NORTH CAROLINA CONFERENCE OF SUPERIOR COURT JUDGES

RECENT DECISIONS

ASHEVILLE, NORTH CAROLINA
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Don Cowan

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A. Motor Vehicles

Rabon v. Hopkins, ___N.C.App.___, 703 S.E.2d 181 (2010) arose from a motor vehicle accident on 11 April 2008 when the air brakes on the defendant's truck allegedly failed. The jury awarded $150,000 in compensatory damages and $3,500 for property damage.

The Court of Appeals affirmed. On appeal, the defendant argued that the plaintiff's expert was improperly allowed to testify and express opinions. The Court of Appeals held that the trial judge had correctly allowed the expert to testify.

> It is obvious that an expert in the field of motor carrier safety who had done thousands of truck inspections would know whether the air line was designed to stay attached during the normal course of transport, regardless of whether the expert was an engineer who could explain the exact physical forces that keep the air line in place. Further, Rule of Evidence 702, which governs the admissibility of expert testimony, has been interpreted by our Courts to require "only that the expert be better qualified than the jury as to the subject at hand, with the testimony being helpful to the jury." . . . . Accordingly, the trial court did not abuse its discretion in admitting Hines' testimony on this subject. 703 S.E.2d at 187.

The defendant also objected to the trial court's instruction on spoliation. The Court of Appeals held that there were sufficient facts for the instruction.

> . . . in discovery, Defendant Keystone denied the existence of any photographs of the truck following the accident. However, at trial, Defendant Hopkins testified that she took pictures of the accident and gave them to her supervisor at Keystone. Further, Defendants denied in discovery the existence of any device that records data concerning the operation of the truck. At trial, however, Plaintiff's expert John Flannigan testified that the type of truck owned by Defendant Keystone and operated by Defendant Hopkins would have had such a device. Defense counsel later argued to the trial court that the truck had been put back into service and that the data was unavailable.
>
> Because Defendants almost certainly were aware of a potential claim by Plaintiff at the time the photographs and recorded data were in Defendant Keystone's control, . . . these contradictions were sufficient to support a jury instruction on spoliation. 703 S.E.2d at 189.

The decedent was a passenger in a vehicle operated by the defendant in Lovendahl v. Wicker, ___N.C.App.___, 702 S.E.2d 529 (2010). The complaint alleged that the one-car accident occurred as a result of the defendant's reckless operation of the vehicle. The answer included defenses of contributory negligence based on the decedent and defendant drinking alcohol for several hours before the accident and the decedent electing to ride with the defendant after she observed his alcohol consumption. Second-degree murder charges were pending against the defendant based on the accident.

The defendant's deposition was noticed for 22 October 2008. On the morning of the deposition, the defendant filed a motion to stay, objection to the deposition and a motion for a protective order. At the time of the deposition, counsel for the defendant stated that the defendant would invoke his Fifth Amendment right. The deposition adjourned. On 13 November, the plaintiff filed a motion to strike the defendant's affirmative defenses. Judge Eagles denied the defendant's motions for a protective order and for a stay. Judge Eagles also ordered the defendant to appear for his deposition. The order stated that the defendant could elect to assert his Fifth Amendment rights, but "may not do so without consequences in the present civil action." 702 S.E.2d at 532.

The defendant's deposition reconvened on 22 January 2009. The defendant again invoked his Fifth Amendment rights. Judge Stone imposed sanctions under Rule 37(b) and struck the defendant's affirmative defenses alleging contributory negligence.

The Court of Appeals affirmed. The Court first addressed the sanction imposed. Rule 37(b) was the appropriate rule because the defendant violated Judge Eagles' order. Rule 37(d) did not apply because the defendant appeared for the deposition. Balancing the

defendant's Fifth Amendment rights with the plaintiff's need for factual information as to the affirmative defenses, the Court held that the trial court did not abuse its discretion in striking the defendant's defenses.

> Here, . . . the value to defendant of asserting his Fifth Amendment rights may be substantial, the trial court found that this assertion of rights "is prejudicial to the due process rights of plaintiff" because it "has served to impede plaintiff's ability to obtain accurate discovery about the nature of defendant's affirmative defenses." The trial court, after balancing the interests of both parties and considering other lesser sanctions, "determined that sanctions less severe than striking defendant's affirmative defenses would not be adequate." This conclusion was not manifestly unreasonable and, therefore, was not an abuse of discretion. 702 S.E.2d at 537.

The defendant bus driver in Springs v. City of Charlotte, ___N.C.App.___, 703 S.E.2d 319 (2010) rear-ended the vehicle in which the plaintiff was a passenger. The plaintiff was seated in a wheelchair at the time of the accident as a result of Multiple Sclerosis. The defendants stipulated that the bus driver was negligent in rear-ending the plaintiff's vehicle. The defendants, however, contested permanent damages. The jury awarded $800,000 in compensatory damages and $250,000 in punitive damages. The trial court denied the defendants' JNOV motions.

At trial, the defendants argued and produced evidence tending to show that the plaintiff's permanent injuries were a result of her previous medical condition and not as a result of the accident. Although the plaintiff's medical experts conceded that there were other potential causes of the plaintiff's permanent injuries, each of plaintiff's experts opined to a reasonable degree of medical certainty that the accident was the cause of the plaintiff's permanent injuries. The Court of Appeals affirmed submission of the issue of permanent injuries to the jury.

> Although Dr. Kingery acknowledged that, as a general matter, there are various possible causes for avascular necrosis, he testified that, in his opinion, to a reasonable degree of medical certainty, the accident causes or aggravated Mrs. Springs' condition. . . . . On cross-examination, Dr. Kingery simply repeated the steroid possibility, but did not recant or in any way correct or contradict his opinion on direct examination that he believed the accident had in fact caused or aggravated the right should condition. . . . Thus, although Dr. Kingery acknowledged that avascular necrosis can come from either trauma or steroids, Dr. Pfeiffer's testimony would permit a jury to find that Mrs. Springs had not taken enough steroids to cause avascular necrosis, leaving the trauma from the accident as the likely cause. 704 S.E.2d at 324, 325.

The trial judge awarded the plaintiff $58,099.92 for expert witness fees composed of time spent in trial preparation, at trial, deposition expenses, mediation

expenses, filing fees and trial exhibits. The defendants argued that N.C. Gen. Stat. § 7A-305(d) as amended on 1 August 2007 limited expert witness fees to time spent testifying. The Court of Appeals disagreed and held that expert witness fees must also be read in connection with G.S. § 7A-314.

> Accordingly, under N.C. Gen. Stat. § 7A-305(d)(11), a trial court is required to included within an award of costs expert fees for time spent by the witness actually testifying. In addition, however, ever, under N.C. Gen. Stat. § 7A-314(d), the trial court has discretion to award expert fees for an expert witness' time in attendance at trial even when not testifying. Further the trial court has discretion to award travel expenses for experts as provided under N.C. Gen. Stat. § 7A-314(d).
>
> Nevertheless, we find no authority in the current statutes authorizing the trial court to assess costs for an expert witness' preparation time. 701 S.E. 2d at 709.

The plaintiff in Haynie v. Cobb, ___N.C.App.___, 698 S.E.2d 194 (2010) alleged that Cobb negligently stuck the plaintiff while Cobb was operating a vehicle owned by Jones Construction Company. The trial court granted the defendants' 12(b)(6) motion relating to the plaintiff's claim for negligent entrustment. The complaint alleged that Cobb was operating the vehicle in the course and scope of his employment and with the permission of his employer

"who knew of should have known of Defendant's Cobb propensity to drive while impaired."

Concluding that the plaintiff had sufficiently alleged a claim for negligent entrustment, the Court of Appeals reversed the trial court.

> Defendant Jones' argument fails because neither the labels or lack thereof as to legal theories used in plaintiff's 2007 complaint nor the motion to amend the 2007 complaint are controlling. . . . Plaintiff alleged in his 2007 complaint that defendant Jones entrusted his vehicle to defendant Cobb, whom defendant Jones should have known had a propensity to drive while impaired." Thus, plaintiff did allege the necessary elements to put defendant Jones on notice of the claim of negligent entrustment, even if plaintiff mislabeled or failed to label the claim. 698 S.E.2d at 199.

B. Premises

The plaintiff in Tyburski v. Stewart, ___ N.C. App. ___, 694 S.E.2d 422 (2010) was injured while staying at the defendant's rental house on Oak Island. The house had a sunroom that could only be accessed by a glass door from the kitchen. The door had a "thumb lock" allowing the door to be locked from the kitchen. When the lock was engaged, reentry into the house from the sunroom required a key. This condition was a housing code violation. During the two weeks he had been staying at the defendant's house, the plaintiff experienced no problem with the door or entry

from the sunroom. Unknown to the plaintiff, his son locked the door to the sunroom over the preceding weekend.

On the day of his injury, the plaintiff was cooking in the kitchen. While food was on the stove, the plaintiff went into the sunroom without checking the lock on the door. When the plaintiff attempted to return to the kitchen, he learned that the door was locked. While attempting to climb out of a window of the sunroom, the glass shattered cutting the plaintiff's arm. The trial court granted the defendants' motion for summary judgment on the grounds of the plaintiff's contributory negligence.

Finding a genuine issue of material fact as to the plaintiff's negligence, the Court of Appeals reversed. The Court first held that there was an issue of fact as to whether the plaintiff was negligent by not checking the lock on the sunroom door.

> To forget or to be inattentive is not negligent unless it amounts to a failure to exercise ordinary care for one's safety. . . . In this case, while plaintiff was aware of the hazard presented by the lock, the question is not whether a reasonably prudent person under similar circumstances would have seen that the sunroom lock was engaged if he had double-checked the lock when entering the sunroom. Rather, the question is whether a reasonably prudent person under similar circumstances would have double-checked the lock at all. . . . We conclude that a jury could reasonably find that an ordinarily prudent person in plaintiff's position would also have entered the sunroom without concern for the

> lock after having disengaged it. The evidence does not so clearly establish plaintiff's negligence that a jury could not reasonably reach a different conclusion. 694 S.E.2d at 425-426.

The Court also held that an issue of fact was created by the plaintiff's choice of exiting the sunroom through a window.

> Therefore, we cannot, as defendants urge, presume contributory negligence as a matter of law from the fact that plaintiff was injured when he tried to move the window from its track. Even if defendants are correct in asserting that plaintiff would have fared better by choosing another method of escape, it is for the jury to decide whether such an assertion amounts to 20-20 hindsight or a conclusion plaintiff necessarily should have reached if acting reasonably under the circumstances at the time. 694 S.E.2d at 426-427.

The plaintiff in Kelly v. Regency Centers Corp., ___N.C. App. ___, 691 S.E.2d 92 (2010) alleged that Ms. Ingram fell while stepping over the curb to walk on the sidewalk at Cameron Village in Raleigh. At the time of the accident, Ms. Ingram qualified for handicapped parking, but, she did not utilize a handicapped space while parking. Ms. Ingram died from unrelated causes. Her testimony about the accident was not preserved. The complaint alleged: (1) failure to maintain the sidewalk; (2) the raised sidewalk was a hazard; and (3) failure to comply with the North Carolina Accessibility Code and the Americans with

Disabilities Act. The trial court granted the defendant's motion for summary judgment.

The Court of Appeals affirmed summary judgment for the defendants on the grounds that the condition of the curb and sidewalk was open and obvious.

> . . . we conclude that either the sidewalk curb where Ms. Ingram parked, or the lack of a properly handicapped sanctioned route, even if either was an obvious defect or danger, was easily discoverable or likely to be known by Ms. Ingram. Evidence forecast that Ms. Ingram had been a frequent patron of the K & W Cafeteria prior to the accident. It is well settled that a person is contributorily negligent if he or she knows of a dangerous condition and voluntarily goes into a place of danger. . . . In the present case, plaintiff presented no evidence that the curb or route to the entrance was obstructed or hidden in any way, or that her attention was diverted by a condition on the premises. 691 S.E.2d at 95-96.

