

# NORTH CAROLINA CIVIL LITIGATION REPORTER

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## CIVIL LIABILITY

### Coverage from Multiple UIM Policies Stacked

Daijah and Desiree' Maurizzio were injured in a single car accident while riding as passengers in a vehicle owned by Suzanne Maurizzio, operated by her granddaughter Destany, and insured by Integon under a policy with liability and underinsured motorist ("UIM") limits of \$50,000 per person and \$100,000 per accident. Integon settled with Desiree' and, because Daijah's medical expenses exceeded \$200,000, offered her its full policy limits of \$50,000 in exchange for a covenant not to enforce judgment.

As a resident in her parents' household, Daijah qualified an insured under their auto policy, which was also with Integon and had the same coverage limits as Suzanne's. Integon brought a declaratory judgment action, seeking a determination that Suzanne's policy did not provide UIM coverage for the accident. Daijah responded through her parents and guardian *ad litem*, contending that the vehicle in which she was a passenger was "underinsured" because it was only covered by \$50,000 in liability insurance, whereas when the coverage from the two Integon policies was stacked, she was entitled to a total of \$100,000 in UIM coverage. Both sides then moved for summary judgment.

When their competing motions came on for hearing, Integon argued that North Carolina law did not permit stacking of the UIM coverage limits in this case because more than one

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DENNIS MEDIATIONS, LLC

**GEORGE W. DENNIS III**

NCDRC CERTIFIED SUPERIOR COURT MEDIATOR

NC INDUSTRIAL COMMISSION MEDIATOR

**dennismediations@gmail.com**

**919-805-5002**

[www.dennismediations.com](http://www.dennismediations.com)

claimant had been injured in the accident. The trial court disagreed. It denied Integon's motion, granted the Maurizzios', and ruled that the two policies provided Daijah with \$100,000 in UIM coverage, less the \$50,000 credit owed to Integon for the liability coverage it provided to Destany under Suzanne's policy. Integon appealed.

On March 17, the Court of Appeals affirmed the trial court's resolution of the parties' coverage dispute in *Integon National Insurance Company v. Maurizzio*. In its opinion, the Court observed that before N.C.G.S. § 20-279.21(b)(4) was amended in 2004, the determination of whether a tortfeasor's vehicle was "underinsured" came down to a comparison between the victim's UIM coverage and the tortfeasor's liability coverage, not the tortfeasor's actual liability payment. But, the 2004 amendment created a "multiple claimant exception" applicable to those cases in which more than one claimant is seeking a liability recovery. In such cases, vehicles are considered "underinsured" if "*the total amount actually paid ... under all bodily injury liability ... insurance policies ... is less than the applicable limits of underinsured motorist coverage for the vehicle involved in the accident.*"

While multiple claimants were seeking a liability recovery in the present case, Integon nevertheless argued that it was error for the trial court to grant summary judgment to the Maurizzios because the second sentence of the "multiple claimant exception" provides that "a highway vehicle shall not be an 'underinsured motor vehicle' for purposes of an underinsured motorist claim ... unless the owner's policy insuring that vehicle provides underinsured motorist coverage with limits that are greater than the policy's bodily injury liability limits" and in this case Suzanne's UIM limits were equal to, not greater than, her liability limits.

But the Court rejected Integon's interpretation of the amended statute. Instead, it found that "[t]he multiple claimant exception applies only when the amount paid to an individual claimant is less

than the claimant's limits of UIM coverage after liability payments to multiple claimants," and while this case involved multiple claimants, Integon's liability payment to Desiree' did *not* reduce the liability coverage that was available to satisfy Daijah's claim.

The Court held that "the \$50,000 per person UIM coverage provided by [Daijah's] parents' policy stacks on the \$50,000 UIM coverage provided for by Suzanne's policy, for a total of \$100,000 in UIM coverage." That meant the available UIM coverage was \$50,000 greater than the available liability coverage, which rendered the vehicle driven by Destany at the time of the accident an "underinsured highway vehicle." That being so, the trial court did not err when it granted the Maurizzios' motion for summary judgment.

