ARBITRATION MANUSCRIPT TABLE OF CONTENTS

MANUSCRIPT FOR ARBITRATION PRESENTATION
TO SUMMER 2012 JUDGES' CONFERENCE

I. SCOPE OF MANUSCRIPT

- **What is covered in this manuscript?**

The cases cited in this presentation apply to the North Carolina version of the Revised Uniform Arbitration Act (Article 45C of Chapter 1 of the North Carolina General Statutes 1-569.1 to 1-569.31) and the earlier Uniform Arbitration Act (Article 45A of Chapter 1 of the North Carolina General Statutes 1-567.1 to 1-567.20 which was repealed effective January 1, 2004).

The Revised Uniform Arbitration Act governs an agreement to arbitrate made on or after January 1, 2004 (N. C. Gen. Stat. 1-569.3(a)). The Revised Uniform Arbitration Act governs an agreement to arbitrate made before January 1, 2004, if all parties to the agreement or to the arbitration proceeding agree in a record that the Act applies (N. C. Gen. Stat. 1-569.3(b)). The Revised Uniform Arbitration Act does not govern arbitrations under Article 1H of Chapter 90 of the General Statutes (N. C. Gen. Stat. 1-569.3(c)).

- **What is not covered in this manuscript?**

This manuscript does not attempt to address the provisions of or cases under the Federal Arbitration Act.

This manuscript does not attempt to address the provisions of or cases under the International Commercial Arbitration and Conciliation Act (N. C. Gen. Stat. 1-567.30 to 1-567.87).

This manuscript does not address the provisions of or cases under the Family Law Arbitration Act set forth in N. C. Gen. Stat. Chapter 50 (N. C. Gen. Stat. 50-41 to 50-62) and the use of arbitration in domestic matters.

This manuscript does not address the Rules for Court-Ordered Arbitration in North Carolina and the cases applying those rules.

This manuscript does not address the provisions of or cases concerning the Voluntary Arbitration of Labor Disputes contained in Article 4A of Chapter 95 of the North Carolina General Statutes (N. C. Gen. Stat. 95-36.1 to 95-36.9).

This manuscript does not address the provisions of or cases concerning the Voluntary Arbitration of Negligent Health Care Claims contained in Article 1H of Chapter 90 of the North Carolina General Statutes (N. C. Gen. Stat. 90-21.60 to 90-21.69).

II. POLICY OVERVIEW

- **Strong Policy Favoring Arbitration**

There exists in North Carolina a strong public policy in favor of settling disputes by arbitration. Smith v. Young Moving & Storage, Inc., 141 N. C. App. 469, 540 S. E. 2d 383 (2000); Carteret County v. United Contractors of Kinston, 120 N. C. App. 336, 462 S. E. 2d 816 (1995); Prime South Homes, Inc. v. Byrd, 102 N. C. App. 255, 401 S. E. 2d 822 (1991).

North Carolina public policy strongly favors arbitration. Boynton v. ESC Medical Systems, Inc., 152 N. C. App. 103, 566 S. E. 2d 730 (2002).

North Carolina has a strong public policy favoring settlement of disputes by arbitration. Johnston County v. R. N. Rouse & Co., 331 N. C. App. 88, 414 S. E. 2d 30 (1992); N. C. Farm Bureau Mutual Ins. Co. v. Sematoski, 195 N. C. App. 304, 672 S. E. 2d 90 (2009); Register v. White, 160 N. C. App. 657, 587 S. E. 2d 95 (2003).

North Carolina public policy favors settling disputes by arbitration. Bass v. Pinnacle Custom Homes, Inc., 163 N. C. App. 171, 592 S. E. 2d 606 (2004); Palmer v. Duke Power Co., 129 N. C. App. 488, 499 S. E. 2d 801 (1998).

The public policy of this State, like federal policy, favors arbitration. Sholar Business Associates v. Davis, 138 N. C. App. 298, 531 S. E. 2d 236 (2000); Rodgers Builders, Inc. v. McQueen, 76 N. C. App. 16, 331 S. E. 2d. 726 (1985).

The public policy includes, however, the judicial admonition that a party who has selected this form of adjudication must be content with the results. Thomas v. Howard, 51 N. C. 350, 276 S. E. 2d 743 (1981).

- **Purpose of Arbitration**

The intent of the legislature in enacting the Uniform Arbitration Act was to encourage parties to submit disputed matters to arbitration when feasible and expedient. This policy of encouraging arbitration is consistent with federal policy regarding arbitration. Blow v. Shaughnessy, 68 N. C. App. 1, 313 S. E. 2d 868 (1984).

The principal legislative purpose behind enactment of the Revised Uniform Arbitration Act is to provide and encourage an expedited, efficient, relatively uncomplicated, alternative means of dispute resolution, with limited judicial intervention or participation and without the primary expense of litigation—attorney's fees. Indeed, the purpose of arbitration is to reach a final settlement of the disputed matters without litigation. Gemini Drilling and Foundation, LLC v. National Fire Ins. Co. of Hartford, 192 N. C. App. 376, 665 S. E. 2d 505 (2008).

Arbitration is a process to privately adjudicate a final and binding settlement of disputed matters quickly and efficiently, without the costs and delays inherent in litigation. Parties agree to arbitration in order to avoid the costs and delays associated with litigation, specifically the costs

and delays, inherently incurred in civil discovery. Apply the Rules of Civil Procedure and Evidence to arbitration negates the very purpose for agreeing to arbitration. The procedural and evidentiary rules governing judicial proceedings do not apply to arbitrations absent plain and unambiguous language in the arbitration agreement that those rules apply. Capps v. Virrey, 184 N. C. App. 267, 645 S. E. 2d 825 (2007).

The purpose of arbitration is to settle matters in controversy and avoid litigation. Carolina Virginia Fashion Exhibitors, Inc. V. Gunter, 41 N. C. App. 407, 255 S. E. 2d 418 (1979).

The purpose of arbitration is to reach a final settlement of disputed matters without litigation, and it is well established that the parties, who have agreed to abide by the decision of a panel of arbitrators, will not generally be heard to attack the regularity or fairness of the award. G. L. Wilson Building Co. v. Throneburg Hosiery Co., Inc., 85 N. C. 684, 355 S. E. 2d 815 (1987); Thomas v. Howard, 51 N. C. 350, 276 S. E. 2d 843 (1981).

The advantages of arbitration include reduction of court congestion, speed, economy, finality and an opportunity for the parties to choose the judges who resolve their dispute. Sholar Business Associates v. Davis, 138 N. C. App. 298, 531 S. E. 2d 236 (2000).

Arbitration also poses disadvantages in that parties to arbitration enjoy limited appellate review and have no recourse when an arbitrator makes a mistake. Sholar Business Associates v. Davis, 138 N. C. App. 298, 531 S. E. 2d 236 (2000).

- **No Constitutional Prohibition**

An agreement to arbitrate a dispute is not an unenforceable contract requiring a waiver of a jury and there is no constitutional impediment to arbitration agreements. Carteret County v. United Contractors of Kinston, 120 N. C. App. 336, 462 S. E. 2d 816 (1995).

The Court of Appeals has repeatedly held that the enforcement of arbitration agreements does not violate a party's constitutional right to a jury trial An agreement to arbitrate is not an unenforceable contract requiring waiver of a jury and there is no constitutional impediment to arbitration agreements. Kiell v. Kiell, 179 N. C. App. 396, 633 S. E. 2d 827 (2006).

III. INTERACTION WITH FEDERAL ARBITRATION ACT

- **Federal Policy**

The United States Supreme Court has indicated that Section 2 of the Federal Arbitration Act is a "congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." Carpenter v. Brooks, 139 N. C. App. 745, 534 S. E. 2d 641 (2000); Blow v. Shaughnessy, 68 N. C. App. 1, 313 S. E. 2d 868 (1984).

- **Whether the Federal Act or the State Act Applies**

The Federal Arbitration Act applies where there is a contract evidencing a transaction involving "commerce." Commerce is defined by the Federal Act as interstate or foreign commerce. Securities brokerage contracts fall within the broad construction of the term commerce. Carpenter v. Brooks, 139 N. C. App. 745, 534 S. E. 2d 641 (2000).

When an arbitration dispute involves a contract affecting interstate commerce, it is governed by the Federal Arbitration Act. First Union Securities, Inc. v. Lorelli, 168 N. C. App. 398, 607 S. E. 2d 674 (2005).

The FAA governs any contract evidencing a transaction involving commerce. The FAA's term involving commerce is considered the functional equivalent of affecting commerce. It is broader than the term in commerce and signals intent to exercise Congress' commerce power to the full. Advantage Assets, Inc. II v. Howell, 190 N. C. App. 443, 663 S. E. 2d 8 (2008); WMS, Inc. v. Weaver, 166 N. C. App. 352, 602 S. E. 2d 706 (2004).

The FAA will apply if the contract evidences a transaction involving interstate commerce. Hobbs Staffing Services, Inc. v. Lumbermens Mutual Casualty Co., 168 N. C. App. 223, 606 S. E. 2d 708 (2005).

If the contract does not involve or affect commerce outside of North Carolina, then the Federal Act does not apply. N. C. Farm Bureau Mutual Ins. Co. v. Sematoski, 195 N. C. App. 304, 672 S. E. 2d 90 (2009).

Before the FAA applies to a contract, the contract must either relate to a maritime transaction or evidence a transaction involving commerce. Eddings v. Southern Orthopedic & Musculoskeletal Assocs., P. A., 147 N. C. App. 375, 555 S. E. 2d 649 (2001), reversed on the grounds set forth in the dissenting opinion, 356 N. C. 286, 569 S. E. 2d 645 (2002).

The question whether the Federal Arbitration Act or the North Carolina Act applies is a question of fact which should be determined by the trial court. U. S. Trust Co., N. A. v. Stanford Group, Inc. 199 N. C. App. 287, 681 S. E. 2d 512 (2009).

- **When the Federal Arbitration Act applies**

The United States Supreme Court has held that the FAA contains no express preemptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration. Because state law is preempted only to the extent that it actually conflicts with federal law, we must therefore determine whether application of the Revised Uniform Arbitration Act would undermine the goals and policies of the Federal Arbitration Act. Scottish Re Life Corp. v. Transamerica Occidental Life Ins. Co., 184 N. C. App. 292, 647 S. E. 2d 102 (2007). (FAA did not preempt State Act in this case.)

The threshold determination whether the alleged arbitration agreement is governed by the Federal Arbitration Act or state law cannot be bypassed as the FAA preempts conflicting state

law, including state law addressing the role of courts in reviewing arbitration awards. Advantage Assets, Inc. II v. Howell, 190 N. C. App. 443, 663 S. E. 2d 8 (2008).

The FAA preempts conflicting state law, including state law addressing the role of courts in reviewing arbitration awards. N. C. Farm Bureaus Mutual Ins. Co. v. Sematoski, 195 N. C. App. 304, 672 S. E. 2d 90 (2009); WMS, Inc. v Weaver, 166 N. C. App. 352, 602 S. E. 2d 706 (2004).

If the FAA requires that a particular question be determined by the arbitrators, while state law would allow a court to address the issue, the FAA controls. WMS, Inc. v Weaver, 166 N. C. App. 352, 602 S. E. 2d 706 (2004).

The Federal Arbitration Act preempts N. C. Gen. Stat. 22B-3's provisions prohibiting forum selection clauses. Boynton v. ESC Medical System, Inc., 152 N. C. App. 103, 566 S. E. 2d 730 (2002). See also Szymcyk v. Signs Now Corp., 168 N. C. App. 182, 606 S. E. 2d 728 (2005).

Where the Federal Arbitration Act applies to the contract, the federal act supercedes conflicting state law even if the contract has a choice of law provision. Sillins v. Ness, 164 N. C. App. 755, 596 S. E. 2d 874 (2004); Carpenter v. Brooks, 139 N. C. App. 745, 534 S. E. 2d 641 (2000).

- **What if Neither the North Carolina Act nor the Federal Arbitration Act Applies**

When an arbitration agreement is not a contract to arbitrate under the North Carolina Act, then the common law rule applies. The common law rule provides that it is settled law in this jurisdiction, that when a cause of action has arisen, the courts cannot be ousted of their jurisdiction by an agreement, previously entered into, to submit the rights and liabilities of the parties to arbitration or to some other tribunal named in the agreement. If neither the Federal Arbitration Act nor the UAA governs an arbitration agreement, then a court has no authority to compel arbitration. Sillins v. Ness, 164 N. C. App. 755, 596 S. E. 2d 874 (2004).

IV. GENERAL PROVISIONS

- **Waiver of Provisions of the Revised Uniform Arbitration Act**

§ 1-569.4. Effect of agreement to arbitrate; nonwaivable provisions.

(a) Except as otherwise provided in subsections (b) and (c) of this section, a party to an agreement to arbitrate or to an arbitration proceeding may waive, or the parties may vary the effect of, the requirements of this Article to the extent provided by law.

(b) Before a controversy arises that is subject to an agreement to arbitrate, a party to the agreement may not:

(1) Waive or agree to vary the effect of the requirements of G.S. 1-569.5(a), 1-569.6(a), 1-569.8, 1-569.17(a), 1-569.17(b), 1-569.26, or 1-569.28;

(2) Agree to unreasonably restrict the right under G.S. 1-569.9 to notice of the initiation of an arbitration proceeding;

(3) Agree to unreasonably restrict the right under G.S. 1-569.12 to disclosure of any facts by a neutral arbitrator; or

(4) Waive the right under G.S. 1-569.16 of a party to an agreement to arbitrate to be represented by an attorney at any proceeding or hearing under this Article, but an employer and a labor organization may waive the right to representation by a lawyer in a labor arbitration.

(c) A party to an agreement to arbitrate or to an arbitration proceeding may not waive, or the parties shall not vary the effect of, the requirements of this section or G.S. 1-569.3(a), 1-569.7, 1-569.14, 1-569.18, 1-569.20(d), 1-569.20(e), 1-569.22, 1-569.23, 1-569.24, 1-569.25(a), 1-569.25(b), 1-569.29, 1-569.30, 1-569.31. Any waiver contrary to this section shall not be effective but shall not have the effect of voiding the agreement to arbitrate. (2003-345, s. 2.)

The parties to an arbitration agreement may make an agreement to follow rules other than those specified in the statute. Marolf Construction, Inc. v. Allen's Paving Co., 154 N. C. App. 723, 572 S. E. 2d 861 (2002).

- **Jurisdiction**

§ 1-569.26. Jurisdiction.

(a) A court of this State having jurisdiction over the controversy and the parties to an agreement to arbitrate may enforce the agreement to arbitrate.

(b) An agreement to arbitrate providing for arbitration in this State confers exclusive jurisdiction on the court to enter judgment on an award under this Article. (1927, c. 94, s. 3; 1973, c. 676, s. 1; 2003-345, s. 2.)

- **Venue**

§ 1-569.27. Venue.

A motion pursuant to G.S. 1-569.5 shall be made in the court of the county in which the agreement to arbitrate specifies the arbitration hearing is to be held or, if the hearing has been held, in the court of the county in which it was held. Otherwise, the motion may be made in the court of any county in which an adverse party resides or has a place of business or, if no adverse party has a residence or place of business in this State, in the court of any county in this State. All subsequent motions shall be made in the court hearing the initial motion unless the court otherwise directs. (2003-345, s. 2.)

- **Enjoining Arbitration**

A trial court can enjoin an arbitration when the matter has been tried in another court and the claims are barred by *res judicata* or collateral estoppel. It is within the authority of the trial court to determine whether the subject matter of the demand for arbitration had been previously litigated between the parties and reduced to a judgment binding upon them. C & O Development Company v. American Arbitration Association, 48 N. C. 548, 269 S. E. 2d 685 (1980).

An order staying arbitration pending the trial courts' determination whether the party was induced to execute an agreement to arbitrate by fraud and misrepresentation is not subject to an

immediate interlocutory appeal. Peloquin Associates, P. A. v. Polcaro, 61 N. C. App. 345, 300 S. E. 2d 477 (1983).

V. COMPELLING ARBITRATION

- **Substantive Aspects of a Motion to Compel Arbitration**

    - **Existence of an agreement to arbitrate**

§ 1-569.6. Validity of agreement to arbitrate.

(a) An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for revoking a contract.

(b) The court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate.

(c) An arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled and whether a contract containing a valid agreement to arbitrate is enforceable.

(d) If a party to a judicial proceeding challenges the existence of, or claims that a controversy is not subject to an agreement to arbitrate, the arbitration proceeding may continue pending final resolution of the issue by the court, unless the court otherwise orders. (1927, c. 94, s. 1; 1973, c. 676, s. 1; 1975, c. 19, s. 1; 2003-345, s. 2.)

§ 1-569.7. Motion to compel or stay arbitration.

(a) On motion of a person showing an agreement to arbitrate and alleging another person's refusal to arbitrate pursuant to the agreement:

(1) If the refusing party does not appeal or does not oppose the motion, the court shall order the parties to arbitrate; and

(2) If the refusing party opposes the motion, the court shall proceed summarily to decide the issue and order the parties to arbitrate unless it finds that there is no enforceable agreement to arbitrate.

(b) On motion of a person alleging that an arbitration proceeding has been initiated or threatened but that there is no agreement to arbitrate, the court shall proceed summarily to decide the issue. If the court finds that there is an enforceable agreement to arbitrate, it shall order the parties to arbitrate.

(c) If the court finds that there is no enforceable agreement to arbitrate, it shall not, pursuant to subsection (a) or (b) of this section, order the parties to arbitrate.

(d) The court shall not refuse to order arbitration because the claim subject to arbitration lacks merit or because grounds for the claim have not been established.

(e) If a proceeding involving a claim referable to arbitration under an alleged agreement to arbitrate is pending in a court, a motion under this section shall be made in that court. Otherwise a motion under this section may be made in any court as provided in G.S. 1-569.27.

(f) If a party makes a motion to the court to order arbitration, the court on just terms shall stay any judicial proceeding that involves a claim alleged to be subject to the arbitration until the court renders a final decision under this section.

(g) If the court orders arbitration, the court on just terms shall stay any judicial proceeding that involves a claim subject to the arbitration. If a claim subject to the arbitration is severable, the court may limit the stay to that claim. (1973, c. 676, s. 1; 2003-345, s. 2.)

