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CIVIL LIABILITY

Auto Policy Provisions Bar Stacking of Liability Limits

Jeremiah Jarvis was a passenger in a Ford Explorer owned by Elana Carland and driven by her son, Jarrett, when Jarrett lost control of the vehicle. It went off the road and struck a tree, seriously injuring Jeremiah. The Explorer was insured under a policy issued by North Carolina Farm Bureau Mutual ("Farm Bureau") that listed the Explorer, two other vehicles, and three drivers, Elana, Jarrett, and his sister Victoria. Its liability limits were \$50,000 per person and \$100,000 per accident and the policy expressly provided that "the limit of liability shown in the Declarations for each accident for Bodily Injury Liability Coverage is our maximum limit of liability for all damages for bodily injury resulting from one auto accident."

Three other Farm Bureau policies covered various relatives of Jarrett. The named insureds in the first were his father, Charles, Charles' wife, Sheila, and her two children, Christian and Cassidy Price. The second insured Cassidy and Christian, who lived with Charles and Sheila, and the third insured Carland Dairy Inc., a farm owned and operated by Charles. All three defined "insured" as "[y]ou or any family member" and "family member" as a person related to the named insured by blood, marriage, or adoption who is a resident of the named insured's household.

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WORKERS' COMPENSATION

There were no published workers' compensation decisions issued by our appellate courts in November.

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Farm Bureau offered Jeremiah and his mother the \$50,000 per person limits of Elana's policy, but they refused, contending that because there were three vehicles listed on the declarations page, they were entitled to stack the \$50,000 limit for each of the three vehicles, providing them with \$150,000 in coverage. They also alleged that Jarrett was a resident in his father's household, entitling him to coverage under the policies issued to his father and his father's dairy farm, and because he was a resident of his father's household, he was also a resident of the household of Cassidy and Christian Price, so he had coverage under their policy as well.

Farm Bureau filed a declaratory judgment action regarding its obligations under the four insurance policies, depositions were taken, and it moved for summary judgment, contending that the policy it issued to Elana prohibited stacking of individual claims for coverage greater than her policy limits of \$100,000. The trial court granted the motion and Jeremiah and Melissa appealed.

On November 17, in *North Carolina Farm Bureau Mutual Insurance Company v. Jarvis*, the Court of Appeals found that "our Supreme Court examined language almost identical to that in the present case" in *Lanning v. Allstate Ins. Co.*, 332 N.C. 309 (1992), and in doing so, distinguished an earlier Supreme Court opinion, *Woods v. Nationwide*, 295 N.C. 500 (1973), holding that policies which include a per accident limitation regardless of the number of vehicles listed on the declarations page do not allow for stacking.

As for appellants' argument that Jarrett was a member of his father's household and entitled to coverage under the policies Farm Bureau issued to his father and father's step-children, the Court found that although "[a] minor may be a resident of more than one household for purposes of insurance coverage," and "viewing the evidence in a light most favorable to the [appellants] and looking at the term 'resident' in the broadest sense ..., there was no evidence ... that Jarrett maintained any presence at his father's house."

Therefore, he was not covered by either policy. Nor was coverage available under the dairy's policy, since it defined "covered autos" as those vehicles specifically listed in the policy, which Elana's Ford Explorer was not. Therefore, there was no error in the trial court's granting of Farm Bureau's motion for summary judgment.

Defense Verdict In Medical Malpractice Wrongful Death Action Affirmed

Even before Erica Bohn sought treatment at Coastal Carolina Neuropsychiatric Center ("CCNC"), she had a long history of mental illness and had been involuntarily committed to mental health facilities five times. When seen by CCNC's owner, Dr. Ashraf Mikhail, she reported feelings of sadness, fear and poor concentration, a history of treatment for paranoid schizophrenia, and the existence of numerous stressors in her life, including multiple marriages and divorces, an abusive husband, losing custody of her son after she held a knife to him, and the son's own severe mental illness.

