NORTH CAROLINA CONFERENCE OF SUPERIOR COURT JUDGES

RECENT DECISIONS

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A. Motor Vehicle

Sobczak v. Vorholt, ___N.C.App.___, 640 S.E.2d 805 (2007) arose from a collision between vehicles operated by the plaintiff and defendant on 9 January 2001 at approximately 7:00 a.m. It had snowed the previous evening. There was a light dusting of snow on the highway. The plaintiff was traveling north on Jones Ferry Road. The defendant was traveling south on the same road. The plaintiff testified that he saw the defendant's vehicle about twenty to twenty-five feet away. He saw the defendant's front passenger wheel go off the surface of the road, at which time the plaintiff slowed and pulled toward the right shoulder. The plaintiff then observed the defendant's wheels turning back on the road, at which time the defendant's vehicle "shot" across the road and struck the plaintiff's vehicle. The collision occurred in the plaintiff's lane of travel. Several law enforcement and emergency personnel responded and arrived at the scene. The defendant told the investigating highway patrol officer that "he must have been going a little too fast and he slid

over and hit" the plaintiff. All witnesses described the road as "ice, snowy."

At the charge conference, the plaintiff requested an instruction that the defendant violated N.C.Gen.Stat. § 20-146(d) by failing to keep his vehicle in his lane of travel and that such violation was negligence per se. The trial court refused to give the instruction on the grounds that the defendant had not intentionally driven his car into the plaintiff's lane of travel, but had skidded into the plaintiff's lane. Over the plaintiff's objection, the trial judge also gave an instruction on sudden emergency. The jury found that the plaintiff was not injured by the negligence of the defendant.

The Court of Appeals reversed. The Court held that the instruction on violation of G.S. § 20-146(d) should have been given.

> Here, plaintiff established a prima facie case of negligence in that all of the evidence showed that Defendant crossed over the center line and struck Plaintiff in the opposing lane of traffic. . . . It is irrelevant that Defendant did not intentionally drive his car from his lane of travel across the center line. Rather, the crucial inquiry is whether Defendant's actions culminating in the accident were negligent. On this question, there was evidence from which a jury could find that Defendant was negligent in the operation of his vehicle before he lost

> control, and that these negligent acts in fact caused him to lose control of the vehicle. 640 S.E.2d at 81l.

Based on similar reasoning, the Court of Appeals held that it was error to give an instruction on sudden emergency.

> These admissions of Defendant establish that he was on notice of a potential encounter with ice on the road, and that hitting ice as he drove was foreseeable. For this reason, the evidence does not sustain Defendant's contention that he was confronted with a sudden and unforeseeable change in road conditions, and that he was thereby called upon to respond to a sudden emergency. . . . Because Defendant in the case sub judice knew or in the exercise of reasonable care should have known that the snow on Jones Ferry Road could have become ice in some areas, the mere fact that he did not see the icy patch he hit in advance of hitting it is insufficient to establish that he was thereby confronted with a sudden emergency. 640 S.E.2d at 812-813.

The case was remanded for a new trial.

The plaintiff in Seay v. Snyder, ___N.C.App.___, 638 S.E.2d 584 (2007) was a rural mail carrier who was struck on a narrow, gravel road while delivering mail. The plaintiff testified that when she saw the defendant's vehicle, the defendant was "going fast" and "wasn't looking." The defendant testified that when he first saw the plaintiff, the plaintiff was in the middle of the road. The investigating highway patrol officer testified that the

defendant also told her at the scene that the plaintiff "swerved over in my direction and we hit." The jury found that the plaintiff was injured by the defendant's negligence, the plaintiff contributed to her injuries and the defendant did not have the last clear chance to avoid the accident.

The Court of Appeals affirmed. The Court held that the trial judge had correctly denied the plaintiff's motion for a directed verdict on the issue of contributory negligence and submitted the issue to the jury.

> In the present case, there was sufficient evidence of Plaintiff's contributory negligence to submit the issue to the jury. Defendant testified that the accident occurred in a curve and that when she first saw plaintiff's vehicle, it was in the middle of the road. . . but that she slammed on her brakes and swerved to the right. Defendant's testimony that Plaintiff was in the middle of the road tends to show that Plaintiff did not exercise proper lookout and control of her vehicle. 638 S.E.2d at 587.

The plaintiff also alleged error based on the trial judge's exclusion of the trooper's accident report diagram showing that the defendant's vehicle was left of the centerline of the road at the point of impact. The Court of Appeals held that the trial judge had properly excluded the diagram.

> . . . our Court has held that testimony concerning point of impact is impermissible lay opinion testimony. . . . In the present case, Trooper McCall's diagram indicated that the point of impact occurred in Plaintiff's lane of travel. However, Trooper McCall did not witness the accident and reached this conclusion on the basis of her physical findings at the scene of the accident. Because the diagram depicting the point of impact was in essence a conclusion, the trial court did not err by excluding the diagram from evidence. 638 S.E.2d at 590-591.

Harris v. Daimler Chrysler Corp., ___N.C.App.___, 638 S.E.2d 260 (2006) arose out of an automobile accident in Durham on 24 February 2005 between vehicles operated by Erica Hsu and Rolesha Andrews Harris. Hsu was fourteen years old and did not have a learner's permit or license to drive pursuant to G.S. § 20-11. Hsu was operating the vehicle with the permission and consent of his father, Chieh Hsu, who was a front-seat passenger. Defendant, Ming Hon Suen, was a passenger in the back seat. Suen filed a Rule 12(b)(6) motion to dismiss and a Rule 11 motion for sanctions. The trial court granted both motions and awarded attorney's fees of $1,500.

The Court of Appeals affirmed. The Court first noted that the complaint did not allege a special relationship between Suen and the driver, ownership, joint enterprise,

legal right and duty to control the vehicle or that control was actually exercised.

> With regard to passengers in automobiles who are neither owner-occupants nor on a joint enterprise, our Supreme Court has held that "negligence on the part of the driver of an automobile will not, as a rule, be imputed to another occupant or passenger unless such other occupant . . . has some kind of control over the driver." . . . Since he was merely a guest passenger in the backseat of the vehicle, he had no legal right or duty to: (1) prevent Erica Hsu from operating or advise her not to operate the vehicle; (2) exercise control or management over the vehicle; (3) or to warn members of the community that Erica Hsu was unlicensed. Furthermore, in the absence of a legal duty, any failure of Ming Hon Suen to act affirmatively to prevent the negligence of Erica Hsu is not actionable at law. 638 S.E.2d at 266-267.

The plaintiff and defendant in Taylor v. Coats, ___N.C.App.___, 636 S.E.2d 581 (2006) had been romantically involved for eleven months. On 12 September 2003, they celebrated the plaintiff's birthday at Shooters, a bar in Johnston County. The defendant drove a Nissan to Shooters and the plaintiff rode in the passenger seat. They arrived at Shooters at about 3:00 p.m. Although the defendant had not planned to drink alcoholic beverages, the bartender offered to drive the plaintiff and defendant home so that the defendant could drink with the plaintiff to celebrate the plaintiff's birthday. From the time they arrived at

about 3:00 p.m. until about 10:30 p.m., the plaintiff and defendant remained in Shooters although the plaintiff played pool with friends. Occasionally, the plaintiff joined the defendant and exchanged kisses. At about 10:30 p.m., the plaintiff became angry with the defendant because the defendant was talking to another man. The plaintiff and defendant decided to leave Shooters. As they approached their car, they decided to spend the night at a hotel across the street from Shooters. As they sat in the car at a stoplight, they continued arguing. The defendant thought the light turned green and turned left into the intersection. Their car was struck by another vehicle, causing severe head injuries to the plaintiff. Although neither party remembered how much they had to drink that evening, the defendant blew .18 on the breathalyzer. The trial court granted the defendant's motion for summary judgment based on the plaintiff's contributory negligence in riding with the defendant.

The Court of Appeals affirmed summary judgment for the defendant. Although the evidence was clear that the defendant was intoxicated and that the plaintiff voluntarily rode with the defendant, the plaintiff

contended that there was no evidence that the plaintiff knew that the defendant was unable to drive safely. The Court disagreed.

> . . . the evidence establishes that plaintiff knew or should have known that defendant was appreciably impaired at the time of the accident. Plaintiff and defendant had been in the bar together for approximately seven hours. Plaintiff knew at the beginning of the evening that defendant was going to consume alcohol because the bartender agreed to take them home so that defendant could drink. Moreover, defendant blew a .18 on the breathalyzer. An ordinarily prudent man under like or similar circumstances would have smelled alcohol on defendant's breath when he gave her occasional kisses over the course of the evening, and would have known that he was appreciably impaired at the time they left the bar. . . . We find no genuine issues of material fact as to plaintiff's contributory negligence . . . . 636 S.E.2d at 583-584.

The plaintiff argued additionally that the argument between the parties was a proximate cause of the accident. Therefore, even if the defendant were intoxicated, the intoxication was not the cause of the accident. The Court also rejected this argument.

> However, there may be more than one proximate cause of an accident. Even though defendant may have been slightly distracted by the argument, the evidence of record shows that defendant's intoxication and, therefore, plaintiff's decision to ride with an intoxicated driver, caused plaintiff's injuries. It is common knowledge that the consumption of alcohol affects one's ability to drive. . . . While the argument may have

> played a slight role in the collision, the evidence showed that defendant's impairment was the primary cause of the accident. 636 S.E.2d at 584.

The plaintiff and defendant in Carrington v. Emory, ___N.C.App.___, 635 S.E.2d 532 (2006) were involved in an automobile accident on 4 June 2003. At the time of the accident, the plaintiff was traveling in the left northbound lane of Roxboro Road in Durham. The defendant was traveling south on Roxboro Road. Immediately before the collision, the defendant moved into the left turn lane at the approaching intersection. As the defendant began to turn left, the plaintiff approached from the south. When the defendant saw the plaintiff's vehicle, the defendant stopped in the plaintiff's lane, causing the plaintiff to swerve to the left and strike the right front corner of the defendant's vehicle. During the charge conference, the plaintiff requested an instruction on sudden emergency. The trial court refused to give the instruction. The jury found both parties negligent and did not award damages.

Holding that the trial judge should have instructed on sudden emergency, the Court of Appeals reversed.

> As to the perception and reaction to an emergency situation, plaintiff presented evidence that on initially seeing defendant's car she did not

believe defendant was going to stop before turning. Plaintiff applied her brakes and reduced her speed. Plaintiff saw defendant's car stop within the turn lane, outside of plaintiff's lane of travel. Plaintiff proceeded forward, accelerating to regain speed. After the first stop, defendant then advanced to start turning across the road before coming to a second stop. At this point, the front third of defendant's car was stopped in plaintiff's lane of travel. Plaintiff testified that this second stop occurred when plaintiff was almost at the intersection. In addition, plaintiff indicated that she could not stop her car in time to avoid hitting defendant's car. Plaintiff swerved as a reaction to defendant's car impeding her lane of travel. She testified that the maneuver was taken in an attempt to avoid a head-on collision. Plaintiff provided substantial evidence that she perceived an emergency situation and reacted to it. . . .

Considered in the light most favorable to plaintiff, there was substantial evidence to permit the jury to find that plaintiff did not negligently create or contribute to the emergency. Plaintiff presented evidence that she had the right-of-way at a green light and was traveling under the speed limit due to the rainy conditions. When plaintiff first thought defendant might turn across her lane, she showed caution by braking. Seeing defendant stop, plaintiff resumed her forward travel. Defendant then pulled in front of plaintiff's vehicle. Defendant admitted that plaintiff could not have continued in her lane of travel without striking defendant's vehicle. Based on this evidence, the jury could find that defendant's actions, rather than plaintiff's, were the cause of the sudden emergency and that any negligent acts of the plaintiff occurred after she was confronted with the emergency. 635 S.E.2d at 534-535.

B. Premises

The plaintiffs in Walden v. Morgan, ___N.C.App.___, 635 S.E.2d 616 (2006), petition for discretionary review withdrawn (January 25, 2007) owned homes adjacent to commercial property owned by BRC. BRC leased its property to Basyooni. Basyooni operated a convenience store that sold gasoline. Basyooni had an oral agreement with Pace Oil whereby Basyooni sold gasoline owned and provided by Pace Oil. Pace Oil was solely responsible for servicing the gas pumps, delivery and supplying of gasoline. On 31 May 2002, a fire and explosion occurred while employees of Pace Oil were delivering gasoline to the Basyooni store. The plaintiffs alleged that gasoline and other hazardous chemicals contaminated their lands and groundwater. The trial court granted the motions for summary judgment as to Basyooni and BRC.

Finding that BRC and Basyooni did not owe a duty of care to the plaintiffs, the Court of Appeals affirmed. As to Basyooni, the Court held that the relationship between Basyooni and Pace Oil was that of bailer and bailee.

> The relationship between Pace Oil, and its employees, Morgan and Taylor, and Basyooni was bailer and bailee, not employer and independent contractor as plaintiffs contend. . . . ("This

> Court has recognized that a consignment creates a bailment between the parties."). Plaintiffs have failed to present any evidence that Basyooni owned them a duty of care on their negligence claims. The trial court properly granted Basyooni's motion for summary judgment. 635 S.E.2d at 622.

Finding both that BRC owed no duty to the plaintiffs and that the delivery of gasoline was not an inherently hazardous activity, the Court also affirmed summary judgment for BRC.

> Here, plaintiffs have presented no evidence BRC was on notice that Pace Oil had scheduled the transfer of gasoline on the day the fire and explosion occurred, was aware of the potential of any problem, or that an inherently dangerous activity was occurring on the property. Millions of people store and pump gasoline daily without incident. Nothing in this activity is "inherently dangerous." 635 S.E.2d at 623.

The plaintiffs contended that BRC owed a duty of care because it retained control over the property through the lease agreement with Basyooni. Contrasting the lease in the present case with Holcomb v. Colonial Assocs., L.L.C., 358 N.C. 501, 597 S.E.2d 710 (2004), the Court held that control was lacking under the BRC lease.

