NORTH CAROLINA CIVIL LITIGATION REPORTER

November 2013 [Volume 1, Number 8]

CIVIL LIABILITY

University of Maryland Denied Sovereign Immunity in Suit Filed by ACC

After the University of Maryland informed the Atlantic Coast Conference ("ACC") of its decision to withdraw from the conference, the ACC filed a declaratory judgment action seeking a determination that the withdrawal payment provision in the ACC Constitution was a valid liquidated damages clause, subjecting the University and its Board of Regents to a $52,266,342 payment. The defendants moved to dismiss for lack of personal jurisdiction under Rule 12(b)(2), but their motion was denied by Judge John Craig, so they appealed to the Court of Appeals, claiming entitlement to sovereign immunity under the principle of comity.

In an opinion filed on November 19, ***Atlantic Coast Conference v. University of Maryland***, the Court first addressed the question of whether it had jurisdiction to hear defendants' appeal, as the contested order did not dispose of the case, thereby rendering the appeal interlocutory. While it acknowledged that, "[g]enerally, there is no right of immediate appeal from interlocutory orders and judgments," the Court observed that there is an exception to that rule for interlocutory orders and judgments "affect[ing] a substantial right" and a series of North Carolina appellate decisions have held that "orders denying dispositive motions grounded on the defense of governmental immunity are immediately reviewable as affecting a substantial right."

In This Issue…

Turning next to defendants' contention that Judge Craig erred in refusing to "extend comity to a sister state's sovereign immunity request," the Court held that whether to do so "is solely determined by our state's common law," under which "rights acquired under the laws or judgments of a sister state will be given force and effect in North Carolina if they are not against public policy." While the defendants argued that extending comity in this case would not violate public policy, the Court disagreed because "[t]o deny the party who has performed his obligation under a contract the right to sue the state when it defaults is to take his property without compensation and … would be judicial sanction of the highest type of governmental tyranny." As a consequence, the trial court's order rejecting defendants' plea of sovereign immunity and denying their motion to dismiss was affirmed.

Pleasant v. Johnson Claim Survives Motion to Dismiss

On October 29, 2009, Gary Vaughn was employed by Pike Electric as a groundman. Because he had not received training as a lineman, the company's safety rules prohibited him from working on poles with energized lines. Yet, he was instructed by his supervisor, Kineth Penland, to climb a utility pole supporting uninsulated high voltage distribution lines carrying 7200 volts of electricity and had begun to retrofit a transformer with a "shotgun" stick to de-energize the pole when he came in contact with an energized line and was electrocuted.

After the administratrix of Vaughn's estate filed a negligence action against Penland and Pike Electric in Rutherford County Superior Court, the defendants moved for dismissal under Rule 12(b)(1), Rule 12(b)(6), and N.C.G.S. 97-10.1, the "exclusivity provision" of the Workers' Compensation Act, claiming that the trial court lacked subject matter jurisdiction and the complaint failed to state a claim on which relief could be granted, but their motion was denied, so defendants appealed to the Court of Appeals.

On November 19, in ***Estate of Gary Vaughn v. Pike Electric, LLC***, the Court of Appeals first addressed its jurisdiction to rule on the appeal, as it was interlocutory and the trial court had not certified that there was "no just reason" for it to be delayed. Citing ***Burton v. Phoenix Fabricators & Erectors, Inc.***, 362 N.C. 352 (2008), the Court held that denial of a motion to dismiss under the exclusivity provision of the Workers' Compensation Act affects a substantial right, as it "will work injury if not corrected before final judgment," so the defendants were entitled to an immediate appeal.

The Court then turned to the substantive issues raised by the appeal and, in a lengthy analysis of the case law interpreting N.C.G.S. 97-10.1, reiterated the two limited exceptions that have arisen to the rule that bars injured workers from maintaining common law actions against employers and co-workers, *i.e.*, those cases in which an employer has "intentionally engaged in misconduct knowing … [it] was substantially certain to cause serious injury or death" (***Woodson v. Rowland***, 329 N.C. 330 (1991)) and those in which a co-worker "acted with willful, wanton and reckless negligence" (***Pleasant v. Johnson***, 312 N.C. 710 (1985)).

The Court then focused its attention on the denial of Pike Electric's motion to dismiss and found that the facts in the present case "align more closely with those in ***Whitaker [v. Town of Scotland Neck***, 357 N.C. 552 (2003), in which the Supreme Court held that the ***Woodson*** exception did *not* apply] than with those in ***Woodson*** and ***Arroyo [v. Scottie's Prof'l Window Cleaning, Inc.***, 120 N.C. App. 154 (1995), in which the Supreme Court held that the ***Woodson*** exception *did* apply]," since there was no evidence that Pike Electric knew Penland instructed Vaughn to climb the utility pole, no allegation that Pike Electric's management was present at the site to observe its hazards, and no evidence that the Penland had a prior history of ignoring safety requirements, as was the case for the supervisor in ***Arroyo***. Concluding that "[p]laintiff's

deductions of fact and inferential allegations do not allege egregious employer misconduct," the Court held that the trial court erred in denying Pike Electric's motion to dismiss.

