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

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CIVIL PROCEDURE

Equitable estoppel of statute of limitations defense
Ussery v. BB&T (**NC** No. 277A13; Sept. 25, 2015). In this very fact-specific case, plaintiff argued that BB&T should be equitably estopped from raising a statute of limitations defense to tort claims that he filed more than six years after the relevant events. In short, plaintiff alleged that he incurred additional debt in reliance on BB&T's continued representations that he would soon be able to secure a government-backed loan to fund his business enterprise, and when it turned out that loan was unavailable, he was left holding the bag. He claimed that he did not bring suit within the statute of limitations due to the delay caused by BB&T's assurances. The Court of Appeals majority determined that the facts raised an inference that BB&T was equitably estopped from raising the defense. The Supreme Court reversed, determining that all the evidence showed that Plaintiff's actions in incurring additional debt and expenses were unrelated to any representations BB&T might have made, and thus he could not establish any basis for an equitable estoppel defense. BB&T was entitled to summary judgment in its favor.

Collateral estoppel; an issue determined under Federal Rule 12(b)(6) vs. NC Rule 12(b)(6)
Fox v. Johnson (COA15-206; Oct. 6, 2015). Plaintiffs first filed a number of federal and state claims against defendants in federal court. The federal court dismissed a number of the claims with prejudice under Federal Rule 12(b)(6). Plaintiffs later filed an action against defendants in North Carolina state court. Relevant to this appeal is the North Carolina trial judge's denial of a motion on the pleadings regarding the state law malicious prosecution claim. Defendants moved for judgment as to that claim, arguing that Plaintiffs were collaterally estopped from raising it after the federal court dismissed their malicious prosecution claim rooted in the Fourth Amendment—a claim that involved the same issue of proximate cause.

The Court of Appeals affirmed the trial judge's denial of Defendant's motion on the pleadings. The court reasoned that the federal court's dismissal order applied the federal standard for dismissal—the more stringent "plausibility test", and not the North Carolina standard for dismissal—a looser standard.

In short, "[t]he federal court's opinion simply did not consider or address the issue of whether Plaintiffs' pleadings sufficiently stated a claim to survive a motion to dismiss pursuant to the notice pleading requirements of North Carolina Rule 12(b)(6)." As a result, the doctrine of collateral estoppel did not apply to bar relitigation of the issue in North Carolina. Because the issue was not yet before it, the Court of Appeals expressed "no opinion about whether Plaintiff's malicious prosecution claims were sufficiently pled under North Carolina Rule 12(b)(6)."

Attorney fee award as part of class action settlement; application of the "American Rule"
Ehrenhaus v. Baker (COA14-1201; Sept. 15, 2015). The parties to the class action over the merger between Wachovia and Wells Fargo reached a settlement in late 2008. The trial court (Business Court) entered an order approving the settlement and awarding class counsel over $900,000 in attorney fees. The Court of Appeals in "Ehrenhaus I" affirmed the order approving the settlement but remanded for further findings of fact and conclusions of law regarding reasonableness of attorney fees. On remand, the trial court re-heard the matter of attorney fees and entered an order with findings of fact and conclusions of law awarding class counsel $1,056,067.57 in fees. In the present appeal, the objectors to the settlement argued that there was no statutory authority for the attorney fee award. The Court of Appeals affirmed the award, explaining that the "American Rule"—which prevents attorney-fee-shifting in the absence of statutory authority or application of the common-fund doctrine—does not apply where the fee award is authorized as part of the parties' *voluntary settlement* of the litigation. Here, Wachovia agreed in the settlement to pay up to $1.975 million to class counsel. The trial court was therefore empowered to determine reasonable fees up to that amount in the context of the class-action fairness hearing. Because the trial court made detailed findings sufficiently supporting the amount of fees, the award was affirmed.

In a separate (later consolidated) appeal (COA14-1083), the class action plaintiff appealed a separate aspect of the fee award, but his appeal was properly dismissed by the trial court because, instead of being timely filed with the clerk of court, it was filed through the Business Court electronic filing system.

***Quasi in rem* jurisdiction; personal jurisdiction over out-of-state auto financing company**
Credit Union Auto Buying Service, Inc. v. Burkshire Properties Grp Corp. (COA15-187; Sept. 15, 2015). Plaintiff, a North Carolina non-profit in Winston-Salem, purchased a group of vehicles from Defendant, a New York corporation operating in New York. Defendant delivered the vehicles to Plaintiff in North Carolina but failed to provide Plaintiff the certificates of title for 46 of the vehicles. Appellant (a separate New York defendant) had financed Defendant's purchase of the vehicles at a New York auction before Defendant's subsequent sale of the vehicles to Plaintiff. Appellant claimed a security interest in the vehicles and maintained the certificates of title as collateral in New York. After Plaintiff sued Defendant, Appellant, and others involved in the transactions, Appellant moved to dismiss for lack of personal jurisdiction due to insufficient minimum contacts. The trial court denied the motion and this appeal followed. The Court of Appeals affirmed. As an initial matter, the trial court properly exercised *quasi in rem* jurisdiction over the matter under G.S. 1-75.8 because the subject matter of the action was personal property in this State and the Appellant claimed an interest in that property. The Appellant had sufficient minimum contacts with North Carolina related to this controversy because the vehicles were located in North Carolina; Appellant was aware of the vehicles' destination at the time it financed Defendant's purchase of the vehicles; and Appellant agreed to finance the purchase knowing that any challenge to its security interest would likely occur in North Carolina.