> Here, BRC's lease provision does not provide it control over the premises. In Holcomb, the landlord could remove any pet within forty-eight hours. . . . Under section 7 of its lease with Basyooni, BRC could only re-enter the property upon sixty days prior notice of default for a non-monetary lease provision. In Holcomb, the lease

> provision addressed the issue of liability and a third party was injured. . . . The lease provision before us is too broad and indefinite to create liability for negligence for BRC's failure to exercise control over the premises. The lease governs the business relationship between BRC and Baynooni, not BRC and Pace Oil. Under the lease, Basyooni possessed the right to "use the premises for purposes in keeping with property zone." 635 S.E.2d at 623.

Finally, the Court rejected the plaintiffs' argument that the operation of the convenience store and selling of gasoline was a nuisance.

> Plaintiffs allegations, labeled as "nuisance," are actually negligence claims. . . . as here, the damages the plaintiffs complained of arose out of single physical injury, instead of an on-going injury. . . . The mere ownership and presence of an above-ground storage tank by BRC and Basyooni is not a nuisance. Plaintiffs' allegations sound in tort. We have held the trial court properly granted summary judgment on plaintiffs' negligence claims. 635 S.E.2d at 623-624.

The plaintiff in Griggs v. Shamrock Bldg. Services, Inc., ___N.C.App.___, 634 S.E.2d 635 (2006) was employed at RPM. The defendant, a cleaning service, had a contract to clean the premises of RPM every day from 5:30 p.m. to 7:30 p.m. On 10 August 2001, the plaintiff was walking through the lobby area at RPM when she slipped and fell on an oily substance. The manager of the defendant's cleaning service acknowledged that the cleaning crew from the previous

evening "must have over sprayed" the area in the lobby near the elevators. The defendant moved for summary judgment on the grounds that "Defendant had completed, and RPM had accepted, Defendant's cleaning work prior to Plaintiff's fall." 634 S.E.2d at 636. Even if the defendant were negligent, the defendant did not owe a duty to the plaintiff under the completed and accepted rule. The trial court granted the defendant's motion for summary judgment.

The Court of Appeals reversed. The Court first noted that the completed and accepted rule had been construed in only three cases since 1946.

> . . . our Courts have never applied the completed and accepted rule outside the context of construction or repair contracts. . . . Accordingly, we hold that the trial court erred by granting summary judgment for Defendant on the basis of the completed and accepted rule, as it has no application to service contracts. 634 S.E.2d at 639.

C. Professional

Babb v. Bynum & Murphrey, PLLC, ___N.C.App.___, 643 S.E.2d 55 (2007) was an action alleging professional malpractice. The defendant, Everett Murphrey, was a partner at the law firm of Bynum & Murphrey, PLLC. Murphrey's partner, Zachary Bynum, was the trustee under the will of Violet Henderson. Ms. Henderson's will left

her estate to Bynum as trustee for her grandson, Kevin Henderson. The complaint alleged that Bynum committed multiple acts of fraud and breach of his fiduciary relationship as trustee. The trial court granted Murphrey's motion for summary judgment.

The Court of Appeals affirmed summary judgment in favor of Murphrey. The Court held that Murphrey owed no duty to the plaintiffs as a result of his membership in the limited liability company.

> Here, we determine defendant owed no duty under the facts as shown by plaintiffs. . . . We do not believe that the duty under the [Limited Liability Company] Act requires defendant to investigate the acts of Bynum without defendant having some actual knowledge, and based on our review of the record, it is apparent defendant had no actual knowledge. 643 S.E.2d 55 at *2.

Diggs v. Novant Health, Inc., 177 N.C.App. 290, 628 S.E.2d 851 (2006), petition for discretionary review filed (June 6, 2006) was an action alleging medical malpractice relating to gall bladder surgery on the plaintiff at Forsyth Medical Center on 12 October 1999. The defendants were Forsyth Memorial Hospital, the operator of Forsyth Medical Center; Novant Health Triad Region, the owner of Forsyth Memorial Hospital; Novant Health, Inc., the owner of Novant Health Triad Region; Piedmont Anesthesia & Pain

Consultants, the practice providing the general anesthesia for the plaintiff's surgery; and Dr. McConville and Nurse Crumb, who provided the anesthesia. The trial court granted the motions for summary of all defendants.

In moving for summary judgment, Forsyth Memorial Hospital challenged the qualifications of the plaintiff's nursing expert under Rule 702 and her ability to testify concerning medical causation. As to the absence of qualifications of the plaintiff's nursing expert, Forsyth Hospital relied on deposition testimony indicating that the nurse had not worked as a certified registered nurse since 1986, spent most of her time as a legal consultant, and had not worked as a floor nurse. The affidavit of the plaintiff's nursing expert addressed each ground for objection, causing the Court of Appeals to find that these objections went to the weight of the testimony, not the admissibility of the opinions. The Court of Appeals also rejected the argument of Forsyth Hospital that a nursing expert was incompetent to offer opinions as to medical causation just because she was not a physician.

The trial court allowed summary judgment as to the Hospital defendants on the grounds that the Anesthesia

Group was not the agent of the Hospital. The contract between the Anesthesia Group and the Hospital specified that the Hospital did not exercise any control or direction over the manner in which the Anesthesia Group performed its services. The contract did require that members of the Anesthesia Group be appropriately credentialed and trained. The Court agreed that the contractual control necessary for actual agency was not present.

The Court of Appeals, however, held that an issue of fact existed as to the apparent agency of the Anesthesia Group. Although the Hospital had a Department of Anesthesiology and Medical Director, these positions were filled by the Hospital contracting with the Anesthesia Group.

> . . . courts have employed apparent agency to hold hospitals liable for the negligence of independent contractors in both emergency room and anesthesia contexts. . . . . our Supreme Court suggested that apparent agency would be applicable to hold the hospital liable for the acts of an independent contractor if the hospital held itself out as providing services and care. . . . Under this approach, a plaintiff must prove that (1) the hospital has held itself out as providing medical services, (2) the plaintiff looked to the hospital rather than the individual medical provider to perform those services, and (3) the patient accepted those services in the reasonable belief that the services were being rendered by the hospital or its employees. A hospital may avoid

> liability by providing meaningful notice to a patient that care is being provided by an independent contractor. . . . Plaintiff has submitted sufficient evidence to meet this test. 628 S.E.2d at 859, 861-862.

Alston v. Britthaven, Inc., ___N.C.App.___, 628 S.E.2d 824 (2006), petition for discretionary review denied, 361 N.C. 218, 642 S.E.2d 242 (2007) was an action by the decedent's personal representative against the defendant nursing home. The decedent was admitted to the nursing home because of the decedent's Alzheimer's disease. While in the nursing home, the decedent developed pressure sores, causing the need for amputation of both of the decedent's legs above the knees. The decedent died on 24 June 1999. Expert testimony by the plaintiff indicated that the cause of death was an infection from the pressure sores. The defendant's experts testified that death was caused by Alzheimer's dementia. The plaintiff requested that separate issues be submitted to the jury relating to the defendant's negligence injuring the decedent and the defendant's negligence causing the decedent's death, with separate damages issues as to each. The trial court denied the plaintiff's requested issues and submitted the issue of whether the decedent's death had been caused by the

defendant's negligence, and, if so, the damages resulting therefrom. The jury answered the issues in favor of the defendant.

The Court held that the plaintiff had properly pleaded separate claims for injury and death.

> First, as previously noted, plaintiff's complaint lists five distinct claims, only one of which was entitled "Wrongful Death." Second, except for the punitive damages claim, each claim included a request for "damages in excess of $10,000." Because the damages were not "lumped together" . . . , they did not give the appearance of relating to a "single claim" but rather to separate claims for damages sustained by Mr. Alston by reason of the negligent actions of defendants during his lifetime as well as their negligence allegedly causing his death. . . . Third, several of the damages plaintiff pled in the complaint, including "loss of dignity, . . . scars and disfigurement, mental anguish, inconvenience, loss of capacity for enjoyment of life, [and] discomfort," are not damages recoverable under N.C.Gen.Stat. § 28A-18-2. . . . We therefore conclude, upon reading plaintiff's complaint as a whole, that it sufficiently stated a survivorship claim for decedent's pre-death injuries separate and distinct from the wrongful death claim. 628 S.E.2d at 830.

The Court then examined the plaintiff's evidence at trial and concluded that sufficient expert and factual testimony was presented on both the pre-death injuries and the wrongful death claim.

The Court of Appeals then held that the pre-death claims and the wrongful death claims may both be brought when they are based on the same negligent acts.

> We must also determine whether wrongful death and survivorship claims may be brought as alternative claims for the same negligent acts. We hold that they can. Defendant argues that in order to bring pure survivorship and wrongful death claims in the same suit, they must arise out of different injuries. Therefore, plaintiff should have delineated which pressure sores caused Mr. Alston's death and which sores caused him pain and suffering prior to his death. We disagree. If the jury concluded Mr. Alston died of Alzheimer's disease rather than an infection from the pressure sores, it could still reasonably determine that defendant's negligence caused the pressure sores and that any or all of those sores caused Mr. Alston pain and suffering prior to death. Defendant's argument in this respect has no merit. 628 S.E.2d at 831.

Addressing the defendant's argument that double recovery may result from submitting separate issues, the Court noted that the pattern jury instructions and phrasing of the issues would resolve this question.

> The submission of separate issues . . . does not alone avert the problem of double recovery. The first issue submitted to the jury should be whether the defendant's negligence or wrongful act caused the decedent's death. If the jury answers this question in the affirmative, it can then determine the amount of damages to which plaintiff if entitled for that death, including, where appropriate, those listed in the wrongful death statute for medical costs, pain and suffering, and punitive damages. The pattern jury instructions

> for wrongful death address each of these damage issues. If the jury answers the first question in the negative, however, only then should it turn to the question of whether the defendant's negligence or wrongful act caused the decedent's pre-death injuries. If it answers this second question in the affirmative, it can then consider the issue of damages for these injuries, and the trial court should instruct the jury accordingly. Because the jury instructions in this case only related to the two issues regarding Mr. Alston's death, the jury was told it could not find defendant's negligence caused Mr. Alston's injuries if it did not also determine such negligence caused his death. 628 S.E.2d at 832.

D. Products

The plaintiffs in Edmondson v. Macclesfield L-P Gas Co., Inc., ___N.C.App.___, 642 S.E.2d 265 (2007) alleged injuries as a result of carbon monoxide exposure from a gas heater in their home. The heater was manufactured by Empire Comfort Systems. On 5 March 2002, the plaintiffs noticed that the front of the heater was "black, sooty" and burning a yellow flame. Macclesfield was called to service the heater. Batts, an employee of Macclesfield, came to the plaintiffs' home, took out part of the heater, cleaned the front of the heater, then reassembled the heater. During the early morning hours of 8 March 2002, members of the plaintiffs' family woke up with severe headaches and nausea. They were diagnosed at the local hospital with

carbon monoxide poisoning. They were later taken to Duke Hospital where they underwent hyperbaric chamber treatment and were discharged as asymptomatic. The plaintiffs' expert, David McCandless of Accident Reconstruction Analysis, examined the heater. He was of the opinion that "significant soot buildup" contributed to lack of "adequate air into the burner assembly." He also noticed the absence of an air shutter bracket that the owner's manual required to be installed. McCandless testified that the air shutter bracket "could affect" the amount of air mixed. Finally, McCandless stated that the heater was originally a natural gas unit that had been converted for use with liquified petroleum.

The trial court granted the motion for summary judgment of Empire Comfort Systems and denied the motion for summary judgment of Macclesfield. The Court of Appeals affirmed. Empire based its motion for summary judgment on N.C.Gen.Stat. § 99B-3, arguing that the modification of the heater for use with liquified petroleum instead of natural gas occurred after the heater left Empire's control. Empire's motion for summary judgment relied on affidavits stating that proper modification of the heater for use with

liquified petroleum required the installation of an air shutter bracket for regulation of air into the burner. The plaintiff argued that modification of the heater for use with liquified petroleum was not the sole cause of the defect, therefore, G.S. § 99B-3 did not apply. The Court of Appeals disagreed.

> We acknowledge that the evidence suggests that both the missing air shutter bracket and the leaks in the heater itself led to the production and escape of the carbon monoxide. However, the statute bars a manufacturer's liability where "a proximate cause" of the injury is the improper modification and does not require that the modification be the sole proximate cause. Plaintiff asks us to find that N.C.G.S. § 99B-3 does not apply to situations where the modification does not relate to the design defect alleged to have caused the injury. However, such a reading would require that we ignore the plain meaning of the statute and previous interpretations of this language by this Court. . . . Therefore, we hold that N.C.G.S. § 99B-3 bars recovery by Plaintiff from Empire . . . . 642 S.E.2d at 272.

The Court affirmed the denial of Macclesfield's motion for summary judgment because there was a disagreement between Batts, the Macclesfield serviceman, and the plaintiffs as to the inspection and testing performed by Batts.

II. Insurance

A. Motor Vehicle

Builders Mutual Insurance Co. v. North Main Construction, Ltd., 361 N.C. 85, 637 S.E.2d 528 (2006) was a declaratory judgment action to determine coverage for an automobile accident that occurred on 29 November 2001. Exware, an employee of North Main Construction, was operating a company vehicle when he drove across the median of Interstate 40 and collided with the vehicle of Sirohi. Exware was charged with driving while intoxicated. At the time of the accident, Exware had several previous traffic convictions. The complaint in the underlying personal injury action alleged that North Main Construction was negligent in hiring and training Exware.

Builders Mutual had commercial general liability insurance policy insuring North Main Construction. The policy excluded coverage for "bodily injury" arising out of the "ownership, maintenance, use or entrustments to others of any . . . auto." Sirohi contended that liability against North Main Construction was based on negligent hiring and supervision, and, for this reason, the exclusion did not apply. The trial court entered summary judgment in

favor of coverage for the injuries to Sirohi. The Court of Appeals reversed, holding that the Builders Mutual policy excluded coverage.

