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CIVIL LIABILITY

Wrongful Death Claim Dismissed Under Rule 41(a)(1)

Onslow County Deputy Sheriff Arturo Pizano transported Clifton Gentry to Cherry Hospital to have him involuntarily committed. As they entered the hospital, Gentry grabbed Pizano's gun, used it to shoot a hospital employee, and then shot and killed himself. On the same day that the administrator of Gentry's estate brought a wrongful death action in Superior Court against Pizano, Sheriff Ed Brown, Cherry Hospital Director Dr. Jim Osberg, and the North Carolina Department of Health and Human Services ("NCDHHS"), he also filed a state tort claim against NCDHHS at the Industrial Commission, alleging negligence on the part of the hospital's directors and administrators.

Four months later, the estate dismissed the Superior Court action without prejudice. It later dismissed the state tort claim, also without prejudice, but then refiled it. The defendants responded with a motion for summary judgment, arguing that the claim was barred by the "two dismissal rule" found in Rule 41(a)(1). The Industrial Commission agreed and granted the motion. The estate appealed.

On August 4, in *Gentry v. N.C. Department of Health & Human Services/Cherry Hospital*, the Court of Appeals observed that, under Rule 41(a)(1), a dismissal without prejudice "operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court

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... an action based on or including the same claim.” It found that the Industrial Commission is “constituted a court” by N.C.G.S. § 143-291(a) and cited *Dunton v. Ayscue*, 203 N.C. App. 356 (2010), for the proposition that the “two dismissal rule” applies when “(1) the plaintiff ... filed two notices to dismiss under Rule 41(a)(1) and (2) the second action ... [was] based on or included the same claim as the first action.”

The Court explained that “the claims in the dismissed actions need not be identical to the claims in the third action.” The “two dismissal rule” even applies to “actions with claims arising from the same transaction or occurrence against different defendants.” Again citing *Dunton* as authority, it held that “a second dismissal of an action asserting claims based upon the same transaction or occurrence as a previously dismissed action would operate as an adjudication on the merits and bar a third action based upon the same set of facts.”

As for whether the actions involved in the present case were based on “the same transaction or occurrence,” that determination came down to “(1) whether the issues of fact and law raised by the claim[s] ... are largely the same; (2) whether substantially the same evidence bears on both claims; and (3) whether any logical relationship exists between the two claims.” The Court found that, in this case, all three of the actions filed by the Gentry estate “alleged damages based on the negligent conduct of numerous employees of NCDHHS stemming from the 22 July 2005 incident in which the decedent: was admitted to the hospital, grabbed Deputy Pizano’s gun, and shot a hospital employee and himself.” Therefore, it was “clear that all three actions raise essentially the same issues of fact and law, substantially the same evidence bears on all actions, and a logical relationship between each of the actions exist,” so the Industrial Commission did not err when it applied the “two dismissal rule” and granted defendant’s motion for summary judgment.

University Professor Not Entitled to Emeritus Status

Professor Robert Izydore taught chemistry at NCCU for thirty-eight years. Shortly before he retired in September 2009, the faculty nominated him for Professor Emeritus status, and their nomination was later approved by a committee of eight chairs and directors from the College of Science and Technology and by the Faculty Senate. But, after it was forwarded to and debated by the Academic Planning Council (“APC”), he was not granted emeritus status.

Izydore sued two fellow professors, the university, its provost, and the State, claiming that his nomination was rejected because the professors made false and defamatory statements to the APC, against which he was not given an opportunity to defend. The defendants responded with a motion to dismiss under Rules 12(b)(1), (2), and (6). When their motion was granted by the trial court, Izydore appealed.

On August 4, in *Izydore v. Tokuta*, the Court of Appeals affirmed the dismissal of Izydore’s complaint, finding no merit in his argument that NCCU had violated his constitutional rights under the Fifth and Fourteenth Amendments to the United States Constitution and deprived him of his “property interest” in Professor Emeritus status without due process.

