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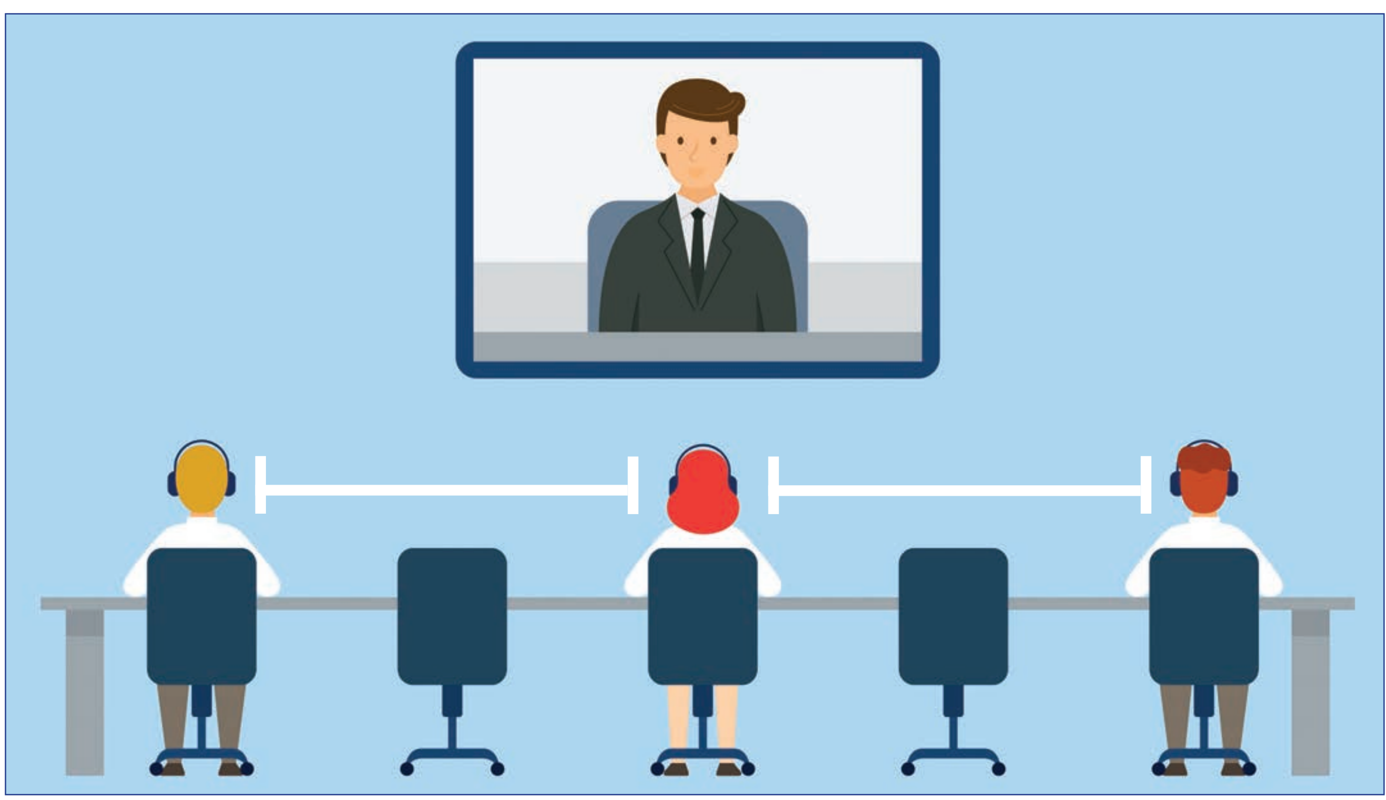

For litigators, COVID-19 has changed everything

BY DAVID DONOVAN
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Depositions and mediations suddenly look a lot different than they did before the time of coronavirus—and those are just the ones that are still taking place at all. Handshaking is out. To the extent possible, participants are dialing in by telephone or videoconference rather than showing up in person. The ones who do show up are checking beforehand to make sure that they aren't showing any symptoms of the virus and practicing good social distancing.

"This is the first one I've had [since most courtroom operations were suspended on March 13], and we agreed to excuse all the clients and let them participate by telephone and we have just the attorneys and the mediator," Allen Smith of Hedrick Gardner in Charlotte said during a break in a mediation he was attending on March 17. "But my firm and I are taking the approach that if an opposing party says they're uncomfortable [proceeding as scheduled], then we're not going to press them, because we're probably going to be in the same boat with our clients at some point."

Smith said that some engagements had already been postponed, but he was still planning to press on with some depositions scheduled a few days later. Even as courtroom proceedings have ground to a halt, for litigators work is for now carrying on—slowly, fitfully, and very differently than before. (Some arbitration agencies have managed to spy a business opportunity in this and have been reaching out to attorneys to see if they might like to try resolving their disputes in arbitration instead.)

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Wage-and-hour damages based on gross pay, not net pay

BY CORREY E. STEPHENSON
BridgeTower Media Newswires

Liquidated damages under North Carolina's Wage and Hour Act should be awarded based upon the employee's gross, rather than net, pay, the North Carolina Court of Appeals has ruled in a case of first impression, upholding a Mecklenburg County jury's verdict in favor of a doctor who was fired from his job because of a dispute over his inability to accept payment from Medicare.

When Dr. James Harper began practicing as a plastic surgeon in Charlotte, the medical practice that employed him did not accept Medicare or Medicaid. As an employee of the practice, Harper completed a "Medicare Opt-Out Affidavit" that prevented him from submitting a claim to Medicare for a two-year period beginning in 2014.

In 2015, Harper left the practice and applied for a position with Vohra Wound Physicians of NY, which provides services mainly to elderly patients in nursing homes, while he litigated the enforceability of his non-compete agreement with the Charlotte practice. On his application, Harper answered a question about any past or pending restrictions in relation to Medicare/ or Medicaid by writing, "None, but I did not accept Medicare/Medicaid at my last job."

Vohra offered Harper a job, and the parties entered into an employment agreement that required that Harper "be qualified to participate and shall

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With changes, N.C. law firms remain open for justice

BY BILL CRESENZO
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As attorneys grapple with COVID-19, they're coming up with creative solutions to keep their firms' lights on, even as many of them are working from home while they deal with an unprecedented situation one day at a time.

Navigating a work and home life that are now one and the same (with the addition of school life for those with children), reassuring clients that their cases are being handled despite the fact that most courts are closed, and keeping morale up among attorneys and staff are now core practices.

"I trust we are not alone: the health, safety and comfort of our employees is paramount," said Dan Cahill, managing partner of Poyner Spruill in Raleigh. "Now is the time to build out cases and do the work that can be done remotely and without a group setting."

Poyner Spruill made the decision on March 16 to require most of its employees to work from home. It now has a skeleton support staff in each office and relaxed its paid time off policy. Beyond that, Cahill said, the firm's attorneys have long had the tools to work from home. The firm has stopped in-person meetings and is conducting business via phone, Zoom meetings, Skype, and other means to reach clients.

Fox Rothschild, which has offices in Greensboro, Charlotte and Raleigh, has long had work-from-home capabilities, said Matt Leerberg, managing partner of its Raleigh office. One reason is that the firm has offices in New York. It was devastated by Hurricane Sandy in 2012, but the disaster provided the firm with best work-at-home practices in emergency situations.

All of the firm's attorneys have been working from home since March 16, with a small staff keeping the offices open and taking care of administrative tasks, such making sure that mail is getting out in a timely manner. The firm has also added IT staff to assist attorneys working from home.

Other firms made the decision to send their employees home early on, such as Bradley Arant Boult Cummings in Charlotte. Chris Lam, an attorney

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NEWS BRIEFS

N.C. Business Court extends deadlines

The North Carolina Business Court has extended deadlines in all of its pending cases in accordance with Chief Justice Cheri Beasley's order extending filing deadlines for county court documents through April 17 due to COVID-19.

The March 23 order, signed by Chief Business Court Judge Louis Bledsoe, provides that all pleadings, motions, briefs, notices, and other documents that were due to be filed in any pending action between March 16 and April 17 shall be timely filed if filed on or before April 17. All other acts, including discovery, mediation, motions, and other case activity that were due to be done in any pending action between March 16 and April 17 will likewise be timely done if done on or before April 17.

Absent consent of the parties, case management deadlines will also be automatically extended to the close of business on April 17, subject to modification to a later date by the assigned Business Court judge. Parties may, with the judge's consent, agree to an earlier deadline for any filing or act that Beasley's order permits to be filed or taken on or before April 17. Any filings before that date must be made electronically through the Court's electronic-filing system.

There will also be no in-person hearings before April 17 in any pending action. The assigned judge may, with the consent of the parties, continue to convene hearings and conferences via videoconference or telephone, and judges are instructed to take all appropriate action to avoid imposing prejudice on any party as a result of COVID-19.

The order may be altered or modified in response to any additional orders or directives that the Chief Justice may issue or as circumstances may otherwise warrant.

Staff reports

North Carolina wins case over Blackbeard's ship

WASHINGTON (AP) — The Supreme Court has sided unanimously with the state of North Carolina in its copyright battle with a company that has documented the salvage of the pirate Blackbeard's ship off the state's coast.

Justice Elena Kagan wrote for the court in its March 23 ruling that the company's copyright infringement lawsuit, which she called "a modern form of piracy," could not go forward because the Constitution generally protects states from lawsuits in federal courts.

The 21st century dispute arose over the Queen Anne's Revenge, which ran aground more than 300 years ago.

The ship is the property of the state, but under an agreement North Carolina-based Nautilus Productions has for nearly two decades documented the ship's salvage. In the process, the company copyrighted photos and videos.

North Carolina first posted photos on a state website, and later put videos on a YouTube channel and included a photo in a newsletter. Nautilus sued in federal court, but the 4th U.S. Circuit Court of Appeals ruled that the state could not be sued.

The Supreme Court ruled in 1999 that states could not be sued in federal court over patent infringements. Patent and copyright protections come from the same constitutional provision that outlines Congress' powers. Kagan noted that the earlier case, known as *Florida Prepaid*, "all but prewrote our decision today."

Among artifacts that have been brought to the surface are cannons and the anchor, but roughly 40 percent of the Queen Anne's Revenge remains on the ocean floor. The ship was sailing under the French flag when Blackbeard, the Englishman Edward Teach, captured the vessel in the fall of 1717 and made it his flagship.

The following year, Blackbeard was sailing north from Charleston, South Carolina, when the ship went aground in what's now called Beaufort Inlet. Blackbeard abandoned the ship. Five months later, members of the Royal Navy of Virginia killed Blackbeard at Ocracoke Inlet.

U.S. Supreme Court postpones all arguments

WASHINGTON (AP) — The Supreme Court announced March 23 that it was postponing arguments for the first time in more than 100 years because of the coronavirus, including fights over subpoenas for President Donald Trump's financial records.

Arguments scheduled at the high court for late March and early April were indefinitely postponed, as federal and state courts around the country closed or curtailed their operations as they tried to come to grips with the virus outbreak.

Other business at the Supreme Court will go on as planned, including the justices' private conference on Friday and the release of orders in a week's time. Some justices may participate by telephone, the court said in a statement.

Six of the nine justices are 65 and older, at higher risk of getting very sick from the illness, according to the Centers for Disease Control and Prevention. Justices Ruth Bader Ginsburg, 87, and Stephen Breyer, 81, are the oldest members of the court.

There is no new date set for the

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LAWYERS IN THE NEWS

Smith Anderson announced the addition of 12 new attorneys in 2019, 11 of whom are associates in the early stages of their careers. **Jenny Bobbitt** focuses her practice on employment law; **Ashton Carpenter**, **David Ortiz**, and **Ed Roche** counsel clients on commercial litigation matters and complex contract disputes; **Victor Demarco**, **Alice Dias**, and **Miles Wobbleton** focus their practice on corporate law, particularly in the banking and finance practices; **Nic Eason**, **Davis Fussell**, and **Robert Hash** assist with a variety of corporate transactions; **Grace Gregson** practices in the areas of construction and commercial litigation; and **Will Pugh** focuses on advising start-ups and emerging companies.

R. Scott Tobin has joined Taylor English Duma as a partner in its corporate practice serving clients from both Raleigh and Atlanta. Tobin's practice includes finance, strategic partnerships, licensing, mergers and acquisitions, emerging companies and venture capital, and litigation. He comes to the firm from Fox Rothschild.

