

Civil Procedure Update - October 2025

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Date: October 22, 2025

Superior Court Judges' Fall Conference

Period covered: June 7, 2025-October 10, 2025

Courts covered: North Carolina Court of Appeals (NCCOA), and
North Carolina Supreme Court (NCSC)

Subject: Civil procedure¹

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¹ Rule numbers refer to the North Carolina Rules of Civil Procedure, G.S. 1A-1, unless otherwise stated. This summary does not cover general civil law issues except when those issues are bound up in the procedural issues.

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Cauley v. Cauley (COA24-200)

Date: 2025-06-18

Rule: Rule 59, 60, and subject matter jurisdiction

Summary: Ex parte DVPO in place for more than a year when the plaintiff moved to amend her complaint for DVPO. The trial court granted leave to amend the complaint, denied a motion for attorney’s fees and sanctions made by the defendant, and at trial, denied the DVPO. The defendant then moved for return of his weapons and attorney’s fees. The trial court ordered the defendant’s weapons returned and awarded attorney’s fees to the defendant. The plaintiff moved for new trial or relief from the attorney’s fees judgment. The trial court denied the plaintiff’s motions and the plaintiff appealed.

Holding: Applying *Rudder v. Rudder*, 234 N.C.App. 173 (2014), the NCCOA held that the trial court’s attorney’s fees order was void because the expiration of the ex parte DVPO after one year deprived the court of subject matter jurisdiction. “[T]he material issue in this case is whether the trial court’s jurisdiction persists to award attorney’s fees after Plaintiff’s ex parte DVPO expired.” Slip op. at 9. The NCCOA also held the trial court could enter an order for attorney’s fees supported by appropriate statutory authority, specifically G.S. 6-21.5. When a party wrongfully brings an action and the trial court has no subject matter jurisdiction to consider the claim, the trial court should make findings under G.S. 6-21.5 as to whether there is a justiciable issue and which party prevailed: “[i]n any civil action, special proceeding, or estate or trust proceeding, the court, upon motion of the prevailing party, may award a reasonable attorney’s fee to the prevailing

party if the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the losing party in any pleading.” G.S. 6-21.5.

Hatcher v. Rodriguez (COA23-1108)

Date: 2025-06-18

Rule: 56

Summary: Action for negligence and gross negligence, among other claims, against police officer and municipality arising out of personal injury. The trial court denied the defendants’ motion for summary judgment. The defendants appealed the interlocutory order based on a defense of public official immunity.

Holding: Denial of the summary judgment motion was proper because there is a genuine issue of material fact as to defendant’s gross negligence, piercing the shield of public official immunity. The trial court’s denial of the motion for summary judgment was affirmed as to the municipality for negligent training and supervision, as well, because the plaintiff sought punitive damages that are unavailable if the plaintiff’s claims against the municipality were based on the doctrine of respondeat superior, in other words, based on imputing the defendant officer’s negligence to the municipality.

Takeaway: while the doctrine of public official immunity grants immunity both from liability and from suit when it applies, when the doctrine does not apply, questions of fact can proceed to trial.

Holland v. Holland (COA24-791)

Date: 2025-06-18

Rule: 41(a)(2), 12(b)(1), Laches

Summary: Action for child custody, equitable distribution, post-separation support, alimony, absolute divorce, and child support. The parties entered into a consent judgment that provided the issue of division of the military pension is reserved for the future and that all issues “remain open for further consideration.” The plaintiff dismissed several of her claims contemporaneously with the judgment of absolute divorce. Fourteen years later, the only remaining claim was for equitable distribution. The plaintiff filed a motion to enter the military pension division order, withdrew the motion by using the AOC form for voluntary dismissals under Rule 41(a), checking the “Other” box, writing “Motion (See Below),” and attaching her motion for entry of the military pension division order. The plaintiff refiled the motion a year later. The defendant then moved to dismiss the

motion under Rules 12(b)(1) and 12(b)(6), contending the trial court lacked subject matter jurisdiction to hear the motion. The defendant also contended that the plaintiff unreasonably delayed in filing her motion. The trial court entered the military pension division order and the defendant appealed.

Holding: The trial court retained subject matter jurisdiction over the equitable distribution claim and the refiled motion because plaintiff “intended only to withdraw her motion, not her underlying equitable distribution claim.” Slip op. at 5. “A party cannot unilaterally alter a court-ordered and entered consent judgment by withdrawing a motion.” Slip op. at 6. The defendant suffered no prejudice and the plaintiff’s error was harmless and procedural. The trial court’s denial of the defendant’s defense of laches and the trial court’s entry of the military pension division order were also affirmed.

NC Dep’t. of Env’tl. Quality v. Wake Stone Corp (COA24-914)

Date: 2025-06-18

Rule: 24(a)(2), 24(b)(2)

Summary: Petition for contested case before Administrative Law Judge related to the denial of an application to modify a mining permit. Homeowners and nonprofit (putative intervenors) moved to intervene under Rule of Civil Procedure 24. The ALJ denied the motion, then reversed the Department of Environmental Quality’s denial of the permit. The DEQ filed a petition for judicial review and later settled with the applicant. But the putative intervenors also filed petitions for judicial review challenging 1) the denial of their motion to intervene and 2) the reversal of the permit denial. The trial court found the putative intervenors’ petitions moot and affirmed the ALJ’s denial of the motion to intervene and reversal of the permit denial. The putative intervenors appealed.