The Supreme Court affirmed the Court of Appeals and held that the exclusion applied and barred coverage.

> An injury "arises out of" an excluded source of liability when it is proximately caused by that source. . . . Here, Poonam Sirohi was injured when Exware drove North Main's van into her vehicle; therefore, her injuries "arise out of" the use of a vehicle owned by North Main. Although the Sirohis allege that North Main was negligent in hiring, retraining and supervising Exware, these actions were harmful to Poonam Sirohi only because Exware was required to drive the company van in the course of his employment, and the collision was the sole cause of Sirohi's injury. For this reason, we determine that negligent hiring, negligent retention, and negligent supervision are not "non-automobile proximate causes" of Poonam Sirohi's injuries for the purpose of determining the scope of Builders Mutual's liability under the policy. 637 S.E.2d at 530-531.

Taylor v. N.C. Farm Bureau Mutual Insurance Co., ___N.C.App.___, 638 S.E.2d 636 (2007), petition for discretionary review filed (February 6, 2007) was an action to collect on an excess verdict. In the underlying case, the jury had awarded the plaintiff $968,140 plus interest and costs. Farm Bureau paid its limits of $100,000 plus interest. The remaining amount on the judgment was $1.4

million. Despite efforts by the plaintiff, the insured refused to cooperate in the present effort to collect from Farm Bureau. The trial court granted the defendant's motion to dismiss pursuant to Rule 12(b)(6).

The Court of Appeals affirmed dismissal.

> . . . Plaintiff's privity with Farm Bureau and status as a third-party beneficiary to the insurance policy existed only until Defendant satisfied its contractual obligations to the extent of the insurance policy provisions. Upon paying out the limits of the policy, Farm Bureau fulfilled its contractual obligations and thus, Plaintiff ceased to have privity with Farm Bureau. Accordingly, Plaintiff cannot maintain a breach of contract action against Farm Bureau under the facts of this matter. 638 S.E.2d at 637.

In Progressive American Insurance Co. v. GEICO General Insurance Co., ___N.C.App.___, 637 S.E.2d 282 (2006), Progressive Insurance issued a policy of insurance to Windy Howell. The Progressive policy stated that if Howell obtained other insurance on her automobile, the Progressive policy would terminate on the effective date of the other insurance. The defendants issued a policy insuring Howell with an effective date of 8 March 2002. Howell was involved in an automobile accident on 11 March 2002. GEICO denied coverage. Progressive settled the claim and brought the present suit to recover payment. The trial court

granted Progressive's motion for summary judgment and allowed recovery for all amounts paid.

The Court of Appeals affirmed.

> It is uncontroverted that plaintiff issued Howell an automobile liability insurance policy on 19 February 2002. It contained an automatic termination clause which provided in part that "if you [Howell] obtain other insurance on your covered automobile, any similar insurance provided by this policy will terminate as to that automobile on the effective date of the other insurance." We have upheld similar automatic termination provisions in the past. 637 S.E.2d at 283.

B. UM/UIM

The plaintiff in Smith v. Harris, ___N.C.App.___, 640 S.E.2d 436 (2007) was a highway patrol officer. On 23 April 2002, Smith stopped Harris for not wearing a seatbelt. Upon checking Harris' driving record, Smith learned that Harris' driving privileges had been suspended. When Smith returned to Harris' car, Harris exited the car and began running away. As Smith was chasing Harris, Smith stepped in a hole and broke his ankle. Smith had personal automobile insurance with North Carolina Farm Bureau with limits of $100,000 per person. Harris had automobile liability insurance with Progressive Insurance with limits of $30,000 per person. Progressive paid Smith $30,000.

Smith brought the present action for personal injury against Harris. Farm Bureau denied that there was underinsured coverage for Smith's injuries. As required by Smith's policy with Farm Bureau, the trial court ordered arbitration. The arbitrator awarded Smith $75,000. The trial court confirmed the arbitration award after reducing the judgment to $45,000 for the amount paid by Progressive.

The Court of Appeals reversed, holding that the injury to Smith did not arise out of the use of the vehicle.

> . . . the requisite causation for uninsured or underinsured motorist coverage is not triggered solely by the fact that a plaintiff is injured while attempting to enforce our state's motor vehicle laws. Here, the causal connection between plaintiff's broken ankle and the use of defendant's underinsured vehicle is too tenuous to invoke the underinsured motorist coverage issued to plaintiff by defendant. As such, we cannot agree that plaintiff's injury was "the natural and reasonable consequence" of the vehicle's use. 640 S.E.2d at 439.

In Allstate Insurance Co. v. Stilwell, ___N.C.App.___, 639 S.E.2d 107 (2007), petition for discretionary review filed (February 2, 2007), Stilwell was killed as a result of the negligent operation of a car driven by Moses on 22 September 2003. At the time of the accident, Moses was covered by two liability policies issued by GMAC Insurance with liability limits of $30,000 per person. Stilwell's

estate settled with GMAC for $60,000, reserving the right to pursue applicable UIM coverage. At the time of his death, Stilwell was the son of Dennis and Frankie Stilwell, resided in their house, and, as a result, was an insured family member under UIM coverage provided by Allstate.

The Stilwell estate contended that Allstate had issued two policies of insurance with UIM coverage to Mr. and Mrs. Stilwell, whereas Allstate contended that only one policy had been issued. In support of Allstate's motion for summary judgment, Allstate attached affidavits of Allstate employees. These affidavits established that Allstate issued policy 130072640 covering two of the Stilwell vehicles with UIM limits of $50,000. Due to limitations of Allstate's computer system and the fact that the Stilwells owned more than four vehicles, Allstate issued a second policy reference number, 13017390, referred to as a multiple record policy which covered three additional vehicles. The Allstate affidavits stated that the two policy numbers comprised only one automobile insurance policy. Additional evidence established that all policy premiums were paid by the Stilwells for the five vehicles under the one policy, 130072640. Other Allstate affidavits

referenced letters sent to the Stilwells before and after the accident confirming that the Stilwells had only one Allstate policy. The trial court granted Allstate's motion for summary judgment and found that since there was only one policy with limits of $50,000, and the estate had settled with GMAC for $60,000, Allstate did not owe any amount.

The Court of Appeals affirmed. The Court first held that the trial court had properly admitted the Allstate affidavits over the objection of the Stilwell estate. The Stilwells contended that the affidavits contained legal conclusions and were, therefore, inadmissible. The Court of Appeals held that the affidavits contained "nothing more than uncontroverted factual assertions about Allstate's billing practices and internal procedures which the trial court properly considered." 639 S.E.2d at 109. Based on these affidavits, the trial court properly granted Allstate's motion for summary judgment.

> Here, . .. Allstate has not conceded that it issued two different policies, but has consistently maintained . . . that it issued the Stilwells only a single policy. . . . Given the language in the declarations, along with the explanatory letters from Allstate, the billing under one number with the same renewal periods, the cross-referencing of the policy numbers, and

> the fact that the Stilwells were only charged once for UIM coverage, we do not see a genuine issue as to whether a reasonable person would think she had two policies. 639 S.E.2d at 109.

Pennsylvania National Mutual Ins. Co. v. Strickland, ___N.C.App. ___, 631 S.E.2d 845 (2006), petition for discretionary review denied, 361 N.C. 221, 642 S.E.2d 445 (2007) was a declaratory judgment action to determine underinsured coverage for an automobile accident on 6 November 1999. Penn National issued a Business Automobile Policy insuring Columbus Utilities, Inc. and Enzor Strickland Lease and Rental, Inc. William Strickland was an owner of both insureds. The policy provided coverage for an "insured" when occupying a "covered auto." On the declarations page, the number "2" referred to "owned autos." Item Three of the policy contained a section entitled "Schedule of Covered Autos You Own." A 1988 Lincoln Town Car was listed in this section. The Lincoln was owned by Mr. Strickland and not registered to either of the insureds. Mr. Strickland was operating the Lincoln on 6 November 1999 when he was struck from the rear by Ms. Jones. The liability carrier for Ms. Jones tendered its limits to Mr. Strickland. The trial court granted Mr. Strickland's motion for summary judgment. The trial judge

found that the Penn National policy provided $1 million of UIM coverage and that Mr. Strickland was entitled to arbitrate the claim.

The Court of Appeals reversed and held that the policy did not provide UIM coverage. Mr. Strickland was not a named insured. He was not occupying a "covered auto" at the time of the accident with Ms. Jones.

The numerical symbol for vehicles with UIM coverage is "2." A vehicle is a symbol "2" vehicle if it is owned by the named insured. Since the Lincoln Town Car was not owned by the named insured, it is not a covered auto for UIM purposes. Item Three of the policy contains only a general list of vehicles under the auto schedule. Item Three does not define "covered autos" or "owned autos." Instead, these terms are specifically defined in the policy in a different section. Owned autos are "Only those autos you [named insured] own . . . . This includes those 'autos' you acquire ownership of after the policy begins." A vehicle that is not owned by the named insured, then, is not provided UIM coverage. After reviewing the entire insurance contract, the listing of the Lincoln as a covered auto does not contradict the clear and unambiguous language

stating that numerical symbol "2" covered autos are only those vehicles owned by the named insured or acquired by the named insured after the policy began." 631 S.E.2d at 847.

C. Business

Magnolia Manufacturing of North Carolina, Inc. v. Erie Insurance Exchange, ___N.C.App.___, 633 S.E.2d 841 (2006), reversed per curiam, 361 N.C. 213, 639 S.E.2d 443 (2007) was an action to recover loss of business income as a result of a roof collapse. Magnolia occupied a building in Hillsborough that was built in 1908. In 2000, Magnolia notified the owner of the building, HOC, that planks from the wooden roof decking were falling into work space of Magnolia. HOC contracted with ADM Building Contractors to repair the roof. It was determined that the roof should be replaced. When roof replacement began in 2001, portions of the roof fell into the Magnolia work space, requiring inventory, equipment and employees to be moved as the roof replacement progressed. It was estimated that about 40 separate instances of wood planks falling occurred during the time of the roof replacement. During the period of the roof replacement, Magnolia's productivity declined. An

affidavit from Magnolia's president stated that Magnolia's "production capability was crippled . . . as a result of the roof collapse." 633 S.E.2d at 843.

Magnolia had an "Ultrapack Business Policy" with Erie throughout the period involved. The policy did not cover "loss caused directly or indirectly . . . by collapse." 633 S.E.2d at 848. The policy also did not cover loss "by faulty, inadequate, or defective . . . workmanship, construction." 633 S.E.2d at 849. The trial court granted Erie's motion for summary judgment. Finding issues of fact, the Court of Appeals reversed. Judge Tyson dissented.

The Supreme Court reversed the Court of Appeals for the reasons in Judge Tyson's dissent.

> Plaintiff alleges in her affidavit that "a portion of the roof of the second story of the building collapsed into the second story of the building." Under the contract's plain and unambiguous language, loss caused directly or indirectly from collapse is expressly excluded from coverage. . . . It is undisputed that plaintiff's loss did not occur until ADM began construction to replace the roof. 633 S.E.2d at 848.

The exclusion for faulty or inadequate construction also applied.

> . . . the roof on the building plaintiff leased had not "collapsed" and plaintiff suffered no

> covered losses prior to the commencement of work on the "Roof Repair Project." Myers testified that the roof was in "poor condition" and "in need of repair." Undisputed evidence shows plaintiff's losses were caused by a poorly maintained roof and during the working to repair or replace it. Construing the contract's plain and unambiguous language, losses caused by collapse, faulty or inadequate maintenance, or construction are expressly excluded from coverage. 633 S.E.2d at 849.

D. Homeowners

The plaintiffs in Nelson v. Hartford Underwriters Ins. Co., ___N.C.App. ___, 630 S.E.2d 221 (2006) sued their homeowner's insurance carrier for breach of contract and violation of the Unfair Claims Settlement Practices statute. The plaintiffs moved into a new home in September 1996. In October 1996 they noticed an unusual odor in the house. It was determined that mold in the house was the cause of the odor. An inspection by an engineering firm concluded that the mold had three causes: (1) an oversized heating and air conditioning system installed during construction which failed to remove humidity from the air; (2) a leak in the water line to the Jacuzzi caused by the contractor's plumbing subcontractor; and (3) a nail penetrating the shower boot in the master bathroom. The Hartford policy was issued on 14 May 1999 for one year.

The policy excluded loss caused by mold and faulty workmanship. The trial court granted Hartford's motion for summary judgment on all claims.

The Court of Appeals affirmed. First, the Court agreed that the events causing the plaintiffs' loss occurred before Hartford issued its policy on 14 May 1999.

> Here, the injury suffered by plaintiffs was from mold contamination. Plaintiffs testified, and Hartford agrees, the mold had three causes: (1) an oversized HVAC system, installed when the house was built in 1996; (2) a leak in the water supply line to their Jacuzzi, discovered in June 1997; and (3) a leak in the shower boot in the master bathroom, discovered in late 1998 or early 1999. The coverage period of the insurance policy issued by Hartford began in May 1999, and therefore each of these three defects occurred prior to the start of the coverage period. Although the harm suffered by plaintiffs, in the form of mold in their home, may have been discovered, and have continued, during the policy period of defendant's policy, our Supreme Court in Gaston County [Dyeing Machine Co. v. Northfield Insurance Co., 351 N.C. 293, 524 S.E.2d 558 (2000)] specifically disavowed using the manifestation of the harm as the trigger date. . . . Instead, even though the mold damage continued over time, we can determine when the defects occurred from which all subsequent damages flowed, and we must use the dates of these defects and trigger the coverage applicable on that date. . . . Thus, Hartford's policy was not in effect on the trigger date of the injuries and therefore was not "on the risk" at that point in time. 630 S.E.2d at 230.

