NORTH CAROLINA CIVIL LITIGATION REPORTER

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CIVIL LIABILITY

Standard of Care Testimony Sufficient to Withstand Directed Verdict Motion

Jeffrey Higginbotham, a resident of West Virginia, developed pain and numbness in his left arm. After failing to receive relief from a series of local doctors, he was referred to a "major medical center" and chose Duke, where he came under the care of Dr. Thomas D'Amico, a board-certified thoracic surgeon. Dr. D'Amico suggested surgical removal of the first rib to alleviate nerve compression and Higginbotham agreed to the proposed procedure. Dr. D'Amico operated, but post-surgery x-rays revealed that the second, not first, rib had been removed.

After neither the procedure performed by Dr. D'Amico nor another operation involving a different approach by a vascular surgeon in Colorado alleviated Higginbotham's symptoms, he sued Dr. D'Amico and Duke, alleging medical malpractice, battery by performance of an unauthorized operation, and failure to obtain informed consent. The trial court dismissed the informed consent claim, granted summary judgment on the battery claim, and directed a defense verdict on the medical malpractice claim. Higginbotham appealed the latter two rulings.

On April 16, in ***Higginbotham v. D'Amico***, the Court of Appeals affirmed the trial court's dismissal of the battery claim. Noting that plaintiff's own expert testified that resection of the second, rather than first, rib was a "recognized complication" of the procedure and "not really a breach in the standard of care," the Court found that "all of the standard of care evidence was that the resulting event was a recognized complication of the consented-to surgical procedure," so summary judgment on the battery

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claim was proper.

However, when the Court turned its attention to the medical malpractice claim, it ruled that the trial court should not have excluded the standard of care testimony of Higginbotham's expert under the theory that he had "testified only to a 'national' standard of care and did not establish sufficient familiarity with Duke and Durham so as to meet the well-established requirements of section 90-21.12." Citing ***Pitts v. Nash Day Hospital, Inc.***, 167 N.C. App. 194 (2004), the Court held that "[t]he mere use of the phrase 'national standard of care' is not fatal to an expert's testimony if … [it] otherwise meets the demands of section 90-21.12." Higginbotham's expert may have repeatedly used the phrase "national standard of care," but he had also acknowledged Duke's "fine reputation" and testified that the standard of care at Duke would be "the national standard … applied to all finer institutions," *i.e.*, "the highest standard of care of the best hospitals." Thus, his testimony was analogous to that of the expert in ***Rucker v. High Point Memorial Hospital***, 285 N.C. 519 (1974), in which the Supreme Court found that standard of care testimony meets the requirements of N.C.G.S. 90-21.12 "where the 'same or similar communit[y]' was a group of the defendant's peer institutions." Since the testimony of Higginbotham's expert was to that effect, it was admissible. As a consequence, the trial court should not have directed a verdict for the defense on his medical malpractice claim.

City Not Entitled to Governmental Immunity In Dispute Over Handling of Construction Contract Responsibilities

The Town of Sandy Creek sued East Coast Contracting (ECC) for damage done to the town's roads while ECC was constructing a sewer system for the City of Northwest. ECC then filed a third party complaint against Northwest, contending that the city owed a duty of reasonable care when exercising its responsibilities on the project, which it breached in several respects. Northwest moved to dismiss under Rule 12(b)(6), invoking the doctrine of governmental immunity, but its motion was denied by the trial court.

Last December, in ***The Town of Sandy Creek v. East Coast Contracting, Inc.*** [***Sandy Creek I***], the Court of Appeals affirmed because ECC's "allegations of breaches of the duty of reasonable care do not concern decisions of government discretion such as whether to construct a sewer system or where to locate the sewer system. Instead, the alleged breaches concern Northwest's handling of the contract and Northwest's business relationship with the contractor, acts that are not inherently governmental but are commonplace among private entities." Therefore, "Northwest was involved in a proprietary function while handling its business relationship with ECC" and not protected from liability by governmental immunity.

