



# STATE OF NORTH CAROLINA COMPENDIUM OF LAW

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## PRE-SUIT AND INITIAL CONSIDERATIONS

### **Pre-Suit Notice Requirements/Prerequisites to Suit**

A) **Libel.** N.C. GEN. STAT. § 99-1 (2012) states:

Before any action, either civil or criminal can be brought for the publishing, speaking, uttering, or conveying by words, acts or any other manner of a libel or slander by a newspaper, periodical, radio or television station, the plaintiff or prosecutor shall at least five days before initiating such action serve notice in writing on the defendant, specifying the time of and the words or acts which he alleges to be false and defamatory.

B) **Medical Malpractice.** N. C. GEN. STAT. § 1A-1, R. 9(j) (2012) provides:

Any complaint alleging medical malpractice by a health care provider shall be dismissed unless: 1) the pleading specifically asserts that the medical care and records pertaining to the alleged negligence have been reviewed by a person who is reasonably expected to qualify as an expert under Rule 702 of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care; 2) the pleading specifically asserts that the medical care and records pertaining to the alleged negligence that are available to the plaintiff after reasonable inquiry have been reviewed by a person that the complainant will seek to have qualified as an expert witness and who is willing to testify that the medical care did not comply with the applicable standard of care, and the motion is filed with the complaint; or 3) the pleading alleges facts establishing negligence under the existing common-law doctrine of *res ipsa loquitur*.

### **Relationship to the Federal Rules of Civil Procedure**

The North Carolina Rules of Civil Procedure are patterned after the Federal Rules of Civil Procedure. *Sutton v. Duke*, 277 N.C. 94, 176 S.E.2d 161 (1970). Despite the overall similarity, the North Carolina rules contain some material differences. *Id.* When any questions of interpretation arise, North Carolina courts often defer to the federal and New York jurisdictions for instruction and guidance. *Burcl v. N.C. Baptist Hosp.*, 306 N.C. 214, 293 S.E.2d 85 (1982); *Brewer v. Harris*, 279 N.C. 288, 182 S.E.2d 345 (1971); *Turner v. Duke Univ.*, 91 N.C. App. 446, 372 S.E.2d 320 (1988).

### **Description of the Organization of the State Court System**

A) **Structure.** The General Court of Justice consists of an Appellate Division, a Superior Court Division and a District Court Division. N.C. CONST. art. IV, § 2. The Appellate Division is made up of the Supreme Court and the Court of Appeals. N.C. CONST. art. IV, § 5.

1) **Supreme Court.** The Supreme Court consists of the Chief Justice and six associate justices, elected by the voters of North Carolina for terms of eight years. N.C. GEN. STAT. § 7A-10 (2012).

- 2) **Court of Appeals.** The Court of Appeals consists of fifteen judges elected by the voters of North Carolina for terms of eight years. There is one Chief Judge that is appointed by the Chief Justice of the Supreme Court. The fifteen judges sit on panels of three and are assigned to panels by the Chief Judge. N.C. GEN. STAT. § 7A-16 (2012).
- 3) **Superior Court.** The Superior Court is divided into eight divisions and forty-six districts across the state. Every six months, Superior Court judges rotate among the districts within their division. Superior Court judges are elected by the voters of North Carolina and shall reside in the district for which they are elected. All felony criminal cases, civil cases involving more than \$10,000 and misdemeanor and infraction appeals from District Court are tried in Superior Court. *See* N.C. CONST. art. IV, § 9; N.C. GEN. STAT. §§ 7A-40, -41 (2012).
- 4) **District Court.** The District Court, also known as the trial court, is divided into four categories: civil, criminal, juvenile and magistrate. Like the Superior Court, District Court sits in the county seat of each county. It may also sit in certain other cities and towns, specifically authorized by the General Assembly. District court judges are elected for terms of four years. *See* N.C. CONST. art. IV, § 10; N.C. GEN. STAT. § 7A-140 (2012).

**B) Alternative dispute resolution.**

- 1) **Mandatory Arbitration.** For the select counties with an Arbitration Program, arbitration is required in every civil case involving a claim for \$15,000 or less. Parties can agree to submit other cases to arbitration with the approval of the judge. Arbitration is also required after a magistrate's order in small claims is appealed, if the case involves a claim for money. In all other cases, the court decides whether the case is eligible for arbitration when the complaint is first filed. N.C. GEN. STAT. § 7A-37.1 (2012); N.C. CT.-ORD. ARB. R. 2 (2012).

Class actions, cases involving injunctive relief, family law matters, real estate title actions, special proceedings, summary ejectments or collection on account cases (where that is the sole claim) are not eligible for arbitration. *Id.*

- 2) **Mandatory mediation.** The senior resident superior court judge of any participating district may order a mediated settlement conference for any superior court civil action pending in the district. N.C. GEN. STAT. § 7A-38.1 (2012). In civil actions involving a farm nuisance dispute, a farm resident or any other party are mandated to initiate mediation pursuant to N.C. GEN. STAT. § 7A-38.3(c) (2012).

**Service of Summons**

- A) **Upon person.** Service of process upon a natural person can occur by (1) delivering a copy of the summons and complaint to the natural person or by leaving copies at the

defendant's dwelling house or place of abode with a person of suitable age residing therein, (2) delivering a copy of the summons and complaint to an agent authorized by appointment or by law, (3) mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to the party to be served, (4) by depositing a copy of the summons and complaint with a designated delivery service authorized by 26 U.S.C. § 7502(f)(2), addressed to the party to be served, delivering to the addressee and obtaining a delivery receipt, (5) by mailing a copy of the summons and the complaint by signature confirmation as provided by USPS, addressed to the party to be served and delivering to the addressee. N.C. GEN. STAT. § 1A-1, R. 4(j)(1)(a)-(e) (2012).

