NORTH CAROLINA SUPERIOR COURT
JUDGES CONFERENCE

RECENT DECISIONS

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ASHEVILLE, NORTH CAROLINA

DON COWAN

Don Cowan received his undergraduate degree and law degree with honors from Wake Forest University where he was Editor in Chief of the law review. After law school, he was a member of the United States Army Office of the Staff Judge Advocate at the 82d Airborne Division, Fort Bragg; 1st Infantry Division, Lai Khe, South Vietnam; and 2d Armored Cavalry Regiment, Nuernberg, Germany.

He has a general trial practice in state and federal courts, including antitrust litigation, DeLoach v. Philip Morris, 206 F.R.D. 551 (M.D.N.C.2001); trademarks, Resorts of Pinehurst v. Pinehurst National Corp., 148 F.3d 417 (4th Cir.1998) patents, medical and pharmaceutical devices, Osburn v. Danek Medical, Inc., 352 N.C. 143, 530 S.E.2d 54(2000); defense of state, Brown v. Lee, 319 F.3d 162 (4th Cir.2003), State v. Johnson, 2003 WL 1873604 (N.C.App.2003) and federal death penalty cases and criminal drug cases, United States v. Allen, 159 F.3d 832 (4th Cir.1998).

He is a Fellow of the American College of Trial Lawyers and a Fellow of the American Academy of Appellate Lawyers. He is a past president of the North Carolina Bar Association and a past president of Legal Services of North Carolina. He has been a member of the Wake Forest University Board of Trustees since 1992. He is an Adjunct Professor, Trial Practice, Duke University School of Law.

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I. Liability

A. Motor Vehicles

The defendant in Parker v. Willis, ___N.C.App. ___, 606 S.E.2d 184 (2004), petition for discretionary review denied, ___N.C.___, ___S.E.2d___ (April 6, 2005) had pulled his car to the side of the road. As the defendant backed into the travel lane, the plaintiff hit the back of the defendant's car, causing the plaintiff to be thrown from his motorcycle into a ditch and receive serious injuries. The trial judge refused to instruct on last clear chance. The jury found the plaintiff contributorily negligent.

The plaintiff argued on appeal that the trial judge erred in submitting the issue of contributory negligence to the jury. Because the plaintiff failed to move for a directed verdict at trial on the issue of contributory negligence, this issue was not preserved for appeal.

> Plaintiff's request that the trial judge not instruct the jury on contributory negligence was based on an argument that the evidence was insufficient to go to the jury. Accordingly, we must decline to review plaintiff's argument due to his failure to make a motion for a directed verdict. 606 S.E.2d at 186.

The plaintiff also contended that the trial judge should have instructed the jury on last clear chance. The Court of Appeals agreed and remanded for a new trial.

> Defendant testified that he had an unobstructed view of and was familiar with the road on which plaintiff was traveling when defendant backed out. Moreover, defendant does not argue that he would have been unable to wait for plaintiff to pass had he seen plaintiff. This evidence would support an inference that defendant had the time and means to avoid the collision by simply keeping a proper lookout and waiting to back out until plaintiff had passed. Accordingly, the jury could have inferred that defendant, having the duty to keep a proper lookout, negligently failed to keep that lookout, thus causing the collision and plaintiff's injuries. Therefore, the issue of last clear chance should have been submitted to the jury . . . . 606 S.E.2d at 187.

In Privett v. Yarborough, ___N.C.App.___, 603 S.E.2d 579 (2004), the plaintiff was transporting a large wardrobe on the back of his pickup truck when the wardrobe fell off onto the road. The plaintiff stopped in the middle of his lane and, since it was near sunset, he turned on the headlights and flashing lights. As the plaintiff was in the middle of his lane, another vehicle approached the plaintiff from the rear, stopped, turned on the headlights and flashing lights and assisted the plaintiff in picking up debris from the wardrobe. As the plaintiff retrieved a piece of the wardrobe from the opposite lane, he was struck by the defendant's car. The plaintiff testified that he never saw the defendant's car. The jury found the defendant negligent, the plaintiff contributorily negligent, and, based on finding that the defendant had the last clear chance, awarded damages to the plaintiff.

The Court of Appeals held that the issue of last clear chance had been properly submitted to the jury. As to the first element of last clear chance – the plaintiff was in a position of helpless peril as a result of his own negligence – the Court held this was satisfied by the plaintiff's testimony that he did not see the defendant's vehicle prior to impact. On the second element – defendant discovered or should have discovered the plaintiff's position – the Court held this element was met by evidence showing that both the plaintiff and the vehicle behind the plaintiff were in the middle of their lane with both headlights and flashing lights activated. Regardless of whether the defendant actually saw the plaintiff, the position and lighting of the vehicles "were an indication that drivers of those vehicles might be nearby." 603 S.E.2d at 582.

On the issue of whether the defendant had the time and means to avoid the accident, the evidence was that the defendant traveled along a straight stretch of the road for about one-half mile as he approached the two vehicles with operating head lights. Finally, the evidence was sufficient to submit to the jury on the issue of had the defendant been keeping a proper lookout, whether the accident could have been avoided.

The jury in Kummer v. Lowry, 165 N.C.App. 261, 598 S.E.2d 223, petition for discretionary review denied, 359 N.C. 189, 605 S.E.2d 153 (2004) found the defendant negligent, the plaintiff

contributorily negligent and awarded no damages. The trial court denied the plaintiff's motion for a directed verdict on the issue of contributory negligence and also denied the plaintiff's motion for a new trial and judgment notwithstanding the verdict.

The plaintiff's evidence at trial indicated that she was driving west on Carowinds Boulevard at a speed between 45 and 55 miles per hour in a 55 mile per hour zone. When the plaintiff entered the intersection of Carowinds Boulevard and Catawba Trace Drive, the light controlling the plaintiff's direction of travel was green. Lowry entered the intersection on Catawba Trace Drive in violation of the red light controlling his direction of travel. Weather conditions at the time of the accident were clear. There were no obstructions to the plaintiff's view. The plaintiff testified that she did not see or notice Lowry until the collision occurred. Lowry's answer pleaded contributory negligence by failing to keep a proper lookout, failing to reduce speed to avoid an accident and acting carelessly and negligently.

Finding no abuse of discretion by the trial court in denying the plaintiff's motion for a new trial, the Court of Appeals affirmed. Even though the direction of travel for a motorist is controlled by a green light, the motorist still has a duty to keep a proper lookout.

> Here, the evidence shows that plaintiff admitted not looking left or right to see if any traffic was coming and stated, "it's not [her] responsibility." Further, the evidence shows that it was a clear and sunny day, the roads were dry, and there was good visibility to the left, right, and front of plaintiff's vehicle. There were no obstructions to plaintiff's view as she approached the intersection, and she testified she was familiar with the intersection. . . .
>
> The evidence also showed that plaintiff did not apply her brakes or slow her vehicle's speed. Plaintiff testified that she did not recall hitting her brakes before impact or seeing any skid marks. Officer Hawk testified that his investigation revealed no evidence that plaintiff took any action to avoid the collision.
>
> Sufficient evidence was presented regarding plaintiff's contributory negligence, which allowed the trial court to submit the issue of contributory negligence to the jury. 165 N.C. App. at 265, 598 S.E.2d at 226-227.

The plaintiff in Garrett v. Smith, 163 N.C.App. 760, 594 S.E.2d 232 (2004), alleged that while she was stopped at a stoplight, she was struck from the rear by the defendant. The jury found that the plaintiff was not injured by the negligence of the defendant. At trial, the defendant testified that the plaintiff made eye contact with her in the plaintiff's rearview mirror, then suddenly slammed on her brakes. The defendant's answer did not allege contributory negligence. The plaintiff made a motion in limine to exclude any evidence that she suddenly slammed on her brakes. Although no ruling appeared in the record concerning a ruling on this motion, the plaintiff failed to object to this testimony at trial. The Court of

Appeals held that the plaintiff's failure to object to this evidence at trial was insufficient to preserve the issue for appeal.

The Court of Appeals also held that the trial court had properly denied the plaintiff's motions for a directed verdict on the issue of liability and for J.N.O.V. and a new trial.

> Although the admission by defendant that her car collided with the rear of plaintiff's vehicle permits a legitimate inference that defendant was not keeping a proper lookout or was following plaintiff too closely, it does not, however, compel either of those conclusions, but instead simply raises the question for the jury's ultimate determination. . . . Thus, even though plaintiff's evidence and defendant's admission that a rear-end collision occurred produced sufficient evidence to raise an inference that defendant was negligent in order for plaintiff's case to reach a jury, we conclude that there is not sufficient evidence to establish defendant's negligence as a matter of law. Thus, the trial court did not err in denying plaintiff's motions for directed verdict and J.N.O.V.; nor did the trial court abuse its discretion by denying plaintiff a new trial. 163 N.C. App. at 765, 594 S.E.2d at 235.

B. Premises

The plaintiff in Jones v. Lake Hickory R.V. Resort, Inc., 162 N.C.App. 618, 592 S.E.2d 284, per curiam reversed, 359 N.C. 181, 606 S.E.2d 119 (2004) received serious burns during a Fourth of July parade. The parade was organized and conducted by the Lessee Association, a group that leased individual lots or campsites at the Lake Hickory R.V. Resort. The rules of the Resort provided that the Association was responsible for

planning social activities for the campers. The Association had held the Fourth of July parade for several years. One of the campers, Morris, was dressed as the Statute of Liberty and skated in the parade with a "tiki" torch. Morris lost control of the torch, causing it to set the plaintiff's clothes on fire. The jury determined that the Lessee Association was the agent of the Resort and awarded damages of $600,000. The trial court denied the defendant's motions for judgment notwithstanding the verdict or for a new trial.

The Court of Appeals reversed on the grounds that it could not determine the basis upon which the jury found the Resort negligent. The Court of Appeals held that the parade was not an intrinsically dangerous activity and that the Association was not the agent for the parade. Although there was evidence that the manager of the Resort had actual knowledge of Morris and the torch, the case was remanded for a new trial to determine the theory of liability.

The Supreme Court reversed per curiam for the reasons stated in the dissenting opinion of Judge Timmons-Goodson. Judge Timmons-Goodson would have affirmed the trial court's rulings denying the defense motions for judgment notwithstanding the verdict because there was evidence that the Association was the agent of the Resort.

> The majority opinion analyzes the element of control by looking for evidence of actual control exerted by the Resort. The case law, however, including every case cited in the majority opinion, focused on the "right to control." . . . . In this case, there is evidence that the Resort delegated the duty to hold social functions on the Resort property to the Lessee Association and retained the right to review all those functions. In addition, there was testimony from employees that the Resort retained the power to deny activities, that employees would sit in on committee meetings held by the Lessee Association, that the committee would supply the Resort with a list of activities on a monthly basis, and that the Resort enforced its rules to keep the grounds safe. Thus, the majority opinion errs in concluding that there was no evidence on the element of control over the details of the activities by the Lessee Association, and the Resort is not entitled to judgment notwithstanding the verdict on the issue of agency. 162 N.C. App. at 631, 592 S.E.2d at 631.

The plaintiff in Holcomb v. Colonial Associates, L.L.C., 358 N.C. 501, 597 S.E.2d 710 (2004) was on land owned by the defendants where he was injured when a Rottweiler dog lunged at the plaintiff causing him to fall and injure his back. The Rottweiler involved in the suit was one of two Rottweilers owned by Olson. Olson was a tenant in one of two houses on land owned by Colonial Associates. Management Associates managed the houses for Colonial. Under the terms of Olson's lease, he could keep one Rottweiler on the property. The lease required Olson to remove the dog within forty-eight hours notification that the dog had created a situation that was in the landlord's opinion undesirable. In 1993 or 1994, one of the Rottweilers attacked the occupant of the other rental house. In 1996, both dogs

attacked a co-worker of the occupant of the other rental house. Both incidents were reported to Management Associates.

The property owned by Colonial was listed for sale with Powell Properties. A company interested in the property contacted the plaintiff, a demolition contractor, about estimating the costs of removing both rental houses. While the plaintiff was on the property, he was injured by the Rottweiler's actions. Suit was filed against Olson and Colonial Associates. The jury found both defendants negligent and awarded the plaintiff $330,000. The Court of Appeals reversed the trial court, holding that Colonial's motion for directed verdict and judgment notwithstanding the verdict should have been granted because there was no evidence that Colonial was the "owner or keeper" of the dogs.

Distinguishing between the strict liability claim alleged against Olson and the negligence claim filed against Colonial, the Supreme Court reversed the Court of Appeals and held that the trial court had correctly denied the motions for directed verdict of Colonial.

> Plaintiff need not show defendant was an owner or a keeper in order to demonstrate a prima facie case of negligence. The fact that we recognize a strict liability cause of action against owners and keepers of vicious animals . . . does not preclude a party from alleging negligence (a different cause of action) against a party who may or may not be an owner or keeper of an animal. Because we conclude that plaintiff was not required to show Colonial was an

> owner or keeper of the dogs in order to show Colonial was negligent, we conclude that the Court of Appeals majority and dissent erred by concluding that Colonial could not be liable unless it was the owner or keeper of the dogs. 358 N.C. at 507, 597 S.E.2d at 714.

The trial court instructed the jury that it could find Management Associates negligent and that such negligence may be imputed to Colonial if the jury found that Management Associates failed to use reasonable care and require Olson to restrain the dogs or failed to give adequate warning to a lawful visitor on the property. The Supreme Court held that the trial court had correctly instructed the jury, and that, in certain circumstances, an independent contractor could be an agent of the property owner. Since the lease required Olson to remove the dogs upon notification by the landlord of a nuisance or disturbance relating to the dogs, this evidence supported the jury's finding that Colonial had control over the dogs.

> . . . a landlord is potentially liable for injuries to third persons if he has "control of the leased premises." . . . . Similarly, a landlord owes a duty to third persons for conditions over which he retained control. . . . we agree with the trial court's statements that an independent contractor can, in certain respects, be an agent. . . . Whether an independent contractor is an agent in certain instances depends upon the degree of control exercised by the person or entity who hired the independent contractor. . . . The evidence supports a finding that Colonial possessed control over Management with respect to the subject of the litigation — the dogs. Olson's lease gave Dillard Powell, owner of Colonial, the authority to remove Olson's dogs at any time. After plaintiff filed suit against Colonial, Powell exercised this control, requesting Management to order

> Olson to remove the dogs. Management complied with Powell's request and, pursuant to this request, Olson removed his dogs from the property. 358 N.C. at 508-10, 597 S.E.2d at 715-716.

The plaintiffs in Anderson v. Housing Authority of City of Raleigh, ___N.C.App. ___, 609 S.E.2d 426 (2005), residents of the Walnut Terrace housing development owned by the defendant, alleged that the release of carbon monoxide from gas boilers caused the plaintiffs' injuries. Dr. Cyril Allen, a physician specializing in internal medicine, and Dr. Laura Jozewicz, a neurologist, examined the plaintiffs or reviewed their medical records. Dr. Allen's examinations were within normal limits. Dr. Jozewicz testified that she lacked sufficient information about exposure to express an opinion as to causation. Another of the plaintiffs' experts identified the symptoms of carbon monoxide exposure. As several of the plaintiffs had these symptoms, the plaintiffs argued that this was sufficient to defeat the defendant's motion for summary judgment.

The trial court granted the defendant's motion for summary judgment. Based on the absence of expert evidence as to causation, the Court of Appeals affirmed.

> In sum, plaintiffs have not forecast evidence of causation beyond conjecture. In particular, plaintiffs do not set forth any specific facts to controvert the testimony by Dr. Jozewicz that there is insufficient information from which to form an opinion as to whether the release of carbon monoxide caused plaintiffs' symptoms. No expert for plaintiffs testified that plaintiffs' symptoms could or might

> have been caused by the gas boilers at Walnut Terrace. Where a layperson can do no more than speculate as to the cause of a physical condition, the medical opinion of an expert is required to show causation. 609 S.E.2d at 429.

The plaintiff in Harris v. Tri-Arc Food Systems, Inc., 165 N.C.App. 495, 598 S.E.2d 644 (2004), petition for discretionary review denied, 359 N.C. 188, 607 S.E.2d 270 (2004) was a customer at a Bojangles restaurant owned by the defendant when a portion of the restaurant's ceiling collapsed, falling on the plaintiff and causing serious injury. The defendant's answers to the plaintiff interrogatories indicated that the defendant was not aware of any defect or condition in the ceiling, inspection of the ceiling was not a responsibility of the defendant and that the last time the ceiling was inspected was by the building inspector who approved the building for occupancy. Based on this evidence, the trial court granted the motion for summary judgment of the defendant-owner of the restaurant.

The Court of Appeals affirmed. An employer is not responsible for the negligent acts of an independent contractor, such as the construction company for the restaurant, unless the work is ultra hazardous or inherently dangerous and the employer knows that the work is of this type. Since the work was not ultra hazardous or inherently dangerous with the employer's knowledge, there was no evidence of the defendant's negligence.