At the same time, however, it affirmed the trial court's denial of co-worker Kineth Penland's motion to dismiss, holding that "his alleged direction to send Decedent up that utility pole despite Decedent's severe lack of training and expertise is sufficient to create an inference that Penland was manifestly indifferent to the consequences of his actions." Therefore, the facts in the present case were more like those in ***Pleasant v. Johnson*** and ***Regan v. Amerimark Bldg. Prods., Inc.***, 118 N.C. App. (1995), in which tort claims brought against co-workers withstood Rule 12 motions to dismiss, than those in ***Trivette v. Yount***, 366 N.C. 303 (2012) and ***Pendergrass v. Card Care, Inc.***, 333 N.C. 233 (1993), in which they did not.

Contributory Negligence Found in Railroad Crossing Case

Nathalie Frazier was injured on January 16, 2009, when her northbound vehicle was struck by a westbound train operated by Carolina Coastal Railway ("CLNA") at the railroad crossing on Fayetteville Street in Knightdale. Frazier subsequently sued CLNA, Norfolk Southern Railway Company, and the Town of Knightdale, alleging negligence and seeking to recover compensatory and punitive damages. She also filed a separate tort claims action against the North Carolina Department of Transportation (NCDOT).

Later, after Frazier voluntarily dismissed her claims against Knightdale and Norfolk Southern, CLNA moved for summary judgment. The trial court made detailed findings of fact, concluded that Frazier was contributorily negligent as a matter of law, and granted CLNA's motion.

Frazier appealed, but on November 19, in ***Frazier v. Carolina Coastal Railway, Inc.***, the Court of Appeals affirmed. Although it acknowledged that "summary judgment is seldom fitting in cases involving questions of negligence and contributory negligence," the Court held that it is nevertheless appropriate "if the evidence is uncontroverted that [plaintiff] failed to use ordinary care and that … was at least one of the proximate causes of injury."

Applying those principles to the present case, the Court found uncontradicted evidence that the collision in question occurred at 12:28 p.m. under clear weather conditions; there were warning signs, pavement warnings, and a white stop line for vehicles approaching the crossing; and plaintiff admitted that she had an unobstructed view of trains approaching from the west for 462 feet, failed to stop at the white line for motorists traveling in her direction, did not look either way for oncoming trains, and stopped her vehicle on the railroad tracks, where she remained for at least twenty to thirty seconds before the collision occurred, although there was sufficient space for her vehicle to finish crossing over the tracks so as to reach the intersection of Fayetteville Street and First Avenue in safety.

The Court also found no merit in Frazier's alternative argument that the absence of "active signalization," *i.e.*, lights and gates, constituted gross negligence on the defendant railroad's part, insulating her contributory negligence. Rather, as the trial court found, under longstanding common law in North Carolina, a railroad cannot be held liable for failing to install gates and lights at a railroad crossing unless it is "peculiarly and unusually hazardous," *i.e.*, one which "a reasonably prudent motorist cannot travel over safely by using his or her vision and hearing to detect the presence of a train on the track." Because the uncontradicted admissions Frazier made when she was deposed established otherwise, the Court of Appeals agreed with the trial court that there were no genuine issues of material fact as to her failure to exercise ordinary care in approaching and traversing the crossing, and that failure proximately caused her to be injured. As a consequence, the Court held that

the trial court did not err when it granted CLNA's motion for summary judgment.

Rule 11 Sanctions Set Aside

After A-1 Auto Charlotte, LLC entered into a one year lease with Jordan Motors to rent its used car lot on Independence Boulevard in Charlotte, the property was sold to Automotive Group, LLC. The lease's renewal provision obligated A-1 Auto to give written notice of its intent to renew at least 180 days in advance of the lease's expiration date, but when A-1 Auto actually gave notice that it intended to renew, less than 180 days remained before the lease was due to expire, so Automotive Group refused to renew and asked A-1 Auto to vacate the premises.

When A-1 Auto failed to do so, Automotive Group filed an ejectment action, which was dismissed by a Mecklenburg County magistrate, who found that Automotive Group not only failed to prove its case, it accepted rent for a month after the initial lease term expired, thereby waiving A-1 Auto's alleged breach.