- **Agreement Essential**

This public policy does not come into play unless a court first finds that the parties entered into an enforceable agreement to arbitrate. As the United States Supreme Court has stressed, arbitration is simply a matter of contract between the parties; it is a way to resolve disputes—but only those disputes—that the parties have agreed to submit to arbitration. D. P. Solutions, Inc. v. Xplore-Tech Services Private Limited, ___ N. C. App. ___, 710 S. E. 2d 297 (2011); Evangelistic Outreach Center v. General Steel Corp., 181 N. C. App. 723, 640 S. E. 2d 840 (2007).

A dispute can only be settled by arbitration if a valid arbitration agreement exists. The party seeking arbitration must show that the parties mutually agreed to arbitrate their disputes. Slaughter v. Swicegood, 162 N. C. App. 457, 591 S. E. 2d 577 (2004).

Only when a valid arbitration agreement exists can a matter be settled by arbitration. The party seeking arbitration must show that the parties mutually agreed to arbitrate their disputes. Culberson v. REO Properties Corp., 194 N. C. App. 793, 670 S. E. 2d 316 (2009).

Before a dispute can be arbitrated, there must first exist a valid agreement to arbitrate. Routh v. Snap-On Tools Corp, 108 N. C. App. 268, 423 S. E. 2d 791 (1992).

Before a dispute can be ordered resolved through arbitration, there must be a valid agreement to arbitrate. Raspet v. Buck, 147 N. C. App. 133, 554 S. E. 2d 676 (2001).

A party cannot be forced to submit to arbitration of any dispute unless he has agreed to do so. Emmanuel African Methodist Church v. Reynolds Construction Co., ___ N. C. App. ___, 718 S. E. 2d 261 (2011); Raspet v. Buck, 147 N. C. App. 133, 554 S. E. 2d 676 (2001).

Before a dispute can be settled by arbitration, there must first exist a valid agreement to arbitrate. Pressler v. Duke University, 199 N. C. App. 586, 685 S. E. 2d 6 (2009); Burgess v. Jim Walter Homes, Inc., 161 N. C. App. 488, 588 S. E. 2d 575 (2003); Sciolino v. TD Waterhouse Investor Services, Inc., 149 N. C. App. 642, 562 S. E. 2d 64 (2002).

While public policy favors arbitration, parties may not be compelled to arbitrate their claims unless there exists a valid agreement to arbitrate. The party seeking to compel arbitration must prove the existence of a mutual agreement to arbitrate. Thompson v. Norfolk Southern Railway Co., 140 N. C. App. 115, 535 S. E. 2d 397 (2000).

Whether a dispute is subject to arbitration is a matter of contract law. Raspet v. Buck, 147 N. C. App. 133, 554 S. E. 2d 676 (2001). Parties to an arbitration must specify clearly the scope and terms of their agreement to arbitrate. Id.

The law of contracts governs the issue of whether there exists an agreement to arbitrate. Harbour Point Homeowners' Association, Inc. v. DJF Enterprises, Inc., ___ N. C. App. ___, 688 S. E. 2d 47 (2010); D & R Construction Co. v. Blanchard's Grove Missionary Baptist Church, 193 N. C. App. 426, 667 S. E. 2d 305 (2008); Burgess v. Jim Walter Homes, Inc., 161 N. C. App. 488, 588 S. E. 2d 575 (2003); Routh v. Snap-On Tools Corp, 108 N. C. App. 268, 423 S. E. 2d 791 (1992).

Contract law determines whether a dispute is subject to arbitration. Boynton v. ESC Medical System, Inc., 152 N. C. App. 103, 566 S. E. 2d 730 (2002).

Where the trial court determines that the parties entered into an enforceable contract providing for arbitration, the court shall order the parties to proceed to arbitration. Accordingly, where the court concludes that no agreement to arbitrate exists, the court will grant the moving party's motion to stay arbitration. Barnhouse v. American Express Financial Advisors, Inc., 151 N. C. App. 507, 566 S. E. 2d 130 (2002).

- **Preference for Arbitration**

A presumption in favor of arbitration exists. Hobbs Staffing Services, Inc. v Lumbermens Mutual Casualty Co., 168 N. C. App. 223, 606 S. E. 2d 708 (2005).

Where there is any doubt concerning the existence of an arbitration agreement, it should be resolved in favor of arbitration. Douglas v. McVicker, 150 N. C. App. 705, 564 S. E. 2d 622 (2002).

Doubts over whether a certain issue is appropriate for arbitration should be resolved in a manner which favors arbitration. This is true whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay or a like defense to arbitration. Capps v. Virrey, 184 N. C. App. 267, 645 S. E. 2d 825 (2007).

When a party claims a dispute is covered by an agreement to arbitrate and the other party denies the existence of an arbitration agreement, the trial court must determine whether an arbitration agreement actually exists. The question of whether a dispute is subject to arbitration is an issue for judicial determination. Moose v. Versailles Condominium Association, 171 N. C. App. 377, 614 S. E. 2d 418 (2005).

Public policy requires courts to resolve any doubts in favor of arbitration. Ruffin Woody and Associates v. Person County, 92 N. C. App. 129, 374 S. E. 2d 165 (1988).

Unless it can be said with confident authority that the arbitration clause cannot be read to include the asserted dispute, the court should grant the parties' motion to arbitrate the particular grievance. Hobbs Staffing Services, Inc. v Lumbermens Mutual Casualty Co., 168 N. C. App. 223, 606 S. E. 2d 708 (2005).

- **Standard for deciding whether to compel arbitration**

In considering a motion to compel arbitration, the trial court must determine (1) whether the parties have a valid agreement to arbitrate, and (2) whether the subject in dispute is covered by the arbitration agreement. Moose v. Versailles Condominium Association, 171 N. C. App. 377, 614 S. E. 2d 718 (2005); Bass v. Pinnacle Custom Homes, Inc., 163 N. C App. 171, 592 S. E. 2d 606 (2004); Register v. White, 160 N. C. App. 657, 587 S. E. 2d 95 (2003).

The determination involves a two-pronged analysis in which the court must ascertain both (1) whether the parties had a valid agreement to arbitrate, and also (2) whether the specific dispute between the parties falls within the substantive scope of that agreement. Emmanuel African Methodist Church v. Reynolds Construction Co., ___ N. C. App. ___, 718 S. E. 2d 261 (2011); D. P. Solutions, Inc. v. Xplore-Tech Services Private Limited, ___ N. C. App. ___, 710 S. E. 2d 297 (2011); Pressler v. Duke University, 199 N. C. App. 586, 685 S. E. 2d 6 (2009); Edwards v. Taylor, 182 N. C. App. 722, 643 S. E. 2d 51 (2007); Steffes v. DeLapp, 177 N. C. App. 802, 629 S. E. 2d 892 (2006).

In general, a two pronged analysis is required to determine whether a dispute is subject to arbitration: (1) whether a valid arbitration agreement exists, and (2) whether the particular dispute is within the agreement's substantive scope. In re W. W. Jarvis & Sons, 194 N. C. App. 799, 671 S. E. 2d 534 (2009); Raspet v. Buck, 147 N. C. App. 133, 554 S. E. 2d 676 (2001).

The question of whether a dispute is subject to arbitration is an issue for judicial determination. This determination involves a two-step analysis requiring the trial court to ascertain both (1) whether the parties had a valid agreement to arbitrate, and also (2) whether the specific dispute falls within the substantive scope of that agreement. U. S Trust Company, N. A. v. Rich, ___ N. C. App. ____, 712 S. E. 2d 233 (2011); Ellis-Don Construction, Inc. v HNTB Corp, 169 N. C. App. 630, 610 S. E. 2d 293 (2005).

When a party files a motion to compel arbitration, the trial court must perform a two-step analysis requiring the trial court to ascertain both (1) whether the parties had a valid agreement to arbitrate, and also (2) whether the specific dispute falls within the substantive scope of that agreement. Harbour Point Homeowners' Association, Inc. v. DJF Enterprises, Inc., ___ N. C. App. ___, 688 S. E. 2d 47 (2010); U. S. Trust Co., N. A. v. Stanford Group, Inc., 199 N. C. App. 287, 681 S. E. 2d 512 (2009); Slaughter v. Swicegood, 162 N. C. App. 457, 591 S. E. 2d 577 (2004). See also Munn v. Haymount Rehabilitation & Nursing Center, Inc., ___ N. C. App. ___, 704 S. E. 2d 290 (2010).

In making this determination, the court must look to (1) the validity of the contract to arbitrate and (2) whether the subject matter of the arbitration agreement covers the matter in dispute. Revels v. Miss N. C. Pageant Organization, Inc., 176 N. C. App. 730, 627 S. E. 2d 280 (2006).

In considering a motion to compel arbitration, a court must determine whether the parties agreed to arbitrate and if so, the scope of the arbitration agreement. Sears Roebuck & Co. v Avery, 163 N. C. App. 207, 593 S. E. 2d 424 (2004).

A contractual clause that constitutes a party's consent to the exercise of jurisdiction by North Carolina courts does not conflict with an arbitration agreement. Johnston County v. R. N. Rouse & Co., 331 N. C. App. 88, 414 S. E. 30 (1992).

- **Fraud in the inducement**

Any allegations of fraud are to be determined by the trial court instead of by arbitration. Eddings v. Southern Orthopedic & Musculoskeletal Assocs., P. A., 147 N. C. App. 375, 555 S. E. 2d 649 (2001), reversed on the grounds set forth in the dissenting opinion, 356 N. C. 286, 569 S. E. 2d 645 (2002) citing Paramore v. Inter-Regional Fin. Group Leasing Co., 68 N. C. App. 659, 316 S. E. 2d 90 (1984). (If the agreement was obtained by fraud, there would be no contract to enforce by arbitration or otherwise, thus the validity of the supporting contract should be determined by the courts before proceeding with arbitration.)

The statutes authorize our courts to stay arbitration on a showing that there was no agreement to arbitrate and such a showing was made by the plaintiffs, who alleged there was no valid contract based on fraud and undue influence. If it is invalid, there is nothing to arbitrate. Paramore v. Inter-Regional Financial Group Leasing Company, 68 N. C. App. 659, 316 S. E. 2d 90 (1984).

The trial court makes a determination whether defenses of fraud or undue influence invalidate an agreement to arbitrate before requiring the parties to proceed to arbitration. Paramore v. Inter-Regional Financial Group Leasing Company, 68 N. C. App. 659, 316 S. E. 2d 90 (1984).

In determining whether or not an agreement to arbitrate exists, the court may also properly resolve preliminary issues surrounding the agreement, such as whether or not the agreement was induced by fraud or whether the doctrines of *res judicata* or waiver apply. Barnhouse v. American Express Financial Advisors, Inc., 151 N. C. App. 507, 566 S. E. 2d 130 (2002).

An order staying arbitration pending the trial courts' determination whether the party was induced to execute an agreement to arbitrate by fraud and misrepresentation is not subject to an immediate interlocutory appeal. Peloquin Associates, P. A. v. Polcaro, 61 N. C. App. 345, 300 S. E. 2d 477 (1983).

- **Unconscionability**

The trial court determines whether an arbitration clause is unconscionable prior to entering an order to compel arbitration. Tillman v. Commercial Credit Loans, Inc., 362 N. C. 93, 655 S. E. 2d 362 (2008).

As with any contract, equity may require invalidation of an arbitration agreement that is unconscionable. Tillman v. Commercial Credit Loans, Inc., 362 N. C. 93, 655 S. E. 2d 362 (2008).

The burden on showing unconscionability in this instance is on the party seeking to invalidate the arbitration agreement. Tillman v. Commercial Credit Loans, Inc., 362 N. C. 93, 655 S. E. 2d 362 (2008).

Unconscionability is an affirmative defense and the party asserting the defense bears the burden of proof. Raper v. Oliver House, LLC, 180 N. C. App. 414, 637 S. E. 2d 551 (2006).

A party may condition its willingness to enter into a contract with another party upon the agreement to resolve any dispute arising from their contractual relationship through arbitration. In the absence of bad faith, inequality, or lack of mutuality, the inclusion of an agreement to arbitrate is neither procedurally or substantively unconscionable. A party may refuse to enter into a contract containing a provision or condition to arbitrate any disputes arising therefrom. Raper v. Oliver House, LLC, 180 N. C. App. 414, 637 S. E. 2d 551 (2006).

- **Estoppel**

In the arbitration context, the doctrine recognizes that a party may be estopped from asserting that the lack of his signature on a written contract precludes enforcement of the contract's arbitration clause when he has consistently maintained that other provisions of the same contract should be enforced to benefit him. To allow a party to claim the benefit of the contract and simultaneously avoid its burdens would both disregard equity and contravene the purposes underlying enactment of the Arbitration Act. Raper v. Oliver House, LLC, 180 N. C. App. 414, 637 S. E. 2d 551 (2006).

- **Absence of an Agreement to Arbitrate**

When the party seeking to enforce the arbitration agreement has performed a portion of the services and thereafter presents a written agreement to the other party, the written agreement, if it substantially changes the terms of the oral agreement, cannot be enforceable. Edwards v. Taylor, 182 N. C. App. 722, 643 S. E. 2d 51 (2007). Mere acknowledgement of receipt of the purchase order form containing an arbitration clause does not constitute consent to its terms.

When one party has agreed with the plaintiff to arbitrate its disputes, another party to the same dispute cannot simply agree to submit itself to binding arbitration. There must be a mutual agreement of both parties to submit their dispute to arbitration. Boynton v. ESC Medical System, Inc., 152 N. C. App. 103, 566 S. E. 2d 730 (2002).

- **Lack of Authority to Agree to Arbitration**

Wife did not have apparent authority to execute arbitration agreement on behalf of her husband which would have required the husband to arbitrate a medical malpractice claim. Milon v. Duke University, 145 N. C. App. 609, 551 S. E. 2d 561 (2001), reversed 355 N. C. 263, 559 S. E. 2d 789 (2002). (The Supreme Court reversed on the basis set forth in the dissenting opinion of Judge Thomas.)

- **Local Government Contracts**

A county can enter into a contract that includes a provision to arbitrate disputes. North Carolina counties have the power to enter into contractual arbitration agreements. Carteret County v. United Contractors of Kinston, 120 N. C. App. 336, 462 S. E. 2d 816 (1995).

- **Scope of Arbitration**

- **Preference for Arbitration Applies to Scope of Arbitration**

Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. Hobbs Staffing Services, Inc. v Lumbermens Mutual Casualty Co., 168 N. C. App. 223, 606 S. E. 2d 708 (2005); Bass v. Pinnacle Custom Homes, Inc., 163 N. C. App. 171, 592 S. E. 2d 606 (2004); Smith v. Young Moving & Storage, Inc., 141 N. C. App. 469, 540 S. E. 2d 383 (2000); Carteret County v. United Contractors of Kinston, 120 N. C. App. 336, 462 S. E. 2d 816 (1995).

There is a strong public policy favoring settlement of disputes by arbitration, and doubts concerning the scope of arbitrable issues will be resolved in favor of the party seeking arbitration. Servomation Corp v. Hickory Construction Co., 316 N. C. 543, 342 S. E. 2d 853 (1986).

Our strong public policy favoring arbitration requires that courts resolve any doubts concerning the scope of arbitrable issues in favor of arbitration. Johnston County v. R. N. Rouse & Co., 331 N. C. App. 88, 414 S. E. 2d 30 (1992); Register v. White, 160 N. C. App. 657, 587 S. E. 2d 95 (2003); Miller v. Two State Construction Co., 118 N. C. App. 412, 455 S. E. 2d 678 (1994).

The public policy of North Carolina strongly favors the settlement of disputes by arbitration and requires that the courts resolve any doubts concerning the scope of arbitrable issues in favor of arbitration. Revels v. Miss N. C. Pageant Organization, Inc., 176 N. C. App. 730, 627 S. E. 2d 280 (2006).

Strong public policy favoring settlement of disputes by arbitration requires courts to resolve any doubts concerning the scope of arbitrable issues in favor of arbitration. Burgess v. Jim Walter Homes, Inc., 161 N. C. App. 488, 588 S. E. 2d 575 (2003).

Any uncertainty as to the scope of the arbitration clause should be resolved in favor of arbitration and unless it can be said with confident authority that the arbitration clause cannot be read to include the asserted dispute, the court should grant a party's motion to arbitrate the particular grievance. This standard reflects this state's strong public policy favoring the settlement of disputes by arbitration. In re W. W. Jarvis & Sons, 194 N. C. App. 799, 671 S. E. 2d 534 (2009).

- **Parties' contract determines the scope of arbitration**

Because the duty to arbitrate is contractual, only those disputes which the parties agreed to submit to arbitration may be so resolved. Faison & Gillespie v. Lorant, 187 N, C. App. 567, 654 S. E. 2d 47 (2007); Rodgers Builders, Inc. v. McQueen, 76 N. C. App. 16, 331 S. E. 2d. 726 (1985).

Parties to an arbitration must specify clearly the scope and terms of their agreement to arbitrate. Burgess v. Jim Walter Homes, Inc., 161 N. C. App. 488, 588 S. E. 2d 575 (2003).

To determine whether the parties agreed to submit a particular dispute or claim to arbitration, we must look to the language in the agreement, the arbitration clause and ascertain whether the claims fall within its scope. In so doing, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. Faison & Gillespie v. Lorant, 187 N, C. App. 567, 654 S. E. 2d 47 (2007); Rodgers Builders, Inc. v. McQueen, 76 N. C. App. 16, 331 S. E. 2d. 726 (1985).

The duty to arbitrate is contractual, therefore, only the disputes which the parties agreed to submit to arbitration may be resolved. To determine whether the parties agreed to submit a particular dispute or claim to arbitration, we must look at the language in the agreement, the arbitration clause, and ascertain whether the claims fall within its scope. D. P. Solutions, Inc. v. Xplore-Tech Services Private Limited, ___ N. C. App. ___, 710 S. E. 2d 297 (2011); FCR Greensboro, Inc. v. C & M Investments, Inc., 119 N. C. App. 575, 459 S. E 2d 292 (1995).

To determine if a particular dispute is subject to arbitration, the court must examine the language of the agreement, including the arbitration clause in particular, and determine if the dispute falls within its scope. In re W. W. Jarvis & Sons, 194 N. C. App. 799, 671 S. E. 2d 534 (2009).

