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CIVIL LIABILITY

Standard of Care Opinion Excluded

Suffering from symptoms of an upper respiratory infection, Martha Schmidt sought medical care in May 2006. Chest x-rays were taken at that time and then again in May 2007, when she was treated for pain in her neck and chest, and in May 2008, when she was seen for symptoms of pneumonia. On all three occasions, Dr. Scott Petty, a licensed radiologist, read the x-ray and failed to detect a lesion in her left lung.

In June 2008, Mrs. Schmidt sought additional treatment for abdominal and pleuritic chest pain. A CT scan was ordered, from which Dr. Petty diagnosed a "primary lung neoplasm." After she died of metastatic lung cancer in February 2009, her estate sued Dr. Petty and his medical practice for malpractice, claiming that his failure to timely diagnose her lung cancer led to a progression of the disease from a "treatable, curable stage" to an "incurable, terminal stage," proximately causing her death.

Dr. Petty's expert witnesses testified that because Mrs. Schmidt's 2006 and 2007 x-rays did not contain a left upper lobe focal opacity suspicious for cancer, for which it would have been appropriate to order a CT scan, he did not violate the applicable standard of care. The experts for both sides agreed that the x-ray taken in 2008 revealed a widened mediastinum indicative of metastatic disease, which should have prompted further investigation with a CT scan, but ordering one at that late date would not have

In This Issue…

CIVIL LIABILITY

Standard of Care Opinion Excluded
Schmidt v. Petty 1

Damages Awarded for Violation of Employment Agreement
GE Betz, Inc. v. Conrad 2

Dismissal of Malicious Prosecution Claim Reversed
Simpson v. Sears, Roebuck and Co. 4

Res Judicata and Claim Splitting
Tong v. Dunn 4

Motions for New Trial and JNOV
Lloyd v. Norfolk Southern Railway Company 5

Legal Malpractice Claim Withstands Motion to Dismiss
Podrebarac v. Horack, Talley, Pharr & Lowndes, P.A. 6

Venue Ruling Affirmed
Capital Bank, N.A. v. Cameron 6

Miscellaneous
John Wm. Brown Co. v. State Employees' Credit Union . . 7
Stainless Valve Co. v. Safefresh Technologies, LLC 7
Elliott v. KB Home North Carolina, Inc. 8

WORKERS' COMPENSATION

Attendant Care, Adaptive Housing, and Case Management
Espinosa v. Tradesource, Inc. 8

Death of Employee Impacts Obligation to Fund MSA
Holmes v. Solon Automated Services 10

Accident Causing Paraplegia Found Noncompensable
Morgan v. Morgan Motor Company of Albemarle 10

Employee's Cancer Found Unrelated to Asbestos Exposure
Wise v. Alcoa, Inc. 11

Virginia Policy Affords No Coverage in North Carolina
Tovar-Mauricio v. T.R. Driscoll, Inc. 12

prevented Mrs. Schmidt's death. However, plaintiff's experts were of the opinion that a focal opacity *was* visible on the 2006 and 2007 x-rays and, by failing to identify and report its presence, Dr. Petty violated the standard of care. The treating oncologist also testified that, had Mrs. Schmidt's lung cancer been diagnosed in May 2006 or May 2007, she would have had an 80 to 85% probability of being cured.

At trial, defendants filed a motion *in limine* to exclude any evidence relating to Dr. Petty's analysis of the May 2008 chest x-ray, under the theory that it lacked relevance because his failure to detect the opacity in Mrs. Schmidt's left lung at that point in time could not have been the proximate cause of her death. The trial judge agreed, ruling that the evidence in question was inadmissible because "there's not a sufficient showing of an adequate number of times that the alleged conduct occurred to establish it as a habit" under Rule 406 and it lacked relevance under Rule 404(b) because it was "not conduct that proximately caused the decedent's injury." She also performed an analysis under Rule 403, weighing its probative value against its prejudicial impact, and concluded that its probative value was substantially outweighed by the danger of unfair prejudice, so she granted defendants' motion and excluded the evidence.

After the jury returned a defense verdict, plaintiff appealed, arguing that the trial court erred in granting defendants' motion *in limine*. But, on December 17, in ***Schmidt v. Petty***, the Court of Appeals disagreed. Quoting from ***Warren v. General Motors Corp.***, 142 N.C. App. 316 (2001), it held that a trial court's pretrial determination of the admissibility of evidence "will not be reversed absent a showing of an abuse of the trial court's discretion," which only occurs when "the trial court's ruling was so arbitrary that it 'could not have been a result of competent inquiry.'"

Because "[a] jury is likely to attach great significance to expert testimony that a party violated the applicable standard of care," the Court determined that it was "reasonable" for the trial judge to conclude that, had the jury been permitted to hear experts testify that Dr. Petty violated the standard of care in reviewing an x-ray which plaintiff admitted was not the proximate cause of Mrs. Schmidt's death, "confusion of the issues in the minds of the jurors and ensuing prejudice to Defendants were likely to occur." Therefore, the Court affirmed the trial court's ruling on defendants' motion *in limine*, since "the potential for harm stemming from the admission of expert testimony regarding a standard of care violation … substantially outweighed … [its] limited probative value."