Jurisdiction over motion while related appeal pending; appeal of injunction (substantial right)
A&D Environmental Services, Inc. v. Miller (COA14-1397; Sept. 15, 2015). In an earlier appeal, Defendant argued that the trial court improperly denied his Rule 12(b)(3) motion to dismiss for improper venue. Plaintiff had filed the action in Guilford County, but Defendant argued that the parties' non-compete agreement required the dispute to be filed in Mecklenburg. (Later, in April 2015, the Court of Appeals affirmed the denial of the venue motion.) While that appeal was pending, the trial court entered a preliminary injunction against Defendant. In the context of the injunction hearing, Defendant argued again that venue in Guilford County was improper, but this time for a different reason: Defendant argued that he now had reason to believe that Plaintiff's principal place of business was not, in fact, Guilford County. The trial court declined to consider the venue argument because the matter of venue was pending before the Court of Appeals.

In the present appeal, the Court of Appeals concluded that the trial court did not err in declining to hear Defendant's venue argument. Under G.S. 1-294, matters "embraced" by the issue on appeal were stayed in the trial court. Although Defendant's second venue argument was based on a different theory, the matter embraced within the appeal was the same—improper venue in Guilford County. As to the preliminary injunction, the court dismissed Defendant's appeal for failure to show that the injunction affected a substantial right. The injunction prevented him from conducting business with a certain narrow group, but it did not prevent him from doing business altogether or from earning a living.

Collateral estoppel; identity of parties
Lancaster v. Harold K. Jordan and Co., Inc.,776 S.E.2d 345 (N.C. App. 2015). Plaintiffs, individual members of an LLC (Village Landing), brought an action against developer, HKJ, based on alleged misrepresentations during the construction of Plaintiffs' 60-townhome development project. The trial court granted summary judgment to HKJ on the basis that the same issues had been determined in earlier binding arbitration between the Village Landing and HKJ; Plaintiffs were the same party as HKJ for purposes of collateral estoppel; and, therefore, Plaintiffs were collaterally estopped from relitigating the issues in the current action. The Court of Appeals affirmed. The court noted that under *Thompson v. Lassiter*, 246 N.C. 34 (1957), the doctrine of collateral estoppel applies even where the parties to the two actions are not identical if the parties to the second action controlled the earlier action; had a proprietary or financial interest in its outcome; had an interest "in the determination of a question of fact or a question of law with reference to the same subject matter, or transactions[.]"; and had notice of the earlier proceeding. All requirements were met in this case, thus the trial court did not err in finding an identity of parties to the two actions and applying the doctrine of collateral estoppel to Plaintiffs' claims.

Attorney fees for frivolous claims
Philips v. Pitt Cty Mem. Hosp., Inc., 775 S.E.2d 882 (N.C. App. 2015). A physician sued a hospital and four fellow physicians, alleging various torts and seeking punitive damages, after his hospital privileges were revoked. Some of his claims were dismissed, and summary judgment was entered against him as to his remaining claims. Pursuant to GS 1D-45, which authorizes attorney fees to a defendant based on frivolous claims for punitive damages, the trial court awarded fees to the defendants in the amount of almost $445,000. The Court of Appeals affirmed the attorney fee award. The trial court did not abuse its discretion it determining that plaintiff's punitive damages claims was frivolous where plaintiff had admitted that his unprofessional conduct was a valid basis for corrective action by the hospital; that he

had misrepresented his qualifications to the hospital; and that he had continued to violate the bylaws after hospital notified him of his non-compliance. In addition, the trial court was not required to apportion the fees for work spent defending the punitive damages claim and work spent defending the other claims because all the claims arose from the same nucleus of operative fact and were "inextricably interwoven."

Stay of arbitration

Neusoft Medical Systems USA, Inc. v. Neuisys, LLC, 774 S.E.2d 851 (N.C. App. 2015). In this very fact-specific case, the Court of Appeals held that the trial court did not commit reversible error in denying a motion to refer certain remaining claims to arbitration (or stay the claims) after the first four of that party's claims had been referred to arbitration in an earlier order. Nor did the court err in denying the other defendants' motions to stay the related claims against them pending arbitration of the four arbitrable claims by their co-defendant.

Rule 41 voluntary dismissal; effect of inadequate pleading

Murphy v. Hinton, 773 S.E.2d 355 (N.C. App. 2015). A man died of carbon monoxide poisoning while he was sleeping in a barn being heated by a propane unit sold by defendant. The wrongful death complaint alleged that defendant was "in the business of inspecting, maintaining, installing, and selling at retail to members of the public various types of propane…equipment, including the propane tank that was installed in the home and barn [in question]." The complaint went on to seek relief "by reason and consequence of the aforementioned negligence, carelessness, recklessness, and/or willfulness" of defendant. The complaint, however, included no specific allegations of such "aforementioned" wrongful conduct. Plaintiff later voluntarily dismissed the complaint and refiled within the one year allowed by Rule 41(a). Plaintiff also amended the refiled complaint to add more detailed allegations of defendant's negligent conduct. By the time of refiling (and amendment), however, the original statute of limitations had run.

The Court of Appeals determined that the original complaint's allegations were too bare to conform to Rule 8(a)(1)'s fundamental requirement of a "short and plain statement of the claim sufficiently particular to give the court and the parties notice of the transactions, occurrences or series of transactions or occurrences, intended to be proved showing that the pleader is entitled to relief." This inadequacy was not remedied before the original limitations period expired. The court held that, because the original complaint did not "conform in all respects to the rules of pleading," the plaintiff's voluntary dismissal did not trigger Rule 41(a)'s tolling provision. Thus the trial court properly dismissed the refiled action with prejudice. [Note: I also blogged about this case back in July: http://civil.sog.unc.edu/more-on-voluntary-dismissals-consequences-of-inadequate-pleading/.]

