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CIVIL LIABILITY

Medical Malpractice Action Fails to Comply with Rule 9(j)

Brandie Fintchre sued Duke University, Duke University Hospital Systems, and two Duke nurses, alleging that after being diagnosed with adenocarcinoma of the cervix and undergoing a hysterectomy, she was transferred to the Post Anesthesia Care Unit, where one of the nurses disregarded her doctor's orders and removed a catheter, causing her to suffer bladder damage, multiple urinary tract infections, and other urinary difficulties. Later, following a vaginal biopsy to determine whether her cancer had returned, the other nurse incorrectly evaluated her condition and released her from the hospital prematurely. As a result, she had to be treated in the emergency room and readmitted to the hospital for an infection that caused further damage to her bladder, incontinence, recurring pain, and a reduced quality of life.

Fintchre's complaint included a certification that the treatment she received was "reviewed by persons who Plaintiff reasonably expects to qualify as expert witnesses under N.C. R. Evid. 702 who are willing to testify that the medical care at issue in this action failed to comply with the standard of care." The defendants moved to dismiss under Rule 12(b)(6), contending that the certification in the complaint failed to satisfy the requirements of Rule 9(j) because it did not expressly state that the expert had reviewed "all medical records pertaining to the alleged negligence." They also filed a second motion to

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dismiss, claiming prejudice from plaintiff's failure to comply with the trial court's discovery scheduling order. But, before either motion was heard, she voluntarily dismissed her claim without prejudice.

Fintchre refiled her complaint within 12 months of the dismissal, but more than three years after the medical treatment about which it complained. The defendants responded with a motion for costs and fees under Rule 41(d), an answer containing a series of affirmative defenses, including the applicable statute of limitations, and another Rule 12(b)(6) motion to dismiss, again contending that the Rule 9(j) certification was fatally defective.

On the day defendants' Rule 41(d) and Rule 12(b)(6) motions were scheduled to be heard, Fintchre filed a Rule 15 "Motion to Amend the Pleadings," seeking to modify her Rule 9(j) certification. It was denied by the trial court, which granted defendants' motion to dismiss and taxed her with costs and interest on the costs under Rule 41(d). She appealed, contending that the trial court should have allowed her to rectify the defect in her Rule 9(j) certification.

On June 2, in ***Fintchre v. Duke University***, the Court of Appeals affirmed the denial of Fintchre's motion to amend, citing ***Delta Environmental Consultants, Inc. v. Wysong & Miles Co.***, 132 N.C. App. 160 (1999), which held that proper reasons for denying a motion to amend include undue delay by the moving party, unfair prejudice to the nonmoving party, repeated failure to cure defects by previous amendments, bad faith, and futility of amendment. While the Court agreed that "[g]enerally, Rule 15 is construed liberally to allow amendments where the opposing party will not be materially prejudiced," ***McKoy v. Beasley***, 213 N.C. App. 258 (2011), held that a "defective original complaint cannot be rectified by a dismissal followed by a new complaint complying with Rule 9(j) where the second complaint is filed outside of the applicable statute of limitations." In this case, defendants' alleged malpractice occurred in October 2008 and April 2010, but the complaint was not refiled until December 2013, by which time the statute of limitations had already run.

Thus, the Court concluded, "where plaintiff failed to file a complaint including a valid Rule 9(j) certification within the statute of limitations, granting plaintiff's motion to amend her second complaint would have been futile, as the trial court found. Therefore, we affirm the order of the trial court, granting defendants' motion to dismiss pursuant to Rule 9(j)."

The Court also considered, but found no merit in, Fintchre's alternative argument that the trial court had erroneously entered findings of fact and conclusions of law that were "unnecessary and not supported by the evidence." To the contrary, the record contained competent evidence supporting each of the challenged findings. But, the Court *did* agree that it was error for the trial court to tax Fintchre with interest on the costs she was ordered to pay. While Rule 41(d) directs the trial court to tax "[a] plaintiff who dismisses an action … under section (a) … with the costs of the action unless the action was brought *in forma pauperis*," the Supreme Court held in ***Charlotte v. McNeely***, 281 N.C. 684 (1972), that, generally, "interest on costs properly assessed may not be allowed without statutory authority," and "Rule 41(d) does not allow the trial court to award interest on costs assessed." So, it reversed the trial court's award of interest on the costs assessed against Fintchre.