- B) **Upon corporations.** Domestic corporations, domestic and foreign, can be served by (1) delivering a copy of the summons and the complaint to an officer, director, or managing agent of the corporation or by leaving copies thereof in the office of such officer, director, or managing agent with the person who is apparently in charge of the office, (2) delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to be served or to accept service of process or by serving process upon such agent or the party in a manner specified by any statute, (3) mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to the officer, director or agent to be served, (4) depositing with a designated delivery service authorized pursuant to 26 U.S.C. § 7502(f)(2) a copy of the summons and complaint, addressed to the officer, director, or agent to be served, delivering to the addressee, and obtaining a delivery receipt. N.C. GEN. STAT. § 1A-1, R. 4 (j)(6)(a)-(d)(2012).
- C) **Waiver.** There are no express provisions for waiver of service in the North Carolina Rules of Civil Procedure.
- D) **Person under disability.** Service of summons upon a natural person under disability can take place in two ways:
- a. Where the person under disability is a minor, process shall be served separately in any manner prescribed for service upon a natural person upon a parent or guardian having custody of the child, or if there is no parent or guardian, upon any other person having the care and control of the child. If there is no parent, guardian, or other person having care and control of the child when service is made upon the child, then service of process must also be made upon a guardian ad litem who has been appointed pursuant to Rule 17.
  - b. If the plaintiff actually knows that a person under disability is under guardianship of any kind, process shall be served separately upon his guardian in any manner applicable and appropriate under this Rule 4 (j). If the plaintiff does not actually know that a guardian has been appointed when service is made upon a person known to him to be incompetent to have charge of his affairs, then service of process must be made upon a guardian ad litem who has been appointed pursuant to Rule 17.

N.C. GEN. STAT. § 1A-1, R. 4 (j)(2)(2012).

- D) **The State.** Service upon the State is good by:

personally delivering a copy of the summons and of the complaint to the Attorney General or to a deputy or assistant attorney general; by mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to the Attorney General or to a deputy or assistant attorney general; or by depositing with a designated delivery service authorized pursuant to 26 U.S.C. § 7502(f)(2) a copy of the summons and complaint, addressed to the Attorney General or to a deputy or assistant attorney general, delivering to the addressee, and obtaining a delivery receipt.

N.C. GEN. STAT. § 1A-1, R. 4(j)(3)(2012).

E) **An agency of the State.** Service upon an agency of the State may occur by

personally delivering a copy of the summons and of the complaint to the process agent appointed by the agency in the manner hereinafter provided; by mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to said process agent; or by depositing with a designated delivery service authorized pursuant to 26 U.S.C. § 7502(f)(2) a copy of the summons and complaint, addressed to the process agent, delivering to the addressee, and obtaining a delivery receipt.

b. Every agency of the State shall appoint a process agent by filing with the Attorney General the name and address of an agent upon whom process may be served.

c. If any agency of the State fails to comply with paragraph b above, then service upon such agency may be made by personally delivering a copy of the summons and of the complaint to the Attorney General or to a deputy or assistant attorney general; by mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to the Attorney General, or to a deputy or assistant attorney general; or by depositing with a designated delivery service authorized pursuant to 26 U.S.C. § 7502(f)(2) a copy of the summons and complaint, addressed to the Attorney General or to a deputy or assistant attorney general, delivering to the addressee, and obtaining a delivery receipt.

N.C. GEN. STAT. § 1A-1, R. 4(j)(4) (2012).

F) **Counties, cities, towns, villages and other local public bodies.** Service is good upon local governments by:

a. Upon a city, town, or village by personally delivering a copy of the summons and of the complaint to its mayor, city manager or clerk; by mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to its mayor, city manager or clerk; or by depositing with a designated delivery service authorized pursuant to 26 U.S.C. § 7502(f)(2) a copy of the summons and complaint, addressed to the mayor, city manager, or clerk, delivering to the addressee, and obtaining a delivery receipt. As used in this sub-subdivision, "delivery receipt" includes an electronic or facsimile receipt.

b. Upon a county by personally delivering a copy of the summons and of the complaint to its county manager or to the chairman, clerk or any member of the board of commissioners for such county; by mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to its county manager or to the chairman, clerk, or any member of this board of commissioners for such county; or

by depositing with a designated delivery service authorized pursuant to 26 U.S.C. § 7502(f)(2) a copy of the summons and complaint, addressed to the county manager or to the chairman, clerk, or any member of the board of commissioners of that county, delivering to the addressee, and obtaining a delivery receipt. As used in this sub-subdivision, "delivery receipt" includes an electronic or facsimile receipt.

c. Upon any other political subdivision of the State, any county or city board of education, or other local public district, unit, or body of any kind (i) by personally delivering a copy of the summons and of the complaint to an officer or director thereof, (ii) by personally delivering a copy of the summons and of the complaint to an agent or attorney-in-fact authorized by appointment or by statute to be served or to accept service in its behalf, (iii) by mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to the officer, director, agent, or attorney-in-fact as specified in (i) and (ii), or (iv) by depositing with a designated delivery service authorized pursuant to 26 U.S.C. § 7502(f)(2) a copy of the summons and complaint, addressed to the officer, director, agent, or attorney-in-fact as specified in (i) and (ii), delivering to the addressee, and obtaining a delivery receipt. As used in this sub-subdivision, "delivery receipt" includes an electronic or facsimile receipt.

N.C. GEN. STAT. § 1A-1, R. 4(j)(5) (2012).

