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

Nov. 1, 2016–June 9, 2016

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I	CIVIL PROCEDURE, JUDICIAL AUTHORITY, and JURISDICTION	1
II.	DECLARATORY JUDGMENTS	10
III.	ARBITRATION	11
IV.	CONTRACTS	12
V.	CONSTITUTIONAL ISSUES	14
VI.	TORTS and IMMUNITY	15
VII.	FORECLOSURES	25
VIII.	REAL PROPERTY, LAND USE, and CONDEMNATION	29
IX.	ESTATES and SPECIAL PROCEEDINGS	33
X.	OPEN MEETINGS and PUBLIC RECORDS	36
XI.	ADMINISTRATIVE APPEALS	37
XII.	Appeal Dismissals (Selected)	38
XIII.	App. A: NC Supreme Court Press Summary in *US Bank v. Pinkney*	39
XIV.	App. B: Related Blog Posts	40

CIVIL PROCEDURE, JUDICIAL AUTHORITY, and JURISDICTION

Judicial estoppel

Old Republic Nat'l Title Ins. Co. v. Hartford Fire Ins. Co. (**NC** No. 155A16; Mar. 17, 2017) (with dissent). In a prior case related to the same bonding dispute, defendant Hartford declined to join the action and represented to the federal court that it would not seek to collaterally attack the judgment. Later, Hartford was named as defendant in a state court action arising from the same facts, and raised counterclaims similar to those it might have litigated in the federal action. The trial court dismissed the counterclaims based on the doctrines of judicial estoppel, collateral estoppel, and res judicata. A divided panel of the Court of Appeals reversed the dismissal. Both the majority and dissent confined their analyses to the doctrines of collateral estoppel and res judicata.

The Supreme Court reversed the decision of the Court of Appeals, but focused solely on the doctrine of judicial estoppel, holding that the trial court did not abuse its discretion by dismissing the Hartford's counterclaims due to Hartford's prior assertions to the federal court that it would not pursue those issues. The dissenting Justice, joined by two others, took issue with the majority deciding the matter based on a doctrine not addressed by the Court of Appeals or thoroughly briefed at the Supreme Court; and, in a detailed discussion, disagreed with the conclusion that judicial estoppel could be properly applied to bar Harford's counterclaims.

Authority to review constitutional question on appeal from Industrial Commission

In the Matter of Redmond (**NC** No. 86A16; Mar. 17, 2016). After the NC Industrial Commission denied petitioner's claim under the eugenics compensation program, petitioner raised a constitutional challenge to the eligibility requirements, and the claim was again denied by the full Commission. On appeal, the Court of Appeals determined that it did not have jurisdiction to review the constitutional question and remanded for review by a three-judge panel of the superior court pursuant to G.S. 1-267.1(a1). The Supreme Court reversed and remanded for review by the Court of Appeals, holding that the constitutional challenge before the Industrial Commission, an administrative agency, is not a challenge in a "court" as contemplated by Rule of Civil Procedure 42(b)(4). Therefore the jurisdiction of the Court of Appeals to review the issue is not limited by G.S. 1-267.1(a1). *See also* In the Matter of Hughes (**NC** No. 87A16; Mar. 17, 2016); and In the Matter of Smith (**NC** No. 88A16; Mar. 17, 2016), which were remanded to the Court of Appeals for the reasons stated in *Redmond*.

Class action certification

Fisher v. Flue-Cured Tobacco Cooperative Stabilization Corp., 794 S.E.2d 699 (**N.C.** Dec. 21, 2016). (In this case the Supreme Court on its own initiative certified an appeal from the superior court for immediate review prior to determination by the Court of Appeals.) Plaintiffs in this case are current and former flue-cured tobacco producers who brought suit against a tobacco cooperative (coop) of which Plaintiffs were members. The trial court granted Plaintiffs' motion to certify the action as a class action, and in this opinion the Supreme Court affirms, holding that the trial court did not abuse its discretion in assessing the standards for class certification.

Interlocutory appeal of complex business case designation

Hanesbrands Inc. v. Fowler, 794 S.E.2d 497 (**N.C.** Dec. 21, 2016). Defendant did not show that the designation of Plaintiff's case against her as a complex business case affected a substantial right. Thus her interlocutory appeal to the Supreme Court pursuant to G.S. 7A-27(a) was dismissed.

Civil contempt; trial court jurisdiction after appeal

Plasman v. Decca Furniture (USA), Inc. (COA16-777; May 16, 2017). Affirming a trial court (Business Court) ordering holding plaintiffs in civil contempt for failure to comply with a preliminary injunction requiring them to turn over diverted funds. The Court of Appeals first determined that the trial court retained jurisdiction to make the contempt ruling during plaintiffs' appeal of an interlocutory order denying a motion to amend the preliminary injunction (distinguishing the facts from those in *Tetra Tech Tesoro*, 794 S.E.2d 535 (N.C. App. 2016)). The court then determined that ample evidence supported the trial court's findings under GS 5A-21 that the purpose of the order would be served by enforcement; plaintiffs had willfully refused to turn over the funds; and that plaintiffs had the present ability to comply. In addition, it was not error to consider plaintiffs' jointly-held bank accounts in determining their ability to pay.

Contempt

McKinney v. McKinney (COA16-884; May 16, 2017). Appeal by father from district court from civil and criminal contempt orders for violation of a custody agreement. Dismissing the appeal of the criminal contempt order (and related attorney fees) because such orders must first be appealed to superior court. Reversing the civil contempt order because the father had complied with the contempt order (by returning the child to the mother) before the contempt hearing, and thus there was no longer a matter needing to be enforced through contempt. Also reversing the attorney fees awarded to the mother in connection with the civil contempt motion and remanding to the trial court to consider whether the

father's actions in allowing the child to remain with him were willful violations of the custody agreement.

Abandonment of issues on appeal; dismissal based on statutes of limitations
Wilson v. Pershing, LLC (COA16-803; May 16, 2017). Plaintiff real estate developer filed an original complaint against several banks and investment companies alleging numerous claims including breach of fiduciary duty, constructive fraud, breach of contract, and fraud. All defendants filed motions to dismiss and a hearing was scheduled. Minutes before the hearing was held, plaintiff filed an amended complaint, and then argued that the hearing should be continued because the amended complaint rendered the motions to dismiss the original complaint moot. The judge refused to allow the motion to continue. During the hearing defendants made oral motions to dismiss the amended complaint, and both parties made arguments about both the original and amended complaint. The judge initially stated he would allow the motions to dismiss the original complaint, and when plaintiff asked for clarification, the judge stated he would allow plaintiff's motion to amend the complaint, and then grant the motions to dismiss the amended complaint on the same grounds he granted dismissal of the original complaint. The judge also noted that plaintiff waived any objection to the decision to allow the hearing to proceed and to consider the oral motions to dismiss.

The Court of Appeals determined that many of plaintiff's issues on appeal had been abandoned for failure to raise the issue on appeal or for lack of substantive argument in his brief, deficiencies which could not be cured by arguments raised in the reply brief. The remainder of the issues subject to review concerned the dismissal of three claims against two of the defendants for being filed outside the applicable statutes of limitations. Plaintiff argued that the statute of limitations did not begin to run until he discovered a check had purportedly been written out to him fourteen years earlier. The Court of Appeals discussed the different standards of what constitutes due diligence in discovering the alleged injury in relation to breach of fiduciary duty, constructive fraud, and fraud, and concluded that plaintiff failed to exercise due diligence in uncovering the alleged fraud. [Summary by Aly Chen.]

Forum selection clause; personal jurisdiction
US Chemical Storage, LLC v. Berto Constr., Inc. (COA16-628; May 1, 2017) (with dissent). A North Carolina company entered into a subcontract with a New Jersey company to provide hazmat and supply storage buildings related to construction in New Jersey, New York and Pennsylvania. The North Carolina company sued the New Jersey company in North Carolina for non-payment. The trial court denied defendant's motion to dismiss based on a New Jersey/New York forum selection clause and for lack of personal jurisdiction. The Court of Appeals reversed, with the majority concluding that:

(1) As to forum selection: The subcontract specified that it was to be interpreted according to New Jersey law, and according to New Jersey law, a forum selection clause (like the one at issue) that states that a party "irrevocably submits" itself to the jurisdiction of the courts of New York and New Jersey is enforceable; and
(2) As to personal jurisdiction: There was no evidence to support the trial court's finding that defendant knew the North Carolina company would produce its product in North Carolina. Thus there was insufficient evidence to support a conclusion that the New Jersey company had sufficient minimum contacts with North Carolina.

The dissenting judge first concurred that the forum selection clause was enforceable, but instead based on G.S. 22B-3 and a lack of evidence that the contract was entered into in North Carolina. The judge then determined that there was indeed sufficient evidence of defendant's minimum contacts with North Carolina because the record showed that defendant would have had knowledge that plaintiff's manufacturing activities would take place in North Carolina (for example, because plaintiff's only facility

was in Wilkesboro, North Carolina, and "the most basic research of any manufacturing company to perform the Subcontract would include at least a cursory assessment of the manufacturing facility[.]").

Demand for jury trial in appeal to Superior Court from Civil Service Board

Town of Asheville v. Frost (COA16-577; May 1, 2017) (with dissent). An Asheville police officer was fired and thereafter appealed to the Asheville Civil Service Board. The Board found in his favor and reversed the City's decision. The City appealed for trial de novo to Superior Court. The officer (respondent on appeal) requested a jury trial. The City opposed this request because the session law governing jury trials in Civil Service Board appeals, 2009-401, specifies that a "petitioner" may request a jury trial, and the City had not done so. The trial court disagreed, finding that 2009-401 goes on to state that the trial "shall proceed to trial as any other civil action." Thus, under Rule 38 of the Rules of Civil Procedure, the respondent also had a right to request a jury trial. The Court of Appeals reversed, the majority primarily relying on the specific-over-general canon of statutory construction to hold that the plain language allowing a "petitioner" to request a jury trial controlled the question.

The dissenting judge determined that the majority's interpretation leads to an absurd result out of line with the purpose and intent of legislation governing the Civil Service Board. The judge therefore believed the trial court's determination that petitioner was entitled to a jury trial should be affirmed. (There was a separate opinion concurring in the majority's result and aiming to refute the dissent.)

Authority to consolidate trial; impact on jury verdict

Boone Ford, Inc. v. IME Scheduler, Inc. (COA16-750; Apr. 18, 2017) (with dissent). A superior court judge entered an order (upon plaintiff's motion) consolidating two related cases for trial. A different judge presided over the trial and entered judgment on the jury's verdict in favor of plaintiff. On appeal, the other parties argued that the first judge had no authority to consolidate the trial. The Court of Appeals agreed and remanded to the trial court for a new trial.

The dissenting judge opined that the first judge's consolidation order was not binding on the presiding judge, and because the appellants did not move the presiding judge to sever the actions prior to trial, they should not be able to raise the issue on appeal in order to gain a new trial.

Change of venue; proper venue for domestic corporation

Terry v. The Cheesecake Factory Rests., Inc. (COA16-549; Apr. 18, 2017). Plaintiffs sued The Cheesecake Factory (Defendant) in Durham County for injury to their daughter related to a food allergy. The Cheesecake Factory at which the injury occurred was located in Wake County, and Plaintiffs resided in Wake County. Pursuant to G.S. 1-83, the trial court granted Defendant's motion to transfer venue to Wake County as a matter of right on the basis that Durham County was not a proper venue. The Court of Appeals reversed. Because the record showed that Defendant, a domestic corporation, also operated a restaurant in Durham County, it did indeed conduct business in Durham County, and Durham County was therefore a proper venue pursuant to G.S. 1-79.

Dismissal of appeal as interlocutory; summary judgment as to fewer than all claims

Moon Wright & Houston, PLLC v. Cole 798 S.E.2d 551 (N.C. App. Apr. 18, 2017). In a civil suit filed by a law firm against husband and wife clients for legal fees owed, the Court of Appeals dismissed as interlocutory the law firm's appeal from the trial court's order partially granting summary judgment in favor of the husband. After the husband and wife filed a motion for summary judgment for the various claims asserted against them, the wife filed for Chapter 13 bankruptcy, triggering an automatic stay pursuant to 11 U.S.C. § 362. The trial court entered an order granting summary judgment in favor of the husband, but did not address the law firm's claims against the wife. The law firm appealed. The Court

of Appeals determined that the appeal was interlocutory since summary judgment was granted for fewer than all defendants and the trial court had not issued a certification pursuant to Rule 54(b) of the Rules of Civil Procedure. Therefore, absent a showing that a substantial right was affected, which the law firm did not assert, the appeal was premature. The law firm had complied with Local Rule 19 of the 26th Judicial District Superior Court Division Local Rules and Procedures by filing notice of the wife's bankruptcy filing with the trial court, but the rule's only effect was to administratively close the case against the wife and hold it in abeyance. There was no evidence that the claims against the wife had been determined by the trial court, discharged in bankruptcy, or voluntarily dismissed by the law firm. Therefore, jurisdiction over the law firm's claims against the wife remains with the trial court pending resolution of the bankruptcy case or a dismissal of those claims. [Summary by Aly Chen.]

Findings of fact in denial of motion to compel arbitration

Terrell v. Kernersville Chrysler Dodge, LLC, 798 S.E.2d 412 (N.C. App. Mar. 21, 2017). Remanding a denial of a motion to compel arbitration. Although the judge explained on the record that he could not conclude there was a binding arbitration agreement, the judge's written order failed to include findings of fact as to this issue as required by *Cornelius v. Lipscomb*, 224 N.C. App. 14 (2012). [For more information on including written findings of fact in civil orders, see the SOG's On the Civil Side blog post from 3/15/2017 here or got to www.civil.sog.unc.edu.]

Foreign judgment; due process defense based on right to be represented

Tropic leisure Corp. v. Hailey, 796 S.E.2d 129 (N.C. App. Feb. 7, 2017) (supersedes opinion filed Aug. 16, 2016). After plaintiff filed a foreign judgment against defendant in North Carolina seeking to have it enforced pursuant to the Uniform Enforcement of Foreign Judgments Act (UEFJA), defendant asserted that the judgment was obtained in violation of his due process rights and was thus not entitled to full faith and credit. The Court of Appeals agreed, accepting (as a matter of first impression) that because the judgment—obtained through the U.S. Virgin Islands court system—was from a court where defendant had no right to be represented by counsel at any fact-finding stage, it was obtained in a manner that denied defendant his right to due process. For this reason, defendant asserted a proper defense to its enforcement in North Carolina.

Exclusivity of Worker's Compensation Act; ultrahazardous jobs

Fagundes v. Ammons Dev. Grp, Inc., 796 S.E.2d 529 (N.C. App. 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.

Contract dispute; 12(b)(6) dismissal; impropriety of judicial notice of local ordinance

Jackson/Hill Aviation, Inc. v. Town of Ocean Isle Beach, 796 S.E.2d 120 (N.C. App. Feb. 7, 2017). The town had a contract with plaintiff aviation company to operate the town's airport. After the town determined that plaintiff had violated the contract by not staffing the airport during all business hours, the town locked plaintiff out. Plaintiff sued for breach of contract. The trial court dismissed the complaint pursuant to 12(b)(6) after concluding that the town's ordinance required that fixed base

operations such as the airport must be manned during all business hours. The Court of Appeals reversed the dismissal because the language of the town's ordinance was neither part of nor incorporated into the complaint and thus was not properly considered at the 12(b)(6) stage. Nor was the trial court permitted to take judicial notice of the ordinance for purposes of 12(b)(6). In addition, 12(b)(6) dismissal was inappropriate because plaintiff raised issues of estoppel and waiver as legal arguments against enforcement of the ordinance as written.

Amendment of complaint to change name of defendant; no relation back; statute of limitations
Williams v. Advance Auto Parts, Inc., 795 S.E.2d 647 (N.C. App. Jan. 17, 2017). Plaintiff sued Advance Auto Parts, Inc. ("Parts") after a slip-and-fall in an Advance Auto Parts store. About seven weeks later, Plaintiff moved to amend the complaint to name Advance Stores Company, Inc. ("Stores") after realizing that Stores was the legal owner of the premises. By the time of the motion to amend, the underlying statute of limitations had expired. The trial court denied the motion to amend and granted summary judgment for Parts because it was not the legal owner and thus did not owe a legal duty to Plaintiff. The Court of Appeals affirmed, agreeing that the motion to amend sought to name an entirely different party, not just correct a misnomer; thus any amendment would not relate back to the original filing and would constitute the filing of an action outside the statute of limitations.

Rule 9(j); ordinary negligence vs. medical malpractice; patient fall in hospital
Gause v. New Hanover Reg. Med. Ctr., 795 S.E.2d 411 (N.C. App. Dec. 30, 2016). The Court of Appeals panel unanimously declared that a fall gave rise to a medical malpractice claim as opposed to a medical malpractice claim. As an X-ray technician was preparing to take chest images of Mrs. Gause from a standing position, the elderly plaintiff fell straight backward, sustaining severe traumatic brain injury. The technician had observed Mrs. Gause before and during her positioning in front of the x-ray machine, but then had turned away to prepare to make the images. Discovery (including the technician's own testimony) revealed that the technician's clinical judgment was required in determining whether it was safe to take Mrs. Gause's x-rays from a standing position rather than seated or lying down. Thus the alleged negligence occurred in the context of "medical assessment or clinical judgment" and was therefore properly classified as a medical malpractice action. Because Mrs. Gause's complaint did not include a Rule 9(j) certification, the trial court properly dismissed it. [For more on the subject of Rule 9(j) and ordinary negligence, see my May 26, 2017 blog post at the SOG's "On the Civil Side" here, or to go to http://civil.sog.unc.edu/.]

Intervention by insurer only partially subrogated to insured's claims
Wichnoski v. Piedmont Fire Protection Systems, LLC, 796 S.E.2d 29 (N.C. App. Dec. 30, 2016). Insured paid over $900,000 to its insured after insured's property was damaged by a ruptured sprinkler system. The payment constituted part of the insured's claim. Insured later sued the alleged tortfeasors, and insurer sought to intervene. The trial court denied the motion to intervene. The Court of Appeals reversed, holding that the right of the insurer to intervene as of right under Rule 24(a)(2) did not depend on whether the intervenor was *partially or fully* subrogated to the insured's claims. Having paid over $900,000 to the insured, insurer established that it claimed "an interest relating to the property or transaction which is the subject of [Plaintiff's] action," as set forth in Rule 24.

Statute of limitations on subrogation rights
NC Farm Bureau Mutual Ins. Co. v. Hull, 795 S.E.2d 420 (N.C. App. Dec. 30, 2016). The trial court properly dismissed a breach of contract action by insurer to claim settlement funds from the insured pursuant to its subrogation rights. The trial court properly determined from the face of the complaint that the insurer's claim accrued in March 2012 when the insured refused, in writing, to return the

settlement funds. Because the insurer's action was filed more than three years after that date, the statute of limitations had expired and the Rule 12(b)(6) dismissal was appropriate.

