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CIVIL LIABILITY

False Imprisonment, Assault, Battery, and Negligent Supervision Claims Survive Summary Judgment Motion

Christopher Day, a Duke University police officer, arrived at the gated lot where Brian Wilkerson worked as a Duke Hospital parking lot attendant to help unlock a parked car. When Wilkerson refused to open the gate, a physical confrontation ensued. Day later issued a "notice of trespass," forbidding Wilkerson to enter Duke property. As a result, Wilkerson lost his job.

Wilkerson sued Day and Duke in a complaint that asserted multiple causes of action, including false imprisonment, assault, battery, negligent supervision and retention, intentional infliction of emotional distress (IIED), negligent infliction of emotional distress (NIED), and violations of the North Carolina Constitution. After the parties completed discovery, defendants' motion for summary judgment was heard by Judge Orlando Hudson. Five days earlier, Wilkerson had moved to amend his complaint to add claims of unfair and deceptive trade practices and tortious interference with contract and prospective contract. Judge Hudson denied the motion to amend and granted defendants' motion for summary judgment. Wilkerson then gave notice of appeal to the Court of Appeals.

On September 17, in ***Wilkerson v. Duke University***, the Court affirmed the trial court's denial of Wilkerson's motion to amend and its

In This Issue…

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dismissal of his IIED, NIED and constitutional claims, but found genuine issues of material fact as to his false imprisonment, assault and battery claims. In doing so, it articulated the elements of a valid false imprisonment claim: (1) illegal restraint (2) "by force or implied threat of force" (3) against plaintiff's will. Quoting from ***West v. King's Dep't Store, Inc.***, 321 N.C. 698 (1988), the Court noted that "[t]he restraint requirement … requires no appreciable period of time…. The tort is complete with even a brief restraint of the plaintiff's freedom." Since Wilkerson's verified complaint alleged that Day "completely restrict[ed his] freedom of movement," the restraint requirement was met. And, although defendants claimed that Day's restraint of Wilkerson was lawful because he was conducting an "investigatory stop," there must be "reasonable suspicion" of criminal activity for a stop to be lawful. Yet, there was no evidence of "reasonable suspicion" in this case. Thus, there were genuine issues of material fact as to whether Day restrained Wilkerson and, if so, whether the restraint was lawful. Therefore, it was error for the trial court to grant summary judgment on the false imprisonment claim.

The Court also defined the essential elements of assault ("intent, offer of injury, reasonable apprehension, apparent ability, and imminent threat of injury") and battery ("when the person of the plaintiff is offensively touched against his will") claims and determined that there were genuine issues of material fact as to whether Wilkerson was "in reasonable apprehension of injury" and whether there had been "harmful or offensive contact." It then held that Wilkerson was entitled to pursue his claims of false imprisonment, assault, and battery against not only Day, but his employer as well under the doctrine of *respondeat superior*, which "allows an employer … to be held vicariously liable for tortious acts committed by an employee … acting within the scope of his employment."

It also found that there was a genuine issue of material fact regarding Wilkerson's negligent supervision and retention claim, the elements of which are (1) a tortious act by an employee, (2) resulting in injury to plaintiff, and (3) proof that "prior to the [tortious] act, the employer knew or had reason to know of the employee's incompetency." Because Day's job performance evaluations showed that his supervisors were aware of "inappropriate conduct" on his part, there were "[g]enuine issues of material fact … as to whether Day was incompetent and … his supervisors knew or had reason to know of his incompetency." As a consequence, the trial court should not have granted summary judgment for the defense on Wilkerson's negligent supervision and retention claim.

But, the Court *did* affirm the trial court's grant of summary judgment on Wilkerson's IIED and NIED claims after it discussed the essential elements of both causes of action in some detail and quoted from ***Johnson v. Ruark***, 327 N.C. 283 (1990), and ***Holloway v. Wachovia Bank***, 339 N.C. 338 (1994), in which the Supreme Court held that IIED and NIED claims require proof of "severe" emotional distress, which consists of "any emotional or mental disorder, such as, for example, neurosis, psychosis, chronic depression, phobia, or any other type of severe and disabling emotional or mental condition which may be generally recognized and diagnosed by professionals trained to do so." Applying that definition to the present case, the Court noted that Wilkerson "acknowledged that he has not been treated by a counselor, therapist, or doctor for any condition arising out of this incident and … [had] not [been] diagnosed with any kind of mental health problems." Therefore, his IIED and NIED claims were without merit and the trial court correctly granted summary judgment for the defense as to both of them.

