CLAIMS ARISING FROM A BREACH OF A FIDUCIARY DUTY

This manuscript is intended to serve as a reference for judges who are handling civil cases involving legal claims arising from fiduciary or confidential relationships between the litigants. In many instances, these claims are labeled as constructive fraud claims. In the first section of this paper, the essential elements of these claims are discussed. The second section of this paper addresses particular relationships which may or may not constitute a fiduciary or confidential relationship.

WHAT POLICIES ARE ADVANCED BY THIS BODY OF LAW

Essentially, the law in this area seeks to prevent fraud and to protect individuals who are in a relatively vulnerable position. These policies are reflected in the following statements from North Carolina appellate courts:

"Fraud, actual and constructive, is so varied in form many courts have refused to precisely define it, lest the definition itself be turned into an avenue of escape by the crafty and unscrupulous. Nevertheless, the legal principles that govern constructive fraud claims are well established. One is that a case of constructive fraud is established when proof is presented that a position of trust and confidence was taken advantage of to the hurt of the other." *Terry v. Terry*, 302 N.C. 77, 273 S.E. 2d 674 (1981); *Link v. Link*, 278 N.C. 181, 179 S.E. 2d 697 (1971).

"Any transaction between persons so situated is 'watched with extreme jealousy and solicitude; and if there is found the slightest trace of undue influence or unfair advantage, redress will be given to the injured party.'" See *Eubanks v. Eubanks*, 273 N.C. 189, 159 S.E. 2d 562 (1968); *Fulp v. Fulp*, 264 N.C. 20, 140 S.E. 2d 708 (1965).

It is just because confidence in others inherently and inevitably begets influence that the law of constructive fraud is needed, lest that influence be exerted for the benefit of the one having it, rather than that of the one whose confidence created it. *Stilwell v. Walden*, 70 N. C. App. 543, 320 S. E. 2d 329 (1984)

WHAT ARE THE ELEMENTS OF A CONSTRUCTIVE FRAUD CLAIM?

The elements of this claim have been outlined in a several slightly different formulations. In *Terry v. Terry*, 302 N. C. 77, 273 S. E. 2d 674 (1981), the North Carolina Supreme Court observed that "(i)n order to establish a claim for constructive fraud, a plaintiff must allege facts sufficient to show the creation of a relationship of trust and confidence and that the defendant took advantage of that relationship to plaintiff's detriment." The North Carolina Supreme Court later opined that "a *prima facie* showing of constructive fraud requires plaintiff to prove that they and defendants were in a 'relation of trust and confidence . . . [which] led up to and surrounded the consummation of the transaction in which defendant is alleged to have taken advantage of his position of trust to the hurt of plaintiff. *Barger v. McCoy Hillard & Parks*, 346 N.C. 650, 666, 488 S.E.2d 215, 224 (1997) (quoting *Rhodes v. Jones*, 232 N.C. 547, 549, 61 S.E.2d 725, 726 (1950)). At times, the Court of Appeals has formulated the requirements slightly differently.

The Court of Appeals has observed that "to survive a motion to dismiss, a cause of action for constructive fraud must allege (1) a relationship of trust and confidence, (2) that the defendant took advantage of that position of trust in order to benefit himself, and (3) that plaintiff was, as a result, injured." White v. Consolidated Planning, Inc., 166 N. C. App. 283, 603 S. E. 2d 147 (2004); *Sterner v. Penn*, 159 N.C. App. 626, 631, 583 S.E.2d 670, 674 (2003). In other instances, the Court of Appeals has opined that:

The elements of a constructive fraud claim are proof of circumstances (1) which created the relation of trust and confidence [the "fiduciary" relationship], and (2) [which] led up to and surrounded the consummation of the transaction in which defendant is alleged to have taken advantage of his position of trust to the hurt of plaintiff. Put simply, a plaintiff must show (1) the existence of a fiduciary duty, and (2) a breach of that duty.

Keener Lumber Co. v. Perry, 149 N.C. App. 19, 28, 560 S.E.2d 817, 823 (2002) (citation omitted). See also *Greene v. Rogers Realty*, 159 N. C. App. 665, 586 S. E. 2d 278 (2003). This formulation of the elements of the claim returns to the language set out in Terry and then adds a simplified description of the cause of action for constructive fraud.

A CONSTRUCTIVE FRAUD CLAIM REQUIRES THE EXISTENCE OF A RELATIONSHIP OF TRUST AND CONFIDENCE

As indicated above, the presence of such a relationship is an element of a constructive fraud claim. When does that relationship exist? That question will be discussed more extensively later in this paper in a lengthy section that begins on page __.

A CONSTRUCTIVE FRAUD CLAIM REQUIRES PROOF OF A BENEFIT TO THE DEFENDANT

As indicated above, each of the different formulations of a constructive fraud claim has a requirement that the defendant take advantage of the plaintiff to his own benefit.

"An essential element of constructive fraud is that 'defendants sought to benefit themselves' in the transaction." *State ex rel. Long v. Petree Stockton, L.L.P.*, 129 N.C. App. 432, 445, 499 S.E.2d 790, 798 (1998) (quoting *Barger*, 346 N.C. at 667, 488 S.E.2d at 224), *cert. dismissed as improvidently granted*, 350 N.C. 57, 510 S.E.2d 374 (1999). See also *Walker v. Sloan*, 137 N.C. App. 387, 529 S. E. 2d 236 (2000).

"Implicit in the requirement that a defendant '[take] advantage of his position of trust to the hurt of plaintiff' is the notion that the defendant must seek his own advantage in the transaction; that is, the defendant must seek to benefit himself." *Barger*. 346 N. C. 650, 488 S. E. 2d 215. "The requirement of a benefit to defendant follows logically from the requirement that a defendant harm a plaintiff by taking advantage of their relationship of trust and confidence . . . [and is] implicit throughout the cases allowing constructive fraud claims." *Id.* at 667, 488 S.E.2d at 224. See also *Toomer v. Branch Banking &Trust*, 171 N. C. App. 58, 614 S. E. 2d 328 (2005)..

The case law in North Carolina indicates that certain situations do not satisfy this requirement of a constructive fraud claim. In *Barger*, the plaintiffs contended that the defendants benefited from their alleged wrongful conduct because they obtained the benefit of their continued relationship with the plaintiffs. The Supreme Court has stated that the benefit of a continued relationship "is insufficient to establish the benefit required for a claim of constructive fraud." *Barger*, 346 N. C. at 667, 488 S. E. 2d at 224. See also *Ridenhour v. IBM*, 132 N. C. App. 563, 512 S. E. 2d 774 (1999). In addition, "payment of a fee to a defendant for work done by that defendant does not by itself constitute sufficient evidence that the defendant sought his own advantage." *NationsBank of N.C. v. Parker*, 140 N.C. App. 106, 114, 535 S.E.2d 597, 602 (2000) (holding that where the plaintiff alleged that the defendant "took advantage of his position of trust and benefited from his actions in that he was paid for his services," such an allegation by itself was insufficient to show that the defendant sought his own advantage); See also *Hunter v. Guardian Life Ins. Co.*, 162 N. C. App. 477, 593 S. E. 2d 121 (2004). In order to satisfy the second element of a constructive fraud claim, a plaintiff must allege that "the benefit sought was more than a continued relationship with the plaintiff or *payment of a fee to a defendant for work it actually performed*." *Clay v. Monroe*, ___ N. C. App. ___, 658 S. E. 2d 532 (2008); *Sterner v. Penn*, 159 N.C. App. 626, 631, 583 S.E.2d 670, 674 (2003).

WHAT IS THE DIFFERENCE BETWEEN AN ACTUAL FRAUD CLAIM AND A CONSTRUCTIVE FRAUD CLAIM?

