A FEW WORDS ABOUT THE LAW OF ATTORNEY PROFESSIONAL LIABILITY IN NORTH CAROLINA

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I. THE BASIS OF LIABILITY, MALPRACTICE AND OTHERWISE .

A. Malpractice.

1. The Elements of the Cause of Action.

In a legal malpractice action based upon an attorney's negligence, the plaintiff must allege and prove "(1) that the attorney breached the duties owed to his client . . . and that this negligence (2) proximately caused (3) damage to the plaintiff." *Rorrer v. Cooke*, 313 N.C. 338, 355, 329 S.E.2d 355, 366 (1985). "An attorney who acts in good faith and in an honest belief that his advice and acts are well founded and in the best interest of his client is not answerable for a mere error of judgment or for a mistake in a point of law which has not been settled by the court of last resort in his State and on which reasonable doubt may be entertained by well-informed lawyers. Conversely, he is answerable in damages for any loss to his client which proximately results from a want of that degree of knowledge and skill ordinarily possessed by others of his profession similarly situated, or from the omission to use reasonable care and diligence, or from the failure to exercise in good faith his best judgment in attending to the litigation committed to his care." *Hodges v. Carter*, 239 N.C. 517, 520, 80 S.E.2d 144, 146 (1954) (citations omitted). When an attorney agrees to prosecute an action on behalf of his client he impliedly represents that he:

1. Possesses the requisite degree of learning, skill and ability necessary to the practice of his profession in which others similarly situated ordinarily possess;

2. Will exert his best judgment in the prosecution of the litigation entrusted to him; and

3. Will exercise reasonable and ordinary care and diligence in the use of his skill and in the application of his knowledge to his client's cause.

Hodges, 239 N.C. at 519, 80 S.E.2d at 145-146.

2. The Existence of an Attorney-Client Relationship and Exceptions.

In a legal malpractice action, a plaintiff must show an attorney-client relationship existed before liability can be established. *Chicago Title Ins. Co. v. Holt*, 36 N.C. App. 284, 244 S.E.2d 177 (1978). As the Court of Appeals held, "before the attorney can be made liable, it must appear the loss for which he is sought to be held arose from his failure or neglect to discharge some duty which was fairly within the purview of his employment. Moreover, *an attorney is liable* for negligence in the conduct of his professional duties *to his client alone*, that is, to the one between whom and the attorney the *contract* of employment and service existed, and not to third parties." *Id*. at 287, 244 S.E.2d 177, 180 *citing* 7 C.J.S., *Attorney and Client*, § 140, p. 978. (emphasis in original)

Although later cases have extended the attorney's professional duties to certain non-client third parties, this extension has been limited to a class of entities such as a title insurance company that has an aligned interest with the buyer-client regarding the attorney's opinion on title. Where the attorney is representing the buyer, a conflict typically would not arise by the attorney's fulfilling duties to the title company when the attorney could reasonably foresee that the title company would rely on the attorney's opinion on title. *See United Leasing Corp. v. Miller*, 45 N.C. App. 400, 263 S.E.2d 313 (1980), *petition denied*, 300 N.C. 374, 267 S.E.2d 685 (1980), *appeal after remand*, 60 N.C. App. 40, 298 S.E.2d 409 (1982), *petition denied*, 308 N.C.

194, 302, S.E.2d 248 (1983); *Commonwealth Land Title Ins. Co. v. Walker & Romm*, 883 F. Supp. 25 (E.D.N.C. 1994), *aff'd*, 43 F.3d 1465 (4th Cir. 1994), *reported in full*, 1994 U.S. App. LEXIS 33537 (4th Cir. 1994). *See*, *also*, opinion #3 to RPC 210 of the North Carolina State Bar.

Under North Carolina law, an attorney-client relationship "may be implied from the conduct of the parties, and is not dependent on the payment of a fee, nor upon the execution of a formal contract." *The North Carolina State Bar v. Sheffield*, 73 N.C. App. 349, 358, 326 S.E.2d 320, 325, *cert. denied*, 314 N.C. 117, 332 S.E.2d 482, *cert. denied*, 474 U.S. 981, 106 S.Ct. 385, 88 L. Ed. 2d 338 (1985), *citing E.F. Hutton & Co. v. Brown*, 305 F. Supp. 371 (S.D. Tex 1969). *See also Cornelius v. Helms*, 120 N.C. App. 172, 461 S.E.2d 338 (1995), *review denied, review dismissed*, 342 N.C. 653, 467 S.E.2d 709 (1996), *reconsideration dismissed*, 342 N.C. 894, 467 S.E.2d 909 (1996); *Broyhill v. Aycock & Spence*, 102 N.C. App. 382, 402 S.E.2d 167 (1990), *review denied*, 329 N.C. 266, 407 S.E.2d 831, *aff'd*, 330 N.C. 438, 410 S.E.2d 392 (1991).

