

NORTH CAROLINA COURT OF APPEALS

NORTH CAROLINA STATE
BOARD OF EDUCATION,

Plaintiff,

v.

THE STATE OF NORTH
CAROLINA and THE NORTH
CAROLINA RULES REVIEW
COMMISSION,

Defendants.

From Wake County

BRIEF FOR THE DEFENDANT-APPELLANT
STATE OF NORTH CAROLINA

FILED

2015 OCT 14 P 3:36

CLERK COURT OF APPEALS
OF NORTH CAROLINA

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From Wake County

I. Whether the Superior Court erred when it denied the State's Motions to Dismiss, when it failed to grant summary judgment in favor of the State, and when it granted summary judgment in favor of the North Carolina State Board of Education.

STATEMENT OF THE CASE

The North Carolina State Board Of Education (the “Board”) filed its Verified Complaint on 7 November 2014. (R pp 8-24) The Complaint presented seven counts that collectively alleged an infringement upon the Board’s constitutional prerogatives by the North Carolina Rules Review Commission, (the “RRC”), and the State, (collectively “Defendants”), through the implementation and application of the Administrative Procedure Act, N.C.G.S. §§ 150B-1 *et seq.* (the “APA”).

Pursuant to Rules 12(b)(1), (2) and (6) of the North Carolina Rules of Civil Procedure, on 12 January 2015 Defendants timely filed Motions to Dismiss the Board’s Verified Complaint. (R pp 25-28). On 23 February 2015, and pursuant to Rule 41(a)(1), the Board filed a voluntary dismissal of Counts Four through Seven of its Verified Complaint. (R pp 29-30). Pursuant to Rule 56 of the North Carolina Rules of Civil Procedure, on 20 March 2015 the Board filed a Motion for Summary Judgment on Counts One through Three. (R pp 31-32). On or about 19 June 2015, the Board voluntarily dismissed Count One of its Verified Complaint. (R pp 34-35).

With Count Two of its Verified Complaint, the Board seeks a declaratory judgment that the RRC’s application of the Administrative Procedure Act to the Board’s rulemaking authority violates Article IX, Section 5 of the North Carolina

Constitution. (R p 17). Likewise, Count Three of the Verified Complaint seeks a declaratory judgment that the RRC's application of the APA to review the Board's rules and rulemaking endeavors is a breach of the separation of powers, and specifically, an encroachment upon the obligations of the legislative branch of government. (R p 18).

On 29 June 2015, Defendants' Motions to Dismiss and the Board's Motion for Summary Judgment were heard in Superior Court, Wake County, by the Honorable Paul G. Gessner. On 2 July 2015, Judge Gessner issued an Order granting summary judgment in favor of the Board. (R pp 156-58). Defendants gave Notice of Appeal on 27 July 2015. (R pp 159-61). The Record on Appeal was settled by agreement on 2 November 2015, (R pp 169-71), and was docketed on 12 November 2015.

STATEMENT OF GROUNDS FOR APPELLATE REVIEW

The lower court's Order for summary judgment disposed of all claims as to the parties, and is a final adjudication. Jurisdiction is therefore vested in this Court by virtue of N.C.G.S. § 7A-27(b).

STATEMENT OF FACTS

Article I, Section 6 of the North Carolina Constitution dictates that there exist only three branches of government in this State. However, with its Verified Complaint, the Board first declares itself to be a "constitutional fixture in its own

right,” (R p 8), that possesses the “supervisory and administrative rulemaking authority on matters concerning North Carolina’s free public schools.” (R p 9). In turn, as a self-proclaimed “constitutional body,” (R p 8), the Board’s Verified Complaint then expresses its intention to “no longer voluntarily submit its rules for RRC approval,” and instead deem its own rules as “having immediate force and effect of law.” (R p 15). In doing so, the Board seeks to cast off the public review and administrative oversight that has been mandated by the General Assembly through the enactment of the APA. (R pp 9-10, 15, 17-18, 21).

The APA is the established rulemaking framework that promotes transparent governance by providing to the public an opportunity to engage in discourse about pending rules. In that regard, the RRC is a statutorily created, executive branch agency that serves to ensure that administrative rules are promulgated pursuant to the APA. N.C.G.S. § 143B-30.2. Despite its current pronouncement that the APA is not applicable to its enterprises, the Board’s has previously and repeatedly acknowledged that its rule-making authority is indeed subject to the provisions of the APA. (R pp 72-73, 88-89, 92).

ARGUMENT

I. STANDARD OF REVIEW.

On appeal, summary judgment is reviewed de novo. Tiber Holding Corp. v. DiLoreto, 170 N.C. App. 662, 665, 613 S.E.2d 346, 349, disc. review denied, 360

N.C. 78, 623 S.E.2d 263 (2005). In viewing the evidence in the light most favorable to the non-moving party, this Court determines “whether the pleadings, interrogatory answers, affidavits or other materials contained a genuine question of material fact, and whether at least one party was entitled to a judgment as a matter of law.” Medley v. N.C. Dep’t of Corr., 99 N.C. App. 296, 298, 393 S.E.2d 288, 289 (1990), aff’d, 330 N.C. 837, 412 S.E.2d 654 (1992). Summary judgment is proper where there are no genuine issues of material fact and that any party is entitled to a judgment as a matter of law. Lavelle v. Schultz, 120 N.C. App. 857, 859, 463 S.E.2d 567, 569 (1995), disc. rev. denied, 342 N.C. 656, 467 S.E.2d 715 (1996). The burden is upon the moving party to establish that there is no genuine issue as to any material fact remaining to be determined. Gray v. Hager, 69 N.C. App. 331, 317 S.E.2d 59 (1984).

