SECTION THREE
2013-2014 BICAR COURSE

SELECTED COURT CASES

Outline:
Introduction
Contract Law Issues
Property Management
Appraiser Liability
Broker Liability
Brokerage Compensation
Rulings

Introduction

This Section summarizes various legal decisions issued in North Carolina or other jurisdictions within the past five to ten years to alert brokers to the errors of others so they will not make the same mistake. The case summaries are drawn from various sources, including a search of recent North Carolina cases, compilations of court decisions presented by Charles Jacobus, Esq. at the 2013 national Real Estate Educators Association Conference (REEA), and case summaries prepared by Commission staff and others for the 2013 Association of Real Estate License Law Officials (ARELLO) annual meeting. Reported North Carolina cases may be cited as precedent; cases from other jurisdictions might be illustrative, particularly in a case of first impression in North Carolina, but are not binding on North Carolina courts.

To facilitate discussion, the facts underlying each case are presented initially, and the Court's decision or ruling in each case is summarized in the final few pages of this Section.

Contract Law Issues

Unilateral Mistake

#1 ***Willis v. Willis***, 365 NC 454, ____ SE2d ____ (2012)

This case provides a poignant example of how a grantor's *unilateral mistake of fact or law* generally will not allow reformation of a warranty deed in the absence of fraud. In this case, Janice Willis had two adult sons, Eddie and Anthony. In December 2004 she prepared her Last Will and Testament leaving her "home place" to Eddie and dividing all other property owned at her death between her two sons equally. The Will also stated that if she conveyed title to the property to Eddie prior to her death and he then decided to sell it, she requested that he share the sale proceeds with Anthony. A month later, Janice executes a General Warranty Deed granting herself a life estate in the property, but otherwise conveying it in fee simple to Eddie without any restrictions, other than her life estate.

As fate would have it, Eddie died unexpectedly in November 2007 and during the probate of his estate, it became apparent that Eddie's surviving wife and children were entitled to inherit Janice's property, a result she had not intended. Since Eddie had not survived her, Janice now wanted her property to go to her surviving son, Anthony, rather than Eddie's widow and children. She filed an action seeking reformation of the General Warranty Deed relying on *Nelson v. Harris*, a 1977 North Carolina case that actually allowed reformation of a Deed based on *mutual mistake* of the parties, but which contained dicta regarding reformation of a Deed based on the grantor's unilateral mistake where no consideration had been given for the conveyance.

The trial court ruled that, given the recitation of consideration in the Deed itself, coupled with the fact that "love and affection" between parents and children may serve as consideration, Janice was not entitled to reform the Deed. The North Carolina Supreme Court opined that Janice's reliance on *Nelson* was misplaced, because dicta is neither binding nor precedential and the comment in *Nelson* that a gift deed could be reformed based on the grantor's unilateral mistake was actually contrary to established North Carolina law and should be ignored.

#2 ***Taylor v. Gore***, COA 03-219, Nov 18, 2003

In contrast to *Willis* in result, but in keeping with the legal theory, is the 2003 case of *Taylor v. Gore* in which the Taylors purchased 15.26 acres of land from L. R. Gore in April 1999. Prior to the sale, Gore, through his listing agent, gave plaintiffs a survey of the property that stated "SUBJECT PROPERTY IS NOT IN A FEDERAL (HUD) DESIGNATED FLOOD HAZARD AREA." In July 2001, the Taylors wanted to develop the property, but learned it was not suitable because part of the property was in fact located in a flood zone. They sued Gore, his listing agent and the listing company in February 2002 arguing fraudulent misrepresentation, negligent misrepresentation, and seeking rescission of the deed based on a substantial mistake of fact affecting the essence of the contract. Gore and the brokers answered that they had no knowledge prior to the sale that the property was in a flood zone and had they known, they would have disclosed it to the Taylors.

Broker's Ability to Bind Principal

#3 ***Manecke v. Kurtz,*** ____ NC App. ____, 731 SE2d 217 (2012)

This case was discussed in the 2013-2014 Update Course materials (*see* article "Contract Formation and Negotiation") regarding a broker's ability to bind his/her principal through the broker's email communications. In this case, Mr. Manecke listed his property for sale in Cornelius with an agent named Linda. Mr. and Mrs. Kurtz were residents of New Jersey, but were looking to purchase real property in North Carolina and had hired a broker named Tom to be their buyer agent. On August 22, 2010, Tom sent Linda an email with an attached Standard Form 2-T signed by the Kurtzes offering to purchase Mr. Manecke's property for $785,000. Linda then emailed Tom a counteroffer with a $845,000 purchase price and an $8,000 repair contingency apparently signed by the seller, which Tom forwarded to the Kurtzes and then replied to Linda, "[The Kurtzes] are really excited about their new home and agree to the counteroffer." The next day, August 23, Tom emailed Linda a copy of the $20,000 earnest money check and informed her that Mr. Kurtz was overnighting the check and that Tom "should also have the initialed changes to the contract tomorrow."

