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

**Opinions issued June 4, 2019–Oct. 1, 2019**
***Selected* opinions issued October 2018–May 2019**

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## Civil Procedure, Jurisdiction, and Judicial Authority

### North Carolina Supreme Court

**New trial vs. amendment of judgment**
*Justus v. Rosner*, 821 S.E.2d 765 (**N.C. Supreme Court** Dec. 21, 2018) (with one partial dissent and one dissent). Jury awarded only nominal damages in medical malpractice action. Trial judge determined the damages were manifestly inadequate, set aside nominal damages verdict (which apparently was a complete reduction of the damages based on failure to mitigate), and awarded $512,162.00 plus costs. The Court of Appeals majority determined that the trial court did not abuse its discretion in setting aside the nominal damages verdict, but that the trial court erred in entering a new verdict rather than awarding a new trial on damages.

The Supreme Court majority determined that the patient's failure to mitigate damages was insufficient to justify a jury verdict of only nominal damages; and the trial court should have granted a new trial as to damages rather than entering its own "amended judgment" and award. (One dissenting judge argued that if a new trial is required, it should be on all issues, not just damages.)

### North Carolina Court of Appeals

**Service of process; presumption of service; motion to continue for additional discovery**
*Patton v. Vogel* (COA19-62; Sept. 3, 2019). Nearly three years after a car accident, Plaintiff Patton sued Defendant Vogel and attempted service of process by FedEx delivery to the address Defendant had

listed on the accident report. The package was returned by FedEx undelivered. Plaintiff hired a private investigator who ascertained a different address for Defendant – the Elm Street address. Plaintiff delivered the summons and complaint to the Elm Street address and received a delivery receipt signed by "R. Price." Defendant timely moved to dismiss the complaint for lack of personal jurisdiction, insufficient process, and insufficient service of process, averring in an affidavit that she never resided at the Elm Street address and did not know "R. Price." Plaintiff moved for a continuance to conduct discovery related to Defendant's address. The trial court denied that motion and dismissed the complaint.

The Court of Appeals affirmed as follows: (1) The trial court properly determined that it did not have personal jurisdiction over Plaintiff (due to lack of valid service) because no evidence in the record showed that Defendant resided at the Elm Street address or knew "R. Price." (Plaintiff's private investigator did not testify.); (2) Defendant overcame the presumption of effective service; (3) Plaintiff was not entitled to the additional time to complete service that is provided by Rule 4(j2)(2), as that rule is applicable only in default judgments and plaintiff did not, in any event, meet the Rule's requirements; and (4) the trial court did not abuse its discretion in denying Plaintiff's motion for a continuance to conduct additional discovery regarding Defendant's address.

**Attorney-client privilege; compelled waiver through discovery order; e-discovery**

*Crosmun v. Trustees of Fayetteville Tech. Comm. College*, 832 S.E.2d 223 (N.C. App. Aug. 6, 2019). Former employees brought action against employer, a community college, for retaliatory dismissals as violation of North Carolina Whistleblower Protection Act. Employees moved to compel discovery, alleging spoliation of electronic evidence. The Superior Court ordered forensic computer examination of employer's servers without specifying the examiner or method of examination. Employees filed motion to compel and for sanctions requesting adoption of proposed examination protocol and award of discovery costs and attorney fees. The parties entered into stipulated protective order. The Superior Court entered an order adopting the employees' proposed examination protocol (Protocol Order) and denying employees' motion for sanctions. Employer appealed. Trial court entered consent order generally staying operation of protocol order.

After a detailed discussion, the Court of Appeals remanded the Protocol Order because it effectively compels an involuntary waiver of attorney-client privilege by allowing Plaintiffs' expert, rather than an independent third party, to directly access the entirety of Defendants' computer systems; and because it orders responsive documents to be delivered to Plaintiffs without allowing Defendants an opportunity to review them for privilege. The Court of Appeals acknowledged throughout the case the difficulty of applying the law of privilege in E-discovery, given the undeveloped state of the law, and also had this to say:

> Judge [ ], as a judge of the trial division tasked with overseeing the discovery, was well positioned to review the conduct of the parties before him—whether dilatory or otherwise—and determine in his discretion that the purposes of discovery were best served by entry of the Forensic Examination Order. Similarly, Judge [ ] was in the best position to determine that, although sanctions were not appropriate, a court ordered protocol that weighed Plaintiffs' discovery needs more heavily than Defendants' was warranted. Although we ultimately vacate the Protocol Order…, this opinion should not

be read on remand as questioning the necessity of either the Forensic Examination Order or entry of a protocol order favorable to Plaintiffs' interests.

**Proper notice; discovery sanctions**

*OSI Restaurant Partners, LLC v. v. Oscoda Plastics, Inc.*, 831 S.E.2d 386 (N.C. App. July 16, 2019). In 2013, Plaintiffs brought a number of claims against Defendant related to allegations that Defendant installed defective flooring in Plaintiffs' restaurants. During discovery two years later, Defendant represented that it might have some responsive information about its flooring stored on backup tapes. The court ordered Defendant to produce the information from the tapes. Defendant soon obtained extensions of time to produce the material, and then moved the court for reconsideration of the order compelling the material. The motion for reconsideration was based first on expense and inconvenience and on assertions that the documents were encrypted. These assertions prompted the court to issue a Spoliation Order in 2017 finding that Defendant's attempts to delay discovery of the files were intentional and ordering that, unless the documents were produced within 120 days of trial, the jury would be given a spoliation instruction. Defendant soon produced 5000 pages of the documents. In their review of the documents, Plaintiffs discovered references to floor testing data. After Plaintiffs made another motion to compel based on its discoveries, Defendant produced further documents. Defendant then represented that it had fully complied with discovery and moved to the court to set aside the spoliation instruction.

But then, in their review of emails produced by Defendant's sister company, Plaintiffs discovered "smoking gun" emails that should been a part of the documents that Defendant produced pursuant to the Spoliation Order. Plaintiff then moved to amend its complaint to add new allegations related to this development.

Defendant's motion to set aside the spoliation order came on for hearing in December 2017. Plaintiffs' motion to amend was not before the court at that hearing. At the hearing, Plaintiffs surprised Defendant by arguing, among other things, that Defendant should be sanctioned in the form of default judgment. The court entered an order denying Defendant's motion to set aside the spoliation instruction and sanctioning Defendant pursuant to Rule of Civil Procedure 37(b)(2) "and its inherent powers." The court struck Defendant's answer and entered default judgment against it as to liability for negligence, breach of implied warranty, and breach of express warranty.

The Court of Appeals reversed, holding that Defendant had not received notice that the court would consider sanctions. Because the only matter before the court at the hearing, and for which Defendant had notice, was Defendant's motion to set aside the spoliation instruction, the sanction was in violation of Defendant's due process rights. The court noted that, "the trial court exhibited abundant patience in this matter. Patience runs thin when a party repeatedly delays compliance with discovery requests and court orders. However, because Defendant received no notice whatsoever that it might be subject to sanctions based upon the facts alleged in Plaintiffs' motion to amend prior to the…hearing, we must reverse the trial court's order."

***Res Judicata*/collateral estoppel**

*Koonts and Sons Masonry, Inc. v. Yadkin Bank*, 830 S.E.2d 690 (N.C. App. June 18, 2019). After Plaintiffs defaulted on a loan, Defendant Bank filed an action in 2009 seeking repayment. Defendant also brought

a claim and delivery action to seize the pledged collateral, which was allowed by court order. Plaintiffs later countersued challenging the propriety of the collateral seizure and seeking damages. In 2015, the superior court determined after a bench trial that Plaintiffs were liable to Defendant for over $700,000 plus interest, and the court entered final judgment. After Defendant sold the collateral, Plaintiffs then filed the present action, claiming Defendant's seizure of the property was excessive and an unfair trade practice and that it violated G.S. 25-9-100. Defendants moved for summary judgment on grounds of *res judicata* and collateral estoppel. The trial court denied the motion for summary judgment, which is the subject of this appeal.

The Court of Appeals reversed the denial of the motion for summary judgment in part and affirmed in part. The court determined that the tort matters related to the seizure of the collateral arose from the same factual circumstances addressed by the first suit and thus could not be relitigated. However, the question of whether Defendant failed to make a commercially reasonable disposition of the collateral as required by G.S. 25-9-100 was dismissed *without* prejudice by the first trial court and was not reached in that case. Thus it survives in the present action and the trial court properly denied the summary judgment motion as to that claim.

**Proper notice of grounds for discovery sanction**

*Walsh v. Cornerstone Health Care, P.A.*, 819 S.E.2d 353 (N.C. App. June 4, 2019). Vacating an order of the trial court striking Defendant's answer as a sanction for discovery violations. Although Plaintiff's motion for sanctions was based on an alleged violation of the certification rule in Rule 26(g) (a rough equivalent of Rule 11), the actual order imposing sanctions, filed five months later, was based on failure to supplement discovery under Rule 26(e). Defendant had not been given notice prior to the hearing that Plaintiff would seek a sanction on this basis. Plaintiff's "scattered references" to Rule 26(e) throughout the sanctions hearing did not suffice to provide Defendant the requisite notice of that basis.

