

NORTH CAROLINA COURT OF APPEALS

STATE OF NORTH CAROLINA ex)
rel. COMMISSIONER OF)
INSURANCE and NORTH)
CAROLINA RATE BUREAU,)

Appellees,)

v.)

DARE COUNTY, WASHINGTON)
COUNTY, CURRITUCK COUNTY,)
HYDE COUNTY, CARTERET)
COUNTY, NEW HANOVER)
COUNTY, BRUNSWICK COUNTY,)
CHOWAN COUNTY,)
PERQUIMANS COUNTY,)
TYRRELL COUNTY, PAMLICO)
COUNTY, PASQUOTANK)
COUNTY, TOWN OF NAGS HEAD,)
TOWN OF DUCK, TOWN OF)
SOUTHERN SHORES, TOWN OF)
INDIAN BEACH, TOWN OF PINE)
KNOLL SHORES, TOWN OF)
EMERALD ISLE, TOWN OF KILL)
DEVIL HILLS, TOWN OF KURE)
BEACH, TOWN OF CEDAR POINT,)
TOWN OF HERTFORD, STARCO)
REALTY & CONSTRUCTION, INC.)
and JOSEPH M. GERAGHTY,)

Appellants.)

FILED
2010 MAR 19 P 3:24
CLERK COURT OF APPEALS
OF NORTH CAROLINA

From Wake County
09 CVS 7841

North Carolina
Commissioner of Insurance
Docket No. 1434
Docket No. 1435

No. COA09-1172

NORTH CAROLINA COURT OF APPEALS

DARE COUNTY, TOWN OF NAGS
HEAD, TOWN OF SOUTHERN
SHORES, STARCO REALTY &
CONSTRUCTION, INC., JOSEPH
M. GERAGHTY, WASHINGTON
COUNTY, CURRITUCK COUNTY,
HYDE COUNTY, THE TOWN OF
DUCK, CARTERET COUNTY,
THE TOWN OF PINE KNOLL
SHORES, THE TOWN OF INDIAN
BEACH, and THE TOWN OF KILL
DEVIL HILLS,

Petitioner-Appellants,

v.

From Wake County
09 CVS 1073

North Carolina
Commissioner of Insurance
Docket No. 1434
Docket No. 1435

THE NORTH CAROLINA
DEPARTMENT OF INSURANCE,
COMMISSIONER OF INSURANCE
WAYNE GOODWIN and NORTH
CAROLINA RATE BUREAU,

Respondent-Appellees.

RESPONSE OF APPELLANTS TO APPELLEE THE NORTH
CAROLINA RATE BUREAU'S MOTION TO STRIKE APPELLANTS'
RULE 28(h)(2) REPLY BRIEF

TO THE HONORABLE NORTH CAROLINA COURT OF APPEALS:

Appellants hereby respectfully submit this response to Appellee the North Carolina Rate Bureau (“Rate Bureau”)’s Motion to Strike Appellants Rule 28(h)(2) Reply Brief. In opposition to the Rate Bureau’s motion, Appellants show the Court as follows:

1. The filing of Reply Briefs is governed generally by N.C. R. App. P. 28(h), and Appellants’ Reply Brief at issue in this case is filed pursuant to N.C. R. App. P. 28(h)(2).

2. N.C. R. App. P. 28(h)(2) grants Appellants the right to file a Reply Brief when an “*appellee has presented in its brief new or additional questions as permitted by Rule 28(c)*” N.C. R. App. P. 28(h)(2) (emphasis added).

3. N.C. R. App. P. 28(c) provides that Appellees may, in their Appellees’ Briefs, “present issues on appeal based on any action or omission of the trial court that deprived the appellee of an alternative basis in law for supporting the judgment, order, or other determination from which appeal has been taken.” Id.

4. Thus, following the express language and cross reference in N.C. R. App. P. 28(h)(2), Appellants have a right to file a Reply Brief addressing “*new or additional questions*” raised in the Appellees’ Briefs

concerning Appellees' arguments that alternative bases exist to support the trial court's order appealed from. Id. (emphasis added); N.C. R. App. P. 28(c).

5. The language "new or additional questions" in N.C. R. App. P. 28 refers simply to questions that are additional to those presented in the Appellants' Brief, and nothing in N.C. R. App. P. 28 suggests that the "new or additional questions" referred to in N.C. R. App. 28(h)(2) refers only to issues that have never before been discussed or argued in any other forum. This interpretation is confirmed by the language of N.C. R. App. P. 28(c) which describes new or additional questions as including arguments that there exist alternative bases to support the trial court's order, which in almost all cases would mean alternative bases argued to the trial court but not made a stated basis of the trial court's order. Id.

