NORTH CAROLINA CIVIL LITIGATION REPORTER

January 2014 [Volume 2, Number 1]

CIVIL LIABILITY

Jurisdiction Over Florida Medical Equipment Repairer Provided by Long Arm Statute

Shortly after being born with spinal muscular atrophy, which rendered him unable to move his head or extremities or breathe on his own, Jacob Berrier was placed on a ventilator supplied by Pediatric Specialists and serviced by Quality Medical Rentals, LLC, a company located in Largo, Florida. After the ventilator malfunctioned, it was sent to Quality Medical for service and then returned to the Berriers, but it malfunctioned again that same evening. By the time the Berriers discovered the problem, Jacob had no pulse and was not breathing. Although he was rushed to Moses Cone Hospital for treatment, he died four days later.

Alleging negligence, negligent infliction of emotional distress, medical malpractice, breach of the implied warranty of merchantability, and unfair and deceptive trade practices, Jacob's parents sued Quality Medical, Pediatric Services, and others involved in his care. Quality Medical responded with a Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction, arguing that it did not have sufficient minimum contacts with North Carolina for the state's courts to exercise jurisdiction over it. However, the court disagreed. It found that North Carolina's long arm statute, N.C.G.S. § 1-75.4, provided the trial court with jurisdiction over Quality Medical and held that the allegations in plaintiffs' complaint established the minimum contacts necessary to satisfy due process. Quality Medical appealed.

In This Issue…

On January 7, in ***Berrier v. Carefusion 203, Inc.***, the Court of Appeals affirmed, finding "competent evidence support[ing] the trial court's findings of fact and conclusion of law that Quality Medical maintained minimum contacts with North Carolina such that the exercise of personal jurisdiction does not offend the notion of due process." Citing N.C.G.S. § 1-277 and the holding in ***Bruggeman v. Meditrust Acquisition Co.***, 138 N.C. App. 612 (2000), the Court agreed that "the denial of a motion to dismiss for lack of jurisdiction is immediately appealable," but, it was not persuaded by any of Quality Medical's arguments, starting with its contention that the trial court should not have based its findings of fact on "unverified allegations" in the complaint. Quoting ***Inspirational Network, Inc. v. Combs***, 131 N.C. App. 231 (1998), the Court held that "[w]here unverified allegations in the complaint meet plaintiff's initial burden of proving … jurisdiction … and defendant[s] … do not contradict plaintiff's allegations in their own sworn affidavit, such allegations are accepted as true and deemed controlling."

The Court found equally meritless Quality Medical's contention that the deposition testimony of two Pediatric Specialists employees was insufficient support for the trial court's findings of fact. While it agreed that, standing alone, their testimony might have been inadequate, it was supplemented by records establishing that Quality Medical provided maintenance and repair services on the ventilator.

As for Quality Medical's argument that " it did not purposefully avail itself of the opportunity to do business in North Carolina and … lacked sufficient contacts … to satisfy the standard of specific jurisdiction," the Court held that question of whether the exercise of jurisdiction is constitutional comes down to a two-step analysis: "First, the transaction must fall within the language of the State's 'long-arm' statute. Second, the exercise of jurisdiction must not violate the due process clause of the fourteenth amendment to the United States Constitution." Because Quality Medical did not contest the first issue, that only left "due process," which is satisfied if certain "minimum contacts" exist between the forum and non-resident defendant.

In performing that analysis, the Court held that the trial court "typically evaluates 'the quantity and nature of the contact, the relationship between the contact and the cause of action, the interest of the forum state, the convenience of the parties, and the location of witnesses and material evidence.'" Because Quality Medical received multiple repair requests from North Carolina and returned the repaired devices to this state, the trial court "found implausible the proposition that Quality Medical did not know … that the end user … would be located in North Carolina." Given that, the connection between Quality Medical's contacts with North Carolina and the cause of action at issue, and this state's "powerful public interest in protecting its citizens against out-of-state tortfeasors," the Court agreed with the trial court that "maintenance of the suit in North Carolina does not offend traditional notions of fair play and substantial justice," so it affirmed the trial court's order denying Quality Medical's Rule 12(b)(2) motion to dismiss.

