IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-699

Filed: 16 February 2016

N.C. Industrial Commission, I.C. No. U00037

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, Claimant-Appellant.

No. COA15-763

Filed: 16 February 2016

N.C. Industrial Commission, I.C. No. U00438

IN THE MATTER OF REDMOND, by and through L. NICHOLS, Administratrix of the Estate of Redmond, Claim for Compensation Under the North Carolina Eugenics Asexualization and Sterilization Compensation Program, Claimant-Appellant.

No. COA15-829

Filed: 16 February 2016

N.C. Industrial Commission, No. U00750

IN THE MATTER OF SMITH, Claim for Compensation Under the North Carolina Eugenics Asexualization and Sterilization Compensation Program, Claimant-Appellant.

Appeal by Claimant-Appellant Hughes, by and through V.H. Ingram, Administratrix of the Estate of Hughes, from amended decision and order entered 28 April 2015 by the North Carolina Industrial Commission. Appeal by Claimant-Appellant Redmond, by and through L. Nichols, Administratrix of the Estate of

Redmond, from decision and order entered 27 April 2015 by the North Carolina Industrial Commission. Appeal by Claimant-Appellant Smith from decision and order entered 7 May 2015 by the North Carolina Industrial Commission. Heard in the Court of Appeals 16 November 2015.

Pressly, Thomas & Conley, PA, by Edwin A. Pressly; and UNC Center for Civil Rights, by Elizabeth McLaughlin Haddix, for Claimant-Appellants.

Attorney General Roy Cooper, by Assistant Attorney General Marc X. Sneed, for North Carolina Department of Justice, Tort Claims Section.

McGEE, Chief Judge.

Ms. Hughes ("Hughes"), Ms. Redmond ("Redmond"), and Mr. Smith ("Smith")[1] were all "sterilized involuntarily under the authority of the Eugenics Board of North Carolina in accordance with Chapter 224 of the Public Laws of 1933 or Chapter 221 of the Public Laws of 1937." N.C. Gen. Stat. § 143B-426.50(5) (2013). Hughes died in 1996, Redmond died in 2010, and Smith died in 2006.

In 2013, the General Assembly enacted the Eugenics Asexualization and Sterilization Compensation Program ("the Compensation Program"), N.C. Gen. Stat. § 143B-426.50 *et seq*., in order to provide compensation to victims of the North Carolina Eugenics laws. Because the North Carolina Industrial Commission ("Industrial Commission") concluded that Hughes, Redmond and Smith were

[1] We avoid using the full names of Claimants in order to protect their anonymity.

"asexualized involuntarily or sterilized involuntarily under the authority of the Eugenics Board of North Carolina in accordance with Chapter 224 of the Public Laws of 1933 or Chapter 221 of the Public Laws of 1937[,]" they were "qualified recipients" under the Compensation Program. N.C. Gen. Stat. § 143B-426.50(5) (2013). However, N.C. Gen. Stat. § 143B-426.50(1) limited which qualified recipients could become successful claimants as follows: "Claimant. – An individual on whose behalf a claim is made for compensation as a qualified recipient under this Part. An individual *must be alive on June 30, 2013*, in order to be a claimant." N.C. Gen. Stat. § 143B-426.50(1) (emphasis added).

The estates of Hughes, Redmond, and Smith ("Claimants") filed claims pursuant to the Compensation Program. However, because Hughes, Redmond and Smith each died before 30 June 2013, those claims were denied. Each Claimant followed the appeals process from the initial denial of their claims to the rehearings by deputy commissioners. Following denials by the deputy commissioners, Claimants filed appeals to the Full Commission. N.C. Gen. Stat. § 143B-426.53 (2013). Following denial of their claims by the Full Commission, Claimants filed notices of appeal with this Court. *Id.* On appeal, Claimants argue that N.C. Gen. Stat. § 143B-426.50(1), by limiting recovery to victims or heirs of victims living on or after 30 June 2013, violates the North Carolina and the United States Constitutions.

