CIVIL LAW UPDATE

Judge Robert C. Ervin

Superior Court Judges Conference
October 2020

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LEONARD v. BELL (Court of Appeals August 4, 2020)

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RULE 9(j) CASE

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RULE 9(j) requires in pertinent part that:

THE PLEADING SPECIFICALLY ASSERTS THAT THE MEDICAL CARE AND ALL MEDICAL RECORDS PERTAINING TO THE ALLEGED NEGLIGENCE THAT ARE AVAILABLE TO THE PLAINTIFF AFTER REASONABLE INQUIRY HAVE BEEN REVIEWED BY A PERSON WHO IS REASONABLY EXPECTED TO QUALIFY AS AN EXPERT WITNESS UNDER RULE 702…

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IN LEONARD, this issue was whether:

ALL MEDICAL RECORDS PERTAINING TO THE ALLEGED NEGLIGENCE THAT ARE AVAILABLE TO THE PLAINTIFF AFTER REASONABLE INQUIRY HAVE BEEN REVIEWED.

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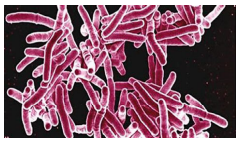
LEONARD WAS AN INMATE IN THE DAC WHO:

---Sued two DAC doctors for negligence
---Began experiencing severe back pain in October 2012
---Was evaluated for over 10 months with increasing pain
---Dr. Bell saw plaintiff 9 times
---Dr. Bell requested an MRI
---Dr. Stover denied the MRI request
---Eventually plaintiff got an MRI that revealed bone erosion of two vertebrae and a spinal infection
---THE ULTIMATE DIAGNOSIS WAS A SPINAL INFECTION CAUSED BY TUBERCULOSIS.



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PRIOR TO FILING SUIT, PLAINTIFF REQUESTED:

---FROM DAC "ALL MEDICAL RECORDS FROM JANUARY 1, 2012 TO THE PRESENT"

---RECORDS FROM UNC HEALTHCARE, REX HEALTHCARE and 6 other providers

---GOT 512 PAGES OF RECORDS

---PLAINTIFF's EXPERT REVIEWED THESE DOCUMENTS

---PLAINTIFF's COMPLAINT INCLUDED THE NECESSARY ALLEGATION OF THE REVIEW OF THE MEDICAL RECORDS BY THE EXPERT

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IN DISCOVERY, THE PLAINTIFF MADE DOCUMENT REQUESTS TO TWO DOCTORS AND DAC:

----AN ADDITIONAL 1172 PAGES OF RECORDS WERE PRODUCED

----THERE WAS ONE ADDITIONAL PAGE PRODUCED IN THIS STASH OF DOCUMENTS THAT INCLUDED A DAC IMMUNIZATION RECORD/T. B. SKIN TEST

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THE T. B. SKIN TEST FORM

---REFLECTED T. B. SKIN TESTS from 2006 to 2009 that were outside the time range of the original request.

---Had entries for July 29, 2012 and July 12, 2013 that were inside the time range of the original request.

Section I
If T.B. Skin Test is Positive Complete Section II and DC-516

Date Administered	Nurse	Unit Number	Lot Number	Date Read	Reaction	Nurse	Unit Number
7/14/06	WSmith	3085	28966	7/17/06	0mm	WSmith	3085
7/16/07	MPK07	4860	39146	7/18/07	6mm	PCH05	4860
5.28.08	RDA16	4880	45270				
6-11-08	CC#13	4880	45270	6/13/08	0mm	CAH05	4880
7.1.09	HSK09	4880	54815	7/3/09	10mm	BOF02	4880

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THE PLAINTIFF'S EXPERT WAS DEPOSED AND HE INDICATED THE T. B. FORM DID NOT CHANGE HIS OPINION THAT THE DOCTORS BREACHED THE STANDARD OF CARE.

WHY NOT?

THERE WAS A UNC HEALTHCARE DOCUMENT IN THE ORIGINAL RECORDS THAT REPORTED:

"Incarcerated for last 7 and half years. Previously worked at fathers landscaping (sic) business. Known exposure to tuberculosis while incarcerated with positive PPD around 6 years ago. Treated with therapy for unknown duration afterwards."

THE COURT OF APPEALS OBSERVED IN A FOOTNOTE THAT "TB WAS NOT IDENTIFIED AS THE CAUSE UNTIL OCTOBER OF 2013, WHEN PLAINTIFF WAS TREATED AT UNC HEALTH CARE."

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THE DEFENDANTS MOVED TO DISMISS FOR FAILING TO COMPLY WITH THE RULE 9(j) REQUIREMENT FOR A REVIEW OF ALL OF THE MEDICAL RECORDS.

MOTION TO DISMISS WAS ALLOWED BY THE TRIAL COURT JUDGE.

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THE TRIAL COURT CONCLUDED THAT "A CIVIL ACTION ALLEGING MEDICAL MALPRACTICE WILL RECEIVE STRICT CONSIDERATION FOR RULE 9(j) COMPLIANCE AND IS SUBJECT TO DISMISSAL WITHOUT STRICT STATUTORY COMPLIANCE."

THE TRIAL COURT FURTHER OBSERVED THAT "THE COURT'S ANALYSIS IS NOT WHETHER … THE EVIDENCE IS VIEWED IN THE LIGHT MOST FAVORABLE TO THE PLAINTIFF BUT IS A QUESTION OF LAW."

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THE COURT OF APPEALS REVERSED.

