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CRANFILL, SUMNER & HARTZOG, L.L.P.

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# Litigation

forum

**LITIGATION FORUM** is an informational newsletter provided regularly by the law firm of **CRANFILL, SUMNER AND HARTZOG, L.L.P.** It is designed to provide helpful and current information in all areas of our practice, which include general liability litigation, workers compensation, medical & professional malpractice, employment law, business/commercial litigation, insurance coverage law, construction law, products liability, appellate litigation, education law, and a variety of other areas related to civil litigation. Obviously, only a limited amount of information can be given within the confines of a short newsletter, so if further information is needed, or if there are any questions, please contact any of our attorneys in Raleigh, Charlotte or Wilmington.

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## ► Medical Malpractice

Expert Testimony On The Standard Of Care:  
 "Same Or Similar" Community Requirement

By Ginger B. Hunsucker

A medical malpractice action can be won or lost based on testimony (or lack thereof) by experts. Thus, it is vital to know the specific requirements for medical malpractice expert testimony in North Carolina. One such requirement is embodied in North Carolina General Statute § 90-21.12, providing that an expert who will testify to the standard of care must be familiar "with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar

communities at the time of the alleged act giving rise to the cause of action." N.C. Gen. Stat. § 90-21.12.

• **In General.** "In a medical malpractice action, a plaintiff must show (1) the applicable standard of care; (2) a breach of such standard of care by the defendant; (3) the injuries suffered by the plaintiff were proximately caused by such breach; and (4) the damages resulting to the plaintiff." *Smith v. Whitmer*, 159 N.C. App. 192, 195, 582 S.E.2d 669, 671 (2003). As questions regarding the standard of care for health care professionals ordinarily require highly specialized knowledge, a plaintiff must establish the relevant standard of care through expert testimony. *Id.* at 195, 582 S.E.2d at 672.

North Carolina has specifically rejected the application of a general or national standard of care for even a "highly trained and certified specialist." *Thompson v. Lockert*, 34 N.C. App. 1, 4-5, 237 S.E.2d 259, 261 (1977) (rejecting an argument that the proper standard of care should be dictated by the standard of care customary among orthopedic surgeons who are Diplomates of the American Board of Orthopedic Surgeons, regardless of the nature of the community of practice). Rather, North Carolina General Statute § 90-21.12 sets forth the appropriate standard of care in a medical malpractice action.

By the adoption of North Carolina General Statute § 90-21.12, it was the intent of the General Assembly to avoid the adoption of a national or

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## CRANFILL, SUMNER & HARTZOG PARTNER PATRICIA HOLLAND NAMED TO "LEGAL ELITE"

Patricia Holland, a partner with the Cranfill, Sumner & Hartzog law firm, has been named one of North Carolina's "Legal Elite" in the field of employment law by Business North Carolina magazine. Holland was among fewer than 3 percent of the state's lawyers selected for recognition by their peers in the magazine's annual ranking of the state's best attorneys. This is Holland's fourth consecutive year of recognition as a "Legal Elite" in the field of employment law.

To develop the list, the magazine mailed nearly 17,000 ballots to every lawyer licensed by the State Bar living in North Carolina. Each lawyer was asked to vote for the best practitioner in 12 areas of law most closely related to business. Nearly 1,600 lawyers received votes, but only one-quarter of those received enough to be honored as a "Legal Elite."

Holland is Managing Partner of the firm's Employment Practices Group and specializes in the representation of private and public sector management in employment litigation and other employment-related matters. Her areas of concentration in the field of employment law include employment discrimination litigation, sexual harassment litigation and the defense of municipalities in employment and con-

stitutional tort matters. She also a mediator certified by the North Carolina Dispute Resolution Commission, and serves as a mediator in employment-related matters. Holland is a member of the American Board of Trial Advocates ("ABOTA") and is a Master Level member and former President of the Susie M. Sharp Inn of Court. She is also a member of the International Municipal Lawyers Association, the Government & Public Sector Section of the North Carolina Bar Association and the Employment Law Committee of the Defense Research Institute ("DRI").

Holland is also a member of the North Carolina Association of Defense Attorneys and served on its Board of Directors from 2000 to 2003. As a member of the Wake County Bar Association, she has served two terms on its Board of Directors.

Holland is a 1976 cum laude graduate of Wittenberg University in Springfield, Ohio. She was admitted to the Bar in 1979 after earning her law degree from Wake Forest University. Holland is a former Assistant United States Attorney for the Eastern District of North Carolina. She has been a State Bar Councilor since 2002 and is a member of the North Carolina State Bar Grievance, Justice and Administrative Committees.

## ► Employment Law

### VIOLENCE IN THE WORKPLACE

#### The North Carolina Workplace Violence Prevention Act

The North Carolina Workplace Violence Prevention Act, N.C. Gen. Stat. § 95-260 *et seq.*, became effective on December 1, 2004. The new law allows an employer to obtain a protective order, similar to a domestic violence order, to prevent potentially violent individuals from harassing employees in the workplace.

The new law enables an employer to obtain a “*civil no-contact order*” on behalf of an employee who has been the victim of “*unlawful conduct*” at the employer’s workplace. The law is designed to protect employees from “*unlawful conduct*” which could be or has been carried out at the workplace. “*Unlawful conduct*” is defined to include: attempts to cause bodily injury; intentionally causing bodily injury; stalking (as defined by the criminal statute); and willfully threatening bodily injury in a manner that would cause a reasonable person to believe that the threat is likely to be carried out.

The purpose of the new law is to allow employers to better protect an employee in the workplace. Now, any **employer**, acting on behalf of a victim-employee, can take court action to obtain a civil no-contact order to prevent further or threatened “unlawful conduct” at the employer’s workplace. Employers may obtain a no-contact order by filing anew action in district court in the county where the “unlawful conduct” took place, or by filing a motion for a no-contact order in any existing civil action. The new law does not replace or supersede any current statutes and it does not limit the ability of the employer or the victim-employee to simultaneously pursue any other civil or criminal remedies which might also be available.

A “*temporary no-contact order*” can be issued *ex parte* and without notice to the wrongdoer. A “*temporary no-contact order*” is good for ten (10) days. After a “*temporary no-contact order*” is obtained, the employer may request that the court enter a “*permanent no-contact order*”. A “*permanent no-contact order*” can be effective for up to one year from the time of issuance.

Both temporary and permanent no-contact orders can provide various forms of relief, including: ordering the aggressor not to visit, assault, molest, or interfere with the employer or the employer’s employee at the workplace; ordering the aggressor to cease contacting, stalking, and/or harassing the employee at the employer’s workplace; ordering the aggressor not to abuse or injure the employee at the employer’s workplace; and ordering any “other relief deemed necessary and appropriate by the court.” Violations of these orders are punishable as contempt and can result in a fine or imprisonment.

The law requires the employer to consult with the victim-employee prior to requesting the “*no-contact order*” in order to determine whether obtaining such an order would increase the employee’s safety concerns. A victim-employee who does not want to participate in the process or obtain a “*no-contact order*” cannot be disciplined or penalized for not participating.

As we begin to see more and more incidents of workplace violence, it is important that employers understand all of the options currently available to employers -including the options this new law provides. Although the new law states that it does not “expand, diminish, alter, or modify any duty of any employer to provide a safe workplace for employees and other persons,” employers would be well served to consider the benefits of offering assistance in obtaining such order on behalf of victim-employees. Regularly advising victim-employees of this option allows employers to more readily assert that they are committed to protecting their employees and to preventing violence in the workplace. ■

## ► Appellate Litigation

Cranfill, Sumner & Hartzog, LLP’s *Appellate Law Practice Group* is experienced, effective and efficient at handling all types of civil appeals. The Group has extensive experience with every stage of an appeal and with appeals in both State and Federal Court. The Group regularly handles Record on Appeal preparation, appellate motions, oral arguments and written submissions to the appellate courts. These written submissions include appellate briefs, petitions for discretionary review, writs and amicus briefs. The Group is also knowledgeable about the North Carolina Rules of Appellate Procedure and carefully monitors changes to these Rules.

The Group is experienced in handling appeals at the North Carolina Supreme Court, the North Carolina Court of Appeals, the North Carolina Industrial Commission and the Fourth Circuit of the United States Court of Appeals. The Group is also accomplished in handling oral arguments at each of these jurisdictions. Additionally, The Group is comprised of attorneys that are experienced litigators who maintain litigation practices in addition to their appellate work, so they have first hand experience with the appellate issues raised at the trial court level and the need to build a record on appeal. These appellate attorneys regularly handle hearings, discovery and trials in their litigation practices.

The attorneys who comprise the *Appellate Law Practice Group* have forty years of combined experience in the areas of appellate law and litigation. The attorneys in The Group have clerked for a total of five appellate court judges, both at the North Carolina Supreme Court and the North Carolina Court of Appeals, and are familiar with the judges, staff and procedures of the appellate courts. Many of The Group had extensive research and writing experience as early as law school, when they served as teaching assistants for the Research and Writing Programs at their respective law schools or worked on journals at their law schools.

In addition to the five experienced appellate attorneys, The Group also has a full-time appellate paralegal who worked at the North Carolina Court of Appeals for fourteen years prior to coming to Cranfill, Sumner & Hartzog. She has experience in Record on Appeal preparation, appellate motion preparation and extensive knowledge of the North Carolina Rules of Appellate Procedure. Having an appellate paralegal with this much experience has allowed The Group to develop a streamlined and efficient approach for handling appeals, including a docketing system to track appellate deadlines for all of the appeals handled by the firm. ■

## ► General Liability

### Last Clear Chance: The Doctrine that Rescues Plaintiffs from Contributory Negligence

The doctrine of last clear chance allows the plaintiff to recover *despite* his own contributory negligence. Under this rule, the person with the last clear chance to avoid an accident who fails to do so is liable for negligence. In effect, last clear chance is a plaintiff’s rebuttal against the defense of contributory negligence.

Last clear chance is typically raised by the plaintiff in its reply, as a response to the defendant’s assertion of contributory negligence. The doctrine is irrelevant unless there is at least prima facie evidence of contributory negligence on the part of the plaintiff. If the jury determines the issue of contributory negligence against the defendant, the issue of last clear chance is moot. If the jury determines the issue of contributory negligence against the plaintiff, it may then consider whether the defendant had the last clear chance to avoid the accident.

