CIVIL LAW UPDATE

NC SUPERIOR COURT JUDGES CONFERENCE
October 2024

1

THIS PRESENTATION ATTEMPTS TO ADDRESS:

38 PUBLISHED OPINIONS WERE ISSUED BY THE SUPREME COURT AND THE COURT OF APPEALS.

THESE OPINIONS WERE ISSUED BETWEEN JUNE 18, 2024, AND OCTOBER 1, 2024.

2

NO ARTIFICIAL INTELLIGENCE WAS USED IN ASSEMBLING THIS PRESENTATION.

HOPEFULLY, THERE IS SOME EVIDENCE THAT SOME INTELLIGENCE IS INVOLVED.

3

APPROXIMATELY 22 OF THESE OPINIONS WILL BE ADDRESSED IN THIS PRESENTATION.

THE GOAL IS TO FOCUS ON MORE FREQUENTLY OCCURRING ISSUES AND SO OPINIONS FOCUSING ON RELATIVELY OBSCURE OR UNUSUAL FACTS WERE CULLED OUT.

AN ATTEMPT WAS MADE TO WEED OUT ISSUES THAT ARE ASSIGNED TO THE DISTRICT COURT.

OTHER CASES INVOLVING UTILITY REGULATION AND CERTIFICATES OF NEED WERE OMITTED.

THE FOCUS IS ON MATTERS THAT ARE MORE PERTINENT TO THE CASES THAT ARE LIKELY TO ARRIVE IN YOUR COURTROOM.

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JURISDICTION OF THE TRIAL COURT DURING AN APPEAL

JESSEY SPORTS, LLC v. INTERCOLLEGIATE MEN'S LACROSSE COACHES ASS'N.
Court of Appeals (July 2, 2024)

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THE DEFENDANT FILED A MOTION TO DISMISS AND A MOTION TO STAY DISCOVERY PENDING THE HEARING ON A MOTION TO DISMISS.

THE TRIAL COURT STAYED DISCOVERY AND ORDERED DISCOVERY RESPONSES WITHIN 45 DAYS AFTER THE RULING ON THE MOTION TO DISMISS.

6

THE TRIAL COURT GRANTED A MOTION TO DISMISS THE UNJUST ENRICHMENT AND WAGE AND HOUR ACT CLAIMS AND DENIED THE MOTION TO DISMISS ON THE BREACH OF CONTRACT AND UNFAIR AND DECEPTIVE TRADE PRACTICES CLAIMS.

THE PLAINTIFF FILED A NOTICE OF APPEAL AND THE DEFENDANT REQUESTED A STAY OF ALL PROCEEDINGS.

7

THE PLAINTIFF FILED A MOTION TO COMPEL DISCOVERY AFTER THE 45 DAY PERIOD EXPIRED.

THE TRIAL COURT ENTERED AN ORDER COMPELLING DISCOVERY AND DENYING THE MOTION TO STAY.

8

THE DEFENDANT FILED ITS RESPONSES TO THE DISCOVERY REQUESTS LATE.

THE DEFENDANT ALSO FAILED TO PRODUCE A SINGLE DOCUMENT. INSTEAD, THE DEFENDANT STATED THAT "IT WILL PROVIDE THE DOCUMENTS."

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ULTIMATELY, THE APPEAL WAS RESOLVED WHEN THE COURT OF APPEALS REVERSED THE DISMISSAL OF THE UNJUST ENRICHMENT CLAIM AND AFFIRMED THE DISMISSAL OF THE WAGE AND HOUR CLAIM.

THE PLAINTIFF THEN MOVED FOR SANCTIONS FOR FAILING TO COMPLY WITH THE DISCOVERY ORDER AND THE TRIAL COURT IMPOSED VARIOUS SANCTIONS.

10

IN JESSEY SPORTS, THE DEFENDANT CHALLENGED THE TRIAL COURT'S SUBJECT MATTER JURISDICTION TO ENTER THE DISCOVERY SANCTIONS ORDER.

11

THE BASIC RULE IS THAT "WHEN A PARTY GIVES NOTICE OF APPEAL FROM AN APPEALABLE ORDER, THE TRIAL COURT IS DIVESTED OF JURISDICTION AND THE RELATED PROCEEDINGS ARE STAYED IN THE LOWER COURT."

N. C. GEN. STAT. 1-294 PROVIDES THAT:

> WHEN AN APPEAL IS PERFECTED AS PROVIDED IN THIS ARTICLE IT STAYS ALL FURTHER PROCEEDINGS IN THE COURT BELOW UPON THE JUDGMENT APPEALED FROM, OR UPON THE MATTER EMBRACED THEREIN, UNLESS OTHERWISE PROVIDED BY THE RULES OF APPELLATE PROCEDURE; BUT THE COURT BELOW MAY PROCEED UPON ANY OTHER MATTER INCLUDED IN THE ACTION AND NOT AFFECTED BY THE JUDGMENT APPEALED FROM.

12

BECAUSE THE PARTIES WERE STILL LITIGATING THE TWO REMAINING CLAIMS AND BOTH REQUIRED DISCOVERY, THE TRIAL COURT RETAINED SUBJECT MATTER JURISDICTION TO COMPEL DISCOVERY AND IMPOSE SANCTIONS RELATED TO THOSE TWO CLAIMS.

Jessey Sports, LLC.

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SANCTIONS FOR FAILURE TO COMPLY WITH DISCOVERY ORDERS

AJAYI v. SEAMAN
Court of Appeals (August 20, 2024)

STATE on relation of CITY OF SANFORD v. OM SHREE HEMAKASH CORPORATION
Court of Appeals (August 20, 2024)

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IN BOTH CASES, A PARTY HAD SERIOUSLY FAILED TO COMPLY WITH COURT ORDERS TO PROVIDE DISCOVERY.

IN AJAYI, THE PLAINTIFF FAILED TO APPEAR FOR A DEPOSITION ON TWO SEPARATE OCCASIONS, FAILED TO PROVIDE COMPLETE RESPONSES TO WRITTEN DISCOVERY, FAILED TO PRODUCE DOCUMENTS PRIOR TO A THIRD NOTICED DEPOSITION AND REFUSED TO ANSWER QUESTIONS ABOUT HER DAMAGES CLAIM AT HER DEPOSITION.

IN OM SHREE, THE DEFENDANTS FAILED TO APPEAR FOR DEPOSITIONS AND WILLFULLY FAILED TO ANSWER INTERROGATORIES AND WRITTEN DISCOVERY,

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IN AJAYI, THE TRIAL COURT JUDGE DISMISSED THE PLAINTIFF'S CLAIMS WITH PREJUDICE.

IN OM SHREE, THE TRIAL COURT ENTERED DEFAULT JUDGMENT AGAINST THE DEFENDANTS AND PERMITTED FORECLOSURE ON THE HOTEL THAT WAS ALLEGED TO BE A NUISANCE.

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TRIAL COURTS HAVE BROAD DISCRETION OVER SANCTIONS.

AJAYI

TRIAL COURTS DO NOT ABUSE THEIR DISCRETION BY IMPOSING SEVERE SANCTIONS IF THE SANCTION IS ENUMERATED (IN THE RULE) AND THERE IS NO SPECIFIC EVIDENCE OF INJUSTICE.

AJAYI

WITH RESPECT TO THE IMPOSITION OF SANCTIONS THAT ARE DIRECTED TO THE OUTCOME OF THE CASE SUCH AS DISMISSALS, DEFAULT JUDGMENTS OR PRECLUSION ORDERS…THE MOST DRASTIC PENALTIES, DISMISSAL OR DEFAULT, ARE EXAMINED IN LIGHT OF THE GENERAL PURPOSE OF THE RULES TO ENCOURAGE TRIAL ON THE MERITS.

OM SHREE

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BEFORE DISMISSING AN ACTION WITH PREJUDICE, A TRIAL COURT MUST CONSIDER LESS SEVERE SANCTIONS.

AJAYI

BEFORE IMPOSING A SEVERE SANCTION, SUCH AS STRIKING AN ANSWER AND ENTERING JUDGMENT AS TO LIABILITY, A TRIAL COURT MUST CONSIDER THE APPROPRIATENESS OF LESS SEVERE SANCTIONS.

OM SHREE

WHEN THE RECORD SUPPORTS THAT THE TRIAL COURT CONSIDERED LESS SEVERE SANCTIONS, THE DECISION WILL NOT BE OVERTURNED UNLESS IT IS SO ARBITRARY THAT IT COULD NOT BE THE RESULT OF A REASONED DECISION.

AJAYI

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LANGUAGE STATING THE TRIAL COURT CONSIDERED LESSER SANCTIONS BUT HAD REASON TO IMPOSE THE MORE SEVERE SANCTION IS SUFFICIENT.

OM SHREE

THE CLEAREST WAY A TRIAL COURT CAN SHOW THAT IT CONSIDERED LESSER SANCTIONS IS THROUGH EXPLICIT LANGUAGE IN ITS ORDER IMPOSING SANCTIONS.

AJAYI

THE AJAYI OPINION CITES AN ORDER ISSUED BY THE LATE JUDGE ERWIN SPAINHOUR THAT RECITED THE FOLLOWING AS AN EXAMPLE:

> THE COURT HAS CAREFULLY CONSIDERED EACH OF (THE PLAINTIFF'S) ACTS (OF MISCONDUCT), AS WELL AS THEIR CUMULATIVE EFFECT, AND HAS ALSO CONSIDERED THE AVAILABLE SANCTIONS FOR SUCH MISCONDUCT. AFTER THROUGH CONSIDERATION, THE COURT HAS DETERMINED THAT SANCTIONS LESS SEVERE THAN DISMISSAL WOULD NOT BE ADEQUATE GIVEN THE SERIOUSNESS OF THE MISCONDUCT.

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IN OM SHREE, THE ORDER RECITED THAT "THE COURT, IN CONSIDERING ORDERING DEFAULT JUDGMENT AS A SANCTION, HAS CONSIDERED LESSER SANCTIONS AS URGED BY DEFENSE COUNSEL AND FINDS IN ITS DISCRETION THAT ALL LESSER SANCTIONS ARE INAPPROPRIATE."

