

# Civil Law Update & Review/Spring 2021

## Contracts

Short v. Circus Trix, COA 11/17/20

*Issue:* Was plaintiff barred from filing this action by binding arbitration clause?

*Answer:* Yes, **if** plaintiff agreed to clause.

*Issue:* Did plaintiff agree to clause?

*Answer:* There is no evidence that plaintiff personally agreed to clause.

*Issue:* Will plaintiff be held to have agreed to clause based on acts of his spouse/agent?

*Answer:* There are three principles of agency that might support this finding:

- (1) Actual agency
- (2) Apparent authority
- (3) Ratification

Elite Guard Inc. v. Veterans Alternative Inc., COA 12/15/2020, 30(e)

Facts: Corporate tenant prepared lease, signed it, and sent it to plaintiff for signature. Owner of corporate plaintiff (and of rental property) struck through every instance of corporate name and substituted his own name. When dispute between the parties subsequently arose, tenant stopped paying rent and plaintiff sued for breach of contract.

HELD: A contract is formed when X offers to contract and Z accepts the offer. Mutual assent is an essential element of a valid contract. When Z purports to accept an offer, but first modifies the terms, no valid contract is formed, assuming the modification is material. Instead of accepting the offer, Z has made a counteroffer, which X may then accept or reject. Making a counteroffer has the legal effect of rejecting the initial offer, which terminates Z's ability to accept the original offer. X may indicate acceptance of the counteroffer either by formal agreement or by performance which indicates an intention to accept.

NOTE: A different rule applies when the contract is one for the sale of goods.

## Torts

King v. Duke Energy, 2021-NCCOA-17 (filed 2/16/21)

Facts: Carolina Tree Company, working for Duke Energy, removed two mature Japanese Maple trees and severely damaged a third; the trees were located on plaintiff's property. Plaintiffs

sued for trespass to timber. Defendants did not contest wrongful removal but won in trial court based on insufficient evidence of damages.

HELD: In action for trespass to timber, there are two possible remedies:

“In some cases it has been held that the correct measure is the value of the timber as a chattel, as soon as it is severed from the land—at the stump.”

N.C. Gen. Stat. § 1-539.1(a) applies to this measure of damages:

*Any person, firm or corporation not being the bona fide owner thereof or agent of the owner who shall without the consent and permission of the bona fide owner enter upon the land of another and injure, cut or remove any valuable wood, timber, shrub or tree therefrom, shall be liable to the owner of said land for double the value of such wood, timber, shrubs or trees so injured, cut or removed.*

In the case, as here, of ornamental or fruit trees, however, “the authorities are practically unanimous that the measure of damage is the difference in the value of the land before and after cutting.” Using this measure, the above statute, with its provision of double-damages, does not apply.

HELD: “Thus, in an action for trespass to timber where the trees have little or no commercial value after they are cut, we hold that evidence of the cost of reasonable remedial measures, such as replacement and restoration, constitutes competent evidence of the diminution in value of the real property, provided it is owned for personal use.”

## Landlord-Tenant

Raleigh Housing Authority v. Winston, 2021-NCSC-16 (filed 3/12/2021) (*disc rev* from COA).

Federal regulations require PHA to execute lease with tenant containing certain language, including requirement that notice of termination of lease “state specific grounds for termination.”

The notice in this case informed the tenant that termination was based “Inappropriate Conduct – Multiple Complaints” and cited on Paragraph 9(f) of the lease: residents must “conduct himself/herself and cause other persons who are on the premises with the Resident’s consent to conduct themselves in a manner which will not disturb the neighbor’s peaceful enjoyment of their accommodations.”

HELD: A notice that identifies the lease provision alleged to have been violated but which fails to specify the conduct by the tenant constituting violation does not provide sufficient notice to the tenant of the basis for the lease termination. (The Court noted, however, that there may be certain circumstances in which quoted language from the lease might sufficiently identify the specific conduct constituting a violation.)

Battle v. O'Neal, COA 11/17/2020, 30(e).

Unpublished opinion dealing with two issues: (1) calculation of rent abatement damages, which is useful because of the detailed description of the calculations, and (2) consequences of plaintiff checking the wrong block (which I believe is incorrect, but remember, this is an unpublished decision).

## Civil Procedure

Inrock Drilling Sys. Inc. v. SMP Techs, Inc. COA 3/2/21 30(e)

Facts: Plaintiff attempted unsuccessfully to serve defendant corporation through its registered agent at the address listed on the Secretary of State's website. [As the law allows](#), plaintiff subsequently served the Secretary of State Service of Process Agent, which was effective service. GS 55D-33. However, the plaintiff failed to provide CV-105, the affidavit of service required by GS 1-75.10 to prove service upon defendant's challenge.

HELD: The affidavit of service is required to be provided upon challenge by the defendant even when that service is on the Secretary of State.

## GS 50B & 50C

M.E. v. T.J. COA 12/31/20

HELD: GS 50B-1(b)(6), limiting protection of that law to persons of the opposite sex in a dating relationship, is unconstitutional as applied to persons of the same sex in a dating relationship. Appeal to NC Supreme Court pending based on dissent in COA.

## Ethics

In re Murphy, NC 12/18/20

Court censured COA judge for conduct prejudicial to the administration of justice by:

- failing to establish, maintain, and enforce appropriate standards of conduct to ensure the integrity and independence of the judiciary;
- allowing his family and social relationships to influence his judicial conduct or judgment, and permitting others to convey the impression that they are in a special position to influence respondent;
- failing to require his staff to exhibit patient, dignified and courteous conduct to lawyers and others with whom respondent deals in his official capacity;
- failing to ensure his staff observed the standards of fidelity and diligence that apply to him.