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

October 20, 2015−June 10, 2016

Ann M. Anderson
with Christopher Tyner

UNC School of Government

CIVIL PROCEDURE, JUDICIAL AUTHORITY, and JURISDICTION	1
CONTRACTS	12
TORTS	17
CONSTITUTIONAL CHALLENGES	25
APPELLATE PROCEDURE and APPELLATE JURISDICTION	27
ADMINISTRATIVE APPEALS and EMPLOYMENT	29
REAL PROPERTY, ZONING, LAND USE, and CONDEMNATION	32
FORECLOSURES	38
WILLS, ESTATES, and TRUSTS	40
CORPORATIONS	41
SCHOOLS	42

CIVIL PROCEDURE, JUDICIAL AUTHORITY, and JURISDICTION

Attempted retroactive certification of prior interlocutory order for immediate review

Branch Banking & Trust Co. v. Peacock Farm, Inc., 780 S.E.2d 553 (**N.C.** Dec. 18, 2015). In a case involving N.C. R. CIV. P. 54(b), the Supreme Court affirmed *per curiam* the majority opinion of the Court of Appeals in *Branch Banking & Trust Co. v. Peacock Farm, Inc.*, __ N.C. App. __, 772 S.E.2d 495 (2015). The Court of Appeals had dismissed an appeal of a 2012 interlocutory summary judgment order for failure to establish a substantial right or obtain a Rule 54(b) certification. Approximately eight months later, the appellant obtained a stand-alone order of the trial court purporting to certify the 2012 order for immediate appeal under N.C. R. CIV. P. 54(b). The Court of Appeals held that the trial court's later stand-alone order could not be used to certify a prior order for immediate appeal. On this issue the court stated: "Neither Rule 54(b) itself nor the cases interpreting it authorize such a retroactive attempt to certify a *prior* order for immediate appeal in this fashion. Therefore, because Rule 54(b) cannot be used to create appellate jurisdiction based on certification language that is not contained in the body of the judgment itself from which appeal is being sought, dismissal of [the] appeal is, once again, appropriate." The majority went on to disagree with the dissent's alternative suggestion that the court treat the second appeal as a petition for certiorari pursuant to Rule 21 of the Rules of Appellate procedure. On this issue, the court was of the opinion that the appeal did not present a compelling basis for such extraordinary relief given that the appellant had failed on two separate occasions to properly bring an interlocutory appeal. The court also noted that the case involved a straightforward commercial dispute that was unremarkable either factually or legally.

Appeals to the Supreme Court under G.S. 7A-27(a1) (three-judge panels)
Town of Boone v. State, 368 **N.C.** 420 (Nov. 6, 2015). The Supreme Court dismissed appeals sought pursuant to G.S. 7A-27(a1) by the State of North Carolina and the County of Watauga of certain orders entered by a panel of the Superior Court in Wake County. The plain text of G.S. 7A-27(a1) states that an appeal of right lies directly to the Supreme Court only "from [an] order or judgment of the court . . . that *holds* that an act of the General Assembly is facially" unconstitutional (emphasis added by the court). Two orders at issue did not include such a holding: An order denying the State and County's motions to dismiss did not provide the panel's rationale for denying the motions, and an order issuing a preliminary injunction concluded that the Town of Boone had "shown a likelihood of success on the merits of its case." Thus, the two orders did not meet the requirements of G.S. 7A-27(a1) for appeal to the Supreme Court. A third order declaring that a law violated the North Carolina Constitution appeared to the court to be appealable under G.S. 7A-27(a1), but consideration of the appeal was premature because, among other things, the parties had not yet settled and filed an appropriate record on appeal.

Expert not under subpoena; expert witness fees taxed against a party
Lassiter ex rel. Baize v. N. Carolina Baptist Hosps., Inc., 368 **N.C.** 367 (Nov. 6, 2015). Reversing the Court of Appeals, the Supreme Court concluded that "the enactment of [G.S.] 7A–305(d)(11) in 2007 allows for the taxing of '[r]easonable and necessary fees of expert witnesses solely for actual time spent providing testimony at trial, deposition, or other proceedings' without requiring the party seeking to obtain the taxing of such costs to demonstrate that the expert witnesses in question testified subject to a subpoena." The court overruled *Jarrell v. Charlotte-Mecklenburg Hospital Authority*, 206 N.C. App. 559 (2010) and related cases which suggested "that the subpoena requirement established in [G.S.] 7A–314 applies to expert witness fees taxed as costs pursuant to [G.S.] 7A–305(d)(11)." Thus, the trial court correctly taxed expert witness fees against the plaintiff even though the expert witnesses were not under subpoena when the defendants deposed them and incurred the fees at issue. [For a discussion of related context for this case, see the blog post from September 16, 2015, and the comments section to that post, at On the Civil Side.]

Direct criminal contempt; opportunity to respond
In the matter of Korfmann (COA15-1005; June 7, 2016). The trial judge was informed that, during a lunch break, the jury foreman had used the note-taking function of his mobile phone to type some notes and questions he had about the case (citing his lack of a pen and paper to write down his thoughts). The court declared a mistrial, summarily adjudicated the foreman in direct criminal contempt, and sentenced him to 30 days in jail, six of which he served before being released on bail. Not reaching the question of whether there was a proper basis for a criminal contempt ruling, the Court of Appeals vacated the contempt sentence on the procedural basis that the judge did not give the juror a summary opportunity to respond to the charge before imposing contempt.

Tripartite attorney-client privilege; common interest doctrine
Friday Investments, LLC v. Bally Total Fitness of the Mid-Atlantic, Inc. (COA15-680; June 7, 2016). In a lawsuit seeking unpaid rent and other lease-related related damages, the plaintiff requested discovery of various communications between Defendants, their counsel, and a third party (a non-party to the litigation). The third party, as part of an earlier asset purchase agreement, had agreed to indemnify Defendants against losses related to the leases. Defendants objected to the discovery on the basis of a

tripartite attorney-client relationship. After conducting a careful *in camera* review of the requested documents, the trial court ordered Defendants to produce them. The Court of Appeals affirmed, holding that Defendants and the third party had a common *business* interest, but not the type of common *legal* interest necessary to find that a tripartite attorney-client privilege protected their joint communications with Defendants' counsel.

Attorney discipline; Rule 11
In re Cranor (COA15-541; May 17, 2016) (with dissent). In this interesting but very fact-specific case, the trial court disciplined an attorney (the appellant) in its inherent authority and under Rule 11 and ordered her to pay substantial attorney fees to the opposing party and his attorney. The issues relate to the appellant's conduct in representing the respondent in an incompetency proceeding. The Court of Appeals reversed, with the majority holding that the record did not support the trial court's findings of fact regarding the bases for Rule 11 sanctions or sanctions imposed in its inherent authority. The dissenting judge opined in detail that, under the proper review standards for Rule 11 and disciplinary orders, the Court of Appeals should have affirmed the trial court's orders imposing discipline and awarding fees. (I will await a disposition by the Supreme Court, if there is one, to provide a more detailed summary of this case.)

Rule 60(b) authority
Pope v. Pope (COA15-1262; May 17, 2016). This case is about relief from a domestic violence protective order (DVPO) and thus is not of direct relevance to superior court practice. I note the decision, however, because it contains a general reminder that Rule 60(b) motions can be disposed of by a judge other than the judge who entered the underlying order without violating the rule prohibiting one trial judge from overruling another. (I discuss this in more detail in my recent book on post-judgment motions.) If you are interested in the substance of the decision regarding relief from the DVPO under Rule 60(b)(5), see my colleague Cheryl Howell's blog post from May 20th at On the Civil Side.

Attorney-client privilege and work product protection; presence/participation of "agent"
Berens v. Berens (COA15-230; April 19, 2016). To aid her during her divorce action, Defendant designated her friend, Ms. Adams—who also happened to be an attorney on inactive status—to be Defendant's consultant or "agent" for purposes of the litigation. Defendant and Ms. Adams entered into a confidentiality agreement specifying that Ms. Adams would not disclose or use any privileged communications or protected information for any purpose other than the litigation. Ms. Adams was thereafter present for discussions between Defendant and Defendant's counsel and other consultants/experts, and she participated in preparation of materials otherwise protected by the work-product doctrine. Plaintiff's counsel eventually issued a subpoena *duces tecum* to Ms. Adams seeking all documents and tangible things relating to Ms. Adams's communications with Defendant, with Defendant's counsel (the firm), and with any third party relating to the litigation. The trial court denied Defendant's motions to quash the subpoena after determining that privilege and work-product protection did not apply.

The Court of Appeals reversed, holding that, under the language of *State v. Murvin*, 304 N.C. 523 (1981), the presence of a third party does not destroy attorney-client privilege if the third party is a party's agent. Here, Defendant established that Ms. Adams was her agent for purposes of these communications

and for purposes of production of work product. The court remanded for determination of which specific documents were subject to protection from discovery.

One judge overruling another; summary judgment
Daughtridge v. North Carolina Zoological Society (COA15-1151; April 19, 2016). Plaintiff filed an action to quiet title to certain tracts of land. Defendant counterclaimed to quiet title. One trial judge conducted a summary judgment hearing and concluded that summary judgment was not appropriate. Later, after some additional discovery, a second trial judge conducted a lengthy pre-trial hearing. At the end of this hearing, the trial court determined that defendant was entitled to judgment as a matter of law and entered an order quieting title in defendant's favor. The Court of Appeals reversed and remanded, holding that the second judge's order was essentially a summary judgment order and therefore impermissibly overruled the first judge's summary judgment order on the same question of law.

Attorney fees under 6-21.5 for non-justiciable issue
McLennan v. Josey (COA15-533; April 19, 2016). The trial court properly determined that defendants presented no justiciable issue of law or fact in their boundary line dispute where the land records provided no basis for their arguments. Thus the trial court was authorized to grant attorney fees to plaintiff under G.S. 6-21.5. However, the trial court erred in including in that award plaintiff's attorney fees incurred in pursuing a prior appeal of this action because appeal fees are not authorized by G.S. 6-21.5. The trial court also erred to the extent it awarded fees incurred in pursuing a separately-captioned (albeit related) case because that case had not been consolidated with this action and plaintiff was not yet the "prevailing party" in that case.

Invalid out-of-state forum selection clause
SED Holding, LLC v. 3 Star Properties, LLC, 784 S.E.2d 627 (N.C. App. April 5, 2016). The trial court properly denied a motion to dismiss for lack of proper venue. The parties entered into a contract in North Carolina with a forum selection clause specifying Harris County, TX. Because the non-consumer contract in question was for sale of property rather than for a loan, the venue selection clause did not fall within an exception to G.S. 22B-3. Thus the trial court properly deemed the clause to be void and against public policy.

JNOV and written opinion pursuant to G.S. 1D-50
Hayes v. Waltz, 784 S.E.2d 607 (N.C. App. April 5, 2016). After meeting during a work trip, defendant and plaintiff's wife began a romantic relationship. Not long after that plaintiff and his wife ended their marriage. Plaintiff sued defendant for alienation of affection. After a jury found in favor of plaintiff husband, defendant appealed the trial court's denial of his JNOV motion as to liability. The Court of Appeals affirmed, finding that, although there was no direct evidence of sexual conduct in North Carolina (only in Cancun and in Indiana, a state that does not recognize this tort), there was ample evidence of other behavior that could "deprive a married person of the affections of his…spouse," such as thousands of text messages and many hours of personal phone calls. In addition, although there was evidence of other potential causes of the marital discord (such as the wife's prior affairs), the law does not require that the defendant's conduct be the *sole* cause of the alienation. Defendant also argued that the trial court should have granted relief due to plaintiff's counsel's statements in closing argument questioning the wife's ability to tell the truth. The Court of Appeals opined that the remarks were impermissible opinions

as to her credibility and thus improper, but then found that in the context of the entire closing they were not so egregious as to warrant a new trial. Nor was counsel's characterization of defendant as a "con man" enough to require relief.

Plaintiff also appealed the trial court's decision to grant JNOV in favor of defendant on the jury's punitive damages award. The Court of Appeals determined that, based on the Supreme Court's directive in *Scarborough v. Dillard's*, 363 N.C. 715 (2009), the matter must be remanded to the trial court for the court to issue a written opinion pursuant to G.S. 1D-50 stating with specificity its reasons for "disturbing" the jury's award. [For an explanation of this requirement, see Chapter 1, pp. 15-19 of Relief from Judgment in North Carolina Civil Cases.]

Medical malpractice; Rule 9(j) and *res ipsa loquitur*

Bennett v. Hospice & Palliative Care Center of Alamance-Caswell (COA15-780; March 15, 2016). Plaintiff, executrix of her mother's estate, brought a complaint *pro se* against a hospice center after her mother died in the aftermath of a fall. The trial court dismissed the complaint for failure to include a certification pursuant to Rule 9(j) (applicable to medical malpractice actions) of the Rules of Civil Procedure. The Court of Appeals affirmed the dismissal with respect to each of the nine claims relating to defendant's alleged actions prior to decedent's death. Two of the claims, however, related to actions occurring after her death: a claim for mishandling the body and a breach of contract claim for failure to provide bereavement services. Because those claims did not relate to medical malpractice, a Rule 9(j) certification was not required and dismissal on that basis was error.

Medical malpractice; Rule 9(j) dismissal

Boyd v. Rekuc (COA15-780; March 15, 2016). Plaintiff filed a medical malpractice complaint within the statute of limitations but without the certification required under Rule 9(j). He later dismissed the complaint without prejudice under Rule 41 and refiled outside the original statute of limitations but with a Rule 9(j) certification. The trial court dismissed the refiled complaint for failure to comply with Rule 9(j) prior to expiration of the underlying statute of limitations. Reaching back to the holding of *Brisson v. Santoriello*, 351 N.C. 589 (2000), the trial court concluded that the dismissal was error and that plaintiff properly refiled the action after the expiration of the statute of limitations because he filed his second action within the time allowed under Rule 41 and the new complaint asserted that the Rule 9(j) expert review occurred prior to the filing of the original complaint.