McCorkle v. North Point Chrysler Jeep, Inc., ___ N.C.App. ___, 703 S.E.2d 750 (2010) involved personal injuries occurring during construction at the defendant's offices. Landmark was the general contractor for the project. Landmark hired Robey Painting as a subcontractor on the project. The plaintiff was an employee of Robey at the time of the injuries. The plaintiff was injured as he was walking down a stairwell on the project. A handrail broke causing the plaintiff to fall. The handrail was installed by a fabricator on the project. The trial court

granted the motion for summary judgment of North Point Chrysler.

The Court of Appeals affirmed summary judgment for North Point Chrysler. As a result of the construction contract, North Point Chrysler had transferred control of the premises to Landmark. North Point Chrysler had no duty to the plaintiff for injuries arising at the construction site.

> . . . this Court held that an owner or occupier of land who hires an independent contractor is not required to take reasonable precautions against "dangers which may be incident to the work undertaken by the independent contractor." . . . Accordingly, whether the duty of reasonable care applies depends on whether or not the danger at issue may be categorized as "incident to the work undertaken" by the independent contractor. . . . In this case, Defendant contracted with Landmark so that possession and control of the construction site were vested solely with Landmark. . . . we hold that the duty of reasonable care, initially borne by Defendant as owner and possessor of the construction site premises, had been shifted away from Defendant at the time of Plaintiff's accident such that Defendant was not required to inspect the construction site for hidden dangers. 703 S.E.2d at 753-754.

The decedent in Waddell v. Metropolitan Sewerage Dist., ___ N.C.App. ___, 699 S.E.2d 469 (2010) died as a result of injuries received while sledding. The decedent and her family moved into their home in November 2004. After a three-inch snow on 29 January 2005, the decedent

was using an inner tube to sled down a hill near her home. The tube rotated causing the decedent to go backward down the hill. The tube struck a sewer manhole that was elevated approximately eighteen inches above ground. All defendants moved for summary judgment on the basis that the manhole was an open and obvious condition. The trial court granted the defendants' motions for summary judgment.

The Court of Appeals affirmed summary judgment for all defendants.

> . . . the manhole was an open and obvious condition in Ms. Waddell's backyard. The manhole was stationary, positioned at the bottom of a 100-150 foot hill, and was clearly visible from the Waddells' back porch. The manhole was approximately one and a half feet above ground on the uphill side and two and a half feet above the ground on the downhill side. The manhole was four feet in diameter.
>
> Further, Ms. Waddell disregarded the warning written on the inner tube and chose to sled down the hill. Ms. Waddell knew that the manhole was at the bottom of the hill and that the inner tube was impossible to steer once it was in motion. As a result of her decision to sled down the hill, Ms. Waddell ran into the stationary manhole and subsequently died from her injuries. . . . Although plaintiffs correctly state that contributory negligence is not a bar to a plaintiff's recovery when the defendant's gross negligence, or willful or wanton conduct, is a proximate cause of the plaintiff's injuries, . . . plaintiffs have failed to forecast any evidence that MSD or CDC were grossly negligent. 699 S.E.2d at 473.

C. Corporations

White v. Collins Bldg., Inc., ___N.C.App.___, 704 S.E. 2d 307 (2011) decided the first-impression issue of an individual's tort liability for corporate acts. The complaint alleged property damages related to negligent construction of the plaintiffs' home at Wrightsville Beach. Claims were alleged against the builder, Collins Building, Inc. and Collins Building's president, Edwin Collins. The complaint alleged daily supervision by Mr. Collins of the construction of the plaintiffs' home. The trial court granted the 12(b)(6) motion of Mr. Collins.

The Court of Appeals reversed and held that the complaint alleged a claim against Mr. Collins even though there was no attempt to pierce the corporate veil.

> ". . . one is personally liable for all torts committed by him, including negligence, notwithstanding that he may have acted as agent for another or as an officer for a corporation. Furthermore, the potential for corporate liability, in addition to individual liability, does not shield the individual tortfeasor from liability. Rather, it provides the injured party a choice as to which party to hold liable for the tort."

704 S.E.2d at 312 (quoting Strang v. Hollowell, 97 N.C. App. 316, 318, 387 S.E. 2d 664, 666 (1990)).

D. Employment

The plaintiff in Matthews v. Food Lion, LLC ___ N.C. App. ___, 695 S.E.2d 828 (2010) alleged that she was injured when Brigitte Hall, an employee of Food Lion, entered the bathroom at the store at a brisk pace. Ms. Hall's duties were as a part-time cashier serving customers and bagging groceries. At the time of the incident, Ms. Hall was "clocked out" of work and was going toward the bathroom before leaving the premises. The trial court granted the defendant's motion for summary judgment on the ground that there was no genuine issue of material fact as to whether Ms. Hall was acting within the scope of her employment at the time of the incident.

The Court of Appeals affirmed summary judgment for Food Lion. The Court held that there was no evidence that Ms. Hall's actions were directed or ratified by Food Lion and that Ms. Hall was acting within the scope and course of her employment.

> Rather, the evidence establishes that Defendant had no control over the actions of its employees once they have "clocked out" of work. It is not enough that the employee was present on the employer's premises at the time of the incident. . . . Although Hall was on the premises at the time of the incident, there is not sufficient evidence to support a finding that Hall was acting within the scope of her employment or in the furtherance of any purpose of Defendant at

the time the incident occurred. 695 S.E.2d at 831.

E. Products

The minor plaintiffs in Stark v. Ford Motor Co., ___ N.C. App. ___, 693 S.E.2d 253 (2010), petition for disc. rev. granted, ___ N.C. ___, 705 S.E. 2d 741 (2011) alleged that they were injured as a result of a defective design of a 1998 Ford Taurus in which they were passengers. At the time of the accident, Cheyenne, age five, and Cody, age nine, were sitting in the back seat and were secured by a three-point seatbelt designed by Ford. The Taurus was operated by their mother, Tonya. Mrs. Stark was driving in a parking lot when the vehicle suddenly accelerated. She lost control, causing the car to collide with a light pole. Although able to walk initially, Cheyenne later lost all feeling below her rib cage and was determined to have received a spinal cord injury. The complaint alleged that Cody received severe abdominal injuries.

As a result of pretrial motions, the claim of Gordon Stark, Cheyenne's and Cody's father, was dismissed. Nicole Jacobsen was substituted as Guardian Ad Litem for Cheyenne and Cody in the action. At trial, Ford presented evidence that the injuries were caused by improper use of the seatbelts, specifically that the shoulder seatbelt had been

placed behind the back of the children. Ford also presented evidence that Cheyenne should have been using a booster seat as instructed by Ford. The plaintiff's motion for directed verdict on Ford's affirmative defenses of alteration or modification were denied. The jury answered the liability issues in favor of Ford.

On appeal, the plaintiff contended that since Cheyenne was five years-old at the time of the accident, Cheyenne was legally incapable of modifying the product under N.C.G.S. § 99B-3. Additionally, since neither of Cheyenne's parents were parties to the action, G.S. § 99B-3 was also unavailable as a defense to Ford. The Court of Appeals agreed and held that the trial court should have granted the plaintiff's motion for directed verdict on these affirmative defenses.

Addressing Ford's defense of modification or alteration as applied to Cheyenne's claim, the Court held that her age at the time of the accident eliminated this defense.

> Therefore, because Cheyenne was a child under seven years of age at the time of the alleged alteration or modification, Defendant is unable, as a matter of law, to prove the requisite element of foreseeability inherent in the proximate cause portion of N.C.G.S. § 99B-3 defense. Because foreseeability, and therefore proximate cause, is lacking in Defendant's defense as to Cheyenne, N.C.G.S. § 99B-3 is

> inapplicable to any alteration or modification alleged to have been performed by Cheyenne herself. 693 S.E.2d at 258.

Ford also argued that the parents' misuse or modification of the seat belt was a defense. The plaintiff countered that this defense did not apply because neither Tonya Stark nor Gordon Stark were parties to the action. The Court of Appeals agreed and held that the trial court should also have granted the plaintiff's motion for a directed verdict as to this affirmative defense.

> Therefore, the plain language of N.C.G.S. § 99B-3 states that the entity responsible for the modification or alteration of the product must be a party to the action in order for the defense to apply. Because Defendant asserts that the modification was performed by Gordon Stark, who is not a party to the action in this case, Defendant is unable to establish an N.C.G.S. § 99B-3 defense as to such an alleged modification. 693 S.E.2d at 260.

II. Insurance

A. Motor Vehicles

State Farm Mutual Automobile Ins. Co. v. Bustos-Ramirez, ___N.C.App.___, ___S.E.2d ___ (2011) was a declaratory judgment action to determine coverage for the underlying wrongful death action. State Farm insured a 1999 Honda owned by Mr. Ramirez. Mr. Perez lived with the Ramirez family. Mr. Perez did not have a driver's license. During the evening hours of 10 January 2009, Mr. Perez took

the keys to the Honda without asking permission from Mr. Ramirez, drove the Honda to a disco where he consumed alcohol. As he was returned, Mr. Perez drove the Honda off the road resulting in his passenger, Mr. Arriaga, being thrown from the vehicle and killed. The trial court granted State Farm's motion for summary judgment and ruled that there was no coverage by State Farm for the wrongful death action filed by the estate of Mr. Arriaga.

The Court of Appeals affirmed summary judgment for State Farm.

> While it is disputed whether Ramirez had allowed Perez to operate his vehicles at other times, it is undisputed that Ramirez had told Perez that he was not to operate any of his vehicles when he had been drinking. It is also uncontroverted that Perez was drinking on the night that Arriaga was killed, and that he knew he did not have permission to operate the Honda on that occasion. . . . We hold that based upon the uncontested facts in this case, . . . Perez did not have a reasonable belief that he was entitled to drive Ramirez' Honda automobile on the night that Arriaga was killed. ___S.E.2d at ___.

Bissette v. Auto-Owners Ins. Co., ___N.C.App.____, 703 S.E.2d 168 (2010) was a declaratory judgment action to determine coverage for a motor vehicle accident. Mr. Cleveland, president of Connected Fiber, sold a 1997 Ford F-150 to Mr. Cothran on 11 August 2007 in South Carolina. Although keys, possession and title were transferred to Mr. Cothran, the Certificate of Title was not notarized and the

North Carolina license plates remained on the vehicle. Mr. Cleveland sent an email to Auto-Owners to remove the vehicle from its policy "at renewal" on 25 November 2007. Mr. Cothran was driving the vehicle on 16 November 2007 when he was involved in an accident resulting in serious injuries to Mr. Bissette.

Auto-Owners retained Mr. Baker to represent Mr. Cothran in the lawsuit brought by Mr. Bissette. Mr. Baker contacted Mr. Cothran, talked with him by telephone and stressed the importance of his cooperation. The facts of the case were not discussed. Thereafter Mr. Cothran did not respond to any other efforts to contact with him and did not appear at trial. The jury awarded Mr. Bissette $375,000 in compensatory damages and $80,000 in punitive damages. Mr. Bissette initiated this declaratory judgment action after Auto-Owners failed to pay the judgment and raised questions about the existence of coverage for Mr. Bissette's damages award. The trial court granted Mr. Bissette's motion for summary judgment and ruled that the Auto-Owners policy provided coverage for the jury verdict.

The Court of Appeals affirmed. Since the title to the F-150 had not been legally transferred and Mr. Cleveland specifically requested that the F-150 be removed from the policy "at renewal" on 25 November 2007, the vehicle was

still covered by the policy at the time of the accident. Mr. Cothran was also an "insured" under the policy at the time of the accident because he was using a "covered vehicle" with "permission" at the time of the accident.

Auto-Owners contended that coverage was voided by Mr. Cothran's failure to cooperate in the defense of the action brought by Mr. Bissette. The Court of Appeals held that Auto-Owners was not prejudiced by Mr. Cothran's absence from the trial and failure to participate in his defense.

> We first note that, contrary to Auto-Owners' seventh contention above, Baker did not testify that Cothran's absence had a "significant impact on the outcome of the case," but rather that his absence had a "significant potential for having an adverse impact on the outcome of the case." . . . . Auto-Owners has failed to show that Cochran's absence could have been prejudicial when Cothran's liability was so clear that Baker stipulated to it. . . . Baker acknowledged that he had in his possession all of Bissette's medical records such that he could fully defend the case on damages. Additionally, Baker testified at deposition that he did not consider the damages ultimately awarded by the jury to be excessive, and, thus, he did not move to set aside the jury's verdict on damages. 703 S.E.2d at 178.