THE COURT MUST VIEW THE EVIDENCE REGARDING THE COMPLIANCE WITH RULE 9(j) IN THE LIGHT MOST FAVORABLE TO THE PLAINTIFF.

THE COURT EXAMINES THE FACTS AND CIRCUMSTANCES KNOWN OR THOSE WHICH SHOULD HAVE BEEN KNOWN TO THE PLEADER AT THE TIME OF FILING.

THE COURT DRAWS ALL REASONABLE INFERENCES IN FAVOR OF THE NONMOVING PARTY.

THE COURT IS ONLY TO DETERMINE IF THE PLAINTIFF ACTED REASONABLY IN HIS EFFORTS TO COMPLY WITH RULE 9(j).

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IN LEONARD, THE COURT OF APPEALS FRAMED THE QUESTION:

WHETHER PLAINTIFF MADE REASONABLE INQUIRY TO OBTAIN ALL THE MEDICAL RECORDS PERTAINING TO THE ALLEGED NEGLIGENCE?

IN THIS CASE, THE PLAINTIFF'S REQUEST INCLUDED A TIME PERIOD WHICH SHOULD HAVE TRIGGERED THE PRODUCTION OF THE T B SKIN TEST RESULTS

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DA SILVA v. WAKEMED (Supreme Court August 14, 2020).

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Da Silva case focuses on Rule 702(b) of the North Carolina Rules of Evidence and STANDARD OF CARE testimony offered against a specialist.

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The plaintiff was a 76-year-old woman, who arrived in the Emergency Room with a urinary tract infection. The plaintiff had been taking a daily doses of Prednisone, a steroid, for years.

In the ER, the plaintiff was prescribed Levaquin, an antibiotic for her infection.

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LEVAQUIN has an FDA BLACK BOX WARNING that warns of an increased risk of tendon ruptures in patients over 60 years old and in patients who are also taking steroids.

The most prevalent tendon rupture attributable to LEVAQUIN is an Achilles tendon rupture.

WARNING:
Fluoroquinolones, including LEVAQUIN®, are associated with an increased risk of tendinitis and tendon rupture in all ages. This risk is further increased in older patients usually over 60 years of age, in patients taking corticosteroid drugs, and in patients with kidney, heart or lung transplants [See *Warnings and Precautions (5.1)*].

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The plaintiff was admitted to the hospital and her care was transferred to three WAKE MED hospitalists.

HOSPITALISTS are physicians who specialize in internal medicine in a hospital setting and all three were board certified in internal medicine.

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All three of the hospitalists continued the plaintiff on LEVAQUIN and her regular steroid.

The plaintiff was discharged to a rehab facility with orders to continue both LEVAQUIN and the steroid.

The plaintiff suffered a ruptured Achilles tendon and had to undergo surgery. She never recovered and died from pneumonia.

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THE PLAINTIFF'S STANDARD OF CARE EXPERT OPINED THAT THE DEFENDANTS breached the STANDARD OF CARE BY:

- ---Administering LEVAQUIN when contraindicated by BLACK BOX WARNINGS
- ---Administering the steroid while the plaintiff took LEVAQUIN
- ---Failing to ensure medication reconciliation
- ---Transferring the plaintiff with orders to continue LEVAQUIN

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The PLAINTIFF'S STANDARD OF CARE EXPERT:

---WAS BOARD CERTIFIED IN INTERNAL MEDICINE

---HIS PRACTICE INVOLVED TREATMENT OF HOSPITALIZED PATIENTS

---"The work that a hospitalist does is the same work as any internist who cares for hospitalized patients."

---HE PRESCRIBES LEVAQUIN IN HIS PRACTICE

---HE WORKS TWO MONTHS OUT OF THE YEAR AS A HOSPITAL ATTENDING PHYSICIAN AT YALE HEALTH CENTER

---HE SEES DOZENS OF PATIENTS A YEAR IN PLAINTIFF'S DEMOGRAPHIC WITH URINARY TRACT INFECTIONS

---HE SEES PATIENTS LIKE HER IN THE EMERGENCY ROOM "ALL THE TIME"

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THE DEFENDANTS MOVED TO DISQUALIFY THE PLAINTIFF'S STANDARD OF CARE EXPERT AND MOVED FOR SUMMARY JUDGMENT.

THE TRIAL COURT ALLOWED BOTH MOTIONS.

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RULE 702(b) PROVIDES:

that "in a medical malpractice action…, a person shall not give expert testimony on the appropriate standard of care … unless the person is a licensed health care provider in this State or another state and meets the following criteria:

(1) If the party against whom or on whose behalf the testimony is offered is a specialist, the expert witness must:

a. Specialize in the same specialty as the party against whom or on whose behalf the testimony is offered; or
b. Specialize in a similar specialty which includes within its specialty the performance of the procedure that is the subject of the complaint and have prior experience treating similar patients.

THIS CASE IS RULE 702(b)(1)b

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A TRIAL COURT'S DECISION TO ALLOW OR DISQUALIFY AN EXPERT WILL NOT BE REVERSED ON APPEAL ABSENT A SHOWING OF ABUSE OF DISCRETION.

A TRIAL COURT ABUSES ITS DISCRETION IF ITS RULING IS MANIFESTLY UNSUPPORTED BY REASON AND COULD NOT HAVE BEEN THE RESULT OF A REASONED DECISION.

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THE SUPREME COURT OPINED:

WHEN THE PERTINENT INQUIRY ON APPEAL IS BASED ON A QUESTION OF LAW, THE APPELLATE COURTS CONDUCT DE NOVO REVIEW.

