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CIVIL LIABILITY

Wrongful Death Claim Barred by Doctrine of Sudden Emergency

Gregory Howell was operating his tractor trailer on Highway 55 when he saw another vehicle approaching in the wrong lane. He "jerked" his steering wheel to the side and hit his brakes "hard," but still could not avoid a collision. His truck ended up in the opposite lane, where it hit a third vehicle driven by Priscilla Maultsby, who was fatally injured. The administrator of her estate sued Howell and his employer, who denied negligence, pled sudden emergency, and moved for summary judgment. Their motion was granted and the estate appealed, claiming Howell violated safety standards by driving in excess of the number of hours specified by federal regulation. It also argued that the sudden emergency doctrine did not apply because Howell could have avoided the collision by reacting in another way.

On May 7, in ***Fulmore v. Howell***, the Court of Appeals rejected the estate's contention that driving more hours than allowed by regulation "shows defendant was fatigued," since the estate's forecasted evidence failed to establish that Howell was in fact fatigued or that his alleged fatigue caused the accident. The Court also considered, but was not persuaded by, the estate's argument that the sudden emergency doctrine did not apply because an expert testified

that Howell could have avoided the collision by reacting in another way, *i.e.*, by veering right instead of left and stopping "more quickly." The Court characterized that testimony as "expert analysis after the fact" and quoted from ***Tharpe v. Brewer***, 7 N.C. App. 432 (1970): "In the face of an emergency, a person is not held to the wisest choice of conduct, but only to such choice as a person of ordinary care and prudence would have made in similar circumstances." While another reaction might have resulted in a different outcome, that did not create a genuine issue of material fact. As a consequence, defendants were properly granted summary judgment.

Doctrine of Equitable Estoppel Creates Material Issue of Fact

After William Ussery and Wayne Barker purchased CAFCO, a chair manufacturing company, in November 1999, they took out several loans from BB&T to purchase equipment and cover operating costs. In mid-2002, they applied for and received another, $425,000, loan from BB&T, the substantial majority of which was used to pay off earlier loans.

Having found that he could not to sustain the payments owed to BB&T, Barker sued the bank, claiming breach of fiduciary duty, negligence, and breach of contract. Ussery later claimed that he was dissuaded from joining Barker's suit by a representative of BB&T, who assured him "everything would be worked out in the Barker litigation" and asked him to hold off filing suit.

After Barker's claim was settled in April 2006, Ussery demanded cancellation of the $425,000 loan. Counsel for BB&T convinced him to further delay filing suit in exchange for BB&T's agreement to hold the $425,000 note in abeyance, pending inspection of a building owned by CAFCO. After an exchange of proposals for resolving the loan, note, and competing claims, Ussery finally filed suit on June 25, 2008, alleging negligence, negligent misrepresentation, breach of contract, unfair and deceptive trade practices, breach of fiduciary relationship, breach of good faith dealing, and fraud. BB&T filed a compulsory counterclaim seeking the balance owed on the $425,000 loan, plus interest and attorney's fees, and moved for summary judgment, contending that Ussery's claim was barred by the statute of limitations. The trial court agreed, Ussery's complaint was dismissed, judgment was entered in BB&T's favor, and Ussery appealed to the Court of Appeals.

On May 21, in ***Ussery v. Branch Banking and Trust Company***, a 2-to-1 majority of the Court determined that, although Ussery did not file his lawsuit within the applicable statute of limitation, thereby rendering his claim time-barred, a material issue of fact existed as to whether BB&T should be estopped from raising that defense. In lengthy majority and minority opinions authored by Judges Stephens and Dillon respectively, the Court articulated in detail the requisite elements of equitable estoppel and debated its application to the facts at issue.

Citing ***Duke University v. Stainback***, 320 N.C. 337 (1987), ***Cleveland Construction, Inc. v. Ellis-Don Construction, Inc.***, 210 N.C. App. 522 (2011), and ***Miller v. Talton***, 112 N.C. App. 484 (1993), the majority concluded that "the forecast of evidence …, considered in a light most favorable to Plaintiff, as we must, … is sufficient to raise an inference that BB&T's actions, when taken together, lulled Plaintiff into a false sense of security, induced him to refrain from filing suit

within the required limitations period, and, as such, constituted conduct reasonably calculated to convey the impression that the facts were otherwise than, and inconsistent with, what BB&T later attempted to assert." Therefore, it reversed the trial court's order and remanded the case for the jury to determine whether equitable estoppel should bar operation of the otherwise applicable statute of limitations.

In his dissent, Judge Dillon took issue with the majority's application of equitable estoppel to the facts before the Court. Citing ***Duke v. St. Paul***, 95 N.C. App. 663 (1989), ***Teague v. Randolph***, 129 N.C. App. (1998), and ***Blizzard v. Smith***, 77 N.C. App. 594 (1985), *cert. denied*, 315 N.C. 389 (1986), Judge Dillon argued that "[w]e have consistently held … a mere promise to negotiate a resolution in the future, as opposed to an assurance that a claim would be resolved in a definitive way, is not the type of promise which would equitably estop a defendant from asserting a statute of limitations defense." He found the cases relied upon by the majority "readily distinguishable," as each involved statements or conduct which led the plaintiff to believe that the defendant would resolve the claim at issue "in a definitive way," whereas that was not so for all but one of BB&T's alleged "assurances" in the case before the Court. And, as for that "assurance," Ussery's allegation that BB&T assured him it would forgive the $425,000 note, Judge Dillon found that claim "incompetent, as it violates the parol evidence rule, and therefore, must not be considered in the determination of whether there is a genuine issue of material fact."

Claim for Negligent Renewal of Physician's Surgical Privileges Survives Summary Judgment Motion

Complaining of abdominal pain, nausea, and vomiting, Donna Ray went to the office of her primary care physician, who evaluated and then admitted her to Grace Hospital. After a series of tests were conducted, a surgical consult was recommended, so Ray was seen by Dr. Keith Forgy, who recommended and performed a gastroscopy and colonoscopy, and then a laparoscopic cholecystectomy to remove her gallbladder. However, the post-operative pathology was negative for gallbladder disease.

