

Recent Cases of Interest to Public Lawyers

October 12, 2017
UNC School of Government
Public Law for the Public's Lawyers

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Public Employment and Due Process

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Frampton v. UNC and UNC at Chapel Hill

- August 15, 2017 – COA 16-1236 – Tenured Professor was placed on unpaid leave after arrest in Argentina.
- After judicial review and COA review, Frampton was awarded \$ 231,475.92 in back salary because UNC should have pursued formal disciplinary proceedings. Trial court denied attorneys fees.
- HOLDING: Award of fees is entirely discretionary under NCGS § 6-19.1. "Unique, unusual and controversial" (See Jones vs DPS, April 2017- COA 16-617 for decision upholding award of attorney's fees)

(Fees award to prevailing party in contested state action if (1) The court finds that the agency acted without substantial justification in pressing its claim against the party; and (2) The court finds that there are no special circumstances that would make the award of attorney's fees unjust)

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Tully vs. City of Wilmington

- August 2016 COA15-956
- Plaintiff, the 2011 Wilmington Police Officer of the Year sought a promotion to sergeant but failed a test he claimed was out dated with old search and seizure law. Tully grieved the issue of the outdated examination answers but that was denied as not being a "grievable item." Tully sued for violation of due process and trial court dismissed.
- HOLDING: City did not follow its own policy for appeal (candidates for promotion may appeal any portion of the selection process) and that is "inherently arbitrary." "Government must scrupulously observe rules . . . Or procedures which it has established." Bryant, J., dissents saying City was acting as an employer not as a sovereign. NC Supreme Court heard oral argument October 10, 2017.

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Cole vs NC Dept. of Public Safety

- May 2017-COA 16-340
- Plaintiff was Laundry Plant Manager for DPS who received several unsatisfactory ratings and failed to get a job required certification. After dismissal, OAH reversed finding DPS had enough to demote but not dismiss. State Appealed.
- HOLDING: Rule 41 applies to OAH proceedings; ALJ reversed; NC administrative Code provisions (setting forth how a career state employee can be dismissed for unsatisfactory job performance) are to be construed using the same rules of statutory construction applied to statutes. Record supported dismissal.

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Holland v Wake County Sheriff

- August 1, 2017 – COA16-889
- Nurse was fired for "voicing objections within the workplace to performing a medical procedure on a patient" – felt it was not safe to patient
- 42 U.S.C. § 1983 claim based upon First Amendment must show 1) speech was protected speech, and 2) that protected speech was motivating factor for firing –
- For public employee, "Protected" means a) speech pertains to a matter of public concern and b) the public concern outweighed the governmental interest in efficient operations"
- HOLDING: Not protected speech – must relate to political, social or other concern to community

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City of Asheville v Frost

- May 2017-COA 16-577
- City of Asheville filed petition for trial de novo a review of Civil Service Board which recommended reinstating an Asheville Police Officer. Officer filed his own and demanded jury trial. Trial Court dismissed officer's petition under prior pending action doctrine.
- HOLDING: Asheville Civil Service Law of 1953 as amended in 2009 only allowed petitioner to demand jury trial – and General Assembly may "give powers and duties to counties, cities and towns. . .as it may deem advisable. "Shall proceed to trial as any other civil action" provision of Act did not trigger the Rule 38 "Jury Trial by Right." Dissent says this construction achieves an absurd result. This has been appealed to NC Supreme Court

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Wray v. City of Greensboro

- August 2017 Supreme Court 255A16
- Suits by former Chief of Police to force Greensboro to pay defense costs of over \$220,000.00 associated with lawsuits against him while Chief as a result of actions he took in the course and scope of his position.
- City passed a defense resolution in 1980
- Court dismissed case.
- HOLDING: COA reversed. Supreme Court held that under these facts plaintiff had sufficiently pleaded a contract claim to which immunity does not apply. No comment on merits, but "Plaintiff is not to be denied his day in court because his contract was with the city."
(Ervin, J., dissented joined by Beasley, J.)

