

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

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Ann M. Anderson  
UNC School of Government

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### **CIVIL PROCEDURE, JUDICIAL AUTHORITY, and JURISDICTION**

#### **Venue; “public officer” pursuant to GS 1-77(2)**

[\*Heustess v. Bladenboro Emergency Services, Inc.\*](#) (COA16-106; Sept. 20, 2016). Plaintiff’s estate sued Defendant (EMS) in Robeson County after Plaintiff was allegedly injured by negligent intubation and monitoring while in transport from Bladen County to a hospital in Robeson County. EMS moved for change of venue, arguing that pursuant to GS 1-82, proper venue was in Bladen County, the County where Plaintiff and Defendant reside. The trial court denied the motion for change of venue, and the Court of Appeals affirmed. Because Defendant contracted with Bladen County to furnish emergency services to Bladen County and was therefore subject to statutory regulations governing EMS services, Defendant was an agency of Bladen County. Therefore, GS 1-77(2) dictated proper venue, and pursuant to that statute Robeson County was a proper venue because the “cause, or some part thereof, arose” in Robeson County.

#### **Corporate defendant and requirement of representation; denial of continuance**

[\*HSBC Bank USA v. PRMC, Inc.\*](#) (COA16-96; Sept. 6, 2016). Bank filed an action against corporate Defendant and its individual guarantor, Mr. Khan, alleging default of a loan-related agreement. The trial court granted summary judgment in favor of Bank and Mr. Khan and the Court of Appeals affirmed. On appeal, Mr. Khan (a non-lawyer) purported to represent both himself and the corporate Defendant. Noting that a corporation cannot maintain an appeal without representation by counsel, the Court of Appeals dismissed corporate Defendant’s appeal. As to Mr. Khan’s appeal, the Court of Appeals held that: (1) the trial court did not err in denying a continuance of the summary judgment hearing to allow Mr. Khan more time to obtain counsel, where Mr. Khan had already obtained five prior attorneys and had sought many prior delays in earlier stages of the litigation; and (2) Mr. Khan’s substantive arguments related to the merits of the corporate Defendant’s defenses, not his own, and the corporate Defendant was no longer an appellant.

**Justiciability; First Amendment; ecclesiastical entanglement vs. neutral principles of law**

[\*Azige v. Holy Trinity Ethiopian Orthodox Tewahdo Church\*](#) (COA15-760; Sept. 6, 2016). After a group of church members brought an action against a church alleging various violations of church bylaws, the church moved to dismiss on First Amendment grounds. The trial court denied the motion. The Court of Appeals reversed, finding that a court’s resolution of the issues requires determination of plaintiffs’ standing as “registered members” of the church, a question involving, among other things, whether the plaintiffs “believe[] that our Lord Jesus Christ is the Savior[.]” Such inquiries would entangle the court in ecclesiastical matters in contravention of the First Amendment and could not be resolved through neutral principles of law.

**Statute of limitations in medical malpractice actions; extension to minor’s 19<sup>th</sup> birthday**

[\*King v. Albemarle Hosp. Auth.\*](#) (COA15-1190; Sept. 6, 2016). In 2008 a medical malpractice action was brought on behalf of a minor plaintiff and was later dismissed without prejudice pursuant to Rule 41. In 2015 the action was refiled. The trial court dismissed the action as outside the three-year statute of limitations. The Court of Appeals reversed pursuant to G.S. 1-17(b), which extended the statute of limitations for medical malpractice actions to a minor’s 19<sup>th</sup> birthday, which in this case will be 2024. (Note that the statute was amended in 2011 to change the applicable age from 19 to 10 years, but that amendment does not apply to this case). The court further held that the Rule 41 dismissal did not prevent refile of the action; the “two-dismissal rule” would only have applied had her case been voluntarily dismissed *twice* prior to the current action.

**Defenses under the Uniform Enforcement of Foreign Judgments Act**

[\*Topic Leisure Corp. v. Hailey\*](#), \_\_\_ S.E.2d. \_\_\_ (N.C. App. Aug. 16, 2016). At issue in this case was whether a debtor could raise a due process defense to an out-of-state judgment in a North Carolina court under UEFJA when the debtor failed to first raise it in the issuing court. The debtor argued that the issuing court, a U.S. Virgin Islands jurisdiction, violated his right to due process by not permitting trial by jury. The Court of Appeals rejected this defense because the debtor failed to raise it in the first court, “and he has not demonstrated that he was in any way prevented from doing so.” The court then held that, “the UEFJA does not permit Defendant to mount a collateral attack on a foreign judgment based on an argument that he could have raised...but instead chose to forego until Plaintiffs sought enforcement of the judgment in North Carolina.” [For further discussion of this case in the broader context of UEFJA, see the SOG blog post at “On the Civil Side” [here](#).]

**Change of venue; court’s own motion**

[\*Zetino-Cruz v. Benitez-Zetino\*](#), COA15-1154 (N.C. App. Aug. 16, 2016). After a district court judge transferred venue of a child custody action to another county on his own motion, the Court of Appeals reversed, finding that the trial court had no authority to change venue in the absence of an objection to venue or motion to change venue filed by a party, and that he had no inherent authority to change venue for what the trial judge called “the convenience of the court”, which is not itself a statutory basis for change of venue. (The Court of Appeals further stated that, “we cannot even determine what this phrase means and we decline plaintiff’s invitation to speculate.”) For further discussion of this case, see the SOG “On the Civil Side” blog post [here](#).

