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CIVIL LIABILITY

Malicious Prosecution Claim Reinstated

With his friend Gregory Smithson, Dr. Kirk Turner went to his wife's residence to retrieve some of Smithson's personal property. According to Dr. Turner, he and his wife were conversing when she picked up a spear and began stabbing him. He grabbed a pocketknife from his right front pocket and cut her twice in the neck. Smithson called 911 and performed CPR until emergency personnel arrived, but their efforts were unsuccessful and she died from her injuries.

The Davie County Sheriff's Office and SBI Special Agent E.R. Wall also responded to Smithson's call. After viewing the scene, Wall notified SBI Assistant Special Agent in Charge K.A. Cline that an expert would be needed to perform a blood splatter analysis, and Cline arranged for it to be done by Special Agent Gerald Thomas.

Thomas documented the bloodstain patterns at the scene, examined the other evidence that had been gathered, and wrote a report stating that the t-shirt worn by Dr. Turner on the night in question contained a large bloodstain consistent with a transfer bloodstain pattern resulting from a bloody hand being wiped on it.

Dr. Turner was indicted for first degree murder and detained for a month before being granted, and then posting, a one million dollar bond. He was then released to house arrest.

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A month after the indictment, Thomas met with another SBI special agent, Duane Deaver, an attorney from the District Attorney's office, and the lead investigator from the Davie County Sheriff's Office to discuss the feasibility of Dr. Turner's version of the events leading to his wife's death. They developed a theory that he killed her as part of a scheme in which he stabbed himself with the spear and staged the scene to make it look like self-defense. The theory required proof that the bloodstain on Dr. Turner's t-shirt was not from his hand, but from wiping off the pocketknife.

With the approval of their supervisor, Thomas and Deaver conducted a series of tests, which they videotaped, in which they attempted to obtain a blood smear from a knife similar to the smear on the t-shirt. After several attempts, they succeeded, causing Deaver to exclaim "Oh, even better! Holy cow, that was a good one!" and "Beautiful! That's a wrap, baby!"

After the tests he and Deaver ran, and a second review of the evidence, Thomas created a new report, in which he replaced the words "consistent with a bloody hand wiped on the shirt" with "consistent with a pointed object being wiped on the shirt."

The jury returned a verdict of not guilty by reason of self-defense. Dr. Turner then filed suit against Thomas and Deaver in their individual capacities, alleging malicious prosecution, abuse of process, false imprisonment, and intentional infliction of emotional distress (IIED). He also brought a 42 U.S.C. § 1983 claim on grounds that the defendants violated Article I § 19 of the North Carolina Constitution. They responded with Rule 12(b)(1), 12(b)(6), and 12(b)(7) motions to dismiss, the first two of which the trial court granted on grounds that it lacked subject matter jurisdiction and plaintiff's complaint failed to state a claim upon which relief could be granted. Dr. Turner appealed.

On August 5, in ***Turner v. Special Agent Gerald R. Thomas***, the Court of Appeals affirmed the trial court's dismissal of plaintiff's abuse of process, false imprisonment, and federal constitutional claims. In doing so, it defined "abuse of process" as "the misuse of legal process for an ulterior purpose," a "malicious perversion of a legally issued process whereby a result not lawfully or properly obtainable … is … secured." While Dr. Turner claimed that the defendants had "intentionally and maliciously" used their positions as SBI agents to "obstruct justice" and "frame" him, the "improper purpose" he alleged - obtaining his conviction - was "within the scope of criminal proceedings," so it did not qualify as a "perversion of the judicial process."

The Court also found no merit in Dr. Turner's false imprisonment claim. While he contended that being confined to house arrest constituted a false imprisonment, the U.S. Supreme Court held in ***Wallace v. Cato***, 549 U.S. 384 (2007), that false imprisonment consists of detention without legal process and "ends once the victim becomes held pursuant to such process." Because he was not arrested until after the grand jury indicted him, Dr. Turner was not confined "without legal process or other legal authority" and, therefore, his false imprisonment claim was properly dismissed by the trial court.

As for his § 1983 claim, which was based on an alleged violation of his "Fourth Amendment right to be free from unreasonable seizure," the Court found that the defendants were entitled to a "qualified immunity" that "shields government officials from personal liability under § 1983 insofar as their conduct does not violate clearly established statutory or constitutional rights." Because Dr. Turner made no argument that the defendants had violated a "clearly established constitutional right," the Court affirmed the trial court's dismissal of his § 1983 claim.

