

NORTH CAROLINA CIVIL LITIGATION REPORTER

March 2014

[Volume 2, Number 3]

CIVIL LIABILITY

Court Rejects “Impossibility” and “Illegality” Defenses In Breach of Contract Claim

Elizabeth Botts bought 15 acres of land from Mark Tibbens and his wife Alicia and entered into a “Septic System Installation Agreement” in which Tibbens agreed to provide “all labor and job supervision” associated with installation of a septic system on the property and Botts agreed to supply the project’s materials, rental equipment, and fuel, up to a total cost of \$10,000. Tibbens was responsible for all additional expenses.

After Tibbens arranged for the septic system to be designed and engineered, his attorney notified Botts that because Tibbens was not a licensed septic system contractor, it would be unlawful for him to install the septic system, so their agreement was “unenforceable and void.” Botts then hired another contractor to complete the job and sued Tibbens and his wife for breach of contract and unjust enrichment.

Defendants’ answer pled impossibility, illegality, and laches, but the trial court found no genuine issues of material fact and determined that Botts was entitled to judgment as a matter of law on all three affirmative defenses. The case was then tried without a jury and the court found that Tibbens breached the installation agreement. It entered judgment for \$32,331.72, the amount Botts spent having her septic system installed, less the \$10,000 she agreed to pay. Tibbens appealed.

In This Issue...

...

CIVIL LIABILITY

Impossibility and Illegality Defenses Found Inapplicable <i>Botts v. Tibbens</i>	1
Complaint Dismissed for Lack of Standing <i>American Oil Company v. AAN Real Estate, LLC</i>	2
New Legal Issues Raised for First Time On Appeal <i>Robinson v. Shanahan</i>	2
Contract Claim Withstands Governmental Immunity Plea <i>Viking Utilities v. Onslow Water and Sewer</i>	3
Successful Conversion Claim Yields Nominal Damages <i>Heaton-Sides v. Snipes</i>	4
ALJ’s Finding of Wrongful Termination Affirmed <i>Hershner v. NC Department of Administration</i>	5
Non-Competition and Non-Disclosure Agreements <i>Horner International Company v. McKoy</i>	5

WORKERS’ COMPENSATION

There were no published workers’ compensation appellate court decisions this month.

Dennis Mediations, LLC

George W. Dennis III

NCDRC Certified Superior Court Mediator

NC Industrial Commission Mediator

dennismediations@gmail.com

919-805-5002

www.dennismediations.com

On March 4, in *Botts v. Tibbens*, the Court of Appeals affirmed. It found that the parties' installation agreement was neither illegal nor impossible to perform. While N.C.G.S. § 90A-72 requires that those who install septic systems be certified contractors, which Tibbens was not, and while the Court agreed that "an agreement which violates a constitutional statute or municipal ordinance is illegal and void," it found "[n]othing in the plain language of [the parties'] contract requires that defendant install the septic system *personally* or precludes him from employing others to effect the installation. Instead, the contract simply makes defendant responsible for the installation."

The Court also found no merit in Tibbens' argument that it was error for the trial court to include the cost of engineering services as an element of Botts' damages. It held that when a contract is breached, "[t]he injured party is entitled to full compensation for his loss, and to be placed as near as may be in the condition which he would have occupied had the contract not been breached." Since "the trial court considered ... engineering services to be part of the 'installation' portion of the contract," there was no error in the amount of the judgment it entered in Botts' favor.

Complaint Dismissed for Lack of Standing

Planning to operate a car wash and vehicle maintenance business at 5320 and 5324 East Independent Boulevard, Charlotte, American Oil Group entered into a lease with AAN Real Estate, LLC. AAN was later sued by American Oil Company, Inc. for failing to install vehicle lifts on the leased property in a timely manner. AAN responded with a Rule 12(b)(6) motion to dismiss, which was granted by the trial court. Plaintiff appealed.

On March 4, in *American Oil Company, Inc. v. AAN Real Estate, LLC*, the Court of Appeals took judicial notice of the fact that the company

that brought suit, American Oil Company, Inc., was "neither a corporation existing within this state currently nor at the time the amended complaint was filed." Instead, it was another entity, American Oil Group, that entered into the lease with AAN. And, because American Oil Group was operating under an assumed name, it was required by N.C.G.S. § 66-68 to file a certificate with the register of deeds, providing its name and the name and address of its owners. It was also obligated by N.C.G.S. § 1-69.1(a)(3) to state in its complaint where its certification was recorded. However, it did neither.

The Court held that "dismissal pursuant to Rule 12(b)(6) is appropriate when 'an insurmountable bar to recovery' exists on the face of the complaint" and lack of standing is "an insurmountable bar to recovery," since "[w]ithout standing, the courts of this State lack subject matter jurisdiction." Applying those principles to plaintiff's lawsuit, it found that although N.C.G.S. § 1-69.1(a)(1) authorizes unincorporated associations such as American Oil Group to "sue or be sued under the name by which they are commonly known and called," the complaint at issue "fails because plaintiff did not show that it was in privity of contract with [the] lessee or a beneficiary of any kind to the lease. The name of the lessee, American Oil Group, is different than the name of plaintiff, American Oil Company, Inc., and no alleged facts in the amended complaint link the two parties." As a consequence, "[t]he trial court did not err in granting defendant's motion to dismiss pursuant to Rule 12(b)(6) because plaintiff lacked standing to bring suit."

