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***ASAP Storage, Inc. v. City of Sparks*, 123 Nev. Adv. Op. No. 61
(Dec. 27, 2007)¹**

**TORT LAW – GOVERNMENTAL IMMUNITY IN EMERGENCY
MANAGEMENT**

Summary

On January 1, 1997, the city of Sparks, Nevada suffered a flood in various parts of the city. One such area was the industrial area of Sparks where ASAP Storage, Inc. (hereinafter “ASAP”) was located. As a result of the flood, ASAP’s real and personal property suffered damage.² Before the flood, the City of Sparks took several actions that may have contributed to, or even caused, the damages ASAP suffered.

The City took four actions that related to the damages ASAP suffered. First, the City permitted Sierra Chemicals to store hazardous materials in the city’s industrial area.³ At the time the City approved the storage of the hazardous material, the City was aware of the dangers associated with storing the material in that part of the city.⁴ Second, the City lowered the elevation a bridge that was adjacent to a levee that protected the industrial area. The lowered bridge allowed the levee to be more easily breached. Third, the City required ASAP to install a “sunken drain” in the middle of the industrial area. The sunken drain allowed floodwaters to overflow into the industrial area.⁵ Fourth, the City required ASAP to accept a flood evacuation plan in order to receive a business permit.⁶

On December 31, 1996, the day before the flood, the City of Sparks’ City Manager knew that the city was expecting flooding. Also, the City Manager was aware of the potential danger for the release of the toxic materials in the industrial area if that area flooded. Despite this knowledge, the City Manager rejected a proposal to set up an emergency command center.

On January 1, 1997, the day of the flood, but prior to the flooding, the City Manager declared a state of emergency and ordered parts of the city to be evacuated and barricaded. One such area of town was the industrial area. Due to this decision, ASAP was denied the opportunity to implement the evacuation plan that the City had required ASAP to accept.⁷ ASAP was denied access to its personal and real property for approximately 48 hours.

¹ By Tyler James Watson

² Five other businesses suffered damages as a result of the flood and were named parties in ASAP Storage’s suit against the City of Sparks.

³ The hazardous materials that Sierra Chemicals stored are also referred to as “hazmat.”

⁴ The City knew that the industrial area was in a known flood plain and if flooding did occur, the site would contaminate the surrounding area.

⁵ It is uncertain if the drain actually aggravated the effects of the flood.

⁶ ASAP was not allowed to implement the plan at the time of the flood. ASAP contends that if it was able to implement the plan, it could have saved its personal property from flood damage.

⁷ ASAP and other businesses in the industrial area could not remove personal property before the flood destroyed it because of the barricade.

In response to the City's actions before and during the flood, ASAP filed a suit against the City. ASAP asserted three main claims against the City; ASAP claimed negligence, gross negligence, and willful misconduct;⁸ ASAP asserted that the City's barricade constituted a taking under the Nevada Constitution;⁹ and, ASAP asserted that the City breached its contract with ASAP when the City did not allow ASAP to execute the flood evacuation plan.

The district court granted the City summary judgment on the grounds that the City is immune from liability and that no taking had occurred.¹⁰

Issue and Disposition

Issue

Does personal property satisfy the "private property" requirement in a takings claim?

Does a short-term (48-hour) governmental interference with one's property constitute a substantial interference to satisfy a takings claim?

Is a Nevada governmental agency immune from liability for acts of negligence, gross negligence, and willful misconduct that occur before and during an emergency?

Disposition

Yes. Personal property satisfies the "private property" requirement because the term "private property" is plain on its face and, therefore, covers personal property.

No. A short-term interference with one's private property does not constitute a substantial interference because the interference was limited in duration.

Yes. A Nevada governmental agency is immune from liability for acts committed in preparation for, and the management of, an emergency; however, the agency may be vicariously liable for the actions of its employees.

Commentary

State of the Law Before *ASAP Storage* Nevada Takings Law

The issue presented in *ASAP Storage*, whether personal property satisfies the "private property" requirement in a takings claim, is one of first impression. Prior to *ASAP Storage*, it had been well established that an individual's real property interest in

⁸ Appellants' claims extend to the City's actions both before and during the flood emergency.

⁹ The taking clause in the Nevada Constitution is located in Article 1, Section 8, Clause 6.

¹⁰ The court held that immunity from liability existed under NRS Chapter 414 (Nevada's Emergency Management Act).

land supported a takings claim. However, in *ASAP Storage*, the appellants claimed that the City of Sparks had committed a taking of both their real and personal property.

Another issue of first impression presented in *ASAP Storage* is whether a 48-hour interference with an individual's private property constitutes a substantial interference and, therefore, supports a takings claim. Prior to *ASAP Storage*, the Nevada Supreme Court addressed the issue of "substantial interference" in two cases. The first case, *Culley v. County of Elko*,¹¹ the Court held that substantial impairment of an owner's right of ingress and egress constitutes a substantial interference with the owner's right of access.¹² In the second case, *Argier v. Nevada Power Co.*,¹³ the government entered onto the landowners' property and installed permanent power lines. The Court held that "[w]hen the government interferes with a person's possession of his/her property, the owner loses an interest in that property."¹⁴ In both cases, the governmental interference was permanent. Prior to *ASAP Storage*, the Court had not yet determined whether temporary interferences with private property might constitute a taking.