There are two primary differences between an actual fraud claim and a constructive fraud claim. First, "constructive fraud differs from actual fraud in that 'it is based on a confidential relationship rather than a specific misrepresentation.'" *Barger v. McCoy Hillard & Parks*, 346 N.C. 650, 666, 488 S.E.2d 215, 224 (1997) (quoting *Terry*, 302 N.C. at 85, 273 S.E.2d at 678-79). Second, intent to deceive is not an essential element of constructive fraud. *Link v. Link*, 278 N. C. 181, 179 S. E. 2d 687 (1971); *Clay v. Monroe*, ___ N. C. App. ___, 658 S. E. 2d 532 (2008).

IS THERE A DIFFERENCE BETWEEN A CONSTRUCTIVE FRAUD CLAIM AND A BREACH OF FIDUCIARY DUTY CLAIM?

The answer to this question appears to be, “Yes.”

In at least two cases, the Court of Appeals has treated claims for constructive fraud and breach of fiduciary duty as separate causes of action. *White v. Consolidated Planning, Inc.*, 166 N. C. App. 283, 603 S. E. 2d 147 (2004); *Governor’s Club v. Governor’s Club Limited Partnership*, 152 N. C. App. 240, 567 S. E. 2d 781 (2002). Given the confusion between constructive fraud claims, breach of fiduciary duty claims and other causes of action, this distinction between these two claims may reflect the difficulty in defining the parameters of similar legal theories.

WHAT IS NECESSARY TO ALLEGE A CLAIM FOR BREACH OF FIDUCIARY DUTY?

The limited case law on the existence of a separate claim for breach of fiduciary duty indicates that a claim for breach of fiduciary duty requires the existence of a fiduciary relationship. White v. Consolidated Planning, Inc. 166 N. C. App. 283, 603 S. E. 2d 147 (2004). That seems self-evident. In addition, to state a claim for breach of fiduciary duty, a plaintiff must allege that the fiduciary failed to "'act in good faith and with due regard to plaintiff's interests.'" *White v. Consol. Planning, Inc.*, 166 N.C. App. 283, 293, 603 S.E.2d 147, 155 (2004) (quoting *Vail v. Vail*, 233 N.C. 109, 114, 63 S.E.2d 202, 206 (1951)), *disc. review denied*, 359 N.C. 286, 610 S.E.2d 717; see also *Toomer v. Branch Banking & Trust*, 171 N. C. App. 58, 614 S. E. 2d 328 (2005). The requirement that the defendant sought to benefit wrongfully from the transaction is not an element of a claim for breach of fiduciary duty. *White v. Consolidated Planning, Inc*., 166 N. C. App. 283, 603 S. E. 2d 147. That is the primary difference between pleading a claim for constructive fraud and one for breach of fiduciary duty. *Clay v. Monroe*, ___ N. C. App. ___, 658 S. E. 2d 532 (2008); *White v. Consolidated Planning, Inc.*, 166 N.C. App. 283, 294, 603 S.E.2d 147, 156 (2004), *disc. rev. denied*, 359 N.C. 286, 610 S.E.2d 717 (2005).

FIDUCIARY DUTY AND CONSTRUCTIVE FRAUD CLAIMS ARE OFTEN CONFUSED WITH OTHER LEGAL THEORIES.

The on-going confusion between these claims and claims based on other legal theories will become more apparent in the second section of this manuscript when specific relationships are analyzed. This analysis will point out several instances when plaintiffs attempted to recast other legal claims as constructive fraud or breach of fiduciary duty claims. In this section of the manuscript, I will give two examples of the blurring of similar legal theories as an attempt to highlight the problem and caution you about this confusion.

One example of this problem appears in *Brown v. Roth*, 133 N. C. App. 52, 514 S. E. 2d 294 (1999). The sellers in Roth hired a real estate agent to sell their house. The agent prepared a multiple listing form that represented that the house had 3,484 square feet of heated living area. The agent did not verify that measurement. Instead, she relied on information from an appraisal. The plaintiff and the real estate agent entered into a Dual Agency Agreement in which the agent agreed to act as agent for both the buyers and the sellers in the sale of the house. The plaintiff purchased the house and later learned that the house contained only 3,108 heated square feet of living area. The plaintiff alleged claims for fraud, breach of fiduciary duty and negligent misrepresentation in his complaint.

In its analysis of the plaintiff's claims, the Court of Appeals observed:

A real estate agent has the fiduciary duty "to exercise reasonable care, skill, and diligence in the transaction of business entrusted to him, and he will be responsible to his principal for any loss resulting from his negligence in failing to do so." 12 C.J.S. *Brokers* § 53, at 160 (1980). "The care and skill required is that generally possessed and exercised by persons engaged in the same business." *Id*., § 53, at 161. This duty requires the agent to "make a full and truthful disclosure [to the principal] of all facts known to him, or discoverable with reasonable diligence" and likely

to affect the principal. *Id*., § 57, at 172; James A. Webster, Jr., *Webster's Real Estate Law in North Carolina* § 8-9, at 243 (Patrick K. Hetrick & James B. McLaughlin, Jr. eds., 4th ed. 1994) (agent has duty to disclose all facts he "knows or should know would reasonably affect the judgment" of the principal). The principal has "the right to rely on his [agent's] statements," and is not required to make his own investigation. 12 C.J.S. *Brokers* § 57, at 172.

Brown v. Roth, 133 N. C. App. 52, 54-55. The quoted language contemplates a negligence theory and it does not address the elements of a breach of fiduciary duty or constructive fraud claim. The use of the term "fiduciary duty" in this instance to describe the real estate agent's duty to exercise care in the context of a general negligence claim fosters the confusion.

Another example of this type of confusion arises in *Carter v. West American Insurance Co*, ___ N. C. App. ___, 661 S. E. 2d 264 (2008). The plaintiff in Carter had her homeowner's insurance with her insurance agent for thirty-five years. The plaintiff had been informed that the insurance was "replacement insurance." The actual policy provided that her coverage would increase to reflect local construction costs. After a fire occurred at her residence, the plaintiff sued contending that she was "underinsured." In Carter, the plaintiff contended that the defendant insurance agent breached "a fiduciary duty to procure insurance for her." In analyzing this claim, the Court of Appeals noted that:

Where an insurance agent or broker promises, or gives some affirmative assurance, that he will procure or renew a policy of insurance under circumstances which lull the insured into the belief that such insurance has been effected, the law will impose upon the broker or agent the obligation to perform the duty which he has thus assumed. Further, where the insured in reliance on the affirmative representation of the insurer, "mistakenly believed that certain items were covered by insurance, and did not seek additional coverage," the insured has a cause of action for negligence. *Carter*, ___ N. C. App. ___, 661 S. E. 2d 264, ___ (cites omitted).

The claim in *Carter* was a common law negligence claim against an insurance agent. However, the plaintiff and the Court Appeals labeled it as a breach of fiduciary duty claim even though the legal principles quoted above do not address the elements of constructive fraud and breach of fiduciary duty claims.

Brown and *Carter* indicate that judges need to carefully read cases discussing alleging breaches of a fiduciary duty in order to be alert for confusion between the legal theories that are at issue.

WHAT IS THE EFFECT OF PROVING THE ELEMENTS OF A CONSTRUCTIVE FRAUD CLAIM?

