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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-236

No. COA21-446

Filed 5 April 2022

Wake County, No. 20 CVS 5194

NORTH CAROLINA STATE CONFERENCE OF THE NAACP, CHARLOTTE-MECKLENBURG BRANCH #5376 OF THE NAACP, GREGORY RANKIN, AND LA TOYA DAWSON, Plaintiffs,

v.

STATE OF NORTH CAROLINA; TIMOTHY K. MOORE in his official capacity as Speaker of the North Carolina House of Representatives; and PHILLIP E. BERGER in his official capacity as President Pro Tempore of the North Carolina Senate, Defendants.

Appeal by defendants from order entered 10 March 2021 by Judge Vinston M. Rozier, Jr. in Wake County Superior Court. Heard in the Court of Appeals 9 February 2022.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Olga E. Vysotskaya de Brito, for the State-Defendants-Appellants.

Lawyers' Committee for Civil Rights Under the Law, by Elizabeth Haddix and Genevieve Bonadies Torres, and Tin, Fulton, Walker & Owen, P.L.L.C., by S. Luke Largess, for Plaintiffs-Appellees.

CARPENTER, Judge.

¶ 1 The State of North Carolina, along with Phillip E. Berger and Timothy K. Moore, in their capacities, respectively, as President *Pro Tempore* of the North

Carolina Senate and as Speaker of the North Carolina House of Representatives (collectively "Defendants") appeal from an order (the "Order") from the Wake County Superior Court, denying their motion to dismiss the instant action on the grounds their sovereign immunity was not waived; Plaintiffs failed to show an actual controversy exists between the parties, as required by the Declaratory Judgment Act; and Plaintiffs failed to show they suffered a direct injury to establish standing. After careful review, we conclude Plaintiffs have not alleged in their complaint they sustained a direct injury, or that they are in immediate danger of sustaining a direct injury, resulting from the enactment of HB 514. Therefore, we hold Plaintiffs failed to carry their burden to make sufficient allegations to establish standing to bring constitutional claims against Defendants. Because we vacate the Order, we need not consider the remaining issues of sovereign immunity and justiciable controversy.

I. Factual & Procedural Background

¶ 2 This case arises from Plaintiffs' facial challenge of the North Carolina 7 June 2018 legislative enactment, An Act to Permit Certain Towns to Operate Charter Schools, S.L. 2018-3, 2018 N.C. Sess. Laws 3 ("HB 514" or the "Act"). The General Assembly enacted HB 514 to allow the Mecklenburg County towns of Cornelius, Huntersville, Matthews, and Mint Hill (the "Towns") to seek North Carolina State Board of Education ("SBE") approval to operate municipal charter schools within the boundaries of the Charlotte-Mecklenburg School ("CMS") District. Under HB 514,

the Towns could apply for and operate municipal charter schools pursuant to Chapter 115C of the North Carolina General Statutes, which, prior to the enactment of HB 514, applied only to non-profit corporate applicants. HB 514 expressly applies only to the Towns and allows charter schools operated by any of the Towns to "give enrollment priority" to "domiciliary of the municipality." In the time between the passing of HB 514 and Defendants' filing of the record on appeal with this Court, not one of the Towns applied to the SBE for approval to operate a municipal charter school.

¶ 3 On 30 April 2020, Plaintiffs commenced the instant action by filing a complaint in Wake County Superior Court against Defendants, seeking declaratory and injunctive relief to prevent the implementation or enforcement of HB 514. In their complaint, Plaintiffs present facial challenges to HB 514, alleging the Act violates three provisions of the North Carolina Constitution: Article IX, Section 2, which ensures a "uniform system of free public schools" and "equal opportunities . . . for all students"; Article II, Section 24, which prohibits, *inter alia*, local legislation that "establish[es] or chang[es] the lines of school districts"; and Article 1, Section 19, which secures "equal protection of the laws" for all persons.

¶ 4 Plaintiffs' complaint alleges, *inter alia*: "HB 514 was introduced expressly as a local bill, thereby avoiding gubernatorial oversight of the legislation." In February of 2016, the CMS Board of Education "adopted broad goals for school assignment,

including prioritizing diversity and reducing the number of schools with high concentration of poor children" to overcome the adverse impacts of racial and economic disparities among Charlotte-area schools. In November of 2016, the CMS Board approved Phase I of its diversity and student assignment plan, focusing on weighing socioeconomic status in administering the magnet school admission lottery. The passing of HB 514 led CMS to "significantly lower the scope of Phase II of the [student] reassignment plan adopted in May 2017" in order for CMS "to appease the [T]owns and to get them to withdraw support for HB 514."

