EVIDENCE NUGGETS

INSURANCE, SETTLEMENTS AND OFFERS TO COMPROMISE

1

N.C. Gen. Stat. § 8C-1, Rule 408 Compromise and Offers to Compromise

- Evidence of (1) offering or promising to furnish, or (2) accepting or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount.
  - *[Evidence of an Offer or acceptance to Compromise (or attempt to compromise) is not admissible to prove liability or invalidity of a claim or its amount.]*
- Evidence of conduct or evidence of statements made in compromise negotiations is likewise not admissible.

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RULE 408 Cont.

- This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations.
- This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

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Breedlove v. Aerotrim, U.S.A., Inc., et al
142 N.C. App. 447, S.E.2d 213 (2001)

- The evidence sought to be excluded must be part of settlement negotiations.
- In *Breedlove*, the minor plaintiff sustained two broken ankles when riding the human gyroscope at the Bele Chere Festival in Asheville, NC.
- The minor plaintiff paid five dollars to ride the human gyroscope. Defendant Matthew Gellert and his wife strapped the minor plaintiff in the ride at his waist and ankles. During the ride, the waist assembly came loose. The minor plaintiff's upper body and legs fell backwards out of the spinning ride.

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Breedlove v. Aerotrim, U.S.A., Inc., et al, cont.

- At trial, the plaintiffs sought to introduce evidence of a message left by Defendant Gellert on the plaintiffs' answering machine the evening following mediation and a telephone conversation the minor plaintiff's mother (Ms. Howard) had with Defendant Gellert approximately one month after mediation.
- The trial court excluded the portions of the answering machine message that referenced the settlement negotiations but found the rest of the message was admissible for the purpose of showing the context of the later conversation between the plaintiff Ms. Howard and defendant Gellert.

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Breedlove v. Aerotrim, U.S.A., Inc., et al
cont.

- The trial court excluded portions of the telephone conversation between Ms. Howard and defendant Gellert concerning the previous month's mediation conference. However, the trial court allowed Ms. Howard to testify as to the remainder of defendant Gellert's remarks, including the fact that he was not "adamantly certain" that he properly secured the minor plaintiff in the ride.
- The trial court found that there was no mention of an intent to compromise or negotiate in the admitted portions of the conversation.
- As admitted, the testimony was not evidence of statements made in compromise negotiations, but admission of fact during a telephone conversation initiated by a party to a dispute.
- Court of Appeals held that the testimony and answering machine message was properly admitted into evidence.

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Marina Food Assoc., Inc. v. Marina Restaurant, Inc., et al
100 N.C. App. 82, 394 S.E.2d 824 (1990)

- When is there a "disputed claim"?
- The plaintiff Marina Food Assoc. filed this action to recover damages for breach of a lease agreement.
- On appeal, the defendants argued that the trial court erred in allowing into evidence the defendant's offer of $150,000 to the plaintiff to terminate the lease agreement. The defendants asserted that the offer should have been excluded pursuant to Rule 408.
- The Court of Appeals found the defendants' arguments to be without merit.

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Marina Food Assoc. Inc. v. Marina Restaurant, Inc., et al Cont.

- The COA noted that "Rule 408 does not apply unless there is an existing dispute when the offer 'to compromise a claim which [is] disputed' is made." *Id.* at 88. (*citing Wilson County Bd. of Ed. v. Lamm*, 276 N.C. 487, 173 S.E.2d 281 (1970)).
- The COA found that when the $150,000 buy-out offer was made, there was no dispute concerning the repair or replacement of the roof and, therefore, the offer was not an offer to settle or compromise a disputed claim. The buy-out offer was an effort on the part of defendant Marina Restaurant to satisfy a condition of the sale of the restaurant property to a third party and was not violative of Rule 408.

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Carter v. Foster, et al
103 N.C. App. 110, 404 S.E.2d 484 (1991)

- This civil action arose out of plaintiff's agreement to capitalize defendants' business venture, which ultimately failed.
- A few months after the plaintiff filed a lawsuit alleging that the defendants had defaulted on two promissory notes and a loan agreement, the parties, intending to settle their dispute, signed a Stipulation and Settlement Agreement ("Settlement Agreement") and a consent judgment.
- Although the Settlement Agreement and consent judgment were signed by the parties, the consent judgment was never signed by a judge.

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Carter v. Foster Cont.