When the superior party obtains a possible benefit through the alleged abuse of the confidential or fiduciary relationship, the aggrieved party is entitled to a presumption that constructive fraud occurred. *Watts v. Cumberland County Hospital System*, 317 N. C. 110, 116, 343 S. E. 2d 879, 884. "This presumption arises 'not so much because the fiduciary has committed a fraud, but because he may have done so.'" *Watts*, 317 N.C. at 116, 343 S.E.2d at 884; *Forbis v. Neal*, 361 N. C. 519, 649 S. E. 2d 382 (2007). "When a fiduciary relation exists between parties to a transaction, equity raises a presumption of fraud when the superior party obtains a possible

benefit." *Jacobs v. Physician Weight Loss Center*, 173 N. C. App. 663, 620 S. E. 2d 232 (2005); *Sullivan v. Mebane Packaging Group, Inc*., 158 N. C. App. 19, 581 S. E. 2d 452 (2003).

THE DEFENSE OF A CONSTRUCTIVE FRAUD CLAIM FOCUSES ON REBUTTING THIS PRESUMPTION.

Once a plaintiff establishes a *prima facie* case of the existence of a fiduciary duty and its breach, the burden shifts to the defendant to prove he acted in an "open, fair and honest" manner, so that no breach of fiduciary duty occurred. *Hajmm Co. v. House of Raeford Farms*, 94 N.C. App. 1, 12, 379 S.E.2d 868, 874 (1989), *affirmed in part and reversed in part on other grounds*, 328 N.C. 578, 403 S.E.2d 483 (1991); see also *Estate of Smith v. Underwood*, 127 N. C. App. 1, 487 S. E. 2d 867 (1997). The "open, fair and honest" defense is not an affirmative defense to constructive fraud; it merely rebuts the presumption of fraud. *Estate of Smith*. Since it is not an avoidance or an affirmative defense, it need not be specifically pleaded in the answer. A denial is all that is required. Id

In *Watts v. Cumberland County Hospital System, Inc.*, 317 N.C. 110, 116, 343 S.E.2d 879, 884 (1986), our Supreme Court explained how transactions involving parties in a fiduciary relationship can create a rebuttable presumption of fraud:

When a fiduciary relationship exists between parties to a transaction, equity raises a presumption of fraud when the superior party obtains a possible benefit. "This presumption arises not so much because the fiduciary has committed a fraud, but because he may have done so." The superior party may **rebut** the **presumption** by showing, for example, "that the confidence reposed in him was not abused, but that the other party acted on independent advice."

See also *Estate of Smith v. Underwood*. 127 N. C. App. 1, 487 S. E. 2d 807.

The presumption of fraud may be rebutted by evidence that the other party obtained and acted on independent advice. *Sullivan v. Mebane Packaging Group, Inc*, 158 N. C. App. 19, 561 S. E. 2d 452 (2003). Two examples may clarify the nature of this defense. In *Sullivan*, the plaintiff alleged constructive fraud in claims arising from a business transaction. The plaintiff's evidence showed that he obtained outside advice throughout the negotiation process, as the defendants consistently advised him to do. The plaintiff in *Sullivan* testified that he discussed the initial promissory note with his attorney, after which the plaintiff concluded that he would sell his shares, but seek a higher price per share. The plaintiff testified he met with his attorney again regarding the sale of his shares during the negotiation process, and acknowledged having shown the March financial package to his business partner to obtain his thoughts. Therefore, the evidence in *Sullivan* rebutted the presumption created by proof of constructive fraud.

In *Watts v. Cumberland County Hospital System*, 317 N. C. 110, 343 S. E. 2d 879 (1986), the plaintiff asserted a claim for constructive fraud arising from the alleged concealment of acts of alleged medical negligence. In *Watts*, the evidence put forward by plaintiff and defendants, however, amply demonstrated that the plaintiff sought and received a number of second opinions concerning the source of her complaints. In *Watts*, the plaintiff's history of seeking and acquiring numerous second opinions from several other specialists dispelled the presumption of

reliance and intentional deceit that arises from the fiduciary relation. This evidence defeated the plaintiff's constructive fraud claim on a motion for summary judgment.

WHAT HAPPENS IF THE DEFENSE IS ESTABLISHED?

Once rebutted, the presumption of fraud evaporates, and the accusing party must shoulder the burden of producing actual evidence of fraud. *Watts v. Cumberland County Hosp. System*, 317 N.C. 110, 115-16, 343 S.E.2d 879, 884 (1986). See also *Sullivan v. Mebane Packaging Group*, Inc., 158 N. C. App. 19, 581 S. E. 2d 452 (2003); *Cash v. State Farm Mutual Auto Ins. Co*., 137 N. C. App. 192, 528 S. E. 2d 372 (2000).

WHAT IS REQUIRED TO PLEAD A CONSTRUCTIVE FRAUD CLAIM?

As a general rule, the material facts and circumstances constituting fraud must be plead in a complaint with particularity. N.C.G.S. § 1A-1, Rule 9(b) (1990); *Moore v. Wachovia Bank and Trust Co.*, 30 N.C. App. 390, 391, 226 S.E.2d 833, 835 (1976). Constructive fraud, however, requires "less particularity" and can be based on a breach of a "confidential relationship rather than a specific misrepresentation." *Terry v. Terry*, 302 N.C. 77, 85, 273 S.E.2d 674, 678 (1981), "A claim of constructive fraud does not require the same rigorous adherence to elements as actual fraud." *Terry v. Terry*, 302 N.C. 77, 83, 273 S.E.2d 674, 677 (1981); *Hunter v. Guardian Life*, 162 N. C. App. 476, 593 S. E. 2d 595 (2004). In other words, the pleading of constructive fraud is less "exacting" than that required for actual fraud. *Terry v. Terry*, 302 N.C. 77, 83, 273 S.E. 2d 674, 677 (1981); see also *Watts v. Cumberland County Hospital System*, 317 N. C. 110, 343 S. E. 2d 879 (1986).

The North Carolina Supreme Court has observed that:

Our consideration of the above-stated rules of law leads us to conclude that in pleading actual fraud the particularity requirement is met by alleging time, place and content of the fraudulent representation, identity of the person making the representation and what was obtained as a result of the fraudulent acts or representations. A constructive fraud claim requires even less particularity because it is based on a confidential relationship rather than a specific misrepresentation. The very nature of constructive fraud defies specific and concise allegations and the particularity requirement may be met by alleging facts and circumstances "(1) which created the relation of trust and confidence, and (2) [which] led up to and surrounded the consummation of the transaction in which defendant is alleged to have taken advantage of his position of trust to the hurt of plaintiff."

Terry v. Terry, 302 N. C. 77, 273 S. E. 2d 674 (1981).

Even though the stricter pleading requirements for actual fraud do not apply, that does not mean that "anything goes" in pleading a claim for constructive fraud. "Mere generalities and conclusory allegations of fraud will not suffice." *Moore*, 30 N.C. App. at 391, 226 S.E.2d at 835. This is true for both actual fraud and constructive fraud claims. See *Watts*, 317 N.C. at 116-17, 343 S.E.2d at 884.; *Sharp v. Teague*, 132 N. C. App. 213, 510 S. E. 2d 702 (1999). In *Hunter v.*

Guardian Life, 162 N. C. App. 477, 593 S. E. 2d 595 (2004), the plaintiff alleged that "there existed a confidential and fiduciary relationship between the parties to this transaction and the Defendants took advantage of their position of trust to the harm of the Plaintiffs and induced the Plaintiffs to continue the policy." The Court of Appeals concluded that the plaintiffs failed to allege the requisite "facts and circumstances" which created this relationship and that the cursory allegations in that case were not sufficient to withstand a motion to dismiss. *Id*. In addition, the complaint in Hunter failed to include a sufficient allegation that the defendants sought to benefit themselves. The complaint merely stated that defendants "failed to perform according to such fiduciary and confidential relationship in the best interest of the Plaintiffs, and performed in the best interest of the Defendants, damaging the Plaintiffs as outlined herein." This conclusory allegation was deemed to be insufficient to show that the defendant sought his own advantage in the transaction. *Id*. The bottom line seems to be that the plaintiff cannot rest on mere legal conclusions and must set forth specific facts concerning both the relationship of trust and confidence and the abuse of that relationship to the benefit of the defendant in order to survive a motion to dismiss.

