NORTH CAROLINA CONFERENCE OF SUPERIOR COURT JUDGES

RECENT DECISIONS

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I. Liability

A. Motor Vehicle

Hill Ex Rel. Hill v. West, ___N.C.App.___, 657 S.E.2d 694 (2008) determined whether a minor's claim for personal injury was barred as a result of a previous judgment in the parents' claim arising out of the same incident. In a previous suit, Hill v. West, ___N.C.App.___, 657 S.E.2d 698 (2008), Mr. Hill alleged that Teresa West was operating a vehicle on 21 January 2001 that crossed the median striking the plaintiff's vehicle. The Complaint also alleged that Teresa West was operating the West vehicle with the expressed and/or implied permission of the other West defendants. The trial court in the parents' case granted the defendants' motions for summary judgment as to all defendants except Teresa West.

The present case was for personal injuries to the minor plaintiff, Natalie Hill, and was brought by her parents, Harvey Hill and Regina Hill. Based on the earlier action, the defendants moved to dismiss the minor's claim on the grounds of res judicata. The Court of Appeals held that even though there was an identity of defendants and causes of actions between the two lawsuits, the minor plaintiff was not a party to the first action and was not in privity with a party in the first case.

> Natalie Hill was not a party in the first case. Moreover, she was not in privity with her parents, who

> were parties to the first action, because her parents did not represent her legal rights in the first case. . . . the fact that Natalie Hill's parents were parties in the first case "is irrelevant to [her] right to prosecute [her] separate cause of action." 657 S.E.2d at 697.

The Court of Appeals, however, held that the trial court had properly granted summary judgment for all defendants except Teresa West. The plaintiffs alleged that Charles West, Sr., Charles West, Jr., Annette West and C.F. West, Inc. owned the vehicle operated by Teresa West. The deposition testimony of Charles West, Sr. established that the vehicle was owned by C.F. West, Inc., therefore the individual West defendants except Teresa were properly dismissed.

The plaintiffs also argued that Teresa West had been given express or implied permission to operate the vehicle. Teresa West testified by deposition that she had never driven the vehicle, had never been authorized to drive the vehicle, did not have any reason to believe she was authorized to drive the vehicle and had pleaded guilty to the charge of unauthorized use of a motor vehicle. The plaintiffs contended that since the car was parked outside the home of Teresa West, it should have been foreseen that Teresa West would operate the vehicle. The Court of Appeals disagreed.

> However, even if foreseeable, Teresa Henson West did not have consent, either express or implied, to drive the vehicle. Therefore, Plaintiffs cannot show that Defendants entrusted the vehicle to Teresa Henson

West, and we must affirm the order of summary judgment in favor of Defendants. 657 S.E.2d at 698.

Atkinson v. Lesmeister, ___N.C.App.___, 651 S.E.2d 294 (2007) involved imputation of the alleged negligence of an agent to the principal. Atkinson was injured in a motor vehicle accident on 20 March 2003. Atkinson was a passenger in a car operated by Lesmeister and owned by William Mott. William Mott died on 25 July 2003 and Mary Mott was qualified as Administratrix of the Estate. Atkinson filed suit within the period of limitations, then filed a voluntary dismissal without prejudice. The present suit was filed on 10 February 2003 and within two weeks of the voluntary dismissal. Service was obtained on the Mott Estate on 12 April 2003. Service was never obtained on Lesmeister. The Mott Estate filed a motion to dismiss contending that were no independent claims of negligence against the Estate. The trial court dismissed the action against the Estate.

The Court of Appeals affirmed on two grounds, the discontinuance of the action as to Lesmeister and the effect of that discontinuance on the agency claims against the Mott Estate. It was undisputed that Lesmeister was not served and that appropriate alias or pluries summons were not issued within the period of limitation. The action, therefore, as to Lesmeister was dismissed. Therefore, the liability of

Lesmeister was determined in his favor. There was no liability of Lesmeister, the agent, to impute to Mott, the principal.

> . . . a dismissal is "with prejudice," and it operates as a disposition on the merits and precludes subsequent litigation in the same manner as if the action had been prosecuted to a full adjudication against the plaintiff. In the case sub judice, since the summons as to Lesmeister was allowed to lapse and the statute of limitations has since run, Lesmeister has no liability to impute to the Estate. Therefore, neither Lesmeister nor the Estate can be determined judicially to be negligent. Thus, plaintiff's cause of action against the Estate must fail. 651 S.E.2d at 297.

Alternatively, the plaintiff contended that N.C.Gen.Stat. § 20-71.1 allowed the claim against Mott, the owner of the vehicle, to survive. The Court of Appeals held that G.S. § 20-71.1 was a rule of evidence rather than a rule of law. Since the dismissal of the action as to Lesmeister established that Lesmeister was not negligent and had no liability to the plaintiff, there was no negligence to impute to Mott.

> Because there is no negligence to impute to the owner of the automobile, plaintiff cannot use a rule of evidence to establish plaintiff has a prima facie case of agency that survives defendant's motion to dismiss and the order of the trial court is affirmed. 651 S.E.2d at 287.

B. Premises

Peerless Ins. Co. v. Genelect Services, Inc., ___N.C.App.___, 651 S.E.2d 896 (2007), affirmed per curiam, ___N.C.___, 658 S.E.2d 657 (2008) was a subrogation action to recover $400,000 paid to the plaintiff's insureds' home

destroyed by fire on 18 September 2004. The complaint alleged that the defendant was negligent in the maintenance of the home's generator. One of the defendant's servicemen inspected the generator last on 9 August 2004. At that time, the serviceman noted nothing unusual and recorded that everything was in good working order. Between the time of the service inspection and the fire, two hurricanes, Hurricane Frances and Hurricane Ivan, went through the area where the house was located. The plaintiff's fire investigator inspected the house on 23 September 2004 and noted that the generator exhaust pipe was facing into mulch. An engineer retained by the plaintiff was of the opinion that "the heat of the exhaust could easily have started the fire by igniting the mulch." The trial court granted the defendant's motion for summary judgment.

The Supreme Court affirmed per curiam, agreeing with the Court of Appeals that the plaintiff had not offered more than speculation as to the cause of the fire.

> Between the time the inspection was made and the time the fire investigator for Peerless investigated the fire scene, there had been two hurricanes, torrential rainfalls, fire hoses with high water pressure, firemen crawling through the window above the generator, and the fire itself. Thus, any observation that the muffler was pointed down at a "slight angle" and covered with mulch is insufficient to submit the case to the jury. There are far too many other possible causes of the unsafe condition, and plaintiff gave no evidence to support the chosen theory that negligent maintenance occurred. . . . Such speculation cannot support Peerless' request for a

> trial. Defendant need not provide evidence that it was not responsible for causing the fire. Once defendant produced evidence which showed that the last maintenance inspection was normal, the burden shifted to plaintiff to produce specific evidence, not speculation, that defendant's actions were responsible for the fire. 651 S.E.2d at 897-898.

Curl v. American Multimedia, Inc., ___N.C.App.___, 654 S.E.2d 76 (2007) alleged claims of "loss of chance of continued health/increased risk of serious disease . . . the right not to be compelled to undergo heightened medical monitoring . . . instilling of fear of cancer . . . ." 654 S.E.2d at 81. The plaintiffs lived along Hahn Road in Burlington. The defendants maintained businesses along Hahn Road and had soil and groundwater contaminated with chlorinated solvents including TCE and PCE. The plaintiffs' wells were also contaminated with TCE and PCE. The trial court granted the defendants' motions for partial summary judgment as to the plaintiffs' claims for medical monitoring, diminished quality of life and increased chances of contracting serious illnesses.

Recognizing that "many jurisdictions" had recognized the claims alleged and that the claims were "not totally novel," the Court of Appeals affirmed dismissal of these claims.

> Clearly, recognition of the increased risk of disease as a present injury, or of the cost of medical monitoring as an element of damages, will present complex policy questions. We conclude that balancing the humanitarian, environmental, and economic factors implicated by these issues is a task within the purview of the legislature and not the courts.

> Accordingly, we decline to create the new causes of action or type of damages urged by Plaintiffs. 654 S.E.2d at 81.

Additional reasons existed for dismissal of the plaintiffs' claims for intentional and negligent infliction of emotional distress. There was no evidence submitted to the trial court showing that the plaintiffs experienced or were being treated for emotional distress.

> Nor are we persuaded by Plaintiffs' citations from other jurisdictions that the element of severe emotional distress is "unnecessary in toxic exposure cases." Plaintiffs produced no evidence that any Plaintiff has suffered from or was diagnosed with or treated for a "severe and disabling emotional or mental condition." 654 S.E.2d at 82.

The plaintiff in Cameron v. Merisel Properties, Inc., ___N.C.App.___, 652 S.E.2d 660 (2007) alleged permanent damage to his vestibular system as a result of exposure to toxic molds at his employment. In an earlier appeal, the Court of Appeals affirmed summary judgment in favor of the plaintiff's employer on the plaintiff's Woodson claims against Merisel and Merisel Americas. The case was remanded to the trial court for the plaintiff's premises liability claims against Merisel Properties. On remand, the trial court imposed discovery sanctions against Merisel Properties and barred Merisel Properties from any defense or offer of evidence that the facility where the plaintiff worked was leased. The jury

awarded the plaintiff $1.6 million in damages and $200,000 to his wife for loss of consortium.

The Court of Appeals affirmed. The defendant first challenged the trial court's denial of its motion for JNOV. Summarizing evidence that the facility had experienced moisture problems before it was purchased by Merisel, several workers had complained of a variety of respiratory and related problems, stachybotrys mold had been found in the plaintiff's office, and treatment of the plaintiff by multiple medical specialists, the Court concluded that the plaintiff had "presented far more than a scintilla of evidence" that his injuries were caused by exposure to mold at the defendant's facility. 652 S.E.2d at 666.

The defendant next argued that the opinions of the plaintiff's treating physician and medical expert were based on "mere conjecture and speculation."

> Having eliminated the other causes of Cameron's symptoms, Dr. Farmer concluded that Cameron's vestibular dysfunction was most likely caused by otoxicity, or poisoning of the ear. Other evidence established that exposure to toxigenic molds can cause vestibular dysfunction, and that Cameron had been exposed to toxic mold at the Cary facility. When Dr. Farmer learned this, he concluded that the ototoxin causing Cameron's vestibular dysfunction was a mycotoxin, or mold byproduct, to which Cameron was exposed at the Cary facility. Clearly, his opinion was based on far more than speculation. . . . The record is clear that Dr. Farmer's diagnosis was based on his testing of Plaintiff to rule out other causes, Plaintiff's history of exposure to mold toxins, and

> Dr. Farmer's review of Dr. Johanning's article on the subject. This being sufficient to defeat Defendant's directed verdict motion, we do not engage in weighing this evidence in the context of all the evidence. 652 S.E.2d at 666-667.

The defendant also objected to the evidence of Cameron's co-workers concerning their respiratory and other medical complaints. Although the evidence was admitted to show notice to the defendant and an appropriate limiting instruction was given by the trial judge, the defendant argued that the limiting instruction was insufficient to cure the prejudicial effect of the evidence. The Court held that the evidence had been properly admitted.

> Defendant asserts that the testimony was inadmissible because Cameron's co-workers' health problems were "dissimilar." The record shows that the witnesses testified about problems with upper respiratory conditions and health effects to their ear, nose, or throat. Cameron's condition is centered in the inner ear. The trial court did not abuse its discretion in finding Cameron's and his co-workers' health problems to be sufficiently similar. 652 S.E.2d at 668.

Finally, the defendant argued that the trial court had improperly admitted evidence from the plaintiff's damages expert. Specifically, at the time Dr. Link was deposed, Kopel, Cameron's supervisor, had not been deposed. After Kopel was deposed, Dr. Link refined some of the calculations that were the basis of his damages opinions. The Court held that the trial court had properly admitted the opinions of Dr. Link.

> In the instant case, we conclude that the trial court did not abuse its discretion by denying Defendant's motion to strike Dr. Link's testimony. Dr. Link's trial testimony included certain revised, lower, figures for Cameron's projected lost earnings than his previous higher numbers during deposition. However, Dr. Link's basic approach remained the same: he used various known dollar amounts and percentages for several years before and after Cameron developed vestibular dysfunction, and interpolated where necessary, to create a trajectory that could be used to calculate the amount Cameron would have earned if he were healthy. Further, Dr. Link indicated during his deposition that his figures were somewhat preliminary because Ken Kopel had not yet been deposed. 652 S.E.2d at 670.

The plaintiff in Duval v. OM Hospitality, LLC, ___N.C.App.___, 651 S.E.2d 261 (2007) alleged that she was injured when she fell at the defendant's Day's Inn. The plaintiff and her husband left their room at 6:30 a.m. In her deposition, the plaintiff testified that it was necessary to walk down "an unlit, dark stairwell to exit the motel." The plaintiff also testified that she knew the "stairway had no lights and she knew there was a possibility she could fall but there was no other way out as far as she knew." 651 S.E.2d at 263. The trial court denied the defendant's motion for summary judgment on the issue of the defendant's negligence, but granted the defendant's motion for summary judgment on the plaintiff's contributory negligence.

The Court of Appeals reversed. Acknowledging that the plaintiff may have entered the unlit stairwell without being

able to see where she was walking, the Court held that under the facts of the case the plaintiff may not have had a choice but to go down the unlit stairway.

> Defendant contends that plaintiff was fully aware that the stairwell was so dark that she could not see the steps, so that she was contributorily negligent by using the stairwell under these conditions and by failure to seek another way out of the motel. It is certainly possible that a jury may agree with defendant. However, considering the evidence in the light most favorable to plaintiff, as we must for the non-moving party, . . . a jury could also find that plaintiff acted reasonably in using the stairwell since she was not aware of another way out and because she used proper care in descending the dark stairs, carefully and slowly, holding the railing, and having her husband ahead of her feeling for the steps, but fell nonetheless. 651 S.E.2d at 265.

C. Employment

Hamby v. Profile Products, L.L.C., ___N.C.___, 652 S.E.2d 231 (2007) determined the liability of a member of limited liability company to employees of the limited liability company. Hamby was injured while working for Terra-Mulch Products, L.L.C. The complaint alleged that Terra-Mulch was a wholly-owned subsidiary of Profile Products, but that Profile controlled and directed the operations of Terra-Mulch and was the alter ego of Terra-Mulch. Profile and Terra-Mulch moved for summary judgment. In support of their motion for summary judgment, the defendants offered evidence establishing that Terra-Mulch Products, L.L.C. was a limited liability company and that Profile Products, L.L.C. was the sole member and manager of

Terra-Mulch Products, L.L.C. The "Single Member Operating Agreement" of Terra-Mulch identified Profile as the sole member of Terra-Mulch. The trial court granted the motion for summary judgment of Terra-Mulch, but denied the motion for summary judgment of Profile.

The Court of Appeals dismissed the appeal of Profile as interlocutory. As the basis for its decision, the Court of Appeals analyzed the complaint and concluded that the plaintiff was alleging a gross negligence claim under Woodson against Hamby's employer, Terra-Mulch, and an ordinary negligence claim against Profile.

The Supreme Court concluded that Profile's appeal was reviewable because Profile was conducting the business of Terra-Mulch, the employer of Hamby, and was, therefore, entitled to the protection of the exclusivity provisions of the Workers' Compensation Act. N.C.Gen.Stat. § 97-9 grants the protection of the exclusivity provisions of the Act to "those conducting [the employer's] business." North Carolina's Limited Liability Act, N.C.Gen.Stat. § 57C-3-30(a) provides the protection of the Limited Liability Act to member-managers when acting as LLC managers. Since the allegations of Hamby's complaint showed that Profile was doing "nothing other than conducting Terra-Mulch's business within the meaning of the pertinent statutes,"

652 S.E.2d at 236, then Profile was entitled to the protection of the Workers' Compensation Act.

> . . . we hold that, as the member-manager of Hamby's employer Terra-Mulch Products, L.L.C., Profile was "conducting [the employer's] business" within the meaning of the Workers' Compensation Act and is thus entitled to the exclusivity provided by statute. . . . we remand this case to the Court of Appeals for further remand to the trial court for entry of summary judgment in favor of Profile. 652 S.E.2d at 237.

D. Limited Liability Company

Spaulding v. Honeywell International, Inc., ___N.C.App.___, 646 S.E.2d 645, petition for discretionary review denied, 361 N.C. 696, 654 S.E.2d 482 (2007), writ of certiorari denied, 362 N.C. 177, 657 S.E.2d 667 (2008) involved allegations by workers at a chemical plant against their employer, a limited liability company, and members of the LLC. Honeywell built a chlor-alkali chemical plant in Riegelwood in 1962. The plant was subsequently owned by other companies. In 1993, Honeywell and two other companies formed a LLC, HMC LLC, pursuant to G.S. § 57C-1-01. The LLC operated the plant from 1994 until it closed in 2000. After the plant closed, the plaintiff and sixty-four other former workers filed suit alleging liability based on ultra-hazardous activities, employer liability and negligence. The trial court granted the motions for summary judgment of all defendants. On appeal, the plaintiff argued: (1) Honeywell was derivately liable as a member of the LLC;

(2) Honeywell had an independent duty to employees that was not shielded by Woodson; and (3) Honeywell had contractually assumed a duty of workplace safety.

The Court of Appeals affirmed summary judgment for all defendants. Under G.S. 57C-3-30(a), a member of a LLC has no liability solely as a result of being a member of the LLC.

> Whether Honeywell participated or failed to participate in the management of HMC LLC does not allow plaintiff to hold Honeywell derivately or individually liable for the acts of HMC LLC. N.C.Gen.Stat. § 57C-3-30(a) is clear, that in the absence of an independent duty, mere participation in the business affairs of a limited liability company by a member is insufficient, standing alone and without a showing of some additional affirmative conduct, to hold the member independently liable for harm caused by the LLC. 646 S.E.2d at 649.

Honeywell did not have an independent duty to the employees as a result of being a member of the LLC. The duty to the employees was a non-delegable of HMC LLC, the employer.

> In North Carolina, the employer owes a non-delegable duty to provide a safe workplace to its employees. . . . Here, it is undisputed that plaintiff's employer was HMC LLC. Under the statute and case law, HMC LLC, not Honeywell, owned a nondelegable duty to provide plaintiff with a safe workplace. 646 S.E.2d at 650.

Finally, the plaintiff argued that Honeywell had contractually assumed duties of workplace safety through payment of expenses of the LLC for workplace safety activities. The Court held that Honeywell had not "undertaken" the duty of

workplace safety and that the plaintiff was not the beneficiary of any activities agreed to by Honeywell.

> Here, . . . plaintiff has failed to argue the 1994 Operating Agreement was entered into to directly benefit him or other HMC LLC employees. Neither plaintiff nor anyone else, other than the signatories, were designated to be beneficiaries of the operating agreement. . . . Also, Honeywell's agreement to be responsible for the budgetary expenditures in response to an environmental event is insufficient, as a matter of law, to impose an independent duty upon Honeywell to plaintiff. 646 S.E.2d at 651.

II. Insurance

A. Motor Vehicle

North Carolina Farm Bureau Mutual Ins. Co., Inc. v. Armwood, 181 N.C.App. 407, 638 S.E.2d 922 (2007), reversed per curiam, ___N.C.___, 653 S.E.2d 392 (2007) was a declaratory judgment action to determine the minimum amount of liability insurance coverage required for a not-for-hire commercial vehicle. Terry Armwood was injured when he was struck by a vehicle after exiting a 30-passenger bus owned and operated by Best. When Best purchased the Farm Bureau policy, Best was offered a liability policy with $750,000 in coverage. Best refused that amount of coverage and selected coverage with limits of $50,000 per person and $100,000 per accident. The parents of Armwood filed a claim with Farm Bureau. When they were offered $50,000 as the limits of coverage, the Armwoods refused the offer. Farm Bureau then filed the present

declaratory judgment action. The trial court granted the Armwood's motion for summary judgment finding that the policy had minimum coverage of $750,000. The Court of Appeals affirmed, 181 N.C.App, 407, 638 S.E.2d 922 (2007). Judge Hunter dissented.

The Supreme Court reversed per curiam, adopted the dissent of Judge Hunter and remanded for entry of a judgment. Judge Hunter reasoned that the Vehicle Financial Responsibility Act of 1957, N.C.Gen.Stat. § 20-309(a1), "puts the onus on owners to maintain required liability insurance on their vehicles." 638 S.E.2d at 926. The Financial Responsibility Act of 1953, N.C.Gen.Stat. § 20-279.21(b)(2) inserts the minimum amounts of coverage into individual policies rather than applying to individual owners.

> The trial court itself stated that: Best, as the owner of the 1974 30 passenger bus, a commercial motor vehicle, had the duty and responsibility to obtain the applicable minimum liability coverage for the vehicle. G.S. 20-309(a1) places this duty to obtain and maintain the appropriate coverage, consistent with the use of the commercial vehicle, on the owner. This conclusion of law explicitly looks to the 1957 Act and places the duty and responsibility for obtaining the correct minimum liability coverage on Best. Despite its own conclusion, however, the trial court then found that the plaintiff had a duty to issue the policy for $750,000 and reformed the existing policy to that level of liability. This finding incorrectly holds plaintiff responsible for the duty and responsibility the trial court had laid at Best's door. 638 S.E.2d at 927.

Additionally, G.S. § 20-279(b) requires that the minimum amount of coverage ($30,000/$60,000/$25,000) be written into every insurance policy. Separately, G.S. 20-309(a1) addresses the minimum amount the owner of a commercial vehicle must maintain.

In Progressive American Ins. Co. v. State Farm Mutual Automobile Ins. Co., ___ N.C.App.___, 647 S.E.2d 111 (2007), State Farm insured Theresa Dassinger and her 1993 Mazda. Ms. Dassinger gave the Mazda to her son, Timothy, as a gift. The title to the Mazda was never changed. Progressive issued a personal automobile insurance policy to Timothy and his girlfriend, Tami Phillips, covering the Mazda. The policy limits were identical on both policies. While Tami was driving the Mazda on 8 May 2003, she was involved in a two-car accident. Progressive and State Farm agreed to share responsibility for claims arising out of the accident. After partial payments, Progressive learned that Ms. Dassinger had never transferred title to the Mazda to Timothy. Progressive brought the present action seeking repayment of the amounts it paid. The trial court granted the motion for summary judgment of State Farm and denied the motion for summary judgment of Progressive.

The Court of Appeals reversed and remanded for entry of an order based on State Farm being the primary carrier, Progressive being the excess carrier and Progressive entitled to payment not owed under the Progressive policy. The State Farm policy had an

"automatic termination" clause providing that if the insured obtained other insurance on the covered vehicle, then the State Farm policy would terminate on that date. The two policies, however, were obtained by different persons; therefore, the State Farm policy did not automatically terminate.

