

Damages Available for Insurance Bad Faith Claims in South Carolina and North Carolina

Christine Gudaitis
Andrea DeField
Ver Ploeg & Lumpkin, P.A.

Mark Langdon
William Silverman¹
Wall Templeton & Haldrup, P.A.

SOUTH CAROLINA

I. Breach of Contract

A. Policy Interpretation Principles

In South Carolina, as in most states, insurance policy contracts are subject to normal rules of contract construction. *Standard Fire Co. v. Marine Contracting & Towing Co.*, 392 S.E.2d 460, 461-62 (S.C. 1990) (citing *Gambrell v. Travelers Ins. Companies*, 310 S.E.2d 814 (S.C. 1983)); see also *Sloan Const. Co., Inc. v. Cent. Nat. Ins. Co. of Omaha*, 236 S.E.2d 818, 819-20 (S.C. 1977). Though the terms of the insurance policy are to be interpreted liberally in favor of the insured and against the insurer, *Id.*; see also *McCracken v. Government Employees Ins. Co.*, 325 S.E.2d 62 (S.C. 1985), if the intent of the parties is clear by the plain language of the policy, the courts may not change the policy to include a provision “not contemplated either by the law or by the contract between the parties.” 392 S.E.2d. at 460 accord 236 S.E.2d 819 (“Courts must enforce, not write, contracts of insurance, and their language must be given its plain, ordinary and popular meaning.”).

B. Breach of Contract Actions May be Tried with a Bad Faith Action

As in other states, an insured who prevails on a breach of contract claim in South Carolina may recover the benefits due under the policy contract. In South Carolina, however, the breach of an express contractual provision is not “a prerequisite to bringing [a bad faith] action.” *Tadlock Painting Co. v. Maryland Cas. Co.*, 473 S.E.2d 52, 55 (S.C. 1996). Consequently, if an insured is able to demonstrate either bad faith or “unreasonable” action by the insurer, the insured may recover extra-contractual damages

¹ The authors would also like to thank Ms. Emily Kiser-Yellick, NCCP, for her hard work and sharp eyes in editing and otherwise improving this manuscript. Ms. Kiser-Yellick works with Mr. Langdon and Mr. Silverman at Wall Templeton & Haldrup, P.A., in its Raleigh office.

in a bad faith tort action.² *Id.*; see also *Nichols v. State Farm Mut. Auto. Ins. Co.*, 306 S.E.2d 616, 619 (S.C. 1983) (*superseded by ERISA statute*); *Tyger River Pine Co. v. Maryland Casualty Co.*, 170 S.E. 346 (S.C. 1933).

For these reasons, South Carolina breach of contract cases are often tried along with a bad faith action. For example, in *Cock-N-Bull Steak House, Inc. v. Generali Ins. Co.* 466 S.E.2d 727 (S.C. 1996), the plaintiff restaurant owner asserted claims for breach of contract and bad faith refusal to pay benefits against its insurer after the restaurant suffered a fire loss. *Id.* Generali did not pay the full amount of benefits due for the fire damage, and attempted to evade payment by misinterpreting and ignoring relevant policy provisions. *Id.* at 729 (“Generali attempted, in effect, to avoid payment by limiting the policy to the short-hand descriptions of ‘Building’ and ‘Contents’ used in the Declarations, while ignoring the detailed language of the contract which set forth the scope of the coverage. This is a clear breach of the contract.”).

As explained by the South Carolina Supreme Court, the insurer’s actions also gave rise to actionable bad faith:

Generali’s attempt to evade payment not only constituted breach of contract, but was also in bad faith. The elements of an action for bad faith refusal to pay benefits under an insurance contract include: (1) the existence of a mutually binding contract of insurance between the plaintiff and the defendant; (2) refusal by the insurer to pay benefits due under the contract; (3) resulting from the insurer’s bad faith or unreasonable action in breach of an implied covenant of good faith and fair dealing arising on the contract; (4) causing damage to the insured.

Id. (citing *Crossley v. State Farm Mut. Auto. Ins. Co.*, 415 S.E.2d 393, 396-97 (1992)).

² For example, in 1979, the District Court for the District of South Carolina surveyed the damages available to an insured seeking actual and punitive damages for alleged bad faith refusal to pay first-party personal injury protection (PIP) benefits. *Robertson v. State Farm Mut. Auto. Ins. Co.*, 464 F. Supp. 876, 883 (D.S.C. 1979). The court discussed that an insured in a bad faith or unreasonable refusal to pay action may recover:

- Attorneys’ fees for bad faith or unreasonable refusal to pay benefits under statute (discussed below);
- Punitive damages from the insurer for a fraudulent breach of contract accompanied by a fraudulent act under the doctrine set forth in *Welborn v. Dixon*, 70 S.C. 108 (1904);
- An excess judgment if caused by the insurer’s bad faith or negligent refusal to settle or refusal to defend, *Tyger River*, 170 S.E. at 348; and
- The insured may “complain to the Insurance Commissioner and have his insurer’s license revoked, or a fine imposed, for such insurer’s unreasonable failure to pay benefits...or for its misrepresentation concerning an insurance policy during settlement negotiations [under the state’s unfair trade practices statute].” *Id.*

In the liability context, the two key policy provisions, the breach of which gives rise to both breach of contract and bad faith claims, are the provisions providing for a duty to indemnify by the insurer and the provision providing for a duty to defend the insured. *Sloan Constr. Co. v. Central Nat'l Ins. Co.*, 236 S.E.2d 818 (1977); *Nationwide Mut. Ins. Co. v. Tate*, 438 S.E.2d 266, 268 (S.C. Ct. App. 1993).

Note that although South Carolina has an improper claim practices statute, S.C. Code Ann. § 38-59-20, the statute does not provide for a private right of action against an insurer that violates its provisions. See *Ocean Winds Council of Co-Owners, Inc. v. Auto-Owners Ins. Co.*, 241 F. Supp. 2d 572, 578 (D.S.C. 2002).

II. Extra-contractual/ “Bad Faith” Damages

The lynchpin of any bad faith case is whether or not the insurer acted reasonably or unreasonably. See, e.g., *Mixson v. American Loyalty Ins. Co.*, 562 S.E.2d 659, 662 (S.C. Ct. App. 2002). An insured may recover damages for bad faith denial of coverage if he or she proves that the insurer had *no reasonable basis* to support its decision to deny benefits. *Mixson*, 562 S.E.2d at 661 (emphasis added) (citing *Cock-N-Bull Steak House*, 466 S.E.2d at 730 and *Crossley*, 415 S.E.2d at 396-97). This test has also been used to determine bad faith in situations in which the insurer exercised its discretionary right to not renew a policy. *Nichols*, 306 S.E.2d at 616 (*superseded by ERISA statute*). And, if the evidence raises a question of reasonableness, the question is one for the jury to decide. *Smith v. Md. Cas. Co.*, 742 F.2d 167, 170 (4th Cir. 1984).

In determining whether an insurer has a reasonable basis for supporting its decision to deny benefits, South Carolina courts will evaluate the insurer’s conduct by the evidence the insurer had before it at the time it denied the claim or before suit was filed if there has been no denial. *Howard v. State Farm Mut. Auto. Ins. Co.*, 450 S.E.2d 582, 584 (S.C. 1994) (“Evidence that arises after the denial of the claim is not relevant to the propriety of the conduct of the insurer at the time of its refusal.”).

Punitive damages are available if the insured can demonstrate that the insurer’s actions were “willful or in reckless disregard of the insured’s rights.” *Nichols*, 306 S.E.2d at 619.

An insured may also recover consequential bad faith damages if the insured can show bad faith or unreasonable action by the insurer in its handling of the claim. *Ocean Winds*, 241 F. Supp. 2d at 576 (citing *Tadlock Painting Co.*, 473 S.E.2d at 52); see also *Mixson*, 562 S.E. at 662 (advancing a novel theory to deny a claim); *Varnadore v. Nationwide Mut. Ins. Co.*, 345 S.E.2d 711 (S.C. 1986).

In third party liability cases, the insured may also recover reasonable litigation expenses, including costs and fees, when the insurer refuses to defend and the insured must provide his own defense. 236 S.E.2d at 819. South Carolina courts have also

applied the reasonableness standard to an insurer’s actions in making settlement decisions. *Compare Tyger River Pine Co.*, 170 S.E. at 346 with *Am. Cas. Co. of Reading Pa. v. Howard*, 187 F.2d 322 (4th Cir. (S.C.) 1951).

Bifurcation of liability and damages is not a common practice in South Carolina. South Carolina courts will allow bifurcation under Rule 42(b), SCRCP only if the issues of both liability and damages do not overlap and the issues “are so distinct that [a separate] trial of each alone would not result in injustice.” *Creighton v. Coligny Plaza Ltd. P’ship*, 512 S.E.2d 510, 516 (S.C. Ct. App. 1998); *see also Flagstar Corp. v. Royal Surplus Lines*, 533 S.E.2d 331, 333 n.8 (S.C. 2000).

III. Types of Extra-Contractual Damages Available

A. Attorneys’ Fees:

The statutory right to recover attorneys’ fees set forth in S.C. Stat. § 38-59-40, is dependent upon entry of judgment in favor of the insured and does not itself support an independent cause of action. *See Powell v. Ins. Co. of N. Am.*, 330 S.E.2d 550 (S.C. Ct. App. 1985). This statute provides as follows:

In the event of a claim, loss, or damage which is covered by a policy of insurance ... and the refusal of the insurer, plan, or corporation to pay the claim within ninety days after a demand has been made ... and a finding ... by the trial judge that the refusal was without reasonable cause or in bad faith, the insurer ... is liable to pay the holder ... all reasonable attorneys’ fees for the prosecution of the case against the insurer The amount of reasonable attorneys’ fees must be determined by the trial judge and the amount added to the judgment. The amount of the attorneys’ fees may not exceed one-third of the amount of the judgment.

