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Procedure; Standing; Amotion

Walker v. Hoke Cty., ___ N.C. App. ___ (No. COA 17-341, Hoke– 6/19/18), *disc. review denied*, ___ N.C. ___ (No. 192P18– 9/20/18)

- ***Holding***– In action wherein plaintiff sought *inter alia* removal of various elected officials stemming from approval of transfer of property, Court of Appeals holds that because plaintiff was not a member of any of the boards from which he sought to remove members, trial court's order dismissing plaintiff's claims for lack of standing was correctly affirmed.

- ***Key Excerpt***– Affirming, the Court held that the trial court did not err by dismissing plaintiff's complaint for lack of standing pursuant to G.S. 1A-1, Rule 12(b)(1).

The Court initially stated, "Historically, 'taxpayers have standing to challenge the allegedly illegal or unconstitutional disbursement of tax funds by local officials.' Goldston v. State, 361 N.C. 26, 31, 637 S.E.2d 876, 879-80 (2006). However, to establish an injury as a taxpayer, the individual must allege 'a misuse of public funds in violation of state statute,' instead of merely 'challenging the wisdom of the County's decision.' Reese v. Mecklenburg Cnty., N.C., 204 N.C. App. 410, 426, 694 S.E.2d 453, 464, *disc. rev. denied*, 364 N.C. 326, 700 S.E.2d 924 (2010)."

"In prior cases before our Supreme Court, taxpayers have been granted standing to bring an action against local and state government bodies when they have alleged an injury that is concrete, traceable, and particular to a specific action in violation of an applicable statute. *See* Goldston, 361 N.C. at 30-33, 637 S.E.2d at 879-81; McIntyre v. Clarkson, 254 N.C. 510, 513-14, 119 S.E.2d 888, 890-91 (1961) (holding a taxpayer had standing to facially challenge the constitutionality of a statute). Goldston v. State noted 'the right of a citizen and taxpayer to maintain an action in the courts to restrain the unlawful use of public funds *to his injury* cannot be denied.' Goldston, 361 N.C. at 33, 637 S.E.2d at 881 (citation and quotation marks omitted) (emphasis added)."

The Court observed that here, plaintiff failed to establish standing for each of his claims for relief. Noting that plaintiff failed to allege that he was a taxpayer in his complaint, the Court emphasized, "even if we were to assume Plaintiff is a Hoke County taxpayer, he has not asserted a traceable, concrete, and particularized injury resulting from the transfer of the 500 acre tract of land between the parties named in his complaint. Even in the light most favorable to the non-moving party, we find no injury in fact under 'any set of facts to support his claim which would entitle him to relief.' Block v. County of Person, 141 N.C. App. 273, 277-78, 540 S.E.2d 415, 419 (2000)."

The Court also addressed plaintiff's attempt to remove various elected officials stemming from transfer of the property. The Court determined that because plaintiff was not a member of any of the boards from which he sought to remove members, the trial court's order dismissing plaintiff's claims for lack of standing should be affirmed. "[S]tanding pursuant to [G.S.] 153A-77 and the common law removal procedure known as 'amotion' does not derive from taxpayer status, but instead from the county board of commissioners. Section 153A-77 provides in pertinent part: 'A member may be removed from office by the county board of commissioners for (i) commission of a felony or other crime involving moral turpitude; (ii) violation of a State law governing conflict of interest; (iii) violation of a written policy adopted by the county board of commissioners; (iv) habitual failure to attend meetings; (v) conduct that tends to bring the office into disrepute; or (vi) failure to maintain qualifications for appointment required under this subsection. A board member may be removed only after the member has been given written notice of the basis for removal and has had the opportunity to respond.' [G.S.] 153A-77(c) (2017)."

