CIVIL CASE LAW UPDATE

North Carolina Conference of Superior Court Judges
Wilmington, North Carolina

20 June 2014

Shannon Joseph

CONTENTS

		Page
I.	NORTH CAROLINA SUPREME COURT CASES	1
	A. Inverse Condemnation/Class Certification	1
	B. Fiduciary Duty; Piercing Corporate Veil	2
	C. Other Dispositions	4
II.	PROCEDURAL ISSUES	6
	A. Personal Jurisdiction	6
	B. Service of Process	9
	C. Subject Matter Jurisdiction	12
	1. State Tort Claims	12
	2. Workers Compensation	13
	D. Venue and Forum Selection	14
	E. Statute of Limitation	15
	F. Motions to Dismiss	16
	G. Arbitration Motions	17
	H. Intervention	20
III.	DISCOVERY	20
IV.	EVIDENCE	22
V.	ADMINISTRATIVE APPEALS	24
	A. Employment	24
	B. Tax	26
	C. Administrative Declaratory Rulings	27
	D. Child Care and Charter Schools	28
	E. Coastal Building Setbacks	30
	F. Unemployment Benefits	30
VI.	DEFENSIVE BARS	31
	A. Successive Actions and Preclusion	31
	B. Immunity	36
VII.	CIVIL CONTEMPT	40
VIII.	CORPORATIONS	41

IX. INSURANCE …….. 43
A. Automobile…….. 43
B. Construction……. 45
C. Premises…… 46
D. Professional…….. 46
X. LAND USE ……... 47
XI. OATHS (Proper Notarization) ……... 53
XII. REAL PROPERTY…… 54
XIII. RESIDENTIAL ASSOCIATION COVENANTS……. 55
XIV. UNCONSTITUTIONAL MONOPOLIES……. 56
XV. SUBSTANTIVE CLAIMS……. 56
A. Agency…….. 56
B. Charter Schools Funding…….. 58
C. Contracts…….. 59
D. Debtor, Creditor, Offset……... 61
E. Eminent Domain…….. 64
F. Foreclosure …….. 64
G. Malicious Prosecution ……. 65
H. Medical Malpractice……. 67
I. Negligence…… 70
J. Noncompetition Covenants & Trade Secrets…… 72
K. Public Records Act…… 77
L. Trusts……. 77
M. Wills…….. 78
N. Wrongful Termination…….. 79
XVI. DAMAGES…… 81
XVII. ATTORNEYS' FEES…….. 82
XVIII. POST-JUDGMENT MOTIONS AND ISSUES…….. 83
XIX. APPELLATE JURISDICTION…… 84

I. NORTH CAROLINA SUPREME COURT CASES

A. Inverse Condemnation/Class Certification

Beroth Oil Co. v. N.C. Dep't of Transp., 757 S.E.2d 466 (N.C. April 11, 2014).

Pursuant to the Transportation Corridor Official Map Act, N.C. Gen. Stat. §§ 136-44.50-44.54, NCDOT recorded corridor maps in Forsyth County identifying transportation corridors for a future Northern Beltway in 1997 and 2008. Nearly 2400 parcels of land are within the Northern Beltway corridor. NCDOT began making advance acquisitions, acquiring 454 properties. In 1999, a group of affected property owners sued in federal court. For eleven years a federal injunction prevented NCDOT from taking any action as to the affected properties. In May 2010, the federal injunction was lifted and NCDOT resumed making advance acquisitions, acquiring six more properties. In September 2010, Plaintiffs filed this case. The trial court dismissed all claims except the inverse condemnation claim and the claim seeking a declaration of the Map Act as unconstitutional. The dismissal order was not appealed. The trial court denied Plaintiffs' motion for class certification in their inverse condemnation case. The Court of Appeals affirmed. The Supreme Court granted discretionary review.

Reviewing for abuse of discretion, the Supreme Court affirmed denial of Plaintiffs' motion for class certification because individual issues predominated over common issues. The court, however, remanded with instructions to vacate the portion of the trial court's order analyzing the merits of Plaintiffs' claim. The court held that analyzing the substantive merits of plaintiffs' inverse condemnation claim is improper at the class certification stage.

The Supreme Court enunciated a standard of review for findings of fact and conclusions of law in a class certification order: findings of fact are binding if supported by competent evidence, and conclusions of law are reviewed *de novo* (a different standard than the more deferential "clearly erroneous" standard applied by federal courts to factual findings). In earlier decisions, the court had evaluated whether the plaintiffs had properly alleged the existence of a class, which is a question of law reviewed *de novo*.

The Supreme Court recognized that an inverse condemnation claim depends on a showing that there has been a taking of property, which can be a complicated issue. The lower courts incorrectly engaged in analysis of whether and what kind of inverse condemnation claim Plaintiffs stated. Rather, the proper inquiry was whether the requirements of Rule 23 were met.

In this case, the prospective class involves over 800 property owners and not all have the same interests and expectations: Plaintiffs did not show "that all 800 owners within the corridor are affected in the same way and to the same extent." The court emphasized that it did not hold that class certification would never be proper for an inverse condemnation claim.

The Supreme Court "expressly disavow[ed] that portion of the Court of Appeals opinion stating that 'the trial court correctly relied upon the ends-means test in the instant case, as the alleged taking is regulatory in nature and as [the court] ha[s] specifically held this analysis applicable outside the context of zoning-based regulatory takings." Instead, the Supreme Court stated that "the unique nature of land combined with the diversity of the proposed class preclude any analysis of the merits of plaintiffs' takings claim when determining the issue of class certification in the case."

B. Fiduciary Duty; Piercing Corporate Veil

Green v. Freeman, 749 S.E.2d 262 (N.C. Nov. 8, 2013).

Plaintiffs lost investment/loan funds when the businesses to which the monies were provided failed. Plaintiff then brought claims for breach of fiduciary duty, fraud, conversion, unfair trade practices, and to pierce the corporate veil against multiple defendants, including Corinna, an owner and officer of the businesses. The evidence showed that Corinna did not participate in the loan transaction at issue and Plaintiffs did not rely on her. By the time the case went to trial only the breach of fiduciary duty and piercing the corporate veil issues as to Corinna were submitted to the jury. The jury found that Corinna "control[led] [the Piedmont companies] with regard to the acts or omissions that damaged the plaintiffs" and that "plaintiffs [were] damaged by the failure of [Corinna] to discharge her duty as a corporate director or officer." Corinna then appealed from the trial court's original judgment and its denial of her motions for JNOV and a new trial. Plaintiffs appealed the trial court's dismissal of their agency claims against Corinna, and their effect on the corporate veil claim. Over a dissent, the Court of Appeals affirmed, holding that there was sufficient evidence to find Corinna liable for breach of fiduciary duty and liable under "plaintiffs' claim for piercing the corporate veil." The Court of Appeals did not reach Plaintiffs' appeal as to the agency claim.

The Supreme Court reversed the decision of the Court of Appeals on the breach of fiduciary duty issue, and remanded to that court for consideration of Plaintiffs' appeal from the trial court's dismissal of their agency claims against Corinna and the effect of the agency claims on the application of the piercing the corporate veil doctrine. The other issues decided by the Court of Appeals were not before the Supreme Court and were not addressed.

Plaintiffs' evidence on their breach of fiduciary duty claim was insufficient as a matter of law. The court applied the rules set forth primarily in *Barger v. McCoy Hillard & Parks*, 346 N.C. 650, 488 S.E.2d 215 (1997). Generally, shareholders, creditors and guarantors may bring an individual action against a third party for breach of fiduciary duty when (1) the wrongdoer owed them a special duty or (2) they suffered a personal injury distinct from the injury sustained by the corporation itself. Because Plaintiffs never became shareholders, Corinna could not have owed them, as shareholders, fiduciary duties under either the special duty or the personal injury exception. Plaintiffs also claimed that as *creditors* they could sue based on the special duty or personal injury exceptions. However, Plaintiffs' testimony that Corinna was not involved in the loan transaction and that they did not rely on any representations made by her precluded any reasonable inference that Plaintiffs relied on her in making the loan, thereby precluding a finding of special duty to them as creditors. Likewise, the loss of an investment is identical to the injury to the corporation, such that there was insufficient evidence of an injury personal to Plaintiffs as creditors.

There must be an underlying legal claim to which liability may attach. The doctrine of piercing the corporate veil is not a theory of liability. Rather, it is an avenue to pursue legal claims against corporate officers or directors who would otherwise be shielded by the corporate form. The breach of fiduciary duty claim being insufficient as a matter of law, Plaintiffs' agency claims were the only remaining claims to which personal liability could attach under the piercing the corporate veil doctrine. Without the agency claims serving as the underlying wrongs that proximately caused Plaintiffs' harm, evidence of domination and control is insufficient to establish liability. Thus, if the trial court properly dismissed plaintiffs' agency claims, it is irrelevant whether Corinna exercised domination and control over the Piedmont companies. On the other hand, if the trial court erred in dismissing the agency claims, the question remains whether plaintiffs may recover against Corinna on those claims through the piercing the

corporate veil doctrine. Accordingly, the Supreme Court reversed and remanded to the Court of Appeals for a determination of whether the trial court erred in granting Corinna's motion for a directed verdict on plaintiffs' agency claims for fraud and breach of fiduciary duty.

See also ***Green v. Freeman***, 756 S.E.2d 368 (N.C. Ct. App. April 1, 2014) (agency claim adjudication on remand to Court of Appeals), *infra* at page 60.

See also ***Brissett v. First Mount Vernon Indus. Loan Ass'n***, 756 S.E.2d 798 (N.C. Ct. App. April 1, 2014) (affirming directed verdict on breach of fiduciary duty claim) *infra* at page 25.

C. Other Dispositions

Glens of Ironduff Prop. Owners Ass'n, Inc. v. Daly, 753 S.E.2d 152 (N.C. Jan. 24, 2014).

Issue: Whether the six-year statute of repose applicable to a homeowners' association's claim for negligent road construction is tolled by N.C. Gen. Stat. § 47F-3-111(c) until the period of declarant control terminates.

Disposition: Discretionary Review Improvidently Allowed (*Per Curiam*).

Gregory v. Pearson, 754 S.E2d 416 (N.C. March 7, 2014).

Issue: Workers' Compensation; whether plaintiff's decedent, an employee of a temporary agency that assigned him to work at a County facility, was also a County employee under the special employment doctrine.

Disposition: Affirmed *Per Curiam*, But Stands Without Precedential Value (appeal from unanimous panel, before the court on discretionary review). Justice Beasley recused. 3 voted to reverse, 3 voted to affirm. Therefore the Court of Appeals' ruling is undisturbed but without precedential value.

Hoke Cnty. Bd. of Educ. v. State, 749 S.E.2d 451 (N.C. Nov. 8, 2013).

Issue: Whether the constitutional right to a sound basic education requires the State to provide access to prekindergarten programs for all eligible, at-risk four year-olds.

Disposition: *Per Curiam* Opinion Dismissing Appeal As Moot *ex mero motu*, and vacating opinion of Court of Appeals and ordering superior court order to be vacated.

In re Blue Ridge Hous. of Bakersville LLC, 753 S.E.2d 152 (N.C. Jan. 24, 2014).

Issue: Exemption of low-income housing project from ad valorem taxation under N.C.G.S. §§ 105-278.6(a)(8) and -277.16.

Disposition: Discretionary Review Improvidently Allowed (*Per Curiam*).

In re Suttles Surveying, P.A., 754 S.E.2d 416 (N.C. March 7, 2014)

Issue: Whether the N.C. Board of Examiners for Engineers and Surveyors exceeded its statutory authority or violated the due process rights of a licensee and his company by disciplining them for violating the Board's professional conduct rules.

Disposition: Discretionary Review Improvidently Allowed (*Per Curiam*).

Johnston v. State, 749 S.E.2d 278 (N.C. Nov. 8, 2013).

Issue: Whether the North Carolina Felony Firearms Act, which bars certain felons from possessing firearms anywhere, is unconstitutional as applied to plaintiff.

Disposition: Affirmed (*Per Curiam*) (appeal from divided panel).

Rutherford Plantation, LLC v. Challenge Golf Grp. of the Carolinas, LLC, 753 S.E.2d 152 (N.C. Jan. 24, 2014).

Issue: Action to recover balance due on a purchase money promissory note and secured by a purchase money deed of trust; trial court's grant of partial summary judgment for amount due on note; whether the trial court made an error of law for which defendant is entitled to amendment of the partial summary judgment order.

Disposition: Affirmed *Per Curiam*, But Stands Without Precedential Value (appeal from divided panel). Justice Beasley recused. 3 voted to affirm, 3 voted to reverse. Therefore the Court of Appeals' ruling is undisturbed but without precedential value.

Samost v. Duke Univ., 751 S.E.2d 611 (N.C. Dec. 20, 2013).

Issue: Breach of contract claim based on statements in a student handbook; whether the handbook creates an enforceable contract and if so, whether defendant breached it; whether the trial court erred in granting judgment on the pleadings for defendant.

Disposition: Affirmed *Per Curiam*, But Stands Without Precedential Value (appeal from divided panel). Justice Jackson recused. 3 voted to affirm, 3 voted to reverse. Therefore the Court of Appeals' ruling is undisturbed but without precedential value.

Tyndall v. Ford Motor Co., 749 S.E.2d 279 (N.C. Nov. 8, 2013).

Issue: Products liability action; whether an Court of Appeals has jurisdiction to hear an interlocutory appeal from a trial court's denial of a motion to dismiss based on a statute of repose; determination of which statute of repose applies to the instant action.

Disposition: Affirmed *Per Curiam*, But Stands Without Precedential Value (on petition for writ of certiorari from Court of Appeals' dismissal of appeal and denial of petition for certiorari from trial court's dismissal). Justice Beasley recused. 3 voted to affirm, 3 voted to reverse. Therefore the Court of Appeals' ruling is undisturbed but without precedential value.

Wind v. City of Gastonia, 751 S.E.2d 611 (N.C. Dec. 20, 2013).

Issue: Whether defendant's employee is entitled to a complete, unredacted copy of all documents in his personnel file related to complaints filed against him; statutory interpretation of N.C.G.S. §160A-168.

Disposition: Affirmed *Per Curiam* (appeal from divided panel).

II. PROCEDURAL ISSUES

A. Personal Jurisdiction

Walden v. Fiore, __ U.S. __, 188 L.Ed.2d. 12 (U.S. 2014).

Plaintiff professional gamblers from Nevada sued a Georgia officer in Nevada after officer improperly confiscated large sums of money from Plaintiffs at an airport in Georgia. The United States Supreme Court held that a Georgia police officer could not be sued in Nevada for his conduct in Georgia, even if that conduct affected plaintiffs who had connections to Nevada. Thus, Plaintiffs could not obtain specific personal jurisdiction.

Daimler AG v. Bauman, __ U.S. __, 180 L.Ed.2d. 796 (U.S. 2014).

Plaintiff sued Daimler AG, a German corporation, in California for alleged human rights abuses by its Argentinian subsidiary which occurred in Argentina. Plaintiff sought to obtain general personal jurisdiction in California over Daimler based on one of its subsidiaries operating extensively in California. The United States Supreme Court rejected Plaintiff's argument that the subsidiary was an agent of Daimler such that general jurisdiction could be

obtained over the principal. Instead, the Court ruled that even assuming that the subsidiary's conduct could be attributed to the German parent corporation, there was not general jurisdiction because the parent corporation was not "at home" there. Apart from an "exceptional case," the Court concluded that general jurisdiction over a corporation exists where it is incorporated and it maintains its principal place of business.

Berrier v. Carefusion 203, Inc., 753 S.E.2d 157 (N.C. Ct. App. January 7, 2014).

Plaintiffs, North Carolina residents, brought suit against defendant ventilator supplier (Pediatric Specialists operating in North Carolina) and defendant ventilator servicer (Quality Medical operating in Florida), among others, after ventilator stopped working and failed to alarm twice, ultimately leading to a child's death. Quality Medical serviced the ventilator provided to the deceased when it was shipped to Florida by Pediatric Specialists. Quality Medical acknowledged that it provided the ventilator that was used by the decedent, but asserted that it did not know who the end user was or would be. Quality Medical moved to dismiss for lack of personal jurisdiction, which the trial court denied after finding facts and concluding that specific jurisdiction existed. The Court of Appeals affirmed.

When the trial court conducts an evidentiary hearing (including considering depositions, affidavits, and records), it must act as factfinder and decide the issue of personal jurisdiction by a preponderance of the evidence. The trial court may properly consider unverified allegations of the complaint if they are not contradicted by the defendant's affidavit and evidence. Here, the trial court properly considered maintenance records from three (3) other ventilators not related to the incident at issue. The trial court's conclusion that Quality Medical repaired, serviced and delivered medical equipment into the stream of commerce in North Carolina with the reasonable expectation that it would be used by consumers within the state was sufficient to support the exercise of specific personal jurisdiction consistent with due process.

Embark, LLC v. 1105 Media, Inc., 753 S.E.2d 166 (N.C. Ct. App. January 7, 2014).

Individual plaintiff Wheeler is a resident of North Carolina and is the president and founder of corporate plaintiff Embark, an event-planning company organized in Illinois. Defendant 1105 Media is a Delaware corporation with its principal place of business in California. 1105 Media, Wheeler and Embark entered a contract making Embark a division of 1105 Media and Wheeler

an employee. Wheeler and Embark sued alleging that 1105 Media improperly terminated the contract. Because it was unclear about Embark's cause of action, the trial court withheld ruling on Defendant's motion to dismiss for lack of personal jurisdiction as to Embark's claims pending discovery. The trial court denied Defendant's motion to dismiss for lack of personal jurisdiction as to Wheeler's claims. The Court of Appeals affirmed.

North Carolina's long-arm statute, N.C. Gen. Stat. § 1-75.4(5), encompassed the conduct at issue and exercise of personal jurisdiction did not offend due process. Among other grounds sufficient to satisfy the long-arm statute, Defendant ratified or authorized the services Wheeler performed in North Carolina. Wheeler was a North Carolina resident and operated Embark from North Carolina at the time of the contract. Defendant never came to North Carolina; the contract was signed outside of North Carolina. But Defendant voluntarily entered into a contract in which it created a division of its company with an office and operations in North Carolina. Defendant paid for the rent and telephone in Wheeler's North Carolina office, along with other expenses, and paid North Carolina payroll taxes. The court rejected Defendant's argument that Wheeler was a mere telecommuting employee. Wheeler did not simply work from home; he worked out of Defendant's office in North Carolina. Nor was Defendant simply accommodating Wheeler's desire to telecommute. Denial of Defendant's motion to dismiss Wheeler's claim was proper.

Deferral of a ruling on the motion to dismiss Embark's claims also was within the trial court's discretion. For specific jurisdiction, the focus is on "the relationship among the defendant, this State, and the cause of action." Because the trial court was unable to determine based on the affidavits and pleadings the precise nature of Embark's cause of action, the Court of Appeals did not conclude that the trial court abused its discretion in deciding that the motion to dismiss as to Embark should be heard based on deposition testimony that more fully fleshes out that cause of action.

GECMC 2006-C1 Carrington Oaks, LLC v. Weiss, __ S.E.2d. __ (N.C. Ct. App. May 6, 2014).

Plaintiff, a North Carolina entity, brought suit in Mecklenburg County alleging that it was the holder of a promissory note which was secured by a deed of trust on real property in Mecklenburg County, and which note was in default. Plaintiff alleged that defendant individual Weiss signed a personal guaranty of the promissory note. The guaranty agreement contained a

consent-to-jurisdiction clause. Defendant Weiss, a resident of New York, argued that he did not and would not have signed the guaranty, and moved to dismiss for lack of personal jurisdiction (among other grounds). The trial court found that Weiss did sign the guaranty, and denied the motion to dismiss. The Court of Appeals affirmed.

Weiss was an experienced real estate investor. He consistently would sign whatever signature pages his lawyers presented to him as necessary for the transactions, but would not ask to see copies of the documents to which the signature pages belonged. He admitted in his deposition that the signature above the word "GUARANTOR" appeared to be his signature, and that he had done a real estate deal involving the North Carolina property specified in the deed of trust. There was competent evidence supporting the trial court's finding that Weiss signed the guaranty that contained a valid consent-to-jurisdiction provision. Weiss's argument that he cannot be bound by an agreement that he did not read was rejected in the absence of any allegation that he was misled or defrauded.

B. Service of Process

Davis v. Urquiza, 757 S.E.2d 327 (N.C. Ct. App. April 15, 2014).

Plaintiff attempted to serve Defendant, an unnamed insurance carrier, by certified mail to the claims adjuster approximately ten (10) days before the statute of limitation ran. The trial court dismissed for insufficient service of process. The Court of Appeals affirmed the dismissal.

By statute, an uninsured motorist carrier must be served formally with process; mere notice is insufficient. Rule 4(j)(6) provides the methods for service on a corporation. N.C. Gen. Stat. § 58-16-30 also provides for service on the Commissioner of Insurance. The Court of Appeals noted that it had "previously held that statutes concerning service of process must be strictly complied with, and that even actual notice, if it does not comply with statutory requirements, does not give the court jurisdiction over a party." The lack of an authorized recipient in this case controlled the disposition of the case. Because proper service was not obtained before the statute of limitation ran, dismissal was proper.

Kahihu v. Brunson, __S.E.2d __ (N.C. Ct. App. June 3, 2014).

Plaintiff sued Defendant after a car accident. After realizing that the case would proceed as an uninsured motorist claim, and after a series of unrelated procedural missteps, Plaintiff

sought to serve his own insurance carrier, GMAC. Plaintiff filed an affidavit of service claiming that the summons and complaint had been served on GMAC by certified mail. In its Answer, GMAC moved to dismiss for insufficiency of service, insufficiency of process and lack of personal jurisdiction. That motion was not heard until trial when GMAC moved for a directed verdict based on deficient service. GMAC submitted an affidavit from its registered agent that it had been served with a complaint, but did not reference any summons. The trial court granted a directed verdict in favor of GMAC. The Court of Appeals affirmed.

