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CIVIL LIABILITY

Age Discrimination Claim Survives Summary Judgment Motion

Crossroads Ford hired Arnold Johnson as a salesman a month before his fiftieth birthday and subsequently promoted him four times, first to Finance and Insurance Manager, then to Business and Development Center Manager, then to Sales Manager, and finally to General Manager. Johnson later sued Crossroads for age discrimination under the North Carolina Equal Employment Practices Act, N.C.G.S. 143-422.1, *et seq.*, alleging that the company's Vice-President, Allen Boyd, repeatedly referred to him in "an age-related derogatory manner," by calling him "old man" and claiming that he was unable to hear the telephone ringing because of his age; demoted him to Director of Sales and Service and replaced him as General Manager with thirty-five year-old Noah Woods; and then terminated his employment for "stealing." Crossroads denied discriminating against Johnson and attributed his termination to "taking a corporate opportunity" by "selling his personal automobile to a customer of the dealership on company time with no benefit to the company and without authorization."

When Crossroads moved for summary judgment, Johnson produced an affidavit from the dealership's new General Manager, Noah Woods, in which Woods stated that Vice-President Boyd "appeared to give [Johnson] a hard time" and referred to him as "old man." It also asserted that Johnson not only did not try to deceive

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anyone or hide the fact that he was selling his car, he planned to let Boyd know of its sale and was willing to pay a commission to Crossroads, but Boyd "used the sale of [the] car as a pretext to fire him" and "terminated him … because of [his] age."

Crossroads filed a motion to strike Woods' affidavit and also moved for summary judgment. In its order granting Crossroads' summary judgment motion, the trial court stated that Woods' affidavit had been "presented at the 11th hour," was "inherently incredible" and inconsistent with the allegations of Johnson's complaint, and "cannot be used to create an issue of fact to forestall summary judgment." Johnson appealed to the Court of Appeals.

On October 15, in **Johnson v. Crossroads Ford, Inc.**, the Court of Appeals reversed, holding that it was error for the trial court to find that Woods' affidavit was presented at the "11th hour" and, therefore, "inherently incredible." Rather, the affidavit's filing five days in advance of the motion hearing was timely, since it complied with Rule of Civil Procedure 6(d), which provides that an affidavit filed in opposition to a pending motion need only "be served at least two days before the hearing."

The Court also determined that it was an abuse of discretion for the trial court to find that Woods' affidavit was "inherently incredible" and "inconsistent with [plaintiff's] complaint." Viewing the evidence in the light most favorable to plaintiff, as the trial court was required to do in ruling on Crossroads' motion for summary judgment, the affidavit not only did not contradict any sworn testimony from Noah Woods, it *supported* Johnson's claim that Crossroads' General Manager approved the sale of his vehicle and "showed that … Vice-President Boyd used the sale of … [the] vehicle as a pretext to terminate [him]," with one of the principle reasons for doing so being his age.

In the course of determining that Johnson had offered sufficient evidence to withstand Crossroads' motion for summary judgment, the Court observed that our Supreme Court "has directed that we look to federal decisions for guidance in establishing evidentiary standards and principles of law to be applied in discrimination cases" under the Equal Employment Practices Act. The Court then located those standards in ***McDonnell Douglas Corp. v. Green***, 411 U.S. 792, 36 L.Ed. 2d 668 (1973): "First, the claimant carries the initial burden of establishing a prima facie case of discrimination…. The burden then … shift[s] to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection…. If a legitimate, nondiscriminatory reason has been articulated, the claimant has the opportunity to show that the employer's reason for the claimant's rejection was in fact a pretext." Applying that test to the present case, the Court found that "plaintiff has produced sufficient evidence to withstand summary judgment," so it reversed the trial court's order granting summary judgment to Crossroads.

