NORTH CAROLINA CONFERENCE OF SUPERIOR COURT JUDGES

RECENT DECISIONS

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I. Liability

A. Motor Vehicles

The plaintiff in Pintacuda v. Zuckeberg, 159 N.C.App. 617, 583 S.E.2d 348 (2003), per curiam reversed, ___ N.C. ___, 593 S.E.2d 776 (2004) was operating a motorcycle. He was injured as he skidded to avoid hitting the rear of the defendant's vehicle. The plaintiff had been following the defendant's vehicle on I-240 in Asheville. He was riding under the speed limit and was at least three car lengths behind the defendant's vehicle. The plaintiff testified that as he came over the top of a hill, he saw the defendant's vehicle stop "instantaneously." The plaintiff applied his brakes, saw that the right lane was clear and swerved to avoid the defendant's vehicle. The plaintiff testified that he "skidded on something or hit the reflector marker." His motorcycle hit the pavement.

The trial court granted the defendant's motion for summary judgment. The Court of Appeals reversed on the basis that it could not be determined as a matter of law that the plaintiff's skidding was "an unforeseeable result of Mr. Zuckeberg's stopping his car unexpectedly on I-240." 583 S.E.2d at 350.

The Supreme Court reversed for the reasons stated in the dissenting opinion of Judge Timmons-Goodson. Judge

Timmons-Goodson would have affirmed the trial court's order granting the defendant's motion for summary judgment on the grounds that the independent action of the plaintiff was the cause of the accident.

> . . . when a plaintiff has become aware that potential dangers have been created by the negligence of another, and then "'by an independent act of negligence, brings about an accident,'" the defendant is relieved of liability, "'because the condition created by [the defendant] was merely a circumstance of the accident and not its proximate cause . . . . A review of plaintiff's testimony clearly places responsibility for the accident on him either "skidding on something" or hitting a lane reflector. Moreover, plaintiff's testimony reveals that he was aware of the potential danger created by defendant's accident, had sufficient time to apply his brakes, safely merge into a different lane, and in an independent act, failed to maintain control of his motorcycle. Therefore, it is clear that there was an independent cause, apart from defendant's collision, which resulted in plaintiff's sustaining injuries. 583 S.E.2d at 353-354.

The plaintiff in Overton v. Purvis, 154 N.C.App. 543, 573 S.E.2d 219, per curiam reversed, 357 N.C. 497, 586 S.2d 265 (2003) was fox hunting during the early morning hours of 7 September 1996. As the hunting dogs pursued a fox, the plaintiff realized that the dogs would be crossing Highway 222. The plaintiff drove to Highway 222 and stood in the westbound lane of travel as the dogs crossed. As the plaintiff stood in the middle of the westbound lane, the defendant approached in the lane driving west. The

plaintiff first saw the defendant’s truck when the truck was about 1000 feet to the east. Expecting the defendant to slow down, the plaintiff remained in the travel lane. When the defendant’s truck was about 100 to 150 feet away, the plaintiff realized that the defendant was not going to stop. The plaintiff ran into the eastbound travel lane. At the same time, the defendant swerved into the eastbound lane and struck the plaintiff.

The jury found that the defendant was negligent, the plaintiff was contributorily negligent and that the defendant had the last clear chance to avoid the injury. The Court of Appeals reversed on the basis that it was error to instruct the jury on last clear chance. The Court of Appeals reasoned that the plaintiff’s evidence did not establish that the plaintiff was in a position of peril from which he could not escape.

The Supreme Court reversed per curiam for the reasons stated by Judge Thomas in his dissenting opinion. Noting that the evidence established that the visibility and lighting at the point of impact were good, Judge Thomas concluded that the plaintiff acted reasonably in remaining in the westbound lane and attempting to attract the defendant’s attention.

> With defendant fast approaching, plaintiff attempted to extricate himself from danger by stepping out of defendant's path. He was much closer to the other lane of travel than the shoulder of the road. Thus, he acted reasonably in clearing defendant's path by stepping into the opposite lane of travel. Defendant, however, had continued to fail to maintain a proper lookout and, according to his testimony and the majority opinion, did not notice plaintiff in the road until "it was too late to stop to avoid hitting him." When defendant finally noticed plaintiff, he swerved into the opposite lane of travel and struck him. By staying in his own clear lane of travel, defendant could have avoided the accident. This evidence is sufficient to support a reasonable inference that plaintiff was in helpless peril from which he could not extricate himself <u>immediately preceding</u> the accident. Thus, the first element of last clear chance is met. 573 S.E.2d at 225.

Judge Thomas also concluded that the evidence established the third element of last clear chance; that the defendant had the time and means to avoid the accident by the exercise of reasonable care after he discovered the plaintiff's position.

> If defendant had maintained a proper lookout, he would have noticed plaintiff sooner and could have stayed in his own clear lane of travel at whatever speed, and avoided striking plaintiff. Further, the evidence, taken in the light most favorable to plaintiff, shows defendant did not apply his brakes until after he hit plaintiff. This evidence is sufficient to support a reasonable inference that, had he exercised reasonable care, defendant had the time and means to avoid the accident. 573 S.E.2d at 225.

On remand, <u>Overton v. Purvis</u>, ___ N.C.App. ___, 591 S.E.2d 18 (2004), the Court of Appeals addressed the

trial court's refusal to instruct on sudden emergency, denial of the plaintiff's motion for additure and the award to the plaintiff of attorneys' fees and costs. The Court held that the defendant had failed to show that the accident was not created by his own negligence.

> Here, defendant testified that he first saw the hunters' vehicles parked along the side of the road when he was approximately 500 feet away from the accident scene. Defendant also saw Jay Womble standing on the right side of the road, waving his arms "for [defendant] to stop." Although defendant could have stopped when he saw Jay Womble, he did not; instead, defendant "got over just a little bit," and proceeded on to the point where he ultimately struck plaintiff, who was standing in the road. In light of this evidence, we conclude that defendant failed to establish the second element required for an instruction on sudden emergency, i.e., that the emergency was not created by defendant's own negligence. 591 S.E.2d at 21.

The jury returned a verdict of $7,000. The plaintiff moved for additur pursuant to N.C.R.Civ.P. 59. The defendant consented to the plaintiff's motion by increasing the jury verdict to $10,546.05 and payment of pre- and post-judgment interest of $1,690.24 and costs of $2,439.61. The trial judge found the jury verdict "adequate" and denied the plaintiff's motion for additur. As a result of the jury verdict of $7,000, the trial court awarded the plaintiff attorneys' fees $32,120. The Court of Appeals held that the defendant had standing to appeal the trial

court's denial of the motion for additur because the defendant had "been directly and injuriously affected by the decision of the trial court," 561 S.E.2d at 22. Finding no abuse of discretion by the trial court in denying the motion for additur or in the amount awarded as attorneys' fees, the Court of Appeals affirmed.

The decedent in Headley v. Williams, ___ N.C.App. ___, 590 S.E.2d 443 (2004) was riding a motorcycle in a southeasterly direction in Watauga County on the evening of 29 November 1999. As the decedent rounded a curve in the road, he collided with a vehicle operated by the defendant. The decedent died as a result of injuries received in the accident. There were no eyewitnesses to the accident other than the defendant.

Mason had been driving behind the decedent before the accident and testified that the decedent was driving between 30 and 35 miles per hour and operating the motorcycle in a normal manner. After seeing flashing lights, Mason rounded the curve and saw the defendant's vehicle stopped in his lane of travel. The investigating highway patrolman testified about two gouge marks in the decedent's lane of travel. The highway patrolman noted that the defendant's driver's license required that she wear corrective lenses. The defendant said that she had

been wearing contact lenses, but had "cried one out." The defendant did not have a contact lens in either eye. The defendant's optometrist testified that he had prescribed contact lenses for the defendant in 1996, but that she had never returned to pick up the lens.

The trial court granted the defendant's motion for a directed verdict. The Court of Appeals reversed. Taking the evidence in the light most favorable to the plaintiff: (1) the testimony of Mason and the highway patrolman showed that the accident happened in the decedent's lane of travel; and (2) the defendant was not wearing required corrective lenses at the time of the accident.

The trial court had bifurcated liability and damages. Although the decision to bifurcate is within the discretion of the trial court, the Court suggested that if bifurcation is ordered then findings of fact and conclusions of law should be entered "which clearly establish that severance is appropriate." 590 S.E.2d at 448.

The defendant in Dunn v. Custer, ___ N.C.App. ___, 591 S.E.2d 11 (2004) admitted liability in causing the automobile accident on 28 July 2000 that produced the plaintiff's injuries. The jury awarded the plaintiff $310,000 in damages. The plaintiff had been a licensed dentist from 1973 to 1997. Multi-level degenerative

cervical disk disease required the plaintiff to sell his dental practice in 1997. The plaintiff then worked part-time with the Buncombe County Health Department Dental Facility and was still working with the Health Department at the time of the accident. In the summer of 2000, the plaintiff was offered a part-time position with Dr. Teague, a dentist in private practice. The plaintiff had received his first pay check of $1,200 the day before the accident. Dr. Teague was riding with the plaintiff at the time of the accident. At trial, Dr. Teague was permitted to testify over objection about the force of impact and the injuries he received in the accident.

The Court of Appeals affirmed the jury verdict for the plaintiff. The defendant contended that evidence about the plaintiff's prospective employment with Dr. Teague was speculative and improperly incorporated into the opinions of the plaintiff's economic expert, Dr. Shirley Browning. Noting the testimony of Dr. Teague about the financial agreement concerning the plaintiff's income, the Court of Appeals disagreed and held that this testimony was admissible and properly a part of the expert's opinions.

> Thus, in formulating his expert opinion, Dr. Browning used "opportunity cost" as an indicator that plaintiff would not leave his present employment with the health department for a lesser-paying job. Based upon that assumption,

> Dr. Browning used plaintiff's earnings and work history with the health department as a baseline for determining plaintiff's loss of earnings.
>
> Moreover, Dr. Browning explicitly testified that his opinion was based upon plaintiff's earnings from the health department and that he did not consider "in any way" the new opportunity plaintiff may have had with Dr. Teague's private practice in the analysis he submitted. Defendants have not challenged the methodology by which Dr. Browning formulated his opinion.
>
> We conclude that evidence about plaintiff's employment with Dr. Teague: (1) was not impermissibly presented to the jury, and (2) did not improperly factor into the expert opinion elicited from Dr. Browning. 591 S.E.2d at 16.

The trial court ruled that evidence of Dr. Teague's injuries were relevant to the force of the impact that injured the plaintiff. When considering a similar issue in Griffis v. Lazaronich, ___ N.C.App. ___, 588 S.E.2d 918 (2003), the Court held that the plaintiff had failed to show abuse of discretion by the trial court in refusing to admit evidence of injuries by an occupant in the same vehicle. Applying the standard of appellate review, the Court held that the trial court in the present case did not abuse its discretion in admitting the evidence of Dr. Teague's injuries.

> Accordingly, applying deferential review to the instant case, we hold that the trial court did not err in admitting the contested testimony for the limited purpose of proving the force of the impact which injured plaintiff, and, further, the trial court did not abuse its discretion in

> failing to exclude it pursuant to Rule 403. 591 S.E.2d at 17.

The decedent in Sharp v. CSX Transportation, Inc., ___ N.C.App. ___, 584 S.E.2d 888 (2003) was operating a fire truck owned by the City of Fayetteville and returning to the fire station. As the decedent approached a railroad crossing on Cumberland Street, a locomotive owned by CSX had stopped at the crossing, causing the crossing gate to descend across the roadway. It was widely known in Fayetteville that CSX had a practice of stopping trains at crossings for extended periods of time and causing the crossing gates to remain descended during that period. After the decedent waited at the crossing without the train moving, he began to cross the tracks. Because his view of the opposite tracks was obscured by the train, he did not see an approaching Amtrak train. The Amtrak train collided with the fire truck resulting in the decedent's death.

The trial court granted the defendant's motion to dismiss pursuant to Rule 12(b)(6) on the grounds that the complaint established the decedent's contributory negligence as a matter of law. The Court of Appeals reversed. Acknowledging the duty imposed by G.S. § 20-142.1 prohibiting a person from driving around a crossing gate, the statute provided that a violation of that section

"shall not constitute negligence per se." Since a violation of the statute would not establish the decedent's contributory negligence as a matter of law, driving around the crossing gate was a factor to be considered by the jury in determining whether the decedent was contributorily negligent.

> The fact that Mr. Sharp bypassed the crossing gate in violation of the statute is evidence that may be considered, together with all of the other facts and circumstances, in deciding whether Mr. Sharp breached his common law duty of exercising ordinary care. . . . Similarly, the fact, standing alone, that Mr. Sharp did not yield the right of way to the oncoming Amtrak train does not establish his negligence as a matter of law at the motion to dismiss stage. 584 S.E.2d at 890.

The plaintiff in Williams v. Davis, 157 N.C.App. 696, 580 S.E.2d 85 (2003) was entering University Parkway from the Holiday Inn in Winston-Salem at 9:30 p.m. when his vehicle was struck by the defendant's vehicle. The plaintiff contended that the defendant was negligent in failing to operate the headlights on her vehicle after sunset. The trial court granted the defendant's motion for a directed verdict based on the plaintiff's contributory negligence. The Court of Appeals affirmed.

> In the present case, there is no conflict in the evidence to be resolved by the jury. The evidence taken in the light most favorable to plaintiff shows that: plaintiff stopped at the stop sign, looked left and then right down

> University Parkway; plaintiff failed to look at the exit ramp; Janae Davis was traveling slightly faster than the forty-five miles per hour speed limit on University Parkway; although Janae Davis might not have had her headlights burning, there was sufficient light for plaintiff to see the vehicle operated by Janae Davis approaching the intersection ["the Nissan dealership was 'lit up like a Christmas tree' and that there was an 'awful lot of light out on that roadway' at the time of the collision."]; and plaintiff pulled out onto University Parkway in front of the vehicle operated by Janae Davis when a reasonable person should have seen it was unsafe to enter the intersection. . . . The evidence was sufficient to support the trial court's conclusion that plaintiff was contributorily negligent as a matter of law. 580 S.E.2d at 89.

