# Civil Procedure Case Summaries
# July–October 2009

**SUBJECT MATTER JURISDICTION OVER ESTATE-RELATED MATTERS**
*Livesay v. Carolina First Bank et al.*, COA09-111 (Oct. 6, 2009).

Wife of deceased filed a declaratory judgment action in Superior Court. The action sought a judicial determination as to nine separate matters related to the relationship between claims by creditors of the husband's estate and a family trust administered by the plaintiff wife. Among other things, the action involved arguments related to offsets against certain creditors' claims and allegations that the claims should be collected from the family trust and not the estate. The superior court dismissed her action for lack of subject matter jurisdiction. Plaintiff appealed.

The Court of Appeals affirmed. The panel acknowledged the apparent tension between GS 28A-2-1, which grants exclusive original jurisdiction over administration of estates to superior court clerks, and GS 1-255, which provides that "any person interested…in the administration of a trust or estate of a decedent, may have a declaration of rights…[t]o determine any question arising in the administration of the estate or trust." The Court of Appeals cited prior case law examining this tension, and explained that courts are to distinguish matters "arising from" the administration of an estate from those that "are part of" the administration of an estate. Concluding that the issues raised by the plaintiff in the declaratory judgment action were properly characterized as "part of" the administration, the Court of Appeals concluded that they were within the exclusive jurisdiction of the clerk.

**SUPERIOR COURT SUBJECT MATTER JURISDICTION IN FORECLOSURE APPEAL**
*Mosler v. Druid Hills Land Co., Inc.*, __ N.C. App. __, 681 S.E.2d 456 (Aug. 18, 2009)

Homeowner defaulted on a deed of trust. After some negotiation, the debtor filed a quitclaim deed to the creditor (the former owner) with the register of deeds in an attempt to settle the debt. The seller brought a foreclosure action. At the hearing, the clerk declined to issue an order of sale, citing conflict over title issues. On appeal to the Superior Court pursuant to GS 45-21.16, the parties stipulated to three of the four required findings, including proper notice, valid debt, and default. As to the four finding, the parties stipulated that the creditor had the right to foreclose if the Superior Court determined that the doctrine of merger did not apply. The Superior Court issued an order allowing the foreclosure sale to proceed, and decreeing that "the Quitclaim Deed was not delivered to or accepted by the Petitioner and the document is

ineffective as either a quitclaim deed or deed in lieu of foreclosure" and "the doctrine of merger does not apply to the facts of this case."

The Court of Appeals affirmed the order allowing foreclosure, but for a different reason. The Court of Appeals raised the issue of the Superior Court's subject matter jurisdiction in foreclosure appeals, emphasizing that its review is limited to the same findings the clerk is required to make in the foreclosure hearing (notice, valid debt, default, and authorization to foreclose). Because the doctrine of merger of title is an equitable doctrine, the Superior Court was not authorized to consider the issue. In order to raise an equitable claim, the debtor was required to bring a separate suit before the superior court in equity.

**NECESSARY PARTY TO ACTION TO SET ASIDE FORECLOSURE**
*In Re Foreclosure of a Lien by Hunters Creek Townhouse Homeowners Assoc., Inc. v. Barbot*, COA09-118 (Oct. 6, 2009).

Homeowners association foreclosed on a claim of lien against absentee homeowners for failure to pay association dues. The home was sold to third-party purchaser (Bartley) at foreclosure sale. Homeowners filed action to set aside the sale because the notice of sale and other relevant notices had not been sent to their home address. Trial court set aside the foreclosure order and vacated the sale. Bartley, the purchaser, appealed to Court of Appeals on grounds that he was a necessary party to the action to set aside the sale and he was not joined as a party by the trial court.

The Court of Appeals vacated and remanded the trial court's order setting aside the foreclosure sale. The panel discussed Rule 19 and cited prior case law holding that any current owner of real property is a necessary party to an action to declare a deed to the property null and void. The court noted that Bartley had been aware and had participated in the proceeding by receiving service of a motion to dismiss and notice of hearing on the motion; obtaining a continuance, the order for which referred to him as a "party in interest"; paying attorney fees related to the continuance; and by filing an affidavit and memorandum of law in the matter. Because he was not, however, *formally joined* as a party to the matter, the Court of Appeals determined that the trial court had not secured its own jurisdiction over the case. Noting that even though Bartley had not made a motion to be added as a party, the panel stated that it was the trial court's duty to correct the defect *ex mero motu* "upon failure of a competent person to make a proper motion."

