SUPERIOR COURT JUDGES' CONFERENCE

WRIGHTSVILLE BEACH
JUNE 21, 2002

J. Donald Cowan, Jr.
Smith Moore LLP

Don Cowan is a partner with Smith Moore, L.L.P. He received his undergraduate and law degrees from Wake Forest University where he was Editor in Chief of the law review. Following service with the United States Army at the 82d Airborne Division, Fort Bragg; lst Infantry Division, Lai Khe, South Vietnam; and 2d Armored Cavalry Regiment, Nuernberg, Germany, he joined his present law firm in 1973.

He has a general trial practice in state and federal courts, including trademarks, patents, chemical and industrial products, medical devices and pharmaceutical products. He also defends persons charged with state and federal capital crimes and federal criminal drug violations.

He is a Fellow of the American College of Trial Lawyers and a Fellow of the American Academy of Appellate Lawyers. He is a past president of the North Carolina Bar Association and a past president of Legal Services of North Carolina. He has been a member of the Wake Forest University Board of Trustees since 1992. He is an Adjunct Professor, Trial Practice, Duke University School of Law.

Table of Contents

Table of Cases

I. Liability

A. Motor Vehicles

The decedent in Bradley v. Hidden Valley Transportation, Inc., ___ N.C.App. ___, 557 S.E.2d 610, affirmed per curiam, ___ N.C. ___, ___ S.E.2d ___ (2002) was killed when his vehicle was struck by a vehicle operated by Price. Price was driving a truck owned by Lee, president of Price's employer, Hidden Valley Transportation. During the plaintiff's first suit, a settlement was reached with all parties except Hidden Valley Transportation. The present suit was refiled against Hidden Valley only.

The trial court granted Hidden Valley's motion for summary judgment on the grounds that Price was not acting within the course and scope of his employment with Hidden Valley at the time of the accident. The Court of Appeals and Supreme Court affirmed summary judgment for Hidden Valley.

> Price was an hourly employee who had clocked out for the day and was not being paid when he was returning Mr. Lee's truck to his house at 7:00 p.m. We conclude that Price was performing a purely personal obligation at the time of the accident. 557 S.E.2d at 613.

The plaintiff argued that Hidden Valley's liability had been adjudicated previously in a related action,

therefore, Hidden Valley was collaterally estopped to deny liability. The Court of Appeals disagreed. In the previous suit, the trial court had granted the plaintiff's motion to amend the complaint to add Hidden Valley and had denied the motion of John Deere Insurance Company, Hidden Valley's liability insurer, for summary judgment.

The Court of Appeals held that the liability of Hidden Valley in relation to the accident was unnecessary to determine the motion for summary judgment of John Deere Insurance Company. The trial court could have determine that Price was not a named insured, that the vehicle was not a covered auto or that notice to the insurance company had not been properly given. Therefore, the issue of Hidden Valley's liability had not been decided.

Yancey v. Lea, 354 N.C. 48, 550 S.E.2d 155 (2001) was an action for wrongful death arising out of the decedent's vehicle turning left in front of the defendant's passing tractor-trailer. The accident occurred during the evening of 6 September 1996, the day after Hurricane Fran went through North Carolina. The weather on the evening of the accident was poor and the sky was overcast. The defendant-driver, Lea, first observed the taillights of the decedent's vehicle in front of him and traveling in the same, northerly direction. As the defendant approached the

decedent's vehicle, Lea pulled into the passing zone, blinked the headlights on his vehicle, and turned on his left-turn signal. As the defendant's vehicle was even with the decedent's vehicle, the decedent's vehicle began to turn left into the path of the defendant's tractor-trailer.

A passenger in the decedent's vehicle testified that the decedent had activated her left-turn signal, intending to turn into a driveway on the left side of the highway. The speed limit at the scene of the accident was forty-five miles per hour. There was evidence that the defendant had earlier been driving between fifty-five and sixty-five miles per hour in a fifty-five mile per hour zone. Dr. Rolin Barrett was qualified as an expert in the field of accident reconstruction. Dr. Barrett testified that the tractor-trailer was entirely in the passing lane at the time of impact. Dr. Barrett also testified that the "right front area of the truck first made contact with the left side of decedent's vehicle as that vehicle tried to turn." 550 S.E.2d at 156.

The trial court refused to instruct the jury on gross negligence. The jury found that the defendant was negligent; the decedent was contributorily negligent and declined to award damages. The Supreme Court affirmed the trial court's refusal to instruct on gross negligence.

> An act or conduct rises to the level of gross negligence when the act is done purposely and with knowledge that such act is a breach of duty to others, i.e., a conscious disregard of the safety of others. An act or conduct moves beyond the realm of negligence when the injury or damage itself is intentional. . . . In the area of motor vehicle negligence, it appears there are no cases wherein the appellate courts of this state have held that a gross negligence instruction should have been given in the context of a simple passing and turning scenario, such as in the instant case. Our case law as developed to this point reflects that the gross negligence issue has been confined to circumstances where at least one of three rather dynamic factors is present: (1) defendant is intoxicated, . . .; (2) defendant is driving at excessive speeds, . . .; or (3) defendant is engaged in a racing competition . . . . 550 S.E.2d at 158.

The automobile accident in Bass v. Johnson, ___ N.C.App. ___, 560 S.E.2d 841 (2002) occurred during "rush hour" on Roxboro Road in Durham on 11 September 1996. Traffic was heavy, and it was raining. The plaintiff had stopped at a business on the south side of Roxboro Road. She was attempting to exit the business by turning left to proceed north on Roxboro Road. Traffic was stopped in front of the business where she was attempting to exit. One of the vehicles in the southbound lane stopped and allowed a space for the plaintiff to exit the business. As the plaintiff was crossing the exterior southbound lane, she was struck by the defendant's southbound vehicle. Evidence at trial was that the defendant was traveling

between 45 and 50 miles per hour in a 25 mile per hour zone. The jury found that both the defendant and the plaintiff were negligent and denied any recovery to the plaintiff.

At the close of the evidence, the plaintiff moved to amend her pleadings to conform to the evidence and plead the defendant's gross negligence as a bar to any contributory negligence of the plaintiff. The Court of Appeals held that the trial judge did not abuse its discretion in denying the plaintiff's motion to amend.

> . . . it is clear that plaintiffs did not seek to amend their pleadings to include a claim of gross negligence until after all of the evidence in the case had been presented. Defendant was not given notice or opportunity to prepare a defense to a gross negligence claim, not did defendant impliedly consent to trying the issue of gross negligence. Accordingly, we hold that the trial court did not abuse its discretion by denying plaintiff's motion to amend. 560 S.E.2d at 845.

In addition to Pattern Jury Instruction 203.29 on the duty in entering or crossing a highway, the trial judge added the following:

> Now, this does not mean that you may cross into a lane of travel which is blinding your view. In other words, both vehicles approaching and to see what ought to be seen means that you must not enter or cross a lane of travel unless you can see traffic that may be approaching in that lane. A violation of this law is negligence within itself. 560 S.E.2d at 846.

The Court of Appeals held that the trial judge had correctly applied the instructions to the facts of the case.

> The language added by Judge Barnette applied the evidence to the Pattern Jury Instruction on contributory negligence. Under the instruction given by the trial court, the jury was instructed to determine whether Mrs. Bass could "see what ought to be seen" and whether Mrs. Bass crossed into a lane of travel in which she could not see oncoming traffic. In light of the entire charge and the evidence of the case, we hold that the trial court did not err in its charge to the jury on contributory negligence. 560 S.E.2d at 847.

The plaintiff in Culler v. Hamlett, ___ N.C.App. ___,559 S.E.2d 195 (2002) was driving a friend's car at 3:00 a.m. on 30 June 1993 when the car became disabled, causing the plaintiff to stop the car on the side of the road. The plaintiff noticed the car of a friend, Anthony Green, approaching from the opposite direction. When Green pulled off the side of the road and parked partially on the shoulder, the plaintiff walked across the highway to Green's car.

The plaintiff then saw the defendant, Stacey Hamlett, driving toward the plaintiff in a westerly direction approximately 300 yards away, the same direction in which Green had been driving. The plaintiff then turned to walk back across the highway. Hamlett's vehicle struck the Green car, then hit the plaintiff. The trial court granted

the defendants' motion for a directed verdict based on the plaintiff's contributory negligence.

The Court of Appeals affirmed the trial court's determination that the plaintiff was contributorily negligent as a matter of law.

> . . . we hold that the evidence establishes that plaintiff's own negligence was at least one proximate cause of her injuries. The plaintiff's own testimony reveals the following: while talking with defendant Green, plaintiff saw headlights from defendant Hamlett's car approaching from approximately 300 yards away; that even though she knew that she was in an unsafe position standing in the roadway, she walked back across the road to her car; that nothing prevented her from running or stepping quickly to her car nor did anything prevent her from moving to the other side of Green's car away from the roadway; there was nothing to prevent her from keeping a continuous lookout as she crossed the roadway but she failed to do so; she knew her car and defendant Green's car were blocking part of their respective lanes of travel; and that visibility was poor in that it was dark and foggy. 559 S.E.2d at 199.

The Court of Appeals also affirmed the trial court's directed verdict in favor of the defendant on the grounds that the evidence did not present an issue of last clear chance.

> . . . plaintiff's evidence fails to establish that she was either in helpless or inadvertent peril. Quite to the contrary, in spite of her knowledge that defendant's vehicle was steadily approaching, plaintiff chose to ignore the dangers from which she had the power to extricate herself. When asked during her deposition if there was anything that prevented her from

> running or stepping quickly to the car, she responded, "No, other than I didn't think I needed to run to my car."
>
> Moreover, while the defendants may have had the last possible change to avoid the injury, defendant had neither the time nor the means to have the last clear change to entitle the submission of the question to the jury. Plaintiff's evidence tended to show that the weather was foggy and dark; defendant had just rounded a curve before approaching the point of the accident and her vision would have been obstructed by the curve itself; plaintiff's vehicle and the vehicle driven by co-defendant Green were blocking portions of the roadway such that there was no place for another car to pull over; and the plaintiff's headlines were shining in the direction of defendant's approach. 559 S.E.2d at 201.

In the related case of Culler v. Hamlett, ___ N.C.App. ___, 559 S.E.2d 193 (2002) the plaintiff had also alleged negligence on the part of Anthony Green, however, that claim was severed from the Hamlett trial as a result of a discovery dispute. Following dismissal of the Hamlett suit, the defendant Green moved for summary judgment on the basis of the jury's finding of contributory negligence in the Hamlett trial. The trial court granted the motion for summary judgment.

The Court of Appeals affirmed and held that res judicata prevented relitigation of the issue of plaintiff's contributory negligence.

> In the instant case, defendant contends that he is entitled to summary judgment in that the trial

> court in plaintiff's action against the Hamletts ruled that plaintiff was contributorily negligent as a matter of law and that the doctrine of res judicata precludes her from re-litigating that issue . . . . We conclude that the doctrine of res judicata does preclude a re-litigation of whether plaintiff was contributorily negligent as a matter of law in that both law suits arose out of a single action, involved the same set of facts and involve identical issues related to plaintiff's contributory negligence. 559 S.E.2d at 194-195.

The defendant in McDevitt v. Stacy, ___ N.C.App. ___, 559 S.E.2d 201 (2002) was delivering newspapers in her car at 5:15 a.m. on 20 October 1998. She was driving on the wrong side of the road inserting newspapers in customers' boxes. When the defendant saw the plaintiff's car approaching, the defendant dimmed her high-beam lights, turned on the emergency flashers and pulled into a driveway parallel to the road. The plaintiff collided with the defendant's vehicle.

In response to the allegations of the complaint, the defendant pled "conditional contributory negligence," stating that it was believed that evidence would be developed during litigation that may support a defense of contributory negligence. The purpose of the defendant's pleadings was to "put the plaintiff on notice of their intention to assert the affirmative defense of contributory negligence." The plaintiff replied to the conditional

defense, denying that the plaintiff was negligent and further pleading gross negligence by the defendant. The plaintiff's pretrial motion to exclude evidence of plaintiff's contributory negligence due to deficient pleadings was denied. The jury found that the plaintiff was contributorily negligent and denied any recovery to the plaintiff.

The Court of Appeals affirmed the trial court's denial of the plaintiff's motion to exclude evidence at trial of plaintiff's contributory negligence.

> We conclude that plaintiff's detailed reply to defendants' answer shows that plaintiff received notice that contributory negligence was an issue in the case . . . . We do not decide whether "conditional" pleading of affirmative defenses satisfies the requirements of Rule 8(c). The record reveals that defendant moved to amend any alleged defect in their pleadings, and the trial court granted by implication that motion when it simultaneously denied plaintiff's motion in limine to exclude the issue of plaintiff's contributory negligence. 559 S.E.2d at 206.

The Court of Appeals also affirmed the trial court's refusal to give an instruction on the defendant's last clear chance.

> Here, defendant testified that when she saw the plaintiff's lights approaching in the distance she was on the wrong side of the road placing newspapers in customers' boxes, and decided that she "would be better off sitting off the road instead of trying to take time to go completely back across the road." After defendant made that decision to park parallel in a customer's drive-

> way, there was nothing more she could have done to avoid the collision. Viewing all the evidence in the light most favorable to plaintiff, the jury could not find all elements necessary for the doctrine of last clear chance. 559 S.E.2d at 210.

The defendant in Hill v. McCall, ___ N.C.App. ___, 559 S.E.2d 265 (2002) admitted fault in causing the automobile accident that was the basis for the plaintiff's claim, but denied that the defendant's conduct was the cause of the plaintiff's injuries. One of the plaintiff's treating orthopedic surgeons, Dr. Keith Maxwell, testified that it was his opinion that the accident proximately caused the plaintiff's herniated disk. On cross-examination, Dr. Maxwell said the possibility existed that the herniated disk existed before the accident. Over the plaintiff's objection, the trial judge instructed the jury on aggravation or activation of pre-existing injuries and that the defendant would be liable only to the extent that his conduct proximately and naturally aggravated the plaintiff's condition. The jury awarded the plaintiff $2,000.

The Court of Appeals held that the evidence did not support an instruction of aggravation of pre-existing injuries, reversed and ordered a new trial on damages only.

> In this case, the evidence, when viewed in the light most favorable to Defendant, the proponent

> of the instruction on activation and aggravation of a pre-existing injury, does not support an inference of the aggravation of a pre-existing condition. Dr. Maxwell testified that while it was possible the herniated disk existed prior to the incident, it was his opinion the incident caused the herniated disk. Although possible, there is no evidence whatsoever in the record to this Court that Plaintiff's herniated disk existed prior to the 25 January 1999 incident. Accordingly, as the record to this Court was devoid of evidence relating to a pre-existing condition, the trial court erred in instructing the jury on activation or aggravation of a pre-existing injury. 559 S.E.2d at 268.

In Boykin v. Morrison, ___ N.C.App. ___, 557 S.E.2d 583 (2001), a vehicle operated by Morrison collided with the plaintiff's vehicle at 4:00 a.m. on 25 December 1997. When the plaintiff got out of his car and approached Morrison's vehicle, he observed Morrison asleep and snoring. Approximately fifteen minutes later, a car operated by Wilson collided with the plaintiff's vehicle which had remained in the intersection. The Wilson collision caused the plaintiff to be thrown from his car. Morrison's blood alcohol level was .0226. Morrison was uninsured. The plaintiff gave notice of the accident to his uninsured motorist carrier, Allstate.

Prior to trial, Allstate filed an offer of judgment of $4001 and stipulated that Morrison's negligence proximately caused the initial collision with the plaintiff. Allstate reserved the right to contest whether Morrison's negligence

proximately caused the plaintiff's injuries. The plaintiff's claim against Wilson was settled during court-ordered mediation. The jury awarded the plaintiff $10,000 in compensatory damages and $17,500 in punitive damages. The trial court awarded the plaintiff $6,000 in attorney's fees and $759.42 in costs.

On appeal, Allstate argued that its requested jury instruction on insulating or intervening negligence was erroneously denied by the trial court. Allstate contended that the fifteen minute delay between the initial Morrison collision and subsequent Wilson collision raised an issue as to which collision caused the plaintiff's injuries. The Court of Appeals held that the trial judge had properly refused to give the requested instruction.

> Wilson's act was not sufficiently independent of, and unassociated with, Morrison's initial negligence of colliding into plaintiff's car, to insulate Morrison from liability. Morrison could reasonably foresee that Wilson would strike plaintiff's car after he disabled it in the middle of the street. Wilson's colliding into plaintiff's car was a foreseeable intervening act and was associated with Morrison's initial negligence. We hold that the requested instruction was not supported by the evidence. 557 S.E.2d at 586.

Allstate also alleged error in the award of attorney's fees pursuant to G.S. § 6-21.1. Allstate argued that the judgment of compensatory and punitive damages totaling

$27,500 was in excess of the $10,000 requirement of G.S. § 6-21.1. The Court of Appeals disagreed and held that punitive damages are not to be considered in awarding attorney's fees under G.S. § 6-21.1

> The main purpose of G.S. § 6-21.1 is to provide relief for a person who sustains damages in an amount so small that, if he would have to pay his attorney from the recovery, it would not be economically feasible to bring suit, not to reward a defendant's willful and wanton conduct. . . . We hold that the word "damages" as used in G.S. § 6-21.1 applies only to compensatory damage amounts when determining whether the judgment amount is equal to or less than $10,000. 557 S.E.2d at 587.

McCurry v. Painter, 146 N.C.App. 547, 553 S.E.2d 698 (2001) arose out of an automobile accident on 17 December 1994. Prior to trial, the defendant stipulated that the accident was caused by the defendant's negligence. The defendant denied that this negligence caused the plaintiff's injuries. A jury awarded the plaintiff $50,000. On appeal, the defendant argued that no foundation was established for admission of plaintiff's medical bills.

At trial, the plaintiff testified as to her injury and the medical treatment she received after the accident. Dr. Wheeler, a specialist in pain medicine and neurology, testified that he first saw the plaintiff in March 1995 and reviewed the records of her previous treatment. He

diagnosed the plaintiff with severe post traumatic cervical segmental and soft tissue dysfunction and nerve impingement, all of which in his opinion could have been caused by a collision such as the one at issue.

The Court of Appeals held this evidence was sufficient for admission of the medical bills.

> In sum, plaintiff testified that immediately following the collision she began to experience severe pain and suffering in her neck, back and shoulder area. Dr. Wheeler's testimony established a causal relationship between the accident and the injuries. His examination of X-rays taken the morning after the accident, and his concurring with Dr. Sander's prescription for physical therapy provide a sufficient basis to submit those bills; other challenged medical bills were for treatment or tests prescribed by Dr. Wheeler for these injuries. We find that the plaintiff's evidence demonstrated a causal relationship between the accident and her injuries. 553 S.E.2d at 702.

The defendant also argued that the plaintiff did not present evidence that the medical bills were reasonable in amount. The Court held that G.S. § 8-58.1 creates a "rebuttable mandatory presumption of the reasonableness of the charges." 553 S.E.2d at 702. Since the defendant did not present evidence about the amount of the medical bills, "the reasonableness of the amount of these charges is conclusively established." 553 S.E.2d at 702.

The defendant in Taylor v. Ellerby, 146 N.C.App. 56, 552 S.E.2d 667 (2001) admitted that her negligence caused

the automobile accident that was the basis of the plaintiff's suit. The jury awarded no damages. The trial court denied the plaintiff's motion to set aside the verdict and refused to order a new trial. The Court of Appeals affirmed.

The Court noted the conflicting evidence as to the inception and cause of the plaintiff's medical complaints.

> In sum, the evidence tended to show that plaintiff suffered some back and neck pain immediately following the collision, but that plaintiff also suffered some lower back pain for which she had sought treatment by Dr. Rommer as recently as a month before the accident. Further, plaintiff's knee injury did not manifest itself until approximately twenty days after the accident, although Dr. Meade testified that an injury of this sort would typically cause a patient immediate pain. . . . Due to the conflicting nature of the evidence on causation, and due to the inconsistency of the testimony offered by plaintiff, "we cannot conclude that the trial court's discretion to defer to the finality and sanctity of the jury's findings was a manifest abuse of discretion or probably amounted to a substantial miscarriage of justice." 552 S.E.2d at 670-671.

At trial, the plaintiff requested that the trial judge instruct the jury on "peculiar susceptibility" as applied in North Carolina Pattern Jury Instruction 102.20. Although the trial judge gave the requested instruction, he omitted "mental" at each place in the instruction where there was an option to use "physical and/or mental." On appeal, the plaintiff argued that she suffered from mild

mental retardation, limiting her physical employment opportunities. The plaintiff contended that the physical effects of the accident prevented her from engaging in this limited type of physical labor employment. The Court held that the trial judge had correctly instructed the jury.

> We believe that plaintiff has confused the role that a pre-existing mental condition can play in aggravating an injury suffered by the plaintiff, with the role that a pre-existing mental condition can play in aggravating, or increasing, the amount of the damages suffered by the plaintiff, and we believe the difference between these two concepts is critical. . . . Here, plaintiff has never contended that the presence of her pre-existing mental condition aggravated the injuries she allegedly suffered from the collision (namely neck, back and knee injuries). Rather plaintiff has alleged only that the presence of her pre-existing mental condition, when combined with her alleged physical injuries, aggravated or increased the amount of the damages to which she is entitled (based on the contention than an inability to perform physical labor has a greater impact on plaintiff's ability to earn a living than it would in the case of a plaintiff without a similar mental condition). Thus, . . . plaintiff's argument here regarding her pre-existing mental condition is not, in fact, relevant to the issue of proximate causation; rather it is an argument addressed to the special damages to which plaintiff contends she is entitled. . . . For this reason, the trial court properly instructed the jury on "peculiar susceptibility" due to a pre-existing physical condition. However, plaintiff was not entitled to a jury instruction on peculiar susceptibility due to a pre-existing mental condition, and the trial court did not err in refusing to give an instruction. 552 S.E.2d at 673.

Sterling v. Gil Soucy Trucking, Ltd., 146 N.C.App. 173, 552 S.E.2d 674 (2001) arose out of a multi-vehicle collision on Interstate 40 near Valdese on 7 June 1996. The initial accident was a result of Jennifer Lowman's loss of control of her vehicle and her vehicle blocking both eastbound lanes of the interstate. Although several vehicles successfully stopped without impact, a vehicle operated by Sarah West was not able to stop and hit the last vehicle stopped in front of her. West and her passenger, Christopher Sterling, did not receive a significant injury in this collision.

The West vehicle was then struck in the rear by a tractor-trailer operated by Caron and owned by Gil Soucy Trucking. This impact pushed the West vehicle forward into the vehicle in front of her, also causing the West vehicle to burst into flames. The tractor-trailer operated by Caron was then struck from the rear by a tractor-trailer operated by Smith and owned by Waldensian. Suit was filed on behalf of Christopher Sterling, a minor, for his injuries. The jury answered issues finding liability against Soucy Trucking, Caron, Jennifer Lowman and Sarah West. The jury determined that Smith and Waldensian were not liable. The plaintiff was awarded $62,500. The trial

court taxed the costs of Smith and Waldensian against the plaintiff.

On appeal, the plaintiff assigned error as to the admission of evidence at trial. Specifically, the school records of Christopher Sterling were admitted into evidence and published to the jury. Disagreeing with the plaintiff that the school records were hearsay in violation of Rule 803(6), the Court of Appeals held that the records were used to impeach Mrs. Sterling's testimony that Christopher's problems at school arose after the accident and had not existed before the accident.

One of the defendant's experts, Dr. Stephen Hooper, was qualified as an expert in neuropsychology. During his testimony at trial, he identified an article by Dr. Carl Dodrill entitled "Myths of Neuropsychology," as "reliable scientific authority." Relying upon Rule 803(18), the Court held that the article was properly admitted into evidence.

> Dr. Stephen Hooper testified for the defense as an expert in the area of neuropsychology. His testimony established the Dodrill article as reliable scientific authority. Therefore, a proper foundation was established for the admission into evidence of the Dodrill article pursuant to the requirements of Rule 803 (18). Thus, the article was not inadmissible as hearsay, and we find no error in the Court's admission of this scientific article. 552 S.E.2d at 678.

N.C.G.S. § 6-20 allows the trial judge discretion to award costs. Although N.C.G.S. § 6-19 does not allow costs to defendants "as a matter of course," the trial court's exercise of discretion under N.C.G.S. § 6-20 was "not reviewable on appeal."

During the appeal, Lowman and West settled with the plaintiff. Soucy Trucking and Caron alleged on appeal that such settlement was not in good faith pursuant to N.C.G.S. § 1B-4. The Court of Appeals disagreed.

> In the present case, the trial court held hearings and found that both settlements were made in good faith and in the best interest of the minor Plaintiff. The transcripts of the settlement reveal that the trial court gave careful consideration to the proposed settlement and to the potential ramification of the settlement should a new trial be ordered. The approved settlements were for the precise amount of the third-party defendants' pro rata share of the jury verdict. Soucy Trucking and Caron had the burden of proving that the settlements were not in good faith. . . . However, the trial court by its ruling concluded defendants had not met their burden. "The mere showing that there has been a settlement" between an injured party and a tort-feasor is insufficient to "show that there has been a lack of good faith" in the settlement . . . . We find that the trial court's determination that the settlements were made in good faith appear to "have been the result of a reasoned decision." 552 S.E.2d at 680-681.