There is no legislative bar to arbitration of claims as long as they arise out of or relate to the contract or its breach. Whether a claim falls within the scope of an arbitration clause depends not on the characterization of the claim as tort or contract. Instead, the courts look at "the relationship of the claim to the subject matter of the arbitration clause." Bass v. Pinnacle Custom Homes, Inc., 163 N. C. App. 171, 592 S. E. 2d 606 (2004).

The purposes of arbitration would be substantially diluted if courts could freely resolve otherwise arbitrable disputes whenever a clear outcome is asserted. In re W. W. Jarvis & Sons, 194 N. C. App. 799, 671 S. E. 2d 534 (2009). As such, the entire dispute between the partners was properly a matter for arbitration and the trial court erred by not referring all disputes to arbitration.

- **Claims Subject to Arbitration**

§ 1-569.21 (a) provides that

An arbitrator may award punitive damages or other exemplary relief if:

(1) The arbitration agreement provides for an award of punitive damages or exemplary relief;

(2) An award for punitive damages or other exemplary relief is authorized by law in a civil action involving the same claim; and,

(3) The evidence produced at the hearing justifies the award under the legal standards otherwise applicable to the claim.

There is no bar to arbitration of claims for tortious conduct or unfair and deceptive trade practices or punitive damages claims. Miller v. Two State Construction Co., 118 N. C. App. 412, 455 S. E. 2d 678 (1994); Rodgers Builders, Inc. v. McQueen, 76 N. C. App. 16, 331 S. E. 2d. 726 (1985).

There is no public policy in this State prohibiting the arbitration of claims for punitive damages which fall within the scope of the arbitration agreement. Our legislature has not indicated that the arbitration of claims for punitive damages is against public policy. Rodgers Builders, Inc. v. McQueen, 76 N. C. App. 16, 331 S. E. 2d. 726 (1985).

Claims seeking punitive damages, claims for fraud in the inducement, unfair and deceptive trade practices, and negligent misrepresentation may be subject to arbitration under the provisions of a written contract between the parties so long as they arise out of or relate to a contract which provides for breach. Red Springs Presbyterian Church v. Terminix Co., 119 N. C. App. 299, 458 S. E. 2d 270 (1995). Consequently, the trial court erred by failing to grant a motion for arbitration of claims for fraud and unfair and deceptive trade practices. Id.

- **Procedural Aspects of a Motion to Compel Arbitration**

    - **How does a party seek to compel arbitration?**

§ 1-569.5. Application for judicial relief.

(a) Except as otherwise provided in G.S. 1-569.28, an application for judicial relief under this article shall be made by motion to the court and heard in the manner provided by law or rule of court for making and hearing motions.

(b) Unless a civil action involving the agreement to arbitrate is pending, notice of an initial motion to the court under this article shall be served in the manner provided by law for the service of a summons in a civil action. Otherwise, notice of the motion shall be given in the manner prescribed by law or rule of court for serving motions in pending cases. (1927, c. 94, s. 5; 1973, c. 676, s. 1; 2003-345, s. 2.)

The proper procedure for staying litigation and compelling arbitration is by a proper motion. Adams v. Nelson, 313 N. C. 442, 329 S. E. 2d 322 (1985).

A request for arbitration in a prayer for relief does not qualify as a motion asking the trial court to order arbitration. Linsenmayer v. Omni Homes, Inc., 193 N. C. App. 703, 668 S. E. 2d 388 (2008).

A motion to dismiss a case that does not make any reference to an agreement to arbitrate is not the proper method to stay litigation and compel arbitration. Adams v. Nelson, 313 N. C. 442, 329 S. E. 2d 322 (1985).

    - **Procedure for Motion to Compel Arbitration**

Where a party denies the existence of an arbitration agreement, the court shall proceed summarily to the determination of the issue so raised and shall order arbitration if found for the moving party. Burke v. Wilkins, 131 N. C. App. 687, 507 S. E 2d 903 (1998); Routh v. Snap-On Tools Corp., 101 N. C. App. 703, 400 S. E. 2d 468 (1991); Blow v. Shaughnessy, 68 N. C. App. 1, 313 S. E. 2d 868 (1984).

When the party contesting arbitration challenges the legitimacy of such an agreement, the trial court must summarily determine whether, as a matter of law, a valid arbitration agreement exists. CIT Group/Sales Financing, Inc., 141 N. C. App. 542, 539 S. E. 2d 690 (2000).

When a party moves to compel arbitration under the Uniform Arbitration Act and the opposing party denies the existence of the agreement to arbitrate, the court shall proceed summarily to the determination of the issue so raised and shall order arbitration if found for the moving party. The Court of Appeals has specifically held that by its plain terms, the statute requires the court to summarily determine whether a valid arbitration agreement exists. Failure of the court to determine this issue, where properly raised by the parties, constitutes reversible error. Kiell v. Kiell, 179 N. C. App. 396, 633 S. E. 2d 827 (2006).

When a party denies the existence of an agreement to arbitrate a transaction in dispute, the court is compelled to proceed summarily to the determination of the issue so raised and failure to do so is error. Barnhouse v. American Express Financial Advisors, Inc., 151 N. C. App. 507, 566 S. E. 2d 130 (2002); CIT Group/Sales Financing, Inc., 141 N. C. App. 542, 539 S. E. 2d 690 (2000). See also Ellis-Don Construction Inc. v. HNTB Corp, 169 N. C. App. 630, 610 S. E. 2d 293 (2005).

When a party denies the existence of an arbitration agreement, the trial court shall proceed summarily to determine whether or not an agreement to arbitrate exists, and it is reversible error for a trial court to fail to do so before ruling on a motion to compel arbitration. Kiell v. Kiell, 179 N. C. App. 396, 633 S. E. 2d 827 (2006).

Whether the moving party met its burden of establishing an agreement to arbitrate is a matter for the trial court's determination. Routh v. Snap-On Tools Corp, 108 N. C. App. 268, 423 S. E. 2d 791 (1992).

This decision is not made on a summary judgment standard. Routh v. Snap-On Tools Corp., 101 N. C. App. 703, 400 S. E. 2d 468 (1991).

On application of a party showing (1) such an agreement to arbitrate, and (2) the opposing party's refusal to arbitrate, the court must order the parties to proceed with arbitration, unless the opposing party denies existence of the agreement. If the opposing party denies existence of the agreement, the court must determine the issue and grant or deny the application accordingly. General contract law governs the issue of the existence of an agreement to arbitrate. Southern Spindle and Flyer Co., Inc, v. Milliken & Company, 53 N. C. App. 785, 281 S. E. 2d 734 (1981).

Before a valid contract can exist, there must be mutual agreement between the parties as to the terms of the contract. Where there is no mutual agreement, there is no contract. If a question arises concerning a party's assent to a written instrument, the court must first examine the written instrument to ascertain the intention of the parties. When the language of the contract is clear and unambiguous, the court must interpret the contract as written. However, where an agreement is ambiguous, interpretation of the contract is a question for the fact-finder to resolve and parol or extrinsic evidence is admissible to explain or qualify the written instrument. Routh v. Snap-On Tools Corp, 108 N. C. App. 268, 423 S. E. 2d 791 (1992).

- **No Jury Determination**

The objecting party is not entitled to have a jury trial to determine the validity of an agreement to arbitrate. Kiell v. Kiell, 179 N. C. App. 396, 633 S. E. 2d 827 (2006).

- **Burden of Persuasion**

The moving party has the burden of establishing the existence of an agreement to arbitrate. Sillins v. Ness, 164 N. C. App. 755, 596 S. E. 2d 894 (2004); Blow v. Shaughnessy, 68 N. C. App. 1, 313 S. E. 2d 868 (1984).

The party seeking to compel arbitration holds the burden of proof. Slaughter v. Swicegood, 162 N. C. 457, 591 S. E. 2d 577 (2004).

The moving party bears the burden of demonstrating that the parties mutually agreed to arbitrate their dispute. Emmanuel African Methodist Church v. Reynolds Construction Co., ___ N. C. App. ___, 718 S. E. 2d 201 (2011); Pressler v. Duke University, 199 N. C. App. 586, 685 S. E. 2d 6 (2009); Sciolino v. TD Waterhouse Investor Services, Inc., 149 N. C. App. 642, 562 S. E. 2d 64 (2002).

- **Jurisdiction of trial court prior to the entry of an order compelling arbitration**

The existence of an arbitration clause does not oust the trial court of jurisdiction. Adams v. Nelson, 313 N. C. 442, 329 S. E. 2d 322 (1985).

A trial court is not ousted of its jurisdiction where defendants failed to apply to the court for arbitration in order to exercise their contractual remedy to which they are entitled. Due to defendant's failure to demand arbitration, the trial court properly maintained its existing jurisdiction. Linsenmayer v. Omni Homes, Inc., 193 N. C. App. 703, 668 S. E. 2d 388 (2008).

A trial court does not err in issuing rulings when it had not received a proper motion requesting mandatory arbitration. Absent such a motion, the litigation was continuing in its ordinary course and the parties were participating. Linsenmayer v. Omni Homes, Inc., 193 N. C. App. 703, 668 S. E. 2d 388 (2008).

Defendants cannot participate in litigation to the point where an unfavorable decision is rendered and then expect that decision to be automatically vacated upon the order compelling arbitration. The trial court, upon entering the arbitration order, merely stayed proceedings and did not vacate any of its prior order. Therefore, the issue of liability was properly decided and not before the arbitrator. Linsenmayer v. Omni Homes, Inc., 193 N. C. App. 703, 668 S. E. 2d 388 (2008).

- **Entry of a Default Judgment prior to Arbitration**

Arbitration pursuant to a valid agreement may be compelled by a court only upon application by a party to the agreement. Because the defendant failed to appear and failed to assert its right to

arbitrate, the trial court is not compelled to enforce an arbitration agreement and may enter default and default judgment. Blankenship v. Town & Country Ford, Inc., 155 N. C. App. 161, 574 S. E. 2d 132 (2002).

- **Motion to Compel Arbitration in a Foreclosure Proceeding**

The Court of Appeals held In the Matter of the Foreclosure of a Deed of Trust, ___ N. C. App ___, ___ S. E. 2d ___ (March 6, 2012), that the trial court properly allowed a foreclosure proceeding to continue in the face of a motion to compel arbitration. The motion to compel was deemed to be outside the scope of the limited matters at issue in the statutory proceeding. The Court of Appeals noted that the respondents should have raised their right to arbitrate in a motion to enjoin the foreclosure pursuant to N. C. Gen. Stat. 45-21.34, which grants the trial court statutory authority and jurisdiction to issue a stay and enforce the arbitration agreement.

- **Granting Summary Judgment in the face of an Arbitration demand**.

When a plaintiff insurance company contended that the defendant was not entitled to recover on a UM/UIM claim because the defendant had released the original tortfeasor and that the statute of limitations had run, the trial court erred by granting summary judgment on these claims and not leaving those matters to the arbitrator. The Court of Appeals noted that it was unable to find a case in which it had upheld the denial of a motion to compel arbitration on grounds other than the scope of or defense to arbitrability. Since the issues raised by the plaintiff insurance company are not argument contesting the scope of or a defense to arbitrability, the trial court erred by granting summary judgment on these issues. N. C. Farm Bureau Mutual Ins. Co. v. Sematoski, 195 N. C. App. 304, 672 S. E. 2d 90 (2009).

Trial court reversed for granting partial summary judgment in face of a motion to compel arbitration. Hobbs Staffing Services, Inc. v. Lumbermens Mutual Casualty Co., 168 N. C. App. 223, 606 S. E. 2d 708 (2005).

- **Choice of Law**

An arbitration agreement may validly provide for arbitration in accordance with the laws of another state. The parties may agree that a certain jurisdiction's substantive law will govern their contract. Pinnacle Group, Inc. v. Schrader, 105 N. C. App. 168, 412 S. E. 2d 117 (1992).

- **Findings of Fact**

The Court of Appeals has reiterated that an order denying a motion to compel arbitration must include findings of fact as to whether the parties had a valid agreement to arbitrate and if so, whether the specific dispute falls within the substantive scope of that agreement. Griessel v. Temas Eye Center, P. C., 199 N. C. App. 314, 681 S. E. 2d 446 (2009).

The Court of Appeals has required that findings of fact state the grounds for the trial court's denial of a motion to stay and compel arbitration. D. P. Solutions, Inc. v. Xplore-Tech Services Private Limited, ___ N. C. App. ___, 710 S. E. 2d 297 (2011).

The Court of Appeals has repeatedly stressed that in making this determination, the trial court must state the basis for its decision in denying a defendant's motion to stay proceedings pending arbitration in order for the Court of Appeals to properly review whether or not the trial court correctly denied the defendant's motion. U. S. Trust Co., N. A. v. Stanford Group, Inc., 199 N. C. App. 287, 681 S. E. 2d 512 (2009).

- **Appellate Issues**

    - **Standard of Review**

The question of whether a dispute is subject to arbitration is an issue for judicial determination. A trial court's conclusion as to whether a particular dispute is subject to arbitration is a conclusion of law, reviewable *de novo* by the appellate court. Emmanuel African Methodist Church v. Reynolds Construction Co., ___ N. C. App. ___, 718 S.E. 2d 201 (2011); D. P. Solutions, Inc. v. Xplore-Tech Services Private Limited, ___ N. C. App. ___, 710 S. E. 2d 297 (2011); Munn v. Haymount Rehabilitation & Nursing Center, Inc., ___ N. C. App. ___, 704 S. E. 2d 290 (2010); Harbour Point Homeowners' Association, Inc. v. DJF Enterprises, Inc., ___ N. C. App. ___, 688 S. E. 2d 47 (2010); Pressler v. Duke University, 199 N. C. App. 586, 685 S. E. 2d 6 (2009). See also Hobbs Staffing Services, Inc. v. Lumbermens Mutual Casualty Co., 168 N. C. App. 223, 606 S. E. 2d 708 (2005).

The trial court's findings regarding the existence of an arbitration agreement are conclusive on appeal where supported by competent evidence, even where the evidence might have supported findings to the contrary. However, the trial court's determination of whether a dispute is subject to arbitration is a conclusion of law that is reviewable *de novo* on appeal. U. S. Trust Company, N.A. v. Rich, ___ N. C. App. ___, 712 S. E. 2d 233 (2011); Raper v. Oliver House, LLC., 180 N. C. App. 414, 637 S. E. 2d 551 (2006).

The trial court's findings regarding the existence of an arbitration agreement are conclusive on appeal where supported by competent evidence, even where the evidence might have supported findings to the contrary. Accordingly, upon appellate review, the Court of Appeals must determine whether there is evidence in the record supporting the trial court's findings of fact and if so, whether these findings of fact in turn support the conclusion that there was no agreement to arbitrate. D. P. Solutions, Inc. v. Xplore-Tech Services Private Limited, ___ N. C. App. ___, 710 S. E. 2d 297 (2011); Munn v. Haymount Rehabilitation & Nursing Center, Inc., ___ N. C. App. ___, 704 S. E. 2d 290 (2010); Harbour Point Homeowners' Association, Inc. v. DJF Enterprises, Inc., ___ N. C. App. ___, 688 S. E. 2d 47 (2010); Pressler v. Duke University, 199 N. C. App. 586, 685 S. E. 2d 6 (2009).

The trial court's findings regarding the existence of an arbitration agreement are conclusive on appeal where supported by competent evidence, even where the evidence might have supported findings to the contrary. Ellis-Don Construction, Inc. v. HNTB Corp., 169 N. C. App. 630, 610 S. E. 2d 293 (2005); Sciolino v. TD Waterhouse Investor Services, Inc., 149 N. C. App. 642, 562 S. E. 2d 64 (2002).

In reviewing the decision of the trial court, the Court of Appeals must determine whether there is evidence in the record which supports the trial court's finding of facts and, if so, whether these findings of fact in turn support the conclusion that there was no agreement to arbitrate. Routh v. Snap-On Tools Corp, 108 N. C. App. 268, 423 S. E. 2d 791 (1992).

- **Determination to Deny Motion to Stay Proceedings Requires Statement of Basis**

The trial court must state the basis for its decision in denying the motion to stay proceedings in order for the appellate courts to properly review whether or not the trial court correctly denied the motion to compel arbitration. Steffes v. DeLapp, 177 N. C. App. 802, 629 S. E. 2d 892 (2006).

- **Failure to Determine Existence of an Agreement to Arbitrate**

The order denying defendant's motion to stay the proceedings does not state upon what basis the court made its decision, and, as such, the Court of Appeals concluded that it could not properly review whether or not the trial court correctly denied defendant's motion. Because the trial court failed to determine whether or not an agreement to arbitrate existed, the trial court erred in denying the defendant's motion to stay proceedings. Barnhouse v. American Express Financial Advisors, Inc., 151 N. C. App. 507, 566 S. E. 2d 130 (2002). See also Steffes v. DeLapp, 177 N. C. App. 802, 629 S.E. 2d 892 (2006).

When the appellate courts cannot determine the reason for the denial, those courts cannot conduct a meaningful review of the trial court's conclusions of law and must reverse and remand the order denying arbitration for further findings. Steffes v. DeLapp, 177 N. C. App. 802, 629 S.E. 2d 892 (2006).

VI. WAIVER OF RIGHT TO COMPEL ARBITRATION

- **The right to compel arbitration may be waived**

It is well established that arbitration may be waived because it is a right arising from contract. Herbert v. Marcaccio, ___ N. C. App. ___, 713 S. E. 2d 531 (2011).

N. C. Gen. Stat. 1-567.2(a) provides that an arbitration agreement is valid, enforceable and irrevocable unless the parties agree to the contrary. Servomation Corp v. Hickory Construction Co., 316 N. C. 543, 342 S. E. 2d 853 (1986).

Since arbitration is a contractual right, it may be waived. Servomation Corp v. Hickory Construction Co., 316 N. C. 543, 342 S. E. 2d 853 (1986); Douglas v. McVicker, 150 N. C. App. 705, 564 S. E. 2d 622 (2002).

Whether waiver has occurred is a question of fact. N. C. Farm Bureau Mutual Ins Co. v. Sematoski, 195 N. C. App. 304, 672 S. E. 2d 90 (2009); Moose v. Versailles Condominium

Association, 171 N. C. App. 377, 614 S. E. 2d 418 (2005); Douglas v. McVicker, 150 N. C. App. 705, 564 S. E. 2d 622 (2002); Sullivan v. Bright, 129 N. C. App. 84, 497 S. E. 2d 118 (1998).