Finding evidence of "depressive symptoms," including sadness, panic attacks, excessive worries, poor concentration, restlessness, and muscle tension, Dr. Mikhail agreed that Bohn was suffering from paranoid schizophrenia. He also diagnosed "generalized anxiety disorder," concluded that she was at an increased risk of suicide, and referred her to his physician's assistant, Jessica Hardin, for treatment. Hardin prescribed Lithium as a mood stabilizer, but later switched the prescription to Lamictal because Bohn appeared to be "going downhill."

Lamictal carries an FDA-mandated warning of the risk of developing Stevens-Johnson Syndrome ("SJS"), a rash that, if left untreated, can cause toxic epidermal necrolysis ("TEN"). Patients with TEN are at an increased risk for infection and can die from its complications.

Considering the elevated risk of suicide and Bohn's lack of improvement with other drugs, and after weighing Lamictal's benefits against

the potential, but statistically rare, risk of developing SJS, it was Hardin's clinical judgment that the best way to manage Bohn's symptoms was to quickly reach the drug's therapeutic effect by using a more rapid titration than its manufacturer recommended. And, when she reported an improvement in her condition two weeks later, Hardin increased the dosage for the third and fourth weeks.

Bohn reported no medication issues to anyone at CCN and cancelled her next two appointments. Instead, she went to Onslow Urgent Care, where she advised its staff that she was taking Lamictal and complained of a sore throat, yeast infection, blisters on her lips, and rash. Although multiple experts later testified that her symptoms were "classic, textbook" for SJS, she was diagnosed instead with herpes simplex, bacterial conjunctivitis, leukoplakia of her oral mucous membrane, a yeast infection, and canker sores.

Two days after being seen at Onslow Urgent Care, Bohn's condition dramatically changed. An ambulance was called and the emergency responders found her lying in a dark room unable to walk, having difficulty talking or moving, and covered head to toe with a blistering rash and sloughing skin. She was transported to the Burn Center at UNC, hospitalized, and intubated, but died of ventilator-acquired pneumonia two months later.

Bohn's estate brought a wrongful death action against Dr. Mikhail, Hardin, and CCNC, seeking compensatory and punitive damages. After the jury returned a defense verdict and the estate's motion for a new trial was denied, it appealed, arguing multiple errors, including the trial court's denial of its motion for summary judgment, submitting the issue of superseding negligence to the jury, its instructions on that issue, granting defendants' motion for directed verdict on punitive damages, allowing irrelevant and prejudicial character to be admitted into evidence, denying the estate's request to bifurcate, and denying its motion for a new trial.

On November 3, in *Clarke v. Mikhail*, the Court of Appeals affirmed, holding that "[a]ny improper denial of a motion for summary judgment is not reversible error when the case has proceeded to trial and has been determined on the evidence and merits by the trier of fact."

As for the estate's objection to the instructions given to the jury on superseding or insulating negligence, the Court found that "[t]he doctrine of insulating negligence is an elaboration of a phase of proximate cause." It is "an extension of a plaintiff's burden of proof on proximate cause." Thus, the burden was not on the defendants to prove that their alleged negligence was insulated by the negligence of another party, it was on the estate to prove that it was a proximate cause of Bohn's death. Therefore, the Court concluded, it was not error for the trial court to instruct the jury that "(1) Plaintiff carries the burden of proving by the greater weight of the evidence that Defendants' negligence was a proximate cause of Ms. Bohn's injury and death; (2) Defendants did *not* carry the burden of proving their negligence, if any, was insulated by Onslow Urgent Care's negligence; and, (3) the issue of superseding negligence was to be addressed only if the jury first found Defendants were negligent in the course of Ms. Bohn's treatment."

The Court also found no error in the directed verdict the trial court granted on the issue of punitive damages, as the recovery of punitive damages requires proof by "clear and convincing evidence" of the presence of "(1) fraud; (2) malice; or (3) willful or wanton conduct" and "requires more than a showing of gross negligence." Although the estate argued that Hardin's prescription of a titration of Lamictal at a faster rate than that recommended by the manufacturer constituted "reckless indifference" to Bohn's safety, thereby warranting the submission of punitive damages as an issue for the jury to decide, all the expert witnesses testified that a manufacturer's guidelines for a particular titration are mere recommendations and do not establish a standard of care. The record

established that the risk of Bohn developing a rash was much lower than her risk of suicide, and Hardin knew that if a rash *did* develop, it could be resolved by discontinuing Lamictal, which Onslow Urgent Care failed to do.