The defendant's vehicle in Horne v. Vassey, 157 N.C.App. 681, 579 S.E.2d 924 (2003) struck the rear of the plaintiff's vehicle. The nature of the impact and the relationship of the impact to the plaintiff's injuries were contested at trial. The plaintiff's neurologist, Dr. Rudolph Maier, was of the opinion that the plaintiff had a ten percent permanent disability to her entire body as a result of the accident. The plaintiff admitted that she suffered from "numerous medical problems" and that she had been diagnosed with chronic pain syndrome several months before the accident. During cross-examination of the plaintiff, she identified four photographs of her car and agreed that the photographs had been taken the day after the accident before her car was repaired. Although

she also agreed that the photographs accurately reflected her vehicle, she disagreed that there was no damage after the impact. Additionally disputing the photographs, she testified that there was more damage to the bumper and trunk than shown in the photographs. The trial judge admitted the photographs over the plaintiff's objection. The jury awarded no damages, and the trial judge denied the plaintiff's motion for a new trial.

The Court of Appeals affirmed. The Court agreed that the trial judge had properly admitted the photographs of the plaintiff's vehicle.

> Testimony that the exhibit is a fair and accurate portrayal of the scene at the time of the accident is ordinarily sufficient to authenticate the exhibit. . . . In the instant case, plaintiff verified that the photographs depicted her vehicle, and that the photographs were made the day after the accident. She further stated she did not have the car repaired the same day as the accident. Plaintiff agreed that Exhibit 1-C, depicting the passenger-side of her vehicle, accurately showed the damage to the automobile. Plaintiff also testified that Exhibit 1-D was an accurate representation, with the exception of alleged damage to the trunk of the automobile. We conclude that the trial court did not abuse its discretion in admitting the photographs. Defendant clearly established that the photographs were of plaintiff's vehicle, and that they were made the day following the accident. Although plaintiff disputed the accuracy of the damage to her vehicle as portrayed in the photographs, such dispute was a matter of the weight to be accorded the exhibits, not their admissibility. 579 S.E.2d at 927-928.

Although the plaintiff introduced evidence that she had incurred medical bills of $9,005 as a result of the accident and the defendant did not offer medical evidence, the Court of Appeals affirmed the trial court's order denying a new trial based on the failure of the jury to award damages to the plaintiff.

> Although defendant presented no expert testimony to contradict the testimony of Dr. Maier, cross-examination revealed that Dr. Maier relied entirely upon plaintiff's statements to him concerning her medical history and her description of the collision in forming his medical opinion of the source and extent of plaintiff's injuries. Dr. Maier also testified that "it would be very hard to sustain a significant injury" in an accident where the rate of speed of impact was five miles per hour or less. Defendant testified that she was traveling at a rate no greater than one to two miles per hour when she "rolled into" plaintiff's automobile. Further cross-examination revealed that plaintiff suffered from a multitude of pre-existing medical problems, and that two physicians who examined plaintiff's neck following the accident found it to be supple and with a full range of motion. As credibility of the evidence is exclusively for the jury, "it was well within the jury's power to minimize or wholly disregard the testimony given by Dr. Maier. . . . . We therefore hold that the trial court did not abuse its discretion in denying plaintiff's motion for a new trial, and we overrule this assignment of error. 579 S.E.2d at 928-929.

B. Premises

The plaintiff in Barringer v. Mid Pines Development Group, L.L.C., 152 N.C.App. 549, 568 S.E.2d 648 (2002), per

curiam reversed, 357 N.C. 451, 584 S.E.2d 807 (2003) was attending an employment related workshop at the Mid Pines Inn and Golf Club. A buffet lunch was provided at the Terrace Room of the Inn. Mr. Barringer initially visited the buffet table to make a sandwich and salad. He returned to the buffet table for fruit. As he turned to walk back to his table, he tripped over an electrical cord connecting a crock pot on the buffet table to an electrical outlet. At trial, the plaintiff requested the following jury instruction on diverted attention.

> A plaintiff may be contributorily negligent if he fails to discover and avoid a defect that is visible and obvious. However, this rule is not applicable where there is some fact, condition or circumstance which would or might divert the attention of an ordinarily prudent person from discovering or seeing an existing dangerous condition. 568 S.E.2d at 650.

The trial court refused to give the instruction. The jury determined that the plaintiff was contributorily negligent and did not award damages. The Court of Appeals reversed on the basis that the plaintiff's requested instruction was correct and "that the defense of contributory negligence cannot be asserted where the defendant diverted the plaintiff's attention, preventing the visitor from discovering the obvious hazard." 568 S.E.2d at 651.

The Supreme Court reversed per curiam for the reasons stated in the dissenting opinion of Judge Tyson.

> The majority's opinion adopts plaintiff's argument that "the 'doctrine of diverted attention' has been used to mitigate the 'harshness' of contributory negligence." Neither plaintiff nor the majority's opinion cite any case or any other authority for the proposition that a "doctrine" of diverted attention exists. . . . The claimed "doctrine" is nothing more than a detailed explanation of the duty of ordinary care in varying circumstances and situations. . . . The requested instruction is not an accurate statement of the law. Plaintiff's assertion is that the rule of negligence does not apply when a party's attention is diverted. The question of whether a party acted as "an ordinary prudent person" always applies when determining whether a person was negligent. Plaintiff's notion that that rule of an ordinary prudent person "is not applicable" misstates and is not a "fair statement of the law" as the majority holds. The jury must consider all the facts and circumstances in order to determine whether a party's actions fell below those of an ordinary prudent person. The jury may not ignore, or fail to apply, the rule of contributory negligence as requested by plaintiff. 568 S.E.2d at 655-656.

The majority opinion in the Court of Appeals decision also held that the trial court had erred in admitting evidence of the plaintiff's Minnesota Multiphasic Personality Inventory (MMPI). Dr. Edmundson, the plaintiff's primary care physician, was cross examined by the defense about the MMPI and the interpretation of the MMPI by Dr. Crovitz, a non-testifying witness. The basis of the Court of Appeals decision excluding the MMPI

testimony was that there was no evidence that the test was properly administered, no testimony about whether the analysis was temporary or permanent and that the results of the MMPI were admitted for the truth of the matters in the test. The Court of Appeals also specifically rejected the defendant's argument that the MMPI was admissible under Rule 803(6).

Judge Tyson's dissent, adopted by the Supreme Court, reasoned that the MMPI was admissible under Rule 803(6).

> Rule 803(6) now controls the admission of records of a regularly conducted activity at trial . . . . Under Rule 803(6), medical records may be admissible when there is an affidavit from a custodian of the records which shows that the record was made at or near the time of the evaluation, that the record was created by a person with knowledge, and the record was kept in the ordinary course of business.
>
> Here, the record shows that defendant fully complied with all of the requirements of North Carolina Rule of Evidence 803(6), Records of Regularly Conducted Activity. Plaintiff was afforded the opportunity to depose the author of the report and subpoena her to appear at trial. Plaintiff declined all of the above. Medical records are not "cross-examined," people are. There is no evidence in the record that plaintiff was unfairly surprised by the information elicited by defendant from plaintiff's witness on cross-examination. 568 S.E.2d at 657.

The plaintiff in Nelson v. Novant Health Triad Region, 159 N.C.App. 440, 583 S.E.2d 415 (2003) was employed by a company that copied medical records. On 29 September 1998,

the plaintiff was at Forsyth Memorial Hospital as part of her employment. In order to get to the area of the medical records, the plaintiff walked down a hall past the hospital dishwashing room. She testified that as she walked down the hall, the floor was "shiny and buffed" and had a "glassy appearance." As she attempted to pass through the hall, she encountered trays and tray carts across the hall. She fell and injured her right knee. While she was in the emergency room, she noticed that the back of her dress was wet.

The jury determined that the plaintiff was injured as a result of the defendant's negligence, the plaintiff was not contributorily negligent and awarded $14,500. The Court of Appeals held that the trial court had correctly denied the defendant's motion for a directed verdict, finding sufficient evidence of negligence to submit to the jury and holding that the plaintiff was not contributorily negligent as a matter of law.

> . . . plaintiff states she was not aware of the slippery condition of the floor and, even if she had looked at her feet, the film of water on the shiny linoleum floor would have been impossible to see. Plaintiff neither admits to being fully aware of the dangerous condition of the hall nor acknowledges that she would have seen the water if she had looked. Therefore, the dangerous condition was not open and obvious as a matter of law. Summary judgment and directed verdict are inappropriate. . . . plaintiff argues that it

> was reasonable for her to look ahead down the hall to avoid the trays, carts and other debris instead of directly at her feet because she was concerned for and acting to protect her own safety. The decision as to whether looking ahead to navigate the debris in the hall was more or less reasonable than looking down at the floor is a question of fact to be determined by the jury. . . . Summary judgment and directed verdict were therefore properly denied. 583 S.E.2d at 418-419.

The defendant church in Clontz v. St. Mark's Evangelical Lutheran, 157 N.C.App. 325, 578 S.E.2d 654, review denied, 357 N.C. 249, 582 S.E.2d 29 (2003) held its annual Halloween festival at a farm owned by Allen Sloop. As part of the festival, a hayride was organized for members of the church and their guests. A flatbed trailer was pulled through the woods at the farm by a tractor operated by Harry Sloop. The plaintiff was not a member of the church, but was invited to stand in the woods "making scary noises." As the last hayride passed Ms. Clontz, she noticed that a child appeared to be falling from the trailer. When Ms. Clontz attempted to help the child, Ms. Clontz fell under the trailer and was dragged for a distance, producing extensive and permanent injuries.

Suit was brought against St. Mark's, Allen Sloop and Harry Sloop, alleging claims for negligence, premises liability, negligent supervision and negligent infliction

of emotional distress. The trial court granted the 12(b)(6) motions of St. Mark's and Allen Sloop.

Acknowledging that the appeals of St. Mark's and Allen Sloop were interlocutory because the dismissal did not apply to the third defendant, Harry Sloop, the Court of Appeals held that the order of dismissal affected a substantial right.

> Because the dismissal was granted in favor of Allen Sloop and St. Mark's before the final resolution of Clontz's action against Harry Sloop, the right to try the issues of liability as to all parties before the same jury as well as the right to avoid inconsistent verdicts in separate trials are implicated. Clontz's appeal is properly before the Court. 578 S.E.2d at 657.

The Court held that the claims of premises liability as to St. Mark's and Allen Sloop were properly dismissed because the allegations of negligence related only to the lack of reasonable care in the operation of the tractor and trailer.

> Hazards relating only to an activity and existing separate and apart from the condition or maintenance of property do not give rise to a claim of premises liability. 578 S.E.2d at 658.

Claims alleging violation of G.S. § 20-135.2(B) prohibiting transportation of children under the age of twelve in the open bed of a vehicle did not apply because statutory liability required operation of the vehicle on a highway. Since the activities alleged to be negligent

occurred on the Sloop farm, the operation of the vehicle was not governed by the statute. As to the remaining claim alleging negligent supervision of children, the Court held that sufficient facts were alleged relating to the entrusting of children to the church on the hayride to survive the motion to dismiss.

II. Insurance

A. Motor Vehicles

State Farm Fire and Casualty Co. v. Darsie, ___ N.C.App. ___, 589 S.E.2d 391 (2003), petition for discretionary review denied, ___ N.C. ___, 594 S.E.2d 194 (2004), was a declaratory judgment action to determine coverage limits for an automobile accident involving State Farms insureds on 29 October 1996. The insureds, Mr. and Mrs. Leinfelders, had carried homeowners and automobile insurance with State Farm since 1984. Mr. High was the State Farm agent for the Leinfelders during this period. Before 1994, the Leinfelders had automobile insurance with State Farm with limits of $500,000 per person for liability and UM/UIM. As a result of a solicitation by Mr. High in 1994 for the Leinfelders to conduct a “check-up” of their coverage, the automobile coverage was then reduced to limits of $100,000/$300,000. A separate $1 million Personal Liability Umbrella Policy was purchased at the

same time. The Umbrella Policy, however, had a first-party or "intra-family" exclusion. The exclusion applied to claims against an insured by a spouse or named insured.

The Leinfelders were involved in an automobile accident on 29 October 1996. As a result of the accident, Mr. Leinfelder was killed, and Mrs. Leinfelder received serious injuries requiring medical treatment costing more than $500,000. The accident was caused by the negligence of Mr. Leinfelder. Mrs. Leinfelder filed suit against her husband's estate on 5 October 1999. State Farm contended that the limit of liability was $100,000 and that coverage was excluded under the Umbrella policy due to the "intra-family" exclusion.

State Farm filed the present declaratory judgment action on 4 February 2000. Mrs. Leinfelder counterclaimed on 8 March 2000 denying that the State Farm coverage was limited and alleging that the "intra-family" exclusion was void as against public policy. After discovery, Mrs. Leinfelder was allowed to amend her counterclaim on 10 May 2001 to allege fraudulent misrepresentation and equitable estoppel. The trial court allowed State Farm's motion for partial summary judgment and held that the "intra-family" exclusion applied. In a trial without a jury, the trial court found that the statute of limitations

on the claims alleging fraud had not run and that Mrs. Leinfelder was entitled to reformation of the Umbrella policy.

The Court of Appeals reversed, holding that the statute of limitations for fraud had run at the time Mrs. Leinfelder amended her counterclaim. The Court first addressed the issue of whether the 10 May 2001 amended counterclaim alleging fraud related back to the time the counterclaim was originally filed on 8 March 2000. The Court concluded that the fraud counterclaim did not relate back because the original counterclaim did not contain sufficient allegations of fact about the transactions to put State Farm on notice of the subsequently-alleged fraudulent conduct.

> . . . when a party seeks to relate back a claim with specialized pleading requirements, fairness to defending parties requires more particular notice in the original pleading as to the transaction or occurrence to be proved in the amended pleading. In this case, Mrs. Leinfelder first alleges false or negligent misrepresentation by State Farm Agent Mr. High in her amended counterclaim. A claim of fraud must allege all material facts and circumstances constituting fraud with particularity. . . . The amended counterclaim alleges the fraud occurred during the procurement of Mrs. Leinfelder's insurance policy. However, in her original counterclaim she avers no elements of fraudulent conduct on the part of State Farm or its agent Mr. High (who is not mentioned once in the entire original counterclaim). . . . We conclude these claims for relief do not sufficiently give notice

> of the transactions, occurrences, or series of transactions or occurrences, of the alleged fraudulent conduct in the amended counterclaim. . . . Therefore, we hold the amended date does not relate back to 8 March 2000, and is deemed filed 10 May 2001. 589 S.E.2d at 396.

