NORTH CAROLINA CONFERENCE OF SUPERIOR COURT JUDGES

RECENT DECISIONS

25 JUNE 2009

Don Cowan

Table of Contents

Table of Cases

I. Liability

A. Motor Vehicle

In Hensley v. National Freight Transportation, Inc., ___N.C. App___, 668 S.E.2d 349 (2008), aff'd per curiam, ___N.C.___, 675 S.E.2d 333 (2009), Smith, a trucker driver and employee of National Freight, drove his truck to a facility of Allvac in South Carolina on 30 June 2005. Following Smith's instructions, the truck was loaded with pallets of wire coils, placed on the truck bed and secured with straps. Smith periodically checked the load and straps as he made trips in the truck. On 4 July 2005, another National Freight employee was operating the truck when he heard a noise and saw sparks at the back of the truck. He stopped the truck, checked and load and concluded that one of the wire coils had fallen off the truck.

At the same time, Ashley Raymer was riding on the back of a motorcycle operated by Wellman. Wellman saw sparks ahead of the motorcycle, attempted to avoid debris in the road, but struck the coil lying in the road. As a result of hitting the coil, Ms. Raymer was thrown from the motorcycle and sustained injuries resulting in her death. A wrongful death action was filed against National Freight, Allvac and both operators of the National Freight truck.

The trial court granted Allvac's motion for summary judgment.

Finding that there was a genuine issue of material fact, the Court of Appeals, and the Supreme Court, per curiam, reversed and remanded for trial.

> Although the evidence demonstrates that [Smith] played a prominent role in the loading of the truck, the record on appeal also contains some evidence that Allvac, the shipper, maintained responsibility as to how the truck should be loaded. Mr. Smith testified that when the facility workers first loaded the truck, the four coils on the pallet in question were stacked on top of each other. . . . when he inquired as to why they were being shipped in this manner, the forklift operator at the facility responded, "that's the way they wanted them shipped." Further [Smith] testified . . . he could not tell them how to band it." Thus, [Smith's] testimony serves as evidence that Allvac maintained the ultimate responsibility in determining how the coils would be packaged and shipped on the truck . . . . we hold an issue of material fact remains as to which party bore the responsibility of loading the truck. 668 S.E.2d at 352.

Robinson v. Trantham, ___N.C. App.___, 673 S.E.2d 771 (2009), involved the extent of knowledge by the decedent of the defendant's intoxication as it related to whether the trial court should have submitted an issue of contributory negligence to the jury. On 25 February 2006, Laura Robinson, her teenage son, Quinton, Greg, the decedent, and Greg's eight year old son, Horace, met at 7:00 p.m. to celebrate a friend's birthday. After eating dinner, the

group moved to a friend's house. The group then traveled to the Appley house. Appley was drinking a beer when they arrived, then brought with him a twelve-pack of beer. The group next moved to a vacation cabin. All of the evidence was that Greg drove normally with no speeding or unusual driving. After arriving at the cabin, Appley continued to drink. While they were at the cabin, Laura made a vodka and orange juice drink for Greg. Greg, Appley and Laura left the cabin with Greg driving. Laura testified that Greg was traveling "way above the posted speed limit."

The next morning, a highway patrolman found the car Greg was driving sitting in the middle of a cornfield. Laura was lying in the backseat of the car. Greg was dead. Appley was thirty yards from the car with faint vital signs. No alcoholic beverages were found in the car. At the hospital, Laura related that Greg had two drinks before eating that night. Laura incurred $31,853 in medical bills. At trial, Greg's estate presented medical evidence that Greg's blood alcohol content was .07. The trial judge refused to submit an issue of contributory negligence to the jury. The jury awarded Laura $275,000.

The Court of Appeals affirmed. The Court first held that the trial court had not abused its discretion in

refusing to submit the issue of contributory negligence to the jury.

> Here, Officer Osteen testified, absent objection, that when he interviewed Laura in the hospital she informed him that Greg had two beers prior to eating. Quinton testified that Greg drove normally – no speeding, no running off the road, or anything of that manner – while returning to their cabin from the dinner party. Laura testified that while she, Greg, and Appley were driving to see wildlife Greg didn't do anything out of the ordinary until he simply "pressed the gas and accelerated through a little straight-away . . . He never let off the gas." Otherwise, there is no testimony from any of the witnesses that Greg was observed drinking more than two beers and no testimony that he was observed to be under the influence of an impairing substance. . . . in the instant case the evidence was insufficient to support such an inference [that the plaintiff knew or should have known the defendant was under the influence of an impairing substance.]. 673 S.E.2d at 775.

The defendant also assigned error to the trial court's exclusion of evidence of a plastic "baggie" containing white powder found on Laura's person after the accident. Although Laura testified that she had observed Greg use cocaine and smoke marijuana on prior occasions, the trial judge did not abuse his discretion in excluding the evidence since that there was "no evidence presented to the jury that on this occasion Greg has consumed or was under the influence of an illegal drug." 673 S.E.2d at 776.

In Jackson v. Carland, ___N.C. App.___, 665 S.E.2d 553 (2008), the vehicle the plaintiff was driving was struck by

a truck owned by Carland Ford Tractor and operated by the owner's son, Chance. After the collision, Chance left the scene of the accident and drove to an abandoned restaurant. A witness to the collision followed Chance and reported the events to the highway patrol. Based on the report by the witness, a trooper arrived at the abandoned restaurant and observed Chance walking around the truck attempting to determine the extent of damage to the truck.

At trial, the defendants stipulated (1) Chance negligently caused the accident; and (2) Chance had permission to operate the truck owned by Carland Ford. The plaintiff presented testimony from the trooper and witness about Chance's conduct following the accident. The jury returned a verdict for the plaintiff in the amount of $275,000.

On appeal, the defendants, relying upon Rule 608, contended that because the defendants had stipulated that Chance had negligently caused the collision it was error to allow the testimony of the trooper and witness. Based on additional evidence the plaintiff was required to offer as to whether Chance was acting as the agent of Carland Ford at the time of the accident, and the absence of abuse of discretion by the trial judge, the Court of Appeals disagreed.

> . . . plaintiff still bore the burden of proving Chance Carland was the agent of Carland Ford Tractor. If Chance were acting as an agent of Carland Ford Tractor, it is possible that he desired to conceal this agency by running away from the scene. Therefore, the testimony of Trooper Goodson and Mr. Roberts regarding Chance's actions in fleeing the scene was relevant to show Chance's motivation for leaving the scene as it related to the possibility that he was acting as an agent for Carland Ford Tractor. Even assuming arguendo that the admission of this testimony was error, defendants have failed to meet their burden of showing how the trial result would have differed had the trial court not admitted the evidence. Therefore, we hold the aforementioned testimony was relevant and the trial court did not abuse its discretion by allowing this testimony to be admitted at trial. 665 S.E.2d at 557.

The defendant additionally assigned error as to the jury instruction on the family-purpose doctrine. The trial judge indicated that he would give an altered version of the instruction. In addition to the standard provisions applying the family-purpose doctrine, the trial court instructed the jury that it was not necessary for the jury to find that Chance used the truck for a purpose directly benefitting Carland Ford. The Court of Appeals held that this instruction was in error, reversed the jury verdict and remanded for a new trial.

> Here, the trial court provided an altered version of the family-purpose doctrine which (1) extended the doctrine to cover company-owned vehicles, and (2) removed the requirement that the vehicle be provided for family use. Thus, the trial court's instruction did not align with either our

> traditional notions of liability under the doctrine of respondeat superior or the exceptional liability provided under the family-purpose doctrine. . . . Therefore, we hold the trial court's instruction constituted a misstatement of the law and likely misled the jury in its determination of defendant's liability. 665 S.E.2d at 560.

Hash v. Estate of Henley, ___N.C. App.___, 661 S.E.2d 52 (2008), determined the effect of the plaintiff's previous testimony in related criminal and civil cases on his claims in the present case. Hash was a passenger in a vehicle operated by the decedent, Henley. While Henley was driving north on Highway 801 in Davie County, Gordon began "tailgating" the Henley vehicle. Henley and Gordon engaged in a series of speeding up, passing and slowing down maneuvers. While Henley was passing Gordon, the cars collided, causing Henley's vehicle to go off the road, into some trees, then back into Gordon's vehicle. Henley died as a result of injuries received in the accident.

Gordon was charged with misdemeanor death by motor vehicle. Hash testified for the State at the criminal trial. Henley's estate then filed a civil action against Gordon. Hash was deposed in the civil action, but did not testify at trial. The civil jury found no negligence by Gordon. The present suit was filed against Gordon and the Henley Estate. Hash settled with Gordon, reserving "any

and all claims." The Henley Estate then moved for summary judgment, contending that Hash's testimony at the criminal and civil trials were judicial admissions binding him in his present case. The trial court granted the defendant's motion for summary judgment.

Agreeing that Hash was bound by his previous testimony in the criminal and civil cases that Gordon was completely at fault in causing the accident, the Court of Appeals affirmed dismissal of the claims against Henley's estate.

> On 17 July 2003, plaintiff testified against Gordon at the criminal trial resulting from the underlying accident in this case. . . . Plaintiff testified unequivocally that Gordon caused the accident. . . .
>
> As in the criminal trial, plaintiff testified [in the civil suit against Gordon] that Henley began to pass Gordon in a passing zone and that it was Gordon who then crossed the center line and hit them. As in the criminal trial, plaintiff testified unequivocally that Gordon caused the accident. . . .
>
> [W]e hold that plaintiff's earlier testimony was unequivocal and unambiguous that it was Gordon's negligence, and not Henley's, that caused his injuries. Therefore, his statements constitute judicial admissions by which he is bound. 661 S.E.2d at 54.

Hinson v. Jarvis, ___N.C. App.___, 660 S.E.2d 604 (2008), disc. rev. denied, ___N.C.___, 675 S.E.2d 366 (2009), arose out of a motor vehicle accident that occurred on 31 March 2003 in Wilkes County. The plaintiffs were

stopped at a traffic light when they were struck head-on by a vehicle operated by Mr. Jarvis. Mrs. Jarvis was riding with her husband at the time of the accident. The undisputed evidence established that Mr. Jarvis had suffered seizures in the past and that his driver's license had not been renewed for this reason. Mrs. Jarvis testified that she was not comfortable with her husband operating a vehicle, but had continued to ride with him while he operated a vehicle. The Jarvis vehicle was owned exclusively by Mr. Jarvis. The trial court granted the motion for summary judgment in favor of Mrs. Jarvis.

The Court of Appeals affirmed dismissal of all claims against Mrs. Jarvis.

> Plaintiffs allege that defendant, by knowingly riding in a vehicle with her husband with knowledge that he had suffered from seizures, breached her duty of due care to plaintiffs. Plaintiffs, however, have not made any allegations or presented any evidence that defendant was acting in a negligent fashion such that she could be a proximate cause of the accident. . . .
>
> [I]f anything, defendant was only complicit in her husband's breach of ordinary care and did not "incite" him to drive. . . . [O]nly Mr. Jarvis, and not defendant, was in violation of a statute that results in negligence per se. . . .
>
> Although the complaint alleged joint ownership, . . . evidence of defendant's lack of control over the vehicle include that she was not responsible for its maintenance, did not own a vehicle, and never drove the vehicle or any other vehicle.

> These additional facts make it even less likely that defendant exercised any control over the vehicle, much less enough to establish a joint enterprise. 660 S.E.2d at 606-608.

B. Premises

The defendant in Smith v. Blythe Development Co., ___N.C. App.___, 665 S.E.2d 154 (2008), aff'd per curiam, 363 N.C. 119, ___S.E.2d ___ (2009), had a contract with the North Carolina Department of Transportation to resurface and expand John Russell Road in Charlotte. On 24 September 2004, the defendant performed construction work on John Russell Road in front of the plaintiffs' home. After the work was completed, a heavy rain flooded the plaintiffs' basement. The plaintiffs filed suit with one claim for negligence. Both parties moved for summary judgment. The trial court denied the plaintiffs' motion and granted the defendant's motion for summary judgment and dismissed the action.

Agreeing with the plaintiffs that summary judgment was improperly entered "on the basis that an expert witness is required to prove negligence," the Court of Appeals reversed. At the hearing on the motions for summary judgment, the plaintiffs' evidence was that they had lived in their house for twenty-two years and had never experienced flooding before the event that was the basis

for the law suit. The plaintiffs also presented evidence that there had been no change in the grade of their yard. Other facts showed that the ditch in front of the plaintiffs' house had been filled in by the construction. After the defendant cleared the ditch and drainage pipe after the flooding, the plaintiffs experienced no flooding thereafter. The defendant's evidence was from Steven Morris, a registered engineer. It was Morris' opinion that the construction did not change the surface water runoff and that other existing conditions in the grade of the yard and the basement "caused the flooding in plaintiffs' basement." Based upon the lay testimony by the plaintiffs' witnesses, the Court of Appeals held that summary judgment was improperly entered.

> . . . this lay witness testimony is sufficient to raise an inference to support the element of causation" and, therefore, raise "genuine issues of material fact . . . regarding whether defendant was negligence in the construction of John Russell Road and proximately caused the flood damage to plaintiffs' basement and its contents. ___S.E.2d at ___.

The plaintiff in Allred v. Capital Area Soccer League, Inc., ___N.C. App.___, 669 S.E.2d 777 (2008), was a spectator at a professional women's soccer match. Before the game began, the plaintiff was in the stands behind one of the goals when she was struck in the head by a soccer

ball and received serious injuries. The complaint alleged that the plaintiff had never attended a soccer game at the facility and had no knowledge of the risk of being struck by a soccer ball. The trial court granted the defendants' 12(b)(6) motion to dismiss.

Focusing on the different legal standards involved in determining a Rule 12(b)(6) motion and a motion for summary judgment, the Court of Appeals reversed. Although prior cases produced a "no duty" rule by operators of baseball parks, this rule no longer exists in North Carolina as a result of Nelson v. Freeland, 349 N.C. 615, 507 S.E.2d 882 (1998), eliminating the distinction between licensees and invitees. The defendants, therefore, under the facts alleged in the present case, owed a duty of reasonable care to the plaintiff.

The Court held that the plaintiff had alleged sufficient facts of a duty, breach of that duty and damages to withstand the motion to dismiss.

