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CIVIL LIABILITY

Student's Defamation Action Against Wake Forest Law School Dismissed

In June 2011, Wake Forest Law School student Daniel Skinner was informed that his merit scholarship would be halved because he had failed to remain in the top two-thirds of his class. Arguing that the class rank requirement did not apply to his scholarship, he unsuccessfully challenged the reduction in a meeting with the school's Director of Admissions, an appeal to the Assistant Dean for Admissions and Financial Aid, and a grievance with the Associate Dean for Administrative and Student Services, who consulted with the school's legal counsel. Skinner's contentions were then reviewed by Law School Dean Blake Morant, who determined that the class rank requirement *did* apply to his scholarship.

Skinner then met with Dean Morant and the school's Executive Dean for Academic Affairs, Suzanne Reynolds. After Dean Reynolds met with him a second time, she hand-delivered a letter, copies of which were sent to Dean Morant and Associate Dean Ann Gibbs, setting forth the university's position regarding the reduction in Skinner's scholarship, reminding him of the code of conduct expected of students, and stating that the school had "tolerated inappropriate conduct in hearing you out, but we will not tolerate inappropriate conduct any longer."

Skinner responded by suing Dean Reynolds, the university, and its law school for defamation,

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claiming that her letter constituted libel *per se* and libel *per quod*. He also brought negligent supervision claims against Dean Morant, the university's president, and its senior vice president, claiming that they failed to properly supervise Dean Reynolds. Defendants' Rule 12(b)(6) motion to dismiss was granted by the trial court and Skinner appealed.

On November 4, in ***Skinner v. Reynolds***, the Court of Appeals affirmed the dismissal of plaintiff's complaint, holding that he "failed to state a claim for defamation based on libel *per se* or libel *per quod*" and his negligent supervision claim was properly dismissed because it was "derivative of his substantive claims." Noting that Skinner's libel *per se* claim was based primarily on the sentence in Dean Reynolds' letter stating that "[f]rom my experience with you on this issue, if people disagree with you, you appear to assume that those persons are acting in bad faith and you accuse them of fraud and deceit," the Court found that, "whether considered alone or in the context of the rest of the letter, [it] does not constitute actionable libel."

Quoting from ***Nucor Corp. v. Prudential Equity Grp., LLC***, 189 N.C. App. 731 (2008), the Court observed that, "words to be libelous *per se* must be susceptible of but one meaning and … tend to disgrace and degrade the party or hold him up to public hatred, contempt or ridicule, or cause him to be shunned and avoided…. [A] pure expression of opinion is protected because it fails to assert actual fact … [and] the alleged defamatory publication … must be defamatory on its face within the four corners thereof."

Applying those principles to the contents of Dean Reynolds' letter, the Court found that the phrase "from my experience with you on this issue" was "tantamount to 'in my opinion' or 'in my experience,'" *i.e.*, it "state[d] her personal opinion." In the context of Skinner's admission that he had accused various parties of fraud and deceit, the Court found that "Dean Reynolds's opinion … [was] not a fact that is subject to being proven or disproved, and cannot constitute actionable libel *per se*."

The Court also found no merit in Skinner's claim of libel *per quod*, which "may be asserted when a publication is not obviously defamatory, but when considered in conjunction with innuendo, colloquium, and explanatory circumstances it becomes libelous." To state a valid claim for libel *per quod*, "a party must specifically allege and prove special damages" with "sufficient particularity," so as to put the defendant on notice of the scope of the demand. In the present case, however, while Skinner alleged in his complaint "special damages, including … lost wages and expenses of mitigating the defamation," the Court found that he "fail[ed] to state any facts indicating the circumstances of the alleged 'special damages' or the amount claimed. The conclusory allegation that he suffered unspecified 'lost wages' and 'expenses' associated with 'mitigating the defamation' is insufficient to inform defendants of the scope of his claim." Therefore, the Court concluded that, like his libel *per se* claim, "the trial court did not err by dismissing plaintiff's claim for libel *per quod*."

Further, since Skinner's claim that the university and its law school negligently supervised Dean Reynolds was "predicated on his allegation that Dean Reynolds's letter defamed him" and that claim was properly dismissed, "it follows that the derivative claims for negligent supervision were also subject to dismissal." As a consequence, the Court affirmed the trial court's order dismissing Skinner's complaint.

