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CIVIL LIABILITY

Summary Judgment for ER Doctor Upheld In Medical Malpractice Case

Richard Hawkins awoke in the early morning hours of January 15, 2011 to take a pill. He lost consciousness while swallowing it and fell to the floor, hitting his head on the way down. A rescue squad ambulance took him to the emergency room, where he was examined by Dr. Gary Lavine, who ordered an EKG, which revealed atrial fibrillation, and a CT scan, which showed no intracranial bleeding or acute abnormalities in his brain and was interpreted by the radiologist on duty as normal.

To prevent the formation of blood clots, Dr. Lavine prescribed a dose of Lovenox, a fast-acting, but not long-lasting, anticoagulant that is effective for about twelve hours after being administered. He also consulted with another physician and made arrangements for Hawkins to be admitted to the hospital for monitoring and treatment of his atrial fibrillation. Because he was only employed in the ER, Dr. Lavine did not have privileges to practice inside the hospital and, as a consequence, was not responsible for Hawkins' care after his admission.

During his hospital stay, the doctors treating Hawkins prescribed additional anticoagulants, aspirin, and four more doses of Lovenox. Two days into the admission, they had difficulty waking him from anesthesia after a procedure to treat his atrial fibrillation, so an MRI of the brain was ordered. When it showed an intracranial

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brain hemorrhage, he was transferred to UNC Hospital for further treatment, but he nevertheless died from complications of the hemorrhage three days later.

The administratrix of Hawkins' estate sued Dr. Lavine, his treating physicians while he was hospitalized, and their medical practices. After discovery depositions were taken, Dr. Lavine and his practice moved for summary judgment on grounds that the estate's forecast of evidence failed to establish that his alleged negligence proximately caused Hawkins' death. The trial court granted the motion and the estate appealed.

The first question the Court of Appeals addressed in *Hawkins v. Emergency Medicine Physicians of Craven County, PLLC*, issued on April 7, was whether the estate's interlocutory appeal was proper, since the trial court did not grant summary judgment as to all of the defendants, nor did it issue a certification under Rule 54(b) that there was "no just reason" for delaying an appeal. Citing the provisions of N.C.G.S. §§ 1-277, 7A-27(b)(3)(a), and 7A-27(b)(3)(b), the Court found that it has the authority to consider an interlocutory appeal when granting summary judgment would affect a "substantial right."

As to whether a trial court order granting summary judgment to less than all of the defendants affects a "substantial right," the Court held that it *would* whenever "(1) the same factual issues would be present in both trials and (2) the possibility of inconsistent verdicts on those issues exists." Because there were multiple defendants in this case and the same factual issues were raised as to each of them, the Court determined that it would be best for one jury to hear and resolve them. That being so, it concluded the trial court's summary judgment order did, in fact, affect a substantial right.

Turning to the substantive issues raised by the estate's appeal, the Court found that, to establish the essential elements of a medical malpractice claim, the plaintiff must prove not only the

applicable standard of care, but also that: (1) the defendant breached that standard; (2) plaintiff's injuries were proximately caused by the breach; and (3) plaintiff was damaged by the breach. It then defined "proximate cause," analyzed the expert testimony offered by the parties on that issue, and observed that although the affidavits of Drs. John Meredith, Harry Strothers, and Robert Stark linked Hawkins' death to Dr. Lavine's treatment, the opinions expressed in those affidavits were inconsistent with the testimony each had previously provided by deposition. Citing *Rohrbough v. Wyeth Labs., Inc.*, 916 F2d 970 (4th Cir. 1990) and *Cousart v. West Am. Ins. Co.*, 190 N.C. App. 532 (2008) as authority, the Court found that "the conflict between the experts' deposition testimony and their affidavits ... created a credibility issue, not a genuine issue of material fact." Therefore, it concluded, it would be "improper ... to consider the affidavit testimony [of Drs. Meredith, Strothers, and Stark] ... in determining whether plaintiff raised a genuine issue of material fact on the issue of proximate cause."

The Court also found that "none of the experts opined that the dose of Lovenox ordered by Dr. Lavine ... was a reasonably proximate cause of Mr. Hawkins' death," nor was there any evidence that "Dr. Lavine's diagnosis misled the subsequent treating physicians or caused them to engage in a plan of treatment that caused Mr. Hawkins' death." Furthermore, because the estate was "unable to direct this court to any testimony that suggests Dr. Lavine implemented a plan of care that he believed the subsequent treating physicians were likely to follow after Mr. Hawkins was admitted to the hospital," the Court concluded that the estate "failed to establish the first prong of the proximate cause analysis – that Dr. Lavine's conduct directly caused Mr. Hawkins' death." As a consequence, it determined that it was not necessary to address the second prong of the proximate cause analysis, the question of foreseeability, and it affirmed the trial court's order granting summary judgment to Dr. Lavine and his medical practice.

