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CIVIL LIABILITY

UIM Carrier Denied Offset for Joint Tortfeasor's Coverage

While traveling east on I-40 in McDowell County, Thomas Mills lost control of his tractor-trailer rounding a curve, collided with the concrete median divider, and flipped over. The first person to the scene, Douglas Lunsford, was standing in the highway attempting to lift Mills over the median divider when Shawn Buchanan approached from the opposite direction, swerved to avoid a vehicle that slowed down in front of him, and struck Lunsford.

Lunsford filed suit against Buchanan, Mills, and Mills' employer, James Crowder, claiming they were negligent and jointly and several liable. The named defendants filed answers containing crossclaims for contribution and indemnity. The answer of unnamed defendant North Carolina Farm Bureau Mutual Insurance Company, which insured Lunsford under business and personal auto policies with underinsured motorist (UIM) coverage limits of $300,000 and $100,000 respectively, claimed an offset against its coverage for any damages Lunsford recovered from the three defendants' liability policies.

After Buchanan's insurer, Allstate, tendered its liability limits of $50,000, Lunsford's attorney notified Farm Bureau of the tender and demanded payment of its UIM limits, which Farm Bureau chose not to do. Lunsford then reached agreement with United States Fire Insurance Company, Crowder's insurer under a

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$1,000,000 business liability insurance policy, to settle his claim against Mills and Crowder for $850,000.

After the trial court entered an order approving Lunsford's settlements with Buchanan, Mills, and Crowder, Farm Bureau moved for summary judgment on Lunsford's UIM claim, arguing that the total of the two settlements ($900,000) exceeded the combined total of Lunsford's UIM policies ($400,000). Lunsford also moved for summary judgment, contending that his policies stacked and he was entitled to recover $350,000 from Farm Bureau ($400,000 minus the $50,000 he recovered from Buchanan's insurer, Allstate).

After the trial court granted Lunsford's motion and ordered Farm Bureau to pay $350,000, plus costs and pre- and post-judgment interest, Farm Bureau appealed. On August 20, 2013, in ***Lunsford v. Mills*** ("***Lunsford I***"), the Court of Appeals affirmed, holding that when UIM coverage is triggered and there are multiple at-fault drivers, UIM carriers are obligated "to first provide coverage, and later seek an offset through reimbursement or exercise of [their] subrogation rights." Thus, in the present case, once all of the liability policies covering Buchanan's vehicle were exhausted, Lunsford's "UIM coverage was triggered" and "Farm Bureau was not at liberty to withhold coverage until [he] reached settlement agreements with Mr. Mills and Mr. Crowder." The Court also affirmed the trial court's award of interest and costs in excess of Farm Bureau's policy limits.

Farm Bureau filed a petition for discretionary review, which was granted by the Supreme Court. On December 16, in ***Lunsford v. Mills*** ("***Lunsford II***"), a divided Court, with Justice Newby dissenting, found that the reference in N.C.G.S. § 20-279.21(b)(4) to "all bodily injury liability … insurance policies applicable at the time of the accident" is in the statute's definition of "underinsured highway vehicle," not in the provision that determines whether UIM coverage is triggered. Placement of that phrase in a "separate and distinct provision of the UIM statute" indicated to the Court that it relates solely to *an* underinsured highway vehicle and not, as Farm Bureau suggested, to *all* of the vehicles involved in an accident. Therefore, the Court reasoned, "a UIM carrier's statutory obligation to provide UIM benefits is triggered when the insurer of a single vehicle meeting the definition of an underinsured highway vehicle tenders its liability limits to the UIM claimant through an offer of settlement or in satisfaction of a judgment."

As a consequence, in the present case, "upon Allstate's tender of its policy limit of $50,000 on behalf of Buchanan, UIM coverage was triggered under subdivision 20-279.21(b)(4), … Lunsford was entitled to recover UIM benefits according to the terms of his policy with Farm Bureau" and the trial court did not err in awarding him a $350,000 recovery from Farm Bureau.

On the other hand, the Court reversed the trial court's order taxing Farm Bureau with interest and costs. Citing ***Baxley v. Nationwide Mutual Insurance Co.***, 334 N.C. 1 (1993), it found that interest is an element of "damages," and since Farm Bureau "contractually capped its obligation to pay 'compensatory damages' at its UIM coverage limit," it was "not required to pay interest and costs over and above the $350,000 coverage amount."

While Justice Newby agreed with the Court's majority that an award of interest and costs against an insurer is "limited contractually by the terms of the insured's policy" and not owed in this case, he dissented from the remainder of its opinion because it was "based on a fundamental misunderstanding of UIM coverage and the implementing statute." The purpose of UIM coverage "is to serve as a safeguard when tortfeasors' liability policies do not provide sufficient recovery," whereas in the present case, the tortfeasors' combined liability limits were more than sufficient to satisfy Lunsford's damages, and more than twice his UIM limits.

Justice Newby took exception to the net result of the judgment entered by the trial court because "plaintiff received $50,000 from Buchanan's insurer, $850,000 from the settlement with Mills and Crowder, and $350,000 from his own UIM policy with Farm Bureau for a total of $1,250,000 while settling his damages claims with the actual tortfeasors for only $900,000." Therefore, "the majority's outcome leaves plaintiff with $350,000 in excess of his agreed-to damages," and that troubled Justice Newby, who would have held that "UIM coverage was not activated in this case" because it "only applies when the policyholder's UIM limits are more than the combined limits of the insurance coverage of all jointly and severally liable tortfeasors against whom the plaintiff files suit."

Constitutional Claim Against Police Officer Dismissed

Early on the morning of July 24, 2009, Durham police officer Daniel Kuszaj discovered Bryan Debaun walking in the road, carrying a twelve-pack of beer. As Debaun appeared to be intoxicated, Officer Kuszaj decided to take him into custody for his own safety, but as he began to restrain him, Debaun started to run away, so the officer tasered him in the back, causing him to fall and break his nose and jaw. Debaun was transported to Duke Hospital, where he was treated and given a citation for impeding the flow of traffic, drunk and disorderly conduct, and "resisting, delaying or obstructing an officer."

Debaun sued the City of Durham and Officer Kuszaj, seeking injunctive relief and damages for assault and battery, use of excessive force, malicious prosecution, and violation of Debaun's rights under the North Carolina Constitution. The defendants denied the material allegations of the complaint and claimed governmental and public officer immunity.

