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Material Misrepresentation Defense Survives Summary Judgment Motion

Natalie Williams' fiancé and mother were among the residents of her household when she applied for a personal auto policy with Integon. On her application, she identified the two vehicles to be covered and listed herself as the sole driver of both, but later added her mother as an additional driver. After the policy was issued, Williams' fiancé, Michael Thomas James, was involved in an accident while operating one of her vehicles. He suffered serious bodily injuries and incurred medical expenses in excess of $50,000.

After exhausting the other driver's minimum limits liability coverage, James submitted a UIM claim to Integon, but it was denied, so he filed a declaratory judgment action, seeking a determination that he was entitled to coverage under Williams' policy. Integon's answer claimed that Williams had made material misrepresentations in her policy application, barring James' recovery. However, James' motion for summary judgment was granted by the trial court, which found that he was an insured under the policy and that Integon had "failed to come forward with … evidence establishing scienter by Williams necessary to establish the affirmative defense of fraud." Integon appealed.

In This Issue…

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On July 2, in ***James v. Integon National Insurance Company***, the Court of Appeals reversed the trial court and remanded the case for a jury trial to determine whether Williams had, in fact, made material misrepresentations on her policy application. It agreed with Integon that it was error to treat the company's material misrepresentation defense as an allegation of fraud and held that "while both fraud and material misrepresentation involve a false representation by the insured, it is unnecessary to prove that the insured had an intent to deceive in order to prove material misrepresentation…. [F]raud and material misrepresentation represent different affirmative defenses."

The Court cited as authority ***Goodwin v. Investors Life Ins. Co. of North America***, 332 N.C. 326 (1992), in which the Supreme Court held that "a representation in an application for an insurance policy is deemed material 'if the knowledge or ignorance of it would naturally influence the judgment of the insurer in making the contract … or *in fixing the rate of the premium.*'" Since Williams certified in her policy application that "all persons age 15 years or older who live with me as well as all operators who regularly operate my vehicle … are listed in this application," and as an affidavit offered by Integon in opposition to James' summary judgment motion indicated that, had he been listed as a driver on the policy, the premium it charged Williams would have been substantially greater, a genuine issue of material fact had been raised and it was error for the trial court to grant summary judgment in James' favor.

Discharged Employee Fails to Plead Valid NIED and Defamation Claims

Amy Horne began working for the Cumberland County Hospital System ("CCHS") in April 2001, initially as a registered radiologic technologist and later as a CT technologist. On four occasions in March 2011, she was "written up" by her supervisor for a variety of performance issues. When her employment was terminated the following month, the supporting documentation indicated that she had been discharged for scanning exams incorrectly, delayed patient care, patient survey complaints, negative peer reviews, and coworker complaints. After Horne applied for and received unemployment benefits, she sued CCHS, claiming breach of contract, wrongful discharge "in violation of public policy," negligent infliction of emotional distress (NIED), and defamation. CCHS responded with a Rule 12(b)(6) motion to dismiss, which was granted by the trial court, so Horne appealed to the Court of Appeals.

On July 2, in ***Horne v. Cumberland County Hospital System, Inc.***, the Court affirmed, finding that all four of Horne's causes of action lacked merit. Starting with her breach of contract claim, it noted that, under North Carolina law, unless the employer and employee have entered into a contract specifying a definite term of employment, their relationship "is presumed to be terminable at … will … without regard to the quality of performance." While Horne attempted to overcome that general rule by citing ***Trought v. Richardson***, 78 N.C. App. 758 (1986), the Court noted that, in ***Harris v. Duke Power Co.***, 319 N.C. 627 (1987), the Supreme Court limited ***Trought*** "to its narrow facts," which were that defendant's personnel manual, restricting employee terminations to those for cause, was deemed to have become part of plaintiff's employment contract. In the present case, however, Horne did not even allege, much less prove, that CCHS' employee handbook similarly restricted when

and for what CCHS could discharge its employees.

As for Horne's argument that there is an exception to the employment-at-will doctrine for cases in which the employee has been discharged for reasons that violate public policy, the Court held that such claims must be "pled with specificity," which she did not do in the present case. And, while Horne also alleged that CCHS violated her due process rights, the Court found that, for an employee to be entitled to procedural due process protections, she "must posses a property interest or other right in continued employment with a public employer," whereas CCHS was a *private* employer. Therefore, there was no merit in Horne's argument that procedural due process principles supported her wrongful discharge claim.