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Sovereign Immunity, Governmental Immunity, Public Official Immunity and Tort Law

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Leonard v. Bell

- August 2017-COA 17-130
- Medical malpractice case brought by inmate for failure to diagnose spinal infection against prison physicians
- Public official immunity defense was raised by physicians – public official vs. public employee analysis
- DAC was statutorily created and was required to provide health care to inmates NCGS §148-19(a)
- HOLDING: Physicians not public officials – no statutory authority for positions or delegation

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Fuller v Wake County

- June 2017 – COA 16-869
- Plaintiff was volunteer Treasurer of non profit EMS provider – County assumed control of EMS (plaintiff alleged hostile takeover) and plaintiff was arrested for embezzlement. Charges dismissed and malicious prosecution, false arrest, IIED claims ensued.
- HOLDING: Governmental immunity barred all claims –ensuring EMS service is statutory obligation; Wake being additional insured on liability policy not a waiver of immunity; no successor/transferee liability under Chapter 55A

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Bunch vs. Britton

- June 2017-COA 16-181
- Plaintiff pleaded guilty to having sex with a female between 13 and 15 in Michigan in 1993; moved to NC and “after consulting with local sheriff” registered as sex offender under protest.
- Opps. . . plaintiff says he was never required to register in NC because his Michigan offense was not reportable or even a crime in NC. He prevailed in court to be removed.
- Plaintiff sued Administrator of Sex offender registration for DPS and administrator of program for Cleveland Sheriff for constitutional violations
- HOLDING: Governmental immunity not a bar to constitutional claims; plaintiff had no “adequate remedy at state law” ; He did have reportable conviction at the time (Michigan law changed) and entire case DISMISSED

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Henderson v Charlotte/Mecklenburg Board of Education

- May 2017-COA 16-977
- BOE leased out high school gymnasium to Carolina Basketball Club, for \$ 170.00 – CBC is a private club who in turn contracted with TSO to have plaintiff referee a tournament. Plaintiff was refereeing game and stepped on a warped board suffering severe knee injury. Afterward, other referees told him they just run around the warped board.
- Trial court granted BOE's motion to dismiss on grounds of immunity
- HOLDING: Affirmed. 1) NCGS § 115C524(c) allows BOEs to permit non-school groups use real and personal property but "no liability shall attach to any board of education . . . for personal injury suffered by reason of the use of such school property." 2) Plaintiff was not a 3rd party beneficiary of contract between school board and CBC.

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Chastain v. Gaston College, et al

- April 2017-COA16-1151
- Plaintiff sued defendant as Gaston College BLET instructor after a gun discharged and struck him in abdomen while they were breaking them down after shooting class. Defendant sued in both person and official capacities.
- HOLDING: suit against Gaston and defendant in official capacities can only be brought in Industrial Commission. On POI, official capacity is not synonymous with official duties. Defendant was sergeant with Gastonia PD and police officers are public officials. BLET instructors are required to be active duty officers and are statutorily delegated duties- BLET instructor is public official. However, defendant's actions at 12(b)(6) stage were gross negligence and willful and wanton – sufficient to pierce public official immunity.

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Page v. Chaing, et al

- April 2017-COA-16-611
- Suit against physicians in State Laboratory of Public Health for alleged negligent screening procedures resulting in a treatable inborn metabolism error causing permanent brain injury in infant.
- Motion to dismiss denied on public official immunity filed, plaintiff amended
- HOLDING: Appeal dismissed. Defendants moved to dismiss on lack of subject matter jurisdiction (predicated on sovereign and public official immunity). All immunity defenses were labeled as subject matter jurisdiction, and denial of motion to dismiss on subject matter jurisdiction is not immediately appealable. (denial of motion to dismiss based on grounds of sovereign and public official immunity are immediately appealable but they are 12(b)(6) grounds.

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Meinck vs City of Gastonia

- March 2017 COA16-892
- City leased commercial building downtown to private tenants. Used as art gallery and gift shop
- Plaintiff fell and broke hip – sued city
- HOLDING: Applying Williams v Pasquotank, while cities are allowed to lease to private parties, here city received “substantial revenues” including rent and a 15% commission on all private art, all mean this is proprietary function.