B. UM/UIM

Martini v. Companion Property & Casualty Ins. Co., ___ N.C. App.___, 679 S.E.2d 156 (2009), per curiam reversed in part and remanded, 364 N.C.234, 695 S.E.2d 101 (2010)

involved issues of underinsured motorist coverage and the insured's temporary substitute vehicle.

On 9 January 2005, Mrs. Martini told Dr. Martini that the brake warning light was activated on their Toyota. Mrs. Martini said she would take the Toyota to be repaired the following morning. Although Dr. Martini normally drove the Toyota, he drove the couple's other vehicle, a Mitsubishi, to the airport on 10 January 2005 to take a flight to a medical conference. While driving to the airport, Dr. Martini was struck by a vehicle operated by Mr. Marquez. As a result of injuries received in the accident, Dr. Martini was out of work for approximately six months during which he underwent surgery to repair his broken neck.

The automobile liability carrier for Mr. Marquez paid its limits of $30,000 to Dr. Martini. Dr. Martini's primary carrier, Southern Guarantee Insurance Company, paid its limits of $250,000 to Dr. Martini. The defendant had underinsured limits of $1 million, but denied the claim and any payments. The trial court granted the plaintiff's motion for summary judgment finding that the defendant provided underinsured coverage to Dr. Martini. The trial court also dismissed the plaintiff's claim for unfair and deceptive trade practices.

The Court of Appeals affirmed the trial court's finding that the defendant provided underinsured coverage, but reversed the trial court's dismissal of the unfair and deceptive trade practices claim on the basis that genuine issues of material fact existed. Judge Steelman dissented. Based on Judge Steelman's dissent, the Supreme Court reversed per curiam.

Judge Steelman determined that genuine issues of fact existed as to whether the Mitsubishi being driven by Dr. Martini at the time of the accident was a temporary substitute vehicle. Countering the trial evidence from Mrs. Martini that she delayed taking the Toyota for repairs for two months because of the injuries to Dr. Martini, the defendant's adjuster stated that Mrs. Martini told him that the reason Dr. Martini drove the Mitsubishi to the airport was because the Toyota was a newer and nicer vehicle than the Mitsubishi and that this was the reason he decided to leave the Mitsubishi at the airport while he was at the medical conference. Dr. and Mrs. Martini also testified that they continued to drive the Toyota after the accident and that the brake warning light subsequently "did go off." Dr. and Mrs. Martini also had a third car at home, an Audi.

> The general rules that can be gleaned from the prior case law are that the vehicle covered under the insurance policy need not be withdrawn from

> use because of some mechanical defect, it may also be unavailable due to body work in order for another to qualify as a substitute. . . . "However, the initially covered vehicle must nonetheless be actually withdrawn from use." . . . . No reasonable interpretation of the policy provision in the instant case would conclude that the Toyota was "out of service because of its breakdown, repair, servicing, loss or destruction because plaintiff did not want to leave it in the parking lot at the airport because it was "newer and nicer" than the Mitsubishi. 679 S.E.2d at 163-64.

Based on similar reasoning, the determination of whether the defendant committed unfair settlement practices would depend upon the reasons Dr. Martini was operating the Mitsubishi at the time of the accident.

Nationwide Mut. Ins. Co. v. Burgdoff, ___N.C.App.___, 698 S.E.2d 500 (2010) was a declaratory judgment action to determine the applicable UM/UIM for a wrongful death action of the defendants'/insureds' eight-year-old daughter. At the time of the initial policy with Nationwide, Mrs. Burgdoff did not execute a North Carolina Rate Bureau UM/UIM Selection/Rejection form. As a basis for summary judgment, Nationwide relied upon an affidavit from its agent stating that Mrs. Burgdoff had been provided the opportunity to purchase liability and UM/UIM coverage up to $1 million. Mrs. Burgdoff's deposition and written discovery responses indicated that she was not informed

that she could select an amount of UIM coverage that was different from the amount of liability coverage.

Concluding that there was a genuine issue of fact and that it was for the jury to determine whether the defendants were provided the opportunity to select or reject different UIM coverage, the Court of Appeals reversed.

> . . . the deciding factor for the [Williams v. Nationwide Mut. Ins. Co., 174 N.C.App. 601, 621 S.E.2d 644 (2005)] Court was not that the insured was not provided with the proper selection/rejection form; instead, the Court emphasized that the insured was not provided with any opportunity at all to even consider UIM coverage. . . . Therefore, the relevant inquiry in determining whether Williams applies is whether defendants were given the opportunity to reject or select different UIM coverage limits. 698 S.E.2d at 503.

C. Arbitration

The parties in Whitlock v. Triangle Grading Contractors, ___ N.C. App. ___, 696 S.E.2d 543 (2010) were involved in a motor vehicle accident on 15 August 2008. The plaintiff submitted a claim to his insurance company, Liberty Mutual, which was paid. Liberty Mutual then filed a claim for reimbursement of these amounts to Frankemuth Mutual Insurance Company, the defendants' carrier. This claim was referred to binding inter-company arbitration. The arbitration panel ruled in favor of Frankemuth on the

basis that Triangle Grading was not negligent in causing the accident. The plaintiff brought the present action to recover for his damages that were not paid by Liberty Mutual. The trial court granted the defendants' motion for summary judgment on the ground that the arbitration panel decision was res judicata.

Finding that the plaintiff's claim was not governed by the arbitration award, the Court of Appeals reversed.

> The dispositive issue in this case is whether the result of an arbitration between insurers may be given preclusive effect against an insured who was not a party to the arbitration. Under the facts of this case, we conclude that it may not. . . . [U]nless plaintiff is a party to the arbitration agreement, he sought to benefit directly from the arbitration, or he actively participated in or controlled the arbitration, plaintiff is not bound by the outcome of the arbitration between Liberty Mutual and Frankemuth. 696 S.E.2d at 546-47.

D. Appraisal

The defendant in Farm Bureau Mut. Ins. Co., Inc. v. Sadler, ___ N.C. ___, ___ S.E.2d ___ (June 16, 2011), as insured under Farm Bureau's policy submitted a claim for damages from a wind storm. After initially rejecting the claim, Farm Bureau mailed a check to Mr. Sadler for $3,203.03. Mr. Sandler did not cash the check and contended that he received more damage than the amount of the check. Mr. Sadler requested that the appraisal

provisions of the policy be utilized. After selecting his representative and Farm Bureau's failure to respond, Mr. Sadler obtained an ex parte order from the trial court appointing an umpire. Farm Bureau's appraiser determined the value of the loss as $31,561.30. Mr. Sadler's appraiser and the umpire determined that the value of the loss was $162,500. The trial court entered summary judgment for Mr. Sadler for $150,500. The Court of Appeals affirmed.

The Supreme Court reversed the Court of Appeals' decision and remanded the case, finding that "the plain language of this policy provides that while the appraisal process assesses the value of the loss at issue, Farm Bureau retains the right to determine in the first instance what portion of that loss is covered by the policy." Slip op. at 8. It further noted that the "appraisal process is limited to a determination of the amount of loss and is not intended to interpret the amount of overage or resolve a coverage dispute." Id.

> Although we express no opinion on the final determination of coverage, "when, as here, the facts and circumstances surrounding a claim – especially causation – remain in dispute," the finder of fact must "determine whether the ultimate cause of the claimed damages falls within the scope of the policy's exclusionary provisions, as defined by the trial court.

III. Pretrial Procedure

A. Statutes and Periods of Limitation and Repose

The plaintiff in Fox v. Sara Lee Corp., ___N.C.App.___, ___S.E.2d ___ (2011) alleged that she was sexually assaulted at work by a co-employee, and, as a result suffered severe mental health problems. The complaint alleged that the assault occurred on 24 August 2005. After the assault was reported, the plaintiff had "a complete nervous breakdown." Suit was filed on 24 September 2009. The trial court granted the defendants' 12(b)(6) motion on the basis that the claims were barred by the statute of limitations.

Holding that the statute of limitations was tolled by the plaintiff's mental disability, the Court of Appeals reversed. The Court noted that the complaint alleged that the plaintiff was mentally disabled from September 2005 until February 2011. The complaint further alleged that her employer was aware of her mental condition.

> Thus, Plaintiff's allegations, construed liberally in her favor, suggest that she had been placed on medical leave, had "a complete nervous breakdown," and became unable to manage her affairs, all at around the same time. We hold that Plaintiff's complaint sufficiently alleged that she was mentally incompetent, either concurrently with, or before, she suffered "severe emotional distress." Thus, Plaintiff's complaint was sufficient to place Defendants on notice that Plaintiff was under a disability when

> her causes of action accrued, thereby tolling the statute of limitations. . . . we hold that Plaintiff's complaint sufficiently alleged that: (1) Plaintiff became an "incompetent adult" for the purposes of tolling the statute of limitations; and (2) Plaintiff was under a disability at the time she suffered the several emotional distress which caused her claims to accrue. ___S.E.2d at ___.

Stinchcomb v. Presbyterian Medical Care Corp., ___N.C.App.___, ___S.E.2d ___ (2011) was an action alleging medical malpractice. The plaintiff, a former NFL player, alleged negligence as a result of an operation on 18 October 2005. On 17 October 2008, plaintiff filed a motion to extend the statute of limitations for 120 days pursuant to Rule 9(j) and had summons issued for the defendants. The motion was granted and the statute of limitations was extended through 17 February 2009. Neither the order extending the statute of limitations nor the summonses were served on any of the defendants. The plaintiff had alias and pluries summonses issued on 29 December 2008. Complaint was filed on 16 February 2009. Copies of the complaint and the alias and pluries summonses were served on the defendants. The trial court granted the defendants' motions to dismiss on the grounds that the actions had not been commenced within the limitations period.

The Court of Appeals affirmed dismissal of the action. Although the original summonses were issued on 17 October

2008, this was three months before filing of the complaint. The October 2008 summonses were insufficient to comply with Rule 4(a)'s requirement that "summons shall be issued 'forthwith, and in any event within five days.'" Since no summons was issued at the time of filing of the complaint in February 2009, no action was commenced.

> Because Plaintiff's complaint was filed but proper summons did not issue "within the five days allowed under the rule, the action is deemed never to have commenced." ___ S.E.2d at ___.

The trial court in Robinson v. Bridgestone/Firestone North AM., ___N.C.App.___, 703 S.E.2d 883 (2011) dismissed the adult and minor plaintiffs' claims under G.S. § 1-50(a)(6)(2008). Mr. Robinson traded a set of four tires he purchased for $20 from an unknown man for a set of used, mismatched tires given to him by an employee at the service center where Mr. Robinson had gone to have the tires mounted on his 1994 Ford Explorer. Two days later, on 2 June 2002, one of the tires blew out while Mr. Robinson's wife was driving the Explorer on Interstate 95. Passengers in the Explorer received serious injuries. Suit was filed on 27 May 2005. Discovery obtained from Firestone indicated that the tires on the Explorer were manufactured at Firestone's facility during the 35th week of 1995. Firestone had no records indicating when the tires

were shipped from the facility or the location where they were shipped. The trial court granted all defendants' motions for summary judgment.

The Court of Appeals affirmed summary judgment in favor of all defendants on the basis that the claims were barred by the six-year products liability period of repose. A different analysis applied to the claims of the adult and minor plaintiffs. As to both claims, G.S. § 1-50(a)(6) placed the burden on the plaintiffs to prove that the claims had been filed within the period of repose.

> Plaintiffs filed their complaint on 27 May 2006. Under N.C. Gen. Stat. § 1-50(a)(6), the adult plaintiffs had to show that the allegedly defective tire was initially purchased within six years of the filing of the complaint – in other words, that the tire was purchased on or after 27 May 1999. . . . Firestone does not maintain records tracking the sale of tires by their DOT identification number. . . . Although Firestone produced summaries of its shipment information for 1995 and 1996, that information does not show the dates of shipment, dates of sale, or the purchase of tires. . . . The adult plaintiffs, therefore, have pointed to no evidence as to what happened to the tire after it was manufactured in August 1995 and have failed to meet their burden of proof. 703 S.E.2d at 887.