Rule 9(j); amendment of complaint to correct error in Rule 9(j) certification language when the required 9(j) expert review itself timely occurred

Vaughn v. Mashburn, 795 S.E.2d 781 (N.C. App. Dec. 30, 2016). In this case, the Court of Appeals felt "constrained" by precedent to affirm the trial court's dismissal of a medical malpractice complaint. A Rule 9(j) certification was included in the original complaint, but it lacked a phrase about review of medical *records* that had been added to Rule 9(j) in 2011. Plaintiff had in fact had a qualifying physician conduct the proper review of those records prior to filing the complaint, but her counsel had simply omitted the certification phrase from the complaint. She attempted to amend the complaint to correct the wording, but because the amendment would not have related back to the date of the original complaint, and the underlying statute of limitations had expired, the amendment would have been futile. [**Note**: The Supreme Court allowed discretionary review of this case on March 16, 2017 at 797 S.E.2d 299. Stay tuned for potential resolution of this important Rule 9(j) issue!]

Relief from default judgment; punitive damages award

Wiley v. L3 Communications Vertex Aerospace, LLC, 795 S.E.2d 580 (N.C. App. Dec. 20, 2016). Affirming a trial court's decision to grant defendant relief from the large compensatory and punitive damages portion of a default judgment and to order a jury trial as to damages. The relief, granted pursuant to Rule 60(b)(6), was in the court's discretion and was justified both by the size of the judgment and the circumstances that led Defendant to default. As to the jury trial, however, the issue of punitive damages should not have been submitted to the jury because the complaint had not specifically requested punitive damages as required by Rule 9(k) of the Rules of Civil Procedure.

Motion to amend; addition of party vs. correction of misnomer

Goodwin v. Four County Electric Care Trust, Inc., 795 S.E.2d 590 (N.C. App. Dec. 20, 2016). Plaintiff named as Defendant "Four County Electric Care Trust, Inc. a/k/a Four County Electric Membership Corporation." The actual owner of the power line regulator on which Plaintiff was injured was "Four County Electric Membership Corporation" (the Co-op). Only "Four County Electric Care Trust, Inc." (the Trust) was alleged in the complaint as the owner of the property, and only the Trust was served the summons. At the hearing on the Trust's motion to dismiss, Plaintiff orally moved to amend the complaint and summons to name the Co-op as the Defendant. The trial court denied the motion to amend and granted the motion to dismiss. The Court of Appeals affirmed, holding that the motion sought not to merely correct a misnomer, but instead attempted to substitute an entirely different party (a separate legal entity), which cannot be done through a mere motion to amend.

Note that there was a lengthy concurrence in the result of this case. The concurrence is notable as an analysis of judicial economy and a court's duty to an incompetent plaintiff, and it notes that the statute of limitations will not have run on this case when it is filed against the Co-op because the plaintiff was disabled when the claim accrued. It further opines that the findings thus far cannot be used by the Co-op as collateral estoppel to bar the suit.

No appeal tolling of interlocutory orders using Rule 59; contempt authority after appeal

Tetra Tech Tesoro v. JAAAT Tech. Servs., LLC, 794 S.E.2d 535 (N.C. App. Dec. 6, 2016). A subcontractor sued a contractor for underpayment. The trial judge granted the subcontractor a preliminary injunction requiring the contractor to segregate the disputed funds pending resolution of the case on its merits. The contractor moved to modify the preliminary injunction, purportedly pursuant to Rules of Civil Procedure 59 ("New Trial") and 60. The trial court (mostly) denied the motion to modify. The

contractor noticed an appeal of both the denial of the motion to modify and the preliminary injunction order itself.

The appeal of the order on the motion to modify was timely, but more than 60 days had elapsed since entry of the underlying preliminary injunction. The contractor argued that the 30-day appeal deadline for appealing that order had been tolled under Rule of Appellate Procedure 3(c)(3) because the motion to modify it had been brought under Rule 59. The court rejected this argument, holding that Rule 59(a) (and, by extension, 59(e)) only apply after trial or judgment ending the case on its merits and "cannot be used to alter an interlocutory order made before the trial on its merits." Thus the appeal was untimely and the Court of Appeals lacked jurisdiction to review the preliminary injunction order.

The court went on to determine that the (timely-appealed) order denying modification of the preliminary injunction was immediately appealable based on a substantial right. After determining that the trial court had made "careful consideration" of the issues, the court affirmed the trial court's denial of that motion. [For further discussion of this Rule 59 issue, see my blog post from 12/7/2016 at "On the Civil Side" here or go to www.civil.sog.unc.edu.]

The court then reversed the trial court's order holding the contractor in contempt for non-compliance with the preliminary injunction. The trial court was divested of jurisdiction to hold the contractor in contempt of the injunction while that injunction was the subject of appeal.

Contempt; civil and criminal contempt for same conduct

State v. Revels, 793 S.E.2d 744 (N.C. App. Dec. 6, 2016) (with dissent). The trial court held Defendant in contempt for violations of a TRO and preliminary injunction in an underlying civil action. The court held Defendant in *criminal* contempt for certain violations of the TRO and preliminary injunction (mostly related to his failure to return certain property to plaintiff) and in *civil* contempt for other violations of the TRO and preliminary injunction, including "retaining [plaintiff]'s equipment[.]" The court sentenced him to 30 days in jail for criminal contempt, with 7 days active and 23 suspended, and ordered that after day 7 he be jailed until he purged himself of civil contempt. Defendant challenged the contempt on several grounds, but the key argument focused on whether the trial court had, in violation of GS 5A-12(d) and 5A-21(c), found him in both types of contempt for "the same conduct." The majority concluded that the trial court's order listed different violations for each type of contempt, and thus, pursuant to *Adams Creek Assocs v. Davis*, 186 N.C. App. 512 (2007), the court did not violate the prohibition on imposing both types of civil contempt for the same conduct.

The dissenting judge believed that the same conduct—failure to return company property in violation of the TRO and injunction—formed a basis for both types of contempt in violation of Chapter 5A. The judge argued that the facts of *Adams Creek* are distinguishable because the conduct in that case involved (1) willful disobedience of a court order (the basis for civil contempt); and (2) disparaging court testimony threatening to disobey future court orders (the basis for criminal contempt), whereas in this case all the conduct at issue related to willful noncompliance with the court order.
[Note: In January 2017 the NC Supreme Court ordered this action abated due to Defendant's death.]

Dismissal of state law claim after 12(b)(6) dismissal by federal court

Bishop v. County of Macon, 794 S.E.2d 542 (N.C. App. Dec. 6, 2016). The trial court improperly dismissed Plaintiff's conversion claim under NC Rule of Civil Procedure 12(b)(6). The federal court's prior dismissal of the claim under Federal Rule of Civil Procedure 12(b)(6) was not an adjudication of the claim on the merits for purposes of collateral estoppel in state court because the pleading standard in federal court is higher than that in state court.

Venue as of right

Williams v. Woodmen Found., 792 S.E.2d 876 (N.C. App. Nov. 15, 2016). After voluntary dismissals, the only defendants left in this action were Kinston public officials and Lenoir County. There were no allegations that the actions of these defendants took place anywhere other than in Lenoir County. Venue in an action against public officers (and, by extension, municipalities) is proper only "where the cause...arose" (GS. 1-77). Because the action was pending in Edgecombe County, and the cause arose in Lenoir, the trial court erred in denying a motion to change venue to Lenoir County pursuant to GS 1-83.

Right to take Rule 41(a) dismissal after summary judgment hearing
Allied Spectrum, LLC v. German Auto Center, Inc., 793 S.E.2d 271 (N.C. App. Nov. 15, 2016) (with dissent). The trial court conducted a hearing on Defendant's motion for summary judgment as to some of Plaintiff's claims. At the end of Plaintiff's argument (after response to Defendant's argument), Plaintiff's counsel stated, "I have no further comments." The trial court then took the matter under advisement and provided the parties an opportunity ("if you choose") to give him supplemental case law on a particular legal issue. The deadline was the next day. The next day Plaintiff's counsel instead filed a notice of voluntary dismissal of the action without prejudice. The trial court later granted summary judgment in defendant's favor, deeming the notice of voluntary dismissal ineffective because Plaintiff's counsel had rested Plaintiff's case at the summary judgment hearing. The Court of Appeals affirmed, holding that Plaintiff had indeed rested its case, and therefore, (per prior case law) Plaintiff no longer had an absolute right to voluntarily dismiss its case under Rule 41(a).

The dissenting judge concluded that, by leaving the parties the opportunity to provide additional authorities after the hearing, the Plaintiff was given an opportunity to invoke the "safety net" of Rule 41(a). Because it did so, the trial court "was divested of jurisdiction" to rule on the summary judgment motion.

Attorney fees and Declaratory Judgment Act
Swaps LLC v. ASL Props., Inc., 791 S.E.2d 711 (N.C. App. Nov. 1, 2016). The trial court erred in awarding attorney fees to the prevailing party in a declaratory judgment action pursuant to the language of G.S. 1-263, which states that, "[i]n any proceeding under this article the court may make such award of costs as may seem equitable and just." In the absence of *express* statutory authority for an attorney fee award, a trial court may not include attorney fees in its order awarding statutory costs.

DECLARATORY JUDGMENTS

Declaratory judgment action related to loan obligation; 12(b)(6) dismissal; claim under G.S. 45-36.9

Perry v. Bank of America, N.A. (COA16-234; Feb. 7, 2017). The trial court improperly dismissed a declaratory judgment action brought by a borrower against a lender where the complaint articulated a controversy over whether plaintiffs were obligated to repay the loan balance when that balance had been procured through fraud of a third person. The trial court properly dismissed their claim brought pursuant to G.S. 45-36.9, however, because the complaint revealed that the plaintiffs never requested the bank cancel a security interest for which there was a zero balance.

Declaratory judgment regarding promotional awards program; sovereign immunity; justiciability

T&A Amusements, LLC v. McCrory (COA16-161; Feb. 7, 2017). The trial court improperly dismissed Plaintiff's declaratory judgment action under NC Rule of Civil Procedure 12(b)(6). The plaintiffs, a retailer and distributor in the promotional games business, were threatened with criminal prosecution by the Asheboro police department after the department concluded that plaintiffs' rewards program included illegal electronic sweepstakes. In response, plaintiffs filed this declaratory judgment action against Governor McCrory, the Secretary of the DPS, the branch head of the Alcohol Law Enforcement Division, the Asheboro Chief of Police, and the Randolph County Sheriff seeking a determination that its rewards program does not violate NC law. The Court of Appeals concluded: (1) that the plaintiffs' complaint should not have been dismissed on sovereign immunity grounds because such immunity is limited in cases where a plaintiff seeks declaratory relief against agencies acting in excess of statutory authority or threatening to invade property rights in violation of the law; (2) that, even assuming the plaintiffs were required to allege waiver of immunity, the allegations in the complaint were sufficient to so allege; and (3) that the action should not have been dismissed for failure to present a justiciable controversy because plaintiffs properly presented the issue of whether their program violates North Carolina law, a question which impacts their ability to operate a business without threat of criminal prosecution.

Attorney fees and Declaratory Judgment Act

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ARBITRATION

Arbitration agreement between doctor and patient; breach of fiduciary duty

King v. Bryant, 795 S.E.2d 340 (**N.C.** Jan. 27, 2017). The Supreme Court, by majority opinion, held that an agreement between a doctor and patient to submit to binding arbitration was procured through the breach of the doctor's fiduciary duty to the patient. Thus the doctor's motion to compel arbitration was properly denied in plaintiff's medical malpractice action. For a more detailed discussion of this case, see my blog post from Feb. 3 at On the Civil Side here (or go to civil.sog.unc.edu).

Findings of fact in denial of motion to compel arbitration

Terrell v. Kernersville Chrysler Dodge, LLC, 798 S.E.2d 412 (N.C. App. Mar. 21, 2017). Remanding a denial of a motion to compel arbitration. Although the judge explained on the record that he could not conclude there was a binding arbitration agreement, the judge's written order failed to include findings of fact as to this issue as required by *Cornelius v. Lipscomb*, 224 N.C. App. 14 (2012). [For more information on including written findings of fact in civil orders, see the SOG's On the Civil Side blog post from 3/15/2017 here.]

Denial of motion to compel arbitration; waiver of right and prejudice to opponent

Town of Belville v. Urban Smart Growth, LLC, 796 S.E.2d 817 (Feb. 21, 2017). Where a plaintiff delayed in demanding arbitration until 32 months after notifying Defendant of default and over seven months after instituting the action, and where Defendant had incurred over $32,000 in legal fees preparing for litigation, the trial court did not err in denying Plaintiff's motion to compel arbitration.

Duty to confirm arbitration award

Flynn v. Schamens, 792 S.E.2d 833 (N.C. App. Nov. 15, 2016). The parties agreed to submit to binding arbitration and to a stay of the superior court action. After the arbitrator awarded plaintiff over $2 million, defendant moved the superior court to vacate the award. The trial court denied that motion, but then declared that plaintiff's motion to confirm the award was "moot." The Court of Appeals reversed, holding that, under GS 1-569.28, after denying a motion to vacate the trial court was required to enter a judgment in plaintiff's favor affirming the arbitration award. Remanded.

CONTRACTS

Deficiency action; anti-deficiency statute; homeowner opinion as evidence of value
United Community Bank v. Wolfe, 799 S.E.2d 269 (**N.C.** May 5, 2017). Reversing the unanimous opinion of the Court of Appeals at __ N.C. App. __, 775 S.E.2d 677 (2015). The anti-deficiency statute, GS 45-21.36, allows a homeowner whose foreclosed property was purchased *by the creditor* for less than the debt amount to challenge a deficiency action by showing that the property was in fact "fairly worth the amount of the debt[.]" In the deficiency action at issue in this case, the homeowners submitted an affidavit stating that their foreclosed property was "fairly worth the amount of the debt." The trial court found this affidavit insufficient to create a genuine issue of material fact about the property value and granted summary judgment for the creditor bank. The Court of Appeals reversed, holding that the homeowner's opinion of value was competent and sufficient to survive summary judgment. Reversing, the Supreme Court concluded that an affidavit simply making a conclusory restatement of the statutory language and "asserting an unsubstantiated opinion" was not sufficient to "show" the property's value pursuant to the statute. The court stated: "Here the issue is not a landowner's competency to testify but whether the landowner's affidavit presented substantial competent evidence under Rule 56(c) regarding the 'true value' of the foreclosed property." Remanded to the Court of Appeals to reinstate the trial court's grant of summary judgment in favor of the lender bank.

Arbitration agreement between doctor and patient; breach of fiduciary duty
King v. Bryant, 795 S.E.2d 340 (**N.C.** Jan. 27, 2017). The Supreme Court, by majority opinion, held that an agreement between a doctor and patient to submit to binding arbitration was procured through the breach of the doctor's fiduciary duty to the patient. Thus the doctor's motion to compel arbitration was properly denied in plaintiff's medical malpractice action. For a more detailed discussion of this case, see my blog post from Feb. 3 at On the Civil Side here (or go to civil.sog.unc.edu).

Contract dispute; 12(b)(6) dismissal; impropriety of judicial notice of local ordinance
Jackson/Hill Aviation, Inc. v. Town of Ocean Isle Beach, 796 S.E.2d 120 (N.C. App. Feb. 7, 2017). The town had a contract with plaintiff aviation company to operate the town's airport. After the town determined that plaintiff had violated the contract by not staffing the airport during all business hours, the town locked plaintiff out. Plaintiff sued for breach of contract. The trial court dismissed the complaint pursuant to 12(b)(6) after concluding that the town's ordinance required that fixed base operations such as the airport must be manned during all business hours. The Court of Appeals reversed the dismissal because the language of the town's ordinance was neither part of nor incorporated into the complaint and thus was not properly considered at the 12(b)(6) stage. Nor was the trial court permitted to take judicial notice of the ordinance for purposes of 12(b)(6). In addition, 12(b)(6) dismissal was inappropriate because plaintiff raised issues of estoppel and waiver as legal arguments against enforcement of the ordinance as written.

Loan agreement; FDIC assumption of lender's obligations; FIRREA and affirm. defenses; repudiation
Settlers Edge Holding Co., LLC v. RES-NC Settlers Edge, LLC, 793 S.E.2d 722 (N.C. App. Dec. 6, 2016). [Note: For a thorough understanding of the complicated disposition of this case, particularly the FIRREA questions, please see the full opinion.] After the FDIC took over the bank that was the lender for Plaintiff's development, Plaintiff made an additional draw request to the FDIC, and the FDIC refused to make payment. Plaintiff eventually brought a declaratory judgment action against the FDIC for material breach, and the FDIC counterclaimed for the same. Plaintiff raised several affirmative defenses to the FDIC's claims. The trial court eventually dismissed Plaintiff's action (and the affirmative defenses to the FDIC's counterclaim) for lack of subject matter jurisdiction and granted summary judgment in favor of

the FDIC as to its counterclaim. The Court of Appeals reversed, holding that the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA) did not bar consideration by the state court of Plaintiff's affirmative defenses to the FDIC's counterclaim. Because the FDIC had repudiated the lender's obligations to Plaintiff, Plaintiff should have been allowed to raise repudiation as a defense. Plaintiff was also entitled to an adjudication of the amount of recoupment that might be available as an offset to its obligations under the loan. Summary judgment was therefore improperly granted in favor of the FDIC on its counterclaims.

Rescission of certificate of satisfaction under G.S. 45-36.6
Wells Fargo Bank, NA v. American National Bank and Trust Co., 791 S.E.2d 906 (N.C. App. Nov. 1, 2016) (with dissent). After homeowners refinanced their mortgage in 2006 through Wells Fargo, Wells Fargo filed a certificate of satisfaction certifying that an earlier 2004 deed of trust had been satisfied and was accordingly cancelled. Wells Fargo neglected, however, to enter into a subordination agreement with Defendant American National regarding an earlier home equity line of credit on the property. The effect was to elevate American National's line of credit to first priority. Wells Fargo discovered the problem six years later and filed a document of rescission of the certificate of satisfaction in an attempt to restore Well Fargo's loan to first priority. In this declaratory judgment action, Wells Fargo argued that G.S. 45-36.6's provision allowing rescission "if a security instrument is erroneously satisfied of record" allows rescission for *any* erroneous satisfaction. Defendant, on the other hand, argued that the statute only permits rescission when a satisfaction is erroneously filed for an obligation *that was not actually satisfied*. The trial court granted summary judgment in favor of Wells Fargo. Analyzing the plain language of the statute, its legislative history, and its construction, the Court of Appeals agreed that Wells Fargo's interpretation was the right one. The court reversed the grant of summary judgment for Wells Fargo, however, holding that a genuine issue of material fact existed as to whether Wells Fargo actually filed the certificate of satisfaction erroneously or on purpose.

The dissenting judge argued that Wells Fargo's "error" was not in filing the certificate of satisfaction, but in failing to enter into a subordination agreement with defendant by which it would have secured its first priority status. Thus it did not commit the kind of error that is correctable under G.S. 45-36.6.

CONSTITUTIONAL ISSUES

Extraterritorial jurisdiction; General Assembly's constitutional authority to reduce
Town of Boone v. State, 794 S.E.2d 710 (**N.C.** Dec. 21, 2016) (with separate concurrence in the result and a dissent). Reversing the decision of a three-judge panel of the Superior Court. Holding that the General Assembly did not exceed its authority under Art. VII, Section 1 of the NC Constitution by removing the extra-territorial jurisdiction of the City of Boone and returning it to the relevant counties. [For more on this opinion and the opinion of the Court in *City of Asheville v. State* (**N.C.** Dec. 21, 2016), a case also analyzing the GA's power over cities, see my colleague Frayda Bluestein's post from January 5, 2017 at "Coates Canons" here or go to canons.sog.unc.edu.]