A week after being discharged from the hospital, Ray saw Dr. Forgy again, complaining of difficulty urinating and abdominal pain. He relieved the pain by inserting a catheter and discharged her with instructions to return if she experienced problems she believed to be related to her cholecystectomy.

Two weeks later, Ray went to the Grace Hospital Emergency Room, again complaining of abdominal pain, nausea, vomiting and difficulty urinating. Because Dr. Forgy suspected that she was suffering from a biliary leak, a complication of the gallbladder surgery, he performed a laparotomy to explore her abdomen, but found no evidence of a leak.

After Ray's condition worsened, she was transferred to the Intensive Care Unit at Frye Regional Medical Center and then to UNC-Chapel Hill, where she died. Her estate sued Dr. Forgy in his individual capacity and as an "apparent agent" of Grace Hospital. After a binding arbitration award resolved the estate's claims against Dr. Forgy, the trial court granted summary judgment in the hospital's favor.

On May 7, in ***The Estate of Donna S. Ray v. Forgy***, the Court of Appeals affirmed the dismissal of the estate's apparent agency claim. While, under the doctrine of *respondeat superior*, a hospital can be held liable for the negligence of a doctor acting as its agent, it was clear from the estate's own pleadings that Ray viewed Dr. Forgy as separate and distinct from Grace Hospital and its personnel. Further, the pre-surgery release form Ray signed provided explicit notice that Dr. Forgy was an independent contractor. Therefore, the estate's apparent agency claim was without merit and properly dismissed by the trial court.

However, the Court agreed with the estate that there was a genuine issue of material fact as to whether the hospital breached its duty to Ray by re-credentialing Dr. Forgy two years earlier, not adequately monitoring or supervising him, and failing to investigate his history of medical negligence claims. The Court noted that, in addition to clinical care claims arising out of treatment provided directly to the patient, there is a second category of valid corporate negligence claims against hospitals: "those related to negligence in the administration or management of the hospital." Because Dr. Forgy admitted there was a professional liability action pending against him at the time he applied for renewal of his surgical privileges and the hospital failed to inquire into it, the Court held that, "[c]onsidered in the light most favorable to plaintiffs, this evidence permits at least an inference that the hospital defendants were not reasonably diligent in reviewing Dr. Forgy's qualifications, raising a genuine issue of material fact with respect to their negligence in renewing Dr. Forgy's surgical privileges."

The Court also found no merit in the hospital's argument that the estate failed to comply with Rule 9(j) because its expert did not meet the "same or similar specialty test" under Rule of Evidence 702(b)(1). Citing ***Estate of Waters v. Jarman***, 144 N.C. App. 98 (2001), it held that where corporate negligence claims arise out of policy, management or administrative decisions, such as failure to monitor or oversee the performance of a physician, "the claim is rooted in ordinary negligence principles and the 'reasonably prudent person' standard should be applied," so a Rule 9(j) certification is not required. Therefore, the Court reversed the trial court's summary judgment order and remanded the case for the jury to determine whether the hospital acted negligently when it renewed Dr. Forgy's operating privileges.

Professional Malpractice Claims Not Assignable

Ronald Carter, owner of Revolutionary Concepts, Inc., a North Carolina corporation ("RCI-NC"), and Revolutionary Concepts, Inc., a Nevada corporation ("RCI-NV"), invented the "Automated Audio Video Messaging and Answering System." In 2003, he retained the law firm of Clements Walker, PLLC to obtain patent protection for his invention from the United States Patent and Trademark Office ("USPTO") and asked that his application not be published until he could apply for international patent rights. In July 2005, Carter asked Clements Walker to apply for an international patent, but it failed to do so. Instead, its patent agent filed a form that caused Carter's USPTO application to be published. As a result, Carter and RCI-NV were unable to obtain patent protection for their invention in foreign jurisdictions.

Carter and RCI-NC filed suit against Clements Walker, its patent agent, and four Clements Walker attorneys, alleging professional malpractice, breach of contract, and related claims. They voluntarily dismissed that action on the same day in February 2008 that Carter and RCI-NV brought similar claims against the same defendants, who moved to dismiss under Rules 12(b)(1) and 12(b)(6), contending that, because the case arose under patent law, it fell under the exclusive jurisdiction of the federal courts. They also claimed that Carter lacked standing because he had transferred his rights in the patent application to RCI-NV two years earlier. Six months later, in August 2008, RCI-NC merged into RCI-NV.

Judge Tennille granted the defendants' motion to dismiss Carter for lack of standing because of his assignment of rights to RCI-NV, but denied their motion to dismiss for lack of jurisdiction. After a subsequent defense motion for summary judgment was granted by Judge Gale, Carter and RCI-NC appealed both orders.

On May 7, in ***Revolutionary Concepts, Inc. v. Clements Walker, PLLC***, the Court of Appeals upheld the trial court's ruling as to RCI-NC, but reversed the dismissal of Carter's individual claims. It noted that, implicit in Judge Tennille's dismissal of Carter's claims was his belief that malpractice claims are assignable. Finding that question to be one of first impression in North Carolina, the Court surveyed other jurisdictions, determined he majority rule was that, as a matter of public policy, legal malpractice claims are *not* assignable, and adopted the majority rule. As a consequence, it reversed Judge Tennille's order dismissing Carter's lawsuit for lack of standing.

But, at the same time, the Court held that Judge Gale correctly granted defendants' motion for summary judgment as to the claims brought by RCI-NV. It was not persuaded by RCI-NV's argument that it acquired the right to assert RCI-NC's malpractice claims when the two companies merged, since that did not occur until six months after RCI-NV's complaint was filed. N.C.G.S. 55-11-06(a)(4) would have allowed pending claims brought by RCI-NC to be automatically continued by RCI-NV without any action on RCI-NV's part, but no such claims were pending at the time of the merger. And, RCI-NV could *not* have asserted the rights owned by RCI-NC when it filed its complaint in February 2008 because the merger had not yet happened. While RCI-NV could have asserted those rights after the merger *did* occur, it failed to do so.

