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

Opinions Issued Nov. 3, 2017–October 2, 2018

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Civil Procedure, Jurisdiction, and Judicial Authority

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

Prior summary of COA opinion:

Adams Creek Assocs. v. Davis (COA16-1080; Jan. 16, 2018) (with dissent). Defendants are brothers in their 60s who were involved in protracted litigation with Plaintiff over ownership of 13 acres of land along Adams Creek in Carteret County. After failing to comply with an order to remove structures and equipment from the property in 2011, they were held in civil contempt and have been in jail in Carteret County *ever since*. In 2016, they moved for custodial release on grounds that they were unable to comply with the civil contempt order (in short, they have barely a dime to their names—especially after sitting in jail for 6 years—and they can't pay the many thousands of dollars it will cost to clear away the stuff). At the hearing, the brothers submitted undisputed evidence of their financial situation, but they also noted that they wouldn't comply even if they could. Thus the trial court did not make findings of fact regarding their "ability to comply" under Chapter 5A. The Court of Appeals majority affirmed this decision, concluding that finding of ability to comply would be futile in light of the brothers' "outright refusals to purge their contempt." The Court of Appeals also rejected arguments that

the purpose of the contempt order was no longer served by further incarceration and that the contempt had become punitive rather than remedial.

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

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

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

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

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

> "We again emphasize that in a medical malpractice action the expert review required by Rule 9(j) must occur before the filing of the original complaint. This pre-filing expert review achieves

> the goal of 'weed[ing] out law suits which are not meritorious before they are filed.'…But when a plaintiff prior to filing *has* procured an expert who meets the appropriate qualifications and, after reviewing the medical care and available records, is willing to testify that the medical care at issue fell below the standard of care, dismissing an amended complaint would not prevent frivolous lawsuits. Further, dismissal under these circumstances would contravene the principle 'that decisions be had on the merits and not avoided on the basis of mere technicalities.'"

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

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

Locklear v. Cummings (**N.C. Supreme Court** No. 202A17; Aug. 17, 2018). Ms. Locklear sued the doctor, hospital, medical center, and physician group after she fell off the operating table during cardiovascular surgery and sustained various injuries. Her counsel pleaded her case as a med mal case, obtained a Rule 9(j) expert review, and included a Rule 9(j) certification in the complaint. But the attorney made the same mistake counsel made in *Vaughn* (discussed above): omitted the post-2011 language about medical "records" (and was not able to amend it before the original statute of limitations expired). Like the trial judge in *Vaughn*, the judge dismissed Ms. Locklear's case for failure to comply with Rule 9(j). The Court of Appeals reversed (*Locklear v. Cummings* (COA16-1015; May 16, 2017)), the majority concluding that Ms. Locklear's claims sounded in ordinary negligence, not medical malpractice. Citing language from earlier opinions, the majority concluded that her injuries did not arise from a failure of "clinical judgment and intellectual skill" necessary to amount to a "medical malpractice action" as that term is defined by our statutes. Thus no Rule 9(j) certification had been necessary in the first place. The dissenting Court of Appeals judge noted that the complaint itself characterized the claims as medical malpractice and that, since Ms. Locklear's attorneys had failed to argue that the complaint was ordinary negligence, the appellate court should not make the argument for her. The Supreme Court agreed with the dissenting judge on that point and reversed the Court of Appeals *per curiam*, thus sending the case back to the lower court as a medical malpractice action (as it had been characterized in the complaint). [Note: Prior to the Supreme Court's ruling in *Vaughn*, this would have been a bad result for Ms. Locklear: the defect in her Rule 9(j) certification would have been incurable under Court of Appeals precedent. But under *Vaughn*, Ms. Locklear has the opportunity to seek leave to correct the Rule 9(j) defect under Rule 15(a). Assuming she properly obtained the required expert witness review prior to filing of her original complaint, one imagines the trial court will permit the defect to be cured and allow the case to go forward on its merits.]

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

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

with Rule 9(j) is required. Plaintiff also asserted a due process claim, but the appeal of that issue was dismissed for failure to provide legal authority and because Plaintiff was in effect asking the court to rewrite Rule 9(j).

Subject matter jurisdiction; core ecclesiastic matters

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

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

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

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

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

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

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

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

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

Rule 59(e) motion and tolling of appeal period

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

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

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

Burgess v. Smith (COA17-1352; Aug. 21, 2018). Ms. Bell was killed in a single-car accident. The car was owned by Defendant Marshal and was driven by another defendant. Ms. Bell was a passenger in the car while traveling as a salesperson for a company that was also owned by Defendant Marshall. Her estate brought this wrongful death action. Defendants Marshall and Johnson did not answer or appear, and default judgment was entered against them jointly and severally in the amount of over $2 million. Five months later, Defendant Marshall filed a responsive pleading asserting that Ms. Bell was his employee and had been killed during the scope of her employment, and that therefore the case fell within the exclusivity provision of the Workers' Compensation Act. Marshall moved to stay enforcement of the judgment, to set aside the default judgment and entry of default, and to dismiss the action for lack of

subject matter jurisdiction. The trial court denied the motions on grounds of estoppel and laches without making findings of fact as to subject matter jurisdiction.

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

Motion to compel arbitration; ambiguous language in clause; public policy favoring arbitration

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

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

Trial court raising an affirmative defense on defendant's behalf; enforcement of GS 58-70-115

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

Prior pending action doctrine

LMSP, LLC v. Town of Boone (COA17-1241; July 17, 2018). Plaintiff filed an action against the Town of Boone alleging that the Town's towing ordinance violated his constitutional rights and exceeded the scope of the Town's authority. The Town removed the action to federal court. After removal, Plaintiff

filed the present action, again seeking relief from the towing ordinance on statutory and constitutional grounds. A trial judge denied plaintiff's motion for preliminary injunction in the present action, and a second trial judge later dismissed the action. Both determinations were based on the prior pending action doctrine. The Court of Appeals affirmed after determining that the present action and the pending federal action indeed involved the "same parties and substantially the same subject matter." The court determined that the existence of some differences in the particulars of the two actions did not negate the fact that both actions revolved around Plaintiff's "beef against the Town of Boone" over the towing ordinance.

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

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

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

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

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

motion *in limine* and admitted Defendants' expert valuation despite its improper method of calculating damages, and thus a new trial was warranted.

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

Standing to assert cause of action related to artwork previously transferred to a receiver

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

"Good cause shown" standard to set aside entry of default

Swan Beach Corolla, LLC v. County of Currituck (**N.C.** 397A17; May 11, 2018). Affirming *per curiam* the decision of the Court of Appeals.

> Prior summary of Court of Appeals opinion:
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> *Swan Beach Corolla, LLC v. County of Currituck* (COA16-804; Oct. 3, 2017) (with dissent). This is a case in which Plaintiffs allege that the County is violating their constitutional rights by preventing development of their land. This is the third round of appeals. Thirty days after remand resulting from a prior appeal, (partially reversing a 12(b)(6) dismissal), the clerk entered default against the County for failure to answer the complaint. After learning of the entry of default, the County moved to set it aside, arguing that the time to answer had not yet run under GS 1-298 and that, even if it had, there was good cause for the failure to answer. The trial court denied the motion to set aside default and entered default judgment. The Court of Appeals (majority) reversed, noting that the trial court did not apply the "good cause shown" standard for setting aside an entry of default under Rule 55, and that even if it had, it denying the motion to set aside would have been an abuse of discretion. The County was reasonable in believing that its answer was not yet due, there was no prejudice to the Plaintiffs from the brief delay in answering, and given the nature of the claims, a resolution on the merits was in the interest of justice.
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> The dissenting judge argued that the matter should be remanded to the trial court for a determination of good cause shown; that the Court of Appeals should not have excused the County's misapprehension of the law; and that there could be a basis for finding that Plaintiffs had been prejudiced by the County's failure to answer.

Foreign corporation pleading capacity to sue; requirement of certificate of authority

Atlantic Coast Props., Inc. v. Saunders, _ **N.C.** _, 813 S.E.2d 194 (May 11, 2018). Here the Supreme Court reverses, *per curiam*, the opinion at _ N.C. App. _, 807 S.E.2d 182 (Nov. 7, 2017), for the reasons stated

in the dissent. A corporation (Petitioner) brought an action to partition a piece of real property it owned in North Carolina. The trial court granted summary judgment in favor of the Respondents on grounds that Petitioner did not have a certificate of authority to transact business in North Carolina and had not properly allege its legal existence and capacity to sue. The Court of Appeals majority affirmed. The dissenting judge would have reversed, opining that (1) a foreign corporation need not have a certificate of authority merely to bring a special proceeding related to its ownership of real property and that its status as a dissolved corporation does not change that fact; and (2) the corporation, which alleged that it was a Delaware corporation that owned real property—did not violate Rule 9(a)'s pleading requirement.

Right of respondent to jury trial in Civil Service Board review

City of Asheville v. Frost, _ **N.C.** _, 811 S.E.2d 560 (April 6, 2018). The Supreme Court held that a respondent in a superior court review of Asheville Civil Service Board decision has right to jury trial. *See Supreme Court Press Summary of this case at https://appellate.nccourts.org/opinions/.*

Statute of limitations in medical malpractice actions; Rule 17; tolling; appointment of GAL

King v. Albemarle Hosp. Auth., _ **N.C.** _, 809 S.E.2d 847 (Mar. 2, 2018). In a 4-3 decision, the majority reversed the Court of Appeals and held that that the appointment of a GAL starts the clock running on a minor's medical malpractice claim because it removes the disability that would toll the running of the statute of limitations to the minor's 19th [now 10th] birthday. *See Supreme Court Press Summary of this case at https://appellate.nccourts.org/opinions/. For further discussion, see blog post from March 16, 2018 at https://civil.sog.unc.edu.*

> Earlier summary of Court of Appeals opinion:
> *King v. Albemarle Hosp. Auth.* (COA15-1190; Sept. 6, 2016). In 2008 a medical malpractice action was brought on behalf of a minor plaintiff and was later dismissed without prejudice pursuant to Rule 41. In 2015 the action was refiled. The trial court dismissed the action as outside the three-year statute of limitations. The Court of Appeals reversed pursuant to G.S. 1-17(b), which extended the statute of limitations for medical malpractice actions to a minor's 19th birthday, which in this case will be 2024. (Note that the statute was amended in 2011 to change the applicable age from 19 to 10 years, but that amendment does not apply to this case). The court further held that the Rule 41 dismissal did not prevent refiling of the action; the "two-dismissal rule" would only have applied had her case been voluntarily dismissed *twice* prior to the current action.

Disqualification of attorney due to conflict of interest; Rule 1.9(a)

Worley v. Moore, 370 **N.C.** 358, 807 S.E.2d 133 (Dec. 8, 2017). Reversing a decision of the Superior Court (Business Court) to disqualify defendants' counsel because his previous representation of one of the plaintiffs created the appearance of impropriety. The Supreme Court determined that the trial court did not apply the objective test for conflict of interest required by Rule of Professional Conduct 1.9(a). *See Supreme Court Press Summary of this case at https://appellate.nccourts.org/opinions/.*

Tripartite attorney-client privilege

Friday Investments, LLC v. Bally Total Fitness of the Mid-Atlantic, Inc., 370 **N.C.** 235, 805 S.E.2d 664 (Nov.

3, 2017). Reaffirming that a tripartite attorney-client relationship can exist between an attorney and two or more clients who have a common interest (in this case, a tenant and the party to whom it had assigned a lease). But further holding that the communications at issue in this case—certain correspondence between the two clients—were not necessarily protected by attorney-client privilege, and that further findings of fact by the trial court would be necessary to make that determination. *See Supreme Court Press Summary of this case at https://appellate.nccourts.org/opinions/.*

Sanction of default judgment for discovery violations

GEA, Inc. v. Luxury Auctions Marketing, Inc. (COA17-1055; May 15, 2018). After defendant disposed of certain computers that stored information sought in the litigation and refused to comply with court orders to permit inspection of other computers, the trial court struck his defenses and ordered default judgment. The Court of Appeals affirmed. The record adequately reflected that the judge considered lesser sanctions; the judge did not exceed the scope of the order compelling discovery; the judge had discretion not to believe defendant's excuse that he could not obtain logins for the computers; and the judge did not improperly disregard defendant's right to protection of private information stored on some of the computers.

Setting aside consent judgment between landowner and DOT; Rule 60(b)(6)

NC Dep't of Transportation v. Laxmi Hotels of Spring Lake, Inc. (COA17-951; May 15, 2018). A hotel owner reached a consent agreement with the NC DOT over his compensation for the partial taking of his property to widen a road. When it was later discovered that the planned scope of the taking had significantly increased between the time he agreed to a price and the time the documents were executed (including the taking of parking spaces and construction of a 15-foot retaining wall), the owner moved to set aside the consent judgment. After a hearing, the trial judge granted the motion under Rule 60(b)(6). The DOT appealed, and the Court of Appeals affirmed the trial court. The trial court was not required to deny the motion because it was filed more than one year after the judgment. In this case, the circumstances would permit a finding that the motion was brought within a reasonable time. In addition, the judge could view the facts at issue through a wider lens than just fraud and misrepresentation, and the evidence supported a finding of "extraordinary circumstances" to justify relief under the broader language of Rule 60(b)(6).

Rule 12(b)(6) dismissal on day of trial

ABC Services, LLC v. Wheatley Boys, LLC (COA17-981; May 15, 2018). An employee of defendant brought one of Defendant's company trucks, with a diesel holding tank, to Plaintiff's car wash. In the course of washing the tank the employee proceeded to dump hundreds of gallons of fuel into the car wash's drainage system. Plaintiff incurred substantial expense to have the fuel removed and responsibly disposed of. Plaintiff then sued Defendant for littering, trespass, and negligence. On the day of trial, after empaneling the jury, the judge *sua sponte* opted to hear Defendant's 12(b)(6) motion that had been included in the answer but that had never been calendared for hearing. The judge dismissed each of the Defendant's claims. The Court of Appeals reversed and remanded in part, holding as follows:

(1) The judge did not abuse his discretion in deciding to dispose of the 12(b)(6) motion that had been stated in the answer even though doing so was in derogation of local motions practice rules, the motion had not been calendared, the scheduling order required the parties to serve notice of

dispositive motions 15 days prior to trial, and the parties had stipulated in the pre-trial order that no motions were pending other than motions *in limine*. Because the 12(b)(6) motion had been included in the answer, the Plaintiff was not unfairly surprised by such a hearing.

(2) The trial court properly dismissed the claim for civil liability for littering brought pursuant to G.S. 14-399. The drains were a "litter receptacle" by the meaning of the statute, thus the Defendant's disposal was not disposal "of litter in an improper location."

(3) The trial court erred in dismissing the trespass claim. The complaint adequately alleged that Defendant's employee exceeded the scope of his invitation onto the property by "dumping a large quantity of hazardous material" thereon.

The trial court erred in dismissing the negligence claim. The complaint adequately alleged a breach of the duty of care causing harm to Plaintiff's property.

Rule 9(j) dismissal; *res ipsa loquitur*

Bluitt v. Wake Forest Univ. Baptist Med. Ctr. (COA17-450; April 17, 2018). Ms. Bluitt underwent a cardiac ablation at Wake Forest to correct an irregular heartbeat. She was under general anesthesia during the procedure. She awoke from surgery to tremendous pain in her lower back, later diagnosed as a third-degree burn. She was treated for the burn with a skin graft. Exactly three years later she sued Wake Forest and the physician for negligence. She did not include a certification of prior expert review as required by Rule of Civil Procedure 9(j), and instead she relied on the doctrine of *res ipsa loquitur*. The trial judge granted summary judgment in favor of defendants due to Ms. Bluitt's failure to comply with Rule 9(j). The Court of Appeals affirmed the trial court's order. The court explained that the doctrine cannot apply when expert testimony is necessary to permit a layperson to evaluate whether the facts establish a breach of the standard of care. Here, the defendants demonstrated through testimony of specialists that burns to the back are an "inherent risk of a cardiac ablation, and can occur without negligence on the part of the physician performing the procedure." The court concluded that the procedures in question were "outside of common knowledge, experience, and sense of a layperson; thus, without expert testimony, a layperson would lack a basis upon which to make a determination as to whether plaintiff's back injury was an injury that would not normally occur in the absence of negligence, or was an inherent risk of a cardiac ablation." [For further discussion of *res ipsa loquitur* and Rule 9(j), see the blog post from April 18, 2018 at "On the Civil Side" (www.civil.sog.unc.edu)].

