

Summaries of Civil North Carolina Appellate Opinions July 1 – October 7, 2014

Ann M. Anderson
UNC School of Government

CIVIL PROCEDURE, STATUTES OF LIMITATIONS & ATTORNEY FEES

***Res judicata* and second foreclosure action**

[*Basmas v. Wells Fargo Bank National Assoc.*](#) (COA13-464; Oct. 7, 2014). Wells Fargo (Defendant), through its substitute trustee, obtained an order of foreclosure from the clerk of court regarding a residential note and deed of trust. On *de novo* appeal, the superior court vacated the order on grounds that Defendant had produced insufficient evidence of indorsement to prove it was the current holder of the note. Several months later, a second petition was filed seeking foreclosure on the same note and deed of trust. In response, debtors filed a declaratory judgment action seeking a ruling that the second foreclosure was barred by the judge's order in the first foreclosure. The trial court declared that the doctrine of *res judicata* did not apply to bar the second foreclosure because the second foreclosure was based on new facts and changed circumstances as follows: (1) debtors failed to make payments on the note in the months *after* the first foreclosure action, thus creating a new default; and (2) Defendant had since come into possession of sufficient evidence of its status as holder of the note. The Court of Appeals affirmed on grounds that continuing nonpayment constituted a new default, thus allowing the second foreclosure action to proceed. (The debtor failed to preserve its argument regarding the second changed circumstance, so the court declined to address that basis).

Rule 53 referee's report; trial court review

[*Lawson v. Lawson*](#) (COA14-286; Oct. 7, 2014). In a trespass, property damage, and quiet title action, the trial court appointed a referee under Rule of Civil Procedure 53 to determine the property's boundary line. Upon determining the proper boundary, the referee concluded that defendants had not trespassed upon or damaged plaintiff's property. Plaintiffs filed exceptions to the referee's report. After a hearing, the trial court adopted the referee's report in its entirety and ordered that it be entered into the record as the court's judgment. On appeal, plaintiffs argued that the trial court erred by not independently considering the evidence and making its own findings of fact and considering the conclusions of law *de novo*. The Court of Appeals agreed that the trial court was obligated to "consider the evidence and give his own opinion and conclusion," but the court ultimately found that the trial court did not err in choosing "to affirm the referee's report in whole" as the "appropriate resolution of plaintiff's boundary dispute."

Statute of limitations for instrument under seal

[*Crogan v. Crogan*](#) (COA14-214; Sept. 16, 2014). Plaintiff brought a declaratory judgment action to invalidate a separation agreement on the basis of fraud, duress, and undue influence. The complaint also alleged that her husband breached the agreement by failing to fully disclose his financial information. The agreement was executed in November 2004, and the complaint was filed in August 2012. The trial court properly dismissed the duress and undue influence claim based on the three-year statute of limitations because those actions began to accrue upon execution of the agreement. The fraud claim was

also time-barred under a three-year statute of limitations because the action accrued when plaintiff discovered the alleged fraud in 2006. It was error, however, to dismiss the breach of contract claim because the agreement was executed under seal, and G.S. 1-47(2) provided a ten-year statute of limitations to a claim arising under such an instrument.

Discovery of defendant doctor's medical records; collateral source rule; permanent injury

[*Nicholson v. Thom*](#) (COA13-1053; Sept. 16, 2014). In this medical malpractice action, a surgical sponge was left in the patient's bowels after removal of a rectal tumor, causing significant infection and requiring corrective surgery and delay in cancer treatment. The patient died the following year. The patient's husband and estate sued the physician for pain and suffering and related issues and loss of consortium, but not for wrongful death. A jury awarded over \$5 million in damages. The trial court did not err in ordering limited disclosure of some of the surgeon's medical records as permitted by GS 8-53, the physician-patient privilege statute, after the surgeon's neurological health was called into question during discovery. The trial court also did not err in allowing plaintiff's counsel to question the surgeon at trial about her use of prescription medication before surgery and whether she had a duty to advise the patient of such use. A new trial was necessary as to damages, however, because the collateral source rule did not apply to prevent defendant from introducing evidence of the hospital's write-offs of the patient's bills. The hospital was not a "collateral" source of payment of those bills, but instead a separate tortfeasor in the same action that had settled with plaintiff and had written off a portion of the bills as a business loss. [Note: This action was filed prior to Rule 414's abrogation of the collateral source rule with regard to past medical expenses.] It was also improper to include an instruction as to permanent injury where plaintiff was not alive at the time of trial and thus had no claim for additional future harm.

Discovery of third party medical records; privilege under GS 8-53

[*Brewer v. Hunter*](#), __ N.C. App. __, 762 S.E.2d 654 (Sept. 2, 2014). In a medical malpractice case involving a thoracic laminectomy, the trial court entered an order compelling production of certain records of other patients upon whom the defendant physician had performed the same procedure. Defendants (physician and his practice) appealed the order on grounds that it was outside the bounds of disclosure permitted under GS 8-53, the physician-patient privilege statute. The statute protects a physician from the requirement that he or she disclose patient communications, but it permits a judge to "compel disclosure if in his opinion disclosure is necessary to a proper administration of justice." Applying an abuse of discretion standard, the Court of Appeals affirmed the order compelling disclosure, noting that the trial court had limited the order to 25 of the 44 records requested; had provided that patient identifying information be redacted; and had provided for *in camera* inspection of individual records on a case-by-case basis should further sensitive issues arise. The court also noted that the trial judge had found that the records were relevant to both the physician's credibility and to the underlying substance of the litigation.

Statute of limitations and 28 U.S.C. 1367(d)

[*Glynn v. Wilson Medical Ctr.*](#), __ N.C. App. __, 762 S.E.2d 645 (Sept. 2, 2014). Plaintiff sued Defendant in federal court asserting both state and federal claims. After she dismissed her federal claims, the federal court declined to exercise supplemental jurisdiction over the state claims and dismissed those claims without prejudice. Thirty-eight days later, plaintiff filed a complaint in state court asserting the state law claims. On defendant's motion, the trial court dismissed all of her claims with prejudice as having been filed outside the statute of limitations. On appeal, plaintiff asserted that 28 U.S.C. 1367(d)

tolls the running of the state-law statute of limitations while the federal court is exercising jurisdiction over the matter and for 30 days after the claim is dismissed. Affirming the trial court's dismissal of her claims, the Court of Appeals held that, because the statute of limitations applicable to her state law claims ran during the period in which the matter was pending in federal court, 28 U.S.C. 1367(d) required that she refile her claim in state court within 30 days after the federal court dismissed the claims. Applying the holdings in *Harter v. Vernon*, 139 N.C. App. 85 (2000) and *Huang v. Ziko*, 132 N.C. App. 358 (1999), the court declined to interpret 1367(d) to include an actual "time-stop" tolling of the statute of limitations during the pendency of the action. In two concurrences, however, members of the court acknowledged the split of opinion among both federal and state courts as to the intended meaning of "tolling" under 28 U.S.C. 1367(d) and urged the Supreme Court to address the question.

