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

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## CIVIL PROCEDURE, JURISDICTION, & TRIAL COURT AUTHORITY

**Preclusive effect of foreclosure on separate contract and tort claims action against lender**
*Funderburk v. JPMorgan Chase Bank, N.A.* (COA14-1258; June 16, 2015). Plaintiffs filed this action against their former mortgage lender for breach of contract, breach of the covenant of good faith and fair dealing, negligent misrepresentation, tortious interference with contracts and business expectancy, quantum meruit, and punitive damages—all in connection with an earlier series of foreclosures. The trial court properly dismissed these claims pursuant to Rule 12(b)(6). Each of the properties had already been foreclosed upon pursuant to Chapter 45 based on plaintiffs' payment default, and the foreclosure orders of the clerk had become final. Each of the claims in the present action was essentially premised upon an argument that there had been no default; because the issue of default had been conclusively determined in the earlier foreclosure proceedings, it could not be re-litigated in this separate civil action.

**Rule 54(b) certification for immediate review included in later order**
*Branch Banking and Trust Co. v. Peacock Farm, Inc.* (COA14-889; June 2, 2015) (with dissent by Tyson, J.). Appeal of a 2012 interlocutory summary judgment order was dismissed for failure to establish a substantial right or obtain a Rule 54(b) order. Approximately eight months later, the appellant obtained a stand-alone order of the trial court certifying the 2012 order for immediate appeal under Rule 54(b). The Court of Appeals majority opinion held that the trial court's later order could not be used to certify a prior order for immediate appeal. The court held that, "because Rule 54(b) cannot be used to create appellate jurisdiction based on certification language that is not contained in the body of the judgment itself from which appeal is being sought, dismissal of [the] appeal is, once again, appropriate."

**Statute of limitations where nature of cause of action uncertain**
*Martin Marietta Materials, Inc. v. Bondhu, LLC* (COA14-908; May 19, 2014). Plaintiff, owner of a one-half interest in a parcel of Virginia real property, sued its cotenant for reimbursement of ad valorem

property taxes Plaintiff had paid on the co-tenant's behalf since 2005. The trial court granted summary judgment in Plaintiff's favor. On appeal, the co-tenant asserted that a portion of the claim was barred by the three-year statute of limitations in G.S. 1-52(1) applicable to an "obligation or liability arising out of a contract, express or implied." Plaintiff, on the other hand, asserted the applicability of the catch-all ten-year statute in G.S. 1-56. The Court of Appeals concluded that the reimbursement claim could be validly characterized as either an action in contract, to which the shorter limitation would apply, or an action based on an equitable right stemming from the trust relationship between the parties, to which the longer limitation would apply. The court noted that, "where there is doubt as to which of two possible statutes of limitation applies, the rule is that the longer statute is to be selected." Thus the trial court properly applied the 10-year limitations period and granted summary judgment in favor of Plaintiff.

**Enforceability of venue selection clause**

*A&D Environmental Services, Inc. v. Miller*, 770 S.E.2d 755 (N.C. App. April 7, 2015). A forum selection clause in a non-compete agreement specifying that any litigation would be brought exclusively in Mecklenburg County was not enforceable where both parties resided in other counties and the relevant venue statute provided that the action must be tried in the county in which either party resides. Per prior Supreme Court precedent, parties cannot by agreement "strip the Legislature of its power to determine which counties in North Carolina would be proper to maintain an action[.]"

**Judicial immunity**

*Price v. Calder*, 770 S.E.2d 752 (N.C. App. April 7, 2015). A commissioner appointed by the clerk of court to oversee the partition of real property was entitled to judicial immunity from an action by one of the parties alleging that the commissioner breached his fiduciary duty. The rule of judicial immunity extended to the commissioner for his actions taken as a quasi-judicial official.

**Contempt; authority to hear second contempt motion after Rule 41(b) dismissal of first motion**

*Hebenstreit v. Hebenstreit*, 769 S.E.2d 649 (N.C. App. March 17, 2015). Plaintiff filed a contempt motion against Defendant related to a custody order. The trial court later dismissed the contempt motion with prejudice under Rule 41(b) for failure to prosecute when Plaintiff failed to appear for hearing. Shortly thereafter, Plaintiff filed a second contempt motion related to the same custody order. The trial court determined that the dismissal with prejudice of the first contempt motion was an adjudication on the merits of the second motion. The Court of Appeals reversed, determining that the second motion alleged more extensive violations of the custody order and sought additional relief not sought in the first order. The matter was therefore remanded to the trial court for further determination of the issues raised in the second contempt motion.

***Res judicata* effect of prior judgment; sanctions for frivolous litigation (GS 6-21.5) and improper purpose (Rule 11)**

*ACC Const., Inc. v. SunTrust Mortg., Inc.*, 769 S.E.2d 200 (N.C. App. Feb. 17, 2015). In a prior action, summary judgment was granted against plaintiff on its claims against SunTrust regarding priority of the parties' respective liens on a piece of real property. Plaintiff's appeal of that judgment was later dismissed for failure to prosecute. Plaintiff thereafter filed this second action claiming unjust enrichment and constructive trust against SunTrust and seeking the value of plaintiff's earlier claim of lien on the real property. The trial court correctly dismissed the second action based on the doctrine of *res judicata*

because the same legal issues were raised or could have been raised in the prior action between the parties. The trial court also made sufficient findings to support its award of sanctions pursuant to G.S. 6-21.5 against plaintiff for pursuing a frivolous action and pursuant to Rule 11 for prosecuting an action for an improper purpose. In addition, because it was amply supported by findings of fact and evidence in the record, the court's award of attorney fees to SunTrust in an amount exceeding what SunTrust sought was not an abuse of discretion.

**Motion to alter or amend judgment under Rule 59**

*Baker v. Tucker*, 768 S.E.2d 874 (N.C. App. Feb. 17, 2015). The trial court was authorized to amend a bench trial judgment to include an additional award of compensation for the movant. Although the motion to amend did not state the specific provision of Rule 59(a) upon which it was based, it was evident that the motion sought correction of the award based on the trial court's misapprehension of the relevant facts and misapplication of the law to them. Under a liberal interpretation of Rule 59(e) and a broad reading of the discretionary bases in Rule 59(a)(7), (8), and (9), these were appropriate bases for amendment of a judgment.

**Withdrawal of counsel**

*In re M.G. and H.G.*, 767 S.E.2d 436 (N.C. App. Jan. 20, 2015). The court erred in allowing counsel for respondent-mother in a termination of parental rights proceeding to withdraw as counsel where there was nothing in the record to show that counsel had notified the client of her intent to withdraw. Pursuant to *Smith v. Bryant*, 264 N.C. 208 (1965), an attorney who has appeared in a case may not withdraw without (1) justifiable cause; (2) reasonable notice to the client; and (3) permission of the court.

**Enforcement of judgment**

*Clark v. Bichsel*, 767 S.E.2d 145 (N.C. App. Jan. 6, 2015). The trial court's monetary judgment against defendant was proper, but the court erred in ordering defendant to pay it in 60 days. Pursuant to G.S. 1-302, the appropriate mechanism for enforcement of a monetary judgment is the execution process.

**Trial court comments not a basis for new trial; improper reduction of attorney fee award**

*Lacey v. Kirk*, 767 S.E.2d 632 (N.C. App. Dec. 31, 2014). This case involved a dispute between an executrix to her mother's estate and the other devisees involving the executrix's refusal, for an extended period of time, to distribute the estate according to the will. After the jury returned a verdict against the executrix, she moved for new trial on several bases including alleged prejudicial remarks by the trial court in front of the jury. The Court of Appeals determined that each of the trial court's statements—including instructions to the executrix to "tell the truth" when she was being evasive; that she had "a problem" if she couldn't prove her point without using hearsay; that she must "answer the question first" before giving an explanation—were and attempt to control the flow of the evidence and were not prejudicial when considered cumulatively and in the broader context of the trial. In addition, comments to her counsel to move on and avoid repetitive evidence "exhibited a certain degree of impatience" but were appropriate for avoiding a waste of the court's time and were, moreover, "meted out" equally to both sides. The trial court also did not err in refusing to grant defendant a new trial where the compensatory and punitive damages awards were supported by the evidence and not excessive under the facts of the case. The court erred, however, in determining that the attorney fee award to plaintiffs would be reduced because of the substantial amount of punitive damages the defendant was already being ordered to pay.

**Preliminary injunction**
*TSG Finishing, LLC v. Bollinger*, 767 S.E.2d 870 (N.C. App. Dec. 31, 2014). Reversing trial court's denial of a preliminary injunction against a long-time employee who had gone to work at a nearby competitor. Plaintiff's evidence showed a likelihood of prevailing on the merits of its claims for misappropriation of trade secrets and (under Pennsylvania law) breach of contract related to a fabric finishing process. Remanded for entry of a preliminary injunction.