Last clear chance will apply when: (i) the plaintiff negligently put himself in a position of helpless peril, (ii) the defendant saw or reasonably should have seen plaintiff in peril, (iii) the defendant had time and means to avoid injuring the plaintiff, (iv) the defendant failed to use reasonably available means to avoid injuring plaintiff, and (v) the defen-

dant caused the plaintiff's injuries. *Bowden v. Bell*, 118 N.C. App. 64 (1994). Unless all of the elements of last clear chance are present, the case is governed by the ordinary rules of negligence and contributory negligence.

In *Culler v. Hamlett*, 148 N.C. App. 372 (2002), the Court of Appeals held that plaintiff pedestrian was contributorily negligent as a matter of law and the doctrine of last clear chance was inapplicable where plaintiff was struck by defendants' vehicle after she saw the vehicle's headlights from approximately 300 yards away and chose to walk across the roadway in the path of defendants' vehicle. The court stated that in applying last clear chance, the peril experienced by plaintiff must be helpless or inadvertent. Plaintiff's helpless peril arises when her prior contributory negligence has placed her in a position from which she is powerless to extricate herself. Inadvertent peril focuses on plaintiff's failure to focus on one's surrounding and discover her own peril. Last clear chance does not apply where the injured party is at all times in control of the danger and simply chooses to take the risk. However, the evidence established that, in spite of plaintiff's knowledge that defendants' vehicle was steadily approaching, she chose to ignore dangers from which she had the power to extricate herself.

In *Privett v. Yarborough*, 603 S .E.2d 579 (2004 ), the Court of Appeals found that last clear chance applied, allowing plaintiff to recover despite her contributory negligence, where plaintiff never saw defendant's car before he was struck as he retrieved debris from the roadway. Plaintiff was transporting a large wardrobe in his pickup truck when it fell off the truck and into the road. Plaintiff stopped, turned on his headlights and flashing hazard lights before beginning to pick up pieces of the wardrobe from the road. The court stated that evidence showing plaintiff was not facing oncoming traffic or did not see the approaching vehicle is sufficient to satisfy the helpless peril requirement since a pedestrian who does not apprehend imminent danger cannot reasonably be expected to act to avoid injury.

Finally, the doctrine of last clear chance contemplates a last "clear" chance, not a last "possible" chance, to avoid the injury. In other words, from the point at which the defendant becomes aware of the peril to the plaintiff, or the point at which he should become aware, there must be both the time and the means to avoid the accident through the exercise of ordinary care. ■

## ► Land Condemnation

Our Land Condemnation Team, consisting of Raleigh lawyers George Autry, Stephanie Autry, and Brady Wells, has prevailed in several cases recently:

In a trial in Durham last October, George and Stephanie Autry represented an owner of a Howard Johnson Motel where the DOT had taken .6 acres to widen Interstate 85. We argued that the taking had rendered the site unmarketable as a motel, and the jury agreed, taking only 11 minutes to render a verdict in the amount of \$2.3 million. The DOT had deposited \$291,000 as its estimate of just compensation.

We reached a favorable settlement in a case wherein we represented a hog farm situated in Richmond County. The DOT took 26 acres for the new US 220 Bypass and deposited approximately \$225,000 into court for the taking. We argued that the taking had eliminated a crucial amount of "spray area" needed in the future, and two days before trial the parties settled for \$815,000.

George Autry tried a case in Moore County that involved the taking of 2.8 acres of commercial property near US 1 in Southern Pines. The jury returned a verdict of \$1.225 million, almost twice DOT's deposit of \$622,450.

We reached another favorable settlement for the owners of a commercial tract of land consisting of almost 2.8 acres located in Durham near the interchange of US 70 and NC 98. The DOT's initial offer of \$329,138 was deposited into court, and the parties settled at mediation for \$625,000. ■

## ► Workers' Compensation

Please note that CSH now provides regular updates of current cases and trends in the Worker's Compensation field through its e-mail newsletter, CSH Current Case Comments. If you are not currently on the mailing list and would like to receive these e-mail updates, please contact Christine Colangelo (ccolangelo@csh.com )

### Recent Cases of Importance

#### Medical Causation

In *Alexander vs. Wal-Mart Stores*, the Supreme Court adopted the dissenting opinion of Judge Hudson who determined there was sufficient evidence regarding medical causation to uphold the Industrial Commissions findings. In this case, the doctor prefaced her opinion regarding causation regarding back injury with the phrases "my suspicion is" and "I suspect". In addition, defendants presented evidence from another doctor that the injury plaintiff suffered from does not usually occur in the manner described by plaintiff. While the Court of Appeals determined that the medical evidence, "taken as a whole," failed to prove causation, Judge Hudson ruled that it was not the job of the Appellate Court to weigh the evidence and that because there was sufficient evidence in the record to support the Industrial Commission findings, they should not be overturned.

The Supreme Court appears to have reached exactly the opposite result in a decision entered only one month prior to Alexander. In *Edmonds vs. Fresenius Medical Care*, the Supreme Court adopted the dissent of Judge Steelman. In this case, the doctor gave his opinion on causation of plaintiff's renal failure stating that the use of drugs "possibly" or "could or might" have caused the renal failure. The majority upheld the Industrial Commissions finding that there was enough evidence in the record to support the finding of causation. Judge Steelman dissented stating the medical evidence was conflicting and pointing out that the Industrial Commission specifically found that the doctor could not say to a reasonable degree of medical certainty the cause of the kidney failure but then linked together testimony of numerous witnesses in an effort to find causation.

Taken together, these two cases contradict each other and prove how difficult it often is to determine the sufficiency of the medical evidence presented on the issue of causation. The one thread that seems to make the cases similar is the determination that the evidence presented supported the Industrial Commission findings with the adopted dissenting opinion of Judge Steelman determining that the Commission, in essence, didn't really follow its own findings of fact.

In *Gutierrez vs. GDX Automotive*, the Court of Appeals reversed the Full Commission decision upholding the Deputy's award of benefits. The court found that the IC had failed to consider all of the testimony, determining it is "reversible error for the Commission to fail to consider testimony or records of the treating physician." The Court further ruled the Commission "must consider and evaluate all the evidence before it is rejected." Here, the Commission failed to enter a finding of fact regarding the consideration, credibility, or relevancy of deposition testimony from one of the treating doctors. The Court went on to rule that there was no sufficient evidence to support the Commission's determination that plaintiff's injury was the result of an accident. Plaintiff had injured her back on July 14, 1999 and been treated conservatively until July 27, 1999. She returned to a doctor for another condition on March 28, 2000 and did not mention a back injury. She next sought treatment for her back on January 15, 2001. The court specifically slated that the deposition testimony of the doctors that plaintiff's injury was a "possible cause of her condition and that plaintiff's injury "could or might" have resulted in the symptoms presented was insufficient to prove causation. Finally, the court found plaintiff failed to prove ongoing disability where there was no physician who placed restrictions on plaintiff's work and plaintiff failed to present any evidence of an attempt to find employment.

### Specific Traumatic Incident

*Goforth vs. K-Mart* is a troublesome decision where the Court of Appeals upheld the Full Commission (which had overturned the Deputy Commissioner) decision finding that plaintiff had described a specific traumatic incident and suffered a compensable injury. Plaintiff had a history of eight prior back surgeries. The Form 33 listed a date of injury as "approximately May 10, 2000" (records showed plaintiff did not work that day). Nonetheless, the Court found sufficient evidence to support the IC finding that plaintiff could point to a "judicially cognizable period of time" (early May, 2000) as when he injured his back. In addition, the IC specifically found that plaintiff took the job at K-mart after his doctor recommended he attempt to get back to work and get off of Social Security disability and that he did not fail to disclose his medical history and that his efforts "should be applauded, not derided." Therefore, the IC awarded attorney's fees for defending the matter without merit. The Court of Appeals determined there was no abuse of discretion in awarding attorney's fees.

### Form 26 Practice

In *Clawson vs. Phil Cline Trucking*, the Court upheld the IC's invalidation of the Form 26 for failure to provide all of the medical records for review with the agreement. They also note that, pursuant to Rule 501(7) of the Workers Compensation Rules, Defendant is required to submit the agreement to the IC. They interpret the Rule to require the defendant to submit the medical records as well as the agreement (although the Rule itself does not specifically mention medical records). Here defendants argued that plaintiff agreed to submit the Form 26, and, therefore, had the burden of submitting all of the medical records, but the Commission was unimpressed with this argument. Furthermore, because the plaintiff was not working when the Form 26 was approved, the IC ordered back TTD benefits and a 10% penalty on all overdue payments. The IC had also awarded attorney's fees and the case was remanded for clarification on that issue.

**PRACTICE TIP:** As Defendant, you are responsible for submitting ALL of the medical records. Therefore, make sure you have obtained them all and submit all of them.

### Appeals Before the Industrial Commission

*Goetz vs. Wyeth-Lederle Vaccines* is not a decision under the Workers' Compensation Act, but is instructive on matters pending before the Industrial Commission. Claims under the North Carolina Childhood Vaccine-Related Injury Compensation Program are decided by the IC. Plaintiff appealed an adverse decision to the Full Commission. The statute for appeals is identical to that in the Workers' Compensation Act which requires that appeals be "heard by the Commission, sitting as a full commission." Three Commissioners heard

oral argument. Immediately after oral argument, one Commissioner recused themselves from the panel. The remaining two Commissioners rendered a decision. The Court rejected plaintiffs argument that "sitting as a full commission" requires all seven Commissioners to hear the case. However, they did remand the case because only two Commissioners reviewed the appeal. The court distinguished those cases where the third Commissioner had "participated" in the decision although they were unavailable to sign the order. Presumably, the same rules apply for appeals of Workers' Compensation cases.

### Jurisdiction

*Davis vs. Great Coastal ExPress*, addresses the issue of jurisdiction for over the road truck drivers. In this case, the accident occurred in South Carolina, meaning North Carolina only had jurisdiction if the employment contract was made in NC (which it was not), the employer's principal place of business was in NC (which it was not), or the employee's principal place of business was in NC, which was the issue in this case. The court determined that NC did not have jurisdiction even though the plaintiff lived in NC because it was determined that Virginia had more significant contacts to plaintiff's employment than NC because he had more pick-ups and deliveries in that state than any other, was supervised by a person in Virginia and his paychecks were issued in Virginia. The Court was not persuaded by the fact that plaintiff stored his truck in NC, received his assignments through a computer in his truck or had NC taxes withheld from his paycheck. Note that jurisdictional issues are subject to *de novo* review meaning the Court was not bound by the decision of the IC even though there was evidence to support those findings.