Breach of Contract Claim Brought by Charlotte Motor Speedway Dismissed

After Speedway Motorsports, Inc. (SMI) announced its plan to relocate Charlotte Motor Speedway (CMS) and construct a National Hot Rod Association-approved "dragway" outside Cabarrus County, SMI, CMS, the County, and the City of Concord entered into a series of negotiations that culminated in a November 21, 2007 letter from the County's Board of Commissioners and the Mayor of Concord to SMI, advising that the City and County (1) were "committed to providing $80,000,000" for a new drag strip facility and "major improvements" to the Speedway, but (2) needed an additional 36 months to secure $20,000,000 from the State, which the County and City pledged from "other sources," if it was not provided by the State, and (3) "all parties anticipate that the $80,000,000 will be formalized in an agreement … to … identify … [SMI's] investment … [constructing] the drag strip and … [improving the] Speedway." CMS

and SMI responded to the November 21, 2007 letter by advising the County and City that "we have an agreement."

After CMS and SMI constructed their new dragway in Cabarrus County, the City and County submitted a "Proposed Formal Agreement," but CMS and SMI rejected it as "wholly unreasonable." They then sued for specific performance, breach of contract, and fraud, or in the alternative, negligent misrepresentation. The County responded to their complaint with a motion to dismiss under Rules 12(b)(1), (2) and (6), which was granted by the trial court. CMS and SMI then gave notice of appeal to the Court of Appeals.

On October 1, in ***Charlotte Motor Speedway, LLC v. County of Cabarrus***, the Court of Appeals affirmed the trial court's order of dismissal. While plaintiffs had argued that the November 21, 2007 letter "standing alone is a valid and enforceable contract," the Court disagreed because "a valid contract requires (1) assent; (2) mutuality of obligation; and (3) definite terms," whereas the letter was "silen[t] on several key terms, render[ing] it void for indefiniteness." Most notably, it was "silent as to any specific obligation on the part of Plaintiffs and is unclear as to precisely when Defendant would be required to expend the $80 million." The Court also took note of the "preliminary nature" of the letter, particularly its provision that "all parties anticipate that the $80,000,000 will be formalized in an agreement … provid[ing] an outline of a schedule to prioritize projects and to identify the investment that SMI plans to make."

Quoting from ***Boyce v. McMahan***, 285 N.C. 730 (1974), the Court observed that "a contract to enter into a future contract must specify all its material and essential terms, and leave none to be agreed upon as a result of future negotiations." Therefore, "[i]f any portion of the proposed terms is not settled, or no mode agreed on by which they may be settled, there is no agreement." Because the November 21, 2007 letter was "wholly unclear what Plaintiffs were bound to do, or not do," since it was devoid of language limiting "Plaintiffs' ability to relocate or … imposing any obligations on Plaintiffs at all," and as it did not specify when the County was to provide its $80,000,000, the Court concluded that it was "too indefinite to constitute a binding agreement." Therefore, the trial court did not err when it dismissed plaintiffs' lawsuit.

Existence of Express Contract Precludes Claim for Breach of Implied Contract

In October 2005, Boddie-Noell Enterprises and Burton Farm Development Company bought and began developing Arlington Place, a 900-acre tract of land in Pamlico County. Their marketing materials described plans to build various recreational facilities, including a clubhouse, swimming pool, tennis court, and marina. After speaking with a Boddie-Noell representative about Arlington Place's "Signature Builder" program, Bernard and Frances Mancuso, owners of Mancuso Development, Inc., and Christopher and Linda Burris, Mancuso's Construction Supervisor and Office Manager, entered into Purchase Agreements to buy five lots. The Purchase Agreements incorporated a Housing and Urban Development (HUD) report containing a warning that, among the risks of buying land is that "[a]ny value your homesite may have will be affected if the roads, utilities and … proposed improvements are not completed."