The Court next addressed the issue of whether the statute of limitations for fraud was tolled during the three years preceding the filing of the amended counterclaim. The Court again noted that the claims of fraud, equitable estoppel and reformation were not filed until the amended counterclaim on 10 May 2001. The findings of fact by the trial court "excused" Mrs. Leinfelder from discovery of the terms of the Umbrella policy at the time it was issued and until the accident in October 1996. Because State Farm raised the statute of limitations, the burden was on Mrs. Leinfelder to "excuse the statutory bar." The Court of Appeals held that Mrs. Leinfelder had failed to carry that burden.

> Based on the uncontradicted evidence in the record set out below, we hold as a matter of law that an otherwise reasonable time to discover fraud or misrepresentation in the PLUP policy was when the policy itself required certain claims, such as an accident, be brought to the attention of the insurer for the purposes of determining coverage. . . . We charge Mrs. Leinfelder with due diligence at least sometime within a year of the accident. We next conclude there is no evidence of record that Mrs. Leinfelder lacked opportunity and capacity to inquire into her coverage under the policy at all times after the accident and before the three years preceding her

> counterclaims dated 10 May 2001. By making immediate inquiry into her coverage, through her attorney-in-fact, Mrs. Leinfelder was exercising reasonable diligence as to discovery of any fraud in the procurement of her policy. We charge her with discovery of the fraud sometime within a year of the accident, or at least by 29 October 1997. Therefore, without more, her claim of May 2001 came too late. 589 S.E.2d at 399,401.

B. UM/UIM

Purcell v. Downey, ___ N.C.App. ___, 591 S.E.2d 556 (2004) was a declaratory judgment action to determine whether underinsured coverage was available to the plaintiffs arising out of an accident on 29 June 1997. The plaintiffs were injured when their motorcycle was struck by a vehicle operated by Downey. Downey's liability carrier paid its limits of $100,000 to each of the plaintiffs. At the time of the accident, the plaintiffs had two automobile insurance policies with State Farm Mutual Automobile Insurance Company. Policy One insured three automobiles and had UIM limits of $100,000/$300,000. Policy Two insured the motorcycle involved in the accident and had liability limits of $25,000/$50,000. The trial court ruled that the two State Farm policies should be aggregated or stacked. Accepting the plaintiffs' allegations, the total UIM coverage would be $125,000/$350,000 resulting in payment to the plaintiffs of an additional $50,000 or $25,000 each.

The Court of Appeals reversed. Policy Two, the policy covering the motorcycle had liability coverage limits equal to the statutorily required minimum amount of $25,000/$50,000 pursuant to G.S. § 20-279.21(b)(4). There was, therefore, no UIM coverage available under Policy Two, and stacking did not apply.

> We hold that because Policy Two is a minimum limits policy which by its terms was not "written at limits that exceed" the minimum financial responsibility amounts set for by Section 20-279.21(b)(2), Section 20-279.21(b)(4) mandates that as a matter of law, UIM coverage is not available to plaintiffs under Policy Two. Consequently, we conclude that there is no additional UIM coverage available to be stacked with the $100,000 of UIM coverage provided to each plaintiff by Policy One which is equal to the amount already paid to each plaintiff under the tortfeasors's exhausted liability policy. 591 S.E.2d at 559.

The decedent, Jacqueline Polk, in Polk v. Andrews, ___ N.C.App. ___, 587 S.E.2d 510 (2003), petition for discretionary review denied, ___N.C.___, 594 S.E.2d 34 (2004), was a passenger in a vehicle operated by Mr. Polk. On 12 April 2000, Mr. Polk's vehicle collided with a truck owned by Lemons Backhoe and operated by its employee, Andrews. The decedent died as a result of injuries received in the accident. At the time of the accident, Mr. Polk and his vehicle were uninsured. Suit was instituted on 8 December 2000 against Lemons, Andrews and

Polk. On 12 June 2002, the plaintiff sent notice to Atlantic Insurance Company, the uninsured motorist carrier for the decedent, giving notice of the lawsuit and the intent of the plaintiff to seek UM benefits. On 28 June 2002, Atlantic, as an unnamed defendant, and, on behalf of Polk, filed a motion to dismiss based on lack of jurisdiction, insufficiency of process and expiration of the statute of limitations. On 3 July 2002, Atlantic was served with a copy of the summons and complaint. The trial court dismissed the action as to Atlantic.

The Court of Appeals affirmed dismissal of the claims against Atlantic. Relying upon Liberty Mutual Insurance Co. v. Pennington, 356 N.C. 571, 573 S.E.2d 118 (2002) and noting the differences between actions against UM and UIM carriers in N.C.G.S. § 20-279.21(b)(3)(a), the Court held that UM carriers must be served with a copy of the summons and complaint within the period of the statute of limitations governing the underlying tort.

> Under the statute, after an insured has served an uninsured motorist carrier with a copy of a summons, complaint, or other process, the carrier becomes a party to an action between the insured and the UM and is permitted to defend the suit in its own name or the name of the uninsured motorist. N.C.G.S. § 20-279.21(b)(3)(a). In requiring the UM carrier to be included in the underlying tort action, the legislature intended to subject the insured's action against the carrier to the statute of limitations for the

> tort claim. . . . In the instant case, plaintiff's daughter died as a result of an accident on 12 April 2000. Atlantic, plaintiff's UM carrier, was served with a copy of the summons and complaint of the underlying wrongful death action on 3 July 2002, well after the two-year statute of limitations for the action had run. . . . Consequently, Atlantic cannot be made a defendant, and the trial court properly dismissed plaintiff's action against Atlantic. 587 S.E.2d at 511-512.

The plaintiff in Register v. White, 160 N.C.App. 657, 587 S.E.2d 95, petition for discretionary review granted, 358 N.C. 155, 590 S.E.2d 862 (2003) was injured on 30 June 1998 while riding as a passenger in an automobile operated by White. Suit was filed against White. On 8 August 2001, White's liability carrier tendered its full limit of $50,000 to the plaintiff. On 24 September 2001, the plaintiff demanded arbitration with her underinsured motorist carrier, North Carolina Farm Bureau Insurance Company. The trial court denied the plaintiff's motion to compel arbitration as being untimely, and, also, on the grounds that the plaintiff had waived her right to arbitration.

The Court of Appeals reversed. Addressing first the issue of when the right to demand arbitration arose, the Court noted a conflict between the Farm Bureau policy and N.C.G.S. §20-279.21(b)(4). G.S. § 20-279.22(b)(4) states that an insured may seek UIM coverage only after the

liability policy has paid its full limits. The Farm Bureau policy stated that a demand for arbitration must be made within the time limits allowed for bodily injury or death actions. The Court held that the right to demand arbitration against a UIM carrier did not arise until the liability carrier had paid its limits.

> We hold a UIM insured's right to demand arbitration arises when the liability carrier has offered a settlement exhausting its coverage, and only once this right has arisen may the time limitation for demanding arbitration commence. Applying this rule to the case at bar, plaintiff's right to demand arbitration did not arise when she was injured on 20 June 1998, but rather arose on 8 August 2001, and therefore she timely demanded arbitration on 24 September 2001. 587 S.E.2d at 98.

Applying similar reasoning, the Court held that the plaintiff had not waived her right to arbitration by initiating the present action and pursuing the litigation until the liability carrier had tendered its limits.

> However, the suit was necessary for plaintiff to enforce her rights against the liability insurer, and Farm Bureau voluntarily exercised its right to appear in the lawsuit. . . . In the case at bar, following the liability carrier's settlement, plaintiff promptly ceased pursuing litigation and demanded arbitration of her UIM coverage pursuant to her contract with Farm Bureau. Therefore, we find plaintiff in no way acted inconsistently with her right to arbitration. 587 S.E.2d at 99.

Austin v. Midgett, 159 N.C.App. 416, 583 S.E.2d 405 (2003) was an action to recover underinsured benefits

arising out of an automobile accident on 25 October 2000. Austin was killed in the accident when he was struck by a vehicle operated by Midgett. Austin was in the course and scope of his employment with the North Carolina Department of Transportation at the time of the accident. Midgett was insured by North Carolina Farm Bureau Mutual Insurance Company at the time of the accident with limits of $50,000. At the time of the accident, Austin was covered by two underinsured policies, one issued by Integon and the other by State Farm. Both underinsured policies had limits of $100,000 per person. Workers' compensation benefits of $100,278.98 were paid to Austin's estate.

Austin's estate and DOT compromised the compensation lien with DOT agreeing to accept $33,426 in satisfaction of its lien. The plaintiff accepted the payment of $50,000 from Farm Bureau. The parties stipulated that Midgett's negligence was the sole cause of the accident causing Austin's death and that the damages sustained by the Austin estate were in excess of $200,000. The trial court entered judgment that Integon and State Farm pay $75,000 each, representing their limits of $100,000, then receiving a credit of $25,000 each from the payment made by Midgett's liability carrier. The trial court denied the UIM carriers any credit for the workers' compensation payments. The

trial court also denied the plaintiff's request for prejudgment interest from the UIM carriers.

The Court of Appeals reversed and remanded. The UIM policies did not exclude the payment of prejudgment interest from the payment of compensatory damages. However, since the liability of the UIM carriers was only $75,000 - the limit of liability established by the trial court - the UIM carriers could not be required to pay prejudgment interest over the $75,000 liability limit found by the trial court.

The Integon and State Farm UIM coverages stated that any amounts payable would be reduced by sums payable under workers' compensation law. The applicable version of G.S. § 20-279.21(e) required the UIM carrier to pay both the amount of the workers' compensation lien under G.S. § 97-10.2(j) and the loss not compensated by workers' compensation.

> N.C.Gen.Stat. § 20-279.21(e) was amended by the General Assembly in 1999 through legislation . . . requir[ing] UIM carriers to insure the amount of the employer's workers' compensation lien on UIM proceeds received by the employee in addition to the damages uncompensated by workers' compensation benefits. . . . Thus, the current version of N.C.Gen.Stat. § 20-279.21(e) preserves a credit to the UIM carrier for workers' compensation benefits which are not subject to an employer's lien. 583 S.E.2d at 408-409.

Thus, the UIM carriers would be responsible for $33,426.00, the amount as a result of the settlement with the workers' compensation carrier, plus the amount not compensated by workers' compensation.

> As we have explained, N.C.Gen.Stat. § 20-279.21(e) requires the UIM carrier to pay both the amount of the workers' compensation lien as determined by N.C.Gen.Stat. § 97-10.2 and the loss uncompensated by workers' compensation payments. In the instant case, Integon and State Farm would be liable for the workers' compensation lien determined under N.C.Gen.Stat. § 97-10.2(j), $33,426, plus the amount of the loss left uncompensated by the amount of workers' compensation benefits. 583 S.E.2d at 409.

The Court of Appeals determined that the plaintiff's uncompensated loss was $200,000, less the amount of workers' compensation benefits of $100,278.98, producing a total of $99,721.01. The compensation lien of $33,426.00 would be added for a total of $133,147.02. The Integon policy contained an "other insurance" provision stating that if other insurance were available, Integon would pay its share of the loss. "Share of the loss" was defined in the policy as the proportion that the limit of liability bore to the total of the applicable limits. Since Integon's $100,000 limit of liability was one-half of the $200,000 aggregate liability, Integon was responsible for one-half of the plaintiff's loss.

> Prorating the total liability, Integon and State Farm each are liable for one-half of $133,147.02, or $66,573.51 each. Since Integon and State Farm are entitled to a credit for the liability proceeds received by plaintiff, the applicable UIM coverage for each carrier is the coverage limit of $100,000 less the credit for liability proceeds, $25,000 each, or $75,000. Thus, we hold Integon must pay plaintiff $66,573.51 under its UIM coverage together with any accrued prejudgment interest up to its $75,000 limit of liability. 583 S.E.2d at 410.

The defendants in Erie Insurance Exchange v. Miller, 160 N.C.App. 217, 584 S.E.2d 857 (2003) signed a private automobile application for insurance with Erie on 12 January 1998. The application was on a two-page form with numbered boxes applying to information requested and coverages. Box 17 on the second page of the form was entitled "Selection/Rejection Form Uninsured Motorists Coverage Combined Uninsured/Underinsured Motorists Coverage." The defendants checked box 17, indicating that UM/UIM coverage was rejected. The defendants were involved in an automobile accident on 27 March 1998. Based on the Millers answer to box 17, Erie denied UIM benefits. The trial court granted Erie's motion for summary judgment finding no UIM coverage.

The Court of Appeals reversed based on Erie's failure to provide a separate form for rejection of UIM/UM coverage that had been approved by the Commissioner of Insurance

even though the language in box 17 was identical to the language approved by the Commissioner of Insurance.

> Erie first contends that its rejection complies with N.C.Gen.Stat. § 20-279.21 because it uses the same words as the promulgated form and because the statute does not require that the rejection be in a separate document. This argument disregards the plain language of the statute. The statute requires that the rejection be "on a form promulgated by the Bureau." The Bureau created and the Commissioner of Insurance approved form NC 01 85 (Ed. 7-91). The Millers' rejection is not on the form promulgated by the Bureau, but rather is included in box 17 on an unrelated application form created by Erie. Nothing in the statute or in any administrative ruling authorizes an insurer to merge an unrelated form with the approved Rate Bureau selection/rejection form. . . . Erie bore the burden of establishing the validity of the Millers' rejection of coverage. . . . Here, Erie offered no evidence that the Rate Bureau or the Commissioner of Insurance has authorized it to include the rejection/selection form in its application or to print it in tiny type. As Erie has failed to show that its modification of the Rate Bureau form was authorized or approved, it has failed to establish that the Millers validly rejected UIM coverage. ___S.E.2d at ___.