### Legislative update

There are several Bills currently pending in the legislature which could affect the Workers' Compensation Act. Some of these appear to be "employee friendly," while others would be viewed as "employer friendly".

Those "employer friendly" bills include legislation to change the statutes regarding asbestosis claims to establish clear medical criteria for a diagnosis of asbestosis by competent medical authorities. Another proposed change includes amending NCGS § 97-12 to shift the burden of proof to the employee to prove intoxication was not a cause of the accident once an employer establishes the employee was intoxicated at the time of injury. Another proposed change would clarify the statute regarding an employee's refusal to return to suitable employment by simply stating that an employee who refuses employment within his physical limitations shall not be entitled to compensation.

Another proposed legislative change would allow employers to have contact with doctors in workers' compensation cases within certain guidelines and empowers the Commission to create rules to allow such contact. A proposed change to NCGS § 97-29 would place a cap on disability benefits when the employee reaches age 65, or 500 weeks, whichever occurs sooner. This would apply to both TTD and TPD benefits (potentially extending the current 300 week limit to as much as 500 weeks). The limit on both types of benefits would be 260 weeks for injury occurring after age 60.

The "employee friendly" bills include a proposal to extend the specific traumatic incident standards for establishing a back injury to "injuries to the back or extremities of the body." Another proposal would increase the discretionary amount that can be awarded by the Commission for damage to an important internal or external organ from \$20,000 to \$50,000. Another proposal, introduced as an incentive to encourage employees to return to work, would eliminate the 300 week limit for TPD benefits and provide no limit on the number of weeks an employee can receive TPD benefits.

Other bills introduced in the legislature this year include a proposal to further clarify the rule regarding truck drivers under NCGS § 97-19.1 to hire an independent truck driver who is licensed as an independent truck driver by a governmental agency and is driving under that license without being responsible under the Act. Another bill would eliminate the requirement of employing 10 seasonal agricultural workers for the employer to come under the act, but would provide other tax credits for employers employing less than 10 employees. ■

(continued from page 1)

## ► Medical Malpractice

regional standard of care for health providers. *Page v. Wilson Mem'l Hosp.*, 49 N.C. App. 533, 536, 272 S.E.2d 8, 10-11 (1980); Robert G. Byrd, *The North Carolina Medical Malpractice Statute*, 62 N.C.L. Rev. 711, 734, 740 (1980).

• **North Carolina General Statute § 90-21.12.** North Carolina General Statute § 90-21.12 sets forth the standard of health care in medical malpractice actions, i.e. civil actions “for damages for personal injury or death arising out of the furnishing or failure to furnish professional services in the performance of medical, dental, or other health care by a health care provider.” N.C. Gen. Stat. § 90-21.11. According to N.C. Gen. Stat. § 90-21.12:

In any action for damages for personal injury or death arising out of the furnishing or the failure to furnish professional services in the performance of medical, dental, or other health care, the defendant shall not be liable for the payment of damages unless the trier of fact is satisfied by the greater weight of the evidence that the care of such health care provider was not in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities at the time of the alleged act giving rise to the cause of action.

N.C. Gen. Stat. § 90-21.12 (emphasis added).

• **§ 90-21.12 Interpreted.** The North Carolina Court of Appeals has articulated that N.C. Gen. Stat. § 90-21.12 “permits a physician, otherwise qualified under Rule 702<sup>1</sup> of the North Carolina Rules of Evidence, to testify regarding the applicable standard of care in a medical malpractice case ‘when that physician is familiar with the experience and training of the defendant and either (1) the physician is familiar with the standard of care in the defendant’s community, or (2) the physician is familiar with the medical resources available in the defendant’s community and is familiar with the standard of care in other communities having access to similar resources.’” *Barham* at \_\_\_, 600 S.E.2d at 3. Comparative communities are not required to be communities within North Carolina. *Baynor v. Cook*, 125 N.C. App. 274, 278, 480 S.E.2d 419, 421 (1997). Rather, they may be located within or without the State. *Id.*

A great deal of discretion necessarily will be involved in determining whether communities are similar. The importance of any characteristic may depend on the facts of a particular case or on the presence or absence of other similarities. No rule of thumb exists to determine what differences in size, population, or medical facilities may be present while still permitting the communities to be regarded as similar. Even the relationship between customary practice in a particular community and the factors commonly relied on to show the similarity of communities is a tenuous one at best.

Robert G. Byrd, *The North Carolina Medical Malpractice Statute*, 62 N.C.L. Rev. 711, 734 (1984).

• **Qualifying An Expert Witness.** Similarly, “[t]he competency of a witness to testify as an expert is addressed to the sound discretion of the trial court and the trial court’s determination will not be disturbed by the reviewing court in the absence of an abuse of discretion.” *Barham v. Hawk*, \_\_\_ N.C. App. \_\_\_, 600 S.E.2d 1 (Aug. 17, 2004) emphasis added. When faced with qualifying an expert on the stand, one should remember that:

[T]he phrasing of the questions used to elicit the standard of care

need not follow § 90-21.12 verbatim; to so require would improperly place form over substance. However, the questions asked must elicit the relevant standard of care as set out in that statute.

*Marley v. Graper*, 135 N.C. App. 423, 428-429, 521 S.E.2d 129, 134 (1999); *Heatherly v. Industrial Health Council*, 130 N.C. App. 616, 626, 504 S.E.2d 102, 109 (1998) (holding that question to expert of whether a physician familiar with the standards of practice among medical doctors with training and experience similar to the expert’s was not sufficient to query the relevant community standard of care). An analysis of case law discussing situations where a court has made a ruling on expert familiarity in the medical malpractice context may be instructive on how a court may view whether an expert is qualified with respect to expert familiarity.

• **Giving Information in Hypothetical Insufficient.** In *Barham v. Hawk*, the only information the doctor had received regarding Hendersonville’s population, size of its hospital, its number of physicians, and its number of specialists was the information that the doctor was asked to assume for purposes of a hypothetical question. *Barham v. Hawk*, \_\_\_ N.C. App. \_\_\_, 600 S.E.2d 1, 4 (Aug. 17, 2004). Furthermore, the doctor did not know whether the information he was being asked to assume was correct. *Id.* He had no actual knowledge of Hendersonville, had no idea about the size of the community, knew nothing about the hospital in Hendersonville or its resources, and had no knowledge of physicians practicing in that area. *Id.* The North Carolina Court of Appeals held that the doctor lacked sufficient familiarity with either the standard of care in Hendersonville or Hendersonville’s resources, leaving the doctor without a basis for stating that any other community was similar to it. *Id.* They commented that the foundation for an expert’s opinion is inadequate where it is based upon mere oral representations by counsel, unsupported by evidence, made in the middle of a trial. *Id.* at \_\_\_, 600 S.E.2d at 5.

• **Mere Statements from Counsel Insufficient.** In *Smith v. Whitmer*, a doctor testified during a deposition that he was familiar with the standard of care in the community where the defendants practiced, though he had never practiced there himself. *Smith v. Whitmer*, 159 N.C. App. 192, 193-194, 582 S.E.2d 669, 671-672 (2003). When asked to describe what he had done to familiarize himself with the relevant standard of care, the doctor stated that he based his understanding of the nature of the community on statements of counsel that he could not specifically recall. *Id.* He conceded that counsel did not supply him any written materials. *Id.* In arriving at the conclusion that the doctor failed to demonstrate that he was sufficiently familiar with the relevant standard of care, the North Carolina Court of Appeals commented:

[The doctor] offered no testimony regarding defendants’ training, experience, or the resources available in the defendants’ medical community. Although [the doctor] asserted that he was familiar with the applicable standard of care, his testimony is devoid of support for this assertion. In preparation for this deposition [the doctor] stated that the sole information he received or reviewed concerning the relevant standard of care in [the community at issue] was verbal information from the plaintiff’s attorney regarding “the approximate size of the community and what goes on there.” [The doctor] could offer no further details, however, concerning the medical community, nor could he actually remember what plaintiff’s counsel had purportedly told him.

*Smith* at 196-197, 582 S.E.2d at 672. They observed that though the doctor stated that he was familiar with a uniform or national standard of care, there was no evidence that a national standard of care was the same standard of care practiced in defendant’s community. *Id.* at 197, 582 S.E.2d at 673. Finding that the doctor acknowledged that he was not acquainted with the medical community in the community at issue, the North Carolina Court of Appeals held that the doctor “failed to make the statutorily required connection to the community in which the alleged malpractice took place or to a similarly situated community.” *Id.*

<sup>1</sup> Effective January 1, 1996, North Carolina Rule of Evidence 702 sets forth criteria that an expert must be able to meet (i.e., whether the expert must be a specialist or a general practitioner, whether expert specialist practices in a similar specialty as defendant, etc.) before being able to give expert testimony on the appropriate standard of health care as defined in N.C. Gen. Stat. § 90-21.12. As this memorandum is limited in scope to the health care standard as set forth in N.C. Gen. Stat. § 90-21.12, the additional limitations provided by Rule 702 are not included for brevity.

### **Familiarity with a North Carolina Standard of Care Insufficient.**

In *Tucker v. Meis*, the plaintiff's expert was only familiar with the standard of care in North Carolina, rather than the standard of care in Winston-Salem, North Carolina. *Tucker v. Meis*, 127 N.C. App. 197, 198, 487 S.E.2d 827, 829 (1997). The North Carolina Court of Appeals held that as the expert was only familiar with the standard of care in North Carolina, rather than the standard of care in Winston-Salem, his testimony was "irrelevant." *Id.* at 199, 487 S.E.2d at 829. They explained that:

Moreover, while we recognize that "changes in the rural-urban population pattern of the country and changes in medical education, training, and communication have led to greater standardization of medical practices," N.C.G.S. § 90-21.12 mandates that the relevant standard of care is that of the community where the injury occurred (or similar communities) and not that of the state as a whole.