S.C. Stat. § 38-59-40.

The insured prevailing on a breach of contract action does not itself justify an award of attorneys’ fees and costs pursuant to Section 38-59-40. *Greene v. Durham Life Ins. Co.*, 336 S.E.2d 478 (S.C. 1985). Under § 38-59-40, “the determination of an insurer’s liability for attorneys’ fees is a matter of decision by the judge who tries the case.” *Coker v. Pilot Life Ins. Co.*, 217 S.E.2d 784, 787 (S.C. 1975). The statute does not require that a bad faith verdict actually be rendered – only that the court, post-verdict, enter a finding that the insurer’s conduct was either “without reasonable cause” or “in bad faith.” *Id.* Thus, the statute permits the recovery of attorneys’ fees for not only patently unreasonable or bad faith conduct, but also for an insurer’s negligent actions, those actions that may not rise to the level of bad faith, but lack “reasonable cause.” *Strickland*

v. Prudential Ins. Co. of Am., 292 S.E.2d 301 (S.C. 1982); *Robertson v. State Farm Mut. Auto. Ins. Co.*, 464 F. Supp. 876, 882 (D.S.C. 1979).

Furthermore, § 38-59-40 applies not only to an insurer that unreasonably refuses to pay a claim, *Sciarrone v. Life Ins. Co. of Virginia*, 313 S.E.2d 322 (S.C. App. 1984) (applying former law to a refusal to pay benefits), but also to an insurer that fails to provide an adequate, or reasonable, defense, *Boggs v. Aetna Cas. & Sur. Co.*, 252 S.E.2d 565 (S.C. 465) (applying the former statute to an insurer’s failure to defend).

Attorneys’ fees may also be recoverable in declaratory actions under the *Hegler v. Gulf Insurance Company* doctrine, which holds that an insured who has “successfully assert[ed] his rights against [an insurer]” in a declaratory judgment action is entitled to an award of attorneys’ fees. *Hegler v. Gulf Ins. Co.*, 243 S.E.2d 443, 444-45 (S.C. 1979). The *Hegler* doctrine applies both to declaratory actions brought by the insurer and those brought by the insured to compel an insurer to comply with policy terms. *Jessco v. Builders Mut. Ins. Co.*, 2010 WL 419920 (D.S.C. Jan. 29, 2010) (affirmed in part, denied in part, and remanded by 472 Fed. Appx. 225 (4th Cir. 2012)). This is because South Carolina courts have found that an insured is entitled to attorneys’ fees on any counterclaim filed in response to the insurer’s declaratory action, where the coverage issues raised by the counterclaim are “essentially identical” to those raised by the insurer in the declaratory action. *Security Ins. Co. of Hartford v. Campbell Schneider & Assocs., LLC*, 481 F. Supp. 2d 496, 502-03 (D.S.C. 2007) (“While the parties sought different holdings, the issues of duty to defend and to indemnify were identical. As such, the court will not reduce an award of attorney’s fees to [the insureds] simply because they filed a counterclaim.”).

B. Prejudgment Interest

In South Carolina, where the insurer denies the claim and the insured is required to bring suit to recover benefits due under the contract, prejudgment interest is available from the date of loss, not a date set forth in a loss payment provision. *Shadow Creek Apartments, L.L.C. v. Hartford Fire Ins. Co.*, 44 F. App’x 640, 648 (4th Cir. 2002) (citing *Flynn v. Nationwide Mut. Ins. Co.*, 315 S.E.2d 817, 821 (S.C. App. Ct. 1984) and *Varnadore*, 345 S.E.2d at 715).

C. Consequential Damages

The insured can recover all actual or compensatory damages that are the proximate result of the insurer’s breach of the implied duty of good faith and fair dealing, which includes all damages the insurer could reasonably have foreseen resulting from its refusal to pay the claim. See *Snyder v. State Farm Mut. Auto. Ins. Co.*, 586 F. Supp. 2d 453, 457 (D.S.C. 2008); *Ocean Winds*, 241 F. Supp. 2d at 576; *Wright v. Unum Life Ins. Co.*, 2001 WL 34907077, at *11 (D.S.C. Aug. 31, 2001) (The law of South Carolina is well-settled that an insured may recover “all consequential damages” caused by an

insurer's bad faith denial of benefits or unreasonable claims handling.); *Brown v. S.C. Ins. Co.*, 324 S.E.2d 641 (S.C. Ct. App. 1984); (overruled on other grounds); *Nichols*, 306 S.E.2d at 619. As the court stated in *Wright v. Unum Life Insurance Company*:

Breach of th[e] duty [to defend] by an insurer's bad faith...renders the insurer liable in tort for *all consequential damages*; actual damages are not limited by the contract. *Nichols v. State Farm Mut. Auto. Ins. Co.*, 306 S.E.2d 616, 618 (S.C. 1983); *Brown v. South Carolina Ins. Co.*, 324 S.E.2d 641, 647 (S.C. Ct. App. 1984). South Carolina has not limited [this] rule, and "all consequential damages," includes damages for emotional distress and the present cash value of all future benefits that [the insured] is entitled to receive and punitive damages if the standard of proof is met. *See Gruenberg v. Aetna Ins. Co.*, 510 P.2d 1032, 1040 (Cal. 1973).

Wright, 2001 WL 34907077 at *11.

D. Emotional Distress Damages

The District Court for the District of South Carolina has held that emotional distress damages are recoverable only if the distress manifests physically as bodily injury. *Robertson*, 464 F. Supp. 876, 883 n.9 (D.S.C. 1979). Thus, damages for bodily injury claims, whether based on physical or emotional distress, are available if proximately caused by the insurer's unreasonable or bad faith actions. *Id.*; *see also State Farm Fire & Cas. Co. v. Barton*, 897 F.2d 729 (4th Cir. (S.C.) 1990).

E. Punitive Damages

Punitive damages under South Carolina law serve fundamental policy interests, and their availability is part of the legislature's deliberate efforts "to deter the wrongdoer and others from committing like offenses in the future." *James v. Horace Mann Ins. Co.*, 638 S.E.2d 667, 670 (S.C. 2006) (quoting *Laird v. Nationwide Ins. Co.*, 134 S.E.2d 206, 210 (S.C. 1964)). Section 15-33-135 of the South Carolina Code governs punitive damages, and authorizes a punitive award where a party acts with willful, wanton, and reckless disregard of the rights or interests of another subject to proof by clear and convincing evidence. S.C. Code. Ann. § 15-33-135. *See also Fairchild v. SCDOT*, No. 27112 (S.C. April 11, 2012) ("Recklessness is the doing of a negligent act knowingly; it is a conscious failure to exercise due care, and the element distinguishing actionable negligence from a willful tort is inadvertence."); *Cock-N-Bull Steak House, Inc.*, 466 S.E.2d 727; *Nichols*, 306 S.E.2d 616.

If the criteria of § 15-33-135 are met, "it is not only the right *but the duty* of the jury to award punitive damages." *Sample v. Gulf Ref. Co.*, 191 S.E. 209, 214 (S.C. 1937) (emphasis added). In other words, in South Carolina, punitive damages "are recoverable

as a matter of right.” *Magnolia N. Prop. Owners’ Ass’n, Inc., v. Heritage Communities, Inc.*, 725 S.E.2d 112, 121 (S.C. Ct. App. 2011); *see also Clark v. Cantrell*, 529 S.E.2d 528, 533 (S.C. 2000); *Harris v. Burnside*, 199 S.E.2d 65, 68 (S.C. 1973).

Any award of punitive damages must comport with the protections of the Due Process Clause of the Fourteenth Amendment of the United States Constitution. 638 S.E.2d at 667 (S.C. 2006). In 2009, the South Carolina Supreme Court adopted federal standards in order to ensure that punitive damage awards comport with due process and are not “grossly excessive.” *Mitchell, Jr. v. Fortis Ins. Co.*, 686 S.E.2d 176, 183-85 (S.C. 2009) (citing *State Farm v. Campbell*, 538 U.S. 408, 416 (2003)). Accordingly, both state and federal courts in diversity analyze punitive damages according to the guideposts set forth in the seminal Supreme Court cases of *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 564 (1996) and *Campbell*, 538 U.S. 408.

Under *Gore*, courts evaluating punitive damages for excessiveness must consider three factors: “(1) the degree of reprehensibility of the defendant’s conduct; (2) the disparity between the actual and potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.” *Mitchell*, 686 S.E.2d at 184 (citing *Gore*, 517 U.S. at 575). Of these factors, “[r]eprehensibility is ‘perhaps the most important indicium of the reasonableness of a punitive damages award,’” *Id.* at 185 (quoting *Gore*, 517 U.S. at 565), and should be viewed in light of federal criteria set forth in *State Farm v. Campbell. Id.*

If an award is “not excessive” under the above guideposts, it “satisfies due process and comports with South Carolina law.” *Mitchell*, at 188. *Mitchell* explains that a court may instruct the jury to consider the factors set forth in *Gamble v. Stevenson* 406 S.E.2d 350, 354 (S.C. 1991) insofar as they relate to *Gore*.³ The *Gamble* factors include: (1) the party’s degree of culpability; (2) duration of the conduct; (3) party’s awareness of concealment; (4) similar past conduct; (5) likelihood the award will deter the defendant or others from similar conduct; (6) whether the award is reasonably related to the harm likely to result from the conduct; (7) defendant’s ability to pay; and (8) “other factors” deemed appropriate.