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Mitchell vs. Pruden

- January 2017 COA16-428
- Charter school sued Superintendent of Brunswick County Schools in individual capacity for libel and UDTP based on statements from defendant that charter schools were “dismantling” public education, had become an entrepreneurial opportunity, posted impact statement and otherwise tried to encourage denial of a charter for a new charter school. Court denied motion to dismiss
- HOLDING: Reversed. Superintendent’s statements were in his capacity as Superintendent and he has public official immunity. Allegations of malice were not enough to pierce immunity.

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Constitutional Law & Separation of Powers Cases

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**Richmond County Board of Education
vs. NC State Treasurer**

- July 2017 – COA 17-112
- “If this were any other case, we would summarily reverse.”
- School Board sued over a \$ 50.00 fee collected on improper equipment offenses that went to jails- under NC. Const. Art. IX, Sec. 7 “All fines ...shall belong to counties...for maintaining free public schools.” School Board won in 2015.
- School Board secured Order and writ of mandamus commanding state to immediately pay or “risk being thrown in jail”
- HOLDING: Long standing precedent is judiciary cannot order State to pay new money to satisfy a judgment. BOE did not get injunction, and money has already been spent on jails. Once a “judgment” is entered, the judiciary has performed to the limit of its constitutional powers.
- Notice of Appeal based upon constitutional question filed August 11, 2017

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**In the Matter of Hughes,
Redmond and Smith**

- June 2017, COA15-699, 15-763, 15-829
- On remand from NC Supreme Court.
- Estates of three individuals involuntarily sterilized under authority of Eugenics Board had claims denied under the Eugenics Compensation Program
- Sued challenging the constitutionality under equal protection grounds
- HOLDING: Statute requiring victim/claimant to be living as of June 30, 2013 was facially constitutional

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WIDEN I77 vs NC DOT, et al

- May 2017-COA 16-818
- Plaintiff challenged DOT’s contract with a private corporation to develop and operate HOLs and charge tolls on I-77
- HOLDING: Contract not unconstitutional, delegation of power by the General Assembly; statute gave DOT power to contract with private entities construction of transportation infrastructure; project was for a public purpose; and Tolls are not taxes – if you use a toll road, it is your option. (Notice of appeal on constitutional issue and PDR filed)

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News and Observer, et al vs. McCrory

- December 2016 COA16-725
- Suit against Governor and appointees compelling response to public records, declaring defendants practices violate PR Law including fees for inspection only. Motion to dismiss on sovereign immunity denied – raised for first time at hearing. Partial motion for judgment on pleadings was allowed.
- HOLDING: Sovereign immunity is affirmative defense, and defendants did not raise it in their answer. Court would not abide this type of “gotcha” result.

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City of Asheville v. State of North Carolina

- December 2016 NC Supreme Court 391PA15
- General Assembly passed legislation in 2013 that transferred all assets of Asheville Public Water System serving 124,000 customers to a newly created metropolitan water and sewer district.
- Asheville sued alleging it was illegal local act “relating to health, sanitation” and non-navigable streams” prohibited by NC Constitution, unlawful taking, impaired contracts.
- HOLDING: Supreme Court agreed with City that this was prohibited local act regulating health and sanitation. Dissent says its just another local government creation and general Assembly has that right

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NC State Bd. Of Education v. State of NC

- Sept. 19, 2017 – COA15-1229- Court of Appeals Case of first impression- Does Rules Review Commission have authority to review/approve rules made by NCSBOE?
- NCSBOE argued it had unreviewable power to promulgate rules by NC Constitution (NCSBOE empowered to supervise and administer the [school] and make all needful rules in relation thereto subject to laws as may be enacted by General Assembly.)
- APA NCGS § 150B enacted in 1973 – Rules Review Commission created in 1986 given power to – well, review rules.
- HOLDING: Review and approval authority of RRC is appropriate delegation of power and not volution of separation of powers
- DISSENT: says 1) the people gave SBOE power to make rules and not unelected commission and 2) SBOE’s power not “delegated to the agency by General Assembly”, which is 1st criteria

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Procedure

Cheatham v. Town of Taylorsville -

- August 1, 2017 – COA 16-1057
- Pro se plaintiff's property condemned
- Plaintiff sued, Taylorsville moved to dismiss, plaintiff filed "motion to deny dismissal"
- Dismissal proper for failure to exhaust administrative remedies for enforcement activities AFTER adoption of minimum housing standards statute NCGS § 160A-441, et seq.
- Exhaustion is subject matter prerequisite
- Dismissal not proper for activities BEFORE adoption of ordinance

Fullwood v. Barnes

- October 2016 COA16-357
- Suit against Greensboro Police Officer in official and individual capacity for malicious prosecution, false arrest and assault/battery arising out of an arrest from a raid on an apartment complex. Motions for summary judgment denied.
- HOLDING : Complaint against individual government actor in official capacity in tort must allege waiver of immunity in complaint. If that allegation is not there, that claim must be dismissed. Officer also had Public Official Immunity but sufficient evidence was forecast to show malice on officer's part.