Findings and conclusions in order denying motion to compel arbitration

Earl v. CGR Development Corp., 773 S.E.2d 551 (N.C. App. 2015). The trial court denied Defendants' motion to dismiss Plaintiffs' claims due to failure to submit to arbitration or, in the alternative, for a stay pending arbitration and an order compelling arbitration. The Court of Appeals remanded to the trial court for findings of fact and conclusions of law regarding whether the parties were bound by an arbitration agreement and whether the arbitration agreement applied in this case.

CONTRACTS

Covenant not to compete; parol evidence to establish consideration; adequate consideration
Employment Staffing Group, Inc. v. Little (COA15-171; Oct. 6, 2015). After Defendant had worked for the Plaintiff employer for nearly 13 years, Plaintiff asked her to sign a non-compete agreement. The agreement was silent as to consideration. It was undisputed, however, that Plaintiff told Defendant she would be paid $100 and that Plaintiff in fact deposited that amount in her account four days later. Soon thereafter Defendant stopped working for Plaintiff, and Plaintiff soon sued her alleging breach of the non-compete. The trial court granted Plaintiff's motion for a preliminary injunction. Defendant appealed, arguing the injunction was improper because the consideration was illusory and inadequate. The Court of Appeals affirmed the injunction. First, although the non-compete agreement contained a merger clause, it was silent as to consideration, so evidence of the separate consideration was admissible because it did not conflict with the terms of the non-compete. Because the evidence was "necessary to show the existence of a complete contract," it was not excluded under the parol evidence rule. Second, the court was not compelled to find that the $100 payment was inadequate due to the pressure on Defendant to sign in order to continue her employment.

TORTS

Immunity under GS 90 for medical peer review participants
Shannon v. Testen (COA15-64; Oct. 6, 2015). After Plaintiff Dr. Shannon was evaluated in a peer-review process pursuant to G.S. Chapter 90, Gaston Memorial Hospital withdrew his privileges to practice ophthalmology. Dr. Shannon sued the two individuals who had evaluated him and also sued their employer. His complaint was properly dismissed for failure to state a claim. First, pursuant to G.S. 90-21.22(f), in order to state a claim against those conducting peer review (and to overcome the immunity the statute provides), a plaintiff must allege bad faith. Dr. Shannon's complaint alleged mistakes and omissions, but nothing that would create an inference of bad faith. In addition, he could not maintain a claim for due process violations under the Health Care Quality Improvement Act because that Act does not provide a private cause of action, and neither could he pursue such a claim as a matter of state common law. Finally, G.S. 90-21.22(b)'s requirement that peer review agreements "shall include provisions assuring due process" did not provide him a private remedy, and even if it did, his complaint established that Defendants had complied with the requirement.

Governmental immunity; pedestrian death and vehicle traffic near parade route
Parker v. Town of Erwin (COA14-1340; Sept. 15, 2015). One late evening after watching the Town Christmas Parade, a small child was struck by a car while he and his family walked across a nearby alley to a restaurant. After more than an hour, and following a series of mishaps that delayed emergency treatment on the scene, he died of his injuries. His parents brought suit against the Town and various Town officials (the "Town Defendants") for various alleged acts of negligence in failing to maintain a safe environment for viewers of the Town-sponsored parade. They also sued numerous others, including the owner of the property adjacent to the alley crossing ("Mr. Morris") for failure to maintain adequate lighting and for related omissions. The trial court denied the Town's motion to dismiss based on governmental immunity and granted Mr. Morris's motion to dismiss.

The Court of Appeals affirmed the dismissal of the claim against Mr. Morris. The trial court correctly determined that Morris had no duty to maintain a light on his property that would have better illuminated the adjacent alley (which he did not own). As for the Town, the trial court did not err in finding that the Town had not waived immunity through the purchase of insurance. However, the "acts or omissions" of Town Defendants that allegedly resulted in the unsafe conditions—including providing a law enforcement presence, regulating traffic, opening and closing roads, approving or denying permits, and providing ambulance services—were governmental rather than proprietary. Thus the Town was entitled to immunity from the suit and the motion to dismiss the negligence claims should have been granted. With respect to the motion to dismiss the claim against the Town under G.S. 160A-296(a) for failure to maintain roads—a duty to which immunity does not apply—the Court of Appeals held that the trial court was required to find facts and make a determination as to whether the alleged violations "directly and proximately caused the driver of the vehicle to strike [the boy]." The matter was remanded to the trial court for such findings.

Jurisdiction to review church and pastor activity; neutral principles of law
Davis v. Williams, 774 S.E.2d 889 (N.C. App. 2015). Members of a church brought a declaratory judgment and an action for an accounting against their pastor, alleging violations of church bylaws regarding voting and accounts. They also sued the pastor for conversion and embezzlement/obtaining property by false pretenses. The trial court denied Defendants' motions to dismiss for lack of subject matter jurisdiction. The Court of Appeals affirmed in part, holding that the courts could use "neutral principles of law, developed for use in all property disputes" to "inquire as to whether the church tribunal acted within the scope of its authority and observed its own organic forms and rules." The trial court correctly denied the motion to dismiss these claims. As for the conversion and embezzlement claims against the pastor, however, such matters, although "troubling," are not reviewable under neutral principles of law because they involve "ecclesiastical decisions concerning church management and use of funds." Thus the members' claims against the pastor should have been dismissed.

