

NORTH CAROLINA COURT OF APPEALS

IN THE MATTER OF COMPLAINTS)
AGAINST OFFICIALS OF KILL DEVIL) From Dare County
HILLS POLICE DEPARTMENT)

MOTION TO STRIKE PETITION FOR REHEARING
AND RESPONSE TO PETITIONER'S MOTION TO WITHDRAW OPINION

NOW COMES Appellant, Town of Kill Devil Hills (hereinafter "the Town"), pursuant to Rules 3, 31 and 37(a) of the North Carolina Rules of Appellate Procedure, N.C. Gen. Stat. § 1-271 and the North Carolina case law interpreting these rules and statute, and moves the Court to strike the Petition for Rehearing of the Honorable Jerry R. Tillett, filed with this Court on November 20, 2012 and responds to Petitioner's Motion to Withdraw Opinion. The Town shows unto the Court as follows:

PROCEDURAL HISTORY

1. On January 20, 2012, Judge Milton F. Fitch, Jr. entered an Order in Dare County Superior Court, with a caption of "In the Matter of Complaints Against Officials of Kill Devil Hills Police Department" and a file number of 12-R-8. (R pp 3-

4)

2. The Order of January 20, 2012 was the first document filed in matter number 12-R-8. (R pp 71-72, 79, 81-92) No Complaint has ever been filed in matter number 12-R-8. (R pp 71-72, 79, 81-92)

3. The January 20, 2012 Order removed the power of the Town to handle its personnel issues and Ordered that all complaints of any Kill Devil Hills Department employee involving the Police Department may be made to the Senior Resident Superior Court Judge, Judge Jerry R. Tillett. (R pp 3-4, 21, 25-26) This Order also allowed Judge Tillett to make determinations regarding such complaints. (R p 4)

4. The Town filed Notice of Appeal from the January 20, 2012 Order on January 23, 2012. (R pp 30-34)

5. On February 13, 2012, this Court entered an Order allowing the Town's Petition for Writ of Supersedeas and staying the January 20, 2012 Order of Judge Fitch pending the outcome of the appeal. (R p 103)

6. On October 16, 2012, this Court filed an Opinion holding that the trial court lacked jurisdiction, inherent authority and mandamus power to enter the January 20, 2012 Order, and that entering such order deprived the Town of its due process right to notice and an opportunity to be heard. *In re Officials of Kill Devil Hills Police Dept.*, No. COA12-398, 2012

WL 4868002 (N.C. Ct. App. Oct. 16, 2012) (See Exhibit 1). As such, this Court vacated, "the order of the trial court, captioned 'In the Matter of Complaints Against Officials of Kill Devil Hills Police Department' with file number of 12-R-8" *Id.* at *5.

7. On November 20, 2012, the Honorable Jerry R. Tillett filed a "Petition for Rehearing Under Rule 31 of the North Carolina Rules of Appellate Procedure; and Alternative Motion to Withdraw Opinion," and the Town now moves to strike this Petition of a nonparty and responds to the Motion to Withdraw the Opinion.

MOTION TO STRIKE PETITION FOR REHEARING

8. Petitioner admits in his Petition section entitled "Standing" that, "A party seeking an appeal must be an 'aggrieved party.'" (Petition p 9) Petitioner goes on to argue that he has standing to bring the Petition because the Opinion of this Court, "has aggrieved Judge Tillett by restating the allegations in the Murphy Affidavit as 'fact'," in light of the fact that, "there is reason to believe that the [Judicial Standards] Commission has begun an investigation" regarding Judge Tillett. (Petition p 10) While Petitioner argues that he is "aggrieved", he does not argue that he is a "party" with standing to bring a Petition for Rehearing.

9. N.C. Gen. Stat. § 1-271 regarding, "Who may appeal,"

provides, "Any party aggrieved may appeal in the cases prescribed in this Chapter." (Emphasis added). "In addition to being aggrieved, [the appellants] must have been parties to the suit from which they wish to appeal." *Duke Power Co. v. Salisbury Zoning Bd. of Adjustment*, 20 N.C. App. 730, 731, 202 S.E.2d 607, 608 (1974).

The North Carolina case law is clear on this point. See *Seeley v. Seeley*, 102 N.C. App. 572, 573, 402 S.E.2d 870, 871 (1991) (Where an attorney appealed on her own behalf, not her client's, this Court cited G.S. § 1-271 in dismissing the appeal, stating, "Clearly, North Carolina law does not permit the taking of an appeal by one who is not a party to the action. N.C. Gen. Stat. § 1-271 (1983) provides, "Any party aggrieved may appeal in the cases prescribed in this Chapter. An attorney is not a party to an action brought on behalf of her client." (Emphasis original; citations omitted)); *Johns v. Johns*, 195 N.C. App. 201, 672 S.E.2d 34 (2009); *Duke Power Co. v. Salisbury Zoning Bd. of Adjustment*, 20 N.C. App. 730, 731-32, 202 S.E.2d 607, 608 (2007) ("While the persons complaining of the court's ruling may have been aggrieved by the proximity of their land to the proposed power line of the petitioner, it does not necessarily follow that they have the right to appeal. In addition to being aggrieved, they must have been parties to the suit from which they wish to appeal Since they were not

parties, they have no right to appeal or otherwise complain of the ruling of the court."); *Siler v. Blake*, 20 N.C. 90 (1838); See also, 1 N.C. Civil Prac. And Proc. § 92:12 (6th ed.) ("In civil cases, a party may petition the appellate court for rehearing pursuant to Appellate Rule 31 within 15 days after the mandate of the court has issued." (Emphasis added.))