Rule 9(j) and ordinary negligence vs. medical malpractice

Estate of Baldwin v. RHA Health Services, Inc., 782 S.E.2d 554 (N.C. App. March 1, 2016). The estate of a severely disabled woman brought a negligence complaint against the company operating a long-term care facility after the woman died in the aftermath of a seizure episode. The trial court dismissed the complaint for failure to include a certification pursuant to Rule 9(j) (applicable to medical malpractice actions) of the Rules of Civil Procedure. The Court of Appeals affirmed the dismissal after determining that the allegations revolved around the woman's treatment by defendant's staff, which was at the direction or under the supervision of an on-call nurse and a physician assistant, both of whom fall within the definition of "health care providers" under G.S. 90-21.11(1)(d). Because the allegations sounded in medical malpractice, a Rule 9(j) certification was required and dismissal was proper.

Failure to preserve issue on appeal; dismissal for failure to prosecute
Don't Do It Empire, LLC v. Tenntex, 782 S.E.2d 903 (N.C. App. March 1, 2016). Plaintiff brought a complaint against several other condominium owners under Chapter 47C, the Condominium Act. After its complaint was dismissed under Rule 41(b) for failure to prosecute, plaintiff appealed, arguing that the defendants had brought their dismissal motion under Rules 12(b)(6) and (b)(7) rather than Rule 41(b). The Court of Appeals affirmed the dismissal after determining that plaintiff had received defendants' brief four days before the hearing; that the brief gave plaintiff ample notice that Rule 41(b) would be argued; that plaintiff availed himself of the opportunity to respond both at the hearing and in post-hearing submissions; and that plaintiff failed to properly object to the Rule 41(b) argument so as to preserve the issue for appeal under Rule 10 of the Rules of Appellate Procedure. In addition, the trial court did not abuse its discretion in dismissing plaintiff's complaint after finding that plaintiff had failed to comply with an earlier court order to add all necessary parties and had engaged in a series of other delays that materially prejudiced defendants.

Discovery; medical review privilege
Estate of Ray v. Forgy, 783 S.E.2d 1 (N.C. App. Feb. 16, 2016). In a medical negligence case, the trial court erred in compelling discovery by hospital defendants of certain documents. Through their affidavits and privilege logs, defendants established that the documents in question were produced and/or considered by the hospital's Medical Review Committees (MRCs) and were thus protected from discovery under the medical review privilege in G.S. 131E-95.

Voluntary dismissal under Rule 41(a); inapplicability to petitions for writs of certiorari
Henderson v. County of Onslow, 782 S.E.2d 57 (N.C. App. Feb. 2, 2016) (with dissent). After the Onslow County Board of Adjustment issued a notice of zoning violation against them, petitioners filed a petition for writ of certiorari to the superior court pursuant to G.S. 153A-345(e2). Over a year later, they voluntarily dismissed the petition, purportedly without prejudice under Rule 41(a) of the Rules of Civil Procedure. Within a year after that, they refiled their petition. The superior court dismissed the petition with prejudice after determining that Rule 41(a) did not apply to petitions for writ of certiorari. The Court of Appeals, in a majority opinion, affirmed the trial court. The court determined that a petition for writ of certiorari was not a "claim" or "action" as contemplated under Rule 41(a), and because such a petition was much more akin to an appeal than to trial court litigation, the petitioners were not claimants/plaintiffs in the sense contemplated by Rule 41(a). Thus, while the Rules of Civil Procedure *generally* apply to petitions for writ of certiorari under G.S. 153A and 160, Rule 41(a) does not itself *specifically* apply because its provisions do not pertain to that type of proceeding. In addition, the petitioners were not entitled to have their earlier dismissal deemed a "nullity" merely because they had been under the mistaken assumption that they would be able to refile under Rule 41(a).

Order compelling discovery; written findings
Maldjian v. Bloomquist, 782 S.E.2d 80 (N.C. App. Feb. 2, 2016). In the absence of a request by one or more parties, the trial court was not required to make written findings of fact and conclusions of law it its order denying in part and granting in part a motion to compel discovery of certain documents that defendants claimed were protected by work-product privilege. In addition, the existence of the language "for good cause shown" in the preamble to the trial court's decree did not negate the presumption that the

trial court applied the correct legal standard, nor did it prevent the appellate court from presuming the trial court found facts in the record to support its conclusion.

Dismissal for failure to prosecute; Rule 41(b)
Greenshields, Inc. v. Travelers Property Cas. Co. of America, 781 S.E.2d 840 (N.C. App. Jan. 19, 2016). The trial court did not err in dismissing a case for failure to prosecute as authorized under Rule of Civil Procedure 41(b). The judge found that the plaintiff had intentionally allowed his claims against an insurance company to remain in limbo for several years both in state and federal bankruptcy court, and the delays were unreasonable, deliberate, tactical, and prejudicial to defendants. Although one of the trial court's findings of fact as to failure to prosecute was unsupported by the evidence, the remaining findings of fact provided ample basis for dismissal. [For my June 8 blog post about dismissal for failure to prosecute (which mentions this case), see On the Civil Side.]

Dismissal of medical malpractice claim under Rule 9(j)
Alston (Estate of Bellamy) v. Hueske, 781 S.E.2d 305 (N.C. App. Jan. 5, 2016). An allegation that the "medical records were reviewed and evaluated by a duly Board Certified [sic] who opined that the care rendered to Decedent was below the applicable standard of care" was not sufficient to comply with Rule 9(j)'s requirement that the complaint certify that the medical records were reviewed "by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care." Because plaintiff did not comply with Rule 9(j) prior to the running of the underlying statute of limitations, the trial court properly dismissed the complaint. The trial court also correctly concluded that plaintiff could not amend the complaint under Rule 15 to comply with Rule 9(j).

Dismissal of appeal from sanction; attorney fee award as sanction; findings and conclusions in the denial of attorney fees under Chapter 75
E. Brooks Wilkins Family Med., P.A. v. Wakemed, 784 S.E.2d 178 (N.C. App. Jan. 5, 2016). A party who was not served sanctions orders within the three-day period required by Rule 58 filed and served its notice of appeal within 30 days "after service upon the party" as allowed by appellate rule 3(c)(2). Based on recent precedent, the Court of Appeals nevertheless affirmed dismissal of the appeal because plaintiff had received *actual* notice of the sanctions orders within three days after entry. The court stated that, "[I]f plaintiff had actual notice of the orders within three days of entry, but waited more than thirty days (from the date the orders were entered) before filing the notice of appeal, its notice would be untimely." For more on this important development in appellate rules practice, see my blog entry from April 6th at On the Civil Side. [Also, an interesting threshold question in this case was whether service by the court, rather than by a party, counted as "service" for purposes of the appeal deadline despite the "party" language of Rule 58. The answer was yes.]

This case also involved the timely appeal of an order allowing attorney fees as a sanction under Rule of Civil Procedure 37. The Court of Appeals affirmed, finding that the award was supported by the findings of fact and the record.

Finally, the defendant appealed the denial of its motion for attorney fees under Chapter 75, the unfair trade practices statute, which allows the court in its discretion to award a fee upon finding that "the party instituting the action knew, or should have known, the action was frivolous and malicious." The Court of Appeals affirmed the denial of fees and held, as a matter of first impression, that a trial court is

not required to make written findings of fact and conclusions of law in an order *declining* to award attorney fees.

Standing of shareholder in action
Spoor v. Barth, 781 S.E.2d 627 (N.C. App. Jan. 5, 2016). A majority shareholder had standing to sue a corporation's former president and former president's father for fraud and related claims. His claims (as articulated in the complaint) were not derivative on behalf of the corporation but instead related to injuries to himself that were separate and distinct from other shareholders. Because his allegations related to his own investment of $8 million in the corporation based on defendants' false representations to him specifically, those claims did not belong to the corporation but instead "belong[ed] to plaintiff alone." The trial court erred by dismissing the action for lack of standing. [Side note: This opinion also includes a useful summary of who may bring actions on behalf of a corporation (legal claims that could be maintained *by the corporation itself*) if that corporation is in bankruptcy. In short, only the bankruptcy trustee may maintain such claims.]

Enforcement of foreign judgment; continuance; enlargement of time
Rossi v. Spoloric, 781 S.E.2d 648 (N.C. App. Jan. 5, 2016). This case involves a trial court's order allowing enforcement of a Pennsylvania judgment in North Carolina. The Court of Appeals held that the trial judge (1) did not abuse his discretion by denying defendant's motion for continuance served three days before the hearing and filed the day of the hearing, where defendant had two months of notice of the hearing and his reason for the continuance was a change in his business travel schedule; (2) did not err by denying plaintiff's motion to allow his affidavit in lieu of live testimony, where the motion was made the same day as the hearing; and (3) did not err by allowing enforcement of the judgment where plaintiff failed to overcome the presumption that the PA court had validly exercised personal jurisdiction over him.

Clerk of Court jurisdiction
Morgan-McCoart v. Matchette, 781 S.E.2d 809 (N.C. App. Jan. 5, 2016). Plaintiff and defendant are sisters. Their mother creates a trust and executes a durable power of attorney naming plaintiff as trustee and attorney in fact. Mother is adjudicated incompetent by the clerk of superior court. Plaintiff and defendant sign and file with the clerk a resignation agreement stating defendant will assume role as trustee, plaintiff will not contest the appointment of defendant as general guardian, and plaintiff will submit a request to the clerk for reimbursement of expenses as trustee and attorney in fact. Plaintiff files a petition with the clerk of superior court for such reimbursement as well as for a distribution from the trust. The clerk enters an order allowing only a fraction of the expenses and not allowing any beneficiary distribution. The plaintiff files a complaint in district court against the defendant in the defendant's individual capacity, as trustee, and as general guardian for breach of contract. The district court dismisses the plaintiff's claims finding that the court did not have subject matter jurisdiction. The Court of Appeals affirms in part and reverses in part. The court finds that while the clerk retains jurisdiction to hear matters related to the guardianship under GS 35A-1203 and the administration and distribution of the trust under GS 36C-3-203, any action against the defendant in the defendant's individual capacity arising based on a claim for breach of contract related to the designation agreement is within the jurisdiction of the district court. [Note: This summary was contributed by SOG faculty member Meredith Smith.]

Judicial estoppel
Hedgepeth v. Parker's Landing Prop. Owners Assoc., Inc., 781 S.E.2d 882 (N.C. App. Jan. 5, 2016). The trial court erred in granting summary judgment for defendant property owner's association (POA) in neighboring landowner's declaratory judgment action. Plaintiff's previous action against the POA in federal court did not judicially estop him from making certain assertions in the current action about the boundary line between his property and the POA's. The prior federal action related to easements and access. The specific location of the boundary line was not at issue, and certain stipulations made about the line in the earlier action were not made for the purpose of establishing underlying ownership.

Stay of proceedings; trial court's discretion
Se. Sureties Grp., Inc. v. Int'l Fid. Ins. Co., 785 S.E.2d 96 (N.C. App. Dec. 15, 2015). In a case with "a lengthy and complex history" and "many potential legal issues" in which the court "had substantial difficulty addressing the issues which were actually argued," the court determined that "the only real issue on appeal is whether the trial court abused its discretion by granting" a motion to stay the proceedings pursuant to G.S. 1-75.12 pending conclusion of related federal litigation. On this issue, the Court of Appeals determined that the trial court did not abuse its discretion in granting the stay because the federal action was filed first and all of the parties were currently litigating the ultimate issue in the case in federal court.

10-day notice requirement for summary judgment is mandatory
Buckner v. TigerSwan, Inc., 781 S.E.2d 494 (N.C. App. Dec. 15, 2015). The trial court erred in entering summary judgment in favor of the plaintiff where the defendant did not have the ten-day notice required under N.C. R. CIV. P. 56. In this case, plaintiff did not move for summary judgment, but proceedings on a motion *in limine* unfolded such that an order for summary judgment was entered at the conclusion of the proceedings. This procedure resulted in deficient notice under Rule 56. The court stated: "Although Rule 56 does not require a party to move for summary judgment to be entitled to it, it does require at least ten days' notice of the time fixed for the hearing." The court went on to reject the plaintiff's alternative argument that the trial court's order could be treated as a judgment on the pleadings or a directed verdict.

Law of the case doctrine; Rule 12 motions and extraneous documents
Bank of Am., N.A. v. Rice, 780 S.E.2d 873 (N.C. App. Dec. 15, 2015). (1) The trial court erred by denying a certain motion for summary judgment and granting a certain cross motion based on an inappropriate utilization of the law of the case doctrine. The Court of Appeals noted that its earlier decision, upon which the trial court based its decision implicating the law of the case doctrine, was "issued in the context of a bare factual record due to the fact that the appeal . . . was taken before the parties had begun discovery." In the proceeding subsequent to the initial appeal, new facts were obtained during discovery such that the law of the case doctrine did not apply. (2) The trial court did not commit reversible error by considering documents extraneous to the pleadings in ruling on certain motions made pursuant to N.C. R. CIV. P. 12 without converting the motions into motions for summary judgment. Certain extraneous documents submitted by a party and considered by the trial court were expressly referenced in the other party's own counterclaims and, consequently, the trial court's review of those documents did not require the Rule 12 motions to be converted into motions for summary judgment. Certain other extraneous documents were not referenced in either party's pleadings and therefore should

not have been considered by the trial court in ruling on the Rule 12 motions, but this error was harmless because no prejudice was shown.

Motion to compel arbitration

Bailey v. Ford Motor Co., 780 S.E.2d 920 (N.C. App. Dec. 15, 2015). In a case that arose in connection with a motor vehicle dealership agreement that included an arbitration clause, the trial court erred by denying defendant's motion to compel arbitration and dismiss. In the absence of Fourth Circuit precedent on the issue, the Court of Appeals adopted the majority rule that "parties' express adoption of an arbitral body's rules, which delegate questions of substantive arbitrability to the arbitrator, constitutes 'clear and unmistakable' evidence that the parties intended to arbitrate questions of substantive arbitrability." The court went on to determine that, given the broad scope of the arbitration agreement at issue and the nature of the plaintiff's plausibly arbitrable claims, the defendant's motion to compel arbitration was not "wholly groundless" such that it would be properly subject to denial by a trial court notwithstanding the parties' agreement to arbitrate questions of substantive arbitrability.

