Michael O'Foghludha

(pronounced O-Fa-lu)
District 16- Durham
919-795-1081
Evidence
Things I've learned along the way, or I've seen a lot, or been surprised by…

1

Do the Rules of Evidence even apply?

- Rule 1101- Rules apply to all proceedings EXCEPT
- Preliminary questions of fact as to admissibility of evidence when issue is to determined by the Court under Rule 104 (i.e. non jury trials)
- Extradition, probable cause hearings, PROBATION, issuance of warrants for arrest, or summons, SEARCH WARRANTS, BAIL proceedings, CONTEMPT, grand jury proceedings

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PROBATION

- S v. Jones 382 NC 267 (2022)
- Defendants are not entitled to full 6th amendment rights, but due process is required.
- NCGS 15A-1345(e) governs procedure for a revocation hearing. Defendant may "confront and cross examine adverse witnesses unless the Court finds good cause for not allowing confrontation."
- Court admitted order denying motion to suppress and transcript of officer's testimony at suppression hearing. Court found violation of new criminal offense despite no conviction (original charge was mistried and apparently not retried)

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PROBATION

- S v. Thorne 279 NCApp 655 (2021)

Revocation hearing: new officer had no information other than file of previous officer. Defendant objected, Court simply said "overruled"

Affirmed, as defendant's objection did not clearly invoke 15A-1345(e)

Court should have found "good cause" to not allow confrontation in Judge's discretion

Practice pointer: find in your discretion rules of evidence don't apply under Rule 1101, and good cause exists not to allow confrontation under the statute. You could listen to the testimony, and then determine whether cross of absent witness is required.

S v. Hemmingway (CoA, 7/20/21). Defendant in fact objected under 15A-1345. Court just said "overruled". Held: no showing that Court exercised discretion under the statute. REMANDED!

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Motions in limine

- Simply a preliminary ruling. If granted, it's not coming in without further ruling. Rule on things that will affect jury selection. Some prefer to wait and hear evidence. I prefer to make as many preliminary rulings as I can.
- To preserve objection, counsel must object AGAIN during the case.

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Rule 615- Sequestration

- Should ordinarily be allowed at request of a party
- Rule says "may", so the ruling is in your discretion. Say that.
- Not authorized for: a party, a designee of a non-natural party, person(s) essential to the presentation of case, or person whose presence is found by court to be necessary in the interests of justice.
- Ask for objections. Do you object to the officer staying in? State: "Victim has a constitutional right" State can't appeal, but if grant or deny, use your discretion.
- State parameters. Can they stay after testifying? Can they talk before or after? Practical considerations: Sheriff check? Alert Court?
- Violations: Exclude (be careful), contempt, instruct jury on credibility

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ORDER AND MODE- Rule 611

- Order of witnesses, scope of cross
- Co-operating wits (co-defendants, for example) can be asked about pending charges if relevant under 401 and 403. Generally wide latitude is allowed on cross, particularly a criminal defendant. Adverse witness or party, or a hostile witness, can be led. Practice pointer: find on the record that witness is hostile.
- Can take out of turn. Can re-open. Can re-call. All of this is in your discretion.
- Conditional relevance: "I'll tie it up later. It corroborates a future witness". Rule 104(b) allows, but I never do it.

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OBJECTIONS

- How handle bench conferences with complete recordation requests in non-capital matters. Full recordation of bench conferences is required in capital cases.
- Don't allow speaking objections. Basis can be stated simply: "Leading", "Hearsay", "Foundation", "Relevance".
- "Would you like to be heard"? Approach the bench, then decide to send jury out. If not, allow record to be made at break, lunch, etc.- "Like to put anything on record"
- You must rule.