At an Arlington Place management meeting in January 2011, Mancuso was told that the property's developers had no binding legal obligation to build a marina and constructing one made "no sense," given the current economic climate. Three months later, the Mancusos and Burrises sued Boddie-Noell and Burton Farm, claiming breach of implied contract, fraud, and unfair or deceptive trade practices. After defendants' motion for summary judgment was granted by Judge Paul Jones, plaintiffs appealed to the Court of Appeals.

On September 17, in ***Mancuso v. Burton Farm Development Company LLC***, the Court of Appeals found no merit in plaintiffs' argument that the defendants had entered into and breached an implied contract to construct a marina at Arlington Place. While claims for breach of implied contract are "generally cognizable under North Carolina law," it is also a "well established principle that an express contract precludes an implied contract with reference to the same matter" and "[n]o agreement can be implied where there is an express one existing."

The Court noted that the Purchase Agreements entered into by the parties disclaimed "the right of any purchaser to rely on any representation not found in the relevant contractual documents." They also provided that the parties' "entire agreement is contained in the Purchase Agreements and … HUD report," which warned prospective purchasers that the project was in the early stages of development, the developer's plans had not been finalized, they were subject to change, and the developer did not guarantee the project's successful completion.

The Court was not persuaded by plaintiffs' alternative argument that, notwithstanding the terms of the parties' express contract, an implied contract to build a marina arose since "parol evidence and verbal statements may be used to establish a developer's implied promise to provide an amenity in a subdivision." Quoting ***Phelps v. Spivey***, 126 N.C. App. 693 (1997), the Court held that "the parol evidence rule prohibits the admission of evidence to contradict or add to the terms of a clear and unambiguous contract" and, in the present case, the Purchase Agreements and HUD report were devoid of unclear or ambiguous terms needing clarification.

The Court also noted that, "instead of clarifying the meaning of ambiguities in the documents embodying the parties' contract, the evidence concerning oral statements by Defendants' agents and the language contained in various marketing materials upon which Plaintiffs rely flatly contradict the parties' express contract." As a consequence, plaintiffs' argument "runs afoul of the legal principle that an implied contract will not be recognized in an instance covered by an express contract." Therefore, plaintiffs' reliance on parol evidence to establish an obligation on defendants' part to construct a marina was misplaced.

The Court also addressed plaintiffs' fraud and unfair and deceptive trade practices claim and found that it, like plaintiffs' implied contract claim, was inconsistent with the terms of the Purchase Agreement and HUD report, which "constituted the entire agreement between the parties and … indicated that Defendants had provided no assurance that the marina would ever be built." That being so, and "given that Plaintiffs expressly disavowed any reliance upon oral statements or non-contractual marketing materials when they purchased property in Arlington Place," the Court held that Judge Jones did not err when he granted defendants' motion for summary judgment.

Ten-Year Statute of Limitations for Actions On Sealed Instruments Applied

In September 2004, Paul Davis and Agnes Gioconda purchased from Woodlake Partners, LLC a tract of real property in Moore County on which they planned to build their "dream retirement home." The parties to the transaction executed three documents, a "Vacant Lot Offer to Purchase and Contract," an "Infrastructure Agreement," and an "Addendum to Offer to Purchase and Contract," with the word "[SEAL]" appearing in brackets on the Purchase Contract, but not on the other two documents.

The Infrastructure Agreement obligated Woodlake to provide "infrastructure of roads, water and sewer" by December 31, 2006 and called for the purchasers to pay $2,500 at closing for their share of the "estimated line installation cost." Although Davis and Gioconda never

made that $2,500 payment, Woodlake neither mentioned it at closing nor sought it at any time thereafter, and many of the other property owners who *had* made such a payment eventually received a refund.

After the closing in October 2004, the purchasers, who resided in St. Louis, Missouri, next visited Woodlake in 2011, at which point they discovered that the roads leading to their property had not been paved, nor had sewers been installed. Woodlake explained that the infrastructure promised in the Infrastructure Agreement had been delayed due to limited interest on the part of other property owners and collapse of the real estate market.