> The Mazda was a vehicle Timothy Dassinger "did not own" at the time of the accident, and thus Progressive's liability coverage is "excess over any other collectible insurance." Since we determined above that the State Farm policy provides liability coverage for the accident, the State Farm policy constitutes "other collectible insurance." Thus, the Progressive policy only provides coverage under its liability provisions when the limit of the State Farm policy's coverage is met. The State Farm policy provided primary liability coverage for the accident. The Progressive policy's liability coverage was excess. The trial court's judgment that the State Farm policy did not provide liability coverage for the accident is reversed. 647 S.E.2d at 115.

Similar reasoning applied to apportionment of damages to the Mazda.

> Under the Progressive policy, the Mazda is not a "non-owned auto" because it was furnished for the regular use of Timothy Dassinger. . . . Thus, the Progressive policy's collision coverage is not "excess over any other collectible insurance." Under the State Farm policy, the Mazda is not a "non-owned auto" because the Mazda was owned by Theresa Dassinger. Since each policies' "share of the loss" is limited to the "proportion that the limit of liability bears to the total of all applicable limits," and since both policy have the same limit, State Farm and Progressive must share pro rata in the damages to the Mazda. 647 S.E.2d at 116.

Integon National Ins. Co. v. Ward Ex Rel. Perry, ___N.C.App.___, 646 S.E.2d 395 (2007) was a declaratory judgment

action to determine liability coverage for injuries to the minor plaintiff. Taylor, insured by Integon, took his insured vehicle to Bragg Auto and Muffler Shop for repairs. He was accompanied by Ward, who was two years old at the time. While waiting for the repair work to be completed, Taylor and Ward walked around the shop. Smith, an employee of Bragg Auto, backed a car out of one of the maintenance bays and struck Ward. Ward brought suit against Smith, Taylor and Bragg Auto. Integon, as liability carrier, brought the present declaratory judgment action seeking a determination that Integon did not provide liability coverage for Ward's injuries.

The trial court granted Ward's motion for summary judgment and held that Integon provided liability coverage for Ward's injuries. The trial court also ruled that Integon did not provide medical payments coverage for the injuries to Ward. The Court of Appeals affirmed.

> Here, Taylor drove his insured vehicle to Bragg Auto for some maintenance work. Ward accompanied Taylor and they were both walking around the repair shop while waiting for the repairs to be completed. While walking back to the office of the repair shop, Ward was struck by a vehicle backing out of a repair bay and driven by an employee of Bragg Auto. While the use of Taylor's vehicle cannot be said to have been the direct cause of Ward's injuries, a sufficient causal connection between the use and the injuries does exist. . . . Thus, Taylor's automobile liability insurance policy with plaintiff does provide liability coverage for the claims raised by Ward against Taylor in the lawsuit . . . . 646 S.E.2d at 397.

B. UM/UIM

In Piles v. Allstate Ins. Co., ___N.C.App.___, 653 S.E.2d 181 (2007), the Court of Appeals held that the issue of when the applicable period of limitations began to run was a question of fact to be determined by a jury. Allstate issued a policy of automobile insurance on 10 July 1998 insuring the plaintiff. The policy did not provide UIM coverage. The plaintiff alleged that the Allstate agent, Mr. McGhee, impermissibly signed her name to the selection/rejection form rejecting UM/UIM coverage. The plaintiff was involved in an automobile accident on 27 October 2000. Ms. Murray, the person at fault in the accident, had automobile coverage with Nationwide with limits of $50,000 per person. In February 2003, the plaintiff was told by her Allstate agent, Mr. McGhee, that she did not have UIM coverage. After this conversation with Mr. McGhee, Ms. Piles informed Allstate that she intended to pursue a claim for UIM coverage.

On 27 October 2003, Ms. Piles filed suit against Ms. Murray. In response to Ms. Piles' attorney forwarding a copy of the lawsuit to Allstate, on 18 December 2003, Allstate informed Ms. Piles that she did not have UIM coverage. As a result of mediation, Nationwide tendered its $50,000 limits to Ms. Piles on 4 November 2004. Suit was filed against Allstate and Mr. McGhee on 22 November 2005 alleging fraud, negligence,

breach of contract, unfair and deceptive trade practices and punitive damages. The trial court granted Allstate's 12(b)(6) motion based upon the defense that her claim was barred by the statute of limitations.

The Court of Appeals reversed. Because Ms. Piles was not asserting a UIM claim against Allstate and Mr. McGhee, but, instead, was alleging fraud, the important date was when she discovered or reasonably should have discovered that Mr. McGhee had impermissibly signed her name to the form rejecting UIM coverage. Factually, Ms. Piles contended that she had no knowledge that she did not have UIM coverage until she was so informed by Allstate in February 2003. Additionally, she would not have had any rights to UIM coverage under the Allstate policy until the limits of the Nationwide policy were tendered to her in November 2004. As the plaintiff's claims also included the manner in which Allstate responded to her request for UIM coverage, those claims would not have arisen until November 2004 when she was denied UIM coverage. The Court of Appeals, therefore, held that "The date of Ms. Piles's discovery of the alleged fraud or negligence – or whether she should have discovered it earlier through reasonable diligence - . . . ." 653 S.E.2d at 186, were questions of fact to be determined by a jury.

The Court of Appeals also held that the trial court erred by dismissing the plaintiff's claims for fraud and constructive fraud.

> Ms. Piles outlined the fiduciary relationship she had with Mr. McGhee, her insurance agent, as well as with Allstate Insurance through him, and put forward allegations of forgery and deception that culminated in no UIM coverage from Allstate Insurance for Ms. Piles. These facts are sufficient to withstand a motion to dismiss. 653 S.E.2d at 186-187.

The plaintiffs in Beddard v. McDaniel, ___N.C.App.___, 645 S.E.2d 153 (2007) were riding in a car on 15 May 2001 when the defendant pulled out in front of them, causing a collision. Universal Underwriters Insurance Company provided automobile liability coverage insuring Beddard's Affordable Tire & Auto. The plaintiff, Roosevelt Beddard, was a "designated individual" named on the UIM coverage form. Universal filed a motion for summary judgment on the grounds that the Beddards were not driving a covered auto at the time of the accident and that the "owned vehicle" exclusion applied. The trial court granted the Beddards' motion for summary judgment and held that they were entitled to UIM coverage under the Universal policy.

The Court of Appeals affirmed, noting that UIM coverage is individual to the insureds under the policy.

> In North Carolina coverage for damages caused by uninsured and underinsured motorists "follows the person, not the vehicle," such that an "owned vehicle" exclusion will not apply if the individuals injured in a collision are the named insureds in the policy. . .

> . Here, the Beddards were driving a vehicle not listed in their Universal Insurance insurance policy at the time of the collision with Ms. McDaniel, the underinsured motorist. . . . The Beddards were named as "designated individuals" . . . for UIM coverage; as such, as conceded by Universal Insurance in its brief, they qualify . . . as "named insureds" for the UIM Coverage Part. 645 S.E.2d at 153-155.

C. Notice of Claim

The plaintiff's powerboat in Digh v. Nationwide Mut.Fire. Ins. Co., ___N.C.App.___, 654 S.E.2d 37 (2007) was insured by Nationwide. The Nationwide policy provided that notice of physical damage "must . . . [be given] as soon as possible." On 29 July 2002, while Digh was in his boat on Lake Norman, a "rogue wave" tossed the boat out of the water and caused stress cracks in the fiberglass and damage to the engine. Although he observed the damage to the boat, Digh did not file a claim with Nationwide because he was concerned about the effect a claim would have on his premiums. In December 2002, Digh took his boat to be winterized and left the boat there until November 2004. He then took the boat to a repair shop and was told that it would cost about $8300 to fix the engine and between $15,000 and $24,000 to repair the stress cracks. When Nationwide did not settle the claim, Digh filed suit. The trial court granted Nationwide's motion for summary judgment.

The Court of Appeals affirmed dismissal of the claim. Applying the factors in Great American Ins. Co v. C.G. Tate

Constr. Co., 303 N.C. 387, 279 S.E.2d 769 (1981), the Court first concluded that there had been delay in notifying Nationwide. The Court then determined that the delay had not been in good faith.

> While Digh was not aware of the full extent of the damage until December 2004, Digh acknowledges that he was aware of the loss on the day it occurred. Digh further admits that the only reason he delayed notice was to prevent his insurance premiums from increasing. In other words, Digh was aware of the loss and he purposefully and knowingly delayed giving notice to Nationwide. Thus, Digh's delay was not in good faith and Nationwide, therefore, had no duty to cover the loss to Digh's boat. 654 S.E.2d at 41.

D. Duty to Defend

Pulte Home Corp. v. American Southern Ins. Co., ___N.C.App.___, 647 S.E.2d 614, petition for writ of certiorari filed (October 16, 2007) determined the duty to defend an additional insured. Pulte Home hired TransAmerica to frame houses in a residential subdivision in Raleigh. The contract required TransAmerica to have Pulte named as an additional insured under TransAmerica's commercial general liability policy with American Southern. The endorsement stated that Pulte was covered "as an insured but only with respect to liability arising out of TransAmerica's operations or premises owned by or rented to TransAmerica."

In August 2002, Pulte, TransAmerica, and Morlando Enterprises were sued by Mr. Mejia, an employee of a

TransAmerica subcontractor. Mr. Mejia alleged that his employer was working under the control and direction of TransAmerica to install trusses on the houses. As Mr. Mejia was working on the roof of a house, a crane operator for Morlando was moving trusses when he hit Mr. Mejia, knocking him from the roof and resulting in injuries including paraplegia. Seven months after the suit was filed, Pulte tendered the defense of the case to American Southern. American Southern declined to defend. Pulte settled the case with Mr. Mejia. The present action was to recover the amount of the settlement with Mr. Mejia as well as legal fees and defense costs. The trial court granted the motion for summary judgment of American Southern.

The Court of Appeals reversed. Interpreting the definition of "insured" in its policy, American Southern argued that Pulte was insured only for the negligence of TransAmerica and not for any independent negligence of Pulte. There was, therefore, no coverage because Mr. Mejia only sued Pulte for its independent negligence. Evaluating this argument required a construction of "arising out of" as used in the policy. In State Capital Ins. Co. v. Nationwide Mut. Ins. Co., 318 N.C. 534, 350 S.E.2d 66 (1986), the Supreme Court called for "a liberal construction" of "arising out of." 502 S.E.2d at 434. The inquiry, therefore, becomes "whether there is a causal nexus between Pulte's liability in the Mejia matter and TransAmerica's operations."

647 S.E.2d at 618. The Court of Appeals concluded that there was coverage available to Pulte under the policy.

> Consequently, we agree with Pulte and TransAmerica that the additional insured endorsement, by its plain terms, triggered American Southern's duty to defend Pulte against the Mejia claims, when those claims bore a causal nexus with TransAmerica's "operations" at the job site. The parties do not dispute that TransAmerica's "operations" included TransAmerica's framing activities at Pulte's job site. . . . In his specific claims against Pulte, Mejia further alleged that Pulte was negligent in failing to ensure that the work performed by its subcontractors – including TransAmerica – was carried out in a reasonably safe manner and failed to ensure that those subcontractors took necessary precautions to reduce risks accompanying the work performed at the construction site. On its face, the allegations of the Mejia complaint indicate that Pulte's liability was "a natural and reasonable incident or consequence of" TransAmerica's operations. State Capital. 647 S.E.2d at 620.

American Southern also argued that Pulte had failed to comply with the policy's notice requirements. The policy required notification "as soon as practicable" after a claim was made or suit filed. Reviewing the factors identified in Great American Ins. Co. v. C.G. Tate Constr. Co., 303 N.C. 387, 279 S.E.2d 769 (1981), the Court held that Pulte was also entitled to summary judgment on this issue.

> Because Pulte has presented evidence that it did not make a deliberate decision not to notify American Southern, but rather any delay was a function of its internal policies for processing claims, American Southern was not entitled to summary judgment on this argument. Moreover, because American Southern has pointed to no evidence contrary to that of Pulte, suggesting a purposeful, intentional, or deliberate

> decision by Pulte to delay notification, Pulte is entitled to summary judgment on the question whether Pulte's delayed notification justified American Southern's refusal to defend. 647 S.E.2d at 622.

Crandell v. American Home Assurance Co., ___ N.C.App.___, 644 S.E.2d 604, petition for discretionary review dismissed, 361 N.C. 691, 654 S.E.2d 250 (2007), was a declaratory judgment action concerning coverage for activities of American Home's insured, Isaiah 61 Ministries. American Home provided liability coverage from 1 August 1996 until 31 July 1998. Rivest was the minister of the church and provided Christian counseling. Crandell, a licensed psychiatrist, provided medical management for clients of Rivest. Three of Rivest's counseling clients filed suit against Rivest and Isaiah 61 alleging improper activities. A separate suit was subsequently filed against Crandell. The suit against Crandell alleged that "as early as 2000," Crandell knew or should have known that Rivest was engaged in improper conduct. Since the allegations were about conduct beyond the policy period, American Home refused to provide a defense to Crandell. The trial court granted the motion for summary judgment of American Home and held there was no coverage.

The Court of Appeals reversed. The Court first noted

> . . . if review of the pleadings in an underlying action gives rise even to "a mere possibility" that the insured's potential liability is covered by the insurance policy, then the carrier has a duty to

> defend. Waste Mgmt., of Carolinas, Inc. v. Peerless Ins. Co., 315 N.C. 688, 691 n.2, 340 S.E.2d 374, 377 n.2 (1986). 644 S.E.2d 605.

The complaint alleged that counseling by Rivest began in 1997 and 1998 and "at all times alleged herein, Crandell maintained supervisory authority over Rivest." Even though the complaint also alleged that "as early as 2000," Crandell should have known that the conduct of Rivest was improper, Crandell could be held liable for conduct occurring before 2000.

> Under Monzingo [v. Pitt County Mem'l Hosp., Inc., 331 N.C. 182, 189, 415 S.E.2d 341, 345 (1992)], Crandell could arguably be held liable for negligently supervising Rivest during 1997 and 1998 regardless whether he knew or should have known of any misconduct by Rivest. 644 S.E.2d at 607.

American Homes also argued that any conduct before "early 2000" was barred by the applicable statute of limitations. The duty to defend, however, does not depend on the sufficiency of the claims alleged.

> The duty to defend is not, however, dependent on the viability of the claims – "the insurer has a duty to defend, whether or not the insured is ultimately liable." . . . Here, the claims may ultimately be found groundless because of the statute of limitations, but that possibility does not excuse American Home from providing a defense to establish that fact. 644 S.E.2d at 607-608.

E. Arbitration

The plaintiff in Stott v. Nationwide Mutual Ins. Co., ___N.C.App.___, 643 S.E.2d 653, petition for discretionary review filed (June 4, 2007) was a passenger in a vehicle

operated by a Nationwide insured. The vehicle in which the plaintiff was a passenger was struck in the rear, causing injuries to the plaintiff. Nationwide paid the initial bills submitted by the plaintiff. Nationwide refused to pay the plaintiff's claim for additional medical expenses. The plaintiff filed suit against Nationwide alleging breach of contract, unfair and deceptive trade practices and exemplary damages. The plaintiff submitted written discovery to Nationwide, then filed a motion to compel discovery. Nationwide filed a motion to compel arbitration.

The trial court granted the motion to compel arbitration and ordered Nationwide to respond to the plaintiff's discovery within thirty days after filing of the arbitration award. The arbitrators awarded $2,028.00, the amount demanded by the plaintiff. Nationwide paid the arbitration award and responded to the plaintiff's discovery. The plaintiff filed additional motions to compel discovery. Nationwide moved for summary judgment. The trial court granted Nationwide's motion for summary judgment and denied the plaintiff's motion to compel discovery.

The Court of Appeals affirmed. As to Nationwide's motion for summary judgment, the Court held that arbitration had resolved the breach of contract claim.

> 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. . . . 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 thus save the expense of litigation." . . . . Plaintiff cannot appeal the binding arbitration award, nor has he asserted any permitted judicial review of the award. Plaintiff's breach of contract claim was fully arbitrated to entry of the award. 643 S.E.2d at 657.

The plaintiff failed to appeal dismissal of his claim for unfair and deceptive trade practices.

The plaintiff appealed the denial of his motion to compel discovery before the trial court considered Nationwide's motion for summary judgment. The Court agreed with the trial court's consideration of Nationwide's summary judgment motion without ruling on the motion to compel discovery.

> . . . "a trial court is not barred in every case from granting summary judgment before discovery is completed. . . . Further, the decision to grant or deny a continuance [to complete discovery] is solely within the discretion of the trial judge and will be reversed only when there is a manifest abuse of discretion." . . . . Plaintiff failed to show further discovery would lead to the production of relevant evidence. No evidence exists in the record to suggest defendant did not comply with the trial court's order compelling defendant to answer plaintiff's discovery request within thirty days after entry of the arbitration award. 643 S.E.2d at 659.

III. Trial Practice and Procedure

A. Statutes and Periods of Limitation and Repose

Forbis v. Neal, 361 N.C. 519, 649 S.E.2d 382 (2007) was an action alleging fraud by one co-executor of an estate against the other co-executor. Ms. Newell and Ms. Sustare executed powers of attorney designating Neal as their attorney-in-fact. Ms. Newell and Ms. Sustare were sisters, and Neal was their nephew. The wills of both sisters contained residuary clauses through which the assets of each passed to the other sister upon death. The powers of attorney authorized Neal to act for each sister with respect to real and personal property. Neither power of attorney allowed Neal to make gifts of the assets to himself. During the course of acting for Ms. Newell, Neal opened a Paine Webber account, sold real property and stock and deposited the funds from those sales into Ms. Newell's Paine Webber account. Ms. Newell died on 19 December 1999. As the sole beneficiary of accounts he had established, Neal received $247,167 in cash and stock. These assets passed outside Ms. Newell's will. The remaining assets in Ms. Newell's will passed to Ms. Sustare and totaled $5,828.00. A final accounting of the Newell estate was filed on 15 February 2001 and the estate was closed. At the time of her death, Ms. Newell resided in an assisted living facility with her sister. Ms. Sustare's funds were depleted and members of the family requested Neal to

assist with the financial demands on Ms. Sustare. Neal declined. On 17 December 2002, Forbis reopened the Newell estate and instituted the present action.

The trial court granted the defendant's motion for summary judgment on all claims. The trial court determined that the three-year statute of limitations in G.S. § 1-52(9) barred the action. The defendant argued successfully that the statute of limitations for fraud began to run when the fraud occurred regardless of when the fraud is discovered. Therefore, the statute of limitations for fraud began to run when Neal opened the Paine Webber account and other accounts through which Ms. Newell's assets passed directly to him. Forbis, on the other hand, contended that the three-year period did not begin to run until Ms. Newell's death. The Supreme Court held that the statute of limitations did not begin to run until the Newell estate discovered or should have discovered the fraud.

> We have previously construed this provision [G.S. § 1-52(9)] to "set accrual as the time of discovery regardless of the length of time between the fraudulent act or mistake and plaintiff's discovery of it." . . . . To the extent Court of Appeals cases . . . conflict with this Court's decision . . . , they are overruled. . . . Here the statute of limitations began to run when Newell or her estate discovered or should have discovered the alleged fraud. . . . the forecast of evidence in the present case was too inconclusive for the trial court to resolve this issue as a matter of law. The statute of limitations was therefore not a proper basis for summary judgment. 2007 WL 2404451 at *3-4.

Forbis also assigned error to the trial court's consideration of Neal's affidavit because it described statements made by Ms. Newell and Ms. Sustare. The Supreme Court concluded that the trial judge did not consider evidence that was not admissible.

> . . . plaintiffs . . . contend the trial court erred by considering this affidavit because it describes, among other things, statements made by Newell and Sustare. Such statements, they argue, are barred by N.C.R.Evid.601(c), the so-called "Dead Man's Statute." . . . . In the instant case, plaintiffs' contention that the trial court erred by allegedly considering the challenged affidavit is without merit. North Carolina Rule of Civil Procedure 56(e) provides that, at summary judgment, affidavits "shall set forth such facts as would be admissible in evidence." N.C.R.Civ.P. 56(e). To the extent the challenged affidavit contains averments which would violate Rule 601(c) if admitted as evidence at a later trial, we assume the trial court properly disregarded them. 2007 WL 2404451 at *4-5.

Reece v. Smith, ___N.C.App.___, 655 S.E.2d 911 (2008) involved service on the administrator of an estate after the statute of limitations had run. The plaintiff was involved in an automobile accident on 2 April 2003. She alleged that a vehicle operated by Robert Smith negligently turned left in front of her vehicle. Suit was filed against Smith on 31 March 2005. Smith could not be served because he died on 30 March 2005. Glenn Smith was appointed as administrator of Robert's estate. After appropriate notice to creditors, the Smith estate was closed in November 2005. The plaintiff filed an amended

complaint on 11 April 2006 naming Glenn Smith, administrator of the estate of Robert Smith. The summons and amended complaint were served on Glenn Smith on 13 April 2006. The trial court granted the defendant's motion to dismiss pursuant to 12(b)(6) on the grounds that the action was not brought against the Smith estate within three years of the date of the accident.

The Court of Appeals affirmed dismissal of the complaint based on the running of the statute of limitations. In distinguishing "misnomer" cases, Pierce v. Johnson, 154 N.C.App. 34, 571 S.E.2d 661 (2002), and substitution of party cases, Crossman v. Moore, 341 N.C. 185, 459 S.E.2d 715 (1995), the Court of Appeals relied upon notice to the defendant as a critical factor. In the present case, there was no notice to Glenn Smith, administrator, of the claim until the running of the statute of limitations.

> In the case at bar, Glenn, the estate administrator, was not served until after the statute of limitations had expired, and there is no indication of any subterfuge or delay by him which prevented plaintiff from amending the complaint prior to the expiration of the statute of limitations. Key to the holding in Crossman for relation back to occur is notice to the defendant. . . . Here, no one was served within the statute of limitations so it is evident that the proper individual was not put on notice of the lawsuit, as was the case in Pierce. . . . Without notice to the proper party, plaintiff's amended complaint does not relate back to the date of the original filing of the complaint. 655 S.E.2d at 914.

State Auto Ins. Co. v. Blind, ___N.C.App.___, 650 S.E.2d 25 (2007) arose out of a motor vehicle accident on 25 May 2002 in which a vehicle operated by Blind turned left in front of a motorcycle operated by Bantz. Suit was filed on 18 March 2005 alleging two claims for relief. The first claim was entitled "Wrongful Death Action" and alleged that Bantz died as a result of injuries sustained in the accident on 25 May 2002. The second claim was entitled "Survival Action" and sought damages for the decedent's pain and suffering and medical expenses. The defendant's answer pled the two-year statute of limitations in N.C.Gen.Stat. § 1-53(4). The plaintiff dismissed the wrongful death claim. The trial court granted summary judgment on the "Survival" claim.

