Summaries of Civil North Carolina Appellate Opinions
of Interest to Superior Court Judges
June 20, 2017 to October 3, 2017

and

Selected 2017 legislation related to civil practice

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CASE SUMMARIES

CIVIL PROCEDURE, JURISDICTION, and JUDICIAL AUTHORITY

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

The dissenting judge argued that the matter should be remanded to the trial court for a determination of good cause shown; that the Court of Appeals should not have excused the County's

misapprehension of the law; and that there could be a basis for finding that Plaintiffs had been prejudiced by the County's failure to answer.

Due diligence requirement that precedes service by publication

Watauga County v. Beal (COA16-1226; Oct. 3, 2017). Prior to filing this tax foreclosure, the County attempted several times unsuccessfully to deliver tax bills, payment plans, and collection notices to defendant's address of record, and during that time could find no other contact information for her. When the County filed this foreclosure action, the County served it by publication (and shortly thereafter also attempted service by certified mail, again unsuccessfully). After the court entered default judgment against defendant and the property was sold, she moved to set aside the sale based on the County's lack of due diligence in locating her before attempting service by publication. The trial court (district court) denied the motion to set it aside. The Court of Appeals affirmed, holding that under the facts of this case, the "due diligence" requirement for service by publication had been met *prior to* the filing of the complaint itself. The court stated that "where plaintiff already knew from extensive prior experience with defendant that it could not with due diligence effect service of process on defendant by personal delivery or by registered or certified mail...plaintiff's actions satisfied the 'due diligence' necessary to justify the use of service of process by publication."

One judge overruling another

Gardner v. Rink (COA16-948; Sept. 5, 2017). In an April 1 order, a superior court judge denied the Plaintiff's motion for summary judgment seeking to set aside a lease. On April 26, pursuant to a separate motion for summary judgment, a second superior court judge granted the request to set aside the lease. Finding that both motions presented the same legal issue, the Court of Appeals held that the second order impermissibly overruled an earlier trial court order. Thus the second order was reversed and the case remanded.

Attorney fees by state agency; substantial justification

Frampton v. The Univ. of NC at Chapel Hill (COA16-1236; Aug. 15, 2017). Affirming the Superior Court's decision to deny attorney fees under G.S. 6-19.1 to a former professor in connection with an earlier award of back pay. [My 2015 summary of the underlying case is included below.] The trial court did not abuse its discretion in determining that the University had acted with "substantial justification" in the way it handled the professor's unusual situation and that the special circumstances of the case would make it unjust to award attorney fees. Furthermore, the decision to award attorney fees under G.S. 6-19.1 is discretionary.

[*Prior Summary of 2015 opinion*: *Frampton v. UNC* (COA14-1117; June 16, 2015). In 2012, a tenured nine-month professor was arrested in Argentina for cocaine possession while he was scheduled to be teaching a spring semester course in Chapel Hill. The University first waited five weeks in hopes that his situation would be resolved, and then, when no progress was made, placed him on personal leave without pay. Eventually he was convicted of cocaine smuggling and sentenced to more than four years imprisonment in Argentina. The University then initiated disciplinary proceedings and terminated his employment. He sought judicial review of the University's decision pursuant to G.S. 150B, and the Superior Court affirmed the University's decision. The Court of Appeals reversed, finding that the University violated its policies by unilaterally placing him on personal leave without pay rather than initiating formal disciplinary proceedings applicable to tenured faculty. He was, therefore, entitled to recover pay and benefits that were withheld from the time he was placed on unpaid leave until the date of his formal termination.]

Forum selection clause; enforceability of clause in North Carolina contract

Schwarz v. St. Jude Medical, Inc., 802 S.E.2d 783 (N.C. App. Aug. 1, 2017). North Carolina Gen. Stat. 22B-3 provides that "..any provision in a contract *entered into in North Carolina* that requires the prosecution of any action...that arises from the contract to be instituted or heard in another state is against public policy and is void and unenforceable." (emphasis added). In this case, an employee sued her employer in North Carolina superior court for wrongful discharge and libel. The trial court dismissed the action because the employment agreement contained a forum selection clause requiring suit to be filed in Minnesota. The trial court concluded that the contract had *not* been "entered into in North Carolina," so the Minnesota forum selection clause was not unenforceable.

The Court of Appeals reversed, holding that the last act necessary to make the employment agreement binding—in this case, Plaintiff's signature—had occurred in North Carolina. Thus the contract was "entered into in North Carolina." G.S. 22B-3 therefore applied, the Minnesota forum selection clause was void and unenforceable, and the case could proceed in North Carolina superior court.

Appointment of referee to conduct accounting

Mitchell, Brewer, Richardson, Adams, Burge & Boughman, 803 S.E.2d 433 (N.C. App. Aug. 1, 2017). This is the second appeal in a case revolving around the contentious breakup of a law firm. This one begins after remand from the first appeal. As a result of the first appeal, the trial court judicially dissolved the firm, appointed a referee to conduct an accounting and distribution of the firm's assets, and granted summary judgment to departing attorneys on the remaining attorneys' counterclaims. The remaining attorneys (two of the former partners) appealed. The Court of Appeals affirmed each of the trial court's actions and concluded as follows: (1) Appellants could not challenge the referee's report because they failed to timely object to the report when it was made (as required by Rule 53); (2) the referee was not required to conduct his investigation with the formalities Appellants argued were required; and (3) Appellants' counterclaims were properly dismissed because they were premised on the assertion that judicial dissolution of the firm was not required, a question that was resolved in the first appeal.

Statutes of limitation; Rule 12(b)(6) conversion to summary judgment

Asheville Lakeview Properties, LLC v. Lake View Park (COA15-1308; July 18, 2017) (with dissent). Lot owners in a subdivision sued the subdivision's commission related to various assumptions of dues-collecting authority, deed transfers, and compulsory membership, much of which occurred in or around 1996. The trial court assessed each claim in turn, determining that the relevant statutes of limitation—ranging from three to ten years in duration—had long since run. The trial court dismissed the claims pursuant to Rule 12(b)(6). The Court of Appeals (majority) affirmed, agreeing with the trial court as to the application of the various statutes of limitations.

The dissenting judge would reverse and remand for further hearing, having noted that the trial court considered various materials outside the pleadings, thus effectively converting the matter from a 12(b)(6) hearing to a summary judgment hearing without affording the non-moving party the requisite opportunity to respond under Rule 56. The judge noted further that the trial court had apparently viewed the evidence in the light most favorable to the movant (rather than non-movant), further necessitating a rehearing.

Expert witness fees as costs

Slaughter v. Slaughter, 803 S.E.2d 419 (N.C. App. July 18, 2017). This is a domestic case, so the underlying substance is not summarized here. But relevant to the superior court is the opinion's discussion of expert witness costs. The trial court ordered one party in this case to pay $20,000 of the other party's expert witness fees. The Court of Appeals reversed, noting that the only fees of (non-court-

appointed) experts that may be shifted pursuant to G.S. 7A-305(d) are those "for actual time spent providing testimony at trial, deposition, or other proceedings." In this case, only $2,100 of the expert's fees pertained to actual testimony, so the award was far in excess of what was allowed by statute.

CONSTITUTIONAL ISSUES

Who is responsible for providing a sound, basic education? Just the State?
Silver v. Halifax Cty Bd. of Comm'rs (COA16-313; Sept. 19, 2017) (with dissent). This is another chapter in the ongoing alleged failure of adults in this State to provide a sound, basic education to certain children in Halifax County. In this case Plaintiffs, students in the Halifax County Public Schools, sued the Halifax County Board of Commissioners (the "County Board") for failure to act within its power to remedy the constitutional deficiencies. The superior court dismissed the action under 12(b)(6), concluding that it is not the County Board's responsibility to maintain a public education system for Halifax County.

In a very detailed analysis, the Court of Appeals (majority) affirmed, concluding that the constitutional responsibility to provide a sound, basic education belongs to the State, and the County Board does not have the power to provide the relief sought. (The opinion provides a provides a useful history of the *Leandro* cases and often takes note of some of Judge Manning's forceful orders during his many years overseeing those cases—*e.g.*, "*The State must step in with an iron hand and get the mess straight*.")

The dissenting judge noted that Plaintiffs have alleged certain failures of the County Board to use school funding *allocated to the Board* consistent with Art. IX of the NC Constitution and various statutes. The judge concluded that "it is *these* revenues that Plaintiffs allege the Board is failing to disburse...consistent with the constitutional right to a public education[.]" Based on the "local responsibility" for public education identified in Article IX, the dissenting judge concluded that a cause of action had been stated "to the extent their complaint alleges [failure]...as a result of the Board's inadequate funding of buildings, supplies, and other resources."

Authority of Rules Review Commission to review State Board of Education rules
North Carolina State Bd. of Educ. v. State (COA15-1229; Sept. 19, 2017) (with dissent). In this detailed opinion, the majority concludes that the State's Rules Review Commission (RRC) has the authority under the Administrative Procedure Act (APA) to review rules made by the State Board of Education, and that it does not contravene the Board of Education's constitutional rule-making authority by doing so. The dissenting judge agreed with the trial court and concluded that the plain language of Art. IX gave the Board of Education authority to promulgate its own rules and regulations, and the State had not demonstrated that the RRC's current involvement in that process was in accord with the NC Constitution.

Separation of Powers; no authority of judiciary to order State to pay judgment out of Treasury
Richmond Cty Bd. of Educ. v. Cowell, 803 S.E.2d 27 (N.C. App. July 18, 2017). In a prior appeal in this case (2015), the Court of Appeals declared that, under the NC Constitution, certain monies the State was collecting for criminal offenses should have been paid to the County schools instead of being used to fund jail programs. The Court of Appeals ordered that the fees be paid back to the counties for school use. Unfortunately the State never paid it back and it has since been spent on other things. There has been no new appropriation from the GA to satisfy the judgment. (Note that the County had not secured an injunction to prevent the money from being spent while the matter was pending.) So Richmond County went back to the trial court and got a writ of mandamus ordering the amount to be paid out of

the State Treasury. In this opinion, the Court of Appeals reverses that order, holding that the Separation of Powers Clause of the NC Constitution prevents the judiciary from ordering new money to be paid out of the State Treasury to satisfy existing judgments against the State. The court closed by stating (in part) that, "The State must honor [the] judgment. But it is now up to the legislative and executive branches, in the discharge of their constitutional duties, to do so. ...We have pronounced our judgment. If the other branches of government still ignore it, the remedy lies not with the courts, but at the ballot box."

CONTRACTS

Real estate sales commission; breach of good faith and fair dealing
Blondell v. Ahmed (**N.C.** No.275A16; Sept. 29, 2017), affirming *per curiam* the decision of the Court of Appeals, summarized below:

> [*Prior summary of 2016 COA opinion:*
> *Blondell v. Ahmed*, 786 S.E.2d 405 (N.C. App. 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.)]

Governmental immunity; sufficient pleading of waiver to overcome immunity
Wray v. City of Greensboro (N.C. No. 255A16; Aug. 18, 2017).
See Supreme Court's press summary here or see attached copy in Appendix A.

Statute of limitations on contract claim
Christenbury Eye Center, P.A. v. Medflow, Inc. (N.C. No. 141PA16; Aug. 18, 2017).
See Supreme Court's press summary here or see attached copy in Appendix A.