In looking for “the source which created [Izydore’s] alleged property interest,” the Court could find no statute or university regulation that created one. Quoting *Town of Castle Rock, Colo. V. Gonzalez*, 545 U.S. 748 (2005), it held that “[t]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire” and “more than a unilateral expectation He must, instead, have a legitimate claim of entitlement to it.... [A] benefit is not a protected entitlement if ... officials may grant or deny it in their discretion.” Because Izydore was “merely nominated” and the conferral process was a “discretionary,” the

Court concluded that there was no basis for his claim that he was deprived of a “protected property interest” when the university chose not to grant him emeritus status.

It also found no merit in Izydore’s claim that the defendant professors’ allegedly defamatory statements deprived him of a constitutionally protected “liberty interest in his reputation and choice of occupation.” Citing *Toomer v. Garrett*, 155 N.C. App. 462 (2002), the Court found that “‘injury to reputation by itself [is] not a ‘liberty’ interest protected under the Fourteenth Amendment’ To invoke an employee’s liberty interest, the stigmatizing remarks must be ‘made in the course of a discharge or significant demotion.’” Because Izydore “had no legitimate claim to Professor Emeritus status,” the denial of his nomination was not an “adverse employment action.” Therefore, there was no error in the dismissal of his “reputational stigma” claim.

Nor was the Court persuaded by Izydore’s argument that NCCU and the State had “entity liability” under 42 U.S.C. § 1983 because of the university’s “constitutionally inadequate training and ... Professor Emeritus status approval procedures.” While *Monell v. Department of Social Services of New York*, 436 U.S. 658 (1977), held that a local government can be sued under § 1983 when execution of a government policy or custom inflicts injury, there were no “matured interests sufficient to warrant constitutional protection under section 1983” in this case. And, since Izadore did not have a constitutionally protected interest, no entity liability could attach to NCCU for its allegedly inadequate emeritus status conferral procedures.

As for Izydore’s defamation claims, after the Court defined slander *per se* as “an oral communication ... which amounts to (1) an accusation that the plaintiff committed a crime involving moral turpitude; (2) an allegation that impeaches the plaintiff in his trade, business, or profession; or (3) an imputation that the plaintiff has a loathsome disease” and slander *per quod* as

“a remark which is not defamatory on its face but causes injury with ‘extrinsic, explanatory facts...’” and observed that to establish slander *per quod*, “the injurious character of the words and some special damage must be pleaded and proved.” In the present case, because Rule of Civil Procedure 8(a)(1) requires “[a] short and plain statement of the claim sufficiently particular to give the court and the parties notice of the ... occurrences ... intended to be proved showing that the pleader is entitled to relief,” it found that Izadore’s allegation of “false and defamatory statements ... with malicious intent” was insufficient because it failed to identify with any degree of specificity the allegedly defamatory remarks, and that prevented determination of whether they were, in fact, defamatory. Therefore, the defamation claims were “facially deficient” and, like his § 1983 and “entity liability” claims, properly dismissed by the trial court.

Attorneys’ Fees Awarded Against Plaintiff Physician

Sherif Philips, MD filed suit against Pitt County Memorial Hospital and four of his colleagues, asserting a number of claims, including one for punitive damages, after the hospital suspended and then revoked his admitting and staff privileges. In *Philips v. Pitt County Memorial Hospital*, 222 N.C. App. 511 (2012) (“*Philips I*”), the Court of Appeals affirmed the trial court’s order granting the defendants’ motion for summary judgment. Then, on remand, the defendants were awarded \$444,554.45 in attorneys’ fees. Philips appealed once again.

On August 4, in *Philips v. Pitt County Memorial Hospital* (“*Philips II*”), the Court of Appeals affirmed the award. It found that while attorneys’ fees are only proper when specifically allowed by statute, N.C.G.S. § 1D-45 authorizes the court to award them when a claim for punitive damages is “frivolous” or “malicious.” And, a claim is “frivolous” when its “proponent can present no rational argument based upon the evidence or law in support of it” and is

“malicious” when it is “wrongful and done intentionally without just cause or excuse or as a result of ill will.”