The Court of Appeals affirmed. At the trial court and in the Court of Appeals, the decedent argued that the survivorship claim was separate from the wrongful death claim. The Court first distinguished Alston v. Britthaven, Inc., 177 N.C.App. 330, 628 S.E.2d 824 (2006), disc. rev. denied, 361 N.C. 218, 642 S.E.2d 242 (2007). In Alston, the Court held that "wrongful death and survivorship claims may be brought as alternative claims for the same negligent acts." 177 N.C.App. at 339, 628 S.E.2d at 831. The facts in Alston could allow a jury to determine that the defendant's negligent acts resulted in injury to the decedent, but that the decedent died as a result of

Alzheimer's disease. The Court in Alston, however, stated that "It is vital to distinguish [Alston] from those where no alternate explanation exists as to the cause of death." 177 N.C.App. at 340, 628 S.E.2d at 831.

In the present case, there was no dispute that the injuries in the motor vehicle accident caused the decedent's death. Therefore, the action was barred by the two-year statute of limitations.

> . . . we hold that when a single negligent act of the defendant causes a decedent's injuries and those injuries unquestionably result in the decedent's death, the plaintiff's remedy for the decedent's pain and suffering and medical expenses lies only in a wrongful death claim. Such claim is "encompassed by the wrongful death statute" and "must be asserted under that statute." 650 S.E.2d at 29.

Winebarger v. Peterson, ___N.C.App.___, 642 S.E.2d 544 (2007) was an action alleging medical malpractice. The original complaint was filed on 24 April 2003 and alleged that the decedent died on 26 April 2001 as a result of the defendant's negligence. The complaint alleged review by an expert witness in compliance with Rule 9(j). In response to the defendant's interrogatories, the plaintiff responded that the first contact with the plaintiff's expert was on 12 November 2003. The defendant then filed a motion for summary judgment on the grounds that there had been no compliance with Rule 9(j) because the expert was not contacted until after the complaint was

filed. The plaintiff took a voluntary dismissal without prejudice on 6 February 2004.

The action was re-filed on 4 February 2005 and alleged compliance with Rule 9(j). The defendant filed another motion for summary judgment on the basis that the original complaint did not comply with Rule 9(j). The trial court granted the defendant's motion for summary judgment.

The Court of Appeals affirmed dismissal of the action and rejected the plaintiff's argument that the voluntary dismissal tolled the statute of limitations.

> Here, Plaintiff filed a complaint on 24 April 2003 containing the required Rule 9(j) certification but later admitted in discovery that she had not consulted with her Rule 9(j) expert until 12 November 2003, nearly seven months after the filing of her complaint. Thereafter on 6 February 2004, Plaintiff dismissed her action under Rule 41(a) and refiled the action on 4 February 2005. . . . . we must hold that "because plaintiff admitted the allegation in the [complaint] was ineffective to meet the requirements set out in Rule 9(j) . . . a voluntary dismissal without prejudice which ordinarily would allow for another year for refiling was unavailable to plaintiff in this case." 642 S.E.2d at 546-547.

B. Res Judicata and Collateral Estoppel

Strates Shows v. Amusements of America, ___N.C.App.___, 646 S.E.2d 418 (2007) arose out of the award to Amusements of America by Agriculture Commissioner Meg Scott Phipps of the North Carolina State Fair midway contract. Strates initially filed suit in the United States District Court for the Eastern

District of North Carolina alleging RICO claims. Chief Judge Flanagan dismissed the claims for lack of standing, holding that AOA had no property interest in the midway contract. Judge Flanagan also held that the involvement of other bidders who were not involved in the conspiracy were intervening acts preventing a finding of proximate cause. Finally, damages as a result of the defendant's action were too speculative. Accordingly, Judge Flanagan concluded that Strates lacked standing to assert a RICO claim resulting from loss of the midway contract. Judge Flanagan refused to exercise supplemental jurisdiction over the state law claims alleged. Strates appealed to the Fourth Circuit, but did not perfect the appeal.

Strates brought the present action alleging facts and legal claims similar to those brought in federal court except that the RICO claim was replaced by an unfair competition and unfair and deceptive trade practices claim. The defendants moved to dismiss all claims on the grounds that Strates was collaterally estopped to bring the present state claims as a result of Judge Flanagan's decision. The trial court denied the defendants' motions to dismiss pursuant to Rule 12(b)(1) and 12(b)(6).

The Court of Appeals reversed and held that Strates was collaterally estopped from relitigating the present claims. As a basis for dismissal, the Court of Appeals concluded that the

federal RICO claim and the state UDP claim contained the same elements of proof.

> Upon reviewing the elements required for both a RICO and an UDP claim, we are able to see that each claim requires a showing by the plaintiff that he or she suffered an injury that was a proximate result of the defendant's improper actions, whether the improper actions constitute racketeering or unfair or deceptive acts or practices. Both Acts require a showing that the plaintiff suffered an actual injury, and that the defendant's improper, or illegal conduct was a cause in fact of plaintiff's injuries. . . . As the federal court has previously held that Strates failed to establish the element of proximate cause, as it relates to the alleged injury of not receiving the midway contract, we therefore hold Strates is collaterally estopped from relitigating this same issue in the instant state action. 646 S.E.2d at 424-425.

The identical collateral estoppel principles applied to the issues of causation and damages determined by Judge Flanagan in the federal action.

C. Summons

Robertson v. Price, ___N.C.App.___, 652 S.E.2d 352 (2007) determined the effect of summonses that did not refer back to the original summonses. The plaintiff alleged that she employed the defendants to examine the title to real property and represent her in the purchase of the property. The purchase of the property closed on 14 March 2003. The plaintiff later discovered that the right-of-way identified in the purchase contract had not been conveyed to her. On 14 March 2006, the plaintiff filed an application requesting permission to file a

complaint within twenty days. The request was granted. On 3 April 2006, the complaint was filed and civil summons issued. The original application to extend time to file the complaint and the complaint and summons issued on 3 April 2006 were not served on the defendants. The 3 April 2006 summons did not state that it was an alias or pluries summons and did not refer to the 14 March 2006 application and summons. Additional summonses were issued on 12 June 2006. These summonses were designated as an alias and pluries summons and referred to 3 April 2006 as the date of the last summons issued. On 20 June 2006, the defendants were served with the 12 June 2006 summonses. The 14 March 2006 application and the complaint were attached to this summons. The trial court granted the defendants motions to dismiss.

The Court of Appeals affirmed. The Court held that the 3 April 2006 summonses did not indicate their relation back to the original 14 March 2006 application and summonses. Therefore, the 14 March 2006 action was discontinued and the 3 April 2006 was a new action filed after the statute of limitations.

> Although the 12 June 2006 summonses referred to the 3 April 2006 summonses, because the 3 April 2006 summonses were not alias or pluries and did not refer back to the 14 March 2006 summonses, Ms. Robertson failed to create "an unbroken chain from the first summons to the time of actual service." . . . Ms. Robertson's issuance of the 3 April 2006 summonses

> without an indication of their relation to the original 14 March 2006 summonses had "the double effect of initiating a new action and discontinuing the original one." . . . The new action initiated on 3 April 2006 was outside of the three-year statute of limitations period. Accordingly, Defendants were not served with appropriate process within the statute of limitations. 652 S.E.2d at 355.

D. Venue

Barrier Geotechnical Contractors, Inc. v. Radford Quarries of Boone, Inc., ___N.C.App.___, 646 S.E.2d 840 (2007) arose out of a contract in Watauga County to perform stream channel and slope stabilization services to certain pieces of real property in the county. A dispute arose between Barrier, the general contractor, and Radford, the subcontractor, about payment under the contract. On 24 February 2006, Radford filed claims of lien in Watauga County. On 3 March 2006, Barrier filed suit in Mecklenburg County. Radford filed an action on 5 April 2006 in Watauga County to enforce its liens. Radford then filed motions in Mecklenburg County to change venue to Watauga County and consolidate the actions. The trial court denied both motions.

The Court of Appeals affirmed. The Court first held that the decision to consolidate is in the discretion of the trial judge and will be overturned only for abuse of discretion. Even though both actions involved the same subject matter, the actions could not be consolidated because the action by Barrier was filed first in Mecklenburg County.

> In North Carolina, our courts have made it clear that "where a prior action is pending between the same parties for the same subject matter in a court within the state having like jurisdiction, the prior action serves to abate the subsequent action . . . . 646 S.E.2d at 842.

Radford attempted to argue that Barrier's action was not the first action filed. Radford reasoned that its notice of lien was filed first and that the subsequent action to enforce the lien related back to the filing of the lien, thus predating the plaintiff's action. G.S. § 44A-10 states that the notice of claim of lien relates back to the date the party first furnished labor or materials. It does not effect the date of the action to enforce the lien. "A lien is not an action; that is why the lien must be enforced by the filing of an action." 646 S.E.2d at 842.

E. Default Judgment

Decker v. Homes, Inc./Construction Mgmt., ___N.C.App.___, 654 S.E.2d 495 (2007) arose out of the defendant's construction of the plaintiffs' home. Being dissatisfied with the quality and schedule of construction, the plaintiffs filed suit on 6 April 2004. On 29 June 2004, the Clerk entered default as to all defendants. On 16 November 2004, the trial judge entered default judgment "on the issue of liability" and set the trial for damages at the 18 January 2005 term of court. On the morning of 18 January 2005, the defendants filed motions to set

aside the entry of default and default judgment. The trial judge denied the defendants' motions. The jury awarded the plaintiffs compensatory damages of $270,570; damages for unfair and deceptive trade practices of $107,408; and punitive damages of $250,000. The plaintiffs elected to treble the award for unfair and deceptive trade practices. Judgment was entered on the jury verdict and included attorneys' fees and costs.

The Court of Appeals held that the trial judge had applied the incorrect standard in deciding whether to set aside the entry of default judgment. The trial judge ruled that the defendants' conduct did not establish excusable neglect. Since default judgment had been issued on only the issue of liability, the correct standard for consideration of the defendants' motion to set aside the default judgment was whether the defendants had shown good cause. Excusable neglect is the correct standard for consideration of a motion to set aside "a final judgment."

Although the entry of judgment on liability eliminated the defendants' right to dispute the plaintiffs' right to recover damages, the plaintiffs were still required to prove "actual injury as a proximate result of the violation of N.C.Gen.Stat. § 75-1.1." 654 S.E.2d at 501. Because the plaintiffs had not established such evidence, the trial judge erred by denying the defendants' motion for a new trial on the jury award for unfair and deceptive trade practices.

> In the instant case, plaintiffs failed to show damages arising from the claim of lien defendants filed on their real property. Further, there was no evidence introduced of damages incurred by plaintiffs as a result of the false representations by defendants giving rise to the unfair and deceptive trade practices claims separate and apart from the damages arising out of their breach of contract claim. . . . The entry of default established the liability of defendants under each of these theories, but did not entitle plaintiffs to a double recovery. 654 S.E.2d at 501.

For similar reasons, the Court of Appeals held that the trial judge erred by not allowing the defendants to present evidence on the issue of punitive damages.

> While the entry of default established the basis for punitive damages under N.C.Gen.Stat. § 1D-15, it did not establish the factors which the jury was to consider in determining the amount of punitive damages under N.C.Gen.Stat. § 1D-35. During the retrial on punitive damages, both plaintiffs and defendants may present evidence pursuant to N.C.Gen.Stat. § 1D-35. 654 S.E.2d at 501-501.

F. Arbitration

The trial court in Tillman v. Commercial Credit Loans, Inc., ___N.C.___, 655 S.E.2d 362 (2008) denied the defendants' motions to compel arbitration on the basis that the arbitration clause in the plaintiffs' loan agreement was unconscionable and unenforceable. Each of the plaintiffs obtained a loan from Commercial Credit. Each loan included premiums for life, disability and involuntary unemployment, with the premiums included within the monthly loan payments. The trial court found that the arbitration clause was a "standard-form contract

of adhesion." 655 S.E.2d at 367. The plaintiffs were not given an opportunity to exclude the arbitration clause. They were not told that insurance was voluntary. The arbitration clause excluded foreclosure actions and matters in which less than $15,000 was sought. The trial judge also made findings about the cost of arbitrators, with fees ranging from $500 to $2,380 a day. Since Commercial Credit began using the arbitration clause, there had been no arbitrations under the loan agreement. Under the exception in the arbitration clause, Commercial Credit has filed lawsuits against more than 3,700 borrowers.

The Supreme Court affirmed the trial court's denial of the defendants' motion to compel arbitration.

> We conclude that, taken together, the oppressive and one-sided substantive provisions of the arbitration clause at issue in the instant case and the inequality of bargaining power between the parties render the arbitration clause in plaintiffs' loan agreement unconscionable. . . . In conclusion, we hold that the provisions of the arbitration clause, taken together, render it substantively unconscionable because the provisions do not provide plaintiffs with a forum in which they can effectively vindicate their rights. 655 S.E.2d at 370-373.

The plaintiff in Sprake v. Leche, ___N.C.App.___, 658 S.E.2d 490 (2008) was riding as a passenger on a motorcycle when she was struck by an uninsured motorist. Suit was filed against the uninsured motorist carrier, North Carolina Farm Bureau. The plaintiff then requested arbitration as allowed by the insurance policy. The arbitration panel awarded $85,000 and prejudgment

interest. The defendant appealed the award of prejudgment interest as being beyond the authority of the arbitration panel.

The Court of Appeals affirmed.

> This Court has applied the rule that "pre-judgment interest up to the amount of the carrier's liability limit is part of compensatory damages for which the UIM carrier is liable." . . . . Given the law as it stands in this State, we hold that the provision granting the arbitration panel authority to address issue of "compensatory damages" was ambiguous as to whether pre-judgment interest was available. As such, we resolve our doubt "against the insurance company and in favor of the policyholder." . . . The arbitration panel had the authority to address the issue and the trial court properly confirmed the amended award. 658 S.E.2d at 492.

Faison & Gillespie v. Lorant, ___N.C.App.___, 654 S.E.2d 47 (2007) involved the arbitration of a dispute relating to the departure of the defendant from the plaintiff's law firm. The plaintiff filed suit alleging that the defendant removed computer data, solicited clients of the plaintiff firm, owed attorneys' fees and costs for work performed by the plaintiff law firm and double-billed three clients. One week before trial, the parties executed an Agreement for Arbitration. The Agreement provided that the scope of arbitration "shall include all claims and defenses asserted by the parties in the Pending Litigation." Retired Superior Court Judge James M. Long conducted the arbitration. At the hearing in superior court to confirm the award, the trial judge granted the defendant's

motion to modify the arbitrator's award by striking the grants of interest.

The Court of Appeals reversed. The defendant contended that an award of interest was not part of the remedy asserted, but was a separate claim beyond the parties' agreement to arbitrate. The Court of Appeals disagreed. The Court first noted that the parties' agreement was "to submit all claims and defenses asserted by the parties." The Court then confirmed that a party's prayer for relief in a pleading is not determinative of the final amount that may be awarded to that party. As both parties had requested "such other and further relief as the Court deems just and proper," an award of interest was within the relief sought.

Additionally, both the rules of the American Arbitration Association and G.S. § 1-569.21 allow the arbitrator to "grant 'any remedy' the arbitrator deems 'just' and appropriate, with the exception of attorneys' fees, which must be expressly agreed upon by the parties and specifically submitted to the arbitrator. . . ." 654 S.E.2d at 54. The Court of Appeals remanded the case to the trial court for an order confirming the arbitrator's award and entering judgment.

> Therefore, we hold that, by inviting the arbitrator to award discretionary relief it "deem[ed] just and proper," coupled with the parties' express incorporation of the AAA Rules and the North Carolina General Statutes which permit an arbitrator to award

> remedies it deems "just and appropriate under the circumstances of the arbitration proceeding," the arbitrator's award of the interest did not exceed the authority expressly conferred on him by the parties' private arbitration agreement. 654 S.E.2d at 55

In Scottish v. Transamerica Occidental Life Ins., ___N.C.App.___, 647 S.E.2d 102 (2007), Scottish Re Life Corporation entered into reinsurance contracts with Annuity and Life Reassurance. Transamerica subsequently assumed all of Annuity's obligations to Scottish. A dispute arose between Scottish and Transamerica as to the liabilities of the parties. Scottish filed a motion to compel arbitration. With the consent of the parties, the trial court ordered arbitration. The trial court also entered an order for provisional remedies. This order required Transamerica to either repudiate its claim of rescission or return the assets it had received as a result of the contract with Annuity. Transamerica was also required to post a bond of $250,000. The trial court also stated that the grant of provisional remedies was without prejudice to the authority of the arbitration panel to modify or vacate the provisional relief ordered.

The Court of Appeals first determined whether the preliminary injunction issued by the trial court was appealable. Based on the "large amount of money at issue in this case," 647 S.E.2d at 104, the effect on Transamerica's right to the assets

and the delays in reaching arbitration, the Court granted the appeal "to preserve a substantial right." 647 S.E.2d at 104.

Transamerica next argued that the trial judge had erred by not applying federal law and the Federal Arbitration Act. The Court of Appeals held that the FAA did apply, but that state law in the Revised Uniform Arbitration Act was not preempted.

> The United States Supreme Court has held that "the FAA contains no express pre-emptive 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 RUAA "would undermine the goals and policies of the FAA." . . . . The trial court's application of the provisional remedies of the RUAA do not undermine this purpose. . . . Appellant's contention that the FAA preempts the RUAA in this case is incorrect. 647 S.E.2d at 104-105.

Addressing the merits of the appeal and the relief granted by the trial court, the Court of Appeals held that the trial judge had correctly granted the provisional relief requested.

> By its plain terms, the trial court's order does not address the merits of the underlying dispute. It instead explicitly stated that it is temporary in nature, that it is modifiable at the arbitrators' discretion, and that it "is without prejudice to and has no bearing on, the parties' respective positions before the arbitration panel as to provisional relief or the merits." . . . Moreover, had the trial court not granted its relief, there was a "reasonable apprehension of irreparable loss." . . . Accordingly, the trial court appropriately granted the provisional relief as empowered under N.C.Gen. Stat. § 1-569.8(a) (2005). 647 S.E.2d at 105-106.

WMS, Inc. v. Alltel Corporation, ___N.C.App.___, 647 S.E.2d 623 (2007) determined the scope of issues to be decided in arbitration. In a previous appeal, the Court determined that the Federal Arbitration Act applied to the arbitration agreement between the parties. WMS, Inc. v. Weaver, 166 N.C.App. 352, 602 S.E.2d 706, disc. rev. denied, 359 N.C. 197, 608 S.E.2d 330 (2004. The arbitration in that case resulted in a treble damages award of $2,887,500 and attorneys' fees of $352,640. An additional appeal in that case construed the point at which a tender of the judgment amount stops the running of interest.

The present litigation involved a different Communication Services Agent Agreement with an arbitration provision similar to the arbitration clause in the earlier appeals. Upon motion of the defendants, the trial court dismissed the present case on the grounds of res judicata and collateral estoppel. The basis of the defendants' motion to dismiss was that the arbitrators in the previous matter had dismissed all claims by the plaintiff against the defendants. The plaintiff argued before the trial court and on appeal that the issue of res judicata could be decided only by the arbitrators and not by the trial court.

The Court of Appeals agreed, reversed and remanded to the trial court. The Communication Services Agent Agreement was a "transaction involving commerce." Therefore, the Federal Arbitration Act controlled the contract.

> The weight of authority supports . . . the conclusion that the issue of res judicata – and by analogy, collateral estoppel – based upon a prior arbitration proceeding is a legal defense and as such, an issue that must be considered by the arbitrator, not the court. . . . The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitratable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitratability. . . . Therefore, we hold that, in the context of the FAA, the issues of res judicata and collateral estoppel must be decided initially by the arbitrator and not the trial court. 647 S.E.2d at 628.

The plaintiff in Capps v. Virrey, ___N.C.App.___, 645 S.E.2d 825 (2007) was injured in an automobile accident on 11 April 2002 when a vehicle operated by Linker failed to stop at a red light. Suit was filed against several defendants and compensation was sought from Nationwide Mutual Insurance Company, the plaintiff's uninsured motorist carrier. On the day the complaint was filed, the plaintiff served requests for admissions. The plaintiff subsequently served a first set of interrogatories and requests for documents on the defendants and Nationwide. After Nationwide answered, the plaintiff served Nationwide with a second and third request for production of documents. Nationwide responded to all discovery. The parties participated in an unsuccessful mediation on 22 November 2005. On 9 December 2005, the plaintiff demanded arbitration under the

Nationwide policy. The trial court denied the plaintiff's motion to compel arbitration.

Finding that the plaintiff had waived the right to demand arbitration by participating in discovery before the demand, the Court of Appeals affirmed.

> Parties agree to arbitrate in order to avoid the costs and delays associated with litigation, specifically the costs and delays inherently incurred in civil discovery. . . . 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. . . . It is clear that Plaintiff's discovery requests exceeded the scope allowed by the Uniform Arbitration Act. Plaintiff thereby waived his right to compel arbitration. 645 S.E.2d at 829.

The plaintiffs in Edwards v. Taylor, 182 N.C.App. 722, 643 S.E.2d 51 (2007) contracted to purchase a home from Taylor. The plaintiffs then contacted Smith and The Home Inspector by telephone to arrange a pre-purchase home inspection. Plaintiffs agreed to pay $288 for the inspection. The home inspection was conducted by Smith on 16 December 2003. After performing the inspection, Smith met the plaintiffs in a parking lot and exchanged the inspection report for the plaintiffs' check of $288. Smith also gave the plaintiffs a home inspection contract with a mandatory arbitration provision. Both parties signed the contract. The arbitration provision had not been discussed previously. After the plaintiffs closed on the house and moved in, they discovered several defects with the house. The present

action was filed as a result of those complaints. The trial court denied the defendant's motion to compel arbitration.

The Court of Appeals affirmed the trial judge's order denying arbitration.

> Defendant performed the home inspection on the basis of an oral contract. Thus, under North Carolina law, the oral agreement between the parties for the performance of a home inspection could not contain an enforceable agreement to arbitrate. N.C.G.S. § 1-567.2 (2002). Therefore, although both parties signed a written agreement, the trial court properly held the parties did not enter into a valid written agreement to arbitrate. Upon de novo review of this issue, we determine the trial court properly denied defendant's motion to compel arbitration. 643 S.E.2d at 54.

G. Settlements

Purcell International Textile v. Algemene AFW, ___N.C.App.___, 647 S.E.2d 667 (2007) involved an attorney's authority to settle a case on behalf of his clients. Purcell filed suit against Algemene alleging claims based in contract, fraud and unfair and deceptive trade practices. Hinnant represented the defendants. Hinnant negotiated a settlement of the claims. The settlement was announced in open court on the date the case was set for trial. The settlement required the defendants to pay $850,000 in three payments over six months. As was later discovered, Hinnant did not have authority from his clients to agree to $850,000. It was also learned that Hinnant had forged his clients' signatures to the settlement agreement and confession of judgment.

When the defendants did not make the first payment required by the settlement, the plaintiff filed a motion to enforce the settlement. The trial court granted the motion and entered judgment for $850,000 plus attorneys' fees and prejudgment interest for a total of $977,500. The trial court later entered an additional restraining order freezing defendants' funds in a trust account accessible by Hinnant. The defendants did not learn of any of these events until after the judgments were entered. The defendants retained new counsel and moved for relief from the judgments pursuant to Rule 60(b). The trial court denied the motion.