IF THE TRIAL COURT ERRS BY MISAPPLYING RULE 702, THE REVIEW IS DE NOVO.

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THE SUPREME COURT CONCLUDED THAT:

INTERNAL MEDICINE AND PRACTICING AS A HOSPITALIST WERE SIMILAR SPECIALTIES.

PLAINTIFF'S EXPERT'S "PRACTICE AS AN INTERNIST INCLUDED THE PROCEDURES ALLEGED IN THE COMPLAINT."

THE PLAINTIFF'S EXPERT SHOULD HAVE BEEN PERMITTED TO TESTIFY.

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Town Council Appoints New Town Attorney
Post Date:07/29/2020 7:21 PM

The Chapel Hill Town Council appointed Ann M. Anderson as Town Attorney Wednesday, July 29, at a special virtual meeting. Her first official day as Town Attorney will be September 1.

Anderson has served on the UNC School of Government faculty since 2007. She is an Associate Professor and recently served as the Albert and Gladys Hall Coates Distinguished Term Associate Professor of Public Law and Government.

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ORLANDO RESIDENCE, LTD. v. ALLIANCE HOSPITALITY MANAGEMENT, LLC.
(Court of Appeals August 14, 2020)

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THIS IS A BUSINESS COURT CASE THAT RAISES ISSUES ABOUT THE PLEADING OF CROSS CLAIMS AND RULE 18 OF THE RULES OF CIVIL PROCEDURE.

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ONE DEFENDANT FILED 18 CROSSCLAIMS AGAINST THE OTHER CO-DEFENDANTS.

THE PLAINTIFF'S CLAIMS WERE ALL DISMISSED.

WHAT HAPPENS TO THE 18 CROSSCLAIMS???

ARE THEY STILL VIABLE???

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RULE 13(g) OF THE RULES OF CIVIL PROCEDURE PROVIDES THAT:

A PLEADING MAY STATE AS A CROSSCLAIM ANY CLAIM BY ONE PARTY AGAINST A COPARTY ARISING OUT OF THE SAME TRANSACTION OR OCCURRENCE THAT IS THE SUBJECT MATTER EITHER OF THE ORIGINAL ACTION OR OF A COUNTERCLAIM THEREIN OR RELATING TO ANY PROPERTY THAT IS THE SUBJECT MATTER OF THE ORIGINAL ACTION.

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WITH THE EXCEPTION OF CROSSCLAIMS SUCH AS CLAIMS FOR INDEMNITY OR CONTRIBUTION THAT NECESSARILY REQUIRE THE CONTINUED LITIGATION OF THE PLAINTIFF'S ORIGINAL CLAIMS IN ORDER TO REMAIN VIABLE—THE DISMISSAL OF THE ORIGINAL ACTION DOES NOT BY ITSELF, MANDATE DISMISSAL OF THE CROSSCLAIM SO LONG AS THE CROSSCLAIM MEETS THE RULE 13(g) PREREQUISITES FOR BRINGING SUCH A CLAIM.

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15 OF THE 18 CROSSCLAIMS DID NOT ARISE OUT OF THE SAME TRANSACTION OR OCCURRENCE.

THE 3 CLAIMS THAT DID WERE BARRED BY RES JUDICATA AND DISMISSED.

SO, WHAT DO YOU DO WITH THE 15 OTHER CROSSCLAIMS?

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RULE 18(a) OF THE RULES OF CIVIL PROCEDURE PROVIDES:

A PARTY ASSERTING A CLAIM FOR RELIEF AS AN ORIGINAL CLAIM, COUNTERCLAIM, CROSS CLAIM, OR THIRD-PARTY CLAIM, MAY JOIN, EITHER AS INDEPENDENT OR AS ALTERNATE CLAIMS, AS MANY CLAIMS, LEGAL OR EQUITABLE, AS HE HAS AGAINST AN OPPOSING PARTY.

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IN ORLANDO RESIDENCE, THE COURT OF APPEALS OPINED THAT:

WE BELIEVE, HOWEVER, THAT IMPLICIT IN RULE 18(a) IS THE NOTION THAT IN ORDER FOR A CROSS-CLAIMANT TO BE PERMITTED TO MAINTAIN SUCH ADDITIONAL JOINED CLAIMS AGAINST A CO-DEFENDANT AS PROVIDED FOR IN THAT RULE, THE PREDICATE CROSSCLAIM ASSERTED BY THE CROSSCLAIMANT IN ACCORDANCE WITH RULE 13(g) MUST SURVIVE THE PLEADING STAGE.

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GLOBAL TEXTILE ALLIANCE, INC. v. TDI WORLDWIDE, LLC et. al.

(Supreme Court August 14, 2020)

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ATTORNEY-CLIENT PRIVILEGE CASE

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GLOBAL is a North Carolina corporation.
GLOBAL has one shareholder who owns all the stock.
The owner has a friend who acts as his financial and business adviser.
This friend is not an officer, director or employee of GLOBAL.

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EARLIER IN THE CASE, THERE WAS A DISCOVERY DISPUTE OVER E-DISCOVERY.

GLOBAL asserted that the friend was not a custodian of documents for ESI purposes because he was a third-party consultant retained, not by GLOBAL, but by the sole shareholder.

THE BUSINESS COURT, based on that representation, determined that the friend was not a custodian of GLOBAL documents.

