Contract disputes: Look closely, there's more than meets the eye

■ BY SCOTT A. MISKIMON

"This is just a simple breach of contract case, Your Honor…" How many times have judges and lawyers heard that? But if breach of contract cases are simple, why are so many decided by North Carolina's appellate courts? And when a contract dispute arises, why can it be so hard to determine what rules apply and whether the rules have changed?

As the co-author and editor of the recently-published second edition of *North Carolina Contract Law*—the first edition was published more than 20 years ago—I hope to shed some light on these questions. The answer to the first question about the sheer number of contract cases helps us to answer the second about why the rules are hard to find, and vice versa. But first, a little historical perspective.

Our appellate courts have been deciding contract cases since the Supreme Court of North Carolina was established in 1819, giving us two centuries worth of case law on contract disputes. Founding Father George Mason wrote that the blessings of liberty require a "frequent recurrence to fundamental principles." So, too, with deciding contract cases.

Some of the most fundamental contract issues in North Carolina were decided more than a century ago in a "golden age" of contract law, from Reconstruction through the Great Depression (roughly 1870-1930). In modern cases, there can be points of law that are so fundamental that they may receive limited discussion in court opinions. By contrast, older cases may provide a more extensive discussion of a rule, including its genesis and the reason for it, and give lawyers grounds for a clearer analysis and more persuasive argument.

If you sense a pattern here, you are right. Fundamental points of contract law can be difficult to find during research—or are simply overlooked in the heat of battle—and as a result many contract cases are not properly argued and are then decided on grounds that cannot withstand appellate scrutiny. More appellate opinions are then issued on contract cases, and the body of case law grows. It is now scattered across more than 650 official reporters from North Carolina's appellate courts, as well as a vast number of unpublished opinions.

Although North Carolina has a long tradition of legal treatises on a number of topics, contract law was not one of them. Even with electronic research tools, attorneys and judges were faced with thousands of contract cases, some conflicting, some rarely or never cited, and some written in dense or archaic language that at times evades the understanding of the modern attorney.

Because contract disputes often involve excavating two centuries of cases in order to properly research an issue, in the 1990s I decided to undertake what has since become a career-spanning and career-defining project. After six years of work, in 2001 my co-author John Hutson and I published the legal treatise *North Carolina Contract Law* through Lexis. Since then, we've updated it each year with a cumulative supplement, and in 2021 we published a second edition that revises and updates the first edition and expands the treatise into a two-volume work.

In the twenty years since the first edition, an entire new generation of attorneys and judges has joined the profession, and the body of case law has grown, while statutory law has also evolved. Much has changed in the intervening two decades, substantively, procedurally, and technologically.

Electronic contracting has become routine, whether through programs like DocuSign or circulating agreements (or signature pages) in PDF form via email. And there are North Carolina appellate cases finding a contract was formed through an exchange of emails, including emails from attorneys.

Statutes have been enacted regarding "business contracts." These changes now give parties a statutory basis to recover attorneys' fees in the event a business contract is breached, or override traditional policy objections to allow the selection of North Carolina law as the governing law for the contract. They also give parties a stronger basis for selecting North Carolina as the forum to litigate disputes, and to largely preclude objections based on personal jurisdiction or an inconvenient forum. Articles 1 and 2 of North Carolina's Uniform Commercial Code have been revised in various ways, and actions under the North Carolina Products Liability Act have also been frequently litigated, giving more clarity to matters involving contracts for the sale of goods and product liability disputes.

Since 2001, most contract cases have been decided by the Court of Appeals rather than the Supreme Court, and a significant portion of its opinions have been in unpublished decisions. In 2014, however, the General Assembly provided an additional route of appeal to the Supreme Court. Mandatory complex business cases decided by the Business Court became appealable as of right directly to the Supreme Court, allowing North Carolina's highest court to decide, in published opinions, some of the most complex contract matters.

Since the first edition of *North Carolina Contract Law*, there has been a growing acceptance among the trial and appellate courts for contract cases to be dismissed at the pleadings stage. This trend highlights the need for counsel, prior to filing suit, to fully appreciate the fundamentals of contract law, the facts of the case, the terms of the contract in dispute, and the requirements of the Rules of Civil Procedure.