Stephen Bell has joined Cranfill Sumner & Hartzog in the firm's Wilmington office as an associate attorney. Bell is a litigator with previous experience at firms in Raleigh and Charleston, South Carolina and will focus his practice in the area civil litigation.

WAGE / 'Plain reading' of law enough to resolve novel issue

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participate in Medicare, Medicaid … and not be under current exclusion, debarment or sanction by any state or federal health care program, including Medicare and Medicaid." When Vohra learned that Harper's Medicaid enrollment application was denied because of his opt-out, it terminated his employment and requested reimbursement for $88,133.43.

Harper sued Vohra, alleging violations of the NCWHA, and Vohra counterclaimed for breach of contract and fraud. After a trial, a jury returned a verdict finding that Harper was owed $29,035.50 in wages and had not breached the contract. Vohra's post-judgment motions were denied, and it appealed.

Judge Hunter Murphy, writing for the Court of Appeals in a unanimous March 17 decision, affirmed the denial of Vohra's motion for judgment notwithstanding the verdict, ruling that the employment agreement was open to multiple interpretations and therefore needed to be considered by the jurors.

"The existence of more than one reasonable interpretation of the language in [the contract] is precisely what renders that provision ambiguous," Murphy wrote. "Given this ambiguity, the interpretation of [the contract] was properly placed before the jury. Moreover, because it is a reasonable inference that [the contract] did not cover or address a voluntary opt-out affidavit, we cannot conclude the trial court erred in declining to disturb the jury's verdict finding that Dr. Harper did not breach the contract."

Ambiguous contract provision

Murphy considered three arguments on appeal, beginning with the denial of Vohra's motion for JNOV on its breach of contract counterclaim. Vohra argued that the contract mandated that Harper be "qualified to participate" in Medicare as a stand-alone, unambiguous requirement.

Harper countered that the provision was ambiguous and the terms "current exclusion, debarment or sanction" suggested disciplinary action by a health care program that limited the preceding language in the contract and did not unambiguously cover a voluntary opt-out affidavit.

The Court of Appeals found both interpretations of the employment agreement reasonable, concluding that the issue was properly put before a jury and the verdict should stand.

Murphy then addressed whether the trial court abused its discretion by letting Harper file an untimely reply to Vohra's amended counterclaims. Although the court agreed with Vohra that the trial judge failed to properly consider whether Harper had made a showing of excusable neglect and exercise its discretion under that standard—instead simply accepting the late filing—it also found that it was a procedural error that didn't prejudice Vohra.

"The counterclaims for fraud and breach of contract do no more than present denials of the complaint's allegations in affirmative form," Murphy wrote. "As such, Dr. Harper needed not repeat in negative form the allegations of his complaint. Accordingly, the trial court did not err in its determination that Dr. Harper's failure to file a reply to the amended counterclaims did not amount to admissions under Rule 8(d)."

'Plain reading' of NCWHA

Finally, Vohra contended that the liquidated damages award under the NCWHA should have equaled Harper's net pay rather than his gross pay, reducing the $29,035.50 award to $18,483.76.

The state's appellate courts had never considered the question before, but the court said the fact that Vohra could withhold or divert a portion of Harper's wages in accordance with state and federal law for tax purposes "does not change the fact that they are 'unpaid amounts' which the employer should have paid out, either directly to the employee or for the employee's benefit, but for the violation of the NCWHA."

"A plain reading of the NCWHA is sufficient to resolve the issue of damages in this case," Murphy wrote. "The NCWHA does not explicitly define 'unpaid amounts' but its definition of 'wages' read in concert with the relevant provisions … demonstrates that the trial court did not err in awarding Dr. Harper liquidated damages based upon his gross pay. The trial court's order is affirmed as it relates to the issue of damages."

Drew Brown of Brown, Faucher, Peraldo & Benson in Greensboro represented Harper.

Drew Brown

"The defendant didn't like the contract it drafted," Brown said. "If you don't like how the contract is drafted, you need to change it on the front end, because once it's signed you can't undo it."

Matt Leerberg of Fox Rothschild in Raleigh, who represented Vohra, said his client plans to petition the state Supreme Court for review and expressed concern about the impact of the court's decision in the health care context.

"Physicians know that the ability to accept government reimbursement goes to the core of this kind of service model," Leerberg said. "The take-home from this opinion is that health care providers need to assume that employees are not representing the full truth and double check their representations. I hate that that is the outcome, but it appears to be the practical import of the panel's opinion."

The 19-page decision is *Harper v. Vohra Wound Physicians of NY, PLLC* (Lawyers Weekly No. 011-069-20). The full text of the opinion is available online at nclawyersweekly.com.

Fake Facebook postings result in $200K verdict

■ BY BILL CRESENZO
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A Mecklenburg County jury has awarded $200,000 to a man whose neighbor waged a campaign of harassment against him that included enlisting friends to leave poor reviews on his business-es' Facebook page and posting a personal ad offering massages that included his phone number.

Mathew Flatow of SeiferFlatow in Charlotte said that his client, Gerald Thibeau, and Thibeau's neighbor, Douglas Bryant, were social acquaintances until Bryant's behavior toward women on social media prompted Thibeau to take back an invitation he extended to Bryant to travel together to Las Vegas.

Mathew Flatow

In his complaint, Thibeau said the falling out angered Bryant, who began a vicious campaign against Thibeau that included putting skunk spray in Thibeau's car, jamming Thibeau's front door knob with blank keys, and tampering with Thibeau's mailbox.

Bryant also posted an ad on Craigslist offering "man-to-man massages" with Thibeau's phone number and posted untrue comments about Thibeau on Facebook, calling him a rapist. Bryant and his friends, sometimes under pseudonyms, posted negative reviews and ratings on the Facebook page of Thibeau's business, Phone Ninjas, causing his rating to drop from 4.8 out of 5 stars, to 3.3. Because Phone Ninja relies on online advertising and industry reputation to attract customers, the damage drove away prospective customers, Thibeau alleged.

Flatow said he hired an expert who was able to trace many of the comments back to Bryant's computer, but Bryant denied the allegations, at one point saying that the concierge of his building had access to his apartment and would at times use his computer.

The trial lasted six days and the jury deliberated for 90 minutes before returning its verdict on March 16.

At one point during the feud, Thibeau had confronted Bryant. He thought Bryant was about to hit him, so he threw punches at his friend-turned-enemy. Bryant countersued Thibeau for battery, and the jury awarded him $500.

Flatow said that Thibeau is now "doing great," and that he and Bryant are no longer neighbors.

VERDICT REPORT – DEFAMATION

Amount: $200,000
Injuries alleged: Loss of earnings and emotional distress
Case name: *Gerald Thibeau and Phone Ninjas v. Douglas Bryant*
Court: Mecklenburg County Superior Court
Case No.: 18-CVS-7647
Judge: Jesse Caldwell III
Date of verdict: March 16
Attorneys for plaintiff: Mathew Flatow and Arcangela Mazariello of SeiferFlatow in Charlotte
Attorney for defendant: Eric Levine of Charlotte

"He feels like justice has been served," Flatow said. "Most small businesses owners don't go this far to defend their reputations."

Arcangela Mazariello, also of SeiferFlatow in Charlotte, also represented Thibeau.

Eric Levine of Charlotte represented Bryant. He could not be reached for comment on the verdict.

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Company's motion to set aside bond forfeiture was UPL

■ BY DAVID DONOVAN
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A motion to set aside the forfeiture of a bail bond constitutes the practice of law, and so a surety's corporate officer wasn't authorized to sign and file a motion to set aside a forfeiture on the surety's behalf, the North Carolina Court of Appeals has ruled in a case of first impression.

1st Atlantic Surety Company, through its bail agent, posted a bond securing a defendant's release from jail pending disposition of his criminal charges in Granville County Superior Court. The defendant failed to appear in court, and the court issued a bond forfeiture notice. 1st Atlantic moved to set aside the bond forfeiture in a motion signed on its behalf by one of its corporate officers.

The Granville County Board of Education objected to the motion (in North Carolina, funds from bail forfeitures are given to local school districts, making them the parties with the standing to challenge motions to set aside forfeitures), arguing that because the corporate officer was neither a bail agent nor a licensed attorney, he wasn't authorized to sign the motion on 1st Atlantic's behalf. The trial court agreed and denied the motion and sanctioned 1st Atlantic in the amount of $1,000.

1st Atlantic appealed, and in a unanimous March 17 opinion written by Judge Allegra Collins, the Court of Appeals reversed the imposition of the sanction but agreed with the trial court that the company had engaged in the unauthorized practice of law by allowing its corporate officer to sign and file the motion.

Collins noted that state law expressly authorizes a surety to make a motion to set aside a bond forfeiture, but doesn't expressly indicate whether such motion may or must be made by an attorney. The general rule, however, is that a corporation must be represented by a licensed attorney and can't proceed pro se, so the question for the court was whether signing and filing a motion to set aside a bond forfeiture constitutes the practice of law—and the panel concluded that it clearly did.

By law, a motion to set aside a bond forfeiture is "a written motion that a forfeiture be set aside … to be filed in the office of the clerk of superior court." As a result, such a motion is a "legal document" and a "petition for use in" court as contemplated by the state law banning the practice of law by corporations, and so the corporate officer wasn't authorized to sign and file the motion on the company's behalf, Collins wrote.

1st Atlantic argued that the case was controlled by a 2011 Court of Appeals ruling, *State ex rel. Guilford Cty. Bd. of Educ. v. Herbin*, which held that motions to set aside bond forfeitures did not constitute the practice of law. But Collins distinguished the two cases, writing that the earlier ruling concerned whether an individual bail agent was prohibited from filing such a motion, and thus it didn't apply because 1st Atlantic was a corporation that violated the law barring the unauthorized practice of law by corporations.

Steve Rawson and Colin Shive of Tharrington Smith in Raleigh represented the school board, while Brad Hill of Hill Law in Cary and Mary Webb and Amie Sivon of Ragsdale Liggett in Raleigh represented 1st Atlantic.

Attorneys for both sides said that the issue had been litigated at the trial court level for years in many counties, but this was the first case to be brought up on appeal, and the ruling provided some much-needed clarity.

"*Herbin* was being read very broadly by the sureties and their counsel, which is what led to this particular case," Rawson said. "*Herbin*, in my view, just says that a bail agent can file because they're almost acting in a *pro se* capacity. The court was allowing them to pursue their own position there, and to me that is very different from a corporation, an insurance company that often serves as the surety in these cases, stepping in with one of its officers who hasn't had any previous involvement in the bond or in the case."

Hill said that sureties wanted clarity on the issue in part because there are strict deadlines for filing a motion to set aside a forfeiture, and since sureties are typically the second line of defense, after the bail bondsman, in a case where a defendant has skipped bail, they often end up needing to file motions on such short notice that it may be challenging to secure an attorney in time. Hill also said he thought that the court's ruling on what constitutes the unauthorized practice of law by a corporation may have implications in other contexts.

"I think the decision creates a little bit of a conundrum in terms of the definition of what constitutes the practice of law and what constitutes an appearance under the general statutes," Hill said. "I think there's some clarity for my client, and that's helpful, but ultimately I think there's some conflicting case law on the books now with this and the prior decision."

The eight-page decision is *State v. Cash* (Lawyers Weekly No. 011-074-20). The full text of the opinion is available online at nclawyersweekly.com.

Follow David Donovan on Twitter @NCLWDonovan

WORK FROM HOME / Our kids will be joining us on this call

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at the firm, said that technologically speaking, his office was well-prepared for its employees to work from home, and any challenges associated with the new arrangement have little to do with technology.

"Many of us are just adjusting to working at home with children who are also out of school," Lam said. "The upshot is that if anyone previously failed to appreciate the yeoman's work that our teachers do, they won't make that mistake again. Since we are all in this together, it is important that everyone be patient, understanding, and supportive of our families, colleagues, and clients."

Leerberg agreed, saying that law firms can't underestimate the challenges that parents of small children or children in middle school now face.

"What the state is asking these folks to do is do their full-time jobs and essentially homeschool their children at the same time," Leerberg said. "That is asking a lot. I have seen a lot of attorneys who are struggling to balance those two competing obligations."

