

Civil Update

Ann M. Anderson  
Associate Professor  
UNC School of Government

*Public Law for the Public's Lawyers*  
November 2019



UNC  
SCHOOL OF GOVERNMENT

www.sog.unc.edu

1

---

---

---

---

---

---

---

---

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

Opinions Issued from 4/1/2019-4/1/2020  
Selected opinions issued October 2019-May 2020

Ann M. Anderson  
UNC School of Government


CIVIL PROCEDURE, JURISDICTION, AND JUDICIAL AUTHORITY	1
TORTS	5
CONSTITUTIONAL MATTERS	10
CONTRACTS	13
EVIDENCE	20
REAL ESTATE, LAND USE, AND FORECLOSURE	21
WILLS AND ESTATES	25
JUDICIAL AUTHORITY	27
ADMINISTRATIVE REVIEW BY SUPERIOR COURT	28
JUDICIAL DECISION	30

**Civil Procedure, Jurisdiction, and Judicial Authority**

**North Carolina Supreme Court**

**New trial vs. award of judgment**

*Justice v. Hester*, 2019-12-19 (N.C. Supreme Court Dec. 15, 2019) (with one partial dissent and one dissent). Jury awarded only nominal damages to plaintiff in negligence action. Trial judge determined the damages were manifestly inappropriate, set aside nominal damages verdict (which apparently was a complete reduction of the damages based on failure to mitigate), and awarded \$100,000 plus costs. Complete reduction of the damages based on failure to mitigate, and awarded \$100,000 plus costs. Complete reduction of the damages based on failure to mitigate, and awarded \$100,000 plus costs. Complete reduction of the damages based on failure to mitigate, and awarded \$100,000 plus costs.



3

---

---

---

---


---

---

---

---

**Procedure,  
Authority, and  
Jurisdiction**



UNC  
SCHOOL OF GOVERNMENT

5

---

---

---

---

---

---

---

---

## “Amend” the jury’s verdict?

*Justus v. Rosner* (NC Supreme Court Dec. 2018)

p. 1

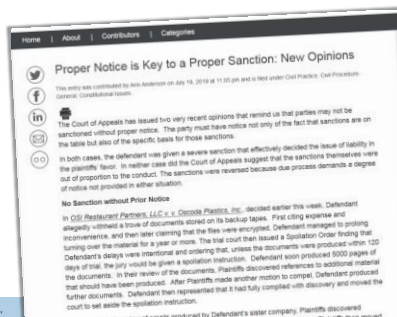
### COA and Supreme Court:

- Jur Trial court had **no authority to enter its own damages amount**. New trial instead.
- Tri
- Tri
- Tri Supreme Court: “[Rule 59] states explicitly that, once that determination had been made, the only relief that the trial court may award to plaintiff is a **new trial**.”

ate.

UNC  
SCHOOL OF GOVERNMENT

6



7

## Proper notice before sanctions

p. 3

*OSI Restaurant Partners, LLC v. D'Onofrio* (NC Supreme Court Dec. 2018)

- Case fi obfusc
  - Court
  - Then C docum
  - OSI m
  - OSCo
  - At hea
  - sancti
  - Judge
  - and i
- “Plaintiffs did not file a written motion seeking discovery sanctions against Defendant. At the time of the...hearing, the...only matter left to be resolved was [the] motion to set aside the spoliation instruction.”**
- “A party is entitled to notice whether sanctions are imposed under Rule 37...or under the trial court’s inherent disciplinary authority. ... [T]he complete absence of notice of potential sanctions ... is not adequate notice.”**

7(b)(2)

UNC  
SCHOOL OF GOVERNMENT

8



UNC  
SCHOOL OF GOVERNMENT

Proper COA: Sanction reversed and remanded.

Walsh v. [illegible]

- Emplc releva no suc
- Motio
- Court struck
- But sa under

"Defendant was **not advised, prior to the hearing, that it might be sanctioned for failure to supplement its discovery responses pursuant to Rule 26(e)**; wholly absent from Plaintiffs' motion was any contention that Defendant should be sanctioned on that basis."

