

# DIGEST OF INSURANCE LAW

## NORTH CAROLINA

Not Revised for this Edition

### CIVIL JUDICIAL SYSTEM

General Court of Justice is a unified judicial system for purposes of jurisdiction, operation, and administration and consists of Appellate Division (Supreme Court, Court of Appeals), Superior Court Division (Superior Courts), and District Court Division (District Courts, Magistrates). N.C. Gen. Stat. §7A-4.

#### Courts of Original Jurisdiction

Trial division of General Court of Justice, consisting of Superior Court Division and District Court Division, has original general jurisdiction of all justiciable matters of a civil nature, except that exclusive original jurisdiction for probate of wills and administration of decedents' estates is vested in Superior Court Division and original jurisdiction for claims against the state is vested in Supreme Court. N.C. Gen. Stat. §7A-240; N.C. Gen. Stat. §7A-241.

Although jurisdiction is concurrent between divisions, N.C. Gen. Stat. §7A-242, "proper" divisions in which to try civil actions are designated as follows: District Courts: All civil actions where amount in controversy is \$10,000 or less, as well as cases concerning domestic relations. N.C. Gen. Stat. §7A-243, 244. Superior Court: All civil actions where amount in controversy exceeds \$10,000. N.C. Gen. Stat. §7A-243. Magistrates have jurisdiction over small claims (amount in controversy less than \$5,000). N.C. Gen. Stat. §7A-210.

#### Appellate Courts

Court of Appeals has appellate jurisdiction to review any decision of Superior Courts, District Courts, and Industrial Commission and to review certain decisions of various administrative agencies. N.C. Gen. Stat. §7A-27, 29. Court of Appeals has 15 judges sitting in panels of 3 judges each. N.C. Gen. Stat. §7A-16. Supreme Court has appellate jurisdiction from decisions of Court of Appeals, as matter of right, in any cases which involve substantial Constitutional question or in which there is dissent. N.C. Gen. Stat. §7A-30. Supreme Court has appellate jurisdiction from trial division as a matter of right in first degree murder cases, which include a sentence of death. N.C. Gen. Stat. §7A-27. Supreme Court also has direct review over certain limited cases

from the Utilities Commission. N.C. Gen. Stat. §7A-29. Supreme Court has Chief Justice and six associate justices elected by qualified voters of the state for eight-year term. N.C. Gen. Stat. §7A-10.

### LAW

#### Abbreviations

N.C. – North Carolina Reports.  
N.C. App. – North Carolina Court of Appeals Reports.  
N.C. Gen. Stat. – General Statutes of North Carolina.  
S.E. – South Eastern Reporter.  
S.E.2d – South Eastern Reporter, Second Series.

### ACCIDENT AND HEALTH INSURANCE

See "ACCIDENTAL MEANS" and "DISABILITY."

Agents. A property and liability insurance license shall not authorize agent or broker to sell accident and health insurance. N.C. Gen. Stat. §58-33-26(d).

Cancellation. If, for any reason, insured is not satisfied with policy, insured has right to cancel and receive full premium refund within 10 days of receipt of policy. N.C. Gen. Stat. §58-51-10.

Exceptions From Liability. Commission of felony, illegal occupation, intoxication, influence of narcotics. N.C. Gen. Stat. §58-51-15(b)(10) and 58-51-16(a).

Reinstatement. Acceptance of late premium by insurer or agent without requiring application for reinstatement reinstates policy. N.C. Gen. Stat. §58-51-15(a)(4).

Notice of Claim and Proof of Loss. Written notice of claim within 20 days of occurrence or commencement of loss covered by the policy, or as soon thereafter as reasonably possible. N.C. Gen. Stat. §58-51-15(a)(5). Written proof of loss must be furnished within 180 days after occurrence or, for continuing loss, within 180 days after termination of insurer's period of liability. N.C. Gen. Stat. §58-51-15(a)(7). Failure to furnish such proof within the time required shall not invalidate or reduce



any claim if it was not reasonably possible to give proof within such time, provided such proof is provided as soon as reasonably possible and in no event, in the absence of legal capacity, later than one year from the time proof is otherwise required. *Id.*

Insured's refusal to submit to examination under oath concerning claim under fire insurance policy as requested by insurer was condition precedent to suing on fire policy and supported dismissal of suit. *Fineberg v. State Farm Fire & Cas. Co.*, 113 N.C. App. 545, 438 S.E.2d 754, *rev. denied*, 336 N.C. 315, 445 S.E.2d 395 (1994); *Baker v. Indep. Fire Ins. Co.*, 103 N.C. App. 521, 405 S.E.2d 778 (1991); N.C. Gen. Stat. §58-44-15; N.C. Gen. Stat. §1A-1, Rule 36.

Limitation for Commencement of Action. Action must be brought after 60 days following submission of written proof of loss and before 3 years after written proof of loss required. N.C. Gen. Stat. §58-51-15(a)(11).

Other Insurance. Where there is other insurance of which insurer is without written notice prior to the occurrence, loss is prorated, and pro rata part of premium is refunded. N.C. Gen. Stat. §58-51-15(b)(4) & (5).

Renewability. Policies are renewable, unless sufficient written notice of non-renewal is provided to the policyholder by the insurer within specified time limit. N.C. Gen. Stat. §58-51-20(a). This section does not apply to refusal to renew due to change in occupation to one classified as uninsurable or to increase in rate due to change to more hazardous occupation. N.C. Gen. Stat. §58-51-20(d).

Disease Induced by Accident. Insurer liable, but if existing diseased condition and accident concur in causing injury, no liability. *Williams v. Pilot Life Ins. Co.*, 25 N.C. App. 505, 214 S.E.2d 230, *aff'd*, 288 N.C. 338, 218 S.E.2d 368 (1975); *Penn v. Standard Life & Accid. Ins. Co.*, 158 N.C. 29, 73 S.E. 99 (1911), *reh'g dismissed*, 160 N.C. 399, 76 S.E. 262 (1912).

Double Indemnity. In construing accident policy, death by "accidental means" refers to occurrence which produces result, while "accidental death" refers to result itself. *Kinney v. Home Sec. Life Ins. Co.*, 2 N.C. App. 597, 163 S.E.2d 520 (1968).

## ACCIDENTAL MEANS

Accident within insurance policy held unusual and unexpected occurrence, or one taking place without foresight or expectation; question determinable by facts as they affect insured. *Chesson v. Pilot Life Ins. Co.*, 268 N.C. 98, 150 S.E.2d 40 (1966); *Clay v. State Ins. Co.*, 174 N.C. 642, 94 S.E. 289 (1917). Term "struck by automobile" includes one who is injured when vehicle,

occupied by him, is struck by another automobile and is not limited to collisions between automobiles and pedestrians, or to other situations involving physical contact between body of claimant and automobile in question. *Wachovia Bank & Trust Co. v. Westchester Fire Ins. Co.*, 276 N.C. 348, 172 S.E.2d 518 (1970). Automobile accident policy provides coverage for accidental discharge of rifle being removed from truck, *State Capital Ins. Co. v. Nationwide Mut. Ins. Co.*, 318 N.C. 534, 350 S.E.2d 66 (1986), but not for injuries caused by a bottle intentionally thrown from a vehicle. *Nationwide Mut. Ins. Co. v. Webb*, 132 N.C. App. 524, 512 S.E.2d 764, *rev. denied*, 350 N.C. 834, 538 S.E.2d 198 (1999). Terms "sickness and disease" do not extend to or include accidental injuries. *Poole v. Imperial Mut. Life & Health Ins. Co.*, 188 N.C. 468, 125 S.E. 8 (1924).

Provision to effect that no recovery can be had if insured killed by intentional act of another person is valid. *Patrick v. Pilot Life Ins. Co.*, 241 N.C. 614, 86 S.E.2d 201 (1955); *Slaughter v. State Capital Life Ins. Co.*, 250 N.C. 265, 108 S.E.2d 438 (1959).

Evidence of unexplained, violent death by external means that is not wholly inconsistent with accident raises rebuttable presumption of death by accidental means. *Moore v. Union Fid. Life Ins. Co.*, 297 N.C. 375, 255 S.E.2d 160 (1979), *appeal on remand*, 56 N.C. App. 741, 289 S.E.2d 610 (1982).

Where policy contains no express "violation of law" clause, insurer may be liable though event insured against was caused by insured's own criminal acts, unless injury was so altogether probable as to remove it from class of "accidental injuries." *Poole v. Imperial Mut. Life & Health Ins. Co.*, 188 N.C. 468, 125 S.E. 8 (1924); *Blackwell v. Nat'l Fire Ins. Co.*, 234 N.C. 559, 67 S.E.2d 750 (1951).

Distinguish accidental death and death by accidental means. Latter requires that events which lead up to or produce ultimate loss, and not just loss itself, be accidental. Man killed when pushed by another man he was cursing and approaching in anger, held not death by accidental means. *Scarborough v. World Ins. Co.*, 244 N.C. 502, 94 S.E.2d 558 (1956). *See also Fallins v. Durham Life Ins. Co.*, 247 N.C. 72, 100 S.E.2d 214 (1957); *Slaughter v. State Capital Life Ins. Co.*, 250 N.C. 265, 108 S.E.2d 438 (1959); *Skillman v. Phoenix Mut. Life Ins. Co.*, 258 N.C. 1, 127 S.E.2d 789 (1962); *Eason v. State Capital Life Ins. Co.*, 8 N.C. App. 293, 174 S.E.2d 72 (1970); *Collins v. Life Ins. Co. of Va.*, 99 N.C. App. 567, 393 S.E.2d 342 (1990).

Death not produced by accidental means if it is natural and probable consequence of voluntary act of



deceased. *Allred v. Prudential Ins. Co. of Am.*, 247 N.C. 105, 100 S.E.2d 226 (1957).

Death resulting directly from insured's voluntary act and aggressive misconduct is not death by accidental means even though death results from accidental injury. *Gray v. State Capital Life Ins. Co.*, 254 N.C. 286, 118 S.E.2d 909 (1961). *But see N.C. Farm Bureau Mut. Co. v. Stox*, 330 N.C. 697, 412 S.E.2d 318 (1992) (holding that insured pushed co-worker causing her to fall but co-worker's injuries were accidental since only the push and not the injuries were intended by the insured). Where policy does not specifically define "accident," term includes injury resulting from intentional act if injury not intentional or substantially certain to result. The resulting injury, as well as the volitional act, must be intended, or the injury is a covered "accident." *Id.* Accident does not include any injury that is intentional or substantially certain to result from an intentional act. *Am. Mfrs. Mut. Ins. Co. v. Morgan*, 147 N.C. App. 438, 556 S.E.2d 25 (2001), *cert. denied*, 355 N.C. 747, 565 S.E.2d 191 (2002).

### ADJUSTERS

An adjuster is an individual who, for compensation, investigates claims arising under insurance contracts other than life or annuity. N.C. Gen. Stat. §58-33-10(2). Adjusters are required to be examined and licensed. N.C. Gen. Stat. §58-33-26, -30. It is a Class 1 misdemeanor for adjuster to act on a contract made by unauthorized company. N.C. Gen. Stat. §58-33-115. Individual may not simultaneously hold agent's and adjuster's license. N.C. Gen. Stat. §58-33-10(2). It shall be unlawful and cause for revocation of license for licensed adjuster to engage in practice of law. N.C. Gen. Stat. §58-33-70(a). But attorney who adjusts insurance losses from time to time incidental to practice of law is not adjuster. N.C. Gen. Stat. §58-33-10(2).

Adjuster licensed in another state is permitted to act under certain circumstances. N.C. Gen. Stat. §58-33-70(e).

Agents may, from time to time, act as adjusters, so long as remuneration from sale of insurance not dependent on adjustment. N.C. Gen. Stat. §58-33-70(b). Adjuster with authority to adjust and settle a loss may be agent of insurance company and waive policy limitations. *Vail v. Vermont Mut. Fire Ins. Co.*, 14 N.C. App. 726, 189 S.E.2d 527 (1972).

### AGE

See "AUTOMOBILES"; "LIABILITY INSURANCE"; "NEGLIGENCE."

Age of majority is 18. N.C. Gen. Stat. §48A-2.

### AGENTS AND BROKERS

An agent is a person licensed to solicit applications for or negotiate a policy of insurance. N.C. Gen. Stat. §58-33-10(1). A broker is a licensed agent who procures insurance for another party through an insurer that is licensed to do business in the state, but for which the broker is not an authorized agent. N.C. Gen. Stat. §58-33-10(3). Broker who solicits life insurance deemed agent of company. *N. Nat'l Life Ins. Co. v. Lacy J. Miller Machine Co.*, 311 N.C. 62, 316 S.E.2d 256 (1984). *See also* N.C. Gen. Stat. §58-58-30.

Payment of premiums made to agent without obtaining official receipt held not to be payment to company. *Mills v. N. Y. Life Ins. Co.*, 209 N.C. 296, 183 S.E. 289 (1936).

Fraud. Collusion between agent and insured to defraud insurer constitutes ground for rescission and cancellation of policy. *Ward v. Durham Life Ins. Co.*, 325 N.C. 202, 381 S.E.2d 698 (1989); *Nat'l Life Ins. Co. v. Grady*, 185 N.C. 348, 117 S.E. 289 (1923); *Sprinkle v. Knights Templar & Masons' Indem. Co.*, 124 N.C. 405, 32 S.E. 734 (1899).

Knowledge of Agent Imputed to Insurer. Any knowledge acquired by agent at inception of contract, within scope of his employment, when not in collusion with insured or otherwise in fraud of his principal, is imputed to principal. *N. Nat'l Life Ins. Co. v. Lacy J. Miller Co.*, 311 N.C. 62, 316 S.E.2d 256 (1984); *Midkiff v. N.C. Home Ins. Co.*, 197 N.C. 139, 147 S.E. 812 (1929); *Nat'l Life Ins. Co. v. Grady*, 185 N.C. 348, 117 S.E. 289 (1923); *Short v. Lafayette Life Ins. Co.*, 194 N.C. 649, 140 S.E. 302 (1927); *Laughinghouse v. Great Nat'l Ins. Co.*, 200 N.C. 434, 157 S.E. 131 (1931) (holding that knowledge is imputed even if policy contains stipulation to contrary). But knowledge acquired by agent after inception of contract not imputed to principal. *Midkiff v. N.C. Home Ins. Co.*, 197 N.C. 139, 147 S.E. 812 (1929); *Johnson v. Aetna Ins. Co.*, 201 N.C. 362, 160 S.E. 454 (1931); *Thompson v. Mut. Ben. Health & Accid. Ass'n*, 209 N.C. 678, 184 S.E. 695 (1936). Knowledge not imputed to principal when insured makes false statements in written application. *Inman v. Sovereign Camp*, 211 N.C. 179, 189 S.E. 496 (1937); *Thomas-Yelverton v. State Capital Life Ins. Co.*, 238 N.C. 278, 77 S.E.2d 692 (1953). *But see Ward v. Durham Life Ins. Co.*, 325 N.C. 202, 381 S.E.2d 698 (1989).

Knowledge not imputed to principal where agent indifferent to truth or falsity of contents of written application. *Jones v. Home Sec. Life Ins. Co.*, 254 N.C. 407, 119 S.E.2d 215 (1961); *Goodwin v. Investors Life Ins. Co. of N. Am.*, 332 N.C. 326, 419 S.E.2d 766 (1992). *But*



see *Buchanan v. Nationwide Life Ins. Co.*, 54 N.C. App. 263, 283 S.E.2d 421 (1981).

Liability. Insurance agent is liable to customer within amount of proposed policy when he agrees to provide insurance coverage and fails to do so. *Baldwin v. Lititz Mut. Ins. Co.*, 99 N.C. App. 559, 393 S.E.2d 306 (1990); *Harrell v. Davenport*, 60 N.C. App. 474, 299 S.E.2d 308 (1983); *Wiles v. Mullinax*, 267 N.C. 392, 148 S.E.2d 229 (1966).

Negligence. Agent or broker may be liable to his customer for negligent advice as to scope of coverage. *Bradley Freight Lines, Inc. v. Pope, Flynn & Co. Inc.*, 42 N.C. App. 285, 256 S.E.2d 522, *rev. denied*, 298 N.C. 295, 259 S.E.2d 299 (1979). Agent is not negligent for failing to advise customer that workers' compensation insurance is mandatory by law, absent a request for information about such insurance by insured. *Bigger v. Vista Sales & Mktg., Inc.*, 131 N.C. App. 101, 505 S.E.2d 891 (1998). *But see Baggett v. Summerlin Ins. & Realty Inc.*, 354 N.C. 347, 554 S.E.2d 336 (2001). Insurance agent's duty to a policyholder is limited to the nature of the policyholder's request to the agent. *Pinney v. State Farm Mut. Ins. Co.*, 146 N.C. App. 248, 552 S.E.2d 186 (2001), *review denied*, 356 N.C. 438, 572 S.E.2d 788 (N.C. 2002). Agent has a fiduciary as well as a contractual relationship with insured. *Baldwin v. Lititz Mut. Ins. Co.*, 99 N.C. App. 559, 393 S.E.2d 306 (1990). Failure of agent to give notice to proposed insured of agent's inability to procure insurance he has undertaken to provide may be negligent. *Olvera v. Charles Z. Flack Agency, Inc.*, 106 N.C. App. 193, 415 S.E.2d 760 (1992). Failure of insured to read policy may be contributory negligence. *Kirk v. R. Stanford Webb Agency, Inc.*, 75 N.C. App. 148, 330 S.E.2d 262, *rev. denied*, 314 N.C. 541, 335 S.E.2d 18 (1985). Action against agent for negligent advice subject to 3-year statute of limitations under N.C. Gen. Stat. §1-52 and is not action for professional malpractice. *Pierson v. Buyher*, 330 N.C. 182, 409 S.E.2d 903 (1991). *See also Jefferson-Pilot Life Ins. Co. v. Spencer*, 336 N.C. 49, 442 S.E.2d 316 (1994).

Claim of negligent misrepresentation against an insurance company might not accrue until discovery of misrepresentation by the aggrieved party. *Jefferson-Pilot Life Ins. Co. v. Spencer*, 336 N.C. 49, 442 S.E.2d 316 (1994). *See also* N.C. Gen. Stat. §1-52(9).

License. Agents and brokers must be duly licensed. N.C. Gen. Stat. §58-33-26. Acting as agent or broker without license punishable as Class 1 misdemeanor. N.C. Gen. Stat. §58-33-120. Agents must meet various requirements and pass examination. N.C. Gen. Stat. §58-33-30.

Twisting (deceiving insured and causing him to cancel insurance to his detriment) prohibited. Rebates forbidden. N.C. Gen. Stat. §58-33-85.

## ARBITRATION

North Carolina has adopted the Revised Uniform Arbitration Act. N.C. Gen. Stat. §1-569.1 *et seq.* International commercial disputes are governed by the North Carolina International Commercial Arbitration and Conciliation Act. N.C. Gen. Stat. §1-567.30 *et seq.* Arbitrator has affirmative duty to disclose prior substantial dealings with party to arbitration even though disclosure not specifically requested, but failure to make disclosure does not necessarily require vacation of award. *Ruffin Woody & Assocs., Inc. v. Person County*, 92 N.C. App. 129, 374 S.E.2d 165 (1988), *review denied*, 324 N.C. 337, 378 S.E.2d 799 (1989). *See also William C. Vick Const. Co. v. N.C. Farm Bureau Federation*, 123 N.C. App. 97, 472 S.E.2d 346 (1998) (granting relief from judgment because of arbitrator's failure to disclose conflict).

## ATTORNEYS

Appointment and Authority. Attorney-client relationship may be implied from parties' conduct and is not dependent on payment of fee or formal contract. *N.C. State Bar v. Sheffield*, 73 N.C. App. 349, 326 S.E.2d 320, *cert. denied*, 314 N.C. 117, 332 S.E.2d 482, *cert. denied*, 474 U.S. 981, 106 S. Ct. 385 (1985); *see also Cornelius v. Helms*, 120 N.C. App. 172, 461 S.E.2d 338 (1995). Express authority required for attorney to waive or surrender client's substantial rights. *State v. Mason*, 268 N.C. 423, 150 S.E.2d 753 (1966).

Termination. Attorney-Client relationship is terminable by client with or without cause. *Potts v. Mitchell*, 410 F. Supp. 1278 (W.D.N.C. 1976). Terminable by attorney for justifiable cause, reasonable notice to client, and permission of court. *Williams & Michael, P.A. v. Kennamer*, 71 N.C. App. 215, 321 S.E.2d 514 (1984); *see also Lamb v. Grole*, 95 N.C. App. 220, 382 S.E.2d 234 (1989).

Conflict of Interest. North Carolina Rule of Professional Conduct 1.7.

Legal Malpractice. A Lawyer must represent client with such skill, prudence and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in performance of tasks which they undertake. *Rorner v. Cooke*, 313 N.C. 338, 329 S.E.2d 355 (1985); *see also Cornelius v. Helms*, 120 N.C. App. 172, 461 S.E.2d 338 (1995). Attorney's duty to client is determined by nature of services attorney agreed to perform. *Nations-Bank v. Parker*, 140 N.C. App. 106, 535 S.E.2d 597



(2000); *Hargett v. Holland*, 337 N.C. 651, 447 S.E.2d 784, review denied, 338 N.C. 672, 453 S.E.2d 177 (1994). Essential element in legal malpractice case is proximate cause; plaintiff must prove that original claim was valid and that claim would have resulted in a judgment in plaintiff's favor. *Byrd v. Arrowood*, 118 N.C. App. 418, 455 S.E.2d 672 (1995); See also *Rorrer v. Cooke*, 313 N.C. 338, 329 S.E.2d 355 (1985); *White v. Schwartzman*, 155 N.C. App. 224, 573 S.E.2d 773 (2002); *Belk v. Cheshire*, 159 N.C. App. 325, 583 S.E.2d 700 (2003) (Criminal malpractice case). See also *Dove v. Harvey*, 168 N.C. App. 687, 608 S.E.2d 799 (2005), review denied, 360 N.C. 28, 628 S.E.2d 249 (2006). Not malpractice to fail to institute a suit which attorney believes is fruitless or an abuse of process. *Harris v. Maready*, 84 N.C. App. 607, 353 S.E.2d 656, review denied, 320 N.C. 168, 358 S.E.2d 50 (1987).

**Fees.** Attorneys' fees may be awarded against insurance company that makes unwarranted refusal to pay claim. N.C. Gen. Stat. §6-21.1. Fees may also be awarded when damages are recovered by settlement prior to trial. *Epps v. Ewers*, 90 N.C. App. 597, 369 S.E.2d 104 (1988). See also *Hicks v. Albertson*, 284 N.C. 236, 200 S.E.2d 40 (1973). Contingent fee contract does not control determination; the fee amount is based upon actual work by attorney. *Id.* See also *Mckinney v. Stafford*, 149 N.C. App. 975, 563 S.E.2d 309 (2002); *Barry v. Carpenter*, 153 N.C. App. 200, 569 S.E.2d 33 (2002).