A-1 Auto continued to remain on the premises and Automotive Group began to return each rent check as it was received. A second ejectment action was filed and dismissed, and then Automotive Group filed a third complaint, but it, too, was dismissed by the magistrate, who found that it alleged the same causes of action as the first and was, therefore, barred by the doctrine of *res judicata*.

Automotive Group appealed the magistrate's ruling to District Court. When the claim came on for trial, A-1 Auto made a motion to dismiss and objected to Automotive Group's evidence on grounds that both were barred by *res judicata.* But, the District Court disagreed, ruled in Automotive Group's favor on both issues, and ordered A-1 Auto to vacate the premises.

A-1 Auto then moved for a new trial under Rule 59(a)(8), arguing once again that Automotive Group's third complaint and its subsequent appeal to District Court were barred by *res judicata*. When the District Court denied the motion for new trial and sanctioned A-1 Auto under Rule 11 for "repeated attempts to re-litigate" the issue of *res judicata,* it appealed to the Court of Appeals.

On November 19, in ***Automotive Group, LLC v. A-1 Auto Charlotte, LLC***, the Court held that, while under the doctrine of *res judicata* "a final judgment on the merits in one action precludes a second suit based on the same cause of action between the same parties," if "subsequent to the rendition of judgment in the prior action, new facts have occurred which may alter the legal rights of the parties, the former judgment will not operate as a bar to the later action." Therefore, although the magistrate had ruled that Automotive Group waived A-1 Auto's breach of the lease by accepting rent for a month after the initial lease term expired, it returned all of A-1 Auto's rent checks after the magistrate dismissed the first complaint and "[t]his change in circumstance eliminated plaintiff's waiver of defendant's lease breaches." Therefore, Automotive Group's third complaint was *not* barred by *res judicata* and the trial court did not err when it denied A-1 Auto's motion for a new trial.

However, the Court *did* find error in the trial court's determination that A-1 Auto's Rule 59 motion violated Rule 11 because the sanctions authorized by that rule should only be imposed when a pleading lacks factual or legal sufficiency or has been interposed for an improper purpose. While A-1 Auto's motion was based on the same *res judicata* argument it unsuccessfully made at trial, Rule 59(a)(8) authorizes a party to move for a new trial "where an 'error of law' occurred at trial and 'was objected to by the party making the motion.'" Therefore, noted the Court, "the only way for a party to make a proper Rule 59(a)(8) motion is to have specifically objected to that issue at trial … [and it] necessarily follows that a party filing a Rule 59(a)(8) motion will reassert the same arguments presented at trial."

As a consequence, the Court held that, although the trial court did not err when it denied A-1 Auto's motion for a new trial, it *did* err when it concluded that A-1 Auto's motion was filed in bad faith and in violation of Rule 11.

Dismissal of Malicious Prosecution Claim Reversed

After a delay of nearly five years between his arrest and trial, Frankie Washington was convicted of assault and battery, first-degree burglary, kidnapping, robbery, and attempted first-degree sex offense. However, his conviction was later vacated by the Court of Appeals, which determined that delays attributable to the State violated Washington's Sixth Amendment right to a speedy trial. So, he sued the State, City of Durham, City Attorney, district attorney, and multiple Durham police officers, alleging federal and state constitutional violations, malicious prosecution, negligence, intentional and negligent infliction of emotional distress, conspiracy, and supervisory liability.

Washington attempted to serve each defendant by Federal Express, a "designated delivery service" under Rule of Civil Procedure 4(j)(1)(d). He addressed the City's copy of the summons and complaint "c/o Patrick Baker," the City Attorney, and it was delivered to a receptionist in Baker's office. Another defendant's summons and complaint was left with his visiting twelve-year-old grandson. A third defendant's copy was left on the step leading to the side door of his home, and the package containing copies of the summons and complaint for each of the remaining defendants, two former and four current Durham police officers, was delivered to the City Police Department's loading dock. But, in each case, the defendant later admitted by affidavit that he had actually received a copy of the summons and complaint.

The defendants all moved to dismiss, claiming insufficient service of process, and the trial court agreed, dismissing the complaint, except as to the City Attorney, District Attorney, and State. When Washington filed notice of appeal, the trial court issued a certification under Rule 54(b) that there was no just reason to delay the appeal.

On November 5, in ***Washington v. Cline***, the Court of Appeals determined that, although Washington's appeal was interlocutory, the trial court's certification rendered it immediately appealable. It then affirmed the trial court's order dismissing the City of Durham, but reversed the dismissal of Washington's claims against the individual defendants.

In affirming the trial court's dismissal of the claim against the City, the Court held that cities may be served through a "designated delivery service" only when the summons and complaint are "addressed to the mayor, city manager, or clerk, delivering to the addressee." Since Washington's summons and complaint were not addressed to Durham's mayor, city manager or clerk, he failed to properly serve the City and the trial court correctly granted its motion to dismiss.

