Civil Case Summaries: November 1, 2011–June 5, 2012

North Carolina Conference of Superior Court Judges

2012 Summer Conference

I. CIVIL PROCEDURE, JURISDICTION, & JUDICIAL AUTHORITY

Rule 41(a)(1) Refiling; New Claim?

Royster v. McNamara, 723 S.E.2d 122 (N.C. App. Feb. 7, 2012). Mr. Royster sued his attorney for professional negligence after a jury awarded over $250,000 against him in a fraud case. After voluntarily dismissing his complaint under Rule 41(a)(1), Mr. Royster properly refiled the action within the one-year allowed by the rule (but after the original statute of limitation had run). The re-filed complaint was essentially identical to the original complaint, except for the addition of an allegation that the attorney's negligence had forced him to "undergo humiliation and emotional damage." The trial court dismissed any claim for emotional damage because it had not been asserted in the original complaint and thus fell outside the statute of limitation. The Court of Appeals reversed, holding that the new emotional injury allegation was not the addition of a new claim or cause of action, but was instead a statement of one potential component of compensatory damages available in the *existing* negligence claim.

Amending Complaint to Add Signature; Rules 11 and 15

Estate of Livesay v. Livesay, 723 S.E.2d 772 (N.C. App. Feb. 21, 2012). A few weeks after plaintiff's complaint was duly filed and served, plaintiff's counsel discovered that the complaint had not been signed, dated, or verified. That afternoon, plaintiff's counsel filed and served a signed and verified duplicate copy. No responsive pleadings to the original complaint had yet been filed or served. Upon later motion of defendants, the trial court dismissed plaintiff's complaint with prejudice for lack of subject matter jurisdiction. The Court of Appeals held that the plaintiff's filing of an amended, duly executed complaint comported with Rule 15, which allows amendment as of right when no responsive pleading has been filed, and was permitted by Rule 11, which contemplates that a plaintiff may "sign[] promptly after the omission is called to the attention of the pleader." Thus the trial court erred in dismissing the complaint.

Findings of Fact

Coastal Federal Credit Union v. Falls, 718 S.E.2d 192 (N.C. App. Nov. 15, 2011). The clerk entered default and default judgment against defendants after they failed to answer. In their motion to set aside the default judgment, defendants created a question of fact as to whether they had made an appearance in the case by communicating with plaintiff's counsel prior to the expiration of the time to respond (thus

requiring default judgment to be entered by a judge, not the clerk). Plaintiff agreed that defendants had contacted their attorney but had evidence that the communications occurred only *after* default judgment. The superior court denied the motion to set aside default and default judgment in a written order with purported findings of fact. The Court of Appeals remanded, concluding that the findings of fact were not sufficient to show whether the judge had determined that the communications occurred *after* default judgment. The court stated that the trial court's findings were instead "merely recitations of the parties' evidence." The court reiterated that "[w]here there is directly conflicting evidence on key issues, it is especially crucial that the trial court make its own determination as to what pertinent facts are actually established by the evidence, rather than merely reciting what the evidence may tend to show."

Discovery Scope; Work Product Doctrine

Young v. Kimberley-Clark Corp., 724 S.E.2d 552 (N.C. App. Feb. 21, 2012). Plaintiff appealed an order compelling her to produce certain items in discovery to defendant, her former employer. The Court of Appeals affirmed the order, holding that (1) plaintiff waived the privileged status of her medical records by alleging her employer had caused her emotional harm; (2) plaintiff's income tax returns were relevant to the question of whether she had mitigated her damages; and (3) requiring plaintiff to produce "information…as to all persons having knowledge or information relating to the subject matter of this action, *including persons contacted by…her counsel*" did not violate the attorney work product doctrine.

Class Certification

Beroth Oil Co. v. North Carolina Dept. of Trans., __ S.E.2d __ (N.C. App. May 15, 2012). Plaintiffs attempted to bring a class action on behalf of 800 landowners to challenge the NCDOT's use of the Map Act to restrict the use of property situated within a large corridor of Forsyth County pending that property's eventual condemnation for highway construction. The trial court declined to find the existence of a class. The Court of Appeals affirmed, holding that, because the DOT's alleged taking is regulatory in nature, the ends-means test was appropriate to determine whether the plaintiffs were similarly situated. Further, the trial court did not err in determining that individual issues dominated over class issues: the effect of DOT's restrictions varies from parcel to parcel, requiring individual assessments of harm.

Venue

Jenkins v. Hearn Vascular Surg., P.A., 719 S.E.2d 151 (N.C. App. Nov. 15, 2011). Parents brought an action in Forsyth County against physician and practice related to a procedure on the mother that allegedly harmed the child *in utero*. The parents and all defendants were residents of Alamance County and, at the time of the complaint, the infant was being cared for as an inpatient in a Forsyth County hospital. The trial court denied defendants' motion for change of venue to Alamance County. The Court of Appeals reversed, holding that the child did not reside in Forsyth County by virtue of long-term treatment there, but was instead domiciled with her parents in Alamance County. Because all parties were residents of Alamance County, Alamance County was the proper county of venue.

