Civil Case Summaries: June 18, 2013–October 15, 2013
North Carolina Conference of Superior Court Judges
2013 Fall Conference

CIVIL PROCEDURE, JURISDICTION, & ATTORNEY FEES

Costs; assessment after dismissal of claims
Green v. Kearney, __ S.E.2d __ (**N.C.** October 4, 2013) (affirming *per curiam* the decision of a divided panel of the COA at 739 S.E.2d 156). After entry of final judgment resolving all issues in a multi-plaintiff case, the trial court assessed costs against all plaintiffs. Two plaintiffs against whom summary judgment had been issued much earlier in the action appealed, arguing that they should not be responsible for costs incurred by defendants after their own claims had been disposed of. The COA affirmed the award of costs against them, holding that the language of Rule 54 provides that a plaintiff against whom judgment has been entered is still a party to an action until final judgment is entered resolving all issues in a case (in the absence of a certification of that plaintiff's claims for immediate appeal).

Rules 52 and 59; applicability to appeals
Myers Park Homeowners Assoc. v. City of Charlotte, 747 S.E.2d 338 (N.C. App. 2013). Homeowners association sought review by the superior court in the nature of certiorari of a zoning board of adjustment decision. The petitioners sought an amendment of the trial court's decision as well as written findings of fact and conclusions of law, which the trial court declined to give. The COA affirmed, holding that Rules 52 and 59 are inapplicable where the superior court "functions as an appellate court rather than a trier of fact."

Foreign judgment amount
Lumbermans Fin., LLC v. Poccia, 743 S.E.2d 677 (N.C. App. 2013). Plaintiff attempted to enforce a 2004 foreign consent judgment (Michigan) in North Carolina which ordered that plaintiff "shall have a judgment against [defendant] on its claim in the amount of $250,000.00 plus statutory interest." Plaintiff also argued, however, that the actual judgment amount should be higher based on the parties' stipulation that they submitted to the Michigan judge in connection with the original judgment. The trial court agreed, and awarded plaintiff $280,368.55 plus interest. The COA reversed, noting that "the 2004 Consent Judgment is not a contract but a final judgment of [the foreign court]" and that the stipulation "was not incorporated into the consent judgment" nor "filed with the consent judgment." Finding the 2004 judgment's language to be unambiguous, the COA remanded for entry of judgment no greater than $250,000.00 plus post-judgment interest.

Attorney Fees; G.S. 6-19.1
Izydore v. City of Durham., 739 S.E.2d 863 (N.C. App. 2013). Prevailing party in action challenging a

city-county planning department's decision was not entitled to recover attorney fees pursuant to G.S. 6-19.1, which allows attorney fees in certain matters brought by or against the State or related to "State action." The City of Durham is not an "agency" of the state, but is instead a local unit of government.

Attorney fees under Ch. 75; findings of fact

McKinnon v. CV Industries, 745 S.E.2d 343 (N.C. App. 2013). Trial court's award of attorney fees pursuant to unfair and deceptive trade practices act (authorized by G.S. 75-16.1) was remanded for a specific finding regarding whether plaintiff knew or should have known the action was frivolous or malicious. The order contained evidentiary findings regarding the weakness of the Chapter 75 claim, but lacked the "ultimate finding" regarding plaintiff's knowledge. The order was also remanded for specific findings regarding the amount of the award, including attorney skill, customary fees, and time and labor expended, without which the appellate court could not "determine the reasonableness of the trial court's award."

Venue; waiver of defense

LendingTree, LLC v. Anderson, 747 S.E.2d 292 (N.C. App. 2013). Defendant waived his objection to venue (pursuant to a mandatory forum selection clause) by making an ambiguous initial objection to venue, participating in discovery after filing his objection to venue, and delaying for over four years (much of which was during a period in which the action was stayed) to notice his objection for hearing.