**Rule 8 and adequacy of pleading wrongful termination**
*Feltman v. City of Wilson*, 767 S.E.2d 615 (N.C. App. Dec. 31, 2014). The trial court erred in dismissing pursuant to 12(b)(6) plaintiff's claims against the city that she was terminated from employment in violation of her right to free speech and free assembly. Her complaint met the standards for notice pleading pursuant to Rule 8, and she was not required to include "magic language" such as "but for" when alleging the cause of her termination.

**Discovery; protection of medical review committee materials**
*Hammond v. Saini*, 367 **N.C.** 328 (Dec. 19, 2014). Defendants did not show that documents withheld from discovery in a medical negligence case were part of a medical review committee proceeding pursuant to G.S. 131E-76(5)(c). Defendants' affidavit in support of their argument were merely "conclusory assurances" that the criteria under subsection (c) had been satisfied, but it offered no factual support for finding that the documents in question satisfied those criteria. Thus, the documents were not shielded from discovery pursuant to the G.S. 131E-95(b). (Affirming the decision of the Court of Appeals which affirmed the trial court's conclusion.)

**Corporation appearing without counsel before administrative agency**
*In re Twin County Motorsports, Inc.* 367 **N.C.** 613 (Dec. 19, 2014). A non-attorney may appear on behalf of corporation before an administrative hearing officer (in this case, the DMV) without engaging in the unauthorized practice of law under G.S. 84-4. Such appearance is not an appearance at an "action or proceeding before [a] judicial body" by the meaning of the statute because an administrative agency is not a "court of justice." (Reversing the decision of the Court of Appeals.)
*In re Jerry's Shell, LLC* 367 **N.C.** 612 (Dec. 19, 2014). Also reversing the decision of the Court of Appeals for the reasons stated in *In re Twin County Motorsports, Inc.* (above).

**Motion to stay under G.S. 1-75.12**
*Bryant & Assocs., LLC v. ARC Financial Services, LLC*, 767 S.E.2d 87 (N.C. App. Dec. 16, 2014). The trial court did not err in entering an order under GS 1-75.12 to stay a Wake County contract and fraud action upon making detailed findings regarding the impracticality of requiring defendant to litigate the claims in North Carolina when a largely parallel action between the parties already existed in New Jersey. In addition, defendant was not judicially estopped from asserting the propriety of a stay; it had not taken a "clearly inconsistent" position when it earlier asserted in the New Jersey action that it did not contemplate any other actions based on the same claims.

**Subject matter jurisdiction over trust; constructive fraud and related claims**
*Ward v. Fogel*, 786 S.E.2d 292 (N.C. App. Dec. 2, 2014). Plaintiff brought an action for fraudulent

inducement, constructive fraud, and breach of fiduciary duties against trustees of two trusts established by her former husband during their marriage that were in part designed to prevent plaintiff from obtaining the assets of the trusts in the event of divorce. The Court of Appeals held that the superior court had subject matter jurisdiction because the defendants and the property in question were not subject to the jurisdiction of the Florida court in which the plaintiff and her ex-husband had a pending equitable distribution action. In addition, the plaintiff was not required to seek relief through the equitable distribution process in a North Carolina district court; she and her ex-husband are both Florida residents and, in any event, the equitable distribution process would not provide plaintiff the relief she seeks against defendants. Plaintiff's claims were also not barred by the 10-year statute of limitations for constructive fraud nor the three-year statute of limitations on fraud. Finally, the trial court erred in granting summary judgment for defendants based on the second trust because plaintiff forecast sufficient evidence of fraud in the inducement, constructive fraud, and breach of fiduciary duty as to that transaction. As for the first trust, the trial court properly granted summary judgment for defendants on all claims because plaintiff was merely a beneficiary of that trust and was not a party to the "distinct agreement or transaction."

**Judgment interest; jurisdiction to award**

*Robertson, et al. v. Steris Corp.*, 765 S.E.2d 825 (N.C. App. Nov. 18, 2014). Four-and-a-half years into a complicated multi-defendant personal injury action, Plaintiffs replaced their counsel, Mr. Temple. Temple then moved to intervene in the personal injury action to recover in *quantum meruit* the value of his services. The trial court awarded him one-third of the plaintiff's recovery after certain costs. Plaintiffs appealed the award (later affirmed in "Robertson I"). Soon after their appeal, Temple filed a motion to correct the award to include pre-and post-judgment interest. Judge Hooks signed an order on April 19, 2013 awarding interest pursuant to GS 24-5. Judge Hooks' resignation from office became effective April 30, 2013. His order awarding interest was filed by the clerk May 3, 2013. Plaintiffs appealed the award of interest on several grounds. The Court of Appeals, affirming the interest award, held that: (1) The trial court did not lack jurisdiction to enter (file-stamp) Judge Hooks' signed order three days after his resignation was effective. The Court held, as a matter of first impression, that "where…a judge signs an otherwise valid written order or judgment prior to leaving office, the trial court, through the proper county clerk of court, retains jurisdiction to file that judgment, even after the trial judge retires, and thereby completes the steps required for entry"; (2) Judge Hooks had jurisdiction to correct the fee award pursuant to Rule 60(a) even though plaintiffs had already appealed the fee award because the appeal had not yet been docketed; (3) failure to include interest in a judgment as mandated by GS 24-5(b) constitutes a "clerical" mistake that may be addressed pursuant to Rule 60(a); (4) the trial court was authorized to grant interest pursuant to GS 24-5(b) on the equitable claim of *quantum meruit* (quasi-contract); and (5) it was not error for the court to award interest pursuant to GS 24-5(b) (the proper statute) although Temple had erroneously requested interest under 24-5(a).

**Class certification; common issues of fact**

*Neil v. Kuester Real Estate Services*, 764 S.E.2d 498 (N.C. App. Nov. 4, 2014). Appalachian State University students sued their former landlords, alleging the landlords charged an unauthorized "administrative fee" and retained the tenants' security deposits for normal wear and tear in violation of the North Carolina Tenant Security Deposit Act. Plaintiffs also moved for class certification on behalf of a large tenant population renting units from defendants. The Court of Appeals concluded that separate damage trials would be required as to each prospective class member to determine what portion of the

class member's charges, if any, was attributable to overcharging or normal wear and tear. Thus the trial court did not err in concluding that "common issues of fact…do not predominate over issues affecting only individual class members." Denial of class certification affirmed.

## CONTRACTS

### Consent judgment regarding use of public funds to construct hotel

*Wells v. City of Wilmington* (COA14-1367; June 16, 2015). In 2005, to resolve an earlier lawsuit in connection with development of its downtown convention center, the City of Wilmington entered into a Consent Judgment in which it agreed that it would not use public funds to "acquire, build, equip, operate, or otherwise underwrite or subsidize" a "Hotel or its operations." In 2012, after several attempts to find a purchaser for the land upon which the hotel would be built, Wilmington authorized a Memorandum of Understanding with Harmony Hospitality, Inc. for Harmony's purchase of the land for $578,820.00. Plaintiff, an individual taxpayer in Wilmington, and Intervenors, a duo of hotel groups, pursued this show cause motion to hold the City in contempt, arguing that the sale of the land would violate the 2005 Consent Judgment. The trial court denied the show cause order, and the Court of Appeals affirmed. First, the sale of the *land* for the hotel was not part of the scope of the Consent Judgment. Second, the trial court's findings of fact that the purchase price was not below market value, and thus did not constitute a taxpayer subsidy of a private sale, and that the City properly set the sale price in accordance with G.S. 158-7.1(d), were supported by evidence in the record. Finally, the City did not violate the Consent Judgment by the terms of its related Garage Parking License Agreement with Harmony.

### Indemnification for prior acts of negligence

*Malone v. Barnette* (COA14-822; June 2, 2015). After her car was hit by the truck driven by a driver employed by Paxton, plaintiff sued Paxton and Young's, the company that had leased the truck to Paxton, on a theory of negligent failure to maintain the brakes. Paxton filed a cross-claim against Young's. The trial court granted partial summary judgment in favor of Young's on the basis of the indemnification agreement in the lease between Paxton and Young's. Affirming the grant of summary judgment, the Court of Appeals rejected Paxton's arguments that Young's could not legally be indemnified against its own negligence; that the provision was not intended to cover Young's negligence occurring prior to the lease term; and that indemnification for Young's prior acts would violate the Federal Motor Carrier Safety Act.

### Attorney fees under G.S. 44A-35 pursuant to claim of lien

*R&L Construction of Mt. Airy, LLC v. Diaz*, 770 S.E.2d 698 (N.C. App. April 7, 2015). Plaintiff filed a claim of lien and an action to enforce the lien in the amount of $11,175.49 based on allegations that Defendant failed to pay him for work performed in a home renovation. The parties reached an impasse at mediation, where Plaintiff's last offer was to reduce his demand to $9,000.00. The trial court later granted summary judgment in favor of Defendant and, in its discretion, granted over $8,000.00 to Defendant in attorney fees under G.S. 44A-35 after finding that Plaintiff had unreasonably refused to settle. The Court of Appeals affirmed the award of attorney fees, holding that the finding of unreasonable refusal was supported in the record and not manifestly unsupported by reason.