After defendants' motion for summary judgment was granted by the trial court, the Court of Appeals affirmed in an unpublished opinion issued in August 2013, but Debaun's petition for discretionary review was granted by the Supreme Court, which remanded the case "for reconsideration in light of ***Craig ex rel. Craig v. New Hanover County Board of Education***, 363 N.C. 334 (2009)."

On December 16, in ***Debaun v. Kuszaj***, the Court of Appeals readdressed Debaun's appeal from the trial court's order granting defendants' motion for summary judgment. Since the ***Craig*** decision was only relevant to Debaun's argument that the trial court erred in dismissing his claim for relief under the North Carolina Constitution, the Court limited its analysis to that issue. It then found that "a direct cause of action under the State Constitution is permitted only 'in the absence of an adequate state remedy.'"

While the Supreme Court held in ***Craig*** that a common law negligence claim brought against a defendant entitled to immunity does not qualify as an "adequate remedy at state law" because it is "entirely precluded" by the immunity plea, when ***Craig*** was applied in ***Wilcox v. City of Asheville***, ___ N.C. App. ___ (2012), the Court held that a plea of public official immunity can be overcome by evidence that the defendant law enforcement officers acted with malice, since "the additional requirement of demonstrating malice … necessary to overcome public official immunity did not render common law tort claims inadequate." Because plaintiff Wilcox "still ha[d] a chance to obtain relief," her claims were "not absolutely, entirely, or automatically precluded." Therefore, she had an "adequate remedy at state law" and was precluded from pursuing a separate constitutional claim.

Similarly, in ***Rousselo v. Starling***, 128 N.C. App. 439 (1998), the Court held that "a common law claim that … requires the plaintiff to demonstrate that the defendant acted with malice is still considered an adequate remedy which precludes a state constitutional claim." In the present case, since Debaun "could seek a remedy for his alleged injuries through his claims of assault and

battery, use of excessive force, and malicious prosecution, he cannot bring a cause of action under the State Constitution … [, and] the fact that [he] must overcome the affirmative defense of public officer immunity to succeed on his tort claims does not negate their adequacy as a remedy." Therefore, the Court affirmed the trial court's order granting summary judgment on Debaun's constitutional claims.

Application of Governmental Immunity Defense Debated

Responding to an emergency call that a motorist was suffering chest pains, Matthew Brackett drove a Mountain Home Fire & Rescue Department ambulance onto I-26 and moved into the far left lane, where he stopped suddenly to make a left turn into the median. When Gregory Wiggins, whose pickup truck was traveling behind Brackett, also attempted to stop, he was rear-ended by a bus owned by Jean's Bus Service and driven by Joel Bingham. The bus and Wiggins' pickup ended up in the right lane, where they collided with a vehicle driven by Sammy Pruett.

Pruett sued Bingham and his employer, who filed a third-party complaint against Wiggins, Brackett, and Mountain Home. In their answer, the third-party defendants moved to dismiss under Rule 12(b)(6) on grounds that the third-party plaintiffs' claims were barred by governmental and public official immunity.

Five days before their Rule 12(b)(6) motion was heard, Brackett and Mountain Home served the third-party plaintiffs with a memorandum supporting their claim of governmental immunity and attached to it a copy of Mountain Home's "Contract for Fire Protection." Third-party plaintiffs objected to consideration of the contract because it had not been produced in discovery, nor had it been attached to an affidavit filed with the court. In the alternative, they asked that if the court considered the contract, it allow them to amend their third-party complaint to allege waiver of governmental immunity by the purchase of liability insurance. The trial court denied their motion to amend and granted third-party defendants' Rule 12(b)(6) motion to dismiss. Third-party plaintiffs appealed.

On December 16, in ***Pruett v. Bingham***, the Court of Appeals affirmed the trial court in a 2-to-1 decision, with Judge Stroud dissenting. The Court's majority observed that, "[i]n the absence of some statute that subjects them to liability, the state and its governmental subsidiaries are immune from tort liability when discharging a duty imposed for the public benefit." It then found that operation of a fire department is a governmental function, that rescue services fall within the scope of activities in which fire departments engage, and that N.C.G.S. § 69-25.8 authorizes county boards of commissioners to provide fire protection services by contracting with incorporated nonprofit volunteer fire departments like the third-party defendant in this case, Mountain Home. As a consequence, the Court concluded, Mountain Home was "subject to the same authority and immunities as a county would enjoy" and, therefore, the trial court properly granted third-party defendants' Rule 12(b)(6) motion to dismiss.

In dissent, Judge Stroud observed that, "when the third-party complaint was filed, there was no reason for [third-party plaintiffs] to specifically plead governmental immunity, since no governmental entity was named as a party." While third-party defendants claimed that their "Contract for Fire Protection" with Henderson County entitled them to governmental immunity, Judge Stroud found merit in third-party plaintiffs' objection to its consideration by the trial court. It had not been produced in discovery and had not been attached to an affidavit filed with the court; rather, "it appears that third-party defendants' counsel simply handed up the Contract during the hearing, and the trial court accepted it without comment despite third-party plaintiffs' objection."

Judge Stroud also took exception to the trial court's failure, once it chose to consider the contents of the "Contract for Fire Protection," to allow third-party plaintiffs' oral motion to amend their third-party complaint so as to allege third-party defendants' waiver of governmental immunity by the purchase of liability insurance. She felt that if the trial court were to consider documents outside the pleadings despite the well-recognized rule that, in passing on a Rule 12(b)(6) motion, "the trial court may consider only the pleadings," it should have considered not only the "Contract for Fire Protection," but also Mountain Home's liability insurance policy, "which was already in the record before the court, as it had previously been provided in discovery, long before the Contract had been provided to third-party plaintiffs." Judge Stroud "[could not] discern why the trial court would consider one document outside the pleadings but not the other." Citing ***Williams v. Owens***, 211 N.C. App. 393 (2011) as authority, she would have found that "the trial court's implicit denial of third-party plaintiffs' motion to amend was an abuse of discretion."

