Civil Case Summaries: June–October 2011
2011 Fall Conference
North Carolina Conference of Superior Court Judges

I. CIVIL PROCEDURE, JURISDICTION, & JUDICIAL AUTHORITY

Rule 15; Substitution of Defendant by Amending Complaint
Treadway v. Diez, __ S.E.2d __ (N.C. Oct. 7, 2011). An accident victim could not amend a complaint pursuant to Rule 15(c) to name a sheriff where the original complaint and summonses named only the sheriff's department (a legal entity not subject to suit), regardless of whether the sheriff himself had actual notice of the original suit. Reversing the court of appeals per curiam for the reasons stated in the dissent in 703 S.E.2d 832 (Jan. 4, 2011).

Rule 9(j) Compliance and Rule 41
McKoy v Beasley, 712 S.E.2d 712 (N.C. App. July 5, 2011). Plaintiff filed a wrongful death/medical negligence complaint without including the requisite Rule 9(j) allegations. Trial court dismissed complaint without prejudice pursuant to Rule 41(b). Plaintiff refiled her action within the timeframe permitted by Rule 41. The refiled complaint (and subsequent amendment) contained Rule 9(j) allegations. The original 2-year statute of limitation had, however, already run by the time of refiling. The trial court dismissed her refiled action for failure to comply with Rule 9(j), and the court of appeals affirmed: "The defective original complaint cannot be rectified by a dismissal followed by a new complaint complying with Rule 9(j), where the second complaint is filed outside the applicable statute of limitations."

Rule 9(j) Compliance and Meaning of "Professional Time" in Rule 702
Moore v. Proper, __ S.E.2d __ (N.C. App. Sept. 6, 2011) (Stevens, J., dissenting).
The trial court erred when it found that dental patient's tendered expert could not reasonably be expected to qualify as an expert witness for medical malpractice trial pursuant to Rule 9(j)(1) and Rule of Evidence 702. These rules require testimony by a health provider who, during the year immediately preceding the date of the alleged occurrence, "must have devoted a majority of his or her professional time to…the active clinical practice of the same health profession[.]" In deposition, the expert testified that he had retired from full-time dentistry several years before; that he now filled in for other dentists on an as-needed basis; and that his time spent in active practice of dentistry amounted to five percent of his time. The court of appeals held that this 5% of his total time could be construed to amount to 100% of his "professional time," and "during the time [he] was engaged in the active practice of dentistry, [he] spent one hundred percent of [his] professional time actively engaged in the clinical practice." Thus the complaint should not have been dismissed for failure to comply with Rule 9(j). Vigorous dissent by Stevens, J.

Discovery: Sufficiency of Assertions of Privilege/Work Product Protection
K2 Asia Ventures v. Trota, __ S.E.2d __ (N.C. App. Sept. 6, 2011). Defendants appealed an order compelling them to provide responses to certain requests for production of documents for which they had asserted attorney-client privilege and work product protection. Rather than setting forth these objections in the space following each request for production, the defendants made a general objection at the

beginning of the responses. In a matter the opinion characterizes as one of "first impression in our State," the Court of Appeals held that these "blanket general objections" are inadequate to properly assert privilege or work product protection pursuant to Rule 34.

Service of Process on Corporation; Authority of Signatory
Dougherty Equip. Co., Inc. v. M.C. Precast Concrete, Inc., 711 S.E.2d 505 (N.C. App. June 7, 2011). Where corporation was served via Fed Ex delivery addressed to its registered agent, but the package was received and signed by a front desk employee, service of process was *not* improper as a matter of law pursuant to Rule 4(j)(6)(d), which requires delivery "to the addressee." Instead, Rule 4(j2)(2) states that if the delivery receipt is signed by a person "not the addressee…the…delivery raises a presumption that the person who…signed the receipt was an agent of the addressee authorized…to be served[.]" Thus, the trial court should have considered evidence rebutting the presumption that the signatory was in fact authorized by the addressee to receive the delivery.

Rule 11 Sanctions for "Improper Purpose"
Coventry Woods Neighborhood Assoc., Inc. v. City of Charlotte, 712 S.E.2d 708 (N.C. App. June 21, 2011). Reversing Rule 11 sanctions against a neighborhood association. The fact that the association had stated in a newsletter and its Web site that the lawsuit would "have the effect of putting [defendant's] financing…on hold" and that "stopping [defendant's project] is the Number One priority of our organization," when viewed under the circumstances, was not sufficient to support a conclusion of "improper purpose."

