Civil Case Summaries: July 3, 2012–October 5, 2012

North Carolina Conference of Superior Court Judges

2012 Fall Conference

I. CIVIL PROCEDURE, JURISDICTION, & JUDICIAL AUTHORITY

Rule 9(j); *res ipsa loquitur*

Smith v. Axelbank, 730 S.E.2d 840 (N.C. App. Aug. 21, 2012). Plaintiff's medical malpractice claim was dismissed for failure to comply with Rule 9(j)'s requirement of prior expert review. Plaintiff argued that compliance with Rule 9(j)(1) and (2) was unnecessary because, pursuant to Rule 9(j)(3), she had alleged facts sufficient to establish negligence by *res ipsa loquitur*. Plaintiff's alleged injuries were the damaging urological side effects of a prescription drug. Her complaint stated that, after discovering the side effects, her prescribing physician wrote her a letter noting, "you suffered with side effects from medication you were on for many months. I feel responsible for adding an extra problem to someone who certainly did not need one more." The complaint also alleged that her medical records included a doctor's note that "she is right." The Court of Appeals rejected the argument that these statements by the doctor were sufficient to establish *res ipsa loquitur*, and held that the matter of the prescribing doctor's negligence required the benefit of expert testimony. Thus the complaint was properly dismissed for failure to comply with Rule 9(j)(1) or (2).

Rule 9(j); findings of fact and conclusions of law

Estate of Wooden v. Hillcrest Convalescent Ctr, 731 S.E.2d 500 (N.C. App. Aug. 21, 2012). Trial court dismissed Plaintiff's complaint for failure to comply with Rule 9(j). The trial court made no findings of fact or conclusions of law regarding the dismissal. Citing language in the Supreme Court's recent opinion in *Moore v. Proper*, 726 S.E.2d 812 (N.C. App. 2012), the Court of Appeals remanded to the trial court for findings of fact and conclusions of law regarding the basis for dismissing Plaintiff's complaint.

Subpoena *duces tecum*; standing to object; social worker privilege

Mosteller v. Stiltner, 727 S.E.2d 601 (N.C. App. July 3, 2012). Plaintiff in a custody action subpoenaed a licensed State clinical social worker for testimony and records regarding treatment of the defendant. The social worker invoked patient privilege under G.S. Chapter 8 and moved to quash. The record showed no objection to the subpoena by the defendant himself. The trial court ordered the social worker to comply. Affirming the trial court, the Court of Appeals held that the social worker had no standing to assert the privilege herself or to pursue the appeal. As in the doctrine of physician-patient privilege, the social worker-patient privilege "belongs to the patient."

Timeliness of order for new trial

Jones v. Southern General Ins. Co., 731 S.E.2d 508 (N.C. App. Aug. 21, 2012). Trial court entered an

order granting Plaintiff a new trial 24 days after judgment was entered. The Court of Appeals reversed, holding that the trial court had no authority to enter an order granting a new trial under Rule 59(d) after the 10-day limit the rule imposes.

***Nunc pro tunc*; ex parte order**

Whitworth v. Whitworth, 731 S.E.2d 707 (N.C. App. Sept. 4, 2012). Marie and Ruben Whitworth were the sole shareholders of Window World, Inc., and their son, Todd, was the president. Marie and Leon separated in 2007, and Marie filed an equitable distribution action. She also filed a TRO to prevent any Window World transactions that would affect her marital assets. Window World moved to intervene. At a preliminary injunction hearing on August 14, 2007, the judge stated orally that (at least in part) she would allow the motion for intervention and asked Window Worlds' counsel to draft an order. Window World's attorney never thereafter drafted an order, and no intervention order was ever entered. In November 2007, a consent order was entered resolving the parties' issues related to Window World. Window World's attorney participated in these negotiations. In January 2008, the court entered a final judgment resolving the equitable distribution claims.