¶ 5 Plaintiffs' complaint further alleges the North Carolina Legislature (the "Legislature") introduced in May 2018 Senate Bill 99 ("SB 99"), an amended annual statewide budget bill, which would allow teachers at municipal charter schools to participate in the State's retirement and healthcare plans—unlike other workers of North Carolina towns. SB 99 also amended "N.C. Gen. Stat. § 160A to allow towns to use property tax revenue for . . . municipal charter schools and to apply property tax revenue to public schools outside town limits based on the number of town residents that attend those schools." SB 99 was passed on 1 June 2018 and vetoed by Governor Cooper on 6 June 2018; the Legislature overrode the veto on 12 June 2018. Had HB 514 been amended to include such provisions, it would have constituted "general legislation requiring the Governor's signature."

¶ 6 On 9 July 2020, Defendants filed a motion to dismiss Plaintiffs' complaint

pursuant to Rules 12(b)(1), 12(b)(2), and 12(b)(6) of the North Carolina Rules of Civil Procedure. *See* N.C. Gen. Stat. § 1A-1, Rule 12 (2021). Defendants alleged the complaint should "be dismissed based on lack of standing, because there is a lack of justiciable controversy between the parties, and because Plaintiffs' claims are not ripe."

¶ 7 On 4 March 2021, the Honorable Vinston M. Rozier, Jr. heard oral arguments on Defendants' motion to dismiss in the Wake County Superior Court. After hearing oral arguments from the parties, Judge Rozier took the matter under advisement. On 10 March 2021, Judge Rozier entered his written Order, denying Defendants' motion to dismiss on all grounds. Judge Rozier also found the complaint presented a facial constitutional challenge to a state statute and referred the case to a three-judge panel pursuant to N.C. Gen. Stat. § 1-267.1 (2021) and N.C. Gen. Stat. § 1A-1, Rule 42(b)(4) (2021).

¶ 8 On 8 April 2021, Defendants timely filed with this Court their notice of appeal from the Order.

II. Jurisdiction & Interlocutory Nature of Appeal

¶ 9 The parties do not contest the Order is interlocutory; however, the parties dispute which issues are immediately appealable. "An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire

controversy." *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381, *reh'g denied*, 232 N.C. 744, 59 S.E.2d 429 (1950) (citation omitted).

> A party may appeal an interlocutory order under two circumstances. First, the trial court may certify that there is no just reason to delay the appeal after it enters a final judgment as to fewer than all of the claims or parties in an action. [N.C. Gen. Stat.] § 1A-1, Rule 54(b) (1990). Second, a party may appeal an interlocutory order that affects some substantial right claimed by the appellant and will work an injury to him if not corrected before an appeal from the final judgment.

Dep't of Transp. v. Rowe, 351 N.C. 172, 174–75, 521 S.E.2d 707, 709 (1999) (citations and quotation marks omitted), *cert. denied*, 534 U.S. 1130, 122 S. Ct. 1070, 151 L. Ed. 2d 972 (2002); *see also* N.C. Gen. Stat. § 1-277 (2021); N.C. Gen. Stat. § 7A-27 (2021). Moreover, a party has the statutory right of immediate appeal from "a denial of a motion to dismiss based on lack of personal jurisdiction." *Meherrin Indian Tribe v. Lewis*, 197 N.C. App. 380, 383, 677 S.E.2d 203, 206 (citing N.C. Gen. Stat. § 1-277(b) (2007)), *disc. rev. denied*, 366 N.C. 238, 731 S.E.2d 147 (2009); *see also* N.C. Gen. Stat. § 1-277(b). Conversely, "the denial of a motion to dismiss pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction is not immediately appealable." *Data Gen. Corp. v. Cnty. of Durham*, 143 N.C. App. 97, 100, 545 S.E.2d 243, 246 (2001). "The appealing party bears the burden of demonstrating that the order from which he or she seeks to appeal is appealable despite its interlocutory nature." *Hamilton v. Mortg. Info. Servs.*, 212 N.C. App. 73, 77, 711 S.E.2d 185, 189 (2011) (citing *Jeffreys*

v. Raleigh Oaks Joint Venture, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994)), *disc. rev. denied*, 366 N.C. 579, 739 S.E.2d 849 (2013).

¶ 10 Defendants appeal from the trial court's order denying Defendants' motion to dismiss pursuant to N.C. Gen. Stat. § 1-277(a) and N.C. Gen. Stat. § 7A-27(b)(3)(a). The Order from which Defendants appeal has not been certified for immediate review under Rule 54(b); thus, Defendants must show they have an immediate right of appeal from the interlocutory Order. *See Rowe*, 351 N.C. at 174–75, 521 S.E.2d at 709; *Hamilton*, 212 N.C. App. at 77, 711 S.E.2d at 189.

A. Sovereign Immunity

¶ 11 Defendants contend they have a right of immediate appeal from the interlocutory order because their motion to dismiss is based on sovereign immunity, which affects their substantial rights. We agree.

