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Constitutional Law; Facial Constitutional Challenge to State Law; Appellate Procedure; Appellate Jurisdiction

Vaitovas v. City of Greenville, ___ N.C. App. ___ (No. COA19-732, Wake– 5/19/20)

- ***Holding*– In plaintiff-appellant's facial constitutional challenge to state law concerning automated red-light traffic cameras, where the challenged order entered judgment as to some, but not all, parties in the action, appeal dismissed for lack of appellate jurisdiction. Absent a small set of special exceptions, which must be asserted by the appellant in the opening brief, this Court lacks jurisdiction to hear an appeal from a non-final, interlocutory order.**

- ***Key Excerpt*–** A unanimous panel of the Court of Appeals dismissed the appeal for lack of appellate jurisdiction. Plaintiff brought a facial constitutional challenge to a state law concerning automated red-light traffic cameras in the City. Plaintiff argued that the law violated the state constitution's provision regarding local laws concerning health. Plaintiff sued the City and the Pitt County Board of Education, as well as the State of North Carolina, through official-capacity claims against the President Pro Tempore of the Senate, and the Speaker of the House of Representatives. *See* Harwood v. Johnson, 326 N.C. 231, 238, 388 S.E.2d 439, 443 (1990) ("A suit against defendants in their official capacities, as public officials ... is a suit against the State.").

The trial court transferred the case to a three-judge panel of superior court judges appointed by the Chief Justice, as the complaint's allegations presented a facial constitutional challenge to a state law. G.S. 1-267.1. Upon hearing cross-motions for summary judgment from plaintiff, the City, and the Board of Education, summary judgment was entered in favor of the City and the Board of Education.

Plaintiff appealed. Plaintiff filed an appellant's brief and a joint appellee's brief was filed by the City and the Board of Education. At oral argument, the Court of Appeals' panel inquired *inter alia* as to what happened to plaintiff's claims against the State, with the following exchange occurring between the Court and counsel for the parties: "*Judge Dietz*: Can I ask a quick, just procedural question. Is the State a party in this case?; *Counsel for Greenville*: I think they were a nominal party and I'm not quite sure how they

disappeared from the case ... but they have not shown up or filed any brief.... They were named at the very beginning ..." Further observing the course of oral argument, the Court noted another attorney for the City and the Board of Education then provided some additional information: "*Counsel for Greenville*: We actually went back and forth a long time about the procedure for this and they ended up taking a voluntary dismissal as to the State. *Chief Judge McGee*: The Plaintiff took a voluntary dismissal? [Motioning to Plaintiff's Counsel] You're welcome to answer. *Plaintiff's Counsel*: We took a dismissal as to the Attorney General. The State is still in it, they just apparently don't care who wins."

The appeal was dismissed for lack of appellate jurisdiction. The Court of Appeals initially stated, "After reviewing the record on appeal, we cannot agree that the State does not care who wins. Early in the trial court proceeding, the State moved to dismiss under Rule 12(b)(6) for failure to state a claim on which relief can be granted. The trial court entered an order on that motion providing that 'Defendant Phil Berger and Tim Moore's motion to dismiss under Rule 12(b)(6). In the Court's discretion this motion should be reserved for a ruling by the three-judge panel appointed to this case.' The record on appeal does not contain any indication that the three-judge panel ruled on that motion. That may explain why the State, although named in the complaint, did not appear in this appeal to defend the constitutionality of a state law."

"'Ordinarily, this Court hears appeals only after entry of a final judgment that leaves nothing further to be done in the trial court.' State v. Oakes, 240 N.C. App. 580, 582, 771 S.E.2d 832, 834 (2015). Absent a small set of special exceptions, which must be asserted by the appellant in the opening brief, this Court lacks jurisdiction to hear an appeal from a non-final, interlocutory order. Campbell v. Campbell, 237 N.C. App. 1, 3, 764 S.E.2d 630, 632 (2014)."

"Because the challenged order entered judgment as to some, but not all, parties in this action, the appeal is interlocutory and we lack jurisdiction to consider it. *Id*. And, despite this Court signaling its concern at oral argument, Plaintiff has not petitioned for a writ of certiorari so that the Court can exercise appellate jurisdiction despite the appeal's interlocutory nature."

