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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF VIRGINIA  
ALEXANDRIA DIVISION

|                             |   |                      |
|-----------------------------|---|----------------------|
| AGCS MARINE INSURANCE       | ) | Case 1:13-cv-01160   |
| COMPANY,                    | ) |                      |
| and                         | ) |                      |
| WESTCHESTER FIRE INSURANCE  | ) |                      |
| COMPANY,                    | ) |                      |
|                             | ) |                      |
| Plaintiffs,                 | ) |                      |
|                             | ) |                      |
| v.                          | ) | Alexandria, Virginia |
|                             | ) | December 13, 2013    |
| ARLINGTON COUNTY, VIRGINIA, | ) | 10:18 a.m.           |
|                             | ) |                      |
| Defendant.                  | ) |                      |
|                             | ) | Pages 1 - 12         |

TRANSCRIPT OF DEFENDANT ARLINGTON COUNTY'S  
MOTION TO DISMISS  
BEFORE THE HONORABLE ANTHONY J. TRENKA  
UNITED STATES DISTRICT COURT JUDGE

COMPUTERIZED TRANSCRIPTION OF STENOGRAPHIC NOTES

1 APPEARANCES:

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1 THE CLERK: Civil Action 1:13-1160, AGCS  
2 *Marine Insurance Company, et al. v. Arlington County,*  
3 *Virginia.*

4 Will counsel please note their appearances  
5 for the record.

6 MR. TRAMBLIAN: Ara Tramblian and Susan Stout  
7 for the county.

8 THE COURT: Good morning.

9 MR. TRAMBLIAN: Good morning.

10 MR. SIMMONS: Thomas Simmons and Mark  
11 Opalisky for Plaintiff AGCS Insurance.

12 THE COURT: The matter is before the Court on  
13 the defendant's motion to dismiss. I'd be pleased to  
14 hear from counsel. I've read the pleadings.

15 MR. TRAMBLIAN: Thank you, Your Honor.

16 As Your Honor knows, this is a two-count  
17 complaint. Count 1 is a count for negligence, which  
18 the plaintiffs have indicated they are voluntarily  
19 dismissing. So we'd ask that an order be entered  
20 dismissing that count.

21 But we'd also ask the Court to enter an order  
22 dismissing Count 2 as well for inverse condemnation as  
23 this Court lacks jurisdiction over Count 2 because of  
24 the plaintiff's failure to comply with Virginia Code  
25 Section 15.2-1248, which provides, "No action shall be

1 maintained by any person against a county upon any  
2 claim or demand until such person has presented his  
3 claim to the governing body...."

4           This is a jurisdictional and procedural  
5 prerequisite to suit under the *Karara* case. The court  
6 in *Mansoor* said it's the exclusive method for suing a  
7 county and it applies to all monetary claims whether  
8 legal or equitable. And it's undisputed here that the  
9 plaintiff did not present their claim to the board  
10 prior to filing suit.

11           Now, the plaintiff suggests that the statute  
12 does not apply to takings, claims, or inverse  
13 condemnation claims. We believe that is just wrong.  
14 There are four controlling decisions from the Virginia  
15 Supreme Court that says that it does apply. There's  
16 *Nelson County v. Loving*. That's at 126 Virginia,  
17 page 299, which states that the claims procedure states  
18 consent that counties can be sued to enforce this  
19 particular constitutional right.

20           Again, in *Nelson County v. Coleman* -- that's  
21 at 126 Va. 280 -- the Virginia Supreme Court explicitly  
22 said that this is the method for recovery set forth in  
23 the claims statute for these kinds of claims.

24           If that was not sufficient, the Virginia  
25 Supreme Court in *Parker v. Prince William County*, which

1 was an inverse condemnation claim, stated that the  
2 claimant's failure to follow the claim's statute was  
3 fatal to their claim.

4           And since that decision in 1956, the General  
5 Assembly has amended the statute a number of times and  
6 has not seen fit to alter it. Under Virginia Rules of  
7 Statutory Construction, the legislature is deemed to  
8 have been aware of the decision and sanctioned it by  
9 its failure to change the statute.

10           Again, for the fourth case, in *Nuckols v.*  
11 *Moore*, Justice Russell highlighted the history of this  
12 statute and said explicitly that the Supreme Court has  
13 held that this statute applies to takings claims such  
14 as this one.