Northwest successfully petitioned for discretionary review and the Supreme Court then ordered the Court of Appeals to reconsider its decision in light of ***Williams v. Pasquotank County Parks and Recreation Department***, __ N.C. __ (2012). On April 16, in ***The Town of Sandy Creek v. East Coast Contracting, Inc.*** [***Sandy Creek II***], the Court issued a revised opinion with the same result, stating that it "remain[s] convinced that a local governmental unit acts in a proprietary function when it contracts with engineering and construction companies, regardless of whether the project under construction will be a governmental function when completed." Therefore, governmental immunity did not shield Northwest from ECC's third party complaint and the city's Rule 12(b)(6) motion was properly denied.

New Trial Granted in Medical Malpractice Action

On February 9, 2008, Aziza Katy gave birth to twins at McDowell Hospital. A subsequent x-ray showed evidence of pneumonia, for which she was treated with antibiotics. Two days after being discharged from the hospital on February 13, Katy was seen by her obstetrician, complaining of shortness of breath. He sent her to the emergency room, where Drs. Kevin Chung and David Craig diagnosed pneumonia, treated her with a different antibiotic, and released her.

A week later, Katy returned to the ER, again complaining of shortness of breath. She was examined by John David Riser, a physician's assistant, who ordered a flu swab, strep test and chest x-ray. Both Riser and Dr. Michael Capriola, with whom he consulted about the x-ray, thought Katy had pneumonia. Riser prescribed another antibiotic and discharged Katy with instructions to return to the ER if her symptoms continued or worsened.

Katy's chest x-ray was not officially interpreted until the following Monday, February 25, because no radiologists were on duty at the hospital on the weekend. When he read it that Monday, the radiologist's diagnosis was different from that of Riser and Dr. Capriola; he felt she was probably suffering from congestive heart failure.

Two days later, Dr. Chung received the radiologist's report. He immediately instructed an ER nurse to contact Katy and warn her that she should see her primary care physician "ASAP." Because she was unable to schedule a visit with an internist or cardiologist until mid-March, the nurse recommended that Katy return to the ER. She was not feeling well and wanted to be seen in the ER, but her husband convinced her to wait.

Katy was readmitted to McDowell Hospital on March 1 and, on the following day, transferred to Mission Hospital, where she suffered an embolus and then a stroke. Her condition continued to decline and she died from complications of the stroke on March 23.

As administrator of her estate, Katy's husband filed a wrongful death action, alleging medical malpractice on the part of Dr. Capriola, Dr. Chung, Riser and others at McDowell Hospital and contending that they had negligently delayed diagnosis of his wife's congestive heart failure, which caused or contributed to her stroke and death. At trial, the jury found no negligence on the part of Drs. Capriola and Chung, but determined that Katy's death resulted from Riser's negligence. He and the hospital appealed.

In a lengthy opinion entered on April 16, ***Katy v. Capriola***, the Court of Appeals ordered a new trial, finding three reversible errors by the trial court: excluding Dr. Capriola's opinion about whether Riser had met the applicable standard of care; failing to submit the issue of contributory negligence to the jury; and denying defendants' request for a special jury instruction on the issue of proximate cause.

The Court noted that, although the trial court had permitted Dr. Capriola to offer an opinion on the standard of care applicable to his own decisions regarding Katy's treatment, it did not allow him to offer a similar opinion with respect to Riser, even though the doctor qualified as a medical expert under Rule of Evidence 702 and subsection (a) authorizes physicians to testify about the standard of care applicable to physician assistants, if they are familiar with the physician assistant's experience and training and either the standard of care or medical resources available in the physician assistant's community. Here, Dr. Capriola worked directly with Riser and he testified on *voir dire* that he was familiar with the standard of care for physician assistants. As a consequence, the Court could "discern no logical reason" why the trial court excluded his opinion about Riser's compliance with the applicable standard of care.

