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Personnel; Immunity; Reimbursement for Litigation

Wray v. City of Greensboro, ___ N.C. ___ (No. 255A16, 8/18/17)

- ***Holding***– In a 5-2 decision, North Carolina Supreme Court holds that plaintiff-former police chief's complaint, seeking indemnification and reimbursement for incurred legal expenses from litigation arising after his resignation, sufficiently alleged both the essence of a contract claim and that plaintiff was sued for actions taken within the course and scope of his employment during the time he was police chief.

- ***Key Excerpt***– The majority stated, "Because we agree that plaintiff has sufficiently pleaded waiver of governmental immunity by alleging a contract claim, we affirm the decision of the Court of Appeals reversing the trial court's order of dismissal and remanding the matter for further proceedings."

  . . . .

  "A State or local government . . . waives that immunity when it enters into a valid contract, to the extent of that contract. Whitfield v. Gilchrist, 348 N.C. 39, 42-43, 497 S.E.2d 412, 414 (1998); Smith [v. State], 289 N.C. [303] at 320, 222 S.E.2d [412] at 423-24 [(1976)]. Specifically, this Court has held 'that whenever the State of North Carolina, through its authorized officers and agencies, enters into a valid contract, the State implicitly consents to be sued for damages on the contract in the event it breaches the contract.' Smith, 289 N.C. at 320, 222 S.E.2d at 423-24. Thus, 'in causes of action on contract . . . , the doctrine of sovereign immunity will not be a defense to the State. The State will occupy the same position as any other litigant.' *Id.* at 320, 222 S.E.2d at 424 (citation omitted). 'Likewise, a city or county waives immunity when it "enters into a valid contract."' Wray, ___ N.C. App. at ___, 787 S.E.2d [433] at 436 (majority opinion) (emphasis omitted) (quoting M Series Rebuild, LLC v. Town of Mount Pleasant, 222 N.C. App. 59, 65, 730 S.E.2d 254, 259, *disc. rev. denied*, 366 N.C. 413, 735 S.E.2d 190 (2012))."

  "'In order to overcome a defense of governmental immunity, the complaint must specifically

allege a waiver of governmental immunity. Absent such an allegation, the complaint fails to state a cause of action.' Fabrikant v. Currituck County, 174 N.C. App. 30, 38, 621 S.E.2d 19, 25 (2005) (quoting Paquette v. County of Durham, 155 N.C. App. 415, 418, 573 S.E.2d 715, 717 (2002) (citations omitted), *disc. rev. denied*, 357 N.C. 165, 580 S.E.2d 695 (2003)); *accord* Hinson v. City of Greensboro, 232 N.C. App. 204, 210, 753 S.E.2d 822, 827 (2014). 'This requirement does not, however, mandate that a complaint use any particular language. Instead, consistent with the concept of notice pleading, a complaint need only allege facts that, if taken as true, are *sufficient to establish* a waiver . . . [of] immunity.' Fabrikant, 174 N.C. App. at 38, 621 S.E.2d at 25 (emphasis added) (citation omitted). Because in contract actions 'the doctrine of sovereign immunity will not be a defense,' a waiver of governmental immunity is implied, and effectively alleged, when the plaintiff pleads a contract claim. *See* Smith, 289 N.C. at 320, 222 S.E.2d at 423-24 ('[W]henever the State of North Carolina . . . enters into a valid contract, *the State implicitly consents to be sued* for damages on the contract in the event it breaches the contract.' (emphasis added)). Thus, an allegation of a valid contract is an allegation of waiver of governmental immunity."

"Here plaintiff adequately pleaded a contract action: that he had an employment relationship with the City that included the obligation on the part of the City to pay for his defense and that the City failed to do so. . . . In sum, plaintiff alleged that he was an 'employee of' defendant, that he 'acted within the course and scope of his employment as the Chief of the Greensboro Police Department,' that 'pursuant to the provisions of the City Policy, [he] is entitled to indemnification and reimbursement for the . . . costs he has incurred in connection with his defense' in various lawsuits, and that defendant 'has refused and continues to refuse to reimburse' him."