Class action certification; mootness

Chambers v. Moses H. Cone Memorial Hosp. (COA17-686; April 17, 2018). Plaintiff was an uninsured patient at Moses Cone Memorial Hospital. After he failed to pay the bills for the hospital's services, the hospital sued him in district court. Plaintiff then filed a class action against the hospital in superior court alleging various claims related to rates the hospital charges uninsured patients. The hospital counterclaimed against him for non-payment. Plaintiff then amended his class action complaint to only seek a declaratory judgment regarding an open price term in the hospital's patient consent form. The hospital thereafter dismissed with prejudice the non-payment claim against Plaintiff (and also dismissed the pending district court claim). The trial court then dismissed Plaintiff's class action for mootness. The Court of Appeals affirmed. When the hospital dismissed its claims against him, he no longer remained a member of the class he sought to represent, and the case did not fall within any exceptions to the mootness doctrine.

Review of administrative decision; proper application of Rules of Civil Procedure 56 and 41(b)
Environmentalee v. NC Dep't of Environment and Natural Resources (COA17-907; April 3, 2018). This case involves permits related to coal ash and structural fill. It has a complicated procedural background and a discussion of the trial court's error in not applying the proper standard of review of an administrative final decision. In the end, though, the Court of Appeals remands the case all the way back to the OAH for rehearing because the ALJ erred in *sua sponte* converting a summary judgment hearing into one for involuntary dismissal under Rule 41(b) (a quite different matter) without affording the parties the proper notice and opportunity to be heard.

Interlocutory appeal; G.S. 1-260 and trial court order declaring that all necessary parties be joined
Regency Lake Owner's Association, Inc. v. Regency Lake, LLC (COA17-1117; April 3, 2018). A dispute arose between Plaintiffs and Defendant about whether Defendant had a right to subdivide and alter the lot that comprised the subdivision's communal lake Access Area. The matter was being heard as a bench trial, but before he reached a decision, the trial judge determined that not all necessary parties to the action had been joined and that the matter could not proceed until they had been. Plaintiffs appealed and the Court of Appeals dismissed the appeal. The court concluded that the trial court was correct to conclude that, under GS 1-260, the remaining property owners in the subdivision—each of whom had an interest in any declaration as to their rights in the Access Area—should be joined. The Plaintiffs had not demonstrated any substantial right in having a trial without the participation of these necessary parties and thus had no right to immediate appeal. In addition, because the trial court's order was not a "new trial" order, there was not right of immediate appeal under G.S. 7A-27(b)(3).

Courts' inherent authority to discipline lawyers and State Bar Disciplinary Authority; standing to bring Declaratory Judgment Action
Boyce v. North Carolina State Bar (COA16-858; April 3, 2018). This matter is an extension, of sorts, of the 14-year-long defamation dispute between Gordon Boyce and the Roy Cooper campaign that started in the early 2000s and was settled 14 years later. In this action against the North Carolina State Bar related to its refusal to pursue a disciplinary matter against Mr. Cooper, Mr. Boyce sought various declaratory judgments. The trial court dismissed the complaint for lack of standing. Affirming in part and reversing in part, the Court of Appeals held that: (1) Mr. Boyce has standing to seek a declaratory judgment interpreting the statutes that allow concurrent jurisdiction between the courts and the State Bar to discipline attorneys; but (2) Mr. Boyce lacks standing to challenge the State Bar's decision not to pursue a grievance against an attorney. Upon reporting his grievance, Mr. Boyd's interest in the outcome became no greater than that of the public in general.

Church dispute; standing; neutral principles of law
Davis v. New Zion Baptist Church (COA17-523; Mar. 6, 2018). This is the second time the Court of Appeals has addressed this dispute between church members, on the one hand, and their church and pastor, on the other. In this round, the Court of Appeals affirmed the trial court's declaration that, in amending its bylaws, the church failed to follow the procedures set out in those bylaws. The court reversed, however, the trial court's mandatory injunction ordering the church to hold new deacon and trustee elections within 90 days. Because removal of such individuals is not addressed in the bylaws, and because the parties showed no other "neutral principles of law" that a court could use to fill the

gap, this portion of the order was an impermissible intrusion into ecclesiastical matters of the church. [Note: For a discussion of other NC case on this First Amendment-related subject, see my blog post from 2016 here: https://civil.sog.unc.edu/courts-church-disputes-and-the-first-amendment/.]

Challenging an order dismissing appeal; inappropriate use of Rule 59

Mehaffey v. Boyd (COA17-812; Mar. 6, 2018). Mr. Mehaffey sued the executor of Ms. Boyd's estate, alleging that the executor wrongly denied his claim for payment for work performed on Ms. Boyd's home. The trial court granted summary judgment in the executor's favor. Mr. Mehaffey appealed but failed to perfect, and the trial court subsequently dismissed his appeal. About a year later, Mr. Mehaffey filed a Rule 59 motion for new trial/amendment of judgment seeking relief from the order dismissing his appeal. The trial court denied this Rule 59 motion, and Mr. Mehaffey appealed that denial. The Court of Appeals affirmed the denial of the Rule 59 motion because (1) it was filed many months after the 10-day deadline for filing Rule 59 motions; and (2) a Rule 59 motion is an inappropriate vehicle for challenging an order dismissing an appeal. The proper method is a petition for writ of certiorari to the Court of Appeals. [Note: In this case the Court of Appeals cites its prior rulings in *Bodie Island* and *Tetra Tech Tesoro* as to whether Rule 59 ("New Trial") motions can be used to challenge orders not arising from a trial judgment. For earlier discussions of this issue, see my blog posts from 2016 here: https://civil.sog.unc.edu/rule-59-not-for-relief-from-interlocutory-orders-a-new-opinion/ and here: https://civil.sog.unc.edu/new-trial-motions-under-rule-59-only-for-post-trial-relief/.]

Claim against wrong party; alter ego; amendment of complaint to name proper party; limitations

Estate of Rivas v. Fred Smith Construction, Inc., _ N.C. App. _, 812 S.E.2d 867 (Feb. 20, 2018). Decedent's estate (Plaintiff) brought a wrongful death action against Fred Smith Construction, Inc. (Defendant) alleging negligence related to a construction project for the DOT. The entity that had actually performed the relevant work under contract with the DOT was FSC II LLC DBA Fred Smith Company (FSC II). After the statute of limitations had run, Defendant moved for summary judgment, which the trial court granted. The Court of Appeals affirmed. After Defendant denied being the entity against a claim might be brought, Plaintiff failed to amend the complaint to name FSC II and did not move to amend the complaint under Rule 15 for another six months after the statute of limitations had run. Summary judgment was proper because Plaintiff failed to create a genuine issue of material fact as to whether Defendant was a mere instrumentality/alter ego of FSC II and because Plaintiff's amendment of the complaint, if granted, would not have related back to the date of the original complaint.

Involuntary dismissal under Rule 41(b) for extensive violations of Rule 8(a)(1) (pleadings rule)

Plasman v. Decca Furniture (USA) Inc., _ N.C. App. _, 811 S.E.2d 616 (Feb. 6, 2018). In the latest in this years-long litigation before the Business Court, the trial judge dismissed Plaintiff's Second Amended Complaint for extensive and material violations of Rule 8(a)(1), the pleadings rule. The Court of Appeals affirmed, concluding that the trial judge properly concluded that the allegations of the complaint were

> vague, misleading, or incorrect with regard to (1) the alleged persons or entities involved—which Plaintiff is asserting the claim and which Defendants are alleged to have engaged in any improper conduct; (2) the alleged conduct in support of the claim

or claims; (3) the legal bases in support of the claim or claims; and (4), in some instances, which specific claim or claims are being alleged.

Due to the severity of the violations, the trial court did not abuse its discretion in determining that dismissal was appropriate under Rule 41(b) despite the absence of an explicit statement that the judge had considered lesser sanctions.

Motions for new trial and JNOV; various bases

Martin v. Pope, _ N.C. App. _, 811 S.E.2d 191 (Feb. 6, 2018) The Martins purchased a piece of real property from Pope. They later sued Pope for fraud based on his failure to disclose to them certain information about environmental contaminants. The jury found in favor of the Martins, and Pope moved for JNOV and new trial, both of which were denied. The Court of Appeals affirmed as follows: (1) Pope's motion for JNOV was properly denied because Pope had not moved for directed verdict at the close of the evidence; (2) the trial court did not abuse its discretion in denying Pope's motion for new trial on the basis of insufficiency of the evidence; (3) Pope's challenge to a jury instruction was waived because he had previously approved the proposed instruction and only objected to it after it had been read to the jury and the jury had been allowed to conduct further deliberations; (4) the trial court did not abuse its discretion in denying Pope's motion to add another party because the motion was made close to the trial date and the allegations against the third-party defendant did not affect the Martins' allegations against Pope; (5) the trial court did not err in refusing to disqualify the Martins' counsel because they had previously represented Pope's wife in an unrelated matter. The Martins also appealed, challenging the trial court's failure to award them attorney fees. The Court of Appeals affirmed on the basis that they did not brief the argument in an appellant's brief, and instead made the arguments in the appellees' brief, thus creating prejudice for Pope who had an insufficient opportunity to respond to their arguments.

Refiled claims after Rule 41 voluntary dismissal; relation back

Spoor v. Barth, _ N.C. App. _, 811 S.E.2d 609 (Feb. 6, 2018). In 2012, Spoor sued John Barth, Jr. and John Barth, Sr., asserting various individual claims and one derivative claim against them. As to Spoor's individual claims, the trial court granted summary judgment against Spoor for lack of standing and based on the statutes of limitations. Spoor then took a voluntary dismissal without prejudice of his derivative claims. The Court of Appeals (in a prior appeal) reversed summary judgment as to Spoor's individual claims against Sr., finding that there were jury questions as to the statute of limitations and that Spoor had standing to sue defendants individually. In 2015, within one year of his prior voluntary dismissal, Spoor then refiled a complaint, this time stating derivative claims against Sr. and Jr. for breach of contract and breach of fiduciary duty. The trial court granted a 12(b)(6) dismissal as to these claims, finding that they did not relate back to the filing of the 2012 action and thus were filed outside the relevant statutes of limitations. The Court of Appeals affirmed the dismissal as to the derivative claim for breach of contract against both defendants and as to the breach of fiduciary duty claim against Sr. The court determined that the allegations in the 2012 complaint could not be read to give notice to defendants of the claims as stated in the 2015 complaint. Under a similar analysis, the Court also affirmed the trial court's denial of Spoor's Rule 15 motion to amend the 2015 complaint (to add additional claims) as futile. The court held, however, that because the 2012 complaint did state a claim

against Jr. for breach of fiduciary duty, it was error to grant summary judgment in Jr.'s favor as to that re-filed claim.

Verified counterclaims as summary judgment affidavit

Ford Motor Credit Co. LLC v. McBride (COA17-720; Feb. 6, 2018). Defendants, the McBrides, entered into a contract with an auto dealer to finance the purchase of a transport van. The dealer thereafter assigned the contract to Plaintiff Ford Motor Credit Co. (Ford Credit). After a few months, Ford Credit sued Defendants for nonpayment of the agreement. Defendant responded by alleging that, starting four days after purchasing the van, they returned it to the dealer repeatedly because the passenger seat would not remain upright; that the dealer had refused to inspect or repair it or take any action. They counterclaimed for breach of the implied warranty of merchantability, implied warranty of fitness for a particular purpose, and express warranty, and also alleged that they had revoked their acceptance of the vehicle. The trial court granted Ford Credit's motion to dismiss the McBrides' counterclaims and granted summary judgment in Ford Credit's favor in the amount of $7,709.67. The Court of Appeals reversed, holding that (1) the McBrides' allegations were sufficient to survive a 12(b)(6) motion as to each of their claims under the relevant provisions of the UCC, G.S. Chapter 25, Article 2; and (2) Ford Motor was not entitled to summary judgment as to the payment amount on grounds that the McBrides failed to offer a competing affidavit; their *verified* counterclaims could be treated as an affidavit under Rule 56, and thus they had not merely "relied upon the bare allegations" of their complaint.

Civil contempt; appeal from order denying motion for custodial release; inability to comply

Adams Creek Assocs. v. Davis, _ N.C. App. _, S.E.2d (Jan. 16, 2018) (with dissent). Defendants are brothers in their 60s who were involved in protracted litigation with Plaintiff over ownership of 13 acres of land along Adams Creek in Carteret County. After failing to comply with an order to remove structures and equipment from the property in 2011, they were held in civil contempt and have been in jail in Carteret County *ever since*. In 2016, they moved for custodial release on grounds that they were unable to comply with the civil contempt order (in short, they have barely a dime to their names—especially after sitting in jail for 6 years—and they can't pay the many thousands of dollars it will cost to clear away the stuff). At the hearing, the brothers submitted undisputed evidence of their financial situation, but they also noted that they wouldn't comply even if they could. Thus the trial court did not make findings of fact regarding their ability to comply" under Chapter 5A. The Court of Appeals majority affirmed this decision, concluding that finding of ability to comply would be futile in light of the brothers' "outright refusals to purge their contempt." The Court of Appeals also rejected arguments that the purpose of the contempt order was no longer served by further incarceration and that the contempt had become punitive rather than remedial.

The dissenting judge argued that the majority had conflated the "willfulness" and "ability to comply" elements of contempt, and that the trial court had erred in not considering and making findings regarding ability to comply. As the judge put it, "The fact that defendants are obstinate and foolish does not absolve the trial court of its responsibility to consider that defendants may be obstinate, foolish, *and* unable to comply with the order." Because the trial court is required by G.S. 5A-21(a)(3) to make findings regarding ability to comply, the dissenting judge would reverse and remand for the appropriate findings and conclusions. The dissenting judge also noted that in keeping these men in jail (for what is

likely to be the rest of their lives, if courts are indeed allowed to ignore their penury), an enormous quantity "of public funds and resources are wasted seeking to accomplish an impossibility." The judge opined that "[t]his simple property dispute has been transformed into a state-funding enforcement action for the benefit of the plaintiff."

Civil contempt; prior order and Rule 58; ability to comply; noncompliance not willful
Cty. of Durham v. Hodges, _ N.C. App., S.E.2d (Jan. 2, 2018). After a hearing for nonpayment of child support, the trial court entered a form order committing defendant for civil contempt. The order had no boxes checked nor any findings of fact; a handwritten notation required defendant to "[p]urge $1000.00 or serve 90 days." Two days after defendant filed notice of appeal, the trial court entered a more detailed order of contempt. The Court of Appeals vacated the latter order on the basis the notice of appeal from the first order divested the trial court of jurisdiction to enter further orders, rendering the second order void. Although the parties on appeal treated the first order as an oral rendition of the ruling from the hearing, the order was written and entered in accordance with Rule 58, and nowhere on the order form did the court indicate its intention to enter another, more detailed order. Regarding the initial order, the Court of Appeals reversed that order for lack of competent supporting evidence, noting defendant presented medical evidence of his inability to work. Defendant met his burden to show cause why he should not be held in contempt since his inability to comply with the child support order was not willful owing to his physical disability. [Summary by Aly Chen, SOG research attorney]

Statute of limitations tolled for disability; incompetency and Ch. 35A adjudication
Ragsdale v. Whitley, _ N.C. App. _, 809 S.E.2d 368 (Jan. 2, 2018). Alec turned 18 in January 2014 and 19 in January 2015. Alec filed a medical malpractice complaint in May 2015. He voluntarily dismissed the complaint in November 2015. He was appointed a guardian ad litem (Plaintiff) in December 2015 due to alleged incapacity to handle his own affairs. Plaintiff refiled Alec's action on December 31, 2015, amended in April 2016. The complaint alleged that Alec had been under a disability continuously since the 2011-2012 treatment by Defendants. Defendants brought a summary judgment motion in May 2016 asserting that the statute of limitations had run because Alec did not allege a disability in his initial complaint and that complaint was not brought before his 19th birthday as required by G.S. 1-17(b). The trial court granted the motion. The Court of Appeals reversed, holding that (1) there is no requirement that person be actually adjudicated incompetent pursuant to G.S. 35A in order to toll the statute of limitations due to a disability; and (2) there was a genuine issue of material fact as to whether Alec was incompetent at the time of his 19th birthday, which would toll the statute of limitations under G.S. 1-17(a).