Fundamental issues in contract law remain the most frequently litigated, as shown by the ever-increasing numbers of cases that turn on matters of mutual assent, consideration, the statute of frauds, and the parol evidence rule. The fact that matters such as offer and acceptance are the subject of centuries of North Carolina precedent, yet still generate so much modern appellate litigation, suggests that bedrock principles of contract law remain underappreciated—and that contract cases are not as simple as they may seem.

Scott A. Miskimon is the co-author and editor of North Carolina Contract Law. He is a commercial litigator and business attorney and partner in the Raleigh law firm of Smith Anderson. The treatise is available for purchase through the LexisNexis Bookstore at https://store.lexisnexis.com/.

Earning capacity from a vocational perspective

■ BY ASHLEY H. JOHNSON, MS, CRC, CLCP

What is earning capacity? According to Black's Law Dictionary, earning capacity refers to the monies that a person is able to earn that result from skills and training. Earning capacity is used in a variety of litigated matters to establish the earnings power of an individual based on their education, work experience, skills, and qualifications within their labor market.

Once the individual's unique set of qualifications are identified, a review of labor market data is necessary to identify potential occupations and their salaries in the individual's labor market. Are they qualified to work as a teacher? If so, what do teachers with their unique set of qualifications, for instance a bachelor's degree and 10 years of experience, earn? By reviewing the salary data for potential occupations that match with the individual's skills and experience, earning capacity can be established.

In some cases, an individual may be able to maximize their earning capacity with a brief training course or by obtaining a license or certificate. For example, a realtor who has a license in another state can obtain their provisional license in North Carolina and begin working immediately for a minimal cost. Upon completion of post-licensing education coursework within an 18-month period, they can become a licensed broker for under $800.

In some legal matters, a loss of earning capacity or loss of future earnings is at issue. Particularly in injury cases where the individual is facing acquired work limitations, they may be unable to return to the occupation they previously performed. It is also important to differentiate the terms lost wages and loss of earning capacity. The former applies to actual lost wages when a person is unable to work following an accident and it is retrospective. Loss of earning capacity applies to the prospective wages lost due to permanent impairments limiting the individual's ability to work in the future. There is a sound methodological basis for calculating an individual's loss of earning capacity.

Collecting information regarding the individual's skills, education, experience, vocational strengths, and qualifications is the first step to evaluating loss of earning capacity. Once the information is gathered

See Page 5 ►

NORTH CAROLINA LAWYERS WEEKLY

"Helping lawyers practice better, more efficiently, and more profitably."

■ PUBLISHER
Liz Irwin
lirwin@bridgetowermedia.com

■ EXECUTIVE EDITOR
Andy Owens
aowens@scbiznews.com

■ EDITOR IN CHIEF
David Donovan
david.donovan@nclawyersweekly.com

■ EDITORIAL
Heath Hamacher, Reporter
hhamacher@nclawyersweekly.com
Scott Baughman, Digital Media Manager
sbaughman@mecktimes.com

■ ADVERTISING
Sheila Batie-Jones, Advertising Account Executive
sheila.batie-jones@nclawyersweekly.com

■ ACCOUNTING & ADMINISTRATIVE
Michael McArthur, Business Manager
mmcarthur@bridgetowermedia.com

■ CIRCULATION
Disa Ehrler, Audience Development Manager
dehrler@bridgetowermedia.com

Circulation: 1-877-615-9536
service@bridgetowermedia.com

■ PRODUCTION & OPERATIONS
Ryan O'Shea, Production Supervisor
roshea@molawyersmedia.com

Subscriptions: $410.36 per year

Established 1988

Statewide General Circulation

919-829-9333 • 1-800-876-5297

Charlotte office: 130 North McDowell Street, Unit B, Charlotte, NC 28204

704-377-6221 • 704-377-4258 fax: 1-800-876-5297

www.nclawyersweekly.com

For subscription questions 1-877-615-9536

service@bridgetowermedia.com

North Carolina Lawyers Weekly [ISSN10411747] [USPS 002-904] is published weekly each month except April through September, when it is printed bi-weekly for $410.36 per year by North Carolina Lawyers Weekly, 130 North McDowell Street, Unit B, Charlotte, NC 28204

Periodicals postage paid at Charlotte, North Carolina 28228-9998.

Postmaster: Electronic ACS Service Requested.

Send address changes to: North Carolina Lawyers Weekly, Subscription Services, P.O. Box 1051, Williamsport, PA, 17703-9940

North Carolina Lawyers Weekly is a publication of BridgeTower Media, 222 South Ninth Street, Suite 900, Minneapolis, MN 55402.