Constitutionality of Comprehensive Agreement pursuant to P3 Statute (State highway infrastructure)
WidenI77 v. North Carolina DOT et al. (COA16-818; May 1, 2017). Affirming the trial court's grant of summary judgment in favor of defendants. Plaintiff sued defendants, including the DOT, for a declaratory judgment that the DOT's Comprehensive Agreement with Mobility, a private entity, for development and operation of an I-77 Corridor improvement violated various constitutional and statutory provisions. The Court of Appeals determined that: (1) The statute authorizing such a Comprehensive Agreement, GS 136-18(39) (the "P3 Statute), was not an unconstitutional delegation of legislative power to the DOT, an agency, because it included sufficient guiding standards for the DOT and procedural safeguards for adherence to those standards; (2) the Agreement met the public purpose requirement for taxation under the North Carolina Constitution because it involved public transportation infrastructure that would be owned solely by the State; (3) the Agreement did not, by its terms, violate the Turnpike Statute; and (4) because a toll is not a tax, the Agreement did not create a toll-collection scheme that unconstitutionally delegates taxing authority.

TORTS and IMMUNITY

Intentional infliction of emotional distress; negligent infliction of emotional distress

Piro v. McKeever, 794 S.E.2d 501 (**N.C.** Dec. 21, 2016). Affirming *per curiam* the opinion of the Court of Appeals (summary below), but with an equally divided panel, *thus leaving the decision standing without precedential value*.

- Earlier summary of Court of Appeals' opinion:

Piro v. McKeever, 782 S.E.2d 367 (N.C. App. 2016) (with dissent). This case involves plaintiff's claims that defendant, a licensed social worker, employed improper and harmful interview techniques during a counseling session with his son, and that the effect directly led to allegations against plaintiff that he had sexually abused his son. The matter eventually led the district court to issue a two-year no-contact order against plaintiff preventing him from seeing all three of his children (until the abuse allegations were later determined to be unsubstantiated). The superior court dismissed plaintiff's claims against the social worker for intentional infliction of emotional distress (IIED) and negligent infliction of emotional distress (NIED). The Court of Appeals affirmed, the majority determining that plaintiff had not alleged the type of extreme and outrageous conduct that would support an IIED claim and had not forecast evidence that the type of harm he suffered was foreseeable. The dissenting judge determined that the complaint included sufficient allegations to survive a Rule 12(b)(6) motion as to both claims and therefore should not have been dismissed at this stage in the proceedings.

Malicious prosecution and IIED claims in context of criminal prosecution

Turner v. Thomas, 794 S.E.2d 439 (**N.C.** Dec. 21, 2016). [The facts and prior dispositions of this case are summarized below in my earlier summary of the Court of Appeals' opinion.] In this opinion, the Supreme Court, through its majority, held that (1) plaintiff's claim for malicious prosecution must fail because there was probable cause to initiate his prosecution for murder; but (2) plaintiff did allege facts which, when viewed in the light most favorable to him, would allow him to proceed on his claim for intentional infliction of emotional distress.

- Earlier summary of Court of Appeals' opinion:

Turner v. Special Agent Thomas et al., 235 N.C. App. 520, 762 S.E.2d 252 (2014). By reason of self-defense, plaintiff was acquitted of murdering his wife after a high-profile murder trial. Plaintiff later sued several individuals, including two SBI special agents, based on the allegations that they engaged in an elaborate scheme to manufacture the prosecution's case against him. Plaintiff's complaint, as partially summarized by the Court of Appeals, alleged that the two agents (Defendants) engaged in

> (1) performing unscientific tests designed to prove a theory that plaintiff's stab wounds were self-inflicted and the scene staged to look like self defense; (2) creating a second report supporting that theory that was inconsistent with one of the agent's first report;(3) writing the second report in a manner that hid the existence of the first report by falsely suggested the second report was the result of examination of the evidence of four months earlier (when the first report was done) and by not indicating that the second report was an amendment or supplement to the first report; and (4) bolstering the theory by making false statements in the second report and in testimony regarding what the Sheriff's Office lead investigator had said.

The Court of Appeals held that the trial court erred in dismissing plaintiff's state law malicious prosecution and intentional infliction of emotional distress claims against Defendants. As to both claims, the plaintiff alleged sufficient facts as to each element to overcome Defendants' 12(b)(1) and 12(b)(6) motions. The trial court also erred to the extent it dismissed plaintiff's state-law claims based on public official immunity. The trial court was correct, however, in dismissing his claim for false imprisonment and his federal § 1983 constitutional claims.

Slip-and-fall; contributory negligence

Rash v. Waterway Landing Homeowners Assoc., Inc. (COA16-1158; June 6, 2017). The trial court erred in determining that plaintiff was contributorily negligent as a matter of law and granting summary judgment in favor of defendant HOA. Plaintiff was a resident of a condo complex. One morning not long after a rain, she proceeded down the stairs from her condo toward the parking area. At the base of the building, she made a ninety-degree turn around a column and within a few feet slipped on a portion of the walkway that was wet and slimy with mold, breaking her femur. (The HOA had been recently been warned by a maintenance inspector of the need to clear away the mold.) The trial court concluded that her negligence claim against the HOA must fail because she admitted she was not looking down at the time of the fall and that, therefore, she was not "complying with that common law sense of duty to keep a proper lookout[.]"

The Court of Appeals reversed, noting that the law does not require a walking person to observe the ground at all times, and concluding that the facts taken as a whole would permit a jury to find that a reasonable person might not have observed the hazardous condition of the walkway at that spot on that particular morning.

Constitutional claims; sovereign immunity; Rules 12(b)(1) and (6)

Bunch v. Britton (COA16-181; June 6, 2017). The Court of Appeals affirmed the trial court's dismissal of plaintiff's claims filed against two government employees in their official capacities. Plaintiff alleged they unnecessarily compelled him to register as a sex offender when he moved to North Carolina from Michigan in 2012. In 1993, when plaintiff was 17 years old, he was convicted of third degree criminal sexual conduct, an offense which is not reportable, or even a crime, in North Carolina, and which ceased being a reportable conviction in Michigan in 2011. Plaintiff registered as a sex offender after being threatened with arrest when he moved to North Carolina. After he successfully petitioned to terminate his registration requirement, he filed the instant action against defendants for violating his rights under Article I, Section 19 of the North Carolina Constitution. One of the defendants asserted several affirmative defenses including sovereign immunity and filed a motion for judgment on the pleadings; the other defendant filed a motion to dismiss under 12(b)(1) for lack of subject matter jurisdiction due to sovereign and governmental immunity and under 12(b)(6) for failure to state a claim for which relief can be granted. The trial court allowed the motions to dismiss, and plaintiff appealed.

The Court of Appeals noted that the trial court did not specify which of the several legal bases raised by defendants supported the dismissal. The Court therefore analyzed each basis, starting with sovereign immunity. Plaintiff's assertion of constitutional violations precludes his claims from being barred by sovereign or governmental immunity, as explained in *Richmond Cnty. Bd. of Educ. V. Cowell*, 225 N.C. App. 583, 587-91 (2013). Plaintiff also had standing for his requests for declaratory judgment and monetary damages, but not for his request for injunctive relief (to modify the statutory scheme to allow an opportunity to be heard on whether a conviction is reportable prior to having to register as a sex offender). Plaintiff's claim for a violation of his liberty interest was properly dismissed since he was afforded due process when he pleaded guilty to a crime in Michigan that required registration. He had a statutory right to seek removal from that registry, but failed to avail himself of the procedure to do so. Pursuant to the relevant North Carolina statutes for registration, which lack a discretionary component, plaintiff was required to register here based on his Michigan conviction. Finally, the trial court properly dismissed plaintiff's claim that his right to equal protection was violated, since he was treated exactly as any other individual who has a final conviction in another state. [Summary by A. Chen]

Ordinary negligence vs. medical malpractice; use of private process server

Locklear v. Cummings (COA16-1015; May 16, 2017) (with partial dissent). Plaintiff filed a complaint alleging negligence after she fell off the operating table during surgery and sustained various injuries.

The trial court dismissed her complaint for failure to comply with the special pleadings requirement of Rule 9(j) for medical malpractice actions. The trial court also dismissed the complaint against one of the defendants for improper service under Rule 12(b)(5) because she had obtained service against that defendant through a private process server. The Court of Appeals reversed the Rule 9(j) dismissal, concluding that her claims sounded in ordinary negligence, not medical malpractice, and thus Rule 9(j) did not apply. The Court of Appeals agreed, however, that dismissal pursuant to Rule 12(b)(5) was proper because service against that defendant by private process server was not authorized under the facts of the case.

The dissenting judge agreed that the Rule 12(b)(5) dismissal was appropriate, but concluded that the plaintiff had in fact alleged medical malpractice and should have been required to comply with Rule 9(j). Because a Rule 9(j) certification had not been properly made within the statute of limitations, the complaint had been properly dismissed.

Interlocutory appeal; statutory immunity of a government agency

Henderson v. The Charlotte-Mecklenburg Bd. of Educ. (COA16-977; May 16, 2017). In a personal injury action arising from an injury sustained while refereeing a non-school game at a high school gymnasium, plaintiff's claims against the Board of Education were dismissed by the trial judge for failure to state a claim for which relief could be granted. The Court of Appeals noted that since the order appealed from dismissed claims against only one of the defendants, and there was no evidence to show that claims against the other defendants had been dismissed as asserted by plaintiff, the appeal appeared to be interlocutory. The court elected to treat appellant's brief as a petition for writ of certiorari, and granted the petition to enable review of the issues raised. The court evaluated whether the Board of Education had statutory immunity pursuant to G.S. § 115C-524(c) and determined that liability did not attach where the Board complied with its own rules and regulations when it entered into a valid contract to allow a non-school group to use school property for a permissible purpose. The Court rejected plaintiff's claim that the Board waived its governmental immunity due to entering into a contract with a third party, as well as his claim that he was entitled to recover as a third-party beneficiary to the contract between the Board and the non-school group. The Court noted that plaintiff's claims regarding the contract were premised on common law contract law and not statutory immunity which was at issue. The Court explained that in order for the Board to enjoy immunity under G.S. § 115C-524(c), the Board had to enter into a contract, making plaintiff's argument that the Board waived immunity by entering into a contract contradictory and without merit. [Summary by Aly Chen.]

***In pari delicto* as applied to tort and contract claims; law of the case**

Freedman v. Payne (COA16-969; May 2, 2017). This is "*Freedman* II." In "*Freedman* I," the trial court dismissed plaintiff's legal malpractice claim against his former attorneys pursuant to the doctrine of *in pari delicto* (see my prior summary below). The Court of Appeals affirmed. After that appeal, the trial court (same judge—exceptional case designation) determined that plaintiff's remaining claims—breach of contract, fraud, constructive fraud, fiduciary duty—must also be dismissed based on the *in pari delicto doctrine* and law of the case. In this opinion (*Freedman* II), the Court of Appeals affirms that dismissal. The factual allegations that showed plaintiff was *in pari delicto* with respect to the medical malpractice claim also supported the remaining claims, requiring dismissal of those claims pursuant to the law of the case as established in Freedman I.

Here is my summary from last year of Freedman I:

***In pari delicto*; legal malpractice**

Freedman v. Payne, 784 S.E.2d 644 (N.C. App. April 5, 2016). Plaintiff was being prosecuted for intentional violations of the Clean Water Act due to his farm's release of hundreds of thousands of gallons of hog waste into nearby waters. During the criminal trial, his attorneys negotiated a no-jail-

time "side-deal" ("wink-wink, nudge-nudge") with the prosecutor in exchange for a plea, and the attorneys advised plaintiff that he must not disclose the deal to the judge when pleading guilty. Predictably enough, the side-deal did not come to pass and plaintiff was sentenced to six months in prison. Plaintiff then—in the current action—sued his attorneys on various tort theories including legal malpractice. The trial court granted the attorneys' motions to dismiss based on their defense of *in pari delicto*. The Court of Appeals agreed and affirmed. Based on the holding of *Whiteheart v. Waller*, 199 N.C. App. 281 (2009), the court held that the plaintiff's claims against his attorneys were properly dismissed based on "*in pari delicto potior est conditio possidentis [defendentis]*" ("in case of equal or mutual fault...the condition of the party in possession [or defending] is the better one"), which "prevents the courts from redistributing losses among wrongdoers." Although the attorneys were at fault for striking the "side deal" and instructing plaintiff not to disclose it to the court, the plaintiff was equally at fault for lying under oath by affirming he was not pleading guilty based on promises outside the plea agreement: "When the deal unraveled and appellant was bound by the express terms of his plea agreement, appellant attempted to redistribute the loss, which the courts of this state will not do."

Sovereign immunity; exclusive jurisdiction of Industrial Commission; public official immunity; piercing
Chastain v. Arndt (COA16-1151; Apr. 18, 2017). Plaintiff was a sheriff's deputy taking the firearms portion of Basic Law Enforcement Training at a State-system community college. After a round of training, the students were instructed to unload their weapons and disassemble them. Defendant, an active police officer hired by the community college to conduct the firearms training, attempted to assist a different student in disassembling her weapon. After he took the weapon, he pulled the trigger, and a bullet that had not yet been removed from the weapon hit plaintiff in the abdomen, seriously wounding him. Plaintiff sued Defendant in his individual and official capacities in superior court for negligence, gross negligence, and negligent infliction of emotional distress. The trial court denied Defendant's 12(b)(6) motions to dismiss. On appeal, the Court of Appeals partially reversed, determining that:

(1) As to the official capacity claims, Defendant was subject to the same sovereign immunity analysis as the State entity for which he was working, and thus the claims against him—like the claims against the entity—were in the exclusive jurisdiction of the Industrial Commission under the State Tort Claims Act.
(2) As to the individual capacity claims, Defendant was a public official and thus was entitled to public official immunity. However, the plaintiff alleged sufficient facts to pierce this immunity (at least for purposes of surviving a 12(b)(6) motion). The allegation that Defendant, an experienced law enforcement officer and certified firearms trainer, fired a deadly weapon in the direction of a student's abdomen, was enough to create the requisite inference of malice to overcome immunity.

Appealability of denial of 12(b)(1) motion to dismiss based on immunity
Page v. Chaing (COA16-611; Apr. 18, 2017). Dismissing an appeal by two DHHS employees sued for negligence and medical malpractice. The trial court denied motions brought under 12(b)(1) for lack of subject matter jurisdiction based on sovereign immunity. Defendants appealed. Based on earlier cases (*Murray, Can Am*), the Court of Appeals determined that it did not have authority to review an interlocutory denial of a motion to dismiss based on sovereign immunity if that motion was brought solely pursuant to Rule 12(b)(1) rather than 12(b)(6) or (b)(2).

Governmental immunity; motion to dismiss; preliminary injunction vs. *lis pendens*
Providence Volunteer Fire Dep't, Inc. v. Town of Weddington (COA16-80; Apr. 18, 2017). A fire department (Plaintiff) brought an action against the Town based on disputes relating to an agreement for Plaintiff to provide the town's fire services. The Town moved to dismiss the complaint on immunity

grounds, which the trial court denied. The trial court further granted a preliminary injunction to prevent the Town from transferring property related to the dispute.

The Court of Appeals determined that the trial court did not err in denying the motion to dismiss. Plaintiff's *verified* [second amended] complaint alleged that the agreement was a proprietary rather than governmental function of the Town, for which the Town was not immune. Because the Town failed to challenge that evidence with competing evidence, the motion to dismiss was properly denied. The trial court erred, however, in granting the preliminary injunction because the *lis pendens* Plaintiff had already secured on the property gave it an adequate remedy at law.

Breach of contract, fiduciary duty, civil conspiracy and related claims in developer/homeowner dispute

Conleys Creek Ltd. P'ship v. Smoky Mountain Country Club Prop. Owners Ass'n (COA16-647; Apr. 4, 2017). This dispute between, on the one hand, the developer-family of a residential development and, on the other hand, a group of the homeowners and their association, revolves around dues for use of a clubhouse. The developer agreed to build the clubhouse and provide it for use of the homeowners as long as the association agreed to collect fees from the homeowners and provide the fees to the developer. Eventually the association refused to honor the obligation to collect dues, and various contract and tort claims and counterclaims ensued. This fact-specific opinion examines the propriety of two trial court orders disposing of summary judgment motions as to various claims, and results in remand of certain fiduciary duty and contract claims.

Constructive fraud; motions for directed verdict and judgment notwithstanding the verdict

Hewitt v. Hewitt, 798 S.E.2d 796 (N.C. App. Apr. 4, 2017) A mother asserted several claims of fraud against her daughter arising from a real property transaction. After a trial, the jury returned a verdict for plaintiff mother that defendant daughter committed constructive fraud. The trial court denied the defendant's motions for directed verdict and judgment notwithstanding the verdict. On appeal, the Court of Appeals determined there was insufficient evidence as a matter of law of the elements of constructive fraud, and that therefore the trial court erred in its denial of defendant's motions. In particular, the Court examined the nature of a fiduciary relationship in the context of a parent/child relationship. A parent/child relationship does not constitute a fiduciary relationship as a matter of law; there must be some evidence that the parent and child are in a relationship of trust and confidence and that one of them exercised or attempted to exercise a dominating influence over the other to his or her own benefit. No such evidence existed in this case that would have been sufficient to go to a jury. [Summary by Aly Chen.]

Expert witness testimony in auto repair case; unfair trade practices; attorney fees under Motor Vehicle Repair Act

Ridley v. Wendel, 795 S.E.2d 807 (N.C. App. Dec. 30, 2016). In a trial for fraud and unfair trade practices related to faulty repairs of an automobile, the trial court: (1) properly allowed plaintiff's automobile repair expert to testify that Defendant did not "just accidentally miss all this damage" and that there was "motivation for not fixing the damages areas," as such comments assisted the jury in understanding the evidence and did not improperly invade the jury's province; (2) properly found that there was a violation of the unfair and deceptive trade practices act based on evidence of Defendant's misrepresentations; and (3) did not err in ordering remittitur of damages and denying a new trial motion. The trial court erred, however, in awarding attorney fees under G.S. 20-354.9 of the North Carolina Motor Vehicle Repair Act, as no claim under that act was tried before the jury.

Slip-and-fall in city-owned building; governmental immunity; negligence and contributory negligence
Meinck v. City of Gastonia, 798 S.E.2d 417 (N.C. App. Mar. 21, 2017). Plaintiff was a subtenant of a building that was owned by the City and which the City leased to a privately owned Art Guild. While carrying paintings out of the building, Plaintiff slipped and fell on a crumbling step and broke her hip. She filed an action against the City for negligent maintenance of the steps. The trial court granted summary judgment in favor of the City. The Court of Appeals reversed.

As to immunity: Under the Williams test, the City was not immune from suit for the negligence of its employees in maintaining the steps to its building. The legislature had not addressed whether the lease of a building to a private tenant was governmental or proprietary; the lease of the building to a private entity was not a service traditionally provided by a governmental entity; and the lease was of a private, commercial nature due to the revenue it generated for the City from a non-governmental venture.

