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Public Enterprises; Water & Sewer Services; Impact Fees

Kidd Constr. Grp. v. Greenville Utils. Comm'n, __ N.C. App. __ (No. COA19-910, Pitt— 5/19/20)

- ***Holding*— In plaintiffs' appeal from order entering summary judgment in favor of defendant-Greenville Utilities Commission ("GUC"), wherein plaintiffs argued that defendant-GUC lacked authority to charge impact fees for water and sewer services and that charging such fees was *ultra vires*, Court of Appeals reverses and remands.**

- ***Key Excerpt*—** By way of background, the General Assembly created GUC, a local government entity, by passing S.L. 1991-861, entitled, "An Act to Amend and Restate the Charter of the Greenville Utilities Commission of the City of Greenville" (the "Charter"), delegating power to GUC for "the proper management of the public utilities of the City of Greenville," including "electric, natural gas, water, and sewer services[.]" Defendant-GUC provides water and sewer services to Pitt County.

  Beginning in 2008, at the time of a developer's water and sewer service application, defendant-GUC began requiring contractors and developers of new construction and new development to pay service connection fees, consisting of two components: 1) a tapping fee, and; 2) a capacity fee. (The first fee recovers the cost for physically making a service tap, while capacity fees (or impact fees) are collected in an effort to "recover a proportional share of the cost of capital facilities constructed to provide service capacity for new development or new customers connecting to the water/sewer system" and, as such, are imposed as a precondition to development approval, to the issuance of building permits, and to receiving service.)

  In July 2017, the General Assembly enacted the Public Water and Sewer System Development Fee Act ("the System Development Fee Act") to clarify the authority of a local government to assess upfront charges for water and sewer services. S.L. 2017-138 (effective October 1, 2017; codified at G.S. 162A-200 - 215 (2019)). After enactment of the System Development Fee Act, Defendant-GUC hired an independent financial consultant to perform the financial study required by [G.S.] 162A-205: Defendant-GUC subsequently adopted the

new fee calculation system, effective July 1, 2018. Plaintiffs, licensed general contractors who work in and around the area, filed this action in April 2018, alleging that defendant-GUC lacked the authority to collect impact fees from the three (3) years prior to the commencement of the action (thus within the three-year statute of limitations period) and seeking recovery of all impact fees paid within that time period. Defendant-GUC filed a motion for summary judgment in March 2019, contending that its Charter authorized the collection of impact fees prior to the enactment of the System Development Act. In June 2019, the trial court entered an order granting summary judgment in defendant-GUC's favor. Plaintiffs appealed.

The Court observed, "Here, the language in GUC's Charter is nearly identical to that at issue in *Quality Built Homes I*. Section 5 of the Charter provides that 'The Greenville Utilities Commission shall have entire supervision and control of the management, operation, maintenance, improvement, and extension of the public utilities of the City, which public utilities shall include electric, natural gas, water, and sewer services, and shall fix uniform rates for all *services rendered*[.] . . .' S.L. 1992-861 § 5 (emphasis added). Not only is 'services rendered' functionally equivalent to *Quality Built Homes I*'s 'services furnished,' it also fails to confer prospective charging authority by lacking the critical 'to be' language. *Compare JVC Enters., LLC*, ___ N.C. App. at ___, 837 S.E.2d [206] at 210 [(2019)] (holding that the language 'furnished or to be furnished' authorized the levying of prospective fees), *with Quality Built Homes I*, 369 N.C. [15] at 20-21, 789 S.E.2d [454] at 458 [(2016)] (holding that the Public Enterprise Statutes lacked 'the essential "to be" language.')." The impact fees at issue here were not charged for contemporaneous services but for future services and therefore required prospective charging power. Just as the 'services furnished' language did not empower Carthage to impose impact fees prior to any service being provided, so too does 'services rendered' fail to empower GUC to impose impact fees on builders and developers as a condition of final development approval. *See id.* at 22, [789] S.E.2d at 459."

