North Carolina Conference of Superior Court Judges

Recent Decisions

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Don Cowan

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I. Liability

A. Premises

Biggers v. Bald Head Island, ___ N.C. App.___, 682 S.E.2d 423 (2009), cert. denied, 363 N.C. 853, ___ S.E.2d ___ (2010) arose from injuries to a minor as a result of a fall from a golf cart. The Biggers family had vacationed at Bald Head Island from 1997 until 2003. They had rented a golf cart during each vacation. On 30 June 2003, one of the Biggers' sons, Howard, fell out of the golf cart while the cart was being operated by his father. He died fourteen months later as a result of complications from the brain injury received when he fell out of the golf cart. The plaintiffs alleged that the golf cart was defective because it did not have a seat belt for occupants. The trial court granted the motions for summary judgment of all defendants.

Relying on the plaintiffs' use of the golf cart over several years including the use by the father

to play golf and the absence of any evidence of changes to the golf cart, the Court of Appeals affirmed dismissal of all defendants.

> Here, any defect alleged by the plaintiffs – the absence of a seatbelt – is an open and obvious condition, and the condition in which the golf cart originally was provided to Odell by the manufacturer. . . . We cannot find in our case law an affirmative duty for defendants such as Limited and Odell to undertake to alter a commonly manufactured product, such as a golf cart. . . . Upon review, we are convinced that plaintiffs' negligence claims against Limited and Odell fail for want of duty, or where a duty does exist, for want of breach. 682 S.E.2d at 427.

The plaintiffs in Worthy v. Ivy Community Center, Inc., ___ N.C. App. ___, 679 S.E.2d 885, cert. denied, disc. rev. denied, 363 N.C. 748, 689 S.E.2d 874 (2009) were injured as a result of an electrical fire at an apartment owned by the defendant. Based on evidence that the plaintiffs did not sign the apartment lease and the affidavit of the defendants' expert, the trial court granted the defendants' motion for summary judgment.

The Court of Appeals reversed. The apartment lease was signed by Mr. Powell. The lease indicated that Mr. Powell was the only occupant of the apartment. The defendants contended that Ms. McLean and her minor children were trespassers to whom the defendants owed no duty. Ms. McLean and her minor children lived in the apartment with Mr. Powell until Mr. Powell moved out of the apartment. Ms. McLean complained to the apartment manager about "naked wires" in the apartment. In resisting the defendants' motion for summary judgment, the plaintiffs filed the affidavits of several maintenance workers employed by the defendants who stated that the apartment management "knew" the plaintiffs were residing in the apartments. Ms. McLean testified that after Mr. Powell moved out of the apartment, the apartment manager told Ms. McLean she could continue living in the apartment as long as she paid her bills. The Court of Appeals held that there was an issue of fact as to

whether the plaintiffs were trespassers or on the premises with the consent of the defendants.

On the question of causation, one of Ms. McLean's children testified about seeing sparks under the hood above the stove and that the sparks were coming from the wires under the hood. Ms. McLean testified that when she heard "popping sounds," she then saw the wires hanging down from the hood. The defendants contended that this testimony was not competent because only experts may give evidence as to the cause. The Court of Appeals disagreed and held that the plaintiffs' lay testimony was sufficient to defeat summary judgment.

> [The cases cited by the defendants]. . . do not hold that expert testimony as to the cause of the fire was required, especially when, as here, the testifying witness was an eye witness to the fire. . . . lay witnesses' opinions regarding the cause of an injury are admissible when based on the witnesses' "perceptions . . . obtained from observing the accident scene." We have found no case in North Carolina holding that an eye witness' testimony regarding the cause of a fire is

> insufficient as a matter of law. . . . We need not address whether expert testimony might be necessary in a case relying only upon circumstantial evidence because this case presents the "extremely rare" and out-of-the-ordinary case in which there was an eye witness. Whether this direct evidence is credible is a question for the jury. 679 S.E.2d at 889-890.

Based on similar reasoning, the Court of Appeals held that lay testimony as to the facts of the fire that were inconsistent with the expert's opinion was sufficient to create an issue of fact and defeat the defendants' motion for summary judgment.

The plaintiff in Shelton v. Steelcase, Inc., ___ N.C. App.___, 677 S.E.2d 485, disc. rev. denied, 363 N.C. 583, 682 S.E.2d 389 (2009), was employed by Drew, LLC, and, at the time of her injury, was an on-site supervisor for Drew at a facility of Steelcase in Fletcher. As part of converting its facility, Steelcase hired M.B. Haynes to remove duct work and install a new dock door. Steelcase requested that Drew work on a special project to clean out the maintenance area.

Employees of Drew and Haynes were working in the same area at the Steelcase facility.

A fire door had been moved into the work area by employees of Steelcase. Barriers around the fire door had been removed as part of the maintenance project. Employees of Haynes had moved the fire door and positioned the door against a wall, although one of the Haynes employees testified that he thought the door would be safer if it had been placed flat on the floor. As Ms. Shelton and other Drew employees were working around the fire door, the door fell on Ms. Shelton causing serious injuries.

Ms. Shelton sued Steelcase and Haynes. The trial court granted Haynes' motion for summary judgment. The jury awarded Ms. Shelton $1,250,000 for her injuries.

The Court of Appeals affirmed judgment against Steelcase, but reversed summary judgment for Haynes. Steelcase contended that it should have

been granted a directed verdict and JNOV on the grounds that Ms. Shelton was a special employee, and, as such, her claims against Steelcase were barred by the Workers' Compensation Act. The contract between Steelcase and Drew required that Drew be "solely responsible for the direction and supervision" of Ms. Shelton. 677 S.E.2d at 193. The Court of Appeals held that this created an issue of fact as to the control and supervision of Ms. Shelton. The trial court, therefore, had correctly submitted the issue to the jury.

Steelcase next argued that the evidence of negligence was insufficient to be submitted to the jury. The Court of Appeals noted, however, that the plaintiff's claims against Steelcase were based on premises liability.

> Plaintiff at trial presented evidence that would allow a jury to determine that Steelcase knew that this 300-pound fire door, leaning against a wall lined with conduits, constituted a hazardous condition. Plaintiff's evidence established that the door was stored in a maintenance area, where non-maintenance

> workers were not generally allowed to go, and had originally been cordoned off by curtains and a fence or cage. Only three or four months before the accident, the door was also secured to the conduits on the wall with a rope so that it would not fall over if someone hit the door or ran into it. The Steelcase maintenance manager acknowledged in his testimony that there was "no" doubt that it would be safer to tie off the door when leaning it against the wall because it removed the "fall hazard." . . . The evidence is more than sufficient to allow a jury to find that Steelcase knew or should have known that the door presented a hazardous condition as it leaned against the wall . . . . Although Steelcase argues that the fire door had never fallen before, it was for the jury to weigh the evidence that Steelcase had previously secured the door and screened other workers from the door by a fence and curtains. 677 S.E.2d at 497.

Continuing to argue about the absence of negligence and causation, Steelcase contended that there was no evidence as to how the door fell. Again, the Court of Appeals observed that the argument overlooked the premises liability theory of the plaintiff.

> This argument, however, again, overlooks the fact that this case was tried on a theory of premises liability. The evidence

> supported a finding that the door was a hazardous condition, that Steelcase knew or should have known of its hazardous nature, and that Steelcase nonetheless did not warn Ms. Shelton of the hazard. She was then injured by the hazard. Steelcase cites no authority that would require plaintiffs to prove the precise mechanism by which the door came to fall. 677 S.E.2d at 498.

The Court of Appeals held that there was sufficient evidence of negligence on the part of Haynes employees, therefore, its motion for summary judgment should have been denied.

> When viewed in the light most favorable to plaintiffs, Mr. Allen's and Mr. Burrell's [Haynes employees] testimony indicates that the two workers were concerned that they had accidentally moved the door while performing their work, that the door might slide out from the bottom, and that there was a risk of injury to other people working in the area. This evidence is sufficient to allow a finding that the M.B. Haynes workers, by repositioning the fire door, assumed a duty to exercise reasonable care to protect third parties that might be injured by their handling of the door. . . . Here, the injury that occurred was precisely the type of injury expected to result form the risk created by M.B. Haynes' negligence of moving the door too close to the wall. . . . Thus, the conflicting testimony regarding the distance of the door from the wall also

> raises a triable issue of fact regarding proximate causation improper for determination on summary judgment. 677 S.E.2d at 503-504.

B. Motor Vehicle

The plaintiff in Blackwell v. Hatley, ___ N.C. App. ___, 688 S.E.2d 742 (2010) was driving west in Landis when she was required to stop at a stop sign. After stopping, she entered the intersection and was struck by the defendant who was driving north and had the right-of-way at the intersection. The plaintiff alleged claims against the defendant including negligent operation of his vehicle. The trial court granted the defendant's motion for summary judgment.

The Court of Appeals affirmed summary judgment in favor of the defendant. The plaintiff alleged that the defendant was operating his vehicle in excess of the posted 35 m.p.h. speed limit. The only evidence relating to the defendant's speed was that he was operating within the speed limit.

> In the instant case, Hatley testified that he was driving 35 mph as he approached the intersection. Adam Pethel and James Bouchard each testified that they did not know the parties, that they had been across the street and seen the accident, that Hatley was driving no more than 35 mph and that Plaintiff pulled out in front of Hatley. This constitutes the only admissible evidence of Hatley's driving speed, and we conclude it does not raise an issue of fact regarding whether Hatley was speeding. 688 S.E.2d at 746.

Other evidence as to the defendant's speed was from the plaintiff's expert, Ryan McMahan. The accident occurred before the amendment to Rule 702 allowing an expert to testify as to speed, therefore, this opinion was not admissible. Additionally, the expert was not tendered as an expert at his deposition. He was not asked questions about his professional experience. There was nothing in his engineering background that would qualify him in "any particular area."

The plaintiff in Tabor v. Kaufman, ___ N.C. App.___, 675 S.E.2d 701, disc. rev. denied, 363 N.C. 381, 679 S.E.2d 836 (2009) was driving north

on Jefferson Highway near Boone. The defendant, Kaufman, was traveling ahead of the plaintiff when he suddenly turned left. The plaintiff and the car behind her were able to stop without incident. The third vehicle operated by Thibodeaux was not able to stop and struck the car behind the plaintiff, causing that car to strike the plaintiff's car and injure the plaintiff. The trial court granted Kaufman's motion for summary judgment.