The standard of review for motions predicated upon N.C.G.S. 1A-1, Rule 12(b)(1) is also de novo. Country Club of Johnston County, Inc. v. United States Fid. & Guar. Co., 150 N.C. App. 231, 563 S.E.2d 269 (2002). Under Rule 12(b)(2), the standard of review is whether the record supports the trial court’s determination that the exercise of jurisdiction over defendants is appropriate. Stann v. Levine, 180 N.C. App. 1, 22, 636 S.E.2d 214, 227 (2006). For a motion based on N.C.G.S. 1A-1, Rule 12(b)(6), the standard of review is whether the allegations made by a plaintiff, if taken as true, are sufficient to state a claim upon which relief

may be granted under some legal theory. Country Club of Johnston County, Inc. v. United States Fid. & Guar. Co., 150 N.C. App. 231, 563 S.E.2d 269 (2002).

II. THE SUPERIOR COURT ERRED WHEN IT DENIED THE STATE'S MOTIONS TO DISMISS, WHEN IT FAILED TO GRANT SUMMARY JUDGMENT IN FAVOR OF THE STATE, AND WHEN IT GRANTED SUMMARY JUDGMENT IN FAVOR OF THE NORTH CAROLINA STATE BOARD OF EDUCATION.

With this action, the Board seeks judicial sanction of what it has been unable to obtain from the General Assembly; a full exemption from the provisions of the APA. That objective fails to comport with the manifest jurisprudence of this State, and the trial court erred when it filed its contrary order. Moreover, for all practical purposes, the State is a party to this litigation solely because it is included in the caption of the matter. There remain no allegations in the Board's Verified Complaint that support any legitimate claim for relief against the State. Consequently, the trial court erred when it failed to dismiss the State.

A. The Actions Of The General Assembly Are Presumed Constitutional And The Board Was Required To Demonstrate A Constitutional Defect Beyond a Reasonable Doubt.

The Board "face[s] a heavy burden of persuasion" when it attacks the legislative acts of the General Assembly as being unconstitutional. Ivarsson v. Office of Indigent Def. Servs., 156 N.C. App. 628, 631, 577 S.E.2d 650, 652 (2003). "Every presumption favors the validity of a statute. It will not be declared invalid unless its unconstitutionality be determined beyond reasonable doubt." Id.

(quoting Baker v. Martin, 330 N.C. 331, 334, 410 S.E.2d 887, 889 (1991)). Any doubt as to the legislature's power to act must be resolved in favor of the legislature. Baker, 330 N.C. at 338, 410 S.E.2d at 889. "If constitutional requirements are met, the wisdom of the legislation is a question for the General Assembly." Hart v. State, 368 N.C. 122, 126, 774 S.E.2d 281, 283 (2015). The acts of the General Assembly are entitled to "great deference, and a statute will not be declared unconstitutional under [the] Constitution unless the Constitution clearly prohibits that statute." In re Spivey, 345 N.C. 404, 413, 480 S.E.2d 693, 698 (1997).

B. In Its Limited Role As a Party-Defendant, The State Incorporates By Reference The Arguments Made By The RRC Pertaining To The Applicability Of The APA To The Board's Rule-Making Endeavors.

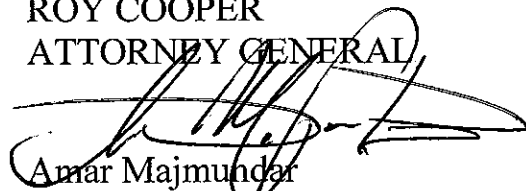
According to the laws of this State, the RRC has correctly applied its statutory rules review authority to the rules promulgated by the Board. The Board's contrary contentions, and the trial court's erroneous affirmation of those contentions, have been fully addressed by the RRC in the brief that it filed with this Court on 9 December 2015. As a party-defendant, and in its limited role, the State hereby incorporates by reference those specific arguments made by the RRC.

CONCLUSION

For the reasons stated above, the State respectfully request this Court reverse the trial court's summary judgment order, and remand the matter with instructions that the Superior Court enter judgment in favor of Defendants.

Respectfully submitted, this the 14TH day of December, 2015.

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N.C. R. App. P. 33(b) Certification: I certify that the attorney listed below has authorized me to list her name on this document as if she had personally signed it.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 28(j) of the Rules of Appellate Procedure, counsel for Defendant-Appellant the State of North Carolina certifies that the foregoing brief, which was prepared using a proportional font, is less than 8,750 words (excluding cover, indexes, tables of authorities, certificates of service, this certificate of compliance, and appendices) as reported by the word-processing software.

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A handwritten signature in black ink, appearing to read 'Amar Majumdar', is written over the printed name.

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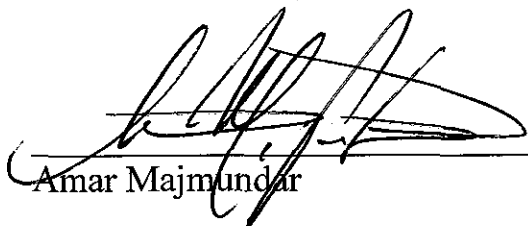
The undersigned attorney for Defendant-Appellant the State of North Carolina hereby certifies that on this day the foregoing Brief of Defendant-Appellant North Carolina Rules Review Commission was served upon counsel for all parties in this action by depositing a copy thereof in the United States mail, First Class, postage pre-paid, and addressed as follows:

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