Turning next to Horne's NIED claim, the Court noted that she premised it on intentional, rather than negligent, conduct, and held that "[a]llegations of intentional conduct … cannot satisfy the negligence element of an NIED claim." Further, to be valid, a NIED claim must establish that it was reasonably foreseeable defendant's negligence would cause *severe* emotional distress, "which has been defined as 'any emotional or mental disorder, such as … neurosis, psychosis, chronic depression, [or] phobia, … generally recognized and diagnosed by professionals trained to do so.'" Where such allegations are absent, as in the present case, the complaint fails to state a valid claim for NIED.

The Court also found that Horne's defamation claim lacked merit, both because it was barred by the one-year statute of limitations contained in N.C.G.S. 1-54(3) and because her complaint failed to identify the allegedly defamatory remarks made by her employer. As a consequence, the Court found no error in the trial court's order dismissing Horne's complaint.

Award of Attorney's Fees and Rule 11 Sanctions Analyzed

When Bobby McKinnon, President and CEO of CVI Industries, Inc., a holding company comprised of Century Furniture and Valdese Weavers, resigned to pursue a new career with another company, he and CVI negotiated a severance agreement that included "shadow equity benefits" payable if he "disengaged from continuous competition with CVI" at a time when the company's ESOP stock price exceeded $9.90/share. Initially, the agreement prohibited McKinnon from acquiring patents or research from Frank Land, who at the time was developing a fire-resistant yarn funded by Valdese Weavers, but McKinnon subsequently obtained a letter from CVI releasing him from that part of the agreement.

In June 2008, McKinnon notified CVI that he intended to withdraw from continuous competition with CVI and obtain the benefits to which he was entitled under the severance agreement, but CVI responded with a letter informing him that they weren't owed because, when he stopped competing with CVI nine years earlier, the company's stock price was less than $9.90/share. That caused McKinnon to sue CVI, claiming breach of contract, fraud, misrepresentation, and unfair and deceptive practices violative of N.C.G.S. 75-1.1(5). His claim was later designated a "complex business case" and assigned to Judge Ben F. Tennille.

CVI's initial response to McKinnon's complaint included a counterclaim alleging that he had breached the parties' severance agreement by

acquiring patents from Land. McKinnon filed a reply which referenced CVI's letter releasing him from his initial agreement to forego acquiring Land's patents, and that led CVI to withdraw the counterclaim. It also moved for summary judgment, which was granted by Judge Tennille. McKinnon appealed, but the Court of Appeals affirmed in ***McKinnon v. CV Industries, Inc.*** ("***McKinnon I***"), ___ N.C. App. ___, 365 N.C. 353 (2011), and the Supreme Court denied discretionary review.

At that point, the parties filed cross-motions for attorney's fees and costs, which were heard by Judge Gale, who denied McKinnon's motion, granted CVI's, and awarded $40,000 in attorney's fees and $16,798 in costs. Appeals from both parties culminated in a second opinion from the Court of Appeals, filed on July 2, ***McKinnon v. CV Industries, Inc.*** ("***McKinnon II***"), in which Judge Gale's order was affirmed in part and remanded in part.

The Court of Appeals first addressed McKinnon's argument that CVI's counterclaim violated Rule 11, which requires the trial court to determine whether the contested pleading was (1) factually sufficient, (2) legally sufficient, and (3) not filed for an improper purpose. It found that the evidence before Judge Gale supported his determination that, in the eight or nine years between issuance of CVI's letter releasing McKinnon from his agreement to forego acquiring patents from Frank Land and the date on which CVI filed its counterclaim, its management had forgotten about the letter's existence. As a consequence, and since the record was devoid of evidence that CVI's counterclaim was filed for an improper purpose, the Court affirmed Judge Gale's denial of plaintiff's Rule 11 motion for attorney's fees.

It also rejected CVI's argument that Judge Gale abused his discretion in two respects: by limiting his award of attorney's fees to those CVI incurred after Judge Tennille granted summary judgment and by awarding substantially less than the $322,151 in fees CVI incurred after that date. At the same time, in a lengthy opinion which addressed in great detail the circumstances under which attorney fee awards may be made under N.C.G.S. 6-21.5, N.C.G.S. 75-16.1, and Rule 11, the Court determined that, while the facts of the case *might* be sufficient to support an award of attorney's fees under N.C.G.S. 75-16.1(2), Judge Gale's order did not contain the specific findings mandated by the statute, *i.e.*, that the party against whom it is proposed that an attorney's fee be taxed "knew or should have known that the action was frivolous and malicious." That being so, and as Judge Gale's order was also devoid of findings regarding the reasonableness of the fee he awarded, the case was remanded for the trial court to enter the missing findings.