Subject matter jurisdiction over claims based on sexual assault by a priest; First Amendment
Doe v. Diocese of Raleigh, 776 S.E.2d 29 (N.C. App. 2015). Plaintiff John Doe filed various claims against the diocese and the bishop based on alleged sexual assault by the priest when Plaintiff was 16. Defendants moved to dismiss based on lack of subject matter jurisdiction on First Amendment grounds. The Court of Appeals summarized the law related to the application of First Amendment (establishment and free exercise) protections to claims against religious establishments and held as follows: The trial court had subject matter jurisdiction over the claims alleging Defendants' negligent supervision of the priest. These claims did not impermissibly entangle the courts in ecclesiastical matters, but instead could be addressed with neutral principles of tort law. To the contrary, the claims alleging that Defendants were negligent in failing to require the priest to undergo STD testing were "premised on the tenets of the Catholic church, namely, the degree of control existing in the relationship between a bishop and a priest." Because court review of these issues would entangle it in religious doctrine in violation of the First Amendment, the trial court lacked subject matter jurisdiction over these claims.

Breach of fiduciary duty of corporate director; minority shareholder's reasonable expectations
Harris v. Testar, Inc., _ S.E.2d _ (N.C. App. 2015). Plaintiff was an employee, minority stockholder, and director of a corporation with three other stockholders. His son was also an employee. The corporation

was in the business of transporting hazardous materials. DOT regulations required such HAZMAT companies to perform yearly criminal background checks on all employees. Plaintiff was tasked with these checks and corresponding driving record checks. It was undisputed that, in this process, he concealed from his fellow stockholders his and his son's prior DWIs and license revocations. When his fellow stockholders discovered the concealment, they terminated him. He later sued them for wrongful termination and related claims. They (and the corporation) counterclaimed for fraud and breach of fiduciary duty. The trial court granted summary judgment in Defendants' favor as to their claims and Plaintiff's. The Court of Appeals affirmed. As a director, Plaintiff had a fiduciary duty to the corporation, and his concealment of material facts that endangered the business constituted a breach of this duty. In addition, the trial court properly enforced the stockholder agreement that provided that the corporation would pay Plaintiff $1.00 per share upon his termination (resulting in him being paid $1000 for his interest in the corporation). Enforcement of this agreement adequately protected his "reasonable expectations" under *Meiselman v. Meiselman.*

Wrongful termination; religious accommodation

Head v. Adams Farm Living, Inc., 775 S.E.2d 904 (N.C. App. 2015). A nursing home employee (activities director) was terminated for refusing, on loosely-articulated religious grounds, to obtain a flu shot as required by the employer after a flu outbreak. She sued for wrongful discharge in violation of public policy on grounds of failure to accommodate her religious beliefs and disparate treatment. Summary judgment was granted for the employer. The Court of Appeals affirmed. North Carolina's public policy against religious discrimination in employment, GS 143-422.2, does not impose a corresponding duty of reasonable accommodation on an employer. As to disparate treatment, Plaintiff articulated a prima facie case by showing that she, a Seventh-day Adventist, was terminated for refusing the vaccine while three non-Seventh-Day Adventists were not. The employer, however, showed a legitimate non-discriminatory reason for terminating her by demonstrating that Plaintiff had been the only one to fail to present a physician's note with a "specific medical justification" for refusing the shot. And finally, Plaintiff could not show that the flu shot issue was a pretext for terminating her based on religion. The note she presented from her chiropractor father was not a medical provider's note (and did not present a "specific medical justification"); the employer gave her extra time to consider her decision not to be vaccinated before terminating her; and there was no evidence of any reason the employer would have treated her differently than others based on her religion.

Due process property interest in emeritus status; defamation

Izydore v. Tokuta, 775 S.E.2d 341 (N.C. App. 2015). A retired chemistry professor sued NCCU and certain faculty members after he was denied emeritus status during the late phases of the emeritus approval process. The trial court dismissed his case for failure to state a claim upon which relief could be granted. The Court of Appeals affirmed. Plaintiffs could not state a claim under §1983 for deprivation of a property interest without due process because he had only a unilateral expectation of receiving emeritus status rather than an existing, cognizable contract right or other interest in the designation. Nor could he state a claim for deprivation of a liberty without due process due to the "malicious and defamatory" remarks certain faculty members made about him during the emeritus process; the stigma he alleged did not rise to the level of a liberty interest. Finally, his defamation claims against the faculty members failed as a matter of law because he did not allege with specificity any remarks that could be deemed defamatory.

Gross negligence; jury question; propriety of directed verdict

McCauley v. Thomas ex rel. Progressive Universal Ins. Co., 774 S.E.2d 421 (N.C. App. 2015). Plaintiff was passenger in a car driven by defendant, her boyfriend at the time, when Defendant crashed the car into a tree at the end of a dead-end road. Earlier in the evening, the two had dinner together in which both were drinking margaritas, then they visited Defendant's mother for about an hour during which time Plaintiff did not see Defendant drink again. They then got in the car and got into a "silly" argument, after which Defendant started to drive poorly. Plaintiff wanted to get out of the car, but it was a bad neighborhood. The two were silent for a while, but then they turned down a road and Defendant "blew up," gassed the car, and quickly accelerated to 35 to 45 miles per hour until he crashed into a tree. Plaintiff sued Defendant for injuries she sustained in the crash. At trial, the court granted directed verdict for Defendant after finding that Plaintiff was grossly contributorily negligent as a matter of law for having voluntarily taken a ride in a car with a person she knew to be intoxicated. (In North Carolina, gross contributory negligence negates a Defendant's liability even for gross negligence.) The Court of Appeals reversed, holding that the question of Plaintiff's awareness of Defendant's intoxication was a question of fact for the jury. The evidence was also conflicting as to whether the crash was a result of Defendant's intoxication or his reaction to the argument he was having with Plaintiff. New trial.