Case Update: The Supreme Court has granted discretionary review of the following case reported at the June 2013 conference:

Rule 60(b); enforcement of foreign judgment

DOCRX, Inc. v. EMI Services of NC, LLC, 738 S.E.2d 199 (N.C. App. 2013). Plaintiff attempted to enforce a foreign judgment in North Carolina. Defendant asserted that plaintiff obtained the judgment by fraud and filed a Rule 60(b) motion to that effect. The trial court determined that the foreign judgment was procured by intrinsic fraud, misrepresentation, and misconduct, and therefore denied plaintiff's motion to enforce the judgment. On appeal, the COA analyzed – largely as a matter of first impression – to what extent the Full Faith and Credit Clause of the U.S. Constitution limits the use of Rule 60(b) as a defense against foreign judgments. The UEFJA statute provides that, "a [foreign] judgment…has the same effect and is subject to the same defenses as a judgment of this state[.]" The Full Faith and Credit Clause, however, limits the grounds upon which a foreign judgment can be challenged, and the COA concluded that the use of Rule 60(b) against a foreign judgment is limited to the following grounds: "(1) the judgment is based upon extrinsic fraud; (2) the judgment is void; and (3) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment shall have prospective application." Thus, while it was a "thorough and reasoned" decision for the trial court to allow defendant to seek relief under Rule 60 for "intrinsic fraud," such relief was outside constitutional limitations and must be reversed.

TORTS, UDTPA, AND IMMUNITY

Governmental immunity; governmental vs. proprietary function

Bynum v. Wilson Cty, 746 S.E.2d 296 (N.C. App. 2013). Plaintiff brought negligence-based claims arising from decedent's fall inside an office building leased by Wilson County. The county sought summary judgment arguing that the operation of a county office building is a governmental function and, thus, governmental immunity should bar the claims against it. The trial court denied the county's motion. The COA unanimously held that governmental immunity did not preclude the claims against the county because (1) the decedent was in the building to pay his water bill and (2) the operation of a public water system for private consumption is a proprietary function. The court acknowledged that its reasoning could lead to "potentially troubling results, such as making liability . . . contingent upon whether a plaintiff injured in a fall at a county-owned office building used for multiple purposes was on the premises [to] pay[] a bill for water service or [to] seek[] the issuance of a building permit." (The issuance of a building permit is a governmental function.) ***Case update: On October 4, the North Carolina Supreme Court granted discretionary review of this case.***

Perjury; no civil cause of action

Gilmore v. Gilmore, __ S.E.2d __ (N.C. App. Sep. 3, 2013). Affirming dismissal of fraud and civil conspiracy claims, each of which centered on allegations that defendants "created a fraudulent will and attempted to submit it for probate by preparing false affidavits and testifying falsely as to its authenticity." The court restated the "well-established" law in North Carolina, established by *Godette v. Gaskill*, 151 N.C. 52 (1909) and its progeny, that a plaintiff cannot sustain an action based on allegations of perjury or subornation of perjury "regardless of how a plaintiff has denominated his claim."

Damage to real property claims; statute of repose

Christie v. Hartley Constr., __ S.E.2d __ (N.C. App. July 16, 2013) (with dissent). Plaintiffs sued to recover damages to their home based on express 20-year warranty provided by manufacturer of exterior finish system. Trial court granted summary judgment in favor of manufacturer based on G.S. 1-50(a)(5), a statute of repose providing that

> "[n]o action to recover damages based upon or arising out of the defective or unsafe condition of an improvement to real property shall be brought more than six years from the later of the specific last act or omission of the defendant giving rise to the cause of action or substantial completion of the improvement."

The COA affirmed the grant of summary judgment, holding that plaintiffs were required to bring their claims – including the breach of express warranty claim—within the six-year statute of repose, even where the manufacturer had provided an express 20-year warranty. (Hunter, Robert N., dissented as to the breach of express warranty claim). *See also Hart v. Louisiana-Pacific Corp.* (E.D.N.C., Sept. 3, 2013) (applying the holding in *Christie* to bar an action and decertify a class in a warranty action that had previously been set for trial in August 2013).

Medical malpractice; Rule 9(j) and "res ipsa loquitur"

Robinson v. Duke Univ., 747 S.E.2d 321 (N.C. App. 2013). During a subtotal abdominal colectomy, a surgical procedure to remove a portion of the lower intestine and reattach the intestine to the rectum using a surgical stapler, the surgeon mistakenly misconnected the intestine to the vagina. (The mistake was

discovered and the procedure was corrected the following day, but the plaintiff later complained of difficulty speaking, erratic hand movements, blurry vision, and was eventually diagnosed with psychiatric conversion disorder.) Plaintiff later sued multiple physicians and Duke for harm related to the colectomy. The trial court granted summary judgment to the doctors and hospital due to plaintiff's failure to include the Rule 9(j)(1) certification of review by a physician reasonably expected to qualify as an expert witness. The COA reversed, holding after a lengthy analysis that plaintiff could rely on the doctrine of *res ipsa loquitur* pursuant to Rule 9(j)(3). The court stated that, "although [plaintiff] underwent a colectomy procedure, an understanding of the requisite techniques employed during the procedure is not required for a layman to determine that [her] small intestine should not have been connected to her vagina during the procedure and that such an anatomical result following surgery does not normally occur in the absence of negligence."