Because we conclude this Court is without jurisdiction to consider Claimants' appeals, we must dismiss and remand to the Industrial Commission for transfer to Superior Court, Wake County.

According to the Compensation Program: "The [Industrial] Commission shall determine whether a claimant is eligible for compensation as a qualified recipient under this Part. The Commission shall have all powers and authority granted under Article 31 of Chapter 143 of the General Statutes with regard to claims filed pursuant to this Part." N.C. Gen. Stat. § 143B-426.53(a) (2013). Article 31 of Chapter 143 of the General Statutes constitutes the Tort Claims Act. According to the Tort Claims Act: "The North Carolina Industrial Commission is hereby constituted a court for the purpose of hearing and passing upon tort claims against the State Board of Education, the Board of Transportation, and all other departments, institutions and agencies of the State." N.C. Gen. Stat. § 143-291(a) (2013). Therefore, the Industrial Commission acts as a court when determining whether claimants under the Compensation Program meet the criteria for compensation.

Claimants argue that N.C. Gen. Stat. § 143B-426.50(1)

> violates the guarantees to equal protection and due process under Article 1, Section 19 of the Constitution of the State of North Carolina and the Fourteenth Amendment to the Constitution of the United States because there is no rational basis to deny compensation to an otherwise qualified claimant who dies before June 20, 2013 while granting compensation to the heirs of a qualified claimant who dies after June 30, 2013.

The General Assembly, by statute enacted in 2014, created a new procedure and venue for facial constitutional challenges of its enactments. N.C. Gen. Stat. § 1-267.1 states in relevant part:

> [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, organized as provided by subsection (b2) of this section.

N.C. Gen. Stat. § 1-267.1(a1) (2014) (emphasis added). The General Assembly had the authority to limit jurisdiction in this manner.[2] N.C. Gen. Stat. § 1-267.1 further states in relevant part:

> No order or judgment shall be entered . . . [that] finds that an act of the General Assembly is facially invalid on the basis that the act violates the North Carolina Constitution or federal law, except by a three-judge panel of the Superior Court of Wake County organized as provided by subsection (b) or subsection (b2) of this section.

N.C. Gen. Stat. § 1-267.1 (c); *see also* N.C. Gen. Stat. § 1-81.1 (a1) (2014) ("Venue lies exclusively with the Wake County Superior Court with regard to any claim seeking an order or judgment of a court, either final or interlocutory, to restrain the

[2] "Except as otherwise provided by the General Assembly, the Superior Court shall have original general jurisdiction throughout the State." N.C. Const. art. IV, § 12(3). "The General Assembly may make rules of procedure and practice for the Superior Court and District Court Divisions[.]" N.C. Const. art. IV, § 13(2). The General Assembly also has the authority to prescribe the appellate jurisdiction of this Court. N.C. Const. art. IV, § 12(2) ("The Court of Appeals shall have such appellate jurisdiction as the General Assembly may prescribe.").

enforcement, operation, or execution of an act of the General Assembly, in whole or in part, based upon an allegation that the act of the General Assembly is facially invalid on the basis that the act violates the North Carolina Constitution or federal law. Pursuant to G.S. 1–267.1(a1) and G.S. 1–1A, Rule 42(b)(4), *claims described in this subsection that are filed or raised in courts other than Wake County Superior Court* or that are filed in Wake County Superior Court *shall be transferred to a three-judge panel* of the Wake County Superior Court if, after all other questions of law in the action have been resolved, a determination as to the facial validity of an act of the General Assembly must be made in order to completely resolve any issues in the case.") (emphasis added).

