No. 87A16

SUPREME COURT OF NORTH CAROLINA

****

IN THE MATTER OF HUGHES, by and through V. H. INGRAM, Administratrix of the Estate of Hughes Claim for Compensation Under the North Carolina Eugenics Asexualization and Sterilization Compensation Program	)	From the Industrial Commission

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CLAIMANT-CROSS-APPELLEES' BRIEF

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ARGUMENT

I. IT IS UNDISPUTED THAT APPELLATE JURISDICTION EXISTS TO CONSIDER CLAIMANTS' EQUAL PROTECTION CHALLENGE

There is no dispute between the parties on the fundamental issue upon which both the appeal and cross appeal of the Court of Appeals decision are based: whether the appellate court has jurisdiction to consider Claimants' constitutional claims related to the Eugenics Compensation Act. For the reasons set out in both parties' respective New Briefs, Claimants and the State agree that the Court of Appeals had mandatory and discretionary jurisdiction over their appeal. (State-Appellant's New Brief pp 18-19; Claimant-Appellants' New Brief pp 9-14).

A. N.C. Gen. Stat. §§ 1-267.1(a1) and 1A-1, Rule 42(b)(4) Have No Bearing on Claims Brought Pursuant to the Eugenics Compensation Act

As the State's brief indicates, the General Assembly established a review process for Eugenics Compensation claims based on the Industrial Commission's "exclusive jurisdiction" that provides a right of direct appeal from the Commission to the Court of Appeals. It was therefore clear error for the Court of Appeals to rule that Claimants' constitutional challenge must first be considered by a three-judge Superior Court panel under N.C. Gen. Stat. § 1-267.1(a1) (2014). (State-Appellant's New Brief pp 32-33 ("Were Claimants required to file their claims in superior court in the first instance the purpose of the Compensation Program would be defeated.")).[1]

The comprehensive administrative and statutory process established for the filing, review, and appeal of claims under the Eugenics Compensation Act, N.C. Gen. Stat. § 143B-426.50 *et seq.*, implicitly incorporated the processes for raising constitutional claims before the Industrial Commission and the appellate courts. And as long as that integrated and established statutory process is followed—as it was by Claimants—it controls without regard to the nature of the constitutional

[1] We note that this position taken by the State contradicts an earlier statement in its brief, with which Claimants disagree, that "Claimants should have raised their constitutional challenges in declaratory judgment actions filed in the first instance in superior court." (State-Appellant's New Brief p 20). That disagreement is discussed further below.

claims being raised. While the parties agree that Claimants have presented an as-applied challenge, *even if* their equal protection claims *were* a facial challenge to the validity of the Compensation Program, because of that established review process and Claimants' compliance with it, appellate jurisdiction would exist, requiring reversal of the Court of Appeals' decision.

Claimants also agree with the State's arguments concerning the non-applicability of N.C. Gen. Stat. § 1-267.1. Their equal protection claims constitute an "as-applied" rather than a facial challenge, and as the statute's very title indicates, it only applies to "claims challenging the facial validity of an act of the General Assembly." N.C. Gen. Stat. § 1-267.1. Further, even if Claimants had made a facial challenge, N.C. Gen. Stat. §§ 1A-1, Rule 42(b)(4) and 1-267.1(a1) would not apply because a Eugenics Compensation Claim is not "an action or proceeding in the General Court of Justice." (State-Appellant's New Brief p 23). Instead, as discussed above, it is part of an administrative proceeding over which the Industrial Commission has "exclusive jurisdiction." As the dissent notes, the law makes a clear distinction between general courts of justice and administrative agencies. *In re Hughes*, __ N.C. App. __, __, 785 S.E.2d 111, 118-19 (2016) (Dillon, J., dissenting).

The parties are also in agreement that, even if the General Assembly had intended N.C. Gen. Stat. § 1-267.1(a1) to change the procedures applicable to the

Eugenics Compensation Program, "the legislature would have been without authority to abrogate the appellate courts' inherent powers." (State-Appellant's New Brief p 31). As Claimants have previously asserted, (Claimant-Appellants' New Brief p 12), those powers include the supervisory power over the Industrial Commission established by N.C. Gen. Stat. §§ 7A-32(c) and 7A-29(a), as well as the appellate courts' broad discretion under Rule 2 of the North Carolina Rules of Appellate Procedure to exercise its jurisdiction "[t]o prevent manifest injustice to a party, or to expedite decision in the public interest." N.C. R. App. P. 2.

B. The State's Assertion that the Claimants Should Have Pursued a Declaratory Judgment Action is Inconsistent with the Statutory Scheme Established by the Eugenics Compensation Act and the State's Basis for its Cross-Appeal

Contrary to the broad consensus on appellate jurisdiction, Claimants strongly disagree with the State's incongruous and unsupported proposition that they "should have raised their constitutional challenges in declaratory judgment actions filed in the first instance in superior court." (State-Appellant's New Brief p 20). Not only is that proposition contradicted by the above-described arguments and the undisputed facts, but it is also not supported by either of the cases on which the State relies. Neither case concerns a claimant or complainant's appeal of a constitutional claim from a final decision by an administrative agency to the Court of Appeals.

Craig v. New Hanover Cty Bd. of Educ., 363 N.C. 334, 678 S.E.2d 351 (2009) was a claim for monetary damages, not a declaratory judgment action. The case involved a mentally-disabled student's negligence and constitutional claims for monetary damages against a school board for failing to protect him from sexual assault. The issue presented to and resolved by this Court concerned sovereign immunity; specifically, whether the student's constitutional claim could proceed, given the requirement under *Corum v. University of North Carolina*, 330 N.C. 761, 413 S.E.2d 276, *cert. denied*, 506 U.S. 985, 113 S. Ct. 493, 121 L. Ed. 2d 431 (1992) that a state constitutional claim may proceed only where there exists no other "adequate remedy at state law." *Craig* has no relevance or bearing on the State's assertion that Claimants should have pursued a declaratory judgment action.