As to negligence/contributory negligence: There were genuine issues of material fact as to whether the City properly inspected and maintained the steps (the only means by which Plaintiff could have exited the building) and whether the steps met building code requirements at the time of Plaintiff's injury. The evidence could also permit a jury to determine that Plaintiff acted reasonably in using the steps while carrying large paintings. Remanded for trial. [Note: The NC Supreme Court granted the petition for discretionary review of this case on June 8, 2017.]

Tortious Interference with Expected Inheritance; Standing to Sue for Breach of Fiduciary Duty, Constructive Fraud, and an Accounting
Hauser v. Hauser (COA16-606; Feb. 21, 2017). Sister filed a civil action against brother for (i) tortious interference with expected inheritance during the lifetime of their mother, the testator, (ii) breach of fiduciary duty under a power of attorney executed by their mother naming brother as agent under the POA, (iii) constructive fraud, and (iv) an accounting by brother to sister under the POA. Trial court dismissed all of sister's claims and the NC Court of Appeals affirmed. The court held that NC does not recognize a claim by a beneficiary for tortious interference with an expected inheritance during the lifetime of the testator. Further, the court held that the sister lacked standing to bring claims for breach of fiduciary duty and constructive fraud because no fiduciary relationship or relationship of trust and confidence existed between the sister and the brother. Any such claims must have been brought by the mother or someone legally authorized to act on her behalf. Finally, the court held that the sister was not entitled to accounting absent some showing that the POA entitled her to an accounting as no other cited legal authority granted her such right solely on the basis of being a potential beneficiary of an estate. [Summary by Meredith Smith.]

Statutes of limitations for various tort claims; continuing wrong doctrine
Williams v. Rojano, 796 S.E.2d 401 (N.C. App. Feb. 21, 2017). Plaintiff sued the County and various social services officials for garnishing his wages even after his child support case had been closed. The trial court dismissed his claims. The Court of Appeals affirmed, holding that: (1) his Fourteenth Amendment and § 1983 claims were properly dismissed because he brought the claims more than three years after they accrued in 2010 when the garnishment began, and the "continuing wrong" doctrine did not apply to extend the limitations period; (2) the N.C. Constitutional claim was properly dismissed because he had adequate state law remedies; (3) those state law remedies–trespass to chattels, conversion, and negligence—were properly dismissed because the applicable statutes of limitations had expired, and the continuing wrong doctrine did not apply; and (4) the constructive fraud/fiduciary duty claim was properly dismissed because there was no fiduciary relationship between Plaintiff and Defendants.

Rule 9(j); ordinary negligence vs. medical malpractice; patient fall in hospital
Gause v. New Hanover Reg. Med. Ctr., 795 S.E.2d 411 (N.C. App. Dec. 30, 2016). The Court of Appeals panel unanimously declared that a fall gave rise to a medical malpractice claim as opposed to a medical malpractice claim. As an X-ray technician was preparing to take chest images of Mrs. Gause from a standing position, the elderly plaintiff fell straight backward, sustaining severe traumatic brain injury. The technician had observed Mrs. Gause before and during her positioning in front of the x-ray machine, but then had turned away to prepare to make the images. Discovery (including the technician's own testimony) revealed that the technician's clinical judgment was required in determining whether it was safe to take Mrs. Gause's x-rays standing rather than seated or lying down. Thus the alleged negligence occurred in the context of "medical assessment or clinical judgment" and was therefore properly classified as a medical malpractice action. Because Mrs. Gause's complaint did not include a Rule 9(j) certification, the trial court properly dismissed it. [For more on the subject of Rule 9(j) and ordinary negligence, see my May 26, 2017 blog post at the SOG's "On the Civil Side" here, or to go to http://civil.sog.unc.edu/.]

Defamation; absolutely privileged statement
Watts-Robinson v. Shelton, 796 S.E.2d 51 (N.C. App. Dec. 30, 2016). Plaintiff was disbarred in 2014 for her handling of client funds. During the hearing that led to her disbarment, former opposing counsel, Mr. Shelton, was called to testify. During his testimony about a settlement payment, Mr. Shelton stated that he was concerned that Plaintiff "was potentially trying to run some kind of scam on [my client]." Plaintiff later sued Shelton for defamation based on this statement. The trial court dismissed the claim, and Plaintiff appealed. The Court of Appeals affirmed the dismissal, holding that Shelton's statement—made in a judicial proceeding and relevant to the subject of that proceeding—was absolutely privileged. The Court of Appeals also rejected Plaintiff's argument that the trial court should have excluded the disbarment order from evidence in the dismissal hearing. The probative value of the order outweighed its prejudice to Plaintiff.

Fiduciary duty and related claims by shareholder against minority shareholder and directors
Corwin v. British American Tobacco PLC, 796 S.E.2d 324 (N.C. App. Dec. 20, 2016). This action arose out of the merger of Reynolds and Lorillard in 2004. The primary upshot of the case is summarized best by the Court of Appeals itself:

> In this case of first impression, reviewing the sufficiency of the pleadings to state a claim for relief, we hold that a minority shareholder which owns shares eight times greater than any other shareholder, is the sole source of equity financing for a transformative corporate transaction, has a contractual right to prohibit the issuance of shares and the sale of intellectual property necessary for the transaction, and which pledges support for the transaction contingent on terms more favorable to it than to other shareholders may owe a fiduciary duty to other shareholders who claim they were harmed by the transaction. We also hold that claims for diminished share value and diluted voting power, as alleged in this case, cannot be the basis for a direct claim against a board of directors.

The court therefore reversed the trial court's dismissal of claims against the minority (but effectively controlling) shareholder, and affirmed the dismissal of claims against the directors.

Professional negligence (accountants); fraudulent concealment; statute of repose
Head v. Gould Killian CPA Group, P.A., 795 S.E.2d 142 (N.C. App. Dec. 20, 2016) (with partial dissent). After hiring Defendants to prepare her tax returns for years 2006-2009, Plaintiff later discovered that none of the prepared returns had actually been filed with the IRS. She brought an action for

professional negligence and fraudulent concealment. The trial court granted summary judgment for Defendants, based in part on the statute of repose. The Court of Appeals, through its majority, determined that (1) genuine issues of fact remained as to when the cause of action accrued, thus it was inappropriate to grant summary judgment on the negligent misrepresentation claim based on the statute of repose; and (2) the trial court properly granted summary judgment for Defendants on the fraudulent concealment claim due to lack of evidence of the requisite duty.

The dissenting judge agreed with the majority regarding the fraudulent concealment claim, but opined that there was no genuine issue of material fact regarding the professional negligence claim and that the trial court properly granted summary judgment as to that cause of action.

[**Note**: The Supreme Court allowed discretionary review of this case on March 16, 2017 at 796 S.E.2d 790.]

Official immunity; assault and battery, false imprisonment, malicious prosecution

Lopp v. Anderson, 795 S.E.2d 770 (N.C. App. Dec. 20, 2016). Plaintiffs, Mr. Lopp his elderly father, alleged they were beaten by police officers at their home when the officers accompanied Mr. Lopp's ex-wife to retrieve the former couple's children pursuant to a custody agreement. Plaintiffs sued the town and county, the sheriff in his official capacity, and the officers in their official and individual capacities. The trial court granted summary judgment in favor of all defendants. The Court of Appeals reversed in part. As to the claims against defendants in their official capacities, the court affirmed the trial court's ruling because plaintiffs failed to properly argue their assertions regarding waiver of sovereign immunity.

As to the claims against the officers in their individual capacities, there was a genuine issue of material facts as to whether the officers acted with malice; it was therefore error to grant summary judgment in their favor based on public official immunity. There were also genuine issues of material fact as to the claims for assault and battery, false imprisonment, and malicious prosecution against the officers in their individual capacities, thus precluding summary judgment on these claims. [As to Mr. Lopp's elderly father, these holdings were relevant to only two of the four officers.] The Court of Appeals made clear that there was ample evidence refuting the Plaintiffs' account of events, and therefore noted that their holdings "should not be taken as the opinion of the Court concerning the relative strength of Plaintiffs' [case]."

Economic loss rule not applicable to bar fraud claim; expert witness qualification

Bradley Woodcraft, Inc. v. Bodden, 795 S.E.2d 253 (N.C. App. Dec. 20, 2016). In a contract and tort action between a cabinet builder and a homeowner, the trial court erred in granting directed verdict for the cabinet builder on homeowner's claim for fraud. While the economic loss rule precludes the litigation of a negligence claim when the claims arise out of the parties' contract, the rule does not prevent fraud claims. Thus the case was remanded for a new trial.

The trial court did not err, however, in allowing a cabinet builder with seventeen years of cabinet-making experience to testify as an expert in cabinet construction pursuant to Rule of Evidence 702(a). His lack of formal education did not prevent him from being better qualified than the jury to form an opinion as to the quality of workmanship.

Damages in auto accident; diminution in value and loss of use

Mauney v. Carroll, 795 S.E.2d 239 (N.C. App. Dec. 20, 2016). Plaintiff, lessee of a Porsche, was involved in an accident with Defendant. Plaintiff sued Defendant for diminution in value and loss of use. The trial court granted summary judgment as to both claims. The Court of Appeals affirmed the diminution in value ruling, holding that, as lessee, he did not have standing to assert a claim for diminution in value of the vehicle (and he did not present evidence of diminution in value of his lease). The court reversed,

however, as to loss of use, holding that Plaintiff presented evidence of the value of his inability to use the Porsche for the 38 days it was being repaired.

Unfair and deceptive trade practices; abuse of process
Moch v. A.M. Pappas & Assocs., LLC, 794 S.E.2d 898 (N.C. App. Dec. 20, 2016). [Note: This is one of those cases that makes for a lackluster summary but actually has interesting facts...so if you are intrigued, I recommend reading the full opinion.] The president of a medical treatment company sent an anonymous letter to the State Treasurer making various allegedly defamatory statements about Defendants. Defendants—an investment company, its managing partner, and its CFO—hired counsel, who soon filed a "John [or Jane] Doe" libel lawsuit against the anonymous sender. After discovering the identity of the sender as Plaintiff, Defendants' counsel sent letters to Plaintiff's counsel offering to settle the matter but making it clear that if the various terms of the offer were not met by a certain date, the John Doe suit would be amended to name the Plaintiff specifically. Once Plaintiff failed to adequately respond by the specified date, Defendants' counsel amended the libel complaint to name the Plaintiff.

Plaintiff then filed the *present action* against Defendants, alleging that the actions of Defendants' counsel leading up to the amended complaint constituted unfair and deceptive trade practices and abuse of process. The trial court dismissed Plaintiff's action under Rule 12(b)(6) for failure to state a claim. The Court of Appeals affirmed, holding that (1) the actions of an attorney within the scope of his or her work falls within the learned profession exemption to unfair trade practices liability; and (2) the complaint failed to allege facts that would support an abuse of process claim.

Unfair and deceptive trade practices; "in or affecting commerce"; default judgment context
Alexander v. Alexander, 792 S.E.2d 901 (N.C. App. Dec. 6, 2016). Co-owner of a family business obtained a default judgment against his uncle, the majority owner, for misuse of company funds. The complaint stated theories of breach of fiduciary duty, unjust enrichment, and UDTPA (Chapter 75). After a hearing, the trial court determined that the allegations of the complaint were "in or affecting commerce" under Chapter 75 and trebled the actual damages. The Court of Appeals reversed the treble damages award, holding that Chapter 75 was meant to apply to acts occurring between outside business or distinct corporate entities and not, as here, to acts occurring within a "single market participant." Because the award under Chapter 75 was reversed, the corresponding Chapter 75 attorney fees award was also reversed.

Contributory negligence; auto collision; directed verdict
Daisy v. Yost, 794 S.E.2d 364 (N.C. App. Dec. 6, 2016). Defendant's car collided with Plaintiff's as Plaintiff proceeded straight through an intersection and Defendant made a left turn through the intersection and across Plaintiff's lane. The jury found Defendant negligent and Plaintiff contributorily negligent. The Court of Appeals held that the trial court should have granted directed verdict in favor of Plaintiff as to contributory negligence. The only evidence at trial was that Plaintiff was in the intersection while the light was yellow and that Plaintiff was not exceeding the speed limit. The sole witness testified that she did not actually see Plaintiff driving, but instead only saw Plaintiff's car after the collision. The court concluded that Plaintiff was "entitled to assume, even to the last moment, that Defendant 'would comply with the law...before entering [Plaintiff's lane of travel],'" and that nothing in the evidence suggested Plaintiff acted unreasonably in so assuming.

Defamation (libel and slander *per se*)
Eli Global, LLC v. Heavner, 794 S.E.2d 820 (N.C. App. Dec. 6, 2016). Plaintiff is in the business of purchasing and investing in other companies and/or their assets. In the process of discussing a potential purchase of Defendant UD Entities, Plaintiff discovered that UD Entities had significant financial

problems. One of Plaintiff's companies then purchased some of UD Entities' commercial loans and soon demanded payment. UD Entities, unable to pay, filed Chapter 11 bankruptcy. UD Entities thereafter published a press release regarding its bankruptcy and described a "hostile takeover" by Plaintiff, stating among other things that it was an "extraordinary situation when potential business partners turn out to be predators." In follow-up interviews with local media, UD Entities said, among other things, that "what we thought were going to be honorable purchasers of a good company turned out to be predatory in ways none of us could have imagined."

Plaintiff brought a complaint against UD Entities for libel, libel *per se*, slander, slander *per se*, and unfair trade practices. The trial court dismissed all claims and granted attorney fees to UD Entities under Chapter 75. The Court of Appeals reversed, holding that the allegations in the complaint were sufficient to state a claim for libel and slander *per se* and should not have been dismissed at the pleadings stage. Likewise, the Chapter 75 claim should have survived a 12(b)(6) motion based on the defamation allegations; accordingly, UD Entities was not entitled to attorney fees under Chapter 75. [Note: The NC Supreme Court granted discretionary review of this case on March 16, 2017 at 797 S.E.2d 282.]

Existence of fiduciary duty; various statutes of limitations

Lockerman v. South River Electric Membership Corp., 794 S.E.2d 346 (N.C. App. Dec. 6, 2016). The trial court did not err in granting summary judgment in favor of Defendant electric cooperative on Plaintiffs' claims for breach of fiduciary duty, conversion, unjust enrichment, breach of contract, and equitable estoppel related to payouts of capital credits. Plaintiffs, the estates of two cooperative members, could not demonstrate that Defendant was in a fiduciary relationship with the members with respect to refunding the members' capital credits upon their deaths. Thus Plaintiffs' claims for breach of fiduciary duty failed. Plaintiffs other claims likewise failed because they were filed outside the applicable statutes of limitations.

Wrongful death and loss of consortium arising from med mal; IIED; Rule 9(j) applicability

Norton v. Scotland Memorial Hospital, Inc., 793 S.E.2d 703 (N.C. App. Nov. 15, 2016). Mr. Norton died at Scotland Memorial and his body was transferred to Duke Hospital for autopsy, where some of his organs were harvested for donation. Mr. Norton's wife and children brought an action against Scotland and Duke claiming, among other actions, wrongful death, consequent loss of consortium, and intentional infliction of emotional distress (IIED). The complaint did not include a Rule 9(j) certification. The trial court granted defendants' motions to dismiss. The Court of Appeals held:

(1) the wrongful death and loss of consortium claims against Scotland arose from allegations of medical malpractice and therefore should have been accompanied by a Rule 9(j) certification. Because they were not, the claims were properly dismissed;
(2) The IIED claim against Scotland was based on allegations that plaintiffs were not allowed to see Mr. Norton before he died—matters not related to medical malpractice. Thus no Rule 9(j) certification was required. In addition, the complaint adequately alleged facts supporting an IIED claim, thus dismissal of the claim at the 12(b)(6) stage was error; and
(3) The IIED claim against Duke was based on the handling of Mr. Norton's body—a matter also unrelated to medical malpractice. Thus no Rule 9(j) certification was required. And the alleged facts did not support an IIED claim (not sufficiently egregious or intentional), so the trial court properly dismissed that claim.

FORECLOSURES

Judicial foreclosure vs. non-judicial foreclosure; notice pleading in judicial foreclosure
U.S. Bank v. Pinkney (**N.C.** No. 229PA16; June 9, 2017). See the Press Summary of this case attached to this document as Appendix A.

Deficiency; anti-deficiency statute; homeowner opinion as evidence of value
United Community Bank v. Wolfe (**NC** No. 289PA15; May 5, 2017). Reversing the unanimous opinion of the Court of Appeals at __ N.C. App. __, 775 S.E.2d 677 (2015). The anti-deficiency statute, GS 45-21.36, allows a homeowner whose foreclosed property was purchased *by the creditor* for less than the debt amount to challenge a deficiency action by showing that the property was in fact "fairly worth the amount of the debt[.]" In the deficiency action at issue in this case, the homeowners submitted an affidavit stating that their foreclosed property was "fairly worth the amount of the debt." The trial court found this affidavit insufficient to create a genuine issue of material fact about the property value and granted summary judgment for the creditor bank. The Court of Appeals reversed, holding that the homeowner's opinion of value was competent and sufficient to survive summary judgment. Reversing, the Supreme Court concluded that an affidavit simply making a conclusory restatement of the statutory language and "asserting an unsubstantiated opinion" was not sufficient to "show" the property's value pursuant to the statute. The court stated: "Here the issue is not a landowner's competency to testify but whether the landowner's affidavit presented substantial competent evidence under Rule 56(c) regarding the 'true value' of the foreclosed property." Remanded to the Court of Appeals to reinstate the trial court's grant of summary judgment in favor of the lender bank.

Rules of Civil Procedure; *res judicata* and collateral estoppel; Rules of Evidence
In re Foreclosure of Lucks, 794 S.E.2d 501 (**N.C.** Dec. 21, 2016). Substitute trustee filed a power of sale foreclosure. Clerk dismissed the proceeding due to the trustee's failure to present sufficient evidence of the trustee's appointment. Less than a year later, a new substitute trustee filed a second power of sale foreclosure. Clerk dismissed the second foreclosure on the basis of res judicata. Lender appealed. Before the superior court, the lender presented a copy of a power of attorney purporting to authorize a servicer to execute the substitution of trustee on behalf of the lender; the borrower objected to this evidence. The court sustained the borrower's objection on the basis that the POA lacked a proper foundation and constituted hearsay. The court dismissed the foreclosure with prejudice. Lender appealed. The NC Court of Appeals reversed; the court found that the trial court erred in excluding the POA given the relaxed evidentiary standard in a non-judicial foreclosure. Borrower appealed to the NC Supreme Court. The NC Supreme Court reversed the court of appeals and held:

1. The NC Rules of Civil Procedure do not apply to non-judicial power of sale foreclosure unless explicitly incorporated by G.S. Chapter 45. This applies to proceedings before both the clerk and before the superior and district court. G.S. Chapter 45 provides the exclusive statutory framework for this proceeding.
2. The rules of evidence are relaxed at the hearing before the clerk and the superior and district court. The superior court's decision to exclude the POA based on internal inconsistencies did not constitute an abuse of discretion. The lender failed to overcome these inconsistencies, which could have occurred by appointing the trustee directly (rather than through a servicer), appropriate witness testimony in person or via affidavit, submitting a certified copy of the POA, or requesting judicial notice of the recorded POA.
3. The doctrines of res judicata and collateral estoppel do not apply to non-judicial foreclosures. If the trustee elects not to proceed with the hearing, the trustee may withdraw the notice of hearing and thus terminate the proceeding. This does not constitute a dismissal and has no collateral

consequence. The trustee may file the non-judicial foreclosure again at a later date. Furthermore, the clerk and the superior or district court on appeal do not have the authority to dismiss a non-judicial foreclosure *with prejudice*. If the court enters an order after the hearing that does not authorize the sale, the creditor is prohibited from proceeding again with a non-judicial foreclosure on the same default; the creditor is not prohibited from proceeding with a judicial foreclosure on the same default. However, the creditor may filed another non-judicial foreclosure on another default.