## Torts

North Carolina Supreme Court

**Unfair and deceptive trade practices; the "learned profession" exemption**
*Sykes v. Health Network Solutions, Inc.* (**N.C. Supreme Ct.** No. 251PA18; June 15, 2019) ("Sykes I") (with dissent in relevant part). This is a matter on direct appeal (in part) from the Business Court. In this case, a group of chiropractors alleged that the conduct of Defendant, an intermediary between the chiropractors and insurance companies, constituted price fixing, monopsony, and monopoly (antitrust claims), unfair and deceptive trade practices, civil conspiracy, and breach of fiduciary duty. The trial court granted motions to dismiss as to each claim.

The Supreme Court affirmed. As to the dismissal of the antitrust and related claims, the court affirmed by an equally divided vote, leaving the decision as to those claims standing without precedential value. As to the unfair and deceptive trade practices claim, the court (majority) affirmed the dismissal because the claim is barred by the "learned profession exemption" to that statute. [Note that this is the first time the NC Supreme Court has addressed this exemption, and the court applied it broadly, in keeping with the long trend before the Court of Appeals. See the thoughtful dissent on this issue]. As to the declaratory judgment action, the court determined that no private right of action is created under the cited statutes. As to the fiduciary duty claim, the court determined that no fiduciary relationship existed between the parties. The court further noted that dismissal of the purported claim for punitive damages was proper because it is not a cause of action in its own right.

**Slip-and-fall in city-owned building; governmental immunity; governmental vs. proprietary function**
*Meinck v. City of Gastonia*, 819 S.E.2d 353 (**N.C. Supreme Court,** Oct. 26, 2018). Reversing the unanimous opinion of the Court of Appeals regarding immunity (summarized below) and determining that the City of Gastonia was entitled to governmental immunity from suit for Plaintiff's injuries because, under the test set forth in *Estate of Williams v. Pasquotank Cty Parks & Rec. Dep't*, 366 N.C. 195 (2012), the City's lease of a City-owned building in a depressed area (at a financial loss) for the purpose of urban revitalization was, under the facts of this case, a governmental rather than a proprietary function. See opinion for full details of this analysis.

**Earlier summary of prior opinion:**

**Slip-and-fall in city-owned building; governmental immunity; negligence and contributory negligence**

*Meinck v. City of Gastonia*, 798 S.E.2d 417 (N.C. App. Mar. 21, 2017). Plaintiff was a subtenant of a building that was owned by the City and which the City leased to a privately owned Art Guild. While carrying paintings out of the building, Plaintiff slipped and fell on a crumbling step and broke her hip. She filed an action against the City for negligent maintenance of the steps. The trial court granted summary judgment in favor of the City. The Court of Appeals reversed.

As to immunity: Under the *Williams* test, the City was not immune from suit for the negligence of its employees in maintaining the steps to its building. The legislature had not addressed whether the lease of a building to a private tenant was governmental or proprietary; the lease of the building to a private entity was not a service traditionally provided by a

governmental entity; and the lease was of a private, commercial nature due to the revenue it generated for the City from a non-governmental venture.

As to negligence/contributory negligence: There were genuine issues of material fact as to whether the City properly inspected and maintained the steps (the only means by which Plaintiff could have exited the building) and whether the steps met building code requirements at the time of Plaintiff's injury. The evidence could also permit a jury to determine that Plaintiff acted reasonably in using the steps while carrying large paintings. Remanded for trial.

North Carolina Court of Appeals

**No direct constitutional claim related to deprivation of right to speedy trial**

*Washington v. Cline* (COA18-1069; Sept. 3, 2019). In 2006, Plaintiff's criminal conviction related to a home invasion was vacated on the basis that he had been deprived of his right to a speedy trial (4 years, 9 months between arrest and trial). In 2011, he brought this civil action stating various claims against state and local actors for their roles in the delayed process. Ultimately all the claims were dismissed or summary judgment was granted in the defendants' favor.

Plaintiff appealed. Pertinent to this appeal is only his direct constitutional claim under N.C. Const., Art. 1, sec. 18, for the deprivation of his right to a speedy trial. The Court of Appeals affirmed the grant of summary judgment as to this claim, determining that Plaintiff has shown no legal authority recognizing a private right of action for damages under that constitutional provision, and the court declined to recognize one as a matter of first impression.

**Negligent infliction of emotional distress and foreseeability; child death by gunshot wound**

*Newman v. Stepp* (COA19-112; Sept. 3, 2019) (with dissent). Unimaginable tragedy – Plaintiffs' 3-year-old daughter was killed by a shotgun blast at a day care when another small child, left unattended, got hold of the [unlicensed] day care owners' loaded shotgun that was left on a kitchen table. The child's father heard about the child's injuries over CB radio and proceeded to the house, where he saw the ambulance. Neither he nor his wife, who soon arrived at the hospital, saw their daughter before she died of her injuries.

Plaintiffs sued for negligent infliction of emotional distress (NIED), intentional infliction of emotional distress, violation of a safety statute, and loss of consortium. All claims were dismissed, but pertinent to Plaintiffs' appeal is the NIED claim—and the crux of the appeal is the foreseeability factor. The Court of Appeals (majority) reversed the dismissal of that claim, determining that the allegations in the complaint were sufficient to allege an NIED claim under the *Sorrells* standard of foreseeability, given that the factors set out in *Sorrells* should not be applied mechanistically. (The majority also instructed the trial court on remand to reconsider the dismissal of the loss of consortium claim.)

In a detailed opinion that acknowledges the depth of the tragedy, the dissenting judge argued that the majority's NIED analysis does not properly require plaintiffs to allege facts satisfying the three factors of foreseeability in *Sorrels*, and thus it impermissibly "broadens the scope and class of defendants" that the law intends for NIED claims.

**Fiduciary duty of executrix; fraud/duress/undue influence**

*Voliva v. Dudley* (COA19-58; Aug. 20, 2019). Amy Payne died testate, naming Plaintiff as executrix. The will provided that Plaintiff was to sell certain property and distribute the net proceeds to three beneficiaries, including Defendants. The Superior Court allowed Plaintiff to deviate from the terms of the will and distribute the property directly to the three beneficiaries (after division into three parcels). Plaintiff received a 5% executor's commission. Plaintiff later sued to enforce the terms of a promissory note executed by the three beneficiaries in the amount of $15,000 "for value received." Summary judgment was granted in favor of Plaintiff. The Court of Appeals reversed and remanded. While it is undisputed that Defendants signed the note, there were genuine issues of material fact regarding whether they did so under fraud/duress/undue influence given the fiduciary duty of executrix to the beneficiaries to this estate and the question of whether Defendants were compelled to do so in exchange for the executrix supporting the in-kind conveyance.

**Interference with prospective economic advantage; Noerr-Pennington doctrine; blasting activity**

*Cheryl Lloyd Humphrey Land Investment Co., LLC v. Resco Products, Inc.*, 831 S.E.2d 395 (N.C. App. July 16, 2019). Plaintiff is an Orange County landowner who entered into contract to sell its land to a developer for a residential townhome subdivision. The project depended on zoning approval by the Town of Hillsborough. Defendant, the adjacent landowner, opposed the rezoning and the townhome project. Defendant represented to the Town that blasting and associated activity from its mining operation would be too hazardous for the future homeowners. Ultimately the rezoning was approved and the developer purchased land from Plaintiff for phase 1 of the development ($85,000 per acre). Thereafter, however, the developer exercised its contractual option *not* to purchase the land for phase 2 (a 5.5-acre area closer to Defendant's land), citing the dangers Defendants advertised to the Town. Plaintiff then sued Defendant for tortious interference with prospective economic advantage, alleging that Defendant's representations to the Town were false and were intended to harm Plaintiff's contract with the developer so that Defendant might later acquire the land itself at a lower price. The trial court dismissed the complaint for failure to state a claim upon which relief could be granted.

The Court of Appeals reversed as follows: (1) This case does not involve the type of dispute between competitors in the marketplace necessary to invoke the Noerr-Pennington immunity doctrine as a basis for dismissal [see the opinion for a useful summary of prior Noerr-Pennington cases]; (2) as a *question of first impression*, overstatements regarding ultrahazardous activity (blasting) can constitute the type of misrepresentation that supports a tortious interference claim; and (3) Plaintiff properly pleaded the elements of tortious interference. In particular, the court rejected Defendant's argument that the claim of tortious interference should be construed narrowly. The court confirmed that it extends not just to interference with the initial formation of a contract but also to instances in which the third party opts not to exercise an existing contractual right.

**Fraud and related torts; findings after bench trial**

*Musselwhite v. Cheshire*, 831 S.E.2d 367 (N.C. App. July 2, 2019). For several years Plaintiff and Defendant together owned and operated a number of Smithfield's restaurants. Generally speaking, Plaintiff ran the operations while Defendant provided financing. At a certain point Smithfield's determined that the restaurants were not being run according to the franchise agreements, and

eventually Smithfield's barred Plaintiff from entering some of the restaurant premises. Ultimately Defendant proposed buying out Plaintiff's interest in the businesses. His attorney negotiated a Membership Redemption Agreement with Plaintiff, which, among other things, would pay Plaintiff $375,000 over 5 years and would cover his auto and health insurance for a period of time. Plaintiff received the full value set forth in the Agreement. But he later sued Defendant, essentially arguing that he had believed that the Agreement was a "meaningless transaction" merely to convince Smithfield's that Plaintiff was no longer involved in the restaurants. After a bench trial on the merits, the trial court dismissed Plaintiff's claims under Rule 41(a). The Court of Appeals affirmed the dismissal: (1) As to fraud and fraud in the inducement, the trial judge did not err in finding that Defendant did not misrepresent material facts; (2) as to mistake, the trial judge did not err in determining that Plaintiff was not subjected to undue influence; and (3) as to the remaining claims – breach of fiduciary duty, unjust enrichment, unconscionability, and constructive trust, the record supported the trial court's findings in favor of Defendant.