Seed Act; limitation of remedies clause against public policy
Kornegay Family Farms LLC v. Cross Creek Seed, Inc. (N.C. No. 187PA16; Aug. 18, 2017).
Press Supreme Court's press summary here or see attached copy in Appendix A.

Personal liability insurance; obligation to defend and indemnify for harm arising from molestation
North Carolina Farm Bureau Mut. Ins. Company, Inc. v. Phillips (COA16-620; Oct. 3, 2017). Mr. Phillips, who had accepted a plea to charges that he committed sexual battery of a child, was sued by the child's father for harm (to the father) resulting from the conduct. Farm Bureau, Mr. Phillips's liability insurance provider, filed this action seeking a declaration that it had no duty to defend or indemnify Mr. Phillips (or his wife) under these circumstances. The trial court determined that the policy required defense and indemnity. The Court of Appeals reversed. Because the policy covered liability for "bodily injury"; the definition of "bodily injury" specifically excluded conduct arising out of "actual, alleged, or threatened sexual molestation of a person"; and the father's claims all arose out of ("hinge[d] on") the sexual molestation of the child, Farm Bureau had no duty to defend or indemnify Defendants.

Contract dispute; summary judgment
Premier, Inc. v. Peterson (COA16-1139; Sept. 5, 2017). This is this second appeal in an ongoing business court dispute between the purchaser and sellers of a software company. The purchase agreement specified that for five years after the purchase, the sellers would continue to receive an "Earnout Amount" from buyer for each hospital (over a certain minimum) that implemented the software. The sellers alleged that buyer had paid them an Earnout Amount only for a portion of those hospitals. In the first appeal the case was remanded to the trial court with guidance as to when a hospital could be considered to have implemented (subscribed to or taken a license of) the product. The trial court then ordered the parties to conduct discovery accordingly. At the conclusion of the extended discovery period, the sellers had taken no steps to discover the relevant information from the hospitals in question. With no evidence before it of hospitals for which no Earnout Amount had been paid, the trial court granted summary judgment in favor of buyer. The Court of Appeals, in this second appeal, agreed and affirmed.

Breach of lease; discharge of liability for negligence; ambiguity of contract terms
Morrell v. Hardin Creek, Inc. (COA16-878; Aug. 15, 2017) (with dissent). After a commercial tenant's kitchen was damaged by flooded sprinklers, the tenant sued the landlord for breach of lease and negligence based on alleged faulty installation of the sprinkler system. The trial court granted summary judgment in favor of the landlord on plaintiff's claims because Paragraph 5(b) in the lease states that tenant and landlord discharge each other from "all claims and liabilities arising from or caused by any hazard covered by insurance...." The Court of Appeals reversed, holding that, when read in conjunction with related paragraphs in the lease, some of which were incomplete, the scope and meaning of paragraph 5(b) was ambiguous. Discussing existing case law, the court also held that paragraph 5(b) cannot be construed as a release of liability for *negligence* because it does not contain the requisite "clear and explicit words that that was the intent of the parties." The dissenting judge found no ambiguity in the lease language and disagreed that further clarity was required before a party could be released from negligence liability.

Breach of contract, unfair and deceptive trade practices; ambiguous terms
Rider v. Hodges (COA17-110; Aug. 15, 2017). Displeased with the scope and/or quality of Defendant's landscaping services, Plaintiffs sued Defendant for breach of contract, fraud, and unfair trade practices. The trial court granted summary judgment in Defendant's favor on all claims. The Court of Appeals affirmed, holding that (1) Plaintiffs' own testimony revealed that there was never a meeting of the minds as to the scope of work to be performed for the sum of money paid, thus the breach of contract action failed as a matter of law; (2) Plaintiffs failed to allege or show any reliance on any alleged false statements by Defendant, thus defeating the fraud claim; and (3) even if there had been a valid contract,

there were no aggravating circumstances attendant to the contract to support an unfair trade practices claim

Insurance coverage; acts of vandalism as intentional acts

Plum Properties v. NC Farm Bureau Mut. Ins. Co., Inc., 802 S.E.2d 173 (N.C. App. Aug. 1, 2017). Plaintiff's rental properties were vandalized by a couple of minors to the tune of over $58,000. Plaintiff sued the minors and their parents. Plaintiff also brought this action seeking a declaration that Defendant, the parents' insurer, was responsible for covering the damage. The trial court granted Defendant's motion for summary judgment and the Court of Appeals affirmed. Because the insurance policy expressly excluded intentional actions from the definition of a covered "occurrence," Defendant was not responsible for providing coverage for the minors' acts of vandalism.

Statute of frauds; consideration for promissory note

Kyle v. Felfel, 803 S.E.2d 249 (N.C. App. Aug. 1, 2017). The trial court correctly determined that Plaintiff could not enforce a promissory note against Defendants in the amount of $200,000. The purported consideration for the note – an option to purchase property—was not signed by Plaintiff and was therefore void under the Statute of Frauds, GS 22-2. In addition, the Plaintiff (Appellant)'s quasi-estoppel argument failed because it was raised for the first time on appeal, and because, in any event, "this case does not cry out" for the use of an estoppel doctrine.

TORTS

Negligence of insurance agent; negligent misrepresentation

Holmes v. Sheppard (COA17-125; Oct. 3, 2017). Over the course of several years, Plaintiff, the owner of various pieces of real estate, obtained insurance policies on those properties through Defendant, a Farm Bureau agent. When one of the unoccupied properties sustained water damage, Plaintiff made a claim under a policy only to find that it did not cover damage occurring during a period of vacancy. Plaintiff alleged that Defendant breached a duty of care in not obtaining insurance for Plaintiff that covered vacancy, and he sued Defendant for negligence and negligent misrepresentation. The trial court granted summary judgment in Defendant's favor.

The Court of Appeals reversed in part. As to negligence, if an insurance agent has represented that he or she will procure a certain type of insurance for a client, the agent can be liable for negligent failure to do so. Because there were genuine issues of material fact about whether Plaintiff had requested a policy with no vacancy exclusion (triggering the agent's duty of care), summary judgment was inappropriate. Further, because there was a question of fact about whether Defendant misled Plaintiff or "put him off his guard" in reading the actual policy, the trial court could not have found Plaintiff contributorily negligent as a matter of law.

As for negligent misrepresentation, however, summary judgment was appropriate. The truth of any alleged "false statements" to Plaintiff by Defendant could have been discovered upon reasonable inquiry by Plaintiff (*i.e.*, reading the policy). Because Plaintiff failed to demonstrate that he was denied the opportunity to read and investigate the policy's actual coverage, the negligent misrepresentation claim failed.

Right to bifurcated punitive damages trial; proper voir dire; pain and suffering instruction; evidence of loss of companionship; disproportionate damages verdicts

Haarhuis v. Cheek (COA16-961; Sept. 19, 2017). Defendant lost control of her car and struck a pedestrian, who died several days later from severe injuries. The pedestrian was plaintiff's wife. In this wrongful death action, the jury awarded plaintiff $4.5 million in compensatory damages and $45,000 in punitives, and the trial court entered judgment on that amount. Rejecting each of Defendant's arguments for a new trial, the Court of Appeals determined that (1) Plaintiff's counsel's questions during voir dire about alcohol and drunk driving were not so overt as to violate Defendant's right to have the compensatory damages and punitive damages evidence bifurcated under 1D-30; (2) Plaintiff's counsel's questions to the jury on various subjects were general enough not to be considered prejudicial "stake out" questions; (3) the judge did not err in giving an instruction decedent's pain and suffering as there was evidence that decedent experienced conscious pain and suffering before her death; (4) it was not improper to allow evidence from decedent's coworkers about her personality in order to allow plaintiff to prove loss of society and companionship; (5) it was not improper to allow plaintiff's counsel to make a general deterrence argument during the closing of the compensatory damages phase; and (6) the large size of the compensatory award compared to the punitive award was not a definitive indication that the jury considered improper factors when awarding compensatory damages.

Alienation of affection and criminal conversation; constitutionality

Malecek v. Williams (COA16-830; Sept. 5, 2017). Holding that the "heart balm" claims of alienation of affection and criminal conversation are not facially unconstitutional (specifically, not facial violations of the First and Fourteenth Amendments). For an in-depth discussion of this case, see yesterday's (9/6) blog post at "On the Civil Side": https://civil.sog.unc.edu/. (attached; See Appendix B)

Retaliation for raising discrimination concerns; Title VII; 42 U.S.C § 1981, 1983

Forbes v. City of Durham (COA16-964; Sept. 5, 2017). The trial court granted summary judgment in favor of the City and defendant police officers as to retaliation claims by a subordinate police officer. The crux of plaintiff's claims—filed pursuant to Title VII, 42 U.S.C. § 1981, 1983, and the NC Constitution—were that the Police Chief promoted a different officer to Deputy Chief instead of him because plaintiff had raised concerns to the Chief about a pattern of perceived racial discrimination. The Court of Appeals affirmed the dismissal, concluding, in sum, that plaintiff had forecast no causal (or even temporal) connection between the complaints he allegedly made and the Chief's decision to promote a different officer; and that he had otherwise failed to create a genuine issue of fact as to any of his claims.

Tort claims based on officers' improper acts leading to criminal conviction

Braswell v. Medina (COA17-33; Sept. 5, 2017). In 2012, Mr. Braswell was convicted and sentenced to 58 to 79 months imprisonment for obtaining property by false pretenses after he lost (during the global financial meltdown) over $100,000 of the money his relatives had entrusted to him for investment. The Court of Appeals overturned that conviction in 2014 after determining that there was no evidence that he had taken the money without intent to invest it with legitimate financial institutions (and in fact that the evidence showed that he *had* invested it with legitimate financial institutions). In the present action, Mr. Braswell sued various officers of the Rocky Mounty Police Department for improper acts (including falsifying evidence) in order to obtain the indictment that led to his conviction. The trial court dismissed all claims under Rule 12(b)(6). At issue in the present appeal were the § 1983 claim brought under a malicious prosecution theory, the state law claims for malicious prosecution and obstruction of justice, and the state constitutional claim.

The Court of Appeals reversed and remanded as to all claims other than obstruction of justice. The court determined that the dismissal of the § 1983 claim was improper because (1) the complaint adequately pled a lack of probable cause; (2) the acts of the grand jury did not create a break in the chain of causation between the officers' acts and plaintiff's harm; and (3) the officers are not entitled to qualified immunity at this stage in the litigation. As for the state law malicious prosecution claim, the complaint adequately pled the elements including the alleged malicious acts of pursuing him without probable cause and fabricating evidence. The court declined, however, to recognize a civil claim for obstruction of justice in the context of a police investigation and therefore affirmed the dismissal of that claim. Finally, the court reversed the dismissal of the state constitutional claim because it is too soon at this stage of the litigation to determine whether Mr. Braswell will ultimately have an adequate state law remedy.