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IN DISCOVERY, GLOBAL produced a privilege log referring to documents including "confidential correspondence" between GLOBAL and or its outside counsel and the friend "conveying and/or summarizing legal advice regarding the matters giving rise to the instant litigation."

GLOBAL ASSERTED ATTORNEY-CLIENT PRIVILEGE AND THE DEFENDANTS MOVED TO COMPEL DISCOVERY.

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THE TRIAL COURT REQUESTED THE ALLEGEDLY PRIVILEGED DOCUMENTS BE PRODUCED FOR IN CAMERA REVIEW.

GLOBAL WAS SLOW IN PRODUCING THE DOCUMENTS FOR IN CAMERA REVIEW.

THE BUSINESS COURT ALLOWED GLOBAL TO SUBMIT "A REASONABLE SAMPLING OF SUCH COMMUNICATIONS" FOR IN CAMERA REVIEW.

GLOBAL THEN SUBMITTED 12 EMAILS FOR IN CAMERA REVIEW AND DID NOT ASK THE COURT TO REVIEW MORE DOCUMENTS.

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THE TRIAL COURT REJECTED THE PRIVILEGE CLAIM AFTER THIS LIMITED IN CAMERA REVIEW.

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COMMUNICATIONS DO NOT MERIT ATTORNEY-CLIENT PRIVILEGE WHEN THEY ARE MADE IN THE PRESENCE OF THE THIRD-PARTY.

A CORPORATION IS AN ENTITY DISTINCT FROM THE SHAREHOLDERS, EVEN A SOLE SHAREHOLDER.

IN ESI DISPUTES, GLOBAL HAD REPRESENTED THAT THE FRIEND WAS NOT ITS AGENT.

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WAS IT AN ABUSE OF DISCRETION TO CONDUCT ONLY A LIMITED IN CAMERA REVIEW??

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THE OFFER TO CONDUCT A LIMITED IN CAMERA REVIEW WAS OFFERED AS AN ACCOMMODATION TO GLOBAL.

AFTER SUBMITTING THE 12 DOCUMENTS, GLOBAL DID NOT ASK FOR A COMPLETE IN CAMERA REVIEW.

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THE SUPREME COURT OBSERVED:

THOUGH THIS COURT HAS NOT DIRECTLY ADDRESSED THE ISSUE OF LIMITED IN CAMERA REVIEWS, COURTS IN THIS STATE AND AROUND THE NATION HAVE CONSISTENTLY PERMITTED LIMITED IN CAMERA REVIEWS AS A SUBSTITUTE FOR EXHAUSTIVE IN CAMERA REVIEWS.

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THE LIMITED IN CAMERA REVIEW WAS DEEMED NOT TO BE AN ABUSE OF DISCRETION.

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QUICK CASE SUMMARIES

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SHEARON FARMS TOWNHOME OWNERS ASSOCIATION II, INC. v. SHEARON FARMS DEVELOPMENT, LLC et. al. (Court of Appeals August 4, 2020)

Standing is a question of subject matter jurisdiction and is a necessary prerequisite to a court's proper exercise of jurisdiction.

A homeowner's association does not have standing to bring a claim when the relief sought is damages for the members of the association.

The proper plaintiffs were the association members.

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JUDD v. TILGHMAN MEDICAL ASSOCIATES, LLC. (Court of Appeals July 21, 2020)

The defendant hired an attorney to defend the case and the attorney took no action. The defendant did not attend to the case and a default judgment was entered for $840,000.

If a defendant turns a legal matter over to an attorney upon the latter's assurance that he will handle the matter and the defendant does nothing further about it, this is not excusable neglect.

A party to a case in court must give it that attention which a prudent man gives to his important business.

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TSONEV v. ESTATE OF SHEARER (Court of Appeals August 4, 2020)

The parties to a home repair contract agreed to a contractual provision that "purchasers may not bring any action against (defendant) more than two (2) years after the Completion Date."

Parties are free to contract as they see fit.

Absent evidence of fraud or misrepresentation in the making of the contract, plaintiffs are bound by the language of the contract they entered.

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HENDRIX v. WEST JEFFERSON (Court of Appeals August 18, 2020)

The plaintiff, a former Town of West Jefferson employee, sued the Town and its officials for an alleged defamatory statement made by the Town's police chief, who also served as a County Commissioner. The defamatory statement about the plaintiff, who was applying to be appointed Sheriff, concerned the plaintiff's earlier termination as a police officer by the Town for allegedly stealing and smoking evidence.

The plaintiff was allegedly terminated by the Town almost 20 years before he applied to become the County's Sheriff.

Any remarks made by the employee in the months after the discharge were, as a matter of law, not made within the scope of employment and consequently, are not attributable to the employer.

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McFADYEN v. NEW HANOVER COUNTY (Court of Appeals August 18, 2020)

The plaintiff, who was fired as New Hanover County Director of Elections, sued the State and County Board of Elections and members of the State Board in New Hanover County.

The applicable statute requires that such an action must be filed in Wake County.

The Court of Appeals concluded the trial court in New Hanover lacked jurisdiction to hear the matter.

An order is void ab initio only when it is issued by a court that does not have jurisdiction. Such an order is void and without legal effect.

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Social History:

Incarcerated for last 7 and half years. Previously worked at fathers landscaping business. Known exposure to tuberculosis while incarcerated with positive PPD around 6 years ago. Treated with therapy for unknown duration afterwards.