> . . . defendant's evidence tends to show that the accident causing injury to plaintiff was the result of a latent construction defect in the restaurant's ceiling of which defendant had no knowledge, nor any reason to discover the defect. Plaintiff first contends there is evidence that defendant failed to conduct a reasonable inspection of the premises. However, the evidence of record shows the building was inspected and approved for occupancy by the building inspector and plaintiff has failed to produce any evidence to support her allegation that regular inspections of the ceiling would have been necessary or reasonable under the circumstances. 165 N.C. App. at 500, 598 S.E.2d at 648.

The Court of Appeals also rejected the plaintiff's reliance upon res ipsa loquitur.

> The doctrine of res ipsa loquitur is not applicable in this case, because there is evidence of what caused plaintiff's injury: a latent construction defect in the ceiling of the restaurant. Furthermore, plaintiff has also failed to introduce any evidence eliminating all possible tortfeasors other than defendant as there is evidence that the defect occurred during the construction of the building by Prostruction, and specifically during the work of the subcontractor. Thus, plaintiff has failed to show that defendant had exclusive control of the instrumentality that caused plaintiff's injury, namely the defect in the ceiling construction and as such, the doctrine of res ipsa loquitur does not apply. 165 N.C. App. at 502, 598 S.E.2d at 649.

II. Insurance

A. UM/UIM

The plaintiff in Register v. White, 160 N.C. App. 657, 587 S.E.2d 95 (2003), affirmed, 358 N.C. 691, 599 S.E.2d 549 (2004) 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. Farm Bureau refused to arbitrate based on a provision in the policy requiring arbitration to "begin within the time limit allowed for bodily injury or death actions in the state where the accident occurred." 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 by participating in discovery and otherwise pursuing in the trial court the claim against White.

Affirming the Court of Appeals, 358 N.C. 691, 599 S.E.2d 549 (2004), the Supreme Court reversed the trial court and held that the right to demand arbitration with the plaintiff's underinsured carrier did not arise until the defendant's liability carrier had paid its limits at which time the opportunity to consider underinsured coverage first arose.

> Exhaustion of that liability coverage...is deemed to occur when either (a) the limits of liability per claim have been paid upon the claim, or (b) by reason of multiple claims, the aggregate per occurrence limit of liability has been paid. N.C.G.S. § 20-279.21(b)(4). . . . Once this exhaustion requirement is satisfied, but not before, an insured may seek UIM benefits from a UIM carrier. . . . In the present case, plaintiff's right to demand arbitration of her UIM claim could not have arisen prior to 8 August 2001, when defendant White's insurance company

> tendered the full limits of its policy. Thus, plaintiff's 24 September 2001 demand for arbitration fell within the three-year "time limit" referenced in the policy . . . . 358 N.C. at 698, 701, 599 S.E.2d at 555, 556.

The original decision by the Court of Appeals was in Austin v. Midgett, 159 N.C.App. 416, 583 S.E.2d 405 (2003) 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 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. 159 N.C. App. at 420-21, 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. 159 N.C. App. at 421-22, 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 $99,721.02. 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. 159 N.C. App. at 422, 583 S.E.2d at 410.

The Court granted rehearing, Austin v. Midgett, ___ N.C.App. ___, 603 S.E.2d 855 (2004) "on the limited issue of the proper application of a credit arising out of a $50,000 payment made by Farm Bureau in this matter." 603 S.E.2d at 855.

> The total amount of the loss shall be reduced by the amount of workers' compensation payments received by plaintiff of $100,278.98. To this amount, there shall be added the amount of the workers' compensation lien of $33,426.00. (Under the provisions of N.C.Gen.Stat. § 20-279.21(e) the uninsured and underinsured motorist carriers are liable for the amount of this lien.) This sum shall then be reduced by the $50,000 payment made by the primary carrier, Farm Bureau. The figure determined shall then be divided in half because Integon and State Farm each had a $100,000 UIM policy. Integon shall be liable for that amount, plus any prejudgment interest applicable . . . up to the limit of its underinsured motorist coverage of $75,000, as computed above. . . . This matter is remanded to the Superior Court of Dare County for a determination of the total loss incurred by plaintiff as required by N.C.Gen.Stat. § 20-279.21(e) and the computation of the amount owed by Integon to plaintiff in accordance with this opinion. 603 S.E.2d at 857.

The Court in Walker v. Penn National Security Ins. Co., ___N.C.App. ___, 608 S.E.2d 107 (2005) applied Austin II, ___N.C.App. ___, 603 S.E.2d 855 (2004), in determining the amounts to which the plaintiff was entitled. The plaintiff was

injured in an automobile accident on 1 August 2000 as a result of the negligence of Troy Walker. At the time of the accident, the plaintiff, James Walker, was in the course and scope of his employment with SIA. Troy Walker had liability insurance with limits of $30,000. The vehicle in which the plaintiff was injured had UIM limits of $1 million through a policy with Penn National. Troy Walker's liability carrier paid its full limits of $30,000. The workers' compensation carrier paid compensation and benefits of $81,948.37. As a result of a clincher agreement, the compensation carrier's lien was $35,000 on any recovery from third parties. The plaintiff and defendant submitted the issue of the valuation of the plaintiff's injuries to arbitration. The arbitration award was $126,874.

The Court of Appeals held that the plaintiff was entitled to recover $56,789.68 from the UIM carrier.

> We first subtract the amount paid to plaintiff by the liability carrier ($30,000) from the UIM policy limit ($1,000,000) and find that the UIM coverage limit is $970,000. We next determine the amount plaintiff is entitled to recover from the UIM carrier. Plaintiff's total loss was valued at $126,874. From this amount we subtract the amount of workers' compensation benefits, not including the amount of the workers' compensation lien, ($40,749.42 [This amount was reached by subtracting the amount paid to Hoover Rehabilitation ($6,198.95) [The trial court found that this cost was for a nurse to accompany the plaintiff to his doctor's visit and that the plaintiff received no benefit from this service and was not compensation to the plaintiff] and the amount of the workers' compensation lien ($35,000) from the total amount paid by the workers' compensation carrier ($81,948.37)] and

> the amount plaintiff received from the liability carrier ($30,000). The resulting figure representing the total amount of plaintiff's uncompensated loss is $56,789.68. Thus, we hold that the amount payable by the UIM carrier to plaintiff is $56,789.68 plus interest. 608 S.E.2d at 111.

Erwin v. Tweed, 159 N.C.App. 579, 583 S.E.2d 717 (2003), per curiam affirmed, 359 N.C. 64, 602 S.E.2d 359 (2004) involved the definition of "non-fleet private passenger type vehicles" in G.S. § 58-40-10(1)(b)(1) for the purpose of interpolicy stacking of underinsurance coverage. The plaintiff was riding his bicycle when he was struck by the defendant's vehicle. The defendant's liability carrier paid its limits. Farm Bureau had two underinsurance policies providing potential coverage to the plaintiff. Pursuant to G.S. § 20-279.21(b)(4), interpolicy stacking of underinsurance coverage was permitted for non-fleet private passenger type vehicles. G.S. § 58-40-10(1)(b)(1) defines a private passenger vehicle as one in which the "gross vehicle weight as specified by the manufacturer of less than 10,000 pounds." Farm Bureau proffered evidence as to the "maximum gross vehicle weight" when fully loaded. The plaintiff proffered evidence as to the weight of the truck at the weigh station.

The Court of Appeals held that both proffers failed to address the statutory definition.

> . . . we construe "gross vehicle weight as specified by the manufacturer" to require evidence of the

> manufacturer's specified weight of the vehicle alone. This weight does not include passenger weight or the weight of any load the vehicle is carrying or capable of carrying at any given time. Only the weight of the vehicle itself is relevant to the determination of the manufacturer's "gross vehicle weight." This value may be obtained by examining dealership literature provided by the manufacturer giving the actual weight of model vehicles adjusted to reflect additional options on the vehicle in question. Alternatively, a statement of the weight of the vehicle contained in the vehicle's owner's manual could be used to show its "gross vehicle weight." 159 N.C. App. 584, 583 S.E.2d at 720-721.

The case was remanded to the trial court to determine the vehicle's gross weight.

The plaintiff in Hoffman v. Great American Alliance Ins. Co., ___N.C.App. ___, 601 S.E.2d 908 (2004) was riding his bicycle in Ocean Drive Beach, South Carolina on 8 July 1999 when he alleged that he was run off the road by an unidentified vehicle. Although initial medical examination indicated that the injuries were minor, subsequent orthopedic examination on 13 July 1999 showed two fractures to the right arm. On the same day, the plaintiff contacted his insurance agent. On 19 July 1999, the plaintiff's uninsured carrier denied the claim for benefits on the grounds that the plaintiff could not state that he was actually struck by the hit and run car, and, also, because a report had not been made to the local police. The trial court granted summary judgment for the defendant.

The Court of Appeals affirmed. G.S. § 20-279.21(b)(3)(b) requires that the accident be reported to the local police within twenty-four hours or as soon thereafter as practicable. The plaintiff contended that the "notice" provisions of the UIM statute, G.S. §20-279.21(b)(4) should apply since "notice" is only required to be given to the underinsured carrier of initiation of the suit. Finding the notice provisions of the uninsured statute to provide specific notice requirements, the Court disagreed.

> The differences in the two notice requirements show the legislature did not intend these provisions be construed the same. N.C.Gen.Stat. § 20-279.21(b)(3)(b) unequivocally requires that "the insured, or someone in his behalf shall report the accident within 24 hours or as soon as thereafter as may be practicable, to a police officer. . . ." . . . Plaintiff's claim for UM benefits was absolutely barred by his failure to comply with the specific notice requirements as set forth in N.C.Gen.Stat. § 20-279.21(b)(3)(b), and the plain and unambiguous requirements of the insurance contract. Defendant asserts plaintiff never notified any law enforcement officer of the alleged accident. 601 S.E.2d at 913.

The plaintiff attempted to excuse the failure to give the statutory notice by reliance upon Great American Ins. Co. v. C.G. Tate Construction Co., 315 N.C. 714, 340 S.E.2d 743 (1986) (notice to liability carrier) and Liberty Mutual Ins. Co. v. Pennington, 356 N.C. 571, 573 S.E.2d 118 (2002) (notice to underinsured carrier). Although agreeing with the trial court that the plaintiff had not given notice as soon as practicable;

that the plaintiff failed to demonstrate good faith in failing to give prompt notice; and that the insurance company had been prejudiced in its ability to investigate the claim, the Court of Appeals concluded that the statutory notice for UM claims controlled and that Tate and Pennington should not be extended to UM claims.

Trivette v. State Farm Mutual Automobile Insurance Co., 164 N.C.App. 680, 596 S.E.2d 448 (2004), petition for discretionary review denied, 359 N.C. 75, 605 S.E.2d 149 (2004) involved the application of G.S. § 20-279.21(b)(3) to stacking of UIM coverages. The plaintiff, Jeffrey Trivette, was involved in an accident on 17 August 2000 when his vehicle was struck by a Ford owned by Mr. Hernandez. New South Insurance Company covered the Hernandez vehicle through a policy that had limits of $25,000/$50,000. New South paid its limits to Trivette. The plaintiff had an automobile insurance policy with Integon with UM limits of $30,000/$60,000. Integon paid Trivette $5,000, the difference between the limits of the New South policy and the Integon policy. At the time of the accident, the plaintiff was living with his parents. His parents had a policy with State Farm that had limits of $50,000/$100,000. State Farm paid the plaintiff $20,000, the difference between its limits and the amounts previously paid to the plaintiff.

The plaintiff filed the present declaratory judgment action alleging that the limits of all policies should be stacked and that State Farm was not entitled to a credit for the previous payments. Both the State Farm and Integon policies contained clauses that limited UM liability to "the highest applicable limit of liability under any one policy." G.S. § 20-279.21(b)(3) provides:

> Where coverage is provided on more than one vehicle insured on the same policy or where the owner or the named insured has more than one policy with coverage under this subdivision, there shall not be permitted any combination of coverage within a policy or where more than one policy may apply to determine the total amount of coverage.

The trial court granted State Farm's motion for summary judgment. The Court of Appeals affirmed. Construing G.S. § 20-279.21(b)(3), the Court held that "inter-policy stacking of UM coverage" was prohibited. 596 S.E.2d at 450. Additionally, the policy provisions limited UM coverage to the highest liability limits of one policy.

> As plaintiff received UM coverage from his own policy and his parents' policy, we hold plaintiff "has more than one policy with coverage under this subdivision" and is not entitled to stack UM coverage limits under the policies. The plain language of both policies clearly limits the total UM coverage to the "highest applicable limit of liability under any one policy." Plaintiff was paid $30,000 . . . . Between his policy and defendant's policy, the "highest applicable limit" was $50,000. . . . The trial court did not err in concluding that N.C.Gen.Stat. § 20-279.21(b)(3) prohibited stacking the UM coverage. . . . 164 N.C. App. at 684-85, 596 S.E.2d at 451.

The plaintiffs in Farrior v. State Farm Mutual Automobile Insurance Co., 164 N.C.App. 384, 595 S.E.2d 790, petition for discretionary review denied, 358 N.C. 731, 601 S.E.2d 530 (2004), were involved in an automobile accident on 1 June 2000. The accident was caused by Chadwick who was operating his vehicle under the influence of alcohol. Chadwick had automobile liability insurance of $25,000/$50,000. The plaintiffs' vehicle was insured by State Farm with limits of $100,000/$300,000. The plaintiffs' claim for underinsured coverage was denied by State Farm because one of the named insured, Regina Farrior, had signed the selection/rejection of UIM coverage. The other insured, Thomas Farrior, did not sign the selection/rejection form.

The trial court granted State Farm's motion for summary judgment. The Court of Appeals affirmed. Relying upon G.S. § 20-279.21(b)(4), the Court held that any insured may reject coverage and that such rejection is binding on all insureds and vehicles under the policy.

B. Motor Vehicle

North Carolina Farm Bureau Ins. Co. v. Nationwide Mutual Ins. Co., ___N.C.App. ___, 608 S.E.2d 112 (2005) was a declaratory judgment action to determine coverage for a fatal automobile accident on 27 October 1994. Charly Simms was

driving her mother's vehicle with the permission of her mother. Reagan Mason was a passenger in the vehicle. Mason grabbed the steering wheel and attempted to steer the vehicle into a weigh station. When Simms tried to regain control of the vehicle, it struck a vehicle driven by Graves causing his death. Farm Bureau insured Mason and Nationwide insured Simms and her mother. The parties stipulated that Mason was not a permissive user of the Simms vehicle, therefore the only issue was whether Mason was in lawful possession of the car.

The Court of Appeals affirmed the trial court's grant of summary judgment in favor of Nationwide on the basis that Mason was not in lawful possession of the car.

> We . . . hold that a passenger who grabs the steering wheel is actually interfering with the vehicle's operation. . . . As such, we cannot agree that grabbing the steering wheel of a moving car from the passenger seat in the circumstances presented here constitutes "possession" of the car. Thus, we conclude that Reagan [Mason] was not in possession of the car when she grabbed the steering wheel. Further, even if Reagan were in possession of the car, the possession would not have been lawful. 608 S.E.2d at 114.

C. Commercial General Liability

Harleysville Mutual Ins. Co. v. Berkley Insurance Company of the Carolinas, ___N.C.App. ___, 610 S.E.2d 215 (2005) was a declaratory judgment action to determine coverage for damage to a residence constructed with synthetic stucco. The certificate of occupancy for the residence was issued on 15 December 1994.

An inspection of the home in May 1996 found areas of medium and high moisture levels. Repairs were performed at the house. A second inspection in May 1997 found penetrations through the stucco system.

The homeowners filed suit against RGS, the contractor. Harleysville provided commercial liability coverage prior to 1 May 1997. Berkley Insurance's policy became effective on 1 May 1997. Berkley refused to provide coverage or a defense to the action by the homeowners. The homeowners settled with RGS, and Harleysville paid the full amount of the settlement. The trial court granted the motion for summary judgment by Berkley in the declaratory judgment action.

The Court of Appeals affirmed summary judgment for Berkley.

> . . . "where the date of the injury-in-fact can be known with certainty, the insurance policy or policies on the risk on that date are triggered." . . . . "even in situations where damage continues over time, if the court can determine when the defect occurred from which all subsequent damages flow, the court must use the date of the defect and trigger the coverage applicable on that date." . . . . In the instant case, the Desairs' [homeowners'] damages arose from the continual entry of moisture into their residence through the synthetic stucco. . . . The record in the instant case establishes that defendant was not insuring RGS on the dates the Desairs' residence was constructed, nor was defendant insuring RGS on the dates RGS attempted to repair its previous construction efforts. . . . The repairs took place following Prime South's inspection of the residence in 1996. Defendant's policy with RGS began on 1 May 1997 . . . . it is clear that the Desairs' property damage was caused by RGS's action or inactions prior to the

effective date of its policy with defendant. 610 S.E.2d at 217-18.

