

APPEAL AND ERROR

Appealability – interlocutory order – subject matter jurisdiction – The trial court had subject matter jurisdiction in a breach of contract and unfair and deceptive trade practices case after plaintiff appealed from a nonappealable interlocutory order that did not completely dispose of the case. Further action was required by the trial court to finally adjudicate the parties' claims. **D.G. II, LLC v. Nix,**

No right of appeal — petition for certiorari — granted for one issue — denied for remaining issues — Defendant in a felonious breaking or entering, larceny after breaking or entering, safecracking, and habitual felon case failed to take timely action to preserve his right to appeal. Defendant's request to consider his brief as a petition for *certiorari* and allow review of the calculation of his prior record level was granted. As defendant had no right to appeal the remaining issues raised in his brief, defendant's request to review these by *certiorari* was denied. **State v. Mungo,**

Preservation of issues — failure to argue — issue abandoned — Petitioners in a zoning case abandoned their argument that the trial court erred by applying the wrong standard when reviewing the decision of the Board of Adjustment to deny petitioners' application for a variance. Petitioners failed to provide any reason or argument in support of their assertion. **Premier Plastic Surgery Cntr., PLLC v. Bd. of Adjust. for the Town of Matthews,**

Preservation of issues – failure to raise constitutional issue at trial – Although plaintiff contended that the trial court erred in a wrongful death case by dismissing her amended complaint based on the unconstitutionality of N.C.G.S. § 1A-1, Rule 9(j), plaintiff waived this contention by failing to present any supporting argument. **McKoy v. Beasley,**

Selection — juror's comments — issue not preserved — no prejudice — Defendant's argument that the trial court erred in an armed robbery case by not declaring a mistrial on its own motion based upon statements made by a potential juror during jury selection was dismissed. The issue was not preserved at trial and was not subject to plain error review. Even assuming *arguendo* that defendant properly preserved this issue for appellate review, his argument failed because he was unable to demonstrate prejudice. **State v. Lee,**

Timeliness of appeal – party designated to prepare judgment failed to serve on other party – Defendants' motion to dismiss plaintiff's appeal as untimely in a breach of contract and unfair and deceptive trade practices

case was denied. Since defendants were the party designated by the trial court to prepare the judgment and they never served plaintiff with a copy of the judgment, they were not in compliance with N.C.G.S. § 1A-1, Rules 58 and 59. Thus, plaintiff timely filed within the ninety days under Rule 59. **D.G. II, LLC v. Nix,**

CHILD ABUSE, DEPENDENCY, AND NEGLECT

Findings of fact – sufficiency – The trial court did not err by adjudicating a minor child as an abused and neglected juvenile. Respondent mother’s testimony supported the trial court’s findings of fact, which in turn supported the adjudication. **In re A.N.L.,**

Guardian ad litem – full representation of child as required by statute – The trial court did not violate N.C.G.S. §7B-601(a) in a child abuse and neglect case. The minor child was fully represented by a guardian *ad litem* (GAL) as contemplated by the statute, and the use of a properly appointed GAL program staff member to serve as the juvenile’s GAL did not violate the statute. **In re A.N.L.,**

CHILD CUSTODY AND SUPPORT

Protected status as parent — acted inconsistently with — insufficient findings of fact — The trial court erred in a child custody case by failing to make the necessary findings of fact to support the conclusion that defendant acted inconsistently with her constitutionally protected status as the legal mother of the minor child. **Powers v. Wagner,**

CONSPIRACY

Failure to allege essential element – agreement to commit unlawful act – The trial court erred by convicting defendant on the charge of conspiracy to commit robbery with a dangerous weapon. The State’s failure to allege an essential element of the crime of conspiracy, the agreement to commit an unlawful act, rendered the indictment facially defective and deprived the trial court of jurisdiction to adjudicate the charge. **State v. Billinger,**

CONSTITUTIONAL LAW

Effective assistance of counsel — failure to object — no prejudice — The failure of trial counsel to object to the admission of challenged evidence at trial did not constitute ineffective assistance of counsel for defendant Ellison where Ellison did not make the required showing of prejudice. **State**

v. Ellison,

CONTRACTS

Severance benefits — no genuine issues of material fact — summary judgment proper — The trial court did not err in a breach of contract case by granting defendant's motion for summary judgment. Plaintiff was not entitled to Plan A benefits when he ceased continuous competition with defendant in 2001, and there were no genuine issues of material fact as to plaintiff's breach of contract claim. Since no breach of contract occurred, plaintiff was not entitled to specific performance. **McKinnon v. CV Indus., Inc.**,

