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CIVIL LIABILITY

Tort Claims Arising from E. Coli Outbreak At State Fair Denied

Over 800,00 people attended the North Carolina State Fair in 2004. Of the estimated 20,000 who visited the petting zoo, approximately 108 contracted E. coli, a bacterium that can cause potentially life-threatening illness in humans. Animals carrying the bacterium can look perfectly healthy and transmission can occur when people pet, touch, or are licked by an animal carrying it in its intestinal tract.

A number of minor children infected with E. coli after visiting the petting zoo filed claims for damages against the North Carolina Department of Agriculture and Consumer Services under the North Carolina Tort Claims Act. After they were consolidated into a single action and a hearing was held, the claims were denied by the Industrial Commission, with Commissioner Ballance dissenting. Plaintiffs appealed.

On April 1, in ***Rolan v. N.C. Department of Agriculture and Consumer Services***, the Court of Appeals held that, "to prove a defendant's negligence in a premises liability case, the plaintiff must first show that the defendant either '(1) negligently created the condition causing the injury, or (2) negligently failed to correct the condition after actual or constructive notice of its existence,'" with the ultimate issue being whether the defendant "breached the duty to exercise reasonable care in the maintenance of [its] premises for the protection of lawful visitors."

In This Issue…

Reasonable care requires a landowner to "not unnecessarily expose a lawful visitor to danger" and "give warning of hidden hazards of which the landowner has … knowledge." However, "[o]ur premises liability law does not require landowners to *eliminate* the risk of harm to lawful visitors on their property or undergo unwarranted burdens in maintaining their premises."

Relying on those principles, the Court concluded that the Commission "correctly determined that Defendant took reasonable steps … to … *reduce* the inherent risks of operating a petting zoo." There were multiple hand sanitizing dispensers at and near the entrance to the petting zoo, bathrooms in the vicinity, signs in English and Spanish advising fairgoers to "ALWAYS WASH HANDS *BEFORE AND AFTER* TOUCHING ANIMALS," and other signs warning that "Hand to Mouth contact after touching animals or their environment is a health risk." A "pre-fair risk assessment" performed to "identify and correct any deficiencies" led to additional signage and hand sanitizing stations. The Fair's veterinarians also checked every arriving animal for the requisite health certificate, observed them during the fair to make sure there were no obvious signs of illness, and removed animals showing signs of disease. As the Commission's findings were supported by competent evidence and those findings supported its conclusion that the defendant was not negligent because it took reasonable steps to reduce the inherent risks of operating a petting zoo, the denial of plaintiffs' claims was affirmed.

Opinion Addressing Insufficient Service of Process Defense Modified

Frankie Washington's conviction for assault and battery, burglary, kidnapping, robbery, and attempted sex offense was vacated when the Court of Appeals held that delays attributable to the State violated his Sixth Amendment right to a speedy trial. Then, he and Frankie Washington, Jr. sued the State, City of Durham, City Attorney, district attorney, and multiple Durham police officers, raising federal and state constitutional, malicious prosecution, and other causes of action.

Plaintiffs attempted to serve each defendant by Federal Express, a "designated delivery service" under Rule of Civil Procedure 4(j)(1)(d). They addressed the City's summons and complaint "c/o Patrick Baker," the City Attorney, and it was delivered to his receptionist. Another defendant's summons and complaint was left with a visiting twelve-year-old grandson. A third defendant's was left on the step leading to the side door of his home, and the package containing the summons and complaint for each of the remaining defendants, two former and four current Durham police officers, was delivered to the Police Department's loading dock. But, in each case, the defendant later admitted by affidavit that he had actually received the summons and complaint.

The defendants all moved to dismiss, claiming insufficient service of process, and the trial court agreed. It dismissed all of the defendants, except the City Attorney, District Attorney, and State. When plaintiffs appealed, the trial court certified under Rule 54(b) that there was no just reason to delay the appeal. Defendant Baker also appealed, and requested that his appeal be heard with plaintiffs', so as to prevent "fragmentary appeals."

On November 5, 2013, in ***Washington v. Cline*** ("***Washington I***"), the Court of Appeals determined that, although plaintiffs' appeal was interlocutory, the trial court's certification under Rule 54(b) rendered it immediately appealable. It then affirmed the trial court's dismissal of the City of Durham, but reversed its dismissal of the individual defendants. For further details, see the November 2013 edition of *North Carolina Civil Litigation Reporter* at www.dennismediations.com.

After the Court of Appeals granted a Petition for Rehearing, it issued a new opinion on April 1, ***Washington v. Cline*** ("***Washington II***"), which reached the same result as its previous opinion, but on modified grounds.

As in its original opinion, the Court held that although it was interlocutory, the trial court's certification that there was "no just reason for delay" provided justification for immediate consideration of the appeal. And, it determined that Baker's appeal was "also proper at this time" because it involved "application of the same rules to the same facts and circumstances as plaintiffs' appeal," and addressing it now would prevent "fragmentary appeals."

The Court then turned to the trial court's dismissal of plaintiffs' claims against the individual defendants for insufficient service of process and found that the issue raised by plaintiffs' attempted service under Rule 4(j)(1)(d) by "depositing with a designated delivery service … a copy of the summons and complaint, addressed to the party to be served, delivering to the addressee," was how to interpret the phrase "delivering to the addressee." While the Court agreed that Rule 4 is "to be strictly enforced to insure that a defendant will receive actual notice of a claim against him," it held that "the greater weight of precedent supports a liberal approach to interpreting the language of the rules." Finding that ***Granville Medical Center v. Tipton***, 160 N.C. App. 484 (2003) was "helpful" in analyzing how to interpret the phrase "delivering to the addressee," the Court concluded that "defendants' argument that Rule 4(j)(1)d requires direct service exclusively on a defendant or his service agent is without merit" because each defendant admitted that he actually received his copy of the summons and complaint. So, it concluded that "plaintiffs properly proved service via Rule 4(j)(1)d under section 1-75.10(5), and the trial court's conclusion that plaintiffs failed to properly prove service … was in error."

But, when the Court looked closely at plaintiffs' attempted service on the City of Durham, it reached a different conclusion. It affirmed the trial court's dismissal of the City because cities may be served through a "designated delivery service" only when the summons and complaint are "addressed to the mayor, city manager, or clerk" and they are "deliver[ed] to the addressee." Since the City's summons and complaint were not addressed to its mayor, city manager or clerk, it was not properly served, and the trial court correctly granted its motion to dismiss.

Although plaintiffs eventually moved to amend their summons to the City, that motion was denied. After observing that "[t]he North Carolina Rules of Civil Procedure vest discretion in the hands of the trial courts to allow or disallow parties to amend summonses," the Court held that appellate review of trial court orders resolving motions to amend "is limited to a determination of whether there was a clear abuse of discretion." Because "plaintiffs needed to comply with Rule 4(j)(5) by sending the summons and complaint addressed to either the City's mayor, city manager, or clerk and … failed to do so," the Court found that the trial court "never acquired jurisdiction over the City." Therefore, the order dismissing the City for insufficient service of process was affirmed, as was the order denying defendant Baker's motion to dismiss, but the Court reversed the trial court order dismissing the other individual defendants.

