Summaries of Civil North Carolina Appellate Opinions of Interest to Superior Court Judges

Opinions Issued July 3, 2018–Oct. 2, 2018

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Civil Procedure, Costs/Fees, Jurisdiction, and Judicial Authority

Civil contempt; appeal from order denying motion for custodial release; inability to comply
Adams Creek Assocs. v. Davis (**N.C. Supreme Court** No. 3A08-4; Sept. 21, 2018). Vacating, *per curiam*, the opinion of the Court of Appeals (majority) and remanding for trial court to make findings of fact about the defendants' ability to comply pursuant to G.S. 5A-21(a)(3). Further noting that, "In the trial court, defendants are also without prejudice to advance claims not briefed or previously raised but discussed at oral arguments before this court."

Prior summary of COA opinion:

Adams Creek Assocs. v. Davis (COA16-1080; Jan. 16, 2018) (with dissent). Defendants are brothers in their 60s who were involved in protracted litigation with Plaintiff over ownership of 13 acres of land along Adams Creek in Carteret County. After failing to comply with an order to remove structures and equipment from the property in 2011, they were held in civil contempt and have been in jail in Carteret County *ever since*. In 2016, they moved for custodial release on grounds that they were unable to comply with the civil contempt order (in short, they have barely a dime to their names—especially after sitting in jail for 6 years—and they can't pay the many thousands of dollars it will cost to clear away the stuff). At the hearing, the brothers submitted undisputed evidence of their financial situation, but they also noted that they wouldn't comply even if they could. Thus the trial court did not make findings of fact regarding their "ability to comply" under Chapter 5A. The Court of Appeals majority affirmed this decision, concluding that finding of ability to comply would be futile in light of the brothers' "outright refusals to purge their contempt." The Court of Appeals also rejected arguments that the purpose of the contempt order was no longer served by further incarceration and that the contempt had become punitive rather than remedial.

The dissenting judge argued that the majority had conflated the "willfulness" and "ability to comply" elements of contempt, and that the trial court had erred in not considering and making findings regarding ability to comply. As the judge put it, "The fact that defendants are obstinate and foolish does not absolve the trial court of its responsibility to consider that defendants may be obstinate, foolish, *and* unable to comply with the order." Because the trial court is required by G.S. 5A-21(a)(3) to make findings regarding ability to comply, the dissenting judge would reverse and remand for the appropriate findings and conclusions. The dissenting judge also noted that in keeping these men in jail (for what is likely to be the rest of their lives, if courts are indeed allowed to ignore their penury), an enormous quantity "of public funds and resources are wasted seeking to accomplish an impossibility." The judge opined that "[t]his simple property dispute has been transformed into a state-funding enforcement action for the benefit of the plaintiff."

Rule 9(j) and Amending a Complaint Under Rule 15

Vaughn v. Mashburn (**N.C. Supreme Court** No. 3A08-4; Aug. 17, 2018). Before filing her medical malpractice action, Ms. Vaughn had timely obtained the required expert review of her medical care and medical records as required by Rule of Civil Procedure 9(j). When her attorney filed the complaint, he included a Rule 9(j) certification, but it was defective: it certified that the medical *care* had been reviewed, but it failed to also state that the medical *records* had been reviewed. The medical "records" language had been added to Rule 9(j) in 2011, and the attorney erroneously included the pre-2011 language. Soon after the complaint was filed, the original statute of limitations expired. When the mistake in the Rule 9(j) certification was revealed, Ms. Vaughn's counsel moved to amend the complaint to add the omitted phrase. Following existing Court of Appeals precedent, the superior court denied the motion to amend as "futile" because, even if granted, the Rule 9(j) certification could not be properly made prior to expiration of the statute of limitations. Based on its prior decisions (*Fintchre* (2016); *Alston* (2016); and *Keith* (1998)), the Court of Appeals affirmed. The Court of Appeals panel itself was, however, clearly not happy about the outcome:

> "We are again compelled by precedent to reach a 'harsh and pointless outcome' as a result of 'a highly technical failure' by Vaughan's trial counsel—the dismissal of a non-frivolous medical malpractice claim and the 'den[ial of] any opportunity to prove her claims before a finder of fact.'" (quoting *Fintchre* (Stevens, J., concurring)).

The Supreme Court granted discretionary review and reversed the Court of Appeals decision, giving Plaintiff relief from that "harsh and pointless" outcome. Harmonizing strict enforcement of Rule 9(j) with the liberal amendment process in Rule 15, the Supreme Court held that "a plaintiff in a medical malpractice action may file an amended complaint under Rule 15(a) to cure a defect in a Rule 9(j) certification when the expert review and certification occurred before the filing of the original complaint…[and]…such an amended complaint may relate back under Rule 15(c)." The court explained that

> "We again emphasize that in a medical malpractice action the expert review required by Rule 9(j) must occur before the filing of the original complaint. This pre-filing expert review achieves the goal of 'weed[ing] out law suits which are not meritorious before they are filed.'…But when a plaintiff prior to filing *has* procured an expert who meets the appropriate qualifications and,

> after reviewing the medical care and available records, is willing to testify that the medical care at issue fell below the standard of care, dismissing an amended complaint would not prevent frivolous lawsuits. Further, dismissal under these circumstances would contravene the principle 'that decisions be had on the merits and not avoided on the basis of mere technicalities.'"

So, on remand Ms. Vaughn will be given the opportunity to amend her complaint and proceed with her case on its merits.

Medical malpractice or ordinary negligence; Rule 9(j); appellate court raising issue for appellant

Locklear v. Cummings (**N.C. Supreme Court** No. 202A17; Aug. 17, 2018). Ms. Locklear sued the doctor, hospital, medical center, and physician group after she fell off the operating table during cardiovascular surgery and sustained various injuries. Her counsel pleaded her case as a med mal case, obtained a Rule 9(j) expert review, and included a Rule 9(j) certification in the complaint. But the attorney made the same mistake counsel made in *Vaughn* (discussed above): omitted the post-2011 language about medical "records" (and was not able to amend it before the original statute of limitations expired). Like the trial judge in *Vaughn*, the judge dismissed Ms. Locklear's case for failure to comply with Rule 9(j). The Court of Appeals reversed (*Locklear v. Cummings* (COA16-1015; May 16, 2017)), the majority concluding that Ms. Locklear's claims sounded in ordinary negligence, not medical malpractice. Citing language from earlier opinions, the majority concluded that her injuries did not arise from a failure of "clinical judgment and intellectual skill" necessary to amount to a "medical malpractice action" as that term is defined by our statutes. Thus no Rule 9(j) certification had been necessary in the first place.

