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CIVIL LIABILITY

Collateral Source Rule Not Applicable to Written Off Medical Bills

On June 28, 2005, general surgeon Arleen Thom, MD operated on Geraldine Nicholson at Cape Fear Valley Medical Center to remove a cancerous tumor in her rectum. Over the course of the next few weeks, Nicholson began experiencing weakness, nausea, diarrhea, an inability to eat, and problems with electrolytes, to the point where she was readmitted. On August 31, 2005, an x-ray revealed a surgical sponge in the right lower quadrant of her abdomen.

When Nicholson's abdomen was reopened to remove the sponge, the surgeon found a contaminated perforation of the bowel, an abscess, and dense adhesions. Due to the amount of infection in the area, he did not close the skin around the abdominal wall, but left an open wound that was later closed in one of five additional operations Nicholson underwent between September 2005 and February 2006.

Nicholson's cancer returned in July 2006, it metastasized to her brain, and she died that October. Her husband, as administrator of her estate, sued Dr. Thom and the hospital, seeking compensation for medical bills incurred, pain and suffering, scarring, disfigurement, inability to complete recommended cancer treatments, a shortened life expectancy, "medical impairments," and loss of consortium. The hospital settled for $1,150,000 and the case went to trial against Dr. Thom in Robeson County Superior Court. The

In This Issue…

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jury awarded $5,050,000 to the estate and $750,000 to plaintiff individually, for a total of $5,800,000. After the trial court denied Dr. Thom's Rule 59(a) motion for "Amendment of Judgment (Remittitur) or New Trial" and Rule 60(b) motion for "Relief from Judgment," it reduced the jury verdict by the estate's recovery from the hospital and entered judgment for $4,650,000. Dr. Thom appealed.

On September 16, in ***Nicholson v. Thom***, the first issue the Court of Appeals addressed was Dr. Thom's contention that trial judge Mary Ann Tally erred in her ruling on defense counsel's motion to quash plaintiff's fifty-four subpoenas *duces tecum*, which sought production of Dr. Thom's personal medical records. Following an *in camera* inspection, Judge Tally ordered production of some of the subpoenaed records, and although she did not allow them to be admitted into evidence, she permitted plaintiff's attorney to make reference to them during his direct examination of Dr. Thom.

The Court was not persuaded by Dr. Thom's physician-patient privilege objection to the production of her medical records. Quoting from its earlier opinion in ***Nicholson v. Thom,*** 214 N.C. App. 561 (2011; unpublished), which resolved Dr. Thom's appeal from the trial court order that directed her to produce the records during discovery, the Court held that "the decision as to whether disclosure of information protected by the physician-patient privilege is required to serve the proper administration of justice is one made in the discretion of the trial judge," and it will only be overturned on appeal upon a showing that the trial court's ruling was an abuse of discretion; *i.e.*, was "manifestly unsupported by reason … [or] so arbitrary that it could not have been the result of a reasoned decision."

In her order resolving Dr. Thom's motion to quash plaintiff's subpoenas *duces tecum*, Judge Tally stated that she had "reviewed the medical records and … [found] that it's in the interest of justice and outweighs the privilege for certain information to be turned over." With Dr. Thom's medical records in hand, plaintiff's counsel questioned her extensively about whether she had taken narcotic and non-narcotic pain medications leading up to and during the operation she performed on the decedent. The Court found that, as her use of pain medications "addresse[d] whether she may have breached her duty of care during the surgery," the testimony she offered in response to plaintiff's attorney's questions was "relevant" under Rule of Evidence 401 because it had a "tendency to make the existence of any fact that is of consequence to the determination of the action more probable … than it would be without the evidence" and because Rule of Evidence 402 provides that "[a]ll relevant evidence is admissible unless otherwise provided by rule or law."

Therefore, the Court concluded, "[t]he questions asked by counsel for Plaintiff sought to elicit and did elicit relevant testimony. Since it was plaintiff's burden to establish that Dr. Thom failed to comply with her duty of care, the Court found that the trial court did not abuse its discretion when it declined to exclude this line of questioning under Rule of Evidence 403, which authorizes the exclusion of relevant evidence if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury."

The Court found no merit in Dr. Thom's argument that plaintiff's questions about the side effects of the medications she was taking were improper because they were not supported by expert testimony. Their purpose, said the Court, was "to confirm the inference that Defendant was negligent while performing the surgery. Indeed, when the standard of care is established pursuant to the doctrine of *res ipsa loquitur*, … expert testimony is not necessary to establish the relevant standard of care." And, *res ipsa loquitur* did apply in the present case because, as the Supreme Court held in ***Tice v. Hall***, 310 N.C. 589 (1984), "a surgeon is under a duty to remove all harmful and unnecessary foreign objects at the

completion of the operation … [, so] the presence of a foreign object raises an inference of a lack of due care."