The Court also affirmed the trial court's dismissal of Wilkerson's state constitutional claims, holding that "when an adequate remedy in state law exists, constitutional claims must be dismissed." Since they were "based upon the same alleged conduct that underlies his state law

claims," and as state law provided him with the possibility of relief, the Court held that the constitutional claims were properly dismissed by the trial court.

Premises Liability Claim Dismissed

Nicholas Burnham, a dump truck driver for McGee Brothers, was injured unloading logs at S&L Sawmill. He chose where to unload, had unloaded at the same location without incident on multiple occasions in the past, saw no reason to believe it would be unsafe this time, was aware that the area was not completely level and his truck would be leaning toward him as he unloaded it, and could have moved to another location at which the load would not be leaning in that manner, but did not do so because, based on past experience, he assumed nothing untoward would occur. However, when he released the second binding strap, a log fell on him, causing serious injuries.

Burnham sued S&L, alleging ordinary, gross, and willful and wanton negligence. S&L denied liability and moved for summary judgment, which was granted by the trial court on grounds that Burnham could not establish breach of any duty owed to him by S&L and because of Burnham's own contributory negligence.

On September 3, in ***Burnham v. S&L Sawmill, Inc.***, the Court of Appeals affirmed. Quoting from ***Nelson v. Freeland***, 349 N.C. 615 (1998), it held that "[t]he ultimate issue … in evaluating … a premises liability claim is … whether Defendants breached 'the duty to exercise reasonable care in the maintenance of their premises for the protection of lawful visitors.'" Then, it quoted from ***Fox v. PGML, LLC*** ___ N.C. App. ___ (2013), in which it was held that in order to establish a valid premises liability claim, "plaintiff must show that the defendant either (1) negligently created the condition causing the injury, or (2) negligently failed to correct the condition after actual or constructive notice of its existence." However, in the present case, as in ***Von Viczay v. Thoms***, 140 N.C. App. 737 (2000), "[the] landowner is under no duty to protect a visitor against dangers either known or so obvious and apparent that they reasonably may be expected to be discovered … [and] need not warn of any 'apparent hazards … of which the invitee has equal or superior knowledge.'"

Applying those principles to the case at hand, the Court found no evidence that S&L either created the condition that caused Burnham to be injured or failed to correct a dangerous condition after notice of its existence. Rather, his complaint was predicated on the theory that S&L had a duty to take affirmative action to ensure that he safely unloaded his own truck, a proposition that was unsupported by any North Carolina caselaw. As Burnham failed to establish that his injury resulted from an existing condition on S&L's property, as the property's uneven surface was as apparent to him as it was to S&L, as it was Burnham who selected the location at which he unloaded his truck, and as he failed to establish that the dangers he faced at the time of his injury arose from the condition of S&L's property, rather than from the very nature of operating a sawmill, the Court concluded that there was no merit to Burnham's argument that the trial court erred when it granted S&L's motion for summary judgment.

The Court was also not persuaded by Burnham's reliance on ***Cook v. Export Leaf Tobacco Co.***, 50 N.C. App. 89 (1980), which held that "[u]nless a condition is so obviously dangerous that a man of ordinary prudence would not have run the risk under the circumstances, conduct which otherwise might be pronounced contributory negligence as a matter of law is deprived of its character as such if done at the direction or order of defendant." The Court found that Burnham's claim was substantially different from the claim in ***Cook***. While Burnham was on S&L's premises when injured, S&L did not instruct him where or how to unload his truck, he selected the location, and he neither asked nor received help in carrying out his duties as an employee of McGee Brothers. All of that being so, the principle

enunciated in ***Cook*** did not apply to Burnham's claim and the trial court properly granted S&L's motion for summary judgment.