Employer Awarded Damages for Violation of Employment Agreement

The employment agreements signed by GE Betz ("GE") employees R.C. Conrad, Robert Dodd, Benjamin Lukowski, and Barry Owings prohibited direct or indirect solicitation of the company's current or prospective customers for eighteen months after the end of their employment. They all eventually left GE to work for its competitor in the water treatment business, Zee Company, and began contacting customers either they or their coworkers serviced while at GE. After discovering what they were doing, GE sent a cease-and-desist letter to Zee's president, with an enclosed copy of the employment agreement, but he claimed they were selling products unrelated to the water treatment industry. So, GE sued Zee and the four employees, alleging a breach of confidentiality and misappropriation of trade secrets under N.C.G.S. § 75-1.1.

During discovery, Zee was sanctioned for failing to comply with multiple orders to produce documentation of its net profits from sales to GE's former customers. At trial, the four individual defendants were found to have violated the terms of the employment agreement by indirectly soliciting GE's customers, and they and Zee were held jointly and severally liable for $288,297 in compensatory damages. The trial

court also awarded punitive damages equal to three times the compensatory damages, or $864,891, against each defendant individually, for a total of $4,324,455 in punitive damages, and it taxed the defendants with $69,888 in costs and $5,769,903 in attorneys' fees, including over $3,000,000 in fees charged by GE's New York law firm, Paul Hastings, LLP. Defendants appealed.

On December 3, in ***GE Betz, Inc. v. Conrad***, the Court of Appeals affirmed the trial court's determination that the defendants were jointly and severally liable for compensatory and punitive damages, but it found error in the amounts awarded for punitive damages and attorneys' fees. In a 64 page opinion, the Court addressed the essential elements of estoppel; defined "misappropriation" and "trade secrets;" outlined the requirements for establishing a *prima facie* case of trade secret misappropriation; and identified the criteria for proving joint and several liability for unfair or deceptive acts or practices under N.C.G.S. § 75-1.1. It also discussed in some detail the discovery sanctions available under Rule 37(b)(2), which "are within the sound discretion of the trial court and will not be overturned on appeal absent a showing of abuse of discretion," and held that it is not an abuse of discretion for the trial court to impose a "severe" sanction, so long as it is "among those expressly authorized by statute" and there is no "specific evidence of injustice."

But, the Court found the trial court's punitive damage award "unconstitutionally excessive" because, while N.C.G.S. § 1D-25 provides that "[p]unitive damages awarded *against a defendant* shall not exceed three times the amount of compensatory damages or two hundred fifty thousand dollars ($250,000), whichever is greater," the Supreme Court held in ***Rhyne v. K-Mart Corp.***, 358 N.C. 160 (2004), that the legislature's intent was to "reduce each *plaintiff's* individual punitive damages award." Therefore, it found that "section 1D-25(b) applies to the individual jury verdict of each plaintiff" and determined that it was error for the trial court to award three times the compensatory damages against each defendant individually.

The Court also found error in the attorney's fee awarded under N.C.G.S. § 6-21.5, which authorizes the trial court to tax a fee when it finds the "complete absence of a justiciable issue of either law or fact by the losing party." But, the statute also obligates the court to make findings regarding the "reasonableness" of the fee awarded. In the present case, the Court agreed that it was "reasonable" for GE to utilize the services of its New York law firm to work with its North Carolina attorneys, but "that does not complete our inquiry" because, in "assessing reasonableness of fees incurred by more expensive out-of-sate counsel," the court must also determine whether "services of like quality … [are] available in the locality where the services are rendered." Since Paul Hastings' rates were double those of GE's North Carolina attorneys and much of the work performed by its attorneys "could have just as effectively been done by local counsel at lower rates," the Court found that "the trial court abused its discretion by awarding the entire fee billed by Paul Hastings … without conducting any inquiry as to which of the services rendered by Paul Hastings' attorneys … could not have been performed by local counsel at reasonable rates within the community in which the litigation took place." So, it remanded the case back to the trial court to make the necessary findings.

The Court also addressed defense counsel Thomas Almy's appeal from a trial court order finding him liable for an attorneys fee under Rule 37(b)(2) and held that, because he was an attorney and not a party, the rule did not apply to him. It also reversed a trial court order holding Almy in criminal contempt. In doing so, the Court distinguished between the two types of contempt, civil and criminal; defined direct and indirect criminal contempt; described the procedural requirements necessary to hold someone in criminal contempt under N.C.G.S. § 5A-15; and concluded that the trial court erred

when it held Almy in indirect criminal contempt for making confidential information public in violation of a protective order. It also reversed and remanded for a new determination the trial court's revocation of Almy's admission *pro hac vice* because "Almy's being held in criminal contempt likely affected the trial court's decision to revoke his admission." At the same time, it upheld the revocation of defense attorney Mark Dombroff's *pro hac vice* admission because he violated N.C.G.S. § 84-4.1 by failing to disclose on his *pro hac vice* application form a disciplinary fine leveled by a federal court in South Carolina.