Standing

Arendas v. North Carolina High School Athletic Assoc., Inc., 718 S.E.2d 198 (N.C. App. Nov. 15, 2011). Northern Guilford High School (NGHS) won the 3A Men's Basketball State Championship. After learning that two of the players lived outside the NGHS residential district, and thus were ineligible to play on the team, the North Carolina High School Athletic Association (NCHSAA) revoked NGHS's championship. Players and coaches of the team brought an action against the NCHSAA alleging various

claims aimed at reinstating NGHS's championship. The superior court dismissed for lack of standing, and the Court of Appeals affirmed, holding that that, because the players and coaches were not themselves members of the NCHSAA, they could not bring an action to enforce the rights of a member school.

Subject Matter Jurisdiction; Supplemental Proceedings During Appeal
Songwooyarn Trading Co., Ltd. v. Sox Eleven, Inc., 723 S.E.2d 569 (N.C. App. Feb. 21, 2012). After defendant appealed a judgment against him, the trial court heard and ruled on plaintiff's supplemental proceeding motions (GS Chapter 1) aimed at discovering and preventing disposal of defendant's assets. The Court of Appeals held that, while the trial court was divested of jurisdiction over the subject matter of the underlying matter once the appeal was perfected, the trial court retained authority to hear motions "proper for the security of the rights of the adverse party." Thus the trial court retained jurisdiction to conduct the supplemental proceedings during the appeal.

Personal Jurisdiction; Minimum Contacts
Bell v. Mozley,716 S.E.2d 868 (N.C. App. Nov. 1, 2011), *disc. rev. denied*, 724 S.E.2d 529 (N.C. 2012). In an alienation of affection action, plaintiff husband was a South Carolina resident and owned a second home in Blowing Rock, NC. Defendant, a South Carolina resident, was vice president of a development company based in Charlotte, NC and traveled to North Carolina several times a year to lead various development projects. Defendant met plaintiff's wife at plaintiff's Blowing Rock home during a holiday party, but he did not begin a relationship with her until a short time later. The evidence showed that all other meetings with her took place outside North Carolina. Because defendant's contacts with North Carolina were in connection with his work, and were not related to his relationship with plaintiff's wife, the Court of Appeals held there were insufficient minimum contacts over defendant in North Carolina.

Personal Jurisdiction; Minimum Contacts
Miller v. Szilagyi, __ S.E.2d __ (N.C. App. June 5, 2012). In 2006, defendants, Florida residents, were approached in Florida by plaintiff, a North Carolina resident, about purchasing defendants' Florida company, Healthmark. The signing of the agreement took place in Florida. The deal fell through. Two years later, in 2008, defendants entered into subsequent Healthmark purchase agreements, this time not with plaintiff individually, but with a North Carolina company owned by plaintiff. In 2011, plaintiff sued in North Carolina to recover the $310,000 deposit he made in the first (2006) agreement. No facts regarding the 2008 agreements were at issue in the complaint. The trial court dismissed the complaint for lack of personal jurisdiction over defendants, citing insufficient minimum contacts. The Court of Appeals agreed, holding that the trial court was correct to consider only the facts surrounding the first (2006) agreement, and not to base the minimum contacts/purposeful availment analysis on any of defendants North Carolina-related activities associated with the 2008 agreements.

Statute of Limitation; Equitable Estoppel
Rink & Robinson, PLLC v. Catawba Valley Enterprises, LLC, __ S.E.2d __ (N.C. App. May 1, 2012). Plaintiff could properly assert that defendants were equitably estopped from asserting a statute of limitation defense. Where there was evidence that defendants asked plaintiff to postpone filing suit to give them more time to pay and represented that they would see that plaintiff got paid and "got taken care of," the trial court was correct in concluding that defendants themselves induced the delay and were thus equitably estopped from asserting the defense.

II. TORTS & IMMUNITY

Product Liability; Defense of Modification

Stark v. Ford Motor Co., 724 S.E.2d 519 (**N.C.** April 13, 2012). A child, through her guardian ad litem, brought an action against Ford after she was injured in an accident. At trial, she attempted to prove that Ford's seatbelt design was responsible for the severity of her injuries. Ford's evidence suggested that plaintiff's father had modified her seatbelt by placing the top strap behind her, rather than leaving it in the proper position across her chest. Ford asserted the defense provided in G.S. 99B-3, which would relieve it of liability if the product in question had been modified after purchase. The Court of Appeals held that this defense was not available to Ford, because the statute states that the manufacturer shall not be liable where there was an "alteration or modification of the product by a party other than the manufacturer or seller." The Court of Appeals reasoned that because the seatbelt was allegedly modified by plaintiff's father, who was not a "party" to the action, the statutory defense did not apply. The Supreme Court reversed, holding that the statutory term "party" is not limited to a *party to the litigation*, but instead means a person other than the manufacturer or seller. Thus the defense was available to shield Ford from liability in this action.