Legal malpractice; statute of limitations

Hackos v. Goodman, 745 S.E.2d 336 (N.C. App. 2013). Plaintiff hired counsel to pursue her injury claim. Counsel filed the claim in the wrong venue, resulting in the running of the statute of limitations. Plaintiff then hired defendants to pursue a legal malpractice claim against counsel, but defendants failed to respond to or appear in court in opposition to his summary judgment motion, and summary judgment was entered against plaintiff. In their attempt to appeal on plaintiff's behalf, defendants committed (and were sanctioned for) gross violations of the appellate rules, and part of plaintiff's appeal was therefore dismissed. Plaintiff then sued defendants for legal malpractice (the present case). The trial court dismissed her malpractice claim based on the three year statute of limitations. The COA affirmed: because the last clearly alleged act of negligence was the sanctionable handling of the appeal, which occurred more than three years before the present action, the plaintiff could not maintain her claim. The court noted, however, that, "[w]e are not without sympathy for Plaintiff's position, particularly when the allegations of negligence concern the acts or omissions of professionals Plaintiff hired to represent her and protect her legal rights."

Premises liability

Malloy v. Preslar, 745 S.E.2d 352 (N.C. App. 2013). Plaintiff delivered feed for defendant Tyson to the farm owned by the co-defendants. During one delivery, plaintiff was stung repeatedly by hornets that were disturbed when he opened the designated delivery box. Plaintiff had a severe allergic reaction and suffered cardiac arrest and multiple seizures. Plaintiff sued Tyson for failure to warn him of the hazardous condition. The COA affirmed the dismissal of the complaint against Tyson, citing the holding of *Lampkin v. Housing Mgmt Resources, Inc.*, 725 S.E.2d 432 (2012), that, "a landowner's duty to keep property safe (1) does not extend to guarding against injuries caused by dangerous conditions located off of the landowner's property, and (2) coincides exactly with the extent of the landowner's control of his property." Thus, "any obligation Tyson had to keep its property safe ended where its ownership and control of its property ended. Tyson could not, under North Carolina law, be held liable for the [co-defendants'] alleged failure to maintain their property."

False imprisonment; assault and battery

Wilkerson v. Duke University, __ S.E.2d __ (N.C. App. Sept. 17, 2013). Plaintiff was an attendant at a Duke University valet parking lot when he and a Duke police officer were involved in a physical altercation over the officer's right to access the lot during a non-emergency. The trial court erred in granting summary judgment for the officer and Duke as to plaintiff's false imprisonment, assault and

battery, and negligent supervision claims because plaintiff sufficiently forecasted evidence of physical restraint, physical contact, and apprehension of physical contact to create genuine issues of material fact.

Age-based wrongful employment termination pursuant to G.S. § 143-422.2

Johnson v. Crossroads Ford, Inc., __ S.E.2d __ (N.C. App. Oct. 15, 2013). Trial court erred in granting summary judgment in favor of car dealership where former employee established a question of fact regarding whether he was terminated based on his age rather than for selling his personal vehicle on company time. The employee alleged (and produced an affidavit from a third party testifying) that employee was regularly subjected to derogatory, age-related comments by his boss and that his superiors were aware of and did not disapprove of the sale of his vehicle on company time. The trial court further erred in striking an affidavit of a third party served by plaintiff in opposition to summary judgment. Contrary to the trial court's order, the affidavit was timely served five days prior to the summary judgment hearing, and therefore was not "eleventh hour," and it was not contrary to the allegations in the complaint.