The Court was also not persuaded by Dr. Thom's argument that the references plaintiff's attorney made when he questioned her to side effects from a "prescription warning that [he] obtained from a local pharmacist" were "inadmissible hearsay." Since Rule of Evidence 801 defines hearsay as "a statement … offered … to prove the truth of the matter asserted" and the questions in which plaintiff's attorney referenced the "prescription warning that [he] obtained from a local pharmacist" were "not asked to establish the truth of the warnings obtained from the pharmacist nor to prove the particular side effects of the medications Defendant was taking …[, but] were asked to elicit Defendant's testimony regarding the extent to which her medications might have affected her judgment during the surgery," the Court found that they did not constitute hearsay.

While it found no error in the trial court's resolution of plaintiff's negligence claim, the Court *did* find error in the denial of Dr. Thom's motion to introduce evidence of the medical bills that Cape Fear Valley Medical Center wrote off. Over Dr. Thom's objection, plaintiff had introduced medical bills totaling $1,219,660. On appeal, she argued that, in doing so, plaintiff "substantially inflate[d] the value of [his] claim in the minds of the jurors," since approximately $860,000 of the total had been written off by the hospital and never paid by any party.

While plaintiff contended that, under the collateral source rule, all of the decedent's medical bills were admissible and the write-offs were not, the Court disagreed. Quoting from ***Badgett v. Davis***, 104 N.C. App. 760 (1991), it found that the collateral source rule provides that "evidence of a plaintiff's receipt of benefits for his or her injury … from sources collateral to [the] defendant generally is not admissible…. This rule gives force to the public policy which prohibits a tortfeasor from reducing [its] own liability … by the amount of compensation the injured party receives from an independent source." In a footnote, the Court recognized that "the collateral source rule was abrogated by Rule 414 of the North Carolina Rules of Evidence with regard to evidence of past medical expense," but it found Rule 414 inapplicable because plaintiff's lawsuit was filed in 2008, which was before the effective date of the new rule.

In this case, said the Court "unlike ***Badgett***, the hospital bills were not paid by an independent third party." Rather, they "appear to have been forgiven by the hospital of its own accord as a business loss." Therefore, "the collateral source rule is not applicable to bar evidence of the hospital bills that were written off…. Accordingly, Plaintiff was entitled to introduce evidence of the decedent's medical bills, but Defendant was … entitled to introduce evidence that some of those bills were written off by the hospital. As a result, … the trial court erred in denying defendant's motion to introduce evidence of the write-offs and … abused its discretion in denying her Rule 60(b) motion for a new trial as it relates to the issue of damages."

Having determined that Dr. Thom was entitled to a new trial on the issue of damages, and in an effort to serve the interests of "judicial economy" by avoiding another appeal regarding "the propriety of the trial court's jury instructions on damages," the Court went on to consider defendant's additional argument that it was error for the trial court to instruct the jury on permanent injury, since the decedent was no longer alive at the time of trial. Because "[t]he purpose of the permanent injury instruction … is to compensate the plaintiff for additional future harm that she is expected to experience because of a permanent injury that she suffered as a proximate result of the defendant's conduct," the Court agreed with Dr. Thom that "the trial court's instruction on permanent injury was erroneous." As a consequence, it remanded the case for a new trial on the issue of damages.

Order Directing Physician to Produce Nonparty Medical Records Affirmed

Jerome Brewer suffered a severe spinal cord infarction during a thoracic laminectomy performed by neurosurgeon William D. Hunter, MD, leaving him without sensation below his thighs, unable to move his lower extremities, permanently confined to a wheelchair, and in need of assistance with daily tasks, including managing his bowel and bladder functions. He sued Dr. Hunter and his neurosurgical practice for medical negligence, loss of consortium, and negligent infliction of emotional distress.

During a discovery deposition, Dr. Hunter testified that he made a list of the 44 occasions on which he had performed thoracic laminectomies. Brewer served a request for production, seeking that list and other documents, including "the operative notes and discharge summaries for all surgeries performed by Dr. Hunter." The defendants objected and Brewer filed a motion to compel, which the trial court granted in part. It directed the defendants to produce 25 of the 44 requested patient records, redacted so as to not reveal the identity of the patients whose records were being produced. The order also provided that, "[t]o the extent that there is information … contained in the produced records that is highly sensitive, … Defense counsel may submit … [it] for *in camera* inspection … [and t]he Court will review and consider any proposed redactions." Defendants gave notice of appeal.

On September 2, in ***Brewer v. Hunter***, the Court of Appeals determined that, although "[a]n order compelling discovery is generally not immediately appealable because it is interlocutory," it had jurisdiction to resolve defendants' appeal in this case because they were contending that the documents at issue were immune from discovery based on the privilege set out in N.C.G.S. § 8-53, which governs the discoverability of patient medical records, and the Supreme Court held in ***Sharpe v. Worland***, 351 N.C. 159 (1999), that "when … a party asserts a statutory privilege which directly relates to the matter to be disclosed under an interlocutory discovery order, and the assertion of such privilege is not … frivolous …, the challenged order affects a substantial right."

As for defendants' argument that "the production of non-party medical records should be compelled only in exceptional circumstances," the Court found it "grounded more in policy than in law," and policy decisions are "solely within the province of the General Assembly." Further, while the Legislature could have drafted N.C.G.S. § 8-53 "so as to impose greater restrictions on the disclosure of non-party medical records than those applicable to the disclosure of the medical records of parties to the litigation …," no such distinction was made in the statute, which, therefore, "leaves the discoverability of all patient records subject to the discretion of the trial courts … based upon whether the court believes the disclosure … 'necessary to a proper administration of justice.'"