WHAT IS THE APPLICABLE STATUTE OF LIMITATIONS?

A claim of constructive fraud based upon a breach of a fiduciary duty falls under the ten-year statute of limitations contained in *N.C. Gen. Stat.* § 1-56 (1999). See *Barger v. McCoy Hillard & Parks*, 120 N.C. App. 326, 336, 462 S.E.2d 252, 259 (1995), *modified*, 122 N.C. App. 391, 469 S.E.2d 593 (1996), *affirmed in part, reversed on other grounds in part*, 346 N.C. 650, 488 S.E.2d 215 (1997). However, it is true that "[a]llegations of breach of fiduciary duty that do not rise to the level of constructive fraud are governed by the three-year statute of limitations applicable to contract actions contained in *N.C. Gen. Stat. § 1-52(1)* (2003)." *Toomer v. Branch Banking & Trust*, 171 N.C. App. at 66-67, 614 S.E.2d at 335.

This difference in the statute of limitations periods begs the question when does a claim for breach of fiduciary duty not rise to the level of constructive fraud? In *Toomer*, 171 N. C. App. 58, 614 S. E. 2d 328, the trustee was alleged to have breached its fiduciary duty by charging excess or inflated fees due to errors in valuations and inaccurate appraisals of property values. There was no assertion in *Toomer* that the trustee sought to benefit itself and even the plaintiff characterized the conduct of the trustee as “erroneous.” In that situation, the plaintiffs did not assert a claim for constructive fraud and the trial court properly ruled that the plaintiffs' claims were governed by the three-year statute of limitations contained in *N.C. Gen. Stat.* § 1-52(1); *Toomer*, 171 N. C. App. 58, 614 S. E. 2d 328..

In cases involving allegations that a trustee has breached his fiduciary duty, "the statute of limitations begins to run when the claimant 'knew or, by due diligence, should have known' of the facts constituting the basis for the claim." *Toomer*, citing *Pittman v. Barker*, 117 N.C. App. 580, 591, 452 S.E.2d 326, 332. The existence of a relationship of trust and confidence has some bearing on the time at which the plaintiff knew or should have discovered the facts relevant to the basis for the claim. In *Shepherd v. Shepherd*, 57 N. C. App. 680, 292 S. E. 2d 169 (1982), the Court of Appeals observed:

Yet failure of the defrauded party to use diligence in discovering the fraud is not wholly excused merely because a relation of trust and confidence exists between the parties. The law only goes so far as to say that when it appears that by reason of the confidence reposed the confiding party is actually deterred from sooner suspecting or discovering the fraud, he is under no duty to make inquiry *until something occurs to excite his suspicions*. A man should not be allowed to close his eyes to facts readily observable by ordinary attention, and maintain for his own advantage the position of ignorance. This can only mean that the defrauded party's ignorance must not be negligent; that he remains ignorant without any fault of his own; that he has not discovered the fraud, and could not by any reasonable diligence discover it . . . .

Id., 57 N. C. App. 680, 292 S. E. 2d 169.

DOES CONSTRUCTIVE FRAUD CONSTITUTE AN UNFAIR AND DECEPTIVE TRADE PRACTICE?

Yes. North Carolina case law has held that conduct which constitutes a breach of fiduciary duty and constructive fraud is sufficient to support a UDTP claim. *Compton v. Kirby*, 157 N. C. App. 1, 577 S. E. 2d 452 (2003); *Governor's Club v. Governor's Club Limited Partnership*, 152 N. C. App. 240, 567 S. E. 2d 781 (2002).

COMPENSATORY DAMAGES

In *In re Trust Under Will of Jacobs*, 91 N.C. App. 138, 370 S.E.2d 860, *disc. review denied*, 323 N.C. 476, 373 S.E.2d 863 (1988), the Court of Appeals recognized that "damages for breach of trust are designed to restore the trust to the same position it would have been in had no breach occurred." *Id.* at 146, 370 S.E.2d at 865. Our Court further stated that "the court may fashion its order 'to fit the nature and gravity of the breach and the consequences to the beneficiaries and trustee.'" *Id.* (quoting Bogert, The Law of Trusts and Trustees, section 543(V) (rev. 2d. ed. 1982)); see also *Babb v. Graham*, ___ N. C. App. ___, 660 S. E. 2d 626 (2008).

IS PROOF OF CONSTRUCTIVE FRAUD SUFFICIENT TO SUPPORT AN AWARD OF PUNITIVE DAMAGES?

No, not in and of itself. Pursuant to *N.C. Gen. Stat.* § 1D-15(a) (2007), punitive damages may be awarded "if the claimant proves that the defendant is liable for compensatory damages and that one of the following aggravating factors was present and was related to the injury for which compensatory damages were awarded: (1) Fraud. (2) Malice. (3) Willful or wanton conduct." *N.C. Gen. Stat.* § 1D-5(4) (2007) provides: "'Fraud' does not include constructive fraud unless an element of intent is present." See also *Babb v. Graham*, __ N. C. App. ___, 660 S. E. 2d 626 (2008).

WHEN DOES A RELATIONSHIP OF TRUST AND CONFIDENCE ARISE?

IN GENERAL

The courts have been as reluctant to define a confidential relationship as they have been to define fraud itself. As the Supreme Court said in *Abbitt v. Gregory*, 201 N.C. 577, 160 S.E. 896 (1931):

The courts generally have declined to define the term "fiduciary relation" and thereby exclude from this broad term any relation that may exist between two or more persons with respect to the rights of persons or the property of either. . . .

Id. at 598, 160 S.E. at 906. See also *Terry v. Terry*, 302 N. C. 77, 273 S. E. 2d 674 (1981).

A confidential or fiduciary relation can exist under a variety of circumstances and is not limited to those persons who also stand in some recognized legal relationship to each other, such as attorney and client, principal and agent, guardian and ward, and the like; it also "extends to any possible case in which a fiduciary relation exists in fact, and in which there is confidence reposed on one side, and resulting domination and influence on the other." *Abbitt v. Gregory*, 201 N.C. 577, 598, 160 S.E. 896, 906 (1931); *White v. Consolidated Planning Inc*., 166 N. C. App. 283, 603 S. E. 2d 147 (2004). A relationship of trust and confidence "exists in all cases where there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence." *Abbitt v. Gregory*, 201 N.C. 577, 598, 160 S.E. 896, 906 (1931); *Compton v. Kirby*, 158 N. C. App. 19, 581 S. E. 2d. 452 (2003).

RELATIONSHIPS OF TRUST AND CONFIDENCE IN SPECIFIC SITUATIONS.

ACCOUNTANTS

The Supreme Court addressed a contention in *Barger v. McCoy, Hilliard and Parks*, 346 N. C. 650, 488 S. E. 2d 215 (1997), that an accountant had such a relationship. However, in that case, the plaintiffs failed to allege that they were harmed by misrepresentations made negligently to them by their accountants and failed to allege that the defendants took advantage of their relationship for their own benefit. These allegations were not sufficient to assert a claim for constructive fraud. Id. The case did not determine whether a relationship of trust and confidence existed.

ATTORNEY-CLIENT RELATIONSHIPS

It has long been recognized that the relationship of attorney and client creates such a relationship of trust and confidence. See *Stilwell v. Walden* 70 N.C. App. 543, 320 S.E. 2d 329 (1984); *Fox v. Wilson*, 85 N.C. App. 292, 299, 354 S.E.2d 737, 742 (1987).