Nor was the Court persuaded by the estate's argument that it was error for the trial court to admit the Social Security, DSS, and medical records of Bohn and her son. It held that whether to admit or exclude evidence under Rule 403 rests within the trial court's discretion, and its ruling "should not be overturned on appeal unless [it] was manifestly unsupported by reason or was so arbitrary that it could not have been the result of a reasoned decision," which the estate failed to prove. Furthermore, the contested records were relevant to the issues of damages and causation, and although Rule 403 permits the exclusion of relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury," the estate did not object when they were offered at trial and its motion *in limine* as the trial began was insufficient to preserve the issue for appeal.

The Court also found no merit in the estate's argument that it was error for the trial court to deny its motion to bifurcate. While Rule 42(b) provides authority to "order separate trials for the issues of liability and ... damages, unless the court for good cause shown orders a single trial," the Court found that whether to do so is in the trial court's discretion. And, in this case, the trial court actually inquired about bifurcation on three occasions, but each time, the estate chose not to request that the two issues be tried separately. So, when the estate moved to bifurcate on the eve of trial, the Court held that it was not an abuse of discretion for the motion to be denied.

Expert Witness Fees for Deposition Testimony Taxed As Costs

Jakari Baize's guardian *ad litem* brought a medical malpractice action against North

Carolina Baptist Hospital and the physicians who treated him there. After the trial court entered a discovery scheduling order directing the parties to designate their expert witnesses and make them available for deposition, plaintiff identified ten experts, four of whom the defendants deposed. Plaintiff then took a voluntary dismissal without prejudice and the defendants filed a motion to recover deposition costs under Rule 41(d). The trial court granted the motion, ordering reimbursement of \$23,799 in costs incurred by the defendant hospital and another \$24,738 in costs incurred by the defendant doctors. Plaintiff appealed.

On August 5, 2014, in *Lassiter v. North Carolina Baptist Hospitals, Inc. ("Lassiter I")*, the Court of Appeals reversed. It distinguished *Jarrell v. The Charlotte-Mecklenburg Hospital Authority*, 206 N.C. App. 559 (2010), and found that when the relevant statute, N.C.G.S. § 7A-305, is read in conjunction with N.C.G.S. § 7A-314, it limits the trial court's power to award expert witness fees as costs to situations in which the expert is under subpoena, whereas in this case, the defendants did not subpoena the expert witnesses they deposed. Defendants' petition for discretionary review was granted by the Supreme Court.

On November 6, in *Lassiter v. North Carolina Baptist Hospitals, Inc. ("Lassiter II")*, the Supreme Court agreed that while there is a long line of cases holding that expert witness fees are only recoverable when the witness' testimony has been compelled by subpoena, the General Assembly recently amended the statute governing the recovery of costs in civil actions, N.C.G.S. § 7A-305(d), adding subsection (11), which authorizes trial courts to assess "[r]easonable and necessary fees of expert witnesses ... for actual time spent providing testimony at trial, deposition, or other proceedings," even when no subpoena has been issued. Therefore, the Court held that the trial court "correctly taxed expert witness fees in accordance with N.C.G.S. § 7A-305(d)(11)" and reversed the decision of the Court of Appeals.

Service by Publication On Out-of-State Defendant Found Ineffective

Wenbin Chen and Yaling Zou married in 2006 and separated four years later, but continued to communicate by telephone and text message. After Chen filed for divorce in 2012, he served Zou by publication through the Charlotte Observer, although she had previously informed him she was living in New York City. When she failed to answer the Complaint, he obtained a Divorce Judgment from the trial court.

Zou became aware of the judgment after she moved back into the marital home in January 2013 and filed a motion to set it aside under Rule 60(b), arguing that Chen's attempted service of process by publication was improper under Rule 4. The trial court agreed and granted the motion. Chen appealed.