In applying those definitions to the facts of this case, the Court observed that the standard of appellate review for awards of attorneys’ fees, including those entered pursuant to N.C.G.S. § 1D-45, is “abuse of discretion.” It then found that competent evidence supported the trial court’s relevant findings: Philips admitted to unprofessional conduct; his conduct was a valid basis for initiating corrective action under the hospital’s bylaws; he misrepresented the true nature of his medical practice and would never have received admitting privileges, but for that misrepresentation; after corrective action was initiated, he failed to comply with the conditions of his reappointment and the requirements of the hospital’s bylaws; he continued to flagrantly violate those bylaws after being notified of his non-compliance; and, despite this knowledge, he persisted in alleging that his hospital privileges were suspended and then revoked “without any valid factual or legal support.” Therefore, the Court concluded, the trial court’s attorney fee award “reflected a reasoned judgment” and was not an abuse of discretion.

As for Philips’ argument that the award was excessive because the statute only authorizes a recovery of attorneys’ fees in the context of a punitive damages claim, not the other claims he brought, the Court cited the holding in *Okwara v. Dillard Department Stores, Inc.*, 136 N.C. App. 587 (2000), that “where attorneys’ fees are not recoverable for defending certain claims in an action but are recoverable for other claims ..., fees incurred in defending both types of claims are recoverable where the time expended on defending the non-recoverable and the recoverable claims overlap and the claims arise ‘from a common nucleus of law or fact,’” so that each claim is “inextricably interwoven” with the others. The trial court having found that all of Philips’ claims arose from a “common legal and factual nucleus,” the Court concluded that

apportionment of legal fees between them was “impractical” and “unnecessary.”

Additional Opinions

On August 4, in *Estate of Jerry Jacobs v. State of North Carolina*, the Court of Appeals affirmed an order entered by the Industrial Commission dismissing claims for compensation due persons wrongfully convicted of felonies filed under N.C.G.S. § 148-82 *et seq.* by the estates of four members of the “Wilmington Ten.” After all ten of the group’s members were arrested, convicted, and sentenced to prison for firebombing Mike’s Grocery Store on February 6, 1971 and attacking police and fire rescue personnel who responded to the scene, the Fourth Circuit overturned their convictions, holding that they had been denied due process through gross prosecutorial misconduct and myriad legal errors at trial. Governor Beverly Perdue subsequently pardoned all ten, posthumously pardoning the group’s four deceased members. The Court held that the “plain and unambiguous” language of the statute authorized claims made by persons wrongfully convicted and imprisoned, but did not permit claims brought by the testamentary estates of those who did not receive a pardon of innocence during their lifetimes.

On August 18, in *Robinson v. University of North Carolina Health Care System*, the Court of Appeals affirmed the “Final Agency Decision” made by the UNC Health Care System to terminate the twenty-year employment of Sheila Robinson, an Accounts Payable Technician with career State employee status, due to “personal conduct,” including what the System concluded were unfounded allegations and complaints she made about co-workers and managers in violation of the System’s Code of Conduct. The Court found no merit in Robinson’s argument that because the Code of Conduct was adopted after October 31, 1998, it did not apply to her because “[t]he Code of Conduct provisions in question are the type of rules which are allowed under N.C. Gen. Stat. § 116-37(d)(2).” And, it

also found that N.C.G.S. § 126-35 provides that a career State employee may be terminated for “just cause,” a term which the North Carolina Administrative Code defines as “unacceptable personal conduct,” including “willful violation of known or written work rules” and “conduct unbecoming a state employee” of the type in which Robinson was found to have been engaged. Citing *Peace v. Employment Security Commission*, 349 N.C. 315 (1998), as authority, the Court also agreed with the trial court’s ruling that the burden of proof is on the employee in an action contesting the validity of her termination.

