

APPEAL AND ERROR

Execution proceedings – issue rendered moot – Defendant’s argument that the trial court erred in denying his motion to dismiss execution proceedings against him in a construction loan case was rendered moot where the Court of Appeals determined that the trial court properly denied defendant’s motion to set aside the entry of default and properly granted summary judgment against defendants. **Jones v. Wallis,**

Sentencing – no appeal as of right — Defendant’s argument that he was entitled to a new sentencing hearing was not addressed. Defendant was not entitled to appeal the sentencing issue as a matter of right because he would have been a prior record level II with or without the challenged sentencing point and he was sentenced in the presumptive range. **State v. McLean,**

Standard of review – violation of Open Meetings Law – de novo – appropriate remedy – abuse of discretion — The Court of Appeals applied a *de novo* standard of review to the issue of whether a violation of the Open Meetings Law (OML) occurred. The Court of Appeals reviewed the trial court’s determination of the appropriate remedy for violation of the OML for abuse of discretion. **Garlock v. Wake Cnty. Bd. of Educ.,**

ASSAULT

Deadly weapon inflicting serious injury – jury instruction – definition of serious injury – no error — The trial court did not err as a matter of law in an assault with a deadly weapon with intent to kill inflicting serious injury case by failing to define “serious injury” in its jury instructions. Our courts have chosen not to narrowly define “serious injury” in the context of assaults, and the trial court was not required to define the term as requested by defendant. **State v. McLean,**

Deadly weapon inflicting serious injury – sufficient evidence — The trial court erred as a matter of law in denying defendant’s motion to dismiss the charge of assault with a deadly weapon with intent to kill inflicting serious injury. There was sufficient evidence of all elements of the crime including that the victim sustained a serious injury. **State v. McLean,**

ATTORNEY FEES

Professional negligence – findings of fact – supported award — The trial court did not err in a professional negligence case by not including an additional \$62,202.84 over and above the amount ordered by the trial court that was paid by plaintiffs individually as part of a \$300,000 settlement. The

findings supported the amount of the trial court's award to plaintiffs individually. **Chase Dev. Grp. v. Fisher, Clinard & Cornwell, PLLC,**

CHILD CUSTODY AND SUPPORT

Custody awarded grandmother – no findings or conclusions – father acted inconsistently with parental rights — The trial court erred in awarding permanent custody of a minor child to her maternal grandmother where the court specifically found that neither of the child's parents was unfit to parent and the trial court failed to make any findings of fact or conclusions of law as to whether respondent father had acted inconsistently with his parental rights. **In re D.M.,**

Grandparents — standing — custody distinguished from visitation — Plaintiffs had standing to proceed in an action for custody pursuant to N.C.G.S. § 50-13.1(a) where they alleged they were the grandparents of the children and that defendant had acted inconsistently with her parental status and was unfit because she had neglected the children. A grandparent's claim for visitation may be different from a custody claim and have different standing requirements. **Rodriguez v. Rodriguez,**

Order reversed and remanded – findings concerning reunification – findings concerning visitation — The Court of Appeals reversed an order granting custody of a minor child to her maternal grandmother and remanded the case to the trial court. On remand, the trial court was to address any efforts made by the Department of Social Services to reunite the child with her father. Furthermore, if the trial court did not return the child to her father's home and instead granted him visitation privileges, the trial court was to set forth the time, place, and conditions of his visitation privileges. **In re D.M.,**

Subject matter jurisdiction — prior juvenile matter terminated — The trial court had subject matter jurisdiction to consider a custody claim by grandparents where a prior juvenile matter was terminated by a juvenile review order that placed the physical and legal custody of the children with defendant, ended the involvement of both DSS and the Guardian ad Litem program, and included no provisions requiring ongoing supervision or court involvement. **Rodriguez v. Rodriguez,**

CONSTITUTIONAL LAW

Effective assistance of counsel – counsel's admission to prior convictions – no reasonable likelihood of different outcome —

