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# Overview of the State of North Carolina Court System

A. Trial Courts

Small Claims Court – Cases presided over by magistrate, who may or may not be an attorney. Amount in controversy does not exceed $10,000.00 and relief prayed is monetary, the recovery of specific personal property, summary ejectment, or any combination of the foregoing in properly joined claims. Appeal is for trial de novo to District Court.

District Court – Amount in controversy does not exceed $25,000.00. Jury trial must be prayed for (jury of 12 will hear evidence). All civil matters in District Court must go through mandatory non-binding arbitration prior to being tried by the Court. Appeal of civil matters heard in District Court is to Court of Appeals.

Superior Court – Amount in controversy in excess of $25,000.00. Jury trial must be prayed for (jury of 12 will hear evidence). All civil matters in Superior Court must go through mandatory court ordered mediation. Parties can self-select mediator by agreement or Court will appoint mediator.

Juries in eastern North Carolina tend to be more pro-plaintiff than the juries in the western part of the state.

B. Appellate Courts

North Carolina Court of Appeals is the intermediate appellate court. It consists of one chief judge and 14 associate judges. Appeals are heard by a three-judge panel. All appeals of civil matters from District and Superior Court are heard in Court of Appeals as a matter of right. Appeal from Court of Appeals to North Carolina Supreme Court is as a matter of right when the decision of Court of Appeals is by a divided panel or when constitutional questions are involved. To appeal a unanimous decision of the Court of Appeals to the Supreme Court, the appeallant does so by discretionary review or writ of certiorari.

North Carolina Supreme Court is the highest court in North Carolina. Cases are heard by the 7 Justices of the Supreme Court.

Supreme Court and Court of Appeals Judges are elected in a non-partisan election for an eight-year term by the people of the State of North Carolina.

**Procedural**

A. Venue

N.C.G.S. 1-76 to 1-87.1 govern venue. Liability claims are generally governed by N.C.G.S. 1-82 which provides that "the action must be tried in the county in which the plaintiffs or the defendants, or any of them, reside at its commencement, or if none of the defendants reside in the State, then in the county in which the plaintiffs, or any of them, reside; and if none of the parties reside in the State, then the action may be tried in any county which the plaintiff designates in the plaintiff's summons and complaint . . ."

B. Statute of Limitations

N.C.G.S. 1-46 to 1-55 are the various statutes of limitations.

Personal injury, assault, battery, false imprisonment, and contract claims are controlled by the three-year statute of limitations in N.C.G.S. 1-52.

Statutory dram shop claims involving negligent sale of alcohol to a minor and libel and slander claims are controlled by the one-year statuts of limitations in N.C.G.S. 1-54.

Wrongful death actions are controlled by the two-year statute of limitations in N.C.G.S. 1-53.

Product liability statute of repose is 12 years after date of initial purchase for use or consumption as specified in N.C.G.S. 1-46.1.

C. Time for Filing An Answer

Rule 12(a) provides that "a defendant shall serve his answer within 30 days after service of the summons and complaint upon him."

D. Dismissal Re-Filing of Suit

Rule 41(a)(1) provides that "an action or any claim therein may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before the plaintiff rests his case, or; (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of this or any other state or of the United States, an action based on or including the same claim. If an action commenced within the time prescribed therefor, or any claim therein, is dismissed without prejudice under this subsection, a new action based on the same claim may be commenced within one year after such dismissal unless a stipulation filed under (ii) of this subsection shall specify a shorter time."

**Liability**

A. Negligence

North Carolina is a contributory negligence state. The pattern jury instruction on contributory negligence is, in relevant part, as follows. "Did the plaintiff, by his own negligence, contribute to his [injury] [damage]? On this issue the burden of proof is on

the defendant. This means that the defendant must prove, by the greater weight of the evidence, that the plaintiff was negligent and that such negligence was a proximate cause of the plaintiff's own [injury] [damage]. The test of what is negligence is the same for the plaintiff as for the defendant. If the plaintiff's negligence joins with the negligence of the defendant in proximately causing the plaintiff's own [injury] [damage], it is called contributory negligence, and the plaintiff cannot recover."

Contributory negligence is not a defense to gross negligence; however, gross contributory negligence is a defense to gross negligence.

B. Negligence Defenses

Contributory negligence. – see above.

No Duty to Anticipate Negligence of Others – a person has the right to assume and to act on the assumption that others will use ordinary care and follow standards of conduct enacted as laws for the safety of the public.

Doctrine of Sudden Emergency - A person who, through no negligence of his own, is suddenly and unexpectedly confronted with imminent danger to himself or to others, whether actual or apparent, is not required to use the same judgment that would be required if there were more time to make a decision. The person's duty is to use that degree of care which a reasonable and prudent person would use under the same or similar circumstances. If, in a moment of sudden emergency, a person makes a decision that a reasonable and prudent person would make under the same or similar circumstances, he does all that the law requires, even if in hindsight some different decision would have been better or safer.

Failure to Mitigate Damages - A person injured by the [negligent] [wrongful] conduct of another is nonetheless under a duty to use that degree of care which a reasonable person would use under the same or similar circumstances to seek treatment, to get well and to avoid or minimize the harmful consequences of his injury. A person is not permitted to recover for injuries he could have avoided by using means which a reasonably prudent person would have used to cure his injury or alleviate his pain. However, a person is not prevented from recovering damages he could have avoided unless his failure to avoid those damages was unreasonable.

Insulating/Intervening Negligence - A natural and continuous sequence of causation may be interrupted or broken by the negligence of a second person. This occurs when a second person's negligence was not reasonably foreseeable by the first person and causes its own natural and continuous sequence which interrupts, breaks, displaces or supersedes the consequences of the first person's negligence. Under such circumstances, the negligence of the second person, not reasonably foreseeable by the first person, insulates the negligence

of the first person and would be the sole proximate cause of the [injury] [damage].

Last Clear Chance – In response to a defendant's claim that a plaintiff was contributorily negligent, a plaintiff may, in appropriate cases, attempt to assert the doctrine of last clear chance. To prove last clear chance, a plaintiff must prove, by the greater weight of the evidence the following four things: (1) the plaintiff negligently placed himself in a position of peril from which he could not escape by the exercise of reasonable care; (2) the defendant knew, or by the exercise of reasonable care should have discovered, the plaintiff's position of peril and inability to escape from it; (3) the defendant had the time and means to avoid [injury] [damage] to the plaintiff and failed to exercise reasonable care to do so; (4) and such failure proximately caused the plaintiff's [injury] [damage].

C. Gross Negligence, Recklessness, Willful and Wanton Conduct

Gross Negligence - An act or conduct rises to the level of gross negligence when the act is done purposely and with knowledge that such act is a breach of duty to others, i.e., a conscious disregard of the safety of others. An act or conduct moves beyond the realm of negligence when the injury or damage itself is intentional.

"Willful or wanton conduct" means the 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. "Willful or wanton conduct" means more than gross negligence. N.C.G.S. 1D-5(7).

D. Negligent Hiring and Retention

Negligent Hiring elements: (1) a specific tortious act by the employee; (2) the employee's incompetence or unfitness; (3) the employer's actual or constructive notice of the employee's incompetency or unfitness; and (4) injury resulting from the employee's incompetency or unfitness.

Negligent Retention and Supervision is established when a plaintiff proves that the incompetent employee committed a tortious act resulting in injury to plaintiff and that prior to the act, the employer knew or had reason to know of the employee's incompetency.

E. Negligent Entrustment

Negligent entrustment is established when the owner of an automobile entrusts its operation to a person whom he knows, or by the exercise of due care should have known, to be an incompetent or reckless driver, who is likely to cause injury to others in its use.

F. Dram Shop

Statutory Dram Shop claim for injury caused by underage person - N.C.G.S. 18B-120 and -121 - One who sustains injury as a consequence of the actions of an

underage person has a claim for relief against a permittee if: (1) the permittee negligently sold or furnished alcohol to an underage person; AND (2) the consumption of the alcohol that was sold or furnished to the underage person caused an underage driver's being subject to an impairing substance within the meaning of N.C.G.S. § 20-138.1 (DWI statute) at the time of the injury; AND (3) the resulting injury was proximately caused by the underage driver's negligent operation of a vehicle while so impaired. N.C.G.S. 18B-122 – Plaintiff has the burden to prove the above elements to make a prima facie case; however, Defendant (Permittee) can prove good practices, that underage person misrepresented age, or that sale or furnishing of alcohol was made under duress as evidence that permittee was not negligent. N.C.G.S. 18B-123 – damages are limited to no more than $500,000.00 per occurrence. When all claims out of one occurrence exceed $500,000.00, each claim shall abate in the proportion it bears to the total of all claims. N.C.G.S. 18B-124 – Joint and Several – liability of negligent driver or owner of the vehicle and the permittee shall be joint and several with right of contribution but not indemnification.

Common Law Dram Shop Claim. (1) Duty – a permittee shall not knowingly sell or give alcohol to any person who is intoxicated; (2) Breach - the patron was intoxicated and the permittee knew or should have known that the patron was in an intoxicated condition at the time he or she was served; (3) Proximate Cause: the permittee's sale of alcohol to the intoxicated customer may be found to be a substantial factor in the chain of events culminating in injuries to third persons as a result of the customer's operation of an automobile while intoxicated.

G. Joint and Several Liability

North Carolina recognizes joint and several liability. Pursuant to N.C.G.S. 1-113: "If all the defendants have been served, judgment may be taken against any or either of them severally, when the plaintiff would be entitled to judgment against such defendant or defendants if the action has been against them or any of them alone."

Uniform Contribution Among Tort-Feasors Act (N.C.G.S. 1B-4) provides: When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death:

(1) It does not discharge any of the other tort-feasors from liability for the injury or wrongful death unless its terms so provide; but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater; and,

(2) It discharges the tort-feasor to whom it is given from all liability for contribution to any other tort-feasor.