**Breach of contract for construction; status as general contractor; attorney fees under G.S. 44A-35**
*Brown's Builders Supply, Inc. v. Johnson*, 769 S.E.2d 653 (N.C. App. March 17, 2015). Plaintiff, a contractor who performed various improvements to a kitchen, did not exercise enough control over the entire remodel to qualify as a general contractor; thus its lack of a general contractor license did not prevent it from maintaining an action seeking payment for its services. The court's award of attorney fees to Plaintiff pursuant to G.S. 44A-35 based on Defendants' unreasonable refusal to settle was not an abuse of discretion, but the court's order contained insufficient findings of fact as to the reasonableness of the fee as was therefore remanded for further findings.

**Underinsured motorist coverage; multiple claimant exception**
*Integon National Insurance Company v. Maurizzio*, 769 S.E.2d 415 (N.C. App. March 17, 2015). Two young women were injured when the car in which they were passengers had a single-car accident. The car owner's policy, provided by Integon, gave 50K per person/100K per accident UIM coverage. Under this policy, Integon settled one of the women's claims within these limits and provided $50,000 to the second woman. The second woman was insured under her parents' auto policy, which was also issued by Integon. That policy also specified 50K/100K UIM coverage. Integon filed this action seeking declaratory judgment that the parents' policy did not provide UIM coverage to the second young woman (Defendant) for this accident. The trial court granted summary judgment for Defendant, and the Court of Appeals affirmed, determining that the payment to the first young woman under the car owner's policy did not reduce the liability coverage available to Defendant under her parents' policy, and the multiple claimant exception in G.S. 20-279.21(b)(4) did not apply. The 50K per person UIM coverage in Defendant's parents' policy would stack on the 50K UIM coverage under the car owner's policy, for a total of $100K UIM coverage. Since this amount was greater than the 50K liability limits of the car owner's policy, the car was an underinsured vehicle for purposes of Defendant's UIM claim.

**Enforceability of 20-year warranty; six-year statute of repose**
*Christie v. Hartley Constr., Inc.*, 367 **N.C.** 534 (Dec. 19, 2014). An action to enforce a 20-year express warranty covering a home exterior product was not barred by the six-year statute of repose in G.S. 1-50(a)(5) relating to improvements to real property. By clearly offering the extended warranty coverage as an added value to its product and an enticement for a consumer to choose its product over others, defendant bargained away the protections of the statute of repose. Such bargaining did not violate any public policy behind the creation of the statute of repose. (Reversing the Court of Appeals.)

**UIM coverage and multiple at-fault drivers; interest and costs**
*Lunsford v. Mills*, 367 **N.C.** 618 (Dec. 19, 2014) (with partial dissent by Newby, J.). In an accident in which the insured was injured by the fault of more than one driver, his insurer's obligation to provide UIM coverage was triggered, pursuant to G.S. 20-279.21(b)(4), once the insured had exhausted the liability limits of *one* of the drivers. The insured was not required to first exhaust the liability limits of *all* of the drivers. The insurer was not, however, required to pay the insured interest and costs in excess of the UIM coverage amount because it had contractually capped its obligation to pay "compensatory damages" at the coverage limit. (Affirming the Court of Appeals as to UIM coverage trigger; reversing as to interest and costs.)

**Breach of employment contract; salary not in compliance with statute**

*Gilbert v. Guilford Cty* 767 S.E.2d 93 (N.C. App. Dec. 16, 2014). In a bench trial, the trial court did not err in concluding that the plaintiff, former elections director for Guilford County, was paid a salary not commensurate with those of other directors in counties similarly situated and similar in population and number of registered voters for fiscal years 2010 through 2012, in violation of GS 163-35(c). The trial record supported the judge's findings, particularly in light of the fact that defendant put on no evidence.

**Breach of contract; exhaustion of administrative remedies**

*Tucker v. Fayetteville State Univ.* 767 S.E.2d 60 (N.C. App. Dec. 16, 2014). Plaintiff, former head women's basketball coach, brought an action against Fayetteville State University for breach of his employment agreement. The trial court properly dismissed the complaint for plaintiff's failure to exhaust – or indeed even to pursue – his administrative remedies against the University prior to bringing his action in superior court.

**Performance bonds; standing; statute of limitations**

*Town of Black Mountain v. Lexon Ins. Co.*, 768 S.E.2d 302 (N.C. App. Dec. 16, 2014). The trial court properly determined that standing to sue to enforce performance bonds was conferred upon a town after assignment of enforcement rights by the county. The trial court also properly determined that the doctrine of *nullum tempus occurrit regi* ("no time runs against the King") applied to exempt the town from the three-year statute of limitations on bringing a contract claim because the function of the bonds at issue were governmental—assuring compliance with subdivision ordinance requirements.

**Insurance policy coverage**

*North Carolina Farm Bureau Mutual Ins. Co. v. Burns*, 767 S.E.2d 109 (N.C. App. Dec. 16, 2014). In a harrowing accident, a minor's leg was amputated below the knee while he helped his brothers clean a grain bin on their father's commercial farm. Plaintiff, provider of the farm's commercial liability policy, brought an action seeking a declaration of rights under the policy. Plaintiff also sought a declaration that Greyson, the oldest brother, who was an employee of the farm, was not an insured with respect to any claims the minor might bring against him. Plaintiff argued that because the minor was a "volunteer worker" at the time of the injury, the policy specifically excluded his injuries from coverage. The trial court properly concluded that, because the minor did not "donate" his services to the farm, but instead was compelled to act in response to his father's instruction, he was not a "volunteer worker," and thus his older brother Greyson qualified as an insured with respect to the minor's injuries.

**TORTS**

**Medical malpractice; Rule 9(j) certification and motion to amend; interest on Rule 41 costs**
*Fintchre v. Duke Univ.* (COA14-1096; June 2, 2015). In neither her original nor re-filed medical negligence complaint did plaintiff's counsel include the full statement required by Rule of Civil Procedure 9(j) prior to the expiration of the statute of limitations. While the complaints alleged that the medical *care* had been reviewed by a relevant expert, they failed to allege that the medical *records* had been reviewed (as is required for all actions after October 1, 2011). The trial court properly denied as futile plaintiff's motion to amend the Rule 9(j) certification, and because no proper Rule 9(j) certification had been made prior to the expiration of the statute of limitations, the trial court properly dismissed the medical negligence claims with prejudice. The trial court was not authorized, however, to assess interest on defendants' award of costs under Rule of Civil Procedure 41(d).

**Derivative litigation; standing of POA members**
*Anderson v. Seascape at Holden Plantation, LLC* (COA14-1088; June 2, 2015). In this opinion, the Court of Appeals examined various principles of corporate governance and statutory procedures under the North Carolina Nonprofit Corporation Act as applied to property owner's associations. In simplified terms, the plaintiffs, individual property owners in a planned community, brought a derivative action on behalf of their POA against the developer of the community and various board members, seeking damages for faulty construction of a bulkhead. The Court of Appeals concluded that the trial court, among other determinations, properly dismissed the individuals' derivative claims for lack of standing because it had not been established (to this point) that the POA itself—the real party in interest—was unwilling or unable to pursue the claim in its own right.

**Libel**
*Desmond v. News and Observer Publishing Co.* (COA14-625; May 19, 2015). After the News and Observer published an article criticizing the forensic analysis performed by Plaintiff incident to a Pitt County murder, Plaintiff brought this libel action. Analyzing each of the allegedly libelous statements, the Court of Appeals determined that the trial court should have granted summary judgment to the N&O as to a number of statements that were either factually accurate or were substantially accurate and thus subject to the "fair reporting privilege" for news media. However, in a series of statements, the reporter attributed certain criticisms of Plaintiff's analysis to various outside forensics experts. There were genuine issues of material fact either about whether the experts had actually made those statements; whether the reporter had elicited the statements under false factual premises; and whether the statements were made with the reporter's knowledge they were false or with reckless disregard of whether they were false. Thus the trial court properly denied summary judgment for the N&O with respect to that series of statements.

**Auto accident negligence; negligence of both driver and defendant in intersection crash**
*Ward v. Carmona*, _ **N.C. _ (**April 10, 2015). Plaintiff brought a negligence action against a driver who collided with her son's car in an intersection. Defendant then filed a third-party negligence claim against the son. After the jury found both drivers negligent, the trial court denied damages to Plaintiff. The Court of Appeals affirmed. The Supreme Court agreed, holding that where the evidence allowed a jury to conclude (1) that the Defendant entered an intersection on a yellow light and (2) that the third-party

defendant attempted a left turn without keeping a proper lookout for Defendant, both parties could properly be found negligent, and the trial court properly denied relief to Plaintiff.

