

## APPEAL AND ERROR

**Appealability – issue not ripe** — The trial court exceeded its statutory authority in a felonious malicious use of an explosive or incendiary device or material case by mandating that a later court must enter any subsequent sentence as consecutive only, rather than concurrent, if such a sentence was entered while defendant was still serving his sentence in the present case. However, because this issue was not a question ripe for review, the judgment was left undisturbed. **State v. Herrin,**

**Issue not addressed — estoppel — statute of limitations** — Plaintiffs’ argument in a construction case that defendant should have been estopped from asserting the statute of limitations as a bar to plaintiffs’ claims was not addressed in light of the Court of Appeals’ conclusion that the trial court erred in granting summary judgment with respect to plaintiffs’ breach of contract and warranty claims. **Williams v. Houses of Distinction, Inc.,**

**Issue not addressed — invited error** — Defendant’s argument that the trial court erred by not submitting to the jury the issue of whether defendants’ activities were egregious activities outside the scope of his employment was not addressed on appeal as any error was invited by defendant. **Songwooyarn Trading Co., Ltd. v. Sex Eleven, Inc.,**

**Negligence — contributory negligence — jury found in plaintiff’s favor** — Plaintiff’s argument in a negligence case that the trial court erred in submitting the issue of contributory negligence to the jury was dismissed as the jury found plaintiff not liable under a theory of contributory negligence and the trial court entered judgment in accordance with the jury verdict. **Smith v. White,**

**Preservation of issues — failure to cite authority** — Plaintiff failed to cite to any authority on appeal and thus failed to preserve for appellate review the argument that the Industrial Commission erred in a workers’ compensation case by allowing the admission of certain evidence. **Thompson v. STS Holdings, Inc.,**

**Preservation of issues – failure to object to instruction – failure to allege plain error** — Where defendant in a prosecution for felonious malicious use of an explosive or incendiary device or material did not object at trial to the instruction that “gasoline is an incendiary material” or allege plain error, defendant failed to properly preserve the issue for appeal. **State v. Herrin,**

**Writ of certiorari — review of implicit determination by trial court —**

A writ of *certiorari* was granted by the Court of Appeals to allow appellate review of any implicit determination by the trial court concerning defendant's right to rely on a governmental immunity defense. **Kirkpatrick v. Town of Nags Head,**

## ARBITRATION AND MEDIATION

**Denial of motion to dismiss proper — neither respondent personally affected — no argument jurisdiction lacking** — The trial court did not err in a dispute concerning an arbitration agreement by denying respondent Hall's and O'Connor's motion to dismiss for lack of personal jurisdiction and because they were not parties to the arbitration. Neither Hall nor O'Connor were personally affected in their individual capacities by the trial court's judgment and no argument was made that they were not, in fact, respondent Rapidz's Director and Alternate Director at the relevant times, or that jurisdiction over Rapidz was lacking. **Canadian Am. Assoc. of Prof'l. Baseball, Inc. v. Ottawa Rapidz,**

**Failure to move to modify or vacate arbitration award — confirmation of arbitration award proper** — The trial court did not err in a dispute concerning an arbitration agreement by granting a motion filed by petitioner Canadian American Association of Professional Baseball, Ltd. to confirm an award in an arbitration proceeding. Respondents failed to move to vacate or modify the award based on the alleged irregularity in the form of the award or pursuant to any other statutory grounds. **Canadian Am. Assoc. of Prof'l. Baseball, Inc. v. Ottawa Rapidz,**

## CHILD CUSTODY AND SUPPORT

**Health insurance — no increased cost — no credit** — The trial court did not err in a child support dispute by not giving defendant credit for medical insurance purchased for the minor child. Defendant incurred no additional cost in covering the child on his wife's health insurance policy and defendant's coverage was unnecessary because plaintiff had been providing coverage under her coverage. **Orange Cnty. ex rel. Clayton v. Hamilton,**

**Support for children of later marriage — not change of circumstances or income** — Child support payments for children of a later marriage did not evidence a substantial change in plaintiff's circumstances or income. **Orange Cnty. ex rel. Clayton v. Hamilton,**