6. If the intent of N.C. R. App. P. 28(h)(2) and 28(c) was so limited (to refer only to issues *never* argued before the trial court) as erroneously suggested by the Rate Bureau, then N.C. R. App. P. 28(c) would have been drafted to refer to any "alternative basis in law for supporting the judgment, order, or other determination from which appeal has been taken *and which was never argued before the trial court*". Such limiting language, of course, was not included in Rule 28 (which, again, makes perfect sense

because most arguments for alternative bases to support a trial court's order are those that were raised before the trial court but not made a stated basis for the trial court's order that is the subject of an appeal).

7. The trial court's consolidated Order at issue in this case dismissed Appellants' petitions for judicial review for lack of subject matter jurisdiction and lack of standing. (A copy of the trial court's Order is attached hereto as Exhibit A. See also R pp. 248-52 in COA09-1171 and pp. 69-73 in COA09-1172). The trial court's Order here did not reference the "filed rate doctrine", "G.S. 58-2-53" or "H.B. 1305". Thus, any argument of Appellees that the trial court's Order should be upheld based on the filed rate doctrine, G.S. 58-2-53 or H.B. 1305 is an argument for "an alternative basis in law for supporting the judgment, order, or other determination from which appeal has been taken." N.C. R. App. P. 28(c). The same is true for Appellees' argument that certain other provisions of Chapter 58 bar Appellants from seeking judicial review (Appellee's "retrospective" argument), as such argument was not the basis of the trial court's Order and is asserted on appeal by Appellees as a potential alternative basis to support the trial court's Order on appeal. N.C. R. App. P. 28(c). The Rate Bureau's

attempt to characterize the arguments in question otherwise is misplaced and should be rejected by this Court.¹

8. By their plain language, N.C. R. App. P. 28(c) and (h) make clear that Appellants are entitled to respond in a Rule 28(h)(2) Reply Brief to such arguments of Appellees that there exist alternative bases to support the trial court's Order that is the subject of the instant consolidated appeals. E.g., Newsome v. North Carolina State Bd. of Elections, 105 N.C. App. 499, 504, 415 S.E.2d 201, 203-04 (1992).

9. The Rate Bureau's suggestion that Appellants have improperly attempted to gain some tactical advantage is also incorrect. The Rate Bureau filed a separate Appellee's Brief from Appellees the Department and Commissioner of Insurance, thus giving Appellees a combined eighty (80) pages of argument versus forty (40) for Appellants. The arguments of all the Appellees are aligned. Even so, Appellees did not each argue all of the same alleged alternative bases to support the trial court's order, thus gaining maximum advantage given the page limitations involved. Thus, it defies common sense to suggest that Appellants have gained any tactical advantage

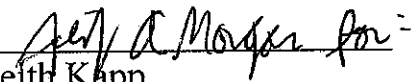
¹ The Rate Bureau errs in its attempt to use Appellees' motions to dismiss before the trial court, rather than the trial court's Order or the Appellants' Brief, to define what is a "new or additional question" in this case. As shown herein, the Rate Bureau's argument is without merit and should be rejected by this Court.


in this case by filing a proper Reply Brief (and one that used only 60% of the maximum permitted 3,750 words) addressing the new or additional questions raised by one or more of Appellees, each of which questions concerned a purported "alternative basis in law for supporting the judgment, order, or other determination from which appeal has been taken."

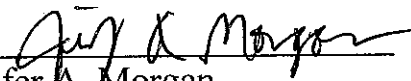
WHEREFORE, Appellants respectfully requests that this Court deny the Rate Bureau's motion to strike Appellants' Rule 28(h)(2) Reply Brief.

Respectfully submitted this the 19th day of March, 2010.

WILLIAMS MULLEN

BY: 
M. Keith Kapp
N.C. Bar No. 8850

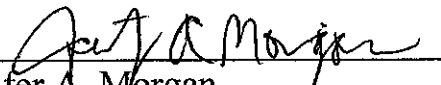
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CERTIFICATE OF SERVICE

I, Jennifer A. Morgan, certify that a copy of the foregoing document in the above-captioned action has been served upon all parties in this cause by mailing a copy thereof to their counsel of record at the addresses indicated below with the proper postage attached and deposited in an official depository under the exclusive care and custody of the United States Postal Service in Raleigh, North Carolina, on the 14th day of March, 2010.

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NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
09 CVS 1073

WAKE COUNTY

DARE COUNTY, TOWN OF NAGS HEAD,
TOWN OF SOUTHERN SHORES, STARCO
REALTY & CONSTRUCTION, INC.,
JOSEPH M. GERAGHTY, WASHINGTON
COUNTY, CURRITUCK COUNTY, HYDE
COUNTY, THE TOWN OF DUCK, THE
TOWN OF SOUTHERN SHORES,
CARTERET COUNTY, THE TOWN OF
PINE KNOLL SHORES, THE TOWN OF
INDIAN BEACH, and THE TOWN OF KILL
DEVIL HILLS,

Petitioners,

v.

THE NORTH CAROLINA DEPARTMENT
OF INSURANCE, COMMISSIONER OF
INSURANCE WAYNE GOODWIN and
NORTH CAROLINA RATE BUREAU,

Respondents.

NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
09 CVS 7841

WAKE COUNTY

DARE COUNTY, WASHINGTON
COUNTY, CURRITUCK COUNTY, HYDE
COUNTY, CARTERET COUNTY, NEW
HANOVER COUNTY, BRUNSWICK
COUNTY, CHOWAN COUNTY,
PERQUIMANS COUNTY, TYRREL
COUNTY, PAMLICO COUNTY,
PASQUOTANK COUNTY, TOWN OF
NAGS HEAD, TOWN OF DUCK, TOWN
OF SOUTHERN SHORES, TOWN OF
INDIAN BEACH, TOWN OF PINE KNOLL
SHORES, TOWN OF EMERALD ISLE,
TOWN OF KILL DEVIL HILLS, TOWN OF
KILL DEVIL HILLS, TOWN OF KURE
BEACH, TOWN OF CEDAR POINT, TOWN



OF HERTFORD, STARCO REALTY &
CONSTRUCTION, INC., JOSEPH M.
GERAGHTY,

Petitioners,

v.

THE NORTH CAROLINA DEPARTMENT
OF INSURANCE, COMMISSIONER OF
INSURANCE WAYNE GOODWIN and
NORTH CAROLINA RATE BUREAU,

Respondents.

ORDER

THE ABOVE-CAPTIONED MATTERS (09 CVS 1073 and 09 CVS 7841) HAVING COME ON FOR HEARING before the Honorable Ronald L. Stephens, presiding Judge of the Wake County Superior Court on April 23, 2009, on Motions to Dismiss filed by the North Carolina Rate Bureau ("Rate Bureau") and Motions to Dismiss filed by the North Carolina Department of Insurance ("Department") and the Commissioner of Insurance ("Commissioner") in each of the captioned matters (09 CVS 1073 and 09 CVS 7841), through which Motions to Dismiss the Rate Bureau, Department and Commissioner assert the following:

(1) That Petitioners lack standing to pursue the relief sought through Petitioners' Petition for Judicial Review, Complaint for Declaratory Judgment, Writ, and Motion for Stay of Administrative Decision in File 09 CVS 1073;

(2) That Petitioners lack standing to pursue the relief sought through Petitioners' Verified Petition for Judicial Review, Motion for Stay, and Request for Declaratory Judgment and Writ in File 09 CVS 7841; and

(3) That this Court lacks subject matter jurisdiction to consider the Petitioners' claims in Files 09 CVS 1073 and 09 CVS 7841.

THE PETITIONERS also brought on for hearing before the Honorable Ronald L. Stephens, presiding Judge of the Wake County Superior Court on April 23, 2009, their Motions to Stay in Files 09 CVS 1073 and 09 CVS 7841.

AND THE COURT having fully considered the record and all the pleadings, memoranda, exhibits, and affidavits of the parties, including the affidavits of Affidavits of Raymond F. Evans, Jr. and Roger Batdorff in each File 09 CVS 1073 and 09 CVS 7841, and having further considered the arguments of counsel for the Petitioners and for the Respondents made in open court on April 23, 2009;

THE COURT is of the opinion that this Court lacks subject matter jurisdiction to consider the claims asserted by the Petitioners in Files 09 CVS 1073 and 09 CVS 7841, and is of the further opinion that Petitioners' lack standing to pursue the claims and seek the relief asserted by them in Files 09 CVS 1073 and 09 CVS 7841, and that Respondents' Motions to Dismiss should therefore be allowed.

WHEREFORE, IT IS HEREBY ORDERED AS FOLLOWED:

1. Respondents' Motions to Dismiss are hereby allowed on the grounds set forth within this Order;
2. Petitioners' Petition for Judicial Review, Complaint for Declaratory Judgment, Writ, and Motion for Stay of Administrative Decision in File 09 CVS 1073 is hereby dismissed for lack of subject matter jurisdiction and lack of standing on the part of Petitioners to pursue the claims and seek the relief asserted in that action;
3. Petitioners' Verified Petition for Judicial Review, Motion for Stay, and Request for Declaratory Judgment and Writ in File 09 CVS 7841 is hereby dismissed for lack of

subject matter jurisdiction and lack of standing on the part of Petitioners to pursue the claims and seek the relief asserted in that action.

4. Petitioners' Motions to Stay in Files 09 CVS 1073 and 09 CVS 7841 cannot be considered by this Court due to the Court's lack of subject matter jurisdiction and the Petitioners' lack of standing, and those Motions to Stay are rendered moot by the Court's dismissal through this Order of the Petition and Verified Petition in Files 09 CVS 1073 and 09 CVS 7841, respectively.

This the 29th day of April, 2009.


THE HONORABLE RONALD L. STEPHENS
SUPERIOR COURT JUDGE PRESIDING

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that he served the foregoing document upon the attorney(s) shown below by depositing a copy of same in the United States mail, postage prepaid, addressed to said attorney(s).

This the 30th day of April, 2009.

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