Although claims on behalf of a minor are tolled during minority, if the claim accrued on behalf of the minor after the six-year period of repose, then the minor's claim is barred.

> The accident in this case occurred on 2 June 2002. . . . the minor plaintiffs had to show that the accident occurred less than six years after the tire was initially sold. For this action to be timely, the tire would have had to have been first sold no earlier than 2 June 1996. As plaintiff's only evidence was that the tire was manufactured in August 1995, the six-year statue of repose could have expired prior to the accrual of the minor plaintiffs' claims. Plaintiffs bore the burden of showing that the tire was not first sold until more than nine months after it was manufactured. While such a lapse of time might well be possible, plaintiffs have presented no evidence suggesting that this much time passed before sale. 703 S.E.2d at 887-888.

Finally, the plaintiffs argued that Firestone should be equitable estopped from relying on the statute of repose because "Firestone was unwilling to recover and submit information about where the tire went after it was manufactured. . . ." 703 S.E.2d at 889. In order for equitable estoppel to apply, the plaintiff "must have been induced to delay filing of the action by the conduct of the defendant that amounted to the breach of good faith." 703 S.E.2d at 889. Equitable estoppel did not apply because there was no evidence that the plaintiffs were delayed from filing of the complaint by any conduct by Firestone.

Kimball v. Vernik, ___N.C.App.___, 703 S.E.2d 178 (2010) arose from a motor vehicle accident on 22 April 2006. A complaint was filed on 16 April 2009 and summons

was issued on the same day. The initial summons was returned on 20 May 2009 unserved. Service was then attempted unsuccessfully by certified mail on 26 May 2009. The plaintiff had issued an alias and pluries summons on 31 July 2009. The defendant filed a motion to dismiss on 8 September 2009. The trial court granted the motion to dismiss.

The Court of Appeals affirmed dismissal. Although the plaintiff argued that the defendant was equitably estopped from moving to dismiss because the defendant was avoiding service, there were no facts presented to the trial court to support this argument.

> Accordingly, it was not Defendant's alleged avoidance of service that caused Plaintiff's action to be barred by the statute of limitations. Rather, it was Plaintiff's own failure to timely sue out his alias and pluries summons [within 90 days]. Therefore, Plaintiff's "claim" of equitable estoppel is meritless as Plaintiff's own conduct, and not Defendant's, led to the dismissal of Plaintiff's complaint. We further note that it does not appear that any action by Defendant was the cause of Plaintiff's decision to delay filing suit in this case for nearly three years and within a few days of the expiration of the statute of limitations. 703 S.E.2d at 180.

B. Jurisdiction

State Farm Fire and Casualty Co. v. Durapro, ___N.C.App.___, ___S.E.2d___ (2011) was a subrogation

action to recover damages to State Farm's insured's home. Suit was filed on 23 September 2009. On 22 October 2009, Linx, Ltd., a Rhode Island corporation, filed a motion pursuant to N.C. Gen. Stat. §§ 7A-258 and 7A-243 to transfer the action from Orange County District Court to Orange County Superior Court on the grounds that the amount involved was more than $15,000. On the same day, Linx filed a motion for extension of time to answer. The trial court granted the extension motion and allowed Linx until 14 December 2009 to answer. On 14 December 2009, Linx filed a motion to dismiss under Rule 12(b)(2) for lack of personal jurisdiction. The trial court denied the motion of Linx to dismiss for lack of jurisdiction.

Holding that Linx had waived jurisdiction, the Court of Appeals affirmed. On appeal, Linx argued that the Rules of Civil Procedure "superseded" the venue provisions of G.S. § 7A-258(f). For this reason, the motion for extension of time by Linx preserved any objection to jurisdiction. The Court of Appeals disagreed.

> Because Linx sought adjudicative relief from the trial court through the motion to transfer and did not consolidate its Rule 12(b)(2) motion with the transfer motion, Rule 12(h)(1) provides that Linx waived its objection to personal jurisdiction. . . . In sum, Rule 12 and N.C. Gen. Stat. § 7A-258(f) establish that Linx, by filing its motion to transfer two months prior to

> its Rule 12(b)(2) motion, waived any defense under Rule 12(b)(2). ___S.E.2d at ___.

C. Service

B. Kelley Enterprises, Inc. v. Vitacost.Com, Inc., ___N.C.App.___, ___S.E.2d ___ (2011) was a suit to collect money due under a rental agreement. The trial court granted the defendant's motion for judgment on the pleadings on the ground that the issues had been determined in a prior action in Florida.

The Court of Appeals reversed on the basis that res judicata did not apply because service in the Florida action was not effective; therefore, there was no jurisdiction over the plaintiff in the Florida action.

Service on the plaintiff in the Florida action was attempted in Forsyth County by a "NC Process Server." A "Final Judgment" by default was entered by a Florida judge. The Court of Appeals held that Florida law required service in North Carolina to be completed by the sheriff of the county where service is to be made.

> There is no evidence in the record that the Clerk of Court for Palm Beach County appointed the process server used in the present case; nor is there is any evidence that such a appointment would have been justified by neglect of the sheriff. Rather, the summons was directed to the attention of: "All and Singular the Sheriffs of the State." Thus, in the Florida action, service of process should have been carried out by the Sheriff of Forsyth County – the sheriff in the

> county where Plaintiff was to be served. Because service of process was not properly executed, the Palm Beach County Circuit Court was not a court of "competent jurisdiction." . . . . Therefore, the doctrines of res judicata and collateral estoppel do not make the Florida judgment a bar to Plaintiff's complaint. __S.E.2d at ___.
>
> Jones v. Wallis, ___N.C.App.___, ___S.E.2d ___ (2011)

determined whether the statutory requirements for service by publication had been met. The underlying dispute involved construction and financing of homes in Rockingham County. Suit was filed on 16 January 2009. The attorney for Wallis did not respond to a request to accept service. Summons was issued on 16 January 2009, however, the Guilford County sheriff was unsuccessful in three attempts to complete service. Two successive alias and pluries summons did not result in service. Service by publication was utilized. On 13 April 2009, notice of service of process by publication and an affidavit of service was filed with the Clerk. Default was entered by the Clerk on 15 April 2009. The trial court denied Wallis' motion to set aside the entry of default.

The Court of Appeals affirmed the trial court's denial of Wallis' motion to set aside default. In support of his motion to set aside default, Wallis argued to the trial court that the plaintiff should have conducted internet searches, inquired of Wallis attorney and contacted Wallis'

children to determine Wallis' location for service. The Court of Appeals concluded that the plaintiff had demonstrated due diligence.

> We note that Rule 4(j1) requires "due diligence," not that a party explore every possible means of ascertaining the location of a defendant. . . . The steps undertaken [by plaintiff] include: (1) attempted service of Wallis at his last known address . . .; (2) searching public records to find the address . . . ; (3) attempted service on Wallis . . .; (4) Internet search for Wallis; (5) counsel for Jones went personally to . . . address and talked with current residents; (6) determined from the public records that the . . . property had been foreclosed; and (7) sent a copy of complaint to Wallis' attorney and requested that he accept service. We hold that . . . Jones' actions constituted "due diligence" justifying the use of service of process by publication. . . . ___S.E.2d at ___.

D. Venue

The plaintiff in Pay Tel Communications, Inc. v. Caldwell County, ___ N.C. App. ___, 692 S.E.2d 885 (2010) alleged breach of a contract to provide telecommunications to the defendant's jail. The agreement was originally entered in 1990, then extended through 1999. The 1999 extension provided that disputes would be resolved by arbitration under the rules of the Duke Private Adjudication Center and further provided that the "venue for such arbitration shall be in Raleigh." The plaintiff filed an "Application for Appointment of Arbitrator" in Wake County Superior Court. The defendant's answer

contended that the 1999 extension was invalid and moved to transfer venue to Caldwell County. Plaintiff filed a motion to compel arbitration. The trial court granted the defendant's motion to change venue, but did not address the plaintiff's motion to compel arbitration.

The Court of Appeals affirmed transfer of venue to Caldwell County. At the time of the hearing, the Duke Private Adjudication Center had been dissolved, therefore, selection of an arbitrator was under the North Carolina Uniform Arbitration Act. The Act provides that application for an arbitrator "shall be served in the manner provided by law for the service of a summons in an action." The Act does not have a venue provision. The Act does provide that application for the appointment of an arbitrator shall be initiated by "proceedings in the superior court, similar to a civil complaint." Since the defendants were "public officers" under G.S. § 1-77(2), venue was properly transferred to Caldwell County. The arbitration provision in the 1999 extension did require venue in Wake County, but venue applied only to arbitration. It did not govern venue for "judicial proceedings that may involve issues associated with the arbitration." 692 S.E.2d at 888.

Roberts v. Adventure Holdings, LLC, ___N.C.App.___, 703 S.E.2d 784 (2010) involved proper venue for an action

for injuries to a minor. The Court of Appeals held that the residence of the guardian ad litem did not determine venue and that the appropriate remedy was to transfer venue rather than dismiss the action.

> Here, all real parties in interest are located either out-of-state or in Wake County. Roberts resides in Virginia with her parents. Adventure's principal office is in Jacksonville, Florida, Capital's principal office is in Wake County. Adventure Landing – the site of the incident at issue – also is located in Wake County. Nevertheless, Robert's GAL filed the complaint initiating the action in Durham County. Because the residence of the GAL is the only conceivable connection to Durham County and because we hold that the GAL's residence, standing along, is insufficient to establish venue, we conclude that Durham County is an improper venue for the instant action. . . . We hold that "venue is not jurisdictional but is only ground for removal to the proper county upon a timely objection made in the proper manner." . . . . Accordingly, we hold that, rather than dismissing Robert's case, the trial court should have transferred it from Durham County, an improper venue, to Wake County, the proper venue. 703 S.E.2d at 787-788.

E. Costs

Jarrell v. Charlotte-Mecklenburg Hosp, ___N.C.App.___, 698 S.E.2d 190 (2010) was an action alleging medical malpractice. The jury returned a verdict in favor of the defense. On appeal, the plaintiff alleged that the trial court lacked authority to award costs related to travel and trial testimony of out-of-state expert witnesses for the

defendants. Acknowledging that the expert witnesses were served with subpoenas, the plaintiff argued that the subpoenas were not effective to compel attendance of the out-of-state witnesses.

The Court of Appeals affirmed the award of costs of the out-of-state expert witnesses. The Court acknowledged that G.S. § 7A-314 limits the discretion of the trial judge to award expert witness fees as costs only when the expert is under subpoena. The plaintiff, however, did not have standing to contest the effectiveness of the subpoenas served upon the out-of-state expert witnesses.

> . . . Plaintiffs cannot raise as a defense to the motion for costs the invalidity of these subpoenas by asserting the rights of non-party expert witnesses—namely, that the subpoenas were ineffectual to compel the appearance of Drs. Rosenthal and Scott at trial. Because Plaintiffs lacked standing to seek adjudication of the precise issue on which their appeal is based, we do not reach their affiliated arguments regarding statutory interpretation. As such, where Drs. Rosenthal and Scott were undisputedly served with subpoenas to testify at trial and Plaintiffs are not entitled to argue that their appearance was voluntary. In fact, Defendants have met not only the requirements of § 7A-305(d)(11) but have also overcome the hurdle imposed by § 7A-314 "that the cost of an expert witness cannot be taxed unless the witness has been subpoenaed." 698 S.E.2d at 194.

The plaintiff in Free Spirit Aviation v. Rutherford Airport, ___N.C.App.___, 696 S.E.2d 559 (2010) alleged

claims arising out of the defendants' failure to renew the plaintiff's contract as the fixed base operator at the defendant airport. The defendants' previous motion for summary judgment was denied by the trial court and affirmed by the Court of Appeals. After remand, the defendants' second motion for summary judgment was denied by the trial court. At the close of the plaintiff's evidence, the trial court granted the defendants' motion for directed verdict as to the plaintiff's claims alleging malicious and retaliatory acts, wrongful interference with contract and punitive damages. After a jury verdict in favor of the plaintiff on the claim alleging violation of the Open Meetings Law, the defendants moved for attorneys' fees under G.S. § 6-21.5. The trial court denied the defendants' motion for attorneys' fees.