The vehicles of the parties in Love v. Singleton, 145 N.C.App. 488, 550 S.E.2d 549 (2001) collided as Singleton

attempted to turn left across Love's lane of travel at a stoplight. As part of the evidence considered by the trial court on the defendant's motion for summary judgment, there was testimony that the defendant, Singleton, was stopped at the intersection of Harris Boulevard and Robinson Church Road in Charlotte, waiting to turn left onto Robinson. In making the turn, Singleton had to yield to traffic traveling north on Harris Boulevard. As the stoplight on Harris Boulevard changed from green to yellow, Love was traveling on Harris Boulevard about forty miles an hour and about twenty feet from the intersection. Love struck Singleton as Singleton entered the intersection. The trial court granted the plaintiff's motion for summary judgment.

Holding that the evidence established the plaintiff's contributory negligence as a matter of law, the Court of Appeals reversed.

> Moreover, viewing the evidence in the light most favorable to Defendants, a reasonable juror could conclude that Love was contributorily negligent by proceeding into the intersection without keeping a proper lookout and, thus, she was not entitled to a judgment as a matter of law on this issue. Love did not notice C. Singleton's vehicle until she was about one car length away from the "stop line" despite the physical evidence raising an issue as to whether C. Singleton's vehicle was in Love's lane of travel when she was 20 feet away from the intersection. Even if Love had the benefit of a green light, which is in dispute, she nonetheless had the obligation to maintain a proper lookout and

> should not have relied blindly on the green light. . . . Accordingly, the trial court erred in granting Plaintiff's motion for summary judgment. 550 S.E.2d at 551-552.

The plaintiff in Womack v. Stephens, 144 N.C.App. 57, 550 S.E.2d 18, petition for discretionary review denied, 354 N.C. 229, 555 S.E.2d 277 (2001) was struck by the defendant's vehicle as she attempted to cross English Street, a four-lane road, in Greensboro at 1:30 a.m. on 24 September 1995. The plaintiff had successfully crossed both northbound lanes and was in the southbound lanes when she was struck. Eugene Siler was a witness to the accident. Siler was driving his car in the outer, right-hand southbound lane. The defendant was driving about two car-lengths behind Siler. When Siler first saw the plaintiff, she had crossed the centerline of the two southbound lanes. As soon as Siler saw the plaintiff, he swerved to the right to avoid hitting her. Siler heard the defendant hit her brakes and turn to her left. When the plaintiff saw Siler, the plaintiff backed up to the dividing line between the two southbound lanes. Other evidence at trial indicated that the plaintiff had consumed alcohol, marijuana, and cocaine on the evening of the accident. The trial court directed a verdict for the defendant.

The Court of Appeals reversed and held that last clear chance should have been submitted to the jury. The Court agreed that the plaintiff's evidence established that her own negligence was at least one proximate cause of her injuries. The plaintiff was attempting to cross English Street at night in an area that was dimly lit and was not crossing at a marked crosswalk. The plaintiff was wearing dark clothing and had been drinking alcohol most of the day.

As to the elements of last clear chance, Siler testified that the plaintiff never looked at him and simply backed up into the defendant's lane of travel. This testimony established the plaintiff's negligent failure to pay attention and discover her peril. The defendant testified that she first saw the plaintiff as the plaintiff was backing up into the defendant's lane of travel. Such evidence established that the defendant saw the plaintiff and recognized the plaintiff's position of peril.

The third element of last clear chance requires that the defendant have the time and means to avoid the accident. The defendant testified that she saw the plaintiff about the same time that Siler slowed down to avoid hitting the plaintiff. As the defendant swerved to

avoid hitting Siler, the defendant saw the plaintiff in her lane of travel.

> The evidence shows defendant knew, for several seconds, that plaintiff was in the middle of the road, that defendant sounded her horn upon swerving to the left, but that 10 to 15 seconds passed before defendant applied her brakes to avoid hitting plaintiff. . . . The evidence raises an inference that defendant could have taken further evasive action to avoid hitting plaintiff. . . . Defendant negligently failed to use the available time and means to avoid plaintiff, and for that reason, the plaintiff was injured. 550 S.E.2d at 24-25.

The decedent, in Kane v. Crowley's at Stonehenge, Inc., 144 N.C.App. 409, 547 S.E.2d 824 (2001), Megan Kane, was a passenger in a vehicle driven by Aaron January that struck a tree resulting in the death of Ms. Kane. Mr. January was under the age of 21 and had consumed alcoholic beverages at a number of locations during the evening of the accident. While at the defendant, Crowley's, January consumed several mixed, alcoholic drinks. As Kane rode with January, January was passed by a BMW in such a manner that January became angry, turned around and chased the BMW. January lost control of his vehicle, resulting in the accident that caused Kane's death.

In his instructions to the jury, the trial judge told the jury that Crowley's contended that the proximate cause of Ms. Kane's injuries "was the intentional conduct of

Aaron January, resulting in his conscious decision to unlawfully engage in a chase or speed competition with another motor vehicle, which intentional conduct . . . resulted in Aaron January losing control of his Chevrolet Camaro, causing it to strike a tree, thereby fatally injuring Megan Ellen Kane. . . . [and] that Aaron January's intentional conduct . . . was not foreseeable."

The jury entered a verdict in favor of Crowley's. On appeal, the plaintiff contended that the trial judge had erroneously instructed the jury that if the jury believed that January's conduct was intentional, the jury could not find in favor of the plaintiff. The Court of Appeals affirmed the trial judge's instructions and the verdict for Crowley's. The Court held that the trial judge had fully instructed the jury on January's negligence and Crowley's negligence and that the plaintiff was not required to "prove that the defendant's negligence was the sole proximate cause of the injury." Finally, the Court stated that the trial judge had also correctly stated the contentions of the parties by telling the jury that "Crowley's contends and the plaintiff denies" as to each specific contention.

Thompson v. Bradley, 142 N.C.App. 636, 544 S.E.2d 258, review denied, 353 N.C. 532, 550 S.E.2d 506 (2001) was

an action for wrongful death arising from a one-car accident on 7 June 1997. The defendant, Susan Bradley, was operating the car and the decedent, Christopher Thompson, was a passenger in the car at the time of the accident. Thompson and Bradley had spent most of the day together. There was no evidence of alcohol consumption. Ms. Bradley testified that she was rounding a curve and slowed down to less than 55 miles per hour. As she took her foot off of the accelerator, Thompson placed his foot on top of her foot, pressed his foot down, causing the car to increase its speed. This resulted in Ms. Bradley loosing control of the car. The car swerved and rolled into a ditch. Mr. Thompson was thrown from the car and died from his injuries.

Michael Sutton, an accident reconstruction expert, filed an affidavit in opposition to the defendant's motion for summary judgment. Sutton related that he had interviewed law enforcement officers, visited the scene, and reviewed Bradley's deposition. Sutton opined that even if Thompson had placed his foot on top of Bradley's foot on the accelerator, there was "no physical evidence to indicate that Thompson caused or contributed to the accident." Sutton concluded that the accident was "due to steering overcorrection which led to the subsequent roll

over of the vehicle." The trial court granted the defendant's motion for summary judgment.

Holding that Sutton's affidavit presented a genuine issue of material fact, the Court of Appeals reversed.

> Bradley's deposition testimony places responsibility for the accident on Thompson, while the affidavit submitted by Thompson's expert stated that the accident was caused by Bradley's steering overcorrection . . . . Differing conclusions might reasonably be drawn from the evidence depending on which party's evidence is accepted as true. Moreover, viewing this conflicting evidence in the light most favorable to plaintiff-appellant, we conclude the evidence presents material issues of fact appropriate for jury determination.
>
> The present case raises issues of credibility, another factor that renders summary judgment improper . . . . If a witness is interested in the outcome of a suit, the witness's credibility should be submitted to the jury, to avoid the trial judge conducting a "trial by affidavit." . . . . In the present case, Bradley's deposition was the only defense evidence. As a party, she has an interest in the outcome of the suit, putting her credibility at issue. Likewise, the jury should be allowed to consider the credibility of the accident reconstructionist. Having been retained by plaintiff, he arguably has an interest in the outcome, which may be considered by the jury. 544 S.E.2d at 262.

B. Premises

The plaintiff in Martishius v. Carolco Studios, Inc., ___ N.C. ___, ___ S.E.2d ___ (2002) was seriously injured when he came into contact with uninsulated energized power lines while working on the defendant's property. The

property where plaintiff was injured was constructed in 1984 as a motion picture studio. Gerald Waller was hired to assist in construction including the electrical distribution system. At the time of original construction, Carolina Power & Light installed uninsulated overhead power lines on the back lot, approximately seventy-five feet from any structures.

Over the years, the back lot sets expanded toward the power lines. At the time of the plaintiff's injury on 1 February 1993, the set for the movie, "The Crow," had actually encroached on the power-line easement. Several workers on the set testified at trial that they were working between the set and the power lines. The plaintiff was injured when the mobile boom lift in which he was working came into contact with the power lines. Waller had continued to be employed on the set. At the time of the plaintiff's injury, Waller was facility manager and was on the set every day. A jury awarded the plaintiff $2.5 million. The Court of Appeals affirmed the trial court's denial of the defendant's motions for directed verdict and for judgment notwithstanding the verdict.

The Supreme Court affirmed. As to the defendant's duty to the plaintiff, the Court held that the defendant exercised sufficient control over the property, especially

with the presence of electrical power lines, to have a duty.

> This evidence establishes that defendant was far more than a mere landlord to Crowvision. Defendant's retention of substantial authority over the use of its property, taken together with its active involvement in Crowvision's daily routines, placed upon defendant a concomitant duty to exercise reasonable care to ensure that Crowvision's employees were not injured by coming into contact with uninsulated power lines running over the back lot. One who maintains a high voltage electric line at places where people may be reasonably expected to go for work, business or pleasure has the duty to guard against contact by insulating the wires or removing them to a place where human beings will not likely come in contact with them. ___ S.E.2d at ___.

There was sufficient evidence of the defendant's breach of this duty to submit to the jury.

> Evidence was presented that defendant was aware that the uninsulated power lines presented a hazard to film crews on the back lot and that workers would have to confront such a hazard to accomplish their assigned duties. Despite defendant's knowledge of the danger, it allowed near-permanent fixtures on the back lot to encroach on CP&L's easement. . . . Given the evidence presented to the jury concerning the nature and use of the property, the knowledge of defendant through its facility manager of the set conditions, and the available alternatives, there was sufficient evidence to submit to the jury the question whether the defendant was negligent in causing plaintiff's injuries. ___ S.E.2d at ___.

The Court also rejected the defendant's argument that it was entitled to a directed verdict as a result of the

plaintiff's contributory negligence as a matter of law in knowingly working around the power lines.

> Plaintiff's expert MacCullum similarly testified that "the power lines may be camouflaged because they blend in with the background, and it's very difficult for people to estimate accurate distances, particularly when they have multiple visual tasks to do." Although no one knew where plaintiff was looking at the time of the accident, testimony as to the relative position of the sun suggested that glare could have been a factor. Taken together, this evidence adequately raised a question sufficient to submit to the jury as to whether plaintiff was contributorily negligent. ___ S.E.2d at ___.

The plaintiff in James v. Wal-Mart Stores, Inc., 141 N.C.App. 721, 543 S.E.2d 158, per curiam reversed, 354 N.C. 210, 552 S.E.2d 140 (2001) slipped and fell after she entered the Wal-Mart store. It was raining on the day of the injury. The plaintiff had entered the store previously and seen a yellow sign warning of wet floors. When the plaintiff returned to her car, she remembered that she needed one more item in the store. When she entered the store the second time, she did not see the warning signs. She fell at the entrance to the store. The jury found no negligence by Wal-Mart.

The Court of Appeals reversed because the trial judge refused to give an instruction requested by the plaintiff to the effect that a landowner has a duty to warn of foreseeable dangers. The plaintiff contended that since

she did not see warning signs at the time of her second entry into the store, the store was required "to give adequate warning to all lawful visitors of any hidden or concealed dangerous condition about which the owners knows or, in the exercise of ordinary care, should have known." The Supreme Court reversed per curiam for the reasons in Judge Edmunds' dissent.

> The evidence in the case at bar is uncontested that the condition, which led to plaintiff's fall was not concealed or hidden, that plaintiff had full knowledge rain was falling, that defendant took steps to remove moisture from the floor where plaintiff fell. . . . "Even if the floor was wet due to the rain that evening, this condition would have been an obvious danger of which plaintiff should have been aware since she knew it was raining outside and it was likely that people would track water in on their shoes." 543 S.E.2d at 160.

Allstate Insurance Co. v. Oxendine, ___ N.C.App. ___, 560 S.E.2d 858 (2002) was a subrogation action to cover for damages to property of Allstate's insured, William Cooper. Oxendine owned property adjacent to Cooper's property. In January 1995, Oxendine used three fifty-gallon drums to burn trash on his property. He testified that he never left the drums when the trash was burning and always had a water hose present. Oxendine's daughter, and her husband, Locklear, also lived on the property. On 21 January 1995, Locklear was burning a bag of trash while Oxendine was

asleep. Fire escaped from the drum and eventually engulfed the Cooper home. The trial court granted Oxendine's motion for summary judgment. The trial court also entered judgment against Locklear.

The Court of Appeals affirmed summary judgment for Oxendine on the grounds that Oxendine was not responsible for the conduct of Locklear and that Locklear's actions did not constitute a nuisance for which Oxendine would be liable.

> In case of work done by a licensee, the work is done on the licensee's own account, as his own business, and the profit of it is his. It is not a case, therefore, where the thing which caused the accident is a thing contracted for by the owner of the land, and for which he may liable for that reason. . . . It is not enough here, of course, to show that the third person's conduct foreseeably and unreasonably jeopardized plaintiff. Plaintiff must also show that the occupier (a) had knowledge or reason to anticipate that the third person would engage in such conduct upon the occupier's land, and (b) thereafter had a reasonable opportunity to prevent or control such conduct. . . .560 S.E.2d at 860.
>
> * * *
>
> There was no evidence, or even forecast of evidence, of any earlier negligent use of the drums by Locklear which would have alerted Oxendine. Locklear stated in his deposition that he burned trash on Oxendine's property a couple of times a month and always made sure the bag was completely inside the drum. On 21 January 1995, he burned the bag in a drum, watched the fire until there was only smoke, and then did other outdoor chores. Oxendine was asleep in the

> morning and at work during the afternoon when Locklear failed to keep a proper lookout. There is no evidence of burning activities by Locklear of such duration or in such a manner as to amount to a nuisance. There is no evidence that Oxendine, with knowledge of such conduct, permitted it to continue. 560 S.E.2d at 861.

The minor plaintiff, Justin Joslyn, in Joslyn v. Blanchard, ___ N.C.App. ___, ___ S.E.2d ___ (2002) was bitten by a dog owned by the Blanchards. The Blanchards kept the dog at their residence. The Blanchards rented their residence from William and Barbara Lewis. The complaint alleged that Mr. and Mrs. Lewis were aware of the violent nature of the dog and were "very cautious when around the dog." The trial court granted the motion for summary judgment of Mr. and Mrs. Lewis.

On appeal, the Court of Appeals ruled that the appeal was interlocutory because the claims of the plaintiffs against the Blanchards were still pending in the trial court. A substantial right was affected, however, because of the possibility of inconsistent verdicts, specifically in the case against the Blanchards, a jury may determine that the minor plaintiff was contributorily negligent, whereas if the Lewis verdict were reversed, a different jury may reach a different result on the issue of contributory negligence.

Summary judgment for Mr. and Mrs. Lewis was affirmed by the Court of Appeals because there was no evidence connecting the dog to Mr. and Mrs. Lewis.

> . . . plaintiff has produced even less evidence that the plaintiff in Patterson [v. Reid, 10 N.C.App. 22, 178 S.E.2d 1 (1970)] that defendants managed, controlled or cared for the dog that injured plaintiff. Plaintiff's complaint and supporting affidavits contain no allegations whatsoever to support any connection between defendants and the dog, beyond the fact that they permitted the Blanchards to keep the dog on the property. As such, plaintiff has failed to prove that defendants were "keepers" of the animal here involved, as defined by our Supreme Court in Swain, [v.Tillett, 268 N.C. 46, 152 S.E.2d 297 (1967)].

Based on similar reasoning, the Court of Appeals also held that Mr. and Mrs. Lewis were not strictly liable under G.S. § 67-4.4 because there was no proof that Mr. and Mrs. Lewis had "any type of possessory property right in the dog."

The plaintiff in Williams v. Smith ___ N.C.App. ___, ___ S.E.2d ___ (2002) was employed by the defendant, the operator of an automotive body shop. The plaintiff was required to furnish his own tools. In November 1998, there was a burglary at the body shop and the plaintiff's tools were taken. Earlier in the year, someone broke into the body shop and took several batteries. In a separate incident, a deputy sheriff told the defendant that someone may have attempted to break into the body shop. The body

shop was secured by a gate that was locked with a heavy chain and padlock. The garage door to the body shop was secured by a latch and bar. There was also a floodlight on the premises. The trial court granted summary judgment for the defendant.

The Court of Appeals affirmed judgment for the defendant. The plaintiff argued that the trial court had incorrectly shifted the burden to the plaintiff to forecast evidence entitling him to recover after the defendant presented evidence that the theft was the result of criminal activity by a third party. The Court of Appeals held that the trial judge had properly considered the defendant's evidence in support of summary judgment, then required to plaintiff to present evidence entitling the plaintiff to recover.

> . . . this Court concludes that the trial court did not err in requiring plaintiff to present evidence of significant criminal activity to overcome defendant's forecast in support of its motion for summary judgment. . . . In the instant case, there was only one confirmed incident of a break-in occurring on the body shop premises. Standing alone, this prior incident is insufficient to negate the sufficiency of the security methods currently employed by the defendant.

Schrimsher v. Red Roof Inns, Inc., ___ N.C.App. ___, 560 S.E.2d 386 (2002) was an action for wrongful death. The decedent was a Mecklenburg County police officer who

worked off-duty as a security guard for the defendant. On the evening of 21 November 1991, the decedent broke up a disturbance in the motel parking lot. One of the participants returned to the motel, entered the lobby through an unlocked door and shot and killed the decedent. The Complaint alleged that the motel had violated its own security regulations by failing to secure the door through which the assailant entered.

The trial court granted the motel's motion for summary judgment. The Court of Appeals affirmed.

> . . . all of the evidence . . . tended to show that decedent was an experienced law enforcement officer, skilled in the area of security services. Decedent's knowledge of appropriate security measures, including the effect of allowing the lobby door to be unlocked at nighttime, was equal to or superior than the knowledge of defendant. There was no evidence to suggest that the unsecured door was a "hidden danger" of which decedent had no knowledge. Indeed, decedent was hired by defendant to prevent the very kinds of criminal acts from which decedent died. 560 S.E.2d at 387-388.

The plaintiff in Goynias v. Spa Health Clubs, Inc., ___ N.C.App. ___, 558 S.E.2d 880, notice of appeal filed (2002), alleged that he was injured as a result of the defendant's negligence when he slipped and fell on a wet floor after leaving the men's shower area. The Court of Appeals affirmed the trial court's granting of summary judgment in favor of the defendant.

. . . plaintiff has failed to show that defendant negligently created the situation which caused plaintiff's injury. Plaintiff's own expert testified in his deposition that the tile floor was textured and possessed a .64 coefficient of friction, significantly higher than the .04 standard for a bathtub or shower floor. Plaintiff's expert testified the floor was sloped; however, the expert performed no tests which would indicate what the slope was or if it was significant enough to be the cause of the accident. Plaintiff's expert testified the lighting in the room was such that a person could not see a puddle which had formed; however, the expert examined the area two and a half years after the accident and offered no evidence or factual basis as to what the lighting conditions were at the time of the accident. Plaintiff's expert offered that the slip resistance of the floor was determined with clean water, and that resistance could be lessened by the presence of soap or other oils. However, neither plaintiff nor plaintiff's expert offered any evidence of the presence of soap or oils in the water on the date of the accident. . . .

A plaintiff may also survive a motion for summary judgment by showing that a defendant failed to correct the condition after actual or constructive notice. . . . However, in this case, plaintiff has failed to offer any evidence which would tend to prove defendant was aware dangerous puddles had formed or were forming on the floor. Plaintiff testified that he did not notice any puddles immediately before or immediately after he slipped. He did not notice any standing water until he returned a few minutes later to the place where he fell, accompanied by an employee of the health club. Furthermore, a proprietor has no duty to warn an invitee of an obvious danger or a condition of which the invitee has equal or superior knowledge. Reasonable persons are assumed, absent a diversion or distraction, to be vigilant in the avoidance of injury in the face of a known or obvious danger. 558 S.E.2d at 882.

Judge Biggs dissented on the basis that the defendant's conduct was a question of fact for the jury.

The plaintiff in Dowless v. Kroger Co., ___ N.C.App. ___, 557 S.E.2d 607 (2001) had been grocery shopping at the Kroger store in Fayetteville. As she was pushing her cart to her car in the parking lot, the front wheel of the cart fell into a hole in the asphalt, causing the cart to turn over. The plaintiff damaged the rotator cuff in her left shoulder when she attempted to catch the cart. Ohio Wesleyan owned the parking lot and the building. Kroger leased only the building, not the parking lot. The trial court granted the motions for summary judgment as to both defendants.

The Court of Appeals held that summary judgment had been properly entered in favor of Kroger because Kroger owned no duty to the plaintiff to maintain the parking lot in a safe condition. Summary judgment, however, should not have been entered for Ohio Wesleyan because there was an issue of fact as to whether a reasonably prudent person would have seen the hole in the asphalt.

> In her affidavit Dowless averred: that she exited Kroger with a full shopping cart; that she proceeded to cross the parking lot to return to her car; that her car was parked in an area of the parking lot in which she had never before parked; that in order to reach her car she had to cross through an intersection of parking lot

> traffic lanes; that, at the time, there were vehicles traveling in all directions requiring her attention; that after she crossed through the intersection of traffic she turned her cart toward her car; that as she turned her cart, or after completing the turn, the shopping cart began to turn over to its left as a result of the fact that a wheel of the shopping cart had fallen into a hole in the asphalt; and that she then injured her left shoulder while trying to prevent the cart from turning over. Dowless further stated in her affidavit that she did not see the hole because her view of the ground was obscured by the merchandise in her shopping cart, and because her attention was focused on the heavy traffic in the parking lot in order to ensure that she would reach her car safely. Plaintiff's forecast of evidence was sufficient to create a triable jury issue as to whether the hole in the asphalt would have been obvious to a person using ordinary care for her own safety under similar circumstances. 557 S.E. at 610.

The plaintiff in Barber v. Presbyterian Hospital, 147 N.C.App. 86, 555 S.E.2d 303 (2001) had accompanied her husband to the defendant hospital for outpatient treatment. As she was walking to the hospital cafeteria, she went through a door that led to a stairway. The plaintiff did not notice that there was a step-down immediately on the other side of the door. The plaintiff fell forward and received injuries to her knee and ankle. The trial court granted the defendant's motion for a directed verdict.

The Court of Appeals reversed, holding that the door obstructed the plaintiff's view of the step-down and that

the issues of negligence and contributory negligence were for the jury.

> . . . plaintiff's view of the step-down was obstructed by the door. Plaintiff was looking straight ahead, rather than down at her feet . . . . Indeed, plaintiff's view was more obstructed, because even if she had been looking down, she would not have seen the step-down until the door was opened and she was passing through it. . . . Because the step-down in this case was visible only after the door was opened, we hold that the plaintiff's evidence is sufficient to present a jury question. 555 S.E.2d at 307-308.

The plaintiff in Sawyer v. Food Lion, Inc., 144 N.C.App. 398, 549 S.E.2d 867 (2001) was injured when he fell from a scaffold while installing ceiling tile at the defendant's store. Vick Construction had been hired to construct an addition to the defendant's store in Cumberland County. The plaintiff's employer, Asheville Acoustics, was to install ceiling tiles in the new addition. The plaintiff was installing ceiling tiles by using a scaffold with wheels. The wheels could be locked to prevent movement of the scaffold while it was being used. On the day of the plaintiff's injury, Commercial Refrigeration was installing a refrigeration system in the addition. As the plaintiff began work, there were uncovered holes in the floor where Commercial had been installing piping. The plaintiff told the construction foreman about the holes and looked for covers for the

holes. When the plaintiff began installing ceiling tiles, he did not lock the wheels on the scaffold. One of the wheels on the scaffold rolled in one of the refrigeration holes, throwing the plaintiff to the floor. The trial court granted the motions for summary judgment of all defendants.

The Court of Appeals affirmed. Acknowledging that evidence of OSHA violations by Commercial may be some evidence of negligence by Commercial, the Court held that the plaintiff's own contributory negligence barred recovery.

