

ABUSE OF PROCESS

Civil action - temporary restraining order - motion in the cause - criminal action - information for arrest warrant - The trial court erred by dismissing plaintiff wife's claim for abuse of process in the civil action because plaintiff properly alleged that defendant husband's attorney did not obtain a temporary restraining order or file a motion in the cause for regular and legitimate functions, but instead provided knowingly false information to the trial court in order to use these processes to gain an advantage over plaintiff in a collateral matter. However, the trial court did not err by dismissing plaintiff wife's claim for abuse of process in the criminal action because the attorney's actions in providing information and assistance to execute the arrest warrant against plaintiff after it had been issued did not constitute an improper act. **Chidnese v. Chidnese,**

APPEAL AND ERROR

Appealability - failure to give notice of appeal from judgment - The Court of Appeals dismissed defendant's appeal in a felonious breaking or entering, felonious larceny, felonious possession of stolen goods, and misdemeanor larceny case based on lack of jurisdiction caused by defendant's failure to note an appeal from the trial court's judgment as required by N.C. R. App. P. 4. **State v. Hughes,**

Interlocutory order - prior action pending - compulsory counterclaim - immediately appealable - Defendants' appeal from the trial court's interlocutory order denying their motion to dismiss in a wrongful termination case was considered by the Court of Appeals. The refusal to abate an action on grounds of a prior action pending and the denial of a motion to dismiss pursuant to Rule 13(a) relating to compulsory counterclaims were immediately appealable. **Townsend v. Shook,**

Interlocutory orders - Rule 54(b) certification - Although plaintiff wife appealed from the trial court's interlocutory order dismissing plaintiff's claims only against defendant husband's attorney, the order included an N.C.G.S. § 1A-1, Rule 54(b) certification that there was no just reason to delay plaintiff's appeal. **Chidnese v. Chidnese,**

Mootness - child visitation - child reaching majority - A child visitation issue was not addressed where the child had reached majority and was no longer subject to any visitation agreement between his parents. **Robinson v. Robinson,**

Preservation of issues - imposition of restitution - no objection

required – Defendant did not fail to preserve for appellate review the issue of whether the State failed to present evidence to support the amounts of restitution ordered in an assault with a deadly weapon inflicting serious injury case. No objection was required to preserve for appellate review issues concerning the imposition of restitution. **State v. Smith,**

Sentencing - issues not addresses - new trial – The Court of Appeals declined to address defendant's arguments with respect to his criminal sentence in a sexual offense with a child and statutory rape case where defendant was given a new trial. **State v. Towe,**

ASSAULT

Deadly weapon inflicting serious injury - lesser-included offense - peremptory instruction - no error – The trial court did not commit plain error in an assault with a deadly weapon inflicting serious injury case by failing to instruct the jury on the lesser-included offense of assault with a deadly weapon. The trial court's peremptory instruction to the jury that the victim's injuries were serious was correct. **State v. Smith,**

Deadly weapon inflicting serious injury - peremptory instruction - serious injury - no error – The trial court did not commit error or plain error in an assault with a deadly weapon inflicting serious injury case by giving a peremptory instruction to the jury that multiple gunshot wounds in the upper body constituted a serious injury. The victim required emergency surgery, was left with scars on his chest, shoulder, back, and neck, and testified that a bullet remained in his neck and that it caused him continuing pain. **State v. Smith,**

ATTORNEY FEES

Combined domestic action - fees not allocated - underlying issues unresolved - remanded – An award of attorney fees in a combined action for equitable distribution, alimony, and child support was vacated and remanded where there were no findings attributing the fees to the underlying actions (attorney fees are not recoverable in equitable distribution actions), and underlying issues involving child support were remanded for further action. **Robinson v. Robinson,**