Warranty Claim Survives Running of Statute of Repose

In August 2004, Hartley Construction entered into a contract with George and Deborah Christie to build a custom home in Chapel Hill utilizing "SuperFlex," a stucco-like material sold by GrailCoat Worldwide, LLC that was designed to coat and waterproof the structural insulated panels ("SIPs") with which Hartley planned to construct the home's exterior walls. On its website, GrailCoat claimed that, if "[p]roperly installed over SIPs, [SuperFlex] is fully warranted for twenty years to not crack, craze, fatigue or delaminate."

After their home was completed, the Christies began to notice cracks and blistering in the SuperFlex, moisture intrusion, and substantial rot and delamination of the SIPs, all of which significantly compromised the home's structural integrity. In October 2011, after several unsatisfactory communications with GrailCoat and meetings with representatives of Hartley, the Christies filed suit against both companies, claiming breach of contract, breach of express and implied warranties, negligence, and unfair and deceptive trade practices.

Each of the defendants answered the complaint and filed motions for summary judgment, contending that plaintiffs' claims were barred by the six-year statute of repose contained in N.C.G.S. § 1-50(a)(5). Plaintiffs moved for summary judgment against GrailCoat on the breach of express warranty claim, but their motion was denied by the trial court, which instead granted summary judgment for the defendants. Plaintiffs appealed.

On July 16, in ***Christie v. Hartley Construction, Inc.*** ("***Chrisite I***"), a 2-to-1 majority of the Court of Appeals affirmed (see *North Carolina Civil Litigation Reporter*, July 2013, p. 7). Relying on the six-year statute of repose, the Court's majority found that issuance of the Certificate of Occupancy on March 22, 2005 was "the last act or omission of defendants giving rise to the cause of action," so plaintiffs had until March 22, 2011 to bring their lawsuit, but did not do so until more than seven months later. Holding that "[a] statute of repose is a … condition precedent to a party's right to maintain a lawsuit," the majority agreed with the trial court that, notwithstanding GrailCoat's 20-year express warranty, the Christies failed to timely assert their claim.

Concurring in part and dissenting in part, Judge Robert N. Hunter, Jr. agreed with the majority that the trial court correctly granted defendant Hartley's motion for summary judgment, but he would have reversed the trial court's ruling on plaintiffs' breach of express warranties claim against GrailCoat because he was of the opinion that "[i]t would be … paradoxical that the statute of repose would void all claims where the parties have contractually agreed to a period of remedy that exceeds the statute of repose."

Judge Hunter's dissent having entitled plaintiffs to a review by the Supreme Court, they appealed. On December 16, it issued its opinion in ***Christie v. Hartley Construction, Inc.*** ("***Christie II***"). After describing the characteristics, functions, and purposes of statutes of limitations and statutes of repose, the Court found that it was "faced with a conflict between the public policy embodied in the repose period set out in N.C.G.S. § 1-50(a)(5) and the right of parties to contract freely." It recognized that the public policy underlying a statute of repose "provide[s] a bulwark against the possibility of open-ended exposure to suits for damages," but it could find "no public policy reason why the beneficiary of a statute of repose cannot bargain away, or even waive, that benefit." And, the Court also observed that a business "may reasonably conclude that offering a warranty giving customers protection exceeding the limitations period will provide an edge over its competitors."

Therefore, the Court concluded, while "the six-year repose period set out in [N.C.G.S. 1-50(a)(5)] provides valuable protection to those who make improvements to real property, … the beneficiaries of the statute of repose may choose to forego that protection without violating any rule of public policy." As a consequence, it reversed the trial court's dismissal of plaintiffs' claim for breach of GrailCoat's express warranty.

Claim Dismissed for Failure to Exhaust Administrative Remedies

Eric Tucker had been head coach of the Fayetteville State University ("FSU") women's basketball team for 16 years when the university's Department of Police and Public Safety ("DPPS") began an investigation of allegations of "inappropriate language towards team members," assault on a team member, and threats to terminate team members' athletic scholarships. After DPPS issued a report that caused the university's Chancellor, James Anderson, to advise Tucker that he could either resign his position or the university would begin the process of terminating his employment, Tucker retired, despite the fact that his employment contract was not due to expire until the following year.

Tucker later sued Anderson and the university, seeking compensatory damages for breach of contract. The defendants filed a Rule 12(b)(6) motion to dismiss, which the trial court granted, but the Court of Appeals reversed and the case was remanded back to the trial court. Tucker then took a voluntary dismissal, but he later refiled his complaint, alleging that the university's grievance system did not allow him to receive the compensatory damages to which he was entitled. The defendants responded with another motion to dismiss, this time under Rules 12(b)(1) and 12(b)(2), pleading sovereign immunity and alleging that Tucker had failed to exhaust his administrative remedies. The trial court agreed and entered an order dismissing Tucker's complaint with prejudice. He appealed.

On December 16, in ***Tucker v. Fayetteville State University***, the Court of Appeals affirmed the dismissal of Tucker's claim, finding that "[t]he actions of the University … and its constituent institutions are subject to the judicial review procedures of N.C. Gen. Stat. § 150B-43," FSU was a constituent institution subject to the review procedures of the statute, and "[b]ecause no statutory administrative remedies are made available to employees of the University, those who have grievances with the University have available only those administrative remedies provided by the rules and regulations of the University and must exhaust those remedies before having access to the courts."

The Court found that Tucker was subject to FSU's "Employment Policies for Personnel Exempt from the State Personnel Act," which were incorporated by reference into his employment contract, and those policies entitled him to file a written grievance with the Director of Human Resources, a hearing before a grievance committee, and a subsequent review of

the grievance by the university's Board of Governors. Because he elected not to pursue any of those administrative remedies, the Court found that the trial court correctly determined that it lacked subject matter jurisdiction and properly dismissed his complaint.

In reaching that conclusion, the Court considered, but ultimately rejected, Tucker's argument that, due to his unique position as a basketball coach, the outcome of any administrative remedy "would have been so unfair to the team and the coach as to render such procedures virtually meaningless," causing his claim to be analogous to the claim in ***Huang v. N.C. State University***, 107 N.C. App. 710 (1992), in which the Court found that "the only remedies available … [were] shown to be inadequate." Here, since Tucker failed to provide any authority in support of his contention that loyalty to the basketball team satisfied his burden of showing that his administrative remedy was inadequate, the Court ruled that the holding in ***Huang*** did not apply and the trial court properly dismissed his complaint for failure to exhaust administrative remedies.