On November 17, in *Chen v. Zou*, the Court of Appeals affirmed. It found that, under Rule 60(b), a judgment may be set aside on any one of six grounds, with the deadline for filing a motion under subsections (1), (2), and (3) being "not more than one year after the judgment" and the corresponding deadline under subsection (4), (5), or (6) is "a reasonable time."

Chen argued that Zou's motion was filed pursuant to subsection (3), which provides relief from judgments based on fraud or other misconduct, and was untimely, since it was filed more than a year after the Divorce Judgment. The Court disagreed. While Zou's affidavit may have used the word "fraudulent" in describing the Chen's service of process, the Court found that the actual basis for her motion was not fraud, but that the judgment was "void" under subsection (4), and motions filed on that basis need only be filed within "a reasonable time." Since Zou filed her motion "shortly after receiving actual knowledge from Plaintiff that he had obtained the Divorce Judgment," the Court concluded that was a "reasonable" length of time and the motion was not untimely.

It also found that Chen failed to comply with Rule 4(j1), which required him to exercise "due diligence" in attempting to locate Zou before resorting to service by publication. Because Rule 4 also provides that publication must be "in an area where the party to be served is believed by the serving party to be located," the Court concluded that as Chen had "reliable information" that Zou was living in New York, his attempt to serve her by publication in Mecklenburg County was "ineffective" and the Divorce Judgment was "obtained without personal jurisdiction over Defendant and ... void."

Malicious Prosecution Claims Not Barred by Collateral Estoppel

Claims and counterclaims of conspiracy, racial discrimination, and other misconduct erupted after James Hinson and other African American Greensboro Police Department ("GPD") officers accused Chief of Police David Wray of using Caucasian officers of the Special Investigation Section to target them. Their accusations led Assistant City Manager Mitchell Johnson to initiate an investigation of two Caucasian officers, William Fox and Scott Sanders, which led to additional investigations by the FBI and SBI and culminated in Fox and Sanders being indicted.

After a jury found Sanders not guilty of improperly accessing a government computer, post-trial production of previously-undisclosed statements led to the dismissal of the remaining charges against Fox and Sanders. They then filed a federal court action against Johnson, the City, the private investigation company it hired, and several GPD officers, alleging that their Fourth Amendment rights had been violated. They also asserted a series of state law claims, including defamation, civil conspiracy, and malicious prosecution, but when the federal law claims were dismissed on defendants' Rule 12(b)(6) motion, the court declined to exercise supplemental jurisdiction over the state law claims.

Fox and Sanders then filed substantially the same claims against substantially the same defendants in state court, and again, the defendants responded with a Rule 12(b)(6) motion to dismiss, which was granted in part and denied in part, leaving only plaintiffs' malicious prosecution claims against the individual defendants.

Appeals by both sides were dismissed as interlocutory by the Court of Appeals in an unpublished opinion issued in December 2013. The defendants then moved for judgment on the pleadings under Rule 12(c), contending that plaintiffs' malicious prosecution claims were barred by collateral estoppel because the federal court decided the essential element of causation against them, but the trial court did not agree and denied the motion. Defendants appealed.

On October 6, in *Fox v. Johnson*, the Court of Appeals found that the current appeal, like its predecessor, was interlocutory, but it also found that while interlocutory orders are generally not immediately appealable, there is a well-known exception for orders affecting a substantial right. And, the Court continued, the Supreme Court held in *Turner v. Hammocks Beach Corp.*, 363 N.C. 555 (2009), that "the denial of a motion to dismiss a claim ... affects a substantial right when the motion ... makes a colorable assertion that the claim is barred under the doctrine of collateral estoppel." Because the defendants pled collateral estoppel as an affirmative defense, it concluded that their appeal was not premature.