These provisions became law, and thus effective, on 7 August 2014. 2014 N.C. Sess. Laws, ch. 100, § 18B.16(f) ("The remainder of this section is effective when it becomes law and applies to any claim filed on or after that date or asserted in an amended pleading on or after that date that asserts that an act of the General Assembly is either facially invalid or invalid as applied to a set of factual circumstances on the basis that the act violates the North Carolina Constitution or federal law."). N.C. Gen. Stat. § 1A-1, Rule 42(b)(4) states:

> Pursuant to G.S. 1-267.1, any facial challenge to the validity of an act of the General Assembly, other than a challenge to plans apportioning or redistricting State legislative or congressional districts, shall be heard by a three-judge panel in the Superior Court of Wake County if a claimant raises such a challenge in the claimant's

> complaint *or amended complaint in any court in this State*, or if such a challenge is raised by the defendant in the defendant's answer, responsive pleading, or within 30 days of filing the defendant's answer or responsive pleading. In that event, the court *shall, on its own motion*, transfer that portion of the action challenging the validity of the act of the General Assembly to the Superior Court of Wake County for resolution by a three-judge panel if, after all other matters in the action have been resolved, 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. The court in which the action originated shall maintain jurisdiction over all matters other than the challenge to the act's facial validity and shall stay all matters that are contingent upon the outcome of the challenge to the act's facial validity pending a ruling on that challenge and until all appeal rights are exhausted. Once the three-judge panel has ruled and all appeal rights have been exhausted, the matter shall be transferred or remanded to the three-judge panel or the trial court in which the action originated for resolution of any outstanding matters, as appropriate.

N.C. Gen. Stat. § 1A-1, Rule 42(b)(4) (2014) (emphasis added). Pursuant to N.C. Gen. Stat. § 143B-426.53(a), in the matters before us "[t]he Commission shall have all powers and authority granted under Article 31 of Chapter 143 of the General Statutes with regard to claims filed pursuant to this Part." Pursuant to Article 31 of Chapter 143:

> The Industrial Commission is hereby authorized and empowered to adopt such rules and regulations as may, in the discretion of the Commission, be necessary to carry out the purpose and intent of this Article. *The North Carolina Rules of Civil Procedure* and Rules of Evidence, insofar as they are not in conflict with the provisions of this Article, *shall be followed in proceedings under this Article*.

N.C. Gen. Stat. § 143-300 (2013) (emphasis added). We disagree with the dissenting opinion's conclusion that Rule 42(b)(4) does not apply in the matters before us.

The dissenting opinion contends that "it could be argued that G.S. 1-267.1 only applies to actions and proceedings in the general court of justice. *See, e.g.*, N.C. Gen. Stat. § 1-1." We are in agreement that the Industrial Commission is not a part of the Judicial Branch. However, N.C. Gen. Stat. § 1-1 simply states: "Remedies in the courts of justice are divided into – (1) Actions[,] [and] (2) Special proceedings." N.C. Gen. Stat. § 1-1 (2013). We are not convinced that N.C. Gen. Stat. § 1-1, or any other provision in Chapter 1 serves to prevent the application of N.C. Gen. Stat. § 1-267.1 to the matters before us.

The dissenting opinion cites *Ocean Hill v. N.C. DEHNR* for the proposition that "the grant of limited judicial authority to an administrative agency does not transform the agency into a court for purposes of the statute of limitations." *Ocean Hill Joint Venture v. N.C. Dept of E.H.N.R.*, 333 N.C. 318, 321, 426 S.E.2d 274, 276 (1993); *see also In re Twin County Motorsports*, 367 N.C. 613, 766 S.E.2d 832 (2014). Our Supreme Court in *Ocean Hill* simply held that because the relevant statute of limitations provision, N.C. Gen. Stat. § 1-54(2) only applied to "actions" or "proceedings" in the general court of justice, and because an Executive Branch agency is not a part of the general court of justice, N.C. Gen. Stat. § 1-54(2) did not apply to matters decided by the Office of Administrative Hearings. This holding in *Ocean Hill*

does not stand for the proposition that *no* provisions of Chapter 1 can ever apply to matters heard outside the general court of justice. In fact, this Court has applied provisions from Chapter 1 to matters heard by the Industrial Commission. *See Sellers v. FMC Corp.*, 216 N.C. App. 134, 139, 716 S.E.2d 661, 665 (2011), *disc. review denied*, 366 N.C. 250, 731 S.E.2d 429 (2012) (applying N.C. Gen. Stat. § 1–278); *Parsons v. Board of Education*, 4 N.C. App. 36, 42, 165 S.E.2d 776, 780 (1969) (applying N.C. Gen. Stat. § 1-139).