Dismissal of Malicious Prosecution Claim Reversed

While shopping in the Sears store in Asheville, Taralyn Simpson was detained by the store's loss control manager, Amy Edwards. She was later arrested and charged with misdemeanor larceny of goods valued at $623.93 and subsequently found guilty in district court. However, she appealed for a trial *de novo* and found not guilty by a superior court jury.

Simpson then sued Edwards and Sears for malicious prosecution and false imprisonment, contending that her arrest and prosecution was the result of a "false, fictitious, fabricated, and fraudulent written 'confession'" and Edwards' "maliciously false and fraudulent testimony." The defendants responded with a Rule 12(b)(6) motion to dismiss, citing as authority ***Griffis v. Sellars***, 20 N.C. 315 (1838) and ***Overton v. Combs***, 182 N.C. 4 (1921), in which the Supreme Court held that a district court finding of guilt conclusively established probable cause for plaintiff's detention and prosecution. The trial court concurred and granted the motion to dismiss. Simpson appealed.

On December 17, in ***Simpson v. Sears, Roebuck and Co.***, the Court of Appeals vacated the order of dismissal, holding that the doctrine relied upon by the defendants and trial court "has eroded somewhat over time," such that, while the judgment in the district court is normally conclusive as to the issue of probable cause, "it can be impeached for fraud or other unfair means in its procurement." Because plaintiff pled that her district court conviction was wrongfully procured, a genuine issue of material fact had been raised. Therefore, it was error for the trial court to dismiss her complaint.

Court Authorizes Filing of Multiple Claims from Common Set of Facts

Siu S. Tong, founder and common shareholder of Engineous Software, Inc., filed two separate lawsuits, contending in the first, which was brought in Wake County Superior Court, but removed to federal court, that negligent misrepresentations by the company and members of its board of directors fraudulently induced him to sign an employment agreement violated the North Carolina Wage and Hour Act and was later breached by the company. In the second lawsuit, which he filed in Orange County Superior Court ten days after the first, Tong and the company's other 47 common shareholders sued five members of the company's board of directors for false representations and breach of fiduciary duty in connection with Engineous' sale to and merger with ENG Acquisition, Inc.

After Tong dismissed the federal court action with prejudice, the defendants in the Orange County lawsuit amended their answer to add *res judicata* and claim splitting as affirmative defenses. They then filed a motion for judgment on the pleadings, which was granted by the trial court. Tong appealed.

On December 17, in ***Tong v. Dunn***, the Court of Appeals reversed, citing as authority ***Bockweg v. Anderson***, 333 N.C. 486 (1993), in which a majority of the Supreme Court rejected the "transactional approach" to *res judicata* urged in the dissent of Justice Meyer, who argued that all issues arising out of a single transaction or series of transactions should be tried together when they result from of a "single core of operative

facts." Instead, the majority held that "[w]here a plaintiff has suffered multiple wrongs … [, he] may … bring successive actions, or, at his option, … join several claims together in one lawsuit" when he is seeking "a remedy for a separate and distinct negligent act leading to a separate and distinct injury."

The Court found "this case materially indistinguishable from ***Brockweg***, in which two separate acts of negligence arose out of a common set of facts." Likewise, the present case involved claims of "(1) fraudulent and negligent misrepresentations to an employee, and (2) a breach of fiduciary duty to a common shareholder." Therefore, like the plaintiffs in ***Bockwe***g and ***Skinner v. Quintiles***, 167 N.C. App. 478 (2004), Tong was seeking a remedy for a "separate and distinct [tortious] act leading to a separate and distinct injury." As a consequence, it was error for the trial court to rely on the doctrines of *res judicata* and claim splitting as grounds for granting defendants' motion for judgment on the pleadings.

Jury Verdict Upheld Following Train-Truck Collision

Ergon Trucking employee Jeremy Tucker was towing a tanker filled with mineral oil when his truck ran off the paved portion of the road while crossing railroad tracks owned by Norfolk Southern Railway. The truck became stuck on the tracks and was still not free several minutes later, when Tucker heard the whistle of an oncoming train. Despite his increasingly frantic, efforts, he was unable to move the truck to a position of safety as the train continued to approach. James Lloyd, the train's engineer, attempted to avoid a collision, but could not, as the truck was not visible to him until it was too late for him to stop in time. The resulting collision caused an explosion, and Lloyd was seriously injured.

Lloyd sued Tucker and Ergon for negligence and Norfolk Southern under the Federal Employers Liability Act for not providing a safe place to work and the defendants crossclaimed against each other for contribution, indemnity and damages. The jury found Tucker and Ergon, but not Norfolk Southern, negligent and awarded $865,175 to Lloyd and $177,600 to Norfolk Southern. Tucker and Ergon filed motions for judgment notwithstanding the verdict (JNOV) and a new trial, but both were denied. They then appealed to the Court of Appeals.

