NORTH CAROLINA
SUPERIOR COURT JUDGES CONFERENCE
RECENT CIVIL APPELLATE DECISIONS
ASHEVILLE, NORTH CAROLINA

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

Table of Contents

Table of Cases

I. Liability

A. Motor Vehicles

The decedent in Bradley v. Hidden Valley Transportation, Inc., 148 N.C.App. 163, 557 S.E.2d 610 (2002), affirmed per curiam, 355 N.C. 485, 562 S.E.2d 422 (2002) was killed when his vehicle was struck by a vehicle operated by Price. Price was driving a truck owned by Lee, president of Price's employer, Hidden Valley Transportation. During the course of plaintiff's first suit, a settlement was reached with all parties except Hidden Valley Transportation. The present suit was refiled against Hidden Valley only.

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

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

The plaintiff argued that Hidden Valley's liability had been adjudicated previously in a related action, therefore, Hidden Valley was collaterally estopped to refute liability. The Court of Appeals disagreed. In the previous suit, the trial court had granted the plaintiff's motion to amend the complaint to add Hidden Valley and had denied the motion of John Deere Insurance Company, Hidden Valley's liability insurer, for summary judgment. The Court of Appeals held that the liability of Hidden Valley in relation to the accident was unnecessary to determine the motion for summary judgment of John Deere Insurance Company. The trial court could have determined that Price was not a named insured, that the vehicle was not a covered auto or that notice to the insurance company had not been properly given. Therefore, the issue of Hidden Valley's vicarious liability had not been decided.

The answer of the defendant in Ellis v. Whitaker, ___N.C.App.___, 576 S.E.2d 138 (2003){ TA \l "Ellis v. Whitaker, ___N.C.App.___, 576 S.E.2d 138 (2003)" \s "Ellis v. Whitaker, ___N.C.App.___, 576 S.E.2d 138 (2003)" \c 1 } admitted negligence in causing a collision with the plaintiff's vehicle. The collision occurred at the intersection of Walnut Street and Warren Street in Wilson. The defendant's direction of travel was controlled by a stop sign. The defendant admitted driving through the stop sign and colliding with the plaintiff's vehicle. The defendant's answer

included the defense of contributory negligence based on allegations of excessive speed and an unobstructed view of the intersection. The jury found the plaintiff contributorily negligent.

Holding that the evidence "fails to provide more than a scintilla" of facts sufficient to submit to the jury on the plaintiff's contributory negligence, the Court of Appeals reversed and remanded the case for a new trial on the issue of damages.

> When considered in the light most favorable to defendants, the evidence in the case sub judice established the following: (1) Plaintiff was driving at a speed of approximately fifty miles per hour; (2) plaintiff's view of the intersection was unobstructed; (3) plaintiff did not apply the brakes prior to impact because no skid marks were found; and (4) the force of the impact resulted in defendants' truck being overturned. However, this evidence "merely raised conjecture on the issue of contributory negligence [and was] insufficient to go to the jury." . . . . a person "has a right to assume that any motorist approaching from his left on the intersection will stop in obedience to the red light [or stop sign] facing him unless and until something occurs that is reasonably calculated to put him on notice that such motorist will unlawfully enter the intersection." 576 S.E.2d at 141.

Mims v. Wright, ___N.C.App.___, 578 S.E.2d 606 (2003){ TA \l "Mims v. Wright, ___N.C.App.___, 578 S.E.2d 606 (2003)" \s "Mims v. Wright, ___N.C.App.___, 578 S.E.2d 606 (2003)" \c 1 } involved claims by the plaintiff for personal injury arising out of an automobile accident on 26 August 1998. The defendant's answer included the

defense of contributory negligence. The plaintiff requested the defendant to produce copies of her medical records for the period five years before the accident to the date of the accident. After the defendant objected to producing her medical records, the trial court compelled production, finding that the defendant had waived the physician-patient privilege by driving.

The Court of Appeals reversed. The Court found that although discovery orders are interlocutory, this order was immediately appealable as affecting a substantial right because it related to a statutory privilege. The Court then concluded that there was no waiver of the privilege.

> In this case, there is absolutely no authority to support the trial court's conclusion that defendant waived the physician-patient privilege simply by driving. Instead, our courts have ruled that implied waivers occur where: the patient fails to object to testimony on the privileged matter; the patient herself calls the physician as a witness and examines him as to the patient's physical condition; or the patient testifies to the communication between herself and the physician. . . . Subsequent case law has also recognized an implied waiver where a patient by bringing an action, counterclaim, or defense directly placed her medical condition at issue. . . . Thus, had defendant, through her answer, placed her medical condition at issue, there would be an implied waiver of the physician-patient privilege; however, defendant simply denied plaintiff's allegation of negligence and, in the alternative, raised the defense of contributory negligence. As nothing in her answer or subsequent conduct during the course of discovery opened the door to an inquiry into defendant's medical history, the trial court abused its discretion in concluding defendant waived her privilege. ___S.E.2d at ___.

Hawley v. Cash, ___N.C.App.___, 574 S.E.2d 684 (2002){ TA \l "Hawley v. Cash, ___N.C.App.___, 574 S.E.2d 684 (2002)" \s "Hawley v. Cash, ___N.C.App.___, 574 S.E.2d 684 (2002)" \c 1 } arose out of a motor vehicle accident on Interstate 85 on 17 August 1999 at about 6:00 a.m. The plaintiff entered Interstate 85 at exit 204 and had traveled north about .7 of a mile when his vehicle was struck in the rear by Cash, operating a tractor-trailer owned by Roseway Transportation. A witness testified that Cash was traveling about 65 miles per hour and that Hawley was driving about 45 to 50 miles per hour in a 65 mile per hour zone. The witness also testified that the cab light was on in the Cash vehicle and that Cash was leaning "a little bit over to the inside, like he was getting something between the seats or something." 574 S.E.2d at 685. Cash struck the plaintiff's vehicle in the "right dead center," causing the plaintiff's vehicle to go across the median and flip over. The parties stipulated that Cash was negligent. At the close of all the evidence, the trial judge granted the plaintiff's motion for a directed verdict on the defense of contributory negligence. The jury awarded the plaintiff $2.5 million for personal injury and $20,000 for property damage.

The Court of Appeals affirmed. On the defendant's appeal relating to the directed verdict for the plaintiff on the defense of contributory negligence, the Court relied on the

trial judge's observations that there were no skid marks left by the defendant's vehicle before impact, there was no evidence that the defendant had taken any action to avoid the impact, that there was no evidence that Cash did not see the plaintiff's vehicle and that there was no minimum speed at the place of the accident on Interstate 85. Driving 40 to 45 miles per hour on the Interstate was not evidence of contributory negligence sufficient to submit to the jury.

> The trial court found as a fact that Mr. Hawley was driving slower than the posted speed limit and that no minimum speed limit was posted. Driving slower than the speed limit is not unlawful unless it is so slow as to "impede the normal and reasonable movement of traffic" in violation of N.C.Gen.Stat. § 20-141(c) and (h). The evidence produced at trial was not sufficient to show that Mr. Hawley was contributorily negligence even by "a scintilla." 574 S.E.2d at 687.

The defendant also appealed the jury verdict of $2.5 million for personal injury as excessive. Relying on evidence showing that the plaintiff received permanent brain damage, was 76 years old and had a life expectancy of 9.5 years, could not continue to work, was unable to pursue garden and yard activities and that relationships with family and friends had been diminished, the Court found no abuse of discretion in the trial judge's denial of the defendant's motion for a new trial and that there was sufficient evidence to justify the verdict.

The plaintiff appealed the trial court's granting of the defendant's motion for summary judgment on the issue of punitive

damages. The basis of the claim for punitive damages was defendant's spoliation of documents that could have been used by the plaintiff to establish a claim for punitive damages. The Court held that the trial judge had correctly granted summary judgment to the defendant on this issue.

> Plaintiff did not forecast any evidence that would have supported a punitive damages claim. Further, plaintiff points to nothing that might be contained in the discovery material he claims was inappropriately destroyed which would support such a claim. 574 S.E.2d at 688.

The minor plaintiff in Marshall v. Williams, 153 N.C.App. 128, 574 S.E.2d 1, review denied, 356 N.C. 614, 574 S.E.2d 683 (2002){ TA \l "Marshall v. Williams, 153 N.C.App. 128, 574 S.E.2d 1, review denied, 356 N.C. 614, 574 S.E.2d 683 (2002)" \s "Marshall v. Williams, 153 N.C.App. 128, 574 S.E.2d 1, review denied, 356 N.C. 614, 574 S.E.2d 683 (2002)" \c 1 } was riding his bicycle when he was struck by a vehicle operated by the defendant. During the pretrial hearing, the trial judge on his own motion indicated his intent to bifurcate the issues of liability and damages. After hearing argument by both sides and the defendants' stipulation that the plaintiff's injuries were a direct result of the accident, the trial judge bifurcated the issues. During the plaintiff's evidence, two witnesses, Matthew, age eleven, and Leon, age thirteen, attempted to express opinions about the speed of the defendant's vehicle and that the defendant's vehicle was "going pretty fast"

and "coming at a fast speed." The trial judge excluded the opinions of these two witnesses as to the actual speed of the defendant's vehicle. The trial court also excluded attempted testimony by the plaintiff's expert as to the defendant's speed. Based on the defendant's testimony, the jury was instructed over the plaintiff's objection on the doctrine of sudden emergency. The jury found no negligence by the defendant.

The Court of Appeals affirmed. The Court held that the trial court had properly instructed the jury on sudden emergency.

> Taken in the light most favorable to defendants, there is substantial evidence that Williams, Jr. was driving his vehicle within the speed limit when Akili, an eleven-year-old, swerved into his lane of traffic. Williams, Jr. attempted to avoid the accident by slamming on his brakes, such that skid marks resulted, and pulling his car to the right away from Akili. He was unable to avoid Akili. Defendants presented sufficient evidence to support an instruction on the sudden emergency doctrine. Presuming the trial court erred in giving an instruction on sudden emergency, such error is harmless if the trial court properly instructed that the jury must find the sudden or unexpected danger arose through no negligence on the part of the defendant. . . . Here, the trial court did so instruct the jury. 574 S.E.2d at 3.

Noting that the plaintiff was given the opportunity to be heard and argue against bifurcation, the Court held that the trial court had not erred in its order of bifurcation.

The Court also held that the trial court did not abuse its discretion in excluding the testimony of the plaintiff's witnesses as to the defendant's speed.

> At the time of the accident here, Matthew was eleven years old and Leon was thirteen years old. Both testified during voir dire that, while they had not driven a vehicle at the time of the accident, both had experience as passengers in vehicles and looking at speedometers. At the time of trial, both witnesses were over the age of eighteen and had been driving vehicles for over two years. Each witness also testified that he had to look away from the vehicle in order to see Akili and that, when he did, he was not watching the vehicle continuously. Leon testified that it was only approximately five seconds from when he first saw the vehicle until the accident occurred. Matthew testified that all events occurred in "a matter of seconds." Although they were not allowed to testify as to their opinion of the actual speed of the vehicle, Matthew did testify before the jury that the vehicle was going "pretty fast" and "never slowed down." Leon testified before the jury that the vehicle was going at "a fast speed." 574 S.E.2d at 4-5.

The Court agreed that the trial judge had correctly excluded the opinions of the plaintiff's expert, Clinton Osborne, as to the defendant's speed at the time of the accident. Cline was a professional land surveyor and had worked in this profession for several years. He was allowed to testify as to the distances involved in the accident. The Court of Appeals noted that there was no attempt to qualify Osborne as an expert, but that the plaintiff attempted to use Osborne as an expert in accident reconstruction. In excluding Osborne's opinions as to speed, the trial court relied upon the fact that

there was no evidence as to the accuracy of the speed devices used, no evidence as to whether there had been any change in the conditions surrounding the accident between the time of the accident and Osborne's observations, no foundation as to the location of the defendant's vehicle as relied upon by Osborne and the physical dimensions of the defendant's vehicle and no confirmation for Osborne's assumption that the speed of the defendant's vehicle would remain constant. The Court of Appeals found no abuse of discretion in the trial judge's exclusion of Osborne's opinions.

The defendant in Byrd v. Adams, 152 N.C.App. 460, 568 S.E.2d 640 (2002), review denied, 356 N.C. 433, 572 S.E.2d 427 (2003){ TA \l "Byrd v. Adams, 152 N.C.App. 460, 568 S.E.2d 640 (2002), review denied, 356 N.C. 433, 572 S.E.2d 427 (2003)" \s "Byrd v. Adams, 152 N.C.App. 460, 568 S.E.2d 640 (2002), review denied, 356 N.C. 433, 572 S.E.2d 427 (2003)" \c 1 } was following the plaintiff's car on Interstate 40 during the evening of 19 April 1997 at a speed between 65 and 70 miles per hour. The defendant's car struck the rear of the plaintiff's car on two separate occasions, the last collision causing the plaintiff's car to spin around in the median. The defendant's car crossed the median and struck a tree. The defendant left the scene of the accident. He later called the police who returned with him to the scene. At the scene of the accident, the defendant told the investigating officer that he

was sleepy, could not recall whether he had blacked out, had drunk one to two beers and had taken three prescription drugs before the accident. Although the investigating officer smelled alcohol on the defendant's breath, a field blood alcohol test established a level below the legal limit. No other sobriety tests were given. The trial court granted the defendant's motion for summary judgment on the claim of punitive damages.

Finding a genuine issue of material fact, the Court of Appeals reversed. The Court concluded that the defendant had not met his burden of showing that the plaintiff had no evidence to support his claim of willful and wanton conduct required for punitive damages.

> Evidence was offered that defendant "fell asleep" while driving his vehicle, but did not wake up until after (1) having collided with the rear of plaintiff's vehicle, (2) having then crossed over the interstate median and the opposite lanes of travel, and (3) eventually having come to a stop in a tree. Also, defendant conceded that he had consumed two beers and taken three prescription drugs prior to the accident. . . . Defendant offered no evidence that these prescription drugs (1) were not impairing substances and (2) to refute the implication that mixing alcohol and these drugs would not have impaired his ability to drive. 568 S.E.2d at 643.

The Court acknowledged that the defendant had passed the field blood-alcohol test administered by the investigating officer. The Court, however, noted that this test had been conducted twenty-five minutes after the accident and was to determine only alcohol on a person's breath. The absence of other field

sobriety tests combined with the deficiencies in the field blood-alcohol tests "could have allowed a jury to possibly recognize and estimate defendant's alleged impairment because he had consumed alcohol and prescription drugs," 568 S.E.2d at 643, sufficient to establish the requisite conduct to support a claim for punitive damages.

Hutton v. Logan, 152 N.C.App. 94, 566 S.E.2d 782 (2002){ TA \l "Hutton v. Logan, 152 N.C.App. 94, 566 S.E.2d 782 (2002)" \s "Hutton v. Logan, 152 N.C.App. 94, 566 S.E.2d 782 (2002)" \c 1 } arose out of an automobile accident on 19 January 1994. The plaintiff was operating her vehicle on a two-lane road in Orange County when she came upon a car that had run off the side of the road and into a ditch. The plaintiff slowed her vehicle and stopped in her travel lane, intending to call 911. The plaintiff's vehicle was then struck from the rear by the defendant's vehicle. At the close of the plaintiff's evidence, the trial judge granted the defendant's motion for a directed verdict on the basis that the plaintiff was contributorily negligent as a matter of law.

The Court of Appeals affirmed judgment for the defendant. The Court agreed that the common law "rescue doctrine" did not apply because the person causing the initial accident was not a party.

> Plaintiff contends that she was a rescuer, and thus cannot be found to have been contributorily negligent in her actions involved with the rescue unless her

> attempt was recklessly made. Plaintiff's reliance on the rescue doctrine in the present case is misplaced. The doctrine allows the rescuer to maintain an action against the tortfeasor who caused the peril that necessitated a rescue attempt. . . . Defendant was a third party who had nothing to do with the original peril. The common law rescue doctrine thus has no applicability as to defendant in this case. 566 S.E.2d at 785.

Based on similar reasoning, the Court also held that G.S. § 20-166(d) did not insulate the plaintiff from contributory negligence since the person being rescued was not a party.

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

> Here, plaintiff admitted in her trial testimony that she deliberately chose to stop her vehicle in the eastbound lane of travel. Plaintiff also acknowledged that there were other nearby locations where the shoulder offered ample room to park her vehicle without obstructing her lane of travel. While she may have raised a question of fact for the jury as to whether her stop was a "necessary" one, it is uncontested that she had no disabling condition which caused her to stop her vehicle in the eastbound traffic lane. 566 S.E.2d at 788.

Efird v. Hubbard, 151 N.C.App. 577, 565 S.E.2d 713 (2002){ TA \l "Efird v. Hubbard, 151 N.C.App. 577, 565 S.E.2d 713 (2002)" \s "Efird v. Hubbard, 151 N.C.App. 577, 565 S.E.2d 713 (2002)" \c 1 } was an action for wrongful death arising out of a collision between a vehicle operated by Deirdre Neely, and the defendant. As a result of the collision, Cyland Efird and Ms. Neely's minor child, Jamie Neely, were killed. The accident occurred when Ms. Neely was

traveling on R.P. 1520 and approached the intersection of R.P. 1520 with R.P. 1514. A stop sign required Ms. Neely to yield to traffic on R.P. 1520. Ms. Neely went through the intersection without stopping and struck the vehicle operated by the defendant. During the course of investigation by the highway patrol, it was observed that the defendant had the odor of alcohol about him, his eyes were bloodshot and a subsequent blood alcohol test revealed a concentration of 0.068 grams of alcohol at the time of the accident.

The defendant moved for summary judgment. In support of his motion for summary judgment, the defendant relied upon the testimony of Brian Anders, an engineer with Engineer Design and Testing. Based on his measurements of the defendant's vehicle and the information provided by the highway patrolman, Anders expressed the opinion that the defendant did not have sufficient time to avoid colliding with Neeley once she went through the intersection without stopping. The trial court granted the defendant's motion for summary judgment.

Agreeing with the trial court that there was no evidence relating the defendant's consumption of alcohol to the accident, the Court of Appeals affirmed summary judgment for the defendant.

> . . . although plaintiff presented proof that defendant had a blood alcohol content of 0.068 at the time of the accident, plaintiff failed to present any

> evidence that would establish a causal relationship between defendant's blood alcohol content and the accident. . . . Instead, the evidence only established that Neely, while operating her vehicle, proceeded through the stop sign, without yielding to oncoming traffic, and thus collided with defendant's vehicle. We therefore hold that although the plaintiff produced evidence that defendant had a blood alcohol content of 0.068 at the time of the accident, plaintiff failed to forecast any evidence that defendant's blood alcohol content proximately caused the accident in question. 565 S.E.2d at 716.

The plaintiff in Edwards v. Cerro, 150 N.C.App. 551, 564 S.E.2d 277 (2002){ TA \l "Edwards v. Cerro, 150 N.C.App. 551, 564 S.E.2d 277 (2002)" \s "Edwards v. Cerro, 150 N.C.App. 551, 564 S.E.2d 277 (2002)" \c 1 } collided with the rear of a forklift operated by the defendant as both parties were driving north on R.P.1400 in Greene County. The forklift was owned by Ham Farms and was being operated by Cerro in the course of his employment with Ham Farms. Based on the failure of Cerro to answer interrogatories of the plaintiff after being ordered to respond, the trial court ordered that as to Cerro, individually and as agent and employee of Ham Farms, the issue of negligence was answered in favor of the plaintiff. The jury determined that the plaintiff was not contributorily negligent and awarded damages of $85,000.

The Court of Appeals affirmed the trial court's denial of the defendant's motion for a directed verdict as to the plaintiff's contributory negligence.

> We conclude that the evidence at trial gives rise to a reasonable inference that the forklift could not have

> been seen or avoided by a person exercising reasonable care. . . . Plaintiff was driving a truck at night with properly operating headlights when, despite his efforts to avoid the crash, he collided with the forklift, which was being operated without reflectors or tail lights. The evidence indicates that he applied his brakes and then skidded for at least twenty-five feet before the collision. We cannot conclude that as a matter of law plaintiff was contributorily negligent. 564 S.E.2d at 280.

During jury deliberations, there was a brief discussion of whether the plaintiff's medical bills were covered by insurance. No witness at trial had mentioned insurance. The Court held that the trial court had not abused its discretion in denying the defendant's motion for a new trial.

> Here, neither the parties nor the witnesses at trial mentioned insurance, and we will not require a new trial under these circumstances. . . . Insurance was briefly discussed during a self-initiated conversation in jury deliberations. This conversation by the jurors did not amount to misconduct and there was no evidence that it affected or biased prior decisions. The trial court acted within its discretion when it denied Ham Farms' motion for judgment notwithstanding the verdict and for a new trial on this basis. 564 S.E.2d at 281.

Finally, the Court held that the trial judge properly ruled by answering the issue of negligence in favor of the plaintiffs based on Cerro's failure to respond to the plaintiff's interrogatories after having being so ordered. Since the defendants had not answered separately and the negligence of Cerro was imputed to Ham Farms, the liability of Ham Farms

"necessarily followed" the negligence of Cerro. 564 S.E.2d at 281.

B. Premises{ TC "B. Premises" \f C \l "2" }

The plaintiff in Goynias v. Spa Health Clubs, Inc., 148 N.C.App. 554, 558 S.E.2d 880, per curiam affirmed, ___N.C.___, 569 S.E.2d 648 (2002){ TA \l "Goynias v. Spa Health Clubs, Inc., 148 N.C.App. 554, 558 S.E.2d 880, per curiam affirmed, ___N.C.___, 569 S.E.2d 648 (2002)" \s "Goynias v. Spa Health Clubs, Inc., 148 N.C.App. 554, 558 S.E.2d 880, per curiam affirmed, ___N.C.___, 569 S.E.2d 648 (2002)" \c 1 } slipped and fell on a wet floor at the defendant's facility as he was leaving the men's shower area and walking to the locker room. The trial court granted the defendant's motion for summary judgment on the grounds that there was no genuine issue of material fact as to the defendant's negligence. The Court of Appeals affirmed with Judge Biggs dissenting.