Ineffective Rule 41(a) voluntary dismissal; dismissal of non-compete; evidence of reasonableness
Market America, Inc. v. Lee, _ N.C. App. _, 809 S.E.2d 32 (Dec. 19, 2017). Plaintiff employer brought suit alleging breach of a covenant not to compete. After a hearing, the trial judge announced her decision to grant defendants' motion to dismiss and motion for judgment on the pleadings. A few hours later, before the ruling was reduced to writing, plaintiff filed a notice of voluntary dismissal without prejudice of all of its claims pursuant to Rule 41(a)(1). The trial court granted defendants' motion to vacate this voluntary dismissal, and then dismissed plaintiff's claims. After plaintiff's motion for reconsideration was

denied, plaintiff appealed. The Court of Appeals agreed with the trial court that plaintiff's voluntary dismissal was sought in bad faith. However, the Court agreed with plaintiff that the trial court erred by granting one of the defendants' motions to dismiss under Rule 12. The enforceability of non-compete agreements cannot be determined at the pleadings stage where evidence is needed to demonstrate the reasonableness of the agreement's restrictions. Therefore, the portion of the trial court's order vacating plaintiff's voluntary dismissal is affirmed, while the portion granting the Rule 12 motions is reversed.

Real party in interest; subject matter jurisdiction; effect of appeal dismissal on subsequent appeal; Rule 17; substitution; ratification

WLAE, LLC v. Edwards, _ N.C. App. _, 809 S.E.2d 176 (Dec. 19, 2017). In affirming the trial court's orders of dismissal based on Rule 12(b)(1), the Court of Appeals determined that plaintiff lacked standing at the time the complaint was filed, rendering the trial court without subject matter jurisdiction. This case has its origin in an adversary proceeding in a bankruptcy case in which ownership of a Florida limited partnership, owner of a parcel of land in North Carolina, was in dispute. A settlement agreement was reached which attempted to resolve all issues of ownership, and which created the plaintiff in this case, WLAE, as an acquiring entity. WLAE was assigned certain rights to the property. Upon further dispute, a second settlement agreement was reached, after which WLAE initiated this action for damage alleged to have occurred on the property as a result of timbering activities. The Court of Appeals first rejected an argument that WLAE's prior appeal from an interlocutory order prevented it from appealing a second order of the trial court. The Court of Appeals does not label dismissals as being issued with or without prejudice, and an appellant whose appeal has been dismissed may appeal the matter again if it is within his or her right, or may petition the Court for discretionary review by writ of certiorari. Next, the Court determined that based on the language of the assignments and FL and NC state law, WLAE was at most a limited partner and had no right to pursue an action for compensation for the alleged damage. Without standing, defendants' motions to dismiss were properly granted. The Court also rejected WLAE's arguments that the FL limited partnership ratified its suit, or that WLAE should have been allowed to substitute the real party in interest, pursuant to Rule 17(a). WLAE did not file a Rule 17(a) motion at any time, and even if it had, the trial court had no jurisdiction to allow such a motion. [Summary by Aly Chen, SOG research attorney]

Presumption of trial court jurisdiction; hearings out of session

Wilson v. SunTrust Bank, _ N.C. App. _, 809 S.E.2d 286 (Dec. 19, 2017). The Court of Appeals found no merit in plaintiff's contention that the trial court was required to produce evidence that it had jurisdiction to hold a hearing in a civil matter related to the foreclosure of her property. There is a "presumption of regularity" in court proceedings, and the burden of showing a lack of jurisdiction lies with the challenging party, not the court. Plaintiff produced no evidence tending to show the trial judge was not commissioned to preside over the hearing in this case, and the judge did not err in denying her motion demanding that the trial court "show cause" that it had jurisdiction. The Court of Appeals also determined that the trial court properly dismissed plaintiff's complaint, which included the claim that defendants had committed "fraud upon the court," as having failed to state a recognized claim for relief. Since the dismissal of plaintiff's complaint was proper, the Court dismissed as moot plaintiff's argument regarding the denial of her motion for entry of a temporary restraining order and preliminary injunction.

The Court rejected plaintiff's argument that a second order signed by the trial court in another county was invalid. Pursuant to Rule 58, the signing and entry of judgment out of county is valid unless an objection is made on the record, which plaintiff did not do. The Court affirmed the trial court's denial of the other motions filed by plaintiff, including her challenge to the trial court's authority to conduct a hearing in another county. [Summary by Aly Chen, SOG research attorney]

Ex parte orders obtained by the State compelling personnel and educational records of uncharged suspect were void due to lack of jurisdiction

State v. Santifort, _ N.C. App. _, 809 S.E.2d 213 (Dec. 19, 2017). The trial court's ex parte orders compelling the production of the defendant's personnel files and educational records were void ab initio. While employed as a police officer the defendant was involved in a vehicle pursuit that resulted in the death of the pursued driver. Prior to charging the defendant with a crime, the State obtained two separate ex parte orders compelling the production of the defendant's personnel records from four North Carolina police departments where he had been employed as well as his educational records related to a community college BLET class. After the defendant was indicted for involuntary manslaughter, he unsuccessfully moved to set aside the ex parte orders. On appeal, the court concluded that the orders were void ab initio. Citing *In re Superior Court Order*, 315 N.C. 378 (1986), and *In re Brooks*, 143 N.C. App. 601 (2001), both dealing with ex parte orders for records, the court concluded:

> The State did not present affidavits or other comparable evidence in support of their motions for the release of [the defendant's] personnel files and educational records sufficiently demonstrating their need for the documents being sought. Nor was a special proceeding, a civil action, or a criminal action ever initiated in connection with the ex parte motions and orders. For these reasons, the State never took the steps necessary to invoke the superior court's jurisdiction. [Summary by Phil Dixon, Jr., SOG Defender Educator]

Order not entered until filed with Clerk of Court

McKinney v. Duncan, _ N.C. App. _, 808 S.E.2d 509 (Dec. 5, 2017). The Court of Appeals dismissed the appeal on the basis that the contempt and no-contact orders from which defendant appealed were never entered, rendering the appellate court without subject matter jurisdiction to review them. Pursuant to Rule 58 of the Rules of Civil Procedure, a "judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court." In this case, there was no indication, by file stamp or otherwise, that the judge's signed orders were filed with the clerk. [Summary by Aly Chen, SOG research attorney]

Action to confirm arbitration award; pre-award interest, costs, and post-award/pre-judgment interest

Thompson v. Speller, _ N.C. App. _, 808 S.E.2d 608 (Dec. 5, 2017). An arbitration panel awarded plaintiff $110,000 in compensatory damages from his underinsured motorist carrier. Upon confirming that arbitration award, the trial court also granted plaintiff the costs of the underlying action, $8000 in pre-award interest, and $805 in post-award/pre-judgment interest. The carrier appealed the award of costs and interest, and the Court of Appeals reversed in part, holding that (1) the trial court had no authority to award pre-award interest unless the arbitration award *expressly* reserved the matter for the trial court (here, it was not enough for the panel to merely say that the "arbitrators did *not* consider interests

or costs"); (2) the trial court had no authority to award the costs of the action; and (3) the trial court properly awarded post-award/pre-judgment costs to account for the time it took to have the award confirmed and reduced to judgment.

Attorney fees incurred on appeal; law of the case doctrine; non-remedial attorney fees
Ocracomax, LLC v. Davis, _ N.C. App. _, 808 S.E.2d 573 (Nov. 21, 2017). Plaintiffs prevailed at the trial court and on appeal of the underlying action in this case. The trial court thereafter entered an award that taxed Plaintiffs' costs and attorney fees to the Davis Defendants alone, and not against the HOA Defendants. The award included costs and fees incurred at both the trial and appellate phases. The Davis Defendants appealed the costs award. The Court of Appeals affirmed, concluding that: (1) The trial court's initial judgment noting that "costs are awarded to the defendants" was not "law of the case" as to the subsequent, more specific costs order and did not require the trial court to allocate costs between the Davis and HOA Defendants; and (2) Although G.S. 47C-4-117, the fee statute, does not include specific language authorizing an award of fees incurred on appeal, it is a non-remedial attorney fee statute and thus can be broadly construed to allow a fee award for all stages of litigation.

Breach of contract and Chapter 75; relief from entry of default; attorney fees under Chapter 75
Ke v. Zhou, _ N.C. App. _, 808 S.E.2d 458 (Nov. 21, 2017). Plaintiffs hired Zhou and his company, Seven Seas Contractors, to convert Plaintiff's property into a restaurant space. After discovering that Zhou did not in fact have a contractor's license, Plaintiffs sued Zhou and Seven Seas for breach of contract, fraud, and unfair and deceptive trade practices (Chapter 75). After a jury verdict awarding damages to Plaintiffs, the trial court trebled the damages pursuant to Chapter 75. The trial court, in its discretion, then declined to award Plaintiffs their attorney fees pursuant to Chapter 75-16.1. Plaintiffs and Defendants appealed, and the Court of Appeals, finding no error, held as follows: (1) The trial court did not err in submitting to the jury the question of whether Plaintiffs reasonably relied on Defendant Zhou's statements that he was a licensed contractor; (2) Defendant Seven Seas was not entitled to have entry of default set aside; the answer filed by Defendant Zhou, Seven Seas' owner (and not an attorney) did not also constitute an answer by Seven Seas; and (3) The trial court did not abuse its discretion in declining to award Plaintiffs' their attorney fees under G.S. 75-16.1: the trial court's finding that Defendants had not "engaged in an unwarranted refusal to fully resolve the matter" was unchallenged on appeal.

Torts

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

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

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

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

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

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

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

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

See also:

Interpretation of waiver of claims provision in settlement agreement

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

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

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

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

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

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

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

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

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

Professional negligence; fraudulent concealment
Head v. Gould Killian CPA Group, P.A. (**NC** 27A17; May 11, 2018). Holding genuine issues of material fact remain in fraudulent concealment and professional negligence claim against accountant. *See Supreme Court Press Summary of this case at https://appellate.nccourts.org/opinions/.*

Tort claims against insurer related to denial of coverage
Jackson v. Century Mut. Ins. Co., _ **N.C.** _, 811 S.E.2d 138 (April 6, 2018). Affirming *per curiam* the unpublished decision of the Court of Appeals at 803 N.C. App. 868 (Table), in which the court of appeals (majority) held that the trial court properly granted summary judgment in favor of an insurer on various tort claims by a homeowner related to insurer's handling of a coverage claim.

Tort claims by employer against competitor and former employees; sufficiency of allegations
Krawiec v. Manly, _ **N.C.** _, 811 S.E.2d 542 (April 6, 2018) (with dissent). Modifying and affirming an order of the Superior Court (Business Court) granting a motion to dismiss claims for tortious interference with contract, misappropriation of trade secrets, Chapter 75, civil conspiracy, and unjust enrichment brought by a dance studio against its former employees and a business competitor.

Dram shop; negligence; contributory negligence; allegations in complaint

Davis v. Hulsing Enterprises, LLC, _ **N.C.** _, 810 S.E.2d 203 (March 2, 2018) (with three Justices dissenting). Reversing the decision of the Court of Appeals (summarized below). Holding that a bar patron who died of intoxication after being served multiple drinks alleged the same level of negligent conduct of the patron as it alleged of the bar. Thus the trial court properly dismissed the patron's complaint on the basis that the patron's contributory negligence defeated her negligence (common law dram shop) claim. *See Supreme Court Press Summary of this case at https://appellate.nccourts.org/opinions/.*

> Prior summary of Court of Appeals opinion:
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> *Davis v. Hulsing Enterprises, LLC*, 783 S.E.2d 765 (N.C. App. April 5, 2016) (with dissent). A husband and wife celebrated their anniversary with a night of hard drinking at a hotel restaurant. The wife was served at least ten of the twenty-four drinks the couple consumed that evening. When the couple decided to head up to their room, the wife was unable to walk and fell to the floor. The hotel staff placed her in a wheelchair, took her to her room, and left her in her husband's care. The next morning her husband found her dead on the floor of acute alcohol poisoning. A wrongful death action against the hotel ensued. For purposes of this appeal, it was undisputed that the hotel was an ABC permittee subject to G.S. 18B-305 that breached its duty to prevent the sale of alcohol to an intoxicated person. The trial court dismissed the action under Rule 12(b)(6) on the basis that the decedent was contributorily negligent as a matter of law. The Court of Appeals reversed, the majority concluding that, because the complaint alleged the hotel's *gross* negligence (or willful and wanton conduct), in order to dismiss the complaint the trial court would have to conclude that decedent was also *grossly* negligent as a matter of law, which in this case was not possible at the pleading stage. The majority also concluded that the complaint sufficiently alleged a negligence *per se* claim based on violation of G.S. 18B-305. Finally, the majority concluded that the complaint did not sufficiently state facts that would support a last clear chance allegation.
>
> (The dissent opined that the trial court properly dismissed the complaint based on the wife's contributory negligence because, in short, the complaint failed to plead any facts showing that defendant's negligence exceeded in severity the wife's own negligence.)

Legal malpractice in equitable distribution context; causation

Moore v. Jordan (COA17-577; May 15, 2018). Plaintiff sued her divorce attorney for legal malpractice after receiving an equitable distribution judgment that she deemed inadequate. The trial court granted summary judgment in favor of the attorney. The Court of Appeals affirmed, finding that (1) the attorney did not fail to present evidence of certain assets that might have been considered marital property; and (2) the attorney did not breach his duty when he concluded that certain information about alleged hidden assets was too speculative to offer into evidence.

Fuel dumping; trespass; litter; negligence; Rule 12(b)(6) dismissal on day of trial

ABC Services, LLC v. Wheatley Boys, LLC (COA17-981; May 15, 2018). An employee of defendant brought one of Defendant's company trucks, with a diesel holding tank, to Plaintiff's car wash. In the course of washing the tank the employee proceeded to dump hundreds of gallons of fuel into the car wash's drainage system. Plaintiff incurred substantial expense to have the fuel removed and responsibly disposed of. Plaintiff then sued Defendant for littering, trespass, and negligence. On the day of trial,

after empaneling the jury, the judge *sua sponte* opted to hear Defendant's 12(b)(6) motion that had been included in the answer but that had never been calendared for hearing. The judge dismissed each of the Defendant's claims. The Court of Appeals reversed and remanded in part, holding as follows:

(4) The judge did not abuse his discretion in deciding to dispose of the 12(b)(6) motion that had been stated in the answer even though doing so was in derogation of local motions practice rules, the motion had not been calendared, the scheduling order required the parties to serve notice of dispositive motions 15 days prior to trial, and the parties had stipulated in the pre-trial order that no motions were pending other than motions *in limine*. Because the 12(b)(6) motion had been included in the answer, the Plaintiff was not unfairly surprised by such a hearing.

(5) The trial court properly dismissed the claim for civil liability for littering brought pursuant to G.S. 14-399. The drains were a "litter receptacle" by the meaning of the statute, thus the Defendant's disposal was not disposal "of litter in an improper location."

(6) The trial court erred in dismissing the trespass claim. The complaint adequately alleged that Defendant's employee exceeded the scope of his invitation onto the property by "dumping a large quantity of hazardous material" thereon.

The trial court erred in dismissing the negligence claim. The complaint adequately alleged a breach of the duty of care causing harm to Plaintiff's property.

Med mal; admission of certain clinical studies; standard of care testimony; Rule 9(j) dismissal

Ingram v. Henderson Cty Hosp. Corp., Inc. (COA1-1016; May 1, 2018). In 2010, Plaintiff suffered severe septic shock that ultimately resulted in the loss of her fingers and her lower legs. She sued the hospital and related defendants alleging that breaches of the standard of care led to a delayed diagnosis of her condition. At trial the jury found in favor of all defendants. On appeal Plaintiff argued various errors unsuccessfully, the Court of Appeals concluding as follows:

(1) The trial court did not err in allowing expert testimony regarding three scientific studies that took place several years after Plaintiff's hospitalization because the studies were relevant to show "lack of causation no matter the timing," were not focused solely on mortality rather than morbidity, were not unfairly based on patients dissimilar to Plaintiff, and were not unfairly prejudicial;

(2) The trial court did not improperly preclude Plaintiff's expert from testifying about standard of emergency room care because, even if it was error to do so, the expert ultimately opined as to the same points in other portions of his testimony;

(3) The trial court properly dismissed Plaintiff's claims related to hospital nursing staff under Rule 9(j) because Plaintiff's designated Rule 9(j) expert testified in her deposition that she had not believed nor would she testify that the nursing care fell below the applicable standard of care; and

(4) The trial court did not err in making a limiting instruction as to evidence of an alleged follow-up visit to the hospital.