On August 25, Linda sent Tom an email inquiring about the deposit. Tom replied that he had received it and would deliver it to Linda's office the next morning and that he should have the initialed contract by then as well. The Kurtzes called Tom on August 26 and told him they had changed their minds, that they were not going to sign the counteroffer, and that he should destroy the earnest money check. Tom then called Linda and related this information. In the interim, Mr. Manecke had received and rejected another offer for $850,000 based on his negotiations/ communications with the Kurtzes.

Mr. Manecke filed suit in November 2010 against the Kurtzes for specific performance or, alternatively, breach of contract. The Kurtzes filed a Motion for Summary Judgment arguing that they never signed or initialed the counteroffer, and thus there was no writing signed by the party to be charged as required by the Statute of Frauds. Plaintiff attempted to argue that Tom's email assertion that the buyers were "excited about their new home and agree to the counteroffer" was a sufficient writing to satisfy the Statute of Frauds and thus obligate the buyers since Tom was their agent. In appealing the trial court's grant of summary judgment in favor of defendants, plaintiff argued that there were genuine questions of material fact as to whether: A) Tom acted with actual or apparent authority, B) there was a valid contract and C) the writings were sufficient to satisfy the Statute of Frauds.

Contract Modification

#5 ***Blackmore vs. Re/Max Tri-Cities***, 237 P. 3d 655 (Idaho, 2010)

The Blackmores entered into a purchase agreement to buy a property listed with the defendant, Re/Max, contingent on the results of a "well inspection" satisfactory to the Blackmores to be conducted by Re/Max, the methodology of which was discussed between the buyers and listing company. Prior to obtaining any results, oral or written, from the well inspection, the Blackmores signed a contract addendum waiving all contingencies and accepting the property "as is" in exchange for a reduced sales price. Within one year after moving in, the Blackmores' son was experiencing health problems. The Blackmores had the well tested and discovered arsenic. They sued Re/Max, alleging breach of a duty of care regarding the well testing. The trial court granted judgment in favor of Re/Max, holding it owed no duty of care given the addendum, and the Blackmores appealed.

Specific Performance

#6 ***The Vue-Charlotte LLC et. al. vs. Sherman***, ___ NCApp ____, 719 SE2d 161 (2011)

The Vue owned several condominiums and had entered into written agreements to sell and purchase with two different buyer-couples using the Vue's own contract form. Both buyers ultimately defaulted, choosing not to go forward with the transaction. The VUE sued each couple for specific performance. The buyers argued that pursuant to the terms of the VUE's own contract, its remedy was limited to liquidated damages as provided in the paragraph addressing purchaser's default, particularly when contrasted with the purchaser's remedies in the event of owner's default found in the same paragraph that stated: "...[Purchasers] shall have such rights as may be available in equity and/or under applicable law." The trial court agreed and denied the claim for specific performance finding that the only remedy available to the VUE was liquidated damages. Because the purchase contracts and issues in both cases were identical, the appellate court consolidated the two cases into one for appeal purposes.

#7 ***Miller v. Russell***, ___ NC App ___, 720 SE2d 760 (2011)

In October 2008, Colie Miller, Jr, executed a deed to Roger and Linda Russell conveying Tracts 1 & 2 to them totaling roughly 11.37 acres in exchange for a loan the Russells were making to Gregory and Sarah Miller. On the same date, Gregory and Sarah Miller entered into an option to purchase agreement with the Russells under which they could purchase Tracts 1& 2 anytime within the next two years for $31,526.00 plus interest. A third small tract of land also was to be included in both the option contract and the deed to the Russells, which Colie Miller separately conveyed to the Russells in January 2009. The option contract stated that at any time during the option period, "...Buyer may exercise this option by hand delivery or written notice by certified or registered mail, return receipt requested and the sum of $1,000.00 as earnest money to Sellers at [defendants' counsel's law firm mailing address]."