The Court of Appeals reversed on the basis that there was an issue of fact as to whether Kaufman's negligence was insulated by the negligence of Thibodeaux.

> Defendant was traveling on the highway in front of Plaintiff when Defendant came to a sudden stop and turned left without using his turn signal. As a result, Plaintiff and the driver of a vehicle behind her (vehicle two) slammed on their brakes and were able to come to a complete stop on the highway. However, a third vehicle driven by Thibodeaux was unable to stop and collided with the rear of vehicle two, causing vehicle two to collide with Plaintiff's vehicle. . . . viewing the allegations in the light most favorable to Plaintiff, there remains a genuine issue

> of material fact as to whether the collision caused by Thibodeaux's negligence was a foreseeable result of Defendant's negligent actions. Therefore, the order entering summary judgment in favor of Defendant was erroneously granted. 675 S.E.2d at 704.

C. Professional

Whiteheart v. Waller, ___ N.C. App. ___, 681 S.E.2d 419 (2009), disc. rev. denied, 363 N.C. 813, ___ S.E.2d ___ (2010) was an action alleging legal malpractice. The plaintiff, Whiteheart Advertising, maintained a billboard on land owned by Beroth. Whiteheart paid rent on the lease through June 1998. Despite notices from Beroth for past due rent, Whiteheart continued to use the billboard on the Beroth land. Skyad, a competitor of Whiteheart, offered to lease the Beroth land. Whiteheart attempted to pay the past due rent to maintain the space, but Beroth refused to accept a check tendered by Whiteheart for the full amount. Whiteheart sent letters to his competitors warning them about Skyad's action in derogatory terms. The

defendant, Ms. Waller, who was Whiteheart's attorney at the time reviewed the letter about Skyad, but did not advise Whiteheart that the statements in the letter were per se defamatory.

In May 2001, Whiteheart, through Ms. Waller, obtained a temporary restraining order permitting Whiteheart to continue to use the Beroth land. Whiteheart then sent a check to the North Carolina Department of Transportation for the renewal fee on the Beroth property, but did not inform DOT that Beroth had not given permission for Whiteheart to use the property. Skyad was denied a DOT permit because Whiteheart held the permit for the property. The trial court granted the motions for summary judgment of Beroth and Skyad in the action initiated by Whiteheart and in which he obtained a TRO.

Beroth and Skyad then sued Whiteheart in Forsyth County for malicious prosecution, abuse of process, libel per se and unfair and deceptive

trade practices. Ms. Waller represented Whiteheart in that action. A jury returned a verdict against Whiteheart in excess of $700,000.

Whiteheart satisfied the judgment against him and brought the present action against Ms. Waller and her law firm for claims of legal practice. The trial court granted Ms. Waller's motion to dismiss pursuant to Rule 12(b)(6) on the grounds that the verdict in the Forsyth County action "establish[es] as a matter of law [plaintiff's] intentional wrongdoing," and, for this reason, the plaintiff was collaterally estopped from maintaining the present action.

The Court of Appeals affirmed dismissal of the claims against Ms. Waller. First, the Court of Appeals agreed with the trial court's application of collateral estoppel.

> The judgments against the plaintiff in Forsyth County necessarily decided his liability for his actions. . . . The trial court correctly applied collateral estopped in determining that the jury verdicts in the Forsyth County cases,

> finding the plaintiff liable for malicious prosecution, abuse of process, libel per se, unfair and deceptive trade practices, slander of title, unjust enrichment, and quantum meruit, establishing as a matter of law plaintiff's intentional wrongdoing. 2009 WL 2601833 at *3.

Because the Forsyth County cases determined the intentional wrongdoing of Whiteheart, then in pari delicto barred the present claim for legal malpractice.

> Plaintiff was well aware that he did not possess either a valid lease or permission from the owner of the Beroth property to maintain his billboard. Yet, he continued to assert his non-existent interests, giving rise to his liability. His verified complaint, in Iredell County, asserted that he had a valid lease for the Beroth property and his application to the NCDOT asserted he had the permission of the property owner to maintain his billboard. Plaintiff knew that neither of these facts were true. . . . Regardless of the nature of the advice from defendant, plaintiff knew that the information was incorrect. . . . It would not serve justice to relieve plaintiff from liability in these circumstances. . . . "A court should not encourage others to commit illegal acts upon their lawyer's advice by allowing the perpetrators to believe that a suit against the attorney will allow them to obtain relief from any damage they might suffer if caught. The attorney's

> misconduct of advising clients to perform illegal acts should be discouraged by the threat of attorney disciplinary action." 2009 WL 2601833 at *4 (quoting Evans v. Cameron, 121 Wis.2d 421, 428, 360 N.W.2d 25, 29 (1985)).

II. Insurance

A. Builders Risk

Builders Mut. Ins. V. Glascarr Properties, ___ N.C. App.___, 688 S.E.2d 508 (2010) was a declaratory judgment action to determine coverage for the costs related to removing mold at a house under construction. While the defendant was constructing the house, vandals broke into the house and left water running, causing damage. A claim by the defendant-insured for damage caused by the water was paid by the plaintiff. The defendant then discovered that the water had caused mold in the house. The defendant's additional claim for $39,000 was denied by the plaintiff based on an exclusion in the policy providing:

> The presence, growth, proliferation, spread or any activity of "Fungi", wet or dry rot or "microbes." 688 S.E.2d at 511.

The trial court entered judgment on the pleadings in favor of the plaintiff.

The Court of Appeals affirmed denial of coverage for the mold damage. Noting that the exclusion was an "anti-concurrent causation" clause, the Court held that the specific provision excluded coverage even though the initial water damage was a covered event.

> . . . the plain language of the policy unequivocally excludes payment for losses "caused directly or indirectly by" mold, and this exclusion applies "regardless of any other cause or event that contributes concurrently or in any sequence to the "loss." We conclude that the policy clearly excludes payment of a claim for the cost of mold remediation. 688 S.E.2d at 511.

B. False Advertising

Harleysville Mutual Ins. Co. v. Buzz Off Insect Shield, No. 272A08, 2010 WL 1492136 (N.C. Apr. 15, 2010), was a declaratory judgment action to

determine the duty to defend an action brought by S.C. Johnson & Son (SCJ) against Buzz Off Insect Shield (BOIS) and other defendants in the Middle District of North Carolina. In the federal case, SCJ alleged that BOIS falsely advertised the benefits of the defendants' insect-repellent clothing. BOIS developed a process to treat fabric with insect repellent by which the repellent binds to the fabric. BOIS then entered into agreements with L.L. Bean, Ex Officio and Orvis by which the BOIS process was applied to clothing sold by these companies. BOIS and the other defendants advertised that the treated fabrics protected the wearer from insect bites, was effective through 25 washings and the repellent contained a natural insecticide from flowers.

SCJ, the manufacturer of "OFF," alleged that it was being unlawfully injured by the advertising and marketing of BOIS clothing. Specifically, SCJ

alleged that the BOIS advertising falsely stated the efficacy of the BOIS-treated apparel.

BOIS and the other defendants requested that Harleysville and other insurers defend the federal action brought by SCJ. The insurance companies denied a duty to defend on the basis that the "Quality or Performance of Goods" exclusion precluded coverage. The trial court found that the insurance companies had a duty to defend. A majority of the Court of Appeals affirmed the duty to defend.

Finding that the exclusion applied, the Supreme Court remanded for entry of an order by the trial court finding no duty to defend. The Court initially confirmed that the duty to defend is broader than the duty to indemnify. The duty to defend is determined by the allegations of the complaint, whereas, the duty to indemnify is determined by the facts found at trial.

> In addressing the duty to defend, the question is not whether some

> interpretation of the facts as alleged could possibly bring the injury within the coverage provided by the insurance policy; the question is, assuming the facts as alleged to be true, whether the insurance policy covers that injury. The manner in which the duty to defend is "broader" than the duty to indemnify is that the statements of fact upon which the duty to defend is based may not, in reality, be true. ___S.E.2d at ___.

The Court then applied the "side by side" analysis by comparing the policy with the allegations of the complaint. The applicable exclusion provided:

> This insurance does not apply to: . . . "Personal and advertising injury" arising out of the failure of goods, products or services to conform with any statement of quality or performance made in your "advertisement" ___S.E.2d at ___.

The Court held that this exclusion removed coverage for false statements about an insured's product's performance as stated in the insured's advertisements.

> The Failure to Conform exclusion envisions an insured's false advertisement that causes injury, and the exclusion removes from coverage potential "personal and advertising injury" suffered from a false

> advertisement, when the falsity "aris[es] out of the failure of goods . . . to conform with . . . statements[s] of quality of performance made in [the insured's] 'advertisement.'" ___S.E.2d at ___.

SCJ's federal complaint specifically alleged that the BOIS apparel did not perform as stated in the defendants' advertisements. The complaint alleged in detail that the advertisements about being effective through 25 washings, the active ingredient in the repellent was not derived from flowers and that the treated fabric prevented insect bites were all false. The SCJ complaint, therefore, was "that defendants made false statements regarding the efficacy of their own products." ___S.E.2d at ___.

After comparing the allegations of the complaint with the policies, the Court concluded that there was no duty to defend the action brought by SCJ.

> Earlier we stated that the Failure to Conform exclusion encompasses allegations that an insured has made false statements

> about its own products. Under the language of the insurance policies, the Failure to Conform exclusion applies when the falsity resulting in the "personal and advertising injury" is caused by the "failure of goods . . . to conform with . . . statement[s] of quality or performance made in [the insured's] 'advertisement'." . . . . Here, SCJ's Amended Complaint alleged facts indicating that the only falsity found in defendants' advertisements resulted from the failure of defendants' own products to be of their advertised quality and nature, placing the falsity of those advertisements squarely within the insurance policies' Failure to Conform exclusion. ___S.E.2d at ___.

C. Motor Vehicles

N.C. Farm Bureau Mut. Ins. Co. v. Simpson, ___ N.C. App.___, 678 S.E.2d 753 (2009), disc. rev. denied, 363 N.C. 806, 691 S.E.2d 13 (2010), was a declaratory judgment action to determine coverage for an accident that occurred on 15 October 2004 at 9:20 a.m. Simpson had liability coverage on his tractor-trailer in early 2004. The policy expired on 30 April 2004. Simpson attempted to renew the policy by payment with a check that bounced. Farm

Bureau notified Simpson that his policy expired on 30 April 2004.