Jury Verdict Upheld In Wrongful Death Action Arising Out of Explosion

Nathan Coppick, an employee of Hobbs Westport Marina, was using a non-pressure-activated hose with a hold-open latch to refuel an eighty-foot-long charter boat, when two explosions occurred, the second of which killed him instantly. Use of a gasoline nozzle with a hold-open latch at a marina violated OSHA regulations and the North Carolina Fire Code.

The events leading to the explosion were captured by video surveillance. It showed Coppick pulling the hose toward the gasoline receptacle located near the end of the boat and then walking away. Six minutes later, a vapor cloud was visible in close proximity to the fueling area, and shortly after that the two explosions occurred.

Coppick's estate brought a wrongful death action against the marina, the charter company, its owner, and the company that provided the marina's fuel dispensing system, Petroleum Equipment & Service ("PE&S"), but it later dismissed all of the defendants, except PE&S. When the case went to trial, the jury found for the estate and awarded \$1,500,000. PE&S moved for judgment notwithstanding the verdict (JNOV) or, in the alternative, for a new trial, but the trial court denied both motions. PE&S appealed.

On April 7, in *The Estate of Nathan Richard Coppick v. Hobbs Marina Properties, LLC*, the Court of Appeals held that when a safety statute is violated, "the traditional rule of the jury in determining whether plaintiff has set forth a prima facie case of negligence is superseded." In that situation, "the defendant-violator is considered to be negligent as a matter of law, or negligent *per se*." So, PE&S, having violated the Fire Code's prohibition against the use of nozzles with hold-open latches to dispense fuel, was negligent as a matter of law. In fact, the Court continued, the breach of a legal duty "comes within the very definition of negligence."

Nevertheless, PE&S argued that it was error for the trial court to deny its motion for JNOV. It urged the Court to consider the evidence it introduced at trial about the type of nozzle Coppick used while he was refueling the boat. However, the Court responded, "[f]or purposes of ruling on a motion for JNOV, the trial court must resolve all conflicts, contradictions, and inconsistencies in the light most favorable to the non-movant.... Taken in ... [that] light ... and giving plaintiff the benefit of every reasonable inference, there was sufficient evidence ... for the jury to find that defendant installed ... the fuel dispensing system"

The Court was also not persuaded by PE&S's argument that the estate failed to prove that PE&S's conduct proximately caused the explosion. Rather, said the Court, "[w]hat is the proximate cause of an injury is ordinarily a question for the jury" and "[a]ctual causation may be proved by circumstantial evidence." The video depicting the vapor cloud, which "defendants here allowed to accumulate constituted a serious fire hazard as a direct result of which the damaging fire occurred. One whose negligence creates the hazard of fire cannot escape responsibility merely because the source of the triggering spark may not be shown."

Turning next to PE&S's argument that, to establish proximate cause, the estate needed the testimony of an expert as to the cause and origin of the fire, the Court found the applicable rule to be that "the standard of care must be determined by expert testimony unless the conduct involved is within the common knowledge of laypersons." Where, as here, "the service rendered does not involve esoteric knowledge or uncertainty that calls for professional judgment, it is not beyond the knowledge of the jury to determine the adequacy of the performance." The evidence taken in the light most favorable to the plaintiff was sufficient for the jury to find that the gas dispenser nozzle used in refueling the boat failed to shut off after the tank reached maximum capacity, causing excess gasoline to spill into the

surrounding area, resulting in the vapor cloud that appeared and then ignited, causing the two explosions, the second of which killed the deceased.

As for PE&S's argument that the trial court should have instructed the jury on insulating negligence because the owner/operator of the boat negligently allowed it to be refueled with the boat systems on, the Court found that insulating negligence did not apply; it "means something more than a concurrent and contributing cause. It is not to be invoked ... merely upon proof of negligent conduct on the part of each of two persons, acting independently, whose acts unite to cause a single injury." Rather, the concept of insulating negligence only applies to conduct "which reasonably may have been viewed as 'a new proximate cause which breaks the connection with the original cause and becomes itself solely responsible for the result in question.'" There being no such evidence in this case, PE&S's request that the jury be instructed on insulating negligence was properly denied.

The Court also found no merit in PE&S's argument that the trial court erred in awarding prejudgment interest on the entire compensatory damages award. While PE&S argued that it was entitled to a set-off for the amounts the estate received in settlement with other tortfeasors, the Court disagreed, citing *Brown v. Flowe*, 349 N.C. 520, 507 S.E. 2d 894 (1998), in which the Supreme Court "directly rejected" the argument that before calculating prejudgment interest, the trial court should subtract from a jury's compensatory damages award any amounts plaintiff may have received by way of settlement with joint tortfeasors. Thus, the Court concluded, none of the trial court's rulings was in error.

