

# NORTH CAROLINA CIVIL LITIGATION REPORTER

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## CIVIL LIABILITY

### Governmental Immunity Bars Wrongful Death Claim

On April 15, 2008, James Bynum went to an office building Wilson County leased from Sleepy Hollow Development Company to pay his water bill. Housed in the building were a number of county offices, including the county commissioners meeting room, county manager's office, and its planning, inspections, finance, human resources, and water departments. While walking down the front steps as he was leaving, Bynum fell and suffered an injury that paralyzed his legs and right arm.

Bynum brought a negligence action against Sleepy Hollow and Wilson County that was later amended to add his wife as a plaintiff and then again after he died to assert a wrongful death claim. Defendants moved for summary judgment, claiming governmental immunity, but the motion was denied and their appeal of the trial court's ruling was later dismissed as interlocutory in *Bynum v. Wilson County*, 215 N.C. App. 389 (2011) ("*Bynum I*"), an unpublished opinion issued in September 2011.

The defendants renewed their motion for summary judgment after Bynum's death, but the trial court denied it once again, so they entered another appeal. In *Bynum v. Wilson County*, \_\_\_ N.C. App. \_\_\_ (2013) ("*Bynum II*"), issued in June 2013, the Court of Appeals found Sleepy Hollow's appeal to be interlocutory again and dismissed it. It also dismissed the County's non-

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immunity defenses for the same reason and concluded that, because Bynum went to the County's office building to pay his water bill, its alleged negligence arose out of the operation of a water system, which is a proprietary function to which governmental immunity does not apply.

After the Supreme Court allowed defendants' petition for discretionary review, it ruled on June 12, in *Bynum v. Wilson County*, \_\_\_ N.C. \_\_\_ (2014) ("*Bynum III*"), that "[g]overnmental immunity 'turns on whether the alleged tortious conduct of the county or municipality arose from an activity that was governmental or proprietary in nature.'" Applying the three-step inquiry for determining whether an activity is governmental or proprietary set out in *Estate of Williams v. Pasquotank County Parks & Recreation Dep't*, 366 N.C. 195 (2012), the Court found that the Court of Appeals erred when it based the availability of immunity on the nature of Bynum's involvement with the government and his reason for being present at a governmental facility; rather, "the analysis should center upon the governmental act or service that was allegedly done in a negligent manner."

The Court found that the office building in question "serves the County's discretionary, legislative, and public functions, several of which only may be performed by the Wilson County government." Since, in N.C.G.S. § 153A-169, the legislature "specifically assigned to the county government the responsibilities of locating, supervising, and maintaining county buildings," the Court found that the County's maintenance of the building in question was a governmental function. Therefore, it was entitled to governmental immunity and summary judgment.

In a concurring opinion, Justices Martin, Edmunds, and Beasley agreed that plaintiff's claims were barred by governmental immunity because "the alleged tort arose out of the operation and maintenance of ... [a] government office building, which is a governmental function," but they expressed a concern that the

reasoning employed in the majority opinion might "categorically bar [all] claims for harms occurring on county or municipal property," since the majority had found it dispositive that the legislature assigned to the county government responsibility for locating and maintaining county buildings. To the concurring justices, such reasoning "would seem to create a categorical rule barring any premises liability claims against counties or municipalities for harms that occur on governmental property," a result that would be "inconsistent with our long-standing precedent," including the *Estate of Williams* case cited in the majority opinion and *Aaser v. City of Charlotte*, 265 N.C. 494 (1965).

### Campus Police Granted Public Official Immunity

Several members of the family of Preston Locklear, a patient in the intensive care unit of Duke University Hospital, were visiting him on March 13, 2010, when one of them approached Mondrez Pamplin, a hospital security guard, at about 1:00 am to complain about a man panhandling near the hospital's entrance. Pamplin went outside, saw Aaron Lorenzo Dorsey, and asked if he was visiting anyone at the hospital. When Dorsey told him he was not, Pamplin suggested that he leave the University's property. He did not, so Pamplin contacted Duke University Police to report him as a "suspicious person."

Duke University Police officers Larry Carter and Jeffrey Liberto responded. When they approached Dorsey and asked for identification, he started walking away. Officer Liberto grabbed him and a struggle ensued. As Carter attempted to assist Liberto, Dorsey grabbed Carter's holstered weapon and tried to remove it from the holster. When Carter yelled "He's got my gun. He's getting my gun," Liberto began hitting Dorsey with his fists and police baton. As Carter was struggling with Dorsey on the ground, both he and Liberto commanded Dorsey to let go of the weapon. Unable to subdue him during the

struggle, Liberto drew his gun and shot Dorsey in the head at close range. He died at the scene.

The administrator of Dorsey's estate filed a wrongful death action against Duke University, Officer Carter, and Officer Liberto. Their answer asserted that the officers were "entitled to public official immunity," were "legally justified in using reasonable force to protect the lives and safety of themselves and other innocent bystanders," acted reasonably, and were not negligent. The trial court agreed and granted summary judgment in defendants' favor. Dorsey's estate appealed.