Jurisdiction Over California Employer Provided by Long Arm Statute

David Wheeler, a resident of Mitchell County, was the founder and sole employee of an event planning company. In March 2011, he contracted with 1105 Media, a Delaware corporation whose principal place of business is in California, to become its employee and for his company to become "Embark Events, a division of 1105 Media." The contract was terminable by either party with 12 months notice, but 1105 Media terminated the contract in August 2011 and refused to pay Wheeler's salary or benefits thereafter, so he and Embark filed a breach of contract action in Mitchell County Superior Court. 1105 Media moved to dismiss under Rule 12(b)(2) for lack of personal jurisdiction. The trial

court denied the motion as to Wheeler's claims, but withheld ruling as to Embark's, pending completion of discovery. 1105 Media appealed.

On January 7, in ***Embark, LLC v. 1105 Media, Inc.***, the Court of Appeals performed a substantially identical jurisdictional analysis of 1105 Media's interlocutory appeal as it did in ***Berrier v. Carefusion 203, Inc.*** (see above) and reached the same result for the same reason, *i.e.*, the provisions of N.C.G.S. § 1-277, which authorize an immediate appeal of an adverse ruling as to jurisdiction over the person of a defendant. In affirming the trial court's ruling that it had statutory and constitutional authority to exercise personal jurisdiction over 1105 Media, the Court applied the same two-step analysis as in ***Berrier***: "First, the transaction must fall within the language of the State's 'long-arm' statute. Second, the exercise of jurisdiction must not violate the due process clause of the fourteenth amendment to the United States Constitution."

Before resolving the constitutional issue, the Court addressed its standard of review and found that it "depends upon the procedural context confronting the court." When both parties submit affidavits, the trial court may resolve jurisdiction based on the affidavits, determining the weight and sufficiency of the evidence presented in them "much as a juror" would, or it may "direct that the matter be heard wholly or partly on oral testimony or depositions." Where, as here, neither party challenges the sufficiency of the evidence supporting the trial court's findings, they are "presumed to be supported by competent evidence and binding on appeal."

Turning next to whether North Carolina's long-arm statute provided authority for the trial court to exercise jurisdiction over a California-based employer, the Court held that jurisdiction is proper under N.C.G.S. §1-75.4(5) when plaintiff's cause of action arises from (a) a promise made anywhere to perform or pay for services in North Carolina; (b) services "authorized or ratified" by the defendant were actually performed in North Carolina; or (c) a promise to deliver or receive things of value is made in this state.

The Court then determined that the trial court's findings supported its conclusion that the requirements of subpart (b) of N.C.G.S. §1-75.4(5) had been met, as 1105 Media paid for Wheeler's office space in North Carolina, paid the office's telephone bill and shipped a computer to it, deposited his paycheck into a North Carolina checking account, paid North Carolina payroll taxes, and created 1105 Media "thank you" cards with Wheeler's North Carolina address on them. The Court also held that those same findings satisfied the requirements of subsections (a) and (c) of N.C.G.S. § 1-75.4(5). Therefore, it agreed with the trial court that jurisdiction existed under North Carolina's long arm statute.

The Court also determined that there were sufficient "minimum contacts" between 1105 Media and North Carolina to satisfy due process and avoid "offend[ing] traditional notions of fair play and substantial justice." Noting that there are two bases for establishing personal jurisdiction, "general jurisdiction" and "specific jurisdiction," the Court agreed with the trial court that it had "specific jurisdiction," which exists when "the cause of action arises from or is related to defendant's contacts with the forum." Finding a parallel between the facts of this case and those in ***Better Business Forms, Inc. v. Davis***, 120 N.C. App. 498 (1995), the Court held that 1105 Media "voluntarily … created a division of its company … in North Carolina" and negotiated a contract with Wheeler knowing that he was a resident and operated his company out of North Carolina, thereby demonstrating "a purposeful attempt … to avail [itself] of the privilege of conducting business in this state."