Motion to Dismiss for Improper Venue Fails

When Orange County resident Joel Miller was hired by A&D Environmental Services, he signed a non-compete agreement that included an

"Applicable Law, Exclusive Venue, Consent to Jurisdiction" clause limiting litigation under the agreement to Mecklenburg County. When he resigned his employment three years later to work for a competitor, A&D sued him in Guilford County, where its principal place of business was located. Miller's answer included a motion to dismiss for improper venue, in which he contended that any action brought pursuant to the agreement had to be filed in Mecklenburg County. When his motion was denied by the trial court, he gave notice of appeal.

On April 7, in *A&D Environmental Services, Inc. v. Miller*, the Court of Appeals found that it was "compelled" by *Gaither v. Charlotte Motor Car Co.*, 182 N.C. 498, (1921) to affirm the trial court's order denying Miller's motion to dismiss. While it agreed that *Gaither* was subsequently "disavowed" by the Supreme Court in *Perkins v. CCH Computax, Inc.*, 333 N.C. 140 (1992), that "disavowal" was limited to the extent to which *Gaither* could be read "to condemn forum selection clauses as depriving North Carolina courts of jurisdiction." Even after *Perkins*, "a forum selection clause which favored a court in another state was enforceable," and the Supreme Court "continued to recognize that parties may not strip our Legislature of its power to determine in which county or counties ... actions maintained in the State must be prosecuted." Therefore, the Court concluded, "a forum selection clause which requires lawsuits to be prosecuted in a certain North Carolina county is enforceable only if our Legislature has provided that said ... county is a proper venue."

Applying those principles to the facts of the present case, because N.C.G.S. § 1-82 requires contract disputes to be tried in the county in which the plaintiff or the defendant lived, and as there was nothing in the record establishing that either resided in Mecklenburg County for venue purposes, the forum selection clause in the parties' agreement was unenforceable, and the trial court correctly denied Miller's motion to dismiss for improper venue.

Intervening Negligence Bars Wrongful Death Action

Susan Fries was riding on the back of her husband Darrell's motorcycle in the far left of the three southbound lanes of Independence Boulevard in Charlotte, when he crested a hill and saw brakes lights and a pickup truck carrying a tall sign with a flashing arrow directing approaching traffic to move to the right. The pickup and three other street sweeping vehicles were either in the left lane or on the left shoulder, moving between 5 and 20 miles an hour. The drivers of two vehicles ahead of the motorcycle applied their brakes as they crested the hill and came upon the street sweeping operation. When Darrell steered into the center lane and applied his rear brake, the motorcycle began to slide. As it skidded, Susan was thrown to the ground and fatally injured when she slammed into one of the vehicles ahead of them.

The administrator of Susan's estate brought a wrongful death action against the street sweeping company, Bridge Broom, Inc., supported by evidence from an expert in "traffic engineering and crash investigation, motorcycle operations and human factors," who testified that the company's operation violated "state and federal standards," its employees failed to properly space and position their trucks, they should have erected advance warning signs before the work zone, and their failures were "at least a cause of the crash that killed plaintiff."

The estate filed a motion *in limine*, seeking to exclude the opinion testimony of the Bridge Broom's accident reconstruction expert, who attributed Susan's death to inadequate braking on Darrell's part, moved for a directed verdict, and requested a jury instruction on negligence *per se*, all of which was denied by the trial court. The trial court *did* allow the defendant's request for a jury instruction on intervening negligence.

The two issues submitted to the jury for consideration were whether negligence on the

part of Bridge Broom was the proximate cause of Susan's death, and if so, the amount of damages to which her estate was entitled for wrongful death. After the jury answered the first question in the negative and the trial court denied the estate's motions for judgment notwithstanding the verdict and for a new trial, it appealed.

On April 7, in *Pope v. Bridge Broom, Inc.*, the Court of Appeals found no merit in the estate's Rule of Evidence 702 challenge to the testimony of Bridge Broom's accident reconstruction expert. It found that since the Legislature's 2011 amendment to Rule 702(a), which now mirrors Federal Rule 702 and conforms to the standard outlined in *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579, 125 L. Ed. 2d 469, 113 S. Ct. 27867 (1993), the "touchstone for admissibility" is "reliability," and it is scientific knowledge that "establishes a standard of evidentiary reliability." Therefore, under the amended rule, an expert's opinion is admissible at the discretion of the trial court, and if the witness is qualified by "knowledge, skill, experience, training, or education" and the witness' testimony is both "reliable" and "relevant," *i.e.*, "will assist the trier of fact to understand the evidence or to determine the fact at issue."

