Rule 407- Remedial Measures

- 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)

Rule 408- Offers to Compromise

- The claim must be disputed as to validity or amount
- 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)
- Compromise of a 3rd party inadmissible Cates v. Wilson 350 S.E.2d 898 (1986). Different result from Rule 407

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

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 N.C.App. 111 (2001) 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.
- 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?
- 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)
- 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)
- 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."

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."

Spoilation

- Pattern Jury Instruction 101.39
- jury may infer, but not compelled to find, that missing evidence would be damaging
- evidence of intent, bad faith, or even negligence 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

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.
- Held: New trial.