The Supreme Court affirmed per curiam. In concluding that summary judgment was appropriate on the defendant's negligence, the Court of Appeals held:

> While we acknowledge plaintiff did not slip in a bathtub, we still deem the area where he slipped to be an area where one might be expected to exercise extra caution. The chances of water, and even soapy water, on the floor of an area where people walk out of a shower across to a locker room appear to be high. Plaintiff admitted he saw the black nonskid mats on the floor and that he knew the purpose of the mats was to help in preventing falls. He also admitted that the nonskid mats indicated to him that the floors could be slippery.

> Defendant was required to keep its premises in a reasonably safe condition. The record shows defendant placed mats on the floor and provided a drain with a slope. Also, the texture of the floor exceeded the required slip resistant standard for bathroom flooring. There is no evidence defendant was actually or constructively aware of an unobvious dangerous condition which it failed to correct. Therefore, plaintiff failed to show defendant breached its duty to plaintiff. 558 S.E.2d at 883.

The plaintiff in Swinson v. Lejeune Motor Company, Inc., 147 N.C.App. 610, 557 S.E.2d 112, per curiam reversed, 356 N.C. 286, 569 S.E.2d 646 (2002){ TA \l "Swinson v. Lejeune Motor Company, Inc., 147 N.C.App. 610, 557 S.E.2d 112, per curiam reversed, 356 N.C. 286, 569 S.E.2d 646 (2002)" \s "Swinson v. Lejeune Motor Company, Inc., 147 N.C.App. 610, 557 S.E.2d 112, per curiam reversed, 356 N.C. 286, 569 S.E.2d 646 (2002)" \c 1 } had her car serviced by the defendant. As she was walking in the defendant's parking lot looking for her car, she stepped into a hole in the parking lot, tripped, fell and broke her arm. The trial court granted the defendant's motion for a directed verdict at the close of the plaintiff's evidence, ruling that there was no evidence sufficient to submit to the jury on the defendant's negligence, and, if there were sufficient evidence of the defendant's negligence, the plaintiff's evidence showed contributory negligence as a matter of law. The Court of Appeals reversed the trial court on the grounds that there was a question of fact as to whether the hole in the parking lot was open and obvious.

The Supreme Court reversed the Court of Appeals for the reasons stated in the dissenting opinion of Judge McCullough. Judge McCullough relied upon photographs and evidence before the trial court showing that the place where the plaintiff fell was "three-quarters of an inch to an inch deep, eight to twelve inches wide, and several feet long." 557 S.E.2d at 117. At trial, the plaintiff testified that she did not see the hole because "I wasn't looking for a hole. I was looking for the car." 557 S.E.2d at 117. In holding that the plaintiff's evidence established contributory negligence as a matter of law, Judge McCullough concluded,

> The evidence shows the plaintiff was eye searching the parking lot for her car and was inattentive to where she was walking at the time she fell. 557 S.E.2d at 119.

The plaintiff in Martishius v. Carolco Studios, Inc., 355 N.C. 465, 562 S.E.2d 887 (2002){ TA \l "Martishius v. Carolco Studios, Inc., 355 N.C. 465, 562 S.E.2d 887 (2002)" \s "Martishius v. Carolco Studios, Inc., 355 N.C. 465, 562 S.E.2d 887 (2002)" \c 1 } was seriously injured when he came into contact with uninsulated energized power lines while working on the defendant's property. The property where plaintiff was injured was constructed in 1984 as a motion picture studio. Gerald Waller was hired to assist in construction including the electrical distribution system. At the time of original construction, Carolina Power & Light

installed uninsulated overhead power lines on the back lot, approximately seventy-five feet from any structures.

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

The Supreme Court affirmed. As to the defendant's duty to the plaintiff, the Court held that the defendant exercised sufficient control over the property, especially with the presence of electrical power lines, to have a duty.

> This evidence establishes that defendant was far more than a mere landlord to Crowvision. Defendant's retention of substantial authority over the use of its property, taken together with its active involvement in Crowvision's daily routines, placed upon defendant a concomitant duty to exercise reasonable care to ensure that Crowvision's employees were not injured by coming into contact with uninsulated power lines running over the back lot. One who maintains a high

> voltage electric line at places where people may be reasonably expected to go for work, business or pleasure has the duty to guard against contact by insulating the wires or removing them to a place where human beings will not likely come in contact with them. 562 S.E.2d at 893.

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

> Evidence was presented that defendant was aware that the uninsulated power lines presented a hazard to film crews on the back lot and that workers would have to confront such a hazard to accomplish their assigned duties. Despite defendant's knowledge of the danger, it allowed near-permanent fixtures on the back lot to encroach on CP&L's easement. . . . Given the evidence presented to the jury concerning the nature and use of the property, the knowledge of defendant through its facility manager of the set conditions, and the available alternatives, there was sufficient evidence to submit to the jury the question whether the defendant was negligent in causing plaintiff's injuries. 562 S.E.2d at 894-895.

The Court also rejected the defendant's argument that it was entitled to a directed verdict as a result of the plaintiff's contributory negligence as a matter of law in knowingly working around the power lines.

> Plaintiff's expert MacCullum similarly testified that "the power lines may be camouflaged because they blend in with the background, and it's very difficult for people to estimate accurate distances, particularly when they have multiple visual tasks to do." Although no one knew where plaintiff was looking at the time of the accident, testimony as to the relative position of the sun suggested that glare could have been a factor. Taken together, this evidence adequately raised a question sufficient to submit to the jury as to whether plaintiff was contributorily negligent. 562 S.E.2d at 897.

The plaintiff in Hobby v. City of Durham, 152 N.C.App. 234, 569 S.E.2d 1 (2002){ TA \l "Hobby v. City of Durham, 152 N.C.App. 234, 569 S.E.2d 1 (2002)" \s "Hobby v. City of Durham, 152 N.C.App. 234, 569 S.E.2d 1 (2002)" \c 1 } was injured by a foul ball while attending a Durham Bulls baseball game. The foul ball hit the roof of the stadium, bounced off a beam, then struck the plaintiff in the back of the head. Although seating was available behind protective netting, the plaintiff had purchased a ticket for a seat that was not protected. The plaintiff's ticket specifically stated that the plaintiff assumed the risk of being injured by a baseball and that the defendant would not be liable.

The trial court granted the defendant's 12(b)(6) motion. The Court of Appeals affirmed, holding that the plaintiff assumed the risk of being hit by a ball and that the defendant discharged any duty to the plaintiff by providing a screened section.

The plaintiff in Miller v. B.H.B. Enterprises, Inc., 152 N.C.App. 532, 568 S.E.2d 219 (2002){ TA \l "Miller v. B.H.B. Enterprises, Inc., 152 N.C.App. 532, 568 S.E.2d 219 (2002)" \s "Miller v. B.H.B. Enterprises, Inc., 152 N.C.App. 532, 568 S.E.2d 219 (2002)" \c 1 } alleged that he was assaulted by employees of the defendant's bar. On the evening of 18 April 1998, the plaintiff and Beers were customers at the defendant's bar, had consumed alcohol and were

intoxicated. Beers worked as a bouncer for the defendant, but was not on duty at the time. The defendant's manager, Bennett, received reports that the plaintiff was "horsing around" with female bartenders. Bennett instructed two bouncers to escort the plaintiff from the bar. As the bouncers led the plaintiff to the door of the bar, Beers approached the group and beat and kicked the plaintiff as Bennett and the two bouncers watched. The plaintiff was taken by ambulance to the hospital and treated for injuries to his head and face. A jury determined that the plaintiff and the bar were negligent, but that the bar had the last clear chance to avoid the plaintiff's injuries. The jury awarded the plaintiff $5,320 for personal injury and $15,760 for punitive damages.

The Court of Appeals affirmed. On the issue of punitive damages, the defendant argued that its motion for a directed verdict should have been granted because the requirements of G.S. § 1D-15 had not been met since there was no evidence that the defendant's employees had acted willfully and wantonly or that officers or managers of the defendant had participated in or condoned the actions of Beers. The Court of Appeals disagreed, noting that G.S. § 1D-25 does not require evidence that the defendant's employees caused the injuries to the plaintiff. Instead, evidence that the defendant acted with "conscious and intentional disregard of and indifference to the

rights and safety of others, which the defendant knows or should know is reasonably likely to result in injury, damage or other harm" is sufficient. G.S. § 1D-25. Evidence that the manager, Bennett, and the two employee bouncers were standing close to Beers and the plaintiff as Beers assaulted the plaintiff, that the bouncers had the opportunity to intervene and did not and that Bennett had the authority to instruct the bouncers to intervene and did not established the evidence sufficient to submit to the jury when considered in the light most favorable to the plaintiff.

Bennett's testimony established that he was hired by the defendant to open the bar and to work directly with one of the co-owners of the bar and that he controlled the daily operations of the bar, including hiring and firing of employees. Bennett's testimony showed that he "condoned" the attack by standing close to Beers without intervening in the assault.

The Court of Appeals also held that the defendant's motion for a directed verdict as to negligence was properly denied.

> While a possessor of land is not ordinarily liable for injuries to lawful visitors to the premises which are caused by the intentional criminal acts of third persons, "a proprietor of a public business establishment has a duty to exercise reasonable or ordinary care to protect his patrons from intentional injuries by third persons, if has reason to know that such acts are likely to occur." 568 S.E.2d at 225.

Since Bennett knew that the female bartenders the plaintiff was accused of annoying were friends of Beers, that Beers and the plaintiff were intoxicated and that Bennett did not intervene in the assault by Beers on the plaintiff, "it was foreseeable that Beers might assault and injury plaintiff if they [Bennett and the bouncers] left plaintiff outside the restaurant in a perilous position, or did not intervene to stop the beating." 568 S.E.2d at 226. Similar reasoning applied to the defendant's argument that it was not liable for the intervening criminal act of Beers. Bennett and the bouncers placed the plaintiff in a helpless state by removing him from the restaurant and leaving him outside with knowledge that Beers was angry as a result of the plaintiff's conduct toward the female bartenders. Additionally, when Beers began assaulting the plaintiff in the presence of Bennett and Bennett did not intervene, "Beers' actions did not entirely supersede defendant's negligent conduct." 568 S.E.2d at 226. Judge Tyson dissented as to that part of the Court's opinion affirming the award of punitive damages. Judge Tyson's view of the evidence was that there were no facts showing that officers of the defendant condoned the assault on the plaintiff.

The plaintiff in Bolick v. Bon Worth, Inc., 150 N.C.App. 428, 562 S.E.2d 602, petition for discretionary review denied, 356 N.C. 297, 570 S.E.2d 498 (2002){ TA \l "Bolick v. Bon Worth,

Inc., 150 N.C.App. 428, 562 S.E.2d 602, petition for discretionary review denied, 356 N.C. 297, 570 S.E.2d 498 (2002)" \s "Bolick v. Bon Worth, Inc., 150 N.C.App. 428, 562 S.E.2d 602, petition for discretionary review denied, 356 N.C. 297, 570 S.E.2d 498 (2002)" \c 1 } fell and was injured as she exited a bathroom at the defendant's store. The plaintiff testified that she had no difficulty seeing steps leading up to the bathroom. As she exited the bathroom, she testified that there was "no landing there . . . It was step downs." The plaintiff's expert, Norman Cope, was of the opinion that the step-down from the bathroom "created a hazardous condition." The trial court granted the defendant's motion for summary judgment.

Finding that the plaintiff had knowledge of the alleged hazardous condition and that the defendant had no duty to warn the plaintiff of an open and obvious condition of which the plaintiff had equal knowledge, the Court of Appeals affirmed summary judgment for the defendant.

> . . . plaintiff admitted that she was able to see the floor and the steps leading to the bathroom. She stated that she did not have any trouble seeing because the bathroom light was on and the bathroom door was open. She testified that she had no trouble getting into the bathroom using the steps. Important to the disposition of this case, plaintiff had full knowledge of the condition of the doorway to the bathroom by virtue of having safely negotiated her way inside the bathroom moments before she fell. On this record, even if the steps leading up to and out of the bathroom created a hazardous condition, plaintiff had

full knowledge of the alleged hazardous condition. 262 S.E.2d at 604.

Allstate Insurance Co. v. Oxendine, 149 N.C.App. 466, 560 S.E.2d 858 (2002){ TA \l "Allstate Insurance Co. v. Oxendine, 149 N.C.App. 466, 560 S.E.2d 858 (2002)" \s "Allstate Insurance Co. v. Oxendine, 149 N.C.App. 466, 560 S.E.2d 858 (2002)" \c 1 } was a subrogation action to recover for damages to property of Allstate's insured, William Cooper. Oxendine owned property adjacent to Cooper's property. In January 1995, Oxendine used three fifty-gallon drums to burn trash on his property. He testified that he never left the drums and always had a water hose present. Oxendine's daughter, and her husband, Locklear, also lived on the property. On 21 January 1995, Locklear was burning a bag of trash while Oxdendine was asleep. Fire escaped from the drum and eventually destroyed the Cooper home. The trial court granted Oxendine's motion for summary judgment. The trial court also entered judgment against Locklear.

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

> In case of work done by a licensee, the work is done on the licensee's own account, as his own business, and the profit of it is his. It is not a case, therefore, where the thing which caused the accident is a thing contracted for by the owner of the land, and for which he may liable for that reason. . . . It

> is not enough here, of course, to show that the third person's conduct foreseeably and unreasonably jeopardized plaintiff. Plaintiff must also show that the occupier (a) had knowledge or reason to anticipate that the third person would engage in such conduct upon the occupier's land, and (b) thereafter had a reasonable opportunity to prevent or control such conduct. . . .
>
> * * *
>
> There was no evidence, or even forecast of evidence, of any earlier negligent use of the drums by Locklear which would have alerted Oxendine. Locklear stated in his deposition that he burned trash on Oxendine's property a couple of times a month and always made sure the bag was completely inside the drum. On 21 January 1995, he burned the bag in a drum, watched the fire until there was only smoke, and then did other outdoor chores. Oxendine was asleep in the morning and at work during the afternoon when Locklear failed to keep a proper lookout. There is no evidence of burning activities by Locklear of such duration or in such a manner as to amount to a nuisance. There is no evidence that Oxendine, with knowledge of such conduct, permitted it to continue. 560 S.E.2d at 860-861,

The minor plaintiff, Justin Joslyn, in Joslyn v. Blanchard, 149 N.C.App. 625, 561 S.E.2d 534 (2002){ TA \l "Joslyn v. Blanchard, 149 N.C.App. 625, 561 S.E.2d 534 (2002)" \s "Joslyn v. Blanchard, 149 N.C.App. 625, 561 S.E.2d 534 (2002)" \c 1 } was bitten by a dog owned by the Blanchards. The Blanchards kept the dog at their residence. The Blanchards rented their residence from William and Barbara Lewis. The complaint alleged that Mr. and Mrs. Lewis were aware of the violent nature of the dog and were "very cautious when around the dog." The trial court granted the motion for summary judgment of Mr. and Mrs. Lewis.

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

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

> . . . plaintiff has produced even less evidence that the plaintiff in Patterson [v. Reid, 10 N.C.App. 22, 178 S.E.2d 1 (1970)] that defendants managed, controlled or cared for the dog that injured plaintiff. Plaintiff's complaint and supporting affidavits contain no allegations whatsoever to support any connection between defendants and the dog, beyond the fact that they permitted the Blanchards to keep the dog on the property. As such, plaintiff has failed to prove that defendants were "keepers" of the animal here involved, as defined by our Supreme Court in Swain, [v. Tillett, 268 N.C. 46, 152 S.E.2d 297 (1967)]. 561 S.E.2d at 537.

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

The plaintiff in Williams v. Smith 149 N.C.App. 855, 561 S.E.2d 921 (2002){ TA \l "Williams v. Smith 149 N.C.App. 855, 561 S.E.2d 921 (2002)" \s "Williams v. Smith 149 N.C.App. 855, 561 S.E.2d 921 (2002)" \c 1 } was employed by the defendant, the operator of an automotive body shop. The plaintiff was required to furnish his own tools. In November 1998, there was a burglary at the body shop and the plaintiff's tools valued at approximately $43,000 were taken. Earlier in the year, someone broke into the body shop and took several batteries. In a separate incident, a deputy sheriff told the defendant that someone may have attempted to break into the body shop. The body shop was secured by a gate that was locked with a heavy chain and padlock. The garage door to the body shop was secured by a latch and bar. There was also a floodlight on the premises. The trial court granted summary judgment for the defendant.

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

> . . . this Court concludes that the trial court did not err in requiring plaintiff to present evidence of significant criminal activity to overcome defendant's forecast in support of its motion for summary judgment. . . . In the instant case, there was only one confirmed incident of a break-in occurring on the body shop premises. Standing alone, this prior incident is insufficient to negate the sufficiency of the security methods currently employed by the defendant. 561 S.E.2d at 924.

C. Products{ TC "C. Products" \f C \l "2" }

The plaintiff in DeWitt v. Eveready Battery Co., Inc., 355 N.C. 672, 565 S.E.2d 140 (2002){ TA \l "DeWitt v. Eveready Battery Co., Inc., 355 N.C. 672, 565 S.E.2d 140 (2002)" \s "DeWitt v. Eveready Battery Co., Inc., 355 N.C. 672, 565 S.E.2d 140 (2002)" \c 1 } purchased a Coleman battery-powered lantern and eight Eveready "Energizer" size D batteries at Wal-Mart. After installing the batteries, the plaintiff was not satisfied with the illumination provided by the lantern and returned the lantern to Wal-Mart. During the process of installing the batteries and operating the lantern, the plaintiff noticed moisture on the batteries, a "tingling" on his ankle and that his sock was moist. After returning the lantern to Wal-Mart, the burning on his ankle increased, causing the plaintiff to remove his sock and notice that his right heel was black. After receiving emergency medical treatment, it was determined that the plaintiff had third- and fourth-degree alkaline chemical burns to his right ankle caused by potassium hydroxide that had leaked from the batteries.

In opposition to the defendant's motion for summary judgment, the plaintiff relied upon affidavits or deposition testimony from Joseph Crawford Hubbell, a chemist and bacteriologist, William Wayne Beaver, an electrical engineer who performed a forensic analysis of the batteries, and Dr. Richard G. Pearson, a professor of industrial engineering at North Carolina State University. The trial court granted the defendant's motion for summary judgment. The Court of Appeals reversed on the basis that a product defect may be inferred from evidence that the product malfunctioned while being put to its ordinary use.

The Supreme Court affirmed the Court of Appeals' reversal of the trial court's grant of summary judgment in favor of the defendant. The Supreme Court also agreed with the Court of Appeals' determination that a plaintiff need not prove a specific defect if the product failed while being used in its ordinary manner.

> . . . a plaintiff need not prove a specific defect to carry his or her burden of proof in a products liability action based upon a breach of implied warranty of merchantability. Accordingly, the burden sufficient to raise a genuine issue of material fact in such a case may be met if the plaintiff produces adequate circumstantial evidence of a defect. This evidence may include such factors as: (1) the malfunction of the product; (2) expert testimony as to a possible cause or causes; (3) how soon the malfunction occurred after the plaintiff first obtained the product and other relevant history of the product, such as its age and prior usage by plaintiff

> and others, including evidence of misuse, abuse, or similar relevant treatment before it reached the defendant; (4) similar incidents "when accompanied by proof of substantially similar circumstances and reasonable proximity in time . . . ; (5) elimination of other possible causes of the accident; and (6) proof tending to establish that such an accident would not occur absent a manufacturing defect. . . . When a plaintiff seeks to establish a case involving breach of a warranty by means of circumstantial evidence, the trial judge is to consider these factors initially and determine whether, as a matter of law, they are sufficient to support a finding of a breach of warranty. The plaintiff does not have to satisfy all these factors to create a circumstantial case, . . . and if the trial court determines that the case may be submitted to the jury, "in most cases, the weighing of these factors should be left to the finder of fact," . . . . 565 S.E.2d at 151.

The Court then applied each factor to the evidence before the trial judge and determined that there was sufficient evidence to defeat summary judgment.

The plaintiff in Evans v. Evans, 153 N.C.App. 54, 569 S.E.2d 303 (2002), review denied, 356 N.C. 670, 577 S.E.2d 296 (2003){ TA \l "Evans v. Evans, 153 N.C.App. 54, 569 S.E.2d 303 (2002), review denied, 356 N.C. 670, 577 S.E.2d 296 (2003)" \s "Evans v. Evans, 153 N.C.App. 54, 569 S.E.2d 303 (2002), review denied, 356 N.C. 670, 577 S.E.2d 296 (2003)" \c 1 } was injured when a clamp failed on an irrigation system while he was working on a farm. The force of the water struck the plaintiff in the face, causing permanent injury including blindness in both eyes. The plaintiff did not remember what happened, and there were no witnesses to the accident. The defendant, Custom Stamping and Manufacturing

Company, manufactured the clamp. The plaintiff's complaint included claims for failure to give adequate warnings, breach of the implied warranty of merchantability and negligence in the design of the clamp.

The plaintiff's expert, Dr. Anand David Kasbeker, testified as an expert witness in the field of mechanical engineering and material science and in the field of failure analysis of metallic components. Dr. Kasbeker testified in detail at trial about the warnings necessary for the clamp. The trial court granted the defendant's motion for a directed verdict on the claim alleging failure to provide warnings. The Court of Appeals affirmed, concluding that even if there were evidence that Custom did not provide adequate warnings, there was no evidence produced by the plaintiff that the failure to warn was a proximate cause of the plaintiff's injuries.