That being so, the Court found that "the only question before us is whether … the trial court abused its discretion in determining that disclosure of … records of certain former patients of Dr. Hunter was 'necessary to a proper administration of justice.'" Because prior case law applying N.C.G.S. § 8-53 established that the trial court's ruling "is reviewed under an abuse of discretion standard," and as it was clear that "careful consideration [was] given by the trial court," the Court was unable to find the trial court's order "manifestly unsupported by reason." Therefore, it concluded that the trial court did not abuse its discretion when it granted plaintiffs' motion to compel disclosure of the medical records of Dr. Hunter's former patients.

Contract Action Barred by Statute of Limitations

Rose Glynne, MD, opened her own obstetrics practice in 2002. Its initial success led her to hire an associate, purchase an office building, and

lease space to Wilson Medical Center. When the hospital vacated the premises in July 2006, Dr. Glynne claimed breach of contract.

After several patients reported problems with the care provided by Dr. Glynne, including complications from surgical procedures performed in 2004 and 2005, the hospital initiated an "external quality review" of her practice. In November 2006, its attorney notified Dr. Glynne that her privileges to admit and treat patients at the hospital were being suspended, but would be restored if she took a leave of absence, arranged for a qualified physician to serve as her mentor, and agreed to having all of her surgical cases reviewed for a year.

During Dr. Glynne's leave of absence, she paid $50,000 in additional compensation to her associate to ensure that needed call coverage was provided and an agreement to sell her office building for $1,000,000 fell through when the purchasers learned that the hospital had ceased leasing space in the building. Her enforced absence, coupled with rumors that circulated within the local community about patient care issues, harmed her practice, such that she resigned her position as a member of the hospital's staff, moved to Rocky Mount, entered practice there, filed for personal bankruptcy, and lost her office building.

Dr. Glynne sued the hospital in the United States District Court for the Eastern District of North Carolina, asserting a variety of claims under federal and state law, but later voluntarily dismissed her federal claims. The District Court then declined to exercise supplemental jurisdiction over her state law claims and involuntarily dismissed the remainder of her complaint on March 1, 2011.

On April 7, 2011, Dr. Glynne sued the hospital in Wilson County Superior Court, claiming negligent infliction of emotional distress, tortious interference with contract, tortious interference with business relationship, breach of contract, and breach of lease agreement. The hospital responded with a Rule 12(b)(6) motion to dismiss, contending that her claims were barred by the statute of limitations. The trial court agreed and granted the motion. Dr. Glynne appealed.

On September 2, in ***Glynne v. Wilson Medical Center***, the Court of Appeals affirmed, finding no merit in plaintiff's argument that the provisions of 28 U.S.C. § 1367(d) operated to *suspend* the running of the statute of limitations during the pendency of her federal court action, such that her state court action was timely filed. Relying on its prior decisions in ***Harter v. Vernon***, 139 N.C. App. 85 (2000), and ***Huang v. Ziko***, 132 N.C. App. 358 (1999), the Court held that, under 28 U.S.C. § 1367(d), Dr. Glynne had 30 days from the date on which her federal court action was dismissed to assert her state law claims in the General Court of Justice. Therefore, she had until March 31, 2011 to file suit in state court, but the action she brought in Wilson County Superior Court was not filed until April 7, 2011. Therefore, the Court held, "the trial court correctly concluded that Plaintiff's complaint was subject to dismissal on statute of limitations grounds."

While Dr. Glynne argued that the word "tolling" as used in 28 U.S.C. § 1367(d) should be understood to *suspend* the running of the limitations period, rather than *extend* it by the 30 days specified in 28 U.S.C. § 1367(d), and while she cited several federal and state court decisions that defined the word "tolling" in that way, the Court found that "[t]he fundamental problem with Plaintiff's argument is that this Court has already considered and rejected it [in ***Harter*** and ***Huang***] and our decisions to that effect have not been overturned by … either the United States Supreme Court or the Supreme Court of North Carolina." Therefore, under "well-established North Carolina law, '[w]here a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent…."

As for Dr. Glynne's argument that she should be allowed to pursue her state law claims on

excusable neglect grounds because she "relied on an interpretation of 28 U.S.C. § 1367(d) that had been accepted in many other jurisdictions," and since her complaint was filed "only slightly beyond the period allowed" and there was a "total lack of prejudice to defendant," the Court found that "[t]he only potentially applicable legal basis for holding that a trial or appellate court has the authority to extend the applicable statute of limitations for 'excusable neglect' is N.C. Gen. Stat. § 1A-1, Rule 6(b)." But, the only time periods that may be extended upon the authority of that rule are those established by the Rules of Civil Procedure, and in this case, "the statutes of limitation at issue … do not appear in the North Carolina Rules of Civil Procedure."