On June 17, in *Mills v. Duke University*, the Court of Appeals first took note of the fact that Dorsey did not contend that summary judgment was improper as to Duke University, so the Court affirmed the trial court's judgment in the university's favor. It then turned to plaintiff's claim against Officers Carter and Liberto in their individual capacities and their plea of public official immunity.

Citing *Clayton v. Branson*, 153 N.C. App. 488 (2002), the Court held that "'public officials cannot be held individually liable for damages caused by mere negligence in the performance of their governmental or discretionary duties.' Police officers are public officials." While Dorsey contended that Officers Carter and Liberto did not have public official immunity because Duke University was a private institution, the Court found that the Legislature "granted certain private universities the power to create campus police agencies through the enactment of Chapter 74G, the Campus Police Act." Therefore, "campus police ..., like municipal police officers, act pursuant to authority granted by our General Assembly, and ... their duties involve 'the exercise of some portion of the sovereign power.'" As a consequence, they were "entitled to public official immunity for their acts in furtherance of their official duties so long as those acts were not corrupt, malicious, or outside of and beyond the scope of their duties."

In response to plaintiff's argument that the testimony given by the eyewitnesses to the incident was contradictory as to whether Dorsey reached for or grabbed Officer Carter's gun, thereby creating a genuine issue of material fact and rendering summary judgment inappropriate, the Court thoroughly reviewed the evidentiary record and determined that "Plaintiff provided no evidence tending to show that Mr. Dorsey did not attempt to gain control of Officer Carter's weapon. 'At the summary judgment stage, plaintiffs cannot rely on the allegations of the complaint; rather, plaintiffs need to present specific facts to support their claim.'"

The Court then observed that, even if Officers Carter and Liberto had no legal basis for detaining Dorsey at the outset, "[o]nce ... [he] grabbed Officer Carter's weapon, he exceeded any 'force as reasonably appear[ed] to be necessary,' rendering his response 'excessive' and 'unlawful.'" And, by virtue of N.C.G.S. § 15A-401(d)(2)(a), "[a]n officer may resort to the use of deadly force '[t]o defend himself or a third person from what he reasonably believes to be the use or imminent use of deadly physical force.'" Therefore, it found that "Officer Liberto's use of deadly force was justified," so it affirmed the trial court's grant of summary judgment on plaintiff's wrongful death claims against the officers in their individual capacities.

The Court also found no merit in plaintiff's contention that it was error for the trial court to grant summary judgment on the issue of false arrest. It found no such claim in plaintiff's complaint, and while plaintiff filed a motion for leave to add one, the trial court took the motion under advisement and never ruled on it. Citing Rule of Appellate Procedure 10(a)(1) and *Department of Transportation v. Webster*, \_\_\_ N.C. App. \_\_\_ (2013) as authority, the Court held that "the failure to obtain a ruling on a motion presented to the trial court renders the argument raised in the motion unpreserved on appeal," so the Court affirmed the trial court's grant of summary judgment in defendants' favor.

## Summary Judgment Reversed In Medical Malpractice Action

After several months of physical therapy and two MRIs, Michele Peter underwent surgery at Mercy Hospital in Charlotte for a severe sprain of her right ankle. During the operation, she remained in “conscious sedation” under the care of Dr. John Vullo of Southeast Anesthesiology Consultants, who administered nerve blocks behind Ms. Peter’s knee. According to the complaint she and her husband subsequently filed against Dr. Vullo, Southeast Anesthesiology, and the hospital, the nerve blocks were improperly administered, resulting in nerve damage, “extreme pain,” and numbness in Ms. Peter’s foot, which interfered with her day-to-date activities and ability to work.

After plaintiffs’ two expert witnesses, Drs. Steven Fiamengo and Robert Friedman, were deposed, the defendants moved for summary judgment. Plaintiffs filed an affidavit from Dr. Fiamengo in response, which defendants moved to strike on grounds that it contradicted his deposition testimony and was offered “in an attempt to create an issue of fact and defeat ... Defendants’ Motion for Summary Judgment.” The trial court denied the motion to strike, but granted the motion for summary judgment, and plaintiffs appealed.

On June 3, in *Peter v. Vullo*, the Court of Appeals first addressed the trial court’s treatment of the affidavit of Dr. Fiamengo. It agreed that, at the time of his deposition, he was not familiar with the standard of care in Charlotte and appeared to improperly apply a national standard to the question of Dr. Vullo’s alleged violation of the applicable standard of care under N.C.G.S. § 90-21.12. But, his affidavit established that subsequent to the deposition, he reviewed information about the Charlotte community and Mercy Hospital, such that he was “familiar with the prevailing standard of care for performing ... nerve blocks in the same or similar community to Charlotte ... by a physician with the same or

similar training, education, and experience as Dr. Vullo.”