*Id.* (internal citations omitted). They noted that the same or similar community standard "allows for consideration of the effect that variations in facilities, equipment, funding, etc. throughout the state might have on the standard of care." *Id.* The North Carolina Court of Appeals concluded that "the problem with the [expert's] testimony was not that he had not practiced in North Carolina; rather, it was his failure to testify that he was familiar with the standard of care in Winston-Salem or similar communities." *Id.*

**Practice with Similar Community Sufficient.** Though N.C. Gen. Stat. § 90-21.12 does not require expert witnesses to have actually practiced in the same or a similar community at the exact time of the alleged act, *See, e.g., Wiggins v. Piver*, 276 N.C. 134, 139, 171 S.E.2d 393, 396 (1970) (rejecting the application of a strict locality rule); *White v. Hunsinger*, 88 N.C. App. 382, 363 S.E.2d 203 (1988), it certainly helps if an expert has such experience. In *Cox v. Steffes*, the expert doctor had reviewed written information concerning the relevant community prior to trial and reviewed it again before testifying in front of the jury. *Cox v. Steffes*, 161 N.C. App. 237, 244, 587 S.E.2d 908, 913 (2003). He noted that he believed the hospital at issue was a level two hospital and that he had previously practiced at a level two hospital. *Id.* He also testified that the two communities were similar with respect to physicians, services, and equipment. *Id.* The North Carolina Court of Appeals found that the doctor was sufficiently familiar with the community to be able to testify. *Id.* They noted that even if the above were disregarded, the doctor testified that the standard of care at issue (post-operative care by board-certified general surgeons) under the circumstances of the case was the same for all communities. *Id.*<sup>2</sup>

Similarly, in *Leatherwood v. Ehlinger*, the doctor testified that he had practiced in Asheville as well as in communities similar in size to Asheville. *Leatherwood v. Ehlinger*, 151 N.C. App. 15, 22, 564 S.E.2d 883, 888 (2002). The North Carolina Court of Appeals contrasted the expert in *Leatherwood* with the challenged expert in *Henry v. Southeastern OB-GYN Assoc.*<sup>3</sup>, noting that the expert in *Leatherwood* specifically testified that he

<sup>2</sup> Though the North Carolina Court of Appeals suggests that the doctor's testimony that there was a national standard of care with regard to post-operative care was somewhat determinative in their decision, I do not put much stock in that part of the holding. Later cases make it clear that a national standard is only to be used in limited instances where there are routine, ordinary procedures. I would not characterize post-operative care as one such instance, and this did not put *Cox* in the section entitled "Limited Instances Where National Standard of Care Applies" as the Court of Appeals had a situation where a doctor was actually familiar with the local community at issue. For a discussion of when a national standard of care applies despite a lack of knowledge with the local community, please see the section entitled "Limited Instances Where National Standard of Care Applies."

<sup>3</sup> In *Henry v. Southeastern OB-GYN Assoc.*, 145 N.C. App. 208, 209-210, 550 S.E.2d 245, 246-247 (2001) *aff'd per curiam* 354 N.C. 570, 557 S.E.2d 530, the plaintiffs offered the testimony of an expert obstetrician gynecologist with a practice in Spartanburg, South Carolina against a defendant who practiced in Wilmington. At trial, the expert failed to testify that he was familiar with the standard of care in Wilmington or like communities and stated in a pretrial deposition that he did not know anything about Wilmington. *Id.* The North Carolina Court of Appeals held that the expert did not satisfy the requirements of N.C. Gen. Stat. § 90-21.12. *Id.* See the section entitled "Limited Instances Where National Standard of Care Applies" for a more complete discussion of *Henry*.

had "knowledge of the standards of practice among obstetricians with similar training and experience as that of [the defendant] in Asheville and similar communities [at the time of the injury] with regard to the appropriate management of shoulder dystocia in delivering children." *Id.* Additionally, the North Carolina Court of Appeals stated that the expert noted that he attended rounds at the hospital where the infant in question was delivered. *Id.* Finally, the North Carolina Court of Appeals explained that the record showed that the doctor currently practices and has practiced in communities which the expert testified that the community and other communities "that size practice in the same national standards with respect to shoulder dystocia." *Id.* They concluded that the expert made the statutorily required connection to the community where the alleged malpractice took place or to a similarly situated community which was lacking in *Henry*. *Id.* at 23, 564 S.E.2d at 889. *See also, Dickens v. Everhart*, 284 N.C. 95, 102, 199 S.E.2d 440, 444 (1973) (holding that even though pathologist was not in particular area at time of treatment, practice in community similar to the one at issue during the relevant time frame was sufficient to permit him to testify); *Pitts v. Nash Day Hosp., Inc.*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 605 S.E.2d 154, 156-157 (Dec. 7, 2004) (holding that doctor's practice in other communities similar to the one at issue and familiarity with the equipment at issue was sufficient to meet 90-21.12); *Warren v. Canal Industries*, 61 N.C. App. 211, 214-216, 300 S.E.2d 557, 559-560 (1983) (holding that expert was properly allowed to testify where the expert had patients in counties similar to the county in question, was required as director of admissions at a hospital to review the case histories of all patients admitted which included patients admitted from the county at issue, and was familiar with the standard of care for doctors in communities similar to that at issue).

**Training in Similar Community Sufficient.** Situations where an expert testifies that he did some training in communities similar to the community at issue during the relevant time frame should be sufficient to establish familiarity with the standard of care. In *Simons v. Georgiade*, the expert at issue testified that he completed his education at two medical centers located in communities of roughly the same size at the community at issue and that he practiced approximately an hour away from a community similar to the one at issue. *Simons v. Georgiade*, 55 N.C. App. 483, 494-495, 286 S.E.2d 596, 603 (1982). The North Carolina Court of Appeals held that the expert's testimony showed that he was trained and experienced in hospitals and communities similar to the facility / community at issue. *Id.* They concluded that the above facts were sufficient to qualify the expert to testify. *Id.*

**Internet Research Sufficient.** In *Coffman v. W. Earl Roberson, M.D., P.A.*, an expert witness had obtained the basis for his testimony from Internet research about the size of the hospital and the programs at issue. *Coffman v. W. Earl Roberson, M.D., P.A.*, 153 N.C. App. 618, 624, 571 S.E.2d 255, 259 (2002). Specifically, the expert based his opinion on Internet research about the size of the hospital, the training program and the Area Health Education Center program. *Id.* The expert testified that the hospital involved was a "training hospital, very sophisticated." The North Carolina Court of Appeals held that the expert's testimony was sufficient to satisfy the requirements of N.C. Gen. Stat. § 90-21.12. They went on to hold that another expert's testimony was sufficient where he had gotten information from the Internet that the hospital was a teaching school, similar to that where he practiced. *Id.*

**Limited Instances Where National Standard of Care Applies.** While North Carolina courts recognize that "if the standard of care for a given procedure is the same across the country, an expert witness familiar with that standard may testify despite his lack of familiarity with the defendant's community," the North Carolina Court of Appeals has reiterated that they have recognized very few "uniform procedures" to which a national standard may apply. *Henry v. Southeastern OB-GYN Assoc.*, 145 N.C. App. 208, 550 S.E.2d 24, <sup>4</sup> *aff'd per curiam*, 354 N.C. 570, 557 S.E.2d 530 (2001). In an unpub-

lished 2004 decision, the North Carolina Court of Appeals noted that they “have recognized very few medical procedures to which a national standard of care may apply, and to which an expert may testify.” *Bak v. Cumberland County Hosp. Sys.*, 2004 WL 1824303 (N.C. App.).

Most parties raise this “same across the country” argument when one of their experts is challenged as having a national standard of care outlook. However, an examination of the cases where a North Carolina court has recognized a national standard of care as being applicable shows that the national standard of care should only be applied in routine, uncomplicated procedures that do not differ appreciably between communities. See *Haney v. Alexander*, 71 N.C. App. 731, 736, 323 S.E.2d 430, 434 (1984) (allowing doctor expert witness to testify that the taking and reporting vital signs of a deteriorating patient was the same for nurses in accredited hospitals across the country); *Page v. Wilson Mem'l Hosp.*, 49 N.C. App. 533, 536, 272 S.E.2d 8, 10-11 (1980) (holding that nursing practices in connection with a patient's use of a bedpan are so routine and uncomplicated that the standard of care should not appreciably differ between neighboring counties); *Howard v. Piver*, 53 N.C. App. 46, 279 S.E.2d 876 (1981) (holding that the decision for the discontinuation of anti-seizure medication was not complicated and one regularly made<sup>5</sup>); *Rucker v. High Point Mem. Hosp.*, 285 N.C. 519, 527, 206 S.E.2d 196, 201 (1974) (holding expert properly admitted though he was not familiar with the hospital facilities and was not familiar with the staff where “sound reason support[ed] the view that gunshot wounds of the lower leg lend themselves most readily to uniform medical and surgical treatment without regard to locality”); *Harris v. Miller*, 103 N.C. App. 312, 329, 407 S.E.2d 556, 565-566 (1991), *rev'd on other grounds*, 335 N.C. 379, 438 S.E.2d 731 (1994) (holding that an orthopedic surgeon who testified that the standard of care with respect to attempts to control surgical bleeding was the same throughout the nation and that he was familiar with a national standard of care was therefore familiar with the standard of care in the community and was qualified to testify).

However, there are outliers in this equation. In the case of *Marley v. Graper*, the matter at issue was not a routine, uncomplicated procedure. *Marley v. Graper*, 135 N.C. App. 423, 521 S.E.2d 129 (1999). Rather, it involved the

<sup>4</sup> It should be noted that *Henry's* status as a *per curiam* decision have led other courts to question its value. *Cox v. Steffes*, in a footnote, calls into question the validity of *Henry* as controlling authority as there were three separate opinions, with one judge concurring only in the result, another judge dissenting and the North Carolina Supreme Court affirming the decision without specifying which opinion was the basis for the affirmance. The recent case of *Pitts v. Nash Day Hospital* points to *Cox* for this proposition. Nonetheless, *Henry* has some value as, (1) *Barbam*, uses Judge Green's formulation in *Henry* to state what the rule is for testimony regarding the applicable standard of care, (2) the case of *Leatherwood v. Ehlinger*, discussed *infra*, uses *Henry's* facts to contrast the facts of that case, and (3) the unpublished decision of *Bak* cites to *Henry* as well.