However, it reached the opposite result when it came to Dr. Turner's malicious prosecution and IIED claims. Quoting from ***Williams v. Kuppenheimer Mfg. Co.***, 105 N.C. App. 198 (1992), the Court found that, to recover for malicious

prosecution, a plaintiff "must establish that 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." There being no question about the fourth element, the Court analyzed the other three and determined that the allegations of the complaint were sufficient to establish a viable claim for malicious prosecution.

In reaching that conclusion, the Court ruled that it was not necessary for Dr. Turner to prove that the defendants *initiated* a criminal proceeding against him; rather, "'participated in the criminal proceeding' is sufficient to establish the first element." In the context of a criminal proceeding initiated by another party, a defendant has "participated" in criminal proceedings if "'[e]xcept for the efforts of the defendant, it is unlikely' that the criminal prosecution would have continued…." Because Dr. Turner's complaint alleged that the defendants "devised and executed unscientific tests designed specifically to support the theory [that he stabbed himself and staged the scene to look like self-defense] and defendant Thomas altered his initial report to reflect their new findings," the Court found that it contained sufficient allegations of "participation" on defendants' part to satisfy the first element of a malicious prosecution claim.

As for the second element, the absence of probable cause to pursue criminal charges against Dr. Turner, the Court determined that "[u]nder the North Carolina standard for motions to dismiss, plaintiff's allegation that there was no probable cause is sufficient unless the facts alleged in the complaint conclusively establish that there was probable cause." The grand jury's bill of indictment was prima facie evidence of probable cause, but did not conclusively establish it; the indictment merely created an issue of fact for the jury to determine. On the other hand, the contention in Dr. Turner's complaint that his wife attacked him, stabbing him several times, was consistent with his claim that he acted in self-defense and "with[out] malice, premeditation, and deliberation." Therefore, the facts as alleged in the complaint did not conclusively establish probable cause.

As for the final requirement for a viable malicious prosecution claim, "malice," the complaint alleged that the defendants "acted with malice, without probable cause, and for the ulterior purposes of political gain and advancing their careers." Those allegations, the Court found, were sufficient under ***Cook v. Lanier***, 267 N.C. 166 (1966), in which the Supreme Court held that "malice may be inferred from want of probable cause," to establish the element of malice in this case.

Therefore, since plaintiff's complaint alleged all of the essential elements of a malicious prosecution claim, the Court held that it was error for the trial court to grant defendants' motion to dismiss it.

The Court then turned to the IIED claim, and found its essential elements to be "(1) extreme and outrageous conduct, (2) which is intended to cause and does cause (3) severe emotional distress." While liability for IIED "clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities," the Court found that, when viewed in the light most favorable to Dr. Turner, his complaint alleged facts showing that he was accused of a crime he did not commit and the defendants "essentially manufactured evidence to negate plaintiff's self defense claim by (1) performing unscientific tests designed to prove a theory that plaintiff's stab wounds were self-inflicted and the scene staged to look like self defense; (2) creating a second report supporting that theory … inconsistent with [defendant Thomas'] first report; (3) writing the report in a manner that hid the existence of the first report …; and (4) bolstering the theory by making false statements in the second report and in testimony regarding what the Sheriff's Office lead investigator had said."

After distinguishing on its facts the case relied upon by the defendants as authority for dismissing the IIED claim, ***Dobson v. Harris***, 134 N.C. App. 573 (1999), the Court found that three federal court cases, ***Limone v. United States***, 579 F. 3d 79 (1st Cir. 2009), ***Pitt v. District of Columbia***, 491 F. 3d 494 (D.C. Cir. 2007), and ***Wagenmann v. Adams***, 829 F. 2d 196 (1st Cir. 1987), although not binding authority, were not only "persuasive," but "consistent with the analysis North Carolina courts have applied" and supported the conclusion that "plaintiff's complaint sufficiently alleges outrageous conduct." Therefore, as with his malicious prosecution claim, the Court found that the trial court erred in dismissing Dr. Turner's IIED claim.

Deputy Sheriff's Gross Negligence Not Shielded by Governmental Immunity

Shortly after 7 am on December 30, 2009, Kaye Howell called the State Highway Patrol (SHP) and Wayne County Communications to report a collision she had just witnessed. She also advised them that emergency services were not needed because no one was injured. Later, she called back to report that a woman involved in the accident had argued with and pushed a man at the scene and was "getting a little out of hand."