For a reader's reference, substantive arbitrability refers to the question of whether the specific dispute at hand falls within the scope of an arbitration agreement and is thereby arbitrable; in this case, the trial court erred by deciding that question with respect to a motion to compel arbitration that was not "wholly groundless."

Motions to amend pleadings under Rule 15(a); Motion to exclude certain evidence under Rule 408; Attorney's fees on appeal under Rule of App. Procedure 35(a)

Crystal Coast Investments, LLC v. Lafayette SC, LLC, 780 S.E.2d 891 (N.C. App. Dec. 1, 2015). In this case involving a contract dispute arising from the construction of a shopping center, the court held as follows: (1) The trial court did not err by denying a party's motion under N.C. R. CIV. P. 15(a) to amend its pleadings prior to trial to add a new affirmative defense of modification because allowing the motion to amend would have resulted in undue prejudice to the nonmoving party. The Court of Appeals noted that a trial court has broad discretion to grant or deny Rule 15(a) motions, and that a trial court's decision on this issue will not be disturbed on appeal unless the decision could not have been the product of a reasoned decision. (2) The trial court did not abuse its discretion by denying a party's motion under N.C. R. CIV. P. 15(b) to amend its pleadings at the close of all evidence to add the affirmative defense of modification in order to conform the pleadings to the evidence. The evidence which would support the amendment also tended to support issues properly raised by the pleadings, and, thus, the nonmoving party did not try the issue of modification by implied consent. (3) The trial court did not err by denying a party's motion *in limine* to exclude certain evidence as evidence of settlement negotiations under N.C. R. EVID. 408 because the evidence was not offered to prove the validity of the nonmoving party's claim but rather was properly offered on the moving party's affirmative defense of waiver. (4) The trial court did not err by refusing to give certain jury instructions that were not supported by the evidence presented at trial. (5) The Court of Appeals granted a party's motion under N.C. R. APP. P. 35(a) for attorney's fees incurred on appeal because the nonmoving party did not challenge the trial court's finding that its refusal to resolve the matter was unreasonable and the nonmoving party filed no response to the motion for attorney's fees on appeal.

Civil contempt where party complied with order; extension of time under Rule 6(b) applicable only to time limits specified in Rules of Civil Procedure

Gandhi v. Gandhi, 779 S.E.2d 185 (N.C. App. Dec. 1, 2015). In this divorce case involving an equitable distribution consent order, the trial court (1) did not err by determining that the defendant was not in civil contempt where he complied with the consent order prior to the contempt hearing because "[c]ivil contempt in inappropriate where a defendant has complied with the previous court orders prior to the contempt hearing." (quotation and citation omitted). (2) The trial court erred as a matter of law in extending a deadline in the consent order pursuant to N.C. R. CIV. P. 6(b) because the deadline was not a time period specified in the North Carolina Rules of Civil Procedure. The Court of Appeals cited precedent establishing that a trial court's authority to extend specified time periods pursuant to Rule 6(b) is limited to those time periods prescribed by the Rules of Civil Procedure. (3) The trial court could not *sua sponte* exercise its judgment to alter the consent order at issue.

Improper service of process; relief under Rule 60(b)(4) for void judgment
Chen v. Zou, 780 S.E.2d 571 (N.C. App. Nov. 17, 2015). The trial court did not err by granting defendant's motion under N.C. R. CIV. P. 60(b)(4) to set aside a divorce judgment on the ground that the judgment was void based on improper service of process. The appellate court first found that defendant was not required to bring her Rule 60(b) motion within 12 months of the entry of the divorce judgment because subsection (4) of Rule 60(b) was the proper ground for the motion in this case. Subsection (4) applies to void judgments, and the court construed the judgment in this case to be void, rather than merely voidable, because the judgment was entered by a court without personal jurisdiction over defendant due to the defective service of process. In contrast to motions under subsections (1) through (3) of the Rule which must be made not more than one year after the judgment, motions under subsection (4) must be made "within a reasonable time." In this case, the defendant made her motion in a timely fashion because she filed it shortly after receiving actual knowledge of the judgment. The court continued by finding that plaintiff's attempted service by publication under N.C. R. CIV. P. 4(j1) was defective. Plaintiff failed to comply with the Rule 4(j1) requirement to exercise due diligence in attempting to locate defendant. Even assuming defendant had exercised due diligence, his attempted service by publication in Mecklenburg County nevertheless was inadequate because plaintiff had reliable information that defendant was living in New York City.

CONTRACTS

Public school teacher tenure

North Carolina Association of Educators, Inc. v. State of North Carolina (**NC** No. 228A15; April 15, 2016). Affirming (the relevant portion of) the opinion of a divided panel of the Court of Appeals, the Supreme Court held that the portions of the 2013 act that revoked the career status of public school teachers (repealed the Career Status Law) unconstitutionally infringed upon the contract rights of those teachers who had already achieved career status as of 26 July 2013, the effective date of the law. The court applied the test set out in *Bailey v. State*, 348 N.C. 130 (1998), in determining that the revocation, as applied retroactively to career teachers, was in violation of the Contract Clause of the United States Constitution. Having so held, the court did not go on to address the question of whether the revocation also violated Article I, Sec. 19 of the North Carolina Constitution (the takings provision).

Non-compete; enforceability of provision authorizing revision; related business torts

Beverage Systems of the Carolinas, LLC v. Associated Beverage Repair, LLC, (**NC** No. 316A14; March 18, 2016). Plaintiff purchased defendants' beverage company and, for additional consideration, defendants executed a non-compete agreement covering all of North and South Carolina. One of the defendants (or a closely related entity) later violated the non-compete, and plaintiff sued to enforce it. The trial court granted summary judgment in the defendant's favor based on the overly-broad scope of the non-compete. The Court of Appeals majority, 762 S.E.2d 316 (2014) (Elmore, J., dissenting), reversed and remanded, holding that the trial court was required to revise the geographic scope of the non-compete based on a provision in the non-compete allowing a court to do so in the event such court "holds that the restrictions stated herein are unreasonable under the circumstances." The majority stated that the strict "blue-pencil rule"—the rule applicable in North Carolina prohibiting a trial court from revising unreasonable provisions in non-compete agreements—did not apply where the agreement itself allowed a court to make such revision. Thus the Court of Appeals held that the trial court "should have invoked its power under [the applicable paragraph] and revised the non-compete to make it reasonable under the circumstances." The Court of Appeals further reversed the trial court's grant of summary judgment on plaintiff's related claims of tortious interference, unfair and deceptive trade practices, and injunctive relief.

The Supreme Court reversed the decision of the Court of Appeals. The Supreme Court agreed that the territorial restriction was overly broad because neither plaintiff nor defendant operated in a territory nearly as large as both North and South Carolina. The court then reiterated that, under the strict blue-pencil rule, the trial court had no authority to rewrite the faulty geographic terms to make them reasonable. The court then disagreed with the Court of Appeals majority that the terms of the non-compete itself could overcome the blue-pencil rule by authorizing the court to make revisions. The Supreme Court stated:

> "[P]arties cannot contract to give a court a power that it does not have. … Allowing litigants to assign to the court their drafting duties as parties to a contract would put the court in the role of scrivener, making judges postulate new terms that the court hopes the parties would have agreed to be reasonable at the time the covenant was executed or would find reasonable after the court rewrote the limitation. We see nothing but mischief in allowing such a procedure. Accordingly, the parties agreement is unenforceable at law and cannot be saved."

Thus the trial court properly declined to enforce the non-compete and properly granted summary judgment as to the breach of contract claim. The Supreme Court also held that the trial court also properly granted summary judgment as to the remaining claims: There was no underlying contract with which the defendants could have tortiously interfered; plaintiffs demonstrated no contract that would have ensued but for defendants' interference nor any other specific loss of prospective economic advantage; and the Chapter 75 claim failed because it "presuppose[d] success" of at least one contract claim, all of which failed as a matter of law.

City's contractual obligation to pay for employee's legal expenses; relationship to immunity
Wray v. City of Greensboro (COA15-912; June 7, 2016) (with dissent). Shortly after resigning from his position, the former police chief was named as defendant in several lawsuits regarding his conduct while working for the City. He later sued the city seeking reimbursement of over $200,000 he paid in legal fees related to those lawsuits. The trial court dismissed on grounds that the City had not waived its immunity. The Court of Appeals reversed, the majority determining that the City had entered into a statutorily-authorized (G.S. 160A-167) employment contract with the plaintiff, and that part of the terms of that contract required the City to pay for certain litigation expenses he may incur related to his employment. Thus the City is not governmentally immune from plaintiff's suit for reimbursement. The Court of Appeals did *not* review the question of the *merits* of Plaintiff's claim for reimbursement—simply the threshold question of whether the action was barred due to an immunity doctrine. (The dissenting judge determined that the record did not support a finding of a valid contractual agreement between the parties and that the evidence did not show an express waiver of immunity or purchase of liability insurance.)

Real estate sales commission; breach of good faith and fair dealing
Blondell v. Ahmed (COA15-796; May 17, 2016) (with dissent). A real estate agent sued to recover a commission she alleged was owed pursuant to a listing agreement with Seller. Agent and Seller entered into the agreement in March. Throughout April, Agent had various communications about the house with an interested couple (Buyers). After Agent had represented Sellers for less than two months, Sellers on April 22 told Agent they wanted to terminate the listing agreement. Agent forwarded for their signature a form termination agreement (that she had not yet signed), and Sellers returned it the next day, April 23, with their signature. (The agreement specified that it would be effective when executed by all parties.) Shortly thereafter, Sellers met with Buyers, and by May 2 Sellers and Buyers had reached a tentative sales price. Buyers made a written offer on May 9. The next day, May 10, without telling Agent about the offer, Sellers asked Agent about the status of the termination agreement. Agent executed the termination agreement that day and emailed it to Sellers. On May 11, Sellers accepted the offer from Buyers and soon closed on the sale without telling Agent.

The trial court granted summary judgment to Sellers. The Court of Appeals reversed after the majority determined that the facts created a genuine issue regarding whether Sellers breached their implied duty of good faith and fair dealing by seeking to have Agent terminate the (still effective) listing agreement on May 10 without revealing the Buyers' offer. (The dissenting judge disagreed, finding that there was no evidence of intent to deceive or conceal material facts from Agent.)

Indemnification against a party's own negligence
CSX Transportation, Inc. v. City of Fayetteville (COA15-1286; May 17, 2016). Pursuant to a 1951 agreement, the City's Public Work's Commission (PWC) was licensed to construct power lines over a

section of railroad tracks belonging to CSX. The agreement contained an indemnity provision by which PWC would hold CSX harmless for all loss to any person or property "by reason of" construction, maintenance, use, or operation of the power lines. In 2011, a CSX employee operating a crane on the tracks struck the power lines, sending a surge that damaged the property of a third party. CSX sued PWC under the indemnification provision seeking reimbursement of the compensation CSX paid the third party. After CSX admitted its own negligence in the accident, the trial court granted summary judgment to PWC, apparently on grounds that a party cannot be indemnified against its own negligence. The Court of Appeals reversed, noting that North Carolina law does indeed recognize the validity of contracts in which parties are indemnified against their own negligence. The court also determined that the indemnification language "by reason of" is not limited to incidents proximately caused by PWC's construction of power lines, but instead is broad enough to encompass accidents, such as this one, which stemmed from PWC's exercise of its privilege to place power lines over the tracks.

Ecclesiastical doctrines and neutral principles of law; Wage and Hour Act
Bigelow v. Sassafras Grove Baptist Church (COA15-557; May 10, 2016). A former pastor sued his congregation for breach of contract and Wage and Hour Act violations after the church allegedly failed to pay him all that was due under a written employment contract. The trial court dismissed his complaint for failure to state a claim. The Court of Appeals reversed. The church argued that the court was precluded from hearing the pastor's claims by the overlapping First Amendment-related doctrines of "ecclesiastical abstention" and "ministerial exception." The Court of Appeals disagreed, holding that the court could decide the pastor's contract-based disputes using neutral principles of law and would not be unavoidably embroiling itself in ecclesiastical matters.

Forum selection clause; unexecuted contract
Southeast Caissons, LLC v. Choate Constr. Co. et al. (COA15-1284; April 19, 2016). Defendant contractor selected Plaintiff subcontractor to perform work related to construction of a parking deck for Wake Technical Community College. For the four months during which Plaintiff performed and eventually completed the work, Plaintiff and Defendant continued to disagree over certain terms of the written subcontract and never actually executed it. The proposed agreement the parties had been haggling over all this time contained a forum selection clause specifying that venue for any dispute would be Raleigh. Plaintiff eventually filed suit in Forsyth County, Plaintiff's principal place of business, seeking payment for its work. Defendant moved for change of venue under the forum selection clause. The trial court denied the motion, finding that the agreement was never executed and that venue in Forsyth County was proper. The Court of Appeals affirmed, determining that the trial court did not err in concluding that the parties never intended to be bound by the forum selection clause. The court also concluded that, even if the clause had been binding, it did not contain sufficient language to indicate that the parties intended for Raleigh (Wake County) to be the exclusive jurisdiction for disputes (*i.e.*, the clause was not a mandatory venue selection clause).

