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Public Enterprises; Statute of Limitations; Continuing Wrong Doctrine

ACTS Ret.-Life Cmtys., Inc. v. Town of Columbus, ___ N.C. App. ___ (No. COA15-1333, Polk– 8/2/16)

- ***Holding***– Wherein in June 2002, the Town Council voted to reclassify two of six water meters from commercial to residential at a retirement facility, and wherein plaintiff filed a complaint in February 2011, Court of Appeals holds action barred by statute of limitations.

- ***Key Excerpt***– Defendant-Town contended that the trial court erred in concluding as a matter of law that plaintiff's complaint was not barred by the statute of limitations. Defendant-Town argued that the three-year statute of limitations in G.S. 1-52(2) & (5) began to run immediately after the June 2002 reclassification took effect, and because plaintiff did not file suit until February 2011, plaintiff's complaint was time-barred. Plaintiff argued that the continuing wrong doctrine applied and that "[t]he limitations period for [its] claims was not triggered by the Council's June 2002 decision to change billing practices for Tryon Estates. That limitations period was triggered only when [defendant] *injured* [plaintiff] by repeatedly sending bills that overcharged for water and sewer." (Emphasis in original.) Plaintiff accordingly claimed that "[e]ach illegal bill was a separate wrong that triggered its own limitations period." (The parties here did not contest that a three year statute of limitations was applicable, but disagreed as to when plaintiff's claims accrued.)

  The Court stated, "'A cause of action generally accrues and the statute of limitations begins to run as soon as the right to institute and maintain a suit arises.' Penley v. Penley, 314 N.C. 1, 20, 332 S.E.2d 51, 62 (1985) (citations omitted); *see also* [G.S.] 1-15(a) (2015). Our courts have accepted the 'continuing wrong' or 'continuing violation' doctrine as an exception to that general rule. Williams v. Blue Cross Blue Shield of N.C., 357 N.C. 170, 179, 581 S.E.2d 415, 423 (2003) (citing Faulkenbury v. Teachers' & State Employees' Ret. Sys. (Faulkenbury II), 345 N.C. 683, 694–95, 483 S.E.2d 422, 429–30 (1997)). In order for the doctrine to apply, there must be a

continuing violation, which 'is occasioned by continual unlawful acts, not by continual ill effects from an original violation.' *Id.* (quoting Ward v. Caulk, 650 F.2d 1144, 1147 (9th Cir. 1981)) (quotations omitted). This Court, however, has 'acknowledge[d] that the distinction between on-going violations and continuing effects of an initial violation is subtle[.]' Faulkenbury v. Teachers' & State Employees' Ret. Sys. (Faulkenbury I), 108 N.C. App. 357, 369, 424 S.E.2d 420, 425 (holding that the plaintiffs were suffering from the continuing effects of the defendants' original action of amending the statute), *aff'd per curiam*, 335 N.C. 158, 436 S.E.2d 821 (1993)."

"To determine whether plaintiff is suffering from a continuing violation, we consider 'the policies of the statute of limitations and the nature of the wrongful conduct and the harm alleged.' *Id.* at 368, 424 S.E.2d at 425 (citing Cooper v. United States, 442 F.2d 908, 912 (7th Cir. 1971)). '"[I]f the same alleged violation was committed at the time of each act, then the limitations period begins anew with each violation . . . ."' Williams, 357 N.C. at 179–80, 581 S.E.2d at 423 (quoting Perez v. Laredo Junior Coll., 706 F.2d 731, 733 (5th Cir. 1983))."

The Court turned to an analysis of the applicability of the continuing wrong doctrine. The Court stated that it had to first determine when plaintiff's cause of action accrued. Under the general rule, plaintiff's cause of action accrued on July 1, 2002 when the reclassification took effect and plaintiff had the right to institute and maintain a suit. Accordingly, plaintiff would have had to file suit prior to July 1, 2005 under the three year statute of limitations. Plaintiff argued, consistent with the trial court's conclusion, that each monthly bill was a "separate wrong," and that plaintiff's February 2011 complaint was not time-barred based on the continuing wrong doctrine.