CHILD ABUSE, DEPENDENCY, AND NEGLECT

Permanency planning - findings of fact - custody with father - termination of juvenile court jurisdiction - no further presentation of evidence – The trial court erred on remand in a permanency planning

proceeding by failing to follow the Court of Appeal's mandate to make findings of fact addressing the factors set out in N.C.G.S. § 7B-907(b). The statute was applicable even though the juvenile was placed in his biological father's home because the juvenile was not returned to the home from which he was removed. The trial court was ordered to make appropriate findings of fact if it found that termination of the juvenile court's jurisdiction was proper. Further, the trial court did not err in refusing to allow respondent to present evidence after remand as the matter was within the discretion of the trial court. **In re J.M.D.,**

CHILD CUSTODY AND SUPPORT

Plaintiff's income - finding supported by evidence - There was no merit in a child support action to plaintiff's challenge to a finding concerning his income where the finding was supported by the evidence. The court had before it plaintiff's tax filing, his company's profit and loss statement, and defendant's testimony. **Robinson v. Robinson,**

Retroactive - actual expenditures - findings required - An order of retroactive child support was reversed and remanded where it contained no findings as to the actual expenditures made for the benefit of the minor children during the relevant time. **Robinson v. Robinson,**

CIVIL PROCEDURE

Motion for partial summary judgment - proper legal standard - The trial court did not apply an incorrect legal standard when ruling on defendants' motion for partial summary judgment. While the trial court did not specifically state that defendants had first met their burden to show the lack of a triable issue of fact, it was implicit in the trial court's statement that it heard the arguments of counsel and then considered plaintiff's forecast of evidence. **George v. Greyhound Lines, Inc.,**

CONSTITUTIONAL LAW

Due process - motion for new trial - failure to give notice of hearing - The trial court's order in a summary ejection case was reversed and remanded for further proceedings because defendants' due process rights were violated when they did not receive notice of the hearing on their motion for a new trial. **Otto v. Certo,**

Effective assistance of counsel - counsel's performance not deficient - Defendant in a first-degree kidnapping case did not receive ineffective assistance of counsel during the trial. Defense counsel's performance was

not deficient and although the trial court's kidnapping instruction was erroneous, the error was not prejudicial. **State v. Boozer,**

Effective assistance of counsel - no different result - Defendant's trial counsel in an assault with a deadly weapon inflicting serious injury case did not provide ineffective assistance of counsel. Even assuming *arguendo* that defendant's counsel made errors at trial, there was no reasonable probability the result of the proceeding would have been different absent the alleged errors. **State v. Smith,**

CRIMINAL LAW

Guilty plea - knowing and voluntary - Defendant's guilty plea was knowing and voluntary based on a review of the record, despite defendant's argument that he did not have the time he needed to reflect on his decision. **State v. Santos,**

Guilty plea - motion to withdraw plea summarily denied - no error - The trial court did not err in a first-degree rape and statutory rape case by summarily denying defendant's motion to withdraw his guilty plea after sentencing. Defendant presented no questions of fact that needed to be resolved by an evidentiary hearing, nothing in the record indicated that defendant's plea was not the product of free and intelligent choice, and the trial court expressed willingness to allow defendant to confer with defense counsel about the propriety of his motion. Furthermore, defendant was not entitled to withdraw his guilty plea as he failed to show manifest injustice. **State v. Shropshire,**

Guilty plea - withdrawing - procedure - Whether a guilty plea was made knowingly and voluntarily was considered because of the length of defendant's sentences, even though he did not move to withdraw his plea and did not seek a writ of *certiorari*. **State v. Santos,**

DAMAGES AND REMEDIES

Punitive damages - motion to dismiss - compensatory damages - The trial court did not err by denying defendants' motion to dismiss plaintiff's appeal based on plaintiff's alleged abandonment of her punitive damages claims by electing to proceed to trial on the issue of compensatory damages after dismissal of the punitive damages claim. Instead of dismissing plaintiff's appeal in order to comply with N.C.G.S. § 1D-30, the case would be remanded for a new trial on all issues including liability for compensatory damages if plaintiff's appeal was successful. **George v. Greyhound Lines,**