**G) Partnerships.** Service may be made upon a general or limited partnership by:

a. By delivering a copy of the summons and of the complaint to any general partner, or to any attorney-in-fact or agent authorized by appointment or by law to be served or to accept service of process in its behalf; by mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to any general partner, or to any attorney-in-fact or agent authorized by appointment or by law to be served or to accept service of process in its behalf; or by depositing with a designated delivery service authorized pursuant to 26 U.S.C. § 7502(f)(2) a copy of the summons and complaint, addressed to any general partner or to any attorney-in-fact or agent authorized by appointment or by law to be served or to accept service of process in its behalf, delivering to the addressee, and obtaining a delivery receipt; or by leaving copies thereof in the office of such general partner, attorney-in-fact or agent with the person who is apparently in charge of the office. As used in this sub-subdivision, "delivery receipt" includes an electronic or facsimile receipt.

b. If relief is sought against a partner specifically, a copy of the summons and of the complaint must be served on such partner as provided in Rule 4 (j)(1).

N.C. GEN. STAT. § 1A-1, R. 4(j)(7) (2012).

**H) Other unincorporated associations and their officers.** Service may be made upon any unincorporated association, organization, or society other than a partnership:

a. By delivering a copy of the summons and of the complaint to an officer, director, managing agent or member of the governing body of the unincorporated association, organization or society, or by leaving copies thereof in the office of such officer, director, managing agent or member of the governing body with the person who is apparently in charge of the office.

b. By delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to be served or to accept service of process or by serving process upon such agent or the party in a manner specified by any statute.

c. By mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to the officer, director, agent or member of the governing body to be served as specified in paragraphs a and b.

d. By depositing with a designated delivery service authorized pursuant to 26 U.S.C. § 7502, a copy of the summons and complaint, addressed to the officer, director, agent, or member of the governing body to be served as specified in paragraphs a. and b., delivering to the addressee, and obtaining a delivery receipt. As used in this subdivision, "delivery receipt" includes an electronic or facsimile receipt.

N.C. GEN. STAT. § 1A-1, R. 4(j)(8) (2012).

### **Statutes of Limitations and Repose**

- A) **Construction.** Actions to recover damages for breach of a contract to construct or repair an improvement to real property must be brought within six years. N.C. GEN. STAT. § 1-50(a)(5)(b)(1) (2012). In addition, unsafe conditions arising from the negligent construction or repair of an improvement to real property are also subject to a six year statute of limitations. N.C. GEN. STAT. § 1-50(a)(5)(b)(2) (2012).
- B) **Contract.** There is a three-year statute of limitations for an action upon a contract, obligation, or liability arising out of a contract, express or implied, except for actions against a local unit of government, actions to recover the penalty for usury and actions for damages on account of the death of a person caused by the wrongful act, neglect or fault of another under N.C. GEN. STAT. § 28A-18-2. N.C. GEN. STAT. §§ 1-52(1), -53.
- C) **Employment.** There is a three-year statute of limitations for actions upon a liability created by a state or federal statute. This limitation period applies to civil rights actions pursuant to 42 U.S.C. § 1981, 1983, and 1985 and Title VII employment discrimination claims. N.C. GEN. STAT. § 1-52(2) (2012); *see also Woodard v. N.C. Local Gov't Emps. Ret. Sys.*, 108 N.C. App. 110, 310 S.E.2d 783 (1984), *Chisholm v. U.S.P.S.*, 665 F.2d 482 (4th Cir. 1981).
- 1) Actions for wrongful discharge or demotion because of proceedings under the North Carolina Workers' Compensation Act must be brought within six months of discharge. N.C. GEN. STAT. § 1-55(3) (2012).
- D) **Fraud.** There is a three-year statute of limitation for an action for relief on the ground of fraud. N.C. GEN. STAT. § 1-52(9) (2012). The cause of action is not deemed to have accrued until discovery by the aggrieved party of the facts constituting the fraud or mistake or until the facts should have been discovered in the exercise of due diligence. *See Willets v. Willets*, 254 N.C. 136, 118 S.E.2d 548 (1961); *B-W Acceptance Corp. v. Spencer*, 268 N.C. 1, 72 S.E.2d 570 (1966).
- E) **Governmental entities.** An action against a local unit of government upon a contract, obligation, or liability arising out of a contract, express or implied, must be brought within two years. N.C. GEN. STAT. § 1-53 (2012).

- F) **Improvements to realty.** There is an elaborate limitations scheme governing improvements made to real property pursuant to N.C. GEN. STAT. § 1-50(5) (2012). The section provides a six year statute of repose for actions to recover damages based upon or arising out of a defective or unsafe condition of an improvement to real property. N.C. GEN. STAT. § 1-50(5) (2012). The statute of repose begins from the later of the specific last act or omission of the defendant giving rise to the cause of action or upon substantial completion of the improvement. *Barwick v. Celotex Corp.*, 736 F.2d 946 (4th Cir. 1984). The six-year statute of repose does not toll the three-year statute of limitation for contract and tort actions set forth in N.C. GEN. STAT. 1-52. *Oates v. JAG, Inc.*, 314 N.C. 276, 577 S.E.2d 168 (2003).
- G) **Personal injury.** There is a three year statute of limitations for recovery for personal injury or property damage negligently inflicted. N.C. GEN. STAT. § 1-52(16) (2012). Any actions to recover damages for personal injuries caused by unsafe conditions arising from the negligent construction or repair of an improvement to real property are also subject to a six year statute of repose. N.C. GEN. STAT. § 1-50(a)(5)(b)(3) (2012).
- I) **Professional Liability.** Claims for professional liability or professional malpractice must be filed within three years. N.C. GEN. STAT. § 1-15(c) (2012). Unlike other claims for negligence,

a cause of action for professional malpractice arising out of the performance of or failure to perform professional services accrues at the time of the occurrence of the last act of the defendant giving rise to the claim. In no event shall an action be commenced more than four years from the last act, except in cases of a foreign object left in the body, in which case the action must be commenced within one year.