Motion to Enforce Arbitration Agreement Raises Issue of Apparent Authority

When Carthina Dew arrived at Britthaven of Wilson after undergoing surgery for a broken femur, she was accompanied by her husband Frederick and daughter Terri (Bookman). Britthaven's admission coordinator later claimed in her affidavit that, when provided the legal documents needed for Carthina to be admitted, Mr. Dew and Mrs. Bookman indicated they had authority to sign for her, and Mr. Dew had Mrs. Bookman sign his name on the signature lines intended for the patient or her representative on each of the required documents, including an arbitration agreement.

Two weeks after being admitted, Carthina was discharged from Britthaven. Less than months later she died, allegedly due to complications

from large pressure ulcers. As administratrix of her mother's estate, Mrs. Bookman brought a wrongful death action. Britthaven moved to compel arbitration, but its motion was denied by the trial court. After Britthaven appealed, the Court of Appeals, in an unpublished opinion issued on April 2, 2013, ***Bookman v. Britthaven, Inc.*** ("***Bookman I***"), ___ N.C. App. ___ (2013), remanded the case to the trial court for findings of fact and conclusions of law on the issue of apparent authority.

Britthaven requested an opportunity to present additional evidence on that issue, but its motion went unanswered by the trial court, which entered an order finding that neither Mr. Dew nor Mrs. Bookman had legal or apparent authority to sign the arbitration agreement. It again denied Britthaven's motion to compel arbitration and Britthaven filed another appeal.

The first issue addressed by the Court in ***Bookman v. Britthaven, Inc.*** ("***Bookman II***"), issued on April 15, was whether Britthaven's appeal should be dismissed as interlocutory. Citing ***U.S. Trust Co., N.A. v. Stanford Grp. Co.***, 199 N.C. App. 287 (2009), the Court held that, since the right to arbitrate is a "substantial right which may be lost if review is delayed, … an order denying arbitration is therefore immediately appealable."

Turning next to the impact of the apparent authority issue on Britthaven's motion to compel arbitration, the Court observed that whether an agreement to arbitrate exists is a matter of contract law, with the burden of proof being on the party seeking to establish agency that the person whose actions are at issue had authority to bind the principal. That being the case, the Court was troubled by the fact that "the trial court made no factual findings as to whether Mrs. Dew conferred authority on Mrs. Bookman or Mr. Dew to conduct the admission process in general on her behalf," especially considering the claim made by Britthaven's admission coordinator in her affidavit that Mrs. Bookman and Mr. Dew "presented themselves as having full authority to act on behalf of Mrs. Dew … to sign and execute … all necessary documents on her behalf."

The Court also found it significant that Mrs. Bookman admitted signing the admission documents on Mr. Dew's behalf. As a consequence, there was evidence "which the trial court failed to address in its findings of fact and conclusions of law 'that would allow …a finding of apparent authority.'" Because the trial court "denied Britthaven the opportunity to carry its burden of establishing apparent authority and failed to address all issues raised by the evidence," the Court concluded that it "did not fully comply with the ***Bookman I*** Court's mandate to enter 'further findings of fact and conclusions of law regarding whether either Mr. Dew or [Mrs.] Bookman had apparent authority to enter into the arbitration agreement in this case.'" Therefore, the Court reversed the trial court's order denying Britthaven's motion to compel arbitration and remanded the case with instructions to conduct an evidentiary hearing regarding the issue of apparent authority.

Authority of Alleged Agent to Act for Defendant Disputed

In 2001, Corinna Freeman, co-founder of Piedmont Southern Air Freight, signed a letter delegating to her son Jack "responsibility and authority for making all corporate, financial, operational and administrative decisions" for the company. He later partnered with Larry D'Amelio to create a new shipping company, Piedmont Express Airways, with the intent of structuring Piedmont Express and Piedmont Southern as subsidiaries of a third entity, Piedmont Capital Holding of North Carolina.

Later, Michael Green met with Jack and Larry to discuss investing in their new venture. Green and his brother Daniel each put $200,000 in the venture as a loan and investment, with Larry signing promissory notes to the Greens on behalf of Piedmont Southern, Piedmont Express, and

Piedmont Capital, promising to repay the funds they had invested within the earlier of one year or when the cumulative billings of the companies equaled $2,000,000.

By June 2006, the Greens' $400,000 had all been spent. That December, they sued Jack, Larry, Corinna, and the Piedmont companies, alleging fraud, breach of contract, conversion, breach of fiduciary duty, unfair and deceptive practices, and unjust enrichment. The Greens later amended their complaint to allege that Jack was acting as Corinna's agent.

When the case went to trial, the jury found that Corinna controlled the Piedmont companies with regard to the acts or omissions alleged by the Greens, who were "damaged by the failure of [Corinna] to discharge her duty as a corporate director or officer." The Court of Appeals affirmed the jury's verdict in ***Green v. Freeman*** ("***Green I***"), ___ N.C. App. ___ (2012), a 2-to-1 decision in which the majority found sufficient evidence to hold Corinna liable for breach of fiduciary duty and plaintiffs' claim for "piercing the corporate veil." However, the Supreme Court reversed on the fiduciary duty issue and remanded the case for the Court of Appeals to consider whether it was error for the trial court to grant Corinna's motion for directed verdict on theories of agency and piercing the corporate veil.

On April 1, in ***Green v. Freeman*** ("***Green II***"), the Court of Appeals affirmed. It held that for Corinna to be personally liable for the actions of the corporation, plaintiffs had to present evidence of three elements: (1) complete domination of the company's finances, policy, and business practices, such that the corporate entity had "no separate mind, will or existence of its own"; (2) such control must have been used to commit fraud or wrong, violating a statutory or other legal duty, in contravention of plaintiffs' legal rights; and (3) the control and breach of duty proximately caused the "unjust loss complained of." The Supreme Court having already held that plaintiffs presented sufficient evidence on the first element, the Court addressed the other two, which, it concluded, came down to a question of agency.

Its ultimate conclusion was that, "even assuming the 2001 letter created an agency relationship, it was an agency relationship between the Piedmont companies and Jack, not between Corinna and Jack." While "[a]n agency relationship can impose vicarious liability on a principal for the torts committed by an agent," and while the Court agreed that Corinna's 2001 letter may have established an agency relationship, "plaintiffs misidentify the principal." Even taking that letter in the light most favorable to plaintiffs, it "shows that Corinna appointed Jack as a general agent on behalf of 'the company;'" nothing in the letter indicated that she appointed him as *her* personal agent. That being so, the Court held that "the trial court did not err in granting defendant Corinna's motion for directed verdict on the theory of agency."