In June 2010 Sarah Miller obtained a loan to purchase the tracts under the option contract and her attorney emailed notice of her intent to exercise the option to the Russells' attorney, stating that she would be prepared to close on June 28, 2010 and to please prepare a deed. The closing did not occur and apparently the Russells continued to balk, at which point all three Millers filed a lawsuit against the Russells in June 2010 seeking specific performance of the option contract and reconveyance of Tract 3 based on lack of consideration for the initial transfer. On or about October 7, 2010, Millers' attorney sent another email letter to the Russells' attorney stating her desire to purchase the properties and that Sarah Miller had the $31, 526.00 plus all interest due thereon. No closing occurred. At hearing, the trial court granted Plaintiff's request for specific performance of the option contract, but denied the request for reconveyance of Tract 3. Both sides appealed.

#8 ***Stoll v. Chong Lor Xiong and Mee Yang,*** 241 P.3d 301 (Oklahoma, 2010)

Stoll, a property owner, entered into a land installment contract in 2005 to sell 60 acres of land to two Laotian immigrants for $2000.00 per acre, plus $10,000 for an access road to be constructed by Stoll. The purchase contract further provided that Xiong and Yang would construct a litter shed and that Stoll would be entitled to receive all chicken litter (guano?) generated from the property for 30 years. In 2009, Stoll learned that the buyers were selling the

chicken litter to others or trading it for shavings. Stoll sued the buyers for breach of contract, requesting specific performance of the land installment contract and an injunction preventing the buyers from selling their chicken litter to any third parties.

Property Management

Negligence

#9 ***Lampkin v. Housing Management Resources, Inc., et al.***, ___ NCApp ___, 725 SE2d 432 (2012)

This case was filed on behalf of a young girl who lived in an apartment complex owned by one entity and managed by Housing Management Resources, Inc. In January 2010, the girl, then four years old, was playing on the complex's playground, when she slipped through a broken portion of the fence to the adjacent property where there was a pond. She began playing on the frozen pond, but fell into the frigid water when the ice broke and sustained permanent brain damage. Her father and a guardian sued the landowner, the complex owner and the management company alleging breach of a duty to maintain a barrier between their property and the adjacent property on the theory of "attractive nuisance." They also argued that the apartment complex was on notice, as the adjacent landowner had informed the complex owners that children were coming through the fence and playing on her property and she was concerned someone might be hurt. All defendants moved to dismiss for failure to state a claim upon which relief may be granted, which was granted by the trial court and the plaintiffs appealed.

#10 ***Davenport v. D.M. Rental Properties, Inc,*** ___ NCApp ___, 718 SE2d 188 (2011)

D.M. Rental Properties, Inc owned and managed a 10 acre, 20 lot mobile home park in Gaston County. Davenport and his wife rented one lot and a man named Herrin rented another lot. One evening, the Davenports and Herrin, who had been drinking heavily, had several confrontations, culminating in Herrin throwing gasoline on Mr. Davenport and setting him on fire. Davenport was severely burned. He sued the defendant owner-manager alleging negligence in: 1) failing to make the property safe, 2) leasing to Herrin, and 3) failing to evict Herrin, all of which proximately caused Davenport's injuries. The defendant counterclaimed alleging contributory negligence and various other affirmative defenses and each side moved for summary judgment. The trial court granted summary judgment in favor of the defendants dismissing plaintiff's action and plaintiff appeals.

Appraiser Liability

#11 ***Davis v. McGuigan***, 325 SW3d 149 (Tenn., 2010)

The Davises wanted to buy a lot on which to construct a residence having a combined cost not exceeding $731,000 and applied to a financial institution for a loan in the amount of $580,000.00. The financial institution hired an appraiser (McGuigan), who in one day issued a report stating that, in his opinion, the value of the lot with the proposed residence was $735,000.00. In preparing his appraisal, the appraiser only used comparable sales from a neighboring subdivision and none from the subdivision in which the lot was located. The

financial institution informed the Davises of the appraisal, approved the loan, and the Davises proceeded to purchase the lot and construct the residence.

More than one year later, the Davises sought a home equity loan from the same financial institution, which application was denied as the property only appraised at $510,000.00. Approximately two years after the loan application denial, the Davises listed their property for sale, but only sold it for $660,000.00. The Davises sued McGuigan, the appraiser, for misrepresentation, among other claims. The trial court granted summary judgment in favor of McGuigan, dismissing the Davises' claims, which was affirmed by the Court of Appeals, and the Davises appealed to the Tennessee Supreme Court.

