

NO. 351PA08

SUPREME COURT OF NORTH CAROLINA

* * * * *

ROBERT BAXTER, Employee,
Plaintiff,

v

From the Court of Appeals
No. COA07-865
(Industrial Commission)

DANNY NICHOLSON, INC.,
Employer, SELF-INSURED
(KEY RISK MANAGEMENT SERVICES,
Servicing Agent),
Defendant.

PLAINTIFF-APPELLANT'S REPLY BRIEF TO AMICUS CURIAE BRIEF OF THE
NORTH CAROLINA INSTITUTE FOR CONSTITUTIONAL LAW

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Pursuant to Rule 28 of the Rules of Appellate Procedure,
Plaintiff-appellant provides the following reply to the new
points and authorities presented in the amicus curiae brief of
the North Carolina Institute for Constitutional Law (NCICL).

QUESTIONS PRESENTED FROM AMICUS CURIAE BRIEF

- I. Whether an appointed officer filling an appointed office in a holdover capacity continues in that office until his successor is appointed though that successor has not yet been sworn into that office?
- II. Whether the administration of an oath of office is a qualification for filling that office under the North Carolina Constitution?

ARGUMENTS

- I. AN APPOINTED OFFICER TAKES OFFICE AS SOON AS
 - A. THE APPOINTMENT IS COMMUNICATED, and
 - B. THE APPOINTMENT IS ACCEPTED, and
 - C. THE APPOINTEE TAKES THE REQUIRED OATH OF OFFICE.

- II. TAKING THE OATH OF OFFICE IS BOTH A QUALIFICATION AND A CONSTITUTIONAL REQUIREMENT BEFORE ENTERING OFFICE.

The NCICL makes three arguments: 1] that taking the oath of office is not a qualification for an appointee to enter office, 2] that the proper interpretation of N.C. Const. art. VI, §10 is that appointees "fill" the office as soon as they are "named", and before they actually enter into the duties of the office, and 3] that Art. VI, §10 should be interpreted to mean that a "hold over" officer serves only until his successor is named, not until he takes the oath of office and enters the duties of the office. (NCICL Brief, p. 3-4). The NCICL further argues that the meanings of Article VI, §7 and Article VI, §10 are clear that appointees fill the office upon being named and that taking the oath of office is not a required qualification of holding office. (NCICL Brief, p. 4, 9) The NCICL then asserts, without citation to a source, that some appointees even choose to delay taking the oath of office for days and weeks for the sake of convenience. (NCICL Brief, p. 9-10). But, as shown herein, North Carolina law does not support the arguments of the NCICL.

SUPREME COURT PRECEDENT ON APPOINTMENT

The meaning of "appoint" is not always clear. It depends on the context of its use. The Supreme Court wrote in Smith v. New Bern, 70 N.C. 14, 1874:

Appoint means to establish, fix, settle. For example, the use of the word in Proverbs: 'When the foundations of the earth were appointed'--the word "appointed" carries with it the two-fold idea of ordinary and doing, of furnishing the materials and the workmen to do it with. We say the army and ships are well appointed. In both cases we mean to convey the idea that the army and the ships are furnished with everything necessary to answer the purpose of their creation.

In the context of when an appointee actually enters the office, the following two Supreme Court cases explain what must occur for the appointment to be accomplished.

In Lee v. Dunn, 73 N.C. 595 (1875), section 8, the Supreme Court affirmed that the State Constitution requires that one must take the oath of office "before entering into the office". The Constitutional language discussed was essentially the same as in today's Constitution. The Court wrote:

After prescribing who are eligible to office, **the Constitution, in section 4, provides that every one, before entering upon the duties of office, shall take an oath to support the Constitution, and to be faithful in office.** But this does not enter into *eligibility* for office. One must be eligible when elected; **the oath is** after election. It is simply **an assurance which one is to give** after election, and **before entering into the office** that he will be faithful to the government and to his office, which assurance is binding on his conscience. And this is the only assurance required of many officers, such as

the Governor, members of the General Assembly, Judges, &c. And **that is the only assurance which is required in terms by the Constitution.**

Lee, at ____, (see Section 8, as no page number shown) (emphasis added).

