

NO. COA13-1338

NORTH CAROLINA COURT OF APPEALS

Filed: 31 December 2014

GARY W. JACKSON,
Plaintiff,

v.

Mecklenburg County
No. 12 CVS 21230

THE CHARLOTTE MECKLENBURG
HOSPITAL AUTHORITY, d/b/a
CAROLINAS HEALTHCARE SYSTEM;
and KEITH A. SMITH, as Senior
Vice President and General Counsel
of THE CHARLOTTE MECKLENBURG
HOSPITAL AUTHORITY, d/b/a
CAROLINAS HEALTHCARE SYSTEM,
Defendants.

Appeal by plaintiff from order entered 22 July 2013 by
Judge Robert T. Sumner in Mecklenburg County Superior Court.
Heard in the Court of Appeals 9 April 2014.

*The Jackson Law Group, PLLC, by Gary W. Jackson, for
plaintiff-appellant.*

*Robinson, Bradshaw & Hinson, P.A., by Mark W. Merritt and
Adam K. Doerr, for defendant-appellee.*

GEER, Judge.

Plaintiff Gary W. Jackson appeals from an order granting
defendants' motion to dismiss for failure to state a claim for
relief under the North Carolina Public Records Act. Plaintiff
argues that the trial court erred in interpreting N.C. Gen.

Stat. § 132-1.3 (2013) to exempt from disclosure settlement documents pertaining to litigation instituted by defendant Carolinas Healthcare System ("CHS") against a financial institution.

It is well established that the purpose of the Public Records Act is to grant liberal access to documents that meet the general definition of "public records" under N.C. Gen. Stat. § 132-1 (2013). Our Supreme Court has held that only specific statutory exceptions exempt documents meeting that definition from disclosure. Because the Public Records Act does not contain a specific statutory exception for settlement documents arising out of litigation instituted by a State agency, we hold that the trial court erred, and we reverse.

Facts

The parties do not dispute that CHS is a local unit of government subject to the Public Records Act. In 2008, CHS filed a lawsuit against Wachovia Bank, allegedly in connection with financial losses suffered through its investment accounts maintained with Wachovia. On or about 5 June 2012, CHS entered into a confidential settlement agreement with Wachovia Bank ("the Wachovia settlement"), and CHS dismissed its suit against Wachovia with prejudice.

On 24 September 2012, plaintiff sent a written request to defendant Keith A. Smith in his capacity as Senior Vice President and General Counsel of CHS seeking production of a copy of the Wachovia settlement. On behalf of CHS, Mr. Smith refused to provide a copy of the document. On 21 November 2012, plaintiff filed a complaint against CHS and Mr. Smith in Mecklenburg County Superior Court requesting relief under N.C. Gen. Stat. § 132-9(a) and seeking to obtain a copy of the Wachovia settlement. CHS and Mr. Smith moved to dismiss plaintiff's action under Rule 12(b)(6) of the Rules of Civil Procedure.

The trial court granted the motion to dismiss as to all parties in an order entered 22 July 2013, construing N.C. Gen. Stat. § 132-1.3 as exempting the Wachovia Settlement from disclosure. Plaintiff timely appealed to this Court.¹

Discussion

"Our standard of review on a motion to dismiss for failure to state a claim is *de novo* review." *S.N.R. Mgmt. Corp. v. Danube Partners 141, LLC*, 189 N.C. App. 601, 606, 659 S.E.2d 442, 447 (2008). "Pursuant to the *de novo* standard of review, the court considers the matter anew and freely substitutes its

¹Plaintiff only appeals with respect to CHS and does not challenge the trial court's dismissal of the action with respect to Mr. Smith.

own judgment for that of the [trial court]." *Blow v. DSM Pharmaceuticals, Inc.*, 197 N.C. App. 586, 588, 678 S.E.2d 245, 248 (2009) (internal quotation marks omitted).

The sole question presented by this appeal is whether settlement documents in actions brought by an entity covered by the Public Records Act constitute "public records" within the meaning of N.C. Gen. Stat. § 132-1(a), which provides that "public record"

shall mean all documents, papers, letters, maps, books, photographs, films, sound recordings, magnetic or other tapes, electronic data-processing records, artifacts, or other documentary material, regardless of physical form or characteristics, made or received pursuant to law or ordinance in connection with the transaction of public business by any agency of North Carolina government or its subdivisions.

As our Supreme Court has held, "[t]he term 'public records,' as used in N.C.G.S. § 132-1, includes all documents and papers made or received by any agency of North Carolina government in the course of conducting its public proceedings." *Virmani v. Presbyterian Health Servs. Corp.*, 350 N.C. 449, 462, 515 S.E.2d 675, 685 (1999).