The Court also addressed plaintiffs' alternative argument that it was error for the trial court to exclude Corrina's deposition when plaintiffs attempted introduce it at trial. Corrina's objection to its use had been sustained on grounds that she was present and available to testify, so reading the deposition was unnecessary, and because, under Rule of Evidence 403, it would "confuse the jury," as "there were multiple defendants and the jury might be tempted to use one defendant's admissions against the others." But, the Court found both rulings incorrect. Under the "plain language" of Rule of Civil Procedure 32(a)(3), the deposition of an adverse party may be used "for any purpose" and "a party's presence at trial is not a reason to prevent an adverse party from introducing her deposition."

As for Rule 403, the Court held that while it authorizes the exclusion of otherwise admissible evidence, if its probative value "is substantially outweighed by the danger of unfair prejudice [or] confusion on the issues," in the present case the

Court was unable to see "any possible reason that admission of this evidence would lead the jury to confuse the issues." As a consequence, it found that the trial court violated both Rule of Civil Procedure 32 and Rule of Evidence 403.

Nevertheless, the Court held that those errors would constitute "reversible error only if the appellant shows that a different result would have likely ensued had the error[s] not occurred." So, "the burden is on the appellant not only to show error, but to show *prejudicial* error." Because nothing in Corinna's deposition indicated that she authorized her son to act on her behalf in a personal capacity, plaintiffs had failed to show that "a different result would have likely ensued had the error not occurred." Therefore, the Court affirmed the trial court's order granting Corinna's motion for directed verdict on the issue of agency.

Claim Against UM Carrier Barred by Untimely Service

Deaven, Danette, and Dickie Davis filed suit for personal injuries resulting from a July 15, 2009 motor vehicle collision caused by the negligence of an uninsured motorist, Hermilo Salazar Urquiza. They served their summons and complaint on Urquiza, sent a copy by certified mail to Steve Wagoner, a claims adjuster with their uninsured motorist carrier, North Carolina Farm Bureau, had alias and pluries summonses addressed to Urquiza issued by the clerk of court on July 20, September 25 and December 10, 2012, and, in accordance with the provisions of N.C.G.S. § 58-16-30, sent another copy of the summons and complaint to the Commissioner of Insurance by certified mail on January 2, 2013.

Farm Bureau's answer included a motion to dismiss based on insufficiency of process, insufficiency of service of process, and the statute of limitations. The attached affidavit stated that Wagoner was not an officer, director, or managing agent of the company, nor was he its designated process agent. The trial court subsequently granted Farm Bureau's motion to dismiss, and plaintiffs appealed.

On April 15, in ***Davis v. Urquiza***, the Court of Appeals affirmed. N.C.G.S. § 20-279.21(b)(3) provides that a UM carrier "shall be bound by a final judgment taken … against an uninsured motorist if the insurer has been served … by registered or certified mail, … or in any manner provided by law…." Quoting ***Liberty Mutual Ins. Co. v. Pennington***, 356 N.C. 571 (2002), the Court held that "mere notice is insufficient; the carrier must be formally served with process."

Under Rule 4(j)(6), service of a summons and complaint can be effected upon a corporation by (a) delivery to an officer, director, managing agent, or "agent authorized by appointment or law"; (b) mailing, by certified or registered mail, to an officer, director, managing agent, or "agent authorized by appointment or law"; (c) depositing the summons and complaint "with a designated delivery service authorized pursuant to 26 U.S.C. § 7502(f)(2)," addressed to an officer, director, managing agent, or "agent authorized by appointment or law"; or (d) serving the Commissioner of Insurance pursuant to N.C.G.S. § 58-16-30. As "statutes concerning service of process must be strictly complied with, … even actual notice, if it does not comply with the statutory requirements, does not give the court jurisdiction…," the Court found that "the lack of an authorized recipient [in the present case] is controlling." Once the UM carrier pled the statute of limitations, the burden was on plaintiffs to show that their cause of action accrued within the limitations period, which they failed to do. As a consequence, "the uninsured motorist carrier was not served within the applicable three-year period."

As for the alias and pluries summonses issued at plaintiffs' request, the Court held that, "to bind an uninsured motorist carrier, … [it] must be served by the traditional means of service, within the limitations period," and "plaintiffs' alias and pluries summons issued after … [Urquiza] was

served have no legal effect." Therefore, the trial court correctly granted Farm Bureau's motion to dismiss for insufficiency of process and insufficiency of service of process.

Ten-Year Statute of Limitations Applies to Claim Against Land Surveyor

In July 2003, Jon Davis, a registered surveyor and employee of Davis-Martin-Powell and Associates ("DMP"), prepared, certified, and recorded the plat for the Randolph Hills Subdivision at the Randolph County Register of Deeds. Two years later, Bruton Cable Service, Inc. purchased lots 7 and 59. According to the recorded plat, Duke Energy Carolinas, LLC had a 150-foot easement across the two lots.

Relying on the information in the recorded plat, Bruton began constructing single-family homes and septic drain fields on the two lots in 2006. In February 2007, Duke Energy sent Bruton a letter, objecting to encroachments within its 200-foot easement on the two properties. By that point in time, the house on lot 59 was almost complete and the house on lot 7 was 60% complete.

After unsuccessful negotiations, Duke filed suit against Bruton in July 2011, alleging encroachment on its easement and requesting issuance of a permanent injunction. Bruton's answer included a third-party complaint alleging negligent misrepresentation by DMP and Davis and reasonable reliance by Bruton on the representation in the plat that Duke's easement was 150 feet wide. Among the affirmative defenses DMP and Davis asserted was their contention that Bruton's claims were barred by the statute of limitations. The trial court granted defendants' motion for summary judgment and Bruton appealed, alleging that the trial court erred in considering unsworn letters between Bruton's counsel and defense counsel and in granting summary judgment on statute of limitations grounds.

On April 15, in ***Duke Energy Carolinas, LLC v. Bruton Cable Service, Inc.***, the Court of Appeals reversed. It held that the letters offered in support of defendants' motion for summary judgment were not affidavits within the meaning of Rule of Civil Procedure 56(e), but instead, "unsworn correspondence," and "[u]nsworn letters and correspondence are not the type of evidence considered … pursuant to Rule 56, and should not be considered during summary judgment."

Turning next to the statute of limitations issue, the Court cited ***Raftery v. Wm. C. Vick Constr. Co.***, 291 N.C. 180 (1976) for the proposition that "a statute of limitations begins to run against an aggrieved party when the aggrieved party becomes entitled to maintain an action for the wrongful act that was committed." In a negligent misrepresentation case like the present one, "the cause of action accrues when two events occur: (1) the claimant discovers the misrepresentation, and (2) the claimant suffers harm because of the misrepresentation." Bruton discovered that the third party defendants misrepresented the easement's location when it received Duke Energy's letter in February 2007, but it only became entitled to maintain a cause of action against the third-party defendants when it was sued in July 2011. Because Bruton filed its third party complaint before the end of that same year, it was timely served.