Award of Expert Witness Fee for Time Waiting in Court Vacated

Ginger McKinney's child support and custody action against Joe McKinney was the subject of an unpublished opinion from the Court of Appeals in 2011, ***McKinney v. McKinney***, ___ N.C. App. ___ (2011) ("***McKinney I***"), in which the Court considered and resolved defendant Joe McKinney's appeal from a trial court order awarding an expert witness fee to plaintiff Ginger McKinney's expert witness, Mr. Boger, under N.C.G.S. 7A-305. The Court held that the amount awarded for time spent preparing for trial was improper and remanded the case back to the trial court to determine how much of its

previous award was attributable to trial preparation. Shortly thereafter, Ginger filed a motion under N.C.G.S. 50-13.6, seeking reimbursement of the attorney's fees she incurred in connection with the original appeal.

On remand, the trial court determined that Boger spent a total of 13 hours in court, including approximately 1½ hours actually testifying. It awarded him an expert witness fee of $390 for time spent testifying and another $2,990 for time spent waiting to testify. The court also taxed Joe with $25,980.51 in attorney's fees under N.C.G.S. 50-13.6. From that order, he appealed the case back to the Court of Appeals.

On July 16, in ***McKinney v. McKinney*** ("***McKinney II***"), the Court affirmed the trial court's attorney fee award under N.C.G.S. 50-13.6, but it agreed with Joe that it was error for the trial court to award an expert witness fee for the time Ginger's expert spent attending court, but not actually testifying. The Court noted that, in its prior opinion, it analyzed the expert witness fees to which Ginger was entitled under N.C.G.S. 7A-305, which "constitute a limit on the trial court's discretion to tax costs pursuant to G.S. 6-20" and are limited to "[r]easonable and necessary fees of expert witnesses solely for actual time spent providing testimony at trial…." That being so, and as the Court's prior mandate remanding the case to "assess costs for time actually spent testifying" was "binding upon [the trial court] and must be strictly followed without variation or departure," the trial court's award of $390 for the time plaintiff's expert spent actually testifying was affirmed, but the $2,990 fee it awarded for time spent waiting in court was vacated.

Landowner's Duty of Care Does Not Extend to Dangerous Condition On Neighboring Property

Raymond Malloy was employed by Davis Mechanical to deliver feed for Tyson Farms to real property owned by Michael and Kathy Preslar. After each delivery, Malloy was required to place the delivery ticket in a designated box on the Preslars' property. On August 18, 2008, he was stung multiple times by hornets, whose nest was located on the back of the box. The hornet stings triggered an allergic reaction, which led to respiratory arrest and seizures.

Malloy and his wife sued the Preslars and Tyson Farms, alleging that the Preslars were Tyson's agents and that they owed Malloy a duty to warn of hazardous conditions on the Preslars' property. Tyson filed a Rule 12(b)(6) motion to dismiss and the Preslars moved for summary judgment. The trial court denied the summary judgment motion, but granted Tyson's motion to dismiss, which led the Malloys to appeal to the Court of Appeals.

In an opinion filed on July 2, ***Malloy v. Preslar***, the Court first noted that the Malloys' appeal was interlocutory because it "did not dispose of all claims against all parties." Therefore, unless the trial court's order affected a "substantial right," plaintiffs did not have the right to an immediate appeal. The Court found that since the Malloys' appeal from the trial court's finding that Tyson had no duty to warn of hazardous conditions on the Preslars' property did *not* impact a substantial right, it was properly dismissed.

At the same time, however, the Court found that plaintiffs' assertion that Tyson was responsible

for the Preslars' actions because they were Tyson's agents *did* impact a substantial right, so the Court reached the merits of that claim. But, it then found that "any obligation Tyson had to keep its property safe ended where its ownership and control of its property ended." Since Malloy's injury occurred on the Preslars' land, not Tyson's, plaintiffs' "complaint failed to allege a *prima facie* claim of negligence." Therefore, the trial court did not err when it granted Tyson's motion to dismiss.

Interlocutory Appeal Dismissed

In August 2008, Paradigm Consultants, Ltd. sued Charles and Kimberly Raymond to obtain payment for construction work performed on their residence. The Raymonds counterclaimed, alleging negligence, unfair and deceptive trade practices, breach of contract, breach of the implied warranty of workmanship, and breach of the "duty of workmanlike performance." Paradigm informed its insurer, BMI, that a dispute had arisen with the Raymonds, but did not mention the counterclaim, which BMI only learned about when a copy of the Raymonds' answer was provided by one of Paradigm's subcontractors.