Inc.,

Punitive damages - partial summary judgment - willful and wanton conduct - The trial court did not err in an action arising out of an automobile accident by granting partial summary judgment for defendants on the issue of whether defendants' conduct was willful or wanton. While the evidence was sufficient to show that the bus driver fell asleep while driving the bus, inadvertent driver error caused by falling asleep behind the wheel by itself did not support an award of punitive damages. Thus, there was also an insufficient forecast of evidence that the bus company participated in or condoned the bus driver's alleged willful or wanton conduct. **George v. Greyhound Lines, Inc.,**

Restitution - amount ordered unsupported by evidence - plain error - The trial court committed plain error in an assault with a deadly weapon inflicting serious injury case by ordering defendant to pay restitution because the State failed to present evidence to support the amounts of restitution ordered. **State v. Smith,**

DIVORCE

Alimony - ability to pay - The trial court clearly considered plaintiff's actual ability to pay when determining alimony; the court's inability to make more detailed findings was due to plaintiff's failure to attend the hearing or to submit more detailed information. **Robinson v. Robinson,**

Alimony - consideration of child care expenses - The trial court erred when determining alimony by determining plaintiff's child support obligation under the Guidelines, then making its own calculations regarding actual expenses and using that total to determine defendant's shortfall to calculate alimony. Defendant may benefit from having her child care expenses considered in the calculation of alimony, but may not receive the benefit of a finding based in part upon her actual child support expenditures if plaintiff is credited only with his Guideline proportionate share of child support expenses. **Robinson v. Robinson,**

Alimony - findings - earnings - The trial court did not err in the amount of alimony awarded where the court's finding as to the parties' earnings while married was supported by the record. **Robinson v. Robinson,**

Equitable distribution - agreement - written stipulation required - The trial court erred in an equitable distribution action by concluding that the parties were in agreement concerning the division of certain personal property where there was no written stipulation in the record. **Robinson v.**

Robinson,

Equitable distribution - findings - valuation and classification of property - The trial court erred in an equitable distribution order by not making a finding as to the total net value of the marital estate, by not classifying or valuing the marital residence, and by not explicitly classifying another property as separate property. **Robinson v. Robinson,**

Equitable distribution - payments toward debt - allocation - debts not properly classified - The Court of Appeals could not determine in a domestic action whether plaintiff's payments on debts should have been included in equitable distribution or allocated toward plaintiff's alimony and child support obligations where the debts were not properly classified, valued, and distributed. **Robinson v. Robinson,**

Equitable distribution - valuation of property - date of separation - finding binding - Although plaintiff contended that the trial court erred in an equitable distribution action in the date used to value certain accounts, plaintiff did not challenge that finding and it was therefore binding. **Robinson v. Robinson,**

EMOTIONAL DISTRESS

Intentional infliction - failure to show extreme and outrageous behavior - The trial court did not err by dismissing plaintiff's claim for intentional infliction of emotional distress. Plaintiff's complaint and brief simply stated that defendants' behavior was extreme and outrageous without providing any support for this assertion. **Chidnese v. Chidnese,**

EMPLOYER AND EMPLOYEE

Wrongful termination - no compulsory counterclaim - The trial court did not err in a wrongful termination case by denying defendants' motions to dismiss. Plaintiff's wrongful termination claim under N.C.G.S. § 143-422.2 was not a compulsory counterclaim to defendant Shook's pending lawsuit. **Townsend v. Shook,**

Wrongful termination - prior action pending doctrine - not applicable - The trial court did not err in a wrongful termination case by denying defendants' motions to dismiss. The prior action pending doctrine was not applicable to this case because the parties, legal issues, and subject matter were not substantially similar to those raised in defendant's pending prior lawsuit. **Townsend v. Shook,**

EVIDENCE

Examining doctor's testimony - sexual abuse - no physical signs - impermissibly bolstered victim's credibility - The trial court committed plain error in a sexual offense with a child and statutory rape case by allowing a doctor who examined the juvenile victim to testify that the victim was sexually abused but showed no physical symptoms of abuse. The testimony impermissibly bolstered the victim's credibility in the eyes of the jury. **State v. Towe,**

Prior bad acts - purpose for which evidence offered - at issue - The trial court failed to properly admit evidence of defendant's prior bad acts for the purpose of demonstrating a common plan or scheme where the trial court failed to determine whether the purposes for which the evidence was offered were at issue. **State v. Towe,**