Unfair and deceptive trade practice; element of reliance

Bumpers v.Community Bank of Northern VA, 747 S.E.2d 220 (**N.C.** 2013) (with two separate dissents). In a case involving second mortgages on their real property, plaintiffs brought claims against lender pursuant to G.S. § 75-1.1 alleging that: (1) they paid a loan discount fee but did not receive a discount; and (2) the loan fees were excessive and unreasonable ("excessive pricing"). The trial court granted summary judgment for plaintiffs. The COA affirmed summary judgment for plaintiffs on the loan discount fee claim, but reversed on the excessive pricing claim, determining there was a question of fact. The Supreme Court reversed and remanded. First, the court determined that the loan discount claim was mischaracterized as a "systematic overcharging" claim, when it was in fact a misrepresentation claim. As such, plaintiffs were required to demonstrate detrimental reliance (*i.e.*, both actual and reasonable reliance), and thus summary judgment for plaintiffs was improper. (The court also found there to be a question of fact as to whether plaintiffs had received a discounted fee.) Second, the court found that the excessive pricing claim was not recognized under G.S. 75-1.1. The court explained that there may be circumstances (other than those in G.S. 75-38) when an excessive price would constitute a Chapter 75-1.1 violation, but not in this case. Instead, "Plaintiffs entered into their loan transactions freely and without any compulsion" and "in most cases, there is nothing unfair or deceptive about freely entering a transaction on the open market."

Unfair debt collection practice; allegation of actual damages

Simmons v. Kross Realty, 746 S.E.2d 311 (N.C. App. 2013). Where debtor sued collection agency for unfair debt collection practices, she was required to allege facts constituting actual damages in order to sustain a civil action under G.S. 58-70-130(a), but she was *not* required to allege actual damages in order to maintain an action for the civil penalty provided by G.S. 58-70-130(b).

Attorney fees under Ch. 75; findings of fact

McKinnon v. CV Industries, 745 S.E.2d 343 (N.C. App. 2013). Trial court's award of attorney fees pursuant to unfair and deceptive trade practices act (authorized by G.S. 75-16.1) was remanded for a specific finding regarding whether plaintiff knew or should have known the action was frivolous or malicious. The order contained evidentiary findings regarding the weakness of the Chapter 75 claim, but lacked the "ultimate finding" regarding plaintiff's knowledge. The order was also remanded for specific

findings regarding the amount of the award, including attorney skill, customary fees, and time and labor expended, without which the appellate court could not "determine the reasonableness of the trial court's award."

CONTRACTS

Arbitration agreement; implied waiver of arbitration right

HCW Retirement and Fin. Svcs, LLC v. HCW Employee Ben. Svcs, LLC, 747 S.E.2d 236 (**N.C.** 2013). Holding that defendants who moved to compel arbitration did not impliedly waive their right to demand arbitration (reversing decision of the COA). The court noted that, in determining waiver,

> [W]e have identified several important points. First, this Court has held that a party implicitly waives its right to compel arbitration when it takes actions inconsistent with arbitration that result in prejudice to the opposing side. Second, the party opposing arbitration bears the burden of proving prejudice. Third, the use of judicial discovery procedures per se does not constitute prejudicial action; rather, the judicial discovery procedures employed must be unavailable in arbitration.

Following these principles, defendants did not waive their arbitration right when they (1) refused to respond to discovery while the motion to compel arbitration was pending and (2) deposed plaintiff's representative for one hour regarding the arbitrable claims (where such discovery would have been available in arbitration at the discretion of the arbitrator).

Franchise agreement; enforcement of non-competition clause

Outdoor Lighting Perspectives Franch., Inc. v. Harders, 747 S.E.2d 256 (N.C. App. 2013). Franchisor sued one of its franchisees for breach of franchise agreement and various business torts. Franchisor also sought a preliminary injunction prohibiting franchisee from operating any outdoor lighting business per the terms of the parties' post-termination non-competition clause. COA affirmed denial of injunction. The court held that the two separate geographical restraints – one preventing franchisee from operating an outdoor lighting business within a 100-mile buffer surrounding his former territory, and the second preventing him from operating a particular type of business within the territory assigned to any of franchisor's franchisees or affiliates – was overly broad in scope.

In making this determination, the court assessed whether non-competition clauses in the franchisor-franchisee context should be scrutinized more like employer-employee agreements or business sale agreements, and stated the following standard:

> As a result of the varying relevance of the factors typically deemed of utmost importance in the employer-employee and business sale contexts in the franchisor-franchisee context, we conclude that the ultimate issue which we must decide in resolving such disputes among franchisors and franchisees is the extent to which the non-competition provision contained in the franchise agreement is no more restrictive than is necessary to protect the legitimate interests of the franchisor, with the relevant factors to be considered in the making of this determination to include the reasonableness of the duration of the restriction, the reasonableness of the geographic scope of the restriction, and the extent to which the restriction is otherwise necessary to protect the legitimate interests of the franchisor.