That being so, the facts in the present case were similar to those in *Roush v. Kennon*, 188 N.C. App. 570 (2008), in which the Court approved the actions of an expert witness who, subsequent to being deposed, supplemented his understanding of the applicable standard of care so as to satisfy the requirements of N.C.G.S. § 90-21.12, and were distinguishable from those in *Wachovia Mortgage Co. v. Autry-Barker-Spurrier Real Estate, Inc.*, 39 N.C. App. 1 (1978), in which the Court held that “a party opposing a motion for summary judgment cannot create an issue of fact by filing an affidavit contradicting the prior sworn testimony of a witness.” Because the testimony of Dr. Fiamengo provided sufficient evidence of a breach of the applicable standard of care to defeat defendants’ motion for summary judgment, the Court reversed the trial court’s order granting summary judgment in favor of Dr. Vullo and Southeast Anesthesiology.

As for plaintiffs’ claim against Mercy Hospital, however, the Court found no merit in their argument that “an inference can be drawn that an agency relationship existed between Dr. Vullo and the Hospital Defendants” under the doctrine of apparent agency. While that doctrine would have been applicable “if the hospital held itself out as providing services and care,” the Court found this claim distinguishable from the case cited by plaintiffs, *Diggs v. Novant Health, Inc.*, 177 N.C. App. 290 (2006), as Dr. Vullo was an employee of Southeast Anesthesiology, not the hospital, and the surgery consent form signed by Ms. Peter included not only a notice that the hospital had contracted with “independent professional groups ..., including Southeast Anesthesiology ...,” who were “not subject to control or supervision” by the hospital, but her agreement that the hospital would “not [be] responsible or liable for what they do or fail to do.” Therefore, the Court found that, unlike Dr. Vullo and Southeast Anesthesiology, the hospital defendants were entitled to summary judgment.

## Alabama Judgment Afforded Full Faith And Credit

DocRx, Inc., an Alabama corporation, sued EMI Services of North Carolina in Mobile County, Alabama for breach of contract and obtained a judgment for \$453,683. It then filed a “Request To File Foreign Judgment” in Stanly County Superior Court and attached a copy of the Alabama judgment. EMI responded with a “Motion for Relief From And Notice of Defense to Foreign Judgment,” arguing that DocRx falsely inflated the amount of damages owed in its filings in Alabama, entitling EMI to relief under Rule 60(b). The trial court entered an order denying the motion to enforce the Alabama judgment after determining that the affidavits and exhibits submitted by EMI supported its argument that the Alabama judgment was obtained as a result of fraud and, under N.C.G.S. § 1C-1703(c) of Uniform Enforcement of Foreign Judgments Act (UEFJA), was “subject to the same defenses as a judgment of this State,” such that, under Rule 60(b)(3), relief from enforcement of the judgment was available if the trial court determined that it was procured by fraud. DocRx appealed

On January 15, 2013, in *DocRx, Inc. v. EMI Services of N.C., LLC*, \_\_\_ N.C. App. \_\_\_ (2013), the Court of Appeals vacated the trial court’s order denying enforcement of the Alabama judgment because “the remedies available under Rule ... 60 are limited by the Full Faith and Credit Clause of the United States Constitution when a foreign judgment is at issue,” and “intrinsic fraud, misrepresentation and misconduct” were not a sufficient basis under the Full Faith and Credit Clause to deny plaintiff’s motion to enforce the Alabama judgment.

The Supreme Court allowed EMI’s petition for discretionary review, and on June 12, issued its opinion in *DocRx, Inc. v. EMI Services of N.C., LLC*, holding that “the defenses preserved under North Carolina’s UEFJA are limited by the Full Faith and Credit Clause to those ... directed to

the validity and enforcement of a foreign judgment,” such as that the judgment creditor committed extrinsic fraud, the rendering state lacked jurisdiction, the judgment has been paid, an accord and satisfaction has been reached, the judgment is subject to continued modification, or the judgment debtor is exempt from execution or its due process rights were violated. Since the four months EMI had to raise a challenge to plaintiff’s judgment under Alabama Rule of Civil Procedure 60(b)(3) had passed, it was final under Alabama law, “[i]rrespective of whether the alleged fraud was intrinsic or extrinsic.” As a consequence, the Alabama judgment was “entitled to the same credit in North Carolina that it would be accorded in Alabama.”

That is, the Court held, “the defenses to a foreign judgment under the UEFJA are limited by the Full Faith and Credit Clause to those ... directed to the enforcement of the foreign judgment,” so North Carolina Rule of Civil Procedure 60(b) did not apply. As a result, the Court affirmed the Court of Appeals’ reversal of the trial court’s order denying enforcement of the Alabama judgment.