The dissenting Court of Appeals judge noted that the complaint itself characterized the claims as medical malpractice and that, since Ms. Locklear's attorneys had failed to argue that the complaint was ordinary negligence, the appellate court should not make the argument for her. The Supreme Court agreed with the dissenting judge on that point and reversed the Court of Appeals *per curiam*, thus sending the case back to the lower court as a medical malpractice action (as it had been characterized in the complaint). [Note: Prior to the Supreme Court's ruling in *Vaughn*, this would have been a bad result for Ms. Locklear: the defect in her Rule 9(j) certification would have been incurable under Court of Appeals precedent. But under *Vaughn*, Ms. Locklear has the opportunity to seek leave to correct the Rule 9(j) defect under Rule 15(a). Assuming she properly obtained the required expert witness review prior to filing of her original complaint, one imagines the trial court will permit the defect to be cured and allow the case to go forward on its merits.]

Rule 9(j); defective certification; dismissal of complaint

Fairfield v. Wakemed (COA18-295; Oct. 2, 2018). Plaintiff alleged negligence and related claims stemming from administration of an excessive dose of medication. Her complaint included a Rule 9(j) certification, but instead of stating that her expert had reviewed "all medical records pertaining to the alleged negligence that are available to the plaintiff after reasonable inquiry"—as required by the statute—the certification stated that the expert had reviewed "certain medical records." The trial court dismissed her complaint for non-compliance with Rule 9(j). The Court of Appeals affirmed, citing prior case law including *Alston v. Hueske*, 244 N.C. App. 546 (2016), that emphasizes that strict compliance with Rule 9(j) is required. Plaintiff also asserted a due process claim, but the appeal of that issue was

dismissed for failure to provide legal authority and because Plaintiff was in effect asking the court to rewrite Rule 9(j).

Subject matter jurisdiction; core ecclesiastic matters

Lippard v. Diamond Hill (COA18-302; Oct. 2, 2018). Plaintiffs filed an action against Diamond Hill Baptist Church after they were removed as members of the congregation. The trial court granted a motion to dismiss the compliant for lack of subject matter jurisdiction. The Court of Appeals affirmed, holding that in order to assess the propriety of the church's membership decision, a court would have to delve into ecclesiastical matters—issues of religious doctrine and practice—which is constitutionally forbidden. [For further discussion of court jurisdiction over religious disputes, see my blog post entitled "Courts, Church Disputes, and the First Amendment" at https://civil.sog.unc.edu.]

Award of attorney fees pursuant to G.S. 6-21.5 and G.S. 75-16.1

Burton Constr. Cleanup and Landscaping, Inc. v. Outlawed Diesel Performance, LLC (COA17-1424; Sept. 18, 2018)). Plaintiffs sued Defendants based on alleged faulty repairs to an automobile. The case survived preliminary motions, but at trial the judge granted directed verdict in favor of Defendants after a plaintiff admitted he had made false material statements in an earlier affidavit. After trial the judge also granted Defendants' motion for attorney fees under G.S. 6-21.5 (non-justiciability) and 75-16.1 (frivolous and malicious claim). Plaintiffs appealed.

The Court of Appeals first determined that Plaintiffs' appeals of the summary judgment order and directed verdict were not properly before it because Plaintiffs had not included copies of the relevant order and the trial transcript. As for the attorney fee award, the court concluded that the judge did not err in concluding that Plaintiffs had continued to litigate the matter even after they should have known it had no merit and that doing so was frivolous and malicious.

Receivership pursuant to G.S. 1-363 (in aid of execution)

Haarhuis v. Cheek (COA17-1179; Sept. 18, 2018). Plaintiff's wife was a pedestrian who was killed when Defendant struck her while driving impaired. At trial, the jury awarded Plaintiff over $4 million. Plaintiff attempted to collect on the judgment, but execution failed because the Sheriff could find no assets on which to levy. The record showed, however, that Defendant had potential claims against her insurer and a prior counsel for failing to facilitate a much more favorable position for Defendant at a much earlier point in the litigation. Defendant appeared to have no intention of pursuing these potentially valuable claims, however, and the statute of limitations clock was ticking. Plaintiff therefore asked the court for the post-judgment remedy of appointing a receiver to investigate and pursue the claims on Defendant's behalf. The trial court denied this motion.

The Court of Appeals reversed. The court first concluded that the trial court should not have allowed Defendant's insurer or the earlier counsel to appear and be heard at the hearing on the receivership motion because they had no standing in the matter. As to the receivership itself, the court, in a detailed discussion, determined that G.S. § 1-363, which allows appointment of receivers to aid in execution, should have been more broadly construed and that, as a matter of equity, Plaintiff should have been granted this remedy in order to facilitate recovery on the judgment.

Attorney fees pursuant to G.S. 6-19.1; applicability in licensing board proceedings

Winkler v. North Carolina State Board of Plumbing, Heating, & Fire Sprinkler Contractors (COA17-873; Aug. 21, 2018). After a series of tragic events related to defective ventilation, an HVAC inspector who had worked on the system was disciplined by Defendant licensing board (Board). As to a portion of the Board's decision, Winkler appealed to Superior Court, arguing that the Board exceeded its authority. He prevailed on that question and later sought his attorney fees pursuant to G.S. 6-19.1, which allows shifting of fees in certain actions by or against the State. The trial court granted him over $29,000 pursuant to that statute. The Court of Appeals reversed, holding after extensive analysis of its plain language and legislative history that the statute excludes "disciplinary action by a licensing board."

Rule 59(e) motion and tolling of appeal period

Davis v. Rizzo (COA17-1153; Aug. 21, 2018). Two beneficiaries of the revocable trust of 99-year-old Ms. Davis brought an action against Ms. Davis's daughter and one of Ms. Davis's estate planning attorneys. The matter centered on allegations that Defendants had exerted undue influence over Ms. Davis, which would render certain of Ms. Davis's decisions about her property invalid. On the day before a hearing on Defendants' motions to dismiss, Plaintiffs moved for a continuance or to stay the proceedings to allow time to make further determinations of Ms. Davis's capacity and to appoint a guardian ad litem. The trial court denied the motion to continue/stay and granted the dismissal motions. Within 10 days after entry of that order, Plaintiffs moved to "amend" the order pursuant to Rules 59 and 60(b). The trial court denied the post-judgment motion without a hearing. Plaintiffs appealed the stay and dismissal order and the post-judgment order.