The Court then examined *Daubert's* "five non-exclusive factors for trial courts to use in assessing the reliability of scientific testimony": "1) whether the expert's scientific technique or theory can be, or has been, tested; 2) whether the technique or theory has been subject to peer review and publication; 3) the known or potential rate of error of the technique or theory when applied; 4) the existence and maintenance of standards and controls; and 5) whether the technique or theory has been generally accepted in the scientific community."

Applying those factors to the present case, the Court found that the disputed opinion testimony of defendant's expert, Timothy Cheek, was based on his calculation that once Darrell crested the hill, he had a sight distance of more than 660 feet

and “driving space” of 800 feet to see and react to any perceived danger from the slowly-moving street sweeping vehicles; the skid marks caused by his motorcycle were left when he locked its rear brake and did not apply the front brake; and he could have stopped within 133 feet, had he used both brakes. Therefore, Cheek concluded, Darrell had “the time, distance, and capability to safely brake” and the accident resulted from his failure to use the motorcycle’s front brake.

The Court found that since “experts may rely on data and other information supplied by third parties,” and since the assumptions upon which Cheek based his calculations came from information in the police file, physical evidence, and the deposition testimony of witnesses at the accident scene, the trial court did not err when it overruled the estate’s objection to the admission of his testimony. It is not for an appellate court to “examine whether the facts obtained by the witness are themselves reliable – whether the facts used are qualitatively reliable is a question of the weight to be given the opinion by the factfinder, not the admissibility of the opinion.” Therefore, the estate “failed to show that the principles and methods Mr. Cheek used were unreliable under Rule 702(a)(2).”

The Court then turned to the estate’s objection to the trial court’s instruction to the jury on “intervening or superseding negligence” and found that it “has the duty to explain the law and apply it to the evidence on the substantial issues of the action.” It may instruct on a defense “if the evidence, when viewed in the light most favorable to the proponent, supports a reasonable inference of such ... defense.”

As for intervening negligence, “also known as superseding or insulating negligence,” it is “an elaboration of a phase of proximate cause,” *i.e.*, “something more than a concurrent and contributing cause.” It is an “efficient intervening cause,” a “new proximate cause which breaks the connection with the original cause and becomes itself solely responsible for the result in question.”

Unlike the case cited by the estate, *Adams v. Mills*, 312 N.C. 181 (1984), the Court found that the facts in the present case were “substantially the same as those in *Pintacuda [v. Zuckeberg]*, 159 N.C. App. 617 (2003)], in which the Supreme Court held that the negligent defendant was insulated from liability as a matter of law. Therefore, “Mr. Cheek’s testimony, if found credible and entitled to weight, would permit the jury to find that Mr. Fries had the time, distance, and capability to safely brake and that the accident was due to Mr. Fries’ failure to use his front break,” so the trial court did not err when it instructed the jury on intervening negligence.

The Court also disagreed with the estate’s contention that, because one of its witnesses testified that the actions of defendant’s employees violated “state and federal standards,” the trial court committed reversible error by not instructing the jury on negligence *per se* and by not granting its motions for directed verdict, JNOV, and a new trial. While the general rule is that violation of a public safety statute constitutes negligence *per se*, there are exceptions, with the distinction between violations that qualify as negligence *per se* and those that do not being “one of duty.” In the former category, the duty is to obey the statute, whereas in the latter, the duty is “due care under the circumstances.”

In the present case, the provisions of the Manual for Uniform Traffic Control Devices that defendant’s employees allegedly violated were “recommended but not mandatory.” As such, they “did not define any required standard of conduct” and did not constitute negligence *per se*. Therefore, there was no error in the trial court’s evidentiary rulings or its resolution of the parties’ pre- and post-trial motions.

Both Drivers at Fault in Intersection Accident

Sheena Ward’s son Justin was operating her Mercedes automobile in an easterly direction on Spring Forest Road in Raleigh, approaching its

intersection with Departure Drive. Intending to turn left, he stopped for the traffic light to turn red. At trial, he testified that he did not attempt to complete his turn until after it did, but Luis Carmona, who was approaching from the opposite direction, testified that the light was still green when he drove his Plymouth van into the intersection. The two vehicles collided.

Sheena sued Carmona, who brought a third-party complaint against Justin. The jury found both drivers negligent and denied her property damage claim. After the Wards' motion for a new trial was denied by the trial court, they appealed, but the Court of Appeals determined that there was sufficient evidence to find both drivers at fault and it affirmed the jury's verdict. The Wards then filed a petition for discretionary review, which the Supreme Court allowed.