"Removal by amotion is a 'quasi-judicial' procedure employed by the board or commission from which the member is being removed for cause. Russ v. Board of Education, 232 N.C. 128, 129-30, 59 S.E.2d 589, 591 (1950); *see also* Burke v. Jenkins, 148 N.C. 25, 61 S.E. 608 (1908). An amotion proceeding 'could not be taken without notice and an opportunity to be heard, except where the officer is removable without cause at the will of the appointing power.' Stephens v. Dowell, 208 N.C. 555, 561, 181 S.E. 629, 632 (1935) (citations omitted). Plaintiff has not alleged in his complaint or on appeal that he is a member of any elected or appointed office." (In a footnote, the Court added, "The most recent amotion proceeding in North Carolina was in 2013 in Berger v. New Hanover County Bd. of Comm'rs., 2013 NCBC 45, 2013 WL 4792508 (2013) (unpublished), where the New Hanover County Superior Court upheld the removal of a local County Commissioner and recognized the validity of the amotion procedure when 'accompanied by appropriate procedural safeguards and the Board's findings and conclusions were supported by sufficient competent evidence.' *Id*. at *11.")

- ***Synopsis***− Appeal by plaintiff from February 2017 order. Affirmed. Court of Appeals' opinion by Judge Berger, with Chief Judge McGee and Judge Dietz concurring. The North Carolina Supreme Court denied plaintiff's petition for discretionary review on September 20, 2018.

Procedure; Eminent Domain; Appellate Procedure; Notice of Appeal; Untimely Appeal; Motion to Reconsider

Town of Apex v. Rubin, ___ N.C. App. ___ (No. COA17-955, Wake- 10/16/18)

- ***Holding***− In appeal arising from an underlying condemnation action, Court of Appeals holds where the time for filing notice of appeal was not tolled, plaintiff-Town's appeal is deemed untimely. Accordingly, Court dismisses plaintiff-Town's appeal and denies plaintiff-Town's petition for writ of certiorari.

- ***Key Excerpt***– On appeal, plaintiff-Town argued that the trial court erred in concluding that plaintiff-Town's claim to defendant's property by eminent domain was for a private purpose. Further, plaintiff-Town contended the denial of its Motion for Reconsideration was error: defendant argued that the Motion for Reconsideration from the Section 108 Judgment did not toll the thirty (30) day period for filing the notice of appeal, and accordingly, that plaintiff-Town's appeal from the Section 108 Judgment was untimely.

The Court first addressed defendant's argument and considered whether the Court of Appeals had jurisdiction. "Plaintiff[-Town] filed its notice of appeal on 30 January 2017, which was more than thirty days after the Section 108 Judgment was rendered on 18 October 2016. Accordingly, in order to circumvent the jurisdictional bar to the appeal, plaintiff[-Town] contends that the Rule 59 Motion for Reconsideration filed on 21 October 2016 tolled the thirty-day period for asserting a timely notice of appeal. We disagree."

"Rule 3(c) of the North Carolina Rules of Appellate Procedure provides that a notice of appeal must be filed within thirty days after entry of a final judgment. N.C. R. App. P. 3(c) (2017). 'Appellate Rule 3 is jurisdictional and if the requirements of this rule are not complied with, the appeal must be dismissed.' Currin-Dillehay Bldg. Supply, Inc. v. Frazier, 100 N.C. App. 188, 189, 394 S.E.2d 683 (1990). North Carolina courts have consistently held that 'orders from a condemnation hearing concerning title and area taken are "vital preliminary issues" that must be *immediately appealed* pursuant to [G.S.] 1-277, which permits interlocutory appeals of determinations affecting substantial rights.' City of Wilson v. Batten Family, L.L.C., 226 N.C. App. 434, 438, 740 S.E.2d 487, 490 (2013) (emphasis added) (quoting Dep't. of Transp. v. Rowe, 351 N.C. 172, 176, 521 S.E.2d 707, 709 (1999))."

"While rulings from a Section 108 hearing are typically interlocutory, an appeal is mandatory as the appropriate remedy for issues involving title and area. *See* N.C. State Highway Comm'n v. Nuckles, 271 N.C. 1, 14, 155 S.E.2d 772, 784 (1967) ('One of the purposes of [a Section 108 hearing is] to eliminate from the jury trial any question as to [the land or area condemned]. Therefore, should there be a fundamental error in the judgment resolving these vital preliminary issues, ordinary prudence requires an immediate appeal, for that is the proper method to obtain relief from legal errors.') Therefore, '[w]hen [an] appeal is mandatory, the right will be lost if [the] appeal is not made within thirty days after entry of judgment.' Wilson, 226 N.C. App. at 438, 740 S.E.2d at 490."