The SHP informed Wayne County Communications that the collision occurred on a curve in the road, that traffic control was needed, and that they were unable to get a trooper to the scene right away. Daniel Truhan, a Wayne County Deputy Sheriff, overheard the call and told Wayne County Communications he was free, nearby, and could respond. After receiving approval, he headed toward the scene of the accident, only to collide with a vehicle driven by Susan Walston, who pulled out from a stop sign while he was speeding toward her from the right with his accelerator fully depressed.

Four to five seconds before impact, Truhan was traveling at 86 to 87 miles per hour and he continued to accelerate until approximately one-half second before the two vehicles collided. At impact, he was traveling approximately 95 mph.

Both drivers were seriously injured in the collision. Truhan sued Walston and joined her husband as a defendant under the "Family Purpose Doctrine." They denied liability, asserted a counterclaim seeking compensatory and punitive damages, and filed a third party complaint against the county's insurers and Western Surety, which had issued a $25,000 bond to the Sheriff. Among other defenses to the Walstons' counterclaim, Truhan and the county's insurers pled governmental immunity.

All interested parties moved for summary judgment. The trial court granted Truhan's motion and that of the county's insurers, and later denied the Walstons' motion for reconsideration, but did grant her motion for certification pursuant to Rule 54(b). The Walstons then gave notice of appeal.

On August 5, in ***Truhan v. Walston***, the Court of Appeals reversed. Citing ***Greene v. City of Greenville***, ___ N.C. App. ___ (2013), for the proposition that "issues of negligence are generally not appropriately decided by way of summary judgment," the Court found that the Waltons' evidentiary forecast established a genuine issue of material fact regarding whether Truhan's actions qualified as gross negligence. While N.C.G.S. § 20-145 provides that posted speed limits do not apply to police vehicles "operated with due regard for safety … in the chase or apprehension of violators of the law," the statute specifically provides that "[t]his exemption shall not … protect the driver of any such vehicle from the consequences of a reckless disregard of the safety of others."

That is, the Court held in ***Greene***, "an officer's liability in a civil action for injuries resulting from the officer's vehicular pursuit of a law violator is to be determined pursuant to a gross negligence standard of care." And, as the Supreme Court held in ***Jones v. City of Durham***, 361 N.C. 144 (2006) by adopting the opinion of

the dissenting Court of Appeals judge in ***Jones v. City of Durham***, 168 N.C. App. 433 (2005), "'gross negligence' occurs when an officer consciously or recklessly disregards an unreasonably high probability of injury to the public despite the absence of significant countervailing law enforcement benefits."

Viewing the record in the light most favorable to the Walstons, as it was required to do in determining whether Truhan was entitled to summary judgment, the Court found that the evidence would allow the jury to find that he "(1) … was responding to a minor traffic accident involving only property damage, and … [his] sole purpose … was to provide traffic flow assistance; (2) … initiated emergency response driving without any justifiable reason …; (3) … engaged his blue lights …, but failed to engage his siren, … [in] violation of public policy; (4) … sped along Highway 117 at speeds topping one hundred mph …; (5) … was a warrant officer and did not usually engage in driving that required high speeds; (6) … had no high-speed training beyond … Basic Law Enforcement Training; (7) … sped past a school, not knowing whether the school was in session; (8) … sped past … a fire station before reaching Defendant's residential community; (9) … because of his high speed, either did not see Defendant before she pulled out … or saw Defendant and did not take appropriate measures to avoid a collision; (10) if … [he] did not see Defendant, it was because he was traveling around a blind curve, … not paying proper attention …, or perhaps suffering from tunnel vision due to his excessive speed; (11) … was traveling ninety-five mph and still accelerating until immediately before he made contact with Defendant's vehicle …; and (13) … 'routine driving,' … was all that was warranted in this situation – in fact, the accident would probably not have occurred had … [he] been driving … less than seventy-five miles per hour."

From those facts, the Court found that there was a "high probability of injury to the public despite the absence of significant countervailing law enforcement benefits." It also found no merit in Truhan's reliance on governmental immunity, both because it was waived to the extent of the $25,000 bond the Sheriff's Office purchased from Western Surety and because of Truhan's alleged gross negligence under N.C.G.S. § 20-145. As a consequence, the Court reversed the trial court's grant of summary judgment and remanded the case for "further action" on the defendants' counterclaims against Truhan.

Nebraska Judgment Afforded Full Faith and Credit

Responding to an advertisement for a 1970 Ford Mustang on the website classiccars.com, Ron Meyer contacted Race City Classics, LLC and, after three days of negotiations, agreed to purchase the vehicle for $21,000. He wired payment to Race City in Iredell County and it was shipped to his home in Nebraska, but he was dissatisfied with its condition when it arrived.