> We find that the evidence conclusively shows plaintiff had knowledge of the uncovered holes, understood the risks associated with this hazard, disregarded these risks by placing his rolling scaffold in close proximity to one of the holes, failed to take additional safety precautions by failing to set any of the wheel brakes, and that as a result of his actions, plaintiff was injured. We therefore conclude that plaintiff was contributorily negligent as a matter of law, and that as such, he is precluded from recovering damages for his injuries from Commercial. Thus, plaintiff is also barred from recovering from Vick and Food Lion, since plaintiff's claims against them were predicated upon the claim against Commercial. 549 S.E.2d at 870.

The plaintiff in Whaley v. White Consolidated Industries, 144 N.C.App. 88, 548 S.E.2d 177, petition for discretionary review denied, 354 N.C. 229, 555 S.E.2d 277 (2001) received a severe electric shock and resulting loss

of function of most of his right arm while performing high voltage electrical work at the defendant's plant. Expansion of the defendant's plant required installation of electrical equipment. The high voltage electrical work was subcontracted to the plaintiff's employer, E & R Inc. The electrical work was to be completed by Thanksgiving 1995. Since certain electrical equipment had not been delivered to the construction site, E & R was not able to complete its work as scheduled. Although the electrical work had not been concluded, the defendant's manufacturing engineer, Patton, decided to maintain the original schedule and energize the high voltage cable over the Thanksgiving weekend. Energizing the cable also energized all unfinished electrical work. Patton padlocked the high voltage switch handles, but did not "tag" the equipment. When the plaintiff reported to work to complete the high voltage line work, he received electrical burns when he leaned against an energized metal bar. The jury awarded $1.27 million in compensatory damages and $2.1 million in punitive damages.

The Court of Appeals affirmed. The Court held that the trial judge had properly submitted the issue of punitive damages to the jury:

> In the present case, Patton, acting as liaison for defendant White, made the decision to energize the high voltage cable over Thanksgiving weekend 1995, in spite of the fact that the substations lacked necessary equipment and were not operational. Patton energized the cable, which in turn energized the substations, knowing employees from E & R still had work to perform on the substations. Patton testified that he believed plaintiff and Sutton were aware the line was energized; he also claimed to have told three other people involved in the project that the line was energized, but those people testified that they were never warned. Although Patton padlocked the HVL switch handles, these locks did not prevent exposure to potentially deadly electrical currents for those working inside the cabinet. Finally, Patton did not "tag" the substations, as OSHA standards require, to notify other workers that the equipment was energized. Taken in a light most favorable to plaintiff, the evidence presented was sufficient to go to the jury on the question of whether Patton's behavior demonstrated a reckless indifference for the rights of others. 548 S.E.2d at 181.

The plaintiff in Thompson v. Wal-Mart Stores, Inc., 138 N.C. App. 651, 547 S.E.2d 48 (2000) slipped and fell at the defendant's store as she was reaching for an item in the shampoo aisle. As she fell, the plaintiff saw small pieces of glass "tucked up under the overhang of the lowest shelf" and saw a puddle of thick liquid on the floor. At the close of the plaintiff's evidence, the trial court granted the defendant's motion for a directed verdict.

Agreeing that the plaintiff had produced no evidence of the defendant's negligence, the Court of Appeals affirmed.

> In this case, Ms. Thompson presented no direct evidence about how long the liquid was in the aisle. She instead presented circumstantial evidence, trying to establish that the liquid had been there for some time. Her evidence included the existence of the puddle and the pieces of glass hidden under the shelf. She also presented evidence showing that no one at Wal-Mart could say when the shampoo aisle had been cleaned last. However, to reach the conclusion that Wal-Mart should have known about the spill, a jury would have to make a number of inferences not based on established facts. For instance, a jury would have to infer that the spill came from a glass container; that the glass under the shelf came from a glass container as opposed to some other glass item; that the glass under the shelf came from the same glass container which held the liquid; that someone cleaned up some of the broken glass container and hid the rest under the shelf, but left the puddle on the ground free of broken glass. The jury would have also had to speculate, without factual support, about how long the spill existed. To reach the conclusion that the liquid had been on the floor a long time, a jury would have to make too many inferences based on other inferences. We uphold the trial court's decision to find as a matter of law that Ms. Thompson's evidence cannot support the conclusion that Wal-Mart had constructive notice of the spill. 547 S.E.2d at 50.

C. Products

The plaintiff in Jones v. GMRI, Inc., 144 N.C.App. 558, 551 S.E.2d 867 (2001), cert. dismissed as improvidently granted, 355 N.C. 275, 559 S.E.2d 787 (2002) alleged that she was injured when she bit into a meatball at the defendant's Olive Garden Restaurant. The complaint alleged claims for negligence and breach of implied warranty. At trial, the plaintiff's evidence showed that

she cut the meatball into eight pieces. While taking the first bite, she bit down into an unidentified metal object. Being startled, she "sucked in and immediately sucked down the food." At the close of the plaintiff's evidence, the trial judge granted the defendant's motion for a directed verdict as to the negligence claim.

The defendant presented evidence that the meatballs arrived at the restaurant frozen and in sealed bags. As part of the preparation for service, the meatballs are heated and mixed with tomato sauce. The meatballs are not inspected other than checking the temperature with a probe. The jury found that the defendant breached the implied warranty of merchantability, but that the defendant did not have a reasonable opportunity to inspect the food in a manner that would have revealed the claimed defect. Therefore, no damages were awarded.

The Court of Appeals affirmed. As to the directed verdict on the negligence claim, the Court noted that the plaintiff had offered evidence showing only that she was injured after biting into a meatball. The plaintiff "offered no evidence showing defendant's breach of a duty or standard of care. . . . res ipsa loquitur does not apply in a case involving an injury from the ingestion of an adulterated food product." 551 S.E.2d at 873.

The plaintiff objected to the application of the "sealed container" defense in G.S. §99B-2(a) because the restaurant had removed the meatballs from the sealed container. The statute, however, additionally applies when "the seller was afforded no reasonable opportunity to inspect the product." The Court concluded that the defense applied under the facts of this case.

The plaintiff had initially sued Rich Products, the supplier of the meatball. During discovery, the plaintiff requested copies of documents showing that the meatball was supplied by Rich Products. In response to the plaintiff's motion to compel production, the restaurant responded that during the three years between the incident and the filing of the lawsuit, the requested documents no longer existed. The plaintiff then took a voluntary dismissal against Rich Products. The plaintiff presented a spoliation of evidence argument for the first time in her post-trial motion for judgment notwithstanding the verdict. In this motion, the plaintiff argued that the 99B defense should have been stricken as a sanction for failure to comply with the discovery. Imposition of discovery sanctions was within the discretion of the trial judge. The Court of Appeals found no abuse of discretion.

The plaintiff in Phillips v. Restaurant Management of Carolina, 146 N.C.App. 203, 552 S.E.2d 686 (2001), petition for discretionary review denied, 355 N.C. 214, 560 S.E.2d 132 (2002) was on duty as a member of the North Carolina Highway Patrol. He stopped at the drive-through window of a Taco Bell restaurant in Black Mountain operated under a franchise by the defendant. An employee of the restaurant, Jason Jones, spat into the plaintiff's food before serving it to him. The trooper noticed a substance on the food and reported it to the restaurant manager. A SBI laboratory analysis confirmed the presence of human saliva on the food. Jones later told his shift supervisor that he spat in the trooper's food because local police officers had harassed him for skateboarding and he thought the plaintiff was one of the officers. The trial court granted the motions for summary judgment of Restaurant Management and Taco Bell.

The Court of Appeals reversed as to Restaurant Management, holding that there was a genuine issue of material fact as to the vicarious liability of Jones' employer.

> In the instant case, we hold that there is at least a genuine issue of material fact as to whether Jones's acts were within the scope of his employment and in furtherance of Restaurant Management's business. The record shows that

> when he spat into the trooper's food, he was in the act of performing his job of preparing that food for the trooper. His concealed act of spitting into food while preparing it related directly to the manner in which he carried out his job duty of preparing the food for consumption by the customer. Indeed, a jury could determine that his act of spitting in the trooper's food was done within the scope of his employment. We see no distinction between the instant case and the situation envisioned by our Supreme Court in Wegner [v. Delicatessen, 270 N.C. 62, 153 S.E.2d 804 (1967)], where a bus boy slams down a glass, such that the glass shatters and injures a customer. . . . Accordingly, we conclude that the trial court erred in granting summary judgment as to the issue of Restaurant Management's vicarious liability for Jones's conduct. 552 S.E.2d at 690-691.

The Court also held that there was a genuine issue of material fact as to the claim alleging breach of the implied warranty of merchantability. Since spitting upon a person is a battery, the Court held that "introducing one's saliva into another person's internal system would be highly offensive and, as such, constitute a harm or injury." 552 S.E.2d at 692.

The claim of intentional infliction of emotional distress also survived summary judgment, based, in part, on a supporting affidavit from the plaintiff's physician that the plaintiff had "experienced emotional distress associated with the spitting incident."

> In the instant case, the trooper alleged that he suffered severe emotional distress as a result of consuming the saliva-covered nachos, and offered

> competent evidence in the form of an affidavit from a physician in support thereof. In his complaint, the trooper asserted that the alleged actions were "intended to cause severe emotional distress to Plaintiff or occurred with reckless indifference to the likelihood that said conduct would cause such distress." 552 S.E.2d at 694.

The trial court correctly dismissed the claim of punitive damages against Restaurant Management. N.C.G.S. § 1D-15(c) bars punitive damages on the basis of vicarious liability. There was no independent evidence that Restaurant Management participated in Jones's conduct. Since Jones was not an employee or agent of Taco Bell at the time of the events alleged, the trial court properly granted summary judgment on all claims against Taco Bell.

The plaintiff in Dewitt v. Eveready Battery Co., Inc., 144 N.C.App. 143, 550 S.E.2d 511, petition for discretionary review denied, 354 N.C. 216, 553 S.E.2d 398 (2001), purchased a battery-operated Coleman lantern and eight Eveready "Energizer" D cell batteries from Wal-Mart on 10 December 1995. After the plaintiff installed the batteries in the lantern, he was not satisfied with the "brightness" of the lantern. When he removed the batteries, he noticed fluid on one of the batteries. He then noticed a "tingle" on his ankle, but did not associate it at that time with the batteries. The plaintiff drove to Wal-Mart to return the batteries. After he returned home,

the burning intensified in his foot. When he removed his sock, he saw that the heel of his foot was black. At the hospital, he was diagnosed as having third and fourth degree alkaline chemical burns on his ankle. The burns were determined to be caused by potassium hydroxide, a chemical in the batteries. Suit was filed on 10 September 1997, alleging claims of negligence and breach of warranty.

The trial court granted the defendant's motion for summary judgment on all claims. The Court of Appeals held that there was sufficient evidence of breach of the implied warranty of merchantability to survive summary judgment. The Court otherwise affirmed summary judgment on the claims based on failure to warn and negligence. Relying on Red Hill Hosiery Mill, Inc. v. MagneTek Inc., 138 N.C.App. 70, 530 S.E.2d 321 (2000), the Court held that even if there is no direct proof of a product defect, proof of a product defect may be shown if the product is being put to its ordinary use and the product malfunctioned. Through the plaintiff's testimony, the jury could find that the plaintiff was putting the batteries to their ordinary use when he placed them in the lantern. Malfunction could also be established through the plaintiff's evidence by his testimony that the fluid in the batteries leaked.

The inadequate warning claim was based on the plaintiff's allegation that there was no warning that the type of injury he sustained could be caused by exposure to potassium hydroxide. The plaintiff testified, however, that he was not aware that his ankle had been exposed to potassium hydroxide until he arrived at the hospital.

> As Plaintiff was not aware that he had been exposed to battery fluid, Plaintiff's injuries would have occurred even if the warnings on the batteries had been more "prominent" and "conspicuous," and contained information regarding injuries resulting from potassium hydroxide exposure as well as appropriate medical treatment for such exposure. Accordingly, because the record does not contain substantial evidence that any inadequacy in the warning proximately caused Plaintiff's injuries, the trial court properly granted summary judgment in favor of Defendant on this claim. 550 S.E.2d at 518.

The trial court also properly entered summary judgment for the defendant on the claims based on negligence. Although a product defect could be inferred from the malfunction of the product sufficient to withstand summary judgment on the breach of warranty claim, this same evidence was not sufficient "to infer manufacturer negligence from a product defect which has been inferred from a product malfunction." Red Hill, 138 N.C.App. at 77 n.7, 530 S.E.2d at 327 n. 7. Judge Campbell dissented on the basis that the plaintiff had not shown sufficient

evidence of the product's defect to survive summary judgment on the claim alleging breach of the implied warranty of merchantability.

The plaintiff in Lashlee v. White Consolidated Industries, Inc., 144 N.C.App. 684, 548 S.E.2d 821, petition for discretionary review denied, 354 N.C. 574, 559 S.E.2d 179 (2001) was cutting limbs from a tree while using a chainsaw manufactured by the defendant. At the time of his injury, the plaintiff was using an aluminum ladder with his left foot a rung higher on the ladder than his right foot. The plaintiff's weight was against the tree. As he started to cut a limb on the tree, the plaintiff fell to the ground, receiving injuries that rendered him a paraplegic. Dr. Charles Suggs, an expert in agricultural and biological engineering, testified that the defendant was negligent in manufacturing a chainsaw that did not have appropriate "kickback" protection. William Kitzes, a safety analyst and product safety manager, testified that the labeling used by the defendant to warn about kickbacks was inadequate.

The trial court granted the defendant's motion for summary judgment. The Court of Appeals affirmed based on evidence establishing that the plaintiff was contributorily negligent as a matter of law.

> In the case before us, Lashlee had experienced kickback and was aware of the danger it posed. He had tied himself into the tree earlier on the day of his injury to prevent himself from falling, both because he had seen professionals do so and because it was "common sense." Lashlee had never seen anyone try to cut a tree while standing on a ladder. Yet, when he decided to cut the final limb, Lashlee chose not to retrieve the rope he had previously used to tie himself in. Instead, Lashlee stood near the top of the ladder, leaned his left side against the tree, and began to cut. We conclude that Lashlee was aware of the danger that kickback could potentially knock him backward off the ladder and out of the tree, and that Lashlee's failure to secure himself to the tree constituted contributory negligence as a matter of law. 548 S.E.2d at 826.

II. Insurance

A. Motor Vehicles

Griswold v. Integon General Insurance Co., ___ N.C.App. ___, 560 S.E.2d 861 (2002) arose out of an automobile accident on 17 January 1997 in which a 1989 Pontiac, owned by Ted and Teresa Helms and operated by Wesley Philips, collided with a vehicle operated by Hatchell, resulting in the death of Allen. At the time of the accident, Philips was living with his mother, Teresa Helms, and her husband, Ted Helms. The Helms owned three vehicles, a 1992 Chevrolet, a 1995 Honda and a 1989 Pontiac. The Chevrolet and Honda were insured under a separate policy issued by New South Insurance Company that listed the Honda and Chevrolet as insured vehicles. The

Pontiac was insured by Integon. The Helms provided the Pontiac to Philips. Integon tendered the limits of its policy insuring the Pontiac. The present action was brought for coverage under the New South policy.

The Court of Appeals held that there was no coverage under the New South policy, either as a result of their ownership of the Pontiac or through the family purpose doctrine. The New South policy excluded coverage for any vehicle owned by the Helms other than the insured vehicle. The New South also excluded coverage for any vehicle not insured that was provided for regular use by a family member. The exclusions, therefore, prevented direct coverage for the Pontiac by the New South policy.

The Helms may be liable for their son's acts as a result of the family purpose doctrine since the Helms were the owners of the Pontiac. The exclusions, however, for any vehicle owned that is not insured also prevented coverage under the family purpose doctrine.

> Exclusion B.1.a in the case . . . "limits liability to coverage to personal injury or property damage arising out of the ownership, maintenance or use of the covered vehicle." It does not deal with UM/UIM coverage. . . . We find that the exclusion is clear, unambiguous and not contrary to public policy. Therefore, the New South policy provides no coverage to Ted and Teresa Helms even if the plaintiffs proved the applicability of the family purposes doctrine and

> the son's negligence is imputed to the parents. 560 S.E.2d at 866.

The plaintiff's motorcycle in Whittaker v. Furniture Factory Outlet Shops, 145 N.C.App. 169, 550 S.E.2d 822 (2001) was stolen from the defendant's store display. A declaratory judgment action was brought against the store and its insurer. The plaintiff took a voluntary dismissal without prejudice as to the store. The trial court entered judgment for the insurer on the grounds that the motorcycle was excluded from coverage.

The Court of Appeals dismissed the plaintiff's appeal on the grounds that the plaintiff had no cause of action against the insurer in the absence of a judgment against the insured.

> The policy provides coverage of the "property of others that is in your care, custody or control; but this property is not covered for more than the amount for which you are legally liable. . . . " Petitioner has not established the legal liability of Furniture Factory for his loss. No "rights" of petitioner under N.C.Gen.Stat. § 1-254 exist to establish a case in controversy to meet the jurisdictional requirements for declaratory judgment under Sec. 1-253. . . . the petitioner in this case is an incidental beneficiary to the insurance policy and does not have a contractual "right" under N.C.Gen.Stat. § 1-253, and therefore, does not have standing. . . . Without a judgment against Furniture Factory, petitioner does not have an enforceable contractual right under the insurance policy. As a result, petitioner does not have standing to bring this action directly against respondent. 550 S.E.2d at 825-826.

The plaintiff in Muscatell v. Muscatell, 145 N.C.App. 198, 550 S.E.2d 836, petition for discretionary review denied, 354 N.C. 364, 556 S.E.2d 574 (2001) was a passenger in an automobile driven by her husband. She was injured as her husband exited the driveway at their home, turned left, and was struck by a vehicle operated by Ysteboe. The plaintiff incurred medical bills in the amount of $3,743. Her husband's automobile insurance carrier reimbursed the plaintiff for these expenses under the medical payments coverage provisions of the policy. A jury found both defendants negligent and awarded the plaintiff $5,000. The trial judge allowed the defendant, Muscatell, a credit, or setoff in the amount of $3,743, and denied the motion of Ysteboe for contribution or setoff.

The Court of Appeals reversed and held that the defendant, Muscatell, was not entitled to a credit and that the defendant, Ysteboe, was entitled to contribution.

> Here, plaintiff's receipt of medical payment coverage was not on behalf of defendant Ysteboe but due to a contractual obligation. . . . This case raises the collateral source rule, which provides "a tort-feasor should not be permitted to reduce his own liability for damages by the amount of compensation the injured party receives from an independent source." . . . . Therefore, under the collateral source rule, neither defendant may benefit from a credit or setoff of money paid to plaintiff under the medical payment coverage. . . . By filing the cross claim, defendant Ysteboe took advantage of the potential

> for contribution under the Act, since the trial court found he and defendant Muscatell were jointly and severally liable for plaintiff injuries. Thus, upon payment of the $5,000 judgment by defendant Ysteboe, he is entitled to contribution from defendant Muscatell. 550 S.E.2d at 837-838.

The Court of Appeals in Eatman Leasing v. Empire Fire & Marine, 145 N.C. App. 278, 550 S.E.2d 271 (2001) held that the defendant's business auto policies required payment of prejudgment interest in addition to the policy limits.

> . . . the four policies issued to Eatman have a provision for payment of either "all costs" or "all . . . interest incurred" in addition to liability limits. The policies contain no specific language discussing prejudgment interest as damages. The primary policies . . . have identical prejudgment interest language which provides:
>
> 4. COVERAGE EXTENSIONS
> a. Supplementary Payments:
> In addition to the Limits of Insurance, we will pay for the "insured": . . . (5) All costs taxed against the "insured" in any "suit" we defend;
>
> The excess policies . . . provide:
>
> If we exercise this right [to defend the case], we will assume our proportionate share of all court costs, legal fees, investigation costs, and interest incurred with our consent.
>
> The "all costs" language in these policies is almost identical to the policy language in Lowe v. Tarble, 313 N.C. 460, 329 S.E.2d 648 (1985). Therefore, following the ruling in Lowe and

> applying it to the policies at issue here, we conclude that the "all costs" language of the policies includes prejudgment interest. Further, the policies clearly provide that supplementary payments are in addition to the policy limits. Accordingly, we affirm the trial court's ruling that the four policies provided supplemental payments for prejudgment interest over the policy limits. 550 S.E.2d at 278.

The plaintiff in Morin v. Sharp, 144 N.C.App. 369, 549 S.E.2d 871, petition for discretionary review denied, 354 N.C. 219, 557 S.E.2d 531 (2001) was riding a motorcycle on Interstate 40 when he was struck by a spare tire that had rolled off a tractor-trailer owned by U.S. Transport and operated by Sharp. Suit was filed on 3 March 1998. When the defendants did not file answer, default was entered. The liability carrier for Transport, Legion Insurance Company, received notice of the suit after default was entered. By consent, the entry of default was set aside. At the time the default was set aside, Mr. Morris stated that he represented both the insured and the insurance carrier. Answer was filed denying liability. The plaintiff submitted discovery to the defendants. Mr. Morris indicated that he was not able to locate the defendants. The plaintiff then filed a motion requesting that the liability carrier, Legion Insurance Company, be allowed to intervene. The trial court entered an Order allowing any insurance company who desired to do so to

intervene and assert any interest it may have in the suit. Legion then filed its own motion to intervene. The trial court allowed Legion's motion to intervene.

A jury awarded the plaintiff $1,035,167. On appeal, Legion alleged that it was "prejudicially forced" to intervene. The Court of Appeals affirmed. Beginning with Dunkley v. Shoemate, 350 N.C. 573, 515 S.E.2d 442 (1999), the Court acknowledged that Mr. Morris had not been able to locate the defendants. Dunkley held "that a law firm or attorney may not represent a client without the client's permission to do so." The trial court, therefore, had properly allowed Legion to intervene.

> In the instant case, the trial court properly granted plaintiff and defendant Legion's motions to allow defendant Legion to intervene as a party defendant to protect its interests as articulated in Dunkley. After reviewing the record, we fail to see how defendant was forced to intervene or was prejudiced by this intervention. 549 S.E.2d at 873.

B. Homeowners

Nationwide's insured, Fogleman, in Nationwide Mutual Insurance Co. v. Douglas, ___ N.C.App. ___, 557 S.E.2d 592 (2001) as convicted of violating G.S. § 14-202, the secret peeping statute as a result of his secretly videotaping a guest while she was in the bathroom in his house. Nationwide defended Fogleman under a reservation of rights

in the civil action alleging invasion of privacy and intentional infliction of emotional distress. A jury awarded the plaintiff $33,000 in compensatory damages and $50,000 in punitive damages. Nationwide brought the present declaratory judgment action contending that the "expected or intended" provision in the policy excluded coverage.

The Court of Appeals affirmed the trial court's entry of judgment on the pleadings in favor of Nationwide.

> We conclude that the policy, as a matter of law, excludes coverage for Douglas's injuries, as Fogleman's intentional act of concealing a video camera in his bathroom and filming its occupants was sufficiently certain to cause injury that Fogleman should have reasonably expected such injury to occur. 557 S.E.2d at 594.

American Manufacturers Mutual Insurance Co. v. Morgan, 147 N.C.App. 438, 556 S.E.2d 25 (2001), petition for writ of cert. filed (2002), was a declaratory judgment action to determine coverage under a homeowners' policy and a Personal Catastrophe Liability Endorsement. Martha Glidewell alleged alienation of affection and criminal conversation between Elizabeth Morgan and Mrs. Glidewell's then husband, Pete Glidewell. At the time of the events alleged, Elizabeth Morgan had a homeowners' policy issued by the plaintiff. The trial court determined that the

policies of insurance did not provide coverage for the acts alleged.

The homeowners' policy provided coverage for an "occurrence," and defined "occurrence" in part as an "accident." The Court of Appeals affirmed the trial court's ruling that the acts alleged were intentional and did not fall within the coverage provisions of either occurrence or accident.

> We hold that when a defendant engages in conduct that is sufficient to constitute alienation of affection or criminal conversation tort actions, intent to injure the marriage and the non-consenting spouse may be inferred, as a matter of law, from such conduct when interpreting the term "accident" if the policy fails to define it. 556 S.E.2d at 29.

The Personal Catastrophe Liability Endorsement provided coverage for "personal injury," defined as "bodily injury, sickness, . . . mental anguish and mental injury." The Court of Appeals also affirmed the trial court's ruling that the alleged damages from alienation of affection and criminal conversation were not covered.

> With respect to "bodily injury," the trial court found that "Martha' . . . alleged humiliation, mental anguish and injuries to her feelings and her health, . . . and the claims for alienation of affection and criminal conversation .. . do not present claims for 'bodily injury' as that term is defined . . . ." 556 S.E.2d at 30.

The plaintiffs in Crawford v. Commercial Union Midwest Ins., 147 N.C.App. 455, 556 S.E.2d 30 (2001), petition for writ of cert. filed (2002), had homeowners insurance with the defendant. The plaintiffs' home was destroyed by fire on 31 January 1995. Commercial Union attempted to void the policy because the policy application did not identify three deeds of trust on the property. The insured contended that the third deed of trust was a forgery and that the second deed of trust was a "scam" to protect him. As to the first deed of trust, the insured alleged that he could not read well and relied on the agency to complete the application.

