

NO. COA13-1463

NORTH CAROLINA COURT OF APPEALS

Filed: 18 November 2014

ROBERT M. PHILLIPS, SR.,  
THOMAS E. OSBORNE, and wife  
KAREN L. OSBORNE,  
Plaintiffs

v.

Orange County  
No. 12 CVS 1848

ORANGE COUNTY HEALTH  
DEPARTMENT,  
Defendant

Appeal by defendant from order entered 11 June 2013 by  
Judge George B. Collins in Orange County Superior Court. Heard  
in the Court of Appeals 4 June 2014.

*Hoof Hughes Law, PLLC, by James H. Hughes, for plaintiff-  
appellees.*

*Orange County Attorney's Office, by Annette M. Moore,  
Jennifer Galassi, and John L. Roberts, for defendant-  
appellant.*

CALABRIA, Judge.

The Orange County Health Department ("defendant") appeals  
from an order granting summary judgment and declaratory judgment  
in favor of Robert M. Phillips, Sr. ("Phillips"), Thomas E.  
Osborne ("Osborne"), and Karen L. Osborne (collectively,  
"plaintiffs"). The trial court found (1) that defendant had no

authority to inspect and charge fees for inspecting plaintiffs' wastewater systems; and (2) that defendant is statutorily preempted from regulating any wastewater treatment systems permitted by the North Carolina Department of Environment and Natural Resources ("NCDENR") under rules adopted by the North Carolina Environmental Management Commission ("EMC") pursuant to Article 21, Chapter 143 of the General Statutes of North Carolina. The court also awarded plaintiffs attorneys' fees. We affirm.

#### I. Background

Plaintiffs own properties in Orange County, North Carolina that failed perk tests, which determine whether land is suitable to percolate wastewater. Since the properties were determined to be unsuitable for traditional septic tank systems for wastewater disposal, plaintiffs' properties utilize "spray irrigation" wastewater systems designed to discharge effluent directly to the land surface ("spray irrigation system"). NCDENR is the agency that designed a method of advancing its statutory purpose of administering a complete program of water and air conservation, by issuing permits for property owners utilizing spray irrigation systems in North Carolina. See N.C. Gen. Stat. §§ 143-211(c); -215.1(a4) (2013).

On 18 April 1997 and 14 February 2005, plaintiffs obtained permits from NCDENR allowing them to use spray irrigation systems on their properties. The conditions of the permits were that the systems would be periodically inspected by NCDENR, and that plaintiffs would be billed and be responsible for paying NCDENR an "administering and compliance fee." Plaintiffs executed operation and maintenance agreements with NCDENR, indicating that they would maintain their spray irrigation systems in compliance with the permitted conditions.

Prior to the events of the instant case, Phillips received a notice of late inspection fees from defendant. When Phillips inquired into the matter, questioning defendant's authority to inspect and charge fees, defendant indicated that the Orange County Board of Health had approved a program "whereby all non-discharge systems permitted by the State . . . would be inspected on a periodic basis[,] " and that Phillips' spray irrigation system was subject to inspection.

Defendant subsequently attempted to inspect plaintiffs' spray irrigation systems. Osborne objected to an inspection of his spray irrigation system because the State of North Carolina had recently inspected it. Despite Osborne's objection in December 2011, defendant again attempted to inspect his spray irrigation system in January 2012. After being deterred by a

locked gate, defendant sent Osborne an incomplete inspection report and invoice, along with a request that he contact defendant to schedule an inspection appointment. On 15 March 2012, defendant received an inspection payment from Osborne, along with a letter indicating that "[p]ayment is made under protest and believe [sic] to be fraudulent."

Defendant encountered similar resistance from Phillips in its efforts to inspect his spray irrigation system. In July 2012, Phillips contacted defendant, indicating that he did not want his system inspected, and that he did not want any of defendant's employees on his property without his permission. Phillips and defendant subsequently corresponded regarding defendant's authority to inspect Phillips's spray irrigation system and charge fees for such inspections. In August 2012, defendant informed Phillips of a proposed date to inspect his spray irrigation system. Phillips indicated that he was unavailable on the proposed date and referred the matter to his attorney. However, Phillips stated that while he was amenable to the inspection being conducted while he was present, he refused to pay the accompanying fee.

