

# Municipal Law Notes

April 2021

Volume XL, No. 10

**Public Enterprises: Authority;**  
**Charter Consolidation; Power to Levy**  
**Prospective Water and Sewer Fees**

Bost Realty Co. v. City of Concord, 2021-NCCOA-107, (No. COA19-309-2, Cabarrus-4/6/21) (*unpublished*)

Upon remand via Special Order issued by the Supreme Court of North Carolina, the Court of Appeals stated, “We reconsider our prior opinion in this matter, Bost Realty Co., Inc. v. City of Concord, 269 N.C. App. 109, 836 S.E.2d 344, 2019 WL 6875346 (2019) (unpublished), in light of JVC Enterprises, LLC v. City of Concord, \_\_\_ N.C. \_\_\_, 2021-NCSC-14 (March 12, 2021). As we recognized in our prior opinion, this appeal and cross-appeal is entirely controlled by JVC Enterprises. Bost Realty, 2019 WL 6875346 at \*1. We therefore affirm the trial court’s entry of summary judgment in favor of Defendant and the dismissal of Plaintiffs’ complaint consistent with our Supreme Court’s holding in that case. JVC Enterprises, \_\_\_ N.C. at \_\_\_, 2021-NCSC-14, ¶ 1.”

- **Synopsis**– Appeal by plaintiffs and cross-appeal by defendant-City from October 2018

summary judgment. Heard in the Court of Appeals 18 September 2019 and opinion filed 17 December 2019. Subsequently remanded to the Court of Appeals by order of the Supreme Court of North Carolina for reconsideration in light of JVC Enterprises, LLC v. City of Concord, \_\_\_ N.C. \_\_\_, 2021-NCSC-14 (March 12, 2021) (*see MLN* March 2021, p. 1). Affirmed. Judge Inman delivered the Opinion of the Court.

**Public Enterprises: Authority;**  
**Charter Consolidation; Power to Levy**  
**Prospective Water and Sewer Fees**

Journey Cap., LLC v. City of Concord, 2021-NCCOA-111 (No. COA19-310-2, Cabarrus-4/6/21) (*unpublished*)

Upon remand via Special Order issued by the Supreme Court of North Carolina, the Court of Appeals stated, “We reconsider our prior opinion in this matter, Journey Cap., LLC v. City of Concord, 269 N.C. App. 109, 836 S.E.2d 345, 2019 WL 6876613 (2019) (unpublished), in light of JVC Enterprises, LLC v. City of Concord, \_\_\_ N.C. \_\_\_, 2021-NCSC-14 (March 12, 2021). As we recognized in our prior

opinion, this appeal and cross-appeal is entirely controlled by JVC Enterprises, Journey Cap., 2019 WL 6876613 at \*1. We therefore affirm the trial court’s entry of summary judgment in favor of Defendant and the dismissal of Plaintiffs’ complaint consistent with our Supreme Court’s holding in that case. JVC Enterprises, \_\_\_ N.C. at \_\_\_, 2021-NCSC-14, ¶ 1.”

- **Synopsis**– Appeal by plaintiffs and cross-appeal by defendant-City from October 2018 summary judgment. Heard in the Court of Appeals 18 September 2019 and opinion filed 17 December 2019. Subsequently remanded to the Court of Appeals by order of the Supreme Court of North Carolina for reconsideration in light of JVC Enterprises, LLC v. City of Concord, \_\_\_ N.C. \_\_\_, 2021-NCSC-14 (March 12, 2021) (*see MLN* March 2021, p. 1). Affirmed. Judge Inman delivered the Opinion of the Court.