But, as for Washington's claims against the individual defendants, the Court reached the opposite conclusion. Finding that, under Rule 4(j)(1)(d), service may be made on a natural person by "depositing with a designated delivery service … a copy of the summons and complaint, addressed to the party to be served, delivering to the addressee," the Court found no merit in defendants' argument that the designated delivery service must personally serve either the natural person himself or a service agent with specific authority to accept service. Rather, when service of process is challenged, it may be proved under N.C.G.S. 1-75.10(a)(5) "by affidavit … averring … [t]hat a copy of the summons and complaint was deposited with a designated delivery service … [and] was in fact received as evidenced by the attached delivery receipt or other evidence satisfactory to the court…." That is, "the plain language of section 1-75.10 allows a plaintiff to prove service by designated delivery service with evidence that copies of the summons

and complaint were 'in fact received' by the addressee, not evidence that the delivery service agent personally served the individual addressee…. [T]he crucial inquiry is whether [the addressee] received the summons and complaint, not who physically handed … [it] to the addressee." Therefore, the trial court erred in granting the individual defendants' motions to dismiss, and its order to that effect was reversed.

Dismissal of Malicious Prosecution Claim Affirmed

Denise Mathis, CEO and Executive Director of the Haywood County Council on Aging ("Council"), offered to host flood relief efforts for other non-profits when western North Carolina was struck by two separate hurricanes in September 2004 and Haywood County's "Unmet Needs Committee" (UNC) subsequently acted as a clearinghouse for disbursement of funds received from the "Governor's Disaster Relief Fund" and the United Way of Haywood County.

In early 2006, concern arose over possible misuse of flood relief funds and the Council terminated Mathis' employment. Later, after an investigation conducted by the Waynesville Police Department, Mathis was indicted on fourteen counts of embezzlement, but prior to trial, the Haywood County District Attorney's Office dismissed the charges against her. Mathis then filed suit for malicious prosecution against the United Way, its Executive Director and Disaster Relief Coordinator, and the Council's Program Coordinator, each of whom had cooperated with the police department's investigation of the Council's flood relief account. Judge Alan Thornburg subsequently granted defendants' motion for summary judgment, and Mathis appealed.

On November 5, in ***Mathis v. Dowling***, the Court of Appeals affirmed the trial court's order granting summary judgment and, in doing so, quoted from ***Williams v. Kuppenheimer Mfg. Co., Inc.***, 105 N.C. App. 198 (1992), that "[t]o recover for malicious prosecution the plaintiff bears the burden of proving that the defendant: '(1) instituted, procured or participated in the criminal proceeding against plaintiff; (2) without probable cause; (3) with malice; and (4) the prior proceeding terminated in favor of plaintiff." The Court held that, while no one disputed that the criminal prosecution of Mathis ended in her favor, thereby satisfying the fourth element of a valid malicious prosecution claim, the trial court correctly concluded that she failed to establish the other three essential elements of a viable claim. Therefore, the Court affirmed the trial court's order granting summary judgment for the defense.

Judicial Estoppel Bars Inconsistent Factual Assertions in Successive Lawsuits

On August 6, the Court of Appeals affirmed the $4.9 million verdict obtained by Timothy Hurst and Jeffrey and Beverly Hensley against Moorehead I, LLC and its alter ego, Bruce Blackmon, in ***Estate of Timothy Alan Hurst v. Moorhead I, LLC***, a breach of contract action arising out of the sale of a large tract of land in Cabarrus County. For additional details, see pages 9-10 of the August edition of *North Carolina Civil Litigation Reporter*.

The Hensleys and Hurst filed a second lawsuit arising out of the same transaction, naming as defendants Patrick Jones, Jeffrey Gordon, and Scott Bieber, to whom Moorehead I paid $650,000, $380,383 and $380,383 respectively from a $3.4 million bank loan secured by a first deed of trust on the land Moorehead I purchased from the plaintiffs, whose complaint alleged that the payments to the defendants were fraudulent and violated the Uniform Fraudulent Transfer Act.

Following discovery, both sides moved for summary judgment. After the trial court held that plaintiffs were entitled to judgment as a matter of law against Jones, Bieber, and Gordon for the amounts they received from Moorehead I, the defendants appealed to the Court of Appeals.