THAT LANGUAGE WAS DEEMED SUFFICIENT.

WHILE SUCH WRITTEN LANGUAGE IN ORDERS IS SUFFICIENT FOR A FINDING, IT IS NOT NECESSARY TO SHOW THAT A TRIAL COURT CONSIDERED LESSER SANCTIONS BEFORE DISMISSING THE CASE. THIS COURT WILL AFFIRM AN ORDER FOR SANCTIONS WHERE IT MAY BE INFERRED FROM THE RECORD THAT THE TRIAL COURT CONSIDERED ALL AVAILABLE SANCTIONS.

AJAYI

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AS A FOOTNOTE, IN AJAYI, THE COURT OF APPEALS ADDRESSED AN AWARD OF ATTORNEY'S FEES. THERE ARE A FEW PERTINENT STATEMENTS.

AN AWARD OF EXPENSES SHOULD BE A REIMBURSEMENT TO THE SUCCESSFUL MOVANT AND NOT A PUNISHMENT TO THE NON-COMPLYING PARTY.

TO DETERMINE THE REASONABLENESS OF ATTORNEY'S FEES, THE RECORD MUST CONTAIN FINDINGS OF FACT AS TO THE TIME AND LABOR EXPENDED, THE SKILL REQUIRED, THE CUSTOMARY FEE FOR LIKE WORK AND THE EXPERIENCE OR ABILITY OF THE ATTORNEY.

AN AFFIDAVIT MAY ATTEST FEES INCURRED, BUT AN AFFIDAVIT THAT CONTAINS ONLY A CONCLUSORY STATEMENT AND DOES NOT STATE THE COMPARABLE RATE BY OTHER ATTORNEYS IN THE AREA WITH SIMILAR SKILLS FOR LIKE WORK IS INSUFFICIENT EVIDENCE TO ESTABLISH THE AWARDED AMOUNT WAS REASONABLE.

THE CASE WAS REMANDED FOR FINDINGS OF FACT ON THE AWARD OF ATTORNEY'S FEES.

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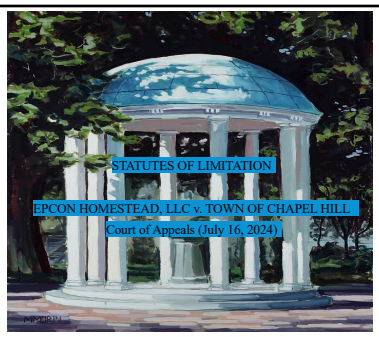

STATUTES OF LIMITATION

EPCON HOMESTEAD, LLC v. TOWN OF CHAPEL HILL

Court of Appeals (July 16, 2024)

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THE TOWN ADOPTED A NEW PROVISION IN ITS LAND USE MANAGEMENT ORDINANCE ("LUMO") TO PROMOTE AFFORDABLE HOUSING. THE PROVISION REQUIRED DEVELOPERS TO DEDICATE 15% OF THEIR PROPOSED CONSTRUCTION TO AFFORDABLE HOUSING UNITS OR, IN THE ALTERNATIVE, TO PAY AN APPROVED FEE.

RATHER THAN DEDICATING 15% OF THE PROPERTY, THE DEVELOPER OFFERED TO PAY A FEE OF $803,250 WHICH THE TOWN APPROVED.

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THE DEVELOPER THEN SUED THE TOWN ALLEGING:

- CLAIMS FOR DECLARATORY JUDGMENT CHALLENGING THE ORDINANCE, AND
- CLAIMS FOR A REFUND OF THE FEE PAYMENTS

THE TRIAL COURT GRANTED THE TOWN'S MOTION FOR SUMMARY JUDGMENT BASED UPON THE STATUTE OF LIMITATIONS.

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A STATUTE OF LIMITATION BEGINS TO RUN ON THE ACCRUAL DATE.

THE ACCRUAL DATE IS THE DATE WHEN THE INJURED PARTY CAN SUE.

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THE COURT OF APPEALS EXPENDED A GREAT DEAL OF INK ANALYZING THE DIFFERENCE BETWEEN A CLAIM AND A CAUSE ACTION.

ULTIMATELY, THE COURT OPINED THAT "A CLAIM IS A PATTERN OF ALLEGATIONS THAT MAY, OR MAY NOT, SUPPORT A CAUSE OF ACTION."

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ON THE DECLARATORY JUDGMENT CAUSES OF ACTION, THE COURT OF APPEALS CONCLUDED THAT THE ACTION ACCRUED WHEN THE DEVELOPER BOUGHT THE PROPERTY AT ISSUE SINCE THE ORDINANCE WAS ALREADY IN EFFECT AT THE TIME OF THE PURCHASE OF THE PROPERTY.

WITH RESPECT TO THE CLAIM FOR THE PAYMENT OF THE FEES, THE COURT OF APPEALS CONCLUDED THAT CLAIM ACCRUED WHEN THE FEE WAS ACTUALLY PAID.

IN THIS CASE, THERE WERE TWO DIFFERENT ACCRUAL DATES.

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THEN THE ISSUE AROSE, WHICH STATUTE OF LIMITATION APPLIES?

THE DEVELOPER ARGUED FOR THE THREE-YEAR STATUTE CREATED BY N. C. GEN. STAT. 1-52(2).

THE TOWN ARGUED FOR A ONE-YEAR STATUTE BASED ON N. C. GEN. STAT. 160A-364.1 WHICH PROVIDES THAT:

> AN ACTION CHALLENGING THE VALIDITY OF ANY ZONING OR UNIFIED DEVELOPMENT ORDINANCE OR ANY PROVISION THEREOF ADOPTED UNDER THIS ARTICLE OR OTHER APPLICABLE LAW SHALL BE BROUGHT WITHIN ONE YEAR OF THE ACCRUAL OF SUCH ACTION. SUCH AN ACTION ACCRUES WHEN THE PARTY BRINGING THE ACTION FIRST HAS STANDING TO CHALLENGE THE ORDINANCE.

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THE COURT OF APPEALS CONCLUDED THAT THE DECLARATORY JUDGMENT CAUSES OF ACTION ACCRUED ON THE DATE OF THE PURCHASE OF THE PROPERTY.

THE DECLARATORY JUDGMENT CAUSES OF ACTION WERE BARRED BY EITHER STATUTE OF LIMITATION.

THE DEVELOPER PAID THE FEE IN INSTALLMENTS. HOWEVER, THE COURT OF APPEALS CONCLUDED THAT THE ACTION ACCRUED WHEN THE FIRST PAYMENT WAS MADE.

WITH RESPECT TO THE CAUSES OF ACTION FOR THE PAYMENTS, THE SELECTION OF THE APPLICABLE STATUTE OF LIMITATION DETERMINED WHETHER THE CLAIMS WERE TIMELY OR NOT.

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HOW DO YOU DECIDE WHICH STATUTE OF LIMITATION TO APPLY??

WHERE ONE OF TWO STATUTES MIGHT APPLY TO THE SAME SITUATION, THE STATUTE WHICH DEALS MORE DIRECTLY AND SPECIFICALLY WITH THE SITUATION CONTROLS OVER THE STATUTE OF MORE GENERAL APPLICABILITY.

PLAINTIFF ARGUED THAT SUBSECTION 1-52(2) APPLIED BECAUSE IT SEEKS A LIABILITY CREATED BY STATUTE, BUT SUBSECTION 160A-364.1(b) DEALS MORE DIRECTLY AND SPECIFICALLY WITH PLAINTIFF'S PAYMENT CAUSES. THEREFORE, SUBSECTION 160A-364.1 CONTROLS OVER THE STATUTE OF MORE GENERALLY APPLICABILITY.

ALL CAUSES OF ACTION HELD TIME BARRED.

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DAMAGES AWARDS

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CHAPPELL v. WEBB

Court of Appeals (August 6, 2024)

IN CHAPPELL, A JURY AWARDED COMPENSATORY DAMAGES OF $15 MILLION AND PUNITIVE DAMAGES OF $5 MILLION AGAINST DEFENDANT WEBB AND $15 MILLION IN PUNITIVES AGAINST DEFENDANT FOREMAN.

AFTER THE TRIAL, DEFENDANTS MOVED FOR POST TRIAL RELIEF.

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THIS CASE AROSE FROM A MOTOR VEHICLE COLLISION WHEN WEBB CROSSED THE CENTER LINE TO PASS IN A NO PASSING ZONE AND HIT THE PLAINTIFF'S DECEDENT'S VEHICLE HEAD ON.

DEFENDANT WEBB WAS DRIVING DEFENDANT FOREMAN'S VEHICLE. DEFENDANT FOREMAN WAS A PASSENGER IN THE VEHICLE AT THE TIME OF THE CRASH.

DEFENDANT WEBB WAS SIGNIFCANTLY IMPAIRED AND WAS CONVICTED OF SECOND-DEGREE MURDER. WEBB WAS SENTENCED TO AN ACTIVE TERM OF IMPRISONMENT OF 13 TO 16 YEARS.

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THE DEFENDANTS CONTENDED THAT THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING A REQUEST FOR A NEW TRIAL.

RULE 59 OF THE RULES OF CIVIL PROCEDURE ALLOWS THE TRIAL COURT TO GRANT A NEW TRIAL ON GROUNDS THAT "EXCESSIVE OR INADEQUATE DAMAGES APPEAR TO HAVE BEEN GIVEN UNDER THE INFLUENCE OF PASSION OR PREJUDICE."

IT HAS BEEN LONG SETTLED IN OUR JURISDICTION THAT AN APPELLATE COURT'S REVIEW OF A TRIAL COURT'S DISCRETIONARY RULING EITHER GRANTING OR DENYING A MOTION TO SET ASIDE A VERDICT AND ORDER A NEW TRIAL IS STRICTLY LIMITED TO THE DETERMINATION OF WHETHER THE RECORD AFFIRMATIVELY DEMONSTRATES A MANIFEST ABUSE OF DISCRETION BY THE JUDGE.