**Public Enterprises: Authority;**  
**Charter Consolidation; Power to Levy**  
**Prospective Water and Sewer Fees**

Metro Dev. Grp., LLC v. City of Concord, 2021-NCCOA-113 (No. COA19-311-2, Cabarrus-4/6/21) (*unpublished*)

Upon remand via Special Order issued by the Supreme Court of North Carolina, the Court of Appeals stated, “We reconsider our prior opinion in this matter, Metro Dev. Grp., LLC v. City of Concord, 269 N.C. App. 109, 836 S.E.2d 346, 2019 WL 6876685 (2019) (*unpublished*), in light of JVC Enterprises, LLC v. City of Concord, \_\_\_ N.C. \_\_\_, 2021-NCSC-14 (March 12, 2021). As we recognized in our prior opinion, this appeal and cross-appeal is entirely controlled by JVC Enterprises, Metro Dev. Grp., 2019 WL 6876685 at \*1. We therefore affirm the trial court’s entry of summary judgment in favor of Defendant and the dismissal of Plaintiffs’

complaint consistent with our Supreme Court’s holding in that case. JVC Enterprises, \_\_\_ N.C. at \_\_\_, 2021-NCSC-14, ¶ 1.”

- **Synopsis**– Appeal by plaintiffs and cross-appeal by defendant-City from October 2018 summary judgment. Heard in the Court of Appeals 18 September 2019 and opinion filed 17 December 2019. Subsequently remanded to the Court of Appeals by order of the Supreme Court of North Carolina for reconsideration in light of JVC Enterprises, LLC v. City of Concord, \_\_\_ N.C. \_\_\_, 2021-NCSC-14 (March 12, 2021) (*see MLN* March 2021, p. 1). Affirmed. Judge Inman delivered the Opinion of the Court.

***Nota Bene (N.B.)***

**Other Recent Decisions of Note**

**Personnel; Constitutional Law; Privacy Claims; Dismissal; Lack of Appellate Jurisdiction** Gupton v. N.C. Dep’t of Pub. Safety, 2021-NCCOA-49 (No. COA20-357, OAH– 3/2/21) (*unpublished*) (Petitioner appealed from a final decision of the N.C. Office of Administrative Hearings (OAH), which concluded that respondent-N.C. Department of Public Safety discharged petitioner from her position with the State Highway Patrol with just cause. As petitioner sought review of constitutional claims that had not been decided on the merits by a tribunal with original jurisdiction, her appeal was dismissed for lack of appellate jurisdiction. In a prehearing statement, petitioner argued that respondent’s decision to discharge her from employment: (1) was without just cause, and (2) invaded her privacy interests in violation of the Fourteenth Amendment of the federal constitution. The administrative law judge (“ALJ”) issued an order granting, in part, respondent’s motion for summary judgment, finding that OAH

“lack[ed] jurisdiction over Petitioner’s argument of infringement upon her constitutional right to privacy.” Petitioner thereafter filed a “Motion for Preservation of Constitutional Issues,” requesting that her claims of infringement “be preserved for consideration before the North Carolina Court of Appeals.” The ALJ issued a final decision finding that respondent had just cause to dismiss petitioner. On appeal, petitioner sought review of whether respondent’s conduct infringed upon her right to privacy pursuant to the Fourteenth Amendment. “Petitioner contends that ‘[G.S.] 150B-51 specifically reserves jurisdiction [over constitutional] issues with a [c]ourt reviewing the decision of the Office of Administrative Hearings.’ While the statute petitioner cites does outline the scope of appellate review of a final decision issued by the Office of Administrative Hearings, it does not permit this Court to decide constitutional claims that have not first been adjudicated on the merits by a trial tribunal. [G.S.] 150B-51(b) outlines the scope of appellate review of a final decision issued by the Office of Administrative Hearings... Pursuant to [that] scope of review, this Court may review whether an ALJ’s ‘findings, inferences, conclusions, or decisions’ were made “[i]n violation of constitutional provisions[.]’ *Id.* Accordingly, while we may review constitutional issues resulting from an alleged error made by the ALJ, we cannot exercise appellate jurisdiction over constitutional claims that have not yet been decided on the merits.” Accordingly, petitioner’s appeal was dismissed for lack of appellate jurisdiction. (Appeal by petitioner from February 2020 final decision entered in the Office of Administrative Hearings. Dismissed. Opinion by Judge Griffin, with Judge Dietz and Judge Zachary concurring.))