Farm Bureau Insurance Company of N.C., Inc. v. Blong, 159 N.C.App. 365, 583 S.E.2d 307, petition for discretionary review denied, 357 N.C. 578, 589 S.E.2d 125 (2003) arose out of an automobile accident on 6 April 1999 in which a vehicle operated by Ms. Marvin struck a vehicle occupied by Ms. Blong and four others. Ms. Blong was killed as a result of injuries received in the accident. Ms. Marvin had been drinking at two bars for a period of

three hours before the accident. Immediately after the accident, her blood alcohol level was .21. Ms. Marvin's automobile liability insurance carrier paid its limits of $50,000 to the occupants of the Blong vehicle immediately after the accident. At the time of the accident, each of the occupants of the Blong vehicle had UIM coverage. One of the other decedents, Ms. Lawler, was insured by Farm Bureau with UIM limits of $100,000/$300,000. Suit was filed against Ms. Marvin, causing Farm Bureau to pay its limits of $250,000 to the deceased and injured occupants of the Blong vehicle.

The occupants of the Blong vehicle filed two separate dram shop suits against the bars providing alcohol to Ms. Marvin. The dram shop suits were settled through court-ordered mediation. Farm Bureau filed the present action to be subrogated to the recoveries received as a result of settlement of the dram shop suits. The trial court granted judgment for Farm Bureau allowing it to be subrogated to the recoveries from the dram shop. The trial court also ordered that Farm Bureau pay its percentage of the attorney's fees and expenses related to these recoveries.

The Court of Appeals affirmed. The UIM provisions of the Financial Responsibility Act, G.S. § 20-279.21(b)(4), make the uninsured sections of the Act, G.S. § 20-

279.21(b)(3), applicable to UIM claims. (b)(3) provides that the insurer making payments is entitled to the proceeds of any settlement relating to the injury for which payment was made. The UIM policies at issue also provided that any amounts payable "shall be reduced" by the amounts paid by persons or organizations responsible.

> The plain language of the policy and the Act appears to allow for the type of subrogation that plaintiff claims. The language from § 20-279.21(b)(3), "any person or organization legally responsible" is very broad. By virtue of the dram shop lawsuits, defendants were seeking to make the two bars responsible, at least in part, for what happened on 6 April 1999. 583 S.E.2d at 312.

The declaratory judgment action by Farm Bureau sought to create a constructive trust on the settlement amount of $250,000. The settlements from the dram shop suits were part of this common fund. If the defendants' attorneys were not compensated out of the dram shop recoveries, then Farm Bureau would have acquired the recoveries by subrogation without paying the costs of the efforts to recover these amounts. The trial court correctly reduced Farm Bureau's recovery of the dram shop settlement by requiring it to pay the attorney's fees.

The plaintiff in Espino v. Allstate Indemnity Co., 159 N.C.App. 686, 583 S.E.2d 376 (2003) was injured in an automobile accident on 19 October 1999 with an uninsured

motorist. The plaintiff was insured by Allstate under a policy providing uninsured benefits. The uninsured provisions of the policy provided that Allstate would pay reasonable medical expenses as a result of bodily injury, but that these payments were in excess of and would not duplicate payments made under Coverage B, the medical payments coverage. Pursuant to the policy, Allstate paid $1,000 under the medical payments coverage. The plaintiff demanded arbitration to determine the amount of medical payments due. The arbitrator awarded the plaintiff $9,000. Allstate paid $8,000, contending that it was entitled to a credit of the $1,000 paid under the medical payments coverage. The trial court granted the plaintiff's motion for summary judgment on the basis that the provisions of the Allstate policy violated the collateral source rule.

The Court of Appeals reversed and held that Allstate was entitled to a credit of the amount paid under the medical payments coverage. Medical payments coverage is not required by the Financial Responsibility Act. The policy, therefore, governs the relationship between the parties.

> . . . the express language of plaintiff's Allstate policy that its UM coverage was in excess of and shall not duplicate payments made under the medical payments coverage entitles defendant to a credit for the $1,000 it

previously paid plaintiff in medical expenses. 583 S.E.2d at 379.

Monin v. Peerless Insurance Co., 159 N.C.App. 334, 583 S.E.2d 393, petition for discretionary review denied, 357 N.C. 506, 587 S.E.2d 670 (2003) was a declaratory judgment action by the adult son of the Peerless insured for a determination that he was a resident of his father's household at the time of the accident upon which the claim for uninsured benefits was based. The jury answered the issue of the plaintiff's residence in favor of Peerless. The trial court granted the plaintiff's motion for judgment notwithstanding the verdict.

The Court of Appeals reversed on the basis that there was "more than a scintilla of evidence that plaintiff did not reside" at his father's residence. Specifically, the plaintiff had moved to Florida in an unsuccessful effort to become a professional golfer. The plaintiff then returned to Charlotte and obtained a job at a local golf club. Plaintiff slept at a friend's house because it was closer to the club. Plaintiff intended to work at his father's business at which time he would live at his father's residence. At the time of the accident on 27 September 1999, plaintiff had spent one or two nights at his father's house. On cross examination, plaintiff testified that he

was going to continue sleeping at his friend's house until he found a permanent residence. Since the issue of residency was to be determined by the jury, the Court of Appeals held that there was sufficient evidence that the plaintiff was not a resident of his father's house such that the trial court erred in entering verdict for the plaintiff.

C. Unfair and Deceptive Practices

Cullen v. Valley Forge Life Ins. Co., ___ N.C.App. ___, 589 S.E.2d 423 (2003) was a declaratory judgment action by a putative insured to enforce a life insurance policy. The insured, Cullen, purchased a $1 million life insurance policy through Flur, his insurance agent, in the early 1990's. Cullen identified skin disorders and Crohn's disease on the application for insurance. The application was approved. In 1999, Cullen inquired of Flur about increasing his coverage. Flur presented a $500,000 policy with Valley Forge for Cullen to consider. The application was completed on 2 April 1999. Because a premium was not required to be submitted with the application, the policy stated that it would not become effective until the first premium was paid and the policy was delivered while the insured's health was as described in the application.

On 14 April 1999, Cullen submitted to a medical examination, blood and urine samples and authorized release of his medical records. The policy was approved on 19 May 1999. On 26 May 1999, Cullen was seen by his primary care physician at a regularly scheduled appointment. A biopsy of a blister on Cullen's back was determined to a melanoma, a form of skin cancer. Cullen was informed of this condition on 2 June 1999. Flur delivered the policy to Cullen on 11 June 1999 and collected the first premium. Cullen submitted a second life insurance application for additional coverage. Cullen received a second medical examination and submitted a medical supplement on 14 June 1999. The medical information on the supplement identified the melanoma that was diagnosed by Cullen's primary physician. Valley Forge deposited Cullen's premium on 17 June 1999. On 8 July 1999, Valley Forge complied with Cullen's request for change of beneficiary. On 21 September 1999, Valley Forge wrote Cullen and informed him that his second application for insurance was denied. Valley Forge also informed Cullen that his policy was never in effect and enclosed a check refunding his first premium payment.

Cullen filed suit on 11 June 2001 seeking enforcement of the policy and requesting treble damages for unfair and

deceptive practices. The trial court granted Cullen's motion for summary judgment and awarded over $2.2 million for breach of contract, unfair and deceptive practices and attorneys' fees.

The Court of Appeals first addressed the issue as to whether Valley Forge had waived the right to enforce the "good health" provisions of its policy before the insurance contract would become enforceable. Although Cullen did not disclose the melanoma when applying for the additional insurance, the medical supplement on 14 June 1999 fully disclosed the condition and treatment. Thereafter, Valley Forge accepted and negotiated the first premium payment and processed Cullen's change of beneficiary request. The Court held that this conduct waived the right to enforce the good health provisions of the policy.

> Notably, at no time before 21 September 1999, more than three months after Valley Forge learned of the melanoma, did Valley Forge make the assertion that plaintiff had violated the "good health" provision, that the "good health" provision precluded coverage from taking effect or prevented the coverage from being concluded, or that Valley Forge intended to deny coverage on that basis. We hold this conduct was inconsistent with an intent to enforce the provision; therefore, Valley Forge waived the right to enforce it. . . . if . . . the insurer has knowledge of all pertinent facts and if reasonable inquiry would reveal no other information exists other than that submitted in the medical records and application, then the insurer waives the right to assert provisions in

> the insurance contract permitting the insurer to avoid coverage by acting inconsistently with the intent to enforce those provisions. 589 S.E.2d at 428-429.

Valley Forge also asserted the defense of accord and satisfaction based on Cullen's cashing of the premium refund check. In rejecting this defense, the Court noted several internal memoranda in Valley Forge's file before the 21 September 1999 letter contending that the policy was not in effect and refunding the premium. All of the memoranda stated that Valley Forge knew of the melanoma before the policy was issued. The September letter asserting no coverage, therefore, was a misrepresentation of the facts known by Valley Forge. Accord and satisfaction could not be based on this misrepresentation and was precluded as a defense as a matter of law.

The internal memoranda recognizing coverage before the September rejection letter were also the basis for affirming the trial court's finding of unfair and deceptive practices under G.S. § 58-63-15(1).

> However, Valley Forge's internal memos compel the conclusion that Valley Forge, despite knowing coverage existed, represented and attempted to convince plaintiff that there had never been coverage under the subject policy. Where the only reasonable inference is existence or non-existence, purpose may be adjudicated by summary judgment when the essential facts are made clear of record. The undisputed facts in the record compel the conclusion that the purpose of the

> letter accompanying the check was to induce plaintiff to accept the returned premium check under the false impression that Valley Forge was correct in claiming coverage had never existed. Thus, the evidence supports the existence of an unfair and deceptive act by Valley Force. 589 S.E.2d at 431.

Recovery by the plaintiff for unfair and deceptive practices precluded additional recovery for breach of contract.

D. Indemnity

Pennsylvania National Mutual Casualty Ins. Co. v. Associated Scaffolders and Equipment Co. Inc., 157 N.C.App. 555, 579 S.E.2d 404 (2003) was a declaratory judgment action to determine coverage related to a rental contract between Associated Scaffolders and Comfort Associated. The contract required Comfort to indemnify Associated for Associated's own actions and possible negligence in a building construction. The indemnity contract was determined to be void under G.S. § 22B-1 in Jackson v. Associated Scaffolders, 152 N.C.App. 687, 568 S.E.2d 666 (2002).

In the present action, Pennsylvania National sought a determination that it did not have a duty to defend its insured, Associated Scaffolders, for any claims related to the invalid indemnity contract. The policy excluded coverage for liability assumed by the insured in a

contract. In addition to the indemnity provisions, the rental contract required Comfort to maintain the scaffolding consistent with regulatory standards.

The Court of Appeals affirmed the trial court’s conclusion that Pennsylvania National had no duty to defend Comfort.

> Although at the time of the complaint, the contract had not yet been adjudicated void, an insurer will not be obligated to defend its insured when the insured has stepped outside the protective bounds of the General Statutes. An insurer may assume that its insured will contract within the law and not obligate the insurer to defend an illegal contract. . . . The policy clearly states that the exception which grants coverage applies to tort claims only which “would be imposed by law in the absence of any contract or agreement.” This claim lies outside the policy coverage. Therefore, Penn National had no duty to defend on either count of the complaint. 579 S.E.2d at 407.

III. Trial Practice and Procedure

A. Statutes and Periods of Limitation and Repose

Bass v. Durham County Hospital Corp., 158 N.C.App. 217, 580 S.E.2d 738 (2003), per curiam reversed, 358 N.C. 144, 592 S.E.2d 687 (2004) was an action alleging medical malpractice arising from surgery on 3 August 1996. Suit was filed on 2 December 1999, the last day of a 120-day extension granted pursuant to Rule 9(j). The complaint did not contain the required Rule 9(j) certification. On 13 December 1999, the plaintiff filed an amended complaint

pursuant to Rule 15(a) prior to a responsive pleading by the defendant. The amended complaint contained the Rule 9(j) certification. On 29 May 2001, the plaintiff voluntarily dismissed the complaint without prejudice. The complaint was refiled on 12 June 2001 with the Rule 9(j) certification.

The trial court granted the defendants' motion to dismiss. The Court of Appeals reversed. The Court of Appeals analyzed the issue as one of a dismissal under Rule 41(a), leaving "the plaintiff exactly as she was before the action was commenced." 580 S.E.2d at 741. The Court of Appeals reasoned that since the complaint was timely filed, it was not barred by the statute of limitations even though the Rule 9(j) certification was missing.

The Supreme Court reversed based on the dissent by Judge Tyson. Judge Tyson approached the issue as one of compliance with Rule 9(j) and controlled by Thigpen v. Ngo, 355 N.C. 198, 558 S.E.2d 162 (2002). Thigpen held that once the 120-day period expired without the required certification, the complaint cannot be amended to include the certification. In the present case, the 120-day period expired without the certification; therefore, the statute

of limitations applied and barred the action when refiled regardless of the Rule 41 dismissal without prejudice.

> The 120-day extension of the statute of limitations available to medical malpractice plaintiffs by Rule 9(j) is for the purpose of complying with Rule 9(j). . . . Since relation back is not available through Rule 15(c) . . ., to comply with Rule 9(j), plaintiff's amended complaint did not toll the statute of limitations. . . . Plaintiff was not entitled to the one-year extension under Rule 41(a) because her original action was not timely filed. 580 S.E.2d at 743.

The plaintiff in Hatcher v. Flockhart Foods, Inc., ___ N.C.App. ___, 589 S.E.2d 140 (2003) slipped and fell on a slick substance at the Piggly Wiggly store in Wallace on 10 July 1997. The plaintiff's attorney wrote Piggly Wiggly notifying them of the claim. Great American Insurance Company as insurer of Piggly Wiggly contacted the plaintiff's attorney by telephone and acknowledged receipt of the letter. Over the following sixteen months, plaintiff's attorney and the insurance company communicated concerning settlement. As the three-year statute of limitations approached, the plaintiff's attorney searched the Secretary of State's corporate registry and determined that Piggly Wiggly of Wallace, Inc. was now known as Wallace Farm Mart, Inc.

Suit was filed on 30 June 2000 naming Wallace Farm Mart, Inc., formerly known as Piggly Wiggly of Wallace,

Inc. Wallace Farm Mart filed a motion to dismiss on the grounds that the store was leased to Flockhart Foods. The plaintiff's motion to add Flockhart Foods as an additional defendant was allowed. Flockhart filed a motion to dismiss based on the statute of limitations. The plaintiff responded by pleading equitable estoppel. The trial court denied the defendant's motion because the lease was not recorded in the office of the Register of Deeds. Flockhart's subsequent motion for summary judgment was allowed. The trial court found that the plaintiff had failed to establish equitable estoppel as a defense to the statute of limitations.