Concurring Opinion: Justices concur with the ultimate outcome of the majority opinion. However, they would not have stated, as the majority did, that the rules of evidence are relaxed before the superior and district court. Such rules are relaxed only before the clerk with regard to affidavits and certified copies, given that the clerk is mentioned in G.S. 45-21.16(d). Otherwise, they apply as in any other case. In addition, the concurring justices would not have stated that the NC Rules of Civil Procedure do not apply on appeal in superior and district court. They would have limited that portion of the opinion to the proceeding before the clerk because there is a presumption that the rules apply unless a different procedure is prescribed. [Summary by Meredith Smith]

Rule 41(a) "Two Dismissal Rule"

In re Foreclosure of Beasley, 794 S.E.2d 484 **(N.C.** Dec. 21, 2016). Vacating the opinion of the Court of Appeals (see prior summary below). Citing *In re Foreclosure of Lucks*, the Supreme Court held that the trustee did not take a dismissal of the second foreclosure proceeding. Instead, the trustee "effectively withdrew its notice of the non-judicial foreclosure hearing" and thus terminated the proceeding.

- Earlier summary of Court of Appeals' opinion:

In re Foreclosure of Beasley (COA14-387; June 2, 2015). Trustee on behalf of lender filed power of sale foreclosure. Trustee then filed a notice of voluntary dismissal of the foreclosure proceeding. Fifteen months after the dismissal, the trustee filed a second power of sale foreclosure. Prior to the foreclosure hearing before the clerk, the borrower filed a motion to dismiss the action with prejudice and the trustee filed a second voluntary dismissal of the foreclosure. At the hearing, the clerk entered an order finding that the second voluntary dismissal filed by the trustee operated as an adjudication on the merits pursuant to Rule 41(a) and granted the borrower's motion to dismiss with prejudice. Lender appealed. In its opinion, the NC Court of Appeals addressed two issues raised by the application of Rule 41 to a power of sale foreclosure.

- First, the court noted that Rule 41 allows a plaintiff to dismiss the action any time prior to resting the plaintiff's case and file a new action on the same claim within one year after the dismissal. The court held that this one year time period is a "savings provision" that constitutes an extension beyond the general statute of limitations. It does not limit the statute of limitations if it has not yet expired. In the case of a foreclosure, there is a 10 year statute of limitations. Therefore, Rule 41 did not preclude the second power of sale foreclosure in the instant case even though it was filed more than one year after the first dismissal because the 10 year statute of limitations had not yet expired.
- After determining that Rule 41 did not preclude the second foreclosure filing by the trustee, the court then analyzed the effect of the second voluntary dismissal under Rule 41(a). The court held that the trustee's two prior voluntary dismissals of the Chapter 45 foreclosure proceeding on the same note did not operate as an adjudication on the merits that would prevent a third Chapter 45 foreclosure proceeding under Rule 41(a). Notwithstanding that the lender accelerated the debt prior to the first action, if the second action is based on different defaults or new period of defaults from the first action, then a third action is not barred because the first two actions did not arise out of the same claim of default. The court noted that the lender's election to accelerate

the amount due under a note does not necessarily place future payments at issue such that the lender is barred from filing subsequent foreclosure actions based on subsequent defaults. [Summary by Meredith Smith. For further discussion of this case, see the https://civil.sog.unc.edu/the-general-specific-the-n-c-supreme-court-decision-in-re-foreclosure-of-lucks/.]

Statute of frauds; foreclosure; error in deed description

In re Thompson (COA16-1014; Apr. 18, 2017). Mortgage debtors appealed from the trial court's order allowing foreclosure of their home. The only issue raised on appeal was whether an error in the property description in the deed of trust rendered the bank's legal title invalid such that it had no right to pursue foreclosure. The Court of Appeals affirmed the trial court's order after discussing the requirements of G.S. 22-2, the statute of frauds, with regard to the level of specificity needed to convey proper legal title. The Court cited case law discussing the difference between a patent and a latent ambiguity, and noted that, in general, appellate courts of this state have affirmed the validity of deeds and similar documents "when it is possible to ascertain the identity of the subject property," or to uphold a trial court's decision to allow extrinsic evidence in order to identify a property with greater certainty. In the instant case, the error in the deed amounted to no more than a scrivener's error which did not affect the right of the bank to foreclose on the property.

Foreclosure hearing; affidavit as evidence of holder; findings of fact

In re Foreclosure of Deed of Collins, 797 S.E.2d 28 (N.C. App. Feb. 7, 2017). In a *de novo* Chapter 45 foreclosure hearing, the trial court did not err in accepting into evidence the affidavit of lender's administrative services employee averring the lender's possession of the original note. The fact that the affidavit was executed more than two years prior to the hearing did not invalidate it, and the affidavit sufficiently revealed that the averments were made on the affiant's personal knowledge. In addition, the evidence before the trial court amply demonstrated that the lender was holder of the note, so the trial court's failure to make an explicit finding of fact regarding physical possession did not require a remand.

Service of Notice of Hearing

In re Foreclosure of Garrett (COA15-1083; COA15-1118; Nov. 15, 2016).

Facts: This case involved three separate foreclosures.

1. First, the homeowner association foreclosed based on a claim of lien for unpaid assessments (Foreclosure #1). The HOA took title to the property out of the foreclosure and later conveyed the property to the first-lien mortgagee, Household Realty Corporation.
2. The HOA filed a second foreclosure as a result of Household's failure to pay assessments and conveyed the property to Select Transportation Services LLC out of the foreclosure (Foreclosure #2). The HOA did not serve Household, the record owner, at its registered agent address in NC or principal office in IL. Instead, the HOA served Household's "officer, director, or managing agent" at the NY address shown on the deed conveying the property from the HOA to Household recorded between Foreclosure #1 and #2.
3. Prior to the conveyance of the property by the trustee to Select from Foreclosure #2, Household filed a notice of hearing and amended notice of hearing initiating a foreclosure of the first-priority deed of trust (Foreclosure #3). Select was not served with the notice of hearing or amended notice of hearing for Foreclosure #3. Select was not the record owner or the borrower at the time of the filing of either notice of hearing. The trustee conveyed the property via trustee's deed to Household out of Foreclosure #3.

Procedural History: After the recordation of the trustee's deed from Foreclosure #3, Select filed a motion under GS 1A-1, Rule 60(b) to set aside Foreclosure #3 due to, in part, to the failure of the trustee to notice Select. Household also filed a Rule 60(b) motion to set aside Foreclosure #2 due to insufficient notice, given that the HOA did not serve Household at its registered agent or principal office address. At a consolidated Rule 60 hearing, the trial court entered an order granting the motion to set aside Foreclosure #3 and denying the motion to set aside Foreclosure #2. Select later filed a third motion for attorneys' fees, which was granted. Household appealed from both orders.

Disposition: The NC Court of Appeals affirmed the trial court's order on the Rule 60(b) motions and reversed the attorneys' fees order.

1. With regard to Foreclosure #2, the court held that the HOA properly served Household in the second foreclosure. This was based on the fact that (i) service was by certified mail, return receipt requested, (ii) service was addressed to Household by "its officer, director, or managing agent," (iii) the return receipt was signed as received, (iv) the address was the same as the used by Household on the deed from Foreclosure #1, and (v) the address was the one used to by the HOA to serve Household on prior occasions. The failure to serve Household at the registered agent or principal office address did not alone result in improper service.
2. With regard to Foreclosure #3, the court held that Household's failure to notice Select supported the trial court's order setting aside Foreclosure #3. The court did not provide analysis as to why Select was entitled to notice of Foreclosure #3.
3. Finally, with regard to the attorneys' fees order, the court held that the trial court's order did not identify the grounds on which the trial court awarded fees and therefore vacated and remanded the order to trial court for a new hearing.

Note: This opinion does not address GS 45-21.16(b), which governs who is entitled to notice of the foreclosure hearing, as it does not appear that either party raised the issue on appeal or challenged the trial court's order related to Foreclosure #3 on that basis. In addition, Rule 60 no longer applies to non-judicial foreclosure proceedings given the NC Supreme Court's decision in *In re Foreclosure of Lucks*. That Supreme Court opinion from December 21, 2016 states that the N.C. Rules of Civil Procedure do not apply to non-judicial foreclosures. [Summary by Meredith Smith]

REAL PROPERTY, LAND USE, and CONDEMNATION

Riparian rights; ownership of pier adjacent to easement; fee simple ownership
Kings Harbor Homeowners Assoc., Inc. v. Goldman (COA16-1189; June 6, 2017). In March 2011, the developer of a residential community conveyed a creek-adjacent lot to Mrs. Hartley. On that lot was a ten-foot pedestrian walkway easement accessible to the other homeowners as provided by the 2005 covenants. Also on the lot, and adjacent to the walkway easement, was a pier that extended out into the creek. Members of the community had been using the pier (accessed via the walkway easement) since the developer first constructed it in 2007, and Mrs. Hartley did not object when she purchased the lot. In August 2011 Mrs. Hartley died and the Goldmans inherited the lot. For a while the Goldmans did not object to neighborhood use of the pier, but in mid-2014, they began to assert exclusive ownership over it, ultimately placing a chain over the pier entrance to prevent access. The HOA sued for a declaratory judgment and for damages, and the Goldmans countersued. The trial court granted summary judgment in favor of the HOA and against the Goldmans.

The Court of Appeals reversed, holding that lot ownership came with all appurtenant riparian rights, and those rights included the right to construct piers and related structures. Whether or not the developer originally *intended* for the pier to be used by all the homeowners, the fact remains that the developer did not *preserve* such a right—specifically, the developer did not include the pier as part of the walkway easement and did not create any other easement that would cover use of the pier. Thus only the Goldmans, fee owners of the lot, had legal access to the pier.

Lease/option agreement for home; equity of redemption
Lee v. Cooper (COA16-485; June 6, 2017). The parties entered into an agreement whereby tenants-plaintiffs leased a property from owner-defendant for a term of four years, during which they could qualify for a loan to purchase the property equal to defendant's mortgage balance. Plaintiffs stayed past the end of the term without exercising their option to purchase, and allegedly defaulted on their rental payments. After defendant obtained an order of summary ejectment, which plaintiffs did not appeal, plaintiffs commenced this action to recover the "equity" they felt they were due from having made rental payments for four years. Defendant counter-claimed for unpaid rent and for damage to the property. The parties filed cross motions for summary judgment; the trial court dismissed all claims and counterclaims, entering summary judgment for defendant on plaintiffs' claims and vice versa.
The Court of Appeals reversed the order granting summary judgment for defendant because the ambiguity of the terms of the agreement created a genuine issue of fact. The Court discussed the rights of tenants pursuant to N.C. Gen. Stat. § 47G, and noted that the terms of the agreement variously conflicted with or were vague regarding those rights. The underlying issue is whether the parties were in a landlord-optioner/tenant-optionee relationship or a mortgagor/mortgagee relationship, which the Court declined to resolve. The Court also reversed the order granting summary judgment for plaintiffs on defendant's counterclaim for damages because there was some evidence that plaintiffs had some responsibility for making repairs to the property but did not do so. The Court affirmed, however, the trial court's order granting summary judgment for plaintiffs on defendant's counterclaim for unpaid rent, an issue which defendant neglected to argue on appeal. The case was remanded to the trial court for further proceedings. [Summary by A. Chen]

Conditional use permit; prima facie case; quasi-judicial hearing
Innovative 55, LLC v. Robeson Cty (COA16-1101; June 6, 2017). The Superior Court erred in affirming the County Board of Commissioners' decision to deny petitioners' application for a conditional use permit (CUP) to construct a solar farm. The record revealed that Petitioners made the requisite prima facie showing of compliance with all applicable ordinance requirements for a CUP, and the opponents

presented no competent evidence to rebut that prima facie showing. The three people who spoke in opposition to the project made only "unsupported and highly speculative" statements about their fears of the project's potential harm, but they presented no evidence to support their claims as is required in a quasi-judicial proceeding. Reversed and remanded for further remand to the County to issue the CUP for operation of the solar farm.

DOT condemnation; lots affected by taking
Dep't of Transp. v. Riddle (COA16-445; Apr. 18, 2017). In a condemnation action, the Department of Transportation ("DOT") filed a claim to take portions of two lots owned by defendants. Defendant also owned four other adjacent lots, but the DOT only listed the two lots from which it took land as being "affected" by the taking. After the trial court determined that only those two lots could be considered in setting the amount of compensation by a jury, defendants appealed. The Court of Appeals remanded to the trial court to determine whether any of the other lots should be unified with the two listed by DOT for purposes of just compensation. The trial court held another hearing and determined that one of the other lots should also be considered; defendants appealed on the basis that the other three lots were also affected by the taking, and DOT cross-appealed that only the two lots it initially listed were affected.

After noting that the appeal was interlocutory because a jury trial on damages had not yet been held, the Court of Appeals concluded it had jurisdiction to hear the appeal because the trial court's order affected a substantial right. In doing so, the Court discussed prior case law as well as the distinction between an action to determine which land was actually taken and an action to determine which land was affected by a taking. The Court applied relevant principles of condemnation actions, including factors to determine what constitutes the "entire tract" for purposes of compensation. The Court affirmed in part and reversed in part after concluding that the trial court was correct in not including the three remaining lots as argued by defendants, but incorrect in including one additional lot. Therefore, only the two lots initially listed by the DOT in its declaration of taking were part of the "entire tract." [Summary by Aly Chen.]

Statute of frauds; foreclosure; error in deed description
In re Thompson (COA16-1014; Apr. 18, 2017). Mortgage debtors appealed from the trial court's order allowing foreclosure of their home. The only issue raised on appeal was whether an error in the property description in the deed of trust rendered the bank's legal title invalid such that it had no right to pursue foreclosure. The Court of Appeals affirmed the trial court's order after discussing the requirements of G.S. 22-2, the statute of frauds, with regard to the level of specificity needed to convey proper legal title. The Court cited case law discussing the difference between a patent and a latent ambiguity, and noted that, in general, appellate courts of this state have affirmed the validity of deeds and similar documents "when it is possible to ascertain the identity of the subject property," or to uphold a trial court's decision to allow extrinsic evidence in order to identify a property with greater certainty. In the instant case, the error in the deed amounted to no more than a scrivener's error which did not affect the right of the bank to foreclose on the property.

Zoning appeal; proper trial court review standard
Thompson v. Town of White Lake, 797 S.E.2d 346 (N.C. App. Mar. 7, 2017). Reversing the trial court's decision to affirm the town Board of Adjustment's zoning order and reversing the zoning order itself. Rather than applying the appropriate "whole record" test to a challenge of the Board's decision, the trial court incorrectly applied a de novo standard of review and substituted its own findings for those of the Board. In this case, however, remand to the trial court for application of the proper standard was unnecessary: the Town conceded on appeal that the Board's finding of fact in support of its zoning

decision was not supported by the evidence. Thus both the trial court's and the Board's decisions were reversed.

Real property dispute; standing; discovery sanctions
Burns v. Kingdom Impact Global Ministries, Inc., 797 S.E.2d 21 (N.C. App. Feb. 7, 2017). In a dispute between trustees of a church (plaintiffs) and another church (defendant) regarding ownership of real property, (1) the trial court did not err in entering discovery sanctions and a corresponding protective order against defendant for long delays in responding to discovery and submission of incomplete responses; (2) plaintiffs, as church trustees, had standing to assert church property rights pursuant to G.S. 59B-4, -5, -15 and 61-2; and (3) the trial court properly granted summary judgment in favor of plaintiffs because the undisputed evidence showed that a deed purporting to grant title to defendant was invalid.

Easement implied by prior use, easement by necessity
Adelman v. Gantt, 795 S.E.2d 798 (N.C. App. Dec. 20, 2016). The Court of Appeals affirmed the trial court's determination that plaintiff was entitled to an easement in a property boundary dispute. The Court lays out and discusses the elements of both easement implied by prior use and easement by necessity, the two theories accepted by the trial court as the basis for its ruling. The Court also affirmed the lower court's denial of defendant's motion for new trial or for supplemental proceedings, concluding that the trial court's description of the easement was not ambiguous. [Summary by A. Chen]

Interlocutory appeal; Inverse condemnation
Wilkie v. City of Boiling Spring Lakes, 796 S.E.2d 57 (N.C. App. Dec. 20, 2016). Appeal from the trial court's finding that the city took property by inverse condemnation as a result of flooding after the city took steps to address altered lake levels. Although the appeal was interlocutory, the Court of Appeals noted that the judgment affected a substantial right. It conducted a *de novo* review and concluded that the trial court erred where the property was not taken for a public use, a necessary finding pursuant to the statutory scheme contained in Gen. Stat. §§ 40A-3 and 40A-51. The Court stated it need not reach the other bases argued for reversal. However, since the trial court did not address plaintiff's claims under the state constitution, the Court remanded to the lower court for further proceedings. [Summary by A. Chen]

Conditional-use permit; quasi-judicial proceedings
Hirschman v. Chatham Cty, 792 S.E.2d 211 (N.C. App. Nov. 15, 2016). A telecommunications company sought and obtained a conditional use permit for a cell tower. Neighbors appealed the decision but failed to name the applicant telecommunications company as a party in case, as required by G.S. 160A-393. The trial court ruled, and the Court of Appeals affirmed, that the court lacked jurisdiction and must dismiss the case because the neighbors failed to name a necessary party. [Summary by Adam Lovelady.]

Life estate; unreasonable restraint on alienability
Davis v. Davis, 791 S.E.2d 714 (N.C. App. Nov. 1, 2016). Parents deeded their beach property to an LLC owned by their children, and the parents reserved a life estate for themselves. The parents then occasionally rented the property out to vacationers. The grantee children filed suit to enjoin such rentals, arguing that the language of the life estate required that the property be reserved only for the personal use of the life estate holders. The trial court (business court) ruled that the language of the life estate, which, among other things, stated that the property "may not be utilized by any other person," was an unreasonable restraint on alienation and was therefore void. The Court of Appeals affirmed, holding that such an unlimited restraint on the alienation of a life estate was in violation of public policy,

was void *per se* and—quoting earlier case law—was a "dead letter." The fact that it was the grantor parents themselves who created the restraint was immaterial.