After BMI sent Paradigm a reservation of rights letter, Paradigm and the Raymonds reached agreement on a $2.5 million settlement whose terms encouraged Paradigm to file suit, seeking coverage under the BMI policy. Paradigm did in fact sue BMI, alleging breach of contract, bad faith, and unfair and deceptive trade practices. BMI answered and both sides moved for summary judgment. The trial court granted Paradigm partial summary judgment on BMI's champerty and maintenance defense, but otherwise denied both parties' motions. Each then gave notice of appeal.

On July 16, in ***Paradigm Consultants, Ltd. v. Builders Mutual Insurance Co.***, the Court of Appeals dismissed both appeals on grounds that they were interlocutory and did not affect a substantial right. It found the case relied upon by the parties, ***Lambe Realty Inv., Inc. v. Allstate Insurance Co.***, 137 N.C. App. 1 (2000), in which an order granting partial summary judgment on the issue of Allstate's duty to defend was found to "affect a substantial right that might be lost absent immediate appeal," was factually distinguishable. In ***Lambe***, the issue in dispute was whether the insurer owed a duty to defend, whereas in the present case, the order from which appeal had been taken addressed neither that question nor the scope of Paradigm's coverage. Instead, the trial court's order only addressed BMI's champerty and maintenance defense and the question of whether there were genuine issues of material fact that rendered summary judgment inappropriate.

Sexual Assault Claim Dismissed

On the last night of a summer camp operated by the Moravian Church, sixteen-year-old Summer Nowlin participated in "the Game," an activity in which campers sneak around the camp's staff through a wooded area in the dark and ring a bell located at the top of a hill. For safety purposes, "the Game" was restricted to senior high campers and required participants to have a partner.

Summer's partner was her friend Molly. They met with two of the camp's staff members, one of whom departed with Molly, leaving Summer alone with the other staff member, Raj Crawford.

Although she did not report it until several months later, Summer alleged that once she and Crawford were left alone, he kissed her, pushed her down on her back, held her down, and had sexual intercourse with her. Crawford initially denied the encounter, but later claimed it was consensual.

Summer's parents filed suit, alleging negligent hiring, retention and supervision, negligent failure to provide a safe environment when conducting "the Game," and severe emotional distress. The church denied negligence and moved for summary judgment, which was granted by the trial court. Plaintiffs appealed.

On July 16, in ***Nowlin v. Moravian Church in America***, the Court affirmed, ruling that, to prevail, the Nowlins had to prove (1) failure to exercise care while performing a duty owed to Summer; (2) negligent breach of that duty; and (3) that a person of ordinary prudence would have foreseen that Summer's injury was probable. The question of the duty owed by a camp to its campers being one of first impression in North Carolina, the Court analogized to cases addressing the care owed by a daycare center owner (***Pruitt v. Powers***, 128 N.C. App. 585 (1998)) and by a homeowner to children at a pool party (***Royal v. Armstrong***, 136 N.C. App. 465 (2000)), and held that it requires adult hosts and supervisors to "exercise a standard of care that a person of ordinary prudence, charged with similar duties, would exercise under similar circumstances," with "the amount of care … increas[ing] with the student's immaturity, inexperience, and relevant physical limitations."

Applying that standard to the present case, the Court found that, notwithstanding the contents of an affidavit offered by the plaintiffs from their "summer camp consultant," who was of the opinion that the church's written policies were "below the standard of care," the trial court did not err in granting summary judgment for the defense. While the consultant's affidavit may have created a genuine issue of fact regarding whether the church had an adequate *written* policy regarding sexual relationships between camp staff and campers, there was uncontradicted evidence that Crawford and other camp staff members were made aware of the fact that sexual relationships with campers were prohibited. The Court also noted that (1) before he was hired, the camp obtained a personal disclosure from Crawford indicating that he had no criminal convictions, had never been dismissed, suspended or asked to resign from a job, and never had a complaint lodged against him for sexual molestation, abuse or harassment; (2) the camp checked the National Sex Offender Registry and received a favorable recommendation of Crawford from a "trusted reference" before he was hired; (3) he had a "very positive" job performance as a camp staff member the preceding summer; and (4) participation in "the Game" was restricted to senior high campers, who, for safety purposes, were required to be with a partner while it was being played. The Court concluded that "[t]aken together, this undisputed evidence demonstrates as a matter of law that defendants acted reasonably … and … Crawford's conduct … was unforeseeable …." Therefore, the trial court correctly determined that the defendant church was entitled to summary judgment.