The Court of Appeals dismissed the appeal of the underlying orders and affirmed the denial of the post-judgment motion: (1) The purported Rule 59 motion was not a proper Rule 59 motion because it sought relief from an interlocutory rather than a final order, and also because it sought to rehash legal arguments already made before the trial court. Thus it did not toll the running of the appeal period for the underlying orders, and because the appeal was noticed more than 30 days after those orders, it was untimely.; and (2) As to the post-judgment motion, the trial court was not required to hold a hearing on the motion, and because Plaintiffs did not advance sufficient evidence regarding Ms. Davis's capacity to raise a substantial question, the trial court did not abuse its discretion in denying the motion.

Subject matter jurisdiction as between superior court and IC; raising for first time after default judgment

Burgess v. Smith (COA17-1352; Aug. 21, 2018). Ms. Bell was killed in a single-car accident. The car was owned by Defendant Marshal and was driven by another defendant. Ms. Bell was a passenger in the car while traveling as a salesperson for a company that was also owned by Defendant Marshall. Her estate brought this wrongful death action. Defendants Marshall and Johnson did not answer or appear, and default judgment was entered against them jointly and severally in the amount of over $2 million. Five months later, Defendant Marshall filed a responsive pleading asserting that Ms. Bell was his employee and had been killed during the scope of her employment, and that therefore the case fell within the exclusivity provision of the Workers' Compensation Act. Marshall moved to stay enforcement of the judgment, to set aside the default judgment and entry of default, and to dismiss the action for lack of subject matter jurisdiction. The trial court denied the motions on grounds of estoppel and laches without making findings of fact as to subject matter jurisdiction.

The Court of Appeals reversed, holding that because subject matter jurisdiction can be raised as an affirmative defense any time—"even months after entry of a default judgment"—and "is never dependent upon the conduct of the parties," the trial court erred in failing to make findings of fact as to subject matter jurisdiction. The court remanded the matter to the superior court to make these findings. The court further noted that if the trial judge determines that the court indeed had no subject matter jurisdiction, "we instruct the [Industrial Commission] not to apply section 97-24 two-year filing requirement as a procedural bar to [plaintiff's] claim."

Motion to compel arbitration; ambiguous language in clause; public policy favoring arbitration
AVR Davis Raleigh, LLC v. Triangle Constr. Co., Inc. (COA17-958; Aug. 7, 2018). Landowner and contractor brought various claims against each other related to the construction of an apartment complex in Raleigh. The total of the various claims neared $6 million, but they broke out into various amounts depending on how they were characterized. The construction contract contained an arbitration clause that stated the parties agreed to "Arbitration of claims under $500,000 with litigation of claims over $500,000. In the event there are several claims under $500,000, but the aggregate of all claims exceeds $500,000, all the claims shall be arbitrated." Defendant construction company moved for an order compelling arbitration. The trial court concluded that the language of the agreement did not address the particular facts and circumstances of the case and denied the motion to compel.

The Court of Appeals reversed, noting that once a court determines that parties have an agreement to arbitrate, the second question is whether the instant dispute falls within it. As to that second question, the law favors arbitration. Here, where there is more than one reasonable interpretation of the agreement's application, the trial court "should have deferred to North Carolina's strong policy favoring arbitration" and granted defendant's motion to compel.

Trial court raising an affirmative defense on defendant's behalf; enforcement of GS 58-70-115
Unifund CCR, LLC v. Francois (COA18-111; July 17, 2018). A debt collector brought an action against an alleged debtor. The debtor did not file a responsive pleading. The clerk entered default. At the hearing on the debt collector's motion for default judgment (which the debtor did not attend), the trial judge denied the default judgment motion and dismissed the action as outside the statute of limitations and as a violation of G.S. 58-70-115, which prohibits collectors from bringing claims outside the limitations period. The Court of Appeals reversed, stating that the trial court (1) did not have authority to raise *sua sponte* an affirmative defense of statute of limitations on the debtor's behalf and (2) did not have authority to dismiss an action based on G.S. 58-70-115. The only mechanism for enforcement of that statutory prohibition, as set out in G.S. 58-70-130, is through an action by a debtor and the Attorney General for damages.

Prior pending action doctrine
LMSP, LLC v. Town of Boone (COA17-1241; July 17, 2018). Plaintiff filed an action against the Town of Boone alleging that the Town's towing ordinance violated his constitutional rights and exceeded the scope of the Town's authority. The Town removed the action to federal court. After removal, Plaintiff filed the present action, again seeking relief from the towing ordinance on statutory and constitutional grounds. A trial judge denied plaintiff's motion for preliminary injunction in the present action, and a second trial judge later dismissed the action. Both determinations were based on the prior pending

action doctrine. The Court of Appeals affirmed after determining that the present action and the pending federal action indeed involved the "same parties and substantially the same subject matter." The court determined that the existence of some differences in the particulars of the two actions did not negate the fact that both actions revolved around Plaintiff's "beef against the Town of Boone" over the towing ordinance.

Voluntary dismissal (Rule 41(a)) of claim for just compensation in condemnation action

City of Charlotte v. University Fin. Properties, LLC (COA17-388; July 3, 2018). The City filed a declaration of taking of Defendant's property and deposited $570,425 as its estimate of compensation. Defendant duly requested a jury trial to determine just compensation. After receiving a determination (pursuant to an earlier and separate appeal) that the compensation could not include the impact of a planned bridge, the City moved to amend its complaint and reduce its deposit to $174,475. Defendant landowners filed a Rule 41(a) dismissal of their claim for a trial as to just compensation (which would then trigger a disbursement of the City's original deposited amount). The trial court deemed their voluntary dismissal ineffective and granted the City's motion to amend. The Court of Appeals reversed, holding that the Defendants (the claimants in this case) had the right to dismiss their claim—otherwise the City could force them into a jury trial they no longer seek—and that once they filed their dismissal, the trial court was without jurisdiction to allow the City to amend its complaint. In addition, the Court of Appeals noted that G.S. Chapter 136 only permits the condemnor to *increase* its deposit, and includes no authority for *decreasing* the deposit. The Court thus remanded the matter to the trial court for entry of final judgment (and therefore a disbursement to the landowners of the deposited sum).