The Court was not persuaded by 1105 Media's reliance on an unpublished opinion from the Ninth Circuit, ***Slepian v. Guerin***, 172 F.3d 58 (1999) which held that paying unemployment insurance and payroll taxes to a foreign state for

a "mere telecommuting employee" is not, alone, sufficient to establish "purposeful availment or minimum contacts with that state." Here, said the Court, "the circumstances do not involve a mere telecommuting employee." Wheeler did not simply work from home, he worked out of his "1105 Media office" in Mitchell County, "an office paid for by 1105 Media." Thus, its actions were "not merely an accommodation to Wheeler's choice of residence, but rather a result of 1105 Media's own initiative to create an operating division and office in North Carolina."

Recognizing that even when a non-resident defendant has had sufficient minimum contacts with the forum state, the trial court must still consider those contacts in light of (1) the forum state's interests and (2) the convenience of the forum to the parties, the Court observed that "once the first prong of purposeful minimum contacts is satisfied, the defendant will bear a heavy burden in escaping the exercise of jurisdiction." It then found that North Carolina has a "manifest interest" in "providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors."

The Court also observed that while it would be inconvenient for 1105 Media to litigate in North Carolina, it would also be inconvenient for Wheeler to litigate in another state. Since the record did not indicate that any one state would be more convenient than another, and as 1105 Media failed to establish "any disparity between plaintiff and itself which might render the exercise of personal jurisdiction over it unfair," the Court affirmed the denial of 1105 Media's Rule 12(b)(2) motion to dismiss.

It then turned to 1105 Media's appeal from the trial court's decision to delay a ruling on its motion to dismiss Embark's claims. After noting that, in federal court, it is within the court's discretion to defer ruling on motions to dismiss for lack of personal jurisdiction until after completion of discovery, the Court affirmed, explaining that the federal rule "is consistent with this Court's holding [in ***Banc of Am. Secs. LLC v. Evergreen Int'l Aviation, Inc.***, 169 N.C. App. 690 (2005)] that a trial court may choose either to hear a motion to dismiss for lack of minimum contacts based on affidavits or '… may direct that the matter be heard wholly or partly on oral testimony or depositions.'"

Minor Plaintiff Found Resident of Insured's Household As Matter of Law

Sixteen-year-old Harley Jessup incurred over $81,000 in medical expenses after being thrown from a truck driven by her cousin Randall that ran off the road and into a ditch. After Randall's insurer tendered its policy limits of $30,000, Harley asserted an underinsured motorist (UIM) claim against a North Carolina Farm Bureau policy issued to her grandfather. Farm Bureau responded by filing a declaratory judgment action in Wake County Superior Court, seeking a determination that her grandfather's policy did not afford UIM coverage to Harley.

Harley moved for a change of venue from Wake to Chatham or Randolph County "for the convenience of witnesses and the promotion of justice," but her motion was denied. The trial court also granted Farm Bureau's motion for summary judgment after concluding that, on the date of accident, Harley was "not a resident of [her grandfather's] household, and therefore not entitled to coverage under the policy." Harley, her grandfather, and her father all appealed.

On January 7, in ***North Carolina Farm Bureau Mutual Insurance Company, Inc. v. Paschal***, the Court of Appeals issued an opinion in which it first addressed the question of whether the trial court erred when it denied the Jessups' motion for change of venue. Finding no error, the Court affirmed, holding that "the trial court is given broad discretion when ruling on a motion to change venue for the convenience of witnesses." While either Chatham or Randolph County might have been more convenient for the defendants, Farm Bureau's principal office was

in Wake County, making Wake County a more convenient forum for the plaintiff. Therefore, it was not an abuse of discretion for the trial court to deny defendants' motion to change venue.