CRIMINAL LAW

Joinder of charges — other crimes — The trial court did not abuse its discretion by joining charges against both defendants for trial where defendant Treadway argued that this decision allowed the jury to consider evidence of other crimes introduced against defendant Ellison as evidence of Treadway's guilt. Treadway did not show that he was prejudiced by the admission of evidence concerning Ellison's 2003 drug-related activities. **State v. Ellison**,

DAMAGES AND REMEDIES

Jury's failure to award nominal damages – no prejudicial error – The trial court did not abuse its discretion in a breach of contract and unfair and deceptive trade practices case by denying plaintiff's motion for a new trial based on the jury's failure to follow the trial court's instruction to write a nominal amount in its verdict after declining to award plaintiff actual damages. The trial court's entry of the October 2009 order entitled plaintiff to recover nominal damages as a matter of law. **D.G. II, LLC v. Nix**,

Restitution – no jurisdiction – The trial court's restitution award was vacated because there was no conspiracy conviction attached to it due to the trial court's lack of jurisdiction. **State v. Billinger**,

DECLARATORY JUDGMENTS

North Carolina State Highway Patrol's wrecker rotation — declaration of parties' rights — incomplete — The trial court erred in a declaratory judgment case by failing to clearly declare the rights of the parties and effectively dispose of the dispute concerning the rules governing the North Carolina State Highway Patrol's wrecker rotation. Because the

trial court failed to make a full and complete declaration, the matter was remanded. **Danny's Towing 2, Inc. v. N.C. Dep't of Crime Control & Public Safety,**

DISCOVERY

Identity of informant — motion to reveal denied — The trial court did not err in a drugs prosecution by denying defendant Ellison's motion to require disclosure of an informant's identity. The detective had ample justification for stopping defendant Ellison and the denial of Ellison's request for disclosure of the informant's identity was fully consistent with N.C.G.S. § 15A-978(b). **State v. Ellison,**

DRUGS

Trafficking — evidence of possession — sufficient — The trial court did not err by denying defendant Treadway's motion to dismiss charges of trafficking in prescription drugs for insufficient evidence of possession. Defendant argued that the State's evidence was highly suspicious but did not suffice to permit a reasonable juror to conclude that he ever actually possessed or transported or sold any drugs; however, there was clear testimony that a witness gave prescription medications to Treadway and returned later for payment, and prescription drugs matching those described by the witness were found in the vehicle of Treadway's accomplice. **State v. Ellison,**

Trafficking — prescription medications — opiates — statutes providing punishment — The trial court did not err by denying defendants' motions to dismiss charges of trafficking in opium and conspiracy to traffic in opium on the grounds that the medications at issue were not proscribed under N.C.G.S. § 90-95(h)(4). The General Assembly drafted N.C.G.S. § 90-95(h) for the purpose of punishing acts of drug trafficking in specific controlled substances at the level specified in N.C.G.S. § 90-95(h) regardless of the extent to which those same activities would also be subject to punishment under other provisions of N.C.G.S. § 90-05. **State v. Ellison,**

Trafficking — prescription opiates — entire weight of pills — The trial court did not err by denying defendant Ellison's motion to dismiss drug trafficking charges where defendant contended that he lacked adequate notice that possession of prescription Lorcet pills could result in being charged with trafficking in an opiate and being responsible for the entire weight of the pills. **State v. Ellison,**

EVIDENCE

Joined defendants — prior crimes or bad acts of one defendant — no prejudice — There was no plain error in a drugs prosecution against joined defendants where defendant Treadway argued that the trial court should not have admitted evidence about defendant Ellison's prior possession of prescription medications. Defendant Treadway was clearly not involved in the 2003 incident, the contested evidence was relevant to guilty knowledge, the trial court gave a limiting instruction, and Treadway did not meet his burden of showing that the outcome probably would have been different absent the challenged evidence. **State v. Ellison,**

Trafficking in prescription drugs — evidence that drugs contained opium — The trial court did not abuse its discretion in a prosecution for trafficking in prescription drugs by admitting testimony from an SBI agent on rebuttal that dihydrocodeinone and hydrocodone contained opium. **State v. Ellison,**

FIREARMS AND OTHER WEAPONS

Possession of weapon of mass death and destruction – motion to dismiss – sufficiency of evidence – possession – The trial court did not err by denying defendant's motion to dismiss the charge of possession of a weapon of mass death and destruction based on alleged insufficient evidence of possession. The evidence was sufficient to support a reasonable inference that defendant owned and constructively possessed a sawed-off shotgun. **State v. Billinger,**