The trial court also granted the defendant's motion for a directed verdict on the claim alleging breach of the implied warranty of merchantability. Relying upon Dewitt v. Eveready Battery Co., Inc., 355 N.C. 672, 565 S.E.2d 140 (2002), the Court of Appeals affirmed. On appeal, the plaintiff argued that since the clamp was being used for its intended purpose at the time of failure, this was sufficient evidence to submit to the jury. Addressing the six factors identified by the Court in Dewitt, the Court of Appeals held that the plaintiff's evidence

in the present case showed that: (1) the clamp in the present case was not manufactured differently from other clamps; (2) of the 300,000 clamps manufactured per year since 1972, the plaintiff's injury was the only complaint about a defect; (3) the plaintiff's expert testified that Custom's clamp did not violate industry standards; (4) the clamp had been in use for two to three years before the accident; (5) other causes of the accident were not eliminated; and (6) there was no inference that the accident would not have occurred but for a manufacturing defect. The plaintiff's evidence satisfied two of the Dewitt factors: (1) malfunction of the product; and (2) "expert testimony as to a variety of possible causes."

The claim alleging negligence was submitted to the jury. The plaintiff requested that the jury be instructed that a manufacturer is under a duty to exercise reasonable care in the design of a product. The trial court refused to give the requested instruction, instructing the jury instead that a manufacturer is under a duty to make reasonable efforts to correct design defects which it knows or should have known. The jury found no negligence by the defendant and awarded no damages. The Court of Appeals affirmed the trial judge's instruction, concluding that G.S. § 99B-6(a) does not impose a duty of design on the manufacturer. There was no evidence that Custom had designed the clamp

II. Insurance{ TC "II. Insurance" \f C \l "1" }

A. Motor Vehicles{ TC "A. Motor Vehicles" \f C \l "2" }

Harleysville Mutual Insurance Co. v. Zurich-American Insurance Co., ___N.C.App.___, 578 S.E.2d 701 (2003){ TA \l "Harleysville Mutual Insurance Co. v. Zurich-American Insurance Co., ___N.C.App.___, 578 S.E.2d 701 (2003)" \s "Harleysville Mutual Insurance Co. v. Zurich-American Insurance Co., ___N.C.App.___, 578 S.E.2d 701 (2003)" \c 1 } arose out of an automobile accident on 12 July 1999. An employee of Briggs Tire was test driving a vehicle owned by Wheels, Inc. and leased to Nationwide Mutual Insurance Company. The vehicle operated by the Briggs employee collided with a vehicle owned and operated by Harris. A Cumberland County jury awarded Harris $1.5 million in her suit. At the time of the accident, Harleysville insured Briggs. Zurich-American insured Nationwide. St. Paul Fire and Marine Insurance Company had a commercial automobile liability insurance policy and an umbrella policy insuring Wheels. Harleysville brought the present declaratory judgment action against Zurich and St. Paul. After Harleysville settled with Zurich, the trial court ruled that the St. Paul policy did not provide coverage for Briggs and its employee and granted St. Paul's motion for summary judgment.

The Court of Appeals reversed, primarily on the grounds that the St. Paul policy did not comply with the Financial Responsibility Act. The named insured under the St. Paul policy

was Wheels. The vehicle involved in the accident was owned by Wheels and leased by Wheels to Nationwide. At the time of the accident, Nationwide had given permission to Briggs and its employees to drive the vehicle when it was delivered to Briggs for service. St. Paul contended that its policy did not insure "lessees of vehicles and their permittee drivers."

> St. Paul does not limits its exclusion of coverage to when the driver of the vehicle is covered under some other policy for the statutory minimum amount. It provides that, regardless of whether the lessee or the person in lawful possession had insurance, the lessee and anyone driving with permission of the lessee are not covered under the policy. This provision does not satisfy the Financial Responsibility Act. Because the policy does not satisfy N.C.Gen.Stat. § 20-281 and 20-279.21, the terms of those statutes are written into St. Paul's basic Automobile Liability Protection policy. There is coverage in the statutory minimum amounts for claims against Briggs' employee, a person in lawful possession of the vehicle and operating with the permission and authority of Nationwide. ___N.C.App. at ___.

Because the Financial Responsibility Act does not require a duty to defend, St. Paul was not responsible for the expenses and costs incurred by Harleysville in defense of the underlying action.

United Services Automobile Association v. Rhodes, ___N.C.App.___, 577 S.E.2d 171 (2003){ TA \l "United Services Automobile Association v. Rhodes, ___N.C.App.___, 577 S.E.2d 171 (2003)" \s "United Services Automobile Association v. Rhodes, ___N.C.App.___, 577 S.E.2d 171 (2003)" \c 1 } was an action for a declaratory judgment that a

lessee was not a permissive user at the time of the accident, and, therefore, not an insured. Hampton rented a car from B & R Rent-A-Car. The rental agreement provided that the vehicle was not to be used while the operator was under the influence of intoxicants. Nationwide Mutual Insurance Company issued an automobile liability policy insuring B & R. The Nationwide policy contained no exclusions relating to coverage for persons operating vehicles under the influence of alcohol and did not adopt the terms of the rental agreement. The trial court determined that Nationwide provided coverage for Hampton.

The Court of Appeals affirmed on the basis that the rental agreement granted use of the vehicle to Hampton although she was not operating the vehicle at the time of the accident as permitted by the lease agreement.

> We . . . hold that although Hampton violated a provision of the rental agreement as to her operation of the vehicle, she did not exceed the scope of B & R's permission to use the vehicle for purposes of qualifying as an insured under the Nationwide policy. Accordingly, the trial court properly concluded that "the terms of the contract set forth in the . . . B & R rental agreement executed . . . by Hampton . . . do not constitute a legal basis for the exclusion of coverage afforded under the terms of the [Nationwide] policy" and that Nationwide must provide coverage under the terms of its policy. 577 S.E.2d at 174.

Scottsdale Insurance Co. v. The Travelers Indemnity Co., 152 N.C.App. 231, 566 S.E.2d 748 (2002){ TA \l "Scottsdale Insurance Co. v. The Travelers Indemnity Co., 152 N.C.App. 231,

566 S.E.2d 748 (2002)" \s "Scottsdale Insurance Co. v. The Travelers Indemnity Co., 152 N.C.App. 231, 566 S.E.2d 748 (2002)" \c 1 } was a declaratory judgment action to determine coverage for injuries received when members of an American Legion baseball team were involved in an automobile accident. Scottsdale provided coverage for Cary American Legion Post. Members of the Post baseball team were riding to a scheduled game in Chapel Hill with Reel, a member of the team, when the accident occurred. The Scottsdale policy had an exclusion for "bodily injury" arising out of the use of an "auto." An endorsement to the policy provided coverage for "activities necessary or incidental to the conduct" of a scheduled game.

The Court of Appeals affirmed the trial court's grant of summary judgment for the defendants on the basis of coverage by the Scottsdale policy. On appeal, the defendants contended that there was coverage because the automobile accident was "incidental" to a scheduled game since the players were being transported to the game in Chapel Hill. Scottsdale argued that there was coverage for "activities incidental to the conduct" of a scheduled game unless the activities were related to the operation of a motor vehicle. Therefore, the auto exclusion prevents coverage for the use of an automobile by an insured. The Court of Appeals rejected Scottsdale's argument.

> A reasonable reading of the insurance policy could produce either the reading offered by plaintiff or the reading offered by defendants; therefore, the policy is ambiguous . . . . When an "endorsement provision . . . can be construed as being in direct conflict with the coverage provisions in the initial policy . . . the provisions most favorable to the insured, i.e., those in endorsement, are controlling." . . . . Therefore, the endorsement provision allows for coverage of the accident. 566 S.E.2d at 750.

Floyd v. Integon General Insurance Corp., 152 N.C.App. 445, 567 S.E.2d 823 (2002){ TA \l "Floyd v. Integon General Insurance Corp., 152 N.C.App. 445, 567 S.E.2d 823 (2002)" \s "Floyd v. Integon General Insurance Corp., 152 N.C.App. 445, 567 S.E.2d 823 (2002)" \c 1 } was a declaratory judgment action to determine whether Integon's insured, Jerry McNeill, could be "using" two vehicles at the time of an accident, and, if so, whether there were any limitations on coverage. On 22 November 1996, a GMC truck being operated by McNeill became disabled. McNeill pushed the truck off the road into a ditch. McNeill and his wife returned the following day, with McNeill driving a 1973 Chevrolet. As the McNeills were attempting to pull the GMC truck from the ditch with the Chevrolet, a vehicle operated by Floyd approached in the lane occupied by the Chevrolet. Despite warnings by McNeill, the Floyd vehicle collided with the Chevrolet, resulting in the death of Floyd.

The GMC truck and the Chevrolet were insured vehicles under a policy issued by Integon with the policy providing bodily

injury coverage of $25,000/$50,000. The limit of liability on the policy was also stated as the limit of liability for bodily injury, "regardless of the number of . . . vehicles . . . shown in the Declarations, or vehicles involved in the auto accident. . . ." The trial court granted the plaintiffs' motion for summary judgment and held that coverage the accident was available through the GMC truck and the Chevrolet in the total amount of $25,000/$50,000 separately for each vehicle.

The Court of Appeals affirmed the trial court's determination that each vehicle was "in use" and covered separately. The Financial Responsibility Act requires that liability coverage be provided "for each insured vehicle being 'used' by the insured at the time of the accident." G.S. 20-279.21(b)(2) "does not limit an insured's 'use' of insured motor vehicles to one at a time, and we decline to read such a restriction into the statute."

The question, therefore, was whether Mr. McNeill was using both the GMC truck and the Chevrolet at the time of the accident. The Court of Appeals held that both vehicles were in use at the time of the accident with Mr. Floyd.

> . . . we conclude that Mr. McNeill was using the GMC truck at the time of the accident; furthermore, there is a causal connection between his use of the truck and the accident giving rise to this action. The parties stipulated that Mr. McNeill's intention on the afternoon of 23 November 1996 was to tow the GMC truck home with the Chevrolet using a chain and steel pipe.

> Additionally, Mr. McNeill attached the two vehicles at some time prior to the accident, but the chain became unhooked from the GMC truck. Mr. McNeill was then attempting to re-attach the vehicles using the chain when the Floyds' car approached and the accident occurred. Under these circumstances . . . we conclude as a matter of law that Mr. McNeill was using the GMC truck at the time of the accident even though the GMC was not struck nor was it being driven or otherwise operated at the time of the accident. . . . Furthermore, we conclude as a matter of law that there was a causal connection between Mr. McNeill's use of the GMC truck and the accident, thereby giving rise to coverage under his motor vehicle liability policy issued by Integon. 567 S.E.2d at 827-828.

Griswold v. Integon General Insurance Co., 149 N.C.App. 301, 560 S.E.2d 861 (2002){ TA \l "Griswold v. Integon General Insurance Co., 149 N.C.App. 301, 560 S.E.2d 861 (2002)" \s "Griswold v. Integon General Insurance Co., 149 N.C.App. 301, 560 S.E.2d 861 (2002)" \c 1 } arose out of an automobile accident on 17 January 1997 in which a 1989 Pontiac, owned by Ted and Teresa Helms and operated by Wesley Philips, collided with a vehicle operated by Hatchell, resulting in the death of Allen. At the time of the accident, Philips was living with his mother, Teresa Helms, and her husband, Ted Helms. The Helms owned three vehicles, a 1992 Chevrolet, a 1995 Honda and the 1989 Pontiac. The Chevrolet and Honda were insured under a separate policy issued by New South Insurance Company that listed the Honda and Chevrolet as insured vehicles. The Pontiac was insured by Integon. The Helms provided the Pontiac to Philips. Integon tendered the limits of its policy

insuring the Pontiac. The present action was brought for coverage under the New South policy.

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

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

> Exclusion B.1.a in the case . . . "limits liability to coverage to personal injury or property damage arising out of the ownership, maintenance or use of the covered vehicle." It does not deal with UM/UIM coverage. . . . We find that the exclusion is clear, unambiguous and not contrary to public policy. Therefore, the New South policy provides no coverage to Ted and Teresa Helms even if the plaintiffs prove the applicability of the family purposes doctrine and the son's negligence is imputed to the parents. 560 S.E.2d at 866.

B. UM/UIM{ TC "B. UM/UIM" \f C \l "2" }

Liberty Mutual Insurance Co. v. Pennington, 356 N.C. 571, 573 S.E.2d 118 (2002){ TA \l "Liberty Mutual Insurance Co. v. Pennington, 356 N.C. 571, 573 S.E.2d 118 (2002)" \s "Liberty Mutual Insurance Co. v. Pennington, 356 N.C. 571, 573 S.E.2d 118 (2002)" \c 1 } was a declaratory judgment action concerning UIM benefits in Liberty's automobile liability insurance policy insuring the defendants. Judy Pennington and her daughter were involved in an automobile accident on 9 December 1993 with a truck owned by Blackburn Logging Company. Suit was instituted on 9 June 1996. During court-ordered mediation on 10 December 1997, the Penningtons learned that Blackburn Trucking had insurance with liability limits of $25,000/$50,000. A tentative settlement of the Penningtons' claims against Blackburn Trucking was reached at the mediated settlement conference. On 22 December 1997, the attorney for the Penningtons notified Liberty in writing of the proposed settlement. Liberty elected not to review the settlement documents and did not advance $25,000 to preserve its subrogation rights under G.S. § 20-279.21(b)(4). Instead, Liberty instituted the present declaratory judgment action contending that no UIM benefits were available because the Penningtons failed to notify Liberty of the UIM claim before the expiration of the three-year statute of limitations in G.S. § 1-52. The trial court granted Liberty's motion for summary

judgment. The Court of Appeals affirmed judgment for Liberty on the basis of the three-year statute of limitations.

The Supreme Court reversed on the grounds that the Financial Responsibility Act does not require that the UIM carrier be notified of a claim within the statute of limitations that applies to the underlying negligent act.

> . . . we conclude that under N.C.G.S. § 20-279.21(b)(4), there is no requirement that the UIM carrier be notified of a claim within the limitations period applicable to the underlying tort action. . . . The statute does not prescribe the type of notice, the content of the notice, or the method by which it is to be executed. The statute is similarly devoid of any particulars as to the time within which notice to the insurer must be provided. Given the lack of direction and specificity of N.C.G.S. 20-279.21(b)(4) regarding the notification requirement, we cannot conclude that the failure to provide such notice within the statute of limitations applicable to the underlying tort action operates to bar recovery of UIM benefits. 573 S.E.2d at 121.

In N.C. Farm Bureau Mutual Insurance v. Edwards, ___N.C.App.___, 572 S.E.2d 805 (2002){ TA \l "N.C. Farm Bureau Mutual Insurance v. Edwards, ___N.C.App.___, 572 S.E.2d 805 (2002)" \s "N.C. Farm Bureau Mutual Insurance v. Edwards, ___N.C.App.___, 572 S.E.2d 805 (2002)" \c 1 }, Philip Edwards and Mary Louise Haggenmaker were involved in an automobile accident in Maryland on 15 April 1991. At the time of the accident, Edwards was insured under a personal auto policy issued by Farm Bureau that covered the 1974 Volvo he was driving at the time of the accident. The policy provided UIM coverage of $100,000 per person. After Edwards

filed suit against Haggenmaker, Haggenmaker's liability carrier, State Farm, offered to settle for its policy limits of $100,000. Farm Bureau declined to advance its $100,000 limits. On 16 August 1997, Edwards accepted the $100,000 from State Farm and executed a Release. The Release executed by Edwards stated that it discharged Mr. and Mrs. Haggenmaker, but deleted the standard release language applying to "all other persons." The Release also stated that it applied to the accident occurring on 15 April 1991, then added that it precluded additional claims "against the above named individuals." When Edwards presented a claim against Farm Bureau, Farm Bureau contended that the Release with Haggenmaker barred UIM benefits from Farm Bureau. The trial court granted the motion for summary judgment of Edwards against Farm Bureau.

Holding that the Release with Haggenmaker did not bar UIM benefits from Farm Bureau, the Court of Appeals affirmed the trial court's judgment for Edwards. The Court discussed first the 1997 amendment to G.S. § 20-279.21(b)(4), codifying N.C. Farm Bureau Mutual Insurance Co. v. Bost, 126 N.C.App. 42, 483 S.E.2d 452 (1997).

> . . . section 20-279.21(b)(4) now provides that individuals injured in car accidents may execute contractual covenants not to enforce judgment in favor of tortfeasors as consideration for payment of the liability policy limits and that the execution of such a covenant does not preclude the injured party from

> seeking any available UIM benefits. 572 S.E.2d at 808.

Even though the Edwards Release did not specifically mention UIM benefits, it did not bar Edwards UIM claims against Farm Bureau.

> Here, given the substantial, critical hand-written alternations contained in the Release, defendants' intent to limit release of liability to that of the tortfeasor is clear from the plain language of the Release. . . . Accordingly, we conclude that defendants' claims against their UIM carrier, Farm Bureau, are not barred by the execution of their limited release, even though it contained neither a covenant not to enforce nor an express provision reserving their rights as against Farm Bureau. We do not find our holding here to be contrary to our holding in Spivey [v. Lowery, 116 N.C.App. 124, 446 S.E.2d 835 (1994)], where we stated that the plaintiff's lack of intent to release the UIM carrier was irrelevant. Unlike in Spivey, defendants clearly intended the Release to be limited to the Haggenmakers, given the alterations therein. 572 S.E.2d at 809.

Barton v. Sutton, 152 N.C.App. 706, 568 S.E.2d 264 (2002){ TA \l "Barton v. Sutton, 152 N.C.App. 706, 568 S.E.2d 264 (2002)" \s "Barton v. Sutton, 152 N.C.App. 706, 568 S.E.2d 264 (2002)" \c 1 } arose out of an automobile accident on 22 March 1997 between the plaintiff and Sutton. Sutton was served on 31 March 2000. Based on the failure of Sutton to answer, the trial court entered a default judgment against Sutton on 4 December 2000 of $50,000. On 29 March 2001, Nationwide Mutual Insurance Company filed a motion to intervene pursuant to Rule 24 and a motion to "challenge a Default Judgment pursuant to Rule 60." The trial court allowed

the motion to intervene, but denied the motion to set aside the default judgment.

On appeal, Nationwide argued that the default judgment should be set aside because Nationwide, the uninsured motorist carrier, had not been served with a copy of the summons and complaint as required by G.S. § 20-279.21(b)(3)a. Acknowledging that the statute requires service on the UM carrier in order for the UM carrier to be bound by a final judgment and Love v. Insurance Co., 45 N.C.App. 444, 263 S.E.2d 337, disc.review denied, 300 N.C. 198, 269 S.E.2d 617 (1980) holding that a default judgment is not enforceable against a UM carrier when service has not been made as required by the statute, the Court of Appeals concluded that the judgment was not "void." In order to set aside a default judgment under Rule 60(b)(4), the judgment must be "void." A judgment is "void" under Rule 60 when there is no jurisdiction over the party. A judgment is not "void" under Rule 60 when there is an error of procedure. Judge Greene dissented, being of the opinion that the trial court had no authority to enter the default judgment without notice to the UM carrier. The default judgment, therefore, was void as required by Rule 60.

Integon Specialty Insurance Co. v. Austin, 151 N.C.App. 593, 565 S.E.2d 736, petition for discretionary review denied, 356 N.C. 302, 570 S.E.2d 509 (2002){ TA \l "Integon Specialty

Insurance Co. v. Austin, 151 N.C.App. 593, 565 S.E.2d 736, petition for discretionary review denied, 356 N.C. 302, 570 S.E.2d 509 (2002)" \s "Integon Specialty Insurance Co. v. Austin, 151 N.C.App. 593, 565 S.E.2d 736, petition for discretionary review denied, 356 N.C. 302, 570 S.E.2d 509 (2002)" \c 1 **}** was a declaratory judgment action to determine coverage under uninsured provisions of Integon's policy. On 14 December 1997, Gregory was operating a Mazda he had obtained in return for $25.00 rock cocaine. Ms. Austin was a passenger in the Mazda automobile. As Gregory was driving the Mazda, he "exchanged words" with the driver of a car in another lane and fired several shots from the Mazda in the direction of the other car. One of the bullets ricocheted off the other car and struck Ms. Austin, resulting in her death. Ms. Austin's mother filed an uninsured motorist claim against her insurance company, Integon, for the wrongful death of her daughter.

The Court of Appeals affirmed the trial court's grant of summary judgment in favor of Integon on the basis that the shooting did not arise out of the use or operation of the Mazda vehicle.

> Because Audrey Austin's death was the result of Gregory's intentional pointing of the gun out the window of the Mazda Protégé and the subsequent discharge of the gun, we hold that Audrey Austin's death was not the natural and reasonable consequence of the use of the Mazda Protégé but was the result of something "wholly disassociated from, independent of, and remote from the vehicle's normal use." 565 S.E.2d at 738.

The plaintiff in Darroch v. Lea, 150 N.C.App. 156, 563 S.E.2d 219 (2002){ TA \l "Darroch v. Lea, 150 N.C.App. 156, 563 S.E.2d 219 (2002)" \s "Darroch v. Lea, 150 N.C.App. 156, 563 S.E.2d 219 (2002)" \c 1 } was injured in an automobile accident on 11 September 1996. Suit against the defendant was filed on 9 July 1999. On 28 February 2000, plaintiff notified North Carolina Farm Bureau, her underinsured motorist carrier, of the action. Farm Bureau then filed answer, raising defenses of contributory negligence and the statute of limitations. Allstate Insurance Company, the liability carrier for the defendant, tendered its policy limits of $25,000. When Farm Bureau learned that Allstate had tendered its limits, Farm Bureau tendered a check for $25,000 and requested that the plaintiff execute an "Advance and Trust Agreement." Because the plaintiff objected to the terms of the agreement, the plaintiff refused to sign the agreement. The plaintiff then filed a motion to compel arbitration with Farm Bureau pursuant to the terms of the insurance policy. Farm Bureau filed a motion to amend its answer to alleged insufficiency of process and insufficiency of service of process.

The Court of Appeals affirmed the trial court's denial of Farm Bureau's motion for summary judgment based on deficiencies in service. The Court held that Farm Bureau was not required to

be served and that notice to Farm Bureau within the period of limitations was not required.

> . . . we hold that the formal service of process requirement of our Rules of Civil Procedure do not apply to G.S. § 20-279.21(b)(4). We further hold that plaintiff was not required to notify Farm Bureau within the three-year statute of limitations for negligence. . . . while the statute of limitations would serve to bar underinsured motorist coverage when the insured fails to bring a timely claim against a tortfeasor, the statute of limitations for tort claims generally does not impact the notification provisions of N.C.Gen.Stat. § 20-279.21(b)(4). 563 S.E.2d at 222-223.

