

FILED

NORTH CAROLINA) IN THE GENERAL COURT OF JUSTICE
) 2019 NOV 12 P SUPERIOR COURT DIVISION
CHATHAM COUNTY) 19 CVS 809

CHATHAM CO., C.S.C.

BARBARA CLARK PUGH; GENE
TERRELL BROOKS; THOMAS HENRY
CLEGG; THE WINNIE DAVIS CHAPTER
259 OF THE UNITED DAUGHTERS OF
THE CONFEDERACY,

Plaintiff,

vs.

KAREN HOWARD; MIKE DASHER;
DIANNA HALES; JIM CRAWFORD; and
ANDY WILKIE, in their official capacities
as members of the Board of County
Commissioners of Chatham County, North
Carolina,

Defendants.

BRIEF IN SUPPORT OF PLAINTIFFS
MOTION FOR PRELIMINARY
INJUNCTION

STATEMENT OF THE CASE

This is an action in which Plaintiffs seek a Declaratory Judgment pursuant to G.S. § 1-253 et. seq. for the purpose of determining a question of actual controversy between Plaintiffs and Defendants with regard to the status of the Confederate Monument situated at the Chatham County Courthouse in Pittsboro, its location, and the decision of Defendants to remove the Monument from its present location, as well as the applicability of Article 1 of Chapter 100 of the North Carolina General Statutes.

Plaintiffs' filed their Complaint, Motion for Temporary Restraining Order, and Notice of Hearing on October 24, 2019.

The matter came on for hearing on October 29, 2019 before the Honorable Charles M. Viser, who entered a Temporary Restraining Order Restraining and enjoining Defendants from taking affirmative action to remove or relocate the Confederate Monument nor cause to have issue process for trespass pending a hearing on November 8, 2019 at which time the court would take up the issue of the propriety of a preliminary injunction.

In his Order, Judge Viser found as a fact that Defendants had instructed the Chatham County Manager that the Confederate Monument would be considered a public trespass on November 1, 2019 in the event that Plaintiff Chapter failed to submit a plan to the county manager's office by October 1, 2019. Judge Viser went on to conclude that "a risk of immediate and irreparable harm exist(s) to the rest of this action of which there is no adequate remedy at law exists."

This matter is before the Court upon Plaintiffs' Motion for Preliminary Injunction, upon such conditions as the Court might deem appropriate, restraining and enjoining Defendants from taking affirmative action to remove or relocate the Confederate Monument pending further hearing of this action nor seek issuance of process for trespass.

STATEMENT OF FACTS

Plaintiffs' verified complaint tends to show that:

Plaintiffs are citizens and residents of Chatham County, as well as a duly qualified nonprofit association, other than one created by a trust and other than a limited liability company, consisting of two or more members joined by mutual consent for a common, nonprofit purpose, which is organized and existing under the provisions of Chapter 59B of the North Carolina General Statutes.

Plaintiff Chapter began organizing a fund raising campaign after the turn of the Twentieth Century for the purpose of raising funds necessary to designing, procuring, and installing a monument in Chatham County, North Carolina which would honor those individuals who had served in the armed forces of the Confederate States of America during the Civil War. On August 23, 1907, a monument honoring the individuals who had served in the armed forces of the Confederate States of America during the Civil War was dedicated in a public ceremony conducted at the Chatham County Courthouse in Pittsboro, North Carolina.

Upon information and belief, Plaintiffs allege and say that the Confederate Monument was accepted as a gift and that its placement at the Chatham County Courthouse was specifically authorized and directed by the Chatham County Board of County Commissioners on behalf of the citizens of Chatham County, North Carolina. By such actions, the Confederate Monument became the property of the county, which has maintained the Confederate Monument at public expense since it was dedicated and given to Chatham County by Plaintiff Chapter and accepted by Chatham County Board of Commissioners.

After the Confederate Monument was installed, it was vandalized; and the Chatham County Board of Commissioners authorized the payment of a reward for the arrest and conviction of those responsible for the crime. In addition, the Board resolved to prosecute vigorously those responsible for the damage.