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Common rulings

- Rule 401- relevant evidence is admissible
- Rule 403- In your discretion, if probative value is substantially outweighed by its prejudicial effect. Say that every time, either way.
- Unfair prejudice, confusion of the evidence, misleading, undue delay, cumulative are grounds for exclusion

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404(b)

- Other crimes, wrongs, acts not admissible to show conformity, but admissible for motive, opportunity, plan, etc.
- In essence, must have 1) sufficient evidence it was indeed the defendant 2) not be used to prove his character 3) must be sufficiently similar, and 4) must not be too remote
- Find all those, find the purpose, and THEN, DO 403
- Your FOFs and COLS under 404(b) are reviewed de novo, your 403 balancing reviewed for abuse of discretion.

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CHILD ABUSE

- These cases are difficult. Witnesses and parties may or can be emotionally invested and not necessarily overly concerned about evidentiary rules
- Have https://www.sog.unc.edu/sccc (Criminal case law compendium) and https://benchbook.sog.unc.edu/evidence open
- Illustrative cases:
- Expert can't say that the defendant was the perpetrator, can't say that the alleged victim is believable, and can't say, in absence of physical findings, that sexual abuse or trauma in fact occurred.

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CHILD SEX CASE EXPERTS, cont.

- S. v. Shore (CoA 4/3/18). Social Worker, qualified as expert in that field, said "not uncommon to delay disclosure". Challenged on Rule 702 Daubert grounds. No error.
- S. v. Warden 276 NC 503 (2020) DSS worker testified that they substantiated sexual abuse in the DSS investigation. No objection. Plain error, and new trial.
- S. v. Betts (NCSC 6/11/21) Social worker testified as to profiles of sexually abused children and that victim's condition was consistent with said profile, and that victim suffered from PTSD. No error
- Practice tip: However, social worker's testimony can only be considered for purposes of corroboration. Give limiting instruction if requested, or out of abundance of caution, sua sponte.

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CHILD SEX CASES

- Accord with Betts, above: S v. Thompson 852 SE2d 365 (CoA 10/6/20): therapist's testimony that victim suffered from PTSD may not be offered for substantive purposes, but only for corroboration. Judge admitted for corroboration only, but did not give limiting instruction, as none was requested. No plain error.
- S v. Clark 380 NC 204 (2022). Expert may not testify that child was in fact sexually abused in absence of physical findings. Plain error! Expert's testimony that she recommended victim stay away from defendant was tantamount to saying that the defendant was the perpetrator. Again, plain error.

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Closing the courtroom?

- Just saying ok will get you reversed
- Waller v. Ga. 467 U.S. 39 (1984)
- 1st amendment is implicated (public and press)
- 6th amendment is implicated (defendant's right to open proceeding)
- Party seeking must have over-riding interest likely to be prejudiced
- Closure is no broader than necessary
- Reasonable alternatives have been considered
- FOFs needed to support

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Confrontation in these cases

- Child is unavailable (includes not competent as a witness- 3 year old, for example)
- Again, https://benchbook.sog.unc/evidence
- Testimonial statements offered for the truth are not admissible unless defendant has been offered a prior opportunity to cross examine.
- Ohio v. Clark 135 SCt 2173 (2015) Statements to child's preschool teacher were not testimonial, even though teacher was under mandatory reporting requirement.
- Maryland v. Craig (USSC) allows remote testimony of child victim. This does not violate the confrontation clause, multiple NC cases.

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Confrontation in general

Statements to law enforcement are generally testimonial but are non-testimonial under circumstances objectively indicating that the primary purpose of the questioning is to enable assistance to meet an ongoing emergency. i.e. "Who shot you, where is the gun," etc

- Prior transcripts are testimonial, obviously, but there is an opportunity to cross exam.
- Caution: S. v. Smith (CoA 2/7/23- unpublished) Probable cause testimony transcript was not properly admitted because defendant faced second degree kidnapping charge at time, and at trial was charged with first degree kidnapping and sex trafficking of a minor. New trial despite opinion stating substantial evidence of guilt.