Denies pet exposure, tobacco use. Endorses occasional EtOH and Marijuana use prior to being incarcerated

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Civil Case Law Update

Richard S. Gottlieb
21st Judicial District

Fall 2020 Judges Conference

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You Used to Get… Now you get…

We're Sorry

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Bartley v. City of High Point and Blackman (COA as July 2020)

- Case addressing Public Official Immunity
  - Derivative of governmental immunity
  - Precludes suits against public officials in their official capacity
- Police officers "engaged in performing their duties are public officials . . . . [and] enjoy absolute immunity from *personal liability* for discretionary acts done without corruption or malice."
  - Police officer is generally "immune from suit ***unless*** the challenged action was:
    (1) outside the scope of official authority,
    (2) done with malice, or
    (3) corrupt."

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Bartley v. City of High Point and Blackman (COA s July 2020)

- Officer Blackman appealed denial of summary judgment
- Facts of the case:
  - Officer Blackman was a plain clothed detective who observed a traffic violation
  - Officer Blackman turned on the lights/siren of his unmarked vehicle
  - Wasn't able to get close enough to Mr. Bartley to initiate a stop but believes Mr. Bartley should have seen the flashing lights and heard the siren
  - Mr. Bartley turned into a residential area in a way that made Officer Blackman believe he was trying to get to a house to pull into a driveway
  - Mr. Bartley, who was 60 y.o., pulled into a driveway and Officer Blackman pulled behind him. Siren was off – lights on the undercover car still strobing.
  - Mr. Bartley exited the vehicle and was heading toward the back of it when he says he first noticed Officer Blackman.

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Bartley v. City of High Point and Blackman (COA s July 2020)

- Officer Blackman got out of his car and 2x ordered Mr. Bartley back into his vehicle
- Officer Blackman was in plain clothes, did not ID himself as a police officer or state the basis for the stop
- Mr. Bartley testified that Officer Blackman stood behind his door so he could not see the police badge on Officer Blackman's waste and that he did not notice the flashing strobe lights on the unmarked car
- Mr. Bartley refused to get back into his car and proceeded to the back of his vehicle to retrieve his sick cat from the backseat
- Officer Blackman viewed Mr. Bartley's refusal and movements as threatening and he radioed for backup

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Bartley v. City of High Point and Blackman (COA s July 2020)

- Mr. Bartley testified that when his back was turned, Officer Blackman "body slammed" him against his car, handcuffed him, and informed him he was being detained.
- Mr. Bartley sued Officer Blackman for false imprisonment, assault and battery, and malicious prosecution in both his official and individual capacities
- Office Blackman moved for summary judgment on the basis of public official immunity
  - City's motion for summary judgment based on governmental immunity ***ALLOWED***
  - Blackman's motion ***GRANTED*** as to official capacity ***DENIED*** as to individual
- Came before COAs as an interlocutory appeal
  - Reminder that immediate appeal will be allowed since claim of immunity involved
- The focus of the COAs was the second prong of the Public Official Immunity

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Bartley v. City of High Point and Blackman (COA July 2020)

- Public official is generally immune from suit unless the challenged action was:
  - (1) outside the scope of official authority,
  - (2) done with malice, or
  - (3) corrupt.

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Bartley v. City of High Point and Blackman (COA July 2020)

- Plaintiff argued that Officer Blackman not entitled to Public Official Immunity because he acted with malice when he body slammed him into the car and charged and arrested him for resisting arrest without probable cause.
- "A Defendant acts with malice when he wantonly does that which a man of reasonable intelligence would know to be contrary to his duty and he intends to be prejudicial or injurious to another"
  - i.e. malicious = (1) done wantonly, (2) contrary to actor's duty, and (3) intended to be injurious to another
- Wantonly and Contrary to Public Duty issue:
  - Plaintiff's claim for false imprisonment or false arrest was based on a claim that Officer Blackman did not have probable cause to arrest him.

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Bartley v. City of High Point and Blackman (COA July 2020)

- Wantonly and Contrary to Public Duty issue (cont.):
  - An officer may, in connection with a traffic stop, maintain status quo or to ensure officer safety use "forms of force typical of an arrest."
  - HOWEVER, the COA found that the trial court properly denied summary judgment because "*there is a genuine issue of material fact as to whether body slamming plaintiff in the course of arrest was a necessary use of force such that Officer Blackman did not act contrary to, or outside the bounds of, his duty.*"
- Intent to Injure Issue:
  - Malice can be proven by a showing of *actual* or *implied* intent to injure
  - To satisfy implied intent, plaintiff must show that the officer's conduct was "so reckless or so manifestly indifferent to the consequences, where the safety of life or limb is involved as to justify a finding of willfulness and wantonness equivalent in spirit to an actual intent."

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Bartley v. City of High Point and Blackman (COA July 2020)

- Intent to Injure Issue (cont.):
  - Mr. Bartley alleges that Officer Blackman used unnecessary and excessive force when arresting him.
- Taking the allegations in the light most favorable to the Plaintiff, the COA opined that "Officer Blackman body slammed a 60-year old unarmed man who was not being threatening or attempting to run away," raising a material question of fact as to whether Officer Blackman acted with malice.
- 2-1 opinion

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Desmond v. The News and Observer (NC Supreme Court August 2020)

- Case addressing libel and punitive damages (75 page opinion)
- Multi-part series about the SBI and forensic firearms examiner Beth Desmond (plaintiff)
- Stories were extremely critical of Desmond's work on two criminal cases
- Stories included statements which asserted that other experts had examined photographs of some of the evidence in the cases and concluded that Desmond's analysis was *false*.
- Other experts purportedly questions whether Desmond was incompetent or had falsified her reports to convict an innocent man