3. Expert Testimony.

It is generally held that a deviation from the appropriate standard of care must be established by expert, competent testimony, *Progressive Sales v. Williams*, 86 N.C. App. 51, 356 S.E.2d 372 (1987).

4. Proximate Cause.

Rorrer v. Cooke, 313 N.C. 338, 329 S.E. 2d 355 (1985), the seminal authority on proximate cause in North Carolina legal malpractice cases, has been relied upon more than fifty times in reported decisions by North Carolina state and federal courts. Justice Harry Martin held, for a unanimous court, that the essential elements of a cause of action for legal malpractice are that the defendant attorney entered into an attorney-client relationship with the plaintiff; that the defendant attorney deviated from the applicable standard of care; and that the attorney's alleged

negligence was the proximate cause of the damages sustained by the plaintiff. *Rorrer*, 313 N.C. 338, 359. "[W]hen a plaintiff brings suit for legal malpractice, plaintiff must show that but for the negligence of defendant, plaintiff would have suffered no 'loss.' In order to meet this burden, plaintiff must prove three things: (1) that the original claim was valid; (2) it would have resulted in a judgment in plaintiff's favor; and (3) the judgment would have been collectible."). Applying these principles to the facts, the Court affirmed summary judgment for defendant because plaintiff's expert's affidavit did not aver that but for the defendant-attorney's negligence, plaintiff would have prevailed in underlying case and did not contain specific facts suggesting how plaintiff's outcome at trial would have been better had defendant handled the matter differently. 313 N.C. 338, 361, 329 S.E.2d 355, 369.

Said another way, a legal malpractice plaintiff is required to prove the viability and likelihood of success of the underlying case as part of the present malpractice claim. This has been referred to as obligating the plaintiff to prove "a case within a case." *Kearns v. Horsley*, 144 N.C. App. 200, 211, 552 S.E.2d 1, 8 (2001). The plaintiff bears this burden even if the allegedly negligent actions of the attorney resulted in a total foreclosure of the underlying case being heard on its merits. *See*, *Id*., at 211-212, 552 S.E.2d 1, 8-9 (even where a defendant-attorney allows a plaintiff-client's claim to become time-barred, to meet her burden in a malpractice claim, the plaintiff-client must establish she would have recovered in her underlying claim if the claim had been filed within the statute of limitations.)

This same analysis applies to transactional legal work as well. *See*, *e.g.*, *Summer v Allran*, 100 N.C. App. 182, 394 S.E.2d 689 (1990)(client asserting claim for malpractice against attorney who drafted separation agreement must meet the requirements of *Rorrer* by showing but for the

negligence of her attorney, she would have suffered no loss. This case is discussed in more detail *infra* p. 15)

B. Breach of Fiduciary Duty.

Claims against an attorney for breach of fiduciary duty are tantamount to claims for legal malpractice, the statute of limitations for which is N.C. Gen. Stat. 1-15(c). *See, e.g.*, *NationsBank v. Parker,* 140 N.C. App. 106, 535 S.E.2d 597 (2000)(breach of fiduciary duty is a species of negligence or professional malpractice); *Sharp v. Teague,* 113 N.C. App. 589, 592, 439 S.E.2d 792, 794 (1994) (claims arising out of the performance of or failure to perform professional services based on negligence or breach of contract are in the nature of malpractice claims, governed by N.C. Gen. Stat. § 1-15(c)); *Carlisle v. Keith*, 169 N.C. App. 674, 682, 614 S.E.2d 542, 548 (2005); *Heath v. Craighill, Rendleman, Ingle & Blythe*, 97 N.C. App. 236, 244, 388 S.E.2d 178, 183 (1990) (breach of fiduciary duty is a species of negligence or professional malpractice.); *Childers v. Hayes*, 77 N.C. App. 792, 795, 336 S.E.2d 146, 148 (1985) (breach of fiduciary duty claim is essentially a negligence or professional malpractice claim).

C. Constructive Fraud.

In North Carolina, a claim for constructive fraud requires a showing that the plaintiff and the defendant were "in a relation of trust and confidence which led up to and surrounded the consummation of the transaction in which defendant is alleged to have taken advantage of his position of trust to the hurt of plaintiff." *Barger v. McCoy Hillard & Parks*, 346 N.C. 650, 666, 488 S.E.2d 215,224 (1997), quoting *Rhodes v. Jones*, 232 N.C. 547, 549, 61 S.E.2d 725, 726 (1950).