Furthermore, it should be noted that Judge Hudson in his dissent in *Henry* pointed to the case of *Baynor v. Cook* for the proposition that a plaintiff may satisfy N.C. Gen. Stat. § 90-21.12 by offering the testimony of an expert who asserts that “(1) the standard of care for the treatment in question is uniform across the country and does not vary depending on the community, and (2) he is familiar with this national standard.” *Henry* at 216, 550 S.E.2d at 251. In *Baynor v. Cook*, the plaintiff's experts testified that there was a national standard of care for the diagnosis and treatment of a thoracic aortic rupture. *Baynor v. Cook*, 125 N.C. App. 274, 275, 480 S.E.2d 419, 420 (1997). One of the plaintiff's experts testified that he was familiar with the standard of care for an emergency room physician in the community, and the other plaintiff's expert commented that he would not expect the standard of care in the community to differ from the national standard of care with which he was familiar. *Id.* at 278, 480 S.E.2d at 421. In case a savvy plaintiff's attorney tries to use *Baynor* for the same proposition as Judge Hudson, counsel may rebut this reasoning by noting the purpose of the appeal at issue in *Baynor*. In *Baynor*, the plaintiffs were appealing a trial court's decision not to instruct the jury using a national standard of care but rather used a same or similar community standard. *Id.* at 277, 480 S.E.2d at 421. The North Carolina Court of Appeals actually *upheld* the trial court's decision to instruct the jury on using a same or similar community standard of care jury instruction. *Id.* Judge Hudson relies on the Court of Appeals' notation *in dicta* that the trial court properly allowed the plaintiff's experts to testify “that based on their familiarity with the national standard of care as related to a common medical issue (TARs), this standard of care did not vary depending on the community.” *Id.* at 278, 480 S.E.2d at 421. As the appeal was taken up by the plaintiffs whose only assignment of error was that the trial court erred by denying their requested jury instruction, the qualifications of the plaintiff's experts were not at issue. Furthermore, that the affirming portions of *Henry* have been used in cases post-*Henry* serves as a commentary to what kind of credence a court should give this argument.

<sup>5</sup> This conclusion seems arguable. As such, it should be noted that the court found it persuasive that the expert testified he was familiar with the standard of care in areas similar to the one at issue, which may have tipped the scales in favor of calling the decision common.

standard of care for plastic surgery. *Id.* at 430, 521 S.E.2d at 134. Nonetheless, a close examination of *Marley* reveals that *Marley* may act as a “save” for the limited instance of a *defense* expert's testimony. In *Marley*, a defendant's expert witness stated that the defendant doctor “met the standard of care for plastic surgery not only in [the relevant community] but [also] anywhere in the United States.” *Id.* The North Carolina Court of Appeals commented that:

Although the witness did not testify that he was familiar with the standard of care for [the relevant community], the testimony he did provide obviated the need for such familiarity. The import of the witness's testimony was that, in his opinion, [the doctor] met the highest standard of care found anywhere in the United States. Therefore, if the standard of care for [the community] matched the highest standard of care found anywhere in the country, [the doctor's] treatment of [the plaintiff] met that standard; if the standard of care in [the community] was lower, [the doctor's] treatment of [the plaintiff] exceeded that standard.

*Id.* They held that the above testimony was sufficient to meet the requirements of § 90-21.12. *Id.*

The proposition that *Marley* may operate differently depending on the expert's orientation has in fact been supported by at least one of the justices in the decision of *Henry*. *Henry v. Southeastern OB-GYN Assoc.*, 145 N.C. App. 208, 550 S.E.2d 245, *aff'd. per curiam*, 354 N.C. 570, 557 S.E.2d 530 (2001). In *Henry*, the North Carolina Court of Appeals affirmed the exclusion of the plaintiff's expert. *Id.* at 213, 550 S.E.2d at 248. In his opinion, Judge McCullough explained that the plaintiffs failed to establish that their expert was familiar with or practiced in the community at issue or a similar community. *Id.* at 212, 550 S.E.2d at 248. He commented that plaintiffs relied on *Marley* for their argument that, even though their expert was not familiar with the community, he should nonetheless be allowed to testify. *Id.* Judge McCullough stated that, unlike *Marley*, the doctor in the instant situation would have “testified that the defendants *failed* to meet the national standard of care, creating an obvious need for the establishment of the applicable standard through proper testimony.” *Id.* (emphasis in original).

Unfortunately, *Marley* has been used in at least one case for the global save of *any* expert who testifies that a health care provider failed to meet a national standard of care, at least in dicta. *Brooks v. Wal-Mart Stores, Inc.*, 139 N.C. App. 637, 535 S.E.2d 55 (2000). In *Brooks*, a patient sued both the practice / physician and the pharmacy / pharmacist when she got her prescription filled at such a dose that allegedly led to her kidney failure. *Id.* at 639-640, 535 S.E.2d at 58. Counsel for the defendant practice / physician, on cross-examination, asked if the expert was familiar with the standards of practice for pharmacists who had training and experience similar to the pharmacist in the instant case. *Id.* at 655-656, 535 S.E.2d at 66-67. The pharmacist expert admitted that he was not familiar with South Carolina statutes or administrative regulations governing the practice of pharmacy, that he had not attended seminars discussing such statutes or regulations, and that he had not discussed the case with any South Carolina pharmacist. *Id.* at 656, 535 S.E.2d at 67. He testified during cross-examination that he believed that the standard of care of a pharmacist, no matter where they are practicing, is the same. *Id.* at 655, 535 S.E.2d at 66. The central holding in the case was that counsel for the defendant challenging the expert witness waived<sup>6</sup> the challenge, but the North Carolina Court of Appeals *nonetheless* went on to *note*

<sup>6</sup> The practice / physician and pharmacy / pharmacist were represented by different counsel, and that fact became a material issue in the case. Plaintiff's expert testified on direct examination and defendant pharmacy / pharmacist did not object to the plaintiff's tender of the expert as “an expert in the field of pharmacy.” *Id.* at 653, 535 S.E.2d at 66. Furthermore, when the expert was questioned by counsel for the practice / physician, counsel for the pharmacy / pharmacist objected but did not move to strike the expert's testimony. *Id.* at 654, 535 S.E.2d at 66. Thereafter, counsel for the pharmacy / pharmacist cross-examined the expert, eliciting “essentially the same testimony” to which it had previously objected. *Id.* at 656, 535 S.E.2d at 67. The North Carolina Court of Appeals held that “in light of the [counsel for pharmacy / pharmacist's] failure move to strike the standard of care testimony by [the expert], and its presentation on cross-examination of essentially the same testimony of [the expert] to which it had previously objected, and its further failure to object to the tender of [the expert] as an expert in pharmacy or to request a voir dire hearing pursuant to Rule 705 to explore the basis for his opinion, the present argument of [counsel for the pharmacy / pharmacist] that G.S. § 90-21.12 does not encompass a nationwide standard of care for pharmacists and that [the expert's] testimony concerning the standard of care applicable to [the defendant pharmacist] was erroneously based upon a nationwide standard, is not properly before us. *Id.* at 656, 535 S.E.2d at 67.

that they rejected a similar argument by counsel in *Marley*. *Id.* at 657, 535 S.E.2d at 66. (quoting *Marley* for the general proposition that “if the standard of care for a given procedure is the same across the country, an expert witness familiar with that standard may testify despite his lack of familiarity with the defendant’s community.” (internal quotations omitted)).

**Most Recent Published Decision and Strategy Implications.** The most recent published case on the issue, *Pitts v. Nash Day Hospital, Inc.*, currently on appeal, further muddies the familiarity issue and raises concerns about how future challenges to expert familiarity will be received. *Pitts*, \_\_\_ N.C. App. \_\_\_, 605 S.E.2d 154. In *Pitts*, the North Carolina Court of Appeals held, 2-1 that the expert doctor’s testimony should be admitted even though the doctor testified that the standard of care for laparoscopic surgery is a national standard of care. *Id.* at \_\_\_, 605 S.E.2d at 156-157. The majority’s reasoning was correct in that the critical determination is “whether an expert is familiar with a community that is similar to defendant’s community in regard to physician skill and training, facilities, equipment, funding, and also the physical and financial environment of a particular medical community.” *Id.* at \_\_\_, 605 S.E.2d at 156.

However, to make their determination of sufficient familiarity, the majority relied on some premises wholly inconsistent with the case law as described above. The North Carolina Court of Appeals majority found that the doctor was sufficiently familiar with the community at issue in that: (1) the doctor was trained outside of North Carolina but practiced medicine in multiple communities in North Carolina, some of which were similar to the ones at issue, (2) the evidence was sufficient to show that the facilities, equipment, etc. where the doctor practiced were similar to the community at issue, (3) the doctor had undergone continuing medical education, taking numerous courses, and (4) the doctor was a fellow with the American College of Obstetricians and Gynecologists (ACOG).

To the extent that the Court of Appeals used numbers one and two to make their determination (training in a similar community and similar equipment), their determination was consistent with prior case law as discussed above. See *Cox*, 161 N.C. App. 237, 587 S.E.2d 908; *Leatherwood*, 151 N.C. App. 15, 564 S.E.2d 883; *Dickens*, 284 N.C. 95, 199 S.E.2d 440; *Warren*, 61 N.C. App. 211, 300 S.E.2d 557. Conversely, to the extent that the Court of Appeals used numbers three and four to make their determination (doctor had continuing medical education and was a member of ACOG), this is wholly inconsistent with the holding in *Thompson v. Lockert* (discussed above), specifically rejecting an argument that the proper standard of care should be dictated by the standard of care customary among orthopedic surgeons who are Diplomates of the American Board of Orthopedic Surgeons, regardless of the nature of the community of practice. See *Thompson v. Lockert*, 34 N.C. App. 1, 4-5, 237 S.E.2d 259, 261.

Furthermore, the dissent in *Pitts* made a few very interesting points. The dissent noted that the plaintiff tendered this expert *three* times. *Pitts* at \_\_\_, 605 S.E.2d at 158. In plaintiff’s first tender, the doctor tried to make the identical argument that was rejected in *Thompson*, that he was in the same professional organizations as other medical professionals and that there was no difference in standards across the country. *Id.* In plaintiff’s second tender, the doctor tried to rectify his position, commenting that he had practiced in certain similar communities and that the records were similar, but he was not sure what he could deduce from that. *Id.* The plaintiff’s third tender was made after a forty-five minute recess, where, the doctor looked in the phonebook, drove by the hospital and made deductions from that information. *Id.* The dissent concluded that the third tender conflicted with the second tender and noted that the doctor never testified as to what level the hospital was or equated the hospital’s resources to other areas at which he had practiced medicine. *Id.* at 159.