The Court also found unpersuasive Dr. Glynne's argument that the hospital should be equitably estopped from pleading the statute of limitations because its attorney indicated that if she reasserted her state court claims following dismissal of the federal court action, he would likely want to depose her again. However, responded the Court, while equitable estoppel might bar a defendant from relying on a statute of limitations in a proper case, estoppel only applies when "a party has been induced by another's acts to believe that certain facts exist, and that party rightfully relies and acts on that belief to his [or her] detriment." In the present case, unlike ***Ussery v. Branch Banking and Trust Co.***, ___ N.C. App. ___ (2013), in which the defendant told the plaintiff to "hold off on instituting any action" because "everything would be worked out," defense counsel's statement "would not have had any tendency to induce Plaintiff to refrain from filing her complaint in a timely manner." Therefore, the Court found no error in the trial court's determination that the defendant hospital was not equitably estopped from pleading the statute of limitations in defense of Dr. Glynne's claim.

In separate concurring opinions, Judges Martha Geer and Robert N. Hunter, Jr. agreed that the Court was bound by its prior opinions in ***Harter*** and ***Huang*** to affirm the trial court's dismissal of Dr. Glynne's complaint on statute of limitations grounds, but in light of what Judge Hunter described as "recent persuasive federal authority and authority from other states interpreting the meaning of 'tolling' both as a general matter and as used specifically in 28 U.S.C. § 1367(d)," he and Judge Geer urged the Supreme Court to "review … and resolve the conflict between this persuasive federal precedent and our state's case law."

Claim Against Investigating Police Officer Barred by Public Duty Doctrine

Kayla Inman was injured in a motor vehicle accident near the intersection of East Hayes and South Madison Streets in Whiteville. Investigating officer Donnie Hedwin of the Whiteville PD spoke to the other motorist, but did not ascertain his identity or include his name on the accident report because there was no physical contact between the two vehicles.

Inman sued the City of Whiteville, alleging that Officer Hedwin was an agent of the City and acting in the course and scope of his employment when he negligently investigated the accident by failing to identify the other motorist, and "[b]ut for the negligent acts of [the City], … plaintiff could have … maintained an action against the unknown driver of the second vehicle for her damages." The City's answer included a Rule 12(b)(6) motion to dismiss, which was granted by the trial court. Plaintiff appealed.

On September 16, in ***Inman v. City of Whiteville***, the Court of Appeals affirmed. It found that the "public duty doctrine," which was adopted by the Supreme Court in ***Braswell v. Braswell***, 330 N.C. 363 (1991), provides that "when a governmental entity owes a duty to the general public … individual plaintiffs may not enforce the duty in tort." Where a municipality is providing police protection, it is "generally insulated from liability because … '[the] municipality and its agents act for the benefit of

the public, and therefore, there is no liability for the failure to furnish police protection to specific individuals.'" The doctrine "acknowledges the limited resources of law enforcement and works against judicial imposition of an overwhelming burden of liability."

While, in ***Braswell***, the Supreme Court recognized exceptions to the public duty doctrine for cases in which there is a "special relationship between the injured party and the police, for example a state's witness or informant," or where the municipality "creates a special duty by promising protection to an individual," neither exception applied in the present case. Instead, plaintiff's claim was "premised on the manner in which a motor vehicle accident was investigated by law enforcement officers … [, whereas t]he duty to investigate motor vehicle accidents and to prepare accident reports is a general law enforcement duty owed to the public as a whole…. As such, the circumstances at issue in this case fall within the scope of the public duty doctrine." Therefore, the trial court properly granted the City's motion to dismiss.

Res Judicata, Collateral Estoppel, and Class Certification Issues Addressed

Allen Hedgepeth purchased a parcel of land on a peninsula in Currituck County at a foreclosure sale without procuring a title examination. When he sought to develop it, he discovered that he would not be able to do so without a right-of-way leading to U.S. Highway 158, which bisects the peninsula and runs in a north-south direction. In an effort to obtain one, he sued the Parkers' Landing Property Owners' Association (POA) in the United States District Court for the Eastern District of North Carolina, seeking a declaratory judgment that he had a right of ingress and egress by virtue of an easement across the adjacent Parkers' Landing subdivision.

The district court eventually entered an order finding Hedgepeth's theories of express easement, easement by necessity, and easement by equitable estoppel were all without merit. But, it also determined that "an implied easement exists such that he has reasonable access to his property" and held that the Parker's Landing tract was subject to a 10-foot easement and a 25-foot right of way … consistent with the use to which those paths were put when the common title to the two tracts was severed in 1894."

After the Fourth Circuit affirmed the district court's order, Hedgepeth filed a declaratory judgment action against Parker's Landing POA and the subdivision's individual lot owners in Currituck County Superior Court, seeking to quiet title to his property and enjoin the defendants from interfering with his right of access. Two of the subdivision's lot owners brought their own suits against Hedgepeth, seeking to enjoin him from trespassing on or clearing a roadway across their property and requesting a declaration from the court that his easement had been terminated.