The *Barger* court added:

> Implicit in the requirement that a defendant '[take] advantage of his position of trust to the hurt of plaintiff' is the notion that the defendant must seek his own advantage in the transaction; that is, the defendant must seek to benefit himself.

Id.

A showing that the defendant sought to "benefit" himself is an essential requirement to prove such a claim. *See*, *Walker v. Sloan*, 137 N.C. App. 387, 402, 529 S.E.2d 236, 246-247 (2000)(constructive fraud claim dismissed as to certain defendants because no allegation those defendants sought to benefit themselves); *Sharpe v. Gailor*, 132 N.C. App. 213, 216, 510 S.E.2d 702, 704 (1999)(constructive fraud claim properly dismissed absent allegations that defendant "took advantage of her position of trust for the purpose of benefiting herself"); *State Ex Rel. Long v. Peatree Stockton*, 129 N.C. App. 432, 447, 499 S.E.2d 790, 799 (constructive fraud claims properly dismissed because no allegations "that defendant sought benefit to themselves"), *rev. dismissed*, 349 N.C. 240, 516 S.E. 2d 607 (1998).

The promise of a continued business relationship or the receipt of payment for professional services is not sufficient to satisfy the element of "benefit" to the defendant. In *Barger*, *supra*, the North Carolina Supreme Court rejected the plaintiffs' contention that the defendants benefited from their alleged misrepresentations because they enjoyed a continuing relationship with plaintiffs, holding that this fact was insufficient to establish the benefit requirement in a claim of constructive fraud. *Id.* In *NationsBank of North Carolina v. Parker*, 140 N.C. App. 106, 535 S.E.2d 597 (2000), the Court of Appeals affirmed summary judgment in favor of the defendant, holding the fact that the attorney received a fee for notarizing forged loan documents was insufficient to establish the "benefit" required to state a claim for constructive fraud. 140 N.C. App. 106, 114.

Despite some confusion in earlier decisions, it is now clear that the statute of limitations for constructive fraud claims in three years pursuant to N.C.G.S. § 1-52, which accrues upon discovery of the underlying facts. *Carlisle v. Keith*, 169 N.C. App. 674, 614 S.E.2d 542 (2005).

D. Fraud.

Our Supreme Court has held the essential elements of actionable fraud to be: (1) a false representation or concealment of a material fact; (2) reasonably calculated to deceive; (3) made with intent to deceive; (4) and which does, in fact, deceive; and (5) to the hurt of the injured party. *Vail v. Vail*, 233 N.C. 109, 63 S.E.2d 202 (1951). Constructive fraud differs from active fraud in that the intent to deceive is not an essential element, but it is nevertheless fraud though it rests upon presumption arising from breach of fiduciary obligation rather than deception intentionally practiced. Miller *v. First Nat'l Bank*, 234 N.C. 309, 67 S.E.2d 362 (1951).

In *Fender v. Deaton*, 153 N.C. App. 187, 571 S.E.2d 1 (2002), *review denied*, 356 N.C. 612, 574 S.E.2d 680 (2002), the Court of Appeals considered an appeal by a plaintiff whose case was dismissed under the malpractice statute of limitations who asserted that he was suing his former lawyer not for malpractice, but "for fraud claims." After reviewing the plaintiff's allegations, the court affirmed dismissal, holding, "the plaintiff's allegations of fraud are in essence claims of legal malpractice which are governed by the three-year statute of limitations under N.C. Gen. § 1-15(c)." 153 N.C. App. 187, 190-191, 571 S.E.2d 1, 3.

Although "equity raises a presumption of fraud when the superior party [to a fiduciary relationship] obtains a possible benefit," the "superior party may rebut the presumption by showing, for example, that the confidence reposed in him was not abused, but that the other party acted on independent advice. Once rebutted, the presumption evaporates, and the accusing party must shoulder the burden of producing actual evidence of fraud." *Watts v. Cumberland County*

Hospital, 317 N.C. 110, 116, 343 S.E.2d 879, 884 (1986) (citation omitted) (plaintiff's history of seeking second opinions from several other specialists dispelled presumption of reliance and intentional deceit that arises from the fiduciary relation itself; dismissal of constructive fraud claim proper.) *See, also, Lackey v. Bressler*, 86 N.C. App. 486, 358 S.E.2d 560 (1987) (plaintiff's treatment by numerous other physicians and medical facilities constituted the seeking of independent advice and prevented plaintiff from contending that she relied solely upon plaintiff to inform her of her condition and its causation. Accordingly, evidence was sufficient to rebut the presumption of reliance and intentional deceit arising out of the fiduciary relationship and dismissal of the constructive fraud claim was proper.)