"The [party] against whom sanctions are to be imposed must be **advised in advance** of the charges against [it]." ...While North Carolina does not require notice of the precise type of sanctions sought, a party is nevertheless entitled to (1) **notice of the bases of the sanctions** and (2) an opportunity to be heard thereon."

4

---

---

---

---

---

---

---

---

9

## Torts




---

---

---

---

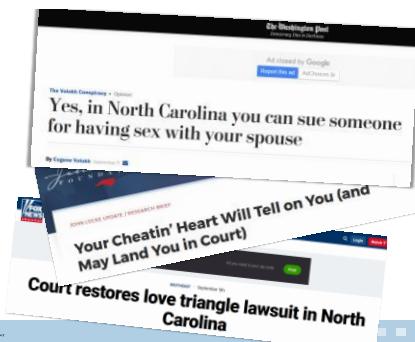
---

---

---

---

10




---

---

---

---

---

---

---

---

11

## Alienation of affection and criminal conversation



The screenshot shows a news article from UNC School of Government. The headline reads "Malecek v. Williams, --- S.E.2d --- (2017)". A blue banner overlay says "NC Supreme Court: Cert denied December 2017". The article text states: "The common law torts of alienation of affection and criminal conversation are not facially invalid under the First and Fourteenth Amendments." A red bracket and a blue star highlight this sentence.

12

---

---

---

---

---

---

---

Many states have repealed alienation of affection laws, but they still exist in Hawaii, Mississippi, New Mexico, South Dakota, Utah, and, of course, North Carolina.

13

---

---

---

---

---

---

---



The screenshot shows a CNN article with the headline "A North Carolina man just won a \$750,000 lawsuit after suing his wife's lover". The byline is "By Christina Maxouris and Leah Asmelash, CNN" and the update time is "Updated 3:20 PM ET, Wed October 2, 2019".

14

---

---

---

---

---

---

---

Home / Local / Article

## Pitt County man wins \$750,000 judgment against man for stealing his wife



"No. Because Daddy doesn't own you...Duh."

UNC

15

---

---

---

---

---

---

---

### Immunity: Governmental or proprietary?

p. 5

*Meinck v. City of Gastonia* (NC Oct. 26, 2018))



Proprietary function.  
Not immune.

COA

Governmental function.  
Immunity applies.

Supreme Court

Both courts applying *Williams v. Pasquotank*, 366 N.C. 195 (2012).

UNC

16

---

---

---

---

---

---

---

### Immunity: Governmental or proprietary?

p. 5

*Meinck* NC Supreme Court:



"We again emphasize that "the proper designation of a particular action of a county or municipality is a **fact intensive inquiry ... and may differ from case to case.**"

Governmental function.  
Immunity applies.

Supreme Court

Both courts applying *Williams v. Pasquotank*, 366 N.C. 195 (2012).

UNC

17

---

---

---

---

---

---

---



UNC  
SCHOOL OF GOVERNMENT

## Right to speedy trial – direct Const'l claim? p. 6

Washington v. Cline (COA Sep. 3, 2019)

Home invasion → ARREST → TRIAL  
4 years, 9 months

**VIOLATION OF RIGHT TO SPEEDY TRIAL**  
Conviction Vacated - 2008

2011 – Direct civil claim under N.C. Const. Art. 1, Sec. 18 against DA - Damages for deprivation of his right to speedy trial

Court of Appeals: **NO SUCH CLAIM**  
"We decline to recognize a private cause of action in connection with the deprivation of the right to a speedy trial as guaranteed by Article I, section 18 of our North Carolina Constitution."