The right to arbitrate, as other contract rights, may be impliedly waived through the conduct of a party to the contract clearly indicating such purpose. Servomation Corp. v. Hickory Construction Co., 70 N. C. App. 309, 318 S. E. 2d 904 (1984).

Arbitration is a contractual right, and therefore, the right to arbitrate may be waived by the conduct of the party seeking to enforce the right. Capps v. Virrey, 184 N. C. App. 267, 645 S. E. 2d 825 (2007).

In order for the trial court to determine defendants have waived their right to arbitrate the trial court must first determine (1) whether the parties had a valid agreement to arbitrate, and also (2) whether the specific dispute falls within the substantive scope of the agreement. Culberson v. REO Properties Corp., 194 N. C. App. 793, 670 S. E. 2d 316 (2009).

- **Preference against waiver**

As North Carolina maintains a strong public policy favoring arbitration, courts must closely scrutinize any allegation of waiver of such a favored right. N. C. Farm Bureau Mutual Ins Co. v. Sematoski, 195 N. C. App. 304, 672 S. E. 2d 90 (2009); Douglas v. McVicker, 150 N. C. App. 705, 564 S. E. 2d 622 (2002); Sullivan v. Bright, 129 N. C. App. 84, 497 S. E. 2d 118 (1998).

Due to the strong public policy in North Carolina favoring arbitration, courts must closely scrutinize any allegation of waiver of the right to arbitration. Capps v. Virrey, 184 N. C. App. 267, 645 S. E. 2d 825 (2007).

Our strong public policy requires that the courts resolve any doubts concerning the scope or arbitrable issues in favor of arbitration. This is true whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay or like defense to arbitrability. Johnston County v. R. N. Rouse & Co., 331 N. C. 88, 414 S. E. 2d 30 (1992).

Waiver of a contractual right to arbitration is a question of fact. Because of the strong public policy in North Carolina favoring arbitration, courts must closely scrutinize any allegation of waiver of such a favored right. Because of the reluctance to find waiver, we hold that a party has impliedly waived its contractual right to arbitration if by its delay or by other actions it takes which are inconsistent with arbitration another party is prejudiced by the order compelling arbitration. Cyclone Roofing Co. v. LaFave Co, 312 N. C. 224, 321 S. E. 2d 872 (1984); Prime South Homes, Inc. v. Byrd, 102 N. C. App. 255, 401 S. E. 2d 822 (1991).

Waiver of a contractual right to arbitration is a question of fact. Because of the strong public policy in North Carolina favoring arbitration, courts must closely scrutinize any allegation of waiver of such a favored right. Because of the reluctance to find waiver, we hold that a party has impliedly waived its contractual right to arbitration if by its delay or by actions it takes which are inconsistent with arbitration, another party to the contract is prejudiced by the order compelling

arbitration. Register v. White, 160 N. C. App. 657, 587 S. E. 2d 95 (2003); Miller v. Two State Construction Co., 118 N. C. App. 412, 455 S. E. 2d 678 (1994).

- **Standard for Waiver**

Before a party will be found to have impliedly waived a contractual right to arbitration, that party must have, by its delay or actions inconsistent with arbitration, caused another party to be prejudiced by an order compelling arbitration. Carteret County v. United Contractors of Kinston, 120 N. C. App. 336, 462 S. E. 2d 816 (1995). See also O'Neal Construction, Inc. v. Leonard S. Gibbs Grading, 121 N. C. App. 577, 468 S. E. 2d 248 (1996).

A party opposing arbitration must prove that it was prejudiced by its adversary's delay or by actions of the adversary which were incompatible with arbitration. Douglas v. McVicker, 150 N. C. App. 705, 564 S. E. 2d 622 (2002); Sullivan v. Bright, 129 N. C. App. 84, 497 S. E. 2d 118 (1998).

A party impliedly waives his contractual right to arbitration if by its delay or by actions it takes which is inconsistent with arbitration, another party to the contract is prejudiced by the order compelling arbitration. Adams v. Nelson, 313 N. C. 442, 329 S. E. 2d 322 (1985); Culberson v. REO Properties Corp., 194 N. C. App. 793, 670 S. E. 2d 316 (2009); McCrary v. Byrd, 148 N. C. App. 630, 559 S. E. 2d 821 (2002).

A party may be prejudiced by his adversary's delay in seeking arbitration if (1) it is forced to bear the expense of a long trial, (2) it loses helpful evidence, (3) it takes steps in litigation to its detriment or expends significant amounts of money on the litigation, or (4) its opponent makes use of judicial discovery procedures not available in arbitration. Servomation Corp v. Hickory Construction Co., 316 N. C. 543, 342 S. E. 2d 853 (1986); Herbert v. Marcaccio, ___ N. C. App. ___, 713 S. E. 2d 531 (2011); Capps v. Virrey, 184 N. C. App. 267, 645 S. E. 2d 825 (2007); Douglas v. McVicker, 150 N. C. App. 705, 564 S. E. 2d 622 (2002); Smith v. Young Moving & Storage, Inc., 141 N. C. App. 469, 540 S. E. 2d 383 (2000); Sullivan v. Bright, 129 N. C. App. 84, 497 S. E. 2d 118 (1998).

A party may be prejudiced if, for example, it is forced to bear the expenses of a lengthy trial; evidence helpful to a party is lost because of the delay in seeking arbitration; a party's opponent takes advantage of judicial discovery procedures not available in arbitration; or, by reason of delay, a party has taken steps in litigation to its detriment or expended significant amounts of money thereupon. Cyclone Roofing Co v. Lafave Co., 312 N. C. 224, 321 S. E. 2d 872 (1991); Culberson v. REO Properties Corp., 194 N. C. App. 793, 670 S. E. 2d 316 (2009); Gemini Drilling and Foundation, LLC v. National Fire Ins. Co. of Hartford, 192 N. C. App. 376, 665 S. E. 2d 505 (2008); Moose v. Versailles Condominium Association, 171 N. C. App. 377, 614 S. E. 2d 418 (2005); McCrary v. Byrd, 148 N. C. App. 630, 559 S. E. 2d 821 (2002); Prime South Homes, Inc. v. Byrd, 102 N. C. App. 255, 401 S. E. 2d 822 (1991). See also O'Neal Construction, Inc. v. Leonard S. Gibbs Grading, 121 N. C. App. 577, 468 S. E. 2d 248 (1996).

Prejudice may result if a party has to bear the expenses of a lengthy trial; evidence which may be helpful to the party is lost because of delay in seeking arbitration; a party's opponent seeks an

advantage of judicial discovery procedures which are not available in arbitration; or because of delay, the party takes steps in litigation to its detriment or expends significant amounts of money. Miller v. Two State Construction Co., 118 N. C. App. 412, 455 S. E. 2d 678 (1994).

- **Standard applied to specific factual situations**

- **Filing of Pleadings**

The mere filing of a complaint or answer does not result in waiver of arbitration absent evidence showing prejudice to the adverse party. Servomation Corp v. Hickory Construction Co., 316 N. C. 543, 342 S. E. 2d 853 (1986).

The filing of a complaint or answer does not automatically result in waiver. Adams v. Nelson, 313 N. C. 442, 329 S. E. 2d 322 (1985).

The mere filing of these pleadings (cross-claims) did not manifest waiver of the right to arbitrate under the contract. To hold otherwise, that is, to hold that the mere filing of pleadings or other motions in a pending lawsuit constitutes waiver of a contractual arbitration provision would make parts of the act nonsensical. Cyclone Roofing Co. v. LaFave Co., 312 N. C. 224, 321 S. E. 2d 872 (1984).

The mere filing of pleadings does not constitute a waiver of a contractual right to arbitrate and the failure to plead a right to arbitrate as an affirmative defense also does not waive the right to compel arbitration. Herbert v. Marcaccio, ___ N. C. App. ___, 713 S. E. 2d 531 (2011); N.C. Farm Bureau Mutual Ins Co. v. Sematoski, 195 N. C. App. 304, 672 S. E. 2d 90 (2009); Smith v. Young Moving & Storage, Inc., 141 N. C. App. 469, 540 S. E. 2d 383 (2000).

The mere filing of pleadings or a claim of lien does not constitute a waiver of an arbitration provision. Prime South Homes, Inc. v. Byrd, 102 N. C. App. 255, 401 S. E. 2d 822 (1991).

A party, however, does not waive a contractual right to arbitration or prejudice the other party by the mere filing of pleadings. McCrary v. Byrd, 148 N. C. App. 630, 559 S. E. 2d 821 (2002).

Participation in a mediation after the filing of a request to arbitrate is not inconsistent with arbitration and does not constitute an implied waiver of arbitration. O'Neal Construction, Inc. v. Leonard S. Gibbs Grading, 121 N. C. App. 577, 468 S. E. 2d 248 (1996).

The plaintiff has not been prejudiced by the fact that defendant argued its legal defenses during the hearing on its motion for summary judgment and at its argument in the Court of Appeals. There is no evidence in the record that the plaintiff incurred increased expenses or was prejudiced in any way by being required to meet defendant's legal defenses as well as its demand for arbitration at the summary judgment hearing. Servomation Corp v. Hickory Construction Co., 316 N. C. 543, 342 S. E. 2d 853 (1986).

- **Conducting Discovery**

The taking of two depositions was not sufficient to waive the right to compel arbitration since the applicable arbitration rules permitted depositions. Sullivan v. Bright, 129 N. C. App. 84, 497 S. E. 2d 118 (1998).

Responding to discovery requests promulgated by an opposing party—or, in this case, failing to respond to discovery requests—does not constitute making use of discovery not available in arbitration. Herbert v. Marcaccio, ___ N. C. App. ___, 713 S. E. 2d 531 (2011).

Moreover, participation in discovery not available at arbitration may constitute a waiver of a party's right to arbitrate. McCrary v. Byrd, 148 N. C. App. 630, 559 S. E. 2d 821 (2002).

A party's compliance with a court order compelling discovery does not constitute a waiver of the right to compel arbitration. It is difficult to imagine that complying with an order of a trial court to which one objects would amount to a waiver of the right to arbitration. McCrary v. Byrd, 136 N. C. App. 487, 524 S. E. 2d 817 (2000).

When the moving party engaged in extensive discovery procedures that are not available in arbitration and the party opposing incurred in excess of $30,000 in legal fees and costs in the civil litigation, a court properly concluded that the moving party had waived its right to compel arbitration. This conclusion was supported by the fact that the motion to compel arbitration was made in the face of discovery requests that had been served on the moving party. Moose v. Versailles Condominium Association, 171 N. C App. 377, 614 S. E. 2d 418 (2005).

When a moving party has filed a third party claim, taken a deposition of a non-party witness, and obtained document discovery and the opposing party incurred legal fees in excess of $10,000.00, the party seeking arbitration was deemed to have waived that right. Prime South Homes, Inc. v. Byrd, 102 N. C. App. 255, 401 S. E. 2d 822 (1991).

When a party took advantage of and benefitted from a discovery procedure without leave of an arbitrator and the opposing party was prejudiced by the cost of responding to the discovery and by the lack of reciprocal discovery, the right to compel arbitration was waived. Douglas v. McVicker, 150 N. C. App. 705, 564 S. E. 2d 622 (2002).

- **Motions Practice**

Filing a motion to compel arbitration after the deadline for filing dispositive motions under the applicable local rules does not waive a party's right to compel arbitration. Smith v. Young Moving & Storage, Inc., 141 N. C. App. 469, 540 S. E. 2d 383 (2000).

- **UM/UIM Situations**

A plaintiff's right to arbitration cannot be waived by a UIM carrier's choice to participate in litigation brought to pursue the liability policy claim. In determining the issue of waiver raised by a UIM carrier, our courts have considered only those actions by the plaintiff in the existing

lawsuit occurring after the liability insurer tendered its full coverage upon settlement of the liability policy. Register v. White, 160 N. C. App. 657, 587 S. E. 2d 95 (2003). In this case, the plaintiff promptly ceased pursuing litigation after the liability carrier's settlement and demanded arbitration. As a result, the plaintiff did not waive her right to arbitration.

The expenditure of $3,402.24 in the defense of the same claim in another state is not sufficiently prejudicial to cause a waiver of the right to arbitrate. N.C. Farm Bureau Mutual Ins. Co. v. Sematoski, 195 N. C. App. 304, 672 S. E. 2d 90 (2009).

The Court should focus on whether the insurance carrier could have avoided the legal fees it incurred if the party seeking arbitration made the request earlier and whether the expenses were incurred after the right to demand arbitration accrued. See McCrary v. Byrd, 148 N. C. App. 630, 559 S. E. 2d 821 (2002).

- **Participating in a trial or protracted litigation**

By failing to appeal from an order denying a motion to compel arbitration and then engaging in protracted litigation, including a full bench trial, defendant prejudiced the plaintiff and waived its right to compel arbitration. Gemini Drilling and Foundation, LLC v. National Fire Ins. Co. of Hartford, 192 N. C. App. 376, 665 S. E. 2d 505 (2008).

Even without specific dollar amounts of expenses incurred, the attendance of counsel at multiple hearings and defense of a litigation over a two-year period with the case being twice calendared for trial as well as other hearings involved significant resources and supported a waiver of the right to compel arbitration. Herbert v. Marcaccio, ___ N. C. App. ___, 713 S. E. 2d 531 (2011). The better practice would be for the party opposing arbitration to provide specific information about the time and expense incurred and for the trial court to make findings of fact based on that information.

When waiver is based upon delay that causes a party to expend significant amounts of money, we must then consider whether the party could have avoided these expenses through an earlier request for arbitration or whether such expenses were incurred after the right to demand arbitration accrued. Culberson v. REO Properties Corp., 194 N. C. App. 793, 670 S. E. 2d 316 (2009). (Case remanded due to lack of sufficient findings.)

- **Standard of Review of Finding of Waiver**

Whether a party has waived the right to compel arbitration is a question of fact, and the trial court's findings are binding on appeal when supported by competent evidence. Herbert v. Marcaccio, ___ N. C. App. ___, 713 S. E. 2d 531 (2011).

The Court of Appeals has consistently held that when considering whether a delay in requesting arbitration resulted in significant expense for the party opposing arbitration, the trial court must make findings (1) whether the expenses occurred after the right to arbitration accrued, and (2) whether the expenses could have been avoided through an earlier demand for arbitration. Herbert v. Marcaccio, ___ N. C. App. ___, 713 S. E. 2d 531 (2011).

Waiver of a contractual right to arbitration is a question of fact. In this regard, findings of fact, when supported by any evidence are conclusive on appeal. Conclusions of law, even if stated as factual conclusions, are reviewable. Nevertheless, when there is evidence in the record which supports the trial court's findings of fact and those findings support its conclusions of law that a party has waived its right to compel arbitration, the decision must be affirmed. Capps v. Virrey, 184 N. C. App. 267, 645 S. E. 2d 825 (2007).

VII. PROVISIONAL REMEDIES

§ 1-569.8. Provisional remedies.

(a) Before an arbitrator is appointed and is authorized and able to act, the court, upon motion of a party to an arbitration proceeding and for good cause shown, may enter an order for provisional remedies to protect the effectiveness of the arbitration proceeding to the same extent and under the same conditions as if the controversy were the subject of a civil action.

(b) After an arbitrator is appointed and is authorized and able to act:

(1) The arbitrator may issue orders for provisional remedies, including interim awards, as the arbitrator finds necessary to protect the effectiveness of the arbitration proceeding and to promote the fair and expeditious resolution of the controversy, to the same extent and under the same conditions as if the controversy were the subject of a civil action; and

(2) A party to an arbitration proceeding may move the court for a provisional remedy if the matter is urgent and the arbitrator is not able to act in a timely manner or the arbitrator cannot provide an adequate remedy.

(c) A party does not waive the right to arbitrate by making a motion under subsection (a) or (b) of this section. (2003-345, s. 2.)

Where a dispute is subject to mandatory arbitration under the Federal Arbitration Act, a trial court has the discretion to grant a preliminary injunction to preserve the status quo pending the arbitration of the parties' dispute if the enjoined contract would render that process a hollow formality. The arbitration process would be a hollow formality where the arbitral award when rendered could not return the parties substantially to the status quo ante. Scottish Re Life Corp. v. Transamerica Occidental Life Ins. Co, 184 N. C. App. 292, 647 S. E. 2d 102 (2007). (Court of Appeals used federal law principles to resolve a state law issue.)

VIII. PROCEDURAL ASPECTS OF ARBITRATION PROCESS AND HEARING

- **Court Appointment of an Arbitrator**

§ 1-569.11. Appointment of arbitrator; service as a neutral arbitrator.

(a) If the parties to an agreement to arbitrate agree on a method for appointing an arbitrator, that method shall be followed, unless the method fails. If the parties have not agreed on a method, the agreed method fails, or an arbitrator appointed fails or is unable to act and a successor has not been appointed, the court, on motion of a party to the arbitration proceeding,

shall appoint the arbitrator. An arbitrator so appointed has all the powers of an arbitrator designated in the agreement to arbitrate or appointed pursuant to the agreed method.

(b) An individual who has a known, direct, and material interest in the outcome of the arbitration proceeding or a known, existing, and substantial relationship with a party shall not serve as an arbitrator required by an agreement to be neutral. (1927, c. 94, s. 4; 1973, c. 676, s. 1; 2003-345, s. 2.)

- **Failure to Specify Details in Arbitration Agreement**

While the arbitration clause does not provide any details on the arbitrator or the procedures for arbitration, these provisions are insufficient to strike the arbitration clause. The failure of the parties to designate a process for determining who will arbitrate a dispute is not fatal to the agreement. Goldstein v. American Steel Span, Inc., 181 N. C. App. 534, 640 S. E. 2d 740 (2007).

- **Consolidation of Arbitration Proceedings**

§ 1-569.10. Consolidation of separate arbitration proceedings.