**Rule 70; Rule 58 entry of order; *nunc pro tunc***

[\*Dabbondanza v. Hansley\*](#), COA16-117 (N.C. App. Aug. 16, 2016). After Husband failed to convey Property to Wife pursuant to a 2007 equitable distribution (ED) order, a district court judge in 2008 *orally* directed the clerk of court to convey the Property to Wife pursuant to Rule of Civil Procedure 70. The clerk did so, and the deed was duly recorded in 2009. In 2013, Defendant in the present action obtained

a money judgment against Husband (the 2013 Judgment). In 2015, Wife conveyed the Property to Plaintiffs. Defendant attempted to collect on the 2013 Judgment by executing on the Property, claiming that the 2009 conveyance from Husband to Wife was not valid. Plaintiffs commenced this action to quiet title, which the trial court granted in their favor. The Court of Appeals reversed, holding that the 2009 deed from Husband to Wife was not valid because the district court judge's Rule 70 order had not been "entered" pursuant to Rule 58 (written, signed by the judge, and filed) and thus was not a valid order. Moreover, an attempt by the district court judge in 2014 to enter a written order *nunc pro tunc*, relating back to the 2007 ED order, was not effective to validate the Rule 70 order because the district court judge never signed a *written order* at the time she orally directed the clerk to convey the property. And even if the judge had signed a written order at the time, her order would not be valid because it would prejudice a third party, the Defendant in the current action. For discussion of this case and *nunc pro tunc* orders in civil cases, see the SOG "On the Civil Side" blog post [here](#).

#### **Necessary party; imposition of constructive trust**

[Tanner v. Tanner](#), 789 S.E.2d 888 (N.C. App. Aug. 2, 2016). Vacating an order of the district court imposing a constructive trust over property held by a third party in connection with an equitable distribution action. Because the third party was a necessary party with respect to the constructive trust, and she had not yet been joined as a party to the action, the court had no authority to rule on the merits of the constructive trust motion and the order was invalid.

#### **Statute of limitations; continuing wrong doctrine**

[Acts Retirement-Life Communities, Inc. v. Town of Columbus](#) (COA15-1333; Aug. 2, 2016). Plaintiff instituted this action in 2011 challenging the Town's 2002 decision to reclassify Plaintiff's water meters from commercial to residential, resulting in higher monthly water and sewer charges. The Town moved to dismiss based on expiration of the three-year statute of limitations. The trial court denied the motion but, after conducting a bench trial, ordered relief to Plaintiff only as to the three years preceding the filing of the action. The Court of Appeals reversed, holding that the cause of action accrued at the time of the reclassification in 2002, and that the "continuing wrong doctrine" did not operate to extend that period beyond three years. Although Plaintiff continued to receive bills each month based on the reclassification, this did not constitute "continuing wrongful acts" triggering the doctrine, but was instead merely the "continual ill effects of the...violation." Thus the trial court should have dismissed the action as outside the statute of limitations.

#### **Order compelling disclosure; work-product doctrine and attorney-client privilege; email subject lines**

[Sessions v. Sloane](#), \_ S.E.2d\_ (N.C. App. July 19, 2016). The trial court did not abuse its discretion in compelling corporate defendants to produce a series of communications defendants had argued were protected by the work-product doctrine. Defendants' bare-bones privilege log was insufficient to demonstrate that the communications were prepared in anticipation of litigation. Defendants' decision not to provide the documents to the court for *in camera* inspection in connection with the motion to compel was a "strategic risk" that did not pay off, and the trial court did not abuse its discretion by not ordering an *in camera* inspection in the absence of a request by the parties. In addition, the trial court did not abuse its discretion in ordering defendants to provide the "To, From, Cc, Bcc, and Subject Lines" of various emails. The Court of Appeals held as a matter of first impression that, as with other email content, this introductory information is subject to the five-part test for attorney-client privilege. In this case defendants did not meet their burden under this five-part test to show that the information was protected by attorney-client privilege.

**Affidavits to defeat summary judgment; affiant's personal knowledge**

[\*S. Carolina Telecommunications Grp Holdings v. Miller Pipeline LLC\*](#), 788 S.E.2d 634 (N.C. App. July 5, 2016). Plaintiff telecommunications provider sued a pipeline installer after the pipeline installer (Defendant) struck and damaged Plaintiff's underground fiber optic lines during an excavation. The trial court granted summary judgment in Defendant's favor. Defendant submitted two affidavits of its employees establishing that Defendant had properly notified North Carolina's "One Call" system for preventing underground utility line damage and that, at the time of excavation, there were no line markings indicating the presence of Plaintiff's fiber optic lines. Plaintiff, in response, submitted the affidavit of its VP of legal affairs stating that the fiber optic lines had indeed been marked. The Court of Appeals affirmed summary judgment for Defendant, holding that Plaintiff's affidavit was insufficient to establish a prima facie cause of action. The affidavit merely contained a series of conclusory statements with no indication that they were made on the affiant's personal knowledge as required by Rule 56(e) and the Rules of Evidence.

**Summary judgment; genuine issue created by competing affidavits as to attorney-client relationship**

[\*Jenkins v. Batts\*](#), 788 S.E.2d 628 (N.C. App. July 5, 2016). Plaintiff claimed that Defendant attorney (and his PLLC) agreed to represent him in connection with two injuries he incurred while incarcerated. Defendant never filed an action on his behalf, and the statute of limitations expired. Plaintiff sued defendant for legal malpractice. Defendant moved for summary judgment and submitted affidavits alleging that no attorney-client relationship was ever formed. The trial court granted summary judgment for Defendant. The Court of Appeals reversed, noting that Plaintiff had submitted competing affidavits alleging facts that created a jury question as to whether Defendant had indeed agreed to represent him on a contingency basis.

**Injunction bond; effect of voluntary dismissal after action became moot**

[\*Allen Industries, Inc. v. Kluttz\*](#), 788 S.E.2d 208 (N.C. App. July 5, 2016). After suing defendant for violations of a non-compete covenant, plaintiff obtained a preliminary injunction against her and paid a \$20,000 bond. Defendant appealed the preliminary injunction, but the appeal was ultimately dismissed as moot because the contractual term of the non-compete expired in the meantime. After the case was remanded to the trial court, plaintiff voluntarily dismissed the action. Defendant then moved for damages on the injunction bond arguing that the voluntary dismissal was tantamount to an admission that plaintiff had never been entitled to the injunctive relief. The trial court denied the motion and the Court of Appeals affirmed. The voluntary dismissal alone was not grounds for relief under the injunction bond because the reason for the voluntary dismissal was that, after the non-compete term had expired, there was no longer a basis for maintaining an action. The trial court therefore did not err in finding that plaintiff was not "wrongfully enjoined."