On April 10, in *Ward v. Carmona*, the Court reiterated the two essential elements of actionable negligence: failure to exercise proper care in the performance of a legal duty and proof that negligent breach of that duty was the proximate cause of plaintiff's injury. Applying that rule to the present case, it found that the parties' conflicting evidence created issues of fact for resolution by the jury, whose function is to "weigh the evidence and determine the credibility of any witnesses."

As for the Wards' contention that the trial court should not have submitted the issue of contributory negligence to the jury, the Court found their reliance on *Cicogna v. Holder*, 345 N.C. 488 (1997) misplaced because there was undisputed evidence in *Cicogna* that the plaintiff had a green light as he proceeded into the intersection and there was "no evidence ... that there was anything that would have put the plaintiff on notice that the defendant would not obey the traffic light." That was not so in the present case and the record contained evidence from which the jury could find both drivers negligent, so the trial court's denial of the Wards' motion for a new trial was affirmed.

Attorney's Fee Awarded In Breach of Contract Action

Javier Diaz entered into a contract with R&L Construction to renovate his home in Surry County. After the project was finished, R&L filed a lien on Diaz's property and sued to perfect the lien, claiming that while it furnished labor and materials worth \$16,175, Diaz only made one \$5,000 payment and then refused to pay the remaining balance.

At mediation, R&L reduced its demand from \$11,175 to \$9,000, but Diaz rejected the offer and, instead, filed a motion for summary judgment. The trial court granted the motion and cancelled R&L's lien. Diaz then moved for attorneys' fees under N.C.G.S. § 44A-35, contending that he had "made multiple good faith attempts to fully resolve the matter, including but not limited to a settlement offer at mediation, which Plaintiff has unreasonably refused." The trial court granted his motion and awarded \$8,823 in attorneys' fees. R&L appealed.

On April 7, in *R&L Construction of Mt. Airy, LLC v. Diaz*, the Court of Appeals affirmed the trial court's attorney fee award. After first establishing the applicable standard of review, *i.e.*, that it "reviews a trial court's award of attorneys' fees under N.C. Gen. Stat. § 44A-35 for abuse of discretion," and holding that "[t]o demonstrate an abuse of discretion, the appellant must show that the trial court's ruling was manifestly unsupported by reason, or could not be the product of a reasoned decision," the Court found that the statute authorizes the trial court to award an attorneys' fee to the prevailing party if "the party required to pay the attorneys' fees unreasonably refused to resolve the matter."

Applying that principle to the present case, it was undisputed that Diaz was the prevailing party, so the only question left to decide was whether R&L "unreasonably refused to resolve the matter." However, the Court noted, R&L neither appealed the order granting Diaz's

motion for summary judgment nor included in the record on appeal transcripts of the hearing on that motion or Diaz's motion for attorneys' fees. So, not only was the Court "unable to ascertain how statutorily confidential information under N.C. Gen. Stat. § 70A-38.1, such as an offer to settle in a court-ordered mediation procedure, was entered into evidence and considered by the trial judge," but because of the incomplete record, R&L failed to establish that the trial court's award of attorneys' fees was "manifestly unsupported by reason."

The Court then turned to Diaz's motion to tax R&L with the attorneys' fees he incurred on appeal and found that subsection (a) of Rule of Appellate Procedure 35 authorizes it to tax costs against an appellant when a judgment is affirmed, subsection (c) states that "[a]ny costs of an appeal that are assessable in the trial court shall ... be taxed ...," and N.C.G.S. § 7A-305(d)(3) provides that "assessable costs" include "counsel fees, as provided by law." However, for the same reason it concluded that R&L did not establish that the trial court's award of attorneys' fees was "manifestly unsupported by reason," *i.e.*, "the absence of a [motion hearing] transcript, or other evidence to review," the Court denied Diaz's request for an additional attorney's fee.

Deputy Sheriff's Wrongful Termination Claim Dismissed

Ivan McLaughlin, a Mecklenburg County Sheriff's Department detention counselor for youthful offenders, and Timothy Stanley, a county deputy sheriff, were among the 1,350 recipients of a letter from Sheriff Daniel Bailey soliciting campaign contributions when he ran for reelection in 2010. The sheriff was a Democrat and they were Republicans. Neither made a contribution to the campaign or attended the fund-raising barbeque it sponsored.

After Bailey was reelected, both men were fired from their jobs, although each had received favorable performance reviews in the years

leading up to the election, so they filed suit, alleging that by terminating them for "failing to make contributions to [his] re-election campaign and for failing to work in his campaign," Bailey violated their rights under the state constitution. He responded with a motion for summary judgment, which the trial court granted. Plaintiffs appealed.