Holding: For mandatory intervention under Rule 24(a)(2), “a putative intervenor [must] show that (1) it has a direct and immediate interest relating to the property or transaction, (2) denying intervention would result in a practical impairment of the protection of that interest, and (3) there is inadequate representation of that interest by existing parties.” Slip op. at 4. Intervenors can “introduce new issues beyond the scope of the original case once they become a party,” slip op. at 5-6, but putative intervenors cannot introduce new issues as the basis for intervention. Because the putative intervenors’ interest in the case was not the same as the applicant’s, it was not a direct interest mandating intervention.

For permissive intervention under Rule 24(b)(2), a putative intervenor must show a common question of law or fact between the putative intervenor’s claim and defense and the main action. Trial courts are “accorded great deference” in ruling on motions for permissive intervention. Slip op. at 5. Only arbitrary rulings that “could not have been the result of a reasoned decision” will be reversed. *Id.* The putative intervenors conflated

“two distinct legal and factual inquiries,” slip op. at 6, and the NCCOA affirmed the denial of the motion to intervene. In the case of the putative intervenor nonprofit, the ALJ made additional findings that permitting intervention “after the scheduling order as issued would require deadlines to be extended,” slip op. at 7, create burdensome discovery, and “hinder mediation or settlement agreements.” Slip op. at 8. That the ALJ permitted the putative intervenor nonprofit to file an amicus curiae brief shows the ALJ’s decision was reasoned. Finally, the settlement between the DEQ and the applicant over the permit mooted the entire controversy, leaving nothing to intervene in.

Takeaway: When considering a motion for mandatory intervention, consider any direct and immediate interest. For permissive intervention, consider common questions of law or fact, and also make findings regarding prejudice or delay.

Sessoms v. Ray (COA23-919)

Date: 2025-06-18

Rule: 41(b), 12(b)(1)

Summary: Action for alimony and post-separation support among other claims. In the first action, the trial court ordered postseparation support and dismissed the wife’s claim for alimony for failure to prosecute under Rule 41(b). The order of dismissal said nothing about whether the dismissal was with or without prejudice. In the refiled action, the wife brought claims for post-separation support and alimony and contended she was allowed because she was doing so within one year of the dismissal. The husband moved for dismissal under Rule 12(b)(1), and the court ordered the husband to pay postseparation support before dismissing the alimony claim. The husband appealed the order for postseparation support.

Holding: The Rule 41(b) order of dismissal in the first action is an adjudication on the merits and a final order dismissing the action with prejudice. Case law interpreting Rule 41(b) states that an order dismissing a case under this rule is with prejudice unless the order provides otherwise; this was an explicit change in the law when North Carolina adopted its Rules of Civil Procedure. While the wife argued that the lack of mention of a dismissal without prejudice in the first case was a clerical error that could be corrected by a Rule 60(a) motion, the NCCOA has repeatedly held that Rule 60(a) cannot affect the substantive rights of the parties. Erroneous orders may not be collaterally attacked. When the dismissal of a claim is with prejudice, the court lacks subject matter jurisdiction to hear the same claim. The NCCOA also notes that a trial court must address a lack of subject matter jurisdiction, even on its own motion, if the parties do not raise the issue. Use of the phrase “[t]his matter is retained for further Orders of the court,” slip op. at 17 (cleaned up), does not convert the dismissal to one without prejudice.

Theuerkorn v. Heller (COA24-715)

Date: 2025-06-18

Rule: 60(a)

Summary: Domestic relations action. The trial court ordered alimony but left the amount blank in its order. The dependent spouse filed a Rule 60(a) motion to add in the amount, the trial court filled it in, and supporting spouse appealed.

Holding: On the Rule 60(a) issue, the NCCOA affirmed the trial court's order filling in the blank, holding that this act did not affect a substantive right. “[T]he amount of money involved is not what creates a substantive right. Instead, it is the source from which this money is derived that determines whether a change in the amount owed is substantive for the purposes of Rule 60(a).” Slip op. at 8. Additionally, the error “resulted from a minor mistake or inadvertence rather than from judicial reasoning or determination.” Slip op. at 9 (cleaned up). The NCCOA vacated and remanded the substantive domestic relations issues on appeal.