C. Homeowners{ TC "C. Homeowners" \f C \l "2" }

Erie Insurance Exchange v. St. Stephen's Episcopal Church, ___N.C.App.___, 570 S.E.2d 763 (2002){ TA \l "Erie Insurance Exchange v. St. Stephen's Episcopal Church, ___N.C.App.___, 570 S.E.2d 763 (2002)" \s "Erie Insurance Exchange v. St. Stephen's Episcopal Church, ___N.C.App.___, 570 S.E.2d 763 (2002)" \c 1 } was a declaratory judgment action to determine coverage under a homeowners policy insuring Brian and Amy Ruff for fire damage caused by their eight-year old son, Levi, at St. Stephen's Church. While Levi Ruff was with his mother at choir practice at St. Stephen's, Levi went to an unoccupied office in the church and found a box of matches. Levi then decided to determine whether choir robes hanging in the closet would burn. He lit a match and held it against one of the robes. When the robes began to burn, he left the office to find his mother. Although Levi located his mother, he did

not tell her about the fire. When Levi returned to the closet, the fire had spread. He told a church secretary about the fire. Levi testified by deposition that he had used matches with his parents in lighting a fire in the fireplace at his home. The plaintiff's policy excluded coverage for "intentional acts." The trial court denied the plaintiff's motion for summary judgment and granted the motion for summary judgment of St. Stephen's.

The Court of Appeals reversed, holding that Levi should have reasonably expected damages as a result of his intentional act based on his experience and age. The presumption that children between the ages of seven and fourteen are incapable of contributory negligence may be overcome.

> Levi's testimony demonstrates that he intended to light the match and hold it up to the robe to see if the robe would burn. Levi testified that he saw the flames spread to the size of a nickel or quarter before leaving to find his mother. When asked why he ran back to the office where he had set the fire, Levi responded, "because I knew that cloth would burn easily, and I ran because I wanted to get there soon enough to blow it out." Furthermore, Levi testified that his parents had shown him how to start a fire with matches and instructed him never to use them unless he was supervised. Levi also testified that he was aware of the danger of matches and the damage that could result from playing with them. The evidence demonstrates that a child of similar knowledge, experience, capacity, and discretion should have reasonably expected the results of his intentional acts. Based upon the evidence presented in the record, there is no issue of material fact concerning the application of the exclusion provision. 570 S.E.2d at 767.

D. Unfair and Deceptive Acts and Practices{ TC "D. Unfair and Deceptive Acts and Practices" \f C \l "2" }

Country Club of Johnston County, Inc. v. United States Fidelity & Guaranty Co., 150 N.C.App. 231, 563 S.E.2d 269 (2002){ TA \l "Country Club of Johnston County, Inc. v. United States Fidelity & Guaranty Co., 150 N.C.App. 231, 563 S.E.2d 269 (2002)" \s "Country Club of Johnston County, Inc. v. United States Fidelity & Guaranty Co., 150 N.C.App. 231, 563 S.E.2d 269 (2002)" \c 1 } was a coverage action arising out of a lawsuit involving an automobile accident on 18 October 1991 caused by a member of the Country Club. The member of the Club consumed alcoholic beverages at the Club following a Club golf tournament on 18 October 1991. As the member was driving home, he struck another vehicle, resulting in the death of the driver and serious injuries to the passenger. USF&G defended the action under a reservation of rights and settled the case.

In April 1991, USF&G directed its underwriters to attach to policies of insurance of insureds who served alcohol an amendment to the policy restricting coverage for liquor liability. The amendment would apply to insureds "in the business of" selling or furnishing alcohol. In August 1991, Davis, a senior USF&G underwriter, concluded that since the Club had a liquor license, the amendment applied to the Club, therefore, the Club should be informed that additional coverage

was necessary to insure liquor liability. After this decision by Davis, Davis talked with Grady, a member of the Club. Grady told Davis that the Club had "brown bag" events about six times a year. Based on this conclusion, Davis determined that the amendment to the policy "was going to be deleted." After the automobile accident, Davis sent a letter to the Club indicating that the amendment would be attached to the policy.

During the coverage trial, the Club presented evidence that Funk, a USF&G claims supervisor, concluded that the liquor liability exclusion did not bar coverage. He recommended that USF&G not send a reservation of rights letter. USF&G did send the reservation of rights letter and stated that the claim would be investigated. The day after the reservation of rights letter was sent, the home office of USF&G decided that there was "no coverage."

Also at trial, the Club presented the testimony of Don Roinestad, an expert in the fields of underwriting and claims handling. He was of the opinion that USF&G failed to follow "acceptable claims practices." Additionally, he testified that the reservation of rights letter was "totally inappropriate" because Davis had already decided to provide coverage. The jury found that USF&G had committed four separate acts constituting unfair and deceptive practices. The jury award after remittitur was $43,312.53. This amount was trebled to $129,037.59. The

trial judge additionally awarded costs of $12,530.52 and attorney's fees of $154,078.75.

The Court of Appeals affirmed. USF&G argued that an action under G.S. § 75-1.1 could not be maintained because the Club had failed to plead a claim under G.S. § 58-63-15(11), acts constituting unfair claims settlement practices in the insurance industry. The Court held that it was not necessary to allege a claim under Chapter 58 in order to recover under Chapter 75.

> This Court has noted "that unfair and deceptive acts in the insurance area are not regulated exclusively by Article 63 of Chapter 58, but are also actionable under N.C.Gen.Stat. § 75-1.1 . . . ." . . . . an insurer may violate N.C.Gen.Stat. § 75-1.1 separate and apart from any violation of Chapter 58, and that a plaintiff need not prove a violation of Chapter 58 in order to recover for unfair and deceptive practices. 563 S.E.2d at 277-278.

The Court of Appeals concluded that the jury's answers to the special interrogatories established a basis for the trial judge's finding of a violation of Chapter 75.

> . . . the jury determined that USF&G "prematurely and improperly" determined it would deny the Club's claim prior to conducting a "meaningful investigation"; that USF&G "misrepresented" to the Club that it would investigate the claim and specifically the application of Exclusion C when it had already concluded it would deny the claim; that USF&G "unfairly" and "improperly" sent a reservation of rights letter based on Exclusion C without having "an adequate or documented basis to reverse Mr. Funk's position to not reserve rights as to Exclusion C document on 11/19/91"; and that USF&G solicited an opinion letter from counsel only after having made its decision regarding coverage. 563 S.E.2d at 279.

III. Trial Practice and Procedure

A. Statutes and Period of Limitation and Repose

The plaintiffs in Alford v. Catalytica Pharmaceuticals, Inc., 150 N.C.App. 489, 564 S.E.2d 267 (2002), per curiam reversed, 356 N.C. 654, 577 S.E.2d 293 (2003) filed Woodson claims against their employer for personal injury and intentional infliction of emotional distress. The trial court and the Court of Appeals dismissed the claims as being barred by the one-year statute of limitations for intentional torts. The Supreme Court reversed for the reasons stated by Judge Thomas in his dissenting opinion for application of the three-year statute of limitations.

> However, in Owens v. W.K. Deal Printing, Inc., 339 N.C. 603, 453 S.E.2d 160 (1995), our Supreme Court explained that a Woodson claim is not an intentional tort "in the true sense of that term." Id. at 604, 453 S.E.2d at 161. In Pendergrass v. Card Care, Inc., 333 N.C. 233, 424 S.E.2d 391 (1993), our Supreme Court stated that a Woodson claim involved a "higher degree of reckless negligence than willful, wanton and reckless negligence[,]" but did not say the claim involved an intentional tort. Id. at 240, 424 S.E.2d at 395. (Emphasis added) . . . .

> If that "true intentional tort test" is indeed "more rigorous," then by the majority's own description section 1-54(3) is not applicable. Therefore, this claim, as with intentional infliction of emotional distress, must be controlled by the catch-all three-year statute of limitations in section 1-52(5). See also Smith v. Cessna Aircraft Co., Inc., 571 F.Supp. 433 (M.D.N.C.1983) (holding that absent other specific limitation, N.C.Gen.Stat. § 1-52(5) is applicable.) 564 S.E.2d at 271-271.

The plaintiff in Shaw v. Mintz, 151 N.C.App. 82, 564 S.E.2d 593, per curiam reversed, 356 N.C. 603, 572 S.E.2d 782 (2002){ TA \l "Shaw v. Mintz, 151 N.C.App. 82, 564 S.E.2d 593, per curiam reversed, 356 N.C. 603, 572 S.E.2d 782 (2002)" \s "Shaw v. Mintz, 151 N.C.App. 82, 564 S.E.2d 593, per curiam reversed, 356 N.C. 603, 572 S.E.2d 782 (2002)" \c 1 } was injured in an automobile accident on 3 November 1997. The defendant died on 2 July 1998. Without knowing of the defendant's death, the plaintiff filed suit on 5 August 1999 to recover for injuries arising out of the 1997 accident. Service was made by restricted certified mail at the defendant's last known address. The plaintiff then filed an affidavit and proof of service showing service on the defendant. The defendant filed a motion to dismiss on 4 December 2000 based on the defense of the three-year statute of limitations. The trial court dismissed the action because the action was not instituted against the defendant's estate within the three-year period of limitations. The Court of Appeals affirmed, holding that the suspension of the statute of limitations in G.S. § 1-22 did not

apply because an administrator of the defendant's estate had not been appointed.

The Supreme Court reversed per curiam for the reasons stated by Judge Greene in his dissenting opinion.

> I do not believe N.C.Gen.Stat. §§ 1-22 and 28A-19-3 require a personal representative to be appointed before a plaintiff is entitled to a section 1-22 suspension of the statute of limitations in her claim against an estate. . . . If no representative or collector is appointed and thus no notice given for the presentation of claims against the estate, the time for the filing of the claim against the estate of the negligent decedent remains suspended. Prentzas v. Prentzas, 260 N.C. 101, 103, 131 S.E.2d 678, 680 (1963)("death suspended the running of the statute [of limitations] until the qualification of an administratrix"). . . . 564 S.E.2d at 595-596.

Teague v. Isenhower, ___N.C.App.___, ___S.E.2d___, 2003 WL 1903465 (2003){ TA \l "Teague v. Isenhower, ___N.C.App.___, ___S.E.2d___, 2003 WL 1903465 (2003)" \s "Teague v. Isenhower, ___N.C.App.___, ___S.E.2d___, 2003 WL 1903465 (2003)" \c 1 } alleged legal malpractice in the representation of Mr. Teague arising from an action for divorce, equitable distribution and child support. The judgment of divorce was entered in October 1996. The equitable distribution and alimony judgment was entered on 22 May 1998. The alimony judgment was appealed, but affirmed by the Court of Appeals on 30 December 1999. While the appeal was pending, Mrs. Teague moved for contempt based on allegations of failure to pay alimony. This issue was settled by a consent order. Mr. Teague discharged his attorney in January 2000. The

present action was filed in October 2001 and alleged claims for deficient representation relating to the trial of the equitable distribution and alimony claims. The trial court held that the plaintiff's claim arose on 22 May 1998, the date of the equitable distribution judgment and the last act of the defendant giving rise to the present claims. Since suit was not filed prior to 22 May 2001, the suit was barred.

The Court of Appeals affirmed dismissal of the action based on the statute of limitations defense.

> As with the legal malpractice claims relating to the equitable distribution action, the acts of negligence set forth by the plaintiff concerning the alimony action relate only to defendants' representation at the trial court level. Moreover, although defendants represented plaintiff in the appeal of the alimony award, plaintiff makes no contention that defendants failed to properly represent him in the appeal of his case. Thus, the last act of defendants giving rise to a cause of action relating to defendants' alimony representation occurred on 6 August 1998. By that date, plaintiff should have been aware of defendants' failure to present accurate information regarding plaintiff's and his ex-wife's financial status. Since plaintiff filed his complaint on 12 October 2001, after the statute of limitation lapsed, we uphold the trial court's 12(b)(6) dismissal of his claims arising from the equitable distribution action. ___S.E.2d at ___.

The plaintiff in Fender v. Deaton, 153 N.C.App. 187, 571 S.E.2d 1, review denied, 356 N.C. 612, 574 S.E.2d 680 (2002){ TA \l "Fender v. Deaton, 153 N.C.App. 187, 571 S.E.2d 1, review denied, 356 N.C. 612, 574 S.E.2d 680 (2002)" \s "Fender v. Deaton, 153 N.C.App. 187, 571 S.E.2d 1, review denied, 356 N.C. 612, 574 S.E.2d 680 (2002)" \c 1 } alleged legal

malpractice arising out of the defendant's representation of the plaintiff. The defendant properly filed suit on behalf of the plaintiff for breach of contract. Without the plaintiff's knowledge, the plaintiff voluntarily dismissed the action without prejudice on 1 October 1990. The plaintiff alleged that he did not discover the voluntary dismissal until November 1993. The present action was filed on 9 October 1996.

The trial court dismissed the action as being barred by the three-year statute of limitations in G.S. § 1-15(c). The Court of Appeals affirmed, holding that the "last act of the defendant giving rise to the cause of action" occurred on 1 October 1991, the last opportunity for the defendant to refile the plaintiff's action for breach of contract. The Court specifically rejected the plaintiff's argument to extend the statute of limitation under the "continuing course of treatment" doctrine applicable to medical malpractice actions. The Court also disagreed with the plaintiff's contention that the fraud statute of limitations in G.S. § 1-52(9) should apply "because the plaintiff's allegations of fraud are in essence claims of legal malpractice which are governed by the three-year statute of limitations under N.C.Gen.Stat. § 1-15(c).

Mabry v. Huneycutt, 149 N.C.App. 630, 562 S.E.2d 292 (2002){ TA \l "Mabry v. Huneycutt, 149 N.C.App. 630, 562 S.E.2d 292 (2002)" \s "Mabry v. Huneycutt, 149 N.C.App. 630, 562 S.E.2d 292 (2002)" \c 1 } arose

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

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

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

> In the present case, the accident and alleged personal injuries in question occurred on 27 June 1997. N.C.Gen.Stat. § 1-52 would bar a personal injury action arising out of this accident after three years, or as of 27 June 2000. However, Mr. Kimrey died on 7 November 1997, at which time the three-year limitations period had not yet expired. Plaintiff's cause of action against Mr. Kimrey survived Mr. Kimrey's death, see N.C.Gen.Stat. § 28A-18-1 (19998),

> and thus, pursuant to N.C.Gen.Stat. § 1-22, plaintiff is permitted to commence this . . . action . . . provided either (1) it is brought within the time specified for presentation of claims in N.C.Gen.Stat. § 28A-19-3, or (2) notice of the claim upon which the action is based is presented to the personal representative or collector within the time specified for the presentation of claims in N.C.Gen.Stat. § 28A-19-3 . . . by the date specified in the general notice to creditors . . . . 562 S.E.2d at 294.

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

B. Amendment to Pleadings, Rule 15{ TC "B. Amendment to Pleadings, Rule 15" \f C \l "2" }

The plaintiff in Pierce v. Johnson, ___N.C.App.___, 571 S.E.2d 661 (2002){ TA \l "Pierce v. Johnson, ___N.C.App.___, 571 S.E.2d 661 (2002)" \s "Pierce v. Johnson, ___N.C.App.___, 571 S.E.2d 661 (2002)" \c 1 } was injured in an automobile accident on 14 October 1997 caused by the negligence of John Daniel Johnson. John Daniel Johnson died on 4 May 1999 from causes unrelated to the 1997 automobile accident. His son, Roby Daniel Johnson, qualified as

executor of the estate and published the appropriate notices requiring claims against the estate to be presented by 21 October 1999.

The present suit was filed on 28 April 2000. The plaintiff did not know of the death of John Daniel Johnson and served him at his last known address. The decedent's son accepted service by signing his name, "Daniel Johnson." Signing the pleadings as "Attorney for Defendant," Attorney Rowe moved to dismiss the complaint under Rules 12(b)(2)(4) and (5) for lack of jurisdiction, insufficiency of process and insufficiency of service of process. In response to the defendant's motion to dismiss, the plaintiff filed a "Proof of Service" showing that "Daniel Johnson" had accepted service. The plaintiff also took out alias and pluries summons and kept them alive until the action was dismissed by the trial court. Attorney Rowe also filed two offers of judgment, interrogatories and requests for documents. After the statute of limitations had run, Attorney Rowe filed a notice of hearing for 16 February 2001 on the defendant's motion to dismiss. At the hearing on the motion to dismiss, the plaintiff learned for the first time of the death of John Daniel Johnson. The trial court denied the plaintiff's motion to amend and substitute the estate of John Daniel Johnson as the defendant. The trial court also granted the defendant's motion to dismiss.

The Court of Appeals reversed. The Court first addressed the issue of whether the plaintiff had a right to amend the complaint under Rule 15(a). Concluding that the defendant had never filed a responsive pleading, the Court held that the plaintiff could amend her complaint as a matter of right.

> Here, the defendant's motions to dismiss under Rules 12(b), 17, and 19 were not responsive pleadings. Likewise, the offers of judgment, interrogatories, request for production of documents, and request for monetary relief sought, were not responsive pleadings. The record further shows that Pierce had not previously amended her complaint. Therefore, we conclude Ms. Pierce was entitled under Rule 15(a) to amend her complaint. 571 S.E.2d at 663.

As to the motion to substitute the estate of John Daniel Johnson as a defendant, the Court held that the amendment was to correct a misnomer and not to add a new party as prohibited by Crossman v. Moore, 341 N.C. 185, 459 S.E.2d 715 (1995) and Franklin v. Winn Dixie Raleigh, Inc., 117 N.C.App. 28, 450 S.E.2d 24 (1994), aff'd per curiam, 342 N.C. 404, 464 S.E.2d 46 (1995).

> Here, in contrast, John Daniel Johnson and the estate of John Daniel Johnson, although separate, are connected and dependent legal entities. Indeed, the life of John Daniel Johnson is a condition precedent to the estate of John Daniel Johnson. John Daniel Johnson, a legal entity, is transformed, after death, into the estate of John Daniel Johnson, a legal entity. Unlike Winn Dixie Raleigh, Inc. and Winn Dixie Stores, Inc., the life and estate of John Daniel Johnson are inextricably dependent: Death of the person is a point at which a legal transformation to an estate can occur. Once death occurs, the legal entity known as the life of John Daniel Johnson can

> never again have legal standing. As a consequence, anyone with the legal authority to accept service of process for the estate, is necessarily apprised of an adverse legal claim even if the complaint names the decedent rather than the estate as a defendant. 571 S.E.2d at 665.

Addressing next the equities of the proposed substitution, the Court noted that the intended defendant, the son as executor of his father's estate, was actually served. Based on this service, the estate had been represented by counsel throughout the litigation and would not be prejudiced by the amendment. Finally, based upon the pleadings filed by the defendant and the fact that the plaintiff was not informed of the death of John Daniel Johnson until the hearing on the motion to dismiss, the Court also concluded that the defendant was equitably estopped from relying upon the statute of limitations.

C. Service{ TC "C. Service" \f C \l "2" }

The plaintiff in Sowell v. Clark, 151 N.C.App. 723, 567 S.E.2d 200 (2002){ TA \l "Sowell v. Clark, 151 N.C.App. 723, 567 S.E.2d 200 (2002)" \s "Sowell v. Clark, 151 N.C.App. 723, 567 S.E.2d 200 (2002)" \c 1 } was struck from the rear by a vehicle operated by the defendant. The defendant's answer and a subsequent motion to dismiss for insufficiency of service of process alleged that the defendant did not live at the address listed and the person served was not authorized to accept service for the defendant. The trial judge denied the defendant's motion to dismiss. The defendant's

answer also included an offer of judgment of $1,000. The jury returned a verdict for the plaintiff of $4,940. The trial judge awarded attorney fees of $5,445.

The Court of Appeals affirmed. As to the defendant's motion to dismiss for insufficiency of service, the defendant testified at his deposition that he lived with his father at 411 Boyce at the time of service. This was the address listed on the summons. On appeal, the defendant argued an additional grounds for dismissal and alleged that the sheriff did not leave a copy of the summons and complaint for him at the residence. In rejecting the new argument for insufficiency of service, the Court of Appeals noted that a defendant waives a Rule 12(b)(2) defense if it was not raised in the answer. Since this new ground was raised for the first time on appeal, the Court held that it had been waived.

As to the award of attorney fees, the defendant contended that the total of the jury award, attorney fees and costs was $11,130.23. Since the total was in excess of $10,000 in G.S. § 6-21.1, attorney fees were not authorized. In rejecting this argument, the Court held that damages and costs are "legally separate." Damages are compensation for injuries caused by the negligence of another. A party's costs are generally not recoverable as an element of damages. Thus, the judgment finally obtained by the plaintiff was "more favorable than the

defendant's offer of judgment," entitling the trial judge to award attorney fees.

D. Appeal{ TC "D. Appeal" \f C \l "2" }

The plaintiff in RPR & Associates, Inc. v. University of North Carolina at Chapel Hill, 153 N.C.App. 342, 570 S.E.2d 510 (2002), review denied and certiorari dismissed, ___N.C.___ (2003){ TA \l "RPR & Associates, Inc. v. University of North Carolina at Chapel Hill, 153 N.C.App. 342, 570 S.E.2d 510 (2002), review denied and certiorari dismissed, ___N.C.___ (2003)" \s "RPR & Associates, Inc. v. University of North Carolina at Chapel Hill, 153 N.C.App. 342, 570 S.E.2d 510 (2002), review denied and certiorari dismissed, ___N.C.___ (2003)" \c 1 } alleged breach of contract by the defendants relating to the construction of the George Watts Hill Alumni Center on the campus of the University of North Carolina at Chapel Hill. The trial court granted the 12(b)(6) motion to dismiss of the State, but denied similar motions by the North Carolina Department of Administration (DOA). DOA filed a notice of appeal, however, the plaintiff continued with the case in the trial court against DOA. The trial court denied the motion of DOA to stay the action pending appeal. The Court of Appeal and the Supreme Court denied motions by DOA for writ of supersedeas and certiorari. After DOA's case was argued in the Court of Appeals, but before a decision was rendered, the case was tried. The trial court entered a judgment finding that DOA had breached

the contract and awarded damages against DOA of $851,058 and interest of $748,931. The Court of Appeals then issued an opinion determining that because the motion to dismiss was based on sovereign immunity, the denial of the motion affected a substantial right and was, therefore, immediately appealable. The Court of Appeals concluded that DOA had waived sovereign immunity by entering into the contract with the plaintiff.

