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Procedure; Class Certification Motion; Summary Judgment Motion

Plantation Bldg. of Wilmington, Inc. v. Town of Leland, 2021-NCSC-122 (No. 515A20, 10/29/21)

- ***Holding*— In a case presenting issue of whether the trial court erred when it granted a motion for class certification, filed after a summary judgment motion had been granted in plaintiff's favor, Supreme Court of North Carolina determines on the record before it that no reversible error occurred, as defendant waived any objection it may have had to the purported error.**

- ***Key Excerpt*—** The Court initially observed that defendant consented and joined in a motion for continuance filed by plaintiff, indicating that the parties had agreed to file cross-motions for summary judgment and address class certification if the matter was not resolved during the summary judgment stage. The trial court granted the motion for continuance, and plaintiff and defendant filed motions for summary judgment in February and March 2020, respectively. Upon hearing arguments, the trial court granted plaintiff's motion for summary judgment, resolving the issue of liability, but not the issue of damages, and effectively denying defendant's motion for summary judgment. Plaintiff subsequently filed a motion for class certification: defendant then filed a motion to dismiss pursuant to G.S. 1A-1, Rule 12(b)(1), objecting for the first time to the trial court addressing a motion for class certification after resolving the motions for summary judgment (as well as two other motions). In August 2020, after a hearing on the motions, the trial court granted plaintiff's motion for class certification and denied defendant's motion to dismiss (and the two other motions). Defendant appealed to the Supreme Court.

  The Court stated, "Since the motion for continuance identifies that the issue of class certification would be resolved after addressing the cross-motions for summary judgment and expressly states that '[b]oth parties to this action join in and consent to this Motion' and since the parties did follow this sequence, we conclude that defendant waived any objection that it may have had to the trial court granting plaintiff's motion for class certification after granting plaintiff's summary judgment

motion. *See* Whitacre P'ship v. Biosignia, Inc., 358 N.C. 1, 26 (2004) ('[A] party to a suit should not be allowed to change his position with respect to a material matter in the course of litigation.' (*quoting* Roberts v. Grogan, 222 N.C. 30, 33 (1942)); Frugard v. Pritchard, 338 N.C. 508, 512 (1994) ('A party may not complain of action which he induced.'); Klein v. Avemco Ins. Co., 289 N.C. 63, 68 (1975) ('Waiver sometimes has the characteristics of estoppel and sometimes of contract, but it is always based upon an express or implied agreement. There must always be an intention to relinquish a right, advantage, or benefit. The intention to waive may be expressed or implied from acts or conduct that naturally lead the other party to believe that the right has been intentionally given up.'); Clement v. Clement, 230 N.C. 636, 639 (1949) ('A person *sui juris* may waive practically any right he has unless forbidden by law or public policy. The term, therefore, covers every conceivable right—those relating to procedure and remedy as well as those connected with the substantial subject of contracts.')." The Court concluded its opinion by stating that no reversible error occurred and that it was unnecessary to address defendant's remaining arguments.

- ***Synopsis***— Appeal by defendant pursuant to G.S. 7A-27(a) from August 2020 orders. Affirmed. Justice Barringer wrote the opinion.

Nota Bene (N.B.)
Other Recent Decisions of Note

Immunity; Torts; Law Enforcement; Basis for Immediate Appellate Review; Summary Judgment Butterfield v. Gray, 2021-NCCOA-523 (No. COA20-218, Wilson— 10/5/21) (In plaintiffs' wrongful death action, defendants detention officers, sheriff, and County did not waive immunity under G.S. 153A-435 by purchasing liability insurance, as the policy provided that the parties did not intend for the purchase of coverage to waive immunity for any of the covered parties and did not intend to cover any claims to which an immunity defense was applicable. The Court dismissed defendants' argument regarding plaintiffs' direct state constitutional claim (which asserted plaintiffs had an adequate remedy at law not barred by governmental immunity) and the County's argument concerning its liability for the acts of its co-defendants, because defendants had not shown a basis for immediate appellate review of these issues. The Court held that governmental immunity barred plaintiffs' suit against the County and the official capacity claims against the detention officers, and additionally held that governmental immunity barred plaintiffs' claims in excess of the sheriff's statutory bond, G.S. 162-8. Accordingly, the Court stated that the trial court erred in denying defendants' motions for summary judgment on those causes of action. (Appeal by defendants from October 2019 order. Dismissed in part; Reversed in part. Opinion by Judge Collins, with Judge Dietz and Judge Zachary concurring.))