Ponder v. Been (COA24-552)

Date: 2025-07-02

Rule: 50(b)

Summary: Action for alienation of affection: the plaintiff alleged that he had enjoyed a loving and affectionate relationship with his wife and that the defendant, located in Florida, had destroyed that love and affection. This is actually the second time this case has come before the NCCOA. In the first appeal the defendant moved to dismiss the case for lack of personal jurisdiction. While a majority of the NCCOA disagreed and held that the defendant had not availed himself of the laws of North Carolina, Judge Stroud filed a dissenting opinion that would have held that the defendant’s contacts with plaintiff’s then-wife while she was located in North Carolina were sufficient to subject the defendant to personal jurisdiction in North Carolina. The NCSC adopted the dissent, reversing the NCCOA and allowing the lawsuit to proceed. *Ponder v. Been*, 380 N.C. 570 (2022). The defendant filed a counterclaim against the plaintiff for abuse of process arising out of an incident in which the plaintiff assaulted his ex-wife and the defendant at the defendant’s home in Florida, which also led to a Florida court entering a domestic violence protective order against the defendant. At trial, the defendant obtained a jury verdict in his favor, the jury finding that the plaintiff’s actions in attempting service of the summons and alienation of affection complaint intentionally used that process to accomplish an ulterior purpose. The jury awarded defendant compensatory and punitive

damages. The plaintiff moved for JNOV under Rule 50(b). The trial court granted the plaintiff's motion and the defendant again appealed.

Holding: a jury could reasonably conclude that plaintiff had used the issuance of a civil summons as an excuse to confront his ex-wife and to assault the defendant in Florida, so the trial court erroneously granted plaintiff's motion. Under Rule 4(a), the plaintiff was not allowed to serve the defendant with the summons and complaint himself, and even if he was trying to assist the private process server he had hired, doing so would not require him to trespass on the defendant's property. The NCCOA also noted that the plaintiff engaged in these acts after the defendant's attorney had offered to accept service. As the NCSC put it eighty years ago, "[o]ne who uses legal process to compel a person to do some collateral act not within the scope of the process or for the purpose of oppression or annoyance is liable in damages." *Melton v. Rickman*, 225 N.C. 700, 703 (1945). Abuse of process is a tort based on "misuse of legal process for an ulterior purpose." *Id.* Even though the plaintiff had presented evidence at trial that contradicted the defendant's version of events, on appeal from a motion for JNOV, every conflict in the evidence is resolved in the favor of the non-moving party. If there is more than a scintilla of evidence, the court must allow the jury to weigh the evidence, find the facts, and render a verdict.

White v. Boatwright (COA24-780)

Date: 2025-07-02

Rule: 12(b)(6)

Summary: The father in grandparent custody case filed a motion to "dismiss under Rule 12" that addressed the allegations of the complaint and contained additional factual allegations. The trial court allowed the father to testify at the motion hearing and granted the Rule 12(b)(6) motion to dismiss the complaint with prejudice. The grandparents appealed.

Holding: whether the motion to dismiss was filed under Rule 12(b)(1) or 12(b)(6), the NCCOA reviews the order de novo based on the allegations in the complaint. "Normally, it is not appropriate to consider testimony at a hearing on a motion to dismiss under Rule 12(b)(6), because a motion to dismiss is based only on the sufficiency of the complaint." Slip op. at 7. Taking the allegations in the complaint as true, the NCCOA held that the grandparents could bring a custody claim for the minor child. The NCCOA notes that generally it is not necessary for parties to attend and testify at a Rule 12(b)(1) or 12(b)(6) motion hearing. Nor are findings of fact generally required in an order granting or denying a Rule 12(b)(6) motion.

Marlow v. TCS Designs (COA24-901)

Date: 2025-07-02

Rule: 41(a)

Summary: Workers compensation claim before the Industrial Commission. The plaintiff moved for voluntary dismissal without prejudice. After the Commission granted the plaintiff's motion, noting that the plaintiff could refile the claim within one year, the defendant then sent checks to the plaintiff and filed repeated documents with the Commission, including an alleged "award" and multiple motions to reconsider, all of which were denied. The Commission recognized its lack of subject matter jurisdiction. On the plaintiff's motion, the Commission entered an order staying the matter and removing it from the docket. During this time, the plaintiff also filed a wrongful death action in superior court, and the superior court denied the defendants' motion to dismiss for lack of subject matter jurisdiction. That order was affirmed by the NCCOA. In filings directed to the Commission, the defendants moved for dismissal with prejudice of the workers compensation claim and the plaintiff moved for sanctions in response. The Commission dismissed the case without prejudice for lack of subject matter jurisdiction and denied the plaintiff's motion for sanctions. The defendants appealed.

Holding: The Industrial Commission rules allow for a voluntary dismissal of a claim and later refile. The NCCOA looked to Rule of Civil Procedure 41(a)(1) to interpret the Commission rules and held the rules allows a claim to be voluntarily dismissed and refiled within one year. In the interim, the Commission lacked subject matter jurisdiction, so any filings directed to it are a nullity. The defendants' filings and their arguments for same before the NCCOA are not well grounded in law and fact and are intended to harass the plaintiff. The NCCOA affirmed the Commission's dismissal without prejudice and remanded for the Commission to determine the amount of reasonable attorney's fees to be taxed to the defendants under Rule of Appellate Procedure 34(c).