³ Prior to *Mitchell*, South Carolina courts reviewed punitive damages under criteria set forth in *Gamble*, S.E.2d 350. The Court in *Mitchell* receded from *Gamble*, however, stating: “We hold now that *Gamble* remains relevant to post-judgment due process analysis, but only insofar as it adds substance to the [federal] guidelines (set forth in *BMW of N. Am., Inc.*, 517 U.S. at 564).” *Mitchell*, 686 S.E.2d at 185.

F. South Carolina punitive damages awards have been upheld in the following cases:

Austin v. Stokes-Craven Holding Corp., 691 S.E.2d 135 (S.C. 2010) (upholding a 8.2:1 ratio in a fraud case brought by purchaser of a used vehicle against the auto dealership that failed to disclose vehicle had been severely damaged and was potentially unsafe).

James v. Horace Mann Ins. Co., 638 S.E.2d 667 (S.C. 2006) (upholding a 6.82:1 ratio in an insurance bad faith claims handling case where the insurance adjuster repeatedly falsely represented the law to third party dog bite victim and insureds).

Collins Entertainment Corp. v. Coats & Coats Rental Amusement, 584 S.E.2d 120 (S.C. Ct. App. 2003) *aff'd*, 629 S.E.2d 635 (S.C. 2006) (upholding a 9.97:1 ratio in an intentional interference with contract case).

Cody P. v. Bank of Am., N.A., 720 S.E.2d 473, 483 (S.C. Ct. App. 2011), *reh'g denied* (Dec. 12, 2011) (upholding a 7.69:1 ratio in a negligence action by minor beneficiary of life insurance policy where bank's negligence allowed minor's conservator to transfer all of the life insurance proceeds to her personal account).

Jenkins v. Few, 705 S.E.2d 457 (S.C. Ct. App. 2010), *reh'g denied* (Feb. 28, 2011) (upholding a 3.6:1 ratio in action by fertilizer business owner against competitor whose employees repeatedly placed sugar in gas tank of business owner's truck in an attempt to destroy business).

Lister v. Nationsbank, 494 S.E.2d 449, 458 (S.C. Ct. App. 1997) (explaining that, in a case involving unauthorized charges by an Avis Rent A Car licensee in Aruba, "[t]he punitive damages award is approximately 23.24 times the actual damages award. We find this ratio to be within the constitutionally accepted range").

Orangeburg Sausage Co. v. Cincinnati Ins. Co., 450 S.E.2d 66 (S.C. Ct. App. 1994) (upholding ratio of 2.4 in first party claim for breach of contract, negligence and bad faith arising from insurer's failure to pay benefits due for hurricane damage); *but see Hollis v. Stonington Dev., LLC*, 714 S.E.2d 904 (S.C. Ct. App. 2011) (reducing punitive ratio from 8.75:1 to 5:1 due to lessened reprehensibility under a due process analysis in action by landowners against developer for negligence, trespass and private nuisance arising from erosion and flooding of landowners' ponds and property).

NORTH CAROLINA

I. Breach of Contract

In general, damages in a breach of contract action attempt to place the injured party, as much as possible, in the position she would have been in had the contract been performed. *Perfecting Serv. Co. v. Prod. Dev. & Sales Co.*, 259 N.C. 400, 415, 131 S.E.2d 9, 21 (1963). “Where one violates his contract he is liable for such damages, including gains prevented as well as losses sustained, which may fairly be supposed to have entered into the contemplation of the parties when they made the contract.” *Id.* An injured party has a right to damages for breach of contract measured by: (a) the loss in the value to him of the other party's performance caused by its failure or deficiency, plus (b) any other loss, including incidental or consequential loss, caused by the breach, less (c) any cost or other loss that he has avoided by not having to perform. *Pleasant Valley Promenade v. Lechmere, Inc.*, 120 N.C. App. 650, 665, 464 S.E.2d 47, 59 (1995) (citing Restatement (Second) of Contracts § 347).

The language of the insurance policy controls its interpretation, so the terms of the insurance contract generally determine what damages are available to an insured under the policy. *See, e.g., Smith v. Nationwide Mut. Ins. Co.*, 328 N.C. 139, 142, 400 S.E.2d 44, 47 (1991). “The various terms of the [insurance] policy are to be harmoniously construed, and if possible, every word and every provision is to be given effect. If, however, the meaning of words or the effect of provisions is uncertain or capable of several reasonable interpretations, the doubts will be resolved against the insurance company and in favor of the policyholder.” *Gaston County Dyeing Mach. Co. v. Northfield Ins. Co.*, 351 N.C. 293, 299-300, 524 S.E.2d 558, 563 (2000) (quoting *Woods v. Nationwide Mut. Ins. Co.*, 295 N.C. 500, 505-06, 246 S.E.2d 773, 777 (1978)). Thus, when an insurance company breaches its policy with an insured, the damages typically claimed by the insured are the benefits and loss amounts within the coverage due under the express terms of the policy itself. *Burrell v. Sparkkles Reconstruction Co.*, 189 N.C. App. 104, 109, 657 S.E.2d 712, 716 (2008); *Cleveland Const., Inc. v. Fireman's Fund Ins. Co.*, 819 F. Supp. 2d 477, 481 (W.D.N.C. 2011).⁴ In the insurance “bad faith” context, North Carolina appellate courts often distinguish between the contractual damages and extra-contractual damages by referring to the former as *compensatory* or

⁴ Claims for emotional distress damages, specifically the tort of intentional infliction of emotional distress, are often included in “bad faith” claims, and have been held to be recoverable in that context. *See, e.g., Dailey v. Integon Gen. Ins. Corp.*, 75 N.C. App. 387, 401, 331, N.C. App. 148, 158 (1985) (“Dailey II”). Although not likely in an insurance contract, emotional distress damages have previously been allowed under North Carolina law as compensatory damages in a pure breach of contract claim. *See, e.g., Lamm v. Shingleton*, 231 N.C. 10, 14, 55 S.E.2d 810, 813 (1949) (allowing compensatory damages for emotional distress for breach of contract where the contract is personal in nature and the contractual duty is so coupled with the sensibilities of the party to whom the duty is owed that a breach of that duty will reasonably result in mental anguish or suffering and such damages should therefore have been in the contemplation of the parties at the time of contracting).

actual damages. *E.g.*, *Murray v. Allstate Ins. Co.*, 51 N.C. App. 10, 11, 275 S.E.2d 195, 196 (1981); *Olive v. Great Am. Ins. Co.*, 76 N.C. App. 180, 180, 333 S.E.2d 41, 41 (1985).

An evaluation of all of the coverage provided under a policy is necessary to ascertain exposure for damages under the breach of contract. In the context of a first-party claim, the scope of contract damages is typically framed by the terms and coverage of the applicable insurance policy.⁵ In fact, many of North Carolina's decisions addressing insurance "bad faith" claims spring from contract disputes under common insurance coverages, e.g.:

- **UIM benefits:** *Murray v. Nationwide Mut. Ins. Co.*, 123 N.C. App. 1, 472 S.E.2d 358 (1996); *Miller v. Nationwide Mut. Ins. Co.*, 112 N.C. App. 295, 435 S.E.2d 537 (1993); *Jones v. Penn Nat. Ins. Co.*, 835 F. Supp. 2d 89 (W.D.N.C. 2011); *Braddy v. Nationwide Mut. Liab. Ins. Co.*, 122 N.C. App. 402, 470 S.E.2d 820 (1996); *Chew v. Progressive Universal Ins. Co.*, 5:09-CV-351-FL, 2010 WL 4338352 (E.D.N.C. Oct. 25, 2010).
- **homeowner's/commercial property insurance:** *Gray v. N. Carolina Ins. Underwriting Ass'n*, 352 N.C. 61, 529 S.E.2d 676 (2000); *Dailey v. Integon Gen. Ins. Corp.*, 75 N.C. App. 387, 331 S.E.2d 148 (1985); *Topsail Reef Homeowners Ass'n v. Zurich Specialties London, Ltd.*, 11 F. App'x 225 (4th Cir. 2001); *Olive v. Great Am. Ins. Co.*, 76 N.C. App. 180, 333 S.E.2d 41 (1985); *Kielbania v. Indian Harbor Ins. Co.*, 1:11CV663, 2012 WL 3957926 (M.D.N.C. Sept. 10, 2012).
- **commercial general liability/business insurance:** *Blis Day Spa, LLC v. Hartford Ins. Group*, 427 F. Supp. 2d 621 (W.D.N.C. 2006); *Cleveland Const., Inc. v. Fireman's Fund Ins. Co.*, 819 F. Supp. 2d 477 (W.D.N.C. 2011); *Defeat The Beat, Inc. v. Underwriters At Lloyd's London*, 194 N.C. App. 108, 669 S.E.2d 48 (2008); *Martinez v. Nat'l Union Fire Ins. Co.*, 5:12-CV-170-D, 2012 WL 5993754 (E.D.N.C. Nov. 30, 2012); *Whiteville Oil Co., Inc. v. Federated Mut. Ins. Co.*, 889 F. Supp. 241 (E.D.N.C. 1995) *aff'd*, 87 F.3d 1310 (4th Cir. 1996).