10. Pursuant to the law detailed above, Judge Tillett does not have standing to bring a Petition for Rehearing in this matter, and the Town requests that the Petition be struck. A reading of the Petition shows that what Petitioner takes issue with is one sentence where this court stated, "The trial court acted beyond its jurisdiction in issuing both orders, *sua sponte*, against petitioner." *In re Officials of Kill Devil Hills Police Dept.*, No. COA12-398, 2012 WL 4868002, at *2. Judge Tillett filed a Petition for Rehearing in the case asserting that, with this sentence, this Court held that the Order he entered on September 11, 2011 was improper for lack of jurisdiction. (Petition pp 11-14, 16-19) Judge Tillett has filed a Petition for Rehearing arguing that his own Order was proper and not in error. The implications of allowing a trial court judge to Petition for Rehearing, inserting themselves in the appeal to argue that their own order/action at the trial court was proper are far reaching and would result in every judge having the opportunity to make filings with this Court

arguing why their Order/Judgment/ruling was proper. This is not permitted by the North Carolina Rules of Appellate Procedure and was certainly never intended by the Appellate Courts or the Legislature.

11. Finally, Judge Tillett's Petition for Rehearing is further inappropriate when he: (1) had full knowledge of the Town's appeal in this matter (See letter from Dan Hartzog advising of Notice of Appeal and requesting sealed Order of September 11, 2012 for the Record on Appeal - R pp 63-64, 66); (2) was requested to provide a copy of his sealed Order of September 11, 2012 for the Town's record preparation (See letter from Dan Hartzog advising of Notice of Appeal and requesting sealed Order of September 11, 2012 for the Record on Appeal - R pp 63-64, 66); (3) denied jurisdiction in the matter, asserting that Judge Fitch retained jurisdiction (see correspondence of Dan Hartzog and Judge Tillett - R pp 63-69), yet he took no action related to the appeal or to become a party to the appeal. See *Duke Power*, 20 N.C. App. 730, 202 S.E.2d 607 (nonparty's appeal was dismissed where they "may" be aggrieved by the relevant Order and were aware of the appeal, but took no action to become a party to the appeal).

RESPONSE, PURSUANT TO RULE 37(a) OF THE NORTH CAROLINA RULES OF APPELLATE PROCEDURE, TO PETITIONER'S MOTION TO WITHDRAW OPINION

12. Petitioner also moves, alternatively, that this Court

withdraw its Opinion in this matter filed October 16, 2012, asserting that: (1) this Court made a holding regarding Judge Tillett's Order of September 11, 2011, when that Order was not appealed from; (2) this Court cited factual assertions of Shawn Murphy that were not based on firsthand knowledge and were not accurate; and (3) this Court's "holding" regarding Judge Tillett's September 11, 2011 Order was in error. (Petition)

13. The Opinion should not be withdrawn, and Petitioner's arguments to the contrary are in error. First, the Opinion cannot be withdrawn at this stage, as the mandate already issued to the trial court on November 5, 2012. N.C. R. App. P. 32(a) & (b). After the issuance of the mandate, jurisdiction no longer exists at the appellate court. See *Woodard v. Local Government Employees' Retirement Sys.*, 110 N.C. App. 83, 85, 428 S.E.2d 849, 850 (1993).

14. Next, this Court's Opinion, filed October 16, 2012, should not be withdrawn as it is supported entirely by the law of this State, and it properly vacated Judge Fitch's Order of January 20, 2012 for want of jurisdiction, inherent authority and mandamus power to enter the Order, and for depriving the Town of its due process right to notice and an opportunity to be heard. Petitioner does not argue otherwise. (Petition)

15. The Opinion of this Court is quite clear that its holding pertained only to the Order of Judge Fitch entered

January 20, 2012, as it specifically states, "For the foregoing reasons, the order of the trial court, captioned 'In the Matter of Complaints Against Officials of Kill Devil Hills Police Department' with file number of 12-R-8, is vacated." *In re Officials of Kill Devil Hills Police Dept.*, No. COA12-398, 2012 WL 4868002 at *5. This Court only referenced the lack of jurisdiction of the September 11, 2011 Order to explain that there was no pending litigation or controversy when the January 20, 2012 Order was entered. *Id.* at *2. The context of this Court's statement about lack of jurisdiction of the September 11, 2011 Order is entirely clear from the Opinion, as is this Court's holding, and Petitioner's interpretation to the contrary is puzzling.

16. Finally, in response to Petitioner's motion to withdraw the Opinion due to the inclusion of language about Judge Tillett's son having, "an encounter with one or more Kill Devil Hills police officers," and Judge Tillett's actions following this encounter, due to some items in the Affidavit of Shawn Murphy not being based on personal knowledge, and Petitioner's supporting Affidavit, the Town, pursuant to N.C. R. App. P. Rule 37(a) submits the Affidavits of Dana Harris, Assistant Police Chief for the Town of Kill Devil Hills; Debora Diaz, Town Manager for the Town of Kill Devil Hills; Gary Britt, Chief of Police for the Town of Kill Devil Hills, who were all

present at the meeting held in the chambers of Judge Jerry Tillett on April 15, 2010, which is referenced in Judge Tillett's Petition for Rehearing, and the affidavits of Mary Quidley, Town Clerk, and Shawn Murphy, Assistant Town Manager for the Town of Kill Devil Hills. These affidavits are attached hereto and establish that Shawn Murphy's original Affidavit, and the language in the Court of Appeals Opinion, was factually correct and entirely accurate. (See Exhibit 2)

CONCLUSION

For the reasons stated herein, the Town of Kill Devil Hills respectfully requests that the Petition for Rehearing filed by the Honorable Jerry R. Tillett be struck and that Petitioner's Motion to Withdraw the Opinion be denied.

This the 29th day of November, 2012.

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N.C. R. App. P. 33(b) Certification:

I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

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CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served the attached *Motion to Strike Petition for Rehearing and Response to Motion to Withdraw Opinion* on the following by depositing a copy hereof, postage prepaid, in the United States Mail, addressed to each party as follows:

Milton F. Fitch, Jr.
Senior Resident Judge
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Wilson, NC 27894-2445

Norman W. Shearin
Kevin A. Rust
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This the 29th day of November, 2012.

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EXHIBIT 1

2012 WL 4868002

Only the Westlaw citation is currently available.
Court of Appeals of North Carolina.

In the Matter of Complaints Against OFFICIALS
OF KILL DEVIL HILLS POLICE DEPARTMENT.

No. COA12-398. | Oct. 16, 2012.