"In light of the low bar for notice pleading under Rule 12(b)(6), as well as the waiver of governmental immunity that is inferred from the pleading of a contract claim, we conclude that the averments in plaintiff's first amended complaint are sufficient to allege a waiver of governmental immunity due to the City's failure to honor contractual obligations to plaintiff as an employee. Although we hold that dismissal of the complaint was not warranted, like the Court of Appeals, we express no opinion on the merits of plaintiff's contract action. We simply conclude, as we did in Smith, that 'plaintiff is not to be denied his day in court because his contract was with' the City. Smith, 289 N.C. at 322, 222 S.E.2d at 424."

The majority also held that the trial court erred by concluding that the City was "shielded by the doctrine of governmental immunity" based on Blackwelder v. City of Winston-Salem, 332 N.C. 319, 420 S.E.2d 432 (1992). (The trial court, citing Blackwelder, had stated, "Neither the institution of a plan adopted pursuant to [G.S.] 160A-167, under which a city may pay all or part of some claims against employees of the city, nor action taken by the city under [G.S.] 160A-167, waives governmental immunity.") The majority determined that Blackwelder did not control on the facts presented. "In Blackwelder this Court stated that '[a]ction by the City under [G.S.] 160A-167 does not waive immunity' in the context of a tort action, noting that "[G.S.] 160A-485 provides that the *only way* a city may waive its governmental immunity is by the purchase of liability insurance.' 332 N.C. at 324, 420 S.E.2d at 436 (emphasis added). Section 160A-485 of the North Carolina General Statutes specifically addresses waiver of immunity from civil liability in tort. [G.S.] 160A-485(a) (2015) ('Any city is authorized to waive its immunity from civil liability in tort by the act of purchasing liability insurance.'). Here, in the context of a contract action, rather than a tort action, section 160A-485 has no application and does not limit how governmental immunity may be waived.

Because there is no analogous statute limiting mechanisms for waiver of governmental immunity in the context of contract actions, the reasoning in Blackwelder does not control here."

• ***Dissent***− Justice Ervin wrote a dissenting opinion, joined by Justice Beasley. "As a result of its reliance upon what I believe to be an excessively 'low bar for notice pleading under [G.S. 1A-1,] Rule 12(b)(6),' the Court has determined that plaintiff 'adequately pleaded a contract action: that he had an employment relationship with the City that included the obligation on the part of the City to pay for his defense and that the City failed to do so.' In view of my belief that plaintiff did not sufficiently allege the existence of a contractual relationship between himself and the City that encompassed a right to obtain reimbursement for the costs of defending the civil actions brought against him in the . . . suits, I am unable to agree with the Court's conclusion that plaintiff's amended complaint adequately alleged the necessary waiver of governmental immunity. As a result, I respectfully dissent from the Court's decision to affirm the Court of Appeals' opinion in this case."

• ***Synopsis***− Appeal from decision of a divided panel of the N.C. Court of Appeals, ___ N.C. App. ___, 787 S.E.2d 433 (2016), which had reversed trial court's May 2015 order of dismissal. Affirmed by the N.C. Supreme Court in a 5-2 decision. Opinion of the Court by Justice Hudson. Justice Ervin dissenting, joined by Justice Beasley. ***Note*****:** The League participated as *amicus curiae* in this case.

Procedure; Interlocutory Appeals; Immunity; Proprietary Function; Wastewater Disposal

Union Cty. v. Town of Marshville, ___ N.C. App. ___ (No. COA17-37, Union− 9/5/17)

• ***Holding***− In a dispute over the disposal of wastewater, Defendant-Town appealed from two orders ruling on motions made in its dispute with Plaintiff-County. The appealed orders are interlocutory, and Defendant-Town must accordingly establish grounds for appellate review, as the appellant has the burden of demonstrating that the order deprives the appellant of a substantial right, N.C. R. App. P. Rule 28(b)(4), which would be jeopardized absent a review prior to a final determination on the merits. Defendant-Town argued review of these orders is proper because the orders affect the substantial rights of governmental immunity and the avoidance of the possibility of inconsistent verdicts. Since Defendant-Town is unable to establish that either ground for appellate review applies to these appealed orders, the appeals are dismissed as interlocutory.