As recently as 1988, the Chatham County budget included funds for the dismantling, restoration, and reinstallation of the Confederate Monument at public expense. At all times pertinent to the allegations of the complaint, Chatham County has exercised dominion and control of the Confederate Monument as being owned by the County.

On August 19, 2019, the Chatham County Board of County Commissioners voted 4 to 1 to require Plaintiff Chapter to remove and relocate the Confederate Monument from its present location on or before November 1, 2019. The Chatham County Board of Commissioners is on record as stating that Chatham County will remove the Confederate Monument in the event that Plaintiff Chapter fails to remove and relocate the Confederate Monument by said date. By such action, Defendants have asserted that Plaintiff Chapter owns the Confederate Monument, which Plaintiffs specifically deny. The County Commissioners further resolved, in the event the Plaintiff Chapter refused, failed or neglected to remove the Confederate Monument, Plaintiff Chapter would be charged with criminal trespass.

On October 21, 2019, the Chatham County Board of County Commissioners reaffirmed its decision to require Plaintiff Chapter to remove the Confederate Monument. Upon information and belief, Plaintiff alleges that employees of Guy M. Turner, Inc., a heavy equipment moving company, were inspecting the Confederate Confederate Monument for its removal on October 23, 2019, the day this action was filed.

DISCUSSION OF LAW

THE ENDS OF JUSTICE WILL BE SERVED BY ENTERING A PRELIMINARY INJUNCTION PRESERVING THE STATUS QUO PENDING FURTHER PROCEEDINGS BECAUSE PLAINTIFFS HAVE NO ADEQUATE REMEDY AT LAW AND THE THREATENED INJURY IS IRREPARABLE.

1. *It is necessary and appropriate for the court to maintain the status quo pending further proceedings concerning the substantive allegations of the pleadings as they develop.*

Three facts are not in serious dispute in this litigation: (1) that the Chatham County Commissioners decided that the Confederate Confederate Monument must be removed from its location at the Chatham County Courthouse; (2) that Plaintiff Chapter was been given until

November 1, 2019 to effect such a removal; and (3) that, if Plaintiff Chapter failed to remove the Confederate Monument by that date, Chatham County would undertake to do so itself; (4) cause process issued for trespass.

That those facts are not in serious dispute does not resolve this action. While these facts are salient and material with regard to Plaintiffs' claim for relief, they are not dispositive of the case. Indeed, the case turns upon three specific questions: (1) who owns the Confederate Monument presently situated at the Historic Chatham County Courthouse; (2) is the Monuments Act applicable to this specific historical monument; and, (3), if the Monuments Act applies to these facts, is the stated decision of Chatham County within the course and scope of its authority under the Constitution of the State of North Carolina and the North Carolina General Statutes?

Plaintiffs submit that the ownership of the Confederate Monument is a question of fact while the remaining two questions are matters of law to be determined by the court. Even then, the questions of law cannot be addressed until the issue of ownership has been resolved. For that reason, Plaintiffs contend that the interests of justice justify the entry of a preliminary injunction for the purpose of maintaining the status quo as it pertains to the Confederate Monument pending further proceedings, which would necessarily include offers of proof on the core issue of the ownership of the Confederate Monument.

As a general rule, a preliminary injunction is an extraordinary measure taken by a court to preserve the status quo of the parties during litigation. It will be issued only (1) if a plaintiff is able to show likelihood of success on the merits of his case and (2) if a plaintiff is likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the Court, issuance is necessary for the protection of a plaintiff's rights during the course of litigation. *A.E.P. Indus., Inc. v. McClure*, 308 N.C. 393, 401, 302 S.E.2d 754, 759-760 (1983); *see also Bessemer City Express*,

Inc. v. City of Kings Mountain, 155 N.C.App. 637, 639, 573 S.E.2d 712, 714 (2002); *Little v. Stogner*, 140 N.C.App. 380, 383, 536 S.E.2d 334, 336 (2000). The purpose of a preliminary injunction is ordinarily to preserve the status quo pending trial on the merits, and its issuance is a matter of discretion to be exercised by the hearing judge after a careful balancing of the equities. *E.g., Horner Intern. Co. v. McKoy*, 232 N.C.App. 559, 754 S.E.2d 852 (2014). The Supreme Court of North Carolina has observed:

The purpose of a preliminary injunction is ordinarily to preserve the status quo pending trial on the merits. Its issuance is a matter of discretion to be exercised by the hearing judge after a careful balancing of the equities. Its impact is temporary and lasts no longer than the pendency of the action. Its decree bears no precedent to guide the final determination of the rights of the parties. In form, purpose, and effect, it is purely interlocutory.

State v. School, 299 N.C. 351, 357–58, 261 S.E.2d 908, 913, *appeal dismissed*, 449 U.S. 807, 101 S.Ct. 54, 66 L.Ed.2d 11 (1980).

2. Plaintiffs can show a likelihood of success on the merits of the litigation.

Plaintiffs have alleged that the action of Defendants is beyond the course and scope of Chatham County's authority as a body politic under the North Carolina Constitution and the North Carolina General Statutes in that such action violates the Monuments Act in the event that it is established that ownership of the Confederate Monument lies with Chatham County.

It is not necessary for Plaintiffs to establish to a certainty that they will prevail in this litigation in order to justify entry of a preliminary injunction. The North Carolina Supreme Court has held that it is merely necessary to show a likelihood of success rather than a certainty of success. *Investors, Inc. v. Berry*, 293 N.C. 688, 701, 239 S.E.2d 566, 574 (1977). Indeed, in citing *Investors, Inc. v. Berry* with approval in his opinion in *A.E.P. Indus., Inc. v. McClure*, *supra*, Justice Meyer specifically stated:

In the present case, the trial judge conceded “that *there is probable cause to believe the plaintiff may prevail at the hearing*” and that “*plaintiff makes out an apparent case for issuance of a temporary injunction by showing some recognized equity.*” Thus the trial court found that there was a reasonable likelihood that the agreements were reasonable and valid and that plaintiff would likely prevail on the merits.

A.E.P. Indus., Inc. v. McClure, *supra* at 401-402; 302 S.E.2d at 759-760 (emphasis added).

Therefore, a party seeking a preliminary injunction is required to establish that their claim is supported by probable cause rather than conclusive proof. Plaintiffs’ detailed complaint, together with the supporting affidavits and exhibits tend to establish probable cause on the issue of the underlying validity of their claim.

While the ultimate outcome of this litigation necessarily turns on the factual question of ownership of the Confederate Monument, it is well-recognized that a claim for relief is stated by allegations that a governmental subdivision is acting beyond the course and scope of its authority under law. *Hall v. City of Morganton*, 268 N.C. 599, 151 S.E.2d 201 (1966); *Wishart v. City of Lumberton*, 254 N.C. 94, 118 S.E.2d 35 (1961); *Hall v. City of Fayetteville*, 248 N.C. 474, 103 S.E.2d 815 (1958).

Of course, it is to be expected that there will be further proceedings addressing challenges to Plaintiffs’ right to bring this action, and such challenges will be resolved by the court in due time upon notice and a hearing. Nonetheless, Defendants cannot determine the outcome of this litigation merely by asserting that Plaintiffs’ factual allegations are incorrect. It is manifestly the province of the trier of fact to determine what facts are established by competent evidence. That duty and that function would be subverted if Defendants were to be able to subvert the judicial process by removing the Confederate Monument before there has been a full and fair opportunity to address the issues raised by the complaint.

Whether the Confederate Monument is subject to the Monuments Act is a question of law

whose resolution must be predicated on the resolution of the factual question of the ownership of the statue. It is Plaintiffs' position that the stated decision of Defendants is in direct conflict with the requirements of the Monuments Act and that decision, if it is implemented, is arguably *ultra vires* simply because no municipal corporation, whether it is a county or a city or a town, acts within the course and scope of its authority by violating the express provisions of a statute governing its conduct.