Synopsis

Background: The Superior Court, Dare County, Milton F. Fitch, Jr., J., entered two sua sponte orders in an attempt to compel a specific course of action by town. Town petitioned for writ of supersedeas, seeking to suspend judge's order directing that any complaint against town police department be presented to judge for review.

Holdings: The Court of Appeals, Steelman, J., held that:

[1] Superior Court acted beyond its jurisdiction when no litigation or controversy was pending before the court;

[2] Superior Court improperly exercised its inherent power due to a lack of jurisdiction;

[3] Superior Court's orders were in violation of town's due process rights, and were a legal nullity; and

[4] Superior Court exceeded its mandamus power.

Order vacated.

West Headnotes (19)

[1] Appeal and Error

⚡ Cases Triable in Appellate Court

Whether a trial court has subject matter jurisdiction is a question of law, which is reviewable on appeal de novo.

[2] Courts

⚡ Acts and Proceedings Without Jurisdiction

Trial court acted beyond its jurisdiction when it issued two sua sponte orders that required town to provide to the court the personnel files of the town's police chief and assistant town manager, and that directed that any complaints against the town's police department be submitted to the court for review, where no litigation or controversy was pending before the court.

[3] Courts

⚡ Mode of Acquiring or Exercising Jurisdiction in General

Judgment

⚡ Necessity of Pleadings

A court cannot undertake to adjudicate a controversy on its own motion, but, rather, it can adjudicate a controversy only when a party presents the controversy to it, and then, only if it is presented in the form of a proper pleading; thus, before a court may act there must be some appropriate application invoking the judicial power of the court with respect to the matter in question.

[4] Courts

⚡ Acts and Proceedings Without Jurisdiction

Where no action or proceeding has been commenced and is not pending before the court, jurisdiction does not exist.

[5] Municipal Corporations

⚡ Police

Trial court improperly exercised its inherent power when it issued order directing that any complaints against town's police department be submitted to the court for review on the basis it was preserving the efficient and expeditious administration of justice, due to the fact that the court lacked jurisdiction over a matter that was not pending before the court.

[6] Courts

In General; Nature and Source of Judicial Authority

Courts have the inherent power to do only those things which are reasonably necessary for the administration of justice within the scope of their jurisdiction.

[7] **Constitutional Law**

↔ Disclosure and Discovery

Municipal Corporations

↔ Removal

Municipal Corporations

↔ Police

Municipal Corporations

↔ Chief or Superintendent or Other Executive

Trial court's actions in issuing sua sponte orders directing town to provide to the court the personnel files of the town's police chief and assistant town manager, and also directing that any complaints against the town's police department be submitted to the court for review, were in violation of town's due process rights, and were a legal nullity, where no action was commenced against town and no notice or opportunity to be heard was given before the issuance of the orders. U.S.C.A. Const.Amend. 14.

[8] **Constitutional Law**

↔ Nature and Scope in General

No procedure or practice of the courts, even those exercised pursuant to their inherent powers, may abridge a person's substantive rights. U.S.C.A. Const.Amend. 14.

[9] **Constitutional Law**

↔ Notice and Hearing

In order that there be a valid adjudication of a party's due process rights to notice and an opportunity to be heard, the party must be given notice of the action and an opportunity to assert his defense, and he must be a party to such proceeding. U.S.C.A. Const.Amend. 14.

[10] **Judgment**

↔ Judgment for or Against Person Not a Party

Any judgment which may be rendered in an action will be wholly ineffectual as against one who is not a party to such action.

[11] **Constitutional Law**

↔ Nature and Scope in General

Courts

↔ In General; Nature and Source of Judicial Authority

The exercise of the court's inherent power to do what is reasonably necessary for the proper administration of justice must stop where constitutional guarantees of justice and fair play begin.

[12] **Courts**

↔ Acts and Proceedings Without Jurisdiction

The instant that the court perceives that it is exercising, or is about to exercise, a forbidden or ungranted power, it ought to stay its action, and, if it does not, such action is, in law, a nullity.

[13] **Mandamus**

↔ Jurisdiction and Authority

Trial court exceeded its mandamus power when, without jurisdiction, proper notice, or a hearing, it attempted to compel town to provide it with copies of the personnel records of police chief and assistant town manager, and to direct any complaints against town police department to the court for review, usurping the town's personnel decisions.

[14] **Mandamus**

↔ Nature of Acts to Be Commanded

Writs of mandamus may be issued to order officials to perform their constitutional or statutory duty.

[15] **Mandamus**

⇒ Ministerial Acts in General

A “writ of mandamus” is the proper remedy to compel public officials to perform a purely ministerial duty imposed by law, where it is made to appear that the plaintiff, being without other adequate remedy, has a present, clear, legal right to the thing claimed and it is the duty of the respondents to render it to him.

[16] **Mandamus**

⇒ Matters of Discretion

As a general rule, the writ of mandamus may not be invoked to review or control the acts of public officers and boards in respect to matters requiring and depending upon the exercise of discretion; in such cases mandamus lies only to compel public officials to take action, but ordinarily it will not require them, in matters involving the exercise of discretion, to act in any particular way.

[17] **Mandamus**

⇒ Scope of Inquiry and Powers of Court

Under the mandamus power a court of competent jurisdiction may determine in a proper proceeding whether a public official has acted capriciously or arbitrarily or in bad faith or in disregard of the law, and it may compel action in good faith in accord with the law.

[18] **Mandamus**

⇒ Scope of Inquiry and Powers of Court

When the jurisdiction of a court is properly invoked to review the action of a public official to determine whether he, in choosing one of two or more courses of action, abused his discretion, the court may not direct any particular course of action through mandamus; it only decides whether the action of the public official was contrary to law or so patently in bad faith as to evidence arbitrary abuse of his right of choice.

[19] **Mandamus**

⇒ Scope of Inquiry and Powers of Court

If a public officer acted within the law and in good faith in the exercise of his best judgment, the court must decline to interfere through mandamus even though it is convinced the official chose the wrong course of action.

*1 Appeal by petitioner from order entered 19 January 2012 by Judge Milton F. Fitch, Jr. in Dare County Superior Court. Heard in the Court of Appeals 12 September 2012.