Condemnation for beach renourishment; JNOV standard and procedure; new trial; public trust doctrine

Town of Nags Head v. Richardson, _ N.C. App. _, 817 S.E.2d 874 (July 3, 2018) (with partial dissent). In 2011 the Town of Nags Head undertook a beach nourishment project along its coastline. For those beachfront landowners who declined to grant the Town a temporary easement for this project—including Defendants—the Town filed condemnation actions for ten-year easements over the area between the mean high water mark and the vegetation line (or equivalent). At trial the jury awarded the Defendants $60,000 as compensation for the taking of the easement. Several months after trial, the court granted the Town JNOV on grounds that (1) the Town already had the relevant rights to the easement pursuant to the public trust doctrine and (2) even if it didn't have such rights, the defendants presented no competent evidence of damages.

The Court of Appeals reversed the JNOV and remanded for a new trial. As to Defendants' (landowners') appeal, the JNOV was improper because the Town admitted to a taking in its pleading, never revisited the issue in its "all other issues" hearing, and never raised the issue at directed verdict or JNOV (and the trial court cannot raise an issue at JNOV on its own). The JNOV as to damages was improper because even incompetent damages evidence, once admitted, is to be considered competent for purposes of JNOV. However, as to the Town's appeal, the trial court improperly denied the Town's motion *in limine* and admitted Defendants' expert valuation despite its improper method of calculating damages, and thus a new trial was warranted.

The dissenting judge agreed with the bulk of the majority's analyses, but concluded that a new trial was not warranted regarding the value of the easement because the Defendants never offered nor

intended to offer evidence of the easement's value. Thus the $60,000 verdict should be vacated, but no new trial granted.

Standing to assert cause of action related to artwork previously transferred to a receiver
McDaniel v. Saintsing (COA18-88; July 3, 2018). Plaintiff brought an obstruction of justice claim against Defendants. Defendants, lawyers for some of Plaintiff's creditors, had made a UCC-1 filing with the Secretary of State, giving those creditors a secured interest in some of Plaintiff's very valuable Andrew Wyeth paintings. The trial court dismissed the obstruction of justice claim for lack of standing. The Court of Appeals affirmed. Because Plaintiff had previously transferred all of his interest in the paintings (including pending and future causes of action) to a court-appointed receiver, he no longer had standing to assert claims related to the paintings.

Torts

Strict liability of owner/developer for blasting operation; 12(b)(6) standard; ultrahazardous activity
Fagundes v. Ammons Dev. Grp, Inc. (COA17-1427; Sept. 4, 2018). An employee of a blasting company who was working at the blasting site as a rock crusher was seriously injured by debris from his employer's blasting operation. In a prior appeal in this case, the Court of Appeals determined that the Workers' Compensation Act was the sole avenue for seeking a remedy against the employer itself. (See prior summary below.) In the present appeal, the court addresses whether it was appropriate for the trial court (in its 2015 order) to dismiss the employee's liability case against the *developer* who hired the employer blasting company as an independent contractor. In this detailed opinion, the Court of Appeals determined that—under existing precedent regarding strict liability for the ultrahazardous activity of blasting—it was inappropriate for the trial court to dismiss the employee's claim against the *developer* under Rule 12(b)(6), but the court emphasized that their holding expresses no opinion about whether the employee will be able to actually prove a basis for liability as the case proceeds past the pleadings stage.

> *Prior summary of earlier appeal:*
> **Exclusivity of Worker's Compensation Act; ultrahazardous jobs**
> *Fagundes v. Ammons Dev. Grp, Inc.* (COA16-776; Feb. 7, 2017). While plaintiff was crushing rocks for the defendant employer, debris from the employer's blasting operation struck and seriously injured him. He sued the employer, its CEO, and the blaster in superior court. The trial court partially dismissed the claims based on the exclusivity provision of the Workers' Compensation Act. On appeal, plaintiff argued that the *Woodson* exception to that exclusivity should be extended to "ultrahazardous" jobs. The Court of Appeals rejected that argument, finding that *Woodson* was premised on the intentional conduct of the employer that creates substantial certainty of harm, not on the degree of dangerousness of the job itself. The court also rejected plaintiff's argument that his suit against the blaster fell within the *Pleasant* exception to exclusivity, finding that there was no forecast of evidence of the blaster's willful, wanton, or reckless conduct.

Contributory negligence as a matter of law; failure to use designated pedestrian crosswalk
Khatib v. N.C. Dep't of Transp. (COA17-1430; Sept. 4, 2018). As plaintiff was completing a jog, her husband came to pick her up in his car. She crossed a grassy median to get to the car, and as she stepped off the median curb, she fell into a DOT-maintained manhole that had become uncovered. She fell five feet down, sustaining injuries. The Industrial Commission dismissed her claim, concluding that she was contributorily negligent as a matter of law. The Court of Appeals affirmed on grounds that her decision to cut across a grassy median, *rather than follow the nearby pedestrian crosswalk*, was contributory negligence barring her claim against the DOT.

Summary judgment regarding claims for breach of contract, fraud, unfair trade practices, and civil conspiracy; failure to support claims
Thompson v. Bass (COA17-1194; Sept. 4, 2018). Plaintiff was the owner of several internet sweepstakes businesses. In the course of her business, she had received notices from local law enforcement that she

was operating some of the sweepstakes in violation of the law. In response, she had adjusted some of the business practices and continued with others. In July 2015, she purchased Defendant's sweepstakes business in a nearby county. Before selling his business to Plaintiff, Defendant had received his own notices of violation from local law enforcement. But before buying Defendant's business, Plaintiff made no inquiry with local law enforcement about any potential illegality. In October 2015, Plaintiff was charged with criminal activity for the continuing operation of certain aspects of the business formerly owned by Defendant. Plaintiff sued Defendant (and also an independent software vendor for Defendant's company), stating various claims. The trial court granted summary judgment in favor of Defendants. The Court of Appeals affirmed as follows: (1) As to breach of the contract for the sale of the business, Plaintiff failed to allege any aspects of the contract that Defendant had breached (and the vendor was not a party to any contract); (2) as to fraud, Plaintiff failed to demonstrate any actual misrepresentations by Defendants or that she, an experienced internet sweepstakes owner, could have reasonably relied on such representations; (3) her Ch. 75 claim failed as a matter of law; and (4) she demonstrated no facts in support of a civil conspiracy claim.