On November 5, in ***Estate of Timothy Alan Hurst v. Jones***, the Court found significance in the fact that, in plaintiffs' lawsuit against Moorehead I, LLC and Bruce Blackmon, they alleged that Blackmon held complete domination over Moorehead I, such that it and its development company "had no separate mind, will, or existence on their own," and the jury so found, as a result of which plaintiffs obtained a significant judgment against Blackmon personally. But, in their suit against Jones, Bieber, and Gordon, they contended that Moorehead I had repaid debts it did not owe because its development company was a separate entity, a position the Court found to be "clearly inconsistent with [plaintiffs'] prior assertion."

The Court held that plaintiffs were barred from taking that position by "judicial estoppel," which applies when "First, a party's subsequent position … [is] inconsistent with its earlier position. Second, … judicial acceptance of an inconsistent position in a later proceeding might pose a threat to judicial integrity by leading to inconsistent court determinations…. Third, … the party seeking to assert an inconsistent position would derive an unfair advantage … if not estopped." But, at the same time, the Court was careful to point out, as did the Supreme Court in ***Whitacre Partnership v. Biosignia, Inc.***, 358 N.C. 1 (2004), that "judicial estoppel is limited to … inconsistent *factual assertions* and … should not be applied to prevent the assertion of inconsistent *legal theories*" (emphasis added).

The Court went on to apply the provisions of N.C.G.S. 39-23.3(a), -23.4, -23.5, and -23.8(b)(2) of the Uniform Fraudulent Transfer Act to the facts before it and held that there were genuine issues of material fact regarding the payments made to the three defendants, so it reversed the trial court's order granting summary judgment and remanded the case for further evidentiary proceedings to determine issues of "reasonably equivalent value," defendants' alleged "intent to hinder, delay or defraud," and whether, if the bank payments at issue were fraudulent, nevertheless, defendants were "good faith transferees who took for value."

Attorney's Claim for Interest In Excess of Legal Rate Denied

In June 2003, James Brookbank hired attorney Jewel Farlow to represent him in litigation with his former spouse. Over the course of the next four years, Farlow issued five separate invoices. Attached to the fourth was a letter stating, in pertinent part, that "[i]nterest at the rate of 1½ percent per month will be added to the balance due on amounts which remain unpaid thirty (30) days or more." A similar notice appeared on the invoice itself. Farlow's other four invoices included no mention of interest at all.

Brookbank paid the first two invoices in full and made a partial payment on the fourth. After receiving no further payment for over two years, Farlow brought a breach of contract action against her client, seeking recovery of his past due balance of $22,359, plus interest "at the legal rate." At trial, the jury returned a verdict of $16,600 and then, in accordance with the terms of the parties' pretrial agreement, the trial court, sitting without a jury, proceeded to determine the extent to which Brookbank owed interest. Farlow requested an award at the rate of 1½ percent per month under N.C.G.S. 24-11 and Brookbank argued for the legal rate. The trial judge, agreeing with Brookbank, entered an interest award at the legal rate, and Farlow appealed to the Court of Appeals.

On November 5, in ***Farlow v. Brookbank***, the Court of Appeals affirmed the trial court's order, holding that, while N.C.G.S. 24-11(a) authorizes a party to charge "finance charges or other fees" not to exceed one and one-half percent (1½%) per month on unpaid balances owed where credit is extended under an "open-ended credit or similar plan," before it can do so the creditor must first give notice to the debtor that she intends to assess interest, and it may not be assessed retroactively. That is, "in order to lawfully assess

interest against an unpaid balance pursuant to N.C. Gen. Stat. 24-11(a), the creditor must notify the debtor of the interest payment requirement, refrain from assessing interest against principal amounts accrued prior to the date upon which notice … was provided, and give the debtor at least 25 days after the date upon which the principal amount in question had been billed to make an interest-free payment."

Applying those principles to the facts before it in the present case, the Court noted that, although Farlow did not attempt to charge Brookbank with interest until thirty days after she transmitted her fourth invoice, the effect of her claim was to "impermissibly seek to charge interest on amounts relating to services provided … prior to [her] initial notice, a result that our prior decisions construing N.C. Gen. Stat. 24-11(a) simply do not permit." And, continued the Court, as for an award of interest on the principal balance owed on Farlow's fifth invoice, the notice she provided to Brookbank with her fourth invoice "will not be deemed valid in perpetuity." Rather, "a creditor's right to collect interest at a level higher than the legal rate pursuant to N.C. Gen. Stat. 24-11(a) should be asserted in a regular and consistent manner and may be waived by the creditor's subsequent failure to assert her rights." The Court found that the single reference to interest in the fourth of Farlow's five invoices "stands in stark contrast to the level of regularity … this Court has deemed important in determining that a creditor was entitled to assess interest charges against a debtor pursuant to N.C. Gen. Stat. 24-11(a)." Therefore, Farlow waived her right to charge interest at the rate of 1½ percent per month on the principal balance of her fifth invoice, and the trial court properly refused to award it to her.