On 16 November 2012, defendant sent letters to plaintiffs, requesting permission to enter plaintiffs' properties to inspect the spray irrigation systems and informing them that defendant

would seek administrative inspection warrants if permission was not granted. Plaintiffs' counsel advised defendant of plaintiffs' position that defendant had no legal authority to conduct the requested inspections. Counsel further requested that defendant notify him should it seek administrative inspection warrants, so that he could object to the warrants at that time. Plaintiffs' counsel also noted that plaintiffs were amenable to supervised inspections, but that they would not pay fees for the inspections. On 28 November 2012, defendant sought and obtained administrative inspection warrants to complete inspections of both plaintiffs' spray irrigation systems. Defendant executed the warrants on 29 November 2012, and sent invoices to plaintiffs for inspection costs.

On 14 December 2012, plaintiffs filed a complaint seeking a declaratory judgment in Orange County Superior Court. Plaintiffs alleged, *inter alia*, that since plaintiffs' spray irrigation systems were permitted by NCDENR under rules adopted by the EMC, defendant had no right to inspect, or charge fees for inspecting, plaintiffs' systems. Plaintiffs sought to enjoin defendant from (1) conducting further inspections of plaintiffs' systems; or (2) taking any action to collect inspection fees for plaintiffs' systems. Plaintiffs also sought

to recover attorneys' fees from defendant, and to have defendant refund the inspection fees it had collected.

On 22 January 2013, defendant filed an answer, a motion to dismiss, and a motion for judgment on the pleadings. Plaintiffs filed a motion for summary judgment on 16 April 2013. After a hearing, the trial court entered an order finding that defendant was preempted by statute from regulating plaintiffs' type of wastewater treatment system and enjoining defendant from taking any action to collect fees from inspections that had already been conducted on plaintiffs' spray irrigation systems. The trial court also ordered defendant to refund Osborne's inspection fee, which he had paid under protest. Defendant appeals.

Defendant raises several issues on appeal, including (1) that the trial court lacked subject matter jurisdiction; (2) that the trial court erred in declaring that defendant was statutorily preempted from regulating wastewater systems permitted by NCDENR under rules promulgated by the EMC and had no right to inspect or collect fees for inspecting plaintiffs' wastewater systems; (3) that the trial court erred by granting summary judgment in favor of plaintiffs; (4) that the trial court erred by failing to grant defendant's motion to dismiss or

its motion for judgment on the pleadings; and (5) that the trial court erred by awarding plaintiffs costs and attorneys' fees.

## II. Subject Matter Jurisdiction

We first address defendant's jurisdictional claims. Specifically, defendant contends that the trial court lacked subject matter jurisdiction because (1) defendant is not the real party in interest; (2) necessary parties were not joined; (3) there was no justiciable claim; (4) plaintiffs' complaint was defective as a result of failing to allege a waiver of sovereign or governmental immunity; and (5) plaintiffs failed to exhaust their administrative remedies. We disagree.

"It is well-established that the issue of a court's jurisdiction over a matter may be raised at any time, even for the first time on appeal or by a court *sua sponte*." *New Bar P'ship v. Martin*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 729 S.E.2d 675, 681 (2012) (citation omitted). "Whether a trial court has subject-matter jurisdiction is a question of law, reviewed de novo on appeal." *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010).

### A. Real Party in Interest

Defendant first contends that the trial court lacked subject matter jurisdiction because defendant is not a real party in interest. Specifically, defendant contends that it is

not a real party in interest because the enabling statutes of local health departments do not contain provisions for the capacity of health departments to sue or be sued.

As an initial matter, we note that defendant did not raise the issue of whether it was the real party in interest before the trial court. Where "th[e] question as to [defendant's] right to sue was not raised in the court below[,] . . . it is too late now to make this contention." *Asheville Safe Deposit Co. v. Hood*, 204 N.C. 346, 348, 168 S.E.2d 524, 526 (1933). Therefore, by declining to raise the issue before the trial court, defendant conceded to being treated as the real party in interest. Defendant's argument is without merit.