Wrongful termination for political speech; 42 U.S.C. 1983; *ex mero motu* dismissal on immunity grounds and for failure to join necessary party

Lambert v. Town of Sylva (COA17-84; May 1, 2018). Plaintiff alleged that the police chief and town manager terminated his position as police officer not for cause but instead because he was running for Jackson County Sheriff. He sued the Town under 42 U.S.C. 1983 for violation of his rights to free speech

and association and for wrongful termination in violation of public policy. The Town's answer raised no governmental immunity defenses, and the Town never moved to dismiss or for summary judgment. After Plaintiff's evidence at trial, the Town made a directed verdict motion arguing various points but *not* governmental immunity. The trial court granted the directed verdict motion, basing the decision at least in part on immunity. Plaintiff appealed. The Court of Appeals reversed. After discussing the odd procedural posture of the case, the court determined as follows: (1) the trial court was not empowered to raise an affirmative defense of governmental immunity on the Town's behalf; (2) the trial court erred to the extent it determined that Plaintiff must prove that the Town Manager's actions were a "custom or policy" of the Town in order to establish *respondeat superior* liability under 1983; and (3) the trial court erred to the extent it dismissed the case with prejudice for failure to join an [unspecified] necessary party. New trial on all claims.

Contributory negligence, negligence per se, and sudden emergency doctrine

Goins v. Time Warner Cable Southeast, LLC (COA17-531; Mar. 6, 2018). Both the plaintiffs, Mr. Goins and Ms. Knapp, were injured when, at different times, they collided with a utility line lying at ground level. Mr. Goins was injured when the front tire of his bicycle collided with the line. Ms. Knapp was injured when she struck the cyclist in front of her after that cyclist hit the line and wrecked. The jury found the utility company negligent in failing to remove the downed line and found neither defendant contributorily negligent. The trial court denied the company's JNOV motion. The company appealed, and the Court of Appeals determined that: (1) Plaintiff Knapp was not contributorily negligent as a matter of law; the question of whether she was following the cyclist in front her too closely was a question of fact for the jury; but (2) the trial court erred in giving an instruction on the "sudden emergency doctrine." Because the utility's negligent act of leaving the wire in the road did not itself create a "sudden emergency" that would excuse plaintiffs' alleged negligence of traveling too fast (Goins) or not keeping a proper lookout (Knapp), the instruction was out of place. New trial.

Fraud; constructive fraud and fiduciary duty; Chapter 75; compromise verdict and new trial

Bickley v. Fordin, _ N.C. App. _, 811 S.E.2d 671 (Feb. 20, 2018). Plaintiff purchased a 10% share in Defendant's software company for $50,000 in 2006. Soon thereafter he was sentenced to two years in prison on drug charges. In 2008, Defendant approached Plaintiff to persuade him to sell his shares back to the company in exchange for a $50,000 promissory note, which Plaintiff agreed to do. In 2014, the software company was sold for $14 million. Plaintiff sued for fraud, constructive fraud, and unfair and deceptive trade practices (UDTP), alleging that Defendant made various misrepresentations when procuring Plaintiff's shares. The trial court granted directed verdict on the UDTP claim but submitted the remaining claims to the jury, which awarded Plaintiff over $500,000. Both parties appealed. As to Plaintiff's appeal, the Court of Appeals affirmed the trial judge's decision to grant directed verdict, agreeing that internal shareholder disputes do not fall within the scope of Chapter 75. As to Defendant's appeal, the Court of Appeals determined as follows: (1) The trial court did not err in submitting the issues of fraud and constructive fraud to the jury because there was some evidence the Defendant made statements that would tend to deceive, particularly in light of the fiduciary duty Defendant, as controlling shareholder, owed to Plaintiff, minority shareholder; and (2) the trial court was not required to grant Defendant a new trial under Rule 59 based on the dollar value of the jury's verdict. While the sum of $505,000 was indeed a numerical average of the $70,000 Defendant

conceded he owed on the promissory note and the $940,000 Plaintiff sought from the sale, that fact alone was not sufficient to establish that the jury had arrived at an impermissible compromise verdict.

Corum direct constitutional claims when immunity applies to common law claims; "adequate state remedy" through Tort Claims Act

Taylor v. Wake County, _ N.C. App. _, 811 S.E.2d 648 (Feb. 20, 2018). Plaintiff sued Wake County DSS on various negligence-related theories after her estranged husband entered her house, murdered her parents, and shot her in front of her children. At the time, Wake County DSS had been involved in the assessment and monitoring of the domestic problems that apparently led up to this tragedy. The trial court dismissed her negligence and related common law claims against the County on immunity grounds. As to her direct state constitutional claim against the County (*Corum* claim)—the subject of this appeal—the trial court also dismissed that claim after determining that Plaintiff's action against the *State* DHHS under the Tort Claims Act (before the Industrial Commission) was an adequate state law remedy for her harms. The Court of Appeals affirmed, concluding in a detailed analysis that Plaintiff's ability to seek redress for the injury through the Tort Claims Act foreclosed her direct constitutional claim against the County, even though the Tort Claims action sought recovery from a different defendant and was subject to a statutory damages cap.

Governmental immunity waiver; stating a claim for procedural due process; immediate appeal

Ballard v. Shelley, _ N.C. App. _, 811 S.E.2d 603 (Feb. 6, 2018). Homeowners, the Shelleys, got permits from Cabarrus County to build a fence to enclose their pool. After fence construction began, their neighbors complained to the County, arguing the fence did not meet the applicable code requirements. The neighbors eventually filed claims against the County seeking a writ of mandamus requiring the County to enforce the codes. In that context the County relented and filed a crossclaim against the Shelleys seeking an order requiring them to remove the fence. The Shelleys then sued the County, alleging various tort claims, a declaratory judgment claim, and a due process claim. The trial court dismissed the tort claim based on governmental immunity (12(b)(1)) and dismissed the declaratory judgment action and due process claims pursuant to 12(b)(6). The Court of Appeals affirmed in part, holding as follows: (1) the trial court properly dismissed the tort claims because the County had not waived governmental immunity through the purchase of excess liability insurance coverage; (2) the dismissal of the declaratory judgment claim was not immediately appealable because it did not implicate a substantial right; and (3) the complaint—taken as true and in the light most favorable to the Shelleys—alleged a procedural due process claim against the County and should not have been dismissed at this early stage.

Wrongful termination of employment; Title VII

Norman v. NC Dep't of Administration, _ N.C. App. _, 811 S.E.2d 177 (Feb. 6, 2018). Plaintiff was employed by the State for less than one year as parking attendant. During a month-long period during her employment, she experienced inappropriate comments and sexually suggestive behavior by her male immediate supervisor. Eventually, due to several instances of her problematic absences, leaving her post unattended, altering a certificate of return to work form from her physician, and failure to log off her fee computer properly, plaintiff was scheduled for a pre-disciplinary conference. During this conference, she reported (for the first time) the prior sexual behavior of her supervisor. The Office of

State Personnel investigated her claims and ultimately found no harassment or retaliation. Her probationary employment was soon terminated for the reasons stated in her pre-disciplinary conference. Plaintiff then filed an EEOC complaint under Title VII, for which she received a right to sue. The trial court granted summary judgment in favor of the State on her three claims of (1) sexual harassment creating a hostile work environment; (2) sex discrimination resulting in quid pro quo harassment; and (3) sex discrimination resulting in retaliatory discharge. The Court of Appeals affirmed, finding that (1) her hostile work environment claim failed because she did not assert any tangible employment action taken against her in connection with her supervisor's conduct or failure of the State to exercise reasonable care to deter harassment in the workplace; (2) her quid pro quo claim failed because she did not forecast evidence that her rejection of her supervisor's advances affected a tangible aspect of her employment; and (3) her retaliation claim failed because she failed to forecast evidence that her termination would not have occurred in the absence of her reporting her supervisor's inappropriate behavior and her failure to show that the reasons given for her termination were mere pretext.

Statutes of limitations applicable to fiduciary duty, constructive fraud, and conversion claims
Honeycutt v. Weaver, _ N.C. App. _, 812 S.E.2d 859 (Feb. 6, 2018). Margaret, mother of Brenda and Tommy, made her daughter Brenda her executor and attorney-in-fact. In 2005 Brenda conveyed Margaret's real property to herself. In 2010, Margaret died, and Brenda did not submit Margaret's will for probate, telling the clerk that there were no assets to divide. In 2013, Tommy challenged Brenda's actions with the clerk, and in 2016 the clerk ordered Brenda to file an application for probate and appointment as executor. Later in 2016 Tommy sued Brenda under various theories, including declaratory judgment to void the real property conveyance; breach of fiduciary duty; constructive fraud; and conversion. The trial court granted Brenda's motion to dismiss Tommy's claims as barred by the statutes of limitations in G.S. 1-52(1), and (4) and 1-56.

The Court of Appeals affirmed, holding that Tommy's fiduciary duty, constructive fraud, and declaratory judgment actions accrued when Brenda conveyed the real estate in 2005, and thus the applicable 10-year statutes of limitations barred these claims. In addition, his conversion claim accrued in 2010, and was thus barred by the applicable 3-year limitations period. Finally, he could not rely on G.S. 1-24 to stay the underlying statutes of limitations because that statute does not apply to claims that are not a controversy over the probate of a will or granting of letters testamentary.

Criminal conversation; alienation of affection; use of evidence of post-separation conduct
Rodriguez v. Lemus, _ N.C. App. _, S.E.2d (Jan. 16, 2018). Affirming a judgment in favor of (and award of $65,000 to) Plaintiff wife in an alienation of affection and criminal conversation bench trial. The key holding in this case is that, although conduct that took place *post*-separation cannot form the basis for liability for these torts (*see* G.S. 52-13),

> "evidence of post-separation conduct may be used to corroborate evidence of pre-separation conduct and can support claims for alienation of affection and criminal conversation, so long as the evidence of pre-separation conduct is sufficient to give rise to more than mere conjecture."

In this case, there was *some* circumstantial evidence of *pre*-separation behavior to support the claims—records of text messages between Husband and Defendant; hotel receipts; testimony that Husband was accompanied by a woman during one hotel stay; and potentially suggestive social media postings. But much of the evidence was of conduct that occurred *after* Plaintiff and her husband had separated, including: (1) Husband and Defendant began living together; (2) less than a year later Defendant bore a child named after Husband; (3) Husband claimed he loved Defendant and could not reconcile with Plaintiff because of the child; and (4) Defendant admitted to sexual intercourse with Husband post-separation. The Court of Appeals held that this post-separation conduct corroborated some of the evidence of pre-separation conduct, and thus it was not error for the trial court to consider it in making its finding that Defendant and Husband had had *pre*-separation sexual relations.

Contributory negligence in roadside/fallen tree accident; last clear chance; mental capacity as relates to due care

Proffitt v. Gosnell, _ N.C. App. _, 809 S.E.2d 200 (Dec. 19, 2017). The Court of Appeals affirmed the trial court's order granting summary judgment for defendant in an action for damages resulting from a roadway accident. The Court determined that the doctrine of last clear chance applied to the facts of the case, and that plaintiff was contributorily negligent as a matter of law. The accident occurred when a father and son stopped their car due to a fallen tree across the road. The son climbed on the tree, intending to wave down approaching traffic. A truck came along and hit the tree, causing serious injuries to the son. The Court of Appeals concluded that plaintiff son's argument that he lacked the mental capacity to understand and avoid a clear danger due to a low IQ was not supported by sufficient evidence and that he was therefore subject to the usual objective standard of ordinary care to keep himself safe that is used in analyzing contributory negligence. Regarding plaintiff's own actions, the Court determined that the evidence was sufficient to show that plaintiff's failure to yield the right of way (while atop the fallen tree) constituted contributory negligence as a matter of law, and that his negligence was a proximate cause of his injuries. Further, plaintiff's own evidence showed that he was not in a position of "helpless peril" and had enough time and warning to extricate himself from danger prior to the accident. [Summary by Aly Chen, SOG research attorney]

Lease renewal; motion to dismiss; equitable estoppel; UDTPA; declaratory judgment

Chapel H.O.M. Assocs., LLC v. RME Mgmt., LLC, _ N.C. App. _, 808 S.E.2d 576 (Dec. 5, 2017). When negotiations for the renewal of long-term lease broke down over the question of lease value, the lessee sued the owner, attempting to state claims for equitable estoppel, unfair and deceptive trade practices, and declaratory judgment. The trial court granted the owner's motion to dismiss all claims under Rule 12(b)(6). Affirming in part and reversing in part, the Court of Appeals held that: (1) the trial court properly dismissed the equitable estoppel claim because equitable estoppel is not a cognizable affirmative claim for relief; (2) the trial court properly dismissed the unfair trade practices claim because the complaint alleges no substantial aggravating factors; and (3) the declaratory judgment action should not have been dismissed because plaintiff adequately alleged a genuine controversy between the parties regarding the interpretation of the lease.

Summary judgment; liability for failing to exercise reasonable control over a child's behavior
Plum Props., LLC v. Holland, _ N.C. App. _, 807 S.E.2d 676 (Nov. 21, 2017). The Court of Appeals affirmed the trial court's grant of partial summary judgment to parents of minors who vandalized property on the basis that no genuine issue of material fact existed that the parents were negligent or in breach of their duty to supervise their minor children. The Court held that parents cannot be held liable if they did not know or should not have known of the necessity of exercising control over their children, a standard set forth in *Moore v. Crumpton*, 306 N.C. 618 (1982). In this case, evidence was presented that the parents in question had no prior knowledge of their children sneaking out of their residence, the minors had not previously engaged in vandalism, and the parents had reasonable rules regarding curfew and behavior. Other evidence about the minors engaging in prior destructive behavior was inadmissible hearsay and could not be used to oppose the motion for summary judgment. [Summary by Aly Chen, SOG research attorney]

Underinsurance motorist insurer; Right to assert claim for contribution
Nationwide Prop. & Cas. Ins. Co. v. Smith, _ N.C. App. _, 808 S.E.2d 172 (Nov. 21, 2017). The Court of Appeals affirmed the trial court's dismissal of insurance company Nationwide's claim for contribution from third-party defendants. The case arose from an accident in which a drunk driver lost control of her car and hit a pedestrian. When an action was filed under the underinsurance motorist insurance policy, Nationwide filed a third-party complaint alleging that two individuals negligently served alcohol to the defendant and allowed her to drive. Plaintiffs and Nationwide negotiated a settlement, leaving the third-party complaint the only remaining issue. The trial court granted the third-party defendants' motion to dismiss for failure to state a claim upon which relief could be granted. On appeal, the Court of Appeals distinguished between an insurer's right to bring a claim against other parties when it appears in its own name, as allowed by G.S. 20-279.21(b)(4), and an attempt by an insurer to seek contribution against other tort-feasors who may have helped cause the accident. Pursuant to G.S. 1B-1(b) and prior case law, underinsured motorist carriers are not tort-feasors and thus have no right to seek contribution. Further, Nationwide's insured had no right to assert a claim for contribution against the third-party defendants, and Nationwide could not assert a claim which its insured had no right to pursue. The Court emphasized that Nationwide could still "assert any properly preserved direct claim which could have been asserted by its insured." [Summary by Aly Chen, SOG research attorney]

Breach of contract and Chapter 75; relief from entry of default; attorney fees under Chapter 75
Ke v. Zhou, _ N.C. App. _, 808 S.E.2d 458 (Nov. 21, 2017). Plaintiffs hired Zhou and his company, Seven Seas Contractors, to convert Plaintiff's property into a restaurant space. After discovering that Zhou did not in fact have a contractor's license, Plaintiffs sued Zhou and Seven Seas for breach of contract, fraud, and unfair and deceptive trade practices (Chapter 75). After a jury verdict awarding damages to Plaintiffs, the trial court trebled the damages pursuant to Chapter 75. The trial court, in its discretion, then declined to award Plaintiffs their attorney fees pursuant to Chapter 75-16.1. Plaintiffs and Defendants appealed, and the Court of Appeals, finding no error, held as follows: (1) The trial court did not err in submitting to the jury the question of whether Plaintiffs reasonably relied on Defendant Zhou's statements that he was a licensed contractor; (2) Defendant Seven Seas was not entitled to have entry of default set aside; the answer filed by Defendant Zhou, Seven Seas' owner (and not an attorney)

did not also constitute an answer by Seven Seas; and (3) The trial court did not abuse its discretion in declining to award Plaintiffs' their attorney fees under G.S. 75-16.1: the trial court's finding that Defendants had not "engaged in an unwarranted refusal to fully resolve the matter" was unchallenged on appeal.