In a separate concurring opinion, Judge Stephens agreed with the Court's holding that "the mandatory language of Rule 9(j) requires the result we reach here." However, in her mind, "[t]he intent of Rule 9(j) is to prevent the filing of entirely frivolous medical malpractice claims," which "is plainly accomplished by the act of having a would-be plaintiff's relevant medical care and records reviewed by a medical expert prior to the filing of a medical malpractice action."

Since she found it undisputed that "plaintiff complied with the requirement that her medical care and records be reviewed by a medical expert before her first complaint was filed," Judge Stephens felt that the failure of plaintiff's attorney to "word the Rule 9(j) certification … as specified in the statute is a highly technical failure which here results in the dismissal of a medical malpractice case which is not frivolous for the reasons Rule 9(j) is designed to prevent." She "question[ed] whether such a harsh and pointless outcome was intended by our General Assembly in enacting Rule 9(j)," but she nevertheless felt "compelled" by the wording of the rule to concur in the majority's affirmance of the trial court's order of dismissal.

Contractual Indemnification Provision Upheld

Patricia Malone was injured when a truck driven by Calvin Barnette collided with her vehicle at the intersection of Holly Tree Road and South College Road in Wilmington. As the truck had been leased by Barnette's employer, Paxton Van Lines of North Carolina, Inc., from Young's Truck Center, she sued Barnette, Paxton, and Young's, alleging that negligence on their part in failing to inspect and maintain the truck's braking system led to the collision. Young's cross-claimed against Paxton for indemnification pursuant to a Rental Agreement in which Paxton agreed to "indemnify and hold [Young's] harmless from … all claims … arising out of … the maintenance, leasing, repair … or operation" of vehicles covered by the agreement and moved for partial summary judgment on its cross-claim. Judge Phyllis Gorham granted Young's motion, Paxton appealed, and Judge Gorham certified her order for immediate appeal under Rule of Civil Procedure 54(b).

On June 2, in ***Malone v. Barnette***, the first issue the Court of Appeals addressed was its jurisdiction over the appeal, which was clearly interlocutory, since the trial court's order did not dispose of all of the claims asserted by the parties. Although the Court agreed that interlocutory orders are generally not immediately appealable, it found that it has jurisdiction over an appeal "when the trial court's orders constitutes a final determination as to some, but not all, of the claims asserted and the trial court certifies the order for appeal pursuant to Rule 54(b)."

When it turned to the merits of the appeal, the Court found that trial courts "may enter summary judgment in a contract dispute if the provision at issue is not ambiguous and there are no issues of material fact." While Paxton argued that North Carolina law does not permit contractual indemnification of a party for its own negligence, the Supreme Court held otherwise in ***Gibbs v. Carolina Power & Light Co.***, 265 N.C. 459 (1965), which emphasized "the fundamental principle of freedom of contract." And, the Court of Appeals reached the same result in ***Cooper v. H.B. Owsley & Son, Inc.***, 43 N.C. App. 261 (1979), holding that "North Carolina public policy is not violated by an indemnity contract that provides for the indemnification of a party against the consequences of its own negligent conduct, particularly when the agreement is made 'at arms length and without the exercise of superior bargaining power.'"

Paxton attempted to distinguish ***Gibbs*** and ***Cooper*** by arguing that the alleged negligence in this case occurred *prior* to the parties' execution of the Rental Agreement, but the Court was unable to find in either Paxton's brief or its own research any case "expressly articulating a *per se* prohibition against indemnity contracts that hold an indemnitee harmless from its past negligent conduct." To the contrary, it found that in ***New Amsterdam Casualty Co. v. Waller***, 233 N.C. 536 (1951), the Supreme Court held that "[i]n indemnity contracts the engagement is to make good and save another harmless from loss on some obligation which *he has incurred or is about to incur* to a third party...."

