Civil Case Update
July 6–October 5, 2010
North Carolina Conference of Superior Court Judges
October 2010

I. CIVIL PROCEDURE, JURISDICTION, & JUDICIAL AUTHORITY

Collateral Estoppel; Effect of Outcome of Prior Arbitration Between Insurers
Whitlock v. Triangle Grading Contractors Dev., Inc., 696 S.E.2d 543 (N.C. App. 2010). Reversing an order granting summary judgment for defendant driver where the parties' insurers completed binding arbitration not involving plaintiff that resulted in a favorable decision for defendants' insurer as to negligence. Holding that an issue decided in arbitration between litigants' insurers was not binding upon an insured who was not a party to the arbitration, did not seek to benefit from the arbitration, and did not actively participate in or control the arbitration.

Minimum Contacts and Apparent Agency
Bauer v. Douglas Aquatics, Inc., __ S.E.2d __, 2010 WL 3464533 (N.C. App. Sept. 7, 2010). Holding that personal jurisdiction can be based on minimum contacts between the state and the party's apparent agent (where there was no actual agency). Finding that apparent agency existed and affirming denial of the party's motion to dismiss.

No Minimum Contacts Where First Contact With NC Was to Resolve Dispute
Smith Architectural Metals, Inc. v. American Railing Sys., __ S.E.2d __, 2010 WL 3464413 (N.C. App. Sept. 7, 2010). Reversing trial court's denial of a third-party defendant's motion to dismiss for lack of personal jurisdiction. Holding that, where plaintiff sued the party with whom it had contracted, and that defendant in turn sued one of its suppliers, there were insufficient minimum contacts between NC and the supplier, a Pennsylvania company with no contacts with NC prior to its attempt to resolve the dispute.

"Two Dismissal Rule"
State ex rel. *Boggs v. Davis*, __ S.E.2d __, 2010 WL 3860753 (N.C. App. Oct. 5, 2010). Reversing the trial court's dismissal of an action based on the Rule 41(a)(1) "two dismissal rule". Holding that, because one of the dismissals at issue was by order of the court, Rule 41(a) did not apply because it requires that both dismissals be at the plaintiff's own instance.

Interplay of Rules 3 and 9(j)
Carlton v. Melvin, 697 S.E.2d 360 (N.C. App. 2010). Affirming dismissal of action as outside statute of limitations in a medical malpractice action where a party received an extension of 120 days to file a complaint and Rule 9(j) certification and, on day 120, filed a summons and application for extension of time (20 days) to file a complaint per Rule 3. Holding that Rule 3 cannot be used to further extend the time to file a complaint after receipt of an extension under Rule 9(j).

Order Compelling Medical Records in Medical Malpractice Action
Lowd v. Reynolds, 695 S.E.2d 479 (N.C. App. 2010). In a medical malpractice action, affirming an order compelling plaintiff to produce medical records going back to 1995. Citing its decision earlier this year in

Midkiff v. Compton, 693 S.E.2d 172 (2010), holding that, by bringing a medical malpractice action, the plaintiff impliedly waived its physician-client privilege under G.S. 8-53. Also holding that the trial court did not abuse its discretion in declining to make an *in camera* inspection of the records.

Default Judgment as Rule 37 Sanction in Caveat
In Re Estate of Johnson, 697 S.E.2d 365 (N.C. App. 2010). Affirming the grant of a default judgment in favor of caveators, and holding that a trial court was not prohibited from imposing Rule 37 sanctions disposing of the legal question of *devisavit vel non* in favor of the moving party.

Necessary Parties in Homeowner Association Dispute
McCraw v. Aux, 696 S.E.2d 739 (N.C. App. 2010). In a dispute between homeowner members of a community association regarding a decision by the association's architectural review committee, the architectural review committee was a necessary party. Because the committee had not been joined, the summary judgment order was vacated and remanded.

Necessary Parties in Trust Action
Hasselmann v. Barnes, __ S.E.2d __, 2010 WL 3860726 (N.C. App. Oct. 5, 2010). In an action by one of several named beneficiaries against a trustee, reversing partial summary judgment in plaintiff's favor and remanding for inclusion of four other beneficiaries as necessary parties to the action.