N.C. Gen. Stat. § 20-279.21(b)(3) "unequivocally requires" that an uninsured carrier be served with a summons and complaint. Here, Plaintiff's counsel's affidavit of service complied with the requirements of N.C. Gen. Stat. § 1-75.10, thereby creating a presumption of valid service. The affidavit by GMAC's agent, which did not reference receipt of a summons, rebutted that presumption.

Washington v. Cline, __S.E.2d __ (N.C. Ct. App. April 1, 2014), *superseding Washington v. Cline*, 750 S.E.2d 843 (N.C. Ct. App. Nov. 5, 2013).

During a six-year period from 2002-08, plaintiff Washington was arrested, prosecuted, and convicted of multiple felonies. Washington's convictions ultimately were vacated as a consequence for violations of his right to a speedy trial. Thereafter, Washington and his son brought claims against multiple individuals, the State, and the City of Durham based on Washington's arrest, prosecution and convictions.

The trial court (1) denied City Attorney Baker's motion to dismiss for insufficient service of process, (2) granted City's motion to dismiss for insufficient service of process, (3) denied Plaintiffs' motion to amend the summons to the City, (4) denied City Attorney Baker's motion to dismiss for failure of the summonses to contain the "title of the cause," and (5) granted all other defendants' motions to dismiss for insufficient service of process. The Court of Appeals reversed the trial court's order dismissing all defendants except the City and affirmed the trial court's order denying Baker's motions to dismiss.

No estoppel because of extension of time Defendants' previous motions to extend time to answer did not estop them from moving to dismiss for insufficiency of service of process after the statute of limitations ran. The extension motions stated that the purpose was to evaluate the propriety of any Rule 12 defenses. Also, Defendants served their motions to dismiss four (4)

days before the date for extending the life of the summonses, and Plaintiffs in fact served their reply to the motion on the day the summonses expired.

Sufficient Service of process on individuals The individuals, including Baker, moved to dismiss for insufficient service of process on the ground that the summons and complaint had not been "deliver[ed] to the addressee" as set forth in Rule 4(j)(1)d. In general, Plaintiff served the individual defendants, natural persons, by FedEx delivery. FedEx did not deliver directly to the individual defendants, but left the packages either at the individual's household doorstep or with other people (a receptionist, a visiting 12 year-old grandson, or a loading-dock employee). Each individual defendant received the summons and complaint. Defendants' motions to dismiss involved the interpretation of the requirement that service be made by "delivering to the addressee" as used in Rule 4(j)(1)d and N.C. Gen. Stat. § 1-75.10(5). The Court of Appeals agreed that Rule 4 is to be "strictly *enforced*," but noted that the "greater weight of precedent supports a liberal approach to interpreting the language of the rules." The Court of Appeals also relied on section 1-75.10(4) which, like section 1-75.10(5), allows proof of delivery to the addressee with "other evidence" sufficient to establish that the summons and complaint were "in fact received." The Court of Appeals rejected Defendants' arguments as to "why Rule 4(j)(1)d should be read to require personal service on a defendant or his service agent, exclusive of all other individuals and regardless of whether the defendant actually receives the summons and complaint."

In particular, the court rejected Defendants' argument that the case should be controlled by *Hamilton v. Johnson*, 747 S.E.2d 158, 162-63 (N.C. Ct. App. 2013), in which service was held defective because FedEx delivered a summons and Complaint to the concierge, not the defendant. The Court of Appeals distinguished *Hamilton* on the ground that the court in that case did not mention "whether the defendant actually received the summons and complaint, or more specifically, whether the plaintiff attempted to prove service under section 1-75.10 with affidavits indicating that the defendant received the summons and complaint." The Court of Appeals further observed that "the *Hamilton* Court makes no citation to section 1-75.10, a statute crucial to our holding that the General Assembly explicitly states must be read "contemporaneously" with Rule 4."

Insufficient Service of Process on City The Court of Appeals affirmed the trial court's dismissal of the City for insufficient service. Unlike service on a natural person, Rule 4(j)(5)a prescribes an exclusive list of parties on which service of a city may be made. Service on anyone other than those parties is insufficient to confer jurisdiction over a city. Here, the summons and complaint were not addressed to either the mayor, city manager, or clerk, as is required by Rule 4(j)(5)a; they were addressed to Baker, who was the city attorney.

Other motions properly denied The trial court did not abuse discretion in denying the motion to amend summons to the City. Because service on the City was improper, the court never obtained jurisdiction over the City. Such amendment would impermissibly have conferred jurisdiction over the City without proper service. Finally, the trial court correctly denied Baker's motion to dismiss for failure to include in the summons the "title of the cause." The case name in the summons did not list all defendants, but listed the City and then substituted "et al." for the rest of the defendant names. Baker cited no authority for his appeal on that issue, so the Court of Appeals deemed the argument abandoned.

C. Subject Matter Jurisdiction

1. State Tort Claims

Irving v. Charlotte-Mecklenburg Bd. of Educ., 750 S.E.2d 1 (N.C. Ct. App. Nov. 5, 2013).

A school teacher driving the high school football team to a game in a school activity bus allegedly caused a collision and resulting injuries. The school classifies athletic events as instructional programs. The driver was transporting the team in the bus at the direction of the principal of the school. The Industrial Commission granted summary judgment for Defendant upon concluding that transporting the high school football team did not fall within the scope of the Tort Claims Act, such that it lacked subject matter jurisdiction. The Court of Appeals reversed.

The Tort Claims Act covers negligence claims against drivers of "public school buses" and public "school transportation service vehicles" under certain circumstances. The issue presented was whether a school activity bus is considered a "school bus" or a "school transportation service vehicle" and, if so, whether the driver was operating the vehicle in accord with N.C. Gen. Stat. § 115C-242 (2011). The Court of Appeals answered both prongs in the

affirmative. Thus, pursuant to N.C.G.S. § 143-300.1(a), the Industrial Commission had exclusive jurisdiction to hear the case. The School Board's written policy that activity buses are not governed by the State Tort Claims Act could not operate to contravene the statutory enactments.

2. Workers Compensation

Estate of Vaughn v. Pike Elec., LLC, 751 S.E.2d 624 (N.C. Ct. App. Nov. 19, 2013), *disc. rev. denied*, 755 S.E.2d 624 (N.C. March 6, 2014).

Plaintiff brought a wrongful death claim against the employer, Pike Electric, and his supervisor, Penland, after Penland ordered Decedent to climb a power pole and utilize a "shotgun stick" to de-energize a transformer despite knowing that Decedent had not been trained to do so. Defendants moved to dismiss Plaintiff's wrongful death claims pursuant to Rule 12(b)(6), not Rule 12(b)(1), as barred by the exclusivity of the Workers Compensation Act. The trial court denied the motions. The Court of Appeals affirmed as to Pike Electric, but reversed as to Penland.

Notwithstanding the Rule 12(b)(6) procedural context, because the issue involved whether the trial court had jurisdiction to hear the case, the Court of Appeals concluded that the appeal affected a substantial right and the ruling was immediately appealable.

Reviewing *de novo*, the Court of Appeals concluded Plaintiff's allegations were insufficient to show the egregious and intentional conduct necessary to bring an employer into the *Woodson* exception to Workers Compensation exclusivity. The *Woodson* exception requires that an injured employee show or allege intentional misconduct by an employer that was substantially certain to cause serious injury or death. This exception is so narrow that in no reported appellate case since *Whitaker v. Town of Scotland Neck, C.T.*, 357 N.C. 552 (2003) has a plaintiff been allowed to proceed in tort against the employer. Here, there were no allegations that would support that Pike Electric knew or had good reason to know that Penland would order Decedent to undertake the activity that led to his death, or that Pike Electric was aware of or encouraged the risk.

With respect to the co-worker, however, the test is whether the co-employee engaged in willful, wanton, and reckless negligence either by intentionally injuring a coworker or whether he acted with manifest disregard to the consequences of his actions. In this case, Penland's

alleged direction to send Decedent up the utility pole despite Decedent's severe lack of training and expertise was sufficient to create an inference that Penland was manifestly indifferent to the consequences of his conduct.

May v. Melrose S. Pyrotechnics, Inc., 753 S.E.2d 52 (N.C. Ct. App. Feb. 4, 2014).

Plaintiff Estates brought claims for negligence, gross negligence, strict liability and negligent hiring after a fireworks explosion killed several people. Decedents had been working on the fireworks display. The Court of Appeals ruled that the trial court properly denied Defendants' motion for summary judgment. There was substantial factual controversy regarding the nature of the relationship between the decedents and the fireworks company—whether the decedents were employees or independent contractors.

D. Venue and Forum Selection

Capital Bank, N.A. v. Cameron, 753 S.E.2d 153 (N.C. Ct. App. Dec. 17, 2013).

Plaintiff Bank sued in Wake County to collect monies from defendant debt Guarantors, guarantors of a promissory note. The loan documents, including the guaranty agreement, contained language that the parties consented to "the exclusive, personal jurisdiction by the courts of North Carolina and to venue in Alamance County, North Carolina and waive[ ] any objection thereto." The trial court denied Defendant's motion to change venue pursuant to Rule 12(b)(3). The Court of Appeals affirmed.

Applying an abuse of discretion standard, the Court of Appeals held that a plain reading of the contractual language does not render venue exclusive to Alamance County. In the absence of language such as "exclusive" or "sole" or "only," which indicate that the contracting parties intended to make jurisdiction exclusive, the clause is viewed as permissive and a mere consent to jurisdiction. Here, both the mandatory forum selection clause with respect to personal jurisdiction and a permissive consent to jurisdiction clause with respect to venue appear together in the same sentence. However, "exclusive" modified only the parties' agreement as to personal jurisdiction, not venue.

E. Statute of Limitation

Duke Energy Carolinas, LLC v. Bruton Cable Serv., Inc., 756 S.E.2d 863 (N.C. Ct. App. April 15, 2014).

Defendant asserted a third-party claim against land surveyors for an inaccurate survey on which Defendant relied in situating and building houses within Plaintiff Duke Energy's easement across the lots. Defendant discovered the inaccuracy of the surveys after Duke Energy asserted its claim against Defendant. The trial court granted summary judgment in favor of the land surveyors. The Court of Appeals reversed.

The trial court erred in considering unsworn letters in determining the motion for summary judgment and further erred by granting summary judgment based on the statute of limitations. Unsworn letters and correspondence are not properly considered by the court pursuant to Rule 56.

With respect to the statute of limitations, N.C. Gen. Stat. § 1-47(6) prescribes ten years as the limitations period for actions against land surveyors based on negligent surveying or platting. This limitation applies to the exclusion of the limitation period in N.C. Gen. Stat. § 1-52(16). N.C. Gen. Stat. § 1-52(18) also could apply and prescribes a different, shorter period. However, N.C. Gen. Stat. § 1-47(6) more specifically applies to this type of action and the time period is longer. Where there is doubt as to which of two possible statutes of limitation applies, the rule is that the longer statute governs.

Finally, the Court of Appeals rejected the land surveyors' assertion that Defendant was not permitted to file its third-party action because the claim was "an inappropriate direct action disguised as a third-party action." Because Defendant specifically alleged that the land surveyors were liable to it for all or part of Duke Energy's claims against Defendant, it alleged indemnity within the language of Rule 14(a). Thereafter, Defendant could include any other claim for relief against the land surveyors, as joining all other claims against a party is specifically contemplated by Rule 18(a).

Podrebarac v. Horack, Talley, Pharr & Lowndes, 752 S.E2d 661 (N.C. Ct. App. Dec. 3, 2013).

The trial court dismissed Plaintiff's legal malpractice action as barred by the statute of limitations. The Court of Appeals reversed. The three-year statute of limitations for legal malpractice accrues at the last act of the defendant giving rise to the claim, regardless of

continuing representation of the client. If the loss was not apparent on that date or within the two years following, however, the claimant must file suit within one year of the date of discovery. Here, the alleged negligence was failing to notarize a mediated settlement for equitable distribution. Based on the complaint, Plaintiff discovered such negligence more than two years after the act and only after a district court refused to enforce the agreement, thereby triggering the running of the statute, and then filed within a year of that discovery. The Court of Appeals acknowledged that while evidence may later reveal that Plaintiff knew or should have known of the problem before that time, but the complaint did not disclose a fatal defect.

See also ***Brissett v. First Mount Vernon Indus. Loan Ass'n***, 756 S.E.2d 798 (April 1, 2014) (accrual of statute of limitation for fraud claim), *infra* at page 25.

F. Motions to Dismiss

Am. Oil Co., Inc. v. Aan Real Estate, LLC, 754 S.E.2d 844 (N.C. Ct. App. March 4, 2014).

Pursuant to a lease agreement, "American Oil *Group*" leased property from Defendant for use as a car wash and vehicle maintenance business. Plaintiff "American Oil *Company, Inc*." sued Defendant alleging various lease breaches. Plaintiff attached a copy of the lease to the complaint, but did not identify its relationship to Defendant or otherwise explain the difference in between the named lessee ("American Oil *Group*") and the named plaintiff ("American Oil *Company Inc.*"). Plaintiff was not a corporation existing in North Carolina at the time the complaint was filed or during pendency of the appeal. Thus, it was an unincorporated entity, and failed to allege the location of its certificate of recordation as required by N.C. Gen. Stat. § 1-69.1(a)(3). Further, the complaint did not demonstrate that the named plaintiff had any relationship to Defendant. Because it was not the real party in interest and did not have standing to pursue claims for breach of a lease with American Oil Group, the trial court properly granted Rule 12(b)(6) motion.

Westlake v. Westlake, 753 S.E.2d 197 (N.C. Ct. App. January 7, 2014).

Two years after a permanent custody order was entered, defendant Ex-Husband filed an "Emergency Motion for Contempt for Interstate Custodial Interference." Plaintiff Ex-Wife moved to dismiss for failure to state a claim, which the trial court granted. Ex-Husband appealed, in part asserting untimeliness and insufficient notice. The Court of Appeals affirmed.

Relying on Rules 12(b)(6) and 12(h)(2), the Court of Appeals noted that a motion to dismiss is timely even if made at trial. Further, the Court of Appeals concluded that Plaintiff gave sufficient notice of her motion to dismiss. On the day of the hearing of another motion, Plaintiff filed the motion to dismiss and served it by hand delivery. The trial court entered an order approximately fifteen (15) days later dismissing the action. The Court of Appeals rejected Ex-Husband's argument that if a party moves to dismiss in writing, rather than orally, the written motion should be subject to the notice requirements of Rule 6(d). Further, Defendant did not show prejudice from the lack of notice.

G. Arbitration Motions

Bank of Am., N.A. v. Rice, 750 S.E.2d 205 (N.C. Ct. App. Nov. 19, 2013).

Defendant had signed multiple contracts and promissory notes with plaintiff Bank of America (BOA) and a wide assortment of its affiliate corporations, including Bank of America Investment Services (BAI), in connection with his employment with a series of BOA affiliates. With BAI, his initial employer, Defendant signed an agreement referred to as the BAI Series 7 (essentially an employment agreement), a 2005 Note, and a 2006 Note; each of which contained an arbitration provision. With plaintiff BOA, Defendant signed a 2004 Note which contained an arbitration provision. Defendant also entered into a 2010 Novation with plaintiff BOA which by its stated terms purported to supersede the 2004 Note, the 2005 (BAI) Note and the 2006 (BAI) Note and "all prior . . . commitments and understandings between and among" Plaintiff and Defendant. The 2010 Novation did not contain an arbitration provision. Plaintiff BOA sued Defendant for breach of contract, conversion, and trade secret misappropriation, among other claims. After a voluntary dismissal of many claims, Plaintiff's remaining claims were based only on breach of the 2010 Novation. Defendant moved to compel arbitration, which the trial court denied. The Court of Appeals affirmed.

The 2010 Novation could not effect a novation of the 2005 and 2006 BAI Notes: a valid novation could not occur without the involvement of BAI. BAI was not a party to the novation agreement and there was no evidence that BAI agreed to or otherwise ratified the novation of its contracts. Nor was there evidence that BAI transferred its Notes to BOA. Further, none of the BAI contracts formed the basis of Plaintiff's claims and BAI was not a party to the lawsuit.

Thus, the arbitration provisions in the BAI contracts could not form a proper basis of a motion to compel arbitration. Although the 2005 BOA Note contained an arbitration provision, the 2010 Novation effectively superseded that Note and its arbitration provision. Consequently, Plaintiff's claims did not implicate any arbitration agreement between Plaintiff and Defendant.

Bookman v. Britthaven, Inc., 756 S.E.2d 890 (N.C. Ct. App. April 15, 2014).

The Court of Appeals remanded (again) to the trial court for an evaluation of whether husband and daughter had apparent authority to enter an arbitration agreement on behalf of now-deceased nursing home patient. The patient was awake and lucid at the time of her admission to a nursing home but her husband and daughter signed the twelve (12) contracts presented to them for the patient's admission to the nursing home. Plaintiff challenged only the validity of the arbitration agreement. Evidence was before the trial court that would allow for, but not require, a finding of apparent authority. The trial court did not address the evidence in its findings of fact and conclusions of law. Further, after the first remand, the trial court did not allow the nursing home the opportunity to present evidence on the apparent authority issue. Thus, the trial court did not comply with the first remand's mandate.

Elliott v. KB Home N.C., Inc., 752 S.E.2d 694 (N.C. Ct. App. Dec. 17, 2013).

Plaintiff Homeowners filed a putative class action against defendant Builder in 2008 alleging improper installation of Hardiplank which allowed moisture to penetrate the house exterior and damage the houses. Builder had entered a purchase contract and limited warranty contract with each homeowner. Both contracts contained an arbitration clause. Builder did not move to compel arbitration until three years into the litigation: after answering; after cross-country depositions were taken; after class certification; and after Builder's interlocutory appeal from class certification was dismissed. The trial court denied the motion to compel arbitration based on a finding of waiver. The Court of Appeals affirmed.

Although the Federal Arbitration Act ("FAA") and the North Carolina Revised Uniform Arbitration Act have different tests for waiver, the trial court was not obligated to first determine which applied before deciding waiver. The FAA waiver provision applies only in federal court. The trial court properly evaluated whether there was (1) conduct inconsistent with assertion of arbitration rights and (2) consequent prejudice to Homeowners. As to (1), Builder had

participated in years of litigation, including extensive discovery, before moving for arbitration as to the named plaintiffs only after unsuccessful appeal from class certification. The same was true with respect to the unnamed class members, and the delay would effectively subvert class certification. Further, the court rejected a federal case holding that "litigation conduct with named plaintiffs prior to class certification could not waive arbitration rights as to unnamed class members." Builder could and should have signaled its intention to compel arbitration as to the unnamed class members, even before certification.

With respect to (2), the prejudice to the named plaintiffs included the over $100,000 expended to pursue the case. Although the trial court could have been more specific as to how much would not have been spent if the motion to compel arbitration had been made earlier, given the amount of the expense and the vigorous litigation practice the trial court's findings were minimally sufficient. Prejudice to class members included that allowing arbitration would eliminate the opportunity to pursue the case as a class action, as well as the significant expenditures by class counsel and named plaintiffs in pursuit of a class. Class members are beneficiaries of those expenditures, which would be lost if arbitration were allowed. Moreover, the court sought to discourage allowing a defendant to pursue "gamesmanship" in which it tries its hand on dispositive and other motions before seeking arbitration.

Knox v. First S. Cash Advance, 753 S.E.2d 819 (N.C. Ct. App. Feb. 4, 2014).
Torrence v. Nationwide Budget Fin., 753 S.E.2d 802 (N.C. Ct. App. Feb. 4, 2014).

In each case, plaintiff Borrowers brought a putative class action against defendant lending companies and individuals for alleged violations of the North Carolina Consumer Finance Act, the North Carolina unfair trade practice statute and state usury laws. Borrowers had signed an agreement that contained a conspicuous arbitration provision which also precluded participation in a class action. Defendants moved to compel arbitration. The trial court denied the motion to compel arbitration and granted class certification. The Court of Appeals reversed.

Based on United States Supreme Court decisions in *Concepcion*, 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011) and *Italian Colors*, 133 S.Ct. 2304, 186 L.Ed2d 417 (2013), the arbitration agreement was not unconscionable. *Concepcion* and *Italian Colors* evince "a broader theme that unconscionability attacks directed at the arbitration process itself will no longer be tolerated." The Court of Appeals distinguished (and disregarded) the North Carolina Supreme Court's

plurality decision in *Tillman*, which generally has governed arbitration unconsionability analysis in North Carolina. In particular, the Court of Appeals concluded that the United States Supreme Court has since rejected the grounds on which the *Tillman* plurality relied to find substantive unconscionability: "prohibitively high" potential arbitration costs; the one-sided quality of the agreement; and class action waiver.

In *Torrence*, the Court of Appeals concluded that the trial court should have substituted an arbitrator for the one designated in the agreement, which was not available. The arbitration agreement was governed by the Federal Arbitration Act (FAA), which provides for a method to substitute should the named arbitrator be unable to serve. North Carolina law contains a similar provision. The "key aspect of the analysis of an agreement to arbitrate is the intent of the parties to arbitrate, not the identity of the arbitrator." Further, *Concepcion* makes clear that state laws that frustrate the intent of the FAA will not stand.

H. Intervention

Anderson v. Seascape at Holden Plantation, LLC, 753 S.E.2d 691 (N.C. Ct. App. Jan. 21, 2014).