The Court concluded its opinion by stating, "While the Charter 'clearly and unambiguously' empowers GUC 'to charge for contemporaneous use of its water and sewer systems,' it does not contemplate charges for future services. *Id.* And, though the Charter authorizes GUC to pay out its receipts for 'extending[] and planning for future improvements and expansions of said utilities,' S.L. 1992-861 § 7, that does not change the limited sources through which those receipts can originate—contemporaneous use. The impact fees charged by GUC were for future services and, therefore, not authorized by the Charter."

- ***Synopsis***— Appeal by plaintiffs from June 2019 order. Reversed and remanded. Opinion by Judge Brook, with Judge Bryant and Judge Young concurring.

Procedure; Special Proceeding; Criminal Investigation Files; Advisory Opinion; Actual Controversy

In re Wash. Cty. Sheriff's Office, __ N.C. App. __ (No. COA18-653, Washington— 5/5/20)

- ***Holding*— Wherein district attorney's *ex parte* motion, seeking *in camera* inspection of criminal investigative file, was not filed in correlation with any ongoing trial or criminal prosecution, but for the purpose of determining whether the investigative file contained information requiring the State's disclosure to potential**

criminal defendants in the future, trial court's order vacated as improper advisory opinion.

- ***Key Excerpt—*** The District Attorney of Washington County ("the State") filed an *Ex Parte* Motion for *In Camera* Review in the Superior Court of Washington County seeking a determination of "whether or not [a criminal investigative file] contain[ed] potentially exculpatory information" involving petitioner-appellant "that the State would be required to disclose . . . in cases [in which] the State intends to call [petitioner-appellant] as a witness." This motion was not filed in correlation with any ongoing trial or criminal prosecution, but for the purpose of determining whether the investigative file contained information requiring the State's disclosure to potential criminal defendants in the future. Upon review, the judge ordered the District Attorney's Office to, "in any criminal matter wherein the State of North Carolina intends to call [petitioner-appellant] as a witness, disclose to the defendant and/or defendant's counsel the contents of" the investigative file. On appeal, petitioner-appellant argued error in the issuance of the *ex parte* orders arising from a lack of notice and an opportunity to be heard. He further contended that error occurred due to (1) lack of subject matter jurisdiction to act on the State's *ex parte* motion for *in camera* review; (2) violation of his procedural due process rights; and (3) violation of his rights to liberty and to enjoy the fruits of his labor under the North Carolina Constitution.

The Court of Appeals' majority stated, "In the context of Brady [v. Maryland, 373 U.S. 83 (1963)] and Giglio [v. United States], 405 U.S. 150 (1972)] disclosures, trial courts have the authority to require the government to disclose exculpatory and/or impeachment evidence. State v. Martinez, 212 N.C. App. 661, 666, 711 S.E.2d 787, 790-91 (2011); *see also* State v. Lynn, 157 N.C. App. 217, 224, 578 S.E.2d 628, 633 (2003). However, this matter is not a situation where the judge has issued an order requiring disclosure of exculpatory or impeachment evidence in a criminal matter over which the court is *presently* presiding. Instead, the judge's order here attempts to require disclosure 'in any criminal matter wherein the State of North Carolina intends to call [Appellant] as a witness' in the future. There is a fine line between declaratory judgments, which trial courts have the statutory authority to enter, and advisory opinions, which go beyond a trial court's judicial authority. *See, e.g.*, Lide v. Mears, 231 N.C. 111, 117, 56 S.E.2d 404, 409 (1949) ('The Uniform Declaratory Judgment Act does not license litigants to fish in judicial ponds for legal advice.'); Town of Tryon v. Duke Power Co., 222 N.C. 200, 204, 22 S.E.2d 450, 453 (1942) (noting that it is not the function of the courts 'to give a purely advisory opinion which the parties might, so to speak, put on ice to be used if and when occasion might arise'). Here, the judge's order is purely advisory and therefore an improper exercise of its power. Duke Power Co., 222 [N.C.] at 204, 22 S.E.2d at 453 (*citing* Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 324, 80 L.Ed. 688, 699 (1936)." (Emphasis in original.)