Responding to the third party defendants' argument that Bruton's claim for negligent misrepresentation accrued much earlier, when a Duke Energy representative visited the property in 2006 to determine whether the ongoing construction was within Duke's easement, the Court found that, even so, the third-party complaint would still have been timely. While N.C.G.S. § 1-52(18) establishes a three-year limitation on actions "[a]gainst any land surveyor … for … economic or monetary loss due to negligence or a deficiency in the performance of surveying or platting," N.C.G.S. § 1-47(6) provides that "an action against any registered land surveyor … for economic or monetary loss due to negligence in the

performance or surveying or platting must be commenced 'within 10 years after the last act or omission giving rise to the cause of action.'" The Court found that both statutes applied and, in that situation, "the statute which deals more directly and specifically with the situation controls over the statute of more general applicability." Further, "where there is doubt …, the rule is that the longer statute is to be selected." Therefore, "even if Bruton's claim accrued in 2006, the third-party complaint was still filed within 10 years and thus timely filed pursuant to N.C. Gen. Stat. § 1-47(6)." As a consequence, the Court reversed the trial court's order granting summary judgment to the third-party defendants.

Theft Claim Not Covered By Property Damage Policy

Dr. Curtis Holmes, who owns several office buildings in the Greensboro area, including 5411 and 5415 Friendly Avenue, was insured with North Carolina Farm Bureau. Someone stole eight heating and air conditioning units from the building at 5415 Friendly Avenue and Dr. Holmes made a claim for his loss, but Farm Bureau refused to cover it on grounds that the "vacancy" provision of the policy applied.

Section 9(a)(1)(b) of the policy provided that a building is "vacant" when "70% or more of its total square footage: (i) Is not rented; or (ii) Is not used to conduct customary operations." 5415 Friendly Avenue consisted of five units, A, B, C, D, and G, with total square footage of approximately 8,200 square feet. At the time of the loss, only Unit A, consisting of 1,344 square feet, was rented. However, tenants of 5411 Friendly Avenue had Dr. Holmes' permission to use a 144 square foot room in Unit C, which had a total square footage of approximately 2,600 square feet, to store old files and excess furniture. They also had permission to use the entire unit until he found a regular tenant, but limited their use to the one 144 square foot room, which they used once or twice a week to store, retrieve, or review files. Sometimes they would sit in one of the chairs in the room, but normally, they only stayed five to ten minutes.

After Dr. Holmes and Farm Bureau filed cross-motions for summary judgment, the trial court granted Farm Bureau's motion and denied that of Dr. Holmes. He appealed.

On April 15, in ***Holmes v. North Carolina Farm Bureau Mutual Insurance Co., Inc.***, the Court affirmed after it found that "the only question is whether Unit C was used for 'customary operations' and how much of Unit C was so used." The record contained testimony from the tenants, who were attorneys, that storage and review of archived files was part of their "customary operations." But, the Court was not persuaded by Dr. Holmes' argument that the trial court should have counted the entirety of Unit C as being "used for customary operations" because the attorneys had Dr. Holmes' permission to occupy the entire unit. That argument, found the Court, was "contrary to the plain language of the [insurance] contract," which "defines 'vacancy' in relation to the total square footage of the building."

So, the Court held that "the plain language of the contract directs us to consider only the portion of the total square footage 'used to conduct customary operations,' … not what amount *could* have been used." Since only 144 square feet of Unit C were used to conduct the "customary operations" of the attorneys' law practice, the total square footage either rented or used to conduct customary operations was 1488 square feet, or approximately 18% of the building. That being so, 5415 Friendly Avenue was "vacant" as that term was defined in the insurance contract. Therefore, the trial court properly granted Farm Bureau's motion for summary judgment.

Fraud Claim Not Covered By Professional Liability Policy

Oliver Burkeman contacted attorneys Sue Mako, Scott Girdwood, and Mako & Associates, PA for assistance collecting the $350,000 he said was

owed after settling a workers' compensation claim against his former employer, Crest Iron and Steel. He and the attorneys agreed that they would receive a 20% contingent fee from any funds collected from Crest Iron.

The attorneys received a $175,000 cashier's check from Crest Iron on July 11, 2011, deposited it in their trust account on July 12, and per Burkeman's instructions, attempted to wire $140,000 to a bank account in Japan that same day, despite their general policy of holding funds for ten days prior to distribution. Due to an error in his account information, the wire was unsuccessful.

On July 15, the attorneys received a second $175,000 cashier's check from Crest Iron, and they also deposited it in their trust account. Again disregarding their policy of holding funds for ten days prior to distribution, they immediately wired $140,000 to the Japanese bank account, this time successfully.

That same day, the attorneys were notified by their bank that the first of the two $175,000 checks was being returned unpaid. Then, three days later, they received notice that the second $175,000 check had also been returned unpaid. Both checks were later determined to be fraudulent.

The attorneys filed a claim with their professional liability insurer, Lawyers Mutual, to recover the $175,000 lost as a result of the fraud. It responded by filing a complaint for declaratory relief, seeking a determination that the claim was not covered by the policy, as Provision I, Section (r) excluded from coverage "any **claim** … based … upon disbursement by any **Insured** … of funds … deposited to a trust … account unless such deposit is irrevocably credited to such account." Lawyers Mutual subsequently filed a motion for summary judgment, which was granted by the trial court.

The attorneys appealed, contending that the phrase "irrevocably credited" was ambiguous. They argued that a cashier's check "differs from a traditional check" and, as they understood the policy, it covered losses involving forged cashier's checks, which, like cash, are "irrevocably credited" upon deposit.

The Court of Appeals disagreed. On April 1, in ***Lawyers Mutual Liability Insurance Company of North Carolina v. Mako***, it found that, under N.C.G.S. § 25-3-104(f), "a cashier's check is treated the same as a traditional check," which "cannot be deemed fully credited until its provisional settlement period has elapsed without action by the bank to reject the check." Since the attorneys did not wait until the provisional settlement period ended to ensure that the cashier's check had been accepted and fully credited, the exclusion in question applied and the trial court properly granted Lawyers Mutual's motion for summary judgment.

Appeal of Ruling On Motion to Compel Depositions Dismissed As Interlocutory

Brunswick County's decision to rezone property in the Royal Oak community to accommodate the expansion of an existing landfill caused the Royal Oak Concerned Citizens Association to file suit, alleging a pattern and practice of racial discrimination and violations of N.C.G.S. § 153A-136(c), the North Carolina Fair Housing Act, and the Equal Protection Clause of the North Carolina Constitution. During discovery, plaintiffs noticed the depositions of former County Manager Marty Lawing and former County Commissioner William Sue. When the county claimed legislative and quasi-judicial immunity and refused to produce them for deposition, plaintiffs filed a motion to compel. The county moved for a protective order, but its motion was denied by the trial court, which also granted plaintiffs' motion to compel, but set certain conditions on the deposition of Mr. Sue. The county appealed.

After entry of the county's appeal, plaintiffs again noticed the deposition of Mr. Lawing and

filed another motion to compel. At that point, the trial court entered an order concluding that its prior order did not affect a substantial right and was, therefore, a "non-appealable interlocutory order." It also decided that a stay of its prior order was not warranted and again directed the county to produce Mr. Lawing for deposition.

The county filed another appeal, a petition for writ of supersedeas, and a motion for a temporary stay. By order entered in June 2013, the Court of Appeals allowed the petition for supersedeas and stayed the two trial court orders, pending the outcome of the county's appeals.