Premises Liability; Jury Instructions as to Standard of Care

Cobb v. Town of Blowing Rock, 722 S.E.2d 479 (**N.C.** Jan. 27, 2012), *per curiam*. The Supreme Court reversed the Court of Appeals *per curiam* for the reasons stated in the dissenting opinion in 713 S.E.2d 732 (N.C. App. July 5, 2011). During her family visit to the town-owned Glen Burney Falls, a twelve-year-old child veered off the designated trail, exited the overlook platform, and attempted to cross the creek. She slipped and went over the falls, suffering serious injury. The town prevailed before the jury in a negligence action. On appeal, plaintiffs argued, among other things, that the trial court should have instructed the jury to consider the foreseeable characteristics (in this case, young age) of potential visitors in determining whether the town had exercised reasonable care. The dissenting opinion, adopted by the Supreme Court, stated that the "foreseeable characteristics" of visitors – including their age – is an evidentiary consideration already factored into the pattern instruction as to a landowner's duty to exercise reasonable care under the circumstances. Thus, the trial court did not err in refusing to give the plaintiff's requested "characteristic-based" negligence instruction.

Premises Liability

Davis v. Cumberland Cty Bd of Educ., 720 S.E.2d 418 (N.C. App. Dec. 20, 2011). A six-year-old boy slipped and fell through riser gap (between seat and floorboard) near top of bleachers while attending a high-school football game with his father. He suffered severe injuries. Where there was no dispute that the bleachers complied with relevant building codes; there was no evidence that other schools had installed riser boards on similar bleachers; and there was no evidence of a history of similar incidents, plaintiffs did not forecast evidence that a reasonable school board would have maintained the bleachers differently. Summary judgment was properly granted for the school.

Premises Liability; Voluntary Undertaking

Mynhardt v. Elon Univ., __ S.E.2d __ (N.C. App. May 1, 2012). An Elon student was permanently paralyzed during an altercation at a house rented by members of the Elon chapter of a fraternity. The house was not on Elon property and was not owned by Elon or the fraternity. Plaintiff alleged that, because Elon had promulgated rules and regulations affecting greek organizations and had expressed

concern about previous dangerous incidents at greek off-campus parties, Elon had made a "voluntary undertaking" to impose supervision over such activities. The trial court granted summary judgment for Elon, and the Court of Appeals affirmed, holding that, merely by adopting organizational safety policies, Elon did not "owe a duty to protect Plaintiff from drinking-related injuries at an off-campus party."

Premises Liability; Responsibility to Prevent Access to Adjacent Dangers

Lampkin v. Housing Mgmt. Resources, Inc., __ S.E.2d __ (N.C. App. May 15, 2012). A small child was permanently injured when she crawled through a broken portion of a fence located around the perimeter of the apartment complex where she and her family lived. She began to play on an icy pond on adjacent property and fell into the water, suffering brain damage. In a negligence action, it was alleged that the apartment complex had erected the fence as a containment barrier, and thus was liable for the child's injuries because of failure to maintain the fence for that purpose. The Court of Appeals affirmed the dismissal of plaintiff's claims, holding that the facts could not support a finding that the apartment complex had undertaken to contain children on the premises. The court further held that a landowner's duty of care to maintain safety did not include guarding against harms located on adjacent premises over which the landowner has no control.

Medical Malpractice; Expert's Qualification to Testify as to Standard of Care

Crocker v. Roethling, 719 S.E.2d 83 (N.C. App. Nov. 15, 2011). An infant died after suffering injuries related to shoulder dystocia during the birth process. Parents brought malpractice action against obstetrician and hospital, alleging the obstetrician breached the standard of care by not performing a "Zavanelli maneuver" in the delivery room to attempt to relieve the condition. Plaintiffs had one expert as to standard of care. After conducting a voir dire of the expert (as mandated by the Supreme Court in an earlier round of appeals), the trial court granted summary judgment for defendants, concluding that the expert was not qualified to testify as to the "similar community" standard in G.S. 90-21.12. The Court of Appeals affirmed. The Court concluded that because the expert practiced only in a larger, tertiary-care hospital in a major population area of Arizona; had never performed nor witnessed a "Zavanelli maneuver"; did not know whether the maneuver had ever been performed in North Carolina; and testified simply that "there is a national standard of care for most things", his testimony failed to demonstrate his qualification to opine as to the "community" standard of care in Goldsboro, North Carolina.