THE NEWS&OBSERVER

SBI relies on bullet analysis critics deride as unreliable

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Desmond v. The News and Observer (NC Supreme Court August 2020)

- Jury found Locke (the writer) and the N&O liable for defamation and awarded $1.5 million in damages for 5 defamatory statements and an additional $11,500 against the N&O for a 6th statement
- Jury awarded $7.5 million in punitive damages against N&O and another $75,000 against Locke
  - Reduced to approx. $4.5 in punitive damages
- Defendants appealed judgment as to liability and award of punitive damages. COAs affirmed. Came before NC Supreme Court on discretionary review
- Holding on liability issue:
  - "The evidence is sufficient to support a finding by clear and convincing evidence that that Locke and the N&O published the six statements with serious doubts as to truth of the statements or a high degree of awareness of probable falsity."

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Desmond v. The News and Observer (NC Supreme Court August 2020)

- Defamation claim by ***PRIVATE INDIVIDUAL***:
  - "In order to recover for defamation, a plaintiff generally must show that the defendant caused injury to plaintiff my making false, defamatory statements of or concerning the plaintiff, which were published to a third person." citing *Boyce & Isley, v. Cooper*, 153 N.C. App. 25 (2002).
- Defamation claim by ***PUBLIC OFFICIAL*** relating to his or her official conduct:
  - Requires the plaintiff to "prove[] that the statement was made with 'actual malice' – that is, with knowledge that it was false or with reckless disregard of whether it was false or not." citing *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)
  - Requires clear and convincing standard for evidence of falsity (as opposed to preponderance of the evidence).

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Desmond v. The News and Observer (NC Supreme Court August 2020)

- Defamation claim by *public official* relating to his or her official conduct (cont.)
  - Mere negligence does not suffice – plaintiff must prove that the author "in fact entertained serious doubts as to the truth of his publication, or acted with a high degree of . . . probable falsity"
  - Importantly, "[a]ctual malice under the *New York Times* standard should not be confused with the concept of malice as an evil intent or a motive arising from spite or ill will." (this distinction becomes important later in case)
  - Finding of whether the evidence in the record is sufficient to support a finding of actual malice is a *question of law.*
    - This "rule is premised on the recognition that judges, as expositors of the Constitution, have a duty to independently decide whether the evidence in the record is sufficient to cross the Constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of 'actual malice.'"

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Desmond v. The News and Observer (NC Supreme Court August 2020)

- Defamation claim by public official relating to his or her official conduct (cont.)
  - Where First Amendment issues are raised in a defamation claim, the appellate court has an obligation to engage in an independent examination of the whole record.
  - NC Supreme Court went on to do a thorough examination of the record
    - Concluded that plaintiff had presented sufficient evidence for the jury to find by clear and convincing evidence that defendants published the statements at issue with actual malice and that the jury had been properly instructed on that issue.
- But we're not done yet . . . *punitive damages*
  - Defendants objected to the jury instruction on punitive damages

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Desmond v. The News and Observer (NC Supreme Court August 2020)

§ 1D-15. Standards for recovery of punitive damages.
(a) Punitive damages may be awarded only if the claimant proves that the defendant is liable for compensatory damages and that one of the following aggravating factors was present and was related to the injury for which compensatory damages were awarded:
(1) Fraud.
(2) Malice.
(3) Willful or wanton conduct.
(b) The claimant must prove the existence of an aggravating factor by clear and convincing evidence.

§ 1D-5. Definitions.
(5) "Malice" means a sense of personal ill will toward the claimant that activated or incited the defendant to perform the act or undertake the conduct that resulted in harm to the claimant.
(7) "Willful or wanton conduct" means the conscious and intentional disregard of and indifference to the rights and safety of others, which the defendant knows or should know is reasonably likely to result in injury, damage, or other harm. "Willful or wanton conduct" means more than gross negligence. (1995, c. 514, s. 1.)

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Desmond v. The News and Observer (NC Supreme Court August 2020)

- Punitive damages issue (cont.)
  - Trial Court did not instruct the jury that it was required to find one of the statutory aggravating factors
  - Relying on the Pattern Jury Instructions (N.C.P.I.—806.40), the trial court reasoned that a finding of malice in the liability phase automatically allowed for an award of punitive damages
  - *Actual malice* as used in a public official defamation case is a *term of art*.
  - Finding of *actual malice* in the liability phase permits an award of punitive damages but the jury must still find once of the statutory factors under N.C.G.S. § 1D-15(a).
    - Malice and willful and wanton conduct ≠ actual malice

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Desmond v. The News and Observer (NC Supreme Court August 2020)

- Punitive damages issue (cont.)
  - Court noted that much of the evidence that lead to a finding of actual malice could support a finding of malice under N.C.G.S. § 1D-15(a), but the jury must make that determination before an award of punitive damages can be given.
  - Case remanded for new trial on punitive damages only
- Editors note – the PJI committee is working now to revise the pattern jury instructions for defamation to reflect the NC Supreme Court's ruling
- Unanimous decision of the Court

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DC Custom Freight, LLC v. Tammy A. Ross & Assoc., Inc. (COA September 1, 2020)