UNC SCHOOL OF GOVERNMENT

18

---

---

---

---

---

---

---

## Medical malpractice – proximate cause p. 9

Parkes v. Hermann (COA May 2019)

EMERGENCY  
Alteplase

Failure to properly diagnose and treat stroke **diminished her chance for improved outcome.**

But...undisputed evidence: Alteplase would have given her a 40% chance of improvement.

SO...could she, as a matter of law, possibly meet the "more likely than not" standard of proof for proximate cause?

Court of Appeals: **NO. SJ for doctor affirmed.**  
"We conclude that North Carolina has not departed from this traditional approach. As such, we must conclude that Ms. Parkes' "loss of chance" at a better result is not a separate type of injury for which she may recover in a medical malpractice negligence action."

UNC SCHOOL OF GOVERNMENT

20

---

---

---

---

---

---

---

## Medical malpractice – proximate cause p. 9

Parkes v. Hermann (COA May 2019) (disc. rev. allowed – Sept. 2019)

EMERGENCY  
Alteplase

Failure to properly diagnose and treat stroke **diminished her chance for improved outcome.**

But...undisputed evidence: In her attempt to administer Alteplase, the doctor delayed for 45 minutes, possibly meeting the "more likely than not" standard of proof for proximate cause.

Court of Appeals: **reversed.**  
"We conclude that North Carolina has departed from this traditional approach. As such, we must conclude that Ms. Parkes' "loss of chance" at a better result is not a separate type of injury for which she may recover in a medical malpractice negligence action."

**"Loss of chance"**

UNC SCHOOL OF GOVERNMENT

21

---

---

---

---

---

---

---

## Negligence: duty of appraiser

p. 9

*Lamb v. Styles* (COA Feb 2019)


Professional negligence

Negligent misrepresentation

**Court of Appeals: Dismissal affirmed.**

Appraiser did not have duty of care toward adjacent landowner in performing this survey.

As third parties to the appraisal, Lambs would have to show that there was an intention that they would act in reliance on the survey.



UNC

22

---

---

---

---

---

---

---

---

## NIED and foreseeability

p. 6

*Newman v. Stepp* (COA Sept 2019) (w/ dissent)

"The dispositive issue surrounding plaintiffs' claim for NIED is foreseeability."

COA majority:

NIED claim can proceed.  
Foreseeability sufficiently alleged.

COA dissent:

NIED claim properly dismissed. Not "foreseeable" for NIED.



Case is on NC Supreme Court docket.



UNC

23

---

---

---

---

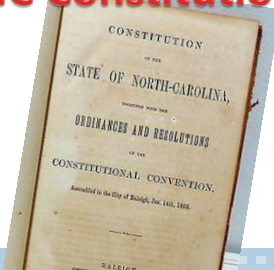
---

---

---

---

## NC Constitution



UNC

24

---

---

---

---

---

---

---

---



UNC  
SCHOOL OF GOVERNMENT

## “Sound, basic education”

p. 10

*Silver v. Halifax*

Leandro

"The State must step in with an iron hand and get the mess straight." *Hoke Cnty. Bd. of Educ. v. State*, No. 93 CPS 1158, 2007 WL 34165638 (N.C. Super. Ct. Apr. 4, 2007) ("Judge Manning 2007 Memorandum").

NC Supreme Court: (Dec. 2018)  
Affirmed (6-1)

"[T]he duty to remedy these harms rests with the State, and the State alone."

HALIFAX COUNTY

UNC

25

## Court files and First Amendment

p. 11

*Doe v. Doe* (COA Dec. 2018)

Permanently Sealed

Party names  
Attorney/GAL names  
Facts and allegations  
Motions  
Orders  
Court-approved settlement

Motion to unseal  
DENIED  
G.S. 1-72.1

Fayetteville Observer

UNC

26

### § 1-72.1. Procedure to assert right of access.

(a) Any person asserting a right of access to a civil judicial proceeding or to a judicial record in that proceeding may file a motion in the proceeding for the limited purpose of determining the person's right of access. The motion shall not constitute a request to intervene under the provisions of Rule 2.