The Court then addressed the question of whether the denial of defendants' Rule 12(b)(6) motion to dismiss barred them from pursuing a Rule 12(c) motion for judgment on the pleadings. It agreed that "no appeal lies from one Superior Court judge to another; that one Superior Court judge may not correct another's errors of law; and that ordinarily one judge may not modify, overrule, or change the judgment of another ... in the same action," but found an exception to that general rule when three conditions are met: "the subsequent order 'was rendered at a different

stage of the proceeding, the materials considered by [the second judge] were not the same, and the [first] motion did not present the same question as that raised by the later motion." It then agreed with the defendants that all three conditions were met in this case because (1) a Rule 12(c) motion can only be made *after* the pleadings are closed, whereas a Rule 12(b)(6) motion must be made *before* the pleadings are closed; (2) in ruling on defendants' Rule 12(b)(6) motion, the trial court only considered plaintiffs' complaint and the arguments of the parties, whereas its ruling on their Rule 12(c) motion was based on additional materials, including defendants' answer, the federal complaint, and the federal court's decision; and (3) the trial court's Rule 12(c) order explicitly ruled on defendants' collateral estoppel argument, whereas its Rule 12(b)(6) order did not. Therefore the Court concluded, the Rule 12(c) order was not an improper overruling by a superior court judge of another superior court judge's Rule 12(b)(6) order.

Turning its attention to the merits of defendants' collateral estoppel defense, which was based on their argument that the federal court's dismissal of plaintiffs' Fourth Amendment claim resolved the same proximate cause issue raised by their malicious prosecution claim, the Court identified the essential elements of collateral estoppel: "(1) a prior suit resulting in a final judgment on the merits; (2) identical issues involved; (3) the issue was actually litigated in the prior suit and necessary to the judgment; and (4) the issue was actually determined." Because it found that there is a difference between federal and state pleading standards for motions to dismiss under Rule 12(b)(6), the Court held that "a federal court's dismissal of claims pursuant to Federal Rule 12(b)(6) is not an adjudication on the merits for purposes of collaterally estopping a plaintiff from raising the same or related claims under State law in our State's courts." Therefore, plaintiffs were *not* collaterally estopped from pursuing their malicious prosecution claims in state court.

Attorney's Violation of Rules of Professional Conduct Bars Breach of Contract Claim

The Law Offices of Peter H. Priest, PLLC, a firm specializing in patent law, agreed to help a small information technology start-up, Information Partners, LLC ("IP"), and one of its co-owners, Gabriel Coch, obtain a patent for an internet-based mapping computer program at \$250 per hour, with a cap of \$10,000. After the cap was reached early in the application process, the United States Patent and Trademark Office ("USPTO") issued a "non-final rejection" notice, to which Priest responded at his firm's expense. He and Coch then conferred about the fact that IP was unable to pay him at the previously agreed-upon hourly rate for the work he had just done or any future work he might do. They eventually agreed that Priest would continue to seek approval of the patent and pay 25% of the costs of doing so, in return for 25% of the proceeds he helped generate from the patent.

Priest drafted a written agreement to that effect and gave it to Coch for execution. Although neither was able to produce an executed copy, both parties believed they had entered into the agreement and proceeded in accordance with its terms. Priest paid the full cost of registering the patent and was reimbursed by IP for 75% of the expense, but when the patent was later sold to a third party and Priest sought 25% of the sale's net revenue, Coch refused, contending that Priest was only entitled to 25% of the proceeds he personally generated, not 25% of the sale price.

Priest filed suit, alleging breach of contract, fraud, and related claims. The case was transferred to Business Court, Coch and IP moved for summary judgment, and their motion was granted. The court found that Priest failed to comply with Rule of Professional Conduct 1.8(a), which provides that a lawyer shall not enter into a business transaction with a client, unless the terms of the transaction are "fair and reasonable" and "fully disclosed and transmitted in writing," the client is advised in writing of the desirability

of seeking the advice of independent legal counsel, the client is given a "reasonable opportunity" to do so, and the client gives "informed consent" to the essential terms of the transaction in writing. Priest appealed.