- Case involving a claim for UDTPA against an insurance agent based on the agent's representation to a third party of the terms of a policy, absent evidence of plaintiff's reliance.
- Case considers whether certain misrepresentation that are defined as unfair trade practices pursuant to N.C. Gen. Stat. § 58-63-15 in the insurance content require actual and reasonable reliance to prove that the misrepresentations caused damage
  - Case was one of first impression
- Factual background
  - Plaintiff was a freight shipping and trucking co.
  - Defendant was the plaintiff's insurance broker
  - Plaintiff engaged defendant to procure commercial auto insurance coverage

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DC Custom Freight, LLC v. Tammy A. Ross & Assoc., Inc. (COA September 1, 2020)

- Factual background (cont.)
  - Plaintiff provided Defendant with a list of equipment and a former insurance policy to use as a "go-by"
  - The go-by policy indicated that trucks used by Plaintiff:
    - on a long-term lease *were covered* for physical damage; but
    - on a short-term lease were *not* covered for physical damage
  - Through Defendant, Plaintiff purchased a policy that did not cover short term rentals
  - Plaintiff rented trucks from a third-party, Rush Enterprises, Inc. on long- and short-term leases
    - Rush requested, and Defendant provided, a Certificate of Insurance (COI) that implied that Plaintiff's policy covered trucks covered physical damage for long- and short-term rentals

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DC Custom Freight, LLC v. Tammy A. Ross & Assoc., Inc. (COA September 1, 2020)

- Factual background (cont.)
  - Defendant did *not* send a copy of the COI to Plaintiff
  - Two more COIs were sent by Defendant to Rush, making similar representations
    - Neither of those letters was sent to Plaintiff
  - In June 2018, a truck rented on a short-term basis was in an accident. The claim was denied because short-term rentals were not covered by Plaintiff's policy
- Trial court granted summary judgment in favor of Defendant on Plaintiff's claims for negligence, breach of contract, and UDPTA under N.C. Gen. Stat. § 75-1.1
- Unfair and Deceptive Trade Practices
  - Plaintiff argued that the misrepresentations made to Rush gave rise to a claim of UDTPA for Plaintiff

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DC Custom Freight, LLC v. Tammy A. Ross & Assoc., Inc. (COA September 1, 2020)

- Unfair and Deceptive Trade Practices
  - Issue addresses the intersection of:
    - *N.C. Gen. Stat. § 75-1.1* - creates a private right of action for unfair and deceptive trade practices, and
    - *N.C. Gen. Stat. § 58-63-15(a)* - NC Courts have said that certain acts within the insurance industry are *per se* unfair and deceptive trade practices
  - Section 75-1.1 UDTPA claims based on misrepresentation by defendant generally require a showing of reliance on the misrepresentation
  - Issue – Do Section 75-1.1 claims based on misrepresentations in the insurance context which have been found to be unfair trade practices *per se* under *§ 58-63-15(a)* require a showing of reliance?
    - Holding: YES, a plaintiff must show reliance

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DC Custom Freight, LLC v. Tammy A. Ross & Assoc., Inc. (COA September 1, 2020)

- Under N.C. Gen. Stat. § 58-63-15, misrepresenting the term of an insurance policy is an "unfair and deceptive act in the business of insurance."

§ 58-63-15. Unfair methods of competition and unfair or deceptive acts or practices defined.

The following are hereby defined as unfair methods of competition and unfair and deceptive acts or practices in the business of insurance:

(1) Misrepresentations and False Advertising of Policy Contracts. - Making, issuing, circulating, or causing to be made, issued or circulated, any estimate, illustration, circular or statement misrepresenting the terms of any policy issued or to be issued or the benefits or advantages promised thereby or the dividends or shares of the surplus to be received thereon, or making any false or misleading statement as to the dividends or share or surplus previously paid on similar policies, or making any misleading representation or any misrepresentation as to the financial condition of any insurer, or as to the legal reserve system upon which any life insurer operates, or using any name or title of any policy or class of policies misrepresenting the true nature thereof, or making any misrepresentation to any policyholder insured in any company for the purpose of inducing or tending to induce such policyholder to lapse, forfeit, or surrender his insurance.

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DC Custom Freight, LLC v. Tammy A. Ross & Assoc., Inc. (COA September 1, 2020)

- UDPTA claim under § 75-1.1 plaintiff must show 3 things:
  1. Defendant committed an unfair or deceptive act or practice;
  2. In or affecting commerce; and which
  3. Proximately caused injury to the plaintiff
- COAs focused on the third element (finding that misrepresenting the terms of the policy was a deceptive act as a matter of law)
- Defendant argued that Plaintiff could not show causation without showing reliance on the misrepresentation
- Relying on *Bumpers v. Community Bank of Northern Virginia*, 367 N.C. 81 (2013):
  - "a claim under section 75-1.1 stemming from alleged misrepresentation does indeed require a plaintiff to demonstrate reliance on the misrepresentation in order to show the necessary proximate cause."