IDENTIFICATION OF DEFENDANTS

Harris factors - findings support conclusion - The trial court did not err in denying defendant's motion to suppress a witness's identification of defendant. The trial court's findings on each of the factors set forth in *State v. Harris*, 308 N.C. 159, fully supported its conclusion that there was no likelihood of irreparable misidentification. **State v. Boozer,**

INSURANCE

Coverage under policy - employees of named insured - insured - Defendant insurance companies MAG Mutual's and American's argument that the individual plaintiffs were not insureds under the policies was overruled. The individual plaintiffs were employees of the named insured and the actions that formed the bases of the complaint involved actions undertaken while the individual plaintiffs were performing duties related to the conduct of the named insured's business. **Kubit v. MAG Mut. Ins. Co.,**

Duty to defend - defamation - negligent misrepresentation - quality assurance activities - Defendant insurance company MAG had a duty to defend plaintiffs in a negligent misrepresentation and defamation case because complainant's factual allegations were based in part on the individual plaintiffs' quality assurance activities. **Kubit v. MAG Mut. Ins. Co.,**

Duty to defend - defamation - personal injury - claim not covered - Defendant insurance companies had a duty to defend plaintiffs against complainant's defamation claim. The claim fell within the policies' coverage for personal injury and no exclusions were applicable. **Kubit v. MAG Mut. Ins. Co.,**

Duty to defend – defense costs – The trial court did not err in granting summary judgment in favor of defendant insurance company on plaintiffs' claim for reimbursement for expert witness fees where plaintiffs failed to offer any evidence that the expert fees were defense costs. **Bain v. Unitrin Auto and Home Ins. Co.,**

Duty to defend – defense costs – unjust enrichment – contract – Plaintiffs' claim that defendant was unjustly enriched by receiving the benefit of plaintiffs' expert witness's services without having to pay for them was overruled. The doctrine of unjust enrichment does not apply where, as here, a contract between the parties exists. **Bain v. Unitrin Auto and Home Ins. Co.,**

Duty to defend – equitable estoppel – no evidence of reliance – Defendant insurance company was not equitably estopped from claiming that the services of an expert witness who was hired by plaintiffs in conjunction with their negligence claim were not defense costs. Plaintiffs failed to demonstrate that they relied upon any statement or conduct of defendant or its attorney. **Bain v. Unitrin Auto and Home Ins. Co.,**

Duty to defend – negligent misrepresentation – bodily injury – claim not covered – Defendant insurance companies did not have a duty to defend plaintiffs against complainant's negligent misrepresentation claim because the claim did not fall within the policies' bodily injury coverage. **Kubit v. MAG Mut. Ins. Co.,**

Duty to defend – notice of action – actual notice – timely notice not received – no duty – Where plaintiffs failed to give proper notice of a complaint filed against them to an agent of defendant insurance companies American and Cincinnati, the insurers' duty to defend plaintiffs did not arise until the insurers themselves received notice. Moreover, where defendant Travelers insurance companies did not receive timely notice of the action, those carriers were relieved of their duty to defend. **Kubit v. MAG Mut. Ins. Co.,**

JUDGMENTS

Clerical error – remanded for correction – A clerical error in a Tort Claims order was remanded for correction where the Industrial Commission concluded that plaintiff had complied with the special pleading requirements of Rule 9(j), even though it was clear from the context that the Commission had intended the opposite. **Stevenson v. N.C. Dep't of Corr.,**

KIDNAPPING

First-degree - jury instruction - erroneous - not prejudicial - The trial court did not commit plain error in its instruction to the jury on first-degree kidnapping. Although the instruction was erroneous, the error did not have a probable impact on the jury's finding of guilt. **State v. Boozer**,

First-degree - lesser-included offense - jury instruction - no error - The trial court did not commit plain error in a first-degree murder case by failing to instruct the jury on the lesser-included offense of false imprisonment. The State presented sufficient evidence that defendants removed the victim for the purpose of doing him serious bodily harm or terrorizing him. **State v. Boozer**,