On April 7, in *McLaughlin v. Bailey*, a 2-to-1 majority of the Court of Appeals affirmed the dismissal of plaintiffs' claims, finding no merit in their argument that, as county employees, they were protected from being terminated for political reasons by the provisions of N.C.G.S. § 153A-99. While acknowledging that the statute states that its purpose "is to ensure that county employees are not subjected to political or partisan coercion while performing their job duties" and also provides that county employees shall not be restricted while off duty from "supporting ... political organizations, or ... candidates of their choice," the Court's majority based its resolution of the appeal on the statute's definition of "county employee," *i.e.*, "any person employed by a county or any department or program thereof that is supported, in whole or in part, by county funds."

While the majority found it "undisputed" that a county sheriff's department is "supported, in whole or in part, by county funds," they identified multiple cases, including *Styers v. Forsyth County*, 212 N.C. 558 (1937), *Clark v. Burke County*, 117 N.C. App. 85 (1994), *Peele v. Provident Mutual Life Ins. Co.*, 90 N.C. App. (1988), and *Sims-Campbell v. Welch*, ___ N.C. App. ___ (March 3, 2015), which have held that "[o]ur common law as well as the relevant statutory and state constitutional provisions clearly establish that plaintiffs, who were hired by the sheriff, are employees of the sheriff, and are not employed by the county in which the sheriff is elected." Therefore, the majority concluded, plaintiffs' reliance on N.C.G.S. § 153A-99 in support of their claim of "wrongful

termination in violation of public policy” was not well grounded.

In dissent, Judge Geer read subsection (b) of the statute to define “county employee” as someone who was “either (1) ‘employed by a county’ or (2) employed by ‘any department or program thereof that is supported, in whole or in part, by county funds.’” Having interpreted the statute in that way, she focused not on whether plaintiffs were “county employees,” as had the majority, but whether they were “employees of ‘any department or program ... supported, in whole or in part, by county funds.’” And, from that, she argued that since a county sheriff’s department is funded “in whole or in part by county funds,” it “arguably” falls within the statute’s reference to a “department ... [of the county] supported ... by county funds.”

Thus, Judge Geer concluded, “N.C. Gen. Stat. § 153A-99(b)(1) can reasonably be construed as encompassing employees of a sheriff’s department.” So, she would have found Deputy Sheriff Stanley entitled to pursue his wrongful termination claim. And, having found that he presented “sufficient” evidence to give rise to a genuine issue of material fact regarding whether the termination of his employment violated public policy, she would have reversed the trial court’s summary judgment order dismissing his wrongful discharge claim.

Disagreeing with Judge Geer’s interpretation of N.C.G.S. § 153A-99, the majority found that “the statute’s references to ‘county employee’ and ‘employee’ did not create two separate classes, but simply clarifies that the statutory definition applies uniformly to all provisions of the statute, regardless of whether or not the word ‘employee’ is modified by ‘county.’ There is no indication in the statute that the legislature intended to identify two separate classifications of employees.” Further, the majority concluded, “employees of a county sheriff are not ‘employed by a county or any department or program thereof,’” as suggested by Judge Geer. Instead,

“[o]ur common law as well as the relevant statutory and state constitutional provisions clearly establish that plaintiffs, who were hired by the sheriff, are employees of the sheriff, and are not employed by the county in which the sheriff is located.”

As for plaintiff Stanley’s argument that the termination of his employment for political reasons violated his free speech rights under the North Carolina Constitution, the majority agreed that “the First Amendment generally bars the firing of public employees ‘solely for the reason that they were not affiliated with a particular political party or candidate,’” but the United States Supreme Court created an exception to that general rule in *Elrod v. Burns*, 427 U.S. 347, 96 S. Ct. 2673, L. Ed. 2d 547 (1976), so as to “‘give effect to the democratic process’ by allowing patronage dismissals of those public employees occupying policymaking positions.” The *Elrod* line of reasoning having been adopted in *Carter v. Marion*, 183 N.C. App. 449 (2007), the majority found *Carter* “controlling on the issue of whether Stanley could lawfully be fired based on political considerations,” so it concluded that his termination “did not violate his free speech rights under the North Carolina Constitution.”

As for plaintiff McLaughlin’s claim, the Court reached the same result, but for different reasons. Because he was not a sworn law enforcement officer like Stanley, *Carter* was not necessarily dispositive of his claim. But, even assuming *arguendo* that he produced sufficient evidence to establish that he was terminated for political reasons, nevertheless the trial court correctly granted summary judgment as to his claim because he “failed to produce any evidence to rebut defendants’ substantial showing that he was fired for failure to comply with Sheriff’s Department rules.” Indeed, he admitted in his deposition that he had violated department rules and he also admitted that he did not know whether Sheriff Bailey was aware of the fact that he supported his opponent. As a consequence, his opinion on that issue was mere “speculation.”