On April 1, in ***The Royal Oak Concerned Citizens Association v. Brunswick County***, the Court found that the two appeals were interlocutory, determined that the orders from which they were taken did not affect a substantial right, and dismissed both appeals. After quoting the Supreme Court's definition of a "substantial right" from ***Sharpe v. Worland***, 351 N.C. 159 (1999) and acknowledging that "the 'substantial right' test for appealability of interlocutory orders is more easily stated than applied," the Court described the two-part test that has developed: "the right itself must be substantial and the deprivation of that substantial right must potentially work injury … if not corrected before appeal from final judgment."

Applying that test to the present case, the Court held that while claims of immunity "affect a substantial right for purposes of appellate review," and while individuals who are "entitled to absolute legislative immunity for all actions taken in the sphere of legitimate legislative activity" are also "entitled to absolute quasi-judicial immunity for actions taken in the exercise of their judicial function," there was nothing in the trial court's two orders that would preclude Brunswick County from making "good-faith objections based on privilege" during the depositions noticed by plaintiffs. Therefore, as the county had "not been deprived of any right nor suffered injury warranting our immediate review," the Court dismissed both appeals.

Appeal By Potential Expert Witness Dismissed As Interlocutory

Hoffman-LaRoche began marketing Accutane for treatment of severe acne in the early 1980s. Beginning in 2003, it became the target of lawsuits claiming that use of the drug caused inflammatory bowel disease. Two years later, the New Jersey Supreme Court ordered that litigation pertaining to Accutane be administered as a mass tort, and by July 2012, nearly 8000 cases were listed on the state's Accutane mass tort list.

Dr. Michael D. Kappelman, an Assistant Professor on the faculty of the medical school at UNC-CH, is the author of multiple medical journal articles regarding Accutane and its relationship to the development of inflammatory bowel disease. When Hoffman-LaRoche sought to introduce his articles to rebut plaintiffs' evidence of a causal link, a New Jersey trial judge ruled that Hoffman-LaRoche could not do so and would have to depose Dr. Kappelman instead.

Following issuance of a subpoena by the Superior Court of Atlantic County, New Jersey, the Orange County Clerk of Court issued a subpoena for Dr. Kappelman to be deposed in Chapel Hill. He moved for a protective order, which was granted. It barred Hoffman-LaRoche from deposing Dr. Kappelman as an "involuntary non-fact" witness, but it also stated that he could be deposed as an expert witness, so he appealed.

On April 8, in ***In re: Accutane Litigation***, the Court of Appeals dismissed the appeal as interlocutory because it did not "affect a substantial right" and only raised "entirely hypothetical and speculative" issues not ripe for review. The Court was not persuaded by the doctor's argument that the trial court's protective order "unjustly compelled [him] to testify as an expert without compensation or limitations on

the scope of the deposition." Rather, Rule 26(c) provides that, "[u]pon motion by a … person from whom discovery is sought, … the judge of the court in which the action is pending may make any order which justice requires," and that would include an expert witness fee.

The Court also found no merit in Dr. Kappelman's argument that his appeal affected a "substantial right." Referring to the same two-part test it applied in ***The Royal Oak Concerned Citizens Association*** case (see page 9 above), the Court noted that Dr. Kappelman claimed two "substantial rights": to be paid for expert testimony and, as he claimed to be a journalist, to refuse to divulge information protected by "journalistic privilege." He then speculated that Hoffman-LaRoche might subpoena him as an expert witness in the future and seek information that he believed privileged. But, the Court noted, "neither of these scenarios has yet occurred," so any opinion it might offer as to his right to a particular fee, his qualification as a journalist, or whether any specific information might be subject to a journalist's privilege "would be entirely hypothetical and speculative." Quoting ***Baxter v. Jones***, 283 N.C. 327 (1973), the Court held that "courts have no jurisdiction to determine matters purely speculative, enter anticipatory judgments, … deal with theoretical problems, give advisory opinions, … provide for contingencies which might hereafter rise, or give abstract opinions." Since the contested order was interlocutory and "Dr. Kappelman has not identified any substantial right that would be jeopardized by delay of appeal, and the issues [he] raised … all pertain to possible ramifications of a hypothetical subpoena that might or might not ever be issued, and thus do not present issues that are ripe for review," the Court dismissed his appeal.

Peer Review Process At Issue In Medical Malpractice Action

After undergoing cataract surgery at North Carolina Specialty Hospital, Jerry Medlin filed a medical malpractice action against the hospital and his doctor, Dr. Timothy Young, alleging extreme pain and permanent damage to his eye resulting from the use of Methylene Blue during the procedure, rather than VisionBlue.

Several disputes arose during discovery, one of which related to defense counsel's instruction during the depositions of the hospital's Director of Surgical Services, Joy Boyd, and nurse, Cathy Pruitt, that they not answer questions regarding the investigation undertaken as a result of the events described in the complaint. Medlin's response to that instruction, a Motion to Compel Discovery, led the trial court to order that eighteen of the twenty-one questions to which Boyd and Pruitt did not respond at defense counsel's direction be answered "as if posed by written interrogatories." The hospital appealed.

A second disagreement resulted from plaintiffs' request for production of what the hospital viewed as peer review privileged documents. The trial court ruled that the documents "were prepared pursuant to N.C.G.S. § 131E-95(b) and are protected from production by the peer review statutes." Nevertheless, it ordered the hospital to serve a "Privilege Log" on plaintiff. The hospital appealed that order as well.

On April 1, in ***Medlin v. North Carolina Specialty Hospital, LLC***, the Court of Appeals first addressed the interlocutory nature of the hospital's appeal, noting that, in general, orders allowing or denying discovery are not immediately appealable. However, to the extent an order relates to "the production of privileged materials and testimony," it affects a "substantial right," so the Court found that the orders in dispute *were* immediately appealable.

But, it was not persuaded by the hospital's reliance on the peer review process as the basis for challenging the two contested orders. While N.C.G.S. § 131E-95 "is designed to encourage candor and objectivity in the internal workings of medical review committees," Boyd and Pruitt were not members of such a committee, and

simply presenting things to one "does not impinge on this statutory purpose." Therefore, the Court held that "[t]hese kinds of materials may be discovered and used in evidence even though they were considered by the medical review committee."

The Court found that N.C.G.S. § 131E-95 protects three categories of information from discovery: (1) the proceedings of a medical review committee; (2) records and materials the committee produces; and (3) materials considered by the committee. It then described an exception to the third category, *i.e.*, "information not generated by the committee itself but merely presented to it," and found that, in the present case, "[t]o the extent that any questions to Joy Boyd and Cathy Pruitt … were regarding information … protected by North Carolina General Statute 131E-95, the questions … fall into the exception of the third category." It then found that, by allowing Boyd and Pruitt to respond to written interrogatories in lieu of providing oral responses to deposition questions, the trial court had provided the hospital's attorney with an opportunity to ensure that its witnesses did not inadvertently disclose information that went beyond the scope of the question asked, so the Court found no error in the order directing Boyd and Pruitt to answer the questions posed by plaintiff's counsel.