One example of a constructive fraud claim involving attorneys is presented in *Fox v. Wilson*, 85 N.C. App. 292, 354 S.E.2d 737 (1987). In *Fox*, the plaintiff sued her attorneys and their professional corporation for, among other things, constructive fraud in the handling of a transaction in which plaintiff sold a newspaper she owned to a corporation owned by some of the defendants. *Fox*, 85 N.C. App. at 293, 296, 354 S.E.2d at 740. Plaintiff alleged that defendant attorney and another attorney, who was also an officer and employee of defendant professional corporation, undertook to represent her in February, 1985, in reacquiring the assets of the newspaper. The plaintiff alleged a confidential relationship existed between her and defendant attorney. *Id.* at 293, 354 S.E.2d at 738-39. The complaint alleged that the defendants deceived the plaintiff about the payment of a promissory note another party had taken out with the plaintiff in order to buy the assets of the newspaper. *Id.* at 294-95, 354 S.E.2d at 739. The defendants persuaded the plaintiff to sign a default letter and to arrange for the transfer of the assets of the newspaper to the plaintiff and, shortly thereafter, the sale of the paper to a corporation owned by some of the defendants. *Id.* The *Fox* court concluded that the plaintiff had alleged facts sufficient to show a relationship of trust and confidence and that the defendants took advantage of that relationship to the plaintiff's detriment. *Id.* at 299-300, 354 S.E.2d at 742

As discussed earlier in this manuscript, the plaintiff's evidence must prove the defendants sought to benefit themselves or to take advantage of the confidential relationship. *Barger*, 346 N.C. at 666, 488 S.E.2d at 224; *NationsBank v. Parker*, 140 N.C. App. 106, 114, 535 S.E.2d 597, 602 (2000). The failure to establish this element of a constructive fraud claim has defeated some claims against attorneys. For instance, in *Wilkins v. Safran*, 185 N. C. App. 668, 649 S. E. 2d 658 (2007), the defendant attorney withdrew from his representation of the plaintiff and that action formed the basis for the constructive fraud claim. The Court of Appeals noted that the plaintiff presented no evidence tending to show the defendants sought or gained any personal benefit by withdrawing from their representation of the plaintiff. The defendant attorney in *Wilkins* moved to withdraw from representing the plaintiff in a complicated construction case after he suffered a heart attack and several attorneys left his firm. In the absence of a showing of a benefit to the defendant, the trial court properly granted summary judgment for the defendants on the plaintiff's claim of constructive fraud. In *Lowry v. Lowry*, 99 N. C. App. 246, 393 S. E. 2d 141 (1990), the lack of evidence that the defendant attorney took advantage of her position of trust to harm the plaintiff justified the granting of summary judgment against the plaintiff's constructive fraud claim.

In other instances, constructive fraud claims have been asserted against attorneys for conduct that is essentially negligent. In *Fender v. Deaton*, 153 N. C. App. 187, 571 S. E. 2d 1 (2002), the plaintiff alleged that the defendant attorney failed to prepare or settle his case, dismissed the case without the plaintiff's knowledge and then concealed the dismissal from the plaintiffs. The Court of Appeals concluded that these allegations were no more than claims of ordinary legal malpractice and did not state a claim for constructive fraud since there was no allegation of a benefit to the defendant attorney.

BROKER

In *White v. Consolidated Planning, Inc.*, 166 N. C. App. 283, 603 S. E. 2d 147 (2004), the complaint alleged that "[a] relationship of confidence and trust" existed between the plaintiff and

Robert White, individually and in his capacity as "an employee and agent" of Consolidated. The plaintiff alleged that "because of [the Whites'] lack of expertise in financial affairs," they relied upon Robert White and Consolidated to properly manage their funds. The Court of Appeals found that these allegations, together with further facts and circumstances set forth in the complaint, adequately plead the existence of a fiduciary relationship.

CONSTRUCTION CASES

In *Eastover Ridge, LLC v Metric Constructors*, 139 N. C. App. 360, 533 S. E. 2d 827 (2000), the plaintiff owner asserted a constructive fraud claim against the contractor in a construction dispute. The parties' contract provided that "the Contractor accepts the relationship of trust and confidence established by this Agreement and covenants with the Owner to cooperate with the Architect and utilize the Contractor's best skill, efforts and judgment in furthering the interests of the Owner." The defendant's project manager in Eastover also admitted that he knew the owner expected him to look after the owner's interests. The plaintiff owner had retained an architect to administer the parties' agreement and oversee the construction project. The contract further provided that the architect would be the owner's representative during construction. The Court of Appeals concluded as a matter of law that the architect's constant, close involvement in the project belied any claim that a "relation of trust and confidence" existed between the owner and the defendant contractor giving rise to a fiduciary relationship. Eastover, citing *Rhodes*, 232 N.C. at 549, 61 S.E.2d at 726; and *Barger*, 346 N.C. at 666, 488 S.E.2d at 224. Thus, the plaintiff failed to establish the existence of a fiduciary relationship.

CORPORATE FIDUCIARIES.

Under North Carolina law, officers or directors of a corporation generally owe a fiduciary duty *to the corporation.* *Underwood v. Stafford*, 270 N.C. 700, 703, 155 S.E.2d 211, 213 (1967); *Mountain Top Youth Camp, Inc. v. Lyon*, 20 N. C. App. 694, 207 S. E. 2d 498 (1974). Additionally, in North Carolina, an individual may owe a fiduciary duty to the corporation if he is considered to be a *de facto* officer or director, with authority for tasks such as signing tax returns, offering major input with respect to the company's formation and operation, or managing the company. *Lowder v. All Star Mills, Inc.*, 75 N.C. App. 233, 241, 330 S.E.2d 649, 654-55, *disc. review denied*, 314 N.C. 541, 335 S.E.2d 19 (1985); *Kinesis Advertising, Inc. v. Hill*, ___ N. C. App. ___, 652 S. E. 2d 284 (2008)

North Carolina statutes also codify this obligation. *G.S.* § 55-8-30 requires a corporate director to discharge his or her duties as a director:

(1) In good faith;

(2) With the care an ordinarily prudent person in a like position would exercise under similar circumstances; and

(3) In a manner he reasonably believes to be in the best interests of the corporation.

G.S. §§ 55-8-30(a)(1)-(3).

Directors and officers also are fiduciaries in their relationship with a shareholder when they are purchasing shares from that shareholder without providing pertinent financial information to the shareholder. *Sullivan v. Mebane Packaging Group, Inc*., 158 N. C. App. 19, 581 S. E. 2d 452 (2003).

RELATIONSHIP BETWEEN CORPORATE OFFICIALS AND THE CORPORATION'S CREDITORS.

"As a general rule, directors of a corporation do not owe a fiduciary duty to creditors of the corporation." *Whitley v. Carolina Clinic, Inc.*, 118 N.C. App. at 526, 455 S.E.2d at 899. However, North Carolina law holds that, under certain circumstances, directors of a corporation do owe a fiduciary duty to creditors of the corporation, and that this duty is breached if the directors take advantage of their position for their own benefit at the expense of other creditors. *Id.* 118 N. C. App. 523, 455 S. E. 2d ___. See also *Keener Lumber Co. v. Perry*, 149 N. C. App. 19, 560 S. E. 2d 817 (2002).

The Court of Appeals held in *Whitley* that a corporate director has a fiduciary duty to creditors only "under circumstances amounting to a 'winding-up' or dissolution of the corporation." *Id.* at 528, 455 S.E.2d at 900. The Court of Appeals noted in Whitley that during the relevant time period: (1) the corporation was balance sheet insolvent, but was solvent on a cash flow basis in that it was always able to pay its financial obligations when they were due; and (2) there was no evidence that the corporation was making plans to cease doing business or that it was conducting its business in bad faith. *Id.* at 529, 455 S.E.2d at 900. On these facts the Court of Appeals concluded in *Whitley* that no fiduciary duty had been triggered. See *Keener Lumber*, 149 N. C. App. 19, 560 S. E. 2d 817 (2002).