When the plaintiff knows in advance of material facts about which he claims to have been deceived, he cannot establish that his reliance was reasonable. *See, e.g., Jay Group, Ltd. v. Glasgow*, 139 N.C. App. 595, 601, 534 S.E.2d 233, 237 (2000) (plaintiffs' knowledge, in advance of acquisition of business, of problems with business' trademarks was fatal to their claims for constructive fraud inasmuch as such advance knowledge rebutted inference that plaintiffs were deceived by, or reasonably relied upon, the alleged misrepresentations by defendants.)

E. Civil Conspiracy.

In North Carolina, a civil conspiracy is: "(1) an agreement between two or more persons; (2) to do an unlawful act in an unlawful way; (3) which agreement resulted in injury to the plaintiff." *Boyd v. Drum*, 129 N.C. App. 586, 592, 501 S.E.2d 91, 96 (1998). In order to create liability on a theory of civil conspiracy, plaintiff must show "an overt act committed by one or more of the conspirators pursuant to a common agreement and in furtherance of a common objective." *Dickens v. Puryear*, 302 N.C. 437, 456, 276 S.E.2d 325, 377 (1981).

A claim for civil conspiracy is subject to the three-year statute of limitations set forth N.C. Gen. Stat. §1-52(5). *See, e.g., Norlin Indus., Inc. v. Music Arts, Inc*., 67 N.C. App. 300, 306, 313 S.E.2d 166, 170 (1984), *cert. denied*, 311 N.C. 403, 319 S.E.2d 273 (1984) (civil conspiracy claims governed by three-year statute of limitations in G.S. § 1-52(5)).

F. A Claim Under General Statute § 84-13.

Section 84-13 of the General Statutes provides, "If any attorney commits any fraudulent practice, he shall be liable in an action to the party injured, and on the verdict passing against him, judgment shall be given for the plaintiff to recover double damages." The North Carolina Court of Appeals in *Estate of Wells by & Through Morley v. Toms*, 129 N.C. App. 413, 415, 500 S.E.2d 105, 107 (1998), held that § 84-13 only applies after a jury has reached its verdict or at the conclusion of a bench trial upon a finding of fraud. The language of § 84-13 and the holding in *Estate of Wells* stand for the proposition that by including a request for double damages under § 84-13, a plaintiff does not allege a cause of action independent from or in addition to the purported violations of the rules of professional conduct.

G. It Doesn't Matter What You Call It, the Claims are Measured by the Same Yardstick.

In *Bamberger v. Bernholz*, 326 N.C. 589, 391 S.E.2d 192 (1990), the North Carolina Supreme Court reinstated the trial court's summary judgment in favor of the defendant attorney where the forecast of evidence failed to establish the validity of the underlying tort claim which was allegedly lost through the attorney's negligence. The plaintiff alleged claims against his former lawyer for negligence, fraud, breach of fiduciary duty and breach of contract. The Superior Court granted summary judgment for the lawyer-defendant on all claims. The Court of Appeals reversed in a divided decision. The author of the two-person majority seemed to be impressed that claims in addition to a claim for professional negligence had been asserted. Judge

Jack Lewis dissented, observing that "whether we consider the causes of action brought here by the defendant in negligence, fraud, breach of fiduciary duty or breach of contract, the plaintiff would have to prove the original claim against [the original tortfeasor] was valid. I do not believe this is possible and would sustain the trial judge in granting summary judgment." Judge Lewis concluded that although the quality of the defendant's representation was "certainly unflattering, but that is not the main point in this case; the law is clear as to the requirement for success of a legal malpractice action and in this case the first hurdle cannot be cleared." 96 N.C. App. 555, 564, 386 S.E.2d 450, 455. The Supreme Court reversed for the reasons stated in Judge Lewis' dissenting opinion, 326 N.C. 589, 391 S.E.2d 192 (1990).

II. COMMON DEFENSES IN ATTORNEY PROFESSIONAL LIABILITY ACTIONS.

A. The Statute of Limitations.

It is familiar North Carolina law that statutes of limitation are inflexible and unyielding. A plaintiff must initiate litigation within the prescribed time or not at all. Statutes of limitation operate inexorably without reference to the merits of plaintiff's cause of action. *Congleton v. Asheboro*, 8 N.C. App. 571, 174 S.E.2d 870 (1970). A defendant has a vested right to rely on the statute of limitations and a court does not have discretion to extend the statute of limitations period for a plaintiff to file her action. *Id. See also Callahan v. Rogers*, 89 N.C. App. 250, 365 S.E.2d 717 (1988). When a statute of limitations defense is pleaded by a defendant, the burden is on the plaintiff to show that her cause of action accrued within the applicable time period. *State v. Cessna Aircraft Corp.*, 9 N.C. App. 557, 176 S.E.2d 796 (1970).

