

ADMINISTRATIVE LAW

Contested case — no showing of prejudice — The trial court did not err by affirming a final agency decision against petitioners in an action concerning the development of adult care home facilities. There was no showing of substantial prejudice. **Ridge Care, Inc. v. N.C. Dep't of Health & Human Servs.**,

APPEAL AND ERROR

Interlocutory orders and appeals — receiver appointed — no substantial right affected — dismissed — Defendant's appeal from the trial court's order appointing a receiver was dismissed as interlocutory as there was no substantial right of defendant that would have been lost or irretrievably and adversely affected prior to a determination on the merits. **Batesville Casket Co., Inc. v. Wings Aviation, Inc.**,

Mootness — administrative decision — superior court review — dismissed — In an appeal arising from an administrative action in which petitioner challenged a new methodology for calculating coverage under the Personal Care Services (PCS) Medicaid program, the superior court's injunction and order directing that the contested case be dismissed was vacated and remanded with instructions to dismiss the contested case for mootness. The PCS Medicaid program and related coverage policy had been terminated, eliminating the effect that any determination in petitioner's contested case could have had on the controversy. **Ass'n for Home & Hospice Care of N.C., Inc. v. Div. of Med. Assistance**,

Preservation of issues — issue not raised at trial — dismissed — Defendant's argument that the trial court violated her right to be free from double jeopardy when it sentenced her for both maiming without malice and assault with a deadly weapon inflicting serious injury was not preserved for appellate review where defendant failed to raise the issue at trial. **State v. Flaughner**,

Preservation of issues — not alternative basis to support order — failure to cross-appeal — arguments dismissed — Neither of the issues plaintiff presented in her appellee brief in a child support case, if meritorious, would have provided an alternative basis for upholding the trial court's judgment ordering defendant's payment of child support arrearages. To properly present these issues for appellate review, plaintiff should have cross-appealed from the trial court's order. Plaintiff's arguments were dismissed. **Wilson v. Wilson**,

ASSAULT

Deadly weapon inflicting serious injury — lesser-included offense — misdemeanor assault with deadly weapon — jury instruction not warranted — The trial court did not err in an assault with a deadly weapon inflicting serious injury case by refusing to instruct the jury on the lesser-included offense of misdemeanor assault with a deadly weapon. The evidence squarely showed serious injury and defendant did not address the intent to kill element. **State v. Flaughner,**

ATTORNEY GENERAL

DHHS settlement — signature not required — The Attorney General was not required to execute a settlement between an adult care home and the North Carolina Department of Health and Human Services. Moreover, a Joint Motion to Dismiss Appeal Based Upon Settlement by the Parties was signed by the Solicitor General on behalf of the Attorney General. **Ridge Care, Inc. v. N.C. Dep't of Health & Human Servs.,**

CHILD CUSTODY AND SUPPORT

Support obligation — language of agreement unambiguous — Defendant's argument in a child support case that he was not required to pay child support beyond October 2004 because the younger son was not in good academic standing was overruled. Because the younger son was still enrolled in school and did finish his degree requirements in May 2005, the unambiguous language of the incorporated agreement required that defendant continue to pay child support from November 2004 through May 2005. **Wilson v. Wilson,**

Support order — impermissibly modified defendant's support obligation — The trial court erred in a child support case by entering an order which impermissibly modified defendant's support obligation. The trial court erroneously computed increases in defendant's salary and applied those increases to payments over an eighteen-year period without a finding of a substantial change of circumstances. **Wilson v. Wilson,**

CONSTITUTIONAL LAW

Certificate of need — settlement — equal protection and due process — Petitioners' right to due process and equal protection was not violated by a settlement between the North Carolina Department of Health and Human Services and respondent intervenor that allowed the development of adult care home beds without meeting the certificate of need conditions required of

other providers. Respondent intervenor already had the right to develop many more beds under a prior decision, and the settlement provided new limitations on development rather than granting respondent intervenor any new rights. **Ridge Care, Inc. v. N.C. Dep't of Health & Human Servs.,**

Effective assistance of counsel — necessity of prejudice — Defense counsel was not ineffective during a narcotics trafficking prosecution where defense counsel did not object to characterizations of an informant as reliable. Defendant did not show prejudice from the alleged errors. **State v. Johnson,**

Right to counsel — waiver of appointed counsel — no pro se inquiry — A *pro se* defendant received a new trial where he waived appointed counsel but the record did not show that the trial court conducted the required inquiry before allowing him to proceed *pro se*. **State v. Seymore,**