As there is nothing in N.C. Gen. Stat. § 1-267.1 limiting its application to actions or proceedings conducted in the general court of justice, and as there is no logical reason why a facial challenge to an act of the General Assembly would be reviewed differently depending on whether it was brought before the Industrial Commission or a court of the Judicial Branch, we hold that N.C. Gen. Stat. § 1-267.1 applies to the matters before us. Because, pursuant to N.C. Gen. Stat. § 143B-426.53(a) and the Tort Claims Act, the Industrial Commission has been constituted as a court for resolution of the matters before us, N.C. Gen. Stat. § 1-267.1 and other relevant provisions apply, so long as the facial challenges in these matters were included in pleadings or amended pleadings filed on or after 7 August 2014.

We must also address the dissenting opinion's argument concerning this Court's appellate jurisdiction. N.C. Gen. Stat. § 7A-26 is a statute granting general appellate jurisdiction and cannot serve to broaden the jurisdiction of this Court if that

jurisdiction has been curtailed or rescinded by another, more specific, statute. *See In re Vandiford*, 56 N.C. App. 224, 226-27, 287 S.E.2d 912, 913-14 (1982). *State v. Colson*, 274 N.C. 295, 302-03, 163 S.E.2d 376, 381 (1968), relied on by the dissenting opinion, has been abrogated by statute, specifically N.C. Gen. Stat. § 1-267.1 and N.C. Gen. Stat. § 1-1A, Rule 42(b)(4), so far as a facial challenge to an enactment of the General Assembly, such as the one before us, is concerned. N.C. Gen. Stat. § 143B-426.53(f), the statute granting a right of appeal from the denial of a claim pursuant to the Compensation Program, stated: "Appeals under this section shall be in accordance with the procedures set forth in G.S. 143-293[.]" N.C. Gen. Stat. § 143B-426.53(f) (2013). N.C. Gen. Stat. § 143-293, which concerns appeals from the Industrial Commission when acting as a court for the purposes of the Tort Claims Act, states: "appeal shall be for errors of law only under the same terms and conditions as govern appeals in ordinary civil actions[.]" N.C. Gen. Stat. § 143-293 (2013). N.C. Gen. Stat. § 7A-27 is the statute governing appeals of right in ordinary civil actions.[3] For this reason, N.C. Gen. Stat. § 7A-29(a), which applies generally to appeals from the Industrial Commission and other administrative agencies, does not apply to the present appeal.

[3] We note that because, pursuant to N.C. Gen. Stat. § 143B-426.53(f) and N.C. Gen. Stat. § 143-293, N.C. Gen. Stat. § 7A-27 controls the appeal in this matter, the Industrial Commission must be included when N.C. Gen. Stat. § 7A-27 refers to "court," "trial court," "district court," or "superior court."

We do not believe a general grant of jurisdiction to this Court to review decisions of the Industrial Commission, or more specifically in these instances – decisions denying compensation pursuant to the Compensation Program – can supplant the intent of the General Assembly that "any 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). The General Assembly, having provided an exclusive means of review of facial challenges to enactments of the General Assembly based upon the North Carolina Constitution or federal law, has thereby precluded review by other means in the first instance.[4]

Returning to the cases before us, Claimants initiated these actions by filing the necessary claims with the North Carolina Office of Justice for Sterilization Victims. These claims were initiated prior to 7 August 2014, and all three claims were first denied by the Industrial Commission based on the fact that Hughes, Redmond, and Smith had all died before 30 June 2013 and therefore did not qualify as claimants