Summary Judgment; Use of Contradictory Testimony in Affidavit & Deposition
Unitrin Auto and Home Insurance Co. v. McNeill, __ S.E.2d __ (N.C. App. Sept. 6, 2011). Trial court erred in granting summary judgment in favor of plaintiff insurer regarding UIM coverage. Where defendant insured testified at deposition that a signature on a selection/rejection form "could be" his, he was not admitting that the signature was in fact his. His subsequent affidavit asserting that he had become convinced that the signature was *not* his therefore created a question of fact to defeat summary judgment.

Summary Judgment; Use of Contradictory Testimony in Affidavit & Deposition
Marion Partners, LLC v. Weatherspoon & Voltz, LLP, __ S.E.2d __ (N.C. App. Sept. 6, 2011). Companies that sued their lawyer for legal negligence in including certain provisions in a contract were contributorily negligent as a matter of law where the companies' representatives did not read the contract after ample opportunity to do so. Also, after the companies' representative testified at deposition to a personal "expectation" that the lawyer would communicate with the companies in a certain way, he could not later defeat summary judgment with an affidavit asserting that the parties instead had an express "agreement" about the way the lawyer would communicate.

Judicial Authority; Release of City Employee's Personnel Records
In Re Release of Silk Plant Citizen Review Committee Report v. Barker, __ S.E.2d __ (N.C. App. Oct. 4, 2011). As part of its extensive review of a 1995 murder investigation, the City of Winston-Salem interviewed several police officers concerning their role in the investigation. The interviews were transcribed and became part of the police officers' personnel records. In 2009, the City filed a petition with the Superior Court requesting the trial court grant full disclosure of the interviews to the general public. The disclosure request was granted after hearing. The Court of Appeals reversed, holding that

G.S. 160A-168(c)(4)—the statute pursuant to which a court may order examination of confidential personnel files—is not broad enough to authorize disclosure of personnel files to the *general public*.

One Judge Overruling Another
Shelf v. Wachovia Bank, NA, 712 S.E.2d 708 (N.C. App. June 21, 2011).
Second judge improperly overruled first judge's order when he granted DHHS's motion for summary judgment after first judge denied it. The issue raised by DHHS in its second motion for summary judgment was precisely the same as the issue DHHS raised in its first motion heard by the first judge (whether grandparents were precluded from receiving distributions from trust for services rendered to beneficiary before his death).

II. ATTORNEY FEES AND COSTS

Costs
Khomyak v. Meek, __S.E.2d__ (N.C. App. Aug. 2, 2011). Reversing and remanding for trial court to award prevailing defendant in a medical negligence action the *full amount* of its costs under G.S. 7A-305(d). The opinion clearly expresses the panel's reluctance, stating that G.S. 6-20 unambiguously provides that these costs are *not* mandatory, but are instead in the discretion of the trial court. The opinion states that the panel is bound by the recent court of appeals decisions in *Springs* and *Priest*, which, contrary to all prior case law construing G.S. 6-20, state that the award of costs under G.S. 6-20 is mandatory. The panel stated that "[u]nfortunately, this panel cannot correct the troublingly divergent path that recent decisions of this Court have followed on this issue."

III. EVIDENCE

New Trial; Use of Juror Affidavits Regarding Misconduct
Cummings v. Ortega, __S.E.2d__ (N.C. Oct. 7, 2011). Reversing the court of appeals which had affirmed the grant of a new trial under Rule 59 upon consideration of affidavits of two jurors swearing to the misconduct of another juror (statements about his state of mind) which materially affected the affiants' view of the evidence. Supreme Court held that "Rule 606(b) of the North Carolina Rules of Evidence bars jurors from testifying during consideration of post-verdict motions seeking relief from an order or judgment about alleged predeliberation misconduct by their colleagues."

Use of Affidavits in Condemnation Proceeding
NCDOT v. Cromartie, __S.E.2d__ (N.C. App. Aug. 2, 2011). In conducting a hearing pursuant to G.S. 136-108 to determine issues related to inverse condemnation, the trial court erred in considering and basing findings of fact on witness affidavits. The affidavits were hearsay pursuant to Rule 801, and there was no evidence in the record that the affidavits had been submitted pursuant to the hearsay exception provided by Rule 803(24).

Disqualification of Counsel Because of Necessary Witness Status
Braun v. Trust Dev. Group., LLC, 713 S.E.2d 528 (N.C. App. July 19, 2011). Trial court did not abuse its discretion in disqualifying plaintiff's counsel due to the likelihood they would be necessary witnesses on the key contested issue of anticipatory repudiation. Defendants alleged that plaintiff had anticipatorily

breached the agreement after plaintiff's counsel communicated to defendant plaintiff's inability to close the deal by the deadline. Thus plaintiff's counsel were "necessary witnesses to explain their communication and conduct with [defendant]."