"In determining if the continuing wrong doctrine applies, we consider 'the policies of the statute of limitations and the nature of the wrongful conduct and the harm alleged.' Faulkenbury I, 108 N.C. App. at 368, 424 S.E.2d at 425. Our Supreme Court has stated, 'Statutes of limitation are intended to afford security against stale claims.' Estrada v. Burnham, 316 N.C. 318, 327, 341 S.E.2d 538, 544 (1986), *superseded by statute on other grounds as stated in* Turner v. Duke Univ., 325 N.C. 152, 381 S.E.2d 706 (1989). 'With the passage of time, memories fade or fail altogether, witnesses die or move away, evidence is lost or destroyed; and it is for these reasons, and others, that statutes of limitations are inflexible and unyielding and operate without regard to the merits of a cause of action.' *Id.*"

"While plaintiff submits a number of cases on the continuing wrong doctrine and a series of hypotheticals indicating that the statute of limitations defense cannot 'grandfather repeated wrongdoing,' we agree with defendant that plaintiff has mischaracterized its own claims to attempt to avoid the statute of limitations. On appeal, plaintiff argues that defendant had a continuing legal duty to comply with [G.S.] 160A-314, which grants a city the authority to establish and revise 'schedules of rates,' and each monthly bill violated that duty. Yet, the actual wrongdoing of which plaintiff complained was defendant's decision to reclassify two water meters at Tryon Estates from commercial to residential, which occurred in June 2002."

"Moreover, as stated throughout the trial court's judgment, the relief granted 'invalidat[ed]' the June 2002 reclassification…. In sum, the trial court concluded that the reclassification and change in billing was unlawful. The overcharges were resulting damages. Such a conclusion, however, is inconsistent with our application of the continuing wrong doctrine."

"We conclude that there was not a continuing violation, 'occasioned by continual unlawful acts,' but rather only 'continual ill effects from an original violation.' Williams, 357 N.C. at 179–80, 581 S.E.2d at 423. The only alleged unlawful act was the June 2002 reclassification. The higher monthly bills constituted the continual ill effects from that reclassification. The Town Council did not reclassify the water meters at Tryon Estates as residential or commercial each month. Because the same alleged violation was not committed each month, the limitations period cannot begin anew. *See id.* at 179, 581 S.E.2d at 423."

"Plaintiff waited over eight-and-a-half years to challenge the Town Council's decision to reclassify two meters at Tryon Estates. Since the June 2002 decision, three new town managers have served, there were four changes to the Town Council, and plaintiff had paid over one hundred monthly bills. Plaintiff had the option, which it pursued, to attempt to negotiate with defendant. However, plaintiff cannot now challenge the Town Council decision by claiming that it is affected by a continuing wrong. Accordingly, we hold that the statute of limitations bars plaintiff's claims."

- ***Synopsis***− Appeal by plaintiff and defendant from June 2015 order. Reversed and remanded. Opinion by Judge Elmore, with Judge McCullough and Judge Zachary concurring.

Personnel; Law Enforcement; Special Separation Allowance; Teachers' and State Employees' Retirement System (TSERS); Local Governmental Employees' Retirement System (LGERS)

Lovin v. Cherokee County, ___ N.C. App. ___ (No. COA15-1350, Cherokee− 8/2/16)

- ***Holding***− Based on its definition, membership in TSERS is not perpetual. Instead, it may terminate upon the happening of some event, e.g., withdrawing contributions or receiving retirement benefits. Trial court erred in granting partial summary judgment in favor of plaintiff-sheriff, as his special separation allowance should have been based on 12.0833 years of creditable service because plaintiff was not a member of TSERS when he retired.

- ***Key Excerpt***− The Court stated that the sole issue on appeal was whether plaintiff's special separation allowance should be based on 36 years of service (which included 24 years of state service through TSERS and 12 years of local government service through LGERS), or just 12 years of service through LGERS. "The trial court erred in granting partial summary judgment in favor of plaintiff. His special separation allowance should have been based on 12.0833 years of creditable service because plaintiff was not a member of TSERS when he retired." The Court emphasized that the case began and ended with the statutory language.

