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via U.S. Mail

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RE: *NAACP, et al. v. Gaston County, et al.*
Case No. 20-CVS-3996 (Gaston County)

Dear Counsel:

Enclosed and served upon you, please find the file-stamped copy of DEFENDANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO TRANSFER TO THE APPROPRIATE THREE-JUDGE PANEL in the above-referenced matter.

Please contact me if you have any questions.

Sincerely,

Bradley K. Overcash

BKO:wg
Enclosure

STATE OF NORTH CAROLINA

COUNTY OF GASTON

IN THE GENERAL
COURT OF JUSTICE
SUPERIOR COURT DIVISION
20-CVS-3996

NAACP (NATIONAL ASSOCIATION
FOR THE ADVANCEMENT OF
COLORED PEOPLE) GASTON
COUNTY BRANCH; NABVETS
(NATIONAL ASSOCIATION FOR
BLACK VETERANS, INC.) GASTON
COUNTY CHAPTER; ETU MU LAMDA
CHAPTER OF ALPHA PHI ALPHA
FRATERNITY, INC.; KAREN BRINGLE;
GRACIE MOORE; AND JOSÉ TROCHE,

Plaintiffs,

v.

GASTON COUNTY; GASTON COUNTY
BOARD OF COMMISSIONERS; and
COMMISSIONERS TRACY PHILBECK,
TOM KEIGHER, CHAD BROWN, JACK
BROWN, ALLEN FRALEY, BOB HOVIS
and RONNIE WORLEY, in their official
capacities,

Defendants.

**DEFENDANTS' MOTION TO
DISMISS OR, IN THE
ALTERNATIVE, TO TRANSFER
TO THE APPROPRIATE THREE-
JUDGE PANEL**

NOW COME, Gaston County, (the incorrectly/improperly named) Gaston County Board of Commissioners, and (the incorrectly/improperly named) Commissioners Tracy Philbeck, Tom Keigher, Chad Brown, Jack Brown (who is no longer a County Commissioner), Allen Fraley, Bob Hovis, and Ronnie Worley, in their official capacities, Defendants herein, by and through counsel and pursuant to N.C. GEN. STAT. § 1A-1, Rules 12(b)(1), (3), (6), and (7), § 1-81.1(a1), § 1-267.1(a1), § 100-2.1, and other provisions of law, and move this Honorable Court to dismiss this action,

or alternatively, to transfer it to a three-judge panel. In support hereof, the Defendants show unto this Court as follows:

Introduction

1. In their Complaint, the Plaintiffs allege, *inter alia*, that the Confederate Heroes Monument (the “Monument”) in front of the Gaston County Courthouse “threatens public safety and stands in violation of multiple provisions of the North Carolina Constitution.” Complaint ¶ 1. They are petitioning this Court to enter an order requiring the Defendants to remove the Monument. Complaint ¶ 65(b).

2. However, the Defendants lack the authority to move the Monument pursuant to N.C. GEN. STAT. § 100-2.1 (the “Monuments Law”). As a result, the Complaint fails to state a claim upon which relief can be granted and, therefore, should be dismissed pursuant to N.C. GEN. STAT. § 1A-1, Rule 12(b)(6). This action is, in fact, a challenge to the constitutionality of the Monuments Law. As a result, a dismissal (or alternatively, a transfer) is warranted pursuant to the Monuments Law and N.C. GEN. STAT. § 1A-1, Rules 12(b)(1), (3), and (7), as the proper subject matter jurisdiction lies with the Wake County three-judge panel, said panel is the proper venue, and the State is the necessary and proper party to any such constitutional challenge. The alternate requested relief of a transfer to a Wake County three-judge panel is also supported by N.C. GEN. STAT. §§ 1-267.1(a1) and 1-81.1(a1).

3. In addition, the Gaston County Board of Commissioners and individual commissioners in their official capacities are improper/redundant parties and, therefore, should be dismissed regardless of the outcome of the other relief sought.