Todd died in 2010. Later that year, both Marie and Leon filed claims against Todd's estate and Window World (totaling over $75 million). On August 12, 2010, an order was filed *nunc pro tunc* to August 14, 2007 allowing Window World's motion to intervene in the 2007 equitable distribution action. Window World's attorney handed the order to the trial judge in a regular session and asked her (ex parte) to sign it. He did not provide a copy to Marie or Leon's counsel before doing so, and did not serve either of them with a signed order. The order contained findings of fact related to Todd's ownership of Window World assets that were not consistent with the findings in the parties' 2007 consent order. Marie moved pursuant to Rule 60 to vacate the intervention order for lack of subject matter jurisdiction. The trial court denied the motion.

The Court of Appeals reversed, vacating the intervention order, and held that use of the term "*nunc pro tunc*" did not solve the jurisdiction problem. Before an order may be ordered *nunc pro tunc* to take effect on a prior date, there must be an order actually decreed or signed on the prior date. If the order is not then entered due to accident, mistake, or the clerk's neglect, and if there is no prejudice, the order may be entered *nunc pro tunc* to the date of decree or signature. Because the court in 2007 did not precisely set out a decree, and did not make any oral or written orders containing findings of fact, there was no underlying order to be entered *nunc pro tunc*. Further, the trial court had no jurisdiction to enter the 2010 order because the 2007 action had been concluded, and this was not a matter of the trial court's continuing jurisdiction. Finally, the court expressed concern about the ex parte manner in which the order was signed by the trial court and about the attorney's failure to serve opposing counsel.

Authority to hear matters remanded to now-retired judge

Springs v. City of Charlotte, 730 S.E.2d 803 (N.C. App. Aug. 7, 2012). In 2008, a superior court judge entered an order denying a defendant's motion for JNOV with respect to a punitive damages verdict. The Court of Appeals remanded to the trial court for the trial court to issue a written opinion of reasons for denying the JNOV motions, as required by G.S. 1D-50 (and the *Scarborough* opinion (N.C. 2009)). Prior to the remand, the superior court judge retired. Another superior court judge then took the matter up on remand and issued an opinion pursuant to G.S. 1D-50 based on the evidence that had been presented in the 2008 trial. The Court of Appeals held that, pursuant to Rule 63, the second judge was authorized to act as a substitute for the retired judge in this matter and to issue the 1D-50 opinion.

Civil contempt; waiver of objection

Moss v. Moss, 730 S.E.2d 203 (N.C. App. Aug. 7, 2012). The trial court erred in allocating the burden of proof to a defendant where the contempt notice had been initiated by the motion of an aggrieved party (rather than by an authorized judicial official). The defendant waived her right to challenge the procedural defect on appeal, however, because she did not object to the misallocated burden of proof at the contempt hearing.

II. TORTS, UDTPA, AND IMMUNITY

Sovereign immunity; "governmental" vs. "proprietary"

Estate of Williams v. Pasquotank Cty Parks & Rec. Dep't., __ S.E.2d __ (**N.C.** Aug. 24, 2012). Mr. Williams drowned in the "Swimming Hole" at a public park, Fun Junktion, owned by the Pasquotank County and operated by its Parks & Recreation Department. The trial court denied the County's motion to dismiss the estate's negligence action on the basis of governmental immunity, concluding that because the County collected a fee for use of "Fun Junktion" and the "Swimming Hole," it was providing a service a private entity could provide – thus it was engaged in a proprietary function not immune from action. The Court of Appeals affirmed unanimously.

The Supreme Court, "restat[ing] its jurisprudence of governmental immunity, remanded. The court concluded that the "threshold inquiry in determining whether a function is proprietary or governmental is whether, and to what degree, the legislature has addressed the issue." (In this case, the question is the extent to which G.S. 160A-351 provides that the specific operation of the swimming facility in this type of park is governmental.) The court then offered "guiding principles" for making the threshold inquiry: (1) Where the legislature has not directly resolved the question, the activity is necessarily governmental when it can only be provided by a governmental agency or instrumentality; (2) When a particular service can be performed both publicly and privately, a number of additional factors (none dispositive) are relevant: whether the service is traditional provided by the government; whether a substantial fee is charged; and whether the fee does more than cover operating costs. The court then noted that these distinctions are fluid with the passage of time, cautioned against over-reliance on any one of them, and emphasized that each analysis is fact-intensive. In remanding, the court did not express an opinion as to whether Pasquotank County would ultimately be entitled to immunity in this case.