At the same time, the Court agreed with the Jessups that the trial court erred when it granted Farm Bureau's motion for summary judgment because, notwithstanding the allegations of the complaint, Harley was entitled to UIM coverage under her grandfather's policy. In reaching that conclusion, the Court observed that summary judgment is only appropriate when there is no genuine issue of material fact, and in making that determination, all relevant evidence "must be considered in a light most favorable to the non-moving party."

In the present case, the dispositive issue was whether Harley qualified as a "family member," which the policy defined as "a person related to [the named insured] by blood … who is a resident of [his] household." But, Farm Bureau's policy failed to define either "resident" or "household" and the Court found the word "resident" to be "'flexible, elastic, slippery and somewhat ambiguous,' meaning anything from 'a place of abode for more than a temporary period of time' to 'a permanent and established home.'" So, the Court held, as it did in ***Fonvielle v. Insurance Co.***, 36 N.C. App. 495 (1978), that when a term in an insurance policy is not defined and is capable of more than one definition, it "is to be construed in favor of coverage," since "the fault lies in [the insurers'] own selection of the words by which it chose to be bound."

The Court then cited ***Davis v. Maryland Casualty Co.***, 76 N.C. App. 102 (1985) and ***Great American Ins. Co. v. Allstate Ins. Co.***, 78 N.C. App. 653 (1986) as authority for finding that "[a] minor may be a resident of more than one household for the purposes of insurance coverage" and concluded that, considering the evidence in the light most favorable to the Jessups, Harley was a resident of her grandfather's household on the date of accident because he was "the most constant caregiver in Harley's life," he owned the house in which she lived, he did not charge her rent, he had a key to the house and frequently entered it, he paid its utility bills and bought its appliances, the property on which it was located and his house were connected to each other by contiguous land he owned, and he considered both houses to be part of his "family farm."

Therefore, held the Court, "in light of the very particular circumstances in this case, … Harley was a resident of [her grandfather's] household." So, it reversed the trial court's order granting summary judgment to Farm Bureau and remanded the case "for entry of an order declaring that, at the time of the accident, Harley was a 'family member,' and thus an 'insured' pursuant to … [Farm Bureau's] UIM policy."

UIM Carriers Awarded Pro Rata Credit for Tortfeasor's Liability Coverage

Gaye Ikerd ran a red light and collided with a motorcycle driven by Nelson Clark, who was fatally injured when he fell from his motorcycle and run over by a third vehicle. Ikerd's liability insurer admitted responsibility for the accident and paid Clark's estate its policy limits of $50,000.

At the time of the accident, Clark was the named insured in policies issued by Integon and State National with UIM limits of $100,000 and $50,000 respectively. He also had another $50,000 in UIM coverage under a Nationwide policy issued to his parents, with whom he resided.

Nationwide filed a declaratory judgment action to obtain a court order allocating among the three UIM insurers the $50,000 credit that arose from the liability insurance payment made by Ikerd's insurer. After all three UIM carriers moved for summary judgment, Judge Carl Fox determined that the Nationwide policy was "excess," held Nationwide liable for its full policy limit, and ruled that each of the other two insurers was entitled to a $25,000 credit against its UIM limit of liability. Nationwide appealed.

On January 21, in ***Nationwide Mutual Insurance Company, Inc. v. Integon National Insurance Company***, the Court of Appeals held that, when resolving UIM credit/liability apportionment disputes among multiple insurers, the trial court's first obligation is to determine whether the language used in each policy's excess clause is identical, or "mutually repugnant." If not, the comparison between the provisions of each policy ends and the court should "apply the facial policy language to determine distribution." However, if the excess clauses *are* identical, then under the holding in ***North Carolina Farm Bureau v. Bost***, 126 N.C. App. 42 (1997), "the second inquiry is to determine whether the respective UIM carriers are in the same class," as their liabilities and credits are apportioned according to the "class" of the "persons insured" in each policy. As was held in ***Bost***, "the first class of 'persons insured' are the named insured and, while resident of the same household, the spouse … and relatives of either … [and all] persons in the first class are treated the same for insurance purposes," but a "Class II insured may be treated differently than a Class I insured."