(a) Except as otherwise provided in subsection (c) of this section, upon motion of a party to an agreement to arbitrate or to an arbitration proceeding, the court may order consolidation of separate arbitration proceedings as to all or some of the claims if:

(1) There are separate agreements to arbitrate or separate arbitration proceedings between the same persons or one of them is a party to a separate agreement to arbitrate or a separate arbitration with a third person;

(2) The claims subject to the agreements to arbitrate arise in substantial part from the same transaction or series of related transactions;

(3) The existence of a common issue of law or fact creates the possibility of conflicting decisions in the separate arbitration proceedings; and

(4) Prejudice resulting from a failure to consolidate is not outweighed by the risk of undue delay or prejudice to the rights of or hardship to parties opposing consolidation.

(b) The court may order consolidation of separate arbitration proceedings as to some claims and allow other claims to be resolved in separate arbitration proceedings.

(c) The court shall not order consolidation of the claims of a party to an agreement to arbitrate if the agreement prohibits consolidation. (2003-345, s. 2.)

- **Initiation of Arbitration**

§ 1-569.9. Initiation of arbitration.

(a) A person initiates an arbitration proceeding by giving notice in a record to the other parties to the agreement to arbitrate in the agreed manner between the parties or, in the absence of agreement, by certified or registered mail, return receipt requested, and obtained, or by service as authorized for the commencement of a civil action. The notice shall describe the nature of the controversy and the remedy sought.

(b) Unless a person objects for lack or insufficiency of notice under G.S. 1-569.15(c) no later than the beginning of the arbitration hearing, the person, by appearing at the hearing, waives any objection to lack or insufficiency of notice. (2003-345, s. 2.)

- **Rules of Civil Procedure Inapplicable**

The North Carolina Rules of Civil Procedure do not apply to arbitrations unless incorporated into the arbitration agreement. Palmer v. Duke Power Co., 129 N. C App. 488, 499 S. E. 2d 801 (1998).

- **Notice of Arbitration Hearing**

Notice is deemed received when it is delivered at the person's place of residence or place of business or at another location held out by the person as a place of delivery of communications. Linsenmayer v. Omni Homes, Inc., 193 N. C. App. 703, 668 S. E. 2d 388 (2008).

- **Disclosures by Arbitrators**

§ 1-569.12. Disclosure by arbitrator.

(a) Before accepting appointment, an individual who is requested to serve as an arbitrator, after making a reasonable inquiry, shall disclose to all parties to the agreement to arbitrate and to the arbitration proceeding and to any other arbitrators any known facts that a reasonable person would consider likely to affect the impartiality of the arbitrator in the arbitration proceeding, including:

(1) A financial or personal interest in the outcome of the arbitration proceeding; and,

(2) An existing or past relationship with any of the parties to the agreement to arbitrate or to the arbitration proceeding, their counsel or representatives, a witness, or other arbitrators.

(b) An arbitrator has a continuing obligation to disclose to all parties to the agreement to arbitrate and to the arbitration proceeding and to any other arbitrators any facts that the arbitrator learns after accepting appointment which a reasonable person would consider likely to affect the impartiality of the arbitrator.

(c) If an arbitrator discloses a fact required by subsection (a) or (b) of this section to be disclosed and a party timely objects to the appointment or continued service of the arbitrator based upon the fact disclosed, the objection may be a ground under G.S. 1-569.23(a)(2) for vacating an award made by the arbitrator.

(d) If the arbitrator did not disclose a fact as required by subsection (a) or (b) of this section, upon timely objection by a party, the court under G.S. 1-569.23(a)(2) may vacate an award.

(e) An arbitrator appointed as a neutral arbitrator who does not disclose a known, direct, and material interest in the outcome of the arbitration proceeding or a known, existing, and substantial relationship with a party is presumed to act with evident partiality under G.S. 1-569.23(a)(2).

(f) If the parties to an arbitration proceeding agree to the procedures of an arbitration organization or any other procedures for challenges to arbitrators before an award is made, substantial compliance with those procedures is a condition precedent to a motion to vacate an award on that ground under G.S. 1-569.23(a)(2). (2003-345, s. 2.)

- **Actions by Multiple Arbitrators**

§ 1-569.13. Action by majority.

If there is more than one arbitrator, the powers of an arbitrator shall be exercised by a majority of the arbitrators, but all of them shall conduct the hearing under G.S. 1-569.15(c). (1973, c. 676, s. 1; 2003-345, s. 2.)

- **Immunity of Arbitrators**

§ 1-569.14. Immunity of arbitrator; competency to testify; attorneys' fees and costs.

(a) An arbitrator or an arbitration organization acting in that capacity is immune from civil liability to the same extent as a judge of a court of this State acting in a judicial capacity.

(b) The immunity afforded by this section supplements any immunity under other law.

(c) The failure of an arbitrator to make a disclosure required by G.S. 1-569.12 shall not cause any loss of immunity under this section.

(d) In a judicial, administrative, or similar proceeding, an arbitrator or representative of an arbitration organization is not competent to testify and shall not be required to produce records as to any statement, conduct, decision, or ruling occurring during the arbitration proceeding to the same extent as a judge of a court of this State acting in a judicial capacity. This subsection shall not apply:

(1) To the extent necessary to determine the claim of an arbitrator, arbitration organization, or representative of the arbitration organization against a party to the arbitration proceeding; or

(2) To a hearing on a motion to vacate an award under G.S. 1-569.23(a)(1) or (a)(2) if the movant makes a prima facie showing that a ground for vacating the award exists.

(e) If a person commences a civil action against an arbitrator, arbitration organization, or representative of an arbitration organization arising from the services of the arbitrator, organization, or representative, or if a person seeks to compel an arbitrator or a representative of an arbitration organization to testify or produce records in violation of subsection (d) of this section, and the court decides that the arbitrator, arbitration organization, or representative of an arbitration organization is immune from civil liability or that the arbitrator or representative of the organization is not competent to testify, the court shall award to the arbitrator, organization, or representative reasonable attorneys' fees, costs, and other reasonable expenses of litigation.

(f) Immunity under this section shall not apply to acts or omissions that occur with respect to the operation of a motor vehicle. (2003-345, s. 2.)

- **Procedure for Arbitration hearing**

§ 1-569.15. Arbitration process.

(a) An arbitrator may conduct an arbitration in the manner the arbitrator considers appropriate for a fair and expeditious disposition of the proceeding. The authority conferred upon the arbitrator includes the power to hold conferences with the parties to the arbitration proceeding before the hearing and, among other matters, determine the admissibility, relevance, materiality, and weight of any evidence.

(b) An arbitrator may decide a request for summary disposition of a claim or particular issue:

(1) If all interested parties agree; or,

(2) Upon request of one party to the arbitration proceeding if that party gives notice to all other parties to the proceeding and the other parties have a reasonable opportunity to respond.

(c) If an arbitrator orders a hearing, the arbitrator shall set a time and place and give notice of the hearing not less than five days before the hearing begins. Unless a party to the arbitration proceeding objects to the lack or insufficiency of notice not later than the beginning of the hearing, the party's appearance at the hearing waives the objection. Upon request of a party to the arbitration proceeding and for good cause shown, or upon the arbitrator's own initiative, the arbitrator may adjourn the hearing from time to time as necessary but shall not postpone the hearing to a time later than that fixed by the agreement to arbitrate for making the award unless the parties to the arbitration proceeding consent to a later date. The arbitrator may hear and decide the controversy upon the evidence produced although a party who was duly notified did not appear. The court, upon request, may direct the arbitrator to conduct the hearing promptly and render a timely decision.

(d) At a hearing under subsection (c) of this section, a party to the arbitration proceeding may be heard, present evidence material to the controversy, and cross-examine witnesses appearing at the hearing.

(e) If an arbitrator ceases to or is unable to act during the arbitration proceeding, a replacement arbitrator shall be appointed in accordance with G.S. 1-569.11 to continue the proceeding and to resolve the controversy.

(f) The rules of evidence shall not apply in arbitration proceedings, except as to matters of privilege or immunities. (1927, c. 94, ss. 6, 7; 1973, c. 676, s. 1; 2003-345, s. 2.)

- **Representation by An Attorney in Arbitration Proceedings**

§ 1-569.16. Representation by lawyer.

A party to an arbitration proceeding may be represented by an attorney or attorneys. (1927, c. 94, s. 9; 1973, c. 676, s. 1; 2003-345, s. 2.)

- **Discovery in Arbitration Proceedings**

§ 1-569.17. Witnesses; subpoenas; depositions; discovery.

(a) An arbitrator may issue a subpoena for the attendance of a witness and for the production of records and other evidence at any hearing and may administer oaths. A subpoena shall be served in the manner for service of subpoenas in a civil action and, upon motion to the court by a party to the arbitration proceeding or the arbitrator, enforced in the manner for enforcement of subpoenas in a civil action.

(b) In order to make the proceedings fair, expeditious, and cost-effective, upon request of a party to or a witness in an arbitration proceeding, an arbitrator may permit a deposition of any witness to be taken for use as evidence at the hearing, including a witness who cannot be subpoenaed for or is unable to attend a hearing. The arbitrator shall determine the conditions under which the deposition is taken.

(c) An arbitrator may permit any discovery the arbitrator decides is appropriate under the circumstances, taking into account the needs of the parties to the arbitration proceeding and other affected persons and the desirability of making the proceeding fair, expeditious, and cost-effective.

(d) If an arbitrator permits discovery under subsection (c) of this section, the arbitrator may order a party to the arbitration proceeding to comply with the arbitrator's discovery-related orders, issue subpoenas for the attendance of a witness and for the production of records and other evidence at a discovery proceeding, and take action against a noncomplying party to the extent a court could if the controversy were the subject of a civil action in this State.

(e) An arbitrator may issue a protective order to prevent the disclosure of privileged information, confidential information, trade secrets, and other information protected from disclosure to the extent a court could if the controversy were the subject of a civil action in this State.

(f) All laws compelling a person under subpoena to testify and all fees for attending a judicial proceeding, a deposition, or a discovery proceeding as a witness apply to an arbitration proceeding as if the controversy were the subject of a civil action in this State.

(g) The court may enforce a subpoena or discovery-related order for the attendance of a witness within this State and for the protection of records and other evidence issued by an arbitrator in connection with an arbitration proceeding in another state upon conditions determined by the court so as to make the arbitration proceeding fair, expeditious, and cost-effective. A subpoena or discovery-related order issued by an arbitrator in another state shall be served in the manner provided by law for service of subpoenas in a civil action in this State and, upon motion to the court by a party to the arbitration proceeding or the arbitrator, enforced in the manner provided by law for enforcement of subpoenas in a civil action in this State.

(h) An arbitrator shall not have the authority to hold a party in contempt of any order the arbitrator makes under this section. A court may hold parties in contempt for failure to obey an arbitrator's order, or an order made by the court, pursuant to this section, among other sanctions imposed by the arbitrator or the court. (1927, c. 94, ss. 10, 11; 1973, c. 676, s. 1; 2003-345, s. 2.)

Contrary to a civil case at law, where there exists a broad right to discovery, discovery during arbitration is at the discretion of the arbitrator. McCrary v. Byrd, 148 N. C. App. 630, 559 S. E. 2d 821 (2002); Palmer v. Duke Power Co., 129 N. C App. 488, 499 S. E. 2d 801 (1998). See also, Capps v. Virrey, 184 N. C. App. 267, 645 S. E. 2d 825 (2007).

Discovery during the arbitration process is designed to be minimal and informal and is optimally far less extensive than discovery under traditional litigation. Palmer v. Duke Power Co., 129 N. C App. 488, 499 S. E. 2d 801 (1998).

The North Carolina Rules of Civil Procedure do not apply to arbitrations, unless incorporated into the arbitration agreement. Capps v. Virrey, 184 N. C. App. 267, 645 S. E. 2d 825 (2007).

Discovery during arbitration, as opposed to litigation, is designed to be minimal and informal and less extensive. McCrary v. Byrd, 148 N. C. App. 630, 559 S. E. 2d 821 (2002).

The decision of the arbitrator to determine that certain materials were discoverable was within his broad discretion and therefore not appealable. Revels v. Miss N. C. Pageant Organization, Inc., 176 N. C. App. 730, 627 S. E. 2d 280 (2006).

Unless the parties specifically agree on a method of discovery in an arbitration proceeding, North Carolina's statutory provisions govern the discovery process. Palmer v. Duke Power Co., 129 N. C App. 488, 499 S. E. 2d 801 (1998).

- **Preawards**

§ 1-569.18. Judicial enforcement of preaward ruling by arbitrator.

(a) If an arbitrator makes a preaward ruling in favor of a party to the arbitration proceeding, the party may request the arbitrator to incorporate the ruling into an award under G.S. 1-569.19. A prevailing party may make a motion to the court for an expedited order to confirm the award under G.S. 1-569.22, in which case the court shall summarily decide the motion. The court shall issue an order to confirm the award unless the court vacates, modifies, or corrects the award under G.S. 1-569.23 or G.S. 1-569.24.

(b) An arbitrator's ruling under subsection (a) of this section that denies a request for a preaward ruling is not subject to trial court review. A party whose request under subsection (a) of this section for a preaward ruling has been denied by an arbitrator may seek relief under G.S. 1-569.20 and G.S. 1-569.21 from any final award the arbitrator renders.

(c) There is no right of appeal from trial court orders and judgments on preaward rulings by an arbitrator after a trial court award under this section, G.S. 1-569.19, and G.S. 1-569.28. (2003-345, s. 2.)

- **Failure of Parties to Arbitrate**

After one Superior Court judge had entered an order to arbitrate a matter, another Superior Court judge placed the matter on the trial calendar since the parties had taken no action to proceed to actually arbitrate the case. The second Superior Court judge had no jurisdiction to hear the action arising out of the contract and erred in withdrawing the matter from arbitration and placing it on the trial calendar. Sims v. Ritter Construction, Inc., 62 N. C. App. 52, 302 S. E. 2d 293 (1983).

- **Role of Court during Arbitration Process**

North Carolina has a process whereby the existence of an agreement to arbitrate requires a court to compel arbitration on one party's motion and then requires the court to step back and take a hands-off attitude during the arbitration proceeding. The trial court then reenters the dispute arena to confirm, modify, deny or vacate the arbitrator's award. Henderson v. Herman, 104 N. C. App. 482, 409 S. E. 2d 739 (1991).

Once an agreement to arbitrate is found, courts should compel arbitration on a party's motion and then step back and take a hands-off approach during the arbitration proceeding. The trial court then reenters the dispute arena to confirm, modify, deny or vacate the award. Miller v. Two State Construction Co., 118 N. C. App. 412, 455 S. E. 2d 678 (1994).

However, during the hands-off period the trial court must not interfere with the arbitration proceeding. Henderson v. Herman, 104 N. C. App. 482, 409 S. E. 2d 739 (1991).

After a case was ordered to arbitration, the trial court erred by lifting the stay and granting Rule 11 sanctions to enter a default judgment. Henderson v. Herman, 104 N. C. App. 482, 409 S. E. 2d 739 (1991).

IX. ARBITRATION AWARDS

- **Awards**

§ 1-569.19. Award.

(a) An arbitrator shall make a record of an award. The record shall be signed or otherwise authenticated as authorized by federal or State law by any arbitrator who concurs with the award. The arbitrator or the arbitration organization shall give notice of the award, including a copy of the award, to each party to the arbitration proceeding.

(b) An award shall be made within the time specified by the agreement to arbitrate or, if not specified therein, within the time ordered by the court. The court may extend or the parties to the arbitration proceeding may agree in a record to extend the time. The court or the parties may extend the time within or after the time specified or ordered. A party waives any objection that an award was not timely made unless that party gives notice of the objection to the arbitrator before receiving notice of the award. (1927, c. 94, ss. 8, 14; 1973, c. 676, s. 1; 2003-345, s. 2.)

- **Timeliness of the Award**

Failure to object to the untimeliness of an award before its entry constitutes a waiver of an objection to the delay in issuing the award. Carroll v. Ferro, 179 N. C. App. 402, 633 S. E. 2d 708 (2006).

- **Service of the Award**

Service of an award must be by either personal delivery or registered mail. Where, as here, a statute prescribes a specific mode of notice that method must be strictly followed where notice must be relied upon to divest the recipient of a right. Service by regular mail did not commence the running of the 90 day period for vacating or modifying the award. J. M. Owen Building Contractors, Inc. v. College Walk, Ltd., 101 N. C. App. 483, 400 S. E. 2d 468 (1991).

Failure to serve the arbitration award by registered mail or certified mail, return receipt requested was not prejudicial since the moving party received the award by first class mail. Palmer v. Duke Power Co., 129 N. C. App. 488, 499 S. E. 2d. 801 (1998).

- **Form of an Award**

Arbitrators are not required to articulate reasons for their award. In fact, arbitrators are no more bound to go into particulars and assign reasons for their award than a jury is for its verdict. The

duty is best discharged by a simple announcement of the result of their investigation. Howell v. Wilson, 136 N. C. App. 827, 526 S. E. 2d 194 (2000).

When an arbitrator announces his award and explains it in any accompanying document, the explanatory document becomes part of the award for judicial review. Howell v. Wilson, 136 N. C. App. 827, 526 S. E. 2d 194 (2000).

An arbitration award is not required to include findings of fact and conclusions of law. Sholar v. Business Associates v. Davis, 138 N. C. App. 298, 531 S. E. 2d 236 (2000). The arbitrator does not have to expressly rule on issues presented in the dispute.

Arbitrators are no more bound to go into particulars and assign reasons for their award than a jury is for its verdict. The duty is best discharged by a simple announcement of the result of their investigation. They are not bound to decide according to law when acting within the scope of their authority, being the chose judges of the parties and a law unto themselves, but may award according to their notions of justice and without assigning any reason. Carteret County v. United Contractors of Kinston, 120 N. C. App. 336, 462 S. E. 2d 816 (1995).

There is no error in the absence of specific findings by the arbitrator that would justify treble damages as the trial court previously found for the plaintiffs on the issue of liability for unfair and deceptive trade practices and found treble damages to be statutorily appropriate. The arbitrator was bound by law to treble the damages and was not required to make findings already established by the trial court. Lisenmayer v. Omni Homes, Inc., 193 N. C. App. 703, 668 S. E. 2d 388 (2008).

When an award was not signed or otherwise authenticated by the arbitrators, the failure of the objecting party to move to vacate or modify the award based on this alleged irregularity of the award removed this irregularity as a bar to confirmation of the award. Canadian American Association of Professional Baseball, Ltd. v. Ottawa Rapidz, ___ N. C. App. ___, 711 S. E. 2d 834 (2011).