So, while the Court split 2-to-1 on whether it was error for the trial court to grant summary judgment to the defense on Stanley's claim, the entire panel, including Judge Geer, agreed that, because McLaughlin failed to demonstrate that he would not have been fired "but for" his political beliefs, the trial court's order granting summary judgment as to his claim should be affirmed.

Additional Opinions

On April 7, the Court of Appeals issued its opinion in *Union County Board of Education v. Union County Board of Commissioners*, a dispute between Union County's boards of education and commissioners over the local expense and capital outlay funds appropriated by the Board of Commissioners for the school system's 2013-2014 fiscal year. While ordering a new trial on grounds that the trial court erred when it allowed the Board of Education to introduce evidence of "inadequate appropriations ... in preceding ... fiscal years," which "allow[ed the jury] ... to consider funding beyond that requested by the board of education, whose duty it is to request sufficient funding to maintain a system of free public schools," the Court found that although it generally reviews trial court rulings on the admissibility of evidence under an "abuse of discretion" standard, there is an exception for "rulings on relevancy" like those in the present case, which "are not technically discretionary and therefore not afforded as much deference." The Court also addressed the standard of review for trial court decisions regarding the content of trial counsels' opening statements, finding that it, too, is "abuse of discretion." And, finally, in response to an exception taken by the Board of Commissioners to the trial court's jury instructions, the Court held that "it is not enough for the appealing party to show that error occurred in the jury instructions; rather, it must be demonstrated that such error was likely, in light of the entire charge, to mislead the jury."

High Point Bank & Trust Company v. Fowler, issued by the Court of Appeals on April 7, arose out of a lawsuit brought by the bank against Robert and Delores Fowler and Thomas and Pamela Baker on their individual guaranties of a debt incurred by Armadillo Holdings, LLC, with a remaining balance of \$651,251, plus interest. After the trial court granted the bank's motion for summary judgment, the Fowlers appealed. The bank then filed, and the trial court granted, a motion to dismiss the appeal on grounds that the Fowlers failed to file their notice of appeal within 30 days of the trial court's judgment, as required by Rule of Appellate Procedure 3. The Fowlers then gave notice of appeal to the Court of Appeals from the trial court's dismissal of their initial appeal, but the Court dismissed that appeal as well, holding that "no appeal lies from an order of the trial court dismissing an appeal for failure to perfect it within apt time, the proper remedy to obtain review in such case being by petition for a writ of certiorari."

WORKERS' COMPENSATION

Credibility Denial of Back Injury Claim Affirmed

Timothy Lowe's duties as a tire technician with Branson Automotive included frequent lifting of 50 to 100 pounds. On February 28, 2012, he filed a claim for workers' compensation benefits, alleging that twenty days earlier, on February 8, while lifting a 110 pound wheel and tire, he felt a "pop" and an immediate onset of pain in his neck, which caused him to grab his neck with one hand and left the wheel and tire in the other. He then felt another pop, this time in his low back, along with radiating tingling and numbness in both hands and feet.

Lowe had a long history of back pain, for which he had been treated on numerous occasions by Dr. Thomas Futrell. When he sought medical treatment on February 9, 2012, he told Medzone nurse Martha Jo Denton that he had been

suffering daily back pain for two years, but it worsened in the last two days. He did not tell her that his pain was the result of a specific traumatic incident at work. And, while he had reported an on-the-job knee injury to Branson's benefits manager two years earlier, he did not contact her about a back injury. Instead, she learned of the alleged incident 16 days later, when she called him about his short-term disability benefits.

After conducting a full evidentiary hearing, Deputy Commissioner Ledford found that Lowe was injured as the result of a specific traumatic incident of the work assigned and entitled to TTD benefits and medical compensation. Branson appealed and the Full Commission reversed on credibility grounds. Lowe appealed.

On April 21, in *Lowe v. Branson Automotive*, the Court of Appeals reiterated the oft-cited rule that its review of an opinion of the Industrial Commission is "limited to consideration of whether competent evidence supports the Commission's findings of fact and whether the findings support the Commission's conclusions of law. This court's duty goes no further than to determine whether the record contains any evidence to support the finding." It then found that the record contained competent evidence in support of each of the Commission's findings, including its determination that Lowe's testimony was not credible, because it and his interrogatory answers, "when compared with Ms. Denton's testimony and [his] documented history of treatment for back problems, cast doubt as to whether a work-related injury ... occurred."