G.S. § 100-2.1 provides, 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, under the circumstances listed in this subsection and subject to the limitations in this subsection. An object of remembrance that is temporarily relocated shall be returned to its original location within 90 days of completion of the project that required its temporary removal. An object of remembrance that is permanently relocated shall be relocated to a site of similar prominence, honor, visibility, availability, and access that are within the boundaries of the jurisdiction from which it was relocated. An object of remembrance may not be relocated to a museum, cemetery, or mausoleum unless it was originally placed at such a location. As used in this section, the term "object of remembrance" means 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. The circumstances under which an object of remembrance may be relocated are either of the following:

- (1) When appropriate measures are required by the State or a political subdivision of the State to preserve the object.
- (2) When necessary for construction, renovation, or reconfiguration of buildings, open spaces, parking, or transportation projects.

Plaintiffs contend that the foregoing statute applies to the controversy between the Parties on the basis that the Confederate Monument is an object of remembrance located on public property. Though the statute limits the extent to which the objects of remembrance may be removed from public property or relocated, and applies to a broad array of memorials, monuments, statues and other objects, including the many Confederate Monuments found on county courthouse grounds and other public property across the State, it is not self-executing in

that no enforcement mechanism is provided under its terms. Therefore, it is eminently appropriate and necessary for the court to address this specific issue in the context of these specific facts. For the court to do so, however, the court must maintain the integrity of the res which is the subject matter of this controversy in the first place. In their complaint, Plaintiffs have alleged a colorable claim based upon an *ultra vires* theory and there is sufficient evidence to establish probable cause to believe that Plaintiffs can prevail on their claim.

1. *Plaintiffs' remedy at law is inadequate and their potential damage is irreparable.*

A preliminary injunction is only an ancillary remedy for the purpose of preserving the status quo or restoring a status wrongfully disturbed pending the final determination of a civil action. *E.g., Beau Rivage Homeowners Ass'n v. Billy Earl, L.L.C.*, 163 N.C. App. 325, 329, 593 S.E.2d 120, 123 (2004); *see also Hutchins v. Stanton*, 23 N.C. App. 467, 469, 209 S.E.2d 348, 349 (1974).

It is not required that a plaintiff wait until damage has been inflicted to seek a preliminary injunction, but it is sufficient if he proves that apprehension of material and irreparable injury is well grounded upon a state of facts from which it appears that the danger is real and immediate. *Causby v. High Penn Oil Co.*, 244 N.C. 235, 93 S.E.2d 79 (1956); *Patterson v. Durham Hosiery Mills*, 214 N.C. 806, 200 S.E. 906 (1939). As the Verified complaint and the affidavits of Plaintiff Pugh make clear, while Defendants have not yet undertaken to move the Confederate Monument from its present location, Defendants have made their intention to do so clear and unequivocal. Indeed, there is reason to believe that preliminary steps to move the Confederate Monument have been taken in retaining a heavy equipment moving company which has already inspected the Confederate Monument. Such facts tend to prove that Plaintiffs' apprehension of material and irreparable injury is well grounded because it appears that the danger is real and immediate.

Furthermore, because Plaintiff Chapter did not submit a plan to remove the Confederate Monument before the deadline unilaterally imposed by Defendants, Plaintiff Chapter is subject to prosecution for criminal trespass.