On August 18, in *Malinak v. Malinak*, a trial court order applying the equitable doctrine of laches to limit the recovery of past-due child support payments was reversed by the Court of Appeals, which found laches to be an affirmative defense the pleading party bears the burden of proving and only applicable when a time delay has resulted in some change in the relation of the parties. The “mere passage of time” is not sufficient for it to apply. The delay must also be shown to have disadvantaged the person seeking to invoke it as a defense and will only work as a bar when the claimant “knew of the existence of the grounds for the claim.” And, use of laches as a defense is further limited by *Napowska v. Langston*, 95 N.C. App. 14 (1989), which held that it is “not applicable to an action for retroactive child support since the public policy concerns about stale claims are already adequately served by the ... [ten-year] statute of limitations” found in N.C.G.S. § 1-47.

On August 4, in *Fowler v. North Carolina Department of Revenue*, the Court of Appeals affirmed a ruling by the trial court that vacated a North Carolina Department of Revenue (DOR) order assessing state income and gift taxes against Steve and Elizabeth Fowler, who owned homes in North Carolina and Florida when they sold their commercial grading business in February 2006. Citing the relevant statutory provisions, N.C.G.S. § 105-134(1), which authorizes the State to impose an income tax on

“every resident of this State,” and N.C.G.S. § 105-134.1, which provides that a resident who removes himself from the State during a taxable year is nevertheless considered a resident “until he has both established a definite domicile elsewhere and abandoned any domicile in this State,” the Court cited *State v. Williams*, 224 N.C. 183 (1944), in support of its holding that “[d]omicile is a matter of fact and intention.” Or, as it was put in *Farnsworth v. Jones*, 114 N.C. App. 182 (1994), “residence and domicile are not convertible terms. A person may have his residence in one place and his domicile in another.... Domicile denotes one’s permanent, established home as distinguished from a temporary, although actual, place of residence.” Therefore, while the record could have supported a contrary result, there was evidence that, before they sold their business, the Fowlers “abandoned their domicile in Raleigh with the intention of making ... Naples, Florida, their permanent home, thereby effecting a change in domicile.” And, since they were not domiciled in this state, the Fowlers were not subject to North Carolina income or gift tax.

On August 18, in *John Doe 1K v. Roman Catholic Diocese of Charlotte*, a personal injury action alleging fraud, constructive fraud, breach of fiduciary duty, and fraudulent concealment filed against the Diocese of Charlotte in September 2011, but arising out of events that occurred in 1977 and 1978, the Court of Appeals affirmed a trial court order granting summary judgment to the defendant Diocese on grounds that plaintiff’s claims were barred by the statute of limitations. While he argued that fraud-related claims are subject to the “discovery rule,” under which the statute of limitations does not begin to run until the allegedly false statements should have been discovered in the exercise of reasonable diligence, the Court found that the very fact of the alleged abuse put plaintiff on notice that the Diocese’s alleged assurances may have been false. He also admitted that he had no contact with the Diocese after the alleged abuse, so it never concealed anything from him, nor did

it misrepresent its actions to him after the fact. While he argued that a “special relationship” developed between the Diocese and him, the Court found that “the duty of inquiry begins ‘when an event occurs to excite the aggrieved party’s suspicion or put her on such inquiry as should have led, in the exercise of due diligence, to the discovery of the fraud,’” and the sexual abuse alleged in this case “is of the type of event that triggers this inquiry notice.” Further, because there was no evidence that the Diocese either concealed anything from plaintiff or misrepresented anything to him, the doctrine of equitable estoppel was not a bar to application of the statute of limitations. Therefore, the trial court did not err when it granted the Diocese’s motion for summary judgment.

WORKERS’ COMPENSATION

Injury During Conference Social Event Found Compensable

Timothy Holliday, whose duties as a territory manager and outside representative with Tropical Fruit & Nut Company in Asheville were “essentially administrative in nature,” injured his right knee while participating in a laser tag activity during the company’s annual National Sales and Marketing Conference in Charlotte. When he attempted to continue the game, the pain became so severe that he developed a noticeable limp, so he stopped playing, informed his general manager of the injury, and applied ice to his knee.