Property Owners Association (POA) moved to intervene in an action brought by property owners within a planned development community alleging defects in construction of various amenities and roads common to the development. The trial court denied the motion to intervene. The Court of Appeals reversed.

The POA could intervene as a matter of right pursuant to Rule 24(a) because it was a necessary party. The POA owned the property at issue. Among other things, Plaintiffs sought to enjoin the POA from expending funds to make repairs because Plaintiffs contended that Defendants were responsible for the expenses. Further, Plaintiffs' claims were derivative claims brought on behalf of the POA. Finally, even if the claims were not derivative, any adjudication of the issues would determine the property rights of the POA as the owner.

II. DISCOVERY

Britt v. Cusick, 753 S.E.2d 351 (N.C. Ct. App. January 7, 2014).

The trial court issued a protective order that Defendants could obtain discovery from one witness only by written question and answer. The order further specified that it could be

modified in the future "if required in the interest of justice." Before appealing, Defendants did not attempt to use the authorized discovery method. Rather, Defendants appealed and argued that the order "effectively precluded" them from introducing evidence that was "highly material to the determination of the critical question to be resolved" at trial, such that the order was immediately appealable. The Court of Appeals disagreed and dismissed the appeal as interlocutory. Having failed to even attempt the permitted discovery, Defendants could not show what relevant and material information they would have obtained in an oral deposition that they could not get otherwise.

In re Accutane Litig., __ S.E.2d __ (N.C. Ct. App. April 1, 2014).

Appellant Dr. Kappelman, a North Carolina resident, was subpoenaed for a deposition by defendants in a mass tort case pending in New Jersey involving Accutane. Kappelman was not a party in the NJ case. Plaintiffs in the New Jersey case cited Kappelman's work to support the causation element in their case. The New Jersey court refused to allow the defendants to rebut the plaintiffs' evidence with documentary evidence of Kappelman's work, but ruled that the defendants would have to depose him. A New Jersey deposition subpoena followed which resulted in a North Carolina deposition subpoena to Kappelman. He moved a North Carolina court to quash and for a protective order. The trial court issued a protective order preventing deposition of Kappelman as an involuntary non-fact law witness, but allowing for future issuance of a subpoena to Kappelman as an expert witness. The Court of Appeals ruled that the order was interlocutory as it addressed only the ancillary issue of whether Kappelman was entitled to a protective order limiting the scope of the deposition, and did not resolve the case as to all parties in the Accutane litigation. Should the defendants issue an expert witness deposition subpoena, Kappelman may seek a protective order. Because that had not yet happened, the remaining issues raised by Kappelman involved speculation about a hypothetical, future subpoena which were not ripe for review.

The Royal Oak Concerned Citizens Ass'n v. Brunswick Cnty., 756 S.E.2d 833 (N.C. Ct. App. April 1, 2014).

Plaintiffs sued Defendant for claims arising out of alleged discriminatory practices culminating in Defendant's decision to rezone property in Plaintiffs' community to accommodate the expansion of a landfill. The trial court ordered the County Manager and a

County Commissioner to appear for deposition, but allowed defense counsel to interpose good-faith objections to questions based on testimonial or other privilege. Defendant appealed, contending that the order affected a substantial right as it precluded the assertion of legislative or quasi-judicial immunity on behalf of the individuals. The Court of Appeals disagreed and found that Defendant had not been deprived of any right or suffered injury that warranted interlocutory review. The appeal was dismissed.

See also ***GE Betz v. Conrad***, 752 S.E.2d 634 (N.C. Ct. App. Dec. 3, 2013) (affirming exclusion of evidence as sanction) *infra* at page 76.

See also ***Medlin v. N.C. Specialty Hosp., LLC***, 756 S.E.2d 812 (N.C. Ct. App. April 1, 2014) (affirming discovery ruling in medical malpractice case) *infra* at page 70.

III. EVIDENCE

Brissett v. First Mount Vernon Indus. Loan Ass'n, 756 S.E.2d 798 (N.C. Ct. App. April 1, 2014).

Plaintiffs, Debtors, worked through a financial services company to obtain financing to rehabilitate multiple rental properties. Defendant Creditor provided the funds. Debtors signed all documents at the loan closing without reading them. The closing documents deeded the properties to an LLC established for the sole purpose of facilitating the loan. One plaintiff, Brissett, was established as a 40% member and manager of the LLC; the controlling 60% ownership was provided to defendant Gonzales, a board member of Creditor. To facilitate the collection process and protect Creditor's interests from bankruptcy, the documents further specified that Brissett's 40% interest would be conveyed to Gonzales upon a default. Debtors, having not read the closing documents, did not know that the LLC owned the properties until they attempted to refinance a rehabilitated property a year later. Debtors defaulted two years after the original loan, and Gonzales removed Plaintiff from the 40% interest of the LLC. Plaintiffs sued. The case went to trial against only Creditor and its trustees. The jury determined that the deeds did not meet the requirements of the law for conveying valid title or creating a valid debt and that Creditor was entitled to a lien on the properties in the amount of $131,500. The jury deadlocked on whether Creditor acted with unclean hands.

Among other rulings made during the jury trial, the trial court: (1) granted Creditor's motion to exclude the transcript of Gonzales's testimony during Virginia State Bar proceedings;

(2) directed a verdict in favor of Creditor on Debtors' fraud and misrepresentation claims; (3) directed a verdict in favor of Creditor on Debtors' constructive fraud claim; and (4) entered a judgment notwithstanding the verdict on the issue of unclean hands. Debtors appealed these rulings.

Evidentiary ruling The trial court ruled that Debtors could cross-examine witnesses regarding the unethical conduct of Gonzales and others, but that transcripts from the Virginia State Bar proceedings against Gonzales, who died before trial, were immaterial and inadmissible hearsay. The Court of Appeals disagreed in part. The transcripts of Gonzales's testimony about the conduct at issue in the present case were relevant and material, even if the orders containing the results and conclusions of the proceeding were irrelevant because the standard of ethical proceedings differed from that in this civil case. The Court of Appeals agreed that the statements in the transcripts were hearsay but concluded that their exclusion was error and that Debtors were prejudiced by the error.

Debtors proffered the transcript pursuant to a residual hearsay exception, Rule 804(b)(5). The trial court must show that it engaged in the required six-part inquiry when evaluating the admissibility of evidence specifically proffered pursuant to a residual hearsay exception. Once a trial court denies admission, however, it is not required to issue findings of fact or conclusions of law to support a decision to *exclude* the evidence pursuant to residual hearsay exception, although such findings are required when admitting evidence pursuant to a residual exception. In this case, the trial court "gave no indication" that it considered the six-part inquiry, and the Court of Appeals held the exclusion as "arbitrary and an abuse of discretion." The Court of Appeals then concluded that the transcripts would "likely be admitted" if properly considered.

Directed verdicts based on statute of limitations The Court of Appeals found that the trial court correctly directed verdicts on Plaintiffs' fraud and misrepresentation claims in favor of Creditor on statute of limitation grounds. Debtors admitted becoming suspicious about the loan when they tried to refinance but did not discover Creditor's actual ties to the loan until later. Discovery of fraud, however, is tied to when the fraud should have been discovered in the exercise of reasonable diligence.

Directed verdict for Creditor on constructive fraud claim The trial court also correctly directed a verdict against Debtors on their claims for breach of fiduciary duty/constructive fraud

against Creditor. Creditor had no contact with Debtors until the loan closed, had no prior relationship with Debtors, and the transaction was commercial (not residential) in nature.

JNOV for unclean hands The jury deadlocked on the issue of unclean hands and the trial court erred by entering judgment as a matter of law for Defendant. Conduct need not amount to fraud to allow for equitable relief on the basis of unclean hands. The excluded transcript testimony was germane to the issue of unclean hands. The case was remanded for determination of the issue.

See also ***Green v. Freeman***, 756 S.E.2d 368 (N.C. Ct. App. April 1, 2014) (discussing use of deposition as evidence) *infra* at page 60.

See also ***Schmidt v. Petty***, 752 S.E.2d 690 (N.C. Ct. App. Dec. 17, 2013) (discussing application of Rule 403 in medical malpractice case) *infra* at page 71.

See also ***Webb v. Wake Forest Univ. Baptist Med. Ctr.***, 756 S.E.2d 741 (N.C. Ct. App. Feb. 18, 2014) (discussing admissibility of expert opinion in context of summary judgment adjudication of pre-2011 medical malpractice claim) *infra* at page 72.

IV. ADMINISTRATIVE APPEALS

A. Employment

Hershner v. N.C. Dep't of Admin., 754 S.E.2d 847 (N.C. Ct. App. March 4, 2014).

Based on the whole record test, the Court of Appeals ruled that the trial court correctly adopted the unchallenged findings of fact of the Administrative Law Judge and State Personnel Commission, which found in favor of the employee who challenged her dismissal. Based on *de novo* review, the Court of Appeals ruled that those unchallenged findings of fact supported the legal conclusion that Petitioner's employment termination was unlawful, which conclusion was properly affirmed by the trial court. Specifically, the Agency failed to prove that the employee's termination was for "just cause" as a consequence of disclosure of confidential information, violation of a rule that was in effect, or disobedience of an instruction. The Court of Appeals rejected the Agency's argument that the SPC was not authorized to act on the case because, after conflict recusals and absences, only five members of the nine member SPC decided the case. Because the SPC had a quorum (of six pursuant to then-existing law) at the time of it commenced business, it was authorized to issue a decision.

Kreuger v. N.C. Criminal Justice Educ. & Training Standards Comm'n, 750 S.E.2d 33 (N.C. Ct. App. Nov. 5, 2013).

Petitioner Law Enforcement Officer falsified radar training document so as to represent that two officers participated in radar training with him when they had not. Officer's certification was suspended for six months and he brought suit, arguing that failure to offer him a "consent agreement" as had been done with other officers violated Officer's due process and equal protection rights. Officer lost at the agency/administrative level and appealed to superior court. The superior court concluded that Officer's rights had not been violated. Reviewing *de novo*, the Court of Appeals affirmed.

Wetherington v. N.C. Dep't of Crime Control & Pub. Safety, 752 S.E.2d 511 (N.C. Ct. App. Dec. 17, 2013).

Petitioner State Trooper lied to his superiors about how he lost his hat and was fired for violating the Truthfulness Policy. State Trooper contested his termination. The Administrative Law Judge and State Personnel Commission sustained the termination. Concluding that State Trooper's conduct did not rise to the level to constitute just cause for dismissal, the superior court reversed. The Court of Appeals affirmed the superior court.

The Court of Appeals ruled that the superior court properly applied a *de novo* standard of review to determine whether the conduct constituted just cause for the discipline imposed. Evaluation of the flexibility and fairness requirements for just cause requires the court to balance the equities after considering whether the employee engaged in unacceptable personal conduct. Here, Trooper "broke down" when confronted about his lie, stated that he got "bad counsel from someone about what he should say," and further expressed concern about getting in trouble again after a previous reprimand for not wearing his hat during a traffic stop.

The Court of Appeals rejected Respondent's contention that Trooper's untruthfulness would prevent him from testifying in criminal cases. "Respondent's argument depends upon at least two assumptions that Respondent does not address: (1) that defense counsel will elect to impeach Petitioner using the finding; and (2) that defense counsel's impeachment will necessarily influence a jury to the point that a jury will disregard the entirety of Petitioner's testimony. The possibility of impeachment and the possibility of the impeachment's success must both occur in order to diminish Petitioner's performance of the duty to testify successfully." The Court of Appeals concluded that "Respondent presents no argument that the likelihood of

the two possibilities justifies dismissal." The Court of Appeals further noted that the finding of untruthfulness would not interfere with any other essential job duties other than the possible diminished ability to credibly testify.

Joyner v. Perquimans Cnty. Bd. of Educ., 752 S.E.2d 517 (N.C. Ct. App. Dec. 17, 2013).

The superior court reversed Respondent Board of Education's decision denying Petitioner Teacher career status (tenure). The Court of Appeals affirmed the superior court. The Court of Appeals ruled that the superior court properly applied the "whole record test" in reviewing whether the Board's decision was supported by substantial evidence or was arbitrary, capricious or an abuse of discretion. Teacher carried her burden to show that the Board's decision was without rational basis. The superintendent and school principal recommended that she be tenured and her performance evaluations designated her as at least equal to her peers and commended her for engaging performance. Evidence of Teacher's negative performance was sparse apart from one Board member's vague and unsubstantiated concerns: although he expressed concerns, he lacked a basis in knowledge and educational training to make appropriate assessments. The Court of Appeals also rejected the Board's assertion that it was proper to deny tenure because it believed it could find a teacher to do "a better job" than Teacher. Without requiring the Board to articulate a specific concern supported by substantial evidence in the record would be to grant the Board unfettered discretion to act arbitrarily toward a particular candidate, as there will always be some candidate, somewhere, who could "do a better job."

B. Tax

Gust v. NC Dep't of Revenue, 753 S.E.2d 483 (N.C. Ct. App. January 7, 2014).

Plaintiff brought a declaratory judgment action in superior court seeking a declaration that he did not owe certain state taxes. The trial court dismissed the case, and the Court of Appeals dismissed Plaintiff's appeal. Plaintiff did not follow the statutory procedures for a taxpayer to challenge tax liability.

As set forth in Chapter 105 of the North Carolina General Statutes, a taxpayer who disagrees with a final determination of tax liability may file a contested case with the Office of Administrative Hearings, which result may be appealed by seeking judicial review by filing in

the Superior Court of Wake County. Such remedies are exclusive and the statute specifies that any other action is barred, including a declaratory judgment action.

C. Administrative Declaratory Rulings

Equity Solutions of the Carolinas, Inc. v. N.C. Dep't of State Treasurer, 754 S.E.2d 243 (N.C. Ct. App. Feb. 18, 2014).

Plaintiff Company is in the business of locating surplus funds from foreclosure proceedings. It then enters into contracts with the persons entitled to those funds to obtain them in exchange for a percentage of the proceeds. The State Treasurer and Attorney General contended that such contracts violate North Carolina law, began an investigation, and commenced an enforcement action against Company.

Separately, while the investigation was ongoing, Company asked the State Treasurer for a declaratory ruling that its contracts complied with North Carolina law and for a similar ruling on prospective, future contracts. It attached to its request a form contract, with many of the material terms left blank, such as Company's fee. The State Treasurer declined to issue a ruling on Plaintiff's request for a declaratory ruling pursuant to N.C. Gen. Stat. § 150B-4 (pre-2012 version). The State Treasurer maintained that issuing a declaratory ruling was undesirable because: (1) the subject matter of the request was the subject of active enforcement litigation; (2) the request failed to disclose the full factual setting; and (3) the request involved disputed issues of fact, including whether the agreements at issue were valid.

Plaintiff appealed to superior court which concluded that the "State Treasurer's reasons for denying the request, each standing alone or taken together, constitute[d] 'good cause' for the denial." The Court of Appeals affirmed.

The Court of Appeals ruled that the conclusion reached by the superior court showed that the lower court had properly applied a *de novo* standard of review to the issue, even if the standard of review had not been stated in the order. The Court of Appeals noted that "the better practice is for a trial court reviewing an agency decision to expressly state which standard of review it has applied to each distinct issue in an order." The Court of Appeals added that it would be a "waste of administrative resources" to rule on an issue that would likely be decided during the course of pending litigation. With respect to future business practices, the State

Treasurer also could properly determine that good cause existed to deny the request for a ruling because the missing material facts would render any ruling purely hypothetical.

D. Child Care and Charter Schools

Nanny's Korner Care Ctr. v. N.C. Dept. of Health and Human Servs., __ S.E.2d __ (N.C. Ct. App. May 20, 2014).

Relying on a local DSS investigation and conclusion that husband of child care facility operator had inappropriately touched a child, DHHS issued a warning letter and prohibited husband from being on the facility's premises while children were present. The Administrative Law Judge and superior court affirmed DHHS's actions. The Court of Appeals reversed.

The Court of Appeals concluded that the pertinent rules and statutes place an affirmative duty on DHHS to independently substantiate abuse before it can issue a warning and mandate correction action. While DHHS can collaborate with other agencies in investigations, or use evidence collected by another organization in its investigation, DHHS cannot treat a local DSS substantiation as dispositive for purposes of discipline. Further, due process concerns arise where the underlying facts supporting a substantiation of abuse are not presented at a hearing on licensing issues and the aggrieved party is not afforded an opportunity to challenge the evidence or cross-examine the witness. Although Petitioner did not advance a constitutional challenge, the Court of Appeals noted the constitutional considerations as having informed its statutory analysis.

N.C. State Bd. of Educ. v. N.C. Learns, Inc., 751 S.E.2d 625 (N.C. Ct. App. Dec. 3, 2013).

Respondent submitted an application to the State Board of Education (SBOE) to operate a virtual charter school. The SBOE decided not to act on any applications for virtual charter schools by the March 15 statutorily-set date pending receipt of results from a Commission studying virtual education. On March 21, Respondent filed a contested case with the Office of Administrative Hearings, and the Administrative Law Judge ruled in favor of Respondent, deeming its application granted. SBOE appealed to superior court, which reversed. The Court of Appeals affirmed the superior court ruling.

The Court of Appeals ruled that the superior court correctly reversed the ALJ's determination that the SBOE lost jurisdiction to act on Respondent's application to operate a virtual charter school when it did not act on it before March 15, thereby deeming the application

approved. The Court of Appeals rejected Respondent's argument that the SBOE was required to follow Robert's Rules of Order in deciding whether to delay acting on applications by virtual charter schools pending receipt of results of a Commission studying the issue. Awaiting such results was not an impermissible permanent ban and a consequent shift in policy. Further, the statutory period of review was directory not mandatory, as the statute did not include a consequence for failing to act within the period.

The Court of Appeals concluded that superior court did not err when it allowed eighty-nine local school boards and the State Boards of Education Association to intervene as "aggrieved parties" pursuant to N.C. Gen. Stat. § 150B-46 (2011). Respondent's application projected receiving $6753 per student, a portion of which would come from local funds. Thus, the local boards were affected by the ALJ's ruling. Similarly, the ALJ's decision could affect policy and management of school boards across the state, thereby affecting the interest of the School Boards Association.

The Court of Appeals ruled that Respondent did not follow proper procedure in filing its OAH case. N.C. Gen. Stat. § 150B-44 allows an adversely-affected party to bring a state court action to compel an agency to make a decision after the agency has delayed 120 days. Respondent did not wait 120 days or file its action in state court. Similarly, section 150B-23 allows an aggrieved party to file an OAH action if an agency fails to act as required by law. The SBOE, however, was under no obligation to act by March 15. Thus, Respondent improperly filed a case with OAH; its only available form of relief would have been in state court pursuant section 150B-44.

The Court of Appeals concluded that the trial court did not err when it allowed amendment of the record to include Respondent's application. N.C. Gen. Stat. § 150B-47 allows the superior court to require or permit subsequent corrections or amendments to the record "when deemed desirable." The superior court noted that the amendment was to preserve a complete record for appeal. Further, the superior court did not rely on the application in its findings or conclusions.

E. Coastal Building Setbacks

Busik v. N.C. Coastal Res. Comm'n, 753 S.E.2d 326 (N.C. Ct. App. Nov. 5, 2013), *disc. rev. denied*, __ S.E.2d __ (N.C. April 10, 2014).

This case involved application of the Setback Rules from the North Carolina Administrative Code regarding oceanfront construction to proposed development of a single-family residence and appurtenant structures on Bald Head Island. The Setback Rules require that "[a] building or structure less than 5,000 square feet requires a minimum setback [from the ocean's vegetation line] of 60 feet" and that "[a] building or structure [between] 5,000 square feet [and] 10,000 square feet requires a minimum setback of 120 feet[.]" The principal question presented was whether the square footage of all structures are to be combined to determine which setback applies. The superior court affirmed the Commission's conclusion that the plain language of the rule applies to each individual structure, not the aggregate of all structures in the project. The Court of Appeals affirmed.

F. Unemployment Benefits

Bailey v. Div. of Emp't Sec., 753 S.E.2d 219 (N.C. Ct. App. Jan. 21, 2014).

Plaintiff Bailey sought unemployment benefits after termination from employment. The agency had found that Bailey had been assigned to monitor a patient on suicide watch, was found sleeping during that assignment, the patient was found wandering the halls, and Bailey was discharged for her misconduct, such that she was not entitled to unemployment benefits. Upon petition to superior court for judicial review, the trial court adopted the findings of fact of the agency as based on competent evidence, but concluded that Bailey's behavior was not "misconduct" so that she was not disqualified from receiving unemployment benefits. The Court of Appeals reversed, finding that the trial court disregarded the standard of review set forth in N.C. Gen. Stat. § 96-15(i), which governs claims for unemployment benefits. Because the findings of fact included that the employer's written policy specified that employees found sleeping would be subject to immediate discharge, Bailey knew of the policy, and she did not turn down the shift. Thus, a conclusion that no misconduct occurred was without basis in law.

V. DEFENSIVE BARS

A. Successive Actions and Preclusion

Auto. Grp., LLC v. A-1 Auto Charlotte, LLC, 750 S.E.2d 562 (N.C. Ct. App. Nov. 19, 2013).

Plaintiff leaseholder brought multiple suits to eject defendant lessee from property where lessee operated a used car lot on the ground that the lease term had expired and Defendant was holding over without permission. Plaintiff accepted (but did not cash) Defendant's rent check in the first month after the lease term expired. Magistrate dismissed the first action, concluding that Plaintiff waived breach of the lease terms. Plaintiff filed a second ejectment action, which the magistrate dismissed as barred by *res judicata*. In Plaintiff's third ejectment action, it alleged that it had returned all rent checks since the first month and that Defendant was in violation of other rent terms. Magistrate dismissed the case as being the same claim as the first dismissed action, and therefore barred. Plaintiff appealed to district court.