Medical malpractice; impeaching credibility of expert; same or similar community standard of care

Kearney v. Bolling, 774 S.E.2d 841 (N.C. App. 2015). In a medical malpractice trial in which the jury found in Defendant surgeon's favor, Plaintiff's expert, a non-practicing medical school professor, testified that he was a fellow in the American College of Surgeons (ACS) and asserted that this was a "great honor." After the trial court accepted him as an expert witness, defense counsel cross-examined him with guidelines from the ACS stating that non-practicing surgeons should not be expert witnesses. The Court of Appeals held that allowing cross-examination from the ACS guidelines was not an abuse of discretion. Rather than undermining the trial court's ruling that Plaintiff's witness was an expert, the examination instead was an acceptable method of impeaching the witness's credibility in light of that witness's earlier testimony about his ACS membership.

In addition, the Court of Appeals determined that the trial court did not abuse its discretion in allowing Defendant's expert witness to testify that the ACS "would say that [Plaintiff's expert] absolutely should not be an expert witness." Although the Court of Appeals found this testimony "troubling" because the witness appeared to speak on behalf of the ACS, the court was "sharply constrained by the narrow standard of review for evidentiary rulings," and deferred to the trial judge's superior ability to assess the response in context.

Plaintiff also argued that the trial court erred in allowing one of Defendant's experts to be qualified to testify as to the standard of care in a community similar to Winston-Salem. The Court of Appeals disagreed. Although Beaumont, Texas, the community to which he compared Winston-Salem, was actually smaller than Winston-Salem with fewer hospital beds, the disparities were explained through testimony and were not so extreme that a trial court could not reasonably conclude the witness was familiar with the standard of care in a "similar community."

Finally, Plaintiff asserted that the trial court erred in not allowing her to amend her complaint before trial to assert a claim for lack of informed consent. The Court of Appeals rejected this argument, asserting that such a claim could not be made at that time because it could not comport with Rule 9(j)'s certification requirement: her expert testified that he was not aware of this theory and had not addressed it

in his opinion as to the standard of care at the time the complaint was filed. Thus the trial court did not err in granting Defendant's motion *in limine* to exclude Plaintiff's assertions as to informed consent. In addition, it was no abuse of discretion to disallow her motion to amend *by implication* during trial after defense counsel opened the door on the issue; the evidence was isolated to two questions and did not rise to the level of actually litigating the elements of informed consent.

CONSTITUTIONALITY

Opportunity Scholarship Program

Hart v. State, 774 S.E.2d 281 (**NC** 2015). In this and a companion case, *Richardson v. State*, the Supreme Court examined the constitutionality of the Opportunity Scholarship Program, which, under GS 115C-562.2(a), provides scholarship funding for a certain number of lower-income students to attend *nonpublic* schools. Reversing the decision of the trial court, the Supreme Court held that the program does not violate constitutional requirements for school funding and does not violate the NC Constitution's uniformity clause, and that appropriations for the program were for a "public purpose." *Three justices dissented.*

Constitutionality of water and sewer legislation

City of Asheville v. State of North Carolina (COA14-1255; Oct. 6, 2015). This case involves a challenge to legislation that affects only Asheville. In 2013, the General Assembly enacted legislation that withdraws Asheville's authority to own and operate its Water System and transfers the system to the Buncombe County Metropolitan Sewerage District (MSD), whereupon it becomes a metropolitan water and sewerage district (MWSD). Asheville challenged this legislation on various grounds, and the trial court enjoined its application, concluding it violated the North Carolina Constitution on three grounds. The Court of Appeals held that Asheville had standing to challenge the law, but the court then reversed the trial court's injunction, holding that the legislation (1) does not constitute a local act related to health, sanitation, or non-navigable streams in violation of Art. II, Secs. 24(1)(a) and (e); (2) does not violate the "law of the land clause in Art. I, Sec. 19; and (3) is not an invalid exercise of power to take or condemn property under Art. I, Secs. 19 and 35. Summary judgment should have been granted in favor of the State as to each claim.

PUBLIC RECORDS

AOC's ACIS database

LexisNexis Risk Management Inc. v. North Carolina Administrative Office of the Courts, 775 S.E.2d 651 (**N.C.** 2015). In this case, the Supreme Court determined that the Public Records Act does not require the AOC to provide a copy of the Automated Criminal/Infraction System (ACIS) to a private party. The opinion is discussed in detail and in a broader context in the following blog post by SOG faculty member, Frayda Bluestein: http://canons.sog.unc.edu/?p=8198.]

Personnel information vs. political and policy information; *in camera* review

Times News Pub. Co. v. Alamance-Burlington Bd. of Educ., 774 S.E.2d 922 (N.C. App. 2015). The

newspaper filed an action to compel the school board to disclose minutes of a closed meeting in which the school superintendent resigned and the board approved a $200,000 severance payment. The Court of Appeals examined the public records and open meetings laws in connection with GS 115C-319, which specifies that personnel files of local board of education employees are not subject to inspection and examination. The court concluded that GS 115C-319 is a permanent exception and does not expire after the employment ends. Thus no disclosure from a closed meeting of information within the scope of GS 115C-319 is required. GS 143-318.10(e) states that minutes and general accounts of closed sessions are public records, but they can be withheld from public inspection "so long as inspection would frustrate the purpose of a closed session." The court held that disclosure of personnel information within the scope of 115C-319 "*always* would frustrate the purpose of the closed session and may be withheld under GS 143-318.10(e)."