Simpson was involved in an accident on 15 October 2004 at 9:20 a.m. while operating his tractor-trailer. On that same afternoon, Simpson went to his insurance agent and gave him a check for the past due premium. Simpson did not inform the agent of the accident. Two weeks later, Farm Bureau issued a liability policy effective at 12:01 a.m. on 15 October 2004. Farm Bureau did not learn of the accident until it was informed by an attorney for the claimant. The trial court entered an order declaring that the policy was in effect at the time of the accident.

The Court of Appeals reversed, holding that there was no coverage under a policy that was procured by fraud and intended to be effective retroactively. The policy specifically provided that it was void if there were a concealment or misrepresentation concerning a claim.

> This is a question of first impression in North Carolina. . . . when injury has occurred, the liability of an insurer becomes absolute, where there is a policy of insurance in effect at the time of the injury. However, this not the law when the policy was not in effect at the time of injury or damage. . . . It is clear from the undisputed facts of this case that Simpson fraudulently obtained the policy of insurance by deliberately concealing the fact that he had been in an accident earlier that day. Because there was no policy of insurance in effect at the time of the accident, the above policy provision voids the policy as to the pre-existing accident. 678 S.E.2d at 756.

III. Pretrial Practice

A. Extensions of Time – Rule 6(b)

The plaintiff in Welch v. Lumpkin, ___ N.C. App. ___, 681 S.E.2d 850 (2009) initially filed suit on 6 June 2006 alleging claims of intentional infliction of emotional distress, malicious prosecution and negligence. She took a voluntary dismissal without prejudice on 27 November 2006, then refiled on 20 November 2007. On motion of the defendants, on 23 January 2008, the trial court ordered the plaintiff to pay within 30 days the

defendant's costs in the amount of $2,005.56 with interest. The trial court found that plaintiff's counsel spoke with counsel for the defendants and was told that the defendant would not move to dismiss the action if the costs were paid by 25 February 2008. On 25 February 2008, the plaintiff tendered payment to the defendant of $2,005.56. The trial court granted the defendant's motion to dismiss based on the plaintiff's failure to pay the costs and interest within 30 days of the court's order of 23 January 2008.

Holding that the parties could not stipulate to an extension of time for the plaintiff to pay the costs, the Court of Appeals affirmed dismissal.

> It follows that if Rule 6(b) fails to give the court discretion to amend an order to pay costs, 6(b) also fails to give the parties discretion to amend an order to pay costs, as the parties purported to do here. Not giving the court or the parties the discretion to amend an order to pay costs following a voluntary dismissal is in keeping with the object of Rule 41(d), which "is clearly to provide superior and district courts with authority for the efficient collection of costs in cases in

> which voluntary dismissals are taken." 2009 WL 2803796 at *3 (quoting Ward v. Taylor, 68 N.C. App. 74, 79, 314 S.E.2d 814, 819 (1984)).

B. Statutes and Periods of Limitation and Repose

Marzec v. Nye, ___ N.C. App.___, 690 S.E.2d 537 (2010) was an individual and derivative action against Nyeco, Inc. by Marzec, vice president of Nyeco. The complaint alleged that Nyeco, Inc. entered into a contract with Marzec for payment of monthly compensation. Additionally, the complaint alleged that Nye, president of Nyeco, obtained a personal loan in the name of Nyeco and converted other corporate funds. Nyeco stopped making payments to Marzec in September 2002. Marzec sent a letter to Nye on 23 April 2004 complaining about misuse of corporate funds and obtaining a personal loan in the name of Nyeco. Marzec filed suit on 4 June 2008. The trial court granted the defendants' 12(b)(6) motion on the grounds that the

complaint established that the action was barred by the three-year statute of limitations.

The Court of Appeals reversed dismissal of the claim concerning failure to make monthly payments to Marzec. Under the continuing wrong doctrine, the Court held that payments withheld during the three years preceding the filing of the complaint were not barred.

> "Our Supreme Court has recognized the continuing wrong doctrine as an exception to the general rule that a claim accrues when the right to maintain a suit arises." . . . . Under the continuing wrong doctrine, the statute of limitations does not start running "until the violative act ceases.". . . . According to Marzec, Nye's refusal to pay him his salary and back pay and to provide him with an accounting amount to a continuing violation. . . . Marzec's claim is, therefore, timely as to the failure to provide an accounting during the three years preceding the filing of this action. 690 S.E.2d at 542.

Although the continuing wrong barred the application of the three-year statute of limitations of failure to make the monthly payments, the continuing wrong doctrine did not

apply to claims alleging breach of fiduciary duty and conversion of corporate funds. Marzec made one request in his letter of 23 April 2004 related to these claims. Marzec had not demonstrated that Nye's ongoing failure to respond "constituted continual unlawful acts as opposed to continual ill effects from the failure to produce the records." 690 S.E.2d at 543.

C. Jurisdiction

Brown v. Meter, ___ N.C. App.___, 681 S.E.2d 382 (2009), appeal dismissed, disc. rev. denied, ___ S.E.2d ___ (2010) arose out of a bus crash outside of Paris in which two minor North Carolina residents were killed. Suit was brought in Onslow Superior Court alleging defects in the manufacture of tires by The Goodyear Tire & Rubber Company. Finding that Goodyear had sufficient contacts with North Carolina to satisfy due process, the trial court denied Goodyear's motion to dismiss for lack of jurisdiction.

The Court of Appeals affirmed the trial court's dismissal of the defendants' motion to dismiss for lack of jurisdiction. Since the accident did not occur in North Carolina, the focus was on general rather than special jurisdiction. Stated more directly, the issue was whether the defendants "purposefully injected their product into the stream of commerce without any indication that they desired to limit the area of distribution of their product so as to exclude North Carolina." 681 S.E.2d at 391. Findings of fact entered by the trial court included that the tires involved in the accident had U.S. Department of Transportation markings required for the tires to be sold in the United States and other labeling allowing the tires to be sold in the United States. In addition to there being no evidence that Goodyear had attempted to exclude North Carolina from the distribution chain, the trial court found that Goodyear had sold between 6,402 and 33,923 tires in North Carolina

during the years 2004 to 2007. Concluding that the trial court's findings supported its conclusion that Goodyear purposefully injected its tires into the stream of commerce without any effort to exclude North Carolina from distribution, the Court of Appeals agreed that Goodyear had "purposefully availed themselves of the protection of the laws of this State." 681 S.E.2d at 395.

D. Discovery

Wallace Farm, Inc. v. City of Charlotte, ___ N.C. App.___, 689 S.E.2d 922 (2010) was based on a zoning dispute between the parties originating from a complaint about odors coming from the plaintiff's farm. After Charlotte zoning inspectors searched the plaintiff's farm pursuant to an administrative warrant, the plaintiff served a public records request for records concerning the plaintiff's farm. The plaintiff then filed a complaint seeking to require the defendants to produce the requested public records.

The defendants produced 21,424 pages of records, but withheld 500 pages on the basis that the City reasonably anticipated litigation, and, for this reason, withheld records that reflected mental impressions of members of the City Attorney's office. The trial judge reviewed the withheld records in camera. Based on the trial court's review, it concluded that the withheld documents were trial preparation materials, not public records, and would not be ordered to be produced.

The Court of Appeals affirmed the trial court's determination that the withheld documents were protected from production because they contained mental impressions of the defendants' attorneys.

> Specifically, defendants "contend that if it takes any actions against [Wallace Farm], be it via the City beginning enforcement proceedings for possible zoning ordinance violations, or the odor study resulting being submitted to any party, litigation is reasonably anticipated to follow. . . . we agree with the trial court's ruling and hold the challenged documents contain mental

> impressions, conclusions, opinions, or legal theories of city attorneys or other agents of the City in reasonable anticipation of litigation. Therefore, we hold that the trial court did not abuse its discretion . . . . 689 S.E.2d at 924.

E. Woodson Claims

The decedent in Edwards v. GE Lighting Systems, Inc., ___ N.C. App.___, 685 S.E.2d 146 (2009) was employed by GE Lighting Systems, Inc., ("GELS") a subsidiary of G.E. GELS maintained a safety department. G.E. monitored the GELS facility through safety audit systems. Through the audit system, G.E. safety personnel were able to access any safety deficiencies at the GELS facility.

Mr. Edwards was employed at the GELS plant as an annealing oven operator. On 4 December 2008 while taking a break behind one of the annealing ovens, Edward died as a result of carbon monoxide poisoning. The North Carolina Department of Labor, Division of Occupational Safety and Health ("NCOSHA") cited GELS for a number of serious

safety violations. GELS had not received an OSHA citation for violations related to carbon monoxide levels at the plant prior to death of Edwards. The trial court granted G.E.'s motion for summary judgment.

Finding that G.E. had not violated any duty to Edwards, the Court of Appeals affirmed summary judgment in favor of G.E. The Court first addressed parent company immunity as determined by Hamby v. Profile Prods., L.L.C., 361 N.C. 630, 652 S.E.2d 231 (2007), noting that the G.E./GELS relationship was not that of member-manager in a limited liability company.

> The detailed factual analysis conducted by the Hamby court does not support the broad holding of per se parent company immunity encouraged by the defendant. There is nothing in Hamby that could be read to create per se immunity for a parent corporation under the Workers' Compensation Act. 685 S.E.2d at 149.

The Court did recognize that a parent corporation that is not the employer may be liable

for injuries to an employee of the subsidiary company.

> This Court has held, "under certain circumstances one who undertakes to render services to another which he should recognize as necessary for the protection of a third person, or his property, is subject to liability to the third person, for injuries resulting from his failure to exercise reasonable care in such undertaking." . . . . This holding relies upon the Restatement (Second) of Torts § 324A, also known as the "Good Samaritan" doctrine, ... 685 S.E.2d at 149.

Rejecting the plaintiff's argument that the safety audits conducted by G.E. of the GELS plant created a duty by G.E. to Edwards, the Court held that G.E. did not undertake or assume responsibility for the safety of the decedent.

> The biannual verification audits conducted by G.E. personnel were intended to ensure that GELS was utilizing PowerSuite correctly and effectively in light of G.E.'s goals and objectives. These audits were a general review and were not intended to be extensive safety audits of the entire GELS plant. Day-to-day safety at the GELS facility was always the exclusive responsibility of GELS personnel. There are no allegations of any specific undertaking by G.E. that would create a genuine issue of material

> fact that G.E. went beyond concerns or minimal contact about safety matters and assumed the primary responsibility for workplace safety at GELS. 685 S.E.2d at 150-151.

