No. COA 15-1229 TENTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

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NORTH CAROLINA STATE BOARD OF EDUCATION, Plaintiff-Appellee, v. THE STATE OF NORTH CAROLINA and THE NORTH CAROLINA RULES REVIEW COMMISSION, Defendants-Appellants.	)	From Wake County

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PLAINTIFF-APPELLEE NORTH CAROLINA STATE BOARD OF EDUCATION'S MOTION TO DISMISS

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Pursuant to Rule 37(a) of the North Carolina Rules of Appellate Procedure, the North Carolina State Board of Education ("the Board") moves to dismiss the argument presented on pages 30-36 of the brief filed by Defendants North Carolina Rules Review Commission ("the RRC") and incorporated by reference on page 7 of the State's brief.

In the alternative, the Board moves to dismiss the entire appeal.

INTRODUCTION

Until recently, Defendants agreed with the Board that the only claims before the trial court on summary judgment were *as-applied* constitutional challenges, not facial constitutional challenges. Now, for the first time on appeal, Defendants attempt to reverse course. Defendants now argue that these claims were *facial* constitutional challenges that should have been heard by a three-judge panel.

For two reasons, this Court should dismiss this argument.

First, and most importantly, this argument is not a subject-matter jurisdiction argument that may be raised at any time. It is a procedural argument that is capable of being waived, and Defendants have waived it. The Court need not go any further in resolving these issues.

Second, Defendants' argument that this Court should direct the trial court to provide additional "clarification" about its order is untimely. Defendants failed to follow the Rules of Civil Procedure that impose a ten-day deadline on these requests. Defendants are not entitled to a remand now, more than six months later.

In the alternative, if the Court were to reach Defendants' unpreserved procedural argument and find it meritorious, then

Defendants filed this appeal in the wrong appellate court. This would require dismissal of the entire appeal.

For these reasons, Defendants' procedural argument should be dismissed. In the alternative, Defendants' entire appeal should be dismissed.

STATEMENT OF FACTS

The Board incorporates by reference the statement of facts from its brief. (Pl. Br. at 3-11). Additional facts are discussed where relevant below.

ARGUMENT

I. DEFENDANTS' PROCEDURAL ARGUMENT SHOULD BE DISMISSED BECAUSE THEY WAIVED IT.

A. Defendants' procedural argument does not pertain to subject-matter jurisdiction and, therefore, is capable of being waived.

Defendants recognize that styling their procedural argument as a "subject-matter jurisdiction" argument is their only hope for avoiding the consequences of waiver. This is because subject-matter jurisdiction issues may be raised at any time. To that end, Defendants' brief states that "a single Superior Court judge [did] not have subject matter jurisdiction" to decide this case. (RRC Br. at 30); (State's Br. at 7).

As authority for that proposition, Defendants cite four cases: two parental rights cases, a criminal case, and a case involving the engineering board. None of those cases involved N.C.G.S. § 1-267.1, the three-judge panel statute that forms the basis for Defendants' procedural argument. In fact, none of those cases involved three-judge panels at all. They are irrelevant.

Instead, Defendants' procedural argument is foreclosed by the Supreme Court's decision in *Stephenson v. Bartlett*, 358 N.C. 219, 595 S.E.2d 112 (2004). In *Stephenson*, the defendants argued that the three-judge panel provision of N.C.G.S. § 1-276.1 "unconstitutionally creates a new court." *Id.* at 227, 595 S.E.2d at 117. A unanimous Court rejected that argument.

The Court in *Stephenson* explained that N.C.G.S. § 1-267.1 is merely a "procedural" statute that places jurisdiction over certain cases "in the Superior Court," not a new "three-judge court." *Id.* at 227, 595 S.E. 2d at 117-18. Thus, *Stephenson* explained, the Wake County Superior Court sitting as a three-judge panel was not "a new court"; rather, it was the same Wake County Superior Court as it had always been—only in certain cases, it has two more judges at the bench. *Id.*

The *Stephenson* defendants also argued that a companion statute "unconstitutionally restricts to Wake County the jurisdiction of the three-judge panel of the superior court hearing redistricting cases." *Id.* at 228, 595 S.E.2d at 118 (discussing N.C.G.S. § 1-81.1). The Court likewise rejected this argument, holding that "this provision does not affect jurisdiction." *Id.*

In sum, *Stephenson* clarified that North Carolina's three-judge panel statutes do not affect subject matter jurisdiction because they do not create "new courts." Other courts interpreting similar provisions have reached the same result. *See, e.g.*, *Fails v. Va. State Bar*, 574 S.E.2d 530 (Va. 2003) (holding that three-judge panel provision did not implicate subject-matter jurisdiction and, therefore, is waivable); *Brown v. Va. State Bar*, 621 S.E.2d 106 (Va. 2005) (same).