¶ 12 It is well-settled in North Carolina that "the denial of a motion to dismiss based upon the defense of sovereign immunity affects a substantial right and is thus immediately appealable." *RPR & Assocs. v. State*, 139 N.C. App. 525, 527, 534 S.E.2d 247, 250 (2000) (citations omitted); *see Richmond Cnty. Bd. of Educ. v. Cowell*, 225 N.C. App. 583, 586 739 S.E.2d 566, 568 (2013) (addressing the merits of the defendants' sovereign immunity claim despite the interlocutory nature of the appeal from a motion to dismiss); *Faulkenbury v. Tchrs.' & State Emps.' Ret. Sys. of N.C.*, 335 N.C. 158, 160 436 S.E.2d 821, 822 (1993) (affirming the Court of Appeals'

decision, which denied the defendants' motion to dismiss based on the defenses of sovereign immunity, qualified immunity, and official immunity). An appeal of a motion to dismiss grounded "on sovereign immunity presents a question of personal jurisdiction rather than subject matter jurisdiction . . . ." *Data Gen. Corp.*, 143 N.C. App. at 100, 545 S.E.2d at 246.

¶ 13 In following case precedent, we conclude Defendants have an immediate right of appeal from the Order based on their defense of sovereign immunity. *See RPR & Assocs.*, 139 N.C. App. at 527, 534 S.E.2d at 250.

B. Justiciable Controversy & Direct Injury

¶ 14 In addition to sovereign immunity, Defendants argue this Court has jurisdiction to address the trial court's denial of Defendants' motion to dismiss on two other grounds: lack of a justiciable controversy and lack of a direct injury. Defendant contends all three issues are immediately appealable because they are inextricably intertwined with one another and are so closely interrelated. Alternatively, Defendants filed a petition for writ of certiorari pursuant to Rule 21(a)(1) of the North Carolina Rules of Appellate Procedure requesting we hear the merits of their appeal.

¶ 15 Rule 21 provides a "writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when . . . no right of appeal from an interlocutory order exists . . . ." N.C. R. App. P. 21(a)(1). "A petition for . . . writ must show merit or that error was

probably committed below. Certiorari is a discretionary writ, to be issued only for good and sufficient cause shown." *State v. Grundler*, 251 N.C. 177, 189, 111 S.E.2d 1, 9 (1959) (citations omitted).

¶ 16 In this case, Defendants allege in their petition that the trial court erred in dismissing this declaratory action because "no municipal charter school has ever been pursued or opened under HB 514." Additionally, Defendants contend "Plaintiffs cannot allege the existence of an actual controversy that could justify declaratory relief, and [they] cannot allege that they have suffered a direct injury that provides them with standing to sue." Because Defendants have "show[n] merit [and] that error was probably committed below" with respect to the issue of Plaintiffs' standing, we grant their petition and consider the merits of the case. *See Grundler*, 251 N.C. at 189, 111 S.E.2d at 9.

III. Issues

¶ 17 The issues before this Court are whether the trial court erred by: (1) failing to dismiss Plaintiffs' complaint for lack of standing; (2) failing to dismiss Plaintiffs' complaint for failure to allege the existence of an actual controversy under the North Carolina Declaratory Judgment Act; and (3) denying Defendants' motion to dismiss based on sovereign immunity.

IV. Analysis

¶ 18 With respect to the issue of standing, Defendants argue "Plaintiffs fail to show

an invasion of a constitutional right that would give rise to standing." Defendants further argue Plaintiffs' allegations of injuries "are at best indirect." Plaintiffs counter the "allegations in the[ir c]omplaint, . . . taken as true at this stage, establish direct injury." For the reasons set forth below, we agree with Defendants to the extent they argue Plaintiffs' alleged injury is indirect.

¶ 19 "A ruling on a motion to dismiss for want of standing is reviewed *de novo*." *Metcalf v. Black Dog Realty, LLC*, 200 N.C. App. 619, 625, 684 S.E.2d 709, 714 (2009) (emphasis added). "If a party does not have standing to bring a claim, a court has no subject matter jurisdiction to hear the claim." *Marriott v. Chatham Cnty.*, 187 N.C. App. 491, 496, 654 S.E.2d 13, 17 (2007), *disc. rev. denied*, 362 N.C. 472, 666 S.E.2d 122 (2008) (citations omitted). "If a court finds at any stage of the proceedings it is without [subject matter] jurisdiction, it is its duty to take notice of the defect and stay, quash or dismiss the suit." *Burgess v. Gibbs*, 262 N.C. 462, 465, 137 S.E.2d 806, 808 (1964).