Involuntary commitment; Liability for breach of duty to third parties

McArdle v. Mission Hosp., Inc. (COA16-554; Aug. 15, 2017). Family members filed a petition for involuntary commitment of a former Marine who had substance abuse and possible PTSD issues, after an altercation with various family members. After an initial examination required by G.S. 122C-263 and G.S. 122C-283, the hospital discharged the respondent upon concluding he did not meet the criteria for involuntary commitment. Three days later, the respondent seriously injured three family members and fatally shot himself. The family sued the hospital for wrongdoing; the hospital filed a 12(b)(6) motion to dismiss. The trial court denied plaintiffs' motion to amend the complaint as futile, and entered an order dismissing the action on the basis that defendant hospital had no legal duty to the plaintiffs. The Court of Appeals affirmed the trial court's order after discussing legal theories of liability for breach of duty to third parties and examining the statutory scheme for involuntary commitment. The Court held that in an involuntary commitment proceeding, neither the examiner nor the hospital or facility obtains custody of or a legal right to control a respondent unless and until involuntary commitment is recommended. Where the hospital did not assume custody of the respondent, no special relationship was created that

would impose liability for harm to third parties. The involuntary commitment statutes are intended to protect the due process rights of the respondent, not the safety of the public. Even if the initial examination does not comport with statutory requirements, neither the examiner nor the facility owes a legal duty to third parties for harm resulting from a recommendation against involuntary commitment. The Court distinguished the instant situation from one in which a recommendation of involuntary commitment is made, but the facility negligently releases the respondent, resulting in harm to a third party. [*Summary by A. Chen*]

Public official immunity; physicians employed by DPS

Leonard v. Bell, 803 S.E.2d 445 (N.C. App. Aug. 1, 2017). An inmate who alleged negligent care in the diagnosis of a vertebral condition and spinal infection brought an action against his two treating physicians employed by the Department of Public Safety. The physicians moved to dismiss the action on grounds of public official immunity. The trial court denied their motion. The Court of Appeals affirmed, holding that because the physicians' positions were not created by statute or the constitution, they were not public officials for purposes of immunity.

42 U.S.C. § 1983 claim by a public employee for 1st Amendment violation

Holland v. Harrison (COA16-889; Aug. 1, 2017). A nurse employed at the Wake County Detention Center was ordered to administer an antibiotic to a patient through an IV. The nurse refused, stating that in her medical experience the drug could only be safely administered through a pump device. She was nevertheless ordered to administer the drug as directed. A few days later she was reassigned to another shift. When she failed to appear the next work day at the new shift (citing the need to receive approval from her workers' compensation administrator due to a prior injury), her job was terminated. She sued various actors, some individually and some (like the sheriff) officially, alleging that her termination was due to her objection to the IV and similar disagreements about patient care. The trial court dismissed certain claims and allowed others to continue.

At issue in this appeal is the dismissal of her claim under 42 U.S.C. § 1983 for violation of her 1st Amendment free speech rights. The Court of Appeals affirmed the dismissal because the nurse, a public employee, could not establish that the alleged protected speech "pertained to a matter of public concern." She had not pled facts "alleging a systemic problem with patient care at the Detention Center" or showing that she had "voiced her concerns publicly outside the employment setting, which would tend to indicate a public concern."

Medical liens and insurance payments; duty to satisfy liens before disbursement; unfair trade practice

Nash Hospitals, Inc. v. State Farm Mut. Automobile Ins. Co., 803 S.E.2d 256 (N.C. App. Aug. 1, 2017). After Ms. Whitaker was injured in a car accident, the negligent driver's insurance company, State Farm, negotiated a settlement with her for approximately $1940. This amount that did not fully cover valid medical liens. State Farm had already received notice of medical liens from Ms. Whitaker's medical providers, including Nash Hospitals. State Farm nevertheless paid out the full amount of the settlement in a single check payable jointly to Ms. Whitaker, Nash Hospitals, and another lien holder. Nash Hospitals did not receive any of the funds from Ms. Whitaker. Nash Hospitals sued State Farm for violations of G.S. 44-50 and 44-50.1. The trial court granted summary judgment in favor of Nash Hospitals, and the Court of Appeals affirmed. By paying the full amount in a single negotiable instrument to the *pro se* insured, State Farm violated its statutory duty to retain funds to satisfy liens (up to a certain amount) and to pay those funds to the lienholders on a pro rata basis *before* disbursing remaining funds to the insured. The Court of Appeals also affirmed the trial court's decision to award Nash Hospitals treble damages under the unfair and deceptive trade practices act.

Breach of standard of care; expert testimony; lack of evidence to survive directed verdict
Johnson v. Wayne Mem'l, 802 S.E.2d 610 (N.C. App. July 5, 2017). After a patient died from complications related to sickle cell anemia, his estate sued the hospital alleging negligence in the care he received during his emergency room visit. Relevant to this appeal is the claim that the hospital breached the standard of care in the process by which radiologists communicate their reviews of X-rays that have been initially read by ER physicians (x-ray over-reads and subsequent reporting of discrepancies). At trial, the superior court entered a directed verdict in favor of the hospital on this issue. The Court of Appeals affirmed, holding that Plaintiff's only expert as to standard of care, as defined in GS 90-21.12, offered no testimony to establish his knowledge of the standard of care of hospitals in similar communities at the time of the patient's death.

Negligent misrepresentation bench trial; "homeowner exception" to Chapter 75
Glover v. Dailey, 802 S.E.2d 136 (N.C. App. June 20, 2017). Home buyers sued home sellers for negligent misrepresentation and unfair and deceptive trade practices. Buyers alleged that Sellers had failed to disclose material information about past water damage to the home; that Buyers had justifiably relied to their detriment on the disclosures; and that Buyers were harmed when the home was later discovered to have extensive mold issues. The matter was tried as a bench trial, and the judge found in favor of Sellers, dismissing all claims. The Court of Appeals affirmed, holding that there was competent evidence to support each of the trial court's findings of fact as to negligent misrepresentation (which were largely credibility determinations), and that the court had not erred in determining that the "homeowner exception" applied to prevent applicability of the Unfair Trade Practices Act.

REAL ESTATE and LAND USE

Leaseholder damages in DOT condemnation

Department of Transportation v. Adams Outdoor Advertising of Charlotte Limited Partnership (**N.C.** No. 206PA16; Sept. 29, 2017)

See Supreme Court press summary here or see attached copy in Appendix A.

Actual partition vs. partition by sale

Solesbee v. Brown (COA16-1214; Sept. 19, 2017). Four sisters own three parcels of land as tenants in common. One sister filed a petition for partition by sale and two other sisters acknowledged in their response that a sale of all parcels was necessary. The fourth sister agreed that partition by sale was necessary for parcel one but contested a partition by sale for parcels two and three. The clerk of superior court and the superior court on appeal entered orders authorizing the partition by sale of all three parcels. The NC Court of Appeals reversed the superior court and remanded for additional findings of fact pursuant to GS 46-22 and re-examination of the trial court's conclusions of law. The COA noted that the law favors actual partition and before ordering a partition by sale, the court must find by preponderance of the evidence that an actual partition would cause substantial injury to the interested parties. Specifically, the COA found the trial court erred in ordering a partition by sale because:

1. The trial court failed to make specific findings of fact.
    a. The trial court failed to make specific findings of fact as to the value of each share of each parcel if the parcels were to be physically divided. The court's findings were limited to the value of one-fourth of the total value of all three parcels. The court's findings were thus insufficient to support the conclusion of law that each cotenant's share from an actual partition of each parcel would be materially less than from a sale of the whole parcel.
    b. The trial court failed to make specific findings as to the value of each of the three parcels. The trial court determined the value of each parcel was a range spanning from the current residential value to a re-zoned commercial value. The sweeping nature of the ranges, including a range in value of $110,000 for parcel one, failed to yield *specific* findings of fact by the court as to the value of each parcel.
2. The trial court erred by considering certain factors when determining a substantial injury would result to the parties from an actual partition.
    a. *Personal value*. The COA noted that prior case law establishes that economic factors alone control whether substantial injury will result to the parties from an actual partition. The trial court's consideration of the personal value of the property to the cotenants who lived adjacent to parcels two and three was inappropriate.
    b. *Difficult to physically partition*. A determination that the property is difficult to physically partition does not replace the obligation of the court to make findings as to the fair market value of each cotenant's share resulting from an actual partition. The court erred in relying on the difficulty in physically partitioning the property without making findings as to the actual value of each share of the physically partitioned property.

Highest and best use. The trial court erred by relying on the "highest and best use" of the land in determining whether substantial injury would result to the parties from an actual partition of the land. The COA stated that substantial injury to a party does not occur simply because an actual partition would not result in the highest and best use of the land. [Summary by Meredith Smith]

General warranty deed; deed interpretation

Rutledge v. Feher (COA16-1287; Sept. 5, 2017). In 1983, the Vieles executed a general warranty deed in which they retained a life interest for themselves in their real estate, conveyed a life estate to their four

children, and conveyed a fee simple remainder interest to their grandchildren. By 2014, only one of the four children, Helen, remained living, along with two of the seven grandchildren, and several great-grandchildren. One of the two grandchildren, Helen's daughter, sought a declaratory judgment and injunctive relief to determine the rights to the property. After the suit was filed, Helen conveyed her interest to her daughter the plaintiff; Helen passed away after the trial court's judgment and before briefs were submitted to the Court of Appeals. After a non-jury trial, the trial court concluded: (1) the two surviving grandchildren each held a contingent remainder interest in the property; (2) the class of grandchildren would not close and could not be determined until Helen's death; and (3) the individuals in which the remainder interest vested could not be determined until Helen's death.
The central issue on appeal was whether the grandchildren's interest was immediately vested at the time the deed was executed, or contingent upon surviving the last of the living children before any interest vested. The Court of Appeals concluded that the plain language of the deed signaled the intention of the grantors to convey a contingent remainder interest, since a specific triggering event, that is, the death of the last of their children, was required before any interest could vest in the grandchildren. [Summary by Aly Chen]

Developer/HOA disputes; planned community ownership; Planned Community Act
Conleys Creek Ltd. P'ship v. Smoky Mountain Country Club Prop. Owners Ass'n (COA16-647; Sept. 5, 2017). This case revolves around various disputes between a residential community developer and the HOA and the trial court's dismissal of various claims on both sides. In this opinion, the Court of Appeals decided (in broad strokes) as follows: The Association was entitled to a declaration that the 1999 Declaration applicable to the community established a type of condo ownership not recognized under NC law; the Association's claim for reformation based on that error in the Declaration could not be adjudicated absent all necessary parties; and the provision requiring that the developer retain ownership of the clubhouse and that the Association collect and pay dues to the Developer for clubhouse use is not inconsistent with the Planned Community Act (Chapter 47F). The opinion also disposes of various other fact-specific tort claims between the parties. For details, see the full opinion.

Zoning violation; screening dumpsters; nonconforming use
NCJS, LLC v. City of Charlotte (No. 16-1096; Aug. 15, 2017). Reversing the trial court's decision to affirm a notice of zoning violation (NOV) issued by the City Board. The Board issued the NOV against Petitioner after determining that Petitioner's failure to screen dumpsters from view violated the City's zoning ordinance. The Court of Appeals concluded that the Board misinterpreted the City's zoning ordinances and thus had incorrectly determined that the dumpsters were "nonconforming structures" subject to the screening regulation. Remanded to the trial court for further remand to the City Board to rescind the NOV.

