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Torts; Negligence; Rental Agreement; Real Property; Statutes of Limitations; Mold Claims

The Little Willie Cent. Cmty. Dev. Corp. v. City of Greenville, ___ N.C. App. ___ (No. COA19-357, Pitt– 12/3/19) (***unpublished***)

- ***Holding***- **In case alleging damages from mold contamination, Court of Appeals holds that trial court did not err when it granted defendant-City's G.S. 1A-1, Rule 12(b)(6) motion to dismiss, as plaintiffs' negligence and breach of contract claims were time-barred.**

- ***Key Excerpt***– In November 2018, the trial court granted defendant-City's motion to dismiss pursuant to G.S. 1A-1, Rule 12(b)(6). On appeal, the Little Willie Center Community Development Corporation, *et al.* (the "Center") argued that the trial court erred by dismissing the complaint because: (1) defendant-City was not entitled to governmental immunity; and (2) the Center's breach of contract and negligence claims were not barred by the statute of limitations.

The Center contended that defendant-City was not entitled to governmental immunity because the City was engaged in a proprietary activity. The Court agreed. The Court initially stated, "Our Supreme Court developed a three-step inquiry to determine if an activity is a government function or a proprietary action. 'First, a court must consider whether the legislature has designated the activity as governmental or proprietary.' Bynum v. Wilson Cty., 367 N.C. 355, 358, 758 S.E.2d 643, 646 (2014) (citing [Estate of] Williams v. [Pasquotank Cty. Parks & Recreation Dep't], 366 N.C. [195] at 200-01, 732 S.E.2d [137] at 141-42 [(2012)]). 'Second, "when an activity has not been designated as governmental or proprietary by the legislature, that activity is necessarily governmental in nature when it can only be provided by a governmental agency or instrumentality." ' *Id.* at 358-59, 758 S.E.2d at 646 (quoting Williams, 366 N.C. at 202, 732 S.E.2d at 142). Third, we must consider ' "whether the service is traditionally a service provided by a governmental entity, whether a substantial fee is charged for the service provided, and whether that fee does more than simply cover the operating costs of the service provider." ' *Id.* at 359, 758 S.E.2d at 646 (quoting Williams, 366 N.C. at 202-03, 732 S.E.2d at 143)."

Turning to the case *sub judice*, the Court observed, "[T]he legislature has not

designated whether leasing government-owned property is a government or proprietary function. [G.S.] 160A-272 states that '[a]ny property owned by a city may be leased or rented for such terms and upon such conditions as the council may determine, but not for longer than 10 years.' [G.S.] 160A-272 (2017). However, our legislature did not specify in Section 160A-272 whether leasing city-owned property to private parties was either a governmental or proprietary function. Where the legislature fails to designate an activity as either governmental or proprietary, then the 'activity is necessarily governmental in nature when it can only be provided by a governmental agency or instrumentality.' Williams, 366 N.C. at 202, 732 S.E.2d at 142."

"Traditionally, the activity of owning property and then leasing or renting such property is not an activity that is within the exclusive province of government. Therefore, we conclude leasing property is a proprietary activity, and the City is not entitled to governmental immunity. While the City does not charge a *substantial* fee, it does charge a fee to rent the Property. Whether a venture is profitable to the City is not relevant to our inquiry. It is not the role of the courts to second guess and substitute our judgment for the City's business decisions." (Emphasis in original.) The Court concluded that the City was engaged in a proprietary function and accordingly waived its governmental immunity.

Next, the Court turned to the arguments pertaining to the statute of limitations. As to the breach of contract claim, the Court stated, "Our General Assembly codified the statute of limitations against local government in [G.S.] 1-53 (2017). Section 1-53(1) states that '[a]n action against a local unit of government upon a *contract*, obligation or *liability* arising out of a *contract*, express or implied' must be commenced '[w]ithin two years.' [G.S.] 1-53(1) (2017) (emphasis added). The statute of limitations for a breach of contract claim 'begins to run on the date the promise is broken.' Pickett v. Rigsbee, 252 N.C. 200, 204, 113 S.E.2d 323, 326 (1960)." The Court rejected plaintiffs' claim that the breach of contract claim was subject to a three-year statute of limitations. "As stated above, Section 1-53(1) provides in part that a two-year statute of limitation applies in causes of action 'against a local unit of government' that arises 'out of a contract.' A rental agreement 'is a contract.' Wal-Mart Stores, Inc. v. Ingles Markets, Inc., 158 N.C. App. 414, 418, 581 S.E.2d 111, 115 (2003) (citation and quotation marks omitted). Thus, the statute of limitations for the Center's breach of the rental agreement is subject to the two-year statute of limitations under Section 1-53(1)."