Breach of express warranty claim; statute of repose

Christie v. Hartley Constr., __ S.E.2d __ (N.C. App. July 16, 2013) (with dissent). Plaintiffs sued to recover damages to their home based on express 20-year warranty provided by manufacturer of exterior

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Breach of contract; vagueness

Charlotte Motor Speedway, LLC v. County of Cabarrus, __ S.E.2d __ (N.C. App. 2013). In 2007, plaintiffs and Cabarrus County corresponded about various financial incentives the County hoped to offer plaintiffs to encourage construction of a racing dragway within Cabarrus County limits. Plaintiffs proceeded to build the dragway in 2008. In 2011, plaintiffs sued the County for breach of contract based on the terms of a November 2007 letter between the parties. The letter made various assertions of the County's "commitment" to finding $80,000,000 in infrastructure funding and other incentives and provided the County's intentions as to how to procure the funding. The trial court dismissed the breach of contract claim on its face, and the COA affirmed, holding that the November 2007 letter was void for indefiniteness: It did not require any obligation of or consideration by plaintiffs themselves; was unclear as to when the County was to provide the proposed funding; and contained language indicating that the parties would formalize a specific agreement at a later time. Because the November 2007 letter "does not evidence a meeting of the minds as to basic terms that would have been fundamental to the existence of a valid contract," the trial court properly dismissed the claim.

Contracts under seal; statute of limitations

Davis v. Woodlake Partners, LLC, __ S.E.2d __ (N.C. App. Oct. 15, 2013) (with dissent). The 10-year statute of limitations applicable to sealed instruments (G.S. § 1-47(2)) applied in a breach of contract action brought by purchasers who contracted with defendant for construction of a home. The COA majority determined that, even though the parties' "Infrastructure Agreement" and "Addendum" were separate documents from the Purchase Agreement and were not accompanied by seals, they were intended to be "attached and should be understood as addenda" to the Purchase Agreement, which was executed under seal "[SEAL]." (McGee, J., dissented).

LIENS, FORECLOSURE & CONDEMNATION

Claim of lien; "last furnishing"
Kemp v. Richmond Hills Residential Partners, LLC, __ S.E.2d __ (**N.C.** Oct. 4, 2013) (affirming per curiam the opinion of a divided COA panel at 737 S.E.2d 420). The trial court properly determined that plaintiff had filed its claim of lien within 120 days of the "last furnishing" of labor or materials. A letter from plaintiff to defendant that included a "status report" on outstanding or unresolved issues on the construction project, such as roadway improvements, driveway permits, and other issues, was properly considered for purposes of calculating the 120-day requirement.

Foreclosure; res judicata
In re Raynor, __ S.E.2d __ (N.C. App. Aug. 20, 2013). Debtors filed both an appeal of a Chapter 45 foreclosure order and a separate equitable action, pursuant to G.S. 45-21.34, to enjoin the foreclosure sale. In the injunction action, debtors asserted the bank's alleged failure to comply with certain provisions of the Home Affordable Modification Program (HAMP). Debtors removed the matter to federal court, but later dismissed the action based on a related federal ruling. Debtors then argued the same essential legal point in their appeal of the foreclosure order. The COA determined that, once the debtors dismissed their equitable claim with prejudice in the federal court, the "specific issue of whether the bank violated HAMP regulations…ha[d] been decided" and thus was *res judicata* in the foreclosure appeal.

Condemnation by local government; "public use" and "public benefit"
City of Asheville v. Resurgence Dev. Co., __ S.E.2d __ (N.C. App. Oct. 15, 2013). Trial court determined that the City's taking of a 435 square foot easement over defendant's property for purposes of creating a sewer easement and extending a sewer line to service 55 single-family affordable-housing residences on adjacent property (property owned by the City at the time of the taking) was for a public purpose and for the public benefit. The COA affirmed, determining that there was no evidence in the record that the "access to the sewer system will be somehow restricted to [the City], Habitat [for Humanity] or the initial residents on plaintiff's property" and that the public benefit of facilitating construction of affordable housing was paramount to any private benefit the City would garner from having the easement.

Inverse condemnation; regulatory taking; unity of title
Town of Midland v. Wayne, __ S.E.2d __ (N.C. App. Sept. 3, 2013). Where the Town took an easement over a portion of a large tract of land, the trial court found there had been a regulatory taking of the entire tract because the easements would prevent construction of the roads necessary to develop the tract pursuant to a town-approved plan to which the owner had a vested right. The COA reversed, holding that loss of the owner's ability to develop according to an existing plan – even one to which there was a vested right – did not amount to the denial of "all economically beneficial or productive use of [the] property," and thus did not support a finding of a regulatory taking.

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