Right of tortfeasor to receive credit for injured's UIM payments

Hairston v. Harward, _ N.C. App. _, 808 S.E.2d 286 (Nov. 7, 2017) (with dissent). In this case, the Court of Appeals majority held that an underinsured motorist Defendant was entitled to an offset and credit toward the judgment in the amount of Plaintiff's payments from his own underinsured motorist insurer. The dissent opined to the contrary, arguing, in closing, that "[i]f a tortfeasor receives credits for UIM payments, "the statutory right of subrogation is meaningless, and this upsets the statutory balance between competing interests." [This case is being briefed before the NC Supreme Court.]

Contracts and Insurance

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

Loan commitment vs. loan agreement; breach of contract; related tort claims; materials considered at summary judgment
French Broad Place, LLC v. Asheville Savings Bank, S.S.B. (COA17-1087; June 5, 2018). Plaintiff LLC undertook development of a multi-use building in Brevard, NC. For partial financing, Plaintiff negotiated a loan commitment from Defendant Asheville Savings Bank (the Bank) in the amount of $9,950,000. Over the course of many months (but well after development had begun), discussions with the Bank resulted in a final Loan Agreement in the amount of $7,750,000. Ultimately this loan amount proved insufficient for Plaintiff to successfully complete the project, and Plaintiff sued the Bank for various alleged breaches of the loan commitment and for related torts. The trial court granted summary judgment in favor of Bank. The Court of Appeals affirmed, determining as follows: (1) Plaintiffs did not object to certain materials attached to the Bank's motion but that had not been "filed" with the court under Rule 56, so those materials were properly part of the summary judgment record; (2) where the parties' Loan Agreement contained various merger-type clauses indicating its finality and exclusivity, Plaintiff could not establish that the Bank breached prior agreements to provide more financing, deal differently with change-order requests, finance take-out loans, and other matters; (3) there was no genuine issue of fact as to any violations of the covenant of good faith and fair dealing; (4) where there was no breach of contract, there could be no attendant aggravating circumstances to support an unfair and deceptive trade practices claim; and (5) there was no evidence of the kind of special relationship that could give rise to a fiduciary duty from Bank to Plaintiff.

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

Liquidated damages in commercial lease; attorney fees under G.S. 6-21.6; attorney fees and judicial notice of customary rates

WFC Lynnwood I LLC v. Lee of Raleigh, Inc. (COA17-562; June 5, 2018) (with partial dissent)**.** A commercial tenant ended its lease early and vacated the premises. The landlord sued tenant and its guarantors for rent recovery, liquidated damages, and attorney fees. The trial court granted summary judgment in landlord's favor and awarded $43,253.16 in rent, $37,685.98 in liquidated damages (calculated by a formula in the lease), and, in a subsequent order, nearly $45,000 in attorney fees. The tenant appealed the liquidated damages and attorney fee awards. The Court of Appeals affirmed in part and remanded in part as follows: (1) Because the tenant failed to meet its burden to show that the liquidated damages were not a "reasonable estimate of damages, or reasonably proportionate to damages suffered," the trial court did not err in enforcing this provision; (2) the trial court properly concluded that the reciprocal attorney fee provision in the lease could be enforced pursuant to G.S. 6-21.6 and could also be enforced against the guarantors; *but* (3) because there was no evidence in the record that the attorneys' rates were comparable to other attorneys in this field of practice, the court's findings–which were based on judicial notice of customary rates—were not supported by the record. The court therefore remanded for reconsideration of the amount of attorney fees.
[The dissenting judge would have affirmed the attorney fee award based on the trial court's judicial notice in light of *Simpson v. Simpson*, 209 N.C. App. 320 (2011), which held that "a district court considering a motion for attorneys' fees…is permitted, although not required, to take judicial notice of the customary hourly rates of local attorneys performing the same services and having the same experience."]

UIM coverage and innocent passengers of tortfeasor

Nationwide Affinity Ins. Co. of America v. Le Bei (COA17-1086; May 15, 2018). This action revolves around whether innocent passengers of the at-fault driver were entitled to recover proceeds of the driver's underinsured motorist (UIM) coverage. The superior court granted summary judgment in the injured passengers' favor, ordering that they were so entitled. The Court of Appeals affirmed the trial court's conclusion after a detailed analysis of the multiple claimant exception in GS 20-279.21(b)(4) and

"stacking" of UIM coverage. The court stated that, "we decline to apply the multiple claimant exception in a way which would reduce compensation to innocent victims and conflict with the avowed purpose of the [Financial Responsibility] Act."

Electronic execution of agreement; ratification of agreement through conduct

IO Moonwalkers, Inc. v. Banc of America Merchant Servs., Inc. (COA17-1117; April 3, 2018). Banc of America Merchant Services (BAMS) entered into an agreement with Plaintiff (Moonwalkers) to provide credit card processing services. The parties used the ubiquitous "DocuSign" software to electronically execute the agreement. A few months later, BAMS sought to enforce certain terms of that agreement against Moonwalkers (the obligation to repay BAMS for fraudulent purchase reimbursements), but Moonwalkers did not comply. In the litigation that ensued, Moonwalkers alleged that the person who electronically signed the agreement (using Moonwalkers' email account) was not a person authorized to do so. Moonwalkers did not identify this alleged unauthorized person. The trial court granted summary judgment in favor of BAMS as to Moonwalkers' obligations under the agreement, finding that even if an unauthorized person had somehow accessed the email account to sign the agreement, Moonwalkers ratified the agreement by never rejecting the final signed copy and by thereafter accepting BAMS services under the agreement for months until the parties' dispute arose. The Court of Appeals agreed and affirmed, holding that the evidence showed that Moonwalkers had read and reviewed the agreement and, after it was signed, acted with intent to be bound by it, all of which amounted to a subsequent ratification. [Note that one judge concurred in the result but would have based appellate jurisdiction over the matter on a substantive right rather than on the trial court's Rule 54(b) designation.]

Third-party beneficiary to insurance policy; privity

USA Trouser, S.A. v. Williams, _ N.C. App. _, 812 S.E.2d 373 (Feb. 20, 2018). Plaintiff, a sock manufacturing company, brought various contract and tort claims against Defendant, a legwear company. Plaintiff obtained a default judgment against Defendant. Plaintiff later sued Defendant to enforce the judgment. Plaintiff also sent a copy of the judgment and demand for payment to Navigators Insurance, *Defendant's* insurer, and soon added Navigators as a party to the enforcement action. The trial court (Business Court) dismissed Plaintiff's claims against Navigators. The Court of Appeals affirmed, holding that Plaintiff did not become a third party beneficiary to Defendant's policy with Navigators by obtaining a default judgment against Defendant: "[Plaintiff] has not cited any authority, binding upon this Court, which tends to establish a trade creditor is in privity with its debtor and the debtor's insurer with respect to a directors and officers liability insurance policy, merely by virtue of the trade creditor's obtainment of a judgment against the insured debtor."

Contract claims against sanitary sewer district related to rate hikes; applicability of Ch. 75

Badin Shores Resort Owners Ass'n, Inc. v. Handy Sanitary Dist., _N.C. App. _, 811 S.E.2d 198 (Feb. 6, 2018). This is the latest in the litigation between Badin Shores Resort Owners Ass'n (BSR) and Handy Sanitary District (Handy) related to the contract through which Handy agreed to provide wastewater services for BSR. In this appeal, BSR challenged the trial court's grant of summary judgment on BSR's claims that Handy improperly raised its rates. The Court of Appeals affirmed, determining that: (1) The court did not err in hearing Handy's summary judgment motion on only seven days' notice where BSR

waived an objection to that procedural issue; (2) summary judgment on BSR's breach of contract claim was proper where BSR failed to create a genuine issue of material fact about whether Handy's rate hike was reasonable under the terms of the contract; (3) BSR's sewer system was "online and operational" by the meaning of the contract, entitling Handy to implement a rate hike; (4) BSR created no genuine issue of material fact related to its claim under GS 130A-64(a) related to sanitary sewer charges; and (4) a sanitary district cannot be sued for unfair and deceptive trade practices, even if there had been more than just mere breach of contract allegations at issue in the case.

UCC sales warranty provisions; auto sales contract; 12(b)(6); verified counterclaims as summary judgment affidavit

Ford Motor Credit Co. LLC v. McBride, _ N.C. App. _, 811 S.E.2d 640 (Feb. 6, 2018). Defendants, the McBrides, entered into a contract with an auto dealer to finance the purchase of a transport van. The dealer thereafter assigned the contract to Plaintiff Ford Motor Credit Co. (Ford Credit). After a few months, Ford Credit sued Defendants for nonpayment of the agreement. Defendant responded by alleging that, starting four days after purchasing the van, they returned it to the dealer repeatedly because the passenger seat would not remain upright; that the dealer had refused to inspect or repair it or take any action. They counterclaimed for breach of the implied warranty of merchantability, implied warranty of fitness for a particular purpose, and express warranty, and also alleged that they had revoked their acceptance of the vehicle. The trial court granted Ford Credit's motion to dismiss the McBrides' counterclaims and granted summary judgment in Ford Credit's favor in the amount of $7,709.67. The Court of Appeals reversed, holding that (1) the McBrides' allegations were sufficient to survive a 12(b)(6) motion as to each of their claims under the relevant provisions of the UCC, G.S. Chapter 25, Article 2; and (2) Ford Motor was not entitled to summary judgment as to the payment amount on grounds that the McBrides failed to offer a competing affidavit; their *verified* counterclaims could be treated as an affidavit under Rule 56, and thus they had not merely "relied upon the bare allegations" of their complaint.

Arbitration agreement; denial motion to compel

Smith Jamison Constr. V. APAC-Atl., Inc., _ N.C. App. _, 811 S.E.2d 635 (Feb. 6, 2018). Plaintiff (Jamison) sued APAC for breach of a subcontract agreement when APAC terminated the agreement with Jamison in favor of working with Yates. Jamison also sued Yates—not a party to the subcontract—on various tort theories and under Chapter 75. Pursuant to a clause in the subcontract, Jamison and APAC agreed that they were bound to arbitrate Jamison's claims against APAC, and the two parties entered into a consent agreement to do so. In turn, Yates filed a motion to compel Jamison to arbitrate its claims against Yates. The trial court denied this motion. The Court of Appeals affirmed, holding that because Yates was not a signatory to the arbitration agreement, and the claims against Yates did not arise out the contract between Jamison and APAC (but instead were "premised upon duties created by…common law or statutes"), the trial court was not required to compel arbitration as to those claims.

Uninsured motorist; statute of limitations; service

Powell v. Kent, _ N.C. App. _, 810 S.E.2d 241 (Jan. 16, 2018). Shortly before expiration of the underlying statute of limitations, Plaintiff filed auto negligence and related claims against two defendants. As required by G.S. 20-279.21(b)(3)(a), Plaintiff soon served the action on its uninsured motorist carrier.

The carrier later filed a motion for summary judgment arguing that the statute of limitations had expired, and the trial court granted the motion. The Court of Appeals noted that, although G.S. 20-279.21(b)(3)(a) does not itself specify when the UIM carrier must be served, prior case law indicates that the carrier must be served prior to the expiration of the statute of limitations. Here, although the action was timely filed, service on the carrier did not take place until more than thirty days after the statute of limitations would have run. Thus the Court of Appeals was compelled to affirm the order granting summary judgment in the carrier's favor. The court opined, however, that this apparent inconsistent application of the statute of limitations for similarly-situated litigants "appears ripe for determination or clarification by our Supreme Court or the Legislature."

Waiver of the right to compel arbitration; discovery and prejudice

iPayment, Inc. v. Grainger, _ N.C. App. _, 808 S.E.2d 796 (Jan. 2, 2018). Trial court denied a motion by Plaintiff to compel arbitration (pursuant to an arbitration agreement) of counterclaims by Defendant Universal. The trial court denied the motion, finding that Plaintiff had acted inconsistent with its right to compel arbitration by conducting discovery. The Court of Appeals reversed and remanded, holding that the discovery pertained to related claims against the other defendants and that Plaintiff had reserved its right to compel arbitration against Defendant Universal. In addition, Plaintiff demanded arbitration soon after receiving the counterclaims and did not take advantage of discovery not permitted under the rules of arbitration.

Lease renewal; motion to dismiss; equitable estoppel; UDTPA; declaratory judgment

Chapel H.O.M. Assocs., LLC v. RME Mgmt., LLC, _ N.C. App. _, 808 S.E.2d 576 (Dec. 5, 2017). When negotiations for the renewal of long-term lease broke down over the question of lease value, the lessee sued the owner, attempting to state claims for equitable estoppel, unfair and deceptive trade practices, and declaratory judgment. The trial court granted the owner's motion to dismiss all claims under Rule 12(b)(6). Affirming in part and reversing in part, the Court of Appeals held that: (1) the trial court properly dismissed the equitable estoppel claim because equitable estoppel is not a cognizable affirmative claim for relief; (2) the trial court properly dismissed the unfair trade practices claim because the complaint alleges no substantial aggravating factors; and (3) the declaratory judgment action should not have been dismissed because plaintiff adequately alleged a genuine controversy between the parties regarding the interpretation of the lease.

Constitutional Matters/Due Process

"Fruits of their own labor"; due process ("law of the land"); arbitrary promotion process

Tully v. City of Wilmington, _ **N.C.** _, 810 S.E.2d 208 (March 2, 2018). Affirming the decision of the Court of Appeals holding that a career police officer could proceed with a claim under the "fruits of their own labor" clause of the North Carolina Constitution related to his career advancement, but reversing the determination that he had stated a valid due process ("law of the land") claim because he failed to establish that he had a property interest in the advancement. *See Supreme Court Press Summary of this case at Appendix __*.

> Earlier summary of Court of Appeals opinion:
> *Tully v. City of Wilmington* (COA15-956; Aug. 16, 2016) (with dissent). After a decorated police officer took a required exam as part of his application for promotion to sergeant, he was informed that he had failed the exam, rendering him unable to further advance. After discovering that several of the purportedly "correct" answers were in fact incorrect and had been based on outdated law (particularly as to search and seizure), he filed a grievance which ultimately led to this action in superior court alleging violations of equal protection and "fruits of their own labor" clauses of the State constitution. The trial court granted judgment on the pleadings in favor of the City. The Court of Appeals reversed, holding that Plaintiff had adequately pled an equal protection claim based on the City's alleged failure to provide a non-arbitrary and non-capricious promotional process and failure to follow its own grievance process with respect to promotion. (The dissenting judge disagreed that such facts constituted a cognizable constitutional claim against an employer, but urged the Supreme Court to address the issue in light of prior decisions mandating that the "N.C. Constitution be liberally construed, particularly those provisions which safeguard individual liberties.").

Gun permit appeals; due process

DeBruhl v. Mecklenburg Cty Sheriff's Office (COA17-880; April 17, 2018). As required by G.S. 14-415.12, Mr. DeBruhl submitted a renewal application for a permit to carry a concealed handgun to the sheriff in September 2016. In December 2016, the Sheriff's Office issued him a written denial. Mr. DeBruhl was not given notice of the basis for the denial or an opportunity to be heard as to the reasons. The denial simply informed him that he did not meet the requirements of G.S. 14-415.12 for possession of a handgun and that he was ineligible to own, possess, or receive a firearm under State or Federal law. The denial also informed him that "YOU ARE DENIED DUE TO INFORMATION RECEIVED FROM VETERANS AFFAIRS." Mr. DeBruhl then appealed to the district court in March 2017, noting that "there is no way for [Mr. DeBruhl] to know what facts to challenge on appeal" because the sheriff did not include specifics. In April, the district court judge in entered an order denying the appeal. The judge included a finding that the sheriff's office had denied the permit because the applicant had sought mental health/substance abuse treatment in 2016. The judge then found that Mr. DeBruhl "suffers from a mental health disorder that affects his ability to safely handle a firearm." (This is a proper statutory basis for denial of a permit.) The district court's appeal denial was the first time Mr. DeBruhl had notice of the statutory basis for his permit denial, and neither the sheriff nor the district court had given him notice and a hearing on the question.