On December 17, in ***Lloyd v. Norfolk Southern Railway Company***, the Court affirmed the jury's verdict, finding no merit in any of appellants' arguments on appeal. In support of their contention that the trial court erred in denying their motion for JNOV, Tucker and Ergon argued that Lloyd failed to mitigate his damages by not returning to work after the accident, even though Norfolk Southern had offered to assist him with vocational rehabilitation. The Court disagreed because, although ***Miller v. Miller***, 273 N.C. 238 (1968), held that "[i]f plaintiff fails to mitigate his damages, '… no recovery can be had,'" Tucker and Ergon had the burden of proof on this issue and the record established that plaintiff had not been medically cleared to work, his physicians testified that he might never be able to return to work, and defendants' own expert witnesses acknowledged that he had done everything he was asked to do by his doctors. Therefore, Tucker and Ergon failed to meet "their burden [of] demonstrating that Lloyd acted unreasonably in mitigating his damages."

The Court also found no merit in appellants' objection to the trial court's ruling on their motion for a new trial, which was within the trial court's discretion and will not be disturbed on appeal, absent proof of a "manifest abuse of discretion" resulting in "a substantial miscarriage of justice."

And, finally, the Court held that the trial court did not err when it allowed the attorney for Norfolk Southern to question Ergon's expert about a reference in his report to the hearsay

opinion of Ergon's investigator that he found "no negligence on the part of Norfolk Southern." While plaintiff objected to that line of questioning, Tucker and Ergon did not. By failing to enter their own objection, they waived it under ***State v. Bell***, 359 N.C. 1 (2004), in which the Supreme Court held that "[w]here one party objects to testimony at trial, that objection does not inure to the benefit of another party for purposes of preserving the objection."

Legal Malpractice Claim Withstands Motion to Dismiss

Donald Podrebarac hired Horack, Talley, Pharr & Lowndes, P.A. to represent him in an equitable distribution action. The parties later reached agreement on the terms of a three-page document entitled "Mediation Stipulations," which was executed, but not notarized, signed by a district court judge, and filed with the Clerk of Court. However, when Mrs. Podrebarac's attorney drafted an Alimony and Property Settlement Agreement based on the stipulations agreed upon at mediation, she refused to sign it.

Nevertheless, both sides began complying with the property division outlined in that document, and they continued to act in accordance with its terms for approximately three years. Eventually, counsel for both parties withdrew and were replaced by other attorneys. When Podrebarac's new attorney moved to enforce the "Mediation Stipulations" as a "mediated settlement agreement," Mrs. Podrebarac's new attorney filed a Motion to Dismiss, claiming that the agreement failed to satisfy the requirement of N.C.G.S. § 50-20(d) that stipulations settling an equitable distribution either be notarized or sworn to in open court. The district court judge agreed and granted the Motion to Dismiss.

Podrebarac sued his former attorneys, claiming that their negligence in failing to have the "Mediation Stipulations" notarized rendered them unenforceable. The defendant law firm responded with a Rule 12(b)(6) motion to dismiss, contending that Podrebarac's claim was barred by the statute of limitations. Judge Timothy Kincaid agreed and granted the motion. Podrebarac appealed.

In an opinion filed on December 3, ***Podrebarac v. Horack, Talley, Pharr & Lowndes, P.A.***, the Court of Appeals first took note of the fact that the three-year statute of limitations applicable to legal malpractice actions, N.C.G.S. § 1-15(c), "accrue[s] at the time of … the last act of the defendant giving rise to the cause of action." It then held that, while continuing representation of a client by his attorney following the last act of negligence does not extend the statute of limitations, "if the claimant's loss is 'not readily apparent to the claimant at the time of its origin, and … is discovered or reasonably should be discovered by the claimant two or more years after the last act of the defendant giving rise to the cause of action, suit must be commenced within one year from the date discovery is made.'"

Applying that principle to Podrebarac's claim, the Court found that, "[l]iberally construing the complaint and taking all of … [its] allegations … as true," which it was required to do when reviewing an order granting a Rule 12(b)(6) motion to dismiss, Podrebarac's loss was not apparent on the date the stipulations were signed. The earliest he could reasonably have been expected to discover a defect in that document was the date on which his wife's attorney moved to dismiss his motion to enforce its terms, and his lawsuit was filed well within one year of that date. Therefore, held the Court, Podrebarac's claim against his former attorneys was *not* barred by the statute of limitations, and Judge Kincaid's order of dismissal was reversed.

Venue Ruling Affirmed

Ocean King, LLC borrowed $3,150,000 from Capital Bank. As its managers, Julian Cameron and Alfred Cooper, signed the loan agreement and promissory note for the company. They also executed personal guaranties. Each

agreement provided that "the parties consent to the exclusive, personal jurisdiction by the courts of North Carolina and to venue in Alamance County, North Carolina and waive any objection thereto."

Ocean King defaulted on the loan and Capital Bank foreclosed on the deed of trust. A deficiency balance was still owed, so the bank brought suit against Cameron and Cooper, and did so in Wake County, its principal place of business. Cameron consented to venue there, but Cooper contested the issue by filing a Rule 12(b)(3) motion to dismiss. The trial court denied the motion and Cooper appealed.