See also *Horne v. Town of Blowing Rock*, __ S.E.2d __ (N.C. App. October 2, 2012), in which the Court of Appeals remanded a question of park-operation immunity so the parties could further develop trial court record regarding the factors stated in *Williams*.

Public official immunity; definition of "malice"

Wilcox v. City of Asheville, 730 S.E.2d 226 (N.C. App. Aug. 7, 2012). Plaintiff was the passenger in a car driven by the subject of a police pursuit. Plaintiff was shot by police officers as they fired at the car in an attempt to stop it. During the pursuit, the car was hit by 16 bullets and Plaintiff was hit by two bullets. The question for appeal was whether Plaintiff's suit against the three officers in their *individual* capacities should have been dismissed on grounds of public official immunity for lack of evidence of malice. The court stated that proof of "malice" requires showing that the act was done (1) wantonly; (2) contrary to the actor's duty; and (3) with intent to be injurious to another. In a lengthy analysis, the court held that proving "intent to injure" requires "at least that the officer's actions were so reckless or so manifestly indifferent to the consequences…as to justify a finding of willfulness and wantonness equivalent in spirit to an actual intent." Thus, while proof of actual intent is not required, mere reckless indifference is not enough. Applying this standard, the court held that the officers' actions in firing multiple rounds of bullets at the car raised a question of fact as to "malice," and the officers' motions to dismiss were therefore properly denied.

Duty to prevent harm by third person

Bridges v. Parrish, 731 S.E.2d 262 (N.C. App. Aug. 21, 2012)(with dissent as to part of holding).

Plaintiff was injured when her long-time, 52-year-old boyfriend, Bernie, took his parents' gun, drove his parents' truck to her place of work, and shot her in the abdomen. Plaintiff sued the parents for negligence, and the trial court dismissed pursuant to Rule 12(b)(6). Bernie had been charged with many crimes in his life, some involving drugs, weapons, and violence toward women. For 10 years prior to the shooting, his parents had provided him a place to live in their apartment complex and gave him money and support. The parents never told Plaintiff about Bernie's criminal history and assured her that he was no threat. Plaintiff alleged that the parents owed her a duty of care because they (1) they engaged in an active course of conduct creating a foreseeable risk of harm to Plaintiff; (2) negligently failed to secure their gun from Bernie; and (3) negligently entrusted Bernie with the gun. The Court of Appeals rejected the first theory because there was an inadequate "nexus of foreseeability" between the parents sheltering Bernie and Bernie shooting Plaintiff. The court rejected the negligent storage claim as an unrecognized claim in North Carolina. The court rejected the negligent entrustment claim on grounds that the complaint did not allege that the parents entrusted the "use" of the gun to Bernie, nor that they gave Bernie express permission to use the gun (awareness that he possessed it was not enough). The court thus affirmed the dismissal of Plaintiff's claims. (The dissenting judge disagreed that Plaintiff has failed to state a cause of action for negligent storage of a firearm.)

Duty to prevent harm by third person

Scadden v. Holt, __ S.E.2d __ (N.C. App. Sept. 18, 2012). Plaintiff deputy sheriff responded to a dispatch call to assist emergency responders with a combative patient. The patient was loaded on a stretcher into an ambulance, and Plaintiff accompanied defendant Holt, an EMS attendant, in the ambulance. While Plaintiff handcuffed the patient to the stretcher, the patient attempted to kick Plaintiff, resulting in an injury to Plaintiff's lower back. Plaintiff sued Holt for negligence in failing to restrain the patient's legs to the stretcher. The trial court dismissed the complaint, finding that Holt owed no legal duty to Plaintiff to control the patient. Affirming the trial court, the Court of Appeals stated that "in general, there is neither a duty to control the actions of a third party, nor to protect another from a third party," except when there is a special relationship between the defendant and the third party. Such a special relationship arises when (1) defendant knows or should know of the third person's violent tendencies; and (2) defendant has the ability and opportunity to control the third person at the time of the act. The "ability and opportunity to control" must be more than physical ability; it must rise to the level of legal right to control. In this case, the court held that Holt had "no legal right to mandate his patient's behavior", and thus had no special relationship with the patient giving rise to a legal duty to protect Plaintiff.