The parties filed multiple motions, including a motion to consolidate the various pending lawsuits, a motion to dismiss for failure to join necessary parties, and Hedgepeth's motions for summary judgment, to join additional lot owners as necessary parties under Rule 19(a), and to certify a class of defendants consisting of the individual Parkers' Landing lot owners. Judge Marvin Blount granted the motion to consolidate and denied Hedgepeth's motions to dismiss, for summary judgment, and to join necessary parties. Hedgepeth appealed.

On September 2, the Court of Appeals addressed Hedgepeth's appeal in two companion opinions, ***Hedgepeth v. Parker's Landing Property Owners Association, Inc.*** (COA 13-914) and ***Hedgepeth v. Parker's Landing Property Owners Association, Inc.*** (COA 13-809). In the more lengthy of the two, COA 13-914, the Court determined that it had jurisdiction, despite the interlocutory nature of the appeal, because Hedgepeth's motion for summary judgment and appeal were based on the doctrines of *res judicata* and collateral

estoppel, and the Supreme Court held in ***Barfield v. N.C. Department of Crime Control & Public Safety***, 202 N.C App. 114 (2010) and **Bockweg v. Anderson**, 333 N.C. 486 (1993), that denial of a motion for summary judgment based on either *res judicata* or collateral estoppel "may affect a substantial right, making the order denying the motion immediately appealable."

Citing ***Williams v. Peabody***, ___ N.C. App. ___ (2011) as authority, the Court found that, for the doctrine of "*res judicata* or 'claim preclusion' … to apply, a party must show that the previous suit resulted in a final judgment on the merits, that the same cause of action is involved, and that both … [parties] were either parties or stand in privity with the parties." As for the doctrine of collateral estoppel, or "issue preclusion," the party claiming its application must establish that "the earlier suit resulted in a final judgment on the merits, that the issue in question was identical to the issue actually litigated and necessary to the judgment, and that 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 with the parties." Applying those principles to the facts of the present case, the Court held that collateral estoppel did *not* apply, nor did *res judicata*, except as to Hedgepeth's 25-foot right-of-way over the POA's property.

In the second of its two opinions, COA 13-809, the Court addressed the question of whether it was error for the trial court to deny Hedgepeth's motion to certify the individual Parkers' Landing lot owners as a class. Because the Supreme Court held in ***Frost v. Mazda Motor of America, Inc.***, 353 N.C. 188 (2000), that denial of class certification "affect[s] a substantial right because it determines the action as to the unnamed plaintiffs," the Court found that it had jurisdiction to consider Hedgepeth's appeal. It then affirmed the denial of his motion for class certification because the standard of review for evaluating a trial court decision to grant or deny such a motion is "abuse of discretion" and Hedgepeth failed to prove that the trial court's ruling was "manifestly unsupported by reason … [or] so arbitrary that it could not have been the result of a reasoned decision."

Exculpatory Clause In Contract Upheld

David Hyatt contracted with Mini Storage on the Green to rent Unit 816 in Building 8 of its storage facility in Hampstead. Building 8 had been constructed pursuant to a contract between Mini Storage and David Smith, who subtracted the work to Royall Commercial Contractors, Inc. The rental agreement for Unit 816 provided, *inter alia*, that "[l]andlord [shall not] be liable to tenant and/or tenant's guest or invitees for any personal injuries sustained by tenant and/or tenant's guest or invitee while on or about landlord's premises."

On July 3, 2008, Hyatt went to Unit 816 to collect various personal items. While there, the roller door to the unit became stuck as he was closing it. When he attempted to use additional force, the door came off its tracks and struck him in the head. He subsequently sued Mini Storage and Smith, claiming breach of contract and breach of express and implied warranties. They denied the material allegations of the complaint, asserted various affirmative defenses, and moved for summary judgment. The trial court granted their motion and plaintiff appealed.

On September 16, in ***Hyatt v. Mini Storage on the Green***, the Court of Appeals first addressed plaintiff's claim against Mini Storage and found that the issue in dispute was whether the exculpatory clause in the parties' contract, which purported to absolve Mini Storage from liability for personal injuries sustained on the premises, was enforceable. While the Court acknowledged the general rule that contracts "which exculpate persons from liability for negligence are not favored" and "must be strictly construed against the person seeking to escape liability," nevertheless, an exculpatory contract "will be enforced unless it violates a statute, is gained through inequality of bargaining power, or is contrary to a substantial public interest."

Here, the Court found that the exculpatory language in the parties' rental agreement was "clear" and "unambiguous" and, therefore, enforceable. Each of the cases relied upon by plaintiff was distinguishable and none of the three exceptions to the general rule applied. The public policy exception for "activity … extensively regulated to protect the public from danger" that was applied in ***Alston v. Monk***, 92 N.C. App. 59 (1988) and ***Fortson v. McClellan***, 131 N.C. App. 635 (1998), did not apply in this case; plaintiff identified no statute that the exculpatory provision in the rental agreement violated; and the parties' rental agreement was not "gained through inequality of bargaining power." In fact, plaintiff admitted that there was another storage facility "up the road" that he considered dealing with before he signed the Mini Storage rental agreement containing the exculpatory provision enforced by the trial court.