**Reliability of expert testimony in accident reconstruction; intervening negligence; negligence per se**
*Pope v. Bridge Broom, Inc.*, 770 S.E.2d 702 (N.C. App. April 7, 2015). Decedent was killed after being thrown from the back of a motorcycle that skidded to a stop in an attempt to avoid crashing into a truck at the tail of a street-sweeping operation. Decedent's estate sued the street-sweeping company, alleging negligence in positioning its vehicles and displaying warning signs. The jury found in favor of defendant, and the trial court denied plaintiff's motion for JNOV. Affirming, the Court of Appeals determined that (1) under Rule 702 (and the *Daubert* standard) testimony by defendant's accident reconstruction expert was sufficiently reliable, and the trial court did not err in allowing it; (2) following the precedent set by *Pintacuda v. Zuckerberg*, 358 N.C. 211 (2004), the court's instruction on intervening negligence was warranted where the evidence allowed the jury to find that the motorcycle driver failed to brake within the time allowed; and (3) a negligence per se instruction would not have been appropriate based on defendant's failures to comply with federal traffic control device standards where compliance with those standards were recommended rather than voluntary – and thus were relevant to negligence but did not constitute negligence *per se*.

**Medical negligence; causation; contradictory testimony on summary judgment**
*Hawkins v. Emergency Medicine Physicians of Craven County, PLLC*, 770 S.E.2d 159 (N.C. App. April 7, 2015). Decedent died after suffering a brain hemorrhage in the course of his hospital treatment for atrial fibrillation. In the estate's action against the emergency medicine physician for prescribing decedent a dose of anticoagulant, the trial court properly granted summary judgment in the physician's (and his group's) favor. The affidavits by plaintiff's expert witnesses in opposition to summary judgment contradicted those experts' earlier testimony regarding causation, and thus, under Rule of Civil Procedure 56, could not be considered as evidence to defeat summary judgment on that element of negligence. The plaintiff's remaining evidence as to causation—her experts' deposition testimony—was inadequate to support a negligence claim: one expert declined to opine at all as to causation; the other two essentially opined that the one dose of medication in question would not have caused the death; and none of them opined that defendant influenced the successive treating physicians' continued provision of additional doses of the same medication.

**Negligence per se for Fire Prevention Code violation; prejudgment interest**
*Estate of Coppick v. Hobbs Marina Properties, LLC* (COA14-127; April 7, 2015). After decedent was killed in an explosion near a marina's fuel dispensing system, his estate proceeded to a negligence trial against the company that supplied the fuel dispensing equipment. The jury found defendant liable for the death and awarded $1.5 million. The trial court denied defendant's motions for JNOV and new trial, and the Court of Appeals affirmed as follows: (1) defendant had a duty of care to provide a fuel nozzle that complied with the North Carolina Building Code; the evidence supported a finding that Defendant had installed a non-compliant nozzle; and the instruction as to negligence *per se* based on the Code violation was proper; (2) the evidence of the cause and origin of the explosion was sufficient to establish that Defendant's violation was the proximate cause of the death; (3) an insulating negligence claim was not appropriate based on the potential contributing, but not *superceding*, negligence of others; (4) the court's

evidentiary rulings did not constitute reversible error; and (5) there was no error in the court's calculation of statutory pre-judgment interest as adjusted for settlement sums paid by other defendants.

**Wrongful termination under G.S. 153A-99; deputy sheriff's status as county employee**
*McLaughlin v. Bailey* 771 S.E.2d 570 (N.C. App. April 7, 2015) (with dissent); *Young v. Bailey*, 771 S.E.2d 628 (N.C. App. April 21, 2015). In these two cases, deputy sheriffs alleged that their employment was terminated by the sheriff after they refused to support his re-election campaign, and that this termination violated G.S. 153A-99, which protects county employees from political or partisan coercion or activity that restricts their right to support candidates of their choice. The Court of Appeals concluded that, because deputy sheriffs are employees of the sheriff, they are not "county employees" under this statute, and are therefore not entitled to the statute's protections.

**Wrongful termination; status of assistant register of deeds as county employee; IIED**
*Sims-Campbell v. Welch*, 769 S.E.2d 643 (N.C. App. March 3, 2015). An assistant register of deeds was fired after she informed the register of deeds that she intended to run against him in the upcoming election. The trial court dismissed her claims against the register of deeds under Rule 12(b)(6). The Court of Appeals affirmed, concluding that her termination was not in violation of public policy; that she was not a "county employee" under G.S. 153A-99 and thus was not protected by that statute from political or partisan coercion; and that her termination was not extreme and outrageous conduct that would support an intentional infliction of emotional distress (IIED) claim.

**Rule 9(j) and statute of limitations**
*Ratledge v. Perdue*, 770 S.E.2d 389 (N.C. App. Feb. 17, 2015). Plaintiff filed a medical malpractice action that contained a Rule 9(j) certification. He later voluntarily dismissed the claim without prejudice and refiled the complaint within the one-year permitted by Rule 41(a) but after the original statute of limitations had run. The trial court dismissed the refiled action with prejudice after discovery revealed that the physician who conducted a review pursuant to Rule 9(j) did not state that the standard of care had been breached or that he would be willing to testify to that effect. Affirming the dismissal, the Court of Appeals held that, because the plaintiff had failed to comply with Rule 9(j) prior to expiration of the original statute of limitations, the trial court properly dismissed the complaint.

**Uniform Transfer to Minors Act (GS Chapter 33A); fiduciary duty**
*In re Alessandrini*, 769 S.E.2d 214 (N.C. App. Feb. 17, 2015). A father who acted as custodian of the UTMA accounts of two of his children did not commit a *per se* violation of his fiduciary duty by paying various expenses of the minors from his own funds and then reimbursing himself from the UTMA accounts. Summary judgment was properly granted in favor of the custodian. (The COA identified this issue as a matter of first impression.)

**Breach of contract between college and student**
*Supplee v. Miller-Motte Bus. Coll., Inc.*, 768 S.E.2d 582 (N.C. App. Feb. 3, 2015). After Plaintiff had attended classes for more than a year in Defendant's surgical technology program, Defendant performed a criminal background check on him, finding that he had previously been charged with felonies, and informed him that he would be unable to complete the program because he could not meet the criteria to attend the required clinical externships. He later sued the college for breach of contract, fraud, unfair

trade practices, negligent misrepresentation, and negligence. The trial court granted summary judgment in Defendant's favor as to the tort claims, but allowed trial to proceed as to breach of contract, where the jury found in Plaintiff's favor and awarded him over $50,000 in damages. Defendant's motion for JNOV was denied. The Court of Appeals affirmed. While there was insufficient evidence to support any of Plaintiff's tort claims, evidence existed to support the breach of contract verdict. The record supported a finding that Defendant had been contractually obligated to conduct the criminal background check at the beginning of Plaintiff's enrollment—rather than a full year later—to determine his eligibility for degree completion. In addition, Plaintiff submitted sufficient evidence to support the damages verdict based on earning opportunity he had lost while enrolled with Defendant.

**Parent-child immunity**

*Needham v. Price*, 768 S.E.2d 160 (N.C. App. Jan. 20, 2015). Defendant was plaintiff's long-term domestic partner and father of her three children. After the couple separated, defendant allegedly entered the home at 1:25 a.m. where plaintiff and her children were living, breaking through the attic door, striking plaintiff in the process and severely injuring her head, neck, and shoulder. The children were awakened by this event, and then witnessed their mother collapse to the floor as the father proceeded to shout obscenities at her. Through their mother, the children sued the father for negligence, premises liability, negligent infliction of emotional distress (NIED), intentional infliction of emotional distress (IIED), gross negligence, and punitive damages. The trial court granted summary judgment to the father on all of the minors' claims on the basis of parent-child immunity. The Court of Appeals reversed summary judgment with respect to IIED, gross negligence, and related punitive damages. While parent-child immunity bars claims between unemancipated children and their parents based on *ordinary* negligence, the doctrine does not insulate a defendant against willful and malicious acts.

**Res ipsa loquitur in medical malpractice case; Rule 9(j)**

*Wright v. WakeMed*, 767 S.E.2d 408 (N.C. App. Dec. 31, 2014). The trial court properly dismissed plaintiff's medical malpractice action for failure to include a Rule 9(j) certification. The complaint did not allege facts allowing her to rely on the doctrine of *res ipsa loquitur* because she alleged injury arising in a specific manner by a specific act of negligence—error in the prescription and administration of medications—and because expert testimony would be needed to establish whether the medications caused the alleged injury.

**Claims against bank related to fraudulent activity of account holder; liability to third party**

*Bottom v. Bailey*, 767 S.E.2d 883 (N.C. App. Dec. 31, 2014). The trial court properly dismissed various tort claims against Morgan Stanley related to the fraudulent use by Bailey—another defendant—of plaintiffs' funds in one of Bailey's Morgan Stanley accounts. The negligence claim was properly dismissed because Morgan Stanley owed no duty to plaintiffs, who were not its customers. The claim under G.S. 32-9 failed because the account in question was not in plaintiffs' names. The claim stated under 31 U.S.C. 5311 failed because that statute does not provide a private remedy for third party non-customers of banks, but is instead intended to aid in criminal, tax, and regulatory investigations or proceedings or intelligence activities. The aiding and abetting a breach of fiduciary duty claim failed because, even if such a claim is valid in North Carolina, plaintiffs failed to adequately allege requisite knowledge or assistance by Morgan Stanley. The civil conspiracy claim failed for failure to adequately

allege an agreement between Bailey and Morgan Stanley. Finally, the Chapter 75 claim was properly dismissed because the alleged conspiracy upon which it was based was not adequately pled.