In Production Systems, Inc. v. Amerisure Insurance Co., ___N.C.App. ___, 605 S.E.2d 663 (2004), petition for discretionary review denied, 359 N.C. 322, ___S.E.2d ___ (2005) the plaintiff, PSI, entered into a contract with Rubatex, Inc. to design, construct and install two foam rubber sheet line systems. Shortly after the systems were put into operation, Rubatex experienced problems. Defects in the lines also caused damage to other parts of the Rubatex machinery. Rubatex refused to pay the balance due on the PSI contract. PSI sued for the balance, and Rubatex counterclaimed for breach of contract and damages related to repairing the lines and loss of use of the machinery.

At the time of the Rubatex contract, PSI had a commercial general liability policy with Amerisure providing coverage for "property damage" caused by an "occurrence." The policy excluded coverage for property damage "expected or intended from the standpoint of the insured." In a separate declaratory judgment action to determine coverage, the trial court granted Amerisure's motion for summary judgment.

The Court of Appeals affirmed.

> The term "property damage in an insurance policy has been interpreted to mean damage to property that was **previously undamaged**, and **not** the expense of repairing property or completing a project that was not done

> correctly or according to contract in the first instance. . . . We conclude that . . . "property damage" does not refer to repairs to property necessitated by an insured's failure to properly construct the property to begin with. 605 S.E.2d at 666.

The Court in Hutchinson v. Nationwide Mutual Fire Insurance Co., 163 N.C.App. 601, 594 S.E.2d 61 (2004), was required to determine whether a construction defect occurred during a period of insurance coverage. Brulen Custom Builders constructed a custom home for the Hutchinsons. The project included a retaining wall that was built during the summer of 1999. Construction on the home stopped in October 1999. Nationwide insured Brulen on or before 11 December 1998 and on and after 15 November 1999. Brulen failed to pay the required premiums for the period between 11 December 1998 and 15 November 1999, and was, therefore, not insured. The Hutchinsons' suit against Brulen was referred to binding arbitration. The arbitrator concluded that the retaining wall was damaged as a result of Brulen's negligence and awarded $67,900 in damages against Brulen.

Nationwide's policy insuring Brulen defined property damage as "caused by an occurrence . . . within the policy period." The property damage alleged by the Hutchinsons occurred either when Brulen failed to install a drainage system when the wall was constructed, or, when water entered the surrounding soil.

The trial court determined that the damage occurred when the wall was constructed, therefore, there was no coverage. The Court of Appeals affirmed.

> If this Court can determine when the injury-in-fact occurred, the insurance policy available at the time of the injury controls. . . . It is uncontested that the building was complete before the end of October 1999 and that Brulen's new insurance policy was not available until 15 November 1999. This Court can determine with certainty that Brulen's failure to install a drainage system in the retaining wall or to use the proper soil under the retaining wall occurred before 15 November 1999 and therefore Brulen's later insurance policy is not triggered if the damage was caused under those theories . . . .
>
> In Gaston [County Dyeing Machine Co. v. Northfield Ins. Co., 351 N.C. 293, 524 S.E.2d 558 (2000)] our Supreme Court held that even in situations where damage continues over time, if the court can determine when the defect occurred from which all subsequent damages flow, the court must use the date of the defect and trigger the coverage applicable at that date. . . . Assuming arguendo that the damage was caused by the continual entry of water, if it can be determined with certainty that the entry of water was caused by faulty construction pre-dating insurance coverage, defendants are not liable for plaintiffs' damages. 163 N.C. App. at 604-05, 594 S.E.2d at 63-64.

D. Liens of Health Care Providers

The plaintiff in Smith v. State Farm Mutual Automobile Insurance Co., 157 N.C.App. 596, 580 S.E.2d 46 (2003), per curiam reversed, 358 N.C. 725, 599 S.E.2d 905 (2004) provided medical services to Johnny Wynne as a result of injuries received by Wynne in an automobile accident. Wynne retained counsel and filed suit against Materu. Materu was insured by

State Farm. The plaintiff submitted a health insurance claim form to Wynne's counsel itemizing the amount owed. Wynne discharged his counsel and settled directly with State Farm. During the course of settlement negotiations, Wynne provided State Farm with a copy of the claim form completed by the plaintiff and a copy of the plaintiff's bill for services. State Farm paid all funds directly to Wynne. Wynne did not pay the plaintiff out of the settlement proceeds.

The case was tried to a jury. The jury found that the claim form put State Farm on notice of the plaintiff's lien and awarded the plaintiff the full amount owed. The Court of Appeals agreed that Wynne's submission of the claim form to State Farm put State Farm on notice of the lien. Judge Levinson dissented. The Supreme Court reversed the Court of Appeals based on the reasoning in Judge Levinson's dissent.

> I would hold that when an insurance carrier settles directly with an unrepresented injured party, the carrier does not have valid "notice" of a "just and bona fide claim" pursuant to G.S. § 44-50 unless it receives documentation that (1) constitutes a valid assignment of rights signed by the injured; or (2) contains unambiguous language that the medical provider is asserting a lien under the provisions of G.S. §§ 44-49 and 44-50, or language asserting an interest in or claim to settlement proceedings. . . . I would reverse and remand with instructions for the trial court to enter summary judgment in favor of defendant. 157 N.C. App. at 608-09, 580 S.E.2d at 54.

E. Contribution and Indemnity

The plaintiffs in Land v. Tall House Bldg. Co., ___N.C.App.___, 602 S.E.2d 1 (2004) contracted with Tall House to construct a house for the plaintiffs. Tall House used a direct exterior finish system manufactured by Dryvit and applied by Southern Synthetic. Shortly after the Lands moved into the house, they sued Tall House alleging construction defects. Tall House filed a third-party complaint against Dryvit and Southern Synthetic. The Lands and Tall House reached a settlement by which the Lands assigned all claims to Assurance Company of America ("ACA"), the insurer for Tall House. After substitution of ACA as the real party in interest, the trial court granted the motions for summary judgment of Dryvit.

Holding that breach of contract claims could not be the basis for claims of indemnity and contribution, the Court of Appeals affirmed.

> . . . the Lands had a contract with Tall House for the construction of a home. After the home was completed, the Lands began to experience problems with water intrusion and other structural defects. We believe that Tall House failed to perform the terms of the contract, and this failure resulted in injury to the subject matter of the contract, the home. Thus the law of contract, not the law of negligence, defines the obligations and remedies of the parties. . . . Under this statute [G.S. § 1B-1], there is no right to contribution from one who is not a joint tort-feasor. . . . Because Tall House could only be liable to the Lands for breach of contract, it could not be a joint tort-feasor. Therefore, standing in the shoes of Tall House, ACA has no claim for contribution against

> Dryvit or any other party. . . . any damage caused by the DEFS constitutes damage to the house itself. Since no other property damage has resulted, this is purely economic loss. Therefore, the economic loss rule bars any negligence claims against Dryvit. This includes ACA's indemnity claims which were rooted in tort. 602 S.E.2d at 3-4.

F. Arbitration

The parties in Hobbs Staffing Services v. Lumbermens, ___N.C.App. ___, 606 S.E.2d 708 (2005) entered into an Insurance Program Agreement by which the defendants agreed to provide workers' compensation coverage for employees of the plaintiff. The Agreement became effective on 30 September 2002 and contained an arbitration clause. When the plaintiff's check for payment of the first premium was returned for insufficient funds, the defendant sent written notice that the policy would be cancelled effective 19 December 2002. A second, subsequent notice gave the effective date of cancellation as 27 December 2002. The plaintiff wired funds for payment of the premium on 27 December 2002. The defendant treated the policy as cancelled. The trial court denied the plaintiff's motion for an injunction barring the termination of coverage. The trial court also denied the defendant's motion to compel arbitration.

The Court of Appeals reversed and remanded for the trial court to stay the matter pending arbitration.

> In the instant case, the arbitration clause is written very broadly. The agreement requires that "any dispute" with reference to the "interpretation,

> application, foundation, enforcement or validity" of the agreement, or any "transaction involved, whether such dispute arises before or after termination of the Agreement" shall be submitted to arbitration. A dispute involving the cancellation of a policy for non-compliance with its terms falls within the covered areas of interpretation, application, enforcement, or a transaction. 606 S.E.2d at 710.

The plaintiff in Miller v. Roca & Son, Inc., ___N.C.App. ___, 604 S.E.2d 318 (2004) was involved in an automobile accident on 13 January 1997 when a truck he was driving collided with a vehicle that had been abandoned on the side of the interstate. The vehicle the plaintiff was driving was owned by his employer and had uninsured coverage with Insura Property & Casualty Insurance Company. Because the plaintiff had not been able to identify coverage for the abandoned vehicle, a claim was made against Insura for uninsured coverage. The Insura policy had a clause requiring arbitration if the parties were not able to agree about damages recoverable. The clause also provided that disputes concerning coverage "may not be arbitrated." The arbitration panel awarded the plaintiff $80,000. The trial court confirmed the award.

On appeal, Insura contended that the plaintiff had not offered proof that the abandoned vehicle was uninsured, therefore, there was no uninsured coverage. The Court of Appeals held that Insura had waived the right to object to the arbitration award based on lack of coverage. Since arbitration

would occur only if there were an uninsured vehicle, Insura had waived the right to contest coverage by submitting to arbitration. Insura had not reserved its rights or raised other objections to coverage before the arbitration award.

> Given the language of the arbitration agreement, Insura, by consenting to arbitration, either was (1) admitting that there was an uninsured motor vehicle involved in the accident; or (2) consenting to have the issue of coverage decided by the arbitrator. . . . By not objecting to arbitration of the coverage issue prior to the arbitration hearing, Insura failed to assert its objection in a timely manner and, through its consent to and active participation in the arbitration proceedings, has engaged in conduct inconsistent with a purpose of insisting upon determination of coverage by the trial court. 604 S.E.2d at 320.

G. Law Enforcement Liability Policy

Young v. Great American Insurance Co., 162 N.C.App. 87, 590 S.E.2d 4, reversed per curiam, 359 N.C. 58, 602 S.E.2d 673 (2004) was a declaratory judgment action to determine coverage for lawsuits filed by victims of sexual assaults by a Fayetteville police officer. The policy defined "occurrence" as "arising out of the performance of the Insured's duties to provide law enforcement duties." The policy excluded coverage for "willful violation of a penal statute or ordinance committed by or with the knowledge or consent of any Insured."

The trial court granted the motion for summary judgment of Great American and held that there was no coverage. The Court of Appeals reversed on the grounds that "but for" the officer's

position in the police department, he would not have had the opportunity to detain the women and assault them. Judge Hunter dissented. The Supreme Court reversed on the basis of Judge Hunter's dissent.

> The phrase "while performing law enforcement duties" requires a contemporaneity between the acts for which coverage is sought and the performance of law enforcement duties. The intent of the policy is clear and unambiguous; it is designed to cover those wrongful acts of police officers committed as the officer is carrying out duties related to law enforcement. A sexual assault is not a law enforcement duty. . . . I would also conclude that the intentional sexual assaults were not within the scope of plaintiff's employment, and thus, the general liability policy does not provide coverage for plaintiff's assaults on the three women. 162 N.C. App. at 92, 590 S.E.2d at 8.

H. Homeowners

Erie Insurance Exchange v. Szamatowicz, 164 N.C.App. 748, 597 S.E.2d 136 (2004) was a declaratory judgment action to determine coverage arising from a fire during the early morning of 16 September 2001. A birthday party for Mr. Szamatowicz included between 100 to 150 guests. Because the party could not be hosted at Mr. Szamatowicz' house, he subleased a warehouse and held the party there. During the party, a fire started. Ms. Evans and Ms. Wilson, were injured in the fire.

Erie insured Mr. and Mrs. Szamatowicz through a homeowners's policy. The policy defined the "insured location" as "the residence premises" and "any premises used by you in

connection with" the residence premises. The policy also contained a business pursuits exclusion. The trial court granted the motion for summary judgment of the defendants and concluded that the Erie policy covered the injuries received from the fire.

The Court of Appeals affirmed.

> Here, Mr. Szamatowicz decided to have his birthday party at the warehouse instead of his residence, due to the number of guests, and out of concern for his infant son. The warehouse provided a more appropriate area for an activity that normally would have taken place at his residence. We conclude that Mr. Szamatowicz's use of the warehouse on this occasion was "in connection with" his residence as that term is used in the Policy. . . .
>
> Here, there is no evidence that Evans and Wilson went to Mr. Szamatowicz's warehouse on the evening in question for any business purpose. . . . Mr. Szamatowicz did not collect an admission or other type of fee from the guests, nor did he otherwise host the party for profit. Indeed, Mr. Szamatowicz's deposition testimony reveals that his sublease of the warehouse was a mere passive investment. He had no specific use or purpose in mind when he acquired the warehouse, though he did consider three possibilities for the property: subleasing the property for profit, establishing a marble and granite business, or opening a restaurant and/or nightclub. However, Mr. Szamatowicz had taken no affirmative steps to establish any business at the warehouse, and thus, at the time of the accident was not engaged in any business activity there. 164 N.C. App. at 753-54, 597 S.E.2d at 138-139.

III. Trial Practice and Procedure

A. Statutes and Periods of Limitation and Repose

Udzinski v. Lovin, 358 N.C. 534, 597 S.E.2d 703 (2004) was a wrongful death action alleging medical malpractice. The complaint was filed on 27 July 2001 and alleged that on 17 February 1997 the defendant negligently misinterpreted a chest x-ray and failed to detect what was later determined to be a cancerous lesion. The decedent died on 1 April 1999. The trial court granted the defendants' 12(b)(6) motion based on the four-year statute of repose in G.S. § 1-15(c).

Holding that the two-year statute of limitations for wrongful death actions did not apply, the Supreme Court affirmed dismissal of the action.

> . . . the last act of defendant Lovin giving rise to this cause of action occurred on 17 February 1997 when defendant Lovin interpreted Mrs. Udzinski's x-ray. This action was filed on 27 July 2001. The passage of four years from defendant Lovin's last act triggered the operation of the statute of repose in N.C.G.S. § 1-15(c). Notwithstanding that plaintiff was seeking damages for wrongful death, by the time he filed his complaint . . . , he had no cause of action. 358 N.C. at 537, 597 S.E.2d at 706.

In Mitchell v. Mitchell's Formal Wear, Inc., ___N.C.App. ___, 606 S.E.2d 704 (2005), Mitchell's Formal Wear entered into a contract in November 1995 for renovations at its store at Crabtree Valley Mall in Raleigh. The store reopened for business on 15 January 1996, but the City of Raleigh did not

issue a permanent certificate of occupancy until January 1999. The president of the construction company responsible for the renovation testified that a temporary certificate of occupancy was issued in January 1996, but, as a result of other construction at the Mall, the permanent certificate was not issued until 1999. The plaintiff was injured on 23 February 2000 when a bench on which she was sitting collapsed. Suit was filed on 12 March 2002. The trial court granted the defendant's motion for summary judgment based on the six-year statute of repose in G.S. § 1-50(a)(5).

The Court of Appeals affirmed. The president of the construction company testified that any work on the bench and dressing room would have been a part of the initial framing and woodwork that was completed by 6 December 1995. Although there was evidence that punch list work may have been later, the "last act or omission" that starts the running of the statute of repose "must give rise to the cause of action." There was no evidence that the punch list items were related to any defect alleged in the bench. The Court also held that a certificate of occupancy or compliance is not necessary before a project is determined to be "substantially complete" sufficient to begin the period of repose.

The plaintiffs in Wood v. BD & A Construction, L.L.C., ___N.C.App.___, 601 S.E.2d 311 (2004) contracted with the

defendants for the design and construction of a house. The house was substantially completed and a certificate of occupancy was issued in April 1996. The plaintiffs immediately noticed water leaks throughout the house. The defendant attributed the problem to the windows and replaced the windows in 1997. In August 2002, the plaintiffs were involved in maintenance to the house and discovered construction defects arising from the water leaks. Suit was filed on 11 February 2003. The trial court dismissed the action since it was brought more than six years after the last act of the defendant giving rise to claim, G.S. § 1-50(a)(5).

On appeal, the plaintiffs argued that G.S. § 1-50(a)(5) did not apply because of the defendant's fraud or willful or wanton negligence. The Court held that the complaint alleged negligence and negligent misrepresentation, but did not allege intentional wrongdoing by the defendant. The plaintiff also alleged that the defendant was equitably estopped from pleading the statute of repose because the defendant blamed the water leaks on the windows. The windows were replaced by the defendant in 1997, but the plaintiff's discovery of the construction defects did not occur until 2002. There was no explanation as to the reason for the delay after 1997 in filing suit.

> The cause of delay in filing in the instant action was not the defendant's representations that it had addressed the window problem, but rather the plaintiffs' delay in discovering the other defects in the home. As there are no allegations as to how plaintiffs' reliance on the particular representations regarding the Anderson windows prevented them from filing suit within the applicable statute of repose, we find that plaintiffs have not sufficiently alleged equitable estoppel. 601 S.E.2d at 315.

On 10 September 2001, after the plaintiff in Keyzer v. Amerlink, Ltd., 164 N.C.App. 761, 596 S.E.2d 878 (2004) had rested and the defendant was presenting evidence, the parties reached a settlement. The hand-written agreement provided that the trial court would declare a mistrial and that on or before 2 January 2002, the parties would file a stipulation of dismissal without prejudice under Rule 41(a). The court declared a mistrial and dismissed the jury. The stipulation of dismissal was filed on 10 January 2002. On 4 December 2002, the plaintiff refiled the same action. On defendant's motion, the trial court dismissed the 2002 action on the grounds under Rule 41 that the mistrial on 10 September 2001 began the running of the one-year period to refile.