Medical Review Committee Privilege Found Not Applicable

Judy Hammond suffered first and second degree burns when oxygen trapped under a surgical drape ignited during an operation to remove a basal cell carcinoma on her face. She sued the hospital, surgeon, anesthesiologist, and nurse anesthetists and served them with interrogatories and a request for production of documents, to which the defendants objected, claiming that several of the requested documents were shielded from discovery by N.C.G.S. § 131E-95. After Hammond responded with a Rule 37 motion to compel, the hospital provided the court for *in camera* inspection its written administrative policy entitled "Sentinel Events and Root Cause Analysis" ("RCA Policy"), an affidavit from its risk manager, Harold Maynard, describing the hospital's incident review process, Mr. Maynard's notes, and the hospital's "Root Cause Analysis Report ("RCA Report").

After inspecting the disputed documents, the court granted Hammond's motion to compel and defendants appealed. On September 3, 2013, in ***Hammond v. Saini*** ("***Hammond I***"), the Court of Appeals affirmed the trial court's conclusion that N.C.G.S. § 131E-95 did not apply because the defendants failed to show that the withheld documents were part of a medical review committee's proceedings, produced by a medical review committee, or considered by a medical review committee (see *North Carolina Civil Litigation Reporter*, September 2013, p. 4). Defendants' petition for discretionary review was subsequently granted by the Supreme Court.

On December 16, in ***Hammond v. Saini*** ("***Hammond II***"), the Supreme Court affirmed the Court of Appeals' determination that the trial court did not err when it granted Hammond's motion to compel. While the defendants argued that their "RCA Team" qualified as a "medical review committee" under N.C.G.S. § 131E-76(5)(c) ("A committee of a hospital …, if created by the governing board or medical staff … or operating under written procedures adopted by the governing board or medical staff …"), the Court held that, to satisfy that definition, "the evidence must set forth either how the committee was 'created' or how the 'written procedures' it 'operat[es] under' were 'adopted.'" The Court found that because defendants' affidavit "merely recites the language of the statute and offers the conclusory assurance that each requirement has been satisfied …[, it] does not provide specific evidence that could serve as the basis of findings of fact." Further, defendants' affidavit "explains none of the formal organizational processes that led to the adoption of the RCA Policy and the creation of the RCA Team and identifies none of the departments or personnel involved." Therefore, the Court was "unable to conclude that the RCA Team constitutes a medical review committee pursuant to N.C.G.S. § 131E-76(5)." That being the case, the trial court did not err

when it ruled that the documents at issue were not protected by N.C.G.S. § 131E-95(b) and granted Hammond's motion to compel.

Social Host Liability Barred by Decedent's Contributory Negligence

On April 1, 2011, nineteen-year-old Sam Matthews attended a cookout at the Davie County home of his grandparents, Joby and Gloria Matthews. His father John and stepmother Lisa were also present. Early the next morning, shortly after everyone else went to bed, Sam got into Gloria's automobile and drove away, but before he got out of the subdivision, he crashed into a tree and the vehicle caught fire. He died at the scene.

The administrator of Sam's estate brought a wrongful death action against Joby, Gloria, and John, contending that in the past, they provided Sam with alcohol, actively encouraged him to drink, and hosted parties where alcohol was served to other underage individuals. The estate also alleged that the defendants provided Sam with beer and liquor at the cookout and encouraged him to continue drinking after he became visibly impaired, knowing that he often drove after consuming alcohol, especially when agitated or angry. It further alleged that they had a discussion earlier that evening about Sam taking Gloria's car back to Winston-Salem to clean and detail it, Sam was told its keys were in the ignition, and he was still agitated from a disagreement he and John had earlier that day over whether he would be provided money to attend college if he chose to return to school. The defendants' answers contained Rule 12(b)(6) motions to dismiss, which were granted by the trial court, and plaintiff appealed.

On December 2, in ***Mohr v. Matthews***, the Court of Appeals looked to the discussion of social host liability in ***Camalier v. Jeffries***, 340 N.C. 699 (1995), and ***Sorrells v. MY.B. Hospitality Ventures of Ashville***, 332 N.C. 645 (1992), and found that, in ***Camalier***, the Supreme Court held that "an individual may be found liable on a theory of common-law negligence if he (1) served alcohol to a person (2) when he knew or should have known the person was intoxicated and (3) … would be driving afterwards." At the same time, it held in ***Sorrells*** that although serving alcohol to an intoxicated consumer with knowledge the consumer would later drive "may support a recovery for injuries to third parties," a "plaintiff's contributory negligence is a bar to recovery from a defendant who commits an act of ordinary negligence." And, the ***Sorrells*** Court added, "to the extent the allegations in the complaint establish more than ordinary negligence on the part of the defendant, they also establish a similarly high degree of contributory negligence on the part of the decedent."

In response to plaintiff's argument in the present case that ***Sorrells*** was distinguishable because it was brought under the Dram Shop Act, whereas the current claim was not, the Court found that the Supreme Court's decision in ***Sorrells*** "expressly analyzed … plaintiff's claims under common law negligence principles as well as under the Dram Shop Act." So, the Court found the estate's contention that defendants owed Sam "a special duty to prevent him from harming himself" lacked merit. While it agreed that "a parent-child relationship is recognized under the law as a special relationship," the legal consequences of such a relationship did not arise in the present case because "Sam was over 18 years old at the time of the accident, he was not a minor and, therefore, [he] was not under the legal control of his parents." Therefore, the trial court did not err when it granted defendants' motions to dismiss.

Health Care Professionals Not Subject to Unfair and Deceptive Trade Practice Liability

Clifford R. Wheeless, III, MD, a certified orthopedic surgeon, held medical privileges at Maria Parham Medical Center from 1998 to 2006. After the hospital's medical executive committee conducted peer reviews of Wheeless' clinical

skills in 2005 and 2006, he was accused of having violated the hospital's "disruptive physician policy." That led to a mediated settlement conference, at which an agreement was reached whereby his medical privileges were changed from "active" to "consulting staff." The hospital also agreed to end further actions against him and abide by a strict confidentiality provision.