**Pleading termination in violation of rights to freedom of speech and freedom of assembly**
*Feltman v. City of Wilson*, 767 S.E.2d 615 (N.C. App. Dec. 31, 2014). The trial court erred in dismissing pursuant to 12(b)(6) plaintiff's claims against the city that she was terminated from employment in violation of her right to free speech and free assembly. Her complaint met the standards for notice pleading pursuant to Rule 8, and she was not required to include "magic language" such as "but for" when alleging the cause of her termination.

**Retaliatory termination in violation of Whistleblower Act**
*Manickavasagar v. NC Department of Public Safety*, 767 S.E.2d 652 (N.C. App. Dec. 31, 2014). Plaintiff, who was terminated as a physician from the NC Correctional Institution for Women during his probationary employment period, could not maintain an action under the Whistleblower Act (G.S. 126-84 *et seq.*) for reporting racial or ethnic discrimination where plaintiff's own testimony revealed he never believed he was subject to such discrimination. Nor could he maintain an action based on reporting fraud, misappropriation, and mismanagement where he could offer no factual issue to show that the legitimate, non-retaliatory reasons proffered for terminating him—clashes with personnel, sleeping on duty, etc.—were pretextual.

**Claims for conversion, trespass; one judge overruling another; evidence at summary judgment hearing; counterclaim for reimbursement**
*Steele v. Bowden*, 768 S.E.2d 47 (N.C. App. Dec. 31, 2014) (with partial dissent). This case involves a dispute between a former couple over payments for a jointly-owned car after defendant attempted to forcibly "repossess" the vehicle from plaintiff's property after plaintiff failed to make the final car payment. The trial judge did not err in entering summary judgment for plaintiff on his conversion claim, as all the evidence supported his allegations that defendant wrongfully took property belonging to him as co-owner. In entering this order, the trial judge did not impermissibly overrule another judge who had previously denied plaintiff's motion for judgment on the pleadings. The trial court also properly granted summary judgment to plaintiff on his trespass to personal property claim because all the evidence showed an unauthorized, unlawful interference with the property. The trial court also did not abuse its discretion in refusing to allow defendant to give oral testimony at the summary judgment hearing where she did not offer affidavits, depositions, or other evidentiary materials in opposition to the motion. The trial judge erred, however, by refusing to submit to the jury her counterclaim for unjust enrichment where she forecast evidence of payments for which she was entitled to reimbursement.

**Public official immunity; direct Constitutional claim**
*DeBaun v. Kuszaj*, 767 S.E.2d 353 (N.C. App. Dec. 16, 2014) (on remand for reconsideration in light of *Craig ex rel. Craig v. New Hanover Cty Bd of Educ.*, 363 N.C. 334, 678 S.E.2d 351 (2009)). The trial court properly granted summary judgment in favor of defendants, a Durham police officer and the City of Durham, on plaintiff's claim under the North Carolina Constitution for violation of plaintiff's rights when he was severely injured by use of a taser. Because plaintiff had the opportunity to seek relief through claims of assault and battery, use of excessive force, and malicious prosecution—even though public

official immunity precluded success on these claims—he had an "adequate remedy at law" which prevented his direct constitutional claim.

**Governmental immunity for incorporated voluntary fire department**

*Pruett v. Bingham*, 767 S.E.2d 357 (N.C. App. Dec. 16, 2014) (with dissent). The trial court properly granted summary judgment in favor of an incorporated volunteer fire department in an action based on the role of the driver of one of its vehicles in an accident while the driver was responding to an emergency. Because the incorporated fire department was under contract with a county at the time of the accident to provide the very services for which it was operating the vehicle, it was entitled to governmental immunity in connection with the accident. In addition, the claimants failed to raise an argument before the trial court that the fire department had waived immunity through the purchase of liability insurance. Finally, the trial court did not err in denying the claimant's oral motion to amend their complaint to amend their pleadings because they had ample opportunity to make such a motion at an earlier time.

**Unfair and deceptive trade practices; debt collection**

*Wells Fargo Bank, N.A. v. Corneal*, 767 S.E.2d 374 (N.C. App. Dec. 16, 2014). Lender sued defendants for collection of a debt that was not paid at maturity and for judicial foreclosure. The trial court properly dismissed defendants' counterclaim for violation of the unfair and deceptive trade practices act because defendants failed to allege that lender *intended at the time the promise was made* to break its promise to allow defendants to refinance at maturity. The trial court also properly dismissed defendants' counterclaim under the North Carolina Debt Collection Act because defendants failed to allege that they incurred the debt for "personal, family, household, or agricultural purposes" as required under the Act.

**Negligence related to animals**

*Wilmoth v. Hemrich*, 768 S.E.2d 570 (N.C. App. Dec. 2, 2014). The trial court erred in failing to grant directed verdict for defendants on plaintiff's negligence claim for injuries he received when defendant's straying cow charged at him. Because plaintiff failed to submit evidence that the cow was "at large" due to some negligence of defendants (inadequate fence, infrequent surveillance, etc.) or that prior to plaintiff's injury defendant knew or should have known that the cows had escaped, plaintiff failed as a matter of law to demonstrate breach of a duty of care.

**UDTPA and "learned profession; whether medical malpractice alleged; abatement**

*Wheeless v. Maria Parham Medical Ctr, Inc.* 768 S.E.2d 119 (N.C. App. Dec. 2, 2014). Plaintiff brought claims against the medical center and certain medical care providers related to their peer review of plaintiff, various limitations on his practice privileges, and a related complaint to the medical board. The trial court properly dismissed his unfair and deceptive trade practices claim because defendants' alleged act of complaining about defendant to the medical board was "integral to their role in ensuring the provision of adequate medical care" and thus fell within the "learned profession" exclusion in GS 1-75.1. In addition, the trial court properly dismissed plaintiff's medical malpractice claim because he had no physician-patient relationship with defendants. Finally, the trial court properly dismissed the negligence, negligence *per se*, and *res ipsa* claims included in his second complaint because they were abated by the substantial inclusion of those claims against the same core of defendants in an earlier action.

**Negligence and contributory negligence involving impaired driving**

*Mohr v. Matthews*, 768 S.E.2d 10 (N.C. App. Dec. 2, 2014). A 19-year-old died when he drove a car after becoming intoxicated at his grandparent's home with the knowledge of his grandparents and father. The trial court properly dismissed his estate's claim for negligence against the grandparents and father (defendants) that had been premised on a theory of social host liability. The negligence claim was defeated because the complaint established the decedent's contributory negligence (in continuing to consume alcohol) "so clearly that no other conclusion [could] be reasonably drawn therefrom." In addition, because the decedent was past the age of majority, there was no special relationship between defendants and himself that would allow them to legally control his conduct.

**Libel per se; libel per quod**

*Skinner v. Reynolds*,764 S.E.2d 652 (N.C. App. Nov. 4, 2014). Wake Forest University School of Law reduced plaintiff's scholarship when he failed to remain in the top two-thirds of his class. He thereafter engaged in a protracted dispute with various members of the school's administration regarding the decision. The communications culminated in a letter to plaintiff from the school's dean reiterating the school's decision. The second part of the letter addressed plaintiff's behavior during his challenge, stated the dean's opinion that plaintiff tended to react with suspicion to those who disagreed with him, and reminded plaintiff of the university's code of conduct. Plaintiff sued the dean for libel per se and libel per quod and sued the school, university, and various administrators for negligent supervision of the dean. The libel claims focused on the following language of the letter: "From my experience with you on this issue, if people disagree with you, you appear to assume that those persons are acting in bad faith and you accuse them of fraud and deceit." The trial court dismissed the complaint pursuant to 12(b)(6). The Court of Appeals affirmed, concluding that the complaint (1) failed as a matter of law to allege libel per se because, among other reasons, the statements in question were opinions rather than facts subject to being proven or disproved; and (2) failed as matter of law to allege libel per quod because there were insufficient allegations of special damages to plaintiff. Because the negligent supervision claim was derivative of the libel claims, it was also properly dismissed.

**Breach of fiduciary duty and related claims against auditor**

*Commscope Credit Union v. Butler & Burke, LLP*, 764 S.E.2d 642 (N.C. App. Nov. 4, 2014). Plaintiff credit union was penalized $374,200 by the IRS because plaintiff's general manager failed to make critical tax filings between 2001 and 2009. To recover for loss related to this penalty, plaintiff sued the certified public accounting firm that plaintiff retained between 2001 and 2009 to provide professional independent audit services. Plaintiff stated claims against defendant for breach of contract, negligence, breach of fiduciary trust, and professional malpractice. The trial court dismissed plaintiff's claims pursuant to Rule 12(b)(6). The Court of Appeals reversed. Following the rationale of *Smith v. Underwood*, 127 N.C. App. 1 (1997), plaintiff stated a prima facie case for a fiduciary duty given the nature of the auditing services defendant was hired to provide. Defendants also could not defeat plaintiff's remaining claims with their defenses of "in pari delicto" (mutual fault) and contributory negligence. The court also rejected defendant's argument that the express terms of the parties' agreement placed responsibility for financial issues solely on plaintiff. In short, plaintiff alleged sufficient facts to survive defendant's motion to dismiss as to each of its claims.