**CONTRACTS**

**Enforcement of note; lost note; enforcement against guarantors**

[\*Emerald Portfolio LLC v. Outer Banks/Kinnakeet Associates, LLC\*](#) (COA16-31; Sept. 6, 2016). Lender made a loan to a limited liability company borrower and individual members of the LLC signed guaranty agreements guaranteeing the debt. Lender subsequently sold the loan to Lender #2. Borrower defaulted. Lender #2 filed complaint alleging the borrower and the guarantors were in default under the terms of the note and sought a judgment against both to recover the unpaid balance of the note. Trial court granted summary judgment in favor of Lender #2. Borrowers appealed. NC Court of Appeals held that Lender #2 did not have a right to enforce the lost note against the borrower LLC as Lender #2 was

not in possession of the note when the loss of possession occurred, which is a requirement of GS 25-3-309. The court noted that North Carolina did not adopt the 2002 amendments to the UCC which provide that a person who acquires ownership from a person entitled to enforce the note when the loss of possession occurred may also enforce the lost, stolen or destroyed note. As a result, such relief was not available to the note purchaser under NC's version of the UCC. The court further held that the guaranty remained enforceable notwithstanding the unenforceability of the note against the borrower and therefore did not serve as a viable defense for the individual guarantors. [Summary provided by SOG faculty member Meredith Smith.]

#### **Contract interpretation; reasonable terms**

[\*Cape Hatteras Elec. Membership Corp. v. Stevenson\*](#) (COA15-1102; Aug. 16, 2016). Defendant landowner was a member of Plaintiff electric cooperative on Cape Hatteras. Each cooperative member was required to grant an easement to the cooperative upon request across his or her land for power lines and other services "with reasonable terms and conditions." In 2013, Plaintiff demanded that Defendant grant a 44-foot-wide easement across her Hatteras Island property for relocation of transmission lines. In exchange for the easement, Plaintiff would pay her \$1.00. She refused to grant the easement, then conveyed a relevant portion of her property to her boyfriend, who was not a member of the cooperative. Plaintiff sued Defendant and her boyfriend for intentional interference with contract, civil conspiracy, and declaratory judgment. The superior court (business court) granted summary judgment against Plaintiff cooperative. The Court of Appeals affirmed, holding that Defendant was under no obligation to convey the easement except upon "reasonable terms and conditions", which consideration in the sum of \$1.00 was not.

#### **Uniform Voidable Transactions Act; "transfer"; statute of repose**

[\*KB Aircraft Acquisition, LLC v. Hansley\*](#) (COA15-823; Aug. 16, 2016). Plaintiff sued Defendant, a loan guarantor, after discovering that Defendant, in default on a \$10 million loan from Plaintiff, had transferred Defendant's biggest asset to an LLC. Plaintiff brought suit under the Uniform Voidable Transactions Act, GS. 39-23.1 *et seq.*, seeking to void the transfer to the LLC and regain its ability to execute on the transferred property. The trial court entered summary judgment in favor of Defendant, and the Court of Appeals affirmed. As matters of first impression, the Court of Appeals held that a "transfer" under the Act refers to the date the transfer was actually made (rather its discovery) and that GS 39-23.4 of the Act operates as a 4-year statute of repose rather than statute of limitations. Because Defendant's transfer of property occurred in 2008, and the action was brought more than four years later, the claim was barred by the statute of repose.

#### **Condition precedent to obligation to pay invoices; assignment of payment obligation**

[\*Caron Assocs., Inc. v. Southside Mfg Corp.\*](#), 788 S.E.2d 610 (N.C. App. July 5, 2016). Plaintiff "Purchaser" contracted with "Cabinet Maker" to construct cabinets, and the agreement specified that no payment would be due until the cabinets were delivered. Cabinet Maker nevertheless sent periodic invoices, which Purchaser declined to pay. Meanwhile, Cabinet Maker sold its accounts receivable to Crown Financial ("Crown"), which attempted to collect the existing invoices from Purchaser and had Purchaser sign a document agreeing not to assert defenses against the debt. Cabinet Maker never delivered the cabinets. Purchaser soon sued Cabinet Maker for breach and brought a declaratory judgment action against Crown. Crown counterclaimed for payment of the invoices. The trial court granted summary judgment in favor of Purchaser. The Court of Appeals affirmed, holding that the contract between Purchaser and Cabinet Maker required no payment until the cabinets were delivered; without delivery, the condition precedent to Purchaser's obligation to pay had not been met. There was, therefore, no debt for Crown to collect.

## TORTS

### **Fiduciary duty between auditor and client**

[\*Commscope Credit Union v. Butler & Burke, LLP\*](#) (N.C. No. 5PA15; Sept. 23, 2016). After an auditor allegedly failed to discover that Plaintiff's General Manager had not filed tax returns for eight years, resulting in IRS penalties to Plaintiff of \$374,200, Plaintiff sued the auditor for breach of contract, negligence, breach of fiduciary duty, and professional malpractice. The auditor moved to dismiss all claims after alleging the defenses of contributory negligence and *in pari delicto*. The trial court dismissed all claims pursuant to Rule 12(b)(6). The Court of Appeals reversed, finding that the trial court erred in determining that the auditor did not, as a matter of law, have a fiduciary duty to Plaintiff. The Court of Appeals also determined the affirmative defenses could not be established as a matter of law at the pleadings stage.

The Supreme Court reversed the Court of Appeals in part. The court determined that an auditor's obligations to third parties prevents a determination that a fiduciary relationship arises as a matter of law between an auditor and its client. And here, where the auditor's duties to Plaintiff extended no further than normal independent auditing services performed pursuant to AICPA standards, no fiduciary duty arose on the specific facts of the case. Thus the trial court was correct to dismiss the fiduciary duty claim. The Supreme Court went on to affirm the Court of Appeals' opinion as to the effect of the affirmative defenses on the remaining claims, but did so with an evenly divided panel; thus that part of the Court of Appeals opinion stands without precedential value.