The North Carolina Medical Board later notified Dr. Wheeless that it had received an anonymous complaint of "inappropriate and disruptive behavior" on his part. It investigated and dismissed the complaint, but Dr. Wheeless nevertheless sued the hospital, its executive committee, its Board of Directors, and its CEO for unfair and deceptive trade practices, breach of contract, fraud, civil conspiracy, and intentional and negligent infliction of emotional distress. He alleged that all of the defendants were "potentially involved" with the anonymous complaint made to the Medical Board, since it referred to matters addressed in the 2005 and 2006 peer reviews, and only they had access to the hospital's investigation and its related materials. He also alleged that, by registering an anonymous complaint with the Medical Board, the defendants violated the confidentiality provision of their mediated settlement agreement.

After Dr. Wheeless voluntarily dismissed his emotional distress claims, the hospital filed a motion for summary judgment, which the trial court granted as to his claims of unfair and deceptive trade practices, actual and constructive fraud, breach of contract, invasion of privacy, civil conspiracy, and tortious interference with contractual relations and prospective economic advantage. The claims that remained proceeded to discovery, during which the trial court entered orders that were appealed to the Court of Appeals and resolved in unpublished opinions issued on July 1 and 15, 2014, both entitled "***Wheeless v. Maria Parham Medical Center, Inc***."

In the interim, Dr. Wheless filed a second complaint against the hospital and its related individuals and entities, in which he asserted claims of unfair and deceptive trade practices, malicious prosecution, medical malpractice, negligence, negligence *per se*, and *res ipsa loquitur*. The defendants responded with Rule 12(b)(6) motions to dismiss, which were granted by the trial court as to all of the complaint's causes of action, except malicious prosecution. Dr. Wheeless appealed.

On December 2, in ***Wheeless v. Maria Parham Medical Center, Inc.***, the Court of Appeals acknowledged that Dr. Wheeless' appeal was interlocutory, but nevertheless determined that an immediate appeal was appropriate because the trial court had certified under Rule 54(b) that its order was a final judgment as to the dismissed causes of action and there was "no just reason for delay."

When it turned to the merits of Dr. Wheeless' appeal, the Court was not persuaded by his argument that the "learned profession" exception of N.C.G.S. § 75-1.1(b) did not apply. The statute's subsection (a) declares "[u]nfair methods of competition in or affecting commerce" unlawful and subsection (b) provides that "commerce" does *not* include "professional services rendered by a member of a learned profession." While Dr. Wheeless argued that, by "illegally access[ing], shar[ing], and us[ing] Plaintiff's peer review materials and patients' confidential medical records out of malice and for financial gain for illegal improper purpose[s,]" the defendants "have not rendered professional services," the Court disagreed. Instead, it found that "the conduct of which plaintiff complains involves correspondence sent by one or more medical professionals (defendants) to another group of medical professionals (the North Carolina Medical Board) concerning the conduct of yet another medical professional (plaintiff) committed in a professional setting." Because the alleged conduct, *i.e.*, registering a complaint with the Medical Board, was "integral to [defendants'] role in ensuring the provision of adequate medical care," the Court found no

merit in Dr. Wheeless' contention that the "learned profession" exception of N.C.G.S. § 75-1.1(b) did not apply.

The Court also found no merit in Dr. Wheeless' objection to the dismissal of his medical malpractice claim. Because ***Massengill v. Duke University Medical Center***, 133 N.C. App. 336 (1999), held that "the relationship of health-care provider to patient must be established to maintain an actionable claim for medical malpractice" and Dr. Wheeless was not defendants' patient, but instead was a fellow medical professional, the Court agreed with the trial court that he failed to establish this essential element of an actionable claim for medical malpractice.

And, finally, as for Dr. Wheeless' claims of negligence, negligence *per se*, and *res ipsa loquitur*, which were founded on his contention that the defendants had "exclusive possession, custody and control" of "private and confidential materials" that would not have been disclosed, but for their negligence, the Court found that they were "abated" by plaintiff's first complaint. Quoting from ***Jessee v. Jessee***, 212 N.C. App. 426 (2011), it held that, "[a]s plaintiff's two lawsuits 'present a substantial identity as to parties, subject matter, issues involved, and relief demanded,' plaintiff's second complaint has been abated by plaintiff's first complaint." Therefore, the trial court did not err in granting defendants' Rule 12(b)(6) motions to dismiss.

Summary Judgment Affirmed In Declaratory Judgment Action

Andrew and Brenda Burns owned J-Ham Farms, a family business engaged in the purchase and re-sale of grain. On February 13, 2009, Mr. Burns told his two minor sons, Dillon and Jackson, to help their brother Greyson, an employee of the business, to finish cleaning out a grain bin. Other than to tell them on which side to begin, Greyson did not have to give instructions to his brothers about cleaning out a grain bin because they had been trained by their father and had swept out bins in the past.

Grain was pulled through open holes in the floor by an auger down below. As Jackson was sweeping, he accidentally stepped into one of the holes and the auger tore off his leg from below the knee. At the time, the business had commercial general liability coverage with North Carolina Farm Bureau Mutual Insurance Company ("Farm Bureau"), which filed a complaint in Wake County Superior Court seeking a declaration that Greyson was not an insured under the policy with respect to any cause of action that might be brought against him by Jackson. Through his guardian *ad litem*, Jackson filed an answer and counterclaim, seeking a declaration that Greyson *did* qualify as an insured under the policy. He also filed a separate action in Robeson County Superior Court, seeking damages under the theory that his injuries resulted from Greyson's negligence.

Farm Bureau and Jackson's guardian *ad litem* filed cross-motions for summary judgment, which were heard by Judge Robert Hobgood, who granted Jackson's motion and denied Farm Bureau's after concluding as a matter of law that Greyson was an insured under the business's policy with Farm Bureau. Farm Bureau then filed a notice of appeal.

On December 16, in ***North Carolina Farm Bureau Mutual Insurance Company v. Burns***, the Court of Appeals looked to the definition of the term "insured" in Farm Bureau's policy and found that it included both employees and volunteer workers, but not for bodily injuries to "'voluntary workers' while performing duties related to the conduct of [the] business." The policy defined "volunteer worker" as an individual that (1) is not an "employee"; (2) "donates his or her work"; (3) "acts at the direction of and within the scope of duties determined by" the named insured; and (4) "is not paid a fee, salary or other compensation" for work performed for the business.