Nevertheless, because the closed session may also have included political and policy discussions "broader than the 'core' personnel information" subject to protection, the trial court is required to review the meeting minutes and determine what must be disclosed. Thus the court remanded to the trial court for *in camera* review. [Note: This case is discussed in detail and in broader context in the following blog post by SOG faculty member, Frayda Bluestein: http://canons.sog.unc.edu/?p=8177.]

REAL PROPERTY, ZONING, and LAND USE

Notarization of deed by grantee; validity as between grantor and grantee; adverse possession
Quinn v. Quinn (COA14-979; Oct. 6, 2015). This quiet title action is a "convoluted case" in which the parties' own respective versions of the facts have changed over the course of litigation. The case is essentially about the validity of one of the deeds that was part of an agreed-upon exchange of land between brothers. Two possibilities arise from the alleged facts: (1) that Plaintiff deeded his land to defendants, and one of the defendants, Patricia Quinn, later notarized the deed to herself as a grantee; or (2) that Plaintiff deeded the land to his brother, and later defendant Patricia Quinn notarized the deed. Either way, the deed was invalid as between Plaintiff and Defendants. In the first scenario, the deed was invalid to convey property because it was notarized by one of the grantees, Defendant Patricia Quinn, in violation of G.S. 10B-20(c)(5-6). In the second scenario, the deed to the brother was invalid under G.S. 22-2 because the first two pages had been switched, and, as recorded, it was not signed by the grantor. Either way, Defendants could not prevail as a matter of law, and summary judgment in their favor was improper. Issues of fact remained, however, as to Defendants' later-asserted claim for adverse possession under color of title; the Court of Appeals remanded that issue to the trial court.

Constructive ouster of co-tenant
Atlantic Coast Props, Inc. v. Saunders (COA14-1278; Oct. 6, 2015) (with dissent). This case is about which of two co-tenants owns a 14-acre parcel in Currituck County. Through various inheritances over time (beginning with an original inheritance by siblings in the 1920s), two families came to own the tract as co-tenants, each with a one-half undivided interest. One family (two children of one of the original siblings) remained on the property; the other family lived out-of-state, did not visit the property, and were not in contact with the resident family. In 2005, the out-of-state family (the "Baxters") sold their property by quitclaim deed to a developer, and the developer soon filed an action to partition the property. The resident family (Respondents) moved for summary judgment, claiming that they were the sole owners of

the property through constructive ouster (twenty years of continuous undisturbed possession by a cotenant without demand or possession by the other). The trial court agreed and granted summary judgment for Respondents.

The Court of Appeals (majority) reversed on grounds that the record contained sufficient evidence to allow a jury to determine that the resident family had recognized the Baxters' interest, thus defeating a presumption of constructive ouster. The court noted the following from the record: Testimony by one of the Baxters that one of the Respondents, Edna Winslow, had contacted her in 2004 to determine what she wanted to do with her interest because Respondents wanted to subdivide the property; testimony by Edna Winslow that she believed any subdivision would involve the Baxters; evidence that Respondents had hired a surveyor to assist with the subdivision; and testimony by both Respondents conceding that their father had recognized the Baxters' interest during his life and that he and their mother would have wanted them to include the Baxters in a subdivision because it was the right thing to do. Citing *Clary v. Hatton*, 152 N.C. 107 (1910), the court determined that the Respondents' testimony regarding their father's intentions was sufficient to create an inference that he recognized the cotenants' interest during the first 20 years of his possession. The court further stated that,

> Private property rights are the bedrock of liberty. It is one thing to lose property rights to the open and notorious adverse possession of another. But in a case like this one, where a joint property owner's rights are threatened through the legal fiction of constructive ouster without any actual ouster, courts must be particularly vigilant in applying the well-settled summary judgment standard and permitting a jury to resolve factual disputes about who told what to whom.

(The dissent disagreed about the impact of the Respondents' testimony and about the impact of *Clary*, and determined that summary judgment was proper because the record contained no evidence that the Respondents' father had not already obtained a constructive ouster in the first 20 years of his possession between 1921 and 1941).

Interest on payment of an unauthorized impact fee; accord and satisfaction

China Grove 152, LLC v. Town of China Grove, 773 S.E.2d 566 (2015). The trial court correctly granted judgment on the pleadings in favor of plaintiffs (developers) who brought declaratory judgment to recover interest paid to the town on a $54,284 impact fee. The Court of Appeals affirmed and concluded, based on *Lanvale Properties LLC v. Cnty of Cabarrus*, 366 N.C. 142 (2012), that the impact fee required by the town's Adequate Public Facilities Ordinance (APFO) was not authorized by GS Chapter 160A. Thus, under GS 160A-363(e), the town was required to return the fee plus interest of 6% per year. Further, Plaintiffs' earlier acceptance of the principal amount, in which they agreed to release the town from liability under the APFO, did not release the town from its obligation to pay interest under GS 160A-363(e).

Spot zoning

Good Neighbors of Oregon Hill Protecting Property Rights v. County of Rockingham, 774 S.E.2d 902 (N.C. App. 2015) (with partial dissent). Owner of a 100-acre parcel sought to use a 2-acre portion as a bird-dog training facility. The county Board of Commissioners allowed a rezoning of the small portion from Residential Agricultural to Highway Commercial. Plaintiff (a neighborhood group) sought a preliminary injunction and declaratory judgment that the rezoning was illegal spot zoning, contrary to statutory requirements, in violation of the zoning ordinance, and arbitrary and capricious. The trial court

granted summary judgment to Plaintiff. The Court of Appeals reversed and remanded. First, the rezoning could not have been spot zoning because the parcel was not owned by a "single person" but instead by applicant and his son. Second, the trial court erred by making findings of fact and conclusions of law in a summary judgment order and substituting its own judgment for the Board's rather than conducting a whole-record test. Thus the matter was remanded for a new summary judgment hearing. In addition, the trial court erred in finding that notice of the rezoning hearing had been inadequate and that the applicant had failed to obtain certain permits and approvals.