⁵ *But see Murray v. Allstate Ins. Co.*, 51 N.C. App. 10, 275 S.E.2d 195 (1981) (holding that if an insurer undertakes to repair an insured residence, a negligent repair that causes additional damage can give rise to tort liability against insurer, and damages from this tort liability are not capped at Policy Limits); *Prince v. Wright*, 141 N.C. App. 262, 541 S.E.2d 191 (2000) (holding an insurer liable for personal injuries resulting from negligence in adjusting a fire loss claim). Both of these cases, however, are distinguishable on the basis that, in both circumstances, the insurer undertook some additional obligation that created a legal duty to an insured over and apart from the parties' contract.

The contractual duties owed to an insured for a third-party claim made under a liability policy, and the potential damages flowing from a breach of those duties, generally run beyond simply the limits of coverage, e.g., the duty to defend and indemnify. For example, “ ‘an insurer who wrongfully refuses to defend a suit against its insured is liable to the insured for sums expended in payment or settlement of the claim, for reasonable attorneys’ fees, for other expenses of defending the suit, for court costs, and for other expenses incurred because of the refusal of the insurer to defend.’ ” *Bruce-Terminix Co. v. Zurich Ins. Co.*, 130 N.C. App. 729, 504 S.E.2d 574 (1998) (quoting *Jamestown Mut. Ins. Co. v. Nationwide Mut. Ins. Co.*, 277 N.C. 216, 219, 176 S.E.2d 751, 754 (1970)).⁶ Attorney’s fees and expenses incurred by an insured in litigating the coverage action with an insurer, however, are generally not recoverable as damages, costs or expenses. *Collins & Aikman Prods. Co. v. Hartford Acc. & Indem. Co.*, 125 N.C. App. 412, 415, 481 S.E.2d 96, 97 (1997).⁷

The costs and fees associated with litigation for a breach of contract action may constitute “damages” under specific statutory provisions.⁸ The provision most frequently encountered in North Carolina in the insurance context is the recently-revised N.C. Gen. Stat. § 6-21.1⁹, which provides for a reasonable attorney fee to be taxed as costs in favor of a successful personal injury or property damage litigant against an insurance company where there was: 1) an unwarranted refusal by the insurer to pay the claim; 2) a judgment ultimately recovered that was less than \$20,000; and 3) an amount of damages that exceeded the highest offer made by the insurer within 90 days prior to trial. The award of attorneys’ fees under this statute is discretionary, and a trial court’s discretion is governed by considerations enumerated by the Court of Appeals in *Washington v. Horton*. 132 N.C. App. 347, 351, 513 S.E.2d 331, 334 (1999).

Court costs, irrespective of interest which is discussed below, are allowed as of course to a prevailing party in North Carolina. *Khomyak ex rel. Khomyak v. Meek*, ___ N.C. App. ___, ___, 715 S.E.2d 218, 226 (2011) *review denied*, ___ N.C. ___, 720 S.E.2d 392

⁶ *But see Duke Univ. v. St. Paul Mercury Ins. Co.*, 95 N.C. App. 663, 384 S.E.2d 36 (1989) (reducing damages award against insurer that wrongfully denied its insured a defense by amount of legal fees incurred in prosecuting insured’s counterclaims and allowing credit for funds paid to insured in settlement with other insurer).

⁷ The *Collins* court questions the wisdom of this result in the insurance context based on “the disparity in bargaining power and sophistication of parties that is often reflected in adhesion contracts[,]” but ultimately follows the on-point holding from *Perkins v. Am. Mut. Fire Ins. Co.*, 4 N.C. App. 466, 467-68, 167 S.E.2d 93, 94-95 (1969).

⁸ North Carolina follows the American Rule, holding that a successful litigant may not recover attorneys’ fees, whether as costs or as an item of damages, unless such a recovery is expressly authorized by statute. *See, e.g., Hicks v. Albertson*, 284 N.C. 236, 238, 200 S.E.2d 40, 42 (1972).

⁹ The 2011 amendment to § 6-21.1 added the 90-day timeliness limit on the settlement offer, capped attorney’s fees that may be awarded at \$10,000, doubled the “amount ultimately recovered” limit to \$20,000, and now expressly requires written findings of fact detailing the statutory requisites for the attorney fee award. The amended statute is applicable to all actions arising on or after October 1, 2011. 2011 N.C. Sess. Laws 283, §§ 3.1, 4.2.

(2012).¹⁰ Following a 2007 statutory amendment, recoverable court costs in North Carolina are enumerated in N.C. Gen. Stat. § 7A-305(d). If a party is entitled to costs, a Court has no discretion on whether or not to award the items in N.C. Gen. Stat. § 7A-305(d) as costs, but does have flexibility in setting the recoverable amount of such costs under discretionary language in the statute. *Id.*

By statute, all sums of money due by contract of any kind, except money due on penal bonds, will bear interest. N.C. Gen. Stat. § 24-5. The principal amount awarded in a contract action bears interest from the date of breach. *Id.* When the amount of damages in a breach of an insurance contract action is ascertainable from the contract itself, or from relevant evidence, or from both, interest should be allowed from the date of the breach. *Stanback v. Westchester Fire Ins. Co.*, 68 N.C. App. 107, 116, 314 S.E.2d 775, 780 (1984). Whether or not there is coverage for such pre-judgment interest is a separate matter. *See Nationwide Mut. Ins. Co. v. Mabe*, 115 N.C. App. 193, 198, 444 S.E.2d 664, 667 (1994) *aff'd*, 342 N.C. 482, 467 S.E.2d 34 (1996) (holding that a liability carrier's obligation to pay pre-judgment interest in addition to its stated limits is governed solely by the language of the policy). Unless specifically provided for under the parties' contract, interest, both pre-judgment and post-judgment, accrues at the legal rate of 8% per annum on the principal sum due under the contract. N.C. Gen. Stat. §§ 24-5(a) & 24-1.¹¹

II. Damages Available under North Carolina's Unfair and Deceptive Practices Act, N.C. Gen. Stat. §§ 75-1.1, 75-16 and 75-16.1.

A. Statutory Language

North Carolina's Unfair and Deceptive Practices Act (hereafter, "UDPA")¹², N.C. Gen. Stat. § 75-1.1, is typically the second cause of action available to an insured in pursuing a "bad faith" claim against his or her insurer. The potency of a UDPA claim obviously lies in the remedy provided under N.C. Gen. Stat. § 75-16 for offending conduct:

If any person shall be injured ... in violation of the provisions of this Chapter, such person, firm or corporation so injured shall have a right of action on account of such injury done, and if damages are assessed in such

¹⁰ The *Khomyak* Court recognizes and parses an apparent conflict on this point under controlling Court of Appeals case law. The North Carolina Supreme Court has yet to take up the issue to clarify, but the *Khomyak* opinion is the most recent and comprehensive discussion of the current state of the law.

¹¹ For a comprehensive analysis of pre-judgment interest in the insurance context, see Alan D. Woodlief, Jr., *North Carolina Law of Damages* § 8:10. Prejudgment Interest (5th ed.).

¹² Claims asserted under N.C. Gen. Stat. § 75-1.1 were historically labeled "Chapter 75" or "UDTPA" claims; however, as the North Carolina Court of Appeals has recently noted, the statute was recently modified to delete the reference to "trade." *See North Carolina Farm Bureau Mut. Ins. Co. v. Cully's Motorcross Park, Inc.*, ___ N.C. App. ___, 725 S.E.2d 638, 640 at FN 1 (2012); thus, this manuscript will catch up with modern nomenclature in discussing N.C. Gen. Stat. § 75-1.1 claims.

case judgment shall be rendered in favor of the plaintiff and against the defendant for **treble** the amount fixed by the verdict.

(emphasis added). N.C. Gen. Stat. § 75-16.1 adds additional teeth to the remedy by affording the trial court discretion to award attorney fees where the court determines that “[t]he party charged with the violation of N.C. Gen. Stat. § 75-1.1 has willfully engaged in the act or practice, and there was an unwarranted refusal by such party to fully resolve the matter which constitutes the basis of the suit.”

The North Carolina Supreme Court has described N.C. Gen. Stat. 75-16 as a “hybrid” statutory remedy that is broader than its common law counterparts, i.e., both punitive and remedial, but neither wholly tortious nor wholly contractual in nature. *Marshall v. Miller*, 302 N.C. 539, 546-547, 276 S.E.2d 397, 402 (1981). Stated another way by the North Carolina Court of Appeals:

an action for unfair and deceptive acts or practices is a distinct action apart from fraud, breach of contract or breach of warranty. Since the remedy was created partly because those remedies often were ineffective, it would be illogical to hold that only those methods of measuring damages could be used.

Poor v. Hill, 138 N.C. App. 19, 530 S.E.2d 838 (2000) (quoting *Bernard v. Central Carolina Truck Sales*, 68 N.C. App. 228, 231, 314 S.E.2d 582, 585, *disc. rev. denied*, 311 N.C. 751, 321 S.E.2d 126 (1984)). Indeed, many North Carolina decisions conclude that the *sine qua non* of N.C. Gen. Stat. § 75-16 is to “restore the victim to his original condition, to give back to him that which was lost as far as it may be done by compensation in money.” *Id.*, 138 N.C. App. at 35, 530 S.E.2d at 848; *accord TradeWinds Airlines, Inc. v. C-S Aviation Services*, ___ N.C. App. ___, 733 S.E.2d 162, 169 (2012).