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Videos

- Can always be used to illustrate or corroborate testimony of witness on the stand- remember to give jury instruction. I generally don't give a limiting instruction on illustrative videos unless requested.
- Practice tip: Always ask if objection to substantive
- S v. Snead 368 NC 811 (2016)- video as substantive evidence
- Witness testified that he was familiar with how video surveillance system worked, that the recording equipment was "industry standard," that the equipment was "in working order" on the date in question, and that the videos produced by the surveillance system contain safeguards to prevent tampering. State's exhibit at trial contained the same video that he saw on the digital video recorder. Because defendant made no argument that the video had been altered, the State was not required to offer further evidence of chain of custody. Court did not err in admitting the video into evidence.
- Practice tip: ask if there's any objection.

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Videos

- Officer or lay witness can't testify person in the video is the defendant, or that two videos are the same person, unless they know the defendant otherwise.
- Caution: S v. Thomas (CoA 12/21/21) Detective says car in video was silver or grey with a sunroof was in essence saying it was the defendant's car. Case has good discussion of above principles and supporting cases.
- Illustrative: S v. Dove (CoA 12/1/20) Lay witness testimony that person in video was "holding a gun" was error, but harmless. Principle is that witness is no better than the jury, and it's for the jury to determine.

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Arrest warrant or indictment

- Don't let it in, don't let it be read.
- S v. Bryant 244 NCApp 102 (2015) and NCGS 15A-1221(b)

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Gruesome photos

- S v. Hennis 323 NC 279, 372 SE2d 523 (1988)
- The admission of an excessive number of photographs depicting substantially the same scene may be sufficient grounds for a new trial when the additional photographs add nothing in the way of probative value but tend solely to inflame the jurors. Large screen projected directly over defendant's head
- Practice Tip: Hold a voir dire, say it's a "Hennis hearing", exclude cumulative things (ask the DA why?), find method of presentation is not inflammatory

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Civil pleadings in criminal trials

- Don't let them in. NCGS 1-149: No pleading can be used in a criminal proceeding against the party as proof of a fact admitted or alleged therein.
- S v. Young 368 NC 188 (2015) complicated analysis of this issue ultimately holding that defendant did not properly preserve his objection.
- My recommendation: stay away, stay away…

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Authentication of Social media

- S v. Clemmons 274 NCApp 401, 852 SE2d 671 (2020) A DVPO case where there was no direct evidence of who made the posts. Held that circumstantial evidence can be sufficient to show that posts likely came from defendant. Complicated facts but a great discussion of the issues involved.
- S v. Ford 782 SE2d 98 (CoA 2016) more common scenario. Officer could testify that photo found on the internet was in fact the defendant and his dog as he was familiar with both defendant and his nickname.
- Practice tip: Social media is expanding and transforming almost daily and AI will complicate this even further. Find out whether anyone is offering social media and find out any objections ahead of time. Rule in limine? Be ready when the time comes?

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Reluctant witnesses- prior statements

- Anything can be used to refresh recollection. Does not have to be admitted or read to jury. What if they say it doesn't help?
- Rule 803(5): 1) witness had knowledge at the time 2) witness now has insufficient recollection 3) was (video, recording, writing) made at time when fresh? 4) did it reflect knowledge accurately?
- Have a voir dire. If say "it's a lie" or otherwise disclaim, not in. If say accurate or it must have been, coming in.
- S v. Thomas (CoA 12/21/21) Witness neither denied or affirmed. A great synopsis of prior cases. Court says it's a very close case. Witness couldn't remember what happened, couldn't remember what was in statement(s), but did remember talking to detective and sister, but couldn't remember what said. Said it was her voice on tape (made covertly by detective), said "I was just talking to him like a friend", on cross "I was just ranting, I don't know what I said". Said she was talking to her sister about what happened, sister sent her an email summarizing their conversation, she signed it and gave it to detective. Affirmed it was her signature. No error in admission of both recording and email as substantive evidence.