The trial court denied Defendant's motion to dismiss on *res judicata* grounds, overruled Defendant's objections to evidence during trial based on *res judicata*, found for Plaintiff and ordered ejectment. Defendant moved for a new trial pursuant to Rule 59, again asserted that *res judicata* barred admission of certain evidence and the claim, for which the trial court ordered Rule 11 sanctions and denied the new trial motion. The Court of Appeals upheld the trial court's denial of the new trial motion, concluding that the third action was not barred by *res judicata*, but reversed the Rule 11 sanction.

Because there was a change in circumstances between the first action and the third action—the return of rent payments, in particular—the trial court correctly found no *res judicata* bar. Therefore, the trial court correctly denied the motion for new trial. The Rule 11 sanctions, however, were improperly based on Defendant's multiple attempts to assert the *res judicata* bar. Because a Rule 59(a)(8) motion requires allegation that an error of law occurred during trial, it necessarily will require re-argument of an issue decided at trial.

Barrow v. D.A.N. Joint Venture Props., LLC, 755 S.E.2d 641 (N.C. Ct. App. March 4, 2014).

Plaintiff-Guarantors had guaranteed a debt of a company. The company filed for bankruptcy. The debt was recapitalized pursuant to a bankruptcy Plan of Reorganization. As part of the conditions for the Plan's approval, Guarantors contributed $550,000 to the Plan. In

addition to dividing the debt into two Notes, the Plan provided that the "guaranties will remain in full force and effect for the Notes except as adjusted to reflect the amount of Recapitalized Debt, defined herein." Defendant became a Creditor when it bought the Note for one portion of the debt.

In the first case, which instituted in bankruptcy court, Guarantors brought an adversary proceeding against Creditor to enjoin Creditor from demanding payment from the company and them in excess of the recapitalized debt amount. The bankruptcy court declared the amount of recapitalized debt owed by Guarantors, but declined to enter injunctive relief because there was no showing of irreparable harm.

After the bankruptcy court order, Guarantors sued in state court for a declaration that the expiration of the statute of limitations prevented Creditor from asserting any claim against them as guarantors. Creditor counter- and cross-claimed that Guarantors were in breach of the agreements as modified by the Plan. Both sides moved for summary judgment. The trial court granted judgment for Guarantors. The Court of Appeals reversed and ruled that summary judgment should have been entered for Creditor.

Claim preclusion and issue preclusion apply in declaratory judgment proceedings if the prior proceeding also was a declaratory proceeding. In this case, the Court of Appeals found that preclusion applied because Guarantors' company in the adversary proceeding sought declaratory relief in addition to injunctive relief, and the bankruptcy court entered a final judgment in the adversary proceeding. Both cases focused on how the Plan affected Guarantors' obligations to Creditor, and Guarantors were not prevented from raising the statute of limitations issue in the first case. The superior court action involved an additional Plaintiff-Guarantor than did the bankruptcy case. For the same parties to both actions, claim preclusion applied. Further, because the additional Plaintiff-Guarantor was in privity with the others, the Court of Appeals concluded that he he shared the same legal rights. Guarantors' failure to raise the statute of limitations issue during the bankruptcy proceeding precluded consideration of that issue in the state court case.

Burakowski v. Burakowski, 757 S.E.2d 507 (N.C. Ct. App. May 6, 2014).

By motion in 2010, Plaintiff asked the trial court to "clarify" (reform) a separation agreement to require payment of half of Defendant's "basic annuity" benefits to her. In its 2011

Order on the motion, the trial court ordered payment of half of Defendant's "supplemental annuity" payments but did not order payment of "basic annuity" payments. In 2012, Plaintiff moved to hold Defendant in contempt for not paying half his "basic annuity" benefits to her. In response, Defendant moved for sanctions. The trial court granted Plaintiff's contempt motion and denied Defendant's sanctions motion; the Court of Appeals reversed.

The Court of Appeals held that, despite the trial court's recitation in the contempt order that the basic annuity issue had not been fully litigated in the prior proceeding, the record revealed that it had. The 2011 Order was not appealed and therefore was law of the case. Defendant could not be held in contempt for failing to do something that he was never ordered to do.

Estate of Hurst v. Jones, 750 S.E.2d 14 (N.C. Ct. App. Nov. 5, 2013).

In a prior case, Plaintiffs sought to pierce the corporate veil against individual Blackmon, and two entities Blackmon controlled: Moorehead and Park West. Plaintiffs alleged that Blackmon and Moorehead defrauded Plaintiffs in a land deal and then used the financing from the deal to repay debts owed by Blackmon entities other than Moorehead. Plaintiffs succeeded in the prior case, such that Blackmon and the two entities—Moorehead and Park West—were held to be non-distinct.

In this second action, Plaintiffs sued the recipients of the land deal monies to recover the funds pursuant to the Uniform Fraudulent Transfer Act: individuals Jones, Gordon and Bieber. Jones had loaned $500,000 to Park West; Gordon and Bieber had loaned $300,000 to Investments International Incorporated (Investments), another Blackmon entity. These debts were repaid with the monies Blackmon and Moorehead obtained in the fraudulent land deal. Both sides moved for summary judgment. The trial court held that Plaintiffs were entitled to judgment as a matter of law and entered damages awards for Plaintiffs against Jones, Gordon and Bieber. The Court of Appeals reversed.

Claims against Jones An essential element of a transfer in fraud of creditors claim under either N.C. Gen. Stat. § 39-23.4(a)(2) or N.C. Gen. Stat. § 39-23.5 is that the transfer was made without the debtor receiving "reasonably equivalent value." Plaintiffs alleged that Moorehead transferred monies to the individual defendants to pay the debts of Park West and/or

Blackmon, debts not owed by Moorehead. The Court of Appeals ruled that Plaintiffs were judicially estopped from taking this position—that the entities were separate and distinct—as it was directly, and impermissibly, contrary to Plaintiffs' successful corporate piercing claim in the earlier action. Consequently, the Court of Appeals held that the payment to defendant Jones to satisfy an antecedent debt was in exchange for a "reasonably equivalent value," and remanded for entry of summary judgment for defendant Jones on that issue.

Jones did not win outright, however. Pursuant to N.C. Gen. Stat. § 39-23.8(a), even if the Blackmon entities sent the money to Jones with fraudulent intent (about which there were genuine issues of fact), the transfer is not voidable if Jones can establish that he was a "good-faith transferee for value." Jones had established that he took for a reasonably equivalent value, but the Court of Appeals found that he did not show conclusive evidence that he took in good faith. The Court of Appeals therefore remanded for a jury to determine whether the Blackmon entities transferred the monies to Jones with the intent to defraud Plaintiffs and, if so, whether Jones can assert a "good faith" affirmative defense under N.C. Gen. Stat. § 39-23.8(a).

Claims against Gordon and Bieber The Court of Appeals ruled that the prior litigation did not involve a determination of whether and to what extent Investments was an alter ego of Blackmon and the other entities. Gordon and Bieber could not rely on it to show that Moorehead's payment to Gordon and Bieber to satisfy Investments' debt to them was of "reasonably equivalent value" to Moorehead. Nor was there conclusive alter ego evidence in this case. Notwithstanding, the evidence showed a book entry loan from Moorehead to Investments in an amount similar to that paid by Moorehead to Gordon and Bieber. The Court of Appeals recognized a change from the earlier Uniform Fraudulent Conveyance Act: an unperformed promise may constitute consideration in a number of situations, so long as it is not an executory promise. Here, evidence of the book entry loan was sufficient to create a genuine issue of material fact as to whether Moorehead made the transfers to Gordon and Bieber and received reasonably equivalent value in exchange. The issue was remanded for determination by the trial court. Likewise, there was a genuine issue of fact about whether Moorehead was insolvent, or its assets were unreasonably small or insufficient, at the time of the transfers to Gordon and Bieber. The insolvency issue was remanded for determination by the trial court. Further, genuine issues of material fact as to whether Gordon and Bieber were transferees in

good faith and for value pursuant to N.C. Gen. Stat. § 39-23.8(b)(1) precluded summary judgment. Because Gordon and Bieber received payment directly from Moorehead, rather than Investments, they could not be "subsequent transferees" within the meaning N.C. Gen. Stat. § 39-23.8(b)(2). The Court of Appeals further held, against Gordon and Bieber, that the transfer of cash is not subject to the equitable adjustments contemplated by N.C. Gen. Stat. § 39-23.8(c).

In re K.A., 756 S.E.2d 837 (N.C. Ct. App. April 1, 2014).

The Court of Appeals noted that the North Carolina Supreme Court has differed in its opinions on whether mutuality of parties (or privity) is a requirement of collateral estoppel. Its decision in this case, however, did not turn on the issue. Rather, the court concluded that the trial court erroneously applied the doctrine of collateral estoppel because of different burdens of proof used in custody and neglect hearings.

Propst v. N.C. Dept. of Health and Human Servs., __ S.E.2d __ (N.C. Ct. App. June 3, 2014).

In the first lawsuit in superior court, Plaintiff sued the medical examiner for negligence after the medical examiner incorrectly identified her son's eye color and specified that his body was warm, causing Plaintiff to be exhume her son's body out of fear that they had buried someone else. The superior court granted summary judgment for the medical examiner on grounds of immunity and public duty doctrine. Plaintiff did not appeal. Plaintiff then brought this second action under the Tort Claims Act alleging that medical examiner negligently failed to perform his duties which caused her severe emotional distress. Defendant moved for summary judgment on grounds of collateral estoppel and that, even if the previous action did not preclude the second one, Defendant owed Plaintiff no individual duty under the public duty doctrine. The Full Commission granted the motion on both grounds. The Court of Appeals affirmed.

The Court of Appeals rejected Plaintiff's argument that because the superior court granted summary judgment on both grounds of immunity and the public duty doctrine its determination of the duty issue was not *necessary* to its judgment, and therefore not entitled to preclusive effect. Although the Second Restatement of Judgments supported Plaintiff's position that neither basis of a judgment with alternative bases is entitled to preclusive effect, that position is contrary to the historical application of collateral estoppel in North Carolina. Generally, issues actually litigated and determined in a prior action preclude later relitigation.

Thus, both independent grounds of a prior judgment have later preclusive effect, assuming all of the other elements of collateral estoppel are present. This rule applies even if the prior judgment may have been erroneous.

Tong v. Dunn, 752 S.E.2d 669 (N.C. Ct. App. Dec. 17, 2013).

In lawsuit 1 and 2, Plaintiff's allegations stemmed from the circumstances surrounding the negotiation and consummation of the merger of the company Plaintiff helped found with a larger company. In lawsuit 1, Plaintiff brought claims for fraudulent and negligent misrepresentation to him in his capacity as an employee, which he alleged resulted in him not receiving payments due in connection with his employment. Plaintiff took a voluntary dismissal with prejudice of lawsuit 1. In lawsuit 2, Plaintiff and many other common shareholders alleged breach of fiduciary duty to all common shareholders by failing to seek a merger deal that benefited all shareholders, not just preferred shareholders. In lawsuit 2, Defendants moved for judgment on the pleadings on the ground that Plaintiff's claim was barred by *res judicata*. The trial court grated the motion. The Court of Appeals reversed.

The Court of Appeals noted that the rule against claim-splitting requires that all damages from a single wrong be recovered in one case. Although there were a great many common factual allegations, North Carolina does not follow the transactional or "operative facts" approach to test for claim-splitting. Because each lawsuit sought to address a separate wrong, although part of the same stream of facts, the separate lawsuits did not constitute impermissible claim-splitting, and lawsuit 2 was not barred by *res judicata*.

See also ***Mount Ulla Historical Pres. Soc'y, Inc. v. Rowan Cnty.***, 754 S.E.2d 237 (N.C. Ct. App. Feb. 18, 2014) (preclusion in quasi-judicial, land use context) *infra* at page 52.

B. Immunity

Atl. Coast Conference v. Univ. of Maryland, 751 S.E.2d 612 (N.C. Ct. App. Nov. 19, 2013).

After the University of Maryland decided to withdraw from the Atlantic Coast Conference (the ACC) and join the Big Ten, the ACC sought a declaratory judgment that a withdrawal payment provision in the ACC Constitution is a valid liquidated damages clause. Defendants moved to dismiss based on sovereign immunity and comity. The superior court denied the motion. The Court of Appeals affirmed.

The Court of Appeals declined to adopt an abuse of discretion standard. Instead it reviewed the issue *de novo*. It held that sovereign immunity applied to Defendants, if at all, only through the rule of comity. The rule of comity in North Carolina is that rights acquired under the laws or judgments of a sister state will be given force and effect in North Carolina if not against public policy. Public policy is violated in North Carolina when the State is allowed to assert sovereign immunity as a defense to causes of action based on contract. This rationale applies equally in declaratory judgment actions regarding contractual clauses.

Brown v. Town of Chapel Hill, 756 S.E.2d 749 (N.C. Ct. App. April 1, 2014).

Plaintiff sued defendants Town and Police Officer for false imprisonment and other claims after Officer stopped and detained Plaintiff despite Plaintiff having photo identification on his person showing that he was not a "Mr. Fearrington," the person being sought by police for arrest. The trial court granted summary judgment for Defendants on all claims except false imprisonment. The Court of Appeals reversed the denial of summary judgment. Over a dissent, the majority concluded that Plaintiff failed to forecast sufficient evidence that Officer acted with malice such that judgment for Officer on the ground of public official immunity was proper.

Plaintiff's and Officer's accounts of the events at issue differed. It was undisputed that Officer immediately handcuffed Plaintiff without asking him to identify himself or providing any explanation for the stop. It also was undisputed that Officer had probable cause to arrest "Mr. Fearrington" and that Plaintiff is not Mr. Fearrington. Under such circumstances, liability can attach only when the officer fails to use reasonable diligence to determine that the party arrested was actually the person subject to the arrest warrant. Here, Plaintiff did not stop when Officer asked him to stop, and Officer knew that Mr. Fearrington had evaded arrest earlier than day in the Town. Upon handcuffing Plaintiff, Officer called him "Mr. Fearrington." Photos of Plaintiff and Mr. Fearrington show that "the individuals appear similar" and the encounter took place late at night. Plaintiff's evidence that he immediately told Officer that he was not Mr. Fearrington did not preclude judgment as "aliases and false identifications are common." Thus, the majority concluded that it was reasonable for Officer to not believe Plaintiff until he saw his identification and verified it through NCIC. The majority further discounted Plaintiff's averments that Officer handled him roughly while handcuffing him and intended to inflict pain in the process. Although it did "not disagree that the evidence may show that [the officer] acted with reckless indifference

prior to arresting plaintiff and during his interactions with him," the majority ruled that Plaintiff failed to "establish [Officer] acted with malice."

Dissenting, Judge Geer took issue with the majority's holding on the ground that it would be "an extraordinary undermining of the protections of the Fourth Amendment" to find, as the dissent says the majority does, that it is permissible to *arrest* a person and then seek identification of the person. The dissent further opined that the majority "improperly applie[d] the applicable standard of review by (1) failing to require defendant[ ] to meet his initial burden of showing an absence of any genuine material fact and (2) failing to view the evidence . . . in the light most favorable to plaintiff."

Can Am S., LLC v. State, __ S.E.2d __ (N.C. Ct. App. June 3, 2014).

Plaintiff Lessor LLC leased commercial office and storage space to Defendants for three state agency divisions. The lease agreements contained an "availability of funds" provision which allowed the lessee to terminate the lease should insufficient funds be available or appropriated to maintain the lease. Defendants invoked the "availability of funds" provision to terminate two of the leases. Plaintiffs sued for breach of contract and to prevent termination of the third lease. Defendants moved to dismiss pursuant to Rules 12(b)(1), 12(b)(2), and 12(b)(6), claiming that sovereign immunity had not been waived. The trial court denied the motions. The Court of Appeals affirmed denial of the Rule 12(b)(2) motion, finding it immediately appealable as an adverse ruling as to personal jurisdiction. The Court of Appeals dismissed appeal of the Rule 12(b)(1) and 12(b)(6) rulings as un-appealable interlocutory orders.

Here, the Court of Appeals concluded that Lessor sufficiently pleaded waiver of immunity, as required. Second, Defendants impliedly waived sovereign immunity by entering into the lease agreements with Lessor. Defendants' denial of a breach of contract does not factor into the evaluation of waiver. Sovereign immunity is waived upon entry into the contract, not breach of the contract.

Hinson v. City of Greensboro, 753 S.E.2d 822 (N.C. Ct. App. Feb. 4, 2014)

Plaintiff, a former city police Officer, asserted state and federal claims of racial discrimination and conspiracy to injure reputation and profession against defendants City, Police Chief and Deputy Police Chief (in their official capacities). Officer alleged that he had been

falsely accused of being associated with criminal activity and had been the subject of investigations that did not adhere to policies and procedures. Defendants moved to dismiss based on sovereign immunity. The trial court denied the motion. The Court of Appeals reversed.

The Court of Appeals ruled that dismissal based on sovereign immunity grounds was warranted. The City was self-insured up to $3 million and had purchased excess insurance for claims above $3 million. The excess insurance policy language specified that the policy was "not intended . . . to waive [ ] governmental immunity." Thus, sovereign immunity was not waived.

Viking Utils. Corp., Inc. v. Onslow Water & Sewer Auth., 755 S.E.2d 62 (N.C. Ct. App. March 4, 2014).

Defendant County signed an agreement to buy Plaintiffs' wastewater system, including real property Plaintiffs owned. The agreement provided for a $250,000 credit toward allowing Plaintiffs to connect to the wastewater system for five years without paying a "Tap Fee" valued at $2500. Alleging a breach, Plaintiffs sued for specific performance, declaratory relief, *quantum meruit*, estoppel, negligent misrepresentation, and, alternatively, rescission. County moved to dismiss pursuant to Rules 12(b)(1), (2) and (6) based on governmental immunity. The trial court denied dismissal. The Court of Appeals affirmed.

The Court of Appeals noted that the restated governmental immunity test enunciated in *Williams v. Pasquotank County*, 366 N.C. 195 (2012) emphasizes a fact-based analysis using a number of relevant factors, rather than bright-line rules. Similarly, in *Sandy Creek v. East Coast Contr., Inc.*, __ N.C. App. ___, 741 S.E.2d 743 (2013), the Court of Appeals looked to the complaint's description of the transaction as involving a business relationship—failing to properly manage a contract with an engineering firm for construction of a sewer system--rather than performance of a governmental function. It consequently concluded that governmental immunity did not apply,

Here, the Court of Appeals ruled that denial of the motion to dismiss based on governmental immunity was proper. The "necessary factual evidence regarding plaintiffs' allegations, fees charged by defendant, whether the fees cover more than the operating costs of the water authority, and any other evidence relevant to the issue of whether in executing and interpreting

its contract with plaintiffs, defendant was acting in a governmental or proprietary capacity" was not before the court. The parties could later seek summary judgment "at which time they may offer documentary or testimonial evidence in support of their positions." The Court of Appeals did not reach the issue of whether the governmental immunity defense had been waived by execution of a valid contract with Plaintiffs.

VI. CIVIL CONTEMPT

Gordon v. Gordon, 757 S.E.2d 351 (N.C. Ct. App. April 15, 2014).

The Court of Appeals ruled that the trial court properly entered a civil contempt order requiring Mr. Gordon to pay $20,000 in alimony arrearages within 60 days or be sent to jail. Once the trial court entered a show cause order finding that there was probable cause to find Mr. Gordon in contempt, the burden was then on him to show why he should not be held in contempt. Mr. Gordon attacked the order on the ground that it found that, at the time of the failure to pay, he "had" the ability to pay, but the order did not find that he "has" the ability to pay at the time the order is issued: thus lacking a finding of a present ability to pay. The Court of Appeals rejected this argument. While a trial court must make findings as to a contemnor's present ability to pay before holding him in civil contempt, the use of the past tense verb of "had" must be read in context. The findings in totality showed that the trial court considered plaintiff's ability to comply as of the date of the hearing and within the sixty days afforded to him to take any additional measures he may need to take—including ceasing to pay for expenses of his adult children, borrowing the money, using available lines of credit, and considering business assets and expenditures (given Mr. Gordon's history of using business assets to pay personal expenses).

Tyll v. Berry, __ S.E.2d __ (N.C. Ct. App. May 20, 2014).

The trial court entered a civil contempt order after Defendant continued harassing family members despite a 50C order prohibiting the conduct. The civil contempt order required payment of a "purge" amount of $2500 for each prohibited act, past and future. The Court of Appeals reversed.

North Carolina civil contempt statutes require that a person have a present ability to comply with the conditions for purging contempt before (s)he may be imprisoned for civil

contempt. Although fines are statutorily permitted sanctions for civil contempt proceedings based on Chapter 50C no-contact orders, the order was invalid because the trial court made no findings concerning Defendant's ability to pay at the time of the contempt hearing or at any point in the future.

VII. CORPORATIONS

First Bank v. S&R Grandview, L.L.C., 755 S.E.2d 393 (N.C. Ct. App. March 4, 2014).

Plaintiff obtained a $3.5 million judgment against defendant individual based on individual's default on multiple loan and guaranty agreements. To collect on the judgment, Plaintiff sought a charging order against defendant individual's membership interest in defendant LLC. The trial court entered a charging order for the judgment amount. The charging order further (1) noted that it "effectuated an assignment" of the individual's interest in the LLC and (2) enjoined the individual from exercising his rights as a member of the LLC until the judgment was satisfied. Interpreting the pre-2014 language of N.C. Gen. Stat. § 57C-5-02, -03, the Court of Appeals reversed the assignment and injunction provisions of the order. A charging order can deprive the member only of his profit distribution rights in favor of the judgment creditor, and cannot change any other membership interests (such as voting and management).