While the other case relied on by the State, *Woodard v. Carteret County*, 270 N.C. 55, 153 S.E.2d 809 (1967), does concern a complaint under the North Carolina Declaratory Judgment Act, it is similarly inapposite and irrelevant to the present appeal. Reversing a dismissal of plaintiffs' claims, this Court simply reiterated the underlying general premise of a declaratory judgment action, finding "the existence of a real and justiciable controversy between the parties who have a substantial and legally protectable interest in the subject matter of the litigation, and that the plaintiffs would be adversely affected by the enforcement of the

challenged Acts." *Woodard*, 270 N.C. at 60, 153 S.E.2d at 813. Unlike the eugenics compensation Claimants, the plaintiffs in *Woodard* had no statutory or administrative process by which to raise or otherwise challenge the unconstitutional voting processes at issue in that case.

Neither *Woodard* nor *Craig* mandate or even imply that any and all constitutional claims should be brought "in the first instance" in superior court. There is, on the other hand, plenty of case law establishing that, where properly raised (as Claimants here have done) via a Motion to Certify (filed with the administrative agency) or a Petition for Certiorari (filed with the Court of Appeals), constitutional challenges are properly heard first by the Court of Appeals. *See, e.g.*, *Tinsley v. City of Charlotte*, 228 N.C. App. 744, 750, 747 S.E.2d 145, 150 (2013) (holding the cap on workers compensation attorneys' fees under N.C. Gen. Stat. § 97-10.2(f)(1)(b) constitutional where rationally related to the legitimate government interest of compensating the injured worker); *Myles v. Lucas & McGowan Masonry*, 183 N.C. App. 665, 645 S.E.2d 143 (2007) (petition for certiorari or certification by the Industrial Commission is necessary to establish Court of Appeals jurisdiction).

II. THE EUGENICS COMPENSATION CLAIMS ARE *SUI GENERIS* AND GIVEN THE SIGNIFICANT PUBLIC INTEREST IN THEIR FINAL RESOLUTION, TO PREVENT MANIFEST INJUSTICE AND PROMOTE JUDICIAL ECONOMY, THIS COURT SHOULD EXERCISE ITS OWN DISCRETION UNDER RULE 2 AND MAKE A FINAL DECISION ON THE MERITS OF THESE CLAIMS

The only issue remaining in dispute is how best to resolve the underlying constitutional question on the merits of Claimants' equal protection claims. And while this Court could remand the case back to the Court of Appeals, given the unique circumstances of these claims, the significant public interest in their full and final resolution, principles of judicial economy, and to prevent manifest injustice, this Court should exercise its Rule 2 jurisdiction to consider the merits of claimants' claims and issue a final decision.

The State's position on this point has not been articulated. Despite its accurate analysis of the existence of both mandatory and discretionary appellate jurisdiction in these consolidated cases, the significant impacts of the delay of a final decision on *all* eugenics victims seeking compensation, and its admission that the Court of Appeals "could have reviewed the merits of Claimants' as-applied equal protections challenges," (State-Appellant's New Brief p 14), the State remarkably "takes no position as to whether the Court of Appeals **should** have exercised its discretionary jurisdiction." (*Id.* p 27, emphasis in original). Instead, the State's brief concludes with a confusing and erroneous instruction that the

Court "should . . . remand the case to the Court of Appeals . . . to (1) review the denial of Claimants' claims under the terms of the Compensation Program, and (2) determine, in an exercise of its discretion, whether to review or dismiss Claimants' constitutional challenges." (*Id.* p 38).

It would however, be pointless to review the denial of Claimants' inclusion in the Eugenics Compensation Program "under the terms" of that program alone, without considering their equal protection challenges to the arbitrary 30 June 2013 "alive by" term that delineates them from heirs of deceased eugenics victims who received compensation. As the State itself recognizes, this Court has the power to address substantive issues in the interests of fundamental fairness, judicial economy, and matters critical to the public interest through its supervisory jurisdiction. (*See* State-Appellant's New Brief pp 21-22). It should exercise that power now.

This appeal involves an unprecedented and entirely unique restitution program to remedy "injustices suffered and unreasonable hardships," S.B. 421 Gen. Assemb., 2013 Session (N.C. 2013), caused by the longest-running forced sterilization eugenics program in the nation. Claimants have been waiting for decades for restitution for those injustices and hardship, and the more than 200 individuals who have received some compensation will not get their final compensation checks until the eight appeals pending before this Court are fully and

finally resolved. If ever there were a circumstance in which Rule 2 should be invoked by this Court, it is the one presented by the claims of the victims of the State's forced sterilization program.

CONCLUSION

For all the reasons set out above, and in the interest of justice and judicial economy, the Court should reverse the Court of Appeals' jurisdictional determination, assert its own Rule 2 jurisdiction, consider the merits of Claimant's "as applied" equal protection challenge to N.C. Gen. Stat. § 143B-426.50(1), and issue a final determination of these claims.

Respectfully submitted this the 11th day of August, 2016.

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N.C. R. App. P. 33(b) Certification: I certify that 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

The undersigned certifies that the foregoing document entitled CLAIMANT-CROSS-APPELLEES' BRIEF was served on the following individual by electronic mail on this the 11th day of August, 2016.

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