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Reluctant witnesses

- S v. Brown 811 SE2d 224 (2018) disc. rev. den. 813 SE2d 852
- Former boyfriend accused of killing woman and new boyfriend. (extensive voir dire on ballistics evidence with extensive FOFs- not the appellate issue). Witnesses were defendant's two brothers. They testified that defendant told them "I did it", but testified to things that contradicted their statements to detectives, and specifically that the only reason they gave them was that they didn't want to be charged as accessories. Testified that defendant was drunk at the time he talked to them and you just could never tell what he might say. Testified that they gave statements at time when fresh, that the statements contained their signatures, that they had not been altered, but didn't remember the contradictory statements. Defendant argued on appeal that testimony did not support finding that witnesses' recollection was now insufficient, since they did remember things. Each witness testified to what defendant told them at time, and neither witness claimed to not remember what defendant said. Defendant also argued that the State was improperly impeaching its own witness by introducing a prior statement that the State knew to be inconsistent with the witness's trial testimony.
- In response to defendant's arguments, the court made the following oral findings of fact and legal conclusions regarding the witnesses' testimony and the various out-of-court statements: (1) that defendant's out-of-court statement to Reginald- "that he did it"—was admissible via Reginald's testimony as a statement of a party-opponent; (2) that defendant's more detailed out-of-court written statements were made at a time when defendant's statements were fresh in the witnesses' memories; (3) that based on both witnesses' testimonies—particularly Antonio's testimony that three years had passed and he has "a lot of stuff going on"—the witnesses had an insufficient recollection of what they wrote down for the investigator on 17 December 2013; (4) that the witnesses testified that they did, in fact, write down for the investigator what defendant said on 16 December 2013; (5) that this was "a case of a witness who's talking about events three years later," not of the State impeaching its own witness; and (6) that both written statement fit within the hearsay exception for recorded recollections under Rule 803(5) of the Rules of Evidence. The court then overruled defendant's objection, denied his request for a limiting instruction, and allowed Antonio's written statement to be read to the jury as substantive evidence. No error. Court then allowed video of interview as corroborative and illustrative of written statements with a limiting instruction

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803(3)

- Particularly applicable in murder cases. An out of court statement by a declarant's then existing state of mind is admissible, but not a statement about past events. So, "I'm afraid of my spouse" comes in, but not statement about past events. S v. Stager 329 NC 278 406 SE2d 876 (1991)

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Residual hearsay 803 (24)

- Six part test
- 1) whether proper notice has been given
- 2) it's not covered by another exception
- 3) objective indications of trustworthiness
- 4) is it material
- 5) whether statement is more probative on the issue than any other evidence which the proponent could procure through reasonable efforts.
- 6) whether interests of justice served by admission

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Hearsay

- Full treatment of all the hearsay rules at
- https://benchbook.sog.unc.edu/evidence/hearsay-rules

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Scientific evidence

- Rule 702
- 1) an expert qualified by training and/or experience must
- 2) apply established principles
- 3) to adequate and sufficient data
- 4) using methods generally accepted and standard in the field, and
- 5) explain how they applied those methods and principles to the facts presented by the case

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Rule 702

- S v. Koiyan 841 SE2d 351 (CoA 2021) Fingerprints. Expert gave extensive testimony about his qualifications and how fingerprint comparisons worked, but failed to explain adequately, just said the fingerprints matched. Error (but not prejudicial)
- S v. Miller 852 SE2d 704 (CoA 2020). Ballistics. Sufficient facts and data used by a qualified expert using established and reliable principles, demonstrating and explaining how those principles were applied to the facts of the case.
- Practice tip: Don't admit hair comparisons. National studies to this effect.