15           Now, really, the only authority that the  
16 plaintiff has relied on is a circuit court decision  
17 from Fairfax County, which I would -- rather than get  
18 into the details of which, unless the Court has  
19 questions, I would just posit to the Court really is  
20 not applicable. It had a different procedural posture.  
21 In that case, the claimants did make a claim to the  
22 county board, but they didn't appeal the claim as the  
23 statute provided.

24           The statute that we're citing to the Court is  
25 15.2-1248, which provides that -- as I said, no suit

1 can be brought against the county until their claim is  
2 presented to the board. In that case, the Fairfax  
3 case, a claim was presented to the board. So it's  
4 really inapplicable here.

5 We also think the decision was flawed for  
6 other reasons, but I don't believe we need to get into  
7 them unless Your Honor wants me to because it really is  
8 not an applicable case.

9 So in summary, the General Assembly has said  
10 that the county board needs to hear these kind of  
11 claims before suit is filed and it's their right to  
12 hear it. They are elected officials. They have a  
13 right to hear from their constituents and respond.  
14 This statute gives them the opportunity to audit and  
15 hear claims and budget accordingly and perhaps accept  
16 or resolve the claim.

17 So we'd ask the Court at this point to grant  
18 the motion to dismiss so that the plaintiffs can bring  
19 this case properly.

20 THE COURT: All right. It's still timely for  
21 them to do that?

22 MR. TRAMBLIAN: Yes, Your Honor. It's a  
23 three-year statute.

24 THE COURT: All right. Counsel.

25 MR. OPALISKY: Thank you, Your Honor.

1 THE COURT: Yes.

2 MR. OPALISKY: The case --

3 THE COURT REPORTER: I'm sorry. What was  
4 your name?

5 MR. OPALISKY: I'm sorry. Mark Opalisky,  
6 O-P-A-L-I-S-K-Y.

7 The case law of those that counsel cited and  
8 in our brief all make a distinction between certain  
9 state claims and a constitutional claim. Our inverse  
10 condemnation claim is a constitutional claim. It's a  
11 right protected by the Virginia Constitution.

12 The numerous cases cited by defense counsel  
13 all deal with -- one is a breach of contract claim.  
14 One was a nuisance claim. They've cited no cases that  
15 deal with the specific issue of whether this piece of  
16 legislation applies to constitutional claims.

17 They rely heavily on the *Parker* decision, but  
18 in the *Parker* case, all the court was looking at was  
19 whether there was some exception to the appeal aspect.  
20 They weren't looking at whether the inverse  
21 condemnation was an exception to that statute.

22 Likewise, on the *Nuckols* case, the court  
23 specifically said that they weren't dealing with  
24 inverse condemnation because before that motion was  
25 heard by the court, the plaintiff withdrew that count.

1 And nowhere in *Nuckols* does it say that the court is  
2 focusing on a takings issue. They were focused only on  
3 the two declaratory judgment counts, again, because the  
4 inverse condemnation claim was withdrawn. So the court  
5 had no occasion to even make that ruling.

6 The one case that is directly on point and  
7 the other case that's cited in our brief that's close  
8 to being on point is the *Hartwell* case and the  
9 *Chaffinch* case. I know counsel thinks that the  
10 *Hartwell* case is wrongly decided, but that case was  
11 directly on point in which the judge and the court  
12 reasoned that because it's a constitutional claim, it's  
13 certainly protected to a higher degree of scrutiny than  
14 your general -- your contract claims or other types of  
15 action.

16 THE COURT: Am I correct that none of the  
17 inverse condemnation claims that you've cited dealt  
18 with this issue of notice?

19 MR. OPALISKY: I'm sorry, sir?

20 THE COURT: None of the inverse condemnation  
21 cases dealt with the issue of notice --

22 MR. OPALISKY: I think the *Hartwell* case did.

23 THE COURT: -- other than the *Hartwell*?

24 MR. OPALISKY: Correct. The *Chaffinch* case  
25 touched on it, but it didn't directly deal with whether



1 notice was a prerequisite either.

2 THE COURT: Right. None of the Supreme Court  
3 cases you've mentioned deal with this issue?

4 MR. OPALISKY: That's correct, Your Honor.

5 So as I said, the *Hartwell* case makes a  
6 distinction, and then the other cases do make the  
7 distinction between the constitutional remedies and  
8 that this statute is not the exclusive remedy that  
9 plaintiffs can proceed with.