Professional Malpractice Claim Withstands Rule 12(b)(6) Motion to Dismiss

Each year from 2001 to 2009, Commscope Credit Union's general manager, Mark Honeycutt, failed to file with the IRS a Form 990 "Return of Organization Exempt From Income Tax Returns." During those same years, Commscope retained Butler & Burke, LLP, a certified public

accountant firm, to provide audit services. In the course of its audits, Butler & Burke did not request copies of Commscope's tax forms, and as a result, it did not discover its failure to file Form 990s. In 2010, the IRS notified Commscope of the deficiency and assessed a penalty of $424,000, which it subsequently reduced to $374,200.

Commscope sued Butler & Burke for breach of contract, negligence, breach of fiduciary duty, and professional malpractice. Butler & Burke's answer contained a Rule 12(b)(6) motion to dismiss, which was granted by the trial court. Commscope appealed.

On November 4, in ***Commscope Credit Union v. Butler & Burke, LLP***, the Court of Appeals rejected Butler & Burke's argument that a fiduciary relationship did not arise between the parties because they were "mutually interdependent businesses." Rather, their relationship was like that in ***Smith v. Underwood***, 127 N.C. App. 1 (1997), in which the relationship that arose between accountants providing accounting and tax-related services and their client was found to be "much more like that between 'attorney and client, broker and principal' … than that between 'mutually interdependent businesses,' like distributors and manufacturers, or retailers and suppliers.'"

The Court also disagreed with Butler & Burke's argument that it was entitled to dismissal of Commscope's complaint under the common law doctrine of *in pari delicto*, "which prevents the courts from redistributing losses among wrongdoers." Citing ***Skinner v. E.F. Hutton & Co.***, 314 N.C. 267 (1985) as authority, it found that "the *in pari delicto* defense traditionally has been *narrowly limited* to situations in which the plaintiff was *equally at fault* with the defendant." Although the doctrine was applied in ***Whiteheart v. Waller***, 199 N.C. App. 281 (2009), to bar claims against attorneys in a legal malpractice case when their clients knowingly engaged in intentional wrongdoing, in the present case "nothing in Plaintiff's complaint establishes that Honeycutt's failure to file the [Form 990] tax forms was an example of intentional wrongdoing, as opposed to negligence, or for that matter, that Honeycutt's alleged failure was not excusable conduct."

The Court also found no merit in Butler & Burke's argument that Commscope was attempting to "hold defendant liable for matters which the parties expressly agreed plaintiff was responsible." Rather, "the engagement letters between the parties appear to give the parties overlapping, if not conflicting, responsibilities for the very types of situations, actions, and omissions as lie at the heart of this case," and "in the absence of expert testimony or any other evidence, we cannot evaluate [the parties' competing arguments]." Therefore, the Court held that the trial court erred in determining that no material issues of fact remained to be resolved and it reversed the trial court's order granting Butler & Burke's motion to dismiss.

Denial of Motion for Class Certification Affirmed

In August 2011, Appalachian State University students Devin Neil and Kollin Kalk entered into a lease agreement to rent an apartment in the Turtle Creek West complex near the university. That same month, fellow students Susan Zhao and John Stoehr signed a similar agreement to lease an apartment at Greenway Commons, another apartment complex in Boone. Both leases provided for a security deposit covering unpaid rent, cleaning charges, and other expenses upon termination of the lease and an "administrative fee" covering a series of safety, health, and maintenance regulations.

In November 2012, Neil, Kalk, Zhao, and Stoehr filed a complaint in Watauga County Superior Court, alleging that the defendant landlords and their managing agents had committed fraud, engaged in unfair and deceptive trade practices, and violated the North Carolina Tenant Security Deposit Act by forming a plan to "increase

profits through overcharging of their respective tenants and taking their security deposits at the end terms of their respective leases." Plaintiffs moved for class certification, but their motion was denied, so they gave notice of appeal.

On November 4, in ***Neil v. Kuester Real Estate Services, Inc.***, the Court of Appeals first addressed the interlocutory nature of plaintiffs' appeal, since the trial court's order denying their motion for class certification "does not constitute a final judgment on the merits of their claims." It observed that, while there is generally no right of immediate appeal from interlocutory orders, "in cases purporting to warrant class certification, where … the trial court has refused to certify the action, the other members of the class will suffer an injury which could not be corrected if there were no appeal before the final judgment." Therefore, the trial court's denial of class certification was found immediately appealable.

The Court then turned to plaintiffs' objection to the determination made by the trial court in finding of fact 5 that "the claims of individual tenants would necessarily require a series of separate trials to determine … the damages, if any, to which each tenant was entitled, resulting in differing outcomes which would negate the benefits of a class action lawsuit." Because the record contained "competent evidence that Defendants claimed different amounts and types of alleged damages by each Plaintiff and charged each Plaintiff differing amounts for the alleged damages," the Court held that finding of fact 5 was binding on appeal.