As for Hyatt's claim against David Smith, the Court found that "the work that allegedly resulted in plaintiff's injuries was actually performed by Royall rather than Defendant Smith." To successfully pursue a claim against Smith, plaintiff had to establish that he "violated some duty that he owed to Plaintiff." But, the cases Hyatt was relying upon "all address the assignor's liability to the other party to the original contract rather than to a third party like Plaintiff." Therefore, the trial court did not err when it granted David Smith's Rule 12(b)(6) motion to dismiss.

Unjust Enrichment Theory Not Applicable

College Road Animal Hospital, which was owned by veterinary physicians Phillip Lanzi and Jon Cottrell, borrowed $293,000 from Bank of America to make capital improvements to its Carolina Beach location. Both Dr. Lanzi and Dr. Cottrell signed the loan agreement, which called for College Road to make the loan payments. They and their wives also signed personal guaranties that made them responsible for the loan, if College Road failed to make payment.

In May 2011, Dr. Cottrell notified Dr. Lanzi that he was relinquishing his interest in College Road. Two months later, his attorney informed Bank of America that he was no longer affiliated with College Road and the Cottrells were terminating their personal guaranty with respect to any additional advances made to College Road. Thereafter, College Road kept making the required monthly payments to Bank of America without contribution from Dr. Cottrell.

In August 2012, College Road, Dr. Lanzi, and his wife sued Dr. Cottrell and his wife for "equitable contribution" and "unjust enrichment," seeking half of the monthly payments made by College Road and an order directing the Cottrells to provide 50% of the funds needed for the remaining loan payments. After both parties filed motions for summary judgment with supporting affidavits, the trial court granted plaintiffs' motion and entered an order granting plaintiffs the relief sought in their complaint. Defendants appealed.

On September 16, in ***College Road Animal Hospital, PLLC v. Cottrell***, the Court of Appeals first addressed College Road's contribution claim. It defined contribution as "the right of one who has discharged a common liability or burden to recover of another also liable [the fractional] portion which he ought to pay or bear" and it found that the prerequisites to a contribution claim include proof that "both [parties] are required to pay the obligation" and the party seeking contribution has "satisfied more than his just proportion of … [the] common obligation." Therefore, in the present case, the validity of plaintiffs' claim against Mrs. Cottrell required proof that she was obligated to make the underlying loan payments to Bank of America. However, the only signatures on the loan agreement were those of Drs. Lanzi and Cottrell. While Mrs. Cottrell signed a personal guaranty, her obligations under that agreement only arose if the borrower failed to make the required payments, and College Road's payments were current. Therefore, the Court concluded, it was

error for the trial court to enter summary judgment against Mrs. Cottrell.

As for plaintiffs' argument that Dr. Cottrell was a "co-borrower" with Dr. Lanzi and they were jointly liable to repay the loan, Dr. Cottrell's affidavit asserted that he and Dr. Lanzi signed the loan agreement as College Road's agents, not in their individual capacities. As that allegation raised a genuine issue of material fact, the Court found it was error for the trial court to grant plaintiffs' motion for summary judgment.

It also found no merit in plaintiffs' argument that they were entitled to summary judgment under the theory of unjust enrichment. Quoting ***Atlantic Coast Line R.R. Co. v. State Highway Commission***, 268 N.C. 92 (1966), the Court found that "[t]he general rule of unjust enrichment is that where … expenditures [are] made by one party … for the benefit of another, without an express contract to pay, the law will imply a promise to pay a fair compensation therefor," based on the equitable principle that "a person should not be permitted to enrich himself unjustly at the expense of another." However, the Supreme Court held in ***Whitfield v. Gilchrist***, 348 N.C. 39 (1998) that "[o]nly in the absence of an express agreement of the parties will courts impose a … contract implied in law in order to prevent an unjust enrichment." In the present case, both the loan agreement between Bank of America and Drs. Lanzi and Cottrell and the guaranty agreement they and their wives signed qualified as express agreements between the parties. Therefore, since plaintiffs' theory of unjust enrichment, like their contribution claim, lacked merit, the trial court erred in granting summary judgment in their favor.

Statutes of Limitations and Repose Applied In Construction Defect Action

The Trillium Ridge Condominium complex is one of several within Trillium Development, a private residential, lake, and golf community in Cashiers. It was developed by Trillium Links & Village, LLC and built by Trillium Construction Company. Trillium Links' principal owners, S.C. Culbreth, Jr. and Gregory Ward, were appointed to serve as the initial officers and directors of Trillium Ridge Condominium Association, and they continued in that capacity until control of the Association was turned over to the owners of the individual units in February 2007.

After a structural engineering analysis revealed that two missing foundation piers in one of the condominium complex's six buildings had caused a sagging floor, the piers were replaced. The report from a reserve study commissioned by the Association indicated that the condominiums' wooden siding had a shorter remaining life than anticipated, and when an expert was retained to provide a second opinion, he found siding-related and metal flashing defects that the Association's secretary attempted to remedy with caulk.

After leaks were discovered in two of the complex's six buildings, an investigation revealed numerous defects in the original construction of the condominium buildings, extensive water damage, and rotting. That led the Association to sue Trillium Links, Trillium Construction, Culbreth, and Ward, claiming negligent construction, gross negligence, breach of fiduciary duty, and constructive fraud.