Discovery Dispute Remanded for Further Analysis of Work Product Objection

Having suffered first and second degree burns on her face, head, neck, back, hand, and tongue when oxygen trapped under a surgical drape ignited during an operation to remove a basal cell carcinoma on her face, Judy Hammond sued the hospital, surgeon, anesthesiologist, and two nurse anesthetists. The hospital and nurse anesthetists subsequently objected to her request for production and interrogatories, claiming that several of the requested documents were protected from discovery by the medical review privilege, work product doctrine, and attorney-client privilege.

After Hammond responded to their objection with a motion to compel discovery under Rule 37, the hospital provided the trial court with copies of a written administrative policy entitled "Sentinel Events and Root Cause Analysis" ("RCA Policy"), the hospital's "Root Cause Analysis Report" ("RCA Report"), several "Risk Management Worksheets" ("RMWs"), and an affidavit from its risk manager, Harold Maynard, in which he described the hospital's incident review process. After an *in camera* inspection, the court granted Hammond's motion to compel and the defendants appealed.

On September 3, in ***Hammond v. Saini***, the Court of Appeals first considered and resolved the question of its jurisdiction over defendants' appeal, since "an order compelling discovery is generally not immediately appealable because it is interlocutory and does not affect a substantial right." However, held the Court, if the contested order compels discovery of materials that are protected by either the medical review privilege or work product doctrine, then it affects a substantial right and would be immediately appealable.

The Court then examined defendants' claim that the disputed documents fell within the "medical review privilege" created by N.C.G.S. 131E-95, which protects from discovery and admissibility the proceedings of medical review committees, the materials they consider, and the reports they produce, to determine whether the hospital's RCA Team, which created the disputed documents, met the definition of "medical review committee" found in N.C.G.S. 131E-76. Because the party objecting to disclosure on grounds of the medical review privilege has the burden of establishing that the discovery requests at issue fall within the scope of the privilege, and as the Court found that the defendants failed to prove that the hospital's "RCA Team" constituted a "medical review committee" for purposes of N.C.G.S. 131E-76(5)(c), it ultimately concluded that the trial court did not err when it granted Hammond's motion to compel.

The Court also found that, even if the hospital's "RCA Team" had met the criteria for a medical review committee under N.C.G.S. 131E-76, nevertheless, the defendants failed to establish that the disputed documents "'were (1) part of the [RCA Team]'s *proceedings*, (2) *produced* by the [RCA Team], or (3) *considered* by the [RCA Team] as required by' 131E-95." That being so, they failed to meet their burden of establishing that the documents in dispute came within the purview of the medical review privilege.

Turning next to defendants' argument that the notes of hospital risk manager Maynard were protected from disclosure by the work product doctrine of Rule 26(b)(3), the Court noted that the party making such a claim has the burden of proving "(1) the material [at issue] consists of documents or tangible things, (2) which were prepared in anticipation of litigation or for trial, and (3) by or for another party," and it cautioned that "[m]aterials prepared in the ordinary course of business are not protected." Because the Court believed that the trial court could not determine whether Maynard's notes were made

in anticipation of litigation or, instead, were made in the ordinary course of the hospital's business without first examining the hospital's internal policies, which Hammond had requested, but the defendants had not produced, the case was remanded with instructions to the trial court that it review Maynard's notes, his affidavit, and the hospital's policies to determine whether the notes were made in anticipation of litigation or pursuant to hospital policy.

Settlement Does Not Preclude Pursuit of Claim for Contribution or Indemnity

Shortly after moving into a new home built by Bost Construction Company, Mary Blondy began complaining about a number of construction issues, including a fireplace that had been installed by Flue Sentinel, LLC. After it arranged for Flue to repair the fireplace, Bost filed suit against Blondy for breach of contract because she had not paid in full the construction cost of her home. Blondy counterclaimed, alleging, *inter alia*, defects in the fireplace. Bost then filed a third party complaint under Rule 14, impleading its subcontractors, including Flue.