> Plaintiffs assert that the defendants were negligent in failing to warn patrons of the danger from soccer balls leaving the field of play, failure to provide a safe environment, and failure to install protective netting behind the goals. Plaintiff also alleged that defendants had superior knowledge of the risks that led to her injuries and that their negligence caused her injuries. These allegations are adequate to establish a duty, a breach of that duty, and

> damages arising out of the alleged breach of duty. 669 S.E.2d at 782.

As the complaint also alleged that plaintiff had no knowledge of the risk of being struck by a soccer ball, this was "sufficient to withstand" defendants' 12(b)(6) motion based on plaintiff's actual knowledge of the danger of being struck. 669 S.E.2d at 782. Reviewing comparable cases from multiple jurisdictions, the Court concluded that

> It is rare that a negligence claim should be dismissed upon the pleadings . . . Such dismissal should be limited to cases where there is a clear, affirmative allegation of a fact that necessarily defeats a plaintiff's claims. 669 S.E.2d at 784.

The plaintiff in Gibson v. Ussery, ___N.C. App.___, 675 S.E.2d 666 (2009), fell down an unfinished stairway at the defendants' condominium development. It was undisputed that not all of the condominium units had been completed. After the plaintiff and her friends had seen the finished units, they walked down a hallway and looked at unfinished units. There were no warnings, signs or barriers to prevent access to the unfinished units. The plaintiff was the second-to-last person in her group to walk down the stairway. Ms. Dickinson, a member of the group, testified that the plaintiff fell forward on the stair and landed on the floor. No member of the group testified as the cause of the fall or the place where the fall occurred. At the

close of all the evidence, the trial court granted a directed verdict in favor of the defendants.

Finding no evidence of causation, the Court of Appeals affirmed dismissal of the plaintiff's claim.

> At trial, plaintiff presented evidence in the form of witness testimony that Cynthia fell forward on the staircase, and that she did not appear to trip on anything. Testimony also showed that she was one of several to descend the staircase, but the only one to fall; none of the witnesses noticed any problems with the condition of the staircase as they descended. One witness testified that she went back to inspect the stairs and found the third step from the bottom to "wobble to and fro" under her foot. However, there was no testimony about which stair Cynthia fell on and no testimony that anyone observed what caused her to fall. . . . All of this testimony, taken in the light most favorable to plaintiff, provides no more than mere speculation that defendants' negligence was the proximate cause of Cynthia's fall . . . . 675 S.E.2d at ___.

The plaintiff in Hines v. Wal-Mart Stores East, L.P., ___N.C. App.___, 663 S.E.2d 337 (2008), disc. rev. denied, 363 N.C. 126, 673 S.E.2d 131 (2009), alleged that he received injuries from a slip and fall at the defendant's store. At trial, the plaintiff testified that he slipped and fell on peaches. At the time of the incident, the defendant had a "zone defense" or "safety sweeps" policy to keep the floors free of spills. There was a dispute at trial as to whether the defendant had notice of the peaches on the floor before the plaintiff's fall. The jury

determined that the plaintiff was not injured as a result of the defendant's negligence. Finding that the defendant had produced no evidence that it complied with its "zone defense" policies, the trial court granted the plaintiff's motion for a new trial.

Holding that the trial court had improperly shifted the burden of proof to the defendant, the Court of Appeals reversed the trial court's grant of a new trial.

> Here, as grounds for granting a new trial, the trial court found that defendant failed to produce evidence that it "had complied with its [safety sweeps] policies" and that defendant failed to identify "any employee . . . responsible for performing the . . . 'safety sweeps' in the location that the plaintiff fell at or near the time the plaintiff fell." By requiring defendant to produce evidence that defendant had been acting in a non-negligent manner at the time of plaintiff's fall, the trial court improperly shifted the legal burden of proof to defendant. This was an abuse of discretion. Accordingly, we reverse. 663 S.E.2d at 340.

Michael v. Huffman Oil Co., ___N.C. App.___, 661 S.E.2d 1 (2008), disc. rev. denied, 363 N.C. 129, 673 S.E.2d 360 (2009), was a wrongful death action relating to construction of a municipal waterline. The City of Burlington purchased an easement from Huffman Oil to construct the waterline. Arcadis provided engineering services for the project. Paul Howard Construction Company

did the construction work. PDM Investments installed underground vaults where the valves were located.

David and Christopher Michael of Michael's Backhoe & Landscaping subcontracted with PDM for part of the waterline. After completion of the required work, the Michaels tested the pressure in part of the waterline and determined that a leak existed in the line. After dismissing the work crew, the Michaels began to search for the leak. The Michaels were discovered dead the following morning at the bottom of one of the vaults. The cause of death was "asphyxia and environmental hypoxia" associated with low levels of oxygen in the area where the bodies were found. The complaint alleged that toxic vapors had leaked into the soil from underground storage tanks used by Huffman Oil for a gasoline service station previously operated. The trial court entered summary judgment on all claims in favor of the City of Burlington and Arcadis.

The Court of Appeals affirmed dismissal of all claims against the City of Burlington and Arcadis. The trial court excluded the testimony of the plaintiffs' expert witness, Dr. Wu-Seng Lung, because of Dr. Lung's reliance on a standard of care relating to the claims against Arcadis. In his deposition testimony, Dr. Lung stated that he relied upon "the code of ethics for professional

engineers" for the standard of care applicable to the engineering work of Arcadis. The trial court specifically found that the code of ethics for engineers was "an unreliable methodology for determining the standard of care applicable to the defendants at bar." 661 S.E.2d at 6. Acknowledging that the standard of review on appeal for exclusion of Dr. Lung's opinions is abuse of discretion, the Court of Appeals affirmed the trial court's exclusion of Dr. Lung's testimony.

> This Court addressed a similar issue in Associated Indus. Constr'rs, Inc. v. Fleming Eng'g, Inc., 162 N.C.App, 405, 413, 590 S.E.2d 866, 872 (2004), aff'd, 359 N.C. 296, 608 S.E.2d 757 (2005). In Fleming, the defendant challenged the trial court's findings of fact, which took judicial notice of various statutes relating to the practice of engineering and land surveying. . . .
>
> In Fleming, this Court expressly rejected the contention that this language created a specific standard of care for professional engineers in this State. . . . We hold that N.C. Gen. Stat. §§ 89C-2, -3 are analogous to the "code of ethics for engineers," upon which Dr. Lung solely relied to base his expert opinion. 661 S.E.2d at 6-7.

Excluding the testimony of Dr. Lung also resulted in affirming dismissal of claims of professional negligence. As to the premises liability claim, the Court held that due to "the complexity of the facts before us, expert testimony is required to establish the standard of care applicable to the City of Burlington." 661 S.E.2d at 12. Therefore, the

exclusion of Dr. Lung's opinions also required dismissal of the premises liability claim.

Although the exclusion of Dr. Lung's opinions also required dismissal of the claim for negligent misrepresentation, the Court of Appeals noted that negligent misrepresentation claims apply only when there is information provided in business transactions.

> North Carolina has "adopted the Restatement 2d definition of negligent misrepresentation and [our courts have] held that the action lies where pecuniary loss results from the supplying of false information to others for the purposes of guiding them in their business transactions." . . . "[W]e have not found, and plaintiffs have not directed us to, any cases in which the theory of negligent misrepresentation was approved as a basis for recovery for personal injury." 661 S.E.2d at 11.

In dismissing claims against the City of Burlington, the trial court rejected the plaintiffs' claim that the Michaels were engaged in an inherently dangerous activity. The Michaels argued that entering into the vault was similar to "trenching" and should also be considered an inherently dangerous activity. The Court of Appeals affirmed the trial court's ruling.

> Here, the Michaels were not engaged in the activity know as "trenching," but entered a secure concrete water vault structure located below ground level to evaluate the cause of a decrease in waterline pressure. Plaintiffs' own expert witness, David Jackson Hooks ("Hooks"), a supervisor of underground utilities, stated in

> his deposition that in the twenty-two years he has worked in construction of underground utilities, "it [was] the first time [he] ever heard of anybody dying in a-anything associated with new construction with water mains[.]" . . . Under the facts of this case, plaintiffs have failed to establish that the Michaels were engaged in an inherently dangerous activity. 661 S.E.2d at 9.

C. Professional

The plaintiff in Goodman v. Holmes & McLaurin Attorneys, ___N.C. App.___, 665 S.E.2d 526 (2008), petition for disc. rev. withdrawn, __N.C.__, 675 S.E.2d 363 (2009), alleged professional negligence arising from the defendant law firm's representation of the plaintiff in a personal injury action. Goodman was injured in an automobile accident on 31 July 1992. Goodman retained McLaurin of the defendant law firm to represent him. Suit was filed on 28 July 1995. McLaurin filed a voluntary dismissal without prejudice on 21 October 1997. Goodman had no knowledge of and did not consent to the dismissal. The action was not refiled within one year of the voluntary dismissal.

McLaurin took "affirmative steps" to hide his conduct from Goodman, including informing Goodman of offers of settlement and an eventual settlement of $200,000. Transfers of money from the law firm trust account to the plaintiff in the amount of $25,000 were made as representing installment payments on the settlement. When

additional payments were not made as represented by McLaurin, McLaurin represented to Goodman that a lawsuit had been filed to enforce the settlement.

Goodman was injured in a second accident on 11 December 2001. Goodman again retained the defendant law firm to represent him in this action. In November 2005, Goodman learned for the first time that the lawsuit relating to his 1992 accident had been dismissed and not refiled and that the suit to enforce the settlement had not been filed. Goodman filed the present suit on 9 May 2006 alleging claims for negligent and fraudulent conduct by McLaurin and the law firm on the grounds that McLaurin's action were imputed to the law firm. The trial court granted the defendants' Rule 12(b)(6) motion to dismiss on the grounds of the statute of repose in N.C.Gen.Stat. § 1-15(c).

The Court of Appeals affirmed dismissal of all claims against all defendants. The plaintiff contended that the defendants were equitably estopped to rely upon the statute of repose because of the "affirmative acts" by McLaurin to conceal his conduct. The Court held that principles of equity do not stop the running of the "unyielding and absolute barrier" of a statute of repose. 665 S.E.2d at 531. Although the Court agreed that the actions of

McLaurin as alleged were "particularly egregious," the Court stated that it was for the legislature to address this issue.

> This Court has consistently refused to apply equitable doctrines to estop a defendant from asserting a statute of repose defense in a legal malpractice context, and the line of cases addressing this issue specifically state that "G.S. § 1-15(c) contains a four year statute of repose, and equitable doctrines do not toll statutes of repose." 665 S.E.2d at 532.

As a result of McLaurin filing the voluntary dismissal without prejudice on 21 October 1997, "the last opportunity for McLaurin to act" was on 21 October 1998. Goodman's present action was filed "nearly seven years after McLaurin's last act," and was, therefore, barred by the statute of repose. 665 S.E.2d at 532.

Goodman also contended that the actions of McLaurin were imputed to the law firm. The Court of Appeals agreed that the retention of McLaurin by Goodman and McLaurin's actions in filing the lawsuit were within the scope of his partnership, the Court held that the fraudulent conduct by McLaurin was "not in the ordinary course of the partnership business." Since there was also no evidence that other members of the partnership "authorized, participated in, or even knew" of McLaurin's conduct, the law firm was not responsible for his fraudulent actions. 665 S.E.2d at 533.

Jones v. Coward, ___N.C. App.___, 666 S.E.2d 877 (2008), was an action for defamation against an attorney and his law firm arising from statements made to a witness in litigation in which the plaintiff and defendants were involved. In November 2006, Coward approached Bracken, a potential witness in litigation in which Coward represented one defendant. Jones, the plaintiff in the current action, was also a defendant. Coward stated to Bracken, "Did you hear that [plaintiff] got run out of town for drugs" or "[plaintiff] got run out of town for drugs." The trial court granted the defendants' motion to dismiss.

Finding that the statements alleged to have been made were privileged, the Court of Appeals affirmed.

> We hold that an attorney's statement or question to a potential witness regarding a suit in which the attorney is involved, whether preliminary to trial, or at trial, is privileged and immune from civil action for defamation, provided the statement or question is not "so palpably irrelevant to the subject matter of the controversy that no reasonable man can doubt its irrelevancy or impropriety" and it was " so related to the subject matter of the controversy that it may [have] become the subject of inquiry in the court of the trial." . . . . Plaintiff's complaint contains the following relevant allegations . . . defendant knew Bracken was a potential witness in that suit, and in fact deposed Bracken subsequent to the alleged complaint; and that defendant had "no other purpose to speak to Bobby Bracken other than to learn information regarding the [suit]." Upon these allegations in plaintiff's complaint, we hold that the trial court did not err in

> dismissing plaintiff's defamation suit, as plaintiff's own evidence is that defendant approached Bracken as a witness, in an attempt to gather evidence for an ongoing suit. 666 S.E.2d at 880.

D. Employment

Outlaw v. Johnson, ___N.C. App.___, 660 S.E.2d 550 (2008), arose out of a highway construction site injury. Outlaw was operating a steamroller east on Highway 70 in Lenoir County. At this location, Highway 70 was four lanes, with two lanes in each direction. Outlaw was proceeding at a speed of five or six miles per hour. Brewington was driving a van in the same direction as Outlaw and behind Outlaw. When Brewington first observed Outlaw, Brewington assumed Outlaw was "just another vehicle going down the road." Brewington looked in his rear-view mirror and observed a tractor-trailer being operated by Johnson. When Brewington looked to his front, Outlaw's steamroller was immediately in front of him. Brewington swerved to the left and was able to avoid colliding with the steamroller. Johnson then saw the steamroller for the first time, swerved to the right, but struck the rear of the steamroller. Outlaw and Johnson were seriously injured in the collision. Outlaw received workers' compensation benefits from his employer, APAC, of $117,217.94.

Outlaw sued Johnson and Johnson's employer, MCA, alleging negligence. Johnson and MCA answered and alleged contributory negligence and negligence by APAC in allowing Outlaw to operate the steamroller on the highway. Outlaw replied that Johnson had the last clear chance to avoid the accident. APAC cross-claimed for the damage to the steamroller of $55,000. The jury found: (1) Outlaw was injured by Johnson's negligence; (2) Outlaw was contributorily negligent; (3) Johnson had the last clear chance to avoid the accident; (4) Outlaw was entitled to recover $450,000; and (5) APAC was negligent and this negligence joined and concurred with Johnson's negligence. The trial court deducted the workers' compensation payments to Outlaw from the jury award, entered judgment against the defendants of $332,782.06 and denied all post-trial motions. Based on the jury finding that APAC was negligent, the trial court determined that APAC was not entitled to recover the damage to the steamroller.