Premises Liability

Bryson v. Coastal Plain League, LLC, 729 S.E.2d 107 (N.C. App. July 17, 2012). While waiting for a Gaston Grizzlies baseball game to begin, Plaintiff, who was standing in the baseball park's "beer garden" area, was struck and injured by a wild pitch thrown during warm-up. Plaintiff sued the park operators for negligence. The trial court granted summary judgment for the operators, and the Court of Appeals affirmed. The court, citing existing holdings, stated that operators "are held to have discharged their full duty to spectators in safeguarding them from…thrown or batted balls by providing adequately screened seats for patrons who desire them, and leaving the patrons their choice between such screened seats and those unscreened." The screened seats need only be "sufficient in number to accommodate as many patrons as may reasonably be expected to call for them on ordinary occasions."

Chapter 75-1.1; substantial aggravating circumstances

SunTrust Bank v. Bryant/Sutphin Props., LLC, __ S.E.2d __ (N.C. App. Sept. 18, 2012). Plaintiff's unfair and deceptive trade practices claim was based on "substantial aggravating circumstances" related to a breach of contract. The verdict sheet presented interrogatories regarding breach of contract, followed by interrogatories attendant to the alleged aggravating circumstances. The jury answered "no" to the questions of breach, but "yes" so some of the special interrogatories. Based on these responses, the trial court found a violation of Chapter 75 and trebled the damages award. The Court of Appeals reversed, holding that no Chapter 75 liability can be premised on "substantial aggravating circumstances" related to a breach of contract where the jury has concluded there is no breach of contract.

Chapter 75-1.1; meaning of "commerce"

Green v. Freeman, __ S.E.2d __ (N.C. App. Sept. 4, 2012). Individual plaintiffs brought a Chapter 75 unfair trade practices claim against officers and directors of a company to whom Plaintiffs had loaned money and otherwise contributed funds as an investment in the company's activities. The court concluded that the trial court properly dismissed the claim as not falling within the meaning of "commerce" as required by Chapter 75. The court stated that raising capital is not a business activity contemplated within the Act, and "the Act is not focused on the internal conduct of individuals within a single market participant, that is, within a single business. To the contrary, [its] provisions apply to interactions between market participants." (Note: This case also presented a lengthy breach of fiduciary duty analysis, which was the subject of a dissent. Further reporting will be forthcoming after Supreme Court disposition.)

Contributory negligence

Thorpe v. TJM Ocean Isle Partners, LLC, 729 S.E.2d 724 (N.C. App. Aug. 7, 2012). A subcontractor was hired to construct a pier. During the construction, he was using a drill near the waterline. He connected the drill to an outlet on the construction site. When a boat passed by creating a large wake, the water rose to the level of the drill, electrocuting the subcontractor and causing his death. The subcontractor's estate sued the property owners and others for negligence because the outlet had not been equipped with a ground fault circuit interrupter (GCFI), which would have stopped the flow of electricity from the drill. Affirming the trial court, the Court of Appeals held that, because there was uncontroverted evidence that the subcontractor knew that the outlet was not GCFI-protected, and opted to proceed with the work anyway, he was contributorily negligent as a matter of law.

Completed and accepted work doctrine

Lamb v. D.S. Duggins Welding, Inc., __ S.E.2d __ (N.C. App. Aug. 7, 2012). A contractor building a library hired a subcontractor to install a perimeter safety cable. At the end of the installation, the subcontractor secured and clamped the safety cable around a column. Some time after the subcontractor completed its work, employees of the contractor removed the column to which the cable was attached and secured the safety cable to another structure. Later, while one of the contractor's employees was performing a safety check, the cable came loose, causing him to fall two floors. The employee sued the subcontractor. The Court of Appeals held that the "completed and accepted work doctrine" operated to foreclose any liability of the subcontractor. Because the condition of the cable had been altered by the contractor after the subcontractor completed its work and after the contractor had accepted that work, the subcontractor could not be liable to a third party for injuries. An independent contractor is "not liable when…the injury is not due to the condition in which he left the work."