Cunningham v. Bravo 4 Autoworks (COA24-1008)

Date: 2025-07-16

Rule: 63

Summary: Small claims action for improper repairs to a motor vehicle. On appeal to district court, the case went to arbitration, following which the plaintiff moved for trial de novo. The defendant moved for summary judgment and the plaintiff did not attend the hearing. After the trial court granted summary judgment to the defendant, the plaintiff filed a "motion to reconsider," arguing that traffic kept her from attending the summary judgment hearing. Pursuant to Rule 60, the trial court allowed the plaintiff to be heard on

the summary judgment motion, then orally denied the plaintiff's motion to reconsider and ordered defense counsel to draft a proposed order to that effect. Defense counsel emailed a draft proposed order and the plaintiff emailed objections to the draft. No written order was entered. A year and a half later, after the expiration of the term of the original trial court judge, the chief district court judge held a hearing in the case. The trial court then entered an order denying the plaintiff's motion to reconsider under Rule 63. The plaintiff appealed that order and the summary judgment order.

Holding: the appeal of the summary judgment order is dismissed for lack of jurisdiction. The Rules of Civil Procedure do not contain a "motion to reconsider." The trial court and NCCOA treat the plaintiff's motion as a Rule 60(b)(1) motion for relief from judgment. A Rule 60(b)(1) motion does not toll the time for taking an appeal, and the plaintiff's notice of appeal of the summary judgment order was filed more than 30 days after that order was entered, depriving the NCCOA of jurisdiction to hear that appeal. Turning to the issue of the Rule 63 order, the trial court's entry of this order was proper. After expiration of a trial court judge's term, the chief district court judge reviewed the audio recording and entered an order finding that the former trial court judge made certain findings of fact and conclusions of law. This procedure conforms to Rule 63 because the chief district court judge did not make new findings of fact or conclusions of law, and "did nothing more than put his signature on the order and enter it ministerially." Slip op. at 10.

Yang Real Estate Investments v. Affordable Mini Storage (COA24-1120)

Date: 2025-07-16

Rule: 60(b)

Summary: The plaintiff and defendant signed a purchase agreement for the plaintiff to purchase the defendant's business and real property. The closing never happened. The plaintiff sued the defendant for breach of contract. The plaintiff and the defendant entered into a mediated settlement agreement that gave the plaintiff the option to purchase for a certain price and to sign a purchase agreement within fourteen days and then close by a date certain. The plaintiff dismissed its action and then signed a purchase agreement within sixteen days of the mediated settlement agreement. The defendant refused to sign the purchase agreement on the grounds that the plaintiff had waited too long to sign. The plaintiff moved under Rule 60(b)(1) to set aside its notice of voluntary dismissal and to enforce the settlement agreement requiring the defendant to sell the business to the plaintiff. In the defendant's response to the motion, the defendant moved for summary judgment to enforce the settlement agreement the other way (releasing the parties from the sale). The trial court granted the plaintiff's motion to enforce the settlement agreement

and reserved ruling on Rule 60(b) motions. The defendant filed a Rule 60(b) motion for relief from the trial court order enforcing the settlement agreement and also appealed that order. The NCCOA directed the trial court to hold an evidentiary hearing and enter an order indicating how it would decide the Rule 60(b) motions if an appeal were not pending. The trial court would have enforced the settlement agreement against the defendant. The defendant appealed from the indicative order.

Holding: the plaintiff's intention in dismissing its case "was deliberate and obvious." Slip op. at 8. As the plaintiff intentionally followed the terms of the mediated settlement agreement, its dismissal of the case was excusable neglect and the trial court's grant of the plaintiff's Rule 60(b)(1) motion is affirmed. On the issue of the motion and order to enforce the settlement agreement, this motion "is treated as motion for summary judgment," slip op. at 9. The NCCOA held that the plaintiff's breach of the settlement agreement was not material. The date of signing the purchase agreement by the plaintiff was not a material term of the agreement, and the defendant's refusal to go forward with the sale was arbitrary and deprived the plaintiff of the benefit of the bargain.

Farmers & Merchs. Bank v. Henley (COA24-651)

Date: 2025-08-20

Rule: Claim preclusion

Summary: Action for quiet title and for a declaratory judgment that no easement exists. In a prior proceeding for a power of sale foreclosure, the defendants had alleged that the plaintiff's deed of trust was invalid because it had been materially altered. The NCCOA had held that the modifications to the deed of trust were not material alterations. In the present action, the defendants contended that the plaintiff's deed of trust had been obtained by fraud. The plaintiff moved for judgment on the pleadings, which the trial court granted to the plaintiff, concluding the purported easement is void. The trial court also dismissed the defendants' counterclaim for a declaratory judgment to determine their rights and benefits under the easement, and dismissed the defendants' affirmative defenses of unclean hands and laches. The defendants appealed.

Holding: In considering whether the trial court properly dismissed the defendants' affirmative defenses of laches and unclean hands, the NCCOA determined that the validity of the deed of trust is the issue subject to analysis for preclusion, and therefore collateral estoppel is the relevant doctrine. "Although Defendants alleged 'fraud' instead of 'material alterations,' the factual allegations reveal that Defendants' primary contention is not meaningfully different from that raised and rejected" by the NCCOA in the prior proceeding. Slip op. at 16. This issue was raised and proceeded to a final judgment in the prior proceeding, barring the defendants from raising it again.