The Court of Appeals affirmed. The Court first determined that the issue of last clear chance was properly submitted to the jury. On elements two and three of last clear chance – whether Johnson would have discovered Outlaw's position of peril had a proper lookout been maintained; and, whether Johnson had the time and means to

avoid the accident – the Court of Appeals held that a jury could have determined that Johnson should have seen the steamroller.

> Therefore, the question is not whether Defendant Johnson had the time and means to avoid the collision upon seeing the steamroller, but rather whether he had the time and means to do so after he should have seen the steamroller. 660 S.E.2d at 558.

The Court of Appeals held that the trial court had correctly refused to give an instruction on sudden emergency. Based on the jury's findings, the jury determined that Johnson was negligent in the operation of his vehicle. Thus, it could not be found that Johnson "through no negligence of his own, [was] suddenly and unexpectedly confronted with imminent danger," as required by N.C.P.I. Civil 102.15.

The defendants requested an instruction on spoliation. At the time of the accident, a strobe light was attached to the top of the steamroller. After the accident, the strobe light was removed by APAC employees and stored in a workshop. At the time the steamroller was inspected by the defendants' expert, the strobe light was not inspected because it was not attached to the steamroller. Shortly before trial, defendants learned that the strobe light was available for inspection. In support of the motion for an

instruction on spoliation, the defendants argued that APAC was aware of the pending lawsuit when the strobe light was removed, therefore, the defendants were prejudiced by not being able to inspect the strobe light at the same time as the steamroller was inspected. The Court of Appeals agreed that the trial court had correctly refused to give a spoliation instruction. The instruction was not warranted "simply because Defendants would have preferred to inspect the strobe light at the same time they inspected the steamroller." 660 S.E.2d at 560.

APAC argued on appeal that the trial court erred in deducting the workers' compensation payments from the jury award and denying recovery for the property damage to the steamroller. APAC based its appeal on the jury finding that Johnson had the last clear chance to avoid the accident. As to the relationship between the workers' compensation lien pursuant to N.C. Gen. Stat. § 97-10.2 and the finding of last clear chance, the Court of Appeals agreed that the issue was "one of first impression in North Carolina." 660 S.E.2d at 563. N. C. Gen. Stat. § 97-10.2 provides that a negligent employer may not recover its workers' compensation lien. The Court held that the statute controlled even though last clear chance was not mentioned.

> We also note that under N.C.G.S. § 97-10.2(e), when a defendant alleges negligence on the part of the employer, the trial court shall submit the issue of the employer's negligence to the jury, and this shall be the last question considered by the jury. In accordance with this mandatory language, we find that the General Assembly intended for N.C.G.S. § 97-10.2(e) to apply even in cases where the issue of last clear chance has been submitted to the jury, and the jury has answered this question in the affirmative. 660 S.E.2d at 563-564.

Even with the finding that Johnson had the last clear chance to avoid the accident, the Court of Appeals then held that APAC was not entitled to recover the damage to its steamroller. Under Rule 13(g), in order for APAC to be allowed to assert a crossclaim against Johnson and MCA, APAC must be a party to the action. N.C. Gen. Stat. § 97-10.2(e) provides that the employer "shall not be made a party."

> While N.C.G.S. § 97-10.2(e) did grant APAC certain rights with respect to the litigation, the right to file a crossclaim was not included within these rights. Since APAC was not a party to the proceeding and was not made a party to the proceeding under any other statute or rule of civil procedure, it was unable to assert a crossclaim under Rule 13(g). 660 S.E.2d at 564-565.

II. Insurance

A. Motor Vehicle

North Carolina Farm Bureau Mutual Insurance Co. v. Morgan, ___N.C. App.___, 675 S.E.2d 141 (2009), was a

declaratory judgment action to determine the application of the "regular use" exclusion in Farm Bureau's policy insuring Breedlove. Morgan and Breedlove were involved in an automobile accident on 13 June 2008. Breedlove was driving a vehicle owned by Whitaker, with Whitaker being a passenger in the car at the time of the accident. Whitaker was insured by Allstate. Farm Bureau declined to participate in attempts to settle the case against the Breedlove estate on the grounds of its "regular use" exclusion. After Whitaker's wife passed away, Breedlove began driving Whitaker to locations in Raleigh and Durham because Whitaker was unfamiliar with the area. By September 2005, Breedlove was driving Whitaker three or four times a week using Whitaker's car. The trial court granted summary judgment in favor of the defendants, concluding that the regular use exclusion did not apply.

The Court of Appeals affirmed summary judgment against Farm Bureau and held that there was coverage under the policy. Whitaker's car may have been used frequently by Breedlove, but Whitaker's car was not available as required by the "regular use" exclusion.

> Whitaker's vehicle was not regularly available to Breedlove. Breedlove did not have keys to the car, and she never drove the car without him being present. Further, Breedlove did not have permission to take Whitaker's car for her

> personal errands. The car was parked at Breedlove's house only once or twice when they came home late at night, but the remainder of the time, Whitaker's car was parked at his house. Whitaker took care of the maintenance of the vehicle: he would get the car inspected and put gas in it when needed. 675 S.E.2d at 143.

Batts v. Lumbermen's Mutual Casualty Insurance Co., ___N.C. App.___, 665 S.E.2d 578 (2008), applied the ownership requirements in N.C.Gen.Stat. § 20-72(b) to the newly acquired or replacement provisions in an automobile liability policy. Lumbermen's issued a personal automobile liability policy to Ms. Batts on 12 May 2003. The policy required that for newly acquired or replacement vehicles to be covered by the policy the insured must request that the new vehicle be insured "within 30 days after [the insured] become the owners."

Ms. Batts purchased a Chevrolet truck on 29 June 2003. On the same day, she signed a title application, the dealer signed a "Reassignment of Title" form reassigning the title to Ms. Batts and Ms. Batts took possession of the vehicle. On 15 July 2003, the Department of Motor Vehicles issued a registration card for the Chevrolet in the name of Ms. Batts. Ms. Batts was involved in an accident on 13 August 2003 while driving the Chevrolet truck. Her notice of the accident to her insurance agent was the first notice that Ms. Batts had purchased the Chevrolet. The trial court

held that the Chevrolet was covered because the notification on 13 August 2003 was within thirty days of 15 July 2003, the date the registration card was issued by the North Carolina Department of Motor Vehicles.

The Court of Appeals reversed and remanded for entry of judgment in favor of Lumbermen's.

> Finally, we conclude that the three requirements for the ownership interest in the Chevrolet Avalanche to pass to plaintiffs, as set forth in N.C.Gen.Stat. § 20-72(b) were satisfied on 29 June 2003. First, on 29 June 2003, Greenville Nissan executed, in the presence of a notary public, the reassignment of title form. This reassignment of title was on a standard form provided by the NCDMV and included the same and address of the transferee, Mrs. Batts. Second, on 29 June 2003, plaintiffs took actual possession of the Chevrolet Avalanche. Third, Greenville Nissan delivered the Certificate of Title to the lienholder, Nissan Motors Acceptance Corporation. Thus, 29 June 2003 is the date that the legal ownership interest in the Chevrolet Avalanche vested in plaintiffs. It is irrelevant that the NCDMV did not issue the registration card for that vehicle until 15 July 2003. 665 S.E.2d at 581.

Since Lumbermen's was not notified of the acquisition of the new vehicle within thirty days of 29 June 2003, the vehicle was not covered at the time of the accident on 13 August 2003.

B. UM/UIM

In Moore v. Nationwide Mutual Insurance Co., ___N.C. App.___, 664 S.E.2d 326, aff'd per curiam, 362 N.C. 673, 669 S.E.2d 321 (2008), the plaintiff sought uninsured motorist benefits, alleging that the plaintiff's vehicle struck a "log" that had fallen off a truck and was lying in the middle of the road. The trial court granted Nationwide's 12(b)(6) motion.

The Court of Appeals affirmed with dissent.

> Plaintiff's complaint failed to allege physical contact between plaintiff's automobile and the vehicle that allegedly carried the pine tree log struck by plaintiff. . . . . plaintiff's complaint fails to state a claim upon which relief may be granted.

The Supreme Court affirmed per curiam.

The plaintiff in Benton v. Hanford, ___N.C. App.___, 671 S.E.2d 31 (2009), was a passenger in a vehicle operated by Hanford. Hanford's automobile collided with a tree. At the time of the accident, Hanford had UIM coverage with Nationwide with limits of $50,000. Benton was a "household resident" under a Progressive Insurance policy with UIM limits of $100,000. Nationwide paid its $50,000 limits. The trial court determined that the Nationwide policy provided the primary UIM coverage, therefore, Nationwide

was entitled to a credit of $50,000 to its $50,000 UIM limit and that Progressive was not entitled to any credit.

The Court of Appeals affirmed and held that the defendant's vehicle was "underininsured."

> Under the general definition of "underinsured highway vehicle,: it follow that the Nationwide UIM policy limit ($50,000) may be stacked with the Progressive policy limit ($100,000) to determine whether the Toyota is an underinsured motor vehicle. . . . The amount of the stacked UIM coverages ($50,000 + $100,000 = $150,000) is the "applicable limits of underinsured motorist coverage for the vehicle involved in the accident." Because the amount ($150,000) is greater than the liability limits ($50,000) under the Nationwide policy, we conclude that the Toyota is an "underinsured highway vehicle" within the meaning of the Act. 671 S.E.2d at 35.

Since Nationwide was the primary UIM carrier, it was entitled to the credit from its liability payment.

> According to the "other insurance" clauses in both policies, sub judice, . . . the UIM coverage for the vehicle owned by the policy holder is not excess, but is "primary coverage." . . . . In the case sub judice, this is the Nationwide policy covering the Toyota involved in the accident. The other policy, sub judice, the Progressive policy, insured the injured party as a household resident of a named insured, in a vehicle not owned by the named insured. According . . . to the language of the policy, this is "excess" coverage. . . . As the provider of primary coverage, Nationwide is entitled to the entire credit from the liability payment. 671 S.E.2d at 36.

The plaintiff in Blanton v. Isenhower, ___N.C. App.___, 674 S.E.2d 694 (2009), was seriously injured in an

automobile accident on 24 April 2004 when he was riding as a passenger in a vehicle operated by Ingerling. The Ingerling vehicle was struck by a vehicle driven by Smith. Smith's automobile liability policy was insufficient to cover the injuries arising out of the accident. Blanton received $16,500 from Smith's policy. Because Blanton lived with his parents at the time of the accident, there were three policies with UIM provisions that covered Blanton's injuries. Each policy contained arbitration clauses.

The arbitrator issued an award entitling Blanton to recover $296,732.72. The trial court confirmed the arbitrator's award. The trial court also denied Blanton's motion that prejudgment interest be included in the judgment.

The Court of Appeals affirmed. The Court held that "an arbitrator's award is not to be treated as a fact finder's verdict," 674 S.E.2d at 695, such that prejudgment may be added pursuant to N.C.Gen.Stat. § 24-5(b). The Revised Uniform Arbitration Act. N.C.Gen.Stat. §§ 1-569.1 et seq. specifies only three events by which an arbitrator's award may be modified or corrected. The addition of prejudgment interest is not one of the statutory grounds to change an arbitrator's award. The

trial court, therefore, properly denied the plaintiff's motion to add prejudgment interest.

The Court of Appeals in Hamby v. Williams, ___N.C. App.___, ___S.E.2d___, 2009 WL 1181502 (May 5, 2009), distinguished Blanton on the grounds that "plaintiff conceded in his appellate brief that the issue of prejudgment interest was never raised before the arbitration panel." ___S.E.2d at ___. Hamby arose out of an automobile accident on 22 May 2003. At the request of the plaintiff, arbitration was ordered with the UIM carrier. The parties agreed that the issue for arbitration was "What amount is the Plaintiff entitled to recover for his damages resulting from the auto accident of May 22, 2003." ___S.E.2d at ___. The arbitration panel awarded the plaintiff $250,000, excluding interest and costs. The arbitration panel specifically "deferred to the Superior Court for further review" the question of prejudgment interest. The trial court denied the plaintiff's motion for prejudgment interest and confirmed the award.

The Court of Appeals reversed and remanded for an award of prejudgment interest. The Court first reviewed the UIM policy and held that the policy provided for prejudgment interest.

> The applicable provision of the policy provides that "UIM carrier will pay all sums the insured is legally entitled to recover as compensatory damages . . . ." . . . . this Court [has] held that prejudgment interest is part of compensatory damages for which an UIM carrier is liable. ___S.E.2d at ___.

The Court then considered the failure of the arbitration panel to award prejudgment interest and whether the trial court had the authority to award prejudgment interest.

> In the instant case, the parties consented to arbitrate plaintiff's UIM claim "in accordance with the terms of the policy of insurance." The parties stipulated that the issue to be determined was the amount of plaintiff's "damages resulting from the auto accident of May 22, 2003." The terms of the policy provided for "compensatory damages" which included prejudgment interest. Since the arbitration agreement encompassed prejudgment interest, and this issue was deferred to the trial court for resolution, . . . an award of prejudgment interest would not constitute a modification of the arbitration award. N.C.Gen.Stat. § 24-5(b)(2007) provides that: "in an action other than contract, any portion of a money judgment designated by the factfinder as compensatory damages bears interest from the date the action is commenced until the judgment is satisfied." We hold this provision to be mandatory and not discretionary on the part of the trial court, and that the trial court erred in not awarding prejudgment interest to plaintiff. ___S.E.2d at ___.

State Farm Mutual Automobile Insurance Co. v. Gaylor, ___N.C. App.___, 660 S.E.2d 104 (2008), disc. rev. denied, 363 N.C. 130, ___S.E.2d___(2009), was a declaratory

judgment action to determine whether the defendants were entitled to uninsured motorists coverage arising out of an automobile accident on 26 March 2002. The present action was filed on 30 March 2006. On 25 May 2006, the defendants filed answer and counterclaims. The counterclaims requested reformation of the insurance policy based on mutual mistake, negligent failure to procure insurance and misrepresentation. The trial court dismissed the defendants' counterclaims and granted State Farm's motion for summary judgment.