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Defendant's evidence

- Defendant cannot introduce exculpatory statement ("I didn't do this") during State's case in chief. Self-serving. Numerous cases.
- State cannot comment on Defendant's post- arrest post Miranda silence. Practice tip: Don't let them ask if defendant made a statement.
- Can't be asked about whether he "told lawyer this story". S v. Graham 283 NCApp 271 (2022)
- Defendant CAN be asked about pre-arrest silence. Defendant can be asked about silence to friends and family. S v. Young 233 NCApp 207 (2014) rev'd on other grounds 368 NC 188 (2015)
- Full cases: https://benchbook.sog.unc.edu/evidence/impeachment

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Jury Argument

- Lawyers get carried away. You know who they are.
- Can't make comparisons to animals, comment on defendant's silence and failure to testify, putting victim through a trial and not pleading guilty, sending a message, "why don't those other juries do something about crime", questioning defense lawyer's integrity.
- Full cases at https://www.sog.unc.edu/sccc/41246

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Jury Deliberations and Evidence

- The evidence can be re-opened in your discretion at any time prior to verdict.
- More commonly, jurors ask for evidence. If the jury has begun its deliberations and asks (make them put it in writing) to review certain testimony or other evidence, all the jurors must be brought back into the courtroom. G.S. 15A-1233(a); *State v. Ashe*, 314 N.C. 28 (1985). Have a hearing outside of jury and get suggestions. It's error not to bring the full jury in after consulting with the attorneys. Judge must then exercise discretion and decide whether to direct that requested parts of testimony be read out, or permit the jury to reexamine in open court any exhibits that had been admitted into evidence. See *State v. Johnson*, 346 N.C. 119 (1997); *State v. Starr*, 365 N.C. 314 (2011). The consent of the prosecutor or defendant is not required for either of these options. *State v. Barnett*, 307 N.C. 608 (1983). See also *State v. Benson*, 323 N.C. 318 (1988); *State v. Eason*, 328 N.C. 409 (1991) (can also require related evidence in your discretion to be included- I've never done this- I always just instruct them to consider all the evidence, not just what they've asked for….

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Deliberations

- Jurors who are used to seeing trials on television assume it's a simple matter to ask to "see the transcript" of a particular witness's testimony to assist them in their deliberations. Obviously the official transcript of that testimony does not exist yet. Error! to say you "can't" provide the jury with a transcript. See *State v. Hinton*, 226 N.C. App. 108 (2013). Instead, say something to the effect of "in my discretion I'm denying that request, and I instruct you to rely instead on your own recollection of the testimony." For more information about this topic, see Jessica Smith, "*Jury Review of the Evidence: Say the Magic Words*," N.C. Criminal Law Blog, March 6, 2013.
- Practice tip: Pre-empt it from the start.

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Deliberations

- The jury might also ask to take certain exhibits back into the jury room with them during its deliberations. The trial judge may allow this, in his or her discretion, but only if both the prosecutor and the defendant consent to the jury's request. See *State v. Huffstetler,* 312 N.C. 92 (1984). If either party objects, it is error to send the exhibits into the jury room. See *State v. Mumma*, 372 N.C. 226 (2019); *State v. Mason,* 221 N.C. App. 223 (2012). Instruct the jury not to conduct experiments with the evidence, write on it, etc.
- I always make them watch the videos in the courtroom. If they are three hours long or so, I ask them to go write me another note.

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Polling the Jury

- How to avoid it.
- If asked, you do it. Why is a war story
- It's not hard.
- Start with the foreperson
- Jury has returned as it's verdict that the defendant is guilty of armed robbery beyond a reasonable doubt.
- Was that the jury's verdict? Was that your verdict? Is it still your verdict? Thank you Mr. Foreperson
- Juror 1, your foreperson has indicated to the Court that the jury has unanimously found beyond a reasonable doubt that the defendant is guilty of armed robbery. Was that the Jury's verdict? Was it your verdict? Is it still your verdict? Thank you Juror #1. (Thanking them is important) So on down the line…

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Civil experts- med mal

- Even it's true, can't just say it's a national standard of care. Henry v. Southeastern Ob-Gyn 145 NCApp 208 (2001)
- Saying it's a national standard is ok if also says familiar with local community (can get information from internet), is similar to his community, he is familiar with defendant doctor's qualifications, does same procedure. Cox v. Steffes 161 NCApp 237, 587 SE2d 908 (2003). Reading Pa similar to Fayetteville, compared equipment, all rest above.
- Purvis v. Moses Cone 624 SE2d 380 (2006). Expert who reviewed demographic information from 2003, but incident happened in 1998. Properly excluded.