In re Twin Cnty. Motorsports, Inc., 749 S.E.2d 474 (N.C. Ct. App. Nov. 5, 2013), *disc. rev.* ***allowed***, 755 S.E.2d 627 (N.C. March 7, 2014).

DMV assessed a civil penalty of $1,500 against Twin County Motorsports, Inc. and suspended its safety inspection license for a period of 1,080 days. The superior court reversed the DMV and remanded for a new hearing on the ground that corporations must be represented by legal counsel in hearings before the DMV and cannot appear *pro se* at DMV hearings. The Court of Appeals affirmed.

Joyce, LLC v. Van Vooren Holdings, Inc., 756 S.E.2d 355 (N.C. Ct. App. March 4, 2014).

A complicated set of facts led to a lawsuit before this one, which involved many of the same parties, and resulted in the judicial dissolution of VVGR USA LLC pursuant to N.C. Gen. Stat. § 57-6-02. A receiver was appointed to administer the dissolution. The receiver sold the assets of VVGR USA at auction pursuant to judicial orders allowing and approving the sale.

In this later case, a purchaser of the assets (HMF) sued Defendants (previously stakeholders VVGR USA, the dissolved company) claiming that Defendants were liable to HMF as assignee for legal claims previously held by VVGR USA related to unapproved distributions and unpaid invoices, among other things. Defendants counterclaimed for breach of contracts they had with VVGR USA, alleging that HMF, as the new owner of VVGR USA's contracts and goodwill, was liable to Defendants for money owed to them by VVGR USA for various business activities. Plaintiff HMF moved for partial summary judgment claiming that the liabilities of VVGR USA were not transferred in the dissolution sale, so that all of Defendants' counterclaims should be dismissed. The trial court granted the motion. The Court of Appeals affirmed.

The Court of Appeals concluded that because the receivership sale did not transfer VVGR USA's liabilities to the buyer, HMF, summary judgment dismissing Defendant's counterclaims against HMF was proper. The general successor liability rule provides that a corporation is not liable for the transferor's liabilities as a result of an asset purchase. Further, the trial court's orders, which were silent as to Defendants' contract claims, did not create a genuine issue of material fact about transfer of the liabilities. The orders and receivership sale documents specified that the assets were to be sold "free and clear of all liens, claims and encumbrances" and that the sale was of assets only, with no liabilities included.

The Court of Appeals further noted that attacking an order as ambiguous in a separate proceeding is an impermissible collateral attack. Even if raising the issue in a separate proceeding is not an impermissible collateral attack, whether an order is ambiguous is a question of law. Nothing in the record indicated any intention to contravene the general successor liability rule. Finally, no exceptions to the general successor liability rule set out in *Budd Tire Corp. v. Pierce Tire Co.*, 90 N.C. App. 684 (1988), which involved a private transaction and inadequate consideration, applied to this structured, court-ordered and court-supervised sale of assets.

VIII. INSURANCE

A. Automobile

Integon Nat'l Ins. Co. v. Helping Hands Specialized Transp., Inc., __ S.E.2d __ (N.C. Ct. App. May 6, 2014).

Helping Hands Specialized Transport had an insurance policy issued by Integon insuring it against liability for damages "caused by an accident and resulting from the ownership, maintenance or use of a covered" vehicle, as required by and consistent with N.C. Gen. Stat. § 20-279.21. This language appears in every automobile liability policy.

Helping Hands safely transported a non-ambulatory and terminally-ill patient home in one of its handicapped accessible vans. Once at the house, the driver attempted to help the patient into the house by pulling her backwards in a wheelchair up the front porch stairs. The patient suffered a gash on her leg and died two days later. Patient's family brought a wrongful death action. Integon brought suit asking for a declaration that its policy did not cover the conduct at issue in the wrongful death suit. The trial court found that there was coverage. The Court of Appeals affirmed.

The Court of Appeals noted that the test for coverage for an accident is whether there is a "causal connection between the use of the automobile and the accident." Historically, this test has been liberally applied to find coverage if an injury is caused by an activity ordinarily or necessarily associated with the use of an insured vehicle. The Court of Appeals noted that previous cases extend coverage "beyond the common-sense application of the principles of a causal connection." Bound to follow those cases, the Court of Appeals concluded that there was a sufficient causal connection between the ordinary use of the insured's van and the injury at issue. The court rejected the request for reformation of the policy as inappropriate for declaratory judgment relief.

N.C. Farm Bureau Mut. Ins. Co., Inc. v. Paschal, 752 S.E.2d 775 (N.C. Ct. App. January 7, 2014), *disc. rev.* ***allowed***, 755 S.E.2d 54 (N.C. March 7, 2014).

Plaintiff Insurer moved for a declaratory judgment that injured passenger, Harley Jessup, was not covered by its UIM policy issued to Thurman Jessup. The policy covered any family member of the named insured who "is a resident of [the named insured]'s household." Thurman Jessup was Harley's paternal grandfather and the family patriarch. Harley did not live in the

same house as Thurman at the time of the accident. For much of Harley's life, Thurman was the most constant caregiver in her life—her mother was absent and her father often incarcerated—and she mostly lived in his house or houses he owned. Harley moved to change venue from Wake County to Chatham County, which the trial court denied. Insurer moved for summary judgment that Harley was not a resident of Thurman's household at the time of the accident, and therefore not covered by the policy. The trial court granted summary judgment for Insurer. The Court of Appeals reversed the summary judgment ruling and affirmed denial of the motion to change venue.

The Court of Appeals ruled that "[r]esident" is ambiguous and must therefore be broadly construed in favor of coverage. In other cases, "household" has been broadly interpreted such that "family members need not actually reside under a common roof to be deemed part of the same household." In this case, Thurman had been Harley's principal caregiver and paid for most of her expenses, including for medical, food and clothing needs. He saw her every day and she lived rent-free in a house he owned and which he freely entered whenever he chose. He paid the bills for the house and bought its appliances, and it was on land contiguous with that on which Thurman's house was situated and which Thurman considered to be part of his "family farm." Thurman considered Harley to be a member of his household. Thus, the Court of Appeals concluded that Harley was covered by the UIM policy as a family member and resident of the household.

The trial court did not abuse its discretion in denying a motion to change venue where Plaintiff's principal place of business was in Wake County, and Defendants lived in nearby counties.

Nationwide Mut. Ins. Co., Inc. v. Integon Nat'l Ins. Co., 753 S.E.2d 388 (N.C. Ct. App. Jan. 21, 2014), *disc. rev. denied*, __ S.E.2d __ (N.C. April 10, 2014).

Nationwide brought this declaratory judgment action regarding apportionment of credit/liability obligations of three separate UIM policies in connection with a wrongful death claim after the tortfeasor's insurance company tendered its $50,000 limits. The two defendant insurance companies contended that their policies were primary and Plaintiff's policy should be considered excess. The trial court agreed and granted summary judgment for Defendants. The

Court of Appeals reversed, concluding that a *pro rata* distribution should have been applied to all three UIM providers.

To resolve credit/liability apportionment disputes among multiple providers, the trial court must engage in a 3-part inquiry. (1) "First the language used in the excess clause must be identical between the excess clauses of the respective UIM policies, or 'mutually repugnant.'" If not, then the trial court may apply the facial policy language to determine distribution. (2) If the policies are repugnant, the trial court must determine whether the respective UIM carriers are in the same class. If so, liabilities and credits are apportioned on a *pro rata* basis. (3) "If separate classes exist, a primary/excess distinction may be drawn despite identical language." This step may include "applying the policies' definitions," particularly those related to ownership, to allow a finding of non-repugnancy.

The Court of Appeals observed in this case that (1) the excess clause was identical in all three policies and that (2) the decedent was a Class I claimant under all three policies. Because the policies were identical and decedent was a member of the same class within each policy, the court could not reach the question of whether the identical language may be read harmoniously. Therefore, the Court of Appeals remanded for *pro rata* distribution of the credit.

B. Construction

John Wm. Brown Co. v. State Employees' Credit Union, 752 S.E.2d 185 (N.C. Ct. App. Dec. 3, 2013).

Plaintiff served as the general Contractor for defendant SECU's new facility. Contractor contracted with General American Insurance Company (GAIC) to provide the bonds on the project. Contractor entered into an Indemnity Agreement with GAIC. Disputes arose between Contractor and subcontractors regarding non-payment. GAIC paid the subcontractors and then filed a federal action for indemnity against Contractor. Disputes arose between Contractor and SECU about the project and whether Contractor owed SECU money for delays and other fees or whether SECU owed Contractor for change orders. SECU tendered monies owed pursuant to the contract directly to GAIC to defer Contractor's indemnity obligations. Contractor sued SECU in state court for alleged contract payment deficiencies; SECU counterclaimed. Over the course of a year the parties, including GAIC, attempted to settle the matter but Contractor repeatedly refused SECU's $100,000 settlement offer. After a year of litigation, GAIC exercised its

assignment rights under the Indemnity Agreement and, over Contractor's objection, accepted SECU's settlement offer. The trial court granted SECU's motion to approve and enforce the settlement. The Court of Appeals affirmed.

The Court of Appeals concluded that neither laches nor equitable estoppel would bar enforcement of the settlement agreement. Although GAIC delayed in exercising its assignment rights, that delay was not attributable to SECU, which was not the cause of the delay or change in position. Further, the assignment provision in the Indemnity Agreement specified that any delay to exercise the right shall not impair or waive its ability to do so. The proper forum for assertion of bad faith in settlement by the surety is in the federal action for indemnity.

C. Premises

Holmes v. N.C. Farm Bureau Mut. Ins. Co., 756 S.E.2d 848 (N.C. Ct. App. April 15, 2014).

Plaintiff Policyholder sought a declaratory judgment that defendant Insurer breached its office-lessor's insurance policy when it refused to cover a loss after theft of multiple heating units from the office building pursuant to a "vacancy clause" in the insurance contract. The trial court granted summary judgment for Insurer. The Court of Appeals affirmed.

The policy excluded from coverage any building that had been vacant for more than sixty days before a loss. "Vacancy" was defined as either when 70% or more of the building's total square footage was either not rented or not used to conduct customary operations. Policyholder argued that if any part of a unit was used, then the entire square footage of the unit should be counted. The Court of Appeals disagreed based on the language of the policy: the relevant question under the contract was what percentage of the total square footage was *actually* used to conduct customary operations, not what amount *could* have been used.

D. Professional

Lawyers Mut. Liab. Ins. Co. v. Mako, 756 S.E.2d 809 (N.C. Ct. App. April 1, 2014).

Before the cashier's checks it received cleared, and in violation of its own policy to hold checks for ten days before disbursing funds to clients, defendant law firm disbursed $175,000 from its own account to a client who had defrauded the law firm with a false "collection" matter. After the disbursement of $175,000, the bank rejected the cashier's check and Defendant learned that it was forged. Defendant submitted an insurance claim to its insurer, Lawyers Mutual.

Lawyers Mutual filed this action seeking a declaration that the loss was not covered by the policy. The trial court granted summary judgment in favor of Lawyers Mutual. The Court of Appeals affirmed.

The insurance policy excluded coverage for any claim based on disbursement of funds unless they were "irrevocably credited" to the insured's account. Cashier's checks are not like cash; they are "irrevocably credited" upon deposit. Pursuant to N.C. Gen. Stat. § 25-3-104(f), a cashier's check is treated the same as a traditional check and cannot be deemed fully credited until its provisional settlement period has elapsed without action by the bank to reject the check.

IX. LAND USE

Blair Invs., LLC v. Roanoke Rapids City Council, 752 S.E.2d 524 (N.C. Ct. App. Dec. 17, 2013).

Respondent City Council denied Petitioner's application to construct a cell phone tower. The trial court affirmed. The Court of Appeals reversed. The Court of Appeals ruled that Petitioner was entitled to a special use permit to construct a cell tower where it made a *prima facie* case that it was so entitled and City Council's denial of the application was not supported by competent, material and substantial evidence. Once an applicant makes a *prima facie* showing of entitlement to a special use permit, the burden of establishing that the approval of a conditional use permit would endanger the public health, safety, and welfare falls on the opponents to the permit.

In this case, the only evidence in opposition was that of statements by several local residents expressing generalized concerns that: the tower would affect their property value because the tower would be ugly; the tower would affect use of their cell phones in their homes; the property smells or is not well-maintained; and questioning if the tower would produce adverse health effects. Such speculative opinions and concerns by local residents, unsupported by documentary or testimonial evidence, were not competent or sufficient to support a finding that the tower would endanger health or safety or otherwise not be in harmony with the area.

Lipinski v. Town of Summerfield, 750 S.E.2d 46 (N.C. Ct. App. Nov. 5, 2013).

Respondent Town issued a Notice of Violation of the Town's Land Development Ordinance (LDO) to Petitioner Landowner. The LDO expressly permitted construction of chain-

link fences, but prohibited fences constructed "in whole or in part of readily flammable material such as paper, cloth or canvas." Landowner had attached plastic tarps to a 300 feet chain-link fence along his property, which the Town deemed to be construction of a fence using prohibited materials. Petitioner did not prevail in his appeal to superior court. The Court of Appeals reversed based on its conclusion that the Town did not properly interpret the ordinance.

The Court of Appeals rejected Petitioner's assertion that his due process rights were violated by the procedure used by the Town. Reviewing *de novo*, the Court of Appeals held that the Town's interpretation of the ordinance superimposed a limitation that is not found in the ordinance: that attaching things to a fence changes its structural composition. No relevant part of the LDO states that materials may not be attached to a properly constructed fence.

Morningstar Marinas/Eaton Ferry, LLC v. Warren Cnty., 755 S.E.2d 75 (N.C. Ct. App. March 18, 2014).

Petitioner appealed a zoning determination by the county Board of Adjustment (BOA) in favor of a third-party. Respondent County Planning and Zoning Administrator refused to put the appeal on the BOA's agenda on the ground that Petitioner did not have standing to appeal. The trial court issued a writ of mandamus in favor of Petitioner requiring that the administrator put the appeal on the BOA's agenda. Over a dissent, the Court of Appeals affirmed. The majority ruled that whether Petitioner had standing to appeal is a legal determination that must be made by the BOA. The administrator is compelled by a statutory "shall" to transmit an appeal to the Board once the record is complete, and this ministerial act does not involve the exercise of discretion. Thus, the majority held that the trial court correctly issued a writ of mandamus compelling the respondents to put the appeal on the BOA's agenda.

Judge Elmore dissented and would reverse. He disagreed with the majority's conclusion that the administrator had a statutory duty to transmit the appeal to the BOA given that only a "person aggrieved" by a zoning decision has a statutory right of review. Further, the dissent would hold that *Smith v. Forsyth County Bd. Of Adjustment*, 186 N.C. App. 651 (2007) supports a finding that a zoning officer has discretionary authority to refuse to transmit an appeal to the BOA if the petition does not show the party is aggrieved.

Mount Ulla Historical Pres. Soc'y, Inc. v. Rowan Cnty., 754 S.E.2d 237 (N.C. Ct. App. Feb. 18, 2014).

In 2005, an applicant asked the County Board of Commissioners to issue a conditional use permit (CUP) to build a 1350 foot radio tower. The 2005 application was denied. The written decision stated that the Board denied the CUP because the proposed tower would pose an air safety hazard to a nearby private airport. The 2005 denial was affirmed by the superior court, and the Court of Appeals. Five years later, in 2010, the applicant sought a CUP to build a 1200 foot radio tower in substantially the same location as proposed in 2005. There were some differences in the 2010 application from the 2005 application, including 150 feet difference in height, a small change in location, and specification of a "fall zone." The Board approved the CUP, finding in part that the tower would not create any hazardous conditions. Upon appeal to superior court, the trial court reversed the Board's 2010 grant of the CUP as barred by *res judicata* and collateral estoppel. The Court of Appeals affirmed.

The Court of Appeals concluded that *res judicata* and collateral estoppel principles apply to the final decision of a *quasi*-judicial body, including land use decisions, unless there has been a material change in the facts or circumstances. Here, the differences between the 2005 and 2010 applications did not amount to a material change in conditions or circumstances that would avoid preclusion. The trial court properly applied the whole record test to determine whether the record disclosed "competent, material or substantial evidence that the height variance materially alter[ed] the proposed use from that use proposed in the earlier application."

Patmore v. Town Of Chapel Hill, 757 S.E.2d 302 (N.C. Ct. App. April 1, 2014).

The Town enacted a zoning amendment to curb over-occupancy of rental properties in a district near UNC by limiting the number of cars parked on a rental property to four cars per residential lot. The Town enforced the zoning amendment against the owners of the rental properties, not the residents. The owners sued seeking a declaration that enforcement of the zoning amendment against the property owners, rather than the renters or drivers, was unlawful, *ultra vires*, void, and in violation of the North Carolina Constitution's substantive due process provisions because enforcement against the property owners was arbitrary and capricious. The trial court entered summary judgment for the Town; the Court of Appeals affirmed.

The Court of Appeals found that the plaintiff property owners were not "innocent" and rejected their bare assertion of inability to enforce terms of the leases executed with tenants. Plaintiffs did not dispute that decreasing over-occupancy of rental properties is a valid goal of a zoning ordinance. The Town proffered evidence that citing transient student tenants would be burdensome, impractical and ineffective. Further, the appellate court accepted the Town's reasoning that a property owner can use his authority under the lease to ensure tenants comply with the parking regulations, making regulation more effective and reducing cost of enforcement. Thus, the Court of Appeals concluded that the increased efficacy of the enforcement mechanism is rationally-related to the goal of decreasing over-occupancy and did not offend substantive due process rights of the owners.

Further, N.C. Gen. Stat. § 160A-301, which addresses municipal authority to regulate parking on public vehicular areas, does not prohibit municipalities from regulating parking on private property through a zoning ordinance by virtue of the doctrine of *expressio unius est exclusion alterius*. "[A]lthough the parties have referred to the zoning amendment as a 'parking' regulation, the context establishes that the amendment was intended to regulate the ration of bedroom to tenants in rental properties . . . by restricting the number of vehicles parked in the yard." Thus, that the Town "chose to restrict the number of cars parked on a lawn as a rough proxy for the number of tenants does not transform this into a 'parking' ordinance within the meaning of N.C. Gen. Stat. § 160A-301. The Court of Appeals held that the regulation at issue was a *bona fide* zoning ordinance within the local government's authority, unlike previous cases where a fee or surcharge was imposed as a condition of granting a permit.

PBK Holdings, LLC v. Cnty. of Rockingham, 756 S.E.2d 821 (N.C. Ct. App. April 1, 2014).

Defendant County adopted a new Uniform Development Ordinance to address "high impact uses" which "by their nature produce objectionable levels of noise . . . or other impacts upon the lands adjacent to them." The UDO applied more stringent restrictions against regional landfills collecting from multiple counties (in and outside the state) than to local landfills collecting only from within the County. Plaintiff sought a special use permit to develop a regional landfill and recycling facility to accept municipal solid waste. Plaintiff asserted that provisions of the ordinance were invalid because they were: in conflict with North Carolina law; in excess of the Board of Commissioners' authority; in violation of the Equal Protection clauses

of the state and federal constitutions; and in violation of the Commerce Clause. The trial court disagreed and entered summary judgment for County. The Court of Appeals affirmed.

The Court of Appeals concluded that the ordinance did not violate Equal Protection clauses. The ordinance's disparate treatment of regional landfills from local landfills was proper. Regional landfills are broader and bigger than local landfills, thereby affecting a larger area. Thus, pursuant to a rational basis level of scrutiny, applying more stringent requirements to regional landfills has a reasonable basis in relation to the legitimate governmental purpose of the subject matter of the ordinance.

The Court of Appeals concluded the ordinance did not violate the Commerce Clause. The ordinance was not facially discriminatory; it did not distinguish between landfills accepting in-state or out-of-state waste. Plaintiff also did not show an explicit discriminatory design in the ordinance. The court rejected Plaintiff's contention that having heightened restrictions on regional landfills was akin to the higher surcharges imposed on waste generated out-of-state, which was held unconstitutional in *Oregon Waste Systs. v. Dept of Evntl. Quality*, 511 U.S. 93 (1994) (applying *per se* rule of invalidity because law was facially discriminatory). Further, the ordinance was not discriminatory in its practical effect. The ordinance affected both in-state and out-of-state waste as applied to this Plaintiff.

The Court of Appeals ruled that the ordinance does not conflict with North Carolina law. North Carolina statutes prohibit landfills from being constructed within the 100-year floodplain, but they allow for other portions of the landfill's facilities to be within the floodplain if no risk to public health or safety. In contrast, the ordinance does not allow any portion of a regional landfill to be built in a 100-year floodplain, whether or not it would be authorized by state law. Nevertheless, N.C. Gen. Stat. § 153A-136(a)-(b) authorizes a county to regulate all disposition of solid wastes with ordinances "consistent with and supplementary to any rules" adopted by DENR. N.C. Gen. Stat. § 130A-309.09C9(c) further explicitly allows ordinances that are "stricter or more extensive than those imposed by the State." Thus, the ordinance's stricter treatment is expressly authorized.

The Court of Appeals ruled that the ordinance does not conflict with and is not preempted by state or federal law with respect to its provisions on siting landfills near airports. The state and federal provisions do not preclude more stringent regulations issued by counties.

The Court of Appeals concluded that the ordinance's requirement that a regional landfill have a truck entrance located on or within 2000 feet of a major arterial highway did not constitute a regulation on vehicular traffic, such that it would violate N.C. Gen. Stat. § 153A-121(b). It is merely a regulation of the location of a driveway placed on a landfill. Finally, the ordinance properly requires the application for a landfill permit to include submission of the "site plans and information" that must be submitted to DENR for permitting of a landfill, even if that process can occur only after a local permit issues.

Templeton Props. LP v. Town of Boone, __ S.E.2d __ (N.C. Ct. App. June 3, 2014).