Turning to the negligence claim, the Court observed that the statute of limitations for such a claim is three years. G.S. 1-52(16). "The statute of limitations for a negligence action 'begins to run as soon as the injury becomes apparent or should reasonably become apparent.' Hamlet HMA, Inc. v. Richmond Cty., 138 N.C. App. 415, 423, 531 S.E.2d 494, 499 (2000) (citation omitted). Here, Section 1-53(1) applies to any negligence actions that arise out of the rental agreement. The Center alleges in their complaint that the mold contamination was discovered on May 27, 2015. Thus, the Center's claim for negligence is barred by the two-year statute of limitations because the Center did not commence this action until May 29, 2018."

- ***Synopsis***– Appeal by plaintiffs from November 2018 order. Affirmed. Opinion by Judge Berger, joined by Judge Stroud and Judge Dillon.

Public Enterprises: Authority; Charter Consolidation; Power to Levy Prospective Water and Sewer Fees; Doctrine of Constitutional Avoidance

JVC Enterprises, LLC v. City of Concord, ___ N.C. App. ___ (No. COA19-308, Cabarrus– 12/17/19)

- ***Holding*- Court of Appeals holds that trial court erred in entering summary judgment in defendant-City's favor because the 1986 local act did not give the City the power to levy prospective water and sewer fees. Trial court's entry of summary judgment reversed and matter remanded to trial court for further proceedings not inconsistent with this decision.**

- ***Key Excerpt–*** Plaintiffs appealed the entry of summary judgment in defendant-City's favor and dismissing their complaint. The City cross-appealed a portion of the summary judgment order, contending that the trial court impermissibly ruled on the constitutionality of a session law. The Court reversed the trial court's entry of summary judgment for defendant-City and remanded for further proceedings.

"Plaintiffs first contend that the 1977 Charter [1977 N.C. Sess. Laws ch. 744] failed to give the Board [of Light and Water Commissioners (now-defunct)] authority to charge prospective water and sewer fees. Alternatively, plaintiffs argue that the provisions in the 1986 Act [1985 N.C. Sess. Laws. ch. 861] revoking the 1977 Charter's grant of powers to the Board but transferring the Board's powers to the City created an ambiguity as to what powers were actually conveyed to the City by the General Assembly."

The Court disagreed with plaintiffs' assertion that the 1977 Charter did not authorize the Board to levy fees for future service. Therein, the Board was enabled to: "Fix and collect rates, fees and charges for the use of and for the services and facilities furnished *or to be furnished* in the form of electrical, sewer and water service to be paid by the owner, tenant or occupant of each lot or parcel of land which *may be served* by such electrical, sewer and water facilities[.]" 1977 N.C. Sess. Laws ch. 744, § 1 (emphasis added). The Court stated, "Plaintiffs interpret the phrase 'to be paid by the owner, tenant or occupant of each lot or parcel of land which may be served' as limiting the Board to charging fees for services currently provided. But the words 'owner, tenant or occupant ... which may be served' encompass persons currently served as well as those who may be served in the present or future. That language aligns with—rather than limits—the Board's authority under the 1977 Charter to levy prospective fees for 'services and facilities furnished or to be furnished.' *Cf.* McNeill v. Harnett Cty., 327 N.C. 552, 570, 398 S.E.2d 475, 485 (1990) (holding that the language 'to be furnished' in the Public Enterprise Statutes applicable to county water and sewer districts authorized said districts to levy prospective fees); Quality Built Homes [Inc. v. Town of Carthage], 369 N.C. [15] at 20-21, 789 S.E.2d [454] at 458 [(2016)] (holding that the Public Enterprise Statutes applicable to cities did not allow for prospective water and sewer fees because it lacked 'the essential "to be" language' (citation omitted)). Construing these phrases *in pari materia* as we must to give effect to each, State v. Johnson, 278 N.C. 126, 145, 179 S.E.2d 371, 383 (1971), we hold the 1977 Charter provided the Board with authority to levy prospective fees."

The Court agreed with Plaintiffs that the subsequent 1986 local act was

ambiguous. "Section 2 of the Act dissolved the Board and provided '[a]ll powers and duties of said Board shall become powers and duties of the City of Concord.' 1985 N.C. Sess. Laws. ch. 861, § 2. But Section 6 of the Act repealed the provisions of the 1977 Charter affording those powers to the Board in the first instance. *Id*. at § 6. So, the 1986 Act ostensibly both eliminates *and* transfers the powers of the Board afforded by the 1977 Charter." (Emphasis in original.) Plaintiffs resolved this ambiguity by contending that the 1986 Act eliminated the specific powers designated to the Board in the 1977 Charter and merely transferred any remaining powers (i.e., those powers contained in the General Enterprise Statutes applicable to all municipalities), to the City upon the Board's dissolution. Plaintiffs argued that, as held by the Supreme Court of North Carolina in Quality Built Homes, those General Enterprise Statutes did not authorize the City to levy prospective water and sewer fees.