Broker Liability

Misrepresentation

#12 ***Defterios vs. Dallas Bayou Bend, Ltd.***, 350 SW3d 659 (Texas Court of Appeals, 2011)

Defterios, a licensed real estate broker, approached Nussbaum, a developer, and told him that Defterios had a client, Flaven, who was the beneficiary of a multimillion dollar trust fund and wanted to use those monies to purchase Nussbaum's portfolio of properties. Flaven signed contracts to purchase nine of Nussbaum's properties. The original closing date was August 2004, but it was postponed numerous times. Defterios explained to Nussbaum that the trust wasn't releasing the funds, but confirmed that he (Defterios) had personally verified the funds existence and that the closings were imminent. After more than a year elapsed without the transactions closing, Nussbaum began to question the truthfulness of what he was being told and made some inquiries.

Company's Vicarious Liability for Agent's Conduct

#13 ***Auer v. Paliath***, 986 NE2d 1052 (Ohio 2013)

Paliath was an associated salesperson with Home Town Realty, dba Keller Williams Home Town Realty, and was treated by Home Town as an independent contractor. Reading the facts of the case reveal that Paliath wove a fairly tangled web, most likely unbeknownst to her broker-in-charge. In her capacity as an associated sales agent with Home Town Realty, she assisted Torri Auer, a California buyer, in the purchase of several residential investment properties between August 2007 and December 2007. Upon the consummation of each transaction, Ms. Auer usually entered into a management and/or rehab agreement with A-1 Property Management or Miami Valley Home Improvements, LLC, both companies owned by Paliath and under which Paliath provided the rehabilitation and management services, separate and apart from Home Realty Town. Auer paid Miami Valley Home Improvements at least $150,000 for renovations to three of the newly purchased properties, which renovations/repairs were never performed.

In November 2007 Auer contracted to purchase through Home Town Realty with Paliath as her agent one final property, this one owned by Miami Valley Custom Homes, Inc for which Auer paid $60,000 at closing on December 19, 2007 with Home Town Realty receiving the entire commission. Paliath neglected to disclose to at least Auer, and possibly Home Town

Realty, that she owned Miami Valley Custom Homes, Inc that had just purchased the property under contract to be sold to Auer only a few weeks earlier for less than $9,000.00. On December 7, 2007, prior to closing, Home Town Realty severed its employment relationship with Paliath, who then created another company, The Investment Genie Realty Group, found a broker-in-charge and continued working as a salesperson for her own company. Auer finally fired Paliath in October 2008, having received no income from any of the rental properties since purchasing each. As of August 2008 only 1 of 27 units was rented and many of the properties were in disrepair. Auer sued Paliath, Home Town Realty and others, alleging among other things, fraud in the inducement in the initial purchase of the properties, Paliath having represented that the properties typically had a fair market value of twice what Auer was paying, that many of the units already were rented or had waiting lists, etc.

At the conclusion of the trial, the judge instructed the jury on "vicarious liability" stating that if the jury found that Paliath committed fraud in her statements regarding four of the properties purchased, then Home Town Realty would be vicariously liable for Paliath's actions. Home Town Realty objected to the phrasing of these jury instructions. The jury entered multiple awards in favor of Auer against Paliath, but also found Home Town Realty liable for the four properties Paliath had fraudulently induced Auer to purchase and awarded Auer judgment in the amount of $135,200.00 against Home Town Realty. The only appeal was by Home Town Realty on the issue of its vicarious liability for the acts of its independent contractor salesperson.

Brokerage Compensation

#14 ***839 E. 19th Street, L.P. vs. Friedson***, 373 SW2d 674 (Texas, 2012)

Friedson, a licensed real estate broker doing business as National Property Income, LLC, entered into a written listing agreement with Waloon, the owner of an apartment complex. The listing agreement was to expire on April 30, 2006 with a 90 day protection period thereafter. In late March/early April, Friedson received an inquiry from 839 E. 19th Street (hereinafter "purchaser") and Friedson provided various information needed for due diligence. On April 7, 2006 Friedson presented an offer for $5.8 million dollars from the purchaser, which offer Waloon rejected.