The Court also found no merit in Paxton's argument that the parties to the Rental

Agreement did not intend for the indemnification provision to apply to prior negligent acts. It found that "[w]hen interpreting an indemnification clause within a contract, a court's primary objective 'is to ascertain and give effect to the intention of the parties…,'" and in this case, the Rental Agreement was "devoid of any language suggesting that the parties intended for Young's to be indemnified only as to liability or claims arising from *future* acts of negligence." Instead, the agreement "broadly" required Paxton to indemnify Young's "without containing the restriction advanced by Paxton in this appeal."

Moreover, the Court noted, Paxton's narrow interpretation of the indemnity provision would render the language providing indemnification for claims arising out of the maintenance of the truck "essentially meaningless," since federal regulations governing the leasing of trucks required Paxton to have "exclusive possession, control, and use of the [Truck] for the duration of the lease," making it "unlikely that Young's would have had the ability to perform *any* maintenance on the Truck while the Rental Agreement was in effect." Since "[b]asic rules of construction applicable to contracts preclude an interpretation rendering such language in the parties' agreement purposeless," the Court concluded that there was no merit in Paxton's argument that it only contracted to indemnify Young's from claims arising out of negligent maintenance of the truck during the lease period.

It reached the same conclusion about Paxton's argument that construing the indemnity provision so as to allow Young's to be indemnified for its own prior acts of negligence would be inconsistent with the requirements of the Federal Motor Carrier Safety Act, which was enacted to "ensure that interstate motor carriers would be fully responsible for the maintenance and operation of … leased equipment ..., thereby protecting the public from accidents, ... and providing financially responsible defendants." Enforcement of the indemnity provision in the present case would not leave the victim of a negligent act without financial recourse; instead, it would "merely [shift] the financial responsibility of such negligence from one entity to another." Like the United States Supreme Court in ***Transamerican Freight Lines, Inc. v. Brada Miller Freight Systems, Inc.***, 423 U.S. 28 (1975), the Court found that the indemnification provision at issue "does not affect the basic responsibilities of the parties to the public and the public's safety." Therefore, the Court concluded, the indemnification provision did not contravene the purpose of the Federal Motor Carrier Safety Act.

As "the indemnity provision between Young's and Paxton reflects an arms-length, bargained-for contractual agreement between two commercial entities," the Court concluded that the trial court did not err when it granted partial summary judgment to Young's.

Court Splits Over Dismissal of Interlocutory Appeal

Rudolphe Lynch, who operates a business specializing in farm management and field preparation of horse farms, entered into Memorandum of Understanding with Willard Rhodes, owner of Peacock Farm, Inc., whereby Lynch would do the site work for a residential horse farm development in Southern Pines at cost, in exchange for 50% of the net profits from the development. Lynch and Peacock Farm then entered into an agreement with BB&T for a $2,250,000 loan to Peacock Farm that Lynch and Rhodes personally guaranteed. BB&T subsequently made three additional loans to Peacock Farm and, for each of them, Lynch signed another personal guaranty agreement.

After Peacock Farm defaulted on its loan payments, BB&T sued the farm, Rhodes, and Lynch. Lynch's answer included a counterclaim against BB&T and crossclaims for contribution and indemnity against his codefendants. They,

in turn, crossclaimed against him for contribution.

BB&T then moved for, and was granted, summary judgment by the trial court, which entered judgment against Lynch for $3,749,255.85. He appealed, but the appeal was dismissed by the Court of Appeals in August 2013 on grounds that it was interlocutory, since crossclaims among the defendants were still pending and Lynch failed to show that the trial court's order affected a substantial right.

Lynch subsequently obtained an order from the trial court purporting to certify its earlier judgment for immediate appeal pursuant to Rule of Civil Procedure 54(b). He then filed another notice of appeal, which a 2-to-1 majority of the Court of Appeals dismissed for "lack of appellate jurisdiction" on June 2, in ***Branch Banking and Trust Company v. Peacock Farm, Inc.***

The majority opinion held that the trial court's order was not an amended judgment, but rather, a "'stand-alone' order" that made reference to the prior judgment against Lynch and stated the court's belief that an immediate appeal was "appropriate." The Court did not agree; it found that Rule 54(b) authorizes trial courts to certify interlocutory orders for immediate appeal "only if there is no just reason for delay *and it is so determined in the judgment*." In this case, however, "Lynch had obtained a separate order from the trial court purporting to certify for immediate appeal its prior order, despite the fact that [n]either Rule 54(b) itself nor the cases interpreting it authorize such a retroactive attempt to certify a prior order for immediate appeal in this fashion."