In January 2012, RCI-NV made an oral Rule 15 motion to amend its complaint so as to add RCI-NC as a plaintiff, but its motion was denied by the trial court because, under Rule 41(a), RCI-NC only had one year to refile its claims after they were voluntarily dismissed in February 2008. The Court found the trial court's ruling in that regard "supported by reason," since RCI-NV's complaint did not give "fair notice" that the claims it was asserting included those held by RCI-NC. It also affirmed Judge Gale's denial of plaintiffs' Rule 17(a) motion to substitute RCI-NV as the real party in interest because "plaintiffs could have substituted … at any point after the August 2008 merger …[, but] did not attempt to do so for over three years." Having failed to offer a "compelling reason" for their failure to act within a "reasonable time" after the merger, the Court held that it was not an abuse of discretion for Judge Gale to have denied the motion.

"Common Knowledge" Exception to Requirement of Expert Testimony in Professional Liability Cases Applied

John and Dawn Russell purchased two lots in the Sportsman Village subdivision of Carteret County, intending to construct a residence on the property. Before closing, they applied for a permit to construct a wastewater system. Robert McCabe, the Health Department inspector who issued the original permits in 1998, re-inspected the property, found that it looked essentially the same as it had in 1998 and, therefore, thought it unnecessary to perform additional soil borings, so he issued the new permit without re-sampling the soil.

The Russells then closed their purchase of the property, bought a modular home, had it and a septic system installed on the property, and moved into their new residence. Within a week, the septic system began to fail. Upon recommendation of the septic system installer, the Russells added five truckloads of dirt to the property, but that did not solve the problem. After multiple evaluations, inspections, and tests, the Russells filed an action against the North Carolina Department of Environment and Natural Resources ("NCDENR") under the Tort Claims Act, alleging negligence, gross negligence, and negligent misrepresentation.

A deputy commissioner ruled that the NCDENR was negligent under the special duty exception of the public duty doctrine and awarded the Russells $113,900, plus costs. Upon appeal, the Full Commission modified the award to $106,674.66 and costs. On May 21, in ***Russell v. North Carolina Department of Environment and Natural Resources***, the Court of Appeals affirmed the Commission's determination that the NCDENR was negligent, but remanded the case for new findings on the issue of damages.

At the outset of its opinion, the Court noted that "[t]he Tort Claims Act was enacted in order to enlarge the rights and remedies of a person who is injured by the negligence of a State employee who was acting within the course of his employment." It then addressed the NCDENR's argument that it was error for the Commission to find negligence on the part of inspector McCabe in the absence of expert testimony. It held that while, ordinarily, expert testimony is required to establish the standard of care in professional negligence cases, the exception to that rule, "where the common knowledge and experience of the jury is sufficient to evaluate compliance with a standard of care," applied to the facts of this case. In a lengthy analysis of the testimony offered by the Russells from McCabe, a second county inspector, the county's environmental health supervisor, and three lay witnesses familiar with the property, the Court concluded that "the common knowledge and experience of the finder of fact [the Full Commission] was sufficient to permit a determination whether Mr. McCabe acted negligently."

Turning next to damages, the Court cited with approval ***Huberth v. Holly***, 120 N.C. App. 348 (1995) and ***Plow v. Bug Man Exterminators, Inc.***, 57 N.C. App. 159, *disc. rev. denied*, 306 N.C. 558 (1982), as support for holding that, when land is used for a purpose personal to the owner, "replacement cost is an acceptable measure of damages," but "by no means the only one." "Damages based on the cost of repair are equally acceptable." Therefore, it was proper for the Commission to base its award on the cost of replacement property, and the Court limited its remand for additional findings to the narrow

question of the replacement property's fair market value.

Attorney Ordered to Reimburse State Health Plan

Jennifer Barnett was injured in an auto accident caused by a third party and received $73,075.43 in benefits under the State Health Plan ("the Plan"). She was also paid $70,000 in settlement of her claim against the negligent third party, less medical expenses, rental car charges, and a $14,000 fee paid to her attorney, Eugene Ellison. He told her that the Plan had a lien on the settlement funds under N.C.G.S. 135-45.15, but she directed him not to pay anything to it, so he disbursed the remaining balance to her.

The Plan sent Barnett and Ellison multiple letters seeking satisfaction of its lien rights, without success. It then sued them for $28,000, which represented 50% of Barnett's recovery after attorney fees. After the Plan's claim against Barnett was stayed when she filed for bankruptcy, the trial court entered summary judgment against Ellison and ordered him to pay the Plan $28,000.

On May 7, in ***The State Health Plan for Teachers and State Employees v. Barnett***, the Court of Appeals affirmed, noting at the outset that N.C.G.S. 135-45.15 "explicitly requires an attorney representing a Plan member to 'disburse proceeds pursuant to this section.'" Although our appellate courts had not previously interpreted this statute, several cases decided under an analogous one, N.C.G.S. 44-50, "place[d] an affirmative duty on the attorney for an injured party to retain the full amount of a medical provider's lien before disbursing settlement proceeds" and subjects attorneys who violate that duty to "legal liability for the full amount of the lien." The Court held that, because "the plain language of N.C. Gen. Stat. 135-45.15 similarly places a duty upon an injured party's attorney to direct settlement funds recovered by an injured State Health Plan member to … [the Plan] in satisfaction of its statutory lien, … [it] necessarily also creates a cause of action by which the … Plan may enforce its lien … against an attorney who violates its requirements by failing to disburse his client's settlement proceeds in accordance with the statute." Therefore, the trial court's order directing Ellison to reimburse the Plan was proper.

Suspension of Surveyor's License Upheld

John Smith was involved in a property dispute with his neighbor, Ruby Revis, who hired a surveyor to determine whether a mobile home Smith believed to be on his property was in fact on her property. In an effort to challenge Revis' survey, Smith's daughter hired Kenneth Suttles of Suttles Surveying, PA, to establish the boundary between the two properties. After a dispute arose over his initial invoice, Suttles informed Smith that he would not continue working on the survey until his bill was paid. While the parties were in the process of exchanging a series of proposals to resolve their dispute, but before they reached an agreement, Smith filed a formal complaint with the Board of Examiners for Engineers and Surveyors ("the Board").