Challenge to ordinance enforcement; exhaustion of administrative remedies
Cheatham v. Town of Taylortown (COA16-1057; Aug. 1, 2017). Affirming in part the dismissal of a homeowner's civil action challenging the Town's decision to condemn his property. The homeowner failed to first exhaust the administrative remedies provided to him by GS Chapter 160A and the Town's Ordinance. Thus the trial court did not have jurisdiction over his civil action to the extent it related to Town actions taking place after the Ordinance was adopted. However, the trial court should not have granted the motion to dismiss the claims related to actions that occurred *prior* to adoption of the Ordinance. Remanded for further consideration of Plaintiff's claims arising from the pre-Ordinance enforcement actions.

Development of golf course; rights of adjacent homeowners; perpetual burden; easement by plat
Friends of Crooked Creek, LLC v. C.C. Partners, Inc., 802 S.E.2d 908 (N.C. App. July 18, 2017). Defendant, the owner of several tracts of land upon which a golf course was to be developed, experienced severe economic hardship starting in 2008 and ultimately decided to sell the tracts for residential development. A group of homeowners adjacent to the would-be golf course tracts brought this action seeking a declaration that Defendant was required to develop the land as a golf course. The trial court granted summary judgment in favor of Defendant, and the Court of Appeals affirmed. The court determined that the applicable declaration and restrictive covenants did not create a specific restriction or perpetual burden on Defendant's property and instead merely included risk disclosure clauses about a *contemplated* golf course; and there was no "easement by plat" because none of the plaintiff homeowners' deeds referenced the relevant survey plat showing a golf course. The marketing materials contemplating a golf course, without an accompanying recorded instrument to encumber the land, did not create a requirement that the land be developed as previously advertised.

FORECLOSURES

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

DISSENT: The dissent would have found that the trial court had the authority to set aside the sale under Rule 60 and to restore title to the homeowner as a result of the order to set aside the sale. The dissent would have found that GS 1-108 affords the trial court discretion to affect title to the property if the trial court deems it necessary in the interest of justice despite a conveyance to a good faith purchaser. [Summary by Meredith Smith]

Foreclosure by power of sale; collateral attack; Declaratory Judgments Act; G.S. 45-21.34.
Howse v. Bank of Am., N.A. (COA16-979; Aug. 15, 2017) (with partial dissent). In an earlier appeal, the Court of Appeals affirmed an order allowing power of sale (Chapter 45) foreclosure of the deed of trust on Plaintiffs' property. After that decision, but before the sale, Plaintiffs brought the present action to enjoin the foreclosure, stating claims under both the declaratory judgment act and the equitable relief provisions of G.S. 45-21.34. The trial court concluded that the action constituted a collateral attack on

the prior judgment and granted summary judgment in the Bank's favor. In so doing, the trial court also denied Plaintiffs' motion to compel the Bank to produce discovery responses.

The Court of Appeals held as follows: (1) Summary judgment as to the declaratory judgment act claim was proper because that claim did in fact constitute a collateral attack on the prior judgment, but (2) Plaintiffs' claim under G.S. 45-21.34 was not a collateral attack on a prior judgment because the equitable relief sought therein could not have been sought in power of sale foreclosure; and (3) because the trial court improperly granted summary judgment as to the 45-21.34 action, on remand it must reconsider Plaintiffs' motion to compel discovery from Defendants.

[The dissenting judge argued that, even if the claim under G.S. 45-21.34 was not a collateral attack, summary judgment was still proper because those claims would fail on the merits for other reasons (not argued by the parties on appeal). The majority responded in part by noting that Plaintiffs had not been given the opportunity at summary judgment to forecast evidence as to a prima facie case nor indeed to complete the discovery process.]

Right to foreclose (reverse mortgage)

In re: Foreclosure of Clayton (COA16-960; Aug. 1, 2017). Respondent's husband entered into a reverse mortgage with Wells Fargo (WF). Respondent and her husband signed a deed of trust (DOT) as borrowers. Only the husband signed the note as borrower. The DOT provided that the lender could accelerate the debt upon the borrower's death and foreclose the lien, provided that the property did not remain the principal residence of a "surviving borrower." After respondent's husband died, WF accelerated the debt and initiated foreclosure proceedings. The clerk of superior court dismissed the action finding that lender did not have the right to foreclose because the respondent was a surviving borrower under the DOT and the house was respondent's principal residence. WF appealed to superior court. The superior court held that the husband was the only borrower and entered an order authorizing foreclosure. The respondent appealed asserting that (i) the order was not supported by competent evidence because WF failed to formally offer any evidence at the hearing, and (ii) the lender had no right to foreclose for the same reasons found by the clerk of superior court. The NC Court of Appeals affirmed the order of the superior court authorizing the foreclosure and held:

1. Evidentiary rules are relaxed in foreclosure proceedings. The documents handed to the court in a binder and not formally offered and admitted into evidence by WF, along with stipulations by the parties, constituted sufficient competent evidence of the requisite statutory criteria for a power-of-sale foreclosure.
2. WF had a right to foreclose based on a reading of the terms of the loan documents and relevant statutory provisions. The court noted that the deed of trust, note, and loan agreement were executed simultaneously and therefore must be considered as one instrument. Reading the documents together, the husband was the only contemplated borrower and the only person obligated to repay the loan. In addition, the respondent was not old enough to qualify for a reverse mortgage as a "borrower" under G.S. 53-257(2). Therefore, the husband was the only borrower, the respondent was not a "surviving borrower," and WF had a right to foreclose under the DOT. [Summary by Meredith Smith.]

INCOMPETENCY AND GUARDIANSHIP

Removal of guardian; proper review standard
In re Estate of Skinner (**N.C.** No. 277A16; Sept. 29, 2017).
See Supreme Court press summary here or see attached copy in Appendix A.

Power of attorney executed after adjudication of incompetence
O'Neal v. O'Neal (COA16-1299; July 5, 2017). The clerk adjudicated a ward incompetent upon a petition filed by the ward's granddaughter and appointed the granddaughter as general guardian. After the adjudication and appointment of a guardian, the ward executed a durable power of attorney (POA) in favor of the guardian/granddaughter. The clerk subsequently removed the granddaughter as general guardian and appointed a new guardian of the estate. The new guardian of the estate revoked the POA and filed suit to declare the POA and three deeds conveyed by the granddaughter as agent under the POA void. The trial court entered an order declaring the POA and three deeds void *ab initio*. The NC Court of Appeals affirmed the trial court. The court held the subsequently executed POA was void as a matter of law. The ward's incompetency to execute the POA was conclusively established, and not a rebuttable presumption, as to the granddaughter who was the petitioner in the incompetency proceeding and appointed guardian for the ward. The court noted that the holding poses no threat to subsequent good faith purchasers for value of real property as potential purchasers are on constructive notice of all information recorded in the land and court records, which includes an adjudication of incompetence in the special proceedings index. [Summary by Meredith Smith]

TAXATION

Deduction of market discount income
The Fidelity Bank v. North Carolina Department of Revenue (**N.C.** No. 392A16 and 393PA16)
See Supreme Court press summary here or see attached copy in Appendix A.

ADMINISTRATIVE APPEALS

Authority of North Carolina Reinsurance Facility to remedy fraud
Discovery Insurance Co. v. NC Dep't of Insurance (COA17-285; Oct. 3, 2017). Discovery Insurance Company ("Discovery"), a Kinston-based auto insurer, learned in 2011 that one of its agents was committing fraud against the North Carolina Reinsurance Facility ("Facility"). (The Facility is the statutory pool of insurers that exists to facilitate NC's compulsory liability insurance law.) This fraud resulted in the Facility paying $1.3 million in invalid claims to Discovery. Pursuant to G.S. Chapter 58, the Facility's Board determined that Discovery must reimburse the Facility that amount. The Commissioner of Insurance issued an order affirming that decision. On petition for judicial review, the Superior Court also affirmed the Board's order.

The Court of Appeals further affirmed, holding as follows: (1) The Board did not exceed its statutory authority under Chapter 58 by ordering Discovery to repay the $1.3 million; (2) the Facility was not required to commence a civil action in order to seek reimbursement; (3) certain challenged findings of fact were supported by the whole record; (4) the Commissioner did not err in determining that Discovery was barred by the doctrine of unclean hands (through agency) from asserting the defenses of estoppel and ratification; and (5) the Commissioner did not err by denying certain pre-hearing discovery.

INTERLOCUTORY APPEAL DISMISSALS

Dismissal of interlocutory appeal

Union Cty. v. Town of Marshville (COA17-37; Sept. 5, 2017). Dismissing an appeal of orders dismissing a portion of the claims in the action. Appellants had failed to establish a basis for immediate appeal of these interlocutory orders.

Interlocutory appeal; arbitration

C. Terry Hunt Indus., Inc. v. Klausner Lumber Two, LLC (No. 16-1136; Aug. 15, 2017). Dismissing an appeal of the trial court's interlocutory order granting a motion to compel arbitration. The court held that because the order does not prevent plaintiff from seeking relief in the courts following arbitration, it does not affect a substantial right. [Note the concurring opinion emphasizing that this holding should not be construed as a bright-line rule with respect to all orders compelling arbitration.]

Appendix A

Press Summaries

Supreme Court of North Carolina

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PRESS SUMMARY

September 29, 2017

Court Issues Opinion in *Department of Transportation v. Adams Outdoor Advertising of Charlotte Limited Partnership* (206PA16)

In *Department of Transportation v. Adams Outdoor Advertising of Charlotte Limited Partnership* (206PA16), the Court addresses which Article of Chapter 136 of the North Carolina General Statutes applies, and explains what evidence is admissible, in a condemnation action to assess a leaseholder's damages when the North Carolina Department of Transportation condemns a leasehold featuring a nonconforming billboard in order to widen a highway.

The billboard, which belongs to Adams Outdoor Advertising, sat on land that was purchased by the Department of Transportation for the purpose of building a highway. Adams Outdoor had a lease to use the property and rented ad space on the billboard to its clients. When the Department of Transportation condemned Adams Outdoor's leasehold interest, a dispute arose over the valuation of Adams Outdoor's damages.

When government takes private property for public use, the possessor of a recorded leasehold interest in the property is entitled to just compensation. When government takes property that is necessary for our state's roads and highways, just compensation is defined as the fair market value of the property at the time of the taking—that is, the price to which a willing buyer and a willing seller would agree.

The Court first addresses whether Article 9 or Article 11 of Chapter 136 of the General Statutes applies. It holds that Article 9—which contains the general fair market valuation provision for condemnations—applies, not Article 11—which applies specifically when the Department of Transportation condemns a billboard and its associated property rights because the billboard is nonconforming. It reasons that, here, the Department of Transportation condemned the leasehold to widen a highway, not because Adams Outdoor's billboard was nonconforming.

The Court's opinion indicates that the valuation of Adams Outdoor's leasehold interest is inextricably linked to the value that Adams Outdoor's billboard adds to the property, the rental income derived from the billboard, the permits that allow Adams Outdoors to continue using the billboard for advertising purposes, and the automatic renewal provision in Adams Outdoor's lease. The Court's opinion therefore concludes that evidence of these facts is admissible to prove Adams Outdoor's damages. The Department of Transportation's proposed valuation method—which simply compared the rent stipulated in the lease to two nearby billboard lease sites—is inadmissible, the Court said, because it fails to account adequately for these facts.

As a result of the Court's opinion, the case will return to the trial court, where Adams Outdoor will be afforded the opportunity to present its evidence of its leasehold interest.

The Court's opinion in this case is available on the Court's web site.

