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Developer Beware: Liability for Negligent Development Sequencing

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John I. Mabe Jr.
919.653.7819
jmabe@nexsenpruet.com

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The North Carolina Court of Appeals decided in a recent case that a residential real estate developer owes a duty to future homeowners to plan the construction of the subdivision so as to avoid such foreseeable risks as a piece of heavy equipment rolling away and injuring a resident.

This decision expands the scope of potential liability for real estate developers beyond what has been understood as the limits of their potential liability.

The facts of the case are sympathetic to the homeowner. During mass grading operations on a new lot, up an apparently steep hill from the homeowner, a heavy dump truck was left running unattended and without wheel chocks. The dump truck rolled away, striking and killing a five-year-old child playing near his home. The Court of Appeals discussed two theories of developer liability and rejected them under established precedents. First, the court held that the developer did not have a duty to inspect or to monitor safety precautions taken on the construction site. If the developer does not retain control of the construction activities of the purchasers of lots in the subdivision, the developer cannot be held liable for injuries resulting from the independent activities of a builder who purchases a lot and builds on it. Second, the court reviewed the claim that the developer should anticipate the negligence of the operators of heavy equipment and take reasonable precautions to prevent harm from such inattentive conduct by contractors. However, this theory has previously been rejected by the NC Supreme Court, so the Court of Appeals was also required to reject this theory of developer liability.

Third and crucially, the Court of Appeals reviewed the theory that the developer should anticipate roll-away accidents can happen without any active negligence on the part of the builder, that such things happen on construction sites where mass grading is undertaken, and a prudent developer therefore can anticipate such accidents and take reasonable precautions against resulting injury or damage. The homeowner bolstered this theory with witnesses who testified that reasonably careful developers can sequence construction activities to minimize the impact of accidents

like the one in this case. The Court of Appeals accepted the plaintiffs' theory that "developers of large projects on hilly terrain have a duty to sequence and manage construction to limit the risk that bystanders downhill might be harmed by foreseeable roll-away accidents." The court said:

[The claimants] put forth experts who testified in depositions that there are various "hazards" and "risks" associated with roll-away equipment on hilly construction sites. Those experts testified that the risks of roll-away accidents are known in the planned development industry. They also testified that a reasonably prudent developer would undertake a "safety analysis" or "hazard analysis" and take steps such as sequencing development or conducting mass grading to eliminate the risk of injury from these roll-away accidents.

The conceptual basis for holding the developer liable is that the developer did not act reasonably in circumstances where it was foreseeable that failure to take reasonable precaution could lead to personal injury or significant property damage. The Court of Appeals noted in its decision that the developer still may defend itself on various exculpatory theories, such as proof that the cause of the accident was the intervening negligence of other actors. Another such defense is an "act of God" weather event, in which extraordinary weather conditions cause injury or a loss of property. Even if precautions against the extreme weather event might have been taken, the law does not impose a duty to take all possible precautions; the law only imposes a duty to act with reasonable care under the circumstances.

The implication of this decision is that long after a developer subdivides land, completes infrastructure improvements, and sells lots or even the entire subdivision, the developer can be called to answer for damage or injury caused by some accident that occurs on the project during later construction activities. If the case stands, developers in North Carolina will not be insulated against such claims. The basis for this theory of liability is that bad things can happen even if the future builder exercises due, ordinary care, and does not cause an injury. If it be shown that the developer failed to take reasonable precautions against the risk of injury caused by roll-away accidents, such as scheduling the uphill work before the downhill work, or completing all of the mass grading of the subdivision lots before selling any of them, then the developer could be held liable for injuries foreseeably resulting from a roll-away accident, even if the roll-away accident was not itself the result of careless conduct. By implication, the court has said that a roll-away accident is not an "Act of God," because it is reasonably foreseeable that roll-away accidents will occur.

Our research did not reveal an instance where South Carolina has adopted this theory of developer liability.

Can a developer protect against such liability? The best strategy to guard against liability for such a loss is for the developer to document steps taken as precautions against future injuries that could otherwise result from construction activities, such as by obtaining or preparing a "hazard analysis" or "safety analysis" of the project. (If those analyses are not readily available in the marketplace, they will likely become available in response to the outcome in this case.) But even if a developer shows it tried to anticipate what could go wrong and adjust the development activities accordingly, the developer still could be hauled into court and required to defend against claims that its precautions were not reasonable under the prevailing circumstances.

Is the duty owed to future lot owners in a subdivision matched by a similar duty owed to future commercial tenants? Presumably so, if it were shown the developer of a commercial project failed to take reasonable precautions against a risk of injury which is inherent in the nature of commercial development. For example, if a claimant shows that falling glass is an inherent risk in commercial projects, the developer of the project may be deemed to have a duty to future tenants or to the public to take reasonable precautions against resulting injury or property damage.

The case is Copeland v. Amward Homes of N.C., Inc., (COA18-1021, January 7, 2020).

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