The plaintiff in Blow v. DSM Pharmaceuticals, Inc., ___ N.C. App.___, 678 S.E.2d 245 (2009), 363 N.C. 853, ___ S.E.2d ___ (2010), was temporarily employed as a chemical processor at the defendant's plant. The defendant's operations included processing of bromine, a highly toxic and lethal chemical. On 15 August 1999, a hose ruptured, resulting in the plaintiff being exposed to bromine. The plaintiff was hospitalized and alleged permanent injuries.

The incident was investigated by North Carolina OSHA. OSHA found thirty-one safety and health violations and concluded that the defendant's safety systems were incomplete and that hazard response procedures were inadequate. A consultant who evaluated the system before the incident observed that a failure in the bromine hose "can

create catastrophic [bromine] emission." Although the consultant concluded that a "serious hazard" could occur, no replacement measures were recommended.

The complaint alleged that the defendant failed to comply with governmental safety standards; the defendant acted willfully, wantonly and in reckless disregard; defendant knew or reasonably should have known that there was "a substantial certainty that a catastrophic [bromine spill] would result"; and that plaintiff was injured as a result of this conduct. The trial court granted the defendant's motions to dismiss for lack of jurisdiction and for failure to state a claim under Rules 12(b)(1) and (b)(6).

The Court of Appeals affirmed dismissal.

> . . . defendant in the case sub judice has not been cited for violations of the bromine system prior to the spill. Although it failed to adequately construct and maintain the bromine system, and failed to implement appropriate safety procedures, defendant did not "engage in misconduct knowing it was substantially

> certain to cause death or serious injury," as required to support a Woodson claim. . . . Absent a proper Woodson claim, the trial court had no subject matter jurisdiction to hear plaintiff's claim, because the Act provides an exclusive remedy for injured workers. 678 S.E.2d at 250.

F. G.S. § 97-10.2(j)

The plaintiff in Alston v. Federal Exp. Corp., ___ N.C. App.___, 684 S.E.2d 705 (2009) was injured in the course and scope of her employment with the defendant when she was struck by a vehicle operated by an employee of the North Carolina Department of Transportation. The defendant paid the plaintiff over $285,000 in benefits under the Workers' Compensation Act. The plaintiff then settled with NC DOT for $300,000. After deducting attorney's fees, the plaintiff received $198,400.

The plaintiff filed an application in Durham County Superior Court pursuant to G.S. § 97-10.2(j) to determine the amount of the defendant's lien. The trial court entered an order reducing the defendant's lien to $50,000. When the parties

submitted the matter to the Industrial Commission, a question arose concerning attorney's fees owed by the defendant from the settlement with NC DOT. The plaintiff filed a motion for reconsideration in Durham County Superior Court. The trial judge entered an order stating that the defendant "shall pay their share of attorney's fees." The defendant appealed.

The Court of Appeals first held that the trial judge had jurisdiction to reconsider its earlier order and award attorney's fees.

> Pursuant to Rule 60(b)(6)'s "grand reservoir of equitable power," the trial court had jurisdiction to revisit its order so that its intentions could be made clear. 684 S.E.2d at 707.

The Court of Appeals held, however, that there was no authority to award attorney's fees from the settlement with NC DOT.

> There is no express authority in N.C.Gen.Stat. § 97-10.2(j) that provides an award of attorney's fees as part of the costs of third-party litigation. 684 S.E.2d at 708.

Finally, the trial court's order reducing the defendant's lien did not include findings of fact. The case was remanded to the trial court for the required findings of fact.

> In the instant case, there are no findings of fact in the trial court's order for the following mandatory statutory factors: (1) the net recovery to plaintiff; (2) the likelihood of plaintiff prevailing at trial or on appeal; and (3) the need for finality to the litigation. The findings provided in the trial court's order are insufficient to determine "whether the court properly exercised its discretion or if it acted under a misapprehension of law" when it reduced the amount of defendant's lien. 684 S.E.2d at 708.

G. Unfair and Deceptive Trade Practices

Jones v. Harrelson & Smith Contractors, LLC, ___ N.C. App.___, 670 S.E.2d 242 (2008), aff'd per curiam, 363 N.C. 371, 677 S.E.2d 453 (2009) arose from Pamlico County's purchase of houses damaged by Hurricane Floyd. The County purchased three houses, then entered into a contract with Harrelson & Smith for removal of the houses from the 100-year flood plain. Harrelson & Smith had the option to

sell and relocate the houses. Harrelson & Smith sold one of the houses to Ms. Jones for $500. Ms. Jones identified the lot where she wanted to move the house. The lot was located in the 100-year flood plain. The County's contract with Harrelson & Smith prohibited houses being relocated within the flood plain. Harrelson & Smith did not tell Ms. Jones nor the purchasers of the other two houses about this prohibition. The Jones house was moved to the lot identified by Ms. Jones. When the County learned that the Jones house had been moved to a lot within the flood plain, it notified Harrelson & Smith that the house would have to be moved or the value of the house returned to the County. Without informing Ms. Jones, Harrelson & Smith moved the house, then demolished the house.

Ms. Jones sued Harrelson & Smith for fraud, negligent misrepresentation, conversion and unfair and deceptive trade practices and sought compensatory, punitive and treble damages. The

trial court bifurcated compensatory and punitive damages. At the close of all the evidence and during the charge conference, the trial court directed a verdict in favor of the defendant dismissing the claims for unfair and deceptive trade practices. The claims of fraud and conversion were submitted to the jury. The jury returned a verdict of $31,815 on the fraud claim and $30,000 on the conversion claim. The trial court then entered judgment notwithstanding the verdict on the fraud claim and dismissed the punitive damages claim.

The Court of Appeals initially dismissed the plaintiff's appeal for appellate rules violations. The Supreme Court remanded to the Court of Appeals for reconsideration of the appellate rules violations. Addressing the merits of the plaintiff's appeal, the Court of Appeals reinstated the fraud verdict and also held that the trial court erred in dismissing the unfair and deceptive

trade practices claims because fraud was an unfair and deceptive trade practice. On remand, the trial court was directed to enter judgment as a matter of law on the unfair and deceptive trade practice claim. The Court of Appeals also held that a new trial was not required on the punitive damages claim because the plaintiff had elected on appeal to waive the punitive damages claim and accept the jury verdict on the fraud claim.

> . . . . the trial judge stated that he was dismissing only Jones' independently pled UDTP claim, but would still allow Jones to argue, during the punitive damages stage of the bifurcated trial, that UDTP principles should apply in the calculation of damages, if the jury found liability on the basis of either fraud or conversion.
>
> The court's ruling appears to reflect a misunderstanding of the nature of a claim brought under N.C. Gen. Stat. § 75-1.1. A UDTP claim is a substantive claim, the remedy for which is treble damages. N.C. Gen. Stat. § 75-16 (2007). Chapter 75 is not a remedial scheme for other substantive claims. . . . As this Court has stated, "plaintiffs can assert both UDTP violations under N.C. Gen. Stat. § 75-1.1 and fraud based on the same conduct or transaction. Successful

> plaintiffs may receive punitive damages or be awarded treble damages, but may not have both." . . . . The approach followed by the trial court in this case of dismissing the UDTP claim, but allowing counsel to argue it in connection with punitive damages was in error. 670 S.E.2d at 251-252.

Noble v. Hooters of Greenville, ___ N.C. App. ___, 681 S.E.2d 448 (2009), disc. rev. denied, 363 N.C. 806, 690 S.E.2d 706 (2010), arose out of injuries received by the plaintiffs in an automobile accident on 30 December 2003. Beginning at 11:45 a.m. on 30 December 2003, Justin Noble, Matthew Noble, Jonathan Sugg and Joseph Thomas began drinking beer at the Greenville Hooters. When their waitress "cashed out" at 2:00 p.m., she had served 35 beers to the crowd. The subsequent waitress served an additional 23 beers to the group before they departed at 5:00 p.m. The vehicle was owned by Thomas, but operated by Sugg. Sugg lost control of the car, causing it to run off the road and turn over four times. Justin Noble received

injuries resulting in paraplegia and Matthew Noble sustained brain injuries.

The complaint alleged that Sugg operated the vehicle negligently, but did not allege that Sugg was intoxicated. The complaint alleged claims of negligence against Hooters of Greenville and included claims of Unfair and Deceptive Trade Practices. The trial court granted the Rule 12(b)(6) motion of Hooters as to the claims for Unfair and Deceptive Trade Practices.

The Court of Appeals affirmed dismissal of the Unfair and Deceptive Trade Practices claims based on the plaintiffs "lack of standing" to bring a Chapter 75 claim. The Court of Appeals concluded that the "essence" of the plaintiffs Chapter 75 claim was allowing the group to be served 58 beers during a five-hour period and the defendant's failure to prevent the group from leaving the restaurant.

> We hold that these allegations do not demonstrate conduct which amounts to an inequitable assertion of Defendants' power or position over Plaintiffs, nor do these allegations demonstrate that Defendants' actions had the capacity or tendency to deceive. . . . in this case, Defendants asserted no power over Plaintiffs, inequitably or otherwise, and instead served Plaintiffs solely at Plaintiffs' repeated requests. 2009 WL 2601845 at *4-*5.

The Court of Appeals acknowledged that Hooters violated Chapter 18B of the North Carolina General Statutes. Even though there may be a statutory violation, neither Chapter 18B nor the administrative alcohol beverage regulations state that a violation of those acts is also a Chapter 75 violation.

> In this case . . . the provisions cited by Plaintiffs do not specifically define and proscribe unfair or deceptive conduct within the meaning of N.C. Gen. Stat. § 75-1.1. Accordingly, we decline to hold that a violation of the provisions of Chapter 18B or 4 N.C.A.C. § 2S is a <u>per se</u> violation of the UDTPA. 2009 WL 2601845 at *6.

H. Settlement and Release

On 4 August 1987, the plaintiffs in Woods v. Mangum, ___ N.C. App.___, 682 S.E.2d 435 (2009), aff'd per curiam, 363 N.C. 827, 689 S.E.2d 858 (2010) purchased two tracts of land from the Mangums. The purchase was financed by a promissory note and a deed of trust in the amount of $66,634. Various disputes arose between parties concerning the payments that had been made on the note and tobacco-related payments that the plaintiffs contended should have been made to them. The parties retained attorneys who negotiated on behalf of the parties. At some time between November 1995 and January 1996, a conversation occurred between the plaintiffs and the attorney for the defendants "in which plaintiffs affirmed that they accepted the offer contained" in the attorneys' previous letters.