## CIVIL PROCEDURE

**Motion for relief or new trial — notice of summary judgment** — The trial court did not abuse its discretion by denying defendant's motion for relief or for a new trial where plaintiff contended that it had not been provided with sufficient notice of defendant's motion for summary judgment. **Elliot v. Enka-Candler Fire & Rescue Dep't, Inc.,**

**Order entered out of session — no objection at trial** — The trial court did not improperly enter an order out of session. Entry of orders out of session is allowed by N.C.G.S. § 1A-1, Rule 6(c), and defendant did not object at trial. **Orange Cnty. ex rel. Clayton v. Hamilton,**

## CONFESSIONS AND INCRIMINATING STATEMENTS

**Defendant's verbal statement after arrest — not prejudicial** — The trial court did not err in a sexual offense, kidnapping, robbery with a dangerous weapon, burglary, communicating threats, and assault with a deadly weapon case by allowing a witness to testify to defendant's verbal statement made after defendant was arrested. Even if the statement was erroneously admitted, defendant failed to show that the exclusion of the statement could have changed the result of the case. **State v. Speight,**

## CONSTRUCTION CLAIMS

**Breach of contract — breach of warranty — statute of limitations — date statute began to run in dispute — summary judgment erroneous** — The trial court erred in a breach of contract and breach of warranty claims action by granting summary judgment in favor of defendant based on the plea of the statute of limitations. The point in time at which the construction defects in question became or should have become apparent to plaintiffs was genuinely in dispute between the parties, so that the date upon which the statute of limitations began to run should have been decided by a jury at trial rather than by the court as a matter of law. **Williams v. Houses of Distinction, Inc.,**

**Negligence — contractual obligations — exceptions inapplicable — summary judgment proper** — The trial court did not err in a negligence action by granting summary judgment in favor of defendant with respect to its negligence claims. Plaintiffs' negligence-based claims stemmed from defendant's allegedly deficient performance of its contractual obligations to plaintiffs and none of the *Ports Authority* exceptions were applicable. **Williams v. Houses of Distinction, Inc.,**

## COSTS

**Offer of judgment — exceeded jury award — properly awarded —** The trial court did not abuse its discretion in a negligence case by awarding costs to defendant where defendant's offer of judgment to plaintiff exceeded plaintiff's jury award. **Smith v. White,**

**Zoning proceeding — taxed against respondent — no abuse of discretion —** The superior court did not abuse its discretion in taxing the cost of a zoning proceeding against respondent Town of Hillsborough. The superior court was acting in accordance with the judgment of the Court of Appeals in *Schaefer I* and the Rules of Appellate Procedure. **Shafer v. Town of Hillsborough,**

## CRIMINAL LAW

**Guilty plea — reservation of right to appeal — denial of motion to dismiss —** The trial court erred by accepting defendant's *Alford* plea where defendant attempted to reserve the right to appeal the denial of his motion to dismiss. A defendant who pleads guilty may not appeal the denial of a motion to dismiss, and the matter was remanded for further proceedings. **State v. White,**

## DRUGS

**Possession of cocaine — resist, delay, or obstruct an officer — habitual felon — voluntary dismissal —** The trial court did not err in a resisting, delaying, or obstructing an officer (RDO), felony possession of cocaine, and habitual felon case by dismissing the felony possession of cocaine charge and habitual felon indictment. The State voluntarily dismissed the possession of cocaine charge and the habitual felon indictment and the State's argument that the dismissals were erroneous was overruled. **State v. Joe,**

## EMPLOYER AND EMPLOYEE

**Employment agreement and extension — consideration by employee — giving up at will status —** There was consideration in an employment agreement and its extension where a fire chief who was already in the job gave up his employment at will status and his right to leave at any time before the dates specified in the agreements. **Elliot v. Enka-Candler Fire & Rescue Dep't, Inc.,**

## EVIDENCE

**Expert testimony — amount of cocaine in system — effect on driving**

— **reliable methods** — The trial court did not err in a prosecution for second-degree murder and other offenses by admitting expert testimony about the amount of cocaine in defendant's system and the effects of cocaine on the ability to drive. The witness's testimony that the level of cocaine in defendant's system would have been higher at the time of the collision, and his testimony as to the general effects of cocaine on a person's ability to drive, were supported by reliable methods. **State v. Norman,**