Standard of Review

4. A motion to dismiss pursuant to North Carolina Rule of Civil Procedure 12(b)(6) “tests the legal sufficiency of the complaint.” *Stanback v. Stanback*, 297 N.C. 181, 185, 254 S.E.2d 611, 615 (1979); N.C. GEN. STAT. § 1A-1, Rule 12(b)(6). In considering a Rule 12(b)(6) motion to dismiss, the Court must take the factual allegations of the complaint as true and determine whether, as a matter of law, the allegations are sufficient to state a claim upon which relief may be granted. *Affordable Care, Inc. v. N.C. State Bd. of Dental Exm’rs*, 153 N.C. App. 527, 532, 571 S.E.2d 52, 57 (2002). “[D]ismissal is proper . . . when the complaint on its face reveals that no law supports plaintiff’s claim.” *Schloss Outdoor Adver. Co. v. City of Charlotte*, 50 N.C. App 150, 152, 272 S.E.2d 920, 922 (1980).

5. Furthermore, the Rules provide that an action may be dismissed (or other relief granted) for the lack of subject matter jurisdiction, improper venue, and the failure to include a necessary party. N.C. GEN. STAT. § 1A-1, Rule 12(b)(1), (3), and (7).

Dismissal is Warranted for Lack of Defendants’ Authority to Grant Relief

6. The Plaintiffs have failed to state a claim upon which relief can be granted because the Defendants lack the authority to move the Monument pursuant to the Monuments Law which states in pertinent part:

An object of remembrance located on public property may not be permanently removed and may only be relocated, whether temporarily or permanently, . . . [w]hen appropriate measures are required by the State or a political subdivision of the State to preserve the object [or] [w]hen necessary for construction, renovation, or

reconfiguration of buildings, open spaces, parking, or transportation projects.

N.C. GEN. STAT. § 100-2.1(b)(1-2). An object of remembrance is defined as “a monument, memorial, plaque, statue, marker, or display of a permanent character that commemorates an event, a person, or military service that is part of North Carolina's history.” N.C. GEN. STAT. § 100-2.1(b). The Monuments Law provides certain exceptions for the removal or relocation of an object of remembrance, including when “a building inspector or similar official has determined [that the object] poses a threat to public safety because of an unsafe or dangerous condition.” N.C. GEN. STAT. § 100-2.1(c)(3).

7. The Monuments Law provides the mandatory statutory mechanisms for the lawful removal and/or relocation of monuments and memorials with which the Defendants are required to comply. The Plaintiffs allege that the Monuments Law does not preclude the Defendants from removing the Monument because the “public safety” exception applies. Complaint ¶¶ 43-44. However, the Plaintiffs have wholly failed to allege any facts supporting the requirement that “a building inspector or other similar official has determined that [the Monument] poses a threat due to an unsafe or dangerous condition.” In fact, the Plaintiffs have failed to allege any facts supporting any exception and/or circumstance under which the Defendants would be permitted to remove or relocate the Monument. As such, the Plaintiffs have failed to state a claim upon which relief can be granted, and the Complaint should be dismissed.

8. This action is directed against Gaston County. However, North Carolina courts have consistently held that each county government is an arm, or political subdivision, of the State government. In *Martin v. Board of Commissioners*, the North Carolina Supreme Court held that counties “are simply agencies of the state, constituted for the convenience of local administration in certain portions of the state’s territory.” 208 N.C. 354, 365, 180 S.E. 777, 783 (1935); *see also Lanvale Props., LLC v. Cnty. of Cabarrus*, 366 N.C. 142, 150, 731 S.E.2d 800, 807 (2012); *Stephenson v. Bartlett*, 355 N.C. 354, 364, 562 S.E.2d 377, 385 (2002) (stating that counties “serve as agents and instrumentalities of State government”); *Harris v. Bd. of Comm’rs*, 274 N.C. 343, 347, 163 S.E.2d 387, 390 (1968) (holding that “[t]he powers and functions of a county bear reference to the general policy of the state, and are in fact an integral portion of the general administration of state policy”). In the case *sub judice*, the Plaintiffs filed the Complaint against Gaston County, which is an agency of the State of North Carolina. As such, the State’s political subdivision is not permitted to remove the Monument when such action is forbidden by a law enacted by the principal government. Therefore, a dismissal is required under these circumstances.