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Rule 9(j)

- Rule 9(j) is a special pleading requirement for medical malpractice actions. The rule "serves as a gatekeeper, enacted by the legislature, to prevent frivolous malpractice claims by requiring expert review before filing of the action." *Estate of Wooden ex rel. Jones v. Hillcrest Convalescent Ctr., Inc.*, 222 N.C. App. 396, 401, 731 S.E.2d 500, 504 (2012). The relevant provision for our analysis is Rule 9(j)(1), which requires the complaint to specifically assert "that the medical care ... ha[s] been reviewed by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care." N.C. Gen. Stat. § 1A-1, Rule 9(j)(1).
- Even if a complaint facially complies with the requirements of Rule 9(j), the trial court may dismiss it "if subsequent discovery establishes that the certification is not supported by the facts, at least to the extent that the exercise of reasonable diligence would have led the party to the understanding that its expectation was unreasonable." *Estate of Wooden*, 222 N.C. App. at 403, 731 S.E.2d at 506.
- But, importantly, if the trial court determines that a complaint is subject to dismissal on this ground, "the court must make written findings of fact to allow a reviewing appellate court to determine whether those findings are supported by competent evidence, whether the conclusions of law are supported by those findings, and, in turn, whether those conclusions support the trial court's ultimate determination." *Id.*

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702 and 9(j)

- **Kennedy v. Deangelo, 264 N.C. App. 65**
- Plaintiff's expert periodontist testified he did not practice general dentistry. Properly excluded.
- Miller v. Carolina Coastal (NCSC Aug 19 2022). Plaintiff's attorney reasonably believed expert would qualify at time of filing of complaint. Error to exclude.

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Rule 407 Remedial measures

Generally not admissible

- safety rules, repairs, new devices, firings
- Admissible for purposes other than proving negligence: 1)
- ownership 2) feasibility 3) impeachment
- attempt to recreate conditions admissible: Smith v. Pass 95 N.C.App. 243 (1989)
- Subsequent remedials of a third party admissible Murrow v. Daniels 85 N.C.App. 401 (1987) rev'd. oog 321 N.C. 494 (1988)

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Rule 408- Offers to Compromise

- Not admissible generally
- Evidence of statements made also barred, unless otherwise discoverable
- Admissible to prove bias, to negate a contention of undue delay, or to prove an effort to obstruct a criminal investigation
- 161 A.L.R. 395, Fenberg v. Rosenthal 348 Ill. App. 510 (1952): passenger in civil defendant's car gave testimony that defendant was only travelling 20 mph. In fact passenger had been compensated by defendant driver's insurance company. Trail judge excluded and upheld. Great discussion of competing principles. Strong presumption that it's inadmissible.
- Compromise of a joint tortfeasor inadmissible Cates v. Wilson 350 S.E.2d 898 (1986). Med mal- settlement of other party not admissible, and generally other tortfeasor should not know

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Rule 409- Payment of medical and other expenses

- Medical, hospital, or "other expenses"- latter includes lost wages, property damage claims
- Contrary to Rule 408- statements made in conjunction with the offer admissible: "In cases of payments of offers to pay medical expenses, factual statements may be expected to be incidental in nature."
- Very little case law

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Rule 411- Liability insurance

Not admissible to prove negligence. Admissible to prove agency, ownership, control, or bias or prejudice.