**Vicious animal attack; negligence *per se*; premises liability**

*Parker v. Colson*, 831 S.E.2d 102 (N.C. App. July 2, 2019). A man kept his two pit bulls in a pen on his sister's property. Because that property had no water or electricity, the man used the water and power from the house next door to provide for the dogs. That house belonged to the man's other sister, who is the Defendant in this action. The dog owner's use of Defendant's property was by consent. One day, Plaintiff was walking past the parcel where the dogs were penned. At that time, the dog owner was allowing the dogs to roam free on the property. The dogs saw Plaintiff walking by, ran toward him, attacked him, and left him hospitalized for 13 days with severe and permanent leg injuries. (About a month before that, the dogs had also bitten Plaintiff's brother as he passed by on the same sidewalk.) Plaintiff sued Defendant (the owner of the adjacent parcel with power and water) alleging negligence *per se* under three Wadesboro ordinances—4-4, 4-7 and 4-31—and also alleging premises liability. The superior court granted summary judgment in Defendant's favor.

The Court of Appeals affirmed in part and reversed in part: (1) As to ordinance 4-4, summary judgment was error because there were indeed genuine issues of material fact about whether Defendant "caused to be kept" a dangerous animal without the requisite restraint; *but* (2) as to ordinance 4-7, summary judgment was appropriate because Plaintiff failed to forecast evidence that Defendant herself caused the dangerous animal *to leave* the property without restraint; (3) summary judgment was appropriate as to ordinance 4-31 because that statute did not impose a specific duty toward another person and could not form the basis for negligence *per se*; and (4) summary judgment was proper for premises liability because there was an insufficient forecast of evidence that Defendant herself exercised the requisite control over the dogs.

**Negligence: Duty of care, contributory negligence, last clear chance**

*Patterson v. Worley*, 828 S.E.2d 744 (N.C. App. June 4, 2019). Plaintiff, a pedestrian, crossed two lanes of traffic on foot before stopping at a paved median. She then proceeded to cross the next two lanes of traffic in front of two vehicles that had come to a stop. After she crossed in front of the second vehicle, she proceeded into the next lane, where Defendant's car was moving forward at 35 miles per hour. Defendant, who did not see Plaintiff walking into her lane in time to slow down, struck Plaintiff. Plaintiff was injured and sued Defendant for negligence. The trial court granted summary judgment in favor of

Defendant. The Court of Appeals affirmed: Plaintiff did not establish that Defendant had any duty of care toward Plaintiff in this scenario; Plaintiff was contributorily negligent as a matter of law; and without any antecedent negligence on the part of Defendant, Plaintiff could not establish the applicability of the last clear chance doctrine.

**Medical malpractice; proximate cause and "loss of chance" of improved outcome**

*Parkes v. Hermann*, 828 S.E.2d 575 (N.C. App. May 21, 2019), *rev. allowed*, _ S.E.2d_ (N.C. No. 241PA19; Sept. 25, 2019). Plaintiff Parkes was taken to the ER due to signs of a stroke. Defendant, the physician on duty, allegedly failed to properly diagnose her stroke and thus did not follow the standard of care and arrange for the issuance of Alteplase, a tissue plasminogen activator (tPA), within three hours of the stroke. Ms. Parkes sued Defendant, alleging her chance for an improved outcome was diminished by his failure to properly diagnose and treat her. Defendant moved for summary judgment on grounds that Ms. Parkes could not establish that she would have "more likely than not" be better but for Defendant's alleged lapses. The trial court granted summary judgment in favor of Defendant. The Court of Appeals affirmed, noting that the record in the light most favorable to Ms. Parkes, revealed that administration of tPA would have given her only a 40% chance of improvement. Thus she could not meet the "more likely than not" standard of proof of proximate cause. The court rejected the argument that North Carolina law would recognize her "loss of chance" (40% chance) of improvement as a cognizable injury itself that could be recovered in a medical malpractice action.

**Negligence; duty of care of surveyor to adjacent property owner**

*Lamb v. Styles*, 824 S.E.2d 170 (N.C. App. Feb. 5, 2019). The Lambs and the Holts owned adjoining parcels. In 2008, the Lambs, through their surveyor, discovered a 2007 survey of the Holts' land that had been performed by Defendant. The 2007 survey incorrectly designated about 17 acres of the Lambs' property as belonging to the Holts. As it turned out, Defendant had conducted this survey in part based on "parol evidence from William and Harold Holt" rather than through proper methods. (Incidentally, Defendant was later disciplined by the NC Board of Examiners for Engineers and Surveyors for their work on this survey.) After discovering this faulty survey, in 2009 the Lambs brought a quiet title action against the Holts, which eventually resulted in a declaration that the Lambs owned the disputed 17 acres.

In turn, the Lambs sued Defendant for professional negligence and negligent misrepresentation based on the expenses they incurred in seeking judicial correction of the title record. The trial court dismissed under Rule 12(b)(6) for failure to state a claim upon which relief may be granted. The Court of Appeals affirmed, and in a detailed opinion concluded that North Carolina law does not recognize a duty of care of a surveyor to an adjacent homeowner not in privity with the surveyor and who did not rely on the survey in taking a particular action. Furthermore, the court concluded that the faulty survey was not a proximate cause of any damages to the Lambs.

## Constitutional Matters

North Carolina Supreme Court

**Who is responsible for providing a sound, basic education? Just the State?**

*Silver v. Halifax Cty Bd. of Comm'rs*, 821 S.E.2d 755 (**N.C.** Supreme Ct. No. 338A17, Dec. 21, 2018). Affirming the majority opinion of the Court of Appeals regarding who may be sued for failure to comply with the NC Constitutional requirement that all North Carolinians be provided a sound, basic education. In a detailed analysis of relevant Constitutional and statutory provisions, the Supreme Court concluded that only the State of North Carolina has this responsibility and thus only the State may be challenged before the courts for failure to do so. Thus the action against the local County Board of Commissioners was properly dismissed under 12(b)(6). In closing, the Supreme Court said this (emphasis added):

> In *Leandro II* we noted that "[t]he children of North Carolina are our state's most valuable renewable resource. If inordinate numbers of [students] are wrongfully being denied their constitutional right to the opportunity for a sound basic education, our state courts cannot risk further and continued damage because the perfect civil action has proved elusive." *Leandro II*, 358 N.C. at 616, 599 S.E.2d at 377. This Court's statement in *Leandro II* remains true today. However, here, we are not confronted by a civil action that is merely imperfect, but rather we have been presented with an action that must fail because plaintiffs simply cannot obtain their preferred remedy against this particular defendant on the basis of the claim that they have attempted to assert in this case. ***The allegations in plaintiffs' complaint, if true, are precisely the type of harm Leandro I and its progeny are intended to address. In keeping with Leandro, however, the duty to remedy these harms rests with the State, and the State alone.***

Prior summary of Court of Appeals opinion:

> *Silver v. Halifax Cty Bd. of Comm'rs*, __ N.C. App. __, 805 S.E.2d 320 (Sept. 19, 2017) (with dissent). This is another chapter in the ongoing alleged failure of adults in this State to provide a sound, basic education to certain children in Halifax County. In this case Plaintiffs, students in the Halifax County Public Schools, sued the Halifax County Board of Commissioners (the "County Board") for failure to act within its power to remedy the constitutional deficiencies. The superior court dismissed the action under 12(b)(6), concluding that it is not the County Board's responsibility to maintain a public education system for Halifax County.
>
> In a very detailed analysis, the Court of Appeals (majority) affirmed, concluding that the constitutional responsibility to provide a sound, basic education belongs to the State, and the County Board does not have the power to provide the relief sought. (The opinion provides a provides a useful history of the *Leandro* cases and often takes note of some of Judge Manning's forceful orders during his many years overseeing those cases—*e.g.*, "*The State must step in with an iron hand and get the mess straight*.")
>
> The dissenting judge noted that Plaintiffs have alleged certain failures of the County Board to use school funding *allocated to the Board* consistent with Art. IX of the NC Constitution and various statutes. The judge concluded that "it is *these* revenues that Plaintiffs allege the Board is failing to disburse…consistent with the constitutional right to a public education[.]" Based on the "local responsibility" for public education identified in Article IX, the dissenting

judge concluded that a cause of action had been stated "to the extent their complaint alleges [failure]…as a result of the Board's inadequate funding of buildings, supplies, and other resources."

North Carolina Court of Appeals

**First Amendment; sealing of court file**

*Doe v. Doe*, 823 S.E.2d 583 (N.C. App. Dec. 28, 2018). A civil action was brought in superior court alleging sexual abuse of the minor plaintiffs by defendants. The trial court temporarily sealed the entire file, and after the parties reached a court-approved settlement agreement, the trial court sealed the entire file (including filing dates, party names, names of counsel and GALs, etc.) based on motions from both sides. Newspaper brought a motion under G.S. 1-72.1 seeking access to the file, which was denied. Newspaper appealed the denial and the sealing orders as violations of the First Amendment. But because the Newspaper did not have notice of the orders within the appeals period (because the file was sealed), the appeal was partially untimely. The Court of Appeals therefore granted certiorari in order to preserve Newspaper's right to have the matter reviewed.