The Court of Appeals affirmed. The defendants failed to file their counterclaims within three years of the accident that occurred on 26 March 2002. The counterclaims, therefore, were barred by the three-year statute of limitations in N.C. Gen. Stat. § 1-52(5) and (9). The evidence before the trial court established that the defendants executed a "Selection/Rejection Form" in the statutorily-required form rejecting uninsured/ underinsured motorist coverage. Since there were no genuine issues of material fact about the rejection of coverage, summary judgment was properly entered for State Farm.

C. Homeowners

The plaintiffs in Luther v. Seawell, ___N.C. App.___, 662 S.E.2d 1 (2008), sued for recovery under a homeowner's policy with Farm Bureau and for fraud and deceptive trade practices. The application for the homeowner's insurance was completed by Seawell, an agent for Farm Bureau. The application stated that the plaintiffs did not conduct business from their home; denied that their insurance had previously been cancelled; denied that other insurance companies had refused to issue them insurance; and denied that they had a prior homeowner's claim in the last five years. During their deposition, the plaintiffs admitted that these answers were false. The plaintiffs contended that they had given correct answers to Seawell, but that Seawell told the plaintiffs that the truthful answers did not need to be included on the application. After issuance of the policy, the plaintiffs' home was damaged by fire. Although Farm Bureau made advanced payments for clothing, Farm Bureau refused to make additional payments. The trial court granted the motions for summary judgment of both defendants and dismissed all claims.

The Court of Appeals agreed that the actions of the plaintiffs voided coverage under the homeowner's policy.

The false representations by the plaintiffs were sufficient to void coverage.

> It appears to be undisputed that plaintiffs signed the application knowing that it contained misrepresentations about several pieces of information regarding their past credit and insurance histories. Per defendant Seawell's deposition and defendant Farm Bureau's responses to interrogatories, defendant Farm Bureau would not have issued the policy had the correct information been provided. As such, it appears that plaintiffs made material misrepresentations to obtain the policy and, therefore, the trial court was correct in granting summary judgment on that claim. 662 S.E.2d at 4.

The plaintiffs alternatively argued that the misrepresentations were made by Seawell because he completed the application. Since the plaintiffs then signed the form, the plaintiffs "adopted those representations" as their own. 662 S.E.2d at 5.

D. Negligence

Scott & Jones, Inc. v. Carlton Insurance Agency, Inc., ___N.C. App.___, ___S.E.2d___, 2009 WL 910424 (April 7, 2009), determined the applicable statute of limitations for claims against insurance agents. In March 1998, Scott & Jones installed a grain silo on a farm in South Carolina. On 24 January 2002, Carlton Insurance Agency procured a commercial liability policy with Ohio Casualty Insurance insuring Scott & Jones. On 3 February 2003, MacMillan, an employee of the farm where the silo was installed, fell

while working on the silo. MacMillan was severely injured and is a paraplegic.

MacMillan filed suit against Scott & Jones in South Carolina on 6 October 2004. Ohio Casualty filed a declaratory judgment action to determine whether there was coverage under its policy for the injuries to MacMillan. The court found in favor of Ohio Casualty. The jury in MacMillan's case returned a verdict in his favor of $5,000,000. The present against was filed on 31 October 2006. The trial court granted the defendant's motion for summary judgment.

The Court of Appeals affirmed dismissal of the action. The plaintiff argued that the professional malpractice statute of limitations in N.C.Gen.Stat. § 1-15(c) applied. Relying upon Pierson v. Buyher, 330 N.C. 182, 409 S.E.2d 903 (1991), the Court of Appeals disagreed. Specifically, the Court held that insurance agents do not provide "professional services," and, for this reason, G.S. § 1-15(c) did not apply.

Addressing the applicability of the three-year statute of limitations in G.S. § 1-52(16), the Court first noted that the Ohio Casualty policy contained a completed products exclusion that "should have been apparent to plaintiff on the date plaintiff received the policy . . .

or at the latest, it should have been apparent to plaintiff immediately upon Mr. MacMillan's injury." ___S.E.2d at ___.

In a further attempt to avoid the bar of the three-year statute of limitations, the plaintiff argued that Carlton Agency was in a "continuing breach of the fiduciary duty to procure, inform and not misrepresent the insurance coverage even after 3 February 2003." ___S.E.2d at ___. Disagreeing, the Court of Appeals confirmed that a cause of action "based on negligence accrues when the wrong giving rise to the right to bring suit is committed." ___S.E.2d at ___. Since the present complaint was filed on 31 October 2006, more than three years after the injury to MacMillan on 3 February 2003, the action was barred by the statute of limitations. Similar reasoning also barred the plaintiff's claim for breach of contract based upon the failure of Carlton Agency to procure completed products coverage.

E. Arbitration

N.C. Farm Bureau Mutual Insurance Co. v. Sematoski, ___N.C. App.___, 672 S.E.2d 90 (2009), was a declaratory judgment action to determine whether defendant was entitled to UM/UIM coverage from policies issued by the plaintiff. Ms. Sematoski was injured in an automobile accident in

Florida on 7 April 2002 when the vehicle she was driving was struck from the rear by a vehicle operated by Mr. Ferguson. Ferguson was insured by Progressive Insurance. Ms. Sematoski's vehicle was insured by Hartford. Her vehicle was registered and garaged in North Carolina. Ms. Sematoski was also a beneficiary of two policies issued by Farm Bureau with separate UM/UIM limits of $50,000 and $100,000 per person. After suit was filed in Florida, Progressive, the liability carrier for Ferguson, paid Ms. Sematoski its limits of $10,000. Ms. Sematoski voluntarily dismissed with prejudice her suit against Ferguson. Hartford then paid its UM/UIM limits of $10,000.

After Farm Bureau filed the present suit, Farm Bureau moved for summary judgment. Ms. Sematoski filed a motion to compel arbitration and stay the proceedings because both of Farm Bureau's policies provided for arbitration of personal injury claims involving an underinsured motorist. The trial court denied the defendant's motion to compel arbitration and granted Farm Bureau's motion for summary judgment.

The Court of Appeals reversed and remanded for referral to arbitration. The Court first determined whether the Federal Arbitration Act or the North Carolina Uniform Arbitration Act applied. Concluding that all

transactions occurred in North Carolina, the Court held that the North Carolina Act governed.

> Here, both of plaintiffs' policies were entered into in 2001 and the arbitration agreement does not fall under either exception listed under N.C.G.S. § 1-567.2(b)(2001). Both plaintiffs are North Carolina corporations with a principal place of business in North Carolina. Plaintiffs each issued an insurance police with defendant as a named beneficiary. Both policies were applied for and entered into in North Carolina and covered vehicles registered and garaged in North Carolina. Also, there is no evidence in the record that the collection of insurance premiums or payment of insurance benefits involved or affected commerce outside of North Carolina. Therefore, we hold that on the record before us the arbitration agreement is governed by the UAA. 672 S.E.2d at 92-93.

Farm Bureau contended that Ms. Sematoski waived her right to arbitration by filing suit against Ferguson in Florida. The Court of Appeals disagreed, concluding that "the mere filing of pleadings" and "expenditure of $3,401" did not constitute a waiver of the right to demand arbitration. 672 S.E.2d at 93. Finally, the Court determined that Ms. Sematoski's right to UM/UIM benefits after releasing Ferguson and the applicability of the Florida statute of limitations should be referred to arbitration.

F. Unfair or Deceptive Trade Practices

The plaintiff's home in Carter v. West American Insurance Co., ___N.C. App.___, 661 S.E.2d 264 (2008), was

extensively damaged by fire on 25 July 2000. The plaintiff's home had been insured under policies obtained by Graham Underwriters Agency from 1965 to 2001. The plaintiff's husband had handled the insurance policies until his death in 1985. After Mr. Carter's death, Mrs. Carter told the employees at Graham to do what her husband always did. The amount of insurance on the house increased to reflect local construction costs. At the time of the fire, the amount of insurance was $119,500. As part of re-financing, Mrs. Carter had the home appraised in August 1998 for $129,496. Graham was not told of the appraisal. After the fire, it was determined that the cost to replace the house was $200,000. West American tendered a check to Mrs. Carter for $125,475, constituting the insured value of $119,500 and the cost of debris removal. Mrs. Carter refused to accept the check with the memorandum stating the composition of the amount of the check. The check was reissued, and Mrs. Carter deposited the check.

Mrs. Carter filed the present action contending that the defendants had orally agreed to cover the replacement cost of the house. The complaint also included claims for unfair or deceptive trade practices. The trial court granted the motions for summary judgment of Graham and West American dismissing all claims.

The Court of Appeals affirmed dismissal of all claims. Addressing the breach of contract claim, the Court held that Mrs. Carter had not presented any evidence contradicting the terms and amount of the insurance policy.

> Viewing the evidence in the light most favorable to plaintiff, the records shows only that about fifteen years before the fire, plaintiff requested that Graham continue to provide her with the same insurance provided to Mr. Carter. Plaintiff provided no evidence of any action by defendants to change from the type and amount of coverage provided to Mr. Carter. Plaintiff's dwelling coverage was regularly adjusted for inflation, and the coverage was for more than 92% of the home's value according to the appraisal prepared less than two years before the fire. The dwelling coverage amount was clearly stated on the face of the policy, and there is no evidence that plaintiff was unable to read and understand the policy. Plaintiff simply has not provided a factual basis to support equitable reformation of the insurance policy. 661 S.E.2d at 270.

Mrs. Carter's claim for unfair or deceptive trade practices was based on the delay in tendering payment, continuing to accept premiums on the policy after the fire and payment was tendered with a memorandum on the check attempting to limit exposure. The Court of Appeals agreed that this evidence did not support a claim for unfair or deceptive trade practices.

> Plaintiff's assertion that "there was no dispute regarding coverage" is manifestly contrary to plenary evidence in the record. Plaintiff was offered the full amount of the dwelling policy limits in October 2000, but she chose to refuse

> it and hired an attorney. Further, plaintiff's refusal to accept the tender of $125,475 on 14 June 2001 is not an unfair or deceptive trade act on the part of West American. West American's failure to cancel the policy before it expired was neither unfair nor deceptive when plaintiff had not yet filed an inventory of the contents as required by the policy. Advising plaintiff to pretend that she was not represented by counsel may be inappropriate, but there is no evidence that plaintiff suffered damages as a result, as required in a claim for unfair or deceptive trade practices. . . . Finally, there was nothing deceptive about the memorandum . . . , as the words, "REFLECTS TOTAL RECOVERABLE UNDER THESE COVERAGES" accurately represented the terms of plaintiff's insurance policy. In sum, plaintiff has forecast no evidence that she was injured by any unfair or deceptive act on the part of defendants. 661 S.E.2d at 271.

III. Trial Practice and Procedure

A. Statutes and Periods of Limitation and Repose

Boor v. Spectrum Homes, Inc., ___N.C. App.___, 675 S.E.2d 712 (2009), applied the six-year statute of repose concerning real property in N.C.Gen.Stat. § 1-50(a)(5)a. Evergreen Construction, an affiliate of Spectrum Homes constructed a home in Raleigh. The City of Raleigh issued a certificate of occupancy for the home on 18 May 2000. The sale of the home to the Martins was finalized on 12 June 2001 with the Martins receiving a general warranty deed on that date. At the closing, the Martins also received a Limited Warranty including in part "repair of a Major Structural Defect," the warranty also stating that it

applied to "you as the purchaser of the home . . . and automatically to any subsequent owners." The plaintiffs purchased the home from the Martins on 20 October 2006. The Boors made several requests to the defendant for repairs to the home under the warranty. Suit was filed on 11 June 2007. In opposing the defendants' motion for summary judgment, the plaintiffs submitted the written report of their expert which showed "convincingly that the damage to the plaintiffs' home involves structural damage." 675 S.E.2d at ___. The trial court granted the defendants' motion for summary judgment.

Concluding that the claim was barred by the six-year statute of repose, the Court of Appeals affirmed dismissal.

> Here, the City of Raleigh Inspections Department issued a certificate of occupancy for the home on 18 May 2000, stating that "work performed under this permit has been found to be in substantial compliance with applicable building codes." Under this certificate of compliance, an owner could utilize the property as a residence on that date. . . . Plaintiffs have alleged no act by defendant after 18 May 2000, nor any fraud or willful or wanton negligence in defendant's construction of the home pursuant to N.C.G.S. § 1-50(a)(5)(e). . . . Because plaintiffs filed their claims . . . on 11 June 2007, they cannot prove that the six-year statute of repose is not a bar to the maintenance of this action. 675 S.E.2d at ___.

The plaintiff in Lawrence v. Sullivan, ___N.C. App.___, 666 S.E.2d 175 (2008), was injured in an automobile accident on 16 February 2002. Suit was filed on 8 February 2005 and a summons was issued addressed to the defendant at 10200 Jefferson Davis Hwy, Lot 52, Richmond, VA. Because the summons was not served, an alias and pluries summons was issued to the defendant at the same address on 7 April 2005. On 5 October 2005 at 1:51 p.m., the plaintiff's attorney filed an affidavit with a return receipt signed by James Holt. On the same day at 1:57 p.m., the plaintiff filed a motion to voluntarily dismiss without prejudice. The present complaint was filed on 29 September 2006.

The defendant moved to dismiss the complaint for lack of jurisdiction and insufficiency of process. In support of the motion to dismiss, the defendant filed an affidavit, stating in part that James Holt did sign the certified mail receipt; that the defendant did not reside at the address shown on either summons; and that the defendant did not receive a copy of the summons and complaint. The trial court dismissed the action.

The Court of Appeals affirmed, holding that the defendant had rebutted the presumption of valid service arising from the affidavit of the plaintiff's attorney.

> Defendant therefore rebutted plaintiff's presumption of valid service, and plaintiff thereafter failed to bring forth any evidence "to show that [her] cause of action accrued within the limitations period." . . . . As defendant was never properly served with the first complaint, plaintiff's voluntary dismissal without prejudice did not toll the statute of limitations. 666 S.E.2d at 183.

The plaintiff in Roemer v. Preferred Roofing, Inc., ___N.C. App.___, 660 S.E.2d 920 (2008), entered into a contract on 29 November 1999 with the defendant to remove the existing roofing on the plaintiff's home and replace it with new roofing. Suit was filed on 18 July 2007 alleging that the project was completed in the summer of 2000 when "the plaintiff accepted the completed project." The complaint alleged claims for negligence and breach of the defendant's express lifetime warranty of dependability and reliability of the installation of the roof. The plaintiff requested compensatory damages in excess of $10,000. The trial court granted the defendant's motion to dismiss pursuant to Rule 12(b)(6).