The Court of Appeals reversed, finding that Flockhart permitted the insurance company to act on its behalf, thereby imputing to Flockhart the insurance company's concealment of the identity of the responsible party.

> . . . plaintiff . . . sought to deal directly with the party (i.e. the party's insurance company) responsible for the Store in which he received his injuries when he sent the initial correspondence to Piggly Wiggly, Inc. The insurer responded to plaintiff on behalf of Piggly Wiggly, Inc. and not on behalf of Flockhart, the entity that was actually the responsible party and also insured by the insurer. Thereafter, plaintiff engaged in sixteen months of settlement discussions with the insurer during which time the insurer, by its conduct, concealed that Flockhart was the responsible party, as well as represented that the responsible party was Piggly Wiggly, Inc.

> Ultimately, the action plaintiff initiated against "Wallace Farm Mart, Inc. formerly Piggly Wiggly of Wallace Inc." was dismissed by the trial court because plaintiff had failed to name Flockhart as the proper defendant prior to the applicable statute of limitations running out. Thus, since plaintiff justifiably relied on the insurer's conduct to his detriment, these facts are sufficient to create an agency by estoppel. 589 S.E.2d at 143.

B. Rule 41 Dismissals

The plaintiffs in Estate of Barber v. Guilford County, ___ N.C.App. ___, 589 S.E.2d (2003) sued the sheriff's department and a deputy for wrongful death. The deputy counterclaimed for defamation and infliction of emotional distress. The parties participated in a court-ordered mediated settlement conference. The dispute was resolved, and the parties signed a settlement agreement. As part of the settlement agreement, the plaintiffs promised not to use the word "murder" in relation to the deputy and also agreed that the investigation did not provide a basis for accusing the deputy of committing a crime. To comply with the settlement agreement, the deputy dismissed his counterclaims with prejudice on 19 July 2002.

Later on the day that the deputy dismissed his counterclaims, the plaintiffs called a press conference. At the press conference, the plaintiff stated that she did not intend to comply with the settlement agreement, called

the deputy a "murderer" and admitted that she lied. On 26 July 2002, the deputy filed a motion for sanctions for violation of the settlement agreement, and, in the alternative, to set aside the dismissal of the counterclaims. The trial court granted the motion for sanctions and ordered enforcement of the settlement agreement.

The Court of Appeals reversed, holding that the trial court could not order enforcement of the settlement agreement or impose sanctions without ruling on the deputy's motion to set aside the dismissal. Since the mediated settlement agreement was not incorporated into a consent judgment, the deputy was required to either initiate a separate action or file a motion in the original action. His dismissal precluded a motion in the original action.

> . . . defendant had two options in deciding how to specifically enforce the terms of the settlement agreement. Defendant could: (1) take a voluntary dismissal of his original action and then institute a new action on the contract, or, (2) seek to enforce the settlement agreement by petition or motion in the <u>original</u> action. . . . Defendant chose the former of these two options and voluntarily dismissed his claims. . . . Once defendant voluntarily dismissed the claims with prejudice, the only options defendant had left were to either institute a new action on the settlement agreement itself or to file a motion to set aside the dismissal with prejudice of his counterclaims. 589 S.E.2d 436.

In remanding the action to the trial court, the trial court should rule on the defendant's motion to set aside the dismissal of his counterclaims. If the trial court sets aside the dismissal, then the trial court could consider specific performance of the settlement agreement. If the trial court did not set aside the dismissal, then a separate action was required.

The trial court also erred in imposing sanctions in connection with the mediated settlement. G.S. § 7A-38.1(g) allows "appropriate monetary sanction" if a party fails to attend a mediated settlement conference without good cause. No other sanctions are provided by statute.

> The Mediation Rules do not require a party to abide by the terms of a settlement agreement entered into at a mediated settlement conference that is not entered as a consent judgment of the court. Further, nothing in N.C.Gen.Stat. § 7A-38.1(g) grants the trial court the authority to sanction a party who subsequently violates a settlement agreement that has not been incorporated into a consent judgment. 589 S.E.2d 438.

The plaintiff and defendant in <u>Centura Bank v. Winters</u>, 159 N.C.App. 456, 583 S.E.2d 723 (2003) entered into a lease in June 1995 for a 1995 Lexus. The defendant defaulted in January 1996, causing the plaintiff's suit in March 1997 to recover the amount in default. Settlement discussions resulted in the plaintiff dismissing this suit

without prejudice. The defendant paid for a period, then defaulted a second time producing another suit in November 1997 by the plaintiff to recover the amount in default. The second suit was dismissed without prejudice in March 1998. The present action was a third suit to recover the remaining balance under the lease. The defendant responded to the plaintiff's motion for summary judgment by contending that the suit had been dismissed twice, therefore, the present or third suit was barred by Rule 41(a)(1).

The trial court granted the plaintiff's motion for summary judgment. The Court of Appeals affirmed on the basis that the third suit was not "based on or including the same claim" as the first two suits.

> Where payments arising from a contract are at issue, this Court has previously recognized that more than one claim may arise from a single contract and that a dismissal with prejudice of a suit based on a default with respect to some payments does not bar future claims with respect to subsequent payments. . . . Each lawsuit in the present case was based on a default with respect to a separate set of payments. . . . Although plaintiff's prior lawsuits arose from breaches of the same lease agreement, both suits were based on separate defaults. Thus, the prior suits involved claims which were based upon different transactions. Therefore, the trial court correctly determined that the two previously dismissed actions were not based on and did not include the same claim and that the present action is not barred by the provisions of Rule 41(a)(1). 583 S.E.2d at 725.

C. Governmental Immunity

The plaintiff, Stacy Batts, in Batts v. North Carolina Dept. of Transportation, 160 N.C.App. 554, 586 S.E.2d 550 (2003) was a passenger in a car operated by Shawan Batts. The complaint alleged that a stop sign controlling Mr. Batts direction of travel was being obstructed by tree limbs. The complaint was filed against Mr. Batts and the Town of Elm City. Mr. Batts filed a cross-claim against the Town of Elm City and a third-party complaint against NCDOT. The plaintiff then obtained permission of the trial court to amend her complaint to add NCDOT as a defendant and to dismiss her claim against the Town of Elm City. The trial court denied NCDOT's motion to dismiss the plaintiff's complaint based on sovereign immunity. On appeal, NCDOT also contended that jurisdiction of the plaintiff's claim was in the Industrial Commission pursuant to the Tort Claims Act.

The Court of Appeals affirmed the trial court's denial of NCDOT's motion to dismiss. Rule 14(c) provides that the State of North Carolina may be made a third-party defendant notwithstanding the provisions of the Tort Claims Act. Rule 14(a) provides that a plaintiff may allege a claim against a third-party defendant arising of the transaction

or occurrence that is the subject matter of the plaintiff's claim. The plaintiff's amended complaint against NCDOT was, therefore, proper.

> Under the clear language of Rule 14(a), once a third-party defendant is added to a lawsuit, a plaintiff may assert claims directly against the third-party defendant, subject only to the limitation that the claim arose out of the same transaction or occurrence as the plaintiff's original claim against the original defendant.
>
> The Tort Claims Act waives sovereign immunity. By the addition of Rule 14 (c), the General Assembly created an exception to the general rule that claims against the State under the Tort Claims Act must be pursued before the Industrial Commission as to third-party claims. . . . By adding subsection (c) to Rule 14, the General Assembly waived the State's immunity to claims brought by a plaintiff under Rule 14(a), subject to the express limitations contained therein. 586 S.E.2d at 552-553.

The decedent's estate in Dawes v. Nash County, 357 N.C. 442, 584 S.E.2d 760 (2003) alleged that Nash County and Nash County EMS, a division of Nash County, were negligent in treating and transporting the decedent and that these negligent acts resulted in the decedent's death. The defendants asserted sovereign immunity as a complete defense.

The County had purchased a comprehensive insurance policy covering the period and acts alleged in the complaint. The County contended that coverage was excluded for the acts alleged. The exclusion applied to "Hospital

and Health Clinic Professional Liability," however the exclusion stated that it did not apply "to liability of county employed or county volunteer Emergency Medical Technicians." The County argued that the intent of the policy was to insure emergency medical technicians for individual liability, therefore, the exclusion applied to the actions alleged against the County.

The Supreme Court held that there was coverage under the policy for the acts alleged in the complaint; therefore, sovereign immunity had been waived by the purchase of the insurance policy. The policy defined the insured as Nash County. Coverage was provided for "incidental malpractice," which the policy defined as "emergency professional medical services rendered by . . . Technicians."

> Thus, the above portions of the policy plainly provide that the Fund will pay "on behalf of the Participant" damages incurred as the result of actions taken by the County's EMTs whether employed or voluntary. This coverage is consistent with the plain language of the provision. . . . Nothing in the coverage agreement provides for any other entity or personnel to be insured or covered other than the participant county and those county officials and employees named . . . . The insurer (the Fund) has in no way obligated itself to cover and pay for acts by individuals not a party to the insurance contract and for whose acts the participant is not responsible except in their official capacities. 584 S.E.2d at 765.

D. Sanctions

The complaint in Board of Drainage Commissioners of Pitt County v. Dixon, 158 N.C.App. 509, 581 S.E.2d 469 (2003), per curiam affirmed, ___N.C.___, 593 S.E.2d 763 (2004) alleged that the defendant Dove and other defendants embezzled money from the plaintiffs. The plaintiffs noticed the deposition of Dove. Dove answered initial questions about his name and address. Dove's attorney asserted a "blanket Fifth Amendment privilege" and Dove refused to answer any other questions. The plaintiffs' attorney attempted to require Dove to assert the privilege on a question-by-question basis. The plaintiffs then filed a motion for sanctions under Rule 37(c) as to both Dove and his attorney. The trial court granted the motion and imposed sanctions of $2,800. The trial judge also ordered that Dove be deposed and that the privilege be raised on a question-by-question basis.

Dove and his attorney appealed only the imposition of monetary sanctions. The Court of Appeals reversed, holding that since Dove appeared at the deposition, he could not be sanctioned under Rule 37 for failure to appear at the deposition.

> When an individual party physically appears at a deposition, the imposition of Rule 37(c) sanctions for failure to appear is not

> appropriate. The better course of action would have been for Dove to apply for a protective order pursuant to Rule 26(c). Then the trial court could define the scope of the examination in light of defendant's assertion of his Fifth Amendment privilege. 581 S.E.2d at 471.

The plaintiff in Summey v. Barker, 357 N.C. 492, 586 S.E.2d 247 (2003) alleged that he received improper medical treatment while a prisoner in the Forsyth County jail. Suit was brought against the Forsyth County Sheriff, the Sheriff's surety and two individual members of Correctional Medical Services, Inc. In addition to allegations of negligence, the suit also alleged medical malpractice and included a Rule 9(j) certification. The trial court entered a scheduling order requiring the plaintiff to identify expert witnesses within thirty days after final decision on an appeal relating to sovereign immunity. The plaintiff did not identify expert witnesses within the time required by the scheduling order. The defendants moved for summary judgment on the grounds that the plaintiff did not have expert witnesses to support his allegations. The plaintiff's motion for an extension of time to identify expert witnesses was denied by the trial court. The trial court then granted the defendants' motions for summary judgment.

The Supreme Court affirmed. The Court held that an analysis of the plaintiff's failure to identify expert witnesses as required in the scheduling order should be under Rule 26(f1). This rule requires a scheduling conference in medical malpractice cases and allows dismissal of the action if a party fails to identify an expert witness. Review of the trial court's order denying the plaintiff's motion for an extension of time to identify experts was limited to whether the plaintiff had demonstrated excusable neglect. Since the plaintiff did not allege excusable neglect, the trial court properly denied the motion for an extension of time to designate expert witnesses. Without expert evidence, the plaintiff was not able to forecast evidence to defeat the defendants' motions for summary judgment.

<u>Essex Group, Inc. v. Express Wire Services, Inc.</u>, 157 N.C.App. 360, 578 S.E.2d 705 (2003) was an action alleging violations by defendants of plaintiff's trade secrets. The individual defendants had been employed by the plaintiff and were alleged to have started a competing business using documents and customer and supply lists of the plaintiff. Essex obtained an expedited discovery order allowing a search of the defendant's facilities. At the time the search was to occur, one of the individual

defendants deleted emails from his computer. The other individual defendant was observed loading boxes from the defendant's facility and removing them to a storage facility. When questioned about these activities at a deposition, the individual defendants denied removal of the documents. Although it was admitted that emails had been deleted, the individual defendant stated that he did not believe he was forbidden to do so. The documents were eventually delivered to the plaintiff.

On motion of the plaintiff, the trial court entered sanctions pursuant to Rule 37 and struck the defendants' answers, entered default judgment and ordered payment of costs and attorney fees of $7,000. The Court of Appeals affirmed. The Court first held that the appeal of the order of sanctions was properly before the Court because the order struck the answer and entered default judgment. Such orders affect a substantial right.

As to the sanctions entered by the trial court, the defendants argued that they had complied by producing the documents and allowing the entry onto the defendants' premises. The Court of Appeals affirmed the imposition of sanctions.

> It is no defense that defendants eventually produced the requested documents and allowed plaintiff to inspect its premises. Rule 37

> sanctions are powers granted to the trial courts of our state to prevent or eliminate dilatory tactics on the part of unscrupulous attorneys or litigants. This Court has held that failure to answer interrogatories or turn over requested documents in a timely manner constitute proper grounds for a sanction. . . . Our Court has held that a litigant's answering of interrogatories after the trial court ordered the litigant to answer did not prevent the trial court from imposing sanctions upon the dilatory party. . . . Defendants' actions here were at best dilatory and at worst dishonest. In either case, the trial court's decision to sanction defendants cannot be said to be so arbitrary that it was not the result of a reasoned decision. 578 S.E.2d at 707-708.

E. Evidence

(1) Experts

Holley v. ACTS, Inc., 357 N.C. 228, 581 S.E.2d 750 (2003) was a claim for workers' compensation benefits. The employee contended that she was entitled to compensation for developing deep vein thrombosis (DVT) as a result of twisting her leg at work on 13 July 1996. At the time of the injury, the plaintiff was on blood pressure medication to control hypertension and was also receiving medical treatment to lose weight. Other medication included Premarin which increases the risk of blood clots. As a result of the plaintiff's age and other medical conditions, she had other risks factors for DVT.