CONTRIBUTION

Dram Shop Act — negligence – liability — The trial court did not err by granting summary judgment for the third-party defendant, the estate of Ms. Lutz, on a claim for contribution in an action under the Dram Shop Act against the defendants/third-party plaintiffs by the son of a passenger killed in the car which the intoxicated Ms. Lutz was driving. Defendants (the bar at which Ms. Lutz had been drinking) focused on N.C.G.S. § 18B-120, *et seq.*, which created a cause of action against the permittee or a local ABC board only and did not create a cause of action against the negligent driver. There was no claim articulated under any other legal theory by which Ms. Lutz's estate would be liable to plaintiff; the difference between negligence and liability was pivotal. **Green v. Fishing Piers, Inc.,**

CRIMES, OTHER

Crimes, Other — maiming without malice — sufficient evidence — motion to dismiss properly denied — The trial court did not err in a maiming without malice case by denying defendant's motion to dismiss the charge. There was substantial evidence of each of the elements of the offense, including that defendant intended to strike the victim's finger with the intent to disable him. **State v. Flaughner,**

DISCOVERY

Discovery order — sanctions for noncompliance — defendant not properly served — The trial court erred in an action concerning the payment of a monetary judgment by awarding sanctions based upon

defendant's noncompliance with a discovery order. The record did not demonstrate that defendant was properly served with the discovery order as required by N.C.G.S. § 1-352.1. **Batesville Casket Co., Inc. v. Wings Aviation, Inc.,**

DIVORCE

Equitable Distribution — Counterclaim — dismissal — failure to prosecute — lesser sanctions not considered — The trial court erred by dismissing defendant's counterclaim for equitable distribution pursuant to Rule 41(b) of the Rules of Civil Procedure and Rule 11 of the Wake County Family Court Rules. The court failed to make any findings or conclusions indicating that the court considered lesser sanctions prior to dismissing the claim. **McKoy v. McKoy,**

DRUGS

Trafficking — sale of opium derivative — sale of schedule III substance — not mutually exclusive — Judgments against defendant for both trafficking in opium and the possession and sale of a schedule III substance were not mutually exclusive. The trafficking statute refers to the total weight of the opium derivative at issue rather than the quantitative measure per dosage unit. **State v. Johnson,**

EASEMENTS

Express dedication — summary judgment proper — The trial court did not err in a real property case by granting summary judgment in favor of defendant with respect to its claim to possess an express easement across plaintiffs' property. Plaintiffs had expressly dedicated an easement for public use in the Final Plat of Subdivision & Dedication of Easement. **Smith v. Cnty. of Durham,**

EVIDENCE

Expert testimony — not commentary on victim's credibility — no plain error — The trial court did not commit plain error in a sexual offenses case by admitting testimony of an expert witness regarding the characteristics of sexually abused children. The witness's testimony did not go to the victim's credibility. **State v. Khouri,**

Prior crimes or bad acts — assault — deadly weapon — absence of mistake — not unfairly prejudicial — The trial court did not commit plain error in an assault with a deadly weapon with intent to kill inflicting

serious injury case by admitting evidence that defendant had previously assaulted the victim with a fork, injuring his hand. The evidence was properly admitted for the purpose of showing absence of accident or mistake and the probative value outweighed the danger of any unfair prejudice. **State v. Flaughner,**

Prior crimes or bad acts — sexual offenses — common plan or scheme — temporal proximity — The trial court did not abuse its discretion in a sexual offenses case by admitting testimony pursuant to N.C.G.S. § 8C-1, Rules 404(b) and 403 regarding sexual contact between defendant and the prosecuting victim's cousin. There were sufficient similarities between the acts and the acts occurred within sufficient temporal proximity to be admissible under Rule 404(b). Furthermore, the testimony was not more prejudicial than probative and was properly received for the purpose of showing a common plan or scheme. **State v. Khouri,**

Rape Shield Act — not implicated in two instances — testimony of victim's prior sexual activity properly excluded — The trial court did not err in a sexual offenses case by excluding testimony by defense witnesses that the victim had made inconsistent statements. The Rape Shield Act was not implicated in two of the rulings defendant objected to and the trial court properly excluded testimony under the Rape Shield Act concerning the possible paternity of the victim's child. **State v. Khouri,**

Video — replayed during closing and deliberations — A narcotics trafficking defendant did not meet his burden of showing that the trial court abused its discretion by determining that the versions of a video recording played during closing argument and during jury deliberations constituted the same evidence that had been admitted during the State's case-in-chief. The video was enlarged and shown in slow motion during the closing argument and frame-by-frame during deliberations. **State v. Johnson,**