These pronouncements are consistent with the basic definition of subject-matter jurisdiction. Subject-matter jurisdiction refers to the power of a particular *court* to decide a particular type of *case*. *In re M.I.W.*, 365 N.C. 374, 379, 722 S.E.2d 469, 473 (2012) (quoting *Black's Law Dictionary* 654 (9th ed. 2009)) (stating that subject-matter jurisdiction "is defined as 'a court's power to decide a case'"). As

Stephenson makes clear, North Carolina's three-judge panel statutes merely confer subject-matter jurisdiction on the Wake County Superior Court. These statutes do not confer subject-matter jurisdiction on some other "Three-Judge Court of Wake County." Indeed, they could not do so without creating "new" courts in violation of Article IV of the North Carolina Constitution.

For that reason, Defendants' attempt to fit their new procedural argument within the rubric of "subject-matter jurisdiction" is illusory. After all, Defendants do not contend that the case was heard by the wrong *court*. Rather, they argue that the case was heard by the right court (the Superior Court of Wake County), but that it should have heard the case with two more judges at the bench. This "procedural" argument—in the words of the *Stephenson* Court—does not implicate subject-matter jurisdiction. *Id.* at 228, 595 S.E.2d at 118.

Accordingly, Defendants' procedural argument is not a subject-matter jurisdiction argument, and it is capable of being waived.

B. Defendants waived their procedural argument under the invited error doctrine.

The invited error doctrine holds that an appellant "may not complain of action which he induced" in the trial court. *Frugard v.*

Pritchard, 338 N.C. 508, 512, 450 S.E.2d 744, 746 (1994). Under this doctrine, North Carolina's appellate courts have "consistently denied appellate review to [appellants] who have attempted to assign error to the granting of their own requests." *State v. Wilkinson*, 344 N.C. 198, 214, 474 S.E.2d 375, 383 (1996).

Here, Defendants induced the very action that they now seek to overturn. After the Board voluntarily dismissed its facial constitutional challenges, Defendants sought the appointment of a single Superior Court Judge—as opposed to a three-judge panel—to rule on the remaining as-applied challenges. (R Supp pp 179-83). Joined by the Board, Defendants filed a motion requesting that Wake County's Senior Resident Superior Court Judge appoint the Honorable Paul G. Gessner to preside over the case. *Id.*

In the motion, Defendants stated that "the interests of justice will be best served by the appointment of Judge Gessner to preside over all proceedings." (R Supp p 181). The motion further stated that "Judge Gessner would be particularly well-suited to hear these motions because of his past experience with state constitutional litigation, his experience in cases involving important state governmental matters,

and his well-earned reputation for fairness and impartiality." *Id.* Consequently, at the parties' request, Judge Gessner—and not a three-judge panel—was assigned to preside over the remaining as-applied challenges. (R p 33).

Once the matter was before Judge Gessner, Defendants repeatedly acknowledged that the only remaining claims were *as-applied* challenges. (R p 57) ("[I]n light of this 'as applied' constitutional challenge, the Court should deny the Board's Motion for Summary Judgment"). Defendants asked Judge Gessner—as opposed to a three-judge panel—to dismiss the Board's as-applied challenges or, in the alternative, enter summary judgment in their favor. (R pp 36-55); (T p 63).

Now, having lost before the "experienced," "fair," and "impartial" Superior Court Judge of their choosing, Defendants attempt to disavow their earlier representations. After hiring new lawyers for this appeal, the RRC argues in its brief that granting its own request that Judge Gessner preside over the case was error. In other words, the RRC's appellate counsel is arguing that the RRC's trial counsel caused the trial court to err.

This is a textbook example of the invited error doctrine. Defendants cannot urge the trial court to grant a certain request, then argue on appeal—through new lawyers—that the trial court erred when it granted that request.

Accordingly, the invited error doctrine requires that Defendants' procedural argument be dismissed.

C. At a minimum, Defendants' procedural argument is barred by the waiver rule.

Rule 10(a)(1) of the North Carolina Rules of Appellate Procedure states that "[i]n order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make." N.C. R. App. P. 10(a)(1).