The Court of Appeals reversed summary judgment for Commercial Union on the grounds that there was no evidence that the misrepresentations on the policy application was knowing and willful.

> . . . we reject Defendant's contention that section 58-44-15 does not apply to the application process and that any material misrepresentations made in the application process must be governed by section 58-3-10. In the context of a fire/homeowners policy, section 58-44-15 is the controlling statute and any misrepresentation or concealment made in the application process is governed by that statute, not section, 55-3-10.
>
> Because there was no evidence offered at the summary judgment hearing that Greene knowingly or willfully made any misrepresentations . . . about encumbrances on his property, summary judgment

> cannot be sustained for Defendant. 556 S.E.2d at 33.

Judge Campbell dissented.

The plaintiffs in Bell v. Nationwide Insurance Co., 146 N.C.App. 725, 554 S.E.2d 399 (2001) applied for homeowners insurance with Nationwide on 14 July 1995. The home was destroyed by fire on 15 September 1996. Nationwide denied coverage on the basis of material misrepresentation. The plaintiffs' insurance application misrepresented that they had not filed bankruptcy within the last seven years, had a policy canceled or not renewed and had past losses. Plaintiffs did not dispute that the misrepresentations were material. They argued that the misrepresentations were not knowing and willful. The plaintiffs contended that the insurance agent did not inquire as to each issue, but simply wrote "no" after each question on the application.

The Court of Appeals affirmed summary judgment in favor of Nationwide.

> Our Supreme Court has held "if an application for insurance containing material misrepresentations is filled in by the agent before being signed by the applicant, these are material misrepresentations of the applicant which bar recovery." 554 S.E.2d at 401.

North Carolina Farm Bureau v. Allen, 146 N.C.App. 539, 553 S.E.2d 420 (2001) was a declaratory judgment action to

determine Farm Bureau's duty to defend and indemnify its insured, Edgar Allen. Allen owned an unoccupied house that had been burglarized. Allen asked Joe Yow to stay overnight with him to guard against additional burglaries. During the night, Allen was awakened by the sound of someone outside. Allen pointed one of his guns in the direction of the suspected intruder, fired and hit Yow. The Farm Bureau policy excluded coverage for injury "which is expected or intended by the insured."

The trial court granted Farm Bureau's motion for summary judgment. The Court of Appeals affirmed that coverage did not exist under the policy.

> . . . Allen's statement to police after the shooting indicated that he "shot through the door" at someone he saw outside. Allen also advised the police that "he had shot Joe Yow because he thought he was breaking in on him." According to Yow's deposition, he could clearly see Allen approximately three feet away through the door when Allen shot him. We hold that Allen's intentional act of firing his handgun at Yow, in close proximity, was sufficiently certain to cause injury that Allen could have expected such injury to occur. . . . Accordingly, the "expected or intended" exclusionary language in Allen's insurance policy with Farm Bureau precludes coverage for Yow's injuries. 553 S.E.2d at 424-425.

State Auto Property and Casualty Ins. Co. v. Southard, 144 N.C.App. 438, 548 S.E.2d 546, petition for discretionary review denied, 354 N.C. 370, 557 S.E.2d 535

(2001) was a declaratory judgment action to determine whether the plaintiff's policy provided coverage for a negligence action against the estate of David Morse, the grandson of Lucille Sharar, the insured under the State Auto policy. Southard owned a house in Surry County that was rented to Russell. On 2 January 1998, Morse, a guest in the house, died from injuries received when the house caught fire and was extensively damaged. Southard brought the underlying negligence action against the Morse estate. The estate made demand on State Auto for defense of the action brought by Southard on the grounds that Morse was an insured under the policy.

The policy defined insured as "residents of the household who are your relatives." Since Morse was Sharar's grandson, coverage depended on whether Morse was a "resident." The evidence described Morse as a "wanderer" who did not have a permanent residence. He had a bedroom and dresser for his clothes at Sharar's house. He used Sharar's home as his mailing address. For tax purposes, he listed the Russell house as his residence.

The Court of Appeals affirmed the trial court's determination that Morse was not a resident of Sharar's house and thus not an insured under the State Auto policy.

> . . . we find there is substantial evidence that Morse was not a resident, but rather a frequent visitor to Sharar's home. He did not make his home in that particular place, live there permanently, or even stay there for an extended period of time. 548 S.E.2d at 548.

C. Life

Adams v. Jefferson-Pilot Life Insurance Co., ___ N.C.App. ___, 558 S.E.2d 504, petition for discretionary review filed (2002), determined whether the decedent had effectively changed the beneficiary of his life insurance policy with the defendant. The initial policy was acquired in 1983 and named Jacqueline Adams as the beneficiary. When the decedent and Jacqueline divorced, the decedent changed the beneficiaries to the three children of the marriage. The decedent married the plaintiff, Tammy Adams, in 1999 and executed another change of beneficiary form naming her as the policy beneficiary.

The change of beneficiary was made on a form provided by the defendant and was accomplished at the decedent's restaurant with an agent of the defendant. When the agent submitted the change of beneficiary form to the defendant's branch office, it was noted that the form used indicated that the policy proceeds would be paid in installments. It was suggested that the agent contact the decedent to determine whether this was his intent. The decedent died

before contact could be made by the agent. The change of beneficiary form was sent to the defendant's home office after the decedent's death.

The children of the decedent's first marriage contended that benefits from the policy vested at the time of death. Since the policy language stated that change of beneficiary forms were to be filed at the home office, filing the form after death could not change benefits that vested at the time of death. The trial court entered summary judgment in favor of the decedent's second wife, the plaintiff, Tammy Adams. The Court of Appeals affirmed.

> Thus, we conclude that the change of beneficiary is given effect on the date that the policy owner completes and signs a Jefferson Pilot change of beneficiary form, provided that the insured is alive on the date of the written request. In this case, Adams was both the owner and the insured and clearly was alive at the time he executed the change of beneficiary form. Therefore, this policy language supports giving effect to the change of beneficiary as of the date he signs the Jefferson Pilot form provided by Lytle. 558 S.E.2d at 507.

D. UM/UIM

McCrary v. Byrd and Ham's Restaurants, Inc., ___ N.C.App. ___, 559 S.E.2d 821, petition for discretionary review filed (2002) was an action for personal injuries. Nationwide, the plaintiff's UM/UIM carrier was an additional defendant. Byrd's liability carrier, N.C. Farm

Bureau Insurance Company, was also served with the complaint. Before discovery, Nationwide waived any subrogation interests it had in the litigation. Without informing Nationwide, the plaintiff entered into a tentative settlement with Farm Bureau, Byrd and Ham's under which the plaintiff would receive $100,000 from Farm Bureau, the limits of its policy insuring Byrd. As part of the settlement, Ham's paid $35,000 to Farm Bureau and $5,000 to the plaintiff. The plaintiff then demanded arbitration of the dispute between the plaintiff and Nationwide and that no additional discovery be conducted.

In motions before the trial of the plaintiff's claim against Nationwide, the trial judge ruled that the plaintiff had not exhausted the Farm Bureau limits and that the plaintiff had breached her contract with Nationwide by not giving Nationwide an opportunity to approve the plaintiff's settlement with Ham's and Byrd.

The Court of Appeals held that the plaintiff had exhausted the Farm Bureau limits and that the plaintiff had not breached her contract with Nationwide.

> In this case, Farm Bureau insured Byrd for $100,000 per person. In Byrd's settlement with Plaintiff, Farm Bureau was to pay $100,000 to Plaintiff. At the time Farm Bureau paid the $100,000 to Plaintiff, it paid its limits of liability per person; Byrd's limits of liability under the Farm Bureau policy were "used up,

> consumed or depleted." Plaintiff has therefore exhausted Byrd's liability limits with Farm Bureau, regardless of whether Farm Bureau received additional payment from Ham's, as the $100,000 payment to plaintiff represented Farm Bureau's limits of liability. 559 S.E.2d at 825.

Since Nationwide had waived its subrogation interest in the case, the plaintiff did not breach her contract with Nationwide by failing to notify Nationwide of the settlement negotiations with Ham's and Byrd.

> Since Nationwide waived its right of subrogation, the consent-to-settlement clause no longer served the primary purpose of protecting Nationwide's right to subrogation. As to the secondary purpose, there is no evidence of collusion in the records to this court. . . . Accordingly, the trial court erred in concluding Plaintiff's failure to obtain Nationwide's consent before entering into the settlement with Byrd and Ham's barred her recovery against Nationwide. 559 S.E.2d at 826.

The Court of Appeals also held that the plaintiff's failure to submit to a deposition after she had requested arbitration was not a breach of her contract with Nationwide.

> Moreover, the provision in Nationwide's contract required that an insured submit to examinations under oath as cooperation to the defense, settlement, or investigation of a claim. At the time Nationwide sought to depose Plaintiff, there was no indication Nationwide wished to settle with Plaintiff, rather, Nationwide appeared to be assuming an adversarial role. Likewise, there is no provision in Nationwide's contract with Plaintiff that if Plaintiff failed to submit to a deposition she would waive either coverage or her right to arbitrate. 559 S.E.2d at 826.

The plaintiffs in Pinney v. State Farm Mutual Ins. Co., 146 N.C.App. 248, 552 S.E.2d 186, petition for discretionary review filed (2001) alleged claims of breach of contract and unfair and deceptive trade practices in seeking underinsured motorists coverage from State Farm. The plaintiffs contended that Dick had received a mailing from State Farm stating that Dick was entitled to receive an additional $1 million in coverage under his automobile policy and that such additional coverage would be included unless Dick returned the rejection form. Dick did not return the rejection form. On 9 February 1997, Pinney was injured in an automobile accident while a passenger in a vehicle operated by Simmons. The limits of the Simmons policy were offered to Pinney. Since Pinney resided with Dick at the time of the accident, he requested underinsured coverage from State Farm under Dick's policy. The complaint alleged that Dick had maintained the statutory minimum amount of liability coverage under the State Farm automobile policy.

The trial court granted State Farm's motion to dismiss pursuant to Rule 12(b)(6). The Court of Appeals affirmed. Since the complaint alleged that Dick had the statutory minimum amount of automobile liability coverage, he was not entitled to underinsured coverage. Additionally, the State

Farm agent was not required to explain to Dick the effect of increasing his liability coverage so as to be able to obtain underinsured coverage.

> In the present case, the face of plaintiffs' complaint reveals that Dick was not entitled to UIM coverage. The complaint clearly avers that Dick "maintained minimum liability limits on the policy." Under G.S. § 20-279.21(b)(4), defendants were prohibited from providing Dick UIM coverage. Nor are plaintiffs entitled to any benefits at all from defendants since plaintiffs only have UM coverage, and both Simmons and Teresa Pinney were insured. Thus, an insurmountable bar to recovery of UIM or UM coverage benefits appears on the face of plaintiffs' complaint. . . . We hold that, under these circumstances, defendants had no duty to advise plaintiff that, if he increased his liability coverage limits, he would be eligible for UIM coverage. We note that even had plaintiff been so notified, it is entirely speculative whether he would have incurred the additional expense of increasing his liability limits above the statutory minimum limits in order to avail himself of the opportunity to purchase UIM coverage. 552 S.E.2d at 190-191.

The plaintiff in Church v. Allstate Ins. Co., 143 N.C.App. 527, 547 S.E.2d 458 (2001) received injuries on 25 October 1996 while she was a passenger in a car driven by Coffey. Coffey's liability carrier, Integon, tendered its limits. The plaintiff was covered by an underinsured policy issued by Allstate. After the plaintiff settled with Coffey, reserving her rights against Allstate, the plaintiff instituted the present suit, naming Allstate as a

defendant. The trial court denied Allstate's motion to appear as an unnamed defendant.

Relying on N.C.G.S. § 20-279.21(b)(4), the Court of Appeals reversed and held that Allstate was entitled to appear as an unnamed defendant and defend the original tort-feasor. The same statute mandates that the UIM carrier "cannot be compelled to be named defendant in the liability phase of a trial." 547 S.E.2d at 460. The Court also rejected the plaintiff's argument that there was "an impermissible conflict of interest" between the UIM carrier and the tortfeasor. Since the tortfeasor had been released, the interests and defenses of the tortfeasor and UIM carrier would be the same during the liability phase of the trial.

In Burger v. Doe, 143 N.C.App. 328, 546 S.E.2d 141, petition for discretionary review denied, 354 N.C. 67, 553 S.E.2d 36 (2001) the plaintiff, Nancy Burger, was involved in an automobile accident with a car owned by Alice Skeens. The defendants asserted that they did not know who was driving the Skeens' car at the time of the collision. The defendants' liability carrier, Allstate, denied coverage based on the dispute about the operation of the insured vehicle. Ms. Burger then made an uninsured motorist claim against her carrier, N.C. Farm Bureau Mutual Insurance

Company, and demanded arbitration under the provisions of her policy. Allstate was given notice of the arbitration proceedings. After Ms. Burger's demand for arbitration, but before the arbitration proceeding, she filed the present suit against Ms. Skeens. The arbitration panel awarded Ms. Burger $19,000. The trial court confirmed the award.

The trial against Skeens for Ms. Burger's personal injuries was bifurcated. In the first phase, the jury determined that the defendant, Richard Skeens, was operating the vehicle at the time of the accident. During the second phase, the trial judge ruled that the plaintiff could present evidence that Farm Bureau paid the $19,000 arbitration award. The trial judge also ruled that Farm Bureau could not produce any evidence as to the arbitration hearing and the methods by which the arbitrators arrived at their award. During the charge conference, the trial judge declined the plaintiff's request based on Nationwide Mutual Insurance Co. v. Chantos, 293 N.C. 431, 238 S.E.2d 597 (1977) to instruct the jury concerning the plaintiff's settlement with Farm Bureau, whether the settlement was made in good faith and whether the settlement was reasonable. The jury awarded the plaintiff $7,000.

Relying on Chantos, the Court of Appeals held that the trial judge should have allowed the jury to determine whether the defendants were bound by the results of the arbitration hearing. The Court also held that evidence about the arbitration proceeding was admissible.

> We now hold that the relief sought by Farm Bureau here is the same relief sought by the plaintiff in Chantos. Once Allstate denied coverage, the defendants became uninsured motorists. The Financial Responsibility Act requires insurers to provide uninsured motorist coverage. G.S. § 20-279.21(b)(3) (1999). Therefore, plaintiff Burger obtained her right to recover as a matter of law. Like the defendant in Chantos, the Financial Responsibility Act makes the defendants here "insureds" under the policy for the public's protection. Accordingly, Farm Bureau may seek recovery from the defendants and defendants may be bound by the results of the arbitration proceeding.
>
> Like Chantos, on remand the trial court should utilize the following issues: 1. Was the Plaintiff Nancy Elizabeth Burger, injured, or damaged by the negligence of the Defendants Richard Skeens and Alice Ann Skeens? 2. Was the plaintiffs' arbitration settlement entered in good faith? 3. Was the amount of plaintiffs' arbitration settlement fair and reasonable? 4. What amount are the plaintiffs entitled to recover? If the jury answers the first three issues "yes," then the case is over and the trial court should enter judgment for $19,000 for Farm Bureau. 546 S.E.2d at 144.

Since the jury is entitled to evaluate the reasonableness and good faith of the arbitration proceeding, the plaintiff was also entitled to present evidence about the arbitration hearing.

McNally v. Allstate Insurance Co., 142 N.C.App. 680, 544 S.E.2d 807, petition for discretionary review denied, 353 N.C. 728, 552 S.E.2d 163 (2001) was a declaratory judgment action relating to whether the plaintiff had effectively rejected underinsured motorist coverage with the defendant. The plaintiff and her husband applied for automobile insurance with the defendant on 21 January 1993. The policy was written with liability coverage of $25,000/$50,000, the statutory minimum coverage at that time. The plaintiff and her husband signed a form rejecting uninsured/underinsured coverage at limits of $25,000/$50,000. The policy was renewed at the same limits until April 1995 when the plaintiff and her husband increased the liability limits to $100,000/$300,000. No new UIM rejection form was signed.

The plaintiff was injured in an accident in 1998. The at fault vehicle had the minimum coverage of $25,000/$50,000. By stipulation, the parties agreed that the plaintiff's injuries exceeded the coverage of the adverse driver. Allstate denied the plaintiff's uninsured claim based on the original rejection signed in 1993. The trial court ruled that the plaintiff had UIM coverage and that the 1993 rejection was invalid for the accident occurring in 1998.

The Court of Appeals affirmed the trial court's determination that the plaintiff had coverage. At the time of the plaintiff's initial policy with Allstate, G.S. § 20-279.21(b)(4) stated that the rejection form was to be used "only with a policy that is written at limits that exceed those prescribed by subdivision (2)[i.e., $25,000/$50,000] . . . ." Although the rejection form said that UM/UIM coverage was available, such coverage was not available because the plaintiff was not purchasing a policy with limits that exceeded the statutory minimum. The Court of Appeals held that the rejection form as applied specifically to the plaintiff in this case was ambiguous. The rejection, therefore, was not valid and resulted in "a failure to reject underinsured motorist coverage."

> Since the purported rejection of underinsured coverage in this case was not valid, we view this matter more properly as a failure to reject underinsured motorist coverage. See N.C. Gen. Stat. § 20-279.21(b)(4). At the time of plaintiff's injuries, her highest bodily injury limit was $100,000 per person and $300,000 per accident. Accordingly, the plaintiff's UIM coverage was in the same amount. . . . Plaintiff's right to reject or waive UIM coverage was not in existence at the time of the "rejection." 544 S.E.2d at 809-810.

The plaintiff in Erwin v. Tweed, 142 N.C.App. 643, 544 S.E.2d 803, petition for discretionary review denied, 353 N.C. 724, 551 S.E.2d 437 (2001) was riding a bicycle when

he was struck and injured by a vehicle operated by Tweed. Tweed's automobile liability insurance company tendered its $50,000 limits by payment of the plaintiff's parents' medical bills of $12,666 and $37,334 to the plaintiff. At the time of the accident, Farm Bureau had two policies in effect providing underinsured motorist coverage. One policy was issued to the plaintiff's parents. Farm Bureau agreed that underinsured motorist coverage was available under this policy. A second policy insured vehicles owned by Bellevue Farm Trust (BFT), the farm operated by the plaintiff's parents. Farm Bureau denied coverage under that policy on the basis that the plaintiff was not a family member of BFT.

Construing federal (26 U.S.C.A. § 2032A) and state (G.S. § 105-277.2(4)(c)) legislation allowing farms to be incorporated and placed in trust for relatives of the farm owner, the Court of Appeals affirmed the trial court's granting of summary judgment in favor of coverage to the plaintiff under the policy insuring BFT.

> In addition, the General Assembly has enacted legislation, which treats family farm entities differently from other businesses in insurance regulations. . . . G.S. § 58-40-10. This section specifically states that vehicles used for farming, whether owned by a natural person or a family farm business entity are considered "individually owned" for the purposes of insurance. . . . We hold that for liability

> insurance purposes there is no substantial difference between a family farm copartnership or a family farm corporation and a family farm trust. Accordingly, on this record, we hold that vehicles owned by BFT, a family farm trust, shall be treated as "individually owned" for insurance purposes. 544 S.E.2d at 805-806.

E. Agents

The plaintiff in Baggett v. Summerlin Insurance and Realty, Inc., 143 N.C.App. 43, 545 S.E.2d 462, per curiam reversed, 354 N.C. 347, 554 S.E.2d 336 (2001) owned the Boutique House, a ladies clothing store in Jacksonville. From May 1990 through July 1993, commercial insurance coverage on the property and business was placed through the Bailey Insurance and Realty Company. The policy provided through Bailey was an "all-risk coverage" policy specifically excluding flood insurance. As a result of a proposal by the Summerlin agency for coverage at a lower cost, the plaintiffs cancelled their coverage through Bailey and accepted coverage through Summerlin.

Summerlin told the plaintiffs that the policy was "an all-risk coverage. That's all they would need." The policy issued through Summerlin specifically excluded flood coverage. During the 1994/1995 coverage period, Summerlin alerted the plaintiffs that they would be receiving a Notice of Cancellation of the policy, but that Summerlin would place the coverage with another company. In August

1995, the plaintiffs entered into a lease to operate a clothing store in Swansboro. When the plaintiffs contacted Summerlin about coverage on the Swansboro business, the plaintiffs questioned Summerlin about whether "there's anything else she needed." Summerlin knew that the Swansboro business was located near the White Oak River and told the plaintiffs that "the necessary coverage" would be provided.

As Hurricane Bertha approached the east coast in July 1996, the plaintiffs asked Summerlin if they were "covered down there on that water front." Summerlin responded, "well, maybe you will or maybe you won't." Summerlin did not tell the plaintiffs that they would be fully covered. As a result of the hurricane, the plaintiffs' business in Swansboro sustained severe water damage to the property and its contents. Coverage was denied based on the flood damage exclusion. The plaintiffs never requested flood coverage with Summerlin. Summerlin never said that flood coverage was provided.

The trial court granted Summerlin's motion for summary judgment. The Court of Appeals reversed. The Court held that Summerlin's statement that it would obtain "the necessary coverage" created a genuine issue of material fact precluding summary judgment. The Court of Appeals

also rejected the defendants' argument that the plaintiffs were contributory negligent in failing to read the Summerlin policy which excluded coverage for flood damage. Judge Tyson dissented from the Court of Appeals decision.

The Supreme Court reversed for the reasons stated by Judge Tyson in his dissent. Summary judgment, therefore, for Summerlin was affirmed. In Judge Tyson's opinion, Summerlin issued the specific policy requested by the plaintiffs. The plaintiffs, however, did not read the policy issued and see that insurance coverage for flood was excluded.

> The words "all risk" do not appear on any insurance policy. The flood exclusion is clearly set forth in the insurance policy. . . . Summerlin never affirmatively represented to plaintiffs that they had flood insurance. Mrs. Baggett testified that there was no discussion with Summerlin about flood insurance until shortly before Hurricane Bertha hit the North Carolina coast. Furthermore, plaintiffs had the policy in their possession several years prior to the date of loss. Summerlin did not have a duty to point out the exclusions in the written insurance policy where those exclusions did not negate a particular coverage specifically requested by plaintiffs. I would hold it unnecessary to look beyond the plain language of the insurance contract, which expressly excludes coverage for flood losses. 545 S.E.2d at 469-470.

F. Builder's Risk

The plaintiffs' residence in Rouse v. Williams Realty Bldg. Co., Inc., 143 N.C.App. 67, 544 S.E.2d 609, per

curiam affirmed, 354 N.C. 357, 554 S.E.2d 337 (2001) was destroyed by fire while the residence was under construction. Williams, as builder, obtained a builder's risk policy with Federated Insurance Company with limits of $2,369,000. Williams had almost completed construction of the residence when the fire occurred on 19 December 1997. A Federal claims adjuster determined that the plaintiffs suffered a total loss of $2,406,809. Although the plaintiffs demanded payment in the full amount of the policy, $2,369,000, Federated tendered $1,774,381. Federal's tender was based on its interpretation of the policy allowing payment to be based on the percentage of construction completed as applied to the limits of the policy. Since the residence was 74.9% completed, Federal applied that percentage to the limits of the policy to determine the amount owed.

The trial court entered summary judgment for the plaintiffs for the full limits of the policy. The Court of Appeals affirmed. The "amount of insurance" under the policy was stated as "provisional," with the amount of insurance "on any date while the policy is in force will be a percentage of the provisional amount." The "loss settlement" paragraph of the policy provided that if at the time of the loss the "amount of insurance" is less than 80%

of the full replacement cost, then Federal would be required to pay the "greater" of "the actual cash value" or "the proportion of the costs to repair." Since the "amount of insurance" of $1,774,381 was 75.4% or less than 80%, Federal was required to pay the greater amount under the "loss settlement" paragraph. Applying the "loss settlement paragraph, the Court held that the plaintiffs were entitled to the larger amount, the actual cash value of the damaged building. The policy also contained "other coverages," allowing for the removal of debris. Since the cost of debris removal was $85,000, adding this amount to the "loss settlement" amount reached the liability limit of $2,369,000.

G. Excess

Moore v. Cincinnati Insurance Co., ___ N.C.App. ___, 556 S.E.2d 682 (2001) was a declaratory judgment action to determine coverage for injuries received during the operation of a loaner vehicle. Jeffrey Moore purchased a 1991 Subaru station wagon from Alcoke Auto Center in New Bern. Due to mechanical problems with the vehicle, Moore returned the vehicle to Alcoke for repair. Alcoke provided Moore with a loaner vehicle during the time repairs to the Subaru were being made. When the repairs were not completed within the stated time, Moore told the manager of

Alcoke that he would drive the loaner vehicle to New York. The manager indicated his consent to the trip. On the return to North Carolina, one of Moore's passenger's Sanders was operating the vehicle at the time it collided with a tractor-trailer.