- **Award Presumed Valid**

A strong public policy supports upholding arbitration awards. Cyclone Roofing Co. v. LaFave Co., 312 N. C. 224, 321 S. E. 2d 872 (1984); WMS, Inc. v. Weaver, 166 N. C. App. 352, 602 S. E. 2d 706 (2004).

An award is ordinarily presumed valid, and the party seeking to set it aside has the burden of demonstrating an objective basis which supports his allegations that one of the arbitrators has acted improperly. G. L. Wilson Building Co. v. Throneburg Hosiery Co., Inc., 85 N. C. 684, 355 S. E. 2d 815 (1987); Thomas v. Howard, 51 N. C. 350, 276 S. E. 2d 743 (1981).

An arbitration award is ordinarily presumed to be valid and the party seeking to set it aside has the burden of demonstrating an objective basis which supports his allegations that one of the grounds for setting it aside exists. Lisenmayer v. Omni Homes, Inc., 193 N. C. App. 703, 668 S. E. 2d 388 (2008); Faison & Gillespie v. Lorant, 187 N. C. App. 567, 654 S. E. 2d 47 (2007).

As a general rule, an arbitration award is presumed valid and the party seeking to vacate it must shoulder the burden of proving grounds for attacking its validity. Revels v. Miss N. C. Pageant Organization, Inc., 176 N. C. App. 730, 627 S. E. 2d 280 (2006); Pinnacle Group, Inc. v. Schrader, 105 N. C. App. 168, 412 S. E. 2d 117 (1992).

A foundation of the arbitration process is that by mutual consent the parties have entered into an abbreviated adjudicative procedure, and to allow "fishing expeditions to search for ways to invalidate the award would tend to negate this policy. Creative Homes and Millwork, Inc. v. Hinkle, 109 N. C. App. 259, 426 S. E. 2d 480 (1993).

Public policy favors the confirmation of arbitration awards; there is a presumption of validity and every reasonable intendment will be indulged in favor of the regularity and integrity of the proceeding. Wildwoods of Lake Johnson Associates v. L. P. Cox Co., 88 N. C. App. 88, 362 S. E. 2d 615 (1987)

X. JUDICIAL REVIEW OF AN AWARD

- **In General**

The trial court has three options when presented with an arbitration award. First the trial court can confirm the award as it is. Second, upon application of a party, the court can vacate an award and order a new hearing before the original arbitrators, or before newly appointed arbitrators depending on the statutory grounds for vacating the award. Finally, upon application of a party, the trial court can modify or correct the award so as to affect the intent of the parties and then confirm the award as modified and corrected. The trial court cannot simply deny a request to confirm the award and do nothing. Hooper v. Allstate Ins. Co., 124 N. C. App. 185, 476 S. E. 2d 380 (1996).

If the dispute resolved by the arbitrator is within the scope of the arbitration agreement, then the trial court must confirm the arbitration award unless one of the statutory grounds for vacating or modifying the award exists. Faison & Gillespie v. Lorant, 187 N. C. App. 567, 654 S. E. 2d 47 (2007).

Judicial review of an arbitration award is confined to determination of whether there exists one of the specific grounds for vacation of an award under the Act. Cyclone Roofing Co. v. LaFave Co., 312 N. C. 224, 321 S. E. 2d 872 (1984).

Judicial review of an arbitration award is limited to determining whether there exists one of the specific grounds for vacating an award or modifying the award. Only awards, reflecting mathematical errors, errors relating to form, and errors resulting from arbitrators exceeding their authority shall be modified or corrected by the reviewing courts. FCR Greensboro, Inc. v. C & M Investments, 119 N. C. App. 575, 459 S. E. 2d 292 (1995).

Upon the application of a party, the court shall confirm the award, unless within the time limits hereinafter imposed grounds are urged for vacating or modifying or correcting the award. Nucor Corp v. General Bearing Corp, 333 N. C. 148, 423 S. E. 2d 747 (1992).

Parties entering into arbitration should exercise great care to delineate the precise claims and disputes to be resolved, including any specific requests that the award conform to a specific form. Trafalgar House Construction v. MSL Enterprises, Inc., 128 N. C. App. 252, 494 S. E. 2d 613 (1998).

- **Statutes constitute exclusive grounds to modify, correct or vacate awards**

The Arbitration Act provides controlling limitations upon the authority of our courts to vacate, modify or correct an arbitration award. The statutes provide the exclusive grounds for vacating, modifying or correcting an award. Nucor Corp. v. General Bearing Corp, 333 N. C. 148, 423 S. E. 2d 747 (1992).

N. C. Gen. Stat. 1-567.14 of the Uniform Arbitration Act provides the exclusive grounds and procedure for modifying and correcting an arbitration award. Sentry Building Systems v. Onslow County Board of Education, 116 N. C. App. 442, 448 S. E. 2d 145 (1994).

The statutes provided the exclusive grounds for vacating, modifying or correcting an arbitration award. Eisinger v. Robinson, 164 N. C. App. 572, 596 S. E. 2d 831 (2004).

- **Mistake of Arbitrator**

If an arbitrator makes a mistake, either as to the law or fact, it is the misfortune of the party and there is no help for it. There is no right of appeal and the Court has no power to revise the decisions of judges who are of the parties' own choosing. An award is intended to settle the matter in controversy and save the expense of litigation. If a mistake be a sufficient ground for setting aside the award, it opens a door for coming into court in almost every case; for in nine cases out of ten some mistake either of law or fact may be suggested by the dissatisfied party. Thus…arbitration, instead of ending would tend to increase litigation. Cyclone Roofing Co. v. LaFave Co., 312 N. C. 224, 321 S. E. 2d 872 (1984); Faison & Gillespie v. Lorant, 187 N. C. App. 567, 654 S. E. 2d 47 (2007); Smith v. Young Moving & Storage, Inc., 167 N. C. App. 487, 606 S. E. 2d 173 (2004); Miller v. Roca & Son, Inc., 167 N. C. App. 97, 604 S. E. 2d 318 (2004); Vanhoy v. Duncan Contractors, Inc., 153 N. C. App. 320, 569 S. E. 2d 715 (2002); G. L. Wilson Building Co. v. Throneburg Hosiery Co., Inc., 85 N. C. 684, 355 S. E. 2d 815 (1987); Carolina Virginia Fashion Exhibitors, Inc. v. Gunter, 41 N. C. App. 407, 255 S. E. 2d 414 (1979). See also Palmer v. Duke Power Co., 129 N. C. App. 488, 499 S. E. 2d 801 (1998).

Ordinarily, an award is not vitiated or rendered subject to impeachment because of a mistake or error of the arbitrators as to the law or facts. The general rule is that errors of law or fact, or an erroneous decision of matters submitted in judgment of the arbitrators, are insufficient to invalidate an award fairly and honestly made. Carolina Virginia Fashion Exhibitors, Inc. v. Gunter, 41 N. C. App. 407, 255 S. E. 2d 414 (1979).

It is a truism that an arbitration award will not be vacated for a mistaken interpretation of law. In re Arbitration between State and Davidson & Jones Construction Company, 72 N. C. App. 149, 323 S. E. 2d 466 (1984).

Errors of law or fact or erroneous decisions of matters submitted to arbitration are not sufficient to invalidate an arbitration award fairly and honestly made. Carteret County v. United Contractors of Kinston, 120 N. C. App. 336, 462 S. E. 2d 816 (1995).

A court's review of an arbitration award is limited and does not permit review based on the contention of a mistake of law. Revels v. Miss N. C. Pageant Organization, Inc., 176 N. C. App. 730, 627 S. E. 2d 280 (2006).

Because an arbitrator is not bound by substantive law or rules of evidence, an award may not be vacated merely because the arbitrator erred as to law or fact. Where an arbitrator makes such a mistake, it is the misfortune of the party. Smith v. Young Moving & Storage, Inc., 167 N. C. App. 487, 606 S. E. 2d 173 (2004); Sholar Business Associates v. Davis, 138 N. C. App. 298, 531 S. E. 2d 236 (2000).

An arbitrator's award cannot be modified for error of law unless that error caused the arbitrator to act beyond the scope of his authority. Indeed, an arbitrator is not bound by substantive law or rules of evidence and an award may not be vacated merely because the arbitrator erred as to law or fact. Faison & Gillespie v. Lorant, 187 N. C. App. 567, 654 S. E. 2d 47 (2007).

- **Confirmation of an Award**

§ 1-569.22. Confirmation of award.

After a party to an arbitration receives notice of an award, the party may make a motion to the court for an order confirming the award. Upon motion of a party for an order confirming the award, the court shall issue a confirming order unless the award is modified or corrected pursuant to G.S. 1-569.20 or G.S. 1-569.24 or is vacated pursuant to G.S. 1-569.23. (1927, c. 94, s. 15; 1973, c. 676, s. 1; 2003-345, s. 2.)

- **Arbitrator's Enforcement of a Settlement Agreement**

Since the validity of the settlement agreement was related to a dispute arising out of the parties' contractual relationship, the arbitrator did not exceed his authority in concluding that the settlement agreement was binding. Smith v. Young Moving & Storage, Inc., 167 N. C. App. 487, 606 S. E. 2d 173 (2004).

The applicable statutes precluded review of the arbitrator's award determining the settlement agreement was binding and enforceable Smith v. Young Moving & Storage, Inc., 167 N. C. App. 487, 606 S. E. 2d 173 (2004).

- **Modification of an Award by an Arbitrator**

§ 1-569.20. Change of award by arbitrator.

(a) On motion to an arbitrator by a party to an arbitration proceeding, the arbitrator may modify or correct an award:

(1) Upon a ground stated in G.S. 1-569.24(a)(1) or (a)(3);

(2) Because the arbitrator had not made a final and definite award upon a claim submitted by the parties to the arbitration proceeding; or

(3) To clarify the award.

(b) A motion under subsection (a) of this section shall be made and notice given to all parties within 20 days after the moving party receives notice of the award.

(c) A party to the arbitration proceeding shall give notice of any objection to the motion within 10 days after receipt of the notice.

(d) If a motion to the court is pending under G.S. 1-569.22, 1-569.23, or 1-569.24, the court may submit the claim to the arbitrator to consider whether to modify or correct the award:

(1) Upon a ground stated in G.S. 1-569.24(a)(1) or (a)(3);

(2) Because the arbitrator had not made a final and definite award upon a claim submitted by the parties to the arbitration proceeding; or

(3) To clarify the award.

(e) An award modified or corrected pursuant to this section is subject to G.S. 1-569.19(a), 1-569.22, 1-569.23, and 1-569.24. (1973, c. 676, s. 1; 2003-345, s. 2.)

The statute permits an arbitrator upon the application of a party to modify or correct an arbitration award for the purpose of clarifying the arbitration award or upon grounds set out in the statute. The addition of an award of attorney's fees is not a clarification of the award or a mistake subject to modification. Vanhoy v. Duncan Contractors, Inc., 153 N. C. App. 320, 569 S. E. 2d 715 (2002).

A trial court has the authority to remand an award to the arbitrator for the purpose of clarifying the award. In re Boyte, 62 N. C. App. 682, 303 S. E. 2d 418 (1983).

- **Modification of an Award by the Court**

§ 1-569.24. Modification or correction of award.

(a) Upon motion made within 90 days after the moving party receives notice of the award pursuant to G.S. 1-569.19 or within 90 days after the moving party receives notice of a modified or corrected award pursuant to G.S. 1-569.20, the court shall modify or correct the award if:

(1) There was an evident mathematical miscalculation or an evident mistake in the description of a person, thing, or property referred to in the award;

(2) The arbitrator has made an award on a claim not submitted to the arbitrator, and the award may be corrected without affecting the merits of the decision on the claims submitted; or,

(3) The award is imperfect in a matter of form not affecting the merits of the decision on the claims submitted.

(b) If a motion made under subsection (a) of this section is granted, the court shall modify and confirm the award as modified or corrected. Otherwise, unless a motion to vacate is pending, the court shall confirm the award.

(c) A motion to modify or correct an award pursuant to this section may be joined with a motion to vacate the award. (1927, c. 94, s. 17; 1973, c. 676, s. 1; 2003-345, s. 2.)

Only awards reflecting mathematical errors, errors relating to form, and errors resulting from arbitrators exceeding their authority shall be modified or corrected by the reviewing courts. Cyclone Roofing Co. v. LaFave Co., 312 N. C. 224, 321 S. E. 2d 872 (1984); Palmer v. Duke Power Co., 129 N. C . App. 488, 499 S. E. 2d 801 (1998).

The statute allows for modification of an award by a court in only three limited situations: (1) evident miscalculation or evident mistake in description, (2) arbitrators awarded on a matter not submitted to them, or (3) the award is imperfect in form. Eisinger v. Robinson, 164 N. C. App. 572, 596 S. E. 2d 831 (2004).

When a trial court decides to modify or correct an award for one of the statutorily-enumerated reasons, it shall do so to effectuate the intent of the arbitrators. Clearly the legislative intent is that only awards reflecting mathematical errors, errors relating to form, and errors resulting from arbitrators exceeding their authority shall be modified or corrected by the reviewing courts. Courts are not to modify or correct matters affecting the merits which reflect the intent of the arbitrators. General Accident Ins. Co. of America v. MSL Enterprises, Inc., 143 N. C. App. 453, 547 S. E. 2d 97 (2001).

The trial court has the authority to review an arbitration award and modify or correct the award if it is imperfect in a matter of form, not affecting the merits of the controversy. The trial court should utilize this power only in special circumstances as it is a disfavored procedure, not to be used to reopen the arbitration with respect to matters which might have been brought forward in the previous proceeding. Trafalgar House Construction v. MSL Enterprises, Inc., 128 N. C. App. 252, 494 S. E. 2d 613 (1998).

- **Correction of an Arbitration Award**

The legislative intent is that only awards reflecting mathematical errors, errors relating to form, and errors resulting from the arbitrators exceeding their authority shall be modified or corrected by the reviewing courts. Courts are not to modify or correct matters affecting the merits which reflect the intent of the arbitrators. Carolina Virginia Fashion Exhibitors, Inc. v. Gunter, 41 N. C. App. 407, 255 S. E. 2d 414 (1979).

Only awards reflecting mathematical errors, errors relating to form, and errors resulting from arbitrators exceeding their authority shall be modified or corrected by the reviewing courts. Faison & Gillespie v. Lorant, 187 N. C. App. 567, 654 S. E. 2d 47 (2007); Sentry Building Systems v. Onslow County Board of Education, 116 N. C. App. 442, 448 S. E. 2d 145 (1994).

The court may examine the record and correct a clerical error. A clerical error is an error resulting from a minor mistake or inadvertence, esp. in writing or copying something on the

record, and not from judicial reasoning or determination. The arbitrator's reference to petitioner as "Co." instead of "Inc." is a clerical error and was properly corrected by the trial court. Marolf Construction, Inc. v. Allen's Paving Co., 154 N. C. App. 723, 572 S. E. 2d 861 (2002).

A trial court errs by reviewing an arbitration award when the moving party has failed to make a proper application as provided by the applicable statute. Sentry Building Systems v. Onslow County Board of Education, 116 N. C. App. 442, 448 S. E. 2d 145 (1994).

- **Mathematical Errors**

In providing that awards could be modified or corrected for an evident miscalculation of figures, we think our legislature had reference only to mathematical errors committed by arbitrators which would be patently clear to a reviewing court. The statute is not an avenue for litigants to persuade courts to review the evidence and then reach a different result because it might be interpreted differently. Such an interpretation of the statute would completely frustrate the underlying purposes of the arbitration statute. Carolina Virginia Fashion Exhibitors, Inc. v. Gunter, 41 N. C. App. 407, 255 S. E. 2d 414 (1979).

The trial court properly denied a motion to confirm a modified arbitration award when the award was modified by the arbitrators because the wrong formula was used to calculate the amount due the plaintiff. The use of an incorrect formula to determine an award is not an evident miscalculation of figure. North Boulevard Plaza v. North Boulevard Associates, 136 N. C. App. 743, 526 S. E. 2d 203 (2000). (Then Judge Timmons-Goodson dissented and opined that the arbitrators had the authority to make this modification because the use of the wrong formula by the arbitrators constituted an evident miscalculation of figures.)

- **Clarification of an Award**

Where, the trial court is asked to interpret an ambiguous term in an arbitration award, such matters may be resolved by the trial court only where the ambiguity may be resolved from the record. Where the ambiguity is not resolved by the record, the only proper method by which to resolve the matter is to remand the matter to the arbitration panel for clarification of the disputed term. On remand, the arbitration panel must limit its review to a clarification of the ambiguity. General Accident Ins. Co. of America v. MSL Enterprises, Inc., 143 N. C. App. 453, 547 S. E. 2d 97 (2001).

- **Vacating An Award**

§ 1-569.23. Vacating award.

(a) Upon motion to the court by a party to an arbitration proceeding, the court shall vacate an award made in the arbitration proceeding if:

(1) The award was procured by corruption, fraud, or other undue means;

(2) There was:

a. Evident partiality by an arbitrator appointed as a neutral arbitrator;

b. Corruption by an arbitrator; or,

c. Misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding;

(3) An arbitrator refused to postpone the hearing upon a showing of sufficient cause for postponement, refused to consider evidence material to the controversy, or otherwise conducted the hearing contrary to G.S. 1-569.15 so as to prejudice substantially the rights of a party to the arbitration proceeding;

(4) An arbitrator exceeded the arbitrator's powers;

(5) There was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising the objection under G.S. 1-569.15(c) no later than the beginning of the arbitration hearing; or,

(6) The arbitration was conducted without proper notice of the initiation of an arbitration as required in G.S. 1-569.9 so as to prejudice substantially the rights of a party to the arbitration proceeding.

(b) A motion under this section shall be filed within 90 days after the moving party receives notice of the award pursuant to G.S. 1-569.19 or within 90 days after the moving party receives notice of a modified or corrected award pursuant to G.S. 1-569.20, unless the moving party alleges that the award was procured by corruption, fraud, or other undue means, in which case the motion shall be made within 90 days after the ground is known, or by the exercise of reasonable care would have been known, by the moving party.