This "waiver rule" in Rule 10(a)(1) clarifies that unless a party timely objects to an alleged error at trial, any argument on appeal about the alleged error has been waived and must be dismissed. *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 195-96, 657 S.E.2d 361, 364 (2008). Therefore, "where a theory argued on appeal was not raised [in the court below,] the law does not permit parties to swap horses between courts in order to get a better mount."

State v. Sharpe, 344 N.C. 190, 194, 473 S.E.2d 3, 5-6 (1996) (quoting *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934)).

Here, if the invited error doctrine does not bar Defendants' procedural argument, then at a minimum, the waiver rule does. Defendants never made their procedural argument to the trial court. It was only *after* the trial court ruled against them that the RRC's new lawyers raised the issue for the first time on appeal. The law does not permit Defendants to "swap horses" on appeal like this to "get a better mount." *Id.*

Accordingly, if the invited error doctrine does not bar Defendants' procedural argument, then at a minimum, the waiver rule does.

II. DEFENDANTS' REQUEST THAT THE TRIAL COURT PROVIDE "CLARIFICATION" IS UNTIMELY.

Rule 52(b) provides that "[u]pon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly." N.C. R. Civ. P. 52(b). The ten-day period in Rule 52(b) cannot be expanded. N.C. R. Civ. P. 6(b). Therefore, "a party must make a motion under Rule 52(b) within ten days or [the] motion will be barred." *Parrish v. Cole*, 38 N.C. App. 691, 694, 248 S.E.2d 878, 880 (1978).

The primary purpose of a Rule 52(b) motion "is to give the appellate court . . . a clearer understanding of the trial court's decision." *DOT v. Elm Land Co.*, 163 N.C. App. 257, 268, 593 S.E.2d 131, 138 (2004) (citing *Branch Banking & Tr. Co. v. Home Fed. Sav. & Loan Ass'n.*, 85 N.C. App. 187, 198, 354 S.E.2d 541, 548 (1987)). This is "typically for appeal purposes," *Spoon v. Spoon*, 755 S.E.2d 66, 70 (N.C. Ct. App. 2014), and is done to "avoid remand by the appellate court for further findings." *Branch Banking*, 85 N.C. App. at 198, 354 S.E.2d at 548; *Parrish*, 38 N.C. App. at 694, 248 S.E.2d at 879.

Here, Defendants did not move the trial court under Rule 52(b) to provide "clarification" about its summary judgment order. Yet nearly six months later, in their brief to this Court, Defendants request that the trial court provide such clarification. (RRC Br. at 32) (requesting a remand for the trial court to "expressly specify the scope of the declaratory judgment it has entered."). This is nothing more than a Rule 52(b) request for the trial court to clarify certain features of its judgment. This request, however, is far too late: the ten-day deadline to make this request expired nearly six months ago. N.C. R. Civ. P. 52(b).

Defendants' tactics flout the purpose of Rule 52(b). The Rule is designed to "provide the appellate court with a better understanding of the trial court's decision, thus promoting the judicial process." *Parrish*, 38 N.C. App. at 694, 248 S.E.2d at 880. It is designed to "*avoid* remand by the appellate court for further findings"—the very relief that Defendants seek here. *Branch Banking* at 198-99, 354 S.E.2d at 548 (emphasis added). These sandbagging tactics do not "promot[e] the judicial process"; they *undermine* the judicial process. *Parrish*, 38 N.C. App. at 694, 248 S.E.2d at 880 (noting further that Rule 52(b) is designed to "avoid multiple appeals").

Defendants' delay, moreover, has real consequences. On 31 December 2015, Judge Gessner retired from the bench.[1] Thus, Judge Gessner is no longer available to "expressly specify the scope of the declaratory judgment [he] has entered." (RRC Br. at 32). Had Defendants made a timely request for clarification under Rule 52(b) within ten days of Judge Gessner's summary judgment order, there would be no such problem.

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[1] This Court may take judicial notice of this fact. *West v. Slick*, 313 N.C. 33, 45, 326 S.E.2d 601, 608-09 (1985); *State ex rel. Utils. Comm'n. v. S. Bell Tel. & Tel. Co.*, 289 N.C. 286, 288, 221 S.E.2d 322, 323 (1976).

For these reasons, Defendants' request to "remand for clarification" is no more than a time-barred Rule 52(b) request. Accordingly, this argument should be dismissed.