[4] The situation before us is analogous to the failure to follow the procedural mandates provided by the General Assembly for challenges to administrative decisions. *See Justice for Animals, Inc. v. Robeson Cty.*, 164 N.C. App. 366, 369, 595 S.E.2d 773, 775 (2004) (citations omitted) ("It is well-established that 'where the legislature has provided by statute an effective administrative remedy, that remedy is exclusive and its relief must be exhausted before recourse may be had to the courts.' If a plaintiff has failed to exhaust its administrative remedies, the court lacks subject matter jurisdiction and the action must be dismissed."); *See also Shell Island Homeowners Ass'n, Inc. v. Tomlinson*, 134 N.C. App. 217, 220-21, 517 S.E.2d 406, 410 (1999).

pursuant to N.C. Gen. Stat. § 143B-426.50(1) (2013) ("Claimant. – An individual on whose behalf a claim is made for compensation as a qualified recipient under this Part. An individual must be alive on June 30, 2013, in order to be a claimant.").

Each Claimant appealed the rejection of their claim according to the procedures set forth pursuant to the Compensation Program. However, because the Industrial Commission is not part of the judicial branch, it could not have made any determinations concerning a statute's constitutionality. *Carolinas Med. Ctr. v. Employers & Carriers Listed In Exhibit A*, 172 N.C. App. 549, 553, 616 S.E.2d 588, 591 (2005) (citations omitted) ("It is a 'well-settled rule that a statute's constitutionality shall be determined by the judiciary, not an administrative board.'"). For this reason, in their appeals from the decisions of the deputy commissioners, the attorneys representing the estates of Redmond and Smith included motions to certify the constitutional questions relevant to those appeals to this Court. The estate of Hughes, apparently operating without benefit of an attorney at the time, filed its appeal to the Full Commission without any motion to address the constitutional issues. The current attorney for the Hughes estate petitioned this Court for a writ of certiorari, which was granted 9 November 2015, in order to include the appeal of the Hughes estate along with those of the Redmond and Smith estates for consideration of their constitutional challenges.

We hold that the motions in COA15-763 and COA15-829 to certify constitutional questions to this Court and the petition for writ of certiorari in COA15-699, all of which were sought and granted following the 7 August 2014 effective date of N.C. Gen. Stat. § 1-267.1(a1), constituted claims

> asserted in an amended pleading on or after [7 August 2014] that assert[ed] that an act of the General Assembly [N.C. Gen. Stat. § 143B-426.50(1)] is either facially invalid or invalid as applied to a set of factual circumstances on the basis that the act violates the North Carolina Constitution or federal law.

2014 N.C. Sess. Laws, ch.100, § 18B.16(f). For this reason, the appropriate procedure is for the Industrial Commission, *sua sponte* if necessary, to "transfer that portion of the action challenging the validity of the act of the General Assembly to the Superior Court of Wake County for resolution by a three-judge panel[.]" N.C. Gen. Stat. § 1A-1, Rule 42(b)(4).

We dismiss Claimants' appeals, and remand to the Industrial Commission for transfer to the Superior Court of Wake County those portions of the actions challenging the constitutional validity of N.C. Gen. Stat. § 143B-426.50(1) for resolution by a three-judge panel pursuant to N.C. Gen. Stat. 1A-1, Rule 42(b)(4). The Industrial Commission may take any additional action, in accordance with the law, that it deems prudent or necessary to facilitate transfer.

DISMISSED AND REMANDED.

Judge DAVIS concurs.

Judge DILLON dissents by separate opinion.

No. COA15-699 – IN THE MATTER OF HUGHES; No. COA15-763 – IN THE MATTER OF REDMOND; No. COA15-829 – IN THE MATTER OF SMITH

DILLON, Judge, dissenting.

The majority concludes that N.C. Gen. Stat. § 1-267.1 (in which our General Assembly created "the three-judge panel" to consider facial constitutional challenges) abrogates our Court's appellate jurisdiction to consider the facial constitutional arguments raised in the present appeals. I believe, however, that we do have the *appellate jurisdiction* to consider the facial challenge arguments raised by these appellants. Therefore, I respectfully dissent.

The North Carolina Constitution provides that "[t]he Court of Appeals shall have such appellate jurisdiction as the General Assembly may prescribe." N.C. Const. Art. IV, § 12(2).