Medical Malpractice vs. Ordinary Negligence

Horsley v. Halifax Reg. Med. Ctr., __ S.E.2d __ (N.C. App. May 1, 2012). Plaintiff was a patient in Defendant's psychiatric unit. Her complaint alleged that she had trouble standing, and that during one attempt to seek help to avoid falling, none of the nurses offered her a wheelchair, cane, or walker. She fell and was injured. She filed suit against the hospital alleging negligence and gross negligence. The trial court dismissed for failure to include the Rule 9(j) statement required in complaints alleging medical malpractice. The Court of Appeals reversed, holding that the facts of the complaint alleged ordinary negligence rather than medical negligence; therefore no Rule 9(j) certification was required and the complaint was improperly dismissed.

Professional Negligence

Royster v. McNamara, 723 S.E.2d 122 (N.C. App. Feb. 7, 2012). Mr. Royster sued his attorney for professional negligence after a jury awarded over $250,000 against him and four other defendants in a fraud case. Mr. Royster alleged that the attorney should have moved for a directed verdict in his favor on

the grounds that there was no evidence of any fraud by *Mr. Royster himself*, and that if the attorney had done so, he would not be liable on the judgment along with the other defendants. The attorney was granted summary judgment on the basis of collateral estoppel because, on appeal of the underlying fraud matter, the Court of Appeals had affirmed the trial court's denial of a motion for a new trial. In this appeal, the Court of Appeals held that the question litigated in the prior appeal had been whether there was sufficient evidence to support a fraud judgment against the *defendants* (the five of them together), not *Mr. Royster individually*. Mr. Royster was therefore *not* collaterally estopped from litigating this issue in his professional negligence case. Summary judgment reversed.

Libel; Sovereign Immunity

White v. Trew, 720 S.E.2d 713 (N.C. App. Dec. 20, 2011), *disc. rev. granted*, ___ S.E.2d __ (N.C. March 8, 2012). An associate professor at NCSU brought defamation action against full professor for allegedly false statements made in associate professor's annual review and distributed to the department dean and university counsel. The Court of Appeals affirmed a denial of full professor's motion to dismiss on grounds of sovereign immunity because he had been sued in his individual capacity, rather than in his capacity as a state employee, and because the complaint alleged that the statements had been made with malice, taking them out of the realm of immune conduct. The court also rejected full professor's argument that there was no "publication" necessary to sustain a libel claim because the statements has only been sent to faculty and administrators within NCSU.

Ordinary Negligence vs. Wilful or Wanton Behavior; Emergency Treatment Immunity

Green v. Kearney, 719 S.E.2d 137 (N.C. App. Nov. 15, 2011). At 8:53 p.m. plaintiff was struck by a car while crossing the road. He was declared dead a few minutes later by an Epsom fire department employee. Minutes later, two Franklin County EMS members arrived, declined to take plaintiff's pulse to confirm death, and placed a white sheet over him. At 9:00 p.m., two Louisburg Rescue Unit members arrived, but neither checked for vital signs. One minute later, The Franklin County medical examiner arrived, but he did not inspect plaintiff until the crime scene unit arrived some time later. Upon examining plaintiff, the medical examiner and seven other people saw plaintiff's chest move. The examiner stated it was "only air escaping the body," and ordered that plaintiff be transferred to the morgue, which occurred at 10:06 p.m. The medical examiner examined plaintiff again at the morgue, where he and the Rescue Unit workers all observed twitches in plaintiff's eyelid. The examiner passed them off as muscle spasms. After further inquiry from the Rescue Unit and EMS workers, the examiner reassured them that plaintiff was dead. Plaintiff was placed in a refrigerator drawer until 11:23 p.m., when he was viewed by a Highway Patrol officer for purposes of accident reconstruction. The officer and medical examiner both noticed plaintiff's abdomen moving, and at that time plaintiff was rushed (alive, of course) to the hospital for treatment. He suffers from severe permanent injuries.

Summary judgment was granted in favor of the medical responders, the examiner, and the County on the basis of immunity under Chapter 90-21.14, which exempts persons rendering emergency health treatment from liability except in cases of "gross negligence, wanton conduct or intentional wrongdoing." Taking instruction from Illinois case law, the Court of Appeals affirmed, emphasizing that the test for such behavior is not the *degree* of negligence, but whether the acts are done with knowing disregard of duty or with a wicked purpose. The court found that there had been no forecast of any evidence amounting to more than ordinary negligence.

Negligence; Public Duty Doctrine
Frayley v. Griffin, 720 S.E.2d 694 (N.C. App. Dec. 20, 2011). A high school student and football player called 911 from home complaining of full body cramps and dehydration. An EMT responded, briefly examined him, instructed him to drink water and call 911 again if he worsened, and then left him at home. The boy died at home hours later, and his parents sued the EMT in his individual capacity for wrongful death. The trial court denied the EMT's motion for summary judgment on the basis of public official immunity. The Court of Appeals agreed, holding that although the position of EMT is regulated by statute, it is not a statutorily-*created* position afforded the status of a public office. Further, his duties did not involve the exercise of discretion as that term is intended in the immunity context; instead, he was required to "follow an established treatment protocol," and thus his responsibilities were ministerial.