**Liability.** Attorney not personally liable for unpaid debts of client if disbursed funds according to N.C. Gen. Stat. §44-50. *N.C. Baptist Hospitals, Inc. v. Mitchell*, 323 N.C. 528, 374 S.E.2d 844 (1988).

## AUTOMOBILES

See Law Digest Tables.

See "NEGLIGENCE" and "NO-FAULT."

**Accidents.** Driver of any vehicle involved in collision must stop, provide information to other drivers involved, and render assistance to injured persons. Willful failure to stop constitutes felony. N.C. Gen. Stat. §20-166(a). Other violations of this statute constitute misdemeanors. N.C. Gen. Stat. §20-166. Anyone administering first aid or emergency assistance at scene of accident is liable only for wanton conduct or intentional wrongdoing. N.C. Gen. Stat. §20-166(d).

**Age.** Unlawful for minor under 18 years of age to operate motor vehicle in state, unless specific statutory criteria met in 3-level graduated licensing system: Age 15-18 - limited learner's permit; Age 16-18 - limited provisional license; Age 16-18 - full provisional license (if minor meets statutory requirements). Graduated system requires driver's education and driver eligibility or

certificate diploma from school. N.C. Gen. Stat. §20-11 (A proposed amendment to N.C. Gen. Stat. §20-11 is currently pending in North Carolina House. H.B. 2206 (May 18, 2006) (would prohibit cell phone use while driving)). Also unlawful for owner to permit an unlicensed minor under 18 years of age to do so. N.C. Gen. Stat. §20-32.

**Agency.** Automobile owner knowing reckless character of minor child given permission to use car is liable for injuries or damage done. *Tyree v. Tudor*, 183 N.C. 340, 111 S.E. 714 (1922). Driver's negligence may be imputed to owner who is passenger in vehicle. *Hearne v. Smith*, 23 N.C. App. 111, 208 S.E.2d 268, review denied, 286 N.C. 211, 209 S.E.2d 315 (1974); see also *Rhoades v. Bryant*, 56 N.C. App. 635, 289 S.E.2d 637 (1982), review denied, 306 N.C. 386, 294 S.E.2d 211 (1982). Prospective purchaser driving dealer's car is bailee, not agent. *Wilcox v. Glover Motors, Inc.*, 269 N.C. 473, 153 S.E.2d 76 (1967). Proof of ownership at time of accident is prima facie evidence that vehicle was being operated and used with authority, consent, and knowledge of owner. N.C. Gen. Stat. §20-71.1. Proof of registration in name of any person, firm, or corporation is prima facie evidence of ownership. *Id.* Once lease revoked, lessee no longer permissive user. *Nationwide Mut. Ins. Co. v. Land*, 78 N.C. App. 342, 337 S.E.2d 180 (1985), *aff'd*, 318 N.C. 551, 350 S.E.2d 500 (1986). But see *United Services Auto. Ass'n v. Rhodes*, 156 N.C. App. 665, 577 S.E.2d 171 (2003). Ownership of vehicle by non-resident to be determined by law of owner's state of residence. *Hargett v. Reed*, 95 N.C. App. 292, 382 S.E.2d 791 (1989).

**Impaired Driving.** N.C. Gen. Stat. §20-138.1 (Proposed amendments to N.C. Gen. Stat. §20-138.1 are currently pending in North Carolina House of Representatives and Senate. H.B. 1048 (July 20, 2005) (adding regulation of Schedule I or II Controlled Substances); S.B. 104 (Feb. 9, 2005) (making it illegal to transport a minor with any alcohol present in blood)). One-year license suspension for impaired driving mandatory. N.C. Gen. Stat. §20-19(c1). Plea of no contest sufficient for "prior conviction" when permanently suspending license. *Davis v. Hiatt*, 326 N.C. 462, 390 S.E.2d 338 (1990). Four-year license suspension may be ordered where defendant is convicted of two impaired driving offenses within a three-year period. N.C. Gen. Stat. §20-19(d). See *Wagoner v. Hiatt*, 111 N.C. App. 448, 432 S.E.2d 417 (1993). Sentencing Hearing. N.C. Gen. Stat. §20-179 (Proposed amendments to N.C. Gen. Stat. §20-179 are currently pending in North Carolina House of Representatives and Senate. H.B. 1435 (April 21, 2005) (adding additional aggravating factors); H.B. 1048 (July 20, 2005 (adding consideration of aggravating and mitigating factors, adding provisions for jury trials); H.B.



680 (March 17, 2005) (providing punishment where aggravating factors are present); S.B. 738 (March 22, 2005) (restricting release on parole and reduction of time)).

Financial responsibility is prerequisite to registration. N.C. Gen. Stat. §20-309. (Proposed amendments to N.C. Gen. Stat. §20-309 are currently pending in the North Carolina Senate. S.B. 602 (Aug. 30, 2005) (creating an exception for members of the armed forces); S.B. 881 (June 29, 2005) (rewriting the insurance termination provisions)). Owner of motor vehicle must have financial responsibility (liability insurance policy, financial security bond, financial security deposit, self-insurer) for vehicle and must maintain such responsibility throughout registration period. N.C. Gen. Stat. §20-309(b).

Notice. Where insured knowingly and intentionally fails to give timely notice, insurer is relieved of obligation to defend and indemnify regardless of whether delay prejudiced insurer. *Great Am. Ins. Co. v. C.G. Tate Constr. Co.*, 315 N.C. 714, 340 S.E.2d 743 (1986); see also *Liberty Mut. Ins. Co v. Pennington*, 141 N.C. App. 495, 541 S.E.2d 503 (2000), cert. granted, 353 N.C. 451, 548 S.E.2d 526 (2001), aff'd, 356 N.C. 571, 573 S.E.2d 118 (2002). Notice is timely when insured notifies malpractice carrier of potential claim six weeks after attorney for claimant requests claimant's medical records from insured. *Am. Cont'l Ins. Co. v. PHICO Ins. Co.*, 132 N.C. App. 430, 512 S.E.2d 490, aff'd, 351 N.C. 45, 519 S.E.2d 525 (1999).

Contributory Negligence. Bars recovery if it contributes to injury as a proximate cause. *Griffin v. Ward*, 267 N.C. 296, 148 S.E.2d 133 (1966). Party asserting defense bears burden of proof. N.C. Gen. Stat. §1-139. See *Federal Paper Bd. Co., Inc. v. Kamyr, Inc.*, 101 N.C. App. 329, 399 S.E.2d 411, review denied, 328 N.C. 570, 403 S.E.2d 510 (1991).

Family Purpose Doctrine. Family purpose doctrine applies in North Carolina. *Watts v. Lefler*, 190 N.C. 722, 130 S.E. 630 (1925); *Stansel v. McIntyre*, 237 N.C. 148, 74 S.E.2d 345 (1953). Family purpose doctrine applies to motor boats. N.C. Gen. Stat. §75A-10.1. Ownership of vehicle not conclusive proof of control. *Camp v. Camp*, 89 N.C. App. 347, 365 S.E.2d 675 (1988); *Taylor v. Brinkman*, 118 N.C. App. 96, 453 S.E.2d 560 (1995). Doctrine does not apply to allow recovery of punitive damages against owner for willful act of family member. *Byrne v. Bordeaux*, 85 N.C. App. 262, 354 S.E.2d 277 (1987). Owner of vehicle is liable for negligence of child's guest who is driving family car. *Rector v. Roberts*, 264 N.C. 324, 141 S.E.2d 482 (1965); *Jones v. Allred*, 52 N.C. App. 38, 278 S.E.2d 521 (1981), aff'd, 304 N.C. 387, 283 S.E.2d 517 (1981).

Guest Cases. Guest injured by negligence of driver of automobile and third person may recover from either or both. *Ballinger v. Thomas*, 195 N.C. 517, 142 S.E. 761 (1928). Guest who knows driver is incompetent, inexperienced or reckless cannot recover against driver if riding with driver amounts to a failure to exercise reasonable or ordinary care for guest's own safety. *Dinkins v. Carlton*, 255 N.C. 137, 120 S.E.2d 543 (1961). Includes wife driving with husband. *Bogen v. Bogen*, 220 N.C. 648, 18 S.E.2d 162 (1942). Guest who knows or should know driver is under influence of intoxicating beverage and voluntarily rides with driver cannot recover against driver. *Coleman v. Hines (In Re Estate of Musso)*, 133 N.C. App. 147, 515 S.E.2d 57 (1999), review denied, 350 N.C. 826, 539 S.E.2d 281 (1999); *Watkins v. Hellings*, 321 N.C. 78, 361 S.E.2d 568 (1987); *Ayscue v. Weldon*, 118 N.C. App. 636, 456 S.E.2d 344 (1995) (upholding recovery when passenger was unaware of intoxication).

Inspection. Vehicles registered in state are subject to mandatory annual safety equipment inspections. N.C. Gen. Stat. §20-183.2 through 20-183.8G. (Proposed amendments to these statutes are currently pending in the North Carolina House of Representatives and Senate. H.B. 1371 (April 21, 2005) (exemption for all-terrain vehicles operated by a public safety agency); S.B. 1006 (March 24, 2005) (exemption for light-duty cars and trucks); and S.B. 1587 (June 26, 2006) (exemption for motor vehicles on federal installation) propose to amend N.C. Gen. Stat. §20-183.2; S.B. 774 (March 22, 2005) (adding seat belts to list of equipment required to be in working order) proposes to amend §20-183.3; S.B. 185 (February 23, 2005) (adding letters to the section subdivisions) proposes to amend §20-183.6; H.B. 2805 (May 29, 2006) (requiring only one inspection of tinted windows) proposes to amend §20-183.7.) Vehicles may be subject to emissions inspections. *Id.*

Last Clear Chance. Doctrine recognized. *Mathis v. Marlow*, 261 N.C. 636, 135 S.E.2d 633 (1964). Under the doctrine, defendant has duty to avoid injury if defendant has time and means to avoid injury by exercise of reasonable care after discovering plaintiff's peril. *Watson v. White*, 309 N.C. 498, 308 S.E.2d 268 (1983); *Nealy v. Green*, 139 N.C. App. 500, 534 S.E.2d 240 (2000); *Womack v. Stephens*, 144 N.C. App. 57, 550 S.E.2d 18 (2001), review denied, 354 N.C. 229, 555 S.E.2d 277 (2001); *Privett v. Yarborough*, 166 N.C. App. 664, 603 S.E.2d 579 (2004); *Overton v. Purvis*, 154 N.C. App. 543, 573 S.E.2d 219 (2002), reversed, 357 N.C. 497, 586 S.E.2d 265 (2003) (remanded for consideration of additional issues), on remand, 162 N.C. App. 241, 591 S.E.2d 18 (2004). Original negligence of defendant may be considered. *Exum v. Boyles*, 272 N.C. 567, 158 S.E.2d 845 (1968). To obtain instruction on last



clear chance, plaintiff must show: 1) plaintiff's negligence put herself into position of helpless peril, 2) defendant discovered, or should have discovered, the plaintiff's position, 3) defendant had time and ability to avoid injuring plaintiff, 4) defendant negligently failed to do so, and 5) plaintiff's injury resulted from defendant's failure to avoid injury. *Kenan v. Bass*, 132 N.C. App. 30, 511 S.E.2d 6 (1999); *see also, Parker v. Willis*, 167 N.C. App. 625, 606 S.E.2d 184 (2004), *review denied*, 359 N.C. 411, 612 S.E.2d 322 (2005).

**Motorized Bicycles.** Distinction between mopeds and motorcycles. N.C. Gen. Stat. §20-4.01(27)(d)(d1); §105-164.3(22).

**Motor Vehicle.** Policy exclusion for "motor vehicles" did not include go-cart; go-cart was "motorized land conveyance" within meaning of policy. *State Auto. Mut. Ins. Co. v. Hoyle*, 106 N.C. App. 199, 415 S.E.2d 764, *review denied*, 331 N.C. 557, 417 S.E.2d 803 (1992).

**Res Ipsa Loquitur.** Res ipsa loquitur is applicable to raise inference of driver's negligence in allowing his automobile to leave highway, and identity of driver of automobile may be established by circumstantial evidence. *Greene v. Nichols*, 274 N.C. 18, 161 S.E.2d 521 (1968). *But see Curry v. Brown*, 8 N.C. App. 464, 174 S.E.2d 856 (1970).

**Seat Belts. Required Use.** N.C. Gen. Stat. §20-135.2A. Failure of guest passenger to use available seat belts is not contributory negligence. *Miller v. Miller*, 273 N.C. 228, 160 S.E.2d 65 (1968). Improper use of available seat belt by guest passenger is not contributory negligence. *Chaney v. Young*, 122 N.C. App. 260, 468 S.E.2d 837 (1996). Evidence of failure to wear seat belt is not admissible except in action for violation of seat belt statute. N.C. Gen. Stat. §20-135.2A(d). DWI case dismissed where defendant was stopped for violation of seat belt statute. *State v. Williams*, 113 N.C. App. 686, 440 S.E.2d 324 (1994). Restrictions on transporting children under 12 in open bed or open cargo vehicles. N.C. Gen. Stat. §20-135.2B. Child restraint systems mandatory. N.C. Gen. Stat. §20-137.1.

**Service of process upon nonresident motorists and upon residents who depart state.** Service must be effectuated in accordance with Rule 4, North Carolina Rules of Civil Procedure. Rule 4 (j) provides for personal service outside state, service by registered mail, and service by publication. N.C. Gen. Stat. §1-105 appoints Commissioner of Motor Vehicles as process agent upon whom summons may be served.

**Speed limits in school zones.** N.C. Gen. Stat. §20-141.1.

**Sudden emergency, thin skull rule discussed.** *Casey v. Fredrickson Motor Exp. Corp.*, 97 N.C. App. 49, 387 S.E.2d 177, *review denied*, 326 N.C. 594, 393 S.E.2d 874 (1990); *Taylor v. Ellerby*, 146 N.C. App. 56, 552 S.E.2d 667 (2001) (referring to the thin skull rule as the peculiar susceptibility doctrine); *Hughes v. Webster*, \_\_\_ N.C. App. \_\_\_, 625 S.E.2d 177 (2006).

**Trailers/Weight Limits.** Limits on tandem trailers, N.C. Gen. Stat. §20-115.1; size of vehicles and loads, N.C. Gen. Stat. §20-116 (A proposed amendment to N.C. Gen. Stat. §20-116 is currently pending in the North Carolina Senate. S.B. 832 (Aug. 4, 2005) (specifying permissible towing distance)); weight, N.C. Gen. Stat. §20-118 (Proposed amendments to N.C. Gen. Stat. §20-118 are currently pending in the North Carolina Senate and House of Representatives. S.B. 603 (March 16, 2005); S.B. 832 (Aug. 4, 2005) (specifying permissible towing distance); H.B. 669 (Sept. 7, 2005) (assign axel-weight regulations; changing administrator of statute to crime control and public safety)).

**Uninsured and Underinsured Motorist Coverage.** Every "motor vehicle liability policy" issued to a North Carolina resident with limits in excess of \$30,000.00 per person and \$60,000.00 per accident must include uninsured and underinsured motorist coverage unless rejected by insured. N.C. Gen. Stat. §20-279.21(b)(4); *McNally v. Allstate Ins. Co.*, 142 N.C. App. 680, 544 S.E.2d 807, *review denied*, \_\_\_ N.C. \_\_\_, 552, S.E.2d 163 (2001). After rejection of coverage in initial policy, this coverage need not be offered again unless requested by insured. N.C. Gen. Stat. §20-279.21(b)(4). N.C. Gen. Stat. §20-279.21(b)(4) provides for stacking of UIM coverages and prevails over contrary policy. *See Smith v. Nationwide Mut. Ins. Co.*, 328 N.C. 139, 400 S.E.2d 44, *reh'g denied*, 328 N.C. 577, 403 S.E.2d 514 (1991). *But see Mitchell v. Nationwide Ins. Co.*, 110 N.C. App. 16, 429 S.E.2d 351 (1993), *aff'd*, 335 N.C. 433, 439 S.E.2d 110 (1994); *Vasseur v. St. Paul Mut. Ins. Co.*, 123 N.C. App. 418, 473 S.E.2d 15, *review denied*, 345 N.C. 183, 479 S.E.2d 209 (1996); *Purcell v. Downey*, 162 N.C. App. 529, 591 S.E.2d 556 (2004). Prior to 1991 amendment of N.C. Gen. Stat. §20-279.21(b)(4), both intrapolicy and interpolicy stacking of nonfleet policies were allowed. *Harris v. Nationwide Mut. Ins. Co.*, 103 N.C. App. 101, 404 S.E.2d 499 (1991), *aff'd*, 332 N.C. 184, 420 S.E.2d 124 (1992). However, there can be no intra-policy stacking of fleet policies before or after amendment. *Nationwide Mut. Ins. Co. v. Mabe*, 342 N.C. 482, 467 S.E.2d 34 (1996). As amended, N.C. Gen. Stat. §20-279.21(b)(4) appears to prohibit intrapolicy stacking, *Bass v. N.C. Farm Bureau Mut. Ins. Co.*, 332 N.C. 109, 418 S.E.2d 221 (1992), and inter-policy stacking of fleet policies. *Erwin v. Tweed*, 142 N.C. App. 643, 544 S.E.2d 803, *rev. denied*, 353 N.C. 724, 551 S.E.2d 437



(2001), *appeal after remand*, 159 N.C. App. 579, 583 S.E.2d 717 (N.C. App. 2003), *review denied*, 358 N.C. 234, 593 S.E.2d 780 (N.C. 2004), *aff'd*, 359 N.C. 64, 602 S.E.2d 359 (N.C. 2004); *Cf. Iodice v. Jones*, 135 N.C. App. 740, 522 S.E.2d 593 (1999) (permitting inter-policy stacking for non-fleet policy). UM and UIM coverage must insure against loss uncompensated by workers' compensation and the amount of an employer's lien. N.C. Gen. Stat. §20-279.21(e).

### AVIATION

Uniform Act Not Adopted. Policies usually contain an aircraft exclusion for risks engaged in aviation, military service, etc. Aircraft exclusion in homeowner's policy applies to actions against insured for failure to warn and instruct on condition of plane. *Wilkins v. Am. Motorists Ins. Co.*, 97 N.C. App. 266, 388 S.E.2d 191, *review denied*, 327 N.C. 145, 394 S.E.2d 189 (1990).

Portions of National Transportation Safety Board report found inadmissible in personal injury action. *Bolick v. Sunbird Airlines, Inc.*, 96 N.C. App. 443, 386 S.E.2d 76 (1989), *aff'd*, 327 N.C. 464, 396 S.E.2d 323 (1990). For a discussion of admissibility of evidence in action arising from plane crash caused by dog on runway, see *Screaming Eagle Air Ltd. v. Airport Comm'n of Forsyth Cty.*, 97 N.C. App. 30, 387 S.E.2d 197, *review denied*, 326 N.C. 598, 393 S.E.2d 882 (1990).

For regulation and liability of airplanes, airports, see N.C. Gen. Stat. §63-1 *et seq.* (A proposed amendment to N.C. Gen. Stat. §63-1 is pending in the North Carolina Senate. S.B. 247 (July 25, 2005) (adding definitions of heliport, tourist resort, county and tribal land)).

### BROKERS

See "AGENTS AND BROKERS."

### BURGLARY INSURANCE

Intentional acts by third party on leased premises are not an "unavoidable accident" for purposes of liability of lessee's insurer. *Tayloe v. Hartford Accid. & Indem. Co.*, 257 N.C. 626, 127 S.E.2d 238 (1962). Duty of insured to make reasonable effort to secure premises. *Clemmons v. Glens Falls Ins. Co., Inc.*, 2 N.C. App. 479, 163 S.E.2d 425 (1968).

### CANCELLATION

See "ACCIDENT AND HEALTH INSURANCE, Contracts"; "LIABILITY INSURANCE"; "FIRE INSURANCE, Contracts."

Life policies may be cancelled for fraud, material misrepresentations – see N.C. Gen. Stat. §58-3-10;

*George Washington Life Ins. Co. v. Am. Collapsible Box Co.*, 185 N.C. 543, 117 S.E. 785 (1923); *Mut. Life Ins. Co. v. Leaksville Woolen Mills*, 172 N.C. 534, 90 S.E. 574 (1916); *Tharrington v. Sturdivant Life Ins. Co.*, 115 N.C. App. 123, 443 S.E.2d 797 (1994) – and suppression of material fact, see *Thomas-Yelverton v. State Capital Life Ins. Co.*, 238 N.C. 278, 77 S.E.2d 692 (1953). Company liable for premiums paid on policy if it wrongfully cancels same. *Scott v. Mut. Reserve Fund Life Ass'n*, 137 N.C. 515, 50 S.E. 221 (1905); *Strauss v. Mut. Reserve Fund Life Ass'n*, 126 N.C. 971, 36 S.E. 352 (1900), *reh'g denied*, 128 N.C. 465, 39 S.E. 55 (1901); *Braswell v. Am. Life Ins. Co.*, 75 N.C. 8 (1876).

It is not necessary to prove fraud or intent to deceive; even if innocently made, material misrepresentation will prevent recovery. N.C. Gen. Stat. §58-3-10; *Garvey v. Old Colony Ins. Co.*, 153 F. Supp. 755 (E.D.N.C. 1957), *aff'd*, 253 F.2d 299 (4th Cir. 1958); *Tolbert v. Mut. Benefit Life Ins. Co.*, 236 N.C. 416, 72 S.E.2d 915 (1952); *Matter of McCrary*, 112 N.C. App. 161, 435 S.E.2d 359 (1993). Rescission even though material misrepresentation is not related to cause of loss. *Schas v. Equitable Life Assur. Soc'y*, 166 N.C. 55, 81 S.E. 1014 (1914).

Requirement in N.C. Gen. Stat. §20-310 that notice of cancellation of automobile liability policy advise insured of his eligibility for insurance through North Carolina Automobile Insurance Plan repealed. *Coleman v. Interstate Cas. Ins. Co.*, 84 N.C. App. 268, 352 S.E.2d 249 (1987). To cede risk of unacceptable applicant to North Carolina Reinsurance Facility, see N.C. Gen. Stat. §58-37-1 *et seq.* N.C. Gen. Stat. §20-309(e) requires insurer to notify DMV of cancellation of auto insurance policy. Failure to notify DMV does not continue coverage if insured receives specific notification of cancellation. *Allstate Ins. Co. v. McCrae*, 325 N.C. 411, 384 S.E.2d 1 (1989). For effectiveness of notice of cancellation, see *Sanders v. Am. Spirit Ins. Co.*, 135 N.C. App. 178, 519 S.E.2d 323 (1999); *Pearson v. Nationwide Mut. Ins. Co.*, 325 N.C. 246, 382 S.E.2d 745 (1989). Sufficient to send notice to "last known address." *Allstate Ins. Co. v. Nationwide Ins. Co.*, 82 N.C. App. 366, 346 S.E.2d 310, *rev. denied*, 318 N.C. 505, 349 S.E.2d 858 (1986). Insurance carrier must give Office of Commissioner 20 days' notice of cancellation or termination of a certified motor vehicle liability policy. N.C. Gen. Stat. §20-279.22. For effect of former N.C. Gen. Stat. §20-310(f) (repealed in 1993) on policy that expires by its own terms, see *Nationwide Mut. Ins. Co. v. Choice Floor Covering Co.*, 112 N.C. App. 801, 436 S.E.2d 851 (1993).