Applying those principles to the present case, the Court found that Clark "was a Class I insured under all three UIM policies," since he was the named insured in the Integon and State National policies and a "relative resident of his parents' household, making him a Class I beneficiary of their Nationwide UIM policy." While ***Bost*** has been subsequently criticized, it has never been overruled, so the Court felt bound to follow it and hold that "the credit paid by Ikerd's insurer must be distributed pro rata amongst Plaintiff and Defendants." As a consequence, it reversed Judge Fox's order and remanded the case "for a pro rata distribution of the credit."

Appeal of Discovery Order Dismissed

As administrator of Dana Britt's estate, Marshall Britt brought a wrongful death claim against her obstetrician and the hospital in which she died following an emergency caesarean section operation. Among the causes of action included in his complaint was a "FAILURE TO PRODUCE MEDICAL RECORDS/SPOLIATION" claim, in which it was alleged that while they were investigating whether her death was caused by defendants' negligence, his attorneys repeatedly requested medical records that the defendants wrongfully failed to produce, either intentionally or through a failure to exercise reasonable care, entitling him to "an inference that Defendants withheld or destroyed evidence because … [it] would have been adverse to Defendants."

Because many of the allegations relating to Britt's medical records claim were based on conversations between a paralegal employed by his attorneys and employees of the defendants, they noticed the paralegal's deposition. Britt moved to quash the deposition and requested a protective order under Rule 26(c), claiming that allowing an oral deposition of the paralegal would "inevitably lead to the discovery of [plaintiff's] counsel's mental impressions and thought processes," thereby violating the attorney-client and work product privileges.

The trial court agreed. Its order granting Britt's motion directed him to produce the paralegal's testimony in writing, authorized the defendants to ask follow-up written questions, and limited the paralegal's trial testimony to "information produced in her written form testimony and responses to Defendants [sic] follow-up written questions." The trial court's order also allowed for future modification, "if required in the interest of justice." Defendants appealed.

On January 7, in ***Britt v. Cusick***, the Court of Appeals dismissed the appeal, finding that the trial court's order was interlocutory and did not affect a substantial right. After stating that "[g]enerally, there is no right of immediate appeal from interlocutory orders," and defining an interlocutory order as one that "does not dispose of the case, but leaves it for further action by the trial court … to … determine the entire controversy," the Court acknowledged the

exception to that rule for interlocutory orders that affect a "substantial right." It then defined a "substantial right" as "one which will clearly be lost or irremediably adversely affected if the order is not reviewable before final judgment" and found that "[b]ecause defendants have not pursued the discovery authorized by the trial court, they cannot show that this order regulating the manner of discovery, but not prohibiting it, 'effectively preclude[d … them] from introducing evidence' that was 'highly material to the determination of the critical question to be resolved' at trial." Since the defendants had "not shown what relevant and material information they would obtain in an oral deposition that they cannot obtain using the procedure adopted by the trial court," the Court dismissed their appeal, but it suggested that "such a showing might be possible after completing the discovery allowed by the trial court."

Attorney Fee Awarded for Filing Derivative Action Without Reasonable Cause

Ryan Jackson Properties purchased an office building in Greensboro and converted it into residential condominiums with the help of Collins & Galyon General Contractors ("C&G"). Shortly after the renovation project was completed, two units located in the basement of the building flooded and their owners had to move out. They later filed suit, claiming that the developer breached its implied warranty of habitability. They also brought negligence claims against C&G individually and derivatively on behalf of the condominium association, of which they were members.