On appeal, the Court of Appeals first noted that Newspaper has standing under G.S. 1-72.1 to appeal the sealing orders and the denial of its motion, and Newspaper was not required to first intervene in the case. As to the substance of the sealing orders and the denial of the motion for access, the court reversed and remanded as follows:

- Newspaper has a qualified right of access to the Court file under Art. I, sec. 18 of the North Carolina Constitution as interpreted by *Virmani* (N.C. 1999) that can only be limited when there is a compelling countervailing public interest that must be protected through sealing;
- The trial court erred in sealing the *entire* file due to the public interest in protecting the identity of minor victims of sexual abuse. While it is appropriate to shield the minors' names and utilize pseudonyms, the sealing of the defendants' identities, the allegations, the motions filed, the orders entered, and the settlement reached in the case is not justified.
- The trial court erred in sealing the *entire* file to protect a defendant's right to a fair trial in a related South Carolina criminal matter. The trial court made no findings of fact regarding how this civil case in North Carolina would create "undue pretrial publicity" in that criminal case. On remand, the court may consider whether the criminal case is still active and whether temporary and *limited* sealing of portions of the file is necessary for a fair adjudication of that matter; and
- The trial court improperly justified the sealing of the file based on an interest in protecting innocent third parties from embarrassment or economic loss. Protection of such interests is not a recognized basis for overcoming the public's First Amendment right to access.

The court gave specific instructions to the trial court regarding potential sealing of certain aspects of the court file on remand.

**Body cam footage; gag order; First Amendment**

*In re Custodial Law Enforcement Recording Sought by City of Greensboro*, (COA18-992; Aug. 6, 2019). Members of the City Council of Greensboro were granted permission by the court to view body cam footage worn by Greensboro police officers during an arrest incident. The order permitted the council members to discuss the footage only amongst themselves in the performance of their official duties. Later the City moved the court to modify the gag order to allow the officials to discuss the footage with constituents and others. The court denied the motion. On appeal, the City argues the gag order violated the council members' First Amendment rights.

The Court of Appeals affirmed the denial of the motion to modify the gag order. By statute, GS 132-1.4A, the footage was not a public record, and the City had no right of access to the footage to begin with except as permitted by court order. The court could have restricted the City's access altogether, thus the limitation on the Council members' ability to discuss the footage did not impermissibly restrict First Amendment rights that they otherwise would have had.

## Contracts

North Carolina Supreme Court

*Morrell v. Hardin Creek, Inc.* _ **N.C.** _, 821 S.E.2d 360 (Dec. 7, 2018)(with partial dissent). Reversing the opinion (majority) of the Court of Appeals (summarized below) and holding that the NC Supreme Court precedent requiring that exculpatory clauses related to negligence contain "clear and explicit words that that was the intent of the parties" does not require the actual use of the word "negligence." And, here, the intent of the parties regarding "all claims and liabilities" was clear and unambiguous. Thus the order of the trial court dismissing the negligence claim against the landlord should have been affirmed.

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

North Carolina Court of Appeals

**Summary ejectment; lease term renewal; month-to-month tenancy upon holdover**
*Mount Airy-Surry County Airport Auth. v. Angel* (COA18-1019; Oct. 1, 2019). Tenant leased an airport hangar from Landlord. The term of the Lease ended June 2014. The rent was $200 per month. After the term ended, Tenant continued to occupy the hangar and pay $200 per month in rent. In 2017, the landlord notified Tenant that it was ending the month-to-month lease. Tenant refused to vacate, and Landlord commenced summary ejectment. The magistrate found in favor of Landlord, and the district court on appeal granted summary judgment to Landlord.

The Court of Appeals rejected Tenant's arguments and affirmed as follows: (1) Landlord's acceptance of rent each month past the original Lease period did not constitute a series of annual Lease renewals. In contrast to the case of *Coulter v. Capitol Finance Co.* (NC 1966), the Lease did not build in a rent increase which, if paid, would have created a new one-year term. Landlord and Tenant did not negotiate a new rental payment as would have been required by the Lease in order to create a one-year extension; (2) there was no evidence that Landlord waived the Lease's renewal terms; and (3) there was no novation when, in early 2017, Tenant began paying $215 per month, because there is no evidence of offer and acceptance of a new one-year lease term.

**Insurance policy terms interpretation**

*NC Farm Bureau Mut. Ins. Co., Inc. v. Martin* (COA18-328; September 3, 2019) (with dissent). Mother and daughter ("injured parties") were injured in auto accident and asserted coverage under the uninsured/underinsured motorist (UM/UIM) provisions of an automobile insurance policy issued by Farm Bureau for family member Mary Martin ("Mary," who is mother-in-law and paternal grandmother to the injured parties, respectively). Injured parties lived in a house located on Mary's farm and asserted they were insured under Mary Martin's policy as her family members. Farm Bureau brought a declaratory judgment action alleging injured parties did not qualify as "insured[s]" under the policy because they live in a separate residence from Mary and are not members of her household; the trial court granted summary judgment in favor of Farm Bureau.

On appeal, the majority affirmed the trial court's order after determining that the terms "resident" and "household" as used in the insurance policy have a plain and ordinary meaning and are not ambiguous. Since Mary's home was never the actual residence of injured parties and since "household" is limited to a single structure, in which injured parties did not live with Mary, the trial court did not err in finding they did not meet the policy's definition of "insured."

The dissenting judge relies primarily, though not exclusively, on *Farm Bureau Mut. Ins. Co. v. Paschal*, 231 N.C. App. 558 (2014), in which this Court held that a granddaughter who lived on her grandfather's farm, sometimes in a separate house, was entitled to coverage under the grandfather's policy. The dissent disagrees with the majority's analysis of "resident" and "household" under prior case law, argues that the terms at issue here should be construed broadly and states that, in general, any ambiguity in an insurance policy should be construed against the drafter – in this case, the insurer. Although the majority acknowledges *Paschal* involves "virtually identical" facts, it notes that neither *Paschal* nor any other North Carolina case has extended coverage to individuals who had never resided in the policyholder's household. The majority distinguishes *Paschal* on the basis the grandfather in that case was his granddaughter's legal guardian, *de facto* parent, and "most constant caregiver," unlike Mary in relation to her granddaughter in this case. [Summary by SOG Research Attorney Aly Chen]

**Guarantors; fiduciary duty and constructive fraud**

*Bethesda Road Partners, LLC v. Strachan* (COA18-1170; Aug. 20, 2019). A group of investors formed an LLC (ABMS). ABMS executed a promissory Note in favor of a Bank, and the investors guaranteed the Note. ABMS defaulted on the Note. The Bank would not sell the Note to any of the guarantors. However, McKee, the guarantor who was the sole member manager of ABMS, formed another LLC, Bethesda, and his wife became Bethesda's sole member manager. (McKee became a member thereafter.) Bethesda then purchased the Note and turned around and sued the other ABMS guarantors to enforce the guarantys. The guarantors sued Bethesda and McKee for violations of the Equal Credit Opportunity Act, breach of fiduciary duty, constructive fraud, and Chapter 75. All but one guarantor, Strachan, settled. As to Strachan's claims, the trial court entered summary judgment in favor of Bethesda. The Court of Appeals affirmed as follows:

(1) The trial court properly granted summary judgment for Bethesda as to Strachan's guaranty. Upon purchasing the Note, Bethesda, a separate entity, also took assignment of the guarantys and was entitled to enforce them. (2) Strachan did not properly preserve his argument that Bethesda was a mere

instrumentality of McKee; no piercing claim was pled. (3) Bethesda did not discharge McKee's debt by purchasing the debt; the purchase of the Note was an assignment. (4) McKee did not owe a fiduciary duty to Strachan or the other members of ABMS, and therefore did not breach that duty nor commit constructive fraud. (5) The court did not err in refusing to allow Strachan to add ABMS to the action years after the original action was filed.

The Court of Appeals reversed, however, the trial court's conclusion that Bethesda was limited to recovering only half the price Bethesda paid to purchase the Note instead of its face value. The trial court further erred in applying the doctrine of equitable contribution to reduce Strachan's liability by half. Applying this equitable doctrine was inappropriate where there was an adequate remedy at law, which in this case was enforcement of the Note at its face value.