The Mangums did not cancel the promissory note and deed of trust. Disagreements continued between

the parties concerning the amount of the indebtedness and the tobacco allotment payments. The present action was filed by the plaintiffs to obtain clear title to the property. The trial court granted the plaintiffs' motion for summary judgment and concluded that the matter had been settled in 1995. The trial court ordered that the note and deed of trust be marked cancelled.

The Court of Appeals affirmed. Judge Robert C. Hunter dissented. The Supreme Court, per curiam, agreed with the trial court that the dispute had been settled and affirmed summary judgment for the plaintiffs. On appeal, the Mangums argued that summary judgment should not have been granted because the plaintiffs' motion for summary judgment depended upon an affidavit describing a conversation between Dr. Woods and Mr. Vann, now deceased, the initial attorney for the Mangums. The Mangums argued that the affidavit was incompetent under the dead man's statute. The

Court of Appeals noted that this objection had not been raised in the trial court. More importantly, however, the defendants had waived this objection through discovery.

> Even if the Estate [defendants] had preserved this objection and properly assigned it as error, it waived the protection of the dead man's statute by eliciting this testimony through interrogatories. 682 S.E.2d at 439.

The Court of Appeals agreed that the plaintiffs had offered undisputed evidence that the matter had been settled between Dr. Woods and the defendants' attorney.

> As plaintiffs correctly point out, a compromise and settlement is legally distinct from an accord and satisfaction. . . . Because mutual unliquidated indebtedness is the issue in these claims, compromise and settlement is the appropriate legal standard by which to judge the agreement. . . . The other distinction between accord and satisfaction and compromise and settlement is that no action on the part of either party is required for a compromise and settlement, while some action is required for an accord and satisfaction. . . .

> Documentary evidence in the exchange of correspondence between the parties' respective counsel and between the Mangums' counsel and plaintiffs supports the finding of a settlement agreement. . . . Since no further action was needed to effectuate the settlement, uncontested evidence suggests that the parties had a meeting of the minds. 682 S.E.2d at 439.

Hewett v. Weisser, ___ N.C. App.___, 689, S.E.2d 408, disc. rev. denied, ___ S.E.2d ___ (2010), arose out of a 2004 automobile accident in which a vehicle owned by Bonnie Weisser and operated by Robert Weisser collided with a vehicle operated by Tonya Goode in which the plaintiff was a passenger. The plaintiff alleged that he was injured in the accident. Goode filed an answer and a crossclaim against the Weissers. The Weissers filed an answer, a crossclaim against Goode and a counterclaim. The plaintiff replied to the Weissers counterclaim by pleading accord and satisfaction based on the fact that Bonnie Weisser had accepted payment for the property damage to her vehicle. The trial court granted the Weissers'

motion for summary judgment as a result of the plaintiff's ratification of the settlement with Bonnie Weisser.

Relying on G.S. § 1-540.2, the Court of Appeals reversed summary judgment for the Weissers. The only evidence of the settlement with Bonnie Weisser was the check from State Farm. There was no release or written settlement agreement. The plaintiff's reply to the Weisser counterclaim did not mention a written settlement agreement.

> Pursuant to the plain language of N.C.Gen.Stat. § 1-540.2, we conclude that without the "written terms of a properly executed settlement agreement . . . [that] stated that the acceptance of said settlement constitutes full settlement of all claims and causes of action arising out of said motor vehicle collision or accident," N.C.Gen.Stat. § 1-540.2, plaintiff's pleading of accord and satisfaction cannot act as a bar to his personal injury claim. 689 S.E.2d at 411-412.

Burton v. Williams, ___ N.C. App.___, 689 S.E.2d 174 (2010) was an action to cancel a release based on failure of consideration. Mr. and Mrs.

Burton sold their home to Williams for $160,000, securing the purchase with a properly recorded purchase money deed of trust. The Burtons subsequently signed a release providing that if they died before Williams completed payment of the purchase price of the land, then Williams would be "released of any and all remaining financial obligations" to the estate. The release was properly recorded. The Burtons passed away.

The present action was brought by the Burtons' son as administrator to cancel the later release based on failure of consideration. At trial, the parties stipulated that the original deed of trust, the original promissory note and the subsequent release were "genuine" and "authentic." At the close of the plaintiff's evidence, the trial court denied the defendant's motion for a directed verdict and granted the plaintiff's motion for a directed verdict.

The Court of Appeals affirmed the trial court's grant of the plaintiff's motion for a directed verdict at the close of the plaintiff's evidence.

> The [second] release fails to recite any consideration for the new agreement to release defendant from having to continue to make payments on the promissory note in the event that Mr. Burton died prior to the debt being paid off in full. . . . Because plaintiff established his claim that the release was not supported by consideration by documentary evidence, which the parties stipulated as being genuine and authentic, and defendant made no argument at trial or on appeal that the release was, in fact, supported by consideration, the trial court properly directed the verdict in favor of plaintiff despite the fact that plaintiff had the burden of proof on this issue at trial. 689 at 179-180.

The plaintiff in Powell v. City of Newton, ___ N.C. App. ___, 684 S.E.2d 55 (2009) alleged that the City improperly cut trees on his land while constructing a city park. The City joined the engineering and tree removal companies as third-party defendants. During trial, the parties announced that they had reached a settlement. When the trial judge inquired of the plaintiff if that

was his agreement, the plaintiff responded, “Yes, that’s my agreement.” Under the terms of the settlement, the plaintiff was to execute a quitclaim deed in exchange for payment by the defendants of $40,000.

The plaintiff refused to execute the quitclaim deed or otherwise comply with the settlement. The trial court entered an order enforcing the settlement. The Court of Appeals affirmed. Even though the settlement involved real property, the Court held that the settlement announced in court complied with the statute of frauds.

> Here, in open court, the parties . . . agreed that defendants would pay to plaintiff $40,000 in exchange for plaintiff’s executing a quitclaim deed to the subject property. A transcript of the parties’ discussion with the trial court with respect to these basic elements was reduced to writing. In addition, the parties exchanged correspondence and a proposed “Settlement Agreement and Release” specifying the terms of the agreement more specifically, we well as a draft quitclaim deed. 684 S.E.2d at 58

Addressing compliance with the statute of frauds and the requirement that the writing be signed, the Court analyzed the issue as one of judicial estoppel.

> Plaintiff's current position that he did not agree to surrender a quitclaim deed in exchange for $40,000 clearly is inconsistent with his position before the trial judge that "That's my agreement." The judge was persuaded to accept plaintiff's earlier position; the trial judge dismissed the jury and discontinued proceedings. Acceptance of plaintiff's current position is simply untenable under these circumstances. If not estopped, plaintiff would impose an unfair detriment to defendants, who proceeded believing there was an agreement to settle the case. Pursuant to the doctrine of judicial estoppel, plaintiff ought not to be permitted to now assert that he did not agree in open court in the presence of a trial judge to surrender a quitclaim deed to the disputed property in exchange for $40,000. . . . When the hearing transcript, draft agreement, draft quitclaim deed, and associated emails are read together, as permitted by the statute of frauds, the settlement agreement that plaintiff was ordered to execute is in total compliance with the statute of frauds. 684 S.E.2d at 59-60.

Judge Wynn dissented on the basis that there was no written agreement signed by the plaintiff as required by the statute of frauds.

The plaintiff in Hardin v. KCS Intern., Inc., ___ N.C. App.___, 682 S.E.2d 726 (2009) purchased a Cruisers Yacht from Cape Fear. Hardin immediately began to experience problems with the yacht and demanded that the defendants either return the purchase price or give a new boat to the plaintiff. The defendants refused, contending any complaints would be repaired under the boat's warranty. Hardin filed suit and served requests for production of documents. The defendants obtained an extension of time to respond to the document requests. Volvo, the manufacturer of the engines, contacted Hardin and offered to replace the engines and make other repairs in exchange for Hardin dismissing his lawsuit against Cruisers and Cape Fear. All parties entered into a general release by which Hardin agreed to dismiss his lawsuit with

prejudice in consideration of the defendants making specified repairs.

After the defendants made the specified repairs, Hardin continued to find defects in the boat. Because Hardin refused to dismiss his action, the case was referred to mediation. Three weeks before the mediation, the defendants complied with Hardin's request for documents and produced records indicating that boat had been involved in a collision with a tree before it was sold to Hardin. Hardin moved to amend his complaint to allege fraud and negligent misrepresentation. Finding that the release was valid and enforceable, the trial court dismissed Hardin's complaint.

The Court of Appeals affirmed dismissal of the action. First, the Court held that the defendants had no duty during settlement negotiations to disclose the tree collision to the boat.

> Thus, if Hardin had waited until after preliminary discovery had taken place, he would have obtained the very information that he claims defendants had a duty to

> disclose to him during settlement negotiations. Hardin had not, therefore, shown that he lacked the ability to discover through due diligence – civil discovery procedures – the information that his boat was involved in a collision during shipping. Hardin cites no authority – and we have found none – requiring opposing parties in litigation to disclose information adverse to their positions when engaged in settlement negotiations. 682 S.E.2d at 734.

The Court noted that the general release signed by Hardin necessarily included any claims that the defendants fraudulently concealed the boat collision.

Hardin argued next that the failure of the repairs to be made satisfactorily voided the release. The Court observed that Hardin had presented no evidence that the defendants did not intend to make the repairs at the time the release was entered into by all parties. The resolution of the underlying lawsuit was sufficient consideration for the release.

> . . . agreements to compromise and settle disputes, such as the one in this case, are supported by "real consideration" in

> the form of "the bare fact that the parties have settled their dispute, which is considered to be of interest and value to each one of them." 682 S.E.2d at 738.

Hardin retained the right to make claims in the future concerning the adequacy of the repairs made as required by the release.

Pressler v. Duke University, ___ N.C. App. ___, 685 S.E.2d 6 (2009), was an action for slander and libel by the plaintiff against his former employer, Duke University. When Pressler was initially employed by Duke, his contract of employment stated that it was subject to the Duke Dispute Resolution Policy requiring all claims arising out of or related to the employment to be resolved by arbitration. As a result of the events concerning the Duke lacrosse team in March 2006, Pressler's employment was terminated through a "Mutual Release and Settlement Agreement." In part, the Release provided that it cancelled "all earlier agreements." Pressler's current defamation claims arose after the execution of the Release. The

trial court denied Duke's motion to compel arbitration of the defamation claims.