Takeaway: Affirmative defenses in subsequent actions, even if labeled differently, may be barred by collateral estoppel if they are predicated upon the same assertion as issues in a prior proceeding.

Moheballi v. Hayes (COA24-454)

Date: 2025-08-20

Rule: art I. sec 25 right to jury trial, punitive damages

Summary: Action for ordinary negligence based on medical malpractice. The defendant offered no defense in trial court or on appeal. The trial court granted summary judgment for the plaintiff on liability. The jury awarded the plaintiff \$7.5 million in damages, which the trial court reduced to \$656,000 under the legislative cap in G.S. 90-21.19. The plaintiff appealed.

Holding: the plaintiff did not have a vested property right in her cause of action until the wrong had occurred, which was after the 2011 enactment of the noneconomic damages cap. The noneconomic damages cap is not unconstitutional because the General Assembly has the “power to define the circumstances under which a remedy is legally cognizable without impairing the right to a jury trial.” Slip op. at 10. The NCCOA notes that the plaintiff could have avoided the noneconomic damages cap had she alleged or argued that the defendant's violation of a 2015 consent order constituted gross negligence.

Wyman v. Barber (COA24-41)

Date: 2025-08-20

Rule: 56(f), 6(d)

Summary: Action for reformation of contract and property deed. The plaintiffs moved for summary judgment. On the Friday before the hearing, at 4:56 p.m. and 4:57 p.m., the defendant filed two affidavits in opposition. The plaintiffs were served with these affidavits after the close of business. The next business day, Monday, September 23, 2024, the defendant moved to continue, and the trial court denied defendant’s motion and then granted the plaintiffs’ motion for summary judgment. The defendant appealed.

Holding: When a trial court denies a motion to continue, it is generally reviewed for abuse of discretion, defined as “when its ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.” Slip op. at 13. Even when a trial court abuses its discretion, a party can only obtain a new trial on appeal

from the denial of a motion to continue after showing error and prejudice due to error. *Id.* In this case, the NCCOA reasoned that “Defendant had seven months to seek discovery and produce evidence in opposition to Plaintiffs’ complaint and Motion and failed to do so.” Further, the defendant’s affidavits were untimely under Rule 6(d), which requires that affidavits be served two business days before the hearing. The trial court, in its discretion, could have accepted the late affidavits, but was not required to do so. The trial court’s orders are affirmed.

Cutter v. Vojnovic (229A24)

Date: 2025-08-22

Rule: 12c, 56e

Summary: Action arising out of an alleged breach of a common law partnership agreement. The Business Court dismissed many claims based on the defendants’ motion for judgment on the pleadings. On cross motions for summary judgment, the Business Court struck portions of the plaintiff’s affidavit, granted the defendants’ motion for summary judgment, and denied the plaintiff’s motion for summary judgment. The plaintiff appealed.

Holding: “[c]onclusory statements tracking the elements of a claim alone are insufficient to withstand a motion for judgment on the pleadings.” Slip op. 9-10. Well pleaded factual allegations may be considered on a Rule 12(c) motion. The NCSC also considered whether opinions, beliefs, and conclusory statements in affidavits under Rule 56(e) could be considered on a motion for summary judgment, and adopted the Business Court’s reasoning that these statements cannot be considered, based on NCCOA precedent.

Howell, et al. v. Cooper, et al. (252A23)

Date: 2025-08-22

Rule: 8(a)

Summary: Action by plaintiff bar owners to challenge COVID-era executive orders issued by the governor. The defendants moved to dismiss under Rules 12(b)(1), 12(b)(2), and 12(b)(6). The trial court denied the motions to dismiss, and the defendants appealed. The NCCOA affirmed the trial court, holding that sovereign immunity does not bar a claim if it is a *Corum* claim, and the defendants appealed to the NCSC on the basis that the NCCOA’s opinion contained a dissent.

Holding: the plaintiffs' complaint survives the motion to dismiss because it "unquestionably puts the trial court and defendants on notice of the transactions, occurrences, or series of transactions or occurrences that plaintiffs intend to prove," slip op. at 16, and alleges that the state actions in question were not "a reasonable means to effect the purpose of limiting COVID-19's spread," slip op. at 15, which states a colorable claim under the Fruits of Their Own Labor clause.

Dissent: Justice Earls would have held that the trial court should have dismissed the plaintiffs' complaint because it did not "sufficiently allege[] that the state's response to this public health crisis failed to strike a reasonable balance between public good and private burden." Slip op. at 45. In reaching this conclusion, the dissent states that the pleading standard applied by the majority does not follow notice pleading principles because "it declines to give defendants notice of the legal standard they will be held to on remand." Slip op. at 34.

NC Bar and Tavern Association, et al. v. Stein (126PA24)

Date: 2025-08-22

Rule: 56

Summary: Action by bar owners and employees challenging COVID-era executive orders by the governor, bringing claims under *Corum*, the Fruits of Their Labor clause, the Equal Protection clause, and statutory claims. The plaintiffs sought a preliminary injunction, which the trial court denied. The defendant moved to dismiss under Rules 12(b)(1), 12(b)(2), and 12(b)(6). The plaintiffs moved for partial summary judgment. The trial court granted the motion to dismiss and denied the motion for partial summary judgment. On the plaintiffs' appeal, the NCCOA held that the motion to dismiss became a motion for summary judgment once materials beyond the pleadings were considered by the trial court, vacated the order, and remanded to the trial court. The defendant appealed to the NCSC.