When the listing agreement expired April 30, purchaser contacted Friedson directly and they entered into a written buyer agency agreement covering only the apartment complex owned by Waloon. The buyer agency agreement ran from May 9, 2006 through September 29, 2006 with a 120 day protection period thereafter. Friedson brokered another offer from purchaser dated May 30, 2006 for $6.25 million, but it expired for lack of acceptance by Waloon, who then told Friedson that he had decided not to sell the property after all and purchaser said he was done dealing with Waloon. Friedson failed to list the prospects to be protected under the buyer agency agreement. On November 6, 2006, Waloon and purchaser entered into a contract to purchase the apartment complex for $6.35 million. Friedson was not paid by either party and sued the purchaser under the buyer agency agreement.

#15 ***Knipe Land Company vs. Robertson***, LEXIS 83, Idaho 2011.

The Robertsons owned in their individual names 1400 acres of land, as well as an additional 1887 acres owned by their business, Robertson Kennels. They listed both tracts for sale with Knipe Land Company. The listing agreement stated "Should a depositor amounts paid

on account of purchase be forfeited, one-half thereof may be retained by you, as the Broker, and the balance shall be paid to me." The Robertsons accepted an offer from the Harmons for the1400 acre tract with a $50,000 earnest money deposit. When the Harmons terminated the contract, $35,000 of the $50,000 was forfeited to the Robertsons. Knipe did not request any portion of that $35,000 as permitted by the listing agreement.

A nuclear energy company then made an offer to purchase both tracts which was accepted and the company paid a total of $450,000 in non-refundable deposits under the terms of the purchase contract. The Robertsons gave written permission to the title company to pay $22,500 of those deposits to Knipe and the remaining $427,500 to the Robertsons. The energy company ended up cancelling the transaction and when the Robertsons refused to pay Knipe the balance due for his 50% of all non-refundable deposits, he sued them. The Robertsons counterclaimed, alleging that Knipe violated the Consumer Protection Act by failing to provide them with legible copies of the listing agreement at the time of signing and that he converted the $22,500 previously paid to him. The jury found that the Robertsons had not breached the listing agreement, that Knipe had not wrongfully converted the $22,500, but awarded the Robertsons $1,000 for Knipe's alleged failure to provide copies of the listing agreement. Knipe appealed.

#16 ***Michael Salove Co. vs. Enrico Partners, L.P.,*** 23 A3d 1066 (Pennsylvania, 2011)

Salove is a real estate broker. He entered into a 120 day exclusive agreement with Enrico Partners to procure a tenant for a space in Enrico's shopping center. No tenant was found and the listing expired, but Salove left his brokerage sign in the window. He later received a call from a prospective tenant to whom he then showed the space and the tenant entered into a lease agreement. When Enrico failed to pay a commission, Salove filed a broker lien against the property and sued Enrico. Salove argued that Enrico had orally extended the exclusive agency agreement which Enrico denied. The trial court extinguished the lien and dismissed the case. Salove appealed.

Rulings/Outcomes

Contract Law Issues

Unilateral Mistake

#1 ***Willis v. Willis***, 365 NC 454, ____ SE2d ____ (2012)

Held: The NC Supreme Court, citing a 1926 case, held that it is well-settled in North Carolina that reformation of a deed is only available in three situations, namely: 1) mutual mistake of the parties; 2) mistake of one party induced by fraud of the other party; or 3) mistake of the draftsman. The 1926 case had stated: "mistake of one party to the deed, or instrument, alone, not induced by the fraud of the other, affords no ground for relief by reformation." Thus, since none of the three situations were present in this case, Janice was not entitled to reform the deed. Accordingly, she could live there during her lifetime under the life estate, but title to the property was vested in her grandchildren and their mother.

#2 ***Taylor v. Gore***, COA 03-219, Nov 18, 2003

Held: The trial court granted summary judgment in favor of the defendants on all issues and dismissed the case and the Taylors appealed. The Court of Appeals affirmed the trial court's grant of summary judgment as to the fraudulent and negligent misrepresentation claims, finding that an element of fraudulent misrepresentation is an intent to deceive, and one cannot intend to misrepresent that which one does not know. As to the negligent misrepresentation claim, the Court had previously held that a seller's agent was not liable for inaccuracies or misrepresentations in a survey where the agent had no reason to conduct an independent investigation or question the surveyor's assertions since a properly licensed person with expertise and training had been hired to perform the survey. [See *Clouse v. Gordon*, 115 NC App 500, 445 SE2d 428 (1994).] The Court chose to apply this same exemption to the property owner, as well as the brokers, and affirmed the trial court's dismissal of the negligent misrepresentation claim.