Scope of arbitration clause
Epic Games, Inc. v. Johnson (COA15-454; April 19, 2016). After his employment was terminated, Johnson filed a demand for arbitration pursuant to an arbitration clause in his employment agreement. His former employer, Epic Games, filed for judicial relief to enjoin arbitration of certain claims. The trial court entered an order allowing Johnson to go forward with arbitration of his wrongful termination claim

but enjoining arbitration of his fiduciary duty claim, his claim for the value of certain stock options, his request for declarations nullifying certain intellectual property assignments, and his claim for lost profits. The Court of Appeals reversed, determining that the language of the arbitration clause, which required arbitration of "disputes…in any way concerning [Johnson's] employment, this Agreement or this Agreement's enforcement, including the applicability of this Paragraph," was broad enough to encompass Johnson's other claims, and that it also required arbitration of the substantive question of whether those claims were arbitrable.

Invalid out-of-state forum selection clause

SED Holding, LLC v. 3 Star Properties, LLC, 784 S.E.2d 627 (N.C. App. April 5, 2016). The trial court properly denied a motion to dismiss for lack of proper venue. The parties entered into a contract in North Carolina with a forum selection clause specifying Harris County, TX. Because the non-consumer contract in question was for sale of property rather than for a loan, the venue selection clause did not fall within an exception to G.S. 22B-3. Thus the trial court properly deemed the clause to be void and against public policy.

Economic loss rule

Beaufort Builders, Inc. v. White Plains Church Ministries, Inc., 783 S.E.2d 35 (N.C. App. March 1, 2016). A builder brought a breach of contract action against a project owner after not receiving payments under the construction contract. The project owner filed a third-party complaint against the builder's president for negligence alleging that the president's removal of dirt from the foundation site allegedly caused the building elevation to fall below the FEMA minimum allowable elevation. The jury returned a verdict of negligence against the builder's president, and the trial judge thereafter granted JNOV for president. The Court of Appeals affirmed the granting of JNOV, holding that the economic loss rule prevented recovery under a tort theory where the injury was fully encompassed by the parties' contractual relationship and where, as here, none of the exceptions to the economic loss rule applied.

Unfair trade practices in contract breach; breach of covenant of good faith and fair dealing

Heron Bay Acquisition, LLC v. United Metal Finishing, Inc., 781 S.E.2d 889 (N.C. App. Feb. 16, 2016). The trial court properly granted summary judgment against plaintiff on its claim for unfair and deceptive trade practices. The claim, which centered around defendant's alleged breach of a "no-shop" clause in an asset purchase agreement, was not accompanied by the type of "substantial aggravating circumstances" that would convert it from a mere breach of contract into a tort. Moreover, there was insufficient evidence of actual harm resulting from the breach. The trial court also properly dismissed plaintiff's claim for breach of the implied covenant of good faith and fair dealing because there was no evidence that defendant's relatively minor delays in meeting a condition precedent had caused actual harm to plaintiff.

Failure to timely file demand for arbitration forfeited right to arbitrate

T.M.C.S., Inc. v. Marco Contractors, Inc., 780 S.E.2d 588 (N.C. App. Dec. 1, 2015). A construction contractor forfeited its purported right to arbitrate a dispute with a subcontractor by failing to timely file a demand for arbitration as required by the agreement between the parties. The trial court's order denying the contractor's motion to compel arbitration was sufficient because it stated the specific bases for the court's ruling.

“Stacking” of liability limits in auto insurance policy not permitted by policy language
N. Carolina Farm Bureau Mut. Ins. Co. v. Jarvis, 780 S.E.2d 759 (N.C. App. Nov. 17, 2015) In this case involving a single vehicle automobile accident that resulted in serious injuries, the court held as follows: (1) The language of a certain automobile insurance policy specifically and explicitly limited the maximum liability to $50,000 for bodily injury per person with a total limit of $100,000 per accident and, therefore, the claimants were not entitled to “stack” or aggregate the liability limits for each of three vehicles listed on the policy for a total liability coverage of $150,000. (2) Claimants were not entitled to liability coverage under two other automobile insurance policies because the policies did not cover the specific automobile at issue and the driver, though he was the insured’s son, was not a “family member” of the insured as that term was defined in the policies. (3) Claimants were not entitled to liability coverage under a fourth policy because the policy specifically identified a single “covered automobile” and that vehicle was not involved in the accident at issue.

Attorney’s violation of RPC 1.8 could be used defensively against him
Law Offices of Peter H. Priest, PLLC v. Coch, 780 S.E.2d 163 (N.C. App. Nov. 17, 2015). In a matter of first impression, the court determined that an attorney’s failure to comply with the explicit requirements of Rule 1.8 of the North Carolina Rules of Professional Conduct prior to entering into a business transaction with a client could be used defensively by the client to defend against the attorney’s claims of breach of contract and fraud. The court found that there was a “strong public policy rationale for allowing violations of Rule 1.8 to be used defensively.” The court rejected the attorney’s alternative argument that he should be entitled to recovery in *quantum meruit*.

Grant of 12(b)(6) motion improper where ambiguous contract presented question of fact
WakeMed v. Surgical Care Affiliates, LLC, 778 S.E.2d 308 (N.C. App. Nov. 3, 2015). Reversing the trial court, the Court of Appeals concluded that a particular contractual provision was ambiguous as to the true intention of the parties, and, thus, the trial court erred by granting the defendant’s Rule 12(b)(6) motion to dismiss the plaintiff’s claim for damages caused by defendant’s material breach of the contract. Defendant’s Rule 12(b)(6) motion was based on interpreting the contractual provision at issue as providing an exclusive remedy of contract termination in the event of a material breach; plaintiff advanced a contrary interpretation of the provision. The Court of Appeals found that each interpretation was reasonable and the provision was consequently ambiguous. Because “interpretation of an ambiguous contract is best left to the trier of fact,” the trial court erred by granting defendant’s motion to dismiss under Rule 12(b)(6).

TORTS

Governmental immunity for incorporated voluntary fire department
Pruett v. Bingham (**N.C.** No.34A15; March 18, 2016), affirming *per curiam* the decision of a divided panel of the Court of Appeals. I previously summarized the opinion of the Court of Appeals (now cited as _ N.C. App. _, 767 S.E.2d 357 (2014)) as follows:

> *Pruett v. Bingham* (COA14-191; Dec. 16, 2014) (with dissent). The trial court properly granted summary judgment in favor of an incorporated volunteer fire department in an action based on the role of the driver of one of its vehicles in an accident while the driver was responding to an emergency. Because the incorporated fire department was under contract with a county at the time of the accident to provide the very services for which it was operating the vehicle, it was entitled to governmental immunity in connection with the accident. In addition, the claimants failed to raise an argument before the trial court that the fire department had waived immunity through the purchase of liability insurance. Finally, the trial court did not err in denying the claimant's oral motion to amend their complaint to amend their pleadings because they had ample opportunity to make such a motion at an earlier time.

Liability for operation of school activity bus
Irving v. Charlotte-Mecklenburg Board of Educ. (**N.C.**, No. 557PA13; Jan. 29, 2016). Plaintiff was injured when she was struck by a school activity bus transporting student athletes to a football game. She filed a claim with the Industrial Commission under the Tort Claims Act. The Commission dismissed the appeal for lack of subject matter jurisdiction after determining that the State had not waived immunity under G.S. 143-300.1 for negligent operation of a school activity bus. The Court of Appeals reversed. The Supreme Court reversed the Court of Appeals, holding that a school activity bus did not fall within the definition of a "public school bus" or "school transportation service vehicle" under G.S. 143-300.1. Because a school activity bus was not included in the types of vehicles for which immunity had been waived under the statute, plaintiff's claims were properly dismissed.

Wrongful termination under G.S. 153A-99; termination of sheriff's employees

Young v. Bailey (**N.C.** No. 355PA14-2; Jan. 29, 2016). A sheriff's deputy alleged that her employment was terminated by the sheriff after she refused to support his re-election campaign, and that this termination violated G.S. 153A-99, which protects county employees from political or partisan coercion or activity that restricts their right to support candidates of their choice. The Court of Appeals concluded that, because deputy sheriffs are employees of the sheriff, they are not "county employees" under this statute, and are therefore not entitled to the statute's protections. The Supreme Court affirmed, explaining the demarcation between employees of county government and employees—including deputies—of the county sheriff. The court further analyzed plaintiff's argument that her termination was a violation of her free speech rights. The court determined that, because a deputy's loyalty to the sheriff is paramount, including in matters of policy, termination of deputies for political reasons is permitted (as an exception to the general prohibition on terminating public employees for exercising free speech rights). The related case of *Lloyd v. Bailey* (**N.C.**, No. 181PA15) was affirmed *per curiam* for the reasons stated in *Young*.

McLaughlin v. Bailey (**N.C.,** No. 163A15; Jan. 29, 2016). In this related case, a non-deputy employee of the same sheriff also alleged that his employment was terminated after he refused to support

the sheriff's re-election. The Supreme Court affirmed the trial court's grant of summary judgment in the sheriff's favor because the record showed numerous job performance-related (non-political) reasons for the employee's termination.

Parent-child immunity and willful and malicious conduct
Needham v. Price, 780 S.E.2d 549, 549 (**N.C.** Dec. 18, 2015). Reversing the Court of Appeals, the Supreme Court determined that a defendant father's conduct was not willful and malicious and, thus, parent-child immunity shielded him from liability on tort claims brought on behalf of his minor children by their mother. The tort claims at issue (based on negligence, premises liability, negligent infliction of emotional distress, intentional infliction of emotional distress, and gross negligence) arose from an incident where the father attempted to surreptitiously enter the home where the mother and children lived through the attic stairs. The stairs unfolded striking the mother on the head, and the children witnessed the incident. The Supreme Court held that the father's conduct did not rise to the level of willful and malicious conduct against the children because there was no evidence forecast to show that the conduct was directed towards the bystander children and there was no evidence that the action was malicious conduct reasonably calculated to injure another. Therefore, the parent-child immunity doctrine—which shields a parent from liability for *ordinary* negligence—applied, and the trial court correctly entered summary judgment in favor of the father.

Negligent infliction of emotional distress (IED); intentional IED; libel/slander per quod
Glenn v. Johnson (COA15-523; June 7, 2016). After the church chairman and the head deacon requested the church treasurer retain an appraiser to compile the church financial records, the treasurer repeatedly refused. The treasurer was subsequently asked to resign. He later sued the chairman and head deacon (Defendants) on various tort theories, all of which eventually were disposed of under Rule 12(b)(6) and summary judgment. He appealed the summary judgment order disposing of his NIED, IIED, and defamation claims. The Court of Appeals affirmed. His NIED claim failed because he did not plead nor forecast evidence of any duty of Defendants nor any negligent conduct. His IIED claim failed because he did not allege any actions that rose to necessary level of extreme and outrageous conduct. Finally, his defamation claim failed because he did not identify any false statements made to any third person.

***Woodson* and *Pleasant* claims as exceptions to exclusivity of Worker's Compensation Act**
Blue v. Mountaire Farms, Inc. (COA15-751; May 17, 2016). Plaintiff, an employee of a poultry processing plant, was catastrophically injured due to a mistake that occurred during a fellow employee's attempt, at management's direction, to replace a part in the plant's refrigeration system. (The fellow employee was killed.) Plaintiff sued the employer and various fellow employees in superior court under the *Woodson* and *Pleasant* exceptions to the exclusivity of the Worker's Compensation Act. Defendants moved for summary judgment, which the trial court denied. The Court of Appeals reversed, holding that the evidence would not support a cause of action against the employer under *Woodson v. Rowland*, 329 N.C. 330 (1991), because the exception established by that case requires evidence that the employer intentionally committed misconduct with knowledge it was substantially certain to cause serious injury or death to an employee. Plaintiff presented no evidence of any such knowledge by the employer and, as a preliminary matter, the employer had not tasked plaintiff with participating in the repair in question. Plaintiff also could not maintain his claims against the fellow employees under *Pleasant v. Johnson*, 69

N.C. App. 538 (1985), because Plaintiff presented no evidence of willful, wanton, or reckless conduct as *Pleasant* requires. Remanded for entry of summary judgment in Defendants' favor.

Alienation of affections; punitive damages; JNOV and written opinion pursuant to G.S. 1D-50
Hayes v. Waltz, 784 S.E.2d 607 (N.C. App. April 5, 2016). After meeting during a work trip, defendant and plaintiff's wife began a romantic relationship. Not long after that plaintiff and his wife ended their marriage. Plaintiff sued defendant for alienation of affection. After a jury found in favor of plaintiff husband, defendant appealed the trial court's denial of his JNOV motion as to liability. The Court of Appeals affirmed, finding that, although there was no direct evidence of sexual conduct in North Carolina (only in Cancun and in Indiana, a state that does not recognize this tort), there was ample evidence of other behavior that could "deprive a married person of the affections of his…spouse," such as thousands of text messages and many hours of personal phone calls. In addition, although there was evidence of other potential causes of the marital discord (such as the wife's prior affairs), the law does not require that the defendant's conduct be the *sole* cause of the alienation. Defendant also argued that the trial court should have granted relief due to plaintiff's counsel's statements in closing argument questioning the wife's ability to tell the truth. The Court of Appeals opined that the remarks were impermissible opinions as to her credibility and thus improper, but then found that in the context of the entire closing they were not so egregious as to warrant a new trial. Nor was counsel's characterization of defendant as a "con man" enough to require relief.

Plaintiff also appealed the trial court's decision to grant JNOV in favor of defendant on the jury's punitive damages award. The Court of Appeals determined that, based on the Supreme Court's directive in *Scarborough v. Dillard's*, 363 N.C. 715 (2009), the matter must be remanded to the trial court for the court to issue a written opinion pursuant to G.S. 1D-50 stating with specificity its reasons for "disturbing" the jury's award. [For an explanation of this requirement, see Chapter 1, pp. 15-19 of Relief from Judgment in North Carolina Civil Cases.]

Dram shop; ordinary or gross negligence; negligence per se; last clear chance
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.)