The Court of Appeals concluded its opinion by emphasizing, "The jurisdictional rules governing appealability of final judgments are mandatory even in routine cases. *Id*. But here, we are particularly sensitive to the consequences of a potentially 'piecemeal' interlocutory appeal. Veazey v. City of Durham, 231 N.C. 357, 363, 57 S.E.2d 377, 382 (1950). This lawsuit is a facial constitutional challenge to a state law that names the State as a party. Before this Court hears the matter and addresses the constitutionality of that law on the merits, the appeal should include a judgment entered as to the State, so that the State, if it chooses, can appear and advocate for its position on that constitutional question. Accordingly, we dismiss this appeal for lack of appellate jurisdiction."

- ***Synopsis***— Appeal by plaintiff from June 2019 order. Dismissed. Opinion by Judge Dietz, with Chief Judge McGee and Judge Young concurring.

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

Land Use; Permits; Quasi-Judicial Proceeding; Fair and Impartial Decision-Maker; Recusal; Solar Farm
Dellinger v. Lincoln Cty II, ___ N.C. App. ___, 832 S.E.2d 172 (No. COA18-1080, Lincoln— 7/16/19), *petition for disc. review filed*, ___ N.C. ___ (No. 321P19, 8/20/19),

remanded with instructions, ___ N.C. ___ (No. 321P19, 4/29/20) (The history of this case is found in Dellinger v. Lincoln Cty. I, 248 N.C. App. 317, 789 S.E.2d 21 (2016) (*see* MLN July 2016*,* p. 1). Before the Court a second time, petitioners argued: (1) the denial of their motion to recuse [a Commissioner] equated to a deprivation of their constitutional right to a quasi-judicial proceeding before a fair and impartial decision-maker; and, (2) the Intervenors failed to produce competent, material, and substantial evidence *contra* to overcome their *prima facie* showing of an entitlement to a conditional use permit. "Petitioners clearly demonstrated [the Commissioner's] bias to mandate recusal based upon his actively opposing the application, committing money to the cause of defeating the application for this solar farm, and openly communicating his fixed opposition on this application to others. [The Commissioner] assumed the role of an advocate at the quasi-judicial hearing by presenting ten pages worth of 'condensed evidence' in an attempt to rebut Petitioners' *prima facie* case while also sitting, discussing, and voting on Petitioners' application. The evidence presented by the Intervenors failed to rebut Petitioners' *prima facie* showing of entitlement to a conditional use permit. Because the superior court and Board concluded Petitioners have made a *prima facie* showing on all four conditions, as set forth in the ordinance, we reverse the trial court's order and remand for issuance of Petitioners' conditional use permit." (Appeal by petitioners from May 2018 order. Reversed and remanded. Judge Tyson wrote the opinion, with Chief Judge McGee concurring. Judge Berger concurred in a separate opinion. On April 29, 2020, the Supreme Court of North Carolina issued a Special Order providing as follows: "Intervenors' petition for discretionary review is decided as follows: The Court allows the Intervenors' petition for discretionary review for the limited purpose of remanding this case to the Court of Appeals for further consideration in light of this Court's decision in PHG Asheville, LLC v. City of Asheville, No. 434PA18 (N.C. Apr. 3, 2020). Intervenors' Petition for Writ of Supersedeas is allowed.”))