Dismissal or Transfer is Warranted due to State Law Challenge

9. The plain language of § 1-267.1(a1) and § 1-81.1(a1) mandates that this case be heard by a three-judge panel in Wake County. “[A]ny facial challenge to the validity of an act of the General Assembly shall be transferred[,] pursuant to G.S. 1A-1, Rule 42(b)(4), to the Superior Court of Wake County and shall be heard and determined by a three-judge panel of the Superior Court of Wake County.” N.C. GEN.

STAT. § 1-267.1(a1). Moreover, North Carolina law states that “[v]enue lies exclusively with the Wake County Superior Court with regard to any claim seeking” that an act of the General Assembly not be enforced because it “is facially invalid on the basis that [it] violates the North Carolina Constitution or federal law.” N.C. GEN. STAT. § 1-81.1(a1).

10. In the case-at-bar, the Plaintiffs are bringing what is tantamount to a facial challenge to the Monuments Law. If counties, as political subdivisions of the State, are constitutionally required to remove monuments, memorials, and other objects covered by the law, without an applicable exception, then the Monuments Law would effectively be struck down on constitutional grounds. Therefore, this case should be dismissed, or alternatively, transferred.

11. Both § 1-267.1(a1) and § 1-81.1(a1) require that the transfer of a facial challenge be conducted pursuant to N.C. GEN. STAT. § 1A-1, Rule 42(b)(4), which states in pertinent part:

[A]ny facial challenge to the validity of an act of the General Assembly . . . shall be heard by a three-judge panel as long as the challenge was raised by the claimant in the complaint or amended complaint, by the defendant in the defendant’s answer or responsive pleading, or within 30 days of the filing of the defendant’s answer or responsive pleading.

N.C. GEN. STAT. § 1A-1, Rule 42(b)(4). Once a party has properly raised the challenge, the court “shall, on its own motion, transfer that portion of the action . . . after all other matters in the action have been resolved [and] a determination as to the facial validity of an act of the General Assembly must be made in order to completely resolve any matters in the case.” *Holdstock v. Duke Univ. Health Sys.*,

841 S.E.2d 307, 313-14 (2020); N.C. GEN. STAT. § 1A-1, Rule 42(b)(4). In *Holdstock v. Duke University Health System*, the Court of Appeals acknowledged that an *in pari materia* reading of Rule 42(b)(4), § 1-267.1(a1), and § 1-81.1(a1) ultimately indicates that the three-judge panel is the only court with jurisdiction to enter an order finding that an act of the General Assembly is unconstitutional as long as the facial challenge was raised according to the requirements of Rule 42(b)(4). 841 S.E.2d at 314.

12. In this case, the Plaintiffs allege that the Defendants have failed to comply with their alleged legal responsibility to remove or relocate the Monument. However, for the reasons described *supra*, any such action is precluded by the Monuments Law. Therefore, the relief that the Plaintiffs seek is only lawful if the Monuments Law is rendered invalid. As such, based on their allegations and requested relief, the Plaintiffs have raised a facial challenge to the constitutionality of the Monuments Law which much be determined before any other matter in the case can be resolved. Consequently, this action, if not dismissed for the reasons stated herein, must be transferred to the Superior Court of Wake County for consideration by a three-judge panel pursuant to § 1-267.1(a1) and § 1-81.1(a1).

13. In addition to the grounds for dismissal, or alternatively transfer, set forth above, this case should be dismissed, or transferred, pursuant to Rule 12(b)(1) as the proper subject matter jurisdiction lies with the Wake County three-judge panel and Rule 12(b)(3) as Wake County is the proper venue.