Eventually, Smith and Suttles settled for $8000, plus Smith's initial deposit of $1000, a confidentiality provision, Smith's agreement to waive his right to file a complaint with the Board and dismiss the complaint he had already filed, and Suttles' agreement to provide Smith with a

map of his survey. However, the map Suttles eventually produced was incomplete because it did not place the northwest corner of the property and was marked "Preliminary Plat Only Not for Conveyance." Nevertheless, Suttles told Smith's daughter the map would "stand up in court," so she recorded it.

Some time later, the Board sent Smith a letter advising him that its Review Committee had decided to investigate his complaint. In keeping with the terms of their agreement, Smith attempted to withdraw his complaint and he initially refused to meet with the Board's investigator, but he and his daughter later did so after Suttles' attorney sent them a letter waiving the confidentiality provision.

The Board found that, by issuing a map marked "preliminary" and entering into the confidentiality clause, Suttles failed to "conduct his practice … to protect the public health, safety and welfare," a failure of his "primary obligation to protect the public in the performance of his duties" which constituted "performance of services in an unethical manner," causing the Board to suspend his license for six months. Suttles petitioned for judicial review of the suspension, but the trial court affirmed the Board's decision, so Suttles appealed to the Court of Appeals.

On May 7, in ***In The Matter of Suttles Surveying, PA***, the Court disagreed with Suttles' argument that the Board had erroneously adjudicated "a purely contractual dispute," finding instead that the Board had focused on Suttles' business dealings with Smith and determined that Suttles "did not perform his services in an ethical manner and was not truthful in all of his interactions with Smith, thus falling short of the professional standards promulgated by the Board." Such actions, said the Court, were "the very issues for which the Legislature granted the Board power to promulgate professional rules protecting the 'safety, health, and welfare of the public.'"

The Court also rejected Suttles' contention that the Board's decision violated due process because its rules were "unconstitutionally vague and overbroad," having failed to provide him with adequate notice that he would violate them if he entered into a settlement that prevented Smith from filing or maintaining a disciplinary complaint against him. Finding that "the test for constitutional vagueness is 'whether a reasonably intelligent member of the profession would understand that the conduct in question is forbidden'" and citing N.C.G.S. 89C-20, which requires all licensees to cooperate with the Board in the course of its investigations, the Court concluded that Suttles knew his settlement with Smith, which included a confidentiality clause and prohibited Smith from filing or continuing a complaint to the Board, "would necessarily prevent reporting to the Board" and "subvert the Board's investigation." That being so, "[t]he inclusion of such a clause is void against public policy when entered into after a complaint is pending." As a consequence, the Board's decision to suspend Suttles' license was supported by "substantial evidence" and properly affirmed by the trial court.

Court Addresses Request for Trial Exhibits During Jury Deliberations

Brenda Redd entered the WilcoHess convenience store on Silas Creek Parkway in Winston-Salem to buy a soda. As she was walking toward the cash register, she slipped and fell on a wet floor that had just been mopped, sustaining injuries

for which she brought suit. Among other defenses, the defendants pled contributory negligence. At trial, the jury found the defendants negligent, but agreed that Redd was contributorily negligent.

Redd appealed, contending that the trial court erred in (a) failing to instruct the jury on the issues of last clear chance and willful and wanton negligence and (b) not submitting for the jury to review during its deliberations a surveillance video showing her slip and fall. The Court of Appeals rejected each of those arguments in an opinion filed on March 5, ***Redd v. WilcoHess, LLC*** ("***Redd I***").

After Redd successfully petitioned for rehearing, the Court issued a new opinion on May 21, ***Redd v. WilcoHess, LLC*** ("***Redd II***"), in which it modified Part IIB of its earlier opinion, but otherwise adopted the remainder. In its new opinion, the Court agreed with Redd that when the Legislature enacted N.C.G.S. 1-181.2 in 2007, it effectively overruled ***Nunnery v. Baucom***, 135 N.C. App. 556 (1999), the case the Court cited in its discussion of the surveillance video issue in ***Redd I***. Before the new statute was passed, both parties had to consent for trial exhibits to be present in the jury room during deliberations under the ***Baucom*** rule. But, subsections (a) and (b) of N.C.G.S. 1-181.2 now provide the trial court with "sole discretion to permit the jury to reexamine evidence admitted at trial in open court or to take evidence admitted at trial into the jury room, regardless of whether the parties consent, provided that the parties are permitted to be heard before the trial court makes its decision."

In the case *sub judice*, the jury requested that the surveillance video depicting plaintiff's slip and fall, which had been admitted into evidence and published to the jury during the trial, be shown again. However, before the trial judge could complete the hearing he convened to allow the parties to argue whether, where and how the video might be shown again, the jury announced that it had reached a verdict and no longer wanted to see the video. Because N.C.G.S. 1-181.2 requires the trial court to give the parties "an opportunity to be heard" before exercising its discretionary authority under the statute, the Court concluded that no prejudicial error had been committed and the jury's verdict was upheld.

Covenant Not to Execute Extinguishes Insurer's Obligations Under Liability Policy

Phillip Smith was operating a vehicle insured by Allstate when he collided with another vehicle occupied by Claude, Marcella and Charlotte Savage. In the lawsuit the Savages brought against Smith, they alleged that he resided with his parents and was, therefore, an additional insured under a Farm Bureau policy issued to his father, Michael Smith.

The Savages eventually settled their claims against Smith and Allstate, and each signed a "Release, Covenant Not To Execute and Settlement Agreement" which provided that, in consideration of the payments made by Allstate, they "covenant[ed] never to attempt to collect any sum from [Smith] except to the extent allowed herein…." Farm Bureau filed a declaratory judgment action, seeking a determination that it would not be liable under Michael Smith's policy for the damages sustained by the Savages. The trial court agreed and granted summary judgment in Farm Bureau's favor.