- The COA held that "[w]hile evidence of either an offer or acceptance of consideration in compromising or attempting to compromise a disputed claim is not admissible to prove liability for or invalidity of the claim, *N.C.G.S. § 8C-1, Rule 408*, 'evidence of a **contract** of compromise between the parties to a suit, whether or not performed, is admissible'." (*citing* 2 H. Brandis, *Brandis on North Carolina Evidence* § 180 (3rd ed. 1988)(emphasis in original). *Carter*, 103 N.C. App. at 116.
- The COA held that the trial court could properly consider the parties' Settlement Agreement and its negotiated provision for payment of attorney's fees in deciding plaintiff's motion for summary judgment. The Court noted that the defendants did not contend that the Settlement Agreement was procured by fraud, bad faith, or mistake.

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N.C. Gen. Stat. § 8C-1, Rule 411 LIABILITY INSURANCE

- Evidence that a person was or was not insured against liability is not admissible upon the issue whether he acted negligently or otherwise wrongfully.

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RULE 411 Cont.

- This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

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Johnson v. Skinner
99 N.C.App. 1, 392 S.E.2d 634 (1990)

- Plaintiff John Johnson instituted this action against the defendants for personal injury damages stemming from an automobile accident.
- At the time of the accident defendant John Green worked as a mechanic at the defendant P.M. Concepts, Inc. d/b/a Toyota Sanford ("Toyota"). Defendant Green and defendant Thomas Skinner lived together with a third person, Jinene Pierce.
- At least one month, and perhaps as long as several months before the accident, Green obtained a set of dealer license plates from Toyota and placed them on his vehicle and canceled his personal insurance on the vehicle.

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Johnson v. Skinner
cont.

- Green's possession and use of the dealer tags were known to the president, general manager and service manager of Toyota.
- Defendant Green allowed defendant Skinner and Pierce to have free access to the vehicle and to use it for personal trips. Both Skinner and Pierce often drove the automobile with the plates attached, and on several occasions they drove the car onto the premises of the Toyota dealership where they were observed by employees and officers of the corporation.
- On the day of the accident, defendant Skinner had borrowed Green's vehicle to go on a social outing with Pierce and other friends. On the return drive home from the lake, Skinner negligently collided with plaintiff Johnson, causing his injuries.

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Johnson v. Skinner
cont.

- At trial, over the objection of the defendants, plaintiff elicited testimony from defendant Green that he had no liability insurance on the vehicle at the time of the accident.
- The jury returned a verdict in favor of the plaintiff.
- On appeal, one of the defendants' assignments of error was the admission of evidence concerning the insured status of defendant Green. Defendants sought to exclude this evidence under Rule 411.
- The Court of Appeals found this assignment of error to be without merit.

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Johnson v. Skinner cont.

- The COA noted that Rule 411 enumerates several examples for which evidence of insurance is admissible, but it does not by its terms limit admissibility to those examples alone. *Id.* at 14.
- The COA found that evidence that Green's automobile was uninsured was not offered to demonstrate the cause of the accident or to suggest the relative wealth of the defendants. Instead, the evidence was offered for the following purposes: (1) to show Green's motive for using the dealer tags; (2) to show that Toyota had knowledge that Green wanted to use the tags so his Pontiac could be driven on the highway by himself and others after Green's insurance had lapsed; and (3) to allow the jury to assess the foreseeability of an accident when dealer tags are loaned to a member of the class of persons who have not complied with the North Carolina's Financial Responsibility Act.

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Carrier v. Starnes 120 N.C. App. 513; 463 S.E.2d 393 (1995)

- In *Carrier* the plaintiff filed suit to recover damages allegedly caused when defendant's automobile hit the vehicle in which plaintiff was riding.
- At trial, the defendant offered into evidence a videotape of the plaintiff taken by an investigator hired by defendant's insurance carrier.
- During the defense direct examination of the investigator, the investigator testified that he saw the plaintiff using her right hand to pull a lawnmower backwards. He testified that the plaintiff had no difficulty using her right hand.

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Carrier v. Starnes cont.

- Over the defendant's objection, the trial court permitted the plaintiff to cross-examine the investigator as to his employment by the insurance carrier; his financial arrangement with the insurance carrier; the surveillance instructions given to the investigator by the insurance carrier; and the investigator's compensation for testifying on the insurance carrier's behalf.
- On appeal, the Defendant argued that the trial court erred by allowing plaintiff's counsel to cross-examine the investigator about being hired by the insurance carrier to do the videotape and his arrangement with the insurance carrier.