On December 17, in ***Capital Bank, N.A. v. Cameron***, the Court of Appeals first addressed its jurisdiction to resolve Cooper's interlocutory appeal. Acknowledging the well-recognized rule that there is no right of immediate appeal from an interlocutory order unless it affects a "substantial right," the Court cited ***Cable Tel. Servs., Inc. v. Overland Contracting, Inc.***, 154 N.C. App. 639 (2002), for the proposition that "an appeal from a motion to dismiss for improper venue based upon a jurisdiction or venue selection clause … deprives the appellant of a substantial right." Therefore, it had jurisdiction to hear Cooper's appeal.

The Court then looked to N.C.G.S. § 1-79(a) and found that, because the bank's principal place of business was Wake County, it was a proper venue, absent a contractual forum selection provision. But, the Court also found that "when a jurisdiction is specified in a … contract, the provision generally will not be enforced as a mandatory selection clause without some further language that indicates the parties' intent to make jurisdiction exclusive." Applying those principles to the present case, it determined that the "plain … language" of the loan documents contained "a mandatory forum selection clause … and a permissive consent to jurisdiction clause with respect to venue" because the word "exclusive" only "modified the parties' agreement as to personal jurisdiction, not venue." Therefore, as venue was not exclusive to Alamance County and was proper in Wake County, the trial court did not err when it denied Cooper's Rule 12(b)(3) motion to dismiss.

Additional Opinions

On December 3, in ***John Wm. Brown Co., Inc. v. State Employees Credit Union***, the Court of Appeals affirmed a Wake County Superior Court order resolving a dispute between the State Employees' Credit Union (SECU) and its general contractor over the construction of a new SECU branch office in Raleigh. In doing so, the Court described the essential elements of laches, which it defined as "[t]he equitable doctrine by which a court denies relief to a claimant who has unreasonably delayed or been negligent in asserting … [a] claim, when that delay or negligence has prejudiced the party against whom relief is sought," and of equitable estoppel, which it defined as "[a] defensive doctrine preventing one party from taking advantage of another when, through false language or conduct, the person to be estopped has induced another person to act in a certain way, with the result that the other person has been injured…."

On December 3, in ***Stainless Valve Co. v. Safefresh Technologies, LLC***, the Court of Appeals reversed an order granting summary judgment to Safefresh Technologies, LLC in a case in which the Court found there was sufficient evidence forecasted by Stainless Valve Company that Safefresh's president, Anthony Garwood, was acting with actual authority on behalf of Safefresh when he placed an email order for two types of valves manufactured by Stainless Valve. Quoting from N.C.G.S. § 57C-3-23, the Court held that "every manager is an agent of [a] limited liability company … for apparently carrying on … the business of the limited liability company …, unless the manager so acting has in fact no authority to act … and the person with whom the manager is dealing has knowledge of … [that] fact."

On December 17, in ***Elliott v. KB Home North Carolina, Inc.***, the Court of Appeals affirmed an order entered by the North Carolina Business Court denying the defendant general contractor's motion to compel arbitration, brought more than three years after a class action was filed against it by five named plaintiffs on behalf of themselves and all others similarly situated, alleging breach of contract, breach of express warranty, breach of implied warranty, negligence, unfair and deceptive trade practices, and negligent misrepresentation. Citing the "seminal case in North Carolina involving waiver of a contractual right to arbitrate," ***Cyclone Roofing Co. v. LaFave Co.***, 312 N.C. 224 (1984), the Court found competent evidence supporting the business court's determination that the defendant general contractor waived its right to arbitrate by failing to exercise that right in the more than three years in which it filed pleadings, engaged in discovery, and otherwise participated in plaintiffs' lawsuit, the cost of which prejudiced plaintiffs, who incurred approximately $100,000 in fees and other expenses as their claim was being litigated.

WORKERS' COMPENSATION

Attendant Care, Adaptive Housing, and Case Management Issues Resolved

While working as a construction crew supervisor for Tradesource, Inc., Jorge Espinosa was shot and rendered paraplegic. Tradesource and its insurer, Arch Insurance Company, admitted compensability and contracted with Paradigm Management Services to provide vocational rehabilitation services and assume responsibility for Espinosa's medical management, including payment of his medical expenses, in exchange for a lump sum payment of $2,286,953. A dispute arose over Paradigm's continued involvement in his care, multiple motions were filed, a hearing was held, and decisions entered by a deputy commissioner and the Full Commission.

In addition to his total disability benefits, the Full Commission awarded retroactive and future attendant care, the pro rata difference between Espinosa's pre-injury and post-injury rent, private transportation services, and the cost of a life care plan. It denied Espinosa's motion to remove Paradigm from the case, denied both parties' attorney fee requests under N.C.G.S. § 97-88.1, and referred the claim to the Department of Insurance to "investigate whether Paradigm … [is] properly operating under North Carolina law." At that point, Paradigm moved to intervene, but its motion was denied, as were two later motions for reconsideration. Plaintiff, the defendants, and Paradigm all appealed.