H. Wrongful Death and/or Survival Actions

N.C.G.S. 28A-18-2

(a) When the death of a person is caused by a wrongful act, neglect or default of another, such as would, if the injured person had lived, have entitled the injured person to an action for damages therefor, the person or corporation that would have been so liable, and or her the personal representatives or collectors of the person or corporation that would have been so liable, shall be liable to an action for damages, to be brought by the personal representative or collector of the decedent; and this notwithstanding the death, and although the wrongful act, neglect or default, causing the death, amounts in law to a felony. The personal representative or collector of the decedent who pursues an action under this section may pay from the assets of the estate the reasonable and necessary expenses, not including attorneys' fees, incurred in pursuing the action. At the termination of the action, any amount recovered shall be applied first to the reimbursement of the estate for the expenses incurred in pursuing the action, then to the payment of attorneys' fees, and shall then be distributed as provided in this section. The amount recovered in such action is not liable to be applied as assets, in the payment of debts or devises, except as to burial expenses of the deceased, and reasonable hospital and medical expenses not exceeding four thousand five hundred dollars ($4,500) incident to the injury resulting in death, except that the amount applied for hospital and medical expenses shall not exceed fifty percent (50%) of the amount of damages recovered after deducting attorneys' fees, but shall be disposed of as provided in the Intestate Succession Act. The limitations on recovery for hospital and medical expenses under this subsection do not apply to subrogation rights exercised pursuant to G.S. 135-45.1. All claims filed for such services shall be approved by the clerk of the superior court and any party adversely affected by any decision of said clerk as to said claim may appeal to the superior court in term time.

(b) Damages recoverable for death by wrongful act include:

(1) Expenses for care, treatment and hospitalization incident to the injury resulting in death;

(2) Compensation for pain and suffering of the decedent;

(3) The reasonable funeral expenses of the decedent;

(4) The present monetary value of the decedent to the persons entitled to receive the damages recovered, including but not limited to compensation for the loss of the reasonably expected;

a. Net income of the decedent,

b. Services, protection, care and assistance of the decedent, whether voluntary or obligatory, to the persons entitled to the damages recovered,

c. Society, companionship, comfort, guidance, kindly offices and advice of the decedent to the persons entitled to the damages recovered;

(5) Such punitive damages as the decedent could have recovered pursuant to Chapter 1D of the General Statutes had the decedent survived, and punitive damages for wrongfully causing the death of the decedent through malice or willful or wanton conduct, as defined in G.S. 1D-5;

(6) Nominal damages when the jury so finds.

(c) All evidence which reasonably tends to establish any of the elements of

damages included in subsection (b), or otherwise reasonably tends to establish the present monetary value of the decedent to the persons entitled to receive the damages recovered, is admissible in an action for damages for death by wrongful act.

(d) In all actions brought under this section the dying declarations of the deceased shall be admissible as provided for in G.S. 8-51.1.

I. Vicarious Liability

Respondeat Superior: In an action against an employer under a theory of respondeat superior, plaintiff must show: (1) plaintiff was injured by the negligence of the alleged wrongdoer; (2) the relation of master and servant, employer and employee, or principal and agent, existed between the one sought to be charged and the alleged tort feasor; (3) the neglect or wrong of the servant, employee, or agent was done in the course of his employment or in the scope of his authority; and (4) the servant, employee, or agent was engaged in the work of the master, employer, or principal, and was about the business of his superior, at the time of the injury.

Independent Contractor: The general rule is that an employer is not liable for the torts of an independent contractor committed in the performance of the contracted work unless the employer retains the right to control the manner in which the contractor performs his work.

J. Exclusivity of Workers' Compensation

**N.C.G.S. 97-10.1. Other rights and remedies against employer excluded.**

If the employee and the employer are subject to and have complied with the provisions of this Article, then the rights and remedies herein granted to the employee, his dependents, next of kin, or personal representative shall exclude all other rights and remedies of the employee, his dependents, next of kin, or representative as against the employer at common law or otherwise on account of such injury or death.

The exclusive remedy doctrine does not insulate employers from liability for non-insurable risks such as intentional acts, negligence unconnected with the employment relationship, and actions in contract. *Woodson v. Rowland*, 329 N.C. 330, 407 S.E.2d 222 (1991); *Wake County Hosp. Sys., Inc., v. St. Paul Fire & Marine Ins. Co.*, 127 N.C. App. 33, 487 S.E.2d 789 (1997); Cf. N.C.G.S. 97-10.1 (Comp Act is in derogation of common law tort liability only.

Injury to an employee resulting from willful, wanton and reckless negligence of a co-employee should also be treated as an intentional injury for purposes of our Workers' Compensation Act. *Pleasant v. Johnson*, 312 N.C. 710, 325 S.E.2d 244 (1985).

Where an intentional act results in injury to a plaintiff, the plaintiff may pursue simultaneously her workers' compensation claim and her civil action without being required to elect between them if the forecast of evidence tends to show that the injury was the result of both an "accident" under the Act and an intentional tort. The plaintiff is, however, entitled to but one recovery. *Woodson*, 329 N.C. 330, 407 S.E.2d 222.

**N.C.G.S. 97-10.2. Rights under Article not affected by liability of third party; rights and remedies against third parties.**

(a) The right to compensation and other benefits under this Article for disability, disfigurement, or death shall not be affected by the fact that the injury or death was caused under circumstances creating a liability in some person other than the employer to pay damages therefor, such person hereinafter being referred to as the "third party." The respective rights and interests of the employee-beneficiary under this Article, the employer, and the employer's insurance carrier, if any, in respect of the common-law cause of action against such third party and the damages recovered shall be as set forth in this section.

(b) The employee, or his personal representative if he be dead, shall have the exclusive right to proceed to enforce the liability of the third party by appropriate proceedings if such proceedings are instituted not later than 12 months after the date of injury or death, whichever is later. During said 12-month period, and at any time thereafter if summons is issued against the third party during said 12-month period, the employee or his personal representative shall have the right to settle with the third party and to give a valid and complete release of all claims to the third party by reason of such injury or death, subject to the provisions of (h) below.

(c) If settlement is not made and summons is not issued within said 12-month period, and if employer shall have filed with the Industrial Commission a written admission of liability for the benefits provided by this Chapter, then either the employee or the employer shall have the right to proceed to enforce the liability of the third party by appropriate proceedings; either shall have the right to settle with the third party and to give a valid and complete release of all claims to the third party by reason of such injury or death, subject to the provisions of (h) below. Provided that 60 days before the expiration of the period fixed by the applicable statute of limitations if neither the employee nor the employer shall have settled with or instituted proceedings against the third party, all such rights shall revert to the employee or his personal representative.

(d) The person in whom the right to bring such proceeding or make settlement is vested shall, during the continuation thereof, also have the exclusive right to make settlement with the third party and the release of the person having the right shall fully acquit and discharge the third party except as provided by (h) below. A proceeding so instituted by the person having the right shall be brought in the name of the employee or his personal representative and the employer or the insurance carrier shall not be a necessary or proper party thereto. If the employee or his personal representative shall refuse to cooperate with the employer by being the party plaintiff, then the action shall be brought in the name of the employer and the employee or his personal representative shall be made a party plaintiff or party defendant by order of court.

(e) The amount of compensation and other benefits paid or payable on account of such injury or death shall be admissible in evidence in any proceeding against the third party. In the event that said amount of compensation and other benefits is introduced in such a proceeding the court shall instruct the jury that said amount will be deducted by the court from any amount of damages awarded to the plaintiff. If the third party defending such proceeding, by answer duly served on the employer, sufficiently alleges that actionable negligence of the employer joined and concurred with the negligence of the third party in producing the injury or death, then an issue shall be

submitted to the jury in such case as to whether actionable negligence of employer joined and concurred with the negligence of the third party in producing the injury or death. The employer shall have the right to appear, to be represented, to introduce evidence, to cross-examine adverse witnesses, and to argue to the jury as to this issue as fully as though he were a party although not named or joined as a party to the proceeding. Such issue shall be the last of the issues submitted to the jury. If the verdict shall be that actionable negligence of the employer did join and concur with that of the third party in producing the injury or death, then the court shall reduce the damages awarded by the jury against the third party by the amount which the employer would otherwise be entitled to receive therefrom by way of subrogation hereunder and the entire amount recovered, after such reduction, shall belong to the employee or his personal representative free of any claim by the employer and the third party shall have no further right by way of contribution or otherwise against the employer, except any right which may exist by reason of an express contract of indemnity between the employer and the third party, which was entered into prior to the injury to the employee. In the event that the court becomes aware that there is an express contract of indemnity between the employer and the third party the court may in the interest of justice exclude the employer from the trial of the claim against the third party and may meet the issue of the actionable negligence of the employer to the jury in a separate hearing.

(f) (1) If the employer has filed a written admission of liability for benefits under this Chapter with, or if an award final in nature in favor of the employee has been entered by the Industrial Commission, then any amount obtained by any person by settlement with, judgment against, or otherwise from the third party by reason of such injury or death shall be disbursed by order of the Industrial Commission for the following purposes and in the following order of priority:

a. First to the payment of actual court costs taxed by judgment and/or reasonable expenses incurred by the employee in the litigation of the third-party claim.

b. Second to the payment of the fee of the attorney representing the person making settlement or obtaining judgment, and except for the fee on the subrogation interest of the employer such fee shall not be subject to the provisions of G.S. 97-90 but shall not exceed one third of the amount obtained or recovered of the third party.

c. Third to the reimbursement of the employer for all benefits by way of compensation or medical compensation expense paid or to be paid by the employer under award of the Industrial Commission.

d. Fourth to the payment of any amount remaining to the employee or his personal representative.

(2) The attorney fee paid under (f)(1) shall be paid by the employee and the employer in direct proportion to the amount each shall receive under (f)(1)c and (f)(1)d hereof and shall be deducted from such payments when distribution is made.

(g) The insurance carrier affording coverage to the employer under this Chapter

shall be subrogated to all rights and liabilities of the employer hereunder but this shall not be construed as conferring any other or further rights upon such insurance carrier than those herein conferred upon the employer, anything in the policy of insurance to the contrary notwithstanding.

(h) In any proceeding against or settlement with the third party, every party to the claim for compensation shall have a lien to the extent of his interest under (f) hereof upon any payment made by the third party by reason of such injury or death, whether paid in settlement, in satisfaction of judgment, as consideration for covenant not to sue, or otherwise and such lien may be enforced against any person receiving such funds. Neither the employee or his personal representative nor the employer shall make any settlement with or accept any payment from the third party without the written consent of the other and no release to or agreement with the third party shall be valid or enforceable for any purpose unless both employer and employee or his personal representative join therein; provided, that this sentence shall not apply:

(1) If the employer is made whole for all benefits paid or to be paid by him under this Chapter less attorney's fees as provided by (f)(1) and (2) hereof and the release to or agreement with the third party is executed by the employee; or

(2) If either party follows the provisions of subsection (j) of this section.