*See* N.C. GEN. STAT. § 1-15 (2012); *Flippin v. Jarrell*, 301 N.C. 108, 270 S.E.2d 482 (1980).

- J) **Tolling.** In North Carolina, the statutes of limitation run uninterrupted unless tolled or delayed by some disability, incapacity, or other occurrence beyond the control of the parties. A person who is insane, incompetent, or a minor may bring his action within the time limitation prescribed for each cause of action after the disability is removed. N.C. GEN. STAT. § 1-17(a) (2012).
- K) **Wrongful Death.** There is a two-year statute of limitation for an action for damages on account of the death of a person caused by a wrongful act, neglect, or fault of another. The cause of action does not accrue until the date of death. N.C. GEN. STAT. §§ 1-53(4), 28A-18-2 (2012).

## Venue Rules

- A) Generally, actions must be tried in the county in which any of the plaintiffs or defendants reside at its commencement, or if none of the defendants reside in the State, then in the county in which any plaintiff resides; and if none of the parties reside in the State, then the action may be tried in any county which the plaintiff designates in his summons and

complaint, subject to the power of the court to change the place of trial. N.C. GEN. STAT. § 1-82 (2012).

B) Specifically, actions for the following causes must be tried in the county in which the subject of the action, or some part thereof, is situated:

- 1) The recovery of real property, an estate or interest therein, or for determination in any form of such right or interest therein, or for injuries to real property;
- 2) Partition of real property,
- 3) Foreclosure of a mortgage of real property,
- 4) Recovery of personal property when the recovery of the property itself is the sole or primary relief demanded.

N.C. GEN. STAT. § 1-76 (2012).

C) In actions involving (1) the recovery of a penalty or forfeiture or (2) an action against a public officer or a person especially appointed to execute his duties, the action must be tried in the county where the cause or some part thereof, arose. N.C. GEN. STAT. § 1-77 (2012).

D) All actions against executors and administrators in their official capacity and all actions upon official bonds must be instituted in the county where the bonds were given. N.C. GEN. STAT. § 1-78 (2012).

E) For the purpose of suing and being sued the residence of a domestic corporation, limited partnership, limited liability company, or registered limited liability partnership is: (1) where the registered or principal office of the corporation, partnership, or company is located, (2) where the corporation, partnership or company maintains a place of business, (3) if no registered or principal office exists, and no place of business is currently maintained or can be reasonably found, the term “residence” shall include the place where the corporation, partnership, or company is regularly engaged in business. N.C. GEN. STAT. § 1-79 (2012).

F) **Change of venue.** If the county designated for that purpose in the summons and complaint is not the proper one, the action may still be tried in the named county unless the defendant demands in writing that the trial be conducted in the proper county. N.C. GEN. STAT. § 1-83 (2012).

G) The court may change the place of trial in the following cases:

- 1) When the county designated for that purpose is not the proper one.
- 2) When the convenience of witnesses and the ends of justice would be promoted with the change.

- 3) When the judge has, at any time, been interested as party or counsel.
- 4) When motion is made by the plaintiff and the action is for divorce and the defendant has not been personally served with summons.

*Id.*

## **NEGLIGENCE**

### **Comparative Fault/Contributory Negligence**

Contributory negligence is a complete defense. Upon a finding of contributory negligence, a plaintiff may not recover in a personal injury action unless the defendant's negligence is willful or wanton (gross negligence). *Yancey v. Lea*, 354 N.C. 48, 51, 550 S.E.2d 155, 157 (2001). Comparative fault is not the law in North Carolina. *Cashatt v. Asheville Seed Co.*, 202 N.C. 383, 385, 162 S.E.2d 893, 894 (1932). Contributory negligence is the plaintiff's own negligence that occurs simultaneously or successively with the defendant's negligence to cause the plaintiff's injury. *Harvey v. Stokes*, 137 N.C. App. 119, 120, 527 S.E.2d 336, 337 (2000). A plaintiff is contributorily negligent when he fails to use ordinary care or such care that an ordinarily prudent person would exercise under similar circumstances. *Benton v. Hillcrest Foods, Inc.*, 136 N.C. App. 42, 48, 524 S.E.2d 53, 58 (1999).

### **Exclusive Remedy – Workers' Compensation Protections**

If the Workers' Compensation Act applies to an injury, the rights and remedies included in the Act shall exclude all other rights and remedies against the employer. N.C. GEN. STAT. § 97-10.1 (2012). The exceptions to the rule of exclusivity are in actions against fellow employees involving willful, wanton, and reckless negligence, and actions against the employer if the employer's conduct was substantially certain to result in serious injury and was tantamount to an intentional tort. *Pleasant v. Johnson*, 312 N.C. 710, 716, 325 S.E.2d 222, 249 (1991); *Woodson v. Rowland*, 329 N.C. 330, 407 S.E.2d 222 (1991).

### **Indemnification**

Indemnification involves shifting the entire liability between tortfeasors. Indemnity can arise by contract or by way of vicarious liability. Contracts of indemnity are favored above contracts that wholly excuse liability. *Cooper v. Owsley & Son, Inc.*, 43 N.C. App. 261, 266, 258 S.E.2d 842, 845 (1979).