III. IF THE COURT WERE TO REACH DEFENDANTS' UNPRESERVED PROCEDURAL ARGUMENT AND FIND IT TO BE MERITORIOUS, THEN THE ENTIRE APPEAL MUST BE DISMISSED FOR LACK OF JURISDICTION.

It is well-settled that a jurisdictional defect in an appeal "precludes the appellate court from acting in any manner other than to dismiss the appeal." *Dogwood*, 362 N.C. at 197, 657 S.E.2d at 365. One of the jurisdictional requirements for an appeal is that it must be filed with the correct appellate court. N.C. R. App. P. 3(d); *In re Albemarle*, 300 N.C. 337, 344, 266 S.E.2d 661, 665 (1980); *Iredell Mem'l Hosp. v. N.C. Dep't of Human Res.*, 103 N.C. App. 637, 406 S.E.2d 304 (1991).

When parties appeal to the wrong court, the appellate court has no jurisdiction to decide the appeal. *See, e.g.*, *Albemarle*, 300 N.C. at 344, 266 S.E.2d at 665 (vacating decision of Court of Appeals for lack of jurisdiction); *Iredell Memorial*, 103 N.C. App. at 641, 406 S.E.2d at 307). When that happens, the Court must dismiss the appeal. *Id.*; *see also Dogwood*, 362 N.C. at 197, 657 S.E.2d at 365.

Here, if the Court were to reach Defendants' unpreserved procedural argument and find it to be meritorious, it would mean that Defendants filed this appeal in the wrong appellate court. This is because Defendants' procedural argument relies on a single premise: that Judge Gessner's order "finds that an act of the General Assembly is facially invalid." N.C.G.S. § 1-267.1(c). If Defendants are correct about this, then it follows that Judge Gessner's order "holds that an act of the General Assembly is facially invalid." N.C.G.S. § 7A-27(a1). Under N.C.G.S. § 7A-27(a1), an order holding that an act of the General Assembly is facially invalid must be appealed "directly to the *Supreme Court*," not the Court of Appeals. *Id.* (emphasis added).

Therefore, if the Court were to reach Defendants' unpreserved procedural argument and find it to be meritorious, it would necessarily mean that Defendants filed their appeal in the wrong appellate court. This would "preclude the appellate court from acting in any manner other than to dismiss the appeal." *Dogwood*, 362 N.C. at 197, 657 S.E.2d at 365; *see also, e.g.*, *Albemarle*, 300 N.C. at 344, 266 S.E.2d at 665 (vacating Court of Appeals' decision when statute provided for appeal directly to Supreme Court).

Defendants seem to acknowledge this jurisdictional defect in their brief, but they blame the trial court. (RRC Br. at 35-36) (citing N.C.G.S. § 7A-27(a1)). Defendants could have avoided this situation, however, if they had simply complied with Rule 52(b), as described above. This is because the tolling provisions of Rule 3 of the North Carolina Rules of Appellate Procedure expressly allow parties to seek clarification about a trial court order *before* their time to appeal that order expires. *See* N.C. R. App. P. 3(c) (tolling the thirty-day deadline for appeal when a Rule 52(b) motion has been filed).

If Defendants were concerned that the trial court's order was in need of "clarification," they should have filed a Rule 52(b) motion asking Judge Gessner to clarify his ruling. This motion would have tolled their deadline for appealing the order. N.C. R. App. P. 3(c). This would have allowed Judge Gessner to clarify his ruling *before* the deadline ran for Defendants to choose between filing their appeal with this Court or with the Supreme Court.

Defendants never took advantage of those post-judgment procedures. Instead, they ignored Rule 52(b) and filed their appeal with this Court. If they wanted to avoid the possibility that their appeal

would be dismissed, they should have simply followed the Rules of Civil Procedure.

For these reasons, if the Court were to reach Defendants' unpreserved procedural argument and find it to be meritorious, it would mean that Defendants filed this appeal in the wrong appellate court. In that instance, the Court should dismiss the entire appeal.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court dismiss the procedural argument set forth on pages 30-36 of the RRC's brief and incorporated by reference on page 7 of the State's brief.

In the alternative, the Board respectfully requests that the Court dismiss Defendants' entire appeal.

Respectfully submitted, this the 26th day of January, 2016.

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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

I do hereby certify that I have this day served a copy of the foregoing by depositing a copy thereof in an envelope bearing sufficient postage in the United States mail, addressed to the following persons at the following addresses, which are the last addresses known to me:

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This the 26th day of January, 2016.

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