NOTE:

This case summary is provided as a courtesy to the press and to the public. It is not an opinion of the Court. For a full understanding of the facts and legal analysis in the case, please read the Court's published opinion in its entirety.

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PRESS SUMMARY

September 29, 2017

Court Issues Opinion in *In re Estate of Skinner* (277A16)

In *In re Estate of Skinner* (277A16), the Court holds that an assistant clerk of superior court acted within his discretion when he determined that a woman's husband should be removed as the trustee under her special needs trust and as the guardian of her estate.

Mark Skinner, Jr., married Cathleen Bass Skinner after she had been adjudicated as an incompetent adult. Subsequently, Mr. Skinner was named as the guardian of Ms. Skinner's estate and trustee of a special needs trust that was created to hold an inheritance that Ms. Skinner received following the death of her mother. Within sixty days of Ms. Skinner's inheritance being deposited into her trust account, Mr. Skinner spent over ninety percent of these funds for purposes for which Mr. Skinner received some, if not all, of the benefit. These expenditures included paying himself back for legal fees that he incurred prior to being named guardian of the estate and trustee, a house for the couple, and furniture and appliances for use in that house. Members of Ms. Skinner's family petitioned for the removal of Mr. Skinner as trustee and guardian of her estate. The assistant clerk of superior court removed Mr. Skinner.

Clerks have the statutory authority to remove a trustee or guardian or to take other action to protect an incompetent person's interest when the guardian or trustee wastes money, converts it to his own use, mismanages the incompetent person's estate, breaches a fiduciary duty, or commits a serious breach of trust.

The Court's opinion indicates that Mr. Skinner had an obligation to carry out his duties as trustee and guardian in a reasonable and prudent manner that served Ms. Skinner's best interests. Instead, the evidence before the assistant clerk reflected that Mr. Skinner spent ninety percent of Ms. Skinner's inheritance in ways that either directly or indirectly benefitted himself while leaving insufficient funds to

sustain the assets that he had purchased and to take care of Ms. Skinner's long-term needs. Accordingly, the Court concluded that statutory grounds existed to remove Mr. Skinner as trustee and guardian and that the assistant clerk had acted well within his discretion when he decided to remove him.

As a result of the Court's decision, the assistant clerk's order removing Mr. Skinner as trustee and as guardian stands.

The Court's opinion in this case is available on the Court's web site.

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PRESS SUMMARY

August 18, 2017

Court Issues Opinion in *Wray v. City of Greensboro* (255A16)

In *Wray v. City of Greensboro* (255A16), the Court holds that plaintiff David Wray has sufficiently pleaded a waiver of the City of Greensboro's governmental immunity by alleging the existence of a valid contract between them.

Plaintiff was the Chief of Police for the City of Greensboro from 2003 until 2006. Following his resignation, plaintiff was sued for actions that he alleges took place within the course and scope of his employment. The City refused to provide him with a defense to these lawsuits, so plaintiff sued the City seeking indemnification and reimbursement for the legal expenses that he incurred. The City moved to dismiss plaintiff's complaint, arguing that it had governmental immunity. The trial court agreed with the City and dismissed plaintiff's complaint, but the Court of Appeals reversed that decision.

Under the legal doctrine of governmental immunity, the State and local governments are immune from suit unless they waive their immunity. When the State or a local government enters into a contract with a private citizen, governmental immunity is waived to the extent of that contract. Accordingly, a plaintiff who sufficiently alleges the existence of a contract with a local government also sufficiently alleges that the local government has waived its governmental immunity.

The Court's opinion in this case indicates that plaintiff's complaint alleges the existence of a valid contract with the City. The opinion notes that the complaint alleges the existence of an employment relationship and that plaintiff was sued for actions taken within the course and scope of his employment. The Court therefore determined that plaintiff had sufficiently pleaded a waiver of the City's governmental immunity with respect to his employment contract.

As a result of the Court's opinion, plaintiff's case returns to the trial court for additional consideration of his complaint.

The Court's opinion in this case is available on the Court's web site.

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PRESS SUMMARY

August 18, 2017

Court Issues Opinion in *Christenbury Eye Center, P.A. v. Medflow, Inc.* (141PA16)

In *Christenbury Eye Center, P.A. v. Medflow, Inc.* (141PA16), the Court concludes that plaintiff's claims against defendants are barred by North Carolina's statutes of limitations. The opinion emphasizes the principle that a party must timely bring an action after discovering its injury to avoid dismissal of that party's claims.

In October 1999, plaintiff Christenbury Eye Center, P.A. entered into an agreement with defendants Medflow, Inc. and Dominic Riggi to enhance a software management package. Under the agreement, plaintiff assigned its rights in the software enhancements to defendants. In exchange, defendants agreed to provide plaintiff with monthly reports detailing the fees received from defendants' sales of the enhancements, to pay plaintiff royalties, and to abstain from selling the enhancements in North Carolina and South Carolina. Defendants, however, never performed any of their obligations under the agreement. Plaintiff did not raise any question or concern regarding defendants' breach until filing this action in September 2014. The Business Court dismissed plaintiff's complaint, concluding, among other things, that plaintiff's claims were time barred under North Carolina's statutes of limitations.

A statute of limitations is a law that requires a plaintiff to pursue a claim within a specified period of time after the plaintiff discovers his or her injury. Plaintiff's claims in this case were subject to either a three or four-year statute of limitations period.

The Court's opinion indicates that plaintiff had notice of its injury, at the latest, by October 2000. The filing of plaintiff's complaint in September 2014 was therefore well beyond the applicable three or four-year statute of limitations period.

The Court rejected plaintiff's argument that a new limitations period should run from the due date of each royalty payment. The parties' agreement evidences a one-time, unified agreement that was executed in 1999, not an installment contract that can be apportioned with each royalty payment. The Court's opinion therefore holds that plaintiff's claims are barred the statutes of limitations.

As a result of the Court's opinion, the Business Court's decision to dismiss plaintiff's complaint is affirmed.

The Court's opinion in this case is available on the Court's web site.

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PRESS SUMMARY

August 18, 2017

Court Issues Opinion in Kornegay Family Farms LLC v. Cross Creek Seed, Inc. (187PA16)

In Kornegay Family Farms LLC v. Cross Creek Seed, Inc. (187PA16), the Court holds that defendant Cross Creek Seed's limitation of remedies clauses are unenforceable because they are contrary to the public policy announced by North Carolina's Seed Law.

Defendant sold mislabeled tobacco seed to plaintiffs between January and February 2014. On each seed container, defendant affixed a label that purported to limit any damages resulting from the transaction to repayment of the purchase price of the seed. When the seeds yielded poor crops, plaintiffs sued.

Defendant argued before the Business Court that plaintiffs' remedy should, consistent with the seed label, be limited to repayment of the purchase price. The Business Court disagreed and denied defendant's motions for summary judgment.

North Carolina's Seed Law, Chapter 106, Article 31 of the General Statutes, makes it unlawful to sell seeds for seeding purposes if the seed packaging has a false or misleading label. In a 1971 case that interprets the Seed Law, the Court indicated that the Seed Law declared a policy of protecting farmers from the disastrous consequences of planting mislabeled seed. The opinion in that case further indicated that a "skeleton" limitation of warranty, similar to the one present in this case, would leave a seed purchaser with no substantial recourse for his or her loss.

Citing this previous opinion, the Court's opinion in this case holds that defendant's limitation of remedy is unenforceable because it violates the policy announced in the Seed Law. The Court disagreed with the argument that the adoption of the Uniform Commercial Code, which permits this type of limitation on remedies, affects the Seed Law or this Court's previous opinion on the limitation of remedies issue.

As a result of the Court's opinion, the Business Court's order denying defendant's motions for summary judgment is affirmed.

The Court's opinion in this case is available on the Court's web site.

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PRESS SUMMARY

August 18, 2017

Court Issues Opinion in *The Fidelity Bank v. North Carolina Department of Revenue* (392A16 and 393PA16)

In *The Fidelity Bank v. North Carolina Department of Revenue* (392A16 and 393PA16), the Court concludes that North Carolina's tax laws do not allow corporations to deduct market discount income obtained from certain United States government bonds in calculating their North Carolina taxable income.

The Fidelity Bank acquired United States government bonds at a discount to face value and held those bonds until maturity. The difference between the original purchase price and the face value of the bonds yielded $724,098 in market discount income for the bank during the 2001 tax year. The bank claimed that it was entitled to deduct this income from its net taxable income for state income taxation purposes on the grounds that market discount income constitutes "interest" on United States obligations—a recognized tax deduction in North Carolina. The North Carolina Department of Revenue disagreed with the proposed deduction, precipitating this litigation. The Business Court ruled in favor of the Department of Revenue, indicating that the market discount income derived from the bonds was not deductible "interest" under North Carolina tax law.

According to North Carolina's corporate income taxation law, a taxpayer's state net income consists of the taxpayer's federal taxable income as defined in the Internal Revenue Code, subject to several state-specific adjustments. One of those adjustments is a deduction for "interest" derived from obligations of the United States.

The Court's opinion indicates that the bank's position hinges on the definition of "interest" as that term is used in the statute governing adjustments to federal taxable income. The term "interest," however, is not defined in the applicable statute. In reliance upon well-settled principles of statutory interpretation, the Court's

opinion defines "interest" based on its plain meaning—"periodic payments received by the holder of a bond." Because market discount income earned on United States bonds at the time of maturity does not fit within this plain meaning, the Court's opinion concludes that the income could not be deducted from the bank's federal taxable income.

As a result of the Court's opinion, the Business Court's determination that the income could not be deducted from the bank's net taxable income is upheld.

The Court's opinion in this case is available on the Court's web site.

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Appendix B
Blog posts

Court of Appeals holds that "heart balm" claims are not facially unconstitutional

This entry was contributed by Ann Anderson on September 6, 2017 at 9:42 am and is filed under Civil Law, Constitutional Issues.

North Carolina is among only a handful of states still recognizing the civil claims of alienation of affection and criminal conversation. Known as the twin "heart balm" torts, these laws were devised long ago when women were regarded as a type of property and private morals were regular court business. In short, these claims allow a person to sue his or her spouse's paramour for money damages. To prove "alienation of affection," a plaintiff must show that the defendant wrongfully alienated and destroyed the genuine love and affection that existed between plaintiff and spouse. (Although lovers typically are the target of these suits, a defendant could be another third person who has set out to create the rift.) To prove criminal conversation, a plaintiff must show that the defendant had sexual intercourse with the plaintiff's spouse in North Carolina during the marriage (but before separation).

In the other states that have not yet swept them into the dustbin of history, these claims do not often make their way to court. North Carolina appears to be one of only a couple of states in which they are filed regularly and sometimes result in substantial settlements and large verdicts.

But even in North Carolina the continued enforcement of these claims has long been controversial. Over two decades ago a well-known tort treatise declared their legitimacy "problematic" and "dubious." *See* Logan and Logan, North Carolina Torts, Ed. 1996, p. 439. A decade before that, in 1984, the North Carolina Court of Appeals attempted to judicially abolish them, stating that "there is no continuing legal basis for the retention of these tort actions today" and that they "remain permeated with the uncultivated and obsolete ideas which marked their origin." *Cannon v. Miller*, 71 N.C. App. 460, 497 (1984). The court's attempt was, however, rebuffed by the North Carolina Supreme Court without discussion of the merits. 313 N.C. 324 (1985).