Relying on Thompson v. Newman, 331 N.C. 709, 417 S.E.2d 224 (1992), the Court of Appeals reversed and held that the one-year period to refile did not begin until the stipulation of dismissal was filed.

> However, we note that in Baker [v. Becan, 123 N.C.App. 551, 473 S.E.2d 413, cert. denied, 344 N.C. 629, 477

> S.E.2d 37 (1996)] the plaintiff gave notice of voluntary dismissal pursuant to Rule 41(a)(1)(i) before she rested her case, while in the instant case the parties informed the first trial court of their agreement to dismiss the action after plaintiff had rested his case and during defendant's presentation of evidence. Thus, the dismissal in the instant case was pursuant to Rule 41(a)(1)(ii), which requires the assent of both parties to the dismissal. In order for plaintiff to extend the period for refiling his action, plaintiff would have to gain defendant's assent to the execution of a supplement or revisions of the Agreement. Therefore, as in Thompson, "there was no danger plaintiff could have extended indefinitely the one-year savings provision of [Rule 41(a)(1)]." . . . . the Agreement does not extend the one-year period in which plaintiff may refile his claim following the Rule 41 dismissal; it merely dictates the date the dismissal will be filed. 164 N.C. App. at 764-65, 596 S.E.2d at 880-881.

B. Governmental Immunity

The minor plaintiff in Evans v. Housing Authority of City of Raleigh, 359 N.C. 50, 602 S.E.2d 668 (2004) alleged injuries from lead poisoning related to exposure to paint dust and chips at the home leased from the defendant. The trial court denied the defendant's motion to dismiss based on governmental immunity.

The Supreme Court first held that the Housing Authority was entitled to the same immunity for governmental functions as other municipal corporations. Relying upon the Housing Authorities Law, G.S. §§ 157-1 to 39.87, the Court concluded that the providing of moderate income housing was a governmental, not a proprietary function. Chapter 157 of the

North Carolina General Statutes gave authorities such as the defendant, "additional authority 'to insure or provide for the insurance . . . against such risks as the authority may deem advisable'." 602 S.E.2d at 672-673. The case was remanded to the trial court for a determination of whether the defendant waived governmental immunity by the purchase of insurance. See also Fisher v. Housing Authority of City of Kinston, per curiam reversed, 359 N.C. 59, 602 S.E.2d 359 (2004).

C. Compulsory Counterclaim – Rule 13(a)

The plaintiffs in Murillo v. Daly, ___N.C.App. ___, 609 S.E.2d 478 (2005) entered into a residential lease agreement with the defendant. The plaintiffs stopped paying rent because of alleged deterioration of the septic tank system at the property. The defendant filed a small claim action for ejectment. Although the plaintiffs moved for dismissal of the action, the magistrate ruled in favor of the landlord/defendant. No appeal was taken.

The present action alleged breach of contract, negligence and unfair and deceptive trade practices. The trial court granted the defendant's motion for summary judgment on the grounds that the present claim was a compulsory counterclaim in the small claims court, therefore, the present action was barred by res judicata. Holding that the present action was not a compulsory counterclaim, the Court of Appeals reversed.

> In North Carolina, to establish when an action will be treated as a compulsory counterclaim, the similarity in the nature of the action and the remedy sought has been characterized as more important than a basis in a common factual transaction. . . . Here, the Murillos' claims are based on the Dalys' failure to adequately maintain the septic tank system on the property: they do not attack the summary ejectment proceeding. Both the summary ejectment proceeding and the current claims arise from the landlord-tenant relationship of the parties. However, a "common origin" alone is insufficient to characterize the Murillos' claims as compulsory counterclaims. . . . Also, the remedies sought by the Murillos and Dalys in the two actions are different. The Dalys sought possession of the property and unpaid rent, whereas the Murillos seek monetary damages for breach of contract, tort claims, as well as a claim for unfair and deceptive trade practices. The nature of the remedies are too divergent to classify the Murillos' claims as compulsory counterclaims. 609 S.E.2d at 479, 481.

The plaintiff and defendant in Kemp v. Spivey, ___N.C.App. ___, 602 S.E.2d 686 (2004) were involved in an automobile accident on 14 January 1999. At the time of the accident, Ms. Kemp was operating a school bus with students as passengers. Ms. Spivey was operating a Rescue Squad ambulance. Several lawsuits arose from the accident. In each lawsuit, the plaintiffs alleged that Ms. Spivey was at fault. Ms. Spivey and the Rescue Squad then filed a third-party complaint against Ms. Kemp alleging that she caused or contributed to the accident. Ms. Kemp was represented by the Attorney General's office in each action and filed an answer to the third-party complaint. Each action was subsequently settled.

The present action was filed by Ms. Kemp for her own injuries arising out of the accident. The trial court dismissed the action on the basis that it was a compulsory counterclaim in the earlier actions in which Ms. Kemp was a third-party defendant. On appeal, Ms. Kemp argued that her claims "were not mature" at the time of the earlier actions because she did not know the extent of her injuries. The Court of Appeals disagreed, holding that the facts of the accident were known at the time of the earlier third-party complaints, therefore, "the speculative nature of the amount of damages sustained in the instant case did not render the claim premature at the time the third-party complaints were filed." 602 S.E.2d at 688.

The trial judge's order granting the defendant's 12(b)(6) motion recited that the court had heard arguments of counsel "and presentation of evidence." Since the trial court had heard evidence outside the pleadings, the parties should have been allowed discovery and introduction of evidence.

> The trial court's consideration of evidence other than the pleading is contrary to the purpose of Rule 12(b)(6). . . . Based on the trial court's consideration of matters in addition to the complaint, defendant's Rule 12(b)(6) motion was thereby converted into a motion for summary judgment. . . . Upon conversion of the motion as one for summary judgment, the parties were not afforded a "reasonable opportunity to present all material made pertinent to such a motion by Rule 56." . . . . Accordingly, this case is remanded so as to allow the parties full opportunity for discovery and presentation of all pertinent evidence. 602 S.E.2d at 690.

D. Arbitration

The defendant in First Union Securities, Inc. v. Lorelli, ___N.C.App. ___, 607 S.E.2d 674 (2005) was terminated by the plaintiff from his position as a brokerage representative. The defendant requested arbitration before a panel of the New York Stock Exchange (NYSE). The panel awarded the defendant attorneys' fees of $196,911 and costs of $26,715. First Union appealed the trial court's confirmation of the award.

The Court of Appeals affirmed. First, because the contract involved interstate commerce, it was governed by the Federal Arbitration Act. The award of attorneys' fees was allowed by the rules of NYSE. Equally important, both parties submitted the issue of attorneys' fees to the arbitration panel.

> NYSE Rule 629 provides that "In addition to forum fees, the arbitrator(s) may determine in the award the amount of costs incurred . . . and, unless applicable law directs otherwise, other costs and expenses of the parties. The arbitrator(s) shall determine by whom such costs shall be borne." . . . . the First Circuit has interpreted "other costs and expenses" to include attorneys' fees. . . . We conclude that in light of the parties' requests for fees and execution of the submission agreement expressing their intent that the Constitution and Rules of the NYSE define the scope of the panel's jurisdiction, the arbitrators did not exceed their authority in awarding attorneys' fees to Lorelli. 607 S.2d at 677-678.

The parties in Szymczyk v. Signs Now Corp., ___N.C.App. ___, 606 S.E.2d 728 (2005) entered into a franchise agreement by which the plaintiffs operated a Signs Now store in Wilson. The

franchise agreement provided that it would be subject to arbitration by the American Arbitration Association under the Federal Arbitration Act and that venue for any claims would be Manatee County, Florida. In 2003, the plaintiffs informed the defendant that the plaintiffs would be transferring their store because of financial problems. Plaintiffs, however, continued to operate the store under a name similar to that of the defendant. Defendant notified the plaintiffs that they were in violation of the franchise agreement, then filed a demand for arbitration in Florida. The defendant also instituted suit in Manatee County, Florida. The plaintiffs then filed the present suit in Wilson County for breach of the franchise agreement and for injunctive relief. The trial court granted the plaintiffs a preliminary injunction barring the defendant from proceeding with arbitration or the civil action in Florida. The trial court did allow arbitration of all claims in North Carolina.

The Court of Appeals reversed. The Court first addressed the validity of arbitration agreement and the applicability of the Federal Arbitration Act. Based on evidence that the plaintiffs transmitted payment of franchise fees by wire to the defendant's bank in Florida and attended several training programs in Florida, the Court concluded that these were sufficient contacts in interstate commerce to allow the dispute to be governed by the FAA. Applying the FAA, the forum

selection clause requiring disputes to be determined in Florida was valid. The trial court, therefore, erred in enjoining arbitration in Florida. Similar reasoning applied to application of the forum selection clause relating to the civil action in Florida to enforce the covenant not to compete.

The plaintiff in Smith v. Young Moving and Storage, Inc., ___N.C.App.___, 606 S.E.2d 173 (2004) entered into a contract with the defendant for the storage of the plaintiff's photographic equipment. When the defendant was not able to locate the plaintiff's property, the plaintiff filed suit. The plaintiff also filed a demand for arbitration consistent with the contract. Settlement discussions followed. The attorney for the plaintiff sent a letter to the attorney for the defendant indicating that the plaintiff was willing to settle for $32,750 plus interest over the three years the property had been missing. The following day the defendant's attorney sent a settlement agreement and release to the plaintiff's attorney. The plaintiff refused to sign the settlement agreements.

The defendant then filed a motion with the American Arbitration Association to enforce the settlement agreement. An arbitrator was selected, and a hearing was conducted by telephone. The arbitrator entered an award enforcing the settlement agreement. The plaintiff then filed a motion in

superior court to vacate the award of the arbitrator. The trial court denied the plaintiff's motion and confirmed the award.

On appeal, the plaintiff argued that the arbitrator had erroneously concluded that the initial letter from the plaintiff's attorney was a binding and enforceable settlement agreement. The plaintiff also contended that the arbitrator had exceeded his authority by enforcing the letter agreement and not conducting a hearing on the issue. The Court of Appeals disagreed and affirmed the trial court.

As to the question of the legal sufficiency of the arbitrator's award, N.C.Gen.Stat. § 1-567.13 does not allow this defense as a basis for vacating an arbitration award.

> Indeed, "an arbitrator is not bound by substantive law or rules of evidence, [and] an award may not be vacated merely because the arbitrator erred as to law or fact." Where an arbitrator makes such a mistake, "it is the misfortune of the party." 606 S.E.2d at 175-176.

The arbitrator also did not exceed his authority by enforcing the settlement agreement and not conducting a hearing on the merits. The validity of the settlement agreement "was related to a dispute arising out of the parties' contractual relationship," 606 S.E.2d at 177, and, therefore within the authority of the arbitrator to determine.

Even though the trial court did not have the "statutory basis under N.C.Gen.Stat. § 1-567.13, for reviewing the

arbitrator's award," the trial court did correctly conclude that the settlement agreement was "binding and enforceable." 606 S.E.2d at 177.

The parties in Eddings v. Southern Orthopaedic, ___N.C.App. ___, 605 S.E.2d 680 (2004), petition for discretionary review denied, 359 N.C. 321, ___S.E.2d___ (2005) entered into an employment agreement containing an arbitration clause.

> Any controversy, dispute, or disagreement arising out of or relating to the Agreement, including the breach thereof, shall be settled exclusively by binding arbitration. . . . Any arbitrator so appointed shall have the express authority, but not the obligation, to award attorney's fees and expenses to the prevailing party in any such proceeding. 605 S.E.2d at 681.

The employment agreement provided notice requirements for the termination of employment. In violation of the notice requirements and covenant not to compete, the plaintiff terminated his employment with the defendant and began work with a competing medical practice within the geographical restrictions. The defendant requested arbitration. The plaintiff filed suit alleging fraud, requesting rescission of the employment contract and seeking an injunction barring arbitration.

In a prior appeal, 356 N.C. 285, 569 S.E.2d 645 (2002), the Supreme Court held that the trial court must first determine whether the Federal Arbitration Act applied. On remand, the trial court held that the FAA applied. The trial court also

ruled that the plaintiff's claims alleging rescission of the contract, no meeting of the minds and quantum meruit were not subject to arbitration. All other claims were ordered to arbitration.

The Court of Appeals affirmed the trial court's order applying the FAA.

> SOMA's contract with Dr. Eddings involved interstate commerce. SOMA has provided evidence to demonstrate that it treats patients who live in other states, receives payments from insurance carriers outside North Carolina, and receives goods and services from out-of-state vendors. Therefore, the trial court did not err in determining Dr. Eddings and SOMA were engaged in interstate commerce and the FAA applied. 605 S.E.2d at 684.

Applying the FAA and relying upon Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967) and PaineWebber, Inc. v. Hartmann, 921 F.2d 507 (3d Cir.1990), the Court held that the arbitrator had the jurisdiction to determine all claims arising from the contract that is subject to arbitration.

> Where a party challenges the enforceability or validity of the contract containing the arbitration clause as a whole, it is within the exclusive jurisdiction of the arbitrator to determine those claims. 605 S.E.2d at 684.

The Court of Appeals also concluded that all claims between the parties in the present case should be submitted to arbitration.

> Clearly the agreement to arbitrate the instant case is a broad one. Accordingly, . . . claims such as rescission, no meeting of the minds, and quantum meruit directly challenge the validity of the contract. Therefore, such claims are within the jurisdiction of the arbitrator. This does not diminish the superior court's jurisdiction as to any claims unresolved through arbitration. . . . Based on the trial court's determination that the agreement and transactions between plaintiff and defendant involve interstate commerce, failure to send all issues in controversy to arbitration was error. 605 S.E.2d at 685.

WMC, Inc. v. Weaver, ___N.C.App. ___, 602 S.E.2d 706, petition for discretionary review denied, 359 N.C. 197, 608 S.E.2d 330 (2004) was a contractual dispute arising from a dealer agreement to provide wireless cellular communication services. The dealer agreement contained an Arbitration clause providing in part:

> Arbitration: (a) Any controversy, dispute, or claim arising out of [or] relating to this contract . . . . (e) The arbitrator shall have no authority to award punitive damages or any other damages not measured by the prevailing party's actual damages, nor shall any party seek punitive damages relating to any matter arising out of this contract in any other forum . . . . 602 S.E2d at 708.

The arbitration panel determined that the defendant had breached the dealer agreement and "engaged in unfair and deceptive acts and practices under §Section 75-1.1 of the General Statutes of North Carolina." 602 S.E.2d at 708. Finding damages of $962,000, the arbitration panel trebled to $2,887,500 and also awarded attorneys' fees of $352,640. The trial court determined

that the arbitration panel did not have authority to award treble damages under section (e). The trial court also held that there was no authority to award attorneys' fees, but that the defendant had waived this right by litigating the issue of attorneys' fees before the arbitration panel.

The Court of Appeals addressed first whether the Federal Arbitration Act or the North Carolina Uniform Arbitration Act applied. FAA "preempts conflicting state law," particularly the relationship of the courts to review of arbitration awards. Finding that the contract involved interstate commerce, the Court held that FAA applied.

Turning to the scope of issues that may be decided by an arbitration panel, the Court of Appeals relied upon Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 115 S.Ct. 1212, 131 L.Ed.2d 76 (1995) and the Supreme Court's holding that an arbitration may award remedies authorized by state law if those remedies are not specifically excluded in the arbitration agreement. Since treble damages for unfair and deceptive acts and practices were authorized by North Carolina law, the Court of Appeals found that those damages were not excluded in the arbitration clause of the dealer contract.

> Plaintiffs argue that because treble damages are a multiple of actual damages, they are "measured by" actual damages. . . . Courts have routinely referred to treble damages as being measured by actual damages. . . . Plaintiffs also reasonably suggest that if the

> parties truly had intended to limit damages only to actual damages, the contract would simply say "the arbitrator shall have no authority to award damages in excess of actual damages." Given the unusual phrasing of the provision and the fact that courts have previously described "treble damages" as being measured by actual damages, we hold that plaintiff's interpretation is plausible and that, in any event, there is no unequivocal exclusion of treble damages as required by Mastrobuono. 602 S.E.2d at 712.

As to the issue of attorneys' fees, the trial court concluded that the arbitration panel did not have the authority under section (a) and the arbitration rules to award attorneys' fees. The trial court, however, further held that the defendant had waived the right to appeal the arbitration panel's award of attorneys' fees by addressing the fees and arguing the fees before the panel "without contending that the arbitrators lacked authority to decide the issue." 602 S.E.2d at 709. The Court of Appeals affirmed the trial court's decision as to attorneys' fees.

> Here, there is no question that defendants could have argued to the arbitrators that the parties' agreement . . . precluded any award of attorneys' fees. Instead of doing so, they litigated plaintiff's entitlement to fees. . . . If, as our courts have held, a failure to object during arbitration regarding these significant matters leads to waiver, then defendants here necessarily waived any right to seek vacation of the attorneys' fees award. 602 S.E.2d at 716.