As for clients, Cahill's employment practice group has been advising them on ways to handle their specific industries in dealing with COVID-19, while Dan Boyce of Nexsen Pruet in Raleigh said his firm's business clients are focused on what changes need to be made on business operations and their employees.

Clients want legal advice on communicating coronavirus policies internally and externally and how they can assist their own clients, Boyce said. They understand the judicial process takes time and are used to seeing delays in the administration of justice and are more concerned about business delays that could result in bankruptcy, or even worse, shuttering their business altogether.

At Lam's firm, client matters relate primarily to business disputes rather than life or liberty, so there is less anxiety that exists than for people with pending domestic or criminal matters, Lam said.

Beyond that, Lam said having civil motions, hearings, or trials continued or postponed within a particular case or cases is not unusual. The difference now, though, is that his firm's attorneys litigate across the country and every state and federal court is postponing proceedings.

Leerberg said that beyond keeping up with caseloads, it's important for firms to make sure that their attorneys and staff don't feel isolated from each other. Employees of the Raleigh office have compiled a list of their "Five Most Meaningful Songs" with an explanation of why and a partner in the firm is completing it and circuiting it. They are collecting pictures of "Crafty Foxes" that the attorney's children are drawing and sharing with each other. His firm is hosting tele-lunches with no agenda other than connecting with each other.

"We share our stories, so people can scratch that social itch," Leerberg said.

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COVID-19 overwhelms North Carolina's ill-equipped employment law protections

■ **BY JOSH VAN KAMPEN AND LANA TIGRI**

North Carolina has always offered weak stew when it came to statutory employment law protections. Lacking a state non-discrimination statute and enforcement agency, North Carolina residents have been forced to rely primarily on federal statutes that often leave gaping holes in coverage. Legislatures in more progressive states eagerly have filled these gaps—for instance, by prohibiting discrimination by employers with fewer than 15 employees.

Thankfully, starting with the seminal case, *Sides v. Duke University*, 328 S.E.2d 818 (1985), North Carolina courts bolstered workplace protections with a common law tort, prohibiting terminations that violate North Carolina "public policy." Unfortunately, it took a deadly chicken plant fire in 1991 to prompt the General Assembly to pass the N.C. Retaliation in Employment Discrimination Act (REDA), which prohibits retaliation against employees who make complaints related to workplace safety or wage and hour issue or pursue workers' compensation claims. Further, North Carolina has a "baby ADA," the N.C. Persons with Disabilities Protection Act (NCPDPA), a statute that handicapped itself by severely limiting its remedies, essentially rendering it useless.

COVID-19 has overwhelmed the federal and spotty North Carolina employment law protection scheme, just as it has overwhelmed our balkanized healthcare system. To our pleasant surprise, the federal government acted decisively—albeit with loopholes through which one could fly all the grounded aircraft—to expand protections under the Family Medical Leave Act, but the focus of this column is to highlight what Gov. Roy Cooper can achieve with the stroke of a pen to supercharge the North Carolina wrongful discharge tort and bring needed relief to our suffering workforce.

The feds set a fast but deeply flawed example with the Families First Coronavirus Response Act (FFCRA).

The Family and Medical Leave Act (FMLA) was enacted in 1993 and has applied only to employers with 50 or more employees within a 75-mile radius. Additionally, employees were eligible for FMLA only if they worked more than a calendar year and at least 1,250 hours for their current employer. Eligible employees could take up to 12 weeks of unpaid leave, with company-paid medical benefits, to take care of their own "serious health conditions," or that of their spouse, child, or parent. While the unamended FMLA likely covered COVID-19 infected individuals as having a "serious health condition," it failed to address workers who were not infected but needed to self-quarantine, or those who needed to be absent from work due to lack of childcare options, for example.

Recently passed by Congress, the FFCRA takes effect on April 2. It contains two acts that work in concert together: the Emergency Paid Sick Leave Act (EPSLA) and the Emergency Family Medical Leave Expansion Act (FMLEA). Both acts apply to employers with fewer than 500 employees.

EPSLA is straightforward: qualifying employers must provide two weeks of paid sick leave regardless of how long the employee worked for the employer if the employee: (i) is subject to a federal, state, or local quarantine or isolation order related to COVID-19; (ii) has been advised by a health care provider to self-quarantine due to concerns related to COVID-19; (iii) is experiencing symptoms of COVID-19 and seeking a medical diagnosis; (iv) is caring for an individual who is either (1) subject to a Federal, State, or local quarantine or isolation order related to COVID-19 or (2) has been advised by a health care provider to self-quarantine due to concerns related to COVID-19; (v) is caring for a son or daughter of such employee if the school or place of care of the son or daughter has been closed, or the child care provider of such son or daughter is unavailable, due to COVID-19 precautions; or (vi) is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.

Finally, the paid sick leave must be: (1) at the employee's regular rate, not to exceed $511 per day and $5,110 in total for qualifying conditions under (i), (ii), and (iii), or (2) at two-thirds the employee's regular rate, subject to a maximum of $200 per day, and $2,000 in total for qualifying condition (iv), (v), and (vi).

The FMLEA expands the FMLA but only in a very narrow way—employees who have worked at least 30 days are now entitled to take up to 12 weeks of job-protected leave if needed to care for their child under the age of 18, if the school or place of care for the child has been closed, or the child care provider of the child is unavailable, due to a public health emergency. The FMLEA picks up after the EPSLA's initial two weeks of paid leave by requiring up to an additional 10 weeks paid leave at a minimum of two-thirds an employee's regular rate of pay, capped at $200 per day or $10,000 in the aggregate. Employers are prohibited from mandating that an employee use other sick time provided by the employer prior to using the paid sick time provided for by the act.

However, there are more problems here than solutions. First, employers with more than 500 employees get a free pass. For example, those brave and low-paid cashiers at Harris Teeter and Publix don't receive any of these protections. Additionally, the U.S. Department of Labor may exempt businesses with fewer than 50 employees from both acts if the requirement would jeopardize the business. The statute will also sunset on December 31, 2020 without further congressional action.

There are huge gaps even for those covered by the statute. Unfortunately, defeating a COVID-19 infection will not resolve in a neat 14-day window contemplated by EPSLA. It's difficult to even get a test in 14 days, let alone defeat the virus and be cleared to return to work; we're talking a month at least. Folks who are home anyway to care for school-age children are still covered, but what about everybody else? Childless workers or empty-nesters will be back to square one with the original FMLA, where many will fall through the coverage cracks because they have not been employed for a full year or their employer is too small. The leave would be unpaid in any event, and thus a pyrrhic victory.

The EPSLA may also have an unintended flaw in its enforcement provision. On its face, it prohibits discrimination or retaliation against employees who took leave "and" who engaged in protected activity by making a complaint alleging a violation of that law. This could be a drafting error, but employers are likely to argue there is no recourse for terminating an employee who took the leave, but never lodged a complaint. The poorly worded enforcement section also cross references the remedy for denial of paid leave to the federal minimum wage instead of specifying the pay rate articulated in the statute. Most surprisingly, the provision appears to apply a "willfulness" standard for the employer's intent in a retaliation action, which is usually reserved only for awarding punitive damages. In short, employers may be poised to pounce, arguing this tiger is toothless.

The North Carolina wrongful discharge tort is built to adapt immediately to new pronouncements of "public policy," and an executive order should do the trick.

The wrongful discharge tort was born out of desperation to address a paucity of legislative action in the 1980s. It is perfectly positioned to onboard a new public policy during this pandemic. Gov. Cooper can generate an executive order proclaiming that it is a violation of North Carolina public policy for any employer (regardless of size) to retaliate against an employee for:

- Following a COVID-19 governmental directive such as a "stay-at-home" order that was issued in Mecklenburg County;
- Quarantining under medical advice;
- Staying at home to care for themselves or an immediate family member with COVID-19; or
- Making safety-related complaints associated with the COVID-19 pandemic, such as requesting personal protective equipment or adequate sanitation.

It would be preferable for the General Assembly to also act. In fact, the General Assembly could give a booster shot to our beleaguered workforce by adding just a few sentences to statutes already on the books by, for example, amending:

- the NCPDPA to specify that COVID-19 is a disability and eliminating the two-year lost wages cap;
- the N.C. Occupational Safety and Health Act to explicitly mandate that our brave cashiers, delivery drivers, and agricultural workers be provided personal protective equipment;
- REDA to make taking COVID-19-related leave protected from retaliation just like filing a workers' compensation claim; and
- the N.C. Workers Compensation Act to extend those benefits to employees working in pandemic critical industries, such as food production and grocery retailers, who contract COVID-19 while performing their duties.

But for now, let's start with what we know Gov. Cooper has the power to do. An executive order can help fill these gaps.

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Commercial lease issues in the age of COVID-19

Lessons from Charlotte School of Law's closing

BY ERIC SPENGLER

The COVID-19 pandemic has wrecked small businesses across North Carolina and, indeed, the world. Since declaring a state of emergency on March 10, Gov. Roy Cooper has issued a series of escalating executive orders aimed at "flattening the curve" and containing the spread of the deadly coronavirus. These government interventions, necessary as they may be, have increased the unforeseen toll on commerce in the state.

As of March 25, the state had prohibited most gatherings of more than 50 people; limited the sale of food and beverages to carry-out, drive-through, or delivery only; and ordered the temporary closure of certain non-essential businesses. And six counties had already enacted even more stringent measures, issuing a stay-at-home order and shuttering all but certain essential businesses.

The rapid spread of coronavirus—and the drastic governmental restrictions adopted in response—would have been unimaginable just a short time ago. Simply put, these are unprecedented times.

Against this backdrop, small businesses across the state now face difficult decisions, including whether they can afford to pay rent. Companies that must close their doors due to COVID-19 will be searching for defenses to claims brought by landlords for accelerated rent under commercial leases. Once reopened, courts in North Carolina almost certainly will face an unusually high volume of business litigation, in which commercial tenants will argue once-obscure contractual defenses, such as frustration of purpose and *force majeure*.

Not surprisingly, there appears to be no case in North Carolina that addresses the impact of a global pandemic on the enforceability of a commercial lease.

Guidance can be found, however, in a 2018 Business Court decision authored by Judge Michael L. Robinson, *South College Street, LLC v. Charlotte School of Law, LLC*, 2018 NCBC 80. The controversy related to the headline-grabbing closure of the Charlotte School of Law and the resulting breach of its lease. Robinson's opinion offers commercial litigators several practice pointers for breach of lease claim related to COVID-19.

In *South College Street*, CSL's landlord filed suit after CSL stopped paying rent on 250,000 square feet of office space in uptown Charlotte. CSL's default under the 13-year lease came only after "several interrelated regulatory and governmental actions, including and culminating in the expiration of CSL's state license" to conduct post-secondary degree activities in North Carolina. The sole question before the court was whether the doctrine of frustration of purpose excused CSL's performance obligations under the lease.

Under North Carolina law, a defense based on frustration of purpose requires a contracting party to prove three elements:

(1) there must be "an implied condition to the contract that a changed condition would excuse performance";

(2) this changed condition must cause a "failure of consideration or the expected value of performance"; <u>and</u>

(3) the changed condition must not have been "reasonably foreseeable" to the contracting parties.

CSL argued that the revocation of its license to operate as a law school satisfied all three elements. According to CSL, the lease restricted the use of the premises to "an educational institution and uses ancillary to its business as an educational institution, thereby implying a condition in the Lease that CSL be able to use the Premises to operate an educational institution."

Robinson rejected CSL's claimed defense and granted the landlord's motion for summary judgment, holding there was no issue of material fact that CSL failed to satisfy the first two elements of the applicable legal standard. Specifically, Robinson wrote that CSL had "failed to come forward with sufficient evidence that CSL's inability to operate a law school caused a failure of consideration or a total destruction of the expected value of performance."

The ruling explained the lease agreement was not as restrictive as CSL suggested. While prohibiting certain activities, the definition of "Permitted Use" was broad enough to include "general office space" and "other legally permitted uses," subject to landlord's approval (not to be unreasonably withheld). The ruling also emphasized that the lease agreement permitted CSL to assign or sublease the premises, subject to the same provisions on landlord approval. Robinson noted that the landlord, in fact, had granted CSL's requests to sublease portions of the premises on two prior occasions, earlier in the lease term. In effect, the court found that CSL could have received some value from its lease by using its space for a non-law school purpose, or by subleasing to another tenant.