(The dissenting judge determined that the rezoning was indeed spot zoning, disagreeing with the majority's conclusion that prior case law has created a definitive rule limiting spot zoning determinations only to parcels with a single owner. The judge also determined that the spot zoning in question was legal, and thus the case should be remanded not for a rehearing but instead for entry of summary judgment in the county's favor.)

Condemnation; compensable taking

Department of Transportation v. BB&R, LLC, 775 S.E.2d 8 (N.C. App. 2015). In an evidentiary hearing under GS 136-108, the trial court determined that the DOT's taking of fee simple title to a right of way adjacent to Defendant landowner's property and an easement to provide lateral support for a highway was not compensable. The Court of Appeals affirmed, holding that the trial court was correct to conclude that the DOT did not cut off Defendant's access to an adjacent road but merely re-routed the road, leaving Defendant with reasonable ingress and egress to the road from a different portion of the property.

FORECLOSURES

Guarantors and deficiency

High Point Bank and Trust Co. v. Highmark Props, LCC (**NC**, No. 8PA14; Sept. 25, 2015). In this case, the Supreme Court further resolved the question of whether a non-mortgagor guarantor to a loan may raise the anti-deficiency defense in order to reduce its outstanding debt to the lender. Here, Plaintiff bank issued two loans to Highmark—$4.7 million and $1.75 million. Guarantors, members of Highmark, guaranteed the loans. Highmark later defaulted, leaving balances of about $3.5 million and $1.3 million. The bank sued Highmark and the guarantors and also foreclosed on the properties, putting in the only bids: about $2.6 million and $720,000. In the action to collect on the deficiency, the bank dismissed Highmark and sought to collect only against the guarantors. The guarantors raised the defense under G.S. 45-21.36, the anti-deficiency statute, which allows an offset where the amounts paid for the property at foreclosure are substantially less than their true value. The trial court allowed the guarantors' motion to add Highmark (back) as a party and submitted the anti-deficiency issue to the jury. The jury found that the fair market values of the properties were about $3.7 million and about $1 million, leaving guarantors with respective debts of $0 and $300,000.

The bank appealed, arguing that non-mortgagor guarantors are not permitted to take advantage of the anti-deficiency statute. The Court of Appeals affirmed, holding that the guarantors could indeed raise the defense; the majority and concurrence differed, however, as to whether the defense could be raised in an action in which the debtor itself was not a party. The Supreme Court looked closely at the language of G.S. 45-21.36 and concluded that a non-mortgagor guarantor may "stand in the shoes of the principal borrower" and raise the anti-deficiency defense *whether or not* the borrower is a party to the action. In

addition, the court stated that conditioning a guarantee agreement on guarantor's waiver of anti-deficiency protection violates public policy.

The following two synopses of foreclosure-related cases are adapted from summaries by Meredith Smith at the School of Government. Meredith's summaries of foreclosure cases can be found at http://www.sog.unc.edu/clerks/topics.

Original note indorsed in black; holder

In the Matter of Foreclosure of Rawls, _ S.E.2d _ (N.C. App. Oct. 6, 2015). The clerk of superior court entered an order authorizing sale in a power of sale foreclosure proceeding. The owner of the real property appealed. At the *de novo* hearing before the superior court judge, the party seeking the order of foreclosure produced the original promissory note indorsed in blank. The owner of the real property disputed whether the party seeking the order of foreclosure produced sufficient competent evidence that it was the holder of the note. The NC Court of Appeals held that production of the original note indorsed in blank by the party seeking the order of foreclosure is alone enough to establish that the party is the holder.

Deficiency judgment; evidence of value by property owner

United Community Bank v. Wolfe, _ S.E.2d _ (N.C. App. 2015).
Lender foreclosed and was the high bidder at the foreclosure sale. Lender's bid was less than the total value of the debt. Lender filed a deficiency action against the borrowers for the remaining amount due on the loan. Superior court granted summary judgment in favor of the lender and borrowers appealed. NC Court of Appeals reversed and remanded. The court's analysis included a discussion of the defenses available to a borrower under GS 45-21.36 in a deficiency action: (1) the property was worth more than the outstanding debt, or (2) the amount of the lender's bid was substantially less than the true value of the property. The court held that an affidavit from the owner of the property setting forth the specific value of the property is sufficient to raise a genuine issue of material fact whether the value of the property was fairly worth the amount of the debt and thus defeat a summary judgment motion. The court noted prior case law from the NC Supreme Court that the owner's opinion of value is competent to prove the property's value.