It is well established that the purpose of the Public Records Act is to "provide[] for liberal access to public records." *Id.* Consistent with that purpose, "in the absence of

clear statutory exemption or exception, documents falling within the definition of 'public records' in the Public Records Law must be made available for public inspection." *News & Observer Publ'g Co. v. Poole*, 330 N.C. 465, 486, 412 S.E.2d 7, 19 (1992) (emphasis added). In other words, "North Carolina's public records act grants public access to documents it defines as 'public records,' absent a specific statutory exemption." *Virmani*, 350 N.C. at 465, 515 S.E.2d at 686 (emphasis added).

Since the Wachovia settlement agreement falls within the definition of "public record" set out in N.C. Gen. Stat. § 132-1, see *News & Observer Publ'g Co. v. Wake Cnty. Hosp. Sys., Inc.*, 55 N.C. App. 1, 13, 284 S.E.2d 542, 549 (1981) (holding that "the public has the right to know the terms of settlements made by the [Wake County Hospital] System in actions for wrongful terminations of its agreements"), the public is entitled to access to that agreement unless there is a "specific statutory exemption" for settlement agreements in actions instituted by the public agency, *Virmani*, 350 N.C. at 465, 515 S.E.2d at 686.

In claiming that the Wachovia settlement agreement is exempt from the Public Records Act, CHS and the trial court relied solely upon N.C. Gen. Stat. § 132-1.3, which provides:

(a) Public records, as defined in G.S. 132-1, shall include all settlement

documents in any suit, administrative proceeding or arbitration instituted against any agency of North Carolina government or its subdivisions, as defined in G.S. 132-1, in connection with or arising out of such agency's official actions, duties or responsibilities, *except in an action for medical malpractice against a hospital facility.* No agency of North Carolina government or its subdivisions, nor any counsel, insurance company or other representative acting on behalf of such agency, shall approve, accept or enter into any settlement of any such suit, arbitration or proceeding if the settlement provides that its terms and conditions shall be confidential, *except in an action for medical malpractice against a hospital facility.* No settlement document sealed under subsection (b) of this section shall be open for public inspection.

(b) No judge, administrative judge or administrative hearing officer of this State, nor any board or commission, nor any arbitrator appointed pursuant to the laws of North Carolina, shall order or permit the sealing of any settlement document in any proceeding described herein except on the basis of a written order concluding that (1) the presumption of openness is overcome by an overriding interest and (2) that such overriding interest cannot be protected by any measure short of sealing the settlement. Such order shall articulate the overriding interest and shall include findings of fact that are sufficiently specific to permit a reviewing court to determine whether the order was proper.

(c) Except for confidential communications as provided in G.S. 132-1.1, the term "settlement documents," as used herein, shall include all documents which reflect, or which are made or utilized in connection with, the terms and conditions

upon which any proceedings described in this section are compromised, settled, terminated or dismissed, including but not limited to correspondence, settlement agreements, consent orders, checks, and bank drafts.

(Emphasis added.)

The plain language of N.C. Gen. Stat. § 132-1.3 contains only two "specific statutory exemption[s]," *Virmani*, 350 N.C. at 465, 515 S.E.2d at 686, to the Public Records Act: (1) settlement documents "in an action for medical malpractice against a hospital facility," and (2) settlement documents in certain actions against state agencies when sealed by a written court order containing specified findings of fact. N.C. Gen. Stat. § 132-1.3. N.C. Gen. Stat. § 132-1.3 contains no specific exception or exemption to the Public Records Act for settlement agreements arising out of litigation commenced by an entity that is subject to the Public Records Act.

Nonetheless, CHS and the trial court concluded that N.C. Gen. Stat. § 132-1.3(a)'s specification that settlement agreements in cases "instituted against" any State agency are public records necessarily means that the General Assembly intended to exclude settlements in cases instituted by a State agency. In other words, according to CHS and the trial court, we should imply an exception to the Public Records Act for settlement agreements in cases brought by a State agency because

of the General Assembly's failure to specifically include such settlements in N.C. Gen. Stat. § 132-1.3. This contention -- implying an exemption -- cannot be reconciled with the Supreme Court's mandate that a document is a public record in the absence of a "specific statutory exemption." *Virmani*, 350 N.C. at 465, 515 S.E.2d at 686. See also *Lexisnexis Risk Data Mgmt. Inc. v. N.C. Admin. Office of the Courts*, ___ N.C. App. ___, ___, 754 S.E.2d 223, 229 (holding that ACIS database is a "public record" because "there is no clear statutory exemption or exception applicable to the ACIS database"), *disc. review granted*, ___ N.C. ___, 758 S.E.2d 862 (2014); *McCormick v. Hanson Aggregates Se., Inc.*, 164 N.C. App. 459, 471, 596 S.E.2d 431, 438 (2004) (holding that "[a]s there is [n]o statute specifically exempt[ing] from public access [under the Public Records Act] materials held by a local government attorney that qualify as work product which would apply to the City Attorney, the City Attorney's documents are not protected from disclosure as work product" (internal quotation marks omitted)).