The expansive remedial goals of the UDPA, however, have proven to be more easily announced in dicta than applied in the courtroom. Even a cursory review of just a handful of UDPA decisions from the legions of them issued by North Carolina’s courts¹³ demonstrates that trial courts have struggled to balance the remedial goals of the N.C. Gen. Stat. §75-16 against the traditional standards employed to measure damages under the common law remedies upon which UDPA claims are generally premised. This tension has produced a body of conflicting and fact specific case law that falls short of

¹³ UDPA claims have apparently generated roughly 2,000 reported decisions under North Carolina law as of late 2012. See Matthew W. Sawchak and Kip D. Nelson, “Defining Unfairness in ‘Unfair Trade Practices,’” 90 N.C. Law Rev., 2040-41 (2012) and Noel L. Allen, *North Carolina Unfair Business Practice*, § 1.01, at 1-2 (3rd ed. 2012). Mr. Allen’s treatise is a comprehensive review of UDPA litigation in general under North Carolina law. Messrs. Sawchak’s and Nelson’s article provides a thorough analysis of the inherent inconsistencies and difficulties raised by UDPA litigation. Both works are truly outstanding, and are commended as a “must read” for anyone handling UDPA litigation in North Carolina.

establishing any bright line rules regarding damage calculations. Nonetheless, certain parameters may be drawn from the North Carolina decisions addressing damages under the UDPA that provide at least loose guidance on the scope of damages available for a “bad faith” claim and the method by which such damages are calculated.

B. Causation

To establish a UDPA claim under North Carolina law, a plaintiff must prove the following elements:

- (1) an unfair or deceptive [] act or practice..., (2) in or affecting commerce, and (3) which proximately caused actual injury to the plaintiff....

See, e.g., Gray v. North Carolina Ins. Underwriting Ass’n, 352 N.C. 61, 68, 529 S.E.2d 676, 681 (2000); *Nelson v. Hartford Underwriters Ins. Co.*, 177 N.C. App. 595, 609, 630 S.E.2d 221, 231(2006); *Belk, Inc. v. Meyer Corp., U.S.*, 679 F.3d 146, 164-65 (4th Cir. 2012) and *Blis Day Spa, LLC v. The Hartford Insurance Group*, 427 F. Supp. 2d 632, 635 (W.D.N.C. 2006).¹⁴ In putting a finer point on the proximate causation element, the *Gray* court held:

[i]n forging N.C.G.S. § 75-16, the legislature intended for the phrase ‘treble the amount fixed by the verdict’ to mean that damages *proximately caused* by a violation of N.C.G.S. § 75-1.1 shall be trebled, not that damages on every claim that happens to arise in a case involving a violation of N.C.G.S. § 75-1.1 shall be trebled. This Court has stated that in order to recover treble damages, a plaintiff must show that he ‘suffered actual injury as a proximate result of defendant’s deceptive statement or misrepresentation.’

352 N.C. at 74, 529 S.E.2d at 685 (quoting *Pearce v. American Defender Life Ins. Co.*, 316 N.C. 461, 471, 343 S.E.2d 174, 180 (1986)); *see also Edmondson v. American Motorcycle Ass’n.*, 7 Fed. App’x 136, 153 (4th Cir. 2001) (unpublished). A review of North Carolina UDPA decisions, particularly in the insurance bad faith context, reveals this arguably strict construction of proximate causation has played itself out in the courtroom on two distinct fronts: (1) the permissible scope of damages flowing from an alleged unfair or deceptive practice; and (2) the precise nature of damages that are subject to trebling.

¹⁴ Proximate causation is generally a question of fact for the jury on a UDPA claim. *See, e.g., Sunbelt Rentals, Inc. v. Head & Engquist Equipment, L.L.C.*, 174 N.C. App. 49, 62, 620 S.E.2d 222, 232 (2005).

1. *Scope of Damages*

UDPA litigation in the insurance context has produced a wide array of decisions addressing the scope of damages that an insured may claim for an alleged UDPA violation. For example:

- alleged violations of N.C. Gen. Stat. § 58-63-15(11) that slowed the remediation of mold damage at Plaintiffs’ home that pre-dated the subject insurance policy were not a proximate cause of any injury to Plaintiffs. *Nelson v. Hartford Underwriters Ins. Co.*, 177 N.C. App. 595, 613-14, 630 S.E.2d 221, 234 (2006) (“[e]ven if Hartford’s actions slowed the remediation [of the mold damage], those actions slowed only the response to the injury, and did not cause the injury itself” – “response” is not the cause of an injury, “but rather a reaction to it.”); accord *Burrell v. Sparkkles Reconstruction Co.*, 189 N.C. App. 104, 112-13, 657 S.E.2d 712, 717-18 (2008).
- alleged misrepresentations regarding the scope of business interruption insurance did not proximately cause any injury to insured where insurer paid the losses it acknowledged were owed under subject policy, and insured could not demonstrate any damage caused by statements beyond reasonable disagreement over amount of loss based on different calculation methodologies. *Blis Day Spa v. The Hartford Ins. Group*, 427 F. Supp. 2d 621, 635-36 (W.D.N.C. 2006); accord *Defeat the Beat, Inc. v. Underwriters at Lloyd’s of London*, 194 N.C. App. 108, 117, 669 S.E.2d 48, 54 (2008)¹⁵; but see *Belk, Inc. v. Meyer Corp., U.S.*, 679 F.3d at 165 (profits earned by entity infringing upon patent and trade dress are a “rough measure” of patent holder’s damages under N.C. Gen. Stat. § 75-16), and *Sunbelt Rentals, Inc. v. Head & Engquist Equipment, L.L.C.*, 174 N.C. App. At 61-62, 620 S.E.2d at 231-232 (UDPA damages supported by Plaintiff’s lost profits).
- an insured can unquestionably recover settlement payments, attorney fees and litigation expenses on a breach of contract claim under North Carolina law if its insurer breaches its duty to defend a claim against the insured in the third-party context. See, e.g., *Bruce-Terminx Co. v. Zurich Ins. Co.*, 130 N.C. App. 729, 737-38, 504, S.E.2d 574, 580 (1998) (citing *Jamestown Mutual Ins. Co. v. Nationwide Mutual Ins. Co.*, 277 N.C. 216, 219, 176 S.E.2d 751, 754 (1970)). Presumably,

¹⁵ See also *Westchester Fire Ins. Co. v. Johnson*, 221 F. Supp. 2d 637, 649 (M.D.N.C. 2002) (“letter from insurer stating period of coverage for business income loss under subject policy did not proximately cause damage when received by insured shopping center landlord who already decided not to reopen center after many tenants vacated due to extended loss of power”).

such payments and expenses would constitute recoverable damages if also proximately caused by a specific unfair or deceptive trade practice under the unfair insurance practices act, N.C. Gen. Stat. § 58-63-15, or N.C. Gen. Stat. § 75-1.1 in general. *See ABT Building Products Corp. v. National Union Fire Ins. Co.*, 472 F.3d 99, 126-128 (4th Cir. 2006). It further appears that attorney fees incurred by an insured in ameliorating the effects or impact of an insurer’s allegedly unfair and deceptive conduct may be a recoverable element of damage under a UDPA claim, particularly if such conduct would support an independent tort. *See N.C. Farm Bureau Mut. Ins. Co. v. Cully’s Motorcross Park, Inc.*, ___ N.C. App. ___, 725 S.E.2d 638, 650 (2012) (insurer’s unfair/deceptive act of malicious prosecution to gain leverage in civil action over insurance dispute “caused [insured] to suffer damages in the form of legal fees and other costs deriving from her prosecution.”).¹⁶

- While it does not appear that North Carolina’s courts have specifically addressed the issue of whether an insured can recover emotional distress or other personal injury damages directly under a UDPA claim, decisions in the commercial litigation context appear to contemplate the availability of such damages on proper proof. *See, e.g., Walker v. Branch Banking & Trust Co.*, 133 N.C. App. 580, 585-86, 515 S.E.2d 727, 730-31 (1999) and *Williams v. HomeEQ Servicing Corp.*, 184 N.C. App. 413, 423-24, 646 S.E.2d 381, 387-33 (2007); *see also Dailey v. Integon General Ins. Corp.* (“Dailey II”), 75 N.C. App. 387, 400-01, 331 S.E.2d 148, 157-58 (1985) (noting that while common law bad faith claim may permit intentional infliction of emotional distress claim, insured must still prove such distress was proximately caused by insurer’s actions).

2. Damages Subject to Trebling

As noted above, the North Carolina Supreme Court has stated that N.C. Gen. Stat. 75-16 only allows trebling of those damages proximately caused by a violation of N.C.G.S. § 75-1.1. *See Gray*, 352 N.C. at 74, 529 S.E.2d at 684-85. This restriction has led to considerable confusion among both the bench and bar over exactly what damages should be trebled when the jury returns a damage award for an insured on multiple causes of action. *Gray* is particularly illustrative.

¹⁶ *But see Dailey v. Integon Gen. Ins. Corp.*, 75 N.C. App. 387, 401, 331 S.E.2d 148, 158 (1985) (“Dailey II”) (noting that insured’s claim preparation, expert and other expenses incurred on underlying insurance claim were not proximately caused by insurer’s alleged bad faith, and thus not recoverable under a common law bad faith action).