Attorneys and Law Firms

Cranfill Sumner & Hartzog, LLP, Raleigh, by Dan M. Hartzog, Dan M. Hartzog, Jr., and Jaye E. Bingham-Hinch for appellant.

No appellee brief filed.

Opinion

STEELMAN, Judge.

The trial court lacked jurisdiction to usurp the personnel policies of the Town of Kill Devil Hills. The order entered by the trial court was not within the scope of its inherent authority. The entry of the order without notice or hearing was a violation of due process. The entry of the order was beyond the scope of the trial court's mandamus authority.

I. Factual and Procedural History

The factual background in this case is derived from petitioner's Amended Petition for Writ of Supersedeas, dated 23 January 2012.

The son of the Honorable Jerry R. Tillett, Senior Resident Superior Court Judge for the First Judicial District, had an encounter with one or more Kill Devil Hills police officers. No charges were filed. Shortly thereafter, Judge Tillett expressed to Shawn Murphy, Assistant Town Manager of Kill Devil Hills (“Murphy”), and to the Kill Devil Hills Chief of Police, his concerns about the operation of the Kill Devil Hills Police Department. On 11 September 2011, Judge Tillett issued an order that certain personnel files, including those of Murphy and the Chief of Police, be delivered to

his office (“first order”). There was no pending court action which gave rise to this order. After conferring with the Town Attorney, the Town Manager’s office complied with the first order.

The Chief of Police requested a copy of the first order, and was informed that all copies were to be returned to Judge Tillett and none retained. Judge Tillett permitted one copy of the first order to be retained, provided that it was kept in a sealed envelope not to be opened without his permission.

In September 2011, the Town of Kill Devil Hills (“petitioner”) was informed that the District Attorney would file a petition seeking the removal of the Chief of Police, and that the filing of this petition was “imminent.” No petition was filed as of the filing of the Amended Petition for Writ of Supersedeas. In that same month, the Chief of Police was placed on non-disciplinary, paid suspension. During this leave, the Town reviewed his performance. On 23 December 2011, the Chief of Police was reinstated to active duty.

On 19 January 2012, the trial court entered an order in Dare County Superior Court, styled as “In the Matter of Complaints Against Officials of Kill Devil Hills Police Department” and a file number of 12–R–8 (“second order”). This order stated that “numerous complaints have been received alleging improper conduct and/or conduct prejudicial to the Administration of Justice against the Kill Devil Hills police chief and/or other Kill Devil Hills Town officers having supervisory authority over the Kill Devil Hills Police Department.” It further stated that the first order of Judge Tillett “was *not* entirely complied with in a timely manner.” (Emphasis in original)

*2 The second order directed that “any Kill Devil Hills Department employee may present any complaint, grievance or appeal involving the Police Department or conduct, disciplinary action or employment to the Senior Resident Superior Court Judge [Judge Tillett] ... [who will] address any complaint, grievance or appeal as legally appropriate.” The order further required that “[a]ny petition or other filing addressing these issues made by the District Attorney or his staff shall be presented to the office of the Senior Resident Superior Court Judge of Judicial District One.” Petitioner has not implemented the new policies set forth in the second order.

On 20 January 2012, petitioner filed notice of appeal. On 20 January 2012, petitioner filed a Petition for Writ of

Mandamus or Prohibition, Petition for Writ of Supersedeas, Motion for Temporary Stay and for Additional Time to Brief the Issues. On 23 January 2012, petitioner filed an Amended Petition for Writ of Mandamus or Prohibition, Petition for Writ of Supersedeas, Motion for Temporary Stay and for Additional Time to Brief the Issues. We dismissed the 20 January motion as moot, and denied the 23 January Motion for Temporary Stay and Petition for Writ of Mandamus or Prohibition. On 13 February 2012 this Court granted the Amended Petition for Writ of Supersedeas.

II. Jurisdiction

Petitioner contends that the trial court lacked jurisdiction to enter the second order. We agree.

A. Standard of Review

[1] “[W]hether a trial court has subject matter jurisdiction is a question of law, which is reviewable on appeal *de novo*.” *Ales v. T.A. Loving Co.*, 163 N.C.App. 350, 352, 593 S.E.2d 453, 455 (2004) (citing *Harper v. City of Asheville*, 160 N.C.App. 209, 585 S.E.2d 240, 243 (2003)).

B. Analysis

[2] [3] [4] “A court cannot undertake to adjudicate a controversy on its own motion; rather, it can adjudicate a controversy only when a party presents the controversy to it, and then, only if it is presented in the form of a proper pleading. Thus, before a court may act there must be some appropriate application invoking the judicial power of the court with respect to the matter in question.” *In re Transp. of Juveniles*, 102 N.C.App. 806, 808, 403 S.E.2d 557, 558 (1991) (citations omitted). Where no action or proceeding has been commenced and is not pending before the court, jurisdiction does not exist. *Id.* at 807–808, 403 S.E.2d at 558–559.

In the instant case, there was no action filed by any person or body, other than the trial court itself, which preceded the second order, or indeed which preceded the first order. There was no pending litigation or controversy. The trial court acted beyond its jurisdiction in issuing both orders, *sua sponte*, against petitioner.

III. Inherent Authority

[5] Petitioner next contends that the trial court lacked the authority to enter the second order under its “inherent authority.” We agree.

[6] “Courts have the inherent power to do only those things which are reasonably necessary for the administration of justice *within the scope of their jurisdiction.*” *Id.* at 808, 403 S.E.2d at 559 (emphasis original).

*3 In the instant case, the trial court's second order, citing *In re Alamance Cty. Court Facil.*, 329 N.C. 84, 100, 405 S.E.2d 125, 133 (1991), noted that “[t]he Judiciary must exercise its inherent power to preserve the efficient and expeditious administration of justice and protect it from being destroyed.” Nonetheless, this “inherent power” applies only to those actions that the court takes within the scope of its jurisdiction. As previously stated, the trial court lacked jurisdiction over this matter, due to the fact that it was not pending before the court. The trial court improperly exercised its “inherent power.”