The Court of Appeals affirmed. Although attorney fraud may have been involved, relief from attorney fraud is generally available only where the improper conduct results in a judgment from "improper conduct of the party in whose favor it was rendered." 647 S.E.2d at 670.

> Hinnant's actions were binding on defendants, who hired him to act as their agent in handling the case and negotiating a settlement. . . . Defendants granted Hinnant the authority to settle the case and never stripped him of that authority. . . . Thus, the agreement negotiated by Hinnant bound defendants despite the fact that Hinnant exceeded his authority and violated his duty to defendants. . . . Because Hinnant acted with apparent authority as defendants' agent, defendants fail to meet the criteria for setting aside the judgment." 647 S.E.2d at 671.

H. Discovery

The issue in Fulmore v. Howell, ___N.C.App.___, 657 S.E.2d 437 (2008) was whether the trial court abused its discretion in ordering discovery from the defendants. The action was for wrongful death arising out of a motor vehicle accident on 5 August 2004. The trial court ordered the defendant-driver to produce his social security number. The defendant resisted on the grounds of the Federal Privacy Act of 1974. Finding that both state and federal law allowed production of social security numbers by order of court, the Court of Appeals affirmed.

> Because the trial court's order compelling discovery of Howell's social security number falls squarely within the exemption for court orders in N.C.Gen.Stat. § 132-1.10, and the original Federal Privacy Act of 1974, which Defendants submit as authority for their argument, we conclude that the trial court did not abuse its discretion, 657 S.E.2d at 441.

The trial court also ordered the defendants to disclose all non-privileged documents the driver reviewed with his attorney in preparation for his deposition. The defendant contended that even if the documents were not privileged, any documents identified by the driver's attorney for review in preparation for the deposition were protected by both the work-product and attorney-client privileges. Based in part on the failure of the defendant's attorney to submit the documents for in camera review, the Court of Appeals again held that the trial judge did

not abuse his discretion in ordering production of these documents.

> Because Defendants generally argue that the documents reviewed by Howell are either protected by the attorney-client privilege or the doctrine of work product, without submitting the allegedly privileged documents to either the trial court, in camera, or to this Court, offering a specific explanation as to why the documents are protected, we conclude that the trial court did not abuse its discretion in compelling, in accordance with . . . Rule 612, the discovery of non-privileged documents Howell reviewed in anticipation of his deposition. 657 S.E.2d at 443.

Rule 612 states that if a writing "is used before testifying for the purpose of testifying, disclosure is in the discretion of the court." Since testifying at a deposition is within the scope of the rule, disclosure of the documents reviewed is within the discretion of the trial judge.

The trial judge ordered production of the accident report prepared by the truck driver. The defendant contended the report was privileged because the trucking company had retained an attorney to conduct the investigation. The Court of Appeals again found no abuse of discretion in ordering production of the accident report.

> Here, the facts tend to show that the attorney, Ullrich did not contact Lawrimore and Howell until they had already begun the accident report, and the procedural manual directs that the preparation of the accident report was for safety purposes, not for the purpose of seeking legal advice, as required for the attachment of attorney-client privilege. Moreover, the accident report was created in the ordinary course of the business of Pilgrim's Pride, pursuant to their

> safety manual, which negates the possibility of the protection of the report under the doctrine of work product. 657 S.E.2d at 443.

Spangler v. Olchowski, ___N.C.App.___, 654 S.E.2d 507 (2007) was an action alleging medical malpractice. The defendants-doctors filed a motion to compel discovery of all medical records for the ten-year period preceding the surgery involved. The plaintiff-patient had been undergoing substance abuse treatment during part of the ten-year period. The plaintiff filed a motion for a protective order, seeking to limit the period requested and to prevent disclosure of the substance abuse records. The trial court ordered production of all medical records requested by the defendants.

The Court of Appeals affirmed. The Court addressed the applicability of the patient-physician privilege and related state and federal regulations involving mental health treatment. By alleging a claim for emotional distress, the plaintiff had placed her "mental health and history of substance abuse at issue." 654 S.E.2d at 513. The privilege was, therefore, waived. The North Carolina Mental Health, Developmental Disabilities, and Substance Abuse Act of 1985 provides that no confidential mental health treatment may be disclosed except as provided by statute. N.C.Gen.Stat. § 122C-54(a) allows disclosure of such information "if a court of competent jurisdiction issues an order compelling disclosure."

42 C.F.R. § 2.1 et seq. allows disclosure of such confidential communications if: (1) the medical treatment is in relation to litigation in which the patient offers evidence; and (2) for "good cause."

> Here, as previously discussed, the records and communications related to decedent's substance abuse treatment are causally related and thus relevant to plaintiff's claim for damages. Accordingly, § 2.63(a)(3) is satisfied. Furthermore, we conclude that § 2.64(d) is satisfied, as (1) the information at issue cannot be discovered other than by court order; and (2) because decedent has died, there is no potential injury to the patient or patient-physician relationship due to such disclosure. Therefore, the federal regulations do not prohibit disclosure of the information at issue. In sum, we conclude that neither federal nor state law prohibited the trial court from ordering disclosure of the information at issue. 654 S.E.2d at 544.

The plaintiffs in Brown v. American Partners, ___N.C.App.___, 645 S.E.2d 117 (2007) alleged violations of the North Carolina Investment Advisers Act. During discovery, one of the defendants, the Credit Union, refused to produce documents on the grounds of the attorney-client and work product privileges. In response to the plaintiffs' motion to compel discovery, the Credit Union submitted an affidavit of its CEO, Simpson, concerning communications with the attorneys for the Credit Union. The trial court conducted an in camera inspection of the documents, then ordered partial production of some of the documents about which the privileges were asserted.

"Document 27" was a copy of minutes of the Credit Union board of directors. The claim of privilege was based upon the report of the CEO, Simpson, to the board about legal advice received from Drake, the Credit Union's attorney. The Court of Appeals affirmed the trial court's order compelling production of this document on the grounds that the Credit Union had not carried its burden of establishing that the communication was not made in the presence of a third party.

> The minutes state that a member of a "Supervisory Committee" was present at the meeting as well as an individual "from management" identified only as "Valerie Marsh." . . . According to the Credit Union, because the member of the Supervisory Committee and Valerie Marsh were "agents" of the Credit Union, the communication was made confidentially, and the privilege applies . . . . We decline to accept the Credit Union's suggestion that simply because a person may be an agent of the company in some capacity, the company's attorney-client privilege automatically applies to communications made in the presence of that person. 645 S.E.2d at 122.

"Document 36" was a letter from Simpson, the CEO, to Drake, the attorney for the Credit Union. The trial court ordered production of a redacted copy of the letter. The redacted portion of the letter to be produced contained facts that the trial court did not believe were privileged. The Court of Appeals held that the trial judge abused his discretion in ordering production of the redacted copy of the letter.

> "A fact is one thing and a communication concerning that fact is an entirely different thing. The client cannot be compelled to answer the question, 'What did

> you say or write to the attorney.'" . . . . Based upon this reasoning, we believe it would be manifestly unreasonable to require the Credit Union to disclose to plaintiffs what information it felt that its lawyers should have in advising it. Accordingly, we hold that the trial court abused its discretion in ordering the production of Document 36. 645 S.E.2d at 124.

"Document 1" was a copy of another set of minutes of a meeting of the Credit Union Board of Directors. The Credit Union asserted only the work product privilege as to these minutes. The Court of Appeals first observed that documents "prepared in the ordinary course of business" are not protected by the work product privilege. 645 S.E.2d at 125. The Credit Union, however, argued that the minutes were protected because they contained information "prepared in anticipation of litigation." The Court of Appeals rejected this argument and held that the trial court correctly ordered production of the minutes.

> The work product doctrine, however, protects only "documents or tangible things." . . . . It does not shield from disclosure actions taken in anticipation of litigation or information contained in a document that does not constitute work product. Because the Credit Union has failed to show that Document 1 itself, as opposed to any action or conduct discussed therein, was prepared in anticipation of litigation, we affirm the trial court's order as to this document. 645 S.E.2d at 125.

I. Decisions of Multiple Superior Court Judges

Cail v. Cerwin, ___N.C.App.___, 648 S.E.2d 510 (2007) involved rulings by different superior court judges on multiple

motions for summary judgment. The business relationship between the Cerwins and their business, Canusa Mortgage, was related to investing in residential mortgage loans. A mortgagee, Deal, paid the amount of his loan in full, however, employees of Canusa did not mark the loan paid and did not cancel the note. Ms. Cerwin instituted foreclosure proceedings, but was enjoined by the trial court on motion of Deal. On 15 December 2003, Judge Titus heard the defendants' motions for summary judgment. Judge Titus denied the motion except as to the plaintiffs' claim for unfair and deceptive trade practices. At the hearing, Judge Titus noted that the "extent of the agency" was the issue, and, for this reason was not going to grant summary judgment. Judge Titus expressly did not rule on the plaintiffs' fifth claim for relief of unfair and deceptive trade practices.

On 21 January 2005, plaintiffs filed a motion for summary judgment. This motion was heard by Judge Cashwell. Judge Cashwell entered judgment for the plaintiffs: (1) with respect to their declaratory judgment about the status of the note and deed; (2) staying the defendants' foreclosure; (3) against the defendants for falsely representing the debt; (4) on the unfair and deceptive trade practices; (5) fees for defendants' failure to cancel the note and deed; and (6) against the defendants on the counterclaim.

The Court of Appeals reversed, concluding that Judge Cashwell could not revisit the summary judgment motions before Judge Titus.

> Although additional evidence was before the court – particularly with respect to the alleged agency relationship between Canusa and the Cerwins – the legal issues were the same as those at issue in defendant Christina Cerwin's motion. As this Court has explained, "the presentation of a new legal issue is distinguishable from the presentation of additional evidence. . . . and only when the legal issues differ between the first motion for summary judgment and a subsequent motion may a trial court hear and rule on the subsequent motion. 2007 WL 2238356 at *5.

The issue of agency was before both Judge Titus and Judge Cashwell, and, since Judge Titus had ruled on this issue, Judge Cashwell could not address the same issue a second time.

> Before Judge Cashwell, the key legal issues once again were agency – both apparent and actual – and the applicability of the UCC. As pointed out by counsel for plaintiffs, "it may be a complex factual case, but the legal issue is a simple one – It's just a legal question on agency . . . ." On 3 March 2005, Judge Cashwell entered an order . . . . As such, Judge Cashwell's order overrules Judge Titus' order in several respects, and as Judge Cashwell had no jurisdiction to overrule Judge Titus on the same legal issues, Judge Cashwell's order must be vacated to the extent that it contradicts Judge Titus' earlier order. Id.

J. Obstruction of Justice/Spoliation of Evidence

The complaint in Grant v. High Point Regional Health System, ___N.C.App.___, 645 S.E.2d 851 (2007), petition for discretionary review allowed (March 6, 2008) alleged claims for spoliation of evidence and obstruction of justice. The decedent

was admitted to the defendant's emergency room on 13 September 2000 complaining of knee pain. X-rays were taken of the decedent's knee. It was alleged that as a result of delay in diagnosing cancer in the decedent's knee, the cancer had advanced to the point that it was terminal. The decedent died on 17 February 2003.

Holt, one of the plaintiff's attorneys, wrote the hospital on 31 August 2003 indicating that she represented the decedent with respect to a potential claim for medical malpractice. Holt requested copies of the emergency records and films. When there was no response to the letter, Holt called the hospital on 15 September 2003 and spoke with "Rose." Rose told Holt that the decedent's x-rays "were present" at the hospital. In response to a request from Rose, Holt sent another medical release. When there had been no answer from the hospital, Holt called on 23 September 2003 and was told that the decedent's x-rays could not be found. After additional efforts to obtain the records and films, the plaintiff's attorney sent a subpoena to the hospital on 14 January 2004. The hospital responded that the x-rays were not present at the hospital. The complaint alleged that the hospital's conduct constituted obstruction of justice and spoliation of evidence. The trial court dismissed the complaint.

The Court of Appeals reversed.

> Plaintiff . . . alleged . . . that Defendant destroyed the medical records of decedent. Plaintiff alleged Defendant's actions effectively precluded Plaintiff from obtaining the required Rule 9(j) certification. Plaintiff further alleged that Defendant's actions "obstructed, impeded and hindered public or legal justice . . . and from being able to successfully prosecute a medical malpractice action. . . . We hold that such acts by Defendant, if true, "would be acts which obstruct, impede or hinder public or legal justice and would amount to the common law offense of obstructing public justice." 645 S.E.2d at 855.

Because the plaintiff did have a claim for obstruction of justice, the plaintiff had a remedy for the alleged acts of the defendant. For this reason, the trial court correctly dismissed the claim for common law spoliation.

> Since Dulin [v. Bailey, 172 N.C. 608, 90 S.E.689 (1916)], the only case law related to spoliation has dealt with the inference arising in ongoing litigation from the intentional destruction of evidence. . . . it is clear that any wrong alleged by Plaintiff in the present case is not without a remedy because we had already held that Plaintiff stated a cause of action for common law obstruction of justice. 645 S.E.2d at 856-857.

K. Workers' Compensation Liens

The decedent in Estate of Bullock, ___N.C.App.___, 655 S.E.2d 869 (2008) died on 18 September 2004 in the course and scope of his employment with C.C. Mangum when a dump truck owned by Puryear Transport and operated by Parker ran over Bullock. At the time of his death, Bullock was not married and had no children. He had been living with his girlfriend for over

twenty years and supported her two minor nephews. On 21 April 2005, the Industrial Commission issued an Opinion and Award finding that the minor nephews were wholly and fully dependent on Bullock and were entitled to receive death benefits, an amount anticipated to total $259,586. Without notifying the employer and its carrier, the wrongful death claim against Puryear and Parker was settled for $95,000. The instructions accompanying the settlement check stated that it was delivered "in trust" and was not to be negotiated until "all liens" were satisfied. The settlement proceeds were distributed to Bullock's mother pursuant to the Intestate Succession Act. The trial court granted the motion of Bullock's estate to approve the settlement and declare that Bullock's workers' compensation carrier and employer did not have a lien on the wrongful death settlement proceeds. In the alternative, the trial court held that even if there were a lien, the lien should be struck.

The Court of Appeals reversed and remanded for a hearing. First, by statute, the workers' compensation carrier and employer had a lien on the wrongful death settlement.

> According to the plain language of § 97-10.2(f) and (h), . . . respondents have a statutory lien against <u>any</u> payment made by a third-party tortfeasor arising out of an injury or death of an employee subject to the Act. This lien may be enforced against "<u>any</u> person receiving such funds." . . . . It is a lien for "all amounts paid or to be paid" to the employee, and it is mandatory in nature. 655 S.E.2d at 873.

When considering the workers' compensation lien, the superior court judge does have "discretion . . . to adjust the amount of a workers' compensation lien, even if the result is a double recovery for the plaintiff." 655 S.E.2d at 874. The decision of the superior court judge, however, must be "a reasoned choice, a judicial value judgment, which is factually supported . . . by findings of fact and conclusions of law sufficient to provide for meaningful appellate review." 655 S.E.2d at 874. As the trial judge had ruled in the alternative that the lien should be struck, the Court of Appeals was not able to determine whether the trial judge had engaged in such a "judicial value judgment."

L. Summary Judgment

Morris v. Moore, ___N.C.App. ___, 651 S.E.2d 594 (2007) involved conversion of a 12(b)(6) motion to a summary judgment motion and whether the non-moving party should have been allowed additional time to respond. Morris filed suit to compel the defendant to execute a deed returning ownership of property related to the defendant's bankruptcy. Although Moore did not answer the complaint and the Clerk entered default, the trial court denied the plaintiff's motion for default judgment on the grounds that the complaint "did not state any grounds for relief." The trial court allowed the plaintiff to amend the complaint. The defendant responded by filing a "Motion to

Dismiss, Answer, Affirmative Defenses, Rule 11 Attorney's Fees." At the hearing on the defendant's motion, the trial court considered documents outside the pleadings, then entered summary judgment in favor of the defendant.

The Court of Appeals affirmed. On appeal, the plaintiff argued that the trial court erred by not giving the plaintiff additional time to respond. The Court noted that the plaintiff was the party first offering documents outside the complaint, then participated in the hearing without requesting a continuance. For these reasons, the trial court properly entered judgment in favor of the defendant.

> When a motion to dismiss pursuant to Rule 12(b)(6) is treated as a motion for summary judgment pursuant to Rule 56 because of the consideration of material outside the pleadings, the parties must be given a reasonable opportunity to present material pertinent to a Rule 56 motion. . . . Here, plaintiff did not request a continuance or additional time to produce evidence. Plaintiff did not object to the admission of material outside the pleadings. In fact, plaintiff himself first offered material outside of the pleadings. Plaintiff has waived his right to complain he was denied a reasonable opportunity to present material to the trial court. 651 S.E.2d at 596-597.

M. Attorney's Fees

The attorney's fees awarded by the trial judge in Wright v. Murray, ___N.C.App.___, 651 S.E.2d 913 (2007) were more than three times the amount of the jury verdict in favor of the plaintiff. The parties were involved in an automobile accident on 3 August 2002. Suit was filed in District Court, then

transferred to Superior Court based on the plaintiff's response to the defendant's Statement of Monetary Relief Sought. The parties engaged in written discovery including production of medical records. During mediation, the defendant's offer to settle of $8,000 was rejected.

Approximately a month before trial, the defendant then filed an Offer of Judgment of $8,001 to include costs, interest, and attorney's fees. The jury awarded the plaintiff $7,000. In response to the plaintiff's motion for costs, the trial court awarded $3,188.25 for filing, subpoenas, expert witnesses and depositions and $160.50 for photocopying expenses. Finding that the judgment finally obtained was more favorable than the Offer of Judgment and finding than more than 139.5 hours were involved at a hourly rate of $220, the trial court awarded attorney's fees of $25,000 pursuant to N.C.G.S. § 6-21.1.

Reviewing under the abuse of discretion standard, the Court of Appeals affirmed.

> In the instant case, the trial court's order contains explicit findings regarding the lack of settlement offers prior to filing of Ms. Wright's claim, offer of judgment made pursuant to Rule 68, timing of the settlement offers, and amounts of the settlement offers relative to the jury verdict. The order further finds that the "judgment finally obtained" by Ms. Wright was more favorable than Mr. Murray's final offer of judgment. As such the order had specific findings as to the majority of the Washington [v. Horton, 132 N.C.App. 347, 513 S.Ed.2d 331 (1999)] factors. 651 S.E.2d at 916.

Additionally, the Court of Appeals commented that the trial judge "observed the attorneys throughout the course of the matter, including their demeanor and characteristics during the hearing on costs and fees." 651 S.E.2d at 917. Noting that there were disagreements between counsel as to matters such as production of medical and other records, the Court of Appeals concluded by stating that "we cannot substitute our assessment of the credibility of the evidence for that of the trial judge." 651 S.E.2d at 917.

The trial court in Bruning Federle Mfg. Co. v. Mills, ___N.C.App.___, 647 S.E.2d 672, petition for writ of certiorari denied, 362 N.C. 86, 655 S.E.2d 837 (2007) granted the defendants motions for summary judgment on North Carolina Trade Secrets Protection Act claims brought by the plaintiff. The Court of Appeals affirmed. The defendants then moved in the trial court for court costs and attorneys' fees. The trial court entered findings of fact and conclusions of law at the request of the plaintiff and determined that the defendants had not established evidence of the plaintiff's bad faith as provided for in G.S. § 66-154. The trial court, therefore, denied the defendants' motion for attorneys' fees, but allowed the award of costs other than attorneys' fees.

The Court of Appeals affirmed. The Court noted the apparent conflict between G.S. § 66-154(d) allowing the award of

attorneys' fees in Trade Secret Protection Act cases only if the claim "is made in bad faith or if willful and malicious misappropriation exists" and G.S. § 6-21(12) stating that "costs" shall be awarded in the discretion of the court, with "costs" "construed to include reasonable attorneys' fees" in the discretion of the trial court. The Court concluded that attorneys' fees in TSPA cases could only be awarded under the conditions stated in G.S. § 66-154(d).

Section 66-154(d) is at odds with Section 6-21. A trial court "may" award attorneys' fees under Section 66-154(d), while under Section 6-21, a trial court "shall" award costs, which "shall be construed to include" attorneys' fees. Under Section 66-154(d), the trial court may only award attorneys' fees to the prevailing party if "a claim of misappropriation is made in bad faith or if willful and malicious misappropriation exists." Under Section 6-21, a trial court has the discretion to tax costs against either party or apportion costs between the parties, and has the discretion to determine the amount of a "reasonable" fee. Importantly, neither party must show "bad faith" or "willful and malicious misappropriation" under Section 6-21 to be awarded costs. While we agree with Defendants that to superimpose the conditions of Section 66-154(d) on Section 6-21 would "eviscerate section 6-21 for TSPA cases," we also note that to ignore the condition of Section 66-154(d) when awarding

"costs" under Section 6-21 would render Section 66-154(d) meaningless. . . . Based on our principles of statutory construction, we conclude that in an action under the TSPA, a trial court may only award attorneys' fees to the prevailing party, "if a claim of misappropriation is made in bad faith or if willful and malicious prosecution exists," pursuant to N.C.Gen.Stat. § 66-154(d). 647 S.E.2d at 674-5.

N. Judgments

North Carolina Industrial Capital, LLC v. Clayton, ___N.C.App.___, 649 S.E.2d 14 (2007) arose out of a lease of commercial property in Charlotte. The complaint alleged entitlement to $373,000. The jury awarded the plaintiff $101,830.38. The trial judge added prejudgment interest of $53,430.38 and attorneys' fees of $15,274.55. The plaintiff moved for judgment notwithstanding the verdict, or, in the alternative, a new trial. The plaintiff also requested that the trial court make findings of fact and conclusions of law. The trial court denied the motion for judgment notwithstanding the verdict and for a new trial. Judgment was entered without making findings of fact and conclusions of law.

Noting the different standard of appellate review for judgment notwithstanding the verdict and for new trial, the Court of Appeals remanded for the trial judge to make the

requested findings of fact and conclusions of law as to the motion for a new trial.

> Since our review of the trial court's denial of Plaintiff's motion for judgment notwithstanding the verdict is de novo, the purpose for requiring findings of fact and conclusions of law under Rule 52 – to allow meaningful appellate review – does not arise in this case. That is, "we consider the matter anew" and would freely substitute our judgment for that of the trial court regardless of whether the trial court made findings of fact and conclusions of law. Therefore, it was not necessary . . . to make findings of fact and conclusions of law in his order denying Plaintiff's motion for judgment notwithstanding the verdict. . . . However, because the trial court's ruling on Plaintiff's motion under Rule 59(a)(5), Rule 59(a)(6) and Rule 59(a)(9) is evaluated for abuse of discretion, findings of fact and conclusions of law are necessary to effectuate meaningful appellate review. Therefore, the trial court erred in failing to make findings and conclusions as requested by Plaintiff. Accordingly, this matter is remanded to the trial court . . . . 2007 WL 2362763 at *9-10.