**Appellate Procedure; Immunity; Woodson Claim; Corum Claim; Interlocutory Order; Dismissal** Callahan v. North Carolina Department of Public Safety, 2021-NCCOA-46 (No. COA20-269, Chowan— 3/2/21)

**(unpublished)** (Defendant-N.C. Department of Public Safety appealed from the trial court’s order denying in part defendant’s motion to dismiss. Plaintiff-administrator filed an action in April 2019 asserting two alternative claims. Plaintiff asserted a “Woodson” claim “alleging that the Department knew it had inadequate staffing to provide a safe work environment for Sergeant Callahan, and that the unsafe working conditions at Bertie [Correctional Institution] led to Sergeant Callahan’s death.” See Woodson v. Rowland, 329 N.C. 330, 407 S.E.2d 222 (1991). Alternatively, plaintiff asserted a “Corum” claim under N.C. Const. art. I, sec. 19 alleging those same facts. In June 2019, defendant filed a motion to dismiss plaintiff’s complaint pursuant to G.S. 1A-1, Rule 12(b)(1), (b)(2), & (b)(6). See Corum v. Univ. of N. Carolina Through Bd. of Governors, 330 N.C. 761, 413 S.E.2d 276 (1992). The trial court entered an order in December 2019 granting defendant’s motion to dismiss the Woodson claim, on the grounds of sovereign immunity, and denying its request to dismiss plaintiff’s Corum claim. Defendant appealed the trial court’s denial of its motion to dismiss plaintiff’s Corum claim. (Plaintiff did not cross-appeal the trial court’s dismissal of the Woodson claim.) Defendant argued the order affected a substantial right, as “[o]rders denying dispositive motions based on the defenses of governmental and public official immunity affect a substantial right and are immediately appealable.” Plaintiff conceded that if a government entity’s motion to dismiss a state or common law claim based on sovereign immunity is denied, the denial may be immediately appealed. However, plaintiff maintained that defendant could not pursue an interlocutory appeal of a denial of a motion to dismiss a Corum claim based on sovereign immunity. The Court agreed, stating, “[O]ur Supreme Court has unequivocally held that Corum claims brought under the North Carolina

Constitution are not susceptible to a sovereign immunity defense. Craig ex rel. Craig v. New Hanover Cty. Bd. of Educ., 363 N.C. 334, 338, 678 S.E.2d 351, 354 (2009) (‘Allowing sovereign immunity to defeat plaintiff’s colorable constitutional claim here would defeat the purpose of the holding of Corum.’). Defendant did not move to dismiss the Corum claim on the grounds of governmental or sovereign immunity. Rather, defendant moved to dismiss the claim because plaintiff allegedly has adequate state remedies from which plaintiff could recover for the alleged injuries. This indicates that defendant acknowledges that sovereign (or governmental) immunity could not shield it from plaintiff’s Corum claim, and, therefore, that the trial court’s disinclination to dismiss that claim could not be appealed on the grounds that the order affects a substantial right. Defendant has shown no substantial right to have its claim of adequate state remedies decided on appeal at this stage of the proceedings.” Citing Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co., 362 N.C. 191, 197, 657 S.E.2d 361, 365 (2008), the Court held that as the December 2019 order did not dispose of the entire action and was not certified for immediate appeal by the trial court, and as defendant failed to show that the order deprived it of a substantial right which would be jeopardized absent a review prior to a final determination on the merits, the appeal would be accordingly dismissed as interlocutory and premature. (Appeal by defendant from December 2019 order entered in Chowan County Superior Court. Dismissed. Opinion by Judge Arrowood, with Judge Zachary and Judge Murphy.))