### **Joint and Several Liability**

Where two or more tortfeasors unite to cause an indivisible injury, each tortfeasor is jointly and severally liable for the injury. Each tortfeasor is liable in full for the entire damage. The satisfaction of judgment against one tortfeasor discharges the other tortfeasor but does not eliminate a right to contribution held by the tortfeasor found liable to the claimant. N.C. GEN. STAT. § 1B-3(e) (2012).

## **Strict Liability**

- A) **Animals.** North Carolina imposes strict liability on owners for injuries caused by possessing wild animals or vicious domestic animals. N.C. GEN. STAT. § 67-4.4 (2012).
- B) **Minors.** The parent or parents of a minor who maliciously or willfully injures another person or property is held strictly liable for damages up to two thousand dollars. N.C. GEN. STAT. § 1-538.1 (2012).
- C) **Products liability.** There is no strict liability in North Carolina for product liability actions. N.C. GEN. STAT. § 99B-1.1 (2012).

## **Willful and Wanton Conduct**

Willful and wanton conduct is more than gross negligence. It means the intentional disregard of the rights and safety of others through conduct that one either knows or should know is likely to cause harm. N.C. GEN. STAT. § 1D-5 (2012). An act is willful when it is done in deliberate violation of the law or with a deliberate purpose not to discharge a duty owed to another by law or contract. *Yancey v. Lea*, 354 N.C. 48, 52-53, 550 S.E.2d 155, 157-58 (2001).

## **DISCOVERY**

### **Electronic Discovery Rules**

N.C. GEN. STAT. § 1A-1, R. 26 (2012) defines “electronically stored information” (ESI) to include “reasonably accessible metadata that will enable the discovering party to have the ability to access such information as the date sent, date received, author and recipients.” ESI does not include other metadata unless the parties agree otherwise or the court orders otherwise upon motion of a party and a showing of good cause for the production of certain metadata. Under Rule 34, a party requesting discovery can specify a particular form for the production of ESI. If the producing party objects to the requested form or forms, it must state its objection in writing and indicate the form it intends to use. Absent agreement among the parties or a court order, the ESI must be produced in a reasonably usable form or forms; however, the ESI need not be produced in more than one form. N.C. GEN. STAT. § 1A-1, R. 26 (2012); N.C. GEN. STAT. § 1A-1, R. 34 (2012).

### **Expert Witnesses**

Testimony by expert witnesses is governed by N.C. GEN. STAT. § 8C-1, R. 701-705 (2012), which generally track the Federal Rules of Evidence. Discovery of facts and opinions held by experts retained in anticipation of litigation may be obtained only through: (1) interrogatories requiring the other party to identify each person who will or may be called as an expert witness, the subject matter of the expected testimony, and the substance of the facts and opinions; or (2) a court order requiring discovery of expected expert testimony by other means on motion. This is subject only to the scope of discovery and provisions regarding appropriate expenses. N.C. GEN. STAT. § 1A-1, R. 26(b)(4) (2012). The court may require the party seeking discovery to pay the

expert a reasonable fee for his time. N.C. GEN. STAT. § 1A-1, R. 26(b)(4)b (2012). In 2011, the North Carolina General Assembly revised North Carolina Evidence Rule 702(a) to impose restrictions on the admissibility of expert testimony. Expert testimony under N.C. R. EVID. 702(a) is allowed only if: (1) the testimony is based on sufficient facts or data; (2) the testimony is the product of reliable principles or methods; and (3) the witness has applied the principles and methods reliably to the facts of case.

### **Non-Party Discovery**

In order to obtain oral or written depositions of non-parties, a subpoena must be issued from the county in which the action is pending. N.C. GEN. STAT. § 1A-1, R. 30(a), 45(a) (2012). An independent action may be undertaken to request production of documents or entry onto the land of a non-party, and a subpoena duces tecum may require the non-party to produce documents for inspection and copying N.C. GEN. STAT. § 1A-1, R. 34(c), 45 (2012). No other discovery methods may be utilized against non-parties in North Carolina.

### **Privileges**

A) **Attorney-client privilege.** The attorney-client privilege is absolute in discovery matters. The privilege exists if

- (1) the relation of attorney and client existed at the time the communication was made,
- (2) the communication was made in confidence, (3) the communication relates to a matter about which the attorney was professionally consulted, (4) the communication was made in the course of giving or seeking legal advice for a proper purpose although litigation need not be contemplated, and (5) the client has not waived the privilege.

*Miles v. Martin*, 147 N.C. App. 255, 259, 555 S.E.2d 361, 364 (2001) (internal citations omitted).

B) **Statements.** A party or person not a party may obtain his own previously-made statement without a showing of need or hardship if the statement was given in writing or if the oral statement was recorded or a substantially verbatim transcription was made. N.C. GEN. STAT. § 1A-1, R. 26(b)(3) (2012).

C) **Documents.** Documents and tangible things prepared in anticipation of litigation may not be discovered except on a showing of substantial need and inability to obtain the substantial equivalent by other means without undue hardship. *Id.* If such a showing is made, the court must not allow disclosure of the mental impressions, conclusions, opinions, or legal theories of the attorney or representative of the party in the litigation.

### **Requests to Admit**

A) Requests to admit may be served by any party on any other party in order to establish opinions of fact, application of law to fact, or authenticity of any documents described. Leave of court is not required to serve requests to admit. N.C. GEN. STAT. § 1A-1, R. 36(a) (2012).