#### B. Joinder

Defendant next contends that the trial court lacked subject matter jurisdiction because necessary parties were not joined in the instant case pursuant to N.C. Gen. Stat. § 1A-1, Rule 19.

"The defense of failure to join a necessary party must be raised before the trial court and may not be raised for the first time on appeal." *Sutton v. Messer*, 173 N.C. App. 521, 528, 620 S.E.2d 19, 24 (2005). In addition, "a failure to join a necessary party does not result in a lack of jurisdiction over the subject matter of the proceeding." *Stancil v. Bruce Stancil Refrigeration, Inc.*, 81 N.C. App. 567, 573, 344 S.E.2d 789, 793,



*disc. rev. denied*, 318 N.C. 418, 349 S.E.2d 601 (1986). Because defendant failed to raise this issue below, and because failure to join a necessary party does not negate a court's subject matter jurisdiction, *id.*, this argument is overruled.

### C. Justiciability

Defendant next contends that plaintiffs have no justiciable claim because the inspections that plaintiffs are complaining about have already been completed, and the next inspections are not scheduled to occur until November 2015. Defendant is mistaken.

"[C]ourts have jurisdiction to render declaratory judgments only when the complaint demonstrates the existence of an actual controversy. To satisfy the jurisdictional requirement of an actual controversy, it must be shown in the complaint that litigation appears unavoidable." *Wendell v. Long*, 107 N.C. App. 80, 82-83, 418 S.E.2d 825, 826 (1992) (citations omitted).

Plaintiffs' complaint includes other issues in addition to the already completed inspections. Specifically, it includes the reimbursement of the fees that were paid for the inspections as well as an injunction to prevent any further inspections and fees. The affidavits submitted to obtain the administrative warrants indicate that plaintiffs' wastewater systems are subject to inspection every three years, meaning that defendant

intends to continue the inspections in the future. Although defendant has already completed the currently contested inspections, there is no authority for defendant to continue doing so in the future. Because plaintiffs argue that defendant had no legal right to conduct the inspections it has already completed, a justiciable controversy exists. Moreover, the very purpose of a declaratory judgment is to "make certain that which is uncertain and secure that which is insecure." *Pilot Title Ins. Co. v. Northwestern Bank*, 11 N.C. App. 444, 449, 181 S.E.2d 799, 802 (1971) (citation omitted). Because it is uncertain whether defendant may inspect and charge fees for inspecting wastewater systems when such systems have already been permitted and inspected by the State, this question is an appropriate subject under the Uniform Declaratory Judgment Act.

#### D. Sovereign/Governmental Immunity

Defendant further contends that the trial court lacked subject matter jurisdiction because plaintiffs failed to allege that defendant had waived sovereign or governmental immunity in its complaint.

"Under the doctrine of governmental immunity, a county is immune from suit for the negligence of its employees in the exercise of governmental functions absent waiver of immunity." *Meyer v. Walls*, 347 N.C. 97, 104, 489 S.E.2d 880, 884 (1997)

(citation omitted). A complaint fails to state a cause of action where it fails to allege that immunity has been waived. See, e.g., *In re Kitchin v. Halifax Cty.*, 192 N.C. App. 559, 567, 665 S.E.2d 760, 765-66 (2008) (holding trial court did not err by granting summary judgment in favor of defendants where plaintiffs' complaint failed to allege a waiver of governmental immunity).

Local boards of health derive their powers from the counties in which they sit. See N.C. Gen. Stat. § 130A-34 (providing that counties "shall operate a county health department, establish a consolidated human services agency, . . . participate in a district health department, or contract with the State for the provision of public health services."). As such, any action against a local board of health, as an agency of the county, is an action against the county for the purposes of governmental immunity.

It is true that plaintiffs failed to allege that appellant had waived governmental immunity in their complaint. However, the complaint in the instant case is a declaratory judgment action, not a negligence action. Although defendant enjoys governmental immunity, such immunity does not bar the claims brought by plaintiffs in the instant case. Therefore, this argument is overruled.

