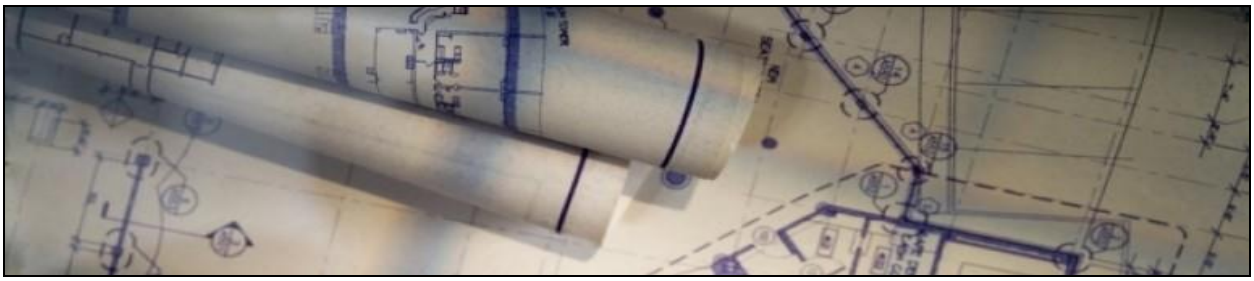
N.C. Construction Law, Policy & News

Matthew C. Bouchard, Esq.
919.719.8565
mcb@lewis-roberts.com
www.nc-construction-law.com



North Carolina Court of Appeals Limits Reach of Sedimentation Pollution Control Act in 2-1 Decision

March 27, 2012

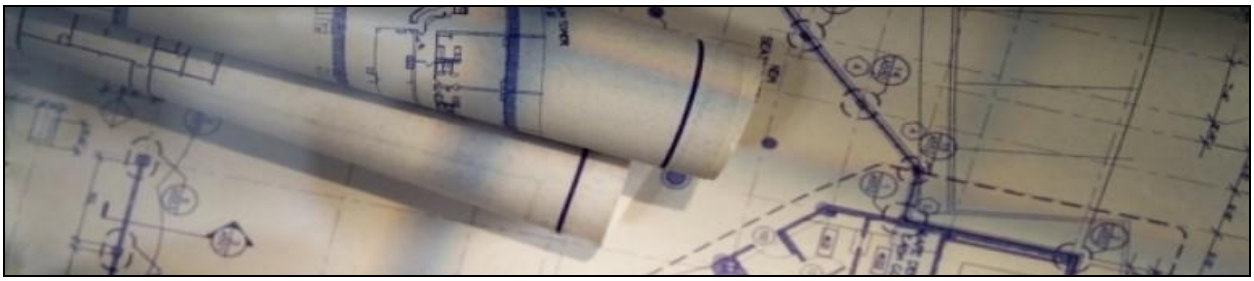
The Court of Appeals ("COA") ruled last week that a general contractor could not be held liable under North Carolina's Sedimentation Pollution Control Act (the "SPCA" or the "Act") for land-disturbing activities that resulted in an offsite deposit of silt, mud, debris and water on an adjacent landowner's golf course. The 2-1 split decision limits the reach of the SPCA, codified at N.C. Gen. Stat. § 113A-50 *et seq.*, to offsite sediment disposal into water; according to the COA, disposal onto land is not covered by the Act.

The lawsuit in *Applewood Properties, LLC v. New South Properties, LLC* arose from the rupturing of an erosion control basin that defendant general contractor had installed on defendant developer's land. The basin had overflowed onto the plaintiff's golf course on a number of occasions over a period of several months, leaving behind an expensive mess.

The plaintiff asserted claims against the developer and the general contractor for violations of the SPCA, in addition to a host of common law claims such as negligence, nuisance, trespass and negligence *per se*. The SPCA claims were valuable to the plaintiff because unlike its common law claims, the SPCA claims carried with them the opportunity for the plaintiff to recover its attorneys' fees and expert witness costs in connection with the litigation. N.C. Gen. Stat. § 113A-66(c).