Attorney fees under GS 6-19.1 against local school board

[*Thomas Jefferson Classical Academy Charter School v. Cleveland Cty Bd of Educ.*](#), __ N.C. App. __, __ S.E.2d __ (Sept. 2, 2014). Trial court erred by requiring a local school board defendant to pay attorney fees to the prevailing charter school plaintiffs pursuant to GS 6-19.1. Because a local school board is not a state "agency" as defined by the Administrative Procedures Act, the provisions of GS 6-19.1 do not apply. [Note: The larger issue in this case was whether the local school board had improperly placed certain revenues in a fund that could not be shared with the local charter schools. Finding that the trial court had not made adequate findings regarding the "origins or nature of the funds for each source of funding," the court remanded the matter to the trial court. The court also noted that recent amendments to GS Chapter 115C (not applicable to the underlying case) should clarify the identification of funds in future situations.]

Discovery sanctions; lesser sanctions; scope of commission

[*Keese v. Hamilton*](#), __ N.C. App. __, 762 S.E.2d 246 (Aug. 5, 2014). Trial court entered an order compelling plaintiff in an alienation of affection case to produce, within 10 days, a number of documents, audio and video recordings, and other records related to his surveillance of his wife and defendant. Nearly two years later, the court held a show cause hearing to determine why plaintiff had not complied with the order. Plaintiff admitted that many of the materials were in possession of his private investigator but that he had made no effort to obtain them for production. The trial court found plaintiff in contempt of the order compelling discovery and remanded him to custody. His attorney then began producing some materials. It quickly became clear that plaintiff had made material false statements at the show cause hearing, and that he in fact possessed a number of documents and other materials he had earlier claimed did not exist. His responses still incomplete several days later, the trial court sanctioned him pursuant to Rule 37 by dismissing his complaint and entering a default judgment against him on defendant's counterclaims. The Court of Appeals affirmed, holding that the trial judge adequately noted that he had considered lesser options before imposing dispositive sanctions. The court also held that some factual misstatements and minor clerical errors in the trial court's findings of fact did not materially affect the validity of the sanctions order. In addition, although the trial judge entered the contempt order during a March 4 commission lasting one day or "until the business is completed," he retained jurisdiction on March 12 to hear the sanctions motion in order to ensure compliance with the earlier contempt order.

Expert witness fees as costs; requirement of subpoena

[*Lassiter v. North Carolina Baptist Hospitals, Inc.*](#), __ N.C. App. __, 761 S.E.2d 720 (Aug. 5, 2014). Plaintiff voluntarily dismissed her action after extensive expert witness discovery. Pursuant to Rule

41(d), the trial court awarded costs to defendants, including selected costs related to taking depositions of the experts. Construing GS 7A-305(d) and 7A-314 together, the Court of Appeals held that no such costs could be awarded as to expert witnesses not under subpoena. As to costs of those experts not subpoenaed to attend their depositions, therefore, the court reversed the award.

Enforcement of foreign judgment in North Carolina; minimum contacts

[*Meyer v. Race City Classics, LLC*](#), __ N.C. App. __, 761 S.E.2d 196 (July 29, 2014). A North Carolina resident sold a car to a Nebraska resident over the phone and arranged to ship the car to Nebraska. Unhappy with the car's condition, the Nebraska resident (Plaintiff) sued the North Carolina resident (Defendant) in Nebraska and obtained a default judgment. Plaintiff later docketed the Nebraska judgment in North Carolina under GS 1C-1703 in an attempt to enforce it against Defendant. Defendant moved for relief from the foreign judgment under GS 1C-1705(b) for lack of the Nebraska court's personal jurisdiction over him. The trial court agreed that the Nebraska court lacked sufficient minimum contacts and set aside the judgment. Reversing, the Court of Appeals held that Defendant had sufficient minimum contacts with Nebraska for *specific* personal jurisdiction over him with respect to the transaction. Although he never physically entered Nebraska, he had extensive contact with Plaintiff regarding the transaction, he shipped the car to Nebraska, and he knew that any problem Plaintiff might have with the car would occur in Nebraska; thus he "could reasonably have anticipated being haled into court in Nebraska[.]" The Nebraska judgment was therefore valid and enforceable in North Carolina.

Default judgment; rule 11 sanctions

[*Dowd v. Johnson*](#), __ N.C. App. __, 760 S.E.2d 79 (July 15, 2014). Trial court erred in refusing to grant defendant's Rule 60(b) motion for relief from default judgment. Service of complaint upon defendant by publication was defective where there was no evidence that plaintiffs had first attempted to serve defendant at the service address defendant's counsel had sent to plaintiffs' counsel. Because plaintiffs had not, therefore, exercised due diligence as required by Rule 4(j1) before serving by publication, the trial court lacked personal jurisdiction over defendant, rendering the default judgment void. In addition, the trial court erred in imposing \$1,000 in sanctions against defendant pursuant to Rule 11: Defendant's motions for relief from default judgment were factually sufficient, legally sufficient, and not filed for an improper purpose.

CONTRACTS

Forbearance agreement; enforceability of waiver

NC SUPREME COURT: [*RL Regi N.C., LLC v. Lighthouse Cove, LLC*](#), __ N.C. __, 762 S.E.2d 188 (Aug. 20, 2014). Borrowers defaulted on a \$4.2 million loan. Lender agreed to a restructuring agreement, which included a forbearance period. In exchange, borrowers agreed in writing to waive “any and all claims, defenses and causes of action” against lender. Borrowers later defaulted again, and lender’s successor-in-interest sued to recover the indebtedness. As an affirmative defense, one of the loan guarantors (and wife of one of the business partners who had secured the loan), asserted that her guaranty had been procured in violation of the Equal Credit Opportunity Act (ECOA). After a jury trial, the trial court entered judgment in the guarantor’s favor on the basis of her affirmative defense. The Court of Appeals unanimously affirmed, holding that the lender could not enforce a waiver of an ECOA defense as part of a forbearance agreement. Reversing the Court of Appeals’ decision, the Supreme Court determined that the waiver was a clearly agreed-upon exchange for the benefit of the lender’s forbearance in enforcing the terms of the original loan (a “‘negotiated benefit’ or compromise of the original contract terms”), was not facially illegal, and did not violate public policy. Thus the waiver was enforceable, and the guarantor should not have been permitted to assert her affirmative defense.