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DC Custom Freight, LLC v. Tammy A. Ross & Assoc., Inc. (COA September 1, 2020)

- Relying on *Bumpers v. Community Bank of Northern Virginia*, 367 N.C. 81 (2013):
  - "actual reliance requires that the plaintiff have affirmatively incorporated the alleged misrepresentation in [their] decision-making process."
- In this case, Plaintiff did not present evidence of actual reliance
  - Did not receive the COI letters and, therefore, could not have relied on them
  - Plaintiff had provided Defendant with the go-by that itself did not provide for insurance of trucks on a short-term lease
  - Plaintiff could always have reviewed the insurance policy itself and would have seen no coverage ("Reliance is not reasonable where the plaintiff could have discovered the truth of the matter through reasonable diligence, but failed to investigate")
  - Rush's reliance on the COI (i.e. a third-party's reliance) was too attenuated

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DC Custom Freight, LLC v. Tammy A. Ross & Assoc., Inc. (COA September 1, 2020)

- Take away
  - While a misrepresentation in the insurance industry will be a *per se* deceptive trade practice supporting a UDTP claim (i.e. satisfying the first element of UDTP claim), plaintiff must still show reliance for the causation element.
  - Reliance required would be similar to the detrimental reliance requirement under a fraud claim

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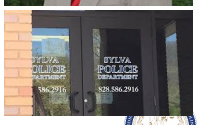
Lambert v. Town of Sylva (COA July 2020)

- Case involving claim of wrongful termination in violation of:
  - Right to free speech and association under US Constitution (42 U.S.C § 1983)
  - Right to free speech and association under NC Constitution (N.C. Gen Stat § 160A-169)
- Plaintiff, Lambert, was a patrol officer with the Sylva Police Department, having worked for the Jackson County Sheriff's Office as a patrol deputy
  - Officer Lambert was supervised by Chief Woodward, who reported to the Town Manager, Paige Dowling
- In February 2014, Officer Lambert filed a Notice of Candidacy for Jackson County Sheriff
- Thereafter, Officer Lambert claims he was ridiculed and suffered adverse consequences in the workplace



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Lambert v. Town of Sylva (COA July 2020)

- On March 2, 2014, Plaintiff reported to a meeting with the Chief Woodward, Assistant Chief Hooper, and the City Manager
  - Chief Woodward offered Officer Lambert the option to resign or to be terminated
  - Plaintiff refused to sign a pre-printed termination letter but agreed to sign a document indicating his separation
- In May, 2016, the case went to trial (*Lambert I*) on similar issues to the one in this matter
  - COAs reversed granting of directed verdict in favor of defendant
- Issue in *Lambert II* was the jury instruction for the 42 U.S.C. § 1983 claim
- Case is a reminder for elements of a 42 U.S.C. § 1983 and law on instructing a jury

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Lambert v. Town of Sylva (COA July 2020)

- Claim under 42 U.S.C. § 1983
  - "To state a claim under 42 U.S.C. § 1983, a plaintiff must show that an individual, acting under color of law, has subjected [him/her] to the deprivation of any rights, privileges, or immunities secured by the Constitution and law."
    - Local government units can be liable under 42 U.S.C. § 1983 for deprivation of federal rights
- The "first inquiry in any case alleging municipal liability under [Section] 1983 is the question of whether there is a direct causal link between a municipal policy and custom and the alleged constitutional deprivation."

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Lambert v. Town of Sylva (COA July 2020)

- A specific jury instruction should be given when:
  (1) the requested instruction was a correct statement of law and
  (2) was supported by the evidence, and that
  (3) the instruction given, considered in its entirety, failed to encompass the substance of the law requested and
  (4) such failure likely misled the jury.

  Outlaw v. Johnson, 190 N.C. App. 233, 243, 660 S.E.2d 550, 559 (2008)
- "[W]hen a request is made for a specific instruction, correct in itself and supported by evidence, the trial court, while not obliged to adopt the precise language of the prayer, is nevertheless required to give the instruction, in substance at least, and unless this is done, either in direct response to the prayer or otherwise in some portion of the charge, the failure will constitute reversible error."

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Lambert v. Town of Sylva (COAs July 2020)

- Plaintiff requested following instruction:

If you find that [plaintiff] was deprived of [describe federal right], [municipality] is liable for that deprivation if [plaintiff] proves by a preponderance of the evidence that the deprivation resulted from [municipality's] official policy or custom – in other words, that [municipality's] official policy or custom caused that deprivation.

  - From the US Third Circuit COAs

- Trial Court gave the following instruction:

Was the plaintiff's filing to run for sheriff of Jackson County a substantial or motivating factor in the defendant's decision to terminate him from employment with the Town of Sylva? On this issue the burden of proof is on [Plaintiff.] This means that the plaintiff must prove by the greater weight of the evidence, two things:

This instruction looks and feels like it could have come from the NCPJI

First, that the plaintiff participated in conduct protected by law. Now, I instruct you that filing to run for public office is conduct protected by law.

And second, that the plaintiff's participation in conduct protected by law was a substantial or motivating factor in the defendant's decision to terminate the plaintiff. Now, an employer may terminate an employee with or without cause and even for an arbitrary or irrational reason. Even so, no employee may be terminated because of his participation in conduct protected by law.

Finally, as to this first issue on which the plaintiff has the burden of proof, if you find by the greater weight of the evidence that the plaintiff's participation in conduct protected by law was a substantial or motivating factor in the defendant's decision to terminate the plaintiff, it would be your duty to answer this issue yes, in favor of the plaintiff.

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Lambert v. Town of Sylva (COAs July 2020)

- Jury answered the issue:

Issue: "Was the plaintiff's filing to run for sheriff of Jackson County a substantial or motivating factor in the defendant's decision to terminate him from employment with the Town of Sylva?"

Answer: No

- Court of Appeals found that because the instruction required the jury to find a "direct causal link" between Defendant's termination of Plaintiff and the alleged constitutional deprivation (i.e. running for office), the instruction was proper (if not perfectly clear)
  - The jury finding that Plaintiff's run for sheriff's was not a substantial or motivating factor in termination rendered any error harmless
- No reversible error

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Civil Case Law Update

QUESTIONS? unmute yourself or type a question in comments

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

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