**USE OF RULE 6(b) TO EXTEND TIME TO PAY RULE 41(d) COSTS**
*Welch v. Lumpkin*, __ N.C. App. __, 681 S.E.2d 850 (September 1, 2009)

Plaintiff filed Rule 41(a) voluntary dismissal without prejudice of her action against Defendants. Plaintiff later refiled her action within the one-year deadline. Defendants brought motion pursuant to Rule 41(d) to require her to pay costs of the first action within 30 days. The superior court so ordered. Plaintiff paid the costs on the 32nd day. Defendants filed a motion to dismiss Plaintiff's action in full based on the language of Rule 41(d) that "[i]f the plaintiff does not comply with the order [to pay costs within 30 days], the court shall dismiss the action."

The superior court found that the Defendant's counsel had told Plaintiff that he would not seek dismissal of her action as long as she paid costs by the 32nd day. Plaintiff therefore argued to the superior court that the parties had stipulated to an extension of time of the 30-day payment deadline pursuant to Rule 6(b). Despite the agreement by Defendant's counsel to accept her late payment, the superior court rejected Plaintiff's argument and dismissed her action for failure to comply with Rule 41(d).

The Court of Appeals affirmed the trial court's dismissal of Plaintiff's action. Citing prior case law holding that a *court* cannot use Rule 6(b) to extend the 30-day deadline to pay costs under Rule 41(d), the Superior Court rejected the argument that *parties* can use a Rule 6(b) stipulation to do so.

[Note: Rule 6(b) provides that "[P]arties may enter into binding stipulations without approval of the court enlarging the time…within which an act is required or allowed to be done under these rules." The Rule expressly does not apply to requirements under Rules 50(b), 52, 59(b), (d), and (e), and Rule 60(b). It contains no express exclusion of the provisions of Rule 41.]

**COMPLIANCE WITH RULE 9(j) BY DESIGNATING TREATING PHYSICIAN**
*Morris v. Southeastern Orthopedics Sports Medicine and Shoulder Ctr., P.A.*, __ N.C. App. __, 681 S.E.2d 840 (September 1, 2009).

Plaintiff fractured her right clavicle and pursued a course of treatment with Defendants. Defendants ultimately removed Plaintiff's clavicle. Plaintiff brought sued against Defendants for malpractice. Defendants moved to dismiss Plaintiff's complaint for failure to comply with Rule 9(j), which requires malpractice complaints to "specifically assert that the medical care has been reviewed by a person who is *reasonably expected to qualify as an expert witness* under Rules 702 of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care" (emphasis added).

Plaintiff's expert witness designation named Dr. Carl Basamania. It stated that

> Dr. Basamania is not a retained expert witness, but instead will offer his testimony as [plaintiff's] subsequent treating physician….Dr. Basamania may offer testimony on the following: (1) [t]he standard of care for the treatment of plaintiff's injury…[and] (6) that it was below the standard of care to perform a total claviculectomy on [plaintiff].

Making various arguments about both the timing and substance of Plaintiff's expert witness designation, the Defendants moved to dismiss her complaint. The Superior Court granted the motion and dismissed the complaint for failure to comply with Rule 9(j).

The Court of Appeals reversed and remanded. The Court of Appeals first rejected all of Defendants' arguments regarding compliance with the time requirements of Rule 9(j). [See the opinion for a full discussion of the timing requirements as well as an analysis of the record on appeal.] The Court of Appeals then proceeded to address the question of whether Plaintiff properly complied with Rule 9(j) by designating a physician who would testify as her *treating physician* rather than as a retained expert. The Court of Appeals explained that the standard is not whether the witness is "in fact not an expert," but whether "there is ample evidence in the record to that a reasonable person armed with the knowledge of the plaintiff at the time the pleading was filed would have believed [the witness] *would have qualified* as an expert under Rule 702." *Trapp v. Maccioli*, 129 N.C. App. 237, 241 (1998) (emphasis added). Analyzing Plaintiff's knowledge of Dr. Basamania's medical background under the standard set forth in *Trapp*, the Court of Appeals concluded that Dr. Basamania could reasonably be expected to qualify as an expert. The panel made clear that

> Rule 9(j) does not require that the person who gives an opinion as to the standard of care prior to filing the complaint be an expert witness whom the plaintiff has specifically retained for this purpose only. A treating physician may provide the review required by Rule 9(j) as long as he or she meets the qualifications of the rule.