Robinson also zeroed in on the *force majeure* provision of the lease agreement, which specified that CSL would not be excused from the timely payment of rent, even in the event CSL failed to "obtain governmental permits." The court declined to find an *implied* condition in the lease for the loss of CSL's license because the contract *expressly* allocated this risk to the tenant. Quoting from an appellate decision, Robinson wrote, "if the parties have contracted in reference to the allocation of the risk involved in the frustrating event, they may not invoke the doctrine of frustration to escape their obligation."

The court granted summary judgment in favor of CSL's landlord without deciding whether the revocation of CSL's license was reasonably foreseeable.

Tenants in today's world can argue credibly that the COVID-19 pandemic was not reasonably foreseeable. Tenants seeking to be excused from performance of commercial lease obligations due to COVID-19 and related government restrictions still must show, however, that this changed condition was an implied condition of their lease agreement, and that any value of the lease agreement has been practically destroyed by the changed condition.

Following the guide of *South College Street*, attorneys advising tenants in these circumstances should look first for a *force majeure* provision in the relevant commercial lease agreement.

For the tenant to prevail on a frustration defense, the *force majeure* clause, if any, cannot explicitly allocate the risk to the tenant in the event of a pandemic, government shutdown order, or any other applicable intervening event. (It's easy to foresee much debate about whether COVID-19 constitutes an "act of God.")

Even if a lease contains a *force majeure* clause that favors the tenant by excusing the timely payment of rent during this time of COVID-19, a landlord still could argue against a tenant's right to terminate the lease. While *force majeure* clauses typically delay performance during the intervening event, a defense based on frustration generally terminates a party's obligations under the contract. A landlord in this case plausibly could maintain COVID-19 was a changed condition, the occurrence of which the lease explicitly addressed by providing for the temporary suspension of rent payments pursuant to a *force majeure* clause.

In the absence of any *force majeure* clause, the tenant has a strong *prima facie* showing of an implied condition (the first of three elements). Attorneys advising tenants in these circumstances should look next to the provisions of the lease agreement relating to assignment and permitted use.

A tenant who once was able to negotiate a flexible "permitted use" provision in their lease may now face the other side of a double-edged sword. By way of illustration, government restrictions related to COVID-19 have shut down the operations of sit-down restaurants. Depending on the lease terms, a restaurant-tenant may be permitted to repurpose its fine dining establishment into a restaurant serving takeout orders, a use not prohibited by COVID-19 restrictions in North Carolina (at least, not as of the time of this writing). That means this restaurant could operate, at least in theory, in another form. Following the lead of *South College Street*, courts may deny the tenant's frustration defense in this case for lack of a "total destruction of the expected value of performance."

To avoid such a harsh result, a tenant likely needs to be able to show either oppressive lease terms that disallow other permitted uses and restrict subletting, or the lack of any market for a replacement tenant.

It's plausible, at least, that a court would be willing to distinguish the facts of *South College Street* on the basis that CSL, in practice, had admitted the ease with which it could sublet its uptown offices. Courts shouldn't necessarily assume that a tenant in the grim real estate market after COVID-19 can salvage any value by subletting its space, even if allowed by the lease agreement. A tenant in these dire circumstances should document its efforts to find a replacement tenant, both to build a record for potential litigation and as a measure of good faith.

One question *South College Street* didn't address is the significance of the intervening event's duration. The court assumed, correctly, that CSL had lost indefinitely its state license to operate as a law school. The COVID-19 pandemic, however, presumably will come to a merciful end, albeit at some unknown time. The temporary nature of the government's COVID-19 restrictions could create an additional hurdle for tenants seeking to terminate a commercial lease, especially if, for example, the remaining lease term extends several years and could be valuable in the future.

In a post-COVID-19 world, the new normal demands special attention be paid to the list of *force majeure* events in commercial leases. A keen-eyed attorney will make sure that commercial lease agreements expressly include epidemics and public health emergencies as intervening events. None of us will soon forget the coronavirus.

Eric Spengler is the litigation partner at Spengler & Agans, PLLC, a business and employment law firm in Charlotte. He negotiates and litigates commercial lease issues on behalf of tenants.

Continued from 2 ▸

postponed arguments. The building has been closed to the public since last week.

The only other time the 85-year-old court building was closed for arguments was in October 2001, when anthrax was detected in the court mailroom. That led the justices to hold arguments in the federal courthouse about a half mile from the Supreme Court. Within a week and after a thorough cleaning, the court reopened.

In 1918, when the court still met inside the Capitol, arguments were postponed for a month because of the flu pandemic. In the nation's early years, in August 1793 and August 1798, adjustments were made because of yellow fever outbreaks, the court said.

4th Circuit suspends oral argument rule

In another example of how quickly courts are moving to accommodate the need to practice social distancing in order to contain the novel SARS-COV-2 coronavirus, the 4th U.S. Circuit Court of Appeals has suspended a rule that requires parties to conduct oral arguments in order for an opinion in the case to be published.

The court's March 23 order, signed by Chief Judge Roger Gregory, suspends Fourth Circuit Local Rule 36(a), which provides that the court will publish opinions "only in cases that have been fully briefed and presented at oral argument."

"To enable the court to continue to issue opinions in accordance with its publication standards and in response to the need for social distancing to contain the novel coronavirus, the court temporarily suspends its oral argument requirement for published opinions," the order reads. "Accordingly, cases calendared for oral argument in March or April 2020 but not presented at oral argument may be decided by published opinion with the unanimous consent of the panel."

The order, Standing Order 20-01, takes effect immediately.

Staff reports

Judge's refusal to provide transcript to jury was error

BY BILL CRESENZO
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A man convicted of taking indecent liberties with a child in Gaston County has had his conviction tossed out after the North Carolina Court of Appeals rather begrudgingly ruled that the trial judge committed error by denying the jury's request for a transcript of witness testimony on account of the fact that such transcripts are not compiled in real time.

The jury requested the transcript during the 2018 trial of Victor Manuel Medina. Superior Court Judge Athena Fox Brooks denied the request, telling jurors that "This is one of those things unlike on TV those are not real-time, those are not made as they are testifying. It would take us a couple of weeks at the fastest to make those. So that's just not able to be done."

Nova appealed his conviction. In a unanimous March 17 opinion, Judge Richard Dietz said that if the issue were a case of first impression, the appeals court would hold that Brooks' statement was an appropriate exercise of the trial court's discretion, but it was nevertheless "constrained" to vacate the conviction because the state's appellate courts have held in a series of indistinguishable cases that trial court statements denying jury requests for transcripts because there is no "real-time" transcript constitutes an error.

In those earlier cases, appellate courts ruled that it was unclear whether the trial judges understood that they had the discretion to grant the jury's request and wait for the transcript to be prepared, even if it meant postponing deliberations. Brooks' statement during Nova's trial was almost identical to the statements that other judges made in those other cases, Dietz wrote.

While courts rarely order a transcript of trial testimony during jury deliberations, state law permits them to do so at their discretion, or, alternatively, to read portions of the trial transcript to the jury. That statute has prompted the state's appellate courts to vacate criminal convictions on the grounds that the "trial court's statement that it is unable to provide the transcript to the jury demonstrates the court's apparent belief that it lacks the discretion to comply with the request."

"This is so, our appellate courts explained, even if the trial court also stated the reason the court was unable to provide the transcript—typically a concern that it would take too long to prepare one," Dietz wrote.

But there is "some logical tension" in the previous decisions, Dietz wrote. When a trial court observes that it would take at least two weeks to prepare a transcript of witness testimony, so it is "just not able to be done," the implication is that the trial court understands it has discretion to order a transcript and to then direct that requested parts of the testimony be read to the jury. Instead, the language implies that the trial court understands its discretionary authority, but is unwilling to delay deliberations for several weeks while waiting for a transcript to be prepared.

"After all, if the court thought it did not have the discretion to order a transcript and have excerpts read to the jury, what difference would it make how long it would take to prepare that transcript?" Dietz wrote.

"As an intermediate appellate court, we can do nothing more than observe this. We are bound by both our own precedent and the Supreme Court's, and thus are constrained to find error."

Because the case turned on the credibility of the defendant and the accusing witnesses and the key trial testimony—that of Nova and of the alleged juvenile victim—was conflicting and the jury asked to review transcripts of that conflicting testimony, there was a reasonable possibility that the trial court's error affected the outcome of the jury's deliberations, thus requiring the court to vacate the conviction, Dietz concluded.

Joseph Lattimore of Charlotte represented Nova. He could not be reached for comment on the court's ruling.

The eight-page opinion is *State v. Nova* (Lawyers Weekly No. 011-078-20). The full text of the opinion is available online at nclawyersweekly.com.

Follow Bill Cresenzo on Twitter @bcresenzonclw

Laughs in the time of Coronavirus

BY PAUL FLETCHER

Picture this: a bottle of beer all alone in the corner of a fridge, scaring away the rest of the food items, all of which are wearing surgical masks. The beer was a Corona, and this image was perhaps the first of the memes shared on the internet about the coronavirus.

A "meme" is an idea or a concept that is shared on one or more social media platforms. Like the Corona pic, a lot of memes are meant to be funny. Look at Facebook or Twitter, and you'll find numerous jokes about the virus and its impact.

It may seem strange to make jokes during this confusing and unfamiliar time, particularly about something potentially deadly. But the act of sharing a simple meme is a way to strike back at the darkness. By including your friends, you can seek to bolster their spirits (and your own). The wellness experts will tell you that laughter is a great way to alleviate stress, even if just for a moment.

Here's our contribution to the cause, a compilation of some of the best corona-memes that have sprouted in the past week. They are organized by general topic.

BRAVE NEW WORLD. Some of the humor simply marveled at the changes to life that seemingly happened overnight.

"I don't think anyone expected that when we changed the clocks earlier this month … we'd go from standard time to the Twilight Zone," said one.

Confinement was limiting: "I still haven't decided where to go for Easter … the living room or the bedroom."

A third was a visual gag – A blueprint of a house, with a glass of wine in each room, allowing every room to be a tasting room.

WORK. Working from home also was celebrated for its moments.

One recurring theme was how to dress. One item said, "It's time to change from my work pajamas into my bedtime pajamas."

One cartoon had the thought balloon of a guy on the couch: "Working from home is going pretty well!" On the floor, the guy's cat wrote in a diary: "Day 5. He's still in my spot."

TOILET PAPER. One of the stranger phenomena about the coronavirus crisis is the run on toilet paper. It's not a digestive malady. One would have thought there was a snowstorm behind it the way TP flew off the grocery store shelves.

Many of the toilet paper jokes had a punchline too rude to print here.

One of the visual gags was a pic of five St. Bernards with rolls of TP instead of little barrels of rum around their necks: "Help is on the way!"

In another, Gollum, the anti-hero from "Lord of the Rings," was holding a roll of TP and hissing, "My precious!"

SOCIAL DISTANCING. Of course, there's a separate category entirely dedicated to "social distancing," a term sure to be in the running for phrase of year for 2020, along with "shelter in place."

There were many variations on a theme here.

Social distancing, Beatles style: A picture of the Fab Four all crossing Abbey Road, just like on the famous album cover, but six feet apart.

Social distancing with a Scottish twist: a picture of a hearty lad, in a kilt, on the heather overlooking a loch. He's playing his bagpipe. The simple punchline: "Social distancing tool."

Forced to distance, one could always enjoy "[t]oday's drink special: The Quarantini. It's just a regular martini, but you drink it alone, in your house."

And where's Waldo? Right there, in a field, far away from everybody else in the picture.

KIDS. With schools closed for the remainder of the school year, many parents found themselves spending more time than they anticipated with their children at the same time they were working from home.

Home-schooling memes abounded.

In one, the poster reported, "Home-schooling is going well. Two students have been suspended and a teacher was fired for drinking on the job."

Another said, "Day 3: They all graduated yesterday."

DARK HUMOR. Given the seriousness of the coronavirus, and the steady drumbeat of cases, and deaths, it's not surprising that there was a dark edge to some of the humor.

These posts ranged from the catty… "We are about three weeks away from knowing everyone's true hair color."

...To the millennial. One post recalled a 1990s computer game where everyone always seemed to die from dysentery: "I think my generation is taking this extra serious because we remember how bad we were at Oregon Trail."

Country crooner Kenny Rogers passed away March 20 at age 81. One poster "commemorated" his death this way: "Kenny Rogers dipping out in the middle of apocalypse is the most 'Know when to fold 'em' thing ever."