(i) Institution of proceedings against or settlement with the third party, or acceptance of benefits under this Chapter, shall not in any way or manner affect any other remedy which any party to the claim for compensation may have except as otherwise specifically provided in this Chapter, and the exercise of one remedy shall not in any way or manner be held to constitute an election of remedies so as to bar the other.

(j) Notwithstanding any other subsection in this section, in the event that a judgment is obtained by the employee in an action against a third party, or in the event that a settlement has been agreed upon by the employee and the third party, either party may apply to the resident superior court judge of the county in which the cause of action arose or where the injured employee resides, or to a presiding judge of either district, to determine the subrogation amount. After notice to the employer and the insurance carrier, after an opportunity to be heard by all interested parties, and with or without the consent of the employer, the judge shall determine, in his discretion, the amount, if any, of the employer's lien, whether based on accrued or prospective workers' compensation benefits, and the amount of cost of the third-party litigation to be shared between the employee and employer. The judge shall consider the anticipated amount of prospective compensation the employer or workers' compensation carrier is likely to pay to the employee in the future, the net recovery to plaintiff, the likelihood of the plaintiff prevailing at trial or on appeal, the need for finality in the litigation, and any other factors the court deems just and reasonable, in determining the appropriate amount of the employer's lien. If the matter is pending in the federal district court such determination may be made by a federal district court judge of that division.

**Damages**

A. Statutory Caps on Damages

Medical Malpractice damages are capped as provided in N.C.G.S. 90-21.19 at

$500,000.00. This amount is subject to increase based upon the Consumer Price Index. Per the statute, the court shall not instruct the jury with respect to the limit of noneconomic damages and neither the attorney for any party nor a witness shall inform the jury or potential members of the jury panel of that limit.

Statutory Dram Shop – Damages are capped as provided in N.C.G.S. 18B-123. The total amount of damages that may be awarded to all aggrieved parties pursuant to any claims for relief under this Article is limited to no more than $500,000 per occurrence. When all claims arising out of an occurrence exceed $500,000, each claim shall abate in the proportion it bears to the total of all claims.

Punitive Damages - Shall not exceed three times the amount of compensatory damages or $250,000, whichever is greater. Cap shall not be made known to the trier of fact through any means, including voir dire, the introduction into evidence, argument, or instructions to the jury.

B. Compensatory Damages for Bodily Injury

Personal Injury Damages – Pattern Jury Instruction 810.02 - Actual damages are the fair compensation to be awarded to a person for any [past] [present] [future] injury [proximately caused by the negligence] [caused by the wrongful conduct] of another. In determining the amount, if any, you award the plaintiff, you will consider the evidence you have heard as to (each of the following types of damages): [medical expenses]; [loss of earnings]; [pain and suffering]; [scars or disfigurement]; [(partial) loss (of use) of part of the body]; [permanent injury]; [state any other type of damage supported by the evidence]. The total of all damages are to be awarded in one lump sum.

Medical Expenses - Pattern Jury Instruction 810.04D - Medical expenses include all [hospital] [doctor] [drug] [state other expenses] bills reasonably [incurred] [to be incurred in the future] by the plaintiff as a [proximate result of the negligence] [result of the wrongful conduct] of the defendant. To be reasonably incurred, medical expenses must have been: (1) reasonably necessary for the proper treatment of the plaintiff's injury, (2) incurred as a [proximate result of the defendant's negligence] [result of the defendant’s wrongful conduct] and (3) reasonable in amount. To show that the amount of claimed medical expenses is reasonable, the plaintiff must prove by the greater weight of the evidence the amount actually paid for medical services (and the amount necessary to satisfy medical expenses that have not yet been paid). If you find that the plaintiff has proved [this amount] [these amounts], then the law presumes that [this amount is] [these amounts are] reasonable. This means that if you find by the greater weight of the evidence the amount actually paid for medical services (and the amount necessary to satisfy medical expenses that have not yet been paid), in the absence of other evidence as I am about to discuss with you, then you also must find that the amount of medical expenses was reasonable. However, it is your duty to consider all of the evidence in the case. If you find from the plaintiff’s evidence the amount actually paid for medical services (and the amount necessary to satisfy medical expenses that have not yet been paid), then the burden shifts to the defendant to prove by the greater weight of the evidence that a different amount was actually paid for medical services (or

a different amount is necessary to satisfy medical expenses that have not yet been paid). If you find that the defendant has proved by the greater weight of the evidence that [[certain] [the] charges were] [a charge was] (either) satisfied by payment of an amount less than the amount charged (or can be satisfied by payment of less than the amount charged), then you must find that the lesser amount is the reasonable amount of the charges (unless you find that the plaintiff has rebutted the defendant's evidence). Remember, for you to find the plaintiff's bills were reasonably incurred, the plaintiff must also prove by the greater weight of the evidence that the medical services shown on the bills were reasonably necessary for the treatment of the plaintiff's injuries and that the services were necessary as a [proximate result of the defendant's negligence] [result of the defendant's wrongful conduct]. [I already have instructed you on the definition of proximate cause, and that definition applies equally here.]

Evidence Rule 414 provides: Evidence offered to prove past medical expenses shall be limited to evidence of the amounts actually paid to satisfy the bills that have been satisfied, regardless of the source of payment, and evidence of the amounts actually necessary to satisfy the bills that have been incurred but not yet satisfied.

Loss of Earnings – Pattern Jury Instruction 810.06 - Damages for personal injury also include fair compensation for the [past] [present] [future] loss of time from employment, loss from inability to perform ordinary labor, or the reduced capacity to earn money experienced by the plaintiff as a [proximate result of the negligence] [result of the wrongful conduct] of the defendant. In determining this amount, you should consider the evidence as to: [the plaintiff's age and occupation]; [the nature and extent of the plaintiff's employment]; [the value of the plaintiff's services]; [the amount of the plaintiff's income, at the time of his injury, from salary, wages or other compensation]; [the effect of the plaintiff's disability or disfigurement on his earning capacity]; [the plaintiff's loss of profits from his business or profession]; [the loss of capacity to earn money]; [specify any other factor supported by the evidence]. (The fact that a person [was not working at the time of his injury] [had not yet begun work at the time he was injured] does not, in and of itself, prevent a person from recovering fair compensation for loss of future earning capacity.)

Pain and Suffering – Pattern Jury Instruction 810.08 - Damages for personal injury also include fair compensation for the actual [past] [present] [future] physical pain and mental suffering experienced by the plaintiff as a [proximate result of the negligence] [result of the wrongful conduct] of the defendant. There is no fixed formula for placing a value on physical pain and mental suffering. You will determine what is fair compensation by applying logic and common sense to the evidence.

Scarring and Disfigurement – Pattern Jury Instruction 810.10 - Damages for personal injury also include fair compensation for [scarring] [disfigurement] of the plaintiff as a [proximate result of the negligence] [result of the wrongful conduct] of the defendant. There is no fixed formula for placing a value on [scarring] [disfigurement]. You must determine what is fair compensation by applying logic and common sense to the evidence. You may consider: [the extent of any [past] [present] [future] alteration of

the plaintiff's physical appearance [proximately caused by the negligence] [caused by the wrongful conduct] of the defendant]; [the extent of any [past] [present] [future] embarrassment and mental suffering [proximately caused by the negligence of the defendant] [caused by the wrongful conduct of the defendant]]; [(specify any other factor supported by the evidence)]. However, the plaintiff is not entitled to recover twice for the same element of damages. Therefore, you should not include any amount you have already allowed for loss of earnings or physical pain and mental suffering because of [scarring] [disfigurement].

Loss (of Use) of Part of the Body – Pattern Jury Instruction 810.12 - Damages for personal injury also include fair compensation for the (partial) loss of (use of) (identify part of body affected) experienced by the plaintiff as a proximate result of the negligence of the defendant. There is no fixed formula for placing a value on the (partial) loss (of use) of part of the body. The jury determines what is fair compensation by applying logic and common sense to the evidence. The jury may consider: (1) [the extent of any [past] [present] [future] disability or handicap proximately caused by the negligence of the defendant]; (2) [any [past] [present] [future] inconvenience or hardship proximately caused by the negligence of the defendant]; (3) [(specify any other factor supported by the evidence)]. However, the plaintiff is not entitled to recover twice for the same element of damages. Therefore, the jury should not include any amount is already allowed for [loss of earnings] [pain and suffering] [scarring or disfigurement] because of the (partial) loss of (use of) (identify part of body affected).

Permanent Injury – Pattern Jury Instruction 810.14 - Damages for personal injury also include fair compensation for permanent injury[1] incurred by the plaintiff as a [proximate result of the negligence] [result of the wrongful conduct] of the defendant. An injury is permanent when any of its effects will continue throughout the plaintiff's life.[2] These effects may include: [medical expenses]; [loss of earnings]; [pain and suffering]; [scarring or disfigurement]; [(partial) loss (of use) of part of the body]; [(state any other element of damages supported by the evidence)] to be incurred or experienced by the plaintiff over his life expectancy. However, the plaintiff is not entitled to recover twice for the same element of damages. Therefore, you should not include any amount you have already allowed for [medical expenses] [loss of earnings] [pain and suffering] [scarring or disfigurement] [(partial) loss (of use) of part of the body] because of permanent injury. Life expectancy is the period of time the plaintiff may reasonably be expected to live. [The life expectancy tables are in evidence.] [The court has taken judicial notice of the life expectancy tables.] They show that for someone of the plaintiff's present age, (state present age), his life expectancy is (state expectancy) years. (See N.C. Gen. Stat. §8-46. Mortality tables as evidence.) In determining the plaintiff's life expectancy, you will consider not only these tables, but also all other evidence as to his health, his constitution and his habits.

C. Collateral Source

NC Rule of Evidence 414 provides: “Evidence offered to prove past medical expenses shall be limited to evidence of the amounts actually paid to satisfy the bills that have been satisfied, regardless of the source of payment, and evidence of the amounts actually necessary to satisfy the bills that have been incurred but not yet satisfied. This rule does not impose upon any party an affirmative duty to seek a reduction in billed charges to which the party is not contractually entitled.”

NC Rule of Evidence 411 provides: “Evidence that a person was or was not insured against liability is not admissible upon the issue whether he acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.”