"Here, the Section 108 hearing involved whether plaintiff[-Town]'s taking of defendant's property was motivated by a public use or benefit. Plaintiff[-Town] was afforded the opportunity to present evidence and other supporting documents to rebut defendant's claims of a taking motivated and supported by private interests. Following the hearing, the superior court, considering all the evidence, issued a ruling in favor of defendant. Plaintiff[-Town] did not immediately appeal but instead filed a Rule 59 Motion for Reconsideration."

"Because a Section 108 judgment becomes a final judgment on the issues it addresses if it is not immediately appealed, a *proper* motion for reconsideration under Rule 59 could serve the same purpose if a party to a condemnation action actually discovered new evidence after a Section 108 hearing, and that new evidence would lead to a different determination on the area or interest taken. *See* [G.S.] 1A-1, Rule 59(a)(4) (2017). 'To qualify as a [proper] Rule 59 motion within the meaning of Rule 3 of the Rules of Appellate Procedure, the motion must "state the grounds therefor" and the grounds stated must be among those listed in Rule

59(a). The mere recitation of the rule number relied upon by the movant is not a statement of the grounds within the meaning of Rule 7(b)(1). The motion, to satisfy the requirements of Rule 7(b)(1), must supply information revealing the basis of the motion.' Smith v. Johnson, 125 N.C. App. 603, 606, 481 S.E.2d. 415, 417 (1997) (citations and quotation marks omitted)." (Emphasis in original.)

"Although a Rule 59 motion will toll the time for an appeal, we consider the motion based upon its substance. Notwithstanding the grounds listed in the motion, the substance of plaintiff[-Town]'s filing was not a proper Rule 59 motion. Plaintiff[-Town] cites to Rule 59 generally in its motion for reconsideration which alleges an attempt to present new evidence; however, that evidence was admittedly available at the time of the Section 108 hearing."

"In its motion, plaintiff[-Town] concedes that '[a]lthough most of the evidence and facts discussed herein existed at the time of the 'all other issues' [Section 108] hearing, it was not known or reasonably anticipated that this evidence would be necessary. But given the [c]ourt's ruling in the matter, the [c]ourt should consider this evidence.' Even assuming plaintiff[-Town] did not reasonably anticipate the evidence needed at the Section 108 hearing, a Rule 59 motion is not intended to be a second bite at the apple where the evidence was in plaintiff[-Town]'s possession or existed at the time of hearing and plaintiff[-Town] was afforded 'every opportunity to argue all relevant issues in a single [Section 108] hearing.' Wilson, 226 N.C. App. at 439, 740 S.E.2d at 491; *see also* N.C. All. for Transp. Reform, Inc. v. N.C. Dep't of Transp., 183 N.C. App. 466, 470, 645 S.E.2d 105, 108 (2007) ('Although such deficiency would alone be adequate basis for dismissal of the motion, the trial court also found that petitioners simply sought to reargue matters from the earlier hearing, additionally supporting the court's conclusions that the Motion to Alter or Amend was not a proper Rule 59(e) motion.'). Therefore, having determined the substance of plaintiff[-Town]'s Rule 59 motion was not proper, it could not effectively toll the thirty-day notice of appeal. *See* N.C. R. App. P. 3(c)."

The Court held that, as the notice of appeal was untimely, plaintiff-Town's appeal from the Section 108 Judgment was dismissed. The Court also stated that an improper Rule 59 motion cannot be used as a substitute for appeal, and that accordingly the Court would not review an appeal from the denial of such an improper motion. *See* Musick v. Musick, 203 N.C. App. 368, 371, 691 S.E.2d 61, 63 (2010).

In closing its opinion, the Court noted, "Following oral argument [on 4 June 2018], plaintiff[-Town] petitioned this Court, on 22 June 2018, to exercise its discretion and grant a writ of certiorari as an alternative means to review the merits of the superior court's judgment. However, we decline to exercise our discretion to allow a writ of certiorari. *See* N.C. R. App. P. 21(a) (2017). Plaintiff[-Town]'s petition for a writ of certiorari is denied."

- ***Synopsis***− Appeal by plaintiff-Town from January 2017 order. Dismissed. Opinion written by Judge Bryant, with Chief Judge McGee and Judge Stroud concurring.