III. CONTRACTS AND INSURANCE

Waiver of arbitration by conducting discovery

HCW Retirement and Financial Svcs, Inc. v. HCW Employee Benefit Svcs, LLC, 731 S.E.2d 181 (N.C. App. Aug. 7, 2012). Trial court properly denied defendants' motion to compel arbitration of certain claims after defendants conducted discovery related to those claims that would not have been available in the arbitration. The fact that defendants had deposed Plaintiff's representative for over one hour regarding the matters to be arbitrated, causing Plaintiff to incur "expense in connection" with the relevant claims, was adequate evidence upon which to base a finding of waiver of Defendant's right to arbitrate.

Chapter 75-1.1; substantial aggravating circumstances

SunTrust Bank v. Bryant/Sutphin Props., LLC, __ S.E.2d __ (N.C. App. Sept. 18, 2012). Plaintiff's unfair and deceptive trade practices claim was based on "substantial aggravating circumstances" related to a breach of contract. The verdict sheet presented interrogatories regarding breach of contract, followed by interrogatories attendant to the alleged aggravating circumstances. The jury answered "no" to the questions of breach, but "yes" so some of the special interrogatories. Based on these responses, the trial court found a violation of Chapter 75 and trebled the damages award. The Court of Appeals reversed, holding that no Chapter 75 liability can be premised on "substantial aggravating circumstances" related to a breach of contract where the jury has concluded there is no breach of contract.

Contract with municipality; pre-audit certificate; unjust enrichment

M Series Rebuild, LLC v. Town of Mount Pleasant, 730 S.E.2d 254 (N.C. App. Aug. 7, 2012). Plaintiff made an agreement with a town fire department to repair a fire truck. After the fire department refused to pay the invoice, Plaintiff sued for breach of contract and unjust enrichment. The trial court dismissed the claims on the basis that the agreement was not accompanied by a signed pre-audit certificate required by G.S. 159-28(a) to contractually bind a municipality: without a valid certificate, there is no valid contract, and without a valid contract, the town does not waive its sovereign immunity. Plaintiff argued on appeal that even if the contract claim was properly dismissed, the unjust enrichment claim should not have been. The Court of Appeals rejected that argument, stating that "we decline 'to imply a contract in law in derogation of sovereign immunity to allow a party to recover under a theory of' unjust enrichment." Thus the court affirmed the dismissal of the complaint.

Contract for purchase of home; representations of agent

Manecke v. Kurtz, 731 S.E.2d 217 (N.C. App. Aug. 21, 2012). During the negotiations for the purchase and sale of a Charlotte residence, after receiving a counteroffer, buyers' agent emailed sellers' agent stating that the buyers "are really excited about their new home and agree to the counter offer." He later also emailed a copy of the earnest money check, and stated that he would deliver it to sellers' agent on Monday morning. When Monday arrived, buyers informed the agent that they were not going to sign a contract (the counteroffer), and asked him to tear up the earnest money check. Sellers then sued buyers for specific performance. The Court of Appeals held that evidence was insufficient to demonstrate that buyers' agent had the special, actual authority necessary to bind buyers to a contract. And, in any event, the contract had not been actually signed or initialed by buyers, thus it did not meet the requirement of G.S. § 22-2, providing that contracts for the sale of land are "void unless…put in writing and signed by the party to be charged therewith."

Adequate consideration for contract modification

NRC Golf Course, LLC v. JMR Golf, LLC, 731 S.E.2d 474 (N.C. App. Aug. 21, 2012). The price term in an option to purchase contract was modified during the period of the option so the lessee could achieve certain tax advantages. The court concluded that, because the lessor was already obligated to make payments during the term of the option, those payments did not constitute adequate consideration for the modification, and the modification was therefore unenforceable. By extension, a later revision of the modification not supported by additional consideration was likewise unenforceable.