The Court of Appeals affirmed denial of attorneys' fees to the defendant. Concluding that there must be "a complete absence of a justifiable issue in the case," the Court also noted the difference in evidence considered on a motion the summary judgment and directed verdict.

> Defendants argue, however, that such an approach would improperly preclude an award of fees wherever a case proceeded to trial after a denial of a motion for summary judgment. We need not address whether fees are always precluded after a denial of summary judgment because under the circumstances of this case – given the trial

> court's summary judgment order, our previous opinion in Free Spirit I, and defendants' arguments relying on deposition testimony – the trial court did not err in denying defendants' motion for attorneys' fees under N.C. Gen. Stat. § 6-21.5. 696 S.E.2d at 565.

F. Collateral Estoppel

Estate of Means v. Scott Electric Co., Inc., ___N.C.App.___, 701 S.E.2d 294 (2010) was a wrongful death action arising from the ten-year-old decedent being crushed between an elevator cab and shaft well. Suit was filed initially on 25 January 2007 against the owners of the condominium where the elevator was located and Scott Electric, the installer of the elevator. Scott filed a Rule 12(c) motion alleging that any negligence by Scott was insulated and superseded by the negligence of Mr. Pridgen, the managing member of the condominium association when he removed the safety devices on the elevator in order to paint the elevator walls. The trial court granted Scott's 12(c) motion and dismissed the case against Scott without prejudice. The trial court amended its order by allow the plaintiff to re-file the complaint "within the time period prescribed by the statute of limitations and/or statute of repose." 701 S.E.2d at 297

The plaintiff filed a second complaint on 12 October 2007 against Pridgen and the condominium association. The

plaintiff settled all claims in that suit. On 21 July 2008, the plaintiff filed suit against Scott alleging improper installation of the elevator. Scott filed a Rule 12(c) motion on the basis that the claims were barred by collateral and judicial estoppel. The trial granted the motion and dismissed the action.

The Court of Appeals reversed. The Court first held that collateral estoppel did not apply because the first action against Scott had been dismissed without prejudice. There was, therefore, no "final judgment on the merits" against Scott. 701 S.E.2d at 298.

Judicial estoppel was also not applicable because the plaintiff had not taken inconsistent positions in the two lawsuits against Scott.

> The prior complaint was directed at Scott and not at Pridgen. The allegations in the 25 January 2007 amended complaint dealing with Pridgen's knowledge and experience in the construction industry in general are not inconsistent with the allegations in the 2008 complaint pertaining to specific duties owed by Scott to the owner of the premises under the Safety Checklist and Owner's Manual. These documents contained specific warnings and procedures to be followed when the elevator was used by children. These allegations are not factually inconsistent and could not serve as a basis for judicial estoppel in this case. . . . plaintiffs . . . . were rather setting forth differing legal theories of liability for Lauren's death against multiple defendants, which is permissible under Rule 8 of the Rules of Civil Procedure. 701 S.E,2d at 299-300.

G. Discovery

The parties in Kelley v. Agnoli, ___ N.C. App.___, 695 S.E.2d 137 (2010) were engaged to be married. Mr. Kelley agreed to pay several law firms to negotiate and prepare a premarital agreement between the parties. The parties did not marry. Instead, Mr. Kelley filed the present action for fraud. Mr. Kelley served a subpoena duces tecum on all law firms that represented Ms. Agnoli in preparing the pre-marriage agreement. Negotiations followed between counsel for Mr. Kelley and the law firms that received subpoenas. Davis & Harwell served objections directed at the breath of the subpoena as well as the privileged nature of the documents requested.

The trial court granted Mr. Kelley's motion to compel production of the documents and required Davis & Harwell to submit a privilege log and to provide in camera the documents the law firm contended were privileged. The trial court's order included the statement that the subpoena was "overly broad and did include . . . the possibility that one of the counsel who represented the ex-wife of [Mr. Kelley] would have to disclose matters completely unrelated to the issues involved in the case at bar." The trial court also rejected Mr. Kelley's request

for sanctions against Davis & Harwell. Although Davis & Harwell continued to raise the issue of undue burden and expense, the trial court did not rule on that matter.

After review of the privilege log and documents submitted in camera, the trial court found that the privilege log "accurately described" the documents withheld. The trial court then entered an order indicating that it was required under Rule 45(c)(1) and (c)(6) to protect a person from significant expense in complying with a subpoena. Accordingly, after receiving records from the law firm detailing the time and expense involved, the trial court order Mr. Kelly to pay Davis & Harwell $40,000.

The Court of Appeals affirmed the imposition of sanctions, but remanded for a determination by the trial court of the amount of the sanctions. Mr. Kelley argued first that sanctions were not authorized because the trial court had granted Mr. Kelley's motion to compel the documents. The Court of Appeals disagreed.

> . . . we hold that if a trial court finds a violation of Rule 45(c)(1), it must impose an appropriate sanction. The nature of that sanction, however, rests within the discretion of the trial court and will not be reversed on appeal without a showing of abuse of discretion. 695 S.E.2d at 145.

The Court of Appeals noted that Mr. Kelley was on notice throughout the discovery dispute that Davis &

Harwell contested the breath of the subpoena and intended to seek sanctions. The Court also rejected Mr. Kelley's argument that Rule 45 did not apply because Davis & Harwell was a party since it represented Ms. Agnoli. The Court held that Davis & Harwell was "never a party," thus, Rule 45 applied. Because the record did not reflect the basis of the award of the $40,000 sanctions, the matter was remanded for findings of fact on the amount.

Crook v. KRC Management Corp., ___ N.C. App.___, 697 S.E.2d 449, petition for disc. rev. denied, ___ N.C. ___, 703 S.E.2d 442 (2010) arose from a slip and fall by Mrs. Crook at the defendants' shopping center. On 19 February 2007, the plaintiffs submitted written discovery to the defendants. On 21 August 2007, Judge Baddour entered an order on the plaintiffs' motion to compel in which he granted in part the plaintiffs' motion to compel, but, also, denied the remainder of the plaintiffs' motion to compel. No findings of fact were made as to the documents sought by the motion to compel. The record did not identify the legal issues argued before Judge Baddour. No transcript of the hearing was prepared.

The plaintiffs filed a second motion to compel requiring production of documents requested in the initial written discovery. The trial court entered an order on 10

October 2008 granting the plaintiffs' motion to compel. An additional hearing was held on 1 December 2008 on plaintiffs' motion for sanctions based on the defendants' alleged failure to comply with the discovery ordered by the court on 10 October 2008. On 17 December 2008, the trial court granted the plaintiffs' motion for sanctions and ordered the defendants to produce the documents requested. The sanctions motion also required the defendants to pay $50,000 in sanctions and $8,875 in attorney fees.

On 28 January 2009, the trial court held a hearing on the plaintiffs' next sanctions motion. The trial court allowed the plaintiffs' sanctions motion, struck the defendants' answer and entered judgment in favor of the plaintiffs.

Finding that the second order entered by the trial court on 10 October 2008 overruled Judge Baddour's order of 21 August 2007, the Court of Appeals reversed. Because there were no findings of fact entered by Judge Baddour as to the discovery requests considered or the legal issues argued and there was no transcript of the hearing before Judge Baddour, the record showed only that the plaintiffs sought production of additional documents that Judge Baddour had denied.

> As a result, by seeking the entry of an order compelling the production of documents based on the same request for production of documents that had been before Judge Baddour and which had led to the entry of Judge Baddour's order refusing to order the production of additional documents, Plaintiffs were effectively asking the trial court to modify or overrule Judge Baddour's earlier order ruling on their original motion to compel, an action that the trial court lacked the authority to take unless the existence of one of the limited exceptions to the general prohibition against one trial judge overruling another was established. ___ S.E.2d at ___.

First, the Court of Appeals observed that Judge Baddour's order of 21 August 2007 was never brought to the attention of any of the subsequent trial judges conducting hearings on the plaintiffs' motion to compel and sanctions. As a result, the subsequent trial judges were not presented with whether there had been a change of circumstances that would allow reconsideration of Judge Baddour's order.

> First, the determination of whether an adequate change in circumstances has occurred must be by the trial court, not the parties. . . . Secondly, in the absence of adequate findings specifying the nature of the change of circumstances upon which the court relies, it is "without authority to overrule, <u>either expressly or implicitly</u> [the first judge's] prior determination" as reflected in its order. . . . In other words, where the trial court fails to find that there has been a material change of circumstances, it has no authority to modify the order of another judge. ___S.E.2d at ___.

Since all orders by the trial court after Judge Baddour's order were "invalid discovery orders," the sanctions entered in each order were equally valid.

The Court in Harbour Point Homeowners' Association, Inc. v. DJF Enterprises, Inc., ___ N.C. App.___, 697 S.E.2d 439 (2010) determined that the plaintiffs' appeal from a discovery order was interlocutory and, thus, not appealable. The Court also gave guidance concerning the trial court's certification under Rule 54(b) and inadvertent production of privileged documents.

The plaintiffs alleged that the defendants manufactured defective building materials used in the plaintiffs' subdivision. The defendants produced documents in response to the plaintiffs' written discovery requests. The defendants subsequently contended that some of the documents were inadvertently produced and were privileged. The plaintiffs disagreed. The trial court ordered that the contested documents be returned to the defendants. The trial court also certified the order for immediate appeal pursuant to Rule 54(b).

The Court of Appeals dismissed the appeal as interlocutory. First, because the order was not a final judgment, it was subject to certification under Rule 54(b). Factually analyzing the disputed documents, the Court

concluded that a substantial right of the plaintiffs was not affected.

> Thus, the memo contains the opinions of a university professor in the field of wood science, unsupported by factual information concerning his qualifications, the basis of his opinions, the literature he reviewed, the testing he conducted, or the results of any testing. . . . it does not "establish what [Defendant's] employees, outside product testers, and experts knew about the adequacy of the PrimeTrim product and when they knew it." . . . we conclude that the memo addressed in the trial court's order does not contain information that is "highly material to a determination of the critical question to be resolved in the case. . . . and that the order directing Plaintiff to return the memo to Defendant did not implicate a "substantial right" that will be lost absent immediate review." 697 S.E.2d at 446-47.

The plaintiff in Bryson v. Haywood Regional Medical Center, ___N.C. App.___, 694 S.E.2d 416 (2010) alleged that she was wrongfully terminated from her employment because she filed occurrence reports concerning patient safety. In response to the plaintiff's requests for production of documents, the defendants refused to produce some of the requested documents on the grounds that the documents were produced or considered by a medical review committee and were protected by N.C.G.S. § 131E-95(b). The plaintiff moved to compel production of the documents. The defendants responded to the motion to compel, but did not file affidavits or documents supporting the claim of

privilege. The trial court ordered that the disputed documents be produced for in camera review. The trial court then ordered production of some of the documents.

Finding that the defendants had not met their burden of showing that the documents were privileged and that the trial court had not abused its discretion, the Court of Appeals affirmed production of the documents. The Court noted that a claim of privilege is not sufficient to support withholding requested documents. Additionally, when there is no factual support for the claim of privilege, the Court can only determine privilege by the contents of the documents. The contested documents did not identify the sender and recipients. The mere fact that the recipients of the documents may have been members of the medical review committee did not carry the defendants' burden.

> Although the reports identify themselves as peer review documents, . . . "the title, description, or stated purpose attached to a description, or stated purpose attached to a document by its creator is not dispositive. . . ." In sum HRMC submitted no affidavits or other evidence to support its claim that the documents at issue were protected from discovery under N.C.G.S. § 131E-95(b). In addition, the documents on their face, do not establish that they are privileged. 694 S.E.2d at 422.