Condemnation; Reliability of Expert Witness Testimony as to Valuation
City of Charlotte v. Combs, __ S.E.2d __ (N.C. App. Oct. 4, 2011). Trial court erred in allowing the city's expert to give his opinion about the value of a taking of real property for a temporary construction easement (TCE). The expert's methodology was not sufficiently reliable in that he failed to include in his valuation any effect of the TCE on the value of the remaining property (including denial of access) and testified that there was "no reason to go through the exercise." New trial.

IV. TORTS, UNFAIR AND DECEPTIVE TRADE PRACTICES, & IMMUNITY

Contributory Negligence as a Matter of Law; Duty to Read Contract
Marion Partners, LLC v. Weatherspoon & Voltz, LLP, __ S.E.2d __ (N.C. App. Sept. 6, 2011). Companies that sued their lawyer for legal negligence in including certain provisions in a contract were contributorily negligent as a matter of law where the companies' representatives did not read the contract after ample opportunity to do so. Also, after the companies' representative testified at deposition to a personal "expectation" that the lawyer would communicate with the companies in a certain way, he could not later defeat summary judgment with an affidavit asserting that the parties instead had an express "agreement" about the way the lawyer would communicate.

Contributory Negligence; Automobile Accident
Fisk v. Murphy, 713 S.E.2d 100 (N.C. App. June 21, 2011). Issue of whether plaintiff motorcyclist was contributorily negligent in causing his own injuries was for the jury. There was evidence that motorcyclist's direction of travel was governed by a flashing yellow light, which required him to yield to traffic approaching or already in intersection, and that, at the point of impact, defendant's truck was straddling the double yellow line in the intersection. Plaintiff's motorcycle struck the truck's rear half. Plaintiff's expert conceded that motorcyclist could have perceived the truck as a hazard and responded accordingly.

Negligent Infliction of Sexually Transmitted Disease
Carsanaro v. Colvin, __S.E.2d__ (N.C. App. Sept. 6, 2011). Plaintiff's wife had affair with defendant. Wife contracted sexually transmitted disease from defendant, and wife subsequently gave the disease to plaintiff. Plaintiff sued defendant for negligent infliction of a sexually transmitted disease (NISTD), among other claims. Trial court dismissed NISTD claim pursuant to 12(b)(6). The court of appeals reversed, acknowledging that the question of liability to third parties for NISTD was a matter of first impression in North Carolina. The court held that the duty owed by a defendant who knows or has reason to know he or she has contracted an STD to warn those with whom he or she has sexual relations extends to the spouse of the sexual partners, if the spouse is known or should have been known to the infected person. (The court expressly declined to address the scope of this duty as it may relate to non-spouses.) The court also held that if the wife knew or had reason to know she was infected before engaging in sexual activity with her husband, she would become an intervening cause of the husband's STD, thereby relieving defendant of liability to the husband.

Unfair and Deceptive Trade Practices; Self-Dealing Employee
Songwooyarn Trading Co., Inc. v. Sox Eleven, Inc., 712 S.E.2d 162 (N.C. App. June 21, 2011). Foreign manufacturer could sustain an unfair and deceptive trade practices action against the manager of its domestic distributor who engaged in self-dealing activities in or affecting commerce. While the manager was an employee, his actions were outside the scope of his assigned duties and otherwise qualified as unfair or deceptive trade practices pursuant to the *Sara Lee* test.

Unfair and Deceptive Trade Practices; Charging for Product Not Delivered
Bumpers v. Community Bank of Northern VA, __S.E.2d __ (N.C. App. Sept. 6, 2011). Summary judgment for plaintiff under Chapter 75 was proper where the undisputed evidence showed that defendant charged plaintiff a loan discount fee for a loan that did not have a discounted interest rate.

Landlord's Duty to Third Parties; Control of Premises
Hylton v. Hanesbrands, Inc., __ S.E.2d __ (N.C. App. Sept. 6, 2011). Plaintiff sued the landlord of the premises on which he was injured for failure to properly maintain the premises in a safe condition. The premises were, at the time of plaintiff's injury, under lease to plaintiff's employer. The court of appeals held that the lessee, rather than landlord, was in exclusive control of the safety issues on the premises pursuant to the lease agreement, and thus the landlord was not liable for plaintiff's injuries. Because the landlord had neither possession nor control of the leased premises, it was not liable to third parties for their injuries on the premises.