- B) **Objections.** An objection to any request must include the reason for objecting. A denial must meet the substance of the request, but the respondent may admit in part and deny in part. If the respondent does not answer within thirty days of service of the request, the matter is deemed admitted. *Id.* If the respondent lacks knowledge as to the truth of a request, the respondent must also state that reasonable inquiry was made. *WXQR Marine Broad. Corp. v. JAI, Inc.*, 83 N.C. App. 520, 521-22, 350 S.E.2d 912, 913-14 (1986).

## **EVIDENCE, PROOFS & TRIAL ISSUES**

### **Accident Reconstruction**

A qualified expert may testify, generally, about how an accident happened. A qualified reconstruction expert who has performed an accident reconstruction can, for example, give his opinion on the speed of a vehicle in the accident. N.C. GEN. STAT. § 8C-1, R. 702(i) (2012).

### **Appeal**

An objection to the admission of evidence must be made in a timely manner in order to preserve an error for appeal. N.C. GEN. STAT. § 8C-1, R. 103 (2012).

### **Biomechanical Testimony**

Under N.C. R. EVID. 702 (2012), if scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise, if: (1) the testimony is based on sufficient facts or data; (2) the testimony is the product of reliable principles or methods; and (3) the witness has applied the principles and methods reliably to the facts of case.

### **Collateral Source Rule**

North Carolina recognizes the collateral source rule, which prohibits the admission of evidence that an injured party's damages will be compensated through a source other than the defendant. *Coats v. Wilson*, 321 N.C. 1, 361 S.E.2d 734 (1987). However, under Rule 414, evidence offered by plaintiff to prove past medical expenses is limited to evidence of the amounts actually paid to satisfy the bills that have been satisfied, regardless of the source of payment and evidence of the amounts actually necessary to satisfy the bills that have been incurred by not yet satisfied. N.C. GEN. STAT. § 8C-1, R. 414 (2012).

### **Convictions**

- A) **Not admissible for character.** Evidence of prior crimes is not admissible to show character or propensity to commit the crime. However, it may be admitted for other purposes, such as to show "motive, opportunity, intent, preparation, plan, knowledge,

identity, or absence of mistake, entrapment or accident.” N.C. GEN. STAT. § 8C-1, R. 404(b) (2012).

- B) **Credibility.** Evidence of a conviction may be used to attack the credibility of a witness, but only if the crime was a felony or Class A1, Class 1, or Class 2 misdemeanor within the past ten years. N.C. GEN. STAT. § 8C-1, R. 609(a), (b) (2012). Crimes older than ten years may be admitted if the court decides the probative value substantially outweighs the prejudicial effect and the adverse party is given written notice of the use of the evidence ahead of time. N.C. GEN. STAT. § 8C-1, R. 609(b) (2012). There is no requirement that the crime be relevant to truthfulness. Juvenile adjudications are generally inadmissible. N.C. GEN. STAT. § 8C-1, R. 609(d) (2012).

### **Day in the Life Videos**

“Day in the Life” videos are admissible to illustrate a witness’s testimony. However, the court will examine its authenticity, relevancy and competency and give the jury a limiting instruction to only consider the video for illustrative purposes. *Campbell v. Pitt Cnty. Mem’l Hosp., Inc.*, 84 N.C. App. 314, 352 S.E.2d 902 (1987) (overruled on other grounds by *Johnson v. Ruark Obstetrics & Gynecology, Assocs., P.A.*, 327 N.C. 283, 395 S.E.2d 85 (1990)).

### **Dead Man’s Statute**

An interested party is incompetent to testify about oral communications with a deceased person when the opposing party is the deceased’s representative, survivor or successor in interest. The major exceptions to the rule are when the testimony relates to the identity of the driver of a vehicle or when the deceased’s counsel “opens the door” by giving evidence of the subject matter of the communication. N.C. GEN. STAT. § 8C-1, R. 601(c) (2012).

### **Medical Bills**

Generally, a plaintiff’s medical bills are admissible regardless of the fact that they may have been paid by a third party. Evidence of an offer to pay medical bills is not admissible to prove liability. N.C. GEN. STAT. § 8C-1, R. 409 (2012).

### **Offers of Judgment**

An offer of judgment may be made any time more than ten days prior to trial. If the judgment obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the offer was made. If an offer of judgment is not accepted, evidence of the offer is inadmissible except for the purpose of determining costs. N.C. GEN. STAT. § 1A-1, R. 68(a) (2012). The rule involves shifting the burden of costs, but not attorneys’ fees.

### **Offers of Proof**

If there is a ruling excluding evidence, an offer of proof must be made in order to preserve error for appeal. Once a definitive ruling is made, there is no need to renew the offer of proof. Offers of proof should not be made within earshot of the jury. N.C. GEN. STAT. § 8C-1, R. 103 (2012).

### **Prior Accidents**

The general rule is that evidence regarding a driver's prior accidents is not admissible. *Mason v. Gillikin*, 256 N.C. 527, 532, 124 S.E.2d 537, 540 (1962). However, evidence regarding prior accidents may be admitted to show whether the prior or later accident caused the injuries in question. See *Fisher v. Thompson*, 50 N.C. App. 724, 730, 275 S.E.2d 507, 512-13 (1981).

### **Relationship to the Federal Rules of Evidence**

The North Carolina Rules of Evidence are patterned after the Federal Rules of Evidence, but are not identical to them. Some topics, such as privilege, are not included in the North Carolina Rules of Evidence, but are governed by other statutes. KENNETH S. BROUN, BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE §2 (6th ed. 2004).

### **Seat Belt and Helmet Use Admissibility**

Evidence of failure to wear a seat belt is generally inadmissible. N.C. GEN STAT. § 20-135.2A(d) (2012).