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IN CHAPPELL, THE PLAINTIFF:

- DID NOT PRESENT EVIDENCE OF THE DECEASED'S ANTICIPATED FUTURE INCOME
- DID NOT OFFER EVIDENCE OF MEDICAL EXPENSES
- DID NOT OFFER EVIDENCE OF THE FUNERAL EXPENSES
- OFFERED PAIN AND SUFFERING EVIDENCE TO SHOW THAT THE PLAINTIFF'S DECEDENT SURVIVED APPROXIMATELY AN HOUR AND EXPERIENCED RESPIRATORY DISTRESS AND A CARDIAC ARREST.
- OFFERED EVIDENCE OF LOSS OF SOCIETY AND COMPANIONSHIP WITH HER TWO CHILDREN.

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THE ASSESSMENT OF DAMAGES MUST, TO A LARGE EXTENT, BE LEFT TO THE GOOD SENSE AND FAIR JUDGMENT OF THE JURY—SUBJECT, OF COURSE, TO THE DISCRETIONARY POWER OF THE JUDGE TO SET THE VERDICT ASIDE WHEN, IN HIS OPINION, EQUITY AND JUSTICE SO REQUIRE.

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THE DEFENDANTS ARGUED THAT OTHER VERDICTS IN OTHER CASES WERE NOT AS LARGE AS THE VERDICT IN THIS CASE.

THE DEFENDANTS URGED THE COURT OF APPEALS TO EMPLOY A "DAMAGES NORM" TEST BY COMPARING THE VERDICT TO THOSE AWARDED IN OTHER CASES.

THE COURT OF APPEALS NOTED THAT "THE OVERWHELMING PRECEDENT OF THIS COURT DISCLOSES NO COMPELLING REASON OR NEED FOR THE IMPLEMENTATION OF SUCH A RULE IN NORTH CAROLINA. MOREOVER, WE ARE NOT PERSUADED THAT THE APPELLATE USE OF A VAGUE TEST TO MEASURE THE REASONABLE RANGE OF A GIVEN VERDICT'S AMOUNT WOULD PROVDE A MORE EFFECTIVE, CONSISTENT OR PRECISE METHOD OF DETERMINING WHETHER A TRIAL JUDGE HAS EXCEEDED THE BOUNDS OF DISCRETION…

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THE COURT OF APPEALS RECOGNIZED THAT "TO BE SURE, TO SOME PEOPLE, AND PERHAPS EVEN TO SOME JUDGES, A COMPENSATORY DAMAGES AWARD OF $15 MILLION BASED ON A DEATH INVOLVING LESS THAN AN HOUR OF PAIN AND SUFFERING AND WHERE NO 'ECONOMIC DAMAGES EVIDENCE WAS INTRODUCED IS EXCESSIVE."

WE CANNOT SAY THAT THE TRIAL COURT ABUSED ITS DISCRETION IN REFUSING TO SET ASIDE THE COMPENSATORY DAMAGES AWARD AND GRANT A NEW TRIAL.

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THE COURT OF APPEALS ALSO HELD IN CHAPPELL THAT THE TRIAL COURT JUDGE DID NOT ABUSE HER DISCRETION IN FAILING TO DISTURB THE PUNITIVES VERDICT.

THERE WAS EVIDENCE IN THIS CASE, THAT FIVE YEARS EARLIER, WEBB HAD BEEN CONVICTED OF DWI WHILE DRIVING FOREMAN'S VEHICLE WHEN FOREMAN WAS A PASSENGER AT THE TIME.

THE COURT OF APPEALS OBSERVED THAT THERE WAS NO CAP ON PUNITIVE DAMAGES WHERE THE CONDUCT INVOLVED IMPAIRED DRIVING.

THE COURT OF APPEALS ALSO OPINED THAT A JURY IS ENTITLED TO SEND A MESSAGE OF DETERRENCE TO PEOPLE WHO CONSIDER DRUNK DRIVING OR NEGLIGENTLY ENTRUSTING A VEHICLE TO A DRUNK DRIVER.

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GOVERNMENTAL IMMUNITY

FLOMEH-MAWUTOR v. CITY OF WINSTON-SALEM

Court of Appeals (August 6, 2024)

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THIS CASE ARISES FROM THE PLAINTIFFS' EFFORTS TO OBTAIN A LOAN FROM THE CITY FROM A SMALL BUSINESS LOAN PROGRAM THROUGH THE U. S. DEPARTMENT OF HEALTH AND HUMAN SERVICES.

CITY OFFICIALS CONFIRMED THE APPROVAL OF THE LOAN IN FEBURARY 2020 AND THE LOAN PROCEEDS WERE NOT DISBURSED UNTIL AUGUST 2020.

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THE PLAINTIFFS SUED ALLEGING THEY SUFFERED LOSSES OF SIGNFICANT BUSINESS OPPORTUNITIES AND GOOD WILL DUE TO THE DELAY IN RECEIVING THE MONEY.

THE PLAINTIFFS ALLEGED CLAIMS SOUNDING IN BOTH NEGLIGENCE AND CONTRACT.

THE CITY MOVED FOR SUMMARY JUDGMENT BASED ON GOVERNMENTAL IMMUNITY SINCE THE PLAINTIFFS DID NOT ALLEGE A WAIVER OF IMMUNITY BY PURCHASING INSURANCE.

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UNDER THE DOCTRINE OF GOVERNMENTAL IMMUNITY, A COUNTY OR MUNICIPAL CORPORATION IS IMMUNE FROM SUIT FOR THE NEGLIGENCE OF ITS EMPLOYEES IN THE EXERCISE OF GOVERNMENTAL FUNCTIONS ABSENT A WAIVER OF IMMUNITY.

THE DETERMINATION OF WHETHER AN ENTITY IS ENTITLED TO GOVERNMENTAL IMMUNITY TURNS ON WHETHER THE ALLEGED TORTIOUS CONDUCT OF THE COUNTY OR MUNICIPALITY AROSE FROM AN ACTIVITY THAT WAS GOVERNMENTAL OR PROPRIETARY IN NATURE.

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A GOVERNMENTAL FUNCTION IS AN ACTIVITY THAT IS DISCRETIONARY, POLITICAL, LEGISLATIVE, OR PUBLIC IN NATURE AND PERFORMED FOR THE PUBLIC GOOD ON BEHALF OF THE STATE RATHER THAN FOR ITSELF, WHILE A PROPRIETARY FUNCTION IS ONE THAT IS COMMERCIAL OR CHIEFLY FOR THE PRIVATE ADVANTAGE OF THE COMPACT COMMUNITY.

THE SUPREME COURT HAS ADOPTED A THREE-STEP METHOD OF ANALYSIS FOR USE IN DETERMINING WHETHER A MUNICIPALITY'S ACTION WAS GOVERNMENTAL OR PROPRIETARY IN NATURE.

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THE FIRST STEP OR THRESHOLD INQUIRY, IN DETERMINING WHETHER A FUNCTION IS PROPRIETARY OR GOVERNMENTAL IS WHETHER, AND TO WHAT DEGREE, THE LEGISLATURE HAS ADDRESSED THE ISSUE.

IF AN ACTION HAS BEEN DESIGNATED AS GOVERNMENTAL OR PROPRIETARY IN NATURE BY THE LEGISLATURE, THAT IS THE END OF THE INQUIRY.

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THE SECOND STEP REQUIRES A DETERMINATION WHETHER THE ACTIVITY IS ONE IN WHICH ONLY A GOVERNMENTAL AGENCY COULD ENGAGE OR PROVIDE, IN WHICH CASE IT IS PERFORCE GOVERNMENTAL IN NATURE.

THE THIRD STEP IS NECESSARY WHEN THE PARTICULAR SERVICE CAN BE PERFORMED BOTH PRIVATELY AND PUBLICLY.

THE THIRD STEP INVOLVES CONSIDERATION OF A NUMBER OF ADDITIONAL FACTORS, OF WHICH NO SINGLE FACTOR IS DETERMINATIVE.

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THE RELEVANT FACTORS ARE WHETHER THE SERVICE IS TRADITIONALLY A SERVICE PROVIDED BY A GOVERNMENTAL ENTITY, WHETHER A SUBSTANTIAL FEE IS CHARGED FOR THE SERVICE PROVIDED, AND WHETHER THAT FEE DOES MORE THAN SIMPLY COVER THE OPERATING COSTS OF THE SERVICE PROVIDER.

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N. C. GEN. STAT. 160A-456 PROVIDES THAT THE EXPENDITURE OF FUNDS FOR COMMUNITY DEVELOPMENT IS A GOVERNMENTAL ACTIVITY.

THE COURT OF APPEALS ASSUMED WITHOUT DECIDING THAT THE INITIAL STEP WAS NOT DETERMINATIVE OF THE INQUIRY AND MOVED TO THE SECOND STEP OF THE ANALYSIS.

THE COURT OF APPEALS NOTED THAT ONLY GOVERNMENTAL ENTITIES COULD OBTAIN THE HUD GRANTS. HOWEVER, THE COURT ALSO NOTED THAT LOANING FUNDS TO PRIVATE CITIZENS IS A PROPRIETARY ACT.

BECAUSE THIS STEP WAS UNCLEAR, THE COURT OF APPEALS DEEMED IT TO BE “PRUDENT” TO CONSIDER THE THIRD STEP.

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WITH RESPECT TO THE THIRD STEP, THE COURT OF APPEALS NOTED THAT:

- THE BLOCK GRANT PROGRAM COULD ONLY BE ADMINISTERED BY A GOVERNMENTAL ENTITY.
- THE LOANS WERE ONLY MADE TO ENTITIES THAT COULD NOT SECURE LOANS FROM TRADITIONAL LENDERS.
- THE GRANT PROGRAM WAS DESIGNED TO OPERATE AT A LOSS.

AS SUCH, AT THE THIRD STEP, THE COURT OF APPEALS CONCLUDED THAT THIS WAS A GOVERNMENTAL ACTIVITY AND THE CITY WAS IMMUNE FROM TORT LIABLITY.

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WITH RESPECT TO THE PLAINTIFFS' CONTRACT CLAIM, THE COURT OF APPEALS CONCLUDED THAT THERE WAS NO CONTRACT BECAUSE THE GOVERNMENTAL OFFICIAL AT ISSUE DID NOT HAVE AUTHORITY TO ENTER INTO A VALID CONTRACT.