On May 21, in ***North Carolina Farm Bureau Mutual Insurance Company v. Smith***, the Court of Appeals affirmed, holding that an insurance company's liability is "derivative in nature" and "depends on whether or not its insured is liable to the plaintiff." Farm Bureau's policy provided that it "will pay damages for bodily injury or property damage for which any insured becomes *legally responsible*…." Thus, assuming that Phillip Smith was in fact an insured under his father's policy, "the critical issue becomes whether Phillip can be held 'legally responsible' for the Savages' damages … in light of the covenants [they] executed." Consistent with the holding in ***Terrell v. Lawyers Mutual Liability Insurance Company***, 131 N.C. App. 655 (1998), "where the parties covenant that no judgment shall be executed against the insured, the insurer's 'obligations under the policy [are] extinguished by the execution of the [covenant].'" Therefore, the trial court correctly granted Farm Bureau's motion for summary judgment.

"Injury-In-Fact" Triggers Insurance Coverage in Construction Defect Case

In August 2006, TPD Builder, a licensed general contractor, entered into a contract to construct a new residence for Michael and Sara Hardison. At the time, TPD was insured for commercial general liability by Erie Insurance Exchange. During the course of construction, its subcontractors altered the slope of the property overlooking the residence and built a retaining wall. On December 7, 2009, the altered slope and retaining wall above the house collapsed, causing extensive damage to the residence and the Hardisons' personal property. By that point in time, TPD's CGL insurance was with Builders Mutual.

The Hardisons sued TPD and the excavation and stabilization subcontractor. Erie agreed to defend TPD under a reservation of rights, but Builders Mutual refused to do so. Later, Erie settled with the Hardisons and filed a declaratory judgment action to address the rights and obligations of the two insurers under the policies they issued to TPD.

Builders Mutual's answer contained motions to dismiss and for judgment on the pleadings. At the motion hearing, Erie orally made its own motion for judgment on the pleadings, which was granted by the trial court. Builders Mutual then moved to alter, amend or vacate the trial court's order, but that motion was denied. It then appealed to the Court of Appeals.

On May 21, in ***Erie Insurance Exchange v. Builders Mutual Insurance Company***, the Court of Appeals affirmed. Citing its decision in ***Builders Mutual Insurance Company v. Mitchell***, 210 N.C. App. 657 (2011), the Court held that one example of an "occurrence" is "an accident caused by or resulting from faulty workmanship including damage to any property other than the work product." Applying that definition to the present case, the Hardisons' complaint alleged that the damages they suffered occurred when the altered slope and retaining wall above the house collapsed on December 7, 2009. TPD was insured by Builders Mutual at the time, and its policy "requires only that the property damage occur during the policy period." Thus, Builder's Mutual was responsible for the Hardisons' claim, a conclusion that was consistent with the holding in ***Gaston County Dyeing Machine Company v. Northfield Insurance Company***, 351 N.C. 293 (2000), in which the Supreme Court held that "where the date of the injury-in-fact can be

known with certainty, the insurance policy or policies on the risk on that date are triggered."

Contractor's Breach of Contract Claim Dismissed

Southeast Development hired Highland Paving Company to install utilities and perform grading and road construction in a development known as Green Valley. To finance the development, Southeast took out a loan from First Bank that was secured by a deed of trust on the Green Valley property. After the development began, Southeast became unable to pay Highland for the work it was doing, and Highland refused to do anything further. Eventually, the bank suggested an agreement whereby Highland would complete its work with the understanding that all of the proceeds from the sale of the first 12 to 16 lots in the development would be put in escrow and disbursed to the various contractors on the project, including Highland.

Highland received its portion of the proceeds from the first 8 lots sold, but nothing further, so it sued Southeast and the bank, alleging breach of contract, constructive fraud, *quantum meruit*, and unfair and deceptive practices. It contended that Southeast and the bank sold Green Valley to a third party (East West) without consulting Highland and refused to compensate Highland for the outstanding balance on its construction costs, an amount in excess of $153,000. Highland's theory of liability against the bank was that it had "fail[ed] to escrow the funds and pay Plaintiff as agreed." In fact, the bank *had* cancelled Southeast's debt and deed of trust on the property, but it was in exchange for East West's assumption of the debt.

After the trial court granted First Bank's Rule 12(b)(6) motion to dismiss, Highland appealed to the Court of Appeals, which on May 7, in ***Highland Paving Company, LLC v. First Bank***, agreed with the bank that each of Highland's causes of action rested on a claim that the bank had received proceeds from a "sale" of the property to East West. However, the exhibits attached to Highland's complaint contradicted its allegations, since they established that the property was transferred in satisfaction of a debt obligation, not in exchange for money. Since there were no "proceeds" from the transfer, there was no breach of contract on First Bank's part.

The Court also discussed in detail the elements of Highland's constructive fraud, *quantum meruit*, and unfair and deceptive trade practices claims and determined that they, too, were properly dismissed by the trial court because each was premised on the same contention that First Bank had received funds from a sale of the property, whereas the exhibits attached to Highland's complaint established that such was not the case. That being so, Highland's complaint was properly dismissed under Rule 12(b)(6).

School Employee Dismissed After Striking Disruptive and Misbehaving Student

Amy Diamond was an "academic facilitator" at Bailey Middle School when it was evacuated because of a bomb threat. While the students were outside the school building in the track and field area, a seventh grader repeatedly disregarded teacher instructions, refused to sit down, and responded to requests to behave with inappropriate verbal assaults, causing continued disruption and leading his teacher to ask Diamond for assistance. After initially suggesting that the teacher and other students

ignore the disruptive student, a tactic that failed to improve the situation, Diamond approached the student, told him he needed to cooperate, and gave him the option of either sitting down or relocating to an area removed from the other students. The student responded by using offensive language. At that point, Diamond led him away from the other students by the arm, but he continued to behave disruptively, so she slapped him across the face.