Based on this factual scenario, defense counsel faces obvious future concerns regarding the attack of an expert witness. Plaintiff’s counsel should not have three bites at the apple to remedy an expert’s testimony. We should not have to worry about preparing for an attack on an expert only to have that expert literally “whisked away” around town by plaintiff’s counsel during a recess to do an end-run around our motion.

However, the largest concern in *Pitts* is the majority’s treatment of the state of the case law in footnote two of their decision. The majority noted that there appeared to “be some conflict concerning what testimony sufficiently obviates the need to show an expert’s familiarity with a defendant’s community.” *Id.* at 156. They cited *Marley*, *Brooks*, and *Haney* for the global proposition that “if the standard of care for health care providers is ‘the same across the country, an expert witness familiar with that standard may testify despite his lack of familiarity with the defendant’s community.’” However, what they *forgot* to do is properly qualify that statement by noting that lack of familiarity is only to be used in *limited* instances involving *uniform* procedures. The proper inquiry is not what testimony sufficiently obviates the need to show an expert’s familiarity. Rather, the proper inquiry is whether the court is faced with a situation involving a uniform procedure, something that will only arise in limited instances (i.e. taking vital signs, nursing use of a bedpan, etc.).

**Conclusion.** North Carolina General Statute § 90-21.12 establishes a “same or similar community” requirement for expert testimony in medical malpractice actions. We must be ready to prepare our experts for familiarity with the relevant community at issue. The more an expert can articulate their familiarity with the community at issue or how their familiarity with a similar community relates to the community at issue, the more their opinion will be looked upon favorably by a court. We must also be ready to challenge the poorly prepared expert, fully briefing these issues to not only to mount a strong attack in the case at hand, but also to clarify the development of the case law.

## ► CSH Wins Defense Verdict In Highly Publicized Trial

In October 2004, the CSH defense team of Dan Hartzog and Donna Rascoe began an extended stay in downtown Durham for the trial of Baker v. Home Depot in which the plaintiff requested \$20 million for alleged brain injuries to an 8 year old boy. After eight days of jury selection, several months of evidence and six days of jury deliberations, the trial ended on January 12, 2005 with a meager verdict of only \$500,000.

The case involved a March 25, 2001 incident where an 8 year old boy accompanied his parents to a Home Depot to shop for various supplies including storm doors. The parents acknowledged that, at some point they left the storm door area of the store, but allowed their son to remain in that area alone. Shortly thereafter, a customer in the next aisle heard a loud noise and came down the storm door aisle to find the boy lying on the floor under a door display. The boy testified at deposition that he was opening and closing doors when one of the doors fell on him. There were no other witnesses to the accident. The boy was taken to the hospital and spent two nights at Duke University Medical Center after which he was discharged home. CT scans showed some brain injury which was resolved on a follow-up scan several weeks later.

There was evidence at trial that the door display was installed improperly and, at the time of the accident, was secured with a single screw. Plaintiffs put on a number of engineering experts to testify to the proper installation, maintenance and routine inspection of the door. Although there was evidence that the manufacturer and its vendor were responsible for the installation, plaintiffs contended that a later inspection by the defendant should have revealed the unsafe condition of the door display. The defense engineering expert testified that, although the door was installed improperly, a routine inspection by a store employee would not have revealed the unsafe condition. Further, the defense expert testified that the door would not have come down unless someone pulled on the display frame rather than simply opening and closing the door.

The plaintiffs also put on multiple witnesses and exhibits including a 3-D animation to emphasize that the boy suffered bleeding in his brain as result of this accident. Expert medical witnesses testified to the existence of several areas of blood including some that were internal and likely to cause severe deficits. Plaintiff’s experts included a psychologist, psychiatrist, voca-

tional expert and life care planner who testified that boy experienced severe cognitive and learning deficits as a result of this accident. The experts testified that the boy might not graduate from high school, would not be able to serve in the military, and would suffer significant vocational losses.

However, the evidence also included the fact that the boy was diagnosed with ADHD and a learning disability three years before this accident. There were extensive school records and prior testing documenting the boy's learning problems. Teachers testified for the plaintiffs but acknowledged that the boy remained in the same private school and had been promoted from grade to grade through the time of the trial. The defense neuropsychologist conducted an IME and found that the boy performed well on a number of cognitive and academic measures and that his weaknesses were

consistent with his pre-existing learning disability. With this evidence, the defense argued that the boy did not suffer any permanent injury as result of this accident.

The jury clearly gave serious consideration to all of the parties' contentions. During deliberations, the jury asked to have instructions repeated several times and requested to review some of the photographic exhibits, expert reports and videotape of the boy playing games and hanging out with friends after school. At one point there was even a request to review the testimony of the damages experts. This was not allowed, but apparently the jury had what it needed to conclude that the plaintiffs had not proven a multi-million dollar damages case. ■

## Civic / Professional Notes

JAY TILLMAN and GLORIA BECKER, both of our Raleigh office, were selected as instructors for the National Institute for Trial Advocacy (NITA) program on "Taking and Defending Depositions," conducted at Duke University School of Law from March 14-16, 2005.

GEORGE SIMPSON, of our Raleigh office, successfully represented the North Carolina Guardian Ad Litem Program in a case before the North Carolina Court of Appeals, involving determination of a father's parental rights. The father, a convicted murderer serving 15 years in a Missouri prison, sought to have his parental rights reinstated so that his family, and in particular, his mother would still be able to visit with his young son. The GAL Program wanted the father's parental rights terminated so the son could be adopted by relatives on his mother's side of the family, with whom he has lived for several years now. The Court of Appeals recently issued an opinion affirming the trial court and adopting the position urged by the GAL Program.

RACHEL ESPOSITO, of our Raleigh office, has volunteered as a mentor to assist a new lawyer in the community through the Silent Partners Program, which is run by the North Carolina State Bar and the Young Lawyers Division of the North Carolina Bar Association. The Silent Partners Program is a voluntary program designed to assist new lawyers in the practice of law. The program pairs a new lawyers with an experienced lawyer from the same community who can answer the new lawyer's questions about the practical aspects of practicing law. Ms. Esposito is looking forward to helping her new colleague in the practice of law.

DONNA RASCOE, of our Raleigh office, was a speaker for two classes at the UNC-Chapel Hill School of Law. In January, 2005, Donna assisted with the law school's Trial Advocacy Course. In March, 2005, Donna was a speaker for the Disability Law Seminar.

TRISH HOLLAND, of our Raleigh office, and ROBERT JONES, of our Wilmington office, presented a speech on February 15, 2005, to the Lower Cape Fear Human Resources Association entitled "E-Mail, Voice Mail and the Internet, Employer Liability for Employee's Acts."

CHIP CAMPBELL, JENNIFER ADDLETON, and GINGER

HUNSUCKER, all of our Raleigh office, organized the firm's participation in the 2004 Wake County Young Lawyers Division Clothing Drive. Cranfill, Sumner & Hartzog's donation contributed to the drive, which collected a total of over 500 large bags of clothing. Organizations receiving items from the 2004 drive included the Brooks Avenue Church of Christ, Catholic Parish Outreach Community Services, First Baptist Church, Front Porch Glory to Glory House of Refuge, Haven House, Helping Hand Mission, The Healing Place, New Beginnings, Passage Home, Pregnancy Life Care Center, Raleigh Rescue Mission, Volunteer Families for Children, Wake Family Entry, Wake Interfaith Hospitality Network, and the Women's Center.

On behalf of the North Carolina Bar Candidate Committee, GINGER HUNSUCKER and CHIP CAMPBELL, both of our Raleigh office, interviewed applicants for the North Carolina Bar Exam, evaluating their fitness to practice law.

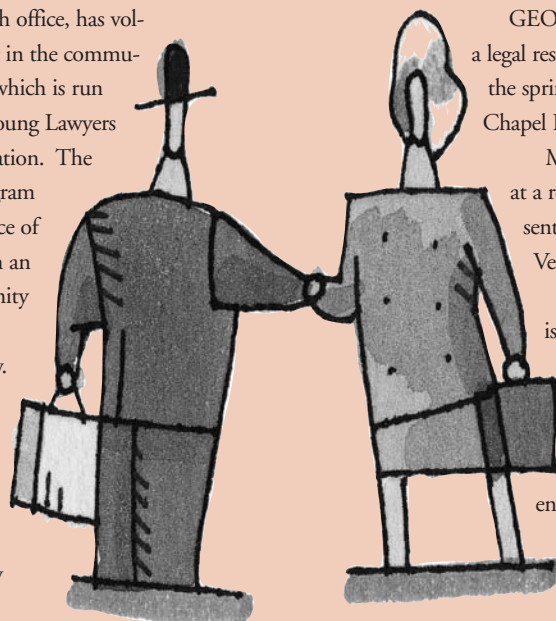
GEORGE SIMPSON, of our Raleigh office, is teaching a legal research, writing, and appellate advocacy class during the spring semester at the University of North Carolina-Chapel Hill School of Law.

MARSHALL WALL, of our Raleigh office, spoke at a recent seminar in September, 2004. Marshall's presentation was entitled "In the Driver's Seat: Motor Vehicle Law in North Carolina."

RACHEL ESPOSITO, of our Raleigh office, is currently doing pro bono work for the Urban Ministries of Durham ("UMD"). UMD runs the homeless shelter in Durham, and it is planning a new program allowing for its clients to work part-time in a janitorial service in order to enable them to get out of the cycle of poverty and establish greater self-sufficiency. Ms. Esposito is research and advising UMD on whether these clients will be classified as employees to ensure

compliance With the Fair Labor Standards Act.

ROBIN DAVIS and ALCYIA LEVY, of our Raleigh office, recently authored an article that was published in the March, 2005, edition of "For the Defense," the national publication of the Defense Research Institute. The article was entitled "What Every Lawyer (and Their Client) Needs to Know About the Fair Credit Reporting Act."



## Recent Case Results

**TAYLOR PACE** and **GREER VANDERBERRY**, of our Raleigh office, recently prevailed before the North Carolina Industrial Commission in an occupational disease claim involving alleged repetitive trauma. The plaintiff presented evidence that his job duties at a cardboard manufacturing plant involved repetitious bending of cardboard dozens of times every hour. The plaintiff elicited testimony from his treating orthopedic surgeon and treating neurologist that this highly repetitive job undoubtedly aggravated his underlying arthritic condition in both upper extremities. Taylor and Greer retained two expert witnesses to refute the opinions of the treating physicians. The Industrial Commission rejected the opinions of the treating physicians, finding the opinions of the defendants' experts more credible, and denied the plaintiff's claim in its entirety.