The Court of Appeals was therefore tasked with deciding whether Mr. DeBruhl had been denied the permit in violation of the Fourteenth Amendment's protection against deprivation of property without due process of law. The Court first concluded that Mr. DeBruhl did indeed have a property interest in the gun permit because the statute *required* the sheriff to issue it if the statutory criteria were met. *See* G.S. 14-415.15(a) (the "permit shall not be denied unless the applicant is determined to be ineligible pursuant to G.S. 14-415.12."). The court stated that, "[b]ecause the statute does not give the sheriff unfettered, unassailable discretion in the issuance of gun permit renewals, an applicant enjoys a legitimate claim of entitlement to renewal so long as the enumerated criteria have been satisfied." The Court then concluded that the appellate review afforded Mr. DeBruhl did not comport with procedural due process because it did not provide him any opportunity whatsoever to be heard on the mental health question. The court pointed out that the requirement of a hearing was particularly important in this case because a determination about the effects of a mental health condition could be "especially susceptible to the type of arbitrary governmental action that the due process clause was designed to prevent." An applicant in Mr. DeBruhl's position must, in short, "be afforded an opportunity to dispute the allegations underlying the denial before it becomes final."

Governmental immunity waiver; stating a claim for procedural due process; immediate appeal
Ballard v. Shelley, _ N.C. App. _, 811 S.E.2d 603 (Feb. 6, 2018). Homeowners, the Shelleys, got permits from Cabarrus County to build a fence to enclose their pool. After fence construction began, their neighbors complained to the County, arguing the fence did not meet the applicable code requirements. The neighbors eventually filed claims against the County seeking a writ of mandamus requiring the County to enforce the codes. In that context the County relented and filed a crossclaim against the Shelleys seeking an order requiring them to remove the fence. The Shelleys then sued the County, alleging various tort claims, a declaratory judgment claim, and a due process claim. The trial court dismissed the tort claim based on governmental immunity (12(b)(1)) and dismissed the declaratory judgment action and due process claims pursuant to 12(b)(6). The Court of Appeals affirmed in part, holding as follows: (1) the trial court properly dismissed the tort claims because the County had not waived governmental immunity through the purchase of excess liability insurance coverage; (2) the dismissal of the declaratory judgment claim was not immediately appealable because it did not implicate a substantial right; and (3) the complaint—taken as true and in the light most favorable to the Shelleys—alleged a procedural due process claim against the County and should not have been dismissed at this early stage.

Corporations and Agency

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

Compliance with bylaws and rules; standing to sue
Willowmere Community Assoc., Inc. v. City of Charlotte, _ **N.C.** _, 809 S.E.2d 558 (Mar. 2, 2018). Holding that a non-profit corporation was not required to affirmatively plead or prove compliance with its own bylaws in order to have standing to bring a lawsuit—in this case a zoning dispute. *See Supreme Court Press Summary of this case at https://appellate.nccourts.org/opinions/.*

Foreign corporation pleading capacity to sue; requirement of certificate of authority
Atlantic Coast Props., Inc. v. Saunders, _ **N.C.** _, 813 S.E.2d 194 (May 11, 2018), *per curiam*. Here the Supreme Court reverses, *per curiam*, the opinion in _ N.C. App. _, 807 S.E.2d 182 (Nov. 7, 2017), for the reasons stated in the dissent. A corporation (Petitioner) brought an action to partition a piece of real property it owned in North Carolina. The trial court granted summary judgment in favor of the Respondents on grounds that Petitioner did not have a certificate of authority to transact business in North Carolina and had not properly allege its legal existence and capacity to sue. The Court of Appeals majority affirmed. The dissenting judge would have reversed, opining that (1) a foreign corporation need not have a certificate of authority merely to bring a special proceeding related to its ownership of real property and that its status as a dissolved corporation does not change that fact; and (2) the corporation, which alleged that it was a Delaware corporation that owned real property—did not violate Rule 9(a)'s pleading requirement.

Termination of membership in non-profit corporation; GS 55A-6-31; failure to mitigate damages
Emerson v. Cape Fear Country Club, Incorporated (COA17-1149; June 5, 2018). Cape Fear Country Club terminated the membership of a long-time member after he went on an alleged "profanity-laced tirade" against a Club employee. The member had a history of disciplinary actions by the Club. The Club's

Board made the termination decision in a special meeting and communicated the termination to him by letter. The member brought this declaratory judgment action seeking a determination as to whether the Club was required by G.S. 55A-6-31 (governing memberships in non-profit corporations) to first provide him notice and a hearing. The trial court granted summary judgment in favor of the Club. The Court of Appeals affirmed. The court first declined to hold that non-profit corporations are required in all cases to provide prior notice and a hearing before terminating a membership. The court then determined that the member had failed as a matter of law to mitigate his damages when he rejected the Club's invitation (after the termination) to appear before the Board and "speak on [his] behalf concerning the termination of his membership." Thus his claims related to compensatory and punitive damages were properly dismissed, and the rest of his arguments were rendered moot.

Apparent agency; declaratory judgment regarding right to proceeds from a fire

Sullivan v. Pugh (COA17-450; April 3, 2018). In April 2012, Ms. Pugh allegedly set a fire that spread and damaged 500 acres of timber on adjoining land. At the time, TOG Properties maintained record ownership of that land. A few months later, Sullivan foreclosed on the property and purchased it at a foreclosure sale in October 2012. (Background: When TOG Properties filed for bankruptcy in 2010, B&N, the company that financed the land purchase, assigned its interest to Sullivan.) A dispute soon arose over whether TOG or Sullivan would be entitled to any damages recovered from Ms. Pugh. In this declaratory judgment action, TOG sought summary judgment declaring it the owner at the time of the fire and thus the party entitled to the proceeds. The trial court granted that motion. Sullivan appealed (self-represented), arguing that there was a genuine issue of material fact about the right to the proceeds because Kenner Day, TOG's former manager, had sent letters and executed documents in late 2012 purporting to transfer to Sullivan TOG's interests in any proceeds and claims related to the fire. The Court of Appeals disagreed and affirmed the trial court after determining that all the evidence presented at summary judgment showed that Mr. Day had been terminated as TOG's manager in 2010 and that there was no justifiable reason for Sullivan to have believed that Day was TOG's agent in 2012 (*i.e.*, no competent evidence of apparent agency).

Real Estate, Condemnation, Land Use, and Foreclosure

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Unrecorded right of first refusal; specific performance; innocent purchaser

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

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

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

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

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

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

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

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

Unlawful impact fees; statute of limitations on recovery

Quality Built Homes Inc. v. Town of Carthage, _ **N.C.** _, 813 S.E.2d 218 (May 11, 2018). Holding that Plaintiffs' claims to recover unlawfully-exacted impact fees from the Town were time-barred under G.S. 1-52(2) because they were not brought within three years of imposition/payment of the last fee. *See Supreme Court Press Summary of this case at https://appellate.nccourts.org/opinions/ .*

Foreclosure; setting aside under Rule 60 due to inadequate notice; relief limited to restitution

In re Ackah, _ **N.C.** _, 811 S.E.2d 143 (April 6, 2018). Affirming *per curiam* the opinion of the Court of Appeals.

> Earlier summary of Court of Appeals Opinion:
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> *In re: Ackah* (COA16-829; Sept. 5, 2017) (with dissent). Homeowners' association (HOA) foreclosed on real property under GS Chapter 47F. After the foreclosure sale, the homeowner filed a motion to set aside the foreclosure order due to insufficient notice. The superior court entered an order setting aside the foreclosure and restoring title to the homeowner. The clerk then entered an order returning possession of the property to the homeowner. The high bidder at the foreclosure sale appealed. On appeal, the NC Court of Appeals affirmed in part and reversed in part. The court held the superior court had the authority to set aside the sale under Rule 60 of the NC Rules of Civil Procedure. The court affirmed the trial court's finding that the HOA failed to use due diligence before relying on posting to notify the homeowner of the proceeding as required under Rule 4 of the Rules of Civil Procedure. Although the HOA attempted service by certified mail, which was unclaimed, and regular mail, the HOA had the homeowner's email address and failed to email her notice and thus failed to meet the standard of due diligence under Rule 4. However, the relief ordered by the court, that the homeowner was entitled to a return of the property, was improper. The homeowner was limited under GS 1-108 to restitution from the HOA because the property had been conveyed to a good faith purchaser for value. The inadequacies of notice, although improper under Rule 4, did not violate constitutional due process and therefore the homeowner was not entitled to the return of the property.
>
> DISSENT: The dissent would have found that the trial court had the authority to set aside the sale under Rule 60 and to restore title to the homeowner as a result of the order to set aside the sale. The dissent would have found that GS 1-108 affords the trial court discretion to affect title to the property if the trial court deems it necessary in the interest of justice despite a conveyance to a good faith purchaser. [Summary by Meredith Smith, SOG faculty member]

Condemnation; valuation testimony by real estate broker; G.S. 93A-83(f)

NCDOT v. Mission Battleground Park, _ **N.C.** _, 810 S.E.2d 217 (Mar. 2, 2018). Reversing the Court of Appeals and holding that G.S. 93A-83(f)—which prohibits real estate brokers from preparing appraisals that estimate the value of a property—does not extend to preventing a broker from giving expert testimony as to the property's value at trial if that testimony meets the standard for admissibility under Rule of Evidence 702. *See Supreme Court Press Summary of this case at https://appellate.nccourts.org/opinions/.*

Earlier summary of Court of Appeals opinion:

NCDOT v. Mission Battleground Park (COA16-125; Sept. 6, 2016). A landowner appealed a jury determination of its compensation for a DOT condemnation, arguing that several rulings by the trial judge entitled it to a new trial. Finding no error, the Court of Appeals affirmed, stating that (1) pursuant to GS 93-83, the judge properly excluded testimony by a real estate broker that could be construed as a valuation appraisal; (2) the judge was not required to conduct *voir dire* of excluded testimony where the record showed the judge had ample opportunity to review the evidence in question prior to ruling; (3) the judge did not abuse his discretion in excluding a sound demonstration after conducting a balancing test under Rule of Evidence 403; and (4) the trial judge did not abuse his discretion in denying a motion for new trial after reviewing evidence of a juror's prior knowledge of DOT's construction plans and concluding it would not have prejudiced the jury's decision; and (5) the trial court properly instructed the jury about the effect on damages of DOT's acquisition of adjoining lands.

Inverse condemnation; public vs. private use; G.S. 40A-51

Wilkie v. City of Boiling Spring Lakes, _ **N.C.** _, 809 S.E.2d 853 (March 2, 2018). Reversing the Court of Appeals, the Supreme Court held that a property owner bringing an inverse condemnation action under G.S. 40A-51 against a municipality did not have to demonstrate that the property was being taken for a public—rather than private—use. *See Supreme Court Press Summary of this case at https://appellate.nccourts.org/opinions/.*

Earlier summary of Court of Appeals opinion:

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 Aly Chen, SOG research attorney]

Contractual claims under GS 45-21.34 to enjoin foreclosure; 12(b)(6) dismissal

McDonald v. The Bank of New York Mellon Trust Co. (COA17-1310; May 15, 2018). Plaintiff filed a claim under G.S. 45-21.34 to enjoin the foreclosure sale of her home. In the complaint she alleged that the bank had breached the loan agreement (a loan modification), breached the duty of good faith and fair dealing, and violated the Unfair and Deceptive Trade Practices Act. The trial court dismissed her claims under Rule 12(b)(6). The Court of Appeals affirmed. Each of Plaintiff's claims was premised on the existence of a loan modification agreement. The complaint itself (through incorporated attachments) revealed that Plaintiff had failed to meet the first condition for existence of that agreement—making a time-is-of-the-essence first payment of the modified loan amount. Thus there was no agreement to which the Bank was bound.

Invalidation of zoning and CAMA approvals for home; propriety of preliminary injunction requiring county to allow construction

Letendre v. Currituck Cty, _ N.C. App. _, 817 S.E.2d 73 (May 15, 2018). After a lengthy design process, Plaintiff received approvals by Currituck County and CAMA to construct a very large home near the waterfront. Neighbors concerned about the impact of the huge structure contested the approvals, but the superior court judge affirmed. The neighbors appealed to the Court of Appeals (in a prior appeal). Despite the risk of reversal, Plaintiff proceeded to build the structure due to potential expiration of the existing permits and loss of revenue. The Court of Appeals then reversed the superior court's determination that the home complied with zoning regulations. By that time the home was over 90% complete. Plaintiff then brought the current action raising various theories regarding her entitlement to construct the home and seeking a preliminary injunction requiring the County to allow construction to be completed. The superior court granted the preliminary injunction. In this lengthy opinion, the Court of Appeals reverses the grant of a preliminary injunction, determining that, for purposes of injunctive relief, Plaintiff has not shown a likelihood of success on the merits of any of her eight claims.

Agritourism exemption from zoning requirements

Jeffries v. Harnett County (COA17-729; May 15, 2018). This lengthy opinion involves a complicated years-long series of local board decisions, followed by certiorari petitions to superior court, over whether a landowner can operate several hunting and shooting activities on his land without getting zoning approvals. In the end, the Court of Appeals determines that the parties did not properly preserve their right to have certain local board decisions reviewed by the superior court. As to those properly before the court, the Court of Appeals affirmed the superior court's determination that commercial shooting activities involving continental shooting towers, 3D archery courses and ranges, sporting clay, skeet and trap ranges, rifle ranges, and pistol pits are not "agritourism" activities (even when performed on a farm) that would be shielded from countywide zoning under the statutory farm exemption.

Condominium Association's obligation to maintain flood insurance

Porter v. Beaverdam Run Condominium Assoc. (COA17-793; May 1, 2018). A group of condo owners brought this action against its Condo Association seeking a declaration that the Association is required to maintain flood insurance for the 5 (out of 66) buildings in the community that are located in a FEMA flood zone. The trial court granted summary judgment in favor of the Association. The Court of Appeals reversed in favor of the condo owners. General Statute 47C-3-113 (of the Condominium Act) requires condo associations to maintain property insurance against risks of "direct physical loss commonly insured against" "to the extent available." Because flood damage is a "direct physical loss" under this provision, and flood loss is "commonly insured against" in areas within FEMA flood zones, the Association is required to acquire flood insurance for the applicable buildings to the extent such insurance remains reasonably available.

Tacking and adverse possession; imposition of easement without notice and opportunity to be heard

Cole v. Bonaparte's Retreat Prop. Owners Assoc., Inc., (COA17-492; April 17, 2018). Mr. Earney purchased Lot 18 in the Bonaparte's Retreat Subdivision in 1981. His deed only included Lot 18, but he thought it also included a portion of the "Reserved Area" behind it, an area that connected Lot 18 to the Calabash River. Under the assumption that he owned the reserved area, he landscaped and maintained

that area and built a pier out to the water, which he prevented others from accessing. The Reserved Area was, in fact, owned by the property owners' association as common space for the 188-owner community. In 2000, Mr. Earney conveyed Lot 18 to Plaintiffs. The deed only described Lot 18, but Plaintiffs thought it included the Reserved Area as well. They, too, maintained the Reserved Area as their own—clearing trees from it and improving the pier. Then, in 2008, they decided to build a house on Lot 18 and discovered they did not in fact own the Reserved Area. After a failed process of trying to buy the Reserved Area from the property owner's association (Association), Plaintiffs filed this action in 2015 for adverse possession against the Association. The trial court found in favor of the Association. The Court of Appeals affirmed. Examining NC Supreme Court precedent dating back to the 1950s, the court determined that, under North Carolina law, a current owner (Plaintiffs) cannot tack its period of adverse possession of a property onto the adverse possession of the prior owner (Mr. Earney) if the deed to the current owner does not purport to convey the property adversely possessed. In short, "because Plaintiffs cannot tack their adverse possession of [the Reserved Area] to Mr. Earney's adverse possession, they must satisfy the twenty-year period of adverse possession alone."