Court Refuses to Pass On Legal Issues Raised for First Time On Appeal

Death-sentenced inmates Marcus Robinson, James Thomas, Archie Billings, and James Campbell, filed a declaratory judgment action seeking injunctive relief, arguing that North Carolina's three-drug protocol for the administration of lethal injections ("the 2007

Protocol”) violated the Eighth Amendment of the United States and North Carolina Constitutions, which proscribe cruel and/or unusual punishment. They also claimed that the 2007 Protocol violated the Administrative Procedure Act (“APA”) because it was not promulgated through the administrative rule-making process. However, Judge Donald Stephens disagreed and granted summary judgment for the defendants. The inmates appealed.

During the pendency of their appeal, a statutory amendment gave the Secretary of the North Carolina Department of Public Safety authority to determine execution procedures and he replaced the 2007 Protocol with the “Execution Procedure Manual for Single Drug Protocol (Pentobarbital).” That development prompted the Court of Appeals to permit the parties to file supplemental briefs. At the same time, it dismissed as moot plaintiffs’ argument that the 2007 Protocol constituted cruel and unusual punishment, which left as the sole issue for determination whether it was necessary for the Secretary to promulgate the new lethal injection protocol through APA rule-making.

However, as the Court noted on March 18 in *Robinson v. Shanahan*, “[o]ur appellate courts have consistently declined to consider issues that were not presented at the trial level.” Citing Rule of Appellate Procedure 10 as authority and quoting *In re Hutchinson*, ___ N.C. App. ___ (2012), the Court held that “a contention not raised and argued in the trial court may not be raised and argued for the first time on appeal.” Therefore, it remanded the case to the trial court “so that it may properly determine this matter and develop an adequate record for any subsequent appellate review.”

Breach of Contract Claim Withstands Plea of Governmental Immunity

In November 2007, the Onslow Water and Sewer Authority (“Onslow”) entered into an “asset purchase agreement” with Viking Utilities

Corporation (“Viking”) and Garland and Sue Tuton, pursuant to which Onslow acquired Viking’s “wastewater system assets” in exchange for cash paid at closing and other consideration, including a \$250,000 credit toward the cost of connecting to Onslow’s wastewater system in the future without payment of a “tap fee,” at the rate of \$2,500 per connection. Five years later, Viking and the Tutons filed suit, alleging that Onslow had breached their agreement by refusing to allow them to connect to the sewer system without cost. Claiming governmental immunity, Onslow moved to dismiss under Rules 12(b)(1), (2), and (6), but its motion was denied by Judge Allen Cobb. Onslow appealed.

On March 4, in *Viking Utilities Corporation, Inc. v. Onslow Water and Sewer Authority*, the Court of Appeals first addressed the interlocutory nature of Onslow’s appeal. Citing *Price v. Davis*, 132 N.C. App. 556 (1999) as authority, it observed that “this Court has repeatedly held ... appeals raising issues of governmental or sovereign immunity affect a substantial right sufficient to warrant immediate appellate review.”

The Court then addressed the merits of Onslow’s appeal, and in particular its plea of governmental immunity, observing that while a municipal corporation “is immune from suit ... in the exercise of governmental functions absent waiver of immunity,” its immunity “is not without limit”; it only covers “acts ... committed pursuant to its governmental functions” and does not apply when the municipality engages in proprietary functions.

For guidance on the distinction between governmental and proprietary functions, the Court turned to the recent cases of *Estate of Williams v. Pasquotank County*, 366 N.C. 195 (2012), and *Town of Sandy Creek v. East Coast Contr., Inc.*, ___ N.C. App. ___ (2013), noting that in *Williams*, the Supreme Court ruled that whether an activity is governmental or proprietary requires the court to “engage in a fact-based analysis, considering various relevant

factors, rather than applying bright-line rules.” And, “although an activity may be classified in general as a governmental function, liability ... may exist as to certain of its phases; and conversely, although classified in general as proprietary, certain phases may be considered exempt from liability.” Similarly, in *Sandy Creek*, which involved a contract dispute between a municipality and an engineering firm arising out of the construction of a sewer system, the Court of Appeals held that “although the operation of a sewer system might be a governmental function, the specific allegations of plaintiff’s complaint did not assert acts undertaken in a governmental capacity.”

Applying those principles to the case at bar, the Court held that whether Onslow was entitled to governmental immunity “will require the trial court to consider the pertinent statutory provisions as well as factual evidence, ... fees charged by defendant, ... and any other evidence relevant to the issue of whether, in executing and interpreting its contract with plaintiffs, defendant was acting in a governmental or proprietary capacity.” Because the record did not contain that type of evidence when Onslow’s motion was heard, it was properly denied by the trial court.