Before trial, the defendants were successful in dismissing the SPCA claims on a motion for summary judgment. The remaining common law claims were then tried, and a jury found both the developer and the general contractor negligent in their erosion control efforts. The jury's damages award? $675,000.

Matthew C. Bouchard, Esq.
919.719.8565
mcb@lewis-roberts.com
www.nc-construction-law.com



Unsatisfied with this result – presumably because the jury's award did not provide for recovery of attorneys' fees and expert witness costs – the plaintiff appealed the pre-trial dismissal of the SPCA claims. After apparently settling with the developer, the appeal went forward against the general contractor only.

On March 20, 2012, the COA upheld the trial court's dismissal of the SPCA claims. The COA's opinion relies heavily on the language of the SPCA's preamble, which states in pertinent part as follows:

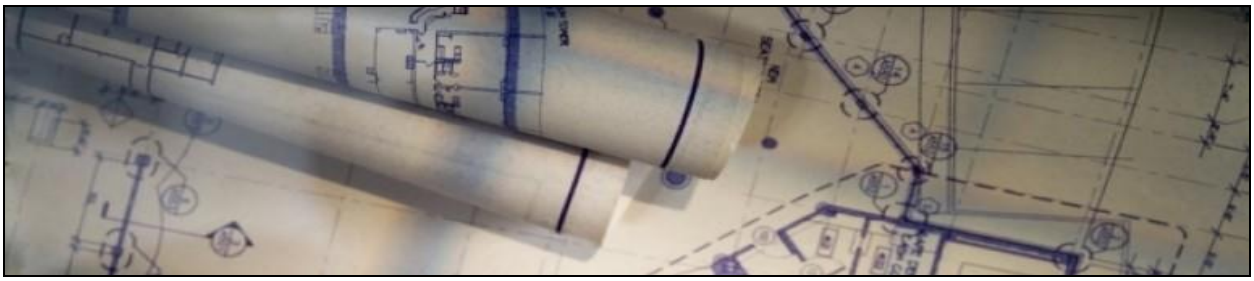
> The sedimentation of streams, lakes and other waters of this State constitutes a major pollution problem. Sedimentation occurs from the erosion of depositing of soil and other materials **into the waters**, principally from construction sites and road maintenance. . . . It is the purpose of this Article to provide for the creation, administration, and enforcement of a program and for the adoption of standards which will permit development of this State to continue with the least detrimental effects from pollution by sedimentation.

N.C. Gen. Stat. § 113A-51 (emphasis supplied). A prior decision of the COA had interpreted the preamble to mean that "the state legislative intent behind the enactment of the SPCA . . . is to protect against the sedimentation **of our waterways**." *McHugh v. N.C. Dept. of E.H.N.R.*, 126 N.C. App. 469, 476, 485 S.E.2d 861, 866 (1997) (emphasis supplied). Based on the language of the preamble and the court's interpretation of same in *McHugh*, the COA in *Applewood* held that "because the preamble to the SPCA provides that sedimentation results from the erosion or deposition of materials into water, it is clear that even a 'land-disturbing' activity requires an element of deposition into a body of water." Since the plaintiff in *Applewood* was only complaining about deposits onto land, the SPCA did not apply.

Environmentalists and other critics of the decision may argue that such an interpretation guts the effectiveness of the SPCA. That argument could still hold sway, since the COA's decision includes a dissent that entitles the plaintiff to further review by the North Carolina Supreme Court. It is presently unclear whether the plaintiff will exercise that right.

For the moment, however, the general contractor in *Applewood* has been able to avoid paying the golf course's attorneys' fees and expert witness costs to which the plaintiff may have been entitled under the SPCA. Still, a damages award of $675,000 isn't exactly chump change. So developers and contractors

Matthew C. Bouchard, Esq.
919.719.8565
mcb@lewis-roberts.com
www.nc-construction-law.com



would be well-served to note that common law remedies continue to exist even where a remedy under the SPCA may not. Stated differently, the *Applewood* decision is by no means a license to pollute. Reasonable care in the installation and maintenance of erosion control devices is still very much the order of the day.