Defendant did not receive ineffective assistance of counsel at a hearing to determine if he had attained habitual felon status. Defense counsel's admission that defendant had three prior felony convictions did not violate *State v. Harbison*, 315 N.C. 175, and the *Harbison* rule does not apply to sentencing proceedings. Furthermore, even assuming *arguendo* that defense council's representation was deficient, there was no reasonable likelihood that the outcome at defendant's habitual felon proceeding would have been different had his trial counsel not made the challenged comment. **State v. Womack,**

Effective assistance of counsel – counsel's statement – no reasonable likelihood of different outcome – Defendant did not receive ineffective assistance of counsel at a sentencing hearing for his conviction of possession of drugs. Defense counsel's challenged statement was nothing more than a slip of the tongue and the isolated statement, taken in context, did not constitute deficient performance. **State v. Womack,**

CONTRACTS

Construction of boat — delayed completion — The trial court did not err by granting plaintiff's motion for partial summary judgment and by denying defendants' motion for summary judgment on a breach of contract claim involving the construction of a 57-foot sport fishing boat that was finished late and sold to another buyer. Contrary to defendants' allegation, plaintiff did not declare defendants in default after being notified that completion would be delayed, and did not insist on closing on the specified date. **D.G. II, LLC v. Nix,**

EVIDENCE

Prior incident — adolescent sexual encounter — The trial court erred in a prosecution for first-degree sexual offense and indecent liberties by admitting testimony of an incident twelve years earlier involving the victim's half-brother. Sexual exploration with a child in the same general age range is quite different from a sexual act by force by a 27 year old man upon an eleven year old child. **State v. Beckelheimer,**

Prior incident — erroneous admission prejudicial — There was prejudice in a prosecution for first-degree sexual offense and indecent liberties in the erroneous admission of testimony about a prior incident where there was no physical evidence and the jurors had to decide whether to believe the victim or defendant. **State v. Beckelheimer,**

FIREARMS AND OTHER WEAPONS

Discharging weapon into moving vehicle – jury instruction — The trial court’s jury instructions in a discharging a weapon into a moving vehicle case were not erroneous. The instructions correctly stated the requisite mental intent and did not reduce the State’s burden of proof to prove intent beyond a reasonable doubt. **State v. McLean**,

HIGHWAYS AND STREETS

Cartway —final judgment by clerk — exceptions after jury of view report — not reviewed — A judgment entered by the clerk ordering that a permanent cartway be established across respondents' land and appointing a jury of view became final when neither party filed exceptions or an appeal. A request for a trial *de novo* after the report of the jury of view and a request that an additional party be added were correctly denied. **Watson v. Brinkley**,

JUVENILES

Disposition order — required findings — A juvenile disposition order was remanded where the order did not demonstrate that the court considered the factors listed in N.C.G.S. § 7B-2501. **In re V.M.**,

MEDICAL MALPRACTICE

Rule 9(j) — order extending statute of limitations — not effective — not filed — An order under N.C.G.S. § 1A-1, Rule 9(j) extending the statute of limitations must be filed to be effective and the trial court in this case correctly dismissed the complaint because a Rule 9(j) order that was signed but never filed did not extend the statute of limitations. **Watson v. Price**,

NEGLIGENCE

Professional negligence – contributory negligence – evidence admissible – jury instruction proper — The trial court did not err in admitting evidence about and instructing the jury on contributory negligence in plaintiff’s professional negligence action against defendant Baker. Contributory negligence is a defense to a claim of professional negligence by attorneys, and the evidence supported a reasonable inference of contributory negligence on plaintiff’s part. **Piraino Bros. LLC v. Atl. Fin. Grp., Inc.**,

Professional negligence – expert testimony – standard of care — Plaintiff’s argument in a professional negligence case that defendant Baker’s expert was allowed to testify about the standard of care owed to a commercial

lender rather than that applicable to an individual investor was rejected. The expert testified that the standard of care he was discussing was applicable to a non-regulated private lender such as plaintiff. **Piraino Bros. LLC v. Atl. Fin. Grp., Inc.,**

Professional negligence – findings of fact – burden of proof – denial of involuntary dismissal motion — The trial court did not err in a professional negligence case by denying defendants’ motion for involuntary dismissal. The key findings of fact challenged by defendants were supported by evidence in the record and the court applied the correct burden of proof to the critical finding of fact. **Chase Dev. Grp. v. Fisher, Clinard & Cornwell, PLLC,**