On December 3, in ***Espinosa v. Tradesource, Inc.***, the Court of Appeals first addressed plaintiff's contention that Paradigm's appeal, filed after its second motion for reconsideration was denied, was untimely because motions filed under Rule of Civil Procedure 60(b) do not toll the thirty-day deadline for appealing under N.C.G.S. § 97-86. The Court disagreed with the premise of plaintiff's argument, as the Rules of Civil Procedure "are not strictly applicable to proceedings under the Workers' Compensation Act." Rather, as recognized by the Supreme Court in ***Hogan v. Cone Mills Corp.***, 315 N.C. 127 (1985), "while the Commission's power to set aside judgments on a motion for reconsideration 'is analogous' to the power granted trial courts under Rule 60(b)(6), it arises from a different source – 'the judicial power conferred on the Commission by the legislature …,' not the North Carolina Rules of Civil Procedure." Instead, the Court looked to the Commission's rules and found Rule 702, which provides that "[t]he running of the time for filing and serving a notice of appeal is tolled as to all parties by a timely motion filed by any party to … reconsider the decision …." Therefore, the Court denied plaintiff's motion to dismiss Paradigm's appeal.

Turning next to both parties' appeal from the Commission's *pro rata* award of adaptive housing, in which the defendants were held liable for the difference between plaintiff's pre-injury and post-injury rent, the Court found no merit in

plaintiff's argument that, in cases in which the injured worker owns either no dwelling or one that cannot be adapted, the employer must provide "the entire handicapped-adapted dwelling." It also rejected defendants' argument that adaptive housing is an "ordinary expense of life Plaintiff is required to pay out of his weekly benefits." Citing ***Derebery v. Pitt County Fire Marshall***, 318 N.C. 192 (1986) and ***Timmons v. N.C. Dep't of Transp.***, 346 N.C. 173 (1997), the Court found that "[t]he Commission sensibly reasoned that living arrangements constitute an ordinary expense of life and, thus, should be paid by the employee …[, but] also recognized … that a change in such an expense … necessitated by a compensable injury, should be compensated for by the employer … [, so] it was appropriate for the Commission to require the employer to pay the difference between the two."

It also found evidence in the record to support the Commission's finding that the attendant care services provided by plaintiff's father, who left his job to care for his son, and plaintiff's sister, who emigrated from Mexico to assist her brother, were not only "medically necessary and reasonably required to give relief and lessen his disability," but owed retroactively because his request for their reimbursement was timely and in accordance with the holding of the Supreme Court in ***Mehaffey v. Burger King***, ___ N.C. ___ (November 8, 2013; see *North Carolina Civil Litigation Reporter*, November 2013, pages 9-10).

However, the Court found that the Commission erred in ordering the defendants to reimburse plaintiff for the cost of a life care plan. Adopting the viewpoint expressed by Commissioner Tammy Nance in her dissent at the Full Commission, and distinguishing the facts of this case from those in ***Scarboro v. Emory Worldwide Freight Corp.***, 192 N.C. App. 488 (2008), in which there was medical testimony that the injured worker's life care plan was "reasonable and medically necessary," Commissioner Nance reasoned that, while a life care plan "is a useful litigation tool," it is not "a component of medical compensation within the meaning of N.C. Gen. Stat. § 97-2(19) or N.C. Gen. Stat. § 97-25, … [nor] reasonable and necessary … to effect a cure, give relief, or lessen the period of Plaintiff's disability."

The Court also found error in the Commission's determination that the services provided by the two nurse case managers assigned by Paradigm "do not fit within the parameters of medical case management allowed under the [Commission's Rules for Rehabilitation Professionals ('RP Rules')]" because the nurses had full authority to authorize medical treatment they deemed to be medically necessary and were, therefore, "closer to … insurance claims adjusters." The Court found that the RP Rules "do not address medical care authority," nor bar "claims adjustment type services" and "neither the Commission's opinion nor … Plaintiff's brief offers any reason that the nurse case managers' approval of payment for … medical treatment … constitute 'claims negotiation' or 'investigative activities.'" That being the case, the Court reversed the Commission's determination that the two nurse case managers assigned by Paradigm were acting outside the authority granted by its RP Rules.

The Court also found no merit in plaintiff's argument that the Commission should have taxed the defendants with his entire attorney's fee under N.C.G.S. § 97-88.1, as the test for determining whether that statute applies is "not whether the defense prevails, but whether it is based in reason rather than in stubborn, unfounded litigiousness," and "nothing in the record … suggest[s] that [defendants] provided anything less than a sound and sensible defense of their clients." Therefore, "the Commission lacked the authority to tax Defendants with attorneys' fees under section 97-88.1."

When the Court turned its attention to the remaining issues in dispute, plaintiffs' contention that Paradigm had a "conflict of interest" and should have been removed from the case because it engaged in "illegal insurance activities" and Paradigm's argument that plaintiff deliberately

excluded it from participation in litigating the claim, the Court found the record "insufficient" to resolve either issue, so it remanded the case to the Commission "for further proceedings …, including the taking of additional evidence, if necessary."

Death of Employee Impacts Obligation to Fund MSA

Washington Holmes was injured in May 1990 and still receiving workers' compensation benefits when the parties to his claim signed a mediated settlement agreement in August 2010, under which the defendants agreed to (1) pay $250,000, the mediator's fee, and authorized medical care and (2) fund a Medicare Set-Aside Allocation (MSA) in the amount of $186,032 by paying "seed money" of $19,582.37 and purchasing an annuity paying $9,247 per year for eighteen years "if Washington Holmes is living" for "the sole purpose of paying future medical expenses related to his injury which would otherwise be paid for by Medicare."