First-degree - sufficient evidence - intent to cause bodily harm or terrorize - The trial court did not err in denying defendants' motions to dismiss first-degree kidnapping charges. The State presented sufficient evidence of each element of the crime, including defendants' intent to cause bodily harm or terrorize. **State v. Boozer**,

LIENS

Consent judgment - discharge of lien - harmless error - Any error by the trial court in discharging liens against a builder was harmless where plaintiff eventually entered into a consent judgment against the builder for the full amount it sought. **Pete Wall Plumbing v. Sandra Anderson Builders, Inc.**,

Extinguishment - foreclosure on property - Carolina Bank's foreclosure of two properties extinguished plaintiff's claims of liens against those properties where Carolina Bank recorded deeds of trust on the lots before plaintiff provided labor and materials. Carolina Bank's deeds of trust were senior to plaintiff's claims of lien. **Pete Wall Plumbing v. Sandra Anderson Builders, Inc.**,

Motion to strike allegations - considered under lien statute - filing sufficient - Plaintiff plumbing company's lien filings were sufficient to protect its interests, if they created a valid lien or a valid notice of lien, where they contained all of the information required by N.C.G.S. §§ 44A-12 and -19. Although defendant Anderson filed a motion to strike based only on N.C.G.S. § 1A-1, Rule 12(f), striking material allegations from the pleadings is not akin to reaching a final determination, and the discharge of statutory liens is governed by N.C.G.S. § 44A-16. **Pete Wall Plumbing v. Sandra Anderson Builders, Inc.**,

Notice of claim on funds - foreclosure - no evidence of payments for improvements - The trial court erroneously discharged plaintiff's notices of claim of lien on funds where the record did not contain evidence about whether payments were made for improvements between receipt of the notices and the foreclosure. The issue was remanded to determine the issue of payments. **Pete Wall Plumbing v. Sandra Anderson Builders, Inc.,**

Notice of claim on funds - received by bank after sale of property - Notices of a claim of lien on funds against a bank were correctly discharged where the properties for which services and supplies had been furnished were conveyed free of the bank's ownership interest before the notice of claim of lien on funds was received. Liability only attaches to funds after the notice of claim of lien on funds is received. **Pete Wall Plumbing v. Sandra Anderson Builders, Inc.,**

Plumbing supplies and services - contractor's property interest extinguished by sale - The trial court properly ordered that plaintiff plumbing company's claims of lien be discharged where the action involved the construction of single family houses on property owned by the Housing Authority of Greensboro, with the construction managed through leases and subleases and financed through multi-party agreements. Upon completion, the houses were conveyed to private owners. The lien statutes provided plaintiff only a claim of lien to the extent of an owner's interest in the property; here, the builder's sublease had been extinguished by the sale to private owners before plaintiff began enforcement proceedings. **Pete Wall Plumbing v. Sandra Anderson Builders, Inc.,**

MALICIOUS PROSECUTION

Liability of attorneys - motion to dismiss - vagueness - motion for more definite statement - The trial court erred by dismissing plaintiff wife's claim for malicious prosecution. Attorneys in North Carolina may be held liable for a malicious criminal prosecution only when the attorney advised the client, without any instigation from the client, to initiate criminal proceedings and the attorney acted without probable cause or for an improper purpose. Mere vagueness or lack of detail were not grounds for a motion to dismiss, but should have been attacked by a motion for a more definite statement. **Chidnese v. Chidnese,**

MEDICAL MALPRACTICE

Rule 9(j) certification - res ipsa loquitur - not established - Although a claim which fails to comply with N.C.G.S. § 1A-1, Rule 9(j) may still be valid if

it establishes negligence under *res ipsa loquitur*, plaintiff's allegation that a physician assistant's examination consisted of only a cursory glance was not the type of negligence a jury could infer through common knowledge and experience and plaintiff did not establish negligence through *res ipsa loquitur*.
Stevenson v. N.C. Dep't of Corr.,