### Attorney Fee Award Remanded for Missing Findings of Fact

John and Angela Johnson hired general contractor Jimmy Allen to remodel their home and he arranged for Brown's Builders Supply to remodel the kitchen, including installation of a new sink, countertops, kitchen cabinets, and a wooden hood for the stove. When it was discovered that the wooden hood was damaged after it was installed, the Johnsons requested that it be replaced free of charge. Brown's refused, contending that it was not liable for damages caused by other subcontractors or by heat, humidity, or environmental conditions.

When the Johnsons responded by refusing to pay the outstanding balance owed for remodeling the kitchen, Brown's filed suit, seeking damages for breach of contract or in *quantum meruit*. Following a bench trial, the court entered judgment for Brown's, awarding \$17,737.66 in damages, plus interest, attorneys' fees, and costs. The Johnsons appealed.

On March 17, in *Brown's Builders Supply, Inc. v. Johnson*, the Court of Appeals first addressed defendants' argument that plaintiff's lack of a valid general contractor's license was an absolute

bar to its claim. While it agreed that general contractors, unlike subcontractors, must be licensed and that unlicensed general contractors are prohibited from recovering in contract or *quantum meruit*, it concluded that “[w]hat distinguishes a general contractor from a subcontractor is ‘the degree of control to be exercised by the contractor over the construction of the entire project.’” Therefore, since Brown’s did not oversee, direct, or manage the work of the other subcontractors involved in defendants’ home remodeling project and its involvement was limited to the kitchen area, the Court held that it was “not subject to the licensure requirement applicable to general contractors, nor the corresponding bars on recovery.”

As for defendants’ challenge to the trial court’s award of attorneys’ fees, the Court found that while, as a general rule, “attorneys fees may not be recovered by the successful litigant as damages or a part of the court costs,” there are statutory exceptions for cases such as those described in the statute relied upon by the trial court, N.C.G.S. § 44A-35. At the same time, however, as it and the Supreme Court held in *N.C. Department of Corrections v. Myers*, 120 N.C. App. 437 (1995); 344 N.C. 626 (1996), an award of attorneys’ fees is only appropriate where the trial court makes “findings of fact as to the time and labor expended, the skill required, the customary fee for like work, and the experience or ability of the attorney.” Because no such findings were made by the trial court in this case, its attorney fee award was reversed and the case remanded for the requisite findings, but the remainder of its judgment was affirmed.

### [Assistant Register of Deeds May Be Fired for Political Reasons](#)

Sandra Sims-Campbell, a long-time employee of the Rowan County Register of Deeds who consistently received exceptional performance evaluations and had been elevated to the position of Assistant Register of Deeds, was fired by the Register of Deeds, Harry Welch, a day

after she informed him of her intention to run against him in the next election. Sims-Campbell sued Welch, claiming wrongful termination in violation of the state and federal constitutions and the state’s public policy. Welch’s answer included a Rule 12(b)(6) motion to dismiss, which was granted by the trial court, and Sims-Campbell appealed.

On March 3, in *Sims-Campbell v. Welch*, the Court of Appeals found that while government employees are generally protected from termination because of their “political viewpoints,” it has been repeatedly held in the relevant case law that “deputy sheriffs and deputy clerks of court may be fired for political reasons such as supporting their elected boss’s opponents during an election.” The reason this exception to the general rule is necessary, the Court explained, is that deputies are authorized to act on behalf of their elected superiors, and their actions are binding on them. “It would be untenable if employees with these broad-ranging powers could not be terminated when they were also actively working to undermine their superiors for their own political gain.” Since assistant registers of deeds have the same authority as deputy sheriffs and clerks of court, including the ability to act on behalf of, and bind, their bosses, and as the same sections of the General Statutes govern all three positions, the Court held that they, like deputy sheriffs and clerks of court, may be fired for political reasons.

As for Sims-Campbell’s argument that even if her firing was not unconstitutional or in violation of public policy, it violated N.C.G.S. § 153A-99, which provides that “county employees ... are not restricted from political activities,” the Court held that “an assistant register of deeds is not a county employee.” Just like the relationship between a county and its deputy sheriffs, “the county has no authority to hire, fire, supervise, or control” employees of the register of deeds. As a consequence, an assistant register of deeds is “not a ‘county employee’ within the meaning of N.C. Gen. Stat. § 153A-99(b)(1).”