While the defendants were drafting the clincher agreement, Holmes died unexpectedly. His widow was substituted as plaintiff and she was paid the $250,000 required by the settlement agreement, but the defendants refused to pay any sums related to the MSA, contending that its purpose was to comply with the mandate of the Medicare Secondary Payer Act that Medicare be protected from bearing the burden of future medical expenses arising from Holmes' workers' compensation claim, and an implied condition of the agreement to fund an MSA was that he would be alive and capable of incurring future medical expenses. The Full Commission agreed, concluding that Holmes' death excused the defendants from performing the MSA portion of the settlement. Holmes' widow appealed.

On December 3, in ***Holmes v. Solon Automated Services***, the Court of Appeals held that Holmes' widow was entitled to the MSA's seed money under the "principle of restitution," which "is not aimed at compensating the plaintiff, but at forcing the defendant to disgorge benefits that it would be unjust for him to keep." It found that, just as the defendants did with the provision for annual payments, they could have "specifically bargained that … payment of the seed money was conditioned on Mr. Holmes [sic] survival, but they did not do so." Therefore, the Court concluded, "it would be inequitable for defendants to keep the $19,582.37, despite the purpose of the Agreement being frustrated, as the Agreement did not condition payment of this sum upon Mr. Holmes' continued survival."

However, the Court also held that the defendants were not obligated to purchase an annuity to cover the cost of future medical care, as "plaintiff failed to meet an explicit condition precedent in the contract, survival." It was not persuaded by the widow's argument that the net effect of failing to fund the MSA was a windfall for the defendants. To the contrary, "defendants did not receive a windfall, since the parties explicitly bargained that in order for Mr. Holmes to receive the benefit of the annual payments of the annuity … [he] must survive," and he did not. Therefore, the Commission's denial of plaintiff's request for the cost of the annuity was affirmed, while its denial of the annuity's seed money was reversed.

Accident Causing Paraplegia Found Noncompensable

David Morgan, Secretary-Treasurer, Sales and Financial Manager, and part owner of Morgan Motors in Albemarle, was also financial manager and part owner of Pontiac Pointe, a restaurant located in a building leased from Morgan Motors. He went to Pontiac Pointe every morning to pick up the restaurant's receipts and make a deposit at the bank. While at the restaurant on January 15, 2008, he heard a noise like "a bearing that was going bad" in the air-conditioning unit on the roof and went to investigate. He fell off the roof and suffered a C7 spinal cord injury, leaving him paralyzed from the waist down.

Morgan Motors and the third party administrator for the North Carolina Auto Dealers Association Self-Insurer's Fund denied Morgan's claim for workers' compensation benefits on grounds that his injury did not arise out of or in the course of his employment with Morgan Motors. Morgan requested a hearing and Deputy Commissioner George Glenn found his claim compensable, but on appeal, the Full Commission reversed the deputy commissioner and denied the claim. Morgan appealed.

On December 17, in ***Morgan v. Morgan Motor Company of Albemarle***, a divided panel of the Court affirmed in an opinion which observed that the "arising out of" and "in the course of" requirements are "two separate and distinct elements, both of which a claimant must prove to bring a case within the Act." It held that "arising out of" refers to "the origin or cause of the accident," with the controlling test being "whether the injury is a natural and probable consequence of the nature of the employment," and "in the course of" refers to "the time, place, and circumstances under which an accident occurred," *i.e.*, happened "under circumstances in which the employee is engaged in an activity which he is authorized to undertake and which is calculated to further, directly or indirectly, the employer's business." The Court found ample evidentiary support for the Commission's finding that Morgan's act of ascending to the roof of the restaurant was not causally related to his duties with Morgan Motors, but instead to his ownership and management of a separate business, the restaurant. It also found evidentiary support for the Commission's finding that his injury did not occur in the course of his employment with the dealership because he was at the restaurant at the time, his duties with Morgan Motors did not take him there, and at the time he fell, he was not engaged in any activity he was authorized to undertake for the dealership.

In dissent, Judge Dillon argued that while the Commission's findings supported a conclusion that the restaurant might be liable for Morgan's injuries, he believed those same findings "compel a conclusion that Morgan Motors is also liable" under the theory of joint employment because Morgan's decision to climb onto the roof to investigate the source of the noise "conferred an 'appreciable' benefit to both employers: Both had an interest in the maintenance of … the HVAC system." But, in rebuttal, the Court's majority took exception to Judge Dillon's reliance on "findings the Industrial Commission could have conceivably made but did not" and, therefore, were "inconsistent with our standard of review," which is "merely whether the Commission's findings *support* its conclusions – not whether other conclusions could have … been drawn."