And a few had some bite. The failure to observe social distancing could prove dire: "Better six feet apart than six feet under."

THERE'S ALWAYS HOPE. And on the flip side, some of the humor held out hope for a return to normal. One post invoked the power of positive thinking: "This too will pass. It might pass like a kidney stone, but it will pass."

Give Gandalf, the wizard from "The Lord of the Rings," the last word. The LOTR trilogy features a crew of ordinary creatures forced to face and vanquish difficult foes. One poster found inspiration in that tale, citing this passage:

"I wish it need not have happened in my time," said Frodo.

"So do I," said Gandalf. "And so do all who live to see such times. But that is not for them to decide. All we have to decide is what to do with the time that is given us."

DISTANCE / A logjam of cases could continue for a long time

The fact that many lawyers are in an age group that puts them at heightened risk from COVID-19 has certainly contributed to the profession taking this with a great deal of seriousness. Almost overnight, the pandemic has changed the legal profession in a variety of ways. What remains to be seen is how the experience might end up continuing to influence the legal profession long after the danger has passed.

Depositions from a distance

There are a lot of different roles that need to be filled at a deposition, and if any of the players are missing, it can shut down the whole production. Most obvious, of course, are the witnesses themselves, many of whom are finding themselves unable to show up for an in-person deposition right now, whether because of illness, fear of illness, or an inability to secure child care at a time when public schools are closed across the state.

That, at least, can be resolved through videoconferencing. Many attorneys reported that they've already altered plans to begin deposing witnesses via Skype or similar technology, or even just an old-fashioned telephone. But even if that solves one problem, it opens up another because the notaries who swear in those witnesses are not, under state law, allowed to swear anyone in remotely, and so difficulties in wrangling up court reporters can create another bottleneck slowing up depositions.

As a result, deadlines are being extended, even as non-essential judicial proceedings remain on hold. Steve Baynard of Ennis, Baynard, Morton, Medlin & Brown in Wilmington said that judges in New Hanover County—where lawyers have a fair amount of experience battening down the hatches because of hurricanes—have been working with lawyers helpfully. Judges in many other courts have sent emails out of their offices telling attorneys that they are going to be willing to work with them to find flexible solutions to deal with a problem that is not anyone's fault.

"I had a motion for a protective order to try to stop some depositions from going forward next week, and the judge agreed to handle that hearing by telephone, which was helpful to all parties," Baynard said. "I don't know that we've got a feel for how long this is going to last, so everybody is just trying to figure out where we're going to be by the end of this month and just try to plan the best we can. We've rescheduled some depositions for the end of April, hoping that that may be a time when we may all be past this, but we just don't know."

Right now, minds are mostly focused on getting through the current crisis, but some of the creative solutions being employed to get around in-person meetings may prove to have staying power even after people are shaking hands again. Many attorneys strongly prefer to conduct depositions in person, but the potential to save time and money had already made videoconference depositions attractive in some cases. Experiences in the next few months could have some attorneys reevaluating that calculus.

A challenge for notaries

Everyone is being asked to practice good social distancing right now, but having to keep your distance creates a real problem for the state's notaries. Under state law, a notary must be in close physical contact with the person to whom they're administering an oath or affirmation, whether for depositions or anything else.

As of the time this story went to press, that requirement had not been relaxed, but the Secretary of State's office, which regulates notaries, is working on creating an emergency procedure so that a notary could administer an oath via a video connection. (While court reporters typically also administer the oath at a deposition, the Secretary of State's office does not have any role in regulating depositions outside of the notary's role.)

Implementing such a change would require either an amendment to state law or an executive order from Gov. Roy Cooper. The Secretary of State's office is currently working with the administration on what such an order might look like, but any relaxation in the requirement that oaths be administered in person would be for a temporary period of time and not be permanent.

Some court reporting agencies have apparently been directing attorneys' attentions to a law that was passed last year to allow declarants that lack the necessary identification to nevertheless provide an "unsworn declaration." But that law was intended to deal only with the issue of declarants lacking identification and did not in any way change the requirement that oaths be administered in person.

The Secretary of State's office has provided guidance for notaries to protect themselves from contracting the virus while performing their duties. That includes keeping a safe six-foot distance from the principal at all times, not sharing pens, wearing gloves and a mask if possible, not touching an identification card or document, and keeping all documents that need to be notarized grouped together to minimize the length of the interaction. The guidance notes that documents can be signed in advance—signatures don't actually have to be signed in front of a notary, they just need to be acknowledged by the signer in front of one.

Mediations and more

A lot of mediations and other forms of dispute resolution have been placed on hold as well. Some insurance carriers are prohibiting their employees from traveling or attending mediations. Baynard said that he'd already had an arbitration cancelled because the arbitrator, who was in his seventies, felt uncomfortable and said he wasn't taking any chances and rescheduled.

On March 17, the North Carolina Dispute Resolution Commission pressed the point further, sending out a notice clarifying that DRC court-ordered mediations are included among the court proceedings that have been suspended by Chief Justice Cheri Beasley's order. As a result, the DRC strongly encouraged that all court-ordered mediations be held via electronic means for now. If all parties fail to provide their consent to conduct mediation via electronic means, the matter will be rescheduled after April 12.

Sara Lincoln of Lincoln Derr in Charlotte (which has implemented a firm-wide work-from-home policy) said that if cases do start to fall behind schedule, as some inevitably will, it's important to communicate proactively with clients, many of whom likely were not paying especially close attention to Beasley's order.

"Litigation in particular is especially stressful for the parties involved, and lawyers should be mindful about counseling their clients about these delays and try to decrease their stress levels about these delays," Lincoln said. "For cases scheduled for trial in 2021, hopefully we won't have to push back those dates. But for people with shorter scheduling orders, their clients are going to need some counseling about what this means for them. Litigation is stressful, and people want this to come to an end, and I think the wider public is not as aware as lawyers are about how the coronavirus is impacting the court system."

Another issue troubling attorneys is the potential for a backlog of cases to build up. Even with an extension of filing deadlines, new cases will continue to come into the system while existing ones are largely stuck unless they can be resolved amicably in mediation, which may become an increasingly attractive option. If the suspension is limited to 30 days, things may get resolved fairly quickly. But if, as seems very likely, the delay proves to be longer than that, things will get a lot more difficult.

"It's going to create a logjam of cases, especially on the civil side," Lincoln said. "It could impact us as long as two years."

Follow David Donovan on Twitter @NCLWDonovan

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N.C. COURT OF APPEALS

Domestic Relations

Parent & Child – Custody – Relocation – *Ramirez-Barker* Findings

Faced with evidence of the plaintiff-mother's dysfunctional relationship with her parents, the trial court should have made, but did not make, findings as to more of the factors set out in *Ramirez-Barker v. Barker*, 107 N.C. App. 71, 418 S.E.2d 675 (1992), before approving the mother's and children's relocation to Indiana to live with the mother's parents.

We vacate the trial court's custody order and remand for entry of a new order consistent with this opinion.

Background

The trial court heard evidence that the plaintiff-mother had suffered from mental health issues since adolescence, stemming from what plaintiff characterized as an abusive, disciplinarian upbringing by her religious fundamentalist parents. Plaintiff ceased all contact with her parents shortly after the birth of the parties' first child in 2014, in part due to plaintiff's resentment about her own upbringing and concerns with how her parents' religious beliefs would conflict with the worldview under which the parties planned to raise their own children.

Nonetheless, amid increasing marital strife and a desire to separate from the defendant-father, plaintiff reinitiated contact with her family and moved herself and the children to her parents' home in Indiana. The trial court awarded primary physical custody to plaintiff and permitted the move to Indiana.

Findings

Ramirez-Barker lists several factors that should be considered in a child custody relocation case. Despite receiving evidence relating to those factors, the trial court merely recites several of those factors without engaging in any substantive analysis.

For example, the trial court found that the distance between Indiana and North Carolina would require visits with defendant during seasonal school breaks and holidays. However, the court omitted any consideration of how such a visitation schedule would preserve and foster the children's relationship with defendant or serve their best interests.

The court also found that defendant opposed the relocation of the children. Rather than assessing the integrity of his opposition, the trial court instead chose to downplay his opposition by finding that he unreasonably failed to acknowledge his role in the failure of the marriage. A party's fault for the failure of the marriage is not an appropriate consideration in determining whether relocation would be in the best interests of the children.

Given the cursory manner in which the trial court addressed the *Ramirez-Barker* factors and its failure to otherwise note how relocation of the children would be in their best interests, its conclusion of law rests upon its finding of an advantage in the family support network in Indiana. This finding alone cannot carry the weight of the custody order.

Even if this finding were sufficient, it is undermined by unresolved contradictions with several other findings in the order. The trial court found that the children "appear to have long standing relationships with their extended family members, with the exception of a *three year period of time* that ended a few weeks prior to the parties' separation." However, the children were only ages four and one at the time of the hearing. We find no competent evidence would support this determination.

As to plaintiff's writings about her physical, verbal, and emotional abuse at the hands of her parents, the trial court noted that these writings were her way of "venting." Yet notably absent from the order is any indication as to whether the trial court believed the accounts of abuse. Other than their availability to provide transportation and supervision of the children if plaintiff secures employment in Indiana, the trial court does not make any findings indicating that contact with plaintiff's parents would be beneficial to the chil-

dren.

Moreover, the trial court found that plaintiff's mental health issues are partially caused by the burden of being the children's primary caregiver, yet it failed to explain how these issues would not be exacerbated by awarding her primary custody of the children and placing them in daily contact with her parents, which whom she had a dysfunctional relationship at best.

The trial court's findings do not support its conclusion that granting plaintiff primary physical custody and permitting relocation to Indiana would be in the children's best interests.

Vacated and remanded.

Tuel v. Tuel (Lawyers Weekly No. 011-083-20, 13 pp.) (John Arrowood, J.) Appealed from Johnston County District Court (Addie Rawls, J.) No appearance for plaintiff; Evan Horwitz and Jeffrey Russell for defendant. N.C. App.

Criminal Practice

Probation Revocation – Absconding – Willfulness

Where the state alleged that defendant had absconded probation supervision by failing to report as directed by his probation officer, failing to return the officer's phone calls, and failing to provide the officer with a certifiable address, and where the officer's testimony showed that he instituted an absconding investigation and exhausted all available avenues of contacting defendant, it was then defendant's burden to show that his absconding violation was not willful. In the absence of any such evidence, the trial court did not abuse its discretion when it found defendant had willfully absconded supervision.

We affirm the trial court's revocation of defendant's probation and the court's refusal to consolidate defendant's sentences. We remand for correction of clerical errors.

Where the trial court finds that a defendant has absconded in violation of G.S. § 15A-1343(b)(3a), then the trial court may revoke probation and activate a defendant's suspended sentence based solely upon this finding. G.S. § 15A-1344(a).

Under the plain language of § 15A-1343(b)(3a), a defendant "absconds" by either (1) "willfully avoiding supervision" or (2) "willfully making the defendant's whereabouts unknown to the supervising probation officer."

Where a probation violation report specifically alleges that a defendant has absconded and the state brings forth competent evidence establishing the violation, then the state has met the burden required by § 15A-1344(a) to warrant revocation of a defendant's probation. The task falls upon the defendant to demonstrate that his noncompliance was not "willful."

At the revocation hearing, the officer testified that defendant had failed to report as directed by the officer, failed to return the officer's phone calls, and failed to provide the officer with a verifiable address. The officer exhausted all available avenues of contacting defendant. While the investigation was ongoing, defendant also failed to report to scheduled appointments without contacting the officer.

Defendant never made contact with his probation officer, and the officer was completely unaware of defendant's whereabouts from at least May 14, 2018, to May 23, 2018. Based upon defendant's actions, on May 23, 2018, the probation officer entered an absconding violation.

The state presented sufficient competent evidence by which the trial court could find that defendant absconded by willfully avoiding supervision or willfully making his whereabouts unknown to his probation officer in violation of § 15A-1343(b)(3a).

The dissent's reliance on *State v. Williams*, 243 N.C. App. 198, 776 S.E.2d 741 (2015), and *State v. Melton*, 258 N.C. App. 134, 811 S.E.2d 678 (2018), is misplaced.