**Lay opinion — impairment at scene of accident**— The trial court did not abuse its discretion in a prosecution for second-degree murder, driving while impaired, and other offenses by allowing a lay bystander at the scene to testify to his opinion that defendant was impaired. The conditions under which the witness observed defendant go to the weight rather than the admissibility of the testimony. **State v. Norman,**

**Prior arrests — not prejudicial** — The defendant in a prosecution for second-degree murder, driving while impaired, and other offenses did not show that there was a reasonable possibility of a different result had evidence of prior arrests for possession of drug paraphernalia and resisting and delaying an officer not been admitted. Overwhelming evidence of defendant's guilt was presented at trial. **State v. Norman,**

## **FRAUD**

**Misrepresentation – justifiable reliance – sufficient allegation in complaint – sufficient factual support – motions for directed verdict and judgment notwithstanding verdict – properly denied** — The trial court did not err in a negligent misrepresentation case by denying defendant's motions for directed verdict and judgment notwithstanding the verdict. The complaint sufficiently alleged justifiable reliance and there was factual support for the jury to infer that plaintiff justifiably relied on defendant's misrepresentations. **Songwooyarn Trading Co., Ltd. v. Sex Eleven, Inc.,**

## **HOMICIDE**

**Second-degree murder — malice and proximate cause — sufficiency of evidence** — There was sufficient evidence of malice and proximate cause in a second-degree murder prosecution arising from impaired driving where there was evidence that defendant had been drinking and was impaired; that he had ingested cocaine, which correlates to high-risk driving; that defendant was speeding; that he had prior convictions; and that his actions were a proximate cause of the victims' deaths. A left-hand turn by the victims was foreseeable, and, although the victims failed to yield the right-of-way to

defendant, there was substantial evidence that defendant's speeding and driving while impaired were concurrent proximate causes. **State v. Norman,**

## IMMUNITY

**Governmental — closure of road —** The extent to which particular municipal streets and roads are kept open for use by members of the public is a governmental function and governmental immunity is available to municipalities as a defense to damage claims arising from such discretionary road closure decisions. Governmental immunity is not available as a defense to claims arising from personal injuries or property damage sustained as a result of a defective condition in the maintenance of the street or road. **Kirkpatrick v. Town of Nags Head,**

**Governmental — waiver by insurance — road closing —** Defendant Town was entitled to rely on governmental immunity in a claim arising from the closing of a beach road following a storm and should have been granted summary judgment. Immunity was not waived by the Town's insurance policy because the policy covered occurrences resulting in damages for which the Town was liable. The storm was an act of God and thus not conduct for which defendant was legally liable, and the decision not to repair the road was intentional with full knowledge of likely consequences, which also prevents coverage under the policy. **Kirkpatrick v. Town of Nags Head,**

## INDICTMENT AND INFORMATION

**First-degree burglary — not fatally defective — sufficiently clear —** An indictment charging defendant with first-degree burglary was not fatally defective or insufficient to support the trial court's imposition of a consecutive sentence. The indictment's stated felonious intent of "unlawful sexual acts" informed defendant of the charge against him with sufficient clarity to withstand dismissal and did not allow the jury to convict him on alternative theories of felonious intent. **State v. Speight,**

## JUDGES

**Ex parte communication — proposed order —** Use of a counsel's proposed order that was requested by the court as the final order did not constitute an improper *ex parte* communication. **Orange Cnty. ex rel. Clayton v. Hamilton,**

**Outburst of laughter — ill-advised — not prejudicial —** The trial court did not commit prejudicial error in a felonious malicious use of an explosive

or incendiary device or material case when the judge laughed in open court and in the presence of the jury upon hearing a witness's testimony. Although the judge's outburst may have been ill-advised, any resulting error was harmless and did not prejudice defendant so as to entitle him to a new trial. **State v. Herrin,**

