IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID JOHNSON, AS TRUSTEE OF THE JOSEPH W. HUNTSMAN 1983 TRUST,
Appellant,
vs.
MCCARRAN INTERNATIONAL AIRPORT AND CLARK COUNTY, A POLITICAL SUBDIVISION OF THE STATE OF NEVADA,
Respondents.

No. 53677

FILED

OCT 19 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order dismissing a complaint pursuant to NRCP 12(b)(5) in an inverse condemnation action. Eighth Judicial District Court, Clark County; Elizabeth Goff Gonzalez, Judge.

In 2008, appellant David Johnson, as Trustee of the Joseph W. Huntsman 1983 Trust, instituted an inverse condemnation action against respondents McCarran International Airport and Clark County, alleging that the height and use restrictions imposed by County Ordinance 1221, adopted in 1990, constituted a taking, entitling him to just compensation and precondemnation damages.[1] The district court ultimately dismissed

[1]We note that although Johnson's complaint generally alleged a taking by the "imposition of height and use restrictions," his appeal is based entirely on the airport-related zoning height restrictions imposed by Ordinance 1221 and therefore we confine our discussion to that ordinance, with the caveat that our analysis applies equally to any ordinances adopted before October 1, 1993.

the action with prejudice. Relying on White Pine Lumber v. City of Reno, 106 Nev. 778, 801 P.2d 1370 (1990), the district court determined that the 15-year limitation period for bringing such actions barred Johnson's claim because he instituted this action more than 15 years after the ordinance was adopted.

The primary issue in this appeal is whether the 15-year limitation period, as recognized in White Pine Lumber, bars Johnson's inverse condemnation action.[2] We note that the Las Vegas Convention and Visitors Authority (LVCVA) submitted an amicus curiae brief in support of respondents. The LVCVA raises two arguments: (1) that Johnson's claim is time-barred and (2) that this court should shorten the 15-year limitation period established in White Pine Lumber.[3]

---

[2]Johnson also argues that respondents are precluded from asserting a statute-of-limitations defense because respondents: (1) violated constitutional principles of procedural due process in enacting Ordinance 1221; (2) denied in previous cases that Ordinance 1221 effectuated a taking and therefore waived or are judicially estopped from asserting such a defense; (3) were required to commence condemnation proceedings in adopting Ordinance 1221; and (4) did not establish title to the property through adverse possession, which Johnson asserts is required under White Pine Lumber. We have considered each of these arguments and conclude that they lack merit; it was appropriate for respondents to raise a statute-of-limitations defense.

[3]We decline to consider shortening the 15-year limitation period established in White Pine Lumber. Neither party raised this issue below or on appeal, and Johnson did not attempt to distinguish White Pine Lumber or persuade us to overrule it. See, e.g., Coast to Coast Demo. v. Real Equity Pursuit, 126 Nev. ___, ___, 226 P.3d 605, 607 (2010) (issues not litigated in the district court and raised for the first time on appeal need not be considered by this court); see also Potter v. Potter, 121 Nev.

continued on next page . . .

For the reasons set forth below, we conclude that Johnson's contention is without merit. Accordingly, we affirm the order of the district court. As the parties are familiar with the facts, we do not recount them further except as necessary to our disposition.

DISCUSSION

The 15-year limitation period for bringing inverse condemnation actions, as recognized in White Pine Lumber, bars Johnson's taking claim

Johnson argues that the district court erred in determining that his inverse condemnation action was barred by the 15-year limitation period established in White Pine Lumber. He does not attempt to distinguish White Pine Lumber or its applicability to the instant case. Instead, he contends that the 15-year limitations period commenced upon the actual physical invasion of his property's airspace, not upon the enactment of Ordinance 1221.

Standard of review

We review de novo "a district court's dismissal of an action pursuant to NRCP 12(b)(5) for failure to state a claim[ ] [and] regard all factual allegations in the complaint as true and draw all inferences in favor of the nonmoving party." Stockmeier v. State, Dep't of Corrections, 124 Nev. 313, 316, 183 P.3d 133, 135 (2008). "'Dismissal is proper where the allegations are insufficient to establish the elements of a claim for

---

. . . continued

613, 619 n.16, 119 P.3d 1246, 1250 n.16 (2005) (declining to review amicus curiae arguments where they pertained to issues not raised in context of appeal). We note, however, that should the issue come properly before us, it may warrant consideration.

relief.'" Id. (quoting Hampe v. Foote, 118 Nev. 405, 408, 47 P.3d 438, 439 (2002), overruled in part on other grounds by Buzz Stew, LLC v. City of N. Las Vegas, 124 Nev. 224, 181 P.3d 670 (2008)). "A court [may] dismiss a complaint for failure to state a claim upon which relief can be granted if the action is barred by the statute of limitations." Bemis v. Estate of Bemis, 114 Nev. 1021, 1024, 967 P.2d 437, 439 (1998).