The plaintiffs contended that their claim for Unfair Claims Settlement Practices under Chapter 58, North

Carolina General Statutes, continued regardless of the Court's decision on coverage. Specifically, the plaintiffs alleged that the failure of Hartford to state specifically that its denial of coverage was based on the events occurring before the issuance of the policy, the failure of Hartford to conduct a prompt and reasonable investigation, and failure to affirm or deny coverage within a reasonable time were violations of Chapter 58. The Court of Appeals disagreed, holding that these actions were not the cause of the plaintiffs' injuries.

> Keeping in mind the ongoing injury from mold contamination, Hartford's actions are related to the response by the parties to the injury. A response to an injury is, by its nature, not the cause of the injury itself; the injury happens first, and the response to the injury follows. . . . Furthermore, plaintiffs suffered no new injury from Hartford's actions. Instead, plaintiffs' ongoing mold contamination simply proceeded unabated, as a continuation of the already-existing injury. Accordingly, we hold Hartford's actions in response to the mold contamination were not a proximate cause of plaintiff's injury. . . . Because plaintiffs cannot produce evidence to show any genuine issue of material fact that Hartford proximately caused their injury from mold contamination, or that Hartford's actions were unfair or deceptive practices, they cannot sustain two essential elements of an unfair or deceptive trade practices claim. 630 S.E.2d at 234.

E. Arbitration

The parties in Lovin v. Byrd, ___N.C.App.___, 631 S.E.2d 58 (2006) were involved in an automobile accident on 14 February 1992. Suit was filed on 5 January 1995. Allstate Insurance Company, the plaintiff's underinsured carrier, filed answer. The plaintiff demanded arbitration as allowed in her insurance policy with Allstate. The arbitrator awarded $127,968.50 in compensatory damages, but declined to award prejudgment interest. The arbitrator further stated that the parties "anticipated a separate award of prejudgment interest," but that this decision was left to the superior court. 631 S.E.2d at 59. Upon motion of the plaintiff for prejudgment interest, the trial court awarded interest at the rate of 8% from the date of filing until the amount was paid in full, for a total amount of $86,324.56.

On appeal, Allstate argued that the trial court modified the award of the arbitrator in violation of N.C.G.S. § 1-569.24. The Court of Appeals disagreed and affirmed the trial court.

> Here, the trial court did not change or alter any provision of the arbitration award, but merely enforced it as written. . . . Therefore, Judge Beale's mathematical calculation, largely a

> ministerial function, does not amount to a modification of the arbitration award, but rather enforces the award as written. . . . In the case sub judice, however, both the parties and the arbitration award . . . contemplate an award of prejudgment interest. We hold Judge Beale did not modify the arbitration award when he calculated prejudgment interest, but merely enforced the award as written. 631 S.E.2d at 60-61.

III. Trial Practice and Procedure

A. Statutes and Periods of Limitation and Repose

Ramboot, Inc. v. Lucas, ___N.C.App.___, 640 S.E.2d 845 (2007), petition for discretionary review filed (March 27, 2007) was an action alleging legal malpractice. The plaintiff retained the defendant on 12 April 1999 to represent it in recovering monies under a commercial insurance policy as a result of a fire to property owned by the plaintiff. Suit was properly filed by the defendant. The case went to mediation on 15 May 2001. The insurance companies offered to settle with the plaintiff for $212,500 in addition to previous payments of $253,578.98. The plaintiff agreed to the offer. On the same day, the plaintiff signed a memorandum of settlement. On 1 June 2001, the plaintiff went to the defendant's office and signed the release prepared by the insurance company. The dismissal with prejudice was filed on 6 June 2001.

After signing the settlement agreement, the plaintiff retained another attorney to represent it in a malpractice action against its former corporate attorney. During the course of discussions with the newly-retained attorney in December 2001, he told them that the defendant had misrepresented the amount of insurance available to settle the fire claim. Suit was filed in the present case on 3 June 2004. The trial court granted the defendant's motion for summary judgment based on the defense of the three-year statute of limitations.

The Court of Appeals affirmed. The Court first noted that since the plaintiff was informed in December 2001 of the defendant's malpractice, the three-year statute of limitations applied. The Court then held that the period of limitation began to run on 15 May 2001, the day of the mediated settlement conference.

> All of the allegations in the Bucks' original complaint refer to actions by Mr. Lucas and his partners either at or prior to the 15 May 2001 settlement conference. Even if we conclude that Mr. Lucas and his partners had a continuing duty to represent the Bucks beyond the settlement conference in this matter, we must hold that "the last act of the defendant giving rise to the cause of action" in the instant case occurred no later than the time at which the Bucks signed the release and took possession of their settlement check on 1 June 2001. Thereafter, the acts of

> mailing and filing the dismissal with prejudice were duties that Mr. Lucas and his partners performed as officers of the court to comply with the terms of the agreement previously signed by their clients. 640 S.E.2d at 848.

The plaintiff in Kennedy v. Speedway Motorsports, Inc., ___ N.C.App.___, 631 S.E.2d 212 (2006), petition for writ of certiorari denied, 360 N.C. 648, 636 S.E.2d 806 (2006) was injured when a pedestrian walkway at the Lowe's Motor Speedway collapsed on 20 May 2000. Suit was filed against the Speedway on 20 May 2003. The complaint alleged that the Speedway caused the walkway to be constructed in 1995. Since the walkway crossed U.S. Highway 29, the Speedway entered into a "Right of Way Encroachment Agreement" with the North Carolina Department of Transportation. In the Encroachment Agreement, the Speedway agreed to construct the walkway to conform with DOT standards and specifications. An earlier trial involving another plaintiff determined that the Speedway was not negligent. That jury, however, found that Tindall, the manufacturer of prestressed concrete used to construct the walkway, was negligent. This jury also determined that the plaintiffs were third-party beneficiaries of the Encroachment Agreement between the Speedway and DOT, and that the

plaintiffs were injured as a result of the Speedway's breach of the Agreement. The trial court granted the Speedway's motion to dismiss under Rule 12(b)(6) based on the statute of repose in G.S. § 1-50(5)(a).

The Court of Appeals affirmed the trial court's dismissal. On appeal, the plaintiff argued that the Speedway could not rely upon the statute of repose because G.S. § 1-50(a)(5)(d) prohibited reliance upon the statute "by any person in actual possession or control, as owner, tenant or otherwise. . . in the event such person in actual possession or control either knew, or ought reasonably to have known, of the defective or unsafe condition." The Court distinguished between the conduct of Tindall attributable to Speedway and the knowledge of Tindall about the defects in the prestressed concrete.

> We draw a distinction between the Speedway's liability for the acts and omissions of Tindall and an imputation of Tindall's knowledge. . . . The jury determined that the Speedway, which had a nondelegable duty to the plaintiffs, did not injure the plaintiffs by any negligent acts. Instead, the jury found that Tindall's negligence injured the plaintiffs, and that the Speedway's breach of the encroachment agreement injured the plaintiffs, who were third-party beneficiaries of the agreement. Absent any persuasive authority to the contrary, we do not agree with plaintiffs that the Speedway's liability for the acts and omissions of Tindall necessarily translates into

> an imputation of Tindall's knowledge. 631 S.E.2d at 216-217.

The trial judge had ruled earlier that all parties were bound by the liability findings of the jury in the first trial. In the present case, the plaintiffs contended that the Speedway's reliance on the statute of repose was an attempt to avoid the liability findings by the jury in the initial case. The Court of Appeals disagreed.

> A statute of repose is a condition precedent to an action and must be specifically pled by a plaintiff. . . . Therefore, the issue of liability, on the one hand, and the issue of a statute of repose, on the other hand, are two separate and distinct legal doctrines. The Speedway has not previously litigated the issue of the statute of repose, and thus is not collaterally estopped from asserting the statute of repose. 631 S.E.2d at 217.

The plaintiffs in Hodge v. Harkey, ___N.C.App.___, 631 S.E.2d 143 (2006) alleged that their property was contaminated by petroleum products released from land owned by the defendants. Powell leased the land to Harkey from 1976 until 1988. Harkey operated a retail store, and, as part of his business, he sold petroleum products from underground storage tanks. The underground tanks were removed from the site in 1988. Powell also contracted with Cline to service the site with petroleum products from 1976

until 1988. On 8 November 2000, the North Carolina Department of Environment and Natural Resources discovered that petroleum products had been released from the underground tanks and contaminated the plaintiffs' water supply. The Department ordered Harkey and Cline to construct a new water supply for plaintiffs. The present action was filed on 8 September 2003. The trial court granted the defendants' motion for summary judgment based on the ten-year statute of repose in G.S. § 1-52(16).

The Court of Appeals affirmed dismissal as to all defendants.

> As to defendants Cline, they removed the USTs from the property in 1988 and ceased delivering petroleum products to the site at that time. Thus, their last act or omission which could give rise to a cause of action occurred in 1988. Harkey's lease of the property ended in 1988. Since that time he has had no involvement with that property. Thus, the last act or omission which could give rise to a cause of action occurred in 1988. Plaintiffs filed this suit in 2003. Since both Cline and Harkey's last acts or omission occurred more than ten years prior to the filing of this action, all of plaintiffs' claims against both parties are barred by the statute of repose found in N.C.Gen.Stat. § 1-52(16). 631 S.E.2d at 145.

Seeking to avoid the bar of the statute of repose, the plaintiffs argued that the defendants had an "ongoing responsibility" to remove the contamination; therefore, the

defendants had not yet performed the "last act" for the purposes of the statute of repose. The Court of Appeals rejected this argument. The plaintiffs also contended that the order by the Department to provide the plaintiffs with a new water supply began the running of the statute of repose. The Court disagreed, noting that the period of repose had run before these repairs were ordered.

> In the instant case, the ten-year statute of repose had already expired prior to 2000 when these defendants took their "remedial" actions. Any subsequent activity by either defendant cannot expand the statute of repose, regardless of who required that the remedial action be taken. 631 S.E.2d at 145-146.

B. Res Judicata and Collateral Estoppel

Gregory v. Penland, ___N.C.App.___, 634 S.E.2d 625 (2006) arose from injuries to the plaintiffs performing volunteer activities as a result of Governor Hunt's proclamation of a State of Disaster following Hurricane Floyd. Penland was a member of the North Carolina National Guard on active duty on Oak Island. Ward, Gregory and Sapp were volunteers performing beach patrols with the National Guard. On the evening of 22 September 1999, Penland was driving a Humvee on a beach patrol with the plaintiffs riding in the Humvee as passengers. As a result of Penland

operating the Humvee at high speeds in the sand, the Humvee flipped over. Penland was thrown from the vehicle and killed. The plaintiffs were also thrown from the vehicle and were injured.

The plaintiffs filed suit alleging gross negligence by Penland. The plaintiffs also filed an action against the National Guard in the Industrial Commission under the Tort Claims Act. The Industrial Commission denied the claims. The Commission found that Penland had "breached his duty of care toward plaintiffs." The claims were denied because the Tort Claims Act and the Emergency Management Act did not permit recovery against the State for a worker's actions committed during emergency management operations. The Commission also found that Penland's "actions did not rise to the level required in order to constitute gross negligence."

Relying on the Commission's findings that Penland was not grossly negligent, Penland moved for summary judgment and argued that this finding precluded the plaintiffs' recovery based on res judicata and collateral estoppel. The trial court denied the defendant's motion for summary

judgment, but entered summary judgment for the plaintiffs on these defenses.

The Court of Appeals affirmed. In order to establish that the plaintiffs' claims were barred, the defendant was required to establish: (1) a final judgment on the merits; (2) an identity of the cause of action; and (3) identity of parties. The action under the Tort Claims in the Industrial Commission was a final judgment on the merits. The action in the Industrial Commission, however, was against the State, whereas the present action was against Penland as an individual

> It is, however, well established that "the relationship of principal and agent or master and servant does not create [the] privity" required for res judicata. 634 S.E.2d at 630.

Again, since the action in the Industrial Commission was against the State, findings relating to the conduct of Penland was not necessary to the Commission's decision.

> Likewise, in this case, the Industrial Commission lacked jurisdiction to address SFC Penland's gross negligence. "The Tort Claims Act does not confer jurisdiction in the Industrial Commission over a claim against an employee of a state agency." . . . . Thus, the Commission would have jurisdiction to address the issue of gross negligence only if that issue fell within its jurisdiction with respect to claims against the State. . . . Accordingly, ... because of this lack of jurisdiction, plaintiffs' claims of gross

> negligence under the Emergency Management Act were not "actually litigated" before the Commission or "necessary" to its judgment, and, therefore, plaintiffs are not collaterally estopped by the Commission's findings on that issue. 634 S.E.2d at 632.

The plaintiffs in Blair v. Robinson, ___N.C.App.___, 631 S.E.2d 217 (2006) filed an earlier suit against R&M Homes to recover a $20,000 deposit by the plaintiffs for the purchase of a manufactured home sold by R&M Homes. Judgment was entered for the plaintiffs in the full amount. The present complaint alleged that when the plaintiffs attempted to enforce the judgment, it was discovered that the individual defendants in the present case were the sole shareholders, directors, and officers of R&M Homes, and had ceased operations and sold all assets of R&M Homes. Accordingly, the present suit alleged that R&M Homes was operated as a mere instrumentality or alter ego of the Robinsons, and that the plaintiffs were entitled to pierce the corporate veil and proceed individually against the Robinsons. The defendants moved to dismiss the present action on the grounds that the Robinsons were necessary parties to the earlier action against R&M Homes. The

present action, therefore, was barred by res judicata. The trial court agreed and dismissed the action.

The Court of Appeals reversed. The complaint in the present case alleged that it was not discovered that the Robinsons were the sole shareholders, had ceased operations, and had converted all of the assets of R&M Homes until the plaintiffs attempted to execute on the judgment against R&M Homes. For this reason, there were not grounds to join the Robinsons in the first lawsuit.