The Court of Appeals reversed, however, the trial court's decision to add to the judgment an access easement in favor of the Association across Plaintiffs' Lot 18 to the Reserved Area. There was no legal basis for creation of such an easement, such relief had not been sought in the pleadings, there was no notice or opportunity to be heard on the matter, and the order—which gave an easement across Plaintiffs' property to all 188 members of the community—worked to the Plaintiffs' "substantial prejudice."

Private condemnation; evidence of nearby property sales prices; new trial

Piedmont Natural Gas Co., Inc. v. Kinlaw (COA17-619; Mar. 20, 2018). Plaintiff, a gas company, brought a private condemnation action for an easement across Mr. Kinlaw's farmland. At trial, Mr. Kinlaw sought $730,000 as just compensation, but the jury returned a verdict of $200,000. Mr. Kinlaw moved for a new trial, which the trial judge granted. The Court of Appeals affirmed, holding: (1) it was error to allow Plaintiff to cross examine Mr. Kinlaw about the purported sales price of a nearby property when there had been no determination that the property was comparable to the property taken; Mr. Kinlaw had denied knowing the sales price; and there was a lack of foundation for questions related to handwritten notes on the other property's deed; (2) the trial court did not abuse its discretion in determining that its error created material prejudice to Mr. Kinlaw; and (3) the trial court did not err in concluding that its own curative instruction was insufficient to undo the prejudice.

Standing to challenge proposed rezoning; transfer to three-judge panel

Byron v. Synco Props, Inc. (COA17-318; Mar. 20, 2018). The Byrons brought an action challenging a rezoning approved by the City of Charlotte, including whether the City was required to comply with the pre-July 2015 laws related to protest petitions. The Court of Appeals affirmed the dismissal, holding that the Byrons had no standing to file a protest petition, and therefore had no standing to challenge whether the City had complied with the relevant protest petition laws. In addition, the Byrons had no standing to challenge the constitutionality of the rezoning, and because they lacked standing, the trial court was not required to transfer the claims to a three-judge panel pursuant to G.S. 1-267.1.

DOT condemnation action; inverse condemnation; prior pending action doctrine
Department of Transportation v. Stimpson (COA17-596; Mar. 20, 2018). Mr. Stimpson's (Defendant's) property was one of the many "Map Act" properties included in the Corridor Map the DOT recorded in Forsyth County in 2008 pursuant to its condemnation authority. In May 2016, Mr. Stimpson filed an inverse condemnation action under G.S. 136-111 requesting that DOT be compelled to proceed with purchasing the property. In December 2016, DOT then filed the present direct condemnation action under G.S. 136-103 with respect to the same property. The trial court dismissed the DOT's action. The Court of Appeals affirmed, holding that the prior pending action (abatement) doctrine prevented the DOT from filing a direct condemnation action when Mr. Stimpson's existing action for inverse condemnation would address the same legal issues.

Easement implied by prior use
Lester v. Galambos, _ N.C. App. _, 811 S.E.2d 661 (Feb. 20, 2018). In this action, Plaintiffs, owners of Tract 6 in a residential development, sought a declaration that Defendant, owner of the adjacent Tract 1A, had no easement over Tract 6 that would allow Defendant to use Tract 6's driveway for access to Tract 1A. The trial court determined that there was an easement implied by prior use and ruled in favor of Defendant. The Court of Appeals reversed, holding that the evidence was insufficient as a matter of law to establish the second element of such an easement – that there had been apparent, continuous, and permanent use (by a prior common owner) of Tract 6 for the benefit of Tract 1A. The common prior owner's affidavit merely established that when he owned both properties he drove over Tract 6 for a period of about two years (too short a time to establish an implied easement). The affidavit also failed to establish how that use benefited Tract 1A or how such use would be obvious (or visible or apparent) to third parties. Remanded for consideration by the trial court of the remaining claim—easement by grant.

Declaratory judgment challenging a rezoning; standing; special harm to neighboring owner
The Cherry Cmty. Org. v. The City of Charlotte, _ N.C. App. _, 809 S.E.2d 397 (Feb. 6, 2018). A neighborhood organization brought a declaratory judgment action against Charlotte and a rezoning applicant ("Applicant") challenging the procedure by which the City approved Applicant's petition to rezone a set of adjacent parcels for a mixed-use development. The trial court dismissed the action, and the Court of Appeals affirmed, holding that, although the plaintiff was the owner of an adjacent property, it had not put forth evidence that it would suffer special harm distinct from the harm that might be suffered by the public at large. For that reason, plaintiff did not have standing to challenge the rezoning through the mechanism of a declaratory judgment action.

Adverse possession under color of title; adverse possession under 20 years continuous use; lappage
Parker v. Desherbinin, _ N.C. App. _, 810 S.E.2d 682 (Jan. 2, 2018). Plaintiff, Mr. Parker, brought a declaratory judgment action regarding his claim to a portion of land (the "Disputed Area") on the boundary line between his and his neighbor's property. After a bench trial, the judge found in the neighbors' favor on all claims. The Court of Appeals reversed in part and remanded, holding that (1) Mr. Parker had established through undisputed evidence that he had acquired title to the south portion of the Disputed Area through more than 20 years of adverse possession (starting with the construction of a

fence in the mid-1980s); (2) as to adverse possession under color of title (7 years), further findings of fact would be required to determine whether the 1983 deed and survey under which Mr. Parker acquired his property sufficiently describe the property; and (3) further findings of fact would be necessary to determine the questions of lappage and negligence.

Petition for writ of certiorari to review quasi-judicial special use permit decision; naming the wrong party; necessary party; relation back of amendment

Azar v. Town of Indian Trail, _ N.C. App. _, 809 S.E.2d 17 (Dec. 19, 2017). After a property owner's request to renew a special use permit was denied by the Board of Adjustment, he filed a petition for judicial review with the superior court. Instead of naming the Town, however, he named the Board of Adjustment itself. He amended the petition to name the Town well after the 30-day filing period under G.S. 160A-393(e). The trial court dismissed his Petition, and the Court of Appeals affirmed, holding that he had failed to name a necessary party and that his amendment of the petition to properly name the Town did not relate back to the initial filing date, rendering it untimely.

Special use permit for quarry; prima facie case for entitlement

Little River, LLC v. Lee Cty, _ N.C. App. _, 809 S.E.2d 42 (Dec. 19, 2017). Where the applicant for a special use permit to build a quarry (a permitted use in the district) presented ample evidence to make a prima facie showing of entitlement, the town board of adjustment erred in denying the permit, and the superior court erred in affirming the town's denial. The findings of fact upon which the council denied the permit were not based on competent, material, or substantial evidence presented by the respondent-intervenors. Reversed and remanded for issuance of permit.

Special use permit for solar array; prima facie case for entitlement; rebuttal evidence

Ecoplexus Inc. v. Currituck Cty, Bd. of Comm'rs, _ N.C. App. _, 809 S.E.2d 148 (Dec. 19, 2017). Where the applicant for a special use permit to build a solar array (a permitted use in the district) presented ample evidence to make a prima facie showing of entitlement, the town council erred in denying the permit, and the superior court erred in affirming the town's denial. The findings of fact upon which the council denied the permit were not based on competent, material, or substantial evidence in the record, but instead only on "generalized lay concerns, speculation, and "mere expression of opinion." Reversed and remanded for issuance of permit.

Bond and fines imposed by planned community association; Planned Community Act

McVicker v. Bogue Sound Yacht Club, Inc., _ N.C. App. _, 809 S.E.2d 136 (Dec. 19, 2017) (with dissent). Plaintiffs, members of a planned community, hired landscapers to remove some trees and clear the overgrowth from their lot. They did not realize they were required to obtain architectural review approval from their planned community association (Association). When the Association saw the work in progress, they instructed Plaintiffs to file the approval application and submit a $250 bond. Plaintiffs submitted the application but not the bond, arguing that the Association had no authority to require it, either as part of the covenants or pursuant to the Planned Community Act. The Association proceeded to assess a fine of $100 per day the bond was not paid, which in the end amounted to a $1400 fine before the Plaintiffs finally paid the bond under protest. Plaintiffs filed a claim for declaratory relief. The trial court granted summary judgment in the Association's favor. The Court of Appeals majority

reversed, holding that (1) the issue of whether the bond was authorized did not become moot upon the Association's return of the bond amount to Plaintiffs; (2) under these circumstances, neither the applicable Covenants nor the Planned Community Act authorized a bond and the attendant fines.

Standing for an adjacent landowner's challenge to rezoning

Ring v. Moore Cty, _ N.C. App. _, 809 S.E.2d 11 (Dec. 19, 2017). Where plaintiffs failed to allege an actual or imminent injury to their property from a rezoning decision, the trial court's order dismissing their claims for lack of standing was affirmed. Plaintiffs, who own land adjacent to the tract subject to the rezoning, cited to Taylor v. City of Raleigh, 290 N.C. 608 (1976) and Morgan v. Nash Cty., 224 N.C. App. 60 (2012) for support. The Court of Appeals noted that *Taylor* set forth a two-part analysis for determining whether standing exists to challenge rezoning under the Declaratory Judgment Act, which includes showing (1) "a specific personal and legal interest in the subject matter affected by the zoning ordinance," and (2) that the challenger is "directly and adversely affected thereby." The *Morgan* case also utilized the test for standing pronounced in Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). In the instant case, the Court of Appeals determined that proximity of plaintiffs' land to the rezoned tract, while relevant, was insufficient by itself to meet the required tests, and that plaintiffs' alleged potential injuries to their land were mere conjecture. Nor did plaintiffs allege that the zoning ordinance would directly limit the use of their land, distinguishing this situation from that in Thrash Limited Partnership v. County of Buncombe, 195 N.C. App. 727 (2010), also relied upon by plaintiffs for support. [Summary by Aly Chen, SOG research attorney]

Easement over private road; whether municipal restrictions voided easement

Mid-America Apts, L.C. v. Block at Church Street, _ N.C. App. _, 809 S.E.2d 22 (Dec. 19, 2017). The owner of a building (Mid-America) was the beneficiary of an easement granted by the owner of the adjacent private street (Lincoln Street). The easement gave Mid-America a "perpetual easement…over, upon, and across Lincoln Street, for the purposes of providing pedestrian and vehicular access [and] ingress and egress[.]," which included access by service and delivery vehicles. When Lincoln Street's owner later attempted to block off and restripe the easement area to prevent Mid-America's access, Mid-America filed an action seeking injunctive relief. The trial court eventually granted the relief, including a permanent injunction to prevent interference with Mid-America's easement. The Court of Appeals affirmed, holding that (1) the easement was not void even though the City's fire code restricted some of the activities specifically allowed by the easement – "We decline to hold that the Fire Code prohibiting parking in fire lanes invalidates the Easement because it is specific conduct allowed by the Easement, rather than the granting of rights by the Easement, that violates the law. This is the distinction between an illegal contract and an impossible contract."; and (2) the trial court's permanent injunction was appropriate equitable relief under the circumstances.

Zoning notice of violation; scope of superior court review; bona fide farm exemption

Hampton v. Cumberland Cty. _ N.C. App. _, 808 S.E.2d 763 (Dec. 5, 2017) (with dissent). This lengthy opinion revolves around whether a County Board properly upheld a Notice of Violations (zoning) against landowners for operating a firing range on their property. The superior court reversed the Notice of Violations, but in this opinion the Court of Appeals reverses and remands that decision. The court

(majority) determined that the County Board did not make adequate findings of fact as to the uses to which the owners were subjecting the property, and without those findings the Board could not properly make the relevant legal determinations. And the superior court, in its role as a reviewing court, was not authorized to make those relevant findings of fact. Thus the Court of Appeals remanded the case for further remand to the Board to make the necessary findings. In addition, as part of the larger discussion, the Court of Appeals determined that the landowners' possession of a federal Farm Identification Number did not alone compel a conclusion that their use of the land was exempt from zoning regulations.

Rezoning; relocation of improvements on approved site plan; statement of consistency; spot zoning
McDowell v. Randolph Cty., _ N.C. App. _, 808 S.E.2d 513 (Dec. 5, 2017). The Randolph County commissioners approved a modification to a lumber company's site plan to allow the company to relocate a chemical vat to a different location on the property. Plaintiffs, neighboring property owners, sued, alleging that the modification was an illegal zoning change. The superior court granted summary judgment in the County's favor, and the Court of Appeals affirmed. The court determined that (1) the record showed several possible rational bases for permitting the modification, thus the amendment was not arbitrary and capricious; (2) the Statement of Consistency made by the Board in its minutes went beyond merely reciting the statutory language and therefore satisfied the requirements of G.S. 153A-341; and (3) because the modification "was merely a review and approval of the modification to the previously approved site plan" and was not a "reclassification" of the property, it did not constitute "spot zoning."

Interlocutory appeal; sovereign immunity; inverse condemnation
Beroth Oil Co. v. N.C. Dep't of Transp., _ N.C. App. _, 808 S.E.2d 488 (Nov. 21, 2017) (with dissent)**.** The Court of Appeals dismissed as interlocutory an appeal by the N.C. Department of Transportation (DOT) of an order that addressed three issues in an inverse condemnation action which has previously made its way through the appellate courts before being remanded back to the trial court. In this appeal, DOT asserts two substantial rights that would not be fully protected by appellate review after final judgment: (1) any orders affecting title or area taken are immediately appealable, since "vital preliminary issues" are involved; and (2) DOT's assertion of sovereign immunity as a defense creates a substantial right. The Court held that a substantial right accrues only to those who hold an interest in the subject property of the eminent domain proceeding, and here, DOT could not show it had a substantial right where it had not yet filed a map or plat pursuant to Article 9 of Chapter 136 identifying the properties subject to eminent domain proceedings and condemnation. Regarding sovereign immunity, the Court noted that the mere assertion of this defense is insufficient in and of itself to establish that a substantial right exists to justify appellate review of an interlocutory order. Since landowners have been granted certain rights by statute when the State exercises its eminent domain power, the State has implicitly waived immunity in these types of cases. Although DOT disputes the litigants' right to just compensation, and that any taking at all has occurred, it previously admitted it had recorded a highway corridor map and that its action had placed restrictions on affected owners' fundamental property rights. It was these actions which triggered statutory rights for landowners to pursue, in the form of seeking just compensation. Since the landowners are utilizing the statutory framework for just compensation contained in G.S. 136-

111, as well as the general constitutional framework of takings, sovereign immunity is no bar to their suit against DOT. Finally, DOT's argument that immediate appellate review is necessary to prevent irreparable financial harm if it were forced to pay deposits to the court for the takings, such consideration should have taken place prior to the filing of the highway corridor map.
A dissenting opinion agreed that DOT had factually admitted to a taking in its pleadings and therefore must comply with the trial court's order, but disagreed with the majority that the appeal should be dismissed. The dissenting judge would have considered the merits of the appeal and found in favor of the landowners. [Summary by Aly Chen, SOG research attorney]

Attorney fees incurred on appeal; law of the case doctrine

Ocracomax, LLC v. Davis, _ N.C. App. _, 808 S.E.2d 573 (Nov. 21, 2017). Plaintiffs prevailed at the trial court and on appeal of the underlying action in this case (prior summary included below). The trial court thereafter entered an award that taxed Plaintiffs' costs and attorney fees to the Davis Defendants alone, and not against the HOA Defendants. The award included costs and fees incurred at both the trial and appellate phases. The Davis Defendants appealed the costs award. The Court of Appeals affirmed, concluding that: (1) The trial court's initial judgment noting that "costs are awarded to the defendants" was not "law of the case" as to the subsequent, more specific costs order and did not require the trial court to allocate costs between the Davis and HOA Defendants; and (2) Although G.S. 47C-4-117, the fee statute, does not include specific language authorizing an award of fees incurred on appeal, it is a non-remedial attorney fee statute and thus can be broadly construed to allow a fee award for all stages of litigation.

> Earlier summary of underlying action and prior appeal:
>
> **Enforcement of property right in parking space; laches; quasi-estoppel; statute of limitations for incorporeal hereditament**
>
> *Ocracomax, LLC v. Davis*, 788 S.E.2d 664 (N.C. App. Aug. 2, 2016). A condo owner sued his neighbor because the neighbor's maintenance of a shed on the adjacent space interfered with Plaintiff's right to a full parking space. The trial court granted Plaintiff's motion for judgment on the pleadings declaring Plaintiff's right to the full parking space. The Court of Appeals affirmed, holding that Plaintiff did not waive his right to enforce his property right by not asserting it as soon as he knew of the shed; was not barred by a doctrine of quasi-estoppel because he did not receive a benefit under the purchase agreement for the property; had standing to bring the action by the terms of the bylaws; was not barred by the doctrine of laches because Defendant had suffered no prejudice; and brought his action within the applicable 6-year statute of limitations (GS 1-50(a)(3)) by filing suit less than six years prior to his purchase of the property.