(c) If the court vacates an award on a ground other than that set forth in subdivision (a)(5) of this section, it may order a rehearing. If the award is vacated on a ground stated in subdivision (1) or (2) of subsection (a) of this section, the rehearing shall be before a new arbitrator. If the award is vacated on a ground stated in subdivision (3), (4), or (6) of subsection (a) of this section, the rehearing may be held before the arbitrator who made the award or the arbitrator's successor. The arbitrator shall render the decision in the rehearing within the same time as the time provided in G.S. 1-569.19(b) for an award.

(d) If the court denies a motion to vacate an award, it shall confirm the award unless a motion to modify or correct the award pursuant to G.S. 1-569.24 is pending. (1927, c. 94, s. 16; 1973, c. 676, s. 1; 2003-345, s. 2.)

To vacate an award, the trial court must determine whether there exists one of the statutory grounds for vacation of an award under the statute. General Accident Ins. Co of America v. MSL Enterprises, Inc., 143 N. C. App. 453, 547 S. E. 2d 97 (2001).

A court may only vacate an award for the reasons enumerated in the statute. Smith v. Young Moving & Storage, Inc., 167 N. C. App. 487, 606 S. E. 2d 173 (2004).

Legal arguments are not grounds for vacating an arbitration award… Indeed, an arbitrator is not bound by substantive law or rules of evidence and an award may not be vacated merely because the arbitrator erred as to law or fact. Where an arbitrator makes such a mistake, it is the misfortune of the party. Carroll v. Ferro, 179 N. C. App. 402, 633 S. E. 2d _708 (2006).

One of the grounds upon which the court shall vacate an award is where the arbitrators …so conducted the hearing, contrary to the statute, as to prejudice substantially the rights of a party. Carolina Virginia Fashion Exhibitors, Inc. v. Gunter, 291 N. C. 208, 230 S. E. 2d 380 (1976).

If a motion to vacate is granted, the determination of the motion to confirm an award is rendered moot. In re Arbitration between State and Davidson & Jones Construction Company, 72 N. C. App. 149, 323 S. E. 2d 466 (1984).

- **Burden of showing grounds to vacate an award**

A party seeking to set aside an arbitration award has the burden of demonstrating an objective basis to support its allegations of an arbitrator's improper conduct. Carteret County v. United Contractors of Kinston, 120 N. C. App. 336, 462 S. E .2d 816 (1995).

An arbitration award is presumed valid and the burden of proving specific grounds to vacate the award rests with the party attacking it. Turner v. Nicholson Properties, Inc., 80 N. C. App. 208, 341 S. E. 2d 42 (1986).

- **Exceeding Powers**

An arbitrator's ability to act is both created and limited by the authority conferred on him by the parties' private arbitration agreement. An arbitrator must act within the scope of the authority conferred on him by the arbitration agreement, and his award is subject to attack for that he, acting under a mistake of law, exceeded his authority. Faison & Gillespie v. Lorant, 187 N. C. App. 567, 654 S. E. 2d 47 (2007).

An award is presumed valid, and the party seeking to set is aside must demonstrate and objective basis in the record for concluding that the arbitrator in fact exceeded his authority. FCR Greensboro, Inc. v. C & M Investments, 119 N. C. App. 575, 459 S. E. 2d. 292 (1995).

The fact that the relief was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm an award. Carteret County v. United Contractors of Kinston, 120 N. C. App.336, 459 S. E. 2d 292 (1995).

Before the award may be vacated on the grounds that the arbitrators exceeded their authority, the record must objectively disclose that the arbitrators exceeded their authority in some respect. G. L. Wilson Building Co. v. Throneburg Hosiery Co., Inc., 85 N. C. 684, 355 S. E. 2d 815 (1987).

An arbitrator exceeds his authority by making an award on matters not submitted to him under the terms of the arbitration agreement. FCR Greensboro, Inc. v. C & M Investments, 119 N. C. App. 575, 459 S. E. 2d 292 (1995).

An arbitrator exceeds his authority when he arbitrates additional claims and matters not properly before him. Faison & Gillespie v. Lorant, 187 N. C. App. 567, 654 S. E. 2d 47 (2007); Smith v. Young Moving & Storage Inc., 167 N. C. App. 487, 606 S. E. 2d 173 (2004).

An arbitrator exceeds his authority when he arbitrates additional claims and matters not properly before him. The denial of a claim that was submitted to arbitration, regardless of the reason, cannot be considered outside the scope of the arbitrator's authority. Howell v. Wilson, 136 N. C. App. 827, 526 S. E. 2d 194 (2000).

An arbitration award cannot be modified on the ground that the arbitrator exceeded or imperfectly executed his powers. Such a determination could be a basis for vacating an award. Carroll v. Ferro, 179 N. C. App. 402, 633 S. E. 2d 708 (2006).

- **An error of law does not constitute an act in excess of authority**

A contention that an arbitrator who errs as a matter of law exceeds his powers is a faulty one. Turner v. Nicholson Properties, Inc., 80 N. C. App. 208, 341 S. E. 2d 42 (1986).

Even if the arbitrator erred in his application of law, this does not constitute him exceeding his authority warranting vacatur. Carroll v. Ferro, 179 N. C. App. 402, 633 S. E. 2d 708 (2006).

If an arbitrator exceeded his powers merely by rendering an award based on errors of law, the general rule that such errors are insufficient to invalidate an award would be easily circumvented. Turner v. Nicholson Properties, Inc., 80 N. C. App. 208, 341 S. E. 2d 42 (1986).

- **Bias or Partiality**

It is, of course, true that public policy generally requires that arbitrators be impartial and that they have no connection with the parties involved or the subject matter of the dispute. Thomas v. Howard, 51 N. C. App. 350, 276 S. E. 2d 743 (1981).

This principle is enforced in our State by NCGS 1-567.13(a)(2), which provides that a court shall vacate an award when there is "evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party." Significantly though, the statute does not provide relief from an award when there is evident partiality by an arbitrator who is not appointed as a neutral or umpire. The statute, by its terms, does not, therefore, necessarily prevent parties from accepting arbitrators who they know are acquainted in some way with the case or the parties. Thomas v. Howard, 51 N. C. App. 350, 276 S. E. 2d 743 (1981).

Indeed, it is only natural that parties will attempt to appoint arbiters, who tend to be biased in their favor. A noted author has explained that:

> One who submits his case to an arbitrator selects his own judge; and he selects one, if he can induce the other party to agree, who is likely to be prejudiced in his own favor.
>
> If two parties are willing to take their chances before an arbiter so selected, it is now believed that there is no public interest that makes it necessary to forbid them.

Thomas v. Howard, 51 N. C. App. 350, 276 S. E. 2d 743 (1981).

It is well settled that parties knowing the facts, may submit their differences to any person, whether he is interested in the matters involved or is related to one of the parties, and the award will be binding upon them. But if the submission be made in ignorance of such incompetency, the award may be avoided. No relief, however, will be granted unless objection is made as soon as the aggrieved party becomes aware of the facts, and if after the submission he acquires such knowledge and permits the award to be made without objection, it is treated as waiver and the award will not be disturbed. Thomas v. Howard, 51 N. C. App. 350, 276 S. E. 2d 743 (1981).

It is well settled that parties knowing the facts may submit their differences to any person, whether he is interested in the matters involved or is related to one of the parties, and the award will be binding upon them. When the plaintiff had knowledge of the extent and nature of the relationship between the defendant and the arbitrator at the time the agreement was executed, and when the plaintiff merely assumed that the arbitrator would not be impartial without any evidence to support this belief, the court is not permitted to interfere with the contractual rights of the parties when each was aware and understood the contracts it entered into. Canadian American Association of Professional Baseball, Ltd. V. Ottawa Rapidz, ___ N. C. App. ___, 711 S. E. 2d 834 (2011).

When a party was aware of the arbitrator's business association with both parties when he entered into the agreement selecting the arbitrator, the party has not stated sufficient grounds to vacate the award. Thomas v. Howard, 51 N. C. App. 350, 276 S. E. 2d 743 (1981).

There is also no prejudice from the alleged bias of one of three arbitrators when the award is made unanimously by the three arbitrators and the agreement provided that award could be made on the concurrence of only two of the three arbitrators. Thomas v. Howard, 51 N. C. App. 350, 276 S. E. 2d 743 (1981).

The fact that an arbitrator had appeared as an expert witness for clients of opposing counsel's law firm is alone insufficient to establish an objective basis for believing the arbitrator was biased. Turner v. Nicholson Properties, Inc., 80 N. C. App. 208, 341 S. E. 2d 42 (1986).

To allow inquiry into an arbitration award based solely on the disclosed fact that the arbitrator was indirectly and remotely associated with a party's counsel would severely frustrate the goals of parties seeking arbitration. A foundation of the arbitration process is that by mutual consent the parties have entered into an abbreviated adjudicative procedure and to allow fishing expeditions to search for ways to invalidate the award would tend to negate this policy. Turner v. Nicholson Properties, Inc., 80 N. C. App. 208, 341 S. E. 2d 42 (1986).

The failure of a neutral arbitrator to disclose prior work performed for a defendant on previous construction projects was insufficient to require vacating the award or the deposing of the arbitrator since the prior services were remote in time and more recent work was not substantial. Ruffin Woody and Associates v. Person County, 92 N. C. App. 129, 374 S. E. 2d 165 (1988).

An arbitrator has an affirmative duty to disclose any prior dealings with a party. Furthermore, failure to disclose prior dealings could lead to a finding of evident partiality on the part of the

arbitrator and require that an arbitration award be vacated. William C. Vick Construction Co. v. N.C. Farm Bureau Federation, 123 N. C. App. 97, 472 S. E. 2d. 346 (1996).

A sole arbitrator's failure to disclose numerous social, business, and professional relationships with partners of the law firm representing the defendant when these relationships were likely to affect impartiality or reasonably create and appearance of partiality formed a basis to grant a Rule 59 motion for a new trial. William C. Vick Construction Co. v. N.C. Farm Bureau Federation, 123 N. C. App. 97, 472 S. E. 2d. 346 (1996).

The court shall vacate an arbitration award upon application of a party if there was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party. Carteret County v. United Contractors of Kinston, 120 N. C. App. 336, 462 S. E. 2d 816 (1995).

The fact that the three arbitrators were all contractors and had the same occupation as the defendant did not make the arbitration process inherently unfair. To accept the plaintiff's argument that this is inherently unfair would be like accepting an argument that three judges cannot impartially decide a matter involving an attorney because they are members of the same profession. Carteret County v. United Contractors of Kinston, 120 N. C. App. 336, 462 S. E. 2d 816 (1995).

- **Waiver of Bias**

Even if the chairman of the arbitration panel's relationship with a witness prevented him from being impartial, the plaintiff cannot complain since the disability of an arbitrator is waived if the complaining party had prior knowledge of it. Carteret County v. United Contractors of Kinston, 120 N. C. App. 336, 462 S. E. 2d 816 (1995).

Thus, the common sense rule evolved that, even though partiality of an arbitrator is a well-recognized ground for setting aside of awards, a party may, nonetheless, be concluded by an award when he knew the facts alleged to constitute the bias or prejudice of the arbitrator at the time the agreement was made. Thomas v. Howard, 51 N. C. App. 350, 276 S. E. 2d 743 (1981).

This rule, that the disability of the arbitrator is waived if the complaining party had prior knowledge of it, obtains in North Carolina. Thomas v. Howard, 51 N. C. App. 350, 276 S. E. 2d 743 (1981).

- **Ex Parte Acts**

It has been established in this jurisdiction that ex parte acts by arbitrators constitute misconduct. In re Arbitration between State and Davidson & Jones Construction Company, 72 N. C. App. 149, 323 S. E. 2d 466 (1984).

The act of an arbitrator in gathering evidence outside of the scheduled hearing and without notice to the parties would be a violation of the arbitration act and the arbitration agreement. In re

Arbitration between State and Davidson & Jones Construction Company, 72 N. C. App. 149, 323 S. E. 2d 466 (1984).

When the arbitrators requested copies of several articles from a witness who testified at the hearing during the hearing that was attended by all of the parties and copies of articles were later provided by a party to the arbitration, there was no ex parte consideration of evidence and no misconduct by the arbitrators. In re Arbitration between State and Davidson & Jones Construction Company, 72 N. C. App. 149, 323 S. E. 2d 466 (1984).

Although the Court of Appeals did not believe that this is the best or preferred manner for an arbitrator to receive evidence, the court held that it was not enough to vacate an arbitration award. In re Arbitration between State and Davidson & Jones Construction Company, 72 N. C. App. 149, 323 S. E. 2d 466 (1984).

The actions of the arbitrators in gathering evidence outside the scheduled hearings and without notice to the parties is a violation of the Act and hence of the arbitration agreement. The violation of the agreement, however innocently conceived constitutes misconduct. Fashion Exhibitors, Inc. v. Gunter, 291 N. C. 208, 230 S. E. 2d 380 (1976). (By visiting the leased premises to conduct their own investigation, the arbitrators engaged in misconduct.)

In Fashion Exhibitors, Inc. v. Gunter, 291 N. C. 208, 230 S. E. 2d 380 (1976), the Supreme Court specifically did not address the issue whether an arbitrator's contact with a disinterested attorney constituted misconduct. The Supreme Court did comment that it suffices to say that consultation by an arbitrator with an outsider is apt to raise more questions than it answers and opined that the practice should be avoided.

An arbitrator approached a witness during a recess and asked the witness if he did business in a certain area and gave the witness his business card and asked him to contact him. The Court of Appeals deemed that contact to be a trivial and casual one. Creative Homes and Millwork, Inc. v. Hinkle, 109 N. C. App. 259, 426 S. E. 2d 480 (1993). Since there was no allegation of actual prejudice, the Court of Appeals concluded that there was no prejudicial misconduct.

- **Refusal to Hear Evidence or Procedural Issues**

When arbitrators conduct the hearing contrary to law in their basic refusal to hear evidence which would interfere with their desire to dispose of the controversy as quickly as possible, an award should be vacated. The parties are entitled to be heard and to present evidence which is material to the determination of the dispute. Wildwoods of Lake Johnson Associates v. L. P. Cox Co., 88 N. C. App. 88, 362 S. E. 2d 615 (1987).

- **Fraud or Corruption**

The moving party must not only prove the existence of fraudulent conduct, but also that the award was procured by corruption, fraud or other undue means. Trafalgar House Construction v. MSL Enterprises, Inc., 128 N. C . App. 252, 494 S. E. 2d 613 (1998). There must be a nexus between the alleged fraud and the basis for the panel's decision.

- **Time for deciding request to vacate an award**

A trial court can determine whether to confirm or vacate an award prior to the expiration of the ninety statutory period. The trial court is not required to deter its ruling for the entire ninety day period. Miller v. Roca & Son, Inc., 167 N. C. App. 91, 604 S. E. 2d 318 (2004).

- **Deposing Arbitrators**

A party to an arbitration may depose the arbitrator relative to alleged misconduct only when an objective basis exists for a reasonable belief that misconduct has occurred. Turner v. Nicholson Properties, Inc., 80 N. C. App. 208, 341 S. E. 2d 42 (1986).

Depositions of arbitrators may be taken and admitted in a proceeding to vacate an award where an objective basis exists for a reasonable belief that misconduct has occurred. Ruffin Woody and Associates v. Person County, 92 N. C. App. 129, 374 S. E. 2d 165 (1988).

Although disclosure of prior contacts is preferred, to permit a party to attack an award or depose arbitrators whenever any prior transaction is not disclosed would frustrate the parties' intent to avoid litigation and obtain a swift resolution of their dispute. Ruffin Woody and Associates v. Person County, 92 N. C. App. 129, 374 S. E. 2d 165 (1988).

An arbitrator's deposition may be allowed when some objective basis exists for a reasonable belief that misconduct has occurred. Fashion Exhibitors, Inc. v. Gunter, 291 N. C. 208, 230 S. E. 2d 380 (1976); Creative Homes and Millwork, Inc. v. Hinkle, 109 N. C. App. 259, 426 S. E. 2d 480 (1993).

To refuse to admit testimony of the arbitrators where there is an objective basis reasonably to believe that misconduct has occurred, would deprive the aggrieved party of its most effective means of ascertaining and proving the alleged misconduct. Fashion Exhibitors, Inc. v. Gunter, 291 N. C. 208, 230 S. E. 2d 380 (1976).

Where an objective basis exists for a reasonable belief that misconduct has occurred, the parties to the arbitration may depose the arbitrators relative to that misconduct; and such depositions are admissible in a proceeding to vacate the award. Fashion Exhibitors, Inc. v. Gunter, 291 N. C. 208, 230 S. E. 2d 380 (1976); William C. Vick Construction Co. v. N.C. Farm Bureau Federation, 123 N. C. App. 97, 472 S. E. 2d. 346 (1996).

- **Participation in Arbitration Proceeding as a Waiver of an Objection to Arbitration**

One who participates in an arbitration hearing without objection may not raise an objection after the award is entered. Ruffin Woody and Associates v. Person County, 92 N. C. App. 129, 374 S. E. 2d 165 (1988).

When a party objects to an arbitration hearing and the court refuses to stay the arbitration proceeding, a party may then participate in the arbitration proceeding without waiving its

objection. Ruffin Woody and Associates v. Person County, 92 N. C. App. 129, 374 S. E. 2d 165 (1988).

A party's participation in the arbitration without making any protest or demand for a jury trial waives any right to object to the award later on the grounds that the arbitration agreement was coercive in that it compelled him to participate in the arbitration process. McNeal v. Black, 61 N. C. App. 305, 300 S. E. 2d 575 (1983). A party may waive a statutory benefit by express consent, by failure to assert it at an apt time, or by conduct inconsistent with the purpose to insist upon it. Id.

A party's consent to submission of the matter to arbitration and his participation in the arbitration hearing, without making any objection, demand for jury trial or motion to stay the proceedings, resulted in a waiver of the right to subsequently challenge the arbitration process. Burgess v. Jim Walter Homes, Inc., 161 N. C. App. 488, 588 S. E. 2d 575 (2003); McNeal v. Black, 61 N. C. App. 305, 300 S. E. 2d 575 (1983).

When none of the defendants, after being served with a notice of arbitration, applied for a stay of the proceedings or objected to the proceedings, but rather they participated, without objection to their status as parties in the proceedings, the parties may not later attempt to vacate an award on the ground that there was no agreement to arbitrate. In re Boyte, 62 N. C. App. 682, 303 S. E. 2d 418 (1983).