It also determined that plaintiffs "misinterpret[ed] the remedies available to them for Defendants' alleged violations of the [Tenant Security Deposit] Act" when they argued that the Act's willful violation would require a total refund of each class member's security deposit, regardless of what damage may have been done to their individual apartments. The Court observed that "[n]othing in the statute would require an automatic refund of every tenant's full security deposit for Defendants' alleged overcharging for repairs and … normal wear and tear. Thus, we agree with the trial court's conclusion that each prospective class member would require a separate trial to determine, *inter alia*, what portion of the class member's individual charges … was attributable to overcharging for normal wear and tear." Since "common issues of fact … do not predominate over issues affecting only individual class members," the Court concluded that the trial court did not abuse its discretion in denying plaintiffs' motion for class certification.

Trial Court Order Correcting "Clerical Mistake" Authorized by Rule 60

Terri Robertson and Mary Daniel, who were injured in a work-related accident, settled their workers' compensation claims and then hired Raleigh attorney Henry Temple to assert a third party tort claim. He filed a complaint on their behalf against multiple defendants, including Sealmaster, Inc. and Steris Corporation, without entering into a written contract of representation with them. The lawsuit was designated "exceptional" under General Rule of Practice 2.1 and assigned to Judge Jack Hooks. After a protracted period of discovery, two mediated settlement conferences, and the dismissal of the other defendants, separate settlements were negotiated with Sealmaster and Steris.

After a dispute arose between Temple and his clients over litigation costs and his fee, they fired him and hired substitute counsel. He then moved to intervene in their lawsuit and filed a motion in the cause, seeking to recover in *quantum meruit* for the costs and fees he incurred while working on their case. Judge Hooks granted Temple's motion to intervene, conducted a bench trial to resolve the fee issue, and awarded him a fee equal to one-third of plaintiffs' net recovery after reimbursement of the workers' compensation lien and a portion of Temple's costs. Plaintiffs appealed, but on July 1, in ***Robertson v. Steris Corporation*** ("***Robertson I***"), the Court of Appeals affirmed the trial court's

quantum meruit award to Temple (see *North Carolina Civil Litigation Reporter*, July 2014, p. 5).

While plaintiffs' appeal was pending, Temple filed a "Motion to Correct Judgment," requesting that the trial court add interest to his *quantum meruit* attorney fee award. It was heard by Judge Hooks, who signed an order on April 19, 2013, ruling that Temple was entitled to interest from the date on which he filed his motions in the cause and to intervene, but the order was not filed with the Clerk of Court until May 3, 2013. In the interim, Judge Hooks resigned from office, effective April 30, 2013.

Plaintiffs filed a "Motion to Amend Order and Alternative Motion for Relief From Order," seeking to have the trial court reverse its ruling awarding Temple interest on his attorney fee award, but their motions were denied by Judge Hooks, who had been sworn in as an Emergency Judge on May 31, 2013. Plaintiffs then filed notices of appeal from the order adding interest to the *quantum meruit* attorney fee award and from the order denying plaintiffs' motion for relief from that order. The Court of Appeals consolidated the two appeals pursuant to Rule of Appellate Procedure 40 and resolved them on November 18, in ***Robertson v. Steris Corporation*** ("***Robertson II***").

While plaintiffs argued the trial court was divested of subject matter jurisdiction to enter the order Judge Hooks signed on April 26, 2013 because it was filed by the Clerk of Court after the judge's resignation, the Court found that, "[i]n 1967, the General Assembly repealed the entry of judgment provision of [N.C.G.S.] section 1-205 and enacted the North Carolina Rules of Civil Procedure, including Rule 58," one purpose of which was "to make the time of entry of judgment easily identifiable, and to give fair notice to all parties that judgment has been entered." Citing ***Pinckney v. Van Damme***, 116 N.C. App. 139 (1994), which held that "a judgment may be filed outside the session of court in which the matter was decided 'so long as the hearing to which the order relates was held in term,'" and recognizing that the "[f]iling of an order or judgment has traditionally been the province of the clerk, not the judge," the Court held that "where … a judge signs an otherwise valid written order or judgment prior to leaving office, the trial court … retains jurisdiction to file that judgment, even after the trial judge retires."

As for plaintiffs' argument that their appeal of the trial court's order awarding Temple an attorney's fee in *quantum meruit* divested the trial court of authority to hear his subsequent "Motion to Correct Judgment," the Court found that, in ***Sink v. Easter***, 288 N.C. 183 (1975), the Supreme Court held that "Rule 60(a) specifically permits the trial court to correct *clerical mistakes* before the appeal is docketed in the appellate court." Because N.C.G.S. § 24-5(b) provides that monetary awards other than costs bear interest as a matter of law, the Court determined that "failure to include interest mandated by N.C. Gen. Stat. § 24-5(b) constitutes a clerical mistake for the purposes of Rule 60(a)." Therefore, it held that the trial court did not err when it granted Temple's "Motion to Correct Judgment" and denied plaintiffs' "Motion to Amend Order and Alternative Motion for Relief From Order."