Under Art. I, sec. 18 of N.C. Constitution:

- Public (including media) have a **qualified right of access** to a court file.
- This right can only be limited when there is **a compelling countervailing public interest**.

-Virmani 1999

(e) A ruling on a motion for immediate interlocutory appeal must be given in writing, filed after entry of the court's ruling.

UNC

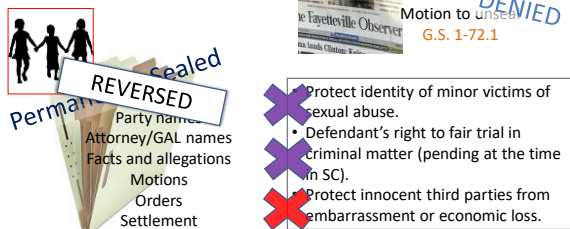
27



## Court files and First Amendment

*Doe v. Doe* (COA Dec. 2018)

p. 11



UNC

28

---

---

---

---

---

---

---

## Contracts



UNC

29

---

---

---

---

---

---

---

## Exculpatory clauses & negligence

*Morrell v. Hardin Creek, Inc.* (NC Dec. 2018)

p. 13

What kind of contractual language does it take for a party to be exempted from liability for its *own negligence*?

UNC

30

---

---

---

---

---

---

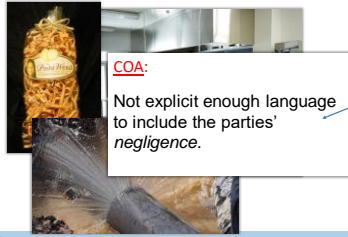
---



UNC  
SCHOOL OF GOVERNMENT

## Exculpatory clauses & negligence

Morrell v. Hardin Creek, Inc. (NC Dec. 2018)



(b) Tenant's Neglect. Subject to the provisions set forth in the following sentence, Tenant shall pay for the cost of any repairs or damage resulting from the negligence or the wrongful acts of his employees, representatives or visitors. However, notwithstanding the provision of this lease, Landlord and all parties claiming under them agree and discharge each other from all claims and liabilities arising from or caused by any hazard covered by insurance on the leased premises, or covered by insurance in connection with the property owned or activities conducted on the leased premises, regardless of the cause of the damage or loss, provided that such cause does not prevent payment of insurance proceeds to Landlord under the provisions of the applicable policy.

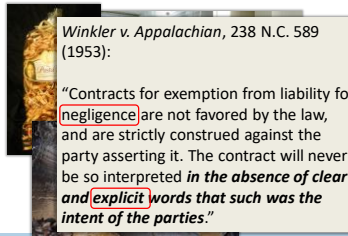
p. 13

What about negligence?

31

## Exculpatory clauses & negligence

Morrell v. Hardin Creek, Inc. (NC Dec. 2018)



(b) Tenant's Neglect. Subject to the provisions set forth in the following sentence, Tenant shall pay for the cost of any repairs or damage resulting from the negligence or the wrongful acts of his employees, representatives or visitors. However, notwithstanding the provision of this lease, Landlord and all parties claiming under them agree and discharge each other from all claims and liabilities arising from or caused by any hazard covered by insurance on the leased premises, or covered by insurance in connection with the property owned or activities conducted on the leased premises, regardless of the cause of the damage or loss, provided that such cause does not prevent payment of insurance proceeds to Landlord under the provisions of the applicable policy.

What about negligence?

32

## Exculpatory clauses & negligence

Morrell v. Hardin Creek, Inc. (NC Dec. 2018)

NC Supreme Court (6-1): Claim properly dismissed.

A contract **need not expressly include** the term "negligence" in order for an exculpatory clause to be enforceable.