After Race City refused Meyer's request for a refund, he filed suit in Nebraska, contending that the paint on the car was cracked, its front hood was out of alignment, the trunk could not be opened, and it would not start. Meyer served Race City with his summons and complaint, but it did not file an answer, so he obtained a default judgment.

Meyer then filed a "Docketing of Foreign Judgment" pursuant to N.C.G.S. § 1C-1703 and "Notice of Filing Foreign Judgment" pursuant to N.C.G.S. § 1C-1704 in Iredell County Superior Court. Race City responded with a "Motion for Relief Against Foreign Judgment" under N.C.G.S. § 1C-1705(a), contending that the Nebraska judgment was invalid. The trial court agreed and granted Race City's motion, finding that it did not have sufficient minimum contacts with Nebraska for that state's courts to obtain personal jurisdiction. Meyer appealed.

On July 29, in ***Meyer v. Race City Classics, LLC***, the Court of Appeals reversed. Quoting from ***Bell Atlantic Tricon Leasing Corp. v. Johnnie's***

Garbage Service, Inc., 113 N.C. App. 476 (1994), the Court found that the "general rule" is that "one state must accord full faith and credit to a judgment rendered in another state," with the caveat that a foreign state's judgment is only entitled to "the same validity and effect in a sister state as it had in the rendering state" and "the rendering court must comport with the demands of due process such that it has personal jurisdiction ... over defendant."

The Court found that Nebraska performs a two-step analysis to determine whether it would be constitutional to exercise personal jurisdiction over a defendant: (1) Does the state's long-arm statute authorize the exercise of personal jurisdiction over the defendant? and (2) Were there sufficient minimum contacts between the defendant and Nebraska, such that it may exercise personal jurisdiction without offending "constitutional due process"?

Applying those questions to the present case, the Court found that while Race City's conduct was insufficient to allow Nebraska to obtain "general personal jurisdiction" because "[t]he sale to this Nebraska resident happened one time, and did not create any sort of systematic or continuous relationship with the state," the sales transaction between Meyer and Race City *did* confer "specific personal jurisdiction" over Race City, since it "intentionally directed its actions towards Nebraska" by: (1) advertising its cars on websites accessible to Nebraskans, (2) negotiating with Meyer, who was a resident of Nebraska at the time, (3) receiving his payment from Nebraska, and (4) shipping the vehicle to him in Nebraska. Therefore, the Court concluded, "Defendant should not be surprised to have been haled into a Nebraska court when Plaintiff alleged the car was not as … represented."

It also observed that "a single contract is sufficient contact for due process purposes, even if the defendant has not physically entered the forum state, as long as the contract has a substantial connection to the forum state." As the Supreme Court held in ***Williamson Produce, Inc. v. J.H. Satcher, Jr.***, "[w]hen a contract bears a substantial connection to the forum state, a defendant who enters into the contract 'can reasonably anticipate being haled into court …' in the forum state."

Having concluded that it was proper for Nebraska to exercise personal jurisdiction over Race City, the Court held that the judgment entered in Nebraska was "valid and enforceable" in North Carolina, so it reversed the trial court's order granting Race City's "Motion for Relief Against Foreign Judgment."

Order Taxing Expert Witness Deposition Fees and Expenses Reversed

Keen Lassiter, *guardian ad litem* for Jakari Baize, filed a medical malpractice action against multiple defendants, including North Carolina Baptist Hospitals. Later, the trial court entered a "Discovery Scheduling Order," in which the parties were directed to designate their expert witnesses by a specified deadline and were required to make them available for deposition. Later, after the defendants deposed four of his expert witnesses, Lassiter filed a Notice of Voluntary Dismissal Without Prejudice" under Rule of Civil Procedure 41(d) and N.C.G.S. §§ 7A-305 and 6-20. The defendants then moved to recover their deposition costs under Rule 41(d). The trial court granted the motion and entered an order directing Lassiter to reimburse $23,799 in costs incurred by the defendant hospitals and another $24,738 in costs incurred by the defendant doctors. Lassiter appealed.

On August 5, in ***Lassiter v. North Carolina Baptist Hospitals, Inc.***, the Court of Appeals reversed the trial court's order on grounds that "N.C. Gen. Stat. § 7A-305, when read in conjunction with N.C. Gen. Stat. § 7A-314, limits the trial court's power to award expert fees as costs only when the expert is under subpoena," and the defendants did not issue subpoenas to the witnesses they deposed in this case.