On September 28, 2011, Davis and Gioconda filed suit, alleging breach of contract. In its answer, Woodlake asserted that plaintiffs' claim was barred by the statute of limitations and plaintiffs' failure to make the $2,500 payment required by the Infrastructure Agreement.

Both parties moved for summary judgment. The trial court denied Woodlake's motion, allowed plaintiffs', and ordered an evidentiary hearing to determine the amount of damages to be awarded. At the conclusion of that hearing, plaintiffs were awarded $191,000 in compensatory damages, plus costs. Woodlake appealed.

On October 15, in ***Davis v. Woodlake Partners, LLC***, the Court of Appeals, in a 2-to-1 decision with Judge McGee dissenting, affirmed the judgment entered by the trial court. Judge Ervin's majority opinion first addressed the statute of limitations issue, citing ***Biggers v. Evangelist***, 71 N.C. App. 35 (1984), for the proposition that, "in the event the bracketed word 'seal' appears on a contractual document adjacent to each of the parties' signatures, the instrument in question has been executed under seal." Although the word "[SEAL]" only appeared on the Purchase Agreement, and notwithstanding Woodlake's denial that the three documents constituted a single contract, the Court's majority held as a mater of law that "the parties intended that the Purchase Contract, the Infrastructure Agreement, and the Addendum form a single agreement." Since the Purchase Contract was under seal, "the entire agreement constitutes an instrument executed under seal, rendering the present action subject to the ten-year statute of limitations set out in N.C. Gen. Stat. 1-47(2)," rather than the three-year statute of limitations for contract actions found in N.C. Gen. Stat. 1-52(1).

Acknowledging Judge McGee's dissenting view that plaintiffs' claim should be remanded for the trier of fact to determine whether "the parties intended the Infrastructure Agreement and the Addendum to have been executed under seal by virtue of listing them as addenda to the Purchase Contract," the majority took exception to the implications of her position, "which would appear to allow a party to introduce evidence to the effect that, despite having clearly executed the principal contractual document under seal, it did not intend for attachments or addenda … incorporated into that explicitly sealed instrument to be treated as sealed instruments," which would, in turn, result in "different statutes of limitation … apply[ing] to claims arising under different provisions of the same contract, … lead[ing] to considerable and undesirable uncertainty in the enforcement of contractual provisions." For those reasons, the Court's majority agreed with the trial court that plaintiffs' claim was not barred by the applicable statute of limitations.

The majority also found no merit in Woodlake's second challenge to the trial court's order, its contention that the $2,500 deposit required by the Infrastructure Agreement was a "condition precedent which had to be satisfied before Defendant had any obligation to construct the relevant facilities." As conditions precedent are disfavored in the law, "a contractual provision will be construed as a condition precedent only 'where the clear and plain language of the agreement dictates such construction.'" While the use of words such as "when," "after," and

"as soon as" indicates "that a promise is not to be performed except upon the happening of a stated event," the Court found "[n]othing in the language of the Infrastructure Agreement [that] in any way tends to suggest that Plaintiffs had to make the required $2,500 payment before Defendant became obligated to … [install] the required facilities." Therefore, the $2,500 payment was not a condition precedent and the trial court did not err in granting plaintiffs' motion for summary judgment.

Order Taxing Costs Affirmed

Shortly before 9 pm on January 24, 2005, EMS was dispatched to the scene of an accident involving a motor vehicle and pedestrian, Larry Donnell Green, who had suffered an open head wound. Wade Kearney of the Epsom Fire Department was the first to arrive. After checking for vital signs, he determined Green was dead. Several minutes later, Paul Kilmer of the Franklin County EMS arrived. Kearney asked Kilmer to verify that Green did not have a pulse, but he declined, stating that Kearney had already done so, and that was sufficient.