Ellis-Don Construction, Inc. v. HNTB Corp., ___N.C.App. ___, 610 S.E.2d 293 (2005) arose out of the engineering and construction of the parking garage at the Raleigh-Durham

Airport. All of the construction contracts involved had identical arbitration clauses. The trial court denied the defendant's motion to stay proceedings and compel arbitration. The trial court's order stated that it had reviewed the matters submitted, heard arguments of counsel and was of the opinion that the defendant's motion to compel arbitration should be denied.

The Court of Appeals reversed and remanded for findings of fact and conclusions of law. The trial court's findings about the arbitration agreement are conclusive on appeal when supported by competent evidence, however, those findings must be made in order to allow review by the appellate court.

> Here, the trial court's order does not indicate whether it determined if the parties were bound by an arbitration agreement. While denial of a defendant's motion might have resulted from (1) a lack of privity between the parties; (2) a lack of a binding arbitration agreement; (3) this specific dispute does not fall within the scope of any arbitration agreement; or (4) any other reason, we are unable to determine the basis for the trial court's judgment. Without findings of fact, the appellate court cannot conduct a meaningful review of the conclusions of law and "test the correctness of [the lower court's] judgment." . . . . The order appealed from contained neither factual findings that allow us to review the trial court's ruling, nor a determination whether an arbitration agreement exists between the parties. . . . the matter is remanded for further factual findings and conclusion of law . . . . 610 S.E.2d at 296-97.

E. Punitive Damages

The plaintiff in Schenk v. HNA Holdings, Inc., ___N.C.App. ___, 604 S.E.2d 689 (2004) was a pipe fitter/welder and alleged claims against the owner of a manufacturing plant for occupational exposure to asbestos dust. The trial court granted the defendant's motion for a directed verdict on punitive damages. The jury awarded compensatory damages from which the trial court set off workers' compensation benefits received.

The Court of Appeals affirmed. On appeal, the plaintiff argued several grounds for error by the trial court in dismissing the claim for punitive damages. The Court began with the statutory basis for punitive damages in G.S. § 1D-15(a) and that proof of the statutory aggravating factors be by "clear and convincing evidence." Evidence was offered by the plaintiff at trial that an internal engineering memorandum describing the presence of asbestos exposure was destroyed by the plant's resident engineer. The plaintiff, however, did not offer evidence that the destruction of the memorandum was related to the plaintiff's injuries.

The plaintiff did establish that the defendant had violated OSHA regulations governing asbestos exposure. This violation, however, did not provide the proof necessary for a jury determination of punitive damages.

> . . . assuming arguendo that defendant violated OSHA standards, this evidence goes only to the issue of defendant's negligence. Violation of OSHA standards does not, by itself, provide sufficient evidence of willful and wanton conduct to present the issue to the jury. 604 S.E.2d at 693.

The defendant had established procedures for the removal of occupational exposure to asbestos. These procedures negated a basis for punitive damages.

> . . . Daniel developed its own asbestos training program for its workers. To make certain the established procedures were followed, Celanese had weekly safety inspections where a supervisor made certain the mechanics compiled with procedures. These policies and procedures do not demonstrate a "conscious and intentional disregard of and indifference to the rights and safety of others" by Celanese as required by statute to award punitive damages. 604 S.E.2d at 694.

The trial court correctly reduced the jury award by the amounts previously received by the plaintiff from workers' compensation and other third-party settlements.

> Each plaintiff sued defendant to recover for one injury, i.e., asbestos damages to his lungs. "Where '[t]here is one injury, [there is] still only one recovery.'" . . . . Plaintiffs cannot recover workers' compensation benefits and damages from defendant for the same injury. The final judgment determined plaintiffs were entitled to recover for their asbestos related injuries as compensatory damages. Compensatory damages provide recovery for, inter alia, mental or physical pain and suffering, lost wages and medical expenses. . . . Set-offs, therefore, were appropriate as plaintiffs were compensated at trial for the same injury and the same damages as their previous settlements. 604 S.E.2d at 694.

The plaintiff in Wallace v. M, M & R, Inc., ___N.C.App.___, 600 S.E.2d 514 (2004) alleged that he was assaulted at the Sports Pad bar by employees of the defendant. The plaintiff was awarded $35,000 in compensatory damages and $210,000 in punitive damages. On 5 February 2000, the plaintiff was sitting at the bar in the Sports Pad. The bartender overheard the plaintiff and a friend talking about being in the bar on a previous evening when Whaley, one of the bar's bouncers, had been struck on the head with a beer bottle. Believing that the plaintiff was involved in the assault on Whaley, Whaley radioed Southard, the operations manager of the bar. Although unsure of whether the plaintiff was actually the assailant, Southard gathered several employees of the bar to confront the plaintiff. As the plaintiff attempted to leave, he was assaulted by Whaley and the bar employees and injured. Whaley had a history of violence against bar patrons and had been dismissed previously as a result of excessive force. Southard was aware of Whaley's history of violence.

The Court of Appeals affirmed the jury verdict in favor of the plaintiff. As to the responsibility of the Sports Pad for the injuries to the plaintiff, the Court held that the bar was liable for the acts of its employees under these facts.

> If the servant was engaged in performing the duties of his employment at the time he did the wrongful act which caused his injury, the employer is not absolved

> from liability by reason of the fact that the employee was also motivated by malice or ill will toward the person injured, even by the fact that the employer had expressly forbidden him to commit such an act. 600 S.E.2d at 517 (quotation omitted.)

The defendant also appealed the award of punitive damages against the Sports Pad. Describing Southard as the manager of the Sports Pad under G.S. § 1D-15(c), the Court affirmed the award of punitive damages against the Sports Pad.

> Under G.S. § 1D-15(c), punitive damages may not be assessed against a corporation unless "the officers, directors, or managers of the corporation participated in or condoned the conduct constituting the aggravating factor giving rise to punitive damages." . . . . In the present case, we find the evidence, taken in the light most favorable to plaintiff, was sufficient to show that Southard condoned the attack on plaintiff. When Southard was notified that plaintiff and Elwell were in the bar, he sent Whaley and two other employees to see if plaintiff and Elwell were the assailants. After several minutes, Southard then gathered his staff of bouncers. . . . Whaley testified that Southard also asked Redfield to assist in removing plaintiff and Elwell. By his own testimony, Southard failed to intervene in the beating of plaintiff. He did not ask the bouncers to stop or attempt to break up the attack on plaintiff in any way. 600 S.E.2d at 517-18.

F. Evidence

(1) Experts

The defendant in State v. Morgan, 359 N.C. 131, 604 S.E.2d 886 (2004) was convicted of first degree murder and sentenced to death. Among the errors assigned on appeal was the defendant's contention that the trial court erred in qualifying an SBI

investigator as an expert in bloodstain pattern interpretation and permitting the witness to express opinions to the jury. Identifying the standard of appellate review as an abuse of discretion, the Court emphasized that "A trial court is 'afforded wide latitude of discretion when making a determination about the admissibility of expert testimony.'" 604 S.E.2d at 904. Although the defense conceded that bloodstain pattern interpretation is "a sufficiently reliable area for expert testimony," the error argued was that the SBI agent was not qualified in this field.

Finding no abuse of discretion, the Supreme Court held that the agent's expert testimony was properly admitted.

> Agent Garrett testified that he had completed two training sessions on bloodstain pattern interpretation, had analyzed patterns in dozens of cases, and had previously testified in a homicide case as a bloodstain pattern interpretation expert. In addition, Agent Garrett described to the judge and jury the difference between blood spatter and transfer stains and produced visual aids to illustrate his testimony.
>
> Based on this testimony, the trial court reasonably could have determined that Agent Garrett was in a better position to have an opinion on bloodstain pattern interpretation than the trier of fact. There is more than one road to expertise that assists a jury in understanding the evidence or determining a fact at issue, and Agent Garrett's qualifications are not diminished, as defendant suggests, by the fact that he has never written an article, lectured, or taken a college-level course on bloodstain or blood spatter analysis. The trial court did not abuse its discretion in qualifying Agent Garrett as an expert. 359 N.C. at 161, 604 S.E.2d at 904.

The plaintiff in Howerton v. Arai Helmet, Ltd., 358 N.C. 440, 597 S.E.2d 674 (2004) alleged injuries from a motorcycle accident resulting in quadriplegia caused by the defendant's negligently designed motorcycle helmet. The defendant filed a motion for summary judgment and a motion to exclude all of the plaintiff's experts. The trial court entered detailed findings of fact as to each of the plaintiff's four experts, concluding that North Carolina "has adopted Daubert," and, in the discretion of the trial judge, and, under Daubert, that the experts did not offer reliable opinions on causation.

In concluding that North Carolina had adopted Daubert, the trial court also referenced State v. Goode, 341 N.C. 513, 461 S.E.2d 631 (1995). The trial court stated additionally that North Carolina had adopted "reliability" as a basis for admission of expert testimony, relying upon State v. Pennington, 327 N.C. 89, 393 S.E.2d 847 (1990). After addressing the issue of reliability, the Court determined that Rule 702, North Carolina Rules of Evidence, required that the "matters or data upon which an expert bases his opinion be recognized in the scientific community as sufficiently reliable and relevant," citing Goode. In concluding that the plaintiff's experts were unreliable, the trial court relied upon Daubert "and/or State v. Pennington . . . ." 358 N.C. at 453-54, 597 S.E.2d at 683.

Professor Hugh Hurt was President of the Head Protection Research Laboratory of Southern California. The defendant stipulated that Professor Hurt was an expert in motorcycle accident investigation, motorcycle helmet design and motorcycle helmet testing. The trial court found that Professor Hurt did not test or perform independent research for his opinions about the defects in the defendant's helmet; did not report his findings about defects in the defendant's helmet to the United States Government for which he conducted studies; could not identify published articles supporting his opinions; and that Professor Hurt's publications contradicted his opinions about defects in the defendant's helmet.

Dr. William Hutton was the Director of Orthopedic Research at Emory University School of Medicine. Dr. Hutton was of the opinion that the bottom screws of the chin guard broke allowing rotation of the plaintiff's neck and head. Dr. Hutton agreed with Professor Hurt that an integrated chin bar would have prevented the plaintiff's quadriplegia. The trial court found that Dr. Hutton had never researched or tested his opinions relating to the degree of flexion involved; he could not identify medical literature supporting his opinions; he had never been involved with an injury comparable to the plaintiff's injury; and he could not identify medical literature to confirm

his opinion that the plaintiff would not have been paralyzed but for the hyperflexion.

Dr. Charles Rawlings was tendered as an expert in neurosurgery. Dr. Rawlings testified that the plaintiff did not suffer any cervical injuries in the accident until his head rotated forward beyond normal range. The trial court found that Dr. Rawlings did not know the amount of force necessary to produce the flexion; he had no medical basis for his opinions about the degree of flexion of the plaintiff's head; and that he did not use objective criteria in reaching his opinion that the plaintiff would not have been paralyzed but for the head rotation.

James Hooper was offered as an expert in helmet design. The trial court found that Hooper conceded that he did not have the expertise to express the opinion that a helmet designed differently than the defendant's helmet would have prevented the plaintiff's injury.

The Court of Appeals affirmed the trial court's grant of summary judgment to the defendant and the exclusion of the plaintiff's experts under the Daubert standard. The plaintiff's petition for discretionary review raised the issue of "(1) Whether the Court has adopted the Daubert standard for determining the admissibility of expert testimony . . . ." 358 at 455, 597 S.E.2d at 684. Specifically holding that "North

Carolina is not, nor has it ever been, a Daubert jurisdiction," 358 at 469, 597 S.E.2d at 693, the Supreme Court reversed.

Addressing first the relationship between North Carolina Rules of Evidence 702 and 104(a), the Court held that the trial judge "must decide preliminary questions concerning the qualifications of experts to testify or the admissibility of expert testimony." 358 N.C. at 458, 597 S.E.2d at 686. In making this Rule 104(a) determination, the trial judge is "not bound by the rules of evidence . . . . trial courts are afforded 'wide latitude of discretion when making a determination about the admissibility of expert testimony.'" 358 N.C. at 458, 597 S.E.2d at 686.

The admissibility of expert testimony under Rule 702 in North Carolina is determined by the three-step test in State v. Goode, 341 N.C. 513, 461 S.E.2d 631 (1995).

> (1) Is the expert's proffered method of proof sufficiently reliable as an expert for expert testimony? . . . . (2) Is the witness testifying at trial qualified as an expert in that area of testimony? . . . . (3) Is the expert's testimony relevant? 358 N.C. at 458, 597 S.E.2d at 686.

On the first step concerning the reliability of the expert's testimony, the trial court "should favor" admissibility of an expert's testimony when such evidence is based upon "established scientific theory or technique." 358 N.C. at 459, 597 S.E.2d at 687. As examples of such "established" areas of

science, the Court cited cases dealing with DNA evidence, blood-stain pattern interpretation and blood group testing. However, when the scientific theories upon which the expert's testimony are "inherently unreliable," such evidence is "generally inadmissible." 358 N.C. at 460, 597 S.E.2d at 687. The Court used polygraphs as an example of such inadmissibility.

When the trial court is confronted with areas of science that are either "novel" or "without precedential guidance," the trial judge's decision should be based upon "indices of reliability."

> . . . the expert's use of established techniques, the expert's professional background in the field, the use of visual aids before the jury so that the jury is not asked "to sacrifice its independence by accepting [the] scientific hypothesis on faith," and independent research conducted by the expert. 358 N.C. at 460, 597 S.E.2d at 687.

With reference to the second area of inquiry as to whether the expert is qualified as an expert in the area about which the expert intends to testify, the Court relied upon traditional North Carolina guidelines contained in Rule 702 concerning the expert's "knowledge, skill, experience, training, or education."

> As pertains to the sufficiency of an expert's qualifications, we discern no qualitative difference between credentials based on formal, academic training and those acquired through practical experiences. In either instance, the trial court must be satisfied that the expert possesses "scientific, technical or other specialized knowledge [that] will assist the trier of fact to understand the evidence or to

> determine a fact in issue." 358 N.C. at 462, 597 S.E.2d at 688.

As to the final inquiry of relevancy, the Court relied upon Rule 401 and Goode.

> As stated in Goode, "in judging relevancy, it should be noted that expert testimony is properly admissible when such testimony can assist the jury to draw certain inferences from facts because the expert is better qualified than the jury to draw such inferences." 358 N.C. at 462, 597 S.E.2d at 688-689.

In rejecting "the federal approach" to Rule 702, two additional factors influenced the Court. First, the Supreme Court expressed concern about the burden upon the trial bench of evaluating the foundations of an expert's opinion.

> One of the most troublesome aspects of the Daubert "gatekeeping" approach is that it places trial courts in the onerous and impractical position of passing judgment on the substantive merits of the scientific or technical theories undergirding an expert's opinion. We have great confidence in the skillfulness of the trial courts of this State. However, we are unwilling to impose upon them an obligation to expend the human resources required to delve into complex scientific and technical issues at the level of understanding necessary to generate with any meaningfulness the conclusions required by Daubert. 358 N.C. at 464-65, 597 S.E.2d at 690.

Second, the Court focused on the "case-dispositive nature of Daubert proceedings," or, that parties were using Daubert motions as a companion to summary judgment motions "to bootstrap motions for summary judgment that otherwise would not likely succeed." 597 S.E.2d at 691. The Court reasoned that evidence presented to the Court in ruling on a motion for summary

judgment must be admissible and considered in the light most favorable to the non-moving party. The Court contrasted Daubert motions under Rule 104(a) where the trial court is not confined by the rules of evidence, not required to consider the evidence in a light favorable to the non-moving party and may resolve conflicting issues of fact. The Court concluded that "a party who directly moves for summary judgment without a preliminary Daubert determination will not likely fare as well because of the inherent procedural safeguards favoring the non-moving party in motions for summary judgment." 358 N.C. at 468, 597 S.E.2d at 692.

The Supreme Court directed the Court of Appeals to remand the case to the trial court "for further proceedings not inconsistent with this Court's opinion." 358 N.C. at 472, 597 S.E.2d at 694.

(2) Admissions of Agents, Rule 801(d)

The defendant in State v. Villeda, 165 N.C.App. 431, 599 S.E.2d 62(2004) was charged with driving while impaired. The defendant filed a motion to suppress evidence obtained during the traffic stop alleging that the arresting officer, Trooper Carroll, engaged in racial profiling in making traffic stops. At the hearing on the motion to suppress, the defendant presented the testimony of three attorneys. These attorneys testified that they heard Trooper Carroll state that he stopped

Hispanics because "if they're Hispanic and they're driving, they're probably drunk." The trial court granted the motion to suppress and dismissed the charges with prejudice.

The Court of Appeals affirmed. On appeal, the State contended that it was error for the trial court to admit and consider the hearsay statements of the three attorneys about what they heard Trooper Carroll say. The Court of Appeals held that the attorney statements were admissible as admissions by a party-opponent under Rule 801(d).