While ***Jarrell v. The Charlotte-Mecklenburg Hospital Authority***, 206 N.C. App. 559 (2010), held that the express terms of a discovery scheduling order can render "inapplicable the statutory provisions detailing recovery of expert witness costs," the Court found ***Jarrell*** distinguishable because the expert witnesses deposed in that case were subpoenaed, whereas the witnesses in this one were not. Further, "the discovery scheduling order language in ***Jarrell*** was explicit in terms of waiving the requirement of issuing … a subpoena … [, while h]ere, the DSO language merely provided that '[p]laintiff shall make [his] expert witnesses available for deposition upon request by any party on or before' [a specified date.] There was no mention by the parties [in the present case] that the expert witnesses … did not need to be issued subpoenas." Therefore, the trial court erred in ordering plaintiff to reimburse the defendants for the cost of deposing plaintiff's expert witnesses.

Court Splits Over Enforceability of Non-Competition Agreement

In July 2009, Ludine Dotoli and his parents entered into an "Asset Purchase Agreement," pursuant to which Beverage Systems of the Carolinas, LLC purchased Imperial Unlimited Services, Inc. ("Imperial") and Elegant Beverage Products, LLC ("Elegant"). As part of that transaction, the Dotolis signed a "Non-Competition Agreement," in which they agreed not to compete with Beverage Systems' business in North and South Carolina for five years. Paragraph six of the non-competition agreement provided that if a court were to find its restrictions unreasonable in length, scope, or geographic area, "the court shall be allowed to revise the [agreement] … to cover the maximum period, scope and area permitted by law."

In March 2011, Beverage Systems learned that Dotoli's mother had created Associated Beverage Repair and that her son was managing the business and soliciting Beverage Systems' customers, so it filed suit, alleging breach of the Non-Competition Agreement, tortious interference with contract, tortious interference with prospective economic advantage, and unfair and deceptive trade practices.

The defendants denied contacting the customers of Imperial and Elegant and moved for summary judgment, claiming that the Non-Competition Agreement was unenforceable because it contained unreasonable territorial provisions, since it prohibited them from competing with Beverage Systems anywhere in North or South Carolina, whereas the geographic expanse of Imperial's and Elegant's business in North Carolina was limited to the area between Wake County and Morganton and in South Carolina from Rock Hill to Spartanburg and Gaffney. The trial court agreed that the agreement's territorial limitation was overbroad and granted defendants' motion. Plaintiff appealed.

On August 5, in ***Beverage Systems of the Carolinas, LLC v. Associated Beverage Repair, LLC***, a two-to-one majority of the Court of Appeals reversed. It found that, while the geographic limitation on competition imposed by the Non-Competition Agreement was overly broad and unenforceable, since it was "not limited to places where Elegant and Imperial had former customers and included areas not necessary to maintain plaintiff's customer relationships," paragraph six of the agreement "specifically and expressly gave the trial court authority to 'revise the restrictions … to cover the … area permitted by law.'"

The Court's majority acknowledged that North Carolina has adopted the "strict blue pencil doctrine," which "severely limits" what a court may do to alter an overly broad covenant not to compete, limiting it to "choos[ing] not to enforce a distinctly separable part of a covenant in order to render the provision reasonable." However, while application of that doctrine would prevent the court from "draft[ing] a new contract for the parties," paragraph six of their non-compete agreement authorized the trial court to revise the

agreement "to cover the maximum period, scope and area permitted by law." As a consequence, "the trial court should not have held the entire non-compete unenforceable nor should the trial court's power to revise and enforce reasonable provisions of the non-compete be limited under the 'blue pencil doctrine.' Instead, the trial court should have invoked its power under paragraph six and revised the non-compete to make it reasonable based on the evidence before it."

The majority opinion also found that the affidavit attached to defendants' motion for summary judgment contradicted the allegation in plaintiff's complaint that Dotoli violated the non-competition agreement by soliciting business from its customers, thereby raising a genuine issue of material fact that "must be resolved by the jury rather than the trial judge."

The majority opinion also addressed in detail the essential elements of plaintiff's claims for tortious interference with a contract, tortious interference with prospective economic advantage, and unfair and deceptive practices, and in each case, it found that plaintiff forecasted sufficient evidence to raise a genuine issue of material fact for submission of the issue to the jury. Therefore, the trial court erred in granting defendants' motion for summary judgment.

In dissent, Judge Elmore argued that the "blue pencil" doctrine barred the trial court from rewriting an unenforceable non-competition provision and plaintiff's evidentiary forecast lacked essential elements of its claims for tortious interference with a contract, tortious interference with prospective economic advantage, and unfair and deceptive trade practices. He would have affirmed the trial court's order granting defendants' motion for summary judgment.