Lack of standing to challenge zoning decision based on non-compliance with Plaintiffs' bylaws
<u>*Willowmere Community Ass'n, Inc. v. City of Charlotte*</u>, 792 S.E.2d 805 (N.C. App. Nov. 1, 2016). Affirming the trial court's dismissal of plaintiff community associations' challenges to City rezoning decisions. Because the undisputed facts showed that Plaintiffs had not complied with their own bylaws governing whether Plaintiffs were authorized to initiate suit on their members' behalf, they lacked standing to bring the suit.

ESTATES and SPECIAL PROCEEDINGS

Probate of a Holographic Codicil

***In re Estate of Allen* (COA16-1209; June 6, 2017) .**Caveat proceeding filed challenging the validity of a holographic codicil to a typewritten will. Trial court held the handwritten notes on the will constituted a valid holographic codicil. Caveator appealed and the NC Court of Appeals reversed the decision of the trial court. The court held:

- To be a valid holographic codicil to a typewritten will, the meaning of the testator's handwritten words must not require reference to other words in the typewritten part of the will. The handwritten words must be sufficient, standing alone to establish their meaning. In this case, the testator's handwritten words required reference to typewritten parts of the will, specifically "Article IV", to give them meaning and therefore did not constitute a valid holographic codicil.
- To be a valid handwritten or typed codicil, a codicil must establish present testamentary intent of the testator to modify the will and not a plan for a possible future change to the will. In this case, the record did not establish whether the testator's handwritten note "beginning 7-7-03" was added on that date and indicated such present intent or on an earlier date and thus expressed an intent to make a future change to the will. Therefore, there was insufficient evidence of the testator's present testamentary intent to modify the will.

[Summary by Meredith Smith]

Waiver of Right to Partition; Equitable Authority of the Court

Ward v. Ward (COA16-832; March 7, 2017). Husband and wife owned real property as tenants by entirety; parties subsequently divorced resulting in ownership of the property as tenants in common. Husband filed for partition by sale. Wife filed a response raising two defenses: (i) husband waived right to partition by implied in fact contract, and (ii) equitable principles precluded distribution of the property by partition. Clerk and superior court judge on *de novo* appeal from the clerk both authorized the partition by sale. Wife appealed the superior court's order to the NC Court of Appeals. The court affirmed the trial court's order authorizing partition by sale. The court found competent evidence to support the trial court's findings that there was no written agreement, action, or conduct that gave rise to an implied in fact contract and no implied in fact contract existed to waive the husband's right to partition. Second, the court noted that a partition proceeding is equitable in nature and the court has the authority to adjust all equities with respect to the property, including to authorize reimbursement of an owner for improvements to the property. However, the husband's extra-marital affair did not have any bearing on such equity when partitioning a marital home. [Summary by Meredith Smith.]

Tortious Interference with Expected Inheritance; Standing to Sue for Breach of Fiduciary Duty, Constructive Fraud, and an Accounting

Hauser v. Hauser (COA16-606; Feb. 21, 2017). Sister filed a civil action against brother for (i) tortious interference with expected inheritance during the lifetime of their mother, the testator, (ii) breach of fiduciary duty under a power of attorney executed by their mother naming brother as agent under the POA, (iii) constructive fraud, and (iv) an accounting by brother to sister under the POA. Trial court dismissed all of sister's claims and the NC Court of Appeals affirmed. The court held that NC does not recognize a claim by a beneficiary for tortious interference with an expected inheritance during the lifetime of the testator. Further, the court held that the sister lacked standing to bring claims for breach of fiduciary duty and constructive fraud because no fiduciary relationship or relationship of trust and confidence existed between the sister and the brother. Any such claims must have been brought by the mother or someone legally authorized to act on her behalf. Finally, the court held that the sister was

not entitled to accounting absent some showing that the POA entitled her to an accounting as no other cited legal authority granted her such right solely on the basis of being a potential beneficiary of an estate. [Summary by Meredith Smith.]

Effect of probate and related caveat on prior civil action implicating validity of the will

Finks v. Middleton, 795 S.E.2d 789 (N.C. App. Dec. 30, 2016). Decedent allegedly executed a 2009 will naming her son and a daughter as co-executors and distributing her property equally among her three children. In 2012, decedent executed a new will, an *inter vivos* revocable trust agreement, and a power of attorney naming her son as the executor, successor trustee, and agent under the power of attorney, respectively. After decedent's death, daughter filed a civil suit against son for, in part, breach of fiduciary duty, fraud, and conversion. As part of the civil suit, daughter alleged (i) son procured revisions to the decedent's estate plan using undue influence and (ii) the decedent lacked capacity to execute the 2012 documents. The son then filed a motion to dismiss the civil action and submitted the 2012 will for probate. The will was admitted to probate by the clerk. The daughter subsequently entered a caveat to the 2012 will alleging undue influence and lack of testamentary capacity, similar allegations raised in her civil action. The superior court denied the son's motion to dismiss the civil action for lack of standing and the son appealed.

The Court of Appeals affirmed the decision of the trial court and held that the daughter had standing to assert the claims in her civil action as an heir. In addition, the daughter did not lose standing when the son probated the 2012 will. The court noted that jurisdiction is determined at the time the civil action is filed and may not be eliminated by subsequent actions of the defendant. Although the civil action implicated the validity of the will, a caveat was not available when the civil action was filed. Furthermore, the caveat would not resolve all claims in the civil action because the civil action included claims related to the revocable trust and the POA. The timing of the probate of the 2012 will coupled with the inadequacy of relief the daughter could obtain through the caveat entitled her to proceed with the civil action. The court recommended the superior court hold the caveat in abeyance until the civil action was resolved in the interest of judicial economy and clarity. [Summary by Meredith Smith.]

Caveat: Standing, Evidence, and Summary Judgment

***In re Estate of Phillips*, 795 S.E.2d 273 (N.C. App. Dec. 20, 2016).** In 2007, one month prior to his death, decedent executed a will leaving all of his property to his daughter (propounder). Daughter submitted and the court admitted the 2007 will to probate. Another daughter of decedent (caveator) entered a caveat alleging lack of testamentary capacity, undue influence and duress, and invalid execution of the will. Propounder filed motion for summary judgment as well as a motion to strike affidavits filed by the caveator in support of the caveat. Trial court granted both motions and held caveator did not have standing to enter the caveat. Caveator appealed. The NC Court of Appeals reversed on all grounds and remanded the caveat for trial. First, the court held that the caveator did have standing to enter the caveat as an interested party and heir at law. The fact that the decedent also executed a 1993 will submitted by the propounder that left nothing to the caveator did not defeat caveator's standing because the caveat proceeding would resolve the validity of all of the scripts before the court. The caveator was a potential intestate heir in the event both the 1993 and 2007 wills were invalid. Second, the court held that the decedent's statements included in the caveator's affidavits were admissible. The court discussed the NC Supreme Court decision *In re Will of Ball*, 225 NC 91, and stated that decision provides that relevant declarations of the decedent not made at the time of the execution of the will or that demonstrate the circumstances under which the will was executed are admissible in a caveat proceeding. The court also noted that the Dead Man Statute did not apply in this instance because the affiants had no interest in the estate. Third, the court held, given the admissibility of the declarations in the caveator's affidavits, that genuine issues of material fact existed with regard to whether the

decedent lacked testamentary capacity, was subject to undue influence and duress, and whether the will was properly executed. [For a detailed analysis of each of these legal standards, please see the full opinion.] [Summary by Meredith Smith.]

Jurisdiction between Ch. 50 Custody and Ch. 35A Guardianship of Minor
Corbett v. Lynch (COA16-221; Dec. 20, 2016).

Facts: Brother and Sister were orphans as a result of Mother's death in 2006 and Father's death in 2015. Father was married to Stepmother at time of his death. Father's will named Aunt and Aunt's husband as testamentary guardians for the minor children.

Procedural History:

- August 4, Stepmother filed a petition for guardianship and a petition for a stepparent adoption in superior court
- August 5, 2015, Stepmother initiated a custody action under G.S. Ch. 50 in district court. An ex parte temporary emergency custody order was entered based on the allegation that Aunt was coming to take children to Ireland.
- August 7, 2015, Aunt filed an application for guardianship in superior court and filed an answer, motion to dismiss, and counterclaim for custody in the district court custody action.
- August 17, 2015, clerk of superior court ordered guardianship to Aunt and her husband.
- District court dismissed the custody action as a result of the guardianship order. Stepmother appealed.

Holding: The NC Court of Appeals affirmed the district court's dismissal of the custody action. The court held that the clerk of superior court had jurisdiction over the guardianship proceeding as the children had no "natural guardian" (no biological or adoptive parent). G.S. 35A-1221. The custody order did not divest the clerk of jurisdiction as G.S. 35A-1221(4) requires the application for guardianship to include a copy of any order awarding custody. **Guardianship of the person includes custody**. G.S. 35A-1241(a)(1) and -1202(10). NC statutes "provide for an override of a Chapter 50 custody determination by the appointment of a general guardian or guardian of the person." The clerk retains jurisdiction over the guardianship proceeding, including modifications. G.S. 35A-1203(b), (c). **The appointment of a general guardian in a Ch. 35A guardianship proceeding renders a Ch. 50 custody action moot.** The holding "does not affect any jurisdiction the district court may have to issue ex parte orders under Chapter 50 for temporary custody arrangements where the conditions of G.S. 50-13.5(d)(2)-(3) are met. [Summary by Sara DePasquale.]

OPEN MEETINGS and PUBLIC RECORDS LAW

Reasonable access to meeting; mootness of argument over outcome of meeting; attorney fees
Hildebran Heritage & Dev. Ass'n, Inc. v. Town of Hildebran, 798 S.E.2d 761 (N.C. App. Mar. 21, 2017) (with partial dissent). The town council voted to demolish an old school building and award the contract to a certain demolition company. Plaintiffs, two citizen groups, filed an action against the town alleging violations of the open s law and violations of contract bid statutes. After a bench trial, the trial court granted judgment in favor of the town. The Court of Appeals affirmed. As to the open meetings arguments: A board member's discussions one-on-one with other board members prior to the meeting did not invalidate the vote; the vote itself took place later at the duly-noticed council meeting. In addition, public access to the meeting was not unreasonable merely because the meeting room did not accommodate the unusually large crowd, causing an overflow of attendees who could not hear all of the proceedings. As to the contract award: By the time the Court of Appeals heard argument on this issue, the school building had burned down through no fault of the parties, making any performance under the contract impossible anyway and rendering the issue moot. As to attorney fees: The trial court did not err in declining (in its discretion) to award fees to either party under the open meetings statutes.

The dissenting judge argued that the one-on-one meetings prior to the vote were in fact designed to evade the purpose of the open meetings laws and were in violation of those laws. [For a discussion of the issue of one-on-one meetings generally, see questions 33 through 35 in Open Meetings and Local Governments in North Carolina: Some Questions and Answers (SOG, 8th Ed. 2017, available here).

The Times News Pub'g Co. v. The Alamance-Burlington Bd. of Educ., 797 S.E.2d 375 (N.C. App. Mar. 7, 2017). Affirming the trial court's order that only certain portions of the Alamance School Board's closed-session meeting minutes must be disclosed pursuant to public records law. The trial court correctly determined that the remaining contents, which the judge examined *in camera* and the Court of Appeals examined under seal, were exempted from the public records law as personnel information, attorney-client communications, and confidential student information.

ADMINISTRATIVE APPEALS

State Hazardous Waste Program contested case appeal
WASCO, LLC v. N.C. Dep't of Env't & Nat. Res. (COA16-414; Apr. 18, 2017). This is an appeal of the superior court's order affirming an ALJ decision granting summary judgment in favor of DENR's Division of Waste Management. In this detailed opinion, the Court of Appeals determined that the trial court correctly concluded that Petitioner was an "operator" of a former textile facility and was, therefore, responsible for necessary remedial cleanup of the site pursuant to applicable federal statutes and North Carolina's State Hazardous Waste Program.

License suspension; insufficient evidence of refusal to submit to chemical test
Brackett v. Thomas (COA16-912; Apr. 4, 2017). Petitioner was arrested and charged with driving while impaired. His driving privileges were suspended on the basis that he refused to submit to a chemical test. An administrative hearing officer upheld the suspension, and petitioner appealed to Superior Court. The trial court reversed the decision after determining there was insufficient evidence that petitioner's refusal to submit to the chemical test was willful, as required by G.S. 20-16.2(d)(5). Upon appeal by the Commissioner for the North Carolina DMV, the Court of Appeals affirmed. The court agreed that the record and findings failed to support a conclusion that the driver had willfully failed to submit to the test. The driver in fact blew into the Intoximeter, which registered "mouth alcohol" and did not indicate that another sample would be needed. There was no other evidence that the driver thereafter refused to submit another sample.

Driver's license revocation; officer's amendment of Rights Form
Wolski v. North Carolina Div. of Motor Vehicles, 798 S.E.2d 152 (N.C. App. Mar. 21, 2017). Affirming the trial court's reversal of the agency's revocation of a driver's license. After discovering that a Rights Form failed to indicate that the driver had refused breathalyzer testing (a material requirement under G.S. 20-16.2(c1)), the chemical analyst amended the form to reflect the refusal, but did not do so in front of the requisite witness. Because the Rights Form was not modified in front of a magistrate or other official authorized to administer oaths, the DMV was stripped of jurisdiction to revoke the license.

Adequate accommodation of disability; termination from employment
Rittelmeyer v. Univ. of North Carolina at Chapel Hill (COA15-1228; Mar. 21, 2017). Affirming the trial court's order affirming an ALJ decision affirming the University's termination of an employee. The ALJ's 40 pages of opinion and 260 findings of fact (supported by the record) established that the University made extensive efforts to accommodate the employee's light sensitivity, and that the termination resulted not from a failure to accommodate her but from her own refusal to return to work despite the University's extensive efforts to assist her.

Right to contested case hearing regarding exempt status
Vincoli v. State of North Carolina, 792 S.E.2d 813 (N.C. App. Nov. 1, 2016). The trial court declared G.S. 126-34.02 unconstitutional as applied to Plaintiff because it did not provide Plaintiff, a DPS employee, the right to a contested case hearing before the Office of Administrative Hearings to challenge the designation of his position as "exempt" from the NCHRA. The Court of Appeals reversed, holding that such a right was in fact provided by G.S. 126-5(h).

Appeal Dismissals (Selected)

In the following cases, the court dismissed the appeals as follows:

Hanesbrands Inc. v. Fowler, 794 S.E.2d 497 (**N.C.** Dec. 21, 2016). Defendant did not show that the designation of Plaintiff's case against her as a complex business case affected a substantial right. Thus her interlocutory appeal to the Supreme Court pursuant to G.S. 7A-27(a) was dismissed.

Edwards v. Foley (COA16-1060; May 16, 2017). Dismissing appeal of an order granting summary judgment in favor of Plaintiff on Defendants' counterclaims but denying summary judgment as to Plaintiff's claims in a dispute among minority shareholders. Appellants failed to demonstrate a substantial right affected by the trial court's interlocutory order.

Hanna v. Wright (COA16-1134; May 16, 2017). Dismissing appeal of a default judgment and preliminary injunction where the amount of the money judgment had yet to be determined by the trial court. Because the defendant failed to show that his business as a whole would be prevented from operating as a result of the interlocutory orders, he did not demonstrate that the orders affected a substantial right.

Radiator Specialty Co. v. Arrowood Indem. Co. (COA16-638; May 16, 2017). Dismissing an appeal of six orders entered in protracted litigation related to insurance indemnification for benzene- and asbestos-related "progressive claims spanning multiple policy periods of a decades-long, multi-carrier, multi-policy, multi-layered liability insurance coverage block." [Fun!] Because the orders were interlocutory and not certified by the trial court pursuant to Rule 54(b), and because the appellants failed to demonstrate that they affected a substantial right, they were not properly before the Court of Appeals at this stage.

Appendix A

Supreme Court of North Carolina

Mark Martin
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PRESS SUMMARY

June 9, 2017

Court Issues Opinion in *U.S. Bank v. Pinkney* (229PA16)

In *U.S. Bank v. Pinkney* (229PA16), the Court clarified the distinction between judicial foreclosure and non-judicial foreclosure by power of sale. Whereas the latter is a non-judicial summary proceeding, requiring the creditor to establish certain statutory elements before a hearing official to proceed with foreclosure, the former is an ordinary civil action, employing the liberal standard of notice pleading. As such, the Court held that plaintiff's complaint adequately states a cause of action for judicial foreclosure because it alleges a debt secured by a deed of trust, a default, and plaintiff's right to enforce the deed of trust.

After defendants failed to make payments on a loan that they received to purchase real property, plaintiff U.S. Bank filed a complaint in the superior court seeking judicial foreclosure. The Bank alleged that it was not the original lender, but that it possessed the underlying promissory note through a series of note transfers. In support, the Bank attached to its complaint various transfer exhibits. Finding the exhibits failed to include a required indorsement, however, the trial court dismissed the action with prejudice. The Court of Appeals affirmed that decision, finding the Bank failed to affirmatively establish its right to enforce the deed of trust, as required under the General Statute applicable to non-judicial foreclosure by power of sale.

"Judicial foreclosure," unlike non-judicial foreclosure by power of sale, is a civil action governed by the liberal standard of notice pleading found in the Rules of Civil Procedure. Under that standard, a complaint sufficiently alleges a claim for judicial foreclosure if it contains enough detail to place the court and the parties on notice of the essential facts to be proved at trial—including the plaintiff's right to enforce the deed of trust. Because the Bank alleged that it was the holder of the promissory note and detailed the transfers that led to its ownership, the Court determined that its complaint met this standard. The Court specifically rejected the idea that the Bank was required to produce evidence of each ownership transfer at the initial pleading

stage. In an action for judicial foreclosure, the foreclosure by power of sale statute on which the Court of Appeals relied is inapplicable.

As a result of the Court's opinion, the case returns to the Court of Appeals for consideration of defendant's remaining issue on appeal.

The Court's opinion in this case is available on the Court's web site.

NOTE:

This case summary is provided as a courtesy to the press and to the public. It is not an opinion of the Court. For a full understanding of the facts and legal analysis in the case, please read the Court's published opinion in its entirety.

Appendix B

Relevant Blog Posts (506)

Do I Need to Include Findings of Fact in this Order?

This entry was contributed by Ann Anderson on March 15, 2017 at 11:52 am and is filed under Civil Practice, Civil Procedure-General.

When must a civil order include specific findings of fact and conclusions of law? Some types of orders must always include at least *some* findings; some orders need only include them if a party asks for them; and for other orders, findings of fact are inappropriate whether requested or not. Rule 52 of the North Carolina Rules of Civil Procedure gives us the core rules, but exceptions and clarifications abound. And, of course, some types of orders are governed by separate, more specific statutes. Here are the fundamentals:

Orders (judgments) after bench trials. In all actions tried without a jury, the judge (as finder of fact) *must* include specific findings of fact and conclusions of law in the written judgment or written memorandum. Rule 52(a)(1), (3). The requirement is mandatory and does not depend on a party's request. If the court later amends the judgment under Rule 59(e) or 52(b), the court must include any necessary additional findings and conclusions.