> The question whether Rule 801(d), identical to the Federal Rules of Evidence, . . . applies to statements by government agents for the purpose of a criminal proceeding has yet to be decided in North Carolina; however, the Fourth Circuit Court of Appeals has clearly resolved the issue in defendant's favor. See United States v. Barile, 286 F.3d 749, 758 (4th Cir.2002) . . . As there is nothing in the plain language of Rule 801(d) to suggest that it does not apply to the prosecution in a criminal case, we adopt the position taken in Barile. 165 N.C. App. at 437, 599 S.E.2d at 66.

(3) Parol Evidence

The plaintiffs in Godfrey v. Res-Care, Inc., 165 N.C.App. 68, 598 S.E.2d 396, petition for discretionary review denied, 359 N.C. 67, 604 S.E.2d 310 (2004) were shareholders of Access, Inc., a company that provided vocational services to the mentally handicapped. The plaintiffs had been previously associated with VOCA of North Carolina and left VOCA and formed Access because of philosophical differences with VOCA

management. CNC, a subsidiary of the defendant, expressed an interest in acquiring Access. Throughout the negotiations, the plaintiffs conditioned sale of Access on their company never being affiliated with a company that operated or acted as VOCA. The sale of Access to CNC occurred on 17 March 1999. The agreement contained a merger clause. A week after the sale, the defendant announced that it had signed a Letter of Intent to purchase VOCA.

The plaintiffs sued alleging claims for common law fraud and unfair and deceptive trade practices. The jury awarded $300,000 to one of the plaintiffs on the issue of fraud. On appeal, the defendant contended that there was no duty on the defendant to disclose negotiations with VOCA. Additionally, the defendant argued that the admission of parol evidence about the pre-sale negotiations was barred by the merger clause in the agreement.

The Court of Appeals affirmed. Acknowledging the general rule that when the parties negotiate at arm's length, no duty to disclose arises, the Court also recognized a duty to make "a full frank disclosure of the matter" if that party elects to speak about a specific issue.

> Although a duty to disclose generally arises out of a fiduciary relationship, . . . this Court has recognized that a duty to disclose arises in an arm's length negotiation where one party has taken affirmative steps to conceal material facts from the

> other. . . . Both plaintiffs testified that throughout negotiations, plaintiffs made repeated comments that their willingness to sell Access to defendant was contingent on defendant's assurance that it would never associate with VOCA . . . . We conclude that the foregoing evidence, when viewed in the light most favorable to plaintiffs, sufficiently demonstrates that defendant took affirmative steps to conceal from plaintiffs the fact that defendant was negotiating to buy VOCA . . . . 165 N.C. App. at 75-6, 598 S.E.2d at 402.

The Court also held that parol evidence about the negotiations relating to the plaintiffs' assurances about no association with VOCA was admissible even though there was a merger clause.

> In North Carolina, parol evidence may be admitted into evidence to prove that a written contract was procured by fraud because "the allegations of fraud challenge the validity of the contract itself, not the accuracy of its terms." . . . We conclude that in the instant case, the parol evidence rule does not prohibit plaintiffs from introducing evidence regarding the parties' negotiations prior to signing the Agreement. 165 N.C. App. at 78, 598 S.E.2d at 403.

Finally, the defendant alleged that the verdict sheet was "impermissibly confusing" as a result of submission of the issues of fraud and unfair and deceptive trade practices. The Court disagreed.

> Because an action for unfair and deceptive trade practices is a distinct action separate from fraud . . . , at the close of all the evidence in the instant case, two issues were before the jury. . . . Both the jury instructions and the verdict sheet utilized the North Carolina Pattern Jury Instructions on fraud, which allow a jury to find fraud in both affirmative representations and concealment of a material fact. N.C.P.I 800.00. . . . By separating the fraud and

> unfair and deceptive trade practices issues and by allowing for separate answers, the verdict sheet offered three distinct alternatives to the jury. The jury could find (1) that defendant committed fraud, or (2) that defendant committed unfair and deceptive trade practices, or (3) that defendant committed both fraud and unfair and deceptive trade practices. 165 N.C. App. at 80-81, 598 S.E.2d at 405.

G. Rules 11, 37 and Other Sanctions

Adams v. Bank United of Texas FSB, ___N.C.App. ___, 606 S.E.2d 149 (2004), petition for discretionary review denied (March 15, 2005), discussed the procedural and proof requirements for Rule 11 sanctions. The plaintiff was the trustee of the Adams Retirement Plan and claimed ownership to real property foreclosed by the defendant Bank. The defendants were the trustee employed by the Bank to foreclose and the successful upset bidders at the foreclosure. The plaintiff brought suit to have the foreclosure voided and to have the deed to the property transferred to him. The trial court granted the defendants' motions for summary judgment. The Court of Appeals affirmed.

The present appeal was by the plaintiff from Rule 11 sanctions imposed by the trial court. The trial court determined that the plaintiff's complaint was not well grounded in fact and was not warranted by existing law. Although the defendants also alleged that the action was brought for an

improper purpose, the trial court did not make findings on this issue.

The Court of Appeals held that the trial court had correctly placed the initial burden of proof for the Rule 11 motion on the movants/defendants. However, once the defendants established a prima facie case, "the burden shifts to the nonmovant to put forth evidence indicating Rule 11 was not violated." 606 S.E.2d at 153; Turner v. Duke University, 325 N.C. 152, 381 S.E.2d 706 (1989). The plaintiff next contended that the burden of proof for Rule 11 motions should be by clear and convincing evidence. Noting that this issue had not been previously decided by the North Carolina Supreme Court, the Court of Appeals held that proof should be by the preponderance or greater weight of the evidence.

> However, in North Carolina, "[i]n the superior court, except in extraordinary cases, the burden of proof is by the greater weight of the evidence." . . . . Thus, we conclude the preponderance of the evidence quantum of proof should be utilized in determining whether a Rule 11 violation has occurred. In light of this conclusion, we do not reach whether Rule 11 sanctions rise to the level of the dire consequences of disbarment and censure. 606 S.E.2d at 154.

The Court then addressed the different legal analysis associated with the legal and factual sufficiency requirements of Rule 11. The initial complaint alleged noncompliance with N.C.Gen.Stat. § 45-21.16(a), failure to file the affidavit of service and lack of basis for service by publication. Although

the defendants identified objective proof that the plaintiff had received notice of the foreclosure, that the affidavit of service was in the court file and that service was proper, the Court of Appeals held that these arguments went to the factual sufficiency of the complaint, not to the legal sufficiency of the allegations.

> Thus, Adams' allegations that defendants failed to comply with the requirements of N.C.Gen.Stat. § 45-21.16(a) and that he did not receive notice of the foreclosure proceedings presents a plausible legal theory. Defendant argue, however, that Adams was given notice via certified mail and that Adams' personal file contained three original green receipts for certified articles which he disclosed to defendants in discovery. As such, Adams had actual notice of the foreclosure proceedings. These arguments, however, relate to whether a pleading is well grounded in fact (factual sufficiency), and not the legal sufficiency. . . . Whether the facts of a particular case support a plausible legal theory is not part of the legal sufficiency analysis. Rather, it is part of the factual sufficiency analysis . . . . 606 S.E.2d at 156-157.

The trial court, therefore, erred in concluding that the complaint lacked legal sufficiency.

Rule 11 requires the trial court to address specific issues to decide whether the complaint is factually sufficient.

> "In analyzing whether the complaint meets the factual certification requirement, the court must make the following determinations: (1) whether the plaintiff undertook a reasonable inquiry into the facts and (2) whether the plaintiff, after reviewing the results of his inquiry, reasonably believed that his position was well grounded in fact." 606 S.E.2d at 157-158.

Concluding that the trial court did not render sufficient findings of fact on the issue of factual sufficiency, and that the issue of improper purpose must be addressed, the case was remanded for further proceedings.

The first lawsuit filed by the plaintiff in Ibele v. Tate, 163 N.C.App. 779, 594 S.E.2d 793 (2004) alleged breach of contract by the defendant arising out of attempted repairs to the plaintiff's airplane. This dispute was settled at mediation. A consent order reflecting payment by the defendant of $5,000 was signed by the trial court. The consent order provided for dismissal of all claims and further stated that it was "enforceable by the contempt powers of this Court." After the dismissal with prejudice was filed, the plaintiff filed a motion for contempt alleging that the defendant had not met the requirements of the consent order. The trial court denied the motion for contempt on the basis that the parties had dismissed all claims in the underlying action.

Finding that the consent order merely recited the agreement of the parties and did not make separate findings, the Court of Appeals affirmed and held that the consent order was not enforceable by contempt.

> In this case, the consent order contains no findings of fact or conclusions of law by the trial court and does therefore not represent an adjudication of the parties' respective rights. Instead, the trial court merely recited the parties' settlement agreement. As

> a result, the consent order "is not enforceable through the contempt powers of the court." . . . . As the consent order in this case essentially represents a contract between the parties, the court has no authority to exercise its inherent contempt power, and the parties have no right to grant or accept a power held only by the judiciary, which includes the potential for imprisonment. . . . Proper avenues for enforcement of the consent order entered by the parties include: (1) an action for breach of contract, (2) a motion in the cause to seek specific performance of the consent order, and (3) an independent action for a declaratory judgment on the parties' contract embodied in the consent order. 163 N.C. App. at 781-82, 594 S.E.2d at 795.

H. Workers' Compensation Liens, G.S. § 97-10.2(j)

The decedent in Wilkerson v. Norfolk Southern Ry. Co., ___N.C.App. ___, 606 S.E.2d 187 (2004) was killed in the course and scope of his employment when the cement truck he was driving was struck by an Amtrak train. His employer's workers' compensation carrier, Liberty Mutual, accepted liability and filed a lien for reimbursement of payments. After filing suit in superior court, the plaintiff and Norfolk Southern reached a mediated settlement for $400,000 "subject to a satisfactory resolution of Liberty's lien on those funds." A motion was filed in superior court to reduce the Liberty lien. The trial court concluded that it had jurisdiction and eliminated the lien.

Holding that the trial court did not have jurisdiction, the Court of Appeals vacated the order and remanded for further proceedings. G.S. § 97-10.2(j) requires that "a settlement has

been agreed upon by the employer and the third party" before application may be made to the superior court "to determine the subrogation amount." The mediated settlement of $400,000 was contingent upon "a satisfactory resolution of Liberty's lien," therefore, there was no settlement between the plaintiff and Norfolk Southern as required by G.S. § 97-10.2(j). The Court of Appeals acknowledged the apparent conflict between subsections (h) and (j) of G.S. 97-10.2. Subsection (h) requires the consent of all parties before a settlement is reached. The only way to settle a claim without the consent of all parties is by subsection (j), but the Court's decision required a final settlement before the superior court may consider reducing or eliminating the workers' compensation lien.

I. Res Judicata and Collateral Estoppel

The plaintiff in Mays v. Clanton, ___N.C.App. ___, 609 S.E.2d 453 (2005) sued Clanton, a Taylorsville police officer, the Town of Taylorsville and the Taylorsville Police Department for battery and false imprisonment arising out of an altercation at a Christmas parade in the Town of Taylorsville. The plaintiff was charged and convicted of assaulting a public office with a deadly weapon. Relying upon the criminal conviction, the defendants moved for summary judgment in the plaintiff's civil action. The trial court denied the plaintiff's motion in limine to exclude evidence of the criminal

conviction and granted the defendants motion for summary judgment.

The Court of Appeals affirmed summary judgment for the defendants.

> For the use of collateral estoppel, North Carolina does not require mutuality of parties. Where an issue in a civil suit has already been fully litigated in a criminal trial, evidence of that criminal conviction is admissible in the civil suit. . . . to support a defense of collateral estoppel . . . . we must conclude that the trial court properly consider May's 14 May 2002 criminal convictions in granting summary judgment. 609 S.E.2d at 454, 456.

Based on the plaintiff's discharge from her employment in Skinner v. Quintiles Transnational Corp., ___N.C.App. ___, 606 S.E.2d 191 (2004), the plaintiff filed an employment discrimination complaint with the North Carolina Department of Labor under North Carolina's Retaliatory Employment Determination Act (REDA), N.C.Gen.Stat. § 95-240. The plaintiff then filed a charge with the United States Equal Employment Opportunity Commission claiming that her employer had violated the Americans with Disabilities Act (ADA). On 24 July 2001, the plaintiff filed a complaint in the United States District Court alleging ADA violations. The District Court granted the employer's motion for summary judgment and dismissed the action.

The plaintiff then filed the present action in superior court alleging violation of REDA. The trial court denied the defendant's motion for judgment on the pleadings on the grounds

that the federal dismissal was res judicata and barred the present action. The Court of Appeals reversed and held that the state court action was barred.

> Our courts had not adopted the "transactional approach" to res judicata in which all issues arising out of a single transaction or series of transaction must be tried together as one claim. . . . However, "the defense of res judicata may not be avoided by shifting legal theories or asserting a new or different ground for relief . . . ." In the instant action, while plaintiff has brought claims under two different statutes, her claims stem from the same relevant conduct by defendant. . . . It is clear that each of plaintiff's new claims are based upon her termination by defendant and that the instant action merely presents a new legal theory as to why plaintiff was terminated by defendant. . . . Thus, we conclude that, with reasonable diligence, plaintiff could and should have brought the claims that make up the instant action as part of her original federal complaint. 606 S.E.2d at 194-195.

The allegations in Williams v. City of Jacksonville Police Department, 165 N.C.App. 587, 599 S.E.2d 422 (2004) arose from a traffic stop of the plaintiffs by the defendants. Suit was filed alleging emotional distress, violations of the 4th and 14th Amendments to the U.S. Constitution, false arrest and negligent training of the defendant's police officers. Based on allegations of § 1983 violations, the defendants removed the case to federal court. Judge Fox granted the defendants' motions for summary judgment, specifically finding that the defendants had probable cause to detain the plaintiffs, the defendants acted reasonably in searching the plaintiffs and the

defendants did not use excessive force. Judge Fox dismissed the federal claims, but refused to exercise supplemental jurisdiction over the state law pendent claims. The plaintiffs timely filed a new action in state court alleging the same claims as in the original action without the allegations concerning violations of the U.S. Constitution. The defendants moved for summary judgment on the defenses of res judicata and collateral estoppel. The state court denied the motions for summary judgment.

On appeal, the Court of Appeals first addressed the interlocutory nature of the appeal since there was not a final judgment. The Court held that denial of motions for summary judgment on the defenses of res judicata and collateral estoppel affect a substantial right and are immediately appealable.

As to the defense of res judicata, the Court held that the motion for summary judgment had been properly denied because Judge Fox specifically held that he would not exercise supplemental jurisdiction over the plaintiffs' state law claims. The plaintiffs' present claims, therefore, were not the same claims litigated before Judge Fox.

The trial court, however, should have granted the defendants' motion for summary judgment based on collateral estoppel. In order for collateral estoppel to apply:

> (1) the issues to be concluded must be the same as those involved in the prior action; (2) in the prior action, the issues must have been raised and actually litigated; (3) the issues must have been material and relevant to the disposition of the prior action; and (4) the determination made of those issues in the prior action must have been necessary and essential to the resulting judgment. 165 N.C. App. at 593, 599 S.E.2d at 428-29.

In granting the defendants' motion for summary judgment in federal court, Judge Fox concluded that the search and arrest were reasonable, that excessive force was not used, that the threat of force or violence was not unreasonable and that the plaintiffs' Fourth Amendment rights were not violated.

Applying Judge Fox's findings to the existing state court claims, the Court of Appeals concluded that the plaintiffs' factual allegations had been addressed by Judge Fox and resolved against the plaintiffs.

> The U.S. District Court's Order does not rule on the ultimate issue of defendants' negligence in their individual capacity. However, Judge Fox's award of summary judgment to defendants essentially ruled both officers' actions were reasonable; neither officer violated plaintiffs' constitutional rights; and their actions did not extend "beyond the scope of duty." Collateral estoppel precludes plaintiffs' suit on the issue of negligence for Officer Houston and Officer Burkhart in their individual capacity. 165 N.C. App. at 595-96, 599 S.E.2d at 430.

The additional claims alleging false arrest and assault were dismissed on the same grounds. Dismissal of the claims against the individual officers also resulted in dismissal of the claims against the Jacksonville Police Department.

J. Service

The plaintiff in Lane v. Winn-Dixie Charlotte, Inc., ___N.C.App. ___, 609 S.E.2d 456 (2005) alleged that he slipped and fell at the defendant's store on 8 December 1999. Suit was filed on 13 November 2002. Although the summons was issued to Winn-Dixie Charlotte, Inc., no person was designated in the summons to receive service. On 17 December 2002, the plaintiff filed an affidavit of service, attaching a signed postal receipt by a Winn-Dixie mailroom employee, Cannon.

The defendant filed a motion to dismiss pursuant to Rule 12(b)(4) and 12(b)(5). The trial court granted the defendant's motion to dismiss. The Court of Appeals affirmed. The plaintiff first argued that the defendant's motion to dismiss was not stated with the particularity required for grounds for dismissal in Rule 7(b)(1). The Court of Appeals disagreed.