Immunity; Public Duty Doctrine
Strickland v. UNC Wilmington, 712 S.E.2d 888 (N.C. App. Aug. 3, 2010). UNC-W's police department requested the sheriff's department to serve a warrant on Strickland in connection with an earlier assault. The county's emergency response team (ERT) was dispatched to serve the warrant at Strickland's home. An ERT member mistook the sound of a battering ram as gunfire, and fired his weapon through Strickland's front door, killing Strickland. Strickland's father sued the State under the Tort Claims Act for wrongful death, alleging the UNC-W police department provided "false, misleading, and irrelevant" information to the sheriff and ERT in the process of service of the warrant. The State alleged immunity under the public duty doctrine. Court of Appeals held that the doctrine did not apply: (1) The duty of UNC-W police officer not to provide false information during a criminal investigation was not one owed to the public in general; rather, it clearly benefited a certain, identifiable segment of the general public (subjects of criminal investigations), and thus, was *not* subject to public duty doctrine immunity; and (2) the public duty doctrine applied only to duty, and not causation, and thus the wrongful death action was not barred on the basis that UNC-W police officers did not themselves fire the bullets that killed Strickland. So, while UNC-W officers were not the "direct cause" of the harm, these police officers' negligent provision of inaccurate information was the impetus that brought about the ERT member's decision to fire his weapon through the door.

Immunity; Road Closure and Maintenance
Kirkpatrick v Town of Nags Head, 713 S.E.2d 151 (N.C. App. July 5, 2011). Plaintiffs sued town for negligence when the town opted not to reopen the road accessing their coastal home after a serious of storms washed the road away. The court of appeals held that town's decision not to rebuild road after it was washed away in storms was governmental function, and thus town was entitled to governmental immunity from liability in a negligence action alleging failure to keep the road in repair. The court

further stated, however, that a town's maintenance of streets and sidewalks is a proprietary function, and thus a town does not have immunity against suits for negligence in performing its maintenance obligations. Because the plaintiffs in this case did not allege a cause of action for defective maintenance, but instead based their claim on the town's decision to close the road, summary judgment should have been granted in favor of the town.

Immunity; Sewer System Maintenance

Williams v. Devere Constr. Co., Inc., __ S.E.2d __ (N.C. App. Aug.16, 2011). Plaintiffs sued city when a sewer line backed up, causing sewage to spill through their home and cause severe damage. The court of appeals affirmed a dismissal of the claim on the basis that plaintiffs failed to properly alleged the municipality's duty of care. The court also discussed the question of immunity at length and concluded that a city may be engaging in a proprietary (rather than governmental) function, depending on the facts, if it is operating and maintaining another municipality's sewer system under contractual agreement. If the activity was indeed proprietary, it would not be entitled to governmental immunity from liability for negligence arising out of that activity.

Immunity; Waiver

Arrington v. Martinez, __ S.E.2d __ (N.C. App. Sept. 6, 2011). A suit against the City of Raleigh regarding the provision of police services (a governmental function) should have been dismissed where the plaintiff had refused to sign a release as required by the City's resolution of waiver of immunity. The city was authorized pursuant to Chapter 160A to limit the terms of its immunity waiver by requiring potential plaintiffs sign such a release.

V. CONTRACTS

Adequate Consideration in an Employment Agreement

Elliott v. Enka-Candler Fire and Rescue Dept., Inc., 713 S.E.2d 132 (N.C. App. July 5, 2011). Defendant hired plaintiff as at-will employee (fire chief) in 1996. In 2004, the parties entered into an employment agreement providing for retention of plaintiff as fire chief through 2008 (later extended to 2013). The agreement specified that if plaintiff's employment was terminated, defendant would pay his salary and benefits through the contract term. Plaintiff's position was terminated in March 2008, and he sued for salary and benefits pursuant to the employment agreement. Defendants argued that the contract could not be enforced because there was no consideration on plaintiff's part. The court of appeals disagreed, holding that the fact that plaintiff "relinquished his status as an at-will employee" by entering into the agreement, thereby giving up "his right to leave his employment with defendant at any time, for any or no reason, without notice to the defendant" was adequate consideration to form an enforceable agreement.

Offer and Acceptance

Marso v. UPS, Inc., __S.E.2d__ (N.C. App. Sept. 20, 2011). Plaintiff shipped a diamond ring COD through UPS, and the check that UPS returned to the plaintiff from the package recipient turned out to be bogus. Trial court granted summary judgment for UPS. The court of appeals reversed, holding that there was a genuine issue of material fact as to whether the plaintiff had in fact agreed to UPS's standard terms limiting UPS's liability.