> Assuming the allegations in the complaint are true, when they instituted the first suit, plaintiffs could not have predicted the subsequent actions of the Robinsons giving rise to the present suit. There was therefore no basis, at the time of the prior action, to attempt to pierce the corporate veil and name the Robinsons as defendants. Thus, the Robinsons were not necessary parties to the first action. . . . Defendants' untenable position would require every person seeking recovery against a corporation to attempt to pierce the corporate veil and name as defendants every officer and director of the company in order to ensure collection of any favorable judgment. 631 S.E.2d at 220.

Don Setliff & Associates, Inc. v. Subway Real Estate Corp., ___N.C.App.___, 631 S.E.2d 526 (2006), petition for discretionary review allowed (March 8, 2007) was a summary ejectment action initiated in small claims court. The magistrate found that Subway had breached its lease by

failing to pay taxes and ordered Subway removed from the property. On Subway's appeal and trial de novo in the district court, the trial judge found that Subway had breached the lease and was indebted to the plaintiff for past taxes, but that the plaintiff was estopped to use Subway's failure to pay taxes as a basis for ejectment.

On appeal, the plaintiff contended that the trial judge erred in finding estoppel because Subway had not pled estoppel as an affirmative defense. The Court of Appeals affirmed and held that affirmative defenses were not required to be pled in an appeal from small claims court.

> Because no affirmative defenses are required to be pled in small claims court, and a district court judge may try the case on the pleadings filed, we hold that Defendant did not waive its affirmative defense by failing to plead it. 631 S.E.2d at 527.

C. Jurisdiction

The plaintiff in Deer Corp. v. Carter, 177 N.C.App. 314, 629 S.E.2d 159 (2006) alleged claims for misappropriation of trade secrets, tortious interference with contract, and unfair and deceptive trade practices. The defendant, a resident of Great Britain, moved to dismiss for lack of personal jurisdiction. The trial court ordered discovery on the question of jurisdiction. After

the completion of discovery, the court conducted a hearing at which depositions and competing affidavits were submitted. The trial court dismissed the action against the defendant finding no grounds for jurisdiction under G.S. § 1-75.4, and finding that the exercise of personal jurisdiction would not comply with constitutional due process.

The Court of Appeals affirmed. Initially, the plaintiff contended that the trial court had erred by requiring the plaintiff "to do more than make a prima facie showing of jurisdiction." Based on the hearing conducted and the evidence considered, the Court of Appeals agreed that the trial judge was required to act as a fact-finder.

> If the exercise of personal jurisdiction is challenged by a defendant, a trial court may hold an evidentiary hearing including oral testimony or depositions or may decide the matter based on affidavits. N.C.Gen.Stat. § 1A-1, Rule 43(a). If the court takes the latter option, the plaintiff has the initial burden of establishing prima facie that jurisdiction is proper. Of course, this does not alleviate the plaintiff's ultimate burden of proving personal jurisdiction at an evidentiary hearing or at trial by a preponderance of the evidence. . . . both parties also submitted depositions to the trial court, and its findings are replete with facts taken from these depositions. Furthermore, the trial court held a hearing on the question of personal jurisdiction, and although no witnesses testified at the hearing, both parties argued facts based on the

> depositions. We therefore conclude this case had moved beyond the procedural standpoint of competing affidavits to an evidentiary hearing. As such, the trial court was required to act as a fact-finder. . . . and decide the question of personal jurisdiction by a preponderance of the evidence. Plaintiff therefore had the "ultimate burden of proving jurisdiction" rather than the "initial burden of establishing prima facie that jurisdiction [was] proper." 629 S.E.2d at 166.

Reviewing the evidence to determine whether the trial court's findings of fact were supported by competent evidence, the Court of Appeals agreed with the trial court that general and specific jurisdiction did not exist over the defendant.

> Thus, it appears defendant's contacts with North Carolina include: returning telephone calls to Donahue in North Carolina, which the trial court found was not related to any essential element of plaintiff's claims; relaying an offer of employment to Donahue in North Carolina, which the trial court determined he received no benefit from; and visiting North Carolina for a number of unspecified personal visits ending in February 1999. Plaintiff contends defendant visited North Carolina between four and eight times from 1996 to 1999 and, during those visits, conducted two training sessions, several "wrap-up" meetings, and one international sales meeting near the time of Allan Hansen's wedding celebration. The trial court concluded such contacts were insufficient to incur general jurisdiction over defendant, stating that his "general contacts with the state . . . were not systematic and continuous such that Carter should be expected to defend claims filed nearly five years after his last visit that are factually unrelated to those prior contacts." 629 S.E.2d at 169.

Relying again on the trial court's findings that the defendant received no benefit from the contacts described, and that those contacts were not related to the plaintiff's claims, the Court held that the defendant's acts did not result in specific jurisdiction.

D. Issuance of Summons

The complaint in Conner Brothers Machine Company, Inc. v. Rogers, 177 N.C.App. 560, 629 S.E.2d 344 (2006) was filed on 1 March 2005 alleging unfair and deceptive trade practices, violations of the trade secrets act, and seeking temporary and permanent injunctive relief. No summons was ever issued. A temporary restraining order was entered on 1 March 2005. A preliminary injunction was ordered on 22 April 2005.

The Court of Appeals vacated the preliminary injunction order because the trial court did not have subject matter jurisdiction since a summons had never been issued.

> Our Court has held that where a summons does not issue within five days of the filing of a complaint, the action abates and is deemed never to have been commenced. . . . When the trial court entered the preliminary injunction, it did not have subject matter jurisdiction over the action and, therefore, had no authority to enter a preliminary injunction. 629 S.E.2d at 345.

E. Amended Pleadings

The complaint in Baldwin v. Wilkie, ___N.C.App.___, 635 S.E.2d 431 (2006), petition for discretionary review filed (October 24, 2006) was filed in Wake County on 17 December 2004. None of the plaintiffs were residents of Wake County. On 13 January 2005, the defendants filed a motion to change venue. On 24 January 2005, the plaintiffs filed an amended complaint adding the Churches as plaintiffs. The amended complaint alleged that the Churches were residents of Wake County. The plaintiffs filed a second amended complaint, adding the Shys, the Perrigos, the McGees and Walden as plaintiffs and alleged that the Shys and McGees were residents of Wake County. The defendants filed answer on 14 April 2005 and renewed their motion for change of venue. The trial court denied the defendants' motion for change of venue.

The Court of Appeals affirmed the trial court's order denying change of venue. The Court agreed that venue of the original complaint was improper because no plaintiff was a resident of Wake County. The amended complaints, however, were as a matter of right because they were filed before any responsive pleadings by the defendants. Rule

15(c) provides that claims in amended pleadings relate back to the filing of the original pleading unless the original pleading did not give notice of the transactions alleged in the amended pleadings. Crossman v. Moore, 341 N.C. 185, 459 S.E.2d 715 (1995) held that an amended complaint did not relate back when the amended complaint added claims against a new defendant. Unlike Crossman, the amended complaint in the present case added new plaintiffs with the same claims as in the original complaint. For this reason, the amended complaints did relate back and venue in Wake County was, therefore, proper.

> In this case, the substance of the claims of newly joined Plaintiffs, the Churches, are virtually identical to original Plaintiffs' claims. The Churches and original Plaintiffs are similarly situated as all Plaintiffs were allegedly injured during a one-week period at the same location. Accordingly, we hold that the Churches claims are deemed to have been interposed as of the time of the interposition by original Plaintiffs for purposes of determining venue. 635 S.E.2d at 434.

F. Discovery

Roadway Express, Inc. v. Hayes, ___N.C.App.___, 631 S.E.2d 41 (2006) was an action for wrongful death. A vehicle operated by Hayes collided with a tractor trailer driven by Horn and owned by Roadway Express. Horn died at the scene of the accident. The complaint alleged that

Hayes was legally intoxicated at the time of the accident as a result of beverages he consumed at a sports bar. The plaintiff submitted written discovery to Hayes requesting all medical records regarding his treatment after the accident. Hayes objected to the discovery on the grounds of the physician-patient privilege and the Fifth Amendment right against incrimination. After review of the records in camera, the trial judge ordered production of the records on the condition that the records not be shared with anyone other than experts retained by the parties. The plaintiff then submitted a request to admit to Hayes concerning prescription medication and the fact that Hayes was under the influence of the medication at the time of the accident. The defendant objected on the same grounds. On motion of the plaintiff, the trial court ordered the defendant to respond to the request to admit.

The Court of Appeals affirmed the trial court's order requiring the defendant to produce the medical records.

> The medical records sought by Plaintiff include a hospital lab analysis and a State Bureau of Investigation lab analysis of Defendant's blood taken after the accident. . . . the results of Defendant's blood test are not protected under the Fifth Amendment because the results of the test are neither testimonial nor communicative. Under the facts of this case, Defendant's Fifth

> Amendment right against self-incrimination does not shield him from producing his medical records. Likewise, Defendant's medical records are not protected by the physician-patient privilege. . . . it is in the trial court's discretion to compel the production of evidence that may be protected by the privilege if the evidence is needed for a proper administration of justice. See N.C.Gen.Stat. § 8-53. . . . the trial judge limited the scope of the production by requesting only those medical records that mention or reflect the results of any tests performed to determine Defendant's blood alcohol content and the presence of controlled substances in his body. 631 S.E.2d at 45-46.

Since the defendant raised the sudden emergency defense, his medical condition at the time of the accident as reflected in the records was relevant.

The Court of Appeals disagreed with the trial court concerning the application of the Fifth Amendment protection to the plaintiff's request to admit. Even though the trial court limited access to the medical records to experts, the Court of Appeals held that this restriction did not adequately protect the defendant's Fifth Amendment rights.

> To determine whether the Fifth Amendment privilege applies, the trial court must evaluate whether, given the implications of the question and the setting in which it is asked, a real danger of self-incrimination by the witness exists. . . . The court should only deny the claim of Fifth Amendment privilege if there is no possibility of such danger. . . . We hold, however, that this

> limitation [production only to experts] is insufficient to ensure that Defendant's Fifth Amendment rights are protected and that there is no possibility of danger of self-incrimination. We, therefore, conclude the trial court erred when ordering Defendant to respond to Plaintiff's second request for admissions and interrogatories. 631 S.E.2d at 46-47.

Reliance by the defendant on his Fifth Amendment privilege "may preclude him from asserting certain affirmative defenses," such as sudden emergency.

> However, at trial, if the trial court determines such responses are essential to evaluate the application of the sudden emergency doctrine, the trial court must hold that Defendant's choice to invoke his rights not to respond to the request for admissions and interrogatories precludes his assertion of the sudden emergency defense to Plaintiff's allegations. 631 S.E.2d at 47.

The plaintiffs in Wachovia Bank v. Clean River Corp., ___N.C.App. ___, 631 S.E.2d 879 (2006), petition for discretionary review denied, 361 N.C. 227, 643 S.E.2d 401 (2007) (August 22, 2006) alleged that Zurich American Insurance Company improperly made payment for property damage on which the plaintiffs had a lien and should have been included as loss payees. In response to the plaintiffs' requests for production of documents, Zurich American contended that some of the documents requested were confidential. When the plaintiffs filed a motion to

compel, Zurich American filed a motion for a protective order. On the hearing on the motion to compel, the trial court reviewed 12 documents that were the subject of the defendants' motion for a protective order. Four hundred fifty other documents that were also subject to the defendants' motion for a protective order were not produced to the trial judge. The trial court found that Zurich American had waived the attorney-client privilege, but also found that the work-product doctrine did apply to documents generated after 20 December 2001, the date the plaintiffs first wrote Zurich American asserting a claim. The court, therefore, ordered production of all documents.

The Court of Appeals affirmed. As to the defendants' argument that the trial court abused its discretion in ordering production of privileged documents, the Court agreed that the defendants had not carried their burden of showing existence of the privilege.

> The party seeking either attorney-client or work-product privilege bears the burden of proof. . . . Here, appellants communicated with the trial court on three separate occasions: the hearing, a letter, and a facsimile transmission in a twenty-four (24) day window, yet never produced the Group B documents for an in camera inspection. Appellants could have, but chose not to, produce the Group B documents for an in camera inspection, as evidenced by their prior submission of Group A

> documents on 6 June 2005. Consequently, appellants failed to carry their burden with respect to the Group B documents. We discern no abuse of discretion by the trial court in ordering the production of documents appellants failed to provide for an in camera review. 631 S.E.2d at 882.

The Court of Appeals also affirmed the trial court's finding that the work-product privilege applied to documents generated after 20 December 2001.

> In the instant case, the trial court concluded that appellants retained the work-product privilege from 20 December 2001 forward. . . . Specifically, the letter from Zurich to Steigerwald acknowledged Toms asserted a claim under the policy in a letter to Zurich dated 20 December 2001. . . . Therefore, pursuant to an abuse of discretion standard, . . . , the trial court reasonably determined the earliest date Zurich anticipated litigation from plaintiffs was 20 December 2001. Consequently, the trial court did not abuse its discretion. 631 S.E.2d at 883.

Isom v. Bank of America, N.A., ___N.C.App.___, 628 S.E.2d 458 (2006) was an action for wrongful discharge. The plaintiff alleged that she was terminated because she would not sign a document prepared by the Bank to be used in an arbitration proceeding with a vendor. The Bank contended that the plaintiff was terminated because she gave the vendor confidential information. In the present suit, the plaintiff filed a request for production of documents relating to the dispute with the vendor. The

Bank asserted the attorney-client and work product privileges. When similar information was involved in the plaintiff's depositions of Bank employees, the Bank filed a motion for a protective order regarding the requested documents. At a hearing on the plaintiff's motion to compel, the Bank submitted the requested documents to the trial court for in camera inspection. The trial court found that some of the documents were protected, while ordering production of other documents.

Finding no abuse of discretion by the trial court in the discovery orders, the Court of Appeals affirmed. One group of documents consisted of emails between bank officials that were copied to the bank's attorneys. The Court of Appeals agreed with the trial court that these documents were not protected by either the attorney-client or work product privileges.