## **JURISDICTION**

**Standing – negligent misrepresentation – unfair trade practices – no certificate of authority needed – personal jurisdiction over defendant existed** — Plaintiff had standing to file a negligent misrepresentation and unfair trade practices lawsuit against defendant. Plaintiff was conducting business in interstate commerce and thus did not need a certificate of authority in North Carolina since personal jurisdiction existed over defendant because he was a resident of Mecklenburg County. **Songwooyarn Trading Co., Ltd. v. Sex Eleven, Inc.,**

**Subject matter — trust — second superior court order impermissibly overruled first order** — One superior court judge's order in a trust case granting summary judgment in favor of one defendant impermissibly overruled another superior court judge's order denying summary judgment on the same legal issue for the same defendant. The matter was remanded to superior court for further proceedings. **Shelf v. Wachovia Bank, NA,**

## **LACHES**

**No knowledge of grounds for claim — motion to dismiss — denial proper** — The trial court did not err in a case involving the imposition of a constructive trust on decedent's death benefits by denying defendant's motion to dismiss on the grounds of laches. Defendants failed to present any evidence that plaintiff had knowledge of the existence of the grounds for the claim. **Myers v. Myers,**

## **MOTOR VEHICLES**

**Diminution of value — evidence of cost of repairs — improperly excluded — new trial properly granted** — The trial court did not err in a vehicular accident case by setting aside the jury verdict and granting plaintiff a new trial on the issue of diminution in value of his motorcycle. The trial court properly concluded that evidence regarding the cost of repairs of plaintiff's motorcycle should not have been excluded. The cost of the repairs was relevant; the admission of such evidence would not cause a jury to award double recovery; and plaintiff was entitled to a new trial on the issue of diminution in value. **Smith v. White,**

**Driving while impaired – appreciable impairment – sufficient evidence – motion to dismiss properly denied** — The trial court did not err in a driving while impaired case by denying defendant’s motion to dismiss for insufficient evidence. Evidence that defendant consumed an impairing substance and then drove in a faulty manner was sufficient to show appreciable impairment. **State v. Norton,**

## **POLICE OFFICERS**

**Resist, delay, or obstruct an officer — consensual encounter — motion to dismiss properly granted** — The trial court did not err in a resisting, delaying, or obstructing an officer (RDO) case by granting defendant’s motions to suppress evidence and dismiss the charge. The State invited consideration of defendant’s motion to dismiss the RDO charge on the merits and considering all the circumstances surrounding the police officer’s encounter with defendant prior to his flight, a reasonable person would have felt at liberty to ignore the officer’s presence and go about his business. **State v. Joe,**

## **PREMISES LIABILITY**

**Jury instructions — known or reasonably foreseeable characteristics of lawful visitors — denial of motion for new trial — erroneous** — The trial court erred in a negligence case by denying plaintiffs’ motion for a new trial. The trial court failed to instruct the jury to consider the known or reasonably foreseeable characteristics of lawful visitors when determining whether defendant discharged its duty to exercise reasonable care in maintaining its property for the protection of plaintiff. **Cobb v. Town of Blowing Rock,**

**Jury instructions — known or reasonably foreseeable characteristics of lawful visitors — failure to instruct — erroneous** — The trial court erred in a negligence case by failing to instruct the jury to consider the known or reasonably foreseeable characteristics of lawful visitors when determining whether defendant had discharged its duty to exercise reasonable care in maintaining its property for the protection of plaintiff. **Cobb v. Town of Blowing Rock,**

**Jury instructions — landowner’s duty to minor — requested instruction incorrect — no error** — The trial court did not err in a negligence case by failing to give plaintiffs’ requested jury instructions regarding a landowner’s duty to a minor who is a lawful visitor as the instructions contained an incorrect statement of law. **Cobb v. Town of**

**Blowing Rock,**

## **PROBATION AND PAROLE**

**Rejection of negotiated plea — motion to continue denied — no abuse of discretion** — The trial court did not abuse its discretion in a breaking and entering a vehicle, misdemeanor larceny, injury to personal property, possession of a firearm by a felon, and carrying a concealed gun case by denying defendant a continuance as to the probationary matters upon rejection of the negotiated plea arrangement. N.C.G.S. § 15A-1023(b) applies only to criminal prosecutions and not to probation revocation proceedings. **State v. Cleary,**