Waiver of Demand for Arbitration
Herbert v. Marcaccio, 713 S.E.2d 531 (N.C. App. July 19, 2011). Trial court did not abuse its discretion in a UIM case by finding that plaintiff had waived her contractual right to demand arbitration where plaintiff participated in litigation for nearly two years before demanding arbitration and ultimately made her arbitration demand on the eve of trial.

VI. REAL ESTATE AND LAND USE

Use of Affidavits in Condemnation Proceeding
NCDOT v. Cromartie, __S.E.2d__ (N.C. App. Aug. 2, 2011). In conducting a hearing pursuant to G.S. 136-108 to determine issues related to inverse condemnation, the trial court erred in considering and basing findings of fact on witness affidavits. The affidavits were hearsay pursuant to Rule 801, and there was no evidence in the record that the affidavits had been submitted pursuant to the hearsay exception provided by Rule 803(24).

Claim of Lien Extinguished After Owner's Interest Conveyed
Pete Wall Plumbing Co., Inc. v. Sandra Anderson Builders, Inc., __ S.E.2d __ (N.C. App. Sept. 6, 2011). A claim of lien against a leasehold was extinguished and could not be enforced after the property owner sold and conveyed the property, thereby terminating the leasehold. Further, foreclosure of certain parts of the property extinguished a later-filed claim of lien on those portions of the property.

Quantum Meruit Not Basis for Lien on Real Property
Waters Edge Builders, LLC v. Longa, __ S.E.2d __ (N.C. App. Aug. 2, 2011). The trial court erred in granting a claim of lien on real property where the contractor's recovery against the owner was based not on an express contract, but instead on quantum meruit (contract implied in law). Because quantum meruit is not a theory based upon an actual agreement, it cannot establish the contractual relationship necessary to form the basis for filing a claim lien pursuant to Chapter 44A-8, which requires either an express contract or a contract implied in fact.

Time for Filing Petition for Writ of Certiorari
McCrann v. Village of Pinehurst, __ S.E.2d __ (N.C. App. Oct. 4, 2011). Residents of Pinehurst opposed the granting of as special use permit by the board of adjustment. The permit was granted, and the residents filed a petition for writ of certiorari to superior court pursuant to G.S. 160-388(e2). The permit was filed on day 31 after the board's order was filed. The statute requires filing within 30 days. The court of appeals held that the 30-day appeal period is jurisdictional and affirmed the trial court's denial of the petition as untimely.

Destruction of Covenant; Radical Change; Frustration of Purpose
Fairfield Harbour Prop. Owners Ass'n, Inc. v. Midsouth Golf, LLC, __ S.E.2d __ (N.C. App. Aug. 16, 2011). Property owners in a golf community sued the golf course owner to enforce its obligations under the restrictive covenants to maintain and operate the golf course. The court of appeals held that financial hardship on the golf course owner was not a "radical change in circumstances destroying the essential purpose" of the restrictive covenants that would render the covenants unenforceable. Further, the golf course owner could not invoke the doctrine of frustration of purpose to avoid its obligations when certain

property owners began boycotting the golf course and refusing to pay amenity fees, where language incorporated into the covenants allocated the potential risk involved in the frustrating event to the golf course owner.

Goats

Steiner v. Windrow Estates HOA, Inc., 713 S.E.2d 518 (N.C. App. July 19, 2011). Trial court did not err in granting summary judgment in a declaratory judgment to the owners of Fred and Barney, two Nigerian dwarf goats. Because there was no genuine issue of material fact over whether Fred and Barney were kept as pets, rather than livestock, the owners were not violating a restrictive covenant prohibiting "livestock or poultry of any kind…except that…pets may be kept provided they are not kept, bred, or maintained for any commercial purposes[.]"

VII. TRUSTS

Trust; Standing to Sue for Enforcement

Yost v. Yost, 713 S.E.2d 758 (N.C. App. July 19, 2011). A corporation identified by grantor as the entity that would provide the financial support to a research center trust was not a trust beneficiary. Thus the corporation lacked standing to intervene in an action in which two non-family board of trustee members and one family board member sought to challenge amendments to the trust that would significantly alter the makeup of the board. A beneficiary who has standing to sue to enforce a trust is one for whose benefit a trust directly and specifically provides, whereas one who incidentally benefits from the trust, but who is not a beneficiary, cannot sue to enforce the trust.

Ann M. Anderson
UNC School of Government