Guarantor liability; signing as representative or obligor; unjust enrichment as remedy

[*College Road Animal Hosp., PLLC v. Cottrell*](#) (COA 14-29; Sept. 16, 2014). Plaintiffs, borrowers under a loan agreement, brought a contribution action against an alleged co-borrower and his wife, a guarantor, based on the co-borrower’s failure to make his share of the repayment. The trial court erred in granting summary judgment against defendants. As for the alleged co-borrower, there was a question of fact as to whether he signed the loan agreement as representative of the entity of which he was an officer (the entity was the actual named borrower under the loan) or whether he intended to be individually liable as well. As for his wife, her repayment obligation was triggered only upon default by the original obligors. Because plaintiffs had kept the payments current, she therefore had no liability as guarantor, and summary judgment should have been granted in her favor. Finally, the trial court should have granted summary judgment against plaintiffs on the unjust enrichment claim because the loan agreement fully governed the relationship between the parties, rendering this equitable doctrine inapplicable.

Enforceability of exculpatory clause

[*Hyatt v. Mini Storage on the Green*](#) (COA14-215; Sept. 16, 2014). The renter of a mini-storage unit was injured when the unit’s roller door became stuck and he attempted to close it with force. The trial court properly granted summary judgment in favor of the mini-storage facility owner based on an exculpatory clause in the duly-executed rental agreement that provided that “[l]andlord [shall not] be liable to tenant...for any personal injuries sustained by tenant...while on or about landlord’s premises.” Because the clause was clear and unambiguous, not contrary to a substantial public interest, and not the result of an unequal bargaining position, it was enforceable. The trial court also properly granted summary judgment in favor of the original contractor for the construction of the mini-storage unit. The original contractor had assigned the contract to another entity before construction was completed. Although the original contractor retained a duty to the mini-storage facility owner, there was no legal basis for finding he owed a duty to plaintiff, a non-party to the construction contract.

State temporary employees; “Twelve Month Rule”

[*Sanders v. State Personnel Commission*](#) (COA 13-654; Sept. 2, 2014). This is the third time the Court of Appeals has addressed issues in this case. In this round, the Court determined that the trial court did not err in granting summary judgment to the State on plaintiffs’ claim for breach of contract. By allowing plaintiffs, originally hired as temporary State employees, to remain employed beyond one year, the State did not breach a contract with the employees. Although the State Personnel Act’s “Twelve-Month Rule” prohibits temporary employees from being employed in that capacity for more than one year, allowing the employees to remain on the job past that point did not violate a contract with the employees. The court determined that “the uncontradicted evidence showed that Plaintiffs were compensated as agreed and...there is no law requiring Defendants to confer any other benefit or status upon Plaintiffs after twelve months of service.”

Non-compete; provision authorizing revision

[*Beverage Systems of the Carolinas, LLC v. Associated Beverage Repair, LLC*](#), __ N.C. App. __, __ S.E.2d __ (Aug. 5, 2014) (with dissent) (currently being briefed before the NC Supreme Court). Plaintiff purchased defendants’ beverage company and, for additional consideration, defendants executed a non-compete agreement covering all of North and South Carolina. One of the defendants later violated the non-compete, and plaintiff sued to enforce it. The trial court granted summary judgment in the defendant’s favor based on the overly-broad scope of the non-compete. The Court of Appeals reversed and remanded, holding that the trial court was required to revise the geographic scope of the non-compete based on a provision in the non-compete allowing a court to do so in the event such court “holds that the restrictions stated herein are unreasonable under the circumstances.” The Court of Appeals held that the “blue-pencil rule”—the rule applicable in North Carolina prohibiting a trial court from revising unreasonable non-compete agreements—did not apply where the agreement itself allowed a court to make such revision. Thus the trial court “should have invoked its power under [the applicable paragraph] and revised the non-compete to make it reasonable under the circumstances.” (The court further reversed the court’s grant of summary judgment on plaintiff’s related claims of tortious interference, unfair and deceptive trade practices, and injunctive relief.)

TORTS & UNFAIR TRADE PRACTICES

Standing to bring claim under North Carolina Debt Collection Act

[*Green Tree Servicing LLC v. Locklear*](#) (COA13-1287; Oct. 7, 2014). In 1998, a husband and wife entered into a contract for the purchase of their mobile home. Later, the creditor assigned its rights under the contract to a debt collection servicer (Plaintiff). By 2004, both husband and wife had died, and one of their heirs and his wife (Defendants) moved into the home but did not make payments on the contract. Plaintiff never took steps to make Defendants liable under the contract and knew that Defendants were not personally obligated to make the payments. Nevertheless, through its agents, Plaintiff began a protracted course of contacting Defendants at home and at work to persuade them to pay, to convince them that they had a payment obligation, and ultimately to threaten them with removal from the home if they did not pay. Soon thereafter Plaintiff filed an action against Defendants to recover the mobile home and its contents. Defendants filed counterclaims for violations of the North Carolina Debt Collection Act (NCGS 75-50 *et seq.*) based on Plaintiff's harassing collection efforts. The trial court dismissed Defendants' counterclaims for lack of standing, and Defendants appealed.

At issue before the Court of Appeals was whether Defendants were protected "consumers" under GS 75-50. Analyzing the term, its surrounding statutory language, and existing case law, the court concluded that the definition of "consumer" was not strictly limited to one who had actually incurred the debt, but also applied to those the collector *alleged* to be responsible for the debt, particularly where—as in the present case—the alleged debtors were more than merely "bystanders" in the collection process, had a close connection to the debt and collateral, and had specifically been targeted by the collector, who set about to "perpetuate [their] impression that they were legally bound by the debt." Under these circumstances, Defendants had alleged facts sufficient to establish standing under the Debt Collection Act.

Public duty doctrine; applicability to investigation of car accident

[*Inman v. City of Whiteville*](#) (COA14-94; Sept. 16, 2014). The trial court properly dismissed a claim against the City pursuant to Rule 12(b)(6). Plaintiff brought a negligence claim after a police officer allowed the driver of a car to leave the scene of plaintiff's accident without ascertaining the driver's identity. Plaintiff alleged that the driver had run her off the road, causing her to crash and suffer significant injuries, and that without his identity, she was not able to pursue a claim against him. The police officer reported that there had been no actual contact between plaintiff and the other driver's vehicle, and thus no need for further investigation. The Court of Appeals agreed that the public duty doctrine insulated the city from liability for the officer's handling of the accident investigation, holding that the officer's duty was to the general public, not to the plaintiff, and that plaintiff had alleged neither the special relationship nor special duty exception to the doctrine.