### **Uniform Voidable Transactions Act; "transfer"; statute of repose**

[\*KB Aircraft Acquisition, LLC v. Hansley\*](#) (COA15-823; Aug. 16, 2016). Plaintiff sued Defendant, a loan guarantor, after discovering that Defendant, in default on a \$10 million loan from Plaintiff, had transferred Defendant's biggest asset to an LLC. Plaintiff brought suit under the Uniform Voidable Transactions Act, GS. 39-23.1 *et seq.*, seeking to void the transfer to the LLC and regain its ability to execute on the transferred property. The trial court entered summary judgment in favor of Defendant, and the Court of Appeals affirmed. As matters of first impression, the Court of Appeals held that a "transfer" under the Act refers to the date the transfer was actually made (rather its discovery) and that GS 39-23.4 of the Act operates as a 4-year statute of repose rather than statute of limitations. Because Defendant's transfer of property occurred in 2008, and the action was brought more than four years later, the claim was barred by the statute of repose.

### **Abuse and harassment of neighbor; various tort theories; IIED; statutes of limitation and tolling for federal action**

[\*Radcliffe v. Avenel Homeowners Ass'n, Inc.\*](#), 789 S.E.2d 893 (N.C. App. Aug. 2, 2016). Plaintiff alleged a long pattern of verbal and physical attacks by several of her neighbors allegedly designed to run her out of the neighborhood and prevent her prospective employment with a nearby church. Plaintiff filed suit alleging various torts and violation of her civil rights under Chapter 99D. The trial court ultimately dismissed a number of her claims, and the Court of Appeals reversed in part. In a lengthy opinion addressing the many issues raised, the court disposed of the issues as follows: (1) The statutes of limitations on Plaintiff's claims were tolled during the pendency of her prior federal action to the extent those claims were raised in the federal case, and only for claims based on acts that occurred after March 2004 (in accordance with the three-year statute of limitations); (2) collateral estoppel based on prior rulings of the federal court on the same issues barred her Chapter 99D claim; (3) Plaintiff stated sufficient facts to support her intentional infliction of emotional distress based on the alleged "systemic pattern of harassment, intimidation, and abuse" (when the facts were considered together); (4) the limitations period on her one remaining assault claim was not tolled during the pendency of the federal



action because she did not assert it in federal court; (5) a portion of her claims for tortious interference with prospective economic advantage were properly dismissed for failure to allege sufficient facts, and a portion were improperly dismissed; (6) her negligent infliction of emotional distress claims were properly dismissed because all of her allegations centered on intentional conduct; and (7) the asserted claims were for individual harm to Plaintiff, so the trial court was not required to dismiss all her claims for failure to join as a necessary party a trust that was the record owner of her property.

#### **Shareholder action against third party; special duty; distinct injury**

[\*Raymond James Capital Partners, LP v. Hayes\*](#), 789 S.E.2d 695 (N.C. App. Aug. 2, 2016). Plaintiff, majority shareholder in a close company, brought an individual action against minority shareholder after discovering that she had misappropriated corporate funds for her own use. The trial court dismissed the action and the Court of Appeals affirmed, holding that Plaintiff could not maintain an individual action against Defendant because Plaintiff failed to establish that Defendant owed any special duty to Plaintiff or that Plaintiff suffered any injury separate and distinct from the injury suffered by the corporation.

#### **Medical malpractice; proximate causation**

[\*Seraj v. Duberman\*](#), 789 S.E.2d 551 (N.C. App. Aug. 2, 2016). After beginning surgery under local anesthesia to remove what he thought was a lipoma from Plaintiff's arm, Defendant surgeon determined that the mass was more complicated than anticipated and rescheduled the surgery for a later date. In the second surgery, Defendant ended the surgery without being able to completely remove the mass. Plaintiff immediately experienced pain and multiple complications with her arm and ultimately lost the use of her right hand. Eventually other physicians identified the mass as a "Masson's tumor", and another surgeon was able to remove the rest of it, but not before Plaintiff sustained permanent loss of function. Plaintiff brought a medical malpractice action against Defendant, alleging he breached the standard of care by failing to conduct any tests or imaging to determine the nature of the mass (and his own qualifications to remove it) before conducting the second surgery. The trial court granted summary judgment in favor of Defendant after determining that Plaintiff had failed to forecast evidence that any breach of the standard of care was a proximate cause of her injury. Reversing the summary judgment order, the Court of Appeals examined the depositions and determined that Plaintiff's expert and a treating physician both provided testimony that created a genuine issue of material fact about whether Defendant could have prevented Plaintiff's harm by conducting additional tests prior to attempting the second surgery.

#### **Corporations and bankruptcy; standing of creditors to sue third parties; statutes of limitations**

[\*Newton v. Barth\*](#), [\*Diorio Forest Products, Inc. v. Barth\*](#), 788 S.E.2d 653 (N.C. App. July 19, 2016). A class of customers, vendors, and suppliers of a now-bankrupt corporation sued the corporation's former president and his father alleging fraud, unfair trade practices, and civil conspiracy. The trial court dismissed their claims for lack of subject matter jurisdiction and based on the expiration of applicable statutes of limitations. The Court of Appeals reversed. Because Plaintiffs' allegations against the individual defendants related to harm to the plaintiffs themselves, they were separate and distinct from any injury to the corporation, and thus the claims did not belong exclusively to the corporation's bankruptcy trustee. In addition, the claims did not accrue at the time the corporation closed its doors in 2008, but instead when the defendants' alleged fraudulent scheme became discoverable in 2012. Thus the claims were filed within the applicable three- and four-year statutes of limitations.