The General Assembly has empowered the Court of Appeals with "jurisdiction to review upon appeal decisions . . . of administrative agencies, *upon matters of law or legal inference*, in accordance with the system of appeals provided in this Article [5]." N.C. Gen. Stat. § 7A-26 (2014) (emphasis added). Clearly, a facial challenge to a law is a matter of law or legal inference. *See State v. Colson*, 274 N.C. 295, 302-03, 163 S.E.2d 376, 381 (1968) (stating that "cases involving a substantial constitutional question are appealable *in the first instance to the intermediate appellate court* and then to the highest court as a matter of right") (emphasis added).

The General Assembly has provided in Article 5 that an "appeal of right lies directly to the Court of Appeals" "[f]rom *any* final order or decision of . . . the North

Carolina Industrial Commission[.]" N.C. Gen. Stat. § 7A-29(a) (2014) (emphasis added).

Additionally, the General Assembly provided in the Compensation Program legislation that an unsuccessful claimant may appeal the Industrial Commission's denial of a claim to the Court of Appeals. N.C. Gen. Stat. § 143B-426.53(f) (2014).

The General Assembly has placed a limitation in Article 5 on our Court's consideration of facial challenges. Specifically, Article 5 provides that a litigant no longer has an "appeal of right" to the Court of Appeals *in the limited context* where the trial division has held "that an act of the General Assembly is facially invalid [based on our State Constitution or federal law]," but rather a litigant's appeal *in this limited context* "lies of right directly to the Supreme Court[.]" N.C. Gen. Stat. § 7A-27(a1) (2014).[5]

N.C. Gen. Stat. § 7A-27(a1), however, is not implicated in these appeals since there has not been any order holding that the Compensation Program is facially invalid. Indeed, the Industrial Commission is without authority even to consider the challenge. *See Meads v. N.C. Dep't. of Agric.*, 349 N.C. 656, 670, 509 S.E.2d 165, 174

[5]The General Assembly has not *expressly* provided in N.C. Gen. Stat. § 7A-27(a1) that the Supreme Court has *exclusive appellate jurisdiction* to consider the appeal from an order in the trial division declaring a law to be facially invalid, only that the appeal of right lies with the Supreme Court and not with this Court. It may be argued that, in this context, our Court *could* exercise appellate jurisdiction through the power to grant *certiorari* conferred on us in Article 5 (assuming the parties seek review here and choose not to exercise their appeal of right to the Supreme Court). However, this argument need not be addressed here since there has been no determination in the trial division that the Compensation Program is facially invalid.

(1998) (stating the "well-settled rule that a statute's constitutionality shall be determined by the judiciary, not an administrative board"); *Carolina Med. Ctr. v. Employers & Carriers*, 172 N.C. App. 549, 553, 616 S.E.2d 588, 591 (2005) (holding that Industrial Commission lacks power to consider constitutional issues).

Simply stated, these appeals are properly before us: They are from final determinations of the Industrial Commission involving claims made under the Compensation Program. N.C. Gen. Stat. § 143B-426.53(f) (2014). As such, we have the *appellate jurisdiction* to consider any "matters of law" raised by these claimants concerning the denial of their claims, including the matter concerning their facial challenge to the Compensation Program. N.C. Gen. Stat. §§ 1-267.1 and 7A-27(a1) do not provide any impediment since the appeal is not from a determination by the trial division that the Compensation Program is facially invalid.

It is true that "[o]rdinarily, appellate courts will not pass upon a constitutional question unless it affirmatively appears that such question was raised and passed upon in the trial court."[6] *State v. Hudson*, 281 N.C. 100, 105, 187 S.E.2d 756, 760 (1972). This Court, nonetheless, has been granted the authority to consider the arguments raised by these claimants. For instance, the General Assembly has

[6]The matter involves three appeals making a facial challenge to the Compensation Program. In two of the appeals (*In the Matter of Redmon* and *In the Matter of Smith*), the parties expressly raised the facial challenge before the Industrial Commission, though recognizing that the Commission lacked authority to act on it. Nonetheless, these claimants sought to preserve the issue for appeal. In the third appeal (*In re Hughes*), the claimant did not make a facial challenge at the Commission level.