Action On Promissory Note Dismissed

In September 2012, First Federal Bank sued Scott Aldridge, seeking enforcement of two promissory notes that identified Aldridge as the borrower and "Cape Fear Bank" as the lender. Neither First Federal's complaint nor an attached affidavit from its Asset Recovery Coordinator indicated that it had acquired the notes in question from Cape Fear Bank or was otherwise their holder in due course.

Aldridge's answer included a Rule 12(b)(6) motion to dismiss, which was granted by the trial court. First Federal appealed, but on November 5, in ***First Federal Bank v. Aldridge***, the Court of Appeals affirmed. Citing ***Deloatch v. Vinson***, 108 N.C. App. 147 (1981), the Court held that when "the plaintiff is the payee of a promissory note that has been attached to the complaint, he is not required to allege … that he is the holder of the note because '[t]he payee … is the *prima facie* owner and holder." But, "when the plaintiff is not the payee, he 'must aver … facts showing … assignment or other transfer to himself.'" Here, since the notes in question identified "Cape Fear Bank," and not plaintiff, as payee, First Federal's complaint lacked the essential element of an allegation that it had the right to enforce them. As a consequence, the trial court's dismissal under Rule 12(b)(6) was proper.

The Court also found no merit in First Federal's argument that dismissing its complaint with prejudice was "extreme" and "inequitable." To the contrary, held the Court, "[t]he decision to dismiss an action with or without prejudice is in the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion." And, an abuse of discretion only occurs when the court's ruling is "manifestly unsupported by reason or … so arbitrary that it could not have been the result of a reasoned decision." Where, as here, the complaining party made no effort to amend its complaint, take a voluntary dismissal without prejudice, or move that its claim be dismissed without prejudice, it was not an abuse of discretion for the trial court to dismiss it with prejudice.

Additional Opinions

On November 8, in ***Green v. Freeman***, a lawsuit that arose out of a failed corporate venture and

involved claims of breach of contract, breach of fiduciary duty, agency, fraud, conversion, unfair and deceptive trade practices, a request to pierce the corporate veil, a jury verdict, and post-trial motions for judgment notwithstanding the verdict (JNOV) and/or for a new trial, the Supreme Court reversed and remanded the decision of a divided panel of the Court of Appeals affirming the judgment and orders entered by the trial court in Guilford County Superior Court.

On November 19, in ***Brown v. Cavit Sciences, Inc.***, the Court of Appeals affirmed the denial of defendant Joseph Connell's Rule 55(d) and 60(b) motion for relief from a $1.9 million default judgment entered against Connell and others after they failed answer a complaint seeking compensatory damages, treble damages, interest, and attorneys fees arising out of a $100,000 loan made by plaintiff Christopher Brown, DDS. In a lengthy opinion addressing the grounds upon which Rule 60 motions might be allowed, including cases in which default judgments are entered in excess of the relief requested and, therefore, are "irregular, irrational and should have been set aside," the Court found that the judgment entered against Connell was not "irregular." Therefore, there was no error in the trial court's order denying Connell's Rule 60 motion for relief.

Randal Long, football coach for Providence High School, was driving an activity bus owned by the Charlotte-Mecklenburg Board of Education when it collided with a vehicle driven by Tyki Sakwan Irving, who filed an Industrial Commission form NCIC-T-1, Claim for Damages Under Tort Claims Act, alleging personal injuries caused by Long's negligence. The Commission eventually granted the Board of Education's motion for summary judgment after concluding that the accident did not fall within the requirements of N.C.G.S. 143-300.1 and, as a result, it lacked jurisdiction over the claim. However, Irving appealed the Commission's ruling and, in a lengthy opinion issued on November 5, ***Irving v. Charlotte-Mecklenburg Board of Education***, the Court of Appeals reversed, holding that, notwithstanding a Board of Education policy stating that "[a]ctivity buses … are not covered by the Tort Claims Act," the bus Long was driving at the time of its collision with Irving's vehicle qualified as a "school transportation service vehicle" under N.C.G.S. 143-300.1(a) and Long's operation of it was in accordance with N.C.G.S. 115C-242, so the Industrial Commission did, in fact, have "sole jurisdiction … to hear Plaintiff's claim."

WORKERS' COMPENSATION

Supreme Court Authorizes Retroactive Approval of Attendant Care Services

While working as a restaurant manager for Burger King on August 13, 2007, Dewey Mehaffey injured his left knee. He underwent arthroscopic surgery and was later diagnosed with reflex sympathetic dystrophy and depression. Although his pain management doctors were of the opinion that he would derive greater benefit if he attempted to move under his own strength to rehabilitate his injury and also believed that providing him with a power wheelchair was counterproductive, his family doctor prescribed a walker, motorized wheelchair, hospital bed, and "motility scooter."