In this third trip on appeal for this case, the Court of Appeals reversed the superior court's decision to reverse the Town's denial of petitioner Templeton's application for a zoning permit. The dispute was based on Templeton's 2.9 acre lot located between State Farm Road and VFW Drive in Boone on which sits a 2,250 square foot building historically used as a church. Templeton sought a Special Use Permit (SUP) to build a 10,010 square foot medical clinic. The parcel was located in an area zoned R-1. Under section 165 of Boone's then-existing unified development ordinance (UDO), medical clinics over 10,000 square feet were allowed in R-1 zoning with a valid special use permit.

Pursuant to the UDO, applications for special use permits could be denied by the Board upon showing one of four reasons, including that the development "(1) will materially endanger the public health or safety, or . . . (3) Will not be in harmony with the area in which it is to be located, or (4) Will not be in general conformity with the comprehensive plan, thoroughfare plan, or other plan officially adopted by the council." After the second remand from the Court of Appeals, the Town again denied the application based on these three bases. The superior court reversed as to all three. The Court of Appeals reversed the superior court, addressing only the "lack of harmony" ground.

The superior court had concluded that the Town's "determination that Petitioner's proposed use is not in harmony with the area rest[ed] on an overly-restrictive application of the term 'area,' which amount[ed] to a misinterpretation of the applicable standard." The superior court reasoned that the "relevant 'area' within the meaning of the ordinance is not limited to the residences that lie north of the subject site and that do not front State Farm Road but includes similarly situated properties along State Farm Road that are in reasonable proximity to the

subject site. The undisputed evidence in the record is that most of those properties are used for office, institutional, and commercial — not residential — purposes. Therefore, the Board's conclusion that the proposed use is not in harmony with the area in which it is to be located is not supported by the evidence."

The Court of Appeals held that determination of the issue of the proper "area" is mixed question of fact and law. Here, the superior court improperly acted as a finder of fact in its review and imposed its own view of what the bounded "area" should be, rather than reviewing whether the Town's findings of fact concerning the area were supported by competent evidence and were not arbitrary and capricious. If the Town's findings were supported by competent evidence, even if conflicting evidence could allow for a different conclusion under *de novo* review, the Town's findings must stand. The Court of Appeals found that in this case such evidence consisted of: the number of parking places, light poles and dumpster pads; uncertainty of the type of clinic to be located at the facility; the comparative size of the proposed facility with the existing structure; that the VFW Hall adjacent to the parcel was built before the Town adopted zoning; that the surrounding area is comprised primarily of single-family homes; and that the parcel is separated from other non-residential properties by topography, distance and road features, among other related findings. Such evidence was sufficient competent evidence to support the Town's finding of lack of harmony.

X. OATHS (Proper Notarization)

In re Adoption of Baby Boy, 757 S.E.2d 343 (N.C. Ct. App. April 15, 2014).

Based on a requirement that a parental rights relinquishment must be "signed and acknowledged under oath," and that the notary did not administer an oath before notarizing the relinquishment form, the trial court declared void a birth mother's relinquishment of a baby boy. Adoptive parents and adoption agency appealed on the ground that the trial court's conclusions of law were erroneous; the Court of Appeals agreed and reversed. In so doing, the court took the opportunity "to discuss the role of a notary when administering oaths and affirmations, [ ]given that the case law on this topic is fairly sparse."

A notary's primary function is to be an impartial witness when authenticating legal documents and administering oaths or affirmations. When a notarization requires the signor to

be placed under oath, the notarization begins with the administration of an oath or affirmation, which gives weight to the truthfulness of the document's substance. The court stated: "we cannot stress enough the seriousness of properly administering oaths and affirmations, and we urge notaries to be diligent in performing this duty." The state's "oath" statute, N.C. Gen. Stat. § 10B-3(14), does not specifically require that the notary orally administer the oath; the notary need only certify that the notary witnessed the signor make a vow of truthfulness by using any form of the word "swear." The notary may delegate the administration of the oath to a person not vested with authority to administer oaths.

In this case, the requirement that the birth mother be placed "under oath" was satisfied when the social worker from the adoption agency read the relinquishment to the birth mother, which included the "duly sworn" language. The notary was physically present when the oath was administered, was aware of the circumstances, and thereby implicitly assented to its administration, which was done in her name. By these facts, the administration of the oath was the act of the notary.

XI. REAL PROPERTY

***McLennan v. Josey*, __ S.E.2d __ (N.C. Ct. App. May 20, 2014).**

Plaintiffs and Defendants owned adjoining land parcels obtained from a common source: David Clark, whose lands were divided at his death in 1882. The common boundary line as "down the run of [Gaynor's] Gut to the Canal[.]" The parties disagreed about the actual location of the run of the gut to the canal. Defendants filed a deed that asserted ownership of an area allegedly owned by Plaintiffs. Plaintiffs filed a quiet title action. The trial court granted summary judgment for Plaintiffs. The Court of Appeals affirmed.

The Court of Appeals noted that the plaintiff in a quiet title action has the burden to establish "the on-the-ground location of the boundary lines which they claim." He must "locate the land by fitting the description in the deeds to the earth's surface." Here, Plaintiffs met that burden through testimony of an individual plaintiff and through property surveys and other documents in the chain of title corroborating the testimony. Once Plaintiffs established a *prima facie* case of title to the disputed land, Defendants were required to establish superior title. Defendants failed to offer evidence to create a genuine issue of material fact. Defendants' 2010

recorded map was junior to the early 1900s title documents on which Plaintiffs relied, which showed that the chain of title excludes Defendants and their predecessors from the tract.

XII. RESIDENTIAL ASSOCIATION COVENANTS

Fed. Point Yacht Club Ass'n, Inc. v. Moore, __ S.E.2d __ (N.C. Ct. App. April 1, 2014).

Plaintiff, a residential water-access community with marina facilities and boat slips, sued Defendant, who owns a residence and two boat slips in the community, to enforce restrictive covenants and to enjoin Defendant from atrocious behavior (including conduct involving spreading feces on walls in clubhouse bathrooms and spraying ketchup on the household fence of the Association's president). Defendant counterclaimed, asserting a myriad of claims including infliction of emotional distress, unfair trade practices, negligent hiring and supervision and for punitive damages. The trial court dismissed the counterclaim for failure to join necessary parties. The trial court rejected Defendant's motions to dismiss Plaintiff's claim for lack of standing and that injunctive relief was unnecessary because of an adequate remedy at law. The trial court further granted summary judgment for Plaintiff, and entered a permanent injunction.

The Court of Appeals held that plaintiff Association had representational standing on its own to bring suit, even if not all of its members were injured by Defendant's conduct if: its members would have standing to sue in their own right; the interests at issue are germane to the organization's purpose and the claims; and the claims and relief at issue do not require participation of individual members in the suit. That fourteen individual members of the Association dismissed their no-contact order actions against Defendant did not bar the corporate Association's claims. While the trial court properly granted permanent injunctive relief to enforce restrictive covenants, the Court of Appeals held that the relief prohibiting certain types of contact with Association members (*e.g.,* screaming profanities) was too broad where it was not limited to specific people, times and locations: unlimited proscription is not allowed. Further, even though certain members of Plaintiff behaved equally inappropriately to Defendant as Defendant did toward them, injunctive relief was not inequitable.

Finally, the Court of Appeals concluded that the trial court properly dismissed Defendant's counterclaim when Defendant failed to re-file the claims against Plaintiff within a year of dismissal of his earlier claims for failure to join necessary parties.

XIII. UNCONSTITUTIONAL MONOPOLIES

Rockford-Cohen Grp., LLC v. N.C. Dep't of Ins., 749 S.E.2d 469 (N.C. Ct. App. Nov. 5, 2013).

In 2012, the General Assembly amended existing law requiring bailbondsmen to complete initial and continuing education to specify that only the North Carolina Bailbondsmen Association could provide the training. Plaintiffs alleged that that the law contravened the North Carolina Constitution's prohibition on perpetuities and monopolies, and sought a preliminary injunction pending adjudication of their claim. The trial court granted preliminary injunctive relief. The Court of Appeals affirmed and concluded that the statute violated the state constitution.

The Court of Appeals rejected Defendant's position that the opportunity to provide state-mandated training to bail bondsmen is not a common right because General Assembly created creditable bail bondsmen training. The common right lost was the opportunity to be considered by the Commissioner of Insurance for approval to provide creditable bail bondsmen training. By excluding all others, the General Assembly deprived all others of the opportunity "to earn a livelihood for themselves and their dependents."

XIV. SUBSTANTIVE CLAIMS

A. Agency

Stainless Valve Co. v. Safefresh Techs., LLC, 753 S.E.2d 331 (N.C. Ct. App. Dec. 3, 2013).

Mr. Garwood was a manager and officer of two different entities: defendant Safefresh and American Beef Processing (ABP). In the early 2000s, Garwood communicated with Plaintiff about purchasing a particular valve on behalf of Safefresh but ultimately did not buy anything. In 2008, Garwood began communicating again with Plaintiff about manufacturing different valves-- this time, Garwood contended, on behalf of ABP. In response, Plaintiff sent multiple quotes about the valves, all addressed to Safefresh. Garwood did not inform Plaintiff that ABP, not Safefresh, was the principal on whose behalf he was working. Plaintiff sent Garwood an offer to manufacture the valves. Garwood accepted by signing "Tony," and did not specify whether he was acting for Safefresh or ABP. Garwood issued the deposit payment from ABP's account. Plaintiff shipped the valves addressed to Safefresh, and later sent a final invoice

addressed to Safefresh. Garwood later requested that the final invoices be addressed to ABP, and stated that the order and deposits were done by ABP. Plaintiff never received payment. Plaintiff sued Safefresh for breach of contract or unjust enrichment. The trial court granted summary judgment in favor of Safefresh. The Court of Appeals remanded on the issue of whether Garwood was acting as an actual agent for Safefresh in contracting for manufacture of the valves.

The Court of Appeals found that a genuine issue of material fact precluded summary disposition. Evidence showed Garwood was a manager for Safefresh. It was only after months of communications and actual shipment of the valves that Garwood specified ABP as the client. That Garwood identified himself as affiliated with ABP in correspondence is not controlling given that he had originally communicated with Plaintiff on behalf of Safefresh and that he remained silent for months even though it was apparent that Stainless Valve believed that Safefresh was the client, not ABP.

Judge McCullough concurred separately to identify other principles of contract law that would dictate that the case should not be decided on summary judgment, including principles of acceptance by conduct or silence.

Green v. Freeman, __ N.C. App. __, __ S.E.2d __ (April 1, 2014).

Upon remand from the North Carolina Supreme Court (*see supra* at page 1), the Court of Appeals affirmed the trial court's directed verdict for defendant Corinna on the issue of agency. Although the evidence showed that Corinna appointed Jack the general agent of the company, there was no evidence that she appointed him as her personal agent. With respect to the issue of apparent agency, there was no evidence that Corinna did anything to act in such a way to convey to Plaintiffs that Jack had authority to act on her behalf. Further, "Jack's out-of-court representations about his authority to act for Corinna are irrelevant."

The Court of Appeals also found that the trial court erroneously excluded deposition testimony of a defendant proffered by an adverse party. Rule 32 allows for use of deposition testimony of an adverse party even when the party is available to testify live. Further, the testimony should not be excluded pursuant to Rule 403 just because the deponent's statements might be used against co-defendants: such use is explicitly permitted when the co-defendant was represented at the deposition. The error, however, was not prejudicial.

See also ***Peter v. Vullo***, __ S.E.2d__ (N.C. Ct. App. June 4, 2014) (discussing apparent agency in medical malpractice case) *infra* at page 70.

B. Charter Schools Funding

Charter Day Sch., Inc. v. New Hanover Cnty. Bd. of Educ., 754 S.E.2d 229 (N.C. Ct. App. Feb. 18, 2014).

Plaintiff Charter School brought claims against defendant county school system pursuant to the Charter School Funding Statute seeking a declaration that it was owed more funds than it had been paid and a judgment requiring payment of the alleged underpayment. Defendant Board appealed from entry of summary judgment for School. The issues on appeal centered on the proper calculation of the "per pupil current expense appropriation." The trial court (1) included the entire fund balance in the calculation of per pupil local current expense appropriation and (2) excluded pre-K students from the calculations of the per pupil local current expense appropriation. The Court of Appeals reversed the trial court's inclusion of the entire fund balance, but affirmed with respect to the exclusion of pre-K students.

The Court of Appeals ruled that only the portion of the fund balance that is actually appropriated for use in a particular year is to be included in the local current expense fund, and therefore subject to *pro rata* allocation, not the entire fund balance. If unappropriated funds are included in the balance, charter school students would receive greater funding than students attending regular public schools. Pre-K students are properly excluded from the per pupil calculation pursuant to statutes that define enrollment as beginning in kindergarten and making five year-olds eligible for kindergarten. The Court of Appeals was unsympathetic to the Board's argument that it had been providing pre-K services pursuant to courts' previous rulings, as upheld in *Hoke County Bd. Of Educ. v. North Carolina*, 731 S.E.2d 691(2012), which required the Board to not deny any eligible "at risk" four year-old admission to the pre-K program. First, the decision was after the years at issue in the case. Second, the Court of Appeals recognized that the North Carolina Supreme Court later vacated those rulings. 749 S.E.2d 451 (2013).

Thomas Jefferson Classical Acad. Charter Sch. v. Cleveland Cnty. Bd. Of Educ., __ S.E.2d __ (N.C. Ct. App. June 3, 2014).

Plaintiffs, Charter Schools, sued the county School Board alleging that it had failed to pay the proper per-pupil amount required by statute by wrongfully moving approximately $4.9 million from the local current expense fund, which must be shared with the charter schools, to a

"special revenue fund," which was not shared. After a bench trial, the trial court ruled that the monies that the School Board had placed in the Special Fund should have been put in the local current expense fund and distributed on a *pro rata* basis to Charter Schools, and awarded Plaintiffs' attorneys' fees pursuant to N.C. Gen. Stat. § 6-19.1(a). The Court of Appeals remanded to allow the trial court to apply the correct legal standard and reversed the order awarding fees.

The Court of Appeals ruled that, based on mandatory language found in the budget statute, the determination of which funds may be placed in a separate fund is not solely in the discretion of the local school board. After extensive litigation over the definition of "restricted" and "unrestricted" funds, the Generally Assembly amended N.C. Gen. Stat. § 115C-426 in 2010 and again in 2013. The Court of Appeals concluded that the trial court did not use the definition in the 2010 statutory amendment. Pursuant to the amendments, "'[r]estricted' funds, *i.e.*, monies that may be properly placed in a fund separate from the local current expense fund, are those that fall into one of the categories mentioned in N.C. Gen. Stat. § 115C-426(c) as amended." The case was remanded to the trial court to apply this definition and to "make findings about whether the funds at issue here are 'reimbursements, including indirect costs, fees for actual costs, tuition, sales tax revenues distributed using the *ad valorem* method pursuant to G.S. 105-472(b)(2), sales tax refunds, gifts and grants restricted as to use, trust funds, federal appropriations made directly to local school administrative units, [or] funds received for prekindergarten programs'" as set forth in N.C. Gen. Stat. § 115C-426(c) (2013).

The Court of Appeals further held that the trial court erred in awarding attorney's fees under N.C. Gen. Stat. § 6-19.1 because School Board is not a state agency for purposes of that statute.

C. Contracts

Botts v. Tibbens, 754 S.E.2d 708 (N.C. Ct. App March 4, 2014).

Plaintiff bought property from Defendant. Plaintiff planned to build a residence on property after the construction of a septic system. Defendant, pursuant to a separate contract, agreed to "install a septic system" and "be responsible for all labor and job supervision associated with the installation." Defendant further agreed to be responsible for costs in excess of $10,000. Defendant later notified Plaintiff that he would not construct her septic system

because he was not a licensed contractor. Plaintiff hired a contractor to construct the system at a cost of $33,500 and incurred other related expenses. Plaintiff then sued Defendant. Defendant asserted affirmative defenses of impossibility, illegality and laches. The trial court granted summary judgment for Plaintiff on Defendant's affirmative defenses. After a bench trial, the court entered judgment awarding damages to Plaintiff. The Court of Appeals affirmed summary judgment and the damages award.

The contract did not require Defendant to personally build and operate the septic system. Therefore the contract was not void for illegality as it did not contravene statutes requiring such installers and operators to be licensed. That Defendant miscalculated how expensive the job would be does not make his performance impossible. Plaintiff properly recovered as damages all monies she expended for construction of the septic system, less the $10,000 she had agreed to contribute to the project.

Holmes v. Solon Automated Servs. 752 S.E.2d 179 (N.C. Ct. App. Dec. 3, 2013).

The parties settled a Workers Compensation dispute but, before the written agreement was fully drafted, the injured employee died. Based on contract principles of frustration of purpose, his Estate sought to enforce provisions of the settlement agreement regarding establishment of a Medicare Set Aside account to fund future medical expenses for nineteen years. The Estate claimed it was entitled to restitution. The Industrial Commission denied the restitution claim. The Court of Appeals affirmed in part and reversed in part.

Pursuant to contract principles, the Court of Appeals ruled that the Estate was entitled to some restitution: "In the circumstances presented by this case, whether impossibility or frustration of purpose is the correct defense, it seems that the remedy is the same, so we believe that any attempt we might make to distinguish the two as to this case would simply be frustrating for the reader, and perhaps impossible to understand." The appellate court concluded that a condition precedent of the annuity portion of the set-aside was that the employee remain alive, such that the Estate was not entitled to those funds. The seed money, however, had no such condition precedent either implicitly or explicitly; and the employer would be unjustly enriched if allowed to keep it. The Estate was entitled to receive it as restitution.

Premier, Inc. v. Peterson, 755 S.E.2d 56 (N.C. Ct. App. March 4, 2014).

Plaintiff Buyer purchased corporation from Defendants former shareholders and stakeholders of corporation, pursuant to a stock purchase, thereby acquiring a bundle of software applications. The purchase agreement provided for five-year earnout payments to Defendants based on the number of sites that had subscribed to or licensed the software. A dispute arose about the number of applicable sites and the appropriate earnout amount. The trial court granted summary judgment for Buyer on its declaratory judgment claim that it did not breach the contract and in favor of Buyer on Defendants' counterclaims for breach of contract, attorneys' fees and recovery of audit expenses. Reviewing *de novo*, the Court of Appeals reversed and remanded for further proceedings.

Applying established principles of contract interpretation, the Court of Appeals ruled as a matter of law that the trial court correctly construed "subscribe" and "license" to connote an affirmative act by the recipient before receive of the product or service. Summary judgment, however, was premature at the early stage of litigation given the forecast of evidence of facilities that had received and used part of the software at issue in the case. Further discovery was warranted to determine whether the sites undertook affirmative acts to obtain the software products. The case was remanded for further development of the factual record.

D. Debtor, Creditor, Offset

Farlow v. Brookbank, 749 S.E.2d 493 (N.C. Ct. App. Nov. 5, 2013).

Plaintiff Lawyer sued defendant Client for non-payment of past due invoices. Lawyer prevailed but appealed the issue of whether the trial court erred by applying the legal rate of interest, rather than a rate of 1½ percent per month pursuant to N.C. Gen. Stat. § 24-11. The Court of Appeals affirmed application of the legal rate.

For the interest rate specified by N.C. Gen. Stat. § 24-11 to apply, a creditor must notify the debtor of the interest payment requirement, refrain from assessing interest against principal amounts accrued before the date on which notice of the interest payment requirement was provided, and give the debtor at least 25 days after the date on which the principal amount in question had been billed to make an interest-free payment. Here, the first three invoices and the last invoice that Lawyer sent to Client did not mention a due date or contain any language about

the payment of interest; only the fourth invoice did. Nor was there any indication that Lawyer provided other notice of intent to charge an interest rate. The lone notice on one invoice was not valid in perpetuity. A creditor must assert intent to collect interest at a rate higher than the legal rate in a regular and consistent manner or the right to do so may be waived.

First Fed. Bank v. Aldridge, 749 S.E.2d 289 (N.C. Ct. App. Nov. 5, 2013).

Plaintiff Bank sued defendant Debtor to enforce two promissory notes, both of which identified another bank as the lender. Debtor was in arrears approximately $230,000. No allegations in the complaint or any affidavit filed indicated that Bank had acquired the debt from the named lender or was otherwise a holder in due course. Debtor moved to dismiss pursuant to Rule 12(b)(6). The trial court granted the motion and dismissed with prejudice. The Court of Appeals affirmed.

The Court of Appeals ruled that when the plaintiff is not the payee designated in the promissory note, it must allege facts showing the execution of the note and the assignment or other transfer to the plaintiff. Mere assertion in an affidavit that Bank was aware of the deficient status of Debtor's account was insufficient under notice pleading to show that Bank had a right to enforce the instrument.

Plaintiff Bank further argued that the trial court should either have not dismissed with prejudice or allowed it to amend the complaint. Plaintiff, however, did not move to amend and did not ask that the trial court dismiss without prejudice. Thus, the trial court did not abuse its discretion.

High Point Bank & Trust Co. v Highmark Props., LLC, 750 S.E.2d 886 (N.C. Ct. App. Dec. 3, 2013), *disc. rev.* ***allowed***, 755 S.E.2d 628 (N.C. March 7, 2014).

Plaintiff Bank foreclosed on two parcels of property, was the highest bidder for both at foreclosure, and then sued Borrower and Guarantors to recover the deficiency. Bank attempted to dismiss Borrower, but Guarantors successfully joined Borrower. At trial, Borrower successfully obtained an offset pursuant to N.C. Gen. Stat. § 45–21.36, reducing Borrower's indebtedness. The trial court accordingly reduced Guarantors' liability. The Court of Appeals affirmed.