provided the Court of Appeals with the power "to issue . . . writs . . in the aid of its jurisdiction, or to supervise and control the proceedings of . . . the Industrial Commission." N.C. Gen. Stat. § 7A-32(c) (2014). Our Supreme Court has recently recognized our Court's broad authority to issue such writs. *State v. Stubbs*, 368 N.C. 40, 42-44, 770 S.E.2d 74, 75-76 (2015). Further, in promulgating Rule 2 of our Rules of Appellate Procedure, our Supreme Court has recognized "the residual power of *our appellate courts* to consider, in exceptional circumstances, significant issues of importance in the public interest[.]" *Steingress v. Steingress*, 350 N.C. 64, 66, 511 S.E.2d 298, 299 (1999) (emphasis added); *see also Dogwood Dev. and Mgmt. Co., LLC v. White Oak Transp. Co., Inc.*, 362 N.C. 191, 196, 657 S.E.2d 361, 364 (2008) ("Rule 2 permits *the appellate courts* to excuse a party's [failure to argue an issue at the trial level] in both civil and criminal appeals when necessary to . . . 'expedite decision in the public interest'") (emphasis added).[7]

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[7]The majority suggests that the context here is analogous to the context where a party has not exhausted its administrative remedies, in which case, courts lack subject-matter jurisdiction. The majority quotes *Justice for Animals, Inc. v. Robeson Cty.*, 164 N.C. App. 366, 369, 595 S.E.2d 773, 775 (2004), for the proposition that "where the legislature has provided by statute an effective administrative remedy, that remedy is exclusive and its relief must be exhausted before recourse may be had to the courts." I do not believe, however, that the situations are analogous.

In *Justice for Animals*, our Court was quoting the Supreme Court in *Presnell v. Pell*, 298 N.C. 715, 260 S.E.2d 611 (1979). In *Presnell*, the Supreme Court explained that exhaustion of administrative remedies was an essential prerequisite to a court's jurisdiction where the relevant administrative agency was "particularly qualified for the purpose [of reviewing the issue]," and "the legislature [by providing an administrative remedy] has expressed an intention to give the administrative entity most concerned with a particular matter the first chance to discover and rectify error." *Id.* at 721, 260 S.E.2d at 615. Here, though, the three-judge panel is no more "particularly qualified" than a panel of Court of Appeals judges to consider a facial challenge. I believe that the

In conclusion, the General Assembly has addressed a past injustice suffered by many at the hands of the State. I believe that we have the appellate jurisdiction to consider the facial challenge to the Compensation Program. And to the extent that these claimants, or any of them, have lost their right of review of their constitutional arguments, I believe we should, nonetheless, exercise our authority to consider them. Otherwise, they could be deemed waived on remand.

Though not essential my conclusion above, I note that it could be argued that the N.C. Gen. Stat. §§ 1-267.1 and 1A-1, Rule 42(b)(4) do not apply to Compensation Program claims at all. Specifically, it could be argued that N.C. Gen. Stat. § 1-267.1 only applies to actions and proceedings in the general court of justice. *See, e.g.*, N.C. Gen. Stat. § 1-1 (2014) ("Remedies in the courts of justice are divided into . . . (1) Actions[] [and] (2) Special proceedings."). Our Supreme Court has so held in the context of the statute of limitations provisions in Chapter 1. *See In re Twin County Motorsports*, 367 N.C. 613, 616, 766 S.E.2d 832, 834-35 (2014) (holding that even though an administrative agency may be clothed with some measure of judicial authority, said agency is not part a "court of justice" and, therefore, the statute of limitations provisions in Chapter 1 of our General Statutes do not apply). *See also*

present situation is more analogous to any other situation where the trial division fails to rule on a legal issue (in which the appellate division has *de novo* review). In such a case, our Court is not required to remand the issue to the trial division, but may consider the issue on appeal, though generally we would deem the issue waived and refuse to consider it.