Negligent construction and related claims

[*Trillium Ridge Condominium Assoc., Inc. v. Trillium Links & Village, LLC*](#) (COA-14-183; Sept. 16, 2014). A few years after development of a condo community, the developer turned control over to the condo owners. A short time later, the condo association (plaintiff) discovered various construction defects and brought suit against the developer and its related construction company for negligence, gross negligence, and other claims, and against two of developer's owners for breach of fiduciary duties. The trial court properly granted summary judgment against plaintiff on the gross negligence and constructive

fraud claim, but improperly granted summary judgment on the negligent construction, breach of fiduciary duty, and breach of warranty claims. There was evidence in the record that developer supervised the project and was liable for violations of the applicable building code. There were also genuine issues of material fact as to the whether the individual defendants breach a fiduciary duty by failing to disclose to plaintiff relevant information in their possession, and as to whether the developer had a fiduciary duty to plaintiff arising out of the disputed facts. There were also genuine issues of material fact as to the applicability of the relevant statutes of limitation and statutes of repose.

Protected speech; administrative decision banning individual from athletic events

[*Donnelly v. University of North Carolina*](#) (COA14-208; Sept. 2, 2014). In an administrative decision, UNC banned petitioner, a long-time UNC sports fan and alumni, from all future UNC athletic events after he persistently harassed UNC athletes, their families, and UNC Athletics staff members for several years, including making sexually suggestive comments and showing up uninvited at the women's soccer team tournament hotel in San Diego. Petitioner unsuccessfully appealed the administrative decision to the superior court pursuant to GS 150B-51. Affirming, the Court of Appeals held that UNC's decision was not "arbitrary, capricious, or an abuse of discretion," and that UNC had not violated petitioner's first amendment rights because harassment is not "protected speech." Nor did UNC use unlawful procedure in implementing the ban or use the ban as a form of retaliation against petitioner.

Malicious prosecution and IIED claims in context of criminal prosecution

[*Turner v. Thomas*](#), __ N.C. App. __, 762 S.E.2d 252 (Aug. 5, 2014). By reason of self-defense, plaintiff was acquitted of murdering his wife after a high-profile murder trial. Plaintiff later sued several individuals, including two SBI special agents, based on the allegations that they engaged in an elaborate scheme to manufacture the prosecution's case against him. Plaintiff's complaint, as partially summarized by the Court of Appeals, alleged that the two agents (Defendants) engaged in

- (1) performing unscientific tests designed to prove a theory that plaintiff's stab wounds were self-inflicted and the scene staged to look like self defense;
- (2) creating a second report supporting that theory that was inconsistent with one of the agent's first report;
- (3) writing the second report in a manner that hid the existence of the first report by falsely suggested the second report was the result of examination of the evidence of four months earlier (when the first report was done) and by not indicating that the second report was an amendment or supplement to the first report; and
- (4) bolstering the theory by making false statements in the second report and in testimony regarding what the Sheriff's Office lead investigator had said.

The Court of Appeals held that the trial court erred in dismissing plaintiff's state law malicious prosecution and intentional infliction of emotional distress claims against Defendants. As to both claims, the plaintiff alleged sufficient facts as to each element to overcome Defendants' 12(b)(1) and 12(b)(6) motions. The trial court also erred to the extent it dismissed plaintiff's state-law claims based on public official immunity. The trial court was correct, however, in dismissing his claim for false imprisonment and his federal § 1983 constitutional claims.

Negligence of police officer responding to emergency call to accident scene

[*Truhan v. Walston*](#), __ N.C. App. __, 762 S.E.2d 338 (Aug. 5, 2014). The trial court erred in granting summary judgment to a police officer regarding defendant's negligence counterclaim against him. The

officer and defendant collided at an intersection while the officer was in route at high-speed to a separate accident scene. While GS 20-145 exempts officers from speed limits under certain circumstances, it does not “protect the driver of any such vehicle from the consequence of a reckless disregard for the safety of others.” The courts have assigned a “gross negligence” standard when assessing an officer’s reckless disregard, looking specifically at the reason for the pursuit, probability of injury to the public, and officer’s conduct during the pursuit. In the light most favorable to defendant, the evidence created a genuine issue of material fact as to each of these factors. The officer was not in pursuit of a suspect, was instead merely in route to a minor traffic accident, was driving during a busy traffic period of the morning through an area of mixed uses, and was driving in an area with visual obstructions at very high speed without activating his siren (in violation of policy). The trial court also erred to the extent it granted summary judgment to the officer on the basis of governmental immunity. Such immunity does not apply to actions under GS 20-145.

Negligent misrepresentation, UDTPA, and related claims in land development scheme; reasonable reliance. [*Fazzari v. Infinity Partners, LLC*](#), __ N.C. App. __, 762 S.E.2d 237 (Aug. 5, 2014). Developers of Grandfather Vistas, a failed real estate development scheme in Caldwell County, sold “founders’ lots” to plaintiffs. Each lot was sold for \$500,000 with a guarantee that the developers would buy the lot back within one year for \$625,000. Each lot was actually valued between \$41,000 and \$60,000. When the development tanked and no lot was ever repurchased, plaintiffs sued numerous actors in the scheme, including a number of lenders who provided preferred lending arrangements for the lots (“lenders”). Relevant to this appeal was the trial court’s grant of summary judgment against plaintiffs on their claims of negligent misrepresentation and unfair and deceptive trade practices (UDTP) against lenders related to lenders’ appraisals of the property. Affirming the judgment in favor of the lenders, the Court of Appeals held that plaintiff could not demonstrate the element of justifiable reliance necessary to maintain either a negligent misrepresentation or UDTP claim. Emphasizing the arm’s-length nature of a loan agreement, the court noted that plaintiffs “cite no case from this State in which courts have found that a lender had a common law duty to the borrower regarding the manner in which the lender undertook appraisals or underwriting in connection with making loans. ...[S]uch appraisals and underwriting are for the benefit of the lenders, not the borrowers.”

Professional negligence; prima facie showing of standard of care

[*Frankenmuth Insurance v. City of Hickory*](#), __ N.C. App. __, 760 S.E.2d 98 (July 15, 2014). A country club sued the City for negligent operation of its municipal water system after the club’s sprinkler system pipes burst, damaging the clubhouse. The club alleged that the City breached a duty to the club by failing to prevent excess water pressure; failing to install a system to prevent excess pressure at terminal ends of water line; and failing to install pressure-relieving devices near the club. The trial court properly granted summary judgment for the City where the club failed to establish with expert testimony the standard of care to which a municipality should be held in the context of its operation of a municipal water supply. Not having offered “legal evidence tending to establish beyond mere speculation or conjecture every essential element of negligence,” plaintiff could not overcome the City’s summary judgment motion.