Abuse of discretion (!): Williams v. McCoy 145 NCApp 111 (2001) Plaintiff in auto case went to the emergency room immediately after the accident and then to a chiropractor four days later. Said she did not visit the chiropractor earlier because he was not available. She also met with the defendant's insurance claims adjuster, and after the meeting went badly, hired an attorney. At trial, defense counsel sought to play up the fact that P had hired an attorney before going to the chiropractor to show that she was a litigious person. The court prevented her from explaining that the reason she had hired an attorney was because of the negative experience with the claims adjuster.

Trial court could have given a limiting instruction. Plaintiff's answer did not bear on the tortfeasor's negligence, but explained defense counsel's attempt to make her injuries appear exaggerated or overly litigious. New Trial.

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Rule 411

Is it offered to show that a party acted negligently?

- If not, what is the purpose?
- Is that purpose relevant?
- Is the probative value of that evidence substantially outweighed by its prejudicial effect?

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Rule 411

Williams v. Bell 167 N.C.App. 674 (2005)

Evidence of defendant's liability coverage should not have been introduced just because evidence of plaintiff's recovery in worker's compensation was introduced pursuant to N.C.G.S. 97-10.2. Anderson v. Hollifield 123 N.C.App. 426 (1996) rev'd oog 345 N.C. 480 (1997)

What if it's Underinsured Motorist's Coverage? (the real policy at issue is the plaintiff's own policy) The rule is the same: Braddy v. Nationwide 122 N.C.App.402 (1996)

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What if someone blurts it out?

- Witness said that the defendant's insurance carrier had hired the engineering firm and their work was excellent. "The mere mention that coverage exists does not warrant a mistrial." Medlin v. FYCO 139 N.C.App. 534 (2000) (In this case the trial judge decided in his discretion that a curative instruction would only highlight the matter)
- What if a juror asks during jury selection?

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Rule 411- Bias

- Carrier v. Starnes 120 N.C.App. 513 (1995)
- P.I. hired by Nationwide. Plaintiff's counsel properly crossed on bias: Who hired? Prior number of times hired in the past? Hope for future hiring? Amount of compensation in this case and in total in the past? Conversations with adjuster? What instructions given?
- Limiting instruction: "Evidence was received for the limited purpose of showing the source of information the witness received before and during the conducting of surveillance, and for the limited purpose of showing any possible bias or prejudice the witness may have. You may not consider this evidence for any other purpose"

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Rule 803(18)- Learned Treatises

"To the extent called to the attention of an expert witness upon cross-examination or relied upon by him in direct examination, statements contained in published treatises, periodicals, of pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be admitted as exhibits."

Commentary to the Rule: "The rule does not require that the witness rely upon or recognize the treatise as authoritative, thus avoiding the possibility that the expert may at the outset block cross-examination by refusing to concede reliance or authoritativeness."

Commentary to the Rule: "The rule avoids the unreality of admitting evidence for the purpose of impeachment only, with an instruction to the jury not to consider it otherwise…It is intended that Exception (18) authorize such statements as substantive evidence."

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Missing evidence

- Spoilation
- Pattern Jury Instruction 101.39

The jury may infer, but is not compelled to find, that missing evidence would be damaging

Evidence of intent, bad faith, or even negligence is not required. Mere absence is sufficient

No inference permitted if jury finds that evidence was either equally available or a satisfactory explanation is given for the failure to produce

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Experiments

• Experiments are admissible when conducted under conditions substantially similar to the disputed event and the. probative value of the evidence is not substantially outweighed by its prejudicial effect. State v. Jones 287 N.C.84 (1975)

Conditions need not be identical

Brandis and Broun on Evidence: Experiments should be received with care, and should be substantially similar.

Examples of admitted evidence: visibility of objects, reaction times, amount registered on a cab meter over a certain distance, range of powder burns, flammability of materials

Addison v. Moss 122 N.C.App 569 (1996)- tobacco bales falling off the back of a flat bed truck- relevant to contributory negligence. Experiment was conducted at the same speed, truck was the same type, the roadway was flat, but the experiment was conducted in Nash County, rather than Wilson County. Not admitted, New Trial