Cincinnati Insurance provided a garage owner's liability policy insuring Alcoke. The garage owner's policy provided that its coverage would apply only if a customer as insured had no available liability coverage with limits required by financial responsibility laws. Both Sanders and Moore had automobile liability policies that provided coverage required by the Financial Responsibility Act for the events alleged.

The Court of Appeals held that the garage owner's policy exclusion applied. Since Moore and Sanders had policies with the limits required by the Financial Responsibility Act, there was no coverage under the garage owner's policy.

> . . . Alcoke's policy provided coverage if the customer had "no other available insurance." Sanders' and Moore's liability policies, however, provided the minimum amount of liability coverage as required by the Financial Responsibility Act and stated it would "be excess over any other collectible insurance." Accordingly, Alcoke's policy provided no liability coverage for the injuries sustained in the use of its loaner vehicle by either Moore or Sanders. 556 S.E.2d at 685.

H. Declaratory Judgment Actions

The plaintiff in DeMent v. Nationwide Mutual Insurance Co., 142 N.C.App. 598, 544 S.E.2d 797 (2001) was injured in an automobile accident on 23 April 1998, when a vehicle operated by Paula Keene failed to stop at a stop sign and collided with the plaintiff's vehicle. At the time of the accident, Ms. Keene had a motor vehicle liability insurance policy with the defendant that provided, in part, that it would pay "on behalf of an insured . . . Expenses for emergency first aid." The plaintiff's request that the defendant pay his emergency medical expenses was denied. The present action was brought seeking a declaration of the plaintiff's rights under the policy.

The Court of Appeals affirmed the trial court's determination that the plaintiff had no standing to claim benefits under the policy since the "plaintiff was a stranger to its insurance contract with Keene."

> Therefore, we conclude that defendant's obligation as an insurer to pay first aid medical expenses "on behalf of any insured" flows primarily and directly to the insured. Because the benefit running to plaintiff by reason of the provision is merely incidental, he is without standing as a third party beneficiary to seek enforcement of the covenant or a declaratory judgment as to its terms. 544 S.E.2d at 801.

III. Practice and Procedure

A. Statutes and Periods of Limitation and Repose

Thigpen v. Ngo, 355 N.C. 198, 558 S.E.2d 162 (2002) was an action alleging medical malpractice in June 1996. On 8 June 1999, the plaintiff filed a motion to extend the statute of limitations 120 days to file a medical malpractice complaint against the defendants. The motion stated that the plaintiff needed additional time to comply with Rule 9(j). The motion was granted and an order entered extending the statute of limitations through 6 October 1999. The complaint was filed on 6 October 1999, but did not contain the certification required by Rule 9(j). On 12 October 1999, the plaintiff filed an amended complaint including the required certification.

The Supreme Court affirmed the trial court's dismissal of the action.

> While other subsections of Rule 9 contain requirements for pleading special matters, no other subsection contains the mandatory language "shall be dismissed." This indicates that medical malpractice complaints have a distinct requirement of expert certification with which plaintiffs must comply. Such complaints will receive strict consideration by the trial judge. Failure to include the certification necessarily leads to dismissal. . . . permitting amendment of a complaint to add the expert certification where the expert review occurred after the suit was filed would conflict directly with the clear intent of the legislature. . . . In light of the plain language of the rule, the title of the act,

> and the legislative intent previously discussed, it appears review must occur before filing to withstand dismissal. 558 S.E.2d at 165-166.

Estate of Fennell v. Stephenson, 354 N.C. 327, 554 S.E.2d 629 (2001) was an action for wrongful death. The complaint alleged that State Trooper Stephenson stopped the decedent, Kenneth Fennell, during a traffic stop on 30 August 1993. An altercation followed. Mr. Fennell was shot several times and died as a result of his injuries. Suit was filed initially on 25 August 1999 in the United States District Court. The defendant, Stephenson, was named and sued "in his personal capacity." On 29 July 1997, Judge William Osteen dismissed the federal claims and refused to exercise supplemental jurisdiction over the state claims for wrongful death. The Fourth Circuit affirmed on 21 July 1998. The present action was filed in state court three days after the Fourth Circuit decision. Stephenson was named as a defendant "in his personal and official capacity." An amended complaint was filed on 24 September 1998 adding the State Highway Patrol as a defendant.

The Supreme Court affirmed the trial court's dismissal of the action based on the statute of limitations. Although Stephenson had been sued since the initial federal action on 25 August 1995, he was not sued in his official

capacity until 24 July 1998, almost five years after Mr. Fennell's death.

> This Court has also clearly stated that when a plaintiff sues a state officer for violating the North Carolina Constitution, he must sue the officer in his official capacity. . . . Thus, when a plaintiff seeks recovery from the state for state constitutional violations, and when he does so by suing a state officer, he must name the state officer in his official capacity. Naming the officer in his personal capacity is simply not enough. . . . Plaintiffs failed, however, to name Trooper Stephenson in his official capacity until the state complaint on 24 July 1998, almost five years after the cause of action accrued, and almost two years after the statute of limitations had expired. Thus, their constitutional claim for unreasonable detention against Trooper Stephenson in his official capacity is barred by the statute of limitations. 554 S.E.2d at 633.

The Court also rejected the plaintiff's contention that the claim against the State Highway Patrol related back to the time of filing the initial state complaint.

> . . . the addition of the State Highway Patrol in the amended state complaint does not relate back to the original state complaint. This Court has directly and explicitly stated that while Rule 15 of the North Carolina Rules of Civil Procedure permits the relation-back doctrine to extend periods for pursuing claims, it does not apply to parties. . . . Furthermore, even if the naming of the North Carolina State Highway Patrol as a party did somehow relate back to the original state complaint, the addition would not rectify the fact that the original complaint was not filed until 24 July 1998, nearly five years after Mr. Fennell was killed and almost two years after the statute of limitations for the claim had expired. 554 S.E.2d 633-634.

Mabry v. Huneycutt, ___ N.C.App. ___, ___ S.E.2d ___ (2002) arose out of an automobile accident on 27 June 10997 in which a vehicle operated by Kimrey negligently struck the plaintiff. Mr. Kimrey died on 7 November 1997 from injuries unrelated to the accident. On 26 November 1997, the Clerk of Court issued an order for summary administration of the estate to Mrs. Kimrey. On 26 June 2000, the plaintiff sued Mrs. Kimrey individually and as personal representative of her husband's estate. Mrs. Kimrey answered and denied that she was the personal representative of her husband's estate. The plaintiff took a dismissal without prejudice on 18 October 2000.

On 18 October 2000, the Clerk of Court issued Letters Testamentary to Ms. Huneycutt related to Mr. Kimrey's estate. Suit was filed by the plaintiff against Ms. Huneycutt on 20 October 2000. The trial court dismissed the action based on the defendant's plea of the claim being barred by the statute of limitations.

The Court of Appeals reversed because the present lawsuit had been brought within the statutory period for presenting claims against the Kimrey estate.

> In the present case, the accident and alleged personal injuries in question occurred on 27 June 1997. N.C.Gen.Stat. § 1-52 would bar a personal injury action arising out of this accident after three years, or as of 27 June 2000. However, Mr.

> Kimrey died on 7 November 1997, at which time the three-year limitations period had not yet expired. Plaintiff's cause of action against Mr. Kimrey survived Mr. Kimrey's death, see N.C.Gen.Stat. § 28A-18-1 (19998), and thus, pursuant to N.C.Gen.Stat. § 1-22, plaintiff is permitted to commence this . . . action . . . provided either (1) it is brought within the time specified for presentation of claims in N.C.Gen.Stat. § 28A-19-3, or (2) notice of the claim upon which the action is based is presented to the personal representation or collector within the time specified for the presentation of claims in N.C.Gen.Stat. § 28A-19-3 . . . by the date specified in the general notice to creditors . . . .

The earliest period after appointment for presentation of claims would have been three months or 18 January 2001. Since the action was filed on 20 October 2000, it was filed within the time limitations provided by N.C.Gen.Stat. §§ 28A-19-3 and 28A-14-1(a). The period for presenting claims did not begin upon the issuance by the Clerk of an order entitling Mrs. Kimrey to summary administration. This status is distinct from the position of personal representative or collector of the decedent's estate, see N.C.Gen.Stat. § 28A-28-1.

The plaintiff in Liss v. Seamark Foods, 147 N.C.App. 281, 555 S.E.2d 365 (2001) became sick on 29 May 1997 after purchasing a jar of oysters from "Seamark Foods" store in Kitty Hawk. Suit was filed on 9 May 2000 naming Seamark Foods as defendant. Service was properly made on Tim

Walters, president of Seamark Enterprises, Inc. Seamark Foods moved for an extension of time to answer. After expiration of the statute of limitations, Seamark Enterprises, Inc. filed a motion to dismiss. The plaintiff then filed a motion to name Seamark Enterprises, Inc. as defendant and for the name change to relate back to the filing of the original complaint. The trial court allowed the plaintiff's motion to change the name of the defendant, but also granted the defendant's motion to dismiss.

Holding that the plaintiff was only correcting the name of the corporate defendant, the Court of Appeals reversed and held that the name change did relate back to the time the original complaint was filed.

> Here, there is evidence that the intended defendant, "Seamark Enterprises, Inc.", was properly served. An affidavit from a Dare County Deputy Sheriff establishes that a copy of the summons was served on 17 May 2000 upon Timothy Walters. The president of "Seamark Enterprises, Inc." is Timothy Walters.
>
> "Seamark Enterprises, Inc." would not be prejudiced by the amendment. After its president was served, "Seamark Foods/Enterprises, Inc." through counsel moved for an extension of time to answer and then filed a motion to dismiss. Through its president, defendant had notice of the action from the beginning and would suffer no prejudice as a result of the amendment.
>
> Here, "we are concerned with only one legal entity which uses two names," not an "attempt to substitute one legal entity for another as defendant." . . . . Plaintiff did not add or

> substitute a new defendant to the action, he merely corrected a misnomer in the summons and complaint. 555 S.E.2d at 369.

Henderson v. Park Homes, Inc., 147 N.C.App. 500, 555 S.E.2d 926 (2001) was an action alleging defects in synthetic stucco applied to the plaintiffs' house. Park Homes was the general contractor for the plaintiffs' house. Park subcontracted with Southern Synthetic & Plastic for installation of the stucco. Southern Synthetic purchased the stucco from Dryvit Systems. Workers for Southern Synthetic applied the stucco to the plaintiffs' house in the fall of 1992. The certificate of occupancy was issued on 5 April 1993. Suit was filed on 5 March 1999. The plaintiffs opted out of the state class action on 16 July 1999. The trial court dismissed the action based on the six-year products liability statute of repose, G.S. § 1-50(a)(6).

The Court of Appeals affirmed. The Court agreed that the products statute of repose applied rather than the real property statute of repose. The stucco system was a material purchased for use in the construction of the plaintiffs' house.

> Dryvit, which uses a wholesale distribution network, is a remote manufacturer. The EIFS made its way to plaintiffs' home through the commerce stream, thus implicating the products liability statute of repose, N.C.Gen.Stat. § 1-50(a)(6). .

> . . the statute of repose was triggered upon the purchase by the subcontractor of the EIFS for installation on the plaintiffs' house. . . . The EIFS, therefore, was first "purchased for use or consumption," by the subcontractor who applied the EIFS to the plaintiffs' residence. 555 S.E.2d at 928-929.

Bryant v. Don Galloway Homes, Inc., ___ N.C.App. ___, 556 S.E.2d 597 (2001) was an action for breach of warranties in connection with the defendant's construction of the plaintiffs' house. Construction was completed on 25 November 1991. The plaintiffs' purchase of the house was closed on 4 December 1992. The defendant attempted repairs through August 1994 pursuant to his one-year warranty. The plaintiffs continued to find construction defects through 10 February 1998. Suit was filed on 25 November 1998. The trial court granted the defendant's motion to dismiss based on the statute of repose.

The Court of Appeals affirmed dismissal. The Court agreed that the statute of repose began to run in November 1991, the date construction was completed and the certificate of occupancy issued. The statute of repose was not interrupted and did not begin to run anew as a result of the defendant's last repairs in August 1994.

Vincent v. CSX Transportation, Inc., 145 N.C.App. 700, 552 S.E.2d 643, petition for discretionary review denied, 354 N.C. 371, 557 S.E.2d 537 (2001) was a suit alleging

negligence and seeking damages under the Federal Employers' Liability Act for asbestosis. The plaintiff worked for the defendant from 1970 until 1986. He was hospitalized in 1984 for breathing problems. At this time, he "knew" that dust in the workplace was the cause of his breathing difficulties. In 1998, the plaintiff learned that some of his co-workers had been diagnosed with work-related asbestosis. After being diagnosed on 18 November 1998 with asbestosis, the present suit was filed on 25 January 1999. The trial court dismissed the action based on the expiration of the three-year statute of limitations before the suit was filed.

Under the Federal Employers' Liability Act and interpretations of the limitations period in that Act, United States v. Kubrick, 444 U.S. 111, 100 S.Ct. 352, 62 L.Ed.2d 259, (1979), the employee's action accrues when the employee "becomes, or should become aware of his injury." The Court of Appeals affirmed dismissal based on the plaintiff's knowledge in 1984 that his breathing problems were related to his employment.

> . . . once plaintiff's breathing difficulties manifested themselves and plaintiff attributed these breathing difficulties to the dust in his workplace, he possessed sufficient information that he knew, or should have known, that he had been injured by his work with the railroad. 552 S.E.2d at 647.

The plaintiff in Soderlund v. Kuch, 143 N.C.App. 361, 546 S.E.2d 632, petition for discretionary review denied, 353 N.C. 729, 551 S.E.2d 438 (2001) alleged intentional infliction of emotional distress relating to sexual relationships with his teachers when he was a minor. The initial contact occurred in 1983 when the plaintiff was fifteen years old. The last contact occurred in 1986 when the plaintiff was eighteen years old. During the following seven years, the plaintiff continued on a "self-destructive course," until 1992 when he told his mother of the relationships with the defendants. In 1993, the plaintiff was evaluated by a psychologist who diagnosed him with post-traumatic stress disorder. Suit was filed on 19 July 1995 against the defendants.

The Court of Appeals affirmed the trial court's dismissal of the suit based on the statute of limitations. Claims for intentional and negligent infliction of emotional distress are governed by the three-year statute of limitations in G.S. § 1-52(5). At the time of the plaintiff's last contact with the defendants in 1986, the plaintiff was 18 and no longer a minor. The plaintiff's evidence confirmed that his emotional distress was "triggered" at that time when he left school. During the following seven years, he "manifested signs of severe

emotional distress . . . shame, confusion . . . ." The Court, therefore, concluded that "plaintiff's severe emotional distress and PTSD matured to the level of being actional after his leaving [school] . . . in the summer of 1986." 546 S.E.2d at 637.

> While it may be true that until diagnosis, plaintiff was not aware that he suffered from PTSD by that name, plaintiff's admissions show that he did know for some years after leaving [school] . . . in 1986 that he was suffering from some sort of emotional distress. We find that because plaintiff's emotional distress could have been generally recognized and diagnosed as PTSD by a medical professional in 1986, it was not latent. 546 S.E. 2d at 637.

Since plaintiff's emotional distress claim accrued in 1986, the period of limitations began to run in 1986 and expired in 1989.

> Moreover, the accrual of emotional distress claims does not necessarily begin at the time of diagnosis, nor is an "actual diagnosis" always necessary to trigger accrual. . . . Thus, the three-year period of time for emotional distress claims accrues when the "conduct of the defendant causes extreme emotional distress." 546 S.E.2d at 639.

The plaintiff in Stewart v. Southeastern Medical Center, 142 N.C.App. 456, 543 S.E.2d 517, petition for discretionary review denied, 353 N.C. 733, 552 S.E.2d 169 (2001) was injured on 14 January 1995, in an automobile accident in Robeson County. He was initially treated by an emergency room physician in Robeson County, then

transferred to Cape Fear Valley Hospital in Cumberland County for additional treatment. He remained hospitalized in Cumberland County until 4 June 1995 when he was transferred to a hospital in New York. In January 1998, the plaintiff filed a motion in Robeson County Superior Court pursuant to G.S. § 1A-1, Rule 9(j) seeking a 120-day extension of time. The motion named defendants in Robeson and Cumberland County. The motion was signed by a resident superior court judge in Robeson County and allowed the plaintiff until 14 May 1998, to file a complaint. The complaint was filed on 11 May 1998, in Robeson County Superior Court.

The Cumberland County defendants moved to dismiss the complaint based on the failure of the plaintiff to comply with Rule 9(j) in obtaining an extension of the statute of limitations. Specifically, the Cumberland County defendants relied under that part of Rule 9(j) providing that the resident superior court judge in the county where the cause of action arose may allow the motion to extend the statute of limitations. The trial court granted the motions to dismiss of the Cumberland County defendants.

The Court of Appeals reversed. The Court held that a complaint alleging causes of action against multiple defendants was properly filed in Robeson County. Since the

Robeson County superior court judge had jurisdiction, his order granting the extension of the statute of limitations was valid as to all defendants.

> We . . . hold that where there are multiple defendants, a single motion filed in the county where the cause of action first arose will be effective to extend the statute of limitations against all defendants ultimately named in the action. . . . As the Robeson County Superior Court had jurisdiction, the extension order was valid and therefore effective as to all of the joined defendants, including the Cumberland County defendants. Upon the transfer of the action (at defendants' request) to Cumberland County, the superior court therein was obligated to give the Rule 9(j) extension full effect as to all named parties, absent a showing by defendants of changed circumstances warranting a modification of the order to effect justice or equity. 543 S.E.2d at 520-521.

B. Appeal

The plaintiff in Lee v. Baxter, 147 N.C.App. 517, 556 S.E.2d 36 (2001) and her husband purchased a new Ford Ranger on 12 April 1991. The plaintiff was injured on 28 October 1996 when her husband drove the Ford off the road and hit a tree. Mr. Lee died of injuries unrelated to the accident. Suit was filed on 26 October 1999 against Mr. Lee's estate. On 8 March 2000, Mr. Lee's estate filed a third-party against Ford. The trial court denied Ford's motion for summary judgment based on the statute of repose, G.S. § 1-50(6). The trial court, however, certified the action for appeal under Rule 54(b).

The Court of Appeals dismissed the appeal as interlocutory. The denial of Ford's motion for summary judgment was not final as to either a claim or a party. For this reason, it did not come within the requirements of Rule 54(b). Additionally, denial of a motion to dismiss based on the statute of limitations does not affect a substantial right.

C. Contracts of Minors

Creech ex rel. Creech v. Melnik, 147 N.C.App. 471, 556 S.E.2d 587 (2001), petition for discretionary review denied ___ N.C. ___, 561 S.E.2d 498 (2002), was an action alleging medical malpractice in the delivery of Justin Creech. Before the action was filed, the plaintiffs' attorney, Paul Pulley, interviewed Dr. Melnik. Dr. Melnik contended that Mr. Pulley assured her during that interview that she would not be sued. A jury found that the plaintiffs breached their implied contract not to sue her and ruled in favor of Dr. Melnik.

The Court of Appeals reversed and ordered a new trial as to the minor's claim on the grounds that a trial court had not approved the implied contract by the minor not to sue Dr. Melnik.

> In the present case, neither the record on appeal nor the brief on behalf of Dr. Melnik points to any evidence showing that the alleged implied

> contract on behalf of the minor was reviewed or approved by the trial court. Since it is well established in North Carolina that a covenant not to sue negotiated for a minor is invalid without investigation and approval by the trial court, we must reverse the jury's finding of a contract on behalf of the minor not to sue Dr. Melnik, and remand for a new trial. 556 S.E.2d at 592.

D. Evidence

(1) Rule 411 – Evidence of Liability Insurance

The plaintiff in Williams v. McCoy, 145 N.C.App. 111, 550 S.E.2d 796 (2001) sought damages for injuries received in an automobile accident. In response to the defendant's pretrial motion, the trial judge instructed the plaintiff not to testify or make any references to liability insurance or conversations with the defendant's insurance adjuster. During the defendant's opening statement, counsel for the defendant stated "she's here for profit . . . hiring an attorney before she went to see a doctor." 550 S.E.2d at 799. On cross-examination, counsel for the defendant questioned the plaintiff about whether she retained counsel before seeing a chiropractor. Out of the presence of the jury, the plaintiff testified that she retained counsel only after the defendant's claims adjuster tried to convince her to take less money than she believed she was entitled to receive. The trial court refused to reverse its pretrial ruling and did not permit the

plaintiff to give this explanation before the jury. The jury awarded the plaintiff $3,000.

The Court of Appeals initially addressed the issue of whether defense counsel's question to the plaintiff about retaining counsel prior to seeing a doctor violated the attorney-client privilege.

> . . . the attorney-client privilege is not violated when an attorney questions the plaintiff concerning whether she had communications with an attorney on a particular date, as long as such questioning does not probe the substance of the client's conversation with her attorney. 550 S.E.2d at 799.

Holding that the plaintiff should have been allowed to explain the reason she retained counsel and that this explanation did not violate Rule 411, the Court of Appeals reversed and ordered a new trial on all issues.

> It is clear to this Court that Rule 411 did not bar plaintiff's explanation as to why she hired an attorney, in light of the circumstances presented by the instant case. A review of the transcript reveals that based upon pre-trial discovery, defense counsel knew plaintiff would testify that her motivation for hiring an attorney was a negative encounter with defendant's insurance adjuster. It appears that during opening statements, defense counsel then argued that plaintiff hired an attorney prior to seeing the doctor. Plaintiff's explanation as to defense counsel's subsequent question did not bear directly on defendant's liability or wrongful conduct, but, as a collateral issue, simply explained the somewhat confusing answer solicited by the defense. We therefore find that plaintiff's examination should not have been excluded per Rule 411. 550 S.E.2d at 801.

(2) Business Records

The defendant in CIT Group/Commercial Services, Inc. v. Vitale, ___ N.C.App. ___, 559 S.E.2d 275 (2002) personally guaranteed payment of debts of Trendline Home Fashions. When Trendline defaulted, suit was filed against Vitale. From a judgment in the full amount, the defendant appealed on the basis of error by the trial court in admitting into evidence "Inventory Certification" as a business records exception to the hearsay rule.

Pursuant to the loan agreement, Trendline was to furnish CIT Group with weekly inventory reports. At trial, Gordon Jones testified that he was employed by CIT Group and was in charge of the Trendline account. He also testified that he received weekly inventory certifications from Trendline, that the certifications were signed by an employee of Trendline and that the certifications were required by the security agreement.

The Court of Appeals held that the Inventory Certification had properly been received into evidence.

> The trial court found that the Inventory Certification . . . was prepared in the regular course of business by Trendline for the specific purpose of satisfying its obligation under the Security Agreement, that the document was obtained by the plaintiff in the regular course of its business and made a part of its operating documents relative to this case, that it was relevant, that authenticity had been stipulated

> to, and that the probative value outweighs any undue prejudice. . . . The authenticity of such records may be established by circumstantial evidence and there is no requirement that the records be authenticated by the person who made them. . . . We hold that plaintiff laid a proper foundation for admission of the Inventory Certification through the testimony of Gordon Jones, the custodian of the record. 559 S.E.2d at 276-77.

(3) Experts

Taylor v. Abernethy, ___ N.C.App. ___, 560 S.E.2d 233, petition for discretionary review filed (2002) determined the standards for admissibility of a handwriting expert's opinions. The decedent, Romer Taylor, was alleged to have signed a contract on 10 July 1978 agreeing to make a will devising his entire estate to his brother, Harvey Taylor. Romer Taylor died on 18 January 1998. His nephew, Don Abernethy, offered for probate a handwritten document under which Abernethy was given Romer Taylor's entire estate. The present action was brought for specific performance of the 1978 contract by which Romer Taylor was to have bequeathed his estate to his brother, Harvey Taylor.

At trial, the plaintiff called Charles Perrotta as a handwriting expert. The trial judge allowed Perrotta to testify as to his observations about the similarities between the handwriting in the 1978 contract and the established handwriting of Roemer Taylor. Although finding

that Perrotta was "well-trained and qualified in the field of handwriting analysis," the trial court refused to allow Perrotta to give his opinions because "the methodology underlying handwriting analysis in general [was not] . . . . sufficiently reliable for Perrotta to given his opinion because it was not 'scientific.'" The jury concluded that the signature on the 1978 contract was not that of Roemer Taylor and that Harvey Taylor was not entitled to the relief sought.

The Court of Appeals held that Perrotta's opinions should have been allowed to have been presented to the jury, reversed and ordered a new trial.

> North Carolina case law requires only that the expert be better qualified than the jury as to the subject at hand, with the testimony being "helpful to the jury." . . . . While it is certainly true that the trial court must act as gatekeeper in determining the reliability of expert testimony being offered, there is simply no requirement that a party offering the testimony must produce evidence that the testimony is based in science or has been proven through scientific study. . . .
>
> It is clear under [State v.]Goode [341 N.C. 513, 461 S.E.2d 631 (1995)] that the admissibility of expert testimony is not dependent upon its having a scientific basis. Under the Goode analysis, expert testimony may be deemed to be reliable notwithstanding that it is not based in science. We therefore conclude the trial court committed an error of law in refusing to permit Perrotta to render an expert opinion on the basis that the handwriting analysis is not based in science and has not been scientifically proven. The trial

> court's proper inquiry must be guided by the factors set forth in Goode, which simply require that the expert's testimony be sufficiently reliable.
>
> Moreover, nothing in Daubert or Goode requires that the trial court re-determine in every case the reliability of a particular field of specialized knowledge consistently accepted as reliable by our courts, absent some new evidence calling that reliability into question. Our courts have consistently held expert testimony in the field of handwriting analysis to be admissible. 560 S.E.2d at 239-240.