The plaintiff and DOA both appealed from the trial court's judgment. The Court of Appeals held that the trial court did not err in continuing to exercise jurisdiction over the case after DOA's appeal. In reaching this decision, the Court addressed the issues relating to appeals of interlocutory orders. If there is an appeal of an immediately appealable interlocutory order, the trial court has no authority during the appeal to try the case. When there is an appeal from a non appealable interlocutory order, the trial court is not deprived of jurisdiction and may try the case. The trial court has the authority to determine whether its orders affect a substantial right or are otherwise immediately appealable. Utilities Commission v. Edmisten, Attorney General, 291 N.C. 361, 230 S.E.2d 671 (1976).

> Because the trial court had the authority to determine whether its order affected defendant's substantial rights or was otherwise immediately appealable, the trial court did not err in continuing to exercise jurisdiction over this case after defendant filed its

> notice of appeal. The trial court's determination that the order was nonappealable was reasonable in light of established precedent and the repeated denials by the appellate courts of this State to stay proceedings. Although this Court ultimately held that defendant's appeal affected a substantial right, it also held that defendant was not immune to suit. Defendant states no grounds nor has it produced any evidence to demonstrate how it was prejudiced by the trial court's exercise of jurisdiction over this case. 570 S.E.2d at 515.

Van Engen v. Que Scientific, Inc., 151 N.C.App. 683, 567 S.E.2d 179 (2002){ TA \l "Van Engen v. Que Scientific, Inc., 151 N.C.App. 683, 567 S.E.2d 179 (2002)" \s "Van Engen v. Que Scientific, Inc., 151 N.C.App. 683, 567 S.E.2d 179 (2002)" \c 1 } was a suit for unpaid wages and discriminatory employment practices arising from the plaintiff's employment with the defendant. Suit was filed on 17 August 1998 and served by registered mail on 19 August 1998 on the defendant's registered agent, Regina Dean. John Dean, president of the defendant, filed an affidavit on 30 September 1998 describing the defendant's assets in North Carolina. On 15 February 1999, the defendant notified the plaintiff that the defendant could no longer afford to defend the action and would not resist a judgment against it.

On 3 March 1999, the plaintiff filed a motion for summary judgment against Que Scientific, Inc. On 2 August 1999, the plaintiff filed a motion to amend the complaint to add John and Regina Dean as individual defendants. The trial court heard and granted the motion to amend on 18 August 1999. At the same

hearing, the trial court granted the plaintiff's motion for summary judgment and entered judgment against Que Scientific, Inc. and the Deans on 18 August 1999 for $41,748. On 1 September 2000, the Deans filed a motion pursuant to Rule 60(b) to set aside the judgment entered on 18 August 1999 against them on the grounds that the court did not have jurisdiction over them because they had not been served with a copy of the amended complaint or the motion for judgment against them. On 5 January 2001, the trial court granted the Deans' Rule 60(b) motion and set aside the judgment against them. The trial court denied the plaintiff's motion to certify the order for immediate appeal under Rule 54(b).

The Court of Appeals held that the plaintiff's appeal was interlocutory and dismissed the plaintiff's appeal of the trial court's order denying Rule 54(b) certification. The Court noted that the proper method for appeal an interlocutory order is to contend that the interlocutory order affects a substantial right, or to petition for a writ of certiorari pursuant to N.C.R.App.P. 21(b). The Court treated the plaintiff's appeal as a petition for certiorari, granted the petition and addressed the merits of the plaintiff's appeal.

The Court of Appeals affirmed the trial court's finding that it did not have jurisdiction over the Deans because they had never been served pursuant to Rule 4. The action,

therefore, as to the Deans was "deemed never to have commenced" against them because they had not been notified that they were being sued in their individual capacity. 567 S.E.2d at 183. The Court rejected the plaintiff's argument that the Deans had waived jurisdiction as a result of Mr. Dean's affidavit concerning assets of Que Scientific in North Carolina and Mrs. Dean's acceptance of service as the registered agent of Que Scientific. Both actions by the Deans were in their capacity as agents and officers of Que Scientific.

The plaintiff also argued that the Deans' Rule 60(b) motion was untimely and that it required one superior court judge to overrule another superior court judge. Rule 60(b) requires only that the motion be made "within a reasonable time." Because the Deans' motion contested jurisdiction, it could be made at any time. Additionally, the trial court's ruling on the Deans' Rule 60(b) motion did not require overruling a previous order of a superior court judge. In accordance with Rule 60(b), it "relieves parties from the effect of an order." 567 S.E.2d at 184.

E. Evidence{ TC "E. Evidence" \f C \l "2" }

(1) Parol Evidence{ TC "(1) Parol Evidence" \f C \l "3" }

The plaintiff in Thompson v. First Citizens Bank & Trust Co., 151 N.C.App. 704, 567 S.E.2d 184 (2002){ TA \l "Thompson v.

First Citizens Bank & Trust Co., 151 N.C.App. 704, 567 S.E.2d 184 (2002)" \s "Thompson v. First Citizens Bank & Trust Co., 151 N.C.App. 704, 567 S.E.2d 184 (2002)" \c 1 } alleged that the defendant wrongfully dishonored the plaintiff's certificate of deposit. The plaintiff borrowed $10,500 from the defendant. The defendant required the plaintiff to purchase a $10,000 CD as collateral for the loan. The plaintiff met with Ms. Huggins, an employee of the Bank to execute documents necessary for the loan and purchase of the CD. Ms. Huggins gave the plaintiff a CD confirmation form acknowledging that the plaintiff had opened a CD account with an initial deposit of $10,000. The plaintiff paid the $10,500 loan as required and presented the CD confirmation form for payment. The defendant refused to pay on the grounds that the plaintiff had not made the initial $10,000 deposit to purchase the CD.

The Court of Appeals affirmed the trial court's ruling that the plaintiff recover the amount of the CD. As part of the Court of Appeals' reasoning that the defendant had not presented an issue of material fact, the Court of Appeals agreed with the trial court that an attempted affidavit of Ms. Huggins about non-payment of the $10,000 for the CD would not be considered as it violated the parol evidence rule. The Court held that the CD was a valid contract between the parties as evidenced by the CD confirmation form acknowledging that the plaintiff had opened a

CD account with an initial deposit of $10,000. The Huggins' affidavit stated that the plaintiff had mistakenly been given the CD confirmation form. Acknowledging cases permitting parol evidence to show lack of consideration, the Court of Appeals distinguished these cases because the contested contract in those cases referenced the consideration as a condition precedent. Thus, the parol evidence in those cases did not contradict the contract; rather, it confirmed the agreement of the parties. In the present case, the Huggins' affidavit attempted to contradict the CD confirmation contract that recited the deposit of $10,000 by the plaintiff.

> We conclude that defendant's affidavit (1) directly contradicts the clear language in the contract between the parties; (2) does not demonstrate that the CD was only to become effective upon the occurrence of some future contingency; (3) alleges a unilateral mistake by defendant; and (4) is therefore inadmissible as a violation of the parol evidence rule, and thus is not proper for consideration by the Court in ruling on plaintiff's summary judgment motion. 567 S.E.2d at 189.

(2) Experts{ TC "(2) Experts" \f C \l "3" }

Hummer v. Pulley, Watson, King & Lischer, ___N.C.App.___, 577 S.E.2d 918 (2003){ TA \l "Hummer v. Pulley, Watson, King & Lischer, ___N.C.App.___, 577 S.E.2d 918 (2003)" \s "Hummer v. Pulley, Watson, King & Lischer, ___N.C.App.___, 577 S.E.2d 918 (2003)" \c 1 } was an action alleging legal malpractice. The plaintiff was dismissed as a public school teacher and retained defendants to contest his

discharge. The plaintiff alleged that the defendants failed to request a hearing within the time required, thereby precluding him from contesting the grounds for dismissal. At trial, the defendants attempt to offer expert testimony to the effect that the dismissal proceedings would not have been different even if the defendants had timely requested a hearing. The trial judge excluded this testimony on the grounds that it would invade the province of the jury as the fact finder.

The Court of Appeals affirmed the trial court's exclusion of the opinion of the defendant's expert.

> . . . it is not necessary to present evidence of what the particular fact-finder would have done in the underlying case. Moreover, expert testimony is inadmissible when the expert is testifying to the legal effect of specific facts. . . . Finally, expert testimony simply telling the jury the result they should reach is also inadmissible. . . . In this case, the expert testimony proffered by defendants was offered to tell the jury what result the school board would have reached and thus the result the jury should reach as a legal conclusion from the facts and circumstances of plaintiff's dismissal. Therefore, the trial court properly excluded defendants' expert testimony. 577 S.E.2d at 924.

The plaintiff in Loy v. Martin, ___N.C.App.___, 577 S.E.2d 407, discretionary review allowed, ___N.C.___ (2003){ TA \l "Loy v. Martin, ___N.C.App.___, 577 S.E.2d 407, discretionary review allowed, ___N.C.___ (2003)" \s "Loy v. Martin, ___N.C.App.___, 577 S.E.2d 407, discretionary review allowed, ___N.C.___ (2003)" \c 1 } alleged personal injuries arising from an automobile accident caused by the defendant

running a stop sign. The defendant testified that he could not remember how the accident occurred. The defendants proffered David McCandless as an expert in accident reconstruction. The trial judge refused to permit McCandless to give his opinions concerning the speed of the vehicles before impact. The jury determined that the plaintiff was injured by the negligence of the defendant and awarded damages of one dollar. The trial court granted the plaintiff's motion for a new trial on the issues of damages.

Finding no "manifest abuse of discretion," the Court of Appeals affirmed the trial court's order granting the plaintiff a new trial on the issues of damages.

> In the present case, the court found, in part, that the jury's award to plaintiff of one dollar in damages was contrary to the evidence and inadequate. The court's finding was supported by uncontroverted evidence establishing defendant Joshua's negligence. Also, there was little to no evidence establishing that plaintiff was contributorily negligence, especially in light of (1) defendant Joshua not remembering the events surrounding the accident, and (2) Strickland's [eyewitness to accident] unbiased testimony supporting plaintiff's claim. Finally, the court found, and the evidence at trial tended to show, that "plaintiff incurred medical bills relating to the accident in the sum of $13,118.75." Thus, the trial court's decision to set aside the jury's award of damages did not constitute an abuse of discretion. 577 S.E.2d at 409-410.

Again, finding no abuse of discretion, the Court also affirmed the trial court's exclusion of any opinions by

McCandless concerning the speed of the vehicles involved in the accident.

> The admissibility of expert testimony is within the sound discretion of the trial court and will not be overruled absent an abuse of discretion. . . . "with respect to the speed of a vehicle, the opinion of a[n] . . . expert witness will not be admitted where he did not observe the accident, but bases his opinion on the physical evidence at the scene." . . . . Marshall v. Williams, 153 N.C.App. 128, ___S.E.2d___ 1, 5 (quoting Hicks v. Reavis, 78 N.C.App. 315, 323, 337 S.E.2d 121, 126 (1985)), appeal dismissed and disc. Review denied, 356 N.C. 614, 574 S.E.2d 683 (2002)
>
> Here, defendants sought to offer the expert opinion of McCandless regarding the speed of each vehicle at the time of impact. Yet, McCandless' expert opinion was (1) based solely on his view of the accident scene months after the collision, and (2) of no assistance in establishing the exact locations where the vehicles came to rest. Without having personally observed the accident, McCandless' opinion testimony was clearly inadmissible . . . . 577 S.E.2d at 410-411.

The plaintiff in Johnson v. Piggly Wiggly of Pinetops, Inc., ___N.C.App.___, 575 S.E.2d 797 (2003){ TA \l "Johnson v. Piggly Wiggly of Pinetops, Inc., ___N.C.App.___, 575 S.E.2d 797 (2003)" \s "Johnson v. Piggly Wiggly of Pinetops, Inc., ___N.C.App.___, 575 S.E.2d 797 (2003)" \c 1 } was shopping at the defendant's store when an altercation occurred involving employees of the defendant. As one of the defendant's employees was being chased through the store, the employee ran into the plaintiff causing her arms to be struck and her head pushed back. Among other injuries, the plaintiff alleged that she suffered an outbreak of painful shingles as a result of the injury. The jury awarded the

plaintiff medical expenses of $2,225.04 and $6,000 for pain and suffering for a total of $8,225.04. The trial judge awarded the plaintiff attorneys' fees of $8,000 pursuant to G.S. § 6-21.1.

On appeal, the defendant argued that the trial court erred in the admission of the testimony and opinions of Dr. Brookes Peters, the plaintiff's regular physician. Dr. Peters was tendered as an expert in the general practice of medicine. Dr. Peters testified that the cause of shingles is "poorly understood," but is thought to occur "at times of stress." Dr. Peters also testified that it was "possible" that the incident at the defendant's stores caused the plaintiff's shingles, but "I cannot say that it was certain."

The Court of Appeals affirmed the jury verdict in favor of the plaintiff. Discussing Cherry v. Harrell, 84 N.C.App. 598, 353 S.E.2d 433, disc.review denied, 320 N.C. 167, 358 S.E.2d 49 (1987), the Court stated that separate issues of admissibility and causation were present. Even though Dr. Peters expressed the opinion that it was "possible" that the store incident caused the shingles, his opinions were admissible.

> Thus, after Cherry, as to the admissibility of expert testimony on causation, as long as the testimony is helpful to the jury and based sufficiently on information reasonably relied upon under Rule 703, the testimony is admissible. No longer is testimony inadmissible for its failure to state it was based on "reasonable medical probability." The degree in which an expert testifies as to causation, be it "probable" or "most likely" or words of similar import, goes to

> the weight of the testimony rather than its admissibility. Applying this principle to the present case, we believe the testimony given by Dr. Peters was helpful to the jury. . . . We note that Dr. Peters' testimony was not baseless speculation because his diagnosis was based on his own personal diagnosis and treatment of plaintiff, and the prevailing knowledge of the causes of shingles. . . in light of his statement that it was "possible" that other events could have independently caused the shingles, this goes to the weight to be accorded his testimony by the jury, and not its admissibility. 575 S.E.2d at 802.

Dr. Peters' testimony by itself was not sufficient to establish causation because he testified that an event separate from the incident at the defendant's store could have caused the shingles. Combining Dr. Peters' opinions with the fact that the plaintiff had never experienced shingles before the incident, the outbreak occurred a few days after the incident and the incident caused the plaintiff to be upset were sufficient facts to establish causation.

> Despite the fact that the expert described the incident as "possibly" being the cause of the shingles outbreak, we believe that his opinion along with his explanation of why the medical community believes shingles occur and the other testimony . . . was "permissible, but not compulsory, that the jury infer" that the incident of 22 September 1997 caused plaintiff's physical injuries and emotional stress, which were the direct causes of plaintiff's shingles. This is so especially in light of the fact that the shingles manifested themselves so close in relation of time to the event. 575 S.E.2d at 804.

The plaintiff in Floyd v. McGill, ___N.C.App.___, 575 S.E.2d 789, review denied, ___N.C.___ (2003){ TA \l "Floyd v. McGill, ___N.C.App.___, 575 S.E.2d 789, review denied,

___N.C.___ (2003)" \s "Floyd v. McGill, ___N.C.App.___, 575 S.E.2d 789, review denied, ___N.C.___ (2003)" \c 1 } was injured in a rear-end collision caused by the defendant. The jury awarded Mrs. Floyd $750,000 for personal injuries and $75,000 to Mr. Floyd for loss of consortium. On appeal, the defendants alleged error in the admission of expert testimony at trial.

Over the defendant's objection, Dr. Ervin Batchelor was accepted by the trial court as an expert in neuropsychology. Dr. Batchelor expressed opinions about Mrs. Floyd's post-accident cognitive difficulties. In addition to his education and clinical experience, Dr. Batchelor testified concerning his training and experience in neurology and medicine. He did not have a medical degree in either area. The Court of Appeals held that the trial judge had correctly admitted the opinions of Dr. Batchelor.

> In the present case, Dr. Batchelor's testimony served to corroborate the testimony of Dr. Rao [a neurologist] and Dr. Brown [an otolaryngologist] regarding Mrs. Floyd's brain injury. Dr. Batchelor testified that he had received training and education in the field of neurology sufficient to render him qualified to testify to issues in this field. Dr. Batchelor's testimony was sufficient to permit the trial court to determine that Dr. Batchelor possessed training and experience to offer an opinion regarding Mrs. Floyd's brain injury that would be helpful to the jury. Additionally, defendants failed to demonstrate that Mrs. Floyd's conditions arose from other circumstances. There was sufficient evidence presented at trial to support her claim of brain injury, thereby rendering any error in the admission

of Dr. Batchelor's testimony harmless. 575 S.E.2d at 796.

The Court of Appeals also held that the trial judge had correctly admitted the testimony and opinions of Ms. Patricia Benfield, a cognitive rehabilitation expert, about Mrs. Floyd's evaluation and treatment for her brain injury. Her education, training and experience as a cognitive and vocational rehabilitation therapist qualified her to testify.

The plaintiffs in Connolly v. Robertson, 151 N.C.App. 613, 567 S.E.2d 193 (2002){ TA \l "Connolly v. Robertson, 151 N.C.App. 613, 567 S.E.2d 193 (2002)" \s "Connolly v. Robertson, 151 N.C.App. 613, 567 S.E.2d 193 (2002)" \c 1 } sought injunctive relief to prevent the defendant from using a road within the subdivision in which the plaintiffs lived. During the trial, the plaintiffs presented expert testimony through an attorney who testified that a 1927 agreement recorded in the Office of the Register of Deeds did not convey an interest in the road to the defendant. The defendant's attorney expert testified that the 1927 agreement did convey access to the road. The trial judge refused to permit the defendant's attorney expert to testify concerning his opinion as to the ownership of the road.

The Court of Appeals affirmed the trial court's exclusion of opinion by the defendant's expert on the grounds that his opinion was based on "inadequate facts and data."

> Attorney Parce attempted to base his expert opinion regarding defendant's fee simple ownership of the roads solely on (1) a deed whereby Penrod, Sr. conveyed property to the plaintiffs' predecessors in title while he was trustee, (2) a deed from Penrod, Jr. and his wife to defendant, and (3) the affidavit of Penrod, Jr. stating that he was Penrod, Sr.'s sole heir and that his father owned all the roads in Summer Haven. However, Attorney Parce testified that, aside from the deed, there was nothing in the Buncombe County public records officially granting Penrod, Sr. authority to hold the property as trustee. Secondly, there was no conclusive documentation to identify Penrod, Jr. as his father's sole heir. The only documentation establishing this allegation was Penrod, Jr.'s own affidavit and an unprobated, unrecorded copy of Penrod, Sr.'s will that Attorney Parce did not have with him in court. Finally, Penrod, Jr. personally struck out of his affidavit all references to his father having retained any ownership in the Summer Haven roads. Thus, having based his expert opinion on inadequate facts and data, the trial court did not abuse its discretion in excluding Attorney Parce's expert opinion and directing a verdict on this issue. 567 S.E.2d at 197-198.

(3) Impeachment{ TC "(3) Impeachment" \f C \l "3" }

Suarez v. Wotring, ___N.C.App.___, 573 S.E.2d 746 (2002), review denied, 357 N.C. 66, 579 S.E.2d 107 (2003){ TA \l "Suarez v. Wotring, ___N.C.App.___, 573 S.E.2d 746 (2002), review denied, 357 N.C. 66, 579 S.E.2d 107 (2003)" \s "Suarez v. Wotring, ___N.C.App.___, 573 S.E.2d 746 (2002), review denied, 357 N.C. 66, 579 S.E.2d 107 (2003)" \c 1 } was an action alleging medical malpractice. The jury returned a verdict finding that the plaintiff was not injured as a result of the defendant's negligence. Dr. Robert Allen testified as an expert witness for the plaintiff. After Dr. Allen testified, he

was released from his subpoena with the consent of the defendant. During the defendant's evidence, parts of Dr. Allen's pretrial deposition were read into evidence over the plaintiff's objection. Deposition extracts from two of the plaintiff's other testifying experts, Dr. Andrew Koman and Dr. Stuart Edelberg, were also read into evidence over objection of the plaintiff.

The Court of Appeals affirmed the trial court's allowance of the deposition testimony of experts who had testified during trial.

> When a witness is available, Rule 32(a) creates an independent exception to the hearsay rule and the proponent of that witness's deposition testimony need only show that (1) the party against whom the deposition is offered was present or represented at the deposition or had reasonable notice thereof, and (2) one of the enumerated purposes of Rule 32 is met. . . . Here, Allen, Koman, and Edelberg were all called as witnesses by plaintiffs. Defendants, in turn are "adverse to the party who called the deponent as a witness." Plaintiffs were present and represented at the taking of the depositions thereby meeting the requirement found in the introductory paragraph of Rule 32(a). Accordingly, Rule 32(a) permitted defendants to use any part or all of the depositions of Allen, Koman and Edelberg, who were available, as substantive evidence. 573 S.E.2d at 751.