> Defendant's motion to dismiss cited Rule 12(b)(4) and 12(b)(5), and specified that "Plaintiff's have failed to properly serve the Defendant" and that "the process issued by the Plaintiffs in this case was not proper and it did not properly provide for service of process on the corporate entity." In addition, the motion specifically stated the relief requested: to wit, the plaintiffs' complaint should be dismissed.
>
> We hold that defendant's Rule 12(b)(4)) and 12(b)(5)) motion to dismiss was stated with sufficient particularity as to the grounds alleged, and sufficiently set forth the relief sought. 609 S.E.2d at 458.

The plaintiff next argued that his affidavit of service that included the signed return receipt had not been rebutted by the defendant, and, for this reason, the trial court erred in dismissing the action. The Court of Appeals disagreed.

> A review of the summons demonstrates that plaintiffs failed to designate any person authorized by Rule 4(j)(6) to be served on behalf of the corporate defendant in violation of the clear requirements of the rule. Accordingly, the summons was defective on its face.
>
> Thus, as the summons was defective on its face, a presumption of service would not exist even upon a showing that the item was received by registered mail. 609 S.E.2d at 460.

The complaint in Wetchin v. Ocean Side Corp., ___N.C.App. ___, 606 S.E.2d 407 (2005) was filed on 31 May 2002. The plaintiff did not serve the summonses on either defendant. On 29 August 2002, the Clerk issued separate alias and pluries summons for each defendant. On 14 November 2002, the attorney for the plaintiff mailed a copy of the summons and complaint to each defendant by certified mail. Although each mailing including a copy of the complaint, Ocean Side was sent the summons for Can-Am and Can-Am was sent the summons for Ocean Side. Ocean Side received the certified mailing on 20 November 2002. The attorney for the plaintiff filed an affidavit of service by certified mail. A voluntary dismissal was taken as to Can-Am.

Ocean Side moved to dismiss the action pursuant to Rule 12. Ocean Side's motion was scheduled to be heard on 28 February 2003. On the morning of the hearing, the plaintiff filed a motion to extend the summons as to Ocean Side for thirty days up to and including 27 November 2002. During the hearing, the plaintiff also made an oral motion to amend the summons directed to Can-Am so that it was directed to Ocean Side. The trial court granted Ocean Side's motion to quash attempted service; denied the plaintiff written motion to extend the summons until 27 November 2002; and denied the plaintiff's oral motion to amend the summons.

The Court of Appeals reversed and remanded for further proceedings. In ruling on the plaintiff's motion to extend the summons as to Ocean Side, the trial court specifically stated that it did not have the "power" to grant the motion, but that if it were permitted, it would have extended the summons in its discretion. The Court of Appeals held that the trial court did have the discretion to extend the summons since it had not expired prior to service on Ocean Side.

> The alias and pluries summons became dormant after sixty days, prior to plaintiffs' effectuating service on 20 November 2002, but before expiration of the summons on 27 November 2002. The summons were merely dormant at the time of service; it had not expired and the trial court had the discretion to retroactively extend the time for service of the alias and pluries summons. . . . This matter is remanded to the trial court to consider whether or not to exercise its

> discretion to extend the time for service of the alias and pluries summons. 606 S.E.2d at 410.

The Court of Appeals also held that the trial court had the discretion to amend the summons served on Ocean Side and change the name on the summons from Can-Am to Ocean Side.

> The threshold issue in this case is whether the summons served on Ocean Side was sufficient to meet the requirements of Rule 4. We hold that it was, and therefore, do not reach the amendment question. . . . Although Ocean Side's name does not appear on the summons, we are convinced there was no substantial possibility of confusion in this case about the identity of Ocean Side as a party being sued. . . . Ocean Side received the summons by certified mail addressed to Ocean Side, and their name appeared on the complaint contained therein. There was no confusion about the fact that Ocean Side was being sued. 606 S.E.2d at 411.

The plaintiff in Lemon v. Combs, 164 N.C.App. 615, 596 S.E.2d 344 (2004) alleged that he was assaulted at a concert given by Mary J. Blige at the Lawrence Joel Veterans Memorial Coliseum in Winston-Salem. The assault was alleged to been committed by two bodyguards employed by Sean "Puffy" Combs. When Combs did not answer the complaint, default was entered, followed by a judgment of $450,000 in compensatory damages and $2 million in punitive damages. Combs' motion to set aside the judgment was granted only as to the punitive damages award.

The plaintiff's proof of service was based on affidavits from deputies in the Guilford County Sheriff's Department. The affidavits stated that Combs was identified at the Greensboro

Coliseum, told that the deputy had a summons and complaint, that Combs started to walk away without accepting the complaint and that the deputy "threw" copies of the summons and complaint at Combs' feet, then stated "You are served." Combs filed affidavits denying these events. The Court of Appeals held that service was sufficient.

> In sum, under N.C. Gen.Stat. § 1-75.10(1), proof of service of the summons is shown by (1) the sheriff's certificate showing the place, time and manner of service or (2) by affidavit showing the place, time and manner of service, the affiant's qualifications to make service, that he knew the person to be served and that he delivered and left a copy with said person or some other identified person. In this case, the sheriff's certificate of service indicated the manner in which Combs was served; moreover, Lemon presented affidavits supporting Deputy Overcash's version of how service was made upon Combs. We conclude Lemon presented sufficient proof of service in accordance with N.C. Gen.Stat. § 1-75.10. 164 N.C. App. at 619, 596 S.E.2d at 347.

The plaintiff was also required to "establish grounds for personal jurisdiction" over the defendant. Lemon's affidavit stated that the bodyguards were employed by Combs. The affidavit, however, demonstrated lack of personal knowledge by Lemons of the employment of the bodyguards. Concluding that the affidavits must be based on personal knowledge, the Court held that the affidavits were not sufficient to provide a basis for personal jurisdiction.

> In sum, although Lemon served Combs with the summons and complaint and obtained an entry of default upon Combs' failure to timely answer, . . . Lemon had to

> provide the trial court with sufficient facts upon which the trial court could establish grounds for personal jurisdiction. . . . Lemon's unverified complaint, affidavit and Blige's interrogatory responses do not provide a basis upon which personal jurisdiction may be established. Indeed, Lemon and Blige lack personal knowledge regarding the circumstances surround the employment of Taurean and Odarus Bennett. Therefore, . . . "for the failure of the record to show, as required by G.S. 1-75.11, personal jurisdiction of Combs by the court, the judgment entered herein was void and could be considered and treated as a nullity." However, the entry of default is valid. . . jurisdictional proof is not required for an entry of default. 164 N.C. App. at 625, 596 S.E. at 350.

K. Attorneys' Fees, G.S. § 6-21.1 and Court Costs

The plaintiff in Brown v. Millsap, 161 N.C.App. 282, 588 S.E.2d 71 (2003), per curiam reversed, 358 N.C. 212, 594 S.E.2d 1 (2004) obtained a jury verdict of $9,500. The plaintiff moved for and was granted court costs of $435 and prejudgment interest of $669.76. The trial court denied the plaintiff's request for attorneys' fees pursuant to G.S. § 6-21.1 on the grounds that it lacked authority to award attorneys' fees because the jury verdict, court costs and prejudgment interest exceeded $10,000.

The Court of Appeals reversed, holding that it was error for the trial court to add courts costs and prejudgment interest to the jury verdict to determine whether it had authority to award attorneys' fees. Judge Tyson dissented. The Supreme Court adopted the reasoning of Judge Tyson's dissent and affirmed the trial court's denial of attorneys' fees on grounds

different that those stated by the trial judge. Judge Tyson noted that court costs are determined by statute and are awarded in the discretion of the trial judge. The trial court, however, has no discretion is determining whether to award prejudgment interest.

> Court costs are not automatically awarded to or added to a successful party's claim. N.C.Gen.Stat § 6-20 (2001) states that "costs may be allowed or not, in the discretion of the court, unless otherwise provided by law." . . . . Prejudgment interest, however, is automatically awarded to the prevailing party's claim. N.C. Gen.Stat. § 24-5 . . . . Under this statute, the trial court has no discretion whether to award prejudgment interest to the prevailing party's award.
>
> Since statutory authority and case law hold court costs to be discretionary, the trial court at bar erred in adding the court costs of $435.00 to the jury award of $9,500 to determine whether the $10,000 maximum was exceeded. Prejudgment interest is automatically added to plaintiff's award to compensate a prevailing party. The trial court was required to add the amount of $669.76 to the jury's award of $9,500 to determine whether the $10,000 statutory maximum was exceeded. . . . I would affirm the trial court's ruling. 161 N.C.App. at 285-87, 588 S.E.2d at 73-74.

The plaintiff, Linda Reinhold, in Reinhold v. Lucas, ___N.C.App. ___, 606 S.E.2d 412 (2005) was a passenger in a car operated by Robert Reinhold. Robert Reinhold stopped his car suddenly, then was struck in the rear by a vehicle operated by Lucas. Ms. Reinhold sued Ms. Lucas. Ms. Lucas brought a third-party complaint against Mr. Reinhold for contribution. Mr. Reinhold then filed a counterclaim against Ms. Lucas for his

injuries. Ms. Lucas served an offer of judgment as to the plaintiff's claim for $3,000. Ms. Reinhold settled with Mr. Reinhold for $5,000. The jury awarded Ms. Reinhold $4,500 on her claim against Ms. Lucas. Finding Mr. Reinhold contributorily negligent, the jury did not award him damages.

The trial court reduced the plaintiff's jury award of $4,500 by the $5,000 settlement with Mr. Reinhold. Pursuant to G.S. § 6-21.1, the trial court awarded the plaintiff $7,500 in attorney's fees and $1,382 in costs.

The Court of Appeals affirmed. Even though the plaintiff did not recover a monetary amount from the plaintiff, she was still the "prevailing party" and entitled to attorney's fees.

> N.C.Gen.Stat. § 6-21.1 applies when "judgment for recovery of damages is ten thousand dollars ($10,000) or less." The statute does not refer to the amount of compensatory damages awarded; it specifically refers to a "judgment for recovery of damages." . . . . As long as the amount of damages awarded is less than $10,000, the precise amount awarded is of no consequence. A judgment for zero dollars, as is the case here, is nevertheless a judgment and N.C.G.S. § 6-21.1 applies. . . . Plaintiff obtained a judgment for damages and was the prevailing party. Plaintiff was thus entitled to receive attorney's fees under N.C.G.S. § 6-21.1. 606 S.E.2d at 415.

The defendant also appealed the award of costs in favor of the plaintiff. Since attorney's fees were properly awarded, the "judgment finally obtained" was $13,382, the total of the jury award of $4,500, attorney's fees of $7,500 and costs of $1,382. The trial court correctly found that the judgment of $13,382 was

more than the offer of judgment, even after deducting the $5,000 settlement with Mr. Reinhold.

The plaintiffs in Lord v. Customized Consulting Specialty, Inc., 164 N.C.App. 730, 596 S.E.2d 891 (2004) alleged breach of contract by Customized relating to the purchase of the plaintiffs' house from Customized. Customized filed answer and a third-party complaint against 84 Lumber Company seeking indemnity and contribution. The only relief sought in the third-party complaint was contingent upon recovery by the plaintiffs. No claims were filed by the plaintiffs against the third-party defendant, nor by the third-party defendant against the plaintiffs. The plaintiffs took a voluntary dismissal without prejudice against the defendant. The third-party defendant moved for costs against the plaintiffs under Rule 41(d). The trial court denied the third-party defendants' motion for costs in his discretion.

Holding that Rule 41(d) mandates the awarding of costs, the Court of Appeals reversed.

> The relevant part of Rule 41(d) states: "A plaintiff who dismisses an action or claim under section (a) of this rule shall be taxed with costs of the action . . . ." . . . . In the instant case, defendant filed a third party complaint seeking indemnity and contribution from third party defendants. Each of these claims was related to plaintiffs' claims against defendant. When plaintiffs' claims against defendant were voluntarily dismissed, defendant's third party claims ceased to exist. All of the claims of plaintiffs and defendant were part of the same action.

> It is therefore equitable and proper that the costs of the third party defendants be taxed to the plaintiffs in this case. 164 N.C. App. at 732-33, 596 S.E.2d at 893-894.

Specifically addressing the costs requested by the third-party defendant, the Court held that there was no statutory basis for copy and telephone expenses. The defendant requested reimbursement of expert witness fees, however, those fees were not authorized under G.S. § 7A-314 because the witness was not under subpoena. The fees requested arose from preparation of the expert report, therefore those fees were properly denied.

Deposition expenses and related costs are not allowed under G.S. § 7A-305(d), but may be awarded in the trial court's discretion under G.S. § 6-20. Finding no abuse of discretion, the Court of Appeals affirmed denial of these costs. G.S. § 7A-38.1 requires mediated settlement conferences. The Court of Appeals held that this cost was required to be taxed.

> The mediator's fee was a cost that the trial court was required to tax as costs under Rule 41(d) and N.C.Gen.Stat. § 7A-305(d)(7). It was error for the trial court not to assess this item as costs against plaintiffs. 164 N.C.App. at 736, 596 S.E.2d at 896.

L. Attorney-Client Relationship

Trial in Daniel v. Moore, 164 N.C.App. 534, 596 S.E.2d 465, affirmed per curiam, 359 N.C. 183, 606 S.E.2d 118 (2004) was scheduled to begin on 9 September 2002. All parties and counsel appeared for trial, but before trial, the trial judge conducted

a pretrial conference with only the attorneys. At the conclusion of the conference, the trial judge announced in open court that the case had been settled. The terms of the settlement were stated in court in the presence of the parties and their attorneys. Four days later, the plaintiff emailed her attorney stating that she did not consent to the judgment and that her attorney did not have authority to approve the order. This message was confirmed in a subsequent letter. The attorney for the plaintiff admitted receipt of the message.

Despite this exchange, the attorney for the plaintiff wrote the attorney for the defendant on 4 October 2002 about modifications to the consent judgment. These changes were made, and, on 9 October 2002, the attorney for the plaintiff signed as "Consented and Agreed To," then the judgment was signed by the trial judge. After entry of the consent judgment, the plaintiffs filed a motion for a new trial or to amend the judgment pursuant to Rule 59. The motion recited the dates and facts about the plaintiffs' objections to the judgment and revocation of the authority for the attorney for the plaintiffs to consent. The trial court denied the motion.

The Court of Appeals reversed, and the Supreme Court affirmed per curiam. The Court of Appeals held that the authority and agency of the plaintiffs' attorney had been

revoked prior to the entry of the consent judgment, therefore, the required consent was absent.

> In the present case, our review of the record indicates plaintiffs withdrew their consent to entry of the judgment prior to the time that Rhodes, acting without authority, signed the proposed consent judgment and sent it to defendants' attorney on 9 October 2002. "An agency can be revoked at any time before a valid and binding contract, within the scope of the agency, has been made with a third party." . . . . A consent judgment is a contract between the parties entered, with the sanction of a court of competent jurisdiction upon the court's records. . . . Because we conclude that plaintiffs revoked Rhodes' authority to enter the consent judgment before final entry of the judgment upon the court's records, we hold that plaintiffs have carried their burden of proving the invalidity of the consent judgment. Accordingly, we conclude that the trial court abused its discretion by denying plaintiffs' motion for a new trial. 164 N.C. App. at 538-40, 596 S.E.2d at 468-469.

M. Jurisdiction

Tejal Vyas L.L.C. v. Carriage Park Limited Partnership, ___N.C.App. ___, 600 S.E.2d 881 (2004), affirmed per curiam, 359 N.C. 315, 608 S.E.2d 751 (2005) was an action alleging breaches of fiduciary duty and contract arising out of a real estate investment. The plaintiffs attended the initial investment presentation in Georgia. Subsequently, there were contacts between the plaintiffs, residents of North Carolina, and their attorneys, also residents of North Carolina, with the defendants in Illinois. The property that was the subject of the investment was in Illinois. There was no evidence that the

defendants had been in North Carolina. All contact by the defendants with the plaintiffs or their attorneys occurred after initiation by the plaintiffs.

The trial court dismissed the action for lack of personal jurisdiction. The Court of Appeals affirmed, and the Supreme Court affirmed per curiam.

> This Court has ruled that "the mere act of entering into a contract with a forum resident . . . will not provide the necessary minimum contacts with the forum state, especially when all the elements of the defendants' performance . . . are to take place outside the forum" . . . . The contract's purpose was to invest in real estate ventures located in Illinois. The agreement required defendants to perform their obligations in Illinois, governed by Illinois law. Defendants' only connection to North Carolina was plaintiffs' limited liability company registered and located in North Carolina that contracted with defendants to become an investor. Our Courts require more than a single contact with an out of state defendant to satisfy the due process requirements for personal jurisdiction. 600 S.E.2d at 888.