Additional Opinions

On August 5, in ***Keesee v. Hamilton***, an alienation of affection action in which plaintiff Brian Keesee alleged that defendant John Hamilton initiated an affair with Keesee's wife and Hamilton counterclaimed for invasion of privacy, electronic eavesdropping, and defamation, a dispute arose over the adequacy of plaintiff's discovery responses, culminating in a trial court order finding plaintiff in willful civil contempt that he then appealed, the Court of Appeals held that although the appeal was interlocutory, it nevertheless had jurisdiction to address its merits because "where a party is found in contempt for noncompliance with a discovery order or has been assessed with certain other sanctions, the order is immediately appealable since it affects a substantial right under [N.C. Gen. Stat. § 1-277]." The Court also held, in response to plaintiff's argument that once the trial judge entered his Contempt Order he did not have jurisdiction to enter a later sanctions order, that because the judge's commission to preside over a special session of Superior Court was for one day or "until the business is completed," his jurisdiction "did not expire simply by virtue of him entering the Contempt Order because enforcement issues related to that order could – and, in fact, did – arise, leaving the business of that session of court unfinished."

Also on August 5, the Court of Appeals issued an opinion in ***4U Homes & Sales, Inc. v. McCoy***, a summary ejectment action brought in small claims court by the owner of a home leased to Helen McCoy, who filed a counterclaim alleging that plaintiff breached an implied warranty of habitability, charged illegal rent and fees, and engaged in unfair debt collection and deceptive trade practices. The magistrate dismissed the summary ejectment claim and found that McCoy was entitled to a rent abatement of $5000, the maximum he was authorized by law to award. McCoy appealed anyhow and the Mecklenburg County District Court subsequently awarded her $3705 in compensatory damages. Both parties then appealed to the Court of Appeals, which held that the District Court lacked jurisdiction because McCoy was not an "aggrieved party" entitled to invoke the District Court's jurisdiction by appealing the magistrate's award, since she

had been awarded "the maximum amount of relief available in that forum." The Court vacated the District Court's judgment and remanded the case to small claims court for reinstatement of the magistrate's judgment.

On August 19, in ***Northern Star Management of America, LLC v. Sedlacek***, an action for injunctive relief brought by Northern Star to enforce non-competition and confidentiality provisions of an agreement signed by former employee Mark Sedlacek, the Court of Appeals determined that it had jurisdiction to address Sedlacek's appeal from a trial court order directing him to refrain from violating the agreement's covenant not to compete because "the issuance of a preliminary injunction has the effect of destroying a party's livelihood," thereby "affect[ing] a substantial right" and rendering the order immediately appealable. The Court then found error in the trial court's failure to make findings with respect to the reasonableness of the geographic scope of the agreement's covenant not to compete and remanded the case to address that issue.

Also on August 19, in ***Lifestore Bank v. Mingo Tribal Preservation Trust***, the Court of Appeals held that when a debtor defaults on a promissory note secured by a deed of trust on real property, the creditor has the option of enforcing payment on the note by foreclosing on the property by "power of sale" or "judicial foreclosure," or may sue on the promissory note, seeking a money judgment. Where the creditor has voluntarily dismissed two actions seeking foreclosure by power of sale, the "two dismissal rule" of Rule 41 would bar a third action for foreclosure by power of sale, but would *not* bar either an action for judicial foreclosure or an action for a money judgment. Collateral estoppel also would not apply in that situation because two of its requisite elements are missing: (1) no final judgment was reached in the foreclosures by power of sale; they were merely dismissed, and (2) the issue in dispute in a judicial foreclosure differs from the issue in dispute in a foreclosure by power of sale.

On August 5, in ***D'Alessandro v. D'Alessandro***, a domestic dispute involving multiple child custody and support issues, in which the trial court found the defendant husband in civil contempt and remanded him into the custody of the Sheriff of Wake County "to remain until paying $10,000 to purge himself of contempt," the Court of Appeals held that "[w]here a defendant faces the potential of incarceration if held in contempt, the trial court must inquire into the defendant's desire for and ability to pay for counsel to represent him as to contempt issues…. [He] may waive his right to representation, but the record must reflect that he was advised of this right and he must voluntarily waive it." Because the record reflected no such inquiry or waiver, the trial court's order incarcerating the defendant was reversed.

WORKERS' COMPENSATION

Willful Misrepresentation Bars Claim Under N.C.G.S. § 97-12.1

After Kimberly Purcell injured her back working for Quality Assured Enterprises in August 1999, testing revealed a disc protrusion at L5-S1 and disc degeneration at L4-5. Her treating physician performed a microdiscectomy, prescribed physical therapy, gave her a five percent PPD rating, imposed a 20-pound lifting restriction, and encouraged her to find sedentary work.