Indeed, CHS' argument is analogous to the one made in *Poole*: the State defendants contended that the exception in N.C. Gen. Stat. § 132-1.1 for communications from an attorney to a State agency should be expanded to encompass records from a public agency to its attorney. 330 N.C. at 482, 412 S.E.2d at

17. In rejecting this argument, our Supreme Court held: "The Public Records Law provides only one exception to its mandate of public access to public records: written statements to a public agency, by any attorney serving the government agency, made within the scope of the attorney-client relationship. . . . In the context of what such agencies must disclose pursuant to the Public Records Law, the statute itself defines the scope of the privilege. . . . Under this definition only those portions of the Poole Commission meeting minutes revealing written communications from counsel to the Commission are excepted from disclosure under the Public Records Law." *Id.* at 481-83, 412 S.E.2d at 17. Thus, under *Poole*, we are limited to the letter of the statutory exemption, and, in N.C. Gen. Stat. § 132-1.3, the only exceptions are for settlements in medical malpractice cases and for properly sealed settlements.

Even if we were to disregard the unique structure of the Public Records Act and our Supreme Court's holdings interpreting it,² CHS' argument is inconsistent with our Supreme Court's

²That structure and the well-established law relating to the Public Records Act render immaterial CHS' argument that other statutes unrelated to the Public Records Act reference both proceedings instituted by and pending against a public agency. See, e.g., N.C. Gen. Stat. §§ 162A-77.1(4) (2013) (addressing "actions, suits, and proceedings pending against, or having been instituted by," a sewage district); 160A-505(b)(5) (2013) (discussing suits "pending against, or having been instituted by," redevelopment commissions).

construction of comparable language in other statutes. CHS' argument amounts to a contention that *expressio unius est exclusio alterius*: because the legislature expressly included settlement documents from litigation instituted against a State agency as public records, it necessarily excluded from the Public Records Act settlement documents in proceedings instituted by a State agency.

In *N.C. Tpk. Auth. v. Pine Island, Inc.*, 265 N.C. 109, 111, 143 S.E.2d 319, 321 (1965) (quoting N.C. Gen. Stat. § 136-89.59), the Supreme Court addressed whether N.C. Gen. Stat. § 136-89.59 (1963), by providing for the construction of highways "embodying safety devices, including" a list of safety devices, precluded the construction of highways with safety devices not specified in the statute. Our Supreme Court explained that "[t]his is not a situation which calls for the application of the maxim, *expressio unius est exclusio alterius*." 265 N.C. at 120, 143 S.E.2d at 327 (quoting *Guar. Trust Co. of N.Y. v. W.V. Tpk. Comm'n*, 109 F.2d 286, 296 (1952)).

Instead, "[t]he term 'includes' is ordinarily a word of enlargement and not of limitation[,]" and "[t]he statutory definition of a thing as 'including' certain things does not necessarily place thereon a meaning limited to the inclusions."

Id. (quoting *People v. W. Air Lines, Inc.*, 42 Cal. 2d 621, 639, 268 P.2d 723, 733 (1954)). Applying these principles, the Supreme Court held that "'[c]learly, by use of the word 'including' the lawmakers intended merely to list examples of known safety devices, but not to exclude others equally well known.'" *Id.* (quoting *Guar. Trust Co. of N.Y.*, 109 F.2d at 296). See also *Polaroid Corp. v. Offerman*, 349 N.C. 290, 301, 507 S.E.2d 284, 292 (1998) (acknowledging that "the phrase 'shall include' indicates an intent to enlarge the statutory definition, not limit it"), *abrogated on other grounds by Lenox, Inc. v. Tolson*, 353 N.C. 659, 548 S.E.2d 513 (2014).