Government Immunity for Emergency Management

Prior to *ASAP Storage*, the Nevada Supreme Court addressed the issue of governmental immunity under NRS 414.110 in two different cases. In the first case, *Nylund v. Carson City*,¹⁵ the City channeled floodwater down a street, and in doing so, damaged the plaintiff's condominium.¹⁶ The condominium owners sued Carson City for negligently designing and maintaining its storm drainage system and for negligently deciding to channel the floodwaters.¹⁷ The Nevada Supreme Court held that NRS 414.110 provided immunity for governmental action in responding to an emergency and any previous negligence that contributed to the damage caused by the emergency management activities.¹⁸

In the second case, *Vermeff v. City of Boulder City*,¹⁹ floodwaters damaged a residence and the homeowner sued Boulder City for negligently constructing a drainage channel adjacent to his property. The district court granted summary judgment in favor of the City under *Nylund* and NRS 414.110. The Nevada Supreme Court reversed, holding that pre-emergency negligence is immune only if it is joined with negligence during the emergency, which together cause damage.²⁰ If the pre-emergency negligence is not joined with negligence during the management of the emergency, then no immunity attaches.²¹

¹¹ 101 Nev. 838, 711 P.2d 864 (1985).

¹² *Id.* at 841, 711 P.2d at 866.

¹³ 114 Nev. 137, 952 P.2d 1390 (1998).

¹⁴ *Id.* at 140, 952 P.2d at 1392.

¹⁵ 117 Nev. 913, 34 P.3d 578 (2001).

¹⁶ *Id.* at 914, 34 P.3d at 580.

¹⁷ *Id.*

¹⁸ *Id.* at 917, 34 P.3d at 581.

¹⁹ 119 Nev. 549, 80 P.3d 445 (2003).

²⁰ *Id.* at 552, 80 P.3d at 447.

²¹ *Id.* at 553, 80 P.3d at 447.

Other Jurisdictions Takings Law

The Utah Supreme Court addressed the issue of whether a short-term interference with property rights is a compensable taking in *Rocky Mountain Thrift v. Salt Lake City*.²² In *Rocky Mountain Thrift*, the government barred vehicles from entering a street abutting several businesses for two weeks after a flood.²³ The Utah Court held that a “temporary, one-time occurrence” rather than a “permanent, continuous, or inevitably recurring interference with property rights” does not constitute a substantial interference; therefore, no taking had occurred in the case.²⁴

Effect of ASAP Storage on Current Law Takings Law

In *ASAP Storage*, the Court resolved two aspects of takings law: (1) whether personal property is “private property” under the Nevada Constitution and (2) whether a 48-hour interference with one’s private property constitutes a substantial interference. The Court held that since the term “private property” in Nevada’s takings clause is plain on its face, the Court did not need to go beyond its language. Therefore, personal property is “private property” which is subject to Nevada takings law. Also, the Court adopted Utah’s position which holds that a temporary interference with an individual’s property rights is not a substantial interference meriting a takings holding.

Governmental Immunity in Emergency Management

In *ASAP Storage*, the court revisited its interpretation of NRS 414.110, under *Nylund* and *Vermeff*. The Court held that both cases suffered from a fundamental flaw in that they ignore the plain language of the statute. The statute immunizes the government from liability relating to “emergency management activities.” Therefore, liability attaches to activities that are not related to emergency management and immunity attaches to activities relating to emergency management whether the activities took place before or during an emergency.

Unanswered Questions

In *ASAP Storage*, the Court left unanswered the question of whether the government can be vicariously liable for its employees’ actions. The court held that the statutory disparity in NRS 414.110, which provides the government with immunity but not its workers, creates a latent ambiguity when considered in the context of vicarious liability. However, the Court did not address the potential ambiguity because the City, in its answer, argued that NRS 41.032(2) provided the workers with immunity, which the

²² 784 P.2d 459 (Utah 1989).

²³ *Id.* at 459-60, 465.

²⁴ *Id.*

district court failed to analyze. Therefore, the question of whether NRS 41.032(2) provides the City workers with immunity was remanded to the district court.

Conclusion

In a takings case, personal property is “private property” under the Nevada Constitution. However, a short-term interference with an individual’s property rights does not rise to the level of a taking. These rules assure that all private property is protected, but limits the viability of frivolous taking claims because the interference must be permanent or of significant duration.

In a tort case against a government entity, the government is afforded immunity under NRS 414.110 for activities performed for the purpose of emergency management whether they occur prior to or during an emergency. This rule does not provide immunity for non-emergency management actions conducted before an emergency even if negligent emergency management actions join with the pre-emergency negligence to cause damage. This rule is in step with the plain language of NRS 414.110. However, there is a potential statutory ambiguity regarding government employee liability which may create vicarious liability for the City, but the district court must first address question to determine if such an ambiguity exists.