**UIM coverage limits**

*N.C. Farm Bureau Mutual Ins. Co. v. Dana* (COA18-1056; Aug. 20, 2019). Mr. Dana was injured and Ms. Dana was killed in an auto accident. Plaintiff insurer provided UIM coverage to the Danas in amounts of $100,000 per person and $300,000 per accident. The other driver had liability coverage up to $50,000 per person and $100,000 per accident. The other driver's policy was exhausted pursuant to the per-accident cap. This case is about how much UIM coverage the Danas are entitled to receive from Plaintiff. The trial court determined that the Danas were entitled to the full coverage amount from Plaintiff pursuant to their per-accident cap. The Court of Appeals affirmed pursuant to *N.C. Farm Bureau Mut. Ins. Co. v. Gurley*, 139 N.C. App. 178 (2000), which held that:

> [W]hen more than one claimant is seeking UIM coverage, as is the case here, how the liability policy was exhausted will determine the applicable UIM limit. In particular, when the negligent driver's liability policy was exhausted pursuant to the per-person cap, the UIM policy's per-person cap will be the applicable limit. **However, when the liability policy was exhausted pursuant to the per-accident cap, the applicable UIM limit will be the UIM policy's per-accident limit.**

**Non-compete and non-solicitation agreement; overbreadth**

*Sterling Title Co. v. Martin*, 831 S.E.2d 627 (N.C. App. Aug. 6, 2019). Martin was an underwriter for Plaintiff Sterling Title Insurance Co. ("Sterling"). She was subject to the following non-compete agreement:

> No Conflicts or Solicitation.
>
> .... I also agree that for the period of my employment by the Company and for one (1) year after the date of termination of my employment with the Company I will not, either directly or through others: .... (c) solicit or attempt to solicit any customer or partner of the Company with whom I had contact during my employment with the Company to purchase a product or service competitive with a product or service of the Company; ... or (d) provide products or services competitive with a product or service of the Company to any customer or partner of the Company with whom I had contact during my employment with the Company.

After 10 years Martin left her employment to open her own title insurance company, Magnolia. Martin and Magnolia soon thereafter solicited and started doing business with some of Sterling's former clients.

Sterling sued Martin for breach of her non-compete and for breach of the implied duty of good faith and fair dealing, violation of the North Carolina Trade Secrets Protection Act, unfair and deceptive trade practices, and conversion. The trial court dismissed Sterling's claims.

The Court of Appeals affirmed. As to the non-compete: It broadly restricts Martin from soliciting or providing services to all of Plaintiff's current or former clients with whom Martin had any form of "contact" during her employment; and, although it appears to be mere one-year restriction, it in fact restricts Martin from doing business with Plaintiff's former or current clients with whom she had any contact during the past ten years, even if the customer ceased doing business with Plaintiff nine years and 11 months ago. The Court determined that "such a restriction is "patently unreasonable." As to the trade secrets claim, the only information in question was a list of emails of 51 "contacts" of Sterling, which is not data that "would not be readily accessible…but for her employment with Plaintiff." Dismissal of the remaining claims was proper either in light of the proper dismissal of the first two claims or in light of Plaintiff's failure to properly challenge them.

**Notice required for insurance policy cancellation; statutory interpretation**

*Ha v. Nationwide General Ins. Co.*, 829 S.E.2d 919 (N.C. App. June 18, 2019) (with dissent). Plaintiffs took out a homeowners' insurance policy with Nationwide on April 1, 2015. A few weeks later, Nationwide decided to cancel the policy after an inspection of the home. Nationwide prepared a cancellation letter dated May 22, 2015. Nationwide's mail report shows the letter was presented for mailing on May 22, 2015. But the Plaintiffs maintained—and the trial court found—that the homeowners never received it. On July 24, 2015, Plaintiffs' home was destroyed by fire. Nationwide denied their insurance claim, citing the cancellation. Plaintiffs sued. The trial court determined that the relevant general statute governing notice of cancellation of insurance policies only requires that the insurer provide "proof of mailing" and not actual delivery and/or receipt of the notice by the insured.

The Court of Appeals (majority) reversed, holding that G.S. 58-41-15(c), which governs cancellations made within 60 days of policy inception, requires the insurer to "furnish" the notice to the insured, which, for reasons of statutory interpretation and policy, means more than simply providing "proof of mailing." In this case, the trial court expressly found that the Plaintiffs did not receive the notice. Therefore the policy cancellation was ineffective and the insureds were entitled to recover under the policy.

[The dissenting judge determined that the facts revealed that Nationwide correctly supplied notice of cancellation and an excess premium check to Plaintiffs and that Nationwide had presented a detailed description of its mailing protocol for cancellation of policies. The judge disagreed with the majority's interpretation of "furnish" in the context of this statute and the language of the insurance policy and would have affirmed the trial court's order.]

**Claims related to termination by State of North Carolina of legislatively authorized lease; Rule 41 tolling**

*North Carolina Indian Cultural Center, Inc. v. Sanders*, 830 S.E.2d 675 (N.C. App. June 18, 2019). Pursuant to legislation, the State entered into a lease with Plaintiff for the North Carolina Indian Cultural Center. As the years went on, the facilities in the Center fell into disrepair to such an extent that the State considered Plaintiff to be in breach of the lease. In 2013, the General Assembly enacted further

legislation requiring the State to terminate the lease. Plaintiff sued various State actors, including Paul Brooks, then-chair of the Tribal Council of the Lumbee, under various contract and constitutional theories. The original complaint was dismissed without prejudice in 2016 and refiled in 2017. In 2018, the superior court granted summary judgment in favor of the State defendants and granted a motion to dismiss in favor of Brooks.

The Court of Appeals affirmed as follows: As to the contract claim, there was no dispute that Plaintiff was in breach of the lease and that the State terminated it in accordance with its provisions. As to the constitutional claims (Contract Clause, Bill of Attainder, and Takings Clause), Plaintiff failed to demonstrate how any of these claims applied under the circumstances. With respect to Defendant Brooks, the trial court properly determined that the re-filed complaint was outside the limitations period because Brooks had never been served the original 2013 complaint, and thus the tolling provision of Rule 41 did not apply to the action against him.

**Arbitration; relationship to G.S. 22B-10; FAA preemption; waiver of arbitration agreement**

*Wygand v. Deutsche Bank Trust Co.*, 829 S.E.2d 681 (N.C. App. June 4, 2019). Plaintiffs obtained a loan from Defendants, and along with the deed of trust signed an arbitration rider that included language making clear that the Plaintiffs were giving up their rights to have disputes decided in court or by a jury. Later Defendants attempted to foreclose the loan through a special proceeding (right to sale foreclosure). Plaintiff in turn sued Defendants in superior court for breach of contract and other claims, demanding a jury trial. Several months later, after some amount of discovery and expenditure of legal fees by Plaintiff, Defendants changed counsel and moved to compel arbitration pursuant to the arbitration rider. The superior court denied the motion under G.S. 22B-10 and because the court determined that Defendants waived the right to arbitration.

The Court of Appeals reversed as follows: (1) Although G.S. 22B-10 does prohibit agreements that require parties to waive their right to a jury trial, the statute also makes clear that parties are permitted to enter into binding arbitration agreements, which by their nature are waivers of the right to jury trials; (2) even if G.S. 22B-10 did prohibit all jury trial waivers, the parties here agreed to be bound by the relevant provisions of the Federal Arbitration Act (FAA), which would preempt a conflicting state provision; and (3) the trial court's findings of fact were insufficient in light of the record to establish that Defendants unduly delayed their demand for arbitration and engaged in litigation to Plaintiff's substantial prejudice, and thus Defendants did not waive their right to arbitration.

**Reinsurance Facility's discretion to deny insurer's claim for reimbursement of certain losses**

*The North Carolina Reinsurance Facility v. Causey*, 830 S.E.2d 850 (N.C. App. June 4, 2019). Allstate suffered a significant extra-contractual loss arising out of an accident caused by one of its insured. The policy in question had been ceded by Allstate to the North Carolina Reinsurance Facility ("Facility"). Pursuant to G.S. Chap. 58, Allstate filed a petition with the Facility for reimbursement of some or all of its loss. The Facility recommended rejection of the petition, and the Facility's Board ultimately denied the petition. Allstate appealed to the Commissioner of Insurance pursuant to G.S. 58-37-65(a). The Commissioner ordered the Facility to reconsider. The Facility petitioned for judicial review. The Superior Court affirmed the Commissioner.

The Court of Appeals reversed the Superior Court's order, determining that Facility Rule 5.C.2 plainly requires the Facility to consider the request for reimbursement of *extra*-contractual losses, but also plainly gives the Facility the full discretion to grant or deny a request (unless the insurer acted grossly or willfully or wantonly, in which case it is required to deny the request). Thus the Facility acted within its authority and the Commissioner erred in requiring the Facility to reconsider the decision.

**Overly broad covenant not to compete and non-solicitation provision; effect of enforcement through buy-out provision**

*Aesthetic Facial & Ocular Plastic Surgery Center, P.A. v. Zaldivar*, 826 S.E.2d 723 (N.C. App. Mar. 19, 2019). Dr. Christenson operated a one-physician, highly specialized ocular surgery practice throughout central and eastern North Carolina. In 2008 his practice took on another highly specialized surgeon, Dr. Zaldivar, and that surgeon's employment agreement included a non-compete and non-solicitation clause. In 2010, the second surgeon resigned and started his own practice in the same geographical region. Dr. Christenson's practice sued Dr. Zaldivar approximately three years later. The trial court granted Defendant Zaldivar's motion for summary judgment. The Court of Appeals affirmed as follows:

(1) The covenant not to compete violated public policy and was unenforceable. The uncontroverted evidence showed that these two doctors practiced a sub-specialty of oculo-facial surgery that very few physicians in North Carolina practice and performed a particular procedure conducted by very few physicians. Restricting the practice of one of them would unduly limit the public's access to a particular type of medical care that cannot be otherwise obtained. The law would not allow enforcement of such restrictions for the time and territorial extent of the covenant: effectively two years, covering a 15-mile radius around Chapel Hill, Durham, Fayetteville, Greensboro, Greenville, Pinehurst, Raleigh, Rocky Mount, Supply, Wake Forest, Wilmington, and Wilson; and

(2) The covenant was not made any more enforceable by the fact that Dr. Christenson's practice sued Dr. Zaldivar through the buy-out provision of the employment agreement (*i.e.*, through an award of damages) rather through a claim for injunction during the term of the non-compete provision; and

(3) Because the non-solicitation provision "would have the same detrimental effect upon availability of medical care as the non-compete agreement", it was also unenforceable.