The Court of Appeals affirmed the trial court. The Court of Appeals held that the mandatory arbitration provision arose as a result of Pressler's employment contract. When the Release cancelled "all earlier agreements," the arbitration provision was also cancelled.

> However, plaintiff would not have been subject to the policy [arbitration] but for the 2005 Employment Contract, in which plaintiff agreed his employment was subject to the policy. The mutual release addresses "all earlier agreements," and whether the policy was a part of the 2005 Employment Contract or not, surely it was an "earlier agreement" between the parties which would be encompassed by the term "all."
>
> In effect, this was an agreement of rescission under which each party agreed to discharge all of the other party's remaining duties under the existing contracts, including the duty to arbitrate. . . . There was no term in the mutual release that provided for arbitration of any claims that arose after the effective date of the mutual release; thus, the parties abandoned arbitration as a means of future dispute resolution. 2009 WL 2783756 at *4-*5.

I. Arbitration

The homeowners association in Harbour Point v. DJF Enterprises, ___ N.C. App.___, 688 S.E.2d 47 (2010) sued the building materials manufacturer for allegedly defective materials used in their homes. Georgia-Pacific PrimeTrim moved to compel arbitration on the basis of an arbitration provision contained in a limited warranty. In part, the warranty provided:

> If a claim under the foregoing warranty is not resolved to the owner's satisfaction, upon the written request of the owner of claimant, Georgia-Pacific agrees to submit any and all disputes . . . to binding arbitration . . .. 688 S.E.2d at 50.

The trial court denied Georgia-Pacific's motion to compel arbitration. The Court of Appeals affirmed denial of the motion to compel to arbitration.

> . . . the . . . portion of the arbitration agreement clearly establishes that only the "owner" may elect arbitration by written request. Pursuant to well settled contract law principles, the language of

> the arbitration clause should be strictly construed against the drafter of the clause. . . . As such, based on the language drafted by Georgia-Pacific, Georgia-Pacific does not have a right to compel plaintiff to submit to arbitration. 688 S.E.2d at 51.

The plaintiff in Brock and Scott Holdings, Inc. v. West, ___ N.C. App.___, 679 S.E.2d 507 (2009), appeal dismissed, disc. rev. granted, 363 N.C. 800, 690 S.E.2d 531 (2010), filed suit to recover the balance owed on a credit card account. The case was referred to court-ordered, non-binding arbitration pursuant to N.C. Gen. Stat. § 7A-37.1. The defendant attended the arbitration, but the plaintiff did not appear. The arbitrator entered an award providing that the plaintiff recover nothing and that the case was dismissed. Two days after the award was entered, the plaintiff filed a motion under Rule 60(b) to set aside the arbitrator's award on the grounds that the claim was "ineligible for referral to mandatory non-binding arbitration." The trial court denied the

plaintiff's Rule 60(b) motion and affirmed the arbitration award.

The Court of Appeals affirmed. Relying initially on Rule 6(b) of the Rules for Court-Ordered Arbitration, the Court of Appeals held that when the plaintiff did not file a demand for trial within 30 days of the arbitration award, then the arbitration award became a consent judgment in the case.

> This Court has held . . . that the failure to demand a trial de novo constitutes a waiver of the right to appeal. . . . A failure to demand such a review within thirty days constitutes a waiver of the right to appeal. 679 S.E.2d at 510.

In response to the plaintiff's contention that the claim was not subject to mandatory court-ordered arbitration, the Court of Appeals held that it was the plaintiff's responsibility to object to the referral to arbitration not less than 10 days before the arbitration hearing as provided by Rule 1(c). The failure of the plaintiff to object to

the arbitration maintained the jurisdiction of the arbitrator to determine the claim.

> In sum, plaintiff became bound by the Rules for Court-Ordered Arbitration when it failed to seek relief from the referral under Rule 1(c). Since plaintiff failed to request a trial de novo under N.C.R.Arb. 5(a) following the issuance of the arbitration award, plaintiff is precluded from seeking review on appeal. Accordingly, we dismiss this appeal. 679 S.E.2d at 512.

J. Overruling Previous Superior Court Judge

Wachovia Bank v. Harbinger Capital, ___ N.C. App.___, 687 S.E.2d 487 (2009) was an action seeking injunctive relief based on allegations that the defendant had purchased tort claims against Wachovia. Judge Bell entered a temporary restraining order and noticed the hearing on the motion for a preliminary injunction. Judge Ervin granted Wachovia's motion for a preliminary injunction. Before Judge Ervin entered a written order, he advised the parties of potential grounds for withdrawing from the case. At that time, there

were no objections. Thereafter, Wachovia raised objections to Judge Ervin remaining on the case. The Chief Justice then assigned the case to Judge Diaz as an exceptional case.

After a hearing, Judge Diaz modified Judge Ervin's preliminary injunction and allowed the defendants to assert additional claims against Wachovia. Wachovia appealed, arguing, among other grounds, that Judge Diaz was not permitted to modify the previous order of Judge Ervin. The Court of Appeals disagreed and affirmed the order of Judge Diaz.

> However, given that Judge Ervin's recusal barred him from revisiting the matter, we believe that Judge Diaz, because the case was reassigned to him by the Chief Justice, stepped into Judge Ervin's shoes and could, in his discretion, revisit the preliminary injunction and rule on it absent a finding of changed circumstances. 687 S.E.2d at 494.

K. Rule 41

Dunton v. Ayscue, ___ N.C. App.___, 690 S.E.2d 752 (2010) arose from personal injuries received by

the plaintiff in an automobile accident on 31 March 2006. Suit was filed on 30 November 2007, but was voluntarily dismissed without prejudice on 27 March 2008 as a result of the sheriff not being able to serve the defendant. A second suit was filed on 13 June 2008. The sheriff was not able to serve the defendant. The plaintiff filed a voluntary dismissal prejudice on 23 March 2009. Three minutes after filing the second dismissal, the plaintiff filed a third action on 23 March 2009 alleging the same facts and automobile accident as the two prior lawsuits. The defendant was served on 25 March 2009. The trial court granted the defendant's motion to dismiss pursuant to Rule 12(b)(6).

The Court of Appeals affirmed dismissal of the action. The plaintiff argued that the two dismissal rule did not apply because the defendant had not been served in the two previous actions, and,

therefore, was never before the court. The Court of Appeals disagreed.

> The fact that defendant was never served in either the first or second action, however, is not dispositive as to the application of the "two dismissal" rule in this case. This Court has held that even when the trial court lacks personal jurisdiction over the defendant, Rule 41(a)(1) bars a third successive action involving the same claim. . . . The plaintiff and unambiguous language of Rule 41(a)(1), however, does not require that a defendant be served in the prior two suits in order for the "two dismissal" rule to operate as a bar to a third successive suit based on the same claim. 690 S.E.2d at 754.

L. Summary Judgment

The plaintiff in Crocker v. Roethling, 363 N.C. 140, 675 S.E.2d 625, reh'g denied, 363 N.C. 140, 675 S.E.2d 625 (2009) alleged medical malpractice related to severe, permanent birth-related injuries. The trial court granted summary judgment to the defendants on the grounds that the only expert for the plaintiff applied a national standard of care and was insufficiently familiar

with the standard of practice in Goldsboro, the location where the delivery occurred.

The defendants took the discovery deposition of the plaintiff's expert, Dr. Elliott. In response to the defendants' motion for summary judgment, the plaintiff filed the affidavit of Dr. Elliott. Differing from Dr. Elliott's testimony at the deposition conducted by the defendants, the affidavit of Dr. Elliott stated that he was familiar with the hospital where the delivery occurred and the standard of care in Goldsboro. The Court of Appeals affirmed the trial court's grant of summary judgment on the grounds that there was not sufficient evidence that Dr. Elliott was familiar with the prevailing standard of care in Goldsboro.

The Supreme Court reversed the trial court's award of summary judgment to the defendants. The Supreme Court first acknowledged the standard of review for the trial court's exclusion or admission

of expert testimony was for abuse of discretion. The Supreme Court then addressed the issue of whether the trial court properly applied the standard of care in G.S. § 90-21.12 and the Rules of Evidence.

Although the Supreme Court addressed the issue on appeal as the proper application of the statutory standard of care, the Supreme Court's opinions focused on the procedures for a trial court considering a motion for summary judgment when an expert witness is involved as a basis for a claim by the non-moving party. Consideration of the precedential effect of the Court's opinion requires review of the decisions of Justice Hudson and Justice Martin and the analysis of Justice Newby.

The Court's opinion is given by Justice Hudson. Justice Hudson emphasizes that the deposition of the plaintiff's expert, Dr. Elliott, was a discovery deposition taken by the defendants.

Justice Hudson noted that the deposition of Dr. Elliott was "not in response to direct examination by plaintiffs, who would later have the burden of tendering the qualifications of the expert." 675 S.E.2d at 629. When the defendants moved for summary judgment, the plaintiff submitted the affidavit of Dr. Elliott. Although the trial judge stated that the affidavit of Dr. Elliott was considered, Justice Hudson concluded that the transcript of the summary judgment hearing raised an issue as to whether the affidavit was properly considered.

Justice Hudson reversed because of the conflict between Dr. Elliott's discovery deposition testimony and the affidavit submitted in opposition to the defendants' motion for summary judgment.

> In sum, we hold that in a medical malpractice case: 1) gaps in the testimony of the plaintiff's expert during the defendant's discovery deposition may not properly form the basis of summary judgment for the defendant; 2) the trial court should consider affidavits submitted by the plaintiff or his witnesses in

> opposition to the defendant's motion for summary judgment in accordance with Rule 56; 3) to determine whether the plaintiff has presented evidence admissible to meet his burden under N.C.G.S. § 90-21.12 and Rule 702, the trial court should apply the test set forth in State v. Goode; 4) to determine whether an expert's testimony satisfies the third prong under Goode of familiarity with the "same or similar community" standard of care, the trial court should apply well-established principles of determining relevancy under Evidence Rules 401 and 701; and, 5) once the plaintiff raises a genuine issue as to whether the defendant's conduct breached the relevant standard of care, the resolution of that issue is for the trier of fact, usually the jury, per N.C.G.S. § 90-21.12. 675 S.E.2d at 632.