Incontestability. Life insurance: two years, exception for non-payment. N.C. Gen. Stat. §58-58-22(2).

Group life insurance: two years, exception for non-payment. N.C. Gen. Stat. §58-58-140(2). Accident and sickness insurance: two years, but see exceptions in statute. N.C. Gen. Stat. §58-51-15(a)(2)(a).

Lapse. Life Policy: cannot lapse without notice within specified limits before due date of premium. N.C. Gen. Stat. §58-58-120. Grace period of at least 31 days required. N.C. Gen. Stat. §58-58-22(1).

Nonforfeiture. Standard provisions required in life policies. N.C. Gen. Stat. §58-58-55.

Policy Void. Insured does not void coverage if all legal documents are not forwarded to insurer. *Aetna Cas. & Sur. Co. v. Welch*, 92 N.C. App. 211, 373 S.E.2d 887 (1988). Answer to ambiguous yes-no question not false as matter of law. *Cockerham v. Pilot Life Ins. Co.*, 92 N.C. App. 218, 374 S.E.2d 174 (1988).

## CHATTEL MORTGAGE

See "FIRE INSURANCE."

## CONSTRUCTION OF POLICY

Insurance policies liberally construed in favor of insured and strictly construed against insurer. *N.C. Farm Bureau Mut. Ins. Co. v. Stox*, 330 N.C. 697, 412 S.E.2d 318 (1992); *State Capital Ins. Co. v. Nationwide Mut. Ins. Co.*, 318 N.C. 534, 350 S.E.2d 66 (1986); *Henderson v. Hartford Accid. & Indem. Co.*, 268 N.C. 129, 150 S.E.2d 17 (1966); *Erie Ins. Exch. v. Bledsoe*, 141 N.C. App. 331, 540 S.E.2d 57 (2000), *rev. denied*, 353 N.C. 371, 547 S.E.2d 442 (2001); *Wehrlen v. Amica Mut. Ins. Co.*, 118 N.C. App. 64, 453 S.E.2d 557 (1995). Ambiguities strictly construed against drafter and in favor of insured and coverage. *Stockton v. N.C. Farm Bureau Mut. Ins. Co.*, 139 N.C. App. 196, 532 S.E.2d 566, *rev. denied*, 352 N.C. 683, 545 S.E.2d 727 (2000); *West Am. Ins. Co. v. Tufco Flooring East, Inc.*, 104 N.C. App. 312, 409 S.E.2d 692 (1991), *rev. denied as improvidently granted*, 332 N.C. 479, 420 S.E.2d 826 (1992), *overruled on other grounds*, *Gaston Co. Dyeing Mach. Co. v. Northfield Ins. Co.*, 351 N.C. 293, 524 S.E.2d 558 (2000). *But see Imperial Cas. & Indem. Co. v. Radiator Specialty Co.*, 862 F. Supp. 1437 (E.D.N.C. 1994), *aff'd*, 67 F.3d 534 (4th Cir. 1995). Unambiguous policy must be strictly construed without resort to extrinsic evidence. *Metric Constructors, Inc. v. Indus. Risk Insurers*, 102 N.C. App. 59, 401 S.E.2d 126, *aff'd*, 330 N.C. 439, 410 S.E.2d 392 (1991).

Insurer's duty to defend until coverage "exhausted" requires defense until settlement or judgment to policy limits. *Brown v. Lumbermens Mut. Cas. Co.*, 326 N.C. 387, 390 S.E.2d 150 (1990). Nontechnical words not defined given ordinary meanings unless context requires

otherwise. *State Auto. Mut. Ins. Co. v. Hoyle*, 106 N.C. App. 199, 415 S.E.2d 764, *rev. denied*, 331 N.C. 557, 417 S.E.2d 803 (1992); *Walker v. Durham Life Ins. Co.*, 90 N.C. App. 191, 368 S.E.2d 43 (1988). Binder may be oral or written. *Sloan v. Wells*, 296 N.C. 570, 251 S.E.2d 449 (1979). Conditional receipt of application. *McLean v. Life of Va.*, 11 N.C. App. 87, 180 S.E.2d 431 (1971).

## DAMAGES

Arbitration. Uniform Act. N.C. Gen. Stat. §1-567.30 *et seq.*

Mediation. Parties to Civil Superior Court actions must attend pretrial mediation conference. N.C. Gen. Stat. §7A-38.1.

Collateral Source Rule. Outside benefits should not serve to mitigate plaintiff's damages. *Cates v. Wilson*, 321 N.C. 1, 361 S.E.2d 734 (1987); *Kaminsky v. Sebile*, 140 N.C. App. 71, 535 S.E.2d 109 (2000).

Contributory Negligence. North Carolina adheres to doctrine. No comparative fault. *Griffin v. Ward*, 267 N.C. 296, 148 S.E.2d 133 (1966); *Williams v. Davis*, 157 N.C. App. 696, 580 S.E.2d 85 (2003). Contributory negligence defense does not preclude recovery if defendant's conduct is wilful, wanton, and proximate cause of injury. *Sloan v. Miller Bldg. Corp.*, 119 N.C. App. 162, 458 S.E.2d 30, *disc. rev. denied*, 341 N.C. 652, 462 S.E.2d 517 (1995).

Indemnification. No cause of action on contract of strict indemnity accrues until liability within scope of agreement certain, loss absolute, or indemnitor fails to pay. *Lackey v. Southern Ry. Co.*, 219 N.C. 195, 13 S.E.2d 234 (1941). Indemnity does not cover payments to third person for which indemnitee not liable but voluntarily or improperly pays. *City of Wilmington v. N.C. Natural Gas Corp.*, 117 N.C. App. 244, 450 S.E.2d 573 (1994).

Insured's costs of compliance with state-ordered hazardous waste cleanup are "damages" within meaning of "property damages" in coverage clause of standard comprehensive general liability policy. *C.D. Spangler Constr. Co. v. Indus. Crankshaft & Eng'r Co.*, 326 N.C. 133, 388 S.E.2d 557 (1990).

Prejudgment interest is not awarded for unliquidated tort damage, *Lazenby v. Godwin*, 60 N.C. App. 504, 299 S.E.2d 288 (1983), or for breach of contract if amount not readily ascertainable. *Lawrence v. Wetherington*, 108 N.C. App. 543, 423 S.E.2d 829 (1993); *see also* N.C. Gen. Stat. §24-5 (interest on compensatory damages calculated from time of filing action to satisfaction of judgment). Insurer not required to pay prejudgment interest in excess of policy limit. *Sproles v.*



*Greene*, 329 N.C. 603, 407 S.E.2d 497 (1991). In general, insurer's obligation to pay interest in addition to policy limits governed by language of policy. *Eatman Leasing v. Empire Fire & Marine Ins. Co.*, 145 N.C. App. 278, 550 S.E.2d 271 (2001). Where policy entitled insured to all "damages," without defining the term, insured was entitled to prejudgment interest. *Baxley v. Nationwide Mut. Ins. Co.*, 334 N.C. 1, 430 S.E.2d 895 (1993). Unless policy provides otherwise, prejudgment interest is deemed a damage, not a cost. *Ledford v. Nationwide Mut. Ins. Co.*, 118 N.C. App. 44, 453 S.E.2d 866 (1995).

**Psychic Injuries.** Damages for fright or intentionally or negligently inflicted emotional distress are recoverable even absent actual physical injury if severe emotional distress was foreseeable and proximate cause of negligence. *Johnson v. Ruark Obstetrics & Gyn. Assocs., P.A.*, 327 N.C. 283, 395 S.E.2d 85 (1990).

**Punitive damages** may be awarded to punish defendant for wrongful conduct accompanied by fraud, malice or wilful or wanton conduct. N.C. Gen. Stat. §1D-1 *et seq.* Recovery limited to three times compensatory or \$250,000, whichever greater. N.C. Gen. Stat. §1D-25. No recovery limit for claims related to driving while intoxicated. N.C. Gen. Stat. §1D-26.

**Punitive damages** against insured covered under insurance contract and public policy does not preclude such coverage. *Mazza v. Medical Mut. Ins. Co. of N.C.*, 311 N.C. 621, 319 S.E.2d 217 (1984); *Boyd v. Nationwide Mut. Ins. Co.*, 108 N.C. App. 536, 424 S.E.2d 168 (1993). Allegations that defendant driver was intoxicated will not alone support punitive damages claim. *Howard v. Parker*, 95 N.C. App. 361, 382 S.E.2d 808 (1989). Punitive damages are not recoverable for breach of contract with exception of breach of contract to marry. However, when breach of contract is accompanied by identifiable tortious act, tort may be grounds for recovery of punitive damages, provided that tortious conduct is aggravated. *Stanback v. Stanback*, 297 N.C. 181, 254 S.E.2d 611, *aff'd and rev'd in part*, 297 N.C. 181, 254 S.E.2d 611 (1979). Punitive damages for tortious bad faith refusal to settle not precluded because insurer eventually pays within time limits of policy. *Robinson v. N.C. Farm Bureau Ins. Co.*, 86 N.C. App. 44, 356 S.E.2d 392 (1987), *rev. dismissed*, 321 N.C. 592, 364 S.E.2d 140 (1988). Complaint stating claim for punitive damages based on insurer's failure to promptly settle property damages claim is sufficient. *Smith v. Nationwide Mut. Fire Ins. Co.*, 96 N.C. App. 215, 385 S.E.2d 152 (1989), *rev. denied*, 326 N.C. 365, 389 S.E.2d 816 (1990).

"New business" rule, which precludes award of damages for lost future profits where party has no recent record of profitability, is not law in North Carolina. *Oli-*

*vetti Corp. v. Ames Bus. Sys., Inc.*, 319 N.C. 534, 356 S.E.2d 578, *reh'g denied*, 320 N.C. 639, 360 S.E.2d 92 (1987).

Excessive verdict grounds for new trial or amendment of judgment. N.C. Gen. Stat. §1A-1, Rule 59 (a)(6). Order pursuant to Rule 59 not reversible on appeal unless clear abuse of discretion. *Boyd v. L.G. DeWitt Trucking Co., Inc.*, 103 N.C. App. 396, 405 S.E.2d 914, *rev. denied*, 330 N.C. 193, 412 S.E.2d 53 (1991).

## DEATH

See Law Digest Tables.

Death not presumed from seven years' absence. N.C. Gen. Stat. §28C-1.

North Carolina's Wrongful Death Act (N.C. Gen. Stat. §28A-18-2) (this statute is currently pending legislation, which would allow for damages based on contributory fault. See N.C. H.B. 1455 (April 21, 2005)). This Act allows recovery of certain types of damage for death of viable but unborn child. *DiDonato v. Wortman*, 320 N.C. 423, 358 S.E.2d 489, *reh'g denied*, 320 N.C. 799, 361 S.E.2d 73 (1987). Court criticized *DiDonato's* implication that damages for loss of stillborn child's companionship, services and society are too speculative to be recoverable. *Greer v. Parsons*, 103 N.C. App. 463, 405 S.E.2d 921 (1991), *aff'd*, 331 N.C. 368, 416 S.E.2d 174 (1992); *See also Fox-Kirk v. Hannon*, 142 N.C. App. 267, 542 S.E.2d 346 (2001), *rev. dismissed as moot*, 353 N.C. 725, 551 S.E.2d 437 (2001) (declined to apply *DiDonato* for earning capacity for young child).

One who wilfully and unlawfully kills insured cannot receive life insurance proceeds. They are distributed in accordance with N.C. Gen. Stat. §§31A-3 & 31A-4. *Tew v. Durham Life Ins. Co.*, 1 N.C. App. 94, 160 S.E.2d 117 (1968).

Death is indivisible injury when identifying joint tortfeasors. *State Farm Mut. Auto. Ins. Co. v. Holland*, 90 N.C. App. 730, 370 S.E.2d 70 (1988), *rev'd on other grounds*, 324 N.C. 466, 380 S.E.2d 100 (1989).

When policy provides coverage for death by accident or external, violent, and accidental means, burden is on plaintiff to show accident or accidental means within terms of policy. *Barnes v. Home Beneficial Life Ins. Co.*, 271 N.C. 217, 155 S.E.2d 492 (1967).

**Abatement and Survival.** No cause of action for personal injury abates as result of injured party's death, but can be brought or continued by personal representative. N.C. Gen. Stat. §28A-18-1. *Johnson v. Smith*, 215 N.C. 322, 1 S.E.2d 834 (1939).



**DISABILITY**

“Confined to his home” held not to mean actually confined to four walls of parents’ home. *Hines v. New England Cas. Co.*, 172 N.C. 225, 90 S.E. 131 (1916). Insurer’s liability is unaffected if insured leaves home only to visit physician, take walks ordered by doctor or for some other purpose which does not negate seriousness of illness and totality of disability. *Evans v. Transp. Ins. Co.*, 269 N.C. 271, 152 S.E.2d 82 (1967). But too much outside activity precludes benefits under “continuously confined within doors” provision. *Suits v. Old Equity Life Ins. Co.*, 249 N.C. 383, 106 S.E.2d 579 (1959). Rehospitalization for same injury not continuous confinement. *Atkinson v. Pilot Life Ins. Co.*, 260 N.C. 348, 132 S.E.2d 681 (1963). Insured actually drawing salary not entitled to benefits for total disability. *Thigpen v. Jefferson Standard Life Ins. Co.*, 204 N.C. 551, 168 S.E. 845 (1933). Attending school is not pursuing occupation for remuneration or profit. *Gennett v. Jefferson Standard Life Ins. Co.*, 207 N.C. 640, 178 S.E. 87 (1935). Insured’s performance of work of permanent nature, although handicapped by disease, held to preclude recovery on total disability clause. *Lee v. Equitable Life Assur. Soc’y*, 211 N.C. 182, 189 S.E. 626 (1937). Provision as to termination of disability provision at certain age valid. *Hunter v. Jefferson Standard Life Ins. Co.*, 241 N.C. 593, 86 S.E.2d 78 (1955); *Teague v. Springfield Life Ins. Co.*, 55 N.C. App. 437, 285 S.E.2d 860 (1982). No recovery under disability provision where insured not prevented by heart condition from performing “each and every duty” of his occupation. *Taylor v. Bankers Life & Cas. Co.*, 14 N.C. App. 418, 188 S.E.2d 728 (1972), *cert. denied*, 281 N.C. 628, 190 S.E.2d 473 (1972). Provision defining total occupational disability as being such as to prevent insured from performing “any and every” duty of his occupation, rendered indemnity for total occupational disability payable when insured was disabled to such extent that he could not perform any “important” duty of his profession. *Greenwood v. Inter-Ocean Ins. Co.*, 242 N.C. 745, 89 S.E.2d 455 (1955); *Shanahan v. Shelby Mut. Ins. Co.*, 19 N.C. App. 143, 198 S.E.2d 47, *cert. denied*, 284 N.C. 122, 199 S.E.2d 660 (1973). Where policy provides for benefits only if “such disability requires insured to be under care and attendance of legally qualified physician,” insured may not receive benefits when condition is static and would not be improved by regular medical treatment. *Duke v. Mut. Life Ins. Co.*, 286 N.C. 244, 210 S.E.2d 187 (1974). Attending physician statement not conclusive as to determination of total and permanent disability under policy. *Guy v. Aetna Life Ins. Co.*, 207 N.C. 278, 176 S.E. 554 (1934); *Misskelley v. Home Life Ins. Co.*, 205 N.C. 496, 171 S.E. 862 (1933). Evidence that insured had submitted proofs of claim to effect that his then disabil-

ity was partial and he had accepted partial loss benefits based on such proofs was not conclusive as to his actual status and did not prevent his recovery of total disability payments under policy. *Greenwood v. Inter-Ocean Ins. Co.*, 242 N.C. 745, 89 S.E.2d 455 (1955).

**FINANCIAL RESPONSIBILITY LAW**

See Law Digest Tables.

See “AUTOMOBILES” and “LIABILITY.”

**FIRE INSURANCE**

Agents. Because standard fire policy allowed waiver of any provisions only after written consent by insurer, agent has no power to orally waive any terms after policy has been issued. *Zibelin v. Pawtucket Mut. Fire Ins. Co.*, 229 N.C. 567, 50 S.E.2d 290 (1948), *disavowed on other grounds*, *Smith v. N.C. Farm Bureau Mut. Ins.*, 321 N.C. 60, 361 S.E.2d 571 (1987). Contra, as to terms at inception of contract. *Bullard v. Pilot Fire Ins. Co.*, 189 N.C. 34, 126 S.E. 179 (1925).

Arbitration. Award binding on parties except in cases of fraud, etc. *Clark Millinery Co. v. Nat’l Union Fire Ins. Co.*, 160 N.C. 130, 75 S.E. 944 (1912); *Perry v. Greenwich Ins. Co.*, 137 N.C. 402, 49 S.E. 889 (1905); *Patton v. Garrett*, 116 N.C. 847, 21 S.E. 679 (1895).

Arson. Arson a felony. N.C. Gen. Stat. §14-58 *et seq.* Fraudulently setting fire to “dwelling house” a felony. N.C. Gen. Stat. §14-65. Burning personal property with intent to injure or prejudice insurer, creditor, or any person a felony. N.C. Gen. Stat. §14-66.

Appraisal. Statutory appraisal clause in N.C. Gen. Stat. §58-44-15 does not deprive insured of North Carolina Constitutional rights to due process or trial by jury. *Bentley v. N.C. Ins. Guar. Ass’n*, 107 N.C. App. 1, 418 S.E.2d 705 (1992). Appraisers, not trial court, authorized to set amount of loss from hurricane damage where parties invoke appraisal process to resolve dispute over amount of loss. *Harleysville Mut. Ins. Co. v. Narron*, 155 N.C. App. 362, 574 S.E.2d 490 (2002).

Assignment. Statutory form prohibits assignment of fire policy before loss without written consent of insurer. N.C. Gen. Stat. §58-44-15.

Cancellation. Fire policy may be cancelled at any time upon request of insured and upon five days’ written notice by insurer. Loss made payable to mortgagee not named as insured may be cancelled by ten days’ written notice. N.C. Gen. Stat. §58-44-15. *Dawson v. Concordia Fire Ins. Co.*, 192 N.C. 312, 135 S.E. 34 (1926); *Wilson v. Nat’l Union Fire Ins. Co.*, 206 N.C. 635, 174 S.E. 745 (1934).



Evidence held sufficient to be submitted to jury in action on fire insurance policy where plaintiffs' evidence tended to show that they had received no notice of cancellation of policy prior to fire, notwithstanding fact that parties stipulated that defendant-insurer had properly mailed notice of cancellation to plaintiffs several months before fire occurred. *Daves v. Union Mut. Ins. Co.*, 3 N.C. App. 82, 164 S.E.2d 195 (1968).

Construction. Ordinary words in policy will be given their commonly understood and popular meaning in absence of language in policy indicating parties intended different meaning. *Jernigan v. Hanover Fire Ins. Co.*, 235 N.C. 334, 69 S.E.2d 847 (1952); *McDaniel v. Imperial Life Ins. Co.*, 243 N.C. 275, 90 S.E.2d 546 (1955). When ambiguous term is reasonably susceptible of two interpretations, courts will construe policy strictly against insurance company and adopt provision most favorable to insured since the company wrote policy. *Anderson v. Allstate Ins. Co.*, 266 N.C. 309, 145 S.E.2d 845 (1966).

Contribution. Ordinarily, insurers required to contribute proportionately to loss, but where policy with New York standard mortgage clause in possession of mortgagee and loss less than amount of mortgage, and another policy in force with no mortgage clause, policy with mortgage clause pays full loss, and policy without mortgage clause pays nothing. *Bennett v. Provident Fire Ins. Co.*, 198 N.C. 174, 151 S.E. 98 (1930).

Insurable Interest. Statutory policy language in N.C. Gen. Stat. §58-44-15 provides that insurance coverage shall not in any event be for more than "the interest of the insured," which is not limited to ownership interest in property, but may be interest of agent for owners. Innocent spouse may recover on homeowner policy where fire is caused by other spouse. *Nationwide Mut. Fire Ins. Co. v. Pittman*, 82 N.C. App. 756, 348 S.E.2d 350 (1986), *rev. denied*, 319 N.C. 105, 353 S.E.2d 112 (1987); *Collins v. Quincy Mut. Fire Ins. Co.*, 297 N.C. 680, 256 S.E.2d 718 (1979). Each party entitled to one-half insurance proceeds upon divorce where property held as tenants by the entirety in sole possession of husband when destroyed by fire. *Carter v. Cont'l Ins. Co.*, 242 N.C. 578, 89 S.E.2d 122 (1955).

Limitations on Coverage. Maximum coverage cannot exceed the fair value of the property. N.C. Gen. Stat. §58-43-5; *State Farm Fire & Cas. Co. v. Folger*, 677 F. Supp. 844 (E.D.N.C. 1988). These provisions used by court in construction question to determine that disputed coverage included three stores instead of one store, because if only one store had been covered, coverage would have been in excess of maximum. *Williams v. Greensboro Fire Ins. Co.*, 209 N.C. 765, 185 S.E. 21 (1936).

Prohibited Acts and Penalties. Transacting insurance business without license prohibited. N.C. Gen. Stat. §58-28-45. Violation of these and similar statutes do not make policy invalid as to insured. *T.T. Hay & Bro. v. Union Fire Ins. Co.*, 167 N.C. 82, 83 S.E. 241 (1914). Violation a misdemeanor. N.C. Gen. Stat. §58-28-45(h); N.C. Gen. Stat. §58-43-35.

Limitation of Time for Commencement of Action. Twelve month limitations period is contractual, and unlike statute of limitations, may be waived. *Gaskins v. Hartford Fire Ins. Co.*, 260 N.C. 122, 131 S.E.2d 872 (1963). Insurer's promise to pay claim is such waiver. *Meekins v. Aetna Ins. Co.*, 231 N.C. 452, 57 S.E.2d 777 (1950); *Pennell v. Sec. Ins. Co.*, 18 N.C. App. 465, 197 S.E.2d 240 (1973). Limitation period is 3 years from date of loss by virtue of N.C. Gen. Stat. §1-52(12) and 58-44-15(c).

Mortgage Clause. Standard mortgage clause operates as separate contract with mortgagee as party. Mortgagee remains covered when he subsequently acquires fee simple. *Shores v. Rabon*, 251 N.C. 790, 112 S.E.2d 556 (1960). Policy not null and void where mortgagee failed to notify insurer of ownership change. *Indus. Bank v. Resolute Fire Ins. Co.*, 223 N.C. 390, 26 S.E.2d 862 (1943); *Stockton v. Atl. Fire Ins. Co.*, 207 N.C. 43, 175 S.E. 695 (1934).