The plaintiffs in WMS, Inc. v. Weaver, ___N.C.App.___, 644 S.E.2d 567 (2007) recovered a judgment against the defendant for breach of the covenant of good faith and fair dealing and for unfair and deceptive trade practices. On 2 December 2005, the defendant tendered a check to the plaintiffs for $3,960,960.19, the amount of the original judgment plus 8% interest. The plaintiffs refused to accept the check because it was jointly payable to multiple payees. The plaintiffs also contended that additional interest of $715 was owed. On 16 December 2005, the defendant issued a second check payable to the Clerk of Court that included additional interest of $715 on the original

judgment. The plaintiffs argued that interest continued to run on the full amount of the judgment through 16 December 2005. The trial court granted the defendant's motion that the judgment be marked as satisfied in full as a result of the check on 16 December 2005.

The Court of Appeals affirmed. The Court held that G.S. § 1-239(a) allowed interest on the original amount of the judgment to stop running upon a tender of full or partial payment.

> The plain language of the statute indicates that to satisfy a judgment, partial payments may be tendered and such payments may be made to either the clerk of court or the judgment creditor. N.C.Gen.Stat. § 1-239(c)(2005). Further, tender of partial payment stops the accrual on all but the unpaid portion of the judgment. 644 S.E.2d at 568.

O. Sanctions

Stocum v. Oakley, ___N.C.App.___, 648 S.E.2d 227 (2007), petition for discretionary review denied (April 10, 2008) was an action alleging medical malpractice. Suit was originally filed on 1 October 2002. Over the next year, the complaint was amended and nine alias and pluries summonses were issued. No attempt was made to serve the defendants. On 22 July 2004, one of the defendants received an order for mediated settlement from the Moore Court Superior Court. This was the first notice any defendant had received about the lawsuit. The plaintiff's attorney wrote the Court on two occasions, stating that

discovery was being conduct and additional time was needed. All defendants were served in August 2004 at the address identified on each summons. The defendants filed a motion to dismiss pursuant to Rules 4 and 41. The plaintiff's attorney's letter to the Court concerning ongoing discovery was a basis for a Rule 11 motion to dismiss. The hearing on the motions to dismiss was scheduled for 18 October 2004. The plaintiff filed a voluntary dismissal without prejudice on 14 October 2004.

The present action was filed on 11 October 2005. The defendants filed similar motions to dismiss. The trial court granted the motions and dismissed the case. The trial court entered findings of fact and conclusions of law relating to violations of Rules 4, 11 and 41.

The Court of Appeals affirmed. The plaintiff argued that the trial court had considered incompetent evidence in ruling on the motion to dismiss. Specifically, the plaintiff objected to the trial judge reviewing unverified pleadings in the previous action. The Court of Appeals disagreed.

> . . . we limit our discussion . . . to the issue of whether the trial court could take judicial notice of unverified documents in ruling on a motion to dismiss. Plaintiffs contend that even unverified documents must comply with Rule 6(d). We disagree. Facts essential to a judgment are not limited to testimony of witnesses, exhibits introduced into evidence or by stipulation of parties. . . . Trial courts may properly take notice of "its own records in any prior or contemporary case when the matter noticed has relevance." 2007 WL 2238503 at *3.

The Court's review of the trial judge's sanctions was de novo with the choice of sanction reviewable for abuse of discretion. The plaintiff argued that the Rule 11 conduct had occurred in the previous action and did not take place after the present lawsuit was filed. The Court stated that a dismissal "may not be taken in bad faith" and that a dismissal will not deprive the trial court of jurisdiction to consider issues of sanctions requiring resolution after the dismissal is taken. The Court also rejected the plaintiff's argument that the defendants' motions for sanctions had been unreasonably delayed.

> Here, there have been two motions for sanctions. The first came before plaintiffs took a voluntary motion to dismiss and the second upon plaintiffs' refiling the claim. Under these circumstances, plaintiffs' attorney was aware that sanctions could be imposed . . . . plaintiffs in this case refiled their complaint which led to defendants' filing their motion for dismissal. This is not a case where defendants sought to impose sanctions long after the litigation between the parties had been conclusively resolved. Instead, when plaintiffs dismissed their case they effectuated the relief defendants were seeking, giving defendants little or no reason to pursue a motion to dismiss. . . . Under these circumstances, we conclude defendants' motion to dismiss was filed within a reasonable time. 2007 WL 2238503 at *5.

As to the dismissal based on Rule 41, the plaintiff argued that he could not be sanctioned for conduct allegedly occurring in the previous case. The Court disagreed.

> Here, the trial court made a conclusion of law that plaintiffs initial complaint was not filed in good faith and was not filed with the intent to prosecute

> under Rule 41(b). Further, when "the Rules of Civil Procedure are violated for the purpose of delay or gaining an unfair advantage, dismissal of the action is an appropriate remedy." . . . . Here, the trial court found that the rules violation was for the purpose of delay and to gave an unfair advantage. Consequently, we reject plaintiffs' arguments that a Rule 41(a) voluntary dismissal wipes the slate clean of any passed sanctionable conduct. 2007 WL 2238503 at *6.

P. Court Costs

O'Mara v. Wake Forest University, ___N.C.App.___, 646 S.E.2d 400, petition for discretionary review allowed in part, denied in part, ___N.C.___, 659 S.E.2d 1 (2007) was an action alleging medical malpractice. The jury found that the defendants were not responsible for the disabilities and damages to the minor plaintiff. The trial court then ordered the plaintiff to pay $181,592.50 in costs.

The Court of Appeals reversed in part. The Court held that the costs associated with the defendants' experts could not be recovered when those experts were not under subpoena. In connection with the same experts of the defendants, the Court held that it was error to award "costs to defendants for their expert witnesses' review, preparation and consultation with defense counsel." 646 S.E.2d at 408. Travel expenses for the defendants' employees and expenses related to trial exhibits were also not recoverable. The Court of Appeals reduced the costs awarded against the plaintiff to $22,595.33.

Q. Evidence

(1) 911 Calls

The defendant in State v. Hewson, 182 N.C.App. 196, 642 S.E.2d 459, petition for discretionary review denied, 361 N.C. 572, 651 S.E.2d 229 (2007) was convicted of first-degree murder and sentenced to life imprisonment without parole. During the course of the events resulting in the victim's death, the victim called New Hanover County 911 and said to Bennett, the 911 operator, "I've been shot . . . my husband keeps shooting me . . .." As a result of the victim's death, the defendant contended that admission of the 911 call was barred by Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). The trial court found that the victim's statements were non-testimonial and admitted them into evidence. The Court of Appeals affirmed admission of the 911 call.

> . . . the colloquy between Bennett and the victim was not designed to establish a past fact, but "to describe current circumstances requiring police assistance." . . . . Therefore, the victim's statements were not testimonial. . . . "[The victim] simply was not acting as a witness; she was not testifying." 642 S.E.2d at 467.

Similarly the "911 event report" was admissible as a business record under Rule 803(6).

> . . . Bennett testified that the event report was kept in the ordinary course of business, that all the entries were made while on the 911 call with the victim, and that Bennett was present when all entries were made. We conclude that the trial court properly

admitted the event report, and that the record was not testimonial in nature. 642 S.E.2d at 467.

(2) Expert Testimony as to Speed

Hoffman v. Oakley, _N.C.App._, 647 S.E.2d 117, petition for discretionary review denied, 361 N.C. 692, 652 S.E.2d 264 (2007) arose out of an automobile accident on Brooks Avenue in Raleigh on 13 March 2003. As Ms. Hoffman was approaching Mr. Oakley's house, Mr. Oakley backed his mini-van out of the driveway causing the cars to collide. The investigating police officer testified that the speed limit at the scene was 35 mph and that he found skid marks 80 feet in length. The defendant's expert, Sean Dennis, testified that he had used a Honda considered to be a "clone" of Ms. Hoffman's vehicle and had determined that a vehicle traveling at 35 mph would be able to stop "in just under 54 feet."

Although Rule 702 was amended to allow an expert witness to testify regarding the speed of a vehicle even if he did not see the vehicle, the amended rule applied only to "offenses" committed on or after 1 December 2006. The trial court allowed the testimony of Mr. Dennis. The jury found Ms. Hoffman contributorily negligent and awarded no damages.

The Court of Appeals affirmed. Testimony about stopping distances is admissible. State v. Gray, 180 N.C. 697, 104 S.E. 650 (1920).

> . . . "a witness who investigates but does not see a wreck may describe to the jury the signs, marks, and conditions he found at the scene, including damage to the vehicle involved. From these, however, he cannot give an opinion as to speed." . . . . the restriction on expert testimony . . . "is limited to opinions regarding speed; it does not apply to opinions concerning other elements of an accident." . . . . Here, Mr. Dennis never gave an opinion as to the speed Catherine Hoffman was traveling. He used his scientific expertise to perform an experiment that demonstrated stopping distances at various speeds. . . . It was left up to the jury to determine Catherine Hoffman's stopping distance – which was a subject of dispute at trial – and make the ultimate determination of the speed of her car, ... 647 S.E.2d at 121-22.

(3) Accident Reconstruction

The defendant in State v. Brown, 182 N.C.App. 115, 646 S.E.2d 775, petition for discretionary review denied, 361 N.C. 431, 648 S.E.2d 848, certiorari denied, 128 S.Ct. 544, 169 L.Ed.2d 373 (2007) was convicted by a jury of second degree murder, willful speed competition and reckless driving. The defendant and Clark were driving west on Highway 19/23 between Asheville and Canton on 10 January 2003. There are periodic half-mile passing lanes in both directions at this point in the highway. Witnesses testified that the defendant and Clark were traveling at high rates of speed and passed cars at each passing lane. The defendant, however, would not let Clark pass on the right or left, frequently hitting Clark's vehicle or straddling the passing lane. Other witnesses described "hand gestures" and "antagonizing racing." When one of the passing zones was

ending, the defendant forced Clark into the ongoing lane and a collision with an oncoming car and death of a passenger in that car. The State called as a witness, Tom Brooks, a certified expert in collision reconstruction. Brooks testified about the physical evidence and expressed the opinion that the vehicles were traveling approximately seventy miles per hour. Brooks also expressed the opinion that Clark was attempting to avoid the lane of oncoming traffic and that the defendant prevented him from doing so.

On appeal, the defendant argued that it was error to permit the jury to hear Brooks' opinion. The Court of Appeals disagreed and affirmed the conviction.

> The trial court is given a wide latitude of discretion when determining the admissibility of expert testimony. . . . The trial court found Brooks to be qualified in the field of accident reconstruction. To arrive at his challenged opinion, Brooks employed methods that have been found to be reliable, such as a review of both the physical evidence and witness testimony. . . . As an accident reconstruction expert, Brooks was far more qualified than the trier of fact to assess whether Clark was trying to avoid oncoming traffic immediately before the accident. His opinion that Clark "was trying to get out of that traffic" is a reasonable inference drawn from the evidence and could reasonably be considered of assistance to the trier of fact. Defendant, therefore, has not shown that the trial court abused its discretion by admitting the evidence. 646 S.E.2d at 779.

(4) Judicial Admission

Jones v. Durham Anesthesia Associates, P.A., ___N.C.App.___, 648 S.E.2d 531 (2007) was an action alleging medical malpractice and wrongful death arising from eye surgery on the decedent. The jury determined that the death was not caused by the negligence of the defendant. The trial judge initially entered judgment consistent with the jury verdict. The trial court then granted the plaintiff's motion for judgment notwithstanding the verdict and also granted a new trial. The basis of the trial judge's ruling was testimony by an employee of the defendant concerning compliance with the applicable standard of care. The trial court's order granting a new trial quoted part of the doctor's testimony that she was not compliant with the applicable standard of care for anesthesiologists at the time of the surgery.

Noting the distinction between judicial admissions and evidential admissions and other contradictory testimony by the doctor, the Court of Appeals reversed.

> It is well established that a judicial admission is a formal concession made by a party (usually through counsel) in the course of litigation for the purpose of withdrawing a particular fact from the realm of dispute . . . Such an admission is not evidence, but rather removes the admitted fact from the field of evidence by formally conceding its existence. It is binding in every sense. . . . In contrast, an evidential or extrajudicial admission "consists of words or conduct of a party, or someone for whose conduct the party is in some manner deemed

> responsible, which is admissible in evidence against such party, but which may be rebutted, denied, or explained away and is in no sense conclusive." . . . . Generally, "a party's statements, given in a deposition or at trial of a case, are to be treated as evidential admissions rather than as judicial admissions." . . . . However, there are two exceptions wherein a party's statements made at trial or in a deposition are treated as judicial admissions: First, when a party gives unequivocal, adverse testimony under factual circumstances . . . . his statements should be treated as binding judicial admissions rather than as evidential admissions. Second, when a party gives adverse testimony, and there is insufficient evidence to the contrary presented to support the allegations of his complaint, summary judgment or a directed verdict would in most instances be properly granted against him. 2007 WL 2363016 at *3-4.

In the present case, the Court held that none of the two exceptions applied to the testimony. When the testimony was viewed as a whole, the doctor initially stated that she did not breach the standard of care, then admitted a breach, but then concluded by denying that the standard of care had been breached. The doctor's testimony was also characterized by the Court as opinion and did not establish a "concrete fact." For these reasons, there had not been an admission, and, therefore, the trial court erred in granting a new trial.

R. Punitive Damages

The issue in Harrell v. Bowen, ___N.C.___, 655 S.E.2d 350 (2008) was whether punitive damages could be recovered against the decedent or his estate. The complaint alleged that the decedent drove across the median of the highway and struck the

plaintiff's vehicle. It was also alleged that the decedent was under the influence of alcohol and was grossly negligent in the operation of his vehicle. The trial court granted the defendant's 12(b)(6) motion as to the claim for punitive damages. The Court of Appeals affirmed.

The Supreme Court affirmed the trial court's dismissal of the punitive damages claim. The plaintiff argued that N.C.G.S. § 1D-1 states that punitive damages may be awarded "to punish a defendant for egregiously wrongful acts and to deter the defendant and others from committing similar wrongful acts." Even though the decedent could not be deterred, "others" could be deterred, therefore, punitive damages were allowable. The Supreme Court disagreed.

> Plaintiff concedes that decedent can no longer be punished or deterred for whatever "egregiously wrongful acts" he may have committed before his death. As a consequence, plaintiff is precluded as a matter of law from asserting his claim for punitive damages under N.C.G.S. § 1D-1. . . . Thus, since N.C.G.S. § 1D-1 precludes plaintiff from asserting a claim for punitive damages against defendant, plaintiff cannot rely upon the "survival statute" to procure a different result. 655 S.E.2d at 353.

The plaintiff in Greene v. Royster, ___N.C.App.___, 652 S.E.2d 277 (2007) purchased a 1993 Saturn from the defendants for $1,911. The odometer recorded 77,024 miles on the Saturn at the time of purchase. The plaintiff's evidence at trial established that the actual mileage on the Saturn was 226,945

and that when the defendants acquired the vehicle, it was "not fit for operation on the highway." Additional evidence showed that the confidential VIN on the Saturn had been removed and replaced with the VIN of another vehicle. The jury awarded the plaintiff $1,911 in compensatory damages and $500,000 in punitive damages. Pursuant to N.C.Gen.Stat. § 1D-25, the trial judge reduced the punitive damages to $250,000. The trial court denied motions of the defendants under Rule 59 for a new trial and made findings of fact and conclusions of law in support of its ruling.

The Court of Appeals affirmed. The defendants first argued that the punitive damages award was unconstitutionally excessive. Since this issue was not raised in the trial court, it was not reviewable on appeal.

> However, a constitutional question which has not been raised and determined in the trial court will not be considered on appeal. . . . Defendants did not raise the constitutionality of the punitive damages award to the trial court, so we will not review this issue, de novo or otherwise. 652 S.E.2d at 281.

The Court next held that the trial judge had properly instructed the jury using N.C.P.I. Civil 810.98. Similarly, the trial judge had entered appropriate findings of fact in denying the defendants' motion for a new trial.

> The facts found by the trial court may be succinctly summarized as follows: (1) defendants sold plaintiff a car that was unfit for operation, in violation of state law; (2) considerable efforts were expended to

> conceal facts of similar conduct by defendants; (3) defendants were well-aware that they were selling unfit vehicles; (4) defendants deliberately concealed information concerning their net worth; and (5) defendants, undaunted by the revocation of their motor vehicle dealers' license, reformed their business as a different corporate entity and continued to sell cars. These findings all support an award of punitive damages under the jury instructions as given, relating to the reprehensibility of defendants' motives and conduct, the degree of the defendants' awareness of the probable consequences of their conduct, the duration of defendants' conduct, the concealment by defendants of the conduct, the existence and frequency of similar past conduct by defendants, and that defendants profited from the conduct. 652 S.E.2d at 283.

S. Unfair and Deceptive Practices

Walker v. Fleetwood Homes of North Carolina, ___N.C.___, 653 S.E.2d 393 (2007) determined standing to bring a Chapter 75 claim. Mr. Walker purchased a new mobile home for his daughter, Ms. Staten. The home was constructed and delivered by Fleetwood Homes. The arrangement was a "buy for" transaction in which Mr. Walker purchased the home for the benefit of his daughter with Ms. Staten living in the home and making the monthly installment payments. She selected the interior furnishings for the home. When the home was delivered, many deficiencies were discovered. Because of difficulties in correcting these problems, Ms. Staten never moved into the home. A jury found in favor of Mr. Walker on the breach of warranty claim. The jury also found that the attempted repairs were not correctly performed. Based on these findings, the trial judge concluded

that the defendant had committed acts that were unfair and deceptive commercial acts as governed by administrative regulations of the Department of Insurance. The trial judge further found that these acts constituted unfair and deceptive trade practices.

The Supreme Court first addressed whether Ms. Staten was an "injured" person under Chapter 75, and, as such, able to pursue a claim for unfair and deceptive trade practices.

> Therefore, as the person who selected the interior details for the home, who planned to live in the home, and who was going to make the monthly installment payments, Staten was a consumer of the mobile home supplied by the defendant. When defendant supplied a defective home, Staten suffered a resulting injury. Accordingly, she has standing as a "person . . . injured" under N.C.G.S. § 75-16. 653 S.E.2d at 397.

The Court then determined whether violations of administrative regulations promulgated by the North Carolina Department of Insurance constituted unfair and deceptive trade practices as a matter of law.

> Although this Court has previously held that violations of some statutes, such as those concerning the insurance industry, can constitute unfair and deceptive trade practices as a matter of law, . . . we decline to hold that a violation of a licensing regulation is a UDTP as a matter of law. . . . the regulation here was promulgated by the Department of Insurance pursuant to N.C.G.S. §§ 143-143.10 and 143-143.13. Because a violation of those statutes would not constitute a UDTP as a matter of law, we do not believe that a violation of a licensing regulation based upon those statutes is necessarily a UDTP. Nevertheless, a regulatory licensure violation may be evidence of a UDTP. Thus, even though defendant's

> violations of subsections (1) and (4) of 11 NCAC 8.0907 are not unfair and deceptive trade practices per se, those violations are potentially relevant to any claim that defendant violated § 75-1.1. 653 S.E.2d at 399.

The case was remanded to the trial court for a new trial on damages. The trial court should submit "additional interrogatories seeking information which, if found, by the jury, may be sufficient to support a finding of fact that defendant committed a UDTP." 653 S.E.2d at 400.

The plaintiffs in Richardson v. Bank of America, N.A., 182 N.C.App. 531, 643 S.E.2d 410 (2007), petition for discretionary review improvidently allowed, 362 N.C. 227, 657 S.E.2d 353 (2007) alleged a class action based on unfair and deceptive trade practices arising out of the defendants' sale to the plaintiffs of single-premium credit insurance (SPCI) in association with mortgage loans. In connection with the motions for summary judgment by all parties, a joint statement of undisputed facts was filed with the court. It was agreed that North Carolina allowed the sale of credit insurance in connection with real estate loans and that the SPCI sold by NationsCredit to plaintiffs with loans of fifteen years or less was approved by the Department of Insurance. SPCI sold loans to the plaintiffs greater than fifteen years that were not approved by the Department of Insurance.

In considering the defendants' motion for summary judgment based on the four-year statute of limitations applicable to unfair and deceptive trade practices, the trial court held that the limitations period began to run at the time of closing on the loans when the plaintiffs signed the documents disclosing the amount of the SPCI premiums. Since the acts alleged in the complaint occurred before or at the time of closing, the Court of Appeals affirmed the trial court's statute of limitations decision.

> . . . Plaintiffs did not allege any overt acts by Defendants after Defendants sold Plaintiffs SPCI at their loan closings. In fact, it is undisputed that Plaintiffs' UDTP claims were based on Defendants' conduct before and during closing and were not based upon Defendants' conduct after closing. . . . Rather, Plaintiffs' UDTP claims were solely premised on Defendants' actions before and at the closing of Plaintiffs' loans. We therefore hold that Plaintiffs' UDTP claims accured at the closing of their loan and N.C.G.S. § 75-8 did not extend the statute of limitations because any violation of the UDTP Act was not continuous. 643 S.E.2d at 422-423.

Summary judgment was granted in favor of the defendants on claims involving loans with terms of fifteen years or less. The Court of Appeals affirmed based on the language of the statute and approval by the Department of Insurance.

> We hold that because the credit insurance sold to Plaintiffs with loans of fifteen years or less was authorized by the Department of Insurance, and because N.C.G.S. § 58-57-35(b) provides that any gain to a lender from the sale of SPCI shall not be a violation of any other law, the trial court did not err by

> granting Defendants' motion for summary judgment. 643 S.E.2d at 418.

The trial court also held that the defendants committed UDTP as a matter of law as to all loans greater than fifteen years. The Court of Appeals affirmed.

> In the present case, the SPCI sold to Plaintiffs in association with loans greater than fifteen years was never submitted to the Department of Insurance for approval. Moreover, it could not have been approved because Article 57 of Chapter 58 does not authorize the sale of such credit insurance on loans with durations greater than fifteen years. See N.C.G.S. § 58-57-1. Therefore, we hold that the sale of the SPCI, which could not have been approved by the Department of Insurance, was void as against the public policy of North Carolina. We also hold that the sale of the SPCI with loans greater than fifteen years was a UDTP as a matter of law. 643 S.E.2d at 425.

In response to the plaintiffs' motion for summary judgment, the defendants raised federal preemption for the first time. The trial court held that the defendants had waived any right to assert federal preemption as a defense by failing to include the defense in the answer. The Court of Appeals affirmed. The Court of Appeals agreed with the trial court that federal preemption was a choice-of-law, affirmative defense preemption issue. It was not a subject matter jurisdiction preemption issue which could not be waived.

The plaintiff in MacFadden v. Louf, 182 N.C.App. 745, 643 S.E.2d 432 (2007) alleged claims for unfair and deceptive trade practices, fraud and negligent misrepresentation arising out of

the sale of a home by the defendant to the plaintiff. The trial court granted the defendant's motion for summary judgment on all claims. The Court of Appeals affirmed.