The Court's majority went on to observe that if Lynch desired to take a "proper appeal" of the judgment entered by the trial court, he had two options: "First, he could have noticed an appeal and then demonstrated in his appellate brief how the trial court's order deprived him of a substantial right. Instead, while he did notice an appeal …, he failed to even argue – much less make a valid showing – in his brief that he would be deprived of a substantial right absent an immediate appeal. As a result, his appeal was dismissed … [and he] has failed to cite any caselaw suggesting that litigants are entitled to multiple 'bites at the apple' to establish the existence of appellate jurisdiction over an interlocutory appeal based on the 'substantial right' doctrine."

In dissent, Judge Tyson argued for addressing the merits of Lynch's appeal under Rule 54(b), primarily for reasons of judicial economy. Had they chosen to do so, he would have affirmed the trial court's order granting BB&T's motion for summary judgment, as he found "no genuine issue of material fact … between Lynch and BB&T on his liability under the [personal] guarantees."

Contract Action Barred by Collateral Estoppel

JP Morgan Chase Bank ("Chase") successfully initiated foreclosure proceedings on eight rental properties in Greensboro that were owned by Mark and Teri Funderburk. After the Guilford County Clerk of Court held foreclosure hearings and entered orders authorizing the sale of all eight properties, the Funderburks appealed six of the clerk's eight orders to Guilford County Superior Court, which authorized the foreclosures to proceed. Plaintiffs chose not to appeal and the properties were sold.

The Funderburks then brought a breach of contract, estoppel, negligent misrepresentation, and tortious interference with contract action against Chase. The bank's answer included a Rule 12(b)(6) motion to dismiss, which the trial court granted. The Funderburks appealed.

On June 16, in ***Funderburk v. JP Morgan Chase Bank, N.A.***, the Court of Appeals affirmed the dismissal of plaintiffs' claims, finding that they were barred by the final determination of the rights of the parties made by in the earlier foreclosure proceeding, since the Funderburks'

claims in the present action were "contingent on there not being a default, an issue plaintiffs are collaterally estopped from re-litigating in this case." Collateral estoppel applies where "the earlier suit resulted in a final judgment on the merits, … the issue in question was identical to an issue actually litigated and necessary to the judgment, and … both the party asserting collateral estoppel and the party against whom collateral estoppel is asserted were either parties to the earlier suit or were in privity."

WORKERS' COMPENSATION

Law of the Case Doctrine Applied to Attorney Fee Dispute

After Thomas Adcox was rendered permanently and totally disabled by a compensable head injury in February 1983, his family attended to his personal needs until February 2003, when his employer's workers' compensation carrier began providing professional attendant care services 60 hours per week. Upon his wife's retirement in 2007, Adcox moved to have future attendant care services provided by her at defendants' expense.

A hearing was held and Deputy Commissioner John DeLuca allowed Adcox's motion in an opinion and award that directed the defendants to pay Mrs. Adcox for attendant care services at the rate of $188.00 per day, seven days a week. It also called for "[a]n attorneys' fee of 25% of the attendant care compensation … for… Plaintiff's counsel." Both parties appealed.

The Full Commission affirmed "with modifications including the amount of attendant care and rate of pay" in an opinion and award that directed the defendants to compensate Mrs. Adcox for 16 hours of attendant care services per day, at $10.00 per hour. No mention was made in the opinion of the 25% attorney's fee awarded by the deputy commissioner.

After Adcox unsuccessfully appealed to the Court of Appeals for reasons unrelated to the attorney fee issue in ***Adcox v. Clarkson Brothers Construction Co.***, 201 N.C. App. 446 (2009; unpublishd), his attorney moved the Full Commission for entry of an order directing the defendants to pay his 25% fee directly to him. However, the Full Commission, with one commissioner dissenting, denied the motion on grounds that no attorney's fee had been awarded in its earlier opinion and award.

An appeal was then taken to Superior Court pursuant to N.C.G.S. § 97-90, the defendants responded with Rule 12(b)(1), (2), and (6) motions to dismiss, an order was entered by Judge Thomas Lock dismissed the appeal on *res judicata* grounds, and Adcox gave notice of appeal.