IV. Due Process

[7] Petitioner next contends that the trial court's order deprived petitioner of its due process right to notice and an opportunity to be heard. We agree.

[8] [9] [10] [11] [12] “No procedure or practice of the courts ..., even those exercised pursuant to their inherent powers, may abridge a person's substantive rights.” *Alamance Cty. Court Facil.*, 329 N.C. at 107, 405 S.E.2d at 137. Further,

[I]n order that there be a valid adjudication of a party's rights, the latter must be given notice of the action and an opportunity to assert his defense, and he *must be a party to such proceeding.* [A]ny judgment which may be rendered in ... [an] action will be wholly ineffectual as against [one] who is not a party to such action. The exercise of the court's inherent power to do what is reasonably necessary for the proper administration of justice must stop

where constitutional guarantees of justice and fair play begin.

Id. at 107–108, 405 S.E.2d at 137–38 (citations omitted) (emphasis original). “The instant that the court perceives that it is exercising, or is about to exercise, a forbidden or ungranted power, it ought to stay its action, and, if it does not, such action is, in law, a nullity.” *Id.* at 108, 405 S.E.2d at 138 (citations omitted).

In *Alamance Cty. Court Facil.*, the superior court judge conducted a hearing “to make inquiry as to the adequacy of the [Alamance County] Court facilities[.]” *Id.* at 89, 405 S.E.2d at 126. He ordered five County Commissioners be served with notice of the proceedings, yet struck down their motions to dismiss, “stating that the movants were not parties to the action and thus were without standing.” *Id.* at 89, 405 S.E.2d at 127. Our Supreme Court held that the superior court exercised “forbidden or ungranted power” that “is, in law, a nullity.” *Id.* at 108, 405 S.E.2d at 138. The Court noted that

A more reasonable, less intrusive procedure would have been for the court, in the exercise of its inherent power, to summon the commissioners under an order to show cause why a writ of mandamus should not issue, which order would call attention to their statutory duty and their apparent failure to perform that duty. If after hearing it was determined that the commissioners had indeed failed to perform their duty, as the court determined in the case before us, the court could order the commissioners to respond with a plan—perhaps in consultation with such judicial personnel as the senior resident superior court judge, the chief district court judge, the district attorney, the clerk, or other judicial officials with administrative authority—to submit to the court within a reasonable time. Such a directive would be a judicious use of the court's inherent power without either seizing the unexercised discretion of a political subdivision of the legislative branch or obtruding into

the constitutional hegemony of that branch.

*4 *Id.* at 106–107, 405 S.E.2d at 137. The Court concluded that “[b]ecause the commissioners were not parties to the action from which the order issued, they are not bound by its mandates.” *Id.* at 108, 405 S.E.2d at 138.

In the instant case, no hearing was conducted, nor was any action commenced against petitioner. No notice was given to petitioner. The trial court, of its own volition, issued an order against petitioner, without providing notice or opportunity to be heard. The trial court's actions were therefore in violation of petitioner's due process rights, and were a nullity.

V. *Mandamus Power*

[13] Petitioner finally contends that the trial court lacked the authority to enter the second order under its mandamus power. We agree.

[14] [15] [16] [17] [18] [19] Writs of mandamus may be issued to order “officials to perform their constitutional or statutory duty.” *Id.* at 104, 405 S.E.2d at 135. A writ of mandamus

[I]s the proper remedy to compel public officials ... to perform a purely ministerial duty imposed by law, where it is made to appear that the plaintiff, being without other adequate remedy, has a present, clear, legal right to the thing claimed and it is the duty of the respondents to render it to him.

But as a general rule, the writ of *mandamus* may not be invoked to review or control the acts of public officers and boards in respect to matters requiring and depending upon the exercise of discretion. In such cases *mandamus* lies only to compel public officials to take action, but ordinarily it will not require them, in matters involving the exercise of discretion, to act in any particular way.

Hamlet Hosp. & Training Sch. For Nurses v. Joint Comm. On Standardization, 234 N.C. 673, 680, 68 S.E.2d 862, 867–868 (1952) (citations omitted). Under the mandamus power

[A] court of competent jurisdiction may determine in a proper proceeding whether a public official has acted

capriciously or arbitrarily or in bad faith or in disregard of the law. And it may compel action in good faith in accord with the law. But when the jurisdiction of a court is properly invoked to review the action of a public official to determine whether he, in choosing one of two or more courses of action, abused his discretion, the court may not direct any particular course of action. It only decides whether the action of the public official was contrary to law or so patently in bad faith as to evidence arbitrary abuse of his right of choice. If the officer acted within the law and in good faith in the exercise of his best judgment, the court must decline to interfere even though it is convinced the official chose the wrong course of action. The right to err is one of the rights—and perhaps one of the weaknesses—of our democratic form of government.

Alamance Cty. Court Facil., 329 N.C. at 106, 405 S.E.2d at 136 (citation omitted).

In the instant case, the trial court did not comply with the procedures described above. The court lacked jurisdiction. The court held no hearing upon proper notice. And the court attempted to compel a specific course of action, usurping control of petitioner's personnel decisions. In doing so, it exceeded the scope of its mandamus power.

VI. *Conclusion*

*5 For the foregoing reasons, the order of the trial court, captioned “In the Matter of Complaints Against Officials of Kill Devil Hills Police Department” with file number of 12–R–8, is vacated.

VACATED.

Judges HUNTER, ROBERT C., and BRYANT concur.

EXHIBIT 2

NORTH CAROLINA COURT OF APPEALS

)	
IN THE MATTER OF COMPLAINTS)	<u>From Dare County</u>
AGAINST OFFICIALS OF KILL DEVIL)	
HILLS POLICE DEPARTMENT)	

AFFIDAVIT OF DANA HARRIS

The undersigned, Dana Harris, being first duly sworn, deposes and says as follows:

1. I am currently and have at all times relevant hereto been employed as the Assistant Police Chief for the Town of Kill Devil Hills, North Carolina. This affidavit is based on my own personal knowledge.

