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CIVIL LIABILITY

Jury Verdict Affirmed In Medical Malpractice Case

When Hannah Kearney arrived at the Forsyth Medical Center emergency room complaining of severe chest and abdominal pain, Dr. Bruce Bolling was brought in for a consultation. He diagnosed acute cholecystitis, performed a laproscopic cholecystectomy to remove her gallbladder, and discharged her the next day. However, she was subsequently found to have a bile leak caused by a hole in her right hepatic duct that necessitated additional treatment.

After changing treating physicians and undergoing another operation to repair the bile leak, Kearney sued Dr. Bolling for medical malpractice. On the first day of trial, he filed a motion *in limine* to exclude any evidence she might offer regarding informed consent, as her complaint made no mention of that issue. The court agreed and granted the motion.

After Dr. Bolling's attorney asked Kearney during cross-examination whether she signed a consent form prior to her cholecystectomy, she moved to amend her complaint to allege lack of informed consent. However, the motion was denied on grounds that the doctrine of "amendment by implication" did not apply and allowing her to amend at that late date would have unduly prejudiced Dr. Bolling.

The jury returned a defense verdict, the trial court entered a corresponding judgment, and

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WORKERS' COMPENSATION

There were no published workers' compensation appellate court decisions this month.

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Kearney appealed, alleging errors in the denial of her motion to amend and several evidentiary rulings made by the trial court.

On July 7, in *Kearney v. Bolling*, the Court of Appeals affirmed, holding that while the arguments Kearney made on appeal “present[ed] close questions ... this Court’s review of evidentiary rulings and other mid-trial discretionary decisions by a trial court is severely limited. [They] ... are reviewed for abuse of discretion and ... reverse[d] only if the trial court’s rulings appear so arbitrary that they could not be the result of a reasoned decision. Although we may not agree with all of the trial court’s rulings below, we cannot say that those rulings were so manifestly arbitrary that they constituted an abuse of discretion.”

The Court applied that standard of review to Kearney’s objection to defense counsel’s cross-examination of her expert witness, Dr. Brickman, about an American College of Surgeon policy providing that physicians such as he, who are not actively practicing medicine in a clinical setting, should not testify as expert witnesses. It held that because a party may attack an opposing expert’s credibility, “[c]ross examination is available to establish bias or interest as grounds for impeachment” and “almost any question may be put to the value of [the expert’s] testimony.” So, the ruling that allowed defense counsel to question Dr. Brickman about whether he violated the guidelines of an organization to which he belonged was not an abuse of discretion, since it “was [not] so arbitrary that it could not have been the result of a reasoned decision.”

Nor was the Court persuaded by Kearney’s alternative argument that the effect of allowing defense counsel to question Dr. Brickman about his compliance with the guidelines of the American College of Surgeons was to permit a private agreement (the guidelines) to supersede a state statute (Rule of Evidence 702(b)(2)) that expressly authorizes medical school professors to testify as expert witnesses in medical malpractice

cases. Rather, the Court observed, the trial court accepted Dr. Brickman as an expert witness and instructed the jury what that means. Although cross-examining him about his professional organization’s guidelines may have raised questions about his motives and credibility, “it did not undermine the trial court’s ruling that, as a matter of evidentiary law, Dr. Brickman was qualified to render expert testimony.”

As for Kearney’s objection to the trial court’s denial of her motion to strike defense expert witness Dr. Todd Heniford’s testimony that “[t]he American College of Surgeons would say that [Dr. Brickman] should not be an expert witness,” the Court conceded that it was “troubling,” since he “did not merely state his understanding of whether [Dr. Brickman] could testify consistent with the organization’s guidelines, but went further and appeared to speak on behalf of the organization.” But, while it agreed that the trial court “*could have* granted the motion to strike” for that reason, it felt “sharply constrained by the narrow standard of review for evidentiary rulings” and held that the trial court’s decision to deny the motion was not “so arbitrary that it could not have been the result of a reasoned decision.”