The Court also found error in the trial court's granting of plaintiff's motion for directed verdict on the issue of contributory negligence. Quoting the Supreme Court's holding in ***Cobo v. Rata***, 347 N.C. 541 (1998), that "[i]f there is more than a scintilla of evidence that plaintiff is contributorily negligent, the issue is a matter for the jury, not for the trial court," the Court found that Katy's failure to follow the explicit instructions of the ER doctors to immediately seek additional medical care if her symptoms persisted or worsened was "more than a scintilla of evidence" of her contributory negligence, making it an issue for the jury, not the court, to decide.

And, finally, the Court agreed with the defendants that "the trial court erred in failing to instruct the jury that plaintiff had the burden to prove more than a mere increased chance of recovery and survival in order to establish proximate cause." While the trial judge's jury instructions included the standard pattern instruction on proximate cause, which "accurately defines proximate cause, it does not make clear to the jury that '[p]roof of proximate cause in a malpractice case requires more than a showing that a different treatment would have improved the patient's chances of recovery.'" Because there was much conflicting testimony about whether the delay in treatment proximately caused Katy's death, and as the proposed special instruction was consistent with the holding in ***White v. Hunsinger***, 88 N.C. App. 382 (1988), it was error for the trial court not to give it to the jury before it deliberated.

While the Court of Appeals granted Riser and the hospital a new trial, it rejected their contention that the trial court should not have granted plaintiff's motion *in limine* to exclude evidence of his remarriage. Acknowledging that the issue was one of first impression, it observed that "North Carolina has long adhered to the collateral source rule" and "this rule requires the exclusion of evidence of plaintiff's remarriage." Only the test of time will establish whether the Court's ruling in that regard proves to be of particular significance to litigants in future wrongful death actions.

Noncompetition Agreement Contrary to Public Policy

Phelps Staffing, LLC was in the business of providing temporary labor to its clients. After CTP, Inc. began successfully competing with Phelps for its existing clients and started recruiting Phelps employees, Phelps implemented a requirement that its employees sign noncompetition agreements that effectively prohibited them from leaving their employment to work directly for a Phelps client or indirectly through another staffing agency.

After a number of Phelps employees working in North Carolina, Georgia and Virginia became CTP employees, Phelps filed suit, asserting claims of tortious interference with contract, conversion, and unfair and deceptive trade practices under N.C.G.S. 75-1.1. However, CTP's motion for summary judgment was granted by the trial judge, Howard E. Manning, Jr., who concluded that the Phelps noncompetition agreement was "unconscionable, void and unenforceable as a matter of law and public policy."

On April 16, in ***Phelps Staffing, LLC v. C. T. Phelps, Inc.***, the Court of Appeals agreed with Judge Manning that "our caselaw disfavors noncompetition agreements which hamper an individual's right to earn a livelihood unless the restriction protects a sufficient countervailing interest of the employer." While noncompetition agreements *can* be valid and enforceable if committed to writing, made part of a contract of employment, based on valuable consideration, reasonable both as to time and territory, and not against public policy, Phelps admitted that the primary purpose of its agreement was to prevent its employees from working for competitors, and it offered no evidence that its employees had access to trade secrets or the kind of unique or

proprietary information that has formed the basis for enforcing noncompetition agreements in other cases. The Court held that where "such proprietary interests of the employer are absent and the effect of a contract is merely to stifle normal competition, it is … offensive to public policy … in promoting monopoly at the public expense" and will not be enforced.

Denial of Petition to Eliminate Workers' Compensation Lien Affirmed

Bobby Anglin, a resident of South Carolina, was injured in South Carolina in a motor vehicle accident that arose out of his employment with a North Carolina company, Dunbar Armored, Inc. After Dunbar paid $31,809.48 in benefits under the North Carolina Workers' Compensation Act, Anglin sued the driver of the other vehicle. He settled for $92,712.55 and Dunbar received a one-third reimbursement of its workers' compensation lien from the tortfeasor's insurer.