Until August 14, 2008, Mehaffey's wife assisted him with his daily activities approximately four hours per day. At that point in time, she stopped working outside the home and attended to his daily needs sixteen hours a day, helping him out of bed, giving him a sponge bath, assisting him when he dressed, helping him onto the scooter, transferring him from the scooter to a recliner, preparing his meals, attending to his bodily needs, and, at the end of the day, helping him dress for and get into bed.

In March 2009, an Industrial Commission nurse recommended that Mehaffey receive eight hours of attendant care, Monday through Friday, but

his family doctor and a life care planner recommended attendant care sixteen hours a day, seven days a week. After a dispute arose over whether Mehaffey's wife should be compensated for the services she provided before they were approved by the Commission, a deputy commissioner held the defendants liable, effective August 15, 2008. And, later, the deputy commissioner's award was amended by the Full Commission to compensate her, retroactive to November 15, 2007, although she was still employed outside the home at that time. Defendants gave notice of appeal to the Court of Appeals.

The Court of Appeals, relying on the Supreme Court's decision in ***Hatchett v. Hitchcock Corp.***, 240 N.C. 591 (1954), reversed the Commission's award of compensation for services provided by Mrs. Mehaffey before they were approved by the Commission, but on November 8, in ***Mehaffey v. Burger King***, the Supreme Court reversed the Court of Appeals, holding that the provisions of N.C.G.S. 97-26(a) "[do] not give the Commission authority to mandate that certain attendant care service providers may not be compensated unless they first obtain approval from the Commission before rendering their assistance."

Recognizing that "this result may appear on its face to be inconsistent with our decision in ***Hatchett***," in which the Court held that "the Commission's fee schedule, promulgated pursuant to the Commission's rulemaking authority under the Workers' Compensation Act (the Act), prohibited … an award of compensation for practical nursing services unless … first approved by the Commission," the Court held that "[w]hen, however, a change occurs in the law upon which a prior decision rests, this Court must look afresh at the questioned provision." And, the Court found that, while at the time ***Hatchett*** was decided, N.C.G.S. 97-26 provided that employers were liable for medical treatment "when ordered by the Commission," that section of the Act was "completely rewritten [in 1994], removing the 'when ordered by the Commission' language …. Therefore, the statutory basis for the decision in ***Hatchett*** no longer exists."

The Court went on to hold that it was "unable to affirm the Commission's award of compensation for Mrs. Mehaffey's past attendant care services" because "an injured worker is required to obtain approval from the Commission within a reasonable time after he selects a medical provider" and, although the defendants challenged the reasonableness of the timing of plaintiff's request, the Commission's opinion award failed to resolve that issue. Therefore, Mehaffey's claim was remanded to the Commission to "make the necessary findings of fact and conclusions of law on this issue. "

In dissent, Justice Newby took exception to what he viewed as a "majority opinion [which] circumvents the doctrine of *stare decisis* by 'overstep[ping] the bounds of legislative intent,' effectively overruling ***Hatchett***." After tracing the Commission's fee schedule preapproval requirement back to 1936, Justice Newby disagreed with the majority's conclusion that the 1994 revisions to the Act justified reversal of the holding in ***Hatchett***, stating that, "[i]f anything, the 1994 revisions … actually bolstered the Commission's authority," and that "authority is even more evident when considered in light of the long history of the preapproval requirement in conjunction with the plain and unambiguous language of section 97-25.4(a) instructing the Commission to adopt 'rules and guidelines' for the provision of 'attendant care' that 'shall ensure that injured employees are provided the services and care intended by this Article and … medical costs are adequately contained.'"

In a separate PER CURIAM opinion issued by the Supreme Court on the same day as ***Mehaffey***, the December 20, 2011 decision of the Court of Appeals in ***Chandler v. Atlantic Scrap & Processing*** was affirmed "[f]or the reasons stated in ***Mehaffey v. Burger King***," with Justice Newby again dissenting.

Taxi Driver Deemed Employee, Not Independent Contractor

Triangle Yellow Transit and its owner, Harold Dover, hired J.D. Mills as a taxi driver in December 2009. After dropping off his last customer on May 23, 2011, Mills was injured in a motor vehicle collision, underwent surgery, and received follow-up treatment, including physical therapy. He filed a notice of claim (Form 18) and request for hearing (Form 33) in June 2011, to which the taxi company responded by contending that he was not their employee, but rather, an independent contractor. However, Deputy Commissioner Adrian Phillips found otherwise, awarded benefits, and assessed penalties for the taxi company's failure to carry workers' compensation insurance in violation of N.C.G.S. 97-93. After the Full Commission affirmed, the company and its owner appealed to the Court of Appeals.