N. Unfair and Deceptive Trade Practices

Castle McCulloch, Inc. v. Freedman Associates, Inc., ___N.C.App. ___, 610 S.E.2d 416 (2005) was an action alleging unfair and deceptive trade practices arising from competing bridal shows by the plaintiff and defendant. The trial court excluded the plaintiff's economic expert because he had not been properly disclosed during discovery. In attempting to establish damages, the general manager of the plaintiff testified about extra work performed by employees and the

decreased number of vendors at the plaintiff's bridal show. There was no testimony relating the employee expenses or loss of vendors to actions of the defendant. The trial court granted the defendant's motion for a directed verdict at the close of the plaintiff's evidence.

The Court of Appeals affirmed primarily on the absence of evidence relating the plaintiff's damages to any conduct of the defendant.

> The damages argued by Castle McCulloch regarding the lost vendor revenue are essentially damages for lost profits. "North Carolina courts have long held that damages for lost profits will not be awarded based upon hypothetical or speculative forecasts of losses." . . . . Here, . . ., Castle McCulloch merely speculated as to the number of vendors that would have attended the bridal show but for Freedman's survey. Castle McCulloch speculated that the number of vendors would not have decreased or the rate of growth would not have slowed. No evidence was presented to show that any vendor left Castle McCulloch's bridal show as a result of Freedman's survey. . . . Similarly, the only evidence Castle McCulloch presented regarding damages from payroll expenses was the general manager's testimony that she looked over her personal notes from some meetings and she estimated the time and then took an average hourly wage figure. . . . After reviewing the entire record, we find no evidence from which a jury could calculate lost profits from vendors or payroll damages with a "reasonable certainty." . . . . As Castle McCulloch failed to present evidence that it suffered actual injury as a proximate result of Freedman's misrepresentations or unfair conduct, the trial court did not err in granting Freedman's motion for a directed verdict. 610 S.E.2d at 420-21.

Judge Tyson dissented only as to the award of attorneys' fees and costs.

The plaintiff in Morgan v. AT&T Corp., ___N.C.App. ___, 608 S.E.2d 559 (2005) alleged that she was solicited by the defendant for a long-distance service plan at five cents per minute. When the plaintiff received her first bill, she was charged ten cents a minute for some calls. After an unsatisfactory attempt to resolve the difference, the plaintiff cancelled the plan with AT&T. AT&T continued to bill the plaintiff, followed by collection agencies contacting the plaintiff for non-payment of the bill. The plaintiff brought the present action for fraud and unfair and deceptive trade practices. The trial court dismissed the action on the grounds that the Federal Communications Commission's regulation of the rates barred the claim because jurisdiction was vested exclusively in the federal courts and the Commission.

Agreeing that the plaintiff's claims for fraud and unfair and deceptive trade practices as to any representations by the defendant about the rates were barred, the Court of Appeals, however, reversed summary judgment as to claims related to actions of the defendant after the plaintiff cancelled the agreement.

> The FCA therefore preempts state actions to enforce even fraudulent agreements of rates which vary from the filed tariff. . . . Thus, as the agreement was made while defendant was operating in a tariffed environment, plaintiff's state action for fraud and unfair and deceptive practices in misrepresentation of the rates offered by defendant is barred and we affirm

> the trial court's grant of summary judgment as to that portion of the complaint. . . . These actions, taken after plaintiff's cancellation of the contract and independent of the agreement governed by the filed tariff, present a claim sufficient, when taken in the light most favorable to the plaintiff, to overcome a motion for summary judgment. . . . damages for unfair and deceptive trade practices for the continued harassment by defendant after cancellation of the phone service, such as sought by plaintiff in this case, present no conflict with the statutory filed-tariff requirements and are therefore not preempted by the FCA. 608 S.E.2d at 563-64.

O. Releases

Financial Services of Raleigh, Inc. v. Barefoot, 163 N.C.App. 387, 594 S.E.2d 37 (2004) arose out of a dispute concerning the terms under which real property was conveyed. On 30 December 1993, Mr. and Mrs. Barefoot conveyed several tracts of land to Financial Services of Raleigh, Inc. ("FSR"). One of the tracts included a warehouse in Benson. The deed contained a metes-and-bounds description of the property and that it comprised 1.85 acres. On 1 November 1995, the Barefoots sued FSR, alleging that FSR agreed to hold the property in trust and to apply proceeds from the sale of the property to a mortgage, then convey the land back to the Barefoots. FSR answered and counterclaimed, alleging unfair and deceptive trade practices, abuse of process and slander of title. The trial court granted FSR's motion for summary judgment on the issue of ownership of the property and dismissed the Barefoots' complaint. The Court of Appeals affirmed.

FSR's counterclaims were scheduled for trial. Immediately before trial, the parties reached a settlement resolving FSR's counterclaims against the Barefoots. The handwritten settlement agreement provided that "The parties release one another for [sic] all claims of any kind arising out of the subject matter of this litigation." The settlement agreement was presented to the Judge Hight who read the settlement into the record.

The Barefoots subsequently moved to enforce the settlement agreement. At a hearing on the Barefoots' motion, FSR argued that it was not bound by the settlement agreement because of misrepresentations made by the Barefoots concerning access to the warehouse. Judge Jacobs allowed the Barefoots' motion to enforce the settlement agreement and entered findings about the previous settlement of FSR's counterclaims, concluding that "The handwritten settlement agreement constitutes a valid . . . agreement enforceable by the Judgment of this Court."

After Judge Jacobs' judgment, FSR had a survey of the property conducted. The survey determined that the initial conveyance from the Barefoots contained less property than stated and that the only access to the warehouse was outside the property conveyed. FSR filed the current action alleging fraud, unfair and deceptive trade practices and mutual mistake in connection with the initial conveyance by the Barefoots to FSR. The trial court granted the Barefoots' motion for summary

judgment on the grounds of res judicata and the signed settlement agreement and release.

Holding that the signed settlement agreement and release covered all future claims even if they were unknown at the time the release was executed, the Court of Appeals affirmed. Since the current FSR complaint alleged mutual mistake arising from the initial conveyance, FSR's claims arose out of the conveyance and were within the scope of the release.

> . . . when the parties stated that they were releasing "all claims of any kind," we must construe the release to mean precisely that: an intent to release all claims of any kind in existence. FSR seeks to add an exception for claims of which it was unaware. We cannot judicially edit the release to provide an exception not agreed to by the parties when they entered into the release . . . . Similarly, we hold that the language of FSR's release was broad enough to include unknown claims and that it, therefore, bars the claims asserted by FSR . . . . The trial court properly granted summary judgment. 163 N.C. App. at 395-96, 594 S.E.2d at 43.

The plaintiff in Van Keuren v. Little, 165 N.C.App. 244, 598 S.E.2d 168, petition for discretionary review denied, 359 N.C. 197, 608 S.E.2d 328 (2004) was injured when he was struck by a car driven by Little. Integon was the liability carrier for Little with limits of $25,000. While represented by counsel, the plaintiff signed a "Release of All Claims" in favor of Little in return for Integon's payment of $25,000. The plaintiff then contacted her employer's automobile liability carrier, Royal & Sun Alliance, notifying it of the opportunity

to preserve its rights of subrogation. The present action for the plaintiff's personal injuries was filed against Little and served also on Royal. Little and Royal moved for summary judgment based on the release executed in connection with Integon's payment. The trial court granted both motions for summary judgment and dismissed the action.

The Court of Appeals affirmed dismissal based on the "Release of All Claims."

> Plaintiff's affidavit states, "It is my belief that the carrier for the defendant forgot, as did my attorneys, of the potential underinsured claim in preparing and reviewing the settlement documents that were executed." Plaintiff also stated, "When I accepted the $25,000 . . . I intended to pursue an underinsured claim . . . ." These conclusory statements fail to show specific facts of mutual mistake, "lack[s] particularity" and is "insufficient to withstand a motion for summary judgment." . . . .
>
> Further, plaintiff's affidavit fails "to state with particularity the circumstances constituting mistake as to all parties to the written instrument." . . . . Plaintiff presented no evidence and made no allegation that Little, who was a named party to the release, was mistaken concerning any legal effect of the release. Plaintiff failed to forecast evidence sufficient to make a prima facie case and show that a genuine issue of material fact existed regarding mutual mistake in executing the release. 165 N.C. App. at 248, 598 S.E.2d at 171.

P. Class Certification

In Stetser v. TAP Pharmaceutical Products, Inc., 165 N.C.App. 1, 598 S.E.2d 570 (2004), the Court of Appeals reversed the trial court's order certifying a nationwide class and

remanded for further findings. The plaintiffs alleged that the defendants fraudulently inflated the price of Lupron, a prescription drug used to treat prostate cancer. Finding common questions of fact and law, the trial court certified a class that included all persons or entities in North Carolina and throughout the United States who paid any part of the cost of Lupron based upon the published Average Wholesale Price of Lupron. Similar lawsuits were pending in New Jersey (state class certified), Arizona (nationwide class requested), federal multi-district litigation panel (nationwide class requested) and Illinois (nationwide class certified).

The parties agreed that the order appealed from was interlocutory. The defendants contended that the order was appealable because it affected a substantial right. The Court of Appeals concluded that the trial court's order certifying the class was interlocutory and did not affect a substantial right. Recognizing the importance of the issues, the Court granted the defendants' petition for certiorari pursuant to Rule 21(a)(1).

Although not specifically stated in the trial court's order, the Court of Appeals reasoned that the trial court concluded that North Carolina law would apply to the claims alleging common law fraud, civil conspiracy, concert of action and violation of consumer fraud protection statutes. Analyzing

North Carolina's conflicts of laws principles first, the Court held that the laws of other states may control.

> Therefore, according to North Carolina's choice of law rules, as traditionally applied, the law of North Carolina would control the procedural matters in this class action lawsuit, such as determining the statute of limitations. However, the substantive law of the state where the injury occurred would be applied to plaintiffs' claims for common law fraud, civil conspiracy and tortious concert of action, as well as determining what damages were available to plaintiffs for any liability resulting from those claims. The substantive law of the state (1) with the most significant relationship or (2) where the injury occurred would control plaintiffs' claims for unfair or deceptive trade practices and determine the damages available. 165 N.C. App. at 16, 598 S.E.2d at 581.

Constitutional due process allows application of North Carolina law to the class only if the substantive law of each of the fifty states "does not materially differ from North Carolina's law on plaintiffs' claims." 598 S.E.2d at 581. The Court of Appeals then reviewed the laws of the fifty states that applied to the claims alleging civil conspiracy, common law fraud, tortious action in concert and consumer protection statutes. Finding differences between the law of North Carolina and the other states as applied to each of these claims, the Court of Appeals held that due process required a finding by the trial court as to whether the differences were material.

> [T]he trial court made no findings of fact or conclusions of law regarding whether these differences between state laws were material or the effect of North Carolina's conflict of law rules on the trial court's choice of law. . . . The trial court made no

> findings with respect to the different state laws or whether those laws were sufficiently similar to North Carolina's law so that application of North Carolina's law was not unfair or arbitrary. 165 N.C. App. at 25, 598 S.E.2d at 582-583.

On remand, the trial court was directed to make additional findings of fact on the state law to be applied to each claim. These findings would also determine whether there were common issues of fact and whether class certification was appropriate for this litigation.

Q. Rule 59 Motions for New Trial

The plaintiffs in Guox v. Satterly, 164 N.C.App. 578, 596 S.E.2d 452 (2004), petition for discretionary review denied, 359 N.C. 188, 606 S.E.2d 906 (2004) were passengers in a vehicle struck by the defendant's vehicle when the defendant ran a red light. The trial court directed a verdict against the defendant on the issue of liability. Evidence at trial established that the medical expenses incurred by the plaintiffs as a result of the accident were $5,526 for Sheryn Guox, $9,477 for Jonathan Guox and $15,523 for Iliana Guox. The jury awarded exactly these expenses for each of the plaintiffs, then awarded for pain and suffering and permanent injury $2,000 for Sheryn Guox, $2,000 for Jonathan Guox and $37,000 for Iliana Guox.

The plaintiffs moved for a new trial under Rule 59(a)(6) contending that the damages were inadequate and were "based on passion or prejudice." In support of the plaintiffs' motion,

they relied upon testimony by the defendant at trial: (1) his observations about the positions of the minor plaintiffs after the accident that inferred that the minor plaintiffs were not wearing seat belts; (2) he purchased toys for the minor plaintiffs and visited them at their home; (3) he offered money to assist with hospital expenses; and (4) he discontinued contact with the plaintiffs because they had retained counsel and he knew "what was coming next." Citing this testimony by the defendant at trial, the trial court granted the plaintiffs' motion for a new trial.

On appeal, the defendant contended that it was error for the trial court to consider his testimony as grounds for granting a new trial when the plaintiffs did not object to this testimony during trial. The Court of Appeals disagreed and affirmed the trial court's order granting a new trial.

> Just because a party did not object to specific testimony does not prevent the trial court from considering it when ruling on a motion for a new trial pursuant to N.C.R.Civ.P. 59(a)(6). . . . the issue before this Court is not whether the trial court's decision was proper under a de novo review, as defendant suggests. Rather, our review is limited to whether the trial court abused its discretion, and as we stated above, it did not. 164 N.C. App. at 581-83, 596 S.E.2d at 455-456.

R. Intervention, Rule 24

Bruggeman v. Meditrust Company, LLC, ___N.C.App.___, 600 S.E.2d 507 (2004) was a suit by Bruggeman, Newton and McGonigal

to recover real estate commissions on golf properties purchased by defendants. On 24 May 2002, defendants moved to dismiss the complaint for lack of subject matter jurisdiction, and, also, to dismiss Newton and McGonigal for lack of standing. On 12 September 2002, Judge Cobb refused to dismiss the case for lack of subject matter jurisdiction, but did dismiss Newton and McGonigal for lack of standing.

On 1 October 2002, Newton and McGonigal filed a motion to intervene. On 3 October 2002, defendants moved that Judge Cobb certify his 12 September 2002 order as a final judgment. Judge Cobb denied the certification motion. Defendants appealed the denial of the certification motion and the denial of their motion to dismiss for lack of subject matter jurisdiction. The Court of Appeals dismissed the defendants' appeal as interlocutory and affirmed Judge Cobb's order denying the defendants' certification motion.

While the defendants' appeal was pending, Judge Crow heard Newton's and McGonigal's motion to intervene. On 8 April 2003, Judge Crow granted the motions of Newton and McGonigal to intervene. Judge Crow's order also stated that it "in effect overruled and circumvented" Judge Cobb's previous order dismissing Newton and McGonigal for lack of standing.

The Court of Appeals concluded that Judge Crow did not have jurisdiction to consider Newton's and McGonigal's motion to

intervene and remanded the case for reconsideration of that motion. The Court addressed first the effect on continued proceedings in the trial court of an interlocutory appeal. The defendants' first appeal raised the issues of: (1) Judge Cobb's denial of defendants' motion to dismiss the action for lack of standing; and (2) Judge Cobb's denial of defendants' motion to certify as a final judgment the order dismissing Newton and McGonigal for lack of standing. In dismissing the defendants' appeal, the Court of Appeals held that the order denying defendants' motion to dismiss for lack of jurisdiction was interlocutory and dismissed the appeal. The Court of Appeals also affirmed Judge Cobb's order refusing to certify as a final judgment his decision to dismiss Newton and McGonigal for lack of standing. During this appeal, Judge Crow granted Newton's and McGonigal's motion to intervene.

G.S. § 1-294 stays proceedings in the trial court relating to the "judgment appealed from, or upon the matter embraced therein. . . . " Recognizing that an interlocutory appeal does not stay proceedings in the trial court, the Court of Appeals held that the defendants' appeal directly related to the motions of Newton and McGonigal to intervene, and, therefore, divested the trial court of jurisdiction to hear this motion.

> Had this Court decided instead to reverse the trial court's order, the previous order dismissing Newton and McGonigal for lack of standing would have been

> certified as a final judgment against Newton and McGonigal's claims. N.C.Gen.Stat. § 1A-1, Rule 54 (2003). Such a decision certainly would have affected Newton and McGonigal's standing to intervene in Bruggeman's suit. Thus, while Bruggeman II was pending before this Court, N.C.Gen.Stat. § 1-294 divested any trial court of its jurisdiction to consider any motion regarding Newton's and McGonigal's intervention in the case. 600 S.E.2d at 510.

The Court addressed next the issue raised by defendants that Judge Crow's order was overruling the order of the previous superior court judge, Judge Cobb. Because different legal issues were involved, a subsequent trial judge had jurisdiction to consider the motions of Newton and McGonigal to intervene.

> In the instant case, Newton and McGonigal were dismissed for lack of standing by Judge Cobb's order prior to Judge Crow's order granting their motion to intervene. Standing requires "that the plaintiff have been injured or threatened by injury or have a statutory right to institute an action." . . . . Permissive intervention, on the other hand, requires that "an applicant's claim or defense and the main action have a question of law or fact in common." N.C.Gen.Stat. § 1A-1, Rule 24(b)(2) (2003). Thus, the impetus behind Newton and McGonigal's motion for intervention was that there was a common question of law or fact being litigated in another action. Judge Crow's inquiry into the case regarding the merits of Newton and McGonigal's motion to intervene was therefore independent of Judge Cobb's previous inquiry into whether Newton and McGonigal had standing to sue defendants. 600 S.E.2d at 511.