Anglin then obtained an additional $30,000 from his underinsured (UIM) motorist carrier and brought a declaratory judgment action in which he sought to eliminate Dunbar's subrogation interest in the UIM recovery, contending that under South Carolina law, which applied because his UIM policy was a South Carolina contract, insurers cannot subrogate against UIM recoveries. However, the trial court disagreed. It determined that North Carolina law applied, as Anglin's motion to eliminate Dunbar's lien was based on the provisions of a North Carolina statute, N.C.G.S. 97-10.2(j), and it concluded that, considering all of the factors set forth in the statute, including the additional workers' compensation benefits Anglin was likely to receive in the future, Dunbar should be paid the remaining two-thirds of its lien from the UIM recovery.

On April 2, in ***Anglin v. Dunbar Armored, Inc.***, the Court of Appeals affirmed, finding no merit in Anglin's argument that, because the funds at issue were paid pursuant to a South Carolina insurance contract, South Carolina law applied, since the terms of the policy were not at issue and, in any event, Dunbar was not a party to it. The real question was which law gave the trial court authority to adjust Dunbar's lien. Since it was N.C.G.S. 97-10.2(j), a statute which had been found "remedial in nature" in ***Cook v. Lowe's Home Centers, Inc.***, 209 N.C. App. 364 (2011), and as "remedial rights are determined by the law of the forum," the trial court had correctly applied N.C.G.S. 97-10.2(j) to Anglin's UIM recovery when it awarded Dunbar the remainder of its workers' compensation lien.

Rule 60(b) Motion Remanded for "Proper Hearing"

Gary and Mary Novak filed suit against Daigle, Inc. and Barbara Howell, alleging breach of contract, unfair and deceptive trade practices, and fraud. After Howell filed an answer, but before the Novaks could serve Daigle, the case was set on a "clean-up" calendar. When none of the parties appeared at calendar call, the trial court dismissed plaintiffs' complaint with prejudice.

Soon after the Novaks' attorneys received the order of dismissal, they moved for relief under Rule 60(b), pleading excusable neglect and asserting that they did not receive notice of the administrative calendar. Less than three weeks later, the trial court entered an order denying the Rule 60(b) motion. Plaintiffs then appealed to the Court of Appeals.

In an opinion filed on April 2, ***Novak v. Daigle, Inc.***, the Court found that "[t]he record before us does not indicate that any hearing was noticed or held." Quoting from ***Hoglen v. James***, 38 N.C. App. 728 (1978), it observed that "[i]t is the duty of the judge presiding at a Rule 60(b) hearing to make findings of fact and to determine from such facts whether the movant is entitled to relief." Since the trial court's order contained no findings

of fact or conclusions of law, and as it was entered without a hearing, plaintiffs had not been given an opportunity to present evidence or argue in support of the relief they were seeking. That being so, the Court vacated the trial court's order and remanded the case for a "proper hearing" on plaintiffs' motion.

WORKERS' COMPENSATION

Supreme Court Leaves Undisturbed Court of Appeals Opinion Addressing Statutory Employer Provisions of N.C.G.S. 97-19

Jose Gonzalez was rendered totally and permanently disabled by injuries suffered in a work-related automobile accident while he was employed by Worrell Construction, a subcontractor for Patrick Lamm and Company. Relying on a certificate of insurance Worrell had produced for an earlier job, Lamm did not obtain a similar certificate from Worrell for the project on which Gonzalez was working when injured.

Worrell's workers' compensation insurer, Cincinnati Insurance, contended that it was not liable because it canceled Worrell's policy before Gonzalez's injury occurred. However, Deputy Commissioner Adrian Phillips found otherwise. She ordered Cincinnati to pay the benefits to which Gonzalez was entitled, but also found Lamm and its insurer, Builders Mutual, "jointly and severally liable" and secondarily responsible, should Cincinnati default on its payments.