Proof of Loss. Immediate notice in writing required. Also required is filing of sworn proof of loss within sixty days showing date, origin and details of fire, interest of insured, cash value of each item and damage thereto, all other contracts of insurance, schedules, changes in title, use, occupation, etc., and if required shall furnish plans, specifications of buildings, etc. Production of relevant account books, records, etc. required. N.C. Gen. Stat. §58-44-15; *Chavis v. State Farm Fire & Cas. Co.*, 317 N.C. 683, 346 S.E.2d 496 (1986); *Huggins v. Hartford Ins. Co.*, 650 F. Supp. 38 (E.D.N.C. 1986); *Baker v. Indep. Fire Ins. Co.*, 103 N.C. App. 521, 405 S.E.2d 778 (1991). Insured under fire insurance policy must bear burden of proof as to "good cause" for failure to give timely and complete proof of loss, but insurer must bear burden of proof as to prejudice. *Smith v. N.C. Farm Bureau Mut. Ins. Co.*, 321 N.C. 60, 361 S.E.2d 571 (1987).

Under standard policy provisions (N.C. Gen. Stat. §58-44-15), entire policy is void if insured willfully conceals or misrepresents material facts, or circumstances at any time, or falsely swears on proof of loss. *Dale v. Iowa Mut. Ins. Co.*, 40 N.C. App. 715, 254 S.E.2d 41, *rev. denied*, 297 N.C. 609, 257 S.E.2d 217 (1979). Insured's contradictory evidence of value of burned building presented jury question on issue of wilful concealment or misrepresentation of fact. *Shields v. Nationwide Mut.*



*Fire Ins. Co.*, 61 N.C. App. 365, 301 S.E.2d 439, *rev. denied*, 308 N.C. 678, 304 S.E.2d 759 (1983).

Rates. Regarding setting fire insurance rates, *see In re N.C. Fire Ins. Rating Bureau*, 2 N.C. App. 10, 162 S.E.2d 671 (1968), *modified*, 275 N.C. 15, 165 S.E.2d 207 (1969).

Sixty-day time limit for proof of loss is strictly enforced. However, showing of good faith by insured, when no prejudice to insurer, relieves strict burden of sixty-day time limit. *Smith v. N.C. Farm Bureau Mut. Ins.*, 321 N.C. 60, 361 S.E.2d 571 (1987). Adjuster has authority to waive sixty-day limitation for filing proof of loss. *Vail v. Vermont Mut. Fire Ins. Co.*, 14 N.C. App. 726, 189 S.E.2d 527 (1972); *Horton v. Iowa Mut. Ins. Co.*, 9 N.C. App. 140, 175 S.E.2d 725 (1970). Denial of liability by insurer also waives proof of loss. *Proffitt Mercantile Co. v. State Mut. Fire Ins. Co.*, 176 N.C. 545, 97 S.E. 476 (1918).

Standard Policy Provisions. North Carolina has standard statutory form fire policy. Exclusions cannot be in fine print. Certain variations permitted. N.C. Gen. Stat. §58-44-15 to 25. Its provisions have repeatedly been held valid and violation of same by insured voids policy. *Lancaster v. Southern Ins. Co.*, 153 N.C. 285, 69 S.E. 214 (1910); *Roper v. Nat'l Fire Ins. Co.*, 161 N.C. 151, 76 S.E. 869 (1912); *Greene v. Aetna Ins. Co.*, 196 N.C. 335, 145 S.E. 616 (1928); *Midkiff v. Dixie Fire Ins. Co.*, 197 N.C. 144, 147 S.E. 814 (1929); *Rouse v. Old Colony Ins. Co.*, 203 N.C. 345, 166 S.E. 177 (1932). North Carolina, like most states, has to some extent abrogated statutory form by adoption of waiver doctrine to effect that knowledge of agent at inception of contract waives violations of its provisions. *Midkiff v. N.C. Home Ins. Co.*, 197 N.C. 139, 147 S.E. 812 (1929); *Midkiff v. Palmetto Fire Ins. Co.*, 198 N.C. 568, 152 S.E. 792 (1930). Such notice or knowledge, however, acquired after policy issued and delivered is not imputed to company. *Midkiff v. Dixie Fire Ins. Co.*, 197 N.C. 144, 147 S.E. 814 (1929); *Johnson v. Aetna Ins. Co.*, 201 N.C. 362, 160 S.E. 454 (1931).

Excepted Risks. Statutory policy does not cover losses caused by enemy army attacks, insurrection, civil war, theft, etc. N.C. Gen. Stat. §58-44-15. Insurers may also except losses caused by nuclear reactions. N.C. Gen. Stat. §58-44-25. Liability coverage excluded under parents' homeowners' policy where 8-year-old child should have reasonably expected fire to result from holding lit match to choir robe. *Erie Ins. Exch. v. St. Stephen's Episcopal Church*, 153 N.C. App. 709, 570 S.E.2d 763 (2002).

Vacancy and Unoccupancy. Term "occupied" implies continuing tenure for period of time and does not

embrace mere transient or trivial use. *Winston-Salem Fire Fighters Club, Inc. v. State Farm Fire & Cas. Co.*, 259 N.C. 582, 131 S.E.2d 430 (1963).

## GUEST CASES

See "AUTOMOBILES, Guests."

## HEALTHCARE LIABILITY

Codified at N.C. Gen. Stat. §90-21.50 *et seq.* Liability for coverage decisions. N.C. Gen. Stat. §90-21.51. Must first exhaust administrative remedies. N.C. Gen. Stat. §90-21.54. Punitive damages provided. N.C. Gen. Stat. §90-21.56.

## HOSPITALS

Evidence—Records. N.C. Gen. Stat. §8-53 established physician-patient privilege not existing at common law. N.C. Gen. Stat. §8-53 applies to nurses, technicians and others assisting or acting under the direction of physician or surgeon. *State v. Bryant*, 5 N.C. App. 21, 167 S.E.2d 841 (1969); *State v. Wooten*, 18 N.C. App. 269, 196 S.E.2d 603 (1973). Privilege extends to hospital records made by or under direction of physicians and surgeons. *State v. Eford*, 309 N.C. 802, 309 S.E.2d 228 (1983). Patient may waive privilege by authorizing disclosure pursuant to application for accident, life policy. *Johnston v. United Ins. Co. of Am.*, 262 N.C. 253, 136 S.E.2d 587 (1964); *Reserve Life Ins. Co. v. Davis Hosp., Inc.*, 36 F.R.D. 434 (W.D.N.C. 1965) (applying North Carolina law); *Wright v. Am. Gen. Life Ins.*, 59 N.C. App. 591, 297 S.E.2d 910 (1982), *rev. denied*, 307 N.C. 583, 299 S.E.2d 653 (1983). Waiver may be express or implied by the patient's conduct. *Cates v. Wilson*, 83 N.C. App. 448, 350 S.E.2d 898 (1986), *modified and aff'd*, 321 N.C. 1, 361 S.E.2d 734 (1987). The facts and circumstances of a particular case determine whether a patient's conduct constitutes an implied waiver. *Capps v. Lynch*, 253 N.C. 18, 116 S.E.2d 137 (1960). In workers' compensation case, under N.C. Gen. Stat. §97-27(b), information may be improperly acquired if defendant obtains it from plaintiff's physician without plaintiff's consent. *Salaam v. N.C. Dept. of Transp.*, 122 N.C. App. 83, 468 S.E.2d 536 (1996). Ex parte communication between employer's agent and insured employee's doctor violated privacy considerations, and doctor's testimony and records stricken in workers' compensation case. *Terry v. PPG Indus., Inc.*, 156 N.C. App. 512, 577 S.E.2d 326, *rev. denied*, 357 N.C. 256, 583 S.E.2d 290 (2003). Under N.C. Gen. Stat. §8-53, trial court may compel disclosure "necessary to a proper administration of justice." *Matter of Farrow*, 41 N.C. App. 680, 255 S.E.2d 777 (1979); *Green by Green v. Maness*, 69 N.C. App. 292, 316 S.E.2d 917, *rev. denied*, 312 N.C. 622,



323 S.E.2d 922 (1984). Guidelines for admissibility of hospital records containing blood-alcohol test results administered after auto accident. *Robinson v. Life & Cas. Ins. Co.*, 255 N.C. 669, 122 S.E.2d 801 (1961); *Bare v. Barrington*, 97 N.C. App. 282, 388 S.E.2d 166, *rev. denied*, 326 N.C. 594, 393 S.E.2d 873 (1990). Guidelines for distinction between statutory physician and patient privilege and rule prohibiting ex parte contact with treating physician. *Crist v. Moffatt*, 326 N.C. 326, 389 S.E.2d 41 (1990).

**Liens.** Lien to recover debt for drugs, medical supplies, ambulance, services and medical services rendered by any physician, dentist, or nurse, or hospital services attaches to sums recovered as damages for personal injury if claim filed with the clerk of court within 30 days after institution of personal injury action. N.C. Gen. Stat. §44-49. Lien on real property of recipient of ambulance service provided by city or county. N.C. Gen. Stat. §44-51.1. Liens attach before insurance company makes payments and when settlement agreed upon so that plaintiff may enforce lien against money that is payable for personal injury. *Charlotte-Mecklenburg Hosp. Auth. v. First of Ga. Ins. Co.*, 340 N.C. 88, 455 S.E.2d 655, *reh'g denied*, 340 N.C. 364, 458 S.E.2d 186 (1995).

**Warranties.** Physician services not “goods” for purposes of U.C.C. implied warranty. *Cameron v. New Hanover Mem'l Hosp., Inc.*, 58 N.C. App. 414, 293 S.E.2d 901, *rev. denied*, 307 N.C. 127, 297 S.E.2d 399 (1982).

**Immunity.** Charitable immunity defense abolished as to actions arising after September 1, 1967. N.C. Gen. Stat. §1-539.9. *Darsie v. Duke Univ.*, 48 N.C. App. 20, 268 S.E.2d 554, *rev. denied*, 301 N.C. 400, 273 S.E.2d 445 (1980). Hospital liable under doctrine of corporate negligence for negligent acts of employees. *Bost v. Riley*, 44 N.C. App. 638, 262 S.E.2d 391, *rev. denied*, 300 N.C. 194, 269 S.E.2d 621 (1980). Hospital liability based on reasonably prudent person standard in corporate negligence claim. *Estate of Waters v. Jarman*, 144 N.C. App. 98, 547 S.E.2d 142, *rev. denied*, 354 N.C. 68, 553 S.E.2d 213 (2001).

## HUSBAND AND WIFE

See Law Digest Tables.

**Effect of Divorce or Separation.** Named insured's former wife was insured under policy covering property that, at time contract was entered, was owned by husband and wife as tenants by entirety. *Worrells v. N.C. Farm Bureau Mut. Ins. Co.*, 103 N.C. App. 69, 404 S.E.2d 188 (1991).

**Joint Property.** Insurance policy issued to husband or wife upon their joint property not void for failure to

disclose interest of other except in cases of fraud. N.C. Gen. Stat. §58-44-45. Where fire insurance policy issued in name of one spouse covers property held by entirety, each spouse is entitled to one-half of insurance proceeds when estate is severed by divorce. *Worrells v. N.C. Farm Bureau Mut. Ins. Co.*, 103 N.C. App. 69, 404 S.E.2d 188 (1991); *Carter v. Cont'l Ins. Co. of N.Y.*, 242 N.C. 578, 89 S.E.2d 122 (1955). Innocent spouse can recover one-half of proceeds under homeowner's policy where property loss is caused by wrongful acts of other spouse. *Lovell v. Rowan Mut. Fire Ins. Co.*, 302 N.C. 150, 274 S.E.2d 170 (1981).

**Right to Sue Each Other in Tort.** Husband and wife have cause of action against each other to recover damages sustained to person or property as if they were unmarried. N.C. Gen. Stat. §52-5; *Ayers v. Ayers*, 269 N.C. 443, 152 S.E.2d 468 (1967); *First Union Nat'l Bank of N.C. v. Hackney*, 266 N.C. 17, 145 S.E.2d 352 (1965). Spouse may recover from negligent spouse necessary medical expenses paid for care of infant, unemancipated child injured by negligent operation of automobile. *Foster v. Foster*, 264 N.C. 694, 142 S.E.2d 638 (1965). Where cause of action arises outside of state see N.C. Gen. Stat. §52-5.1. *Henry v. Henry*, 291 N.C. 156, 229 S.E.2d 158 (1976).

**Loss of Consortium.** Spouse may maintain cause of action for loss of consortium due to negligent actions of third party if action is joined with any suit other spouse institutes to recover for personal injuries. *Nicholson v. Hugh Chatam Mem. Hosp. Inc.*, 300 N.C. 295, 266 S.E.2d 818 (1980). Injured worker's spouse may not maintain action for loss of consortium resulting from worker's injuries when injuries are compensable under Workers' Compensation Act. *Sneed v. Carolina Power & Light Co.*, 61 N.C. App. 309, 300 S.E.2d 563 (1983).

**Doctrine of Necessaries.** Doctrine, which had been applicable only to medical services provided to wife, now applies to medical services provided to either spouse. *N.C. Baptist Hosp., Inc. v. Harris*, 319 N.C. 347, 354 S.E.2d 471 (1987). “Separation exception” to necessities doctrine applies if provider of necessary service had actual notice that spouses were separated at time services were rendered. *Forsyth Mem. Hosp., Inc. v. Chisholm*, 342 N.C. 616, 467 S.E.2d 88 (1996).

## INFANTS

See “AUTOMOBILES, Age”; “NEGLIGENCE, Age.” Age of majority is 18 years. N.C. Gen. Stat. §48A-2.

**Parental Immunity.** Unemancipated child may not sue his parent, or his stepparent standing in loco parentis, for negligent injury. *Foster v. Foster*, 264 N.C.



694, 142 S.E.2d 638 (1965); *Morgan v. Johnson*, 24 N.C. App. 307, 210 S.E.2d 503 (1974). However, parental-child immunity does not apply in actions by minor or his estate for wrongful death, property damage, or personal injury arising out of operation of motor vehicle owned or operated by parent. N.C. Gen. Stat. §1-539.21. Likewise, child is not immune from tort action by parent or parent's estate for wrongful death, property damage or personal injury arising out of operation of motor vehicle owned or operated by child. N.C. Gen. Stat. §1-539.21. Doctrine of parental immunity does not bar claims for injuries resulting from willful and malicious acts of parents against their unemancipated children. *Doe ex rel. Connolly v. Holt*, 332 N.C. 90, 418 S.E.2d 511 (1992).

Parent-child relationship alone does not render parent liable for torts of child. *Pleasant v. Motors Ins. Co.*, 280 N.C. 100, 185 S.E.2d 164 (1971). However, person may recover actual damages, not to exceed \$2,000, from parent of minor who maliciously or intentionally injures such person or destroys such person's real or personal property. N.C. Gen. Stat. §1-538.1. A parent or guardian may be civilly liable, for up to \$50,000, to a school for negligent supervision of unemancipated minor if minor commits certain violations. N.C. Gen. Stat. §1-538.3.

Loss of Parental Consortium. Not recognized as cause of action. *Vaughn v. Clarkson*, 324 N.C. 108, 376 S.E.2d 236 (1989).

Capacity for Negligence. Under 7 years of age irrebuttable presumption of incapacity for negligence. Between ages 7-14, presumption of incapacity can be rebutted—test is capacity, discretion, knowledge and experience. *Walston v. Greene*, 247 N.C. 693, 102 S.E.2d 124 (1958). At age 14 and over there is a rebuttable presumption that person possesses capacity of adult. *Meachum v. Faw*, 112 N.C. App. 489, 436 S.E.2d 141 (1993).

Viable fetus is “person” within terms of wrongful death statute, so there is cause of action for death of fetus in its mother's womb. N.C. Gen. Stat. §28A-18-2; *DiDonato v. Wortman*, 320 N.C. 423, 358 S.E.2d 489 (1987); *Greer v. Parsons*, 103 N.C. App. 463, 405 S.E.2d 921 (1991), *aff'd*, 331 N.C. 368, 416 S.E.2d 174 (1992). However, damages for lost income, loss of services, companionship, and advice are too speculative and therefore cannot be recovered in an action for the wrongful death of a viable fetus. *Id.*

## INLAND MARINE

Coverage. Policy's “entrustment” exclusion strictly construed against insurer in favor of coverage where insured lost equipment through fraud of third party. *Van*

*Sumner, Inc. v. Pennsylvania Nat'l Mut. Cas. Ins. Co.*, 74 N.C. App. 654, 329 S.E.2d 701, *rev. denied*, 314 N.C. 676, 336 S.E.2d 406 (1985).

## LIABILITY INSURANCE

Automobile liability insurance is compulsory. N.C. Gen. Stat. §20-309; *see also* N.C. Gen. Stat. §20-279.1 *et seq.*

Bad Faith—Excess. Insurer liable for recovery beyond its policy limits only if it acts with lack of good faith or with wrongful fraudulent purpose. *Coca-Cola Bottling Co. of Asheville v. Maryland Cas. Co.*, 325 F. Supp. 204 (W.D.N.C. 1971). Insurer may be liable for unfair trade practices if acting in bad faith. *Vazquez v. Allstate Ins. Co.*, 137 N.C. App. 741, 529 S.E.2d 480 (2000).

Cancellation. The insurer shall notify the Division of Motor Vehicles of termination by cancellation or otherwise within 20 business days. Failure to give such notice shall cause insurer to be liable for civil penalty or \$200 unless good cause is shown for failure. N.C. Gen. Stat. §20-309(e). No cancellation notice is required if insurer issues new policy at same time insurer cancels or terminates old policy, no lapse in coverage results, and insurer sends certificate of insurance form for new policy to Division. N.C. Gen. Stat. §20-309(e). Termination of non-fleet private passenger motor vehicle insurance policy is not effective unless formal notice is given to insured giving reason for cancellation and date cancellation is effective, advising him of penalty for driving without required financial responsibility, and advising him that he has right to request review by the Department of Insurance. N.C. Gen. Stat. §58-36-85(b)-(c). Notice to insured must be given no less than 60 days before effective date of cancellation, except notice may be given 15 days before cancellation if due to nonpayment of premiums. N.C. Gen. Stat. §58-36-85(c). However, notice provisions do not apply if insurer has manifested its willingness to renew the policy or insured has given written notification that he wants policy terminated. N.C. Gen. Stat. §58-36-85(b)(1) & (3); *Smith v. Nationwide Mut. Ins. Co.*, 315 N.C. 262, 337 S.E.2d 569 (1985). Strict compliance with statutory notice provisions required. If cancellation notice is defective, policy remains in force. *Pearson v. Nationwide Mut. Ins. Co.*, 90 N.C. App. 295, 368 S.E.2d 406 (1988), *aff'd*, 325 N.C. 246, 382 S.E.2d 745 (1989).

Compromise of Claims. Insurer's honest mistake of judgment in refusing to compromise claim does not make insurer liable to insured for excess of judgment above policy amount. *Wynnewood Lumber Co. v. Travelers Ins. Co.*, 173 N.C. 269, 91 S.E. 946 (1917). *See*



also, *Abernethy v. Utica Mut. Ins. Co.*, 373 F.2d 565 (4<sup>th</sup> Cir. 1967).

**Contribution between Joint Tortfeasors.** Right of contribution exists among joint tortfeasors even if a judgment has not been recovered against any or all of them. N.C. Gen. Stat. §1B-1(a). Right of contribution exists only in favor of tortfeasor who has paid more than his pro rata share of common liability. *Id.*; *Sterling v. Gil Soucy Trucking, Ltd.*, 146 N.C. App. 173, 552 S.E.2d 674 (2001). Liability insurer who discharges liability, in full or in part, of joint tortfeasor succeeds to right of contribution to the extent of the amount it has paid in excess of tortfeasor's pro rata share of common liability. N.C. Gen. Stat. §1B-1(e).

**Cooperation.** Insured's failure to give insurer notice is defense in action by injured person, but only in situations involving non-compulsory insurance. *Clemmons v. Nationwide Mut. Ins. Co.*, 267 N.C. 495, 148 S.E.2d 640 (1966).

**Coverage.** Insured's auto demolished in stock car race while being driven by friend to whom insured had loaned it was covered by comprehensive liability and collision policy that provided coverage if used for business or pleasure and not public or livery conveyance. *Suttles v. Blue Ridge Ins. Co.*, 238 N.C. 539, 78 S.E.2d 246 (1953). For coverage of "omnibus" clause, see *Wilson v. Hartford Accid. & Indem. Co.*, 272 N.C. 183, 158 S.E.2d 1 (1967); *McLeod v. Nationwide Mut. Ins. Co.*, 115 N.C. App. 283, 444 S.E.2d 487, *rev. denied*, 337 N.C. 694, 448 S.E.2d 528 (1994). See also *Engle v. State Farm Mut. Auto Ins. Co.*, 37 N.C. App. 126, 245 S.E.2d 532, *rev. denied*, 295 N.C. 645, 248 S.E.2d 250 (1978); *Caison v. Nationwide Ins. Co.*, 36 N.C. App. 173, 243 S.E.2d 429 (1978), for interpretation of "lawful possession." State-owned vehicle furnished for daily use by medical resident was "furnished for her regular use" within meaning of policy exclusion. *Farm Bureau Mut. Ins. Co. v. Warren*, 326 N.C. 444, 390 S.E.2d 138 (1990); see also *Betts v. Great Am. Ins. Cos.*, 114 N.C. App. 260, 441 S.E.2d 565 (1994). An insurer is liable when passenger exiting parked vehicle is hit by another vehicle. *Nationwide Mut. Ins. Co. v. Davis*, 118 N.C. App. 494, 455 S.E.2d 892, *rev. denied*, 341 N.C. 420, 461 S.E.2d 759 (1995).

Exclusionary provisions contravening compulsory insurance statute are void. *Nationwide Mut. Ins. Co. v. Roberts*, 261 N.C. 285, 134 S.E.2d 654 (1964).

**Excess Insurance.** Owner's policy "drive other car" coverage held primary coverage over garage policy providing excess coverage. *USAA v. Universal Underwriters Ins. Co.*, 332 N.C. 333, 420 S.E.2d 155 (1992); *Allstate Ins. Co. v. Shelby Mut. Ins. Co.*, 269 N.C. 341,

152 S.E.2d 436 (1967). Duty of excess carrier to defend arises before liability is established. *W & J Rives, Inc. v. Kemper Ins. Group*, 92 N.C. App. 313, 374 S.E.2d 430 (1988), *rev. denied*, 324 N.C. 342, 378 S.E.2d 809 (1989).

**Indemnity.** Insurer that pays damages on behalf of stranger to contract in "lawful possession" of insured vehicle pursuant to mandatory coverage is entitled to indemnity from wrongful driver. *Nationwide Mut. Ins. Co. v. Chantos*, 293 N.C. 431, 238 S.E.2d 597 (1977). Policy providing indemnity if insured should die by being struck by automobile or by collision did not cover death caused by falling out of automobile. *Sanderlin v. Life & Cas. Ins. Co. of Tenn.*, 214 N.C. 362, 199 S.E. 275 (1938). *But see State Capital Ins. Co. v. Nationwide Mut. Ins. Co.*, 318 N.C. 534, 350 S.E.2d 66 (1986) (holding that injury caused by accidental discharge of rifle being removed from truck was covered by automobile insurance and homeowners policy, because causal connection existed between use of truck and accident).