New Trial; Juror Affidavits
Cummings v. Ortega, 697 S.E.2d 513 (N.C. App. 2010). Affirming the trial court's grant of a new trial under Rule 59 upon consideration of affidavits of two jurors swearing to the misconduct of another juror which materially affected the affiants' view of the evidence. Holding that, under the facts of the case, the consideration of this evidence did not violate Rule of Evidence 606(b).

New Trial; Notice of Trial Date; Due Process
Brown v. Ellis, 696 S.E.2d 813 (N.C. App. 2010). Reversing and remanding an alienation of affection judgment for new trial, where the court mailed the court calendar and scheduling orders to defendant at the wrong address through no fault of the defendant, resulting in him receiving notice of a Monday trial on the Friday before, when he lived in California and had no means of traveling and preparing for the matter in time.

Voluntary Dismissals Where Counterclaims Exist; Affidavits on Summary Judgment
Bradley v. Bradley, 697 S.E.2d 422 (N.C. App. 2010). Affirming a trial court in setting aside under Rule 60 a voluntary dismissal of claims where the defendant had filed counterclaims arising out of the same set of facts. Also affirming summary judgment for movant where non-moving party attempted to defeat summary judgment by filing affidavits contradicting the allegations of his own pleadings.

One Judge Overruling Another
Crook v. KRC Mgmt Corp., 697 S.E.2d 449 (N.C. App. 2010). Vacating an order to compel (and the sanctions which followed), where a different superior court judge had denied a prior motion to compel that covered the same subject matter.

Venue Determination
ITS Leasing, Inc. v. Ram Dog Enterprises, LLC, 696 S.E.2d 880 (N.C. App. 2010). Reversing a change of venue from Haywood County to Mecklenburg County on grounds that (1) if the change of venue was

discretionary, the answer had not yet been filed, so the change of venue was premature under 1-83; and (2) if the change of venue was of right, the movant had not demonstrated any right to it.

II. ATTORNEY FEES AND COSTS

Award of Attorney Fees to Party Compelled to Make Discovery
Kelley v. Agnoli, 695 S.E.2d 137 (N.C. App. 2010). Analyzing the issue as a matter largely of first impression in North Carolina, affirming an award of attorney fees (as expenses) to a party for time spent responding to an order compelling production of documents. Expanded summary: In the trial court, a litigant brought an action against his ex-girlfriend and subpoenaed a huge range of documents from the law firm representing the girlfriend. The firm objected and moved to quash. The litigant moved to compel. The trial court made an order compelling production of a considerably narrower range of documents than the subpoena called for. The law firm complied with the order, then moved for an award of its expenses in complying with the subpoena (which included a large amount of attorney time.) The trial court awarded $40,000 to the law firm for its expenses. On appeal, the litigant argued that there was no authority to award expenses after-the-fact to a subpoenaed party who had been court-ordered to produce documents. The Court of Appeals found persuasive federal cases holding that expenses could be awarded after-the-fact to a party ordered to make discovery where that party had reserved its right to move for such expenses. Finding that the law firm in this case had reserved the right to ask for its expenses in its motion to quash, the court held that the trial court had authority to make the award. The court remanded the case to the trial court, however, for findings of fact to support the sum of $40,000.

Award of Costs for Expert Witness Expenses
Jarrell v. Charlotte-Mecklenburg Hosp. Auth., 698 S.E.2d 190 (N.C. App. 2010). In a medical malpractice action, affirming an award of expenses related to expert witnesses. In a matter of first impression, holding that the 2007 amendment to the costs statute, G.S. 7A-305(d)(11), allowing a court to award expert fees "solely for actual time spent providing testifying at trial" must be read together with the existing G.S. 7A-314, which provides for costs for witness under subpoena. Holding that, because the defendants' experts in this matter were under subpoena, the defendants were authorized to recover their costs as provided by 7A-305(d)(11). Also holding, however, that the plaintiffs lacked standing to challenge whether the subpoenas themselves were validly issued. (Further noting that the discovery scheduling order entered in the matter appeared to waive the requirement that expert witnesses in the matter be under subpoena, but the parties did not raise the argument before the trial court.)