A footnote in Justice Newby's opinion stated that the opinion of Justice Martin "is the controlling opinion" because Justice Martin's opinion is "the narrower." Justice Martin concluded that a different procedure should be applied upon remand to the trial court.

> When the proffered expert's familiarity with the relevant standard of care is unclear from the paper record, our trial courts should consider requiring the production of the expert for purposes of voir dire examination. In such situations, particularly when the

> admissibility decision may be outcome-determinative, the expense of voir dire examination and its possible inconvenience to the parties and the expert are justified in order to ensure a fair and just adjudication. Voir dire examination provides the trial court with the opportunity to explore the foundation of the expert's familiarity with the community, the method by which the expert arrived at his conclusion regarding the applicable standard of care, and the link between this method and the expert's ultimate opinion. Moreover, unlike the nonadversarial discovery process, counsel for both parties may participate equally in a voir dire hearing and help elicit all information relevant to the expert's qualifications and the admissibility of the proposed testimony. 675 S.E.2d at 634.

See also Barringer v. Forsyth County, ___ N.C. App.___, 677 S.E.2d 465, 474, disc. rev. denied, 363 N.C. 651, 684 S.E.2d 690 (2009) ("We remand this case to the trial court with instructions to conduct a voir dire examination of Dr. Mosca in order to 'determine the admissibility of the proposed experts testimony.'") (quoting Crocker).

IV. Trials

A. Demonstrations and Experiments

The defendant in State v. Witherspoon, ___ N.C. App.___, 681 S.E.2d 348 (2009), disc. rev. denied, ___ S.E.2d ___, 363 N.C. 812 (2010) was convicted of first degree murder of her husband. At trial, the investigating detective used a mannequin to demonstrate that the defendant could not have been standing at the position the defendant claimed when the gun discharged. Based on the medical examiner's testimony, the investigating detective then testified that the path of the bullet showed that the defendant would have been standing over the decedent at the time of the shooting. The defendant was convicted of first degree murder and sentenced to life imprisonment without parole.

On appeal, the defendant contended that the trial court should have excluded the in-court experiment because the conditions at trial were not

substantially similar to the conditions at the time of the shooting. The Court of Appeals disagreed and affirmed the trial court's allowance of the demonstration.

First, North Carolina recognizes a difference between an experiment and a demonstration. Evidence relating to an experiment must be conducted under conditions substantially similar to the conditions of the event that is the subject of the trial. A demonstration, however, does not require that the conditions be similar.

> In this case, the police were not performing an experiment with the mannequin's head and couch, but rather using the model to "illustrate or explain" the physical conditions existing at the time of the shooting, including the position of Quinn's head and the path and direction of the bullet. . . . The State then used this recreation of the crime scene to demonstrate that the shooting could not have occurred the way defendant claimed it did. . . . Accordingly, we hold that the evidence of the mannequin and the couch in this case amounted to a demonstration and not an experiment. The test for determining whether a demonstration is admissible "is whether, if relevant, the probative value of the

> evidence is 'substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury.'" 681 S.E.2d at 353.

See also State v. Anderson, ___ N.C. App.___, 684 S.E.2d 450 (2009) (demonstration through use by expert of toy doll admissible in prosecution of felonious child abuse inflicting serious bodily injury and second-degree murder after State established proper foundation.)

B. Experts

The defendant in State v. Meadows, ___ N.C. App.___, 687 S.E.2d 305, petition for disc. rev. filed (2010) was convicted of possession of cocaine and possession of drug paraphernalia. At trial, Captain Lewis, the investigating officer from the Onslow County Sheriff's Department, testified that the substance found in the defendant's possession was analyzed by the NarTest machine and determined to be cocaine. Captain Lewis testified about his use of the NarTest machine, but the State offered no evidence about the machine's methodology or the

reliability of the machine beyond the knowledge of Captain Lewis.

Relying on Howerton v. Arai Helmet, Ltd., 358 N.C. 440, 597 S.E.2d 674 (2004), the Court of Appeals held that the trial judge abused his discretion by allowing the testimony of Captain Lewis.

> The State did not present any evidence which would indicate that the NarTest machine uses an "established technique" for analysis of controlled substances or that the NarTest machine has been recognized by experts in the field of chemical analysis of controlled substances as a reliable testing method.
>
> Furthermore, Captain Lewis did not testify as to any other testing methods currently used to identify controlled substances and how the NarTest machine compares with those methods. During the trial, Captain Lewis admitted he had absolutely no evidence that the NarTest machine was even accurate . . . . 687 S.E.2d at 307-308.

The State also did not present any evidence as to the qualifications of Captain Lewis. Although he had been employed by the Sheriff's Department for thirteen years, he was not a chemist and had not

been certified by any agency of the State of North Carolina for use of the NarTest machine. Because the State did not present evidence of any of the Howerton "indices of reliability," there was an absence of reliability and acceptable methodology concerning the NarTest machine.

The defendant in State v. Ward, ___ N.C. App.___, 681 S.E.2d 354, disc. rev. granted, 363 N.C. 662, 686 S.E.2d 153 (2009) was convicted of trafficking in opium and other drugs. The only issue on appeal was the methodology used by the special agent of the State Bureau of Investigation to conclude that substances found on the defendant were valium, Ritalin and Oxycodone. The special agent testified that the SBI had subscribed and used Micromedics Literature for 35 years. The special agent then conducted a visual examination of the appearance of pharmaceutical markings on the substances, then compared that information with the

listings in the Micromedics Literature to reach the conclusion.

Addressing Howerton v. Arai Helmet, Ltd., 358 N.C. 440, 597 S.E.2d 674 (2004), the Court of Appeals noted that the first requirement, "is the expert's proffered method of proof sufficiently reliable as an area of expert testimony?," was the only issue. Stated differently, the Court's inquiry focused on whether visual identification is a sufficiently reliable basis for the expert conclusions of the special agent.

Previous decisions of the Supreme Court and the Court of Appeals held "that controlled substances . . . can only be identified through the use of a chemical analysis rather than through the use of lay testimony based on visual inspection." 681 S.E.2d at 371. Additionally, N.C.Gen.Stat. § 90-91(1)a defined the banned controlled substances in "technical, scientific" terms.

> Although Special Agent Allcox has an extensive background in the field of drug

> analysis, we do not believe the record in this case provides an adequate basis for concluding that his visual identification methodology was sufficiently reliable to support the admission of expert opinion testimony identifying particular items as controlled substances. As we have already noted, the approach utilized by Special Agent Allcox involved a visual inspection of the tablets and fragments in question and a comparison of the information gained through that process to material maintained in a medical reference book. We are not persuaded that, given the record in this case, such an approach is sufficiently reliable, particularly given the fact that, in North Carolina, controlled substances are statutorily defined in terms of their chemical composition. 681 S.E.2d at 371.

C. Evidence

(1) Refreshing Memory

The defendant in State v. Black, ___ N.C. App.___, 678 S.E.2d 689, appeal dismissed, 363 N.C. 657, 685 S.E.2d 108 (2009), was convicted of voluntary manslaughter and possession of a firearm by a felon. A witness for the State, Eduardo McConico, was not able to remember the events of the crime. He was allowed to review a transcript of his police interview. When McConico still had

difficulty remembering what had occurred, he was allowed to listen to an audio recording of the police interview. McConico was then allowed to testify in full before the jury.

The Court of Appeals affirmed and held that the trial judge had not abused his discretion in permitting McConico to read the transcript and listen to the audio recording of the interview.

> . . . McConico testified to some of the events of the night in question before being shown the transcript of his police interview. When McConico was shown the transcript, he was equivocal about whether or not he remembered making the statements found thereon. The trial court then allowed him to listen to the entire audio recording of his statements outside the presence of the jury. After hearing the tape, McConico admitted that the tape "refreshed his memory as to certain aspects of the case." McConico then testified in detail to the events of the night in question, apparently without further reference to the interview transcript. We conclude that this is not a case where the witness' testimony was "clearly a mere recitation of the refreshing memorandum, ..." Rather, there was "doubt as to whether the witness purporting to have a refreshed recollection was indeed testifying from his own recollection." The trial court

> . . . did not make an arbitrary or unreasonable decision. 678 S.E.2d at 692.

(2) Motions in Limine

Lail ex rel. Lail v. Bowman Gray School of Medicine, ___ N.C. App.___, 675 S.E.2d 370 (2009) was an action alleging medical malpractice arising from the birth of the minor plaintiff. The plaintiff-mother was treated initially at Grace Hospital in Morganton, then transferred to Forsyth Memorial Hospital for delivery of her child. As a result of complications after delivery, the mother and child were transferred to North Carolina Baptist Hospital. Separate suits were filed against Grace Hospital and Bowman Gray. After discovery, the action against Grace Hospital was settled. A jury determined that the plaintiffs were not injured by the negligence of the Bowman Gray defendants.

The pretrial order stated that the parties "would have motions in limine to be heard prior to trial." The deposition of Dr. Berry was taken as

part of discovery in the Grace Hospital case. Dr. Berry was a defendant in the Bowman Gray case. Dr. Berry moved to exclude use of his Grace Hospital deposition in the Bowman Gray case. Dr. Berry's motion was denied by Judge Kincaid. Judge Cromer, the trial judge, excluded the Grace Hospital deposition of Dr. Berry. The Court of Appeals affirmed Judge Cromer's ruling excluding Dr. Berry's deposition because the plaintiff had not called Dr. Berry to testify or otherwise offered his deposition into evidence.

> A trial court's ruling on a motion in limine is preliminary and is subject to change depending on the actual evidence offered at trial. The granting or denying of a motion in limine is not appealable. To preserve the evidentiary issue for appeal where a motion in limine has been granted, the non-movant must attempt to introduce the evidence at trial. 575 S.E.2d at 375.

The plaintiff also complained of the "surprise" causation opinions offered by Dr. Block at trial. The plaintiff argued that Dr. Block had not been properly identified as an expert witness and that

his trial opinions differed from his treatment records. The Court of Appeals held that the trial judge had correctly permitted Dr. Block to testify.

> A plaintiff is entitled to a new trial if in response to a proper request he is not given "the opportunity to depose [all testifying expert witnesses] prior to trial and adequately prepare for his cross-examination." . . . . However, the rule does not apply to an "expert whose information was not acquired in preparation for trial but rather because he was an actor or viewer with respect to transactions or occurrences that are part of the subject matter of the lawsuit." . . . . We conclude that all of Dr. Block's testimony, including his testimony about why discharge summaries sometimes contain errors and omissions, was derived from his participation, as treating physician, in the events that give rise to this lawsuit. As such, Dr. Block was excluded from mandatory designation as an expert witness. 675 S.E.2d at 376, 378.