E. Exhaustion of Administrative Remedies

Defendant further contends that, because plaintiffs failed to exhaust the administrative remedies available to them pursuant to N.C. Gen. Stat. § 130A-24(b) (2013), the trial court lacked subject matter jurisdiction and the action should have been dismissed. We disagree.

"As a general rule, where the legislature has provided by statute an effective administrative remedy, that remedy is exclusive and its relief must be exhausted before recourse may be had to the courts." *Swan Beach Corolla, L.L.C. v. Cty. of Currituck*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 760 S.E.2d 302, 307 (2014) (quoting *Presnell v. Pell*, 298 N.C. 715, 721, 260 S.E.2d 611, 615 (1979)). "If a plaintiff has failed to exhaust its administrative remedies, the court lacks subject matter jurisdiction and the action must be dismissed." *Id.* (citation omitted). Therefore, defendant must establish that plaintiffs (1) had administrative remedies available to them; and (2) that they failed to exhaust those remedies.

Defendant relies on N.C. Gen. Stat. § 130A-24(b), asserting that plaintiffs had administrative remedies prescribed by statute.

Defendant's reliance on this statute, however, fails to consider that plaintiffs' wastewater systems are not permitted pursuant

to Chapter 130A. Rather, plaintiffs' wastewater systems are permitted pursuant to Chapter 143, which provides its own administrative remedies. In addition, N.C. Gen. Stat. § 130A-24(b) provides the procedure for appeals concerning the enforcement of rules adopted by the local board of health.

Defendant also contends that even if Chapter 143 of the North Carolina General Statutes applies, plaintiffs have failed to exhaust the administrative remedies available to them. Defendant specifically identifies N.C. Gen. Stat. § 143-215.5 (2013) as the statute prescribing these remedies. However, there are no provisions in this statute governing appeals regarding the enforcement of board of health rules; all of the administrative remedies in this statute apply to the State, rather than local entities. Therefore, there are no prescribed administrative remedies available to plaintiffs in this case. Accordingly, defendant's argument is overruled. The trial court properly exercised subject matter jurisdiction.

### III. Statutory Authority/Preemption

Defendant's next argument addresses its authority to inspect plaintiffs' spray irrigation systems. Specifically, defendant argues that the trial court erred in declaring that defendant did not have the right to inspect plaintiffs' spray irrigation systems. We disagree.

"The standard of review in declaratory judgment actions where the trial court decides questions of fact is whether the trial court's findings are supported by any competent evidence. Where the findings are supported by competent evidence, the trial court's findings of fact are conclusive on appeal." *Danny's Towing 2, Inc. v. N. Carolina Dep't of Crime Control and Pub. Safety*, 213 N.C. App. 375, 382, 715 S.E.2d 176, 182 (2011) (citation omitted). "[T]he trial court's conclusions of law are reviewable *de novo*." *Id.*

Defendant contends that it has authority to inspect plaintiffs' spray irrigation systems pursuant to Chapter 130A of the North Carolina General Statutes and the Orange County Regulations. Defendant is mistaken.

N.C. Gen. Stat. § 130A-335(b) provides, in pertinent part, that

[a]ll wastewater systems shall be regulated by the Department [of Health and Human Services] under rules adopted by the Commission [for Public Health] *except for the following wastewater systems that shall be regulated by the Department under rules adopted by the Environmental Management Commission:*

(1) Wastewater collection, treatment, and disposal systems designed to discharge effluent to the land surface or surface waters.

N.C. Gen. Stat. § 130A-335(b) (2013) (emphasis added). In

addition, N.C. Gen. Stat. § 130A-39(b) (2013) expressly excepts certain wastewater systems from the authority of local health boards: "[A] local board of health may adopt rules concerning wastewater collection, treatment and disposal systems *which are not designed to discharge effluent to the land surface or surface waters[.]*" (emphasis added). Wastewater systems designed to discharge effluent to the land surface or surface waters "shall be regulated by [NCDENR] under rules adopted by the [Environmental Management] Commission[.]" N.C. Gen. Stat. § 143-215.1(a4) (2013).