*"The lease executed by plaintiffs and Hardin Creek unequivocally demonstrates the parties' intent to hold each other harmless regarding all liability for damage and loss arising from hazards covered by the insurance obtained for the premises."*

(b) Tenant's Neglect. Subject to the provisions set forth in the following sentence, Tenant shall pay for the cost of any repairs or damage resulting from the negligence or the wrongful acts of his employees, representatives or visitors. However, notwithstanding the provision of this lease, Landlord and all parties claiming under them agree and discharge each other from all claims and liabilities arising from or caused by any hazard covered by insurance on the leased premises, or covered by insurance in connection with the property owned or activities conducted on the leased premises, regardless of the cause of the damage or loss, provided that such cause does not prevent payment of insurance proceeds to Landlord under the provisions of the applicable policy.

What about negligence?

33

Non-compete provisions

“not viewed favorably in modern law”

must be “reasonable as to time and territory”

---

---

---

---

---

---

---



39

Non-compete provisions - *territory*

p. 18

*Aesthetic Facial & Ocular...v. Zaldivar* (COA Mar. 2019)

For... two years after... employment... ends, Dr. Zaldivar will not provide facial plastic and reconstructive surgery services on behalf of you or any other person within a fifteen (15) mile radius of any office, satellite or other place of business used by the Practice at the time your employment commences, or within a fifteen (15) mile radius of any other place of business used by the Practice at the time your employment ends. This promise specific to ophthalmology and/or oculo-facial plastic and reconstructive surgery at any hospital, surgery center or laser center at which you or the Practice have privileges at the time your employment ends (or within one (1) year of the time your employment ends).

15-mile radius around:

- Chapel Hill
- Durham
- Fayetteville
- Greensboro
- Greenville
- Pinehurst
- Raleigh
- Rocky Mount
- Supply
- Wake Forest
- Wilmington
- Wilson

and/or oculo-facial plastic and reconstructive surgery services on behalf of you or any other person within a fifteen (15) mile radius of any office, satellite or other place of business used by the Practice at the time your employment commences, or within a fifteen (15) mile radius of any other place of business used by the Practice at the time your employment ends. This promise specific to ophthalmology and/or oculo-facial plastic and reconstructive surgery at any hospital, surgery center or laser center at which you or the Practice have privileges at the time your employment ends (or within one (1) year of the time your employment ends).

---

---

---

---

---

---

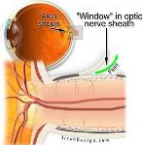
---



40

Non-compete provisions - *territory*

*Aesthetic Facial & Ocular...v. Zaldivar* (COA Mar. 2019)



“highly specialized [emergency] medical procedures and orbital surgeries...which are currently only available in Eastern North Carolina through Dr. Zaldivar’s practice.”

“Should Dr. Zaldivar not be permitted to practice in the “restricted area”...this could cause harmful delay in the delivery of specialized medical care in the emergency setting...”

Subspecialist in oculo-facial plastic surgery

“...time-sensitive face and eye surgeries for a population of millions of people in this geographic area, including children seen in emergency rooms for acute or trauma injuries to the eyes and face.”

---

---

---

---

---

---

---



41

Non-compete provisions - *territory*

*Aesthetic Facial & Ocular...v. Zaldivar* (COA Mar. 2019)



We conclude that restricting Dr. Zaldivar's ability to practice in the most populated areas of North Carolina when there are very few oculofacial plastic surgeons, and even fewer who perform some of the specialized procedures he is trained to provide, raises a "substantial question of potential harm to the public health." ... Accordingly, the covenant violates public policy and will not be enforced.

Subspecialty of oculofacial plastic surgery

geographic area, including children's emergency rooms for acute or trauma injuries to the eyes and face."



42

---

---

---

---

---

---

---

---

Non-compete provision – *time and territory* p. 15

*Sterling Title Co. v. Martin* (COA Aug. 2019)

10 years



.... for one (1) year after the date of termination of my employment with the Company I will not, directly or indirectly, for myself or others: ....