After the trial court entered an order granting summary judgment to Trillium Links, Culbreth, and Ward and partial summary judgment to Trillium Construction, the Association gave notice of appeal and the trial court certified the case for immediate review under Rule 54(b). On September 16, in ***Trillium Ridge Condominium Association, Inc. v. Trillium Links & Village, LLC***, the Court of Appeals affirmed the trial court's order in part and reversed and remanded it in part.

The first issue the Court addressed in its opinion was the Association's argument that Trillium Construction's motion for summary judgment was "untimely" because it had given inadequate notice of the motion hearing. While the Court

agreed that the defendant had, in fact, given less notice than is required by Rule 6(e), it found that the Association waived its objection to that deficiency because it "did not object to the adequacy of the notice that it received …, participated in the hearing, and addressed the … motion on the merits." By failing to object at the time, the Association waived its right to do so on appeal.

The Court then found that it was error for the trial court to grant summary judgment to Trillium Links and Trillium Construction on the Association's negligent construction claim. While Trillium Links contended that, as developer, it owed no duty to those who purchased condominiums constructed by others, the Court found that the Building Code "imposes liability on any person who constructs, supervises construction, or designs a building" and "any person responsible for supervising a construction project is subject to being held liable on a negligent construction theory." Since Trillium Links had supervised the condominiums' construction and the record contained evidence of Building Code violations, there was a genuine issue of material fact as to its alleged negligence. Therefore, it was for the jury, not the trial court, to resolve plaintiff's negligent construction claim against Trillium Links.

The Court also found a genuine issue of material fact as to whether plaintiff's negligent construction claim was barred by the three-year statute of limitations of N.C.G.S. § 1-52(16). But, because the Association had the burden of showing that it "brought the action within six years of either (1) the substantial completion of the house or (2) the specific last act or omission of defendant giving rise to the cause of action," and did not meet that burden, the Court found that the six-year statute of repose of N.C.G.S. § 1-50(a)(5)(a) barred the Association's negligent construction claim against Trillium Construction.

At the same time, because N.C.G.S. § 1-50(a)(5)(d) provides that the statute of repose "shall not be asserted as a defense by any person in actual possession or control … of the improvement [to real property]" and there was a genuine issue of material fact as to whether Trillium Links retained "possession or control" over the condominium complex until February 2007, when it turned over control of the Association to the owners of the individual units, the Court found that a jury question arose as to whether Trillium Links was entitled to rely on the statute of repose. Therefore, it was error for the trial court to grant summary judgment to Trillium Links on that issue.

As for plaintiff's plea of equitable estoppel in bar of defendants' statute of limitations and statute of repose defenses, the Court found that the essential elements of equitable estoppel were "(1) conduct on the part of the party sought to be estopped which amounts to a false representation or concealment of material facts; (2) the intention that such conduct will be acted on by the other party; and (3) knowledge, actual or constructive, of the real facts." It then found the record "totally devoid of any information tending to show that Plaintiff was 'induced to delay filing of the action by the misrepresentations of' Trillium Links." But, as for Trillium Construction, there was a genuine issue of material fact as to whether it "actively concealed its defective work from Plaintiff." Therefore, it found that "Trillium Links [was] not equitably estopped from asserting the statute of limitations or statute of repose in opposition to Plaintiff's negligent construction claims …[, but] the trial court erred by granting summary judgment in favor of Trillium Construction with respect to this issue."

The Court also discussed in some detail the Association's breach of fiduciary duty claim, and in doing so, held that "[a] fiduciary duty arises when there has been a special confidence 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." It then found that there was a

genuine issue of material fact as to whether, while they were serving as directors of the Association, Messrs. Culbreth and Ward breached a fiduciary duty they owed to the Association by failing to disclose relevant information regarding construction-related defects in the complex's six condominium buildings. And, the same was true for Trillium Links, since it had "control of the Association through its power to appoint and remove Board Members." Therefore, the Court held that the trial court erred when it granted summary judgment to Trillium Links, Culbreth, and Ward on plaintiff's breach of fiduciary duty claim.

As for the plaintiff's constructive fraud claim, the Court found that "an essential element … is that the defendants sought to benefit themselves in the transaction." Because the Association produced no evidence that the defendants "sought or gained any personal benefit by taking unfair advantage of their relationship," the Court concluded that it "failed to forecast sufficient evidence to establish a constructive fraud claim," so it affirmed the trial court's grant of summary judgment on this issue.

For similar reasons, the Court affirmed the trial court's dismissal of the Association's gross negligence claim. Because gross negligence "consists of 'wanton conduct done with conscious or reckless disregard for the rights and safety of others,'" since an act is "wanton when it is done of wicked purpose, or when done needlessly, manifesting a reckless indifference to the rights of others," and as there was no such evidence in this case, the trial court did not err in dismissing the Association's gross negligence claim.

Having found that the trial court correctly granted summary judgment on some of the claims raised in plaintiff's complaint, but erred in granting summary judgment with respect to the remainder of them, the Court affirmed the trial court's order in part and reversed and remanded it in part.