The plaintiff in Midkiff v. Compton, ___ N.C. App. ___, 693 S.E.2d 172 (2010) alleged that the defendant's car

ran off the road and struck the plaintiff while she was jogging. The defendant submitted written discovery to the plaintiff requesting medical records of her treatment within the ten years preceding the accident. The trial court allowed the defendant's motion to compel, but limited production to the five years preceding the accident. The trial court declined to review the plaintiff's medical records in camera, reasoning that the judge at trial would be in a better position to evaluate the records based on evidence presented. The court also allowed the plaintiff's motion for a protective order.

Finding no abuse of discretion, the Court of Appeals affirmed the trial court's order requiring production of the plaintiff's medical records. Rejecting the plaintiff's claim of privilege, the Court held that the plaintiff waived any physician-patient privilege by alleging injury from the accident.

> Plaintiff impliedly waived her physician-patient privilege as to medical records causally or historically related to her "great pain of body and mind." . . . we can find no decision that is "manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." 693 S.E.2d at 181.

Similarly, the Court of Appeals found no abuse of discretion by the trial court's decision not to conduct an

in camera review of the plaintiff's medical records prior to ordering production.

Similar issues were before the court in Lowd v. Reynolds, ___ N.C. App. ___, 695 S.E.2d 479 (2010). The plaintiff alleged injuries from an automobile accident. The defendant served a written discovery request for the plaintiff's medical records for the preceding thirteen years. The plaintiff objected to the defendant's discovery on the grounds of privilege and being overly broad. The trial court granted the defendants' motion to compel. The trial court also granted the plaintiff's motion for a protective order limiting use of the records produced to the present litigation.

Relying on Midkiff, the Court of Appeals held that the plaintiff had impliedly waived the physician-patient privilege by bringing the present action for personal injury. The plaintiff also objected to being required to produce medical records that were not in his possession, custody or control. The Court held that since the plaintiff had the right to obtain the documents, Rule 34 was satisfied.

> . . . plaintiff has the right to obtain his medical records upon request pursuant to the Health Insurance Portability and Accountability Act ("HIPPA"). . . . Furthermore, Wheatley's offer to obtain the medical records on

> plaintiff's behalf and at Wheatley's expense eliminates any legitimacy to plaintiff's perceived difficulty. Because plaintiff has a legal right to his medical records, they are considered to be within his "possession, custody or control" pursuant to our prior interpretation of Rule 34 of the North Carolina Rules of Civil Procedure, and the trial court did not abuse its discretion by compelling the production of such records. 695 S.E.2d at 484.

First Mt. Vernon Indus. Loan v. Prodev XXII, ___N.C.App.___, 703 S.E.2d 836 (2011) was an action seeking judicial foreclosure. The plaintiff and defendant noticed the deposition of Mr. Dillahunt, Jr., a non-party. Mr. Dillahunt, Jr. did not appear for deposition as noticed. The trial court granted the parties' motions for contempt and sanctions under Rules 45(e) and 37(d) and awarded attorneys' fees and costs.

The Court of Appeals reversed the award of attorneys' fees and remanded to the trial court. The Court held that Rule 37(a) did not authorize attorneys' fees against a non-party.

> Rule 37(a) demonstrates further that the General Assembly has purposefully distinguished between parties and non-parties. Rule 37(a) provides for the filing of motions to compel discovery, and Rule 37(a)(1) specifies that such a motion may be directed "to a party or a deponent who is not a party." Rule 37(a)(2) states that "the discovering party may move for an order" compelling discovery "if a deponent fails to answer a question propounded or submitted under rules 30 or 31" or if "a party" fails to answer

> an interrogatory or fails to permit inspection of documents.
>
> Because Dillahunt was not a party, he was not subject to sanctions under Rule 37(d). We hold that the trial court, therefore, erred in basing its award of attorneys' fees and costs on Rule 37(d). 703 S.E.2d at 841.

Rule 45(e)(2) does authorize attorneys' fees if the deponent objects to the subpoena and files a motion to quash the subpoena. Dillahunt, however, did not object to the subpoena or file a motion to quash. The case was remanded to the trial court to determine an appropriate sanction for Dillahunt's failure to appear at the noticed deposition.

H. Arbitration

The plaintiffs in Ellison v. Alexander, ___N.C.App.___, 700 S.E.2d 102 (2010) alleged that Mr. Alexander fraudulently misled the plaintiffs into investing in The Elevator Channel. Mr. Alexander was the CEO of The Elevator Channel. At the time each plaintiff purchased stock in The Elevator Channel, they signed a Subscription and shareholder Agreement (SSA) that included an arbitration clause covering "all disputes and claims arising in connection with this Agreement." The trial court denied Mr. Alexander's motion to stay the litigation and compel arbitration.

The Court of Appeals reversed and remanded to the trial court for an order staying further proceedings and requiring arbitration. Although the complaint alleged individual liability against Mr. Alexander related to his statements to the plaintiffs to invest in The Elevator Channel, the Court held that Mr. Alexander's "liability stemmed from conduct undertaken in his corporate, rather than his personal, capacity." 700 S.E.2d at 109.

Using similar reasoning, even though Mr. Alexander did not sign the SSAs, he was entitled to enforce the arbitration clauses.

> Thus, we conclude, based on the allegations set out in the complaint, that Defendant was acting as an agent of The Elevator Channel at the time that the conduct upon which Plaintiffs' claims are predicated occurred, so that Plaintiffs' claims are inextricably entwined with the provisions of the SSAs, entitling Defendant to enforce the arbitration provisions of that agreement. 700 S.E.2d at 111.

I. Woodson Claims

The decedent in Valenzuela v. Pallet Express, Inc., ___N.C.App.___, 700 S.E.2d 76 (2010) was a seventeen-year-old Guatemalan national legally in the United States and had been working for the defendant four months at the time of his death. Although his death was not observed by other employees, it appears that the decedent was crushed in a

pallet shredder. NCOSHA issued citations for safety violations, including: (1) allowing an underage employee to work on heavy equipment; and (2) removing safety guards from the shredder. The trial court granted the defendants' motions for summary judgment.

The Court of Appeals affirmed dismissal of the wrongful death claim.

> . . . the evidence tended to show that defendants were aware a safety guard had been removed from dangerous machinery in violation of safety regulations and still instructed an unskilled underage employee to operate it in violation of the law. . . . these facts do not support the inference that Pallet Express and Briggs knew their actions were substantially certain to cause Nery's serious injury or death. 700 S.E.2d at 79-80.

J. Rule 56 – Summary Judgment

Hodges v. Moore, ___ N.C. App. ___, 697 S.E.2d 406 (2010) was an action for breach of contract relating to customizing the plaintiff's vehicle. The trial court granted the defendant's motion for summary judgment, finding "no genuine issue of material fact." The trial court declined the plaintiff's request to make findings of fact and conclusions of law.

Holding that Rule 52 does not apply to rulings on summary judgment, the Court of Appeals affirmed.

> Judge DeRamus' order stated that the trial court "finds and concludes that there is no genuine issue of material fact and Defendant is entitled to judgment as a matter of law." We hold this order to be sufficient and that the provisions of Rule 52 of the Rules of Civil Procedure do not apply to orders granting summary judgment pursuant to Rule 56. "Rule 52(a)(2) does not apply to the decision on a summary judgment motion because, if findings of facts are necessary to resolve an issue, summary judgment is improper." ___ S.E.2d at ___.

First Gaston Bank v. City of Hickory, ___ N.C. App. ___, 691 S.E.2d 715 (2010) was an action for inverse condemnation related to a storm drain pipe collapse. The City moved for summary judgment. The plaintiff's opposition to the City's motion for summary judgment relied upon the depositions of non-parties that were taken in two separate lawsuits. The trial court granted the City's motion for summary judgment.

Concluding that the trial court had properly relied upon the non-party depositions in the other lawsuits, the Court of Appeals affirmed summary judgment for the City.

> We . . . hold that depositions, if they meet the requirements of an affidavit, may be used in summary judgment proceedings even if the party against whom the deposition is used was not present or represented at the taking of the deposition. . . . In this case, the deponents were sworn, and the City has made no showing that the depositions fail to meet the requirements of affidavits set out in Rule 56(e) . . . 691 S.E.2d at 719-720.

Ahmadi v. Triangle Rent A Car, Inc., ___ N.C. App. ___, 691 S.E.2d 101 (2010) was an action by a purchaser of a wrecked vehicle at an auction to obtain title to the vehicle. The defendant assisted the plaintiff on two separate occasions to obtain title to the vehicle. For reasons not clear, the South Carolina Department of Motor Vehicles refused to recognize the plaintiff's title. The defendant submitted interrogatories to the plaintiff seeking to identify the title defect. The plaintiff responded, "The document was not valid. South Carolina DMV needed more information. . . . completely deficient." When the defendant deposed the plaintiff and was questioned about whether he or his brother had contacted the defendant before suit was filed, the plaintiff responded, "I really don't remember." In opposition to the defendant's motion for summary judgment, the plaintiff submitted his brother's affidavit stating, "Repeated representations were made by Triangle that they would resolve this issue." The plaintiff relied on this affidavit to create an issue of fact to defeat the defendant's motion for summary judgment. The trial court granted the defendant's motion for summary judgment.

The Court of Appeals affirmed summary judgment for the defendant. Directly addressing the plaintiff's attempt to

create an issue of fact by contradicting the plaintiff's deposition testimony, the Court stated:

> A party is not permitted to file affidavits contradicting prior testimony for the purpose of creating an issue of fact. 691 S.E.2d at 103.

Profile Investments No. 25 v. Ammons East, ___N.C.App.___, 700 S.E.2d 232 (2010) was an action alleging breach of contract. Ammons filed motions for summary judgment on 27 November 2007, 21 May 2008 and 26 November 2008. The trial court denied the first two summary judgment motions, then granted the third summary judgment motion.

The Court of Appeals vacated the order granting Ammons' 26 November 2008 summary judgment on the basis that the trial judge had not made the required determination of a change of circumstances from the previous denial of Ammons' summary judgment motion.

> One superior court judge may only modify, overrule, or change the order of another superior court judge where the original order was (1) interlocutory, (2) discretionary, and (3) there has been a substantial change of circumstances since the entry of the prior order. A substantial change in circumstances exists if since the entry of the prior order, there has been an intervention of new facts which bear upon the propriety of the previous order. The burden of show the change in circumstances is on the party seeking a modification or reversal or an order previously entered by another judge. 700 S.E.2d at 234.

K. Consent Judgment

Arising in a marital dispute, Griffith v. Curtis, ___N.C.App.___, 696 S.E.2d 701 (2010) explains the finality of a consent judgment. The action sought distribution of the marital assets and custody of the children of the marriage. After an absolute divorce was granted, the parties engaged in mediation concerning the equitable distribution claims. Reaching agreement, the parties signed a Memorandum of Judgment that was presented to the trial judge as a Consent Judgment. The Consent Judgment was signed by the trial judge and filed.

In response to the divorced husband's motion to hold the plaintiff in contempt for failing to cancel a lien on real property, the plaintiff filed a Rule 60(b) motion to set aside the Consent Judgment on the grounds that the Judgment was "completely and utterly unfair." The trial judge denied the motion to set aside the Consent Judgment. The Court of Appeals affirmed.

> Once a memorandum of judgment is incorporated into a consent judgment, the parties lose their contract defenses. . . . The doctrine of res judicata bars those defenses that could have been addressed before the entry of judgment including unconscionability. . . . Parties seeking to set aside a consent judgment are limited to proving lack of consent, fraud, mutual mistake, or unilateral mistake under some misconduct. 696 S.E.2d at 704.

L. Release

The plaintiff in Runnels v. Robinson, ___N.C.App.___, ___S.E.2d ___ (2011) sued for breach of contract related to the purchase of her residence. She alleged deficiencies in the septic system and failure to comply with the Building Code. After suit was filed, the plaintiff sent a demand letter to Flat Rock Realty with similar complaints. On 28 August 2008, the plaintiff and Flat Rock signed a "Release of All Claims" to include "all other persons, corporations, firms, associations or partnerships of and from any and all claims. . . ." Defendants filed a motion for summary judgment in September 2009. In January 2010, plaintiff and Flat Rock executed a "Release of Claims Against Certain Tortfeasors" (Revised Release) attempting to cancel the original release and stating that it was not intended to release claims against the defendants in the present action. The trial court granted the defendants' motion for summary judgment.