Purcell subsequently worked for multiple companies at various jobs while continuing to complain of pain radiating down her left leg, receive treatment, and undergo additional testing, including a lumbar MRI that revealed a disc bulge at L4-5. She was also seen by a neurosurgeon, who diagnosed degenerative disc disease, prescribed physical therapy, and provided her with a TENS unit.

In May 2010, as part of her application for employment with Friday Staffing, Purcell completed an "Essential Functions Questionnaire" and a "Medical History Questionnaire," in which she asserted that she had never filed a workers' compensation claim, suffered any injury, undergone surgery, or received treatment for back pain. She also indicated that she could lift more than 50 pounds, stand and sit for long periods of time, and frequently bend, pull, push, kneel, squat, and twist. She also made similar claims during an in-person interview.

Friday Staffing placed Purcell at Continental Teves, a manufacturer of auto parts, where she worked on an assembly line until July 18, 2011, when she reinjured her back. After an MRI revealed a "new large focal disk extrusion at L5-S1 compressing the descending right S1 nerve root," she stopped working and filed a Form 18. Friday Staffing denied her claim for benefits on a Form 61. Both the deputy commissioner who heard the claim and the Full Commission agreed that it was barred by N.C.G.S. § 97-12.1 because Purcell "knowingly and willfully made a false representation as to her physical condition," Friday Staffing relied on what she told them, and there was a causal connection between the misrepresentation and her injury. Purcell appealed.

On August 5, in ***Purcell v. Friday Staffing***, the Court of Appeals found that the General Assembly enacted N.C.G.S. § 97-12.1 shortly after the Supreme Court ruled in ***Estate of Freeman v. J.L. Rothrock, Inc.***, 363 N.C. 249 (2009), that there was "no specific statutory basis for the Larson test," which bars an employee from recovering workers' compensation benefits if she made false statements when hired and the employer proves that (1) she "knowingly and willfully" made a false representation as to her physical condition, (2) the employer relied on that false representation and its reliance was a substantial factor in hiring her, and (3) there is a causal connection between the false representation and the employee's injury.

Because the legislature "used language identical to the *Larson* test" when it enacted N.C.G.S. § 97-12.1, the Court concluded that, in "requiring a 'causal connection' to satisfy the third element of N.C. Gen. Stat. § 97-12.1, it intended that … [the] defendant must show that … plaintiff's undisclosed or misrepresented injury, condition, or occupational disease increased the risk of the subsequent injury or disease." Applying that principle to the facts in the present case, Purcell's testimony supported the Commission's finding that she was exceeding the work restrictions imposed by her doctor when she reinjured her back, and "[t]hat finding, in conjunction with Dr. Harley's unchallenged expert testimony that plaintiff was at an increased risk of injury if she exceeded her work restrictions, supported the Commission's conclusion that a causal connection existed between plaintiff's false representation and her 18 July 2011 back injury. We, therefore, hold that the Commission did not err in denying plaintiff's claim for workers' compensation based on N.C. Gen. Stat. § 97-12.1."

Injury Returning to Work from Holiday Lunch Found Noncompensable

State Highway Patrol (SHP) technical support analysts John Graven and Kathryn Wall were injured while returning to work from a holiday lunch held at a public restaurant, when the state-owned vehicle in which they were riding encountered a patch of ice and its driver, another SHP employee, lost control of the vehicle, causing it to collide with a tree. The Department of Public Safety denied their claims for workers' compensation benefits on grounds that the accident and their injuries did not arise out of or in the course of their employment. A deputy commissioner found otherwise, but the Full Commission reversed and denied both claims. Plaintiffs appealed.

On July 29, in ***Graven v. N.C. Department of Public Safety – Division of Law Enforcement***, the Court of Appeals affirmed the Full Commission's determination that plaintiffs' claims were

noncompensable. Although three supervisors made brief remarks welcoming the attendees and thanking them for their service, attendance at the lunch was voluntary and not taken, less than half of the invited employees actually attended, attendees were required to pay for their own meals, and no awards were presented. The Court found that those facts and the two cases relied upon by the Full Commission, ***Perry v. American Bakeries Co.***, 262 N.C. 272 (1964), and ***Chilton v. School of Medicine***, 45 N.C. App. 13 (1980), supported the denial of plaintiffs' claims. As the Supreme Court held in ***Perry***, "[w]here, as a matter of good will, an employer … provides an … outing for his employees and invites them to participate, but does not require them to do so, and an employee is injured …, such injury does not arise out of the employment."