The Court of Appeals affirmed dismissal of all claims. The Court of Appeals first held that the claims were barred by the six-year statute of repose in N.C. Gen. Stat. § 1-50(a)(5)a prohibiting an action "to recover damages for 'the defective or unsafe condition of an improvement to real property' that is not brought within six years of

'substantial completion of the improvement.'" 660 S.E.2d at 923. The complaint did not request compliance with the alleged lifetime warranty.

> Plaintiff's remedy for breach of an alleged lifetime warranty claim that is "brought more than six years from the later of the specific last act or omission of the defendant giving rise to the cause of action or substantial completion of the improvement[,]" lies in specific performance, and not damages. 660 S.E.2d at 923.

The parties in Andrus v. IQMax, Inc., ___N.C. App.___, 660 S.E.2d 107 (2008), entered into a consulting agreement on 8 February 2000. Andrus provided consulting services pursuant to the agreement. On 27 December 2000, Andrus sent IQMax an invoice for services rendered through 16 June 2000. The present suit was filed on 25 April 2006 and requested payment of the 27 December 2000 invoice. In response to the defendant's motion to dismiss based on the three-year statute of limitations, Andrus contended that e-mails between the parties "constituted a new promise to pay within the meaning of N.C. Gen. Stat. § 1-26." 660 S.E.2d at 108. The trial court granted the defendant's motion to dismiss based on the statute of limitations.

The Court of Appeals affirmed dismissal. The Court of Appeals agreed with the trial court that the e-mails did not "manifest a definite and unqualified intention to pay the debt" as required by N.C. Gen. Stat. § 1-26.

> Adkison confirmed [in e-mails] that "the wheels [were] in motion" in getting Andrus a check, but added that he was still "working [on] the details." Subsequent e-mails, addressing the details, "anticipate[d]" possible payment options over time, but said only that Adkison and his chief financial officer were "talking about" a particular proposal. Adkison then indicated that he would provide the paperwork "sometime this week"–something that apparently did not happen. . . . [W]e are confronted in the e-mails with "conditional expressions of defendant's willingness to pay the plaintiff"– statements "not sufficiently precise to amount to an unequivocal acknowledgment of the original amounts owned." 660 S.E.2d at 110.

B. Collateral Estoppel

The decedent, Bishop, in Shehan v. Gaston County, ___N.C. App.___, 661 S.E.2d 300 (2008), was assaulted by Bradshaw, then run over by a vehicle operated by Officer May. There was a dispute as to which event resulted in Mr. Bishop's death. Bradshaw entered an Alford plea of guilty to the charge of voluntary manslaughter relating to Mr. Bishop's death. As part of the plea, Mr. Bradshaw did not admit guilt, but acknowledged that he would be treated as being guilty.

The complaint in the present case alleged that the negligence of Bradshaw concurred with the negligence of the Gaston County Police and Officer May in proximately causing the death of Bishop. The trial court denied the Rule 12(c)

motions to dismiss by the County and May based on the defense of collateral estoppel.

The Court of Appeals affirmed and held that the trial court had correctly denied the motions to dismiss based on collateral estoppel. Since neither the plaintiff estate nor the moving defendants in the civil action were parties to the underlying criminal action against Bradshaw, the plaintiff estate had no opportunity to litigate the issue of proximate cause during the Bradshaw criminal hearing. The defendants relied upon Mays v. Clanton, 169 N.C. App. 239, 609 S.E.2d 453 (2005), in which Mays was charged with a criminal offense involving a city police officer. Mays filed a civil action against the policy officer and the city. Mays was convicted of simple assault. The trial court in the Mays civil action granted the defendants' motion for summary judgment. The Court of Appeals affirmed, citing the "defensive use of collateral estoppel."

Distinguishing Mays, the Court of Appeals agreed with the trial court that collateral estoppel was not applicable in the present case.

> Mays is easily distinguished from the case at hand: Mays had a full and fair opportunity to litigate the elements of his crimes during his criminal jury trial. He was the plaintiff in the civil trial, and his criminal convictions for

> assaulting a police officer with a deadly weapon and simple assault established certain elements that were also elements in his civil case. Here, plaintiff was not a party to Bradshaw's criminal proceeding and had no ability to intercede and litigate the issue of causation. Moreover, plaintiff alleged concurrent negligence in her complaint. Even if she had received a full and fair opportunity to litigate the issue of whether Bradshaw proximately caused Mr. Bishop's death, she still would not have had a full and fair opportunity to litigate defendants' role in Mr. Bishop's death: Bradshaw's negligence does not preclude defendants' negligence. 661 S.E.2d at 304.

C. Jurisdiction

Saft America, Inc. v. Plainview Batteries, Inc., ___N.C. App.___, 659 S.E.2d 39 (2008), rev'd per curiam, 363 N.C. 5, 673 S.E.2d 864 (2009), was an action for breach of contract between Saft America, a North Carolina corporation, and the defendants, New York individuals and corporations. The trial court denied the motion to dismiss for lack of personal jurisdiction as to the individual defendant, Erde. The Court of Appeals reversed as to Erde on the grounds that none of the acts alleged in the complaint "occurred within his individual capacity." 659 S.E.2d at 45.

The Supreme Court reversed based on the Court of Appeals dissent by Judge Arrowood. Judge Arrowood agreed with the Court of Appeals majority that personal jurisdiction "over an individual officer or employee of a

corporation may not be predicated merely upon the corporate contacts within the forum." 659 S.E.2d at 49. The basis, however, of Judge Arrowood's dissent, and the Supreme Court reversal, was that Erde had individual contacts with North Carolina in the course of his corporate responsibilities that were sufficient for the exercise of personal jurisdiction.

> In sum, under North Carolina precedent the determination of whether personal jurisdiction is properly exercised over a defendant does not exclude consideration of defendant's actions merely because they were undertaken in the course of his employment. In particular, the corporate actions of a defendant who is also an officer and principal shareholder of a corporation are imputed to him for purposes of deciding the issue of personal jurisdiction. On the other hand, personal jurisdiction cannot be based solely on a defendant's employment status as the agent or officer of a company with ties to North Carolina, or on personal connections to North Carolina that fall short of the requisite "minimum contacts." . . . .
>
> It is undisputed that Erde (1) was an officer and principal shareholder in both Plainview and Energex; (2) visited North Carolina at least once to conduct business with Plaintiff; and (3) negotiated the terms of pertinent contracts and was otherwise personally involved in the transactions at issue. . . . The contract was to be performed in North Carolina and has a substantial connection with the State. . . I would hold that assumption of in personam jurisdiction over defendant does not offend traditional notions of fair play and substantial justice within the contemplation of the Due Process Clause . . . . 659 S.E.2d at 52-53.

Dailey v. Popma, ___N.C. App.___, 662 S.E.2d 12 (2008), determined whether internet postings by the defendant were sufficient to confer personal jurisdiction. Plaintiff, a North Carolina resident, alleged that defendant, a resident of Georgia, posted defamatory statements about the plaintiff on the internet. The complaint alleged jurisdiction and minimum contacts because the "effect of the defamation occurred in North Carolina." 662 S.E.2d at 14. The trial court dismissed the action for lack of personal jurisdiction.

Adopting the reasoning of ALS Scan, Inc. v. Digital Service Consultants, Inc., 293 F.3d 707 (4th Cir. 2002), cert. denied, 537 U.S. 1105, 123 S. Ct. 868, 154 L. Ed. 2d 773 (2003), the Court of Appeals affirmed dismissal for lack of jurisdiction. Because the plaintiff produced no evidence to establish that the "defendant posted the material in the bulletin board discussions with the intent to direct his content to a North Carolina audience," there was no personal jurisdiction by the North Carolina courts. 662 S.E.2d at 19.

> The trial court's "presumed" finding that defendant did not manifest the necessary intention is supported by the record. Plaintiff did not supply the court with the internet postings that form the basis for his libel suit and his assertion that personal jurisdiction exists over defendant. As a result, the record

> contains no evidence that the postings textually targeted or focused on North Carolina readers. Defendant's affidavit indicates that he participated in a number of internet bulletin board discussions relating to shooting "camps" conducted by plaintiff in at least North Carolina and Alabama, which camps were attended "by enthusiasts from a number of locations across the southeastern United States . . . ." Defendant further stated that he understood that some of the participants in the bulletin board discussions were not located in North Carolina. These assertions are evidence of lack of focus on North Carolina residents. 662 S.E.2d at 18.

The plaintiff in Eaker v. Gower, ___N.C. App.___, 659 S.E.2d 29 (2008), filed a verified complaint against a massage therapy school and the school's president, Gower, alleging breach of contract. The defendant answered and moved to dismissed pursuant to Rule 12(b)(6) for lack of personal jurisdiction over Gower. The defendant submitted an affidavit from Gower stating that she was a resident of Florida. The plaintiff relied on the verified complaint in which it was alleged that Gower was a citizen and resident of North Carolina and had engaged in commerce within North Carolina. The trial court denied Gower's motion to dismiss.

The Court of Appeals reversed and held that Gower's motion to dismiss for lack of personal jurisdiction should have been granted. The Court first noted that the proper motion for dismissal for lack of personal jurisdiction is

under Rule 12(b)(2). The plaintiff's opposition to the motion to dismiss relied only on the allegations in the verified complaint. The Court of Appeals concluded that, based on the facts contained within Gower's affidavit, "the trial court could properly find only that defendant Gower is a citizen and resident of Florida." 659 S.E.2d at 33. Similarly, the allegation in the complaint that Gower "engaged in commerce within the state of North Carolina" was conclusory and did not state facts upon which the conclusion was based. Id.

> We find this statement to be a legal conclusion rather than a factual allegation. Plaintiff has asserted that defendant Gower is "engaged in commerce within the state of North Carolina[,]" but has not provided us with any facts in the record to support this conclusion. . . .
>
> We have no information as to the number of times Gower may have visited North Carolina or even directed communications here. . . . All we know from the evidence before us is that Gower is a citizen and resident of Florida and plaintiff is a North Carolina citizen and resident, who attended classes presented by Natural Touch and/or Gower at an unknown location. . . . We cannot make assumptions regarding these important facts, but rather are required to rely only upon the facts in the record before us. 659 S.E.2d at 33.

D. Service

Camara v. Gbarbera, ___N.C. App.___, 662 S.E.2d 920 (2008), disc. rev. denied, 363 N.C. 122, 675 S.E.2d 38 (2009), arose out of an automobile accident on 21 June

2003. Suit was filed on 9 June 2006. The plaintiff issued an alias and pluries summons on 7 September 2006 which was served on the defendant on 8 November 2006. Another alias and pluries summons was issued on 22 November 2006 but was never served on the defendant. On 30 November 2006, the defendant filed a motion to dismiss for insufficiency of service. The plaintiff took a voluntary dismissal without prejudice on 9 February 2007.

The plaintiff re-filed the complaint on 13 March 2007. An alias and pluries summons issued on 9 June 2007 was served on 23 June 2007. The trial court granted the defendant's motion to dismiss based on insufficiency of service and expiration of the statute of limitations.

The Court of Appeals affirmed dismissal of the action. Because there was no service of the summons in the original action, the plaintiff properly had an alias and pluries summons issued. Since the alias and pluries summons was not served within sixty days, there was no valid service on the defendant of the first action. For this reason, the statute of limitations continued to run and was not tolled because of the filing of the first action.

> Personal service of the original summons in the original action was never made. Plaintiffs issued an alias and pluries summons within 90 days after the issuance of the original summons in accordance with Rule 4(d)(2). However,

> personal service of the alias and pluries summons was not returned within 60 days in the same manner that service was to be returned in the original service of process. Defendant was served 62 days after issuance of the alias and pluries summons, which rendered the service of process on defendant insufficient. . . .
>
> [A] plaintiff must obtain proper service prior to dismissal in order to toll the statute of limitations for a year. . . .
>
> Because the service was defective, the statute of limitations did not toll. . . . [T]he fact that the summonses in the re-filed action were served properly is of no consequence because plaintiffs' service on defendant in the original action was defective. 662 S.E.2d at 921-22.

E. Venue

Price & Price Mechanical of N.C., Inc. v. Miken Corp., ___N.C. App.___, 661 S.E.2d 775 (2008), involved a contract for the improvement of real property, a retail outlet in Asheville, North Carolina. The plaintiff's office and principal place of business were in Asheville. The defendant was a Florida corporation. The parties entered into a contract in November 2003 for the mechanical and HVAC work at the property. The contract contained a clause providing that the law of Florida would govern the contract and that any suit or action relating to or arising out of the contract should be brought in the appropriate Florida State Court in Hillsborough County, Florida. The plaintiff filed suit in Buncombe County Superior Court for breach of

the contract. The trial court dismissed the complaint on the defendant's motion for improper venue.

The Court of Appeals reversed. In part, N.C. Gen. Stat. § 22B-2 provides that a provision in a contract for the improvement of real property in North Carolina that makes the laws of another state applicable or requires that the exclusive forum for litigating disputes under the contract in another state is "void and against public policy." The defendant argued for the application of N.C. Gen. Stat. § 22B-3, which provides that the prohibition in N.C. Gen. Stat. § 22B-2 does not apply to "non-consumer loan transactions."

The Court of Appeals held that the determinative fact was that the real property involved was in North Carolina.

> Section 22B-2, however, provides that the place of execution is irrelevant to contract interpretation when real property located in the state of North Carolina is the issue of the contract and the place of performance is of paramount concern. While both sections relate to contract interpretation, Section 22B-2 applies in the instant case because it deals specifically with contracts relating to real property in North Carolina. 661 S.E.2d at 777.

F. Pro Hac Vice Admission

The defendants in Sisk v. Transylvania Community Hospital, Inc., ___N.C. App.___, 670 S.E.2d 352 (2009), appeal docketed, No. 67PA09 (N.C. April 30, 2009), moved to

revoke the pro hac vice admission of the plaintiffs' attorneys on the grounds that the plaintiffs' attorneys had made "improper contact with one of Abbott's consulting experts." The alleged improper contact occurred in Kentucky. A similar motion had been heard by a trial court in Kentucky, with the Kentucky court concluding that the conduct alleged did not violate Kentucky ethical rules. The trial judge in the present case made findings of fact, then revoked the attorneys' pro hac vice admission.