D. Pre-Judgment/Post judgment Interest

N.C.G.S. 24-5 - Interest on judgments –

(a) Actions on Contracts. - In an action for breach of contract, except an action on a penal bond, the amount awarded on the contract bears interest from the date of breach. The fact finder in an action for breach of contract shall distinguish the principal from the interest in the award, and the judgment shall provide that the principal amount bears interest until the judgment is satisfied. If the parties have agreed in the contract that the contract rate shall apply after judgment, then interest on an award in a contract action shall be at the contract rate after judgment; otherwise it shall be at the legal rate. On awards in actions on contracts pursuant to which credit was extended for personal, family, household, or agricultural purposes, however, interest shall be at the lower of the legal rate or the contract rate. For purposes of this section, "after judgment" means after the date of entry of judgment under G.S. 1A-1, Rule 58.

* * *

(b) Other Actions. - In an action other than contract, any portion of a money judgment designated by the fact finder as compensatory damages bears interest from the date the action is commenced until the judgment is satisfied. Any other portion of a money judgment in an action other than contract, except the costs, bears interest from the date of entry of judgment under G.S. 1A-1, Rule 58, until the judgment is satisfied. Interest on an award in an action other than contract shall be at the legal rate.

E. Damages for Emotional Distress

**Negligent Infliction of Emotional Distress – Pattern Jury Instruction 102.84**

"Did the plaintiff suffer severe emotional distress as a proximate result of the negligence of the defendant?"

On this issue the burden of proof is on the plaintiff. This means that the plaintiff must prove, by the greater weight of the evidence, three things:

First, that the defendant was negligent. "Negligence" refers to a person's failure to follow a duty of conduct imposed by law. [Every person is under a duty to use ordinary care to protect himself and others from [injury] [damage]. Ordinary care means that degree of care which a reasonable and prudent person would use under the same

or similar circumstances to protect himself and others from [injury] [damage]. A person's failure to use ordinary care is negligence.[ [Every person is(also) under a duty to follow standards of conduct enacted as laws for the safety of the public. A standard of conduct established by a safety statute must be followed. A person's failure to do so is negligence in and of itself.]

Second, that the plaintiff suffered severe emotional distress. "Severe emotional distress" means [neurosis] [psychosis] [chronic depression] [phobia] [any type of severe and disabling emotional or mental condition which may be generally recognized and diagnosed by professionals trained to do so]. (Mere temporary fright or anxiety, disappointment or regret is not severe emotional distress.)

Third, that the defendant's negligence was a proximate cause of the plaintiff's severe emotional distress. Proximate cause is a cause which in a natural and continuous sequence produces a person's severe emotional distress, and one which a reasonable and prudent person could have foreseen would probably produce such severe emotional distress. There may be more than one proximate cause of severe emotional distress. Therefore, the plaintiff need not prove that the defendant's negligence was the sole proximate cause of the plaintiff's severe emotional distress. The plaintiff must prove, by the greater weight of the evidence, only that the defendant's negligence was a proximate cause.

(*Use where a plaintiff's severe emotional distress arises due to concern for another person:* The plaintiff may recover for severe emotional distress due to concern for another person if it was a reasonably foreseeable result of, and was in fact caused by, the defendant's negligence. You are to make this determination from all the evidence, including how close the plaintiff was to the negligent act when it occurred, the nature of the relationship between the plaintiff and the person for whose welfare the plaintiff was concerned, whether the plaintiff personally observed the negligent act, and any other factor supported by the evidence.)

In this case, the plaintiff contends, and the defendant denies, that the defendant was negligent in one or more of the following respects:

*Read all contentions of negligence supported by the evidence.*

The plaintiff further contends, and the defendant denies, that the plaintiff suffered severe emotional distress in one or more of the following respects:

Read all contentions of severe emotional distress supported by the evidence.

The plaintiff further contends, and the defendant denies, that the defendant's negligence was a proximate cause of the plaintiff's severe emotional distress. I instruct you that negligence is not to be presumed from the mere fact of severe emotional distress.

*Give law as to each contention of negligence included above.*

Finally, as to this (state number) issue on which the plaintiff has the burden of proof, if you find, by the greater weight of the evidence, that the defendant was negligent, that the plaintiff suffered severe emotional distress and that the defendant's negligence was a proximate cause of the plaintiff's severe emotional distress, then it would be your duty to answer this issue "Yes" in favor of the plaintiff.

If on the other hand, you fail to so find, then it would be your duty to answer this issue "No" in favor of the defendant.

**Intentional or Reckless Infliction of Severe Emotional Distress – Pattern Jury Instruction 800.60**

"Did the defendant [intentionally] [recklessly] cause severe emotional distress to the plaintiff?"

On this issue the burden of proof is on the plaintiff. This means that the plaintiff must prove, by the greater weight of the evidence, the following three things: First, that the defendant engaged in extreme and outrageous conduct. Conduct is "extreme and outrageous" when it exceeds all bounds usually tolerated by decent society.

Second, that the defendant's conduct was [intended to cause] [recklessly indifferent to the likelihood it would cause]severe emotional distress to the plaintiff; and

And Third, that defendant's conduct in fact caused severe emotional distress to the plaintiff.

"Severe emotional distress" means [neurosis] [psychosis] [chronic depression] [phobia] [any type of severe and disabling emotional or mental condition which may be generally recognized and diagnosed by professionals trained to do so]. (Mere temporary fright or anxiety, disappointment or regret is not severe emotional distress.)

Finally, as to this issue on which the plaintiff has the burden of proof, if you find, by the greater weight of the evidence, that the defendant engaged in extreme and outrageous conduct which was [intended to cause] [recklessly indifferent to the likelihood it would cause] severe emotional distress to the plaintiff and which did cause severe emotional distress to the plaintiff, then it would be your duty to answer this issue "Yes" in favor of the plaintiff.

If, on the other hand, you fail to so find, then it would be your duty to answer this issue "No" in favor of the defendant.

No physical impact, physical injury or physical manifestation of emotional distress need be proven. *Johnson v. Ruark Obstetrics and Gynecology Associates, P.A.*, 327 N.C. 283, 304, 395 S.E.2d 85, 97 (1990).

F. Wrongful Death and/or Survival Action Damages

Regarding damages in a wrongful death action, N.C.G.S. 28A-18-2 states in relevant part:

(b) Damages recoverable for death by wrongful act include:

(1) Expenses for care, treatment and hospitalization incident to the injury resulting in death;

(2) Compensation for pain and suffering of the decedent;

(3) The reasonable funeral expenses of the decedent;

(4) The present monetary value of the decedent to the persons entitled to receive the damages recovered, including but not limited to compensation for the loss of the reasonably expected;

a. Net income of the decedent,

b. Services, protection, care and assistance of the decedent, whether voluntary or obligatory, to the persons entitled to the damages recovered,

c. Society, companionship, comfort, guidance, kindly offices and advice of the decedent to the persons entitled to the damages

recovered;

(5) Such punitive damages as the decedent could have recovered pursuant to Chapter 1D of the General Statutes had the decedent survived, and punitive damages for wrongfully causing the death of the decedent through malice or willful or wanton conduct, as defined in G.S. 1D-5;

(6) Nominal damages when the jury so finds.

(c) All evidence which reasonably tends to establish any of the elements of damages included in subsection (b), or otherwise reasonably tends to establish the present monetary value of the decedent to the persons entitled to receive the damages recovered, is admissible in an action for damages for death by wrongful act.

G. Punitive Damages

Chapter 1D of the North Carolina General Statutes governs punitive damages. Punitive damages may be awarded only 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; or (3) Willful or wanton conduct. Punitive damages shall not be awarded against a person solely on the basis of vicarious liability for the acts or omissions of another. Punitive damages may be awarded against a person only if that person participated in the conduct constituting the aggravating factor giving rise to the punitive damages, or if, in the case of a corporation, the officers, directors, or managers of the corporation participated in or condoned the conduct constituting the aggravating factor giving rise to punitive damages. N.C.G.S. 1D-15.

Punitive damages shall not exceed three times the amount of compensatory damages or $250,000, whichever is greater. If a trier of fact returns a verdict for punitive damages in excess of the maximum amount specified under this subsection, the trial court shall reduce the award and enter judgment for punitive damages in the maximum amount. Punitive damage cap shall not be made known to the trier of fact through any means, including voir dire, the introduction into evidence, argument, or instructions to the jury. N.C.G.S. 1D-25.

H. Diminution in Value of Damaged Vehicle

Pattern Jury Instruction 810.62 - The plaintiff's actual property damages are equal to the difference between the fair market value of the property immediately before it was damaged and its fair market value immediately after it was damaged. The fair market value of any property is the amount which would be agreed upon as a fair price by an owner who wishes to sell, but is not compelled to do so, and a buyer who wishes to buy, but is not compelled to do so. (If evidence is introduced regarding the actual or estimated cost of repair, the following paragraph should be used: Evidence of [estimates of the cost to repair] (and) [the actual cost of repairing] the damage to the plaintiff's property may be considered by you in determining the difference in fair market value immediately before and immediately after the damage occurred.)

I. Loss of Use of Motor Vehicle

Pattern Jury Instruction MV 106.67 - The plaintiff's actual property damages may also include compensation for the loss of use of his vehicle. (Here give the applicable alternative statement (give only one:)

[Repairs possible at reasonable cost in reasonable time. When a vehicle, damaged by the negligence of another, can be repaired at a reasonable cost and within a reasonable time, the owner may recover for the loss of its use. The measure of such damages is the cost of renting a similar vehicle during a reasonable period for repairs (whether or not the owner actually rented such a similar vehicle).

[Total destruction or repairs improvident. When a vehicle, by the negligence of another, is totally destroyed as a conveyance (or if for some reason repairs would be so long delayed as to be improvident), the owner may recover for loss of use only if a substitute vehicle is not immediately obtainable. If a substitute is not immediately obtainable, the owner may recover for loss of use during the period reasonably necessary to acquire a substitute. The measure of such damages is the cost of renting a similar vehicle during such period (whether or not the owner actually rented such a similar vehicle)].

[Owner elects to replace repairable vehicle. When a vehicle, damaged by the negligence of another, can be repaired at a reasonable cost and within a reasonable time, but the owner elects to replace it by acquiring a substitute vehicle, the owner may recover for loss of use during the time reasonably required to make repairs or to acquire the substitute, whichever is shorter. The measure of such damages is the cost of renting a similar vehicle during such period].

(Do not use the following paragraph unless the evidence justifies.)

(In such a situation, if the owner proves that he made a reasonable effort to obtain a substitute vehicle but was unable to do so within the area reasonably related to his business, and further proves with reasonable certainty the profits he lost through inability to use the vehicle, he may recover, in place of the cost of rental, such profits lost during a reasonable period within which to [make repairs] [obtain a substitute not immediately obtainable].)