14. Given that this case is a direct challenge to a duly enacted State law, the Plaintiffs failed to name the State of North Carolina as a necessary defendant as

contemplated by Rules 12(b)(7) and 19. A party must be joined when it is “united in interest” with another party. N.C. GEN. STAT. § 1A-1, Rule 19. A party is considered necessary “when [it] is so vitally interested in the controversy that a valid judgment cannot be rendered in the action, completely and finally determining the controversy, without [its] presence.” *G&S Bus. Servs., Inc. v. Fast Fare, Inc.*, 94 N.C. App. 483, 488, 380 S.E.2d 792, 795 (1989) (quoting *Booker v. Everhart*, 294 N.C. 146, 156, 240 S.E.2d 360, 365-66 (1978)). “The term ‘necessary parties’ embraces all [entities] who have or claim material interests in the subject matter of a controversy [whose] interests will be directly affected by an adjudication” thereof. *Wall v. Sneed*, 13 N.C. App. 719, 724, 187 S.E.2d 454, 457 N.C. (1972).

Defendant Board and Defendant Individual Commissioners Should be Dismissed

15. The Gaston County Board of Commissioners and individual commissioners in their official capacities are redundant parties and should be dismissed. “[A]n action against a county agency which directly affects the rights of the county is in fact an action against the county.” *Meyer v. Walls*, 347 N.C. 97, 104, 489 S.E.2d 880, 884 (N.C. 1997). “[O]fficial-capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent.” *Moore v. City of Creedmoor*, 345 N.C. 356, 367, 481 S.E.2d 14, 21 (N.C. 1997) (citations omitted) (internal quotation marks omitted). In other words, “where the governmental entity may be held liable for damages resulting from its official policy, a suit naming public officers in their official capacity is redundant. Consequently, the claims against [individuals] . . . in their official capacities are merely another way

of bringing suit against” the local government of which the individuals are officers. *Id.*, 481 S.E.2d at 21-22.

16. The Plaintiffs have brought this suit against individual Commissioners Tracy Philbeck, Tom Keigher, Chad Brown, Jack Brown (who is no longer a County Commissioner), Allen Fraley, Bob Hovis, and Ronnie Worley in their official capacities. However, this is a redundant mechanism for bringing a lawsuit against Gaston County. Plaintiffs have also expressly named the Gaston County Board of Commissioners as a party which is similarly redundant as the Gaston County Board of Commissioners is a county agency which directly affects the rights of Gaston County. Therefore, a suit against the individual Commissioners in their official capacities and/or the Gaston County Board of Commissioners is effectively a suit against the county itself. As such, the only party which the Plaintiffs have properly named (subject to and without waiving dismissal arguments noted herein) is Gaston County. For these reasons, the individual Defendants and the Gaston County Board of County Commissioners, should be dismissed.

WHEREFORE, Defendants Gaston County, (the incorrectly/improperly named) Gaston County Board of Commissioners, and (the incorrectly/improperly named) Commissioners Tracy Philbeck, Tom Keigher, Chad Brown, Jack Brown, Allen Fraley, Bob Hovis, and Ronnie Worley, in their official capacities, respectfully request that this Honorable Court dismiss this action with prejudice or, in the alternative, transfer this matter to the Superior Court of Wake County for

consideration by a three-judge panel. The Defendants pray for any additional relief this Court deems just and proper.

RESPECTFULLY SUBMITTED, the 15th day of January, in the year 2021.



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CERTIFICATE OF SERVICE

This is to certify that on this date I served the foregoing via e-mail and by depositing a copy thereof in the United States mail, postage prepaid, and addressed to counsel for Plaintiffs as follows:

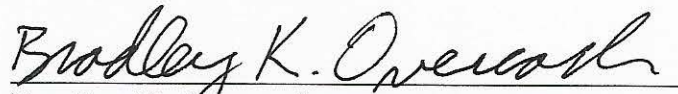
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DATED, this the 15th day of January, in the year 2021.



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