## **PUBLIC OFFICERS AND EMPLOYEES**

**Employment contract — terminated fire chief — summary judgment** — Summary judgment was properly entered for plaintiff in an employment action against a town by a former fire chief where defendant did not show that the contract lacked consideration or violated public policy and defendant did not present any evidence that plaintiff was not performing his duties adequately under the agreements. **Elliot v. Enka-Candler Fire & Rescue Dep't, Inc.,**

**Fire chief — employment agreements — public purpose — balanced budget** — A town's employment agreements with its fire chief served a public purpose in that the town was able to retain its fire chief for a significant period of time without fear that another municipality would lure him away. The contract did not call for payment regardless of whether the chief performed his public service duties, but for salary and benefits to continue only if defendant terminated plaintiff without cause. Furthermore, despite the statutory requirement that local budgets be balanced, there is no authority for the proposition that a municipality can evade payment of severance pay or breach of contract damages by simply not budgeting for them. **Elliot v. Enka-Candler Fire & Rescue Dep't, Inc.,**

## **ROBBERY**

**Dangerous weapon — jury instruction — lesser-included offense — not warranted** — The trial court did not err in a robbery with a dangerous weapon case by refusing to charge the jury on the lesser-included offense of common law robbery. All the evidence indicated that defendant removed property from the victim's apartment after she was awake and while her life was being threatened by defendant's use of a knife, a deadly weapon. **State v. Speight,**

**Dangerous weapon — sufficient evidence — motion to dismiss properly denied** — The trial court did not err in a robbery with a dangerous weapon case by denying defendant's motion to dismiss the charge. The State offered sufficient evidence that defendant took personal property from the victim by the use or threatened use of a knife. **State v. Speight,**

## SCHOOLS AND EDUCATION

**Compulsory Attendance Law – jury instruction – lack of good faith – not an element – no error** — The trial court did not commit error or plain error in its jury instructions in a case involving the violation of the Compulsory Attendance Law. There is no element requiring proof of lack of a good faith effort. **State v. Jones,**

**Compulsory Attendance Law – motion to dismiss – properly denied** — The trial court did not err in a case involving the violation of the Compulsory Attendance Law by denying defendants' motions to dismiss the charge for insufficient evidence. The State presented substantial evidence of each element of the offense, and therefore, the court properly submitted the charge against each defendant to the jury. **State v. Jones,**

## SENTENCING

**Personal bias — insistence on trial** — The trial court did not abuse its discretion when sentencing defendant for second-degree murder and other offenses arising from impaired driving where defendant contended that the trial court impermissibly based defendant's sentence on the decision to contest the charges and on personal bias against defendant. **State v. Norman,**

## SEXUAL OFFENSES

**First-degree — jury instruction — lesser-included offense — not warranted** — The trial court did not err in a first-degree sexual offense case by denying defendant's request to charge the jury on the lesser-included offense of second-degree sexual offense. There was no evidence to support instruction on the lesser-included offense. **State v. Speight,**

## TRIALS

**Compromise verdict — motion for new trial — properly denied** — The trial court did not err in a negligence case arising out of a vehicular accident by refusing to grant plaintiff's motion for a new trial. A juror's statements

may not be used in determining whether a compromise verdict was delivered and the award may have indicated that the jury did compensate plaintiff some amount for his pain and suffering. **Smith v. White,**

## TRUSTS

**Constructive trust — imposition proper** — The trial court did not err in an action involving beneficiaries of decedent's death benefits by imposing a constructive trust upon the gross amounts plus interest that defendants received from decedent's retirement plans. There were circumstances making it inequitable for defendants to retain the proceeds against the claim of the beneficiary of the constructive trust. **Myers v. Myers,**

**Constructive trust — proceeds of retirement plans — consent order unambiguous** — The trial court did not err in a case involving the imposition of a constructive trust on decedent's death benefits by denying defendants' motion to dismiss. Based on the plain language of decedent's retirement plans and the clear language of a 1994 consent order, the trial court did not err in concluding that decedent's retirement plans' proceeds were "death benefits" as set forth in the consent order. **Myers v. Myers,**