In more recent times defendants have challenged these claims on constitutional grounds. In 2014, this effort succeeded at the trial court level in *Rothrock v. Cooke* (see the court's order here), but the case was not appealed. Then last year the Forsyth County case of *Malecek v. Williams* was also dismissed as unconstitutional. Yesterday the North Carolina Court of Appeals issued an opinion reversing that decision.

Malecek v. Williams

In 2015, Amber Malecek, a nurse, began a sexual relationship with Dr. Derek Williams. Marc Malecek, Amber's husband, sued Dr. Williams under both tort theories. Dr. Williams moved to dismiss both claims on grounds that they were facial violations of his First and Fourteenth Amendment rights. The trial court agreed and in May 2016 dismissed the case at the pleadings stage. Mr. Malecek appealed the dismissal, and the Court of Appeals disagreed with the trial court.

The Court of Appeals acknowledged from the outset that "these laws were born out of misogyny and in modern times are often used as tools for enterprising divorce lawyers seeking leverage over the other side." [For a candid admission of this strategy, see here.] The panel went on to make clear that its opinion was "neither an endorsement nor a critique" of the claims, and stated that "[w]hether this Court believes these torts are good or bad policy is irrelevant; we cannot hold a law facially unconstitutional because it is bad policy."

Substantive Due Process

The court agreed that the Unites States Supreme Court in *Lawrence v. Texas* reaffirmed an adult's constitutionally protected interest in "engaging in sexual activity free of governmental intrusion or regulation." The court further agreed that tort claims based on his sexual activity with Ms. Malecek implicate Dr. Williams's Fourteenth Amendment rights. The court noted, however, that *Lawrence* held that regulation of private consensual sexual activity is prohibited "*absent injury to a person or abuse of an institution the law protects.*" (emphasis added). The court then declared that marriage is one such protected institution, and that a marital promise of fidelity, once broken, results in injury to the other spouse. Applying a "robust rational basis" review, the court then concluded that North Carolina's need to protect these interests justifies a private tort action that restricts protected sexual activity: "[T]hese torts deter conduct that causes personal injury; they protect promises made during the marriage; and they help preserve the institution of marriage, which provides innumerable benefits to our society." Because Dr. Williams had not shown that the torts "stem from lingering prejudice or moral disapproval that overshadows the State's other reasons for enacting them," he had not demonstrated that they facially violate the Fourteenth Amendment.

Freedom of Speech, Expression, and Association

The Court of Appeals agreed with Dr. Williams that liability for sexual activity implicates his First Amendment right to free expression. Applying the test established in *United States v. O'Brien*, however, the court held that the government's interest in regulating the expression was not based on its *content*, but instead on deterring the "harmful effects *that result*" from it. The court concluded that because these torts have a deterrent effect that benefits the State and society, they are "narrow enough to survive scrutiny under the *O'Brien* test." The court also rejected the argument that the torts burden his First Amendment right to free association. Noting that there are many other ways to associate with a married person without incurring tort liability, the court concluded that "the incidental burden on those rights does not render these torts facially unconstitutional."

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Looking Ahead

Whether Dr. Williams will seek additional review by our Supreme Court remains to be seen. In the meantime, the heart balm torts have survived to see another day...at least to a point. The court in *Malecek* closed with a reminder about the limits of its opinion:

> "We emphasize that our holding today does not mean that every application of these common law torts is constitutional. There may be situations where an as-applied challenge to these laws could succeed. Take, for example, one who counsels a close friend to abandon a marriage with an abusive spouse. But this case, as the parties concede, is not one of those cases. It was decided as a facial challenge on a motion to dismiss at the pleadings stage. In the future, courts will need to grapple with the reality that these common law torts burden constitutional rights and likely have unconstitutional applications. For now, we hold only that alienation of affection and criminal conversation are not facially invalid under the First and Fourteenth Amendments."

This entry was tagged with the following terms: alienation of affection, criminal conversation, First Amendment, Fourteenth Amendment, heart balm.

Ann Anderson — Ann Anderson is an associate professor with the UNC School of Government and specializes in civil procedure, civil practice, and judicial authority.

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Choice of Law and Forum Selection in Business Contracts – New Law in North Carolina

This entry was contributed by Ann Anderson on October 4, 2017 at 9:00 am and is filed under Civil Law, Civil Practice, Civil Procedure-General.

Contracts often include agreements stating how litigation will be handled in the event the parties have a dispute. These agreements sometimes include "choice of law" and "forum selection" provisions. In a choice of law provision, the parties specify that the contract will be interpreted according to the law of a particular state. In a forum selection clause, the parties specify the State—and sometimes the specific county—in which disputes will be filed.

These provisions generally are valid in North Carolina, but our courts have declined to enforce them in some specific circumstances. This summer the General Assembly created a new Chapter 1G that attempts to remove these limits when parties choose North Carolina as the forum state and North Carolina law as the applicable law. The new legislation *only* affects provisions included in *business contracts*. It defines a "business contract" as "a contract or undertaking, contingent or otherwise, entered into primarily for business or commercial purposes," and it explicitly excludes "employment contracts" and "consumer contracts." *See* 1G-2(1), -5(1). Chapter 1G became effective June 26, 2017 and it applies to business contracts entered into before, on, or after that date. These are the main effects of Chapter 1G:

Choice of law provisions

Our courts have long declined to enforce a choice of law provision if (1) the agreement and parties had no substantial relationship with the chosen state and there was no other reasonable basis for choosing it; or (2) the law of the chosen state was contrary to a policy of the state having a materially greater interest in the dispute. *See* Schwarz v. St. Jude Medical, Inc., 802 S.E.2d 783, 789 (N.C. App. 2017); Cable Tel Svcs., Inc. v. Overland Contracting, Inc., 154 N.C. App. 639, 642–443 (2002) (applying Restatement (Second) of Torts, Conflict of Laws, §187); Torres v. McClain, 140 N.C. App. 238, 241 (2000).

The new Chapter 1G aims to erase these restrictions when parties choose to be governed by North Carolina law:

> **The parties to a business contract may agree in the business contract that North Carolina law shall govern their rights and duties in whole or in part, whether or not any of the following statements are true:**
>
> **(1) The parties, the business contract, or the transaction that is the subject of the business contract bear a reasonable relation to this State.**
>
> **(2) A provision of the business contract is contrary to the fundamental policy of the jurisdiction whose law would apply in the absence of the parties' choice of North Carolina law.**

1G-3(a).

For example, assume ABC Manufacturing and ZED Construction have a contract. Neither ABC nor ZED is a North Carolina company, and the contract work will take place in Virginia. For various reasons not discussed in the contract, however, they specify that North Carolina law will apply to contract disputes and that lawsuits must be filed in North Carolina. After some time the agreement falls apart, ZED sues ABC in North Carolina, and ZED argues that North Carolina law contract law applies. ABC counters that, despite the clear choice of law provision, Virginia law should apply. Before Chapter 1G, the North Carolina court could conclude that North Carolina has nothing to do with the contract and that the choice of law provision is not enforceable in a suit maintained in North Carolina. Chapter 1G seeks to make the relationship between the contract and North Carolina immaterial.

For contracts governed by the UCC, G.S. 25-1-301(a) has also been amended to recognize the effect of Chapter 1G. But if one of the UCC provisions listed in 25-1-301(c) specifies a different applicable law, that UCC provision controls. 1G-3(b).

Forum selection clauses

Prior to Chapter 1G, selection of a particular venue within North Carolina—that is, a specific *county*—was not enforceable unless that county was already a "proper" venue as set forth in the applicable venue statute. In a recent case the Court of Appeals held that a clause requiring suit to be filed in Mecklenburg County was not enforceable. The venue statute, G.S. 1-82, required that litigation occur in a county in which one of the parties resided. Neither resided in Mecklenburg. The court stated that "parties may not strip our Legislature of its power to determine in which county or counties that actions maintained *in this State* must be prosecuted." A&D Environmental Servs., Inc. v. Miller, 240 N.C. App. 296, 298 (2015) (citing Perkins v. CCH Computax, Inc., 333 N.C. 140, 143 (1992)).

With Chapter 1G, parties to business contracts who select North Carolina law as the applicable law may also agree to file suit in North Carolina *and* choose a venue from among the State's 100 counties. Moreover, if they choose not to specify a county, they may bring the action in *any* county:

> **Notwithstanding any other provision of law, a party to a business contract may bring an action in the courts of this State for a dispute arising from the business contract if the business contract contains both of the following provisions:**

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> **(1) A provision where the parties agree that North Carolina law shall govern their rights and duties in whole or in part, pursuant to G.S. 1G-3.**
>
> **(2) A provision where the parties agree to litigate a dispute arising from the business contract in the courts of this State.**

1G-4(a). And...

> **Notwithstanding any other provision of law, the parties...may designate in the business contract one or more counties in this State as the proper venue for a dispute arising from the business contract. If the parties do not designate a county in the business contract, a party may bring an action for a dispute arising from the business contract in any county in this State.**

1G-4(c).

In addition, 1G-4(b) states that a parties selecting North Carolina as the forum state consent to the personal jurisdiction of the State and a court "may not stay or dismiss the action pursuant to G.S. 1-75.12 or the doctrine of forum non conveniens." The statute goes on to provide that transfers of venue are only allowed under G.S. 1-83(2) (convenience of parties or ends of justice), 1-83(3) (judge has conflict), or 1-84-4 (when required for a fair trial). In other words, the case may not be transferred pursuant to G.S. 1-83(1) on grounds that it would be an improper venue under a different venue statute.

[It should be noted that North Carolina courts will not enforce a forum selection clause as mandatory unless the contract indicates that the selected forum is exclusive. *See* Southeast Caissons, LLC v. Choate Constr. Co., 784 S.E.2d 650, 654 (N.C. App. 2016) (a venue clause specifying "the City of Contractor's office" was not mandatory); *Overland Contracting,* 154 N.C. App. at 644 (noting the requirement of language such as "exclusive," "sole," or "only"). It does not appear that Chapter 1G alters this specificity requirement.]

Chapter 1G was enacted at the urging of the Business Law Section of the North Carolina Bar Association. That Section's Legal Opinion Committee argued that these changes would, among other things, bring North Carolina's law in line with that of other states and promote North Carolina as a more business-friendly environment. You can find the Section's draft report and draft bill here.

This entry was tagged with the following terms: choice of law, contracts, forum selection, venue.

Ann Anderson — Ann Anderson is an associate professor with the UNC School of Government and specializes in civil procedure, civil practice, and judicial authority.