Findings of fact and conclusions of law are also required when the judge in a bench trial dismisses the case under Rule 41(b) after the plaintiff's evidence. Rule 52(a)(2); *Hill v. Lassiter*, 135 N.C. App. 515 (1999). If, however, the court properly dismissed the case because the evidence was insufficient as a matter of law (as in a directed verdict)—rather than because the judge was simply unpersuaded by it—there are no facts to be found and including them would be inappropriate. *Bauman v. Woodlake Partners, LLP*, 191 N.C. App. 441, 445 (2009).

Orders on motions. The general rule for orders on a party's or the court's own motion is this: Findings of fact and conclusions of law are not required *unless a party requests them*. Rule 52(a)(2). For example, the court of appeals remanded a case where a party's motion to dismiss for lack of personal jurisdiction included such a request, and the trial court failed to include them in the order. *Agbemavor v. Keteku*, 177 N.C. App. 546 (2006). The party is required to make its request before the court enters an order. *J.M. Dev. Grp v. Glover*, 151 N.C. App. 584 (2002).

To this general rule there are two significant categories of **exceptions**:

> ***Findings of fact inappropriate — Summary judgment and similar dispositive orders***. Even if a party requests them, findings of fact are *not* appropriate in orders disposing of summary judgment motions. The court's task at summary judgment is to determine whether genuine issues of material fact exist for a jury to resolve, not to actually resolve those issues ("find" those facts). *Hodges v. Moore*, 205 N.C. App. 722 (2010). The court may, however, include a recitation of *undisputed* facts (ideally labeled "undisputed") in order to set the stage for its ruling. *War Eagle, Inc. v. Belair*, 204 N.C. App. 548 (2010). (Whether it is a good idea include undisputed facts is a matter of opinion and largely depends on the situation; but that is a discussion for a longer blog post.)
>
> The same rule against including findings of fact applies to 12(b)(6) orders, orders on motions for judgment on the pleadings (12(c)), directed verdict orders, and JNOV orders. For each of these types of orders, the court's task is to make a threshold determination of the sufficiency of the allegations or evidence, not to resolve disputes of fact. *See, for example*, *Tuwamo v. Tuwamo*, 790 S.E.2d 331 (N.C. App. 2016) (12(b)(6) and summary judgment); *Hodgson Constr., Inc. v. Howard*, 187 N.C. App. 408 (2007) (JNOV). (Note, however, that as to JNOV orders on *punitive damages* awards, G.S. 1D-50 requires the judge to issue a written memorandum. For more discussion of this requirement, see Relief from Judgment in North Carolina Civil Cases, pp. 15–19.)
>
> Note also that:
>
> - The "summary judgment divorce" statute *does* require the court to find certain facts supporting its judgment. See G.S. 50-10 and my colleague Cheryl Howell's discussion here.
> - In a complex business case, the presiding business court judge must issue a written *opinion* in connection with any order granting or denying a motion under Rule 12, Rule 56 (summary judgment), Rule 59 (new trial), or Rule 60 (relief from judgment), other than an order "effecting a settlement agreement or jury verdict." G.S. 7A-45.3. Presumably this statute is not intended to include a requirement that actual findings of the facts in issue be included in Rule 12(b)(6) and summary judgment orders.
>
> ***Findings always required — certain types of orders***. Despite the language of Rule 52, our courts have determined that orders on certain specific types of motions must contain written findings of fact and conclusions of law *even if a party does not request them*. Some notable examples include:
>
> - Rule 11 orders. Findings and conclusions should be included in a court's order granting or denying a motion for sanctions under Rule 11 of the Rules of Civil Procedure. *Krantz v. Owens*, 168 N.C. App. 384 (2005). Failure to do so will result in remand unless the record reveals no basis upon which the court could have awarded sanctions. *Sholar Bus. Assocs. v. Davis*, 138 N.C. App. 298 (2000).
> - Attorney fee awards generally: An attorney fee award should always include the statutory basis for the award. It must also include findings of fact and conclusions of law as to the factors in *Washington v. Horton*, 132 N.C. App. 347 (1999), where relevant, and the dollar amount awarded, taking into consideration (1) time and labor expended; (2) skill required; (3) customary fees for like work; and (4) experience and ability of the attorney. *Furmick v. Miner*, 154 N.C. App. 460 (2002).

- Attorney fee awards under G.S. 75-16.1: Specific findings reflecting the statutory basis for the fee must be included in the order. *McKinnon v. CV Industries, Inc.*, 228 N.C. App. 190 (2013). If, however, the trial court denied the fee in its discretion, a failure to include findings may not require remand. *Brooks Wilkins Fam. Med., P.A. v. Wakemed*, 784 S.E.2d 178 (N.C. App. 2016).
- Arbitration: An order denying a motion to compel arbitration must include certain findings as set forth in *Cornelius v. Lipscomb*, 224 N.C. App. 14 (2012) and cases that precede it.
- Rule 9(j) dismissals. The trial court must make written findings of fact to support its conclusion that a Rule 9(j) certification in a medical malpractice complaint was not supported by the facts in the record. *Estate of Wooden ex rel. Jones v. Hillcrest Convalescent Ctr., Inc.*, 222 N.C. App. 396 (2012).

When other statutes govern. Rule 52 governs civil orders generally, but it is important to note that many types of orders are covered by more specific statutes. Rule of Civil Procedure 65, for example, requires certain specific findings for TROs and preliminary injunctions. Other examples are found in Chapter 50, governing divorce and alimony, which requires specific findings for certain types of orders, and Chapter 5A, which requires that certain findings appear in orders adjudicating contempt. Of further note is Chapter 7B, which governs abuse, neglect, or dependency of juveniles and termination of parental rights, and mandates findings for certain types of orders, such ceasing reasonable efforts for reunification (G.S. 7B-901(c), 7B-906.2(b)) and review and permanency planning orders (G.S. 7B-906.1). Our now-retired colleague Professor Janet Mason described Chapter 7B as taking an "unusually prescriptive approach to orders" and noted the importance of including all statutorily mandated findings to avoid remand.

This entry was tagged with the following terms: findings of fact, orders.

Ann Anderson

Ann Anderson is an associate professor with the UNC School of Government and specializes in civil procedure, civil practice, and judicial authority.

^ Back to Top

Rule 59: Not for Relief from Interlocutory Orders – A New Opinion

This entry was contributed by Ann Anderson on December 7, 2016 at 11:15 am and is filed under Appeals, Civil Procedure-General, Jurisdiction.

In a prior post, I discussed whether North Carolina's Rule of Civil Procedure 59—the "new trial" rule—could be used to seek relief from final judgments *not* resulting from a jury or non-jury trial. That post focused on other types of final, appealable judgments, such as summary judgment orders and default judgments. I concluded that North Carolina case law is not crystal clear on the question, but that the recent case of *Bodie Island Beach Club Ass'n, Inc. v. Wray*, 215 N.C. App. 283 (2011), indicates that filing Rule 59 motions for relief from these types of judgments could imperil an appeal. *Proper* Rule 59 motions toll the appeal period for the underlying judgment pending disposition of the motion. *See* N.C. R. App. P. 3(c)(3). If the basis for the Rule 59 motion is not proper, the appeal period will not have been tolled.

Yesterday the Court of Appeals again addressed Rule 59's applicability to orders other than trial judgments, but this time analyzed a pretrial, *interlocutory* order. In *Tetra Tech Tesoro, Inc. v. JAAAT Tech. Services, LLC*, a construction dispute, a subcontractor sued a contractor for unpaid work. The trial judge granted the subcontractor a preliminary injunction requiring the contractor to segregate the disputed funds pending resolution of the case on its merits. The contractor moved to modify the preliminary injunction and purported to do so pursuant to Rule 59 (and also Rule 60, which is another issue for another day). The trial court (mostly) denied the motion to modify. The contractor noticed an appeal of both the denial of the motion to modify and the underlying preliminary injunction order.

The appeal of the order on the motion to modify was filed within 30 days, so it was timely. More than 60 days, however, had passed since entry of the preliminary injunction itself. The contractor argued that the 30-day deadline for appealing that order had been tolled under Rule 3(c)(3) because the motion to modify was a Rule 59 motion. Turning to the "plain terms" and "express purpose" of Rule 59, and reaffirming *Bodie Island*, the Court of Appeals rejected this argument, holding that Rule 59(a) (and, by extension, 59(e)) do "not apply to interlocutory, pretrial orders." So the appeal of the preliminary injunction was untimely and the Court of Appeals lacked jurisdiction to review it.

I should note that, in explaining the scope of Rule 59(a), the court stated that it appears to apply "only after a trial on the merits *or, at a minimum, a judgment ending the case on its merits*." (emphasis added). If this last phrase is meant to indicate that Rule 59 might be used after summary judgment, 12(b)(6), default judgment, *etc.*, it would appear to be at odds with *Bodie Island* on that point. The court, however, did not need to nail down that broader question in order to determine the question before it—Rule 59's applicability to pretrial, interlocutory orders. So for now the language might best be seen as *dicta.*

As for the timely-appealed motion to modify, the court pointed out that the contractor could have filed the motion to modify pursuant to Rules 54(b) or 62(c)—even during appeal—without invoking Rule 59. The court went on to hold that, although interlocutory, the order was immediately appealable based on a substantial right. After then concluding that the trial judge had made "careful consideration" of the relevant issues, the court affirmed the denial of that motion.

The Takeaway. *Tetra Tech* makes clear that parties hoping to appeal immediately-appealable interlocutory orders—such as those involving venue, immunity, personal jurisdiction, and, as in *Tetra Tech*, some types of injunctions—should not pursue Rule 59 motions for relief from those orders. If a party does so, and the 30-day appeal period expires before the trial court rules, the appeal deadline will not have been tolled and the appellate court will not have jurisdiction over the appeal.

[For much more on Rule 59 and the other rules governing relief from final civil orders (including 50, 52, and 60), pick up a copy of our book, Relief from Judgment in North Carolina Civil Cases, here.]

This entry was tagged with the following terms: appellate jurisdiction, Interlocutory appeals, Rule 59, tolling.

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^ Back to Top

Doctors, Patients, and Arbitration Agreements: The NC Supreme Court's Ruling in King v. Bryant

This entry was contributed by Ann Anderson on February 3, 2017 at 7:00 am and is filed under Civil Law, Civil Practice, Dispute Resolution.

Last Friday the North Carolina Supreme Court issued an opinion that should prick up the ears of any physician, hospital, or healthcare facility that asks its patients to agree to binding arbitration in the event of a dispute. In *King v. Bryant* (January 27, 2017), the court's majority held that a physician was in a fiduciary relationship with a new patient at the time the patient signed an arbitration agreement at his initial intake. The majority then concluded that, because the physician's office did not take sufficient measures to disclose the nature and import of the agreement, but instead effectively buried it among other intake papers, the agreement was the product of breach of that fiduciary duty.

Background. The procedural history of the case is complex, but here are the essential facts and lower-court findings that led to the ruling:

In 2009, Mr. King was referred to a surgeon, Dr. Bryant, for a hernia repair. While Mr. King was in the waiting area before meeting Dr. Bryant for the first time, the desk employee asked him to complete forms seeking his medical history and to sign several documents, among which was an arbitration agreement. This was the routine practice in the office for new patient intake. After meeting with Dr. Bryant, Mr. King signed another series of health-related and insurance forms. Believing all the documents to be "just a formality," he did not read them before signing. During the surgery, Dr. Bryant injured Mr. King's distal abdominal aorta, requiring substantial additional hospital treatment and causing significant injury to Mr. King's right leg and foot. Mr. King filed a medical malpractice action about two years later.

Dr. Bryant and his practice then attempted to compel arbitration pursuant to the agreement. The agreement provided for "final and binding resolution through private arbitration," for which the parties would hire three arbitrators, two of whom were to be licensed to practice law in North Carolina and one of whom was to be a physician board certified in the same specialty as Dr. Bryant. When Mr. King later read the agreement, he asserted that he still did not understand its purpose or significance or that it affected his right to pursue an action in court. In a 2013 order, the trial court found that there was a relationship of trust and confidence between Mr. King and Dr. Bryant; that the agreement had been presented to Mr. King casually and without explanation of its importance; and that the wording of the agreement was confusing and lacked reference to its effect on the right to seek a jury trial or consult an attorney before signing. The trial court ruled the agreement unenforceable. The Court of Appeals affirmed, holding that the agreement was procedurally and substantively unconscionable.

The opinion (majority): The Supreme Court allowed defendants' petition for discretionary review. The majority held that there was a fiduciary relationship between Mr. King and Dr. Bryant at the time Mr. King signed the agreement, irrespective of whether the parties had yet formed an actual physician-patient relationship. The court noted in particular that Mr. King had come to Dr. Bryant specifically because of Dr. Bryant's special knowledge and skill and that Mr. King had entrusted Dr. Bryant's practice with his confidential medical information. The court stated that, "[i]t is difficult to see how one could reach any conclusion other than that Mr. King reposed trust and confidence in Dr. Bryant, to whom he had been referred by his family physician for the purpose of receiving surgical treatment." The court went on to find that that fiduciary duty had been breached, in short, because Dr. Bryant 's practice had "failed to make full disclosure of the nature and import of the arbitration agreement to him at or before the time that it was presented for his signature." The Court therefore upheld the denial of defendants' motion to compel arbitration.

The dissents. There were two separate and relatively vigorous dissents. The first dissenting judge took issue with what he deemed the majority's attempt to "have its cake and eat it too" by finding a fiduciary duty based on the characteristics of a physician-patient relationship without first concluding that such a relationship existed. But the main argument—as well as that of the second dissent—revolved around preemption by the Federal Arbitration Act of state law defenses to arbitration agreements. A lot more can be said on this important ADR topic, but an analysis of these arguments is outside the scope of this post. For anyone who specializes in arbitration, though, they are an interesting read.

The takeaway. The court declined to compel arbitration based on the facts of this case, but that does not mean all physician-patient arbitration agreements are unenforceable. The court explained that

> "[w]e...wish to make clear that nothing in our decision in this case should be understood to cast doubt upon the availability of physicians and patients, assuming that proper disclosure is made, to enter into appropriately drafted agreements providing for the arbitration of disputes like the one that underlies this case."

In light of *King v. Bryant*, then, it seems that medical practices hoping to bind their patients to arbitration might fare better if they:

- Make the language of the arbitration agreement clear and complete. Include a plainly worded explanation that binding arbitration affects the patient's right to pursue other legal remedies including access to a jury. Include language advising the patient of the right to consult counsel before signing. And unless a physician truly intends to reject a patient who does not sign, also include a statement

that the patient is not required to sign the agreement in order to receive treatment.

- Instruct office staff to present the arbitration agreement to the patient separately from health- and insurance-related documents. Consider having staff point out the key disclosures of the agreement to the patient before giving the document over for the patient's review. To create evidence that this step was actually performed, also consider having the patient sign a separate page acknowledging that it was done.

This entry was tagged with the following terms: arbitration, fiduciary duty.

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^ Back to Top

Falls at the hospital: medical malpractice or ordinary negligence? Recent Court of Appeals opinions

This entry was contributed by Ann Anderson on May 26, 2017 at 1:22 pm and is filed under Civil Law, Civil Practice, Civil Procedure-General.

Why it matters: Rule 9(j) *very* briefly.

Rule 9(j) of the North Carolina Rules of Civil Procedure requires plaintiffs filing medical malpractice complaints to include a specific allegation that the medical care and records have been reviewed by an expert who meets certain qualifications and who is willing to testify that there was a breach of the standard of care. If a plaintiff fails to include the Rule 9(j) language before the underlying statute of limitations expires, the complaint "shall be dismissed." This special pleading requirement does *not* apply to other types of malpractice or to ordinary negligence actions. Rule 9(j) was enacted as an attempt to curb frivolous medical malpractice claims. But it has had the side effect of generating more than its fair share of appellate wrangling. Since it was enacted in 1995, well over 100 published opinions have been issued interpreting its undefined provisions, reconciling it with other procedural rules, and determining when it does and does not apply. [See an overview here.] One group of those opinions has examined whether the complaint actually alleged a "medical malpractice action" in the first place, or whether it merely stated a claim for ordinary negligence. If a claim is ordinary negligence, Rule 9(j) does not apply, even if the event occurred in a medical setting and the defendant was a "health care provider."

Falling in a medical facility

Patient falls–either from standing or lying positions—have featured somewhat prominently in these cases. Where the court has concluded that the fall involved a provider's clinical assessment or judgment, the claims have been classified as medical malpractice. *See Sturgill v. Ashe Memorial Hospital, Inc.*, 186 N.C. App. 624 (2007) (failure to restrain fall-risk patient where restraints required medical order); *Deal v. Frye Reg. Med. Ctr*, 202 N.C. App. 584 (2010) (unpub'd) (failure to conduct requisite fall risk screening); *see also Littlepaige v. US*, 528 Fed Appx 289 (4th Cir. 2013) (unpub'd) (failure to secure patient who had been placed on "falls precaution").

On the other hand, where the court considers the alleged lapse to be a matter of mere "physical or manual activity" rather than of specialized judgment or skill, the claim is ordinary negligence. *See Horsley v. Halifax Reg. Med. Ctr.*, 725 S.E.2d 420 (N.C. App. 2012) (failure to give a cane to psychiatric patient who fell in hallway); *Lewis v. Setty*, 130 N.C. App. 606 (1998) (failure to adequately lower an exam table when moving patient to wheelchair); *Alston v. Granville Health Sys.*, 207 N.C. App. 264 (2010) (unpub'd) (unrestrained plaintiff's fall from gurney where there was no allegation that restraint was matter of medical judgment).

Two recent opinions: *Locklear v. Cummings* and *Gause v. New Hanover Regional Medical Center*

We can now add two more fall-related opinions to the list, each reaching a different conclusion:

- Last week the Court of Appeals issued *Locklear v. Cummings* (COA16-1015; May 16, 2017), with the panel divided as to the result. Locklear sued the doctor, hospital, medical center, and physician group after she fell off the operating table during cardiovascular surgery and sustained various injuries. The complaint was filed one day before the statute of limitations was up, and although it included a Rule 9(j) certification, it omitted a phrase that was added to the rule in 2011. The trial court dismissed her complaint with prejudice for failure to comply with Rule 9(j). The Court of Appeals reversed, the majority concluding that (as in *Alston*) Ms. Locklear's claims sounded in ordinary negligence. 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. The dissenting 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 majority responded by noting, in part, that "in our de novo review we cannot review whether the trial court erred in dismissing Plaintiff's complaint under Rule 9(j) without addressing whether Rule 9(j) certification is required." The dissenting judge also disagreed with the majority in substance, asserting that "clinical judgment and intellectual skill" were indeed at issue.
- In its recent opinion in *Gause v. New Hanover Reg. Med. Ctr.*, 795 S.E.2d 411 (Dec. 30, 2016), on the other hand, a Court of Appeals panel unanimously declared that a different type of fall gave rise to a medical malpractice claim. As an X-ray technician was preparing to take chest images of Mrs. Gause from a standing position, the elderly plaintiff fell straight backward, sustaining severe traumatic brain injury. The technician had observed Mrs. Gause before and during her positioning in front of the x-ray machine, but then had turned away to prepare to make the images. Discovery (including the technician's own testimony) revealed that the technician's clinical judgment was required in determining whether it was safe to take Mrs. Gause's x-rays standing rather than seated or lying down. Thus the alleged negligence occurred in the context of "medical assessment or clinical judgment" and was properly classified as a medical malpractice action. Because Mrs. Gause's complaint did not include a Rule 9(j) certification, the trial court properly dismissed it.