Finding an abuse of discretion, the Court of Appeals reversed. The Court first noted that a trial court may "summarily revoke" an pro hac admission and is not required to make findings of fact. The decision of the trial judge is reviewed for abuse of discretion. In the present case, the trial court made findings of fact and concluded that the conduct alleged violated the North Carolina Revised Rules of Professional Conduct. Finding a "misapprehension of the law," the Court of Appeals found an abuse of discretion and reversed.

> Assuming arguendo that the conduct of Mr. Meyer and Mr. Stein was inappropriate and constituted the appearance of impropriety thereby violating Rule 4.3 of the North Carolina Rules of Professional Conduct, because the conduct occurred in Kentucky and did not violate the Kentucky Rules of Professional Conduct, the trial court erred in revoking Mr. Meyer's and Mr. Stein's pro hac vice status on that abuse. . . .

> The trial court's conclusions were based upon a misapprehension of law and such misapprehension was material and changed the outcome. 670 S.E.2d at 355.

G. Misnomer or Mistake in Naming Party

Taylor v. Hospice of Henderson County, Inc., ___N.C. App ___, 668 S.E.2d 923 (2008), was an action alleging claims under the North Carolina Persons With Disabilities Protection Act. A complaint was filed and summons issued on 12 June 2007 naming "Four Seasons Hospice & Palliative Care, Inc." as a defendant. On 1 August 2007, plaintiff filed an amended complaint naming "Hospice of Henderson County, Inc., d/b/a Four Seasons Hospice & Palliative Care" as a defendant. An amended alias and pluries summons was issued on 2 August 2007. On 10 September 2007, the plaintiff moved to amend the original summons by changing the name of the defendant. The trial court denied the plaintiff's motion to amend the 12 June 2007 summons and held that the statute of limitations on plaintiff's claim under the Disabilities Act expired before the 2 August 2007 summons was issued.

Finding that the change in naming the defendant was a misnomer or mistake and not the addition of a new party, the Court of Appeals reversed. The Court of Appeals observed that the North Carolina Secretary of State's

records doe not show an entity known as "Four Seasons Hospice & Palliative Care, Inc." but that the defendant, "Hospice of Henderson County, Inc." does business as "Four Seasons Hospice & Palliative Care." Therefore, the change of the defendant's name in the 2 August 2007 summons was a "correction of a misnomer or mistake in the name of the party." 668 S.E.2d at 926. The action, therefore, was commenced on 12 June 2007 and was not barred by the statute of limitations.

H. Discovery

Boyce & Isley, PLLC v. Cooper, ___N.C. App.___, 673 S.E.2d 694 (2009), arose from the 2000 election campaign for the office of North Carolina Attorney General with the complaint alleging that the plaintiffs were defamed by statements made during the campaign. During discovery, the defendants requested that Mr. Boyce produce his attorney time and billing records for cases in which the plaintiffs were involved. Mr. Boyce agreed to produce the requested records at his home office, but refused to copy the records. Ms. Ramseur, one of the attorneys for the defendants, and a legal assistant traveled to Mr. Boyce's home office. Ms. Ramseur brought a laptop with her. Mr. Boyce allowed Mr. Ramseur to use his power cord for her laptop and generally remained present during Ms. Ramseur's

review. None of the files reviewed were designated as confidential. Mr. Boyce did ask that Ms. Ramseur not take notes during her review of the documents produced by Mr. Boyce.

After Ms. Ramseur's visit to Mr. Boyce's home office concluded, Mr. Boyce filed a motion contending that Ms. Ramseur's review violated the protective order entered in the case. The plaintiffs requested that the trial judge conduct an in camera review of Ms. Ramseur's notes and impose sanctions. In response to the plaintiffs' motion, the defendants acknowledged that Ms. Ramseur's notes included short selections of verbatim text from certain documents, "as well as her thoughts regarding them and her theories of the case." The trial judge ordered that Ms. Ramseur's notes be produced to him in camera. After review of the documents, the trial judge rejected the defendants' claim of work-product privilege and ordered that the notes were discoverable.

Finding that Ms. Ramseur's notes were work product, the Court of Appeals reversed and held that the trial judge abused its discretion in ordering production of the notes. The Court determined that Ms. Ramseur's quoting of selected parts of the documents or "highlighting" documents and

selecting a "smaller subset" of documents were protected as privileged work product.

> In the instant case, defendant notes that Mr. Boyce provided defendants' counsel with thousands of pages for inspection, and defendants' counsel copied into her computer only a few, short verbatim excerpts from a few of these documents. Defendants contend that the disclosure of the notes would direct plaintiffs to the few documents and portions thereof that defendants' counsel focused on and considered significant enough to emphasize from among a vast number of items. We agree. Consequently, we conclude that the verbatim text entered in the computer of defendants' counsel qualifies as opinion work product and is not discoverable, especially where plaintiffs, specifically Mr. Boyce, already have the underlying, original documents in their possession. As such, the trial court abused its discretion by concluding otherwise. Furthermore, even assuming, arguendo, that the verbatim text here qualifies merely as ordinary work product as opposed to opinion work product, we agree with defendants that plaintiffs have neither argued nor shown that there is a "substantial need" or "undue hardship" to justify production, particularly given that Mr. Boyce has all of the underlying documents in his possession. 673 S.E.2d at 705.

In re Ernst & Young, LLP, ___N.C. App.___, 663 S.E.2d 921 (2008), appeal docketed, No. 424P08 (N.C. Feb. 5, 2009), was an action by the Secretary of Revenue for Ernst & Young to produce documents relating to advice it provided to a corporation to reduce state corporate income taxes. Asserting the work-product privilege, Ernst & Young produced a privilege log for 760 withheld documents. The corporation receiving advice from Ernst & Young, Wal-Mart,

moved to intervene. After being allowed to intervene, Wal-Mart produced an affidavit and privilege log detailing the date, author, recipient and summary of each document withheld. The trial court rejected the claim of work-product privilege and ordered production of the documents. The trial judge stayed execution of the order to produce on the condition that Ernst & Young deposit the contested documents under seal. Ernst & Young deposited the documents under seal.

The Court of Appeals remanded for the trial judge to review the contested documents in camera.

> At the hearing, intervenor presented the Bullington Affidavit, . . . Intervenor submitted a privilege log where a number of documents are described as containing "legal analysis" or "tax opinion." From the record on appeal, we are unable to determine whether the withheld materials were created in anticipation of litigation. We remand for the trial court to review the documents in camera and determine whether some of the documents are in fact privileged. . . . Petitioner argues that intervenor's failure to submit the documents for in camera review or to request review prejudiced its appeal on this issue. We disagree. . . . Here, it is not clear from the record whether the documents are subject to the work product privilege. Intervenor offered specific reasons why the documents are protected, submitted a privilege log, and submitted an affidavit supporting its reasons for asserting privilege. . . . Accordingly, a remand for an in camera review is proper. 663 S.E.2d at 928-929.

I. Prior Action Pending

The parties in Signalife, Inc. v. Rubbermaid, Inc., ___N.C. App.___, 667 S.E.2d 499 (2008), entered into a sales and marketing service agreement relating to the plaintiff's electrocardiograph monitoring device. A dispute arose under the agreement. While attempting to negotiate a settlement, the parties agreed not to file litigation before 24 January 2007.

On 24 January 2007 at 12:25 a.m., Rubbermaid electronically filed a complaint against Signalife in the Western District of North Carolina. On 24 January 2007 at 9:01 a.m., Signalife filed the present action in Mecklenburg Superior Court. Rubbermaid filed a motion to dismiss the present action pending in state court. The trial court granted the motion to dismiss.

Relying upon Eways v. Governor's Island, 326 N.C. 552, 391 S.E.2d 182 (1990), the Court of Appeals affirmed dismissal.

> After acknowledging that a conflict among jurisdictions existed regarding the question of whether a prior pending federal action would abate a subsequent state action, our Supreme Court adopted the minority position that answered this question in the affirmative. . . . Our Supreme Court further enunciated the "prior action pending" doctrine as applied in North Carolina. . . . 667 S.E.2d at 500.

J. Mediation

The trial court in Perry v. GRP Financial Services Corp., ___N.C. App.___, 674 S.E.2d 780 (2009), imposed sanctions against the plaintiffs for failure to attend a court-ordered mediation. While the mediation was being scheduled, counsel for GRP requested that his client be allowed to participate in the mediation by telephone. Counsel for the plaintiffs consented. When counsel for the plaintiffs subsequently stated that only one of the plaintiffs would attend the mediation, counsel for defendant, Blackwelder, objected. When the mediation was held on 15 May 2007, plaintiffs, Chris Perry, Elizabethe Perry and Bessie Fletcher did not attend. The mediator's report stated that the three plaintiffs "were absent without permission." Subsequent filings indicated that Chris Perry, a player for the Cincinnati Bengal, had missed his plane connection and Elizabethe Perry's employer refused to give her permission to be excused. Bessie Fletcher stated that she did not have sufficient funds to arrange transportation to the mediation.

The Court of Appeals reversed the awarding of sanctions and remanded for additional findings by the trial court. First, only the senior resident superior court judge may excuse a party from attending a mediation.

> Neither N.C.Gen.Stat. § 7A-38.1(f) nor Rule 4A provides a mediator with authority to excuse a party from physical attendance at a court-ordered mediation. . . . The mediator, therefore, did not have authority to unilaterally authorize the sanctioned plaintiffs to be physically absent from the mediation. . . . Thus, because the sanctioned plaintiffs were not excused from attending the mediation, they could be sanctioned by the superior court unless they showed good cause for their absences. 674 S.E.2d at 785-786.

An award of sanctions by the trial court, however, requires findings of fact sufficient for appellate review.

> We see no reason to distinguish an award of sanctions under N.C.Gen.Stat. § 7A-38.1 and Rule 5 from sanctions awarded under Rule 11, Rule 37 and N.C.Gen.Stat. § 6-21.1, all of which require a finding of reasonableness. . . . In this case, the trial court made no findings of fact at all other than to reiterate the amount of attorneys' fees sought by each party. We hold . . . that the trial court erred in failing to make any findings related to the reasonableness of the attorneys' fees sought and awarded. 674 S.E.2d at 787-788.

K. Arbitration

In re W.W. Jarvis & Sons, ___N.C. App.___, 671 S.E.2d 534 (2009) concerned the demand for dissolution of W.W. Jarvis & Sons, a partnership in the business of managing farms in Currituck County. The partnership agreement provided that "All disputes which arise under this agreement shall be referred to a single arbitrator . . . ." 671 S.E.2d at 535. The answer of one of the partners contained a counterclaim requesting that enforcement of a

penalty clause in the partnership agreement and the sale of partnership assets prior to dissolution be determined by the court. The trial judge referred all matters to arbitration with the exception of the issues involving the penalty clause and the sale of partnership assets. The trial court applied the penalty clause and ordered that partnership assets be sold pending dissolution.

The Court of Appeals reversed and remanded for all issues to be submitted to arbitration.

> From the outset, we recognize that "all disputes which arise under this agreement" is broad and inclusive language. Broad arbitration clauses contained within a partnership agreement will govern any dispute concerning the partnership amongst the parties to the agreement. 671 S.E.2d at 537.

The partner filing the counterclaim contended that a provision of the partnership agreement allowed judicial determination. The paragraph involved stated, "withdrawing partner shall have the right to force such compulsory dissolution by court order." The Court of Appeals concluded that this did not exempt dissolution from arbitration since "the means and process of dissolution of a partnership can be determined by arbitration." 671 S.E.2d at 537.

Gemini Drilling & Foundation, LLC v. National Fire Insurance Co., ___N.C. App. ___, 665 S.E.2d 505 (2008),

arose from contracts by Blythe Construction with the North Carolina Department of Transportation for improvements on streets in the City of Raleigh. National Fire Insurance Company provided surety bonds for Blythe on each contract. Blythe entered into subcontracts with Gemini Drilling on each project. A dispute arose between Gemni and Blythe, resulting in Blythe withholding payment under the contracts.

Gemini filed suit against National Fire on 17 June 2004 alleging that Gemini was the intended beneficiary of the bonds issued by National Fire. On 4 October 2004, National Fire filed a motion to stay the action pending ruling on National Fire's motion to compel arbitration. After conducting a hearing, on 11 May 2005, the trial court denied the motion to compel arbitration on the grounds that the arbitration provisions in the contract lacked consideration and were void as against public policy.

After one continuance, the case was set for trial to begin on 3 July 2006. National Fire's motion for a continuance and the subsequent joint motion for a continuance were denied by the trial judge. After a bench trial, the Court awarded Gemini $200,764 and $95,440 for work under both contracts with Blythe and costs and attorneys' fees of $25,367.

The Court of Appeals affirmed. Among other rulings, the Court held that National Fire had waived its right to arbitration. The trial court's order denying arbitration was interlocutory, but "immediately appealable under N.C.Gen.Stat. § 1-277(a) because it affects a substantial right." 665 S.E.2d at 508. Although National Fire was not required to appeal immediately the trial court's order denying arbitration, National Fire's subsequent actions prejudiced Gemini and resulted in waiver of the right to arbitration. The Court of Appeals specifically relied upon National Fire seeking multiple extensions and continuances, engaging in discovery and a complete bench trial.

> Now, three years have passed since . . . [the trial judge] entered his order [denying arbitration] and four since plaintiff filed this suit. We caution that "the waiver determination is fact-specific and these illustrations are not intended to be predictive or exhaustive." . . . . The determination arose from defendant's conduct and plaintiff's resulting prejudice, not merely from defendant's failure to immediately appeal [the order denying arbitration] . . . . . 665 S.E.2d at 509.

L. Costs

The plaintiff in Bennett v. Equity Residential, ___N.C. App.___, 665 S.E.2d 514 (2008), took a voluntary dismissal without prejudice after the trial had been in progress for twenty days. The defendants filed a motion for costs under Rule 41(d) in the amount of $167,724.29. The trial judge awarded $1,726.25, consisting of court costs and mediation fees. The trial court declined to award any amounts related to the defendants' expert witnesses.

Finding no abuse of discretion, the Court of Appeals affirmed.

> The trial court in this case awarded court costs and mediation fees. Defendants argue that the trial court erred by its failure to award expert witness fees as a mandatory cost, or in the alternative, that the court abused its discretion by its failure to award the expert witness fees. We have determined that the greater weight of the authority is that expert witness fees are discretionary, "common law" costs. . . . we find no abuse of that discretion. 665 S.E.2d at 517.