Upon examining the arguments brought forward by the parties, the Court stated, "[There are] two reasonable competing interpretations of the 1986 Act: either (1) the General Assembly intended to eliminate the Board's powers in Section 6 and convey any powers under the General Enterprise Statutes that would have remained with the Board to the City under Section 2; or (2) it merely intended to eliminate the Board, preserve and transfer its powers under the 1977 Charter to the City, and sweep away the 1977 Charter by repeal as a matter of legislative housekeeping. Resort to the canons of statutory construction is necessary to resolve this ambiguity. Abernethy [v. Bd. of Comm'rs], 169 N.C. [631] at 636, 86 S.E. [577] at 580 [(1915)]."

"Plaintiffs argue, and we agree, that the canon of constitutional avoidance compels us to adopt their interpretation. Under that canon, '[w]hen reasonably possible, a statute ... should be construed so as to avoid serious doubt as to its constitutionality.' Comm'r of Ins. v. N.C. Fire Ins. Rating Bureau, 291 N.C. 55, 70, 229 S.E.2d 268, 276 (1976)…. Reliance on the canon does not involve a determination of constitutionality…. This canon does not limit avoidance to interpretations that render a statute conclusively unconstitutional: 'The cardinal principle of statutory construction is to save and not to destroy. We have repeatedly held that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the act. *Even to avoid a serious doubt the rule is the same*.' In re Dairy Farms, 289 N.C. 456, 465, 223 S.E.2d 323, 328-29 (1976) (citation and internal quotation marks omitted) (emphasis added). And, contrary to the arguments raised by the City in its cross-appeal, the canon is not an affirmative cause of action directly challenging the constitutionality of a statute…." (Citations omitted.)

Upon noting that defendant-City's interpretation raised a serious constitutional question in the case *sub judice*, the Court stated, "Rather than compelling us to resolve the serious constitutional doubts present in this case, Plaintiffs' interpretation of the 1986 Act removes those doubts consistent with the canon of constitutional avoidance. Under that interpretation of the Act, the General Assembly did little more than provide the City with the fee-levying powers granted to all municipalities under the pertinent General Enterprise Statutes and eliminated the Board consistent with the plenary powers found in Article VII, Section 1. We therefore hold that the 1986 Act eliminated the Board, revoked the power to levy prospective fees provided to it under the 1977 Charter, and

vested the City with the ability to levy water and sewer fees consistent with the General Enterprise Statutes."

As to the City's cross-appeal, in holding that the trial court did not err in considering the canon of constitutional avoidance in entering summary judgment, the Court stated, "[T]he City asserts that the Plaintiffs' reliance on the canon of constitutional avoidance is in reality a distinct cause of action to declare the 1986 Act unconstitutional, and that it must have been specifically pled consistent with the notice pleading standard found in the North Carolina Rules of Civil Procedure and precedents applying them. As detailed above, however, application of the canon is not a veiled facial constitutional challenge and is, in actuality, merely a tool for divining legislative intent and statutory meaning. *See* Delconte [v. State], 313 N.C. [384] at 402, 329 S.E.2d [636] at 647 [(1985)] ('We do not, of course, purport to decide this constitutional issue.'); Clark [v. Martinez], 543 U.S. [371] at 381, 160 L. Ed. 2d [734] at 747 [(2005)] ('This accusation misconceives—and fundamentally so—the role played by the canon of constitutional avoidance in statutory interpretation. The canon is not a method of adjudicating constitutional questions by other means. Indeed, one of the canon's chief justifications is that it allows courts to *avoid* the decision of constitutional questions.' (citations omitted) (emphasis in original)). We are not aware of any precedents—and the City provides none—holding that a party arguing against a particular interpretation of a statute relied upon by a movant on summary judgment must have previously pled (or moved to amend a pleading to include) a canon of construction in order to raise it at the summary judgment hearing."

- ***Synopsis***– Appeal by plaintiffs and cross-appeal by defendant-City from October 2018 order. Reversed and remanded. Opinion by Judge Inman, with Judge Berger and Judge Murphy concurring.