Burden of proof is on insurer to show that violation of condition voids otherwise valid policy and that damages claimed by insured fall within policy's exceptions. *Polansky v. Miller's Mut. Fire Ins.*, 238 N.C. 427, 78 S.E.2d 213 (1953); *Fallins v. Durham Life Ins. Co.*, 247 N.C. 72, 100 S.E.2d 214 (1957).

**Notice.** Failure to give notice is defense under compulsory auto liability coverage as to insured but not as to injured third party. *Rose Hill Poultry Corp. v. Am. Mut. Ins. Co. Inc.*, 34 N.C. App. 224, 237 S.E.2d 564 (1977). Insurer is relieved of obligation to defend and indemnify regardless of whether delay prejudiced insurer where insured knowingly and intentionally fails to give notice "as soon as practicable." *Great Am. Ins. Co. v. C.G. Tate Constr. Co.*, 315 N.C. 714, 340 S.E.2d 743 (1986). For timeliness of notice, see *Am. Cont'l Ins. Co. v. PHICO Ins. Co.*, 132 N.C. App. 430, 512 S.E.2d 490, *aff'd*, 351 N.C. 45, 519 S.E.2d 525 (1999).

**Rights of insured against insurer.** Anyone for whose benefit insurance policy is issued, covering legal liability of insured as distinguished from indemnity contract, may maintain action directly against insurer. *Carolina Transp. & Distrib. Co. v. Am. Alliance Ins. Co.*, 214 N.C. 596, 200 S.E. 411 (1939). For effect of assigned risk policy provisions, see *Strickland v. Hughes*, 273 N.C. 481, 160 S.E.2d 313 (1968). N.C. Gen. Stat. §20-279.34, which provided for assigned risk plan, was repealed effective July 16, 1994.

**Stipulations Material to Risk.** If insurance policy contains stipulations on breach of which coverage is to be avoided, there can be no recovery if stipulation is not met. No causal connection need be shown between



breach of warranty in insurance policy and loss if loss occurs while breach continues. *Fidelity-Phenix Fire Ins. Co. of NY v. Pilot Freight Carriers*, 193 F.2d 812 (4th Cir. 1952), and cases cited therein. Where coverage of insurance policy has been suspended by breach of condition of policy, subsequent compliance will not revive coverage if risk has since increased. *Beckwith v. Am. Home Assur. Co.*, 565 F. Supp. 458 (W.D.N.C. 1983).

If insurer refuses to defend suit on ground policy was not in force on date of accident, and insured consents to judgment in favor of injured third party, insurer cannot assert defense that policy provides that insurer shall not be liable upon consent judgment to which insurer does not consent. Insurer is liable for full amount of consent judgment if this amount was reasonably necessary to effect settlement. If amount of consent judgment is unreasonable, insurer is liable only for injured person's damages. *Nixon v. Liberty Mut. Ins. Co.*, 255 N.C. 106, 120 S.E.2d 430 (1961). State issued compliance orders requiring hazardous waste cleanup are "suits" giving rise to duty to defend under a comprehensive general liability policy. *C.D. Spangler Constr. Co. v. Indus. Crankshaft & Eng'r Co., Inc.*, 326 N.C. 133, 388 S.E.2d 557 (1990).

Automobile liability insurer's obligation to defend action brought against insured becomes absolute when allegations of complaint bring claim within coverage of policy. However, where insurer defends under full reservation of right to deny coverage, insurer is not estopped to assert defenses of fraud and collusion in any subsequent action against it based upon judgment obtained against its insured. *Strickland v. Hughes*, 273 N.C. 481, 160 S.E.2d 313 (1968). Insurer's duty to defend is broader than its duty to pay damages incurred by events covered by the policy. *Smith v. Nationwide Mut. Fire Ins. Co.*, 116 N.C. App. 134, 446 S.E.2d 877 (1994).

Omnibus Clause in Auto Liability Policy. Where corporation is named insured on automobile policy, employees, officers and shareholders are not Class I insureds. *Busby v. Simmons*, 103 N.C. App. 592, 406 S.E.2d 628 (1991). But a family farm trust does include individuals. *Erwin v. Tweed*, 142 N.C. App. 643, 544 S.E.2d 803 (2001), *aff'd*, 359 N.C. 64, 602 S.E.2d 359 (N.C. 2004). "Use with permission" construed in *Hawley v. Indem. Ins. Co. of North Am.*, 257 N.C. 381, 126 S.E.2d 161 (1962). Coverage extended to include "any other persons in lawful possession." N.C. Gen. Stat. §20-279.21(b)(2). Question of "lawful possession" does not arise when an automobile is driven by spouse living in the same household. *Wilson v. State Farm Mut. Auto Ins. Co.*, 327 N.C. 419, 394 S.E.2d 807 (1990), *decision on reh'g*, 329 N.C. 262, 404 S.E.2d 852 (1991).

Express or implied permission of named insured or of original permittee is essential to extend coverage to second permittee as "person in lawful possession." *Iowa Nat'l Mut. Ins. Co. v. Broughton*, 283 N.C. 309, 196 S.E.2d 243 (1973); *Pemberton v. Reliance Ins. Co.*, 83 N.C. App. 289, 350 S.E.2d 103 (1986). Where recovery within amount of mandatory coverage required by Act is sought, plaintiff need only show "lawful possession" of vehicle by operator and is not required to prove that operator had owner's permission to drive on specific trip and occasion of collision. *Packer v. Travelers Ins. Co.*, 28 N.C. App. 365, 221 S.E.2d 707 (1976). Driver who lacked reasonable belief he had permission to drive vehicle was excluded from father's automobile policy. *Newell v. Nationwide Mut. Ins. Co.*, 334 N.C. 391, 432 S.E.2d 284 (1993). Permission of named insured's son has been held sufficient "lawful possession" to extend coverage to driver. *Engle v. State Farm Mut. Auto Ins. Co.*, 37 N.C. App. 126, 245 S.E.2d 532, *cert. denied*, 295 N.C. 645, 248 S.E.2d 250 (1978). But coverage is not imposed under financial responsibility law when owner's permittee gives permission to third party who knows he is prohibited from using vehicle. *Nationwide Mut. Ins. Co. v. Baer*, 113 N.C. App. 517, 439 S.E.2d 202 (1994). *See also N.C. Farm Bur. Ins. Co. v. Nationwide Mut. Ins. Co.*, 168 N.C. App. 585, 608 S.E.2d 112 (2005). With leased vehicle, permission of lessee in violation of lease agreement will not extend full coverage, but only the minimum amount of coverage required by statute. *Am. Tours, Inc. v. Liberty Mut. Ins. Co.*, 315 N.C. 341, 338 S.E.2d 92 (1986). "Use" of an automobile includes its loading and unloading. *State Capital Ins. Co. v. Nationwide Mut. Ins. Co.*, 318 N.C. 534, 350 S.E.2d 66 (1986). Within terms of omnibus clause insuring against loss arising out of ownership, maintenance and use of vehicle, and all persons actively engaged in loading and unloading with permission of named insured are additional insureds. *Fidelity & Cas. Co. v. N.C. Farm Bureau Mut. Ins. Co.*, 16 N.C. App. 194, 192 S.E.2d 113, *cert. denied*, 282 N.C. 425, 192 S.E.2d 840 (1972). "Use" includes supervision of people getting in or out of vehicles, *Nationwide v. Davis*, 118 N.C. App. 494, 455 S.E.2d 892 (1995), going for help for stalled vehicle, *Falls v. Farm Bureau*, 114 N.C. App. 203, 441 S.E.2d 583, *rev. denied*, 337 N.C. 691, 448 S.E.2d 521 (1994). "Use" does not include throwing objects from vehicle, *Nationwide v. Webb*, 132 N.C. App. 524, 512 S.E.2d 769, *disc. rev. denied*, 350 N.C. 834, 538 S.E.2d 198 (1999), or shooting from vehicle. *Integon Specialty Ins. Co. v. Austin*, 151 N.C. App. 593, 565 S.E.2d 736 (2002), *rev. denied*, 356 N.C. 302, 570 S.E.2d 509 (N.C. 2002).

Other Insurance Clauses. When there are two liability policies covering same insured, policy with "escape"



clause is primary insurance and policy with “excess” clause is excess insurance. *Horace Mann Ins. Co. v. Cont’l Cas. Co.*, 54 N.C. App. 551, 284 S.E.2d 211 (1981). N.C. Gen. Stat. §58-48-55 (formerly N.C. Gen. Stat. §58-155.52) does not distinguish between primary and secondary insurers. *Rinehart v. Hartford Cas. Ins. Co.*, 91 N.C. App. 368, 371 S.E.2d 788 (1988). Where two liability policies covering same insured have identical excess clauses, excess clauses are disregarded and coverage is prorated. *Alliance Mut. Ins. Co. v. N.Y. Cent. Mut. Fire Ins. Co.*, 70 N.C. App. 140, 318 S.E.2d 524 (1984); *Reliance Ins. Co. v. Lexington Ins. Co.*, 87 N.C. App. 428, 361 S.E.2d 403 (1987). However, “super escape” clause (excluding coverage when there is other insurance, either primary or excess) will be given effect as written. *Allstate v. Shelby Mut. Ins. Co.*, 269 N.C. 341, 152 S.E.2d 436 (1967); *Moore v. Cincinnati Ins.*, 147 N.C. App. 761, 556 S.E.2d 682 (2001); *But see Eaves v. Universal Underwriters Group*, 107 N.C. App. 595, 421 S.E.2d 191, *rev. denied*, 333 N.C. 167, 424 S.E.2d 908 (1992).

Stacking. Legislative purpose is to provide innocent victim of an inadequately insured driver an additional source of recovery. *Smith v. Nationwide Mut. Ins. Co.*, 97 N.C. App. 363, 388 S.E.2d 624 (1990), *rev’d on other grounds*, 328 N.C. 139, 400 S.E.2d 44 (1991). Prior to an amendment in 1991, N.C. Gen. Stat. §20-279.21(b)(4) required both interpolicy and intrapolicy stacking of UIM coverages under a non-fleet policy unless named insured rejects UIM coverage. *Sutton v. Aetna Cas. & Sur. Co.*, 325 N.C. 259, 382 S.E.2d 759 (1989); *see also Nationwide Mut. Ins. Co. v. Mabe*, 342 N.C. 482, 467 S.E.2d 34 (1996); *Griswold v. Integon Gen. Ins. Corp.*, 149 N.C. App. 301, 560 S.E.2d 861 (2002). As amended, 20-279.21 (b) (4) appears to prohibit intrapolicy stacking in general, *Bass v. N.C. Farm Bureau Mut. Ins. Co.*, 332 N.C. 109, 418 S.E.2d 221 (1992), and interpolicy stacking of fleet vehicles, *N.C. Farm Bureau Mut. Ins. Co. v. Stamper*, 122 N.C. App. 254, 468 S.E.2d 584 (1996). Excess or umbrella policies do not automatically provide uninsured or underinsured coverage. *Progressive Am. v. Vasquez*, 350 N.C. 386, 515 S.E.2d 8 (1999).

Uninsured Motorist Coverage. Must be offered by the insurer, but the insured has option of taking coverage. Includes one whose insurer becomes insolvent within 3 years after accident. N.C. Gen. Stat. §20-279.21(b)(3). Policy may require physical contact for insured to recover for injuries from alleged hit-and-run vehicle. *McNeill v. Hicks*, 119 N.C. App. 579, 459 S.E.2d 47 (1995), *see also Andersen v. Baccus*, 335 N.C. 526, 439 S.E.2d 136 (1994), *aff’d in part, rev’d in part*, 335 N.C. 526, 439 S.E.2d 136 (1994). Physical contact found through intermediate vehicles in unbroken chain

collision. *McNeil v. Hartford Accid. & Indem. Co.*, 84 N.C. App. 438, 352 S.E.2d 915 (1987). Covers named insured and household relatives injured in nonowner vehicle even though accident occurs in other than insured vehicle. *Crowder v. N.C. Farm Bureau Mut. Ins. Co.*, 79 N.C. App. 551, 340 S.E.2d 127, *rev. denied*, 316 N.C. 731, 345 S.E.2d 387 (1986). Does not cover employees of insured using their own vehicles on business trip. *Sproles v. Greene*, 100 N.C. App. 96, 394 S.E.2d 691 (1990), *aff’d in part and rev’d in part*, 329 N.C. 603, 407 S.E.2d 497 (1991), *overruled on other grounds*, *McMillian v. N.C. Farm Bureau Mut. Ins. Co.*, 347 N.C. 560, 495 S.E.2d 352 (1998); *see also Bray v. N.C. Farm Bureau Mut. Ins. Co.*, 341 N.C. 678, 462 S.E.2d 650 (1995) (finding household-owned vehicle/family member exclusion in UM section of policy unenforceable). Also may cover named insured and family members injured in household-owned vehicle not named in policy. *Smith v. Nationwide Mut. Ins. Co.*, 328 N.C. 139, 400 S.E.2d 44 (1991). “Uninsured vehicle” construed. *Buck v. U.S. Fid. & Guar. Co.*, 265 N.C. 285, 144 S.E.2d 34 (1965). *See also McKinney v. Richitelli*, 357 N.C.483, 487, 586 S.E.2d 258 (2003). Under prior cases, workers’ compensation carrier had a subrogation lien on uninsured motorist policy proceeds paid to employee injured in auto accident while within scope of employment. *Bailey v. Nationwide Mut. Ins. Co.*, 112 N.C. App. 47, 434 S.E.2d 625 (1993), *overruled on other grounds*, *McMillian v. N.C. Farm Bureau Mut. Ins. Co.*, 347 N.C. 560, 495 S.E.2d 352 (1998). After October 1, 1999, uninsured motorist coverage must insure against loss uncompensated by workers’ compensation law and the amount of an employer’s lien. N.C. Gen. Stat. §20-279.21(e). N.C. Gen. Stat. §97-10.2 governs the procedure for adjusting workers’ compensation lien.

Underinsured. When motorist who caused injury had compulsory limits of liability insurance, injured party cannot collect from his uninsured motorist coverage for judgment in excess of compulsory limits. *Tucker v. Peerless Ins. Co.*, 41 N.C. App. 302, 254 S.E.2d 656 (1979). Underinsured coverage is not required where minimum liability limits are purchased. *Morgan v. State Farm Mut. Auto. Ins. Co.*, 129 N.C. App. 200, 497 S.E.2d 83, *aff’d*, 349 N.C. 288, 507 S.E.2d 38 (1998). Otherwise, underinsured coverage must be selected or rejected for non-fleet policies on forms approved by North Carolina Rate Bureau. N.C. Gen. Stat. §20-279.21(b)(4); *State Farm Mut. Auto. Ins. Co. v. Fortin*, 350 N.C. 264, 513 S.E.2d 782 (1999). Underinsured motorist carrier could reduce coverage by amount of workers’ compensation benefits paid to injured worker but, after October 1, 1999, carrier must insure portion of loss uncompensated by workers’ compensation and the amount of an employer’s lien. N.C. Gen. Stat. §20-



279.21(e). Reduction in limits is for all payments regardless of number of claimants. *Progressive Am. v. Vasquez*, 350 N.C. 386, 515 S.E.2d 8 (1999). Amount of underinsured coverage provided by operation of law shall not be less than financial responsibility amounts for bodily injury liability as set forth in N.C. Gen. Stat. §20-279.5, N.C. Gen. Stat. §20-279.21(b)(4). Declaratory judgment action proper to determine extent of underinsured motorist coverage prior to judgment in underlying case when actual controversy exists between parties. “Household-owned vehicle” policy exclusion found only in medical payments and liability portions of policy and not in UM/IUM portion does not prevent stacking of UIM coverage. *Smith v. Nationwide Mut. Ins. Co.*, 328 N.C. 139, 400 S.E.2d 44 (1991); *see also Nationwide Mut. Ins. Co. v. Mabe*, 342 N.C. 482, 467 S.E.2d 34 (1996) (finding household-owned vehicle exclusion in UIM section of policy unenforceable). Term “person insured” defined by N.C. Gen. Stat. §20-279.21(b)(2) and (b)(3); *Haight v. Travelers/Aetna Prop. Cas. Corp.*, 132 N.C. App. 673, 514 S.E.2d 102 (1999); *Harris ex rel. Freedman v. Nationwide Mut. Ins. Co.*, 332 N.C. 184, 420 S.E.2d 124 (1992); *Brown v. Truck Ins. Exch.*, 103 N.C. App. 59, 404 S.E.2d 172, *rev. denied*, 329 N.C. 786, 408 S.E.2d 515 (1991).

#### LIMITATION OF TIME FOR COMMENCEMENT OF ACTION

See Law Digest Tables.

Standard fire insurance policy for North Carolina provides suit must be instituted within three years of inception of loss. N.C. Gen. Stat. §§58-44-15(c) and 1-52(12). “Inception of loss” means date of occurrence of event out of which claim arises. *Marshburn v. Assoc. Indem. Corp.*, 84 N.C. App. 365, 353 S.E.2d 123, *rev. denied*, 319 N.C. 673, 356 S.E.2d 779 (1987). *Boyd v. Bankers & Shippers Ins. Co.*, 245 N.C. 503, 96 S.E.2d 703 (1957) (interpreting the word “inception”). Limitations period not tolled by insured’s failure or inability to discover damage resulting from insured against casualty. *Marshburn*, 84 N.C. App. 365, 353 S.E.2d 123, *rev. denied*, 319 N.C. 673, 356 S.E.2d 779 (1987).

Unless otherwise provided by statute, three year limitation period for personal injury or property damages does not accrue until bodily harm or physical damage becomes apparent or ought reasonably to have become apparent. Such period shall not exceed 10 years from last act or omission of defendant giving rise to cause of action. N.C. Gen. Stat. §1-52(16). Three year limitation period applies to a claim for contribution by one insurance company against another because such claim is sufficiently analogous to claim for subrogation. *Nationwide Mut. Ins. Co. v. State Farm Mut. Ins. Co.*, 122 N.C. App.

449, 470 S.E.2d 556 (1996). Malpractice action on behalf of minor may be brought at any time before minor reaches 19. N.C. Gen. Stat. §1-17(b). Appointment of a guardian for the minor prior to that time will not cause the statute to begin to run. *Osborne ex rel. Williams v. Annie Penn Mem. Hosp., Inc.*, 95 N.C. App. 96, 381 S.E.2d 794, *rev. denied*, 325 N.C. 547, 385 S.E.2d 500 (1989). In action to recover legal fees based on insurer’s failure to defend, statute of limitations is three years from date of each legal expense incurred. *Duke Univ. v. St. Paul Mercury Ins. Co.*, 95 N.C. App. 663, 384 S.E.2d 36 (1989); *Wm. C. Vick Constr. Co. v. Pennsylvania Nat’l Mut. Cas. Ins. Co.*, 52 F. Supp. 2d 569 (E.D.N.C. 1999), *aff’d*, 213 F.3d 634 (4th Cir. 2000). There is no 10 year limitation from last act of defendant in actions for wrongful death; only 2 year limit from date of death applies. N.C. Gen. Stat. §1-53(4); *Raftery v. Wm. C. Vick Constr. Co.*, 291 N.C. 180, 230 S.E.2d 405 (1976). Whenever decedent would have been barred, had he or she lived, from bringing an action for bodily harm by N.C. Gen. Stat. §1-15(c) or 1-52(16), no action for his death may be brought. N.C. Gen. Stat. §1-53(4); *Udzinski v. Lovin*, 159 N.C. App. 272, 583 S.E.2d 648 (2003).

In malpractice actions, cause of action accrues at time of last act of defendant giving rise to claim. If injury is latent, cause of action accrues from discovery, and if discovered two or more years after last act, suit must be commenced within one year; but in no event may action start more than four years from last act, except for foreign objects left in body, which may be commenced within one year of discovery if within 10 years of last act. N.C. Gen. Stat. §1-15(c). Statute of limitations for wrongful death action based on malpractice is two years and runs from date of death. N.C. Gen. Stat. §§1-53(4), 28A-18-1; *King v. Cape Fear Mem. Hosp., Inc.*, 96 N.C. App. 338, 385 S.E.2d 812 (1989), *rev. denied*, 326 N.C. 265, 389 S.E.2d 114 (1990). Passenger’s action against underinsurance carrier barred when brought more than six months after underinsured driver’s death. *Brace v. Strother*, 90 N.C. App. 357, 368 S.E.2d 447, *disc. rev. denied*, 323 N.C. 171, 373 S.E.2d 104 (1988), *overruled on other grounds*, *Ragan v. Hill*, 337 N.C. 667, 447 S.E.2d 371 (1994) (overruled to extent *Brace* required claimant to file action with court, rather than simply presenting claim to personal representative). Statute of limitations for legal malpractice not tolled by appeal of underlying action. *Nationwide Mut. Ins. Co. v. Winslow*, 95 N.C. App. 413, 382 S.E.2d 872 (1989).

Three-year statute of limitation for fraud begins to run upon discovery of facts constituting fraud. N.C. Gen. Stat. §1-52(9).



Products Liability. Actions for personal injury, death, or damage to property arising out of product defects shall be brought no more than six years from date of initial purchase for use or consumption. N.C. Gen. Stat. §1-50(6); *Lindsay by Lindsay v. Pub. Serv. Co.*, 725 F. Supp. 278 (W.D.N.C. 1989). The courts have created a “latent disease” exception to the limitations of N.C. Gen. Stat. §1-50(6) and 1-52(16), such that claims do not accrue until latent diseases are diagnosed. *Wilder v. Amatex Corp.*, 314 N.C. 550, 336 S.E.2d 66 (1985); *Bullard v. Dalkon Shield Claimants’ Trust*, 74 F.3d 531 (4th Cir. 1996). A product making its way to plaintiff’s home through commerce triggers the products liability statute of repose in N.C. Gen. Stat. §1-50(a)(6). *Cacha v. Montaco, Inc.*, 147 N.C. App. 21, 554 S.E.2d 388 (2001), cert. denied, 355 N.C. 284, 560 S.E.2d 797 (2002). N.C. Gen. Stat. §1-50(a)(6) applies to remote manufacturers but not job-site materialmen. *Id.*

Estates. Any claim against an estate, including claims for personal injury or death, must be filed with personal representative by date specified in general notice to creditors, which date must be at least three months from day of first publication or posting of such notice. N.C. Gen. Stat. §§28A-14-1 and 28A-19-3(a). Personal representative or collector may cause notice to be personally served on any creditor. N.C. Gen. Stat. §§28A-14-1(c) and 28A-14-3.