Swan Beach v. Currituck County

- October 2017 COA 16-804
- Entry of Default against County after original dismissal was reversed by Court of Appeals. County filed motion to dismiss in lieu of answer. Mandate issued on reversal within 20 days, and default entered day 30 (and 4 days before a meeting was previously scheduled to discuss settlement).
- Default judgment awarded \$ 39,137,805.00 judgment which bears interest at the rate of \$ 8,578.14 a day, every day.
- HOLDING: Reversed. Court misapplied "good cause" standard and grave injustice will occur.

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Murray v. UNC at Chapel Hill

- June 2017 NC Supreme Court 124A16
- Affirmed COA decision at 782 S.E. 2d 561 (2016) which held that denial of a motion to dismiss based on sovereign immunity - when raised by a Rule 12(b)(1) subject matter jurisdiction defense - is not immediately appealable. The 12(b)(6) defense was based on failure to adequately plead an actual controversy and not on sovereign immunity. Sovereign immunity is a question of personal, not subject matter jurisdiction.

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Standing

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Arnold vs UNC Chapel Hill
(unpublished)

- April 2017 COA 16-573
- Two students sued University asserting their "Education was faulty" as a result of the practice of enrolling student athletes into "Hundreds of sham courses"
- They admitted that some of their courses were "less challenging than some other UNC courses"
- HOLDING: No standing. Standing required an injury in fact. Just because they got jobs at the Y, the Rent-a-center, etc. is not a particularized actual loss

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Open Meeting Law

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Hildebran Heritage vs Town of Hildebran

- March 2017 COA16-568
- Open meetings challenge where the future of the Old Hildebran School was discussed in closed session called to discuss "the location or expansion of industries or other businesses."
- Allegations that Council member engaged in one on one discussions on future of the school
- HOLDING: School burned down while appeal was pending, so contract for demolition issue moot; no open meeting violation ; access to public meeting was sufficient even though some had to stand outside. Dissent on one on one meeting issue. (Appeal to NC Supreme Court dismissed)

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Miscellaneous
Cases/Cogitations of Interest

Rountree v Chowan County

- March 2017-COA16-555
- Retired tax Administrator from Nash Co. went to Chowan on a contract basis to protect his local government retirement benefits
- Two years later he received letter from Retirement Board that he needed to repay \$ 114,448. Plaintiff sued Chowan for negligent misrepresentation and breach of contract
- HOLDING: Summary judgment affirmed for Chowan. 1) "Economic loss rule" bars recovery in tort for contract breach. 2) Chowan owed no duty to plaintiff as prospective employee (and plaintiff was not denied opportunity to investigate his own retirement information)

Jackson Aviation vs Town of Ocean Isle
Beach

- February 2017 COA16-396
- Town sued private company who was contracted to operate the airport - town ordinance required airport to be staffed during normal business hours and contract required compliance with ordinance
- HOLDING: Dismissal reversed. Court of Appeals did not have ordinance in record and it is well settled that courts "cannot take judicial notice of the provisions of municipal ordinances." Citing McEwen v. Charlotte City Coach, 248 N.C.146 (1958)(also, there were issues of estoppel and waiver)

Onslow County and State of NC v. J.C.

- Sept. 19, 2017- COA 17-207- State of North Carolina has no right to appeal the expunction of an expunction pursuant to NCGS § 15A-146 criminal

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Awaiting Opinions

- Dickson vs Rucho – on remand from the US Supreme Court in light of Cooper v. Harris – 2011 legislative and congressional districts- Argued in August
- Cooper v. Berger – fate of the Ethics Commission and State Board of Elections- Argued in August

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