Public official immunity; governmental immunity; punitive damages
Hart v. Brienza, 784 S.E.2d 211 (N.C. App. April 5, 2016). In the wee hours of the morning Plaintiff's wife caught him *in flagrante delicto* with her cousin. After she locked him out of the house and refused to give him his keys and wallet, he fired his shotgun into the air outside the house. The wife called the police, and when they arrived plaintiff was attempting to crawl through the window to get his things. The officers ordered him to get on the ground. The officer alleged that plaintiff then reached for his shotgun. Plaintiff alleged that he did no such thing and merely attempted to comply with the order. In any event, the officer fired three rounds at him and hit him in the hip. Plaintiff asserted various tort claims against the county and the officer. The usual immunity arguments were made and some were disposed of. At issue in this appeal was whether the trial court erred in denying summary judgment for defendants on plaintiff's claims: (1) against the officer for assault and battery; (2) against the County on a respondeat superior theory; and (3) against the officer for punitive damages. The Court of Appeals affirmed the denial of summary judgment as to assault and battery due to conflicting evidence of the events that led to the shooting. The court concluded that a genuine issue remained as to whether the officer exhibited wanton and reckless behavior (which would pierce the veil of public official immunity) or whether circumstances justified the use of deadly force. The court then reversed the denial of summary judgment for the County, holding that governmental immunity applied to bar the claims both against the officer in his *official* capacity and against the County on a respondeat superior theory. Finally, the court affirmed the denial of summary judgment against the officer as to punitive damages, finding that there was a genuine issue of material fact as to whether the officer's conduct was willful and intentionally or recklessly injurious.

Whistleblower Act; requirement of presenting factual issue as to pretext
Hodge v. North Carolina Dep't of Transportation, 784 S.E.2d 594 (N.C. App. April 5, 2016). This case involves a complicated factual history including three prior lawsuits by this plaintiff against the DOT (to reach the Court of Appeals) related to his employment. In this action, plaintiff alleged that the DOT took retaliatory action against him in violation of the Whistleblower Act by firing him for what the DOT alleged was insubordination. The trial court granted summary judgment in favor of the DOT, and the Court of Appeals affirmed. The court held that even if plaintiff could establish a prima facie case of retaliatory termination, the DOT had stated a legitimate, non-discriminatory reason for firing him, and therefore plaintiff carried the burden of establishing a factual issue as to whether the DOT's stated reasons were pretextual. Because he presented no competent evidence of pretext, the trial court properly granted summary judgment against him.

***In pari delicto*; legal malpractice**
Freedman v. Payne, 784 S.E.2d 644 (N.C. App. April 5, 2016). Plaintiff was being prosecuted for intentional violations of the Clean Water Act due to his farm's release of hundreds of thousands of gallons of hog waste into nearby waters. During the criminal trial, his attorneys negotiated a no-jail-time "side-deal" ("wink-wink, nudge-nudge") with the prosecutor in exchange for a plea, and the attorneys advised plaintiff that he must not disclose the deal to the judge when pleading guilty. Predictably enough,

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

Nuisance, trespass, and pollution act violations; proper measure of damages
BSK Enterprises, Inc. v. Beroth Oil Co., 783 S.E.2d 236 (N.C. App. March 1, 2016). After defendant's underground storage tanks leaked, causing some degree of pollution of the groundwater under neighboring property, plaintiffs, who owned adjacent land where they operated a business-related warehouse, sued for nuisance, trespass, and violations of the Oil Pollution and Hazardous Substances Control Act. The jury returned a verdict awarding $108,500 for diminution of the value of plaintiffs' property and $1.492 million for the cost of remediating the pollution. The trial judge entered an order capping the damages at the $108,500 for the diminution in value. The Court of Appeals affirmed, holding as a matter of first impression that it was proper for the court to limit damages to the diminution in value where there was no special, "personal use" to which the plaintiff put the property (here, it was a business use) and the verdict for the cost of remediation was greatly out of proportion with the diminution figure. The trial court also properly found that plaintiff had standing to sue due to its right to the use of the groundwater flowing under its land. The trial court also properly declined to include an instruction on plaintiff's duty to mitigate. In addition, the award did not allow a double recovery for "stigma damages" on the basis that the damages to the property were temporary and abatable. Further, while the contamination did not cause actual injury to person or property, it created a substantial enough interference to permit a claim for nuisance and trespass.

Sovereign immunity; proper Rule 12(b) basis to preserve immediate appeal right
Murray v. University of North Carolina at Chapel Hill, 782 S.E.2d 531 (N.C. App. March 1, 2016) (with dissent). A student filed a declaratory judgment action against the University alleging that the University's sexual assault grievance policy violated Title IX. The University moved for dismissal on various Rule 12 grounds, and the trial court denied the dismissal. The University appealed the denial and argued the interlocutory appeal should be immediately reviewed because it involved the defense of sovereign immunity. The Court of Appeals determined that the record reflected that the University had only obtained a trial court ruling on its sovereign immunity claim under Rule 12(b)(1), rather than 12(b)(6) or (2). The court therefore held that it was bound by *Can Am S. LLC v. State*, 759 S.E.2d 304 (N.C. App. 2014), in which a prior panel concluded that denial of a dismissal based on sovereign immunity is not immediately appealable if the defense was raised under Rule 12(b)(1) (as opposed to 12(b)(6) or 12(b)(2)). Thus the appeal should be dismissed as interlocutory. (The dissenting judge determined that the University had indeed argued sovereign immunity under Rule 12(b)(6) and that the

trial judge had made a ruling on the Rule 12(b)(6) motion. Thus the appeal should have been heard and the trial judge's order denying the dismissal should be reversed.)

Parking lot negligence; intervening and superceding negligence; contributory negligence
Blackmon v. Tri-Arc Food Systems, Inc., 782 S.E.2d 741 (N.C. App. March 1, 2016). Plaintiff was severely injured when struck by a car while he stood behind his truck after parking it in a two-way roadway in front of the parking lot of Bojangles. He sued Bojangles for negligence. The trial court granted summary judgment for Bojangles. The Court of Appeals affirmed, holding that even if plaintiff could establish negligent parking lot design, the admitted careless and reckless driving of the driver who hit plaintiff was the intervening and superceding cause, and plaintiff was contributorily negligent as a matter of law because he opted to park his car on a two-way drive in front of the restaurant rather than in the available, marked parking spaces the restaurant provided.

Malicious prosecution; abuse of process
Fuhs v. Fuhs, 782 S.E.2d 385 (N.C. App. Feb. 16, 2016). Summary judgment was properly granted in defendant's favor on malicious prosecution and abuse of process claims. The defendant at issue in this appeal was plaintiff's estranged wife's attorney. Plaintiff's claims related to allegations in the wife's domestic violence complaint that had been drafted and filed by defendant. As to malicious prosecution, plaintiff failed to forecast evidence of special damages (required for this claim because the earlier proceeding in question was *civil* rather than criminal). Injury to plaintiff's reputation was not the type of damages that would satisfy this requirement, but instead was harm that would "necessarily result in all similar cases." As to abuse of process, plaintiff presented no evidence that defendant committed a willful act aimed at using the existence of the domestic violence proceeding to gain an advantage in a "collateral matter" (here, the wife's custody case against plaintiff).

Intentional inflict of emotional distress; negligent infliction of emotional distress
Piro v. McKeever, 782 S.E.2d 367 (N.C. App. Feb. 16, 2016) (with dissent). This case involves plaintiff's claims that defendant, a licensed social worker, employed improper and harmful interview techniques during a counseling session with his son, and that the effect directly led to allegations against plaintiff that he had sexually abused his son. The matter eventually led the district court to issue a two-year no-contact order against plaintiff preventing him from seeing all three of his children (until the abuse allegations were later determined to be unsubstantiated). The superior court dismissed plaintiff's claims against the social worker for intentional infliction of emotional distress (IIED) and negligent infliction of emotional distress (NIED). The Court of Appeals affirmed, the majority determining that plaintiff had not alleged the type of extreme and outrageous conduct that would support an IIED claim and had not forecast evidence that the type of harm he suffered was foreseeable. The dissenting judge determined that the complaint included sufficient allegations to survive a Rule 12(b)(6) motion as to both claims and therefore should not have been dismissed at this stage in the proceedings. [Note: It appears this case is being pursued at the Supreme Court, so I will provide an update after any disposition by the higher court.]

Probable cause as bar to false arrest and malicious prosecution
Adams v. City of Raleigh, 782 S.E.2d 108 (N.C. App. Feb. 16, 2016). Plaintiff was arrested for violating Raleigh's Amplified Entertainment Permit (AEP) Ordinance, and the charges were later dropped. Plaintiff later sued the City for false imprisonment/false arrest; malicious prosecution and constitutional

violations. The trial court granted summary judgment in favor of the City. The Court of Appeals affirmed, finding that the arresting officer had probable cause to believe plaintiff was violating the AEP: the officer personally observed Plaintiff providing amplified entertainment and had knowledge that plaintiff had not obtained an AEP permit. Because probable cause is a bar to false imprisonment/arrest and malicious prosecution claims, summary judgment was proper. In addition, the constitutional claims failed because plaintiff had adequate state law remedies.

Unfair trade practices in contract breach; breach of covenant of good faith and fair dealing
Heron Bay Acquisition, LLC v. United Metal Finishing, Inc., 781 S.E.2d 889 (N.C. App. Feb. 16, 2016). The trial court properly granted summary judgment against plaintiff on its claim for unfair and deceptive trade practices. The claim, which centered around defendant's alleged breach of a "no-shop" clause in an asset purchase agreement, was not accompanied by the type of "substantial aggravating circumstances" that would convert it from a mere breach of contract into a tort. Moreover, there was insufficient evidence of actual harm resulting from the breach. The trial court also properly dismissed plaintiff's claim for breach of the implied covenant of good faith and fair dealing because there was no evidence that defendant's relatively minor delays in meeting a condition precedent had caused actual harm to plaintiff.

Probable cause as bar to false arrest and malicious prosecution
Adams v. City of Raleigh (COA15-782; Feb. 16, 2016). Plaintiff was arrested for violating Raleigh's Amplified Entertainment Permit (AEP) Ordinance, and the charges were later dropped. Plaintiff later sued the City for false imprisonment/false arrest; malicious prosecution and constitutional violations. The trial court granted summary judgment in favor of the City. The Court of Appeals affirmed, finding that the arresting officer had probable cause to believe plaintiff was violating the AEP; the officer personally observed Plaintiff providing amplified entertainment and had knowledge that plaintiff had not obtained an AEP permit. Because probable cause is a bar to false imprisonment/arrest and malicious prosecution claims, summary judgment was proper. In addition, the constitutional claims failed because plaintiff had adequate state law remedies.

Injury on sidewalk; municipal responsibility to maintain sidewalks; immunity
Steele v. City of Durham (COA15-246; Feb. 2, 2016). Plaintiff was injured when he fell into a hole while walking along a sidewalk late at night in Durham along Highway 55. The trial court granted summary judgment in favor of the City after determining that the City was not responsible for maintenance of a sidewalk along this state-operated highway. The Court of Appeals reversed, finding that G.S. 160A-296 and 19A N.C.A.C. 2d.0404(c)(6) impose upon cities the responsibility to maintain sidewalks. As to the claim for negligence itself, plaintiff submitted affidavits creating a genuine issue of material fact as to whether the City knew about the hole and breached its duty of repair and maintenance. Further, the City was not entitled to governmental immunity because such immunity does not extend to maintenance of streets and sidewalks.

Wrongful death & med mal; superceding negligence instruction; punitive damages; bifurcation under Rule 42(b)
Clarke v. Mikhail, 779 S.E.2d 150 (N.C. App. Nov. 3, 2015). In this wrongful death and medical malpractice case, the court held as follows: (1) A denial of a motion for summary judgment is not reviewable on appeal from a final judgment after a trial on the merits of the case. (2) Because the

plaintiff had the burden to prove that the defendants' negligence was the proximate cause of decedent's injury and death and because superseding negligence is an elaboration of a phase of proximate case, the trial court's jury instruction on superseding negligence, which incorporated North Carolina Pattern Jury Instructions 102.28 and 102.65, did not improperly shift the burden on that issue to the plaintiff. (3) The trial court properly granted a directed verdict in favor of defendants on the issue of punitive damages because plaintiff did not present any evidence that a physician assistant's dosage of a prescribed drug at a higher rate than recommended by the manufacturer's guidelines violated relevant policies or procedures or breached any established standard of care. Absent such evidence, plaintiff failed to raise a genuine issue as to whether defendants acted with the conscious and intentional disregard for decedent's safety as required for punitive damages. (4) Though plaintiff failed to preserve the issue for review, certain medical, Social Security, and DSS records introduced at trial were relevant to various issues at trial and admissible under Evidence Rules 401 and 404; the records were not unfairly prejudicial under Evidence Rule 403. (5) The trial court did not err by denying plaintiff's eve-of-trial motion under N.C. R. CIV. P. 42(b) to bifurcate the trial into liability and damages phases. Plaintiff failed to show that the trial court's finding of good cause to conduct a single trial was manifestly unsupported by reason.

Last clear chance in auto accident case

Scheffer v. Dalton, 777 S.E.2d 534 (N.C. App. Oct. 20, 2015), *disc. rev. denied*, 782 S.E.2d 901 (N.C. 2016). Scheffer was driving his moped home from work on a dark evening when he was struck and killed by a car turning left from the opposite direction. The driver (Defendant) turned left without first coming to a full stop right after another car passed by in front of Scheffer. Defendant testified he did not see Scheffer at all before striking him. The moped's headlight was not working—it had been broken in a prior accident—so Scheffer had attached a bicycle light to the moped's front. The evidence from other witnesses at trial was that the makeshift light was either dim, created only a "streak," or had gone out completely by the time of the accident. The jury found Defendant negligent, but it also found Scheffer contributory negligence, thereby cutting of his estate's ability to recover damages. The trial court declined to allow a last clear chance instruction. As to this ruling, the Court of Appeals reversed. The court determined that the evidence would allow a jury to find that Defendant did not adequately look through the intersection before turning and that, after beginning his left turn, he had time to discover Scheffer's peril and by the exercise of reasonable diligence take action to avoid the collision. Thus the trial court should have allowed the jury to determine whether Defendant had the last clear chance to avoid the accident.