Breach of Express Warranty Claim Barred by Statute of Repose

In August 2004, George and Deborah Christie contracted with Hartley Construction, Inc. to construct a custom home in Chapel Hill utilizing

a coating and waterproofing material applied over structural insulated panels provided by GrailCoat Worldwide, LLC, whose website expressly warranted its product for twenty years. After the house was completed and the Certificate of Occupancy issued, water leaked in, causing the walls to delaminate and compromise the integrity of the house.

The Christies sued Hartley and GrailCoat, claiming breach of contract, breach of express warranties, breach of the implied warranties of merchantability and fitness for a particular purpose, negligence, and unfair and deceptive trade practices. After answering the complaint, both defendants moved for summary judgment, contending that plaintiffs' claims were barred by the six-year statute of repose contained in N.C.G.S. 1-50(a)(5). Plaintiffs moved for summary judgment against GrailCoat on their breach of express warranty claim, but the trial court denied that motion and instead granted summary judgment for the defendants. Plaintiffs appealed.

On July 16, in ***Christie v. Hartley Construction, Inc.***, a 2-to-1 majority of the Court of Appeals, relying on the six-year statute of repose, affirmed. The Court's majority found that issuance of the Certificate of Occupancy on March 22, 2005 was "the last act or omission of defendants giving rise to the cause of action," so plaintiffs had until March 22, 2011 to bring their lawsuit, but they not do so until more than seven months later, on October 31, 2011. Holding that "[a] statute of repose is a … condition precedent to a party's right to maintain a lawsuit," the majority agreed with the trial court that, notwithstanding GrailCoat's 20-year express warranty, plaintiffs had failed to timely assert their claim.

Concurring in part and dissenting in part, Judge Robert N. Hunter, Jr. agreed with the majority that the trial court correctly granted defendant Hartley's motion for summary judgment, but he would have reversed the trial court's ruling on plaintiffs' breach of express warranties claim as to defendant GrailCoat because he is of the opinion that "[i]t would be … paradoxical that the statute of repose would void all claims where the parties have contractually agreed to a period of remedy that exceeds the statute of repose."

"Account Stated" Concept Applied to Dispute Over Attorney's Fees

When Keith Lane retained the Smithfield law firm of Mast, Schulz, Mast, Mills & Stem, PA to represent him in a dispute over money paid to a business of which he was a part owner, he signed a "Minimum Fee Employment Agreement" providing for "a minimum reasonable fee of $205.00 per hour" that would be owed "regardless of the outcome or results obtained." Lane received monthly invoices from the firm and, between 2005 and 2008, made payments totaling $290. He also promised to continue making them "as often as possible to pay off [his] balance," which at the time of his last payment on November 26, 2008 was $43,470.86.

By a letter dated January 19, 2011, the firm reminded Lane of the amount owed, informed him of the State Bar's fee dispute resolution program, and told him that if he did not pay the balance on his account or make alternative arrangements, it would sue him. After receiving no response, it filed a collection action in Johnston County District Court. Lane's answer pled the statute of limitations and laches as affirmative defenses. The firm subsequently filed

a motion for summary judgment, which was granted by the trial court, and Lane appealed.

On July 16, in ***Mast, Mast, Johnson, Wells & Trimyer, PA v. Lane***, the Court of Appeals affirmed the trial court's order granting summary judgment in an opinion that discussed in some detail the four elements of an "account stated cause of action" and found each of them in the present case.

The Court also considered and rejected Lane's contention that summary judgment was inappropriate because there was a genuine issue of material fact as to the reasonableness of the fees charged. Finding no prior North Carolina case law addressing whether the reasonableness of an attorney's fee is foreclosed by a determination that an account rendered has become stated, the Court looked to other jurisdictions, but found a split of authority, so it turned to the facts of this case, the nature of the account stated, and the absence of a timely objection from Lane to the reasonableness of the fees he was charged, which if made would have prevented the account from becoming stated, and held that "the determination that the account was stated foreclosed the issue … [of] the reasonableness of the … fees sought …." Therefore, there was no genuine issue of material fact and the trial court properly granted summary judgment to the plaintiff law firm.

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

A Service and Publication of
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