Land Use; Permits; Rebuttal Evidence; Endangerment to Public Health and Safety Coswalld, LLC v. New Hanover Cty., 2021-NCCOA-596 (No. COA21-37, New Hanover— 11/2/21) (***unpublished***) (Petitioners argued that their opponents did not present competent, material, and substantial evidence to rebut petitioners' *prima facie* case of entitlement to a special use permit for a mixed-use development. Petitioners argued that the trial court erred by upholding the permit denial. The Court reversed and remanded for issuance of the permit, determining that the rebuttal evidence was not competent, material, and substantial. The Court observed *inter alia* "that the rebuttal

evidence regarding an increase in traffic from the proposed development was not substantial. Although the lay comments predicted that the development would increase traffic, no evidence specified what amount the traffic would purportedly increase. '[A] mere increase in traffic does not necessarily mean an intensification of traffic congestion or a traffic hazard that would materially endanger the public . . . safety.' Sun Suites Holdings [L.L.C. v. Board of Aldermen of Garner], 139 N.C. App. [269] at 277, 533 S.E.2d [525] at 530 [(2000)] (concluding there was no 'substantial' evidence that the proposed project would 'materially endanger the public health or safety') (citations and internal quotation marks omitted). Respondents argue that the Board and the superior court did not rely on evidence regarding traffic congestion, but instead relied on evidence concerning the poor condition of Lendire Road. This evidence was not material to whether the proposed use posed a danger to public health or safety. Petitioners did not own Lendire Road, and no evidence suggests they had any ability to remedy it. Regardless of whether the special use permit was issued, Lendire Road would have been in poor condition. There is no competent evidence in the Record that the condition of the roadway would be worsened beyond its designed lifespan by allowing this permit. To deny Petitioners the special use permit (to which they were prima facie entitled) on this basis would deprive them of their right to use their property as authorized by ordinance." (Citations omitted.) The Court also determined that concerns regarding stormwater runoff and public safety were also insufficient under Sun Suites Holdings. The Court reversed and remanded the trial court's judgment with instructions that the matter be remanded to the Board of County Commissioners for issuance of the special use permit. (Appeal by petitioners from October 2020 judgment. Reversed and remanded. Opinion by Judge Griffin, with Judge Tyson and Judge Arrowood concurring.))

Procedure; Appellate Procedure; Interlocutory Appeals; Immunity; Petition for Writ of Certiorari Town of Blowing Rock v. Caldwell County, 2021-NCCOA-650 (No. COA20-834, Caldwell—11/16/21) (***unpublished***) (Defendant-County appealed from an interlocutory order denying in part its motion for summary judgment: the County argued that the trial court erred by failing to dismiss the Town's *ultra vires* claim, as well as defendant Gideon Ridge, Inc.'s cross-claim alleging *ultra vires* acts and constitutional violations by the County. Defendant-County also contended that the trial court erred by failing to grant in full its motion for summary judgment based on its assertion of governmental immunity from suit. The Court affirmed the trial court's order. As to defendant-County's argument based on governmental immunity, the Court stated, "[T]he County's authority to levy an occupancy tax under the 1987 Act did not extend 'to the Caldwell County portion of the Town of Blowing Rock.' An Act to Authorize Caldwell County to Levy a Room Occupancy and Tourism Development Tax, 1987 N.C. Sess. Laws ch. 472, § 2. Once the Lodge was annexed by Blowing Rock in June 2008, the County's continued receipt of occupancy tax payments from Gideon Ridge was *ultra vires* and thus unlawful. As in Durham Land Owners Association [v. Cnty. of Durham, 177 N.C. App. 629, 639-40, 630 S.E.2d 200, 207 (2006)], we hold that governmental immunity does not bar Blowing Rock's claim or Gideon Ridge's crossclaim insofar as they allege that the County unlawfully collected occupancy tax payments from Gideon Ridge once the Lodge was annexed by Blowing Rock…. We hold that the claim adequately alleges that the County's continued receipt of