### **Spoliation**

Destroying evidence may create an inference of wrongdoing. KENNETH S. BROUN, BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE § 60 (6th ed. 2004). Generally, the party seeking the adverse inference must show that the alleged spoliator was on notice of the claim at the time of destruction. *McLain v. Taco Bell Corp.*, 137 N.C. App. 179, 527 S.E.2d 712 (2000).

### **Subsequent Remedial Measures**

Evidence of subsequent remedial measures is not admissible to show negligence or culpability after an accident. However, it is admissible for other purposes, including showing ownership, control, feasibility of precautionary measures, or for impeachment. N.C. GEN. STAT. § 8C-1, R. 407 (2012).

### **Use of Photographs**

Photographs are admissible as evidence, either as substantive evidence, such as a photograph of the murder weapon or the victim's clothes, or to illustrate a witness's testimony. KENNETH S. BROUN, BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE § 249 (6th ed. 2004). Photographs used as demonstrative evidence must be identified as sufficiently accurate. *Id.* at § 252. They may be excluded, however, if the subject of the photograph has changed since the time of the photo, or if the judge decides they are excessively gruesome. *Id.*

## DAMAGES

### **Caps on Damages**

N.C. GEN. STAT. § 1D-25 (2012) limits punitive damages to three times the amount of compensatory damages or \$250,000, whichever is greater.

N.C. GEN. STAT. § 90-21.19 (2012) caps an award of noneconomic damages in medical malpractice cases at \$500,000 unless the trier of fact finds: 1) the plaintiff suffered disfigurement, loss of use of part of the body, permanent injury or death; and 2) the defendant's acts were committed in reckless disregard of the rights of others, grossly negligent, fraudulent, intentional or with malice.

### **Available Items of Personal Injury Damages**

- A) **Past medical bills.** Medical bills ordinarily are proper elements of damages in a tort action. *Jyachosky v. Wensil*, 240 N.C. 217, 81 S.E.2d 644 (1954). The plaintiff has the burden of proving that the medical attention received was reasonably necessary and that charges for the medical attention were reasonable. *Ward v. Wentz*, 20 N.C. App. 229, 201 S.E.2d 194 (1973).
- B) **Future medical bills.** A plaintiff is entitled to recover for future medical expenses upon a showing that they are reasonable and necessary. *Dickson v. Queen City Coach Co.*, 233 N.C. 167, 63 S.E.2d 297 (1951).
- C) **Hedonic damages.** Loss of enjoyment of life damages are generally not allowed in the state of North Carolina in wrongful death cases. *Livingston v. United States*, 817 F. Supp. 601 (E.D.N.C. 1993).
- D) **Disfigurement.** A person whose negligence proximately causes injury to another ordinarily is liable for all damages naturally and proximately resulting from the negligent act, including scars and disfigurement. *Heath v. Kirkman*, 240 N.C. 303, 82 S.E.2d 104 (1954).
- E) **Loss of normal life.** North Carolina does not recognize the claim of loss of normal life damages.
- F) **Disability.** Damages for personal injury include compensation for loss of earnings, which includes consideration of the effect of the plaintiff's disability or disfigurement on his earning capacity. N.C.P.I.—Civil 810.06 Personal Injury Damages—Loss of Earnings. Damages for personal injury also include fair compensation for the loss of use of a part of the body. There is no fixed formula for placing a value on the loss of use of part of the body, but the jury may consider the extent of the disability and any inconvenience or hardship. N.C.P.I.—Civil 810.12 Personal Injury Damages—Loss (of Use) of Part of the Body.

- G) **Past pain and suffering.** Damages for past pain and suffering are allowed. A plaintiff may make a per diem argument as to damages for pain and suffering if there is evidence of continuous pain. A per diem argument is for the jury to award damages for pain and suffering at a certain rate per day, hour, or minute of pain and suffering. *Thompson v. Kyles*, 48 N.C. App. 422, 269 S.E.2d 231 (1980). For a per diem argument the plaintiff's attorney must show evidence that the plaintiff was injured by the defendant's negligence and that the pain and suffering was continuous until the date of trial. *Weeks v. Holsclaw*, 55 N.C. App. 335, 285 S.E.2d 321 (1982).
- H) **Future pain and suffering.** Damages for future pain and suffering are allowed. In order to make a per diem argument for future pain and suffering, the plaintiff must have an expert opinion concerning the permanency of his or her injury. *See id.*
- I) **Loss of society (loss of consortium).**
- 1) Consortium includes service, society, companionship, sexual gratification and affection. *Nicholson v. Hugh Chatham Mem'l Hosp., Inc.*, 300 N.C. 295, 266 S.E.2d 818 (1980). Either spouse may sue for loss of consortium due to torts by third parties. *Bishop v. Glazener*, 245 N.C. 592, 96 S.E.2d 870 (1957) (husband); *Knighten v. McClain*, 227 N.C. 682, 44 S.E.2d 79 (1947) (wife).
  - 2) **Joinder.** Loss of consortium must be joined with any suit the other spouse may have filed to recover for his or her personal injuries. *Nicholson v. Hugh Chatham Mem'l Hosp., Inc.*, 300 N.C. 295, 266 S.E.2d 818 (1980).
  - 3) **Parental consortium.** North Carolina does not recognize the claim of loss of parental consortium by a child against one that has been alleged to have negligently injured the parent. *Vaughn v. Clarkson*, 324 N.C. 108, 376 S.E.2d 236 (1989).
- J) **Lost income, wages, earnings.**
- 1) A plaintiff who receives personal injuries from negligence is entitled to the present value of all damages sustained because of the tort, including inability to perform ordinary labor or loss of capacity to earn money. *Smith v. Corsat*, 260 N.C. 92, 131 S.E.2d 894 (1963).
  - 2) **Present value.** If the personal injuries from negligence result in a diminished earning capacity, the measure of recovery is the reasonable present value of the diminution in his earning capacity and not the difference between the probable earnings of the plaintiff before and after injury. *Johnson v. Seaboard Air Line Ry. Co.*, 163 N.C. 431, 79 S.E. 690 (1913).