## State Waives Sovereign Immunity By Entering Into Contract

Can Am South, LLC, owner of a commercial office and storage facility in Raleigh, entered into lease agreements with three agencies of the State of North Carolina, each of which contained an “availability of funds clause” that allowed the State to terminate the lease if “available funding for the payment of rents is insufficient to continue the operation of its ... office on the premises leased.” After the State exercised its right to terminate two of the three subject leases, Can Am South filed suit, claiming breach of contract. The State and two involved agencies moved to dismiss under Rule 12(b)(1) for lack of subject matter jurisdiction, Rule 12(b)(2) for lack of personal jurisdiction, and Rule 12(b)(6) for failure to state a claim upon which relief can be granted, claiming that they did not waive



sovereign immunity, but the trial court denied their motion. Defendants appealed.

On June 3, in *Can Am South, LLC v. The State of North Carolina*, the Court of Appeals first addressed the interlocutory nature of defendants' appeal, recognizing both the general rule that "there is no right of immediate appeal from interlocutory orders" and its qualification by N.C.G.S. § 1-277, which "allows a party to immediately appeal an order that either (1) affects a substantial right or (2) constitutes an adverse ruling as to personal jurisdiction."

Applying those principles to the present case, the Court dismissed defendants' appeal from the denial of their Rule 12(b)(1) motion to dismiss because "denial of a Rule 12(b)(1) motion based on sovereign immunity does not affect a substantial right and is therefore not immediately appealable under section 1-277(a)." However, because it has consistently held in the past that "(1) the defense of sovereign immunity presents a question of personal, not subject matter, jurisdiction, and (2) denial of Rule 12(b)(2) motions premised on sovereign immunity are sufficient to trigger immediate appeal under section 1-277(b)," it went on to consider whether the trial court properly denied defendants' Rule 12(b)(2) motion to dismiss on sovereign immunity grounds.

The Court then quoted from the "seminal case on waiver of sovereign immunity in the context of contractual disputes," *Smith v. State*, 289 N.C. 303 (1976), which held that "whenever the State of North Carolina, through its authorized officers and agencies, enters into a valid contract, the State implicitly consents to be sued for damages ... in the event it breaches the contract," and in such a case, "the doctrine of sovereign immunity will not be a defense to the State." Therefore, the Court found that "defendants impliedly waived their sovereign immunity by entering into the lease agreements with plaintiff," so it affirmed the trial court's denial of defendants' motion to dismiss.

## State Waives Sovereign Immunity In Retiree Health Insurance Dispute

In April 2012, a group of retired State of North Carolina employees filed suit, contending that they were offered certain benefits as part of their employment, including insurance coverage after their retirement through the State Health Plan, with the option of either non-contributory coverage on a 80/20 basis or coverage on a 90/10 basis with a contribution. Their complaint alleged that although their health insurance benefit rights vested after they worked for five years, the State and State Health Plan stopped providing the 90/10 plan in 2009 and discontinued the 80/20 plan in 2011, thereby breaching their contractual rights.

Defendants moved for dismissal of plaintiffs' complaint under Rules 12(b)(1), (2), and (3), arguing that the trial court lacked jurisdiction due, in part, to sovereign immunity. They also argued that the allegations of the complaint failed to state a claim upon which relief could be granted. The trial court disagreed and denied the motion. Defendants appealed.

On June 17, in *Lake v. State Health Plan for Teachers and State Employees*, the Court of Appeals first addressed its jurisdiction over the appeal, since it was interlocutory, and found that "appeals raising issues of governmental or sovereign immunity affect a substantial right sufficient to warrant immediate appellate review." But, it also held that the denial of a Rule 12(b)(6) motion "is an interlocutory order from which no immediate appeal may be taken," so it dismissed defendants' appeal from the denial of their Rule 12(b)(6) motion and its opinion only addressed defendants' Rule 12(b)(2) motion and their claimed entitlement to sovereign immunity.

Quoting from the same Supreme Court decision it cited in the *Can Am South* case (see page 5 *infra*), *Smith v. State*, 289 N.C. 303 (1976), the Court held that "whenever the State of North Carolina ... enters into a valid contract, ... [it]

implicitly consents to be sued for damages ... in the event it breaches the contract,” and as was the case in *Archer v. Rockingham County*, 144 N.C. App. 550 (2001), its waiver of immunity applies in the context of employment contracts.

Because plaintiffs alleged that they accepted employment with the State based, in part, on its health plan and claimed that their right to participate in the plan vested upon retirement, the Court found “instructive” the holding in *Sanders v. State Personnel Commission*, 183 N.C. App. 15 (2007), in which the State breached the plaintiff-employees’ employment contracts by denying “employment benefits that permanent employees are entitled to receive.” As the plaintiffs in the present case “sufficiently alleged a valid contract between them and the State ... to waive the defense of sovereign immunity,” the Court affirmed the trial court’s order denying defendants’ motion to dismiss.

### Statute of Repose Not Applicable In Ordinary Negligence Claims

Richard Bost, a resident of the Brian Center, a long-term nursing and rehabilitation facility in Salisbury, suffered a blunt trauma to his head, cuts, contusions, and a broken nose when a device used to deliver IV fluids standing next to his bed fell. After being treated at Rowan Regional Medical Center, he was sent to another nursing home, where he died three weeks later.