Fraud; reasonable reliance

[*Folmar v. Kesiah*](#), __ N.C. App. __, 760 S.E.2d 365 (July 15, 2014). Trial court properly granted summary judgment for defendant sellers in action by buyers for fraud related to undisclosed home

defects. Buyers alleged that sellers had committed fraud by checking “no” on the standard real property disclosure form regarding known structural defects. The court properly concluded that, even if the sellers had known of the defects, buyers did not demonstrate reasonable reliance on seller’s representation. The buyers had ample opportunity to inspect the property; were not impeded in making further inspections; and did not heed their own inspector’s recommendation to have the home’s condition “evaluated by a qualified contractor or specialist for corrective measures[.]”

Fiduciary Duty in Debtor-Creditor Context

Lynn v. Federal National Mortgage Assoc., __ N.C. App. __, 760 S.E.2d 372 (July 15, 2014). There was no fiduciary relationship between a mortgage lender and a mortgage borrower merely because the borrower attempted to invoke its statutory right of redemption (to pay off the mortgage balance prior to foreclosure sale) provided in G.S. 45-21.20.

Chapter 75; applicability to partners and independent contractors

Weaver Investment Co. v. Pressly Development Assocs., __ N.C. App. __, 760 S.E.2d 755 (July 1, 2014). After a bench trial, the court found several entities and individuals liable to plaintiff for fraud and various breaches of fiduciary duty. The court trebled the damage award for this misconduct pursuant to G.S. 75-1.1. The Court of Appeals reversed the trebling as to each of the defendants who were in partnership with plaintiff. Following the holding in *White v. Thompson*, 364 N.C. 47 (2010), the court held that misconduct within a partnership is not “in or affecting commerce” pursuant to G.S. 75-1.1 (“the General Assembly did not intend for the Act’s protections to extend to a business’s internal operations.”). As to the remaining defendants, each of whom was an independent contractor of plaintiff rather than a partner, their behavior could be considered “in or affecting commerce” (by extension of the holding in *Sara Lee Corp. v. Carter*, 351 N.C. 27 (1999)), and thus the trial court did not err in finding them liable for treble damages.

Constructive trust; no “wrongdoing” requirement

Houston v. Tillman, __ N.C. App. __, 760 S.E.2d 18 (July 1, 2014). Plaintiff, whose husband had recently left, began a relationship with decedent around 1997. Plaintiff and decedent lived separately, but when plaintiff’s house was near foreclosure, decedent acquired title to it and began paying the mortgage so plaintiff could continue to live there. Soon thereafter, decedent fell ill and, for 11 years until his sudden death in 2012, plaintiff spent several hours a day taking care of him and handling his affairs. Around 2005, decedent also purchased a car in his own name, but gave the car to plaintiff for her own use in daily activities. At the time of decedent’s death, his sister (and heir), whom plaintiff had never met, appeared on the scene and repossessed the car plaintiff had been driving and the home she had been living in. Plaintiff brought an action against the sister claiming a constructive trust over the property. A jury agreed that the car and home were subject to a constructive trust in her favor. On appeal, the sister argued that the constructive trust claim failed as a matter of law because plaintiff had alleged no “wrongdoing” on the sister’s part in acquiring the property – instead, the sister, as heir, had simply acquired it by operation of intestacy law. The Court of Appeals disagreed, stating that a constructive trust can operate to prevent unjust enrichment of a property owner if the owner acquired it through fraud, breach of duty, or “some other circumstance making it inequitable for [her] to retain it against the claim of the beneficiary of the constructive trust.” Such “other circumstance” is not necessarily synonymous with wrongdoing and can encompass other inequitable circumstances such as the one that arose in this case.

Sudden emergency doctrine; applicability to medical negligence

[Wiggins v. East Carolina Health-Chowan, Inc.](#), __ N.C. App. __, 760 S.E.2d 323 (July 1, 2014). The trial court erred in providing an instruction as to the sudden emergency doctrine in a medical negligence case involving an infant delivery. As a matter of first impression, the court held that, under North Carolina law, the doctrine of sudden emergency (which lowers the applicable standard of care) is not relevant in the medical negligence context. [Note As to cases that have arisen on or after October 1, 2011, G.S. 90-21.12(b) provides an enhanced burden of proof for actions involving treatment of an “emergency medical condition.”]

LAND USE, FORECLOSURE, CONDEMNATION, & TAXATION

***Res judicata* and second foreclosure action**

[*Basmas v. Wells Fargo Bank National Assoc.*](#) (COA13-464; Oct. 7, 2014). Wells Fargo (Defendant), through its substitute trustee, obtained an order of foreclosure from the clerk of court regarding a residential note and deed of trust. On *de novo* appeal, the superior court vacated the order on grounds that Defendant had produced insufficient evidence of indorsement to prove it was the current holder of the note. Several months later, a second petition was filed seeking foreclosure on the same note and deed of trust. In response, debtors filed a declaratory judgment action seeking a ruling that the second foreclosure was barred by the judge's order in the first foreclosure. The trial court declared that the doctrine of *res judicata* did not apply to bar the second foreclosure because the second foreclosure was based on new facts and changed circumstances as follows: (1) debtors failed to make payments on the note in the months *after* the first foreclosure action, thus creating a new default; and (2) Defendant had since come into possession of sufficient evidence of its status as holder of the note. The Court of Appeals affirmed on grounds that continuing nonpayment constituted a new default, thus allowing the second foreclosure action to proceed. (The debtor failed to preserve its argument regarding the second changed circumstance, so the court declined to address that basis).

Competent evidence of valid debt in Chapter 45 foreclosure; effect of prior bankruptcy order

[*In the Matter of Foreclosure of Deed of Trust of Murphrey Co.*](#) (COA14-166; Oct. 7, 2014). A prior order of the federal court in debtor's bankruptcy case, determining that there was a bona fide dispute regarding validity of a creditor's lien, was not an adjudication of whether creditor was the holder of a valid debt for purposes of NCGS Chapter 45, so it had no preclusive effect in the state court foreclosure action. In the foreclosure action itself, the terms of the deed of trust and subsequent Chapter 11 bankruptcy Confirmed Plan in bankruptcy provided sufficient evidence of a valid debt pursuant to GS 45-21.16. Thus the trial court did not err in ordering foreclosure under Chapter 45.

Eminent domain under GS 40A; subject matter jurisdiction in multi-county condemnation.

[*Rutherford Electric Membership Corp. v. 130 of Chatham, LLC*](#) (COA14-134; Sept. 2, 2014). Trial court erred in dismissing under Rule 12(b)(1) condemnor's entire condemnation proceeding on grounds that a portion of the land to be condemned was situated in a county outside to the county in which the petition was filed. Because the superior did in fact have subject matter jurisdiction at least over the portion of the land situated within the county in which the petition was filed, the petition should not have been dismissed. The trial court further erred in not allowing the condemnor's motion to amend its petition (brought under Rules 59(e) and 15(a) after the dismissal) to include only the land situated in the county in which the petition was filed.