Holding: The NCSC modified and affirmed the NCCOA's order on the Fruits of Their Labor clause claim. The trial court's grant of summary judgment to the defendant is vacated and the matter remanded to the trial court for further discovery. Now that the NCSC has clarified the legal standard to be applied under the Fruits of Their Labor clause, the scope of discovery and the standard for summary judgment is different than that applied by the NCCOA and the trial court. The NCCOA's decision on the Equal Protection claim is reversed, and the NCCOA's decision on the statutory claims is affirmed.

Concurrence and Dissent: Justice Riggs would have reversed the NCCOA and affirmed the trial court's grant of summary judgment to the defendant on Fruits of Their Own Labor claim on the basis that plaintiffs "did not forecast evidence rebutting the

Governor's stated purpose" in entering emergency orders. Slip op. at 41. The dissent would not have remanded the case to the trial court to reopen discovery. The dissent would have dismissed the *Corum* claim and remanded the Emergency Management Act claim for further consideration. This opinion concurs with the majority on the Equal Protection claim.

Schroeder v. The Oak Grove Farm Homeowners (123PA24)

Date: 2025-08-22

Rule: 50(b) (JNOV)

Summary: Action by homeowner plaintiffs for declaratory judgment, injunctive relief, and damages arising from enforcement of restrictive covenants against the keeping of chickens as livestock in a Union County subdivision. Following the trial court's denial of cross motions for directed verdict, a jury found that the chickens were not pets. The trial court denied the plaintiffs' motion for JNOV. The NCCOA reversed, holding that there was not even a scintilla of evidence that the chickens were not pets, so the trial should have granted the plaintiffs' motions for directed verdict and JNOV. The NCCOA did not consider whether plaintiffs' counsel should have been able to read excerpts from caselaw to the jury, whether the trial court should have adopted plaintiffs' proposed nonpattern jury instructions, and whether the trial court should have local ordinances defining the term "animal."

Holding: "The trial court correctly denied the Schroeders' motions for a directed verdict and for JNOV because there was more than a scintilla of evidence that their chickens were not household pets. The Court of Appeals committed legal error when it reversed that judgment." Slip op. at 9. On the issue of jury instructions, the trial court framed the issue for the jury as two questions of fact (including whether or not the chickens were pets). The trial court gave effect to the legal language of restrictive covenants, recognized that the covenants contained an exception, and construed the covenants "in favor of the free use of the land without contradicting the plain and obvious purpose of the contracting parties." Slip op. at 12 (cleaned up). The trial court did not err in refusing to allow plaintiffs' counsel to read from caselaw during closing arguments. Finally, the trial court correctly excluded the Union County Animal Control Ordinance as evidence.

Town of Apex v. Rubin (206PA21 and 410PA18-2)

Date: 2025-08-22

Rule: prior pending action doctrine

Summary: More than a decade of litigation began with the plaintiff filing a direct condemnation action for the purpose of using the power of eminent domain to install a sewer line. The defendant answered, seeking declaratory relief and just compensation in the alternative. The NCSC notes she did not seek injunctive relief and that the plaintiff installed the sewer line while litigation was pending in the trial court. The trial court entered a judgment finding that the plaintiff's use of eminent domain was for a private purpose and thus null and void, dismissing the direct condemnation claim. This "Private Purpose Judgment" became the law of the case. The plaintiff moved the court for relief from this judgment under Rule 60. The defendant moved the court under Rule 70 for an order that the plaintiff remove the sewer line. Then the plaintiff filed a separate action for a declaratory judgment that it had gained an easement by inverse condemnation, seeking preliminary and permanent injunctive relief. The trial court dismissed the defendant's Rule 70 motion and granted the plaintiff's Rule 60 motion, reasoning "that it lacked subject matter jurisdiction to enter the Private Purpose Judgment to the extent the Judgment is interpreted to negatively affect the installed sewer pipe and corresponding easement." Slip op. at 12 (cleaned up). The NCCOA vacated the trial court's orders in the Private Purpose Judgment case except its order denying the defendant's Rule 70 motion, and in the separate action, the NCCOA held that res judicata barred most of the plaintiff's claims, but left the preliminary injunction against the defendant in place.

Holding: "[T]he Private Purpose Judgment was not final for the purposes of the prior pending action doctrine because it left unresolved the question of damages, including appropriate remedy." Slip op. at 16. When an action is filed, if there was already another action pending that had not reached final judgment between the same parties for the same cause, even in the appellate courts, the second action abates. The "test for whether parties and causes are the same for abatement purposes is whether the actions are substantially similar as to parties, subject matter, issues involved, and relief demanded." Slip op. at 17 (cleaned up). Declaratory and injunctive relief can be similar remedies under this test if the result would be the same under either. But even where the relief requested is different, another action cannot be filed between the same parties involving the same subject matter. The preliminary injunction in the second action is vacated and the second action is remanded to the trial court to be dismissed with prejudice.