The Court of Appeals affirmed summary judgment dismissing all claims against the defendants.

> From the language of the Original Release, it is clear that defendants were intended third-party beneficiaries. "It is well settled that, after acceptance or action on a contract by a third person for whose benefit it was made, the original parties may not, without the consent of such third person, rescind the contract by mutual

> agreement, so as to deprive him of its benefits." . . . Because the Original Release released defendants from liability, the subsequent Revised Release had no effect on defendants. ___S.E.2d at ___.

M. Mediation

Apple Tree Ridge Neighborhood Association v. Grandfather Mountain Heights Property Owners Corp., ___N.C. App.___, 697 S.E.2d 468 (2010) was a dispute concerning access to a right-of-way from U.S. 221 into both parties' subdivision. All parties attended a mediated settlement conference and reached an agreement allowing the defendants permanent access to the right-of-way in return for the defendants executing the plaintiffs' road maintenance agreement for the right-of-way. While the consent order and maintenance agreement were being circulated for signature, it was determined that the grade on the road was in excess of the grade in the original subdivision agreement. Tommy Burleson, Director of the Avery County Planning & Inspections Department, also informed the parties that the new road would have to comply with the North Carolina State Building Code. The settlement agreement was revised to reflect these considerations, however, Weisman, the developer of the defendants' subdivision, refused to sign the consent order because of the increased costs.

The plaintiffs filed a motion for reformation and enforcement of the settlement agreement and requested that the trial court reform the terms of the settlement to reflect the engineering issues. The trial court granted the plaintiffs' motion, finding by "clear, cogent and convincing evidence that there was a 'meeting of the minds of the parties as to their intention to establish a legally sufficient right-of-way for a new road' and that the parties were acting under a mutual mistake as to the legal sufficiency of the twelve-foot-wide road easement." ___ S.E.2d at ___.

Finding that the trial court could not reform a contract because of mistake, the Court of Appeals reversed.

> By reforming the language in the settlement agreement to reflect Clark's [grading consultant] recommended modifications to the proposed right-of-way and enforcing the agreement against Weisman, the trial court "compelled compliance with terms not agreed upon or expressed by the parties in the settlement agreement." . . . This practice is contrary to the law of North Carolina. The trial court erred by granting plaintiffs' motion to reform and enforce the settlement agreement. ___ S.E.2d at ___.

SPX v. Liberty Mutual Ins. Co., ___N.C.App.___, ___S.E.2d ___ (2011) was a declaratory judgment action by SPX, the insured under several policies providing coverage for asbestos claims. One of the defendants, Liberty

Mutual, and SPX participated in a mediation with the trial judge acting as mediator. Liberty and SPX entered into stipulations for the mediation, including that mediation statements would be submitted confidentially to the trial judge and all negotiations were inadmissible at trial. When the mediation concluded, the parties believed they had reached an agreement. Liberty's counsel believed the settlement was contingent on approval by Liberty's management on the amount of the annual cap on deductibles. SPX and its counsel did not believe the contingency was part of the settlement. Thereafter, Liberty informed SPX that its management had not approved the settlement.

During a status conference with the trial judge, Liberty informed the court that its management would not approve the settlement. The trial judge stated that he believed representatives of Liberty present at the mediation had authority to approve the settlement. The trial court then entered a show cause order for Liberty to address why the settlement should not be enforced and sanction entered. After a hearing, the trial court entered an order enforcing the settlement and dismissed any Liberty defenses related to policy deductibles based on Liberty's "improper negotiating conduct." Liberty then moved to disqualify the trial judge based on confidential

information disclosed to him during the mediation. The motion was denied.

The Court of Appeals affirmed all rulings by the trial court concerning Liberty Mutual. Liberty argued first that it was error to enforce an oral agreement, citing G.S. § 7A-38.1 requiring all mediated settlement agreements to be in writing. The Court of Appeals held that G.S. § 7A-38.1 applies only to "a pretrial, court-ordered conference of the parties . . . conducted by a mediator." There was no order in the present case. Moreover, a trial judge may pursue pretrial resolution through "other available dispute resolution methods." G.S. § 7A-38.1(i).

Liberty next contended that it was error for the trial judge to find that an oral settlement agreement had been reach and to base this decision on matters discussed during the conference that the parties had stipulated would be inadmissible. During the hearing before the trial judge about whether an oral settlement had been reached, Liberty relied upon affidavits and called witnesses to testify about what occurred during the settlement conference in an effort to establish that a settlement had not been reached. The Court of Appeals found this to be an instance of "invited error" because Liberty had not argued to the trial judge that he should not consider confidential matters

presented during the conference. Liberty had, in fact, "compelled the trial court to consider the very evidence it now objects to" and thus could not "complain [on appeal] that the trial court had considered that very evidence" it had presented to the trial judge.

In a related argument, Liberty argued that the trial judge had used personal knowledge from ex parte communications during the conference as grounds for his ruling that a settlement had been reached. The trial judge's order concluding that a settlement had been reached recited that the order was based on the briefs, affidavits, testimony and arguments of counsel. The Court of Appeals stated that it was assumed that the trial judge had "relied solely upon the competent evidence and disregarded incompetent evidence."

The trial judge's ruling on Liberty's motion to recuse was reviewed by the Court of Appeals for abuse of discretion. In addition to finding no abuse of discretion, the Court of Appeals also noted the inconsistencies in Liberty's arguments.

> Further, we hold that a party may not argue its substantive point in the trial court with full knowledge of the alleged ground for disqualification, and then, upon losing on the merits, resort to a motion for recusal. ___S.E.2d at ___.

Liberty assigned error to the trial judge's entry of sanctions based on the trial judge's determination that Liberty did not have authorized representatives at the conference to agree to a settlement. The stipulations agreed to by the parties provided that a party representative would be present with authority to settle the case. By contending that the settlement was contingent upon approval of Liberty management, Liberty had violated the preconference stipulations. This "willful violation" of the stipulations provided the required grounds for the trial judge's entry of sanctions striking Liberty's defenses.

N. Unfair and Deceptive Practices

White v. Thompson, ___ N.C. ___, 691 S.E.2d 676 (2010) arose from a partnership dispute. White, Ellis and Thompson were partners in Ace Fabrication and Welding. Among several projects, Ace worked at and bid on activities at Smithfield Packing. The partners began to disagree over work assignments and schedules. Eventually, Thompson withdrew from the partnership and formed his own company. White and Ellis sued Thompson alleging that he violated his duties to his partners and conspired with employees of Smithfield Packing to divert work from Ace to Thompson's new company. The jury found that Thompson breached his

fiduciary duties and awarded $138,195.00 in damages. The jury also found that Thompson failed "to act fairly, honestly and openly." The trial court trebled these amounts pursuant to N.C.G.S. § 75-16.

The Supreme Court held that activities within the partnership did not violate Chapter 75, and, therefore, reversed the award of treble damages.

> The General Assembly did not intend for the Act to regulate purely internal business operations. In the present case the breaching partner's unfair conduct was solely within a single partnership. Accordingly, we hold that his action is not "in or affecting commerce" as that term is used in N.C.G.S. § 75-1.1 and that such conduct is therefore not a violation of the Act. 691 S.E.2d at 676-677.

The plaintiff in MRD Motorsports v. Trail Motorsports, LLC, ___ N.C. App. ___, 694 S.E.2d 517 (2010) operated a NASCAR racing team and entered into two contracts to provide racing teams to the defendant for the Daytona and California races in 2009 at $66,000 a race. The defendant paid the fee for the Daytona race, but did not pay the contracted amount for the California race. Plaintiff sued for breach of contract, fraud, unfair and deceptive trade practices and unjust enrichment. The defendants did not answer and default was entered. The plaintiff moved for treble damages and attorneys' fees against defendants Trail and Shelton. As to the remaining defendant, Fritz, the

plaintiff elected to recover actual damages for breach of contract. The trial court entered default judgment against all defendants for $66,000. The trial court did not rule on the plaintiff's request for judgment under Chapter 75.

The plaintiff appealed. The Court of Appeals held that the plaintiff was entitled to treble damages under Chapter 75 and remanded for the award of treble damages and the trial court's exercise of its discretion as to attorneys' fees. Since the allegations of the complaint as to unfair and deceptive trade practices were deemed admitted, the plaintiff was entitled to elect damages as to each defendant.

> . . . "where the same course of conduct gives rise to . . . an action for breach of contract, and . . . gives rise to a cause of action for violation of G.S. 75-1.1, damages may be recovered either for the breach of contract, or for violation of G.S. 75-1.1, but not for both." . . . A default judgment having been entered against each defendant for failure to file a responsive pleading, the allegations contained in the complaint were deemed admitted, including the several liability of each defendant. . . . As it was entitled to do, plaintiff elected to recover treble damages against defendant Trail and defendant Shelton pursuant to N.C.G.S. § 75-16. Thus, the trial court was required to award damages as against those defendants. 694 S.E.2d at 519-520.

Default judgment, however, did not require the award of attorneys' fees under Chapter 75. The award of attorneys' fees was discretionary with the trial court. Upon remand,

the trial court was to exercise its discretion as to whether award attorneys' fees.

IV. Trial

A. Voir Dire

The defendant in State v. Johnson, ___N.C.App.___, 706 S.E.2d 790 (2011) was convicted of murder. During jury selection, the defense attorney attempted to question potential jurors about factors that may influence their consideration of testimony by a witness.

> [DEFENSE]: Now, what type of facts would look at, Mr. Colopy, to make the determination if someone's telling you the truth? . . . .
>
> [DEFENSE]: Ms. Falcon, would it be important to you that a person could actually observe or hear what they said they have from the witness stand? 706 S.E.2d at 793-794.

The Court of Appeals held that the trial judge had correctly sustained the State's objections to these questions.

> . . . our Supreme Court has made clear that "[h]ypothetical questions that seek to indoctrinate jurors regarding potential issues . . . before jurors have been instructed on applicable principles of law are . . . impermissible. . . . The trial court properly interrupted defense counsel's attempt to "stake out" this juror as to the way he would assess credibility. . . . Defense counsel did not merely seek to find if the prospective juror could follow the law as given but, asked her to state the weight that she would give one factor

> in her analysis. . . . With no evidence yet before the jury, this question seeks to prepare the way for a particular argument that there is some question about the ability of one or more of the witnesses to "observe or hear what they said they could have from the witness stand." Seeking to "indoctrinate jurors regarding [a] potential issue before the evidence had been introduced" . . . . does not serve . . . the proper purposes of voir dire. 706 S.E.2d at 794.

B. Evidence

(1) Dead Man's Statute

Weeks v. Jackson, ___N.C.App.___, 700 S.E.2d 45 (2010) was a suit by the Executor of an estate to collect on a promissory note. The defendants answered and asserted a counterclaim for common law obstruction of justice. The Executor submitted written discovery directed at the genuineness of the note and the signatures on the note. In response to the Executor's motion for partial summary judgment, the defendants served supplemental interrogatory answers and an affidavit, both detailing discussions with the decedent about the note and related transaction. The Executor moved to strike both. The trial court granted the Executor's motion for partial summary judgment.

The Court of Appeals affirmed. On appeal, the defendants argued that the Executor had waived any protections by the Dead Man's statute, Rule 601(c), by submitting the written discovery. The Court of Appeals

examined the issue of whether waiver occurs when discovery does not inquire about communications with a decedent, but the responding party volunteers such communications.

> . . . Executor "asked no questions soliciting evidence of oral communications between the decedent and defendant." . . . . Further, when Defendants attempted to submit Jackson's affidavit and their supplemental discovery responses, Executor objected and moved to strike . . . . we do not find that Executor was seeking to elicit evidence of oral communications between Jackson and Decedent. . . . We do not impute a waiver of Rule 601(c) to Executor simply because Defendants attempted to file answers to questions not asked by Executor. 700 S.E.2d at 49.