Additionally, a statement of intent to provide a complete statutory program is strong evidence of the General Assembly's intent to preempt local regulation. See *Granville Farms, Inc. v. Cty. Of Granville*, 170 N.C. App. 109, 113, 612 S.E.2d 156, 159 (2005). N.C. Gen. Stat. § 143-211(c) (2013) provides that

[i]t is the purpose of this Article to create an agency which shall administer a program of water and air pollution control and water resource management. It is the intent of the General Assembly, through the duties and powers defined herein, to confer such authority upon the Department of Environment and Natural Resources as shall be necessary to administer a complete program of water and air conservation, pollution abatement and control and to achieve a coordinated effort of pollution abatement and control with other jurisdictions.

This Court has previously held that this statute "evidences an intent to create a complete and integrated regulatory scheme to the exclusion of local regulation." *Granville Farms*, 170 N.C. App. at 115, 612 S.E.2d at 160.

In the instant case, according to the statutes, only NCDENR has authority to regulate plaintiffs' spray irrigation systems. Defendant does not. The General Assembly's statement of intent in N.C. Gen. Stat. § 143-211(c) evidences an intent to provide a complete regulatory scheme, thus preempting defendant from regulating wastewater systems designed to discharge effluent to the land surface.

Defendant contends that because N.C. Gen. Stat. § 130A-39 remained in full force and effect when the General Assembly enacted N.C. Gen. Stat. § 143-211, local boards of health are therefore allowed to make rules regulating wastewater systems regulated by the EMC. However, the statutes expressly create a different system of regulation for wastewater systems that discharge effluent to the land surface. The General Assembly asserted the intent to provide a complete regulatory scheme governing wastewater systems permitted pursuant to Chapter 143, and did not intend for local boards of health to have the power to regulate areas that were already completely regulated by the State through NCDENR and the EMC. Therefore, the trial court's



conclusion that defendant did not have the authority to inspect plaintiffs' wastewater systems is supported by the facts and by appropriate law. Defendant's argument is overruled.

IV. Motion to Dismiss and Judgment on the Pleadings

Defendant next argues that the trial court erred by failing to grant its motion to dismiss or, alternatively, to grant its motion for judgment on the pleadings. We disagree.

"On a Rule 12(b)(6) motion to dismiss, the question is whether, as a matter of law, the allegations of the complaint, treated as true, state a claim upon which relief can be granted." *Lynn v. Fed. Nat'l Mtge. Ass'n*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 760 S.E.2d 372, 374 (2014) (citations omitted). On appeal, "[t]his Court must conduct a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." *Id.*, 760 S.E.2d at 374-75 (citation omitted). Similarly, "[a] trial court's ruling on a motion for judgment on the pleadings is subject to *de novo* review on appeal." *Samost v. Duke Univ.*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 742 S.E.2d 257, 259 (2013) (citation omitted).

Defendant essentially contends that it was entitled to have its motion to dismiss granted because plaintiffs' complaint requested relief that the court was not authorized to grant, and

therefore the court lacked subject matter jurisdiction. However, as previously discussed, plaintiffs' complaint set forth a justiciable claim and requested appropriate relief. Additionally, the trial court had subject matter jurisdiction over plaintiffs' complaint. Therefore, defendant's argument is without merit.

Defendant contends in the alternative that it was entitled to judgment on the pleadings because, pursuant to N.C. Gen. Stat. § 130A-39, it adopted more stringent rules for the regulation of plaintiffs' spray irrigation systems. "A motion for judgment on the pleadings . . . should not be granted unless 'the movant clearly establishes that no material issue of fact remains to be resolved and that he is entitled to judgment as a matter of law.'" *Samost*, \_\_\_ N.C. App. at \_\_\_, 742 S.E.2d at 260 (citation omitted). It is undisputed that plaintiffs' wastewater systems are designed to discharge effluent to the land surface. At the hearing, the parties indicated that there were no genuine issues as to the material facts, and that the only dispute was a legal dispute. Because we previously held that the trial court properly applied the law in deciding that defendant was preempted from inspecting plaintiffs' wastewater systems, defendant was not entitled to judgment as a matter of law. Therefore, defendant's argument is without merit.