However, the appellate court found that the trial court erred in dismissing the Taylors' claim for rescission of the deed based on their substantial mistake of fact claim against Gore, the owner. The Court noted that it is well established *both that 1) "... the existence of a mutual mistake as to a material fact comprising the essence of the agreement will provide grounds to rescind a contract...," and 2) "... the mistake of one party is sufficient to avoid a contract when the other party had reason to know of the mistake or caused the mistake.*" While such mutual or unilateral mistakes may provide grounds to rescind a contract, Courts are much more reluctant to apply these doctrines to executed real estate contracts, i.e., to rescind deeds. However, in light of precedent holding that "certain mistakes will justify the rescission of an executed real estate contract" and "... a mistake induced by misrepresentation is as persuasive a case for rescission as any," the Court concluded that there were material issues of genuine fact concerning the Taylors' claim against Gore only to rescind the deed based on a mistake caused by Gore and remanded the case back to the trial court for further proceedings.

Broker's Ability to Bind Principal

#3 ***Manecke v. Kurtz,*** ____ NC App. ____, 731 SE2d 217 (2012)

Held: A Motion for Summary Judgment is appropriate when there are no genuine issues of material fact for a fact-finder, whether judge or jury, to determine; in other words, the facts are undisputed and when the law is applied to those facts, then one party is entitled to judgment as a matter of law — the granting of a judgment summarily. The Court of Appeals noted that principals are only liable on contracts made by their agent with a third party in three instances, namely: 1) when the agent is acting within the scope of his *actual* authority or 2) within the scope of his/her *apparent* authority, or 3) when the principal ratifies the agent's unauthorized act. Actual authority is that authority which the agent reasonably believes s/he has and may be implied from the words and acts of the parties. However, citing a 1981 North Carolina Supreme Court case, the Court stated the ***general rule*** *that "****A real estate agent in North Carolina, absent special authority, does not have the power to bind his principal in a contract to convey real property****."*

In the instant case, the Kurtzes had signed NCAR Form 201, "Exclusive Right to Represent Buyer." Mr. Kurtz testified that while he and his wife had authorized Tom to negotiate a contract, they had not conveyed any permission or authority to enter into a binding contract on their behalf. Such permission should be in the written agency agreement and most

likely would require a formal Power of Attorney granting the broker the authority to accept contracts in the Kurtzes' stead, which Tom acknowledged he had not been given. Thus, there was no actual authority. The Court also held that there was no apparent authority either, as Tom's emails were "... no more than notifications ..." to seller/listing agent that the defendants had agreed to the counteroffer, that Tom had received a faxed copy of the check, and that he expected to receive the initialed offer shortly. Thus, the Court concluded that the trial court had properly granted summary judgment for the defendants.

Contract Modification

#4 ***Blackmore vs. Re/Max Tri-Cities***, 237 P. 3d 655 (Idaho, 2010)

Held: The appellate court affirmed the trial court's ruling, holding that Re/Max didn't owe the Blackmores any duty of care under either Idaho law or the common law, and further that Idaho law eliminates any duty to inspect a well or to independently verify the accuracy or completeness of test results unless the inspection requirement was reduced to writing. While the requirement was in writing initially, the buyers later voluntarily waived that condition by signing the addendum accepting the property "as is."

Specific Performance

#5 ***The Vue-Charlotte LLC et. al. vs. Sherman***, ___ NCApp ____, 719 SE2d 161 (2011)

Held: Trial court ruling affirmed. Where, as here, the contract is "... in writing and free from any ambiguity which would require resort to extrinsic evidence, or the consideration of disputed fact, ..." then the intention of the parties is a question of law that should be ascertained from "the expressions used, the subject matter, the end in view, the purpose sought, and the situation of the parties at the time" each entered into the contract. Thus, because the Default paragraph in the contract only provided the owner with liquidated damages in the event of buyers' breach while allowing buyers any remedy at law or in equity for the sellers' breach, the trial court properly concluded that sellers were limited to liquidated damages and could not sue for specific performance.