## Mitigation

The plaintiff has a duty to minimize the loss occasioned by the defendant's fault. The failure to mitigate damages does not bar all recovery, but does bar recovery for losses which could have been prevented through the plaintiff's reasonable efforts. *Miller v. Miller*, 273 N.C. 228, 160 S.E.2d 65 (1968).

### **Punitive Damages**

- A) Punitive damages may be awarded only if the plaintiff proves that the defendant is liable for compensatory damages and that fraud, malice, or willful or wanton conduct was present and related to the injury for which the compensatory damages were awarded. The plaintiff must prove the existence of fraud, malice, or willful or wanton conduct by clear and convincing evidence. N.C. GEN. STAT. § 1D-15 (2012).
- B) **Actual participation.** Punitive damages may only be awarded against a defendant who actually participated in the conduct constituting the aggravating factor giving rise to the punitive damages. *Id.* Punitive damages will not be awarded against a defendant solely on the basis of vicarious liability. With respect to a corporation, punitive damages will only be awarded upon a showing that its officers, directors or managers participated in or condoned the behavior giving rise to the punitive claim. *Id.*
- C) **Insurability.** Punitive damages are insurable, unless the insurance policy has an express exclusion for punitive damages. *Mazza v. Med. Mut. Ins. Co. of N.C.*, 311 N.C. 621, 319 S.E.2d 217 (1984).
- D) **Amount.** The trier of fact shall determine the amount of punitive damages separately from the amount of compensation for all other damages. Punitive damages awarded against a defendant shall not exceed three times the amount of compensatory damages or two hundred fifty thousand dollars (\$250,000), whichever is greater. N.C. GEN. STAT. § 1D-25 (2012). Where a defendant is convicted of driving while impaired, the limitations on punitive damages do not apply. N.C. GEN. STAT. § 1D-26 (2012).

### **Recovery and Pre- and Post-Judgment Interest**

- A) **Actions on Contracts.** In an action for breach of contract the amount awarded on the contract bears interest from the date of breach. The fact finder shall distinguish the principal from the interest in the award and the judgment shall provide that the principle bears interest until the judgment is satisfied. The interest shall be at the legal rate unless the parties agreed in the contract that the contract rate shall apply after judgment. N.C. GEN. STAT. § 24-5 (2012).
- B) **Other Actions.** In an action other than contract, any portion of a judgment designated as compensatory damages bears interest from the date the action commenced until the judgment is satisfied, with interest calculated at the legal rate. *Id.*

### **Recovery of Attorneys' Fees**

- A) The general rule is that attorneys' fees incurred by the plaintiff are not recoverable as an item of damages, either in a contract or tort claim unless there is a statutory or contractual obligation. *Yeargin Const. Co., Inc. v. Futren Dev. Corp.*, 29 N.C. App. 731, 225 S.E.2d 623 (1976).
- B) In a personal injury, property damage suit or suit against an insurance company in which the insured or beneficiary is the plaintiff, upon findings by the court that there was an unwarranted refusal to negotiate or pay the claim by the defendant, that the amount of damages recovered is twenty thousand or less and the amount of damages recovered exceeds the highest offer made by the defendant no later than ninety days before the trial, the presiding judge may tax the defendant with attorneys' fees as part of the court costs. N.C. GEN. STAT. § 6-21.1 (2012).

### **Taxation of Costs**

Costs are taxed as a matter of course in favor of the prevailing party in certain kinds of cases such as actions for recovery of real property, actions to recover the possession of personal property, and actions for assault, battery, false imprisonment, libel, slander, malicious prosecution and criminal conversation. N.C. GEN. STAT. §§ 6-18, -19 (2012). In all other cases costs may be allowed in the discretion of the court. N.C. GEN. STAT. § 6-20 (2012).

### **Other Damages Issues**

- A) **Economic loss rule.** North Carolina courts recognize an economic loss rule, which states that purely economic losses are not recoverable under tort law. *Chicopee, Inc. v. Sims Metal Works, Inc.*, 98 N.C. App. 423, 391 S.E.2d 211 (1990). The premise is that the rule bars product liability claims that involve solely economic loss and no personal injury or damage to property other than the product that fails to meet expectations. *Reece v. Homette Corp.*, 110 N.C. App. 462, 429 S.E.2d 768 (1993).
- B) **Bifurcation.** N.C. GEN. STAT. § 1A-1, R. 42(b)(3) (2012) provides that upon the motion of any party in an action in tort wherein the plaintiff seeks damages exceeding one hundred fifty thousand dollars (\$150,000), the court shall order separate trials for the issue of liability and the issue of damages, unless the court for good cause shown orders a single trial.

**This Compendium outline contains a brief overview of certain laws concerning various litigation and legal topics. The compendium provides a simple synopsis of current law and is not intended to explore lengthy analysis of legal issues. This compendium is provided for general information and educational purposes only. It does not solicit, establish, or continue an attorney-client relationship with any attorney or law firm identified as an author, editor or contributor. The contents should not be construed as legal advice or opinion. While every effort has been made to be accurate, the contents should not be relied upon in any specific factual situation. These materials are not intended to provide legal advice or to cover all laws or regulations that may be applicable to a specific factual situation. If you have matters or questions to be resolved for which legal advice may be**

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