Insurance contract; appraisal process

Patel v. Scottsdale Ins. Co., 728 S.E.2d 394 (N.C. App. July 3, 2012). Plaintiff and his insurer disagreed about the value of the property Plaintiff had lost in a fire. At summary judgment, the defendant insurer argued that the policy provisions required Plaintiff to demand and complete an appraisal process before initiating litigation. The trial court agreed and granted summary judgment for the insurer. The Court of Appeals agreed that the appraisal process was a condition precedent to Plaintiff's right to file the action, but reversed and remanded the summary judgment order, holding that the trial court should instead have stayed the proceedings, ordered the parties to complete the appraisal process, and then resumed the matter as appropriate once that condition had been met.

Uninsured motorist coverage

Prouse v. Bituminous Casualty Corp., 730 S.E.2d 239 (N.C. App. Aug. 7, 2012) (with dissent). Plaintiff was injured when his truck was hit by a tire that had fallen from another moving vehicle. He sued his insurers under the uninsured motorist coverage provisions of his policies and G.S. Chapter 20-279.21. The Court of Appeals affirmed the trial court's dismissal of his claims, holding that the "hit-and-run" driver coverage statute has been interpreted to require "physical contact between" two vehicles, and the fallen tire fails to satisfy that requirement. The dissenting judge stated, "I interpret plaintiff's complaint as being consistent with our caselaw in alleging an indirect collision with a hit-and-run vehicle." (Further reporting will be provided upon Supreme Court disposition.)

IV. ESTATES AND GUARDIANSHIP

Executor's standing to appeal

Bigger v. Arnold, 728 S.E.2d 437 (N.C. App. July 17, 2012). In a declaratory judgment action brought by an estate executor, the trial court determined that the contents of a brokerage account belonged solely to the decedent's wife. The executor, who was not an estate beneficiary, appealed the trial court's determination. The Court of Appeals dismissed, holding that the executor was not an aggrieved party, and thus had no standing to assert the appeal. The trial court's order only affected the distribution rights of the beneficiaries, not any rights of the executor himself.

Executor's authority under will

RL Regi North Carolina, LLC v. Estate of Moser, 739 S.E.2d 841 (N.C. App. Aug. 21, 2012). Decedent left a large estate, and his will appointed two co-executors. The decedent had been the sole shareholder of a real estate development company (the "Company") that owned several tracts of land to be developed. After their appointment, the co-executors entered into contracts to develop some of the tracts. As part of the development, the co-executors negotiated a $3 million loan on behalf of the Company from Regions Bank and made the estate a guarantor of the loan. When the Company later defaulted on the loan, Regions Bank's successor-in-interest filed an action to enforce the guaranty against the estate. Analyzing the provisions of the decedent's will (and related trust agreements), the court concluded that the co-executors were not given authority to bind the estate to a guaranty, but were instead tasked with settling the affairs of the estate as expeditiously as reasonably possible. The lender therefore could not enforce the guaranty against the estate, and summary judgment for the estate was properly granted.

Guardian's authority to pursue action

White v. Mills Charitable Trust, 730 S.E.2d 213 (N.C. App. Aug. 7, 2012). The guardian of an estate (appointed under G.S. Chapter 35A) pursued an action on behalf of the ward's estate after the ward's death. The trial court entered an order denying the guardian's motion for summary judgment and granting the opposing party's motion. An estate collector was thereafter appointed under Chapter 28A to continue the prosecution of the underlying action on behalf of the ward's estate. The collector appealed the grant of summary judgment against the ward's estate, arguing that the guardian of the estate did not have authority to sustain the action on the ward's behalf after the ward's death. The court agreed, citing G.S. 35A-1295(a), which provides that, "every guardianship shall be terminated and all powers and duties of the guardian…shall cease when the ward…dies." The court therefore vacated the summary judgment order and remanded for consideration of issues raised by the estate collector.