"Chapter 143, Article 12D grants a special separation allowance for qualifying law enforcement officers upon their retirement. [G.S.] 143-166.40–42 (2015). An eligible officer is entitled to receive, beginning in the month he retires, 'an annual separation allowance equal to eighty-five hundredths percent (0.85%) of the annual equivalent of the base rate of compensation most recently applicable to him *for each year of creditable service*.' [G.S.] 143-166.42(a) (2015) (emphasis added). 'Creditable service' is defined as 'the service for which credit is allowed *under the retirement system of which the officer is a member*.' [G.S.] 143-166.42(b) (2015) (emphasis added). The two retirement systems in issue are TSERS and LGERS."

The Court first addressed TSERS. "Defendants argue that because plaintiff was not a 'member' of TSERS when he retired, he was not entitled to receive a special separation allowance for his service through TSERS as a police officer and a state trooper."

"A TSERS 'member' is 'any teacher or State employee included in the membership of the System.' [G.S.] 135-1(13) (2015). 'System,' as that term is used in Chapter 135, refers specifically to TSERS. [G.S.] 135-1(22) (2015). If a member withdraws his accumulated contributions or becomes a beneficiary, he is no longer a member of TSERS. [G.S.] 135-3(3) (2015). 'Beneficiary' is defined as 'any person in receipt of a pension, an annuity, a retirement allowance or other benefit as provided by this Chapter.' [G.S.] 135-1(6) (2015)."

"In 2009, prior to his retirement from the sheriff's department, plaintiff began receiving retirement benefits from TSERS. At that point, he became a 'beneficiary' and ceased to be a 'member' of TSERS. Plaintiff essentially concedes that he was not a member of TSERS when he retired, but argues that 'creditable service,' as defined in section 143-166.42(b), should be interpreted as 'service for which credit is allowed under the retirement system of which the officer is a member *when the credit is accumulated*.' But that is not how the statute is written." (Emphasis in original.)

"Based on its definition, membership in TSERS is not perpetual. Instead, it may terminate upon the happening of some event, e.g., withdrawing contributions or receiving retirement benefits. Subsections 143-166.42(a) and (b) couch creditable service in terms of *current membership* in the system at the time of retirement. The legislature could have easily defined creditable service under Chapter 143 in the manner urged by plaintiff, but it did not. In computing plaintiff's creditable service, therefore, his 24 years of service under TSERS should have been excluded." (Emphasis in original.)

The Court then addressed LGERS. "Defendants do not dispute that plaintiff is a member of LGERS. Accordingly, for the purpose of calculating the special separation allowance, we must determine plaintiff's creditable service under LGERS."

"In LGERS, 'creditable service' means the sum of three things: (1) 'prior service'; (2) 'membership service'; and (3) 'service, both noncontributory and purchased, for which credit is allowable as provided in G.S. 128-26.' [G.S.] 128-21(8) (2015). 'Prior service' means 'the service of a member rendered before the date he becomes a member of the [LGERS], certified on his prior service certificate and allowable as provided by G.S. 128-26.' [G.S.] 128-21(17), (21) (2015). 'Membership service' means 'service as an employee rendered while a member of the [LGERS] or membership service in a North Carolina Retirement System that has been transferred into [LGERS].' [G.S.] 128-21(14), (21) (2015). Section 128-26 gives participating employers the option to 'allow prior service credit to any of its employees' for 'earlier service to the aforesaid employer; or their earlier service to any other employer as . . . defined in G.S. 128-21(11); or, their earlier service to any state, territory, or other governmental subdivision of the United States other than this State.' [G.S.] 128-26(a) (2015). The statute also allows members to transfer to LGERS their credits for membership and prior service in TSERS, [G.S.] 128-34(b) (2015), and provides for situations in which an employee may purchase creditable service, *see e.g.*, [G.S.] 128-26(h1) (2015)."

"Plaintiff has 12 years of membership service in LGERS, calculated from the time he became sheriff in December 2002 until his retirement in January 2015. According to the undisputed statements in [the human resource director's] affidavit, however, the County never issued plaintiff a prior service certificate pursuant to section 128-26(e), plaintiff never transferred membership of his TSERS service to LGERS pursuant to section 128-34, and the County never gave plaintiff credit for prior service pursuant to section 128-26(a).