F. Woodson Claims{ TC "F. Woodson Claims" \f C \l "2" }

Maraman v. Cooper Steel Fabricators, 146 N.C.App. 613, 555 S.E.2d 309 (2001), per curiam, affirming directed verdict for defendant Cooper Steel Fabricators, affirming directed verdict

for defendant James N. Gray Company, 355 N.C. 482, 562 S.E.2d 420 (2002){ TA \l "Maraman v. Cooper Steel Fabricators, 146 N.C.App. 613, 555 S.E.2d 309 (2001), per curiam, affirming directed verdict for defendant Cooper Steel Fabricators, affirming directed verdict for defendant James N. Gray Company, 355 N.C. 482, 562 S.E.2d 420 (2002)" \s "Maraman v. Cooper Steel Fabricators, 146 N.C.App. 613, 555 S.E.2d 309 (2001), per curiam, affirming directed verdict for defendant Cooper Steel Fabricators, affirming directed verdict for defendant James N. Gray Company, 355 N.C. 482, 562 S.E.2d 420 (2002" \c 1 } was a wrongful death action arising from an accident that occurred at a construction site. The decedent's estate sued the decedent's employer, Cooper Steel Fabricators, and the general contractor, James N. Gray Company. The decision by the Supreme Court is understood by the procedural history of the case. The trial court granted the motions for a directed verdict at the conclusion of the plaintiff's evidence. In the Court of Appeals, Judge Tyson wrote an opinion affirming directed verdicts for both defendants. Judge Greene concurred in that part of Judge Tyson's opinion that affirmed directed verdict for the defendant Gray. Judge Greene concurred in that part of Judge John's opinion reversing directed verdict for the defendant Cooper Steel. In affirming per curiam, the Supreme Court did not adopt the opinion of any of the judges writing for the Court of Appeals, stating:

> We reverse that portion of the Court of Appeals' opinion that found error in the trial court's entry of directed verdict for defendant Cooper Steel Fabricator's. We affirm that portion of the Court of Appeals' opinion that affirmed the trial court's entry of directed verdict for defendant James N. Gray Company. 562 S.E.2d at 421.

Gray was the general contractor for the construction of a warehouse in Huntersville. Gray contracted with Cooper Steel to perform steel fabrication. The decedent and his father were employed by Cooper Steel. On 15 December 1995, the decedent and his father were directed by Marlowe, a supervisor at Cooper Steel, to drop safety lines where work had been completed in order that the lines could be used in another section. After that work was completed, the decedent was working about thirty-one feet in the air, having been moved to that position in a bucket with hydraulic lift. No safety lines were present at this location. Additionally, problems were experienced with a crane used to raise a steel joist. As the decedent was positioning the joist, the joist bounced, struck the decedent in the head, causing him to fall and receive injuries resulting in his death. Cooper Steel was cited by OSHA for a serious violation. No citations were issued to Gray.

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

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

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

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

The decedent in Whitaker v. Town of Scotland Neck, ___N.C.App.___, 572 S.E.2d 812 (2002), review allowed, 356 N.C.

696, 579 S.E.2d 104 (2003){ TA \l "Whitaker v. Town of Scotland Neck, ___N.C.App.___, 572 S.E.2d 812 (2002), review allowed, 356 N.C. 696, 579 S.E.2d 104 (2003)" \s "Whitaker v. Town of Scotland Neck, ___N.C.App.___, 572 S.E.2d 812 (2002), review allowed, 356 N.C. 696, 579 S.E.2d 104 (2003)" \c 1 } was employed by the defendant and was assigned to a crew operating a garbage truck. As the truck used mechanical arms to lift a dumpster, the dumpster swing loose and pinned the decedent against the side of the truck, causing injuries that resulted in his death. In opposition to the defendant's motion for summary judgment, the plaintiff's evidence showed that a dumpster at the same location had fallen three weeks earlier, the defect in the mechanical arms had existed for two to six months, the defendant's safety director had been informed of the defect and OSHA issued five "serious" violations that related to the cause of the accident. The trial court granted the defendant's motion for summary judgment.

Holding that there was a genuine issue of material fact as to whether the defendant acted with substantial certainty to cause serious injury or death, the Court of Appeals reversed.

> Plaintiffs' affidavits and pleadings tended to show that the risk that caused decedent's death had existed for a relatively short but significant amount of time. Conflicting deposition testimony places the defect in existence at least three weeks before decedent's accident and possibly as long as six months before the accident. Plaintiffs' evidence showed that the defective instrumentality, in this case equipment on Truck Number 84, created a risk with high probability

> of injuring a town employee in the same manner that decedent was injured. The third factor of the Wiggins [v. Pelikan, Inc., 132 N.C.App. 752, 513 S.E.2d 829 (1999)] test was satisfied by plaintiffs' claim that the Town's Public Works Superintendent Braddy knew of the defect and did not attempt to repair the defective Truck Number 84 in order to prevent injury. Also, plaintiffs' evidence demonstrated that the employer's conduct created the risk. The conduct creating the risk violated state and federal workplace safety regulations and failed to adhere to industry standards. Plaintiffs cite five serious violations by defendant according to the OSHA report in addition to the violations of standards contained with the Accident Prevention Manual which is produced by the National Safety Council. 572 S.E.2d at 815.

The plaintiff in Seymour v. Lenoir County, 152 N.C.App. 464, 567 S.E.2d 799 (2002), review denied, ___N.C.___, 577 S.E.2d 887 (2003){ TA \l "Seymour v. Lenoir County, 152 N.C.App. 464, 567 S.E.2d 799 (2002), review denied, ___N.C.___, 577 S.E.2d 887 (2003)" \s "Seymour v. Lenoir County, 152 N.C.App. 464, 567 S.E.2d 799 (2002), review denied, ___N.C.___, 577 S.E.2d 887 (2003)" \c 1 } was a volunteer firefighter for the Sandy Bottom Volunteer Fire Department. On 19 May 1997, the plaintiff was participating in a training exercise in which he entered a house that had been set on fire for the exercise. While in the house, the plaintiff was engulfed in flames and suffered severe burns and pulmonary injuries. He sued Lenoir County, the Fire Department and Mr. Goff, the instructor in charge of the exercise, alleging that his injuries resulted from an intentional act of the defendants

which they knew "would be substantially certain to cause Plaintiff serious injury or death."

The Fire Department moved to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1). The Fire Department contended it was immune from liability under the doctrine of sovereign immunity because it had not waived immunity by purchasing liability for intentional misconduct which it knew was substantially certain to cause serious injury or death. The Fire Department's insurance policies excluded coverage for bodily injury "expected or intended from the standpoint of the insured." Coverage was provided for an accident which was defined in the policy as resulting from bodily injury "which is neither expected or intended from the standpoint of the insured."

The Court of Appeals held that the Fire Department's policies did not provide coverage for intentional acts, therefore, it had not waived immunity.

> Because plaintiff alleged that defendant Fire Department engaged in intentional acts which were "substantially certain to cause Plaintiff serious injury or death," these acts do not meet the definition of an "accident." Thus, we conclude plaintiff did not alleged injuries by accident or as a result of an occurrence and the insurance policies at issue do not provide coverage for plaintiff's claim. Consequently, defendant Fire Department has not waived its sovereign immunity. We reverse the trial court's denial of defendant Fire Department's motion to dismiss for lack of subject matter jurisdiction. 567 S.E.2d at 802.

Goff argued that the plaintiff had two potential claims against him. Pleasant v. Johnson, 312 N.C. 710, 325 S.E.2d 244 (1985) requires that conduct of a co-employee be an intentional act which is willfully or wantonly negligent. Woodson requires that the employer know or should have known that the act would cause serious injury or death. In the present case, the plaintiff alleged that Goff's conduct was willful and wanton. Goff contended that he was an officer of the Fire Department, therefore, the plaintiff was required to allege that his conduct met Woodson's requirements; not those in Pleasant. The Court of Appeals disagreed and held that Goff's position as an instructor was that of a co-employee and similar to that in Pleasant. Therefore, the plaintiff could maintain an action against Goff based upon allegations that Goff's conduct was willfully and wantonly negligent "while also maintaining an action under the Workers' Compensation Act." 567 S.E.2d at 803.

The plaintiff in Caple v. Bullard Restaurants, Inc., 152 N.C.App. 421, 567 S.E.2d 828 (2002){ TA \l "Caple v. Bullard Restaurants, Inc., 152 N.C.App. 421, 567 S.E.2d 828 (2002)" \s "Caple v. Bullard Restaurants, Inc., 152 N.C.App. 421, 567 S.E.2d 828 (2002)" \c 1 } was the assistant manager of the defendant's Burger King restaurant. The defendant, Wayne Fields, was employed by the restaurant as a night porter. As night porter, Fields was responsible for the safety of employees of the restaurant when the restaurant

closed. Fields' employment application indicated that he had no criminal convictions. In fact, Fields had been convicted of several crimes, including breaking and entering and assault on a female. On the evening of 14 May 1998, the plaintiff closed the restaurant, counted the money in the registers and placed the money into the restaurant safe. After all employees had left, Fields assaulted the plaintiff with a pipe wrench, tied her up and stole the safe when he could not open it.

On 25 May 1998, the plaintiff signed a Form 21 Agreement, stating, among other things, that the injury for which she claimed benefits arose out of her employment. On 22 October 1998, the plaintiff filed a civil suit against her employer alleging claims based on negligent hiring and infliction of emotional distress. The trial court granted the employer's motion for summary judgment based on the exclusivity provisions of the Workers' Compensation Act.

The Court of Appeals affirmed dismissal as to the plaintiff's employer. The Court held that the plaintiff "is bound by her agreement [Industrial Commission Form 21] in which it was stated that the injury arose out of the employment." As in Woodson, however, "there may . . . only be one recovery."

The Court of Appeals also agreed with the trial court that the plaintiff's claim and evidence related to negligent hiring did not support a Woodson claim.

> Contrary to plaintiffs' contention, the facts show that the injury to Mrs. Caple arose out of her employment because of the causal relation between her job and the assaultive conduct. . . . It is certain that getting robbed was a risk that "might have been contemplated by a reasonable person familiar with the whole situation as incidental to the service." . . . She alleges that defendants failed to investigate Fields' application, and as a result he assaulted her during the robbery causing her severe emotional distress. . . . such conduct, at best, only shows that defendants were negligent in hiring and retaining Fields. It would still be insufficient to allege "conduct on the part of [defendants] substantially certain to cause injury or death and, therefore, [does] not meet the stringent requirements of Woodson." . . . Defendants had no indication during the three weeks of Fields' employment that he would commit such a crime. 567 S.E.2d at 833.

The plaintiffs in Baker v. Ivester, 150 N.C.App. 406, 563 S.E.2d 245 (2002){ TA \l "Baker v. Ivester, 150 N.C.App. 406, 563 S.E.2d 245 (2002)" \s "Baker v. Ivester, 150 N.C.App. 406, 563 S.E.2d 245 (2002)" \c 1 } were former employees of Fieldcrest Cannon and alleged injury as a result of workplace exposure to asbestos. The defendant, Ivester, was employed by Fieldcrest Cannon as an industrial hygienist. Ivester was responsible for informing Fieldcrest Cannon of areas in the plant to which employees may be exposed to asbestos and to provide management with recommendations for asbestos abatement. In summary, plaintiffs alleged that Ivester's job performance was "so deficient that as a matter of law it constituted willful, wanton and reckless negligence."

The Court of Appeals affirmed the trial court's grant of summary judgment in favor of the defendant.

> Plaintiffs failed to present evidence that defendant breached any duty owed to individual plaintiffs, or that he acted with actual or constructive intent to injure any individual plaintiffs. Further, plaintiffs have not cited any basis upon which to hold defendant individually liable for an industrial disease. There is nothing in the record indicating that defendant concealed from Fieldcrest, which had the legal responsibility for workplace safety, the fact that asbestos was an issue requiring Fieldcrest's attention. . . . We conclude that the record evidence clearly establishes as a matter of law that defendant did not engage in the type of "willful, reckless and wanton" conduct contemplated by the holding in Pleasant [v. Johnson, 312 N.C. 710, 325 S.E.2d 244 (1985)]. 563 S.E.2d at 248.

G. Release{ TC "G. Release" \f C \l "2" }

The plaintiff in Best v. Ford Motor Co., 148 N.C.App. 42, 557 S.E.2d 163 (2001), affirmed per curiam, 355 N.C. 486, 562 S.E.2d 419 (2002){ TA \l "Best v. Ford Motor Co., 148 N.C.App. 42, 557 S.E.2d 163 (2001), affirmed per curiam, 355 N.C. 486, 562 S.E.2d 419 (2002)" \s "Best v. Ford Motor Co., 148 N.C.App. 42, 557 S.E.2d 163 (2001), affirmed per curiam, 355 N.C. 486, 562 S.E.2d 419 (2002)" \c 1 } was involved in an accident on 4 September 1996 when her 1995 Ford Lincoln Town car was struck by a vehicle operated by Hart, an employee of Westport Corporation. The passenger-side air bag deployed, causing injury to the plaintiff. On 1 August 1997, the plaintiff signed a Covenant Not to Execute for $25,000, releasing Hart, his wife and liability insurance company and "all other persons, firms and corporations except Westport Corporation and Ford Motor Company." In December 1997, the

plaintiff settled with Hart and his employer, Westport, for $175,000. The release specifically released Hart, Westport "as well as all other persons, firms and corporations . . . from any and all actions, claims and demands . . . arising out of the accident." There were no exceptions to the December release.

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

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

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

> . . . plaintiff in the case at bar has failed to state with particularity the circumstances surrounding the alleged mutual mistake. Neither plaintiff's affidavit nor that of Jack Chappell [the adjuster for Westport's liability insurance company] indicated any conversation contemporaneous with the signing of the Release that would indicate mutual mistake of fact; plaintiff merely offers statements from herself and Chappell that they never intended to release anyone other than Hart and Westport. Further, we are not convinced that an affidavit, signed over three years after the execution of the Release, by a former claims adjuster, can appropriately state the intent of the company when the Release was executed. This is insufficient to produce a forecast of evidence demonstrating specific facts to show that plaintiff could establish a prima facie case at trial. 557 S.E.2d at 167.

Sudds v. Gillian, 152 N.C.App. 659, 568 S.E.2d 214 (2002), review denied, ___N.C.___ (2003){ TA \l "Sudds v. Gillian, 152 N.C.App. 659, 568 S.E.2d 214 (2002), review denied, ___N.C.___ (2003)" \s "Sudds v. Gillian, 152 N.C.App. 659, 568 S.E.2d 214 (2002), review denied, ___N.C.___ (2003)" \c 1 } was a claim for underinsured motorist coverage arising out of a three-car accident on 18 July 1996. The plaintiff was a passenger in a car operated by Shook that was traveling west on Rural Road 1003 in Catawba County. A vehicle operated by Coe was traveling east on the same road. As Coe stopped to make a left turn, his vehicle was struck in the rear by a vehicle owned by Eades and driven by Gillian. The impact caused the Coe vehicle to be propelled into the lane of travel of the plaintiff's vehicle, resulting in the plaintiff's injuries.

The Gillian-Eades vehicle was insured by Atlantic Indemnity Company. The Shook vehicle was insured by Nationwide Insurance Company and included underinsured motorist insurance that covered the plaintiff as a passenger in the Shook vehicle. The plaintiff was also covered by an underinsured motorist insurance policy issued by Horace Mann Insurance Company. During settlement negotiations, both Atlantic and Nationwide tendered a total of $100,000 to counsel to divide for the plaintiff and the other two occupants of the Shook vehicle. Counsel for the plaintiff and the other two occupants of the Shook vehicle corresponded with the claims representative of Atlantic requesting that the checks and releases be forwarded immediately. Atlantic's "Release of All Claims" included a provision releasing its insureds and "all other persons, firms, corporation, associations or partnerships" from all claims arising out of the accident. The releases were executed by the plaintiff and the other occupants of the Shook vehicle and returned to Atlantic.

Suit was then filed against Gillian, Eades, Atlantic and Horace Mann alleging claims for underinsurance motorist coverage and to reform the release based upon mutual mistake of fact. As grounds for the allegation of mutual mistake of fact, the plaintiff's attorney alleged that the correspondence and execution of the release had been written and handled by his

paralegal and that he had not reviewed the release. The Court of Appeals affirmed the trial court's grant of summary judgment in favor of Horace Mann, holding that the Atlantic release also released all tortfeasors, including Horace Mann.

> A release against the principal tortfeasor (negligent driver) also acts to release the UIM insurance carrier, as the liability of a UIM carrier is derivative of the principal tortfeasors' liability. . . . An otherwise valid release may be reformed, or re-written, if it was executed pursuant to a mutual mistake of fact. . . . A mutual mistake exists only when both parties "labor under the same misconception respecting a material fact, the terms of the agreement, or the provisions of the written instrument designed to embody such agreement." . . . . Further, "reformation on grounds of mutual mistake is available only where the evidence is clear, cogent and convincing." . . . . We conclude that plaintiff has alleged only his unilateral mistakes, and that, viewing the evidence in the light most favorable to plaintiff, no genuine issue of fact exists as to whether the release was executed pursuant to a mutual mistake of fact. 568 S.E.2d at 217-218.

H. Offers of Judgment, Rule 68{ TC "H. Offers of Judgment, Rule 68" \f C \l "2" }

The plaintiff and defendant in Phillips v. Warren, 152 N.C.App. 619, 568 S.E.2d 230 (2002), review denied, 356 N.C. 676, 577 S.E.2d 633 (2003){ TA \l "Phillips v. Warren, 152 N.C.App. 619, 568 S.E.2d 230 (2002), review denied, 356 N.C. 676, 577 S.E.2d 633 (2003)" \s "Phillips v. Warren, 152 N.C.App. 619, 568 S.E.2d 230 (2002), review denied, 356 N.C. 676, 577 S.E.2d 633 (2003)" \c 1 } were involved in an automobile accident. Before suit was filed, the defendant's insurance carrier offered the plaintiff $6,000. This offer was

declined, and suit was filed on 12 July 1999. Before trial, the defendant filed an offer of judgment for $11,000, "the total sum, in the aggregate, including costs now accrued and attorney's fees." As of the date of the last offer of judgment by the defendant, the plaintiff had incurred costs of $668.16 and reasonable attorney's fees of $4,649.84. The jury awarded the plaintiff $6,000.

As part of the plaintiff's motion for costs and attorney's fees, the plaintiff submitted evidence of costs of $991.31 and attorney's fees of $10,351.25 that had been incurred since the defendant's last offer of judgment. The trial court denied the plaintiff's motion for attorney's fees, allowed the defendant's motion for costs and granted in part the plaintiff's motion for costs.

The Court of Appeals initially examined the defendant's offer of judgment, noting that a party who makes an offer of judgment may: (1) separately identify the amount of the judgment and the amount of costs; (2) identify the amount of the judgment and leave the amounts of costs to be set by the court; or (3) specify a lump sum which includes the amount of the judgment and the amount of costs. The Court of Appeals concluded that the defendant's offer of judgment was a lump sum that covered the plaintiff's damages, costs and attorney's fees.

The defendant contended that its offer of judgment tolled the running of interest as of the time the offer was filed. The Court of Appeals disagreed based on the lump sum of the defendant's offer.

> We believe that prejudgment interest in actions other than contract can be tolled by a lump sum Rule 68 offer of judgment. However, whether the interest was tolled will not be known until a sum certain is available. For purposes of tolling prejudgment interest in actions other than contract, the sum certain to be used for comparison will be judgment finally obtained, calculated for Rule 68 purposes. . . . Thus, in calculating the judgment finally obtained in a case where the plaintiff refused a lump sum offer of judgment, the full amount of prejudgment interest, both pre- and post-offer shall be included along with the pre- and post-offer costs, the verdict and any attorney's fees. . . . Only if the lump sum Rule 68 motion prevails, the offer being greater than the judgment finally obtained, will the offer of judgment be effective so as to toll further accrual of interest. 568 S.E.2d at 235-236.

The Court of Appeals also held that the trial court erred by not including the plaintiff's post-offer costs in the judgment finally obtained. By including the plaintiff's full costs of $1,835.47, the judgment finally obtained was $8,448.47 (the judgment of $6,000, interest of $613 and costs of $1,835.47). The trial court denied the plaintiff's motion for attorney's fees under G.S. § 6-21.1. The plaintiff acknowledged that the trial court's decision could be reversed only for abuse of discretion. Because the Court of Appeal determined that the trial court erred in calculating prejudgment interests and

costs, the Court remanded the case to the trial court "for a re-determination of the appropriateness of attorneys' fees" based on the Court's decision. If the trial court awarded attorneys' fees to the plaintiff, the judgment finally obtained should be adjusted. After such adjustment, if any, for attorneys' fees, the judgment finally obtained could only then be determined as to whether the defendant's offer of judgment prevailed.

I. Sanctions, Rules 11 and 37{ TC "I. Sanctions, Rules 11 and 37" \f C \l "2" }

Patterson v. Sweatt, 146 N.C.App. 351, 553 S.E.2d 404 (2001), affirmed per curiam, 355 N.C. 346, 560 S.E.2d 792 (2002){ TA \l "Patterson v. Sweatt, 146 N.C.App. 351, 553 S.E.2d 404 (2001), affirmed per curiam, 355 N.C. 346, 560 S.E.2d 792 (2002)" \s "Patterson v. Sweatt, 146 N.C.App. 351, 553 S.E.2d 404 (2001), affirmed per curiam, 355 N.C. 346, 560 S.E.2d 792 (2002)" \c 1 } was the third of three actions filed by the plaintiff arising out of the search of his residence by Richmond County law enforcement officers and the seizure of evidence relating to sale and distribution of cocaine. This suit was filed in August 1999. Although the deputy sheriffs were served earlier, the defendant-surety was served on 27 September 1999. On 29 September 1999, the plaintiff served notice of the depositions of two of the deputies on 15 October 1999. Upon motion of the defendant-surety based on violation of Rule 30(a) for not obtaining leave

of court for depositions taken earlier than 30 days after service of the complaint, the trial court granted the defendant's motion for a protective order to cancel the depositions. On 19 October 1999, the surety filed a request for statement of monetary relief. Plaintiff filed with the Court a response to the request. On 16 November 1999, the plaintiff withdrew the statement of monetary relief requested, however, the withdrawal was without consent of leave of court. The trial court then dismissed the action based on filing the statement of monetary relief and withdrawal without leave of court and for improper filing of the deposition notices less than thirty days after service of the complaint.

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

> A dismissal of the action pursuant to N.C.G.S. § 1A-1, Rule 41(b) is one of the permissible sanctions for violating the provisions of Rule 8(a)(2) regarding pleading of damages in excess of ten thousand dollars. 553 S.E.2d at 357.