The Court of Appeals reached the same result in ***Chilton***, in which it adopted a six-factor test for determining whether employee injuries incurred at employer-sponsored recreational and social activities arise out of and in the course of the employment. It found that, in the present case, "the Commission made … findings regarding the factors considered by the Supreme Court in ***Perry*** as well as many of the six ***Chilton*** factors, answering most in the negative." Therefore, the Commission correctly determined that "the holiday lunch was for the benefit of the employees and … the only benefit to the employer was *de minimus* at best."

The Court also noted that in North Carolina, "[i]njuries received by an employee while traveling to or from his place of employment are usually not covered by the Act unless the employer furnishes the means of transportation as an incident of the contract of employment" or the injury occurred "on premises owned or controlled by the employer," neither of which was true here. While plaintiffs were riding in a state-owned vehicle when they were injured, it was not authorized for use to attend the holiday lunch and there was testimony that if permission had been requested for the purpose of attending the lunch, it would have been denied. Although there are multiple exceptions to the "going and coming rule," including the traveling salesman, contractual duty, special errand, and dual purpose exceptions, none applied in the present case.

The Court was also not persuaded by plaintiffs' argument that their injuries were compensable under an "increased risk" analysis because the lunch's location was a 20-30 minute drive from the workplace and SHP employees would never travel that far to eat lunch, since they only received a 30 minute break. As the Supreme Court held in ***Roberts v. Burlington Industries***, 321 N.C. 350 (1988), "[u]nder [an 'increased risk' analysis], the injury arises out of the employment if [the] risk … was … one to which the employee would not have been equally exposed apart from the employment. The causative danger must be peculiar to the work and not common to the neighborhood." The Court found that an increased risk analysis has no application to voluntary attendance at a social event "which, itself, does not arise out of his employment." Instead, the employees in this case were injured due to a risk "common to the public." Therefore, the Full Commission correctly determined that their injuries did not arise out of or occur in the course of their employment.

Commission Lacks Jurisdiction Over Premium Fraud Claim

John Salvie injured his back while delivering medical equipment for Medical Center Pharmacy of Concord. After receiving TTD benefits, he settled with the pharmacy's insurer, AIMCO Mutual. AIMCO then filed a hearing request, seeking a determination that Salvie was a lent employee and Action Development Company, LLC was jointly liable for the benefits Salvie received from AIMCO.

AIMCO's claim was heard by Deputy Commissioner Adrian Phillips, who concluded that Action Development was not subject to the

Workers' Compensation Act because it did not employ the requisite number of employees and the Commission lacked jurisdiction "over what is now a dispute between an insurer, AIMCO, and its insured regarding premium fraud."

Deputy Commissioner Phillips also found that Action Development was entitled to an award of attorneys' fees under N.C.G.S. § 97-88.1, although she did not set the amount of the award. After the Full Commission affirmed her opinion in all respects, AIMCO gave notice of appeal.

On August 5, in ***Salvie v. Medical Center Pharmacy of Concord, Inc.***, the Court of Appeals dismissed AIMCO's appeal from the Commission's award of attorney's fees under N.C.G.S. § 97-88.1 because, as was the case in ***Medlin v. N.C. Specialty Hospital***, ___ N.C. App. ___ (2014), and ***Triad Women's Center, P.A. v. Rogers***, 207 N.C. App. 353 (2010), no specific fee had been set by the Commission and "we have previously held that this Court will not consider an appeal of an attorneys' fees award until the specific amount … has been determined by the trial tribunal."

The Court also ruled that "the unresolved issue of the specific amount of attorneys' fees to be awarded does not render AIMCO's *entire* appeal interlocutory." AIMCO's appeal of the Commission's order dismissing its claim against Action Development was *not* interlocutory. But, it was one over which the Commission had no jurisdiction. While N.C.G.S. § 97-91 provides the Commission with authority to decide questions "arising under the Workers' Compensation Act," the Supreme Court held in ***Clark v. Gaston Ice Cream Co.***, 261 N.C. 234 (1964), that such questions "consist primarily, if not exclusively, of … the determination of rights asserted by or on behalf of an injured employee or his dependents," not an "indemnity dispute … not germane to the employee's right to compensation." Therefore, the Commission correctly determined that it did not have jurisdiction over AIMCO's claim that Salvie was a lent employee and Action Development was jointly liable for the workers' compensation benefits AIMCO paid to him.

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

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