Williams stands for the proposition that a defendant's probation violations, other than violations listed in § 15A-1344(a), cannot serve as the basis for revocation of the defendant's probation unless the requirements of § 15A-1344(d2) are also met. The distinction between a violation of § 15A-1343(b)(3) and § 15A1343(b)(3a) is primarily one of *mens rea*. A defendant does not have to act "willfully" or wrongfully "without justification or excuse" to be found in violation of the conditions of § 15A-1343(b)(3).

Where a violation report alleges that willful violations of § 15A1343(b)(3) together amount to the defendant "willfully avoiding supervision" or "willfully making the defendant's whereabouts unknown" in violation of § 15A- 1343(b)(3a), and the state subsequently proffers sufficient evidence to establish those willful violations, then revocation of the defendant's probation is left to the sound discretion of the trial court. In this case, the state undoubtedly made that additional showing required by § 15A-1343(b)(3a) and contemplated by *State v. Johnson*, 246 N.C. App. 139, 783 S.E.2d 21 (2016).. Therefore, this case plainly falls beyond the scope of *Williams*. Not only would the dissent's expanded reading of *Williams* fail to align with the plain language of §§ 15A-1343(b) and 15A-1344(a), but it would also operate to eliminate absconding as a ground for probation revocation.

Melton is distinguishable because the probation officer therein merely left messages with a defendant's relative over the course of only two days.

Here, defendant admitted to absconding and failed to put forth any evidence that his failure to comply with the requirements of his probation was not willful. Therefore, the trial court did not abuse its discretion when it revoked defendant's probation.

Where the revocation judge refused to modify the original judgment out of deference to the sentencing judge, who was more familiar with the circumstances of defendant's case, such a decision was not an abuse of discretion.

Affirmed and remanded for correction of clerical errors.

Dissent

(McGee, C.J.) First, since defendant's probation officer acknowledged defendant affirmatively contacted him on 14 May 2018, I would hold there is no substantial evidence of absconding prior to that date.

Furthermore, "[failing] to report as directed by the officer," "[failing] to provide the officer with a [certifiable] address," and "[failing] to make himself available for supervision as directed by his officer" are only allegations of violations of G.S. § 15A-1343(b)(3)—a separate condition of probation from absconding. Therefore, even though defendant admitted to the allegations, allegations that fall within § 15A-1343(b)(3) do not support a finding of willful absconding under § 15A-1343(b)(3a).

Assuming the allegations do not only allege conduct that violates § 15A-1343(b)(3), all the alleged acts in allegation 1, taken together, still do not establish a violation of § 15A-1343(b)(3a), because they do not adequately allege willfulness by defendant. The allegations in the report fail to show defendant in fact knew his probation officer was attempting to contact him.

There is no evidence defendant heard the voicemail message from his probation officer telling him to report in two days. I would hold that merely failing to contact a probation officer for nine days, without more, does not show sufficient evidence of willfulness to support a finding of willful absconding under § 15A-1343(b)(3a).

State v. Crompton (Lawyers Weekly No. 011-084-20, 31 pp.) (Philip Berger, J.) (Linda McGee, C.J., concurring in part & dissenting in part) Appealed from Buncombe County Superior Court (Marvin Pope, J.) Brenda Eaddy for the state; Glenn Gerding and Sterling Rozear for defendant. N.C. App.

N.C. COURT OF APPEALS, UNPUBLISHED

Criminal Practice

Judges – Recusal Motion – Former ADA – Ineffective Assistance Claim

Defendant asserted that his trial judge (1) was a former assistant district attorney who prosecuted him for one of the offenses that now serves as a conviction supporting his habitual felon indictment, (2) is married to a former Iredell County detention officer (defendant was being tried for assaulting an Iredell County detention officer), and (3) formerly worked with the prosecutor who represents the state in the current proceeding. None of these assertions shows that the judge had such a personal bias, prejudice or interest that she would be unable to rule impartially. The judge did not err by failing to disqualify herself.

We find no error in defendant's conviction of assault on a law enforcement officer resulting in physical injury and attaining habitual felon status.

Contrary to defendant's argument, trial counsel's waiver of defendant's closing argument during sentencing did not constitute prejudicial error per se.

State v. Jerry (Lawyers Weekly No. 012-118-20, 9 pp.) (Wanda Bryant, J.) Appealed from Iredell County Superior Court (Julia Lynn Gullett, J.) Thomas Campbell for the state; James Parish for defendant. N.C. App. Unpub.

Landlord/Tenant

Commercial Lease – Renewal Option – Time to Exercise – Typo

A commercial lease gave the defendant-tenant the option to extend the lease "by giving Landlord prior written notice, at least six (6) months in advance of Expiration Date, *or* Tenant's election to extend the term; it being agreed that time is of the essence…" The "r" in the word "or" was clearly intended to be an "f." Since the tenant waited until three months before the expiration date to inform the plaintiff-landlord of its desire to extend the lease, the landlord was entitled to refuse to extend the lease.

We affirm summary judgment for the landlord.

The extension provision makes no sense with the word "or" in place. That is, under the tenant's construction, the provision would be contradictory, allowing the tenant to exercise the option by giving the landlord either six months advance notice or no advanced notice. This is nonsensical.

This case is simply about a typo. We note the fact that the letter "r" is right above the letter "f" on a standard keyboard. Further, our holding is reinforced by the presence of the "time is of the essence" language in the option provision.

4000 Piedmont Parkway Associates, LLC v. Eastwood Construction Co. (Lawyers Weekly No. 012-119-20, 4 pp.) (Chris Dillon, J.) Appealed from Guilford County Superior Court (John Craig, J.) Ronald Davis and Brent Powell for plaintiff; Clint Morse and James Adams for defendants. N.C. App. Unpub.

Real Property

Adverse Possession – Hostility – Prior Live-in Relationship

In 1986, the parties were living together, and plaintiff arranged for land she had paid for to be titled in defendant's name. Given plaintiff's multiple requests that defendant deed the property back to her; defendant's consistent refusals; the fact that plaintiff remained on the land when the couple separated in 1991; defendant's 1993 demand that plaintiff leave the property; plaintiff's remaining on the property without defendant's permission; defendant's discovery in 2017 that plaintiff had rented the land to a tenant; and his request that the tenant not tell plaintiff about his visit and continue paying rent to plaintiff, there was evidence that plaintiff's possession of the land was hostile.

We affirm the judgment entered upon a jury's verdict finding that plaintiff acquired title to the land by adverse possession.

Cheek v. Dancy (Lawyers Weekly No. 012-120-20, 11 pp.) (Valerie Zachary, J.) Appealed from Wilkes County Superior Court (Gregory Horne, J.) R. Blake Cheek for plaintiff; J. Clark Fischer for defendant. N.C. App. Unpub.

Civil Practice

Appeals – Interlocutory – Multiple Defendants

The trial court granted one defendant's motion to dismiss, but plaintiff's claims against other defendants remain pending. According to the allegations of the complaint, the liability of the defendants is not joint; rather, the liability of the dismissed defendant is derivative of any liability of the remaining defendants (plaintiff claims the dismissed defendant contracted with the remaining defendants for services rendered, allegedly negligently, to plaintiff). Therefore, there is no risk of inconsistent verdicts.

We dismiss as interlocutory plaintiff's appeal of the trial court's grant of the motion to dismiss filed by defendant Gaston County Department of Social Services.

Hamrick v. Gaston County Department of Social Services (Lawyers Weekly No. 012-121-20, 9 pp.) (Wanda Bryant, J.) Appealed from Gaston County Superior Court (Jesse Caldwell, J.) Erica Nesmith for plaintiff; Martha Raymond Thompson for defendant. N.C. App. Unpub.

Domestic Relations

Parent & Child – Termination of Parental Rights – Willfulness – Insufficient Findings

On a prior appeal, we remanded for the trial court to make findings regarding the willfulness of the respondent-mother's failure to interact with the minor child, given domestic violence protective orders prohibiting respon-

dent from contacting the minor child's father, a custody order which prohibited respondent from having contact with the minor child pending further orders of the court, and respondent's pro se filing opposing the adoption petition filed by petitioner (the child's stepmother). Since the trial court failed to make the findings required by this court's mandate, we must remand for the court to make such findings.

On remand, the trial court must also make a finding regarding the relevance (to the issue of willfulness) of respondent's appearance at petitioner's adoption proceeding. The trial court may make additional findings regarding respondent's willful abandonment of the minor child and may conduct a new hearing and take additional evidence.

Concurrence

(Hampson, J.) On remand, the trial court terminated respondent's parental rights on the new and separate ground of neglect. I write separately to emphasize that the trial court's adjudication of neglect as a ground to terminate parental rights on remand was error.

In re C.A.B. (Lawyers Weekly No. 012-122-20, 14 pp.) (Linda McGee, C.J.) (Toby Hampson, J., concurring) Appealed from the District Court in Mecklenburg County (Elizabeth Trosch, J.) James Epperson and Amber Morris for petitioner; Robert Ewing for respondent; no brief filed for guardian ad litem. N.C. App. Unpub.

Domestic Relations

Parent & Child – Termination of Parental Rights – No-Merit Brief

After many positive drug tests and no progress on her case plan, respondent's parental rights were terminated. Respondent's counsel has filed a no-merit brief pursuant to N.C. R. App. P. 3.1(e). Counsel advised respondent of her right to file a pro se brief and provided her with the necessary materials to do so. Respondent has not submitted any pro se arguments to this court, and a reasonable time for her to do so has passed.

Our review of the record satisfies us that the trial court's termination order was supported by competent evidence and based on proper legal grounds. We affirm.

In re C.S.B. (Lawyers Weekly No. 012-123-20, 7 pp.) (Chris Dillon, J.) Appealed from Catawba County District Court (Burford Cherry, J.) Marcus Almond and Lauren Vaughan for petitioner; J. Thomas Diepenbrock for respondent; Michelle FormyDuval Lynch for guardian ad litem. N.C. App. Unpub.

Domestic Relations

Parent & Child – Termination of Parental Rights – Neglect – Likelihood of Repetition

The respondent-mother's children were removed from her care because of substance abuse, mental health, and domestic violence issues, none of which she resolved. Indeed, the mother was unemployed, relied on her mother to meet her expenses, lived in a storage building on her mother's property, and believed that it didn't matter what drugs she used because her children would be cared for by her family and that "family is more important than treatment." The trial court's findings of fact support its conclusion that there is a strong probability that the children would be neglected again if they were returned to respondent's care.

We affirm the termination of respondent's parental rights.

In re C.R.R. (Lawyers Weekly No. 012-124-20, 17 pp.) (John Arrowood, J.) Appealed from Caldwell County District Court (Burford Cherry, J.) Lucy McCarl for petitioner; Christopher Watford for respondent; Catherine Lawson for guardian ad litem. N.C. App. Unpub.

Domestic Relations

Parent & Child – Abuse & Neglect – Visitation

Although the child victim, "Zoe," may not have used the specific terms "sexual assault" or "sexual abuse," her descriptions of her interactions with the respondent-father (Father) support the trial court's use of these terms.

We affirm and reverse and remand in part the trial court's order adjudicating respondents' children as neglected, continuing custody of the children with DSS and ordering that Father have no visitation.

Where Zoe testified that Father did not penetrate her, there is insufficient evidence to support the trial court's finding that Father had "sexual intercourse" with Zoe. Nevertheless, the remainder of the trial court's finding concerning Zoe remains intact.

Given Father's prior abuse of Zoe, the respondent-mother's (Mother's) inattention and failure to detect repeated sexual abuse illustrates that she did not exercise the care of a reasonable person given the known threats to her children. Mother's initial reaction upon learning of the sexual abuse was to seek to terminate her relationship with Zoe by relinquishing her parental rights. Therefore, "Jessica," "Lauren," and "Quentin"—who were present in the home and left unsupervised on at least one occasion while Father was sexually abusing Zoe—were at a substantial risk of impairment as a consequence of respondents' failure to provide proper care, supervision or discipline. Accordingly, the trial court properly concluded Jessica, Lauren and Quentin were neglected juveniles.

However, the trial court erred by terminating Father's visitation with Jessica and Quentin without finding that Father's visits with them would not be in their best interests or would be contrary to their health and safety.

In re J.C. (Lawyers Weekly No. 012-125-20, 17 pp.) (Chris Dillon, J.) Appealed from Sampson County District Court (William Cameron & Michael Surles, JJ.) Frank Bradshaw for petitioner; Robert Ewing and Mercedes Chut for respondents; Matthew Wunsche for guardian ad litem. N.C. App. Unpub.