CONSTITUTIONAL CHALLENGES

Retention Elections

Faires v. State Board of Elections (**N.C.** No. 84A16; May 6, 2016). Affirming the decision of the three-judge panel of the Superior Court declaring G.S. 7A-4.1, establishing retention elections for North Carolina Supreme Court justices, to be unconstitutional and void. The Supreme Court affirmed *per curiam*, but with an equally divided panel (Justice Edmunds not participating), thereby leaving the Superior Court's judgment undisturbed and without precedential value.

> This is my prior summary of G.S. 7A-4.1:
>
> **S.L. 2015-66 (H 222): Retention elections for elected North Carolina Supreme Court justices.** Creates new Article 1A of Chapter 7A of the General Statutes, providing that a justice of the North Carolina Supreme Court who was elected to that office by the voters and who desires to continue in office "shall be subject to approval by the qualified voters of the whole State in a retention election at the general election immediately preceding the expiration of the elected term." Approval is by a majority of the votes cast. If the voters approve the retention, the justice is retained for a new eight-year term, and if the voters fail to approve the retention, the office is deemed vacant at the end of the term and shall be filled as provided by law. The act sets out the procedure for initiating the retention election process and provides a ballot form template. It also makes related amendments to G.S. 7A-10(a) and relevant sections of Chapter 163. (Note that the amended G.S. 163-335(b) states that an elected justice "may opt" for retention election.) Effective June 11, 2015.

Public school teacher tenure

North Carolina Association of Educators, Inc. v. State of North Carolina (**N.C.** No. 228A15; April 15, 2016). Affirming (the relevant portion of) the opinion of a divided panel of the Court of Appeals, the Supreme Court held that the portions of the 2013 act that revoked the career status of public school teachers (repealed the Career Status Law) unconstitutionally infringed upon the contract rights of those teachers who had already achieved career status as of 26 July 2013, the effective date of the law. The court applied the test set out in *Bailey v. State*, 348 N.C. 130 (1998), in determining that the revocation, as applied retroactively to career teachers, was in violation of the Contract Clause of the United States Constitution. Having so held, the court did not go on to address the question of whether the revocation also violated Article I, Sec. 19 of the North Carolina Constitution (the takings provision).

Commission appointment by the GA; appointments and separation of powers clauses

State of North Carolina v. Berger (**N.C.**, No. 113A15; Jan. 29, 2016) (with partial dissent). On appeal from the decision of a three-judge panel of the superior court. The Supreme Court determined whether legislation authorizing the General Assembly to appoint a majority of the voting members of three administrative commissions—the Oil and Gas Commission, the Mining Commission, and the Coal Ash Management Commission—violates the appointments and separation of powers clauses of the NC Constitution. The Supreme Court determined that the General Assembly is not prohibited from appointing statutory officers to administrative commissions. The legislation therefore does not violate the appointments clause in Article III, Section 5(8). However, because the legislation allows the legislative branch to appoint a majority of the commission members, sharply limits the Governor's power to remove those members, and in other respects prevents the Governor from having control over the Commissions

necessary to “take care that the laws are faithfully executed,” it plainly violates the separation of powers clause in Article I, Section 6.

APPELLATE PROCEDURE and APPELLATE JURISDICTION

Complex business cases; direct appeal to Supreme Court

Christenbury Eye Ctr., P.A. v. Medflow, Inc. (COA15-1120; March 15, 2016).
Plaintiff's case was designated as a mandatory complex business case on October 29, 2014 and assigned to the Business Court. In March 2015 the Business Court dismissed plaintiff's complaint pursuant to Rule 12(b)(6). Plaintiff appealed to the Court of Appeals. The Court of Appeals dismissed the appeal for lack of jurisdiction due to a 2014 amendment to G.S. 7A-27(a)(2), which provides that appeals of final judgments in mandatory complex business cases are appealable *directly to the Supreme Court*. This jurisdictional change went into effect on October 1, 2014 and applies to actions designated as mandatory on or after that date. (Note: The jurisdictional change also relates to *discretionary* complex business cases pursuant to General Rules of Practice Rule 2.1, but such case was not the subject of this appeal. The session law appears not to address the specific effectiveness date for discretionary cases.)

Sovereign immunity; proper Rule 12(b) basis to preserve immediate appeal right

Murray v. University of North Carolina at Chapel Hill, 782 S.E.2d 531 (N.C. App. March 1, 2016) (with dissent). A student filed a declaratory judgment action against the University alleging that the University's sexual assault grievance policy violated Title IX. The University moved for dismissal on various Rule 12 grounds, and the trial court denied the dismissal. The University appealed the denial and argued the interlocutory appeal should be immediately reviewed because it involved the defense of sovereign immunity. The Court of Appeals determined that the record reflected that the University had only obtained a trial court ruling on its sovereign immunity claim under Rule 12(b)(1), rather than 12(b)(6) or (2). The court therefore held that it was bound by *Can Am S. LLC v. State*, 759 S.E.2d 304 (N.C. App. 2014), in which a prior panel concluded that the denials of dismissal based on sovereign immunity is not immediately appealable if the defense was raised under Rule 12(b)(1) (as opposed to 12(b)(6) or 12(b)(2)). Thus the appeal should be dismissed as interlocutory. (The dissenting judge determined that the University had indeed argued sovereign immunity under Rule 12(b)(6) and that the trial judge had made a ruling on the Rule 12(b)(6) motion. Thus the appeal should have been heard and the trial judge's order denying the dismissal should be reversed.)

Electronic filing of notice of appeal; dismissal of appeal

American Mechanical, Inc. v. Bostic, *Yates Constr. Co., Inc. v. Bostic*, *Phillips and Jordan, Inc. v. Bostic* (COA15-385; COA15-422, COA15-525; Feb. 2, 2016). In this case, the Court of Appeals consolidated three petitions for writs of certiorari. The petitions sought relief from orders of the business court dismissing appeals where the appellants had filed their notices of appeal through the Business Court's electronic filing system rather than with the clerk of superior court in the county in which the actions had been filed. The Court of Appeals affirmed the Business Court's dismissal of the appeals, holding that Rule 3 of the Rules of Appellate Procedure, which requires notices of appeal to be filed with the relevant clerk of court, applies to Business Court judgments the same as any other trial court judgment. Rule 3's requirements, which are jurisdictional, are not replaced by the Rules of the Business Court allowing electronic filing of documents in that court.

UIM coverage determination on summary judgment; interlocutory appeal

Peterson v. Dillman (COA15-901; Feb. 2, 2016). The trial court granted summary judgment in favor of plaintiff on the issue of whether her employer's insurer, GuideOne, provided underinsured motorist (UIM) coverage for plaintiff. GuideOne appealed. The Court of Appeals determined that GuideOne did not have a substantial right to immediate review of the interlocutory order. The order did not affect GuideOne's ability to participate in the suit to final decree and it did not amount to a duty to defend the action because GuideOne still had the option to decline to participate.

ADMINISTRATIVE APPEALS and EMPLOYMENT

Patent bonuses and Wage and Hour Act

Morris v. Scenera (**NC** No. 429PA13; June 10, 2016). On discretionary review of unanimous Court of Appeals decision at 229 N.C. App. 31, 747 S.E.2d 362 (2013). This dispute surrounds a former employee's attempt to receive payment for patent applications submitted to the US Patent and Trademark Office while he was employed by defendant. The Supreme Court held as follows: (1) The trial court was correct to deny directed verdict and JNOV as to whether plaintiff met his burden under the Wage and Hour Act (WHA) regarding his entitlement to bonuses for patents still pending; (2) the trial court did not err in submitting to the jury the issue of calculation of issuance bonuses under the WHA, and the Court of Appeals did not err in construing the term "calculable" under the WHA to mean "capable of being estimated"; (3) the Court of Appeals did not err in affirming the trial court's decision not to award liquidated damages under the WHA; (4) the Court of Appeals did not err in affirming the trial court's decision not to treble damages under the NC Retaliatory Employment Discrimination Act due to the absence of evidence of willfulness; and (5) the Court of Appeals erred in determining that the plaintiff was entitled to pursue rescission as a remedy. Because plaintiff's monetary damages were adequate compensation for defendant's breach, the trial court correctly determined that rescission was not an available remedy.

Error of law affecting state personnel commission decision

Wetherington v. N. Carolina Dep't of Pub. Safety, 780 S.E.2d 543, 548 (**N.C.** Dec. 18, 2015). The superior court correctly reversed the State Personnel Commission's decision that the dismissal of a State Highway Patrol Trooper was supported by just cause. A complaint was filed with the Patrol's Internal Affairs Section alleging that the Trooper violated the Patrol's truthfulness policy when he provided contradictory statements about an incident in which he lost his campaign hat. Applying a per se rule of mandatory dismissal for all violations of the truthfulness policy, a Patrol colonel dismissed the Trooper. The State Personnel Commission ("SPC") affirmed the dismissal, but a Superior Court judge reversed. The Supreme Court determined that because under North Carolina case law "just cause is a flexible concept, embodying notions of equity and fairness, that can only be determined upon an examination of the facts and circumstances of each individual case," the colonel's "view that he had no discretion over the appropriate measure of discipline was a misapprehension of the law." (internal quotation omitted). Thus, the decision to dismiss the Trooper, upheld by the SPC, was "[a]ffected by [an] error of law" subjecting the SPC's decision to reversal or modification by a reviewing court under the version of G.S. 150B-51 applicable to the case. The court remanded the case to the employing agency.

Administrative appeal; termination of teacher by school board

Ragland v. Nash-Rocky Mount Bd. of Educ. (COA15-862; June 7, 2016). In reviewing the decision of the county school board to terminate a teacher's employment, the superior court properly determined that the decision was supported by substantial evidence and was not arbitrary and capricious. There was ample support for the teacher's termination based on his behavior during a physical altercation with a student—during which time the teacher removed his shirt to "pre[pare] for combat" and locked himself in a room with other students without notifying administration of the situation—and his subsequent inappropriate contact with a female student the teacher believed had tried to help "save his job." The issues the self-represented teacher raised before the superior court were either inappropriate in the context of a judicial

review or would have required the trial judge to improperly substitute her own judgment for that of the board.

Wage and Hour Act

Powell v. P2Enterprises, LLC (COA15-542; June 7, 2016). Plaintiff and his father started a restaurant together ("Bob's Big Gas Subs and Pub"). Plaintiff was general manager and fully controlled the restaurant's operations. His father typically distanced himself from operations and was mostly the "money man." The business struggled to make a profit from the start and plaintiff went for some time without paying himself a full salary. After the business relationship between father and son went sour, plaintiff quit and sued his father and the restaurant LLC for unpaid wages under the Wage and Hour Act (NCWHA). The trial court granted summary judgment in favor of defendants. The Court of Appeals affirmed, holding that the evidence could not support a determination under the "economic reality" test that the father and LLC were plaintiff's "employer" (for NCWHA purposes). Defendants did not exercise sufficient operational control or supervision over plaintiff under the circumstances.

Political affiliation discrimination

N.C. Dep't of Public Safety v. Ledford (COA15-595; May 3, 2016). This case involves the removal in 2013 of a veteran law enforcement officer, a registered democrat, from his position as Advanced-level Special Agent in the Alcohol Law Enforcement Division. The Senior Administrative Law Judge concluded that the officer had established a *prima facie* case of political affiliation discrimination in violation of G.S. 126-34.1(a)(2)(b)(2011), and that the employer, the NC Department of Public Safety, had thereafter failed to establish that the purportedly legitimate non-discriminatory reasons for the termination were anything other than pretext. The superior court judge affirmed the ALJ's final decision and, in this opinion, so did the Court of Appeals. The court's lengthy and interesting discussion is a look behind the scenes of one narrow instance of political machination in the years following a major shift in power from one party to another. The details are too many to recount here (and, moreover, the relevant non-discrimination statute was repealed in 2013), but the court's final words are worth reproducing as a statement about the role of the judiciary:

> In its final argument, DPS warns in dire tones against the public policy ramifications of allowing ALJ Morrison's Final Decision to stand. Specifically, DPS cautions this Court that our decision in this case might open the proverbial floodgates to allow future administrations of both parties to frustrate our State's democratic ideals by entrenching partisan appointees before relinquishing power. Legal scholars have long recognized the potentially deleterious effects of such practices in other arenas. [citation omitted] While acts of old school political patronage that turn the highest levels of State government into a revolving door through which well-connected acquaintances of those in power can gain prestige and lucrative remuneration at the taxpayers' collective expense are perhaps more publicized, on an abstract level the prospect of the old guard embedding itself bureaucratically on its way out the door in order to stall its successors' progress strikes us as potentially being every bit as corrosive to the goal of representative self-governance.
>
> Nevertheless, on a practical level, we find it difficult to discern how this rationale applies in the case of a veteran law enforcement officer who has dedicated his entire career to serving and protecting the people of this State, wishes to continue doing so in a role that has no clear impact on effectuating either party's policy priorities, and, unlike more common stereotypical well-heeled political appointees, has no proverbial golden parachute to guarantee a comfortable landing in the private sector. If our General

> Assembly is truly concerned with protecting North Carolinians against such harms as DPS forewarns, it can take appropriate legislative action, but this Court declines DPS's invitation to turn [the officer] into a scapegoat for all that ails our body politic.

Extension of time to serve petition; affirming ALJ's reinstatement of sergeant's employment
NC Dep't of Public Safety v. Owens (COA15-367; Feb. 2, 2016). The superior court had authority to grant the Highway Patrol an extension of time to properly serve its petition for judicial review under G.S. 150B-46 upon a showing of good cause. (Overruling a holding in the earlier *unpublished* opinion in *Schermerhorn v. NC State Highway Patrol*, 223 N.C. App. 102 (2012).) The trial court did not err in finding good cause to grant the extension (to serve by certified mail) where the respondent had received *actual* notice of the petition (through regular mail) within the 10 days allowed by statute. The superior court therefore properly exercised jurisdiction over the parties to the petition. As to the merits, the trial court properly affirmed the ALJ's decision to reinstate the respondent to his employment. Respondent was terminated for loss of credentials (firearms certification), and the record showed that the loss was caused by the employer's own refusal to allow the employee to obtain the certification. The superior court therefore properly affirmed the ALJ's determination that he was terminated arbitrarily and capriciously under G.S. 150B-23(a)(4).