The majority observed, "The judge's order in this matter is an anticipatory judgment providing for the contingency that Appellant is to be called as a witness by the State in a future criminal case. The judge's order requires the State to, 'in any criminal matter wherein the State of North Carolina intends to call [Appellant] as a witness, disclose to the defendant and/or defendant's counsel the contents of Washington County Sheriff's Office OCA #2017-08-0026 . . . in compliance with the State's Constitutional responsibility to disclose

potentially exculpatory information.' Such an order is purely speculative and amounts to, using the language of our Supreme Court, 'a purely advisory opinion which the parties might, so to speak, put on ice to be used if and when occasion might arise.' Duke Power Co., 222 N.C. at 204, 22 S.E.2d at 453. Such an order exceeds the scope of the judge's power and must be vacated."

"The advisory nature of the judge's order in this case is especially evident when we consider the alternative scenario in which it ruled the State is *not* required to disclose information contained in the investigative report in future cases. Would such a holding bind trial courts or District Attorneys from making independent Brady or Giglio determinations? Would future defendants be deprived of the opportunity to argue the exculpatory or impeachment value of the report? These questions are undoubtedly answered in the negative because in every criminal case, the prosecutor retains an 'affirmative duty to disclose evidence favorable to a defendant[.]' Kyles v. Whitley, 514 U.S. 419, 432, 131 L.Ed.2d 490, 505 (1995)." (Emphasis in original.)

In vacating the order as an improper advisory opinion, the majority concluded its opinion by stating, "Every defendant enjoys the right to evidence in the hands of the State which may have exculpatory or impeachment value. However, here, there is no actual controversy, as there are no actual defendants on the other side. Rather, the judge's order is an advisory opinion regarding the State's obligation towards purely hypothetical future defendants. The issuance of the order was not a proper exercise of its judicial power."

Judge Berger dissented. Judge Berger initially noted that petitioner-appellant sought relief through a process currently not established in law. "Petitioner certainly advances reasonable concerns about the potential harm that could occur for law enforcement officers wrongly identified as having been untruthful. However, petitioner's concerns, and the procedure he seeks to implement, are better vetted and established by the legislature." Overall, Judge Berger would have dismissed for lack of jurisdiction. "[W]hile the trial court had authority to order the release of the criminal investigative files subject to its Giglio order, this Court is without jurisdiction to reach the merits of petitioner's claims. 'Any party entitled by law to appeal from a judgment or order of a superior or district court rendered in a civil action or special proceeding may take appeal by filing notice of appeal with the clerk of superior court.' [G.S.] 1A-1, Rule 3 (2019). To appeal from a trial court to this Court, one must be an aggrieved party to the proceeding from which he or she wishes to appeal. [G.S.] 1-271 (2019); *see also* Duke Power Co. v. Salisbury Zoning Bd. of Adj., 20 N.C. App. 730, 731-32, 202 S.E.2d 607, 608 (1974). Petitioner was not a party to the special proceeding, which was initiated by the State's *ex parte* motion. In addition, [...] petitioner has no recognized personal, privacy, or property interest in the contents of the criminal investigative file. While one certainly understands petitioner's preference that the file not be released pursuant to Brady and Giglio, the petitioner was not a party to the proceeding within the meaning of our Appellate Rules. Thus, we should 'dismiss the appeal for want of jurisdiction.' Langley v. Gore, 242 N.C. 302, 303, 87 S.E.2d 519, 520 (1955)."

- ***Synopsis—*** Appeal by petitioner-appellant from February and March 2018 orders. Vacated. Majority opinion by Judge Murphy, with Judge Dillon concurring. Judge Berger dissented by separate opinion.