The Court of Appeals held that, because Guarantors could only be held responsible for Borrower's indebtedness, Guarantors benefitted from the offset. Judge Dillon authored a

concurring opinion to articulate different reasons for affirming the trial court. Judge Dillon noted the multiple Court of Appeals' rulings that offset pursuant to N.C. Gen. Stat. § 45–21.36 was available only to the borrower with an interest in the collateral. He nevertheless concurred in the result because the North Carolina Supreme Court, in *Trust Co v. Dunlop,* 214 N.C. 196 (1937), affirmed a denial of a motion to strike a guarantor's assertion of an offset defense; thereby confirming the availability of an offset defense to a guarantor.

JPMorgan Chase Bank v. Browning, 750 S.E.2d 555 (N.C. Ct. App. Nov. 19, 2013).

Plaintiff Bank was the holder in due course of a Second Deed of Trust on a 1/3 interest in real property, which 1/3 interest Defendants inherited after their Father died intestate. Defendants each individually owned 1/3 interest in the property before their Father's death. Bank's predecessor-in-interest made a loan to Father without requiring Defendants to sign the Second Deed of Trust, without doing a title search, and without using in-state counsel. After becoming the note holder, Bank brought an action to reform the deed and otherwise render its property interest as to the whole property or, alternatively, for unjust enrichment. The trial court granted summary judgment for Defendants and denied Bank's motion to amend its complaint. Bank presented on appeal the issues of the summary judgment grant on the unjust enrichment claim and denial of its motion to amend. The Court of Appeals affirmed.

With respect to judgment for Defendants on the unjust enrichment claim, the Court of Appeals found that Bank could establish the three elements of (1) benefit (2) that was non-gratuitous and (3) was measurable. Bank, however, did not forecast evidence of the necessary element that the benefit was "not officiously conferred." Although the Second Deed of Trust stated an intention to encumber the entire property, it failed to do so without signatures of all property owners. The lack of title search (and use of out-of-state counsel) made this deficiency "self-inflicted." Although Defendants had signed a First Deed of Trust, which was discharged by the Second Deed of Trust, there was no evidence that Defendants were aware of or agreed to encumber their 1/3 interests when Father obtained the second loan giving rise to the Second Deed of Trust.

The Court of Appeals concluded that the trial court's denial of Bank's motion to amend based on undue delay and futility grounds was within its discretion. Given that Bank did not forecast any evidence that Defendants participated in any way in procuring the second loan,

which would be necessary to withstand summary judgment, any further amendment of the complaint would be futile.

E. Eminent Domain

Dep't of Transp. v. Webster, 751 S.E.2d 220 (N.C. Ct. App. Nov. 19, 2013), *disc. rev. denied*, 755 S.E.2d 618 (N.C. March 6, 2014).

DOT condemned a strip of Defendants' property for a road widening project. The strip of property included part of a private road, Rescue Lane, and was used to widen a public road from 2 to 4 lanes and install medians. After the condemnation, a portion of Rescue Lane became a public roadway maintained by DOT. Eighteen months after the taking, DOT approved a request from a non-party for a driveway permit to access Rescue Lane. Defendants sought to include in the damages case the fact of dramatically increased traffic as a result of the driveway permit grant. The trial court conducted a section 108 hearing and concluded that the area taken by DOT did not include the grant of the subsequent driveway permit and related effects of that permit. The Court of Appeals affirmed that ruling and the exclusion of evidence of the driveway permit and its effects during the jury trial on damages.

The Court of Appeals concluded that it was a valid exercise of police power of DOT to grant access and that regulating traffic flow was within its purview. Damages are not awarded for the exercise of police power. Thus the trial court correctly excluded evidence of traffic flow and the driveway permit from the jury trial on damages.

See also ***Beroth Oil Co. v. N.C. Dep't of Transp.***, 757 S.E.2d 466 (N.C. April 11, 2014) (discussing inverse condemnation putative class action) *supra* at page 1.

F. Foreclosure

Heaton-Sides v. Snipes, 755 S.E.2d 648 (N.C. Ct. App. March 18, 2014).

Defendants came into lawful possession of Plaintiff's residence pursuant to a foreclosure sale. Defendants disposed of the contents of Plaintiff's residence after Plaintiff failed to respond to a request that she claim her personal property within four days. Plaintiff sued Defendants for conversion. After a bench trial, the trial court dismissed Plaintiff's claim with prejudice, concluding that Plaintiff did not show a wrongful conversion and that, even if she had, she did

not prove actual damages. The Court of Appeals affirmed the in part and reversed and remanded in part.

The Court of Appeals reversed the finding that no wrongful conversion occurred. The statutory rule that a buyer or landlord in a foreclosure sale must wait ten days after coming into lawful possession before disposing of personal property in the residence is immutable and cannot be waived or changed by agreement. Therefore Plaintiff's claim for conversion of her personal property was viable despite her failure to respond to a request that she claim personal property within four days. Nevertheless, at trial Plaintiff failed to show evidence of fair market value of the personal property. Replacement cost is not the measure of damages for conversion. The Court of Appeals therefore affirmed the trial court's conclusion that Plaintiff had failed to show actual damages, and remanded for the trial court to award Plaintiff nominal damages.

HomeTrust Bank v. Green, 752 S.E.2d 209 (N.C. Ct. App. Dec. 3, 2013).

Company, through its president (Mr. Green) and secretary (Ms. Green), entered into two mortgage agreements with Bank. Mr. Green and Ms. Green personally guaranteed the debts. Company defaulted; Bank foreclosed and then proceeded against the Greens, as guarantors, to collect the deficiency. The trial court granted summary judgment for Bank. The Court of Appeals reversed as to Ms. Green only.

The Court of Appeals found that Bank served foreclosure notices addressed to Company in care of Mr. Green. Mr. Green therefore had actual notice of the foreclosure proceeding as required by N.C. Gen. Stat. § 45-21.16(b)(2). For Ms. Green, however, Bank did not mail anything directly to her. There remained a genuine issue of material fact whether she had actual notice of the foreclosure hearing. The claim against Ms. Green was remanded for trial.

G. Malicious Prosecution

Mathis v. Dowling, 749 S.E.2d 284 (N.C. Ct. App. Nov. 5, 2013), *disc. rev. denied*, 753 S.E.2d 674 (N.C. Jan 2014).

Plaintiff, CEO of Non-Profit, volunteered her Non-Profit ("the Council") to host flood relief efforts for other non-profits in Haywood County. The Council obtained a $65,000 grant from the United Way of Haywood County to be distributed solely for flood relief efforts. CEO opened a flood relief account, on which she was a signatory, to hold the grant funds and other

funds contributed to the effort. An oversight committee later learned of unpaid flood relief invoices. CEO refused to answer questions, was terminated, and an investigation ensued. CEO had transferred $100,000 from the account to the Council's general account. CEO also was not depositing the employees' 401k contributions into their accounts. The individual defendants, the United Way and the oversight committee cooperated with law enforcement's investigation. CEO was later indicted for embezzlement; the charges were eventually dismissed. CEO then sued defendant United Way and other individuals associated with non-profit flood relief assistance groups for malicious prosecution. The trial court granted summary judgment for Defendants. The Court of Appeals affirmed.

The Court of Appeals concluded that CEO failed to prove three of the four essential elements of malicious prosecution: initiation of the prior proceeding, probable cause, and malice. Law enforcement conducted an independent, thorough investigation with which Defendants provided honest assistance. Missing funds and large transfers sufficed to show probable cause. Certain defendants had a fiduciary duty to investigate missing funds. There was no material evidence of malice.

Simpson v. Sears, Roebuck & Co., 752 S.E.2d 508 (N.C. Ct. App. Dec. 17, 2013).

While at Sears, plaintiff Shopper was detained and arrested for shoplifting. She was convicted in district court, but acquitted by a jury on appeal to superior court. Shopper sued Defendants for malicious prosecution and false imprisonment. Defendants moved to dismiss this civil suit on the ground that the district court conviction precluded Shopper from demonstrating a required element of each claim: probable cause. The trial court granted the motion. The Court of Appeals reversed dismissal of Shopper's claims for malicious prosecution and false imprisonment.

The Court of Appeals held that where a plaintiff's complaint discloses the (s)he was convicted of criminal charges in district court, the plaintiff must plead that the conviction was procured by fraud or some other unfair means. Shopper in this case did so by, among other things, alleging that the district court conviction was procured "fraudulently or unfairly."

H. Medical Malpractice

Medlin v. N.C. Specialty Hosp., LLC, 756 S.E.2d 812 (N.C. Ct. App. April 1, 2014).

Plaintiff sued Defendants for medical malpractice after a toxic solution was used during cataract surgery. Defendants refused to answer certain deposition questions asserting peer-review privilege, did not provide a privilege log, and moved to shield certain documents pursuant to the peer-review privilege. Plaintiff moved to compel and the trial court orally allowed Plaintiff's motion to shorten the time to notice hearing on the motion to compel. The trial court further granted the motion to compel as to most of the deposition questions and production of the privilege log. The Court of Appeals affirmed.

The Court of Appeals refused to review the challenge to the order to shorten time because the order was not reduced to writing, and therefore was not "entered." The Court of Appeals rejected Defendant's assertion that the trial court should not have reviewed documents *in camera* to determine whether they were privileged. The Court of Appeals further rejected Defendant's argument that the *in camera* review "colored" the trial court's reception to Defendant's defenses: "Defendant Hospital 'doth protest too much, methinks.'" The trial court correctly granted the motion to compel answers to deposition questions because the questions did not call for privileged material.

Next, the Court of Appeals ruled that trial court did not err in proceeding with a properly noticed hearing that defense counsel made a deliberate choice not to attend. Counsel did not attend the hearing because, as he said in its notice to the trial court, none of his "team" was "available to be heard this week" because of "other long-standing obligations in other cases in order to be ready to try this case." Those obligations were meeting with expert witnesses. The Court of Appeals noted that counsel decided that "not even one member of the 'team' could attend the hearing," which was "their prerogative, but it [did] not entitle them to relief."

Finally, the Court of Appeals granted the plaintiff-appellee's motion to sanction Defendant for a frivolous appeal, and awarded Plaintiff the attorney fees incurred in the appeal.

Peter v. Vullo, __ S.E.2d__ (N.C. Ct. App. June 4, 2014).

Plaintiff Patient and her husband sued defendant Doctors for medical malpractice and consequent loss of consortium. Patient suffered nerve damage after Doctors repeatedly inserted

needles into Patient while attempting to administer a nerve block (local anesthesia) during a surgical procedure. Patient also sued Hospital on the theory of *respondeat superior*. Defendants moved for summary judgment. Doctors argued that Patient failed to designate a qualified expert to opine that doctors deviated from the applicable standard of care. Hospital argued that Doctors were not its actual or apparent agents, so that it could not be liable. Trial court granted summary judgment for all Defendants and Hospital. The Court of Appeals reversed judgment for Doctors and affirmed judgment for Hospital.

The Court of Appeals concluded that Patient forecast sufficient evidence of a breach of the applicable standard of care. Patient's expert testified in his deposition that he was applying a "national standard of care," which is not permitted. In opposition to summary judgment, Patient submitted an affidavit from her expert stating that he had reviewed additional information since his deposition about the Charlotte medical community and its applicable standards, which the expert opined were violated in Patient's treatment thereby causing her injury. Contrary to Defendants' arguments, the affidavit did not impermissibly seek to contradict the expert's deposition testimony. Rather, the affidavit supplemented the expert's opinion.

The Court of Appeals ruled that summary judgment for Hospital was proper as there was insufficient evidence to support liability pursuant to an apparent agency theory. Evidence that a doctor had privileges at a hospital is insufficient to make the doctor its agent. Here, Patient signed two forms that expressly stated that independent contractors performing services at Hospital were not agents of Hospital, including specifying that anesthesiologists may not be employed by Hospital. Further, the forms listed at least one treating physician, indicating that Patient looked to Doctor, not Hospital, for treatment.

Schmidt v. Petty, 752 S.E.2d 690 (N.C. Ct. App. Dec. 17, 2013).

In this wrongful death medical malpractice case, Plaintiff challenged the trial court's exclusion of opinions by her testifying experts that Defendants negligently failed to note the opacities on decedent's third x-ray. The experts did not contend that diagnosis at this stage could have changed decedent's prognosis. The trial court ruled that the evidence of breach of standard of care regarding the third scan was not relevant because the failure to report the lesion on the third scan could not have been the proximate cause of death. The trial court also excluded the evidence based on Rule 403, concluding that the limited probative value of the evidence was

substantially outweighed by unfair prejudice and danger of confusion. The Court of Appeals affirmed.

Evaluating whether the trial court's rulings were "fairly supported by the record," the Court of Appeals affirmed the exclusion pursuant to Rule 403 as within the trial court's discretion.

Webb v. Wake Forest Univ. Baptist Med. Ctr., 756 S.E.2d 741 (N.C. Ct. App. Feb. 18, 2014).

Patient died from bronchopneumonia after dental surgery. Plaintiff Estate thereafter brought this pre-2011 medical malpractice action alleging that the dental care and related anesthesia administration were negligent and led to bronchopneumonia, which led to death. One of Plaintiff's experts testified that a breach of the standard of care caused decedent's bronchopneumonia, but limited his response as being "within his knowledge as an oral and maxillofacial surgeon." He further stated that he "would defer his opinions related to the development of [the] bronchopneumonia to a medical doctor." The expert admitted that decedent was a "medically complex patient." Defendants argued in support of summary judgment that Plaintiff did not proffer admissible expert testimony to demonstrate causation, but Defendants did not assert lack of evidence of the applicable standard of care or its breach. The trial court concluded that Plaintiff failed to proffer competent and admissible evidence of causation between the allegedly deficient dental care and the bronchopneumonia, and granted summary judgment for all Defendants as to any claims involving dental care, but allowed claims relating to anesthesia care to proceed. Over a dissent, the Court of Appeals reversed the summary judgment grant for Defendants.

The Court of Appeals noted (more than once) that Defendants had not filed a motion to exclude Plaintiff's expert witnesses. Nevertheless, the Court of Appeals evaluated admissibility and concluded that the testimony was reliable and sufficient to create a genuine issue of material fact. A plaintiff may use one expert witness to show the condition that caused death, and use a second witness to show that the breach of the standard of care created the condition.

Dissenting, Judge Dillon found that the trial court had not abused its discretion by excluding the expert opinions about the cause of the bronchopneumonia which allegedly caused the death. Judge Dillon noted that Plaintiff had not proffered any evidence that the expert's opinion was based on reliable methodology, and in fact had proffered no evidence of

methodology. Judge Dillon concluded that Plaintiff had not shown that its experts were qualified to offer expert opinions as to the cause of the broncopneumonia: the expert had worked in health care, but there was no evidence indicating any expertise in determining the cause of broncopneumonia.

I. Negligence

Chaffins v. Tar Heel Capital Corp., 750 S.E.2d 536 (N.C. Ct. App. Nov. 5, 2013).

Applying general principles of medical causation, the Court of Appeals reversed a finding by the Industrial Commission that a later injury to plaintiff's right shoulder and neck was "a direct and natural result of her admittedly compensable" earlier injury. The Court of Appeals cited "no competent evidence" that the compensable injury was a causal factor in the later injury. Medical testimony that an accident "could or might" have caused an injury generally is not enough alone to prove medical causation. There must be testimony indicating that causation is "more than likely" or to the effect that the witness is satisfied to a reasonable degree of medical certainty. A note in the medical record that the new injury "appears to be in fact related to" the compensable injury was held to be not competent evidence of causation. The doctor's testimony that "it's at least as likely as not" that plaintiff's complaints were consistent with the compensable injury mechanism were "merely speculation" and insufficient to establish a causal relationship.

Frazier v. Carolina Coastal Ry., Inc., 750 S.E.2d 576 (N.C. Ct. App. Nov. 19, 2013).

Plaintiff motorist sued defendant railway after her car was struck by an oncoming train at an at-grade crossing. Plaintiff was familiar with the crossing and that trains traversed the railway there; she did not look to see whether a train was coming; she drove her car onto the tracks where it remained for at least 20-30 seconds if not more; and there was plenty of room for Plaintiff to move her car off the tracks. The trial court granted summary judgment for Defendant finding that Plaintiff was contributorily negligent as a matter of law. The Court of Appeals affirmed.

The Court of Appeals recognized that North Carolina law requires a motorist approaching and traversing a railroad crossing to look in both directions from a point where such looking will be effective and to listen for approaching trains. This duty continues until the motorist is safely

clear of the crossing. Here, the undisputed evidence showed that Plaintiff failed to perform this duty and was contributorily negligent. That the oncoming train in this case did not sound a horn did not excuse Plaintiff from her obligations to exercise reasonable care. Further, as a matter of law, the crossing was not peculiarly and unusually hazardous. The undisputed evidence showed that there was a safe point from which a prudent person could have looked for a train and traveled the crossing safely.

Rolan v. N.C. Dep't of Agric. & Consumer Servs., 756 S.E.2d 788 (N.C. Ct. App. April 1, 2014).

Plaintiffs were minors who were sickened by *E. coli* bacteria after visiting the petting zoo at the State Fair in 2004 and sued alleging negligence. The Industrial Commission found for Defendant. The Court of Appeals affirmed, concluding that the Commission properly addressed the relevant question: "whether Defendant exercised due care in October of 2004 to protect Fair patrons against *E. coli* infection and, in doing so, adequately fulfilled its duty to warn those patrons of the risk of harm."

The Court of Appeals found the Commission's conclusion that Defendant's care was reasonable under the circumstances was supported by its findings, even though Defendant could have taken additional precautions. The Court of Appeals viewed the incidents in the context of the time they happened: before any other outbreaks and other later-developing circumstances. "To hold otherwise would be to engage in the type of Monday-morning quarterbacking that the law of negligence should avoid."

Sims v. Graystone Opthalmology Assocs., P.A., _ S.E.2d __ (N.C. Ct. App. May 20, 2014).

Plaintiff, an 86 year-old Patient, fell off a rolling chair in the examination room of defendant Opthalmology Practice's office before her eye exam started. She fractured her arm and hip. Patient sued Practice alleging that Practice was negligent in placing her in a rolling chair or stool when they knew or should have known that such chairs or stools, without arms or handles, were dangerous to elderly patients such as her. Practice asserted contributory negligence in its Answer. Patient's evidence was that no one helped her into the chair or saw her fall. She had been to the office and sat in rolling chairs before, but testified she did not realize how dangerous they could be. Patient sat down safely but then leaned over to put down her purse. The attending technician did not have a specific recollection of what happened before the

fall. The trial court granted summary judgment for Practice on the ground of contributory negligence. The Court of Appeals reversed.

The Court of Appeals concluded that, although Practice's use of the rolling chair may not itself be negligent, instructing an elderly patient with a purse to sit on the rolling chair and move up to the examination table without offering assistance may be found to be negligent. The Court of Appeals acknowledged that Patient ultimately may be found to be contributorily negligent, but that the evidence did not establish her negligence as a matter of law.

Stephens v. Covington, 754 S.E.2d 253 (N.C. Ct. App. Feb. 18, 2014).

Plaintiff-child, after reaching the age of majority, sued the Landlord-homeowner of a rental house after the tenants' Rottweiler bit Plaintiff while he was visiting a friend in the home. Trial court granted summary judgment for Landlord. The Court of Appeals affirmed.

The Court of Appeals concluded that there was no genuine issue of material fact as to whether Landlord had control over the animal that attacked Plaintiff. A plaintiff must "specifically establish both (1) that the landlord had knowledge that a tenant's dog posed a danger and (2) that the landlord had control over the dangerous dog's presence on the property in order to be held liable for the dog attacking a third party." Here, Plaintiff did not present evidence that Landlord knew or had reason to know that the dog was dangerous. Plaintiff also did not present any evidence demonstrating "that the Rottweiler breed is generally dangerous."

J. Noncompetition Covenants & Trade Secrets

Copypro, Inc. v. Musgrove, 754 S.E.2d 188 (N.C. Ct. App. Feb. 4, 2014).

Defendant former Employee appealed from a preliminary injunction enforcing a non-competition agreement with Employer. The Court of Appeals reversed.

The Court of Appeals held that the noncompetition agreement prohibited an unreasonably wide range of activities such that it was not enforceable. The language of the agreement prohibited employment in any capacity with a competitor, even in a capacity unrelated to the Employer's competitive position, such as a custodian. Given the absence of unusual factors that would justify such a restriction, and the three-year duration, the covenant did not legitimately protect the employer's business interests and was held void.

GE Betz Inc. v. Conrad, 752 S.E.2d 634 (N.C. Ct. App. Dec. 3, 2013).

Plaintiff sued former employees for breach of non-solicitation and confidentiality agreements after they went to work for new employer and successfully solicited Plaintiff's customers. Plaintiff also sued the former employees and their new employer (competitor of Plaintiff) for misappropriation of trade secrets, violating N.C. Gen. Stat. § 75-1.1, and (as against new employer only) tortiously interfering with the former employees' employment agreements. Plaintiff won on all grounds, including recovering punitive damages and attorneys' fees.

Three groups of appellants challenged the trial court's various decisions: (1) the former employee defendants; (2) the new employer/competitor to Plaintiff corporation; and (3) trial counsel for Defendants, Almy and Dombroff.

The former employees' appeal The Court of Appeals ruled that the trial court properly applied Pennsylvania law in finding that the former employees violated their employment agreements, which governed pursuant to a choice-of-law provision. The Court of Appeals rejected the argument that the agreement's prohibition on "indirect" solicitation violated North Carolina public policy. The court reasoned that the defendant competitor in this case had made a concerted effort to hire Plaintiff's former employees to specifically target Plaintiff's customers. Further, Plaintiff's share of the North Carolina market was only 3%, thereby leaving 97% of the market available for solicitation. Also, the non-solicitation provision lasted only eighteen months, and was a reasonable time to allow Plaintiff's new employees to build a relationship with its customers. The Court of Appeals found that the trial court's decision that the individual defendants were exposed to Plaintiff's confidential information and that such information was utilized in soliciting Plaintiff's customers was supported by adequate evidence.