Bost’s estate filed a negligence, wrongful death, and breach of contract action against the Brian Center, which moved for dismissal and/or summary judgment, asserting among other defenses that the statute of repose barred the estate’s claim. The trial court agreed and granted summary judgment. Plaintiff appealed.

On June 17, in *Goodman v. Living Centers-Southeast, Inc.*, the Court of Appeals reversed. While the statute of repose found in N.C.G.S. § 1-15(c) applies to medical malpractice claims, the Court agreed with the estate that, in the present

case, “the gravamen of [plaintiff’s] complaint is ordinary negligence,” not medical malpractice.

In reaching that conclusion, the Court noted that N.C.G.S. § 90-21.11(2)(a) defines medical malpractice as a “civil action for ...personal injury or death arising out of the furnishing or failure to furnish professional [health care] services,” and found in *Lewis v. Setty*, 130 N.C. App. 606 (1998) the definition of “professional services”: an act or service “arising out of a vocation, calling, occupation, or employment involving specialized knowledge, labor, or skill, and the labor [or] skill involved is predominantly mental or intellectual, rather than physical or manual.”

The Court then found that, in essence, plaintiff’s complaint alleged failure to warn and failure to safely position the IV fluid apparatus, “acts or failure to act [which] clearly involved the exercise of manual dexterity as opposed to the rendering of any specialized knowledge or skill.” Because “the claims asserted in plaintiff’s complaint sound in ordinary negligence rather than medical malpractice,” the Court held that the three-year statute of limitations of N.C.G.S. § 1-52(16) applied, and not the statute of repose. Therefore, it the trial court erred when it dismissed the lawsuit under N.C.G.S. § 1-15(c).

### Uninsured Motorist Carrier Must Be Separately Served

In September 2011, Jackson Kahihu sued Raymond Brunson, alleging that while they were driving in the same direction on Holloway Street in Durham, Brunson suddenly swerved into his lane of travel and applied his brakes, leaving Kahihu unable to stop before their two vehicles collided. He served Brunson with a summons and complaint and obtained an entry of default after Brunson failed to file an answer. But, he later requested that the default be set aside because not “[a]ll responsible parties were ... known to [him]” at the time he requested and obtained the entry of default.

After he served Brunson with an amended complaint, Kahihu's uninsured motorist carrier, Integon, filed an answer, but Brunson did not. The trial court entered a default judgment against both Brunson and Integon, which Integon moved to set aside under Rules 60(b)(1), (3), and (6), arguing that the court did not have authority to find it in default after it filed an answer. The trial court agreed. It found that Brunson and Integon were separate entities and held that the entry of default against Brunson was not binding on Integon.

When the case came on for trial, Integon moved for a directed verdict at the close of plaintiff's evidence. The trial court entered judgment against Brunson, but granted Integon's motion for directed verdict because it had not been served with a summons as required by Rule 4 and N.C.G.S. § 20-279.21(b)(3)(a). Kahihu appealed.

On June 3, in *Kahihu v. Brunson*, the Court of Appeals affirmed the trial court's order granting Integon's motion for directed verdict. Quoting from *Liberty Mutual Insurance Co. v. Pennington*, 356 N.C. 571 (2002), it found that N.C.G.S. § 20-279.21(b)(3) "requires that the [uninsured motorist] carrier be served *with a copy of the summons and complaint* in order to be bound by a judgment against the uninsured motorist." And, while plaintiff's filing of an affidavit of service complying with N.C.G.S. § 1-75.10 "create[d] a rebuttable presumption of valid service," Integon rebutted that presumption by submitting an affidavit of its own establishing that "it never received a copy of the summons." As a consequence, the Court held that "the trial court was without jurisdiction over defendant Integon and did not err in granting defendant Integon's motion for directed verdict."

In reaching that conclusion, the Court rejected plaintiff's contention that it was not necessary for him to serve Integon with a copy of his summons and complaint to make it a party to the lawsuit. After quoting from the relevant statutory

provisions, the Court held that "N.C. Gen. Stat. § 20-279.21(b)(3)a establishes that the insurer is a separate party to the action between the insured plaintiff and an uninsured motorist." The fact that the statute "unambiguously provides that that an uninsured motorist carrier may defend in the name of the uninsured motorist or its own name ... evince[es] a legislative recognition that the uninsured motorist and the insurer ... are separate parties with independent interests." Therefore, there was no merit in plaintiff's argument; rather, as held in *Reese v. Barbee*, 129 N.C. App. 823 (1998), "in order for the insurer to be bound by a judgment against the uninsured motorist, service of process must be obtained upon the insurer."

### Emotional Distress Claim Barred By Collateral Estoppel

The Gaston County Medical Examiner's Report prepared by Dr. Bruce Flitt stated that the body of plaintiff Gretchen Propst's son was still warm when he examined it, and his eyes were blue. Contending that those statements were not true, Propst filed a claim against the North Carolina Department of Health and Human Services ("DHHS") under the Tort Claims Act, alleging that because she feared the body her family buried might not have been that of her son, she suffered "severe emotional distress" and "post traumatic stress syndrome."