#### **Legal malpractice**

[\*Hampton v. Scales\*](#), 789 S.E.2d 478 (N.C. App. July 5, 2016). After Plaintiff was charged with multiple counts of second-degree rape after having been accused of having sex with a mentally disabled

teenager, he urgently requested his court-appointed counsel to negotiate a plea that would get him released from prison and back with his family as soon as possible. The attorney (Defendant) negotiated a plea down to one charge and Plaintiff was released on probation. (Later Plaintiff's plea was set aside and all charges were dropped after the accuser admitted to having made a false statement.) Plaintiff sued Defendant for legal malpractice alleging that he did not meet his duty to diligently investigate the case before negotiating the plea. The trial court granted summary judgment in favor of Defendant, and the Court of Appeals affirmed. Defendant's evidence established that he did not breach his duty of care and diligence, particularly in light of his client's strong preference for a plea bargain, and Plaintiff failed to make a prima facie showing that Defendant breached the standard of care, including any obligation to hire an expert or private investigator or to carefully review the videotape of the accuser's interview with nurses. In addition, Plaintiff made no forecast of evidence that he was damaged by any alleged breach of the standard of care by Defendant.

## **EMPLOYMENT and ADMINISTRATIVE APPEALS**

### **Constitutional claims; lack of controversy; AOC authority over magistrates**

[\*Breedlove v. Warren\*](#) (COA15-1381; Sept. 20, 2016). In 2014, the Administrative Office of the Courts (AOC) issued a memorandum interpreting recent federal cases to require NC magistrates to conduct marriages for same-sex couples. After being refused accommodations on grounds that conducting such marriages violated their religious beliefs, plaintiffs resigned their positions as magistrates. Soon thereafter they brought this action against the AOC and its then-director (later substituted as a party by the current director) alleging violations of constitutional rights and seeking a declaratory judgment. The trial court dismissed the action under 12(b)(6) for failure to state a claim. The Court of Appeals affirmed on the basis that plaintiff failed to state any case or controversy against the AOC, which lacks any "actual authority to sanction, suspend, or remove plaintiffs." The court further noted that plaintiffs failed to "demonstrate an injury that defendants were capable of inflicting upon plaintiffs, and by extension fail[ed] to show that such an injury could be redressed."

### **Equal protection; arbitrary promotion process**

[\*Tully v. City of Wilmington\*](#) (COA15-956; Aug. 16, 2016) (with dissent). After a decorated police officer took a required exam as part of his application for promotion to sergeant, he was informed that he had failed the exam, rendering him unable to further advance. After discovering that several of the purportedly "correct" answers were in fact incorrect and had been based on outdated law (particularly as to search and seizure), he filed a grievance which ultimately led to this action in superior court alleging violations of equal protection and "fruits of their own labor" clauses of the State constitution. The trial court granted judgment on the pleadings in favor of the City. The Court of Appeals reversed, holding that Plaintiff had adequately pled an equal protection claim based on the City's alleged failure to provide a non-arbitrary and non-capricious promotional process and failure to follow its own grievance process with respect to promotion. (The dissenting judge disagreed that such facts constituted a cognizable constitutional claim against an employer, but urged the Supreme Court to address the issue in light of prior decisions mandating that the "N.C. Constitution be liberally construed, particularly those provisions which safeguard individual liberties.").

### **Whistleblower Act**

[\*Hubbard v. NCSU\*](#), 789 S.E.2d 915 (N.C. App. Aug. 2, 2016). A university departmental development director's (Plaintiff's) employment was terminated in 2014. Alleging that she had been terminated because she had reported alleged misconduct of her supervisor in 2013, Plaintiff brought an action



stating claims for wrongful termination in violation of public policy (Whistleblower Act), tortious interference with contract (against the supervisor), and a direct constitutional claim. The trial court granted summary judgment in Defendants' favor, and the Court of Appeals affirmed. After Plaintiff stated a prima facie case of wrongful termination, the University presented copious evidence that Plaintiff's work quality and performance had been under review for up to 18 months prior to her accusations against her supervisor and that her termination was as a result of her failure to improve. Plaintiff was unable to demonstrate, thereafter, that the University's stated reasons for her termination were pretextual. As to her tortious interference claim, because of the evidence of her performance issues, she was unable to show that her supervisor's only motive for her termination was malice. And, finally, her direct constitutional claim failed because her claim under the Whistleblower Act was an adequate state law remedy.

#### **Employee benefits; special separation allowance; creditable service**

[Lovin v. Cherokee County](#) (COA15-1350; Aug. 2, 2016). Reversing the trial court's determination that a retired sheriff was entitled to a "special separation allowance" based on 36 years of creditable service as part of both the TSERS and LGERS retirement systems. Because he was not a member of TSERS at the time of his retirement (but instead had become a beneficiary), he was not entitled to receive credit for his years of service as part of that retirement system. His special separation allowance should instead have been based on his 12 years of creditable service as a member of LGERS, of which he was a member at the time of retirement.

#### **Magistrate salaries; vested contractual rights**

[Adams v. State of North Carolina](#) (COA15-1275; Aug. 2, 2016). Plaintiffs, a group of North Carolina magistrates, brought an action against the State alleging breach of contract and various constitutional violations based on the General Assembly's suspension (during various recent fiscal years) of magistrates' statutory future stepwise salary increases. The trial court dismissed the action and the Court of Appeals affirmed, holding that the statutory future pay schedule for magistrates did not create a contractual vested right to pay increases for work not already performed, and the General Assembly was free to suspend the operation of the future increases pursuant to its legislative power. Because the contractual claim failed, the Constitutional claims likewise were properly dismissed.

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

#### **Impact fees; municipal authority**

[Quality Built Homes Inc. v. Town of Carthage](#) (NC No. 315PA15, Aug. 19, 2016). Reversing the decision of the Court of Appeals which affirmed the trial court's grant of summary judgment in favor of the Town. The Supreme Court determined that the Town exceeded its authority under GS 160-311 to -338 by imposing water and sewer impact fees as a condition of issuance of building permits for development of real property. For discussion of this case in broader context, see the SOG "Coates Canons" blog post [here](#).

#### **Easement; "recovery of real property"; statute of limitations**

[Duke Energy Carolinas v. Gray](#) (NC No. 108PA14-2; Aug. 19, 2016). Reversing the opinion of the Court of Appeals ([here](#)) regarding the statute of limitations applicable to Duke Energy's claims for removal of Defendant's encroachment on a utility easement. The Court of Appeals held that Duke Energy's 2012 claims were barred by the six-year statute of limitations on claims for "injury to any incorporeal hereditament" in GS 1-50(a)(3), and that this statute of limitations began to accrue at the time the

encroachment began, regardless of when Duke Energy knew or should have known about it. The Supreme Court instead interpreted Duke Energy's claim for encroachment on an easement as "an action for the recovery or possession of real property," and thus held that it was subject to the much longer 20-year statute of limitations in GS 1-40. Because that limitations period had not yet run, the trial court erred in granting summary judgment against Duke Energy.