**ENFORCEMENT OF SETTLEMENT AGREEMENT**
*Hardin v. KCS International, Inc.*, COA08-996 (Sept. 15, 2009).

Buyer of yacht sued manufacturer and seller based on numerous defects in the yacht's construction and operation. The parties later entered into a settlement agreement providing that Plaintiff would release his claims and Defendants would examine and repair various defects. The settlement agreement contained a general release that included the following language: "[Plaintiff]…hereby release[s] and forever discharge[s] [Defendants]…from any and all claims in any way related to the dispute between them regarding the boat to date." The release contained language excluding from its terms any existing warranties, new warranty issues, and, of course, any actions to enforce the settlement agreement itself.

Eventually Plaintiff became dissatisfied with the quality of the repair work Defendants performed pursuant to the agreement. Plaintiff refused to dismiss his complaint pursuant to the settlement agreement. Instead he demanded Defendants respond to earlier discovery requests and moved to amend his original complaint to add additional claims. Defendants filed an answer and moved to dismiss for failure to state a claim. They later also filed a motion seeking to enforce the settlement agreement and asking for an order dismissing Plaintiff's complaint. The lower court determined that the Settlement Agreement was valid and enforceable and dismissed Plaintiff's complaint.

Plaintiff appealed the dismissal of his complaint arguing, among other things, that the settlement agreement had been procured by fraud and that he was entitled to rescission. The Court of Appeals rejected his argument and affirmed the lower court. The Court of Appeals rejected the fraud argument on grounds that Plaintiff failed to allege it with sufficient specificity. The panel also found no basis for the rescission argument. The Court of Appeals specifically rejected Plaintiff's argument that his discovery of incriminating facts about Defendants' construction of the yacht after the settlement agreement had been signed entitled him to avoid the settlement agreement. The Court of Appeals explained that it is in the nature of a settlement agreement that parties accept that they may later find facts that might have persuaded them not to enter into the agreement.

The Court of Appeals then explained that the general release in the settlement agreement entitled Defendants to have the claims dismissed. The Court of Appeals explained that, in order to enforce the terms of the settlement agreement against the Defendants, Plaintiff had the option of either (1) making a motion in the existing action to enforce the agreement's terms (as the Defendants did); or (2) dismissing the existing action and bringing a new action to enforce the settlement agreement. Instead he opted to attempt to continue litigating the action he had agreed to release.

[Note: Although the settlement agreement in this case contained a general release, it failed to provide the manner in which the Plaintiff would dispose of his existing claims. Settlement agreements can be constructed to provide for some timeframe in which the Plaintiff will file a dismissal of his claims with or without prejudice. Example: A settlement agreement provides that the Defendant will pay Plaintiff $100K in equal installments over the next 10 months. In exchange, Plaintiff will dismiss her claims immediately *without* prejudice. After all the payments are made, Plaintiff will then dismiss her claims *with* prejudice. (At that time, any general release of Defendant from further action will be fully effective.) Thus, if the Defendant defaults in paying the settlement, Plaintiff will still have the right under the agreement to pursue her original claims within the one year provided by Rule 41. To avoid missing the one-year deadline, her attorney should stay very much in tune with whether Defendant is making payments on time. In any event, Plaintiff has the option of bringing a separate action to enforce the settlement agreement itself.]

**CHANGE OF VENUE**

*Town of Maiden v. Lincoln County*, __ N.C. App. __, 680 S.E.2d 754 (Aug. 4, 2009).

The Town of Maiden sued Lincoln County in Catawba County Superior Court for breach of contract, tortious interference with contract, and other claims centering on an agreement to construct and maintain a sewer line from Maiden into a portion of Lincoln County. Lincoln County moved for a change of venue to Lincoln County Superior Court pursuant to G.S. 1-77(2), which provides that causes of action against counties "must be tried in the county where the cause, or some part thereof, arose." The lower court denied the motion for change of venue.

The Court of Appeals reversed and remanded for a change of venue to Lincoln County. The Court of Appeals rejected the Town of Maiden's argument that the "cause arose" in Catawba County because the contract at issue had been negotiated and signed in Catawba County. Instead, the panel concluded that the alleged breach and related claims pertained to the construction of the sewer line, all of which necessarily occurred "within the geographical location of Lincoln County."

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