Application of G.S. 7A-56(a) and (c); fraud and misrepresentation claims in sale of commercial property

NNN Durham Office Portfolio I, LLC v. Highwoods Realty Limited Partnership et al. (COA17-756; Sept. 4, 2018). Defendant Highwoods was the owner of a complex of five office buildings of which the primary tenant was Duke (mostly Duke PRMO). In 2007, Highwoods, through Defendant real estate company TLG, began marketing the property for sale. The advertising for the property included disclosures regarding the length of the existing leases and the expiration dates. But at the same time the property was being marketed for sale, Highwoods was also discussing bids from Duke to construct a separate structure in which to house Duke's PRMO in the future. The high bidder at the sale of the property (approx. $34 million) was a company that intended to facilitate the financing through a group of investors in a like-kind Sec. 1031 real estate investment structure (a security). At the final sale in March 2007, the deed to the properties was transferred to the entity that was comprised of these investors (Plaintiffs). In November 2007, Duke announced that it would not be renewing its leases at the end of the lease term in 2010 for the bulk of the building space. By 2012, the property was in foreclosure.

Plaintiffs sued Defendants Highwoods and TLG. The superior court (Business Court) ultimately dismissed, granted judgment on the pleadings, or granted summary judgment against Plaintiffs as to each of the claims at issue in this appeal. The Court of Appeals affirmed as follows: (1) Plaintiffs' claim for primary liability for securities violations pursuant to G.S. 78A-56 failed because mere transfer of a deed to Plaintiffs at the close of sale and recordation of the deed did not constitute sale of a security; (2) the claim for secondary liability under 78A-56 also failed because there was no evidence of actual knowledge or material aid of a securities violation; and (3) the common law claims of fraud, fraud in the inducement, and negligent misrepresentation failed because there was insufficient evidence of any representations to Plaintiffs that might have created justifiable reliance or of any actual reliance by Plaintiffs.

See also:

Interpretation of waiver of claims provision in settlement agreement

NNN Durham Office Portfolio, I, LLC v. Grubb & Ellis Company, LLC. v. Highwoods Realty Ltd. Partnership (COA17-607; Sept. 4, 2018). In this appeal—a companion to the appeal summarized directly above—the Court of Appeals concludes that Defendants were entitled to dismissal of all claims (i.e., those not already dismissed by the trial court) under the terms of a 2010 settlement in which Plaintiffs agreed to waive claims in exchange for Defendants' agreement to walk away from their property management position.

Malicious prosecution and related tort claims by employer's insurer; Industrial Commission jurisdiction

Seguro-Suarez v. Key Risk Ins. Co. (COA17-697; Sept. 4, 2018). This case has a fact scenario that, with some light embellishment, would resemble an early-career John Grisham novel. In 2003, while working for his employer, Plaintiff fell 18 feet onto concrete. He was severely injured and has permanent cognitive impairment and loss of executive function requiring that he receive daily assistance with personal care. From almost the start, his employer's insurer, Key Risk Insurance Company, took pains to avoid compensating him, even after the Industrial Commission ordered it to make remedial payments in 2008 for some of the funds it had withheld. The company's efforts culminated in 2013 in having its investigator persuade local law enforcement to arrest Plaintiff on suspicion of insurance fraud. He was indeed arrested, jailed, and later indicted on 25 counts of insurance fraud for accepting payments from the insurer—payments the Commission had earlier ordered the insurer to pay. A court-ordered psychological exam revealed he was (gasp!) cognitively deficient to stand trial. The State ended up dropping the charges after a hearing in which the judge asked if the State "really want[ed] to assist in the establishment of a malicious prosecution claim [,]" and expressed "some real concerns when a man is drawing a check pursuant to an order, in effect, pursuant to a court order, and one side doesn't like the court order and decides to take out criminal charges because they disagree with what the ruling was."

Plaintiff sued the insurer (and associates) in superior court for malicious prosecution, abuse of process, bad faith, willful and wanton conduct, civil conspiracy, and punitive damages. Defendant moved to dismiss the claims on the basis that they revolved around compensation by Plaintiff's employer for Plaintiff's work-related injury, and thus were within the exclusive jurisdiction of the Industrial Commission. The trial court denied the motion, and the Court of Appeals affirmed, holding in a detailed analysis that the tort claims do not " 'arise[ ] from an . . . insurer's processing and handling of a workers' compensation claim' but instead out of a fraudulently and maliciously instituted criminal prosecution over which the Commission has no jurisdiction."

The Court of Appeals did, however, reverse the denial of the motion to dismiss the bad faith and civil conspiracy claims. The court determined that the bad faith claim required allegation of withholding payments, and the insurer had not actually withheld payment. The civil conspiracy claim failed because the complaint only alleged intra-entity activity and not collusive activity between two entities.

Doctrine of *nullum tempus*; governmental vs. proprietary functions

Town of Littleton v. Layne Heavy Civil, Inc. (COA17-1137; Aug. 21, 2018). In 2008, Defendants completed work on a sewer system restoration for the Town of Littleton. Around 2011 the Town began to notice serious defects in the work. The Town did not, however, initiate this action against Defendants until

2016. All of the claims—breach of contract, negligence, conversion, and unfair trade practices, among others—were subject to either a three- or four-year statute of limitations. The trial court granted summary judgment against the Town on that basis. On appeal, the Town argued that these statutes do not apply to it because of the doctrine of *nullum tempus*, which exempts towns from time limitations unless the relevant statutes specifically state otherwise. The Court of Appeals disagreed, holding that the doctrine only applies with respect to *governmental* functions, and the operation and maintenance of a sewer system is a *proprietary* function. Summary judgment in favor of Defendants was therefore proper.