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Carrier v. Starnes cont.

- The COA found that the investigator did much more than merely authenticate a videotape of the plaintiff. The investigator's testimony was in the nature of eyewitness observation. His statements had the character of substantive testimony.
- The COA stated that "[i]t is settled law that a party may address the bias of a witness offering substantive testimony." (*citing State v. Wilson*, 269 N.C. 297, 299, 152 S.E.2d 223, 224-25 (1967); *State v. Rowell*, 244 N.C. 280, 281, 93 S.E.2d 201, 202 (1956)). "The act of giving substantive testimony renders that testimony susceptible to cross-examination, as credibility is then at issue." *Carrier*, 120 N.C.App. at 518.

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Carrier v. Starnes cont.

- The COA stated that "Rule 411 merely bars admission of insurance evidence as an independent fact, i.e., solely on the issue of negligent or wrongful conduct. . . . The Rule 411 bar against insurance evidence does not come into play if the evidence is offered to achieve a collateral purpose." *Id.* at 516.
- The COA further stated that "[s]o long as the proponent of the insurance evidence acts in good faith, she may raise the issue of liability coverage on bias or prejudice grounds, 'if it reasonably appears that a witness has such an interest that it would legally affect the value of his testimony'." *Id.* (*citing Bryant v. Welch Furniture Co.*, 186 N.C. 441, 445, 119 S.E. 823, 825 (1923).

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Carrier v. Starnes cont.

- The COA held that the trial court did not abuse its discretion in admitting evidence of liability insurance for the limited purpose of demonstrating the investigator's bias. *Id.* at 519.
- The COA also noted that the trial court specifically instructed the jury on the narrow scope of the insurance information, i.e., "*This evidence was offered for the limited purpose of showing the source of the information the private investigator witness received before conducting his surveillance of the plaintiff, and for the limited purpose of showing the prejudice or bias this witness may have.*"

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Williams v. McCoy
145 N.C.App. 111, 550 S.E.2d 796 (2001)

- In *Williams*, the COA reversed the judgment entered in a personal injury case arising out of an automobile accident, and remanded the case back for a new trial on all issues.
- The COA agreed with the plaintiff that the trial court erred in not permitting her to explain her answer when asked by defense counsel whether she hired an attorney prior to visiting the doctor. The plaintiff argued that her explanation was admissible for a purpose other than to prove the existence of liability insurance.

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Williams v. McCoy
cont.

- On cross-examination, defense counsel questioned plaintiff extensively concerning the timing of her visit to the chiropractor; the reason she did not return to the emergency room although her condition worsened; and the fact that she retained her attorney prior to going to the chiropractor.
- Plaintiff's attorney requested permission to allow plaintiff to explain why she hired an attorney, arguing that defense counsel was attempting to prejudice plaintiff by suggesting that she was litigious.

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Williams v. McCoy
cont.

- On *voir dire*, outside the presence of the jury, plaintiff offered the following explanation as to why she hired an attorney: "[Defendant's claims' adjuster] came to my house. And he tried to persuade me to take some money. And he told me that because I had had an injury in '76 that I was wasting my time and that I needed money and let them settle with me so that I can get medical help." *Id.* at 113.
- The COA noted that "Rule 411 represents a narrow exception providing for the exclusion of otherwise admissible and relevant evidence." Id.

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Williams v. McCoy cont.

- When evidence of insurance is offered for another purpose, the COA stated that the trial court must consider Rule 403 when deciding whether to admit or exclude evidence under Rule 411.
- After conducting the Rule 403 balancing test, the COA found that the "prejudice [did] not outweigh the probative value of plaintiff's testimony and the prejudice she suffered in not being allowed to explain her answer. This is true especially in light of the clear implication that plaintiff only visited her doctor after seeking an attorney's advice, the fact that the extent of plaintiff's injuries was a major issue at trial, and the apparent trial strategy by defendant to characterize plaintiff as blatantly seeking profit." *Id.* at 118.

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SUMMARY

- Rule 408 Offers to Compromise and Settlements
- Rule 411 Insurance
  - Close examination of the reason the evidence is being offered
  - Rule 403 balancing test
  - Limiting instruction

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