Restrictive covenants; setback from "street"

Buysse v. Jones, _ N.C. App. _, 808 S.E.2d 334 (Nov. 21, 2017). Homeowners in the historic Gimghoul neighborhood of Chapel Hill sued their neighbors, the Joneses, for specific performance after concluding that the Joneses' new front porch violated a 40' setback that had been included in the covenants. After a bench trial, the court entered judgment in favor of the plaintiffs. The Court of Appeals reversed, concluding that revisions and attempted revisions to the original covenants over the years to clarify the meaning of "street" did not alter the validity of the original covenant language, which placed the

setback from the “northern boundary line of Gimghoul Road.” Because the Joneses’ porch did not extend into that particular 40’ line, it did not violate the covenants, and the Joneses were entitled to judgment in their favor.

Wills, Estates, and Trusts

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

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

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

Will caveat; elements of a holographic will

Matter of the Will of Hendrix (COA17-281; May 15, 2018). Caveators challenged certain provisions of decedent's 2011 will, alleging that these provisions were amended by a later handwritten—"holographic"—will. The document in question was a copy of the original will labeled "Update Nov. 13, 2012" and containing various handwritten markings and notations in portions of the text. The trial court dismissed the caveat under Rule 12(b)(6) after determining that the document did not meet the legal requirements for a holographic will. The Court of Appeals affirmed, holding that the handwritten portions of the document did not create adequate meaning without being read in conjunction with the existing typewritten words. Under established precedent, it could not, therefore, be considered a valid holographic will, and there was no basis upon which a jury could find in favor of the caveators.

Right of elective share in light of waiver of certain rights in premarital agreement

In re Estate of Sharpe (COA17-1151; April 3, 2018). Mr. Sharpe married Ms. Seward when they were 86 and 75 years old, respectively. Having both had families and accumulated separate estates through the course of their lives, they executed a premarital agreement waiving claims to their separate assets. They were married from 2009 until Mr. Sharpe's death in 2016. Ms. Seward's attorney then filed a petition for an elective share of Mr. Sharpe's estate under G.S. 30-3.1. The Clerk of Superior Court granted the petition over Mr. Sharpe's executor's objection, and the executor appealed to superior court. The superior court judge reversed, finding that in the terms of the couple's premarital agreement, each party clearly agreed to make no claim to the assets of the other. Among other terms, the agreement stated that each party "specifically waives, relinquishes, renounces, and gives up any claim that he or she may have…to the other's separate property under the laws of this state." The Court of Appeals affirmed, holding that this and other language in the agreement "plainly establishes

the parties[‘] intention, prior to their marriage,” to waive any rights to their separate property. Thus the trial court properly reversed the clerk’s award of an elective share to Ms. Seward.

Devisee under a will

Jacobs v. Brewington, _ N.C. App. _, 811 S.E.2d 238 (March 20, 2018). Decedent died leaving a holographic will. The will provided, in part, that all insurance proceeds shall go to a trust account after paying a note at BB&T in the name of the decedent’s sister. Sister filed a claim with the estate requesting payment of the BB&T loan, which the executrixes of the estate rejected. Sister then filed a complaint to recover the sum required to pay off the BB&T loan and requested the trial court compel payment from the executrixes of the estate. Executrixes filed an answer alleging that plaintiff was a creditor of the estate and not a devisee. The trial court held that the will made an “indirect devise” to the sister by directing the decedent’s funds be used to pay a debt owed by sister to a third party. It did not constitute a claim against the estate subject to the time limitations on claims. The trial court entered an order for the executrixes to pay the amount of the loan with interest. The executrixes appealed. The NC Court of Appeals affirmed the trial court’s conclusion that the sister was not a creditor, in part, due to the fact that the executrixes filed an affidavit of notice to creditors (AOC E-307) in the estate stating the estate had no creditors. Thus, the court concluded that the direction in the will to pay BB&T was a devise and not a claim subject to any statute of limitations applicable to creditors. [Summary by SOG Asst. Prof. Meredith Smith]

Attorney fees incident to removal of a trustee of a Chapter 36C trust

In re Trust of Hoffman (COA17-972; Mar. 6, 2018). A co-trustee of a trust filed a petition with the clerk of court to remove her fellow trustee on grounds that his behavior caused waste and damage to the real property that was the subject of the trust. After the clerk ordered the respondent trustee’s removal, she also partially granted petitioner’s motion for attorney fees related to bringing the removal petition, finding that respondent’s behavior was “egregious and obstructionist, jeopardizing the health of the [trust].” The superior court affirmed the attorney fee award. The Court of Appeals further affirmed, concluding that (1) the clerk had authority to award attorney fees pursuant to G.S. 36-10-1004 and G.S. 6-21(2), and that the clerk was not limited to awarding fees only in cases of egregious behavior, such as bad faith or fraud; and (2) even if the clerk’s authority had been so limited, the record supported the clerk’s conclusion that respondent’s behavior in this case was in fact egregious.

Intestate succession and parent’s willful abandonment of child

Shearin v. Reid, _ N.C. App. _, 812 S.E.2d 321 (Feb. 20, 2018). Plaintiff mother filed an action for declaratory judgment to establish that her deceased daughter’s father had willfully abandoned his duty to support his daughter and thus lost all rights to inherit or recover any wrongful death proceeds after her death pursuant to G.S. 31A-2. Prior to trial, plaintiff filed a motion to recuse the judge due to bias; the motion was denied. Defendant father filed three motions in limine to exclude: (1) any mention of potential wrongful death proceeds; (2) expert testimony regarding the average cost of raising a child during the time period in question; and (3) the phrase “adequate maintenance” as it related to child support payments, as well as the phrase “deadbeat dad.” The trial court granted the second and third motions; after initially reserving judgment on the first motion, the court ultimately granted it during

trial. After the jury found that defendant father did willfully abandon his daughter but that he had resumed care and maintenance at least one year prior to his daughter's death, the trial court entered judgment that defendant father possessed the right to inherit from his daughter's estate. Plaintiff filed a motion for a new trial pursuant to Rule 59, as well as a renewed motion to recuse the trial judge, both of which were denied. Plaintiff appealed. On appeal, the Court of Appeals first noted that plaintiff only appealed from the court's order denying the post-trial motions, and not from the underlying judgment, and review was therefore limited to the post-trial order. The standard of review for a motion for a new trial is whether the trial court committed a manifest abuse of discretion. Regarding the motion to recuse the trial judge, the Court of Appeals determined that plaintiff failed to meet her burden of showing substantial evidence of grounds for disqualification. Although plaintiff argued that the judge displayed hostility toward her attorney, the Court noted that a strained relationship between a trial judge and an attorney is not sufficient, by itself, to require recusal. Nor was the involvement of opposing counsel with a committee that worked on the judge's re-election campaign. Regarding the motions in limine, plaintiff argued first that the exclusion of any reference to wrongful death proceeds prevented her from claiming that greed was defendant father's primary motivation for attempting to share in the daughter's estate. However, since plaintiff's counsel did raise greed as a factor in the closing argument, even if the exclusion was erroneous, no prejudice resulted from it. The Court of Appeals agreed with defendant father that exclusion of expert testimony regarding the cost of raising a child did not constitute error, and that such testimony would have confused or misled the jury. Under G.S. 31A-2, the ultimate issue was whether defendant father abandoned his daughter, not whether his child support payments were "adequate," as plaintiff argued. The Court relied on past cases which establish that a parent does not need to exceed support mandated in a court order to meet his or her duty of support. The Court deemed the issue regarding the third motion in limine abandoned for plaintiff's failure to articulate a specific argument, other than she found the trial court's reasoning "difficult" to understand. Finally, the Court considered plaintiff's argument that the trial court erred in refusing to give the alternative jury instructions she requested. The Court determined the instruction that was given was "virtually identical" to the one requested, except for some additional language plaintiff wanted. Since the jury was properly informed of the substance of G.S. 31A-2, the trial court did not abuse its discretion in refusing to give the requested instruction. Plaintiff also wanted an instruction to treat as "conclusive" an older order that found defendant father had the ability to pay his child support. Since defendant father did not attempt to re-litigate the issues from that earlier order, and the jury had the entire child support file to review and heard evidence directly from defendant father, the trial court did not err in refusing this second request. The Court of Appeals affirmed the trial court's order denying Rule 59 relief. [Summary by Meredith Smith, SOG Asst. Prof]

Administrative Reviews and Regulatory Matters

Exhaustion of administrative remedies prior to judicial review; subject matter jurisdiction; grievance against DHHS

Abrons Family Practice and Urgent Care, PA v. NC Dep't of Health and Human Services, _ **N.C.** _, 810 S.E.2d 224 (March 2, 2018). Reversing the Court of Appeals and holding that the trial court properly dismissed a class action by medical providers against DHHS for lack of subject matter jurisdiction because the providers had failed to first exhaust their administrative remedies in accordance with the Administrative Procedures Act. *See Supreme Court Press Summary of this case at https://appellate.nccourts.org/opinions/.*

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

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

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

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

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

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

Winkler v. North Carolina State Board of Plumbing, Heating, & Fire Sprinkler Contractors (COA17-873; Aug. 21, 2018). After a series of tragic events related to defective ventilation, an HVAC inspector who had worked on the system was disciplined by Defendant licensing board (Board). As to a portion of the Board's decision, Winkler appealed to Superior Court, arguing that the Board exceeded its authority. He prevailed on that question and later sought his attorney fees pursuant to G.S. 6-19.1, which allows

shifting of fees in certain actions by or against the State. The trial court granted him over $29,000 pursuant to that statute. The Court of Appeals reversed, holding after extensive analysis of its plain language and legislative history that the statute excludes "disciplinary action by a licensing board."

Judicial review of ALJ decision regarding termination from University; direct appeal to appellate division

Swauger v. Univ. of NC at Charlotte. (COA17-1303; May 15, 2018). After dismissal from his position as a mechanic at UNC Charlotte, petitioner filed a petition for a contested case hearing through the Office of Administrative Hearings. The ALJ issued a Final Decision that the University had cause to dismiss him. He then filed a petition for judicial review in superior court pursuant to Chapter 150B. The trial court dismissed the petition for lack of subject matter jurisdiction. The Court of Appeals affirmed, holding that the superior court lacked jurisdiction and that petitioner had an adequate procedure for judicial review through direct appeal to the Court of Appeals as provided in 7A-29(a) and 126-34.02(a).

NC DEQ power to enforce solid waste regulations after issuance of permit; application of estoppel

N.C. Department of Environmental Quality v. TRK Development, LLC (COA17-882; May 15, 2018). A property owner, Defendant, obtained an erosion and sedimentation control permit from the N.C. DEQ to make a structural addition to a warehouse. After construction began, large quantities of trash were discovered under the soil surface. DEQ was notified that Defendant was moving this waste (some toxic) to an adjacent parcel that Defendant also owned, eventually covering an area of 1.7 acres twenty to thirty feet in height. DEQ then issued a notice of violation to Defendant for operating a solid waste disposal site/open dump in violation of several administrative code regulations. After multiple attempts to obtain compliance from Defendant and multiple notices of violation, DEQ assessed Defendant an administrative penalty. Defendant filed a contested case petition with the OAH and obtained a ruling that Defendant was indeed a solid waste generator subject to the Solid Waste Management Act, but that because DEQ had previously issued erosion and sedimentation control permits to Defendant, it was estopped from enforcing the solid waste provisions. On judicial review, the trial court affirmed.

The Court of Appeals reversed, rejecting the argument that equitable estoppel applied to prevent a state agency from properly exercising its governmental powers to enforce regulations. The court also rejected the estoppel doctrine as applied to these facts, finding (among other things) that the erosion and sedimentation control permit did not address issues related to solid waste disposal.

Review of administrative decision; proper application of Rules of Civil Procedure 56 and 41(b)

Environmentalee v. NC Dep't of Environment and Natural Resources (COA17-907; April 3, 2018). This case involves permits related to coal ash and structural fill. It has a complicated procedural background and a discussion of the trial court's error in not applying the proper standard of review of an administrative final decision. In the end, though, the Court of Appeals remands the case all the way back to the OAH for rehearing because the ALJ erred in *sua sponte* converting a summary judgment hearing into one for involuntary dismissal under Rule 41(b) (a quite different matter) without affording the parties the proper notice and opportunity to be heard.

Petition for judicial review of termination; stating exceptions; proper service; applicability of APA

Butler v. Scotland Cty Bd. of Educ., _ N.C. App. _, 811 S.E.2d 185 (Feb. 6, 2018). After a career teacher

was terminated from his employment by Scotland County Schools, he filed a petition for judicial review to superior court under G.S. Chapter 115C-325.8. The trial court dismissed the petition for his failure to include certain information in the petition and for failure to properly serve the petition on the school board. The Court of Appeals affirmed, holding that although G.S. 115C-325.8 did not address the contents of a petition or the manner of service, that "gap" was properly filled by the provisions of the Administrative Procedure Act, specifically G.S. 150B-46. Because this statute requires a petitioner to state specific exceptions to the underlying decision and to serve the petition on the relevant board within 10 days, and the teacher failed to do either of these things, his petition was properly dismissed.

Public Records Act

North Carolina Public Records Act; FERPA; university sexual assault records; pre-emption
DTH Media Corp. v. Folt (COA17-871; April 17, 2018). Various media organizations brought an action under the NC Public Records Act seeking certain records from the University of North Carolina. Plaintiffs sought the names of students since 2007 who had been found responsible for rape, sexual assault, or lesser sexual misconduct offense by the Honor Court, Committee on Student Conduct, or the Equal Opportunity and Compliance Office, the dates and nature of the offenses, and the sanctions imposed. The Court of Appeals concluded that the University was required to comply with the public records request (except for the dates of the offenses), that such disclosure was not prohibited or left to the University's discretion by the non-disclosure provisions of the Family Educational Rights and Privacy Act (FERPA), and the FERPA's provisions did not pre-empt the relevant requirements of the NC Public Records Act.

Order compelling production under Public Records Act; requirement of mediation; subject matter jurisdiction
Tillett v. Town of Kill Devil Hills, _ N.C. App. _, 809 S.E.2d 145 (Dec. 19, 2017). The trial court entered an order compelling the Town to produce documents pursuant to Plaintiff's public records request. The Court of Appeals vacated the order for lack of subject matter jurisdiction. The court held that G.S. 132.9(a) provides that the superior court cannot enter such an order unless a plaintiff has first initiated mediation within 30 days of the responsive pleadings, as required by G.S. 7A-38.3E.

Interlocutory appeal dismissals (selected)

Interlocutory appeal; denial of preliminary injunction regarding a towing ordinance
Savage Towing Inc. v. Town of Cary (COA17-1228; April 17, 2018). Towing company challenged the Town's ordinance placing certain requirements on non-consensual towing of vehicles. The trial court denied the company's motion for a preliminary injunction, and the company appealed. In this order, the Court of Appeals dismisses the appeal for failure to establish deprivation of a substantial right.

Interlocutory appeal; G.S. 1-260 and trial court order declaring that all necessary parties be joined
Regency Lake Owner's Association, Inc. v. Regency Lake, LLC (COA17-1117; April 3, 2018). A dispute arose between Plaintiffs and Defendant about whether Defendant had a right to subdivide and alter the

lot that comprised the subdivision's communal lake Access Area. The matter was being heard as a bench trial, but before he reached a decision, the trial judge determined that not all necessary parties to the action had been joined and that the matter could not proceed until they had been. Plaintiffs appealed and the Court of Appeals dismissed the appeal. The court concluded that the trial court was correct to conclude that, under GS 1-260, the remaining property owners in the subdivision—each of whom had an interest in any declaration as to their rights in the Access Area—should be joined. The Plaintiffs had not demonstrated any substantial right in having a trial without the participation of these necessary parties and thus had no right to immediate appeal. In addition, because the trial court's order was not a "new trial" order, there was not right of immediate appeal under G.S. 7A-27(b)(3).