Negligence; Insulating vs. Contributory
Muteff v. Invacare Corp., 721 S.E.2d 379 (N.C. App. Feb. 7, 2012), *disc. rev. denied*, 724 S.E.2d 533 (N.C. 2012). Plaintiff was severely burned when her electric wheelchair caught fire in her home. She died from the effects of the burns. In her estate's action against the wheelchair manufacturer, the evidence showed that plaintiff had used her metal necklace to create a more efficient way to plug in the wheelchair's charger cord, possibly creating a short that caused the fire. The trial court gave a jury instruction as to both contributory and insulating (intervening) negligence. The Court of Appeals held that it was error to instruct the jury on insulating negligence for the independent acts of the injured plaintiff herself, particularly in light of the fact that contributory negligence is available as a complete defense in North Carolina. (In this case, the Court of Appeals then went on to hold that the error was not prejudicial.)

Fiduciary Duty; Constructive Fraud
Dixon v. Gist, 724 S.E.2d 639 (N.C. App. April 3, 2012). Plaintiff's complaint alleged that she was befriended by defendants and tricked into believing they had a special relationship with her, through the course of which they persuaded her to add them as signatories on her bank account so they could help her take care of her "daily needs," after which they systematically transferred most of her assets into their own personal accounts. The Court of Appeals reversed a dismissal on the pleadings of her claims for breach of fiduciary duty and constructive fraud, holding that the allegations above adequately stated a prima facie case.

Fiduciary Duty; Competing Law Firms
Crumley & Assocs., Inc. v. Charles Peed & Assocs., P.A., __ S.E.2d __ (N.C. App. April 3, 2012). Plaintiff law firm sued defendant law firm (and individual partners) to recover attorney fees awarded to an associate in contingent fee cases that had been generated when that associate was employed by plaintiff. Among other claims was a claim against a defendant partner individually for constructive fraud. This claim alleged that the partner failed to hold the disputed fees in a trust account in violation of Revised Rule of Professional Conduct 1.15-2 pending the outcome of the fee dispute, and thus he had breached the alleged fiduciary duty imposed by that Rule. The Court of Appeals reversed the constructive trust judgment against him, holding that there was no basis for finding that he had a fiduciary duty to the competing law firm: the respective firms and partners were arm's-length competitors in a legal dispute.

Fiduciary Duty; Defense of Judicial Estoppel
T-Wol Acquisition Co., Inc. v. ECDG South, LLC, __ S.E.2d __ (N.C. App. May 1, 2012). Plaintiff

brought a derivative action as a shareholder in T-Wol (one of only three shareholders), claiming breach of fiduciary duty, constructive fraud, and unfair and deceptive trade practices based on an alleged transfer of T-Wol's property to another entity. Defendants argued that plaintiff was judicially estopped from claiming to be a shareholder of T-Wol. During plaintiff's bankruptcy, he had failed to list T-Wol in the required statement of his "stock and interests in incorporated and unincorporated businesses," the required "Statement of Financial Affairs," and the required income statement. He ultimately received a discharge in the bankruptcy without ever having revealed his involvement in T-Wol to the bankruptcy court. The Court of Appeals held that plaintiff had, therefore, taken an inconsistent position in a prior judicial matter regarding his stock ownership. As a result, the trial court did not abuse its discretion in applying the equitable doctrine of judicial estoppel in granting summary judgment for defendants.

Fiduciary Duty; Mother-Son Relationship of Special Confidence

Holloway v. Holloway, __ S.E.2d __ (N.C. App. June 5, 2012). Plaintiff's complaint alleged that her son persuaded her to move to North Carolina from California so that he could help take care of her in her older age. It was agreed that she would live in a modular home he had purchased, and in exchange, she would help pay off the home's mortgage and back taxes and pay him rent. Within a year she did, in fact, pay well in excess of $50,000, including the full amount of the home's mortgage. Within two years thereafter, her son filed an action to eject her from the home, alleging that she kept the property in poor condition. She brought an action to recover a portion of her expenditures. The Court of Appeals held that plaintiff's complaint, liberally construed, stated a prima facie case for a fiduciary relationship of special trust and confidence–a relationship exceeding a normal mother-son relationship.

III. CONTRACTS

Specific Performance; Strict Adherence to Terms of Option
Miller v. Russell, 720 S.E.2d 760 (N.C. App. Dec. 20, 2011). A contract contained option to repurchase land and required option holder to notify seller of intent to repurchase by "hand delivery or written notice by certified or registered mail." Where the option holder notified seller of her intent to purchase by two letters sent over email, she did not exercise the option strictly in accordance with the contract's terms, and thus was not entitled to specific performance of the option contract. Summary judgment should have been granted in favor of seller.