• ***Key Excerpt***− As grounds for appellate review of the first order dismissing some, but not all, of Plaintiff-County's claims pursuant to G.S. 1A-1, Rules 12(b)(1), (2), and (6), Defendant-Town asserted that the trial court erred in not dismissing Plaintiff-County's remaining tort claims because governmental immunity shielded it from liability. "However, governmental immunity has limits, and it is inapplicable here as a defense to the tort claims asserted by Plaintiff County…. 'The law is clear in holding that the operation and maintenance of a sewer system is a proprietary function where the municipality sets rates and charges fees for the maintenance of sewer lines.' Harrison v. City of Sanford, 177 N.C. App. 116, 121, 627 S.E.2d 672, 676, *disc. review denied*, ___ N.C. ___, 639 S.E.2d 649 (2006) (citations omitted). *See also* Bostic Packaging, Inc. v. City of Monroe, 149 N.C. App. 825, 829, 562 S.E.2d 75, 79, *disc. review denied*, 355 N.C. 747, 565 S.E.2d 192 (2002) (in reversing summary judgment of claims dismissed on governmental immunity grounds, we held 'defendant [town] is not immune from tort liability in the operation and maintenance of its sewer system'). Regardless of the clarity of North Carolina law, Defendant Town herein appeals to have this Court apply governmental immunity to claims that arose

out of the operation of its sewer system. We decline to do so, and Defendant Town is, thus, unable to establish grounds for our interlocutory review because governmental immunity does not apply."

Defendant-Town's other argument addressed the order dismissing its counterclaims as affecting its substantial right to avoid inconsistent verdicts. In attempting to establish grounds for appellate review of the second order, which ruled on Plaintiff-County's motion for judgment on the pleadings, G.S. 1A-1, Rules 12(c) & (h)(2), the Court held that Defendant-Town made a circular argument. "Defendant Town asserts that (1) the trial court erred in dismissing its counterclaims; (2) a successful appeal of the dismissal order based on the merits of the counterclaims could possibly create inconsistent verdicts; (3) the avoidance of inconsistent verdicts is a substantial right; (4) a substantial right establishes grounds for appellate review; and, therefore, (5) because there are grounds for appellate review, this Court should review the merits of the dismissed counterclaims. To support its argument that immediate appeal from an otherwise unappealable interlocutory order is proper, Defendant Town only cites Hartman v. Walkertown Shopping Center, in which we stated that '[t]he right to avoid the possibility of two trials on the same issues can be a substantial right. A judgment which creates the possibility of inconsistent verdicts on the same issue – in the event an appeal eventually is successful – has been held to affect a substantial right.' Hartman, 113 N.C. App. 632, 634, 439 S.E.2d 787, 789, *disc. review denied*, 336 N.C. 780, 447 S.E.2d 422 (1994) (citations, emphasis, brackets, and ellipses omitted). However, the order appealed from in Hartman could have had the effect of bifurcating adjudication of 'identical factual claims' into distinct, and potentially inconsistent, resolutions for different defendants, although similarly situated. *Id.* Our facts differ, and Hartman is inapplicable. Although Defendant Town argues that, if its appeal is successful, there could be the potential for inconsistent verdicts on the issues here, it never explains how these inconsistent verdicts about which it complains could truly become realities. This Court will not construct appellant's arguments in support of a right to interlocutory appeal. Jeffreys [v. Raleigh Oaks Joint Venture], 115 N.C. App [377] at 380, 444 S.E.2d [252] at 254 [(1994)] (citations omitted)."

- ***Synopsis***− Appeal by defendant-Town from October 24 & 27 orders. Appeal dismissed as interlocutory. Opinion by Judge Berger, with Judge Elmore and Judge Inman concurring.