The 15-year limitation period

To determine when a limitations period commences, we look at the day the cause of action accrued. Clark v. Robison, 113 Nev. 949, 951, 944 P.2d 788, 789 (1997). "[A] cause of action accrues when the wrong occurs and a party sustains injuries for which relief could be sought." Petersen v. Bruen, 106 Nev. 271, 274, 792 P.2d 18, 20 (1990). The applicable limitations period in inverse condemnation actions is 15 years. White Pine Lumber, 106 Nev. at 780, 801 P.2d at 1371-72.

We now turn to a discussion of when the 15-year limitations period commenced in this case. Our opinion in McCarran International Airport v. Sisolak, 122 Nev. 645, 137 P.3d 1110 (2006), is controlling. In Sisolak, the plaintiff brought an inverse condemnation action against Clark County and McCarran International Airport, arguing that Ordinance 1221 and Ordinance 1599 effectuated a per se regulatory taking of the airspace above his property, in violation of the United States and Nevada Constitutions. Id. at 654, 137 P.3d at 1116. The district court determined that the ordinances effectuated a per se taking, and the plaintiff was awarded just compensation pursuant to a jury trial. Id. at 656-57, 137 P.3d at 1117-18. Clark County and McCarran International Airport appealed, raising three primary issues: (1) "whether [the plaintiff] had a valid property interest in the airspace over his property"; (2)

whether the ordinances effectuated a regulatory per se taking of the plaintiff's airspace; and (3) "whether the district court abused its discretion during trial and post-trial proceedings relating to [its] award of just compensation, attorney fees and costs, and prejudgment interest." Id. at 657, 137 P.3d at 1118-19.

On appeal, we concluded that the ordinances effectuated a per se regulatory taking because they "authorize[d] the permanent physical invasion of . . . airspace" by aircraft and "compel[led] landowner acquiescence" to that invasion. Id. at 666, 137 P.3d at 1124. In reaching that conclusion, we explained that the property owner did not have to prove low and frequent overflights of its property to establish the taking because the case involved regulation of property through airport height restriction ordinances. Id. at 664-65, 137 P.3d at 1123-24. In addressing the district court's award of prejudgment interest, we recognized that "'[w]here the market value of the property is not paid contemporaneously with the taking, [an] owner is entitled to interest for the delay in payment from the date of the taking until the date of the payment.'" Id. at 675, 137 P.3d at 1130 (emphasis added) (first alteration in original) (quoting County of Clark v. Alper, 100 Nev. 382, 392, 685 P.2d 943, 950 (1984)). Accordingly, we concluded that the district court acted within its discretion when it awarded prejudgment interest from the date the County passed Ordinance 1221. Id.

Sisolak clearly dictates that in this case the 15-year limitations period commenced the date that Ordinance 1221 was adopted and not upon the actual physical invasion of Johnson's airspace. Under Sisolak, the enactment of Ordinance 1221 in itself effectuated the taking and consequently, proof of low and frequent overflights was not necessary

to establish the taking. Therefore, in 1990, the year that Ordinance 1221 was adopted, Johnson sustained an injury for which he could have sought relief and the limitations period began to run. Further, because the property owner in Sisolak did not have to prove low and frequent overflights to establish the taking, whether aircraft began to overfly Johnson's property at altitudes below 500 feet in 1997, as he contends, is inconsequential to the issue of when the statute of limitations commenced.

Moreover, our approval of the district court's award of prejudgment interest in Sisolak supports the determination that the 15-year limitations period commenced upon the enactment of Ordinance 1221. In Sisolak, we approved the district court's award of prejudgment interest from the date Clark County passed Ordinance 1221 because the property owner was entitled prejudgment interest from the date of the taking until the date of payment. Thus, we recognized that the date of the taking in Sisolak was the date on which Clark County passed Ordinance 1221. Accordingly, in 1990, the year Ordinance 1221 was adopted, Johnson sustained an injury for which he could have sought relief and the limitations period began to run.

Because the statute of limitations began to run in 1990 and Johnson did not file his complaint until 2008, the 15-year limitations period established in White Pine Lumber had expired when he filed the

complaint, and the district court properly determined that Johnson's claims were time-barred.[4]

For the reasons set forth above, we

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Parraguirre

_____, J.
Hardesty

_____, J.
Douglas

_____, J.
Cherry

_____, J.
Saitta

_____, J.
Gibbons

_____, J.
Pickering

---

[4]Johnson also asserts that he has stated a claim for precondemnation damages. "To support a claim for precondemnation damages, the landowner must first allege facts showing an official action by the [would be] condemnor amounting to an announcement of intent to condemn." Buzz Stew, LLC v. City of N. Las Vegas, 124 Nev. 224, 229, 181 P.3d 670, 673 (2008) (alteration in original) (internal quotations omitted). Johnson's precondemnation claim clearly fails as a matter of law because the prerequisite to this claim—an announcement of an intent to condemn—is indisputably absent here, where the County enacted Ordinance 1221 without condemning the subject airspace.

cc: Hon. Elizabeth Goff Gonzalez, District Judge
Eighth District Court Clerk
Brownstein Hyatt Farber Schreck, LLP
Clark County District Attorney/Civil Division
John Peter Lee Ltd.
Jones Vargas/Las Vegas
Molo Lamken LLP
Pisanelli Bice, PLLC