Conversations with a decedent were also an issue in In Re Will of Baitschora, ___N.C.App.___, 700 S.E.2d 50 (2010). The testator's son brought a caveat proceeding to contest probate of a will leaving the testator's assets to testator's nephew and his sisters. The jury found that the will was procured by undue influence. The will was set aside. On appeal, the propounder of the will contended that the trial court had erroneously excluded oral communications between the propounder and the decedent.

The Court of Appeals affirmed the trial court's order setting aside the will as a result of undue influence. In reviewing the trial court's evidentiary rulings on the Dead Man's Statute, the Court of Appeals concluded that appellate review was de novo and not on the basis of the

trial court's exercise of discretion. Although the propounder conceded that his communications with the decedent were covered by the Dead Man's Statute, he contended that the protection of the Statute was waived by the caveator when the caveator either examined about or offered evidence concerning conversations with the decedent.

The Court of Appeals concluded that the caveator's lawyer "asked a series of questions concerning these events which were worked in a manner that would not require caveator to repeat oral communications between himself and decedent." 700 S.E.2d at 57. The caveator's answers, however, included several conversations between the caveator and the decedent. Based on these "unsolicited" answers, the Court of Appeals held that the caveator had waived the protection of the Dead Man's Statute.

> . . . the record shows that caveator's remarks concerning the oral communications with decedent, though unsolicited by counsel, should have resulted in a waiver of the protection of the Dead Man's Statute to the extent of the subject matter testified by the caveator. . . . 700 S.E.2d at 58-59.

Since appellate review was de novo, the Court of Appeals was required to find prejudice in order to reverse the trial court erroneous evidentiary ruling. Reviewing all

evidence of undue influence, the Court of Appeals concluded, "we are not convinced that the evidence omitted would have persuaded the jury on the issue of undue influence." 700 S.E.2d at 60.

(2) Photographs

Accelerated Framing v. Eagle Ridge Builders, ___N.C.App.___, 701 S.E.2d 280 (2010) was an action by a subcontractor against the general contractor for breach of contract and recovery based on quantum meruit. As a result of a bench trial, the court entered judgment in favor of the plaintiff for $11,500.

The Court of Appeals affirmed. On appeal, the defendant argued that the trial court erred by admitting photographs for illustrative purposes, then considering the photographs as substantive evidence. The Court of Appeals disagreed.

> ("A ruling [on the admissibility of evidence] is not necessarily final, even when not stated to be conditional, for the judge may strike out evidence theretofore admitted or admit evidence theretofore excluded."). Thus, the trial court, in this case could properly revisit its prior exclusionary ruling and consider the photographs as substantive evidence and not just for illustrative purposes. 701 S.E.2d at 284.

(3) Lay Opinion

The defendant in State v. Ziglar, ___N.C.App.___, 705 S.E.2d 417 (2011) was convicted of felony death by vehicle.

During the defendant's testimony, the trial court sustained the State's objection to the defendant being asked, "And had there been brakes that worked on the car, would you have been able to stop the car in your opinion?" On appeal, the defendant argued that the response to the hypothetical question was admissible as a lay opinion under Rule 701 because the answer was based on the defendant's "perceptions" while driving the car.

The Court of Appeals disagreed and affirmed the conviction.

> While Ziglar's opinion as to the car's speed was based on Ziglar's actual opportunity to observe the car's speed while driving the car and, therefore, satisfied the Rule 701 foundation requirement, . . . Ziglar's opinion as to the car's potential performance under hypothetical circumstances was never observed by Ziglar, or at least no evidence of such observation was offered by Ziglar. 705 S.E.2d at 420.

(4) Internet Documents

The plaintiff in Rankin v. Food Lion, ___N.C.App.___, 706 S.E.2d 310 (2011) alleged injuries as a result of a slip and fall at Food Lion Store #276 in Charlotte. The defendants moved for summary judgment on the grounds that Delhaize America, Inc. had no control over the store; there was no legal entity named Food Lion Store #276; and Food Lion, Inc. and Food Town Stores, Inc. no longer existed. In opposing the defendants' motions for summary judgment,

the plaintiff tendered the internet posting of Delhaize America, Inc. and the website of the North Carolina Secretary State concerning the defendants.

The Court of Appeals affirmed the trial court's grant of summary judgment in favor of all defendants, concluding that the plaintiff had not offered sufficient evidence opposing the motions.

> The record contains no evidence that . . . Plaintiff offered any evidence tending to show what the documents in question were, failed to proffer certified copies of either document, and did not make any other effort to authenticate these documents. . . based on our determination that the internet printouts upon which Plaintiff relies do not constitute admissible evidence for purpose of the analysis required in connection with the consideration of Defendants' summary judgment motion. . . . 706 S.E.2d at 315-316.

(5) Prior Bad Acts

Davis v. Rudisill, ___N.C.App.___, 706 S.E.2d 784 (2011) was an action alleging medical malpractice. The jury determined that the defendants were not liable for the plaintiff's injuries. The individual physician defendant successfully moved in limine at trial to exclude admission of the North Carolina State Medical Board public file involving unnecessary prescription of controlled substances and falsifying patient records. The factual issues in the present case involved witness credibility as to whether the

plaintiff was urged to seek immediate medical attention. Documentary evidence was not significant.

The Court of Appeals affirmed the jury verdict, and, also, held that the trial judge did not abuse his discretion in excluding the Medical Board file.

> Evidence that Dr. Rudisill falsified medical records in the past, for reasons completely unrelated to the issue in the present case, could mislead the jury into giving undue weight to plaintiff's allegations and result in a verdict based on an improper basis, as the trial court determined. . . . "The use of character evidence by a party to a civil action 'might move the jury to follow the principles of poetic justice rather than rules of law.'" 706 S.E.2d at 789-790.

C. Rule 60(b) – Impeaching Jury Verdict

Cummings v. Ortega, ___N.C.App.___, 697 S.E.2d 513, petition for disc. rev. granted, ___ N.C. ____, 705 S.E. 2d 380 (2010) was an action alleging medical malpractice from a surgical procedure during which the plaintiff's iliac artery was inadvertently lacerated. During the two-week trial, the trial judge gave the jury approximately sixty times the standard instruction about not to begin discussing the case until all the evidence was presented, not to discuss the case with anyone other than members of the jury during deliberations after the evidence had been presented, not to form an opinion about the case until all evidence had been presented and not to consult or read any

media or internet sources about anything involving the case. On 16 December 2008, the jury reached a unanimous verdict in favor of the defendants.

On 14 January 2009, the plaintiff filed a motion under Rule 59(a) for a new trial. The motion attached the affidavits of two juror stating that Juror 8 stated before any evidence had been produced that his "mind was made up." The affidavits also stated that Juror 8 attempted to discuss the case with other jurors before deliberations began.

In considering the plaintiff's motion, the trial judge stated that the juror affidavits were admissible as to juror misconduct that occurred before deliberations began. The trial court granted the plaintiff's motion and ordered a new trial.

The Court of Appeals found no abuse of discretion by the trial judge in ordering a new trial. First, the Court stated that it was clear from the trial court's order that the trial judge was aware of the limitations in Rule 60(b) on reviewing juror affidavits to impeach the jury verdict. The juror affidavits, however, related to the jurors' ability to follow the court's instructions and actions by the jury before deliberations began.

> While none of the juror affidavits specifically discuss these factors and attempt to evince obviously incompetent matters which a judge should not consider under Rule 60(b), the factual inference that remains is that some jurors discussed the case before deliberations and no juror reported these discussions to the trial judge. For purposes of Rule 59(a) these acts would qualify as competent evidence to show a trial irregularity, misconduct of the jury, or manifest disregard by the jury of the instructions of the court. 697 S.E.2d at 521.

When the trial judge "finds that the judicial process has been breached under Rule 59(a), he has broad discretion . . . to achieve a just result . . . ." 697 S.E.2d at 522

D. Damages

Littleton v. Willis, ___ N.C. App. ___, 695 S.E.2d 468 (2010) arose from an automobile accident on 21 December 2004. A vehicle operated by Ms. Willis collided head on with a vehicle operated by the plaintiff. The plaintiff was initially treated at Carteret General Hospital, then flown to Pitt Memorial Hospital. The plaintiff was seen and treated by an emergency room doctor, Dr. Crosswell, and Dr. Moore, an orthopedic surgeon. Dr. Moore last saw the plaintiff on 15 July 2005, and Dr. Crosswell last saw the plaintiff on 23 December 2005. At trial, Dr. Crosswell was asked whether the plaintiff's injury was permanent. Dr. Crosswell responded:

> . . . not having seen him for a couple of years, three years, I really don't have . . . I don't

> feel like I could give an accurate assessment to what has happened in the last three years. 695 S.E.2d at 473.

During the charge conference, defense counsel objected to an instruction on permanent injury. The trial court overruled the objection and instructed on permanent injury. The jury awarded $1,428,238.60.

Holding that it was error to instruct on permanent injury, the Court of Appeals reversed and ordered a new trial.

> The medical testimony in this case establishes only that Plaintiff's injury had not healed after one year. Thereafter, Dr. Crosswell could not opine as to whether Plaintiff's fracture had healed in the following years. Thus, the medical testimony in this case was insufficient to warrant an instruction on permanent injury as this would have required the jury "to speculate how long, in their opinion, they think [Plaintiff's] pain will continue in the future, and fix damages therefore accordingly." 695 S.E.2d at 473.

The plaintiff in Mace v. Pyatt, ___N.C. App.___, 691 S.E.2d 81 (2010) alleged that the defendants entered into a conspiracy to forge the plaintiff's name to a deed to her property, then converted her personal property. The plaintiff was involved in a serious automobile accident requiring extensive medical treatment and rehabilitation. The evidence at trial indicated that the defendants entered an agreement to transfer the plaintiff's real property in

Rutherford County and convert her trailer and personal property. The jury found that the defendants had entered into the conspiracy to transfer the plaintiff's land and that the defendants had converted the plaintiff's personal property. The jury awarded $50,000 in compensatory damages and $500,000 in punitive damages. The trial judge reduced the punitive damages to $250,000.

At trial, the plaintiff offered evidence showing that her trailer had been moved from the land. Photographs established extensive damages to the furniture and other contents in the trailer. The plaintiff, however, did not offer any evidence as to the value of the property taken and destroyed. Since there was no evidence as to the plaintiff's damages and the jury's award of compensatory damages, the Court of Appeals ordered a partial new trial on the issue of compensatory damages.

The Court of Appeals affirmed the award of punitive damages.

> Nominal damages need only be recoverable to support a punitive damages award, and a finding of nominal damages by the jury is not required where plaintiff has sufficiently proven the elements of her cause of action. . . . Nominal damages were thus recoverable for the loss of her personal property as a matter of law, and plaintiff's punitive damages award can be properly supported by an award of nominal damages standing alone. 691 S.E.2d at 89-91.

E. Remittitur

The plaintiff in Kornegay v. Aspen Asset Group, LLC, ___ N.C. App. ___, 693 S.E.2d 723 (2010) alleged that he had an employment contract with the defendants and that the contract included bonus compensation. The jury found that an employment contract existed and that the plaintiff was entitled to bonus compensation. The jury awarded the plaintiff $996,147.60. In considering the defendants' JNOV motion, or, in the alternative, a new trial on damages or remittitur, the trial court noted that the plaintiff's evidence at trial was that the plaintiff was entitled to recover $825,070.40. The plaintiff did not object to the remittitur, therefore, the trial court entered judgment for $825,070.40 and denied the defendants' JNOV motion.

Finding no abuse of discretion, the Court of Appeals affirmed judgment for the plaintiff. The trial judge's denial of the defendants' motions for a new trial, or, in the alternative, a trial only on damages, required an examination of the plaintiff's breach of contract evidence and whether the jury's decision may have reflected a compromise verdict. Reaching the same decision as the trial judge, the Court of Appeals concluded that the jury's verdict reflected a calculation error.

. . . we fail to see how the jury's verdict could be viewed as involving a compromise verdict. . . . In this case, the jury found the existence and breach of contract. The jury was then supposed to decide plaintiff's damages under that contract: 20% of the profits on the projects plaintiff implemented and originated. Instead of using that measure of damages, the jury miscalculated and awarded an amount higher than what was due under the contract. No compromise between liability and damages appears. 693 S.E.2d at 740.