Holliday was able to attend the remainder of the conference and continued to work after returning home, but his knee pain persisted, so he scheduled an appointment with an orthopedist, Dr. Thomas Baumgarten, who arranged an for MRI, which revealed tears to the medial and lateral menisci. Arthroscopic surgery was performed to repair the tears, but he missed no time from work until he was laid off due to a company-wide restructuring.

Holliday eventually obtained a second opinion from Dr. Jesse West, who found cartilage damage, recommended total knee replacement, and completed a “work status report” that authorized a return to modified work duties not involving “prolonged standing or walking,” lifting over ten pounds, and squatting, kneeling or twisting. Later, after unrelated back surgery for a disc herniation at S1-2, Dr. Marcus Barnett performed the total knee replacement recommended by Dr. West.

Holliday filed a claim for workers’ compensation, which the defendants denied. He then requested a hearing, which was held by Deputy Commissioner George Hall, who found the claim compensable and awarded temporary total and medical benefits. After the Full Commission affirmed, the defendants appealed.

On August 18, in *Holliday v. Tropical Nut & Fruit Company*, the Court of Appeals began its analysis of the compensability of Holliday’s claim by acknowledging two fundamental principles of workers’ compensation law, *i.e.*, that an injury is compensable if it arose out of and in the course of the employment and that the “arising out of” element refers to “the origin or cause of the accident.” That is, “the employment must be a contributing cause or bear a reasonable relationship to the employee’s injuries.”

While the defendants argued that Holliday’s participation in the laser tag activity was “separate and distinct from the business portions of the Conference” and a non-mandatory “fun outing” that did not provide any measurable benefit to Tropical, there was testimony from Tropical employees, including its vice president of marketing and sales, that the evening on which the injury occurred was an “essential part” of the three-day event because it was part of the “team building” and “networking” content of the conference and, therefore, served a beneficial purpose to the company’s business by facilitating interaction between employees at its various offices. Although there was other testimony that

the outing was “[t]otally a social event” and not work- or business-related, the Supreme Court held in *Deese v. Champion International Corp.*, 352 N.C. 109 (2000), that “the Commission’s findings are binding if supported by competent evidence even if there is also evidence ... that would support contrary findings.” As a consequence, the Court continued, appellate courts are “not permitted ‘to weigh the evidence and decide the issue on the basis of weight’; rather, our duty ‘goes no further than to determine whether the record contains any evidence tending to support the finding.’”

The Court then compared the facts in the present case to those in the appellate court decisions relied upon by the defendants, in which injuries sustained during employer-sponsored social and recreational events were found non-compensable, *Chilton v. Bowman Gray School of Medicine*, 45 N.C. App. 13 (1980); *Frost v. Salter Path Fire & Rescue*, 361 N.C. 181 (2007); *Perry v. American Bakeries*, 262 N.C. 272 (1964); *Graven v. N.C. Department of Public Safety-Division of Law Enforcement*, ___ N.C. App. ___ (2014), and *Foster v. Holly Farms Poultry Indus. Inc.*, 14 N.C. App. 671 (1972), and found that because Tropical “(1) expressly mandated employee attendance and implicitly encouraged participation in the laser tag ... activities; (2) fully financed the outing; and (3) benefited from the event,” the nexus between Holliday’s employment and injury was “substantially greater” than in the cases cited by the defendants.

As for whether it qualified as an injury *by accident*, the Court found that it did, as there was evidence in the record that playing laser tag was not a normal activity for Holliday as a territory manager and sales representative for Tropical. That being so, it constituted “an interruption of Plaintiff’s regular work routine and the introduction of unusual conditions likely to result in unexpected consequences.”

When the Court reached the question of Holliday’s capacity to return to work, it quoted the definition of “disability” given by the Supreme Court in *Hilliard v. Apex Cabinet Company*, 305 N.C. 593 (1982), *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 found that although the burden of proof is on the injured worker to establish the existence and extent of his disability, Holliday satisfied that burden by offering testimony from Dr. Barnett that he was incapable of performing any work at all for three to six months after his last operation.

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

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