A party cannot be allowed to participate in an arbitration, raising no objections, and then refuse to be bound by an adverse award. This type of conduct would serve to defeat the purpose of arbitration. Miller v. Roca & Son, Inc., 167 N. C. App. 91, 604 S. E. 2d 318 (2004).

By not objecting to arbitration of the coverage issue prior to the arbitration hearing, the insurance company failed to assert its objection in a timely manner and, through its consent to and active participation in the arbitration proceedings, has engaged in conduct inconsistent with the purpose of insisting upon determination of the coverage issue by the trial court. Miller v. Roca & Son, Inc., 167 N. C. App. 91, 604 S. E. 2d 318 (2004).

- **Acceptance of Proceeds from an Arbitration Award**

Plaintiff's acceptance of defendant's payment pursuant to the arbitration award constitutes both an accord and satisfaction and a ratification of the arbitration award. Futrelle v. Duke University, 127 N. C. App. 244, 488 S. E. 2d 635 (1997). By cashing a check based on the arbitration award, the plaintiff ratified the award.

XI. JUDGMENT ON AWARD

- **Judgment on an Award**

§ 1-569.25. Judgment on award; attorneys' fees and litigation expenses.

(a) Upon granting an order confirming, vacating without directing a rehearing, modifying, or correcting an award, the court shall enter a judgment in conformity with the order. The judgment may be recorded, docketed, and enforced as any other judgment in a civil action.

(b) A court may allow reasonable costs of the motion and subsequent judicial proceedings.

(c) On motion of a prevailing party to a contested judicial proceeding under G.S. 1-569.22, 1-569.23, or 1-569.24, the court may award reasonable attorneys' fees and other reasonable expenses of litigation incurred in a judicial proceeding after the award is made to a judgment confirming, vacating without directing a rehearing, modifying, or correcting an award. (1927, c. 94, ss. 19, 21; 1973, c. 676, s. 1; 2003-345, s. 2.)

- **Remedies**

§ 1-569.21. Remedies; fees and expenses of arbitration proceeding.

(a) An arbitrator may award punitive damages or other exemplary relief if:

(1) The arbitration agreement provides for an award of punitive damages or exemplary relief;

(2) An award for punitive damages or other exemplary relief is authorized by law in a civil action involving the same claim; and

(3) The evidence produced at the hearing justifies the award under the legal standards otherwise applicable to the claim.

* * *

(c) As to all remedies other than those authorized by subsections (a) and (b) of this section, an arbitrator may order any remedies the arbitrator considers just and appropriate under the circumstances of the arbitration proceeding. The fact that a remedy could not or would not be granted by the court is not a ground for refusing to confirm an award under G.S. 1-569.22 or for vacating an award under G.S. 1-569.23.

(d) An arbitrator's expenses and fees, together with other expenses, shall be paid as provided in the award.

(e) If an arbitrator awards punitive damages or other exemplary relief under subsection (a) of this section, the arbitrator shall specify in the award the basis in fact justifying and the basis in law authorizing the award and state separately the amount of the punitive damages or other exemplary relief. (1973, c. 676, s. 1; 2003-345, s. 2.)

This rule follows cases holding that absent clearly restrictive language, an arbitrator must be allowed latitude in fashioning an appropriate remedy. By submitting to arbitration, it is implied that the arbitrator has the power to order an appropriate remedy, even though the contract may be silent as to any specific or general relief the arbitrator may grant…If a contract specifically limits the authority of the arbitrator to grant a particular type of relief, then the remedies are confined to what is stated, but an arbitrator is allowed flexibility in formulating remedies…where the contract requiring arbitration is not explicit on the subject of remedies and did not prohibit the arbitrator's use of a specific remedy. Faison & Gillespie v. Lorant, 187 N. C. 567, 654 S. E. 2d 47 (2007).

A plaintiff is not foreclosed from pursuing his statutory remedy of filing a claim of lien by agreeing to arbitrate a dispute. Adams v. Nelson, 313 N. C. 442, 329 S. E. 2d 322 (1985).

- **Attorney's Fees**

N. C. Gen. Stat. 1-569.21(b) provides:

> An arbitrator may award reasonable expenses of arbitration if an award of expenses is authorized by law in a civil action involving the same claim or by the agreement of the parties to the arbitration proceeding. An arbitrator may award reasonable attorneys' fees if:
>
> (1) The arbitration agreement provides for an award of attorneys' fees; and
>
> (2) An award of attorneys' fees is authorized by law in a civil action involving the same claim.

There is no provision or authority in this section or elsewhere in the Act allowing a court to increase the award by adding attorneys' fees not contained in the award. The Superior Court errs in so doing. Nucor Corp v. General Bearing Corp, 333 N. C. 148, 423 S. E. 2d 747 (1992).

When the agreement to arbitrate does not otherwise provide for the inclusion of counsel fees, then such fees are not allowable in the award for legal work performed in an arbitration proceeding. Nucor Corp v. General Bearing Corp, 333 N. C. 148, 423 S. E. 2d 747 (1992).

The language of the statute in effect in 1992 clearly reflected the legislative intent that attorney's fees are not to be awarded for work performed in the arbitration proceedings, unless the parties specifically agree to and provide for such fees in the arbitration agreement. There are important policy considerations supporting this determination not to allow attorney's fees in arbitration proceedings, unless provided by the parties. These considerations are consistent with the principle legislative purpose behind the enactment of the Uniform Arbitration Act: to provide and encourage an expedited, efficient, relatively uncomplicated, alternative means of dispute resolution, with limited judicial intervention or participation, and without the primary expense of litigation—attorney's fees. Nucor Corp v. General Bearing Corp, 333 N. C. 148, 423 S. E. 2d 747 (1992).

The reliance on N. C. Gen. Stat. 6-21.2 as authority for the proposition that attorney's fees are awardable by the superior court for work performed in arbitration proceedings, when no agreement for fees exists and such fees have not been allowed by the arbitrator in the award is misplaced and is hereby disavowed. This proposition is contrary to the wording of N. C. Gen. Stat. 1-567.11 and to well settled principles of law including statutory construction. Nucor Corp v. General Bearing Corp, 333 N. C. 148, 423 S. E. 2d 747 (1992).

N. C. Gen. Stat. 6-21.2 does not apply to arbitration proceedings. Thus, in arbitration proceedings, both the arbitrator or arbitration panel and the superior courts upon confirmation are limited to applying the arbitration statute in determining whether attorneys' fees should be or were properly awarded. Nucor Corp v. General Bearing Corp, 333 N. C. 148, 423 S. E. 2d 747 (1992).

When the amount of attorney's fees is fixed by statute, there is no room for arbitration. G. L. Wilson Building Co. v. Throneburg Hosiery Co., Inc., 85 N. C. 684, 355 S. E. 2d 815 (1987).

An award of attorney's fees in excess of the statutory amount exceeds the arbitrator's authority. J. M. Owen Building Contractors, Inc. v. College Walk, Ltd., 101 N. C. App. 483, 400 S. E. 2d 468 (1991).

A trial judge has discretion to award attorney's fees in a personal injury case in which an arbitration award was entered under the limit set by N. C. Gen. Stat. 6-21.1. The award of attorney's fees can include fees for work done outside the arbitration prior to the referral of the case to arbitration. Lucas v. City of Charlotte, 123 N. C. App. 140, 472 S. E. 2d 203 (1996).

Under the Uniform Arbitration Act, there is no authority for an arbitrator or a court to award attorney's fees after an original award is made. Vanhoy v. Duncan Contractors, Inc., 153 N. C. App. 320, 569 S. E. 2d 715 (2002). (In Duncan, the arbitrator issued an award providing that each party would be responsible for its own attorney's fees and later modified the award to grant the plaintiff attorney's fees.)

- **Costs**

An award of costs does not fit within the parameters of the trial court's authority to modify an award. When the arbitrator does not award costs, then the trial court properly denied a motion for costs. Eisinger v. Robinson, 164 N. C. App. 572, 596 S. E. 2d 831 (2004).

- **Interest**

A trial court was permitted to modify the arbitrators' award granting interest at the rate of 8% per diem to an award of 8% per annum. J. M. Owen Building Contractors, Inc. v. College Walk, Ltd., 101 N. C. App. 483, 400 S. E. 2d 468 (1991). In this case, the parties' agreement provided that the interest rate was the legal rate.

Even if the arbitrator's failure to include prejudgment interest in the award was a mistake of law or fact, such a mistake may not be corrected by the trial court upon a party's motion for modification or correction. As the arbitrator's failure to include prejudgment interest was not due to mathematical error, error relating to form, or error resulting from exceeding his authority, the trial court was without authority to modify the award to include prejudgment interest. Palmer v. Duke Power Co., 129 N. C. App. 488, 499 S. E. 2d 801 (1998). See also Eisinger v. Robinson, 164 N. C. App. 572, 596 S. E. 2d 831 (2004).

When the arbitration award provides that "the determination of whether prejudgment interest should be paid and if so in what amount is left to counsel for the parties and a Superior Court judge to decide," the trial court did not err in adding prejudgment interest to the arbitration award. Lovin v. Byrd, 178 N. C. App. 381, 631 S. E. 2d 58 (2006). By adding interest in accordance with the arbitrator's award, the trial court did not modify the award and merely enforced the award as written.

Since the arbitration agreement encompassed prejudgment interest and the issue was deferred by the arbitrator to the trial court for resolution, an award of prejudgment interest would not constitute a modification of the arbitration award. Hamby v. Williams, 196 N. C. App. 733, 676 S. E. 2d 478 (2009). In this instance, the trial court judge erred by not awarding prejudgment interest.

An award of interest by the arbitrator is not in excess of the authority of the arbitrator. Faison & Gillespie v. Lorant, 187 N. C. App. 567, 654 S. E. 2d 47 (2007). In an arbitration of claims asserted in the pleadings in pending litigation, the arbitrator had the authority to award interest. Interest falls within "such other and further relief as the Court deems just and proper.

Given the law as it stands in this State, the provision granting the arbitration panel authority to address issues of compensatory damages was ambiguous as to whether prejudgment interest was available. As such, we resolve our doubt against insurance company and in favor of the policyholder. The arbitration panel had the authority to address the issue and the trial court properly confirmed an award of prejudgment interest. Sprake v. Leche, 188 N. C. App. 322, 658 S. E. 2d 490 (2008).

When an arbitrator fails to award interest, the trial court cannot modify the award to add prejudgment interest. Blanton v. Isenhour, 196 N. C. App. 166, 674 S. E. 2d 694 (2009).

- **An Arbitration Award is a Judgment for *res judicata* or Collateral Estoppel purposes**

The doctrine of *res judicata* applies to a judgment entered on an arbitration award as it does to any other final judgment. Rodgers Builders, Inc. v. McQueen, 76 N. C. App. 16, 331 S. E. 2d 726 (1985).

A party is required to bring forth the whole case at one time and will not be permitted to split the claim or divide the grounds for recovery; thus, a party will not be permitted, except in special circumstances, to reopen the subject of the arbitration or litigation with respect to matters which might have been brought forward in the previous proceeding. Futrelle v. Duke University, 127 N. C. App. 244, 488 S. E. 2d 635 (1997); Rodgers Builders, Inc. v. McQueen, 76 N. C. App. 16, 331 S. E. 2d 726 (1985).

Once judgment is entered upon the arbitration award, it will then operate as an estoppel not only as to all matters actually determined or litigated in the prior proceeding, but as to all relevant and material matters within the scope of the proceeding which the parties, in the exercise of reasonable diligence, could and should have brought forward for determination. Futrelle v. Duke University, 127 N. C. App. 244, 488 S. E. 2d 635 (1997).

An arbitration award constitutes a final judgment for collateral estoppel purposes even if the award has not been confirmed. Murakami v. Wilmington Star News, Inc., 137 N. C. 357, 528 S. E. 2d 68 (2000).

Preclusive effect is not limited to court proceedings; it arises in the same manner from arbitration awards. Whitlock v. Triangle Grading Contractors Development, Inc., ___ N. C. App. ___, 696 S. E. 2d 543 (2010).

One who was not a party to a prior arbitration may use the arbitration award to bind an adverse party in a subsequent proceeding if, among other things, the adverse party or its privy was a party to the arbitration and enjoyed a full and fair opportunity to litigate the issue in the earlier proceeding. Whitlock v. Triangle Grading Contractors Development, Inc., ___ N. C. App. ___, 696 S. E. 2d 543 (2010).

Unless plaintiff is a party to the arbitration agreement, he sought to benefit directly from the arbitration, or he actively participated in or controlled the arbitration, the plaintiff is not bound by the outcome of the arbitration between other parties. Whitlock v. Triangle Grading Contractors Development, Inc., ___ N. C. App. ___, 696 S. E. 2d 543 (2010).

XII. APPEALS

§ 1-569.28. Appeals

(a) An appeal may be taken from:
- (1) An order denying a motion to compel arbitration;
- (2) An order granting a motion to stay arbitration;
- (3) An order confirming or denying confirmation of an award;
- (4) An order modifying or correcting an award;
- (5) An order vacating an award without directing a rehearing; or
- (6) A final judgment entered pursuant to this Article.

(b) An appeal under this section shall be taken as from an order or a judgment in a civil action. (1927, c. 94, s. 22; 1973, c. 676, s. 1; 2003-345, s. 2.)

The orders and judgments enumerated in N. C. Gen. Stat. 1-569.28(a) are the only situations where an appeal could possibly be taken under the Revised Uniform Arbitration Act, though an appeal is not required. Bullard v. Tall House Building Co., 196 N. C. App. 627, 676 S. E. 2d 96 (2009).

An order denying arbitration is immediately appealable. D. P. Solutions, Inc. v. Xplore-Tech Services Private Limited, ___ N. C. App. ___, 710 S. E. 2d 297 (2011); Pressler v. Duke University, 199 N. C. App. 586, 685 S. E. 2d 6 (2009); Griessel v. Temas Eye Center, P. C., 199 N. C. App. 314, 681 S. E. 2d 446 (2009); U. S. Trust Co., N. A. v. Stanford Group, Inc., 199 N. C. App. 287, 681 S. E. 2d. 512 (2009); In re W. W. Jarvis & Sons, 194 N. C. App. 799, 671 S. E. 2d 534 (2009); Gemini Drilling and Foundation, LLC v. National Fire Insurance Co. of Hartford, 192 N. C. App. 376, 665 S. E. 2d 505 (2008).

An order reserving a decision whether to compel arbitration is an interlocutory order that is not immediately appealable. McCrary v. Byrd, 136 N. C. App. 487, 524 S. E. 2d 817 (2000).

If the trial court summarily determines that the parties did not enter into a valid arbitration agreement, the trial court shall grant a motion to stay arbitration and the opposing party may be allowed to appeal the order. Lee County Board of Education v. Adams Electrical, Inc., 106 N. C. App. 139, 415 S. E. 2d 576 (1992).

An appeal from an order compelling arbitration is interlocutory and there is no right of appeal. Bullard v. Tall House Building Co., 196 N. C. App. 627, 676 S. E. 2d 96 (2009); Laws v. Horizon Housing, Inc., 137 N. C. App. 770, 529 S. E. 2d 695 (2000); N. C. Electric Membership Corp v. Duke Power Co., 95 N. C. App. 123, 381 S. E. 2d 896 (1989).

When the trial court has not yet summarily determined the issue of whether the parties have entered into an enforceable contract providing for arbitration, the trial court's order enjoining arbitration pending that determination is not appealable. Lee County Board of Education v. Adams Electrical, Inc., 106 N. C. App. 139, 415 S. E. 2d 576 (1992).

An order denying a motion to confirm an arbitration award is immediately appealable because it involves the denial of a substantial right. Futrelle v. Duke University, 127 N. C. App. 244, 488 S. E. 2d 635 (1997).

An order confirming or denying confirmation of an award is appealable. Bullard v. Tall House Building Co., 196 N. C. App. 627, 676 S. E. 2d 96 (2009).

An order modifying or correcting an award is appealable. Bullard v. Tall House Building Co., 196 N. C. App. 627, 676 S. E. 2d 96 (2009).

An order vacating an award without directing a new hearing is appealable. Bullard v. Tall House Building Co., 196 N. C. App. 627, 676 S. E. 2d 96 (2009).

An appeal from a final judgment entered based on an arbitration award is appealable. Bullard v. Tall House Building Co., 196 N. C. App. 627, 676 S. E. 2d 96 (2009).

When an order contains both appealable and non-appealable issues, then the matter may be appealed if it is certified pursuant to Rule 54 of the North Carolina Rules of Civil Procedure or if the order deprives the appellant of a substantial right which would be jeopardized absent review prior to a final determination on the merits. Bullard v. Tall House Building Co., 196 N. C. App. 627, 676 S. E. 2d 96 (2009).

XIII. OTHER PERTINENT STATUTORY PROVISIONS

- **Definitions**

§ 1-569.1. Definitions.

The following definitions apply in this Article:

(1) "Arbitration organization" means an association, agency, board, commission, or other entity that is neutral and initiates, sponsors, or administers an arbitration proceeding or is involved in the appointment of an arbitrator.
(2) "Arbitrator" means an individual appointed to render an award, alone or with others, in a controversy that is subject to an agreement to arbitrate.
(3) "Court" means a court of competent jurisdiction in this State.
(4) "Knowledge" means actual knowledge.
(5) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government; governmental subdivision, agency, or instrumentality; public corporation; or any other legal or commercial entity.
(6) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form. (2003-345, s. 2)

- **Notice**

§ 1-569.2. Notice.

(a) Except as otherwise provided in this Article, a person gives notice to another person by taking action that is reasonably necessary to inform the other person in the ordinary course, whether or not the other person acquires knowledge of the notice.

(b) A person has notice if the person has knowledge of the notice or has received notice.

(c) A person receives notice when it comes to the person's attention or the notice is delivered at the person's place of residence or place of business or at another location held out by the person as a place of delivery of communications. (2003-345, s. 2.)

- **Uniformity of Application and Construction**

§ 1-569.29. Uniformity of application and construction.

In applying and construing this Article, consideration shall be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it. (1927, c. 94, s. 23; 1973, c. 676, s. 1; 2003-345, s. 2.)