Trespass, conversion, negligence related to timber cutting; sole liability of an independent contractor
Hamby v. Thurman Timber Co., LCC (COA17-1371; July 17, 2018). In 2011, Defendant Thurman Timber (pursuant to a timber rights agreement) hired a company to cut timber on the land of Cline, Plaintiff's neighbor. Plaintiff later discovered that 8 acres of his own timber had been cut in the process. He later brought this action against Thurman Timber and Timothy Thurman for trespass to land, conversion, and negligence. The trial court granted summary judgment in favor of Defendants as to all claims. The Court of Appeals affirmed, finding: (1) as to trespass, the "entry" onto Plaintiff's land was not by the Defendants, but instead by Otis Hill Logging, an independent contractor, and there was no evidence that Otis was acting as an agent of Defendants; (2) as to conversion, the timber in question was removed by Otis, not Defendants, and there was no evidence that Defendants themselves removed any of it nor paid Otis for any of it; and (3) as to negligence, there was no evidence that Defendants themselves removed any of Plaintiff's timber, much less negligently. The Court of Appeals also declined to revive Plaintiff's "claim for piercing the corporate veil" against Timothy Thurman, explaining that this doctrine is not an independent theory of liability but instead an avenue to pursue underlying claims against a shielded party.

Contracts

Unambiguous terms of management contract; ownership of airplane engines at time of bankruptcy
Press v. AGC Aviation (COA17-9; Aug. 7, 2018). One group of folks (Plaintiffs) co-owned Airplane A. Another group (Defendants) co-owned Airplane B. Both groups participated in an airplane management program with Avantair and executed agreements that specified the terms of this program (the "Agreements"). In the course of Avantair's maintenance of Airplane A and Airplane B (and all the other participating planes), Avantair had occasion to swap engines among the planes. Over time the quality of Avantair's management services declined, its finances fell into disarray, and ultimately the company filed for bankruptcy. At that time, both of Airplane B's engines were in Airplane A, and Airplane B had no engines. Plaintiffs filed a declaratory judgment action to determine who owned the engines. The trial court found in favor of Plaintiffs (the owners of Airplane A that ended up with Airplane B's engines). The Court of Appeals affirmed in a detailed opinion as follows: (1) The unambiguous terms of the Agreements established that ownership at the time of bankruptcy would rest with the plane holding the parts (as the court put it: "[w]hen bankruptcy was filed, the music stopped in Avantair's game of musical chairs—or musical engines—and defendants ended up without a chair"); and (2) Defendants' counterclaims for conversion, trespass to chattels, and unjust enrichment were properly dismissed in light of the disposal of the contract claim.

Corporations

Judicial dissolution; expectation of complaining shareholder of continued employment and salary
Brady v. Van Vlaanderen (COA18-61; Aug. 21, 2018). Plaintiff was among several family members who were shareholders of United Tool & Stamping Company of North Carolina, Inc. (United Tool), a company incorporated in 1996 by Plaintiff's father. Over the years Plaintiff was also employed and salaried by United Tool. After her father sold his own shares of the company, Plaintiff became more involved in the company and eventually requested access to certain corporate records and to have certain meetings to review them. After one such meeting, Plaintiff was informed that her employment was terminated. Plaintiff filed a complaint against the other shareholders in 2012 seeking judicial dissolution pursuant to G.S. 55-14-30. In 2016, the trial court (Business Court) granted summary judgment in favor of Defendants. The Court of Appeals affirmed. The court determined that Plaintiff had not shown any abuse of discretion in denying a judicial dissolution, and that Plaintiff had failed to demonstrate some of the key factors, such as management deadlock, an unprofitable company, or asset mismanagement. Her own expectations of receiving a salary did not justify a dissolution that would have to take place without regard to the rights and interests of the other shareholders. In addition, the trial court correctly determined that the only equitable remedy it was statutorily authorized to grant is dissolution, and that it therefore need not consider other equitable remedies the Plaintiff proposed.

Real Property, Condemnation, Land Use, and Foreclosure

Non-judicial (Chap. 45) foreclosure; holder of note; lost note; UCC provision regarding lost instruments
Foreclosure of Deed of Trust by Frucella (COA18-212; Oct. 2, 2018). In 1985, Respondents executed a Note and Deed of Trust on their property to secure a loan. They eventually defaulted. In 2010, the Note was transferred to CitiMortgage but sometime thereafter was lost. Sometime later CitiMortgage initiated a Chapter 45 foreclosure proceeding against Respondents. In April 2017 the clerk issued an order allowing the foreclosure sale. On appeal to superior court, the judge also issued an order allowing foreclosure. Respondents appealed to the Court of Appeals, asserting that CitiMortgage had not established that it was the holder of the Note—and therefore did note show entitlement to foreclose—because the Note had been lost. The court disagreed, concluding that the two lost note affidavits of CitiMortgage employees satisfied the requirements of G.S. 25-3-309, the UCC provision governing entitlement to enforce a lost instrument. Because the evidence was sufficient to support the superior court's findings of fact, the superior court did not err in determining that CitiMortgage was the holder of the Note and allowing a sale.

Effect of local act on Moore County's authority to limit exercise of Town of Pinebluff's ETJ
Town of Pinebluff v. Moore Cty (COA17-286; Oct. 2, 2018). The Superior Court properly granted summary judgment in favor of the Town of Pinebluff and issued a writ of mandamus ordering Moore County to authorize Pinebluff's extension of its extraterritorial jurisdiction (ETJ). G.S. 160A-360 places certain requirements on towns wishing to extend their ETJ and grants counties certain discretion to limit the exercise of ETJ. But those provisions were invalidated with respect to the Town of Pinebluff when the General Assembly enacted local act S.L. 1999-35. Thus Moore County was without discretion to withhold authorization for the Town's exercise of ETJ.

Statute of frauds; intent of testator/grantor; conveyance of beach house
Barrett v. Coston (COA18-16; Sept. 18, 2018). Mr. Clements owned a house in Atlantic Beach and a condo in Indian Beach. In his 2012 will, he left the house to his sister-in-law and the condo to his sister. Sometime after that, apparently he had further discussions with both women about which of them should receive the house and which should receive the condo. In 2016, just a few months before his death, he deeded the condo to the sister-in-law. He did not, however, convey the house to his sister or amend his will before he passed away, so both the house and the condo wound up with the sister-in-law. The sister sued to recover the house, alleging that it was Mr. Clements' intent. The trial court granted the sister-in-law's motion to dismiss, and the Court of Appeals affirmed. Because all of the sister's arguments for receiving the house run counter to G.S. 22-2, the Statute of Frauds—which requires that such conveyances of land be in writing—the trial court properly dismissed her claims. There was no showing of fraud, breach of duty, or mutual mistake that might overcome the legal requirement of a writing. The court closed by noting that,

> "We are certainly sympathetic to Plaintiff's position. It seems likely that the Decedent meant to leave Plaintiff the House but that he simply never got around to change his will or execute a deed to carry out his intent. It may be that her brother thought that he already had taken care of it. But, under the facts of this case, there is simply no remedy available to Plaintiff."