After the developer failed to answer the complaint, a default judgment was entered against it for $36,658. In its answer, C&G contended that the flooding was due to the building's exterior water handling system, the damming effect of its north retaining wall, which had not been renovated, and a change in the topography of the parking lot. It also offered affidavits from its vice president and owner averring that, except for providing the building's windows, doors, and electrical boxes, it only contracted to renovate the interior of the building.

After C&G's motion for summary judgment was granted by the trial court and the Court of Appeals affirmed in an unpublished opinion filed in July 2012, ***McMillan v. Ryan Jackson Properties, LLC***, C&G moved for attorneys' fees, which were granted by the trial court in an order that awarded the entire fee C&G incurred defending the lawsuit. Plaintiffs appealed.

On January 21, in ***McMillan v. Ryan Jackson Properties, LLC*** ("***Ryan Jackson II***"), the Court of Appeals acknowledged the general rule that "ordinarily attorneys fees are not recoverable …, absent express statutory authority." However, it agreed with the trial court that N.C.G.S. § 55A-7-40 provides authority for an award of attorney fees if a derivative action is brought "without reasonable cause." The Court then defined "reasonable cause," characterized it as a conclusion of law because "it involves the exercise of judgment and the application of legal principles," and determined that the applicable standard of appellate review was "*de novo*," *i.e.*, the appellate court "freely substitutes its own judgment for that of the trial court."

Applying those principles to the instant claim, the Court disagreed with plaintiffs' contention that, because they obtained a default judgment against Ryan Jackson, "the action as a whole could not have been brought without reasonable cause, and attorneys' fees should not have been awarded." Rather, held the Court, the statutory provision authorizing an award of attorneys fees specifically referred to derivative actions, so plaintiff's default judgment on a warranty claim against the developer was "irrelevant." The dispositive issue was "whether this derivative action … was brought without reasonable cause."

After observing that "an action is brought 'without reasonable cause' under section 55A-7-40(f) if there is no 'reasonable belief' in a 'sound

chance' that the claim could be sustained," the Court found that plaintiffs offered no evidence C&G's work was the proximate cause of their water damage in response to C&G's affidavits claiming that its involvement in the project was limited to interior work. Logically, then, they could not have had a "reasonable belief" that there was a "sound chance" a derivative action might succeed at the time they filed their lawsuit. Therefore, the Court affirmed the trial court's determination that plaintiff's derivative action was brought "without reasonable cause" under N.C.G.S. § 55A-7-40(f).

At the same time, the Court found that the trial court abused its discretion by failing to distinguish between the costs C&G incurred defending the derivative action, which were recoverable from plaintiffs under the statute, and the costs it incurred defending plaintiffs' individual negligence claim, which were not, so the case was remanded to make the necessary findings and adjust the fee award accordingly.

Rule 24(a) Motion to Intervene Granted

In October 2012, the property owners in SeaScape at Holden Plantation, a planned community in Brunswick County, sued the community's developer, SeaScape at Holden Plantation, LLC, and its manager, Mark Saunders, claiming that while their community derived much of its value from "common elements available for the owners' use," including a marina, clubhouse, ponds, natural areas, and other amenities, they had either been improperly constructed or not constructed at all.

The amenities that *had* been constructed were conveyed to the SeaScape Property Owners' Association (POA). As property owners in the community, plaintiffs were members of the POA, and in that capacity they included derivative claims on behalf of the POA in their complaint. The POA filed a motion to intervene as owner of the property allegedly constructed in a defective manner, but the trial court denied the motion, so the POA gave notice of appeal.

On January 21, in ***Anderson v. SeaScape at Holden Plantation, LLC***, the Court of Appeals held that since the contested order did not dispose of the entire case, the appeal was interlocutory. However, the POA satisfied the two preconditions to the "substantial right" exception to the general rule that interlocutory orders are not immediately appealable, *i.e.*, "[t]he right must be substantial and the deprivation of that substantial right must potentially work injury to [appellant] if not corrected before appeal from final judgment." Since plaintiffs' lawsuit concerned property owned by the POA and their complaint included claims derivative of rights possessed by the POA, the Court held that "[u]nless it was brought into the action, the POA would lose its ability to challenge plaintiffs' standing to bring an action on its behalf, … a major issue in contention." Therefore, the trial court's order denying the POA's motion to intervene "affected a substantial right" and was immediately appealable.