Here, under *Pine Island* and *Polaroid Corporation*, the General Assembly, by using the phrase "shall include" in N.C. Gen. Stat. § 132-1.3, used a term of enlargement and not a term of limitation. Consequently, N.C. Gen. Stat. § 132-1.3 acknowledges that settlement documents in actions instituted against a State agency are public records under N.C. Gen. Stat. § 132-1 subject to two specified exceptions. In doing so, the phrase does not indicate that only such settlement documents are public records. To hold otherwise would be contrary to the statutory construction principles set out in *Pine Island* and *Polaroid Corporation*. See also *Fed. Land Bank of St. Paul v. Bismarck Lumber Co.*, 314 U.S. 95, 100, 86 L. Ed. 65, 70, 62 S.

Ct. 1, 4, (1941) (noting that "the term 'including' is not one of all-embracing definition, but connotes simply an illustrative application of the general principle").

Nonetheless, in support of its position, CHS points to the legislative history of N.C. Gen. Stat. § 132-1.3, noting that the language exempting settlement documents in medical malpractice actions was not added until the second version of the bill enacting N.C. Gen. Stat. § 132-1.3. See S.B. 456, s.1 (1st ed. 1989). CHS contends that the original absence of medical malpractice language indicates that the legislature intended, from the bill's inception, to exempt from public records all settlement documents apart from those in litigation instituted against an agency. Nothing in the original bill is inconsistent with our analysis. Under *Pine Island* and *Polaroid Corporation*, the language of the initial bill simply confirmed that settlements in actions against State agencies are public records with one specific statutory exception: settlement agreements sealed by proper court order. It did not exempt other settlement agreements, and, therefore, the initial bill does not support CHS' position under the principles set out in controlling Supreme Court authority.

Further, N.C. Gen. Stat. § 132-1.3 must be construed consistently with other provisions of the Public Records Act.

See *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 188, 594 S.E.2d 1, 20 (2004) (holding that "this Court does not read segments of a statute in isolation"; "[r]ather, we construe statutes *in pari materia*, giving effect, if possible, to every provision"). N.C. Gen. Stat. § 132-1.1(a) (emphasis added) provides an exception to the Public Records Act for communications by an attorney with a public agency "concerning any claim *against or on behalf of* the governmental body or the governmental entity for which such body acts, or concerning the prosecution, defense, *settlement* or litigation of any judicial action, or any administrative or other type of proceeding to which the governmental body is a party or by which it is or may be directly affected." However, "such written communications and copies thereof shall become public records as defined in G.S. 132-1 three years from the date such communication was received by such public board, council, commission or other governmental body." *Id.*

If we upheld CHS' and the trial court's construction of N.C. Gen. Stat. § 132-1.3, then settlement documents in actions instituted by a public agency would not be public records, but all "communications and copies thereof" from the agency's attorney relating to that settlement would become public record in three years. We do not believe that the General Assembly intended to allow the public to have access to attorney

communications regarding settlements -- which would include, for example, letters attaching settlement agreement drafts -- but to deny access to the actual finalized settlement documents.

It is also a well-established principle of statutory construction that "'statutes *in pari materia* must be read in context with each other.'" *Wake Cnty. Hosp. System, Inc.*, 55 N.C. App. at 7, 284 S.E.2d at 546 (quoting *Cedar Creek Enters. v. Dep't of Motor Vehicles*, 290 N.C. 450, 454, 226 S.E.2d 336, 338 (1976)). "'*In pari materia*' is defined as '[u]pon the same matter or subject.'" *Id.* at 7-8, 284 S.E.2d at 546 (quoting *Black's Law Dictionary* 898 (4th ed. 1968)). Here, N.C. Gen. Stat. § 143-318.11 (2013) -- part of the Open Meetings Law -- addresses the same matter or subject as N.C. Gen. Stat. § 132-1.3: the public's access to the terms of any settlement.

N.C. Gen. Stat. § 143-318.11(a)(3) allows a public body subject to the Open Meetings Law to meet in closed session with an attorney and "preserve the attorney-client privilege between the attorney and the public body," including meetings to discuss the settlement of "a claim" or "judicial action" without limitation as to whether the claim or action was instituted by or pending against the public body. However,

[i]f the public body has approved or considered a settlement, *other than a malpractice settlement by or on behalf of a hospital*, in closed session, the terms of

that settlement shall be reported to the public body and entered into its minutes as soon as possible within a reasonable time after the settlement is concluded.

Id. (emphasis added). N.C. Gen. Stat. § 143-318.10(e) (2013) in turn provides that the minutes "shall be public records within the meaning of the Public Records Law," although "minutes or an account of a closed session conducted in compliance with G.S. 143-318.11 may be withheld from public inspection *so long as public inspection would frustrate the purpose of a closed session.*" (Emphasis added.)