In response to written discovery served by Flue, Blondy stated that she was not alleging damages caused by negligence or faulty workmanship on Flue's part. That prompted Flue to ask Bost to voluntarily dismiss its third-party claim. When Bost refused to do so, Flue filed a motion for summary judgment and a separate motion for attorney's fees under N.C.G.S. 6-21.5, contending that it was improper for Bost to continue to pursue its third party claim once it received notice of Blondy's "admissions," since they created a "complete absence of … justiciable issue of either law or fact."

Bost responded to Flue's motions with an affidavit from its President, Rex Bost, in which it asserted that Flue was responsible for at least some of Blondy's alleged damages. But, the trial court granted both of Blondy's motions, concluding with respect to the attorney's fee issue that Bost violated N.C.G.S. 6-21.5 by "persist[ing] in litigating the case after the point where [it] reasonably should have become aware that the claims it filed against Flue … no longer contained a justiciable issue."

After Blondy and Bost reached agreement on a settlement and entered into a stipulation voluntarily dismissing their claims against each other, Bost appealed the trial court's order granting Flue's motions for summary judgment and attorney's fees. On September 3, in ***Bost Construction Company v. Blondy***, the Court of Appeals reversed, finding that it was error for the trial court to conclude that no genuine issue of material fact existed concerning Flue's liability because Blondy's discovery responses qualified as "judicial admissions" under Rule 36(b). To the contrary, since Blondy was not a party to the contract between Flue and Bost and as she was an agent of neither, her discovery responses could not conclusively establish whether Flue breached its agreement with Bost. In addition, Rex Bost's affidavit raised a question of material fact concerning the nature of the work performed by Flue, making summary judgment improper.

The Court also found no merit in Flue's contention that Bost's third party claim was mooted by Blondy's dismissal of her counterclaim against Bost. Because an original defendant may implead a party for contribution or indemnity under Rule 14, Bost was entitled to its day in court to prove what portion, if any, of its settlement with Blondy stemmed from damages caused by the work Flue performed.

Court Bound by Prior Precedent in Absence of Reversal by Supreme Court

Elizabeth Kane, who wanted biological children, but was not in a romantic relationship with a male partner, received treatment at a fertility clinic, took medication, and underwent various fertility procedures over a three-year period in an attempt to conceive. As a state employee, she was covered by the North Carolina Teachers' and

State Employees' Comprehensive Major Medical Plan ("SHP"), which denied her claim for reimbursement of the associated expense because of a cost containment policy that excluded artificial reproductive treatment.

Kane filed an internal appeal of the denial of her claim, but it, too, was denied by the SHP, which informed her that she had sixty days to appeal its decision to the Office of Administrative Hearings. Rather than do so, Kane filed a declaratory judgment action, alleging breach of contract and violation of the equal protection and due process clauses of the United States and North Carolina Constitutions. However, the trial court granted the SHP's Rule 12(b)(1) and 12(b)(6) motion to dismiss the breach of contract claim because she failed to exhaust her administrative remedies and then it granted summary judgment on her constitutional claims.

On September 3, in ***Kane v. North Carolina Teachers' and State Employees' Comprehensive Major Medical Plan***, the Court of Appeals affirmed the trial court's two orders of dismissal, concluding that "Plaintiff's failure to exhaust her administrative remedies or, in the alternative, to properly plead the inadequacy of those administrative remedies, bars all of her claims against SHP." Quoting from ***Jackson v. N.C. Dep't of Human Res.***, 131 N.C. App. 179 (1998), the Court held that "[w]hen the General Assembly provides an effective administrative remedy by statute, that remedy is exclusive and the party must pursue and exhaust it before resorting to the courts," even when the claim in question alleges a constitutional violation.

While ***Jackson*** also held that "if the remedy established by the APA is inadequate, exhaustion is not required," the Court made it clear that "[t]he burden of showing inadequacy is on the party claiming inadequacy, *who must include such allegations in the complaint*," which Kane failed to do in the present case. As a consequence, and being mindful of the principle that "[w]here a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court," the Court affirmed the trial court's dismissal of Kane's complaint. At the same time, however, it felt "compelled to observe that imposition of the requirement to allege futility or inadequacy in this case appears both illogical and a subversion of the very intent behind the exhaustion of administrative remedies requirement: judicial economy."