Plaintiff does not dispute these facts or otherwise claim any prior service or service allowable under section 128-26. Therefore, plaintiff's creditable service under LGERS is limited to his 12 years of membership service as sheriff."

- ***Synopsis***− Appeal by defendants from October 2015 order. Reversed. Opinion by Judge Elmore, with Judge Davis and Judge Dietz concurring.

Public Records; Mass Records Search

Brooksby v. North Carolina Administrative Office of the Courts, ___ N.C. App. ___ (No. COA 15-1397, Randolph− 8/2/16)

- ***Holding***− In case involving mass records search for all records, trial court properly granted summary judgment for defendant. The need for the records custodian to maintain the integrity of the records for its own use and the use of others, the custodian's fiscal responsibility in maintaining the records, the duty to the public, the protection of public resources, and the exigency of the public's need for the information are some, but not all, of the factors that shape a court's inquiry in a records request.

- ***Key Excerpt***− Plaintiffs contended that the trial court "erred in holding that the Clerk of Court may prohibit the Plaintiffs from inspection [sic] copying of the Randolph County Special Proceeding files through the use of digital cameras, cell phone cameras and/or tablet cameras." They contended that there was a genuine issue of material fact as to whether defendants unreasonably restricted their access to public records. The Court disagreed.

"Under the North Carolina Public Records Act, '[e]very custodian of public records shall permit any record in the custodian's custody to be inspected and examined at reasonable times and under reasonable supervision by any person, and shall, as promptly as possible, furnish copies thereof upon payment of any fees as may be prescribed by law.' [G.S.] 132-6(a) (2015); [G.S.] 132-1 *et. seq.* (2015). The Public Records Act provides the following: "Persons requesting copies of public records may elect to obtain them in any and all *media in which the public agency is capable of providing them*. No request for copies of public records in a particular medium shall be denied on the grounds that the *custodian* has made or prefers to make the public records available in another medium. The public agency may assess different fees for different media as prescribed by law.' [G.S.] 132-6.2(a) (2015) (emphasis added)."

To establish a *prima facie* case under the Public Records Act, a plaintiff must show: '(1) a person requests access to or copies of public records from a government agency or subdivision, (2) for the purposes of inspection and examination, and (3) access to or copies of the requested public records are denied.' State Emps. Ass'n of N.C., Inc. v. N.C. Dep't of State Treasurer, 364 N.C. 205, 207, 695 S.E.2d 91, 93 (2010). Our Supreme Court held 'it is clear that the legislature intended to provide that, as a general rule, the public would have liberal access to public records.' News & Observer Publ'g Co. v. State ex rel Starling, 312 N.C. 276, 281, 322 S.E.2d 133, 137 (1984) (citation omitted)."

"Here, Plaintiffs failed to forecast evidence of a *prima facie* case under the Public Records Act because they failed to show that 'access to or copies of the requested public records [was] denied.' State Emps. Ass'n of N.C., Inc., 364 N.C. at 207, 695 S.E.2d at 93. Plaintiffs' evidence shows they were not allowed to access the Clerk's Office on the explicit terms they requested. While the Court recognizes that there may be circumstances where public officials deny access to records on grounds of resources as a pretext for frustrating the intent of the law to provide open access, we hold under these circumstances no

such factual question has been raised. Under the limitations of the Clerk's Office and the availability of its employees, Defendants made reasonable accommodations to allow Plaintiffs access to the documents in a timely manner."

"The issues raised here regard a request for mass records search of all records. The need for the records custodian to maintain the integrity of the records for its own use and the use of others, the custodian's fiscal responsibility in maintaining the records, the duty to the public, the protection of public resources, and the exigency of the public's need for the information are some, but not all, of the factors that shape a court's inquiry in a records request. We note both parties conceded this matter was appropriate for summary judgment. This indicates the presence of a pure question of law."

- ***Synopsis***- Appeal by plaintiffs from June 2015 order. Affirmed. Opinion by Judge Hunter, Jr., with Judge Calabria and Judge Dillon concurring.