The Court of Appeals confirmed that "private homeowners selling their private residences are not subject to unfair and deceptive trade practice liability." 643 S.E.2d at 433. The plaintiff argued that an exception applied as a result of Bhatti v. Buckland, 328 N.C. 240, 400 S.E.2d 440 (1991) because the defendant "has purchased four homes, rented one and resold three." 643 S.E.2d at 433. The Court of Appeals held that all of the evidence showed that the defendant "was a private party engaged in the sale of her residence" and there was no evidence "that this was a commercial land transaction." 643 S.E.2d at 434. Accordingly, summary judgment on this claim was proper.

At the defendant's suggestion, the plaintiff conducted a home inspection before closing. The plaintiff's home inspector noted many of the problems that were the basis of the plaintiff's fraud and negligent representation claim. The Court of Appeals agreed that the plaintiff had, therefore, failed to establish that any reliance upon statements by the defendant was justified.

> In sum, the undisputed evidence shows that while Plaintiff contends that she was provided a "false roof report" she failed to introduce the alleged report or any evidence of it other than her own uncorroborated statements. . . . To the contrary, the record shows

> Defendant recommended Plaintiff to make additional inspections of the property but she declined to do so. Indeed, a disclosure statement explicitly encouraged Ms. MacFadden to obtain an inspection stating that "it is not a substitute for any inspections they may wish to obtain" and the purchasers are "encouraged to obtain their own inspection from a licensed home inspector or other professional." 643 S.E.2d at 435.

T. Releases

The plaintiff in Weaver v. Saint Joseph of the Pines, Inc., ___N.C.App.___, 652 S.E.2d 701 (2007) alleged that on 20 May 2003 while the defendant was transporting the decedent, Frankie Vamper, to receive dialysis treatment, a part of the van equipment broke, causing injuries to Ms. Vamper's leg and her eventual death on 18 March 2006. Suit was filed on 17 May 2006. The defendant's answer included defenses under Rule 12(b) and a motion for judgment on the pleadings pursuant to Rule 12(c). In support of the motion for judgment on the pleadings, the defendant attached documents from a previous lawsuit filed in August 2004 between the parties. Saint Joseph of the Pines ("SJP") had earlier sued Ms. Vamper for an unpaid bill of $29,174 for services rendered by SJP for Ms. Vamper's treatment. As a result of a mediated settlement conference in June 2005, this case was settled by Ms. Vamper agreeing to pay $6,000 in 24 monthly payments and execute a "full and final settlement of the pending lawsuits." The release executed by Ms. Vamper released SJP from all claims she may have arising out of the

"care and treatment" of Ms. Vamper. The attorneys for the parties then submitted a "stipulation" to the trial court agreeing that the court could rule upon SJP's motion for judgment on the pleadings and consider the additional documents submitted by the parties. The parties specifically stipulated "that the motion shall not be converted into motions for summary judgment." 652 S.E.2d at 706. The trial court granted SJP's 12(b)(6) and 12(c) motions.

Although the Court of Appeals affirmed, the Court first held that the parties' stipulation could not avoid the fact that the trial judge had considered matters outside the pleadings, and, as such, had converted the motion to one for summary judgment. Additionally, a 12(c) motion could be considered only "after the pleadings are closed." Since no answer had been filed, Rule 12(c) was not applicable.

SJP was entitled to summary judgment based on the terms of the release.

> Because the alleged incident giving rise to plaintiff's claims related to "the care and treatment of Frankie Mae Vamper" prior to the signing of the Release, we hold that the plain text of the Release unambiguously relieves defendant from any liability related to that incident. . . . It is immaterial that neither the Release nor the Mediation Settlement Agreement specifically mentions the claim at issue in this case or that the possible existence of this claim never arose during the mediation. 652 S.E.2d at 709.

On appeal, the plaintiff raised several additional reasons the release should not bar the present claim. The plaintiff alleged that Ms. Vamper was incompetent at the time she signed the release. Without deciding whether Ms. Vamper was incompetent, the Court found that the plaintiff had ratified the release by continuing to make the monthly payments agreed to at the mediation after Ms. Vamper's death. The plaintiff also offered affidavits in support of the argument that the release should be avoided as a result of mutual mistake. The plaintiff contended that the parties did not intend to include the personal injury and death claims in the release. Since there were no facts at to the intent of SJP, there was no evidence to support this argument.

U. Limited Liability Agreements

The parties in Blaylock Grading Co. v. Neal Smith Engineering, Inc., ___N.C.App.___, 658 S.E.2d 680 (2008) entered into a contract by which the defendant would provide land surveying services for the plaintiff. The agreement had a "Risk Allocation" provision limiting damages to $50,000. In performing the surveying services, the defendant mistakenly set certain elevations requiring the plaintiff to import fill dirt to raise the elevation of the site.

The trial court denied the defendant's motion for partial summary judgment to limit damages to $50,000. A jury returned a

verdict in favor of the plaintiff of $574,714. In response to the defendant's post-verdict motions, the trial court held that the Risk Allocation provision was void as against public policy and entered judgment on the jury verdict.

The Court of Appeals reversed. Considering the relative positions of the parties and the opportunity to negotiate, the Court held that the Risk Allocation provision was not void as against public policy.

> People should be entitled to contract on their own terms without the indulgence of paternalism by courts in the alleviation of one side or another from the effect of a bad bargain. Also, they should be permitted to enter into contracts that actually may be unreasonable or which may lead to hardship to one side. It is only where it turns out that one side or the other is to be penalized by the enforcement of the terms of a contract so unconscionable that no decent, fair-minded person would view the ensuing result without being possessed of a profound sense of injustice, that equity will deny the use of its good offices in the enforcement of such unconscionability. . . . Plaintiff and defendants are sophisticated, professional parties who conducted business at arms' length, and the "result" of the contract does not elicit a "profound sense of injustice." 658 S.E.2d at 682-683.

The plaintiff also contended that the Risk Allocation provision was void under G.S. § 22B-1. The Court of Appeals disagreed:

> This statute is not applicable in the present case. The contract at issue involves a clause that limits a party's liability, not an indemnity clause whereby one party agrees to be liable for the negligence of the other party. . . . Further, the language of the statute only limits a promisee from recouping damages

paid to a third party as a result of personal injury or property damages when the damages were caused by the promisee . . . . The statute does not apply to contracts between a promisor and promisee limiting the amount of damages recoverable by one from the other, as does the contract in the present case. Thus, the Risk Allocation provision did not violate N.C.G.S. § 22B-1. 658 S.E.2d at 683-684.

NORTH CAROLINA CONFERENCE
OF SUPERIOR COURT JUDGES

FEDERAL RULES OF CIVIL PROCEDURE
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I. Federal Rules of Civil Procedure

A. Rule 12(b)(3) – Venue

The plaintiff in Kochert v. Adagen Medical International Inc., 491 F.3d 674 (7th Cir. 2007) sued for fraudulent inducement of a contract for the purchase of medical equipment. The equipment was delivered to the plaintiff, and the plaintiff paid for the equipment. The plaintiff, an anesthesiologist and pain specialist, purchased the machine based on the representations by Adagen that patient treatments using the machine would be reimbursable by third-party payors. After Dr. Kochert began using the machine to treat patients, third-party payors denied her reimbursement claims.

The contract had a provision entitled, "Governing Law/Venue/Forum" in which the plaintiff consented to "jurisdiction, venue and forum in the State Court of Fulton County, Georgia." The district court dismissed the action on the grounds that any misrepresentations "necessarily became part of the contract, making the claim subject to the forum-selection clause." 491 F.3d at 676.

The Seventh Circuit affirmed dismissal on different grounds. The Court stated that a claim alleging fraudulent inducement required an election of remedies. The contract may be affirmed and the benefits retained, or, the contract may be

rescinded, seek restitution and return the benefits. Here, the plaintiff elected to affirm the contract and seek damages. The Court stated, however, that this election did not make the alleged misrepresentation part of the contract requiring application of the forum-selection clause.

Dismissal was appropriate because the forum-selection clause did not limit the types of claims that would governed by the clause.

> Kochert's fraudulent inducement claim stems from her contractual relationship with Adagen. The contract's forum-selection clause is not limited to claims for breach. The language stipulates to "jurisdiction, venue and forum" in the State Court of Fulton County, Georgia, for the resolution of disputes, regardless of the category of the claim. This broad language is most reasonably interpreted to encompass Kochert's fraudulent claim . . . . We conclude that the forum-selection clause applies here. 491 F.3d at 679.

B. Rule 15(a) – Amendment of Pleadings

Kassner v. 2nd Avenue Delicatessen Inc., 496 F.3d 229 (2nd Cir. 2007) was an action alleging age discrimination. The complaint was filed on 13 September 2004. On 22 September 2004, the Court entered a scheduling order pursuant to Rules 16 and 26(f), Fed.R.Civ.P. The order required any amendments to pleadings to be made by 1 February 2005. On 12 October 2004, the defendants moved to dismiss pursuant to Rule 12(b)(6), Fed.R.Civ.P. On 8 July 2005, the Court granted the defendants' motion to dismiss and denied the plaintiffs' motion to amend the

complaint. The basis for the Court's denial of the motion to amend the complaint was that the proposed amendment did not "cure any time-barred deficiencies" and "would be futile." 496 F.3d at 237.

The Second Circuit reversed. Since the defendants' motion to dismiss was not a "responsive pleading" within Rule 15(a), Fed.R.Civ.P., the plaintiff was allowed to amend the complaint unless the Court's scheduling order under Rule 16(b), Fed.R.Civ.P. governed. Altering the provisions of the Court's scheduling order was in the Court's discretion. As the Court had also held that the proposed amendments would be sufficient as to some of the claims, the case was remanded for the district court to exercise its discretion.

> . . . we hold that amendment of a pleading as a matter of course pursuant to Rule 15(a) is subject to the district court's discretion to limit the time for amendment of the pleadings in a scheduling order issued under Rule 16(b) . . . . On remand, the district court must exercise its discretion under Rule 16(b) to determine whether the scheduling order should be modified so as to allow an amended complaint . . . the primary consideration is whether the moving party can demonstrate diligence. It is not, however, the only consideration. The district court, in the exercise of its discretion under Rule 16(b), also may consider other relevant factors including, in particular, whether allowing the amendment of the pleading at this stage of the litigation will prejudice defendants. . . . The district court, as an exercise of its broad discretion concerning the pleadings, may consider whether to allow the already-submitted proposed amended complaint or allow submission of another one. 496 F.3d at 244-245.

C. Rule 15(c) – Relation Back of Amendments

Goodman v. Praxair, Inc., 494 F.3d 458 (4th Cir. 2007) was an action for breach of contract. Goodman entered into a contract with Tracer Research Corporation on 16 April 1998. Under the contract, Goodman was to lobby the EPA for exemptions under the Clean Air Act. The contract provided for payments to Goodman based on the number of products Goodman was able to exempt under the EPA regulations. A dispute arose over the payments under the contract. Goodman instituted suit in Maryland state court on 18 December 2003, alleging in the complaint that Praxair, Inc. was the successor in interest of Tracer Research Corporation. After the formation of the contract between Goodman and Tracer, Tracer was acquired by UCISCO, Inc., a wholly-owned subsidiary of Praxair, Inc. UCISCO changed its name to Praxair Services, Inc.

Praxair, Inc. removed the action to federal court, then moved to dismiss on the ground that Praxair Services, Inc., not Praxair, Inc. was the successor to Tracer Research's obligations under the contract. Goodman then filed an amended complaint on 5 April 2004 repeating the allegations in the original complaint, then alleging that Praxair Services, Inc., rather than Praxair, Inc. should be liable under the alter ego theory. The district court held that the amendment did not relate back and was barred by the Maryland three-year statute of

limitations. The district court reasoned that there was no relation back because the amended complaint did not change a party, but added a new party. The district court also held that Goodman had not shown that Praxair Services, Inc. knew or should have known of the action but for the mistake concerning the identity of the proper party.

The Fourth Circuit reversed and held that the amendment related back to the initial filing of the complaint.

> At bottom, the inquiry, when determining whether an amendment relates back looks at whether the plaintiff made a mistake in failing to name a party, in naming the wrong party, or in misnaming the party in order to prosecute his claim as originally alleged, and it looks into whether the rights of the new party, grounded in the statute of limitations, will be harmed if that party is brought into the litigation. When that party has been given fair notice of a claim within the limitations period and will suffer no improper prejudice in defending it, the liberal amendment policies of the Federal Rules favor relation-back. . . . Thus, what is clear is (1) that Goodman intended to sue the successor of Tracer Research for breach of contract with Tracer Research; (2) that Praxair Services, Inc., became the successor of Tracer Research; (3) that Goodman named Praxair, Inc. in its original complaint for breach of his contract with Tracer Research; and (4) that Praxair Services, Inc., knew that but for Goodman's mistake in pleading, Praxair Services, Inc., would have been sued for breach of his contract with Tracer Research. Goodman's mistake therefore represents the difference between his manifested intent to sue the successor to Tracer Research and the defendant whom he actually named in the complaint. . . . We conclude that Praxair Services, Inc., knew that it was the successor to Tracer Research Corporation's contractual liability and therefore it knew or should have known within the limitations period that it was the proper party to Goodman's suit. Since Praxair Services, Inc., has

> conceded that it has suffered no prejudice to its defense of Goodman's claim, we conclude that the requirements for relation-back under Rule 15(c)(3) have been met. 494 F.3d at 471-475.

D. Rules 26(a), (b)(2), (b)(5) and (f) - Electronic Discovery

In re NTL, Inc. Securities Litigation, 244 F.R.D. 179 (S.D.N.Y. 2007) was an action alleging federal securities laws violations. The action was filed on 18 April 2002. NTL ("old NTL") entered into Chapter 11 Bankruptcy, emerging on 5 September 2002 under a reorganization plan ("new NTL"). As part of the Bankruptcy Plan, the two NTLs entered into a Demerger Agreement entitling each party to the documents of the other party. On 13 March 2002, a document hold memo was sent to seventeen employees of old NTL. The plaintiffs served their first requests for documents on 2 May 2005. Old NTL, the defendant in the present case, responded and stated that responsive documents were in the possession of new NTL. In response to a subpoena, new NTL stated that electronic documents requested did not exist because the servers had been upgraded after the reorganization.

The Court granted the plaintiffs' motion for discovery sanctions and spoliation of evidence.

> Although NTL sent out hold memos in March and April 2002 . . . those hold memos were not sufficient, since they subsequently were ignored by both NTLs. . . . "It is not sufficient to notify all employees of a litigation hold and expect that the party will then retain and produce all relevant information. Counsel

> must take affirmative steps to monitor compliance so that all sources of discoverable information are identified and searched." 244 F.R.D. at 194-195.

The Court also held that old NTL, the party to the lawsuit, had "the legal right" to custody and possession of the electronic documents requested by the plaintiff. The Demerger Agreement required new NTL to make available documents requested by old NTL. Additionally, the Court found that the intervening bankruptcy had no effect on the duty of old NTL to preserve the documents.

> Once the duty to preserve material for litigation arises – as it did here in March 2002, before NTL emerged from bankruptcy – the party has a duty to initiate a "litigation hold" and preserve potentially responsive documents and ESI. . . . If defendant NTL Europe thereafter turned relevant "held" documents and ESI over to New NTL without itself preserving (or insuring that New NTL would preserve) such information for possible production in this litigation, it failed in its obligation to preserve relevant material, and thus spoliated evidence . . . . 244 F.R.D. at 197.

Finding also that many NTL employees had never received the hold memo and that NTL did not "remind" employees of the hold, the Court held that NTL and its counsel were "at least grossly negligent," 244 F.R.D. at 199, therefore, entitling the plaintiff to an adverse inference jury instruction and a monetary award of attorneys' fees.

Cache La Poudre Feeds, LLC v. Land O'Lakes, Inc., et al., 244 F.R.D. 614 (D.Colo. 2007) was an action for trademark infringement arising from the plaintiff's mark for animal feed,

PROFILE. The plaintiff filed multiple motions to compel and for sanctions relating to the defendants' preservation of electronic documents before and after the present litigation was filed.

In April 2002, the defendants learned that the plaintiff had filed an intent to use application for the PROFILE mark. Correspondence from the plaintiff's outside counsel, Ms. Anderson-Siler, began in June 2002. Rather than threatening litigation, the continuing correspondence from Ms. Anderson-Siler indicated that the plaintiff "preferred and was willing to explore a negotiated resolution." 244 F.R.D. at 622. The present suit was filed on 24 February 2004. The Court held that the defendants had no duty to preserve evidence until the lawsuit was filed.

> Given the dynamic nature of electronically stored information, prudent counsel would be wise to ensure that a demand letter sent to a putative party also addresses any contemporaneous preservation obligations. . . . That delay [between the last letter from outside counsel and the filing of the lawsuit], coupled with the less-than-adamant tone of Cache La Poudre's letters belies Plaintiff's contention that Land O' Lakes should have anticipated litigation as early as April 4, 2002, and therefore had a duty to preserve evidence as of that date. . . . Under the particular facts of this case, this court finds Defendants' duty to preserve evidence was triggered by the filing of Plaintiff's Complaint on February 24, 2002. 244 F.R.D. at 623-624.

The defendants' post-filing preservation of electronic documents was accomplished by a litigation hold and reliance on the defendants' individual employees to comply with the

requested preservation of electronic documents. The Court held that the defendants' inside and outside counsel had failed to discharge properly the discovery obligations under Rule 26.

> Once a "litigation hold" has been established, a party cannot continue a routine procedure that effectively ensures that potentially relevant and readily available information is no longer "reasonably accessible" under Rule 26(b)(2)(B). . . . In this case, Land O'Lakes's General Counsel and retained counsel failed in many respects to discharge their obligations to coordinate and oversee discovery. Admittedly, in-house counsel established a litigation hold shortly after the lawsuit commenced and communicated that fact to Land O'Lakes employees who were believed to possess relevant materials. However, by his own admission, Land O'Lakes General Counsel took no independent action to verify the completeness of the employees' document production. . . . Without validating the accuracy and completeness of its discovery production, Land O'Lakes continued its routine practice of wiping clean the computer hard drives for former employees. Under the circumstances and without some showing of a reasonably inquiry, it is difficult to understand how Defendants' retained counsel could legitimately claim on July 7, 2005 that Land O'Lakes had "made every effort to produce all documentation and provide all relevant information." 244 F.R.D. at 629-630.

In addition to imposing attorneys' fees as sanctions for failure to preserve and produce post-filing electronic communications, the Court found that "Defendants' failure to comply with the requirements of Rule 26(g) provides an alternative basis for imposing sanctions." 244 F.R.D. at 636.

Benton v. Dlorah, Inc., 2007 WL 3231431 (D.Kan. 2007) was an action alleging employment discrimination based on gender. The defendant submitted written discovery to the plaintiff

concerning the allegations in the complaint. Based on the plaintiff's failure to produce electronic communications requested by the discovery, the defendant moved for an order to compel discovery, sanctions and spoliation of evidence. The plaintiff acknowledged that the plaintiff had deleted e-mails from the hard drive of her personal computer, and, for this reason, was unable to produce these electronic communications. The defendant then moved for production of the hard drive on the plaintiff's personal computer.

The Court ordered production of the plaintiff's e-mail communications. If the e-mails were deleted from the plaintiff's personal computer, the plaintiff was ordered to "produce for inspection her computer hard drive from which the deleted e-mails were sent. This will allow Defendants to use the services of a computer forensic specialist, if necessary, to retrieve them." 2007 WL at 3231431 at *3. In response to the plaintiff's additional objection based on relevancy, the Court held that this objection had been waived because it had not been included in the plaintiff's discovery response.

The Court denied without prejudice the defendant's motion for sanctions and spoliation of evidence because facts had not been developed as to when the plaintiff had an obligation to preserve the e-mails.

> The issue is whether Plaintiff had an obligation to preserve e-mails sent and received on her home computer, and, if so, when that obligation was triggered. Plaintiff filed her internal grievance in November 2005. She filed charges of discrimination with the Equal Employment Opportunity Commission ("EEOC") in December 2005 and April 2006. She requested a Right to Sue letter from the EEOC in August 2006 and filed this action on November 7, 2006. Her duty to preserve evidence arguably began when she first filed charges with the EEOC in December 2005.
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> Once the duty to preserve attached, Plaintiff was required to suspend her routine document destruction practices, including the deletion of email. This duty to preserve does not require Plaintiff to preserve each and every e-mail or electronic document she generated or existed on her hard drive. Plaintiff was, however, "under a duty to preserve what [she] knows, or reasonably should know, is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery and/or is the subject of a pending discovery request." 2007 WL at 3231431 at *4.

In re Seroquel Products Liability Litigation, 244 F.R.D. 650 (M.D.Fla. 2007) was a multidistrict litigation case alleging injuries from ingesting AstraZeneca's Seroquel. The court issued several pretrial orders relating to electronic discovery. The present motion was brought by the Plaintiffs and alleged multiple grounds for sanctions against the Defendant: (1) the failure to produce electronic documents in a readable format; (2) failure to produce organizational charts; (3) failure to identify all relevant databases; and (4) failure to produce electronic discovery from custodians self-identified by the

Defendant as being most knowledgeable about Seroquel, with many of the documents produced being "not readable or searchable."

Before addressing each grounds for the motion individually, the Court concluded:

> . . . AZ's failure to cooperate in the production of databases and its failure to timely and systematically produce electronic discovery associated with eighty AZ "custodians" in any manageable, searchable form are sanctionable conduct. The Court will reserve ruling on the appropriate sanctions pending further discovery and after Plaintiffs have the opportunity to offer evidence of the specific prejudice or added costs the sanctionable conduct has caused. 244 F.R.D. at 652.

The Defendant initially argued that sanctions were not appropriate because the Plaintiffs had not filed a motion to compel and there was, therefore, no order of the Court compelling discovery. The Court disagreed.

> Because the Court finds that Plaintiffs' previous Motion to Compel, and the Court's order setting the Evidentiary Hearing on the Motion gave AZ sufficient notice of the discovery conduct Plaintiffs were challenging and the possibility for sanctions if it was not resolved, the Court may sanction AZ for its conduct. 244 F.R.D. at 657.

Evidence produced by the Plaintiffs at the evidentiary hearing for sanctions was replete with electronic deficiencies in the Defendant's discovery responses.

> Plaintiffs' expert and fact witness, Jonathan Jaffe, testified that on November 15, 2007, Plaintiffs realized that IND/NDA production was not searchable for several reasons: no metadata was retrieved; there were multi-page TIFF images, some of which consisted of more than 20,000 pages; there was nothing showing bates numbering; 8% of the entire production was in

> one lengthy document which could only be opened with a very powerful work station; and there were no load files; thus the production was not in a usable or searchable format. 244 F.R.D. at 658.

Counsel for the Defendant explained to the Court that his firm had recently been retained and had not had the opportunity to review the electronic databases responsive to the Plaintiffs' discovery. Instead, counsel had relied upon independent vendors to identify responsive discovery.

