Civil Law Update:
Five Cases You Should Know About

Stainless Valve Co. v. Safefresh Technologies, LLC (filed 12/3/2013): Fact that "Tony" (who conducted all contract negotiations) held the position of manager with defendant is some evidence that he had actual authority to bind defendant to contract. Concurrence discusses "acceptance by silence" at some length.

Farlow v. Brookbank (filed 11/5/2013): While GS 24-11(a) permits a creditor to charge interest of 1 ½% per month on an open-ended account, this rule applies only if the creditor gives notice of the intent to do so in a regular and consistent manner, and a creditor who asserts such right in an irregular and inconsistent manner may be held to have waived the right to charge interest exceeding the legal rate.

Botts v. Tibbens (filed March 4, 2014): The courts will not enforce a contract if the performance requires violation of the law, nor is a contract enforceable if its performance is impossible. A number of factors may operate to make these defenses unavailable, however: if the party asserting the defense is at fault for creating the impossibility, or if the impossibility was foreseeable and the defender assumed the risk of that eventuality, the defense will not stand. Furthermore, impossibility of performance is not *inconvenience of performance*; a change of circumstances making performance more expensive than was anticipated is exacting the "sort of risk that a fixed-price contract is intended to cover." In addition, a party must use reasonable efforts to surmount obstacles even if unforeseen; it is only if these efforts are unsuccessful that performance may be excused.

Automotive Group LLC v. A-1 Auto Charlotte, LLC (filed 11/19/2013). *Res judicata* did not bar a landlord from filing an action for summary ejectment on the following facts: Action for SE #1 based on holding over was dismissed with prejudice because landlord accepted—but did not cash—a check for rent for a period subsequent to the lease expiration. A subsequent action for summary ejectment was filed several months later, the landlord having returned all rent checks to defendant in the interim. This action was dismissed with prejudice as barred by *res judicata*. The district court judge on appeal ruled in favor of plaintiff.

HELD: Res judicata prevents re-litigation of a case if the following requirements are met:

1) An earlier action was resolved on the merits, resulting in a final judgment;
2) The cause of action in the present action is identical to that of the earlier action;
3) The parties or their privies are identical in both actions.

Res judicata does not apply, however, if events subsequent to the first judgment alter the legal rights of the parties. In this instance, plaintiff did not repeat its earlier mistake of accepting rent from the defendant/tenant, and thus "eliminated waiver of defendant's lease breaches."

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Stephens v. Covington (filed 2/18/2014): Landlord will not be held liable for attack of dog owned by tenants unless 1) landlord was aware that tenant's dog posed a danger; and 2) landlord had control over dangerous dog's presence on the property. Specifically distinguishes earlier case of *Holcombe v. Colonial Associates, LLC,* 358 NC 501, 597 SE2d 710 (2004), finding liability in case in which landlord had ample notice of dangerous dogs on the property and specific authority under the lease to have them removed.

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