Zoning violation; burden of proving grandfathering of non-conforming use

[*Shearl v. Town of Highlands*](#) (COA14-113; Sept. 2, 2014). The superior court affirmed the Zoning Board of Adjustment's finding that petitioner had violated the zoning ordinance by operating a landscaping business on the portion of his land zoned residential. In 1983, before petitioner purchased the property, a large portion of the land was zoned commercial and the remainder was zoned residential. Petitioner purchased the land in 1993. The Town asserted that at 1990 zoning change dramatically shrunk the portion of his land zoned commercial, and that petitioner was therefore operating his business on the

portion of his property established in 1990 as residential. The town, however, conceded that the zoning map relevant to the 1990 amendments had been lost, in violation of its own ordinances. There was, therefore, no zoning map in evidence before the Board of Adjustment or the trial court regarding the zoning in place at the time petitioner purchased his property or the time he began his nonconforming use. Holding that the burden of proving the location of the zoning line at the time he began his nonconforming use had improperly been placed on petitioner, the Court of Appeals remanded for a new hearing in which the town must (1) present evidence establishing the existence of a current zoning violation, and (2) present evidence that the 1990 zoning ordinance moved the zoning line [past the point where petitioner was operating his business].”

Foreclosure; Rule 41 “two dismissal rule” and right to pursue money judgment or judicial foreclosure. [*Lifestore Bank v. Mingo Tribal Preservation Trust*](#), __ N.C. App. __, __ S.E.2d __ (Aug. 19, 2014). Lender previously filed—and later voluntarily dismissed under Rule 41—two actions for Chapter 45 foreclosure by power of sale against borrowers. Lender later filed a civil action against borrowers to collect a money judgment based on amounts due under the relevant notes and for judicial foreclosure of the relevant deeds of trust. The Court of Appeals held that the “two dismissal rule” under Rule 41 of the Rules of Civil Procedure did not preclude lender from pursuing a civil action for money judgment after twice dismissing a Chapter 45 foreclosure proceeding because the two proceedings are of different types, must be brought in separate proceedings, and result in different remedies (order of sale vs. money judgment). In addition, neither the “two dismissal rule” nor collateral estoppel precluded the lender from pursuing the subsequent action for judicial foreclosure of the property.

County occupancy tax; no obligation by online travel companies
[*Wake \[Buncombe, Dare, and Mecklenburg\] County v. Hotels.com et al.*](#), __ N.C. App. __, 762 S.E.2d 477 (August 19, 2014). Eleven online travel companies operating websites allowing customers to book and pay for hotel rooms online were not subject to occupancy taxes collected on gross receipts for booking of hotel rooms in the four plaintiff counties. These companies—which collect payment directly from the consumer and then pay a lower negotiated rate to the hotels that provide the rooms—are not “retailers” pursuant to GS 105-164.4 (specifically, not “operators of hotels, motels, tourist homes, tourist camps, or similar type businesses”), so their gross receipts are not subject to the State sales tax under GS 105-164.4. Because the gross receipts are not subject to the State sales tax, there is no obligation to collect and remit the counties’ occupancy tax on those receipts.

Zoning permit; whether firearms training facility vocational or recreational
[*Fort v. County of Cumberland*](#), __ N.C. App. __, 761 S.E.2d 744 (COA14-93; Aug. 19, 2014). The superior court erred in reversing the decision of the Board of Adjustment to classify a firearms training facility as a “recreation/amusement” use permitted in the relevant zoning district. Reviewing the question de novo, the Court of Appeals held that the superior court erred in finding that the facility was more properly classified as an unpermitted “vocational school.” Because the facility would be engaged in “skill level training” in firearms, rather than education aimed at providing “diplomas or degrees...to pursue a career,” the facility was not properly classified as a vocational school. There was, instead, competent evidence to support the Board’s decision to give the training facility a recreation/amusement classification.

Foreclosure; enforcement of declaratory judgment establishing pay-off

[*Iris Enterprises, Inc. v. Five Wins, LLC*](#), __ N.C. App. __, 762 S.E.2d 336 (Aug. 5, 2014). The holder of a Note initiated foreclosure proceedings against debtor. Debtor (plaintiff) soon thereafter filed a complaint for declaratory judgment in superior court to establish the amount of the payoff on the Note. The trial court entered a judgment establishing the pay-off “to redeem the Property and cancel the Deed of Trust is \$894,711.25.” At the subsequent foreclosure sale, an upset bid of over \$917,000 was made for the property. The trustee then made disbursements of this amount such that no surplus remained for plaintiff. On plaintiff’s motion, the superior court then issued an order enforcing the amount of the pay-off established in its earlier declaratory judgment. The Court of Appeals affirmed, holding that the unappealed declaratory judgment was the law of the case, and any sale price in excess of that amount should have been paid out as surplus.

Zoning amendment; illegal “spot zoning”

[*Etheridge v. County of Currituck*](#), __ N.C. App. __, 762 S.E.2d 289 (Aug. 5, 2014). The county Board of Commissioners’ rezoning of a 1.1-acre parcel of land in the center of an agricultural district to “heavy manufacturing” for purposes of scrap metal recycling constituted illegal spot zoning. As to each of the factors the court considers—size of tract, compatibility with zoning plan, benefits and detriments to neighbors and surrounding community, and relationship between present and proposed uses—there was no genuine issue of material fact as to whether the rezoning was illegal spot zoning. Thus the trial court properly granted summary judgment in favor of the rezoning’s challengers. The challengers were not, however, entitled to attorney fees under GS 6-21.7 as a matter of law. The evidence did not compel a conclusion that the Board’s actions were an “abuse of discretion,” thus the trial judge properly exercised his discretion to require each party to pay its own fees.

Zoning amendment; adoption of statement pursuant to GS 160A-383.

[*Atkinson v. City of Charlotte*](#), __ N.C. App. __, 760 S.E.2d 395 (July 29, 2014). The city council did not adopt an adequate Statement of Consistency as required by GS 160A-383 before adopting a zoning amendment. The statement adopted by the council merely provided that the zoning petition “is found to be consistent with adopted policies and to be reasonable and in the public interest[.]” Under *Wally v. City of Kannapolis*, 365 N.C. 449, 452, 722 S.E.2d 481, 483 (2012), the council was required to adopt a statement containing, “at a minimum, both a description of whether the zoning amendment is consistent with any controlling land use plan and an explanation as to why the amendment is reasonable and in the public interest.” Because the required explanation of reasonableness and public interest was missing, the statement was insufficient and the zoning amendment was void.