D. Punitive Damages

The trial court in Scarborough v. Dillard's Inc., 363 N.C. 715, ___S.E.2d ___ (2009) granted judgment notwithstanding the verdict as to the jury's award of punitive damages. Finding that the trial court had applied the proper statutory

requirements, the Supreme Court affirmed the trial court.

The plaintiff was employed part-time in the ladies' shoe department at Dillard's. Based on the observations of two co-employees, the plaintiff was informed that he was suspected of allowing two customers to leave the store with shoes without paying for the shoes. The subsequent investigation by Dillard's included interviews of the plaintiff and other employees. The plaintiff was terminated by Dillard's for embezzlement. A security guard at Dillard's who was also a member of Charlotte-Mecklenburg Police Department presented these facts to a Mecklenburg County assistant district attorney. A grand jury indicted the plaintiff. The plaintiff was arrested at his full-time job at First Union Bank. His employment was thereafter terminated pending a resolution of the charges. A jury found the plaintiff not guilty.

The plaintiff filed the present action for malicious prosecution. A jury awarded the plaintiff $30,000 in compensatory damages and $77,000 in punitive damages. The trial court granted the defendant's motion for JNOV as to the award of punitive damages.

In affirming the trial court, the Supreme Court first addressed the standard of review for the trial court's grant of JNOV.

> . . . we hold that in reviewing a trial court's ruling on a motion for judgment notwithstanding the verdict on punitive damages, our appellate courts must determine whether the nonmovant produced clear and convincing evidence from which a jury could reasonably find one or more of the statutory aggravating factors required by N.C.C.G. § 1D-15(a) and that that aggravating factor was related to the injury for which compensatory damages were awarded. Reviewing the trial court's ruling under the "more than a scintilla of evidence" standard does not give proper deference to the statutory mandate that the aggravating factor be proved by clear and convincing evidence. Evidence that is only more than a scintilla cannot as a matter of law satisfy the nonmoving party's threshold statutory burden of clear and convincing evidence. ___ S.E.2d at ___.

Although G.S. § 1D-50 requires that the trial court "shall state in a written opinion its reasons for upholding or disturbing the finding or award" of punitive damages, findings of fact are not required. Instead, the trial court "shall address with specificity the evidence, or lack thereof, as it bears on the liability for or the amount of punitive damages." ___S.E.2d at ___.

The investigation by Dillard's and the trial court's written reasoning relating the investigation to the award of punitive damages were legally sufficient for the grant of JNOV.

> Although defendant's investigation may not have been perfect and could perhaps have included statements from additional witnesses, . . . plaintiff has not adduced any evidence that this additional investigation that plaintiff thinks could have been conducted would have changed the officers' decision to present the case to the ADA. We simply do not know what any additional investigation would have revealed. ___S.E.2d at ___.

Justices Timmons-Goodson and Hudson dissented.

The plaintiff in Everhart v. O'Charley's Inc., ___ N.C. App.___, 683 S.E.2d 728 (2009) was eating with her family at the defendant's restaurant at Hanes Mall in Winston-Salem on 9 September 2006. When the server went to get a water pitcher to refill the plaintiff's water glass, he mistakenly picked up a pitcher containing the cleaning solution, Auto-Clor System Solution-QA Sanitizer. After Mrs. Everhart took several sips through a straw, she immediately complained of an unfamiliar taste and chemical smell. When she went to the bathroom, the server came back to the table and took the glass from which she had been drinking.

The assistant dining room manager, Byron Witherspoon, then came by the plaintiff's table and began asking questions in order to complete the defendant's "Customer Accident/Incident Report." Although Mr. Everhart repeatedly questioned Mr. Witherspoon about the substance his wife had ingested, Mr. Witherspoon ignored these questions

and continued to complete the form. The label on the Auto-Clor stated that if the substance had been ingested, the poison control center should be contacted immediately, the person ingesting the substance should not attempt to throw up and the person ingesting the substance should attempt to drink water. Mrs. Everhart returned from the bathroom and left immediately with her husband to go to the hospital. Mr. Witherspoon did not attempt to determine the identity of the substance she ingested. When Mrs. Everhart arrived at the hospital, the doctor providing treatment had to call the defendant to determine the identity of the substance she had ingested.

At trial, the defendant successfully moved in limine to prevent the introduction of evidence of an event in 2004 at one of the defendant's restaurants in Florida in which a patron had been served bleach. The Florida incident had not been reported to other restaurants of the defendant.

Kevin Alexander, a regional operations manager of the defendant, was called an adverse witness by the plaintiff. During cross-examination by counsel for O'Charley's, Mr. Alexander was asked whether the incident involving Mrs. Everhart was reported to other restaurants by the defendant. Mr. Alexander confirmed that the incident had been reported to all stores in order that the stores would be reminded of proper procedures to avoid this type of incident. Over objection, the trial court ruled that the plaintiff could introduce evidence of the Florida incident because the cross-examination of Mr. Alexander opened the door for the evidence. The Court of Appeals affirmed.

> It is well established that "where one party introduces evidence of a particular fact, the opposing party is entitled to introduce evidence in explanation or rebuttal thereof, even though the rebuttal evidence would be incompetent or irrelevant had it been offered initially." . . . . The testimony elicited by O'Charley's counsel when questioning Mr. Alexander would have permitted the jury to draw the favorable inference that once O'Charley's had notice of an incident, it

> would take corrective measures to ensure that such an incident would not happen again, thus negating the need to impose punitive damages to deter further misconduct. Ms. Everhart was entitled to attempt to rebut this inference by showing that O'Charley's, when it received notice of similar allegations on a prior occasion, did not advise it regional operations directors of these allegations. 683 S.E.2d at 734.

On motion of the defendant, the issue of punitive damages was bifurcated from the trial of liability and compensatory damages. The jury awarded the plaintiff $10,000 in compensatory damages and $350,000 in punitive damages. The trial judge reduced the punitive damages award to $250,000. The Court of Appeals affirmed, concluding that the evidence at trial was sufficient to support the jury's finding of willful or wanton conduct. The Court relied primarily on the conduct of Mr. Witherspoon in ignoring Mr. Everhart's inquiry about the identity of the substance and the nature of Mrs. Everhart's injury in order that he could complete the accident report. Additionally,

Mr. Witherspoon made no effort to locate the substance or the warning labels on the container. The Court of Appeals found that a reasonable jury could conclude that Mr. Witherspoon gave preference to protecting O'Charley's litigation interests over rendering aid to Mrs. Everhart.

O'Charley's also argued that punitive damages could not be awarded against the defendant based on vicarious liability. The Court of Appeals disagreed, concluding that Mr. Witherspoon was following O'Charley's corporate policies.

> Mr. Witherspoon testified that in his interaction with the Everharts, he was simply following O'Charley's corporate policy of completing the incident report form before investigating the nature of the incident. . . . A corporation may be subject to punitive damages based on a theory of direct liability where the corporation's acts or policies constitute the aggravation factor. 683 S.E.2d at 737.

O'Charley's contended that Mr. Witherspoon's conduct was required to be a cause of Mrs. Everhart's injuries in order for punitive damages

to be awarded. Relying on G.S. § 1D-15(c), the Court held that the plaintiff was required to prove only that the injuries were related to the aggravating conduct.

> Thus, contrary to O'Charley's argument, Ms. Everhart was not required to prove that the willful and wanton conduct caused Ms. Everhart's injuries, but rather was required to prove a connection between that conduct and her injuries. 683 S.E.2d at 739.

Finally, the Court conducted the required review of the punitive damages award pursuant to BMW of N. Am., Inc. v. Gore, 517 U.S. 559 (1996) and found the award met constitutional guidelines, including the 25:1 ratio.

Land v. Land, ___ N.C. App.___, 687 S.E.2d 511 (2010) involved a dispute concerning a family business. The defendants filed a motion requesting that the trial court bifurcate the liability and damages phases of the case. The trial court granted the defendants' motion. The jury answered the issues in favor of the plaintiffs and

determined that the defendants were liable for compensatory and punitive damages. The trial judge discharged the jury without objection from any party.

The defendants appealed, arguing, among other grounds, that it was error to discharge the jury and that the defendants were entitled to have the same jury decide the issue of the amount of punitive damages pursuant to G.S. § 1D-30. The Court of Appeals disagreed and found no abuse of discretion by the trial judge in discharging the jury.

> We hold that when a motion to bifurcate is pursuant to N.C.Gen.Stat. § 1D-30, then the trial court is obliged to follow the procedures set forth in that statute. However, where the motion to bifurcate is made under the more general provision of Rule 42(b) of the Rules of Civil Procedure, the trial court is not so bound. Decisions of the trial court to bifurcate trial proceedings are reviewed by an appellate court under an abuse of discretion standard. . . . Given the extensive nature of the damages discovery, yet to be conducted, the trial court did not err in releasing the jury at the

conclusion of the liability phase of the trial. 687 S.E.2d at 517-518.

E. Rule 59(a)(1) – Motion for New Trial

Boykin v. Wilson Medical Center, ___ N.C. App.___, 686 S.E.2d 913 (2009), disc. rev. denied, 363 N.C. 853, ___ S.E.2d ___ (2010), involved allegations of medical negligence. When trial began, both parties told the trial judge that the case would take at least seven days to try. Based on the trial judge's schedule, the jury reached a verdict at 10:45 p.m. on the fourth day of trial. Several of the trial days consumed at least twelve hours, with court concluding after 9:00 p.m. each day. After forty-five minutes of deliberations, the jury determined that the defendants were not negligent. The trial judge granted the plaintiff's motion for a new trial pursuant to Rule 59(a)(1) on the basis of the "marathon trial schedule."

Finding no abuse of discretion and that the plaintiff did not invite error, the Court of

Appeals affirmed the trial court's grant of a new trial. Noting that the trial judge's discretion to grant a new trial is "practically unlimited," the Court referenced the trial judge's involvement in the trial as the basis for observing the conduct of the trial and the trial judge's "superior advantage in best determining what justice requires in a certain case." 686 S.E.2d at 916. The Court also concluded that the failure of the plaintiff to object to the trial schedule "cannot be said to have 'occurred through the fault of the party now complaining.'" 686 S.E.2d at 916.