Attorney Fees under G.S. 6-21.5; "Prevailing Party" Under 143-318.16B
Free Spirit Aviation, Inc. v. Rutherford Airport Auth., 696 S.E.2d 559 (N.C. App. 2010). Affirming a trial court's denial of a motion for attorney fees under G.S. 6-21.5 (allowing fees where there was a "complete absence of a justiciable issue of either law or fact") where the defendants prevailed on a motion for directed verdict. Holding that, at least under the facts of this case, where a plaintiff loses at the directed verdict stage, but prevailed on a defendant's earlier summary judgment motion as to the same claims, attorney fees for defendant under G.S. 6-21.5 are properly denied. Also remanding to the trial court for reconsideration of attorney fees under G.S. 143-318.16B (open meetings laws) where the trial court believed there could only be one "prevailing party" under that statute.

Interlocutory Appeal of Attorney Fee Award
Triad Women's Ctr, P.A. v. Rogers, __ S.E.2d __, 2010 WL 3860641 (N.C. App. Oct. 5, 2010). Dismissing as interlocutory an appeal filed after an order allowing an award of attorney fees but before the determination as to the amount of the award.

III. STATUTES OF LIMITATION

Action on Promissory Note Under Seal
McGuire v. Dixon, __S.E.2d __, 2010 WL 3860732 (N.C. App. Oct. 5, 2010). Reversing the trial court and holding that the ten-year statute of limitation in G.S. 1-47(2) applies to counterclaims (mutual mistake and no consideration) regarding the execution of a promissory note signed under seal for the purchase of real property.

Interplay of Rules 3 and 9(j)
Carlton v. Melvin, 697 S.E.2d 360 (N.C. App. 2010). Affirming dismissal of action as outside statute of limitations in a medical malpractice action where a party received an extension of 120 days to file a complaint and Rule 9(j) certification and, on day 120, filed a summons and application for extension of time (20 days) to file a complaint per Rule 3. Holding that Rule 3 cannot be used to further extend the time to file a complaint after receipt of an extension under Rule 9(j).

IV. EVIDENCE

Opinion of Expert Witness Invading Province of Jury
Cape Fear Public Utility Auth. v. Costa, 697 S.E.2d 338 (N.C. App. 2010). Divided panel. Majority affirming trial court's striking of the affidavit of an expert witness on the basis that it expressed an opinion as the ultimate legal issue in the matter of whether an easement crossed the counterclaimant's property. Dissent stating that trial court should only have stricken the final paragraph of the affidavit containing the legal conclusion and allowed the remainder of the affidavit.

Dead Man's Statute; Standard of Review
In Re Will of Baitschora, COA-091411 (N.C. App. Sep. 21, 2010). Clarifying prior case law and stating that the standard of review of a decision to admit or deny evidence pursuant to Rule 601(c) is "de novo…with considerable deference given to the decision made by the trial court in light of the relevance-based inquiries that are inherent in the resolution of certain issues involving [the Rule's] application."

New Trial; Juror Affidavits
Cummings v. Ortega, 697 S.E.2d 513 (N.C. App. 2010). Affirming the trial court's grant of a new trial under Rule 59 upon consideration of affidavits of two jurors swearing to the misconduct of another juror which materially affected the affiants' view of the evidence. Holding that, under the facts of the case, the consideration of this evidence did not violate Rule of Evidence 606(b).

V. TORTS, UNFAIR AND DECEPTIVE TRADE PRACTICES, & IMMUNITY

Respondeat Superior Liability
Matthews v. Food Lion, LLC, 695 S.E.2d 828 (N.C. App. 2010). Holding that employee was not operating within the scope of her employment simply by being on the employer's premises after completing her work duties. Affirming trial court grant of summary judgment for defendant grocery store on negligence claim where, after clocking out of work, store's employee opened the door to the store bathroom, injuring plaintiff.

Threshold for Negligence in Dog Attack Case
Harris v. Barefoot, __ S.E.2d __, 2010 WL 3001399 (N.C. App. Aug. 3, 2010). Affirming summary judgment against plaintiff in a negligence action where a dog ran across the street and viciously attacked plaintiff, as there was no evidence that dog's owner (defendant) had prior knowledge of the dog's propensity for aggressive behavior.