Possession of a weapon of mass destruction — sufficient evidence — motion to dismiss correctly denied — The trial court did not err in a possession of a weapon of mass death and destruction and possession of a firearm by a felon case by denying defendant's motion to dismiss the charges for insufficient evidence. The evidence showed that defendant possessed a weapon on different days and in different locations and defendant could be charged with multiple possession offenses. **State v. Lee,**

FRAUD

Severance benefits — no genuine issues of material fact — summary judgment proper — The trial court did not err in a fraud case by granting defendant's motion for summary judgment. There were no genuine issues of material fact as to whether defendant engaged in fraud by denying plaintiff's claim for Plan A benefits. **McKinnon v. CV Indus., Inc.,**

INJUNCTIONS

State Highway Patrol's wrecker rotation program — bases of injunction not adequate — The trial court erred in an injunctive relief case by enjoining certain portions of the rules governing the North Carolina State Highway Patrol's wrecker rotation program as unenforceable. The order of injunction did not state the reasons for its issuance, beyond a bare statement that portions of the rules which the court did not enjoin were reasonable and enforceable as written. **Danny's Towing 2, Inc. v. N.C. Dep't of Crime Control & Public Safety,**

JURISDICTION

Subject matter — administrative hearing — failure to exhaust administrative remedies — motion to dismiss properly granted — The trial court did not err in a negligence and negligence *per se* case by granting defendant's motion to dismiss for lack of subject matter jurisdiction. Plaintiff failed to exhaust his administrative remedies by not requesting an administrative hearing to contest the decision of the North Carolina Criminal Justice Education and Training Standards Commission. **Vanwijk v. Prof'l Nursing Servs., Inc.,**

Subject matter — child custody — home state — findings sufficient — The North Carolina trial court properly exercised jurisdiction over a child custody action where North Carolina was the "home state" of the child and no other jurisdiction had made an initial custody determination that deprived North Carolina courts of subject matter jurisdiction over the matter. **Powers v. Wagner,**

LARCENY

Felonious larceny by employee — defendant not selectively prosecuted — dismissal erroneous — The trial court erred in a felonious larceny by employee case by dismissing the charges against defendant on the grounds that defendant was selectively prosecuted. The other employees who were not charged were not similarly situated to defendant, nor did they perform the same acts. Moreover, defendant failed to demonstrate that his prosecution, as opposed to the initial investigation by local officials, was politically motivated. **State v. Pope,**

Felonious larceny by employee — entrapment-by-estoppel — dismissal erroneous — The trial court erred in a felonious larceny by employee case by dismissing the charges based on the theory of entrapment-by-estoppel. Defendant failed to offer evidence showing that he reasonably relied on explicit assurances by government officials of the legality of his

actions. **State v. Pope,**

LIENS

Materialman's lien — date of first furnishing — prior to date of deed of trust — partial lien waivers — ineffective to change date of first furnishing — The trial court erred in a lien case by granting plaintiff Preserve Holdings, LLC's motion for judgment on the pleadings. As a result of the fact that defendant Superior Construction Corporation (Superior) first furnished labor and materials at The Preserve prior to the date upon which plaintiff Wachovia's deed of trust was recorded, defendant Superior's lien had priority over that of Wachovia. The partial lien waivers signed by defendant Superior did not effectively change the date of first furnishing of labor and materials from 22 April 2005 to 31 May 2005. **Wachovia Bank Nat'l Ass'n. v. Superior Constr. Corp.,**

MEDICAL MALPRACTICE

Rule 9(j) certification – amended complaint filed after statute of limitations expired – The trial court did not err by dismissing a wrongful death case based on medical negligence because plaintiff's original complaint was devoid of any allegations complying with N.C.G.S. § 1A-1, Rule 9(j), and the defect could not be corrected by filing a second complaint after the expiration of the applicable statute of limitations. **McKoy v. Beasley,**

PLEADINGS

Rule 11 sanctions – failure to show principal purpose to harass or cause unnecessary delay – The trial court erred by imposing sanctions against plaintiffs under the improper purpose prong of N.C.G.S. § 1A-1, Rule 11. Based on the evidence in the record and viewed objectively under the totality of the circumstances, plaintiffs' continued prosecution of their action and the language concerning project delay in their neighborhood association newsletter did not create a strong inference that plaintiffs' principal purpose in filing their three actions was to harass or to cause unnecessary delay and disruption. **Coventry Woods Neighborhood Ass'n Inc. v. City of Charlotte,**