occupancy tax payments was *ultra vires* and thus unlawful once the Lodge was annexed by Blowing Rock in June 2008." The Court also denied defendant-County's petition for writ of certiorari requesting discretionary review of issues allegedly pertinent to the merits of the claims. In denying the County's petition for writ of certiorari, the Court stated, "Specifically, the County contends that the 1987 Act's provision [1987 N.C. Sess. Laws ch. 472, § 2] precluding the County from levying an occupancy tax on businesses located in Blowing Rock may be in conflict with, or superseded by, another statute: [G.S.] 153A-155 (2019). 'Certiorari is a discretionary writ, to be issued only for good and sufficient cause shown.' State v. Grundler, 251 N.C. 177, 189, 111 S.E.2d 1, 9 (1959) (citation omitted). '[I]n most immunity-related interlocutory appeals, we have declined requests that we consider additional non-immunity-related issues on the merits.' Bynum v. Wilson Cnty., 228 N.C. App. 1, 7, 746 S.E.2d 296, 300 (2013), *rev'd in part on other grounds*, 376 N.C. 355, 758 S.E.2d 643 (2014). The County contends that addressing its non-immunity argument would 'promote judicial economy by simplifying the remaining issues and claims as this case proceeds further in the trial court.' However, the County provides no other basis for why we should exercise discretionary review and address its arguments on the merits. *See* N.C. Cent. Univ. v. Taylor, 122 N.C. App. 609, 612, 471 S.E.2d 115, 117 (1996) (stating that 'our courts have frequently observed that a writ of certiorari is an extraordinary remedial writ' (citing Pue v. Hood, 222 N.C. 310, 22 S.E.2d 896 (1942)). We decline to review the County's arguments unrelated to governmental immunity." (Appeal by Defendant-County from August 2020 order. Affirmed. Opinion by Judge Griffin, with Judge Tyson and Judge Carpenter concurring.))

Procedure; Motion to Dismiss Appeal; Interlocutory; Petition for Writ of Certiorari; Land Use; Permits; Asphalt Plant Madison Asphalt, LLC v. Madison County, 2021-NCCOA-603 (No. COA 21-115, Madison─ 11/2/21) (***unpublished***) (IndividualRespondent-Appellants sought an order reversing the Board of Adjustment's (BOA's) written decision denying Madison Asphalt's conditional use permit to build an asphalt plant. Individual Respondents-Appellants contended that the order reversing the BOA's written decision was a final judgment, and appeal therefore was to the Court of Appeals pursuant to G.S. 7A-27(b). The Court observed that this case contained both Petitioner-Appellee County's motion to dismiss the appeal, as well as Individual Respondents-Appellants' petition for writ of certiorari to the Court. The Court dismissed Individual Respondents-Appellants' appeal as interlocutory and denied their petition for writ of certiorari. "The lack of written orders denying Individual Respondents-Appellants' motion for preliminary injunction, motion for joinder of the cases, motion for continuance, and motion to join a necessary party and realign the parties deprives this Court of jurisdiction of authority to hear Individual Respondents-Appellants' appeals related to those matters; therefore, we dismiss Individual Respondents-Appellants' appeal as interlocutory. Further, Individual Respondents-Appellants fail to show how the issuance of a writ of certiorari would change the outcome in this case in light of the [BOA's] 28 September 2020 decision granting Madison Asphalt's permit; therefore, we deny their petition for writ of certiorari." (Appeal by Respondents-Appellants from September 2020 order. Dismissed. Opinion by Judge Carpenter, with Judge Dillon and Judge Inman concurring.))