**UNENFORCEABLE**  
**(12(b)(6) dismissal affirmed**

partner of the Company with the Company to

"territory" ("client-based") - unreasonable

Company; ... or (d) provide products or services competitive with a product or service of the Company to any customer or partner of the Company with whom I had contact during my employment with the Company.

"time" - "in essence an 11-year restriction" "patently unreasonable"



43

---

---

---

---

---

---

---

---

Wills



44

---

---

---

---

---

---

---

---

## Holographic will

§ 31-3.4. Holographic will.

(a) A holographic will is a will

(1) Written entirely in the handwriting of the testator but when all the words appearing on a paper in the handwriting of the testator are sufficient to express the testator's intent and not affecting the validity of the will.

“where the meaning or effect of holographic notes on a will requires reference to another part of the will, the holographic notations are not a valid holographic codicil to the will.”

NC Supreme Ct 1940

45

---

---

---

---

---

---

---

---

---

---

## Will of Hendrix (COA May 2018)

COA: Caveat properly dismissed.

The meaning of the handwritten additions to the will could not be determined “without reference to any other part of her will.” Not a holographic will/codicil as a matter of law.

46

---

---

---

---

---

---

---

---

---

---

## Holographic will

p. 27

### Will of Allen (NC Supreme Ct. Dec. 2018)

COA: Not a valid holographic codicil.

NC Supreme Ct: Reversed and remanded.

“[T]he handwritten notation itself...evinces a clear intent regarding the desired disposition for the items contained in Article IV. Those words themselves explicitly show that the will should be modified to eliminate Article IV.”

47

---

---

---

---

---

---

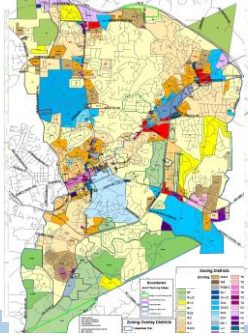
---

---

---

---

# Land Use



UNC  
UNIVERSITY OF NORTH CAROLINA

48

---

---

---

---

---

---

---

## Town boards and Q-J proceedings

p. 23

*Dellinger v. Lincoln County* (COA July 2019)



DENIED 4-1

Motion to recuse  
Commissioner  
Permenter for bias.

DENIED by Board  
Denial affirmed  
by Superior Court

COA: **REVERSED.**  
RECUSAL WAS  
REQUIRED

UNC  
UNIVERSITY OF NORTH CAROLINA

49

---

---

---

---

---

---

---

## Town boards and Q-J proceedings

*Dellinger v. Lincoln County* (COA July 2019)



- Had actively opposed the solar farm and CUP before taking his Board seat
- Had contributed \$\$ to the CUP opposition before taking his Board seat

UNC  
UNIVERSITY OF NORTH CAROLINA

50

---

---

---

---

---

---

---



UNC  
SCHOOL OF GOVERNMENT

N.C. Gen. Stat. § 160A-388(e)(2) (2017).

A member of any board exercising quasi-judicial functions ... shall not participate in or vote on any quasi-judicial matter in a manner that would violate affected persons' constitutional rights to an impartial decision-maker. Impermissible violations of due process include, but are not limited to, a member having a fixed opinion prior to hearing the matter that is not susceptible to change, undisclosed *ex parte* communications, a close familial, business, or other associational relationship with an affected person, or a financial interest in the outcome of the matter.

51

## Town boards and Q-J proceedings

*Dellinger v. Lincoln County* (COA July 2019)



- Had actively opposed the solar farm and CUP before taking his Board seat
- Had contributed \$\$ to the CUP opposition before taking his Board seat

“fixed  
opinion”

During the hearing:

- presented ten pages worth of his own “condensed evidence” in an attempt to rebut Petitioner’s prima facie case
- “biased, one-sided, and incomplete”



52

“In quasi-judicial proceedings, no board or council member should appear to be an advocate for nor adopt an adversarial position to a party, bring in extraneous or incompetent evidence, or rely upon *ex parte* communications when making their decision.”