During plaintiff's duties as a nurses' assistant on 13 July 1996, she twisted her leg and felt a sudden pain in

her left calf. The emergency room physician, Dr. Jason Ratterree, diagnosed the plaintiff with a pulled calf muscle. His medical report at the time of treatment indicated that he might have suspected "DVT in etiology had not the patient told me that there was sudden pain during slight traumatic episode." Medical treatment continued through 3 September 1996 when a Doppler study indicated that the plaintiff had DVT. At a hearing before the Commission, Dr. Ratterree was asked whether he could state to a reasonable degree of medical probability that the incident on 13 July 1996 was a significant contributing factor in causing DVT. Dr. Ratterree responded, "I can't say that, no." Another treating physician, Dr. Zipkin acknowledged that he could not say with a reasonable degree of medical probability what caused the plaintiff's DVT. The Industrial Commission concluded that the DVT was a result of a compensable injury and awarded benefits.

Finding insufficient medical testimony to establish causation, the Supreme Court reversed the award of benefits.

> The entirety of the expert testimony in the instant case suggests that a causal connection between plaintiff's accident and her DVT was possible, but unlikely. Doctors are trained not to rule out medical possibilities no matter how remote; however, mere possibility has never been legally competent to prove causation. . . .

> Although medical certainty is not required, an expert's "speculation" is insufficient to establish causation. . . . As the foregoing testimony indicates, plaintiff's doctors were unable to express an opinion to any degree of medical certainty as to the cause of plaintiff's DVT. 581 S.E.2d at 754.

The defendant in State v. Lassiter, 160 N.C.App. 443, 586 S.E.2d 488, petition for discretionary review denied, 357 N.C. 660, 590 S.E.2d 853 (2003) was convicted of involuntary manslaughter and fraudulently setting fire to and burning a dwelling house. The State's arson and fire expert witness, Agent David Campbell, discounted the defendant's statement to members of the local fire department that the fire started in a pan of grease. It was Campbell's opinion that the fire was intentionally set by someone pouring a large quantity of an ignitable liquid in the living room and setting it on fire.

On appeal, the defendant contended that the trial court erred by allowing Campbell to testify about the impossibility that grease could have caused the fire. The Court of Appeals disagreed and affirmed the trial court's allowance of the opinions by Campbell. The Court discussed Campbell's 40 years of experience with firefighting, his training from recognized institutions and organizations and his teaching experience at the International Association of

Arson Investigators and the United States Bureau of Alcohol, Tobacco, and Firearms.

At trial, the defense agreed to Campbell's expertise in the field of fire chemistry and behavior, fire cause and origin, and arson and fire investigation.

> Agent Campbell testified further that in his opinion, it was physically impossible for the 16 October 1999 fire in defendant's mobile home to have been caused by grease. His testimony was based on an experiment he ran attempting to ignite Food Lion Vegetable Oil. After several failed attempts at igniting the hot oil, he finally did so using a plumber's (benzomatic) torch. He then poured the ignited oil onto the floor where the fire went out, leaving grease patterns on the floor. No traces of grease were found on defendant's living room carpet.
>
> Agent Campbell was a qualified expert who testified as to the source and cause of the fire on 16 October 1999 in defendant's mobile home. His expert opinion that the source of this fire was a hydrocarbon fuel, that it was impossible for ignited vegetable oil to have been the source of the fire, and that the fuel was poured in a large quantity on the living room floor of the mobile home was properly admitted. 586 S.E.2d at 496.

The plaintiff in Red Hill Hosiery Mill v. Magnetek, Inc., 159 N.C.App. 135, 582 S.E.2d 632 (2003) alleged that a ballast in the defendant's florescent light fixture malfunctioned, causing the plaintiff's building to be destroyed by fire. A jury found the defendant negligent and awarded the plaintiff $4,000,000. Among other errors, the defendant contended that the trial court should not

have admitted the opinions of Dr. James McKnight concerning the origin and cause of the fire. The Court of Appeals affirmed the jury verdict and, specifically citing Daubert, held that the trial judge had correctly admitted the opinions of Dr. McKnight.

> Here, Dr. McKnight testified that he has a Bachelor's and Master's Degree in Electrical Engineering and a Doctorate in Physics from Duke University. He has over 23 years of experience in the field of fire causes and origin investigation and has examined lighting fixture ballasts in the past. He has also been recognized as an expert by the courts on other occasions
>
> Given his educational background and expertise, we cannot conclude that the trial court abused its discretion in admitting his testimony. We believe the trial court properly exercised its "gatekeeping" function and that any deficiencies in Dr. McKnight's qualifications or knowledge could be properly tested by cross-examination, presentation of evidence to the contrary, and appropriate jury instruction. 582 S.E.2d at 637.

(2) Attorney-Client Privilege

The plaintiff in Hulse v. Arrow Trucking Co., ___ N.C.App. ___, 587 S.E.2d 898 (2003) received injuries in an automobile accident on 21 May 2001 resulting in the plaintiff being adjudicated an incompetent. The plaintiff submitted interrogatories to the defendant requesting the defendant to describe how the accident occurred and to give information as to speed and distances of the vehicles

involved in the accident. The defendant's answer referred to speeds and distances on the accident report and also gave the plaintiff's speed at fifty miles per hour.

During the defendant's deposition, the defendant was questioned about the interrogatory answers. The defendant testified that he received the plaintiff's interrogatories from his lawyer, wrote the responses in on the interrogatories, returned the answers to his lawyer, but did not see the final answers until the night before his deposition. The defendant also testified that he signed the written verification before a notary public and returned the verification with the handwritten responses. The defendant further testified that several of the answers were "not his answer" because he never told the investigating officer the information recorded on the accident report. The defendant testified that his handwritten answer was that the plaintiff's speed was "fifty-five plus."

It was discovered during the deposition that the answer to the interrogatory had been incorrectly typed. After the deposition, the plaintiff filed a request for production of the defendant's handwritten interrogatory responses. Although the defendant asserted the attorney-client privilege, the trial court ordered production of the

handwritten responses. The trial court specifically found that the attorney-client privilege had been waived and that the plaintiff had a substantial need for the responses.

The Court of Appeals affirmed. Addressing first the issue of whether the appeal was interlocutory, the Court held that orders requiring production of information protected by the attorney-client privilege are immediately appealable. The appeal becomes interlocutory and subject to dismissal, however, if the privilege is waived. Finding that the privilege had been waived, the Court dismissed the appeal.

> During his deposition, plaintiffs' counsel questioned defendant Fincher about the typed responses to Interrogatory Number 31, to which defendant Fincher testified: "That [w]as not my answer . . . . I wrote that the speed of the vehicle was traveling above the speed limit [fifty-five plus]." That testimony alone, offered by the client/claimant of the privilege, put the contents of the interrogatory responses into evidence by identifying obvious differences between the handwritten and typed responses. The trial court's subsequent decision to compel discovery of defendant Fincher's handwritten responses only as to Interrogatories Number 31 and Number 32 (after reviewing all the handwritten responses in camera), provides the best evidence of defendant Fincher's intended responses to these interrogatories. Thus, while the evidence indicates that defendant Fincher's handwritten responses were privileged, his waiver of that privilege resulted in those interrogatory responses being discoverable. 587 S.E.2d at 901.

(3) Hearsay Relied Upon by Experts

The defendant in State v. Thornton, 158 N.C.App. 645, 582 S.E.2d 308 (2003) appealed his convictions of first degree rape and indecent liberties with a minor. The victim of the crimes was interviewed by a licensed clinical social worker at Duke University Department of Psychiatry. The trial judge overruled the defendant's objections about testimony of the social worker concerning out-of-court statements made by the victim to the social worker. The trial judge stated that matters relied upon by an expert are admissible.

The Court of Appeals affirmed the trial court's ruling on the admissibility of the out-of-court statements to the social worker by the victim. The Court of Appeals, however, relied upon Rule 803(4) in determining that the statements were admissible since the victim was at the Duke medical offices for the purposes of diagnosis and treatment of sexually abused children.

> BM's medical and psychological evaluations took place at the Center for Child and Family Health in Durham. The Center utilizes a team approach to the diagnosis and treatment of sexually abused children. Dr. Theodore, who conducted the medical examination of BM, and Social Worker Potter, who conducted the interviews, work in the same building and their offices are just doors apart. Both the physical examination and the initial interview were conducted on 27 October 2000. . . . Given these circumstances, we

> believe that the trial court properly concluded that the statements were admissible, since BM made her statements to Potter with the understanding that they would lead to medical diagnosis and treatment and that the statements were reasonably pertinent to diagnosis or treatment. Thus, Potter's testimony as to BM's interview statements were admissible under Rule 803(4) . . . . 582 S.E.2d at 311.

(4) Demonstrations

The defendant in State v. Fowler, 159 N.C.App. 504, 583 S.E.2d 637, petition for discretionary review denied, 357 N.C. 580, 589 S.E.2d 355 (2003) was convicted of first-degree murder and was sentenced to life imprisonment without parole. On appeal, the defendant argued that the trial court had erred by permitting a law enforcement witness to demonstrate the manner in which the decedent was killed that was consistent with the State's theory of premeditation and deliberation. The State's demonstration controverted the defense of the strangling of the decedent being impulsive and in anger. The Court of Appeals affirmed the trial court's ruling permitting the demonstration.

> This Court has defined a demonstration as "an illustration or explanation, as of a theory or product, by exemplification or practical application." . . . . admissibility of demonstrative or experimental evidence depends as much, as for any other piece of evidence, upon whether its probative value is outweighed by the potential undue prejudicial effect it may have on defendant's case. See Rule 408, N.C. Rules Evid.

> In the case of a court-room demonstration, the demonstrator may not need to be qualified as an expert . . . but a proper foundation still must be laid as to the person's familiarity with the thing he or she is demonstrating. . . . When the evidence is conflicting, the North Carolina Supreme Court has upheld demonstrations intended to illustrate flaws in the prosecution or defense theory, or to rebut a witness's testimony. . . . A demonstration is not inadmissible merely because "[t]he evidence goes straight to the heart of the . . . issue, ..." 583 S.E.2d at 641-643.

F. Costs

Two opinions by the Court of Appeals acknowledged previous decisions of the Court that "irreconciliably conflict as to whether legislation permits the taxing of items not listed in the North Carolina General Statutes as assessable or recoverable costs." 586 S.E.2d at 785. Department of Transportation v. Charlotte Area Manufactured Housing, Inc., 160 N.C.App. 461, 586 S.E.2d 780 (2003) was a condemnation action in which the jury awarded substantially higher values than had been deposited with the clerk by DOT. The defendant moved for costs, including mediation, expert witness fees, expert appraisal fees, maps, and trial exhibits. Relying on City of Charlotte v. McNeely, 281 N.C. 684, 190 S.E.2d 179 (1972), the Court of Appeals held that costs may be taxed only pursuant to specific legislation. Choosing to follow the "explicitly delineated" approach and rejecting decisions employing a

"reasonable and necessary" approach, the Court of Appeals held that the costs to be taxed are only those specified in N.C.G.S. §§ 6-1, 6-20 and 7A-320. Therefore, there was no statutory authority to tax defendant's appraisal fees, maps or trial exhibits.

Although similar issues of costs were presented in Cosentino v. Weeks, 160 N.C.App. 511, 586 S.E.2d 787 (2003), the trial judge denied the defendant's motion for costs "in its discretion." This was an action alleging medical malpractice with the plaintiff taking a voluntary dismissal without prejudice. When the plaintiff refiled, the defendant moved pursuant to Rule 41(d) to tax the plaintiff with costs, including expert witness fees, deposition transcripts and reporter fees, attorney travel associated with the depositions and mediation costs. The trial judge granted the motions for costs as it related to mediation costs, but denied all other costs.

The Court of Appeals affirmed. Under Rule 41(d), the trial court had the discretion to tax expert witness fees and trial exhibits pursuant to G.S. § 6-20. G.S. § 6-20 does not require that such costs be awarded.

> In the present case, the trial court denied defendants' motion for costs with respect to their expert witness fees, deposition transcripts and court reporter fees, and deposition-related attorney travel expenses. We need not decide

> whether the trial court had authority to award these non-statutory common law expenses because, even assuming arguendo that all the expenses denied by the trial court are recoverable as common law costs, the trial court denied, "in its discretion," defendants' motion to assess them. The defendants have not alleged that the trial court abused its discretion. 586 S.E.2d at 791.

G. G.S. § 97-10.2

The plaintiff in Ales v. T.A. Loving Co., ___ N.C.App. ___, 593 S.E.2d 453 (2004) was injured in the course and scope of his employment with Columbus County Hospital. The present suit for personal injury was against the Hospital, Loving, the general contractor at the Hospital, and Shields, a flooring subcontractor. The plaintiff's workers' compensation claim against the Hospital was settled by a clincher agreement by which all medical expenses were paid and the plaintiff received a lump sum payment of $120,000. The plaintiff reached a mediated settlement with Loving and Shields for $145,000 "contingent upon a waiver of the workers' compensation lien." The plaintiff then filed a motion to extinguish the compensation lien. The trial court granted the motion and ordered that the lien be waived.

Holding that the trial court did not have jurisdiction to extinguish the lien, the Court of Appeals reversed.

> We interpret N.C.Gen.Stat. § 97-10.2(j) as permitting the superior court to adjust the

> amount of a subrogation lien if the agreement between the parties has been finalized so that only performance of the agreement is necessary to bind the parties. An agreement containing a condition precedent which must be fulfilled before either party is bound to the contract terms does not give the trial court jurisdiction under N.C.Gen.Stat. § 97-10.2. 593 S.E.2d at 455.

The plaintiff in Sherman v. Home Depot U.S.A., Inc., ___ N.C.App. ___, 588 S.E.2d 478 (2003) was injured in an automobile accident in the course of scope of her employment. Her injuries included a broken neck, a de-gloving laceration of the face and severe brain damage. The liability carrier for the other vehicle settled with the plaintiff for $500,000. The workers' compensation carrier waived its lien on this amount. The plaintiff brought the present action against Home Depot alleging improper loading of the vehicle involved in the accident. Home Depot settled with the plaintiff for $1,300,000.