DMV's failure to follow mandatory notice requirements of old G.S. 20-183.8F deprived DMV of jurisdiction to suspend inspection station license
Inspection Station No. 31327 v. N. Carolina Div. of Motor Vehicles, 781 S.E.2d 79 (N.C. App. Dec. 15, 2015). In this case that involved the suspension of a motor vehicle emissions inspection station's license by the DMV and required the court to construe an older version of G.S. 20-183.8F, the court held that the notice requirements of the statute were mandatory rather than directory. The DMV's failure to follow the notice requirements deprived the DMV of subject matter jurisdiction, an issue that can be raised at any time, and was grounds for the DMV's decision to suspend the station's license to be vacated.

Failure to exhaust administrative remedies
Frazier v. N. Carolina Cent. Univ., ex rel. Univ. of N. Carolina, 779 S.E.2d 515 (N.C. App. Nov. 17, 2015). In a case involving plaintiff's claims arising from his dismissal as the head football coach at North Carolina Central University, the trial court properly dismissed plaintiff's complaints based on the following: (1) As specifically provided in statute, the North Carolina Administrative Procedure Act ("APA") applied to plaintiff's claims despite the fact that his position was designated as employment at will and the fact that his employment contract made no reference to the APA. (2) Plaintiff failed to exhaust his available administrative remedies under the APA by failing to timely file a petition for judicial review of NCCU's decision to terminate his employment. (3) Plaintiff failed to sufficiently allege that his available administrative remedies were inadequate such that his failure to exhaust his available administrative remedies prior to seeking relief in the courts would be excused.

REAL PROPERTY, ZONING, LAND USE, and CONDEMNATION

Map Act and eminent domain
Kirby v. NC Dept of Transportation (**N.C.** No. 56PA14-2; June 10, 2016). This is part of the ongoing legal battle surrounding the potential construction of a Beltway loop around Winston-Salem. In this opinion, the Supreme Court affirms the decision of the Court of Appeals at 769 S.E.2d 218 (N.C. App. 2015) holding that the NC DOT's recording of a corridor map pursuant to the Transportation Corridor Official Map Act, which imposed significant development restrictions on the property it covers, was an exercise of the power of eminent domain over that property. The Supreme Court stated that "The Map Act's indefinite restraint on fundamental property rights is squarely outside the scope of the police power. … The societal benefits envisioned by the Map Act are not designed primarily to prevent injury or protect the health, safety, and welfare of the public. … By recording the corridor maps at issue here, which restricted plaintiffs' rights to improve, develop, and subdivide their property for an indefinite period of time, NC DOT effectuated a taking of fundamental property rights." The court went on to specify that on remand, the fact finder must determine the value of the land before the map was recorded and after, taking into account, among all other relevant factors, the effect of reduced *ad valorem* taxes that accompanied the Map Act's implementation.

Constructive ouster of cotenant
Atlantic Coast Props, Inc. v. Saunders (**N.C.** No. 365A15; April 15, 2016). Affirming *per curiam* the opinion of a divided panel of the Court of Appeals. My earlier summary of the opinion of the Court of Appeals, now cited as _ N.C. App. _, 777 S.E.2d 292 (2015), is reproduced below:

> *Atlantic Coast Props, Inc. v. Saunders* (COA14-1278; Oct. 6, 2015) (with dissent). This case is about which of two co-tenants owns a 14-acre parcel in Currituck County. Through various inheritances over time (beginning with an original inheritance by siblings in the 1920s), two families came to own the tract as co-tenants, each with a one-half undivided interest. One family (two children of one of the original siblings) remained on the property; the other family lived out-of-state, did not visit the property, and were not in contact with the resident family. In 2005, the out-of-state family (the "Baxters") sold their property by quitclaim deed to a developer, and the developer soon filed an action to partition the property. The resident family (Respondents) moved for summary judgment, claiming that they were the sole owners of the property through constructive ouster (twenty years of continuous undisturbed possession by a cotenant without demand or possession by the other). The trial court agreed and granted summary judgment for Respondents.
>
> The Court of Appeals (majority) reversed on grounds that the record contained sufficient evidence to allow a jury to determine that the resident family had recognized the Baxters' interest, thus defeating a presumption of constructive ouster. The court noted the following from the record: Testimony by one of the Baxters that one of the Respondents, Edna Winslow, had contacted her in 2004 to determine what she wanted to do with her interest because Respondents wanted to subdivide the property; testimony by Edna Winslow that she believed any subdivision would involve the Baxters; evidence that Respondents had hired a surveyor to assist with the subdivision; and testimony by both Respondents conceding that their father had recognized the Baxters' interest during his life and that he and their mother would have wanted them to include the Baxters in a subdivision because it was the right thing to do. Citing *Clary v. Hatton*, 152 N.C.

107 (1910), the court determined that the Respondents' testimony regarding their father's intentions was sufficient to create an inference that he recognized the cotenants' interest during the first 20 years of his possession. The court further stated that,

> Private property rights are the bedrock of liberty. It is one thing to lose property rights to the open and notorious adverse possession of another. But in a case like this one, where a joint property owner's rights are threatened through the legal fiction of constructive ouster without any actual ouster, courts must be particularly vigilant in applying the well-settled summary judgment standard and permitting a jury to resolve factual disputes about who told what to whom.

(The dissent disagreed about the impact of the Respondents' testimony and about the impact of *Clary*, and determined that summary judgment was proper because the record contained no evidence that the Respondents' father had not already obtained a constructive ouster in the first 20 years of his possession between 1921 and 1941).

Interpretation of *Land v. Village of Wesley Chapel* in zoning ordinance case

Byrd v. Franklin Cty., 368 **N.C.** 409 (Nov. 6, 2015). In a case about whether operating a shooting range was permitted under a zoning ordinance, the Supreme Court reversed the Court of Appeals decision in *Byrd v. Franklin Cty.*, __ N.C. App. __, 765 S.E.2d 805 (2014), for the reasons stated in the dissenting opinion. In the Court of Appeals, the dissenting judge disagreed with the majority's opinion that the Franklin County Unified Development Ordinance lawfully prohibited any land use that it did not specifically name, as it purported to do in an explicit provision to that effect. The dissent's conclusion was based on its view that *Land v. Village of Wesley Chapel*, 206 N.C. App. 123 (2010) was dispositive on the issue at hand. In *Land*, "[c]iting long-standing common law principles of the 'free use of property,' [the Court of Appeals] rejected the philosophy embedded in [the UDO] that 'everything is proscribed except that which is allowed.'" The dissent continued, stating "[t]he *Land* court made clear that the law favors uninhibited free use of private property over governmental restrictions." Based on *Land*, the dissenting judge found himself "bound to conclude that the UDO's provision prohibiting all uses not explicitly allowed in the ordinance is in derogation of the common law and is without legal effect."

Role of zoning officer in appeals under old G.S. 153-345(b)

Morningstar Marinas/Eaton Ferry, LLC v. Warren Cty., 368 **N.C.** 360 (Nov. 6, 2015). The court concluded that a zoning officer did not have the authority to refuse to transmit an appeal from his own zoning determination to the county board of adjustment for its review, and therefore the superior court properly entered a writ of mandamus compelling the placement of the appeal at issue on the agenda of the Warren County Board of Adjustment. The court reasoned that under G.S. 153-345(b) (which was in effect at the relevant time but has since been repealed) a zoning officer has only a ministerial role in the appeals process and is required to forward to the Board the record relevant to the appeal; the zoning officer has no discretion to do otherwise. Contrary to the mandatory directive of G.S. 153-345(b), the zoning officer in this case made a legal determination that the party seeking appeal lacked standing and refused to transmit the appeal to the Board on that basis. The court noted that the Board, not the zoning officer, determines the fate of such appeals including whether a party has standing to appeal.

Prescriptive easement

Myers v. Clodfelter (COA15-1307; June 7, 2016). Plaintiffs were owners of two tracts of land to and from which Coe Road was the only means of ingress and egress. Nearby landowners (Defendants), across whose land Coe Road also ran, decided to build a large ditch across Coe Road to cut off Plaintiffs' access across their property (and, ultimately, their access to Hwy 64). Plaintiffs (one of whom is named Ms. Coe) sued, claiming a 50+ year prescriptive easement along Coe Road based on open, notorious, continual, and adverse use spanning generations. The trial court declared that there was indeed a prescriptive easement and that defendants wrongfully closed the road. The court ordered defendants to reopen access. The Court of Appeals affirmed, determining there was ample evidence that plaintiffs (and their predecessors in interest) had openly used Coe road as a matter of right rather than permission (in other words, with the requisite "hostility") for well over the twenty years required by law.

Quasi-judicial proceedings

Butterworth v. City of Asheville (COA15-919; May 17, 2016). Residents opposed to a proposed subdivision brought a petition for *certiorari* challenging the Town's approval of the subdivision. The superior court granted the Town's motion to dismiss the petition. The Court of Appeals reversed, holding that the Town's decision to approve the development required the Town's discretion as to whether to allow a modification from Town ordinances. Thus the Town's approval process should have been treated a quasi-judicial proceeding (rather than an administrative/ministerial decision), and the residents therefore should have been afforded certain due process rights during the approval process. Remanded to the trial court for further remand to the Town.

Municipal authority; arbitrary enactment of ordinance

Town of Beech Mountain v. Genesis Wildlife Sanctuary, Inc. (COA15-260 and COA15-517; May 10, 2016) (with dissent). A wildlife sanctuary had for many years operated its visitor center near the banks of Buckeye Lake. In 2009, the Town Council passed a narrowly-crafted ordinance that had the very tailored effect of prohibiting the sanctuary from utilizing any of the buildings in which it operated its sanctuary. After sustaining considerable financial loss, the sanctuary brought an action for violation of its substantive due process rights. At trial, the jury found in the sanctuary's favor. The Court of Appeals affirmed, holding in a lengthy opinion that the trial court properly allowed the as-applied substantive due process claims to proceed because there was ample evidence that the ordinance was an arbitrary act designed to deprive a single property owner of the use of its property rather than a legitimate use of power to protect the water supply. (In his opinion, the dissenting judge disagreed that the Town's action gave rise to a substantive due process claim.)

This case also involves a discussion of potential jury misconduct and affirms the trial court's decision to deny a motion for a mistrial. For a general discussion of jury misconduct and new trials (including a quick summary of the issue from this case), see my May 11 blog post at On the Civil Side.

GS 136-108 hearing; jurisdiction to apply provisions of OACA; findings regarding compensable interest

DOT v. Adams Outdoor Advertising of Charlotte L.P. (COA15-589; April 19, 2016). The NC DOT filed an action condemning land upon which defendant had a lease to maintain a large, non-conforming billboard. The trial court conducted a hearing pursuant to GS 136-108 (a "108 hearing") to decide all issues not related to compensation. The DOT appealed the trial court's order, and the Court of Appeals

reversed. While the trial court did not lack jurisdiction to apply provisions of the Outdoor Advertising Control Act (Article 11 of Chapter 136) in a 108 hearing merely because the pleadings did not invoke the Act, the trial court erred in applying the OACA's provisions. The trial court also erred in: finding that defendant's billboard was a permanent leasehold improvement rather than personal property (for which there is no compensation); determining that loss of outdoor advertising income is a compensable interest; and finding that defendant had a compensable interest in its DOT-granted permit to operate the billboard and its option to renew its lease. Finally, where the trial court erred in determining the type of interest for which compensation was to be determined, the trial court also erred in making rulings regarding the method by which those damages would be measured at trial.

Condemnation; loss of visibility as factor in diminution of value

City of Charlotte v. University Fin. Properties, 784 S.E.2d 587 (N.C. App. April 5, 2016). The City of Charlotte filed an action condemning a portion of defendant's property to accommodate expansion of the roadway for the City's light rail system. The City proposed an elevated bridge down the center of the roadway upon which the rail would operate. The trial court ordered that the defendant be allowed to introduce evidence of the impact of the bridge construction on their property's visibility when establishing the diminution in value to its existing property. The Court of Appeals reversed, holding that the reduced visibility of the existing property caused by the project is not compensable and may not be considered as a factor in the valuation of damages.

Partition issues: betterments; fair rental value; contributions

Harris v. Gilchrist, _ S.E.2d _ (N.C. App. March 1, 2016). Dispute over the division of sale proceeds arising out of an action for partition by sale of real property owned by tenants in common, including awards made for (i) betterments, (ii) fair rental value, and (iii) contributions for property expenses.

1.Betterments. The NC Court of Appeals applied G.S. 1-340 to affirm the trial court's award of an allowance for improvements made by a co-tenant occupying the property because he made improvements to the property while in possession of the land under a color of title believed to be good. The court remanded the issue for findings on the value of the improvements because the sole finding by the trial court that there was an increase in tax value was alone insufficient to show how much improvements made by the occupying co-tenant added to the value of the property.

2. Fair Rental Value. The court noted the Betterments statutes under Article 30 of G.S. Chapter 1 allow a claim for rent to offset a betterments claim, provided one would be entitled to rents in the first instance. A non-occupying co-tenant is entitled to rents when there has been an actual ouster by the occupying co-tenant of the non-occupying co-tenant. Here the court did not find actual ouster because there was no evidence tending to show that the occupying co-tenant prevented the other co-tenants from accessing the property. The court affirmed the trial court's order denying the claim for rents and profits during the co-tenancy.