Additional Opinions

On September 5, in ***Sandhill Amusements, Inc. v. Sheriff of Onslow County***, the Court of Appeals addressed the appeal of Onslow County Sheriff Ed Brown from orders entered by Judge Jack Jenkins denying the sheriff's Rule 12(b)(1), (b)(2), and (b)(6) motions to dismiss and granting a preliminary injunction in favor of plaintiffs Sandhill Amusements, LLC and Gift Surplus, LLC. The injunction enjoined the sheriff from enforcing N.C.G.S. § 14-306.4(b), which makes it "unlawful for any person to … place into operation an electronic machine or device to … [c]onduct a sweepstakes …." The majority and dissenting judges agreed that the Court had jurisdiction over the sheriff's challenge to the denial of his motion to dismiss because it was based on sovereign immunity and "appeals raising issues of governmental or sovereign immunity affect a substantial right sufficient to warrant immediate appellate review." The judges also agreed that, while governmental immunity bars claims for money damages against individual officers in their official capacity, it does not act as a bar to claims for injunctive relief. However, they disagreed over whether the trial court's preliminary injunction order "affect[ed] a substantial right" and was, therefore, subject to immediate appellate review. The majority held that only a portion of the trial court's preliminary injunction was subject to immediate appellate review, whereas in dissent, Judge Ervin would have gone further and reversed the trial court's decision to issue a preliminary injunction against Sheriff Brown.

On September 16, in ***Crogan v. Crogan***, a domestic dispute involving claims arising out of a separation agreement executed under seal, the Court of Appeals agreed with the defendant husband that the plaintiff wife's claims for fraud, duress, and undue influence were barred by the three year statute of limitations contained in N.C.G.S. § 1-52(9). However, since the wife's claims arose pursuant to a document under seal, it found that the ten-year statute of limitation of

N.C.G.S. § 1-47(2) applied and, as a consequence, the trial court erred in granting defendant's motion for summary judgment.

WORKERS' COMPENSATION

Law of the Case Doctrine Applied to Dispute Over Attorney's Fee

On February 28, 1983, Thomas Adcox was rendered permanently and totally disabled by a compensable head injury, and his family attended to his personal needs from then until February 2003, when the defendants began providing professional attendant care services 60 hours per week. When his wife retired in 2007, Adcox moved to have her provide future attendant care services at defendants' expense.

A hearing was held by Deputy Commissioner John DeLuca, whose opinion and award allowed Mrs. Adcox to assume responsibility for her husband's future attendant care at defendants' expense, at the rate of $188.00 per day, seven days per week. It also provided for "[a]n attorneys' fee of 25% of the attendant care compensation … for … Plaintiff's counsel." Both parties appealed to the Full Commission.

The Full Commission affirmed Deputy Commissioner DeLuca's award "with modifications including the amount of attendant care and rate of pay." It ordered the defendants to compensate Mrs. Adcox for 16 hours of attendant care services per day at the rate of $10.00 per hour, but made no mention of the 25% attorney's fee awarded by the deputy commissioner. After plaintiff unsuccessfully appealed to the Court of Appeals for reasons unrelated to the attorney fee issue (see ***Adcox v. Clarkson Brothers Construction Co.***, 201 N.C. App. 446 (2009; unpublished)), he moved the Full Commission for entry of an order directing the defendants to pay the 25% fee directly to his attorney.

The Full Commission, with one commissioner dissenting, denied plaintiff's motion on grounds that no attorney's fee had been awarded in its earlier opinion and award. Plaintiff then gave notice of appeal to Superior Court pursuant to N.C.G.S. § 97-90 and defendants responded with Rule 12(b)(1), (2), and (6) motions to dismiss. The trial court agreed with the defendants and dismissed plaintiff's appeal on grounds of *res judicata.* Plaintiff then appealed to the Court of Appeals.

On September 16, in ***Adcox v. Clarkson Brothers Construction Company***, the Court reversed the Superior Court dismissal of plaintiff's appeal. It found 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." It was not persuaded 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."

Since it was undisputed that Deputy Commissioner DeLuca awarded attorneys' fees to plaintiff's counsel, 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, alternatively, the Full Commission did not consider the issue." In either case, it could find "no authority … which would permit us to concluded that the Commission reversed the deputy commissioner's award and silently denied plaintiff's counsel the 25% attorneys' fee."

Therefore, the Court reasoned, assuming *arguendo* that the defendants had standing to challenge the deputy commissioner's award of attorneys' fees, "the burden was on [them] to obtain a ruling from the Full Commission." When it did not explicitly reverse the deputy commissioner's attorney fee award, the defendants "could have requested reconsideration and, if the Commission did not rule in their favor, appealed to this Court." As they failed to do so, "the decision below becomes 'the law of the case' and cannot be challenged in subsequent proceedings in the same case." Therefore, the Court reversed the Superior Court order dismissing plaintiff's appeal and remanded the case to the Commission for reconsideration of its ruling on plaintiff's motion seeking entry of an order directing the defendants to pay directly to plaintiff's attorney the 25% fee awarded by Deputy Commissioner DeLuca.

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

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