The Court found it undisputed that Jackson met the first, third, and fourth components of the policy's definition of "volunteer worker," thereby narrowing the issue in dispute to whether or not Jackson was "donating" his work at the time he was injured. As the policy used "conjunctive language" in the phrase "donates work … and is not paid a fee, salary or other compensation," the Court concluded that "the term 'donate' must encompass more than working without receiving payment." It then observed that "the common everyday meaning of the word 'volunteer' is characterized by not only lack of compensation, but also choice and free will," and found that, in the present case, Jackson was sweeping the grain bin not of his own free will, but because he was "compelled by parental authority." Therefore, the Court concluded, he did not "donate" his work, he was not a "volunteer worker," and the trial court did not error when it granted his motion for summary judgment and denied Farm Bureau's.

Additional Opinions

On December 2, in ***Wilmoth v. Hemric***, a personal injury action brought by Glenn Wilmoth against the owners of two cows that escaped from their pasture, one of which charged and struck him, causing severe injuries, the Court of Appeals reversed the trial court's denial of defendants' motion for directed verdict and vacated a $350,000 jury verdict, finding that to establish an animal owner's liability for negligence requires proof that the defendant's animals "were at large with his knowledge and consent, or at his will, or that their escape was due to … negligence on his part." While Wilmoth offered evidence that the cow that injured him also roamed free of its pasture twelve days *after* the day he was injured, the Court found that he "did not offer evidence sufficient to show that the cow escaped due to defendants' negligence (failure to maintain an adequate fence, leaving a gate open, counting the cows too infrequently, etc.)" and he also failed to establish that the defendants knew or should have known that the cow had escaped *before* he injured Wilmoth.

On December 16, the Court of Appeals issued its opinion in ***Bryant & Associates, LLC v. ARC Financial Services, LLC***, a dispute over a $3,825 invoice that Bryant & Associates submitted to ARC Financial Services for anti-money laundering services, in which Bryant sued ARC in Wake County Superior Court and ARC sued Bryant in New Jersey Superior Court. After ARC's motion to stay the Wake County action was granted by the trial court, Bryant appealed. The Court found that while ***Motor Inn Management v. Irvin-Fuller Dev. Co., Inc.***, 46 N.C. App. 707 (1980) established ten factors for trial courts to consider when determining whether trying a case in North Carolina would work a "substantial injustice" to a party requesting a stay, the standard for appellate review of a trial court ruling on a motion to stay is "abuse of discretion." Therefore, the sole issue on appeal was whether the trial court abused its discretion in granting ARC's motion. After reviewing the trial court's findings of fact, the Court found that its decision was not "patently arbitrary," nor "manifestly unsupported by reason,'" so it affirmed the trial court's order.

On December 16, in ***Wells Fargo Bank, NA v. Corneal***, a foreclosure action brought after the defendant mortgagees failed to make the balloon payment they owed upon maturity of their promissory note, the Court of Appeals affirmed the trial court's dismissal of defendants' Unfair and Deceptive Trade Practices Act ("UDTPA") and North Carolina Debt Collection Act ("NCDCA") claims. It found that the essential elements of a valid UDTPA claim include proof of "egregious or aggravating circumstances," and while defendants alleged that the bank broke its promise that they could refinance their loan when it matured, they did not allege that the bank intended to break that promise when it was made. Similarly, while the essential elements of a NCDCA claim include proof that a "debt collector" attempted to collect a "debt" owed by

a "consumer," the definition of a "consumer" in N.C.G.S. § 75-50(1) is "any natural person who has incurred a debt … for personal, family, household or agricultural purposes," whereas in the present case, the defendants did not allege that the debt they incurred was for "personal, family, household or agricultural purposes."

WORKERS' COMPENSATION

Taxi Cab Driver Found to Be An Independent Contractor

Refik Ademovic underwent surgery and received counseling for post-traumatic stress disorder, anxiety, paranoia, hypervigilance, social withdrawal, and panic attacks after being shot in the face by a passenger riding in his taxi cab. Although Ademovic owned the cab, he was driving it under the operating certificate of Taxi USA, LLC pursuant to an "Associate Agreement" that described him as self-employed and not an employee of Taxi USA. He also reported himself as self-employed on his tax forms, determined the days and hours he worked, kept all the fares he earned, and was responsible for the vehicle's maintenance, tax, and insurance expenses. While he paid Taxi USA a weekly franchise fee of $195, he had the choice of accepting or rejecting calls from the company's dispatcher and was only obligated to pick up the customer if he accepted the dispatcher's call.

Six days after he was shot, Ademovic filed a Form 18, alleging that his injuries arose out of his employment with Taxi USA. The defendants responded with a Form 61 denial, contending that he was an independent contractor, not an employee. Deputy Commissioner Stanback heard the claim, concluded that no employer-employee relationship existed, and held that the Commission lacked subject matter jurisdiction.

On appeal, the Full Commission found that Taxi USA required Ademovic to paint his vehicle yellow and provided him with a Blackberry the company used to dispatch calls, a top light that was attached to the roof of his vehicle, decals, a taxi meter, and a two-way radio. It found that the goodwill associated with the "unique color scheme" required by the company "belonged exclusively to defendant-employer," that the top light and decals were "advertisements and marketing to the public to attract potential customers to call defendant-employer's dispatch service," and that Ademovic's work as a taxi driver was "a necessary and integral part of defendant-employer's business." From those findings, the Full Commission concluded that Taxi USA "exerted sufficient control over plaintiff's activities … to establish the relationship between the two as an employer-employee relationship," that Ademovic was an employee of Taxi USA, and that it had subject matter jurisdiction of his claim.

After the defendants gave notice of appeal and the Commission certified that the employer-employee relationship issue was "final and ripe for appeal" under Rule 54(b), the Court of Appeals reversed on December 2, in ***Ademovic v. Taxi USA, LLC d/b/a Yellow Cab of Charlotte***. Although it found that the evidence of record supported the two findings of fact to which defendants took exception, the Court agreed with defendants' "central argument that the Full Commission erred by ultimately concluding that plaintiff was defendants' employee."