> Throughout review, these emails do not seem to have been sent or received for the purpose of giving or seeking legal advice. Much to the contrary, the emails suggest a purely business matter. The Bank's attorneys appear to have been copied in the exchange merely for informational purposes. "[A] document, which is not privileged in the hands of the client, will not be imbued with the privilege merely because the document is handed over to the attorney." 628 S.E.2d at 462.

Another group of emails was protected because the attorney-client relationship was involved. The emails were exchanged in confidence, they involved issues in the arbitration, and the advice of the attorney was requested. After review of the documents found by the trial court not to be protected by the attorney-client privilege, the Court of Appeals then evaluated the documents for application of the work product doctrine. Finding no abuse of discretion by the trial court, the Court found that the work product doctrine did not apply.

G. Arbitration

Raper v. Oliver House, LLC, ___N.C.App.___, 637 S.E.2d 551 (2006) was an action for wrongful death arising from the decedent's residence at the defendant's assisting living facility. At the time of the decedent's admission to the defendant's facility, the plaintiff signed a "Residency and Services Admission Agreement" as the decedent's "responsible party." The Agreement provided that "Any dispute or controversy arising out of, or relating to this Agreement, shall be settled by arbitration." When the present wrongful death complaint was filed, the defendant filed a 12(b)(1) motion to dismiss

for lack of subject matter jurisdiction, or, in the alternative, to compel arbitration and stay the litigation. When the trial court heard the defendants' motion, the plaintiff filed an affidavit opposing the motion. The defendants objected to the affidavit, and, after the hearing, filed a written objection. The trial court found that the Agreement was unconscionable and void as against public policy. The trial court also denied the defendants' motion to compel arbitration.

The Court of Appeals first held that the trial court did not abuse its discretion in proceeding with the hearing over the defendants' objection to the plaintiff's affidavit. "Rule 6(d) allows discretion for the trial court to allow late filing of affidavits." Shopping Center v. Insurance Corp., 52 N.C.App. 633, 279 S.E.2d 918 (1981).

The Court of Appeals, however, reversed the trial court's conclusions that the Agreement was unconscionable and against public policy.

> The trial court erred in concluding the arbitration clause was unconscionable. The trial court's finding that there was no independent negotiation on the terms of the contract or the arbitration agreement is not supported by any competent evidence. Plaintiff admitted she signed the Agreement and stated she "voluntarily entered into this agreement with the facility." . . . The

> trial court also erred in finding the use of a standardized form per se by the parties led to unconscionability of the contract. . . . The agreement to arbitrate is prominently located on the last page of the contract in bold face type, directly above the plaintiff's signature. The provisions of the agreement are mutual and apply equally to all parties. The trial court's findings are not supported by any competent evidence and these unsupported findings of fact do not support a conclusion of unconscionability. 637 S.E.2d at 556.

The plaintiff and defendant in Carroll v. Ferro, ___N.C.App.___, 633 S.E.2d 708 (2006), petition for discretionary review denied, 361 N.C. 218, 642 S.E.2d 246 (2007) entered into a business relationship for the acquisition and development of manufactured home communities. The operating agreements for limited liability companies formed as part of the business relationship had arbitration clauses. The plaintiff brought suit alleging multiple claims for breach of contract and unfair and deceptive trade practices. On motion of the defendants, the action was stayed pending arbitration. The Rules of the American Arbitration Association required that the parties pay fees in relation to the amount of the award sought. The plaintiff initially sent a check to AAA for $3,250, the amount to be paid when the plaintiff had not yet estimated his damages. In

response to an inquiry from the arbitrator, the plaintiff estimated his damages at $1 million and paid the necessary fees.

The arbitrator entered an award on 17 December 2004 for the plaintiff of $876,408. The arbitrator also found that the defendants' action constituted unfair and deceptive trade practices, and, therefore, increased the award to $2,667,913.82. The defendant filed a motion to vacate the award because the arbitrator had not made the award within thirty days as required by the AAA rules. The defendants also argued that the award should be reduced because the arbitrator had exceeded his authority by making an award in excess of $1 million. The trial court held that the arbitrator was not permitted to enter an award in excess of $1 million because of the fees paid by the plaintiff. The award was reduced to $1 million. The trial court denied all other relief sought by the defendants.

As to the defendant's argument that the arbitrator had exceeded his authority in making an award in excess of $1 million, the Court of Appeals remanded for further findings by the trial court. Both the Federal Arbitration Act and the North Carolina Uniform Arbitration Act provide that the

trial court may modify or correct an award only if: (1) "there was an evident material miscalculation of figures . . . ."; (2) an award is made on a matter not submitted to the arbitrator; or (3) "the award is imperfect in matter of form . . . ." 633 S.E.2d at 710. However, an arbitration award may be vacated only if the arbitrators "exceeded their powers." The trial court determined that the arbitrator "exceeded or imperfectly executed his powers and authority." Since this ground stated by the trial court was to vacate an award and not to modify or correct an award, the Court of Appeals remanded the case to the trial court "with instructions to either make findings of fact or conclusions of law in support of any modification of the arbitration award as permitted" by either the FAA or the NCUAA. 633 S.E.2d at 711.

The Court of Appeals agreed with the defendants that the award was made "outside the 30 day period mandated by the AAA Rules." The Court held, however, that failure to object to the untimeliness of the award before it was entered waived this ground regardless of whether the arbitration was governed by the FAA or the NCUAA.

The Court of Appeals agreed with the trial court that the award for unfair and deceptive trade practices could not be corrected.

> . . . we agree with the trial court that it was without authority to disturb the arbitrator's conclusions on this matter. "Legal arguments are not grounds 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.'" 633 S.E.2d at 711.

H. Mediation

After answer was filed in Gailey v. Triangle Billiards & Blues Club, ___N.C.App.___, 635 S.E.2d 482 (2006), petition for writ of certiorari filed (November 28, 2006), the senior resident superior court judge entered an order that mediation occur by 30 March 2003. The order required the parties to agree on a mediator within twenty-one days of the order. The parties did not agree on a mediator and mediation did not occur. The case was set for trial on 10 October 2005. On motion of the defendant, the trial court dismissed the action with prejudice based on the plaintiff's failure to comply with the mediation order.

Finding abuse of discretion, the Court of Appeals reversed. G.S. § 7A-38.1 grants the senior resident

superior court judge the authority to order a mediated settlement conference. The statute also provides that upon failure of the parties to designate a mediator, "a mediator shall be appointed by the senior resident superior court judge." G.S. § 7A-38.1(c).

> In this matter, it is clear that the trial judge entered the order of dismissal without reference to the provisions of N.C.Gen.Stat. § 7A-38.1(h) and Rule 2C of the Rules Implementing Statewide Mediated Settlement Conferences. These documents prescribe what must occur when the parties fail to agree upon a mediator or the plaintiff fails to report this fact to the senior resident superior court judge: the parties forfeit their right to select the mediator, and the mediation takes place with a mediator selected by the court. When a specific remedy for a violation is set forth by statute or rule, this specific remedy must control over the provisions of a general rule or statute. 635 S.E.2d at 484-485.

I. Sanctions

Badillo v. Cunningham, ___N.C.App.___, 629 S.E.2d 909 (2006), affirmed per curiam, 361 N.C. 112, 637 S.E.2d 538 (2006) was an action seeking damages for personal injury. The defendants served written discovery on the plaintiff on 24 January 2005. When responses were not received to the discovery within 30 days, counsel for the defendants wrote the attorney for the plaintiff, but received no answer. On 11 April 2005, the trial court granted the defendants'

motion to compel. The court found that the plaintiff did not seek an extension to respond to the discovery and also had not responded to the letter from defense counsel about the discovery. Additionally, the trial court found that only six weeks remained before the court-ordered end of discovery. The court concluded that the conduct of plaintiff's counsel was "an inexcusable failure to make discovery and to prosecute his client's case in violation of Rule 37(d)." 629 S.E.2d at 910. The court's order also stated, "having considered certain lessor discovery sanctions as urged by plaintiff," the action was dismissed with prejudice.

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

> We hold that the trial court is not required to list and specifically reject each possible lesser sanction prior to determining that dismissal is appropriate. . . . Judge Albright states that, given the severity of disobedience by plaintiff's counsel, lesser sanctions would be inappropriate. The record supports the seriousness of plaintiff's misconduct: Plaintiff did not answer or object to any of Nationwide's interrogatories or requests for production of documents. Neither did plaintiff seek a protective order or proffer any justification for this inaction. This Court has previously upheld a trial court's dismissal of an action based upon similar circumstances of a disregard of discovery due dates. 629 S.E.2d at 911.

Baker v. Charlotte Motor Speedway, Inc., ___N.C.App.___, 636 S.E.2d 829 (2006), petition for discretionary review filed (December 27, 2006), arose out of collapse of the pedestrian bridge at Lowe's Motor Speedway on 20 May 2000. After the first jury determined that Tindall and the Speedway were negligent, Judge Spainhour issued a Case Management Order that applied to all other suits. The CMO mandated discovery and deadlines for disclosures. The plaintiff, Sudderth, was deposed on 9 October 2001. At his deposition, Sudderth disclosed for the first time an injury at work in 1992. In March 2004, the defendant learned of a West Virginia Workers' Compensation claim as a result of this injury. Discovery of this claim led to additional medical records that had not been produced. Tindall moved for sanctions. At a hearing on 1 April 2004, Judge Spainhour made 33 findings of fact, granted the motion for sanctions and dismissed Sudderth's claims with prejudice.

The Court of Appeals affirmed. Judge Spainhour's detailed findings of fact recited each of the discovery requests to Sudderth and Sudderth's failure to respond fully. Sudderth argued that his discovery responses were a

result of faulty memory and not intentional. The Court of Appeals concluded that there is no requirement that inadequate discovery responses be "in bad faith" in order for sanctions to be imposed. The Court held that Judge Spainhour's dismissal was supported by the findings of fact.

> Based on these findings of fact, the court concluded that plaintiff's actions cumulatively "frustrated the purpose of discovery, . . . denied defendants the opportunity to prepare properly for trial, . . . unfairly prejudiced Defendants in their defense of his claims," and caused defendants to incur additional costs. This conclusion of law is supported by valid findings of facts, and thus the sanction of dismissal was not "manifestly unsupported by reason." 636 S.E.2d at 832-833.

The plaintiff also contended that Judge Spainhour had not considered less severe sanctions than dismissal. Citing Judge Spainhour's findings on this issue, the Court of Appeals disagreed.

> The Court has carefully considered each of the foregoing acts, as well as their cumulative effect, and has also considered the available and appropriate remedies and sanctions for such misconduct. After such consideration, the Court, in its discretion, has determined that sanctions less severe than dismissal would not be adequate given the seriousness and the repetition of the misconduct described above. 636 S.E.2d at 833.

J. Enforceability of Consent Judgments

The plaintiff and defendant in Couch v. Bradley, ___N.C.App.___, 635 S.E.2d 492 (2006) were employed at the same academic institution. After the defendant resigned from his position, he distributed memoranda alleging that the plaintiff engaged in illegal and immoral conduct. The plaintiff sent a cease and desist letter to the defendant, then filed suit. On 3 November 2004, the plaintiff and defendant entered into a consent judgment, providing that the plaintiff would take no action against the defendant unless libelous statements about the plaintiff were distributed within 10 years. If such statements were distributed within that period, "there shall be a rebuttable presumption that such publication or communication was the responsibility of the defendant." The consent judgment provided for the payment of damages by the defendant of $15,000 and attorneys' fees in the event of breach.

The plaintiff applied for a position at another academic institution. A neighbor of the defendant asked the defendant about the plaintiff's complaint and consent judgment. The defendant gave the neighbor a copy of the

consent judgment. The neighbor wrote to the academic institution at which the plaintiff had applied and enclosed a copy of the consent judgment. The plaintiff filed a motion to enforce the consent judgment. The trial court found that the defendant had failed to rebut the presumption that the defendant had not ceased and desisted from all libelous statements about the plaintiff. In accordance with the consent judgment, judgment was entered against the defendant for $15,000 and attorneys' fees of $631.25.

The Court of Appeals affirmed. The defendant first contended that the trial court had failed to make specific findings of fact. Rule 52(a)(2) required findings of fact when requested by a party as provided in Rule 41(b). Determining that the defendant had not requested findings of fact, the Court of Appeals held that "a trial court is not required to either state the reasons for its decision or make findings of fact showing those reasons." 635 S.E.2d at 494. Since findings of fact were not required, the judgment was affirmed.

> In the absence of a motion or request, the trial court properly entered an order allowing judgment against defendant without making specific findings of fact. Without a request for specific findings

> of fact, it is presumed the trial court found facts from the evidence to support its conclusions of law and enter judgment thereon. . . . The trial court's order is affirmed. 635 S.E.2d at 495.

Trial in Baxley v. Jackson, ___N.C.App.___, 634 S.E.2d 905 (2006), petition for discretionary review denied, 360 N.C. 644, 638 S.E.2d 462 (2006) was in progress when the parties reached a settlement with the defendants paying the plaintiff $87,000. The trial court approved the settlement and stated that the settlement agreement was "enforceable by order of the Court." When the defendants did not pay the settlement amount, the trial court issued a order for the defendants to appear and show cause for failure to comply with the consent order. After the show cause hearing, the trial court signed an order of specific performance requiring the defendants to comply with the settlement agreement.

Following an appeal that was not perfected by the defendants, the trial court issued a second order for the defendants to appear and show cause for failure to comply with the earlier order and to address "other possible sanctions." At the show cause hearing, the trial court denied the defendants motion to reconsider under Rule

60(b). The trial court also found that the defendants failure to comply with the earlier show cause order was willful. The trial court ordered the defendants into the custody of the sheriff until payment of the settlement amount. The trial court also ordered the defendants to pay the plaintiff's attorneys' fees "as a sanction for delaying the trial court in the administration of justice through the use of their dilatory acts." 634 S.E.2d at 907.