On September 16, 2014, in ***Adcox v. Clarkson Brothers Construction Company***, the Court of Appeals reversed Judge Lock's dismissal of plaintiff's appeal from the denial of his attorney's request for an order directing the defendants to pay his 25% fee directly to him. It held that "the deputy commissioner's award of … [a 25% attorney's fee] became final when defendants did not specifically assign as error the award … in their Form 44 as required by Rule 701 of the Workers' Compensation Rules."

Defendants' subsequent petition for rehearing under Rule of Appellate Procedure 31 was granted by the Court, which issued a new opinion on June 2 superseding the opinion it issued last September. But, at the same time, with the exception of an expanded discussion of the legal consequences of defendants' failure to include the attorney fee issue on their Form 44, the Court's latest opinion is substantially identical to the original.

The Court remained unpersuaded by defendants' argument that the Full Commission "removed the … prior award of attendant care attorney fees" when it affirmed the deputy commissioner's award "with modifications." Rather, like ***Polk v. Nationwide Recyclers, Inc.***, 192 N.C. App. 211 (2008), in which the Full Commission affirmed

the opinion and award of a deputy commissioner "with modifications," the Court found that the Full Commission's opinion in this case was "not an order meant to stand on its own."

As it was undisputed that Deputy Commissioner DeLuca awarded a fee to plaintiff's attorney, and as there was no indication that the Full Commission intended to modify that award, the Court concluded that "either the Commission intended to affirm the deputy commissioner's award, or … did not consider the issue." In either case, it could find no basis for reaching the conclusion that the Commission reversed the deputy commissioner's award and "silently denied plaintiff's counsel the 25% attorneys' fee."

Therefore, the Court reasoned, even if the defendants had standing to challenge the attorney's fee awarded by the deputy commissioner, "the burden was on [them] to obtain a ruling from the Full Commission." When it did not explicitly reverse the award, the defendants "could have requested reconsideration and, if the Commission did not rule in their favor, appealed to this Court," which they did not do. So, the deputy commissioner's decision became "the law of the case" and "cannot be challenged in subsequent proceedings in the same case."

Reiterating the holding in its previous opinion, the Court reversed Judge Lock's order dismissing plaintiff's appeal and remanded the case for the Commission to reconsider its ruling on plaintiff's request for an order directing the defendants to pay directly to his attorney the fee awarded by Deputy Commissioner DeLuca.

Virginia Policy Does Not Afford Coverage In North Carolina

On June 11, the Supreme Court affirmed *per curiam* the 2-to-1 majority opinion in ***Tovar-Mauricio v. T.R. Driscoll, Inc.***, in which the Court of Appeals held that the Commission correctly concluded that the workers' compensation policy issued to T.R. Driscoll by General Casualty Insurance Company, provided workers' compensation insurance in Georgia, Tennessee and Virginia, but afforded no coverage for claims filed in North Carolina.

Driscoll, whose principal place of business is North Carolina, intermittently sends its employees to work in other states. In November 2009, it had a crew working on a roofing project in Virginia, when a gas line exploded and seven of its employees were injured. They all filed claims in Virginia, General Casualty began paying benefits, and by November 2011 its medical and indemnity payments totaled approximately $1.96 million.

In September 2010, the seven injured workers requested a hearing, seeking to change the jurisdiction of their claims from Virginia to North Carolina. In response, General Casualty contended that it did not cover North Carolina claims; they were the responsibility of the Carolinas Roofing and Sheet Metal Contractors Self-Insured Fund ("the Fund"), with which Driscoll had workers' compensation coverage for its "North Carolina and South Carolina operations." The Commission agreed, concluding that the Fund "is the insurance carrier on the risk for … claims filed under the North Carolina Workers' Compensation Act." The Fund and General Casualty both appealed.

On December 3, 2013, the three members of an otherwise divided panel of the Court of Appeals agreed that there was no merit in General Casualty's argument that the Commission erred when it failed to award "reimbursement for benefits it paid to Plaintiffs after they transferred their … claims to North Carolina" because there was no evidence General Casualty had paid any compensation other than as ordered by Virginia and the statutory provision it was relying upon, N.C.G.S. § 97-86.1(d), "does not permit repayment for compensation paid under the order of another state."