On November 19, in ***Mills v. Triangle Yellow Transit***, the Court of Appeals affirmed, holding that "[w]hether a relationship is one of employer-employee or independent contractor turns upon the extent to which the party for whom the work is being done has the right to control the manner and method in which the work is performed," with factors relevant to the control issue being whether the injured person "(a) is engaged in an independent business, calling or occupation; (b) is to have the independent use of his special skill, knowledge, or training in the execution of the work; (c) is doing a specified piece of work at a fixed price or for a lump sum or upon a quantitative basis; (d) is not subject to discharge because he adopts one method of doing the work rather than another; (e) is not in the regular employ of the other contracting party; (f) is free to use such assistants as he may think proper; (g) has full control over such assistants; and (h) selects his own time."

The Court found defendants' reliance on ***Alford v. Victory Cab Co.***, 30 N.C. App. 657 (1976), in which the plaintiff taxi driver was determined to be an independent contractor, not an employee, was misplaced because, in ***Alford***, Victory Cab had no control over the manner or method Alford chose to operate his vehicle, he completely controlled his own work schedule, he could disregard Victory's radio dispatcher, and he kept all the fares and tips he earned, whereas in the present case, the defendants owned and maintained the taxis driven by Mills and their other drivers, he could not set his own wages and was required to give the defendants fifty percent of his fares, the defendants set his schedule, he did not have another job, the defendants required advance notice if he wanted to take a vacation, the company had authority to reprimand him if he violated its policies, he was not allowed to use his company-provided and company-maintained taxi for his own personal purposes, and he was required to follow service routes and pick up customers based on the commands of the company's dispatcher.

Injured Employee Fails to Establish Medical Causation

Sonya Chaffins suffered a compensable injury to her back on August 1, 2002, for which she received medical treatment over an extended period of time, including eleven operations on her spine. Her legs would buckle on occasion, causing her to fall and, on October 7, 2010, her left leg gave out as she was getting into her car, causing her to fall and twist her right shoulder.

Chaffins came under the care of an orthopedic surgeon, Dr. Jesse West, whose initial diagnosis was severe biceps tendonitis and right shoulder impingement, for which he provided steroid injections and physical therapy. Later, after she failed to improve and a CT myelogram was performed, he changed his diagnosis to degenerative disc disease with central canal stenosis.

In March 2011, after Chaffins' nurse case manager notified her that her employer's workers' compensation insurer would no longer

authorize treatment of her right shoulder, she requested a hearing, which was conducted by Deputy Commissioner Melanie Goodwin, who issued an opinion and award favorable to Chaffins that was later affirmed by the Full Commission.

But, on November 5, the Court of Appeals reversed the Commission's award in ***Chaffins v. Tar Heel Capital Corporation***, holding that while "[a] subsequent injury is compensable if it is the direct and natural result of a compensable primary injury," the subsequent injury "is not compensable if it is the result of an independent, intervening cause."

Recognizing that it is the employee's burden to prove compensability, and citing ***Click v. Pilot Freight Carriers, Inc.***, 300 N.C. 164 (1980), the Court of Appeals reiterated the Supreme Court's often-quoted holding that, while there are many instances in which the facts are such that "any layman of average intelligence … would know what caused the injuries complained of," an expert's opinion regarding medical causation is needed where "the exact nature … of a particular type of injury involves complicated medical questions far removed from the ordinary experience and knowledge of laymen." That being so, "could or might" testimony and opinions to the effect that an accident "possibly" caused the condition in question are "not generally enough" to establish the "reasonable degree of medical certainty" m..necessary to establish medical causation.

In the present case, the only medical evidence supporting the Commission's finding of a connection between Chaffins' October 7, 2010 fall and the degenerative disc disease for which she received treatment from Dr. West was a notation in a medical record that the "onset [of] shoulder pain … in October 2010 appears to be in fact related." That notation, found the Court, was "not competent evidence of causation" because it "was not Dr. West's opinion." Rather, it "merely amounts to speculation." As a consequence, the record was devoid of evidence supporting the Commission's finding of a causal connection between Chaffins' admittedly compensable back injury and the shoulder and neck difficulties she developed eight years later. Therefore, the Court reversed the Commission's award of benefits to the extent that it ordered the defendants to compensate Chaffins for the treatment of her right shoulder and neck.

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

A Service and Publication of
Dennis Mediations, LLC

George W. Dennis III

NCDRC Certified Superior Court Mediator

NC Industrial Commission Mediator

dennismediations@gmail.com

919-805-5002

www.dennismediations.com