#6 ***Miller v. Russell***, ___ NC App ___, 720 SE2d 760 (2011)

Held: The Court of Appeals, citing several precedents, stated "If the option terms are clear and unambiguous, it must be enforced as written, and the court may not disregard the plainly expressed meaning of its language ..." and that "*... the option must be exercised strictly in accord with all of the terms specified in the option*." [Italics added.] Because the option contract clearly indicated the method by which the Millers were to notify the Russells of the exercise of the option, i.e, registered mail or personal delivery to the Russells' attorney's office with a $1,000 earnest money deposit, and because the Millers failed to follow that method (notice by email and no deposit, even though Sarah Miller had the entire purchase price), the Court reversed the trial court, finding that the Millers had failed to timely exercise the option and thus were not entitled to specific performance of the contract. Accordingly, the Russells retained title to all three tracts for the sum of $31,526.00.

#7 ***Stoll v. Chong Lor Xiong and Mee Yang,*** 241 P.3d 301 (Oklahoma, 2010)

Held: The Oklahoma Court of Appeals affirmed the trial court's finding that the contract provision regarding the chicken litter was unconscionable and thus unenforceable. The trial

court had considered the language barrier between the parties, the buyers' limited education, and the fact that a *conservative* value of the chicken litter over a 30 year period was $216,000, adding $3,325 per acre to the purchase price of the property. Given the provision's effect was "so gross as to shock the conscience," it would not be enforced. Thus, the buyers owed the purchase price as stated in the installment sales contract, but they were free to sell their chicken litter to anyone.

Property Management

Negligence

#8 ***Lampkin v. Housing Management Resources, Inc., et. al.***, ___ NCApp ___, 725 SE2d 432 (2012)

Held: The Court of Appeals affirmed the trial court's dismissal of the action, holding that before there may be a finding of negligence, plaintiffs must first prove that the defendants owed the plaintiffs a duty of care. The appellate court rejected the contention that the complex owed its tenants a duty to protect them from conditions that existed on property the complex did not own and over which it had no control, holding that this would impermissibly shift the burden from the property owner, who maintains and has the use and benefit of and control over the condition, to adjacent property owners, contrary to public policy and established North Carolina law. The Court, citing numerous precedents, ruled that "...the duty to protect from a condition on property arises from a person's control over the property and/or condition, and in the absence of control, there is no duty." Further,

> ... a landowner's duty to keep property safe (1) does not extend to guarding against injuries caused by dangerous conditions located off of the landowner's property, and (2) coincides exactly with the extent of the landowner's control of his property....[B]ecause Defendants did not control the pond ...their duty to keep their premises safe did not include an obligation to make the pond safe by preventing children on their land from accessing the pond. Rather, the adjacent landowner, with exclusive control over the pond, had the sole duty to keep the pond safe, the only obligation to act, and the only possible liability.... Defendants' duty to keep Lampkin and other children safe ... ended where Defendants' ownership and control of their property ended.

#9 ***Davenport v. D.M. Rental Properties, Inc,*** ___ NCApp ___, 718 SE2d 188 (2011)

Held: The Court of Appeals affirmed the trial court's dismissal of plaintiff's action. *To sustain a* ***negligence action****, a plaintiff must show that the defendant: 1) owed the plaintiff a duty of care, 2) breached that duty of care, and 3) the defendant's breach of the duty was the* ***proximate cause*** *of the plaintiff's injuries*. The Court acknowledged that a landlord has a duty to exercise reasonable care to protect tenants from third-party criminal acts that occur on the premises where such acts are foreseeable, but that *foreseeability is the key or test in determining the existence of such a duty*.

The Court concluded that, based on the evidence, the presence of security measures would not have deterred Herrin's assault, since he continued his aggression after Davenport told Herrin that he had called the police, and thus the absence of such security measures was not the proximate cause of Davenport's injuries. As Davenport cited no authority for imposing a duty

on owners to screen potential tenants, there can't be liability for the failure to screen. Lastly, a landlord's duty to protect tenants from foreseeable third-party criminal acts has never included a duty to evict a tenant under North Carolina law and the Court declined to create such a duty under the circumstances of this case. While not stellar, there was nothing in Herrin's prior conduct that would have indicated a propensity for violence at the level of his attack on Davenport, and, there being no foreseeability, there was no breach of any duty of care by the Defendants.

Appraiser Liability

#10 ***Davis v. McGuigan***, 325 SW3d 149 (Tenn., 2010)

Held: The Tennessee Supreme Court reversed the lower courts' grant of summary judgment, holding that there were material issues of fact that should be determined, including whether McGuigan violated the Uniform Standards of Professional Appraisal Practices (USPAP) in his choice of comparable sales. In rejecting McGuigan's argument that he had no liability as to the Davises, because the appraisal was only his opinion and had been prepared to guide the bank's decision to lend, not the Davises' decision to purchase and borrow, the Court held that the opinion/appraisal was intended to be relied upon by all the parties. Accordingly, the case was remanded back to the trial court for hearing.

