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Public Enterprises; Statute of Limitations; Continuing Wrong Doctrine

ACTS Ret.-Life Cmtys., Inc. v. Town of Columbus, 789 N.C. App. 527 (No. COA15-1333, Polk– 8/2/16), *petition for disc. review allowed*, 369 N.C. 482 (No. 334PA16, 1/26/17), *joint motion to dismiss appeal allowed*, ___ N.C. ___ (334PA16, 3/28/18)

- ***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. ***Note:*** In January 2017, the North Carolina Supreme Court granted plaintiff's petition for discretionary review. Oral arguments were heard in October 2017. On March 28, 2018, the Supreme Court allowed the parties' joint motion to dismiss appeal.

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

Personnel; Civil Service Commission; Right to Jury Trial City of Asheville v. Frost, ___ N.C. ___ (No. 170A17, 4/6/18) The Supreme Court held that a respondent, just as much as a petitioner, may demand a jury trial in a superior court appeal of an Asheville Civil Service Board decision. At issue in this case was section 8(g) of the Asheville Civil Service Law, which states: "Within ten days of the receipt of notice of the decision of the [Asheville Civil Service] Board, either party may appeal to the Superior Court Division of the General Court of Justice for Buncombe County for a trial de novo. The appeal shall be effected by filing with the Clerk of the Superior Court of Buncombe County a petition for trial in superior court, setting out the fact[s] upon which the petitioner relies for relief. If the petitioner desires a trial by jury, the petition shall so state. Upon the filing of the petition, the Clerk of the Superior Court shall issue a civil summons as in [a] regular civil action, and the sheriff of Buncombe County shall serve the summons and petition on all parties who did not join in the petition for trial. It shall be sufficient service upon the City for the sheriff to serve the petition and summons upon the clerk of the City. Therefore, the matter shall proceed to trial as any other civil action." Act of Aug. 3, 2009, ch. 401, sec. 7, 2009 N.C. Sess. Laws 780, 784. The Court stated, "The final sentence of section 8(g) states that 'the matter shall proceed to trial as any other civil action.' A civil action is governed by the North Carolina Rules of Civil Procedure, so section 8(g) incorporates, among other things, Rule 38(b) of those Rules. Rule 38(b) does not confer any substantive right to a jury trial in any particular case; that right must come from somewhere else. But under Rule 38(b), the right to a jury trial is generally determined by the type of issue that a lawsuit presents, not by which party is requesting the jury trial. *See* N.C. R. Civ. P. 38(b) ('Any party may demand a trial by jury of any *issue* triable of right by a jury . . . .' (emphasis added)). Section 8(g) indicates that issues arising in section 8(g) appeals are indeed issues on which a party may demand a jury trial. As we have already discussed, by saying that, '[i]f the petitioner desires a trial by jury, the petition shall so state,' section 8(g) makes it clear that a petitioner has the right to a jury trial. Because section 8(g) allows 'either party' to appeal an Asheville Civil Service Board decision, the petitioner in any

given appeal could be either the City or the employee. The issue being appealed could therefore be an issue that either the City or the employee wishes to appeal. This means that any issue related to an Asheville Civil Service Board decision is an 'issue triable of right by a jury' in an appeal to superior court. Under Rule 38(b), moreover, '*[a]ny party* may demand a trial by jury of any issue triable of right by a jury.' (Emphasis added.)." (Appeal from the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 800 S.E.2d 118 (2017), reversing trial court's December 2015 order. Reversed and remanded. Chief Justice Martin wrote the opinion.))

Police Power; Towing Ordinance; Constitutional Challenge; Procedure; Denial of Preliminary Injunction; Interlocutory Appeal Savage Towing v. Cary, ___ N.C. App. ___ (No. COA17-1228, Wake– 4/17/18) (Plaintiff appealed the trial court's order denying its motion for preliminary injunction, wherein plaintiff argued towing ordinance violated its constitutional rights to due process and equal protection, and the Court of Appeals dismissed the interlocutory appeal without prejudice. "At this point in the litigation under a review of a facial challenge, Plaintiff has failed to show that its substantial rights will be harmed by the trial court's denial of its motion for preliminary injunction. The constitutional issues remain to be determined upon a more developed record, Without the [G.S. 1A-1,] Rule 54(b) certification or the showing of potential harm to a substantial right, we lack jurisdiction over Plaintiff's interlocutory appeal. The appeal is dismissed without prejudice." (Appeal by plaintiff from July 2017 order denying plaintiff's motion for preliminary injunction. Dismissed. Opinion by Judge Tyson, with Judge Elmore and Judge Zachary concurring.))

Torts; Constitutional Claims; *Corum*; Adequacy of Remedy Under State Law Taylor v. Wake Cty., ___ N.C. App. ___ (No. COA17-99, Wake– 2/20/18) (At issue here was the scope of a common law doctrine, named for Corum v. University of North Carolina, 330 N.C. 761, 413 S.E.2d 276, *cert. denied*, 506 U.S. 985, 121 L.Ed.2d 431 (1992), which allows a plaintiff to sue the State for a violation the State Constitution. Such Corum claims may be asserted when a plaintiff has suffered a violation of state constitutional rights and otherwise lacks an adequate remedy under state law. *Id*. at 782, 413 S.E.2d at 289. The Court stated that at issue here is whether the adequacy of a remedy depends upon a plaintiff's ability to recover for a particular injury or to recover from a particular defendant. "We hold that adequacy depends upon recovery for the plaintiff's injury, without regard to the party from whom recovery may be obtained. [Plaintiff], individually, and as the administratrix of the estates …. appeals from the trial court's order granting summary judgment in favor of the Wake County Division of Social Services ('Wake County DSS' or 'Defendant') on her claims for ordinary negligence, negligent supervision, negligent infliction of emotional distress, wrongful death, willful and wanton negligence, and denial of due process under Article I, Section 19 of the North Carolina Constitution. Plaintiff argues the trial court erred when it concluded she had an adequate remedy under state law by bringing a claim in the North Carolina Industrial Commission against the North Carolina Department of Health and Human Services ("DHHS"), thereby precluding her from asserting her direct constitutional claim under Corum against Defendant[-County DSS]. After careful review, we affirm the trial court." The Court emphasized, "Ultimately, the implementation of the constitutional mechanism used to allow a Corum claim to proceed is extraordinary. Plaintiff's Tort Claims Act [G.S. 143-291(a)] proceeding is less intrusive than a direct constitutional claim and, if successful, still provides a remedy capable of righting the alleged constitutional wrong. Accordingly, we hold that Plaintiff's Tort Claims Act action against DHHS is an adequate remedy under state law such that Plaintiff is unable to purse a direct constitutional claim against Wake County DSS in superior court." (Appeal by plaintiff from November 2016 order granting defendant-County DSS's motions to dismiss and for summary judgment. Affirmed. Opinion by Judge Inman, with Judge Bryant and Judge Davis concurring.))