After the Full Commission affirmed the deputy commissioner's award, Cincinnati appealed and Builders Mutual cross-appealed. Last June, in ***Gonzalez v. Worrell***, the Court of Appeals affirmed in a 2–1 decision in which Judges Beasley and Calabria found evidence in the record to support the Commission's determination that Cincinnati had failed to comply with N.C.G.S. 58-36-105(b), a statute which provides that, to effectively cancel a workers' compensation insurance policy, written notice must be given by registered or certified mail at least 15 days in advance. As a consequence, Cincinnati's policy was still in effect on the date of accident and it was liable for the compensation benefits owed to Gonzalez.

The Court's majority also affirmed the contingent liability of Lamm and Builders Mutual under the theory that Lamm had violated N.C.G.S. 97-19, which provides that "[a]ny principal contractor … who shall sublet any contract … without requiring from such subcontractor … a certificate … [of] workers' compensation insurance … shall be liable … to the same extent as such subcontractor…."

While Judge Steelman concurred with the majority that Cincinnati was liable, he dissented from their determination that Lamm was secondarily liable as a "statutory employer" under N.C.G.S. 97-19. Relying on ***Greene v. Spivey***, 236 N.C. 435 (1952), in which the Supreme Court held that the purpose of N.C.G.S. 97-19 is "to make sure … workers' compensation insurance is in effect," Judge Steelman found that purpose satisfied by the insurance available to Worrell through Cincinnati. He also noted that, in both ***Rich v. RL Casey, Inc.***, 118 N.C. App. 156 (1995), and ***Patterson v. Markham & Associates***, 123 N.C. App. 448 (1996), his Court had held that for a principal contractor to be liable to an injured worker as a statutory employer under N.C.G.S. 97-19, the subcontractor must be *without* workers' compensation insurance, which, thanks to the majority's finding of liability on Cincinnati's part, was not so in this case.

In a PER CURIAM opinion filed on April 12, the Supreme Court split 3-3 on whether to affirm or reverse the 2-1 majority opinion of Judges Beasley and Calabria. Accordingly, it has been "left undisturbed and stands without precedential value."

Dispute Over Cooperation With Vocational Rehabilitation Services Remanded for Third Time

Centerpoint Human Services accepted Mary Frances Powe's claim as compensable on a Form 60, voluntarily paid medical and TTD benefits, and provided her with the services of vocational rehabilitation specialist Sonya Ellington. Later, a dispute arose over whether Powe had "substantially complied" with the services provided by Ellington or interfered with them to the extent that her actions were the equivalent of a refusal to accept vocational rehabilitation, entitling Centerpoint to cease payment of TTD under N.C.G.S. 97-25 (now N.C.G.S. 97-32.2). The resolution of that issue has been the subject of multiple written opinions, including two prior decisions of the Court of Appeals, ***Powe v. Centerpoint Human Services***, 183 N.C. App. 300 (2007) (unpublished), *available* at 2007 WL 1412447, *disc. rev. denied*, 362 N.C. 237 (2008) [***Powe I***], and ***Powe v. Centerpoint Human Services***, __ N.C. App. __ (2011), *disc. rev. denied*, __ N.C. __ (2012) [***Powe II***]. On both occasions, the Court vacated the Commission's award and remanded the case for additional findings addressing the contested vocational issue.

Last May, the Full Commission entered its most recent opinion in ***Powe***, in which it found that she had misrepresented her true physical capacity with respect to her need to use a cane, failed to make a genuine effort to locate employment and comply with vocational rehabilitation, significantly interfered with Ellington's efforts, and willingly refused vocational rehabilitation until February 22, 2008. It also found that Ellington's decision to end vocational services at that time was not entirely the result of Powe's failure to comply. Based on those findings, the Commission concluded that Powe was barred from receiving TTD until February 22, 2008, but entitled to it thereafter. Both parties appealed.