¶ 20 As our Supreme Court made clear in *Committee to Elect Dan Forest v. Employees Political Action Committee*, 376 N.C. 558, 2021-NCSC-6, ¶ 73, a plaintiff in North Carolina courts need not show an "injury-in-fact," as required by federal standing rules. Rather,

> [s]tanding to challenge the constitutionality of a legislative enactment exists where the litigant has suffered, or is likely to suffer, a direct injury as a result of the law's

> enforcement. When standing is questioned, the proper inquiry is whether an actual controversy existed at the time the pleading requesting declaratory relief is filed.

Simeon v. Hardin, 339 N.C. 358, 369, 451 S.E.2d 858, 866 (1994) (citations omitted). Our Supreme Court explained, "[t]he direct injury requirement applicable in cases involving constitutional challenges to the validity of government action is a rule of prudential self-restraint based on functional concern for assuring sufficient 'concrete adverseness' to address 'difficult constitutional questions . . . .'" *Comm. to Elect Dan Forest*, 376 N.C. 558, 2021-NCSC-6, ¶ 82.

¶ 21 In determining whether an actual controversy existed at the time Plaintiffs filed their complaint, we first turn to Plaintiffs' arguments on the question. We surmise from Plaintiffs' brief that they rely on *Williams v. Blue Cross Blue Shield of North Carolina*, 357 N.C. 170, 581 S.E.2d 415 (2003) for the proposition that an actual controversy is created, and therefore standing is established, when a facial constitutional challenge is brought against a permissive, local law. In *Williams*, the plaintiff's claims alleging employment discrimination, along with the employer's counterclaims, led the Court to inquire into whether the applicable provisions of the county's ordinance at issue violated Article II, Section 24 of the North Carolina Constitution. *Id.* at 183, 581 S.E.2d at 425. Our Supreme Court held the permissive, local law was unconstitutional whether or not the county "had chosen to act on that power" because the legislature gave the county the power to enact invalid legislation.

Id. at 191, 581 S.E.2d at 430. However, the plaintiff in *Williams* sustained a direct injury stemming from alleged discrimination in her workplace; therefore, she undisputedly had standing to bring her employment discrimination claims. *Id.* at 176, 581 S.E.2d at 421.

¶ 22 In this case, unlike the plaintiff in *Williams*, Plaintiffs' standing is contested. Plaintiffs argue they alleged in their complaint "that the threats to pass and the subsequent adoption of HB 514 caused the CMS Board to substantially scale back the scope of its student reassignment plans, thereby undermining its transparent efforts to address the established negative effect of racial segregation and concentrated poverty on educational outcomes." This allegation tends to demonstrate an indirect injury to Plaintiffs because any harm they sustained was not directly caused by the enactment of HB 514; rather, the alleged injury would have been the result of CMS's response to the passing of the Act.

¶ 23 Additionally, our review of the record reveals no Town has submitted an application to create a municipal charter school; thus, we conclude there can be no direct injury or immediate threat of injury. This conclusion is supported by *Templeton v. Town of Boone*, 208 N.C. App. 50, 701 S.E.2d 709 (2010). In *Templeton*, the plaintiffs challenged an amendment to a zoning ordinance adopted by the Town of Boone. *Id.* at 51, 701 S.E.2d at 711. The plaintiffs alleged, *inter alia*, the amendment was in violation of their constitutional substantive and procedural due

process rights, an unconstitutional "taking," and a constitutional violation of their rights "to use their land . . . ." *Id.* at 56, 701 S.E.2d at 713. In concluding the plaintiffs lacked standing for the constitutional challenges, our Court reasoned the plaintiffs' complaint did not contain an allegation "indicating that [the] defendant enforced or attempted to enforce the subject zoning ordinance amendments against either plaintiff . . . ." *Id.* at 56, 701 S.E.2d at 713. We held the trial court properly dismissed the plaintiffs' constitutional claims. *Id.* at 56, 701 S.E.2d at 714.

¶ 24 Here, Plaintiffs have not presented allegations they have been directly injured or will be directly injured by enforcement of the Act, nor have they included allegations tending to show one of the Towns has applied to establish a municipal charter school. *See Simeon*, 339 N.C. at 369, 451 S.E.2d at 866; *Templeton*, 208 N.C. App. at 56, 701 S.E.2d at 713. Therefore, they have not sufficiently shown "concrete adverseness" to establish standing. *See Comm. to Elect Dan Forest*, 376 N.C. 558, 2021-NCSC-6, ¶ 82.

V. Conclusion

¶ 25 We grant Defendants' petition for writ of certiorari because they have shown merit and that error was probably committed in the superior court. We hold Plaintiffs have failed to include allegations in their complaint demonstrating they were directly injured, or are likely to suffer a direct injury, as a result of HB 514's enforcement. Accordingly, we vacate the Order because the trial court was without jurisdiction to

enter it. *See Marriott*, 187 N.C. App. at 496, 654 S.E.2d at 17.

VACATED.

Judges ZACHARY and COLLINS concur.

Report per Rule 30(e).