2. I was present for a meeting held on April 15, 2010 in the chambers of Judge Jerry Tillett. Also present at the meeting were Mayor Ray Sturza, Town Manager Debbie Diaz, Police Chief Gary Britt, and Town Attorney Dan Merrell.

3. Prior to the meeting, we were told by Dan Merrell that we had a meeting with Judge Tillett, and that this would mainly be a "venting session" for Judge Tillett. Dan Merrell advised us that we should just listen.

4. We were told to be at the courthouse for the meeting at 4:00 p.m. We were finally called back to the Judge's chambers at 4:45 p.m.

5. During the meeting, Judge Tillett stated that he had been waiting for a "test case" where no one was arrested and there were violations of liberties by the Police Department. Judge Tillett indicated that based on the incident with his son, he now had a test case.

6. Judge Tillett appeared to be upset with the Kill Devil Hills police department, and accused the department of having officers who intimidated people, lied on the stand, and were generally incompetent. He did not provide any names.

7. During the meeting, Chief Britt attempted to provide explanations and defend the Town's officers, but Judge Tillett did not appear to listen seriously. Often he simply stated that he did not believe Chief Britt.

8. Judge Tillett spent most of the meeting talking about the recent incident with his son. He stated his belief that the officers involved in the incident had no

right to question his son or the others present, and indicated that he believed the officers had violated these individual's constitutional rights.

9. When asked if he wanted to review the video tape of the incident with his son, Judge Tillett responded that he did not, and that it could be manipulated.

10. Judge Tillett appeared to be bothered that the officer dealing with his son had spelled his name out in response to an inquiry as to his identity. He asked us how that officer would like it if he was on the stand and Judge Tillett spelled his name out T-I-L-L-E-T-T. This was in reference to Judge Tillett's concerns about intimidation by officers.


11. Judge Tillett appeared to be upset for much of the meeting. At times he would point his fingers, and at one point he said "CONSPIRACY" while looking at Chief Britt.

12. Judge Tillett stated that police officers do not interpret the law, and that they have to go by what the judge says. Judge Tillett stated that if a judge said the law is that someone had to stand on their head, then that person would have to stand on their head, no matter how crazy it was.

13. At that meeting, Judge Tillett stated that he wanted something done, and stated multiple times that he had the authority to remove anyone from office. He stated that if the Town would not correct the problem then he would. Chief Britt responded that he was not going to be intimidated. This appeared to make Judge Tillett very upset.

14. Further the affiant sayeth not.

This the 27th day of November, 2012.


DANA HARRIS

STATE OF NORTH CAROLINA

COUNTY OF DARE

Personally appeared before me this day, Dana Harris, who being first duly sworn, deposed and said that he/she has read the foregoing Affidavit and knows the contents thereof; that the contents of same are true of his/her own knowledge, except as to those matters and things stated therein upon information and belief, and as to those, he/she believes them to be true.

Witness my hand and notarial seal, this the 27th of November, 2012.

Deborah B. Catow
Signature of Notary Public

Deborah B. Catow
Printed Name of Notary Public

My Commission Expires: 8-17-2014

NO. COA12-398

FIRST JUDICIAL DISTRICT

NORTH CAROLINA COURT OF APPEALS

)	
IN THE MATTER OF COMPLAINTS)	<u>From Dare County</u>
AGAINST OFFICIALS OF KILL DEVIL)	
HILLS POLICE DEPARTMENT)	

AFFIDAVIT OF DEBORA DIAZ

The undersigned, Debora Diaz, being first duly sworn,
deposes and says as follows:

1. I am currently and have at all times relevant hereto been employed as the Town Manager for the Town of Kill Devil Hills, North Carolina. This affidavit is based on my own personal knowledge.

2. I was present for a meeting held on April 15, 2010 in the chambers of Judge Jerry Tillett. Also present at the meeting were Mayor Ray Sturza, Police Chief Gary Britt, Assistant Police Chief Dana Harris, and Town Attorney Dan Merrell.

3. Prior to the meeting, the Town Attorney at the time, Dan Merrell, informed us that this was going to be a "venting session" for Judge Tillett, and that we should just listen.

4. I have reviewed the affidavit signed by Assistant Police Chief Dana Harris, and can attest that everything he said about the meeting is accurate.

5. The meeting appeared to be focused primarily on the recent incident with Judge Tillett's son, and Judge Tillett's belief that the officers involved had violated his son's rights. Judge Tillett spent the majority of the meeting talking about the incident with his son, and appeared to be angry with the Kill Devil Hills police department.

6. At one point, Judge Tillett stated that he had the authority to remove people from office. Chief Britt stated that he was not going to be intimidated. Judge Tillett seemed very angry about this.

9. On September 20, 2011, Dan Merrell delivered to the Town an Order which had been issued by Judge Tillett.

10. The Order required the Town to produce certain personnel files to Judge Tillett's chambers before the end of the day. The requested files included the personnel files of the Chief of Police and Assistant Town Manager

Shawn Murphy, as well as several other police officers. I am not aware of any pending court actions which were related to the issuance of this Order.

11. Dan Merrell informed us that Judge Tillett had the authority to issue this order, and that we had no choice but to comply.


12. At no time did Dan Merrell inform us that a hearing had been offered, or that he had allegedly declined a hearing on behalf of the Town. I did not give Dan Merrell any authority to waive a hearing on the Town's behalf.

13. On that date, Dan Merrell stated his belief that this whole thing was personal for Judge Tillett, and it was all about the incident with his son.

14. I was present when Police Chief Gary Britt asked for a copy of the Order. Dan Merrell stated that he didn't see a problem with that, but that he better call Judge Tillett to make sure. After about 15 minutes, he returned and stated that Judge Tillett was mad that we had even seen the Order, and that Dan Merrell should have just told us what to do. Dan Merrell collected all copies of the Order which we had made.

15. Throughout this process, Dan Merrell appeared to be more of an advocate for Judge Tillett rather than the Town.

This the 27 day of November, 2012.