On April 2, in ***Powe v. Centerpoint Human Services*** [***Powe III***], the Court of Appeals found that the record contained competent evidence supporting the Commission's determination that Ellington's decision to end vocational services was not *entirely* the result of Powe's failure to comply. Therefore, the Court was bound by the Commission's finding to that effect. Nevertheless, it ordered another remand for additional findings because Centerpoint raised the issue of Powe's continued disability and the Commission "improperly or accidentally converted the fact that Defendants paid temporary total disability benefits into a wholly unsupported stipulation that Plaintiff was totally disabled." While Centerpoint had accepted the compensability of Powe's injury by filing a Form 60, "[i]t is well settled that entering into a Form 60 does not create a presumption of ongoing disability. ***Sims v. Charmes/Arby's Roast Beef***, 142 N.C. App. 154, *disc. rev. denied*, 353 N.C. 729 (2001)." So, "once the continuing status of Plaintiff's disability was disputed, it became Plaintiff's burden to prove that she remained disabled" under the four-prong test established in ***Russell v. Lowes Product Distribution***, 108 N.C. App. 762 (1993). Since the Commission had failed to address the question of Powe's continued disability, the case was remanded for additional findings resolving that issue.

Award of Total Disability Benefits to Bank Employee Affirmed

Katherine Williams, a 59 year old employee of Bank of America's overdraft department with a Bachelor of Arts degree in special education, had in the past worked as a special education and second grade teacher. In April 2004, she fell, hit her back on a chair, and "snapped" her neck while training a new employee. Over the course of the next four years, she was evaluated for migraine headaches and back and neck pain by a series of medical specialists who periodically excused her from work.

In June 2008, Williams was laid off by the bank as part of a reduction in force and received a benefit package that allowed her to collect severance pay and unemployment compensation. While doing so, she unsuccessfully applied for positions with eight other banks. Later, her neurologist recommended that she apply for Social Security disability. In a subsequent affidavit, he expressed the opinion that she had reached maximum medical improvement and would require lifetime medical management of her headaches.

Deputy Commissioner Myra Griffin found Williams totally disabled, awarded ongoing weekly benefits, and ordered Bank of America to continue paying her medical expenses. After the bank gave notice of appeal, Williams moved to dismiss for its failure to timely file a Form 44 and brief. The bank's attorneys then filed both.

The Full Commission denied Williams' motion to dismiss, but sanctioned the bank by denying it the opportunity to make an oral argument. It then affirmed the deputy commissioner's award.

On April 2, in ***Williams v. Bank of America***, the Court of Appeals found no merit in Williams' argument that the Commission committed reversible error when it chose not to dismiss the bank's appeal to the Full Commission. While the bank had failed to timely comply with the deadlines found in Commission Rule 701, the provisions of Rule 801 authorize the Commission to waive its own rules "in the interests of justice." That being so, it may in its discretion allow an appeal to proceed, even if the appellant fails to strictly comply with the time limitations found in Rule 701.

The Court also rejected the bank's appeal, noting that, under its well-established standard of appellate review, the Commission's findings of fact are conclusive on appeal if supported by *any* competent evidence, even if the record contains other evidence that might have supported contrary findings. The testimony of Williams' neurologist supplied the requisite evidence of medical causation. And, as for the bank's argument that Williams was not disabled because, like the employee in ***Joyner v. Mabrey Smith Motor Co.***, 161 N.C. App. 125 (2003), she "came to work on the day she was terminated; therefore … [she] could not have been unable to work," the Court found that the combination of her testimony and that of her neurologist was sufficient to satisfy the criteria for proving disability established by the Supreme Court in ***Hilliard v. Apex Cabinet Company***, 305 N.C. 593 (1982).

The Court was also not persuaded by the bank's argument that, since Williams certified her ability to work to the Employment Security Commission during the period of time she received unemployment benefits, it was error for the Industrial Commission to find her disabled. That same argument had been made and rejected in ***Dolbow v. Holland Industries, Inc.***, 64 N.C. App. 695 (1983), in which the Court held that "a certification of ability to work does not estop an employee from recovering disability benefits, nor is it binding on the Commission on the issue of disability."

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

A Service and Publication of Dennis Mediations, LLC

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