> AZ and its counsel had a responsibility at the outset of the litigation to "take affirmative steps to monitor compliance so that all sources of discoverable information are identified and searched." . . . . To the extent that it may not be feasible for counsel to speak with every key player, given the size of a company or the scope of the lawsuit, counsel must be creative. It may be possible to run a system-wide keyword search; counsel could then preserve a copy of each "hit." Although this sounds burdensome, it need not be. Counsel does not have to review these documents, only see that they are retained. For example, counsel could create a broad list of search terms, run a search for a limited time frame, and then segregate responsive documents. When the opposing party propounds its document requests, the parties could negotiate a list of search terms to be used in identifying responsive documents, and counsel would only be obliged to review documents that came up as "hits" on the second more restrictive search. . . . In short, it is not sufficient to notify all employees of a litigation hold and expect that the party will retain and produce all relevant information . . . . 244 F.R.D. at 663.

As an additional finding supporting the imposition of sanctions, the Court found that the Defendant had been "purposely sluggish" in responding to the Plaintiffs' discovery.

> The Court finds that sanctions are warranted for AZ's failure to produce "usable" or "reasonably accessible" documents. 244 F.R.D. at 665.

Consolidated Aluminum Corp. v. Alcoa, Inc., 244 F.R.D. 335 (M.D.La. 2006) arose from the sale of an aluminum processing plant by the plaintiff to the defendant and environmental issues at the plant. The plaintiff requested electronic documents from the defendant. Based on the defendant's failure to produce documents the plaintiff believed were fully responsive, the plaintiff moved for sanctions for spoliation of evidence. Specifically, Consolidated contended that Alcoa (1) failed to implement a "litigation hold" after reasonably anticipating litigation by Consolidated; (2) failed to notify all personnel with relevant documents to preserve email; (3) failed to prevent routine overwriting of electronic evidence; and (4) failed to preserve documents of significant witnesses.

Although finding that Alcoa could have taken more measures to preserve electronic evidence, the Court did not find the specific intent or bad faith to spoliate evidence.

> In sum, Consolidated has failed to convince the Court that the email deletions at issue were motivated by "fraud or a desire to suppress the truth" or that Alcoa "intended to prevent use of the [emails] in this litigation" . . . . At most, Consolidated has shown that Alcoa negligently failed to preserve emails, which might have had some relevance to this lawsuit, by failing to timely inform employees of their duty to preserve. The failure to prove that Alcoa acted intentionally and with bad faith in destroying the electronic evidence at issue "weighs heavily against

> the awarding of an adverse inference jury instruction." . . . However, even assuming that bad faith could be inferred from Alcoa's negligent destruction of emails, the Court nevertheless finds that Consolidated is not entitled to the requested adverse inference instructions because it has failed to provide sufficient evidence that the destroyed emails were "relevant" to Consolidated's claims and defenses as alleged in its proposed adverse inferences. 244 F.R.D. at 346.

E. Rule 26(a)(1)(D) – Insurance Agreements

United States Fire Ins. Co. v. Bunge North America, Inc., 244 F.R.D. 638 (D.Kan. 2007) was a declaratory judgment action filed by excess liability insurers against the insured and primary liability insurers seeking a declaration that the excess carriers did not have an obligation to defend or indemnify for settlement of groundwater contamination claims related to the insured's grain elevator operations. Pursuant to Rule 26(a)(1)(D), Fed.R.Civ.P., all insurers were requested to produce communications with reinsurers; documents relating to loss reserves for the underlying claims; claims handling manuals; and document retention policies. The Court held that Rule 26(a)(1)(D) required production of all reinsurance agreements.

> The Court agrees that production of reinsurance agreements is required by the rule. . . . The Insurers argue that their reinsurance agreements are irrelevant. The rule is absolute, however, and does not require any showing of relevance . . . . because reinsurers "carry [] on an insurance business" and "may be liable . . . to indemnify [insurers] for payments made to satisfy the judgment," reinsurance

> agreements fall within the plain language of the rule. 244 F.R.D. at 641-642.

The Court also ordered production of communications with reinsurers.

> The Insurers argue that reinsurance information is not relevant, and they cite cases in which such information was protected from discovery. Other courts, however, have compelled the discovery of reinsurance information, on the basis that such information may lead to the discovery of admissible evidence relevant to particular claims and defenses asserted in the case. 244 F.R.D. at 642-643.

The Court also ordered production of loss reserve information, when the loss reserve was established and claims manuals and document retention policies.

F. Rule 26(a)(2)(B) – Information received by Expert

Turnpike Ford, Inc. v. Ford Motor Co., et al., 244 F.R.D. 332 (S.D.W.Va. 2007) was an action by a dealer against its manufacturer and the manufacturer's credit financing company. During the Defendants' deposition of Stephen Parsons, one of the principals of Turnpike Ford, Parsons was asked if he provided information about the business to the Plaintiff's expert, Michael Brookshire. Parsons was instructed not to answer the question on the basis of the attorney-client privilege. In response to the Defendants' motion to compel the testimony of Parsons, the Plaintiff argued that the Defendants were required to establish that the expert had considered the information before being required to divulge it. The Plaintiff also argued

that the Defendants were required to question the expert initially before requiring Parsons to respond.

The district court disagreed with the Plaintiff's arguments and ordered Parsons to respond.

> Clearly, the information received by Plaintiff's experts in their meetings with Mr. Parsons or otherwise is discoverable. As the party asserting work product immunity, the burden is on Plaintiff "to demonstrate that the materials were not furnished to their expert to be used in forming an opinion, or that the expert did not consider the materials in forming the opinion. . . ." Plaintiff has not so indicated, and the invoices referenced by Defendants at the hearing belie such a position. Even if the information communicated by Mr. Parsons was not ultimately used in Plaintiff's experts' reports, the exercise of receiving the information, considering it and determining whether or not it would be relied upon and used in the report falls within the broad definition of "considered" contained in Rule 26(a)(2)(B).
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> Furthermore, the court finds that Defendants may ask Mr. Parsons about the information provided to Plaintiff's experts. As Defendants point out, neither Rule 26(a)(2)(B) or the advisory committee notes distinguish from whom discovery may be sought with respect to information provided testifying experts. 244 F.R.D. at 334.

G. Rule 26(b)(2) – Designation of Experts

Penn National Ins. Co. v. HNI Corp., 245 F.R.D. 190 (M.D.Pa. 2007) was a subrogation action arising out of a fire at a model home on 1 October 2004. The plaintiffs alleged that the fire was caused by the defendant's improper installation and assembly of a fireplace. Pursuant to the Court's scheduling order, Penn National and Travelers identified as experts Gerald

Kufta, John Bethel, and Gary Popolizio. In the final pretrial order, Penn National and Travelers indicated that they would not call the three experts to testify. After the defendant included the reports of the three experts on its exhibit list and listed them as witnesses it would call at trial, the plaintiffs moved in limine to exclude the testimony and reports of the three experts.

The Court denied the motion in limine and allowed the defendant to call the plaintiffs' experts as witnesses at trial.

> The practical effect of a Rule 26(b)(2) designation is thus to bring an expert and his report within the universe of material that is discoverable by all parties and, generally, admissible at trial. By designation, Mr. Kufta, Mr. Bethel, and Mr. Popolizio as experts pursuant to Rule 26(b)(2) and allowing discovery of their expert reports without objection, Penn National and Travelers waived the protection of Rule 26(b)(4)(B) and subjected these experts' opinions to the scrutiny of trial. . . . Therefore . . . [defendant] may call these experts to testify at trial. 245 F.R.D. at 193-194.

H. Rule 26(b)(3) – Work Product Privilege

Nesselrotte v. Allegheny Energy, Inc., 242 F.R.D. 338 (W.D.Pa. 2007) alleged violations of Title VII and the Civil Rights Act of 1964 based on sex and age. The plaintiff filed a motion to compel the defendant to produce an internal investigation by the defendant into a similar complaint of discrimination made by another employee. The defendant hired Ms. Candris, an attorney, to conduct the investigation.

The Court first held that since Ms. Candris' investigation included legal advice in anticipation of litigation, the report was protected by the attorney-client and work product privileges. The plaintiff argued that the investigation into potential litigation by a separate employee did not protect the report from discovery in her case. The Court disagreed.

> The literal language of Rule 26(b)(3) requires that the material be prepared in anticipation of some litigation, not necessarily in anticipation of the particular litigation in which it is being sought. . . . Plaintiff correctly notes . . . that the work product doctrine may only apply in related subsequent litigation. . . . However, . . . we find a sufficient identity of subject matter between the two cases. There is no dispute that plaintiff's claims appear to involve allegations of discrimination against many of the same individuals. Regardless, plaintiff would not be entitled to the information because she has failed to establish that she has a substantial need for the material and cannot obtain it or its equivalent elsewhere without incurring a substantial hardship. 242 F.R.D. at 340-341.

The plaintiffs in Disability Rights Council of Greater Washington v. Washington Metropolitan Transit Authority, et al., 242 F.R.D. 139 (D.D.C. 2007) alleged violations of the Americans with Disabilities Act, 42 U.S.C. § 12131. LogistiCare was a former contractor to WMATA and provided services to the disabled. LogistiCare also received customer complaints about adequate paratransit service during the period of the contract. The plaintiffs issued a subpoena for the customer complaint files of LogistiCare pursuant to Rule 45. WMATA filed a motion

seeking production of "the subset of complaints selected by Plaintiffs as relevant to their case." 242 F.R.D. at 142. Although the Plaintiffs conceded that WMATA was entitled to the documents produced by LogistiCare, the Plaintiffs objected on the ground of work product to production of the subset of documents identified by the Plaintiffs.

The Court denied WMATA's motion for production of the subset of documents, but did order production of all documents produced by LogistiCare.

> Though the complaints filed with LogistiCare themselves were created by a third party, the compilation of the documents by Plaintiffs' counsel is indeed done by an attorney in preparation for this litigation . . . . Therefore, the subset of complaints in Plaintiffs' control is unquestionably attorney work product. However, with the number of those documents said to be totaling into the thousands, it would be difficult to conceive the Plaintiffs' trial strategy could be gleaned solely by virtue of Plaintiffs' disclosure of the documents selected. Furthermore, nothing indicates the documents contain any attorney notes or impressions. . . . I therefore find that the compilation of complaints is, at most, fact-based work product. The question that follows is whether WMATA has shown a substantial need and undue hardship under the balancing of interests analysis required by Rule 26(b)(3). I find that WMATA has not made the required showing. 242 F.R.D. at 144.

The decedent in Carnes v. Crete Carrier Corp., 244 F.R.D. 694 (N.D.Ga. 2007) was repairing a UPS truck on the side of the road when he was struck by a vehicle owned by Crete and operated by one of its employees. Crete subpoenaed documents from UPS

and noticed a 30(b)(6) deposition of UPS as to the facts of the accident. UPS objected to the deposition and production of documents based on the work-product privilege. Although UPS was not a party to the litigation, the Court held that the work-product privilege limited the documents to be produced. Shortly after the accident occurred, UPS contacted an attorney and requested that he investigate the accident.

> Although the text of Rule 26(b)(3) appears to limit work product to parties, Rule 26(c), Rule 45 and Hickman suggest that the scope of protection should extend to a non-party such as UPS under the facts of this case. . . . UPS may be a party to litigation at some point in the future; requiring UPS to provide its information to a potential adverse party or co-tortfeasor would be "unduly 'burdensome' and therefore, unjust." 244 F.R.D. at 699.

The Court did allow discovery and depositions as to the facts and circumstances of the accident.

The plaintiff in Alexander v. Carnival Corp., 238 F.R.D. 318 (S.D.Fla. 2006) sought to recover for injuries she received when she slipped and fell while on a cruise on the defendant's ship. The plaintiff moved for production of accident reports of other slip and fall accidents at the same location on the ship where the plaintiff fell. The defendant resisted production on the grounds of the work product privilege. The defendant produced affidavit and deposition testimony that the cruise line had been instructed by its attorneys to prepare an accident

report on every injury on the ship because of likelihood of future litigation.

The Court granted the defendant's motion objecting to production on the ground of the work product privilege.

> The Court has reconsidered the matter and finds that the materials at issue fall within Defendant's work product privilege. . . . Vazquez's testimony reveals that prompted by its attorneys, Defendant has established a policy of preparing reports for those incidents that result in injury and may end up in litigation. These reports are then forwarded to Defendant's attorneys in accordance with the policy. Defendant's position is consistent with its litigation experience and the Court has found no indication that the primary purpose for these reports is other than to aid Defendant in the event of litigation. 238 F.R.D. at 318-320.

I. Rule 26(b)(4)(B) – Nontestifying, Consulting Expert

Plymovent Corp. v. Air Technology Solutions, Inc., 243 F.R.D. 139 (D.N.J. 2007) was an action for Lanham Act violations arising from the parties' competition over diesel exhaust removal systems used primarily in fire stations. The Court granted expedited discovery in connection with Plymovent's motion for a preliminary injunction. Plymovent retained Atlantic Environmental, Inc. to compare the systems of Plymovent and Air Technology. Atlantic concluded that the Plymovent system was effective and that the system of Air Technology was not effective. Plymovent submitted the report of Atlantic Environmental and a videotape of its testing before the injunction hearing.

At the time of the hearing, Dr. Shotwell, the person at Atlantic Environmental who conducted the study and prepared the report was present in court. Before Plymovent could call Dr. Shotwell as a witness, the Court inquired as to whether Plymovent was going to rely upon the Atlantic Environmental report. Counsel for Plymovent eventually decided not to rely upon the report and did not call Dr. Shotwell as a witness. The Court denied injunctive relief. Full discovery followed during which Plymovent produced the Atlantic Environmental report. Plymovent never identified Dr. Shotwell or anyone from Atlantic Environmental as an expert to testify at trial. Air Technology served a subpoena duces tecum on Atlantic Environmental for all documents relating to the report and the videotape. Plymovent resisted the subpoena on the grounds that Dr. Shotwell was a nontestifying expert. Air Technology replied that Plymovent had waived the privilege by submitting the report at the injunction hearing and having Dr. Shotwell present in court prepared to testify.

The Court quashed the subpoena and held that Plymovent had not waived the privilege accorded to Dr. Shotwell as a nontestifying expert.

> . . . Plymovent never designated Atlantic Environmental as a testifying witness, a fact which at least one court, in different circumstances, has considered determinative. On the other hand, not only did Plymovent disclose the videotape and report, it

> initially relied on those materials in support of its preliminary injunction motion before withdrawing its reliance at the preliminary injunction hearing. . . . no relief was granted on the basis of the expert's materials submitted in support of the preliminary injunction application. . . . Given these facts, the Court concludes Plymovent's withdrawal of its expert at the preliminary injunction hearing was effective and its limited reliance on the Shotwell Report and videotape did not waive the protection afforded to nontestifying experts under Rule 26(b)(4)(B). 243 F.R.D. at 145-146.

J. Rule 26(b)(5) – Privilege Log

The plaintiff in Muro v. Target Corp., 243 F.R.D. 301 (N.D.Ill. 2007) alleged violations of the Truth in Lending Act by the defendant converting retailer's guest cards into unsolicited credit cards. After the plaintiff's fourth motion to compel production of documents, the Court ordered the defendant to produce a privilege log identifying documents the defendant contended were protected by the attorney-client privilege. The defendant's subsequent privilege log identified the persons involved in some of the communications, but did not describe the information in the document nor how it was privileged.

In finding that the privilege log was inadequate and that the documents requested should be produced, the Court discussed the issues relating to electronic communications and the defendant's deficient privilege log.

> An initial problem arises from Target's failure to identify and describe separately on its privilege log

> each allegedly privileged message within a string of e-mail communications. Target's documents are typical electronic communications, consisting of the text of the sender's message (the top, or last, e-mail message) as well as prior e-mails that have been forwarded on in the chain (or strand, string, or thread) of an on-going, electronically-memorialized dialogue. Persons who were not sent the earliest message might be added along the way, and others who received earlier messages might or might not be sent the last one. Target's privilege log entries contain information only pertaining to the last, most recent e-mail in a particular print-out of a chain. 243 F.R.D. at 306.

Continuing to focus on the problems inherent in e-mail, the Court noted that one of the e-mails within the string contained business information. Such an e-mail did not become privileged simply by being part of the e-mail string that subsequently contained an attorney-client communication. Although some of the e-mails identified specific individuals, other e-mails were addressed to unidentified distribution lists or groups without any indication about whether persons within those lists were protected by the attorney-client privilege.

Equally important, there was no statement in any of the e-mails that the information communicated was confidential.

> None of the messages on Document 3, including those that refer to information from "legal," contain any limitation on dissemination. There is no notation that the information should be maintained confidential or that the e-mail containing that discussion should not be forwarded to others. Because the final message on Document 3 (the August 12 message) contains only business information, it would not be surprising if one of the dozen recipients of the August 12 message had forwarded it on yet again to someone else,

> complete with the August 2 and August 3 messages that refer to "legal." Target has not submitted any factual material demonstrating that the recipients were instructed not [to] forward the August 2 or August 3 message on to anyone else. 243 F.R.D. at 308.

Addressing the duties of litigation counsel with respect to such electronic communications, the Court ordered production of all documents asserted to be privileged.

> The problem Target has here sustaining its assertion of privilege is not merely a failure of litigation counsel to put enough evidence before the court. More fundamentally, it reflects a style of dealing with internal corporate communications that is inherently at odds with the basic principle that the ability to withhold otherwise-discoverable information is a privilege and an exception to the general rule of discoverability. It is difficult to imagine how communications circulated among such a large number of corporate employees without – or in spite of – an expression of confidentiality or limitation on further dissemination and intermingled in so many instances with non-privileged business discussion, could have been created with the intention of being attorney-client privileged and could have, in fact, remained confidential communications. Target has not demonstrated that they have been. 243 F.R.D. at 310.

K. Rule 30(a)(1) – Depositions

The plaintiff in DiLorenzo v. Costco Wholesale Corp., 243 F.R.D. 413 (W.D.Wash. 2007) alleged violations of the Americans with Disabilities Act arising out of her attempted entry into the defendant's store. The plaintiff alleged that when she entered the Costco store she was accompanied by her dog, a service animal trained to assist her as a result of psychological and physical disabilities caused by military

service activities. She also alleged that she was stopped at the entrance to the store and questioned by store employees in a manner that was harassing, humiliating, and discriminatory.

The present motion was filed by the plaintiff to prevent the deposition of her attorney, Cottingham. The deposition was based on a statement by the plaintiff's attorney, Cottingham, to the defendant's attorney, Valente, that it was expected that the plaintiff's husband would admit that he had entered the Costco store previously with the same dog. He was further expected to testify that when he was questioned by Costco employees he stated that the dog was his service dog.

The Court denied the plaintiff's motion and allowed the deposition of the plaintiff's attorney.

> The testimony sought from Cottingham is not privileged since he is not counsel for Mr. DiLorenzo. Nor does the information sought risk revealing the mental process of Plaintiff's counsel. Indeed, Cottingham himself did not seem to believe that he was revealing anything improper when he made the disclosures to Valente that instigated Defendant's request to depose him. Finally, considering the importance to the Defendant of being able to show that its inquiries to Plaintiff were reasonable, Cottingham's testimony can properly be characterized as crucial. 243 F.R.D. at 415.

L. Rule 30(b)(6) – Deposition of Corporation

The plaintiffs in Equal Employment Opportunity Commission, et al. v. Thorman & Wright Corp., et al., 243 F.R.D. 421 (D.Kan. 2007) filed a motion to require the defendant to produce designees to testify about topics identified in the plaintiff's 30(b)(6) notice. The designee produced by the defendant at the initial deposition, Edwards, an accountant, was not able to testify about several of the topics stated in the deposition notice. The defendant responded that Edwards was as knowledgeable as anyone associated with the corporation and that the original incorporator of the defendant was old, did not have a clear memory of corporate matters and was easily confused.

The Court ordered the defendant to produce a designee capable of responding to all of the 30(b)(6) topics.

> Upon review of the deposition testimony at issue here, the Court finds that Mr. Edwards' inability to answer various questions regarding the identified topics for Thorman Enterprises, Inc. and Eldon Thorman Family Limited Partnership No. 4 demonstrates that Defendants breached their obligation to produce, in good faith, a knowledgeable deponent who is competently prepared to fully and responsibly address the questions posed on the topics designated. In so finding, the Court notes that in preparation for his testimony as a 30(b)(6) designee, Mr. Edwards did not talk to Eldon Thorman, a co-owner of defendants and the registered agent for Thorman . . ., he did not review any documents in Mr. Thorman's possession, and he did not request documents from Ronald Wright or from any other accountants or attorneys who performed work for Thorman Enterprises . . . . 243 F.R.D. at 426.

M. Rule 34 – Production of Documents

Ice Corp. v. Hamilton Sundstrand Corp., 245 F.R.D. 513 (D.Kan. 2007) arose out of the parties' failed business relationship to develop a deicing propeller system for a military aircraft. The plaintiff brought the present "Motion to Compel Defendants to Execute Business Records Releases Directed to Artus and Airbus." The aircraft was built by Airbus. Artus replaced the plaintiff in the development of the deicing system. In opposing the motion, the defendants argued: (1) execution of releases of documents by third parties is not authorized by Rule 34; (2) the defendants did not have control of the documents; and (3) the proper procedure for obtaining documents by third parties is through a Rule 45 subpoena.

The Court partially agreed with the defendants and stated that it would not bypass Rule 45.

> " . . . it is only after the individuals or entities object on grounds of privilege or otherwise fail to produce documents pursuant to the subpoena that the Court will consider a motion requesting (1) the court compel the entity to produce documents pursuant to Rule 45; or (2) compel the party to execute appropriate releases pursuant to the Court's general power to enforce its orders." 245 F.R.D. at 515.

Although the documents may be in the possession of third parties, the Court may still order production of those documents by a party to the litigation.

> Where [plaintiff] has some evidence that would indicate that a party has 'control' over documents of

> a non-party, even though the non-party has actual possession of the documents, [plaintiff] can proceed under Rule 34 if it can meet the burden of proving that the Defendants do have the requisite ' control' of the documents. 245 F.R.D. at 516.

Reviewing the contracts between the defendants and Artus, the Court concluded that the "defendants 'own' and thus control the design documents in Artus' physical possession." 245 F.R.D. at 519.

> . . . "Courts have universally held that documents are deemed to be within the possession, custody or control if the party has actual possession, custody or control or has the legal right to obtain the documents on demand." 245 F.R.d. at 521.

Although the issue of requiring releases by the third parties was rendered moot by the Court's resolution of "control" of the documents, the Court concluded that the plaintiff had failed to give the defendants "proper notice of the subpoenas prior to their service pursuant to Rule 45." 245 F.R.D. at 523.

> . . . the court sees no reason to contravene the general rule that the court cannot compel a party signature pursuant to Rule 34. 245 F.R.D. at 523.