Propst admitted that when the body was later exhumed, it was found to be that of her son, but she complained that it was not dressed in the burial attire she chose, which showed that "Dr. Flitt and his assistants never actually viewed or examined her son's body, in violation of their duties." She claimed \$200,000 in damages.

DHHS moved for summary judgment, contending that Propst's claim was barred by collateral estoppel because she had previously filed a negligence action against Dr. Flitt, in which the superior court granted summary judgment in his favor on immunity grounds and



under the public duty doctrine. Deputy Commissioner George Glenn denied DHHS's motion, but the Full Commission reversed, finding that the claim was barred by collateral estoppel and the fact that Dr. Flitt owed Propst no individual duty distinct from his duty to the public. Propst appealed.

On June 3, in *Propst v. North Carolina Department of Health and Human Services*, the Court of Appeals identified the four elements of collateral estoppel: (1) the issues in dispute in the second action are the same as in the first; (2) they must have been raised and "actually litigated" in the prior action; (3) they were "material and relevant" to resolution of the prior action; and (4) their determination was "necessary and essential" to the resulting judgment.

In the present case, plaintiff contended that because the trial court granted summary judgment on immunity grounds *and* the public duty doctrine, "its determination of the duty issue was not *necessary* to its judgment." Although the Court agreed that the Restatement (Second) of Judgments supported that argument, it found "the approach of the Second Restatement ... [to be] incompatible with the doctrine of collateral estoppel as it has been applied in this state." Under the rule urged by plaintiff, if the parties fully litigated two issues, both of which independently supported the trial court's judgment, and it was held that neither precluded a later lawsuit, then the parties would be free to relitigate either issue in the future. Such a result would be in clear violation of the doctrine of collateral estoppel.

Instead of the rule advocated in the Second Restatement of Judgments, the Court found merit in the contrary rule articulated by the drafters of the *First* Restatement of Judgments, *i.e.*, that when there are multiple bases for a trial court's judgment, "both independent grounds of a prior judgment should have later preclusive effect, assuming [that] all of the other elements of collateral estoppel are present."

Citing as authority *King v. Grindstaff*, 284 N.C. 348 (1973), in which the Supreme Court held that "the doctrine of collateral estoppel applies even if the prior judgment may have been in error," the Court held that "where a trial court bases its judgment on multiple independent grounds, each of which were fully litigated, and that judgment has not been appealed, the trial court's determination as to every issue actually decided has preclusive effect in later litigation." In the present case, the superior court found that Dr. Flitt was entitled to summary judgment based on the public duty doctrine, which "operates to prevent plaintiffs from establishing the first element of a negligence claim – duty to the individual plaintiff." Because all of the elements of collateral estoppel were present, the Court held that "plaintiff is precluded from contesting the issue of whether the public duty doctrine applies" and it affirmed the Full Commission's order granting summary judgment to DHHS.

### Trial Court Change of Venue Ruling Overturned

Wallace Kiker, who was injured in a one-car accident in Union County, sued the vehicle's operator, Cedric Winfield, in Harnett County. Winfield moved for a change of venue under Rule 12(b)(3) and N.C.G.S. §§ 1-82 and 1-83 on grounds that he resided in Union County and Kiker was incarcerated in a prison in Spruce Pine. When asked in discovery where he had lived during the preceding five years, Kiker listed four addresses in Union County and the Mountain View Correctional Institution in Spruce Pine. After the trial court denied Winfield's motion for change of venue, he appealed.

The Court of Appeals reversed on June 17, in *Kiker v. Winfield*. It based its decision on N.C.G.S. § 1-83, which authorizes the trial court to transfer venue when it is improper, N.C.G.S. § 1-82, which provides that, for residents of the State of North Carolina, lawsuits "must be tried in the county in which the plaintiffs or the defendants ... reside at its commencement," and

*Miller v. Miller*, 38 N.C. App. 95 (1978), which held that “this change of venue is not discretionary, but rather it is mandatory.”

In the present case, while Kiker’s complaint alleged that he was a citizen and resident of Harnett County, it was not verified, and the Court of Appeals held in *Hill v. Hill*, 11 N.C. App. 1 (1971) that “[a]n unverified complaint is not an affidavit or other evidence.” Since the record contained no evidence that Kiker was a resident of Harnett County and his verified interrogatory answers suggested otherwise, as he provided four addresses in Union County and one in Mitchell County as those at which he had resided during the past five years, the Court held that “in the absence of any evidence that plaintiff resided in Harnett County, the trial court erred in denying defendant’s motion for change of venue.”