A short time later, Pamela Hayes and Ronnie Wood of the Louisburg Rescue Unit arrived. Having been informed that Green was dead, they did not check for vital signs. Later, the Franklin Medical Examiner, Dr. J.B. Perdue, arrived. After first conducting a survey of the accident scene, he examined the body. As he did, Green's chest and abdomen moved, but Dr. Perdue attributed it to "air escaping from the body."

Green was then transported to the morgue, where he was examined again. Dr. Perdue, Hayes and Wood observed several twitches in his upper right eyelid, but Perdue attributed them to a muscle spasm. He reassured Hayes that Green was dead, so he was zipped into a bag and placed in a refrigeration drawer, where he remained until approximately 11:23 pm, when a State Highway Patrolman arrived to examine the body in an attempt to determine the direction from which it was struck. When it was removed from the drawer and the bag unzipped, Dr. Perdue noticed movement in Green's abdomen, so he summoned emergency services and Green was rushed to the hospital, where he was treated from January 25 through March 11, 2005.

On May 22, 2008, a guardian ad litem was appointed for Green. On that same day, the guardian and Green's parents, Larry Alston and Ruby Kelly, filed a complaint against Dr. Perdue, the two EMS services, all of the involved EMS personnel, the Epsom Fire Department, and Franklin County, alleging negligence and negligent infliction of emotional distress (NIED).

Plaintiffs eventually settled with Franklin County, Franklin County EMS, and its employees. In the interim, Dr. Perdue's motion to dismiss on grounds of sovereign immunity was denied, but on April 6, 2010, in ***Green v. Kearney***, 203 N.C. App. 260 (2010) ("***Green I***"), the Court of Appeals held that Perdue was entitled to sovereign immunity on the claims brought against him in his official capacity as medical examiner. It also held that the complaint failed to adequately assert a claim against him in his individual capacity.

After the remaining defendants, Kearney, Hayes, Wood and Louisburg EMS, answered plaintiffs' complaint, their Rule 12(b)(6) motion to dismiss was denied. However, the trial court subsequently granted their motion for partial summary judgment and dismissed the NIED claims brought by Green's parents, Larry Alston and Ruby Kelly.

Kearney, Hayes, Wood and Louisburg EMS then moved for summary judgment on Green's negligence claim and their motion was granted by the trial court. Green appealed, but on November 15, 2011, in ***Green v. Kearney***, ___ N.C. App. ___ (2011)("***Green II***"), the Court of Appeals affirmed. Defendants then filed a motion to assess costs against plaintiffs and the trial court entered an order taxing Green, Alston and Kelly with $12,030 in costs incurred by Hayes, Wood and Louisburg EMS and $8,327 in

costs incurred by Kearney. From that order, plaintiffs appealed once again.

On February 5, 2013, in ***Green v. Kearney***, ___ N.C. App. ___ (2103) ("***Green III***"), a 2-to-1 majority of the Court of Appeals affirmed the trial court's order assessing costs against Green, Alston and Kelly. In doing so, the majority opinion rejected plaintiffs' argument that the trial court lacked authority to tax costs against Alston and Kelly to the extent they were incurred after summary judgment was entered in defendants' favor on plaintiffs' NIED claims, since Alston and Kelly were no longer parties to the lawsuit. The Court held that plaintiffs' argument was "contrary to the explicit language of N.C. Gen. Stat. 1A-1, Rule 54(b), which provides, in pertinent part, that: When more than one claim for relief is presented in an action …, any order … which adjudicates fewer than all the claims … shall not terminate the action as to any of the claims or parties and … is subject to revision at any time before entry of judgment adjudicating all the claims…."

The majority opinion also observed that, while the primary purpose of Rule 54(b) is to "preserve the right of a party to appeal from a final judgment, … [it] unmistakably defines the effect of a nonfinal order … and compels the conclusion 'that [Alston and Kelly] remained parties to the case subsequent to the Court's nonfinal [partial summary judgment] order.'" Therefore, as in ***Knox v. Lederle Labs***, 4 F3d 875 (10th Cir. 1993), "'under the plain language of Rule 54(b), [Alston and Kelly] remained parties to the action' and remained liable for costs incurred throughout the pendency of this case."