SINCE THERE WAS NO VALID CONTRACT, THE CITY WAS IMMUNE FROM LIABILITY.

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CORUM CLAIMS

KINSLEY v. ACE SPEEDWAY RACING, LTD.
Supreme Court (August 23, 2024)

ASKEW v. CITY OF KINSTON ("ASKEW I")
Supreme Court (June 28, 2024)

ASKEW v. CITY OF KINSTON ("ASKEW II")
Court of Appeals (August 20, 2024)

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WHAT IS A CORUM CLAIM?

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A CORUM CLAIM ALLOWS A PLAINTIFF TO RECOVER COMPENSATION FOR A VIOLATION OF A STATE CONSTITUTIONAL RIGHT FOR WHICH THERE IS NO COMMON LAW OR STATUTORY REMEDY, OR WHEN THE COMMON LAW OR STATUTORY REMEDY THAT WOULD BE AVAILABLE WOULD BE INACCESSIBLE TO THE PLAINTIFF.

Taylor v. Wake County, 258 N. C. App. 178, 183, 811 S. E. 2d 648, 652 (2018)

TO ENSURE THAT NORTH CAROLINIANS MAY SEEK REDRESS FOR ALL CONSTITUTIONAL VIOLATIONS, CORUM CREATES A UNIQUE PATH INTO COURT WHEN EXISTING CHANNELS FAIL TO OFFER AN ADEQUATE REMEDY.

ASKEW I

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THERE ARE THREE CRITERIA NECESSARY TO SUFFICIENTLY ALLEGE A CORUM CLAIM:

- FIRST, THE COMPLAINT MUST ALLEGE THAT A STATE ACTOR VIOLATED THE CLAIMANT'S STATE CONSTITUTIONAL RIGHTS.
- SECOND, THE CLAIM MUST BE COLORABLE MEANING THAT THE CLAIM MUST PRESENT FACTS SUFFICIENT TO SUPPORT AN ALLEGED VIOLATION OF A RIGHT PROTECTED BY THE STATE CONSTITUTION.
- THIRD, THERE MUST BE NO OTHER ADEQUATE STATE REMEDY FOR THIS ALLEGED CONSTITUTIONAL VIOLATION.

KINSLEY

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IN KINSLEY v. ACE SPEEDWAY RACING, LTD., THE DEFENDANTS ASSERTED CORUM CLAIMS IN THEIR COUNTERCLAIMS TO A NUISANCE ABATEMENT ACTION.

IN PARTICULAR, THE DEFENDANTS ASSERTED THAT THE EFFORTS IN 2020 TO STOP THE SPEEDWAY FROM CONDUCTING RACES AND OTHER EVENTS VIOLATED:

- THEIR RIGHT TO THE ENJOYMENT OF THE FRUITS OF THEIR OWN LABOR IN VIOLATION OF THE PROVISIONS OF ARTICLE I, SECTION 1 OF THE NORTH CAROLINA CONSTITUTION.
- THEIR RIGHT TO BE FREE FROM SELECTIVE PROSECUTION IN VIOLATION OF THE EQUAL PROTECTION CLAUSE OF ARTICLE I, SECTION 19 OF THE NORTH CAROLINA CONSTITUTION.

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IN ASKEW I AND ASKEW II, THE PLAINTIFFS ASSERTED CORUM CLAIMS AGAINST THE CITY OF KINSTON CHALLENGING THE CITY'S CONDEMNATION OF ALLEGEDLY DILAPIDATED, BLIGHTED HOUSES AND COMMERICAL BUILDINGS.

THE PLAINTIFFS ALLEGED THAT THE CITY ENGAGED IN THE SYSTEMATIC DESTRUCTION OF AFRICAN AMERICAN OWNED BUILDINGS BY USING THE PROCESS FOR DEMOLISHING DILAPIDATED PROPERTIES IN A RACIALLY DISCRIMINATORY MANNER IN VIOLATION OF:

- THEIR RIGHT TO BE FREE FROM ARBITRARY AND UNDULY DISCRIMINATORY INTERFERENCE WITH THEIR RIGHTS AS PROPERTY OWNERS IN VIOLATION OF THE LAW OF THE LAND CLAUSE IN ARTICLE I, SECTION 19 OF THE NORTH CAROLINA CONSTITUTION.
- THEIR RIGHT TO BE FREE FROM DISPARATE TREATMENT OF THEIR PROPERTY BASED UPON RACE IN VIOLATION OF THE EQUAL PROTECTION CLAUSE IN ARTICLE I, SECTION 19 OF THE NORTH CAROLINA CONSTITUTION.

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WHAT DID WE LEARN ABOUT CORUM CLAIMS IN KINSLEY AND ASKEW?

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IS SOVEREIGN IMMUNITY A DEFENSE TO A CORUM CLAIM?

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THE STATE CANNOT ASSERT SOVEREIGN IMMUNITY AS A DEFENSE TO A VALID CORUM CLAM.

KINSLEY

WHEN THERE IS A CLASH BETWEEN THESE CONSTITUTIONAL RIGHTS AND SOVEREIGN IMMUNITY, THE CONSTITUTIONAL RIGHTS MUST PREVAIL. THUS, SOVEREIGN IMMUNITY CANNOT STAND AS A BARRIER TO A CORUM CLAIM.

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WHAT IS NECESSARY TO ASSERT A CORUM CLAIM?

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NOT MUCH.

WHETHER A CLAIM IS "COLORABLE" FOCUSES ENTIRELY ON THE ALLEGATIONS IN THE PLEADING.

WE TREAT THE INITIAL ALLEGATIONS IN A LAWSUIT AS TRUE WHEN ASSESSING WHETHER THE CASE CAN MOVE FORWARD AT THE OUTSET.

THE CLAIMS IN KINSLEY ALLEGED THAT GOVERNOR COOPER TOOK THESE ACTIONS NOT BECAUSE THERE WAS AN ACTUAL HEALTH HAZARD AT THE RACETRACK, BUT TO PUNISH TURNER FOR SPEAKING OUT, AND THAT HEALTH OFFICIALS DID NOT TAKE SIMILAR ACTIONS AGAINST OTHER LARGE OUTDOOR VENUES WHOSE OWNERS DID NOT OPENLY CRITICIZE THE GOVERNOR.

WE EMPHASIZE THAT THESE ALLEGATIONS REMAIN UNPROVEN. WE TAKE THESE UNPROVEN ALLEGATIONS AS TRUE FOR PURPOSES OF OUR REVIEW.

THE ALLEGATIONS WERE THEREFORE COLORABLE.

KINSLEY

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K. H. v. DIXON AND ALAMANCE-BURLINGTON BOARD OF EDUCATION
Court of Appeals (October 1, 2024)

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THE MINOR PLAINTIFF, WAS A MIDDLE SCHOOL STUDENT, WHO ALLEGED THAT SHE WAS ASSAULTED BY HER TEACHER WHEN SHE ATTEMPTED TO ENTER THE CLASSROOM.

THE PLAINTIFF ALLEGED THAT THE TEACHER PULLED HER INTO THE CLASSROOM, SHUT THE DOOR, SLAMMED HER INTO THE DOOR AND THEN SLAMMED HER TO THE GROUND. THE PLAINTIFF FURTHER ALLEGED THAT THE TEACHER SLAMMED THE MINOR'S HEAD INTO THE GROUND FIVE TIMES.

THE MINOR WAS SUSPENDED FOR TEN DAYS AND RELOCATED TO ANOTHER SCHOOL.

64

THE PLAINTIFF ASSERTED TORT CLAIMS THAT WERE DISMISSED BASED ON SOVEREIGN IMMUNITY FOR FAILING TO ALLEGE A WAIVER OF IMMUNITY BY THE PURCHASE OF INSURANCE.

THE PLAINTIFF ALSO ASSERTED A CORUM CLAIM BASED ON HER RIGHT TO A SOUND BASIC EDUCATION PURSUANT TO ARTICLE I, SECTION 15 AND ARTICLE IX, SECTION 2 OF THE NORTH CAROLINA CONSTITUTION.

65

THE ISSUE IN K. H. WAS WHETHER THE PLAINTIFF ASSERTED A COLORABLE CONSTITUTIONAL CLAIM.

A PRIOR CASE, DEMINSKI v. STATE BOARD OF EDUCATION, HAD RECOGNIZED A CORUM CLAIM WHEN A PLAINTIFF ALLEGED THAT HER DAUGHTER WAS REPEATEDLY SUBJECTED TO BULLYING AND SEXUAL HARASSMENT BY OTHER STUDENTS FOR SEVERAL MONTHS.

IN DEMINSKI, THE PLAINTIFF ALLEGED THAT SHE HAD REPEATEDLY NOTIFIED THE TEACHER, ASSISTANT PRINCIPAL, THE PRINCIPAL AND THE COUNTY BOARD OF EDUCATION OF THE INCIDENTS AND HAD BEEN TOLD THAT "IT WOULD TAKE TIME."

IN DEMINSKI, THE SUPREME COURT FOUND THAT THE PLAINTIFF HAD ALLEGED A COLORABLE CLAIM.

66

IN K. H., THE PLAINTIFF:

- DID NOT ALLEGE THAT THE STUDENT WAS SUBJECTED TO REPEATED OR ONGOING ISSUES WITH THE TEACHER.
- PREDICATED HER CLAIM ON THE SINGULAR ATTACK.
- DID NOT ALLEGE THAT THE PLAINTIFF REPORTED OR IN ANY WAY NOTIFIED SCHOOL OFFICIALS OF THE ISSUES IN THE CLASSROOM.
- DID NOT ALLEGE THAT THE SCHOOL TRANSFER FAILED TO PROVIDE THE CHILD WITH A SOUND BASIC EDUCATION.

67

ON THESE FACTS, THE COURT OF APPEALS CONCLUDED "THE PLAINTIFF HAD FAILED TO ALLEGE A CONSTITUTIONAL CLAIM BECAUSE PLAINTIFF'S COMPLAINT ON ITS FACE REVEALS THE ABSENCE OF FACTS SUFFICIENT TO MAKE A GOOD CLAIM.

SO, IT IS POSSIBLE TO FAIL TO ESTABLISH A COLORABLE CLAIM.