## CONSTITUTIONAL RIGHTS

### Voting Districts

*Dickson v. Rucho* (**N.C.** 201PA12-2; Dec. 19, 2014) (with partial dissent by Beasley, J., joined by Hudson, J.). Affirming, in this 50-page opinion, the decision of the superior court three-judge panel finding that the General Assembly's 2011 redistricting plan did not violate the constitutional rights of the plaintiffs.

UPDATE: Judgment vacated by *Dickson v. Rucho*, 135 S. Ct. 1843 (U.S. 2015) and case remanded to the North Carolina Supreme Court for further consideration in light of *Alabama Legislative Black Caucus v. Alabama*, 575 U.S. ——, 135 S.Ct. 1257, —— L.Ed.2d —— (2015).

## PUBLIC RECORDS

### Settlement agreements

*Jackson v. Charlotte Mecklenburg Hosp. Auth.*, 768 S.E.2d 23 (N.C. App. Dec. 31, 2014). In the absence of a clear exemption or exception from the definition of "public record" in G.S. 132-1 and 132-1.3, settlement documents in actions brought *by* an entity covered by the Public Records Act were considered public records. Thus the settlement agreement that resulted from a lawsuit by the Charlotte Mecklenburg Hospital Authority against Wachovia was a proper subject of a public records request.

### Custodian of public records

*Cline v. David Hoke*, 766 S.E.2d 861 (N.C. App. Dec. 16, 2014). A former Durham County DA sued defendant, Assistant Director at the Administrative Office of the Courts, to compel production of certain emails under public records laws. The trial court properly dismissed the complaint against defendant in his individual capacity because GS 132-69(a) requires such actions to be brought against custodians of public records in their official capacities. The trial court also properly dismissed the complaint against defendant in his official capacity because he was not the custodian of the requested records. Under GS 132-2, the custodian is "the public official in charge of an office having public records," and as an "assistant" director, defendant is not "the" person in charge of the AOC.

## PUBLIC EMPLOYMENT

*Frampton v. UNC* (COA14-1117; June 16, 2015). In 2012, a tenured nine-month professor was arrested in Argentina for cocaine possession while he was scheduled to be teaching a spring semester course in Chapel Hill. The University first waited five weeks in hopes that his situation would be resolved, and then, when no progress was made, placed him on personal leave without pay. Eventually he was convicted of cocaine smuggling and sentenced to more than four years imprisonment in Argentina. The University then initiated disciplinary proceedings and terminated his employment. He sought judicial review of the University's decision pursuant to G.S. 150B, and the Superior Court affirmed the University's decision. The Court of Appeals reversed, finding that the University violated its policies by unilaterally placing him on personal leave without pay rather than initiating formal disciplinary proceedings applicable to tenured faculty. He was, therefore, entitled to recover pay and benefits that were withheld from the time he was placed on unpaid leave until the date of his formal termination.

**REAL PROPERTY, ZONING, and LAND USE**

**Easement vs. fee simple title; right of administrator to reopen estate and convey interest**
*Simmons v. Waddell* (COA14-1214; June 16, 2015). About 12 years after decedent's estate was settled, the estate administrator determined that decedent had, at her death, owned a thirty-foot wide strip of land that had long been used as roadway access to an adjacent landlocked parcel. The administrator thereafter moved successfully to reopen the estate and sold the land (the "Driveway Corridor") to an adjacent landowner, Simmons, so the proceeds could be distributed to decedent's devisees. Another adjacent landowner, Waddell—who had purchased the landlocked parcel from decedent in 1983—disputed the administrator's right to convey, and claimed that her purchase of the landlocked parcel also included fee simple title to the Driveway Corridor. Simmons filed an action to quiet title to the Driveway Corridor. The trial court quieted title in Simmons' favor, and the Court of Appeals affirmed. The 1983 deed from decedent conveying the landlocked parcel to Waddell unequivocally stated that that it "also conveyed [the grantor's] interest in a roadway *easement* 30 feet wide, as spelled out in [earlier Deed]" (emphasis added). Thus Waddell owned only an easement and not fee simple title to the Driveway Corridor, and fee simple titled remained with decedent until her death. Further, because the Driveway Corridor became a part of decedent's estate (and title vested in the administrator) at the time of decedent's death, the administrator was authorized to reopen the estate and convey decedent's fee simple interest to Simmons in order to properly dispose of estate property.

**Condemnation; vested rights; unity of ownership**
*Town of Midland v. Wayne*, _ **N.C. _** (June 11, 2015). Wayne and an LLC of which Wayne was majority owner respectively owned adjacent parcels of land, the "Wayne Tracts" and the "LLC tract". The parcels together constituted a 250-acre subdivision ("Park Creek") for which zoning and development approval was granted in 1997. By 2009, the respective owners remained in compliance with the approvals, and two phases of the subdivision had been completed. In 2009, the Town filed an action condemning three acres of the Wayne Tracts for a natural gas pipeline and fiber optic line easement. The LLC moved to intervene on grounds that the taking of the three acres of the Wayne Tracts affected the value of the entire subdivision and constituted a taking with respect to both the Wayne Tracts and the LLC tract.

The Supreme Court held that there was a vested right to develop the remainder of Park Creek under the 1997 approvals and that the taking of the three-acre parcel adversely affected the ability to develop the property pursuant to the Park Creek plan. For purposes of determining just compensation, that vested right was to be reflected in the valuation of the property before the taking. Reversing in part the Court of Appeals, the Supreme Court then determined that there was sufficient unity of ownership between the Wayne Tracts and the LLC Tract—particularly because they were part of a unified project with a joint vested development right—and should be considered a contiguous tract of land for purposes of the taking under G.S. 40A-67. Thus the case was remanded for determination of just compensation with respect to both the Wayne and LLC tracts.

**Enforceability of certain membership fees related to condominium purchase price**
*Wilner v. Cedars of Chapel Hill, LLC* (COA14-380; June 2, 2015). The trial court erred in granting summary judgment in favor of owners of condominiums who challenged the legality of membership fees of ten percent of the gross purchase price of each unit. The fees were not unlawful transfer fees under G.S. Chapter 39 because they fell within an exception found in G.S. 58-64-85(b); were not properly

challenged under the Marketable Title Act because ownership of the units was not in question; were not unenforceable covenants because they were contracts specific to individuals rather than restrictions running with the land; and were not procedurally or substantively unconscionable. In addition, the trial court's order enjoining enforcement of the fees did not comply with the specificity requirements of Rule of Civil Procedure 65.

**Residential Rental Agreements Act (G.S. Chapter 42-38); smoke alarms and habitability**
*Strikeleather Realty and Investments Co. v. Broadway* (COA14-1136; May 19, 2015). The trial court's finding that defendant landlord had failed to verify operability of a smoke alarm and carbon monoxide detector was insufficient to support the court's conclusions that the landlord had violated the implied warranty of habitability or that the lessee was damaged by such failure and entitled to rent abatement.

**Condemnation; "public use or benefit"**
*Town of Matthews v. Wright*, 771 S.E.2d 328 (N.C. App. April 21, 2015). In 2011, the Town lost a five-year round of litigation over whether a thirty-foot easement in front of the Wrights' home was a public street. Having failed in that battle, the Town then decided to condemn the easement pursuant to G.S. Chapter 40A and "permanently close the issue." The Wrights challenged the taking as having no "public use or benefit" as required by statute. The trial court agreed and dismissed the condemnation action as an arbitrary and capricious exercise of the eminent domain power. The Court of Appeals affirmed, holding that the trial court's findings of fact supported a determination that the taking served no public use or benefit. The Wrights' portion of the easement—which was at the dead end of the road—was only a portion of the total private easement; four other homeowners on the street also held easements over the same road. The Town's claim that the Wrights might *in the future* attempt to block public access to the easement—so condemning the Wrights' portion of the easement would "open" the road to public use—"defie[d] reason." Rather than being a proper use of the eminent domain power, the taking instead reflected "personal conflicts" between the Town and the Wrights.

**Reformation of deed; doctrine of equitable subrogation**
*Bank of New York Mellon v. Withers* (COA14-1111; April 7, 2015). Plaintiff lender's predecessor-in-interest agreed to loan June and her daughter, Rhonda, about $63,000 in exchange for a first position lien on June's real property. As part of the transaction, the lender directed that June transfer the property to herself and Rhonda as joint tenants and pay off the prior deed of trust in full. The closing attorney mistakenly listed not just June and Rhonda, but also June's other three daughters, as grantees on the deed; thus the deed of trust to Plaintiff's predecessor-in-interest secured only two-fifths of the property. In this action for equitable relief by Plaintiff, the trial court correctly applied the doctrine of equitable subrogation to allow Plaintiff's rights to the property to be equitably subrogated to the prior deed of trust so that Plaintiff could claim a first lien on the entire property.