### **Condemnation**

[\*NCDOT v. Mission Battleground Park\*](#) (COA16-125; Sept. 6, 2016). A landowner appealed a jury determination of its compensation for a DOT condemnation, arguing that several rulings by the trial judge entitled it to a new trial. Finding no error, the Court of Appeals affirmed, stating that (1) pursuant to GS 93-83, the judge properly excluded testimony by a real estate broker that could be construed as a valuation appraisal; (2) the judge was not required to conduct *voir dire* of excluded testimony where the record showed the judge had ample opportunity to review the evidence in question prior to ruling; (3) the judge did not abuse his discretion in excluding a sound demonstration after conducting a balancing test under Rule of Evidence 403; and (4) the trial judge did not abuse his discretion in denying a motion for new trial after reviewing evidence of a juror's prior knowledge of DOT's construction plans and concluding it would not have prejudiced the jury's decision; and (5) the trial court properly instructed the jury about the effect on damages of DOT's acquisition of adjoining lands.

### **Removal of "abandoned" cemetery; persons with legal right to cemetery on land of another**

[\*King v. Pender County\*](#) (COA16-51; Aug. 16, 2016). After Defendant landowners were granted consent of the County commissioners to disinter and reinter "abandoned" graves located on their property, Plaintiffs, members of the King family whose ancestors were buried in the graves, brought a declaratory judgment action seeking review of the County's decision. The trial court found in favor of Plaintiffs, but the Court of Appeals (in an earlier appeal) remanded for specific findings of whether the graves had been "abandoned" pursuant to G.S. 65-106. In the present action, the trial court declared that Plaintiffs qualified under Chapter 65 as "persons with legal right" to the King family cemetery and that the graves had not been abandoned by Plaintiffs.

### **Enforcement of property right in parking space; laches; quasi-estoppel; statute of limitations for incorporeal hereditament**

[\*Ocracomax, LLC v. Davis\*](#), 788 S.E.2d 664 (N.C. App. Aug. 2, 2016). A condo owner sued his neighbor because the neighbor's maintenance of a shed on the adjacent space interfered with Plaintiff's right to a full parking space. The trial court granted Plaintiff's motion for judgment on the pleadings declaring Plaintiff's right to the full parking space. The Court of Appeals affirmed, holding that Plaintiff did not waive his right to enforce his property right by not asserting it as soon as he knew of the shed; was not barred by a doctrine of quasi-estoppel because he did not receive a benefit under the purchase agreement for the property; had standing to bring the action by the terms of the bylaws; was not barred by the doctrine of laches because Defendant had suffered no prejudice; and brought his action within the applicable 6-year statute of limitations (GS 1-50(a)(3)) by filing suit less than six years prior to his purchase of the property.

### **Special use permit; standard of review; radio tower**

[\*Davidson Cty Broadcasting Co. Inc. v. Edwards\*](#), \_ S.E.2d \_ (N.C. App. July 19, 2016). Affirming the trial court's determination (after the trial court's *de novo* review) that the County properly denied a special use permit for construction of a 1,130-foot radio tower in a residential agricultural district.

### **Special use permit; burden of proof of petitioner before County board**

[Dellinger v. Lincoln County](#), 789 S.E.2d 21 (N.C. App. July 19, 2016). Reversing in part the trial court's order affirming County's denial of petitioners' application for a special use permit to construct a solar farm, holding that petitioner did in fact meet its burden to present a prima facie case of entitlement to the permit, and that the county had held petitioners to an improper burden of proof ("beyond a doubt") and failed to shift the burden of proof to respondents to oppose the petition. Affirming the trial court's ruling rejecting the argument that one of the county commissioners should not have been allowed to vote because he was not on the board during an earlier hearing on the same matter.

## **FORECLOSURES**

### **Foreclosure sale; federal tax liens**

[Henkel v. Triangle Homes, Inc.](#) (COA15-1123; Sept. 20, 2016). The Court of Appeals held that a deed to real property obtained at a foreclosure sale without notice to the United States does not extinguish a federal tax lien on the property. The court noted that the general rule that federal tax liens are inferior to local tax liens applies only when the United States is provided prior notice of a foreclosure sale arising from a local tax liability. A senior lienholder foreclosing on a property subject to a federal tax lien must provide the United States notice prior to the foreclosure sale in order to extinguish the lien. If no notice is provided to the United States, then the federal tax lien remains undisturbed by the foreclosure.

### **Power of Sale Foreclosure**

[In re Foreclosure of Cain](#) (COA15-591; July 5, 2016).

**Role of the Substitute Trustee.** Trustee filed power of sale foreclosure, the clerk entered an order authorizing sale, and the debtor appealed. After the hearing before the clerk, but before the appeal hearing in superior court, the trustee was removed and replaced with a new trustee. The former trustee appeared at the superior court hearing as counsel for the lender. Debtor objected to former trustee appearing as lender's counsel, the superior court overruled the objection, and entered the order authorizing sale. The debtor argued on appeal that the superior court erred in allowing the former trustee to appear on behalf of the lender because the change in representation constituted a breach of the trustee's fiduciary duty. The NC Court of Appeals affirmed the superior court. The court noted the trustee has a fiduciary duty to both the debtor and the lender and must maintain the strictest impartiality while serving in the role as trustee. However, the court held that the former trustee was not precluded from withdrawing as trustee and later appearing as lender's counsel, particularly where the former trustee gave notice to the debtor of the change in representation and there was no evidence that (i) the trustee acted in bad faith or (ii) the debtor was injured by the trustee's actions. In addition, the court found no evidence of an ethical violation by the attorney/trustee based on a review of NC State Bar ethics opinions and a determination that the change in representation did not create an unfair advantage in favor of the lender.