**MARSHALL WALL**, of our Raleigh office, recently obtained summary judgment in Martin County Superior Court. Marshall represented the local school system, which was sued after the plaintiff claimed that she had slipped coming into a door and suffered a knee injury. In response to our requests, plaintiff's attorney stated that she sought only \$35,000.00. The school system had only excess insurance coverage (over \$100,000). Marshall moved for summary judgment based upon sovereign immunity, and the motion was allowed.

**REGAN TOUPS**, of our Wilmington office, obtained summary judgment in Duplin County Superior Court in a falling merchandise case. Plaintiff claimed a book fell on her foot from a shelf in the Dollar Tree Store. Summary judgment was granted since plaintiff could not prove that the store's employees knew or should have known of the condition of the book before it fell. Plaintiff also could not prove that any of the employees had control of the book or caused the book to fall.

**KARI JOHNSON** and **HOUSTON FOPPIANO**, of our Raleigh office, recently obtained summary judgment in federal court. The case involved a claim of premises liability filed by a plaintiff who alleged that she had been hit on the head by a falling display stand while riding the escalator at a J.C. Penney's store. She subsequently had surgery on her neck, and her medical bills exceeded \$50,000.00. The plaintiff filed a lawsuit in Robeson County Superior Court, and we removed the case to federal court in the Eastern District of North Carolina on grounds of diversity, after the plaintiff responded to our Requests for Statement of Amount of Monetary Relief Sought with a demand in excess of \$75,000.00. After discovery, we filed for summary judgment, arguing that the plaintiff was unable to prove that any negligence of the defendant caused the display stand to fall, and the motion was granted.

**NICOLE SLAUGHTER**, of our Wilmington office, recently obtained summary judgment in favor of a county on the basis of governmental immunity for claims of homeowners against the county for improper inspections by the building inspection department. Plaintiffs' claims included negligence, negligence per se, negligent employment/ retention, gross negligence, fraud, instructive fraud and negligent misrepresentation. The case was originally voluntarily dismissed by plaintiffs on the eve of a hearing on our motions to dismiss for insufficiency of process, insufficiency of service of process, lack of personal jurisdiction, and failure to state a claim. The plaintiffs re-filed the action on the same day. The case was ready for trial, but the judge ruled in our favor and granted summary judgment.

**GLORIA BECKER**, of our Raleigh office, recently obtained a dismissal in federal court, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, of a complaint alleging constitutional violations of a minor plaintiff's civil rights arising out of a false arrest, wrongful detention and a strip search by security guards of a retail department store. The complaint alleged two claims: (1) violation of constitutional rights under 42 U.S.C. § 1983; and (2) violation of constitutional rights under 42 U.S.C. § 1981. Gloria argued that the constitutional claims should be dismissed because the plaintiff failed to allege that the security guards were "state actors" at the time of the alleged wrongful detention and false arrest. It was argued that the defendants' security guards were private parties and could not be held liable

for constitutional violations. Additionally, it was argued that the corporate retail store, as employer of the security guards, cannot be held vicariously liable for the § 1983 claims committed by its employees. The federal judge agreed with the defense argument, and entered an order dismissing the constitutional claims with prejudice.

**REGAN TOUPS**, of our Wilmington office, obtained a successful jury verdict in a motor vehicle case in Durham County Superior Court. The defense offer of judgment prior to trial was \$8,500.00. Plaintiff has demanded in excess of \$123,000.00 prior to trial, and then in excess of \$60,000.00 during trial. Plaintiff also requested over \$12,000.00 in attorney fees and \$1,300.00 in costs. The jury awarded only \$7,200.00 to the plaintiff, and after hearing arguments from counsel, the judge only awarded \$2,400.00 in attorney fees and costs.

**MARSHALL WALL**, of our Raleigh office, recently received a favorable "no cause" finding from the EEOC. The plaintiff, a police officer, had previously filed a federal discrimination lawsuit against his employer. He was later given three written notes about performance problems at work. The town ended up taking two of them out of his file, but he filed a Charge of Discrimination with the EEOC alleging retaliation for his lawsuit. The EEOC did not find cause that the town had retaliated against the employee.

**ALYCIA LEVY**, of our Raleigh office, recently obtained summary judgment in Chatham County Superior Court where the plaintiff alleged he was injured while attending his son's interscholastic basketball game. The court granted the school board's motion for summary judgment based upon grounds of governmental immunity, despite plaintiff's argument that the board was engaged in a proprietary function.

**MAGGIE BENNINGTON**, of our Wilmington office, recently won a workers' compensation matter before the North Carolina Industrial Commission. Plaintiff was involved in a motor vehicle accident and injured her right hand. Plaintiff returned to work, but six months later, she was leaving her house and claims her right wrist gave way, causing her to fall and break her left ankle. Plaintiff also developed tenosynovitis in the left hand and claimed it was from overuse due to her right wrist injury. The Deputy Commissioner denied the claims related to injuries to the left ankle and left wrist.

**COLLINS BARWICK** and **AMY PFEIFFER**, of our Raleigh office, recently prevailed in two companion cases before the North Carolina Industrial Commission, which completely denied benefits where the plaintiffs alleged that mold exposure in their employment caused numerous medical conditions and total disability. The claims arose as a result of a flood on their employer's premises. The case was presented to the Deputy Commissioner and involved extensive expert testimony regarding the plaintiffs' pre-existing medical conditions, as well as intricate scientific evidence regarding dosage and exposure levels in the area of occupational, environmental, and toxicological arenas. The Deputy Commissioner ruled that the plaintiffs failed to prove that they had any disease or condition which arose from their occupational trade. The Deputy Commissioner also ruled that the plaintiffs' employment did not place them at an increased risk and that the plaintiffs failed to prove their was a causal connection between their myriad medical problems and their employment with defendant employer.

**MARSHALL WALL**, of our Raleigh office, recently obtained a summary judgment in Wake County Superior Court. Our client was towing a boat and trailer at sunset when he was rear-ended by an SUV. A suit was filed by his insurance carrier for reimbursement for what it paid to replace the boat and trailer. The other driver counterclaimed against our client for her property damage and personal injuries. She claimed that our client's trailer did not have the required lighting for a vehicle its size. In her deposition, the other driver admitted that she was driving 60 miles per hour in a 55 mile per hour zone when she first saw our client's trailer. The judge allowed our motion for summary judgment, finding that the other driver was contributorily negligent as a matter of law.

**RICHARD BOYETTE**, **MARSHALL WALL**, and **KARI JOHN-**

## Recent Case Results

**SON**, all of our Raleigh office, recently prevailed in Superior Court and later in the North Carolina Court of Appeals. We represented a local ice rink, where plaintiff was injured. Plaintiff claimed that she was skating when a teenage boy at the rink knocked her to the ice, causing a serious closed head injury. Plaintiff claimed that she could not remember the events of the night. Her husband and children, who were with her, did not see her fall but said that they saw a group of teenagers engaging in horseplay shortly before the accident. They sued the rink, claiming that it failed to properly supervise the skaters. We moved for summary judgment on the grounds that plaintiff has offered no evidence to show how she fell and that, even if her allegations were true, she could not connect them to the earlier "horseplay." Our motion for summary judgment was allowed in Superior Court. Plaintiff appealed to the North Carolina Court of Appeals, which affirmed the decision of the Superior Court judge.

**DONNA RASCOE**, of our Raleigh office, and **NORWOOD BLANCHARD**, of our Wilmington office, recently won the dismissal of a public employment lawsuit filed in the U.S. District Court for the Middle District of North Carolina. The suit was brought by a former sheriff's deputy who was stationed as a School Resource Officer at two local high schools. Plaintiff had been hired as a deputy by one sheriff, and later fired by a different sheriff. Plaintiff sued the school superintendent and the hiring sheriff, alleging that the two established a conspiracy to punish plaintiff, who is white, for wanting to participate in an investigation into a racially hostile environment against students at the high school. Plaintiff asserted various constitutional claims for violations of equal protection and due process. The federal judge granted summary judgment in favor of both defendants. The court held that plaintiff had not described any protective conduct that would support a Section 1981 retaliation claim. The court also rejected plaintiff's equal protection claim because such a claim cannot be based upon generic retaliation assertions and because plaintiff failed to identify a policy or regulation that was selectively used against him. Finally, plaintiff failed to plead the necessary elements of a conspiracy claim under any of the various parts of Section 1985.

**DONNA RASCOE**, of our Raleigh office, recently prevailed in a case before the United States Supreme Court. This long-running special education dispute involved the parents' contention that their severely disabled son must served in a private residential placement in Maryland. In 2001, the school district proposed an appropriate placement in a new program in North Carolina. The Federal District Court and the Fourth Circuit Court of Appeals had issued decisions favorable to the school district and supportive of the school district's proposed placement. In March, 2005, the United States Supreme Court denied the parents' petition for certiorari to that court.

**JENNIFER POLLEY-ABRAMSON**, of our Raleigh office, recently prevailed in a case against a nursing home. The plaintiff had sued the nursing home for burn injuries resulting from a fire, and made a claim for punitive damages against the nursing home. Jennifer made a motion to dismiss the claim for punitive damages, and the motion was allowed.

**GEORGE SIMPSON**, of our Raleigh office, recently won a jury verdict in Wake County Superior Court. George represented the defendant in this motor vehicle lawsuit. The defendant admitted negligence, but denied that the accident caused any injury to the plaintiff. On the issue of causation, plaintiff presented testimony from a Raleigh neurologist who testified that the herniated disc in plaintiff's neck was caused by the accident. On cross-examination the neurologist, the neurologist that he did not see the plaintiff until 18 months after the accident. The neurologist also admitted that he had not consulted with, or reviewed the medical records of, several doctors who treated the plaintiff in the months immediately following the accident. Those medical records showed that plaintiff had complained to various doctors after the accident that he suffered from a chest cold and low back pain, with no complaints of neck pain. During closing arguments, plaintiff's attorneys asked for \$65,000.00. During jury deliberations, defendant offered \$20,000.00 to settle the case, but the offer was rejected by the

plaintiff. The jury returned with a verdict of \$1.00.

**TRISH HOLLAND**, of our Raleigh office, successfully defended a charge filed with the Equal Employment Opportunity Commission (EEOC) in which the charging party contended that he had been discriminated against because of his age. After submitting an extensive position statement in opposition to the charge, the EEOC issued a "no cause" determination and dismissed the charge.