THERE WAS A DISSENTING OPINION ON THIS ISSUE.

68

IN CORUM, THE SUPREME COURT HELD THAT, WHEN ADJUDICATING THESE CONSTITUTIONAL CLAIMS, THE JUDICIARY MUST RECOGNIZE TWO CRITICAL LIMITATIONS. FIRST, IT MUST BOW TO ESTABLISHED CLAIMS AND REMEDIES WHERE THESE PROVIDE AN ALTERNATIVE TO THE EXTRAORDINARY EXERCISE OF ITS INHERENT CONSTITUTIONAL POWER.

SECOND, IN EXERCISING THIS POWER, THE JUDICIARY MUST MINIMIZE THE ENCROACHMENT UPON THE OTHER BRANCHES OF GOVERNMENT—IN APPEARANCE AND IN FACT—BY SEEKING THE LEAST INTRUSIVE REMEDY AVAILABLE AND NECESSARY TO RIGHT THE WRONG.

KINSLEY

69

ASKEW ADDRESSES THE FIRST OF THESE CRITICAL LIMITATIONS—THE ADEQUATE REMEDY PRONG.

70

THE ISSUE IN ASKEW I AND II WAS WHETHER PLAINTIFFS BRINGING CORUM CLAIMS MUST EXHAUST ADMINISTRATIVE REMEDIES BEFORE ENTERING THE COURTHOUSE DOORS.

ASKEW I

71

AT THE TIME OF THE PERTINENT EVENTS IN ASKEW, ARTICLE 19 OF CHAPTER 160A GOVERNED THESE CONDEMNATION PROCEEDINGS. THE STATUTORY PROCESS ALLOWED FOR HEARINGS:

FIRST, BEFORE THE BUILDING INSPECTOR

SECOND, BY APPEAL TO THE CITY COUNCIL, AND

THIRD, BY PETITION FOR WRIT OF CERTIORARI TO SUPERIOR COURT.

ON CERTIORARI REVIEW, THE SUPERIOR COURT WAS DIRECTED TO EXAMINE WHETHER THE CHALLENGED ORDER WAS IN VIOLATION OF CONSTITUTIONAL PROVISIONS, ARBITRARY AND CAPRICIOUS OR AFFECTED BY OTHER ERROR OF LAW.

ASKEW I

72

THE PLAINTIFFS IN ASKEW FAILED TO UTILIZE ALL OF THESE PROCEDURAL OPTIONS.

THE CITY OF KINSTON MOVED TO DISMISS THE PLAINTIFFS' CORUM CLAIMS FOR FAILURE TO EXHAUST THE AVAILABLE ADMINISTRATIVE REMEDIES.

BOTH THE TRIAL COURT AND THE COURT OF APPEALS AGREED.

THE COURT OF APPEALS CONCLUDED THAT THE FAILURE TO EXHAUST DEPRIVED THE TRIAL COURT OF JURISDICTION.

ASKEW I

73

THE SUPREME COURT OBSERVED THAT "THE COURT OF APPEALS TIED ADMINISTRATIVE EXHAUSTION TO SUBJECT-MATTER JURISDICTION OVER DIRECT CONSTITUTIONAL SUITS HOLDING THAT A COURT'S POWER TO HEAR CORUM CLAIMS HINGES ON WHETHER THE PLAINTIFF FIRST DEPLETED ADMINISTRATIVE RELIEF. THAT WAS ERROR."

THE JUDICIARY'S POWER TO HEAR CORUM CLAIMS FLOWS FROM AUTHORITY GRANTED TO IT BY THE CONSTITUTION.

74

THE INADEQUACY OF ESTABLISHED CLAIMS AND REMEDIES IS AN ELEMENT OF A CORUM CAUSE OF ACTION.

ADMINISTRATIVE EXHAUSTION DOES NOT IMPUE OR DIVEST A COURT WITH JURISDICTION OVER CORUM CLAIMS. THE AVAILABILITY OF AGENCY RELIEF GOES TO AN ELEMENT OF A PLAINTIFF'S CAUSE OF ACTION—i. e. WHETHER CORUM OFFERS A DIRECT CONSTITUTIONAL CLAIM BECAUSE EXISTING RELIEF FALLS SHORT.

75

AN ADMINISTRATIVE PROCESS IS ADEQUATE IF IT ALLOWS THE PLAINTIFF TO ENTER THE COURTHOUSE DOORS, MEANINGFULLY AIR THEIR CONSTITUTIONAL CLAIM, AND IF SUCCESSFUL, SECURE SUBSTANTIVE REDRESS FOR THEIR INJURIES.

IN SUBSTANCE, THOUGH, AN ADEQUATE ADMINISTRATIVE REMEDY MUST OFFER A FAIR TURN AT BAT—IT MAY NOT DOOM CORUM CLAIMS TO ECHO INTO A BUREAUCRATIC VOID.

IN ASKEW I, THE SUPREME COURT INSTRUCTED THE COURT OF APPEALS TO REVISIT THE ADMINISTRATIVE SCHEME AND REEVALUATE ITS CONGRUENCE WITH PLAINTIFFS' DISCRETE CORUM CLAIMS.

76

IN ASKEW II, THE COURT OF APPEALS ADDRESSED THE ADEQUACY OF THE REMEDIES AVAILABLE.

THE COURT OF APPEALS CONCLUDED IN ASKEW II THAT THE SUPERIOR COURT HAD THE AUTHORITY TO ENJOIN THE DEMOLITION OF THE PLAINTIFFS' HOUSES AND THAT WAS SUFFICIENT FOR THE PLAINTIFFS' SUBSTANTIVE DUE PROCESS CLAIM.

SINCE THE SUPERIOR COURT COULD HAVE REMANDED THE CASES TO THE CITY COUNCIL WITH DIRECTIONS TO IMPLEMENT A NONDISCRIMINATORY PROCESS FOR SELECTING PROPERTIES FOR CONDEMNATION, THERE WAS AN ADEQUATE REMEDY FOR THE EQUAL PROTECTION CLAIM.

CONSEQUENTLY, THE COURT OF APPEALS CONCLUDED THAT THE PLAINTIFFS COULD NOT ESTABLISH AN ESSENTIAL ELEMENT OF THEIR CORUM CLAIMS.

ASKEW II

77

KINSLEY ADDRESSED THE SECOND CRITICAL LIMITATION—THE LEAST INTRUSIVE REMEDY AVAILABLE AND NECESSARY TO RIGHT THE WRONG.

IN KINSLEY, THE PLAINTIFF MOVED TO DISMISS ON THE SECOND LIMITATION CONTENDING THAT THE REMEDY SOUGHT—MONETARY DAMAGES WAS TOO INTRUSIVE.

78

IN KINSLEY, THE SUPREME COURT HELD THAT THE ARGUMENT THAT THE SPEEDWAY'S CLAIMS DID NOT SEEK THE LEAST-INSTRUSIVE REMEDY WAS NOT RIPE FOR REVIEW.

WHAT REMEDY IS BOTH LEAST-INTRUSIVE AND SUFFICIENT TO PROVIDE MEANINGFUL RELIEF IS A QUESTION THAT CAN BE ANSWERED ONLY AFTER FACT ISSUES ARE RESOLVED AND THE CLAIM IS PROVEN.

79

DOES THAT MEAN THE TRIAL OF A CORUM CLAIM MUST BE BIFURCATED??

80

WHO MAY BE ENJOINED??

DURHAM COUNTY DEPARTMENT OF SOCIAL SERVICES v. WALLACE
Court of Appeals (September 3, 2024)

81

THIS IS AN ACTION FOR A CIVIL NO-CONTACT ORDER PURSUANT TO THE WORKPLACE VIOLENCE PREVENTION ACT. N. C. GEN. STAT. 95-260 to 271.

BY STATUTE, THESE CLAIMS ARE HEARD IN DISTRICT COURT.

82

IN DURHAM COUNTY DSS, A SOCIAL WORKER WAS PROTESTING DSS ACTIONS WHICH SHE CONTENDED INVOLVED KIDNAPPING CHILDREN IN DURHAM COUNTY.

A DISTRICT COURT JUDGE ENJOINED NOT ONLY THE DEFENDANT BUT ALSO "HER FOLLOWERS."

83

CAN YOU ENJOIN UNIDENTIFIED OTHERS?

84

THE TRIAL COURT CANNOT ENFORCE ITS NO-CONTACT ORDER AGAINST THESE NON-PARTIES—THE "FOLLOWERS"—BECAUSE IT FAILED TO IDENTIFY THEM.

"OUR COURTS HAVE LONG VOIDED INJUNCTIONS AFFECTING THE VESTED RIGHTS OF NON-PARTIES WHO LACK ANY IDENTIFIABLE RELATIONSHIP TO THE PARTIES OR ANY NOTICE OF THE PROCEEDINGS."

DURHAM COUNTY DSS

85

RULE 65(d) OF THE RULES OF CIVIL PROCEDURE PROVIDES THAT AN INJUNCTION:

> IS BINDING ONLY UPON THE PARTIES TO THE ACTION, THEIR OFFICERS, AGENTS, SERVANTS, EMPLOYEES, AND ATTORNEYS, AND UPON THOSE PERSONS IN ACTIVE CONCERT OR PARTICIPATION WITH THEM WHO RECEIVE ACTUAL NOTICE IN ANY MANNER OF THE ORDER BY PERSONAL SERVICE OR OTHERWISE.

86

MOTIONS TO RECONSIDER

REYNOLDS v. BURKS
Court of Appeals (September 3, 2024)

87

WE REVIEW MOTIONS TO RECONSIDER ONLY FOR ABUSE OF DISCRETION.

REYNOLDS

A MOTION FOR RECONSIDERATION IS NOT A VEHICLE TO IDENTIFY FACTS OR LEGAL ARGUMENTS THAT COULD HAVE BEEN, BUT WERE NOT, RAISED AT THE TIME THE RELEVANT MOTION WAS PENDING.