3.Contributions. The court noted that under GS 105-363(b) and an earlier decision of the court a co-tenant who pays a greater share of taxes, mortgage interest, and costs may enforce a lien in his favor upon the shares of other joint owners for such payments, except when the co-tenant paying the taxes and costs is in exclusive possession of the property. The court noted that exclusive possession is not the same as sole possession. For possession to be exclusive, the court stated there must be a finding that the occupying co-tenant withheld the property from the other co-tenants and the other co-tenants made a demand to possess the property. In this case, neither had occurred therefore the court affirmed the trial

court's award of an allowance for taxes and insurance to the occupying co-tenant during the time he was a tenant in common with the non-occupying co-tenants. [This summary was contributed by SOG faculty member Meredith Smith.]

Standing of neighbor to challenge commission decision before Board of Adjustment; special damages

Cherry v. Wiesner, 781 S.E.2d 871 (N.C. App. Feb. 16, 2016). This case relates to the highly contentious dispute between the owners of a newly-built modernist home and their across-the-street neighbor, who argued the home was incongruous with the Raleigh historic district in which it was built. The dispute, which got a lot of media attention, reached the superior court after the historic commission approved the design, the Board of Adjustment (BOA) later rejected it (the owners choosing to proceed with construction throughout the process), and the BOA's decision was appealed. The superior court judge determined that the neighbor had no standing to challenge the home's design before the BOA (and thus reversed the BOA's decision and affirmed the commission's decision to approve the design). The Court of Appeals affirmed, holding, after a detailed analysis, that the neighbor failed to demonstrate that she would suffer any *special damages* distinct from the rest of the community, and the mere fact that her home was across the street was insufficient to establish such special damages or that she otherwise qualified as an aggrieved party.

Homeowners association had authority to rescind fines

Bilodeau v. Hickory Bluffs Cmty. Servs. Ass'n, Inc., 780 S.E.2d 205 (N.C. App. Nov. 17, 2015). In a relatively fact-specific case, a board of directors of a homeowners' association did not properly impose fines on certain association members where the record showed that no written notice regarding the imposition of fines was mailed to the members as required by the association's bylaws. Even if the fines were properly imposed, the board of directors possessed the authority under the Planned Community Act and Robert's Rules of Order to later rescind the fines and the board exercised that authority.

Privately owned dry sand beaches subject to public trust doctrine; certain ordinances enforceable under town's police power

Nies v. Town of Emerald Isle, 780 S.E.2d 187 (N.C. App. Nov. 17, 2015), *review allowed,* __ N.C. __, __ S.E.2d. __, 2016 WL 1553885 (Apr. 13, 2016). Privately owned dry sand beaches are subject to the public trust doctrine. Because the plaintiff beachfront property owners had no right to exclude the public from public trust beaches, portions of a town ordinance which regulated beach driving, even if construed to allow beach driving, could not effectuate a Fifth Amendment taking. Under the facts at hand, the Town of Emerald Isle could enforce ordinances, determined to be within the scope of the Town's police power, reserving unimpeded access over portions of the plaintiffs' privately owned dry sand beach without compensating the plaintiffs because "public trusts rights in Plaintiffs' property are held by the State concurrently with Plaintiff's rights as private property owners."

Developer's attempt to retain ownership of areas within condo was inconsistent with NC Condominium Act

Residences at Biltmore Condo. Owners' Ass'n, Inc. v. Power Dev., LLC, 778 S.E.2d 467 (N.C. App. Nov. 3, 2015). The trial court properly granted summary judgment in favor of a condominium owners' association seeking a declaratory judgment that certain disputed areas within a condominium were

common elements of the condominium as opposed to properties retained by the developer. The court reasoned that the North Carolina Condominium Act contemplates that the defining feature of a condominium "is that it is comprised of two—*and only two*—types of property: (1) units (defined as the 'physical portion[s] of the condominium designated for separate ownership or occupancy, the boundaries of which are described [in the declaration]'); and (2) common elements (meaning 'all portions of [the] condominium other than the units')." By choosing to create a condominium under the Act, the developer "surrendered the right to maintain ownership of certain areas within the condominium property in a manner that was unauthorized under the Act." Thus, the developer's attempt to retain ownership of the disputed areas was inconsistent with the Act, and the trial court properly granted summary judgment in favor of the owners' association.

FORECLOSURES

Application of statute of limitations in foreclosure action

In the Matter of Foreclosure of Brown (**NC** No. 224PA15; March 18, 2016), ordering *per curiam* that discretionary review of the unanimous opinion of the Court of Appeals was improvidently granted. Here is a summary by my colleague Meredith Smith of the Court of Appeals opinion (now cited as _ N.C. App. _, 771 S.E.2d 829 (2015)):

> *In the Matter of Foreclosure of Brown* (COA14-937; April 21, 2015). Mortgagor/Borrower challenged foreclosure on the basis of the expiration of the statute of limitations applicable to a foreclosure under G.S. 1-47(3). Provided that the mortgagor remains in absolute possession of the property during the 10 year period, the Court of Appeals held that the 10-year statute of limitations period runs from the last to occur of the following: (i) the date that the power of sale becomes absolute, (ii) the date of the last payment made on the loan, and (iii) the date of the forfeiture of the mortgage. The court also held that the power of sale becomes absolute on the date the loan is accelerated and, if the loan is not accelerated, on the maturity date.

Evidence to create an issue under the anti-deficiency statute

TD Bank, N.A. v. Williams (COA15-598; June 7, 2016). Summary judgment was properly granted against debtor/guarantor in creditor's action to collect the debt. Debtor/guarantor failed to create a genuine issue of material fact as to his defense under the anti-deficiency statute. His contention regarding the value of the property was contained in an unverified answer and thus could not be used as evidence, and the materials included in his verified motion for partial summary judgment did not actually include appraisals or opinions of the value of the property.

Bid deposit disbursement to winning bidder on resale; GS 45-21.30(d)

In re: Foreclosure of Ballard (COA15-475; March 15, 2016). Abtos, LLC was the top bidder at a foreclosure sale with a winning bid of $424,263.20, which required a deposit of $21,213.21. Abtos defaulted on the bid. Upon resale, the winning bidder was U.S. Bank, trustee for the holder. U.S. Bank bid $400,300.00. Pursuant to GS 45-21.30(d), the clerk disbursed Abtos's earlier deposit to U.S. Bank to help cover the difference between the final sale price (on resale) and the amount of Abtos's bid (in the prior sale). The Superior Court affirmed the clerk's order disbursing the deposit. On appeal, Abtos argued that it should have been able to recover its deposit because the "procedure for…resale" was not "the same in every respect" as the original sale as required by GS 45-21.30(c). Abtos argued that U.S. Bank had opened the bidding in the original sale with a higher price than its opening (and only) bid in the resale, and therefore the procedure differed. The Court of Appeals rejected the argument that an opening bid amount is part of the "procedure" referred to in the statute and further noted that "[g]iven the vagaries of the real estate market, it would indeed seem strange to bind a party to the amount of its opening bid in a previous sale." The Superior Court therefore properly affirmed the clerk's order disbursing the deposit to U.S. Bank.

Application of two-dismissal rule

In Re Foreclosure of Herndon, 781 S.E.2d 524 (N.C. App. Jan. 19, 2016).
Applying a holding from *In re Foreclosure of Beasley* (2015) to a similar set of facts, the Court of Appeals held that a third Chapter 45 foreclosure proceeding filed after the trustee voluntarily dismissed

two previous actions under Chapter 45 on the same note was not barred by the Rule 41(a) "two-dismissal rule." The court found that each action was based on a different period of defaults and therefore the second voluntary dismissal did not operate as an adjudication on the merits and did not preclude the trustee from filing a third Chapter 45 foreclosure. The court reiterated from *Beasley* that the prior acceleration of the loan by the lender did not preclude the filing of future foreclosure actions based on subsequent defaults. [Note: This summary was contributed by SOG faculty member Meredith Smith.]

Note holder; indorsements

In re Foreclosure of Kenley, 781 S.E.2d 664 (N.C. App. Jan. 5, 2016).
Production of the original note indorsed in blank at the Chapter 45 foreclosure hearing by the party seeking to foreclose constitutes sufficient evidence for the court to determine that the party is the holder of the note.

WILLS, ESTATES, and TRUSTS

In re Estate of Williams, 783 S.E.2d 253 (N.C. App. March 1, 2016). An adult man died intestate; parents of the decedent filed to open an estate and listed themselves as the only persons entitled to take from the decedent on the application for letters of administration. A motion was later filed on behalf of a minor child in the estate before the clerk of superior court to determine whether the minor child was an heir entitled to inherit from the decedent. The court applied the statutory requirements of G.S. 29-19(b)(2) to determine whether the child was entitled to inherit from the father via intestate succession. The court held that strict compliance rather than substantial compliance with the statute is required. Because a written acknowledgement of paternity executed or acknowledged before a certifying officer named in G.S. 52-10(b) was never filed with the clerk during the child's and the father's lifetime, the child could not take as an heir under G.S. 29-19(b)(2). The court also held that the provisions of G.S. 29-19(b)(2) do not violate the Equal Protection Clause of the U.S. Constitution as the state has an interest in a just and orderly disposition of property at death. The classification based on illegitimacy created by G.S. 29-19(b)(2) is substantially related to a permissible state interest and therefore survives an intermediate scrutiny analysis by the court. [Note: This summary was contributed by SOG faculty member Meredith Smith.]

Trusts; Clerk of Court jurisdiction

Morgan-McCoart v. Matchette, 781 S.E.2d 809 (N.C. App. Jan. 5, 2016). Plaintiff and defendant are sisters. Their mother creates a trust and executes a durable power of attorney naming plaintiff as trustee and attorney in fact. Mother is adjudicated incompetent by the clerk of superior court. Plaintiff and defendant sign and file with the clerk a resignation agreement stating defendant will assume role as trustee, plaintiff will not contest the appointment of defendant as general guardian, and plaintiff will submit a request to the clerk for reimbursement of expenses as trustee and attorney in fact. Plaintiff files a petition with the clerk of superior court for such reimbursement as well as for a distribution from the trust. The clerk enters an order allowing only a fraction of the expenses and not allowing any beneficiary distribution. The plaintiff files a complaint in district court against the defendant in the defendant's individual capacity, as trustee, and as general guardian for breach of contract. The district court dismisses the plaintiff's claims finding that the court did not have subject matter jurisdiction. The Court of Appeals affirms in part and reverses in part. The court finds that while the clerk retains jurisdiction to hear matters related to the guardianship under GS 35A-1203 and the administration and distribution of the trust under GS 36C-3-203, any action against the defendant in the defendant's individual capacity arising based on a claim for breach of contract related to the designation agreement is within the jurisdiction of the district court. [Note: This summary was contributed by SOG faculty member Meredith Smith.]

CORPORATIONS

Director Safe Harbor

Piazza v. Kirkbride, __ S.E.2d __ (N.C. App. April 5, 2016). In this detailed opinion analyzing a case of alleged securities fraud, the Court of Appeals affirmed a judgment after a jury trial in favor of the plaintiff investors. The court's majority rejected the defendant-appellant's arguments that the plaintiffs were required to prove scienter to establish securities fraud under the North Carolina Securities Act; rejected the argument that the trial judge erred in declining to submit an instruction regarding the Director Safe Harbor provision in G.S. 55-89-30(b); and held that the verdict was not so inconsistent as to require a new trial. The dissenting judge determined that a Director Safe Harbor instruction was indeed warranted by the evidence and for that and other reasons a new trial was required. [After disposition of this case by the Supreme Court, if any, I will provide a more detailed summary of the issues.]

Standing of shareholder in action

Spoor v. Barth, 781 S.E.2d 627 (N.C. App. Jan. 5, 2016). A majority shareholder had standing to sue a corporation's former president and former president's father for fraud and related claims. His claims were not derivative on behalf of the corporation but instead related to injuries to himself that were separate and distinct from other shareholders. Because his allegations related to his own investment of $8 million in the corporation based on defendants' false representations to him specifically, those claims did not belong to the corporation but instead "belong[ed] to plaintiff alone." The trial court therefore erred by dismissing the action for lack of standing. [Side note: This opinion also includes a useful summary of who may bring actions on behalf of a corporation (legal claims that could be maintained *by the corporation itself*) if that corporation is in bankruptcy. In short, only the bankruptcy trustee may maintain such claims.]

Dissolved LLC could not assign certain rights to another

Landover Homeowners Ass'n, Inc. v. Sanders, 781 S.E.2d 488 (N.C. App. Dec. 15, 2015). The trial court erred in granting summary judgment to defendants in a case where the court erroneously considered defendants to be entitled to certain rights under a subdivision declaration and where ambiguities existed in the language of a declaration such that there was an issue of material fact. As to the first issue, the Court of Appeals found that a purportedly dissolved LLC could not assign its rights under a subdivision declaration to defendants. The closely held LLC was dissolved in December 2005 yet it attempted to assign certain rights it had retained under a subdivision declaration to defendants seven years after the LLC's dissolution. Because this assignment was not related to the winding up of the LLC and because the law does not otherwise support such an assignment following a company's dissolution, the purported assignment was ineffective. As to the issue of material fact, provisions of a second supplemental subdivision declaration were too ambiguous to support an order granting summary judgment. The language of the declaration was fairly and reasonably susceptible to the competing constructions advanced by the opposing parties, and, thus, was sufficiently ambiguous to create an issue of material fact which precluded a grant of summary judgment. The court also determined that the defendants' contention that the second supplemental subdivision declaration was not binding upon them was barred by the equitable doctrine of quasi-estoppel because defendants accepted the benefit of the declaration by making certain conveyances of lots subject to the terms of the declaration.

SCHOOLS

Charter school entitlement to portion of federal funds

Thomas Jefferson Classical Academy Charter School v. Cleveland County Bd. of Educ. (**N.C.** No. 400A15; June 10, 2016). Affirming *per curiam* the decision of a divided panel of the Court of Appeals, which is now cited as 778 S.E.2d 295 (N.C. App. 2015).