It also disagreed with the hospital's objection to a trial court order directing it to produce for *in camera* inspection what the hospital claimed were peer review privileged documents. Quoting from ***In re Investigation of Death of Eric Miller***, 357 N.C. 316 (2003), the Court held that "the responsibility of determining whether … privilege applies belongs to the trial court, not to the attorney asserting the privilege. Therefore, a trial court is not required to rely solely on an attorney's assertion …, [it] may conduct an *in camera* inquiry of the substance of the communication."

The Court also found no merit in the hospital's claim that it was error for the trial court to hold "*ex parte* hearings without affording the defendant … adequate notice and a meaningful opportunity to be heard." Rather, the hearing in question was "properly noticed," and while defense counsel advised the court by letter that "none of our team is available this week …, we simply have other long-standing obligations," those "obligations" consisted of a meeting with expert witnesses at counsel's office. After observing that the hospital did not move to continue the hearing, the Court concluded that it "had both notice of the hearing and an opportunity to be heard; … [it] just chose not to exercise the opportunity."

The hospital's final argument was that the trial court erred when it held that "Plaintiff is entitled to recover attorneys' fees and costs for bringing forward his Rule 37 Motion." But, since the court reserved ruling on the *amount* of the award, the Court held that this portion of the appeal was interlocutory because, as in ***Triad Women's Ctr., P.A. v. Rogers***, 207 N.C. App. 353 (2010), "an appeal from an award of attorneys' fees may not be brought until the trial court has finally determined the amount to be awarded."

On the other hand, the Court agreed that plaintiffs' motion under Rule of Appellate Procedure 34 to sanction the hospital for filing a frivolous appeal was well-taken, as "most of [its] arguments lack legal or factual basis." So, it remanded the case to determine "the reasonable amount of attorney fees incurred … in responding to this appeal."

JNOV Reversed and Remanded to Resolve "Unclean Hands" Claim

In 2004 and 2005, Courtnay and Ladwin Brissett purchased a number of distressed residential properties in New Bern and set up a rental company to hold them. After several unsuccessful attempts to obtain bank financing to rehabilitate the properties, they entered into a loan agreement with First Mount Vernon Industrial Loan Association ("FMV"), signing the

agreement without reading it or being aware that, to ease collection upon default, it conveyed the properties to ProDev XVI, LLC, pending payoff of the loan. The controlling member of ProDev was John Gonzalez, a Virginia attorney and board member of FMV.

When the Brissetts attempted to refinance one of their properties after renovations were completed in 2006, they discovered that ProDev owned it. In June 2010, they filed suit against FMV, its trustees, Gonzalez, and others involved in the loan transaction, asserting numerous causes of action, including misrepresentation, fraud, and constructive fraud. At trial, the court granted FMV's motion *in limine* to exclude all evidence of Virginia State Bar proceedings against Gonzalez and Dale Duncan, another FMV trustee. Six issues were submitted to the jury, which reached a unanimous verdict as to four and deadlocked eleven to one as to the other two, including plaintiffs' claim that FMV acted with "unclean hands." After both sides moved for judgment notwithstanding the verdict (JNOV) under Rule 50(b)(1), the trial court granted FMV a lien on the properties. The Brissetts appealed.

On April 1, in ***Brissett v. First Mount Vernon Industrial Loan Association***, the Court of Appeals held that the trial court correctly directed verdicts on plaintiffs' misrepresentation, fraud, and constructive fraud claims after determining that the applicable statute of limitations for fraud and misrepresentation claims, N.C.G.S. § 1-52(9), is three years. Although such claims do not accrue until "discovery by the aggrieved party of the facts constituting the fraud or mistake," "discovery" means "either actual discovery or when the fraud should have been discovered in the exercise of 'reasonable diligence under the circumstances,'" which occurred in the present case when the Brissetts were unable to refinance the completed property in 2006. Therefore, the statute of limitations began to run in 2006 and expired before they filed suit in June 2010.

The Court also found no error in the trial court's grant of a directed verdict on the issue of constructive fraud, as valid constructive fraud claims require proof that the parties were in a "relation of trust and confidence" and the present case, like ***Dallaire v. Bank of America***, ___ N.C. App. ___ (2012), involved "an ordinary debtor-creditor relationship," which "does not generally give rise to a fiduciary relationship." The Court found that loan made to the Brissetts by FMV was "in all respects a commercial loan for [plaintiffs] to use [to] rehabilitate the [p]roperties."

But, the Court agreed with plaintiffs that it was error for the trial court to grant FMV's JNOV motion on the issue of "unclean hands." Noting that, for the doctrine to apply, "[t]he inequitable action need not rise to the level of fraud," the Court found that there was "sufficient evidence to present the jury with the issue of whether FMV acted with unclean hands." Therefore, it was error for the trial court to grant the JNOV and the case was remanded so the jury could reconsider the issue.

Additional Opinions

On April 11, in ***Beroth Oil Company v. North Carolina Department of Transportation***, an inverse condemnation claim brought by eight of the more than 800 owners of the nearly 2,400 parcels of land designated to be within the "transportation corridor" for future construction of a highway project known as the "Northern Beltway" in Forsyth County, a 5-to-2 majority of the Supreme Court "expressly disavow[ed]" the Court of Appeals' statement that the trial court "correctly relied upon the ends-means test in the instant case," but nevertheless agreed that the trial court did not abuse its discretion when it denied plaintiffs' motion for class certification because individual issues predominated over common issues. The majority held that, "despite some overlapping issues, a trial on the merits would require far too many individualized, fact-intensive determinations for class certification to

be proper." In a separate opinion, the Court's other two justices agreed that the trial court "acted under a misapprehension of existing law by relying on an ends-means analysis," but they would have remanded the case to the trial court to "reconsider plaintiffs' motion for class certification under the appropriate legal standard" and would have allowed the trial court to grant class certification if it determined that the common "takings issue" predominated over the "uniqueness and extent" of each owner's individual damages.

On April 1, in ***Brown v. Town of Chapel Hill***, a 2-to-1 majority of the Court of Appeals held that police officer D. Funk was entitled to the affirmative defense of public official immunity. It also found that the trial court erred when it denied Officer Funk's motion for summary judgment on plaintiff's false imprisonment claim. In lengthy majority and dissenting opinions, the Court's three-judge panel agreed that Officer Funk was entitled to immunity unless he acted with malice and they agreed that a "malicious act" is one "(1) done wantonly, (2) contrary to the actor's duty, and (3) intended to be injurious to another." However, Judge Geer disagreed with the majority as to whether plaintiff forecast sufficient evidence to raise a genuine issue of material fact as to whether Officer Funk acted with malice, wantonly, and with intent to injure.