*PHG Asheville*, — N.C. App. at —, 822 S.E.2d at 85.

53



## Town boards and Q-J proceedings

*Dellinger v. Lincoln County* (COA July 2019)



- Had actively opposed the solar farm and CUP before taking his Board seat
- Had contributed \$\$ to the CUP opposition before taking his Board seat

“fixed opinion”

*During the hearing:*

- presented ten pages worth of his own “condensed evidence” in an attempt to rebut Petitioner’s prima facie case
- “biased, one-sided, and incomplete”

Advocate

UNC  
SCHOOL OF GOVERNMENT

54

## Town boards and Q-J proceedings

*Dellinger v. Lincoln County* (COA July 2019)



DENIED 4-

COA:  
REMANDED  
FOR ISSUANCE  
OF CUP

UNC  
SCHOOL OF GOVERNMENT

55

## Servicemembers’ Civil Relief Act

50 U.S.C. 3901  
*et seq.*

AND  
N.C. G.S. 127B,  
Art. 4

“Dependents” of  
servicemembers

STATE OF NORTH CAROLINA

County \_\_\_\_\_

Name and Address of Plaintiff \_\_\_\_\_

VERSUS

Name and Address of Defendant \_\_\_\_\_

**SERVICEMEMBERS’ CIVIL RELIEF ACT  
AFFIDAVIT**

**NOTE:** Though this form may be used in a Chapter 45 Foreclosure action, it is not a substitute for the certification that may be required by G.S. 45-21.03A.

**AFFIDAVIT**

I, the undersigned Affiant, under penalty of perjury declare the following to be true:

1. As of the current date, (check one of the following):

☐ a. I have personal knowledge that the defendant named above is in military service.\*

☐ b. I have personal knowledge that the defendant named above is not in military service.\*

☐ c. I am unable to determine whether the defendant named above is in military service.\*

2. (check one of the following):

☐ a. I used the Servicemembers Civil Relief Act Website (https://ncsls.civilrelief.ncdoj.gov) to determine the defendant’s military status. (Click “Results from this site if that website was utilized.”)

**NOTE:** The Servicemembers Civil Relief Act Website is a website maintained by the Department of Justice (DOJ). If that website certainties are not transfered on your computer, you may experience security alerts from your Internet browser when you attempt to access the website.

☐ b. I have not used the Servicemembers Civil Relief Act Website and the following facts support my statement as to the defendant’s military service: (Please list how you know the defendant is or is not in military service.) \_\_\_\_\_

3. As of the current date, (check one of the following and explain below):

☐ a. I have personal knowledge that the defendant named above is a dependent of a servicemember in military service.\*

☐ b. I have personal knowledge that the defendant named above is not a dependent of a servicemember in military service.\*

☐ c. I am unable to determine whether the defendant named above is a dependent of a servicemember in military service.\*

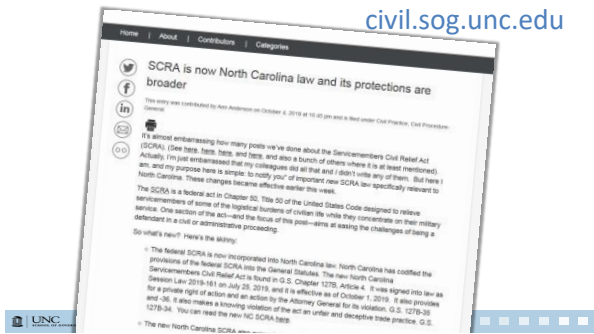
UNC  
SCHOOL OF GOVERNMENT

56



UNC  
SCHOOL OF GOVERNMENT





57

---

---

---

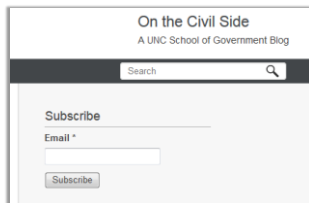
---

---

---

---

---



58

---

---

---

---

---

---

---

---