The next day, Diamond was suspended without pay, pending investigation of the incident. Later, the school system's Superintendent recommended to the School Board that she be dismissed. Diamond then requested a review of her dismissal by an independent case manager, but he ultimately concluded that termination was justified because Diamond's actions "were not reasonably calculated to maintain order," and the exception to the general prohibition against using physical force found in N.C.G.S. 115C-391(a) did not apply because there was no threat of harm to either the student or others and his outbursts "did not create a safety concern."

After the School Board upheld the Superintendent's recommendation, Diamond filed a Petition for Judicial Review under N.C.G.S. 115C-325(n). But, the Board's motion to dismiss was granted by Superior Court Judge Robinson Hassell, who concluded that the Board's termination decision was not based on an error of law and there was evidence of record to support it.

On May 7, in ***Diamond v. Charlotte-Mecklenburg County Board of Education***, the Court of Appeals held that, by virtue of the provisions of N.C.G.S. 150B-51(b)(5), the applicable standard of appellate review is whether "the Board's decision to dismiss plaintiff … was supported by substantial evidence in light of the whole record." And, "substantial evidence" exists when "a reasonable mind might accept [the evidence] as adequate to support a conclusion." Applying that standard to the evidentiary record in ***Diamond***, the Court first observed that, in accordance with the provisions of N.C.G.S. 115C-307(a), teachers have a duty to "maintain good order and discipline." It then found "substantial evidence" supporting the School Board's determination that Diamond's actions not only failed to improve the situation, but possibly made it worse, since an assistant principal and a security officer were required to deal with the repercussions of her actions by stepping in to separate her and the student and calm him down.

The Court was also not persuaded by Diamond's argument that her actions were permissible under N.C.G.S. 115C-391, which, prior to its repeal in 2011, provided that "school personnel may use reasonable force, including corporal punishment, … when necessary" in five particular circumstances, the last and broadest of which is to "maintain order." The Court held that, in defining that phrase, it "must be read in the context of the entire statute, which sets forth particular requirements for the use of physical force, and then articulates narrow exceptions." Finding that each of the other four exceptions "imply a level of emergency" and "some imminent danger to person or property … sufficient to override the typical protections for the use of force against students," the Court determined that, in the present case, while the behavior of the unruly student was "annoying and extremely disruptive, [it] did not pose a threat to the safety or well-being of teachers or students, nor did his actions threaten to damage school or private property." As they "did not appear to create a situation of imminent danger"

and there is a presumption that School Board decisions are "made in good faith and in accordance with the applicable law," the Court held that the trial court did not err when it determined that the statutory exceptions to the prohibition against the use of physical force found in N.C.G.S. 115C-391 did not apply to Diamond's actions. As a consequence, the trial court properly dismissed her petition for judicial review of the School Board's decision to terminate her employment.

Sanitation Workers Plead Viable Wrongful Discharge Claim

Clyde Clark and Kerry Bigelow, sanitation workers for the Town of Chapel Hill, were fired in October 2010 for "insubordination, threatening and intimidating behavior, and … unsatisfactory … job performances" after a town resident complained about the quality of their work and a particular incident during which she "felt threatened" to the point she "was afraid to report the interaction," lest she be "retaliated against." Clark and Bigelow requested a hearing before the town's Personnel Appeals Committee, but it recommended that the town manager uphold their supervisor's decision to fire them. They then filed a wrongful discharge action against the town and town manager, who moved for judgment on the pleadings under Rule 12(c). The trial court granted that motion and plaintiffs appealed.

Clark and Bigelow alleged a pattern of discriminatory conduct by the town and its employees, including: the town superintendent's decision to select a less qualified white applicant for a 2009 job opening; "heated" internal arguments within the town's management team whether to admit that the superintendent's selection of the white candidate over Bigelow was the result of racial discrimination; multiple grievances Bigelow filed in early 2010 and Bigelow's Equal Employment Opportunity Commission (EEOC) charge against the town; Clark's complaint about the dangerous way the driver of the truck on which he and Bigelow worked drove; their supervisor's reaction to being shown photographs illustrating their concerns in that regard, to which he responded by saying that he "was not interested in complaints about unsafe working conditions"; their claim that the town and its manager knew the town's sanitation truck drivers had an incentive to "cut safety corners" because they received the same pay no matter how long it took to complete a route, causing them to drive as quickly as possible so they could take on second jobs; the town manager's failure to follow the town's policy to "expeditiously and thoroughly investigate complaints of safety violations and discrimination"; the grievances Clark and Bigelow filed in the spring and summer of 2010 after they joined the North Carolina Public Service Workers Union and encouraged co-workers to do the same; and their complaint that the town hired Capital Associated Industries, a "right-wing consulting company," to investigate them.

The town appointed a five-member committee to conduct hearings regarding the termination of plaintiffs' employment and the defendants attached the committee's findings to their answer. On May 7, in ***Bigelow v. Town of Chapel Hill***, the Court of Appeals observed that, while those findings "might support a conclusion that Plaintiffs were discharged for lawful and legitimate reasons [, that fact] cannot factor in our review of the trial court's decision to grant Defendants' motion on the pleadings." Rather,

the issue was whether Clark and Bigelow had pled a valid claim for wrongful discharge. Having alleged that they were fired in retaliation for various actions they were legally permitted to take, the Court found that they had, indeed, asserted a valid claim by alleging that (1) the defendants violated the Retaliatory Employment Discrimination Act, which provides that "[n]o person shall discriminate or take any retaliatory action against an employee because the employee … [files] a claim or complaint…," and Article 16 of the Occupational Safety and Health Act of North Carolina; (2) they were fired for engaging in union activities; (3) the town retaliated against them for filing discrimination grievances, in violation of N.C.G.S. 95-151; and (4) it also violated their constitutional rights by (a) firing them for protected free speech activities, such as when they posted union notices and articles on the employee bulletin board, (b) denying them equal protection under Article I, section 19 of the North Carolina Constitution, (c) engaging in racial discrimination, and (d) depriving them of "property and privileges – their jobs – in a manner inconsistent with the 'law of the land.'" As the allegations of plaintiffs' complaint pled a viable claim for wrongful discharge, the Court reversed the trial court's order granting defendants' judgment on the pleadings.