Restrictive covenant; meaning of “convenience store”

[*Eastern Pride, Inc. v. Singh*](#), __ N.C. App. __, 760 S.E.2d 94 (July 15, 2014). Trial court properly determined that the construction and operation of a Family Dollar store did not violate a restrictive covenant against operation of a “convenience store” (a term undefined in the covenant). The Family Dollar store was not a “convenience store” under the ordinary meaning of the term, particularly given the requirement that, when ambiguities in restrictive covenants exist, doubts should be resolved in favor of “the unrestricted use of the property.”

Restrictive covenant; precatory language

[*Prelaz v. Town of Canton*](#), __ N.C. App. __, 760 S.E.2d 389 (July 15, 2014). A clause in a deed provided that “the Town will not operate on the property a summer camp primarily for the benefit of residents of other areas and states.” When the Town leased the land to a private, for-profit camp used primarily by residents of other counties and states, plaintiffs alleged that the Town violated the express condition of the deed, triggering the requirement that the land revert to plaintiffs. The reversionary language, however, provided that when the Town “shall violate any of the *conditions* placed upon the [Town]; the title...shall...automatically revert to [plaintiffs].” (emphasis added) The cited language was not included among the 17 enumerated, express “conditions” in the deed, and therefore was merely precatory. The operation of the camp did not, therefore, trigger the plaintiffs’ reversionary interest.

Restrictive covenant; unreasonable amendment

[*Wallach v. Linville Owners Assoc.*](#), __ N.C. App. __, 760 S.E.2d 23 (July 1, 2014). The subdivision’s original 2003 covenants provided that any lots owned by developers would not be subject to assessments. In 2011, the association amended the covenants to eliminate this assessment exemption. Plaintiffs, owners of developer lots, brought an action to declare the amendment invalid and unenforceable. The trial court granted summary judgment to the association. The Court of Appeals reversed, holding that the amendment thwarted the original intent of the covenants and the legitimate expectations of the lot owners when they purchased the lots. Thus, under *Armstrong v. Ledges Homeowners Assoc., Inc.*, 360 N.C. 547 (2006), the amendment “exceed[ed] the purpose of the original declaration” and thus was unreasonable, invalid, and unenforceable. (Note that this opinion also contains a lengthy discussion of whether a person who purchased a lot after the filing of the action was a necessary party to the action. Comparing the facts to those in *Karner v. Roy White Flowers, Inc.*, 351 N.C. 433 (2000) and *Page v. Bald Head Assoc.*, 170 N.C. App. 151 (2005), the court determined that the unjoined lot owner in this case was a proper, rather than a necessary, party.)

Vested rights; § 1983 violations (stating a claim)

[*Swan Beach Corolla, L.L.C. v. County of Currituck*](#), __ N.C. App. __, 760 S.E.2d 302 (July 1, 2014). The trial court erred in dismissing plaintiffs’ claims under Rules 12(b)(1) and 12(b)(6). Plaintiff alleged that the county defendant’s refusal to allow it to develop its property for specified business uses violated vested rights it had obtained as far back as the 1970s and violated its right to equal protection (claim pursuant to 42 U.S.C. § 1983). The Court of Appeals reversed the trial court’s dismissal, holding that plaintiffs had not failed to exhaust administrative remedies and had alleged sufficient facts to support each claim. As to exhaustion of administrative remedies, the plaintiffs were not required to pursue their common law vested rights or equal protection claims with the county’s Board of Adjustment because the Board was not authorized to grant a remedy for a common law vested rights claim and there is no obligation to exhaust administrative remedies for substantive due process claims. As to their vested rights claim, the plaintiffs adequately alleged that their property was unzoned at the time they made significant expenditures to prepare for development; that their use was lawful at the time the expenditures were made; that the expenditures were made in good faith reliance on this lawful use; and that they are prejudiced by the subsequent applicable zoning ordinance which would disallow their planned use. They also adequately stated a claim under §1983 by alleging the county had allowed other similarly situated owners to operate businesses that are prohibited by applicable zoning, and that the County’s decision to treat them differently was arbitrary and without a rational basis.

Standing to contest street closure pursuant to GS 160A-299

[*Cox v. Town of Oriental*](#), __ N.C. App. __, 759 S.E.2d 388 (July 1, 2014). Plaintiff's appeal of the Town's closure of a public street was properly dismissed for lack of standing. Plaintiff could not establish that he was an "aggrieved" person under GS 160A-299 by simply asserting his residency in the town and ownership of town property close to, but not adjacent to, the closed street. Because he could not establish a connection to the affected areas "distinct from the rest of the community," he had no standing to contest the Town's decision.

REAL PROPERTY, ESTATES & PARTITIONS

Easements; *res judicata*

[*Hedgepeth v. Parker's Landing POA, Inc.*](#) (COA13-914; Sept. 2, 2014). In this case involving a protracted and very complicated procedural history, the Court of Appeals analyzed the extent to which a prior judgment in federal court declaring plaintiff's right to a 10-foot easement and a 25-foot right of way was *res judicata* as to various issues in the present state court litigation. Finding that the federal court order was *res judicata* with respect to the portion of the 25-foot easement that crosses the lot owned by the POA on the northern subdivision boundary, the Court of Appeals remanded for entry of summary judgment in plaintiff's favor on that issue. As to all other relevant claims against the POA and all claims against individual lot owners, the federal court order did not constitute *res judicata*, and the Court of Appeals affirmed the order denying plaintiff's motion for summary judgment. In a related opinion ([*Hedgepeth v. Parker's Landing POA, Inc.*](#) (COA13-809), the Court of Appeals affirmed the trial court's denial of plaintiff's motion for class certification as not arbitrary or "manifestly unsupported by reason.")

Delivery of deed; jury instructions as to completed gifts, retained interests, and survivorship

accounts. [*Fortner v. Hornbuckle*](#) __ N.C. App. __, 761 S.E.2d 683 (Aug. 5, 2014). The year before his death, decedent placed general warranty deeds to five large parcels of real estate in a manila envelope and handed them to his common-law wife, instructing her to "take [them] home, put [them] up and keep [her] mouth shut." Three of the deeds conveyed parcels to his wife's son, and two conveyed parcels to his wife. His wife placed the deeds in her dresser drawer until shortly after decedent's death, when the deeds were recorded with the relevant county Registers of Deeds. Decedent's sons, administrators of his estate, soon thereafter filed an action alleging that the properties were required to be included in decedent's gross estate for estate tax purposes, thus the estate was entitled to recover from the grantees an apportioned share of the estate taxes. The grantees argued that the deeds were a completed gift and therefore not includable among estate assets.

A jury found that the grantees did owe plaintiffs an apportioned share of estate taxes in the amount of nearly \$900,000. On appeal, grantees contended there was no question of fact as to whether the deeds were a completed gift. The Court of Appeals disagreed, noting that, although the deeds were handed directly to the grantee wife, the evidence showed that the deeds remained "within the control and subject to the authority of the grantor" until his death. In addition, after handing his wife the deeds, decedent continued to pay expenses of and otherwise manage the properties. Thus there was a "reasonable inference that [decedent] lacked the intent to fully relinquish control of the deeded properties at the time he handed the deeds to her—a key element of the delivery of a deed by a donor."