No *Woodson* Claim Under the Facts
Valenzuela v. Pallet Express, Inc., __S.E.2d __, 2010 WL 3860740 (N.C. App. Oct. 5, 2010). Affirming summary judgment against decedent's estate where estate brought claim against decedent's employer pursuant to *Woodson v. Rowland*, 329 N.C. 330, 407 S.E.2d 222 (1991). Holding that, even though evidence forecasted that employer had knowingly removed a safety guard from dangerous equipment in violation of safety regulations and instructed the unskilled, underage decedent to operate it in violation of law, there was no inference that employer "knew their actions were substantially certain to cause [employee]'s serious injury or death." Thus the plaintiff was subject to the exclusivity provisions of the Worker's Compensation Act.

Alienation of Affection; Third Party Defendant
Heller v. Somdahl, 696 S.E.2d 897 (N.C. App. 2010). Affirming trial court's refusal to grant directed verdict for "third- party" defendant in alienation of affection action, holding that her actions in encouraging the relationship between Plaintiff's wife and another man constituted more than a scintilla of evidence necessary to support alienation and causation.

Sledding Accident; Contributory Negligence as a Matter of Law
Waddell v. Metropolitan Sewerage Dist. of Buncombe Co., __ S.E.2d __, 2010 WL 3463660 (N.C. App. Sept. 7, 2010). Affirming summary judgment against estate of decedent on claim of negligence against city sewer district and others based on the placement of a sewer pipe that decedent struck while sledding down a city street. Holding that decedent was contributorily negligent as a matter of law by choosing to sled down a hill on an inner tube that was explicitly not designed for such use.

Immunity; Public Duty Doctrine
Estate of Burgess v. Hamrick, __ S.E.2d __, 2010 WL 3001981 (N.C. App. Aug. 3, 2010). After an intoxicated man was struck and killed by a car after being delivered to a hotel by an officer responding to a call by the man's wife, the man's estate brought an action against the officer in his official capacity. Remanding to the trial court for entry of summary judgment against the estate, and holding that the officer was, as a matter of law, acting in his capacity as a police officer protecting the general public. Further holding that the exceptions to the public duty doctrine (special relationship or special duty) did not apply.

911 Call Center; No Waiver of Immunity
Wright v. Gaston County, 698 S.E.2d 83 (N.C. App. 2010). Affirming summary judgment in favor of county in case in which child died while EMT unit was in route. Holding that the trial court properly ruled as a matter of law (1) that the 911 call center performs a governmental function and is entitled to governmental immunity; and (2) that it did not waive its governmental immunity by purchasing liability insurance where that insurance policy expressly excluded claims in which sovereign immunity applied. Reversing summary judgment in favor of 911 operators on the basis of governmental immunity to the extent those operators were being sued in their individual capacities.

Standard for Officer Liability in High-Speed Chase
Lunsford v. Renn, __ S.E.2d __, 2010 WL 3860923 (N.C. App. Oct. 5, 2010). Affirming summary judgment in favor of Defendants in lawsuit against officers and municipality related to deaths caused during the high-speed chase of a suspect. Holding that an officer's pursuit of the suspect at very high speeds through busy and winding streets for a long duration did not support an inference of gross negligence ("wanton conduct done with conscious or reckless disregard for the rights and safety of others") – the standard required for officer liability in vehicular pursuit cases.

Medical Malpractice; Instruction on Permanent Injury
Littleton v. Willis, 695 S.E.2d 468 (N.C. App. 2010). Remanding a medical malpractice case for new trial and holding that trial court erred in giving jury instruction on permanent injury where the evidence as to the permanence of plaintiff's injury came not from medical experts or medical evidence, but from the plaintiff's testimony.

Medical Malpractice; Standard of Care and Causation Experts
Day v. Brant, 697 S.E.2d 345 (N.C. App. 2010). Reversing directed verdict in favor of defendants in a medical malpractice action where decedent died of a liver laceration after a car accident. Holding that plaintiffs' expert had sufficient basis to testify to the "same or similar community" standard of care required by G.S. 90-21.12 by testifying that he had reviewed defendants' depositions to determine the standard of practice for ER medicine at the defendant hospital; confirming that his standard of practice and training an experience were no different; confirming that the community, the hospital, and its facilities were comparable to his own; doing internet research to determine that the defendants' community was similar to his own; and testifying that he had consulted with practitioners in communities similar to the defendants'. Also holding that plaintiffs' causation expert had testified with sufficient specificity by stating that "most" patients with decedent's injury who are treated in accordance with the standard of care will survive and that, if so treated, that the decedent "would have survived."