10 THE COURT: I'll give you the last word.

11 MR. TRAMBLIAN: Thank you, Your Honor.

12 Very briefly, I think counsel suggests  
13 incorrectly that the four cases I cited to the Court  
14 don't involve inverse condemnation. They all did.

15 *Nelson County v. Loving* was a case where a  
16 road was regraded. By virtue of the grade being  
17 changed, the claimant's property was taken or damaged  
18 for public purposes without compensation.

19 *Nelson County v. Coleman* is a case where the  
20 engineer of the state put the road over the wrong  
21 property. They had marked out the right property, but  
22 they went over somebody else's property instead.

23 The *Parker* case explicitly says it's a  
24 takings claim. It's a claim about an operation of a  
25 sewage plant across the street from plaintiff's

1 property and the damage that that caused to plaintiff's  
2 property.

3           Finally, the *Nuckols* case was a case where  
4 claimant was denied the right to build a windmill on  
5 their property and claimed it was a taking.

6           So I think all of those cases are takings  
7 cases. In all of those cases, the Supreme Court  
8 indicated the statute applies.

9           THE COURT: All right. Thank you.

10           The issue in this case is whether plaintiff's  
11 claim is subject to the notice provisions of Virginia  
12 Code 15.2-1248. That provision provides, "No action  
13 shall be maintained by any person against a county upon  
14 any claim or demand until such person has presented his  
15 claim to the governing body of the county...."

16           That provision is unqualified and obligatory.  
17 This particular statute, since it was amended in 1987,  
18 has not been construed by the Virginia Supreme Court,  
19 but it has construed the predecessor statute as it  
20 existed before the 1987 amendments, which is, in fact,  
21 the same language with very minor immaterial changes as  
22 the current statute except for the provision, that is  
23 irrelevant for these purposes, that exempts from the  
24 statute claims for which there's a binding arbitration  
25 clause.

1           The Supreme Court, as I indicated, has had  
2 occasion numerous times to review the application of  
3 this notice provision to various kinds of actions. For  
4 example, in the *Dominion Chevrolet Company v. County of*  
5 *Henrico* case, 217 Va. 243, a 1976 decision, the Supreme  
6 Court stated that the statute relates to general claims  
7 and demands against the county arising out of  
8 transactions, disputes, and matters incident to the  
9 operation of the county by the board.

10           In *Nuckols v. Moore*, a 1987 decision, the  
11 Virginia Supreme Court held that this notice provision  
12 applied regardless of the form of the action employed  
13 and referenced specifically claim for damages for  
14 wrongful taking of land as an example of the kind of  
15 claim that would be subject to the notice statute  
16 referencing specifically the Supreme Court's case where  
17 it recognized the application within that context in  
18 *Nelson County v. Coleman*, which is 126 Va. 275, which  
19 is a 1919 decision of the Virginia Supreme Court.

20           The Court has considered the plaintiff's  
21 argument that the inverse condemnation claim asserted  
22 in this case has its origins within the Virginia  
23 constitution and is therefore exempted from this notice  
24 provision. The Court must conclude that even if that  
25 provision is viewed as self-executing, the cause of

1 action created remains subject to the notice provision,  
2 particularly since the notice of statute does not  
3 displace or unduly burden that claim but simply  
4 prescribes a procedure by which that claim can be  
5 asserted and pursued.

6 The Court has considered the *Hartwell* case,  
7 which the Court views as distinguishable. In any  
8 event, the Court does not view that decision binding  
9 precedent on this Court in light of the Virginia  
10 Supreme Court pronouncements with respect to this  
11 statute.

12 So for these reasons, the Court will grant  
13 the defendant's motion to dismiss without prejudice,  
14 and the Court will issue an order.

15 Counsel, am I correct that plaintiffs are  
16 voluntarily dismissing Count 1?

17 MR. OPALISKY: That's correct, Your Honor.

18 THE COURT: All right. The Court will  
19 include that in its order.

20 Thank you.

21 -----  
Time: 10:30 a.m.

22 I certify that the foregoing is a true and  
23 accurate transcription of my stenographic notes.

24 /s/  
25 Rhonda F. Montgomery, CCR, RPR