Whitley established that directors of a corporation owe a fiduciary duty to creditors of the corporation only where there exist "circumstances amounting to a 'winding-up' or dissolution of the corporation." *Id.* at 528, 455 S.E.2d at 900. *Whitley* also indicated that various factors may be considered in determining whether there existed circumstances amounting to a winding-up or dissolution, including but not limited to: (1) whether the corporation was insolvent, or nearly insolvent, on a balance sheet basis; (2) whether the corporation was cash flow insolvent; (3) whether the corporation was making plans to cease doing business; (4) whether the corporation was liquidating its assets with a view of going out of business; and (5) whether the corporation was still prosecuting its business in good faith, with a reasonable prospect and expectation of continuing to do so. Finally, *Whitley* clearly holds that "balance sheet insolvency, absent circumstances amounting to a 'winding-up' or dissolution of the corporation is insufficient to trigger a fiduciary duty to creditors of a corporation." *Id.* 118 N.C. App. 523. See also *Keener Lumber*, 149 N. C. App. 19, 560 S. E. 2d 817 (2002).

Once a director's fiduciary duty to creditors arises, a director is generally prohibited from taking advantage of his intimate knowledge of the corporate affairs and his position of trust for his own benefit and to the detriment of the creditors to whom he owes the duty. Once the fiduciary duty arises, a director must treat all creditors of the same class equally by making any payments to

such creditors on a pro rata basis. *Keener Lumber*, 149 N. C. App. 19, 560 S. E. 2d 817. Even after the fiduciary duty arises, directors of a corporation may prefer secured creditors over unsecured creditors. Id.

DEBTOR—CREDITOR RELATIONSHIP

A debtor-creditor relationship does not generally create a fiduciary relationship. *Branch Banking and Trust Co. v. Thompson*, 107 N.C. App. 53, 61, 418 S.E.2d 694, 699, *disc. review denied*, 332 N.C. 482, 421 S.E.2d 350 (1992). It is clear that a fiduciary duty arises only when the evidence establishes that the party providing financing to a corporate debtor completely dominates and controls its affairs. *Edwards v. Northwestern Bank*, 39 N. C. App. 261, 250 S. E. 2d 651 (1979). In *Edwards*, an Inventory Control Agreement, the bank's scrutiny of checks drawn against Durham Wholesale's account, and one visit of an officer of the bank to check on Durham Wholesale's inventory simply did not amount to control, domination and spoilation of Durham Wholesale's affairs. To justify the imposition of a fiduciary obligation on a party financing the affairs of a corporation, it must be shown that the financing party essentially dominated the will of its debtor. *Id*.

EMPLOYER—EMPLOYEE RELATIONSHIP

Under the general rule, "the relation of employer and employee is not one of those regarded as confidential." *Dalton v. Camp*, 353 N. C. 647, 548 S. E. 2d. 704 (2001).

In *Dalton*, Camp served as production manager for a division of Dalton's publishing business. In that case, Camp's managerial duties were such that a certain level of confidence was reposed in him by Dalton; and Camp as a confidant of his employer, was therefore bound to act in good faith and with due regard to the interests of Dalton. The Supreme Court concluded that such circumstances merely serve to define the nature of virtually all employer-employee relationships; and without more, they were inadequate to establish Camp's obligations as fiduciary in nature. There was no evidence in *Dalton* to suggest that Camp's position in the workplace resulted in "domination and influence on the employer," an essential component of any fiduciary relationship. *Dalton v. Camp*, 353 N. C. 647, 548 S. E. 2d 704.

Absent a finding that the employer in *Dalton* was somehow subjugated to the improper influences or domination of his employee -- an unlikely scenario as a general proposition and one not evidenced by the facts in *Dalton*–the Supreme Court could not conclude that a fiduciary relationship existed. Id.

FAMILY FRIEND

A close relationship with family members can suffice to establish a confidential or fiduciary relationship. In *Curl v. Key*, 311 N. C. 259, 316 S. E. 2d 272 (1984), the plaintiff established that after James Curl died, his children who ranged from 16 to 21 years of age, inherited the family home. The defendant, known to them as "Uncle Jack," was their deceased father's best friend and he remained a "special friend of the family." The children trusted the defendant and believed that he was a friend who wanted to help them live in peace. When the Curl children were having

difficulties with neighbors who harassed them, the defendant offered to help and indicated that he could keep the troublemakers away if the children signed a “peace paper” that gave him the right to kick others off the property. The plaintiff children later learned the “peace paper” was a deed to the property. This evidence was sufficient to establish a fiduciary or confidential relationship.

FAMILY RELATIONSHIPS.

HUSBAND AND WIFE

As Justice Sharp said in *Eubanks v. Eubanks*, 273 N.C. 189, 159 S.E. 2d 562, "(t)he relationship between husband and wife is the most confidential of all relationships, and transactions between them, to be valid, must be fair and reasonable." *Link v. Link*, 278 N. C. 181, 179 S. E. 2d. 697 (1971). Any transaction between persons so situated is "watched with extreme jealousy and solicitude; and if there is found the slightest trace of undue influence or unfair advantage, redress will be given to the injured party." *Link*, citing *Rhodes v. Jones*, 232 N.C. 547, 61 S.E. 2d 725.

The primary difficulty arising in claims involving the relationship between a husband and wife focuses on the point at which the confidential relationship ends. There are a number of North Carolina cases that address different factual permutations on this issue.

In *Link v. Link*, 278 N.C. 181, 179 S.E.2d 697 (1971), our Supreme Court held that a confidential relationship between husband and wife can exist even after one spouse has left the home. In that case, Mr. Link asked his wife, sometime after they separated, to sign over to him her interest in the house and her interest in some stock. *Id.* at 187, 179 S.E.2d at 700. Mrs. Link offered evidence tending to show that she had relied upon the defendant to handle the family business affairs, habitually signing without question documents such as tax returns. Her evidence also tended to show that, when the defendant requested her to sign the transfer forms, she knew nothing about the value of the stock. The Supreme Court held in *Link* that :

[T]he fact that the transactions here in question occurred after the defendant's departure from the home . . . did not show the previously established confidential relationship between them had terminated so as to free the defendant to deal with the plaintiff as if they were strangers.

Id. at 193, 179 S.E.2d at 704. In *Link*, separation was not sufficient to terminate the confidential relationship.

In *Harroff v. Harroff*, 100 N. C. App. 686, 398 S. E. 2d 340 (1998), the Court of Appeals addressed a slightly different situation. In *Harroff*, the plaintiff's evidence was that an attorney was retained by both parties to act as a scrivener to draft the parties' agreement. Mr. and Mrs. Harroff negotiated the terms of the agreement themselves and gave the information to the attorney. The Court of Appeals inferred that the Harroffs' working out the terms of their separation agreement themselves was evidence of the lack of the adversarial posture indicative of the termination of a confidential relationship. In particular, the defendant in *Harroff* admitted that the retention of the attorney even helped to preserve the relationship between the parties.

The Court of Appeals concluded that the involvement of an attorney did not automatically end the confidential relationship of husband and wife. In *Harroff*, there was an issue of fact whether the confidential relationship had been terminated.