Domestic Relations

Parent & Child – Termination of Parental Rights – Neglect

The trial court's findings establish that the respondent-mother has a history of lying to DSS about the status of her relationships, that she did not acknowledge her past domestic violence in court until she testified at the termination hearing, that she refused to provide DSS or the trial court with information about her new fiancé, and that she was unemployed. Although respondent ended the relationship that initially exposed the children to domestic violence, she failed to engage in needed therapy to help her deal with the repercussions that resulted from that domestic violence and lied to both DSS and the trial court about her participation in therapy. Ultimately, respondent did not resolve multiple issues that placed the children at risk for future neglect if they were returned to her care.

Accordingly, the trial court did not err in adjudicating the existence of the ground of neglect to terminate respondent's parental rights to the children pursuant to G.S. § 7B-1111(a)(1). We affirm the termination of respondent's parental rights.

In re N.J.E. (Lawyers Weekly No. 012-126-20, 12 pp.) (Wanda Bryant, J.) Appealed from Nash County District Court (John Covolo, J.) Jayne Norwood for petitioner; Patrick Lineberry for respondent; Christopher Waivers for guardian ad litem. N.C. App. Unpub.

Domestic Relations

Parent & Child – Abuse Adjudication – Reunification Cessation

Although most of the sexual allegations in this case involved "Steve's" older siblings, a social worker testified that all three siblings slept in the same bedroom. Given Steve's young age (two), his inability to talk, and his close proximity to the alleged events, clear and convincing evidence supports the trial court's findings that Steve was present during the alleged events and was exposed to substantially the same sexual behavior in respondent's home as his older siblings.

We affirm the trial court's adjudication of Steve as abused, its order to cease reunification efforts, and its continuation of Steve's placement with his maternal aunt and uncle.

In re S.R. (Lawyers Weekly No. 012-127-20, 18 pp.) (Toby Hampson, J.) Appealed from Beaufort County District Court (Regina Parker, J.) Jay Anthony Audino for petitioner; Kip David Nelson and Zack Dawson for guardian ad litem; Jacky Brammer for respondent. N.C. App. Unpub.

Domestic Relations

Parent & Child – Guardianship – Reunification Efforts – Constitutional

Given "Zavion's" anxiety at the thought of living with the respondent-father, among other factors, the trial court could find that reunification with respondent could not occur within a reasonable time.

We affirm the trial court's order awarding guardianship to Zavion's grandmother.

Guilford County DHHS, the guardian ad litem, Zavion's therapist, and Zavion himself all testified to the increased anxiety Zavion experienced at the prospect of having to live with respondent. These feelings of anxiety, in addition to having a negative impact on Zavion's mental health, also significantly affected his performance in school. In addition, Zavion's therapist noted that he continued to suffer from PTSD due to the trauma he suffered while living with his mother and her boyfriend, who Zavion grew up believing was his father.

In light of this trauma, Zavion's therapist concluded that building a relationship between Zavion and respondent should not be rushed and would take time, perhaps more than a year. Zavion also consistently expressed his desire to

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live with and be adopted by his grandmother, with whom Zavion has a close relationship and who has already adopted Zavion's siblings. Given these facts, there is competent evidence to support the trial court's finding that reunification "would be unsuccessful or inconsistent with [Zavion's] health, safety, and need for a safe, permanent home within a reasonable period of time."

As to respondent's constitutionally protected status as a parent, the trial court found, "Initially, [respondent] denied knowing the mother ... and denied being the biological father of the juvenile. In addition, [respondent] refused to submit to paternity testing to determine if he was in fact the biological father of the juvenile until March 2017 (approximately a year after the juvenile came into custody)."

Following the establishment of paternity, respondent did take steps to develop a relationship and become involved in Zavion's life. However, the trial court found that respondent significantly delayed entering into a service agreement with DHHS, failed to comply and make adequate progress with his case plan within a reasonable time, failed to understand and put Zavion's needs first, and failed to comply with some components of his case plan. These findings are supported by clear and convincing evidence, and are unchallenged and therefore binding on appeal. Therefore, the trial court did not err in concluding respondent acted in a manner inconsistent with his constitutionally protected status as a parent.

Affirmed.

In re X.A.R. (Lawyers Weekly No. 012-128-20, 17 pp.) (John Arrowood, J.) Appealed from Guilford County District Court (Angela Foster, J.) Mercedes Chut for DHHS; Dorothy Hairston Mitchell for respondent; Michael Crook for guardian ad litem. N.C. App. Unpub.

Civil Practice

Involuntary Commitment – Evidence – Hearsay – Waivable Objection

G.S. § 122C-268(f) says that a "respondent's right to confront and cross-examine witnesses may not be denied." This does not constitute a mandate to the trial court, so respondent's attorney had the responsibility to object to alleged hearsay testimony from a nurse about what respondent's mother told her.

We affirm the trial court's involuntary commitment order.

It was not the trial judge's responsibility to intervene when respondent's attorney failed to object to the alleged hearsay testimony.

In re J.C.D., ___ N.C. App. ___, 828 S.E.2d 186 (2019), specifically notes that the right to object to hearsay testimony during an involuntary commitment hearing is a waivable right. Furthermore, there may very well be strategic reasons for respondents' attorneys to waive objection to hearsay testimony during involuntary commitment hearings as part of trial strategy. Therefore, we decline to place the burden on the trial judge to intervene sua sponte when a respondent's attorney fails to object to hearsay testimony.

In re B.H. (Lawyers Weekly No. 012-129-20, 12 pp.) (Chris Dillon, J.) Appealed from Wake County District Court (Eric Chasse, J.) Robert Broughton for the state; Candace Washington for respondent. N.C. App. Unpub.

Domestic Relations

Parent & Child – Permanency Planning Order – Appropriateness of Placement

Even if we disregard the findings that the respondent-father challenges, the unchallenged findings establish that (1) the trial court was uncertain of the current living situation of "Diana's" paternal grandmother; (2) Diana's sibling nearly drowned under the grandmother's supervision; (3) the grandmother exhibited a pattern of disregard for the authority of the court and noncompliance with its orders (the grandmother allowed her son to visit Diana when such visits were prohibited, and the grandmother visited Diana when her own visitation was prohibited); and (4) respondent continued to engage in domestic violence against Diana's mother. The trial court properly concluded that the grandmother was not able to provide a safe and appropriate home for Diana and that placement with the grandmother was not in Diana's best interests.

We affirm the trial court's permanency planning order. Because respondent's notice of appeal only refers to the permanency planning order, we dismiss his appeal as it relates to the trial court's guardianship order.

In re D.S. (Lawyers Weekly No. 012-130-20, 11 pp.) (John Arrowood, J.) Appealed from Mecklenburg County District Court (Elizabeth Trosch, J.) Marc Gentile for petitioner; David Perez for respondent; Stephen Schoeberle for guardian ad litem. N.C. App. Unpub.

Domestic Relations

Parent & Child – Permanency Planning Order – Visitation Suspension

Given an ongoing police investigation into allegations of sexual abuse by the respondent-mother, evidence of regression by the children when they were faced with visiting the mother, and the children's stated desires (via their therapists) not to visit with the mother, the trial court did not abuse its discretion when it suspended the mother's visitation with the children.

We affirm the trial court's placement review and permanency planning order.

In re J.C. (Lawyers Weekly No. 012-131-20, 16 pp.) (Wanda Bryant, J.) Appealed from Wake County District Court (V.A. Davidian, J.) Mary Boyce Wells for petitioner; Garron Michael for respondent; Kelsey Kingsbery for guardian ad litem. N.C. App. Unpub.

Domestic Relations

Parent & Child – Private TPR Action – Failure to Support

Even if, contrary to petitioners' evidence, the respondent-father actually did provide support for the child, "Paul," for some time after Paul was born in 2013, and even if, after March 2015, respondent was unable to provide support because he did not know where Paul was located, he did not have a valid telephone number for Paul's mother, and the mother had cut off contact with him, these factors would only go to the willfulness of respondent's failure to provide support. However, no showing of willfulness is required to support termination of parental rights pursuant to G.S. § 7B-1111(a)(5)(d); the requirements of § 7B-1111(a)(5) are strictly applied.

We affirm the termination of respondent's parental rights.

In any event, the evidence and findings demonstrate that respondent failed to provide any financial assistance, inquire about Paul's wellbeing, contact Paul directly, or send cards, gifts, letters or tokens of affection even after he became aware of Paul's location in December 2016.

In re P.N.K. (Lawyers Weekly No. 012-132-20, 14 pp.) (Wanda Bryant, J.) Appealed from Guilford County District Court (Tonia Cutchin, J.) Mercedes Chut for petitioners; Sean Vitrano for respondent; no brief for guardian ad litem. N.C. App. Unpub.

Criminal Practice

Indecent Liberties – Expert Testimony – Sexual Abuse – Ineffective Assistance Claim

The record before us is insufficient to determine whether trial counsel was ineffective in failing to object when an expert testified that the child victim, "Jane," had been sexually abused or when the expert implied that defendant was the perpetrator.

We find no plain error in the trial court's admission of expert witness Parsons' testimony. We find no error in the trial court's admission of expert witness Hankerson's testimony. We dismiss defendant's ineffective assistance of counsel claim without prejudice to his right to assert this claim in a motion for appropriate relief.

Parsons' Testimony

Defendant argues that it was plain error for the trial court to allow (1) Parsons' to use of the word "disclosure" to describe Jane's allegations, (2) Parsons' medical recommendations for Jane's treatment, and (3) Parsons' testimony that Jane had been sexually abused.

First, we have held that there is nothing about use of the term "disclose," standing alone, that conveys believability or credibility. Thus, defendant's contention that the trial court erred by permitting Parsons to use the term "disclosure" while describing Jane's allegations is without merit.

Second, Parsons' medical recommendations for Jane's treatment included that she have no contact with defendant. At most, this testimony implies that Jane subjectively believes defendant to be her abuser. Parsons' statements in no way amounted to an assertion that defendant was, in fact, responsible for Jane's alleged sexual abuse. Thus, Parsons' expert testimony did not improperly bolster Jane's testimony at trial.

Third, where Jane's physical exam was normal, it was error for the trial court to allow Parsons to testify that Jane had been sexually abused. Nevertheless, defendant has not shown prejudice.

The state's evidence included the following: (1) Jane's testimony at tri-

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al; (2) a video-recorded interview with Jane at a children's advocacy center; (3) evidence of Jane's lasting behavioral problems after the incident—including bed-wetting, nightmares, and social withdrawal; and (4) the consistency of Jane's accounts of the incident to her family, law enforcement, and medical personnel. Defendant has failed to demonstrate that the erroneous admission of Parsons' testimony tilted the scales of justice in the jury's determination of his guilt or innocence.

Hankerson's Testimony

Our court has previously determined an expert's opinion that a child witness had not been "coached" may be admissible evidence. Here, Hankerson, an expert in the forensic interviewing of children suspected of suffering from abuse, testified that Jane's wording and demeanor during their interview indicated that she had not been "coached" by an adult in making her allegations. Given that Hankerson's expert testimony was helpful in assisting the trier of fact and did not improperly bolster Jane's testimony, this testimony was admissible. Accordingly, the trial court did not abuse its discretion by admitting Hankerson's testimony over defendant's objection.

No error in part, dismissed without prejudice in part.

Dissent

(Arrowood, J.) I would hold that there is sufficient evidence of ineffective assistance of counsel, entitling defendant to a new trial.

Trial counsel not only had no apparent case strategy in failing to object to Parsons' testimony, but also demonstrated ineffective assistance by failing to recognize and object to testimony long held impermissible.

Furthermore, defendant was prejudiced by counsel's deficient performance. The state's sole witness to the alleged sexual abuse was the victim, Jane, a nine-year-old child who had been six years old at the time of the alleged abuse. Given that Jane was the only witness to the alleged sexual abuse and there was no physical evidence of such abuse, the issue of Jane's credibility was crucial to the outcome of the case. Thus, there is a reasonable probability that there would have been a different result in the proceedings had trial counsel objected to Parsons' testimony, both at the trial level and now on appeal.