THE LIMITED USE OF A MOTION TO RECONSIDER SERVES TO ENSURE THAT THE PARTIES ARE THROUGH AND ACCURATE IN THEIR ORIGINAL PLEADINGS AND ARGUMENTS PRESENTED TO THE COURT. TO ALLOW MOTIONS TO RECONSIDER OFFHANDLY OR ROUTINELY WOULD RESULT IN UNENDING MOTIONS PRACTICE.

REYNOLDS

88

OTHER WORTHWHILE OBSERVATIONS IN REYNOLDS:

IT IS AXIOMATIC THAT THE ARGUMENTS OF COUNSEL ARE NOT EVIDENCE.

ARGUMENTS OF COUNSEL DO NOT SUPPORT FINDINGS OF FACT.

89

DEVONWOOD-LOCH LOMOND LAKE ASSOCIATION, INC. v. CITY OF FAYETTEVILLE
Court of Appeals (October 1, 2024)

90

THIS CASE INVOLVES CLAIMS MADE BY FOUR HOMEOWNERS ASSOCIATIONS FOR THE FLOODING OF SEVERAL LAKES DURING HURRICANE MATTHEW. THREE OF THE DAMS BREACHED AND LOST THEIR ABILITY TO IMPOUND WATER AND THE FOURTH SUFFERED SEVERE DAMAGE.

THE HOAs SUED THE CITY IN FEDERAL COURT AND THE FEDERAL COURT GRANTED SUMMARY JUDGMENT ON THE FEDERAL CLAIMS ON THE MERITS AND DISMISSED THE STATE CLAIMS WITHOUT PREJUDICE.

THE PLAINTIFFS FILED A NEW ACTION IN STATE COURT ALLEGING THE STATE CLAIMS.

91

THE PLAINTIFF HOAs ASSERTED CLAIMS FOR THE DESTRUCTION AND DAMAGE TO THE DAMS AND CLAIMS FOR DISCHARGING STORMWATER INTO THE DRY LAKEBEDS.

THE CLAIMS FOR THE DESTRUCTION OF THE DAMS WERE BARRED BY COLLATERAL ESTOPPEL BASED UPON THE FEDERAL COURT'S DETERMINATION THAT THE PLAINTIFFS COULD NOT PROVE CAUSATION ON THE FEDERAL CLAIMS.

THE CITY ALSO MOVED TO DISMISS THE STATE LAW CLAIMS ON THE BASIS OF THE STATUTE OF LIMITATIONS.

92

IN THE COMPLAINT, THE PLAINTIFF HOAs ALLEGED "THIS ACTION HAS BEEN INITIATED WITHIN TWENTY-FOUR MONTHS OF THE DATE OF THE TAKING OF THE AFFECTED PROPERTY."

THE COMPLAINT DID NOT PROVIDE THE ACTUAL DATES.

THE PLAINTIFF HOAs CONTENDED THIS ALLEGATION PREVENTED THE COURT FROM GRANTING A MOTION TO DISMISS BECAUSE "DISMISSAL IS PROPER ONLY IF IT APPEARS ON THE FACE OF THE COMPLAINT THAT THE PLAINTIFF FILED OUTSIDE THE LIMITATIONS PERIOD."

THIS IS CONSISTENT WITH THE GENERAL RULE THAT IN ADDRESSING A RULE 12(b)(6) MOTION THE ALLEGATIONS OF THE COMPLAINT ARE TREATED AS TRUE.

93

THE ISSUE IS WHAT CAN THE TRIAL COURT CONSIDER ON A RULE 12(b)(6) MOTION?

THE COURT OF APPEALS TOOK JUDICIAL NOTICE OF THE DATES THAT HURRICANE MATTHEW AFFECTED THE SOUTHEASTERN UNITED STATES.

THE COURT OF APPEALS ALSO CONSIDERED THE ORDER ENTERED BY THE UNITED STATES DISTRICT COURT AND QUOTED FROM THAT ORDER. THIS ORDER WAS ATTACHED TO THE MOTION TO DISMISS.

CAN A TRIAL JUDGE TAKE JUDICIAL NOTICE OF FACTS IN ADDITION TO THE ALLEGATIONS OF THE COMPLAINT AND CONSIDER THOSE FACTS IN RESOLVING THE MOTION TO DISMISS?

THE ANSWER SEEMS TO BE "YES."

THE DISSENTING JUDGE WOULD HAVE REVERSED A PORTION OF THE TRIAL COURT'S JUDGMENT THAT WAS DEPENDENT ON TAKING JUDICIAL NOTICE OF THE PERTINENT DATES RELEVANT TO HURRICANE MATTHEW.

THIS CASE SEEMS TO PERMIT A TRIAL COURT JUDGE TO TAKE JUDICIAL NOTICE OF FACTS AND TO CONSIDER THE JUDICIALLY NOTICED FACTS IN DECIDING A MOTION TO DISMISS UNDER RULE 12(b)(6).

IN OTHER INSTANCES, THE TRIAL COURT IS PERMITTED TO GO BEYOND THE PLEADINGS TO CONSIDER DOCUMENTS SUCH AS CONTRACTS OR DEEDS WHICH ARE REFERRED TO IN THE PLEADIING AT ISSUE. See Oberlin Capital L.P. v. Slavin, 147 N.C. App. 52 (2001).

UNFAIR AND DECEPTIVE TRADE PRACTICES CLAIMS

SHANNON v. ROUSE BUILDERS, INC.
Court of Appeals (August 6, 2024)

97

97

THIS CASE IS A BIT UNUSUAL.

THE DEFENDANT IS A CONSTRUCTION COMPANY AND PREVIOUSLY OWNED A TRACT OF LAND.

THE DEFENDANT SOLD THE LAND AND RESERVED AN EASEMENT TO PERMIT THE CONTINUED USE OF THE PROPERTY TO "DUMP TIMBER AND NATURAL LAND DEBRIS."

THE PLAINTIFF LATER PURCHASED THE PROPERTY.

98

98

THE COUNTY GAVE THE PLAINTIFF NOTICE OF A VIOLATION FOR THE DUMPING.

THE PLAINTIFFS SUED THE DEFENDANT ALLEGING CLAIMS FOR BREACH OF CONTRACT, NUISANCE, TRESPASS, NEGLIGENCE AND UNFAIR AND DECEPTIVE TRADE PRACTICES.

THE TRIAL COURT GRANTED SUMMARY JUDGMENT ON THE CONTRACT AND UNFAIR AND DECEPTIVE TRADE PRACTICES CLAIMS.

99

99

ON APPEAL, THE ISSUE WAS THE UNFAIR AND DECEPTIVE TRADE PRACTICES CLAIM.

IN PARTICULAR, THE SECOND ELEMENT OF AN UNFAIR AND DECEPTIVE TRADE PRACTICES CLAIM IS WHETHER THE ACT WAS "IN OR AFFECTING COMMERCE."

COMMERCE "INCLUDES ALL BUSINESS ACTIVITIES, HOWEVER DENOMINATED, BUT DOES NOT INCLUDE PROFESSIONAL SERVICES RENDERED BY A MEMBER OF A LEARNED PROFESSION."

100

THE COURT OF APPEALS NOTED THAT "BUSINESS ACTIVITIES" HAVE BEEN DEFINED AS "REGULAR DAY-TO-DAY ACTIVITIES OR AFFAIRS, SUCH AS THE PURCHASE AND SALE OF GOODS, OR WHATEVER OTHER ACTIVITIES THE BUSINESS REGULARLY ENGAGES IN AND FOR WHICH IT IS ORGANIZED."

BUSINESS ACTIVITY HAS BEEN LIMITED BY CASE LAW TO TWO TYPES OF BUSINESS TRANSACTIONS: (1) INTERACTIONS BETWEEN BUSINESSES, AND (2) INTERACTIONS BETWEEN BUSINESSES AND CONSUMERS."

AS SUCH, INTERNAL BUSINESS OPERATIONS ARE NOT COVERED BY CHAPTER 75.

101

A CONSUMER MUST CONSUME THE DEFENDANT'S PRODUCT OR SERVICE.

THE DEFENDANT DID NOT PAY THE PLAINTIFFS TO DUMP ON THEIR PROPERTY AND THE PLAINTIFFS DID NOT PAY THE DEFENDANT.

THE DUMPING WAS NOT AN INTERACTION BETWEEN A BUSINESS AND ITS CONSUMER AND ALTHOUGH THE DUMPING MAY HAVE HARMED THE PLAINTIFFS, DEFENDANT'S DUMPING WAS NOT "IN OR AFFECTING COMMERCE."

102

EVICTIONS

103

TERMINATION LETTERS

L.I.C. ASSOCIATES I v. BROWN
Court of Appeals (July 2, 2024).

104

THE LANDLORD ATTEMPTED TO EVICT A RESIDENTIAL TENANT FOR FAILING TO PAY RENT AND FOR CHANGING THE LOCKS IN VIOLATION OF THE LEASE.

THE TERMINATION LETTER DID NOT MENTION THE ISSUE WITH THE LOCKS.

105

THE TRIAL COURT GRANTED SUMMARY JUDGMENT IN FAVOR OF THE LANDLORD AND THE TENANT APPEALED.

THE TENANT FAILED TO CONTINUE TO PAY RENT DURING THE APPEAL AND THE TENANT WAS REMOVED FROM THE PREMISES.

HOWEVER, N. C. GEN. STAT. 42-36 PROVIDES THAT "IF BY ORDER OF MAGISTRATE, THE PLAINTIFF IS PUT IN POSSESSION AND THE PROCEEDINGS SHALL AFTERWARDS BE QUASHED OR REVERSED, THE DEFENDANT MAY RECOVER DAMAGES OF THE PLAINTIFF FOR HIS REMOVAL."

106

OUR COURTS DO NOT LOOK WITH FAVOR ON LEASE FORFEITURES. WHEN TERMINATION OF A LEASE DEPENDS ON NOTICE, THE NOTICE MUST BE GIVEN IN STRICT COMPLIANCE WITH THE CONTRACT BOTH AS TO TIME AND CONTENTS.

THE LEASE PROVIDED THAT "LANDLORD MUST GIVE TENANT A WRITTEN NOTICE OF ANY PROPOSED TERMINATION OF TENANCY, STATING THE GROUNDS FOR TERMINATION…."