In *Sidden v. Mailman*, 137 N. C. App. 669, 529 S. E. 2d 266 (2000), the evidence indicated that the plaintiff wife and her husband soon after separating and before their divorce, informally agreed to the distribution of their marital assets and debts. This informal agreement was reduced to writing by the defendant's attorney and was signed by both parties. At some point after the execution of that agreement, the plaintiff wife learned that the defendant had failed to disclose the existence of his State Retirement Account, which had a value of $158,100.00. The trial court in *Sidden* concluded that the plaintiff had failed to present "any evidence" of a breach of the fiduciary relationship. The Court of Appeals concluded that the fact that the defendant husband had secured legal advice and had his attorney prepare the agreement did not necessarily reveal that the parties were negotiating as adversaries. The Court of Appeals concluded that the evidence in *Sidden* constituted some evidence that the defendant failed to disclose a material fact to the plaintiff at a time when the parties were in a fiduciary relationship and it remanded the case to the trial court to make findings of fact and conclusions of law on the plaintiff's breach of fiduciary duty claim.

In *Harton v. Harton*, 81 N. C. App. 295, 344 S. E. 2d 117 (1986), the Court of Appeals held that the relationship between husband and wife is no longer confidential when the parties separate and become adversaries negotiating over the terms of their separation. The termination of the fiduciary relationship is firmly established when one or both of the parties are represented by counsel. *Id*. In *Harton*, the plaintiff wife had stopped consulting her husband about financial matters and had begun to rely instead on her son-in-law for advice. In *Harton*, the plaintiff wife was represented by counsel who drafted the settlement agreement for the parties.

In *Avriett v. Avriett*, 88 N.C. App. 506, 363 S.E.2d 875 (1988), *aff'd*, 322 N.C. 468, 368 S.E.2d 377 (1988), the situation between the spouses was slightly different. The plaintiff wife sued to set aside a separation agreement she entered into with her husband. The facts showed that, during the settlement negotiations, the husband had sought legal advice, but the wife chose not to. *Id.* at 507, 363 S.E.2d at 877. After the husband had obtained legal advice, the parties continued their negotiations. *Id.* Plaintiff's complaint acknowledged that her husband had retained a lawyer to advise *him* with respect to the settlement terms. *Id.* at 508, 363 S.E.2d at 877. The Court of Appeals held in *Avriett* that the parties had become adversaries and that the confidential relationship that formerly existed between them was terminated. *Id.*

FIANCEES

As noted above, the relationship between husband and wife is the most confidential of all relationships. *Eubanks v. Eubanks*, 273 N.C. 189, 159 S.E. 2d 562 (1968). In at least one case, a North Carolina court has held that a confidential relationship also exists between a couple contemplating marriage, and a woman is generally entitled to rely on her fiance's representation that he is eligible to marry. *Shepherd v. Shepherd*, 57 N. C. App. 680, 292 S. E. 2d 169 (1982).

COMMON LAW MARRIAGE

In North Carolina, a fiduciary relationship may exist in a common law marriage arrangement when one of the parties manages the other's business. *Holt v. Williamson*, 125 N. C. App. 305, 481 S. E. 2d 307 (1997).

PARENT AND CHILD

The family relationship of parent and child is not a fiduciary one. It does not raise a presumption of fraud or undue influence. *Davis v. Davis*, 236 N.C. 208, 72 S.E. 2d 414 (1952); see also *Clodfelter v. Bates*, 44 N. C. App. 107, 260 S. E. 2d 672 (1979).

SIBLINGS

In *Terry v. Terry*, 302 N. C. 79, 273 S. E. 2d 674 (1981), the Supreme Court considered a case involving allegations of a relationship of trust and confidence between two brothers. The plaintiff in *Terry* alleged that a close family relationship existed between the defendant and his brother Edward McKinley Terry, Sr. Edward McKinley Terry, Sr., made the defendant the executor of his will and for many years there existed a trusted business relationship in that the defendant was given managerial responsibilities including the keeping of the books in his brother's business. Immediately prior to the death of Edward McKinley Terry, Sr., the defendant was relied on "increasingly" to manage the day-to-day operation of the business. As defendant's managerial control over the business increased, his brother Edward McKinley Terry, Sr., became seriously weakened by a continued illness. At the time Edward McKinley Terry, Sr., signed the document which purported to transfer all his interest in Terry's Furniture Company, Inc., to defendant, Edward McKinley Terry, Sr., was confined to his bed, nearly blind, unable to talk or hear clearly and was suffering from intense pain which required heavy medication. The Supreme Court concluded that at the time the document was executed, a relation of trust and confidence existed between the defendant and his brother.

GUARDIAN AND WARD

In *Estate of Armfield*, 113 N. C. App. 467, 439 S. E. 2d 216 (1984), the Court of Appeals concluded that a guardianship is a trust relation and in that relationship the guardian is a trustee who is governed by the same rules that govern other trustees. A guardian, like a personal representative, acts in a fiduciary capacity. *Id*., *N.C. Gen. Stat*. §§ 32-2 and 36A-1(a) (1991). A guardian is charged with the duty of acting for the benefit of another party as to matters coming within the scope of the relationship. *N.C. Gen. Stat*. § 36A-1(a).

INSURANCE AGENT

A fiduciary relationship may exist in disputes between an insured and his or her insurance agent. As indicated on page 4 of this manuscript, there is also some confusion in the law between an insurance agent's legal obligation to exercise reasonable care and the agent's potential liability based on a relation of trust and confidence.

An insurance company and its adjuster do not have a fiduciary relationship with an insured with respect to the settlement of claims. Cash v. State Farm, 137 N. C. App. 192, 528 S. E. 2d 372 (2000). However, in Piles v. Allstate Insurance Co., ___ N. C. App. ___, 658 S. E. 2d 181 (2007), the plaintiff prevailed on a motion to dismiss her claim for constructive fraud. The plaintiff's claim in Piles arose out of the execution of an Uninsured Motorist Coverage Rejection Form that the plaintiff contended had been forged by someone who impermissibly signed the plaintiff's name to a form that rejected coverage. Ms. Piles outlined the fiduciary relationship she had with Mr. McGhee, her insurance agent, as well as with Allstate Insurance through him, and put forward allegations of forgery and deception that culminated in the denial of Piles' claim for UIM coverage. These allegations in Piles were deemed to be sufficient to withstand a motion to dismiss.

PARTNERSHIP

It has been held that "business partners . . . are each other's fiduciaries as a matter of law." *Hajmm Co. v. House of Raeford Farms*, 328 N.C. 578, 588, 403 S.E.2d 483, 489 (1991); *Marketplace Antique Mall, Inc. v. Lewis*, 163 N. C. App. 596, 594 S. E. 2d 121 (2004). In *Casey v. Grantham*, 239 N.C. 121, 124-25, 79 S.E.2d 735, 738 (1954), our Supreme Court observed:

It is elementary that the relationship of partners is fiduciary and imposes on them the obligation of the utmost good faith in their dealings with one another in respect to partnership affairs. Each is the confidential agent of the other, and each has a right to know all that the others know, and each is required to make full disclosure of all material facts within his knowledge in any way relating to the partnership affairs.

See also, *Compton v. Kirby*, 157 N. C. App. 1, 577 S. E. 2d 905 (2003).

This principle is codified in the North Carolina Uniform Partnership Act, *N.C. Gen. Stat.* § 59-31 to -73 (2001). *N.C. Gen. Stat.* § 59-50 requires partners to "render on demand true and full information of all things affecting the partnership to any partner[.]" *N.C. Gen. Stat.* § 59-51 states:

(a) Every partner must account to the partnership for any benefit, and hold as trustee for it any profits derived by him without the consent of the other partners from any transaction connected with the formation, conduct or liquidation of the partnership or from any use by him of its property.