Ocean Hill Joint Venture v. N.C. Dep't of Env't, Healh and Natural Res., 333 N.C. 318, 321, 426 S.E.2d 274, 276 (1993) (reversing a Court of Appeals determination that a matter before DEHNR was an action or proceeding within N.C. Gen. Stat. § 1-54). Also, the provisions of Subsection 8 ("Judgment") of Chapter 1 – of which N.C. Gen. Stat. § 1-267.1 is a part – only reference the general court of justice, and not administrative agencies. *See*, *e.g.*, N.C. Gen. Stat. § 1-208.1 (2014) (providing for the docketing of judgments rendered in the trial division, whereas N.C. Gen. Stat. § 97-87 provides for the docketing of awards of the Industrial Commission); *id.* § 1-277 (providing for appeals from the "superior or district court," whereas appeals from the Industrial Commission are provided for in other statutes).

Additionally, it could be argued that the procedure in Rule 42(b)(4) (containing the procedure for transfers to the three-judge panel) does not apply in the present appeals. Specifically, the Rules of Civil Procedure expressly provide that *the only* Industrial Commission matters which they govern are those tort claims brought under the Tort Claims Act. N.C. Gen. Stat. § 1A-1, Rule 1 (2014) ("These rules shall govern the procedure in the superior and district courts . . . [in civil] actions and proceedings [and] . . . the procedure in tort actions brought before the Industrial Commission"). *See Hogan v. Cone Mills*, 315 N.C. 127, 137, 337 S.E.2d 477, 483 (1985) (holding that the Rules do not apply directly to claims brought under the

Worker's Compensation Act).[8] Compensation Program claims are not tort claims against the State.

But assuming N.C. Gen. Stat. § 1-267.1 does apply, generally, to Compensation Program proceedings, its procedure requiring transfer to a three-judge panel was never implicated in the *Hughes* appeal before this Court, as the claimant in that matter never made any facial challenge argument below. *See* N.C. Gen. Stat. § 1A-1, Rule 42(b)(4) (2014) (providing a procedure for trial courts to transfer facial challenges to a three-judge panel *only if* a challenge is actually made). Regarding the other two appeals before us, I note that those claimants *did* attempt to make the facial challenge below. However, the provision in N.C. Gen. Stat. § 1-267.1 allowing an appeal of right to the Supreme Court was never implicated since the Compensation Program was not held to be facially invalid.

In sum, N.C. Gen. Stat. § 1-267.1 and Rule 42 do not require that a three-judge panel decide *every* facial challenge raised in the trial division. For example, Rule 42 states that a three-judge panel need not decide a facial challenge when the decision is not necessary to the resolution of the case. However, the failure of having a three-judge panel decide the facial challenge issue does not abrogate our Court's appellate jurisdiction to consider the issue in an appeal that is otherwise properly before us.

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[8]Though *Hogan* was subsequently reversed on other grounds by the Supreme Court, *see* 326 N.C. 476, 390 S.E.2d 136 (1990), its holding that the Rules of Civil Procedure do not apply to Worker's Compensation proceedings was not reversed, *see Moore v. City of Raleigh*, 135 N.C. App. 332, 336, 520 S.E.2d 133, 137 (1999).

By way of example, suppose a defendant raises two defenses at the trial level, one of which is a facial challenge; and suppose, further, that a trial judge grants the defendant summary judgment based on the *other* defense. Our Appellate Rules allow the defendant to raise his facial challenge argument as an alternate basis in the law for his victory below, *see* N.C. R. App. P. 10(c) (allowing an appellee to propose issues on appeal as to an alternate basis in the law). In such a case, I do not believe that N.C. Gen. Stat. § 1-267.1 provides that a three-judge panel of our Court considering the appeal *be required* to remand the facial challenge issue to a three-judge panel of superior court judges before addressing the other issues. Rather, I believe that by enacting N.C. Gen. Stat. § 1-267.1 the General Assembly was simply providing a procedure whereby a facial challenge would never be left up to a single judge, but always to a panel of jurists.