PARENT AND CHILD

Custody — actions not inconsistent with parental status — The trial court erred by concluding that defendant had acted inconsistently with her parental status and by awarding plaintiffs visitation where defendant did not voluntarily cede parental authority to another party; a finding that defendant's children had been adjudicated dependent in an earlier proceeding was not alone sufficient to establish that defendant acted in a manner inconsistent with her parental status; the trial court's findings did not indicate that defendant had voluntarily engaged in conduct that would trigger the forfeiture of her protected status; and additional findings that could reflect badly on defendant were not sufficient to show conduct inconsistent with being a parent or that she was unfit as a parent. **Rodriguez v. Rodriguez,**

PRETRIAL PROCEEDINGS

Motion for leave to amend complaint – negligence action – no abuse of discretion — The trial court did not abuse its discretion in denying plaintiff’s motion for leave to amend her complaint in a negligence action where plaintiff’s amended complaint sought to add two new parties to her action after the statute of limitations had expired. **Williams v. Owens,**

Motion to dismiss – negligence action – properly allowed — The trial court did not err in granting defendant’s motion to dismiss in a negligence action where the trial court properly denied plaintiff’s motion for leave to amend her complaint to add two new parties to the action after the statute of limitations had expired. **Williams v. Owens,**

PROCESS AND SERVICE

Service of process – due diligence – service by publication – compliance with statutory requirements — The trial court did not abuse its discretion in denying defendant’s motion to set aside an entry of default against him in a construction loan case. Plaintiff exercised due diligence in attempting to locate defendant for purpose of service of process and plaintiff complied with all the statutory requirements for service of process by publication. **Jones v. Wallis,**

PULBIC RECORDS

Open Meetings Law – misapprehension of order – case properly dismissed – immediate hearing – no prejudice — Plaintiffs’ argument on appeal in an action seeking relief under North Carolina’s Open Meetings Law that the trial court “dismissed” their complaint *ex mero motu* was a misapprehension of the trial court’s order. The trial court made findings of fact and conclusions of law and ruled upon the merits of plaintiffs’ claims, and as there were no further claims to be determined, dismissed the case. Defendant’s argument that the trial court erred by hearing the case on the merits only eight days after the complaint was filed and before an answer was filed or discovery was conducted was overruled. Defendants suffered no prejudice from the “immediate” hearing, as the judgment was predominantly in their favor and denied the most significant relief sought by plaintiffs. **Garlock v. Wake Cnty. Bd. of Educ.,**

Open Meetings Law – violations – no affirmative relief — The trial court in an action concerning North Carolina’s Open Meetings Law (OML) properly found violations of the OML as to a ticketing procedure put into place and in the exclusion of the public from a Committee of the Whole (COW) meeting. The trial court erred in concluding that a violation of the OML occurred when defendants failed to make accommodations for members of the public who were disabled. The trial court did not abuse its discretion by denying plaintiffs affirmative relief for defendants’ violations. **Garlock v. Wake Cnty. Bd. of Educ.,**

SEXUAL OFFENDERS

Registration as sex offender – language of statute not unconstitutionally vague — Defendant’s argument that the trial court erred in a secret peeping case by requiring him to register as a sex offender was overruled. The language of the applicable statute, N.C.G.S. § 14-202(l), was not unconstitutionally vague. **State v. Pell,**

Registration as sex offender – no competent evidence defendant a danger to community — The trial court erred in a secret peeping case by

requiring defendant to register as a sex offender. There was no competent evidence to support a finding that defendant was a danger to the community, or that his registration would further the purposes of N.C.G.S. § 14-208.5. **State v. Pell,**

STATUTES OF LIMITATIONS AND REPOSE

Professional negligence – claims barred — The trial court in a professional negligence case did not err by concluding that a portion of plaintiffs' claims were barred by the applicable statute of limitations. The trial court's findings of fact supported its conclusions of law that claims against defendants for legal malpractice during the period October 2003 through April 2004 were barred by the three-year statute of limitations; individual defendant's renewed representation on the same matter as he previously advised did not halt the running of the statute; and when defendants did not represent plaintiffs individually, there was no reasonable third-party reliance. **Chase Dev. Grp. v. Fisher, Clinard & Cornwell, PLLC,**