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VI. CONTRACTS

Reformation of Settlement Agreement
Apple Tree Ridge Neighborhood Assoc. v. Grandfather Mountain Heights Prop. Owners Corp., Inc., 697 S.E.2d 468 (N.C. App. 2010). Reversing trial court's grant of a motion for reformation and enforcement of a settlement agreement between landowners in two adjacent neighborhood developments. Holding that the reformation by the trial court extended beyond the court's equitable power and imposed a substantial new obligation on the non-movant to which she had not agreed in the original settlement.

Settlement Agreements and Liens
Ellis-Walker Builders, Inc. v. Reynolds, 695 S.E.2d 832 (N.C. App. 2010). Reversing trial court and holding that court should have allowed a party to a settlement agreement to enforce a claim of lien in addition to allowing it to enforce the terms of the settlement agreement. Holding that, under the facts of the case, the remedies were not exclusive.

Choice of Law Provision in Business Tort Case
Harco National Ins. Co. v. Grant Thornton, LLP., __ S.E.2d __, 2010 WL 3463709 (N.C. App. Sept. 7, 2010). Reversing a decision of the NC Business Court and holding that the *lex loc*i test applies to choice of law provisions with respect to negligent misrepresentation and negligence claims arising out of a business transaction.

VII. REAL ESTATE AND LAND USE

Error to Order Partition By Sale
Lyons-Hart v. Hart, 695 S.E.2d 818 (N.C. App. 2010). Reversing and remanding to superior court for an order denying partition by sale of a parcel of land on Ocracoke Island and requiring further remand to clerk to order actual partition. Holding that trial court was not permitted to order a partition by sale without finding that the value of the land would be materially harmed by an actual (physical, in-kind) partition. In this case, the uncontroverted evidence in fact showed that the value of the land would be substantially greater once divided into two parcels.

Deed Restrictions
Rice v. Coholan, 695 S.E.2d 484 (N.C. App. 2010). Reversing trial court order allowing enforcement of deed restrictions where Plaintiff sought to prevent the subdivision and development of Jefferson Park in Charlotte. Agreeing that there was a common scheme of development for the subdivision, which would have entitled the homeowners to enforce the restrictions, but holding that the majority of the homeowners had agreed to terminate those restrictions.

VIII. WILL CAVEATS AND ESTATES

Existence of Fiduciary Relationship
Seagraves v. Seagraves, 698 S.E.2d 155 (N.C. App. 2010). Affirming in part summary judgment in favor of propounders/respondents in consolidated caveat and undue influence case. Holding that as a matter of law there was no question of undue influence or testamentary capacity as to a portion of the property transferred. As to another portion of the property, however, holding that the propounder/respondent was in a fiduciary relationship with the grantee as a matter of law, rendering summary judgment inappropriate on the issue of undue influence.

Default Judgment as Rule 37 Sanction in Caveat
In Re Estate of Johnson, 697 S.E.2d 365 (N.C. App. 2010). Affirming the grant of a default judgment for caveators and holding that a trial court was not prohibited from imposing Rule 37 sanctions disposing of the legal question of *devisavit vel non* in favor of the moving party.

Rule 11 Sanctions in Revocation Petitions (Caveat Context)
In Re Will of Durham, 698 S.E.2d 112 (N.C. App. 2010). Holding, in a caveat, that the superior court had authority to impose Rule 11 sanctions against caveator with respect to the filing of a revocation petition in the underlying estate matter. Holding that Rule 11 sanctions are available in proceedings to remove executors and administrators of estates brought pursuant to Chapter 28A.

Dead Man's Statute; Standard of Review
In Re Will of Baitschora, COA-09-1411 (N.C. App. Sep. 21, 2010). Clarifying prior case law and stating that the standard of review of a decision to admit or deny evidence pursuant to Rule 601(c) is "de novo…with considerable deference given to the decision made by the trial court in light of the relevance-based inquiries that are inherent in the resolution of certain issues involving [the Rule's] application."

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