In dissent, Judge Bryant agreed that while “[a] motion for change of venue must be granted where it is clear that the action has been brought in the wrong county,” *Centura Bank v. Miller*, 138 N.C. App. 679 (2000) held that “[w]here venue is appropriate under N.C.G.S. § 1-82, a trial court’s decision as to whether to permit a non-mandatory transfer is reviewed for abuse of discretion,” and there was no proof of an abuse of discretion in this case. She found significance in the fact that plaintiff’s Harnett County attorney signed the complaint, since Rule 11 provides that “[t]he signature of an attorney ... constitutes a certificate by him that ... the pleading ... is well grounded in fact.” To Judge Bryant, that “indicat[ed] that plaintiff’s attorney believed plaintiff was a resident of Harnett County.... Therefore, the record contains some evidence that was before the trial court as to plaintiff’s residency [in Harnett County] at the commencement of the action.” For that reason, she would have affirmed the trial court’s order denying defendant’s motion to change venue.

### Additional Opinions

On June 12, in *Dallaire v. Bank of America, N.A.*, an action involving allegations of negligent

misrepresentation and breach of fiduciary duty arising out of a home mortgage refinancing loan, the Supreme Court held that, “[g]enerally, the home loan process is regarded as an arm’s length transaction between parties of equal bargaining power and, absent exceptional circumstances, will not give rise to a fiduciary duty.” Therefore, it is unlike situations in which “a special confidence [has been] reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence,” such as the relationship between spouses, partners in a partnership, trustees and beneficiaries, and attorneys and their clients. Because “a borrower cannot establish a claim for negligent misrepresentation based on a loan officer’s statements ... if the borrower fails to make reasonable inquiry into the validity of those statements,” the Court concluded that it was error for the Court of Appeals to overturn the trial court’s order granting summary judgment to the bank on both of plaintiff’s claims.

On June 12, the Supreme Court also issued its opinion in *King v. Town of Chapel Hill*, a declaratory judgment action brought by George King, d/b/a George’s Towing and Recovery, challenging the Towing and Mobile Phone Ordinances enacted by the Town of Chapel Hill. The Court ruled that it was permissible for the Town to regulate towing and concluded that the Town acted within its authority by enacting signage, notice, and payment requirements for towing from private lots, but it held that the Town exceeded its powers when it imposed a towing fee schedule and prohibited towing companies from charging credit card fees. It also held that the Legislature’s “comprehensive scheme regulating mobile telephone usage on our streets and highways [in N.C.G.S. § 20-137.3] precludes municipalities from intruding into this sphere wholly occupied by the State.” Therefore, since the Town’s ordinance purported to prohibit adults from “us[ing] a mobile telephone ... while operating a motor vehicle” within the Town, it was preempted by State law and was invalid.

## WORKERS' COMPENSATION

### *Russell v. Lowe's Test for Disability* Clarified By Supreme Court

Claude Medlin worked in the commercial construction industry as a supervisor, project manager, project engineer, and estimator from the time he graduated from NCSU with a B.S. degree in civil engineering in 1974 until November 21, 2008, when he was laid off by Weaver Cooke Construction, LLC as part of widespread layoffs within the company and the construction industry as a whole.

Medlin hurt his right shoulder moving a large credenza in May 2008 and later exacerbated the injury moving a fifty-pound box of files. After an operation performed by Dr. Raymond Carroll in February 2009, he underwent physical therapy, but his shoulder pain continued to worsen. An MRI in late 2009 showed a labral tear that was not present at the time of surgery earlier that year, so Dr. Carroll concluded it was not caused by his injury at work.

Both Dr. Carroll and Dr. Kevin Speer eventually assigned permanent work restrictions that prevented Medlin from lifting more than ten pounds, climbing ladders, or performing repetitive overhead activities. He began receiving unemployment benefits a month after being laid off, started to receive temporary total disability benefits the following month, and continued to receive both types of benefit as he sought substitute employment within the construction industry. But, despite making hundreds of job inquiries, he was unable to find equivalent work.

Weaver Cooke eventually filed an application to terminate TTD, alleging that Medlin was no longer disabled. After a hearing and depositions from Drs. Carroll and Speer and vocational case manager Gregory Henderson, Deputy Commissioner Baddour denied Medlin's claim for TTD after December 22, 2010 and awarded

the defendants a credit for the unemployment benefits he received while being paid TTD.

Medlin appealed, but the Full Commission found that he was laid off "secondary to a lack of work ... [as] part of a larger economic downturn." It also found that it was Dr. Carroll's opinion that Medlin's labral tear was unrelated to his injury at work, someone with Medlin's activity restrictions was physically capable of performing the job duties of an estimator, and he would have been able to return to work in that capacity, but for the current economic downturn. From those findings, the Full Commission concluded that Medlin was not entitled to weekly benefits after the defendants filed their application to cease payment of TTD and were entitled to a credit for the payments they made after that date.

Medlin then appealed to the Court of Appeals, which, in a divided opinion issued last September (see *North Carolina Civil Litigation Reporter*, September 2013, page 6), affirmed, citing as authority the holding in *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593 (1982) that "a plaintiff seeking to establish disability must show that his inability to earn the same wages as before the injury was a result of his work-related injury." The Court's two-judge majority held that the Commission's finding that "the only reason plaintiff is unable to find employment was ... the economic downturn and was not related to his injury" was a sufficient basis for denying Medlin's claim for additional weekly benefits.