Quoting from ***Williams v ARL, Inc.***, 133 N.C. App. 625 (1999), the Court found that "[t]he question of whether a relationship is one of employer-employee or independent contractor turns upon the extent to which the party for whom the work is being done has the right to control the manner and method in which the work is performed." It then discussed ***Hayes v. Elon College***, 224 N.C. 11 (1944), in which the Supreme Court identified eight factors to consider when examining the degree of control exercised by the alleged employer, and ultimately concluded that its decisions in ***Fulcher v. Willard's Cab Co.***, 132 N.C. App. 74 (1999) and ***Alford v. Victory Cab Co.***, 30 N.C. App. 657 (1976)

were controlling. After distinguishing ***J.D. Mills v. Triangle Yellow Transit***, ___ N.C. App. ___ (2013), the Court reversed the Full Commission's determination that Ademovic was an employee of Taxi USA.

In his concurring opinion, Judge Ervin took exception to the majority's "extensive analysis of the sufficiency of the evidence to support certain of the Commission's findings," since the sole issue raised by defendants' challenge to the Full Commission's order called for the Court to resolve an issue of jurisdictional fact. When such an issue arises, Judge Ervin continued, "the jurisdictional facts found by the Commission, though supported by competent evidence, are not binding on this Court." Rather, "the appropriate standard of review … is *de novo*," and the Court is required to make independent findings regarding the jurisdictional facts.

After "carefully considering the evidentiary record" and prior caselaw, including ***Fulcher*** and ***Alford***, Judge Ervin found that, although the Court's majority "utilized an incorrect analytical framework in reaching their decision to overturn the Commission's order," he agreed that "the result they have reached on the merits is compelled by our precedent," so he concurred with the majority's reversal of the Full Commission's determination that Ademovic was an employee of Taxi USA.

Temporary Employee Limited to Reduced Compensation Rate

A&K Enterprises, a small delivery company operating as a subcontractor for Federal Express, hired Keith Tedder as a temporary employee to fill in for one of its full-time drivers, who was scheduled to undergo surgery and expected to be on medical leave for seven weeks. Tedder's prior work history included employment as a delivery driver for an employer in Asheville that ended in 2004 with a compensable back injury, a 10% permanent partial impairment rating, and permanent lifting and activity restrictions. After reaching maximum medical improvement from that injury, he was out of work for a year before finding employment with Carolina Mulch, for whom he worked from March 2007 until September 2008, when he was laid off. He then remained unemployed for more than two years before he worked on a part-time basis for a temporary staffing agency until A&K hired him on a temporary basis at a weekly salary of $625.

A week after beginning his employment with A&K, Tedder felt a sharp pain in his lower back while bending over to pick up a package. He completed the remainder of his shift, but was unable to work thereafter, and A&K had to hire another temporary worker to cover the remainder of its full-time employee's seven-week medical leave.

Tedder received care from a number of medical professionals for the low back and left buttock, leg, and foot pain he experienced as a result of his injury. Neurosurgeon Jon Silver, MD, who found that he had exacerbated his pre-existing back condition, recommended an FCE and referred him for an epidural injection by Dr. Margaret Burke, who diagnosed left L5 radiculopathy and prescribed physical therapy.

Deputy Commissioner Myra Griffin found that Tedder was totally disabled and entitled to weekly benefits at a compensation rate based on an average weekly wage of $625. After the Full Commission affirmed her award, the defendants appealed, contending that both the Commission's calculation of average weekly wage and its award of ongoing weekly benefits was in error.

On December 16, in ***Tedder v. A&K Enterprises***, the Court of Appeals agreed with the defendants that, under N.C.G.S. § 97-2(5), "average weekly wages are determined by calculating the amount the injured worker would be earning but for his injury," a calculation that is governed by the statute, which "sets out five distinct methods for calculating average weekly wage," with the five methods "ranked in order of preference, and

each subsequent method can be applied only if the previous methods are inappropriate."

The Court found that the statute's first method, which applies "when an employee has worked at his job continuously for the preceding 52 weeks," was "inappropriate" because Tedder had only worked for A&K for a week before he was injured. And, while the third method can be utilized when the employee has been on the job for less than 52 weeks, it "can be used only if 'results fair and just to both parties will be thereby obtained.'" In the present case, however, the Commission found, and the Court agreed, that method 3 was also inappropriate because the result "would be unfair [to the defendants] due to the temporary nature of the employment."

Having determined that methods 1 and 3 were inappropriate, and methods 2 and 4 inapplicable, the Court turned to "catch-all" method 5, which "does not dictate any particular methodology," but instead requires the Commission to "employ whatever method 'will most nearly approximate the amount which the injured employee would be earning were it not for the injury.'" It found that application of the fifth method to arrive at an average weekly wage of $625 was erroneous, since it "effectively treat[ed] Tedder as if he was a full-time, permanent employee of A&K," which he was not. Because the Commission acknowledged that Tedder would have been paid at that rate for no more than seven weeks, after which his temporary job would end and he would be unemployed and searching for work, just as he had done for most of the preceding two years, the Court concluded that "a $625 per week wage so vastly overstates Tedder's actual 'average' earnings that the Commission expressly found it was unfair to A&K." As a consequence, it reversed the Commission's calculation of average weekly wage and remanded the case back to the Commission to calculate a new one.

The Court went on to provide the Commission with "guidance" in its recalculation of Tedder's average weekly wage, beginning with a discussion of ***Joyner v. A.J. Carey Oil Co.***, 266 N.C. 519 (1966), which involved an injury to a relief truck driver whose employment was "inherently part-time and intermittent." In ***Joyner***, the Supreme Court found it "unfair to the employer not to take into consideration both peak and slack periods in the plaintiff's employment," so it calculated average weekly wage by "taking the total wages he actually earned in the 52 weeks prior to his injury and dividing that amount by 52."

After discussing similar average weekly wage calculations made in two other cases in which the injured employee only worked during part of the year, ***Conyers v. New Hanover County Schools***, 188 N.C. App. 253 (2008) and ***Thompson v. STS Holdings, Inc.***, 213 N.C. App. 26 (2011), the Court held that, "in calculating average weekly wages for employees in temporary positions, the Commission must consider the number of weeks the employee would have been employed in that temporary position relative to a 52-week time period." It acknowledged that the approach of taking the total amount the employee would have earned in his temporary position and dividing by 52 is not "the *only* appropriate methodology in every case, as the intent of Method 5 is to provide flexibility in reaching a result that 'will most nearly approximate the amount which the injured employee would be earning if not for the injury,'" but it was clear that the Commission's treatment of Tedder as if he had a history of long-term, full-time employment at $625 per week was in error, as it would not only result in a financial windfall for Tedder and an unjust result for A&K, but would "violate the guiding principle and primary intent of the statute – obtaining 'results that are fair and just to both employer and employee." That being so, the Court remanded the case for a new calculation of average weekly wage.