### MALPRACTICE

Hospitals. Hospitals do not enjoy charitable immunity in North Carolina. *Rabon v. Rowan Mem. Hosp., Inc.*, 269 N.C. 1, 152 S.E.2d 485 (1967). Hospital is vicariously liable for negligence of its employees. A hospital may also be liable for its “corporate negligence” when violating duty of care owed directly to patient. *Bost v. Riley*, 44 N.C. App. 638, 262 S.E.2d 391 (1980). Recognized duty of hospital is to make reasonable effort to monitor and oversee treatment prescribed and administered by doctors practicing at hospital. *Muse v. Charter Hosp. of Winston-Salem, Inc.*, 117 N.C. App. 468, 452 S.E.2d 589, aff’d per curiam, 342 N.C. 403, 464 S.E.2d 44 (1995). What has been called “corporate negligence” is nothing more than application of negligence principles and is not some recently developed doctrine upon which liability is based. *Blanton v. Moses H. Cone Mem. Hosp., Inc.*, 319 N.C. 372, 354 S.E.2d 455 (1987). A corporation can act only through its agent; hospital may be liable if, through person who is agent of hospital, it has breached duty it owes to patient. *Id.* When the alleged breach of a hospital’s duty does not involve provision of professional nursing or medical services requiring special skills, the standard of care of a reasonable, prudent person is generally applied. *Burns v. Forsyth*

*County Hosp. Auth., Inc.*, 81 N.C. App. 556, 344 S.E.2d 839 (1986).

Health Care Providers. Actions for personal injury or death arising out of alleged malpractice of “health care providers” defined by N.C. Gen. Stat. §90-21.11 include both doctors and hospitals. Standard of care is that which is “in accordance with the standards of practice among members of same the health care profession with similar training and experience situated in the same or similar communities at the time of the alleged act.” N.C. Gen. Stat. §90-21.12. North Carolina Gen. Stat. §90-21.13 establishes objective and community standards required of “health care providers” in obtaining the consent of the patient. Expert testimony ordinarily required to establish standard of care. *MacClements v. LaFone*, 104 N.C. App. 179, 408 S.E.2d 878 (1991), rev. denied, 330 N.C. 613, 412 S.E.2d 87 (1992); *Clark v. Perry*, 114 N.C. App. 297, 442 S.E.2d 57 (1994). Expert witness may testify as to standard of care only if he practices in same field of practice. *Whitehurst v. Boehm*, 41 N.C. App. 670, 255 S.E.2d 761 (1979). Claims for wrongful life and wrongful birth are not recognized. *Azzolino v. Dingfelder*, 315 N.C. 103, 337 S.E.2d 528 (1985), cert. denied, 479 U.S. 835, 107 S. Ct. 131 (1986). Claims for wrongful conception/pregnancy are recognized. *Jackson v. Bumgardner*, 318 N.C. 172, 347 S.E.2d 743 (1986). Captain of ship doctrine rejected. Test is whether surgeon has right to control operating room personnel with distinction between power to supervise and control. Such liability exists regardless of whether the surgeon should reasonably have been aware of the negligent conduct sought to be imputed to him. *Harris v. Miller*, 335 N.C. 379, 438 S.E.2d 731 (1994). Medical malpractice action must be filed within three years of last act giving rise to cause of action. If injury not readily apparent, action may be commenced within four years from last act giving rise to action if brought within year of date of discovery of action, except for foreign objects left in body, which may be commenced within one year of discovery, if within 10 years of last act. N.C. Gen. Stat. §1-15(c); *Hatem v. Bryan*, 117 N.C. App. 722, 453 S.E.2d 199 (1995).

Good Samaritans. Any person who voluntarily renders first aid or emergency health care treatment to person who is unconscious, ill, or injured when necessity of immediate treatment is reasonably apparent is liable only for gross negligence, wanton conduct, or intentional wrongdoing. N.C. Gen. Stat. §90-21.14(a).

Architects. Architect who has contractual duty to owner to supervise construction of building may be liable to contractor or subcontractor not in privity of contract with architect for negligence in performance of contract. *Shoffner Indus., Inc. v. W.B. Lloyd Constr. Co.*,



42 N.C. App. 259, 257 S.E.2d 50, *rev. denied*, 298 N.C. 296, 259 S.E.2d 301 (1979); *see also* N.C. Gen. Stat. §22B-1 (construction indemnity agreements invalid except for insurance contracts). Original builder may be liable to subsequent purchaser for defects in retaining wall not attached to home where the retaining wall materially affected the structural integrity of the house itself. *Floraday v. Don Galloway Homes, Inc.*, 340 N.C. 223, 456 S.E.2d 303 (1995).

Claims arising out of the performance of or failure to perform professional services (including legal services) based on negligence or breach of contract are in the nature of “malpractice” claims and are governed by the four year statute of repose and three year statute of limitations established by N.C. Gen. Stat. §1-15(c). *Sharp v. Teague*, 113 N.C. App. 589, 439 S.E.2d 792 (1994), *rev. denied*, 339 N.C. 730, 456 S.E.2d 771 (1995). In North Carolina, whether the “continuous representation doctrine” is recognized remains an open question. *Id.* Generally, however, if there is no continuing duty imposed by contract or by nature of services, attorney has no continuing duty to a client. *Jordan v. Crew*, 125 N.C. App. 712, 482 S.E.2d 735, *rev. denied*, 346 N.C. 279, 487 S.E.2d 548 (1997) (drafting two deeds did not show continuing relationship, thus last act for statute of repose purposes was drafting of deed, not later failure to discover error); *see also Hargett v. Holland*, 337 N.C. 651, 447 S.E.2d 784, *rev. denied*, 338 N.C. 672, 453 S.E.2d 177 (1994) (attorney hired only to draft will is not deemed to have a continuing duty to testator after the will has been executed).

Statute of limitations for legal malpractice not tolled by appeal of underlying action. *Nationwide Mut. Ins. Co. v. Winslow*, 95 N.C. App. 413, 382 S.E.2d 872 (1989). Statute began on last date on which attorney could have successfully brought prior suit for plaintiff, not date on which statute of limitations pled in prior action or date of dismissal due to statute of limitations defense. *Troy's Stereo v. Hodson*, 39 N.C. App. 591, 251 S.E.2d 673 (1979).

## NEGLIGENCE

See Law Digest Tables.

See “AUTOMOBILES”; “INFANTS”; and “HUSBAND AND WIFE.”

Age. Negligence and contributory negligence of children discussed. *Hollingsworth v. Burns*, 210 N.C. 40, 185 S.E. 476 (1936); *Welch v. Jenkins*, 271 N.C. 138, 155 S.E.2d 763 (1967). A child under seven years of age, as matter of law, is incapable of contributory negligence; between ages of seven and fourteen, there is rebuttable presumption of incapability of contributory neg-

ligence. *Hoots v. Beeson*, 272 N.C. 644, 159 S.E.2d 16 (1968); *Walston v. Greene*, 247 N.C. 693, 102 S.E.2d 124 (1958). It is a rebuttable presumption that a fourteen-year-old possesses the capacity of an adult and is responsible for exercising same standard of care as an adult. *Meachum v. Faw*, 112 N.C. App. 489, 436 S.E.2d 141 (1993).

Assumption of Risk. Not an available defense unless there is a contractual relationship between the parties. *Clark v. Pilot Freight Carriers*, 247 N.C. 705, 102 S.E.2d 252 (1958). Must have knowledge of risk to assume risk. *Swaney v. Peden Steel Co.*, 259 N.C. 531, 131 S.E.2d 601 (1963).

Attractive Nuisance. Restatement (Second) position adopted and five-part test outlined. *Broadway v. Blythe Indus., Inc.*, 313 N.C. 150, 326 S.E.2d 266 (1985).

Comparative Negligence. Not recognized. *Yancey v. Lea*, 139 N.C. App. 76, 532 S.E.2d 560 (2000).

Contributory Negligence. Is complete defense. *Sorrels v. M.Y.B. Hospitality Ventures of Asheville*, 332 N.C. 645, 423 S.E.2d 72 (1992).

Damages. In a negligence action, damage, loss or injury need not be extensive, permanent, serious, or substantial to support a claim for damages; it need only to be actual. *Polk v. Biles*, 92 N.C. App. 86, 373 S.E.2d 570 (1988).

Compensatory Damages. Compensatory damages are the pecuniary equivalent of the injury done and are intended to place plaintiff in the same position he would have occupied had he not suffered the injury. *Bowen v. Fid. Bank*, 209 N.C. 140, 183 S.E. 266 (1936); *Lane v. Southern Ry. Co.*, 192 N.C. 287, 134 S.E. 855 (1926). Plaintiff must establish amount of loss with reasonable certainty and show that injury claimed was the natural and probable result of acts complained of. *Phillips v. Universal Underwriters Ins. Co.*, 43 N.C. App. 56, 257 S.E.2d 671 (1979).

Punitive Damages. Given in addition to compensatory damages due to wanton, reckless, malicious, or oppressive character of acts complained of. *Oestreicher v. Am. Nat'l Stores, Inc.*, 290 N.C. 118, 225 S.E.2d 797 (1976). Awarded at discretion of jury to punish defendant and deter others. *Id.* No cause of action for punitive damages alone. *Id.* North Carolina has adopted a statute limiting amount of punitive damages. N.C. Gen. Stat. §1D-25. This statutory cap is valid under state's constitution. *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 594 S.E.2d 1 (2004).

Limitations on Damages. When assessing prospective damages for injuries in negligence action, only present cash value is to be awarded because the plaintiff is



to be paid in advance for future losses. *Mintz v. Atl. Coast Line R.R. Co.*, 233 N.C. 607, 65 S.E.2d 120 (1951). Liability under the Dram Shop Act cannot exceed \$500,000. N.C. Gen. Stat. §18B-123.

**Definition of Negligence.** Actionable negligence is failure to exercise that degree of care which reasonable person would exercise under similar conditions. *Tise v. Yates Constr. Co.*, 345 N.C. 456, 480 S.E.2d 677 (1997). To recover, one must establish a legal duty, a breach thereof, and injury proximately caused by such breach. *Id.*

**Definition of Duty.** Duty, as element of negligence action, is defined as obligation, recognized by law, requiring person to conform to certain standard of conduct for protection of others against unreasonable risks. *Davis v. N.C. Dep't of Human Res.*, 121 N.C. App. 105, 465 S.E.2d 2 (1995).

**Emergency Doctrine.** One confronted by sudden emergency is not liable for injury resulting from his acting as a reasonable person might act in such emergency; acting in this way precludes liability even if calm reflection at a later date reveals a wiser course of action. *Rodgers v. Carter*, 266 N.C. 564, 146 S.E.2d 806 (1966); *White v. Greer*, 55 N.C. App. 450, 285 S.E.2d 848 (1982). Emergency must not have been created by negligence of the party seeking protection by the doctrine. *Long v. Harris*, 137 N.C. App. 461, 528 S.E.2d 633 (2000). For instance, doctrine may be available in automobile accident case if defendant keeps proper look out, sounds horn, and does not create emergency. *Gupton v. McCombs*, 74 N.C. App. 547, 328 S.E.2d 886 (1985).

**Imputed Negligence.** Generally, negligence not imputed unless relationship of master/servant exists. *Townsend v. Carolina Coach*, 231 N.C. 81, 56 S.E.2d 39 (1949). Negligence of operator not necessarily imputed to passenger. *Sample v. Spencer*, 222 N.C. 580, 24 S.E.2d 241 (1943).

**Instrumentalities.** Corporation that exercises actual control over another, operating it as mere instrumentality or tool, is liable for torts of controlled corporation. *Muse v. Charter Hosp.*, 117 N.C. App. 468, 452 S.E.2d 589, *aff'd per curiam*, 342 N.C. 403, 464 S.E.2d 44 (1995). Liability for injuries proximately caused by inherently dangerous activities, as opposed to ultrahazardous activities, is based on negligence rather than strict liability. *Woodson v. Rowland*, 329 N.C. 330, 407 S.E.2d 222 (1991).

**Superseding/Intervening Negligence.** Intervening cause must be "new" cause that breaks chain of causation set in motion by original wrongdoer and becomes sole cause of injury. *Muse v. Charter Hosp.*, 117 N.C. App. 468, 452 S.E.2d 589, *aff'd per curiam*, 342 N.C.

403, 464 S.E.2d 44 (1995). Doctrine also referred to as "insulating negligence" and defined in *McNair v. Boyette*, 282 N.C. 230, 192 S.E.2d 457 (1972); *Hall v. Coble Dairies*, 234 N.C. 206, 67 S.E.2d 63 (1951).

**Premises Liability.** One in control of premises owes all lawful visitors duty of reasonable care in maintenance of premises. *Nelson v. Freeland*, 349 N.C. 615, 507 S.E.2d 882 (1998). Distinction between licensees and invitees abolished in favor of standard of reasonable care toward all lawful visitors. *Id.* Possessor of land not ordinarily liable for injuries to invitees caused by intentional criminal acts of third persons, but proprietor of public establishment has duty to exercise reasonable care to protect patrons from intentional injuries by third persons, if he has reason to know such acts are likely to occur - test is one of foreseeability. *Murrow v. Daniels*, 321 N.C. 494, 364 S.E.2d 392 (1988); *Abernethy v. Spartan Food Sys.*, 103 N.C. App. 154, 404 S.E.2d 710 (1991). Plaintiff may not recover where the allegedly dangerous condition would be obvious to ordinary person or where plaintiff had equal or superior knowledge of allegedly dangerous condition. *Keller v. Willow Springs*, 144 N.C. App. 433, 548 S.E.2d 761 (2001). With respect to trespassers, a landowner need only refrain from willful or wanton infliction of injury. *Nelson v. Freeland*, 349 N.C. 615, 507 S.E.2d 882 (1998).

**Landlord.** A lessor is ordinarily not liable for personal injuries resulting from disrepair or patent defects. *Harrill v. Sinclair Ref. Co.*, 225 N.C. 421, 35 S.E.2d 240 (1945). Compliance with state building codes or custom does not insulate from liability, and violation of state building and housing codes does not constitute negligence per se. *Collingwood v. Gen. Elec. Real Estate Equities*, 324 N.C. 63, 376 S.E.2d 425 (1989). Whether residents jumping out of apartment window from fire may be foreseeable is a jury question. *Id.*

**Last Clear Chance.** Doctrine mitigates the harshness of contributory negligence when it appears that defendant, by exercising reasonable care and prudence, might have avoided injury to plaintiff, notwithstanding plaintiff's negligence. *Bowden v. Bell*, 116 N.C. App. 64, 446 S.E.2d 816 (1994); *Dowdy v. Southern Ry. Co.*, 237 N.C. 519, 75 S.E.2d 639 (1953).

**Liquor Liability/Dram Shop Act.** "Social host liability" may be imposed on gratuitous furnisher of alcohol to guest who the host knows or should know is intoxicated and knows or should know will drive while intoxicated, if guest injures third parties as result of driving while intoxicated. *Hart v. Ivey*, 332 N.C. 299, 420 S.E.2d 174 (1992). It is unlawful to sell or give alcoholic beverages to a person who is intoxicated. N.C. Gen. Stat. §18B-305(a).



**Negligence Per Se.** It is ordinarily negligence per se to violate automobile or other safety statute or ordinance that imposes specific duty for protection of others, and is actionable if it proximately causes injury. *Gore v. George J. Ball, Inc.*, 279 N.C. 192, 182 S.E.2d 389 (1971); *Sellers v. CSX Transp., Inc.*, 102 N.C. App. 563, 402 S.E.2d 872 (1991). Some violations have been specifically excepted by legislature from per se rule. *See, e.g.*, N.C. Gen. Stat. §20-141(n) (failure of motorist to stop within radius of its headlights or within range of vision not negligence per se); N.C. Gen. Stat. §42-44(d) (violation of statutes governing residential rental agreements not negligence per se).

**Vehicle Owner's Negligence.** Owner of motor vehicle who entrusts it to incompetent, careless, or reckless driver may be liable for injury resulting from driver's negligence on ground of personal negligence in entrusting vehicle to one who is likely to cause injury. *Osborne v. Gilreath*, 241 N.C. 685, 86 S.E.2d 462 (1955); *Heath v. Kirkman*, 240 N.C. 303, 82 S.E.2d 104 (1954). Vehicle owners may be liable under negligent entrustment theory for entrusting vehicle to person he knew or should have known was intoxicated or was likely to operate vehicle while intoxicated. *Hutchens v. Hankins*, 63 N.C. App. 1, 303 S.E.2d 584 (1983).

**Proximate Cause.** Defendant may be liable if his negligence is one of several proximate causes; it is error to instruct jury that negligence must be "the" proximate cause. *Price v. Gray*, 246 N.C. 162, 97 S.E.2d 844 (1957); *Pugh v. Smith*, 247 N.C. 264, 100 S.E.2d 503 (1957). Injury (not particular consequence) must be reasonably foreseeable under facts as they existed to constitute actionable negligence. *Boone v. N.C. R.R. Co.*, 240 N.C. 152, 81 S.E.2d 380 (1954).

**Res Ipsa Loquitur.** Ordinarily, a plaintiff bringing an action for negligence must show specific omission or commission by defendant constituting breach of defendant's duty to plaintiff, and cannot rely merely on fact of injury. *Kekelis v. Whitin Mach. Works*, 273 N.C. 439, 160 S.E.2d 320 (1968). The doctrine of res ipsa loquitur ("the thing speaks for itself") removes this requirement by stating that when something causing an injury is under exclusive control of defendant and the accident is of type that does not normally occur if those in control use proper care, then mere fact that accident occurred allows case to be sent to the jury to decide if defendant was negligent. *O'Quinn v. Southard*, 269 N.C. 385, 152 S.E.2d 538 (1967). However, res ipsa loquitur does not apply when evidence establishes that injury may be result of one or more causes. *Id.*

**Sovereign Immunity.** Generally, state and counties immune from suit absent waiver of immunity. However, state may be liable for negligence under Tort Claims

Act. Act is strictly construed, applies only to actions against state departments, institutions, and agencies, and does not apply to individual officers, employees, involuntary servants, or agents of the state. *Meyer v. Walls*, 347 N.C. 97, 489 S.E.2d 880 (1997). Tort Claims Act does not apply to county agencies, even if acting as agent of the state. *Wood v. Guilford*, 143 N.C. App. 507, 546 S.E.2d 641 (2001), *aff'd in part and rev'd in part*, 355 N.C. 161, 558 S.E.2d 490 (2002). Municipal corporations liable for torts in proprietary functions. *Koontz v. Winston-Salem*, 280 N.C. 513, 186 S.E.2d 897 (1972). Collection, removal, and disposition of garbage by a municipality within its borders is a governmental (not proprietary) function. *Id.*

### NO-FAULT

North Carolina subscribes to liability regime, requiring mandatory liability insurance under Motor Vehicle Safety & Financial Responsibility statute. N.C. Gen. Stat. §§20-279.1 to 20-284. The purpose of compulsory liability insurance is to compensate innocent victims injured by financially irresponsible motorists. *Nationwide Mut. Ins. Co. v. Chantos*, 293 N.C. 431, 238 S.E.2d 597 (1977). Court erred when it permitted jury to assess damages in multiple car accident under theory of dividing proceeds of no-fault insurance policies. *Cogdill v. Scates*, 290 N.C. 31, 224 S.E.2d 604 (1976).

### PENALTY AND ATTORNEYS' FEES

Insurer's refusal to defend is at his own peril: If evidence subsequently presented at trial reveals that events are covered, insurer will be responsible for costs of defense. *Waste Mgmt. of Carolinas, Inc. v. Peerless Ins. Co.*, 315 N.C. 688, 340 S.E.2d 374 (1986). Refusal, contrary to agreement, of insurer to defend action renders it liable for expense of defending suit, including attorneys' fees, provided such fees are found reasonable. *Byrd & Bryan v. Georgia Cas. Co.*, 184 N.C. 224, 114 S.E. 1 (1922); *Lowe v. Fid. & Cas. Co.*, 170 N.C. 445, 87 S.E. 250 (1915). Bad faith refusal to provide insurance coverage or pay justifiable claim may give rise to claim for punitive damages. *Miller v. Nationwide Mut. Ins. Co.*, 112 N.C. App. 295, 435 S.E.2d 537 (1993), *disc. rev. denied*, 335 N.C. 770, 442 S.E.2d 519 (1994).

Penalties for violation of insurance laws vary. Some violations incur penalty, some declared to be misdemeanors and some felonies. Several specific penalties mentioned under various classifications of this digest.

If judgment for recovery in personal injury or property damage action is for \$10,000 or less, and there is unwarranted refusal by defendant insurance company to pay the claim that is the basis of the suit, presiding judge may, in his or her discretion, allow reasonable attorneys'



fees to litigant obtaining judgment, which fee is taxed as part of court costs. N.C. Gen. Stat. §6-21.1. Presiding judge must consider entire record, including 1) offers prior to suit; 2) offers of judgment pursuant to Rule 68 and whether final judgment was more favorable than such offers; 3) whether defendant unjustly exercised superior bargaining power; 4) in case of insurance company's unwarranted refusal, the context in which the dispute arose; 5) timing of settlement offers; and 6) settlement offer amounts compared to verdict. *Washington v. Horton*, 132 N.C. App. 347, 513 S.E.2d 331 (1999). Costs awarded are added to jury verdict in determining whether judgment was more favorable than prior offers. *Tew v. West*, 143 N.C. App. 534, 546 S.E.2d 183 (2001). Punitive damages are not included in determining whether judgment is equal to or less than \$10,000. *Boykin v. Morrison*, 148 N.C. App. 98, 557 S.E.2d 583 (2001).

### PRIVILEGED COMMUNICATIONS

Confidential communications made by client to attorney acting in professional capacity are privileged. *State v. Murvin*, 304 N.C. 523, 284 S.E.2d 289 (1981); *State v. McIntosh*, 336 N.C. 517, 444 S.E.2d 438 (1994). *But see Evans v. United Servs. Auto. Ass'n*, 142 N.C. App. 18, 541 S.E.2d 782 (2001), writ denied, 353 N.C. 371, 547 S.E.2d 810 (2001). Rule 26, work product immunity, strictly construed to limit the purpose for which the rule is used. Work product immunity will not generally attach until after decision to deny insurance claim is made. *Id.* (Case states that insurance company can prove that it anticipated litigation prior to denying claim and may sometimes be able to claim work product immunity.)

N.C. Gen. Stat. §8-53.2 provides for certain privileges in communications between clergymen and communicants. N.C. Gen. Stat. §8-53.3 provides for certain privileges in communications to psychologist. This privilege does not protect communications regarding child abuse. *Id.* (Only psychologist statute has section regarding child abuse. Clergyman statute does not mention child abuse.) Accountant-client privilege not recognized in North Carolina. *Miles v. Martin*, 147 N.C. App. 255, 555 S.E.2d 361 (2001).