The Court of Appeals affirmed the trial court's finding of civil contempt, but reversed the award of attorneys' fees. First, as to the defendants' motion to reconsider in the trial court, the Court of Appeals noted the defendants' earlier attempt to appeal the same issues. Observing that a Rule 60(b) motion may not be used "as an alternative to appellate review," the Court also stated that the defendants could not seek a "second bite at the apple" by raising the same issues in the Rule 60(b) motion that had been unsuccessfully attempted on appeal. 634 S.E.2d at 907.

In affirming the trial court's finding of civil contempt, the Court of Appeals stated that the defendants were not held in contempt for breach of the settlement

agreement, but were in contempt for failure to comply with an order of the trial court.

> The trial court did not hold defendants in contempt for breach of the parties' settlement agreement. It held them in contempt for failure to comply with the order of specific performance issues by the court. It is well established that a party seeking enforcement of a settlement agreement may petition the court for an order of specific performance. . . . An order of specific performance, in turn, is enforceable through the contempt power of the court. 634 S.E.2d at 908.

Although the trial court correctly held the defendants in contempt, there was no basis for an award of attorneys' fees.

> Because contempt is considered an offense against the State, rather than an individual party, "damages may not be awarded to a private party because of any contempt." . . . Because there is no statutory authority allowing the trial court to impose attorneys' fees as a sanction for defendants' failure to comply with an order of specific performance, the trial court was without authority to award attorneys' fees. 634 S.E.2d at 908-909.

K. Jurisdiction of Superior Court Judge

Rosenstadt v. Queens Towers, 177 N.C.App. 273, 628 S.E.2d 432 (2006) was an action against a homeowners' association seeking to review the defendants' financial records and a declaratory judgment concerning board meetings of the association. On 27 August 2004, Judge

Boner granted the plaintiffs' motion for summary judgment and allowed examination of the defendants' financial records. Judge Boner denied the plaintiffs' request for declaratory judgment. On 13 December 2004, the plaintiffs filed a motion for contempt and attorneys' fees. On 23 March 2005, Judge Johnston entered an order denying the plaintiffs' motion for contempt and attorneys' fees. At the defendants' request, Judge Johnston's Order also clarified Judge Boner's Order of 27 August 2004 concerning where the records would be examined and copied.

On appeal, the plaintiffs argued that Judge Johnston could not modify the previous Order of Judge Boner. The Court of Appeals disagreed and held that one superior court judge may "clarify" previous orders of another superior court judge.

> In this case, Judge Johnston neither overruled nor modified Judge Boner's 27 August 2004 order; instead, he simply clarified how Defendants were "to make such records available to Plaintiffs." The earlier order by Judge Boner did not specify, for future requests to examine records, where the records could be examined or if copies of the records would be sufficient to comply with the order. . . . This was not "judge shopping" by Defendants; rather, it was a request by Defendants for clarification of a previous order after the parties could not agree. 628 S.E.2d at 433.

L. Right to Trial by Jury

The plaintiffs in Calhoun v. WHA Medical Clinic, PLLC, ___N.C.App.___, 632 S.E.2d 563 (2006), petition for discretionary review denied (March 8, 2007) entered into employment agreements with the defendant that included restrictive covenants with liquidated damages provisions. On 10 April 2002, the plaintiffs left WHA and opened their cardiology practice located within the "restricted territory" defined in their employment agreements with WHA. The plaintiffs instituted the present declaratory judgment action to determine whether the covenants not to compete and liquidated damages provisions were enforceable. The trial judge denied the plaintiffs' request for trial by jury and entered findings of facts on all issues. The trial court determined that the plaintiffs' contracts with WHA were valid and enforceable. The plaintiffs appealed and posted a bond of $1,559,767 required by the trial court to respond to the liquidated damages provisions of the contracts.

The Court of Appeals affirmed the trial court's denial of trial by jury on the issues raised.

> We initially address plaintiffs' argument that the trial court erred in dismissing the jury and

> serving as the finder of fact because plaintiffs had a statutory right to trial by jury on all issues of facts. Plaintiffs instituted this action pursuant to the North Carolina Declaratory Judgment Act. . . . This Court has held, under the Declaratory Judgment Act, the trial court may determine only questions of law absent a waiver of jury trial. . . . the only factual determination of the trial court that plaintiffs challenge in this portion of their brief is that the trial court "made the decisive Findings of Fact on the public policy issue." However, "[s]ince the determinative question is one of public policy, the reasonableness and validity of the contract is a question for the court and not for the jury, to be determined from the contract itself and admitted or proven facts relevant to the decision." . . . ("[t]he reasonableness of a non-compete agreement is a matter of law for the court to decide"). 632 S.E.2d at 570-71.

M. Medicaid Liens

Ezell v. Grace Hospital, Inc., 175 N.C.App. 56, 623 S.E.2d 79 (2005), reversed per curiam, 360 N.C. 529, 631 S.E.2d 131 (2006) was an action alleging medical malpractice relating to the delivery of the plaintiffs' daughter. Settlement was reached initially with the Hospital for $100,000. After discovery, a separate settlement was reached with the treating doctors for $100,000. At the time of the hearing for court approval of the settlement with the physicians, the Medicaid lien was $86,840.92. The trial court limited the recovery of the Department of Medical Assistance (DMA) to $8,054.01, the

amount that the trial judge "determined to be causally related to the alleged negligence of" the treating doctors. 623 S.E.2d at 80. The Court of Appeals agreed with the trial judge that the subrogation rights of DMA were limited to the injury that was the basis for the lien. The Court of Appeals remanded for additional findings as to the causal relationship between the treatment and the lien. Judge Steelman dissented.

The Supreme Court reversed for the reasons given by Judge Steelman in his dissent. N.C.Gen.Stat. § 108A-57(a) provides in part that "the amount paid to the Department shall not exceed one-third of the gross amount obtained or recovered." Judge Steelman concluded that DMA was entitled to the full amount of its statutory lien without limitation to whether the basis for the lien was causally related to the malpractice alleged.

> "North Carolina law entitles the state to full reimbursement for any Medicaid payments made on a plaintiff's behalf in the event the plaintiff recovers an award for damages." . . . . it was irrelevant whether a settlement compensated a plaintiff for medical expenses because "N.C.Gen.Stat. § 108A-57(a) does not restrict defendant's right of subrogation to a beneficiary's right of recovery only for medical expenses." . . . . I would hold that DMA is subrogated to the entire amount of the $100,000 settlement and is entitled to receive one-third of

> that amount as partial payment of the $86,540.92 lien. 623 S.E.2d at 84.

N. Court Costs

Smith v. Cregan, ___N.C.App. ___, 632 S.E.2d 206 (2006) was an action alleging medical malpractice. The jury returned a verdict for the defendants. The defendants filed a motion for costs relating to expert witness fees. The trial denied the motion in its discretion. On appeal, the defendants contended that the General Statutes require expert witness fees to always be awarded to the prevailing party in a negligence action.

The Court of Appeals held that the award of expert witness fees is not required to be taxed in favor of the prevailing party in a negligence action. Finding no abuse of discretion by the trial court, the Court affirmed.

> Thus, expert witness fees are permitted under 7A-305(d)(1) "as provided by law. . . . An expert witness must be subpoenaed to testify for his fees to be taxed as costs against an unsuccessful party. . . . The present case involves a negligence action. Negligence cases are not listed among the types of actions in which costs must be awarded to a prevailing party pursuant to either section 6-18 or section 6-19. Therefore, the trial court's costs ruling was governed by section 6-20, and costs could "be allowed or not, in the discretion of the court." N.C.Gen.Stat. § 6-20. 632 S.E.2d at 209-210.

O. Workers' Compensation Liens, G.S. § 97-10.2(e)

The decedent in Estate of Harvey v. Kore-Kut, Inc., ____N.C.App.___, 636 S.E.2d 210 (2006) was killed in the course and scope of his employment with SCI. The workers' compensation carrier for SCI paid the decedent's estate a lump sum of $92,292.74 and agreed to waive its subrogation lien as to any third-party recovery. Suit was brought against Kore-Kut and its employee, McLean, alleging that their negligence caused the death of Harvey. The defendants' answer alleged the intervening and superseding negligence of SCI. SCI moved to strike this defense on the basis of SCI's waiver of its subrogation lien. The trial court granted SCI's motion and struck the defense of SCI's negligence.

Holding that an employer could not waive its subrogation lien and eliminate a third party's right to a determination of the employer's negligence, the Court of Appeals reversed.

> To allow such a practice within the well-delineated guidelines of the interaction between the courts of general justice and the Workers' Compensation Act would be a disservice. Kore-Kut as the third party, has a right to a jury determination as to whether the negligence of SCI joined with the negligence of Kore-Kut and its employees in causing the death of Mr. Harvey. In

> turn, if the jury finds that SCI's wrongdoing did contribute to the injury, then Kore-Kut is entitled to a reduction of its damages in the amount of $92,292.74, that which the employer would have otherwise been entitled to receive by way of subrogation so long as the jury did not find SCI negligent, but for SCI's waiver of its rights. 636 S.E.2d at 213-214.

P. Economic Loss Rule

The plaintiffs in Lord v. Customized Consulting Specialty, Inc., ___N.C.App.___, 643 S.E.2d 28 (2007) contracted with Customized Consulting Specialty for construction of a home. Customized Consulting used trusses provided by 84 Lumber Company in building the home. The Lords brought suit against Customized Consulting and 84 Lumber alleging negligence and defects in the construction of the home, specifically the trusses provided by 84 Lumber. The jury returned a verdict in favor of the Lords against 84 Lumber for $42,000. On appeal, 84 Lumber argued that the negligence claims were barred by the economic loss rule.

The Court of Appeals affirmed the jury verdict in favor of the Lords and held that the economic loss rule did not apply because there was no contract between the Lords and 84 Lumber.

> . . . the economic loss rule prohibits recovery for purely economic loss in tort, as such claims are instead governed by contract law. . . . Economic losses include damages to the product itself. . . . A claimant, may however, recover in tort rather than contract for damages to property other than the product itself, if the losses are attributable to the defective product. . . . Thus, the rule encourages contracting parties to allocate risks for economic loss themselves, because the promisee has the best opportunity to bargain for coverage of that risk or of faulty workmanship by the promisor. For that reason, "a tort action does not lie against a party to a contract who simply fails to properly perform the terms of the contract, even if that failure to perform was due to the negligent or intentional conduct of that party, when the injury resulting from the breach is damage to the subject matter of the contract. . . .
>
> We hold that the 84 Lumber Defendants had a duty to use reasonable care in performing its promise to provide reliable trusses to Customized Consulting for use in the construction of the Lords' residence. Because there was no contract between the Lords and the 84 Lumber Defendants, we further find that the economic loss rule does not apply and therefore does not operate to bar the Lords' negligence claims. 643 S.E.2d 27 at *5.

Q. Punitive Damages

The parties in Harrell v. Bowen, ___N.C.App.___, 635 S.E.2d 498 (2006), petition for discretionary review filed (November 17, 2006) were involved in a motor vehicle accident on 6 June 2002. The plaintiff filed suit alleging negligence by the defendant in the operation of his vehicle. Also alleging that the defendant was impaired

while operating his vehicle, the plaintiff requested punitive damages. At the time suit was filed, the defendant was deceased. The trial court granted the defendant's Rule 12(b)(6) motion and dismissed the claim for punitive damages.

The Court of Appeals affirmed. G.S. § 1D-1 states that punitive damages may be awarded "to punish a defendant for egregiously wrongful acts and to deter the defendant and others from committing similar wrongful acts." Since the defendant was deceased, the statutorily stated purpose of deterrence could not be achieved.

> In the instant case, defendant died sometime before plaintiff filed the subject complaint. Because defendant is deceased, deterring him from committing a similar wrongful act in the future is, of course, not possible. Consequently, the statutory mandate of G.S. § 1D-1 of punitive damages is contingent upon punishing and deterring defendant from engaging in similar conduct in the future, cannot be achieved. . . . We . . . conclude that the trial court did not err by concluding that plaintiff cannot recover punitive damages from the estate of the deceased tortfeasor. 636 S.E.2d at 500-501.

The plaintiff in Scarborough v. Dillard's, Inc., ___N.C.App.___, 632 S.E.2d 800 (2006) sued his former employer for malicious prosecution. The plaintiff contended that two customers left Dillard's with two pairs

of shoes without paying for them. Dillard's charged the plaintiff, a part-time employee, with embezzlement. The plaintiff was arrested in the lobby of his regular employer, handcuffed, and taken to the police station. Upon his release from jail, the plaintiff returned to his regular employment. He was told that his employment had been terminated because of the embezzlement charges by Dillard's. A jury acquitted the plaintiff of the criminal charges. In the plaintiff's civil trial, a jury awarded him $30,000 for malicious prosecution and $77,000 in punitive damages. The trial judge granted Dillard's motion to set aside the punitive damages award.

Because the trial judge did not explain his reasons for setting aside the award of punitive damages, the Court of Appeals reversed and remanded.

> "When reviewing the evidence regarding a finding by the trier of fact concerning liability for punitive damages . . . , the trial court shall state in a written opinion its reasons for . . . disturbing the finding or award." N.C.Gen.Stat. . 1D-50(2005). . . . Because the orders on appeal do not contain the trial court's required explanation for disturbing the jury's punitive damages award as mandated by section 1D-50 of the North Carolina Statutes, we remand this case to the trial court . . . . To properly assess an award of punitive damages against a corporation, the court must find that there was sufficient evidence to justify a jury's finding of either

> fraud, malice, or willful or wanton conduct by clear and convincing evidence. N.C.Gen.Stat. . . 1D-15(a)(2005). A party need only show one of these circumstances to recover punitive damages. 632 S.E.2d at 803.