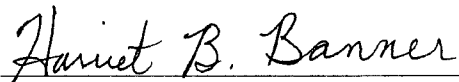
DEBORA DIAZ

STATE OF NORTH CAROLINA

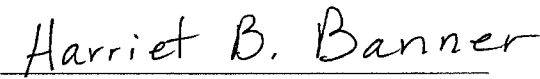
COUNTY OF DARE

Personally appeared before me this day, Debora Diaz, who being first duly sworn, deposed and said that he/she has read the foregoing Affidavit and knows the contents thereof; that the contents of same are true of his/her own knowledge, except as to those matters and things stated therein upon information and belief, and as to those, he/she believes them to be true.

Witness my hand and notarial seal, this the 27th of November, 2012.

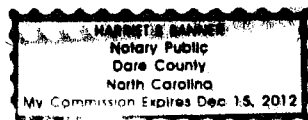


Signature of Notary Public



Printed Name of Notary Public

My Commission Expires: 12/15/2012



NORTH CAROLINA COURT OF APPEALS

IN THE MATTER OF COMPLAINTS
AGAINST OFFICIALS OF KILL DEVIL
HILLS POLICE DEPARTMENT

)
)
)
)
)

From Dare County

AFFIDAVIT OF GARY BRITT

The undersigned, Gary Britt, being first duly sworn,
deposes and says as follows:

1. I am currently and have at all times relevant hereto been employed as the Chief of Police for the Town of Kill Devil Hills, North Carolina. This affidavit is based on my own personal knowledge.

2. I was present for a meeting held on April 15, 2010 in the chambers of Judge Jerry Tillett. Also present at the meeting were Mayor Ray Sturza, Town Manager Debbie Diaz, Assistant Police Chief Dana Harris, and Town Attorney Dan Merrell.

3. Prior to the meeting, we were told by Dan Merrell that we were to meet with Judge Tillett, and that this would mainly be a "venting session" for Judge Tillett. Dan Merrell advised us that we should just listen.

4. It was my understanding that meeting was initiated as a result of an investigative stop that occurred on April 3, 2010 involving Judge Tillett's son.

5. Judge Tillett started the meeting off by stating that the officers who had stopped his son had lied about the events that took place during the stop. He stated that this was a pattern with officers in the Kill Devil Hills Police Department, and that our officers misrepresented facts and manipulated evidence.

6. Judge Tillett spoke in generalities about this accusation, and did not provide any specifics. When I asked for specifics, Judge Tillett responded that he would not give any, and that he would leave it up to me to figure it out.

7. Several times during the meeting, Judge Tillett stated that he makes the law in this jurisdiction. He stated that it was not appropriate for police officers to take it upon themselves to interpret the law or question a judge's decision.

8. Judge Tillett asked me what I was going to do about the corruption in the Kill Devil Hills Police Department. I replied that if I was aware of any corruption, I would immediately put an end to it. I again asked him for any specific cases he was aware of, so that I could take appropriate action.

9. Judge Tillett pointed to the incident with his son as an example of corruption. I stated that I had reviewed the video tape and the reports of the officers, and that I believed that they had handled the situation properly. Upon hearing this, Judge Tillett appeared angry, and stated, "I see where this is going."

10. I explained the details of the stop, and the reasons for the officer's actions.

11. Judge Tillett stated that Officer Twiddy had manipulated the videotape. I offered Judge Tillett a chance to view the video for himself. He responded, "what for? I know it has been doctored."

12. During the meeting, Judge Tillett accused the police department of trying to intimidate citizens, and asked how he could possibly rule on cases involving our officers when he already knew the reputation of the police department. Judge Tillett stated that after this

conversation, he realized where the problem came from, and stated that I must condone it.

13. Judge Tillett stated that he had the power to remove police chiefs from office, as well as town managers and mayors.

14. I told Judge Tillett that I was not going to be intimidated by him, and that he should do whatever he felt he needed to. I told him that my officers and myself were going to continue to do the right thing, and that the rule of law applied to everyone.

15. Judge Tillett made it clear that officers do not have authority to interpret laws or question a judge's ruling. He stated that if a judge says that the officer must stand on his head and spin three times, then that is what the officer must do.

16. Judge Tillett reminded us that he had the power to remove all of us from office and start a grand jury inquiry.

17. On June 24, 2011, I received a letter from Judge Tillett stating that he had received "complaints of professional misconduct" about me, and that his office would "act appropriately in accordance with statutory and/or inherent authority."

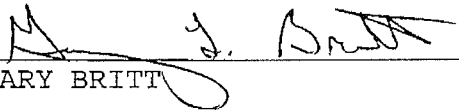
18. On September 20, 2011 Dan Merrell delivered to the Town an Order entered by Judge Tillett. The Order stated that certain personnel files were to be delivered to his chambers before the end of the day on that date. The requested files included my personnel file as well as the Assistant Town Manager and several other police officers. I am not aware of any court actions related to this Order.

19. I asked Dan Merrell if I could have a copy of the Order. Dan Merrell stated that he didn't see a problem with that, but that he better call Judge Tillett to make sure.

20. About 15 minutes later, Dan Merrell returned and stated that I could not have a copy, and that Judge Tillett was mad at him for letting anyone else even see the Order, and that we should have just been told what to do. Dan Merrell took all copies of the Order back.

21. Further the affiant sayeth not.

This the 28th day of November, 2012.



GARY BRITT

STATE OF NORTH CAROLINA

COUNTY OF DARE

Personally appeared before me this day, Gary Britt, who being first duly sworn, deposed and said that he/she has read the foregoing Affidavit and knows the contents thereof; that the contents of same are true of his/her own knowledge, except as to those matters and things stated therein upon information and belief, and as to those, he/she believes them to be true.

Witness my hand and notarial seal, this the 28th of November, 2012.



Signature of Notary Public

MARK KEVIN EVANS
Printed Name of Notary Public

My Commission Expires: 8-1-2017

NORTH CAROLINA COURT OF APPEALS

)	
IN THE MATTER OF COMPLAINTS)	<u>From Dare County</u>
AGAINST OFFICIALS OF KILL DEVIL)	
HILLS POLICE DEPARTMENT)	

AFFIDAVIT OF MARY QUIDLEY

The undersigned, Mary Quidley, being first duly sworn,
deposes and says as follows:

1. I am currently and have at all times relevant hereto been employed as the Town Clerk for the Town of Kill Devil Hills, North Carolina. This affidavit is based on my own personal knowledge.