Guaranty Agreement; Independent Consideration
Procar, Inc. II v. Dennis, 721 S.E.2d 369 (N.C. App. Feb. 7, 2012). Defendants executed an agreement personally guaranteeing their company's debt to plaintiff. At the time of the agreement, their company owed plaintiff over $600,000 on extended credit. Plaintiff later sued defendants on the guaranty for over $500,000 in unpaid receipts. The trial court dismissed the complaint on grounds that the contract was not enforceable. The Court of Appeals affirmed. Because the agreement guaranteed payment only of the company's *existing* obligations (those "due to and owing") rather than any future extensions of credit, it was not supported by separate consideration.

Accord and Satisfaction
In re Five Oaks, 724 S.E.2d 98 (N.C. App. March 6, 2012). Where a check with "full payment" scrawled in the memo line was deposited by the recipient as partial payment, the payment did not constitute accord and satisfaction of the full debt. The check was not accompanied by any indication that the payor disputed the actual amount of the debt, and there was no evidence that there had been a prior discussion or negotiation over the actual sum due.

Third Party Beneficiary
Williams v. Habul, 724 S.E.2d 104 (N.C. App. March 6, 2012). A settlement agreement between plaintiff and defendants included a provision whereby defendants agreed to continue the employment of a particular third-party individual, Mr. Groninger, for a specific period of time. Alleging that defendants had failed to employ Mr. Groninger as agreed, the plaintiff sued to enforce the provision. The Court of Appeals held that Mr. Groninger was the intended beneficiary and real party in interest as to this portion of the agreement, and only Mr. Groninger would have legal standard to enforce it.

Arbitration Agreement
Emmanuel African Methodist Episcopal Church v. Reynolds Constr. Co., 718 S.E.2d 201 (N.C. App. Nov. 15, 2011). Two contracts between plaintiff and defendant required, respectively, that claims arising therefrom "shall be subject to arbitration" and "shall be decided by arbitration." The Court of Appeals held that the trial court should have granted defendants' motion to compel arbitration because the arbitration language was clear and unambiguous. The court held that other language in the contracts referring to "legal or equitable proceedings" did not invalidate the more specific arbitration language.

Arbitration Agreement
Westmoreland v. High Point Healthcare Inc., 721 S.E.2d 712 (N.C. App. Jan. 17, 2012). Ms. Westmoreland, as attorney-in-fact for her father (and subsequently, for his estate) brought a wrongful death action against the nursing facility where her father had lived. Defendant moved to compel

arbitration based on an agreement Ms. Westmoreland had signed after her father's admission to the facility. The trial court denied the motion to compel, concluding that the arbitration agreement was unconscionable.

The Court of Appeals reversed, analyzing the question under the rationales of both the plurality and concurring opinions in *Tillman v. Commercial Credit Loans*, 362 N.C. 93 (2008). The Court of Appeals held that the agreement was clear in its language and included important disclosures about the right to consult counsel; was not a prerequisite to the father's admission to the facility; was not rendered impossible by AAA policy; did not lack mutuality; did not render any potential claims by Ms. Westmoreland financially impractical; and was not unenforceable merely because Ms. Westmoreland was unsophisticated in business matters. The agreement was neither procedurally nor substantively unconscionable, and the circumstances taken as a whole would not allow a finding of unconscionability. Remanded for entry of an order compelling arbitration.

IV. ESTATES

Executrix's Fiduciary Duty; Collateral Estoppel
Collier v. Bryant, 719 S.E.2d 70 (N.C. App. Nov. 1, 2011). In an estate hearing before the assistant clerk of superior court, an executrix was removed on the basis of breach of fiduciary duty. Soon thereafter, the heirs, again alleging breach of fiduciary duty, filed a civil action against her seeking monetary remedies and the setting aside of a transfer of property. After the trial court denied their motion for summary judgment, the heirs argued that the executrix was collaterally estopped from relitigating the question of her breach of fiduciary duty. Citing a policy exception established in prior case law, the Court of Appeals held that a clerk of superior court's evidentiary finding of an executor's breach of fiduciary duty is *not* binding on a trial court in a later civil action arising from the same facts. Thus the executrix was entitled to defend herself on that claim.

Caveat; Prior Pending Action
Shoaf v. Shoaf, __ S.E.2d __ (N.C. App. March 20, 2012). After Ms. Shoaf's death, her grandson submitted her will for probate. Ms. Shoaf's children then filed a caveat to invalidate the will, claiming Ms. Shoaf had not had capacity to execute the will and that it had been procured through her grandson's undue influence. While the caveat was pending, the children also brought a separate civil action against the grandson for damages for conversion, breach of fiduciary duty, and constructive fraud, alleging various misdeeds with respect to Ms. Shoaf's assets. The grandson moved to dismiss the civil action arguing that the caveat proceeding was a "prior pending action," precluding litigation of the same issues in the civil action. The trial court and Court of Appeals disagreed, determining that the two actions did not share the same elements of proof and did not seek the same relief.