M. Rule 68, Offer of Judgment

The plaintiff in Akins v. Mission St. Joseph's Health System, Inc., ___N.C. App.___, 667 S.E.2d 255 (2008), disc. rev. denied, ___N.C.___, 672 S.E.2d 682 (2009), first filed suit against Dr. Cona, Asheville Radiology and St. Joseph's alleging injuries as a result of Dr. Cona's negligent

interpretation of an x-ray of the plaintiff's wrist. St. Joseph's was voluntarily dismissed. Dr. Cona and Asheville Radiology served an offer of judgment pursuant to Rule 68 which was accepted by the plaintiff. The Clerk entered judgment, and the judgment was satisfied by Dr. Cona and Asheville Radiology.

The plaintiff then filed suit against St. Joseph's alleging that St. Joseph's was estopped to deny liability as a result of the earlier offer and acceptance of judgment. At trial, the jury determined that Dr. Cona was the "apparent agent" of St. Joseph's at the time the x-rays were read. The jury also awarded the plaintiff $1 for personal injury. Based on the jury's answer to the issue of apparent agency, St. Joseph's moved for judgment notwithstanding the verdict of the ground that the plaintiff's claim against St. Joseph's had been discharged as a result of the Rule 68 entry of judgment. The trial court denied the defendant's motion and awarded the plaintiff costs of $1,439.45.

Finding that the jury's answer to the agency issue when combined with the earlier offer of judgment discharged St. Joseph's from further liability, the Court of Appeals reversed and held that St. Joseph's was discharged from liability to the plaintiff. The Court first held that a

judgment entered pursuant to Rule 68 is a judgment as used in N.C.Gen.Stat.§ 1B-3(e). Applying G.S. § 1B-3(e), St. Joseph's was discharged from any liability to the plaintiff.

> Here, plaintiffs accepted an offer of judgment, and a judgment was entered in their favor in a prior action against Dr. Cona and Asheville Radiology for the same wrist injury at issue in this action. That judgment was fully satisfied. Upon the jury's verdict that Dr. Cona was acting as an apparent agent of defendant, Dr. Cona and defendant became joint tort-feasors for purposes of N.C.Gen.Stat. § 1B-3(e), and plaintiff's claims against defendants were extinguished. 667 S.E.2d at 258-259.

N. Rule 59, Motion for New Trial

The plaintiff in Kor Xiong v. Marks, ___N.C. App.___, 668 S.E.2d 594 (2008), was a passenger in a vehicle that was struck from the rear by the defendant's vehicle. At trial, the defendant admitted that she failed to reduce her speed as she approached the rear of the plaintiff's vehicle and that she was "careless in the operation of her vehicle." The defendant, however, denied that the collision was the proximate cause of the plaintiff's injuries. The jury returned a verdict in favor of the defendant on 21 August 2007. On 27 August 2007, the plaintiff filed a motion for a new trial pursuant to Rule 59. Judgment on the jury verdict was entered on 7 September 2007. After a hearing on 10 September 2007, the

trial court denied the plaintiff's motion for a new trial on 18 September.

The Court of Appeals affirmed. The plaintiff appealed the trial court's rulings on several evidentiary issues. Because the plaintiff did not make an offer of proof as to evidence the plaintiff contended was improperly excluded, the Court of Appeals held that there was no issue for review. In a footnote, the Court commented on an argument made by defense counsel at trial relying upon the "reverse collateral source rule."

> We wish to emphasize that our ruling in defendant's favor sub judice does not imply recognition of a "reverse collateral source rule" in any way. As far as we can tell, no such rule exists. While the well-established "collateral source rule" excludes evidence that plaintiff's injury was compensated from another source, ... we are not aware of a "reverse collateral source rule" which categorically excludes evidence of plaintiff's overall financial condition or lack of another source for compensation for his injuries. 668 S.E.2d at 599.

The plaintiff's Rule 59 motion was made before judgment was entered on the jury verdict. Rule 59 states that a "motion for a new trial shall be served not later than 10 days after entry of the judgment." The Court of Appeals concluded that the trial judge had jurisdiction to hear the motion.

> . . . though a motion for new trial may be filed before entry of judgment, the trial court does not have jurisdiction to hear and determine the motion until after entry of judgment. 668 S.E.2d at 600.

In the present case, the trial judge did not rule upon plaintiff's Rule 59 motion until after judgment on the jury verdict was filed. Appellate review of the trial court's decision of a Rule 59 Motion for a New Trial is for abuse of discretion. Finding no abuse of discretion, the trial court was affirmed.

O. Prejudgment Interest

The plaintiff and defendant in Bryson v. Cort, ___N.C. App.___, 668 S.E.2d 84 (2008) were involved in an automobile accident on 26 April 2004. Suit was filed on 1 February 2005. After the initial summons was returned unserved, the plaintiff secured several alias and pluries summons. Due to a break in the alias and pluries summons, the plaintiff eventually "revived" the chain of summons and obtained service on the defendant on 9 June 2006. At trial, the jury answered the issues of negligence and contributory negligence in favor of the plaintiff and awarded damages of $8,173.98. The trial court added stipulated rental car expenses of $881.48 to total $9,055.46. The trial court then determined prejudgment interest from 9 June 2006 to 24 August 2007, the date of

the judgment, of $875.28. The jury verdict, rental car expenses and prejudgment interest totaled $9,930.74. On motion of the plaintiff, the trial court then awarded attorney's fees of $12,255.

The Court of Appeals affirmed. As to the calculation of the time prejudgment interest began to run, the defendant argued that prejudgment interest should have been calculated from the date the action was commenced or the date the action was filed. The Court of Appeals agreed but "only when certain requirements are met" such as service. Since the chain of alias and pluries summons had been broken and the action "discontinued," the action was "revived" and "commenced" when the defendant was served with the last-issued alias and pluries summons. Additionally, the defendant argued that prejudgment should have continued until the judgment was satisfied. The Court of Appeals noted that the defendant's interpretation would encourage satisfaction of judgments to be delayed until a sufficient amount of interest had accumulated to total more than $10,000. The trial court, therefore, correctly determined that prejudgment interest stopped at the time the jury reached a verdict. The trial court entered the required and detailed findings of fact as to the amount of attorney's fees. Finding no abuse of discretion, the Court

of Appeals affirmed the trial court's award of attorney's fees.

P. State Medicaid Liens

Andrews ex rel. Andrews v. Haygood, 362 N.C. 599, 669 S.E.2d 310 (2008), petition for cert. filed, 77 U.S.L.W. 3544 (U.S. Mar. 12, 2009) (No. 08-1146), was an action alleging medical malpractice. The parties reached a confidential settlement. Because the plaintiff was a North Carolina Medicaid recipient, the Division of Medical Assistance requested recovery of $1,046,681, the amount it paid for the plaintiff's medical expenses. The trial court ruled that the State had subrogation rights to the entire settlement, but, limited the State's recovery to one-third as provided by statute. Since the amount sought by the state was less than one-third of the settlement, the trial court ordered full reimbursement.

The Supreme Court affirmed and held that the State's statutory procedures complied with Arkansas Department of Health & Human Services v. Ahlborn, 547 U.S. 268, 126 S.Ct. 1752, 164 L.Ed.2d 459 (2006). The Supreme Court specifically disagreed with the plaintiff's contention that a hearing was required for a "judicial determination of the portion of a tort claim settlement that represents the recovery of medical expenses." 669 S.E.2d at 312.

Q. Woodson Claims

Hamby v. Profile Products, LLC, ___N.C. App.___, ___S.E.2d ___, 2009 WL 1373588 (May 19, 2009), was remanded to the Court of Appeals by the Supreme Court, 361 N.C. 630, 652 S.E.2d 231 (2007), for entry of summary judgment in favor of Profile. Hamby, a truck-operator for Terra-Mulch, was injured in the course and scope of his employment and sustained injuries resulting in the amputation of his left leg. Suit was filed against Terra-Mulch, a subsidiary of Profile. The trial court granted summary judgment in favor of Terra-Mulch, but denied Profile's motion for summary judgment. The Supreme Court held that since Profile was conducting the business of Terra-Mulch because Profile was the member-manager of the Terra-Mulch limited liability company, "Profile's liability for actions taken while managing Terra-Mulch is inseparable from the liability of Terra-Mulch." 652 S.E.2d at 237.

On remand, the plaintiff moved for reconsideration of the grant of summary judgment in favor of Terra-Mulch. The Court of Appeals affirmed summary judgment for Terra-Mulch on the basis that the plaintiff had not established a Woodson claim.

> Similar to the plaintiff-employee's allegations in Pendergrass, Plaintiffs' forecast of evidence here shows that Hamby was injured by Terra-

> Mulch's inadequately guarded machinery – the rotating augers – in violation of OSHA standards. Our Supreme Court, however, found this circumstance insufficient to establish a Woodson claim, even when coupled with an allegation that supervisors specifically directed the employee to work in face of the hazard. ___S.E.2d at ___.

The plaintiff alternatively argued that a Woodson claim had been established by the report of a safety consultant who inspected the plant facilities where the plaintiff was injured. The Court of Appeals disagreed and held that the facts alleged were not sufficient to overcome the bar of the Workers' Compensation Act.

> Here, even though evidence in the record raises the suspicion that conditions at the Conover Terra-Mulch plant failed to comply with OSHA mandates, the evidence hardly shows that Terra-Mulch's noncompliance or other actions or omissions were substantially certain to cause serious injury or death. . . . Rather, the most favorable view of Plaintiffs' evidence demonstrates that the auger pit was inadequately guarded prior to Hamby's injury, in violation of OSHA regulations; the Risk Assessment Reports tends to show that Terra-Mulch was aware of the inadequately guarded augers before Hamby was injured . . . does not sufficiently show that Terra-Mulch was substantially certain that serious injury or death would result. ___S.E.2d at ___.

The decedent in Edwards v. GE Lighting Systems, Inc., ___N.C. App.___, 668 S.E.2d 114 (2008), was employed by GE as an annealing oven operator at GE's plant in Hendersonville. While the decedent was working on 4

December 2003, he died from carbon monoxide poisoning. An OSHA investigation indicating that equipment at the plant was leaking carbon monoxide and that this was the cause of death. OSHA cited GE for several "serious" safety violations. GE had never been cited for OSHA violations related to carbon monoxide levels at the plant before the decedent's death.

GE's motion for summary judgment based on the exclusivity provisions of the Workers' Compensation Act and failure to state a claim under Woodson was denied by the trial court. Acknowledging that GE's appeal was interlocutory and relying upon Burton v. Phoenix Fabricators & Erectors, Inc., 362 N.C. 352, 661 S.E.2d 242 (2008), the Court of Appeals agreed that the immunity from suit affected a substantial right and was appealable.

As to the Woodson claim, the plaintiff's evidence showed that: (1) GE workers were not properly trained about the hazards of carbon monoxide; (2) in the period before the accident, the decedent and other workers complained of headaches, a symptom of carbon monoxide poisoning; (3) maintenance on the equipment involved was inadequate and slow; (4) GE failed to implement carbon monoxide monitoring recommended by an expert; and (5) GE obstructed OSHA's investigation into the accident.

Focusing on the lack of evidence that GE "knew its conduct was substantially certain to cause serious injury or death," the Court of Appeals reversed the trial court and remanded for an order dismissing the action.

> Although plaintiff presented evidence relating to the results of investigations following the accident, including expert testimony regarding the likelihood of an accident, there is no evidence that GELS knew, prior to decedent's death, that a carbon monoxide leak was substantially certain to occur. . . . Unlike the employer in Woodson, . . . GELS had never been cited by OSHA prior to the accident for excess carbon monoxide emissions, ... 668 S.E.2d at 118.

R. Unfair or Deceptive Trade Practices

The plaintiff in Nucor Corp. v. Prudential Equity Group, LLC, ___N.C. App.___, 659 S.E.2d 483 (2008), alleged claims of libel and unfair and deceptive trade practices related to the defendants' publication to investors concerning Nucor. The trial court dismissed all claims pursuant to the defendants' Rule 12(b)(6) motion.

The Court of Appeals affirmed. The Court first held that the statements alleged were not libel per se.

> The statement in regard to "alienated customers" states the customer "may file antitrust lawsuits." Certainly it is true that alienated customers "may" file antitrust lawsuits, as presumably anyone can "file" any lawsuit, although the merits of those lawsuits are a different issue . . . . Plaintiff then goes on in paragraphs 30 and 31 of its complaint, . . . to explain these references. However, for a claim

> of libel per se this Court is not to consider "explanatory circumstances[,]" but rather solely considers the document on its face . . . . Lastly, as to "alienated customers" the publication notes that "[a] clever attorney could make hay from trebled damages on Nucor's $2.6 billion pre-tax earnings." We do not find any part of this statement, which does not allege specific wrongful conduct on the part of the plaintiff and uses such rhetorical language as "could make hay[,]" to be defamatory . . . . The second statement, "Nucor needs to wake up from its monopoly dreams and get back to reality in our view[,]" is also an opinion statement without any alleged facts on which we could find grounds for a claim of libel per se. 659 S.E.2d at 487.

Since the libel per se claim was properly dismissed, it could not be the basis for a claim for unfair or deceptive trade practices. The plaintiff argued that the individual defendant's misappropriation of confidential information and breach of his confidentiality agreement would also support a claim for unfair or deceptive trade practices. Disagreeing, the Court of Appeals held that breach of contract alone will not support a claim for unfair or deceptive trade practices.

> [A]t most, plaintiff has alleged that Misra breached his confidentiality agreement with plaintiff. "However, it is well recognized that actions for unfair or deceptive trade practices are distinct from actions for breach of contract, and that a mere breach of contract, even if intentional, is not sufficiently unfair or deceptive to sustain an action under N.C.G.S. § 75-1.1" . . . . Even assuming that plaintiff has alleged a breach of contract, plaintiff has failed to allege either actual injury of "substantial aggravating circumstances" related

> to any breach of the confidentiality agreement. 659 S.E.2d at 488.

The plaintiff in S.N.R. Management Corp. v. Danube Partners 141, LLC, ___N.C. App.___, 659 S.E.2d 442 (2008), alleged claims of breach of fiduciary duty, unfair or deceptive trade practices, fraud, civil conspiracy and interference with prospective contract. The trial court dismissed all claims pursuant to the defendants' Rule 12(b)(6) motion.