R. Evidence

1. 911 Calls

The decedent's estate in Wooten v. Newcon Transp. Inc., ___N.C.App.___, 632 S.E.2d 525 (2006), petition for discretionary review filed (August 16, 2006) claimed workers' compensation benefits arising from the decedent's death in a traffic accident on 9 May 2002. The plaintiff's evidence indicated that the decedent was driving a tractor-trailer at 10:45 p.m. when the truck ran off the left side of the road, struck a guardrail and came to rest in the median. There were two calls to 911 from unknown persons. One call reported that "it appeared that the truck struck debris in the road." The other call indicated that the driver had been checked, was unconscious and still breathing. Evidence about the decedent's medical history indicated that he had experienced a prior heart attack. An autopsy showed arteriosclerotic heart disease. When asked to consider the evidence from the two 911 calls, the medical examiner who performed the autopsy testified that

he did not know whether the decedent "had the accident because of the heart attack or whether he had a heart attack because of the accident." 632 S.E.2d at 527. The hearing commissioner ruled that the 911 calls were inadmissible hearsay and denied benefits. The Full Commission reversed, holding that the 911 calls were admissible and awarded full benefits.

The Court of Appeals affirmed the award of benefits to the decedent's estate. The Court of Appeals first acknowledged that "The rules of evidence do not strictly apply in workers' compensation cases." 632 S.E.2d at 529. If the rules of evidence did apply, the Commission had correctly admitted the 911 calls pursuant to Rule 803(1).

> Rule 803(1), "Present Sense Impression," allows for admission of "a statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." . . . However, we conclude that 911 calls reporting that "the [tractor trailer] appeared to have struck tire debris in road and ran off roadway" and that "[caller's] husband checked the driver and advised he was not moving but was breathing," qualify as present sense impressions. Even if the callers did not observe the accident happen, they observed the aftermath and then reported this "event or condition." Because we conclude that the calls were admissible pursuant to Rule 803(1), we need not determine whether they qualify as excited utterances under Rule 803(2). 632 S.E.2d at 529.

2. Objections at Depositions, Rule 32(d)(3)(a)

Estate of Redden Ex Rel. Morley v. Redden, ___N.C.App.___, 632 S.E.2d 794 (2006), petition for discretionary review filed (October 19, 2006) alleged that the defendant-wife had converted funds from her husband's estate. At her deposition, the defendant testified that during the time that Mr. Redden was in the hospital, he told the defendant to transfer $237,778.71 from their joint account to a bank account in only the defendant's name. The trial court granted the plaintiff's motion for partial summary judgment and ordered that the funds be paid to the plaintiff-estate. On appeal, the defendant argued that the plaintiff had waived any objection based on the Dead Man's Statute because the plaintiff did not object and move to strike the defendant's deposition at the deposition.

The Court of Appeals affirmed the trial court's grant of partial summary judgment and held that an objection was not required at the deposition.

> Defendant contends that this testimony is admissible because plaintiff's counsel who was taking the discovery deposition, did not object to or move to strike the testimony. Pursuant to North Carolina Rule of Civil Procedure 32(d)(3)(a), however, plaintiff's counsel was not required to make the objection at the deposition. "Objections to . . . the competency, relevancy or

> materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time." Since an objection based on Rule 601 would not "have been obviated or removed if presented" during the deposition, plaintiff has not waived the objection by failing to make it at the deposition. 632 S.E.2d at 799.

3. Experts

Lane v. American National Can Co., ___N.C.App.___, 640 S.E.2d 732 (2007), petition for discretionary review filed (March 12, 2007) was a claim for workers' compensation benefits in which the plaintiff alleged that he contracted an occupational disease, major depression, due to work related stress and pressure. The Commission denied benefits. On appeal, the plaintiff contended that the Commission erred in admitting the testimony and opinions of the defendants' psychiatric expert.

The Court of Appeals affirmed and held that the testimony of the expert met the standards in State v. Goode, 341 N.C. 513, 461 S.E.2d 631 (1995) and Howerton v. Arai Helmet, Ltd, 358 N.C. 440, 597 S.E.2d 674 (2004).

> Dr. Artigues was tendered as an expert in the fields of clinical and forensic psychiatry. She stated, in her opinion, that plaintiff did not meet the criteria for a psychiatric diagnosis. She further opined that the job stressors identified by plaintiff were not unique or

> peculiar to his employment at ANC but rather could occur in any workplace. Dr. Artigues proffered testimony showing that in forming her opinions she relied on articles and publications routinely relied on in the medical practice and her treatment of approximately 100 patients with work-related stress issues.
>
> A review of the records and briefs clearly shows that plaintiff's contentions on appeal only challenge the methodology of Dr. Artigues' opinion which goes to the weight of her testimony and not the admissibility, and this Court will not address such issues. . . . . Our Supreme Court clearly stated in Howerton that North Carolina does not apply the gatekeeping function articulated by Daubert . . . . . but rather leaves the duty of weighing the credibility of the expert to the trier of fact. 640 S.E.2d at 736.

See also Leggette v. Scotland Memorial Hospital, ___N.C.App.___, 640 S.E.2d 744 (2007), petition for discretionary review filed (March 30, 2007) ("Because of Dr. Currin's experience in treating lymphedema, we hold that Dr. Currin's expert opinion was sufficiently reliable. As in Howerton, 'any lingering questions or controversy concerning the quality of the expert's conclusions go to the weight of the testimony rather than its admissibility.'")

Seay v. Wal-Mart Stores, Inc., ___N.C.App.___, 637 S.E.2d 299 (2006) was a claim for workers' compensation benefits based on an injury to the plaintiff's back. To

establish causation, the plaintiff relied on the expert opinion of Dr. Larry Davidson, a neurosurgeon. After asking Dr. Davidson to assume that certain facts were true, he was asked whether he had an opinion, "satisfactory to yourself and to a reasonable degree of medical certainty, whether the work event . . . probably caused the injuries which you treated and which ultimately led to surgery." Dr. Davidson responded, "assuming that everything you have just mentioned is indeed true, it would be my medical assumption that his on-the-job injury of 04/04/03 should be implicated as the culprit of his thoracic disk herniation and his secondary symptoms thereafter." 637 S.E.2d at 302. Finding Dr. Davidson's testimony "too speculative to meet plaintiff's burden of proof on causation," 637 S.E.2d at 303, the Commission denied benefits.

The Court of Appeals affirmed.

> The particular language used leaves the issue of causation in the "realm of conjecture and remote possibility." Holly, 357 N.C. at 232, 581 S.E.2d at 753. Dr. Davidson never connected the injury to the incident on 4 April 2003 as a reasonable scientific probability. The degree of a doctor's certainty goes to the weight of the testimony and the weight given expert evidence is a duty for the Commission and not this Court. . . . In addition, the response elicited by plaintiff's hypothetical question required Dr. Davidson to assume the truth of facts that were not supported by the record.

> An expert's opinion that was solicited through the assumption of facts unsupported by the record is entirely based on conjecture. 637 S.E.2d at 303.

Dr. Davidson was asked to assume that the plaintiff did not have complaints of pain radiating down his legs before the injury at work. Other medical records in evidence established that the plaintiff had back and leg pain six weeks before the injury at work.

The defendant in Hammel v. USF Dugan, Inc., ___N.C.App.___, 631 S.E.2d 174 (2006) admitted liability for a motor vehicle accident resulting in injuries to the plaintiff. At trial, two of the plaintiff's damages experts were Dr. Cynthia Wilhelm and Dr. Finley Lee. The defendant objected to the report of Dr. Lee as hearsay because the report's analysis of future earning capacity of the plaintiff referred to a report prepared by Maria Vargas, a vocational rehabilitation specialist who did not testify at trial. The trial court overruled the objection. The jury awarded the plaintiff $6 million.

The Court of Appeals affirmed the jury verdict and the admission of Dr. Lee's opinions and report.

> When an expert witness testifies to the facts that are the basis for his or her opinion, "such testimony is not hearsay because it is not offered for the truth of the matter, but to show the basis

> of the opinion." . . . . Here, the source of the statistics at issue is the U.S. Bureau of Labor Statistics, specifically the median income of all truck drivers. Lee testified that such median income statistics are a reasonably-relied upon source on which an economist might base his opinion about earning capacity. In addition, plaintiff here was attempting to prove loss of earning capacity, not his actual earnings at the time of his injury. Earning capacity is not determined solely on the present or past earnings of a plaintiff. . . . Plaintiff was entitled to present evidence of his earning capacity as well as of his actual past earnings. 631 S.E.2d at 178-179.

4. Privilege

Hayes v. Premier Living, Inc., ___N.C.App.___, 641 S.E.2d 316 (2007) was an action for wrongful death alleging nursing home neglect. The plaintiff requested production of incident reports describing falls by the decedent before her death. The defendant identified the reports on a privilege log, but refused to produce the reports on the basis that they were protected by the peer review privilege. In support of the defendant's objection to producing the report, the defendant submitted the affidavit of Ms. Parnell. The affidavit described the defendant's "Continuous Quality Improvement Team" that assessed the quality of care provided to residents. The affidavit further stated that the purpose of the incident reports was

to improve the quality of care of residents. During her deposition, Ms. Parnell conceded that the Team did not discuss the incident reports at meetings. The trial court reviewed the reports in camera, then ordered production.

Finding that the reports were not protected by the peer review privilege or N.C.Gen.Stat. § 131E-107, the Court of Appeals affirmed the order requiring production of the incident reports.

> The incident reports were produced by the nurse who responded to each "unusual occurrence" and no nurse who produced the reports was a member of the CQI Team. . . . there is no evidence to show the team actually considered the reports. In fact, Premier Living's CQI team did "not typically" review the incident reports.
>
> We do not agree with defendants that N.C. Gen.Stat. § 131E-107 protects any and all reports which may be subject to consideration by the CQI team; rather, we conclude that the plain language of section 131E-107 protects only those records which were actually a part of the team's proceedings, produced by the team, or considered by the team. We emphasize that these are substantive, not formal, requirements. 641 S.E.2d at 319.

5. Hearsay

The defendant in State v. Forte, 360 N.C. 427, 629 S.E.2d 137 (2006), certiorari denied, ___U.S.___, 127 S.Ct. 557, 166 L.Ed.2d 413 (2006) was convicted of three counts of first-degree murder and sentenced to death. As part of

the State's forensic analysis of evidence, SBI Special Agent Spittle examined samples of blood, sperm and DNA. At the time of trial, Agent Spittle was no longer employed by the SBI and did not testify at trial. Agent Spittle's reports were offered into evidence at trial by Agent Spittle's supervisor, Agent Nelson. The trial court admitted the reports under the business records exception in Rule 803(6).

The Supreme Court affirmed. The Court first addressed the issue of whether the reports were testimonial and violated the defendant's confrontation rights. Applying Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), the North Carolina Supreme Court held that Agent Spittle's reports did not fall within the categories of testimonial evidence identified by the Crawford Court, such as prior testimony or police interrogation. The reports of Agent Spittle were "neutral" and did "not bear witness against defendant." 629 S.E.2d at 143. The reports were also admissible as business records because they "are not inherently subject to manipulation or abuse." 629 S.E.2d at 143. Finally, the

SBI reports were public records and not inadmissible under either Rule 803(6) or 803(8).

> Agent Nelson was Agent Spittle's supervisor and was responsible for creating and implementing laboratory policies regarding record-keeping. Agent Nelson testified that Agent Spittle created the reports contemporaneously with his work as part of the regular practice of the agency and within the ordinary course of agency business. Accordingly, we agree with the trial court that the reports are business records under Rule 803(6). . . . Accordingly, if Agent Spittle's reports fall under this exception for "purely 'ministerial observations,'" they are not inadmissible under either Rule 803(6) or 803(8). Here, the reports concern routine, nonadversarial matters. . . . Thus, potential use in court was only one purpose among several served by the creation and compilation of Agent Spittle's reports. Agent Spittle's analysis of the evidence on hand also facilitated further examination of the evidence within the SBI laboratory. Therefore, these reports are records of purely ministerial observations that do not offend the public records exception and were properly admitted as business records. 629 S.E.2d at 143-144.

6. Electronic Communications

The defendant in State v. Taylor, ___N.C.App.___, 632 S.E.2d 218 (2006) was convicted of first-degree murder, first-degree kidnapping and robbery with a dangerous weapon. The trial court denied the defendant's motion in limine to exclude the State's exhibits that were printouts or transcripts of text messages sent to and from the

telephone number assigned to the victim's company-issued cellular telephone. At trial, Jones, a strategic care specialist with Nextel Communications, testified that Nextel kept a record of all incoming and outgoing text messages to and from customers. The contents of the messages are stored in the Nextel database. Woods, the manager of the Wireless Express Store where the victim worked, identified the cellular telephone and number issued to the victim. Woods was authorized to access the Nextel database and website for the text messages. Woods identified the State's exhibits as the messages he had retrieved.

The Court of Appeals affirmed admission of the text message exhibits.

> Jones and Woods are both witnesses with knowledge of how Nextel sent and received text messages and how these particular text messages were stored and retrieved. This testimony was sufficient to authenticate State's Exhibits 87 and 88 as text messages sent to and from the victim's assigned Nextel cellular telephone number on 16 and 17 February 2004.
>
> Defendant argues no showing was made of who actually typed and sent the text messages. The text messages contain sufficient circumstantial evidence that tends to show the victim was the person who sent and received them. See N.C.Gen.Stat. § 8C-1, Rule 901(b)(4) (provides authentication may be made through "Appearance,

contents, substance, internal patterns, or other distinctive characteristics. . . .")

Although this issue has not been considered in this jurisdiction, other jurisdictions have upheld admission of electronic messages as properly authenticated. See U.S. v. Whitaker, 127 F.3d 595, (7th Cir.1997) (rejected the defendant's argument that the government failed to authenticate computer records where the government presented testimony of an FBI agent who was present when the records were retrieved); U.S. v. Safavian, 435 F.Supp.2d 36 (D.D.C. 2006) (e-mail messages held properly authenticated where the e-mail addresses contain "distinctive characteristics" such as, inter alia, the "@" symbol and a name of the person connected to the address, the bodies of the messages contain a name of the sender or recipient, and the contents of the e-mails also authenticate them as being from the purported sender and to the purported recipient) . . . . 632 S.E.2d at 230-231.