**JOHN MARTIN** and **NORWOOD BLANCHARD**, of our Wilmington office, recently obtained summary judgment in favor of our client, an architect, in a malpractice suit filed in New Hanover Superior Court. The plaintiff, a retired lobbyist and member of the Virginia State Bar, claimed to have spent approximately \$240,000.00 for repairs to his coastal vacation home resulting from water intrusion. In an attempt to circumvent the statute of repose, the plaintiff's attorney retained three expert witnesses who claimed that the damage to the residence was the result of "willful or wanton" negligence. John and Norwood deposed the plaintiff's experts and were able to establish that there was no triable issue of "willful or wanton" negligence. As a result, the presiding judge granted summary judgment and ordered the plaintiff to pay our client's costs.

**GEORGE SIMPSON**, of our Raleigh office, recently won a motion to dismiss for lack of personal jurisdiction in Wake County Superior Court. Plaintiff, a Wake County resident, alleged in her complaint that defendant, a California corporation, negligently installed a display curtain at a trade show in Florida, and that she was injured when the 20 foot high curtain display fell on top of her. Plaintiff claimed that defendants' interactive web site, which is accessible in North Carolina, sufficed to give rise to jurisdiction in this state. Plaintiff also noted that defendant had managed one trade show in Charlotte in 2001. The trial court was unpersuaded by plaintiff's arguments, and dismissed the case on the grounds that an interactive web site and one trade show do not amount to the type of substantial contacts with this state that are required to give rise to personal jurisdiction.

**NORWOOD BLANCHARD**, of our Wilmington office, recently secured a dismissal of the claims against our client in a police liability case filed against a local Sheriff's Department and a Deputy Sheriff in his individual capacity. Due to a clerical error by the Clerk of Court's office, the plaintiff had been arrested and charged with a felony offense. After the Superior Court judge dismissed the criminal charges against the plaintiff, he filed suit against the Sheriff's Department and a Deputy Sheriff, alleging assault, battery and false arrest. The plaintiff's attorney first filed suit in state court, but took a voluntary dismissal and re-filed the suit in federal court. Norwood immediately filed a motion to dismiss the case which was granted by the U.S. District Court judge.

**RACHEL ESPOSITO**, of our Raleigh office, obtained dismissals in three cases against local Boards of Education and teachers based, in part, upon grounds of governmental/ sovereign immunity. The plaintiffs had alleged that their personal injuries on school properties had been caused by the school boards' and/or teachers' negligence, but once confronted with the insurmountable defense of immunity, the plaintiffs' attorneys took dismissals.

**JOHN MARTIN** and **REGAN TOUPS**, of our Wilmington office, recently obtained a dismissal of medical malpractice case filed in New Hanover County. The plaintiff alleged that the defendant orthopedic surgeon failed to remove a headpin that became dislodged during the plaintiff's knee replacement surgery. The plaintiff did not designate expert witnesses, asserting that this was a case of *res ipsa loquitur*, and that expert testimony on the standard of care was not required to take the case to the jury. After defense counsel designated expert witnesses, a motion to dismiss was filed. The court granted the defendant's motion to dismiss, based upon plaintiff's failure to designate expert witnesses on the issue of standard of care.

**LEE POOLE**, of our Charlotte office, recently prevailed in a jury trial in Lincoln County Superior Court. Plaintiff suffered injuries as a result of a collision with a truck which crossed the centerline on a two-lane road.

## Recent Case Results

Plaintiff alleged numerous injuries as a result of the accident, and underwent several surgeries including a hip replacement. Plaintiff alleged that her business was wiped out as a result of the accident. Plaintiff's husband also filed a claim for loss of consortium. We represented the trucking company that was moving a manufactured home, which was built on to the trailer. Plaintiff brought in a vocational expert to testify about the plaintiff's earning history, and this expert was also allowed to testify about future medical costs and possible treatment. Plaintiff also relied upon an economist to present evidence of future lost earnings and the cost of the future medical treatment. Special damages were alleged to exceed \$500,000.00. The jury did not believe that all of the medical treatment was related to the accident. We also contested liability based upon the failure of the brakes upon the trailer, and the jury returned a defense verdict for our client based upon sudden emergency.

**NORWOOD BLANCHARD**, of our Wilmington office, recently obtained a favorable outcome for our client in a gender and pregnancy discrimination lawsuit in federal court. Even though Norwood had convinced the Equal Employment Opportunity Commission to issue a "no cause" finding. The plaintiff nevertheless proceeded to file suit. After taking the plaintiff's deposition, Norwood secured affidavit testimony from the plaintiff's former manager (who had since been terminated) and explained to the plaintiff's attorney why summary judgment would most likely be granted in favor of our client. The plaintiff's attorney then agreed to voluntarily dismiss the case.

**RACHEL ESPOSITO**, of our Raleigh office, recently won a motion to dismiss in a sexual harassment case that plaintiff had attempted to bring in state court. Despite our client's admissions to certain inappropriate sexual comments towards the plaintiff in the workplace (in response to plaintiff's requests for admission), Rachel was nonetheless successfully argue that no state common law tort claim of "sexual harassment" exists, and that the plaintiff's exclusive remedy for such a claim was pursuant to federal law under Title VII of the Civil Rights Act of 1964. Additionally, the court dismissed the plaintiff's negligent infliction of emotional distress claim, based upon our argument that alleged acts of intentional discrimination cannot form the basis for a negligence action.

**RACHEL ESPOSITO**, of our Raleigh office, aided a client in avoiding a potential retaliatory discharge claim by a female former employee by helping the employer obtain a resignation from her (without having to pay any severance), rather than terminating her employment. The employee, before she ultimately resigned, was complaining about sexual harassment she had allegedly suffered on the job and how she felt retaliated against for having previously raised concerns to management about this alleged harassment. At the same time, the employee was having problems with excessive absenteeism and she had filed a workers' compensation claim asserting that she had a "stress related syndrome" based upon sexual harassment and retaliation. If her employment had been terminated at this time, the risk of a retaliatory discharge claim was high. After writing letters to the employee emphasizing the employer's need and hope that she returned to work, the employee returned for a few days and resigned of her own accord. The statute of limitations for the employee to have raised any Charge of Discrimination with the Equal Employment Opportunity Commission has now expired, and the case is fortunately closed.

**NORWOOD BLANCHARD**, of our Wilmington office, successfully represented a Sheriff's Department in a recent federal lawsuit in the Middle District of North Carolina. The plaintiff filed suit against the Sheriff's Department and several individual deputy sheriffs alleging that he had been wrongfully arrested and detained for approximately two weeks pending trial, before he was released on bond. Norwood filed a motion to dismiss the case and also moved for a stay of all discovery pending resolution of the motion to dismiss. The U.S. Magistrate Judge granted the motion to stay discovery and recently issued a recommendation and order recommending that the plaintiff's claims be dismissed. This was a particularly favorable outcome

because the plaintiff had sought to conduct extensive discovery, so the stay of discovery saved our client a considerable amount of effort and expense.

**LEE POOLE**, of our Charlotte office, recently prevailed in a UIM arbitration hearing. The case involved a wrongful death claim, with plaintiff demanding a minimum of \$850,000.00 in "new money." Plaintiff had an economist who put the value of lost wages and services in the neighborhood of \$650,000.00 - \$700,000.00. The arbitrators returned an award of roughly \$380,000.00 in new money, which may be reduced further depending upon resolution of the workers' compensation issue.

**ANN ESTRIDGE**, of our Raleigh office, obtained a "no cause" finding from the Equal Employment Opportunity Commission on a claim brought by a former employee of city housing authority. The former employee contended that her termination constituted discrimination on the basis of religion, and that she was being retaliated because of having previously made a complaint about sexual harassment. Following review of the position statements and supporting documents submitted on behalf of the housing authority, the EEOC found no basis for these allegations and issued a "no cause" finding.

**JONATHAN ANDERS**, of our Raleigh office, recently obtained a favorable decision from the Full Commission of the North Carolina Industrial Commission. The Full Commission affirmed the Deputy Commissioner, who had ruled in our favor. The plaintiff contended that his brother, and partner and co-officer in a landscaping corporation, did not ask the corporation's independent insurance agent to exclude both officers (plaintiff and his brother) from workers' compensation coverage. Plaintiff had lost a leg in a work-related accident, and was likely permanently and totally disabled. The Full Commission affirmed the decision and found that the independent insurance agent's testimony was credible and that additional evidence supported the conclusion that the brother did ask that both officers be excluded from coverage, and that they were in fact excluded.

**ANN ESTRIDGE**, of our Raleigh office, obtained a "no cause" determination from the North Carolina Department of Labor, in connection with its investigation of a potential violation of REDA, the Retaliatory Employment Discrimination Act. The employee complained that his employment had been terminated in retaliation for filing a workers' compensation claim. After reviewing the position statement and supporting documents, the investigator determined that there had not been a violation of law and closed the file.

**ANN ESTRIDGE**, of our Raleigh office, successfully obtained a dismissal, prior to discovery, of a personal injury claim asserted against a high school principal. Specifically, the plaintiff's personal injury claim was barred by the doctrine of public official immunity.

**COLLEEN SHEA**, of our Wilmington office, recently obtained a dismissal in a medical malpractice action. The plaintiff alleged that the defendant orthopedic surgeon breached the standard of care during a shoulder replacement procedure requiring a subsequent revision. After a discovery violation by counsel for plaintiff, Colleen filed and argued a motion to dismiss. The presiding judge ordered that plaintiff either take a voluntary dismissal, or the court would enter a dismissal with prejudice.

**MARSHALL WALL**, of our Raleigh office, recently prevailed in a jury trial in Wake County Superior Court. Plaintiffs were a 12-year-old boy and his mother. The boy was injured and made a claim for pain and suffering resulting from the accident, and the mother made a claim for medical expenses incurred for his treatment. The case was one of clear and admitted liability. The mini-van in which the plaintiff was riding was a total loss. He was sitting in the back row of seats, and the rear window shattered, and he had a few minor cuts as a result. He was treated at the emergency room and released, then followed up with a chiropractor six weeks after the accident. Plaintiff's attorney asked the jury for a total award of more than \$16,000.00. The jury awarded the mother \$1,768.00, less than the total of the medical expenses incurred, and awarded the minor \$1.00 for pain and suffering. The total jury award was less than the last offer made by defendant before trial.