It is too early to tell if defendants in *Locklear* will seize their right to have the case heard by the North Carolina Supreme Court (or to first request *en banc* review by the Court of Appeals). For now, these two cases are additional guidance for lawyers deciding whether to obtain Rule 9(j) opinions prior to filing their clients' complaints.

This entry was tagged with the following terms: medical malpractice, ordinary negligence, Rule 9(j).

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The General Specific: The N.C. Supreme Court Decision In re Foreclosure of Lucks

This entry was contributed by Meredith Smith on January 20, 2017 at 11:04 am and is filed under Foreclosures.

On December 21, 2016, the North Carolina Supreme Court published a final set of opinions for the year. Without a doubt, one case in particular stopped me in my tracks. The case, In re Foreclosure of Lucks, will have a significant impact on G.S. Chapter 45 power of sale foreclosures going forward. ____ N.C. ____ (Dec. 21, 2016). Here's both the general and the specific about what the court had to say.

The Rules of Civil Procedure Do Not Apply to Non-Judicial Foreclosures

The biggest takeaway from the Lucks decision is the holding that the Rules of Civil Procedure applicable to judicial actions do not apply to power of sale, or non-judicial, foreclosure proceedings. G.S Chapter 45 governs these proceedings and provides the "comprehensive statutory framework." This includes both the initial proceeding before the clerk of superior court and the proceeding on appeal before the superior or district court. Any case that implies otherwise is expressly overruled by the opinion. This includes decisions by N.C. Court of Appeals such as In re Foreclosure of Garrett, ___ N.C. App. ___ (Nov. 15, 2016) (applying Rule 60); In re Foreclosure of Herndon, ____ N.C. App. ____ (Jan. 19, 2016) and Lifestore Bank v. Mingo Tribe, 235 N.C. App. 573 (2014) (each applying Rule 41); In re Foreclosure of Garvey, ___ N.C. App. ___ (June 2, 2015) (applying Rule 52(a)); and In re Foreclosure of Cain, ___ N.C. App. ___ (July 5, 2016) (applying Rules 36(a) and Rule 58).

The saga of whether the Rules of Civil Procedure apply to power of sale foreclosures picked up steam over the past couple of years. A string of recent cases from the N.C. Court of Appeals starting with Lifestore stated "[a] foreclosure under power of sale is a type of special proceeding, to which our Rules of Civil Procedure apply." This language caused some concern among court officials and practitioners that depositions, requests for production of documents, interrogatories, and other discovery tools might work their way into power of sale foreclosure proceedings. These rules and related procedures now clearly do not apply to a power of sale foreclosure under G.S. Chapter 45.

As a result of Lucks, the procedures that apply to power of sale foreclosures are found solely in G.S. Chapter 45. The Rules of Civil Procedure that many clerks, judges, and parties have come to rely on to fill in the gaps where G.S. Chapter 45 is silent do not apply. This includes rules like Rule 17, which provides guidance on how a party must defend a proceeding when they lack capacity, and Rule 11, which requires a party or attorney to file a pleading, motion, or other paper based on the law and in good faith and authorizes court sanctions for failing to do so. Rule 60 also no longer applies which some practitioners relied upon to seek an order setting aside the foreclosure sale. Going forward, unless G.S. Chapter 45 specifically incorporates a rule by reference, the Rules of Civil Procedure are no longer available for guidance in power of sale foreclosure proceedings both before the clerk and the superior or district court on appeal.*

A Trustee Withdraws a Notice of Hearing Rather Than Dismisses It

The court in Lucks also weighed in on a creditor's (holder's) decision not to proceed with a foreclosure hearing after a notice of hearing is filed by the trustee. The court stated that in those instances the creditor does not file a "dismissal" of the case. Instead, the trustee simply files a withdrawal of the notice of hearing. The withdrawal of the notice ***terminates*** the case. *See* In re Foreclosure of Beasley, ___ N.C. ___ (Dec. 21, 2016). The court noted that the withdrawal by the trustee has no collateral consequence, meaning it does not impact the ability of the trustee to re-file another power of sale foreclosure at a later date – either on the same default or a different default.

Going forward, clerks and judges should expect to see notices of withdrawal filed in power of sale foreclosures by trustees instead of voluntarily dismissals. There are some counties that have already seen such notices since the Lucks decision.

If a dismissal is filed by a trustee, it should be treated as a withdrawal of the notice and the case is terminated. This was the effect of a case decided by the N.C. Supreme Court on the same day as Lucks. The court in In re Foreclosure of Beasley treated a dismissal previously filed by the trustee as a withdrawal and held that the filing of the withdrawal meant there was no longer a pending case "on which the clerk of court could act."

The Court's Decision: Authorize or Deny the Request to Authorize the Foreclosure Sale

If the court finds the existence of six elements set forth in G.S. 45-21.16(d), the court authorizes the trustee to proceed with the foreclosure sale under the deed of trust. This may be done by "authorization or order" of the court. G.S. 45-21.16(d). In practice, most clerks and judges enter an order authorizing sale. *See* N.C. Clerk of Superior Court Procedures Manual, pg. 130.29.

If the court does not find sufficient evidence of the existence of the requisite statutory elements, the court by order **denies the request to proceed with a foreclosure sale.** *Id.* However, a common practice in North Carolina is for the court to deny the request for sale by entering an order dismissing the proceeding. The court in Lucks seemed to take issue with this practice by referring to each dismissal by the clerk and the superior court in quotes as a "dismissal" – suggesting that the court's actions were not a dismissal but rather a denial of the request to proceed with the sale. And in fact, the court ultimately ruled that the superior court erred by entering an order dismissing the case *with prejudice*.

After the court's decision in Lucks, if the court does not find the existence of the six statutory elements, it seems as though the better practice is for the court to enter an order denying the request to proceed rather than entering a dismissal of the proceeding. This aligns with the procedure described in the NC Clerk of Superior Court Procedures Manual as well. *See* N.C. Clerk of Superior Court Procedures Manual, pg. 130.29. Note, however, there is at least one instance when both the clerk and the superior and district court on appeal clearly have the authority to enter a dismissal of a power of sale foreclosure proceeding. If the court determines that the certification contained in the notice of hearing pertaining to the pre-foreclosure notice under G.S. 45-102 (the 45 day letter) or the pre-foreclosure information required under G.S. 45-103 (the home loan registration) contain a materially inaccurate statement, the court may enter an order dismissing the proceeding without prejudice. G.S. 45-107(b).

Res Judicata and Collateral Estoppel

The N.C. Supreme Court in Lucks also held that collateral estoppel (issue preclusion) or res judicata (claim preclusion) do not apply to power of sale foreclosure proceedings and specifically to a denial of a request to proceed with the foreclosure. Once a court **denies a request to proceed with a sale**, the following applies:

1. The creditor is prohibited from filing another power of sale foreclosure based on the same default.
2. The creditor may file a judicial foreclosure under G.S. Chapter 1 on the same default.
3. The creditor may file another power of sale foreclosure on a *different* default.

One open question I have involves the breadth of the court's statement that traditional doctrines of res judicata and collateral estoppel applicable to judicial actions do not apply to power of sale foreclosures and the extent to which prior case law implying otherwise is overruled. As recently as June of 2015, the North Carolina Court of Appeals held that collateral estoppel barred a borrower from re-litigating the issue of default in a separate civil action where the clerk and the superior court had already entered orders authorizing sale in a power of sale foreclosure proceeding. *See* Funderburk v. JPMorgan Chase Bank, N.A., ___ N.C. App. ___ (June 16, 2015).

The court in Funderburk cited a string of cases from 2014 and 2015 where courts held that an order authorizing sale from a power of sale foreclosure had a preclusive effect on subsequent suits involving the same issues (valid debt, default, etc.). Read broadly, it would seem that Lucks overrules those decisions and going forward the court's order from a power of sale foreclosure has no preclusive effect. The nature of a power of sale foreclosure described by the court in Lucks – the fact that it is not a judicial action, the Rules of Evidence are relaxed, and the Rules of Civil Procedure do not apply – seem to support this position as a party does not have the same opportunity to gather information and challenge an issue in a non-judicial proceeding as it does in a civil action. However, a future court may read Lucks more narrowly and limit the holding stating that res judicata and collateral estoppel do not apply to only other power of sale and judicial foreclosure proceedings. I guess we'll see....

What are your thoughts on the application of Lucks in practice? Feel free to leave them below.

*One instance where Rules of Civil Procedure do apply to a foreclosure is in connection with service of the notice of hearing – G.S. 45-21.16(a) incorporates Rules 4 and 17 by reference. Service of the notice of hearing is made in the same manner as service of summons under the Rules of Civil Procedure, which is by Rule 4. GS 45-21.16(a); G.S. 1A-1, Rule 4. Rule 4(j)(2)(b) sets forth the requirements for serving a natural person under disability, which includes an incompetent ward and a minor, and for the appointment a Rule 17 guardian ad litem to complete service of process in certain limited circumstances described therein.

This entry was tagged with the following terms: collateral estoppel, dismissal, G.S. Chapter 45, notice of withdrawal, res judicata, Rules of Civil Procedure.

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Coates' Canons Blog: Local Acts Relating to Health and Sanitation: Supreme Court Weighs in On Asheville and Boone Cases

By Frayda Bluestein

Article: https://canons.sog.unc.edu/local-acts-relating-health-sanitation-supreme-court-weighs-asheville-boone-cases/

This entry was posted on January 05, 2017 and is filed under Ordinances & Police Powers, Statutory Authority & Construction

Article VII, sec. 1 of the North Carolina Constitution gives the General Assembly almost unlimited power to create local governments, and to define, expand, and limit their authority. Does this power allow the legislature, by local act, to require the city of Asheville to transfer its water system to a newly formed water and sewer authority? The North Carolina Supreme Court has said it does not. Does it permit the legislature, by local act, to eliminate the town of Boone's authority to exercise regulatory powers outside the town limits? The North Carolina Supreme Court has said it does. Both opinions involve interpretations of Article II, sec. 24(1)(a) of the North Carolina constitution, which prohibits local acts relating to health, sanitation, and the abatement of nuisances.

Summary of Asheville v. State of North Carolina.

Asheville challenged a local act that required the city to transfer its water system to a regional water and sewer district. (Please see this blog post to learn more about the facts and the Court of Appeals decision in this case.) In a nutshell, the Court of Appeals concluded that the main purpose of the act was to change the *governance* of the system, and that such a change did not relate to health and sanitation within the meaning of the constitutional limitation on local acts. The court's opinion also confirmed that the legislature may make this type of change and rejected the city's arguments that it should be compensated for the taking of the system.

In an opinion authored by Justice Ervin, the Supreme Court reversed, holding that the legislation mandating the transfer was an unconstitutional local act relating to health and sanitation. (The court did not address or express an opinion regarding the other constitutional issues.) As I chronicled in my earlier blog post, North Carolina's appellate courts have struggled to establish a consistent standard for determining when a local act violates the health and sanitation provision. In the Asheville case, the Supreme Court introduced a new test:

> [T]he ultimate issue that we must decide in this case is whether, in light of its *stated purpose and practical effect*, the legislation has a material, but not exclusive or predominant, connection to issues involving health, sanitation, and the abatement of nuisances.

Slip op. 36-7 (emphasis added). Applying this standard, and listing the numerous health-related regulations that govern water and sewer operations, the Supreme Court held that a change in governance does in fact have a material practical effect on public health and sanitation. Therefore, the local act violated the constitution.

Justice Newby dissented, setting out an analysis that did not carry the day in the Asheville case, but was adopted as the majority opinion in the *Town of Boone* case, decided the same day. The dissent posits that the basic constitutional structure as delineated in Article VII, sec. 1, gives the legislature plenary authority to structure and organize local governments as political subdivisions of the state. This power includes the authority to modify the boundaries and structure of these entities. The dissent concludes that "the plain meaning of the constitutional provision that delegates to the legislature the 'organization and government and the fixing of boundaries' embraces the creation, expansion, retraction, and dissolution of all forms of local government..." *Slip op. at 48.* Noting that the city's water district was created by a local act, the dissent opines: "If it is unlawful to modify [the city's water district] then it was unlawful to establish it by local act." *Slip op. at 43.* Justice Newby expands upon this framework in the *Boone* case.

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Summary of _Town of Boone v. State of North Carolina_.

In 2014, the General Assembly by local act withdrew the Town of Boone's power to exercise regulatory authority in areas outside its corporate limits, returning that authority exclusively to Watauga County. The Town challenged the local act under Article II, sec. 24(a)(1) – the health and sanitation provision in the state constitution. A three-judge panel held that the local act was unconstitutional, and the case was appealed directly to Supreme Court under G.S. 7A-27(a1) (providing for appeals directly to the Supreme Court from any order that holds that an act of the General Assembly is facially invalid on the basis that the act violates the North Carolina Constitution or federal law).

Writing for the majority, this time, Justice Newby again focused on the constitutional provision that defines legislative powers regarding local governments (Article VII, sec. 1):

> The General Assembly shall provide for the organization and government and the fixing of boundaries of counties, cities and towns, and other governmental subdivisions, and, except as otherwise prohibited by this Constitution, may give such powers and duties to counties, cities and towns, and other governmental subdivisions as it may deem advisable.

Citing to the Report of the 1968 Constitutional Study Commission, the opinion notes that this provision is not a delegation of authority, but is instead "'a general description' and 'merely a recognition' of 'the General Assembly's power to provide for the organization and powers of local government.'" *Slip op. at 9.* he opinion's key holding comes with the parsing of the two parts of this provision:

> The second clause of Article VII, Section 1 concerns the authority of the General Assembly to confer specific "powers and duties" on local governmental units. Unlike the first clause in Article VII, Section 1, the second clause includes an express limitation; namely, it prohibits any legislative delegation of "powers and duties" to local governmental units that is "otherwise prohibited by this Constitution." *Only under the second clause, then, is the General Assembly's authority over local governments expressly subject to limitations imposed by other constitutional provisions, including the constraints on local acts in Article II, Section 24 first adopted in 1917.*

Slip op. at 12 (emphasis added). Applying this interpretation to the situation in *Boone*, the opinion framed the issue as follows:

> The pivotal question before this Court is whether the Boone Act...is an exercise of the General Assembly's plenary authority to 'provide for the organization and government and fixing boundaries' of local government under the first clause of Article VII, Section 1. If so, our analysis ends, and there is no need to address the application of the second clause...and any restrictions imposed by Article II, Section 24.

Slip op. at 15-16. The opinion concludes that "[t]his local jurisdictional reorganization is precisely the type of 'organization and government and fixing of boundaries' contemplated by the first clause...". Therefore it is well within the legislative authority and is not subject to analysis under Article II, sec. 24. Simply stated, the opinion holds that because the local act involved a change in the boundaries within which the Town could exercise its jurisdiction, the limitation on local acts relating to health and sanitation simply does not apply.

Justice Ervin concurred in the conclusion that the local act is constitutional, but for different reasons. The concurring opinion rejected the majority opinion's interpretation of the relationship between Article VII, sec. 1 and Article II, sec. 24. In addition, the concurrence notes that the effect of the local act cannot be considered merely a "fixing of boundaries":

> The only reason that a municipality is required to define the area in which it is entitled to exercise extraterritorial jurisdiction is to specify the location or locations within which the municipality can take a limited number of actions that could not otherwise be taken there.

Slip op. at 42-43 (listing numerous statutes authorizing regulatory powers in exterritorial jurisdictions). The concurrence points out that the initial creation and subsequent extensions of municipal boundaries determine who votes in elections, pays taxes, and receives services. The opinion also notes however, that the boundary in *this case* relates directly to the exercise of regulatory powers and thus is subject to the state constitution's prohibitions against local acts relating to health

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and sanitation. *Slip op. at 44-5.* Justice Ervin, applied the new standard enunciated in *Asheville*, and conclued that considering the "purpose and practical effect" of the local act it did not have a material connection to health and sanitation, and was for that reason constitutionally valid.

In a dissenting opinion, Justice Beasley, joined with Justice Ervin in rejecting the majority opinion's standard for determining when Article II, sec. 24 applies, but disagreed about whether the Boone local act violated the constitution. Citing to prior cases, Justice Beasley noted that the Court has previously held that "a [local] law altering who is charged with enforcing health and sanitation laws" violates the constitutional prohibition. *Slip op. at 74* (citations omitted). Also, applying the "purpose and practical effect" standard from the *Asheville* case, the dissent comes to the opposite conclusion from the concurrence, finding that the practical effect of shifting responsibility for enforcement of the regulations – including the building code, fire code, and plumbing code – would have a material connection to health and sanitation and thus violates the constitution.

Reconciling the Opinions: Comments and Questions

The case law regarding local acts has long been marked by a lack of consistency. After years of conflicting decisions and multiple standards, we now have two brand new standards but perhaps not a sense of clarity about how they will be applied.

Here are the two new standards in brief:

The *Asheville* Standard: Considering its stated purpose and practical effect, does the legislation have a material connection to issues involving health, sanitation, and the abatement of nuisances?

The *Boone* Standard: Does the local act only relate to "organization and government and fixing boundaries"? Is so, then the limitations under Article II, sec. 24 do not apply and the local act is constitutional.

The majority and dissenting opinions in these cases reveal a tension between these two approaches. So how might courts apply these standards in future case? One approach would be as follows:

Step 1: Apply the *Boone* standard to determine whether the local act is subject to the prohibitions under Article II, sec. 24.

a) If the court finds that the act relates only to the first part of Article VII, sec. 1 (organization and government and fixing boundaries), then no further review is necessary and the local act is constitutional. End of analysis.

b) If instead the act relates to the second part of that section (the giving of powers and duties), and is not limited to those matters viewed as falling only under the first part, then the Article II, sec. 24 limitations apply. Go to step 2.

Step 2: Apply the *Asheville* "purpose and practical effect" standard to determine whether the act violates the constitution.

The matter is far from clear, however. The *Boone* case presents a good example of how hard it is to separate – legally and conceptually – the drawing of boundaries and the delegation or withdrawal of authority. In many cases these things go hand in hand. In addition, *Asheville* presents an example of a law that makes no changes in the regulatory activity except with respect to the governing body that is carrying it out. Although the *Asheville* majority found that a mere change in governance had a material connection to health and sanitation, the dissent makes a strong argument that a change in governance is squarely within the legislature's plenary authority over the structure and organization of local governments. Furthermore, while both opinions cite to cases in supporting or distinguishing the results under the new standards, it's not clear what remaining value these prior cases have in light of the new standards.

This issue has been challenging the courts for a long time now. For a look back at the origins of the local act limitations, check out the law review article written by our (retired) colleague Joe Ferrell in 1967 (cited multiple times in these two opinions): *Local Legislation in the North Carolina General Assembly.* While it's clear that the initial motivation for limiting local acts was to reduce the volume of bills for the legislature to manage during the sixty-day long sessions of that era, Ferrell's summary of cases demonstrates that a diversity of approaches and justifications has been part of this area of law from the beginning, not only regarding the prohibited subject matter, but even as to what constitutes a local act.

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For more information about local acts, see my blog post: What's a Local Act?

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