## UNFAIR TRADE PRACTICES

**In or affecting commerce – multiple companies – motions for directed verdict – judgment notwithstanding verdict – properly denied** — The trial court did not err in an unfair and deceptive trade practices case by denying defendant's motions for directed verdict and judgment notwithstanding the verdict. Because there were multiple companies involved, including a North Carolina corporation, defendant's actions were "in or affecting commerce." **Songwooyarn Trading Co., Ltd. v. Sex Eleven, Inc.,**

## VENUE

**Motion for change — denied — use of permanent mailing address as legal address** — The trial court did not abuse its discretion by denying a motion for a change of venue in a child support dispute where the original action began in Orange County, where defendant was living with her father, she moved a number of times, and resided in Wake County at the time of the motion. The trial court was within its discretion to determine that her permanent mailing address (Orange County) remained her legal address. **Orange Cnty. ex rel. Clayton v. Hamilton,**

## WITNESSES

**Expert — no degree or certification — practical experience —** The trial court did not err in a prosecution for second-degree murder, driving while impaired, and other offenses by qualifying a witness as an expert in forensic blood alcohol physiology and pharmacology, breath and blood alcohol testing, and the effects of drugs on human performance and testing. Despite the witness's lack of a formal degree or certification, his extensive practical experience qualified him to testify as an expert. **State v. Norman,**

**Expert — testimony not outside scope of expertise — no error —** The trial court did not err in a driving while impaired case by allowing a witness accepted as an expert forensic toxicologist to testify about the effects of cocaine on the body. As a trained expert in forensic toxicology with degrees in biology and chemistry, the witness was in a better position to have an opinion on the physiological effects of cocaine than the jury. **State v. Norton,**

## **WORKERS' COMPENSATION**

**Calculation of compensation rate — exclusion of per diem, travel pay, and wage advances proper —** The Industrial Commission did not err in a workers' compensation case in excluding per diem, travel pay, and wage advances from the calculation of plaintiff's earnings while working for defendant. Competent evidence existed in the record to support the Commission's findings of fact that those items were not advanced to plaintiff in lieu of wages. **Thompson v. STS Holdings, Inc.,**

**Calculation of compensation rate — fifth method — proper calculation —** The Industrial Commission did not err in a workers' compensation case by calculating wages earned by plaintiff while in the employ of defendant in a fifty-two week period, then dividing that amount by fifty-two in order to obtain plaintiff's average weekly wage pursuant to the fifth method enumerated in N.C.G.S. § 97-2. **Thompson v. STS Holdings, Inc.,**

**Calculation of compensation rate — fifth method — proper method —** The Industrial Commission did not err in a workers' compensation case in calculating plaintiff's compensation rate pursuant to the fifth method enumerated in N.C.G.S. § 97-2. Plaintiff agreed that method one was not the appropriate method by which to calculate his average weekly wage and there was sufficient evidence before the Commission to support its findings that methods two, three, and four would not lead to fair and just results. **Thompson v. STS Holdings, Inc.,**

**Credit for overpayment of compensation — no error** — The Industrial Commission did not err in a workers' compensation case in allowing a credit to defendants for overpayment of compensation, as well as in failing to consider estoppel. The Court of Appeals had already rejected plaintiff's estoppel argument and plaintiff made no argument that the Commission abused its discretion by awarding defendants a credit. **Thompson v. STS Holdings, Inc.,**

**Reduction in compensation — equitable estoppel not considered — no error** — The Industrial Commission did not err in a workers' compensation case by failing to consider equitable estoppel as a means of preventing defendant from requesting that the Commission reduce the amount of compensation defendant was providing plaintiff. Plaintiff affirmatively denied the existence of any agreement between plaintiff and defendant concerning compensation, and expressly challenged the amount of compensation plaintiff was receiving from defendant. **Thompson v. STS Holdings, Inc.,**

## ZONING

**Conditional use permit — order on remand — properly carried out mandate** — The superior court's order on remand directing the Board of Adjustment to issue the conditional use permit for which petitioners applied "without application of any new or different conditions" properly carried out the mandate of the Court of Appeals. **Shafer v. Town of Hillsborough,**