N. Rule 35 – Independent Medical Examinations

The plaintiff in Morrison v. Stephenson, 244 F.R.D. 405 (S.D.Ohio 2007) alleged that she was subjected to unreasonable use of force by the defendant Sheriff's Department. Because the plaintiff had placed her mental condition in controversy, the parties agreed that the defendants were entitled to a psychological examination under Rule 35. The plaintiff

requested that the examination be videotaped. As grounds for the request, the plaintiff argued that the examination would be a "de facto deposition," the videotape would resolve disputes about the examination and that it was customary to videotape forensic psychological examinations. The defendants opposed the request to videotape and offered evidence that videotaping would disrupt the examination.

The Court noted that cases generally supported both positions. Relying primarily on Galieti v. State Farm Mut. Auto. Ins. Co., 154 F.R.D. 262 (D.Colo. 1994), the Court concluded that the plaintiff was required to show good cause to prevail. The plaintiff produced no evidence indicating that any of the grounds asserted for the request existed as related to the examining psychologist.

> Certainly, the recording of such an examination might well avoid the potential for disputes. It might also create additional disputes about the integrity of the examination, and it might actually require the jury to hear evidence concerning whether the examination was valid or whether the fact that Ms. Morrison knew she was being videotaped had an impact on the things which she said or the manner in which she conducted herself at the examination. . . . The Court also disagrees that a psychological examination provides a unique potential for the examiner to conduct a de facto deposition of the examined party without counsel being present. . . . Again, without evidence that some improper conduct is likely in this case, a ruling in favor of Ms. Morrison would essentially make routine the ordering of videotape recording of any mental or physical examination conducted under Rule 35. The Court does not believe the rule contemplates that

procedure being routinely incorporated into these examinations. 244 F.R.D. at 407-408.

II. Federal Rules of Evidence

A. Rule 407 – Subsequent Remedial Measures

Millenium Partners v. Colmar Storage, 494 F.3d 1293 (11th Cir. 2007) involved claims to coffee damaged while stored in a warehouse. Colmar stored coffee and other perishables. In February 2000, Colmar leased a warehouse from Cramco Realty. The warehouse was certified by the New York Board of Trade's Coffee and Cocoa Exchange Board for the storage of coffee. The Miami-Dade County Department of Environment Resources Management refused to issue a building permit for subterranean truck loading wells constructed by Cramco because the facilities were not adequately equipped with pumps and drains. Colmar stored coffee for Millenium, AIG and Boody in the warehouse. A tropical storm system passed through Miami on 2 and 3 October 2000 and produced flooding in the warehouse. A large number of coffee beans and bags in the warehouse were contaminated by water. The plaintiffs brought the present action alleging breach of contract, bailment, and negligence. The trial court granted summary judgment in favor of Colmar on the negligence claims. The jury returned a verdict for Colmar on the breach of warehouse contract claim, but found for the plaintiffs on the bailment claims.

At trial, the District Court admitted testimony from a tenant who leased the warehouse from Colmar after it vacated the premises. The tenant testified that it required Cramco to install pumps and drains in the warehouse. Colmar contended on appeal that the admission of this evidence was prohibited by Rule 407 as a subsequent remedial measure. Citing TLT-Babcock, Inc. v. Emerson Elec. Co., 33 F.3d 397 (4th Cir. 1994), the Eleventh Circuit disagreed and held that admission of the evidence was not an abuse of discretion.

> Rule 407 does not apply to a remedial measure that was taken without the voluntary participation of the defendant. . . . The applicability of Rule 407 to repairs made by a non-defendant is a question of first impression in this Circuit. Today, we join the seven Circuits that have agreed that such evidence is not barred. Accordingly, we hold that the District Court did not abuse its discretion in admitting evidence of repairs to the warehouse made by a non-defendant. 494 F.3d at 1302-1303.

B. Rule 408 – Settlement Discussions

The plaintiff in Rodriguez-Garcia v. Municipality of Caguas, 495 F.3d 1 (1st Cir. 2007) alleged that she was demoted from her career municipal position in retaliation for complaining that the mayor was using his position and government resources to campaign in violation of the laws of Puerto Rico. Following her transfer and demotion, the plaintiff sent letters to the Department of Human Resources requesting an explanation for her transfer. Her attorney then sent three letters to the

mayor requesting reinstatement and giving the basis of the plaintiff's claim. The attorney's first letter received a response from the Human Resources Department indicating that the plaintiff would be returned to her position. These efforts failed. The lawsuit was filed.

The defendants filed a motion in limine under Rule 408 to bar admission of the letters between the mayor's office and the plaintiff's attorney on the grounds that the letters reflected attempts to compromise a disputed claim. The trial court granted the mayor's motion for a directed verdict at the close of the plaintiff's evidence and refused to consider the letters for any purpose other that negating the defendants' argument that the plaintiff had requested the transfer. The Court specifically refused to consider the letters as placing the mayor on notice of the plaintiff's claim. The jury found that the municipality was liable and awarded damages of $285,000. The trial court set aside the jury verdict as "inconsistent" with the plaintiff's theory of the case.

The First Circuit held that the trial court abused its discretion in refusing to admit the letters. The Court further held that the evidentiary ruling was not harmless error and awarded a new trial as to the claims against the mayor.

> The March 8 letter from Rodriguez-Garcia's attorney to the mayor's office served the purpose of giving the defendants notice of a claim. . . . Although Human

> Resources disputed a factual matter (that Rodriguez-Garcia had not requested a transfer), that disagreement did not affect their willingness to grant to her, without qualification or condition, the reinstatement that she sought. With Rodriguez-Garcia receiving in this letter exactly what she wanted, it could easily be thought there were no "compromise negotiations" taking place in this exchange of correspondence within the meaning of Rule 408. . . . Therefore, Rodriguez-Garcia should have been permitted to use the Letters as evidence that the mayor personally had notice of her claims, an indispensable element of her theory of liability, rather than simply as evidence that she had not requested a transfer from Public Works. 495 F.3d at 11-12.

The failure of the trial court to appreciate the basis for admitting the letters established that the error was not harmless.

> However, if the court had correctly admitted the Letters as evidence of the mayor's knowledge of Rodriguez-Garcia's complaint and his personal involvement in dealing with it, the court could no longer maintain that Rodriguez-Garcia was attempting to establish the mayor's liability based simply on his role as the supervisor of a department. Instead, she would have had a basis for arguing that the mayor knew about and was directly involved in the disposition of her transfer and the failure to remedy it. 495 F.3d at 13.

The plaintiff in Compudyne Corp. v. Shane, 244 F.R.D. 282 (S.D.N.Y. 2007) alleged that the defendant's trading in the plaintiff's corporation stock caused financial losses to the plaintiff. The defendant moved to compel production of documents related to the plaintiff's settlement agreements with any other entities for the same financial losses. Citing the

prohibitions of Rule 408, Fed.R.Evid., the plaintiff objected to production.

As the request related to discovery and not to evidence admissible at trial, the Court ordered production of the documents.

> "Prevailing authority within this Circuit holds that the discovery of settlement-related information is governed by Fed.R.Civ.P. 26(b)(1), and that no heightened showing or relevance need be made in order to justify the disclosure of a settlement agreement. This being said, Rule 26(b)(1)'s relevancy requirement still applies." Here, Shane has argued that the documents sought are relevant because they may support Shane's contention that other factors were responsible for the failure of the PIPE. Publicly available information reveals that FBR and Shane both short sold Compudyne stock during the time period prior to the price of the PIPE, lending credence to Shane's contention. . . . Additionally, Shane contends that Compudyne, FNY and FBR personnel will testify at trial, and discovery about Compudyne's settlements with FBR and FNY may be important for impeachment purposes. The touchstone of Fed.R.Civ.P. 26(b)(1) is relevance, and Shane has demonstrated that the first category of documents sought is relevant and "appears reasonably calculated to lead to the discovery of admissible evidence." 244 F.R.D. at 283.

C. Rule 501 – Privileges

The plaintiff in Koch v. Cox, 489 F.3d 384 (D.C.Cir. 2007)) sued his employer under the Civil Rights Act of 1964, the Americans with Disabilities Act, and the Age Discrimination in Employment Act, alleging medical problems including cardiovascular disease, hypertension, gout and obstructive sleep apnea. The complaint did not seek damages for emotional

distress. During the deposition of the plaintiff, he testified that he suffered from depression, stress and humiliation. The defendant subpoenaed the records of the plaintiff's psychoanalyst, contending that the plaintiff had put his mental health at issue and waived the psychotherapist-patient privilege. The district court denied the plaintiff's motion to quash the subpoena.

The D.C. Circuit disagreed and held that the plaintiff's deposition testimony and other discovery responses did not put his mental health in issue.

> . . . we hold that a plaintiff does not put his mental health in issue merely by acknowledging he suffers from depression, for which he is not seeking recompense; nor may a defendant overcome the privilege by putting the plaintiff's mental health in issue. A plaintiff who makes no claim for recovery based upon injury to his mental or emotional state puts that state in issue and thereby waives the psychotherapist-patient privilege when, . . . he does the sort of thing that would waive the attorney-client privilege, such as basing his claim upon the psychotherapist's communications with him, . . . or, as with the marital privilege, "selectively disclosing part of a privileged communication in order to gain an advantage in litigation." 489 F.3d at 391.

D. Rule 612 – Writing Used to Refresh Memory

The plaintiff in Heron Interact, Inc. v. Guidelines, Inc., 244 F.R.D. 75 (D.Mass. 2007) produced Gary Chacho in response to the Defendants' 30(b)(6) deposition notice. Based on Chacho's deposition and a subsequent affidavit, he used nine documents to refresh his memory while preparing for the deposition. The

Defendants moved to compel production of those documents. In ordering production, the Court noted that Rule 612, Fed.R.Evid., applied to depositions by Rule 30(c), Fed.R.Civ.P. The Court also observed that cases construing Rule 30(b)(6) required the deponent to "use documents . . . in performing the required preparation." 244 F.R.D. at 77.

The Court ordered production of all documents reviewed by Chacho prior to his deposition.

> The entire thrust of Chacho's affidavit is that he gathered, created and utilized the information to refresh his understanding of the events and to prepare his testimony. And, in accord with those efforts, Chacho brought the annotated documents with him to the deposition. Thus, the documents easily fall within the purview of Rule 612. Defendants also assert that Chacho specifically referred to at least two of the documents during the course of his deposition. . . . The court agrees. Those documents, accordingly, must be produced pursuant to Rule 612 . . . . Granted, Plaintiff argues somewhat more specifically that Chacho did not have to refer to these documents in order to refresh his memory during the course of the deposition. Yet, even were the court to accept this characterization of Chacho's testimony, it is clear that the preparation which Chacho undertook prior to the deposition – including creating and reviewing the documents – was for that very purpose. That, of course, is all that is needed to fall within the purview of Rule 612. 244 F.R.D. at 77.

E. Rule 702 – Experts

The plaintiff in Ervin v. Johnson & Johnson, Inc., 492 F.3d 901 (7th Cir. 2007) suffered from Crohn's disease, autoimmune hypothyroidism, and diabetes. In an effort to manage these diseases, the plaintiff's treating physicians

suggested Remicade, a drug approved by the FDA for Crohn's disease. Five days after the second infusion, the plaintiff was diagnosed with arterial thrombosis in his left leg. A below-the-knee amputation was subsequently performed.

The plaintiff's expert on causation, Dr. Lee McKinley, expressed the opinion that the use of Remicade was the major contributing factor to the thrombotic arterial occlusion and subsequent amputation. In forming this opinion, Dr. McKinley relied on the temporal relationship between infusion of the drug and the blood clot. He also conducted an Internet Google search and found one report of an arterial clot following an infusion of Remicade. He reviewed "line entries" from the FDA, but these entries did not include information about the patient's medical history and treatment. Dr. McKinley could not identify medical studies or textbooks supporting his opinions.

The trial court granted the defendant's motion in limine to exclude the opinions of Dr. McKinley, then allowed the defendant's motion for summary judgment. Finding no abuse of discretion, the Seventh Circuit affirmed.

> We agree with the district court that Dr. McKinley had no reliable basis for his expert opinion. He could not point to any epidemiological data supporting his

> opinion, and he was not able to articulate any scientifically physiological explanation as to how Remicade would cause arterial thrombosis. The mere existence of a temporal relationship between taking a medication and the onset of symptoms does not show a sufficient causal relationship. The district court did not abuse its discretion in finding that Dr. McKinley's testimony was unreliable. 492 F.3d at 904-905.

F. Rule 803(6) – Business Records

Health Alliance Network, Inc. v. Continental Casualty Co., 245 F.R.D. 121 (S.D.N.Y. 2007) was an action by managed health care providers against their insurers for breach of a confidentiality agreement and misappropriation of trade secrets. The jury returned a verdict for the plaintiff. As part of defendant's post-verdict motions, the defendant contested the admission of exhibits from the plaintiff's database. The defendant objected to documents produced as a result of a query to the plaintiff's database. The trial court held that these documents were admissible as business records.

> Moreover, producing limited data from a larger database is more akin to reviewing a set of documents in response to a discovery request and producing only responsive documents, than it is creating a new data compilation or document for the purposes of litigation. Where as here, there are sufficient indicia of reliability of the data produced, and the underlying database is maintained through the ordinary course of business, this court holds that a smaller subset of data provided as evidence from the database is subject to the business records exception to the hearsay rule. 245 F.R.D. at 129.

The defendant also objected to the admission of the documents from the database because they were authenticated by the plaintiff's in-house lawyer.

> Nor were the exhibits in question inadmissible because they were authenticated by Ms. Jones, an in-house lawyer, who did not participate in or supervise the department responsible for maintaining the databases, nor prepare the lists herself. The "custodian need not have personal knowledge of the actual creation of the document to lay a proper foundation . . . nor is there any requirement under Rule 803(6) that the records be prepared by the party who has custody of the documents and seeks to introduce them into evidence." . . . . Ms. Jones testified that she knew through her investigation the type of data collected, how it was inputted and maintained, where it is maintained, and also how the data in question was queried and collected for the purposes of litigation—which she supervised . . . . These statements are sufficient to create a foundation by the custodians of the business records. 245 F.R.D. at 129-130.

G. Rule 803(22) – Evidence of Guilty Plea

Guillermety v. Gonzalez, 491 F.Supp.2d 199 (D.Puerto Rico 2006) was an action for wrongful death. A criminal trial in state court concluded with the defendant's plea of guilty to the charge of homicide based on the same underlying facts. The Plaintiffs argued that the plea of guilty was admissible and established liability so that only the issue of damages would be submitted to the jury. In granting the defendant's motion in limine, the Court disagreed with the effect of the guilty plea.

> This crime is punishable with a minimum of 3 years . . . . therefore, it is admissible under Rule 803(22). . . . "a guilty plea may be introduced in a subsequent civil proceeding as an admission, although this

> admission does not conclusively establish liability." . . . The guilty plea and sentence of conviction are admissible and constitute prima facie evidence that Cancel-Gonzalez willfully killed Toledo-Buscaglia. . . . Defendants can then rebut Plaintiffs' evidence . . . . "by offering whatever explanation there may be concerning either the circumstances surrounding the conviction or the underlying event." 491 F.Supp.2d at 201.

III. Trial Practice and Procedure

A. Products Liability

The female plaintiff in Chlopek v. Federal Ins. Co., 499 F.3d 692 (7th Cir. 2007) underwent fusion surgery on her right foot. After surgery, the treating orthopedic surgeon prescribed Polar Care 300, a medical device that delivers cooling therapy to postoperative patients. The plaintiff applied the device for nine days. During that period, she noticed that her baby toe was purple. When she returned to her treating physician, he observed that her foot looked like "frostbite." Subsequent treatment resulted in the amputation of the plaintiff's entire right big toe.

Suit was brought against Breg, Incorporated, the manufacturer of the device and Federal Insurance Company, Breg's insurer. The trial judge bifurcated the liability and damages parts of the trial over the plaintiffs' objection. The trial judge granted Breg's motion to exclude evidence of all but one of other customer complaints of thermal injuries caused by Polar Care 300 and its sister unit, Polar Care 500. The trial court

also excluded evidence that Breg had changed the warnings on the Polar Care 300 label after the plaintiff's injury. During the plaintiff's cross examination of Breg's expert, the trial judge "chastised" the attorney for exchanges with the expert and commented that the plaintiff's attorney's actions were not "gentlemanly" or "ethical." The jury found that the device was not defective. Judgment was entered for the defendants.

The Seventh Circuit affirmed. Appellate review of the trial judge's rulings excluding evidence is for abuse of discretion. The Court found that the trial judge did not abuse his discretion in excluding evidence of other complaints.

> The district court admitted Exhibit 10-C, the report of an injury under circumstances the court deemed most similar to Chlopek's: a complaint of frostbite on the foot and ankle area after the patient used the Polar Care 300 continuously after surgery. The remaining incidents, the court determined, were not similar enough, either because the injury was to another body part, the type of injury was unclear or not of the same nature as Chlopek's or the nature of the complaint was different (for example, some consumers simply complained of the absence of temperature control). 499 F.3d at 699.

Although the plaintiffs argued that evidence of the subsequent label change should have been admitted because it was not caused by safety concerns, the Court affirmed exclusion of the evidence.

> They seek to sidestep Federal Rule of Evidence 407 by insisting that the change was not a subsequent "remedial" measure because, according to the affidavit of a Breg executive, the change was not prompted by

> safety concerns. But Breg's motive for making the change is irrelevant. All the rule requires is that the measure "would have made the injury or harm less likely to occur." Fed.R.Evid. 407. Regardless of Breg's stated reason for the change, the plaintiffs undoubtedly wanted the jury to conclude that Breg added the warning because the product was unsafe without it. That is precisely the type of inference that Rule 407 forecloses, in order to avoid discouraging the taking of remedial measures. 499 F.3d at 700.

Although the Court found that the trial judge's phrasing could have been different, it affirmed the jury verdict.

> We rarely will reverse a judgment because of the district court's conduct at trial. . . . We are not persuaded that the one instance of judicial intemperance the plaintiffs cite evinced bias or resulted in prejudice. Although the judge's comment perhaps was itself unfortunate, it was hardly the "lacerating critique" or the "attack" the plaintiffs label it. The court's underlying point—that attorney Ryberg should have moved to strike Dr. Silverman's unresponsive answer rather than chastise the witness in front of the jury—is well taken, although the suggestion that Ryberg's conduct was not "ethical" was regrettable. 499 F.3d at 702-703.

B. *Punitive Damages*

In White v. Ford Motor Co., 500 F.3d 963 (9th Cir. 2007), the plaintiffs' three-year-old son was killed on 9 October 1994 when a Ford F-350 pickup truck parked in the driveway rolled over him. The truck was sold to Mr. White's employer on 22 September 1993. At this time, internal engineering investigations at Ford had concluded that a rollaway problem existed with the truck's parking brake. Ford agreed with the

NHTSA to conduct a recall before the accident. The actual recall notice was not sent until two months after the accident.

The jury found that the brake was defective in design and that Ford had failed to warn of the defect. The jury awarded $2,305,435 in compensatory damages; $1,150,000 to each parent for emotional distress; $5,434 for funeral expenses; and $150,884,400 in punitive damages. The trial court reduced the punitive damages award to $69,163,037. On the initial appeal, the Ninth Circuit affirmed the compensatory damages awards. The punitive damages award was reversed because the trial judge's instructions permitted the jury to unconstitutionally punish Ford for out-of-state conduct as a result of evidence of 54 similar rollaway complaints before the accident in the present case.

During the second trial, the trial judge instructed the jury that the issues of liability and the amount of compensatory damages had been decided by a prior jury. The trial judge did not inform the jury of the amounts of the compensatory damages awards. The trial judge also instructed the jury that it had been previously determined that Ford was liable for punitive damages and that the only issue for decision was the amount of punitive damages. The second jury awarded $52 million for punitive damages.

While the case was on appeal for a second time to the Ninth Circuit, the Supreme Court decided Philip Morris USA v. Williams, ___U.S.___, 127 S.Ct. 1057, 166 L.Ed.2d 940 (2007) holding that a jury may not award punitive damages based on a desire to punish for harming nonparties. The Ninth Circuit reversed the second jury's award of punitive damages and remanded for an additional trial on punitive damages.

> As in Williams, there is a significant risk that the jury, in arriving at its punitive damages award, punished Ford for harm to nonparties. Absent a proper limiting instruction, the jury could have mistakenly understood the Whites' argument that Ford's conduct injured 54 other people to justify not just a finding of reprehensibility, but also to consider those other injuries in calculating the amount of damages warranted to punish Ford's reprehensible conduct. Given Williams' guidance, we must conclude that the court's failure to give a harm to nonparties instruction violated due process. . . . On remand, the district court must explain to the jury that although evidence of harm to nonparties may bear on Ford's reprehensibility, any award of punitive damages cannot be used "to punish [Ford] directly for harms to . . . nonparties." 500 F.3d at 972-973.

C. *All Writs Act and Anti-Injunction Act*

Bryan v. BellSouth Communications, Inc., 492 F.3d 231 (4th Cir. 2007) was filed in North Carolina state court as a putative class action and alleged that BellSouth's Universal Service Fund charges to its customers were excessive. The case was removed to the Middle District. BellSouth moved to dismiss the complaint under Rule 12(b(6) on the grounds of the "filed-rate doctrine." Judge Bullock dismissed two of the three claims in

the complaint and remanded Count A to state court. On the initial appeal, the Fourth Circuit held that Count A should also have been dismissed.

BellSouth then filed a motion to dismiss in state court on the grounds of res judicata and the filed-rate doctrine. The state court denied BellSouth's motion to dismiss. BellSouth then filed a motion in the Middle District requesting an injunction of the state-court proceedings under the All Writs Act, 28 U.S.C. § 1651(a). Judge Bullock granted the injunctive relief requested by BellSouth.

The Fourth Circuit affirmed. The plaintiff first challenged the jurisdiction of Judge Bullock to enter an injunction since he had dismissed two of the three claims in the complaint and remanded the remaining claim to state court. The Fourth Circuit held that Judge Bullock had jurisdiction to enforce his judgment.

> "As long as the original lawsuit was properly brought in federal court, the federal court retains subject matter jurisdiction to remove any subsequent state law action to federal court for purposes of applying the All Writs Act." 492 F.3d at 236.

The plaintiff argued next that even if the district court had jurisdiction, the injunction was not authorized by the Anti-Injunction Act. The Court held that the injunction was properly issued by Judge Bullock.

The Act's exception for injunctions that are necessary to "protect or effectuate" a court's judgment has come to be known as the relitigation exception. . . . As the allegations in her complaint and the certification order demonstrate, Bryan in her state-court action is seeking damages in the form of a refund of the FUSC paid by North Carolina BellSouth customers. The claim asserted in state court is therefore functionally identically to Count A of the federal action. Because Bryan in the state-court action is seeking to litigate the very claim that we have concluded must be dismissed under the filed-rate doctrine, the requirements of the relitigation exception to the Anti-Injunction Act are satisfied. 492 F.3d at 236-239.