When the Court turned to plaintiff's intentional infliction of emotional distress claim, it found that our courts have "consistently ... held that the mere firing of an employee can never be 'extreme and outrageous' conduct sufficient to state a claim for intentional infliction of emotional distress." In this case, the Court found, "Welch's only allegedly wrongful conduct was his decision to summarily fire Sims-Campbell when she decided to run against him in the upcoming election. That alleged conduct does not satisfy the 'extreme and outrageous' standard as a matter of law." As a consequence, it affirmed the trial court's order granting Welch's Rule 12(b)(6) motion to dismiss.

## WORKERS' COMPENSATION

### Broker Liable As Statutory Employer Under N.C.G.S. § 97-19.1

Owen Thomas, Inc., a licensed transportation broker, contracted with Sunny Ridge Farms to obtain transportation for the farm's products and then arranged for Goree Logistics to do the transporting, exercise full control over the work, and be responsible for taxes, unemployment, and workers' compensation. But, because Goree did not regularly employ three or more workers, it had no workers' compensation insurance.

Goree employee Frances Atiapo was injured when his tractor-trailer collided with another vehicle while he was transporting Sunny Ridge's products. When he filed a claim for workers' compensation benefits against Goree, it was denied on grounds that he was an independent contractor, not an employee.

After Owen Thomas was added as a defendant, the Commission ruled that although the Broker-Carrier Agreement described Atiapo as an independent contractor, he was actually a statutory employee of Goree, since Owen Thomas was a "principal contractor within the meaning of N.C. Gen. Stat. § 97-19.1(a)" and Goree had no workers' compensation insurance.

It also ordered Owen Thomas to pay medical and indemnity benefits and assessed penalties against Goree and its owner for violating N.C.G.S. § 97-94. Both defendants appealed.

On March 17, in *Atiapo v. Goree Logistics, Inc.*, the Court of Appeals agreed that, under N.C.G.S. § 97-19.1(a), if Owen Thomas was a "principal contractor" and its subcontractor lacked workers' compensation coverage, it would be liable for the benefits owed to Atiapo. Since it was undisputed that Goree was uninsured, the only question was whether the evidence supported the Commission's determination that Owen Thomas "acted as a contractor." The Court found that it did because it was paid to arrange for Sunny Ridge's goods to be delivered, hired Goree to transport them, and issued a 1099 tax form for the money it paid to Goree. And that determination, the Court concluded, "in turn supports a finding that Owen Thomas employed Goree, a subcontractor without workers' compensation insurance coverage, and is therefore liable to plaintiff under N.C. Gen. Stat. § 97-19.1(a)."

As for Owen Thomas' contention that it was exempt from liability under N.C.G.S. § 97-19.1(a) because "federal law precludes states from regulating interstate commerce," the Court reviewed the federal statute in question, which prohibits the enforcement of laws "related to a price, route, or service of any motor carrier," and found "no reason why a statute requiring financial responsibility as to workers' compensation should be considered a regulation of prices, routes, or services." Therefore, it held that federal preemption did not apply to N.C.G.S. § 97-19.1 and affirmed both the Commission's award of benefits against Owen Thomas and its assessment of penalties against Goree Logistics and its owner.

### "Parsons Presumption" Applied In Housekeeper's Disability Claim

While traveling to a job site from her employer's office, Tidy Maids housekeeper Priscilla

Gonzalez was injured in an auto accident. By filing notice of payment without prejudice on a Form 63 and not contesting compensability within the 90-day period specified in N.C.G.S. § 97-18(d), Tidy Maids and its insurer accepted Gonzalez's claim for "neck, back, headache, vertigo, [and] rt shoulder" injuries.

After paying indemnity and medical benefits for ten months, the defendants filed a Form 24, contending that because there were no longer any restrictions on Gonzalez's ability to work, she was not disabled. A special deputy commissioner agreed and granted the Form 24. Two months later, Gonzalez filed a Form 33, which the defendants contested on grounds that her request for hearing was untimely.

Complaining of continued headaches and right shoulder and low back pain, Gonzalez filed a Form 23 "Application for Reinstatement of Disability Compensation," which was denied by a deputy commissioner. Gonzalez appealed.

The Full Commission reversed the deputy commissioner and entered an award in Gonzalez's favor, retroactively reinstating TTD to the date it was cut off and ordering the defendants to continue paying weekly benefits "until plaintiff returns to work or further order of the Commission." Defendants appealed.