The court also more or less summarily affirmed summary judgment as to the remaining claims–Chapter 75, tortious interference, and punitive damages—as these claims were essentially premised on the existence of a valid contract.

**Arbitration agreement and fiduciary duty; enforceability of agreement by non-signatories**

*Hager v. Smithfield East Health Holdings, LLC*, 826 S.E.2d 567 (N.C. App. Mar. 19, 2019). Ms. Hager sued a long-term care facility (Facility) and several related entities after her husband died in the Facility's care. The Facility attempted to enforce an arbitration agreement the wife signed upon admitting the husband to the Facility. The trial court declined to enforce the agreement. The Court of Appeals reversed in part and affirmed in part. The court first determined that the physician-patient relationship in this case did not give rise to a *de jure* fiduciary duty on the Facility's part. Then, distinguishing this case from the North Carolina Supreme Court's opinion in King v. Bryant (see discussion of that case at

https://civil.sog.unc.edu/ or click here), the court went on to find that there was no *de facto* fiduciary duty. The court thus concluded that the Facility met its burden of demonstrating a right to an order staying the proceedings and compelling arbitration.

As to the related entity defendants, none of whom were actual signatories to the arbitration agreement, the trial court properly concluded—as to all but one of them—that they did not have the requisite agency relationship with the Facility that would create standing to enforce the agreement. As to one such entity, however, the Court of Appeals determined that further findings of fact were required before this determination could be made, and the court remanded for those findings.

## Evidence

North Carolina Court of Appeals

**Evidence of medical expenses; relationship between statutory medical liens and fair billing statute**
*Sykes v. Vixamar*, 830 S.E.2d 669 (N.C. App. June 18, 2019). Mr. Sykes was injured by Defendant in a car accident. The hospital treating Sykes decided not to bill Sykes's insurer and instead opted to rely on the medical lien (G.S. 44-49(a)) on Sykes's potential recovery. General Statute 131E-91(c) (the fair medical billing statute) prohibits a hospital from charging patients for treatment if the hospital opts not to bill the patient's insurer. So, in this case, the hospital could not charge Sykes personally.

At the trial between Sykes and Defendant, Sykes introduced the statement of the hospital charges and the lien. Defendant's insurer, Progressive, objected, arguing that because the hospital could not bill Sykes for the treatment (pursuant to G.S. 131E-91(c)), Sykes could not submit evidence of those charges at trial. The trial court rejected this argument and allowed the evidence.
The Court of Appeals affirmed, holding that a hospital is not required to first bill a patient's insurance company in order to rely on a medical lien on the patient's tort recovery. In other words, "a medical lien remains valid even if the hospital fails to timely submit those charges to the patient's health insurer." Thus the trial court properly allowed evidence of the charges at the trial between Sykes and Defendant.

## Real Estate, Land Use, and Foreclosure

North Carolina Supreme Court

**Condemnation for beach renourishment; JNOV standard and procedure; new trial; public trust doctrine**

*Town of Nags Head v. Richardson*, 828 S.E.2d 154 (Mem.) (**N.C. Supreme Court** No. 244A18; June 15, 2019). Affirming *per curiam* the majority opinion of the Court of Appeals and clarifying that "the sole issue on remand is the fair market value of the easement or, as presented to the jury, 'What was the fair market value of the 10-year beach nourishment easement on the Richardsons' property taken by the Town of Nags Head at the time of taking?'."

*Previous summary of Court of Appeals opinions:*

> *Town of Nags Head v. Richardson*, _ N.C. App. _, 817 S.E.2d 874 (July 3, 2018) (with partial dissent). In 2011 the Town of Nags Head undertook a beach nourishment project along its coastline. For those beachfront landowners who declined to grant the Town a temporary easement for this project—including Defendants—the Town filed condemnation actions for ten-year easements over the area between the mean high water mark and the vegetation line (or equivalent). At trial the jury awarded the Defendants $60,000 as compensation for the taking of the easement. Several months after trial, the court granted the Town JNOV on grounds that (1) the Town already had the relevant rights to the easement pursuant to the public trust doctrine and (2) even if it didn't have such rights, the defendants presented no competent evidence of damages.
>
> The Court of Appeals reversed the JNOV and remanded for a new trial. As to Defendants' (landowners') appeal, the JNOV was improper because the Town admitted to a taking in its pleading, never revisited the issue in its "all other issues" hearing, and never raised the issue at directed verdict or JNOV (and the trial court cannot raise an issue at JNOV on its own). The JNOV as to damages was improper because even incompetent damages evidence, once admitted, is to be considered competent for purposes of JNOV. However, as to the Town's appeal, the trial court improperly denied the Town's motion *in limine* and admitted Defendants' expert valuation despite its improper method of calculating damages, and thus a new trial was warranted.

The dissenting judge agreed with the bulk of the majority's analyses, but concluded that a new trial was not warranted regarding the value of the easement because the Defendants never offered nor intended to offer evidence of the easement's value. Thus the $60,000 verdict should be vacated, but no new trial granted.

**North Carolina Court of Appeals**

**Summary ejectment; lease term renewal; month-to-month tenancy upon holdover**

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landlord notified Tenant that it was ending the month-to-month lease. Tenant refused to vacate, and Landlord commenced summary ejectment. The magistrate found in favor of Landlord, and the district court on appeal granted summary judgment to Landlord.

The Court of Appeals rejected Tenant's arguments and affirmed as follows: (1) Landlord's acceptance of rent each month past the original Lease period did not constitute a series of annual Lease renewals. In contrast to the case of *Coulter v. Capitol Finance Co.* (NC 1966), the Lease did not build in a rent increase which, if paid, would have created a new one-year term. Landlord and Tenant did not negotiate a new rental payment as would have been required by the Lease in order to create a one-year extension; (2) there was no evidence that Landlord waived the Lease's renewal terms; and (3) there was no novation when, in early 2017, Tenant began paying $215 per month, because there is no evidence of offer and acceptance of a new one-year lease term.

**Secured transactions; mortgages; deeds of trust; foreclosure**

*In re Worsham* (COA18-1302, Sept. 17, 2019). Borrowers refinanced their home, secured with a deed of trust which was duly registered. Borrowers defaulted and were notified that foreclosure proceedings would be initiated if the default was not cured. After proceedings were initiated, the clerk dismissed for insufficient evidence that the substitute trustee had authority to foreclose under the deed of trust. The trial court entered an order allowing foreclosure to proceed, and borrowers appealed. The Court of Appeals reversed the order of foreclosure and remanded the matter for further proceedings. *In re Worsham*, __ N.C. App. __, 815 S.E.2d 746 (2018) (unpublished). The Court of Appeals determined that the trial court had not found that the petitioner was the holder of the debt evidenced by the note as required by G.S. 45-21.16(d). The Court of Appeals stated that the trial court may make additional findings based on the existing record.

On remand, without further hearing, the trial court entered an order allowing foreclosure to proceed. The trial court concluded that petitioner is the holder of the note and deed of trust and that the note evidences a valid debt owed by Borrowers. Borrowers appealed to the Court of Appeals, challenging multiple findings of fact, including that they were in default. Borrowers argued in the alternative, that if they were in default, it was the same default that an earlier order allowing foreclosure was based on, and the NC Supreme Court's holding in *In re Lucks*, 369 N.C. 222 (2016) precluded foreclosure, stating that a lender cannot foreclose twice based on the same default.

The Court of Appeals affirmed the trial court's order, holding that sufficient competent evidence supported the trial court's findings of fact, the findings were sufficient to support the conclusions of law, and that the conclusions were not erroneous. The Court rejected Borrowers' interpretation of and reliance on *In re Lucks*, which involved a power of sale foreclosure that both a clerk and the trial court had dismissed. The Supreme Court held in *In re Lucks* that res judicata and collateral estoppel do not apply when a request to foreclose is denied. The Court of Appeals discussed subsequent appellate cases interpreting *In re Lucks* and explained that where, as here, a trial court's order being appealed allowed foreclosure to proceed, *In re Lucks* did not apply.

The Court of Appeals also rejected Borrowers' arguments challenging the authority of the substitute trustee, and held that since North Carolina law embraces liberal substitution of trustees under a deed of trust authorizing substitution, "the authorized appointment of a substitute trustee after the decision by the clerk to allow foreclosure to proceed does not require the foreclosure to be noticed a second time

before the superior court conducts *de novo* review of the clerk's decision." Sufficient evidence supported the trial court's findings that the documents authorized substitution of the trustee. [Summary by SOG Research Attorney Aly Chen]

**Power of sale foreclosure; anti-deficiency statutes; right to foreclose under the instrument; enjoining mortgage sale on equitable grounds**

*In re Foreclosure of Nicor, LLC*, 831 S.E.2d 870 (N.C. App. Aug. 6, 2019). Borrower executed multiple promissory notes secured by multiple deeds of trust on various properties. Borrower defaulted under the notes and subsequently entered into two forbearance agreements with the lender. In the agreements, the lender agreed not to exercise its remedies under the loan documents for a certain period of time. In exchange, the borrower acknowledged the defaults and the amount of the debt owed and delivered a signed confession of judgment to the lender for the full amount due under the notes. The lender could file the confession of judgment if borrower failed to satisfy the terms of the forbearance agreement. Later, the forbearance period expired; the borrower failed to satisfy the forbearance agreement terms. The lender filed the confession of judgment with the court for the full amount of the debt due under the notes. The lender then initiated three power of sale foreclosures related to the deeds of trust securing the notes. The clerk and the superior court entered orders authorizing sale.