Retirement Benefit Claim Barred by Statute of Limitations

In April 1997, Chauncey Andrew Ludlum, who had accrued over 17 years of service in the North Carolina National Guard toward the 20 necessary for him to qualify for retirement benefits, was advised that a new program, the "Retired Reserve," had been created for members with at least 15 years experience, allowing them to end their service early and, upon reaching age 60, receive a reduced amount of retirement benefits. He opted for the new program and was discharged from the Guard that October.

Shortly before reaching age 60 on June 12, 2008, Ludlum applied for benefits under the "Retired Reserve" program, but on August 5, 2008, his application was denied because he had not accrued the 20 years of service required by N.C.G.S. 127A-40. In January 2012, he filed a declaratory judgment action seeking a determination that he had been deprived of a contractual right by being denied benefits under the "Retired Reserve" program.

The State successfully moved to dismiss Ludlum's lawsuit under Rule 12(b)(6), pleading the three-year statute of limitations for contract actions found in N.C.G.S. 1-53. Ludlum appealed, but on May 7, in ***Ludlum v. State of North Carolina***, the Court of Appeals affirmed. In doing so, it rejected his contention that his claim did not expire because the statute of limitations was "continuously triggered" each time the State failed to pay him under the "Retired Reserve" program. The Court held that breach of contract claims accrue "at the time of notice of the breach," and Ludlum was put on notice of the State's refusal to pay in August 2008, but he did not file his lawsuit until January 2012. While the Supreme Court adopted the "continuing wrong" doctrine in ***Faulkenbury v. Teachers' & State Employees' Retirement System of North Carolina***, 345 N.C. 683 (1997), its holding in that case was clarified in ***Liptrap v. City of High Point***, 128 N.C. App. 353 (1998), in which the Court of Appeals determined that the three-year statute of limitations for breach of contract claims found in N.C.G.S. 1-53 is distinguishable from the more specific

limitations that were involved in ***Faulkenbury***, N.C.G.S. 128-27 and 135-5, which "specifically mention triggering by periodic payments." The Court found that, as in ***Liptrap***, Ludlum was seeking "a declaration that he was owed any benefits at all, not that he has missed payments every month triggering perpetually new statutes of limitation." Therefore, his claim was properly dismissed by the trial court.

Oral Agreement to Settle Not Binding

Claiming a violation of her civil rights under 42 U.S.C. 1983 and wrongful termination, Sadie Howard filed a lawsuit against Durham County that was removed to federal court. The parties eventually participated in a mediated settlement conference at which the county was represented by its Tax Administrator, Kim Simpson, and an Assistant County Attorney. An oral agreement was reached to settle for $50,000 and the mediator prepared a "Memorandum of Settlement," which Howard signed, but the county did not because Simpson lacked authority to settle for that amount. Two days later, she notified the mediator that she had decided not to recommend the settlement to the County Board of Commissioners.

Howard then filed a second suit against the county, claiming breach of contract and negligent misrepresentation. The county responded with a motion to dismiss under Rules 12(b)(1), (2) and (6), arguing that the trial court lacked subject matter and personal jurisdiction due to sovereign immunity and, further, that Howard's complaint failed to state a claim upon which relief could be granted. The trial court agreed and dismissed Howard's claim. She appealed, but on May 7, in ***Howard v. Durham County***, the Court of Appeals affirmed.

While the county pled sovereign immunity as a bar to Howard's breach of contract claim, the Court noted that, in ***Smith v. State***, 289 N.C. 303 (1976), the Supreme 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," a ruling that was subsequently applied to the state's counties. As a consequence, the Court held that, if plaintiff had a valid contract with Durham County, her claim would not have been barred by the doctrine of sovereign immunity.

However, the Court found that Howard did *not* have a valid contract with the county. Rather, her claim "falls into an unusual gap between the statutes and rules governing mediation." Had the parties' mediated settlement conference taken place in a state superior court action, there would have been no enforceable agreement because mediated settlement agreements must be in writing under N.C.G.S. 7A-38.1(1). While the rules governing mediation in the Eastern District of North Carolina also provide that such agreements "shall" be in writing, the Court was unable to find a Fourth Circuit case holding that this precluded enforcement of an oral agreement reached at mediation, "and we will not presume to interpret the federal rules."

Therefore, the Court turned to "the general common law" to decide whether Howard and the county had entered into a valid contract to settle. It then examined the statute relied upon by the county, N.C.G.S. 159-28(a), which provides that "[i]f an obligation is evidenced by a contract or agreement requiring the payment of money …, the … agreement … shall include on its face a certificate stating that the instrument has been preaudited … [and] signed by the finance officer … approved for this purpose by

the governing board…." The Court then ruled that, since settlement agreements which call for counties to pay money are subject to the requirements of N.C.G.S. 159-28(a) and oral contracts, by their very nature, do not contain the written certification required by the statute, Howard's breach of contract claim was fatally deficient and properly dismissed.

In reaching that conclusion, the Court rejected Howard's reliance on ***Lee v. Wake County***, 165 N.C. App. 154, *disc. rev. denied*, 359 N.C. 190 (2004), in which a preaudit certificate was *not* required. It noted that ***Lee*** was a workers' compensation case decided under the Industrial Commission's "three-stage" mediation process and distinguishable for that reason. ***Lee*** was also distinguishable because "an otherwise valid memorandum of agreement" was executed by a representative of the defendant county in ***Lee***, and such was not the case in ***Howard***.

And, finally, the Court found no merit in Howard's negligent misrepresentation claim, as "[t]he tort of negligent misrepresentation occurs when a party justifiably relies to his detriment on information prepared without reasonable care" and suffers an actual pecuniary loss as a consequence. But, in the present case, Howard neither alleged nor proved either detrimental reliance or a pecuniary loss, and the Court was unwilling to expand the definition of negligent misrepresentation to cover a "simple failure to settle."