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

Procedure; Land Use; Writ of Mandamus; Zoning Determination; Exhaustion of Administrative Remedies; Motion to Dismiss; Subject Matter Jurisdiction Clement v. Cumberland Cnty., ___ N.C. App. ___ (No. COA19-414, Cumberland, 1/7/20) (***unpublished***) (Respondents appealed the trial court's order which granted a petition for writ of mandamus: pursuant to the writ, the County was compelled to provide petitioners with a written zoning determination. On appeal, respondents argued the trial court erred by: (1) denying their motions to dismiss pursuant to N.C. R. Civ. P. Rules 12(b)(1) & (b)(6), and; (2) issuing the writ of mandamus sought by petitioners. The Court held that the trial court erred by denying respondents' motions to dismiss pursuant to Rule 12(b)(1), because the trial court lacked subject matter jurisdiction over petitioners' mandamus proceeding. "Because Lloyd's response to Petitioners' April 16, 2018 zoning inquiry constituted an appealable, official decision, Petitioners were required by Section 1604 of the Ordinance to file their appeal with the Board of Adjustment within thirty days of receiving written notice of that decision. By failing to file an appeal with the Board of Adjustment, Petitioners did not exhaust their administrative remedies. Accordingly, Petitioners cannot subsequently create jurisdiction with the Superior Court 'by couching [their] claim in the guise of a mandamus proceeding.' Northfield Dev. Co. [v. City of Burlington], 165 N.C. App. [885] at 889, 599 S.E.2d [921] at 925 [(2004)]. To hold otherwise would undermine the quasi-judicial scheme intended by the General Assembly in Section 160A-388 and could lead to market uncertainty and costly economic waste by forcing Cumberland County to revisit a prior, official

determination regarding a project which has presumably moved toward completion." (Appeal by respondents from December 2018 order. Reversed. Opinion by Judge Berger, with Judge Inman and Judge Hampson concurring.))

Public Enterprises: Authority; Charter Consolidation; Power to Levy Prospective Water and Sewer Fees Bost Realty Co. v. City of Concord, ___ N.C. App. ___ (No. COA19-309, Cabarrus– 12/17/19) (***unpublished***) ("[T]he legal issues on appeal and cross-appeal in this case are identical to those resolved by our decision in JVC Enterprises [No. COA19-308, filed concurrently with this opinion]. In accordance with that decision, we reverse the trial court's entry of summary judgment in favor of the City and remand for further proceedings not inconsistent with that opinion." (Appeal by plaintiffs and cross-appeal by defendant-City from October 2018 order. Reversed and remanded. Opinion by Judge Inman, with Judge Berger and Judge Murphy concurring.))

Public Enterprises: Authority; Charter Consolidation; Power to Levy Prospective Water and Sewer Fees Journey Capital, LLC v. City of Concord, ___ N.C. App. ___ (No. COA19-310, Cabarrus– 12/17/19) (***unpublished***) ("Plaintiffs' appeal and Defendant's cross-appeal involve legal issues that are substantially identical to those addressed in JVC Enterprises, and—outside the identity of the claimants—its procedural history is substantively identical to that of Bost Realty Co. v. City of Concord, No. COA19-309 (N.C. Ct. App. Dec. 17, 2019) (***unpublished***). All arise from lawsuits brought by former real estate developers alleging the City lacked authority to levy prospective water and sewer fees prior to construction and the provision of water and wastewater services, and all turn on the interpretation of a 1986 session law consolidating the City's charter. *See* 1985 N.C. Sess. Laws ch. 861 (1986). Thus, for the reasons stated in those companion opinions, we reverse the trial court's entry of summary judgment in favor of the City and remand for further proceedings consistent with our holding in JVC Enterprises [No. COA19-308, filed concurrently with this opinion]." (Appeal by plaintiffs and cross-appeal by defendant-City from October 2018 order. Reversed and remanded. Opinion by Judge Inman, with Judge Berger and Judge Murphy concurring.))

Public Enterprises: Authority; Charter Consolidation; Power to Levy Prospective Water and Sewer Fees Metro Development Group, LLC v. City of Concord, ___ N.C. App. ___ (No. COA19-311 Cabarrus– 12/17/19) (***unpublished***) ("Plaintiffs' appeal and Defendant's cross-appeal involve legal issues that are substantially identical to those addressed in JVC Enterprises, and—outside the identity of the claimants—its procedural history is substantively identical to that of Bost Realty Co. v. City of Concord, No. COA19-309 (N.C. Ct. App. Dec. 17, 2019) (***unpublished***). All arise from lawsuits brought by former real estate developers alleging the City lacked authority to levy prospective water and sewer fees prior to construction and the provision of water and wastewater services, and all turn on the interpretation of a 1986 session law consolidating the City's charter. *See* 1985 N.C. Sess. Laws ch. 861 (1986). Thus, for the reasons stated in those companion opinions, we reverse the trial court's entry of summary judgment in favor of the City and remand for further proceedings consistent with our holding in JVC Enterprises [No. COA19-308, filed concurrently with this opinion]." (Appeal by plaintiffs and cross-appeal by defendant-City from October 2018 order. Reversed and remanded. Opinion by Judge Inman, with Judge Berger and Judge Murphy concurring.))