In dissent, Judge Geer argued that proving disability by one of the four methods described in *Russell v. Lowe's Product Distribution*, 108 N.C. App. 762 (1993) necessarily establishes *Hilliard's* causation requirement, and in the present case Medlin had satisfied the second prong of the *Russell* test by producing evidence that he was capable of some work, but despite reasonable efforts, was unable to obtain employment. Her dissent provided Medlin with a right of appeal to the Supreme Court under N.C.G.S. § 7A-30(2), which he exercised.

On June 12, in *Medlin v. Weaver Cooke Construction, LLC*, a unanimous Supreme Court, in an opinion authored by Justice Hudson, affirmed the Court of Appeals' majority opinion. In doing so, it reaffirmed the holding in *Hilliard* that "under the Workers' Compensation Act, a claimant seeking disability must establish that his inability to work was 'because of' his work-related injury." As in *Hilliard*, the Court ruled that, in order to support the legal conclusion of disability, a plaintiff must prove three factual elements: (1) he was incapable after his injury of earning the same wages he had earned before his injury in the same employment, (2) he was incapable after his injury of earning the same wages he had earned before his injury in any other employment, and (3) his incapacity was caused by the injury.

The Court found that the Court of Appeals "has not applied *Russell* consistently," since one line of cases hold that "satisfying one of the *Russell* prongs satisfies two of the *Hilliard* elements, but not necessarily the causation element," and the second line holds that "satisfying one of the *Russell* prongs proves all three *Hilliard* elements." It then "reaffirm[ed] that a claimant seeking to establish that he is legally disabled must prove all three statutory elements as explained in *Hilliard*," and held that while "[h]e may prove the first two elements through any of the four methods articulated in *Russell*, ... these methods are neither statutory nor exhaustive. In addition, a claimant must also satisfy the third element, as articulated by *Hilliard*, by proving that his inability ... is because of his work-related injury." That is, the claimant must also prove causation in order to establish his entitlement to weekly benefits.

The Court then observed that, as "the legal definition of disability refers not solely to physical infirmity, but also to earning capacity, ... broad economic conditions, as well as the circumstances of particular markets and occupations, are undoubtedly relevant to whether a claimant's inability to find equally

lucrative work was because of a work-related injury." Since the Commission's findings established that the limitations attributable to Medlin's labral tear were likely not caused by his work-related injury, the Court held that "these findings support the legal conclusion that plaintiff has not met his burden of showing that he is entitled to disability compensation," so it affirmed the Court of Appeals' majority opinion affirming the Full Commission's denial of TTD benefits after December 22, 2010.

### Interest Awarded Under N.C.G.S. § 97-86.2

In 1996, Department of Corrections employee James J. Lewis was awarded TTD benefits from September 11, 1994 until he returned to work and the Department of Corrections was directed to cover the treatment of his posttraumatic stress disorder. Later, an additional award was entered, in which it was held responsible for the medical expenses resulting from Lewis' diabetes and a related periodontal condition.

Lewis subsequently asked for a hearing to obtain a lump sum award of permanent disability benefits under N.C.G.S. § 97-31. The deputy commissioner who heard the claim, and then the Full Commission, found that he reached maximum medical improvement on November 19, 2009 and was entitled to permanent disability benefits under N.C.G.S. § 97-31, rather than continued temporary disability benefits under N.C.G.S. § 97-29, less the TTD he received after reaching MMI. At the same time, the Full Commission denied Lewis' request for interest on the lump sum award because an individual cannot receive benefits under both N.C.G.S. § 97-29 and N.C.G.S. § 97-31 and he received TTD during the pendency of defendant's appeal. For that reason, the Commission concluded that none of the benefits awarded to Lewis were past due and no interest was owed. Plaintiff appealed.

On June 17, in *Lewis v. N.C. Department of Correction*, the Court of Appeals reversed.



Quoting from the applicable statute, N.C.G.S. § 97-86.2, it found that “where there is an appeal resulting in an ultimate award to the employee, the insurance carrier or employer *shall pay interest* on the ... unpaid portion ... [of the *final award*] from the date of the initial hearing on the claim, until paid at the legal rate of interest...” and “the word ‘shall’ is generally imperative or mandatory,” such that the Commission “has no ‘discretion in making the required determination.’”

Because the Commission’s Opinion and Award made it clear that the Department of Corrections was entitled to a credit for the TTD benefits Lewis received after he reached maximum medical improvement, the Court found that he did not collect benefits under N.C.G.S. § 97-29 and N.C.G.S. § 97-31 at the same time, so there was no double recovery, and Lewis was entitled to interest on the Commission’s award of benefits.

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The full text of the appellate decisions summarized in this newsletter can be located at [www.nccourts.org](http://www.nccourts.org).

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