**Evidentiary Issues**

A. Preventability Determination

**Rule 407. Subsequent remedial measures.**

When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if those issues are controverted, or impeachment.

B. Traffic Citation from Accident

Evidence of a defendant's conviction in a criminal prosecution for the same act which constitutes the basis of the liability to be established in a civil suit is not admissible unless the conviction is based on a plea of guilty. A plea of guilty to a traffic citation is generally admissible; however, it is not conclusive evidence of negligence and may be explained. Evidence of an acquittal in a criminal prosecution for a traffic violation is not admissible in a civil action to establish the truth of the facts on which acquittal was rendered. Prior testimony of a witness may be used for impeachment of that witness.

C. Failure to Wear a Seat Belt

Evidence of failure to wear a seat belt shall not be admissible in any criminal or civil trial, action, or proceeding except in an action based on a violation of this section or as justification for the stop of a vehicle or detention of a vehicle operator and passengers. N.C.G.S. 20-135.2A(d).

D. Failure of Motorcyclist to Wear a Helmet

Violation of N.C.G.S. 20-40.4, which requires motorcycle riders to wear a helmet, shall not be considered negligence per se or contributory negligence per se in any civil action.

E. Evidence of Alcohol or Drug Intoxication

Lay testimony regarding the appearance of a tort-feasor is admissible. Testimony regarding the appearance of another and whether that person appeared intoxicated is generally admissible. Intoxication can be established through the lay opinion testimony of witnesses and/or by the opinion of experts.

Mere proof that a motorist involved in a collision was intoxicated at the time does not establish a causal relation between his condition and the collision. The intoxicated condition must have caused the motorist to operate his vehicle in a manner that was a proximate cause of the collision.

**N.C.G.S. 20-138.1. Impaired driving.**

(a) Offense. - A person commits the offense of impaired driving if he drives any vehicle upon any highway, any street, or any public vehicular area within this State:

(1) While under the influence of an impairing substance; or

(2) After having consumed sufficient alcohol that he has, at any relevant time after the driving, an alcohol concentration of 0.08 or more. The results of a chemical analysis shall be deemed sufficient evidence to prove a person's alcohol concentration; or

(3) With any amount of a Schedule I controlled substance, as listed in G.S. 90-89, or its metabolites in his blood or urine.

(a1) A person who has submitted to a chemical analysis of a blood sample, pursuant to G.S. 20-139.1(d), may use the result in rebuttal as evidence that the person did not have, at a relevant time after driving, an alcohol concentration of 0.08 or more.

(b) Defense Precluded. - The fact that a person charged with violating this section is or has been legally entitled to use alcohol or a drug is not a defense to a charge under this section.

(b1) Defense Allowed. - Nothing in this section shall preclude a person from asserting that a chemical analysis result is inadmissible pursuant to G.S. 20-139.1(b2).

(c) Pleading. - In any prosecution for impaired driving, the pleading is sufficient if it states the time and place of the alleged offense in the usual form and charges that the defendant drove a vehicle on a highway or public vehicular area while subject to an impairing substance.

(d) Sentencing Hearing and Punishment. - Impaired driving as defined in this section is a misdemeanor. Upon conviction of a defendant of impaired driving, the presiding judge shall hold a sentencing hearing and impose punishment in accordance with G.S. 20-179.

(e) Exception. - Notwithstanding the definition of "vehicle" pursuant to G.S. 20-4.01(49), for purposes of this section the word "vehicle" does not include a horse.

F. Testimony of Investigating Police Officer

Accident reports may be admitted under Rule 803(6) (record of regularly conducted activity) if properly authenticated. Proper authentication requires that the report was (1) prepared at or near the time of the acts reported; (2) prepared by or from information transmitted by a person with knowledge of the acts; and (3) kept in the course of a regularly conducted business activity, with such being a regular practice of that business activity. If a document meets these criteria, it is admissible unless the circumstances surrounding the preparation of the report indicate a lack of trustworthiness. *Joines v. Moffitt*, __ N.C. App. __ (2013).

An officer, like any other lay witness, may testify in the form of opinions or inferences "which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." N.C. R. Evid. 701.

See discussion of “Expert Testimony” below.

G. Expert Testimony

Rule 702. Testimony by experts.

(a) If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion, or otherwise, if all of the following apply:

(1) The testimony is based upon sufficient facts or data.

(2) The testimony is the product of reliable principles and methods.

(3) The witness has applied the principles and methods reliably to the facts of the case.

(a1) A witness, qualified under subsection (a) of this section and with proper foundation, may give expert testimony solely on the issue of impairment and not on the issue of specific alcohol concentration level relating to the following:

(1) The results of a Horizontal Gaze Nystagmus (HGN) Test when the test is administered by a person who has successfully completed training in HGN.

(2) Whether a person was under the influence of one or more impairing substances, and the category of such impairing substance or substances. A witness who has received training and holds a current certification as a Drug

Recognition Expert, issued by the State Department of Health and Human Services, shall be qualified to give the testimony under this subdivision.

(b) In a medical malpractice action as defined in G.S. 90-21.11, a person shall not give expert testimony on the appropriate standard of health care as defined in G.S. 90-21.12 unless the person is a licensed health care provider in this State or another state and meets the following criteria:

(1) If the party against whom or on whose behalf the testimony is offered is a specialist, the expert witness must:

a. Specialize in the same specialty as the party against whom or on whose behalf the testimony is offered; or

b. Specialize in a similar specialty which includes within its specialty the performance of the procedure that is the subject of the complaint and have prior experience treating similar patients.

(2) During the year immediately preceding the date of the occurrence that is the basis for the action, the expert witness must have devoted a majority of his or her professional time to either or both of the following:

a. The active clinical practice of the same health profession in which the party against whom or on whose behalf the testimony is offered, and if that party is a specialist, the active clinical practice of the same specialty or a similar specialty which includes within its specialty the performance of the procedure that is the subject of the complaint and have prior experience treating similar patients; or

b. The instruction of students in an accredited health professional school or accredited residency or clinical research program in the same health profession in which the party against whom or on whose behalf the testimony is offered, and if that party is a specialist, an accredited health professional school or accredited residency or clinical research program in the same specialty.

(c) Notwithstanding subsection (b) of this section, if the party against whom or on whose behalf the testimony is offered is a general practitioner, the expert witness, during the year immediately preceding the date of the occurrence that is the basis for the action, must have devoted a majority of his or her professional time to either or both of the following:

(1) Active clinical practice as a general practitioner; or

(2) Instruction of students in an accredited health professional school or accredited residency or clinical research program in the general practice of medicine.

(d) Notwithstanding subsection (b) of this section, a physician who qualifies as an expert under subsection (a) of this Rule and who by reason of active clinical practice or instruction of students has knowledge of the applicable standard of care for nurses, nurse practitioners, certified registered nurse anesthetists, certified registered nurse midwives, physician assistants, or other medical support staff may give expert testimony in a medical malpractice action with respect to the standard of care of which he is knowledgeable of nurses, nurse practitioners, certified registered nurse anesthetists, certified registered nurse midwives, physician assistants licensed under Chapter 90 of the General Statutes, or other medical support staff.

(e) Upon motion by either party, a resident judge of the superior court in the county or judicial district in which the action is pending may allow expert testimony on the appropriate standard of health care by a witness who does not meet the

requirements of subsection (b) or (c) of this Rule, but who is otherwise qualified as an expert witness, upon a showing by the movant of extraordinary circumstances and a determination by the court that the motion should be allowed to serve the ends of justice.

(f) In an action alleging medical malpractice, an expert witness shall not testify on a contingency fee basis.

(g) This section does not limit the power of the trial court to disqualify an expert witness on grounds other than the qualifications set forth in this section.

(h) Notwithstanding subsection (b) of this section, in a medical malpractice action as defined in G.S. 90-21.11(2)b. against a hospital, or other health care or medical facility, a person shall not give expert testimony on the appropriate standard of care as to administrative or other nonclinical issues unless the person has substantial knowledge, by virtue of his or her training and experience, about the standard of care among hospitals, or health care or medical facilities, of the same type as the hospital, or health care or medical facility, whose actions or inactions are the subject of the testimony situated in the same or similar communities at the time of the alleged act giving rise to the cause of action.

(i) A witness qualified as an expert in accident reconstruction who has performed a reconstruction of a crash, or has reviewed the report of investigation, with proper foundation may give an opinion as to the speed of a vehicle even if the witness did not observe the vehicle moving.

H. Collateral Source

NC Rule of Evidence 411 provides: "Evidence that a person was or was not insured against liability is not admissible upon the issue whether he acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness."

I. Recorded Statements

**Rule 801. Definitions and exception for admissions of a party-opponent.**

(d) Exception for Admissions by a Party-Opponent. - A statement is admissible as an exception to the hearsay rule if it is offered against a party and it is (A) his own statement, in either his individual or a representative capacity, or (B) a statement of which he has manifested his adoption or belief in its truth, or (C) a statement by a person authorized by him to make a statement concerning the subject, or (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship or (E) a statement by a coconspirator of such party during the course and in furtherance of the conspiracy.

**Rule 803. Hearsay exceptions; availability of declarant immaterial.**

(5) Recorded Recollection. - A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in his memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be

received as an exhibit unless offered by an adverse party.

**Rule 106. Remainder of or related writings or recorded statements.**

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

**Rule 613. Prior statements of witnesses.**

In examining a witness concerning a prior statement made by him, whether written or not, the statement need not be shown nor its contents disclosed to him at that time, but on request the same shall be shown or disclosed to opposing counsel.

J. Prior Convictions

**Rule 404. Character evidence not admissible to prove conduct; exceptions; other crimes.**

(a) Character evidence generally. - Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

(1) Character of accused. - Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same;

(2) Character of victim. - Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) Character of witness. - Evidence of the character of a witness, as provided in Rules 607, 608, and 609.

(b) Other crimes, wrongs, or acts. - Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident. Admissible evidence may include evidence of an offense committed by a juvenile if it would have been a Class A, B1, B2, C, D, or E felony if committed by an adult.

**Rule 609. Impeachment by evidence of conviction of crime.**

(a) General rule. - For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a felony, or of a Class A1, Class 1, or Class 2 misdemeanor, shall be admitted if elicited from the witness or established by public record during cross-examination or thereafter.

(b) Time limit. - Evidence of a conviction under this rule is not admissible if a period of more than 10 years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative

value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(c) Effect of pardon. - Evidence of a conviction is not admissible under this rule if the conviction has been pardoned.