The defendants also took exception to the Commission's award of ongoing temporary total disability benefits, arguing that Tedder's inability

to find work after January 9, 2013, when Dr. Burke authorized a return to medium-duty work, was not causally connected to his injury at A&K, since he had been assigned permanent "medium-duty" work restrictions after his 2004 injury and now had the same functional capacity as before he re-injured himself. The Court agreed that Dr. Burke's opinion and testimony supported defendants' argument, but there was other evidence supporting the Commission's contrary findings, and the applicable standard of appellate review required it to affirm the Commission's findings under those circumstances. Therefore, while the Court reversed the Commission's calculation of average weekly wage, it affirmed the Commission's award of ongoing temporary total disability benefits.

Delayed Development of Brain Injury Related to Lifting Accident

Mayford Wyatt and a coworker at Haldex Hydraulics were conducting inventory on October 31, 2008, counting aluminum parts stored in metal tubs, when they attempted to move a mislabeled tub they expected to weigh 60 to 70 pounds, but actually weighed 280 pounds. The coworker was holding the front handle and Wyatt was balanced on one knee holding the back handle as they removed the tub from the shelf on which it sat. Its unexpected weight caused him to twist, turn, and fall to the floor.

Wyatt was taken to the Iredell Memorial Hospital emergency room for low back pain and was out of work through mid-December. Haldex and its insurer accepted the compensability of his low back injury on a Form 60 and eventually paid both temporary total disability benefits and compensation for a 7.5% permanent impairment of the back.

Throughout the treatment of Wyatt's low back condition, he also experienced a series of seemingly unrelated symptoms, including dizziness, loss of balance, nausea, stuffy ears, sinus pressure, fatigue, insomnia, headaches, and numbness in his face, tongue, torso, and limbs. While he continued to work through April 15, 2010, his coworkers noticed an observable decline in his health.

Wyatt's physicians offered multiple explanations for his symptoms, including sinusitis and sleep apnea, until a March 2010 MRI of his brain showed a herniated cerebellar tonsil consistent with a Chiari malformation, a condition at the junction of the neck and skull that causes compression of that portion of the central nervous system where the spine joins the brain.

Wyatt eventually came under the care of Dr. John Wilson, a board-certified neurosurgeon, who performed an anterior cervical discectomy, decompression, and fusion, and then a Chiari decompression, C3 laminectomy, and C2-5 fusion. Later, after he was taken to the emergency room suffering from quadriparesis, Wyatt was treated by another board-certified neurosurgeon, Dr. Thomas Sweasey. He diagnosed cervical cord compression and an acquired Chiari malformation caused by intracranial hypotension and performed a posterior cervical decompression and fusion.

Wyatt filed a Form 18 in July 2010, alleging that he injured his back, neck, and leg in the October 31, 2008 accident, and he subsequently filed a Form 42, requesting that his wife be appointed guardian *ad litem*, a Form 33 Request for Hearing, and an Amended Form 33 stating that his injuries were to his back, neck, and brain.

Wyatt's claim was heard by Deputy Commissioner Lovelace, whose opinion and award found that his intracranial hypotension, Chiari malformation, and cervical spine conditions were causally related to the injury he suffered on October 31, 2008. She also found him disabled and entitled to indemnity and medical compensation. After the Full Commission affirmed, with a dissent from Chairman Heath, the defendants appealed.

On December 2, in ***Wyatt v. Haldex Hydrauliucs***, the Court of Appeals considered, but ultimately rejected, defendants' contention that Dr. Sweasey's opinion of a causal connection between Wyatt's lifting accident and brain condition was, like the opinion expressed in ***Young v. Hickory Bus. Furniture***, 353 N.C. 227 (2000), based on "speculation and conjecture." It found that the testifying physician's diagnosis in ***Young*** "relied entirely upon the *post hoc ergo propter hoc* fallacy, as he testified that, 'I think that she does have fibromyalgia and I relate it to the accident primarily because … it was not there before and she developed it afterwards. And that's the only piece of information that relates the two.'" In the present case, however, while Dr. Sweasey acknowledged that there are multiple mechanisms by which a person can acquire intracranial hypotension, he determined that "the most likely proximate cause [of Wyatt's intracranial hypotension] … was a spinal fluid leak secondary to his injury." The Court found that "here, unlike the expert in ***Young***, Dr. Sweasey spent months consulting with numerous specialists, conducting a variety of diagnostic tests and extensive interviews with Plaintiff and his family, and reviewing Plaintiff's voluminous medical records to determine … the cause of Plaintiff's condition, which is why the Commission ultimately found his causation opinion most persuasive."

The Court also found no merit in defendants' argument that it was error for the Commission to conclude that Dr. Sweasey's causation opinion was legally sufficient to establish that Wyatt's cervical cord compression resulted from an aggravation of his underlying cervical condition. While it was true that two of the other medical witnesses, Dr. Wilson and orthopedic surgeon Dr. Theodore Belanger, did not agree with Dr. Sweasey's opinion, the Court found that defendants' challenge to the Commission's finding was "another invitation for this Court to reweigh the evidence that was before the Commission, which we decline to do."

And, finally, the Court disagreed with defendants' contention that the two-year statute of limitations found in N.C.G.S. § 97-24 barred Wyatt from recovering for the "brain sag" caused by his intracranial hypotension because his Form 18 did not specifically refer to an injury to the brain. While it agreed that, until he amended his Form 33 in March 2012, Wyatt did not specifically mention a brain injury on any of his claim forms, the Court excused that defect on grounds that he "suffers from a rare brain condition that is notoriously difficult to properly diagnose given its symptoms, and we believe it would defeat the purpose of the Act to deny him benefits because he was unable to fully diagnose his condition himself within the two-year statute of limitations." For that reason, and as the reference on his Form 18 to neck, back, and leg injuries "sufficiently identified the body parts affected by his work-related injury," the Court found that Wyatt's claim was not time-barred.

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

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