V. REAL AND PERSONAL PROPERTY; LAND USE; FORECLOSURES

County's authority to adopt APFO

Lanvale Properties, LLC v. County of Cabarrus, 731 S.E.2d 800 (**N.C.** Aug. 24, 2012). Cabarrus County was not impliedly authorized to enact an adequate public facilities ordinance (APFO) pursuant to the enabling statutes in G.S. Chapter 153A that allow the County to enact zoning ordinances, nor was it authorized to do so pursuant to a 2004 Session Law. The APFO—which effectively conditioned approval of new residential construction projects on the developers' payment of a fee to subsidize new school construction—was not sufficiently related to "zoning." The APFO did not sufficiently pertain to the County's ability to divide its land into specific uses. (There was a dissent by Hudson, J.)

Standing to contest rezoning; authority to award attorney fees in Rule 60 advisory opinion

Morgan v. Nash Cty, 731 S.E.2d 228 (N.C. App. Aug. 21, 2012). Nash County rezoned an area of land as "General Industrial" in order to allow for its use as a poultry processing facility for Sanderson Farms. In order to support such a facility on the rezoned lots, the purchaser also acquired several separate tracts to be used as wastewater sprayfields. The sprayfield lots were situated in the City of Wilson. Wilson brought an action to challenge the rezoning on the basis that the sprayfields would threaten the City's water treatment facilities and water quality. The court held that the City did not have standing to challenge the rezoning. The City's arguments pertained to the sprayfield lots—which were already zoned to allow their use as sprayfields—and not the land that the County had rezoned for the processing facility. Therefore, "the land use the City seeks to prevent was not made possible by the zoning amendment it seeks to reverse."

During the appeal, the trial court also issued an advisory opinion on the City's Rule 60 motion, concluding that it would rule in favor of the County on that motion. In conjunction with the opinion, the trial court awarded the County over $25 thousand dollars in attorney fees on grounds that the city did not raise a justiciable issue in its Rule 60 motion. The Court of Appeals vacated the award of fees, holding that the trial court was divested of jurisdiction to award attorney fees once the City gave notice of the underlying appeal.

Bailment Law

Johnson v. North Carolina Dep't of Cultural Resources, __ S.E.2d __ (N.C. App. October 2, 2012). In 1910, Colonel Charles E. Johnson loaned the State Archives a valuable set of manuscripts now known as the "Charles E. Johnson Collection." Johnson made the loan "with the right of recall and repossession any time I see fit." Neither he nor his surviving wife ever exercised the right to recall. In 2008, a set of Johnson's descendants contacted the State Archives to reclaim the documents, but the State refused their claim. In a declaratory judgment, the trial court found in favor of the descendants. The Court of Appeals affirmed, rejecting the State's argument that the bailment converted to a gift upon Johnson's death. The court stated that, "the well-established law in North Carolina is that when property is held pursuant to a bailment, revocable at any time by the bailor[,]…no length of possession, under such a bailment, can make the property the property of the bailee." The court further held that Johnson's right to revoke the bailment was fully devisable. In addition, "for transfers of property pursuant to a bailment, the statute of limitations will not begin to run until the bailor demands the return of the bailed property and the bailee refuses to return it." Thus Plaintiffs, who demanded the property in 2008 and filed suit in 2010, were well within the limitations period.

Foreclosure; compulsory counterclaim

In re Draffen, 731 S.E.2d 435 (N.C. App. Aug. 7, 2012). A debtor sued lender (and others) in federal court for fraud and other causes of action related to a real estate loan. Meanwhile, with respect to the same loan, the lender initiated foreclosure proceedings against the debtor before the clerk of superior court. The debtor argued that the foreclosure proceeding should have been brought by the lender as a compulsory counterclaim in the federal court action. The Court of Appeals disagreed, stating that if the lender were required to pursue its foreclosure action in the federal court under Federal Rule of Civil Procedure 13, the lender's statutory right to the expedited foreclosure procedure in G.S. Chapter 45 would be impermissibly lost.

Ann M. Anderson
UNC School of Government