In dissent, Judge Steelman took exception to taxing Alston and Kelly with costs incurred after their claims were dismissed. He would have held that, although they technically remained parties, the trial court's order of dismissal became final as to them when they elected not to appeal, and in the absence of evidence that they actively participated in the litigation thereafter, "they should not have been assessed with any of defendants' costs incurred after that date."

As a result of Judge Steelman's dissent, plaintiffs had an automatic right of appeal to the Supreme Court, and they availed themselves of that right, but on October 4, in ***Green v. Kearney***, ___ N.C. ___ (2013) ("***Green IV***"), the Supreme Court affirmed the Court of Appeals' majority opinion PER CURIAM without further comment.

WORKERS' COMPENSATION

Policy Lapses for Failure to Renew

On December 4, 2008, Horace Smith, doing business as Carolina Construction Company, obtained a workers' compensation policy from Auto-Owners Insurance Company for a fixed term of one year by making an initial down payment of two months premium. Although he made no further premium payments and did not request that his policy be renewed after the policy period ended on December 4, 2009, Auto-Owners never formally cancelled coverage.

On December 22, 2009, one of Smith's employees, Julio Zaldano, was seriously injured when he was struck by a descending elevator as he leaned into the elevator shaft to lay block. He subsequently filed a workers' compensation claim against Smith, Auto-Owners, and the general contractor, Dargan Construction Company. After he settled with Dargan, Zaldano's claim against Smith and Auto-Owners was heard by Deputy Commissioner Adrian Phillips, who ruled that, because Auto-Owners failed to properly terminate Smith's policy, it still provided coverage to him at the time of injury, rendering Auto-Owners liable for the compensation benefits to which Zaldano was entitled.

Auto-Owners appealed to the Full Commission, which reversed the deputy commissioner's determination that Smith's coverage was still in

effect on the date of injury. It found that, because the policy was for a fixed period and did not automatically renew, and as "Smith undertook absolutely no actions to keep coverage in place," Smith was no longer insured by Auto-Owners when the accident occurred.

Zaldano appealed that ruling to the Court of Appeals, claiming that Smith's coverage was still in effect at the time of injury because Auto-Owners failed to follow the nonrenewal procedures found in the policy and applicable statute, N.C.G.S. 58-36-110, thereby causing the policy to automatically renew. However, on October 15, in ***Zaldano v. Horace Smith d/b/a Carolina Construction Company***, the Court of Appeals disagreed. Instead, it affirmed the Full Commission's determination that Smith's coverage lapsed before the date of injury.

The Court held that, while the statute requires, and the policy provided, that Auto-Owners may only refuse to renew an insured's policy if it gives the insured "notice of nonrenewal at least 45 days prior to the expiration date of the policy," and notwithstanding the fact that Smith received no such notice, the notice requirement had no application because Auto-Owners did not refuse to renew Smith's policy. Rather, the phrase "refuse to renew" was correctly interpreted by the Full Commission to "contemplate, at a minimum, an antecedent request to renew by the insured and payment of the premium necessary to effectuate renewal," neither of which occurred in the present case.

In rejecting Zaldano's argument that Auto-Owners bound itself to continue coverage until the company followed the non-renewal procedure found in the policy and statute, the Court observed that, "under plaintiff's proposed interpretation, an insurer … would be considered perpetually liable for the insurance … after its expiration, unless it followed the statutory procedures … even if the insured failed to make any payment towards a renewed policy and never otherwise indicated any desire to renew. Plaintiff is mistaken."

Therefore, because the policy was for a fixed term, and since Smith did not even attempt to renew it before it expired, "Auto-Owners necessarily could not have indicated its unwillingness to renew." As a consequence, the Full Commission correctly determined that Smith's policy was not in effect when Zaldano was injured.

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

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