HOSPITALS AND OTHER MEDICAL FACILITIES

Certificate of need — adult care home facilities — settlement authority — The North Carolina Department of Health and Human Services had the authority to enter into a settlement which allowed a number of adult care home facilities to be constructed outside the certificate of need process, but limited the effect of a prior judicial decision that would have allowed many more. **Ridge Care, Inc. v. N.C. Dep't of Health & Human Servs.,**

Certificate of need — settlement agreement — prior decision — A contention regarding the constitutional authority of the North Carolina

Department of Health and Human Services (DHHS) to enter a settlement agreement that made the certificate of need law not applicable to respondent intervenor was determined by a prior case, which held that N.C.G.S. § 150B-22 provided DHHS with the authority to enter settlement agreements. **Ridge Care, Inc. v. N.C. Dep't of Health & Human Servs.,**

INSURANCE

Commercial — exclusion — grain elevator repair — Given precedent and the policy that insurance policies are construed in favor of the insured, the trial court did not err in an action arising from a grain elevator repair and explosion by granting summary judgment in part for defendant on a declaratory judgment action to determine the effect of an exclusionary clause in defendant's commercial insurance policy. **Alliance Mut. Ins. Co. v. Dove,**

Title — exclusion — actual loss — The trial court did not err when granting summary judgment for BB&T by concluding that an exclusion in a title insurance policy requiring actual loss did not apply to BB&T's action. **Branch Banking & Trust Co. v. Chicago Title Ins. Co.,**

JURISDICTION

Subject matter — First Amendment not prohibitive — dismissal improper — The trial court erred in granting defendants' motion to dismiss for lack of subject matter jurisdiction as the trial court was not prohibited by the First Amendment from addressing plaintiffs' claims. Plaintiffs' claims did not implicate an impermissible analysis by the court based on religious doctrine or practice but rather required the trial court to apply neutral principles of law to determine whether, *inter alia*, defendants complied with the North Carolina Nonprofit Corporation Act. **Johnson v. Antioch United Holy Church, Inc.,**

JURY

Instructions — voluntary intoxication — insufficient evidence — The trial court did not err in a robbery with a dangerous weapon and assault with a deadly weapon with intent to kill inflicting serious injury case by refusing to instruct the jury on the issue of voluntary intoxication. Defendant did not produce sufficient evidence to show that at the time of the crimes, her mind was so completely intoxicated that she was utterly incapable of forming the necessary intent to commit the crimes. **State v. Flaughner,**

JUVENILES

Delinquency — felony larceny pursuant to breaking and entering — indictment insufficient — The trial court erred in adjudicating the juvenile defendant delinquent for the offense of felony larceny pursuant to breaking and entering. As the juvenile petition alleging felony larceny pursuant to breaking and entering contained no allegation that the alleged victim was a legal entity capable of owning property, the petition was fatally defective. **In re D.B.,**

Delinquency — unlawful search — evidence erroneously admitted — not harmless error — The trial court erred in a juvenile delinquency case by admitting evidence obtained by an officer in a search that unlawfully exceeded the scope of a *Terry* frisk. The evidence obtained as a result of that search should have been excluded, and because its admission was not harmless beyond a reasonable doubt, defendant's adjudication of delinquency for the offense of the misdemeanor possession of stolen property was reversed. **In re D.B.,**

Juvenile delinquency order — clerical error — remanded — The trial court's order adjudicating defendant delinquent was remanded so that the trial court could correct finding of fact three to reflect that the court found beyond a reasonable doubt that the juvenile committed the offenses forming the basis for the delinquency adjudication. **In re D.B.,**

Restitution — fairness to victim — A restitution order against a juvenile was remanded where the trial court's findings indicated that the court was primarily concerned with fairness to the victim rather than the juvenile. **In re D.A.Q.,**

Restitution — joint and several liability — The trial court did not err by not holding a juvenile jointly and severally liable for restitution along with another juvenile after they feloniously broke and entered a motor vehicle. Although the juvenile bringing this appeal was required to pay more than half the restitution, joint and several liability could have resulted in this juvenile being required to pay the entire amount due to the co respondent's numerous other restitution obligations. **In re D.A.Q.,**

Restitution — juvenile's best interest — no finding — An order requiring a juvenile adjudicated delinquent to pay restitution was vacated and remanded where the judge did not find that restitution was in the juvenile's best interest. **In re D.A.Q.,**

PLEADINGS

Sufficient allegations — Rule 11 sanctions — erroneous — The trial court erred in granting defendants' motion for Rule 11 sanctions based on the factual and legal insufficiency of plaintiffs' complaint. Plaintiffs' allegations were warranted by North Carolina statutes and common law. **Johnson v. Antioch United Holy Church, Inc.,**