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

Torts; Governmental Immunity; Negligence; Urban Redevelopment; Downtown Revitalization; Lease; Nonprofit Art Guild; Slip and Fall Meinck v. City of Gastonia, ___ N.C. ___ (No. 130PA17─ 10/26/18) **Governmental immunity applies to claim arising from revitalization efforts in redevelopment area.** "After careful consideration of all the factors set forth in [Estate of] Williams v. [Pasquotank Cty. Parks & Recreation Dep't, 366 N.C. 195, 732 S.E.2d 137 (2012)], we conclude that—in light of the statutory indications that urban redevelopment activities undertaken to promote the health, safety, and welfare of North Carolina citizens

are governmental functions, and the legislative determination that urban blight 'cannot be effectively dealt with by private enterprise' [G.S. 160A-501(4)] alone, as well as the uncontroverted evidence: that defendant's lease of the historic property to the nonprofit Art Guild in order to promote the arts in the downtown area was a valid urban redevelopment and downtown revitalization activity; that defendant did not seek to make a profit; and that the fees charged by defendant were not substantial and did not cover its operating costs—defendant's activity here in leasing the property to the Art Guild so as to promote the arts for the purpose of redeveloping and revitalizing the downtown area was a governmental function. Our decision should not be construed as holding that every urban redevelopment activity is a governmental function or even that every lease of historic property to a nonprofit arts group for the purpose of promoting the arts is a governmental function. Urban redevelopment and downtown revitalization activities defy straightforward definition, and such projects could seemingly cast a wide net encompassing a number of local government endeavors, many of which may be more commercial in nature or less geared towards remedying blighted areas and promoting the public interest than defendant's cooperative enterprise here with the Art Guild…. Because we conclude that the trial court correctly determined that defendant was engaged in a governmental function, we reverse the decision of the Court of Appeals. Because the Court of Appeals determined that defendant was not entitled to governmental immunity, it did not address whether the trial court correctly ruled that defendant did not waive governmental immunity by purchasing liability insurance. We remand this case to the Court of Appeals to address that issue." (On discretionary review pursuant to G.S. 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 798 S.E.2d 417 (2017), reversing and remanding a June 2016 order granting summary judgment for defendant-City. (In June 2017, the Supreme Court allowed plaintiff's petition for discretionary review of additional issues pertaining to contributory negligence, subsequently deemed not necessary to decision.) Reversed and remanded; discretion review improvidently allowed in part. Opinion by Justice Hudson. ***Note*:** The League participated as *amicus curiae* in this case.))

Extraterritorial Jurisdiction; Local Act Town of Pinebluff v. Moore County, ___ N.C. App. ___ (No. COA17-286, Moore─ 10/2/18 (Concluding that a local act, S.L. 1999-35, being the most recent enactment, operated to invalidate the applicability of G.S. 160A-360(e) with regard to the Town and that accordingly the County did not have discretion to withhold passing a resolution regarding the Town's extraterritorial jurisdiction, the Court stated, "The disagreement between these local governments can be traced to a conflict between a law of general application and a local bill: North Carolina's extraterritorial jurisdiction statute (codified at [G.S.] 160A-360) and a local act pertaining to the exercise of territorial jurisdiction by the Town of Pinebluff (Senate Bill 433 enacted in 1999 as Session Law 1999-35). Between 2014-2015, Pinebluff sought to expand its extraterritorial jurisdiction and, pursuant to the aforementioned local act, informed Moore County of its intent to do so. Moore County refused to adopt a resolution authorizing Pinebluff's extraterritorial jurisdiction expansion and cited the above General Statute in support of its position. Pinebluff then sued Moore County and sought a writ of mandamus to compel the County Commissioners to approve the town's proposed extraterritorial jurisdiction expansion. The trial court ruled in favor of Pinebluff and entered an order directing the Moore County Commissioners to approve Pinebluff's extraterritorial jurisdiction expansion. We conclude that the local act, codified in N.C. Session Law 1999-35, abrogated the requirement of county approval and requires Moore County to summarily approve any otherwise lawful extraterritorial jurisdiction expansion request by Pinebluff. As a result, we affirm the trial court's order granting summary judgment and writ of mandamus." (Appeal by defendants from November 2016 order granting summary judgment and writ of mandamus for plaintiff-Town. Affirmed. Judge Murphy wrote the opinion, joined by Judge Calabria and Judge Zachary.))

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