WILLS AND ESTATES

Caveat vs. declaratory judgment action

Brittian v. Brittian (COA15-139; Sept. 15, 2015). After her father died, Plaintiff, as executrix, submitted his will to probate before the clerk of court. The document purporting to be his will (as submitted) contained a number of hand markings, including a strikethrough of the name of deceased's granddaughter as a beneficiary. The clerk's office informed Plaintiff that the original writing could be read underneath the markings, and the clerk would proceed to probate the Will in its original form (as though the markings were not there) on the basis that the markings were not a valid partial revocation effective to disinherit the granddaughter. Plaintiff filed a declaratory judgment action in superior court. On the granddaughter's motion, the trial court dismissed the action on the basis that the only proper challenge to the probated will was through a caveat proceeding. The Court of Appeals reversed, holding that the Plaintiff's challenge was not, in fact, a challenge to the will's validity as is required for a caveat, but was instead a controversy

over the construction of the instrument (in this case, "a resolution of the rights of the parties under the terms of the Will and the effect of the markings thereon on these parties' rights"). Under G.S. 1-254, Plaintiff properly brought the question of the construction of the will before the trial court as a declaratory judgment action.

Caveat; evidentiary issues

In re Estate of Pickelsimer, 776 S.E.2d 216 (N.C. App. 2015). The children of Charles Pickelsimer (Charles) filed a caveat to his will alleging that the will, which had only been executed shortly before his death, had been the product of undue influence. The will left a large part of his considerable assets to Brevard College, another charity, and a woman to whom he was not related. After a jury returned a verdict for propounders, the caveators appealed alleging errors in the admission of evidence. The Court of Appeals found no prejudicial error and affirmed. First, after propounders opened the door to testimony about Charles that would be otherwise excluded under the Dead Man's Statute (Rule 601(c)), the trial judge did not abuse its discretion in disallowing certain evidence from caveators of Charles' disenchantment with Brevard College. The jury was given the gist of that testimony through other evidence, and exclusion of further testimony was not prejudicial. Second, the judge did not err in entering judgment as to the validity of "Propounders' Exhibit 2" simply because no such exhibit, by that exact name, was admitted into the record. It was clear from the record that "Exhibit 2," which *was* admitted, was a copy of the will in question, and that that exhibit was part of the parties' stipulated notebook of exhibits in regular use throughout trial.

The following two synopses of estate-related cases are adapted from summaries by Meredith Smith at the School of Government. Meredith's summaries of estate cases can be found at http://www.sog.unc.edu/clerks/topics.

Estate funeral expenses; attorney fees

In re Taylor, _ S.E.2d _ (N.C. App. 2015).

Funeral expenses. Daughter of decedent paid for funeral expenses. Daughter filed a request for reimbursement after the deadline for presentation of claims passed. Executor filed a petition to disallow the request and rejected the claim. Executor filed a final accounting that did not include reimbursement of funeral expenses. Daughter objected to final accounting. Clerk entered order granting reimbursement of funeral expenses. Executor appealed. Superior court reversed clerk's order. Daughter appealed. Court of Appeals held funeral expenses constitute a claim against the estate and as such the claim must be presented within the time limits set forth in GS 28A-19-3. Funeral expenses are not a reimbursable expense that (i) may be submitted at any time prior to the closing of the estate, or (ii) are automatically presented or exempted from presentation. In addition, a dispute over a claim for reimbursement of funeral expenses is not within the jurisdiction of the clerk of superior court to hear. If the claim is filed, then rejected and not referred by the personal representative, the claimant must then commence a civil action for recovery of the funeral expense claim within the time limits set forth in GS 28A-19-16 or else it is barred.

Attorney fees. Non-attorney personal representative hired an attorney to assist personal representative with estate administration and litigation related to the estate. Beneficiary daughter objected to the final account, in part, on the basis that the attorneys' fees were unreasonable. Clerk entered an order approving only a portion of the fees. Personal representative appealed. Superior court vacated

clerk's order and approved the fees in total. Beneficiary daughter appealed. The NC Court of Appeals held the clerk has the authority to review attorneys' fees shown on a final accounting for reasonableness where the non-attorney personal representative hires an attorney to do work on behalf of the estate. In the order approving or denying attorneys' fees, the clerk must make findings of fact and conclusions of law sufficient to allow for meaningful review on appeal.

Payable on Death Account; Totten Trusts

Nelson v. SECU, _ S.E.2d _ (N.C. App. 2015).

Decedent signed State Employees' Credit Union (SECU) paperwork for a statutory "Payable on Death" account, transferred $85,000 to the account, and designated his daughter as the beneficiary. Upon his death, the SECU paid the funds to the beneficiary. The decedent's other two children sued the beneficiary and the SECU. The other children argued that the decedent and SECU failed to create a statutory payable on death (POD) account under GS 54-109.57A and that the statute provides the only means for creating such an account. The Court of Appeals disagreed and held that a grantor may create an account that will pass to a named beneficiary upon death by complying with (1) the statutory requirements of GS 54-109.57A for POD accounts with a credit union (or other applicable POD statute depending on the financial institution), or (2) the common law requirements for Totten or tentative trusts. Although the decedent failed to create a valid statutory POD account in this case, the court held that the decedent created a valid common law Totten trust because the decedent (i) expressed intent to create the trust, (ii) identified a specific sum of money to place in the trust account, and (iii) identified the beneficiary of the trust. The court noted that it was not necessary to use the word "trust" to create a valid trust. Further, the court found that the decedent transferred a present beneficial interest to the beneficiary upon creation of the trust, a necessary component for the formation of a valid trust.

The Court of Appeals also issued the following decisions on administrative appeals. They are not summarized in this paper:

Assessment of income and gift tax; residency
Fowler v. North Carolina Dept. of Revenue, 775 S.E.2d 350 (N.C. App. 2015).

Fines for waste discharge
House of Raeford Farms, Inc. v. North Carolina Department of Environment and Natural Resources, 774 S.E.2d 911 (N.C. App. 2015).

Termination of health system employee
Robinson v. University of North Carolina, 775 S.E.2d 898 (N.C. App. 2015).