Concurrence: Chief Justice Newby cautions against litigants using this case as a model for civil procedure. The concurrence reasons that the defendant could have filed a counterclaim or filed an action for trespass seeking a remedy once the sewer pipe was installed. The concurrence would have held that the trial court abused its discretion in not using its inherent authority to enforce the Private Purpose Judgment. The concurrence would also have held that the Private Purpose Judgment was a final judgment and remanded the second action for dismissal under res judicata and collateral estoppel rather than the prior pending action doctrine.

Funderburk v. Contl. Tire The Ams. (COA24-192)

Date: 2025-09-03

Rule: Law of the case and collateral estoppel

Summary: Pursuant to an agreement between more than 150 claimants and the defendant, the Industrial Commission heard five Bellwether Cases to decide the claims of the Consolidated Plaintiffs. The plaintiff filed this case with the Industrial Commission after the evidentiary hearings in the Bellwether Cases. The Industrial Commission denied the claims in the Bellwether Cases and made findings of fact purporting to be common to all of the Consolidated Plaintiffs. After the NCCOA decided the Bellwether Cases on appeal in *Hinson v. Contl Tire The Ams*, 267 N.C.App. 144 (2019), the Industrial Commission dismissed the claims of the Consolidated Plaintiffs as precluded by the decisions in the Bellwether cases. The plaintiff appealed.

Holding: the Bellwether Cases had no special preclusive effect on the Consolidated Cases, including this case (*Funderburk*). The NCCOA's decision in *Hinson* did not become the law of the case for *Funderburk* because the NCCOA had no jurisdiction over *Funderburk* when the Bellwether Cases were on appeal. Neither was the plaintiff in *Funderburk* precluded by collateral estoppel from bringing this claim because the plaintiff was not in privity with the plaintiffs in the Bellwether Cases and the issue she raised before the Industrial Commission was not identical to the issues in the Bellwether Cases. Finally, similar reasoning means that the plaintiff is not precluded by res judicata from bringing her case because her claim was not before the Industrial Commission in the Bellwether Cases. In considering the effect of the Bellwether Cases on *Funderburk*, the NCCOA understands bellwether procedures to be "exploratory litigation intending to provide information to the remaining parties to assist in resolving their claims, not [] decisions that bind those parties by their results." Slip op at 12. The NCCOA reviewed the record and concluded that "neither the parties nor the Industrial Commission when consolidating these cases understood the Bellwether Cases to bind the Consolidated Plaintiffs such that dismissal of their cases would be appropriate if the claims of the Bellwether Plaintiffs were denied." Slip op. at 19.

Concurrence and Dissent: Chief Judge Dillon would have affirmed the Industrial Commission's dismissal of the plaintiff's claims because the NCCOA understood itself to have jurisdiction over the Consolidated Plaintiffs in *Hinson* and therefore the NCCOA's decision on the Bellwether Cases became binding on all of the Consolidated Plaintiffs and became the law of the case.

Gilbert v. Contl. Tire The Ams. (COA24-477)

Date: 2025-09-03

Rule: law of the case, collateral estoppel

Summary: See *Funderburk v. Contl. Tire The Ams*, COA24-192 (Sep. 3, 2025).

Holding: The dismissal of the Industrial Commission is reversed. In addition to the reasoning in *Funderburk*, the NCCOA notes that the plaintiff was not among the Consolidated Plaintiffs so “there appears to be *no* evidence in the record upon which the Industrial Commission could base its decision.” Slip. op. 3.

Huffstetler v. Contl. Tire The Ams. (COA24-488)

Date: 2025-09-03

Rule: law of the case, collateral estoppel

Summary: See *Funderburk v. Contl. Tire The Ams*, COA24-192 (Sep. 3, 2025).

Holding: The dismissal of the Industrial Commission is reversed. In addition to the reasoning in *Funderburk*, the NCCOA notes that the plaintiff was not among the Consolidated Plaintiffs but the plaintiff did agree that the Bellwether Cases included findings of fact on the common evidence. The NCCOA holds that the plaintiff can present evidence specific to her claim.

Puma Biotechnology v. Hedrick Gardner (COA24-722)

Date: 2025-09-03

Rule: 41(a)(1) and G.S. 1-15(c)

Summary: Action for legal malpractice arising from the defendants’ entering of factual stipulations without consulting the plaintiff client. The defendants withdrew as the plaintiff’s counsel on July 8, 2019. The plaintiff filed initial complaint on Sep. 17, 2020, filed notice of voluntary dismissal under Rule 41(a)(1) on Aug. 22, 2022, , and refiled the complaint on June 6, 2023. The defendants moved to dismiss arguing that the plaintiff had failed to file the case within the four-year statute of repose for malpractice cases under G.S. 1-15(c). The trial court determined that April 22, 2019 was the last date of the defendants’ purported negligence and granted the defendants’ motion. The plaintiff appealed.