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Appendix C
Legislation

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2017

SESSION LAW 2017-158
HOUSE BILL 236

AN ACT TO PROVIDE FOR THE CLERK TO APPOINT AN INTERIM GUARDIAN AD LITEM ON THE CLERK'S OWN MOTION; TO PROVIDE FOR THE CLERK TO EXTEND THE TIME FOR FILING INVENTORY IN THE PROPERTY OF THE DECEASED; TO PROVIDE FOR ISSUANCE OF AN ORDER FOR AN ARREST WHEN A PERSON FAILS TO APPEAR AFTER BEING SERVED WITH A SHOW CAUSE IN A CIVIL PROCEEDING; TO AMEND HOW COSTS IN ADMINISTRATION OF ESTATES ARE ASSESSED; TO ALLOW FOR TEMPORARY ASSISTANCE FOR DISTRICT ATTORNEYS WHEN THERE IS A CONFLICT OF INTEREST; TO AMEND OTHER STATUTES GOVERNING THE GENERAL COURT OF JUSTICE, AS RECOMMENDED BY THE NORTH CAROLINA ADMINISTRATIVE OFFICE OF THE COURTS; TO PROVIDE FOR THE ESTABLISHMENT OF AN ARBITRATION AND MEDIATION PROGRAM FOR THE NORTH CAROLINA BUSINESS COURT; TO AMEND STATUTES GOVERNING MEDIATION IN THE GENERAL COURT OF JUSTICE; AND TO AMEND THE LAW GOVERNING THE REGULATION OF MEDIATORS.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 1A-1, Rule 5(e), reads as rewritten:
"**Rule 5. Service and filing of pleadings and other papers.**

...

(e) (1) Filing with the court defined. – The filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the clerk of the court, pursuant to the rules promulgated under G.S. 7A-109 or subdivision (2) of this section, except that the judge may permit the papers to be filed with him, in which event he shall note thereon the filing date and forthwith transmit them to the office of the clerk.

(2) Filing by electronic means. – If, pursuant to ~~G.S. 7A-34~~G.S. 7A-34, G.S. 7A-49.5, and G.S. 7A-343, the Supreme Court and the Administrative Officer of the Courts establish uniform rules, regulations, costs, procedures and specifications for the filing of pleadings or other court papers by electronic means, filing may be made by the electronic means when, in the manner, and to the extent provided therein.

(3) The failure to affix a date stamp or file stamp on any order or judgment filed in a civil action, estate proceeding, or special proceeding shall not affect the sufficiency, validity, or enforceability of the order or judgment if the clerk or the court, after giving the parties adequate notice and opportunity to be heard, enters the order or judgment nunc pro tunc to the date of filing."

SECTION 2. G.S. 1A-1, Rule 58, reads as rewritten:
"**Rule 58. Entry of judgment.**

Subject to the provisions of Rule 54(b), a judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of ~~court.~~court pursuant to Rule 5. The party

designated by the judge or, if the judge does not otherwise designate, the party who prepares the judgment, shall serve a copy of the judgment upon all other parties within three days after the judgment is entered. Service and proof of service shall be in accordance with Rule 5. If service is by mail, three days shall be added to the time periods prescribed by Rule 50(b), Rule 52(b), and Rule 59. All time periods within which a party may further act pursuant to Rule 50(b), Rule 52(b), or Rule 59 shall be tolled for the duration of any period of noncompliance with this service requirement, provided however that no time period under Rule 50(b), Rule 52(b), or Rule 59 shall be tolled longer than 90 days from the date the judgment is entered. Subject to the provisions of Rule 7(b)(4), consent for the signing and entry of a judgment out of term, session, county, and district shall be deemed to have been given unless an express objection to such action was made on the record prior to the end of the term or session at which the matter was heard.

Notwithstanding any other law to the contrary, any judgment entered by a magistrate in a small claims action pursuant to Article 19 of Chapter 7A shall be entered in accordance with this Rule except judgments announced and signed in open court at the conclusion of a trial are considered to be served on the parties, and copies of any judgment not announced and signed in open court at the conclusion of a trial shall be served by the magistrate on all parties in accordance with this Rule, within three days after the judgment is entered. If service is by mail, three days shall be added to the time periods prescribed by G.S. 7A-228. All time periods within which a party may further act pursuant to G.S. 7A-228 shall be tolled for the duration of any period of noncompliance of this service requirement, provided that no time period shall be tolled longer than 90 days from the date judgment is entered."

SECTION 3. G.S. 28A-9-2(a) reads as rewritten:

"**§ 28A-9-2. Summary revocation.**

(a) Grounds. – Letters testamentary, letters of administration, or letters of collection, shall be revoked by the clerk of superior court without hearing when:

(1) After letters of administration or collection have been issued, a will is subsequently admitted to probate.

(2) After letters testamentary have been issued:

a. The will is set aside, or

b. A subsequent testamentary paper revoking the appointment of the executor is admitted to probate.

(3) Any personal representative or collector required to give a new bond or furnish additional security pursuant to G.S. 28A-8-3 fails to do so within the time ordered.

(4) A nonresident personal representative refuses or fails to obey any citation, notice, or process served on that nonresident personal representative or the process agent of the nonresident personal representative.

(5) A trustee in bankruptcy, liquidating agent, or receiver has been appointed for any personal representative or collector, or any personal representative or collector has executed an assignment for the benefit of creditors.

(6) A personal representative has failed to file an inventory or an annual account with the clerk of superior court, as required by Article 20 and Article 21 of this Chapter, and proceedings to compel such filing pursuant to G.S. 28A-20-2 or 28A-21-4 cannot be had because service cannot be completed because the personal representative cannot be found.

(7) A personal representative or collector is a licensed attorney, and the clerk is in receipt of an order entered pursuant to G.S. 84-28 enjoining, suspending, or disbarring the attorney."

SECTION 4. G.S. 35A-1290 reads as rewritten:

"**§ 35A-1290. Removal by Clerk.**

§ 7A-109. Record-keeping procedures.

(a) Each clerk shall maintain such records, files, dockets and indexes as are prescribed by rules of the Director of the Administrative Office of the Courts. Except as prohibited by law, these records shall be open to the inspection of the public during regular office hours, and shall include civil actions, special proceedings, estates, criminal actions, juvenile actions, minutes of the court, judgments, liens, lis pendens, and all other records required by law to be maintained. The rules prescribed by the Director shall be designed to accomplish the following purposes:

(1) To provide an accurate record of every determinative legal action, proceeding, or event which may affect the person or property of any individual, firm, corporation, or association;

(2) To provide a record during the pendency of a case that allows for the efficient handling of the matter by the court from its initiation to conclusion and also affords information as to the progress of the case;

(3) To provide security against the loss or destruction of original documents during their useful life and a permanent record for historical uses;

(4) To provide a system of indexing that will afford adequate access to all records maintained by the clerk;

(5) To provide, to the extent possible, for the maintenance of records affecting the same action or proceeding in one rather than several units; and

(6) To provide a reservoir of information useful to those interested in measuring the effectiveness of the laws and the efficiency of the courts in administering them.

(a1) The minutes maintained by the clerk pursuant to this subsection shall record the date and time of each convening of district and superior court, as well as the date and time of each recess or adjournment of district and superior court with no further business before the court.

(b) The rules shall provide for indexing according to the minimum criteria set out below:

(1) Civil actions. – the names of all parties;

(2) Special proceedings. – the names of all parties;

(3) Administration of estates. – the name of the estate and in the case of testacy the name of each devisee;

(4) Criminal actions. – the names of all defendants;

(5) Juvenile actions. – the names of all juveniles;

(6) Judgments, liens, lis pendens, etc. – the names of all parties against whom a lien has been created by the docketing of a judgment, notice of lien, transcript, certificate, or similar document and the names of all parties in those cases in which a notice of lis pendens has been filed with the clerk and abstracted on the judgment docket.

(c) The rules shall require that all documents received for docketing shall be immediately indexed either on a permanent or temporary index. The rules may prescribe any technological process deemed appropriate for the economical and efficient indexing, storage and retrieval of information.

(d) In order to facilitate public access to the electronic data processing records or any compilation of electronic court records or data of the clerks of superior court, except where public access is prohibited by law, the Director may enter into one or more nonexclusive contracts under reasonable cost recovery terms with third parties to provide remote electronic access to the electronic data processing records or any compilation of electronic court records or data of the clerks of superior court by the public. Neither the Director nor the Administrative Office of the Courts is the custodian of the records of the clerks of superior court or of the electronic data processing records or any compilation of electronic court records or data of the

clerks of superior court. Costs recovered pursuant to this subsection shall be remitted to the State Treasurer to be held in the Court Information Technology Fund established in G.S. 7A-343.2.

(e) If any contracts entered into under G.S. 7A-109(d) [subsection (d) of this section] are in effect during any calendar year, the Director of the Administrative Office of the Courts shall submit to the Joint Legislative Commission on Governmental Operations not later than February 1 of the following year a report on all those contracts. (Code, ss. 83, 95, 96, 97, 112, 1789; 1887, c. 178, s. 2; 1889, c. 181, s. 4; 1893, c. 52; 1899, c. 1, s. 17; cc. 82, 110; 1901, c. 2, s. 9; c. 89, s. 13; c. 550, s. 3; 1903, c. 51; c. 359, s. 6; 1905, c. 360, s. 2; Rev., s. 915; 1919, c. 78, s. 7; c. 152; c. 197, s. 4; c. 314; C.S., s. 952; 1937, c. 93; 1953, c. 259; c. 973, s. 3; 1959, c. 1073, s. 3; c. 1163, s. 3; 1961, c. 341, ss. 3, 4; c. 960; 1965, c. 489; 1967, c. 691, s. 39; c. 823, s. 2; 1971, c. 192; c. 363, s. 6; 1997-199, ss. 1, 2; 1999-237, s. 17.15(c); 2011-145, s. 15.6(b); 2012-142, s. 16.5(g); 2013-360, s. 18B.8(a); 2015-241, s. 18A.24.)

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2017

SESSION LAW 2017-123
SENATE BILL 621

AN ACT TO VALIDATE CHOICE OF NORTH CAROLINA LAW AND FORUM PROVISIONS IN BUSINESS CONTRACTS.

The General Assembly of North Carolina enacts:

SECTION 1. The General Statutes are amended by adding a new Chapter to read:

"**Chapter 1G.**

"**North Carolina Choice of Law and Forum in Business Contracts Act.**

"**§ 1G-1. Short title.**

This Chapter may be cited as the North Carolina Choice of Law and Forum in Business Contracts Act.

"**§ 1G-2. Definitions.**

The following definitions apply in this Chapter:

(1) Business contract. – A contract or undertaking, contingent or otherwise, entered into primarily for business or commercial purposes. The term does not include a consumer contract or an employment contract.

(2) Consumer contract. – A contract or undertaking, contingent or otherwise, entered into by an individual primarily for the individual's personal, family, or household purposes.

(3) Employment contract. – A contract or undertaking, contingent or otherwise, between an individual and another party to provide labor or personal services by that individual to the other party, whether the relationship is in the nature of employer-employee or principal-independent contractor.

"**§ 1G-3. Choice of North Carolina law in business contracts.**

(a) Choice of Law. – The parties to a business contract may agree in the business contract that North Carolina law shall govern their rights and duties in whole or in part, whether or not any of the following statements are true:

(1) The parties, the business contract, or the transaction that is the subject of the business contract bear a reasonable relation to this State.

(2) A provision of the business contract is contrary to the fundamental policy of the jurisdiction whose law would apply in the absence of the parties' choice of North Carolina law.

(b) Controlling Law. – To the extent this section conflicts with G.S. 25-1-301(c), G.S. 25-1-301(c) controls.

"**§ 1G-4. Choice of North Carolina forum in business contracts.**

(a) Choice of Forum. – Notwithstanding any other provision of law, a party to a business contract may bring an action in the courts of this State for a dispute arising from the business contract if the business contract contains both of the following provisions:

(1) A provision where the parties agree that North Carolina law shall govern their rights and duties in whole or in part, pursuant to G.S. 1G-3.