[NOTE:

Daubert was decided by the United States Supreme Court in 1993. After remand from the Supreme Court, the Ninth Circuit affirmed summary judgment for the defendants and excluded opinions of the plaintiffs' experts. In the Ninth Circuit's opinion, the plaintiffs' experts had not: (1) conducted independent research on the relationship of Bendectin ingestion to limb reduction defects similar to those alleged the present case; (2) published their theories and opinions in scientific or peer-reviewed literature; or (3) concluded that the ingestion of Bendectin "more than doubled" the likelihood of birth defects. Based on scientific standards accepted by the Ninth Circuit, epidemiological analysis does not become "statistically significant" until the relative risk of the exposure resulting in defects is greater than two.

Kumho Tire was decided by the United States Supreme Court in 1999. In Kumho Tire, the Supreme Court affirmed the trial judge's exclusion of testimony and opinions by the plaintiffs' expert, Dennis Carlson, an expert in tire failure analysis. The Supreme Court also held that Daubert's general holding setting the trial judge's responsibilities as a "gatekeeper" applies not only to testimony based on "scientific knowledge," but also to testimony based on "technical" and "other specialized" knowledge. Kumho, 119 S.Ct. at 1171.

In excluding the plaintiffs' expert in Kumho Tire, the trial judge noted that Carlson: (1) had not relied upon or published articles supporting the methodology he used; (2) used a two-factor test and "related use of visual/tactile inspection." His opinion was based on visual inspection without any testing. No other tire expert used these tests; (3) had not examined the tire until the day of his deposition; and (4) concluded that the tire failure was due to manufacturing or design defect because there was no evidence of abuse or over deflection.

Arguably anticipating the issue present in the North Carolina Court of Appeals decision in Taylor v. Abernethy, a federal district court limited handwriting comparison testimony on the basis that Kumho Tire was "plainly

inviting a reexamination even of 'generally accepted' venerable technical fields." United States v. Hines, 55 F.Supp.2d 62,67 (D.Mass.1999). See also "Computer Study Joins Debate Over Validity of Handwriting Analysis", New York Times (26 May 2002) at p. 12; and "Annals of Crime, Do Fingerprints Lie?" The New Yorker (27 May 2002) at p. 96.

State v. Goode, 341 N.C. 513, 461 S.E.2d 631 (1995) held that a law enforcement agent was properly qualified as an expert witness in the area of bloodstain pattern interpretation. Citing Daubert and North Carolina Rule of Evidence 702, the Court stated that the trial judge "must determine whether the expert is proposing to testify to scientific, technical, or other specialized knowledge that will assist the trier of fact to determine a fact in issue." 461 S.E.2d at 639. Additionally, the trial judge is required to assess "whether the reasoning or methodology underlying the testimony is sufficiently valid and whether that reasoning or methodology can be properly applied to the facts in issue." 461 S.E.2d at 639.

In an unpublished opinion on 2 April 2002, the Court of Appeals cited Daubert in rejecting the plaintiffs' assignment of error asserting that the trial court committed error by allowing the defendants' expert witness to testify regarding a collision that was the basis of the

action, Zarek v. Stine, 2002 WL 485366 (unpublished disposition) (N.C.App.2002). The defendants' expert, David McCandless, was an expert in accident reconstruction. Noting that McCandless was called as an expert in accident reconstruction and that plaintiffs "did not object to McCandless's qualifications as an expert in the field of accident reconstruction," the Court concluded that "accident reconstruction analysis has been accepted by the courts of this state," State v. Purdie, 93 N.C.App. 269, 377 S.E.2d 789 (1989); Griffith v. McCall, 114 N.C.App. 190, 441 S.E.2d 570 (1994).

Finding that the trial judge did not abuse his discretion in allowing McCandless to testify, the Court of Appeals observed that the trial court allowed voir dire of McCandless. During the voir dire, McCandless was questioned concerning the manner in which he developed his opinion. McCandless responded that he considered the location of damage on the vehicles, the investigating officer's report and statements he took and the statement of the defendant. The Court concluded, "We note that 'it is the function of cross-examination to expose any weaknesses in [expert testimony.]'."]

E. Post-Judgment Interest

Webb v. McKeel, 144 N.C.App. 381, 551 S.E.2d 440, petition for discretionary review denied, 354 N.C. 371, 557 S.E.2d 537 (2001) was an action for personal injuries arising from an automobile accident. The defendant appealed a jury award to the plaintiff of $75,000. While the appeal was pending, the defendant sent a check to the plaintiff's attorney in the amount of $89,120 in an effort to stop additional interest. It was later determined that the actual amount due was $89,161.11. The plaintiff's attorney refused without explanation to accept the check and did not mention the deficiency in the amount tendered. The defendant's appeal was dismissed for failure to timely serve the record on appeal. After dismissal of the appeal, the plaintiff demanded $102,877.79 which included the additional interest after the initial tender. The trial court granted the defendant's motion in the cause and held that post-judgment interest stopped upon tender of $89,120.

Relying upon N.C.Gen.Stat. § 1-239(a)(1), the Court of Appeals agreed that partial payment of amounts due is valid. N.C.Gen.Stat. § 1-239(c) provides that tender may be made to either the clerk of court or the judgment creditor. The plaintiff, therefore, was entitled to post-

judgment interest on only the $49.11 deficiency in the original tendered amount.

F. Attorney Fees, G.S. § 6-21.1

The plaintiff-wife in Stilwell v. Gust, ___ N.C.App. ___, 557 S.E.2d 627 (2001), petition for discretionary review denied, ___ N.C. ___, ___ S.E.2d ___ (2002) was a passenger in a vehicle operated by her husband. The plaintiff's vehicle was struck by a vehicle operated by the defendant, Gust. In response to the plaintiff's complaint, Gust filed a third-party complaint against the plaintiff's husband. Gust made an offer of judgment of $4,500. The jury found the defendant and third-party defendant were negligent and awarded damages of $5,401. The trial court ordered that the jury award be divided between the defendant and third-party defendant. The trial court also ordered that the defendant pay costs of $853.75 and attorneys' fees of $10,000. The defendant appealed the trial court's refusal to divide the award of costs and attorneys' fees between the defendant and third-party defendant.

The Court of Appeals affirmed.

> Plaintiff sued defendant only. Moreover, when making the settlement offers, defendant never asserted that the $4,500 was to cover only its pro-rata share of the liability. At the hearing on the motion to allow attorneys' fees as costs,

> plaintiff indicated "she would have considered settling" for a sum around $6,000. Defendant never increased the amount of her offer. The original offer was $4,500 and it remained the top offer through the settlement conference two weeks before the trial. The awards taxing costs and fees to defendant are within the trial court's discretion and defendant has not shown an abuse of that discretion. 557 S.E.2d at 630-631.

The plaintiff in Thorpe v. Perry-Riddick, 144 N.C.App. 567, 551 S.E.2d 852 (2001) was injured in an automobile accident on 23 May 1999. After suit was filed and discovery had been exchanged, the defendant offered to settle for $4,800. When this offer was rejected, the defendant filed an offer of judgment for $4,801. The jury returned a verdict for the plaintiff of $4,500. The trial court made findings of fact and conclusions of law and awarded the plaintiff $4,880 in attorney fees and $1,134.30 in costs.

Affirming, the Court of Appeals noted that the trial court had made specific findings as to each relevant factor under Washington v. Horton, 132 N.C.App. 347, 513 S.E.2d 331 (1999).

> In the instant case, the trial court made a total of eight findings of fact to support its award of attorney fees to plaintiff. The timing and amount of settlement offers and the amount of the jury verdict are significant factors for the trial court to consider in determining whether to award attorney fees. . . . However, the trial court is not required to make detailed findings for each factor. . . . As to factor five, the

> trial court found that on 2 December 1999, defendant filed a lump sum offer of judgment of $4,801.00 which included all damages, attorney fees taxable as costs, interest and the remaining costs accrued at the time the offer was served. As to factor six, the trial court found that on 22 August 2000, a jury returned a verdict for plaintiff in the amount of $4,500, and the judgment finally obtained exceeded defendant's offer of judgment. As to the final award of attorney fees taxed against defendant, the trial court made adequate findings to support its conclusion that the reasonable value of services rendered by plaintiff's attorney was $4,880.00. 551 S.E.2d at 856-857.

G. Issuance and Service of Summons

Gibby v. Lindsey, ___ N.C.App. ___, 560 S.E.2d 589 (2002) was an action for wrongful death. Suit was filed on 28 July 1999. On 26 August 1999, the Swain County Sheriff served the summons and complaint on the defendant, Aaron Lindsey, by leaving a copy at the residence of Lindsey's mother, Vicki Craig. It was assumed that Lindsey was living at his mother's house at the time of service. When Lindsey did not answer, a default judgment of $3,000,000 was entered in favor of the plaintiff. Lindsey moved to set aside the default judgment on the grounds that he had moved to South Carolina on 1 August 1999 and did not live with his mother at the time of service. The trial court denied Lindsey's motion to set aside the default judgment.

The Court of Appeals affirmed. The sheriff's return of the summons raised a presumption of valid service under

Rule 4(j)(1)(a). The burden, therefore, was on the defendant to rebut the presumption of valid service "by clear and unequivocal evidence." The Court held that Lindsey had failed to carry his burden of rebutting valid service.

> Defendant left without telling Craig where he was going and had only taken along some of his clothes, leaving his remaining possessions behind. Until Defendant obtained his South Carolina driver's license on 24 January 2000, Defendant used his North Carolina driver's license listing Craig's address as Defendant's residence. Defendant did not have his mail forwarded to South Carolina, nor did he have a bank account or any bills until November 1999 when he bought a truck. Even more significantly, Defendant considered Craig's residence his "home" and admitted he had no intentions of staying with his relatives in South Carolina for any length of time. In addition, Craig testified that even though she did not know where her son was at the time she accepted service of process for him at her residence, her home was Defendant's primary residence. As such, the evidence fails to establish clearly and unequivocally that Defendant had assumed a new dwelling house or usual place of abode by 26 August. . . . Because Defendant failed to meet his burden . . ., the trial court did not err in denying his motion to set aside the default judgment. 560 S.E.2d at 592.

The plaintiff in Selph v. Post, 144 N.C.App. 606, 552 S.E.2d 171 (2001) was injured in an automobile accident on 31 January 1996. A complaint was filed on 29 January 1999 and summons issued on 5 February 1999. The trial court dismissed the action because the summons was not issued

within five days of the filing of the complaint as required by Rule 4(a).

The Court of Appeals reversed based upon Rule 6(a) excluding "intermediate Saturdays, Sundays and legal holidays" if the time prescribed is less than seven days. Rule 6(a) also provides that it applies to "any period of time prescribed or allowed by the Rules of Civil Procedure." The summons, therefore, was timely issued.

Bentley v. Watauga Building Supply, Inc., 145 N.C.App. 460, 549 S.E.2d 924 (2001) was an action alleging retaliatory discharge. The clerk issued summons naming "Watauga Building Supply, Inc." as defendant. The "direction section" of the summons listed "Betty G. Koontz" as "name and address of first defendant." The plaintiff's attorney filed an affidavit confirming service on Ms. Koontz as registered agent for the defendant. Ms. Koontz was served with a copy of the summons and complaint. The trial court granted the defendant's motion to dismiss for insufficiency of service and lack of jurisdiction.

The Court of Appeals reversed, holding that the plaintiff's affidavit of service was sufficient to establish service and jurisdiction.

> . . . it is the better practice to identify in what capacity the person receiving service is acting; however, such failure is not fatal. The

> question is whether the manner of service complies with Rule 4(j)(6). Proper service of process upon a corporation can be made by "delivering a copy of the summons and of the complaint to an officer," or by "delivering a copy of the summons and complaint to an agent authorized by appointment or by law to be served or to accept service." N.C.R.Civ.P. 4(j)(6)(a)-(b). Every corporation in our State must maintain a registered office and registered agent in the State. Ms. Koontz was the registered agent of defendant. . . . We conclude that plaintiff sufficiently complied with the requirements of Rule 4(j)(6) by delivering a copy of the summons and complaint to Ms. Koontz. 549 S.E.2d at 927.

H. Workers' Compensation Act

(1) Workers' Compensation Liens, G.S. § 97-10.2

Dennis Ward, an employee of the plaintiff in Grant Construction Co. v. McRae, 146 N.C.App. 370, 553 S.E.2d 89 (2001), received a compensable workers' compensation injury on 22 March 1993 when Formco, a subcontractor, removed shoring from a scaffold on which Ward was working. Ward hired attorney McRae to represent him in his compensation claim against Grant. The compensation claim was settled for $10,000, with Grant having a lien on any recovery by Ward against Formco.

McRae failed to file suit against Formco within the three-year statute of limitations. A suit alleging professional malpractice was filed by Ward against McRae. This suit was settled for $26,000. Grant filed the present

action alleging a lien on settlement of the legal malpractice action. The trial court granted the defendants' 12(b)(6) motion to dismiss.

The Court of Appeals affirmed dismissal.

> We have found no North Carolina cases which address the question of whether an employer's subrogation lien under N.C.Gen.Stat. § 97-10.2 extends to proceeds from an attorney malpractice lawsuit. After careful examination of the statute and our prior case law, we agree with defendants that the language of N.C.Gen.Stat. § 97-10.2 is clear and unambiguous, and does not contemplate recovery in a situation such as this. We therefore hold that Grant cannot assert a subrogation lien upon the proceeds Ward received from his malpractice lawsuit against Attorney McRae. . . . When Attorney McRae failed to file Ward's lawsuit against Formco and caused Ward to suffer pecuniary losses, McRae himself did not cause an injury to Ward as that term is defined under the Workers' Compensation Act. 553 S.E.2d at 93-94.

(2) Exclusivity of Workers' Compensation Act

The plaintiff in Groves v. Travelers Insurance Co., 139 N.C.App. 795, 535 S.E.2d 105 (2000), per curiam reversed, 354 N.C. 206, 552 S.E.2d 141 (2001) alleged that he was injured in the course and scope of his employment. The workers' compensation carrier prepared a videotape describing the plaintiff's job and showed the tape to the plaintiff's treating orthopedic physician. After reviewing the tape, the treating doctor changed his opinion about the

injury being work related and concluded that the plaintiff's condition was a result of his age.

The plaintiff brought the present action alleging claims for intentional infliction of emotional distress, bad faith, and unfair and deceptive trade practices. The Court of Appeals affirmed the trial court's dismissal of the claims alleging bad faith and unfair and deceptive trade practices on the basis that these claims were within the exclusive jurisdiction of the Industrial Commission. The Court of Appeals, however, reversed the trial court's dismissal of the claims alleging intentional infliction of emotional distress on the grounds that this claim was outside the exclusivity provisions of the North Carolina Workers' Compensation Act.

The Supreme Court disagreed and reversed based on the dissent by Judge McGee:

> In this case, plaintiff essentially alleges that defendants prepared videotape purporting to demonstrate the functions of plaintiff's job, which failed to show all aspects of his job, and allegedly omitted some of the job functions plaintiff contended were the cause of his injury. Defendants sent the videotape to plaintiff's physician, who reviewed the tape and changed his opinion that plaintiff's condition was job-related. While such alleged conduct might well be more objectionable, defendants' actions "may not be reasonably regarded as exceeding all bounds usually tolerated by a decent society so as to satisfy the first element of the tort, requiring a showing of extreme and outrageous

> conduct." . . . . For example, defendants' actions did not involve physical abuse as in Dickens, sexual harassment as in Hogan and Brown, or threats, obscene gestures, and cursing as in Wilson. The conduct that sustained claims in those cases far exceeds in outrageousness the conduct experienced by plaintiff in this case. 535 S.E.2d at 108-109.

The plaintiff in Riley v. Debaer, ___ N.C.App. ___, ___ S.E.2d ___ (2002) received a compensable workers' compensation injury. The present action was against the vocational rehabilitation specialist for negligent infliction of emotional distress arising out of treatment for the workers' compensation injury. The trial court dismissed the action for lack of subject matter jurisdiction on the grounds that the claim was in the exclusive jurisdiction of the Industrial Commission. Relying upon two Court of Appeals opinions in which review was denied, Johnson v. First Union Corp., 131 N.C.App. 142, 504 S.E.2d 808, rev.allowed by 349 N.C. 529, 526 S.E.2d 175 (1998), rev.improvidently allowed by 351 N.C. 339, 525 S.E.2d 171, and reh'g denied by 351 N.C. 648, 543 S.E.2d 870 (2000) and Deem v. Treadaway Sons Painting and Wallcovering, Inc., 142 N.C.App. 472, 543 S.E.2d 209, rev.denied by 354 N.C. 216, 553 S.E.2d 911 (2001), the Court of Appeals affirmed dismissal on the grounds of lack of subject matter jurisdiction. The Court held that the

claim for infliction of emotional distress against the vocational specialist was "ancillary to the original claim," thus the exclusive remedy was provided by the Workers' Compensation Act.

Chief Judge Eagles dissented. In Judge Eagles' opinion, the claim against the vocational specialist was "separate and distinct" from the original work injury and did not arise out of and in the course and scope of the employment. The claim was "analogous" to a claim for medical malpractice. The Act "does not impose liability upon rehabilitation therapists or relieve them thereof."

(3) Woodson Claims

Maraman v. Cooper Steel Fabricators, 146 N.C.App. 613, 555 S.E.2d 309 (2001), per curiam, affirming directed verdict for defendant Cooper Steel Fabricators, affirming directed verdict for defendant James N. Gray Company, ___ N.C. ___, ___ S.E.2d ___ (2002) was a wrongful death action arising from an accident that occurred at a construction site. The decedent's estate sued the decedent's employer, Cooper Steel Fabricators, and the general contractor, James N. Gray Company.

The decision by the Supreme Court is explained through the procedural history of the case. The trial court granted the motions for a directed verdict of both

defendants at the conclusion of the plaintiff's evidence. In the Court of Appeals, Judge Tyson wrote an opinion affirming directed verdicts for both defendants. Judge Greene concurred in that part of Judge Tyson's opinion that affirmed directed verdict for the defendant Gray. Judge Greene concurred in that part of Judge John's opinion reversing directed verdict for the defendant Cooper Steel. In affirming per curiam, the Supreme Court did not adopt the opinions of any of the judges writing for the Court of Appeals, stating:

> We reverse that portion of the Court of Appeals' opinion that found error in the trial court's entry of directed verdict for defendant Cooper Steel Fabricator's. We affirm that portion of the Court of Appeals' opinion that affirmed the trial court's entry of directed verdict for defendant James N. Gray Company. ___ S.E.2d at ___.

Gray was the general contractor for the construction of a warehouse in Huntersville. Gray contracted with Cooper Steel to perform steel fabrication. The decedent and his father were employed by Cooper Steel. On 15 December 1995, the decedent and his father were directed by Marlowe, a supervisor at Cooper Steel, to drop safety lines where work had been completed in order that the lines could be used in another section. After that work was completed, the decedent was working about thirty-one feet in the air,

having been moved to that position in a bucket with hydraulic lift. No safety lines were present at this location. Additionally, problems were experienced with a crane used to raise a steel joist. As the decedent was positioning the joist, the joist bounced, struck the decedent in the head, causing him to fall and receive injuries resulting in his death. Cooper Steel was cited by OSHA for a serious violation. No citations were issued to Gray.

Although the Supreme Court did not adopt an opinion in its per curiam decision, Judge Tyson's reasoning for affirming the directed verdict for Cooper Steel is helpful.

> The record establishes that defendant Cooper Steel maintained a safety policy requiring 100% tie-off when employees were working at heights over six feet, exceeding the OSHA requirement of tie-off at heights of twenty-five to thirty feet. Marlowe ordered the safety lines moved from the back bays where construction was complete to the front bays where construction was continuing. Defendant Cooper Steel furnished a safety manual, safety orientation, safety seminars, and held a safety "tool box" meeting at least once a week. . . .
>
> The record shows no evidence that defendant Cooper Steel had prior OSHA violations or prior similar accidents. Mr. Francis, the OSHA investigator, stated that defendant Cooper Steel had a good commitment to safety. Defendant Cooper Steel was cited for two serious OSHA violations after the accident, which were reduced by OSHA. 555 S.E.2d at 322.

Although there was evidence that Cooper Steel may have installed a safety line and "tampered" with the memory of the crane after the decedent's fall, Judge Tyson concluded that this did not show "an intent, by defendant Cooper Steel, to engage in misconduct, prior to the accident, with knowledge that the misconduct was substantially certain to cause serious injury or death to an employee." 555 S.E.2d at 323.

Judge Tyson's opinion affirming directed verdict for Gray was based on the absence of evidence that Gray, as general contractor, exercised sufficient control over the subcontractor's work, or that the work in which the decedent was engaged was inherently dangerous work.

I. Sanctions

(1) Discovery

Patterson v. Sweatt, 146 N.C.App. 351, 553 S.E.2d 404 (2001, affirmed per curiam, ___ N.C. ___, ___ S.E.2d ___ (2002) was the third of three actions filed by the plaintiff arising out of the search of his residence by Richmond County law enforcement officers and the seizure of evidence relating to sale and distribution of cocaine. This suit was filed in August 1999. Although the deputy sheriffs were served earlier, the defendant-surety was served on 27 September 1999. On 29 September 1999, the

plaintiff served notice of the depositions of two of the deputies on 15 October 1999. Upon motion of the defendant-surety based on violation of Rule 30(a) for not obtaining leave of court for depositions taken earlier than 30 days after service of the complaint, the trial court granted the defendant's motion for a protective order to cancel the depositions. On 19 October 1999, the surety filed a request for statement of monetary relief. Plaintiff filed a response to the request with the Court. On 16 November 1999, the plaintiff withdrew the statement of monetary relief requested, however, the withdrawal was without consent or leave of court. The trial court then dismissed the action based on filing the statement of monetary relief, withdrawal of the statement without leave of court and for improper filing of the deposition notices less than thirty days after service of the complaint.

The Court of Appeals affirmed dismissal. First as to the improper deposition notices, the Court held that the thirty-day limitation in Rule 30(a) has to be met as to every defendant, not just those parties being deposed. Dismissal is one of the sanctions allowed for improper filing of the statement of monetary relief.

> A dismissal of the action pursuant to N.C.G.S. § 1A-1, Rule 41(b) is one of the permissible sanctions for violating the provisions of Rule

> 8(a)(2) regarding pleading of damages in excess of ten thousand dollars. 553 S.E.2d at 357.

Although the trial court did consider less drastic sanctions, the plaintiff's history of discovery violations supported a finding that the trial court did not abuse its discretion in dismissing the action.

The plaintiff in Johnson v. Harris, ___ N.C.App. ___, ___ S.E.2d ___ 2002 WL 959099 (2002) alleged that the defendants, Durham police officers and the City of Durham, violated the plaintiff's Fourth Amendment and common law rights during a vehicle stop. Officer Fuller, one of the defendants, was being deposed when his attorney instructed him not to answer certain questions. After the trial court granted the plaintiff's motion to compel Fuller to respond to the questions objected to by his attorney, Fuller filed a motion for summary judgment.

The City of Durham also filed a motion for summary judgment and attached an affidavit from Fuller. Fuller then filed an amended motion for summary judgment and attached his additional, second affidavit. The plaintiff moved to strike the first affidavit of Fuller on the grounds that it was not based on personal knowledge as required by Rule 56(e). The plaintiff also filed a motion for sanctions against Fuller and his attorneys pursuant to

Rule 56(g) on the basis that the affidavit was submitted in bad faith. Specifically, the plaintiff relied upon Fuller's repeated use of "car frisk" in his first deposition when Fuller's reconvened deposition established that he had never heard the phrase "car frisk."

The trial court denied the plaintiff's motions to strike the Fuller affidavit and for sanctions against the defendants in relation to the first Fuller affidavit. The defendants then moved for Rule 11 sanctions against the plaintiff on the grounds that the plaintiff's Rule 56(g) motion for sanctions was not well grounded in law or in fact. The trial court granted the defendants' motion for Rule 11 sanctions against the plaintiff.

The Court of Appeals reversed the trial court's order granting Rule 11 sanctions. Relying upon Rule 56(g) and federal cases construing that rule, the Court concluded that "the filing of inappropriate affidavits in support of, or in opposition to, motions for summary judgment should be considered under Rule 56(g), rather than Rule 11."