The Court then looked to Rule 24(a), which permits a party to intervene if authorized by statute or if the party "claims an interest relating to the property or transaction which is the subject of the action and … disposition of the action may … impair … his ability to protect that interest." Citing ***Virmani v. Presbyterian Health Services Corp.***, 350 N.C. 449 (1999), the Court held that when those two conditions are met and "there is inadequate representation of … [the moving party's] interest by existing parties," the trial court "must cause it to be brought in because … [it] is a necessary party that *has an absolute right to intervene*." Since the POA owned the property in question and plaintiffs were seeking an injunction prohibiting it from expending its own funds to make the necessary repairs under the theory that the defendants should be held responsible for that expense, the Court concluded that "[n]o valid judgment can be entered without … participation of the POA." So, it held that "the POA has a right to intervene" and reversed the trial court's order denying its motion to intervene.

Additional Opinions

On January 7, in ***Westlake v. Westlake***, an action for equitable distribution, child custody, and child support, the Court of Appeals discussed in detail the requirements for obtaining a recovery for civil contempt. It also reaffirmed prior decisions holding that Rule 12(b)(6) motions to dismiss for failure to state a claim may be made as late as trial on the merits. As part of its holding in that regard, the Court refused defendant's request that it adopt a rule that when a motion to dismiss is not made orally, but committed to writing, it is subject to the notice provisions of Rule 6(d), which require "notice of the hearing thereof … served not later than five days before the time specified for the hearing."

On January 21, in ***Yeager v. Yeager***, a support, alimony, and equitable distribution action filed by Carol Yeager against George Yeager, the Court of Appeals distinguished between criminal and civil contempt and affirmed the trial court's determination that Carol's actions met the criteria for civil contempt. But, it also found that while the trial court entered two separate orders holding her in contempt, Carol's lawsuit was ultimately resolved without penalizing her. So, the Court determined that "plaintiff did not suffer an injury or prejudice as a result of the contempt orders." As a consequence, it dismissed the appeal because "any determination we might make … concerning the contempt orders would not have any practical effect, and therefore, plaintiff's arguments are moot." The Court then summarized its two previous unpublished opinions in interrelated cases, in which the same parties and counsel engaged in "'scorched earth' litigation tactics," including "eleven motions and other requests for relief" and "no less than eleven appeals to this Court," determined that plaintiff's latest appeal was "frivolous" and violated Rule of Appellate Procedure 34(a), and remanded the case for the trial court to determine, and then tax against plaintiff, defendant's costs and expenses, including "reasonable attorney fees," defending plaintiff's latest appeal.

On January 21, in ***Bailey v. Division of Employment Security***, the Court of Appeals reversed a Buncombe County Superior Court order setting aside a Department of Commerce, Division of Employment Security (DOC) decision in which the DOC concluded that Cynthia Bailey was disqualified from receiving unemployment benefits because she had been terminated from her job with Pro Temps Medical Staffing for "misconduct" under N.C.G.S. § 96-14(2) after falling asleep on the job while monitoring a patient who was on suicide watch. The Court held that it was error for the trial court to conclude that no "misconduct" had occurred because its conclusion to the effect was "in direct contradiction to the findings it adopted," which established that Pro Temps had a policy that employees found sleeping were subject to immediate discharge, plaintiff knew or should have known of that policy, and she did, in fact, fall asleep on the job while she was supposed to be monitoring a patient on suicide watch.

The full text of the appellate decisions summarized in this newsletter can be located at www.nccourts.org.

A Service and Publication of
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