V. Summary Judgment

Defendant also argues that the trial court erred by granting summary judgment in favor of plaintiffs because its decision was unsupported by law. Specifically, defendant repeats its contention that the trial court erred in awarding summary judgment in favor of plaintiffs because defendant was entitled to judgment as a matter of law. We disagree.

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2013). "On appeal from an order granting summary judgment, our standard of review is *de novo*, and we view the evidence in the light most favorable to the non-movant." *Baum v. John R. Poore Builder, Inc.*, 183 N.C. App. 75, 80, 643 S.E.2d 607, 610 (2007).

As previously discussed, according to the statutes, only NCDENR has authority to regulate plaintiffs' spray irrigation systems. Defendant does not. At the hearing, the parties indicated that there were no genuine issues as to the material facts, and that the only dispute was a legal dispute. Because we have previously held that the trial court properly applied

the law, and there were no genuine issues of material fact, we accordingly hold that the trial court did not err in granting plaintiffs' motion for summary judgment.

#### VI. Attorneys' Fees

Finally, defendant argues that the trial court abused its discretion in awarding attorneys' fees to plaintiffs because doing so was manifestly unsupported by reason. Specifically, defendant contends that the trial court lacked subject matter jurisdiction. We disagree.

In a proceeding under the Uniform Declaratory Judgment Act, "the court may make such award of costs as may seem equitable and just." N.C. Gen. Stat. § 1-263 (2013). Additionally, "[i]n any action in which a . . . county is a party, upon a finding by the court that the . . . county acted outside the scope of its legal authority, the court may award reasonable attorneys' fees and costs to the party who successfully challenged the . . . county's action[.]" N.C. Gen. Stat. § 6-21.7 (2013). Such a decision is within the trial court's discretion. See *City of New Bern v. New Bern-Craven Cty. Bd. of Educ.*, 338 N.C. 430, 444, 450 S.E.2d 735, 743 (1994) ("It was within the trial court's discretion under [N.C. Gen. Stat. § 1-263] to apportion costs as it deemed equitable."). In North Carolina, "to overturn the trial judge's determination [of attorney's fees and

costs], the defendant must show an abuse of discretion." *Williams v. New Hope Found., Inc.*, 192 N.C. App. 528, 530, 665 S.E.2d 586, 587 (2008) (alteration in original) (citation omitted).

In the instant case, the trial court declared that defendant, an agency of the county, was preempted by statute from inspecting plaintiffs' wastewater systems. The trial court's order provided that "the cost of this action in the amount of \$782.32 be charged to the Defendant and that Plaintiffs recover attorney fees from the Defendant in the amount of \$16,055.00 pursuant to NCGS 1-263."

Despite defendant's argument that the trial court abused its discretion by awarding attorneys' fees to plaintiffs, the trial court did have subject matter jurisdiction. This Court affords the trial court's decision to award attorneys' fees a substantial amount of deference, and defendant has failed to establish that the trial court's decision was "so arbitrary that it could not have been the result of a reasoned decision." *Id.* (citation omitted). Accordingly, we affirm the trial court's award of attorneys' fees to plaintiffs.

#### VII. Conclusion

The trial court properly exercised subject matter jurisdiction over the instant case. Plaintiffs' wastewater

systems are subject to regulation pursuant to Chapter 143 of the North Carolina General Statutes, and defendant is preempted from regulating plaintiffs' systems under the statutory scheme. Therefore, the Orange County Regulations do not apply in the instant case. Accordingly, the trial court properly denied defendant's motions to dismiss and for a judgment on the pleadings. Furthermore, the trial court properly granted plaintiffs' motion for summary judgment and did not abuse its discretion in awarding plaintiffs attorneys' fees. Therefore, we affirm the order of the trial court.

Affirmed.

Judges BRYANT and GEER concur.