Governmental Immunity Inapplicable In Declaratory Judgment Action

Having failed "perk tests" designed to determine whether their properties were suitable for percolating wastewater, Robert Phillips and Thomas and Karen Osborne obtained permits from the North Carolina Department of Environment and Natural Resources ("NCDENR") to utilize a "spray irrigation" wastewater system that discharged effluent directly on the surface of their respective properties. After a dispute arose over whether the Orange County Health Department had the right to inspect, and charge fees for inspecting, their irrigation systems, Phillips and the Osbornes filed a declaratory judgment action in Orange County Superior Court, seeking to enjoin

the Health Department from conducting inspections or collecting inspection fees.

The Health Department's answer included motions to dismiss and for judgment on the pleadings and plaintiffs moved for summary judgment. The trial court found that the Health Department was preempted from regulating plaintiffs' wastewater treatment systems, it was enjoined from collecting fees for inspections that had already been conducted, it was directed to refund an inspection fee Osborne paid under protest, and it was taxed with plaintiffs' costs and attorney's fees. The Health Department appealed.

On November 18, in ***Phillips v. Orange County Health Department***, the Court of Appeals affirmed the trial court's determination that, in Chapter 143, "[t]he General Assembly asserted the intent to provide a complete regulatory scheme governing wastewater systems permitted pursuant to Chapter 143, and did not intend for local boards of health to have the power to regulate areas that were already completely regulated by the State through NCDENR." It also rejected the Health Department's argument that it was not a real party in interest because the enabling statutes for local health departments do not contain provisions for them to sue or be sued. Since the Health Department did not raise that issue before the trial court, it was too late to do so on appeal. And, for the same reason, the Court rejected its argument that plaintiffs had failed to join necessary parties under Rule 19.

As for the argument that the trial court lacked subject matter jurisdiction because plaintiffs did not allege that the Health Department waived governmental immunity, the Court agreed that there was no such allegation in plaintiffs' complaint. Nevertheless, it held that since the present case was a declaratory judgment action, not a negligence action, immunity did not bar plaintiffs' claims. As a consequence, the trial court's order granting plaintiffs' motion for summary judgment was affirmed.

WORKERS' COMPENSATION

Death Benefits Based On Earnings at Time of Retirement, Not Date of Death

After disabling multiple sclerosis caused Ross Lipe to retire in July 1991, he was diagnosed with asbestosis and filed a workers' compensation claim against Starr Davis Company. The Commission awarded benefits based on his average weekly wage at retirement ($606.36), rather what he was earning when diagnosed, which would have been zero. Starr Davis appealed, but the Court of Appeals affirmed the Commission's award in an unpublished opinion filed in 2001, ***Lipe v. Starr Davis Co.***, 142 N.C. App. 213 (2001) ("***Lipe I***").

Lipe died in 2010, two months after being diagnosed with lung cancer. When his widow filed a claim for death benefits, Starr Davis admitted compensability, but only agreed to pay $30.00 per week, the statutory minimum under N.C.G.S. § 97-38. The Commission disagreed. It held that the appropriate compensation rate was $404.24, basing its award on two alternative grounds: "(1) … Decedent's average weekly wages had been … addressed in its … [previous] opinion and award, and Defendant was thus collaterally estopped from relitigating the issue; and (2) … even if collateral estoppel did not apply, the fifth of the five permissible methods of calculating average weekly wages under N.C. Gen. Stat. § 97-2(5) permitted the Full Commission to reach the same result – … calculate Decedent's average weekly wages based on his last full year of employment." Starr Davis appealed.

On November 4, in ***Lipe v. Starr Davis Company, Inc.*** ("***Lipe II***"), the Court of Appeals quoted from ***McAninch v. Buncombe County Schools***, 347 N.C. 126 (1997), in which the Supreme Court held that N.G.G.S. § 97-2(5) "sets forth in priority sequence [the] five methods by which an injured employee's average weekly wages are to be computed," and "establishes an order of

preference for th[at] calculation." Although the fifth method "may not be used unless there has been a finding that unjust results would occur by using the [other four] methods" and "the primary intent of this statute is that results are reached which are fair and just to both parties," the Court agreed with the Commission's calculation of average weekly wage in the present case because the statute's "first three methods of determining average weekly wage … are not applicable because they are based on the earnings of an injured employee during the fifty-two weeks preceding the date of … disability and [Decedent] had been retired for many years prior to his diagnosis of lung cancer…. [Further,] no evidence was presented by the parties regarding the average weekly wage earned by a similarly-situated employee; therefore, the fourth method of calculating average weekly wage cannot be used." That left the fifth method, which provides that "where for exceptional reasons the foregoing would be unfair, … such other method [may be used] … as will most nearly approximate the amount which the employee would be earning were it not for the injury."