Privilege of confidential communications between patient and physician can be revoked by court, either at trial or prior thereto, if in its opinion it is necessary to proper administration of justice. N.C. Gen. Stat. §8-53. Physician-patient privilege inapplicable in cases involving child abuse. N.C. Gen. Stat. §8-53.1. Patient may waive privilege by voluntarily testifying. *Capps v. Lynch*, 253 N.C. 18, 116 S.E.2d 137 (1960), and may do so expressly or impliedly during discovery or trial. *Ad-*

*ams v. Lovette*, 105 N.C. App. 23, 411 S.E.2d 620, *aff'd*, 332 N.C. 659, 422 S.E.2d 575 (1992). Once patient waives physician-patient privilege, he may not assert privilege to prevent physicians from testifying as experts for his opponent about information or opinions formed as result of information obtained during treatment of patient. *Cates v. Wilson*, 321 N.C. 1, 361 S.E.2d 734 (1987). No ex parte contacts between defense counsel and plaintiff's non-party treating physician without express consent of plaintiff, regardless of waiver of physician-patient privilege. *Crist v. Moffatt*, 326 N.C. 326, 389 S.E.2d 41 (1990); *Robertson v. Nelson*, 116 N.C. App. 324, 447 S.E.2d 488 (1994) (noting that holding in *Crist* does preclude use of discovery deposition of trial). Under N.C. Gen. Stat. §97-27(b), information may be improperly acquired if defendant obtains it from plaintiff's physician without plaintiff's consent. *Salaam v. N.C. Dept. of Transp.*, 122 N.C. App. 83, 468 S.E.2d 536 (1996) (Worker's Compensation case).

Insurer/Insured. "Privileged information" in insurance context defined in N.C. Gen. Stat. §58-39-15. Disclosure limitations and conditions as to both privileged and personal information are set forth in N.C. Gen. Stat. §58-39-75.

Facility may disclose confidential information if court of competent jurisdiction issues order compelling disclosure or for purpose of filing petition for involuntary commitment of client or for adjudication of incompetency of client upon determination by facility director that disclosure is in best interest of client. N.C. Gen. Stat. §122C-54.

North Carolina Gen. Stat. §8-56 and N.C. Gen. Stat. §8-57(c) provide that no husband or wife may be compelled to disclose any confidential communication made by one to the other during their marriage, but otherwise one spouse is competent to testify against another. *State v. Holmes*, 330 N.C. 826, 412 S.E.2d 660 (1992); *see also State v. Rush*, 340 N.C. 174, 456 S.E.2d 819 (1995) (compelled testimony exemption does not apply to voluntary statements to third parties). The privilege is waived in cases of child abuse. N.C. Gen. Stat. §8-57.1.

Even absolutely privileged matter may be inquired into when privilege has been waived by disclosure. *Industrotech Constructors, Inc. v. Duke Univ.*, 67 N.C. App. 741, 314 S.E.2d 272 (1984).

Filing verified answer does not waive privilege against self-incrimination. *Gunn v. Hess*, 90 N.C. App. 131, 367 S.E.2d 399 (1988).



## PRODUCTS LIABILITY

There is no strict liability in products liability actions. N.C. Gen. Stat. §99B-1.1 (pending legislation would add provisions for contributory fault. N.C. H.B. 1455 (April 21, 2005)); *Bryant v. Adams*, 116 N.C. App. 448, 448 S.E.2d 832 (1994), *disc. rev. denied*, 339 N.C. 736, 454 S.E.2d 647 (1995). All defenses in Products Liability Act apply to warranty actions unless specifically excluded. N.C. Gen. Stat. §99B-1.2.

An action for breach of implied warranty of merchantability is "product liability action" under N.C. Gen. Stat. §99B if the action is for injury to person or property resulting from sale of a product. *Morrison v. Sears, Roebuck & Co.*, 319 N.C. 298, 354 S.E.2d 495 (1987).

Claims based on failure to warn or instruct are governed by N.C. Gen. Stat. §99B-5 (amended 1995). Failure to adequately warn purchasers will support an action for breach of implied warranty of merchantability. *Lee v. Crest Chem. Co.*, 583 F. Supp. 131 (M.D.N.C. 1984). There can be a contracting post-sale duty to warn of deficiencies manufacturer learns exist. N.C. Gen. Stat. §99B-5(a)(2); *Smith v. Selco Prods.*, 96 N.C. App. 151, 385 S.E.2d 173 (1989), *disc. rev. denied*, 326 N.C. 598, 393 S.E.2d 883 (1990).

Retailers are exempted from liability for breach of implied warranties when retailer sells product in sealed package or without reasonable opportunity to make inspection, provided manufacturer is subject to jurisdiction and has not been judicially declared insolvent. N.C. Gen. Stat. §99B-2(a).

North Carolina allows action for enhanced injury, where defect does not cause accident but increases injury. *Warren v. Columbo*, 93 N.C. App. 92, 377 S.E.2d 249 (1989).

Damages - Compensatory. Manufacturer's liability for damages resulting from product defects applies to both personal and property damages, so far as they could reasonably have been foreseen or anticipated. *Corprew v. Geigy Chem. Corp.*, 271 N.C. 485, 157 S.E.2d 98 (1967). The economic loss rule acts to prohibit products liability plaintiffs from recovering for purely economic losses based on negligence, including damage to product itself. *Moore v. Coachmen Indus.*, 129 N.C. App. 389, 499 S.E.2d 772 (1998).

Indemnification. Where retailer passes on manufacturer's warranty to consumer and is held liable for breach of warranty, retailer is entitled to indemnification from manufacturer so long as retailer informed consumer of any warnings provided by manufacturer. *Wilson v. E-Z Flo Chem. Co.*, 281 N.C. 506, 189 S.E.2d 221 (1972).

Punitive Damages. Punitive damages are available only where tortious conduct is accompanied by some element of aggravation, such as willful, wanton or reckless conduct. *Newton v. Standard Fire Ins.*, 291 N.C. 105, 229 S.E.2d 297 (1976). Consumer who purchased a battery which exploded without warning was not allowed to recover punitive damages from manufacturer, where manufacturer's "economic decision" not to produce safer battery at higher cost showed no evidence of rudeness or oppression to consumer. *Stiles v. Chloride, Inc.*, 668 F. Supp. 505 (W.D.N.C. 1987), *aff'd*, 856 F.2d 187 (4<sup>th</sup> Cir. 1988).

Defenses. Alteration or modification of product. N.C. Gen. Stat. §99B-3 (amended 1995); *Hastings for Pratt v. Seegars Fence Co.*, 128 N.C. App. 166, 493 S.E.2d 782 (1997). Disregard of warnings or instructions, discovery of defect before use (assumption of the risk), and failure to use reasonable care. N.C. Gen. Stat. §99B-4 (amended 1995). No liability for failure to warn about open and obvious danger. N.C. Gen. Stat. §99B-5(b) (amended 1995). No liability for failure to provide direct warning to consumer about prescription drug if adequate warning provided to dispenser of that product, unless FDA requires direct warning. N.C. Gen. Stat. §99B-5(c) ("learned intermediary doctrine"). Contributory negligence as codified in N.C. Gen. Stat. §99B-4 (amended 1995) is defense in products liability actions under negligence and breach of warranty theories. *Champs Convenience Stores, Inc. v. United Chem. Co., Inc.*, 329 N.C. 446, 406 S.E.2d 856 (1991); *Goodman v. Wenco Foods, Inc.*, 333 N.C. 1, 423 S.E.2d 444 (1992). State of the art concept codified at N.C. Gen. Stat. §99B-6(a)(1). No liability when action based on inherent characteristic of product or unavoidably unsafe aspect of prescription drug. N.C. Gen. Stat. §99B-6(c) & (d). Contractual privity is not required in action for breach of express warranty when express warranty is intended to be made to ultimate user of product. *Kinlaw v. Long Mfg. N.C., Inc.*, 298 N.C. 494, 259 S.E.2d 552 (1979); *Alberti v. Manufactured Homes, Inc.*, 329 N.C. 727, 407 S.E.2d 819 (1991). Lack of privity is not a defense to action for breach of implied warranty brought against the manufacturer by the buyer, a member or guest of a member of the buyer's family, a guest of the buyer, or an employee of the buyer. N.C. Gen. Stat. §99B-2(b). Purely economic losses cannot ordinarily be recovered when basis of product liability action is negligence. *Chicopee v. Sims Metal Works, Inc.*, 98 N.C. App. 423, 391 S.E.2d 211, *rev. denied*, 327 N.C. 426, 395 S.E.2d 674 (1990). Specific statutes exist providing immunity for donated food, N.C. Gen. Stat. §99B-10 (amended 1995), and governing products liability suits involving firearms, N.C. Gen. Stat. §99B-11 (amended 1995).



**RELEASE**

See Law Digest Tables.

To be valid, release must be supported by new consideration. *All in One Maintenance Serv. v. Beech Mountain Constr. Co.*, 70 N.C. App. 49, 318 S.E.2d 856 (1984).

Accord is an agreement to settle a disputed claim for less than or something other than what one party claims is due from the other; and satisfaction is execution of agreement so made. *Moore v. Frazier*, 63 N.C. App. 476, 305 S.E.2d 562 (1983). In order for accord and satisfaction to be a successful defense there must have been a negotiation or agreement between parties concerning payment or acceptance of less than full amount owed and agreement must be supported by consideration. *Bromhal v. Stott*, 116 N.C. App. 250, 447 S.E.2d 481 (1994), *aff'd*, 341 N.C. 702, 462 S.E.2d 219 (1995).

Joint Tortfeasors. Release or covenant not to sue given in good faith to one joint tortfeasor does not discharge other joint tortfeasors unless terms provide, but reduces claim against others to extent of amount stipulated by release or covenant, or in amount of consideration paid for it, whichever is greater. N.C. Gen. Stat. §1B-4(1). A tortfeasor includes a vicariously liable employer. *Yates v. New South Pizza, Ltd.*, 330 N.C. 790, 412 S.E.2d 666 (1992). Release or covenant not to sue given to one tortfeasor discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor. N.C. Gen. Stat. §1B-4(2). Plaintiff's pleading of release by defendant as bar to defendant's counterclaim constituted ratification of settlement and barred plaintiff's action. *Johnson v. Austin*, 29 N.C. App. 415, 224 S.E.2d 293, *disc. rev. denied*, 290 N.C. 308, 225 S.E.2d 839 (1976). Plaintiff-passenger's underinsured motorist insurance carrier was not barred from bringing a claim against driver of the vehicle even though driver had executed a release in favor of defendant owner and defendant operator of car with which he had collided. *Johnson v. Hudson*, 122 N.C. App. 188, 468 S.E.2d 64 (1996). Release of person causing injury does not bar cause of action against physician, surgeon, or other professional practitioner for negligent treatment of injury unless terms of the compromise, settlement, or release agreement so provide. N.C. Gen. Stat. §1-540.1. Widow cannot execute valid release of right of action for wrongful death of husband until appointed personal representative. *Todd v. Adams*, 23 N.C. App. 104, 208 S.E.2d 237 (1974).

Voidable. Releases set aside for fraud, mutual mistake of fact, lack of capacity. *Talton v. Mac Tools*, 118 N.C. App. 87, 453 S.E.2d 563 (1995). Failure of literate

injured party to read release, absent fraud or duress, will not support rescission for mistake. *Watkins v. Grier*, 224 N.C. 339, 30 S.E.2d 223 (1944). Release may be set aside for mutual mistake based on error in diagnosis, since relates to existing fact, but not for error in prognosis, since such mistake relates to error in judgment or opinion as to the future course or consequences of a known injury, and is not a mistake of existing fact. *Caudill v. Chatham Mfg. Co.*, 258 N.C. 99, 128 S.E.2d 128 (1962). Release may be set aside for mutual mistake of fact. *Sims v. Gernandt*, 116 N.C. App. 299, 447 S.E.2d 455 (1994), *aff'd*, 341 N.C. 162, 459 S.E.2d 258 (1995). Where consideration for release is simply inadequate, it is alone insufficient to set aside a release, but if the inadequacy is so gross and palpable as to shock the moral sense, may take issue of fraud to jury. *Cowart v. Honeycutt*, 257 N.C. 136, 125 S.E.2d 382 (1962).

Test for mental competence to enter into release is whether person had mental competence to manage his own affairs at time release executed. *Cox v. Jefferson-Pilot Fire & Cas. Co.*, 80 N.C. App. 122, 341 S.E.2d 608, *disc. rev. denied*, 317 N.C. 702, 347 S.E.2d 38 (1986).

**REPRESENTATIONS AND WARRANTIES**

"All statements or descriptions in any application for a policy of insurance, or in the policy itself, shall be deemed representations and not warranties, and a representation, unless material or fraudulent, will not prevent a recovery on the policy." N.C. Gen. Stat. §58-3-10. However, any fact untruly asserted or wrongfully suppressed, even if not intentional, that affects judgment of underwriter in accepting or rejecting risk, or in fixing the premium, is material as matter of law, and voids policy. *Tharrington v. Sturdivant Life Ins. Co.*, 115 N.C. App. 123, 443 S.E.2d 797 (1994); *George Washington Life Ins. Co. v. Am. Collapsible Box Co.*, 185 N.C. 543, 117 S.E. 785 (1923); *Wells v. Jefferson Standard Life Ins. Co.*, 211 N.C. 427, 190 S.E. 744 (1937). To defeat recovery, it is not necessary for the material misrepresentation to contribute to the loss for which indemnity is claimed. *Bryant v. Metropolitan Life Ins. Co.*, 147 N.C. 181, 60 S.E. 983 (1908). Written questions and answers relating to health in application for a life insurance policy are material as a matter of law. *Tharrington v. Sturdivant*, 115 N.C. App. 123, 443 S.E.2d 797 (1994). However, even material misrepresentation will not void policy if insurer knew facts when policy issued. *Northern Nat'l Life Ins. v. Lacy J. Miller Mach. Co.*, 311 N.C. 62, 316 S.E.2d 256 (1984). Knowledge of agent may be imputed to company. *Ward v. Durham Life Ins. Co.*, 325 N.C. 202, 381 S.E.2d 698 (1989).



Where insurer defends on ground of false and material representation, instruction that representations must also be fraudulent is prejudicial error. *Tolbert v. Mut. Benefit*, 236 N.C. 416, 72 S.E.2d 915 (1952).

Ordinarily, the right to rescind a contract is based on fraud or mutual mistake. *Ebbs v. St. Louis Union Trust Co.*, 199 N.C. 242, 153 S.E. 858 (1930).

A policy may be reformed for mutual mistake or mistake on one side and fraud on other. *Wiggins v. Sun Underwriters Ins. Co.*, 196 N.C. 546, 146 S.E. 216 (1929).

### SERVICE OF PROCESS

Corporations. Service is made according to N.C. Gen. Stat. §1A-1, Rule 4 (j) (6) by delivering a copy of summons and complaint to officer, director, or managing agent of corporation; by delivering copy of summons and complaint to an agent authorized by appointment or law to accept service; or by mailing copy of summons and complaint registered or certified mail, return receipt requested, to officer, director, or agent. When registered agent cannot be found, service may be made upon Secretary of State. N.C. Gen. Stat. §55D-33. However, when plaintiff has actual knowledge of address where defendant may be served, substitute service on Secretary of State violates due process and is invalid. *Interior Distribs., Inc. v. Hartland Constr. Co., Inc.*, 116 N.C. App. 627, 449 S.E.2d 193 (1994).

As an alternative to service under Rule 4, the Commissioner of Insurance can serve as an agent for service of process upon any insurance company or any foreign or alien entity admitted or licensed to do business in this state. N.C. Gen. Stat. §58-16-30 (amended 1995). Also, insurers may be served with process pursuant to applicable provisions of Chapter 1 and Chapter 1A of North Carolina General Statutes.

Upon Nonresident Motorists. See "AUTOMOBILES."

Natural Person. Service is made according to N.C. Gen. Stat. §1A-1, Rule 4 (j) (1) by delivering copy of summons and complaint to person or agent, or by registered or certified mail, return receipt requested. Service by publication is allowed only when service by other methods cannot be made with due diligence. N.C. Gen. Stat. §1A-1, Rule 4 (j1); *Winter v. Williams*, 108 N.C. App. 739, 425 S.E.2d 458, *disc. rev. denied*, 333 N.C. 578, 429 S.E.2d 578 (1993). Due diligence requires a plaintiff to use all resources reasonably available to locate defendant. *Id.*

Summons must be served within 60 days else jurisdiction on the trial court over defendant is not conferred. N.C. Gen. Stat. §1A-1, Rule 4 (c) (amended 2001);

*Wetchin v. Ocean Side Corp.*, 167 N.C. App. 756, 606 S.E.2d 407 (2005). An extension may be obtained pursuant to, N.C. Gen. Stat. §1A-1, Rule 4 (d), before discontinuance, N.C. Gen. Stat. §1A-1, Rule 4 (e).

### SUBROGATION

Subrogation is equitable assignment in which insurer can seek reimbursement to extent of its payment to insured. *Investors Title Ins. Co. v. Herzig*, 330 N.C. 681, 413 S.E.2d 268 (1992). Subrogation rights are not assigned to an insurer until insurer complies with its obligation and pays insured. *N.C. Life & Accid. & Health Ins. Guar. Ass'n v. Alcatel*, 876 F. Supp. 748 (E.D.N.C.), *aff'd*, 72 F.3d 127 (4<sup>th</sup> Cir. 1995). Statutory fire policy provides for subrogation. N.C. Gen. Stat. §58-44-15. Liability policies in general contain same provisions.

Liability insurer that settles with parties suing insured before legal liability is determined is mere volunteer and has no subrogation as to third parties. *Nationwide Mut. Ins. Co. v. Weeks-Allen Motor Co. Inc.*, 18 N.C. App. 689, 198 S.E.2d 88 (1973).

Collision Insurance. Assuming owner of car is not tortfeasor, automobile collision insurer, after indemnifying its insured, is entitled to subrogation against tortfeasor legally responsible for loss or harm to insured. *Aetna Cas. & Sur. Co. v. Pennsylvania Nat'l Mut. Cas. Ins. Co.*, 316 N.C. 368, 341 S.E.2d 548 (1986).

Where insurer pays insured lessee of truck under interstate trip-lease agreement for damages occurring to cargo during trip, lessee having paid consignor for damages, insurer becomes subrogated to rights of lessee against lessor under indemnity provision of trip-lease agreement; where insurer has not paid full amount of loss, action for indemnity must be brought in name of insured, and insurer is proper party. *S & N Freight Line, Inc. v. Bundy Truck Lines, Inc.*, 3 N.C. App. 1, 164 S.E.2d 89 (1968); *Burgess v. Trevathan*, 236 N.C. 157, 72 S.E.2d 231 (1952). Insurer's separate equitable subrogation action against tortfeasor to recover monies paid to insured dismissed, as assignment of rights or equitable subrogation to insurer arising from insured's cause of action for personal injuries is prohibited. *Harris-Teeter Super Markets, Inc. v. Watts*, 97 N.C. App. 101, 387 S.E.2d 203 (1990).

"Equitable assignment" doctrine of subrogation permits insurer to assert remedy of insured against wrongdoer only to extent insurer's payments have discharged alleged wrongdoer's primary liability to insured. *Commonwealth Land Title Ins. Co. v. Stephenson*, 97 N.C. App. 123, 387 S.E.2d 77 (1990).

Insurer who waives subrogation can not avoid obligation to provide coverage due to insured's failure to

obtain consent for settlement unless it establishes that it was materially prejudiced by insured's settlement with underinsured motorist. *Silvers v. Horace Mann Ins. Co.*, 324 N.C. 289, 378 S.E.2d 21, *aff'd*, 324 N.C. 289, 378 S.E.2d 21 (1989); *Branch v. Traveler's Indem. Co.*, 90 N.C. App. 116, 367 S.E.2d 369 (1988), *aff'd*, 324 N.C. 430, 378 S.E.2d 748 (1989). Insurer may avoid obligation where tortfeasor and insured collude and tortfeasor fails to cooperate after release by insured. *McCrary Ex Rel. McCrary v. Byrd*, 148 N.C. App. 630, 559 S.E.2d 821 (2002).

Where insurer pays its underinsured motorist limits pursuant to N.C. Gen. Stat. §20-279.21(b)(4) to insured for damages negligently caused by deceased tortfeasor, insurer becomes subrogated to insured's rights against tortfeasor's estate; tortfeasor may not defeat insurer's subrogation rights when he has knowledge of subrogated claim and thereafter secures consent judgment or release from damaged party. *State Farm Mut. Auto. Ins. Co. v. Blackwelder*, 332 N.C. 135, 418 S.E.2d 229 (1992).

Uninsured or underinsured motorist coverage provided as part of a motor vehicle liability policy must insure loss uncompensated by workers' compensation and employer's lien. N.C. Gen. Stat. §20-279.21(e).

Failure to adopt and implement reasonable standards for prompt investigation of claims and failure to attempt in good faith to effectuate prompt, fair settlements in cases in which liability is reasonably clear could support a finding of unfair or deceptive acts or practices, but plaintiff does not have to prove a Chapter 58 violation to prove a Chapter 75 violation. *U.S. Fire Ins. Co. v. Nationwide Mut. Ins. Co.*, 735 F. Supp. 1320 (E.D.N.C. 1990); *Country Club of Johnson County v. U.S. Fidelity & Guar. Co.*, 150 N.C. App. 231, 563 S.E.2d 269 (2002).

Surety. Subrogated to rights of creditor. When a surety pays the debt of his or her deceased principal, the surety will have a claim against the decedent's assets, and such claim will have the same priority as the decedent's debt had before the surety paid it. N.C. Gen. Stat. §26-4.

## WAIVER AND ESTOPPEL

In North Carolina, as most states, courts are eager to find waiver or estoppel to prevent forfeiture and hold insurers liable. But doctrines of waiver and estoppel may not be used to expand scope of coverage in life insurance policy. *Pearce v. Am. Defender Life Ins. Co.*, 316 N.C. 461, 343 S.E.2d 174 (1986). Provisions of printed form of statutory fire policy deemed waived if agent has knowledge of their violation before or at time of issuance of policy. *Midkiff-Brannock v. N.C. Home Ins. Co.*,

197 N.C. 139, 147 S.E. 812 (1929). Delivery of life policy by authorized agent with knowledge of illness of insured held waiver of good health provision of life policy. *Nat'l Life Ins. Co. v. Grady*, 185 N.C. 348, 117 S.E. 289 (1923). Acceptance of note for first premium held waiver of provisions of life policy requiring payment of first premium before it becomes effective. *Pender v. North State Life Ins. Co.*, 163 N.C. 98, 79 S.E. 293 (1913). But when insurer receives payment of past due premium without knowledge of insured's sickness, and writes insured for application for reinstatement and health certificate which was not furnished, and then returned said payment after death of insured, there is no waiver. *Clifton v. Mut. Life Ins. Co. of N.Y.*, 168 N.C. 499, 84 S.E. 817 (1915).

Insurer is estopped to rely on endorsement limiting coverage inserted in renewal policy without notice to policyholder. *Gaston-Lincoln Transit, Inc. v. Maryland Cas. Co.*, 285 N.C. 541, 206 S.E.2d 155 (1974). But automatic termination provision triggered by insured's purchase of alternate "similar" insurance is valid, and insurer is not estopped from asserting rights to defense and responsibility against alternate insurer merely because insurer acknowledged responsibility until it discovered existence of insured's second policy with alternate insurer. *State Farm Mut. Auto Ins. Co. v. Atlantic Indem. Co.*, 122 N.C. App. 67, 468 S.E.2d 570 (1996).