The borrower appealed to the NC Court of Appeals, challenging the trial court's finding that the lender had a right to foreclose under G.S. 45-21.16(d)(iii). The borrower argued that the anti-deficiency statute set forth in G.S. 45-21.36 precluded lender's right to foreclose as a matter of law. The anti-deficiency statute provides that a court may eliminate a deficiency if the borrower can show (i) the property sold at foreclosure was worth the amount of the debt at the time and place of sale or (ii) the lender's bid was substantially less than the true value of the property. The borrower argued that G.S. 45-21.36 precluded the lender from filing a confession of judgment for the full amount of the debt and then later foreclosing on the property because it would allow the lender to avoid the application of the anti-deficiency protections. The court of appeals determined that the borrower's argument was an equitable argument and therefore not a defense that may be raised in a power of sale foreclosure before the clerk or the superior court on appeal from the clerk. The defense could be raised in a separate action to enjoin the foreclosure filed under G.S. 45-21.34.

**Quasi-judicial proceeding; rebuttal of prima facie case; grounds for recusal**

*Dellinger v. Lincoln Cty*, 832 S.E.2d 172 (N.C. App. July 16, 2019). Petitioner, the land owner, and Strata Solar, Petitioner's lessee, applied for a conditional use permit (CUP) in 2013 to build a solar farm on Petitioner's land. The town Board denied the CUP, and after the denial was affirmed by the superior court, in a prior appeal the Court of Appeals reversed the denial and remanded for further proceedings. On remand, the CUP opponents moved to dismiss the Petition because, by that time, Strata Solar was no longer part of the Petition. Petitioner in turn moved to recuse a Board member for bias. Those motions were denied, and the Board again proceeded to deny the CUP by a 4-1 vote. The Superior Court affirmed, giving rise to the present appeal.

The Court of Appeals reversed the decision of the Superior Court to affirm the CUP denial. The court concluded as follows:

(1) As to the opponent's motion to dismiss the Petition: The Board and courts continued to have jurisdiction over the Petition even after Strata Solar was no longer an applicant because Petitioners, the landowners, continue to pursue the Petition; and
(2) As to the motion to recuse: Petitioner's due process rights were violated by the denial of the motion to recuse because (a) the Board member actively engaged in pre-Petition opposition to the solar farm and gave funds to defeat it; and (b) the member submitted, during the hearing, his *own* "biased, one-sided, and incomplete" materials into the record opposing the Petition, which could well have influenced other members to oppose the Petition; and
(3) As to the Petition's merits: The opponents failed to present the requisite evidence to rebut Petitioner's prima facie showing of entitlement to the CUP.

The Court of Appeals therefore remanded for issuance of the CUP to the Petitioner.

**Reformation of deed; statute of limitations**

*Wells Fargo Bank, N.A. v. Stocks*, 831 S.E.2d 378 (N.C. App. July 2, 2019) (with dissent). In 2005, Ms. Stocks executed a Note in favor of the bank (now Wells Fargo) to secure a loan on her home, but only her father was listed as a borrower on the Note. The corresponding Deed of Trust, however, listed Ms. Stocks as the borrower, and Ms. Stocks made payments until sometime around 2016. In 2017 Wells Fargo instituted a foreclosure action. It was then discovered that the Deed of Trust did not actually secure a valid debt because Ms. Stocks was not borrower on the Note. Wells Fargo therefore brought a claim for reformation of the Deed of Trust and judicial foreclosure. Ms. Stocks raised a statute of limitations defense (originally premised on G.S. 1-52(9)), which the trial court rejected, and summary judgment was entered in Wells Fargo's favor.

The Court of Appeals (majority) reversed. The court first determined that, under *Nationstar Mtg. LLC v. Dean* (COA 2018), a claim for reformation of a deed is subject to a 10-year statute of limitations under G.S. 1-47(2), and that the accrual of this limitations period is not delayed by a discovery period. Thus the limitations period began in 2005, and because the claim for reformation was filed in 2017, it was outside the statute of limitations. Summary judgment in favor of Wells Fargo on its judicial foreclosure action was therefore error.

[The dissenting judge determined that Ms. Stocks had not properly raised the statute of limitations argument under G.S. 47-1 on appeal, and thus it is waived. The judge also found problematic the application of G.S. 1-47(2) (without benefit of a discovery period) merely because the action in question involves a sealed instrument.]

**Road easements; requirement of "open" access; summary judgment**

*Taylor v. Hiatt*, 829 S.E.2d 670 (N.C. App. June 4, 2019). Plaintiffs and Defendants owned adjoining property. Defendants accessed a nearby road via two private road easements that crossed portions of Plaintiffs' property. At some point Plaintiffs built fences on their property to contain their horses, and these fences crossed the easements. Plaintiffs gave Defendants the codes to the gates; thus the fences did not prevent Defendants from using the road easements. Defendants, however, contended that the language in the chain of title restricted Plaintiffs from keeping any such gates and similar obstructions across the easements. Plaintiffs brought this declaratory judgment to determine their rights. The trial

court agreed with Defendants that Plaintiffs were not permitted to place gates over the easements and ordered their removal

The Court of Appeals reversed. The court determined that the instruments that created one of the road easements—the 1989 easement—used language requiring that the easement remain "open" and therefore (pursuant to Supreme Court precedent) free of gates and similar encumbrances. The other easement, which was created in 2000, was not subject to the same restrictive language, and the Plaintiffs were therefore permitted to erect gates across that easement that do not materially impair the easement's purpose. The record does not establish, however, whether the gates are on the 1989 easement or the 2000 easement, and it does not demonstrate whether the gates materially impair Defendant's use of the easement, so the matter is remanded to the trial court for further proceedings.

## Municipal Authority

North Carolina Court of Appeals

**Municipal authority; Public nuisance, G.S. 19-2.1; G.S. 160A-12; Rule 12(b)(6) motion to dismiss; Subject matter jurisdiction; Abandonment of issues on appeal, Appellate Rule 28(a)**
*State of North Carolina, on Relation of City of Albemarle v. Nance*, 831 S.E.2d 605 (N.C. App. July 16, 2019). The City of Albemarle instituted an action against the owners, manager, and lender of a hotel that was alleged to be a public nuisance after nearly eighty visits by law enforcement over a three-year period. On appeal, the city challenged the trial court's orders allowing multiple motions to dismiss by the defendants. The Court of Appeals affirmed the dismissal of claims against the hotel manager for failure to state a claim, since the manager was no longer employed when the City brought its claim, nor had the City served her with a notice or requested damages against her in the complaint. The Court also affirmed the dismissal of claims against the hotel's owners for lack of subject matter jurisdiction over the City, which had no standing to assert a claim unless and until the city council passed a resolution to commence legal proceedings pursuant to G.S. 160A-12. Although the city's charter and state laws authorized the city to file an action for a public nuisance, the city council was required to adopt a resolution before a city attorney or outside counsel could initiate the action on the city's behalf; no evidence was presented that it did so. Finally, an issue regarding the trial court's granting of defendant's motion to compel discovery was not addressed in the appellate brief and was therefore considered abandoned. [Summary by SOG research attorney Aly Chen]

**Town authority to assess fee against undeveloped lots**
*Boles v. Town of Oak Island*, 830 S.E.2d 878 (N.C. App. July 2, 2019) (with dissent). After the Town of Oak island spent $140 million dollars to construct a sewer system, the General Assembly passed a local act allowing Oak Island to assess sewer fees to sewer district landowners to help service the debt. The law permitted fees to be assessed to "owners of each dwelling unit or parcel of property that could or does benefit from the availability of sewage treatment." Beginning in 2009, Oak Island charged the fee to both developed and undeveloped parcels. Owners of undeveloped parcels brought this action to recover the fees, arguing that Oak Island exceeded its statutory authority in assessing the fee. The trial court granted summary judgment in favor of Oak Island. The Court of Appeals (majority) reversed. After a detailed analysis, the majority concluded that the sewer services were not adequately "available" to the undeveloped parcels under the meaning of the law, and therefore Oak Island was not statutorily authorized to impose the fee upon owners of these lots.
[The dissenting judge disagreed and determined that Oak Island was within its authority to assess the fees against both developed and undeveloped lots. The dissenting judge also rejected the landowners' equal protection and just compensation/tax principles arguments.]