On April 1, in ***Federal Point Yacht Club Association, Inc. v. Moore***, the Court of Appeals affirmed a trial court order granting summary judgment and a permanent injunction in a lawsuit Federal Point Yacht Club Association ("FPYC") brought against one of its own members, Gregory Moore, who was accused of violating the community's rules and regulations and engaging in a pattern of harassment and intimidation of FPYC's board members, spouses, residents, and guests. The Court rejected Moore's contention that FPYC did not have a sufficient stake in his dispute with FPYC's board to have standing in its own right. It found that FYPC had "representational standing" for its members, even though each of the association's members might have had their own individual standing to sue. It also affirmed the trial court's dismissal of Moore's counterclaim because it was based on the same factual allegations as a complaint he filed and later dismissed without refiling within one year under Rule 41(b). Therefore, his counterclaim raising the same claims as his earlier complaint was barred by *res judicata* and properly dismissed. But, the Court also held that while the types of behavior prohibited by the trial court's preliminary injunction met the requirement of Rule 65(d) that "an injunction … be specific in terms [and] … describe in reasonable detail … the act or acts enjoined or restrained," it was "overly broad" as to the geographic scope of the prohibited behavior. As a consequence, the case was remanded "to limit the scope of the injunction to actions directed at certain, identified individuals … in certain places, such as within the physical boundaries of the FPYC community."

On April 15, in ***Blakeley v. The Town of Taylortown***, a wrongful discharge action brought by Timothy Blakeley, Taylortown's Chief of Police, the Court of Appeals reversed the trial court's decision to deny the Town's motion to amend the jury's verdict from $100,000, plus costs and fees, to $94,113.03, plus costs and fees, but it otherwise found no error and affirmed Chief Blakeley's recovery. In reaching that result, the Court observed that "the employer-at-will rule is subject to certain exceptions," one of which applies when a termination "is done for an unlawful reason or purpose that contravenes public policy." It held that either nominal or actual damages may be awarded in wrongful discharge actions, and the latter may include not only the "amount of money necessary to place the plaintiff in the same economic position in which he would have been if the wrongful termination had not occurred," but future lost wages and damages for emotional distress. The Court also agreed that, in his closing argument, Blakeley's attorney made "inflammatory and prejudicial remarks" that were "improper," but

held that they were "not so prejudicial as to entitle defendant to a new trial."

On April 15, in ***Gordon v. Gordon***, the Court of Appeals affirmed a trial court order finding Steven Gordon in civil contempt and ordering him jailed unless paid his former wife, Deborah Gordon, $20,000 within 60 days. The Court agreed that "[f]or civil contempt to be applicable, the defendant must be able to comply with the order or take reasonable measures that would enable him to comply," but it found that "reasonable measures" can include "borrowing the money, selling defendant's … property …, or liquidating other assets," and it determined that the record supported the trial court's finding that Gordon had the ability to comply when the contempt hearing was held.

WORKERS' COMPENSATION

North Carolina Benefits Awarded for Injury in Georgia

Vincent Burley, a resident of Augusta, Georgia, was hired by U.S. Foods as a truck driver in May 2000 after completing pre-hiring paperwork in Fort Mill, South Carolina, taking his road test in Columbia, South Carolina, and undergoing drug screening in Georgia. He drove a regular route concentrated around the Augusta area, with other stops in Georgia and South Carolina, stowed his truck every day at a drop yard in Augusta, and did not travel to North Carolina.

When U.S Foods merged with PYA Monarch in 2002, Burley had the choice of having the supervision of his employment transferred to the company's Charlotte division or to its Lexington, South Carolina division. After he chose Charlotte, his transfer was approved by three individuals in the human resources department there. His job title and responsibilities did not change after the transfer, but the method by which he was paid was revised from a weight-based system to a component pay system.

Burley injured his back while lifting a case of liquid milk during a delivery in Evans, Georgia. U.S. Foods admitted liability and began paying benefits under Georgia law, but he filed a claim in North Carolina. It came on for hearing before Deputy Commissioner Philip Baddour, who denied the claim after concluding that the final act to create the employment contract did not occur in North Carolina and its subsequent modification did not constitute a contract "made" in this state for purposes of the relevant jurisdiction-granting statute, N.C.G.S. § 97-36. The Full Commission affirmed and Burley appealed.

On April 1, in ***Burley v. U.S. Foods, Inc.***, a 2-to-1 majority of the Court of Appeals reversed. It found that under common law, "a modification of the terms of a contract may create a new underlying contract … 'made' in North Carolina" for purposes of N.C.G.S. § 97-36. While, to be effective, the new agreement must contain the three requisite elements to form an enforceable contract, *i.e.*, offer, acceptance, and consideration, all three were present in this case. When U.S. Foods merged with PYA Monarch, it offered its drivers either a severance package or a job with one of its branches, a choice which the Court found to be "a new offer under the traditional definition of a contract." Burley accepted the offer by completing the necessary paperwork at a safety meeting in Charlotte, thereby "modifying his existing at-will employment agreement." And, the consideration element was present as well: "Paying wages for labor constitutes consideration, and a change in the form of payment has been found to be sufficient consideration to form a contract."

Thus, the Court concluded that all three essential elements of a contract existed in the modification of Burley's previous employment contract. It then considered whether the modified contract was "made" in North Carolina, and in doing so applied the "last act" test, which provides that "for a contract to be made in North Carolina, the final act necessary to make it a binding obligation

must be done here." When it did, the Court decided that "the last act necessary to make the transfer binding occurred in Charlotte, where Plaintiff completed his transfer paperwork and where final approval by U.S. Foods's human resources department was provided." Therefore, it concluded that "the final binding act occurred in North Carolina" and N.C.G.S. § 97-36 "extends subject matter jurisdiction to Plaintiff's claim."

Judge Dillon dissented because "the General Assembly intended that only one state be considered an employment contract's situs, namely, where the contract 'was made[,]' and not also every state where the contract might have been 'modified' over the course of an employee's tenure." Acknowledging that there "there could be situations where a modification may be so significant that it could be deemed that a new contract of employment was 'made,'" he did not believe that the changes made in Charlotte "rise to the level of making of [a] new contract of employment" and he disagreed with the reasoning behind the majority's opinion, under which "a contract of employment is deemed made, not where the employer-employee relationship is established, but where any term of the employment agreement is last modified."

Causation of Employee's Seizures Disputed

Davita Bishop, an Ingles Markets deli cook, slipped on a recently waxed floor, fell, and hit her head. Complaining of dizziness and pain in her head, back, and hip, she was evaluated at OneBeacon Healthcare, diagnosed with a lower back strain and mild concussion, and excused from work for a week. After her condition failed to improve, she went to Sisters of Mercy Urgent Care, complaining of hip and back pain and was again excused from work. After returning three more times, she underwent an MRI scan, which led to a recommendation that she begin physical therapy and return to part-time work with lifting, standing, walking and sitting restrictions.

Consistent with that recommendation, Bishop returned to work in March 2008. That August, she began taking classes in a Masters of Divinity program at Gardner-Webb University on days she did not work. The following month, she returned to OneBeacon, complained of "black-out spells," underwent an EEG, and was referred to Dr. Duff Rardin, who diagnosed possible epilepsy. After a blackout spell at work, another MRI showed an "abnormal signal."