(d) Juvenile adjudications. - Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

(e) Pendency of appeal. - The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

K. Driving History

To attack the credibility of a witness, evidence that the witness has been convicted of a felony, or of a Class A1, Class 1, or Class 2 misdemeanor, shall be admitted if elicited from the witness or established by public record during cross-examination or thereafter. Evidence of a conviction is not admissible if a period of more than 10 years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence. N.C. R. Evid. 609.

Generally, unless the requirements of Rule 609 are met, evidence of driving or accident history will not be admissible.

L. Fatigue

North Carolina has adopted the Federal Motor Carrier Regulations. Pursuant to 49 C.F.R. 392.3, no driver shall operate a commercial motor vehicle, and a motor carrier shall not require or permit a driver to operate a commercial motor vehicle, while the driver's ability or alertness is so impaired, or so likely to become impaired, through fatigue, illness, or any other cause, as to make it unsafe for him/her to begin or continue to operate the commercial motor vehicle.

M. Spoliation

In North Carolina, our courts “have determined that spoliation of evidence gives rise to an adverse inference as opposed to a presumption." *Holloway v. Tyson Foods,*

*Inc.*, 668 S.E.2d 72 (N.C. App., 2008).

Spoliation by a Party - Pattern Jury Instruction 101-39 - When evidence has been received which tends to show that (describe despoiled evidence) was (1) in the exclusive possession of the [plaintiff] [defendant], (2) has been [lost] [misplaced] [suppressed] [destroyed] [corrupted] and (3) that the [plaintiff] [defendant] had notice of the [plaintiff's] [defendant's] [potential] [claim] [defense], you may infer, though you are not compelled to do so, that (describe despoiled evidence) would be damaging to the [plaintiff] [defendant]. You may give this inference such force and effect as you determine it should have under all of the facts and circumstances. [The inference is permitted even in the absence of evidence that the [plaintiff] [defendant] acted intentionally, negligently or in bad faith.] [No inference is permitted if you find that [(describe despoiled evidence) was equally accessible to both parties] [there is a fair, frank and satisfactory explanation for the failure to produce the (describe despoiled evidence)]

**Settlement**

A. Offer of Judgment

**Rule 68. Offer of judgment and disclaimer.**

(a) Offer of judgment. - At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted within 10 days after its service shall be deemed withdrawn and evidence of the offer is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer.

(b) Conditional offer of judgment for damages. - A party defending against a claim arising in contract or quasi contract may, with his responsive pleading, serve upon the claimant an offer in writing that if he fails in his defense, the damages shall be assessed at a specified sum; and if the claimant signifies his acceptance thereof in writing within 20 days of the service of such offer, and on the trial prevails, his damages shall be assessed accordingly. If the claimant does not accept the offer, he must prove his damages as if the offer had not been made. If the damages assessed in the claimant's favor do not exceed the sum stated in the offer, the party defending shall recover the costs in respect to the question of damages.

B. Liens

**Medical Liens** by health care providers require compliance with N.C.G.S. 44-49 & 44-50 which create liens for medical providers on all funds paid to any person in compensation for or settlement of the injuries whether in litigation or otherwise.

N.C.G.S. 44-49 (b) Notwithstanding subsection (a) of this section, no lien

provided for under subsection (a) of this section is valid with respect to any claims whatsoever unless the physician, dentist, nurse, hospital, corporation, or other person entitled to the lien furnishes, without charge to the attorney as a condition precedent to the creation of the lien, upon request to the attorney representing the person in whose behalf the claim for personal injury is made, an itemized statement, hospital record, or medical report for the use of the attorney in the negotiation, settlement, or trial of the claim arising by reason of the personal injury, and a written notice to the attorney of the lien claimed.

If an insurance carrier settles with an unrepresented person the carrier does not have valid "notice" of a lien pursuant to the N.C.G.S. 44-50 unless it receives documentation of either 1) a valid assignment of rights signed by the injured person or 2) documentation containing unambiguous language that the medical provider is asserting a lien under the provisions of N.C.G.S. 44-49 and 44-50. Note that an assignment that assigns a claim for personal injury is not valid.

**Workers Compensation Liens** are created by statute under NCGS 97-10.2. This statute creates the rights of the employee, employer and workers' compensation carrier, if any, against a third party that caused the employee's injury or death. The subrogation right of the employer and workers' compensation carrier is created by payment of benefits under the Workers' Compensation Act.

C. Minor Settlement

In North Carolina, there is no requirement that the court approve the settlement of a minor's claim; however, a minor's claim is conclusively and finally settled only if approved by the court. A minor's claim is prosecuted by and through a court appointed guardian ad litem. When a settlement agreement is reached between a minor plaintiff and a defendant, the matter is scheduled for hearing before the court. At the hearing, the court determines whether the settlement is fair, reasonable, and in the best interest of the minor. When the settlement is approved, the court enters a judgment and funds are disbursed as ordered by the court. Funds for the minor are held by the Clerk of Superior Court until the minor reaches the age of majority.

D. Negotiating Directly With Attorneys

It is permissible and common.

E. Confidentiality Agreements

Confidentiality agreements are permissible and common.

F. Releases

"[A] release executed by the injured party and based on a valuable consideration is a complete defense to an action for damages for the injuries." *Caudill v. Manufacturing Co.*, 258 N.C. 99, 102, 128 S.E.2d 128, 130 (1962), quoting from, *Ward v. Heath*, 222 N.C. 470, 24 S.E.2d 5 (1943). If the release contains language "and all other persons, firms or corporations and other entities not specifically identified.." or similar language the release operates as a full and final release of all claims which

could be asserted against anyone for the injuries and damages. Releases are not required to be notarized. A valid release of one of several joint tort-feasors releases all and is a bar to a suit against any of them for the same injury. However, a covenant not to sue does not release and extinguish the cause of action, and the cause of action may be maintained against the remaining tort-feasors notwithstanding the covenant. The remaining tort-feasors would be entitled to have the amount paid for the covenant credited on any judgment thereafter obtained against them by the injured party.

G. Voidable Releases

An unrepresented injured person has no statutory right to void a release he gives for valuable consideration.

**Transportation Law**

A. State DOT Regulatory Requirements

North Carolina has adopted the Federal Motor Carrier Safety Regulations in their entirety.

B. State Speed Limits

**N.C.G.S. 20-141. Speed restrictions.**

(a) No person shall drive a vehicle on a highway or in a public vehicular area at a speed greater than is reasonable and prudent under the conditions then existing.

(b) Except as otherwise provided in this Chapter, it shall be unlawful to operate a vehicle in excess of the following speeds:

(1) Thirty-five miles per hour inside municipal corporate limits for all vehicles.

(2) Fifty-five miles per hour outside municipal corporate limits for all vehicles except for school buses and school activity buses.

(c) Except while towing another vehicle, or when an advisory safe-speed sign indicates a slower speed, or as otherwise provided by law, it shall be unlawful to operate a passenger vehicle upon the interstate and primary highway system at less than the following speeds:

(1) Forty miles per hour in a speed zone of 55 miles per hour.

(2) Forty-five miles per hour in a speed zone of 60 miles per hour or greater.

These minimum speeds shall be effective only when appropriate signs are posted indicating the minimum speed.

(d) (1) Whenever the Department of Transportation determines on the basis of an engineering and traffic investigation that any speed allowed by subsection (b) is greater than is reasonable and safe under the conditions found to exist upon any part of a highway outside the corporate limits of a municipality or upon any part of a highway designated as part of the Interstate Highway System or any part of a controlled-access highway (either inside or outside the corporate limits of a municipality), the Department of Transportation shall determine and declare a reasonable and safe speed limit.

(2) Whenever the Department of Transportation determines on the basis

of an engineering and traffic investigation that a higher maximum speed than those set forth in subsection (b) is reasonable and safe under the conditions found to exist upon any part of a highway designated as part of the Interstate Highway System or any part of a controlled-access highway (either inside or outside the corporate limits of a municipality) the Department of Transportation shall determine and declare a reasonable and safe speed limit. A speed limit set pursuant to this subsection may not exceed 70 miles per hour.

Speed limits set pursuant to this subsection are not effective until appropriate signs giving notice thereof are erected upon the parts of the highway affected.

(e) Local authorities, in their respective jurisdictions, may authorize by ordinance higher speeds or lower speeds than those set out in subsection (b) upon all streets which are not part of the State highway system; but no speed so fixed shall authorize a speed in excess of 55 miles per hour. Speed limits set pursuant to this subsection shall be effective when appropriate signs giving notice thereof are erected upon the part of the streets affected.

(e1) Local authorities within their respective jurisdictions may authorize, by ordinance, lower speed limits than those set in subsection (b) of this section on school property. If the lower speed limit is being set on the grounds of a public school, the local school administrative unit must request or consent to the lower speed limit. If the lower speed limit is being set on the grounds of a private school, the governing body of the school must request or consent to the lower speed limit. Speed limits established pursuant to this subsection shall become effective when appropriate signs giving notice of the speed limit are erected upon affected property. A person who drives a motor vehicle on school property at a speed greater than the speed limit set and posted under this subsection is responsible for an infraction and is required to pay a penalty of two hundred fifty dollars ($250.00).

(f) Whenever local authorities within their respective jurisdictions determine upon the basis of an engineering and traffic investigation that a higher maximum speed than those set forth in subsection (b) is reasonable and safe, or that any speed hereinbefore set forth is greater than is reasonable and safe, under the conditions found to exist upon any part of a street within the corporate limits of a municipality and which street is a part of the State highway system (except those highways designated as part of the interstate highway system or other controlled-access highway) said local authorities shall determine and declare a safe and reasonable speed limit. A speed limit set pursuant to this subsection may not exceed 55 miles per hour. Limits set pursuant to this subsection shall become effective when the Department of Transportation has passed a concurring ordinance and signs are erected giving notice of the authorized speed limit.

When local authorities annex a road on the State highway system, the speed limit posted on the road at the time the road was annexed shall remain in effect until both the Department and municipality pass concurrent ordinances to change the speed limit.

The Department of Transportation is authorized to raise or lower the statutory speed limit on all highways on the State highway system within municipalities which do not have a governing body to enact municipal ordinances as provided by law. The Department of Transportation shall determine a reasonable and safe speed limit in the

same manner as is provided in G.S. 20-141(d)(1) and G.S. 20-141(d)(2) for changing the speed limits outside of municipalities, without action of the municipality.