ROBBERY

Armed robbery — jury instructions — doctrine of recent possession — sufficient evidence — instruction proper — The trial court did not err in an armed robbery case by instructing the jury, over defendant's objection, on the doctrine of recent possession. The State presented sufficient evidence

of defendant's recent possession of stolen property. **State v. Lee,**

SEARCH AND SEIZURE

Handcuffed defendant — special circumstance — safety-related detainment — stop not arrest — motion to suppress properly denied — The trial court did not err in a resisting a public officer, sale of cocaine, possession with intent to sell or deliver cocaine, and attaining habitual felon case by denying defendant's motion to suppress evidence obtained after he was placed in handcuffs by a law enforcement officer. The trial court properly concluded that a special circumstance justified handcuffing defendant and, thus, this safety-related detainment did not escalate the *Terry* stop into an arrest. **State v. Carrouters,**

School-wide search — lacking individualized suspicion — search constitutionally unreasonable — The trial court erred in a possession of controlled substances case by denying the juvenile defendant's motion to suppress evidence obtained during a school-wide student search. Where the blanket search of the entire school lacked any individualized suspicion as to which students were responsible for the alleged infraction or any particularized reason to believe the contraband sought presented an imminent threat to school safety, the search of defendant's bra was constitutionally unreasonable. **In re T.A.S.,**

Stop of vehicle — multiple factors — informant's information — The trial court did not commit plain error by denying defendant Ellison's motion to suppress drugs seized from his vehicle where defendant contended that officers stopped his truck based exclusively on insufficiently corroborated information received from an informant. The detective had ample justification for treating the information supplied by the informant as having been corroborated by subsequent events and the detective decided to stop Ellison's truck after considering a number of factors. **State v. Ellison,**

SENTENCING

Calculation of prior record level — stipulation to prior record level worksheet — sufficient evidence of prior convictions — The trial court did not err in a possession with intent to manufacture, sell, or deliver cocaine case in determining that defendant had a prior record level of V, based on 16 prior record points. Defendant's stipulation in the prior record level worksheet was sufficient proof of his prior convictions. **State v. Wingate,**

Clerical error — remanded — A prosecution for trafficking in prescription drugs was remanded for correction of a clerical error that had no impact upon

the sentence. **State v. Ellison,**

Prior record level — calculation not erroneous — The trial court did not err in a felonious breaking or entering, larceny after breaking or entering, safecracking, and habitual felon case in its calculation of defendant's prior record level. **State v. Mungo,**

UNFAIR TRADE PRACTICES

Severance benefits — no genuine issues of material fact — summary judgment proper — The trial court did not err in an unfair trade practices claim by granting defendant's motion for summary judgment. The severance agreement did not violate principles of common law and there were no genuine issues of material fact regarding his unfair and deceptive trade practices claim. **McKinnon v. CV Indus. Inc.,**

Summary judgment – allegations not sufficiently egregious or aggravating – The trial court did not err by granting defendants' motion for partial summary judgment on plaintiff's claim for unfair and deceptive trade practices. While the facts supported plaintiff's claim for breach of contract, they were not sufficiently egregious or aggravating. **D.G. II, LLC v. Nix,**

ZONING

Application for variance — erroneously denied — The trial court erred in a zoning case by finding that the Board of Adjustment had no authority to grant petitioner the requested variance. The trial court's reliance on *Donnelly*, 99 N.C. App. 702, was erroneous as petitioners' sign was not, as a matter of law, contrary to the zoning ordinance. Moreover, the variance petitioners sought was not a use variance but was an area variance. **Premier Plastic Surgery Cntr., PLLC v. Bd. of Adjust. for the Town of Matthews,**

Sign permit — vested rights not acquired — estoppel or laches inapplicable — The trial court did not err in a zoning case by concluding that petitioners did not acquire vested rights in a sign permit and that the Town of Matthews was not barred by estoppel or laches from revoking the permit. Petitioners did not appeal the Board of Adjustment's decision to deny petitioner's appeal of the revocation of the sign permit. **Premier Plastic Surgery Cntr., PLLC v. Bd. of Adjust. for the Town of Matthews,**

Variance — denial of petition — findings of fact insufficient — The trial court erred in a zoning case by concluding that the Board of Adjustment made sufficient findings of fact to support its denial of petitioners' application

for a variance. As the trial court erred in concluding the variance was directly contrary to the zoning ordinance, it also erred in concluding the Board had no duty to make sufficient findings. Furthermore, the Board's findings of fact lacked the specificity necessary for a reviewing court to determine whether the Board acted arbitrarily or committed errors of law.

Premier Plastic Surgery Cntr., PLLC v. Bd. of Adjust. for the Town of Matthews,