Successful Conversion Claim Yields Nominal Damages

After the State Employees’ Credit Union (“SECU”) foreclosed on the residence of Jane Heaton-Sides, both parties agreed that she and her husband could continue moving out of the house until 3:00 pm on April 1, 2011. At around 3:00 pm that day, an SECU employee informed Heaton-Sides that if she and her husband wanted to take any further personal property from the residence, they should so inform the SECU property manager by close of business on the following Monday, April 4. Heaton-Sides did not inform anyone that she wanted to retrieve additional property until April 7, by which time everything that remained in the residence had already been disposed of.

Heaton-Sides responded by filing suit against SECU and its property manager for conversion, negligent and intentional infliction of emotional distress, unfair and deceptive trade practices, and punitive damages. However, the trial court dismissed her claim against SECU because she failed to respond to discovery and she voluntarily dismissed all but her conversion claim against the property manager.

During a subsequent bench trial, Heaton-Sides testified that her missing household items would cost \$10,272 to replace. She also testified that the defendants discarded her notes and outlines for several children’s books and \$75,400 was “reasonable compensation” for the time she spent working on them.

The trial court held that Heaton-Sides failed to establish a wrongful conversion because she abandoned her property by not contacting anyone about removing it before the April 4 deadline. It also ruled that even if she had proven a valid conversion claim, she failed to establish any actual damages. Plaintiff appealed.

On March 18, in *Heaton-Sides v. Snipes*, the Court of Appeals agreed that the trial court erred when it dismissed Heaton-Sides’ conversion claim, as the defendants violated N.C.G.S. § 42-25.9(g) when they disposed of her personal property before the statute’s ten-day waiting period expired. It found that SECU gained possession of the residence at a foreclosure sale pursuant to N.C.G.S. § 45-21.29(1), which gives purchasers of foreclosed properties “the same rights ... as are provided to a landlord under North Carolina law, including Chapters 42 and 44A of the General Statutes.” And, Chapter 42 includes N.C.G.S. § 42-25.9(g), which provides that “[t]en days after being placed in lawful possession ..., a landlord may throw away, dispose of, or sell all ... personal property remaining on the premises,” but during that ten-day period, the landlord “may move for storage purposes, but shall not throw away, dispose of, or sell any items of personal property remaining

on the premises....” Therefore, having purchased Heaton-Sides’ residence in foreclosure, SECU was statutorily barred from disposing of anything left behind for ten days after it took possession of the property.

The Court was not persuaded by defendants’ argument that Heaton-Sides waived the ten-day waiting period by agreeing to contact the defendants by April 4 if she wanted to retrieve additional property from the residence, as “[t]he ten-day waiting period in N.C.G.S. § 42-25.9(g) cannot be avoided by contract because N.C.G.S. § 42-25.8 provides: ‘Any ... contract provision contrary to this Article shall be void as against public policy.’” Therefore, the Court reversed the trial court’s determination that Heaton-Sides had failed to prove her conversion claim.

At the same time, however, it agreed that she failed to establish actual damages. Although she testified to the cost of replacing certain missing household items, damages are determined by the “fair market value of the converted property at the time of the conversion” and “replacement cost is not the fair market value.” Similarly, her testimony about “reasonable compensation” for her missing notes and outlines did not establish their fair market value. Rather, “plaintiff would have to demonstrate how much a willing buyer would pay her for the papers.” As a consequence, the trial court correctly determined that “plaintiff ... failed to prove actual damages.” But, the Court went on to note, “[a]ctual damages ... are not an essential element of a conversion claim ..., she can still recover nominal damages,” so it remanded the case to the trial court for entry of an award of nominal damages.

Additional Opinions

On March 4, in *Hershner v. NC Department of Administration*, the Court of Appeals affirmed a trial court order affirming the decisions of an administrative law judge (“ALJ”) and the State Personnel Commission (“SPC”) that the termination of petitioner Millie Hershner’s employment as a staff attorney for the North

Carolina Department of Administration was wrongful. The Court found that the evidence of record supported the ALJ’s findings of fact, which established that petitioner’s termination was not supported by just cause. It also held that whether there was a quorum when the SPC met is determined at the beginning of the meeting. As a consequence, once the meeting is opened, “the SPC may conduct business regardless of subsequent recusals that may reduce the number of members voting on a particular issue.”

On March 5, in *Horner International Company v. McKoy*, the Court of Appeals affirmed a trial court order denying Horner’s motion to enjoin former employee Bill McKoy from violating the Non-Competition Agreement (“NCA”) he signed as a condition of his employment, but it granted Horner’s motion to enjoin McKoy from violating his Agreement Not to Disclose Trade Secrets. The Court found that the NCA was overbroad and unenforceable, but McKoy’s “knowledge of trade secrets and opportunity to use those in his work for his new employer create a threat of misappropriation, and thus the trial court’s grant of a preliminary injunction during the pendency of the action was proper.”

The full text of the appellate decisions summarized in this newsletter can be located at www.nccourts.org.

A Service and Publication of
Dennis Mediations, LLC

George W. Dennis III

NCDRC Certified Superior Court Mediator

NC Industrial Commission Mediator

dennismediations@gmail.com

919-805-5002

www.dennismediations.com