> The record indicates that plaintiffs reasonably believed, based on existing case law, that the appropriate means for seeking attorney's fees and costs associated with their Rule 56(e) motion to strike Fuller's affidavit was to move for sanctions pursuant to Rule 56(g). . . . Given the unusually sparse case law regarding Rule 56(g) and the meaning of "bad faith" in the context of Rule 56(g), we believe it would be

> unduly harsh to conclude that plaintiffs' motion for sanctions pursuant to Rule 56(g) was so unwarranted by existing law as to merit Rule 11 sanctions. . . . Rule 56(g) may be an appropriate basis for seeking sanctions even where a party files a merely "inappropriate" affidavit in support of, or in opposition to, a motion for summary judgment. ___ S.E.2d at ___.

Parris v. Light, 146 N.C.App. 515, 553 S.E.2d 96 (2001), petition for discretionary review denied, ___ N.C. ___, 562 S.E.2d 283 (2002) was an action for personal injuries arising from an automobile accident on 3 October 1996. On 25 August 1999, the defendant served interrogatories and requests for documents. When the plaintiff did not respond, the defendant notified the plaintiff's attorney by letter. The defendant filed a motion to compel on 16 November 1999. On 3 January 2000, the plaintiff filed incomplete responses to the discovery. On 5 January 2000, the parties entered into a consent order allowing the plaintiff thirty days to respond to the discovery. When plaintiff did not respond, the defendant filed another motion to compel on 10 February 2000. This motion also requested appropriate sanctions under Rule 37. The defendant's motion was heard on 1 March 2000.

At the time of the hearing, the trial court noted that the attorney for the plaintiff had not appeared on 21 February 2000 at the call of the calendar when the motion

was initially scheduled. The trial court dismissed the plaintiff's action. The trial court also denied the plaintiff's subsequent motion for relief under Rule 60(b)(1) for excusable neglect.

The Court of Appeals affirmed.

> An attorney's neglect in failing to abide by the rules of discovery has been held to be inexcusable in the context of Rule 60(b)(1). . . . We hold that the evidence of plaintiff's consistent failure to comply with both the Rules of Civil Procedure and a court order is sufficient to support a conclusion that plaintiff's counsel's neglect was not excusable; that such neglect is imputed to plaintiff; and that the trial court did not abuse its discretion in determining that counsel's neglect did not warrant relief under Rule 60(b)(1) or 60(b)(6) (relief permitted for "any other reason" within the court's discretion.") 553 S.E.2d at 99-101.

Clark v. Penland, 146 N.C.App. 288, 552 S.E.2d 243 (2001) was an action for misappropriation of funds due under a contract. Plaintiff served interrogatories on the defendants on 18 March 1999. The plaintiff served a second set of interrogatories on 29 July 1999. Pursuant to plaintiff's motion to compel, the trial court ordered the defendants to supplement responses to the first set of interrogatories and to answer the second set of interrogatories within 30 days. The defendants served responses and answers on 15 November 1999. The trial court found that the answers were deficient. The plaintiff moved

for sanctions. The trial court found that the defendants had failed to comply with an order of court, struck the defendants' answers and defenses, and entered default judgment on all claims as to liability only.

The Court of Appeals affirmed.

> Defendants assert that the trial court committed reversible error because plaintiffs have not shown any prejudice due to defendants' failure to comply with the court's order compelling discovery. We disagree. "Rule 37 does not require the [movant] to show that it was prejudiced by the [nonmovant's] actions in order to obtain sanctions for abuse of discovery. . . . Even so, the trial court specifically found that plaintiffs had been prejudiced. The trial court further stated that it considered less severe sanctions and determined that lesser sanctions would not suffice. . . . We find no abuse of discretion. 552 S.E.2d at 245.

(2) Attorneys

The Supreme Court in Couch v. Private Diagnostic Clinic, 351 N.C. 92, 520 S.E.2d 785 (1999) was evenly divided as to whether conduct of plaintiff's trial counsel required a new trial. The Court did agree that counsel's conduct was "grossly improper" and remanded the case to the trial court "for determination of an appropriate sanction." The trial court entered an order that included the following sanctions: (1) censure; (2) revocation of pro hac vice status in the current case; (3) payment to Duke University in the amount of $53,274.50 as partial

reimbursement of attorney's fees; (4) reimbursement of costs to the individual plaintiff; (5) withdrawal for one year of any cases in North Carolina in which counsel appeared; (6) ordered counsel to report the present order as one of discipline when required to do so; (7) before counsel be admitted to practice in North Carolina again, she attend continuing legal education programs; (8) the order be delivered to the state bars in New York and Florida; and (9) counsel file an affidavit showing compliance with the order.

The Court of Appeals, Couch v. Private Diagnostic Clinic, 146 N.C.App. 658, 554 S.E.2d 356 (2001), petition for discretionary review denied (2002), affirmed all parts of the order except the award of attorney's fees. The reversal as to the award of attorney's fees was based on the fact that the order did not contain specific findings as whether the fees were incurred and were reasonable. The standard of review for the sanctions imposed was for abuse of discretion.

> . . . the case law involving our Rules of Civil Procedure and the exercise of the court's inherent authority to discipline attorneys indicates that such a review warrants an abuse of discretion standard. Therefore, we review the trial court's order of sanctions in this case for abuse of discretion. 554 S.E.2d at 362.

Trial counsel contended that the trial court did not have authority to impose attorney's fees as a sanction in the absence of express statutory direction. The Court of Appeals disagreed and held that such sanctions were within the "inherent authority" of the trial court.

> In its order, the trial court addressed the issue of its authority to impose attorney's fees as a sanction. The trial court noted that the general rule requires express statutory authority for the imposition of attorney's fees; however, as the trial court noted, the court has inherent authority to sanction attorneys for misconduct, which sanctions may include the imposition of attorney's fees, irrespective of statutory authority. 554 S.E.2d at 362.

(3) Imputing Attorney Conduct to Client

The plaintiff in Henderson v. Wachovia Bank of North Carolina, N.A., 145 N.C.App. 621, 551 S.E.2d 464, petition for discretionary review denied, 354 N.C. 572, 558 S.E.2d 869 (2001) sued for breach of fiduciary duty relating to the administration of three testamentary family trusts for which the defendant served as trustee. Judge Jones entered an order providing that all depositions were to be completed by 7 January 2000, and that trial was to begin on 24 January 2000. On 2 December 1999, the plaintiff noticed the 30(b)(6) deposition of the defendant for 17 December 1999. The defendant did not appear at the time noticed. In response to the plaintiff's motion to compel, Judge

Jones ordered the defendant to appear for a deposition on 17 January 2000. The defendant did not appear at the time ordered.

The trial court ordered the defendant to appear at a 30(b)(6) deposition on 16 February 2000. Additionally, the court ordered the defendant to pay $2,363, in sanctions. The court's order also stated that another failure to appear for deposition could result in a default judgment. The defendant did not appear for deposition on 16 February 2000. On 20 March 2000, Judge Hobgood entered default judgment against the defendant on only those claims alleging breach of fiduciary duty. In motions filed after the entry of Judge Hobgood's order, the defendant produced affidavits indicating that it did not know of any of the noticed depositions or orders of court until 15 March 2000.

The Court of Appeals affirmed Judge Hobgood's entry of default judgment against the defendant. Citing cases from the English common law through recent Supreme Court opinions, the Court of Appeals concluded that "this history indicates our fundamental preference for imputing attorney action to clients. . . . neither the courts nor other parties could look behind such acts on the part of attorneys to inquire into their authority or the extent and purport of clients' instructions—especially when innocent

third parties would be prejudiced thereby." 551 S.E.2d at 467.

Noting that the Supreme Court in Briley v. Farabow, 348 N.C. 537, 501 S.E.2d 649 (1998) held that "an attorney's negligence in handling a case constitutes inexcusable neglect and should not be grounds for relief under the 'excusable neglect' provision of Rule 60(b)(1)," 348 N.C. at 546, 501 S.E.2d at 655, the Court of Appeals in the present case declined to adopt a "new rule of law" to protect "a party from attorney fraud." ___ S.E.2d at ___.

Since the order by Judge Hobgood was entered pursuant to Rule 37(b)(2), review by the Court of Appeals was for abuse of discretion. The Court found no abuse of discretion.

> . . . the plain language of Rule 37 does not require a showing of willfulness. The order of default judgment may be entered against a defendant pursuant to Rule 37(b)(2) for failure to obey a court order whether the failure was willful or not. Even so, it was reasonable for the trial court to infer the intent of defendant from the course of conduct. . . . Likewise, it would be reasonable for the court to have inferred deliberate or willful conduct by the defendant in this case based on the drawn-out history of years of discovery in this case. It would also be reasonable for the court to have inferred willful conduct by the defendant based on the repeated failure to appear at depositions hearings. 551 S.E.2d at 470.

J. Governmental Immunity

The plaintiff in Wood v. Guilford County, 355 N.C. 161, 558 S.E.2d 490 (2002), an employee of the Administrative Office of the Courts, was assaulted on the second floor of the Guilford County courthouse. She filed suit against Guilford County and Burn International Security Services Corporation alleging that the County and Burn breached their duty to provide adequate security at the courthouse. The trial court dismissed the claims against the County based on governmental immunity and the public duty doctrine.

The Supreme Court affirmed dismissal of the claims against the County. The Court first considered whether the County's providing of security at the courthouse was similar to providing police protection to the general public.

> In the instant case, the protective services provided at the courthouse through the County's contract with Burns Security are analogous to the police protection provided to the general public in Braswell [v. Braswell, 330 N.C. 363, 410 S.E.2d 897 (1991)]. The rationale underlying the public duty doctrine is thus applicable. The courthouse security guards were employed to provide protective services, as was the crossing guard in Isenhour [v. Hutto, 350 N.C. 601, 517 S.E.2d 121 (1999)], but the group the guards were called upon to protect can hardly be characterized as "identifiable," as plaintiff argues. Rather, the protective services provided by Guilford County were intended to benefit the

> public at large, including those members of the public who worked at the courthouse. 558 S.E.2d at 497.

The Court rejected the plaintiff's argument that the County had waived the protection of the public duty doctrine by contracting with Burns Security and requiring that the County be named as an additional insured on Burns' liability insurance policy. The Court held that the County was performing its law enforcement duties by contracting for security services with Burns.

K. Rule 41 Dismissals

Pardue v. Darnell, ___ N.C.App. ___, 557 S.E.2d 172 (2001) was an action for personal injuries arising out of an automobile accident on 25 June 1996. The case was tried during the 15 May 2000 session of court. At the conclusion of the plaintiffs' evidence, the plaintiffs' attorney stated, "And with that we'll rest." While the trial judge was hearing argument on defense motions, counsel for the plaintiff said he would "move at this time to take a voluntary dismissal." On the same day, the plaintiffs filed a voluntary dismissal without prejudice.

The action was refiled the following week. The trial judge granted the defendant's motion to dismiss on the grounds that the first dismissal was with prejudice. The Court of Appeals affirmed dismissal.

> Plaintiffs in the case sub judice lacked the authority to file a voluntary dismissal under Rule 41(a)(1) after resting. Additionally, plaintiffs failed to apply to the trial court for a voluntary dismissal under Rule 41(a)(2). We conclude that the dismissal taken by plaintiffs was a voluntary dismissal with prejudice, barring them from refiling suit against defendant. 557 S.E.2d at 178.

L. Arbitration

Milon v. Duke University, 145 N.C.App. 609, 551 S.E.2d 561 (2001), per curiam reversed, 355 N.C. 263, 559 S.E.2d 789 (2002) was an action alleging medical malpractice. The plaintiff, James Milon, was treated by Franklin Family Medicine from April 1995 through March 2000. On 1 May 1998, the Duke University Private Diagnostic Clinic purchased the Franklin Family Practice. On 22 December 1998, Mr. Milon underwent surgery for prostate cancer. Following the surgery, he experienced irreversible paralysis from the waist down. Mr. and Mrs. Milon retained counsel in February 1999. Presuit mediation on 8 November 1999 was not successful. On 8 December 1999, Mr. Milon was treated at Franklin Family Practice. During this visit, Mr. and Mrs. Milon were presented with an "Assignment of Benefits" form that included an Agreement to Alternative Dispute Resolution. Subsequent handwriting analysis indicated that Mrs. Milon signed her husband's name to the form.

Suit was filed on 23 December 1999. During defendant's search of medical records at Franklin Family Practice on 10 March 2000, the arbitration agreement was discovered. On 24 March 2000, the defendants moved to compel arbitration. The trial court agreed that there was evidence that Mrs. Milon had signed her husband's name to the arbitration form. The trial court denied the motion to compel arbitration because there was no evidence that Mr. Milon authorized his wife to sign the arbitration agreement.

The Court of Appeals reversed on the basis that the wife had apparent authority to sign the arbitration agreement and that the defendants relied on her apparent authority. Judge Thomas dissented. The Supreme Court reversed the Court of Appeals per curiam for the reasons stated by Judge Thomas in his dissent.

Judge Thomas concluded that there was no evidence that Mrs. Milon had apparent authority to enter into the arbitration on behalf of her husband. The existence of the marriage did not create apparent authority. In considering apparent authority, the actions of the principal, not the agent, are determinative. There was no evidence that Mr. Milon had permitted his wife to sign his name to previous documents. Since the defendants did not locate the

arbitration agreement until well after litigation began, there was no evidence of reliance by the defendants on the arbitration form.

> In this case, there can be no reasonable and prudent reliance, essential for apparent authority to develop into a binding contract, where: (1) the form was given to plaintiffs after all of the parties had obtained legal representation, mediation failed and suit was imminent; (2) the IQ of Mr. Milon was sixty-nine and that of his wife, sixty-five; (3) the record supports a finding that the signing was a mistake; and (4) both Mr. and Mrs. Milon were on medication, including anti-depressants to help them deal with the stress of their worsening situation. 551 S.E.2d at 619.

The plaintiff in Smith v. Young Moving and Storage, Inc., 141 N.C. App. 469, 540 S.E.2d 383 (2000), per curiam affirmed, 353 N.C. 521, 546 S.E.2d 87 (2001) sued to recover the value of lost personal property that had been stored at the defendant's facility. Suit was filed on 22 May 1998. The defendant answered denying liability, but did not assert affirmative defenses. The parties engaged in discovery, including interrogatories, requests for production of documents and scheduling the deposition of the defendant's chief executive officer. A mediated settlement conference was conducted, but did not produce a resolution. On 2 July 1999, the defendant moved to amend the answer and to compel arbitration. The trial court denied both motions.

The Court of Appeals held that an order denying arbitration was interlocutory, but appealable because it involved a substantial right, N.C.G.S. § 1-277. The plaintiff contended that the motion to compel arbitration was untimely because it was filed after the deadline for filing dispositive motions. Noting that the defendant's motion was to stay and that the trial court's jurisdiction is not "ousted" by arbitration, the Court of Appeals held that the motion to compel arbitration was not a dispositive motion.

The Court of Appeals also rejected the plaintiff's arguments that the defendant had waived the right to compel arbitration by participating in extended discovery.

> However, our Supreme Court has held that the mere filing of pleadings does not manifest waiver of a contractual right to arbitrate. See Cyclone Roofing Co., 312 N.C. 224, 321 S.E.2d 872 (1984) . . . . The prejudice described by plaintiff in the case at bar consists, for the most part, of inconveniences and expenses consistent with normal trial preparation. 540 S.E.2d at 386.

The license agreement in Internet East, Inc. v. Duro Communications, Inc., 146 N.C.App. 401, 553 S.E.2d 84 (2001) contained both an arbitration provisions and a forum selection clause. Reasoning that they forum selection clause "nullified" the arbitration clause, the trial court

granted the plaintiff's motion to stay arbitration and denied the defendant's motion to compel arbitration.

Concluding that the two clauses were not "inherently inconsistent," the Court of Appeals reversed and remanded to the trial court.

> The forum selection clause should be read to be triggered only when a court is needed to intervene for those judicial matters that arise from arbitration and when the parties have agreed to take a particular dispute to court instead of resolving it by arbitration. For instance, if a dispute arose and the parties agreed to take the dispute to court instead of placing it in arbitration, the dispute could only be heard by the state courts located in Pitt County, North Carolina. If there were no agreement to take the dispute to court, the parties would be required to resolve the dispute through arbitration. If the dispute were arbitrated, the state courts in Pitt County, North Carolina would have jurisdiction to enforce both the agreement to arbitrate and the arbitration award. . . . In addition, the arbitration provision itself provides that the parties may resort to courts for certain issues, such as the enforcement of the arbitration agreement and confirming an arbitration award as a judgment. The arbitration clause's allusion to the parties' resorting to a judicial forum is further evidence that the parties intended the clauses to be read together with no inconsistency. 553 S.E.2d at 88.

M. Indemnity

Bridgestone/Firestone, Inc. v. Ogden Plant Maintenance Company of North Carolina, 144 N.C.App. 503, 548 S.E.2d 807 (2001), affirmed per curiam, 355 N.C. 274, 559 S.E.2d 786 (2002) was an action for indemnity arising out of a tank

explosion at the plaintiff's plant on 9 September 1994 that resulted in the deaths of two employees of ABES, an independent contractor. Ogden had a subcontract with Bridgestone/Firestone relating to maintenance and operation of the Bridgestone/Firestone plant. Budd Services also had a contract with Bridgestone/Firestone relating to security at the plant and issuance of "hot work" permits. In connection with work on fuel storage tanks at the plant, ABES was to install measuring devices on the tanks. Ogden requisitioned the parts and labor and services of ABES and Budd issued the "hot work" permit for welding. While two employees of ABES were welding on one of the tanks, the tank exploded, resulting in the death of both employees.

The employees filed wrongful death actions against Bridgestone/Firestone, Ogden and Budd. Ogden and Budd settled with the plaintiffs before trial. Bridgestone/Firestone settled with the plaintiffs during trial. Bridgestone/Firestone filed the present action seeking indemnity for the amounts it paid to settle and defend the wrongful death actions. The trial court granted the motions of Ogden and Budd for judgment on the pleadings pursuant to Rule 12(c).

Ogden's contract with Bridgestone/Firestone provided in part that Ogden would indemnify Bridgestone/Firestone:

> . . . regardless of whether claims are alleged to be caused by negligence, or otherwise, on the part of [plaintiff] or its employees, ... 548 S.E.2d at 810.

Budd's contract with Bridgestone/Firestone similarly provided that Budd would indemnify Bridgestone/Firestone

> Except [plaintiff] shall not be held harmless for any such liabilities, claims, demands, suits losses, damages, costs, attorney's fees and expenses caused by any negligent or intentional act or omission on the part of [plaintiff], its officers, employees or agents. 548 S.E.2d at 811.

Ogden and Budd contended that the indemnity contracts with Bridgestone/Firestone were void under G.S. § 22B-1 because Bridgestone/Firestone was seeking indemnity for its own negligence. Relying on the pleadings, the Court of Appeals disagreed, concluding that the plaintiff alleged that it was seeking indemnity only for the negligence of Budd and Ogden.

> In its complaint, plaintiff alleges that the accident occurred solely as a result of defendants' negligence. Plaintiff further alleges that if it were in any way liable, it could only be on the "basis of some passive or derivative fault," and thus would be entitled to indemnification. To support this assertion, the complaint also alleges that plaintiff was not involved in the discussion which took place between defendants and ABES regarding the installation job and that plaintiff "was not notified of [the welding] activity and had no personnel present." In their answer, defendants admit discussing the installation job among each other and with ABES, and that plaintiff's personnel were not present during the activity.

> However, defendants deny that plaintiff was not notified of the activity. Defendants also admit the "hot work" permit to perform the welding was issued without notice to plaintiff but deny the allegation that plaintiff was not included in the coordination of the activity. 548 S.E.2d at 811.

The defendants also argued that Bridgestone/Firestone had voluntarily paid and settled the wrongful death claims when Bridgestone/Firestone was not liable. Being a volunteer, Bridgestone/Firestone was not entitled to indemnity. The Court of Appeals disagreed.

> Plaintiff's settlement in the underlying action came after Ogden and Budd had settled and plaintiff asserts it was faced with the prospect of costly and protracted litigation as the only remaining defendant in that action. We cannot conclude as a matter of law that plaintiff's settlement payment was voluntary. 548 S.E.2d at 812.

Finally, the defendants contended that Bridgestone/Firestone was barred by G.S. § 1B-4 from seeking contribution. Distinguishing the plaintiff's claim for indemnity from contribution, the Court of Appeals held that Bridgestone/Firestone's pleadings allowed it to seek indemnity. Bridgestone/Firestone alleged that it was entitled to indemnity under the doctrine of primary-secondary liability, not on the basis of joint tortfeasors liability.

N. Request for Admissions

See Southland Amusements and Vending v. Rourk, 143 N.C.App. 88, 545 S.E.2d 254 (2001) (A party does not waive right to deemed admissions by waiting until after adverse party has answered the request for admissions.)

O. Offer of Judgment

The plaintiff and defendant in Tew v. West, 143 N.C.App. 534, 546 S.E.2d 183 (2001) were involved in an automobile accident on 15 December 1997. Before suit was filed, the defendant offered to settle for $5,000. This offer was refused, and suit was filed. The defendant then served an offer of judgment for $5,000. This offer was refused. The jury awarded the plaintiff $5,000. The trial court awarded attorney fees and costs. The Court of Appeals affirmed.

Relying upon Roberts v. Swain, 353 N.C. 246, 538 S.E.2d 566 (2000), holding that costs incurred after the offer of judgment but prior to entry of judgment are to be included in the "judgment finally obtained," the Court of Appeals held that the trial court had correctly added attorney fees to the jury verdict of $5,000.

> . . . defendant twice offered to settle the lawsuit for $5,000. Twice, plaintiff rejected the offer. Defendant argues that the judgment offered was not more favorable than the judgment finally obtained because the jury awarded

> plaintiff $5,000. However, plaintiff was also awarded $555 in costs and, additionally, attorney fees were taxed as part of the costs of the action, pursuant to section 6-21.1. Nonetheless, even without attaching the attorney fees, the judgment is still $5,500.00 and therefore, more favorable than the offer of $5,000. We therefore hold the trial court did not err in awarding attorney fees to plaintiff. 546 S.E.2d at 185.

P. Amendments to Pleadings

Mabrey v. Smith, 144 N.C.App. 119, 548 S.E.2d 183, petition for discretionary review denied, 354 N.C. 219, 554 S.E.2d 340 (2001) was a wrongful death action alleging medical malpractice. Suit was filed on 28 February 199, against multiple physicians who had treated the decedent while he was confined at either Central Prison Hospital or Central Prison Mental Health Unit. More than a year after all defendants answered, the defendants moved to amend their answers to allege either sovereign or public official immunity. The trial court denied the motions to amend. The Court of Appeals affirmed.

> Defendants in the instant case sought to amend their pleadings to include an immunity defense more than one year after the complaint was filed. The trial court denied the motions because it would cause "undue delay or prejudice" to plaintiff. This Court has held that undue delay and undue prejudice are valid reasons to deny a motion to amend a pleading. 548 S.E.2d at 186.

Since public official immunity was an affirmative defense that is required to be pleaded, the trial court

did not err in denying the defendants' motion for summary judgment based on that defense. The defendants, however, raised the additional defense that they were being sued in their official, not individual, capacities. Noting that the complaint did not allege involvement of the state or a state entity and that the prayer for relief specifically mentioned joint and several liability, the Court held that the defendants were being sued in their individual, personal capacity.

> In the instant complaint, plaintiff never names the state, a state entity, or the hospital as a defendant or adverse party, nor does plaintiff mention reaching the pockets of the state. Plaintiff asks in his prayer for relief that the trial court find defendants jointly and severally liable for their negligence. . . . Because the trial court denied the motions to amend their answers, defendants still have not actually claimed public official immunity. Therefore, defendants, if found liable will be personally liable. 548 S.E.2d at 187.

Q. Mediated Settlements

The parties in Chappell v. Roth, 353 N.C. 690, 548 S.E.2d 499, rehearing denied, 354 N.C. 75, 553 S.E.2d 36 (2001) were involved in an automobile accident. They participated in a court-ordered, mediated settlement conference on 21 December 1999. The parties reached a settlement by payment to the plaintiff of $20,000, a voluntary dismissal, and a release "mutually agreeable to

both parties." The defendant presented a release that included a hold-harmless provision, but the plaintiff refused to sign the release. When the parties could not agree on a release, the plaintiff filed a motion to enforce the mediated settlement. The trial court denied the plaintiff's motion to enforce the mediated settlement.

The Supreme Court affirmed the trial court based on the failure of the parties to agree to a term material in the release.

> In the present case, the mediated settlement agreement provided that defendants would pay $20,000 to plaintiff in exchange for a voluntary dismissal with prejudice and a "full and complete release, mutually agreeable to both parties." The "mutually agreeable" release was part of the consideration, and hence, material to the settlement agreement. The parties failed to agree as to the terms of the release, and the settlement agreement did not establish a method by which to settle the terms of the release. Thus, no meeting of the minds occurred between the parties as to a material term; and the settlement agreement did not constitute a valid, enforceable contract. 548 S.E.2d at 500.