Although the trial court did consider less drastic sanctions, the plaintiff's history of discovery violations supported a

finding that the trial court did not abuse its discretion in dismissing the action.

The plaintiff in Johnson v. Harris, 149 N.C.App. 928, 563 S.E.2d 224 (2002){ TA \l "Johnson v. Harris, 149 N.C.App. 928, 563 S.E.2d 224 (2002)" \s "Johnson v. Harris, 149 N.C.App. 928, 563 S.E.2d 224 (2002)" \c 1 } alleged that the defendants, Durham police officers and the City of Durham, violated the plaintiff's Fourth Amendment and common law rights during a vehicle stop. Officer Fuller, one of the defendants, was being deposed when his attorney instructed him not to answer certain questions. After the trial court granted the plaintiff's motion to compel Fuller to respond to the questions objected to by his attorney, Fuller filed a motion for summary judgment. The City of Durham also filed a motion for summary judgment and attached an affidavit from Fuller. Fuller then filed an amended motion for summary judgment and attached his additional, second affidavit.

The plaintiff moved to strike the first affidavit of Fuller on the grounds that it was not based on personal knowledge as required by Rule 56(e). The plaintiff also filed a motion for sanctions against Fuller and his attorneys pursuant to Rule 56(g) on the basis that the affidavit was submitted in bad faith. Specifically, the plaintiff relied upon Fuller's repeated use of "car frisk" in his first deposition when

Fuller's reconvened deposition established that he had never heard the phrase "car frisk."

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

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

> The record indicates that plaintiffs reasonably believed, based on existing case law, that the appropriate means for seeking attorney's fees and costs associated with their Rule 56(e) motion to strike Fuller's affidavit was to move for sanctions pursuant to Rule 56(g). . . . Given the unusually sparse case law regarding Rule 56(g) and the meaning of "bad faith" in the context of Rule 56(g), we believe it would be unduly harsh to conclude that plaintiffs' motion for sanctions pursuant to Rule 56(g) was so unwarranted by existing law as to merit Rule 11 sanctions. . . . Rule 56(g) may be an appropriate basis for seeking sanctions even where a party files a merely "inappropriate" affidavit in support of, or in opposition to, a motion for summary judgment. 563 S.E.2d at 230.

The plaintiff in Static Control Components, Inc. v. Vogler, 152 N.C.App. 599, 568 S.E.2d 305 (2002){ TA \l "Static Control Components, Inc. v. Vogler, 152 N.C.App. 599, 568 S.E.2d 305 (2002)" \s "Static Control Components, Inc. v. Vogler, 152 N.C.App. 599, 568 S.E.2d 305 (2002)" \c 1 } produced and sold parts used in the remanufacturing of toner cartridges for computer laser printers. The plaintiff had never sold finished remanufactured cartridges. The defendant was employed by the plaintiff. When the defendant was initially employed by plaintiff, he signed a contract agreeing not to disclose trade secrets during the employment and for three years after the employment terminated. The defendant left the plaintiff's employment and formed a company that remanufactured and sold finished cartridges. The defendant's company did not remanufacture parts offered by the plaintiff.

The plaintiff wrote to the defendant, stating that it considered the defendant's business to compete with the plaintiff's business, and was, therefore, in violation of the defendant's employment agreement with the plaintiff. The defendant responded that he would comply with the agreement "to the extent it is enforceable." The plaintiff filed suit against the defendant for breach of contract and misappropriation of trade secrets. At the time the complaint was filed, the plaintiff obtained an ex parte temporary restraining order. The plaintiff later obtained a preliminary injunction.

The defendant's deposition of the plaintiff's operations manager and president and CEO established that the plaintiff did not sell remanufactured cartridges, planned to sell remanufactured cartridges some time in the future although it would put the plaintiff in competition with its customers, the defendant was not competing with the plaintiff and that the defendant had not disclosed any of the plaintiff's trade secrets. Four days after the CEO's deposition, the plaintiff took a voluntary dismissal. The defendant wrote the plaintiff indicating that the defendant believed it was entitled to Rule 11 sanctions. When the plaintiff did not respond, the defendant filed a motion for Rule 11 sanctions. The trial court granted the motion and awarded $5,918, specifically finding that the complaint was not based upon reasonable inquiry, was not well grounded in fact and was filed for an improper purpose.

The Court of Appeals affirmed. Addressing the trial court's finding that the verified complaint was not well grounded in fact or based upon reasonable inquiry, the Court was influenced by the fact that the complaint alleged affirmatively that the defendant was competing with the plaintiff and misappropriating trade secrets. The complaint did not allege that it had no evidence or information as to the defendant's actions or that the plaintiff had "a reasonable apprehension of

irreparable loss." The depositions of the plaintiff's officers established clearly that these allegations had no factual basis.

Addressing the trial court's findings that the complaint had been filed for an improper purpose, the plaintiff's CEO testified by deposition that the plaintiff was not satisfied with the defendant's response to the plaintiff's letter requesting compliance with the employment agreement. The CEO testified also that as soon as the defendant wrote a letter that he found satisfactory, he would instruct his attorney to drop the suit. The Court of Appeals found that the purpose of the lawsuit was not to obtain relief for an injury, "but to extract from defendant another letter promising to uphold the agreement." 568 S.E.2d at 310. This was an "improper purpose" supporting sanctions.

Finally, the plaintiff noted that it had obtained a preliminary injunction and defeated the defendant's motion for summary judgment. The plaintiff argued that surviving summary judgment established that the complaint was well grounded in fact and not filed for an improper purpose. The Court of Appeals declined to adopt a rule barring Rule 11 motions any time a party survived summary judgment.

Long v. Joyner, ___N.C.App.___, 574 S.E.2d 171 (2002), review denied, 356 N.C. 673, 577 S.E.2d 624 (2003){ TA \l "Long v. Joyner, ___N.C.App.___, 574 S.E.2d 171 (2002), review denied,

356 N.C. 673, 577 S.E.2d 624 (2003)" \s "Long v. Joyner, ___N.C.App.___, 574 S.E.2d 171 (2002), review denied, 356 N.C. 673, 577 S.E.2d 624 (2003)" \c 1 } was an action by the administratrix of the decedent's estate to set aside a deed to the defendants. During discovery, the plaintiff submitted interrogatories to the defendants inquiring as to whether the defendants had retained experts, if so, a summary of the expert's opinions, identification of the records provided to the experts and whether a written report from the expert had been prepared. The defendants identified Dr. McGann and Dr. Antin as "possible experts for trial," but otherwise objected because the individual defendants did not have the requested information since it was in the possession of their attorneys, and, additionally, such information was protected by the attorney-client privilege. The trial court ordered the defendants to answer the interrogatories. When the defendants did not answer as ordered, the trial court sanctioned the defendants pursuant to Rule 37 and ordered the payment of $1,980 for the plaintiff's attorney's fees. All issues in the case were subsequently settled except for the matter of discovery sanctions.

Although an order compelling discovery is interlocutory and not immediately appealable, the Court of Appeals addressed the issue of discovery sanctions because all other matters at issue had been resolved. The Court rejected the defendants' argument

that the defendants were not required to respond to interrogatories about experts because such information was known only by their attorneys.

> Although they did not hire the expert witnesses or interview the doctors, defendants were receiving the benefit of the doctors' consultation with their attorney. The attorney acts as an agent for the client. . . . This presumption of attorney authority and knowledge by the client arises with regards to the procedural matters in a lawsuit. . . . Choosing expert witnesses and obtain their testimony is a procedural pre-trial exercise typically left to the attorney. In this case, defendants' attorney was presumed to be working on the defendants' behalf when he hired expert witnesses and obtained their opinions for use at trial. Accordingly, the attorney's actions can be imputed to his clients in this instance. The sanction against defendants pursuant to Rule 37 could only be reversed upon a showing of abuse of discretion by the trial court. . . . Defendants have failed to show an abuse of discretion in the trial court's order for them to answer interrogatories regarding their attorney's hiring of expert witnesses. . . . However, plaintiff did not ask defendant for documents or tangible things. Instead, plaintiff inquired whether the experts hired by defendants had produced a report in written form. Plaintiff did not ask for the work product of defendants' attorneys, nor for the work product of defendants' expert witnesses. Accordingly, plaintiff's interrogatories did not violate Rule 26(b)(3) [work-product]. 574 S.E.2d at 175.

The Court also rejected the defendants' argument that the interrogatories exceeded the scope of what is allowed.

> Rule 26(b)(4) limits the amount of information a litigant can obtain through interrogatories concerning the substance of an expert opinion, but does not limit the request for information regarding the opinion's existence. When the trial court ordered defendants to answer the interrogatories in question, it did not abuse its discretion. 574 S.E.2d at 176.

J. Medicaid Subrogation{ TC "J. Medicaid Subrogation" \f C \l "2" }

The plaintiff in Campbell v. NC Dept. of Human Resources, 153 N.C.App. 305, 569 S.E.2d 670 (2002){ TA \l "Campbell v. NC Dept. of Human Resources, 153 N.C.App. 305, 569 S.E.2d 670 (2002)" \s "Campbell v. NC Dept. of Human Resources, 153 N.C.App. 305, 569 S.E.2d 670 (2002)" \c 1 } was injured in an automobile accident on 23 October 1999. At the time of the accident, the plaintiff was a minor and enrolled in the Medicaid program. The defendant paid $3,788 to medical care providers for injuries the plaintiff received in the accident. After the plaintiff's eighteenth birthday, he settled his personal injury claim for $25,000. In response to the defendant's request for reimbursement, the plaintiff filed a declaratory judgment action contending that he was not required to reimburse the defendant.

G.S. § 108A-59 provides that acceptance of Medicaid benefits is deemed an assignment to the State of third party benefits. The plaintiff argued that payments by the defendant were for medical bills for which he was not responsible as a minor. The defendant's payments, therefore, were on behalf of the plaintiff's parents. For this reason, he was not required to reimburse the defendant. G.S. § 108A-24(5) defines a "beneficiary" under the Act as "a person who receives benefits" and includes "payment made under insurance." The defendant is

entitled to recover the costs of medical treatment even if funds received by the minor are not reimbursement for medical expenses. Payne v. N.C. Dept. of Human Resources, 126 N.C.App. 672, 486 S.E.2d 469, disc. Review denied, 347 N.C. 269, 493 S.E.2d 656 (1997).

K. Workers' Compensation Claims{ TC "K. Workers' Compensation Claims" \f C \l "2" }

(1) Liens, G.S. § 97-10.2{ TC "(1) Liens, G.S. § 97-10.2" \f C \l "3" }

The plaintiff in Holden v. Boone, 153 N.C.App. 254, 569 S.E.2d 711 (2002){ TA \l "Holden v. Boone, 153 N.C.App. 254, 569 S.E.2d 711 (2002)" \s "Holden v. Boone, 153 N.C.App. 254, 569 S.E.2d 711 (2002)" \c 1 } was injured in an automobile arising out of and in the course and scope of his employment with John Williams Plumbing. The workers' compensation carrier accepted the claim and paid benefits of $56,342.92. The plaintiff, carrier and employer then entered into a Agreement of Final Settlement and Release under which the carrier reduced its lien to $24,151 and all parties to the Settlement agreed that the carrier would be repaid $24,151 without reduction under G.S. § 97-10.2. The Agreement was approved by the Industrial Commission.

The plaintiff filed suit against the adverse driver in the automobile accident and subsequently settled the claim for $30,000. When the workers' compensation carrier refused to

reduce its lien, the plaintiff filed a motion with the trial court to reduce the lien pursuant to G.S. § 97-10.2. The trial court reduced the compensation lien to $10,000.

The Court of Appeals vacated the decision by the trial court on the grounds that the trial court had no jurisdiction to reduce the lien. Under the Settlement Agreement, only the Industrial Commission had authority to reduce the lien.

> We hold that in order to adjust a lien amount agreed to in a workers' compensation claim settlement approved by the Commission, the parties must apply to the Industrial Commission under G.S. § 97-17. Plaintiff may not use G.S. § 97-10.2(j) to make an end-run around the duly executed and Commission-approved Agreement. The superior court has no jurisdiction to adjust a lien amount agreed upon in such an agreement. The order appealed is vacated. 569 S.E.2d at 714.

(2) Negligent Infliction of Emotional Distress{ TC "(2) Negligent Infliction of Emotional Distress" \f C \l "3" }

The plaintiff in Riley v. Debaer, 149 N.C.App. 520, 562 S.E.2d 69, per curiam affirmed, 356 N.C. 426, 571 S.E.2d 587 (2002){ TA \l "Riley v. Debaer, 149 N.C.App. 520, 562 S.E.2d 69, per curiam affirmed, 356 N.C. 426, 571 S.E.2d 587 (2002)" \s "Riley v. Debaer, 149 N.C.App. 520, 562 S.E.2d 69, per curiam affirmed, 356 N.C. 426, 571 S.E.2d 587 (2002)" \c 1 } received a compensable injury arising out of and in the course and scope of her employment. She filed the present action in superior court alleging negligent infliction of emotional distress arising out of her employer's vocational

rehabilitation efforts. The trial court and the Court of Appeals dismissed the action on the basis that the Industrial Commission had exclusive jurisdiction of the claim.

The Supreme Court affirmed the Court of Appeals per curiam. As the basis for affirming dismissal, the Court of Appeals stated:

> The plaintiff in the case at bar makes essentially the same argument as made by the claimants in Johnson and Deem—that defendants' mishandling of plaintiff's workers' compensation claim caused some type of tortious injury to the plaintiff for which the plaintiff seeks court sanctioned remedies. As stated by the Johnson and Deem Courts, "the North Carolina Workers' Compensation Act (N.C.Gen.Stat. § 97-1 through 97-200) gives the North Carolina Industrial Commission exclusive jurisdiction over workers' compensation claims and all matters, including issues such as those raised in the case at bar.'" . . . . Therefore, we find that in the instant case, plaintiff's claim of NIED was ancillary to the original claim and that the Workers' Compensation Act provides the sole remedy for plaintiff's NIED claim. 562 S.E.2d at 72.

(3) Employment Relationship{ TC "(3) Employment Relationship" \f C \l "3" }

The plaintiff in Huntley v. Howard Lisk Company, Inc., ___N.C.App.___, 573 S.E.2d 233 (2002), review denied, 357 N.C. 62, ___S.E.2d___ (2003){ TA \l "Huntley v. Howard Lisk Company, Inc., ___N.C.App.___, 573 S.E.2d 233 (2002), review denied, 357 N.C. 62, ___S.E.2d___ (2003)" \s "Huntley v. Howard Lisk Company, Inc., ___N.C.App.___, 573 S.E.2d 233 (2002), review denied, 357 N.C. 62, ___S.E.2d___ (2003)" \c 1 } applied for employment with the defendant as a truck driver.

The plaintiff was required to take a road test. As the plaintiff exited the cab of the tractor, she reached for the outside handhold. Because there were no outside handholds on this cab, she fell and broke her leg in three places. The trial court granted the defendant's motion for summary judgment.

The Court of Appeals affirmed summary judgment for the defendant. First, the Court agreed that there was no jurisdiction in the Industrial Commission for the claim because the employee-employer relationship did not exist at the time of the injury. Summary judgment was also proper because the defendant did not owe a duty of care to the plaintiff.

> The existence of handholds inside the cab, as well as the lack of similar devices on the outside, represented an open and safe condition which should have been apparent to someone exercising the proper level of care. Plaintiff testified during her deposition that there was nothing obstructing her view or preventing her from seeing that there were no handholds on the outside of the cab. Rather than exercise ordinary care, plaintiff chose to ignore the obvious condition and just assumed that handholds existed on the outside of the cab. Given this and other relevant evidence, we find that defendant clearly did not owe plaintiff a duty of care. 573 S.E.2d at 236.

L. Default Judgment{ TC "L. Default Judgment" \f C \l "2" }

The plaintiff in Hartwell v. Mahan, ___N.C.App.___, 571 S.E.2d 252 (2002), review denied, 356 N.C. 671, 577 S.E.2d 118 (2003){ TA \l "Hartwell v. Mahan, ___N.C.App.___, 571 S.E.2d 252

(2002), review denied, 356 N.C. 671, 577 S.E.2d 118 (2003)" \s "Hartwell v. Mahan, ___N.C.App.___, 571 S.E.2d 252 (2002), review denied, 356 N.C. 671, 577 S.E.2d 118 (2003)" \c 1 } alleged that Davidson County, Lexington Memorial Hospital and Dr. Mahan entered into a civil conspiracy resulting in "unlawful libel and slander" of the plaintiff. Davidson County and the Hospital obtained summary judgment in their favor. Based upon the failure of Dr. Mahan to answer, the plaintiff obtained an entry of default. Dr. Mahan's motion to set aside the default was denied by the trial court and affirmed by the Court of Appeals. Dr. Mahan's subsequent motion to dismiss the complaint pursuant to Rule 12(b)(2) was denied by the trial court and affirmed by the Supreme Court. Dr. Mahan's later motion for summary judgment based on affirmative defenses was granted by the trial court.

Holding that the default against Dr. Mahan prevented summary judgment in his favor, the Court of Appeals reversed and remanded to the trial court for a determination of the plaintiff's damages.

> We hold that where an entry of default has not been set aside and the complaint is sufficient to state a claim, the defendant in default may not defend its merits by asserting affirmative defenses in a motion for summary judgment. 571 S.E.2d at 254.

M. Court Costs{ TC "M. Court Costs" \f C \l "2" }

The plaintiff in Coffman v. Roberson, 153 N.C.App. 618, 571 S.E.2d 255 (2002), review denied, 356 N.C. 668, 577 S.E.2d 111

(2003){ TA \l "Coffman v. Roberson, 153 N.C.App. 618, 571 S.E.2d 255 (2002), review denied, 356 N.C. 668, 577 S.E.2d 111 (2003)" \s "Coffman v. Roberson, 153 N.C.App. 618, 571 S.E.2d 255 (2002), review denied, 356 N.C. 668, 577 S.E.2d 111 (2003)" \c 1 } recovered judgment against the defendant of $250,000 based upon allegations of medical malpractice. The defendant appealed in part the trial court's award of court costs to the plaintiff. First, the defendant argued that costs awarded in relation to the plaintiff's expert witness should not include fees that are not related to testimony in court. The Court of Appeals disagreed and affirmed the trial court.

> Here, the trial court taxed costs to defendants for court costs, N.C.Gen.Stat. § 7A-305(a), 305(d)(6), mediation costs, Sara Lee Corp. v. Carter, 129 N.C.App. 464, 500 S.E.2d 732 (1998), rev'd on other grounds, 351 N.C. 27, 519 S.E.2d 308 (1999), deposition costs, Sealey v. Grine, 115 N.C.App. 343, 444 S.E.2d 632 (1994), expert fees and expenses, supra., witnesses mileage expenses, N.C.Gen.Stat. § 7A-314(b), service of subpoenas, N.C.Gen.Stat. § 7A(b)(4), trial exhibits, and travel expenses for hearings and trial, Estate of Smith v. Underwood, 127 N.C.App. 1, 13, 487 S.E.2d 807, 815, disc.rev.denied, 347 N.C. 398, 494 S.E.2d 410 (1997) ("Since the enumerated costs sought by plaintiffs are not expressly provided for by law, it was within the discretion of the trial court whether to award them. Plaintiffs have not shown an abuse of discretion."). These costs were properly allowed under the authority of N.C.Gen.Stat. § 6-20 and N.C.Gen.Stat. § 7A-305. Defendants have failed to show the trial court abused its discretion in allowing these costs to be taxed to defendants. 571 S.E.2d at 262.

N. Rule 9(j) Certification{ TC "N. Rule 9(j) Certification" \f C \l "2" }

The plaintiff in Anderson v. Assimos, 356 N.C. 415, 572 S.E.2d 101 (2002){ TA \l "Anderson v. Assimos, 356 N.C. 415, 572 S.E.2d 101 (2002)" \s "Anderson v. Assimos, 356 N.C. 415, 572 S.E.2d 101 (2002)" \c 1 } sued several health care providers alleging medical malpractice based on failure to inform the plaintiff of risks related to use of a drug. The trial court dismissed the action based on the failure of the plaintiff to obtain the certification required by Rule 9(j). The Court of Appeals reversed the trial court, holding that Rule 9(j) violated the North Carolina and United States Constitutions.

The Supreme Court, per curiam, reversed the Court of Appeals because the complaint alleged res ipsa loquitur as the only basis for the claims of negligence. Reasoning that Rule 9(j) requires certification only when the plaintiff seeks to prove the defendant's care breached the applicable standard of care, the Supreme Court concluded that claims based on res ipsa loquitur did not require the Rule 9(j) certification.

O. Prejudgment Interest{ TC "O. Prejudgment Interest" \f C \l "2" }

The underlying action in Medical Mutual Insurance Co. v. Mauldin, ___N.C.App.___, 577 S.E.2d 680 (2003){ TA \l "Medical Mutual Insurance Co. v. Mauldin, ___N.C.App.___, 577 S.E.2d 680

(2003)" \s "Medical Mutual Insurance Co. v. Mauldin, ___N.C.App.___, 577 S.E.2d 680 (2003)" \c 1 } alleged medical malpractice arising out of the death of Mr. Houston. A jury returned a verdict finding negligence by Dr. Erdman, Dr. Mauldin and Sylva Anesthesiology and awarded damages of $725,000. While the appeal was pending, St. Paul Insurance Company, the carrier for Dr. Mauldin and Sylva Anesthesiology, settled with the Houston estate for $225,000. The settlement was approved by the trial court without notice to Dr. Erdman or his carrier, Medical Mutual. After the jury verdict was affirmed by the Court of Appeals, Medical Mutual paid $692,168 as full payment of the principal amount of the judgment and accrued, less the amount previously paid by St. Paul. As a result of being subrogated to Dr. Erdman's rights, Medical Mutual brought the present action for contribution to recover the amount paid in excess of its pro rata share of the jury verdict.