Easements for use of a road to access adjacent property (various easement theories)

Town of Carrboro v. Slack (COA17-864; Sept. 18, 2018). This case is about whether owners of two parcels have easements for use of a gravel road (that has existed since around the 1940s) that runs up the eastern edge of the Slack's property. The opinion gives the "lay of the land" as follows:

> "This dispute involves four adjacent tracts of land which, for purposes of illustration, can be envisioned as four quadrants on a map. In the northwest quadrant (the upper left) is a roughly 100-acre tract owned by the Town of Carrboro, the Town of Chapel Hill, and Orange County. Proceeding clockwise from there, the northeast quadrant is William Inman's property, including his home. To the southeast lies the property of the Episcopal Church of the Advocate. To the southwest is the property of Andrew and Bethany Slack, including their home.
>
> On the border between the Slack property and the Church property is a gravel road. The road extends from the southern border of the properties all the way to the Inman and government properties to the north."

In 2016, the Slacks regraded the gravel road, scooted it slightly farther over onto their property, and erected a fence to restrict access to it. The government landowners and Mr. Inman sued. At summary judgment, the trial court found in favor of the government landowners and Mr. Inman and enjoined the Slacks from restricting access in the future. The Slacks appealed.

The Court of Appeals reversed as to the government landowners and affirmed, in part, as to Mr. Inman. (The summary judgment order did not state the legal basis for the ruling, so the Court of Appeals addressed each relevant legal argument.) As to the government landowners, they failed to show a right of access under any of the theories presented: (1) Express easement appurtenant. Such an easement "runs with the land," and the Slacks had never granted such an express easement to anyone who actually owned the parcel that would benefit; (2) Express easement by reservation. No deeds in the Slacks' chain of title contained any such reservation or exception; (3) Implied easement by dedication. The evidence showed no intent by the Slacks or their predecessors in interest to make a dedication of the use of the road for a public purpose; (4) Implied easement by plat. This theory is not applicable because the Slacks and their predecessors never granted anything to Plaintiffs; and (5) Implied easement by estoppel. This claim fails because the evidence did not show that the government landowners took action in reliance on the existence of an easement.

As to landowner Inman, the trial court correctly determined that he had established a prescriptive easement over a portion of the gravel road because he demonstrated the requisite open and continuous use and maintenance of the road for a period of at least 20 years. The trial court exceeded its authority, however, in the scope of its order preventing the Slacks from erecting fencing along their property. The Slacks had a right to do so in such a way that did not unreasonably interfere with Mr. Inman's easement, and the court remanded to the trial court accordingly.

Reformation of deed; statute of limitations in G.S. 1-47.2; standing of holder; unclean hands

Nationstar Mortgage LLC v. Dean (COA18-132; Sept. 18, 2018). In 2004 the Deans used their beach cottage as collateral for a $1.8 million loan from First South Bank. When recording the deed of trust, the Deans' attorney failed to include the exhibit that contained the full legal description of the property (although the note itself did include the property's address, and there was no confusion about the property's identity). The attorney soon filed an amended deed of trust to include the description. By

then the Deans had also conveyed an interest in the property to another bank, although there seems to be no dispute that it was intended to be a second-position lien. Years later, after the Deans fell behind on the payments on the first note, Aurora Bank (a successor in interest to First South Bank) eventually began foreclosure proceedings. Plaintiff Nationstar soon thereafter took over servicing of the loan and filed this action seeking a declaration that the First South Deed of Trust was a valid encumbrance on the property and, in the alternative, seeking reformation of the Deed of Trust to include the full legal description. The Deans countered that these claims were barred by the doctrine of unclean hands and by the statute of limitations. The trial court found in Nationstar's favor.

The Court of Appeals affirmed as follows: (1) The equitable remedy of deed reformation was appropriate in this case because there was no dispute that both the Deans and First South Bank intended that the property description be included in the recording and that it was only omitted by the inadvertence of the Dean's attorney; (2) Nationstar had standing to bring the reformation claim because it was the holder of the original note, regardless of whether it was also the note's owner; (3) the ten-year statute of limitations in G.S. 1-47.2 (upon a sealed instrument or conveyance of real property) applied to the reformation claim, so the claim was timely; and (4) the Dean's assertions of unclean hands by Aurora Bank—which they claim persuaded them in 2011 to miss payments in order to trigger a modification process—related to conduct collateral to the 2004 recordation of the First South deed of trust. It therefore did not operate to bar that claim.

DOT taking of an easement; measure of damages not to include lost income

DOT v. Jay Butmataji, L.L.C. (COA17-689; Aug. 7, 2018). Defendant operated a hotel on a 3.5 acre parcel. The DOT took a temporary construction easement on approximately 0.18 acres of that parcel. The jury returned a verdict for Defendant of $150,000 as just compensation for the taking of the easement. Defendant appealed, asserting that the trial court had improperly excluded certain testimony by its valuation expert. The Court of Appeals held that the trial court did not err in excluding the evidence because the valuation (1) included lost income of the hotel itself, a measure of damages not admissible with regard to taking of a temporary easement; (2) incorrectly assumed that the DOT had blocked access to the hotel during construction; and (3) improperly considered what a willing buyer would pay for the property *during the construction*.

Unrecorded right of first refusal; specific performance; innocent purchaser

Anderson v. Walker (COA17-782; July 3, 2018). Plaintiff was lessee of Defendant Walker's real property. In January 2013 Plaintiff and Walker entered into an agreement giving Plaintiff a two-year right of first refusal to purchase the property. The agreement was incorporated by reference into a subsequent 1.5-year lease. The lease (and therefore the right of first refusal) were not recorded. In December 2013, without notifying Plaintiff, Walker entered into an Option Agreement with Curtis T LLC for the purchase of the property. Plaintiff then attempted to exercise his right of first refusal. Upon discovering that Plaintiff was attempting to purchase the property, Curtis T then proceeded to exercise its Option. Plaintiff sued for strict enforcement of the right of first refusal. The trial court found in Plaintiff's favor, ordering Walker to convey the property to Plaintiff. The Court of Appeals affirmed, holding that the recordation statute, G.S. 47-18(a), does not require recordation of rights of first refusal. The court further concluded that, because Curtis T was aware of Plaintiff's lease before Curtis T entered into the Option Agreement, and was aware that Plaintiff was attempting to exercise his right of first refusal

before Curtis T attempted to exercise its Option, Curtis T was not an innocent purchaser for value. Thus the Option did not take priority over Plaintiff's right of first refusal and Plaintiff was entitled to conveyance of the land.