On November 17, in *Law Offices of Peter H. Priest, PLLC v. Coch*, the Court of Appeals rejected his reliance on *Baars v. Campbell University, Inc.*, 148 N.C. App. 408 (2002), in which it quoted from Comment [7] to Rule of Professional Conduct 0.2 and held that "breach of a provision of the Code of Professional Responsibility is not in and of itself ... a basis for civil liability." Distinguishing *Baars* from the present case, the Court noted that, in *Cunningham v. Selman*, 201 N.C. App. 270 (2009), it "rejected an argument that was virtually identical to the one Priest relies on here," holding that "[t]he fact that the Rules [of Professional Conduct] are not designed to be a basis for civil liability ... does not mean that [they] have utterly no bearing on the proper resolution of civil litigation.... [N]either Comment [7] nor *Baars* categorically precludes the use of standards set out in the Rules of Professional Conduct in civil litigation; instead, they simply point out that the Rules ... do not have the primary purpose of establishing a standard of care to use in determining civil liability."

The Court also distinguished *Robertson v. Steris Corp.*, ___ N.C. App. ___ (2014) (see *North Carolina Civil Litigation Reporter*, July 2014, p. 5), which upheld an award in *quantum meruit* to an attorney whose former clients fired him on the eve of accepting a lucrative settlement offer and then refused to pay for the services he had provided up until then. It held that whether a violation of the Rules of Professional Conduct can be used "defensively as a procedural weapon" against a claim for attorney's fees "should be answered by examining what public policy that specific Rule aims to promote, or what harm it seeks to prevent." Here, Comment [1] to Rule 1.8 provides that "[a] lawyer's legal skill and training, together with the relationship of trust

and confidence between lawyer and client, create the possibility of overreaching when the lawyer participates in a business ... transaction with a client," thereby providing "a strong public policy rationale for allowing violations of Rule 1.8 to be used defensively."

As a consequence, the Court agreed with the trial court that, "for the sake of maintaining the public's trust, attorneys should be held to abide by Rule 1.8(a)'s explicit requirements as a condition of their own recovery when that recovery is based on business transactions with their clients." Since it was undisputed that Priest violated the rule by not advising Coch in writing of the desirability of seeking independent counsel to review the agreement and failing to obtain "informed consent" from IP's owners, the trial court did not err when it granted summary judgment to Coch and IP.

As for Priest's alternative argument that even if the agreement was unenforceable, he was still entitled to recover in *quantum meruit*, the Court acknowledged the "well established" rule that "an agent or attorney, even in the absence of a special contract, is entitled to recover the amount that is reasonable and customary for work of like kind" and agreed that "recovery in *quantum meruit* will not be denied where a contract may be implied from the proven facts ..., so long as it 'appear[s] ... that services are rendered by one party to another, ... knowingly and voluntarily accepted and ... not gratuitously rendered.'" But, the Court found that Priest did not plead *quantum meruit* in his complaint, and while that failure was "not necessarily fatal," it nevertheless found his reliance on *Robertson* "misplaced," once again because of his failure to comply with "the express requirements of Rule 1.8(a)." It also found no evidence that the amount he sought to recover for his services, \$200,000 or 25% of the net proceeds from the sale of the patent, was "reasonable and customary for work of like kind, performed under like conditions." Therefore, the trial court did not err in refusing to allow Priest to recover for his legal services in *quantum meruit*.

Additional Opinion

On November 3, in *WakeMed v. Surgical Care Affiliates, LLC*, a contract action in which the defendant agreed to manage the surgical departments of WakeMed's Cary and North Raleigh hospitals and undertook several related duties, WakeMed exercised a contract provision allowing either party to terminate for a material breach and filed suit, alleging breach of contract and damages in excess of \$10,000. The trial court granted defendant's motion to dismiss under Rule 12(b)(6), finding that WakeMed's claim was "barred by the express language of the contract between the parties," and in particular, its indemnification clause, which provided that it "shall constitute the sole obligation of the [defendant] with respect to any Loss and any claims arising out of this Agreement." However, the Court of Appeals found that "both plaintiff and defendant's interpretations of the language of the Agreements are reasonable." Therefore, there was "an ambiguity as to the true intention of the parties," and "interpretation of an ambiguous contract is best left to the trier of fact," so it reversed the trial court's order granting defendants' motion to dismiss.

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

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