The Court found that the case relied upon by Starr Davis, ***Larrimore v. Richardson Sports***, 141 N.C. App. 250 (2000), was distinguishable because "[t]he issue of whether an individual was entitled to benefits for an injury which did not manifest until after retirement was not before … the … Court in ***Larrimore***." Instead, ***Abnernathy v. Sandoz Chemicals***, 151 N.C. App. 252 (2002), and ***Pope v. Manville***, 207 N.C. App. 157 (2010) controlled. Both involved claimants seeking benefits for an occupational disease that did not manifest until after retirement, and in each case, the Court of Appeals affirmed the Commission's calculation of average weekly wage based not the statutory minimum, but the worker's earnings during his work life.

In a footnote, the Court addressed the Commission's alternative basis for basing the decedent's average weekly wage on his earnings when last employed, rather than during the fifty-two week period of time immediately preceding his death, saying that "[w]e do not reject this alternative basis as meritless, but instead decline to reach the issue in light of our holding, which we believe rests firmly upon ***Pope***." There being no error in the Commission's calculation of average weekly wage, the Court affirmed the Commission's award of benefits.

Employer's Coverage Expired Prior to Employee's Date of Injury

Over the years, James Ceratt, a licensed general contractor doing business as Timber Structures Builders, Inc., had several workers' compensation insurance policies canceled for failure to pay the required premium. As a consequence, when he applied for coverage in 2009, he did so through the North Carolina Rate Bureau, which assigned his application to American Zurich Insurance Company. Upon receipt of Ceratt's $850 premium deposit, Zurich issued a policy that provided coverage from August 4, 2009 through August 4, 2010.

In late May 2010, Zurich notified Ceratt that his policy would expire on August 4, 2010 and, in order to avoid a lapse in coverage, a $1000 renewal premium would have to be received by the expiration date. Ceratt did not make the required payment.

Santiago Estrada Flores ("Estrada"), who was employed by Ceratt as a laborer and carpenter, injured himself at work on August 19, 2010. On his Form 18, he named Zurich as Ceratt's workers' compensation insurer, but Zurich denied the claim, contending that no policy was in effect on the date of injury.

After Ceratt learned that he no longer had coverage, he sought to renew his policy. When he did, the "renewal" Zurich issued was only retroactive to August 24, 2010.

A hearing to resolve Estrada's claim for medical and indemnity benefits was held by Deputy Commissioner Adrian Phillips. Her Opinion and

Award held that the benefits to which Estrada was entitled were owed by Ceratt, but not Zurich, as its policy had expired prior to the date of injury.

Plaintiff and Ceratt appealed to the Full Commission, but Ceratt's appeal was dismissed for failure to timely file a Form 44. The Commission then affirmed Deputy Commissioner Phillips' determination that Zurich did not insure Ceratt on the date of injury, and plaintiff appealed.

On November 18, in ***Estrada v. Timber Structures, Inc.***, the Court of Appeals acknowledged the "well-settled principle that an insurance policy is a contract." It then observed that "contracts for insurance are to be interpreted under the same rules of law as are applicable to other written contracts" and the "cardinal principle" pertaining to their construction is that, "[i]f not ambiguous, … the express language the parties have used should be given effect."

Applying those principles to the facts in the present case, the Court found that "the policy issued by Zurich expired on 4 August 2010 and was not in effect on 19 August 2010, the date that plaintiff was injured." It was not persuaded by Estrada's argument that a different result was mandated by N.C.G.S. § 58-36-105(a) or N.C.G.S. § 58-36-110(a). While the former imposes preconditions to insurance policy cancellations, including prior written consent from the insured, it only applies to cancellations "before … expiration of the term or anniversary date stated in the policy," whereas in the present case, Ceratt's policy was not canceled before the policy term ended. Similarly, while the latter contains requirements that must be met before an insurer may refuse to renew a policy, Zurich did *not* refuse to renew Ceratt's policy. To the contrary, it offered to renew, but "defendants failed to pay the premium required … and, as a result, did not have workers' compensation insurance coverage on the date of plaintiff's injury."

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

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