No Civil Cause of Action for Perjury

On September 3, in ***Gilmore v. Gilmore***, the Court of Appeals considered plaintiffs' appeal from a Cabarrus Superior Court order granting defendants' Rule 12(b)(6) motion to dismiss plaintiffs' complaint because the only damages claimed "result[ed] from the giving of false and perjured testimony" and it has been well-established since the Supreme Court's decision in ***Godette v. Gaskill***, 151 N.C. 52 (1909), that such a claim "did not lie at common law, and we have no statute authorizing it." The Court also considered plaintiffs' claim that the defendants violated North Carolina's RICO statute, N.C.G.S. 75D-1 *et seq.*, but ultimately determined that "the trial court properly dismissed … [the RICO claim] because plaintiffs did not adequately plead all of … [its] essential elements." As a consequence, the trial court's order granting defendants' Rule 12(b)(6) motion to dismiss was affirmed.

WORKERS' COMPENSATION

Termination of Weekly Benefits Affirmed

Claude Medlin, a graduate of NCSU with a BS degree in Civil Engineering, was employed by Weaver Cooke Construction as a project manager and estimator. After he injured his right shoulder moving furniture at a work site, Weaver's insurer, Key Risk, filed a Form 60, accepting the claim as compensable, and provided him with medical treatment. Medlin

continued to work until he was laid off when a lack of work led to a reduction in staff. From early 2009 until late March 2011, he received unemployment benefits from the state and TTD from Key Risk.

After a February 2009 operation performed by Dr. Raymond Carroll and physical therapy, Medlin was found to be at MMI and released to return to work without restrictions. He then obtained a second opinion from Dr. Kevin Speer, who agreed that Medlin was at MMI, but assigned permanent work restrictions, *i.e.*, no lifting greater than 10 pounds, no climbing of ladders, and no repetitive overhead activities. Medlin then sought to return to work in the construction industry, but was unable to find a job.

In December 2010, Weaver and Key Risk filed an "Application to Terminate Payment of Compensation" on grounds that the reason Medlin had not returned to work as an estimator was the ongoing economic downturn, not physical restrictions on his ability to be gainfully employed. The Full Commission agreed, finding that Medlin "cannot establish disability secondary to his work-related injury."

On September 3, in ***Medlin v. Weaver Cooke Construction, LLC***, a 2-to-1 majority of the Court of Appeals agreed with the Full Commission and affirmed the denial of Medlin's claim for ongoing weekly benefits. It quoted the ***Hilliard v. Apex Cabinet Company***, 305 N.C. 593 (1982) definition of "disability," *i.e.*, "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment" and held that, to prove total disability, an injured worker must establish not only incapacity to earn wages in the same or any other employment, but that his incapacity was *caused by the injury*. In the present case, said the Court's majority, "plaintiff's inability to obtain his pre-injury wages was 'attributable to large-scale economic factors,' not … his injury, and [therefore] he was not entitled to receive disability compensation."

Responding to the argument in Judge Geer's dissent that Medlin satisfied the second of the four methods for establishing disability described in ***Russell v. Lowes Product Distribution***, 108 N.C. App. 762 (1993), the majority opinion observed that "[t]he purpose of the four-pronged ***Russell*** test is to provide channels through which an injured employee may demonstrate the required 'link between wage loss and the work-related injury.'" While the employee may meet the second prong by producing "evidence that he is capable of some work, but … has, after a reasonable effort on his part, been unsuccessful in his effort to obtain employment," the Court's majority was of the opinion that "implied in this prong is the causal connection between the injury and the unsuccessful attempt at finding employment," whereas a review of the evidence before the Court established that "plaintiff failed to show *any* causal connection between his injury and subsequent wage loss. We therefore disagree with the dissent and find that the second prong of the ***Russell*** test has not been met."

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

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