Employee's Esophageal Cancer Found Unrelated to Asbestos Exposure

Harvey Smith, who was exposed to asbestos while working for Alcoa between 1935 and 1978 and diagnosed with esophageal adenocarcinoma in February 2008, died a month later. The executor of his estate, Paulette Smith Wise, subsequently filed a workers' compensation claim, in which she contended that her father's asbestos exposure caused or contributed to his cancer and death. She offered medical testimony in support of the claim from a board certified expert in occupational medicine, but the Commission ultimately concluded that she failed to prove that her father was at an increased risk of developing esophageal cancer as compared to members of the general public, that his cancer was characteristic of his employment with Alcoa, and that he had contracted an occupational disease. Wise appealed.

On December 3, in ***Wise v. Alcoa, Inc.***, the Court of Appeals affirmed after considering and rejecting a series of arguments made by Wise, starting with her contention that it was error for the Commission to admit into evidence the testimony of Alcoa's three medical witnesses, two oncologists and a veterinary pathologist and toxicologist offered as an expert in animal

medical studies. Citing Rule of Evidence 702 as it applied to cases commencing before October 1, 2011, when it was amended to implement the standards set forth in ***Daubert v. Merrell Dow Pharmaceuticals, Inc.***, 509 U.S. 579, 125 L.Ed.2d 469 (1993), the Court held that Supreme Court's decision in ***Howerton v. Arai Helmet, Ltd.***, 358 N.C. 440 (2004), established a three-step inquiry for evaluating the admissibility of expert testimony: (1) Is the expert's method of proof sufficiently reliable? (2) Is the witness qualified as an expert in the area of his testimony? and (3) Is the testimony relevant? Under ***Howerton***, "[i]t is not necessary that an expert be experienced with the identical subject matter at issue…. It is enough that the expert witness … is in a better position to have an opinion on the subject than is the trier of fact." That being so, the Court found Alcoa's witnesses sufficiently qualified to testify as experts and held that it was within the Commission's discretion to determine the credibility and weight to be given to their testimony.

The Court also (a) overruled Wise's objection to the Commission's determination that Smith suffered from a condition called Barrett's esophagus, since that finding was supported by the report of the pathologist, whose credentials Wise did not challenge; (b) found no merit in her objection to the Commission's failure to rule on her appeal from the deputy commissioner's decision to quash the subpoena of a company representative regarding Alcoa's knowledge of asbestos-related health risks, since it was harmless error, as Alcoa's "knowledge or lack thereof of the risks of asbestos exposure was not relevant to the issue of whether Smith's exposure was the cause of his esophageal cancer;" (c) rejected her argument that the Commission's opinion was "contrary to the law of North Carolina" because, while the Occupational Safety and Health Act of North Carolina contains a statement that there is a "well-established association between asbestos exposure and esophageal cancer," the Code of Federal Regulations provision making that association "does not constitute North Carolina law, and was not binding upon the Commission" and, in any event, "does not address the pivotal issue … whether asbestos exposure caused Smith's esophageal cancer in the instant case;" and (d) determined that the Full Commission did not err when it denied Wise's motion to admit into evidence the deposition testimony of Dr. Mark Cullen, a physician from California, given in a prior civil action against Alcoa.

Responding to the latter argument, the Court noted that, although N.C.G.S. § 97-85 authorizes the Full Commission to receive further evidence "if good grounds be shown therefor," Commission Rule 701(f) provides that "no new evidence will be … heard by the Full Commission unless the Commission in its discretion so permits." Therefore, the Court found that "plaintiff does not have a substantial right to require the Commission to hear additional evidence" and the Commission's decision whether to reopen the record to take further evidence "is not reviewable on appeal in the absence of a manifest abuse of that discretion."

The burden being on the appellant to prove a "manifest abuse of discretion," and as Alcoa opposed plaintiff's motion because Dr. Cullen's deposition was inadmissible hearsay, its subject was mesothelioma and not esophageal cancer, there was no showing that Dr. Cullen was unavailable, and plaintiff could have deposed him herself, but chose not to do so, the Court could "discern no abuse of discretion" in the Commission's denial of her motion. Therefore, as there was evidence of record to support the Commission's findings of fact and those findings supported its conclusion that Wise had failed to prove causation, the Court affirmed the Commission's denial of her claim.

Virginia Policy Affords No Coverage In North Carolina

T.R. Driscoll, whose principal place of business is North Carolina, intermittently sends its

employees to work in other states. In November 2009, it had a crew working on a roofing project in Virginia when a gas line exploded and seven employees were injured. They all filed claims in Virginia and General Casualty, which provided workers' compensation insurance for Driscoll in Georgia, Tennessee and Virginia, began paying benefits. By November 2011, General Casualty's medical and indemnity payments totaled approximately $1.96 million.

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

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

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

In dissent, Judge Dillon was of the opinion that, for claims filed in North Carolina, General Casualty's policy was ambiguous as to whether it provided coverage for accidents occurring in other states, and since General Casualty "drafted the policy language and could have included language to clearly state that it was providing coverage only for claims 'filed' in Virginia," but did not do so, he would have construed the ambiguity against General Casualty and determined that "the policy provides coverage for … claims filed in North Carolina to the extent that Virginia workers' compensation law would require General Casualty to provide benefits."

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

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