Voluntary dismissal (Rule 41(a)) of claim for just compensation in condemnation action

City of Charlotte v. University Fin. Properties, LLC (COA17-388; July 3, 2018). The City filed a declaration of taking of Defendant's property and deposited $570,425 as its estimate of compensation. Defendant duly requested a jury trial to determine just compensation. After receiving a determination (pursuant to an earlier and separate appeal) that the compensation could not include the impact of a planned bridge, the City moved to amend its complaint and reduce its deposit to $174,475. Defendant landowners filed a Rule 41(a) dismissal of their claim for a trial as to just compensation (which would then trigger a disbursement of the City's original deposited amount). The trial court deemed their voluntary dismissal ineffective and granted the City's motion to amend. The Court of Appeals reversed, holding that the Defendants (the claimants in this case) had the right to dismiss their claim—otherwise the City could force them into a jury trial they no longer seek—and that once they filed their dismissal, the trial court was without jurisdiction to allow the City to amend its complaint. In addition, the Court of Appeals noted that G.S. Chapter 136 only permits the condemnor to *increase* its deposit, and includes no authority for *decreasing* the deposit. The Court thus remanded the matter to the trial court for entry of final judgment (and therefore a disbursement to the landowers of the deposited sum).

Condemnation for beach renourishment; JNOV standard and procedure; new trial; public trust doctrine

Town of Nags Head v. Richardson, _ N.C. App. _, 817 S.E.2d 874 (July 3, 2018) (with partial dissent). In 2011 the Town of Nags Head undertook a beach nourishment project along its coastline. For those beachfront landowners who declined to grant the Town a temporary easement for this project—including Defendants—the Town filed condemnation actions for ten-year easements over the area between the mean high water mark and the vegetation line (or equivalent). At trial the jury awarded the Defendants $60,000 as compensation for the taking of the easement. Several months after trial, the court granted the Town JNOV on grounds that (1) the Town already had the relevant rights to the easement pursuant to the public trust doctrine and (2) even if it didn't have such rights, the defendants presented no competent evidence of damages.

The Court of Appeals reversed the JNOV and remanded for a new trial. As to Defendants' (landowners') appeal, the JNOV was improper because the Town admitted to a taking in its pleading, never revisited the issue in its "all other issues" hearing, and never raised the issue at directed verdict or JNOV (and the trial court cannot raise an issue at JNOV on its own). The JNOV as to damages was improper because even incompetent damages evidence, once admitted, is to be considered competent for purposes of JNOV. However, as to the Town's appeal, the trial court improperly denied the Town's motion *in limine* and admitted Defendants' expert valuation despite its improper method of calculating damages, and thus a new trial was warranted.

The dissenting judge agreed with the bulk of the majority's analyses, but concluded that a new trial was not warranted regarding the value of the easement because the Defendants never offered nor intended to offer evidence of the easement's value. Thus the $60,000 verdict should be vacated, but no new trial granted.

Estates and Trusts

Statute of frauds; intent of testator/grantor; conveyance of beach house

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Administrative Appeals and Regulatory Matters

Rulemaking and compliance with APA; "cap factor" for TSERS

Cabarrus Cty Bd. of Educ. v. Dept. of State Treasurer (COA17-1017; Sept. 18, 2018). This case addresses whether the Retirement Systems Division's adoption of a "cap factor" (G.S. 135-5(a3)) for the Teachers and State Employees' Retirement System (TSERS) was void. Affirming the superior court, the Court of Appeals concluded in this detailed opinion that, because the TSERS Board of Trustees did not follow the rulemaking procedures of the North Carolina Administrative Procedures Act (G.S. 150B) before implementing the rule, the cap factor was of no effect.

N.C. Const. art. IX, sec. 7; whether a payment agreement was a penalty

DeLuca v. Stein (COA17-1374; Sept. 4, 2018) (with dissent). In 2000, North Carolina, through then-Attorney General Easley, entered into an agreement with Smithfield Foods and its subsidiaries through which Smithfield would pay a certain sum of money (up to $2 million per year) for 25 years to be used as grant money for various water quality and similar environmental programs. The agreement came during a period of intense public scrutiny of the hog industry and in the wake of the collapse of hog waste lagoons and the effects of that phenomenon on NC waterways. In 2016, Mr. DeLuca, a North Carolina citizen—later joined by the New Hanover County Board of Education—sued, asserting that the proceeds were a "penalty" by the meaning of Art. IX, sec. 7 of the NC Constitution and seeking an injunction preventing the funds from being directed to any entity other than NC schools. The trial court, working with an extensive record, granted summary judgment in favor of the State. In this appeal, the Court of

Appeals (majority) reversed and remanded for trial, holding that the record revealed a genuine issue of material fact as to whether the agreement amounted to a "penalty."

The dissenting judge opined that the parties had already contended that there were no genuine issues of material fact, that the material facts were undisputed, and that the only question before the trial court was a legal one. The judge determined that the trial court had not erred in making its legal determination based on the fully-developed record before it.

Attorney fees pursuant to G.S. 6-19.1; applicability in licensing board proceedings

Winkler v. North Carolina State Board of Plumbing, Heating, & Fire Sprinkler Contractors (COA17-873; Aug. 21, 2018). After a series of tragic events related to defective ventilation, an HVAC inspector who had worked on the system was disciplined by Defendant licensing board (Board). As to a portion of the Board's decision, Winkler appealed to Superior Court, arguing that the Board exceeded its authority. He prevailed on that question and later sought his attorney fees pursuant to G.S. 6-19.1, which allows shifting of fees in certain actions by or against the State. The trial court granted him over $29,000 pursuant to that statute. The Court of Appeals reversed, holding after extensive analysis of its plain language and legislative history that the statute excludes "disciplinary action by a licensing board."