After expressing his opinion that Bishop's fall did not cause her seizures, Dr. Rardin completed the medical section of a Family Medical Leave Act application and recommended that, because of her seizures, she should not work or continue taking classes at Gardner-Webb.

Bishop ceased working when her FMLA application was approved. Two weeks later, she was admitted to the hospital for epilepsy monitoring and it was determined that her seizures were nonepileptic. She was also seen by a psychiatrist, Dr. C. Britt Peterson, who diagnosed "a major depressive disorder or a possible adjustment disorder with depressed mood and possible conversion disorder." Later, Dr. Rardin recommended that she see Karen Katz, a licensed clinical social worker with a master's degree in social work and psychology, who did a clinical assessment and diagnosed anxiety disorder and chronic depression that began early in Bishop's life and was exacerbated by her fall at work.

When Bishop's claim for workers' compensation reached the Full Commission, it ordered orthopedic and neuropsychological evaluations. Dr. John Barkenbus, a neuropsychiatrist, later testified that her anxiety and depression contributed to her seizure disorder and that her fall was the initiating event that caused her medical and psychological conditions. Dr. Stephen David, an orthopedic surgeon, testified that her medical problems prevented her from sustaining consistent gainful employment.

Based on that evidence, the Full Commission awarded temporary total disability benefits, medical compensation for Bishop's seizures, and attorney's fees, with Commissioner Nance dissenting because she did not find Ms. Katz's testimony credible. Ingles appealed.

On April 15, in ***Bishop v. Ingles Markets, Inc.***, the Court of Appeals affirmed. In doing so, it rejected Ingles' objection to the Full Commission order reopening the record for additional testimony, finding that N.C.G.S. § 97-85(a) "confers plenary powers to the Full Commission to receive additional evidence, rehear the parties, amend the award, and reconsider the evidence."

The Court was also not persuaded by Ingles' argument that the Full Commission erred when it found that Bishop's work-related injury caused her seizures. Although it agreed that, under ***Click v. Pilot Freight Carriers, Inc.***, 300 N.C. 164 (1980), social worker Karen Katz was not qualified to establish causation, she *was* qualified to state her opinion as to plaintiff's psychological condition, and the Full Commission's finding of causation was supported by the testimony of Dr. Barkenbus, who was of the opinion that "plaintiff's fall was the initiating event that caused several medical and psychological issues."

As for Ingles' final argument that Bishop failed to establish disability under ***Russell v. Lowes Product Distribution***, 108 N.C. App. 762 (1993), *i.e.*, that she was "unable to earn the same wage [s]he had earned before the injury, either in the same employment or in other employment," the Court found that the record contained evidence of residual physical limitations, physician–imposed work restrictions, and other non-work related medical conditions, including a stroke and heart attack following her injury. That, in turn, supported the Full Commission's conclusion that it would have been futile for her to search for employment. Therefore, there was sufficient evidence of record to support the Commission's finding that Bishop satisfied the third of the four prongs of the ***Russell*** test for establishing disability.

Reformation of Average Weekly Wage On Form 21 Agreement Set Aside

Emergency room nurse Vickie Miller injured her back on August 21, 2006 while working for Carolinas Medical Center ("CMC"). The hospital paid her medical bills and, on December 6, 2007, also paid for the permanent partial disability rating assigned by Miller's treating physician, Dr. Michael Meighen.

The following September, Miller returned to Dr. Meighen with complaints of increased back pain. He thought her symptoms were not related to the injury at work, but might be due to Lyme disease.

Miller was later seen by Dr. Brian Rose, an orthopedic surgeon, and Dr. Daniel Oberer, a neurosurgeon. Dr. Oberer performed three operations, the last of which allowed her to return to full-time nursing duties in late December 2010. She then filed a Form 18M, seeking additional medical compensation, amended her Form 18 to allege a change in condition, claimed that her average weekly wage had been miscalculated, and requested a hearing. CMC's Form 33R asserted that because she "failed to make her claim regarding a change of condition within 2 years of the last payment of medical compensation," it was barred by the provisions of N.C.G.S. § 97-47.

Deputy Commissioner Gillen found otherwise. He "reformed" the parties' Form 21 agreement to change Miller's average weekly wage from $689.21 to $691.11, ordered CMC to pay $18.90 in additional PPD benefits because of the difference between the two average weekly wage figures, awarded TTD benefits for the periods of time she was out of work between 2008 and 2010, and found CMC responsible for all of Miller's medical expenses. After the Full Commission affirmed his award, CMC appealed.

On April 1, in ***Miller v. Carolinas Medical Center – Northeast***, the Court of Appeals found that the Commission lacked authority to change Miller's average weekly wage. Although N.C.G.S. § 97-17 authorizes the Commission to revise agreements in cases of "fraud, misrepresentation, undue influence or *mutual mistake*," ***Foster v. Carolina Marble & Tile Co., Inc.***, 132 N.C. App. 505 (1999) limited application of the statute to mutual mistakes of *fact*: "[a] mistake of law, however, unless accompanied by fraud, misrepresentation, undue influence, or abuse of a confidential relationship, 'does not affect the validity of a contract.'" Here, the Commission found that N.C.G.S. § 97-2(5) did not provide for calculating average weekly wage in the manner employed on the original Form 21 agreement, so the computation error alleged by Miller was one of law, not fact. As a result, it was error for the Commission to modify the agreement.

In reaching that conclusion, the Court was not persuaded by Miller's argument that, in modifying the average weekly wage figure on the Form 21 agreement, the Commission was *enforcing* a contractual provision, not *rescinding* it, since the form indicated the specified average weekly wage was "subject to verification." The Court found that Miller waited too long to alter her average weekly wage on that basis. While the form "does not specify any time by which either party seeking verification of the average weekly wage figure must request such verification," the Supreme Court held in ***Colt v. Kimball***, 190 N.C. 169 (1925) that "when a contract does not specify a time by which some duty or right … is to be performed …, 'a reasonable time will be implied as a matter of law.'" And, while generally "the determination as to what constitutes a reasonable time would be a question to be resolved by the Full Commission, as the finder of fact," in this case, "[p]laintiff waited an unreasonable amount of time to seek verification, as a matter of law," since the Form 21 was approved in November 2007 and Miller did not seek "verification" of the average weekly wage figure until she filed her amended Form 18 in August 2011, a period of over three and one-half years.

Although the Court determined that Miller's attempt to amend the Form 21 agreement was untimely, it held that she did not wait too long to seek additional benefits under either N.C.G.S. § 97-25.1 or N.C.G.S. § 97-47. While CMC's last *indemnity* payment was made in December 2007 and she did not file her Form 18M seeking additional compensation until November 2010, CMC paid a bill from Armstrong & Armstrong for "medical case management services" in January 2009. The Court determined that there was "room for judicial augmentation" in the definition of "medical compensation" found in N.C.G.S. § 97-2(19) to define the phrase "rehabilitation services" so as to include the services provided by Armstrong & Armstrong and hold that, since Miller's Form 18M was filed within two years of the date that bill was paid, it was timely. So, the Court affirmed the Commission's award of additional TTD and medical compensation.

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

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