Holding: The savings provision in Rule 41(a)(1) allows a claim to be refiled within one year, even if the date of refiling would leave the claim outside the statute of repose in G.S. 1-15(c). Rule 41(a)(1) means that a refiled claim relates back to the date of the original complaint. Relating back works “by *interposing* the filing date of the original complaint to the refiled complaint. When interposing the date of an initial complaint to a refiled complaint, the refiled complaint stands as if it had been commenced on the same date as the initial complaint.” Slip op. at 13 (emphasis in original) (internal citations omitted). “[T]he Rule 41(a)(1) savings provision, because of its relation-back component, does not function as an exception to the statute of repose.” Slip op. at 33.

Concurrence and dissent: Judge Freeman reads the phrase “in no event shall an action be commenced” in G.S. 1-15(c) together with the phrase “a new action based on the same claim may be commenced” in Rule 41(a)(1) to dissent against the majority’s holding. The concurrence and dissent analyzes the interaction between these two statutes differently and would have held that the savings provision of Rule 41(a)(1) does not avoid a statute of repose’s “unyielding and absolute barrier,” slip op. at 51, to commencing a new action more than four years after the last act or omission of the defendant giving rise to the cause of action. The concurrence and dissent would have held that the plaintiff’s action is barred by G.S. 1-15(c).

Legal background: G.S. 1-15(c) states that actions for malpractice must be commenced no more than four years from the last act or omission of the defendant that gives rise to the cause. Statutes of repose are not affirmative defenses under Rule 8(c) but are conditions precedent under Rule 9(c) and need not be specially pleaded by the defendant. A statute of repose creates an additional element of the claim to be proven at trial. While the plaintiff has the burden of proving that the action was filed within the period of repose, at the pleading stage the complaint should not generally be dismissed for failure “to allege facts showing that it was filed within the applicable statute of repose.” Slip op. at 9 (cleaned up). It is proper for a trial court to grant a Rule 12(b)(6) motion to dismiss “if the complaint otherwise alleges facts *conclusively* showing that it was not filed within the applicable statute of repose.” *Id.* (emphasis in original). An amended complaint may relate back to the time of the filing of the original complaint if it gives notice of the transactions and occurrences underlying the original complaint, Rule 15(c), regardless of whether a statute of limitation or statute of repose restricts the time for filing. Only claims in the original complaint can be saved by Rule 41(a)(1) for the refiled complaint. New claims are not subject to the savings provision and may be barred by the statute of repose.

OH Tacoma 1 Subi a series of OH Tacoma 1 Tr v. Newsome (COA25-123)

Date: 2025-09-17

Rule: 56

Summary: Action filed by note holder in 2024 for reformation of deed of trust signed in 2005. The defendants moved for summary judgment, arguing that the statute of limitations bars the claim, and the trial court granted summary judgment in their favor. The plaintiff appealed.

Holding: The trial court did not err in granting the defendants' motion for summary judgment because the plaintiff had the opportunity to conduct discovery during the seven months between the filing of the complaint and the summary judgment hearing. Settlement agreements between the parties are not enough to show the "Defendants affirmatively misled or induced Plaintiff not to file its claim before the running of the applicable statute of limitations." Slip op. at 8.

Leech v. State of NC (COA24-1113)

Date: 2025-10-01

Rule: 12(c), 56

Summary: Action for facial and as-applied challenges to North Carolina's *Giglio* statute, G.S. 17C-16. The defendants moved to dismiss under Rule 12(b)(6) and attached an affidavit and two letters to supplemental briefing. The plaintiff objected to and moved to strike these materials but the trial court did not rule on this motion before granting the motions to dismiss. The plaintiff appealed.

Holding: "Because the trial court allowed material clearly outside of the original pleadings, the 12(b)(6) motion was converted to a motion for summary judgment. The trial court failed to respond to Plaintiff's Objection and Motion to Strike and did not allow Plaintiff time or opportunity to rebut the evidence presented outside the pleadings. Thus, the trial court erred." Slip op. at 12.

In re Rogers (COA24-788)

Date: 2025-10-01

Rule: 4

Summary: Nonjudicial foreclosure proceeding resulting in order of sale. The USPS carrier assigned to deliver the Amended Notice of Hearing (NOH) was required by COVID-19 protocols to notate the first initial and last name of the customer receiving the delivery instead of requiring a signature on the return receipt, as is standard for certified mail. The carrier's notation read "DLGC19n2." The respondent moved under Rule 60(b) to set aside the foreclosure because she was not served with the Amended NOH under Rule 4. The trial court denied her motion and the respondent appealed. The trial court

dismissed the respondent's appeal, and the respondent appealed that order as well as, among others, the order denying the respondent's motion to set aside the foreclosure under Rule 60(b).

Holding: "As Trustee's affidavit lacks both a return receipt with a proper signature and any indication of who received the Amended NOH, the affidavit cannot meet the burden to establish the presumption of valid service." Slip op. at 22-23. "Without offering some confirmation that the Amended NOH was actually delivered to an individual able to receive service on behalf of the addressee, the strict requirements of the statute cannot be found satisfied." Slip op. at 25. The trial court erred in finding that the trustee had produced evidence sufficient to entitle him to the presumption of proper service.