As for the Fund's appeal of the Commission's determination that "the General Casualty policy

affords no coverage for Plaintiffs' claims," the Court's two-member majority held that General Casualty's policy "applies to benefits required by the workers' compensation laws of Virginia," whereas North Carolina's Industrial Commission "did not and indeed cannot award compensation except as required by the North Carolina Workers' Compensation Act." Therefore, the Commission correctly concluded that the General Casualty policy afforded no coverage for plaintiffs' North Carolina claims.

The dissenting Court of Appeals judge was of the opinion that, for claims filed in North Carolina, General Casualty's policy was ambiguous as to whether it provided coverage for accidents occurring in other states. Since General Casualty "drafted the policy language and could have included language to clearly state that it was providing coverage only for claims 'filed' in Virginia," but did not do so, he would have construed the ambiguity against General Casualty and determined that its policy "provides coverage for … claims filed in North Carolina to the extent that Virginia workers' compensation law would require General Casualty to provide benefits." By affirming *per curiam*, the Supreme Court agreed with the Court of Appeals' majority and disagreed with the dissent.

Accident Causing Paraplegia Found Noncompensable

On June 11, the Supreme Court affirmed *per curiam* another 2-to-1 decision of the Court of Appeals, ***Morgan v. Morgan Motor Company of Albemarle***, which affirmed the Industrial Commission's denial of the claim of David Morgan, who was both Secretary-Treasurer, Sales and Financial Manager, and part-owner of Morgan Motors and the financial manager and part-owner of Pontiac Pointe, a restaurant located in a building leased from Morgan Motors.

Morgan went to Pontiac Pointe every morning to pick up the restaurant's receipts and make a deposit at the bank. While at the restaurant on January 15, 2008, he heard a noise like "a bearing that was going bad" in the air-conditioning unit on the roof of the building and went to investigate. He fell from the roof and suffered a C7 spinal cord injury, which left him paralyzed from the waist down.

Morgan Motors and the third party administrator for the North Carolina Auto Dealers Association Self-Insurer's Fund denied Morgan's claim on grounds that his injury did not arise out of or in the course of his employment with Morgan Motors, but Deputy Commissioner George Glenn disagreed and found Morgan Motors liable. However, the Full Commission reversed and Morgan appealed.

In its opinion affirming the Full Commission's denial of the claim, the Court of Appeals, with one judge dissenting, found that the "arising out of" and "in the course of" requirements of a compensable claim are "two separate and distinct elements, both of which a claimant must prove to bring a case within the Act." The "arising out of" element refers to "the origin or cause of the accident," with the controlling test being "whether the injury is a natural and probable consequence of the nature of the employment," and "in the course of" refers to "the time, place, and circumstances under which an accident occurred," *i.e.*, whether it happened "under circumstances in which the employee is engaged in an activity which he is authorized to undertake and which is calculated to further, directly or indirectly, the employer's business."

The Court's majority found ample evidentiary support for the Commission's finding that Morgan's act of ascending to the roof of the restaurant was not causally connected to his duties with Morgan Motors, but instead to his ownership and management of the restaurant, which was a separate business. It also found evidentiary support for the Commission's determination that his injury did not occur in the course of his employment with the dealership, as

he was at the restaurant at the time, his duties with Morgan Motors did not take him there, and when he fell, he was not engaged in any activity he was authorized to undertake for the dealership.

The dissenting judge argued that the Commission's findings supported a conclusion that the restaurant might be liable for Morgan's injuries, and those same findings "compel a conclusion that Morgan Motors is also liable" under a joint employment theory because Morgan's decision to climb onto the roof to investigate the source of the noise "conferred an 'appreciable' benefit to both employers: Both had an interest in the maintenance of … the HVAC system." But, the Court's majority took exception to the dissent's reliance on "findings the Industrial Commission could have conceivably made but did not." Therefore, they were "inconsistent with our standard of review," which is "merely whether the Commission's findings *support* its conclusions – not whether other conclusions could have … been drawn." By affirming *per curiam*, the Supreme Court has disagreed with the viewpoint expressed in the dissent and concurred with the Full Commission's denial of Morgan's claim against Morgan Motors.

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

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