In *Gray*, the insured plaintiffs filed an action against the defendant insurance association to recover damages for both breach of contract and UDPA violations relating to defendant’s adjustment of plaintiffs’ claim for property damage under a commercial wind/hail policy. *Id.* at 63-64, 529 S.E.2d at 678-79. At trial the jury returned a verdict that found the defendant liable for both breach of contract and UDPA violations. *Id.* at 65-66, 529 S.E.2d at 679-80. The jury further awarded plaintiffs damages on the breach of contract claim in the amount of \$256,256.91, and on the UDPA violations in the amount of \$117,000. *Id.* Based on the jury’s verdict, the trial court entered judgment awarding plaintiffs damages totaling \$607,256.91, consisting of \$256,256.91 on the breach of contract claim and \$351,000 (\$117,000 trebled) on the UDPA claim. *Id.* The judgment entered by the trial court further awarded Plaintiffs attorney fees and costs totaling \$117,000, along with pre-judgment interest on the entire award. *Id.*

Among the many issues ultimately addressed by the North Carolina Supreme Court on appeal¹⁷ was the Plaintiffs’ contention that defendant’s UDPA violations entitled them to three times the “total amount of damages fixed by the verdict” on both the breach of contract and UDPA claims, i.e., \$373,256.91. *Id.* at 74, 529 S.E.2d at 684. The Supreme Court disagreed, noting that the trial court could only treble the damages found by the jury to be proximately caused by the UDPA violation since the breach of contract action in and of itself could not constitute an UDPA violation. *Id.*; *see generally ABT Building Products Corp.*, 472 F.3d at 110-11, 126-128 (in which decision the Fourth Circuit Court of Appeals affirmed the trial court’s judgment awarding insured \$2.5M in damages for insurer’s breach of contract and trebled the jury’s award of \$3.9M in damages (for a total of \$11.7M) proximately caused by insurer’s UDPA violations).

At first blush *Gray* could be read to establish a bright line rule that damages for UDPA violations must be entirely independent of those caused by the insurer’s corresponding breach of the insurance contract. In other words, an insurer’s conduct giving rise to a breach of contract or other common law claim cannot alone constitute a violation of UDPA. In fact, there are several UDPA decisions in the commercial litigation context that counsel:

[f]inally, in the damages context, we note that should the ‘same course of conduct give [] rise’ to plaintiffs’ breach of contract and Chapter 75 claims, plaintiffs may recover damages ‘either for the breach of contract, or for violation of [Chapter 75], but not for both.’ Upon a damage verdict favorable to plaintiffs at retrial on their Chapter 75 claim and the trial court’s determination that the ‘same course of conduct’ gave rise to plaintiffs’ breach of contract as well as

¹⁷ The North Carolina Court of Appeals initially reversed the trial court’s judgment by holding, in part, that plaintiffs failed to establish that the defendant’s alleged unfair and deceptive conduct was “a general business practice.” *See generally* 132 N.C. App. 63, 510 S.E.2d 396 (1999).

Chapter 75 claims,...., plaintiffs must elect their damages remedy.

See, e.g., Poor v. Hill, 138 N.C. App at 35, 530 S.E.2d at 848 (internal citations deleted), citing *Marshall v. Miller*, 47 N.C. App. 530, 542, 268 S.E.2d 97, 103 (1980), *modified and aff'd*, 302 N.C. 539, 276 S.E.2d 397 (1981); *see also Edmondson*, 7 Fed. App'x at 152-54 (\$300,000 awarded by jury to plaintiff on breach of contract claim cannot serve as basis for treble damages under UDPA claim).

A number of UDPA decisions after *Gray* confirm that defendant insurers attempted to seize upon this strict interpretation in defending against insured's bad faith claims. The North Carolina Court of Appeals' decision in *Vasquez v. Allstate Ins. Co.* is exemplary. 137 N.C. App. 741, 742-43, 529 S.E.2d 480, 481 (2000). At issue in *Vasquez* were claims by the insured's estate that Allstate had breached its policy with the insured to pay \$25,000 in UM benefits on the estate's wrongful death claim, and in doing so, had committed bad faith. *Id.* The trial court trifurcated the liability, bad faith and punitive damage phases of the trial. *Id.* The jury returned verdict in favor of the insured's estate after the first phase of the trial in the amount of \$104,003 on the wrongful death claim, at which point Allstate stipulated the insured was entitled to payment of the UM benefits under the policy. *Id.* The jury then returned a verdict awarding the insured's estate \$29,160 in damages for Allstate's bad faith after the second phase of the trial, but denied punitive damages during the third phase. *Id.* Believing the jury's awards to be mutually inconsistent, the trial judge then put the insured's estate to an election of either \$50,000 on the contract claim or \$29,160 trebled (totaling \$87,480) on the UDPA claim. *Id.* The insured's estate naturally chose the latter remedy, and judgment so noting was entered. *Id.*

Allstate then appealed the trial court's judgment on the basis that its stipulation that the insured's estate was entitled to payment of the \$25,000 in UM benefits at the end of phase one of the trial pre-empted any damages, i.e., "actual injury," to the estate for violations of the UDPA. *Id.* The North Carolina Court of Appeals rejected Allstate's argument in holding:

[i]n light of *Garlock*, defendant cannot now successfully suggest that by stipulating to pay the contract damages after a determination of liability he has eliminated the plaintiff's injury. Defendant's course of conduct gave rise to both the breach of contract claim and the unfair and deceptive trade practice claim. Where the same course of conduct gives rise to both claims, the plaintiff may recover under the breach of contract action or under G.S. § 75-1.1 (1999).

Accordingly, we hold that the trial court correctly allowed the jury to consider the contractual damages as an element for the unfair and deceptive trade practices claim.

Id., 137 N.C. App. at 482, 529 S.E.2d at 744-45 (citing *Garlock v. Henson*, 112 N.C. App. 243, 246, 435 S.E.2d 114, 116 (1993)). The Court of Appeals premised its holding on the following rationale:

[u]nder defendant’s assertion, insurance companies would have no incentive to settle legitimate claims before a jury verdict. Rather, the defendant could simply take its chances with a jury and then avoid treble damages by stipulating to contractual liability should the jury find for the plaintiff. This method would eliminate the brunt of any damages that the plaintiff could recover under Chapter 75.

Id. Subsequent decisions by the North Carolina Court of Appeals have bolstered its holding in *Vasquez*. See, e.g., *Cullen v. Valley Forge Life Insurance Co.*, 161 N.C. App. 570, 580, 589 S.E.2d 423, 431 (2003) and *Johnson v. Colonial Life and Accident Ins. Co.*, 173 N.C. App. 365, 371-72, 618 S.E.2d 867, 871-72 (2005). As a result, it appears that the current rule under North Carolina law is that damages awarded by the jury to an insured on a breach of contract claim can also serve as the basis for UDPA damages if the breach of contract is intertwined with the requisite unfair/deceptive conduct under N.C. Gen. Stat. § 75-1.1 or a violation of N.C. Gen. Stat. § 58-63-15. See, e.g., *Johnson*, 173 N.C. App. at 364, 618 S.E.2d at 872 (“as evidenced by the jury verdict, the breach of contract accompanied by aggravating factors is what gave rise to the § 75-1.1 claim. Moreover, the court will not allow a defendant to divide the breach of contract action and the conduct which aggravated the breach when in substance there is but one continuous transaction amounting to unfair and deceptive trade practices.”). Accordingly, it appears that the recovery of both contract and UDPA damages is precluded under *Gray* when the same conduct gives rise to both claims. 352 N.C. at 65-66, 529 S.E.2d at 679-80 and *Marshall v. Miller*, 47 N.C. App. at 542, 268 S.E.2d at 103.

C. Interest and Offsets

The rule regarding interest available on UDPA damages is relatively clear, at least at the state court level. It appears that pre-judgment interest awarded for breach of contract cannot be considered as “an amount fixed by verdict” subject to trebling under N.C. Gen. Stat. § 75-16. *Johnson*, 173 N.C. App. at 372, 618 S.E.2d at 872. In *Johnson*, the trial court entered judgment on the jury’s award to plaintiff for \$537,887 on his breach of contract claim along with \$297,561.02 in pre-judgment interest, which sums it then added together before finding treble damages were warranted under N.C. Gen. Stat. § 75-16. *Id.* The North Carolina Court of Appeals held that plaintiff was entitled to pre-judgment interest only on the contract claim, not the damages awarded for the UDPA

claim (although both amounts appeared to be the same), since the statute only allowed for trebling of the damages “fixed by the verdict,” and UDPA damages were awarded as a penalty rather than to compensate. *Id.*; see also *Hanes v. Darar*, 2012 WL 707110 at *6, 722 S.E.2d 211 (2012). Post-judgment interest, however, does attach to a treble damages award under the UDPA. See *Custom Molders, Inc. v. American Yard Products, Inc.*, 342 N.C. 133, 463 S.E.2d 199 (1995).

It further appears that any credits, counterclaim damages or other potential offsets against damages awarded to a plaintiff for UDPA violations should be applied after such damages are trebled. The North Carolina Court of Appeals’ decision in *Sefare Corp. v. Trenor Corp.* is illustrative. 88 N.C. App. 404, 363 S.E.2d 643, *disc. review denied*, 322 N.C. 113, 367 S.E.2d 917 (1988). In *Sefare Corp.*, the jury returned a verdict for Plaintiff on its UDPA claim in the amount of \$400,000; however, the trial court deducted \$137,000 from that amount for settlement amounts paid to Plaintiff by two other original defendants before trebling the award. 88 N.C. App. at 408, 363 S.E.2d at 648. On appeal, the Court of Appeals held that the trial court committed error in deducting the prior settlement payments from the jury award before trebling the award for UDPA violations. The Court of Appeals reasoned that deducting the prior settlement payments before trebling the UDPA damages would undermine the UDPA’s twin purposes of “facilitating [] actions where money damages were limited and to increase the incentive for reaching a settlement.” *Id.* at 417, 363 S.E.2d at 653. Several subsequent decisions have also endorsed this rule relative to counterclaim damages and refunds on consumer loans deemed unfair and deceptive. See *Washburn v. Vandiver*, 93 N.C. App. 657, 664, 379 S.E.2d 65, 69-70 (1989) and *Richardson v. Bank of America, N.A.*, 182 N.C. App. 531, 565-66, 643 S.E.2d 410, 431-32 (2007).