Guardian of the Estate; Standing to Change Venue
Stern v. Cinoman, __ S.E.2d __ (N.C. App. June 5, 2012). A man brought suit as guardian of the estate of a Chapter 35A incompetent ward. The matter was filed in Durham County, the guardian's county of residence. The ward was a resident of Richmond County, the defendant was a resident of Wake County, and the events took place in Orange County. Defendant moved to change venue to Wake County, and the motion was granted. The Court of Appeals reversed, holding that the guardian of the estate (in contrast to a guardian ad litem) had authority under Chapter 35A to maintain an action with respect to the ward's property. The guardian, therefore, was a party in his own right and thus entitled to maintain the action in Durham County, his own county of residence.

V. REAL PROPERTY

Reformation of Deed; Unilateral Mistake

Willis v. Willis, 722 S.E.2d 505 (**N.C.** March 9, 2012). Ms. Willis drafted a will in 2004 bequeathing her interest in her "homeplace" to her son, Eddie. She also stated in her will that if she conveyed the property to Eddie before her death, and he sold it, he should divide the proceeds with his brother, Anthony. In 2005, she conveyed the property to Eddie. Eddie then suddenly died in 2007. The homeplace then passed to Eddie's children. Ms. Willis, contending that this was not the result she intended, filed an action to reform the deed. The Supreme Court held that the remedy of reformation was not available in this circumstance – the unilateral mistake of one party to the deed. Reformation is available in only three circumstances, none of which applied in this case: (1) mutual mistake of the parties; (2) mistake of one party induced by fraud of the other; and (3) mistake of the draftsman.

Boundary Dispute; Insufficient Evidence to Survive Summary Judgment

Williamson v. Long Leaf Pine, LLC, 720 S.E.2d 875 (N.C. App. Jan. 17, 2012). A petition was filed in superior court to resolve a boundary dispute involving the placement of the "M.C. Gore line", which denotes the eastern boundary of the Town of Sunset Beach. In their motion for summary judgment, petitioners presented the 1955 deed creating the line, containing a description of the line and its placement, including reference points; evidence of the General Assembly's use of the line to mark the Town's eastern boundary in 1963; a 1964 survey for the heirs of the party conveying the property to M.C. Gore; a 1982 survey done showing the line to be fixed in the same location as stated in the 1955 deed and 1954 survey; and three other surveys from 1990 and 2000, all showing the same placement.

Respondents then presented an affidavit of their expert, analyzing prior surveys by petitioners' experts, and opining that the line had been inaccurately located. Respondents' expert did not conduct his own survey. Finding respondents' affidavit inadequate to create an issue of fact, the trial court granted summary judgment for petitioners. The Court of Appeals agreed, holding that petitioners had presented overwhelming evidence of the placement of the line, thus shifting the burden to respondents. In the absence of an *actual competing survey* by their expert, the affidavit did not raise "more than a scintilla, or permissible inference" and therefore did not create a genuine issue of material fact.

Public Trust Rights; Jurisdiction

Town of Nags Head v. Cherry, Inc., 723 S.E.2d 156 (N.C. App. Feb. 21, 2012). The Town of Nags Head brought a nuisance action and requested an order of abatement of a deteriorating house located on the wet sand beach near a point of pedestrian beach access. The superior court issued the order of abatement requiring the owner to demolish or remove the alleged nuisance or to allow the Town to do so at defendant's expense. The Court of Appeals reversed, holding that the Town's action was equivalent to attempting to enforce the public trust doctrine: a common law principle providing that certain land associated with bodies of water is held in trust by the State for the benefit of the public. Because only the State has standing to enforce public trust rights on behalf of the people of North Carolina, the Town's action should have been dismissed for lack of standing. [Note: See *Fisher v. Town of Nags Head*, __ S.E.2d __ (N.C. App. May 15, 2012), for discussion of a statutory exception to the public trust doctrine (G.S. 40A-3(b1)(10)) for municipalities using eminent domain to conduct beach erosion control, hurricane protection, and beach nourishment projects.]

Joint Tenancy; Effect of Mortgage as a Conveyance

Countrywide Home Loans, Inc. v. Reed, __ S.E.2d __ (N.C. App. May 15, 2012). Ms. Smith and her daughter and son-in-law executed an offer to purchase a home. The deed named them as joint tenants with right of survivorship. The deed of trust to secure Countrywide's loan, however, was in Ms. Smith's name only. The loan went into default, and Countrywide sought to foreclose on the entire property. The Court of Appeals held that, as a conveyance, the filing of the deed of trust executed only in Ms. Smith's name severed the joint tenancy with right of survivorship, creating in its place a tenancy in common between Ms. Smith and her daughter and son-in-law. Thus the portion of the property owned by the daughter and son-in-law as tenants in common was, therefore, not encumbered by the deed of trust.