PHYSICIAN-PATIENT RELATIONSHIP

Our Courts have consistently recognized the physician-patient relationship to be a fiduciary one, "imposing upon the physician the duty of good faith and fair dealing." Watts v. Cumberland County Hospital System, 317 N. C. 110, 343 S. E. 2d 879 (1986); *Black v. Littlejohn*, 312 N.C. 626, 325 S.E.2d 469 (1985); *Jacobs v. Physician Weight Loss Center*, 173 N. C. App. 663, 620 S. E. 2d 232 (2005).

This duty is frequently confused with the obligations of physicians and medical care providers to exercise reasonable care. The absence of evidence of that the physician acted for his own benefit differentiates constructive fraud claims from medical malpractice claims. One example of this confusion is set out in *Bowlin v. Duke University*, 108 N. C. App. 145, 423 S. E. 2d 320 (1992).

PRINCIPAL AND AGENT

Another common fiduciary relationship is that of a '"principal and agent, where the agent has entire management so as to be, in effect, as much the guardian of his principal as the regularly appointed guardian of an infant.'" *Cross v. Beckwith*, 16 N.C. App. 361, 363, 192 S.E.2d 64, 66 (1972) (quoting *McNeill*, 223 N.C. at 181, 25 S.E.2d at 617). Therefore, when one is the general agent of another, who relies upon him as a friend and adviser, and has entire management of his affairs, a presumption of fraud, as a matter of law, arises from a transaction between them wherein the agent is benefited, and the burden of proof is upon the agent to show by the greater weight of the evidence, when the transaction is disputed, that it was open, fair and honest.'"

In re Will of Sechrest, 140 N. C. App. 464, 537 S. E. 2d 511 (2000) quoting *Cross*, 16 N.C. App. at 363-64, 192 S.E.2d at 66 and *McNeill*, 223 N.C. at 181, 25 S.E.2d at 617).

GENERAL POWER OF ATTORNEY

Under well-established principles of North Carolina agency law:

An agent is a fiduciary with respect to matters within the scope of his agency. In an agency relationship, at least in the case of an agent with a power to manage all of the principal's property, it is sufficient to raise a presumption of fraud when the principal transfers property to the agent. Self dealing by the agent is prohibited.

Hutchins v. Dowell, 138 N. C. App.673, 531 S. E. 2d 900 (2000); *Honeycutt v. Farmers & Merchants Bank*, 126 N. C. App. 816, 487 S. E. 2d 166 (1997).

The agency relationship must exist at the time of the transfer in order for the relationship of trust and confidence to exist and trigger the presumption of fraud. When a general power of attorney was executed contemporaneously with a will devising property to the attorney-in-fact, the fiduciary relationship did not exist at the time of the execution of the will. *In re Will of Sechrest*, 140 N. C. App. 464, 537 S. E. 2d 511 (2000).

HEALTH CARE POWER OF ATTORNEY

The execution of a health care power of attorney creates only a limited fiduciary relationship. An agent is a fiduciary only pertaining to matters within the scope of his agency relationship. *Hutchins v. Dowell*, 138 N.C. App. 673, 531 S.E.2d 900 (2000). Because the health care power of attorney dealt exclusively with medical decisions, it did not create a fiduciary relationship between the agent and the principal concerning a will. *In re Will of Sechrest*, 140 N. C. App. 464, 537 S. E. 2d 511 (2000).

INFORMAL POWER OF ATTORNEY ARRANGEMENT.

A fiduciary relationship can exist based on an informal arrangement akin to a power of attorney. In *Stilwell v. Walden*, 70 N. C. App. 543, 320 S. E. 2d 329 (1984), the plaintiff's decedent relied on the defendant to handle his funds, pay his bills, and manage his investments. The plaintiff's decedent also relied on the defendant to operate his household. The Court of Appeals observed that "obviously, such evidence bespeaks dependence and confidence on the one hand and influence on the other; which relationship was accentuated by the fact that the intestate, because of his health, was unable to do for himself and therefore needed the help of others." In Stilwell, virtually all of the plaintiff's decedent's property was transferred to the defendant without payment or valuable consideration. In these circumstances, the Court of Appeals concluded that the trial court erred by directing a verdict against the plaintiff on the ground that no fiduciary relationship had been established.

REAL ESTATE AGENT

North Carolina case law concerning the "fiduciary duties" of real estate agents was discussed earlier in this manuscript at page 4 in the discussion of confusion between various legal theories. In *Brown v. Roth*, 133 N.C. App. 52, 514 S.E.2d 294 (1999). , as quoted earlier, the Court of Appeals concluded that:

A real estate agent has "the fiduciary duty 'to exercise reasonable care, skill, and diligence in the transaction of business entrusted to him, and he will be responsible to his principal for any loss resulting from his negligence in failing to do so.'" *Id.* at 54, 514 S.E.2d at 296 (quoting 12 C.J.S. *Brokers* § 53, at 160 (1980)). "This duty requires the agent to 'make a full and truthful disclosure [to the principal] of all facts known to him, or discoverable with reasonable diligence' and likely to affect the principal. The principal has 'the right to rely on his [agent's] statements.'" *Id.* at 54-55, 514 S.E.2d at 296.

The real estate agent's duty only extends to the party the agent represented. In *Greene v. Rogers Realty*, 159 N. C. App. 665, 586 S. E. 2d 278 (2003), the Court of Appeals determined that the defendant agent did not owe a duty to the buyer in a transaction in which the agent represented the seller. In the absence of that contractual relationship, there was no fiduciary duty.

TRUSTEE

Trustees have been held to be fiduciaries in numerous cases. *Wachovia Bank v. Johnston*, 269 N. C. 701, 153 S. E.2d 449 (1967); *Babb v. Graham*, ___ N. C. App. ___, 660 S. E. 2d 626 (2008). It is universally recognized that one of the most fundamental duties of the trustee throughout the trust relationship is to maintain complete loyalty to the interests of his *cestui que trust*. This concept was forcefully expressed in the case of *Meinhard v. Salmon*, 249 N.Y. 458, 164 N.E. 545, by Cardozo, C.J., as follows:

"A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exceptions, . . . Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court."

Wachovia Bank v. Johnston, 269 N. C. 701, 153 S. E.2d 449.

In other colorful language, the Supreme Court observed that "(t)he trustee, because of his fiduciary relationship, is skating on the thin and slippery ice of presumed fraud, which he must rebut by proof that no fraud was committed and no undue influence or moral duress exerted." *Id*.

In North Carolina, numerous statutes reinforce this case law. The Court of Appeals summarized these statutes at length recently by commenting:

The trustee of an irrevocable testamentary trust is a fiduciary. *N.C. Gen. Stat.* § 32-2 (2007) ("fiduciary" includes a trustee under any trust); see also *In Re Testamentary Tr. Of Charnock*, 158 N.C. App. 35, 41, 579 S.E.2d 887, 891 (2003). As a fiduciary, the trustee is required by statute to "observe the standard of judgment and care under the circumstances then prevailing, which an ordinarily prudent person of discretion and intelligence, who is a fiduciary of the property of others, would observe as such fiduciary." *N.C. Gen. Stat.* § 32-71 (2007). More specifically, "[a] trustee shall invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust." *N.C. Gen. Stat.* § 36C-9-902(a) (2007). Indeed, this statutory standard aligns with the fundamental rule that courts must give effect to the intent of the testator or settlor when interpreting trust instruments. *Wachovia Bank of North Carolina, N.A. v. Willis*, 118 N.C. App. 144, 147, 454 S.E.2d 293, 295 (1995). However, "the trustee shall exercise reasonable care, skill, and caution." *N.C.G.S.* § 36C-9-902(a).

Heintsh v. Wachovia Bank, ___ N. C. App. ____, 665 S. E. 2d 541 (2008).