**Evidence; Business Records Exception.** The debtor also objected to the admission of records into evidence by the superior court related to the debtor's loan account. The superior court overruled the debtor and the debtor appealed. The NC Court of Appeals affirmed the superior court and held the records were properly admitted under the business records exception to the hearsay rule. The court found that the "authorized signor" of the lender's affidavit of indebtedness constituted a qualified witness with personal knowledge able to authenticate the records through the affidavit. The court found that the records were properly authenticated based on statements in the affidavit that (i) the records were made and kept in the regular course of business by persons having knowledge of the information set forth at or near the time of the acts recorded, (ii) the signor had reviewed the records, and (iii) the signor had personal

knowledge as to how the records were kept and maintained. The court noted that there is no requirement that the records be authenticated by the person who made them.

**Evidence; Hearsay.** The debtor also objected to the admission of certain statements in the lender's affidavit of indebtedness into evidence as hearsay. The superior court overruled the objection and the debtor appealed on this basis as well. The NC Court of Appeals affirmed the superior court and held that the court properly considered the affidavit as competent evidence given (i) the specific provision in G.S. 45-21.16(d) allowing the court to consider affidavits and certified copies of documents and (ii) the necessity for expeditious procedure in a power of sale foreclosure. The court found that the debtor provided no reason to require the lender's out-of-state employee to appear at the foreclosure hearing and present live witness testimony. The court also noted that any legal conclusions contained in the affidavit, such as statements that the lender is the holder of the loan, are to be disregarded by the court, but do not otherwise invalidate the affidavit as evidence. [Summary provided by SOG faculty member Meredith Smith.]

## **WILLS, ESTATES, TRUSTS, and INCOMPETENCY**

### **Right to appeal dismissal of incompetency proceeding**

[\*In re Dippel\*](#) (COA16-54; Issued October 4, 2016 (opinion lists date of Sept. 20, 2016)). Petitioner filed incompetency proceeding against his father, the respondent. The assistant clerk of court found there was not clear, cogent, and convincing evidence of the respondent's incompetency and entered an order dismissing the proceeding. The petitioner appealed the clerk's order. The superior court held that the petitioner lacked standing to appeal the order of the clerk as GS 35A-1115 did not provide a right of appeal from an order dismissing an incompetency proceeding. The NC Court of Appeals, applying GS 35A-1115 and GS 1-301.2, reversed the order of the superior court and held that an aggrieved party has the right to appeal from the clerk's order dismissing an incompetency proceeding. In this case, the court determined that the petitioner was an aggrieved party and could appeal from the clerks' order. However, the court did not provide any analysis as to how the petitioner is aggrieved by the clerk's order dismissing the incompetency proceeding against the respondent. [Summary provided by SOG faculty member Meredith Smith.]

### **Resulting trust**

[\*Tuwamo v. Tuwamo\*](#), \_ S.E.2d \_ (N.C. App. July 19, 2016). After discovering that the house in which she had lived since 1997, and for which her husband had made all mortgage payments, was in fact legally owned by her brother-in-law, plaintiff brought an action against the brother-in-law on a resulting trust theory. Upon hearing cross-motions for summary judgment (including defendant's request for a dismissal of the complaint), the trial court denied both summary judgment motions but dismissed the complaint. After discussing the odd procedural posture of the case, the Court of Appeals affirmed the trial court's dismissal, concluding that the forecast of the evidence demonstrated that plaintiff could not support a resulting trust claim because she failed to show that she had given any consideration before or at the same time the trust was created.

### **Taxation of out-of-state *inter vivos* trust; minimum contacts and due process**

[\*The Kimberley Rice Kaestner 1992 Family Trust v. North Carolina Dept of Revenue\*](#), 789 S.E.2d 645 (N.C. App. July 5, 2016), *temp. stay allowed*, 789 S.E.2d 639 (N.C. July 25, 2016). Affirming the trial court's order granting summary judgment in favor of an out-of-state *inter vivos* trust. The trial court correctly concluded that the Department's assessment of \$1.3 million of income taxes from 2005 to 2008 against

the trust pursuant to GS 105-160.2, based solely on the fact that a beneficiary resided in North Carolina, violated the Due Process Clause of the United States Constitution.

#### **Estate proceedings to ascertain heirs or devisees**

[\*In re Estate of Peacock\*](#) (COA15-1238; June 21, 2016). Richard and Bernadine married, had three children, divorced, and later reconciled in the last years before Richard's death. The day before Richard's death, while he was in the hospital, a reverend performed a marriage ceremony between Richard and Bernadine. Richard died intestate and their daughter applied for letters of administration and did not identify Bernadine as an heir. A proceeding was filed before the clerk to determine whether the marriage in the hospital was valid and thus entitled Bernadine to inherit and otherwise share in the estate. The clerk entered an order that Bernadine was not an heir because the hospital ceremony was conducted without a marriage license and therefore did not result in a valid marriage. The petitioner appealed to superior court who affirmed the order of the clerk. On appeal, the NC Court of Appeals reversed and held that, while it is a Class 1 misdemeanor for a minister or other authorized person to conduct a marriage ceremony without first receiving a license, the absence of a valid marriage license does not invalidate a marriage performed in accordance with the requirements of G.S. 51-1. As a result, Bernadine was entitled to all rights of a spouse of an intestate decedent. [Summary provided by SOG faculty member Meredith Smith.]