Although generally North Carolina General Statute § 1-52(16) allows a plaintiff three years to file an action alleging personal injury with a ten-year statute of repose, that same statute

provides an exception for causes of action that are referred to in North Carolina General Statute § 1-15(c), which includes legal malpractice actions.

North Carolina General Statute § 1-15(c) provides:

> Except where otherwise provided by statute, a cause of action for malpractice arising out of the performance of or failure to perform professional services shall be deemed to accrue at the time of the occurrence of the last act of the defendant giving rise to the cause of action: Provided that whenever there is bodily injury to the person, economic or monetary loss, or a defect in or damage to property which originates under circumstances making the injury, loss, defect or damage not readily apparent to the claimant at the time of its origin, and the injury, loss, defect or damage is discovered or should reasonably be discovered by the claimant two or more years after the occurrence of the last act of the defendant giving rise to the cause of action, suit must be commenced within one year from the date discovery is made: Provided nothing herein shall be construed to reduce the statute of limitation in any such case below three years. Provided further, that in no event shall an action be commenced more than four years from the last act of the defendant giving rise to the cause of action . . . .

(emphasis added)

In legal malpractice actions (and in other claims against lawyers determined by the court to be "in essence claims of legal malpractice," *Fender v. Deaton*, *supra*) accrual begins when the last act of negligence occurs. *Sharp v. Gailor*, 132 N.C. App. 213, 510 S.E.2d 702 (1999). *Thorpe v. DeMent*, 69 N.C. App. 355, 359, 317 S.E.2d 692, 695 (1984), *aff'd*, 312 N.C. 488, 322 S.E.2d 777 (1984) (legal malpractice action accrued on last day attorney could have filed wrongful death claim with estate even though attorney continued to represent plaintiff for some twelve more months). A determination of what constitutes the "last act" of a defendant is necessary to establish whether a plaintiff's claims are time-barred. In *Sharp v. Gailor*, the last act of the defendant was the filing of a brief with the Court of Appeals. "Once the brief in the [underlying case] was filed, nothing could be done to 'correct' it; the matter was out of defendant's hands." *Id.* at 216, 510 S.E.2d 702, 704. The statute of limitations accrued on the

date the appellate brief was filed and the malpractice lawsuit was barred since it was filed more than three years after that date.

Section 1-15(c) provides an outside limit or a statute of repose of four years for a legal malpractice case. *See Black v. Littlejohn*, 312 N.C. 626, 325 S.E.2d 469 (1985). This provision only comes into effect when the discovery of an injury is delayed. *See Mathis v. May*, 86 N.C. App. 436, 358 S.E.2d 94 (1987), *cert. denied*, 320 N.C. 794, 361 S.E.2d 78 (1987).

In *Teague v. Isenhower*, the Court of Appeals examined the portion of 1-15(c) cited above in a legal malpractice case where the related cases involved equitable distribution, alimony, divorce and child support. 157 N.C. App. 333, 579 S.E.2d 600 (2003). Mr. Teague sued his former lawyers after discharging them in January 2000 alleging a failure to meet the standard of professional practice in their representation of him on his equitable distribution and alimony claims. The Court of Appeals determined that Mr. Teague's claims were barred by the statute of limitations, holding:

> [a]lthough defendants were not discharged until January 2000, plaintiff became aware or should have become aware of the defendant's alleged negligent acts by 22 May 1998 and 6 August 1998 when the equitable distribution and alimony judgments were entered. By those dates, plaintiff should have known defendants had allegedly failed to raise certain defenses, present certain information, or challenge his ex-wife's evidence because of the findings of fact in the judgments.

See also, *Fender v. Deaton*, *supra*, (statute of limitations accrued and began to run when plaintiff discovered his attorney voluntarily dismissed his action.)