The Court of Appeals affirmed. In reviewing the legal sufficiency of the claims alleged, the Court noted that the defendants' activities were "nothing more than competitive business activities." 659 S.E.2d at 449.

In affirming dismissal of the claim for unfair or deceptive trade practices, the Court noted the business relationship between the parties.

> All the defendants were in a business relationship with the plaintiff. The complaint alleges "McGregor obtained proprietary information," Adams "encouraged RBP and NRP to breach their contracts with [plaintiff]," and the Belvin defendants "left the impression with [plaintiff]" that there would be further discussions about the contract extension. These allegations do not show any defendant engaged in "conduct which amounts to an inequitable assertion" of their power over plaintiff. . . . Furthermore, the complaint does not allege sufficient facts to show any defendant engaged in conduct that was so egregious in nature to result in "immoral, unethical, oppressive" behavior. . . . Rather, defendants' conduct appears to be

> nothing more than competitive business activities. 659 S.E.2d at 448-449.

Similar reasoning affirmed the trial court's dismissal of the civil conspiracy claim.

> Here, plaintiff's complaint alleges "[d]efendants maliciously conspired together and acted in concert, explicitly, impliedly or tacitly, to engage in the above-referenced fraudulent and otherwise wrongful acts with intent to injure [plaintiff]." . . . . In the complaint, plaintiff asserted the existence of a conspiracy, yet plaintiff failed to allege that there was an agreement between the defendants to commit the alleged wrongful overt acts against plaintiff. Furthermore, plaintiff failed to establish evidence of the conspiracy that was "sufficient to create more than a suspicion or conjecture." 659 S.E.2d at 449.

The Court of Appeals also affirmed dismissal of the fraud claims because there was: (1) no allegation of where and when the fraudulent representation occurred; (2) the "particularity" of the representation was not alleged; and (3) the general allegation that proprietary information was obtained "does not state with sufficient particularity 'what was obtained as a result of the fraudulent acts or representations.'" 659 S.E.2d at 450.

As to the claims alleging breach of fiduciary duty, the Court held that there are two types of fiduciary relationships recognized by North Carolina: (1) those arising from legal relationships such as attorney-client, broker-client, principal-agent or trustee; and (2) those

where “there is confidence reposed on one side, and the resulting superiority and influence on the other.” 659 S.E.2d at 451. The complaint did not allege any facts to support a legal relationship between the parties sufficient to establish a fiduciary relationship. There was also no allegation that would support a finding that the defendants exercised control or dominion over the plaintiff in order to support a fiduciary relationship. This claim, therefore, was properly dismissed.

Dismissal of the remaining claims alleging interference with contract and prospective advantage was affirmed because the parties were competitors. Therefore, the defendants actions as competitors were “justified.” 659 S.E.2d at 452.

S. Pretrial Orders

Schenkel & Shultz, Inc. v. Hermon F. Fox & Assocs., 362 N.C. 269, 658 S.E.2d 918 (2008), arose out of the design of a vocational technical high school in Mecklenburg County. The School Board contracted with Schenkel to design the school. Schenkel contracted with Fox to create the project’s structural steel design. During construction, concerns were raised about the integrity of the structural steel components of the project. Resolution of the steel design defects resulted in cost overruns.

Schenkel filed suit against Fox alleging claims of negligence, professional malpractice, breach of contract and indemnity. The trial court granted Fox's motion for summary judgment and dismissed the claims for negligence, professional malpractice and breach of contract. The trial court later granted Fox's motions for summary judgment on the indemnity claim and on Fox's counterclaim against Schenkel for breach of contract.

The Court of Appeals affirmed summary judgment for Fox on the claims of negligence, professional malpractice and breach of contract. The Court of Appeals reversed the trial court's grant of summary judgment on Fox's counterclaims for breach of contract and indemnification on the grounds that there were genuine issues of material fact. The dissenting judge at the Court of Appeals held that summary judgment for Fox was appropriate because Schenkel had failed to designate expert witnesses as required by the trial scheduling order, and, therefore, Schenkel was precluded from offering expert testimony on the applicable standard of care for Fox.

The Supreme Court affirmed the Court of Appeals on all claims. The trial scheduling order set a deadline for designation of expert witnesses. The scheduling order provided that failure to comply with the deadlines would

result in exclusion of expert witnesses, "absent a showing of excusable neglect for the noncompliance." 362 N.C. at 276, 658 S.E.2d at 923. Citing the numerous letters from contractors on the project about the inadequacies of Fox's steel design, the Supreme Court agreed with the Court of Appeals majority opinion that Schenkel's failure to designate an expert witness was not fatal to its claims against Fox.

> We agree that Schenkel will need to present evidence to establish such "defects and/or problems" (i.e., a breach of care) in the design, as well as a causal connection between Fox's design and the damages incurred. However, we do not agree that Schenkel's failure to timely designate an expert under the scheduling order is fatal to its claim at this juncture. The question of whether Schenkel must designate an expert apart from the fact witnesses in this case and when that designation is required is a matter for the trial court. The record contains numerous letters from project contractors, subcontractors, and consultants expressing their concerns over the inadequacies of Fox's original steel design, as well as evidence that Fox "re-designed" the steel structure in response to such concerns. Whether Schenkel is allowed to establish a breach and causation by using the letters and Fox's actions in response, or by other evidence it may possess, is a matter for consideration by the trial court. By failing to designate an expert witness in a timely fashion, Schenkel may have waived its rights to call an expert witness, but in light of the language of the scheduling order permitting noncompliance where excusable neglect is shown and the evidence in the record, the failure to designate an expert witness is not dispositive of the motion for summary judgment in this case. 362 N.C. at 276, 658 S.E.2d at 923.

T. Evidence

(1) Business Records

In In re S.D.J., ___N.C. App.___, 665 S.E.2d 818 (2008), the trial court terminated the parental rights of the respondent-mother. At trial, a social worker was allowed to testify over objection about the collection of drug tests, and, although she did not conduct the testing, the results of the drug tests.

The Court of Appeals held that the testimony of the social worker was admissible because the business records were an exception to the hearsay rule and were relied upon by the social worker.

> In the case at bar, petitioner's witness, in the course of regularly conducted business activity, collected respondent's sample, ordered the drug test and subsequently filed the results of the drug test with her office. As such, petitioner's witness was qualified to introduce the results of the drug test and the letter from ADS [Alcohol and Drug Services] under the business records exception to the hearsay rule. 665 S.E.2d at 822.

In reaching its decision, the Court of Appeals relied upon State v. Miller, 80 N.C.App. 425, 342 S.E.2d 553 (1986), a case in which an emergency room nurse was similarly allowed to testify to ordering a blood test and testifying to the results of the blood test even though the nurse did not analyze the blood in the laboratory.

(2) Dead Man's Statute

Estate of Redden ex rel. Morley v. Redden, ___N.C. App.___, 670 S.E.2d 586 (2009), involved allegations that the defendant-wife had improperly converted a banking account of her decedent-husband. The defendant-wife contended that the plaintiff-administrator had waived the Dead Man's Statute by failing to object to the defendant's testimony about conversations with the decedent and offering the testimony at the hearing on the defendant's motion for partial summary judgment.

Upon remand from the Supreme Court for consideration of the Dead Man's Statute evidentiary issue, the Court of Appeals held that the plaintiff-administrator had not waived the protection of the Dead Man's Statute.

> Upon consideration, we hold that defendant's oral communications with defendant were offered by defendant in her deposition, not by the Estate, and that the Estate timely objected to these communications and moved to strike the incompetent portions, thus preserving the protection of the Dead Man's Statute. . . .
>
> Here, the Estate deposed defendant and offered the deposition testimony into evidence at the partial summary judgment hearing; however, at the time defendant was deposed, the Estate asked no questions soliciting evidence of oral communications between the decedent and defendant. In addition, answers by defendant relating to such oral communications were promptly objected to by the Estate, with appropriate motions to strike. 670 S.E.2d at 587-588.

(3) Experts

Department of Transportation v. Blevins, ___N.C.App.___, 670 S.E.2d 621 (2009), appeal docketed, No. 59A09, disc. rev. denied as to additional issues (N.C. May 1, 2009), was an action filed by the Department of Transportation and a declaration of taking of the defendant's property. DOT appealed the jury's award to the defendant-landowner. DOT's expert, Marty Reece, was cross-examined at trial by using the report of the defendant's expert.

The Court of Appeals affirmed, holding that the trial judge did not abuse its discretion in permitting DOT's expert to be examined by use of the adverse report.

> As "an expert may be . . . cross-examined with respect to material reviewed by the expert but upon which the expert does not rely." . . . ., we hold the trial court's ruling to allow Blevins, over objection, to cross-examine Reece regarding his knowledge of the Naeger report was not an abuse of discretion. 670 S.E.2d at 627.

The plaintiffs in Elm St. Gallery, Inc. v. Williams, ___N.C. App.___, 663 S.E.2d 874, disc. rev. denied, 362 N.C. 680, 670 S.E.2d 231 (2008), alleged that the defendants, adjacent property owners, negligently maintained their property to such an extent that they contributed to a fire that damaged the plaintiffs' property. The only witnesses who expressed opinions about

the origin of the fire were from the Greensboro Fire Department. Inspector Kenan stated that he "did not find any prevalent indications of an electrical cause of the fire," but he could not "determine that this fire was not electrical in nature." Another member of the Fire Department stated that he "could not make a determination that this fire was or was not incendiary in nature." The cause of the fire was identified as "undetermined." The plaintiffs alleged that the defendants allowed gutters on their building to overflow water, thereby permitting water to come into contact with electrical wiring and cause the fire. The trial court granted the defendants' motion for summary judgment.

Agreeing that the plaintiffs had produced no evidence that any conduct by the defendants caused the fire, the Court of Appeals affirmed summary judgment for the defendants. Distinguishing Snow v. Duke Power Co., 297 N.C. 591, 256 S.E.2d 227 (1979); Phelps v. Winston-Salem, 272 N.C. 24, 157 S.E.2d 719 (1967); and Maharias v. Weathers Bros. Moving & Storage Co., 257 N.C. 767, 127 S.E.2d 548 (1962), from the present case, the Court of Appeals held that the plaintiffs' theory of causation was speculative without evidentiary support.

> The record is completely devoid of any evidence tending to support plaintiffs' assertion. Inspector Kenan and two other experts were unable to determine the origin of the fire. Plaintiffs' unsubstantiated and self-serving allegation that immediately prior to the fire, defendants' rear gutters could have allowed water to come into contact with electrical wiring is insufficient to submit the issue of defendants' negligence to the jury. . . . Plaintiffs have failed to establish any inference that the alleged negligence by defendants was the actual or proximate cause of their injury. 663 S.E.2d at 878.

The plaintiff in Azar v. Presbyterian Hospital, ___N.C. App.___, 663 S.E.2d 450 (2008), alleged that the plaintiff's decedent died as a result of the defendants' negligence. After deposing the plaintiff's experts, the defendants filed a motion to strike and disqualify the plaintiff's experts and for summary judgment. The trial court granted the defendants' motion.

The Court of Appeals affirmed on the basis that the plaintiff's experts did not establish causation.

> Here, Dr. Gura's testimony was mere speculation as to whether decedent's bedsores were the proximate cause of her death. Decedent suffered from many ailments, any number of which would have been the cause of her death. According to Dr. Gura, decedent's bedsores were "at least one cause of infection." He further testified that decedent passed away "as a result of all of [her] complications." Dr. Gura stated an opinion that "her cardiac condition definitely may have contributed to her death." He testified that he could not say whether one or more of decedent's multiple complications was the ultimate cause of her death. He further stated that although decedent's bedsores were one of the significant

> causes of infection that caused her demise, there may have been others, and probably were. . . . Because plaintiff failed to forecast evidence demonstrating causation, defendants were entitled to judgment as a matter of law. 663 S.E.2d at 453.

(4) Impeachment

The plaintiff in Harrell v. Sagebrush of North Carolina, LLC, ___N.C. App.___, 663 S.E.2d 444 (2008), fell as she was leaving the defendant's restaurant. The plaintiff alleged that she fell because the defendant encouraged patrons to discard peanut shells on the floor where customers regularly walked. The plaintiff testified at trial that she slipped on some peanut shells on the floor. Two of the plaintiff's witnesses confirmed the presence of peanut shells on the floor immediately after the plaintiff fell.

Ms. Lloyd, a former employee of the defendant, testified that she was in the area when the plaintiff fell and saw no peanut shells on the floor. On cross-examination, the plaintiff's attorney used Ms. Lloyd's discovery deposition to show that Ms. Lloyd had made prior inconsistent statements about what she saw at the time the plaintiff fell. Ms. Lloyd's testimony at the deposition indicated that she did not know whether the plaintiff fell on a peanut shell. During the rebuttal phase of the trial,

the plaintiff moved to introduce the video of Ms. Lloyd's deposition. The trial court denied the motion on the grounds that the plaintiff had shown the inconsistencies in Ms. Lloyd's testimony by use of the written deposition transcript. The jury returned a verdict for the defendant.

The plaintiff moved for a new trial under Rule 59 on the grounds that the trial judge had erred by not allowing use of the video of Ms. Lloyd's deposition. The trial court allowed the motion and ordered a new trial. The trial court reasoned that the video had been listed as an exhibit in the pretrial order and that the video was admissible to impeach the trial testimony of Ms. Lloyd.

The Court of Appeals held that the initial ruling by the trial judge in which the video was excluded was not an abuse of discretion by the trial judge. The exclusion of the video was not an error of law, therefore, it was improper to award a new trial under Rule 59.

> Here, whether or not to allow plaintiff to introduce the videotape of Lloyd's deposition, repetitive evidence, was within the trial judge's discretion. By having Lloyd read aloud the verbatim transcript of her 4 November 2004 deposition, plaintiff had the full benefit of the prior inconsistent statements that plaintiff sought to introduce by having the jury view the videotaped deposition. Therefore, the trial court's denial of plaintiff's request was not prejudicial and was within the trial court's discretion. . . . Thus, the trial court's conclusion that its decision to exclude the

videotape of Lloyd's deposition amounted to an error of law was erroneous. As such, the trial of a new trial pursuant to Rule 59(a)(8) was improper. . . . Accordingly, we reverse. 663 S.E.2d at 447.