REFORMATION OF INSTRUMENTS

Title insurance policy — undiscovered deed of trust — The trial court did not err by granting summary judgment to plaintiff on the issue of reformation of a title insurance policy where Chicago Title argued mutual mistake but cited no evidence of any oral agreement that would have excluded an undiscovered deed of trust. Chicago Title did not present evidence sufficient to forecast a showing that BB&T and Chicago Title mutually intended to exclude the undiscovered deed of trust from the policy. **Branch Banking & Trust Co. v. Chicago Title Ins. Co.,**

ROBBERY

Dangerous weapon — lesser-included offense — common law robbery — jury instruction not warranted — The trial court did not err in a robbery with a dangerous weapon case by refusing to charge the jury on common law robbery. The pickaxe used by defendant and the manner of its use were of such character as to admit but one conclusion — that it was a deadly weapon. **State v. Flaughner,**

Dangerous weapon — pickaxe — jury instruction — no plain error — The trial court did not commit plain error in a robbery with a dangerous weapon case by instructing the jury that a pickaxe used by defendant was a deadly weapon. The pickaxe and the manner of its use were of such character as to admit but one conclusion — that it was a deadly weapon. **State v. Flaughner,**

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. There was substantial evidence of each essential element of the offense charged, and of defendant's being the perpetrator of such offense. **State v. Flaughner,**

SEARCH AND SEIZURE

No reasonable suspicion for stop — no probable cause for arrest — motion to suppress improperly denied — The trial court erred in a possession with intent to sell and deliver cocaine and possession of cocaine

case by concluding the police had reasonable suspicion to conduct an investigatory stop and in denying defendant's motion to suppress the State's evidence obtained pursuant to his unlawful seizure. The circumstances did not provide the officers with reasonable suspicion necessary to justify an investigatory stop of defendant or probable cause for defendant's arrest. **State v. White,**

Traffic stop — one malfunctioning brake light — no statutory violation — The trial court erred by denying defendant's motion to suppress evidence of cocaine possession and transportation where the initial traffic stop was based on a malfunctioning brake light. Vehicles are required by N.C.G.S. § 20-129(g) to have only one functioning stop lamp or "brake light," as did defendant's vehicle, and there was no violation of N.C.G.S. §§ 20-129(d) (rear lamps) or 20-183.3 (safety inspections). **State v. Heien,**

Vehicular stop — erroneous standard applied — reversed and remanded — The trial court erred in a seatbelt violation and possession of drug paraphernalia case by ruling that the stop of defendant's car was unconstitutional. The trial court's order indicated it applied the wrong standard in determining that the stop was unconstitutional. The ruling was reversed and remanded to the trial court for reevaluation of the evidence presented at the hearing, pursuant to the correct standard. **State v. Salinas,**

SENTENCING

Remand — one of four convictions vacated — same term — Defendant was not punished more severely on remand after one of his four convictions was vacated and he was resentenced to the same term. His sentences were consolidated, which required a single judgment for the most serious offense, a Class C felony on both occasions. The sentence imposed was near the bottom of the presumptive range for a Class C felony with this prior record level. **State v. Skipper,**

SEXUAL OFFENSES

First-degree sexual offense — indecent liberties — date of offenses — insufficient evidence — motion to dismiss improperly denied — The trial court erred in a first-degree sexual offense and indecent liberties case by denying defendant's motion to dismiss for insufficient evidence. The State did not present sufficient evidence to show that the alleged sexual incidents occurred in 2000, as indicated on the indictment, and there was no indication in the record that the State made any attempt to amend the indictment to include the proper date range. **State v. Khouri,**

Sexual offense of person who is 13, 14, or 15 years old — indecent liberties — sufficient evidence — motion to dismiss properly allowed — The trial court did not err in a statutory sexual offense of person who is 13, 14, or 15 years old and indecent liberties with a child case by denying defendant's motion to dismiss for insufficient evidence. There was substantial evidence that defendant committed sexual offenses against the victim and took indecent liberties with her even after he began having vaginal intercourse with her. **State v. Khouri,**

STATUTES OF LIMITATION AND REPOSE

Professional malpractice — negligent misrepresentation — undisclosed deed of trust — Chicago Title was not barred by either N.C.G.S. § 1-15 or N.C.G.S. § 1-52(9) from filing a claim for professional malpractice or negligent misrepresentation at the time it was notified of BB&T's claim based on an undiscovered deed of trust and did not suffer any prejudice as a result of any delay by BB&T in informing Chicago Title of the undiscovered deed of trust. **Branch Banking & Trust Co. v. Chicago Title Ins. Co.,**