Accrual begins when the last act of negligence occurs. *Sharp v. Gailor*, 132 N.C. App. 213, 510 S.E.2d 702. *See*, *also*, *Small v. Britt*, 64 N.C. App. 533, 535, 307 S.E.2d 771, 773 (1983) (cause of action against attorneys based upon negligent representation in death penalty prosecution accrued on date of entry of guilty verdict where no act of negligence was alleged after that even though attorneys continued representation through sentencing) and *Thorpe v.*

Dement, 69 N.C. App. 355, 359, 317 S.E.2d 692, 695 (1984), *aff'd*, 312 N.C. 488, 322 S.E.2d 777 (1984) (legal malpractice action accrued on last day attorney could have filed wrongful death claim with estate even though attorney continued to represent plaintiff for some twelve more months). As noted by the Court of Appeals in *Sharpe v. Teague*, cases in which the accrual was held to begin on the date of termination of the attorney-client relationship, the negligence continued until that time. *Id*. at 595, 439 S.E.2d at 795-796, *citing Southeastern Hosp. Supply Corp. v. Clifton & Singer*, 110 N.C. App. 652, 654, 430 S.E.2d 470, 471 (1993).

The "continuing treatment" doctrine, which holds open the statute of limitations in medical malpractice cases applies only to those cases and not to any other types of professional negligence. *Delta Envtl. Consultants, Inc. v. Wysong & Miles Co.*, 132 N.C. App. 160, 510 S.E.2d 690 (1999), *rev. dismissed*, 350 N.C. 379, 536 S.E.2d 71 (1999), *rev. den.*, 350 N.C. 379, 536 S.E.2d 70 (1999); *Carlisle v. Keith*, 169 N.C. App. 674, 684; 614 S.E.2d 542, 549 (2005).

B. Election of Remedies.

In North Carolina, a plaintiff is deemed to have made an election of remedies and is estopped from suing a second defendant if she has sought and obtained final judgment against the first defendant and the remedy granted in the first judgment is repugnant to or inconsistent with the remedy sought in the second action. *Lamb v. Lamb*, 92 N.C. App. 680, 685, 375 S.E.2d 685, 687-688 (1989). Settlement of or judgment on the first action is inconsistent with suit in the second action when the relief demanded in the second action is a continuation of relief sought in the first action, *Stewart v. Herring*, 80 N.C. App 529, 531, 342 S.E.2d 566, 567 (1986); *Douglas v. Park*, 68 N.C. App. 496, 498, 315 S.E.2d 84, 86 (1984), *review denied*, 311 N.C. 754, 321 S.E.2d 131 (1984); *Davis v. Hargett*, 244 N.C. 157, 163, 92 S.E.2d 782, 786 (1956), or if relief sought in the first action can redress the damage claimed in the second action. *Pritchard v.*

Williams, 175 N.C. 319, 322, 95 S.E. 570, 571 (1918). A second action is a continuation of the first action when the plaintiff seeks to recover some alleged deficiency in the settlement or judgment of the first action. *Stewart*, at 531, 342 S.E.2d 566, 567; *Douglas*, at 598-599, 315 S.E.2d 84, 86; *Davis*, at 163, 92 S.E.2d 782, 786. When a plaintiff accepts settlement, or judgment is rendered on his demand in the first action, such acceptance or judgment is a final redress of that action, regardless of whether the amount of relief is what plaintiff requested. *Stewart*, at 531, 342 S.E.2d at 567.

In *Summer*, the plaintiff separated from her husband and retained the defendant-attorney to prepare a separation agreement. After signing the agreement, the plaintiff instituted an action to have it set aside and for divorce, alimony, child custody and support, and equitable distribution. Before trial, the plaintiff settled her equitable distribution claim against her former husband; the remainder of her claims were dismissed at trial. The plaintiff then sued the defendant and his law firm, alleging the lawyer committed malpractice in drafting the separation agreement, for which she blamed lost alimony, insufficient child support, and an inadequate share of the marital property. Directed verdict was entered in favor of the attorney-defendant and against the plaintiff; she appealed. In affirming the trial court, the Court of Appeals held the plaintiff could not sustain claims based on lost alimony and child support since she could not meet the *Rorrer* requirement that a plaintiff must prove she would have been successful in the underlying case and those claims had been dismissed in the trial of the underlying action. The court also dismissed the claim for damages arising out of the alleged deficiency in the property distribution, holding that "by entering into the consent order disposing of her property claims against her former husband, plaintiff lost her right to assert a negligence claim against defendants

concerning distribution of marital property." *Summer*, 100 N.C. App. at 185, *citing Stewart v. Herring*, 80 N.C. App. 529, 342 S.E.2d 566 (1986).

This principle is still the law in North Carolina; it was recently confirmed in an unpublished decision of the Court of Appeals, *Armstrong v. Rhodes* (COA05-146, March 7, 2006).

C. Contributory Negligence.

Contributory negligence by the client is an absolute defense to a professional liability claim against an attorney. *Hahne v. Hanzel*, 161 N.C. App. 494, 588 S.E.2d 915 (2003), *disc. review denied*, 358 N.C. 543; 599 S.E.2d 46 (2004).