**Condemnation; recording under the Map Act**
*Kirby v. North Carolina Dept. of Transp.*, 769 S.E.2d 218 (N.C. App. Feb. 17, 2015). This lengthy opinion is the latest to address legal issues surrounding the potential construction of a Northern Beltway loop around Winston-Salem. In this case, the Court of Appeals determined that the North Carolina Department of Transportation's recording of a corridor map pursuant to the Transportation Corridor Official Map Act was an exercise of the power of eminent domain over the property affected within the

corridor. The matter was therefore remanded to the superior court to determine damages to the respective property owners for the taking.

**Continuing trespass from an encroachment onto real property**
*Graham v. Deutsche Bank National Trust Co.*, 768 S.E.2d 614 (N.C. App. Feb. 17, 2015). Plaintiff, owner of parcel A was entitled to summary judgment against owner of adjacent parcel B in her action for trespass due to encroachment onto her property of a structure from parcel B. The fact that neither plaintiff nor defendant owned their respective parcels at the time the encroachment began did not foreclose the trespass claim because the encroachment constituted a continuous trespass.

**Review of board of adjustment decision; tree-shaped cellular tower**
*Fehrenbacher v. City of Durham*, 768 S.E.2d 186 (N.C. App. Feb. 3, 2015). Under a whole-record test, the trial court did not err in affirming the Board of Adjustment's (BOA) decision to approve a large, tree-shaped cellular tower as a permitted concealed wireless communications facility under the Durham UDO. In addition, the record before the BOA, although incomplete due to a recording malfunction, was adequate to allow the trial court's review. It was also not error for the trial court to request photographic simulations of the tower that were not before the BOA.

**Right of first refusal in lease; common law rule against perpetuities**
*Khwaja v. Khan*, 767 S.E.2d 901 (N.C. App. Jan. 20, 2015). Landlords were entitled to summary judgment on tenant's action to enforce a right of first refusal to purchase a building. The lease provided for an initial term of 15 years, but also provided an option to extend for an additional "5 to 10 years", and the right of first refusal lasted for the duration of the lease. Because the right of first refusal was not tied to any life in being and could have vested sometime beyond 21 years from the beginning of the lease term, it violated the common law rule against perpetuities and was void *ab initio*. (Relying on holding in *New Bar Partnership v. Martin*, __ N.C. App. __, 729 S.E.2d 675 (2012).)

**Subject matter jurisdiction; billboard in violation of ordinance**
*MYC Klepper/Brandon Knolls L.L.C. v. Board of Adjustment for City of Asheville*, 767 S.E.2d 668 (N.C. App. Dec. 31, 2014). The petitioner's failure to name the City of Asheville rather than the Asheville BOA did not deprive the trial court of subject matter jurisdiction over the review of a quasi-judicial decision in the nature of certiorari, particularly because the City of Asheville was on notice of the matter and participated in the hearing. The trial court also correctly concluded that the BOA had properly issued a notice of violation regarding a replacement nonconforming billboard because the prior nonconforming billboard had been removed more than a year before. In addition, the City was not estopped from enforcing the ordinance where the City Attorney told the owner he was proceeding properly and failed to inform the owner of the time limit for re-establishing the use.

**Condemnation of oceanfront motel; superior court review**
*Six at 109, LLC v. Town of Holden Beach*, 767 S.E.2d 400 (N.C. App. Dec. 31, 2014). The Town of Holden Beach did not improperly apply principles related to the public trust doctrine when condemning an oceanfront motel, but instead based its decision on structural defects and safety hazards. In affirming the Town's decision, the trial court did not err in finding substantial evidence to support the Town's findings. Further, the petitioner did not have a vested right to continue improvements to the motel

(without threat of condemnation) pursuant to a 2008 CAMA permit. The CAMA permit authorized various interior alterations, while the condemnation was based largely on exterior and structural defects.

**Presumption of lien expiration and "life of the lien" statute**

*Falk v. Fannie Mae*, 367 **N.C.** 594 (Dec. 19, 2014). Under G.S. 45-37(b)(2011)—the "life of the lien" statute—the deed of a prior lienholder was terminated 15 years after execution where that lienholder had not recorded an affidavit postponing the effective date of the statute's conclusive presumption of lien satisfaction. Thus, a subsequent creditor of the grantor (here, Fannie Mae) was permitted to foreclose on the property unencumbered by the prior lien. The date on which the subsequent creditor acquired its interest in the property did not affect its right to do so. (Reversing the decision of the Court of Appeals.)

**Restrictive covenant; parking lot on restricted tract**

*Charlotte Pavilion Road Retail Invest., L.L.C v North Carolina CVS Pharmacy, LLC*, 767 S.E.2d 105 (N.C. App. Dec. 16, 2014). The trial court properly declared that the proposed use of a tract of land did not violate a restrictive covenant prohibiting the land from being "used for the purpose of a health and beauty aids store, a drug store, a vitamin store, and/or a pharmacy." The proposed use of the tract was as a parking lot and access easement for a Walmart that would be constructed on an adjacent (non-restricted) parcel. Although the Walmart would provide such products and services, and the parking lot would serve the Walmart, the parking lot itself would not be a structure ("four walls and a roof") that operates one of the prohibited types of stores. By the plain language of the restrictive covenant, therefore, the parking lot was not a restricted use.

**Easement; statute of limitations**

*Duke Energy Carolinas v. Gray*, 766 S.E.2d 354 (N.C. App. Dec. 2, 2014). Duke Energy's claim against defendant for encroachment on a utility easement was barred by the six-year statute of limitations on claims for "injury to any incorporeal hereditament" in GS 1-50(a)(3). This statute of limitations began to accrue at the time the encroachment began, regardless of when plaintiff knew or should have known about it. In addition, the 10-year statute of limitations in GS 1-47(d) for actions based on instruments under seal did not apply because defendant was not a party to the original contract under seal between plaintiff's predecessor and the individuals who were the property owners at the time the easement was created. The trial court therefore properly granted summary judgment in favor of defendant.

**Operation of shooting range; requirement of SUP; interpretation of *Land***

*Byrd v. Franklin County*, 765 S.E.2d 805 (N.C. App. Nov. 18, 2014) (with partial dissent). Petitioners sought to operate a shooting range on their land. Franklin County informed them that a shooting range fell into the category of "Open Air Games" for which a Special Use Permit (SUP) from the Board of Commissioners would be required under the Franklin County Unified Development Ordinance (UDO). Petitioners sought and were denied the SUP. Later, after nevertheless conducting shooting activity on the property, the County sent them a Final Notice of Violation, from which Petitioners appealed to the Board of Adjustment. The Board of Adjustment determined that an SUP would indeed be required for a shooting range and affirmed the Notice of Violation. The trial court affirmed the Board of Adjustment's order. The Court of Appeals affirmed the trial court's conclusion, but for a different reason. The court disagreed that a shooting range fell within the category of "Open Air Games." Instead, a shooting range was a use not listed in the UDO's Table of Permitted Uses. Thus it fell within the language of the UDO

providing that "[u]ses not specifically listed in the Table of Permitted Uses are prohibited." Thus, a shooting range was a prohibited use in the County, and the Board of Adjustment's decision to uphold the Notice of Violation was proper.

In making this determination, the majority declined to interpret *Land v. Village of Wesley Chapel*, 206 N.C. App. 123 (2010), to *allow* any uses not expressly excluded by a development ordinance. In his opinion, the dissenting judge disagreed and determined that *Land* in fact rejected the "notion that a zoning ordinance may prohibit uses not explicitly allowed" and instead compelled a conclusion that the Franklin County UDO's provision "is in derogation of the common law and is without legal effect."

## REGULATORY AUTHORITY

**Authority to inspect wastewater systems**

*Phillips v. Orange Cty Health Dep't*, 765 S.E.2d 811 (N.C. App. Nov. 18, 2014). The trial court correctly held that the Orange County Health Department had no authority under GS Chapter 130A to conduct wastewater system inspection on Plaintiff's spray irrigation system because such system was authorized and regulated exclusively by the State under G.S. Chapter 143. The trial court also properly enjoined the County from collecting fees for prior inspections. In addition, the trial court did not err in ordering the County to pay Plaintiff's attorney fees pursuant to G.S. 1-243 and G.S. 6-21.7 based on the County's actions in inspecting the property outside the scope of its legal authority.