At the time of the settlement with Home Depot, the workers' compensation lien was $168,000. The trial court reduced the lien to $55,667 and ordered the compensation carrier to pay $56,602 as part of the plaintiff's litigation costs. In the trial court's order reducing the lien, the trial court considered the settlement with the adverse driver and Home Depot, attorneys' fees of $390,000, the compensation lien of $168,000 that was increasing each

week, a life care plan that would exceed $1,500,000, diminished earnings in excess of $500,000, the extent of the plaintiff’s injuries and that the amount from the two settlements “will not adequately compensate Plaintiff for all of the damage she has suffered and will continue to suffer over the remainder of her life.”

Finding no abuse of discretion, the Court of Appeals affirmed.

> In the case at bar, the Superior Court considered the factors delineated by the legislature, and, consistent with previous cases, determined, in its discretion, that although the settlement was inadequate to compensate plaintiff, a workers’ compensation lien of $55,667.00 was fair and equitable. 588 S.E.2d at 480.

The Court also found that the trial court had properly required the workers’ compensation carrier to pay part of the plaintiff’s litigation costs.

> The court found as fact “[p]laintiff’s attorneys either advance or incurred costs related to the litigation in excess of $169,806.00. The court, having considered the statutory factors, determined that Companion should pay one-third of the litigation costs, and ordered them to pay $56,602, which is one-third of $169,806.00. The court further ordered the remaining approximately two-thirds of the litigation costs be paid from the $1,300,000 settlement to the attorneys. 588 S.E.2d at 480.

H. G.S. § 97-90(c)

The plaintiff in Palmer v. Jackson, 157 N.C.App. 625, 579 S.E.2d 901, petition for discretionary review granted,

357 N.C. 506, 587 S.E.2d 670 (2003) was employed by the defendant picking tomatoes as part of a federal program. While working in the field, the plaintiff suffered a heatstroke that caused him to be permanently disabled and in a persistent vegetative state. The employer and carrier denied the claim, but after a hearing before the Industrial Commission, the claim was determined to be compensable as an occupational disease. At the time the claim was ruled compensable by the Commission, the accrued lost wages were $24,000 and the medical expenses were $410,000. The Commission awarded the plaintiff's attorneys fees of 25% of the lost wages, but refused to award fees based on a percentage of the medical expenses determined to be owed.

The plaintiff's attorneys appealed to the superior court pursuant to G.S. § 97-90(c) and requested a fee based upon the amount of medical expenses to be paid. The trial court exercised its discretion and awarded 25% of the medical expenses as attorneys' fees. The Court of Appeals reversed and remanded for further proceedings on the grounds that G.S. § 97-90(c) did not allow attorneys' fees to be paid out of the amounts to be paid to the medical providers. The trial court, however, may order attorneys' fees in addition to the medical expenses to be paid.

> The trial court, pursuant to its discretion under § 97-90, appears to have the authority to fashion an attorneys' fees award that would take into account the special circumstances of a case such as the one at bar as the workers' compensation rules provide for doctors in the medical compensation realm. When an insurance carrier is responsible for attorneys' fees pursuant to N.C.Gen.Stat. § 97-88.1, the trial court may award attorneys an amount based on a percentage of the medical compensation recovered to be paid by the bad faith carrier over and above what they have already been ordered to pay to the medical providers and the claimant. . . . Upon the proper findings of fact as to the work and the special nature of the case, the trial court could order that the defendant carrier should further pay appellees an amount based upon a percentage (be it 1%, 5%, 10% or so on) of the $410,000 medical compensation. This amount would be over and above what was ordered by the Industrial Commission to be paid by defendant carrier. Such a result appears to be within the power of the trial court as prescribed by § 97-90(c) and reviewable only for an abuse of discretion. 579 S.E.2d at 909.

I. Punitive Damages

In Rhyne v. K-Mart Corp., ___ N.C. ___, 594 S.E.2d 1 (2004), K-Mart employees, Shawn Roberts and Joseph Hoyle, detained Mr. and Mrs. Rhyne on suspicion that the Rhynes had been going through K-Mart's dumpsters and had committed theft and trespass. Mr. Roberts put Mr. Rhyne in a chokehold and forced him to his knees. When Mrs. Rhyne jumped on Roberts' back, he shook her off and she fell to the ground. When the police arrived, Roberts and Hoyle admitted that "they had only heard a noise near the

dumpsters and assumed it must have been the plaintiffs. K-Mart pressed charges against Mr. Rhyne for assault, but those charges were dismissed. The Rhynes were diagnosed with "adjustment disorders, prescribed medication and advised to obtain counsel." Mrs. Rhyne had a heart attack, but the relationship between the heart attack and K-Mart incident was described by expert testimony as "unquantifiable." Mrs. Rhyne's medical bills were $13,582.40, $11,349.50 of which involved treatment for her heart attack. Mr. Rhyne's medical bills and lost wages were $5,276.12.

The Rhynes alleged claims for assault, false imprisonment, battery, malicious prosecution and intentional infliction of emotional distress. The jury awarded compensatory damages to Mr. Rhyne of $8,255 and to Mrs. Rhyne of $10,730. The jury also awarded punitive damages of $11.5 million each to Mr. and Mrs. Rhyne. Applying G.S. § 1D-25, the trial judge reduced the punitive damages awards to $250,000 per plaintiff.

The Supreme Court upheld the statutory cap of the greater of three times compensatory damages or $250,000 on punitive damages, N.C.Gen.Stat. § 1D-25, as constitutional and ruled that it applied on a per-plaintiff basis, not a per-claim or per-defendant basis. The Court rejected the

plaintiffs' contention that G.S. § 1D-25 was an unconstitutional interference by the legislature with the trial court's inherent power to reduce a jury's punitive damages award. To the contrary, the Court held that the General Assembly had the authority to declare the policy of the State and to implement that policy by practices and procedures to be utilized in the trial courts. Finally, the Court held that G.S. § 1D-25 did not unconstitutionally impose upon the plaintiffs' right to trial by jury.

The trial court in Eatmon v. Andrews, ___ N.C.App. ___, 588 S.E.2d 564 (2003) granted the defendants' motion to bifurcate compensatory and punitive damages. After the jury awarded $45,000 for personal injuries, the trial court granted a directed verdict in favor of the defendant on the issue of punitive damages

The Court of Appeals reversed, holding that there was sufficient evidence of punitive damages to go to the jury. Relying upon Byrd v. Adams, 152 N.C.App. 460, 568 S.E.2d 640 (2002), the Court noted factual similarity in Byrd and the present case from the defendant's consumption of two beers and leaving the scene of the accident which prevented an accurate determination of the defendant's blood-alcohol level.

> Defendant caused a collision after consuming two twelve ounce beers and admitted having fled the scene to avoid taking the Breathalyzer. Defendant spent the entire night at a hotel before contacting the police, and as a result no blood alcohol content was ever obtained. Drawing all inferences of fact in plaintiff's favor, the evidence is sufficient to present a jury question on the plaintiff's punitive damages claim. 588 S.E.2d at 566.

J. Reconsideration of Orders of Superior Court Judge

The defendant in State v. Woolridge, ___ N.C. ___, 592 S.E.2d 191 (2004) was indicted for maintaining a dwelling for trafficking in heroin. The defendant's motion to suppress was heard before Judge Abraham Jones. After presenting evidence, the State argued that the motion to suppress should be denied because of the exigent circumstances exception to the search warrant requirements. In his order granting the motion to suppress, Judge Jones found that no exigent circumstances existed to justify the search.

The State subsequently filed a motion requesting that the trial court reexamine the evidence under the inevitable discovery exception to the search warrant requirement. In a hearing before Judge Orlando Hudson, the State argued that the inevitable discovery exception had not been before Judge Jones and that new evidence would be presented. After hearing evidence, Judge Hudson granted the State's

motion and allowed evidence from the search to be introduced.

The Supreme Court reversed. Noting that the State had presented "virtually the same evidence" at both hearings, the Court held that the argument of different theories of admissibility did not allow one superior court judge to reconsider rulings made by a previous superior court judge.

> . . . an order of one superior court judge may be reconsidered by another only if the party seeking to alter the original order "makes a sufficient showing of a substantial change in circumstances during the interim which presently warrants a different or new disposition of the matter." . . . . . Rather, that evidence was known to the State at the time of the first suppression hearing, and in fact, the State presented similar evidence at the first hearing. Clearly, the State did not present to Judge Hudson evidence of a substantial change in circumstances warranting reconsideration of Judge Jones' order, but simply presented the same or similar evidence based upon a new legal theory, the inevitable discovery doctrine. 592 S.E.2d at 195.

Fox v. Green, ___ N.C.App. ___, 588 S.E.2d 899 (2003) was an action alleging medical malpractice in the delivery of the plaintiff's child. The complaint alleged that the defendant negligently left sponges in the plaintiff's body, causing pain and discomfort and requiring a second surgery to remove the sponges. The defendant Hospital's motion for summary judgment on grounds that res ipsa loquitur did not apply was denied by Judge Spainhour. The defendant

physician, Dr. Green, and his practice, Statesville Clinic, later moved for summary judgment on the grounds that Dr. Green left the sponges in the plaintiff as a therapeutic measure. For this reason, res ipsa loquitur did not apply. The Hospital moved again for summary judgment and incorporated Dr. Green's therapeutic argument as a basis for summary judgment. Judge Klass allowed the motions for summary judgment of all defendants.

The Court of Appeals first addressed the issue of Judge Klass granting the Hospital's motion for summary judgment after Judge Spainhour had earlier denied the Hospital's motion for summary judgment.

> "[A] motion for summary judgment denied by one superior court judge may not be allowed by another superior court judge on identical legal issues." . . . . Subsequent motions for summary judgment are allowed when they present legal issues different than those raised in prior motions. . . . "It is the rule in this State that an additional forecast of evidence does not entitle a party to a second chance at summary judgment on the same issues." . . . Although it appears that the parties made essentially the same arguments about res ipsa loquitur in both proceedings, notwithstanding defendant Hospital's therapeutic justification argument, . . . neither order clearly specifies the ground upon which it is based. 588 S.E.2d at 902.

Even if Judge Klass may have improperly ruled on the Hospital's second motion for summary judgment, the Court of Appeals reversed on the grounds that leaving sponges in the

plaintiff permits a jury to infer negligence by the defendants. The inference of negligence is not removed by the defendants' explanation of therapeutic use. The defense is properly asserted before the jury to attempt to rebut the inference of negligence.

K. Jurisdiction

The trial court in Stetser v. TAP Pharmaceutical Products, ___ N.C.App. ___, 591 S.E.2d 572, petition for discretionary review filed (2004) denied the motion of Takeda Chemical Industries to dismiss for lack of personal jurisdiction, and Takeda appealed. The complaint alleged that Takeda, TAP, Abbott Laboratories and other defendants conspired to violate various laws in connection with the marketing and pricing of Lupron, a drug for the treatment of prostate cancer. Takeda manufactured Lupron in Japan, but did not sell or distribute Lupron in North Carolina. Lupron is sold in the United States by TAP. Takeda owns 50% of the stock of TAP.

The Court of Appeals held that there was no jurisdiction over Takeda and reversed the trial court. Specific jurisdiction may be exercised over a party when the basis of the litigation arises out of the defendant's contacts with North Carolina. General jurisdiction may be imposed where the litigation is not related to the party's

conduct in the State, but the party's conduct with North Carolina is "continuous and systematic."

As grounds for specific jurisdiction over Takeda, the plaintiffs contended that the allegations of conspiracy were sufficient to establish jurisdiction. Since the plaintiffs alleged that other defendants who were alleged to be co-conspirators with Takeda had taken steps to further the conspiracy in North Carolina, then Takeda was subject to specific jurisdiction in North Carolina arising from the conduct of the co-conspirators. The Court disagreed.

> Even if we were to consider the conspiracy theory in this case, plaintiffs' conclusory allegations would be insufficient because plaintiffs have failed to provide specific facts showing that Takeda agreed to perform unlawful conduct. Plaintiffs' alleged injuries arise from the marketing and sales of Lupron. However, a senior Takeda employee, Kenji Yagi, stated in his affidavit that "Takeda has no involvement in the marketing or sale of Lupron . . . to customers in the United States" and "Takeda has not engaged in activities relating to sales or marketing of Lupron to customers in North Carolina." . . . . "Assuming, however, that the conspiracy theory of jurisdiction could, in an appropriate factual context pass federal constitutional scrutiny, due process requires more than a bare allegation of the existence of a conspiracy." 591 S.E.2d at 575-576.

There was also no basis for general jurisdiction over Takeda because it had not been authorized to do business in

North Carolina, did not maintain an office in the State and did not manufacture, sell or ship goods into the State.

L. Judicial Estoppel

In Whitacre Partnership v. Biosignia, Inc., 358 N.C. 1, 591 S.E.2d 870 (2004), the Supreme Court identified the factors to be considered by the trial court in applying judicial estoppel, then remanded the case to the trial court for a factual determination of the relationships between the parties. Whitacre Partnership sought a declaration that it was the owner of one million shares of common stock in the defendant, Biosignia, Inc. Biosignia moved for summary judgment on the grounds that the plaintiff was judicially estopped from claiming ownership in the stock as a result of statements made by Dr. Whitacre before a bankruptcy court arising from his Chapter 7 petition.

During the examination of Dr. Whitacre by the bankruptcy trustee, Dr. Whitacre testified that his stock in Biosignia had no present value. As a result of a written agreement, Dr. Whitacre's resignation from the company resulted in the stock in Biosignia not vesting. The trial court granted the defendant's motion for summary judgment. The Court of Appeals held that judicial estoppel did not apply because there was no evidence that

Dr. Whitacre "intentionally misled the court" by "intentionally manipulating or hiding the truth to gain an unfair advantage."

The Supreme Court held that judicial estoppel applies only in civil cases. When applicable, judicial estoppel is a bar to "inconsistent factual assertions," but not to "the assertion of inconsistent legal theories." 591 S.E.2d at 890. As involved in the present case, the factual issues arose from the individual bankruptcy and testimony of Dr. Whitacre and the attempted use by the defendant of that testimony by Dr. Whitacre to bar an inconsistent position by the Whitacre Partnership in claiming the shares of stock. Because factual determinations are required to establish whether privity is present, the case was remanded to the trial court for those factual findings.