D. Attorneys’ Fees

The UDPA also grants the trial court discretion to award attorney fees and costs to the “prevailing party.” N.C. Gen. Stat. § 75-16.1 specifically provides:

In any suit instituted by a person who alleges that the defendant violated G.S. 75-1.1, the presiding judge may, in his discretion, allow a reasonable attorney fee to the duly licensed attorney representing the prevailing party, such attorney fee to be taxed as a part of the court costs and payable by the losing party, upon a finding by the presiding judge that:

- (1) The party charged with the violation has willfully engaged in the act or practice, and there was an unwarranted refusal by such party to fully resolve the matter which constitutes the basis of such suit; or
- (2) The party instituting the action knew, or should have known, the action was frivolous and malicious.

UDPA decisions have defined the “prevailing party” to require a determination by the jury that: a) conduct violating N.C. Gen. Stat. § 75-1.1 occurred; and b) plaintiff sustained “actual injury” as a result of the violation, which is not necessarily synonymous with an award of damages. *See, e.g., Evans v. Full Circle Productions, Inc.*, 114 N.C. App. 777, 781-782, 442 S.E.2d 108, 110 (1994); *Envirosafe Paints, Inc. v. Conklin*, 172 N.C. App. 591 at *3-4, 616 S.E.2d 693 (2005) (unpublished, citing *Reinhold v. Lucas*, 167 N.C. App. 735, 740-741, 606 S.E.2d 412, 415-16 (2005)) (plaintiff entitled to attorney fees despite fact trial court reduced awarded damages to less than zero) and *Pinehurst, Inc. v. O’Leary Bros. Realty, Inc.*, 79 N.C. App. 51, 64, 338 S.E.2d 918, 926, *disc. review denied*, 316 N.C. 378, 342 S.E.2d 896 (1986) (plaintiffs entitled to attorney fees where they proved disruption to their business, but could not substantiate the monetary amount of such injury).

Once the “prevailing party” is determined, then the trial court must find that: (a) the defendant willfully engaged in the practice deemed unfair or deceptive and unjustifiably refused to resolve the concomitant lawsuit; or (b) the plaintiff had actual or constructive knowledge that the lawsuit was frivolous and malicious. This decision, as well as that of whether the requested fee is reasonable, must be supported by the trial court’s findings of fact. *See, e.g., Country Club of Johnston Co., Inc. v. Unites States Fidelity and Guaranty Co.*, 150 N.C. App. 231, 248-49, 563 S.E.2d 269, 280-81 (2002).

III. Punitive Damages

As a general rule, a plaintiff cannot assert a claim for punitive damages alone; rather, the plaintiff must plead and prove some other recognized cause of action as a prerequisite to a punitive damage award. *Iadanza v. Harper*, 169 N.C. App. 776, 783, 611 S.E.2d 217, 223 (2005). North Carolina has permitted punitive damages for an insurer’s bad faith refusal to settle as an independent cause of action. *See, e.g., Dailey v. Integon Gen. Ins. Corp.*, 57 N.C. App. 346, 350, 291 S.E.2d 331, 333 (1982) (“Dailey I”).

A. Statutory Regime

On January 1, 1996, the legislature codified the law of punitive damages in North Carolina in Chapter 1D of the General Statutes. Chapter 1D applies to all “claims for relief arising on or after that date.” 1995 N.C. Sess. Laws 514, § 5. Prior to 1995, punitive damages were a matter of common law. Punitive damages are awarded to punish a defendant for egregiously wrongful acts and to deter the defendant and others from committing similar wrongful acts. N.C. Gen. Stat. § 1D-1.

Under Chapter 1D, a claim for punitive damages requires evidence of an aggravating factor, either fraud, malice, or willful or wanton conduct, related to the injury for which compensatory damages were awarded. *Id.* § 1D-15(a). Willful or wanton means “conscious and intentional disregard of and indifference to the rights and safety of

others, which the defendant knows or should know is reasonably likely to result in injury, damage, or other harm. ‘Willful or wanton conduct’ means more than gross negligence.” *Id.* § 1D-5(7). Punitive damages shall not be awarded against a person solely for breach of contract, and the claimant must prove the

existence of an aggravating factor by clear and convincing evidence. *Id.* § 1D-15(b)&(d).¹⁸ Punitive damages shall not be awarded against a person solely on the basis of vicarious liability for the acts or omissions of another. *Id.* § 1D-15(c). Punitive damages may be awarded against a person only if that person participated in the conduct constituting the aggravating factor giving rise to the punitive damages, or if, in the case of a corporation, the officers, directors, or managers of the corporation participated in or condoned the conduct constituting the aggravating factor giving rise to punitive damages. *Id.*^{19,20}

A defendant may move for bifurcation to have the issues of liability for compensatory damages and the amount of compensatory damages tried separately from the issues of liability for punitive damages and the amount of punitive damages. N.C. Gen. Stat. § 1D-30. Evidence relating solely to punitive damages shall not be admissible until liability for compensatory damages and the amount of compensatory damages has been determined, and the same trier of fact that tried the issues relating to compensatory damages shall try the issues relating to punitive damages. *Id.*

B. Amount of Award

Punitive damages are limited by Chapter 1D to the greater of \$250,000 or three times the actual damages. *Id.* § 1D-25.²¹ Under appropriate facts, the punitive damages cap applies per person. *See Rhyne v. K-Mart Corp.*, 358 N.C. 160, 594 S.E.2d 1 (2004) (husband and wife each awarded \$250,000 in punitive damages in a suit arising out of assault by department store employees). Nominal damages may support a substantial

¹⁸ For a case reversing an award of punitive damages for failure to prove an aggravating factor by clear and convincing evidence, see *Scarborough v. Dillard's, Inc.*, 363 N.C. 715, 693 S.E.2d 640 (2009).

¹⁹ Although no case in North Carolina has addressed the circumstance yet, it is conceivable that an insurer could attempt to avoid liability for punitive damages by showing that an adjuster acted in derogation of established company policies in causing the damage complained of in a bad faith claim. *See Phillips v. Rest. Mgmt. of Carolina, L.P.*, 146 N.C. App. 203, 552 S.E.2d 686 (2001) (denying punitive damages against the corporation where restaurant owners did not ratify restaurant employee's act of spitting into state trooper's food).

²⁰ The North Carolina Insurance Guaranty Association, a creature of statute that steps in when an insurer that wrote the policy has become insolvent, cannot be held vicariously liable for punitive damages based on the bad faith of the insolvent insurer. *Bentley v. N. Carolina Ins. Guar. Ass'n*, 107 N.C. App. 1, 7, 418 S.E.2d 705, 707 (1992); *see also* N.C. Gen. Stat. § 58-48-20(4).

²¹ North Carolina's punitive damage cap has so far been held constitutional on a due process challenge based on the North Carolina Constitution. *See Rhyne v. K-Mart Corp.*, 358 N.C. 160, 164, 594 S.E.2d 1, 5 (2004).

award of punitive damages. *Zubaidi v. Earl L. Pickett Enters., Inc.*, 164 N.C. App. 107, 118, 595 S.E.2d 190, 196 (2004).

The jury is afforded great discretion in whether to award punitive damages and in fixing the amount of such an award. Within the statutory limits, the jury may award punitive damages in its sound discretion, and the trial court should not disturb such an award unless the amount assessed is “excessively disproportionate to the circumstances of contumely and indignity present in the case.” *Hutelmyer v. Cox*, 133 N.C. App. 364, 375, 514 S.E.2d 554, 562 (1999). There is no formula for the amount of punitive damages.

“In determining the amount of punitive damages, if any, to be awarded, the trier of fact:

- (1) Shall consider the purposes of punitive damages set forth in G.S. § 1D-1 [i.e. ‘to punish a defendant for egregiously wrongful acts and to deter the defendant and others from committing similar wrongful acts’]; and
- (2) May consider only that evidence that relates to the following:
 - a. The reprehensibility of the defendant's motives and conduct.
 - b. The likelihood, at the relevant time, of serious harm.
 - c. The degree of the defendant's awareness of the probable consequences of its conduct.
 - d. The duration of the defendant's conduct.
 - e. The actual damages suffered by the claimant.
 - f. Any concealment by the defendant of the facts or consequences of its conduct.
 - g. The existence and frequency of any similar past conduct by the defendant.
 - h. Whether the defendant profited from the conduct.
 - i. The defendant's ability to pay punitive damages, as evidenced by its revenues or net worth.”