## FORECLOSURES

**Preclusive effect of foreclosure on separate contract and tort claims action against lender**

*Funderburk v. JPMorgan Chase Bank, N.A.* (COA14-1258; June 16, 2015). Plaintiffs filed this action against their former mortgage lender for breach of contract, breach of the covenant of good faith and fair dealing, negligent misrepresentation, tortious interference with contracts and business expectancy, quantum meruit, and punitive damages—all in connection with an earlier series of foreclosures. The trial court properly dismissed these claims pursuant to Rule 12(b)(6). Each of the properties had already been foreclosed upon pursuant to Chapter 45 based on plaintiffs' payment default, and the foreclosure orders of the clerk had become final. Each of the claims in the present action was essentially premised upon an argument that there had been no default; because the issue of default had been conclusively determined in the earlier foreclosure proceedings, it could not be re-litigated in this separate civil action.

***De novo* hearing; findings of fact and conclusions of law under Rule 52**

*In Re the Foreclosure of Garvey* (COA14-570; June 2, 2015). The order of the superior court, on de novo review from the clerk, allowing a foreclosure under Chapter 45, was reversed and remanded for specific findings of fact (under Rule of Civil Procedure 52(a)(2)) as to each of the criteria required by G.S. 45-21.16(d) for exercising a power of sale.

**Voluntary dismissal of foreclosure action; acceleration of debt**

*In Re the Foreclosure of Beasley* (COA14-387; June 2, 2015). Petitioner's two prior voluntary dismissals under Rule of Civil Procedure 41 of petitions to foreclose on a note under Chapter 45 did not operate as adjudications on the merits preventing a third Chapter 45 foreclosure action under Rule 41's two dismissal rule. Although the right to accelerate the debt had been invoked in the first action, the first and

second actions involved different periods of alleged default, and because the period of default alleged in the second action could not have been alleged in the first action, the two actions did not arise out of the same claim of default. The trial court's order dismissing the third foreclosure action with prejudice was therefore reversed.

**Party aggrieved by appeal dismissal; jurisdiction to award injunction; sanctions hearing**
*In re Foreclosure of Foster*, 768 S.E.2d 870 (N.C. App. Feb. 17, 2015). After the trial court properly dismissed an appeal by Wells Fargo of a dismissal of its foreclosure petition, the mortgagors moved to set aside the appeal dismissal to have the court hear their prior motion for permanent injunction and sanctions against Wells Fargo. The trial court properly denied mortgagors' motion because the mortgagors were not the party aggrieved by the appeal dismissal; an injunction would have exceeded the scope of the court's authority in a Chapter 45 foreclosure appeal; and the appeal dismissal did not, in any event, prevent mortgagors from having their motion for sanctions calendared and heard by the trial court.

**Service of notice of hearing**
*In re Deed of Powell*, 768 S.E.2d 133 (N.C. App. Dec. 2, 2014). In serving its notice of hearing on a foreclosure under power of sale, the trustee was not required under Chapter 45 and Rule of Civil Procedure 4(j1) to serve by personal delivery, registered/certified mail, *and* designated delivery service prior to posting notice at the subject property. In addition, the trustee exercised due diligence prior to posting by first attempting personal service and certified mail service to debtor's known address.

*The following 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.*

**Authority to cancel note; holder; indorsements**
*In re Dispute Over Sum of $375,757.47* (COA14-1239; April 21, 2015). The Court of Appeals applied G.S. 25-3-604 to determine whether the original lender had the authority to cancel a note where the original lender recorded a Certificate of Satisfaction with the Register of Deeds. The court determined, based on a review of the allonge to the note and the original note submitted into evidence by the current holder of the note, that the original lender did not have the authority to cancel the note because at the time of the recording of the satisfaction, the lender had previously assigned the note, no longer owned the loan, and was not a "person entitled to enforce the instrument" under G.S. 25-3-604.

In addition, court summarized applicable law under G.S. Chapter 25 to indorsements and the assignment of notes. The court then applied the holding of *In re Bass*, 366 N.C. 464 (2013), which states that there is a presumption that an indorsement to a note is valid, to the indorsements challenged by the borrower. The court held that where a purported holder appears in court with the original note and the note is the subject of a clear chain of indorsements ending with a blank indorsement, the court could find sufficient competent evidence that purported holder was in fact the holder of the note. The burden then shifts to the borrower to provide evidence that the purported holder is not in fact the holder. The court determined that both arguments made by the borrower failed to overcome the legal presumption and physical fact that the purported holder was the actual holder of the note. The first argument made by the borrower was that the version of the note presented in court did not match an earlier version faxed to the borrower's counsel. The court did not find this argument persuasive because the only substantive

difference the court found between the copy and the original presented in court was the addition of the most recent indorsement, which was dated after the date the copy of the note was faxed to the borrower's counsel. Second, the court held that the borrower's arguments that MERS improperly assigned the note were without merit. The court held that MERS was merely the nominee under the deed of trust and had no authority to assign the note as MERS was never the holder of the note. The court held that the deed of trust followed the note and therefore any assignment of the note resulted in an assignment of the deed of trust.

**Application of statute of limitations in foreclosure action**

*In the Matter of Foreclosure of Brown* (COA14-937; April 21, 2015). Mortgagor/Borrower challenged foreclosure on the basis of the expiration of the statute of limitations applicable to a foreclosure under G.S. 1-47(3). Provided that the mortgagor remains in absolute possession of the property during the 10 year period, the Court of Appeals held that the 10-year statute of limitations period runs from the last to occur of the following: (i) the date that the power of sale becomes absolute, (ii) the date of the last payment made on the loan, and (iii) the date of the forfeiture of the mortgage. The court also held that the power of sale becomes absolute on the date the loan is accelerated and, if the loan is not accelerated, on the maturity date.

**Deficiency action**

*Branch Banking and Trust Co. v. Smith*, 769 S.E.2d 638 (N.C. App. Feb. 17, 2015). Lender loaned $1,675,000 to borrower, secured by real estate. In connection with the loan, the lender entered into guaranty agreements with eight different individuals. Borrower defaulted, lender foreclosed on the property, and lender entered a credit bid at the sale in the amount of $800,000. Lender was the high bidder, leaving a deficiency in the amount of approximately $700,000 based on the balance remaining on the loan. Lender filed a civil deficiency action in superior court against each of the eight individual guarantors, which included one guarantor who had executed a limited guaranty agreement capping his liability at $418,750. As a defense, the limited guarantor raised G.S. 45-21.36, arguing that the amount bid was substantially less than the true value of the property, and therefore he was entitled to defeat or offset any deficiency judgment against him. Lender objected and argued that defense/offset provisions under G.S. 45-21.36 do not extend to guarantors. The Court of Appeals held the defense/offset set forth in G.S. 45-21.36 is available to guarantors, even if the mortgagor is dismissed from the case. The court remanded the case to allow the guarantor the opportunity to present evidence regarding the true value of the property.

**Liability of a default bidder**

*Glass v. Zaftrin, LLC*, 768 S.E.2d 612 (N.C. App. Feb. 3, 2015). Bidder entered a high bid of $315,000.00 during the upset bid period of a foreclosure proceeding. In connection with the bid, the bidder paid a deposit of $15,750.00. After expiration of the upset bid period, the bidder notified the substitute trustee that it would be unable to complete purchase of the property and thus defaulted on its bid. The substitute trustee moved the court for an order to resell the property and at the second sale the high bid was $350,000.00. The original defaulting bidder sought the return of the full amount of its deposit from the first sale. The question before the Court of Appeals was whether G.S. 45-21.30(d) allows the costs of the resale to be deducted from the deposit refund where the resale price was more than the defaulting bid plus the costs of resale. The court held that a defaulting bidder is only liable on its

deposit to the extent that the final sale price is less than the bid plus the costs of resale. In this case, the final sale price from the resale ($350,000.00) exceed the total of the defaulting bid ($315,000.00) plus the costs of resale ($1,469.80), therefore the defaulting bidder was entitled to the return of its entire deposit ($15,750.00).

## WILLS AND ESTATES

**Will interpretation; when class of "heirs" is determined**

*Barnes v. Scull*, 765 S.E.2d 820 (N.C. App. Nov. 18, 2014). Testator died testate in 1960. In his will, he devised a life estate in his real property (the "property") to his wife. At his wife's death, the property was to be placed in a trust, with the proceeds used to support Testator's son, Hubert, for Hubert's life. At Hubert's death, if Hubert died without lineal descendants, the property was to "revert to [Testator's] heirs." At his death, Testator was survived by his wife and six children, including Hubert. His wife died in 1969. Hubert died in 1980, at which time one of the Testator's five other children, James, had also died. This declaratory judgment was filed in 2012 by purported devisees of one of James's grandsons to establish their interest in James's portion of the property. The question for the court was *when* Testator's "heirs" were established for purposes of interpreting the phrase "revert to [Testator's] heirs": at Testator's death or at Hubert's death. Finding the Supreme Court's analysis in *White v. Alexander*, 290 N.C. 75 (1976) controlling, the Court of Appeals held that the "roll call of 'heirs' was set at Testator's death." Thus the trial court was correct in concluding that all of Testator's children, other than Hubert, obtained a contingent remainder in twenty percent of the property at Testator's death. When Hubert died, then, James's contingent remainder passed through James's will to those to whom James had devised the property.