THE TERMINATION NOTICE ONLY IDENTIFIED THE GROUND FOR TERMINATION AS 'NON-PAYMENT' OF RENT.

107

AS THE TERMINATION NOTICE ITSELF SPECIFICALLY IDENTIFIES ONLY NON-PAYMENT OF RENT AS THE BASIS FOR TERMINATION AND DOES NOT MENTION LOCKS OR MATERIAL NON-COMPLIANCE WITH THE LEASE, THE TERMINATION NOTICE REGARDING THE LOCK VIOLATION IS NOT IN STRICT COMPLIANCE WITH THE LEASE.

THE TERMINATION NOTICE WAS DEFECTIVE UNDER THE LEASE AS TO THE LOCK VIOLATION.

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT EVICTING THE PLAINTIFF.

108

SELF HELP EVICTIONS

MYERS v. BROOME-EDWARDS
Court of Appeals (June 18, 2024)

109

DEFENDANT BROOME-EDWARDS FILED A SUMMARY EJECTMENT COMPLAINT WHICH WAS DISMISSED.

UNDETERRED, DEFENDANT BROOME-EDWARDS LOCKED THE PLAINTIFF OUT OF HER HOME AND INSTRUCTED ANOTHER DEFENDANT TO PUT THE PLAINTIFF'S BELONGINGS ON THE CURB.

THE PLAINTIFF SUED AND PLEAD AN UNFAIR AND DECEPTIVE TRADE PRACTICES CLAIM.

110

WHEN SERVED WITH THE COMPLAINT AND AN ORDER DIRECTING THE DEFENDANTS TO GIVE THE PLAINTIFF A KEY TO THE HOME, DEFENDANT BROOME-EDWARDS REPLIED BY TEXT THAT SHE DID NOT "GIVE A DAMN WHAT THE JUDGE SAYS. THIS IS MY HOUSE. I CAN DO WHATEVER I WANT WITH IT."

111

IT IS WELL ESTABLISHED THAT A LANDLORD'S TRESPASS UPON A LEASED PREMISES, EVICTION OF THE TENANT WITHOUT RESORT TO JUDICIAL PROCESS, AND CONVERSION OF THE TENANT'S PROPERTY CONSTITUTED UNFAIR OR DECEPTIVE ACTS OR PRACTICES IN COMMERCE WITHIN THE MEANING OF N. C. GEN. STAT. 75-1.1

LESSORS, LANDLORDS, OR AGENTS WHO EXECUTE SELF-HELP EVICTIONS IN VIOLATION OF THE EJECTMENT OF RESIDENTIAL TENANTS ACT MAY ALSO BE HELD LIABLE FOR A VIOLATION OF THE UNFAIR AND DECEPTIVE TRADE PRACTICES ACT, THUS GIVING RISE TO AN AWARD OF TREBLE DAMAGES AND ATTORNEY'S FEES UNDER THE ACT.

Myers v. Broome-Edwards.

112

INTERPRETATION OF ZONING ORDINANCES

ARTER v. ORANGE COUNTY
Supreme Court (August 23, 2024)

113

COURTS INTERPRET ZONING ORDINANCES LARGELY IN THE SAME MANNER AS STATUTES AND OTHER WRITTEN LAWS.

WHEN A ZONING ORDINANCE'S LANGUAGE IS AMBIGUOUS, WE RESORT TO OTHER ACCEPTED TOOLS OF STATUTORY CONSTRUCTION TO ASCERTAIN AND EFFECTUATE THE INTENT OF THE LEGISLATIVE BODY.

THE ONLY DIFFERENCE BETWEEN TRADITIONAL STATUTORY INTERPRETATION AND THE INTERPRETATION OF ZONING LAWS IS A SPECIAL RULE OF CONSTRUCTION: BECAUSE ZONING LAWS ARE IN DEROGATION OF COMMON LAW RIGHTS, THEY CANNOT BE CONSTRUED TO INCLUDE OR EXCLUDE BY IMPLICATION THAT WHICH IS NOT CLEARLY THEIR EXPRESS TERMS.

114

IN ARTER, THERE WAS A CONFLICT BETWEEN THE TEXT OF THE ORDINANCE AND A CORRESPONDING TABLE IN THE ORDINANCE.

HOWEVER, THE ZONING ORDINANCE PROVIDED THAT "IN THE CASE OF ANY DIFFERENCE OF MEANING OR IMPLICATION BETWEEN THE TEXT OF THE ORDINANCE AND ANY HEADING, DRAWING, TABLE, FIGURE, OR ILLUSTRATION, THE TEXT CONTROLS."

AS THE SUPREME COURT OBSERVED IN ARTER, "A FUNDAMENTAL RULE OF STATUTORY CONSTRUCTION IS THAT WHEN THE LEGISLATURE HAS ERECTED WITHIN THE STATUTE ITSELF A GUIDE TO ITS INTERPRETATION, THE GUIDE MUST BE CONSIDERED BY THE COURTS IN THE CONSTRUCTION OF THE OTHER PROVISIONS OF THE ACT WHICH, IN THEMSELVES, ARE NOT CLEAR AND EXPLICIT."

115

NOTICE OF CANCELLATION OF A FIRE INSURANCE POLICY

HA and TRAN v. NATIONWIDE GENERAL INSURANCE COMPANY
Supreme Court (August 23, 2024)

116

NATIONWIDE MAILED A LETTER TO THE PLAINTIFFS TERMINATING THEIR INSURANCE COVERAGE.

THE PLAINTIFFS CONTENDED, AND THE COURT FOUND, THAT THE PLAINTIFFS NEVER RECEIVED THAT LETTER.

NATIONWIDE SENT AND THE PLAINTIFFS RECEIVED, SIGNED AND CASHED A REFUND CHECK FOR PREMIUMS AFTER THE DATE OF CANCELLATION.

117

WAS THE POLICY CANCELLED OR TERMINATED?

N. C. GEN. STAT. 58-44-165(f)(10) PROVIDES INSURANCE COMPANIES MAY CANCEL INSURANCE POLICIES BY "GIVING TO THE INSURED FIVE DAYS' WRITTEN NOTICE OF CANCELLATION WITH OR WITHOUT TENDER OF THE EXCESS OF PAID PREMIUM ABOVE THE PRO RATA PREMIUM FOR THE EXPIRED TIME WHICH EXCESS, IF NOT TENDERED, SHALL BE REFUNDED UPON DEMAND."

THE PLAINTIFFS CONTENDED THAT ACTUAL NOTICE WAS REQUIRED.

118

MINDFUL THAT THE GENERAL ASSEMBLY DESIGNED NOTICE PROVISIONS TO GIVE INSUREDS A MEANINGFUL CHANCE TO AVOID COVERAGE LAPSES, OUR CASES HAVE ELEVATED THAT PURPOSE OVER PROCEDURAL TECHNICALITIES. WE HAVE THUS EXPLAINED THAT THE MANNER IN WHICH NOTICE IS GIVEN IS OF SECONDARY IMPORTANCE—IT IS THE FACT OF NOTICE THAT MATTERS.

THE SUPREME COURT OBSERVED THAT "EVERYONE AGREES THAT ACTUAL NOTICE OF CANCELLATION SATISFIES" THE STATUTE.

A PERSON HAS ACTUAL NOTICE WHEN THE INFORMATION GIVEN DIRECTLY TO HIM IMPARTS CLEAR KNOWLEDGE OF A FACT OR CONDITION WITH LEGAL SIGNIFICANCE.

THE FACT OF NOTICE IS THE STATUTORY LODESTAR AND THE MANNER IN WHICH NOTICE IS GIVEN IS OF SECONDARY IMPORTANCE.

PLAINTIFFS HAD ADVANCE WARNING OF CANCELLATION AND WERE ARMED WITH THE INFORMATION NECESSARY FOR THEIR PROTECTION.

119

THE MAILBOX RULE IN ADMINISTRATIVE PROCEEDINGS

BRADLEY HOME v. N. C. DEPARTMENT OF HEALTH AND HUMAN SERVICES

Court of Appeals (July 16, 2024)

120

THIS CASE INVOLVES AN APPEAL TO THE SUPERIOR COURT FROM A DECISION OF AN ADMINISTRATIVE LAW JUDGE IN A DISPUTE BETWEEN DHHS AND TWO MENTAL HEALTH CARE FACILITIES.

THE FACILITIES' APPEALED FROM AN ALJ'S DECISION DISMISSING THEIR PETITION BECAUSE IT WAS NOT TIMELY FILED.

N. C. GEN. STAT. 150B-23 PROVIDES THAT "THE GENERAL LIMITATION FOR THE FILING OF A PETITION IN A CONTESTED CASE IS 60 DAYS…"

N. C. GEN. STAT. 150B-23 FURTHER PROVIDES THAT "THE TIME LIMITATION… COMMENCES WHEN NOTICE IS GIVEN OF THE AGENCY DECISION TO ALL PERSONS AGGRIEVED THAT ARE KNOWN TO THE AGENCY BY PERSONAL DELIVERY, ELECTRONIC DELIVERY, OR BY PLACING OF THE NOTICE (IN THE MAIL)… (parenthetical for clarity.)

THE 60 PERIOD ENDED ON OCTOBER 4, 2021, AND THE PETITIONER FILED ON OCTOBER 5, 2021.

THE PETITIONER ARGUED THE "MAILBOX RULE."

RULE 6(e) OF THE NORTH CAROLINA RULES OF CIVIL PROCEDURE "PROVIDES THAT WHENEVER A PARTY HAS THE RIGHT TO DO SOME ACT OR TAKE SOME PROCEEDINGS WITHIN A PRESCRIBED PERIOD AFTER THE SERVICE OF A NOTICE OR OTHER PAPER ON HIM AND THE NOTICE OR PAPER IS SERVED UPON HIM BY MAIL, THREE DAYS SHALL BE ADDED TO THE PRESCRIBED PERIOD."

WITH THE THREE ADDITIONAL DAYS, THEN THE PETITION WOULD BE TIMELY FILED.

THE SUPERIOR COURT HELD THAT THE MAILBOX RULE APPLIED AND CONCLUDED THAT THE PETITION WAS TIMELY FILED.

THE COURT OF APPEALS REVERSED.