Public Enterprises; Impact Fees; Interlocutory Order; Substantial Right; Petition for Writ of Certiorari Lennar Carolinas, LLC v. County of Union, ___ N.C. App. ___ (No. COA19-576, Union─2020) (***unpublished***), *disc. review denied, cert. denied*, ___ N.C. ___ (No. 107P20, 4/29/20) (Defendant-County appealed from and requested certiorari review of an order denying summary judgment. The Court of Appeals dismissed defendant-County's appeal for lack of jurisdiction because: (1) an order denying summary judgment is not a judgment subject to certification for immediate appeal pursuant to N.C. R. Civ. Pro. Rule 54(b); and (2) the County failed to demonstrate the interlocutory order affected a substantial right within the meaning of G.S. 7A-27(b)(3). The Court of Appeals also denied defendant-County's petition for writ of certiorari in its discretion. The Court of Appeals stated, "Here, the trial court denied summary judgment and certified the decision for immediate appeal. Because the trial court's order is not a judgment subject to certification pursuant to Rule 54(b), Knighten [v. Barnhill Contr. Co.], 122 N.C. App. [109] at 111, 468 S.E.2d [564] at 565 [(1996)], we have jurisdiction to hear the County's appeal only if the order affects a substantial right. The order does not disclose a substantial right that will be lost absent immediate review, and we can identify no such right from the record." As to the latter issue, the Court of Appeals rejected defendant-County's contentions regarding three putative substantial rights allegedly impaired by the trial

court's order: (1) the enforcement of legislative authority free from judicial restraint or interference; (2) the financial stability of the County; and (3) the availability of the County's retroactive legislation defense, which the County contended was struck by denial of summary judgment. The Court of Appeals stated, "An interlocutory order denying summary judgment, with limited exception, rarely impacts a substantial right. Bockweg [v. Anderson], 333 N.C. [486] at 490, 428 S.E.2d [157] at 160 [(1993)]. Certiorari review is likewise unavailable outside of 'extraordinary circumstances.' Moore [v. Moody], 304 N.C. [719] at 720, 285 S.E.2d [811] at 812 [(1982)]. The County has not, in this instance, 'present[ed] a compelling case for premature review.' Community Bank v. Whitley, 116 N.C. App. 731, 733, 449 S.E.2d 226, 227 (1994). Accordingly, we dismiss the County's appeal as interlocutory and deny certiorari in our discretion." (Appeal by defendant-County from March 2019 order. Appeal dismissed; petition for writ of certiorari denied. Opinion by Judge Inman, with Judge Arrowood and Judge Brook concurring. On April 29, 2020, the Supreme Court of North Carolina denied the petition for discretionary review and denied the petition for writ of certiorari to review the trial court's order.))

Public Enterprises; Impact Fees; Interlocutory Order; Substantial Right; Petition for Writ of Certiorari True Homes, LLC v. Cty. of Union, ___ N.C. App. ___ (No. COA19-572, Union– 2/4/20) (***unpublished***), *disc. review denied, cert. denied*, ___ N.C. ___ (No. 108P20, 4/29/20) (The Court of Appeals stated, "This appeal is one of eight companion cases to Lennar Carolinas, LLC v. County of Union, No. COA19-576 ___ N.C. App. ___ (2020) (***unpublished***) [*see* summary *supra* p. 3], in which the County of Union appeals and seeks certiorari review of an interlocutory order denying summary judgment in its favor. Each case was consolidated for hearing, both in the trial court and on appeal, and all seek review of the same order and present the same issues. For the reasons stated in Lennar Carolinas, we dismiss this appeal as interlocutory and deny certiorari in our discretion." (Appeal by defendant-County from March 2019 order. Appeal dismissed; petition for writ of certiorari denied. Opinion by Judge Inman, with Judge Arrowood and Judge Brook concurring.)). ***Note***: The Court of Appeals also had a similar disposition in several other cases upon consolidation for hearing, all being *unpublished* decisions against Union County: *see inter alia* No. COA19-573 (Shea Homes, LLC; & No. 109P20 on appeal); No. COA19-574 (Shops at Chestnut, LLC; & No. 110P20 on appeal); No. COA19-575 (M/I Homes of Charlotte, LLC; No. & 111P20 on appeal); No. COA19-577 (Calatlantic Grp., Inc.; & No. 112P20 on appeal); No. COA19-578 (McInnis Constr. Co., Inc.; & No. 113P20 on appeal); No. COA19-579 (Eastwood Constr. Co., Inc.; & No. 114P20 on appeal); No. COA19-580 (Pace/Dowd Props., Ltd; & No. 115P20 on appeal). On April 29, 2020, the Supreme Court of North Carolina denied the petitions for discretionary review and denied the petitions for writ of certiorari to review the trial court's orders in these cases.))