VI. FORECLOSURES (Chapter 45 Power of Sale)

Foreclosure Hearings; Subject Matter Jurisdiction
In re Carter, 725 S.E.2d 22 (N.C. App. March 6, 2012). In a foreclosure hearing pursuant to G.S. Chapter 45-21.16, the superior court, in a de novo appeal, has jurisdiction only to determine the legal questions necessary to authorize or disallow the order of sale. The superior court did not have jurisdiction to rule on a motion to compel arbitration, and thus the trial judge properly declined to do so. The proper avenue to seek such relief is in an action to enjoin the foreclosure sale under G.S. 45-21.34. See also *In re Cornblum*, __ S.E.2d __ (N.C. App. April 17, 2012) (below).

Foreclosure Hearings; Subject Matter Jurisdiction
In re Cornblum, __ S.E.2d __ (N.C. App. April 17, 2012). In a foreclosure hearing pursuant to G.S. Chapter 45-21.16, the superior court, in a de novo appeal, has jurisdiction only to determine the legal questions necessary to authorize or disallow the order of sale. The superior court did not have jurisdiction to rule on a motion to compel arbitration. The proper avenue to seek such relief is in an action to enjoin the foreclosure sale under G.S. 45-21.34. Although the trial court erred in ruling on the arbitration motion, however, the issue was moot, as the foreclosure sale had already been completed, the deed had been transferred, and the rights of the parties had become "fixed," thereby precluding any further remedy through Chapter 45. *See also In re Hackley*, 713 S.E.2d 119 (N.C. App. June 2011) (dismissing as moot an appeal of a foreclosure order where the sale had been completed and the deed had already been transferred).

"Holder; Insufficient Evidence
In re Bass, 720 S.E.2d 18 (N.C. App. Dec. 6, 2011). At a Chapter 45 foreclosure hearing, Wells Fargo failed to present sufficient evidence that it was the holder of the note and thus entitled to foreclose. Wells Fargo presented the original note and deed of trust through the testimony of its litigation specialist. Attached to the note was an Allonge bearing three stamps purportedly indorsing and transferring the note among the prior holders and, ultimately, to Wells Fargo. The purported indorsement between the original lender and the next holder, however, consisted only of a stamp, and did not contain a signature indicating authorization or capacity to transfer. Because the absence of this signature, there was a break in the chain of transfer from the original lender to Wells Fargo preventing Wells Fargo from demonstrating it was the current holder. The order authorizing the foreclosure sale was properly denied.

"Holder"; Sufficient Evidence of Merger
In re Carver Pond I, 719 S.E.2d 207 (N.C. App. Dec. 6, 2011). Bank of America proffered sufficient evidence that it was the holder of the note by presenting its affidavit of the Servicer that it had merged with the prior holder; a certified statement from the assistant secretary of Bank of America attesting to the merger; and a letter from the Comptroller of the Currency Administrator of National banks officially certifying to the merger. By virtue of the merger, Bank of America succeeded by operation of law to the prior holder's status.

"Holder"; Insufficient Evidence of Merger
In re Yopp, 720 S.E.2d 769 (N.C. App. Dec. 20, 2011). Where bank seeking to foreclose a $2 million loan ("CitiBank") appeared at the Chapter 45 foreclosure hearing in physical possession of original note and deed of trust, including an indorsement in blank by the original lender, and with competent evidence

of Bank's merger with the original lender (an authenticated Non-Home Loan Certificate), there was sufficient evidence for the superior court's legal conclusion that Bank was the "holder" of the note. Upon its merger with the original lender, Bank, pursuant to N.C.G.S. 53-17, obtained all the rights and powers of the original lender, including the rights as indorser of the note in blank. Based on this evidence, the order authorizing sale was proper. Portions of Bank's affidavits stating that Bank was the "owner and holder" were not, however, admissible, as they were statements of the ultimate legal conclusion; these statements would not have been sufficient had they been Bank's only evidence.

Joint Tenancy; Effect of Mortgage as a Conveyance

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VII. DAMAGES

Intrinsic Value of Companion Animal

Shera v. N.C. State Univ. Veterinary Teaching Hosp., 723 S.E.2d 352 (N.C. App. Feb. 21, 2012). A family brought suit against the veterinary hospital for the loss of their 12-year-old Jack Russell terrier after faulty placement of a feeding tube. Affirming the decision of the Industrial Commission, the Court of Appeals declined to hold that the plaintiff should have been allowed to recover the intrinsic value of the dog (sentimental value as a companion; therapeutic value to the owners, etc.). The court upheld the award of $3,105.72, which reimbursed plaintiffs for the cost of the dog's treatment and the market value of a replacement Jack Russell terrier.

Punitive Damages; Evidence of Ability to Pay

Nguyen v. Taylor, 723 S.E.2d 551 (N.C. App. Feb. 21, 2012). In this defamation action brought by officers of the Greensboro police department, the trial court entered judgment after a bench trial for substantial punitive damages against a rap musician and production company. The Court of Appeals affirmed the trial court's judgment on most of the numerous issues presented in the appeal; however, the court remanded for a new trial as to punitive damages against the production company. The evidence relied on by the court of the production company's "ability to pay" had been based solely on the admissions of co-defendants and not the production company itself.

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