THE COURT OF APPEALS AGREED WITH DHHS' ARGUMENT THAT RULE 6(e), THE MAILBOX RULE, DOES NOT APPLY TO EXTEND THE STATUTORILY MANDATED SIXTY-DAY PERIOD FOR A PARTY AGGRIEVED BY A STATE AGENCY DECISION TO FILE A PETITION CONTESTING THAT DECISION.

KINLAW v. N. C. DEPARTMENT OF HEALTH AND HUMAN SERVICES
Court of Appeals (September 17, 2024)

KINLAW WORKED AT A BEHAVIORAL HEALTH CLINIC.

KINLAW WAS ALLEGED TO HAVE COMMITTED ACTS OF PATIENT ABUSE AND NEGLECT.

DHHS SENT KINLAW A LETTER VIA CERTIFIED MAIL ON OCTOBER 4, 2022 INDICATING THAT HIS NAME WAS BEING PLACED ON A REGISTRY FOR CHARGES OF PATIENT ABUSE AND NEGLECT.

KINLAW HAD A RIGHT TO APPEAL THAT ACTION.

ON OCTOBER 6, KINLAW GOT A NOTICE FROM THE POST OFFICE THAT HE WAS TO RECEIVE A LETTER THAT DAY.

HE DIDN'T.

ON OCTOBER 8, KINLAW WENT TO THE POST OFFICE TO INQUIRE.

HE CAME BACK ON OCTOBER 10TH.

ON OCTOBER 19, 2022, HE CONTACTED DHHS BECAUSE HE STILL HAD NOT RECEIVED THE LETTER.

ON OCTOBER 20, KINLAW GOT THE LETTER BY EMAIL.

127

THE LETTER TOLD HIM TO CONTACT THE OFFICE OF ADMINISTRATIVE HEARINGS FOR MORE INFORMATION.

BETWEEN OCTOBER 25TH and OCTOBER 28TH, KINLAW CALLED OAH 8 TIMES BEFORE GETTING THE INFORMATION.

ON NOVEMBER 6TH KINLAW EMAILED HIS APPEAL TO OAH.

128

N. C. GEN. STAT. 131E-256 PROVIDED THAT THE APPELLANT MUST FILE HIS APPEAL WITHIN 30 DAYS OF THE MAILING OF THE WRITTEN NOTICE.

N. C. GEN. STAT. 150B-23(f) PROVIDES THAT THE TIME LIMITATION FOR FILING COMMENCES WHEN NOTICE IS GIVEN OF THE AGENCY DECISION…BY THE PLACING OF THE NOTICE IN AN OFFICIAL DEPOSITARY OF THE UNITED STATES POSTAL SERVICE…

KINLAW WAS DEEMED BY LAW TO HAVE HAD NOTICE FROM THE DATE THE LETTER WAS MAILED.

BOTH THE OAH HEARING OFFICER AND THE SUPERIOR COURT DISMISSED KINLAW'S APPEAL BASED ON A LACK OF SUBJECT MATTER JURISDICTION.

129

KINLAW ALLEGED A DUE PROCESS VIOLATION CONTENDING THAT THE FUNDAMENTAL PREMISE OF PROCEDURAL DUE PROCESS IS NOTICE AND AN OPPORTUNITY TO BE HEARD.

KINLAW CONTENDED THAT THERE WAS DUE PROCESS VIOLATION AS APPLIED TO HIM UNDER THE CIRCUMSTANCES.

THE COURT OF APPEALS CONCLUDED THAT KINLAW HAD A PROTECTED LIBERTY INTEREST IN HIS RIGHT TO ENGAGE IN ANY OF THE COMMON OCCUPATIONS OF LIFE.

130

DUE PROCESS REQUIRES THAT AN INDIVIDUAL RECEIVE ADEQUATE NOTICE AND A MEANINGFUL OPPORTUNITY TO BE HEARD BEFORE HE IS DEPRIVED OF LIFE, LIBERTY OR PROPERTY.

DUE PROCESS REQUIRES THE GOVERNMENT TO PROVIDE NOTICE REASONABLY CALCULATED, UNDER ALL THE CIRCUMSTANCES, TO APPRISE INTERESTED PARTIES OF THE PENDENCY OF THE ACTION AND AFFORD THEM AN OPPORTUNITY TO PRESENT THEIR OBJECTIONS.

KINLAW GOT THE NOTICE BY EMAIL ON OCTOBER 20TH. THE DEADLINE FOR FILING WAS NOVEMBER 4TH. SO KINLAW HAD 15 DAYS TO FILE HIS APPEAL.

THE COURT OF APPEALS CONCLUDED THAT THERE WAS NO DUE PROCESS VIOLATION IN THIS CASE.

131

KINLAW ALSO CONTENDED THAT DHHS SHOULD HAVE BEEN ESTOPPED FROM RELYING ON THE LATE FILING BECAUSE OF INACCURATE ADVICE GIVEN BY A DHHS EMPLOYEE.

THE COURT OF APPEALS CONCLUDED THAT THE DOCTRINE OF EQUITABLE ESTOPPEL IS IRRELEVANT TO ISSUES OF SUBJECT MATTER JURISDICTION.

132

IMPLIED WAIVERS IN CONTRACTS

IN THE MATTER OF THE ESTATE OF HAYES
Court of Appeals (July 16, 2024)

133

133

PETITIONER SUSAN HAYES AND ROBERT HAYES WERE MARRIED.

THEY SEPARATED IN 2017.

ON MARCH 3, 2020, THE HAYES CONSENTED TO THE ENTRY OF A MEMORANDUM OF JUDGMENT IN DISTRICT COURT TO RESOLVE THEIR DOMESTIC DISPUTE.

THE MOJ PROVIDED THAT "ALL CLAIMS OF THE PARTIES OR EITHER OF THEM FOR THE DIVISION OF PROPERTY, SPOUSAL SUPPORT OR COSTS, INCLUDING COUNSEL FEELS, ARE HEREBY WAIVED AND DISMISSED."

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SIXTEEN DAYS LATER, ROBERT HAYES DIED.

LESS THAN TWO MONTHS LATER, SUSAN HAYES FILED A VERIFIED PETITION ALLEGING THAT SHE WAS ENTITLED TO AN ELECTIVE SHARE OF ROBERT HAYES' ESTATE.

THE ESTATE CLAIMED THAT SHE HAD WAIVED THE RIGHT TO CLAIM AN ELECTIVE SHARE UNDER N. C. GEN. STAT. 30-3.1(a).

THE PETITION WAS TRANSFERRED TO SUPERIOR COURT PURSUANT TO N. C. GEN. STAT. 28A-2-4.

A MOTION FOR SUMMARY JUDGMENT WAS FILED AND THE TRIAL COURT RULED IN FAVOR OF THE EX-WIFE PETITIONER.

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N. C. GEN. STAT. 30-3.6(a) PROVIDES "THE RIGHT OF A SURVIVING SPOUSE TO CLAIM AN ELECTIVE SHARE MAY BE WAIVED, WHOLLY OR PARTIALLY, BEFORE OR AFTER MARRIAGE, WITH OR WITHOUT CONSIDERATION, BY A WRITTEN WAIVER SIGNED BY THE SURVIVING SPOUSE."

THE COURT OF APPEALS CONCLUDED THAT THE DOMESTIC SETTLEMENT WAS AN IMPLIED WAIVER OF THE RIGHT TO CLAIM AN ELECTIVE SHARE.

THE MEMORANDUM OF JUDGMENT "COMPREHENSIVELY ADDRESSED THE DIVISION OF ALL PARTIES' ASSETS AND DEBTS, BOTH MARITAL AND SEPARATE" AND ADDRESSED BENEFITS AFTER MR. HAYES' DEATH.

RESTATEMENTS OF BASIC LEGAL PRINCIPLES

MERE UNFULFILLED PROMISES CANNOT BE MADE THE BASIS OF FRAUD.

THERE MUST BE EVIDENCE OF A MISREPRESENTATION OF EXISTING OR ASCERTAINABLE FACT, AS DISTINQUISHED FROM A MATTER OF OPINION OR REPRESENTATION RELATING TO FUTURE PROSPECTS.

HALE v. McLEOD
Court of Appeals (June 18, 2024)

FRAUD CLAIMS MUST BE PLEAD WITH SPECIFICITY.

RULE 9 OF THE NORTH CAROLINA RULES OF CIVIL PROCEDURE REQUIRES A PLAINTIFF TO PLEAD THE 'IDENTITY OF THE PERSON MAKING THE REPRESENTATION' AND THAT THE PARTICULARITY REQUIRED CANNOT BE SATISFIED BY USING CONCLUSORY LANGUAGE OR ASSERTING FRAUD THROUGH MERE QUOTES FROM THE STATUTE.

HALE v. McLEOD

Court of Appeals (June 18, 2024)

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CLAIMS FOR BREACH OF FIDUCIARY DUTY AND CONSTRUCTIVE FRAUD REQUIRE PROOF OF THE EXISTENCE OF A FIDUCIARY RELATIONSHIP.

HALE v. McLEOD

Court of Appeals (June 18, 2024)

DIRECTORS OF A CORPORATION GENERALLY DO NOT OWE A FIDUCIARY DUTY TO CREDITORS OF THE CORPORATION.

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A CLAIM FOR UNFAIR AND DECEPTIVE TRADE PRACTICES REQUIRES PROOF THAT THE ACTIONS WERE "IN OR AFFECTING COMMERCE."

ACTIONS SOLELY CONNECTED TO A COMPANY'S CAPITAL FUNDRAISING ARE NOT 'IN OR AFFECTING COMMERCE' EVEN UNDER A REASONABLY BROAD INTREPRETATION OF THE LEGISLATIVE INTENT UNDERLYING THESE TERMS.

HALE v. McLEOD

Court of Appeals (June 18, 2024)

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JUDICIAL BRANCH of NORTH CAROLINA
GENERAL COURT of JUSTICE
SUUM CUIQUE TRIBUERE
THANK YOU
Robert C. Ervin
Superior Court Judge

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JUDICIAL BRANCH of NORTH CAROLINA
GENERAL COURT of JUSTICE
SUUM CUIQUE TRIBUERE

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