## Wills and Estates

North Carolina Supreme Court

***Validity of a Holographic Codicil to a Self-Proving Attested Written Will***

***In re Estate of Allen*, 821 S.E.2d 396 (NC 227PA17; Dec. 7, 2018)**. Testator executes a self-proving attested written will. Later, testator handwrites on the will "BEGINNING 7-7-03 DO NOT HONOR ARTICLE IV VOID ARTICLE IV" and signs it. Caveat is filed challenging the holographic (handwritten) codicil. Superior court enters summary judgment finding the notes on the will constitute a valid holographic codicil. The caveator appeals. The NC Court of Appeals reverses the decision of the superior court and orders summary judgment in favor of the caveators. The COA holds the codicil is not a valid codicil because (i) the meaning of the testator's handwritten words do not stand alone and require reference to other words in the typewritten portion of the will to give them meaning, and (ii) there was insufficient evidence of the testator's *present* testamentary intent to modify the will due to the use of the "BEGINNING 7-7-03" language. On discretionary review, the NC Supreme Court reversed the COA. The NC Supreme Court holds:

1. A holographic codicil may amend a will by making reference to a specific provision in the will. The codicil does not have to quote in its entirety the language in the will it intends to alter. In this case, the language "DO NOT HONOR ARTICLE IV VOID ARTICLE IV" evinces a clear intent regarding the disposition of the items in Article IV.
2. A holographic codicil must evidence a *present* testamentary intent. The language "BEGINNING 7-7-03" in the codicil raises an ambiguity as to the testator's present testamentary intent. In a caveat proceeding, this ambiguity is a question of fact to be resolved by a jury and as such summary judgment is inappropriate.

Reversed and remanded.

North Carolina Court of Appeals

**Intent of a will; *per stirpes* distribution**

*Brawley v. Sherrill* (COA18-1043; Sept. 3, 2019) (with dissent). Ms. Deaton's will devised her estate to her children, Billie and Bobby Ray. The will specified that "if either of my children shall predecease me…his or her share shall go to my grandchildren, *per stirpes*." Bobby Ray predeceased her. Bobby Ray left one child. Billie, who is living, has two children. Billie, the executrix, filed this declaratory judgment action to determine whether Bobby Ray's share vested in Bobby Ray's son or in all three grandchildren. The trial court determined that only Bobby Ray's son was meant to inherit Bobby Ray's share. One of the other two grandchildren appealed.

The Court of Appeals (majority) reversed, holding that with the language "my grandchildren", the will established the grandchildren as the class for the term "per stirpes", and that "the predeceased beneficiary's share must be distributed amongst all of Testatrix's grandchildren, with the percentages varying based not upon the total headcount of surviving grandchildren (per capita), but upon the root from which the particular grandchildren descends (per stirpes)" – so, one half of Bobby Ray's share goes to his son, and the other half goes to Billie's children equally.

The dissenting judge argued that the majority's analysis "modifies a per stirpes devise in a manner that has never before been contemplated" and noted that "[w]hile Testatrix's lack of precise language created a chore for counsel, the trial court, and this Court, that imprecision cannot negate the plain meaning of the term 'per stirpes' used to describe the method of distribution among the class members." Thus the judge would have affirmed the trial court in determining that only Bobby Ray's son was intended to take Bobby Ray's share.

**Fiduciary duty of executrix; fraud/duress/undue influence**

*Voliva v. Dudley* (COA19-58; Aug. 20, 2019). Amy Payne died testate, naming Plaintiff as executrix. The will provided that Plaintiff was to sell certain property and distribute the net proceeds to three beneficiaries, including Defendants. The Superior Court allowed Plaintiff to deviate from the terms of the will and distribute the property directly to the three beneficiaries (after division into three parcels). Plaintiff received a 5% executor's commission. Plaintiff later sued to enforce the terms of a promissory note executed by the three beneficiaries in the amount of $15,000 "for value received." Summary judgment was granted in favor of Plaintiff. The Court of Appeals reversed and remanded. While it is undisputed that Defendants signed the note, there were genuine issues of material fact regarding whether they did so under fraud/duress/undue influence given the fiduciary duty of executrix to the beneficiaries to this estate and the question of whether Defendants were compelled to do so in exchange for the executrix supporting the in-kind conveyance.

## Administrative Reviews by Superior Court

North Carolina Court of Appeals

**Dismissal of Highway Patrol officer; administrative process; superior court review**
*Warren v. N.C. Dep't of Crime Control and Public Safety* (COA18-532; Sept. 17, 2019). This case originates from the dismissal of a patrol officer over a decade ago and is back before the Court of Appeals after an earlier remand. In 2007, the Highway Patrol dismissed Sergeant Warren after he was arrested at a party by sheriff's deputies. Warren was off-duty at the time, but had driven to the party in his patrol vehicle. The deputies were on scene because of an altercation between two other people. But they arrested Warren after finding him heavily intoxicated and suspecting that he was already impaired when he drove to the party. After investigating, the Patrol dismissed Warren. Warren filed a Contested Case petition and the ALJ found that the patrol had failed to prove just cause for dismissal. The State Personnel Commission (SPC) rejected the conclusion that termination was inappropriate. The Superior Court reversed the SPC, concluding Warren's conduct did not justify termination. In 2012, the Court of Appeals remanded to the Superior Court to resolve the conflict between its and the ALJ's findings that regarding the amount of alcohol consumed while driving the patrol vehicle. In 2015 (amended in 2017), the Superior Court determined that the allegation of driving while impaired was not substantiated and awarded back pay and benefits.

The Patrol appealed. The Court of Appeals affirmed the Superior Court judgment, determining that the trial court (1) properly conducted a just cause inquiry in determining that Warren was not impaired while driving; (2) properly concluded that Warren's act of driving his patrol vehicle to a party and consuming alcohol there was "unacceptable personal conduct" under the Administrative Code; and (3) properly concluded that such conduct did not amount to the just cause necessary to terminate him because termination would amount to disparate treatment of Warren in light of the Patrol's more lenient disciplinary actions in cases involving equal or more egregious behavior.

**Unemployment compensation benefits; misconduct connected with the work**
*Burroughs v. Green Apple, LLC* (COA18-248; September 3, 2019). The Division of Employment Security appealed the Superior Court's order reversing the Board of Review's decision that petitioner employee was disqualified from receiving unemployment compensation benefits. Petitioner was terminated from employment due to insubordination, a fact which is supported by competent evidence and therefore binding on appeal. The Court of Appeals confined its analysis to the issue of whether petitioner's refusal to sign a statement that the employer failed to conduct a complete investigation into his complaint rose to the level of "misconduct connected with the work," and concluded it did not. Where the conduct did not involve willful intent or "callous, wanton and deliberate misbehavior," petitioner was not disqualified from receiving benefits. [Summary by SOG research attorney Aly Chen]

**Challenge to voting eligibility; petition to Superior Court for review of BOE decision**
*Rotruck v. Guilford Cty Bd. of Elections* (COA19-303; Sept. 3, 2019). Pursuant to GS 163A-911, Ms. Robinson filed a challenge to Mr. Rotruck's qualification to vote in Guilford County Precinct NCGR2 in the Town of Summerfield. After a full hearing, the Guilford County Board of Elections (BOE) sustained

the challenge, concluding that Mr. Rotruck had not, by the time of the hearing, established residence at the Summerfield property he and his wife had purchased in 2016. Mr. Rotruck then filed this petition to the superior court for review of the BOE Order and moved for injunctive relief. The superior court affirmed the BOE Order.

Mr. Rotruck appealed on a number of grounds, and the Court of Appeals affirmed as follows: (1) the trial court did not misallocate the burden of proof to Mr. Rotruck; (2) the trial court did not make prejudicial errors in admitting certain testimony into the record; (3) although the trial court erred in failing to conclude that one of the BOE's findings was unsupported by evidence, that failure was not prejudicial because of the other competent and substantial evidence in the record; and (4) in light of the whole record, the trial court did not err in concluding that Ms. Robinson had established, under G.S. 163A-842, that Mr. Rotruck did not reside in the relevant precinct in Summerfield.

**Attorney discipline; standard of review; inherent authority of the court; G.S. 5A-15(a); representations to the court; conduct calling the court into disrepute**

*In re: Entzminger*, 831 S.E.2d 642 (N.C. App. August 6, 2019). After a superior court judge initiated disciplinary proceedings against respondent assistant district attorney for conduct calling the court into disrepute, the North Carolina State Bar was appointed to prosecute. After a hearing, respondent was found to have violated multiple Rules of Professional Conduct and an order was entered suspending his license to practice law for two years, with the possibility of staying the suspension after six months. After respondent's appeal was denied, he filed a petition for writ of supersedeas in the Court of Appeals.

On appeal, respondent challenged several of the trial court's findings of fact and conclusions of law. The Court first resolved that the correct standard of review is whether the findings are supported by competent evidence, and that conclusions of law, which must be supported by the findings of fact, are reviewed *de novo*. The Court upheld one of the trial court's conclusions that a statement by respondent regarding the availability of a witness constituted a material misrepresentation, as well as a conclusion that respondent refused to acknowledge the wrongful nature of his conduct and issue a sincere apology. However, the Court overruled other findings and a conclusion of material misrepresentation regarding statements made by respondent concerning his knowledge of the trial docket and calendar. After affirming in part and reversing in part, the Court remanded for a new hearing on disciplinary sanctions to be imposed.

## Judicial Discipline

*In re Inquiry Concerning a Judge* (**N.C.** No. 215A19, Sept. 27, 2019). The facts will not be summarized here, but this opinion regarding a trial judge's misconduct in the context of a civil contempt matter is highly recommended reading.