> In conclusion, the doctrine of judicial estoppel is a part of the common law of this state. In the instant case, however, the trial court did not have the benefit of the precise formulation of the doctrine we articulate in this opinion. Moreover, judicial estoppel is a discretionary doctrine, and the privity inquiry required here is a fact-intensive one. Thus, we instruct the trial judge on remand to determine whether the Whitacres and Whitacre Partnership are in privity and, if so, to exercise discretion in determining whether the doctrine of judicial estoppel is applicable in the instant case. 591 S.E.2d at 895.

M. Woodson Claims

Cameron v. Merisel, Inc., ___ N.C.App. ___, 593 S.E.2d 416 (2004) was an action by an employee and his wife alleging that the employer intentionally exposed the employee to toxic conditions knowing that the exposure was substantially certain to cause severe bodily injury or death. Similar claims were alleged against Brian Goldsworthy, the employer's director of security who had responsibilities for maintenance of the areas where the plaintiff worked. The alleged exposure to toxic molds was from 1996 to December 1999 and was alleged to cause dizziness, chronic nausea, blackouts and falling spells. In April 2000, Mr. Cameron was diagnosed as completely disabled and ordered not to return to work with the defendant. The trial court dismissed all claims pursuant to Rule 12(b)(6).

As to the Pleasant claims against Mr. Goldsworthy, the Court of Appeals reversed, holding that the complaint sufficiently alleged a claim.

> The complaint sufficiently alleges Mr. Cameron's co-employee, Goldsworthy, engaged in "conduct [that] threaten[ed] the safety of others and [was] so reckless or manifestly indifferent to the consequences that a finding of willfulness and wantonness equivalent in spirit to actual intent is justified." 593 S.E.2d at 421.

The trial court's dismissal, however, of the Woodson claims against the plaintiff's employer was affirmed because of the deficiency in allegations about the employer's knowledge that the exposure was substantially certain to cause serious injury.

> In this case, allegations in the complaint that several of Mr. Cameron's co-employees "had contracted serious illnesses" and had complained to all defendants of a variety of "symptoms, maladies, and serious illnesses" are insufficient allegations that Merisel and Merisel Americas had knowledge of a "substantial certainty" of "serious injury." Allegations in the complaint do not set out the types of symptoms, maladies, and illnesses that co-employees had allegedly complained of to defendants. In fact, the allegations themselves tend to indicate that the co-employees had different reactions to the alleged toxic mold in the Cary call center. It is insufficient for plaintiffs to simply make a conclusory statement that some of these illnesses were "serious," as opposed to general symptoms and maladies, without describing the illnesses or indicating the number of co-employees who suffered "serious" illnesses. . . . Where the complaint simply alleges defendants knew co-employees had varying reactions to an alleged harm without any further description of those reactions, it is insufficient to meet the standard under Woodson. 593 S.E.2d at 422.

Although the Court acknowledged the range of injuries in a number of Woodson cases in which the Court had determined that the injury was "serious," the Court declined "to precisely define the term and, instead, consider the facts and circumstances of each case." 593 S.E.2d at 422.

N. Attorney Fees, G.S. § 6-21.1

Moquin v. Hedrick, ___ N.C.App. ___, 593 S.E.2d 435 (2004) was an action for personal injuries received by the minor plaintiff and medical expenses incurred by her parents. The jury awarded $6,700 for the minor plaintiff's personal injuries and $4,500 for the parents medical expenses. Pursuant to G.S. § 6-21.1, the trial court awarded attorney fees of $5,000 for representation of the daughter and $5,000 for representation of the parents.

Finding that there were two separate causes of action, the Court of Appeals affirmed.

> . . . plaintiffs' causes of actions, one for personal injuries to the daughter and one for medical expenses incurred by the parents must be categorized as several. . . . Under these circumstances, the judgment awarded by the trial court was a several (separate) judgment, requiring the trial court to consider each several (separate) recovery of damages under the judgment by plaintiffs for purposes of determining whether section 6-21.1 applied. Because plaintiffs' separate damage awards were less than $10,000, application of section 6-21.1 was triggered, and the trial court had the discretion to award attorney's fees thereunder. 593 S.E.2d at 438-439.

O. Unfair and Deceptive Trade Practices

The plaintiff in Sterner v. Penn, 159 N.C.App. 626, 583 S.E.2d 670 (2003) alleged claims of negligence, fraud and unfair and deceptive trade practices arising out a failed investment with Penn, an investor who convinced the

plaintiff to invest her money with him. Penn opened accounts with brokerage firms with the plaintiff's money. The trial court granted the 12(b)(6) motions of the brokerage firms, ruling in part that N.C.Gen.Stat. § 75-1.1 does not apply to securities transactions. The Court of Appeals affirmed.

> Commerce is defined as "all business activities, however denominated, but does not include professional services rendered by a member of a learned profession." N.C.Gen.Stat. § 75-1.1(b)(2001).
>
> In addition to the explicit exception for members of a learned profession, common law exceptions to the Act have evolved since the statute was created. Relevant here, our Supreme Court has explicitly held that "securities transactions are beyond the scope" of the UDTPA. . . . According to the Court . . ., the UDTPA does not apply to securities transactions because such application would create overlapping supervision, enforcement, and liability in an area that is already pervasively regulated by state and federal statutes and agencies. 583 S.E.2d at 675.

The plaintiff in Wilson v. Blue Ridge, 157 N.C.App. 355, 578 S.E.2d 692 (2003) had been employed by the defendant until he was discharged on 31 March 1997. Two weeks after his discharge, the plaintiff applied for membership on the defendant's board of directors. Relying upon a bylaw that made a former employee not eligible for board membership until six years after the termination of

employment, the defendant denied the plaintiff's application for membership on the board.

The plaintiff's suit against the defendant alleged one claim for unfair and deceptive trade practices, G.S. § 75-1.1, contending that the defendant's policy against former employees was intended to conceal mismanagement. The trial court granted the defendant's motion to dismiss pursuant to Rule 12(b)(6), and the Court of Appeals affirmed.

> . . . the conduct plaintiff alleges does not constitute "business activities" as defined by our Supreme Court in HAJMM [Co. v. House of Raeford Farms, Inc., 328 N.C. 578, 403 S.E.2d 483 (1991)] and is not contemplated by N.C.Gen.Stat. § 75-1.1 according to the statute's original stated purpose. . . . Matters of internal corporate management, such as the manner of selection and qualifications for directors, do not affect commerce as defined by Chapter 75 and our Supreme Court. 578 S.E.2d at 694.

Judge Hudson dissented (The plaintiff did not request review by the Supreme Court.)

P. Opening Statements and Closing Arguments

In Smith v. Hamrick, 159 N.C.App. 696, 583 S.E.2d 676, petition for discretionary review denied, 357 N.C. 507, 587 S.E.2d 674 (2003), the rear wheel assembly on the defendant's trailer suddenly detached and struck and shattered the plaintiff's windshield. Evidence at trial showed that glass from the windshield injured the plaintiff's foot, resulting in injuries to her leg and hip.

During the defendant’s opening statement, the attorney for the defendant stated “Ladies and Gentlemen, this is nonsense; it’s absolute nonsense, and we’ll prove it to you.” Likewise, during the attorney’s closing argument, he stated, “Ladies and Gentlemen, this case is – it’s nonsense, and we’ve showed you that. . . . [plaintiff’s case was] not about pain; it’s about profit. And it’s not about injury; it’s about money.” 583 S.E.,2d at 678. The plaintiff’s objection to these statements was sustained each time by the trial court, but no curative instruction was requested or given. The jury awarded the plaintiff one dollar in nominal damages.

The Court of Appeals affirmed the jury verdict. The Court stated clearly that the arguments by defense counsel were inappropriate, but not sufficiently prejudicial to warrant a new trial. Since the plaintiff did not request a curative instruction, the trial court did not err in failing to give such an instruction ex mero motu.

> . . . the transcript indicates that defendant’s attorneys stated in opening and closing arguments that plaintiff’s case was nonsense. Rule 3.4(e) of the Revised Rules of Professional Conduct of the North Carolina State Bar provides that an attorney, in trial, shall not “state a personal opinion as to the justness of a cause [or] culpability of a civil litigant[.]” . . . . Moreover, assuming that characterization was permissible in the closing argument, it was wholly inappropriate in the context of an opening

> statement. . . . Nevertheless, we do not believe the "nonsense" statements were so prejudicial as to entitle the plaintiff to a new trial. In front of the jury, the trial court sustained plaintiff's objections to defense counsels' improper statements and commented on why those statements were improper. . . . Yet, this Court has held that when an objection is made to an improper argument of counsel and the court sustains the objection, that court does not err by failing to give a curative instruction if one is not requested. 583 S.E.2d at 679.

The plaintiff also alleged error in the trial court's giving of Pattern Jury Instructions 106.00 and 106.20 in which the jury is instructed that nominal damages consist of some trivial amount such as one dollar and that if the jury is not able to find by the greater weight of the evidence the amount of damages, "it would be [the jury's] duty to write a nominal sum of 'One Dollar' in the blank space provided." 583 S.E.2d at 679. The Court of Appeals held that the trial court properly gave both instructions.

> Here, the nominal damages instructions with which plaintiff takes issue were created and approved by a committee of the North Carolina Conference of Superior Court judges over twenty-five years ago. During that time these instructions have served as a way of explaining nominal damages, and it was the duty of the trial court to instruct the jury upon the law with respect to the awarding of nominal damages due to the possibility of them being awarded in this case. . . . Plaintiff does not cite, nor has this Court found, any North Carolina case law where giving these instructions to a jury was ever questioned by an appellate court much less deemed prejudicial to the parties. 583 S.E.2d at 680.

Q. Notice/Calendar of Hearing

Scruggs v. Chavis, 160 N.C.App. 246, 584 S.E.2d 879 (2003) arose out of an automobile accident in December 1997. In response to the defendants' motion to compel responses to discovery, the parties entered into a consent order allowing the plaintiff an additional thirty days to respond. When the plaintiff did not comply within the time ordered, the defendants filed a motion to dismiss and served a "Calendar Request Form" that the motion be heard on 29 April 2002. A notice of hearing was also served for the same date. After the defendants' motion and notice of hearing were served, a "Final Calendar" for 6 May 2002 was mailed with the defendants' motion to dismiss included in the motions to be heard. The defendants appeared on 29 April 2002. The trial court found that the plaintiff had been noticed for hearing on 29 April 2002, had failed to appear and granted the defendants' motion to dismiss.

Finding that the "Final Calendar" trumped the defendants' notice of hearing, the Court of Appeals reversed.

> This appeal involves the fundamental principle: in civil cases filed in North Carolina, the calendar is set by the court and not by the lawyers. . . . Under both the General Rules of Practice and the local rules for the 18th Judicial District, plaintiff's counsel was entitled to rely upon the Trial Court Administrator's final

> calendar in the absence of any further direction from the court. . . . The notice of hearing from counsel could not trump the Trial Court Administrator's subsequent "Final Calendar" scheduling the motion for hearing on 6 May 2002. Given the local rules for the 18th Judicial District, plaintiff's counsel was entitled to rely upon that "Final Calendar." ___S.E.2d at ___.

R. Rule 60(b), Relief From Judgment

Hooks v. Eckman, 159 N.C.App. 681, 587 S.E.2d 352 (2003) arose from a previous action filed in 1998 by Mrs. Hooks alleging alienation of affections and criminal conversation against Mrs. Boening. In the earlier action, Mrs. Hooks submitted discovery to Mrs. Boening inquiring about her assets as related to Mrs. Hooks' claims for compensatory and punitive damages. Mrs. Boening submitted her equitable distribution affidavit from her pending divorce from Mr. Boening. Her affidavit included the home she owned with Mr. Boening valued at $279,000. The Boening home was sold in September 1999. Mrs. Boening directed that the sale proceeds of $143,000 be paid directly to her parents. Mrs. Boening did not supplement her discovery responses previously filed.

The 1998 action was tried without a jury. Mrs. Boening was questioned at trial about the payment of $143,000 to her parents. Mrs. Boening stated that the payment was in satisfaction of a promissory note. Mrs.

Hooks argued at trial that the payment to the Eckmans should be treated as a fraudulent conveyance. The trial court entered judgment of $42,500 in compensatory damages and $15,500 in punitive damages. Mrs. Boening paid the judgment in full, and Mrs. Hooks marked the judgment "satisfied."

The present suit was filed in 2001 and alleged that Mrs. Boening gave false testimony in the 1998 action about the value of her assets and that this testimony resulted in a less favorable award that would have been received. Mrs. Hooks also filed a Rule 60(b) Motion for Relief from a Final Judgment. The trial court denied Mrs. Hooks' Rule 60 motion on the basis that the judgment had been marked satisfied and that the plaintiff could not attack the validity of that judgment. The Rule 60 motion was, therefore, dismissed. The defendants then moved for summary judgment in the present 2001 action. The trial court granted the defendants' motion for summary judgment.

The Court of Appeals affirmed. Fraud sufficient to attack the validity of a judgment may be intrinsic or extrinsic. Extrinsic fraud prevents a party from presenting his case in court. Intrinsic fraud occurs when the party has notice of the action, is not prevented from presenting appropriate evidence and has the opportunity to

participate fully in the action. Intrinsic fraud "can only be the subject of a motion under Rule 60(b)(3)." ___S.E.2d at ___.

The Court reasoned that the fraud complained of by Mrs. Hooks was intrinsic because, in the 1998 action, Mrs. Hooks had full knowledge of the payment to the Eckmans, cross-examined Mrs. Boening about the payment and argued to the trial court about the payment.

> A final judgment cannot be reversed merely upon a showing of perjured testimony, because it would prevent judicial finality. . . . Accordingly, this Court will not set aside a judgment on the grounds of perjured testimony or for any other matter that was presented and considered in the judgment, which Hooks now attacks. . . . Therefore, the sole remedy for Hooks was to modify or set aside the consent judgment in the 1998 Action through a motion in the cause pursuant to Rule 60. Here, Hooks filed a Rule 60(b) motion, which was denied on 21 February 2002. Because Hooks withdrew her appeal of the trial court's denial of her Rule 60(b) motion, she is not bound by the findings and conclusions reached by the trial court in the denial of that motion. ___ N.C.App. at ___.