#### **Special Needs Trust; Removal of the Trustee / Guardianship; Removal of Guardian of the Estate**

[\*In re Estate of Skinner\*](#) (COA15-384; June 21, 2016) (with dissent). Clerk of superior court entered an order removing husband as trustee of wife's special needs trust (SNT) and as guardian of her estate (GOE). Husband appealed and superior court affirmed the clerk's order. The NC Court of Appeals reversed, finding that the clerk abused his discretion in removing husband as trustee and GOE because the findings of fact in the order were not supported by the evidence and certain conclusions of law were legally erroneous. This included the following:

1. *Future Medical Expenses.* The court examined the purpose of self-settled SNTs under U.S.C. 1396p(d)(4)(A) along with the language of the trust and found that the trust assets were not intended for future medical needs of the beneficiary. Thus, the court determined that the clerk erred in concluding that the trust was established for the payment of future medical expenses.
2. *Prepaid Burial Expenses.* In the clerk's order, the clerk held the trust language precluded the trustee from expending trust assets on funeral expenses. The court held that the clerk erred in this conclusion because neither the trust language nor regulations related to SNTs bar the use of trust funds for a prepaid burial insurance policy, which is what the trustee purchased during the beneficiary's lifetime.
3. *Purchases of House, Furniture, and Appliances.* The clerk's order stated that the trust language precluded the trustee from using trust assets to purchase a house, furniture, and appliances. The court disagreed and held that the definition of "special needs" in the trust included needs not otherwise covered. Therefore, the court held the clerk erred in determining that the trust assets could not be used to make such purchases.
4. *"Sole Benefit."* The court held that the clerk's interpretation of "sole benefit" constituted legal error. The clerk found that the trust assets were not used for the sole benefit of the beneficiary because the trustee lived in the house and used the furniture and appliances. The court stated that the clerk's interpretation that no one else could use the house, furniture, and appliances would create an absurd result forcing the wife to live alone or charge her husband rent. The court established the "sole benefit" rule to determine whether a (d)(4)(a) SNT is established and being administered for the sole benefit of a disabled adult trust is:
  - a. The trust must have no primary beneficiaries other than the disabled person;

- b. The trust may not be used to effectuate uncompensated or sham transfers;
  - c. The trust must be one that the trustee does not have a duty to balance the fiduciary benefit to the beneficiary with a duty to ensure that funds remain for creditors; and
  - d. The financial and legal benefit of any investment must remain with the trust.
5. *The Trustee's purchases constituted waste and mismanagement.* The court held that the record did not support the clerk's finding that the trustee's use of trust assets constituted waste or mismanagement. The court noted that the evidence tended to show the opposite – the house is handicapped accessible, titled in the name of the trust, and purchased at an amount that was less than appraised value. Further, the only testimony at the hearing was that of the trustee and the court noted that “arguments of counsel are not evidence.”
6. *The Trustee committed a serious breach of trust.* The court held the clerk's finding that the use of trust assets by the trustee to pay attorneys' fees constituted a serious breach of trust necessitating removal of the trustee was not supported by the evidence. The fees related to research about whether the trustee could marry the beneficiary and the institution of guardianship proceedings, both which occurred before the trust was established. The court referred to GS 36C-7-706, which states that not every breach of trust justifies removal of a trustee and the breach must be serious. The court did not find evidence in the record to support a conclusion that the trustee committed a serious breach of trust where the trustee testified that he believed he could use the funds for such fees and that he agreed to repay the trust for them.

*Dissent:* The dissent was entered based on the opinion that majority reweighed the evidence and disregarded the deferential standard of review on appeal from the clerk. The dissenting opinion states that dissent applies to all holdings of the majority listed above except the holding related to burial expenses. [Summary provided by SOG faculty member Meredith Smith.]

## **PUBLIC RECORDS**

### **Public Records Act; court records**

[\*Brooksby v. NC Admin Office of the Courts, COA15-1397 \(Aug. 2, 2016\)\*](#). The clerk of superior court denied a request from a real estate company for all foreclosure records from 2010 to present. Subsequently, the company made a written request to the clerk to come to the clerk's office on specific dates and use the company's staff and scanning equipment to copy the documents. The clerk denied the written request and through counsel advised that the clerk did not have sufficient staff to supervise such an operation and proposed instead to provide 15 to 20 records to the company per week. In response, the company filed a complaint alleging that the clerk denied the company access to public records and violated the Public Records Act. After a mediated settlement conference, the parties agreed to obtain five records at a time and use a handheld scanner approved by the sheriff. Subsequently, the company requested 15 or more records at a time, which the clerk denied. As a result, the clerk moved for summary judgment in the underlying action and the court granted summary judgment in favor of the clerk. The company appealed. The court of appeals affirmed the decision of the trial court. The court held that the clerk did not unreasonably restrict the company's access to public records and the company failed to show that access to or copies of the public records were denied. The evidence showed only that the company was not allowed access on the explicit terms the company requested. The court found that the clerk, given the limitation of the clerk's office and the availability of employees, made reasonable accommodations to allow the company access to the documents. When examining a records request, the court noted that the clerk should balance the nature of the request against (i) the need to maintain the integrity of the records, (ii) fiscal responsibility in maintaining the records, (iii) the duty to the public, (iv) the protection of public resources, and (v) the



exigency of the public's need for information. [Summary provided by SOG faculty member Meredith Smith.]

## **LICENSING BOARD APPEALS**

### **Licensing board; scope of authority to discipline licensee**

[\*Winkler v. State Board of Examiners of Plumbing, Heating and Fire Sprinklers Contractors\*](#) (COA15-1257; Sept. 20, 2016). This case arises out of the tragic death of three hotel guests who were poisoned by carbon monoxide after faulty installation, repair, and maintenance of a pool heater, but the issues in the case deal only with a licensing agency's authority to discipline one of the technicians involved. The Court of Appeals reversed the superior court's decision to affirm an order of the Board of Examiners revoking Petitioner's HVAC license. The Board did not have statutory authority under GS 87-21 to discipline a licensee for "minor repairs or minor replacements" to an already-installed heating system. Because the Board's order was based on actions that fell within the definition of "minor repairs or minor replacements," the order of the Board was invalid. Remanded for consideration only of those actions of Petitioner that fell within the range of activities over which the Board had disciplinary authority, namely Petitioner's planned installation of a new HVAC system.

### **Revocation of surveying license**

[\*Herron v. North Carolina Board of Examiners for Engineers and Surveyors\*](#), \_ S.E.2d \_ (N.C. App. July 5, 2016). Reversing and remanding the decision of the trial court that reversed an order of the Board revoking Petitioner's land surveying license. The Court of Appeals disagreed with the trial court that the Board's procedure for revocation violated Petitioner's due process rights. [See case for additional detail].