(2) A provision where the parties agree to litigate a dispute arising from the business contract in the courts of this State.

(b) Personal Jurisdiction and Forum Non Conveniens. – A party that enters into a business contract that satisfies the requirements of subsection (a) of this section consents to the personal jurisdiction of the courts of this State in an action for a dispute arising from the business contract. A court shall not stay or dismiss the action pursuant to G.S. 1-75.12 or the doctrine of forum non conveniens.

(c) Choice of Venue. – Notwithstanding any other provision of law, the parties to a business contract that satisfies the requirements of subsection (a) of this section may designate in the business contract one or more counties in this State as the proper venue for a dispute arising from the business contract. If the parties do not designate a county in the business contract, a party may bring an action for a dispute arising from the business contract in any county in this State.

(d) Change of Venue. – In an action that is brought in a county in this State permitted by subsection (c) of this section, a court may change the place of trial to another county in this State pursuant to G.S. 1-83(2), 1-83(3), or 1-84 only. Nothing in this subsection allows a court to change the place of trial to another state.

"**§ 1G-5. Effect of provisions.**

Nothing in this Chapter does any of the following:

(1) Validates, invalidates, or otherwise affects the enforcement of a choice of law provision or a choice of forum provision in a contract that is not a business contract.

(2) Confers subject matter jurisdiction upon a court that would otherwise lack subject matter jurisdiction.

(3) Affects the designation of an action as a mandatory complex business case pursuant to G.S. 7A-45.4."

SECTION 2. G.S. 25-1-301 reads as rewritten:

"**§ 25-1-301. Territorial applicability; parties' power to choose applicable law.**

(a) Except as otherwise provided in this section, when a transaction bears a reasonable relation to this State and also to another state or nation the parties may agree that the law either of this State or of ~~such~~ the other state or nation shall govern their rights and duties. Except as otherwise provided in subsection (c) of this section, the parties to a business contract as defined in G.S. 1G-2(1) may agree in the business contract that North Carolina law shall govern their rights and duties in whole or in part, pursuant to G.S. 1G-3.

(b) In the absence of an agreement effective under subsection (a) of this section, and except as provided in subsection (c) of this section, this Chapter applies to transactions bearing an appropriate relation to this State.

(c) If one of the following provisions of this Chapter specifies the applicable law, that provision governs and a contrary agreement is effective only to the extent permitted by the ~~law so specified:~~specified law:

(1) G.S. 25-2-402;
(2) G.S. 25-2A-105 and G.S. 25-2A-106;
(3) G.S. 25-4-102;
(4) G.S. 25-4A-507;
(5) G.S. 25-5-116;
(6) G.S. 25-8-110;
(7) G.S. 25-9-301 through G.S. 25-9-307."

SECTION 3. This act is effective when it becomes law and applies to business contracts entered into before, on, or after that date.

In the General Assembly read three times and ratified this the 26th day of June, 2017.

s/ Daniel J. Forest
President of the Senate

s/ Tim Moore
Speaker of the House of Representatives

s/ Roy Cooper
Governor

Approved 9:14 a.m. this 18th day of July, 2017

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2017

SESSION LAW 2017-10
SENATE BILL 131

See next page

AN ACT TO PROVIDE FURTHER REGULATORY RELIEF TO THE CITIZENS OF NORTH CAROLINA.

The General Assembly of North Carolina enacts:

PART I. BUSINESS REGULATION

EMPLOYMENT STATUS OF FRANCHISES

SECTION 1.1. Article 2A of Chapter 95 of the General Statutes is amended by adding a new section to read:

"**§ 95-25.24A. Franchisee status.**

Neither a franchisee nor a franchisee's employee shall be deemed to be an employee of the franchisor for any purposes, including, but not limited to, this Article and Chapters 96, 97, and 105 of the General Statutes. For purposes of this section, "franchisee" and "franchisor" have the same definitions as set out in 16 C.F.R. § 436.1."

STREAMLINE MORTGAGE NOTICE REQUIREMENTS

SECTION 1.2. G.S. 45-91 reads as rewritten:

"**§ 45-91. Assessment of fees; processing of payments; publication of statements.**

A servicer must comply as to every home loan, regardless of whether the loan is considered in default or the borrower is in bankruptcy or the borrower has been in bankruptcy, with the following requirements:

(1) Any fee that is incurred by a servicer shall be both:

a. Assessed within 45 days of the date on which the fee was incurred. Provided, however, that attorney or trustee fees and costs incurred as a result of a foreclosure action shall be assessed within 45 days of the date they are charged by either the attorney or trustee to the servicer.

b. Explained clearly and conspicuously in a statement mailed to the borrower at the borrower's last known address within 30 days after assessing the fee, provided the servicer shall not be required to take any action in violation of the provisions of the federal bankruptcy code. The servicer shall not be required to send such a statement for a fee ~~that: (i) results~~ that either:

1. Is otherwise included in a periodic statement sent to the borrower that meets the requirements of paragraphs (b), (c), and (d) of 12 C.F.R. § 1026.41.

2. Results from a service that is affirmatively requested by the borrower, ~~(ii)~~ is paid for by the borrower at the time the service is provided, and ~~(iii)~~ is not charged to the borrower's loan account.

(2) All amounts received by a servicer on a home loan at the address where the borrower has been instructed to make payments shall be accepted and

the examination may be taken by one or more of the responsible managing officers or members of the personnel of the ~~applicant, and if the person so examined~~ applicant.

(c1) If the qualifier or qualifying party shall cease to be connected with the ~~applicant,~~ licensee, then ~~in such event~~ the license shall remain in full force and effect for a period of 90 ~~days thereafter, and then be canceled, but the applicant~~ days. After 90 days, the license shall be invalidated, however the licensee shall ~~then~~ be entitled to ~~a reexamination, all~~ return to active status pursuant to ~~the~~ all relevant statutes and rules ~~to be~~ promulgated by the ~~Board: Provided, that the holder of such license~~ Board. However, during the 90-day period described in this subsection, the licensee shall not bid on or undertake any additional contracts from the time such ~~examined employee shall cease~~ qualifier or qualifying party ceased to be connected with the ~~applicant~~ licensee until ~~said applicant's~~ the license is reinstated as provided in this Article.

~~(d) Anyone failing to pass this examination may be reexamined at any regular meeting of the Board upon payment of an examination fee. Anyone requesting to take the examination a third or subsequent time shall submit a new application with the appropriate examination and license fees.~~

(d1) The Board may require a new application if a qualifier or qualifying party requests to take an examination a third or subsequent time.

(e) A ~~certificate of~~ license shall expire on the ~~thirty-first~~ first day of ~~December~~ January following its issuance or renewal and shall become invalid 60 days from that date unless renewed, subject to the approval of the Board. ~~Renewals may be effected any time during the month of January without reexamination, by the payment of a fee to the secretary of the Board. The fee shall~~ Renewal applications shall be submitted with a fee not to exceed one hundred twenty-five dollars ($125.00) for an unlimited license, one hundred dollars ($100.00) for an intermediate license, and seventy-five dollars ($75.00) for a limited license. ~~No later than November 30 of each year, the Board shall mail written notice of the amount of the renewal fees for the upcoming year to the last address of record for each general contractor licensed pursuant to this Article.~~ Renewal applications shall be accompanied by evidence of continued financial responsibility satisfactory to the Board. Renewal applications received by the Board on or after the first day of January shall be accompanied by a late payment of ten dollars ($10.00) for each month or part after January.

(f) After a ~~lapse of four years no renewal shall be effected and the applicant~~ license has been inactive for four years, a licensee shall not be permitted to renew the license, and the license shall be deemed archived. If a licensee wishes to be relicensed subsequent to the archival of the license, the licensee shall fulfill all requirements of a new applicant as set forth in this section. Archived licensed numbers shall not be renewed."

SECTION 2.13.(b) This section becomes effective October 1, 2017, and applies to applications for licensure submitted on or after that date.

REPEAL CERTAIN EDUCATIONAL TESTING LAWS

SECTION 2.14. G.S. 115C-174.12(c) reads as rewritten:

"(c) Local boards of education shall cooperate with the State Board of Education in implementing the provisions of this Article, including the regulations and policies established by the State Board of Education. Local school administrative units shall use the annual tests to fulfill the purposes set out in this Article. ~~Local school administrative units are encouraged to continue to develop local testing programs designed to diagnose student needs.~~"

STATUTE OF LIMITATIONS/LAND-USE VIOLATIONS

SECTION 2.15.(a) G.S. 1-51 is amended by adding a new subdivision to read:

"**§ 1-51. Five years.**

Within five years -

...

(5) Against the owner of an interest in real property by a unit of local government for a violation of a land-use statute, ordinance, or permit or any other official action concerning land use carrying the effect of law. This subdivision does not limit the remedy of injunction for conditions that are actually injurious or dangerous to the public health or safety. The claim for relief accrues upon the occurrence of the earlier of any of the following:

a. The facts constituting the violation are known to the governing body, an agent, or an employee of the unit of local government.

b. The violation can be determined from the public record of the unit of local government."

SECTION 2.15.(b) G.S. 1-49 is amended by adding a new subdivision to read:

"**§ 1-49. Seven years.**

Within seven years an action –

...

(3) Against the owner of an interest in real property by a unit of local government for a violation of a land-use statute, ordinance, or permit or any other official action concerning land use carrying the effect of law. This subdivision does not limit the remedy of injunction for conditions that are actually injurious or dangerous to the public health or safety but does prescribe an outside limitation of seven years from the earlier of the occurrence of any of the following:

a. The violation is apparent from a public right-of-way.

b. The violation is in plain view from a place to which the public is invited."

SECTION 2.15.(c) This section becomes effective October 1, 2018, and applies to actions commenced on or after that date.

PART III. AGRICULTURE, ENERGY, ENVIRONMENT, AND NATURAL RESOURCES REGULATION

SOLID WASTE AMENDMENTS

SECTION 3.1.(a) Section 4.9(a) of S.L. 2015-286 reads as rewritten:

"**SECTION 4.9.(a)** Section 14.20(a) of S.L. 2015-241 ~~reads as rewritten:~~is rewritten to read:

...."

SECTION 3.1.(b) Section 4.9(b) of S.L. 2015-286 reads as rewritten:

"**SECTION 4.9.(b)** ~~Section 14.20(a)~~ Section 14.20(c) of S.L. 2015-241 ~~reads as rewritten:~~is rewritten to read:

...."

SECTION 3.1.(c) Section 4.9(c) of S.L. 2015-286 reads as rewritten:

"**SECTION 4.9.(c)** Section 14.20(d) of S.L. 2015-241 ~~reads as rewritten:~~is rewritten to read:

...."

SECTION 3.1.(d) Section 4.9(d) of S.L. 2015-286 reads as rewritten:

"**SECTION 4.9.(d)** Section 14.20(f) of S.L. 2015-241 ~~reads as rewritten:~~is rewritten to read:

...."

SECTION 3.1.(e) Section 14.20(e) of S.L. 2015-241 reads as rewritten:

"**SECTION 14.20.(e)** After July 1, 2016, the annual fee due pursuant to ~~G.S. 130A-295.8A(d1),~~ G.S. 130A-295.8(d1), as enacted by Section 14.20(c) of this act, for existing sanitary landfills and transfer stations with a valid permit issued before the date this act