By using the terms "entering into the office" and "entering into the duties of the office" interchangeably, the Supreme Court indicated that they have the same meaning. The opinion specifically states that the oath is an assurance one is to give "before entering into the office. . . which is required . . . by the Constitution." Thus, contrary to the argument of the NCICL, an appointee cannot "fill" the office before taking the oath because the Constitution requires that the oath be taken before one can enter into the office.

Birchfield v. N.C. Dept. of Conservation, 204 N.C. 217, 167 S.E. 855 (1933) is even more instructive. In Birchfield, the state game warden sent plaintiff an appointment to the office of deputy game warden for Graham County. But before the appointment arrived, plaintiff was injured while assisting the game warden for Graham County. The issue was whether the plaintiff had become a state employee at the time of injury. The Supreme Court held that the plaintiff had not yet entered into the office of deputy game warden because 1] he had not yet received communication of the appointment, 2] he had not yet accepted the

appointment, and 3] he had not taken the oath required by law.

204 N.C. ___, 167 S.E. at 856. The court wrote:

The exercise of the duties and functions of a public office or public employment of an appointive nature, rests upon the concurrence of two essential facts: (1) Due appointment and (2) proper qualification.

The appointment must be duly made by proper authority, communicated to and accepted by the appointee. The qualification consists in the giving of a bond or taking of an oath where such is required or in otherwise complying with the provisions of law. The courts have held generally that, if a person assumes the duties or enters upon the discharge of the functions of an office, even under a colorable appointment or election, he is at least a de facto officer to the extent of incurring liability in the performance of such duties. . . . Apparently the plaintiff was duly appointed by the state game warden, but such appointment had neither been communicated to him nor accepted by him at the time of his injury. Although he was engaged in assisting the game warden of Graham County, he was not performing such service by virtue or color of an appointment made by the state game warden. Consequently he was not then discharging his duties under circumstances implying an acceptance of the appointment, neither had the plaintiff taken the oath required by law.

204 N.C. ___, 167 S.E. at 856. (emphasis added)

Thus, pursuant to Birchfield, an "appointment" occurs when 1] the appointment is made by proper authority, 2] the appointment is communicated to the appointee, and 3] the appointee accepts the appointment. Although the appointee had been named and actually was performing the duties of the job at the time of his injury, the Court held that he had not legally entered, or filled, the office because he had not yet received

the appointment, had not yet accepted the appointment, and had not taken his required oath. Also, since the appointee never performed any act or duty under color of appointment before his acceptance and before his taking the oath, it could not be inferred that he accepted the appointment under color of law (i.e. as a de facto officer). Lastly, the Supreme Court also held that the "taking of an oath" is a "qualification" that must occur before one enters into the office. Id., at 856.

In both Lee and Birchfield, the Supreme Court has held that 1] there is no distinction between entering the office and entering upon the duties of the office, 2] an appointment must be communicated to and accepted by the appointee, and 3] the oath is both a requirement of the State Constitution and a qualification that must occur before one enters into the office.

In applying these principles to Baxter v. Nicholson, Mr. McDonald did not, and could not, enter into the office of Commissioner of the Industrial Commission until 1] he accepted his appointment, and 2] he took his oath office on February 9, 2007. Since Mr. McDonald never performed any act or duty under color of appointment before taking the oath, it cannot be inferred that he accepted the appointment as a de facto officer before he took his oath of office. Thus, Mr. McDonald took office as Commissioner of the Industrial Commission when he took his oath of office, on February 9, 2007. Pursuant to N.C. Const.

art. VI, §10, Commissioner Bolch held over in his position as Commissioner of the Industrial Commission until Mr. McDonald took his oath on February 9, 2007. Therefore, Commissioner Bolch's vote in the February 5, 2007 Opinion and Award was legal and valid.