Thus, the Open Meetings Law provides that "the terms of that settlement," N.C. Gen. Stat. § 143-318.11(3), shall become a public record at some point -- unless the settlement involves a malpractice settlement by or on behalf of a hospital. CHS' construction would lead to the anomalous result that settlement terms would be public under N.C. Gen. Stat. § 143-318.11, but not public under N.C. Gen. Stat. § 132-1.3. However, our construction of N.C. Gen. Stat. § 132-1.3 -- excepting from the Public Records Act only settlement documents in an action for medical malpractice against a hospital facility and in certain actions against state agencies when sealed by a proper court order -- is consistent with the plain language of N.C. Gen. Stat. § 143-318.11.

Finally, the General Assembly's recent enactment of N.C. Gen. Stat. § 114-2.4A, enacted on 2 August 2014, provides further evidence of the legislature's intent that settlement documents in actions instituted by a State agency are public records under the Public Records Act. "Courts may use subsequent enactments or amendments as an aid in arriving at the correct meaning of a prior statute by utilizing the natural inferences arising out of the legislative history as it continues to evolve." *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 216, 388 S.E.2d 134, 141 (1990).

N.C. Gen. Stat. § 114-2.4A provides the following in pertinent part:

(a) Definition. -- For purposes of this section, the term "settlement" means an agreement entered into by the State or a State agency, with or without a court's participation, that ends (i) a dispute, lawsuit, or part of the dispute or lawsuit or (ii) the involvement of the State or State agency in the dispute, lawsuit, or part of the dispute or lawsuit. This term includes settlement agreements, stipulation agreements, consent judgments, and consent decrees.

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(g) Required Submission. -- In addition to any other report or filing that may be required by law, and unless the settlement is sealed pursuant to a written order of the court in accordance with G.S. 132-1.3 or federal law, the Attorney

General's Office shall submit a copy to the Legislative Library of any settlement or other final order or judgment of the court in which the State or a State agency receives funds in excess of seventy-five thousand dollars (\$75,000). The submission required by this subsection shall be made within 60 days of the date (i) the settlement is entered into or (ii) the final order or judgment of the court is entered. Any information deemed confidential by State or federal law shall be redacted from the copy of the settlement or other final order or judgment of the court prior to submitting it to the Legislative Library.

(Emphasis added.) In short, N.C. Gen. Stat. § 114-2.4A requires that settlement agreements in which a State agency receives in excess of \$75,000.00 will be available to the public at the Legislative Library with the sole exceptions being settlement agreements sealed under N.C. Gen. Stat. § 132-1.3 and "confidential" material redacted from the agreement.³

Obviously, the vast majority of settlement agreements involving payments to the State agency will be in actions

³The General Assembly frequently requires the filing of documents in the Legislative Library in addition to other offices, ensuring public access. See, e.g., N.C. Gen. Stat. § 120C-220 (2013) (requiring Secretary of State to furnish State Legislative Library with list of all persons who have registered as lobbyists and whom they represent); N.C. Gen. Stat. § 143-47.7 (2013) (requiring appointing authority to file written notice of appointment with Governor, Secretary of State, Legislative Library, State Library, State Ethics Commission, and State Controller); N.C. Gen. Stat. § 160A-111 (2013) ("The city clerk shall file a certified true copy of any charter amendment adopted under this Part with the Secretary of State, and the Legislative Library.").

instituted by the State agency. The fact that N.C. Gen. Stat. § 114-2.4A requires that a copy of such settlement agreements be available at the Legislative Library is inconsistent with any reading of N.C. Gen. Stat. § 132-1.3 that settlement documents in actions instituted by a State agency are not public records.

CHS makes various policy arguments supporting its position that settlement agreements in actions initiated by public agencies should not be public. In *Poole*, our Supreme Court was clear: it is not our role to expand upon the General Assembly's specific statements in the Public Records Act. See *Poole*, 330 N.C. at 481, 412 S.E.2d at 16 ("While we recognize this policy argument, we must yield to the decision of the General Assembly, which enacted several specific exceptions to the Public Records Law, none of which permanently protects a deliberative process like that of the Commission after the process has ceased.").

Based on the language of N.C. Gen. Stat. § 132-1.3, the well-recognized structure of the Public Records Act, controlling Supreme Court precedent, the requirement that we construe § 132-1.3 consistently with other provisions of the Public Records Act and the Open Meetings Law, and subsequent legislation reflecting the General Assembly's views, we hold that N.C. Gen. Stat. § 132-1.3 does not except from the Public Records Act settlement documents in actions instituted by public agencies falling

within the Public Records Act. We, therefore, reverse the trial court's order granting defendants' motion to dismiss.

Reversed.

Judges STEPHENS and ERVIN concur.