Tort Claims Act - Rule 9(j) - applicable - An inmate's allegation in a complaint under the Tort Claims Act that a physician's assistant failed to provide the appropriate standard of medical care fell squarely within the definition of a medical malpractice claim. Compliance with N.C.G.S. § 1A-1, Rule 9(j) was required. **Stevenson v. N.C. Dep't of Corr.,**

MORTGAGES AND DEEDS OF TRUST

Default - foreclosure - hypothecation agreement - The trial court erred by finding that the debt owed by the construction company to the bank was evidenced by the 2008 note secured by the deed of trust under the terms of the hypothecation agreement and that the construction company had defaulted under the deed of trust. Thus, the trial court erred by concluding that the substitute trustee was entitled to foreclose on respondent appellant's property pursuant to the power of sale under the terms of the deed of trust. **In re Foreclosure of Hall,**

NEGLIGENCE

Personal injury - sufficiency of service of process - statute of limitations - The trial court erred by dismissing plaintiff's complaint for personal injury arising out of an automobile accident based on alleged insufficient process, and the case was remanded for further proceedings. Defendant was properly served, both individually and as executrix of an estate, within the time prescribed by N.C.G.S. § 1A-1, Rule 4. Further, plaintiff brought her suit before the expiration of either the statute of limitations under N.C.G.S. § 1-52(16) for personal injury due to negligence or the time limit set by the non-claim statute under N.C.G.S. § 28A-19-3(f).
Boyd v. Sandling,

PLEADINGS

Allegations stricken - lien filings - The trial court did not abuse its discretion by striking from a complaint by a plumbing company allegations regarding lien filings that the court correctly discharged. However, the court abused its discretion by striking allegations regarding a potentially viable lien on funds. **Pete Wall Plumbing v. Sandra Anderson Builders, Inc.,**

PROBATION AND PAROLE

Period based on improper factors - restitution - The trial court erred in an assault with a deadly weapon inflicting serious injury case by basing its decision to impose a longer period of probation than necessary upon consideration of the restitution to be paid and nature of the offense. **State v. Smith,**

RULES OF CIVIL PROCEDURE

Summary judgment - uncontested findings must be clearly delineated - An order granting summary judgment should not include findings of fact. If the trial court chooses to recite uncontested findings of fact, they should be clearly denominated as such. **Winston v. Livingstone Coll., Inc.,**

SATELLITE-BASED MONITORING

Aggravated offense - first-degree sexual offense - The trial court erred by finding that a first-degree sexual offense was an aggravated offense for purposes of ordering lifetime satellite-based monitoring. First-degree sexual offense pursuant to N.C.G.S. § 14-27.4(a)(1) requires that the victim be under the age of 13, while an aggravated offense under N.C.G.S. § 14-208.6(1a) requires that the child be less than 12 years old. **State v. Santos,**

STATUTES OF LIMITATION AND REPOSE

Expiration on Sunday - filing on Monday - The trial court erred by granting summary judgment for defendant based on the statute of limitations where the limitations period expired on a Sunday and defendant filed his action on Monday. **Winston v. Livingstone Coll., Inc.,**

TERMINATION OF PARENTAL RIGHTS

Grounds - failure to offer alternative placement for minor child - The trial court did not err by concluding that grounds existed under N.C.G.S. § 7B-1111(a)(6) to terminate respondent father's parental rights. The trial court's finding that respondent had not offered an alternative placement for the minor child was sufficient, in conjunction with the undisputed determination that respondent father lacked the capacity to care for the minor child, to support the court's conclusion. **In re L.H.,**

Improper combining of dispositional hearing and Rule 60(b)(2) motion - best interests of child - The trial court's disposition and order related to the N.C.G.S. § 1A-1, Rule 60(b)(2) motion were reversed because the

trial court combined the Rule 60(b)(2) hearing with what was essentially a new dispositional hearing without proper notice and concluded that it would still find that termination was in the best interests of the minor child even in the absence of the maternal grandmother. The case was remanded for a new dispositional hearing to determine whether termination of respondent father's parental rights was in the minor child's best interest. **In re L.H.,**