The trial court granted summary judgment against Medical Mutual on the basis that the post-judgment settlement extinguished its rights to contribution. The Court of Appeals reversed, holding that the settlement "does not permit one of multiple tortfeasors to avoid liability . . . for less than his pro rata share of the judgment." 137 N.C.App. at 700, 529 S.E.2d at 703. An equally divided Supreme Court affirmed the Court of Appeals without precedential value.

In the trial court, the parties agreed that Medical Mutual was owed $233,584, the balance of the pro rata share by Dr. Mauldin and Sylva Anesthesiology. Medical Mutual contended that it was also owed prejudgment interest on that amount from 30 April 1997, the date it satisfied the underlying jury verdict. The trial judge denied an award of interest to Medical Mutual on the grounds that the judgment was not within the categories set in G.S. § 24-5.

The Court of Appeal affirmed, holding that an award of contribution was not one for compensatory damages even though the underlying jury verdict was for compensatory damages.

> . . . equitable remedies which require the payment of money do not constitute compensatory damages as set forth in N.C.Gen.Stat. § 24-5(b). . . . prejudgment interest under 24-5(b) is "limited to sums due by contract and sums designated by the jury or other fact finder as compensatory damages in certain non-contract cases. . . . Likewise, here, even though the underlying judgment awarded compensatory damages, the apportionment of that judgment among the tortfeasors did not. Thus, we agree with the trial court that this action for contribution is derivative and based upon the codification of equitable principles and that prejudgment interest was properly denied. 577 S.E.2d at 682-683.

P. Negligent Infliction of Emotional Distress{ TC "P. Negligent Infliction of Emotional Distress" \f C \l "2" }

The plaintiff in Pacheco v. Rogers and Breece, Inc., ___N.C.App.___, ___S.E.2d___ 2003 WL 21003729 (2003){ TA \l "Pacheco v. Rogers and Breece, Inc., ___N.C.App.___, ___S.E.2d___

2003 WL 21003729 (2003)" \s "Pacheco v. Rogers and Breece, Inc., ___N.C.App.___, ___S.E.2d___ 2003 WL 21003729 (2003)" \c 1 } was the widow of Jose M. Pacheco. After Mr. Pacheco's death, he was buried at Hair Chapel Cemetery pursuant to a contract with Mrs. Pacheco. Approximately eight years after Mr. Pacheco's death, the defendant funeral home was contacted by a representative of Mr. Pacheco's mother who indicated that she wanted Mr. Pacheco's body disinterred and reburied in Puerto Rico. A petition to exhume Mr. Pacheco was granted by a superior court judge. No contact was made with Mr. Pacheco's widow until the body had been moved to Puerto Rico. The present action was for negligent infliction of emotional distress and breach of contract. The trial court granted the defendant's motion for summary judgment.

The Court of Appeals affirmed, primarily on the grounds that the plaintiff had produced no evidence in opposition to the defendant's motion.

> Plaintiff's unverified complaint included a bare assertion that she suffered emotional distress as a result of defendant's negligence. Further, in response to defendant's summary judgment motion, plaintiff failed to present any evidence in support of her unverified allegation of severe emotional distress. Plaintiff did not file any affidavits, take depositions, submit any medical documentation, or verify her complaint. Instead, plaintiff simply asserts in her brief that defendant "knew that its actions had been greatly upsetting emotionally to Plaintiff." The record does not support this statement. Plaintiff references a statement from Breece's deposition, "I know the wife is very concerned, but she has a balance on the _ but she has

> a balance on the funeral bill." Preliminarily, defendant's awareness that plaintiff was "very concerned" does not indicate that plaintiff suffered "severe emotional distress." . . . . Plaintiff also attempts to avoid her complete failure of proof on this issue by contending that she is not required to produce any evidence of emotional distress, because "some issues are simply too obvious to dispute, and are inferred by the court as a matter of law." Even assuming, arguendo, that some issues are "too obvious to dispute," the legal presence of severe emotional distress is not among these." ___S.E.2d at ___.

The plaintiff in Guthrie v. Conroy, 152 N.C.App. 15, 567 S.E.2d 403 (2002){ TA \l "Guthrie v. Conroy, 152 N.C.App. 15, 567 S.E.2d 403 (2002)" \s "Guthrie v. Conroy, 152 N.C.App. 15, 567 S.E.2d 403 (2002)" \c 1 } alleged that the was forced to quit work with her employer, Clegg's Termite and Pest Control, because of sexual harassment by Conroy, a co-employee. Claims in her complaint alleged intentional and negligent infliction of emotional distress, negligent retention by Clegg's of Conroy and civil assault. The trial court granted the defendants' motions for summary judgment on the claims alleging intentional and negligent infliction of emotional distress and negligent retention.

The Court of Appeals affirmed summary judgment for the defendants on the claims dismissed. Although there were statements by the plaintiff of sexual harassment, the complaint did not allege claims under Title VII. Instead, only claims of infliction of emotional distress were stated. The Court held

that the facts alleged did not support claims of negligent or intentional infliction of emotional distress.

> However, our review of the relevant case law indicates that claims of IIED based upon allegations of sexual harassment generally have included one or more of the following: an unfair power relationship between defendant and plaintiff; explicitly obscene or "X rated" language; sexual advances towards plaintiff; statements expressing desire to engage in sexual relations with plaintiff, or; defendant either touching plaintiff's private areas or touching any part of the plaintiff's body with his private parts . . . . we conclude that defendant Conroy's alleged behavior, while annoyingly juvenile, obnoxious, and offensive, does not rise to the level of "outrageous and extreme" as the term has been interpreted and applied in tort actions alleging IIED. We note that Conroy was not plaintiff's supervisor or workplace superior; that he did not swear or employ obscene language; that he referred to nothing more vulgar than a "wet T shirt"; that although he gave plaintiff a "shoulder rub" against her wishes, he never expressed any interest in sexual activity with plaintiff; and that, notwithstanding allegations in plaintiff's complaint that defendant dropped items down the front of her blouse, the only specific instance of this behavior she described was his throwing potting soil at her while she planted flowers. . . . we conclude that defendant Conroy's behavior was not "atrocious, and utterly intolerable in a civilized community" or "extreme and outrageous." 567 S.E.2d at 410.

Q. Arbitration{ TC "Q. Arbitration" \f C \l "2" }

(1) Waiver{ TC "(1) Waiver" \f C \l "3" }

Douglas v. McVicker, 150 N.C.App. 705, 564 S.E.2d 622 (2002){ TA \l "Douglas v. McVicker, 150 N.C.App. 705, 564 S.E.2d 622 (2002)" \s "Douglas v. McVicker, 150 N.C.App. 705, 564 S.E.2d 622 (2002)" \c 1 } arose from the plaintiff's contract for construction of the defendants' residence. As a result of a payment dispute, the

plaintiff filed a claim of lien and complaint against the defendants. The defendants filed a motion to dismiss for lack of jurisdiction based on an arbitration clause in the construction contract. The trial court denied the defendants' motion, finding that the defendants had waived the right to compel arbitration by engaging in discovery.

The Court of Appeals affirmed the trial court's conclusion that the defendants' had waived the right to compel arbitration.

> . . . the trial court concluded: (1) that defendants had taken advantage of judicial processes not available in arbitration; (2) that defendants benefitted from conducting discovery; (3) that plaintiff expended a significant amount of time and costs in responding to his prejudice; and (4) that defendants waived their right to compel arbitration in taking action inconsistent with their motion to dismiss based upon an arbitration clause. . . . The trial court further found that pursuant to N.C.Gen.Stat. § 1-567.8 (the Uniform Arbitration Act) and the rules of the American Arbitration Association, a party may engage in discovery only by leave of the arbitrator. . . . We conclude that defendants took advantage of and benefitted from a discovery procedure without leave of the arbitrator and that plaintiff was prejudiced in time and costs spent, as well as a lack of reciprocal discovery. 564 S.E.2d at 624.

(2) Court-Ordered, Nonbinding Arbitration{ TC "(2) Court-Ordered, Nonbinding Arbitration" \f C \l "3" }

Bledsole v. Johnson, 150 N.C.app. 619, 564 S.E.2d 902 (2002), reversed, ___N.C.___, ___S.E.2d___, 2003 WL 2006544 (2003){ TA \l "Bledsole v. Johnson, 150 N.C.app. 619, 564 S.E.2d 902 (2002) reversed, ___N.C.___, ___S.E.2d___, 2003 WL 2006544

(2003)" \s "Bledsole v. Johnson, 150 N.C.app. 619, 564 S.E.2d 902 (2002) reversed, ___N.C.___, ___S.E.2d___, 2003 WL 2006544 (2003)" \c 1 } arose out of an automobile accident on 18 November 1998 from which the plaintiff sought damages for personal injury. The defendant's answer admitted that his negligence was the proximate cause of the accident, but denied that the accident was the proximate cause of the plaintiff's injuries. The court ordered the parties to participate in nonbinding arbitration pursuant to G.S. § 7A-37.1. The plaintiff, her attorney and her witnesses were present at the arbitration. The defendant's attorney and a representative of the defendant's insurance carrier were also present. The defendant did not attend the arbitration hearing. The plaintiff was awarded $7,000 by the arbitrator. The defendant filed a timely request for a trial de novo. The plaintiff moved to strike the defendant's request for a new trial on the grounds that the defendant's absence from the arbitration hearing showed a lack of good faith and meaningful participation in the arbitration. The trial court granted the plaintiff's motion and entered an order enforcing the arbitration award. The Court of Appeals affirmed.

The Supreme Court reversed, holding that G.S. § 7A-37.1 does not require the attendance of parties and, also, does not require sanctions.

> . . . we conclude that the evidence was insufficient to support a finding that defendant did not participate in a good faith and meaningful manner in the arbitration proceeding. First, we note that Rule 3(p) requires either the defendant or his representative to be present. Mr. Stroud was present representing the defendant. . . . The record shows that plaintiff was on notice that the named defendant's insurance carrier had undertaken defense of the case and had retained Mr. Stroud's firm to represent defendant's interest. In his answer defendant had admitted negligence as to the collision; . . . . Accordingly, the presence or absence of the named defendant at the arbitration hearing in this particular case was immaterial. We hasten to note, however, that where liability has not been admitted, the presence of a party defendant will most likely be significant to the arbitration proceeding; and the party's absence may be evidence demonstrating a lack of good faith sufficient to trigger the imposition of sanctions under Rule 3(l). . . .
>
> . . . we note that unlike N.C.G.S. § 7A-38.1 authorizing mediated settlement conferences in superior court civil action, N.C.G.S. § 7A-37.1 does not require the attendance of the parties, "their attorneys and other persons or entities with authority, by law or by contract to settle the parties' claims," N.C.G.S. § 7A-38.1(f) (2001); nor does the court-ordered arbitration statute require sanctions as does the mediated settlement conference statute, N.C.G.S. § 7A-38.1(g). . . . we are of the opinion that the proper interpretation of language in Rule 3(p) that the representative be "authorized to make binding decisions . . . in all matters in controversy before the arbitrator" relates to matters that may arise during the course of the proceeding, such as evidentiary or legal issues, not to acceptance of the award or of a settlement offer. ___S.E.2d at ___.

R. Rule 59, Motion for New Trial{ TC "R. Rule 59, Motion for New Trial" \f C \l "2" }

The plaintiff in Roary v. Bolton, 150 N.C.App. 193, 563 S.E.2d 21 (2002){ TA \l "Roary v. Bolton, 150 N.C.App. 193, 563 S.E.2d 21 (2002)" \s "Roary v. Bolton, 150 N.C.App. 193, 563 S.E.2d 21 (2002)" \c 1 } was a passenger on a motorcycle operated by Bolton. Bolton failed to negotiate a curve and crashed the motorcycle causing injuries to the plaintiff. The jury returned a verdict for the defendant. Stating that the "jury's verdict in the trial of this matter was contrary to the overwhelming evidence of negligence presented by plaintiff in the trial of this case," the trial court granted the plaintiff's motion for a new trial.

Alleging abuse of discretion by the trial judge, the defendant appealed the grant of a new trial and the trial court's refusal to submit an issue of contributory negligence to the jury. At trial, Officer Wiktorek testified that he first saw the defendant's motorcycle when the motorcycle was traveling in his opinion at a speed of 80 m.p.h. in a 45 m.p.h. speed zone. As Officer Wiktorek followed the motorcycle, it was his opinion that the motorcycle reached speeds of up to 120 m.p.h. Bolton said that he lost control of the motorcycle when "weight shifted" as he went into a curve. The plaintiff testified at trial that Bolton told her "don't worry about it" when she asked why he was speeding.

At the closed of the plaintiff's evidence, the trial court denied the defendant's motion for a directed verdict. The

defendant did not present evidence. At the charge conference, the trial judge refused to submit an issue of contributory negligence. Although the jury found that the plaintiff was injured by the defendant's negligence, the jury did not award damages to the plaintiff.

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

> When a trial court orders a new trial, "the case remains on the civil issue docket for trial de novo", unaffected by rulings made therein during the original trial. . . . On retrial, a defendant would not be "bound by the evidence presented at the former trial. Whether his evidence at the new trial will support a motion for directed verdict cannot now be decided. 563 S.E.2d at 23.

S. Rule 9, Alleging Fraud{ TC " S. Rule 9, Alleging Fraud" \f C \l "2" }

The plaintiffs in Harrold v. Dowd, 149 N.C.App. 777, 561 S.E.2d 914 (2002){ TA \l "Harrold v. Dowd, 149 N.C.App. 777, 561 S.E.2d 914 (2002)" \s "Harrold v. Dowd, 149 N.C.App. 777, 561 S.E.2d 914 (2002)" \c 1

} retained the defendants to advise them concerning merger of the plaintiffs' optometry practice with a national organization. The initial merger proposal was received in 1995. After an initial investigation, the defendants advised against the merger. The defendants changed their recommendation after additional evaluation and the merger was agreed to on 27 October 1995. After the merger, the plaintiffs learned of misrepresentations by the national organization.

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

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

The allegations of fraud in the complaint were:

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

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

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

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

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

{ TC "T. Rule 606(b) – Improper Outside Influence Upon Juror" \f C \l "2" }

The plaintiff in Lindsey v. Boddie-Noell Enterprises, Inc., 147 N.C.App. 166, 555 S.E.2d 369 (2002), reversed per curiam,

355 N.C. 487, 562 S.E.2d 420 (2002){ TA \l "Lindsey v. Boddie-Noell Enterprises, Inc., 147 N.C.App. 166, 555 S.E.2d 369 (2002), reversed per curiam, 355 N.C. 487, 562 S.E.2d 420 (2002)" \s "Lindsey v. Boddie-Noell Enterprises, Inc., 147 N.C.App. 166, 555 S.E.2d 369 (2002), reversed per curiam, 355 N.C. 487, 562 S.E.2d 420 (2002)" \c 1 } alleged that he ordered a cup of water from the defendant's Hardee's restaurant. Upon drinking from the cup, the plaintiff became ill. At trial, the plaintiff presented evidence that the water contained a sanitizing solution that was used to clean dishes and counters. The trial was bifurcated on defendant's motion. The jury found that the defendant was negligent and awarded $32,500 in compensatory damages. During jury deliberations on punitive damages, the jurors delivered a note to the trial court indicating some difficulty in understanding the instructions on willful and wanton conduct. The jury then returned a verdict awarding no punitive damages to the plaintiff.

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

dictionary definitions was improper and that the plaintiff was prejudiced by the jury's improper conduct.

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

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

U. Jurisdiction{ TC "U. Jurisdiction" \f C \l "2" }

The plaintiff in Wyatt v. Walt Disney World Co., 151 N.C.App. 158, 565 S.E.2d 705 (2002){ TA \l "Wyatt v. Walt Disney World Co., 151 N.C.App. 158, 565 S.E.2d 705 (2002)" \s "Wyatt v. Walt Disney World Co., 151 N.C.App. 158, 565 S.E.2d 705 (2002)" \c 1 } was injured while she was visiting Walt Disney World Resort in Lake Buena Vista, Florida. The plaintiff had reservations at Dixie Landings, a hotel located at the Resort and owned by Lake Buena Vista Communities, Inc. As the plaintiff was riding a tram from the registration desk to her room, she fell from the tram. Suit was filed in Wilkes County Superior Court against Walt Disney World, Co., Lake Buena Vista Communities, Inc d/b/a Disney's Dixie Landings Resort and Claim Verification, Inc., a private investigation firm hired by Disney to investigate the plaintiff's claim. The trial court dismissed all claims against the Disney defendants for lack of jurisdiction.

The Court of Appeals affirmed dismissal as to the Disney defendants. On appeal, the plaintiff argued that Disney's retention of the private investigation firm to observe the plaintiff subjected Disney to specific jurisdiction in North Carolina as related to the North Carolina actions of the investigation firm. The Court disagreed. The firm was retained by Disney in Florida. Disney did not direct the firm as to the manner in which the investigation was to be conducted. Since

the firm was an independent contractor, none of its acts were imputed to Disney so as to subject Disney to specific jurisdiction.

The plaintiff also contended that as a result of the activities of the "Disney empire," the Disney defendants were subject to general jurisdiction in North Carolina. Evidence presented to the trial court established that Walt Disney World Co. did not advertise or otherwise conduct business in North Carolina. "The Disney Store" was a separate corporate entity not related to the defendants in the litigation. National advertisements for Walt Disney World that were not specifically "targeted" to North Carolina were also not sufficient for the exercise of general jurisdiction.

IV. State Farm Mutual Automobile Insurance Co. v. Campbell{ TC "IV. State Farm Mutual Automobile Insurance Co. v. Campbell" \f C \l "1" }

The Supreme Court of the United States further defined the constitutional requirements and factual grounds for punitive damages in State Farm Mutual Automobile Insurance Co. v. Campbell, ___U.S.___, 123 S.Ct. 1513, ___L.Ed.2d___ (2003){ TA \l "State Farm Mutual Automobile Insurance Co. v. Campbell, ___U.S.___, 123 S.Ct. 1513, ___L.Ed.2d___ (2003)" \s "State Farm Mutual Automobile Insurance Co. v. Campbell, ___U.S.___, 123 S.Ct. 1513, ___L.Ed.2d___ (2003)" \c 1 }. Application of the Court's reasoning reaches beyond the

issue of punitive damages and is relevant also to the conduct of a party occurring outside the State.

The decision arose from an automobile accident in Utah in 1981. The State Farm insured, Curtis Campbell, attempted to pass six vans traveling ahead of him on a two-lane highway. Todd Ospital was approaching Campbell from the other direction. As Ospital attempted to avoid hitting Campbell, Ospital swerved off the road, lost control of his automobile and hit a vehicle operated by Robert Slusher. Ospital was killed. Slusher received permanent, disabling injuries. Campbell was not injured.

Suit was filed by Slusher and the estate of Ospital. Campbell insisted that he was not at fault. The State Farm claims file confirmed that the liability of Campbell was clear. Offers by Slusher and the Ospital estate to settle within the policy limits of $50,000 were rejected by State Farm. State Farm investigators assured the Campbells that "their assets were safe, that they had no liability for the accident . . . and that they did not need to procure separate counsel." The jury determined that Campbell was 100 percent at fault and awarded damages of $185,849.

State Farm refused to pay the excess verdict. Counsel for State Farm suggested that Campbell "may want to put for sale signs on your property to get things moving." State Farm

refused to post a supersedeas bond or to allow Campbell to appeal the verdict. Campbell obtained his own counsel to appeal the judgment. During the appeal, Campbell reached an agreement with the Ospital estate and Slusher by which they agreed not to seek satisfaction of their judgments in return for Campbell filing a bad faith action against State Farm. After the Utah Supreme Court affirmed the jury verdict, State Farm paid the full judgment, including the amounts in excess of the policy limits.

In the present bad faith action, State Farm moved at trial to exclude evidence of any conduct by State Farm that occurred outside Utah and was not related to conduct that was the basis of Campbell's claim. The trial court denied the motion in limine. At trial, Campbell introduced evidence of "a national scheme to meet corporate fiscal goals by capping payouts on claims company wide." The trial court also allowed Campell's expert to testify about "fraudulent practices by State Farm in its nation-wide operations." Other evidence of State Farm practices over a twenty-year period and involving actions other than third-party claims was admitted. The jury awarded Campbell $2.6 million in compensatory damages and $145 million in punitive damages. The trial court reduced the award to $1 million in compensatory damages and $25 million in punitive

damages. Applying the Gore standards, the Utah Supreme Court reinstated the $145 million in punitive damages.

Concluding that the case was "neither close nor difficult," the Supreme Court reversed and remanded. Justice Kennedy delivered the opinion of the Court, joined by Chief Justice Rehnquist, and Justices Steven, O'Connor, Souter and Breyer. Justices Scalia, Thomas and Ginsburg dissented, primarily on the grounds that there is no constitutional protection against "'excessive' or 'unreasonable' awards of punitive damages."

The Court initially addressed the evidence considered at trial to award punitive damages; the Gore principle of "reprehensibility of the defendant's conduct." As it had warned in Gore, the Court confirmed that a State "cannot punish a defendant for conduct that may have been lawful where it occurred. . . . Nor, as a general rule, does a State have a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside the State's jurisdiction." ___U.S. at ___. The State also has no interest in punishing State Farm for "conduct that bore no relation to the Campbells' harm." ___U.S. at ___.

Turning to the second Gore issue of the ratio between the harm to the plaintiff and the punitive damages award, the Court initially refused to set a "bright-line ratio which a punitive damages award cannot exceed." ___U.S. at ___. The Court,

however, cautioned that "few awards exceeding a single-digit ratio . . . will satisfy due process." The Court repeated its conclusion in Haslip "that an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety." ___U.S. at ___. This was the ratio relied upon by the Court in Gore. As the amount of the compensatory award becomes "substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." ___U.S. at ___.

In applying the third Gore requirement, the Utah Supreme Court relied upon a civil sanction for fraud of $10,000. The Court observed that "this analysis was insufficient to justify the award." ___U.S. at ___.

Applying all of the Gore standards, the Court concluded that the facts of the Campbell case "likely would justify a punitive damages award at or near the amount of compensatory damages." ___U.S. at ___.