On March 3, in *Gonzalez v. Tidy Maids, Inc.*, the first issue addressed by the Court of Appeals was whether the Full Commission erred when it concluded that Gonzalez's appeal from the administrative order approving defendants' Form 24 was timely. While defendants contended that a printout from the U.S. Postal Service established that Gonzalez received the administrative decision in August 2011 and did not appeal until January 2012, the Court found that there was no "green card" in the Commission's file to identify the person who actually received the administrative decision when it was mailed in August, and Gonzalez testified that she did not receive the decision until it was emailed to her newly-retained

attorney in January. Since her testimony was "competent to support the Commission's finding that she did not receive the administrative order until the day she appealed it," and as "only the Commission may determine the weight and credibility of the evidence," the Court was "compelled to uphold the Commission's determination that plaintiff's appeal was timely."

Defendants' next exception was to the Full Commission's conclusion that they did not rebut the "*Parsons* presumption," which holds that once an injured worker establishes that her injuries are compensable, a rebuttable presumption arises that later treatment is related to the compensable injury. In its analysis of the record to determine whether the Full Commission had correctly applied the "*Parsons* presumption," the Court found "persuasive" the holding in a recent unpublished opinion, *Williams v. Law Cos. Grp.*, 204 N.C. App. 212 (2010), which held that "when, as here, a defendant pays a plaintiff pursuant to a Form 63 and never denies the ... claim, the plaintiff is entitled to rely upon the *Parsons* presumption," shifting the burden to the defense to prove the absence of a causal connection.

Applying those principles to the facts in this case, while the Court found support for defendants' position in the testimony of Dr. Gary Smoot, it also found that the Commission "discredited" his testimony. Since his "credibility was a question solely for the Commission to decide" and the defendants "otherwise failed to point to any evidence showing that plaintiff's current back pain is unrelated to the compensable injuries from her ... car accident," the Court concluded that there was no error in the Commission's finding of a causal connection between Gonzalez's on-the-job injury and her need for additional medical treatment.

As for defendants' challenge to the Commission's award of ongoing disability benefits, while the Court agreed that, in *Sims v. Charmes/Arby's Roast Beef*, 142 N.C. App. 154 (2001), it held that



“admitting compensability and liability ... does not create a presumption of continuing disability,” there was evidence in this case supporting the Commission’s determination that plaintiff had proved ongoing disability under the second of the four-pronged test established in *Russell v. Lowes Product Distribution*, 108 N.C. App. 762 (1993). While the neurologist who treated Gonzalez’s neck, back, and shoulder pain authorized a return to light duty work in 2011, he imposed a five pound lifting restriction, prohibited pushing, pulling, bending, or stooping, never actually lifted the restrictions, and found her condition substantially unchanged when she was last seen in 2012. That evidence, coupled with plaintiff’s testimony that she attempted to find work within her restrictions and completed applications for 17 positions with 14 employers supported the Commission’s conclusion that she had, “after a reasonable effort on her part, been unsuccessful in her effort to obtain employment, as required by the second *Russell* method of proof.”

The Court also considered, but ultimately rejected, defendants’ citation to *Hooker v. Stokes-Reynolds Hospital*, 161 N.C. App. 111 (2003), as authority for their contention that, to prove she made a “reasonable effort” to obtain employment after she was injured, Gonzalez was required to contact two potential employers per week over the period of time she was seeking weekly benefits and, having failed to do so, was not entitled to the weekly benefits being claimed.

While the Court agreed that, in *Hooker*, it affirmed the Commission’s determination that complying with the Employment Security Commission’s requirement of “at least two in-person contacts with different employers on different days each week” qualified as a “reasonable effort” to obtain employment, it cautioned that “*Hooker* does not stand for the proposition that failure to comply with the [ESC’s] regulations for unemployment benefits means an injured employee has not conducted a reasonable search for employment.” So, the Court found no error and affirmed the Commission’s award of benefits.

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The full text of the appellate decisions summarized in this newsletter can be found at [www.nccourts.org](http://www.nccourts.org).

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Dennis Mediations, LLC

**George W. Dennis III**

NCDRC Certified Superior Court Mediator

NC Industrial Commission Mediator

[dennismediations@gmail.com](mailto:dennismediations@gmail.com)

**919-805-5002**

[www.dennismediations.com](http://www.dennismediations.com)