In a negligence action, summary judgment for defendant is proper where the evidence fails to establish negligence on the part of defendant, establishes contributory negligence on the part of plaintiff, or establishes that the alleged negligent conduct was not the proximate cause of the injury. *Williams v. Power & Light Co.*, 36 N.C. App. 146, 147, 243 S.E.2d 143, 144 (1978), *rev'd on factual grounds*, 296 N.C. 400, 250 S.E.2d 255 (1979). (emphasis added) Our Supreme Court has explained the doctrine of contributory negligence as follows:

> Every person having the capacity to exercise ordinary care for his own safety against injury is required by law to do so, and if he fails to exercise such care, and such failure, concurring and cooperating with the actionable negligence of defendant contributes to the injury complained of, he is guilty of contributory negligence. Ordinary care is such care as an ordinarily prudent person would exercise under the same or similar circumstances to avoid injury.

Clark v. Roberts, 263 N.C. 336, 343, 139 S.E.2d 593, 597 (1965).

D. Failure to Mitigate.

It has long been the law in North Carolina that an injured plaintiff has a duty to mitigate his damages. "The law commands that a person injured by the wrongful and negligent act of another is required to use ordinary care and prudence to protect himself from loss, or as

sometimes stated in the decisions, to minimize the loss." *First National Pictures Distrib. Corp. v. Sewell*, 205 N.C. 359, 360, 171 S.E.2d 354, 355 (1933). The law imposes this duty to mitigate on the plaintiffs regardless of whether their claim arises in tort or in contract. *Stimpson Hosiery Mills, Inc. v. Pam Trading Corp.* 98 N.C. App. 543, 392 S.E.2d 128 (1990), *review denied*, 327 N.C. 144, 393 S.E.2d 909 (1990) ("The doctrine of avoidable consequences or the duty to minimize damages requires that 'an injured plaintiff, whether [its] case be tort or contract, must exercise reasonable care and diligence to avoid or lessen the consequences of the defendant[s'] wrong'"). If a Plaintiff fails to mitigate, he is precluded from recovering any damages that he could have avoided by acting as a reasonably prudent person. *Id.* at 551, 392 S.E.2d 128 at 132.

III. OTHER ISSUES.

A. The Role of the Rules of Professional Conduct.

Rule of Professional Conduct 0.2[6], 27 N.C.A.C., Chapter 2A, provides that:

> Violation of a rule should not give rise to a cause of action, nor should it create a presumption that a legal duty has been breached. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability . . . . Accordingly, nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extradisciplinary consequences of violating such a duty.[1]

North Carolina appellate courts have repeatedly held that a purported violation of the Rules of Professional Conduct does not give rise to a cause of action against an attorney. *Baars v. Campbell Univ., Inc.*, 148 N.C. App. 408, 421, 558 S.E.2d 871, 879 (2002); *Webster v. Powell*, 98 N.C. App. 432, 439, 391 S.E.2d 204, 208 (1990); *McGee v. Eubanks*, 77 N.C. App. 369, 374, 335 S.E.2d 178, 181 (1985). Furthermore, the Court of Appeals in *Webster v. Powell*

[1] These Rules were originally developed over a number of years by the American Bar Association. They were subsequently adopted by the North Carolina State Bar and approved by the North Carolina Supreme Court to govern the conduct of North Carolina lawyers. *See*, N.C. Gen. Stat. § 84-23; Rule 0.1, 27 N.C.A.C., Ch. 2.

held that evidence offered to show that a defendant lawyer violated certain rules of professional conduct was correctly *excluded* by the trial court. 98 N.C. App. 432, 439, 391 S.E.2d 204, 208.

In *Baars*, the Court of Appeals held, "'a breach of a provision of the Code of Professional Responsibility is not 'in and of itself . . . a basis for civil liability . . . .'" *Id.* at 421, 558 S.E.2d 871, 879 *citing Webster v. Powell*, 98 N.C. App. 432, 439, 391 S.E.2d 204, 208 (1990), *aff'd*, 328 N.C. 88, 399 S.E.2d 113 (1991) (*quoting McGee v. Eubanks*, 77 N.C. App. 369, 374, 335 S.E.2d 178, 181 (1985), *disc. review denied*, 315 N.C. 589, 341 S.E.2d 27 (1986)). Also, evidence of purported rules violations is properly excluded when a case is subject to dismissal." *Id.*