2. On September 20, 2011, Dan Merrell, the former Town Attorney, delivered an Order which had been issued by Judge Tillett. The Order required the Town to produce certain personnel files to Judge Tillett's chambers before the end of the day.

3. After the Town produced the files, I spoke with Town Attorney Dan Merrell and told him that I needed a copy of the Order for my files. I stated that because I had produced personnel files, I needed the Court Order to establish that I had done so lawfully.

4. Dan Merrell told me that I did not need a copy of the Order, because Judge Tillett would back me up. I insisted that I needed a copy of the Order, since we had produced files in response to that Order.

5. Dan Merrell called Judge Tillett and told him my concern. I was a participant in this conversation, which was on speakerphone.

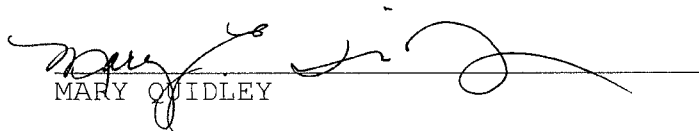
6. I told Judge Tillett that I needed a copy, and suggested that I keep a copy that was sealed. Dan Merrell made the comment that something could happen to him and Judge Tillett on the cruise they were going on together the next day, and that it might be good for me to have a copy.

7. Judge Tillett agreed to let me keep a copy of the Order in a sealed envelope, provided that Dan Merrell and myself both signed on the seal and did not open it without his permission.

8. I have maintained a copy of this Order in the sealed envelope, and have not opened it pursuant to Judge Tillett's instructions.

9. Further the affiant sayeth not.

This the 29th day of November, 2012.



MARY QUIDLEY

STATE OF NORTH CAROLINA

COUNTY OF DARE

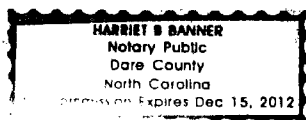
Personally appeared before me this day, Mary Quidley, who being first duly sworn, deposed and said that he/she has read the foregoing Affidavit and knows the contents thereof; that the contents of same are true of his/her own knowledge, except as to those matters and things stated therein upon information and belief, and as to those, he/she believes them to be true.

Witness my hand and notarial seal, this the 29th of November, 2012.


Signature of Notary Public

Harriet B. Banner
Printed Name of Notary Public

My Commission Expires:



NORTH CAROLINA COURT OF APPEALS

)	
IN THE MATTER OF COMPLAINTS)	<u>From Dare County</u>
AGAINST OFFICIALS OF KILL DEVIL)	
HILLS POLICE DEPARTMENT)	

AFFIDAVIT OF SHAWN MURPHY

The undersigned, Shawn Murphy, being first duly sworn,
deposes and says as follows:

1. I am currently and have at all times relevant hereto been employed as the Assistant Town Manager for the Town of Kill Devil Hills, North Carolina. This affidavit is based on my own personal knowledge.

2. On September 20, 2011 Dan Merrell delivered to the Town an Order entered by Judge Jerry Tillett. The Order stated that certain personnel files were to be delivered to Judge Tillett's chambers before the end of the day on that date. The requested files included the personnel files of the Chief of Police and my own personnel file, as well as

other police officers. I am not aware of any court actions related to this Order.

3. At the time, I asked Dan Merrell what options we had in responding to the Order. I told him I did not believe Judge Tillett had the authority to order the Town to produce personnel files of its employees to his chambers on his own volition. Dan Merrell told me that I was wrong, and that Judge Tillett had authority to order us to produce the files.

4. Dan Merrell stated that our only option was to comply, and that this was a valid court order. He responded that, "this is a judge telling you what to do, and you have to do it." I asked him if that meant we would go to jail for contempt of court if we didn't comply. He looked amused and shrugged his shoulders.

5. As Assistant Town Manager, I am the custodian of all town employee personnel files. I did not consent to the production of the requested files, but rather complied because Dan Merrell told me there was no other option.

6. I asked Dan Merrell why he thought Judge Tillett was doing this. He responded that Judge Tillett was doing this because of the incident with his son. I asked Dan Merrell whether Judge Tillett was really doing this for no real reason, and Dan Merrell responded that, "It's all

personal. This is all about his son." Dan Merrell then stated that Judge Tillett was not going to let it go.

7. At no time did Dan Merrell inform me that the Town had been offered a hearing, and at no time did I give authority to Dan Merrell to waive any right to a hearing the Town may have had.

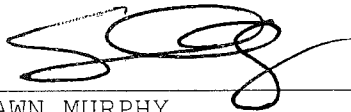
8. Later that afternoon, I was present when Police Chief Gary Britt asked Dan Merrell if he could have a copy of the Order. Dan Merrell stated that he didn't see a problem with that, but that he better call Judge Tillett to make sure.

9. About 15 minutes later, Dan Merrell returned and stated that Chief Britt could not have a copy of the Order. He stated that Judge Tillett was mad at him for letting anyone else even see the Order, and that we should have just been told what to do. Dan Merrell took all copies of the Order back.

10. Dan Merrell appeared to be more of an advocate for Judge Tillett rather than the Town during this process.

11. Further the affiant sayeth not.

This the 27th day of November, 2012.



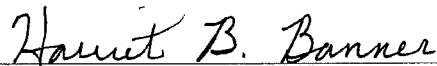
SHAWN MURPHY

STATE OF NORTH CAROLINA

COUNTY OF DARE

Personally appeared before me this day, Shawn Murphy, who being first duly sworn, deposed and said that he/she has read the foregoing Affidavit and knows the contents thereof; that the contents of same are true of his/her own knowledge, except as to those matters and things stated therein upon information and belief, and as to those, he/she believes them to be true.

Witness my hand and notarial seal, this the 27th of November, 2012.



Signature of Notary Public



Printed Name of Notary Public

My Commission Expires: 12/15/2012