Under North Carolina law, insurer may not escape application of waiver or estoppel when appropriate merely because of non-waiver provision in standard form policy. *Northern Assur. Co. of Am. v. Spencer*, 373 F.2d 35 (4<sup>th</sup> Cir. 1966).

Waiver of right to assert forfeiture of policy for nonpayment of premiums occurs where company expressly or impliedly leads insured to believe that insurer has given up right under policy; estoppel results when company leads insured to believe that conformance to course of action will prevent forfeiture of policy. *Thompson v. Northwestern Sec. Life Ins. Co.*, 44 N.C. App. 668, 262 S.E.2d 397, *rev. denied*, 300 N.C. 202, 269 S.E.2d 620 (1980).

Insurer's acceptance of premium installments which it had already earned did not constitute waiver of right to insist on immediate payment of balance of installments and require forfeiture of policy for delay in payment where insured failed to pay due premium installment. *Klein v. Avemco Ins. Co.*, 26 N.C. App. 452, 216 S.E.2d 479, *aff'd*, 289 N.C. 63, 220 S.E.2d 595 (1975).

Actions of employer that reasonably lead employee into belief that injury was compensable may estop assertion of time bar by insurer in opposition to employee's



claim. *Wall v. Macfield/Unifi*, 131 N.C. App. 863, 509 S.E.2d 798 (1998).

## WARRANTIES

See "REPRESENTATIONS AND WARRANTIES."

## WORKERS' COMPENSATION

Statutory Reference.

Original Jurisdiction. Industrial Commission has original and exclusive jurisdiction over rights and remedies afforded under Ch. 97. N.C. Gen. Stat. §97-83, 84. A member of Industrial Commission or deputy commissioner conducts hearing and issues award. N.C. Gen. Stat. §97-84. Upon application to Commission within 15 days of notice of award, full Commission shall review award. N.C. Gen. Stat. §97-85.

Appellate Jurisdiction. Appellate review in the Court of Appeals is limited to questions of law. *Carpenter v. Hawley*, 53 N.C. App. 715, 281 S.E.2d 783, *rev. denied*, 304 N.C. 587, 289 S.E.2d 564 (1981); N.C. Gen. Stat. §97-86 (amended 1996).

Benefits.

Wages. While employee is totally disabled from working, employer must pay 66 2/3% of employee's average weekly wage. Appeal must be made within 30 days after receipt of notice of award. N.C. Gen. Stat. §97-29. Statute provides, in order of preference, methods of calculating average weekly wage. See *Loch v. Entm't Partners Employer*, 148 N.C. App. 106, 557 S.E.2d 182 (2001). Generally, employee's average weekly wage means total earnings during 52 weeks immediately preceding date of injury divided by 52. N.C. Gen. Stat. §97-2(5). If employee is only partially, permanently disabled, employer must compensate the employee under N.C. Gen. Stat. §97-30, 97-31 (proposed amendment pending: 2005 N.C. H.B. 1768; 2005 N.C. S.B. 984, 865 and 866) or both. An employee who suffers injuries resulting in partial disability of a general nature is entitled to compensation under N.C. Gen. Stat. §97-30, which requires employer to pay weekly benefits of 66 2/3% of difference between his average weekly wage before injury and average weekly wage which he is able to earn thereafter for period up to 300 weeks. N.C. Gen. Stat. §97-30. An employee who suffers an injury of a specific nature, such as loss of a limb or loss of hearing, is compensated under N.C. Gen. Stat. §97-31 which sets forth a schedule under which employee receives 66 2/3% of his average weekly wage for specific number of weeks depending upon percentage of partial disability and portion of body injured. An employee who suffers both general and specific injuries may recover under both sections. *Gray v. Carolina Freight Carriers, Inc.*, 105 N.C. App.

480, 414 S.E.2d 102 (1992); *Franklin v. Broyhill Furniture Indus.*, 123 N.C. App. 200, 472 S.E.2d 382, *cert denied*, 344 N.C. 629, 477 S.E.2d 39 (1996). Although employee may not collect compensation for permanent partial disability and total capacity at the same time, employee may elect the more favorable remedy. *Farley v. N.C. Dept. of Labor*, 146 N.C. App. 584, 553 S.E.2d 231 (2001). To receive benefits under N.C. Gen. Stat. §97-31, employee must prove when maximum medical improvement was reached. *Arnold v. Wal-Mart Stores, Inc.*, 154 N.C. App. 482, 571 S.E.2d 888 (2002), *aff'd*, 164 N.C. App. 598, 596 S.E.2d 472 (2004).

Medical. Employer must pay all medical expenses reasonably required to effect cure, give relief, or lessen period of disability, but employee's compensation will cease if employee refuses to accept any medical, surgical, or rehabilitative procedure ordered by Industrial Commission. N.C. Gen. Stat. §§97-2(19), -25 (proposed amendment pending: 2005 N.C. H.B. 1768). Right to medical compensation terminates two years after employer's last payment unless: 1) employee files application with the Commission for additional compensation which is thereafter approved, or 2) Commission orders additional compensation. N.C. Gen. Stat. §97-25.1. If Commission determines that there is substantial risk of the necessity of future medical compensation, it shall order employer to pay future necessary medical compensation. *Id.* Requirements of N.C. Gen. Stat. §97-25 may be satisfied by contracting with managed care organizations. N.C. Gen. Stat. §97-25.2. Insurer may require pre-authorization for in-patient admission to hospital or treatment center, and in-patient or out-patient surgery. N.C. Gen. Stat. §97-25.3. Industrial Commission must adopt schedule of maximum fees for medical services, except hospital fees. N.C. Gen. Stat. §97-26. Health care providers are subject to penalties not to exceed \$10,000 for certain acts of fraud or misrepresentation. N.C. Gen. Stat. §97-88.3.

Criminal Sanctions. Willfully making false statements to obtain or deny benefits is a misdemeanor. N.C. Gen. Stat. §97-88.2. Health care provider who knowingly holds employee financially responsible for services relating to compensable injury guilty of misdemeanor. N.C. Gen. Stat. §97-88.3(c).

Termination of Benefits. Benefits being paid under N.C. Gen. Stat. §97-29 are terminated when employee returns to work. N.C. Gen. Stat. §97-18.1(b). If employer terminates or suspends compensation for any other reason, and employee timely objects, Commission will hold informal hearing. N.C. Gen. Stat. §97-18.1(d). If employee refuses suitable employment, he forfeits compensation during such time refused, unless Commission determines that refusal was justified. N.C. Gen.



Stat. §97-32 (proposed amendment pending: 2005 N.C. H.B. 1768 and 2005 N.C. S.B. 984). If a trial return to work is unsuccessful, the employee's right to continuing compensation continues unimpaired. N.C. Gen. Stat. §97-32.1.

**Disability.** Disability means incapacity because of injury to earn wages which employee was receiving at time of injury in same or any other employment. N.C. Gen. Stat. §97-2(9). Employer cannot create new position not generally available under normally prevailing market conditions to avoid paying workers' compensation benefits for disability. *Peoples v. Cone Mills Corp.*, 316 N.C. 426, 342 S.E.2d 798 (1986), *aff'd*, 86 N.C. App. 227, 356 S.E.2d 801 (1987); *Saums v. Raleigh Cmty. Hosp.*, 346 N.C. 760, 487 S.E.2d 746 (1997); *Smith v. Sealed Air Corp.*, 127 N.C. App. 359, 489 S.E.2d 445 (1997). But if position with employer is generally available, and wages equal or exceed wages in former position, and employee is physically capable of performing the work, the position offered is evidence of earning capacity. *Arrington v. Texfi Indus.*, 123 N.C. App. 476, 473 S.E.2d 403 (1996). Employee has burden of proving both the existence of disability and its degree. The following elements establish disability: 1) inability to earn same wages in same employment, 2) inability to earn same wages in any other employment, and 3) incapacity to earn caused by injury. *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 290 S.E.2d 682 (1982). Employee may satisfy this burden in one of four ways: 1) medical evidence that he is incapable of any employment; 2) evidence that he is capable of some work, but has been unsuccessful in obtaining employment; 3) evidence that he is capable of some work but that it would be futile to pursue such work because of preexisting conditions; or 4) evidence that he has obtained employment at lower wage. *Russell v. Lowes Prod. Distrib.*, 108 N.C. App. 762, 425 S.E.2d 454 (1993); *Blair v. Am. Tele. & Communications Corp.*, 124 N.C. App. 420, 477 S.E.2d 190 (1996); *Knight v. Wal-Mart Stores, Inc.*, 149 N.C. App. 1, 562 S.E.2d 434 (2002), *aff'd*, 357 N.C. 44, 577 S.E.2d 620 (2003). Once initial burden is met, burden shifts to employer to demonstrate that specific, suitable jobs are available which employee is capable of obtaining, taking into account physical and vocational limitations of employee. *Chavis v. TLC Home Health Care*, \_\_\_N.C. App. \_\_\_, 616 S.E.2d 403 (2005); *Kennedy v. Duke Univ. Med. Ctr.*, 101 N.C. App. 24, 398 S.E.2d 677 (1990). See also *Bridges v. Linn-Corriher Corp.*, 90 N.C. App. 397, 368 S.E.2d 388, *rev. denied*, 323 N.C. 171, 373 S.E.2d 104 (1988); *Brown v. S & N Communications, Inc.*, 124 N.C. App. 320, 477 S.E.2d 197 (1996).

Once approved by the Commission, a finding of disability creates a presumption that continues after the case until rebutted by the employer at a subsequent hear-

ing. *Kisiah v. W.R. Kisiah Plumbing, Inc.*, 124 N.C. App. 72, 476 S.E.2d 434 (1996), *rev. denied*, 345 N.C. 343, 483 S.E.2d 169 (1997); *King v. Yeargin Constr. Co.*, 124 N.C. App. 396, 476 S.E.2d 898 (1996), *rev. denied*, 345 N.C. 343, 483 S.E.2d 169 (1997). Absent either prior award of the Commission or a form agreement (Form 21 or 26) for disability which has been approved by Industrial Commission, employee must prove own disability, otherwise no ongoing presumption of disability occurs. *Cialino v. Wal-Mart Stores, Inc.*, 156 N.C. App. 463, 577 S.E.2d 345 (2003). N.C. Gen. Stat. §97-47 permits either party to seek the Commission's review of an award based on substantial change in employee's earning capacity or degree of disability. *Shingleton v. Kobacker Group*, 148 N.C. App. 667, 559 S.E.2d 277 (2002). Party claiming change in condition bears burden of proof. *Id.*

**Denial of Claims.** Employer or carrier must notify Commission of denial of employee's right to compensation within 14 days after written or actual notice to the employer of injury or death. N.C. Gen. Stat. §97-18(c). When employer or carrier is uncertain on reasonable grounds whether it has liability, employer or carrier may initiate payments, without prejudice and without admitting liability, for ninety days. N.C. Gen. Stat. §97-18(d).

**Death.** An employee's estate is entitled to additional death benefits if death results from compensable injury or occupational disease within six years of injury, or within two years of final determination of disability, whichever is later. N.C. Gen. Stat. §97-38. Benefits include 66 2/3% of average weekly wage for 400 weeks and up to \$3,500 for burial expenses. *Id.*

**Employment Defined – Casual.** Employment includes employment by State, all public and quasi-public corporations, and all private employments in which three or more employees are regularly employed in same business. N.C. Gen. Stat. §97-2(1) (proposed amendment pending: 2005 N.C. S.B. 1043 and 2005 N.C. S.B. 864). Employment is casual when it is irregular, unpredictable, sporadic, and brief in nature. *Clark v. Waverly Mills, Inc.*, 12 N.C. App. 535, 183 S.E.2d 855 (1971).

**Dual Capacity.** Joint employment occurs when employee performs services for two employers; in such cases, both employers are liable for workers' compensation. *Henderson v. Manpower of Guilford County, Inc.*, 70 N.C. App. 408, 319 S.E.2d 690 (1984). Under certain circumstances, independent contractors may be declared "statutory employers" for purposes of Act. N.C. Gen. Stat. §97-19 (amended 1996).

**Exclusive Remedy.** An employer subject to provisions of Act who secures payment of compensation for employees as provided by Act shall only be liable to an



employee for personal injury or death by accident to extent and in manner as provided by Act. N.C. Gen. Stat. §97-9. Act provides exclusive remedy for employee if employee and employer are subject to and have complied with the Act. N.C. Gen. Stat. §97-10.1 When employee files claim under Tort Claims Act, claim under Tort Claims Act dismissed because Workers' Compensation Act is exclusive remedy. *Richardson v. N.C. Dept. of Correction*, 118 N.C. App. 704, 457 S.E.2d 325 (1995), *aff'd*, 345 N.C. 128, 478 S.E.2d 501 (1996). See also *Rich v. R.L. Casey, Inc.*, 118 N.C. App. 156, 454 S.E.2d 666, *rev. denied*, 340 N.C. 360, 458 S.E.2d 190 (1995) (statutory employer immunized from civil liability by exclusivity provision). Act does not provide exclusive remedy, however, for intentional conduct by employer. *Hogan v. Forsyth Country Club Co.*, 79 N.C. App. 483, 340 S.E.2d 116, *cert. denied*, 317 N.C. 334, 346 S.E.2d 140 (1986). Intentional misconduct is conduct that employer engages in with substantial certainty that it will cause serious injury or death to employees; if injury is caused, act does not provide exclusive remedy. *Woodson v. Rowland*, 329 N.C. 330, 407 S.E.2d 222 (1991). To date, courts have rarely found conduct sufficiently egregious to overcome exclusive remedy provision and warrant civil action. See, e.g., *Whitaker v. Town of Scotland Neck*, 357 N.C. 552, 597 S.E.2d 665 (2003), *reh'g denied*, 358 N.C. 159, 593 S.E.2d 591 (2004); *Rose v. Isenhour Brick & Tile Co.*, 344 N.C. 153, 472 S.E.2d 774 (1996); *Echols v. Zarn, Inc.*, 342 N.C. 184, 463 S.E.2d 228 (1995); *Mickles v. Duke Power Co.*, 342 N.C. 103, 463 S.E.2d 206 (1995). But see *Regan v. Amerimark Bldg. Prod., Inc.*, 118 N.C. App. 328, 454 S.E.2d 849 (1995), *rev. denied*, 340 N.C. 359, 458 S.E.2d 189 (1996), *cert. denied*, 342 N.C. 659, 467 S.E.2d 723 (1996); *Pastva v. Naegele Outdoor Advertising, Inc.*, 121 N.C. App. 656, 468 S.E.2d 491, *rev. denied*, 343 N.C. 308, 471 S.E.2d 74 (1996). *Woodson* claims are subject to 3-year statute of limitation. N.C. Gen. Stat. §1-52(5); *Alford v. Catalytica Pharms.*, 356 N.C. 654, 577 S.E.2d 293 (2003).

Arising out of and in the Course of. Injury arises out of employment when there is causal connection between employment and resulting injury. *Robbins v. Nicholson*, 281 N.C. 234, 188 S.E.2d 350 (1972). If employment aggravates, accelerates, or combines with employee's pre-existing condition, then injury arises out of employment. *Mills v. City of New Bern*, 122 N.C. App. 283, 468 S.E.2d 587 (1996). Employee entitled to full compensation when no evidence from which Commission could apportion award between work-related and non-work related causes. *Counts v. Black & Decker Corp.*, 121 N.C. App. 387, 465 S.E.2d 343, *rev. denied*, 343 N.C. 305, 471 S.E.2d 68 (1996). Apportionment not permitted where injury aggravated pre-existing condi-

tion. *Cox v. City of Winston-Salem*, 157 N.C. App. 228, 578 S.E.2d 669 (2003).

Occupational Disease. Disablement or death by occupational disease is considered injury by accident for workers' compensation purposes. N.C. Gen. Stat. §97-52. Disability resulting from disease is compensable when disease is aggravated or accelerated by causes and conditions characteristic of and peculiar to claimant's employment. *Robinson v. J.P. Stevens & Co.*, 57 N.C. App. 619, 292 S.E.2d 144 (1982). N.C. Gen. Stat. §97-53 lists diseases and conditions deemed to be occupational diseases. N.C. Gen. Stat. §97-53(13) is catch-all provision which includes any disease, other than hearing loss, which is due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation, or employment, but excluding all ordinary diseases of life to which general public is equally exposed. See *Pulley v. City of Durham*, 121 N.C. App. 688, 468 S.E.2d 506 (1996). Overbearing boss is not considered a compensable occupational disease. *Woody v. Thomasville Upholstery, Inc.*, 355 N.C. 483, 562 S.E.2d 422 (2002). Under N.C. Gen. Stat. §97-57, employer in whose employment employee was last injuriously exposed to hazards of disease is liable. *Rutledge v. Tultex Corp./Kings Yarn*, 308 N.C. 85, 301 S.E.2d 359 (1983). Claim for occupational disease must be filed within two years after death, disability or disablement from occupational disease. N.C. Gen. Stat. §97-58(c). Two conditions start two-year period running: 1) employee suffers occupational disease which renders employee disabled, and 2) employee is informed by competent medical authority of nature and work-related cause of disease. *Rutledge v. Stroh Co.*, 105 N.C. App. 307, 412 S.E.2d 901, *rev. denied*, 331 N.C. 384, 417 S.E.2d 791 (1992).

Mental Injury. If employee sustains compensable injury that causes employee to become so emotionally disturbed that he is unable to work, employee is entitled to compensation for total incapacity. *Fayne v. Fieldcrest Mills, Inc.*, 54 N.C. App. 144, 282 S.E.2d 539 (1981), *rev. denied*, 304 N.C. 725, 288 S.E.2d 380 (1982). Mental injury or disease is compensable. *Jordan v. Central Piedmont Cmty. Coll.*, 124 N.C. App. 112, 476 S.E.2d 410 (1996), *rev. denied*, 345 N.C. 753, 485 S.E.2d 53 (1997). Cause of mental problems must stem from injury by accident or occupational disease, otherwise it is not compensable. If employee commits suicide as result of pain and suffering from compensable physical injury, death is compensable under N.C. Gen. Stat. §97-38. See *Petty v. Associated Transp., Inc.*, 276 N.C. 417, 173 S.E.2d 321 (1970).

Pre-existing Injury. Under N.C. Gen. Stat. §97-33, employee who is epileptic, has permanent disability, or has sustained permanent injury in army or navy of



United States, or in another employment other than that in which he received subsequent permanent injury by accident, such as specified in N.C. Gen. Stat. §97-31, shall be entitled to compensation only for degree of disability which would have resulted from later accident if earlier disability or injury had not existed. Provisions of this section do not apply where employee received no compensation for first injury. *Wilder v. Barbour Boat Works*, 84 N.C. App. 188, 352 S.E.2d 690 (1987). Employee with preexisting, nondisabling impairment is entitled to full compensation, without need for any apportionment, in event of total and permanent disability due to compensable injury's aggravation or acceleration of preexisting condition. *Errante v. Cumberland County Solid Waste Mgmt.*, 106 N.C. App. 114, 415 S.E.2d 583 (1992).

**Fellow Employee Rule.** Worker who is injured in course and scope of employment may not sue and recover from fellow employee whose negligence caused injury. *Ragland v. Harris*, 152 N.C. App. 132, 566 S.E.2d 827 (2002). However, employee may bring an action against fellow employee for injuries received as result of willful, wanton, and reckless conduct by fellow employee. *Pleasant v. Johnson*, 312 N.C. 710, 325 S.E.2d 244 (1985). Employee who serves as immediate supervisor qualifies as "co-employee" for purposes of this exception. *McCorkle v. Aeroglide Corp.*, 115 N.C. App. 651, 446 S.E.2d 145, *cert. denied*, 338 N.C. 518, 452 S.E.2d 812 (1994). Employee may bring negligence action against third-party stranger to the employment. *Wood v. Guilford County*, 355 N.C. 161, 558 S.E.2d 490 (2002).

**Liens.** North Carolina Gen. Stat. §97-10.2 governs the rights and interests of employee and employer's insurance carrier in third-party action if worker's compensation injury or death was covered under circumstances creating liability in some third person. Employer/carrier has lien on any third-party settlement or judgment up to the amount of all compensation benefits and medical expenses provided by employer/carrier. N.C. Gen. Stat. §97-10.2. Chapter 97 gives employer/carrier who has admitted liability under the Act the right to bring action against third-party if employee has not filed action within one year of injury or death. N.C. Gen. Stat. §97-10.2(c). The amount of lien is determined at judge's discretion based on statutory factors. N.C. Gen. Stat. §97-10.2(j). However, if employer and employee enter into

Commission-approved agreement over lien, state court loses jurisdiction to reduce the lien thereafter. *Holden v. Boone*, 153 N.C. App. 254, 569 S.E.2d 711 (2002).

**Attorneys Fees.** If insurer or employer brings any proceedings under Workers' Compensation Act to a hearing or appeals to another court, and the Commission or court orders insurer/employer to continue to pay benefits, then the Commission or court may order insurer or employer to pay employee's reasonable attorneys' fees. N.C. Gen. Stat. §97-88. Fees may not be awarded under this section where only employee has appealed. *Harwell v. Thread*, 78 N.C. App. 437, 337 S.E.2d 112 (1985). If Industrial Commission concludes that hearing has been brought, prosecuted, or defended without reasonable ground, it may assess entire cost of proceedings, including reasonable attorneys' fees, upon party who acted without reasonable grounds. N.C. Gen. Stat. §97-88.1. *See Poplin v. PPG Indus.*, 108 N.C. App. 55, 422 S.E.2d 353 (1992).

**Evidence/Privilege.** No fact communicated to or otherwise learned by any health care provider who has examined an employee claiming compensation is privileged in a workers' compensation case. N.C. Gen. Stat. §97-27(a). Ex parte communications between treating physicians and an attorney for the employer or insurer are precluded, absent the employee's consent to the communication. *Salaam v. N.C. Dept. of Transp.*, 122 N.C. App. 83, 468 S.E.2d 536 (1996), *rev. dismissed*, 345 N.C. 494, 480 S.E.2d 51 (1997). The court may exclude only tainted portion of deposition testimony if necessary to avoid punishing patient for opposing party's violation of privilege against ex parte communications with non-party treating physician. *Porter v. Fieldcrest Cannon, Inc.*, 133 N.C. App. 23, 514 S.E.2d 517 (1999). Restrictions on ex parte communications with treating physicians do not apply to patient, even when patient communicates with physician about lawsuit to which patient is a party. *Pittman v. Int'l Paper Co.*, 132 N.C. App. 151, 510 S.E.2d 705, *aff'd*, 351 N.C. 42, 519 S.E.2d 524 (1999). Restrictions on ex parte communication do apply to agents of employer, including communication between company physician and company representative who is not an attorney. *Terry v. PPG Indus.*, 156 N.C. App. 512, 577 S.E.2d 326, *rev. denied*, 357 N.C. 256, 583 S.E.2d 290 (2003).