Allowing Defendants to remove the Confederate Monument from its historic location before the respective rights and liabilities of the Parties have been determined through the presentation of competent evidence and arguments founded upon law would be to subvert the fair administration of justice. The core relief which Plaintiffs seek is a declaratory judgment for the purpose of determining a question of actual controversy between Plaintiffs and Defendants with regard to the status of the Confederate Monument, its location, and the decision of Defendants to remove the Confederate Monument from its present location, as well as the applicability of Article 1 of Chapter 100 of the North Carolina General Statutes. The remedy of a preliminary injunction has been sought only as ancillary relief pending a judgment on the merits of their claim for a declaratory judgment. Such remedies are appropriately employed to meet an emergency when it appears that any delay would materially affect the rights of a plaintiff. *Register v. Griffin*, 6 N.C.App. 572, 575, 170 S.E.2d 520, 523 (1969). Plaintiff's complaint raises serious and legitimate questions concerning the ownership, status, and location of the Confederate Monument, as well as the applicability of the Monuments Act to these facts. Therefore, it is appropriate to apply an ancillary remedy for the purpose of preserving the status quo pending the further proceedings in this action. *See R.R. v. R.R.*, 237 N.C. 88, 74 S.E.2d 430 (1952). Plaintiff does not seek a mandatory injunction compelling Defendants to do anything positive; indeed, Plaintiffs seek merely to preserve the status quo pending a full and fair adjudication of the merits of this controversy. A prohibitory injunction is preventive in character and forbids the continuance of a wrongful act or the doing of some threatened or anticipated injury.

Roberts v. Madison County Realtors Ass'n, Inc., 344 N.C. 394, 474 S.E.2d 783 (1996). Such a remedy is especially appropriate for a case such as this in which there are genuine issues of fact pertaining to ownership of the Confederate Monument, its continued location at the Historic Chatham County Courthouse, authority of Defendants to engage in conduct which facially violates a statute which is otherwise not self-executing.

If Defendants were to be able to move the Confederate Monument from its present location before Plaintiffs' claim for a declaratory judgment were to be adjudicated, Plaintiffs would have been able to subvert the authority of this court under the Declaratory Judgment Act without Plaintiffs having had a legitimate opportunity to prove their entitlement to relief. The Confederate Monument poses no threat to public health or safety, and it has been part of the historic courthouse campus for more than a hundred years. It is true that a mandatory injunction would lie to compel Defendants to return the Confederate Monument to its present location if Plaintiffs were to prevail ultimately in this litigation; *Ingle v. Stubbins*, 240 N.C. 382, 82 S.E.2d 388 (1954); *Kinston Tobacco Bd. of Trade v. Liggett & Myers Tobacco Co.*, 235 N.C. 737, 71 S.E.2d 21 (1952); *Anderson v. Town of Waynesville*, 203 N.C. 37, 164 S.E. 583 (1932); however, such a process could well prove to be needless and wasteful if Plaintiffs' position were to be sustained and a preliminary injunction were to be entered.

The threatened actions of Defendants will cause an ongoing injury to Plaintiffs during the pendency of this litigation because the Confederate Monument will be removed from its present location without action by the court. An irreparable injury is not an injury which is beyond the possibility of repair or possible monetary compensation but is such a continuous and recurring injury that no reasonable redress is afforded at law, and it is one to which the complainant in equity and good conscience should not be required to submit. *E.g.*, *Hooks v. International*


Speedways, Inc., 263 N.C. 686, 140 S.E.2d 387 (1965). It is appropriate to preserve the status quo and to restrain a defendant from acting in a manner which would tend to render judgment in the pending action ineffectual. *E.g., Southern Ry. Co. v. City of Greensboro*, 247 N.C. 321, 101 S.E.2d 347 (1957). The law surely does not countenance unilateral acts by a litigant which necessarily undermine the authority of the courts to adjudicate disputes and resolve controversies.

Plaintiffs fail to see how Defendants would be harmed by an injunction prohibiting them from taking affirmative action to remove or relocate the Confederate Monument pending further proceedings in this action. *See Automobile Dealer Resources, Inc. v. Occidental Life Ins. Co. of N. C.*, 15 N.C.App. 634, 190 S.E.2d 729 (1972).

CONCLUSION

Based on the foregoing discussion of law, Plaintiffs respectfully submit that the court should enter a preliminary injunction prohibiting Defendants from taking affirmative action to remove or relocate the Confederate Monument pending further proceedings in this cause.

Respectfully submitted, this 12th day of November 2019.



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CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served the foregoing document in the above-entitled action upon all party(is) by:

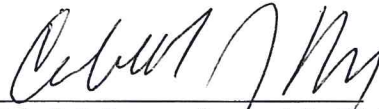
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This the 12th day of November, 2019.



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