NCICL'S ARGUMENT OF COMMON PRACTICE

Despite the holdings of Lee, supra. and Birchfield, supra., the NCICL argues that the meaning of Article VI, §7 and §10 allows one to fill the office before taking the oath. No case law was cited. Instead, the NCICL argues that it is common practice for appointed officers to postpone taking the oath of office for days and weeks, for the sake of convenience. (NCICL Brief, p. 9-10). The NCICL further states that the effect of officers filling the office before entering into the duties of the office has not caused harm to the continuity of government. (NCICL Brief, p. 10). Although Lee and Birchfield dispel these arguments, it is also hard to imagine that the framers and people of North Carolina intended such an interpretation of Article VI, §7 and Article VI, §10.

A fundamental part of constitutional interpretation is to give effect to the intent of the framers and of the people adopting it. The intent and purpose of a provision is more important than the actual language used. Stephenson v. Bartlett, 355 N.C. 354, 370-371, 562 S.E.2d 377, 389, (2002). Two

different provisions must be read in pari material, in conjunction with each other. 355 N.C. at 379, 562 S.E.2d at 394. A provision should not receive a technical construction, but should be interpreted so as to carry out the general principles of the government, and not defeat them. 355 N.C. at 394-395, 562 S.E.2d at 405, (Orr, J. concurrence and dissent).

In determining the correct interpretation of Article VI, §7 and Article VI, §10, the Supreme Court should consider whether the framers and people of this state intended the following scenarios that could occur from the NCICL's arguments:

1. Did the framers and the citizens of North Carolina intend that an appointee could enter the office (I presume the NCICL means the appointee would enter into the payroll of the office) before taking the oath and being qualified to perform the duties of the job? Under the NCICL's scenario, the appointee could fill the job, delay taking the oath indefinitely, and never enter into or perform the duties of the office; literally a paid vacation. Yet, the NCICL argues that it is normal for appointees to delay taking the oath for weeks for the sake of convenience. It is hard to imagine that the framers or the people of this state intended the Constitution to be interpreted to allow the state's business to be run as the NCICL suggests.

2. Did the framers and the citizens of this state intend that an appointee to office actually fill the office merely upon

being named as an appointee? Occasionally, an appointee's name should be withdrawn because a potential conflict of interest is discovered. Under the NCICL's argument, the Governor would be powerless to correct the mistake and withdraw the appointment because the appointment would be vested as soon as the appointee is named. The NCICL fails to offer any good reason the framers or citizens of this state might have had that would support the NCICL suggested interpretation.

3. Lastly, did the framers and citizens of North Carolina intend to have an important state office stop functioning from the date an appointee is named until the appointee takes the oath and actually starts working? Would this carry out, or defeat, the general principles of state government? Would it harm or promote the continuity of government, as argued by the NCICL? (NCICL Brief, p. 10) In essence, the NCICL urges this Court to believe that the framers and people of North Carolina intended the office of Commissioner of the Industrial Commission to stop functioning from the announcement of Mr. McDonald's appointment on February 2, 2007 until he took his oath on February 9, 2007. But the NCICL failed to suggest any good reason the framers and citizens might have had that would support its proposed interpretation.

CONCLUSION

For the foregoing reasons, the Supreme Court should hold that Article VI, §7 and Article VI, §10, when read together, require that hold over appointees of public offices hold their positions until the successor appointees take the oath of office and thus enter into the office. For these reasons, the Court should also hold that Commissioner McDonald entered office as Commissioner of the Industrial Commission when he took his oath of office, on February 9, 2007, and that Commissioner Bolch remained in that office until that time. Therefore, the Court should hold that Commissioner Bolch's vote in the February 5, 2007 Opinion and Award was legal and valid.

This the 21st day of December, 2009.

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CERTIFICATE OF SERVICE

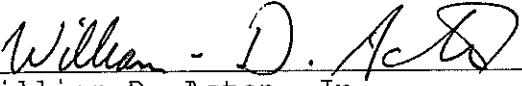
The undersigned hereby certifies that he has served a copy of the foregoing PLAINTIFF-APPELLANT'S REPLY TO NCICL'S AMICUS CURIAE BRIEF upon counsel for the appellee by depositing a copy, contained in a first-class-postage-paid wrapper, into a depository under the exclusive care and custody of the United States Postal Service, on this the 21st day of December, 2009, and addressed as follows:

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