As for Lowe's objection to the Full Commission's decision to place more weight on the nurse's testimony than that of his wife and friends, the Court quoted from *Harrell v. J.P. Stevens & Co., Inc.*, 45 N.C. App. 197 (1980): "The Commission is the sole judge of the credibility of witnesses and may believe all or a part or none of any witness's testimony."

The Court also found no merit in Lowe's contention that Branson's challenge to the conclusions of law entered by Deputy Commissioner Ledford was not properly before the Full Commission because it failed to assign error with the specificity required by Industrial Commission Rule 701. While *Roberts v. Wal-Mart Stores, Inc.*, 173 N.C. App. 740 (2005), held that the Commission may not waive the rule's requirement that the grounds for an appeal be stated with particularity, the Court found that the "spirit of Rule 701" is to provide adequate notice of the basis for an appeal. So, it held in *Adcox v. Clarkson Bros. Const. Co.*, ___ N.C. App. ___ (2014) was that it was not an abuse of discretion for the Full Commission to find that Rule 701 was not violated when the appellant "provided the appellee with adequate notice of the grounds for appeal through ... means such as addressing the issues in its brief." Because Branson did precisely that in this case, the Court affirmed the Full Commission's denial of Lowe's claim for benefits.

Mechanic Fails to Prove Post-Injury Disability

Paul Fields, a sixty-five year old mechanic with a tenth-grade education, some computer skills, and a six-year history of treatment for back pain by Dr. James Rice, felt a "sting" in his back after lifting a forty-three pound battery at work. He went to the emergency room five days later, was subsequently treated by U.S. Healthworks, and then returned to Dr. Rice, complaining of radiating back pain, numbness, and limited range of spinal and leg mobility. Dr. Rice found that Fields' injury aggravated his pre-existing condition, he recommended that Fields not return to his regular work, and he prescribed pain medicine and muscle relaxers.

Fields filed a Form 18 and requested a hearing. His employer and its insurer denied compensability, contending that Fields' disability was not the result of a specific traumatic incident. However, the deputy commissioner and Full

Commission both found that it *was* and awarded ongoing TTD benefits from the date of injury. Contesting the Commission's finding that it would be futile for Fields to seek competitive employment within the work restrictions imposed by Dr. Rice, and questioning the Commission's conclusion that Fields had met his burden of proof on the issue of disability, Branson appealed.

On April 21, in *Fields v. H&E Equipment Services, LLC*, the Court of Appeals held that an employee seeking compensation must prove not only disability, but its extent. It then turned to *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593 (1982), and *Russell v. Lowes Product Distribution*, 108 N.C. App. 762 (1993), for the essential elements of a compensable disability claim. In *Hilliard*, the Supreme Court held that, to prove disability, the injured worker must establish that he "(1) ... was incapable after his injury of earning the same wages he had earned before his injury in the same employment, (2) ... was incapable after his injury of earning the same wages he had earned before his injury in any other employment, and (3) ... [his] incapacity to earn was caused by [his] ... injury." And, in *Russell*, the Court of Appeals held that, to satisfy the first two elements of *Hilliard*, the worker must produce "(1) medical evidence that he is mentally or physically incapable of working in any capacity; (2) evidence that he is capable of some work, but has not been able to find any; (3) evidence that he is capable of some work, but that it would be futile to attempt to find any based on his age, experience, or lack of education; or (4) evidence that he has obtained employment at a lower wage than his previous employment."

Applying those principles to Fields' claim for weekly benefits, the Court found that while he was contending that it would be futile for him to seek competitive employment within the work restrictions imposed by Dr. Rice, he offered no testimony from a vocational expert, no labor market statistics, and no medical expert testimony that his condition would make it

impossible for him to work. That being so, it concluded, "[w]ithout any expert testimony establishing that Plaintiff's job with Defendant is the only job obtainable, or any evidence demonstrating that no other man of his age, education, experience, and physical capabilities is currently working anywhere, Plaintiff did not meet his burden of proof under *Russell* prong three. Therefore, he failed to meet the first two requirements of *Hilliard*."

The Court also considered defendants' alternative argument that Fields did not satisfy the third prong of the *Hilliard* test, *i.e.*, that it was his work injury that caused his inability to earn wages. But, noted the Court, Dr. Rice testified that the lifting incident at work significantly worsened his pre-existing condition, and that testimony was sufficient to satisfy the third prong of the *Hilliard* test. At the same time, however, Fields failed to prove that it would have been futile for him to seek other employment, so the other two prongs of *Hilliard* were not satisfied. As a consequence, the Court vacated the Commission's award of benefits.

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

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