(g) Whenever the Department of Transportation or local authorities within their respective jurisdictions determine on the basis of an engineering and traffic investigation that slow speeds on any part of a highway considerably impede the normal and reasonable movement of traffic, the Department of Transportation or such local authority may determine and declare a minimum speed below which no person shall operate a motor vehicle except when necessary for safe operation in compliance with law. Such minimum speed limit shall be effective when appropriate signs giving notice thereof are erected on said part of the highway. Provided, such minimum speed limit shall be effective as to those highways and streets within the corporate limits of a municipality which are on the State highway system only when ordinances adopting the minimum speed limit are passed and concurred in by both the Department of Transportation and the local authorities. The provisions of this subsection shall not apply to farm tractors and other motor vehicles operating at reasonable speeds for the type and nature of such vehicles.

(h) No person shall operate a motor vehicle on the highway at such a slow speed as to impede the normal and reasonable movement of traffic except when reduced speed is necessary for safe operation or in compliance with law; provided, this provision shall not apply to farm tractors and other motor vehicles operating at reasonable speeds for the type and nature of such vehicles.

(i) The Department of Transportation shall have authority to designate and appropriately mark certain highways of the State as truck routes.

(j) Repealed by Session Laws 1997, c. 443, s. 19.26(b).

(j1) A person who drives a vehicle on a highway at a speed that is either more than 15 miles per hour more than the speed limit established by law for the highway where the offense occurred or over 80 miles per hour is guilty of a Class 2 misdemeanor.

(j2) A person who drives a motor vehicle in a highway work zone at a speed greater than the speed limit set and posted under this section shall be required to pay a penalty of two hundred fifty dollars ($250.00). This penalty shall be imposed in addition to those penalties established in this Chapter. A "highway work zone" is the area between the first sign that informs motorists of the existence of a work zone on a highway and the last sign that informs motorists of the end of the work zone. The additional penalty imposed by this subsection applies only if signs are posted at the beginning and end of any segment of the highway work zone stating the penalty for speeding in that segment of the work zone. The Secretary shall ensure that work zones shall only be posted with penalty signs if the Secretary determines, after engineering review, that the posting is necessary to ensure the safety of the traveling public due to a hazardous condition.

A law enforcement officer issuing a citation for a violation of this section while in a highway work zone shall indicate the vehicle speed and speed limit posted in the segment of the work zone, and determine whether the individual committed a violation of G.S. 20-141(j1). Upon an individual's conviction of a violation of this section while in a highway work zone, the clerk of court shall report that the vehicle was in a work zone at the time of the violation, the vehicle speed, and the speed limit of the work zone to the

Division of Motor Vehicles.

(j3) A person is guilty of a Class 2 misdemeanor if the person drives a commercial motor vehicle carrying a load that is subject to the permit requirements of G.S. 20-119 upon a highway or any public vehicular area at a speed of 15 miles per hour or more above either:

(1) The posted speed; or

(2) The restricted speed, if any, of the permit, or if no permit was obtained, the speed that would be applicable to the load if a permit had been obtained.

(k) Repealed by Session Laws 1995 (Regular Session, 1996), c. 652, s. 1.

(l) Notwithstanding any other provision contained in G.S. 20-141 or any other statute or law of this State, including municipal charters, any speed limit on any portion of the public highways within the jurisdiction of this State shall be uniformly applicable to all types of motor vehicles using such portion of the highway, if on November 1, 1973, such portion of the highway had a speed limit which was uniformly applicable to all types of motor vehicles using it. Provided, however, that a lower speed limit may be established for any vehicle operating under a special permit because of any weight or dimension of such vehicle, including any load thereon. The requirement for a uniform speed limit hereunder shall not apply to any portion of the highway during such time as the condition of the highway, weather, an accident, or other condition creates a temporary hazard to the safety of traffic on such portion of the highway.

(m) The fact that the speed of a vehicle is lower than the foregoing limits shall not relieve the operator of a vehicle from the duty to decrease speed as may be necessary to avoid colliding with any person, vehicle or other conveyance on or entering the highway, and to avoid injury to any person or property.

(n) Notwithstanding any other provision contained in G.S. 20-141 or any other statute or law of this State, the failure of a motorist to stop his vehicle within the radius of its headlights or the range of his vision shall not be held negligence per se or contributory negligence per se.

(o) A violation of G.S. 20-123.2 shall be a lesser included offense in any violation of this section, and shall be subject to the following limitations and conditions:

(1) A violation of G.S. 20-123.2 shall be recorded in the driver's official record as "Improper equipment - Speedometer."

(2) The lesser included offense under this subsection shall not apply to charges of speeding in excess of 25 miles per hour or more over the posted speed limit.

No drivers license points or insurance surcharge shall be assessed on account of a violation of this subsection.

(p) A driver charged with speeding in excess of 25 miles per hour over the posted speed limit shall be ineligible for a disposition of prayer for judgment continued.

C. Overview of State CDL Requirements

**N.C.G.S. 20-37.13. Commercial drivers license qualification standards.**

(a) No person shall be issued a commercial drivers license unless the person:

(1) Is a resident of this State;

(2) Is 21 years of age;

(3) Has passed a knowledge test and a skills test for driving a commercial motor vehicle that comply with minimum federal standards established by federal regulation enumerated in 49 C.F.R., Part 383, Subparts F, G and H; and

(4) Has satisfied all other requirements of the Commercial Motor Vehicle Safety Act in addition to other requirements of this Chapter or federal regulation.

For the purpose of skills testing and determining commercial drivers license classification, only the manufacturer's GVWR shall be used.

The tests shall be prescribed and conducted by the Division. Provided, a person who is at least 18 years of age may be issued a commercial drivers license if the person is exempt from, or not subject to, the age requirements of the federal Motor Carrier Safety Regulations contained in 49 C.F.R., Part 391, as adopted by the Division.

(b) The Division may permit a person, including an agency of this or another state, an employer, a private driver training facility, or an agency of local government, to administer the skills test specified by this section, provided:

(1) The test is the same as that administered by the Division; and

(2) The third party has entered into an agreement with the Division which complies with the requirements of 49 C.F.R. § 383.75. The Division may charge a fee to applicants for third-party testing authority in order to investigate the applicants' qualifications and to monitor their program as required by federal law.

(c) Prior to October 1, 1992, the Division may waive the skills test for applicants licensed at the time they apply for a commercial drivers license if:

(1) For an application submitted by April 1, 1992, the applicant has not, and certifies that he or she has not, at any time during the two years immediately preceding the date of application done any of the following and for an application submitted after April 1, 1992, the applicant has not, and certifies that he or she has not, at any time during the two years preceding April 1, 1992:

a. Had more than one drivers license, except during the 10-day period beginning on the date he or she is issued a drivers license, or unless, prior to December 31, 1989, he or she was required to have more than one license by a State law enacted prior to June 1, 1986;

b. Had any drivers license or driving privilege suspended, revoked, or cancelled;

c. Had any convictions involving any kind of motor vehicle for the offenses listed in G.S. 20-17 or had any convictions for the offenses listed in G.S. 20-17.4;

d. Been convicted of a violation of State or local laws relating to motor vehicle traffic control, other than a parking violation, which violation arose in connection with any reportable traffic accident; or

e. Refused to take a chemical test when charged with an implied consent offense, as defined in G.S. 20-16.2; and

(2) The applicant certifies, and provides satisfactory evidence, that he or she is regularly employed in a job requiring the operation of a commercial motor vehicle, and he or she either:

a. Has previously taken and successfully completed a skills test that was administered by a state with a classified licensing and testing system and the test was behind the wheel in a vehicle representative of the class and, if applicable, the type of commercial motor vehicle for which the applicant seeks to be licensed; or

b. Has operated for the relevant two-year period under subpart (1)a. of this subsection, a vehicle representative of the class and, if applicable, the type of commercial motor vehicle for which the applicant seeks to be licensed.

(c1) The Division may waive the skills test for applicants at the time they apply for a commercial drivers license if the applicant meets all of the following:

(1) The applicant has passed all required written knowledge exams.

(2) The applicant has not, and certifies that the applicant has not, at any time during the two years immediately preceding the date of application done any of the following:

a. Had any drivers license or driving privilege suspended, revoked, or cancelled;

b. Had any convictions involving any kind of motor vehicle for the offenses listed in G.S. 20-17 or had any convictions for the offenses listed in G.S. 20-17.4;

c. Been convicted of a violation of State or local laws relating to motor vehicle traffic control, other than a parking violation, which violation arose in connection with any reportable traffic accident; or

d. Refused to take a chemical test when charged with an implied consent offense, as defined in G.S. 20-16.2.

(3) The applicant certifies, and provides satisfactory evidence on the date of application, that the applicant is a member of an active or reserve component of the Armed Forces of the United States and is regularly employed in a job requiring the operation of a commercial motor vehicle, and the applicant either:

a. Has previously taken and successfully completed a skills test that was administered by a state with a classified licensing and testing system and the test was behind the wheel in a vehicle representative of the class and, if applicable, the type of commercial motor vehicle for which the applicant seeks to be licensed; or

b. Has operated for the two-year period immediately preceding the date of application a vehicle representative of the class and, if applicable, the type of commercial motor vehicle for which the applicant seeks to be licensed, and has taken and successfully completed a skills test administered by the military.

(d) A commercial drivers license or learner's permit shall not be issued to a person while the person is subject to a disqualification from driving a commercial motor vehicle, or while the person's drivers license is suspended, revoked, or cancelled in any state; nor shall a commercial drivers license be issued unless the person who has applied for the license first surrenders all other drivers licenses issued by the Division or by another state. If a person surrenders a drivers license issued by another state, the Division must return the license to the issuing state for cancellation.

(e) A commercial driver learner's permit may be issued to an individual who holds a regular Class C drivers license and has passed the knowledge test for the class and type of commercial motor vehicle the individual will be driving. The permit is valid for a period not to exceed six months and may be renewed or reissued only once within a two-year period. The fee for a commercial driver learner's permit is the same as the fee set by G.S. 20-7 for a regular learner's permit. G.S. 20-7(m) governs the issuance of a restricted instruction permit for a prospective school bus driver.

(f) Notwithstanding subsection (e) of this section, a commercial driver learner's permit with a P or S endorsement shall not be issued to any person who is required to register under Article 27A of Chapter 14 of the General Statutes.

**Insurance Issues**

A. State Minimum Limits of Financial Responsibility

Minimum limits are as follows: "thirty thousand dollars ($30,000) because of bodily injury to or death of one person in any one accident and, subject to said limit for one person, sixty thousand dollars ($60,000) because of bodily injury to or death of two or more persons in any one accident, and twenty-five thousand dollars ($25,000) because of injury to or destruction of property of others in any one accident." N.C.G.S. 20-279.21(b)(2).