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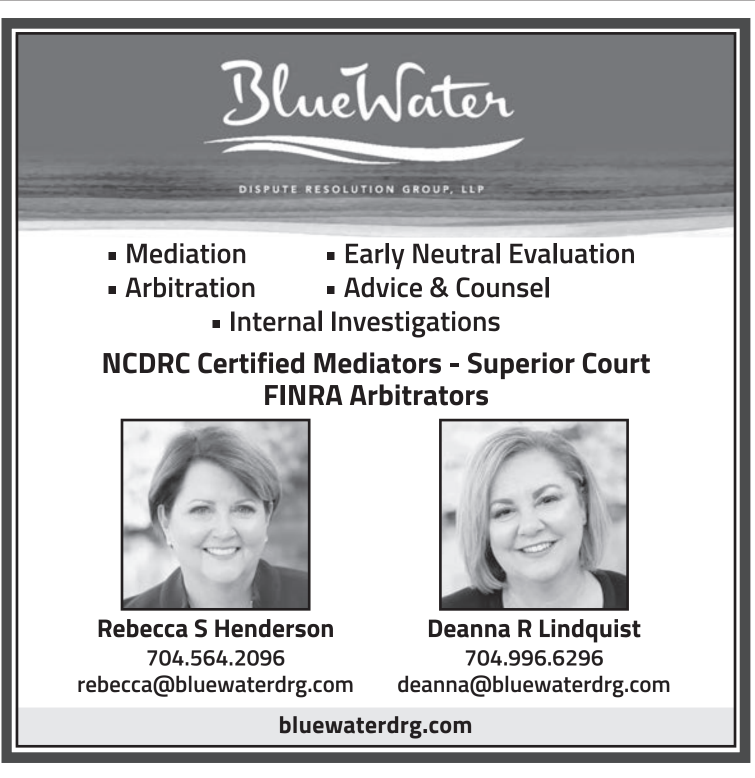

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State v. Clark (Lawyers Weekly No. 012-133-20, 21 pp.) (Philip Berger, J.) (John Arrowood, J., dissenting) Appealed from Pitt County Superior Court (Jeffery Foster, J.) Lisa Finkelstein for the state; Paul Herzog for defendant. N.C. App. Unpub.

Criminal Practice

Verdict Forms – Statutory Rape & Sex Offense – Crime Against Nature

Though defendant was indicted for both statutory rape and statutory sex offense, since the two verdict forms for these charges *each* listed the charge as "Statutory Rape/Sex Offense" and provided the option of "Not Guilty" or "Guilty of Statutory Rape/Sex Offense," this combining of the charges created ambiguity and confusion. Nevertheless, any such ambiguity was not fatal to the verdicts in this case.

However, as the jury never returned a verdict as to the charge of crime against nature – which did not appear on the verdict form – a judgment should not have been entered on this charge.

We vacate defendant's conviction of crime against nature. Otherwise, we find no error.

Even though the trial court rejected defendant's request for an instruction on victim "Olivia's" habit of lying when confronted with trouble, since witnesses were allowed to testify that Olivia had a habit of lying when she got in trouble and about specific instances when she had lied when confronted about something, and since the trial court correctly instructed the jury on a witness's character of truthfulness and on impeachment, defendant received the full benefit of the instruction he requested.

Defendant contends the trial court erred when it admitted a recorded interview of Olivia, in which she relayed that her sister-in-law told her defendant was "acting really guilty." The admission of this evidence did not amount to a fundamental error.

Olivia testified regarding the years of abuse she experienced. A number of additional witnesses also testified regarding defendant's abuse and rape of Olivia. Moreover, defendant used the same evidence he complains of during direct and cross-examination. In light of the litany of evidence presented, we conclude that the admission of potential hearsay that "[defendant was] acting really guilty" did not have a probable impact on the jury's verdict.

No error in part; vacated in part.

State v. Hughes (Lawyers Weekly No. 012-134-20, 8 pp.) (Chris Dillon, J.) Appealed from Lincoln County Superior Court (Lisa Bell, J.) Alexandra Gruber and Amber Davis for the state; Daniel Blau for defendant. N.C. App. Unpub.

Criminal Practice

Jury & Jurors – Minor Interaction with Witness – Court's Investigation – Murder – Home Invasion Evidence

Where a prosecution witness merely opened the jury room door for two jurors (the witness had the necessary key card) and responded to one of those jurors' questions by saying it was inappropriate for them to converse and that he did not recognize the juror from a prior investigation of a break-in next-door to the juror, such contact was without legal significance and is insufficient to permit a presumption of prejudice. Moreover, defendant has shown no harm to his defense. The trial court did not abuse its discretion by denying defendant's motion for a mistrial.

We find no error in defendant's convictions for first-degree murder, possession of a firearm by a felon and conspiracy to commit first-degree murder.

The trial court questioned the witness, along with a sheriff's captain who was present, and defense counsel about the interactions between the witness and the jurors. None of the three described the interactions as meaningful. The trial court's decision to rule upon defendant's motion for a mistrial without conducting a formal hearing was not an abuse of discretion.

In this case, defendant was charged with participating in the murder of victim Kendrick in Efland, after driving there from Durham. Defendant challenges the trial court's admission of evidence of a Cary home invasion under N.C. R. Evid. 404(b).

However, defendant's palmprint within the Cary home places defendant at the site of the Cary home invasion. During that home invasion, a victim's cellphone was stolen, and the perpetrators fled in two sedans identified as possibly silver and black. The stolen cellphone was discovered by law enforcement shortly following the home invasion within a gray Altima that had been rented by defendant's mother and which was parked beside a black Malibu.

Video evidence tends to show that those same two vehicles were driven alongside Kendrick's white Altima in the direction of the scene of Kendrick's killing on the day of the alleged murder for which defendant is charged, and drove away later that same day together, but without Kendrick's Altima. Moreover, the cellphone stolen during the home invasion was located soon after the home invasion on the front passenger seat of the gray Altima beside a .380 caliber pistol from which forensic experts determined shell casings found at the scene of the killing had been fired. Following the discovery of the aforementioned evidence, defendant was arrested and charged with, inter alia, murdering Kendrick.

Thus, the evidence regarding defendant's involvement in the Cary home invasion is relevant within the meaning of Rule 401 and was admissible under Rule 404(b).

No error.

State v. Dixon (Lawyers Weekly No. 012-135-20, 18 pp.) (Allegra Collins, J.) Appealed from Orange County Superior Court (Michael O'Foghludha, J.) L. Michael Dodd for the state; Meghan Adelle Jones for defendant. N.C. App. Unpub.

Criminal Practice

Forfeiture of Counsel – Appeals

Even if defendant's plea agreement had somehow reserved a right to appeal the trial court's ruling that defendant had forfeited his right to counsel, the order's unchallenged findings of fact provide ample support for its conclusion that defendant forfeited his right to counsel.

We dismiss defendant's appeal.

The order's findings establish that defendant demanded, and the trial court allowed, withdrawal of two attorneys appointed by the state and another whom defendant hired himself. Defendant's desire for three successive counsellors' withdrawal was due to his allegations that "his attorneys failed/refused to file motions he requested, failed/refused to provide discovery and/or go over it with him, and had conspired/was conspiring with the State to withhold exculpatory evidence and otherwise deprive Defendant of his constitutional rights." Defendant filed numerous pro se motions with the court, despite being informed that he could not do so while represented by counsel.

The trial court's findings clearly establish that defendant committed several willful actions that resulted in the absence of defense counsel and his right to counsel was perverted for the purpose of obstructing and delaying a trial. Therefore, the trial court did not abuse its discretion in determining that defendant forfeited his right to counsel.

State v. Fields (Lawyers Weekly No. 012-136-20, 6 pp.) (John Arrowood, J.) Appealed from Mecklenburg County Superior Court (Casey Viser & Gregory Hayes, JJ.) Mary McCullers Reece for defendant; Joseph Hyde for the state; N.C. App. Unpub.

Criminal Practice

Armed Robbery – Defendant's Car – Testimony & Subsequent Evidence

Defendant was charged with robbing a Subway and then a Taco Bell – where a witness saw his car. Even if the trial court erred by allowing a detective to testify about the car, the error was harmless because subsequent evidence included a video of defendant's police interview involving photos of the car and a jail phone call from defendant in which he indicated that, when he saw the pictures of the car, he thought, "Like, aw . . . you found me."

We find no prejudicial error in defendant's conviction of armed robbery.

Although defendant contends the state failed to prove he was the individual who made the jail phone call, the state presented evidence that defendant's identification number was used to make the call, and the contents of the call bore substantial similarity to the facts and procedural posture of defendant's case. Therefore, the trial court did not abuse its discretion when it admitted the phone call into evidence.

State v. Finley (Lawyers Weekly No. 012-137-20, 11 pp.) (Philip Berger, J.) Appealed from Mecklenburg County Superior Court (Casey Viser, J.) Scott Conklin for the state; Paul Smith for defendant. N.C. App. Unpub.

Criminal Practice

Search & Seizure – Consent to Search – Possession of a Firearm by a Felon

When a police officer responded to a call about a subject with a gun, defendant was the only occupant at the address in question. The officer asked, "Mind if we just walk through and make sure you ain't got no guns?" Defendant replied, "You can go wherever you wanna go," and later, "You can check whatever." Defendant thus voluntarily allowed officers to search his home.

The trial court did not err in denying defendant's motion to suppress the gun found in the search of defendant's home.

After obtaining consent, the officer said he would not flip anything over. Even if this statement could be construed as placing a limitation on the search, the officer did not flip anything over but merely swept aside clothing before seeing the barrel of a shotgun.

State v. Hairston (Lawyers Weekly No. 012-138-20, 6 pp.) (Reuben Young, J.) Appealed from Forsyth County Superior Court (Stanley Allen, J.) Jarrett McGowan for the state; Amanda Zimmer for defendant. N.C. App. Unpub.

N.C. BUSINESS COURT

Contract

Settlement Agreement – Enforcement – Payment Amount – Accountant's Determination

After a failed deal to transfer an auto dealership, the would-be purchaser is bound by the terms of the parties' settlement agreement; thereunder, an accountant's determination as to the amount of repayment due from the would-be seller is binding on the parties.

Defendants' motion to enforce the settlement agreement is granted.

Facts

The parties agreed that plaintiff would buy defendant's auto dealership, subject to the approval of General Motors. Plaintiff assumed the operation of the dealership for nine months, but GM rejected the deal.

The parties then entered into a settlement agreement—adopted by this court into a consent order—pursuant to which defendant would resume control of the dealership and pay plaintiff $1,006,000. That amount was to be adjusted pursuant to a determination by a mutually chosen accountant as to the amount of profit or loss at which plaintiff had operated the dealership.

The accountant determined that plaintiff had operated the dealership at a loss and reduced the amount due from defendant accordingly. Plaintiff refused to accept defendant's tender of the last (reduced) payment under the settlement agreement.

Analysis

First, as stated in the consent order, this court retains "jurisdiction of this action for consideration and disposition of any motion for violation of any term of this Consent Order."

The settlement agreement contains a merger clause indicating that the settlement agreement and its attachments constitute the parties' sole agreement. The settlement agreement also says the accountant's determination shall be binding.

The settlement agreement contains no numbers from which the preliminary settlement amount of $1,006,000 can be objectively reconstructed.

Plaintiff contends that the settlement agreement was intended to place it in status quo ante; however, language within the four corners of the settlement agreement does not compel an implication that a *status quo ante* was the basis of the bargain.

Furthermore, plaintiffs' argument is essentially that any other result is unfair. A court cannot grant relief from a contract merely because it is a hard one.

Contrary to plaintiff's suggestion otherwise, the accountant has not suggested that his report is in error or that he failed to follow the procedures defined by Section 5 of the settlement agreement when making his determination. He said just the opposite.

At best, the affidavits submitted by plaintiff suggest that its principals, when entering the settlement agreement, were mistaken as to what cash payments plaintiff would ultimately receive.

However, it is evident that, when the agreement was executed, the final cash payment had not been finalized. To the extent that plaintiff's principals were mistaken, there is no forecast that defendant improperly induced that mistake. The law affords plaintiff no relief based on a unilateral mistake.

Defendant has tendered the amount determined by the accountant, and plaintiff is entitled to no more.

GZO, LLC v. LKN, Inc. (Lawyers Weekly No. 020-010-20, 25 pp.) (James Gale, C.J.) Michelle Ledo for plaintiffs; Daniel Blue and Dhamian Blue for defendants. 2020 NCBC 10