The Court of Appeals affirmed the trial court's refusal to apply equitable estoppel. Plaintiff was not equitably estopped from enforcing the employment agreement against one former employee simply because Plaintiff told him it could not find a copy of the agreement.

The Court of Appeals further rejected the former employees' attack on the causation element as not supported by the evidence. Plaintiff adequately demonstrated causation and circumstantial evidence is sufficient to prove it. Even if Plaintiff might have lost customers for reasons other than the former employees' conduct, such evidence would not negate the fact that

the former employees improperly solicited and unjustly profited from customers they recruited to their new employer, thus causing some amount of injury to Plaintiff.

The Court of Appeals ruled that the trial court properly found that Plaintiff's information met the statutory definition of trade secret and that the former employees had misappropriated Plaintiff's trade secrets. Plaintiff showed a *prima facie* case of misappropriation, thereby shifting the burden to the defendants to rebut the presumption of misappropriation which they did not do.

Because the former employees were found to have misappropriated trade secrets, the trial court correctly found that they violated N.C. Gen. Stat. § 75-1.1. In addition, Defendants' willful violation of the terms of their employment contracts constitutes "egregious activities outside the scope" of their employment duties and affects commerce. These willful violations also provided sufficient ground to impose section 75-1.1 liability. Given the evidence that the defendants acted in concert to harm Plaintiff, the trial court properly imposed joint and several liability.

New Employer/Competitor's Appeal Plaintiff opted to pursue as its compensatory damages the disgorgement of profits from sales made to Plaintiff's former customers by defendant Competitor. Competitor refused to provide discovery on its net profits from the sales despite multiple court orders to compel over the span of two years. The trial court sanctioned Competitor pursuant to Rule 37(b)(2) by allowing Plaintiff to use gross sales ($288,297) as the measure of compensatory damages, and prohibited Competitor from offering evidence of Plaintiff's damages. The Court of Appeals affirmed.

The Court of Appeals concluded that the trial court allowed Plaintiff to submit evidence of revenue (instead of profits) as the basis for the measure of damages, but it did not order that revenue displace profits in general as the target measurement. Any lesser sanction would not have been sufficient under the circumstances to ensure that new employer/competitor did not profit from its misconduct. Thus, given the repeated obstinate refusals to produce the information, the Court of Appeals concluded that there was no evidence of injustice which might otherwise support a finding that the trial court abused its discretion by prohibiting Competitor from submitting evidence on compensatory damages.

As to punitive damages, the Court of Appeals reversed and remanded after reviewing the issue *de novo.* For punitive damages, the trial court trebled the compensatory damages amount as to *each defendant individually:* totaling $4,324,455. The trial court may only impose punitive damages as to each plaintiff's cause of action and not as to each defendant pursuant to N.C. Gen. Stat. § 1D-25(b), as interpreted in *Rhyne v. K-Mart Corp*., 358 N.C. 160 (2004).

The Court of Appeals remanded on punitive damages that may have been imposed for out-of-state conduct. The "Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts on nonparties." *Philip Morris USA v. Williams*, 549 U.S. 346, 353, 166 L. Ed. 2d 940, 948 (2007). One of the customers Plaintiff lost to Competitor by unlawful means was outside of North Carolina. The issue was remanded for new findings and conclusions that give no consideration to the out-of-state conduct toward the out-of-state customer.

Reviewing for abuse of discretion, the Court of Appeals affirmed the award of attorneys' fees, but remanded for new findings as to reasonableness. Competitor persisted in pursuing counterclaims after a point where it should reasonably have been aware that their claims were not supported by evidence; therefore there was a statutory basis for awarding fees in connection with the counterclaims. (Competitor did not challenge the fee award in connection with Plaintiff's claims.) As to reasonableness of the fees, the court focused on the rates typically charged in the geographic region where the litigation takes place as a starting point for determining reasonableness. The trial court awarded $5,769,903.10 jointly and severally against defendants, over $3 million of which was billed by Paul Hastings attorneys in New York, billing at rates ranging from $675 hourly to $289 hourly, depending on the attorney's seniority. The balance was billed by Ward and Smith's attorneys at hourly rates from $270-$390. When more expensive out-of-state counsel are hired, the court asks two questions: (1) are services of like quality truly available in the locality of the litigation; and (2) did the party choosing counsel from elsewhere act reasonably in making that choice. With respect to New York counsel's fees, the Court of Appeals concluded that much of the work could have just as effectively been performed by local counsel at local rates. The matter was remanded to the trial court to distinguish which work performed by Paul Hastings' attorneys "truly could not have been performed by local counsel at reasonable rates."

Defense attorneys' appeal from sanctions against them The trial court sanctioned defense attorneys Dombroff and Almy after they attached Plaintiff's confidential customer list to a public court filing in a separate federal case in Virginia, which violated the protective order on confidentiality in the North Carolina case. The trial court held Almy in criminal contempt of court, ordered him to pay $500, and ordered payment of Plaintiff's attorneys' fees in pursuing sanctions. The trial court revoked the *pro hac vice* admissions of both Almy and Dombroff.

The Court of Appeals reversed as to holding Almy in criminal contempt. The trial court did not follow statutory notice procedures for contempt and did not recite that its findings were beyond a reasonable doubt. The Court of Appeals also reversed the order requiring that Almy pay Plaintiffs attorneys' fees incurred in pursuing Rule 37 sanctions. Almy, a lawyer, is not a "party" within the meaning of Rule 37's language authorizing fees. The Court of Appeals reversed revocation of Almy's *pro hac vice* admission because it was based on the criminal contempt finding, and remanded for consideration of revocation without relying on the contempt conduct.

The Court of Appeals affirmed the trial court's revocation of Dombroff's *pro hac vice* admission as properly based on his failure to disclose prior discipline by a federal court that imposed on him a $1000 fine.

Horner Int'l Co. v. McKoy, 754 S.E.2d 852(N.C. Ct. App. March 4, 2014).

For over 20 years, defendant Employee worked in the food processing and flavor industry. Then, in 2006, Employee signed a noncompetition and trade-secret confidentiality agreement when starting employment in Durham with plaintiff Manufacturer, a manufacturer of flavor materials used in tobacco and food products. Employee assisted Manufacturer with starting a manufacturing plant and served as its plant manager thereafter. In 2012, Employee resigned and began employment in New Jersey with Teawolf LLC. Both Teawolf and Manufacturer sell flavor products derived from cocoa and other common ingredients. Employee's work for Teawolf involved installing and maintaining equipment used for making new flavor products. The trial court enjoined disclosure of confidential information, but denied Plaintiff's motion to enforce the noncompetition covenant. The Court of Appeals affirmed.

The Court of Appeals held that the noncompetition was overbroad and unenforceable. It barred employment "directly or indirectly" or acting "as an advisor, consultant, or salesperson

for, or becom[ing] financially interested, directly or indirectly, in any person, proprietorship, partnership, firm, or corporation engaged in, or about to become engaged in, the business of selling materials" for eighteen months after termination of employment with Manufacturer. There was no geographical limitation.

The Court of Appeals affirmed entry of the injunction prohibiting disclosure of confidential information. Manufacturer's complaint contained specific details of the information Employee provided to his new employer, not just broad categories. Further, evidence that a former employee has or necessarily will use trade secrets is sufficient to demonstrate "threatened" misappropriation, which is sufficient to warrant injunctive relief. Finally, the preliminary injunction sufficiently specified the protected information by referring to "any confidential information obtained by [Employee] from [Manufacturer]," which the court construed to apply to the methods, processes and techniques described in the injunction's findings and conclusions.

Judge Steelman issued a concurring opinion to urge the Supreme Court to revise the framework for evaluating non-competition covenants to allow "restrictions upon competing business activities for a specific period of time, limited to a specific, narrow type of business, but with fewer geographic limitations."

K. Public Records Act

LexisNexis Risk Data Mgmt., Inc. v. N.C. Admin. Office of the Courts, 754 S.E.2d 223 (N.C. Ct. App. Feb. 18, 2014).

ACIS, the Automated Criminal/Infraction database, is a public record and is subject to public disclosure under the Public Records Act. AOC is its custodian. There is no express statutory exemption for the database. Thus, LexisNexis's public records request to AOC for an electronic copy of the entire ACIS database was proper.

L. Trusts

THZ Holdings, LLC v. McCrea, 753 S.E.2d 344 (N.C. Ct. App. Dec. 17, 2013).

Ex-Husband established a trust to fulfill his divorce settlement obligation to provide housing for Children. The children were designated the beneficiaries of the trust. To buy a house, Ex-Husband borrowed money from LPS LLC which he then loaned to the trust, and

contributed other monies to the trust. The house was not encumbered by a mortgage or deed of trust. The trust agreed to re-pay the loan to Ex-Husband by 2018. Ex-Husband stopped funding the trust after he lost his job. The corporate trustee resigned after it was not being paid and appointed Ex-Husband as trustee. In consideration for discharging the debt the trust owed to Ex-Husband, Ex-Husband transferred title of the house to himself and his new wife. Ex-Husband and New Wife then transferred the property to plaintiff THZ Holdings, which also acquired the note on the debt between Ex-Husband and LPS, for the purpose of selling the house and satisfying the debt. Plaintiff THZ then brought an action to eject Children and Ex-Wife so it could sell the house. Ex-Wife countered with an action that included Children as third-party plaintiffs and sought to void all transfers of the property and to remove Ex-Husband as trustee.

The trial court removed Ex-Husband as trustee of the trust which held title of a house in which Ex-Husband's Children and Ex-Wife lived, voided transfer of the house to Ex-Husband and his New Wife (and all subsequent transfers), refused to eject Children and Ex-Wife from the house, and appointed a new trustee.

The Court of Appeals affirmed all rulings regarding the disposition of the property and removal of the trustee, but remanded on the issue of who should be appointed as new trustee because the trial court had appointed a trustee without considering the applicable terms of the trust instrument in contravention of N.C. Gen. Stat. § 36C-7-704(c). Ex-Husband, as trustee, breached the duty of loyalty to the beneficiaries of the trust by transferring the house to himself individually for his own personal account in contravention of N.C. Gen. Stat. § 36C-8-802(b). The transfer to Ex-Husband was voidable as it was a result of the breach of the duty of loyalty. Because the first transfer was void, Ex-Husband could not transfer title to any other entity. Therefore all subsequent transfers were void.

M. Wills

Halstead v. Plymale, 750 S.E.2d 894 (N.C. Ct. App. Dec. 3, 2013).

Estranged husband, who cheated on and left his wife, brought action to declare that his late wife's will was ambiguous, so that he should therefore inherit her real property and tangible items. The trial court found an ambiguity in the residuary clause as alleged, but noted that the will specifically declared the testator-wife's intent to disinherit the estranged husband because of

his misconduct and abandonment of wife. The trial court construed the language of the will without reference to extrinsic evidence and concluded that the entire estate passed to the beneficiary named by testator in the will. After a *de novo* review, the Court of Appeals affirmed. Applying well-established principles of will construction, the Court of Appeals concluded that late wife meant to disinherit cheating and estranged husband totally, and devise her entire estate to the only person mentioned as a beneficiary in the will.

In re will of McNeil, 749 S.E.2d 499 (N.C. Ct. App. Nov. 5, 2013).

Testator executed a will in 2008. Then, in 2010, Testator was hospitalized and requested that a lawyer come help her with changes to her will. Testator made the request directly to the lawyer to change her will, and asked one (future) propounder to help mark-up the 2008 will to show desired changes. Testator executed the 2010 will two weeks before dying. Caveators challenged the will's validity on the basis of testamentary incapacity, undue influence, and duress. The trial court granted summary judgment in favor of the will propounders. The Court of Appeals affirmed.

The Court of Appeals concluded that there was no evidence that Testator was under constant control and supervision by propounders. Thus there was no evidence of the third and fourth elements of undue influence: a disposition to exert influence and a result indicating undue influence. Caveators' allegations underlying both undue influence and duress were the same and failed accordingly.

On the issue of testamentary capacity, the Court of Appeals found that Caveators forecasted evidence that Testator misunderstood the effect of her will because one provision called for disposition of "ownership" of Testator's apparently non-profit corporation. Both the 2008 will and the 2010 will devised the business to the same person. While Caveators were correct that the business was a non-profit corporation with no shares to bequeath, a possible misunderstanding of corporate law does not demonstrate lack of testamentary incapacity.

N. Wrongful Termination

Blakeley v. Town of Taylortown, 756 S.E.2d 878 (N.C. Ct. App. April 15, 2014).

The trial court properly instructed the jury that Plaintiff, who sued for wrongful discharge after being fired as the Town's Chief of Police, could recover damages for emotional distress and

future lost wages. The Court of Appeals concluded that there was "no reason" why these types of tort damages would not be available to a plaintiff seeking relief for wrongful discharge in violation of public policy. Further, to recover emotional distress damages, a wrongful discharge plaintiff need not show the same type of "extreme and outrageous conduct" and "severe emotional distress" required to prove an emotional distress tort. Although it was unclear how the jury reached the damages figure it awarded, the amount was consistent with Plaintiff's evidence and Defendant failed to show that the award was so excessive that it could only have been the product of the jury's passion or prejudices. The Court of Appeals similarly rejected Defendant's argument that Plaintiff had failed to use reasonable care and diligence to mitigate his damages where Defendant had applied for multiple positions and even had served a police advisor in Afghanistan for the Department of State. The Court of Appeals granted relief on the amount by which the damages award should have been reduced because of monies earned after termination: evidence of Plaintiff's tax records clearly established an additional $5886.97 for which the jury failed to account.

Finally, the Court of Appeals affirmed denial of a new trial. The evidence was sufficient to demonstrate a violation of public policy and counsel's statements were not so grossly improper as to warrant a new trial.

City of Asheville v. Aly, 757 S.E.2d 494 (N.C. Ct. App. May 6, 2014).

Senior Police Officer returned a rented computer to a store after using it for home and personal use. He did not delete approximately sixteen racially offensive and pornographic images e-mailed to him by friends. City fired him. Officer sued for reinstatement pursuant to the Civil Service Act on the ground that the firing was not "justified" as required by the Act. After a *de novo* bench trial in superior court, the superior court agreed that even if Officer's conduct was negligent, inappropriate and a violation of policy, it did not violate the law or rise to a level justifying termination. City appealed. The Court of Appeals affirmed.

The Court of Appeals held that "justified," as used in the Civil Service Act, does not mean "just cause," as used in the State Personnel Act. Nor does it mean that the employer need only show that the discipline was not for an arbitrary reason based on politics or membership in a particular class. Applying the ordinary meaning of the term, "justified" requires that the employer must prove that the imposed discipline was "just, right or valid." The Court of

Appeals concluded that competent evidence supported the trial court's factual findings, and the trial court's conclusions of law were supported by the facts found. The Civil Service Act confers authority to reinstate employment and order back pay.

XV. DAMAGES

Lloyd v. Norfolk S. Ry. Co., 752 S.E.2d 704 (N.C. Ct. App. Dec. 17, 2013).

Defendant truck driver (Trucker) was driving a tanker filled with mineral oil when he ran off the paved portion of the road and got stuck on the railroad track. Plaintiff Train Engineer was driving the train that struck the tanker after being unable to stop, leading to an explosion and fire, which caused serious injuries to Engineer. Engineer brought negligence claims against defendant Trucker and his employer (Ergon). Engineer also sued his own employer, the Railway, for failing to provide a safe environment. Trucker and Ergon cross-claimed against the Railway for indemnity. The trial court directed a verdict for the railway on the indemnity cross-claim. The jury found that the railway was not negligent, but found for Engineer against defendants Trucker and Ergon. The trial court denied their JNOV and new trial motions. The Court of Appeals affirmed.

The Court of Appeals concluded that denial of Defendants' JNOV motion was proper where the motion chiefly asserted that Engineer failed to adequately prove damages and failed to mitigate his damages. Engineer, who was suffering from PTSD caused by the accident, had not been medically cleared to return to work. Engineer had been following doctor's recommendations about rehabilitation. The Court of Appeals ruled that the trial court properly exercised its discretion to deny Defendants' new trial motion asserting that damages were excessive and (Rule 59(a)(6)) and that they were prejudiced by improper admission of evidence (Rule 59(a)(8)). With respect to the evidentiary ground, while the co-defendant railway objected to the evidence at trial, Trucker and Ergon did not. They thereby waived any objection to that evidence. One party's objection does not inure to the benefit of another party for purposes of preserving the objection for appellate review. Further, the damages awarded were in line with the evidence presented. Because the jury determined that the railway was not negligent in deciding Engineer's claims, the question of whether the trial court properly directed a verdict on the indemnity cross-claim was moot.

XVI. ATTORNEYS' FEES

McMillan v. Ryan Jackson Props., LLC, 753 S.E.2d 373 (N.C. Ct. App. Jan. 21, 2014).

Plaintiffs each bought basement condominiums in a building renovated by defendant building Owner and defendant Contractor (which performed the renovations). The condos flooded. Plaintiffs had to move out. Plaintiff sued property owner and contractor. Plaintiffs asserted negligence against contractor individually and derivatively on behalf of the Condo Association, a nonprofit corporation of which plaintiffs were members. After Owner defaulted, the action continued between Plaintiffs and Contractor. Plaintiffs alleged defects involving systems and features which Contractor did not have control or modify. The trial court granted summary judgment for Contractor. The trial court concluded that Plaintiffs brought a derivative action without reasonable cause and awarded attorneys' fees pursuant to N.C. Gen. Stat. § 55A-7-40. The Court of Appeals affirmed in part and remanded in part.

Because section 55A-7-40 authorizes attorneys' fees only upon a showing that the action was "without reasonable cause," which is a conclusion of law, the Court of Appeals reviewed that finding *de novo*, and the ultimate attorneys' fee award for abuse of discretion. The Court of Appeals affirmed the finding of no reasonable cause as to the derivative claims, viewing them in isolation from other claims asserted. The appellate court adopted the standard of "without reasonable cause" used in the business corporation context and N.C. Gen. Stat. § 55-55(e): plaintiffs "need only have a 'reasonable belief' that there [was] a 'sound chance' that their claims may be sustained" and not "absolute certainty of the legal validity of their claims." (quoted case omitted). Because there was no evidence that the contractor performed any work on any area Plaintiffs alleged to be the source of the damage, and did not have any such evidence when it sued apart from permits to do general work, Court of Appeals ruled that the trial court correctly concluded that Plaintiffs' derivative action was without reasonable cause. As for the amount of attorneys' fees, the trial court's award of the entire defense cost of the contractor did not distinguish between the costs incurred to defend the derivative action and those incurred to defend the individual claim. The matter was remanded for factual findings as to what portion of attorneys' fees was attributable for the derivative action.

See also ***GE Betz v. Conrad***, 752 S.E.2d 634 (N.C. Ct. App. Dec. 3, 2013) (evaluating reasonableness of out-of-state attorneys' fees) *supra* at page 76.

XVII. POST-JUDGMENT MOTIONS AND ISSUES

Brown v. Cavit Scis., Inc., 749 S.E.2d 904 (N.C. Ct. App. Nov. 19, 2013).

Plaintiff sued multiple defendants for fraud and unfair practices, among other claims, after Defendants failed to repay a short-term $100,000 loan that Plaintiff made in reliance of Defendants' allegedly false representations about a pending merger. Defendant-appellant Connell defaulted and judgment was entered against him, jointly and severally with certain other defendants who defaulted, for $1,906,000.00 plus post-judgment interest. The damages award was based on Plaintiff's allegations that he had incurred at least $110,000 damages, plus interest compounded every fifteen days pursuant to the terms of the loan agreement, plus treble damages in connection with his unfair practices claim. Connell moved to set aside the default judgment, which the trial court denied. Connell did not appeal the motion to set aside ruling, but later moved pursuant to Rules 55(d) and 60(b) for relief from the judgment. The trial court denied those motions. The Court of Appeals affirmed.

The Court of Appeals ruled that entry of a monetary judgment against one of multiple defendants affects a substantial right and may be immediately appealed. Connell chiefly argued that the judgment was "irregular" as the relief awarded exceeded the relief sought in Plaintiff's complaint. The Court of Appeals disagreed, emphasizing that its review pursuant to Rule 60(b)(6) did not include evaluation of whether the judgment was premised on errors of law. A judgment need not be free from error to be valid, and Rule 60(b)(6) may not be invoked as a substitute for appellate review of the merits of a contested judgment. The Court of Appeals, however, did review for whether the *amount* of the judgment exceeded the relief sought based on the allegations in the complaint. Here, the allegations sufficiently supported both the amount of the damages and the trebling of damages with respect to Connell.

In re Thompson, 754 S.E.2d 168 (N.C. Ct. App. Feb. 4, 2014).

The clerk's order on incompetency was never entered: the clerk of court orally ruled at the incompetency hearing and later reduced the ruling to a signed and dated writing. There was no file-stamp or other evidence that the order was filed, however. Thus, all further proceedings based on the incompetency ruling were void.

XVIII. APPELLATE JURISDICTON

Huttig Bldg. Prods, Inc. v. McDonald, __ S.E.2d __ (N.C. Ct. App. May 20, 2014).

The trial court ordered BB&T to release funds from Defendant's joint bank accounts to Plaintiff, a judgment creditor. Defendant appealed, asserting that he did not have any interest in the funds that are the subject of the order. Taking Defendant's assertion as true, the Court of Appeals dismissed the appeal. If Defendant has no interest in the challenged funds, defendant likewise has no interest which would allow him to appeal the trial court's order.