B. Uninsured Motorist Coverage

N.C.G.S. 20-279..21(b)(3) - Uninsured: No policy of bodily injury liability insurance, covering liability arising out of the ownership, maintenance, or use of any motor vehicle, shall be delivered or issued for delivery in this State with respect to any motor vehicle registered or principally garaged in this State unless coverage is provided therein or supplemental thereto, under provisions filed with and approved by the Commissioner of Insurance, for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles and hit-and-run motor vehicles because of bodily injury, sickness or disease, including death, resulting therefrom. The limits of such uninsured motorist bodily injury coverage shall be equal to the highest limits of bodily injury liability coverage for any one vehicle insured under the policy; provided, however, that (i) the limits shall not exceed one million dollars ($1,000,000) per person and one million dollars ($1,000,000) per accident regardless of whether the highest limits of bodily injury liability coverage for any one vehicle insured under the policy exceed those limits and (ii) a named insured may purchase greater or lesser limits, except that the limits shall not be less than the bodily injury liability limits required pursuant to subdivision (2) of this subsection, and in no event shall an insurer be required by this subdivision to sell uninsured motorist bodily injury coverage at limits that exceed one million dollars ($1,000,000) per person and

one million dollars ($1,000,000) per accident. . . .

If a person who is legally entitled to recover damages from the owner or operator of an uninsured motor vehicle is an insured under the uninsured motorist coverage of a policy that insures more than one motor vehicle, that person shall not be permitted to combine the uninsured motorist limit applicable to any one motor vehicle with the uninsured motorist limit applicable to any other motor vehicle to determine the total amount of uninsured motorist coverage available to that person. If a person who is legally entitled to recover damages from the owner or operator of an uninsured motor vehicle is an insured under the uninsured motorist coverage of more than one policy, that person may combine the highest applicable uninsured motorist limit available under each policy to determine the total amount of uninsured motorist coverage available to that person. The previous sentence shall apply only to insurance on nonfleet private passenger motor vehicles as described in G.S. 58-40-10(1) and (2). . . .

Notwithstanding the provisions of this subsection, no policy of motor vehicle liability insurance applicable solely to commercial motor vehicles as defined in G.S. 20-4.01(3d) or applicable solely to fleet vehicles shall be required to provide uninsured motorist coverage. When determining whether a policy is applicable solely to fleet vehicles, the insurer may rely upon the number of vehicles reported by the insured at the time of the issuance of the policy for the policy term in question. In the event of a renewal of the policy, when determining whether a policy is applicable solely to fleet vehicles, the insurer may rely upon the number of vehicles reported by the insured at the time of the renewal of the policy for the policy term in question. Any motor vehicle liability policy that insures both commercial motor vehicles as defined in G.S. 20-4.01(3d) and noncommercial motor vehicles shall provide uninsured motorist coverage in accordance with the provisions of this subsection in amounts equal to the highest limits of bodily injury and property damage liability coverage for any one noncommercial motor vehicle insured under the policy, subject to the right of the insured to purchase greater or lesser uninsured motorist bodily injury coverage limits and lesser uninsured motorist property damage coverage limits as set forth in this subsection. For the purpose of the immediately preceding sentence, noncommercial motor vehicle shall mean any motor vehicle that is not a commercial motor vehicle as defined in G.S. 20-4.01(3d), but that is otherwise subject to the requirements of this subsection.

N.C.G.S. 20-279(b)(4) - Underinsured: An owner's policy of liability of insurance shall, in addition to the coverages set forth in subdivisions (2) and (3) of this subsection, provide underinsured motorist coverage, to be used only with a policy that is written at limits that exceed those prescribed by subdivision (2) of this subsection. The limits of such underinsured motorist bodily injury coverage shall be equal to the highest limits of bodily injury liability coverage for any one vehicle insured under the policy; provided, however, that (i) the limits shall not exceed one million dollars ($1,000,000) per person and one million dollars ($1,000,000) per accident regardless of whether the highest limits of bodily injury liability coverage for any one vehicle insured under the policy exceed those limits, (ii) a named insured may purchase greater or lesser limits, except that the limits shall exceed the bodily injury liability limits required pursuant to subdivision (2) of this subsection, and in no event shall an insurer be required by this subdivision to sell underinsured motorist bodily injury coverage at limits that exceed one

million dollars ($1,000,000) per person and one million dollars ($1,000,000) per accident, and (iii) the limits shall be equal to the limits of uninsured motorist bodily injury coverage purchased pursuant to subdivision (3) of this subsection. . . .

In any event, the limit of underinsured motorist coverage applicable to any claim is determined to be the difference between the amount paid to the claimant under the exhausted liability policy or policies and the limit of underinsured motorist coverage applicable to the motor vehicle involved in the accident. Furthermore, if a claimant is an insured under the underinsured motorist coverage on separate or additional policies, the limit of underinsured motorist coverage applicable to the claimant is the difference between the amount paid to the claimant under the exhausted liability policy or policies and the total limits of the claimant's underinsured motorist coverages as determined by combining the highest limit available under each policy; provided that this sentence shall apply only to insurance on nonfleet private passenger motor vehicles as described in G.S. 58-40-15(9) and (10). The underinsured motorist limits applicable to any one motor vehicle under a policy shall not be combined with or added to the limits applicable to any other motor vehicle under that policy. . . .

Notwithstanding the provisions of this subsection, no policy of motor vehicle liability insurance applicable solely to commercial motor vehicles as defined in G.S. 20-4.01(3d) or applicable solely to fleet vehicles shall be required to provide underinsured motorist coverage. When determining whether a policy is applicable solely to fleet vehicles, the insurer may rely upon the number of vehicles reported by the insured at the time of the issuance of the policy for the policy term in question. In the event of a renewal of the policy, when determining whether a policy is applicable solely to fleet vehicles, the insurer may rely upon the number of vehicles reported by the insured at the time of the renewal of the policy for the policy term in question. Any motor vehicle liability policy that insures both commercial motor vehicles as defined in G.S. 20-4.01(3d) and noncommercial motor vehicles shall provide underinsured motorist coverage in accordance with the provisions of this subsection in an amount equal to the highest limits of bodily injury liability coverage for any one noncommercial motor vehicle insured under the policy, subject to the right of the insured to purchase greater or lesser underinsured motorist bodily injury liability coverage limits as set forth in this subsection. For the purpose of the immediately preceding sentence, noncommercial motor vehicle shall mean any motor vehicle that is not a commercial motor vehicle as defined in G.S. 20-4.01(3d), but that is otherwise subject to the requirements of this subsection.

C. No Fault Insurance

North Carolina has a fault based insurance system.

D. Disclosure of Limits and Layers of Coverage

Upon receipt of a request for policy limits information Insurers of a policy of non-fleet private passenger automobile insurance are required, within 15 business days, to provide notice to the injured person that the Insurer is required to provide the information prior to litigation only if the person seeking the information satisfies all of the following conditions:

(1) The person seeking the information submits to the insurer the person's written consent to all of the person's medical providers to release to the insurer

the person's medical records for the three years prior to the date on which the claim arose, as well as all medical records pertaining to the claimed injury.

(2) The person seeking the information submits to the insurer the person's written consent to participate in mediation of the person's claim under G.S. 7A-38.3A.

(3) The person seeking the information submits to the insurer a copy of the accident report required under G.S. 20-166.1 and a description of the events at issue with sufficient particularity to permit the insurer to make an initial determination of the potential liability of its insured.

Within 30 days of receiving the written documents from the injured person the Insurer shall provide the policy limits.

E. Unfair Claims Practices

NCGS 58-63-15 addresses unfair methods of competition and defines unfair or deceptive acts or practices. NCGS 58-63-15 (11) specifically addresses unfair claim settlement practices. Frequent commission of the following acts is considered a violation of the subsection.

a. Misrepresenting pertinent facts or insurance policy provisions relating to coverages at issue;

b. Failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies;

c. Failing to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies;

d. Refusing to pay claims without conducting a reasonable investigation based upon all available information;

e. Failing to affirm or deny coverage of claims within a reasonable time after proof-of-loss statements have been completed;

f. Not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear;

g. Compelling [the] insured to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in actions brought by such insured;

h. Attempting to settle a claim for less than the amount to which a reasonable man would have believed he was entitled;

i. Attempting to settle claims on the basis of an application which was altered without notice to, or knowledge or consent of, the insured;

j. Making claims payments to insureds or beneficiaries not accompanied by [a] statement setting forth the coverage under which the payments are being made;

k. Making known to insureds or claimants a policy of appealing from arbitration awards in favor of insureds or claimants for the purpose of compelling them to accept settlements or compromises less than the amount awarded in arbitration;

l. Delaying the investigation or payment of claims by requiring an insured claimant, or the physician, of [or] either, to submit a preliminary claim report and then requiring the subsequent submission of formal proof-of-loss forms, both of which submissions contain substantially the same information;

m. Failing to promptly settle claims where liability has become reasonably clear, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage; and

n. Failing to promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement.

F. Bad Faith Claims

An insurance company is expected to deal fairly and in good faith with its policyholders. North Carolina recognizes a first party claim for tortuous bad faith refusal to pay claims in a timely manner. A bad faith refusal to provide insurance coverage or to pay a justifiable claim may give rise to a claim for punitive damages where accompanied by the element of "aggravation". Punitive damages are also governed by NCGS 1D and if a claim for punitive damages is asserted against a corporation the Plaintiff must allege and prove that the officers, directors, or managers of the corporation participated in or condoned the conduct constituting the aggravating factor giving rise to punitive damages.

G. Coverage – Duty of Insured

Our courts do not follow the strict contractual approach when construing cooperation clauses in insurance contracts and have held that, in order to relieve an insurer of its obligations, the failure to cooperate by the insured must be both material and prejudicial. Some kind of affirmative action by the insured is required before a court can conclude, as a matter of law, that the insured failed to cooperate. *Greco v. Penn Nat'l Sec. Ins. Co.*, 721 S.E.2d 280 (N.C. App., 2012).

H. Fellow Employee Exclusions

"North Carolina adheres to the majority rule that an employee exclusion clause is a valid limitation on coverage in an automobile liability insurance policy." *South Carolina Ins. Co. v. Smith*, 313 S.E.2d 856, 67 N.C. App. 632 (1984).