Broker Liability

Misrepresentation

#11 ***Defterios vs. Dallas Bayou Bend, Ltd.***, 350 SW3d 659 (Texas Court of Appeals, 2011)

Ultimately, Nussbaum learned that Flaven was a truck driver in Massachusetts, was not a beneficiary of any trust, and would not close on any of the alleged contracts. Nussbaum deeded some of the properties back to the lender banks in lieu of foreclosure and sold others at a loss. Most of the individual investors lost all monies they had invested in these properties. Nussbaum's company sued Defterios and the jury awarded him a $12 million judgment against Defterios for consequential damages. Defterios appealed arguing only that the evidence did not support the amount of the damage award. The appellate court affirmed the jury verdict, holding that the jury could reasonably have found that Defterios' misrepresentations were the cause-in-fact of Nussbaum's losses, which losses were reasonably foreseeable.

Company's Vicarious Liability for Agent's Conduct

#12 ***Auer v. Paliath***, 986 NE2d 1052 (Ohio 2013)

Held: The Ohio Court of Appeals reviewed various prior cases and ultimately held that while a brokerage company and its associated agents may enter into independent contractor agreements that define the parties' relationship between themselves, when the issue involves *an agent's conduct with third parties, then the relationship between the company and the individual agent becomes a principal-agent relationship where the principal (company) may be liable for the agent's tortious conduct committed within the scope of employment, particularly* if the agent

is a salesperson, since a salesperson must be under the supervision of a broker in all brokerage activity. An act falls within the "scope of employment" when it facilitates or promotes the business for which the person was employed/hired. The Court concluded that there was no error in the jury instructions concerning Home Town's possible vicarious liability, but reduced the judgment against Home Town by $15,000, the amount awarded Auer for one of the properties for which she had failed to introduce sufficient evidence of value at the time of purchase. Thus, Home Town Realty ended up with a judgment against it in the amount of $120,200.00 (not to mention the costs it incurred in litigating the case at both the trial and appellate levels).

Brokerage Compensation

#13 ***839 E. 19th Street, L.P. vs. Friedson***, 373 SW2d 674 (Texas, 2012)

Held: The trial court awarded Friedson a judgment based on breach of the buyer agency agreement and purchaser appealed. The Texas Court of Appeals reversed the trial court, holding that the "protection period" under the buyer agency agreement only applied to property to which the buyer was introduced between May 9 and September 29, and since the buyer became aware of the property in April 2006, it was not covered by the protection period, so Friedson received nothing. A peculiar result, particularly considering that the buyer agency agreement was limited to Waloon's property only.

#14 ***Knipe Land Company vs. Robertson***, LEXIS 83, Idaho 2011.

Held: The Idaho Supreme Court reversed the jury's findings and entered judgment for Knipe. The Robertsons had argued that there was a latent ambiguity in the listing agreement in that under the facts of this case, Knipe's share of the non-refundable deposit exceeded what his 5% commission would have been had the property sold and that brokers are only entitled to commissions under Idaho law when a property sells. The Court ruled that there was nothing ambiguous about the terms of the listing agreement, that Knipe was not seeking a commission, but instead was exercising a contractual right to a forfeited deposit and the fact that Knipe had not requested any portion of the first forfeited deposit did not in any way waive its right to exercise its contractual entitlement to future forfeited deposits. Lastly, The Supreme Court held that Knipe did not violate the Consumer Protection Act as the evidence at trial showed that Knipe did provide copies of the listing agreements to the Robertsons and there was no evidence that the copies were illegible. Accordingly, judgment was entered in favor of Knipe.

#15 ***Michael Salove Co. vs. Enrico Partners, L.P.,*** 23 A3d 1066 (Pennsylvania, 2011)

Held: The appellate court affirmed the trial court's decision holding that because Pennsylvania licensing statutes require the material terms of brokerage agreements to be in writing, any extensions of such brokerage agreements must also be in writing.

[Note: with the enactment of G.S. 93A-13 and based on these facts, the result should be the same under North Carolina law as it was in this case, i.e., no recovery against the client because no written agency agreement or event occurring within the protection period provided in the written agency agreement.]