Prisoner's Claim Under Tort Claims Act Remanded for Additional Findings

William Nunn, an inmate at the Caswell Correctional Institution in Yanceyville, brought a claim under the Tort Claims Act, contending that he was injured when assaulted by another inmate while they were standing on line to buy food from the window of the prison's canteen. Deputy Commissioner George Glenn found that Nunn failed to prove negligence and dismissed his claim, but the Full Commission reversed, finding that the prison's administrators did not assign a sufficient number of guards to watch the yard in which the canteen was located. Nunn was awarded $12,000 in damages and the Department of Public Safety appealed.

On May 7, in ***Nunn v. North Carolina Department of Public Safety***, the Court of Appeals vacated the Commission's award and remanded the case for specific findings as to which Department employee breached its duty to Nunn, since to establish a valid claim under the Tort Claims Act, the claimant must identify the allegedly negligent employee and describe the act or omission relied upon to establish his claim and it was "unclear who the Commission believed failed to post another guard at the canteen or whether any of the named employees … even had the authority to do so," a fact that was "vital to plaintiff's right to compensation."

The Court also ordered the Commission to make specific findings regarding the defense of contributory negligence, which had been raised by the Department, but not reached by the Deputy Commissioner, since he determined that plaintiff had failed to establish negligence. When the Commission reversed the Deputy Commissioner on that issue, it should have proceeded to the next one, contributory negligence, but had failed to do so.

Whistleblower Act Has Limited Application

Pamela Johnson was an administrative assistant for the Forsyth County Board of Elections ("BOE") and Terry Cox served as its interim Director until July 2006, when Robert Coffman became Director. In August 2007, Johnson reported to the county's Finance Department that Coffman had violated county policy in his use of a county credit card. She also met with Johnson and a member of the BOE to report alleged violations of North Carolina election law under Coffman's supervision. Later, in the spring of 2008, Johnson met with the BOE's Chairman and advised him that Coffman had hired a consultant without bidding the position as required by law. Deena Head, who was hired by the BOE as a seasonal employee for the 2008 election, subsequently complained that Coffman subjected her to harassment and harsh language.

In May 2009, Johnson was terminated for cause. Later that year, Cox elected to take early retirement upon the advice of his physician. In October 2011, Johnson, Cox and Head filed suit against the county, the BOE and Coffman, claiming negligent hiring and retention of Coffman, wrongful termination of Johnson, negligent infliction of emotional distress, and violation of the North Carolina Whistleblower Act, N.C.G.S. 126-84, *et seq.* The trial court dismissed the Whistleblower Act claim pursuant to Rule 12(b)(6) and later granted summary judgment as to the remaining claims.

On May 21, in ***Johnson v. Forsyth County***, the Court of Appeals agreed with the trial court that plaintiffs were not entitled to pursue a claim under the Whistleblower Act, the provisions of which are only applicable to "state employees." As the three plaintiffs were county, not state, employees, they were not covered by the Whistleblower Act and it was proper for the trial court to dismiss the claim they asserted under it.

WORKERS' COMPENSATION

Commission's Refusal to Approve Settlement Affirmed

Danny Allred was injured in an automobile accident arising out of and in the course of his employment with Exceptional Landscapes, which was neither covered by workers' compensation insurance nor a qualified self-insurer. After Allred filed Forms 18 and 33, he and his employer participated in a mediated settlement conference, but they were unable to reach agreement on a settlement of the workers' compensation claim. However, they *did* agree to settle a liability claim for $26,000, with the understanding that Allred would withdraw his claim at the Industrial Commission. Consistent with that agreement, $26,000 was paid to Allred and his attorney.

However, Allred never withdrew his Form 33 and his claim eventually came on for hearing, first before a deputy commissioner and then the Full Commission, which found that it had jurisdiction over the parties and determined that their agreement did not comply with the provisions of N.C.G.S. 97-17. So, it refused to approve the settlement, finding that it was not "fair and just." The Commission also "pierced the corporate veil," found the three shareholders of Exceptional Landscapes individually and jointly liable for the workers' compensation benefits owed to Allred, ordered them to pay the fee of Allred's attorney, and assessed two penalties, one for failing to procure workers' compensation coverage and the other for failing

to bring Exceptional Landscapes into compliance with N.C.G.S. 97-94(d).

On May 21, in ***Allred v. Exceptional Landscapes***, the Court of Appeals rejected Exceptional Landscapes' argument that, when Allred agreed to settle a liability claim for $26,000, he elected a remedy "at law" under N.C.G.S. 97-94(b), thereby divesting the Commission of jurisdiction. To the contrary found the Court, the exclusive venue for a claim by an employee against an employer for injuries arising in the course of employment is the Commission, and once the employee invokes that jurisdiction by either filing a claim for compensation or submitting a voluntary settlement for approval, the Commission retains continuing jurisdiction. While the language of N.C.G.S. 97-94(b) "may arguably permit plaintiff to bring [his] claim at law," Allred initiated a workers' compensation claim when he filed his Form 33 and, thereafter, the Commission "retained continuing and exclusive jurisdiction over the claim and all related matters," including whether to approve the parties' $26,000 settlement.

The Court affirmed the Commission's decision not to approve that settlement because it complied with the neither the statutory requirements of N.C.G.S. 97-17 nor the provisions of Industrial Commission Rule 502. But, at the same time, it reversed the Commission's attorney fee award because, while N.C.G.S. 97-88 authorizes to Commission to award an attorney's fee to an injured worker if "the insurer" appeals an award of benefits and the Commission orders "the insurer" to make, or continue making, payment of benefits, none of the defendants in this case met the definition of "insurer" found in N.C.G.S. 97-2(7).

The Court also found error in the Commission's attempt to "pierce the corporate veil" so as to hold the defendant employer's shareholders personally liable for the benefits awarded to Allred. Finding that to do so requires proof that one or more individuals are "operating a corporation as a mere instrumentality," the Court held that the facts before it did not establish "complete domination and control of the corporation so that it had no independent identity." Therefore, Joy Wright, Exceptional Landscape's Treasurer, was not personally liable for the workers' compensation benefits owed to Allred.

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

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