N.C. Gen. Stat. § 1D-35. The applicable North Carolina Pattern Jury Instruction includes a mandate that “any amount you award must bear a rational relationship to the sum reasonably needed to punish the defendant for egregiously wrongful acts and to deter the defendant and others from committing similar wrongful acts.” N.C.P.I. Civil 810.98. Punitive Damages – Issue of Whether to Make Award and Amount of Award.²² Under *Phillip Morris USA v. Williams*, 549 U.S. 346 (2007), the insured’s attorney must be

²² To meet due process requirements, jury discretion must be exercised “within reasonable constraints.” *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 20 (1991).

careful to not argue that the jury should punish the insurer for acts which the insurer committed against other claimants.²³

On at least two occasions, the North Carolina Court of Appeals has adopted the three “guideposts” set out by the United States Supreme Court in the *BMW of N. Am., Inc. v. Gore*²⁴ opinion for determining when a punitive damages award is “grossly excessive” such that it violates the due process clause of the Fourteenth Amendment. *Rhyne v. K-Mart Corp.*, 149 N.C. App. 672, 562 S.E.2d 82 (2002), *aff’d on other grounds*, 358 N.C. 160, 594 S.E.2d 1 (2004); *Everhart v. O’Charley’s Inc.*, 200 N.C. App. 142, 683 S.E.2d 728 (2009). The North Carolina Supreme Court has not expressly adopted the *Gore* guideposts, and no appellate court in North Carolina has yet addressed the United States Supreme Court’s *State Farm Mut. Auto Ins. Co. v. Campbell*²⁵ decision. A federal court sitting in diversity would, of course, be bound by both the *Gore* and *Campbell* decisions. The North Carolina Court of Appeals has previously held implicitly that an award of punitive damages must comport with the due process requirements of the Fourteenth Amendment. *See Muse v. Charter Hosp. of Winston-Salem, Inc.*, 117 N.C. App. 468, 478, 452 S.E.2d 589, 597 *aff’d*, 342 N.C. 403, 464 S.E.2d 44 (1995).

C. Attorney’s Fees

Attorneys’ fees may be awarded to a defendant against a claimant who files a claim for punitive damages that the claimant knows or should have known to be frivolous or malicious, and against a defendant who asserts a defense in a punitive damages claim that the defendant knows or should have known to be frivolous or malicious. N.C. Gen. Stat. § 1D-45. “The purpose of providing the costs of legal representation is to encourage professional peer review by limiting the possibility of unreasonable litigation expenses.” *Rhyne v. K-Mart Corp.*, 149 N.C. App. 672, 689, 562 S.E.2d 82, 94 (2002) (quoting *Virmani v. Presbyterian Health Servs. Corp.*, 127 N.C. App. 71, 488 S.E.2d 284 (1997)). For purposes of this section, a defense is frivolous if a proponent can present no rational argument based upon the evidence or law in support of the defense, and it is malicious if it is wrongful and intentionally interposed without just cause or excuse or as a result of ill will. *Id.* (citing to Black’s Law Dictionary).

²³ In appropriate circumstances, a party may request that a limiting instruction, such as the following, be given: “Evidence which may tend to show that the defendant’s conduct caused harm or created the risk of harm to the general public or to persons who are not a party to this lawsuit, if you find that the evidence does so show, may be considered by you only in your determination of the reprehensibility of the defendant’s motives and conduct, and not for any other purpose. You may not award the plaintiff punitive damages in this case to punish the defendant for harm it may have caused to others that are not parties to this lawsuit.” N.C.P.I Civil 810.98. Punitive Damages – Issue of Whether to Make Award and Amount of Award, FN 4.

²⁴ 517 U.S. 559 (1996). The three guideposts are: (1) the degree of reprehensibility of the defendant’s conduct; (2) the disparity between the compensatory and punitive damages awards; and (3) the available sanctions for comparable conduct.

²⁵ 538 U.S. 408 (2003).

D. Examples of punitive verdicts upheld on appeal (some from prior to institution of statutory cap)

Zubaidi v. Earl L. Pickett Enters., Inc., 164 N.C. App. 107, 118, 595 S.E.2d 190, 196 (2004) (upholding a punitive damages award in the amount of \$150,000.00 where the jury awarded compensatory damages in the amount of \$62,001.00 for breach of the lease/purchase agreement and conversion).

Horner v. Byrnett, 132 N.C. App. 323, 328, 511 S.E.2d 342, 346 (1999) (concluding that there was no abuse of discretion by the trial court in denying a defendant's motion for a new trial where the jury awarded the plaintiff \$1.00 in compensatory damages and \$85,000.00 in punitive damages for criminal conversation).

Everhart v. O'Charley's Inc., 200 N.C. App. 142, 683 S.E.2d 728 (2009) (affirming punitive damage award of \$250,000.00 where only \$10,000.00 in compensatory damages was awarded to a restaurant customer that drank bleach formula from a water pitcher that had been served to her table).

Lovell v. Nationwide Mut. Ins. Co., 108 N.C. App. 416, 424 S.E.2d 181 (1993) (affirming punitive damages award of \$225,000 where bad faith conduct by insurer was failure to timely pay the \$2,000 limits in medical payment coverage).

Holt v. Williamson, 125 N.C. App. 305, 481 S.E.2d 307 (1997) (affirming award of \$31,834.00 compensatory and \$1,600,000.00 punitive damages).

IV. Election of Remedies

Under North Carolina Law, a party may seek both punitive damages on a common law tort claim and treble damages pursuant to the UDPA. *Holloway v. Wachovia Bank & Trust Co.*, 339 N.C. 338, 349, 452 S.E.2d 233, 249 (1994). However, such a party may not *recover* punitive damages for both tortious conduct and recover treble damages for a UDPA violation based on the same conduct. *United Laboratories, Inc. v. Kuykendall*, 102 N.C. App. 484, 493, 403 S.E.2d 104, 110 (1991) *aff'd*, 335 N.C. 183, 437 S.E.2d 374 (1993) (holding that a plaintiff must elect between punitive damages and compensatory damages that are trebled pursuant to N.C. Gen. Stat. § 75-16). *See also* N.C. Gen. Stat. § 1D-20 (“A claimant must elect, prior to judgment, between punitive damages and any other remedy pursuant to another statute that provides for multiple damages.”)

The *Kuykendall* case provides perhaps the most comprehensive analysis of the interplay between common law and statutory recoveries available under North Carolina law and the resulting issues concerning election of remedies. Important holdings in the case include:

- Punitive damages on a tort claim and attorney's fees in an UDPA claim may be recovered because the conduct required for the award of attorney's fees is different from the conduct required for an award of punitive damages and the two recoveries serve different interests so that permitting the plaintiff to recover both will not result in double redress for a single wrong.
- Awards of untrebled compensatory damages in the UDPA claim and punitive damages in the tortious interference claim serve completely different purposes and are calculated on entirely different bases, and are neither inconsistent nor duplicative.
- A party may seek both punitive damages on a common-law tortious-interference claim and treble damages pursuant to UDPA, but the party may not both recover punitive damages for tortious conduct and recover treble damages for violation of the UDPA based on the same conduct.

At the end of the day, the plaintiff in *Kukyendall* recovered: compensatory damages for its § 75-1.1 claim, attorney fees pursuant to § 75-16.1, and punitive damages for common law tortious interference with contract. Although such a la carte recovery is not standard fare, the combination of statutory and common law remedies can provide for a substantial recovery despite relatively minor actual injury if accompanied by sufficient aggravating conduct.²⁶

The limitation on double recovery, and the forced election of remedies, appears to be closely linked to a factual determination of the causation of a particular subset of damages. For example, in *Britt v. Jones* a plaintiff was properly awarded damages for both usury and its UDPA claim where the plaintiff's UDPA claim was not based solely on the usurious conduct of the defendant lender. 123 N.C. App. 108, 113, 472 S.E.2d 199, 202 (1996). In *ABT, Inc. v. Juszczuk*, Judge Voorhees allowed for UDPA damages in addition to damages for misappropriation of trade secrets and other claims because the UDPA verdict "was based in part upon conduct deemed to be 'unfair competition' – more than a mere breach of contract, tortious interference, or misappropriation of trade secrets." 5:09-cv-00119, *Order*, DN 567 at pp. 4-5 (W.D.N.C. Dec. 21, 2011). There are likewise counter-examples involving factual situations in which the same conduct was deemed to have caused the damages sought under both the common law remedy and the UDPA claim. *See, e.g., Ellis v. Northen Star Co.*, 326 N.C. 219, 388 S.E.2d 127 (1990) (holding that food broker could not recover both punitive damages for libel and treble damages automatically assessed for unfair trade claims based on sending of letter); *Blankenship v. Town & Country Ford, Inc.*, 174 N.C. App. 764, 622 S.E.2d 638 (2005)

²⁶ Imagine, for example, a first-party bad faith claim where the insured recovers \$10,000 in compensatory damages pursuant to § 75-1.1, punitive damages of \$250,000 under § 1D-25, and attorney's fees under § 75-16.1. Such issues are less likely to arise once compensatory damages reach the \$84,000 mark because, at that level, the \$250,000 cap to punitive damages converts to treble damages making maximum recovery under Chapter 75 co-equal.

(denying treble damages awarded under both § 20-348(a) and § 75-1.1 that were caused by same failure to disclose prior damage to used car).

Although the punitive damages statute requires only that a claimant must elect “prior to judgment,” it appears that a claimant is entitled to wait until after a jury’s verdict and after the Court has ruled on whether the jury’s verdict constitutes a UDPA violation as a matter of law before a party is required to elect between punitive or trebled damages. *Mapp v. Toyota World, Inc.*, 81 N.C. App. 421, 427, 344 S.E.2d 297, 301 (1986) (“We hold that it would be manifestly unfair to require plaintiffs in such cases to elect before the jury has answered the issues *and* the trial court has determined whether to treble the compensatory damages found by the jury and that such election should be allowed in the judgment.” (emphasis in original)). *See also First Atl. Mgmt. Corp. v. Dunlea Realty Co.*, 131 N.C. App. 242, 256, 507 S.E.2d 56, 65 (1998) (“The more recent trend in Chapter 75 cases has been to require election of remedies prior to instruction of the jury, or after return of the jury verdict” (internal citations omitted)).