R. Jurisdiction

The plaintiff in Golds v. Central Express, Inc., 142 N.C.App. 664, 544 S.E.2d 23, petition for discretionary review denied, 353 N.C. 725, 550 S.E.2d 775 (2001) was sitting in his vehicle at a fuel station in Hammond, Louisiana when he was struck by a vehicle owned by Central Express and operated by the defendant, Dennis Jenny. Suit

was filed in Burke County on 6 January 2000. Jenny was served by certified mail. Service was never completed as to Central Express. The defendants moved to dismiss for lack of jurisdiction, alleging that Jenny was a citizen and resident of Illinois and that Central Express was a Missouri corporation. The trial court denied the motions to dismiss.

The Court of Appeals first held that denial of a motion to dismiss for lack of jurisdiction is immediately appealable and is not interlocutory. The complaint alleged that the defendants were subject to jurisdiction of the North Carolina courts pursuant to N.C.G.S. § 1-75.4. The complaint did not allege any specific sections of G.S. § 1-75.4, and did not include factual allegations as to the basis for jurisdiction in North Carolina. Based on the absence of jurisdictional facts in the complaint, the Court of Appeals held that the action should have been dismissed.

> . . . the complaint . . . [did not contain] allegations regarding the nature of defendants' contacts with this State and the record was devoid of evidence to support the trial court's presumed finding of substantial activity within this State. . . . A review of the record and plaintiff's complaint shows he failed to meet his burden of proving prima facie a statutory basis for personal jurisdiction. Accordingly, the trial court erred by denying defendant's motion to dismiss for lack of personal jurisdiction. 544 S.E.2d at 26.

S. Default Judgment

Howard, Stallings, From & Hutson v. Douglas, 143 N.C.App. 122, 545 S.E.2d 470, per curiam reversed, 354 N.C. 346, 553 S.E.2d 680 (2001) was an action for unpaid legal services. Suit was instituted and summons issued on 10 November 1999. On 17 November 1999, the defendant's attorney, Thomas Maher, wrote to the plaintiffs suggesting that the parties consider the matter closed and that neither side initiate litigation. When the original summons was not served, an alias and pluries summons was issued and service was completed on 30 November 1999. As a result of answer not being filed, the plaintiffs received default judgment on 4 January 2000. The trial court denied the defendant's motion to set aside the default.

Holding that the letter of 17 November 1999, by the defendant's attorney constituted an "appearance" under Rule 55(b)(2), the Court of Appeals reversed.

> In this case, Defendant failed to file an answer within 30 days from the date of service; however, Defendant sent his letter to Plaintiff after Plaintiff's complaint had been filed, but prior to service of the complaint. Defendant was seeking to prevent Plaintiff from pursuing its claims for damages and fees, and instead, consider the matter closed. In this regard, Defendant's letter constituted a "step" in the proceedings (negotiations with Plaintiff not to pursue its claim), which would have been beneficial to Defendant. Although the complaint had not been served on Defendant, there is no

> requirement that Defendant be aware of either the complaint or of Plaintiff's action against him, only that the appearance be made after the complaint is filed. Accordingly, once Defendant sent his letter to Plaintiff, he made an appearance for purposes of N.C. Gen. Stat. § 1A-1, Rule 55(b)(2)(a), and, thus, was entitled to three days notice before entry of default judgment. 545 S.E.2d at 472.

Gibson v. Mena, 144 N.C.App. 125, 548 S.E.2d 745 (2001) arose from an automobile accident on 25 July 1996, between the plaintiff and Mena, a resident of New York, and his employer, Carreta Transport, an out-of-state corporation. Service was made upon the North Carolina Commissioner of Motor Vehicles, by mail upon the president of Carreta and by publication. On 5 April 1999, over three months after the last date of service on the defendants, the plaintiff moved for and received entry of default and default judgment in the amount of $950,000. On 29 July 1999, the defendants moved to set aside the judgment only as related to the issue of compensatory damages on the grounds of excusable neglect. Affidavits submitted in support of the defendants' motion to set aside the judgment alleged that the defendants were aware of the accident, had initiated an investigation, and were waiting to determine if the claim could be settled. The trial court entered an order stating that the defendants' failure to answer was "due to excusable neglect and good cause exist for setting

aside the default judgment." There were no findings of fact in the order.

The Court of Appeals reversed based on the absence of findings of fact to support the order and because the facts alleged in support of the defendants' motion did not constitute excusable neglect.

> . . . we hold the foregoing evidence before the trial court was insufficient as a matter of law to show excusable neglect. Defendant, Carreta was aware of the pending litigation prior to the Judgment, and John Deere, Carreta's insurance carrier, knew in April, 1998, that entry of default had been rendered against Carreta, yet failed to give defense of the lawsuit that attention usually given to important business in the exercise of ordinary prudence. . . . In sum, the trial court abused its discretion in allowing the defendants' motion for relief from default judgment, and the Order setting the Judgment is therefore reversed. 548 S.E.2d at 748.

T. Pro Hac Vice Admission

Smith v. Beaufort County Hospital Association, 141 N.C.App. 203, 540 S.E.2d 775 (2000), per curiam affirmed, 354 N.C. 212, 552 S.E.2d 139 (2001) was an action alleging medical malpractice. Suit was filed on 3 May 1999. On the same date, motions were filed to have Bruce M. Wilkinson and Gloretta H. Hall, members of the Gary law firm in Florida, admitted pro hac vice pursuant to G.S. § 84-4.1. The motions were heard by Judge Allsbrook who entered an order allowing the motions. The defendants were not served

with the motion. On 16 July and 6 August 1999, the defendants filed motions to strike, rescind and reconsider and vacate Judge Allsbrook's order. The defendants' motions were heard before Judge Griffin on 11 August 1999. Evidence presented at the hearing before Judge Griffin showed that the Gary Law Firm had been admitted pro hac vice approximately nineteen times in the state courts, the law firm had distributed promotional materials to undertakers in the state and a Lee County court order involving attorneys in the firm. Judge Griffin entered an order revoking and abrogating Judge Allsbrook's earlier order.

The Court of Appeals affirmed. G.S. § 84-4.2 grants authority to judges of the General Court of Justice over attorneys practicing before them.

> Specifically, N.C. Gen. Stat. § 84-4.2 (1999) states, "permission granted under G.S. 84-4.1 may be summarily revoked by the General Court of Justice . . . on its own motion and in its discretion." . . . . In enacting § 84-4.2, our Legislature envisioned and addressed the revocability of previously granted pro hac vice admissions. In fact, the express language of N.C. Gen. Stat. § 84-4.2 allows a superior court judge the authority and discretion to summarily revoke an earlier order granting pro hac vice admission pursuant to § 84-4.1. 540 S.E.2d at 779-780.

Appellate review of Judge Griffin's order was based on an abuse of discretion standard. Finding no abuse of

discretion, Judge Griffin was affirmed. The Supreme Court affirmed, per curiam.

U. Res Judicata and Collateral Estoppel

Burgess v. First Union National Bank of North Carolina, ___ N.C.App. ___, ___ S.E.2d ___, 2002 WL 959162, petition for discretionary review filed (2002) was a dispute as to a family business that was devised under the will of the widow of the founder of the business. Roy Burgess founded Salem Spring, Inc. His brother, Loyd, and Frank Stanley joined the business as employees. When Roy Burgess died, his wife, Nannie Burgess, became the majority shareholder and Loyd Burgess and Frank Stanley continued as minority shareholders.

When Nannie Burgess died on 5 March 1990, First Union was appointed executor of her estate. Under her will, Loyd and Frank were left a conditional bequest of five shares of Salem Spring contingent upon both purchasing from her estate all remaining shares of Salem Springs owned by her at her death. On 15 June 1990, Loyd and Frank said they had no desire to purchase the stock and signed agreements renunciating the bequest. In 1993, Loyd and Frank filed rescissions with the Clerk of Court attempting to rescind the renunciations on the basis of lack of consideration.

First Union filed a declaratory judgment action to determine whether the renunciations were enforceable and not the product of fraudulent misrepresentation. Loyd and Frank counterclaimed and alleged that the renunciations were void on their face. All parties moved for summary judge. Judge Wood granted summary judgment in favor of First Union on the basis that the renunciations on 15 June 1990 were valid, enforceable and binding. The Court of Appeals affirmed Judge Wood's judgment on 18 December 2001.

While the First Union declaratory judgment action was pending, Loyd and Frank filed suit against First Union individually. The complaint alleged that First Union owed a fiduciary duty to Loyd and Frank that had been breached by First Union failing to inform Loyd and Frank that the valuation of Salem Spring was less than represented by First Union. As part of its answer and motion for judgment on the pleadings, First Union alleged that the facts upon which Loyd and Frank based their allegations were before Judge Wood in the initial declaratory judgment action. Judge Eagles granted First Union's motion for judgment on the pleadings on the grounds that the action was barred by res judicata and collateral estoppel as a result of the decision by Judge Wood in the declaratory judgment action.

The Court of Appeals affirmed Judge Eagles order dismissing the action pursuant to First Union's motion for judgment on the pleadings.

> The issue in the previous case . . . was whether the renunciations were void because they were obtained by fraudulent misrepresentation of facts by defendant. In that case, the present plaintiffs sought the monetary value of five shares apiece. In the present case, plaintiffs are suing defendant directly, not as the executor for the Estate of Nannie Coe Burgess, and asking for compensatory damages from defendant. Their claim is that defendant, as a fiduciary, fraudulent induced plaintiffs to renounce their interests as beneficiaries under the will to the benefit of the residuary beneficiaries. This is the same fraud theory that failed in the previous case. Defendant has thus met its "burden of showing that the issues underlying the present claims were in fact identical with the issues raised in the plaintiff's previous [counterclaims]."

V. Punitive Damages

In Rhyne v. K-Mart Corp., ___ N.C.App. ___, 562 S.E.2d 82 (2002), the Court of Appeals upheld the statutory cap on punitive damages, N.C.Gen.Stat. § 1D-25, as constitutional and ruled that it should be applied on a per-plaintiff basis, not a per-claim or per-defendant basis. The Court also rejected (1) the plaintiffs' contention that they were entitled to attorney fees; (2) the defendants' contentions that the award was unconstitutionally excessive; and (3) the defendant's argument that it was entitled to a new trial based on the admission of evidence of its discovery

misconduct. Judge Greene dissented on the basis that the punitive damages cap is unconstitutionally overbroad in that it infringes the right to a jury trial.

K-Mart employees, Shawn Roberts and Joseph Hoyle, detained Mr. and Mrs. Rhyne on suspicion that the Rhynes had been going through K-Mart's dumpsters and had committed theft and trespass. Mr. Roberts put Mr. Rhyne in a chokehold and forced him to his knees. When Mrs. Rhyne jumped on Roberts' back, he shook her off and she fell to the ground. When the police arrived, Roberts and Hoyle admitted that "they had only heard a noise near the dumpsters and assumed it must have been the plaintiffs. K-Mart pressed charges against Mr. Rhyne for assault, but those charges were dismissed. The Rhynes were diagnosed with "adjustment disorders, prescribed medication and advised to obtain counsel." Mrs. Rhyne had a heart attack, but the relationship between the heart attack and K-Mart incident was described by expert testimony as "unquantifiable." Mrs. Rhyne's medical bills were $13,582.40, $11,349.50 of which involved treatment for her heart attack. Mr. Rhyne's medical bills and lost wages were $5,276.12.

The Rhynes alleged claims for assault, false imprisonment, battery, malicious prosecution and

intentional infliction of emotional distress. The jury awarded compensatory damages to Mr. Rhyne of $8,255 and to Mrs. Rhyne of $10,730. The jury also awarded punitive damages of $11.5 million each to Mr. and Mrs. Rhyne. Applying G.S. § 1D-25, the trial judge reduced the punitive damages awards to $250,000 per plaintiff.

The Court of Appeal rejected the plaintiffs' argument that the punitive damages cap was unconstitutional and violated the plaintiffs' right to a jury trial. The Court found that the right to a jury trial applies only: "(1) where the right to a jury trial existed at common law or by statute at the time of the adoption of the 1868 Constitution; and (2) when the cause of action 'respects property.'" The first part of the test was satisfied because juries before 1868 did determine punitive damages. The second element was not satisfied, however, because punitive damages do not "respect property." Although individuals have a right to compensatory damages, the "right to punish, meanwhile, properly resides with the State."

The Court concluded, based on the language of § 1D-25, that the punitive damages cap "should be applied per plaintiff." The Court emphasized that the statute refers

to "an award" and "the amount of punitive damages," which describes "a single award for each plaintiff."

Addressing whether the punitive damages award as reduced by the trial court was unconstitutionally excessive under the federal due process clause, the Court applied BMW v. Gore, 517 U.S. 559 (1996). In Gore, the Supreme Court held that a 500 to 1 punitives-to-compensatories ratio was grossly excessive. The ratio of punitives to actual harm was 30 to 1 for Mr. Rhyne and 23 to 1 for Mrs. Rhyne. In light of this "relatively low ratio," deference due to the legislature, and "K-Mart's reprehensible conduct," which included violence, injuries to the plaintiffs, and accusing the plaintiffs of crimes to try to deter the plaintiffs from bringing their own charges against K-Mart, the modified awards were "not grossly excessive under the BMW factors."

In rejecting the defendant's argument that it was entitled to a new trial "because the trial court erred in allowing plaintiffs to introduce evidence of its discovery misconduct," the Court noted that K-Mart did not properly raise this issue in the trial court by specifically objecting to the inclusion of the evidence at issue. Thus, the issue was not properly before the Court on appeal.

W. Unfair and Deceptive Practices

The plaintiff and defendant in Tucker v. The Boulevard at Piper Glen, ___ N.C.App. ___, ___ S.E.2d ___ (2002) entered into a contract by which the defendant agreed to construct a townhouse for the plaintiff for $344,900. The plaintiff alleged that his willingness to enter into the contract was based, in part, upon the defendant's representations that the townhouse would have a "dramatic," 'unparalleled," and "panoramic" view overlooking the ninth green at the golf course. In fact, when the townhouse was completed, the plaintiff alleged that the view from the townhouse was obscured by "a large number of trees." The defendant refused to reduce the sale price, and the house closed at $344,900. The plaintiff sued, claiming damages in excess of $75,000 because the townhouse as constructed was worth no more than $269,900 at the time of closing.

During discovery, the plaintiff admitted that the townhouse has been appraised by his lender at $362,500. At his deposition, the plaintiff testified that he believed the townhouse was worth $350,000 at closing. The plaintiff also stated that he had taken the closing price of $344,900 and reduced it by what he believed the view was worth. In opposition to the defendant's motion for summary judgment, the plaintiff submitted his affidavit stating that the

townhouse would have been worth $45,000 more at closing if he had an unobstructed view of the golf course. The trial court granted the defendant's motion for summary judgment, but denied the defendant's motions for Rule 11 sanctions.

The Court of Appeals affirmed summary judgment for the defendant on the basis of the written contract between the parties and the failure of the plaintiff's proof of damages. Although the plaintiff alleged that he entered into the contract because of the promised view of the golf course, the written "Purchase and Sale Agreement," stated that "Neither party is relying on any statement or representation made by or on behalf of the other party that is not set forth in this Agreement." The plaintiff, therefore, did not produce any evidence of reliance upon the alleged representations by the defendants. Additionally, the plaintiff did not have evidence of actual damages caused by the alleged representations. Through the appraisal by the plaintiff's lender and the plaintiff's own opinion that the townhouse was worth at least $350,000 at closing, summary judgment was proper because the plaintiff had not established any "legally cognizable damage as a result of defendant's act."

Based on the plaintiff's deposition testimony concerning the manner in which he calculated his damages by

simply deducting his opinion as to the value of the golf course view from the price set in the contract, the Court of Appeals stated that there was "at least some evidence that might support an award of sanctions." The case was remanded for the trial court to enter findings and conclusions to support the denial of the defendant's motion for sanctions.

X. Rule 59, Motion for New Trial

The plaintiff in Roary v. Bolton, ___ N.C.App. ___, ___ S.E.2d ___ (2002) was a passenger on a motorcycle operated by Bolton. Bolton failed to negotiate a curve and crashed the motorcycle causing injuries to the plaintiff. The jury returned a verdict for the defendant. Stating that the "jury's verdict in the trial of this matter was contrary to the overwhelming evidence of negligence presented by plaintiff in the trial of this case," the trial court granted the plaintiff's motion for a new trial.

Alleging abuse of discretion by the trial judge, the defendant appealed the grant of a new trial and the trial court's refusal to submit an issue of contributory negligence to the jury. At trial, Officer Wiktorek testified that he first saw the defendant's motorcycle when the motorcycle was traveling in his opinion at a speed of 80 m.p.h. in a 45 m.p.h. speed zone. As Officer Wiktorek

followed the motorcycle, it was his opinion that the motorcycle reached speeds of up to 120 m.p.h. Bolton said that he lost control of the motorcycle when "weight shifted" as he went into a curve. The plaintiff testified at trial that Bolton told her "don't worry about it" when she asked why he was speeding.

At the close of the plaintiff's evidence, the trial court denied the defendant's motion for a directed verdict. The defendant did not present evidence. At the charge conference, the trial judge refused to submit an issue of contributory negligence. Although the jury found that the plaintiff was injured by the defendant's negligence, the jury did not award damages to the plaintiff.

The Court of Appeals affirmed the trial court's grant of a new trial, finding "no manifest abuse of discretion." The Court relied upon Garrison v. Garrison, 87 N.C.App. 591, 361 S.E.2d 921 (1987) in which the trial court's order of a new trial was upheld when the jury found for the defendant, "in face of plaintiff's evidence as to her injuries." The Court also rejected defendant's appeal alleging error in the trial court's refusal to submit the issue of contributory negligence to the jury.

> When a trial court orders a new trial, "the case remains on the civil issue docket for trial de novo", unaffected by rulings made therein during

> the original trial. . . . On retrial, a defendant would not be "bound by the evidence presented at the former trial. Whether his evidence at the new trial will support a motion for directed verdict cannot now be decided.

Y. Rule 9, Alleging Fraud

The plaintiffs in Harrold v. Dowd, ___ N.C.App. ___, 561 S.E.2d 914 (2002) retained the defendants to advise them concerning merger of the plaintiffs' optometry practice with a national organization. The initial merger proposal was received in 1995. After an investigation, the defendants advised against the merger. The defendants changed their recommendation after additional evaluation and the merger was agreed to on 27 October 1995. After the merger, the plaintiffs learned of misrepresentations by the national organization.

Suit was filed on 6 July 1999 alleging accounting malpractice, fraud and breach of fiduciary duty. The trial court granted the defendants' motion to dismiss pursuant to Rule 12(b)(6), specifically deficient allegations of fraud and the statute of limitations. The plaintiffs contended that the period of limitations began to run on 3 July 1996, the date the merger was completed. The defendants countered that the complaint alleged that the claim arose on 27 October 1995, the date the plaintiffs agreed to the merger by a Letter of Intent.

The Court of Appeals affirmed dismissal of the action. Since the complaint alleged that the defendants failed to investigate the national organization, the last act of the defendants giving rise to the claims occurred on 27 October 1995, the date the plaintiffs agreed to the merger. The complaint, therefore, was barred by the three year statute of limitations in G.S. § 1-52(1) and (5) and 1-15(c).

The allegations of fraud in the complaint were:

> (1) defendants intentionally, carelessly, wantonly, and/or negligently misrepresented material facts, made untrue statements, and failed to disclose other material facts necessary to make other representations to plaintiffs accurate; (2) defendants omitted to state a number of material facts necessary to make other representations not misleading and untrue; and (3) defendants specifically represented that they had performed a due diligence background check and investigation of PrimeVision and failed to perform or if performed, such investigations were not performed properly. 561 S.E.2d at 918.

The Court of Appeals held that these allegations did not conform to the particularity required by Rule 9(b):

> The first two allegations are merely bare assertions and fail to conform to Rule 9(b) particularity requirements. . . . While the latter allegation provides the content of the allegedly fraudulent representation, it fails to identify the person making the representation, it fails to identify what was obtained as a result of the fraudulent representation, and plaintiffs fail to plead any facts to support their allegation that the representation was false or untrue. 561 S.E.2d at 918-919.

Finally, the Court held that the relationship between accountant and client did not per se create a fiduciary relationship. Additionally, the complaint did not allege facts sufficient to establish a fiduciary relationship between plaintiffs and defendants.

Z. Releases

The plaintiff in Best v. Ford Motor Co., ___ N.C.App. ___, 557 S.E.2d 163 (2001), affirmed per curiam, ___ N.C. ___, ___ S.E.2d ___ (2002) was involved in an accident on 4 September 1996 when her 1995 Ford Lincoln Town car was struck by a vehicle operated by Hart, an employee of Westport Corporation. The passenger-side air bag deployed, causing injury to the plaintiff. On 1 August 1997, the plaintiff executed a Covenant Not to Execute for $25,000, releasing Hart, his wife and liability insurance company and "all other persons, firms and corporations except Westport Corporation and Ford Motor Company." In December 1997, the plaintiff settled with Hart and his employer, Westport, for $175,000. The release specifically released Hart, Westport "as well as all other persons, firms and corporations . . . from any and all actions, claims and demands . . . arising out of the accident." There were no exceptions to the December release.

The present suit was against Ford and the manufacturer of the air bag. The trial court granted summary judgment in favor of the defendants based on the December release. The Court of Appeals and Supreme Court affirmed. First, the release validly released Ford and the air bag manufacturer even though they were not parties to the release.

> A release given for valuable consideration is a complete defense to a claim for damages due to injuries. . . . Release and covenants not to sue are treated the same under the Uniform Contribution Among Tort-feasors Act. . . . However, absent other evidence, a release that release all other persons or entities is valid. 557 S.E.2d at 165.

The plaintiff attempted to avoid the release on the ground of mutual mistake, contending that she never intended to release the defendants at the time she executed the December release. The Court of Appeals disagreed, concluding that the plaintiff had not presented clear and convincing evidence of a mutual mistake. Additionally, there was no evidence that the other parties to the December release, Hart and Westport, were mistaken as to the effect of the release.

> . . . plaintiff in the case at bar has failed to state with particularity the circumstances surround the alleged mutual mistake. Neither plaintiff's affidavit nor that of Jack Chappell [the adjuster for Westport's liability insurance company] indicated any conversation

> contemporaneous with the signing of the Release that would indicate mutual mistake of fact; plaintiff merely offers statements from herself and Chappell that they never intended to release anyone other than Hart and Westport. Further, we are not convinced that an affidavit, signed over three years after the execution of the Release, by a former claims adjuster, can appropriately state the intent of the company when the Release was executed. This is insufficient to produce a forecast of evidence demonstrating specific facts to show that plaintiff could establish a prima facie case at trial. 557 S.E.2d at 167.

AA. Rule 606(b) – Improper Outside Influence Upon Juror

The plaintiff in Lindsey v. Boddie-Noell Enterprises, Inc., 147 N.C.App. 166, 555 S.E.2d 369 (2002), reversed per curiam, ___ N.C. ___, ___ S.E.2d ___ (2002) alleged that he ordered a cup of water from the defendant's Hardee's restaurant. Upon drinking from the cup, the plaintiff became ill. At trial, the plaintiff presented evidence that the water contained a sanitizing solution that was used to clean dishes and counters. The trial was bifurcated on defendant's motion. The jury found that the defendant was negligent and awarded $32,500 in compensatory damages. During jury deliberations on punitive damages, the jurors delivered a note to the trial court indicating some difficulty in understanding the instructions on willful and wanton conduct. The jury then returned a verdict awarding no punitive damages to the plaintiff.

In support of the plaintiff's motion for JNOV, or, in the alternative, a new trial, the plaintiff filed affidavits of jurors indicating that one of the jurors had obtained a dictionary and shared with other jurors the definitions of willful and wanton. The trial judge received the affidavits, but refused to order a new trial on punitive damages. The Court of Appeals ordered a new trial on the issue of punitive damages, finding that the trial court erred because the jury's use of the dictionary definitions was improper and that the plaintiff was prejudiced by the jury's improper conduct.

Judge Tyson dissented. The Supreme Court adopted Judge Tyson's dissent in reversing the Court of Appeals, per curiam. First, appellate review of a decision granting or denying a new trial pursuant to Rule 59 is for abuse of discretion or a clearly erroneous decision by the trial judge. Even though Rule 606(b) creates an exception to the general rule that a verdict may not be impeached by the jurors, the mere receipt of "extraneous information" is not sufficient to award a new trial. The trial court found that the "jury was exposed to . . . extraneous definitions or information . . . . [but] this was not extraneous information pursuant to Rule 606, and the Court finds no prejudice to the movant." 555 S.E.2d at 378.

I find that the reading of the dictionary definitions by Juror Couch is analogous to a situation where one of the jurors informs the jury what "willful" and "wanton" mean, according to his knowledge of the English language. The definition of words in our standard dictionaries has been considered a matter of common knowledge which the jury is supposed to possess. . . . The information received in this case does not fall within a definition of extraneous information contemplated by our Supreme Court. . . . After receiving a question regarding the definitions of "willful" and "wanton," . . . . the trial court essentially gave the same instruction as given in [State v.]McLain {10 N.C.App. 146, 177 S.E.2d 742 (1970)], which this Court held cured any potential prejudice, and that defendant failed to show that he was prejudiced. 555 S.E.2d at 378-379.