An attorney's reliance on the requirements of the Rules of Professional Conduct may, however, constitute a defense to a claim of improper behavior. In *Noblot v. Hance*, 2006 N.C. App. LEXIS 861, 628 S.E.2d 413 (N.C. Ct. of App., 2006), the plaintiffs contended that the lawyers representing the adverse parties in a rent dispute had a duty to notify the plaintiffs of the actions of the lawyers' clients. The lawyers-defendants relied upon advice received from the North Carolina State Bar and Rules 1.15-2(m) and 1.6(a) of the Rules of Professional Conduct that the lawyers were required to pay and deliver to their client funds belonging to the client, and they must keep confidential the client's business under the Rules' general confidentiality provision that "a lawyer shall not reveal information acquired during the professional relationship with a client . . . ." The Court of Appeals held, "in accordance with Rule 1.15-2(m), defendants were obligated to disburse to the Timmonses [the defendants' client] funds to them upon request. The money belonged to the Timmonses. Because the defendants' clients were the Timmonses, the defendants were also obligated to comply with Rule 1.6 to not disclose the Timmonses' confidential information to plaintiffs." 628 S.E.2d 413, 416.

Accordingly, true to the purposes of the Rules as set forth in Comment 6 of Rule 0.2, *supra* 16, a person claiming that a lawyer has deviated from the applicable standard of care may not rely upon the Rules of Professional Conduct to establish a deviation, and the Rules do not create duties enforceable in a malpractice action. But a lawyer may, quite properly, rely upon the Rules of Professional Conduct to establish a defense to such a claim.

B. Malpractice Claims Arising from Criminal Actions.

Persons convicted of crimes who wish to prosecute professional negligence claims against their lawyer arising out of criminal representation will find the task particularly challenging. In *Belk v. Cheshire*, 159 N.C. App. 325, 583 S.E.2d 700 (2003), the Court of Appeals affirmed summary judgment for plaintiff's criminal defense counsel observing, following review and approval of decisions from across the United States, that courts impose a stricter standard for criminal malpractice actions in recognition of three basic public policy principles: "(1) [t]he criminal justice system affords individuals charged with crimes a panoply of protections against abuses of the system and wrongful conviction, including safeguards against incompetent and ineffective counsel; (2) a guilty defendant should not be allowed to profit from criminal behavior; and (3) the pool of legal representation available to criminal defendants, especially indigents, needs to be preserved." The Court of Appeals concluded "that the burden of proof required to show proximate cause in an action for legal malpractice arising in the context of a criminal proceeding is, for public policy reasons, necessarily a high one." 159 N.C. App. 325, 332, 583 S.E.2d 700, 706. Accord, *Smith v. Harvey*, 2004 N.C. App. LEXIS 1017 *5-6 (June 1, 2004) (a "plaintiff who alleges an attorney-provided negligent representation in a criminal proceeding has an augmented or higher standard allegation and proof").

C. Bifurcation.

Superior Courts have statutory and case authority to bifurcate the trial of the issues of legal negligence from the issues in the case-within-a-case. Rule 42(b) of the North Carolina Rules of Civil Procedure provides, in pertinent part: "The court may in furtherance of convenience or to avoid prejudice, . . . order a separate trial of any separate . . . issues." A separation of issues under Rule 42(b) rests in the sound discretion of the court. *Fulk v. Piedmont Music Ctr.*, 138 N.C. App. 425, 531 S.E.2d 476 (2000); *Insurance Company v. Transfer, Inc.*, 14 N.C. App. 481, 484, 188 S.E.2d 612, 614 (1972); and the court's decision will not be disturbed absent a showing of clear abuse of discretion and injury or prejudice to the opposing party. *In re Moore*, 11 N.C. App. 320, 181 S.E.2d 118 (1971).

Bifurcation has been ordered in legal malpractice actions. In *Kearns v. Horsley*, 144 N.C. App. 200, 552 S.E.2d 1 (2001), the Court of Appeals upheld an order of bifurcation in favor of the defendants in a legal malpractice action. At the trial the defendants moved for a bifurcation of the issues requiring the plaintiff to prove her case-within-a case, a personal injury claim arising out of a trip-and-fall at a movie theatre, prior to proceeding with a trial of her legal malpractice claim against the defendants. The trial court granted this motion; on appeal, plaintiff argued that the trial court erred in granting defendants' motion to bifurcate the trial. The Court of Appeals affirmed the Superior Court's ruling because, under the *Rorrer v. Cooke* case-within-a-case standard, trying both cases at once, which required the application of different states laws, would have confused the jury and would have prejudiced the defendants. 144 N.C. App. 200, 211-212, 552 S.E.2d 1, 8-9.