In its instructions to the jury, however, the trial court erroneously and prejudicially condensed the discussion of two related but separate legal issues—doctrine of completed gifts and doctrine of retained interests—and compounded the confusion with an oversimplified verdict sheet. In addition, the trial court erred in its instructions and verdict sheet involving a separate issue of the estate's right to the assets of a joint account with right of survivorship. Remanded for new trial.

Renunciation of Interest in Real Property

[*Carmichael v. Lively*](#), __ N.C. App. __, 762 S.E.2d 283 (Aug. 5, 2014). Two individuals (Devisees 1 and 2) each inherited a ½ undivided interest in real property. Shortly thereafter, Devisee 1 filed with the clerk of court a renunciation of her interest in the real property. She did not file the renunciation with the

register of deeds. Devisee 2 (as the estate's executor) then promptly filed with the register of deeds an executor deed conveying the entire interest in the property to himself. Later, Devisee 1 rescinded her renunciation and filed the rescission with both the clerk and the register of deeds. Devisee 1 then filed with the register of deeds a quitclaim deed conveying her purported ½ interest in the property to her husband. It was not until 1 ½ years later that Devisee 1's original renunciation was filed with the register of deeds. The husband (Petitioner) then filed a petition against Devisee 2 (Respondent) to partition the property. In the course of the proceeding, the trial court granted summary judgment in favor of Petitioner on the question of whether Devisee 1 was the record owner of the property at the time she conveyed the property to Petitioner. The Court of Appeals affirmed. Based on the language of GS 31B-2(d), a "renunciation of an interest...in real property shall not be effective to renounce such interest until a copy...is filed for recording in the office of the register of deeds[.]" Because the recording of her renunciation took place *after* Devisee 1 conveyed her interest to the Petitioner, the renunciation was not effective at the time and the conveyance to Petitioner was valid.

Will caveat and elective share petition

[In re purported Will of Shepherd](#), __ N.C. App. __, 761 S.E.2d 221 (Aug. 5, 2014). Ms. Shepherd died leaving estate assets of over \$1.8 million. One of her daughters (Propounder) submitted for probate Ms. Shepherd's purported will. The will devised the estate equally to her four children from a prior marriage and left nothing to her present husband of 30 years. Shortly thereafter, her husband petitioned the clerk for a spouse's elective share (ultimately amounting to approximately \$36,000) pursuant to G.S. Chapter 30. A few months later, the husband (Caveator) filed a caveat to the will alleging Ms. Shepherd had not signed it or had done so under duress or undue influence. The Propounder moved to dismiss the caveat on grounds that, (1) by seeking both an elective share under the terms of the probated will and by challenging the validity of that will through caveat, Caveator was seeking inconsistent remedies and his challenge was barred by the doctrine of election of remedies; and (2) the caveat was barred by judicial estoppel because, in seeking an elective share under the probated will, Caveator had taken the position that the probated will was valid. The trial court agreed and dismissed the caveat. The Court of Appeals reversed, holding that an elective share petition and a caveat action are not inconsistent, even where the elective share petition states that the decedent "died testate." This statement was true when made because, once probated, a will is deemed valid until declared void in a caveat action. The statement was also not a basis for dismissing the caveat based on judicial estoppel: (1) the will was indeed presumed valid once probated, so Caveator's statement was not inconsistent with his challenge to that validity; (2) Caveator was not estopped "by benefit" because the elective share he received was less than he would receive if the will is deemed invalid in the caveat.

Conveyance of real property to trust

[Nevitt v. Robotham](#), __ N.C. App. __, 762 S.E.2d 267 (Aug. 5, 2014). Settlor established a trust, with himself as trustee, for the purpose of ensuring that one of the defendants would be allowed to remain for her lifetime in his residence on Wrightsville Beach. Upon settlor's death, his executrix filed a declaratory judgment action to determine whether the trust was properly funded with the deed to the property. The trial court determined that the deed had never been delivered to the trust, so was not a legally valid deed. The Court of Appeals reversed, noting that because the settlor and trustee were the same person, there was no requirement that the deed be delivered by the settlor to the trustee in order to create a valid trust by declaration. In addition, because this was an *inter vivos* revocable trust by declaration, there was no

requirement that the deed be recorded because legal title to the property remained vested in the settlor. Thus the trust documents satisfied the requirements of GS 36C-4-401(2) and served as a valid trust by declaration.

Elective Share

In re Estate of Heiman, __ N.C. App. __, 761 S.E.2d 191 (July 15, 2014). The superior court erred in affirming the clerk's order declaring a wife entitled to \$90,962.88 as an elective share of her husband's estate as pursuant to GS Chapter 30. The wife had earlier waived her right to an elective share and settled with the estate's sole beneficiary for the sum of \$65,000. But the wife later claimed that her waiver was ineffective pursuant to GS 30-3.6(b)(2) on grounds that the executor had not made "fair and reasonable disclosure of the property and financial obligations of the decedent" by not disclosing a lawsuit regarding decedent's IRA. The clerk agreed, and awarded wife the difference of \$25,970.35. The Court of Appeals reversed on the basis that the IRA lawsuit was immaterial to wife's decision to waive her elective share—its presence or absence had no relevance to the calculations upon which the wife would necessarily base her decision to settle the matter.

ADMINISTRATIVE APPEALS

Scope of trial court's authority under GS 150B-51

[*Kindsgrab v. State of North Carolina Board of Barber Examiners*](#) (COA13-1321; Oct. 7, 2014). The State Board of Barber Examiners (the “Board”) issued a Final Decision ordering Petitioner to pay civil penalties, attorney fees, and costs for displaying barber polls and advertising barber services without barber permits or licensed barbers, in violation of the NC Administrative Code. On Petition for Judicial Review, the superior court affirmed the Board’s conclusions and ordered Petitioner to remove the barber pole and cease advertising barber services until properly licensed. The trial court reversed, however, the imposition of fines, attorney fees and costs on grounds that the Board did not have authority to impose such penalties on persons not licensed by the Board. The Court of Appeals reversed in part, holding that the trial court exceeded the permissible scope of its review under GS 150B-51 by ordering removal of the barber pole and enjoining Petitioner’s activity. The trial court’s authority was, instead, limited to a review of the imposition of fines, attorney fees, and costs, and did not extend to injunctive decrees. Further, the court determined that the Board’s authority to assess penalties for violations of Board rules is broad enough to extend to licensees and non-licensees alike.

Ann M. Anderson
UNC School of Government