Professional negligence – claims not barred — The trial court did not err in a professional negligence case by denying defendants' motion for involuntary dismissal. The trial court correctly determined that a portion of plaintiffs' claims were not barred by the applicable statute of limitations. **Chase Dev. Grp. v. Fisher, Clinard & Cornwell, PLLC,**

TRUSTS

Breach of express trust – civil conspiracy – conversion – summary judgment proper — The trial court did not err in granting summary judgment to the Burris defendants on plaintiff's claims for breach of an express trust and civil conspiracy. Plaintiff failed to preserve the issue of an express trust for appellate review and the Burris defendants did not owe plaintiff a fiduciary duty. Furthermore, plaintiff did not argue that the trial court erred in dismissing plaintiff's underlying conversion claim. **Piraino Bros. LLC v. Atl. Fin. Grp., Inc.,**

UNIFORM COMMERCIAL CODE

Breached contract — recovery of deposit — Plaintiff was entitled under the U.C.C. to recover the amount of the purchase price it had already paid (plus interest) for the construction of a sport fishing boat that was not finished on time and was ultimately sold to someone else. **D.G. II, LLC v. Nix,**

UNJUST ENRICHMENT

Insurance proceeds – JNOV properly granted — The trial court did not err in granting plaintiff's motion for JNOV on plaintiff's claim against defendant James Massengill & Sons Construction Company (JMS) for unjust enrichment. All the elements of plaintiff's unjust enrichment claim were met as a matter of law and JMS failed to prove an irrevocable and material change of position such that it would be unjust to require JMS to refund the proceeds. Furthermore, because JMS could not show any real injury or damages, the issue of balancing the relative equities was not for the jury to consider. **Primerica Life Ins. Co. v. James Massengill & Sons Constr. Co.,**

WORKERS' COMPENSATION

Additional medical treatment – properly determined — The Industrial Commission properly determined that plaintiff was entitled to additional medical treatment reasonably related to his compensable hand injury. **Heatherly v. The Hollingsworth Co., Inc.,**

Attendant care – reasonable and medically necessary – misapprehension of law – matter remanded — The Industrial Commission erred by concluding there was insufficient competent medical evidence to establish that attendant care was reasonable and necessary as a result of decedent's compensable asbestosis. The Commission's requirement that a physician's prescription was a prerequisite to attendant care compensation constituted a misapprehension of law. The matter was remanded for a new determination using the correct legal standard. **In re Estate of Gainey v. Southern Flooring & Acoustical Co.,**

Compensable injury – increased risk – lightning strike – expert testimony not required – findings and conclusions — The Industrial Commission did not err in a workers' compensation case in finding and concluding that plaintiff sustained a compensable injury by accident arising out of and in the course of his employment. Plaintiff was not required to present expert evidence to establish that his employment exposed him to an "increased risk" of being struck by lightning. The non-expert evidence supported the Commission's findings which, in turn, supported the conclusion that plaintiff's employment peculiarly exposed him to risk of injury from lightning greater than that of other persons in the community. **Heatherly v. The Hollingsworth Co., Inc.,**

Death – not significantly caused by asbestosis – findings and conclusions — The Industrial Commission did not err by concluding that

decedent's asbestosis neither caused nor significantly contributed to decedent's death. A doctor's testimony supported the Commission's findings, and in turn its conclusion, that asbestosis did not significantly contribute to decedent's death. **In re Estate of Gainey v. Southern Flooring & Acoustical Co.,**

Temporary total disability benefits – testimony sufficient — The Industrial Commission did not erroneously conclude in a workers' compensation case that plaintiff was entitled to temporary total disability benefits for the period of 12 July 2004 to 2 January 2005. Plaintiff's testimony regarding the pain in his fractured right hand and his inability to work at all was sufficient to support the Commission's determination that plaintiff was temporarily totally disabled during the relevant period. **Heatherly v. The Hollingsworth Co., Inc.,**