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

Personnel; Discharge; Administrative Grievance Process; Internal Investigative Notes; Redaction; Record on Appeal Bray v. Swisher, ___ N.C. App. ___ (No. COA16-928, Forsyth− 5/2/17) (***unpublished***), *disc. review denied*, ___ N.C. ___ (No. 179P17, 8/17/17) (Supreme Court denies review of Court of Appeals' decision in favor of plaintiff. Court of Appeals states, "Defendant Curtis L. Swisher, the Town Manager of the Town of Kernersville, appeals from the trial court's order and writ of mandamus. The trial court directed Swisher to disclose to Plaintiff Kevin Bray the full, unredacted version of internal investigative notes used in the town's decision to terminate Bray's employment with the Kernersville Fire Department…. State law requires the town to disclose to Bray all notes and other internal communications used in the official decision to terminate him. [G.S.] 160A-168(c1)(4). The trial court reviewed the full, unredacted investigative notes *in camera* and found, based on their contents, that those notes were used in the town's decision to terminate Bray. The unredacted notes that the trial court reviewed *in camera* are not in the record on appeal—meaning this Court has no way to know what they say. Thus, under our precedent, we must presume that the trial court's finding is supported by the record below.

We therefore affirm the trial court's order instructing Swisher to produce the notes to Bray. We also hold that [G.S.] 160A-168(c1)(4) provides a right for Bray to review those notes *before* engaging in the administrative grievance process offered by the town. Because the town failed to produce those notes as the law required, it deprived Bray of a meaningful opportunity to defend himself at the grievance hearing. Accordingly, the trial court properly held that the town violated Bray's due process rights and that Bray is entitled to a new grievance hearing after being provided an opportunity to review all records subject to disclosure under [G.S.] 160A-168(c1)(4)." (Emphasis in original.) (Appeal by defendant-Town from June 2016 order instructing defendant-Town to conduct a new grievance hearing. Affirmed. Opinion by Judge Dietz, with Judge Elmore and Judge Tyson concurring.))

Personnel; Racial Discrimination; Retaliation Claims Forbes v. City of Durham, ___ N.C. App. ___ (No. COA16-964, Durham− 9/5/17) (Court of Appeals holds trial court properly granted summary judgment for defendants in action where plaintiff filed complaint containing several causes of action for race discrimination and retaliation, including: (1) under Title VII against defendant-City; (2) under 42 U.S.C. § 1981 against defendant-City and defendants Chief of Police and City Manager in both their official and individual capacities; (3) under 42 U.S.C. § 1983 against defendant-City and defendants Chief of Police and City Manager in both their official and individual capacities; and (4) under the North Carolina Constitution against defendant-City and defendants Chief of Police and City Manager in their official capacities. (Appeal by plaintiff from July 2016 order granting defendant-City's motion for summary judgment. Affirmed. Opinion by Judge Stroud, with Judge Dillon concurring. Judge Murphy concurred in the result only.))

Public Contracts; Revitalization Project; Motion to Compel Arbitration Town of Belville v. Urban Smart Growth, LLC, ___ N.C. App. ___(No. COA16-817, Brunswick− 2/21/17), *disc. review denied*, ___ N.C. ___ (No. 097P17, 8/17/17) (In plaintiff-Town's interlocutory appeal from denial of motion to compel defendant to submit to binding arbitration and to stay all other proceedings in dispute between the parties, Court of Appeals affirms the judgment of the trial court that plaintiff-Town had impliedly waived its right to compel arbitration, as plaintiff-Town took actions contrary to its contractual rights. "Because Defendant has expended significant amounts of money in defense of Plaintiff [-Town's]'s initiation of this suit, before Plaintiff [-Town] belatedly demanded arbitration, we affirm the trial court's order based upon the prejudice to Defendant.") (Appeal by plaintiff-Town from April 2016 order denying plaintiff's motion to compel arbitration. Affirmed. Opinion by Judge Berger, with Chief Judge McGee and Judge Davis concurring.))