For substantially the same reason, the Court also overruled Kearney’s argument that defense witness Dr. William Nealon was not qualified to testify as a medical expert because he was not shown to be familiar with the standard of care in Winston-Salem or a similar community, as required by N.C.G.S. § 90-21.12 and Rule of Evidence 702(b). Distinguishing the two cases she cited in her brief, *Henry v. Southeastern OB-GYN Assocs., P.A.*, 145 N.C. App. 208 (2001), and *Smith v. Witmer*, 159 N.C. App. 192 (2003), and quoting the Supreme Court’s holding in *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440 (2004), that “trial courts are afforded wide latitude ... when making a determination about the admissibility of expert testimony,” the Court applied once again the “deferential standard of review applicable to a trial court’s admission of

expert testimony” and held that the trial court did not abuse its discretion when it concluded that Dr. Nealon met the criteria for testifying as an expert witness under Rule of Evidence 702(b).

It also found no merit in Kearney’s exception to the trial court’s granting of Dr. Bolling’s motion *in limine* and its denial of her motion to amend, which together precluded her from pursuing a lack of informed consent claim. Because both rulings were within the trial court’s discretion, the same abuse of discretion standard of appellate review applied.

Furthermore, noted the Court, because “Rule 9(j) contains additional requirements for medical malpractice complaints,” the “legal theory [of informed consent] could be asserted only if, *before filing the complaint*, Kearney’s expert had reviewed the underlying facts and was willing to testify that Dr. Bolling had not complied with the applicable standard of care concerning informed consent.” But, her expert, Dr. Brickman, conceded that he was unaware of the informed consent issue until it came up during discovery. Therefore, the Court concluded that, like the trial court’s evidentiary rulings, there was no error in its handling of the informed consent issue Kearney raised for the first time at trial.

Directed Verdict On Gross Negligence Set Aside

Kelly McCauley and Steven Thomas went to a restaurant that was offering a margarita special. While Kelly couldn’t recall the exact number of drinks they consumed, she believes she had no more than three, while he probably drank one or two more. Because she was feeling the effects of the alcohol by the time they were ready to leave, she permitted Steven, who was a “far more experienced drinker” than she, to drive her home.

They got into an argument on the way and Steven began to drive “poorly,” so Kelly told him to pull over and let her out. He did, but they were downtown at the time, a place where, she later testified, “a single female would [not] want

to be late at night.” So, when he apologized, said he would not say another word, and promised to just drive her home and drop her off, she agreed.

According to Kelly, after Steven made a “normal turn” onto the dead end street near her house, he “just blew up,” rapidly accelerated to 35 - 45 miles per hour, and crashed into a tree at the end of the street. Having suffered injuries to her face, jaw, and mouth, Kelly sued Steven, alleging gross negligence. He pled gross contributory negligence in bar of her claim and she responded with a plea of last clear chance.

After an unsuccessful mediation, the case went to trial. At the close of evidence, Steven moved for a directed verdict on grounds that Kelly was grossly contributorily negligent as a matter of law. Judge Thomas Lock agreed and granted the motion. Kelly then gave notice of appeal, contending that there was no evidence of gross negligence on her part, or at the very least, the question of gross contributory negligence was for the jury, not the court, to decide.

On July 7, in *McCauley v. Thomas*, the Court of Appeals observed at the outset of its opinion that the standard of review for a directed verdict is whether the evidence was sufficient for the issue in dispute to be submitted to the jury, and “all of the evidence which supports the non-movant’s claim must be taken as true and considered in the light most favorable to the non-movant, giving the non-movant the benefit of every reasonable inference which may be legitimately drawn therefrom and resolving contradictions, conflicts, and inconsistencies in the non-movant’s favor.”

Therefore, the Court continued, a directed verdict for the defendant on grounds of contributory negligence “may only be granted when the evidence taken in the light most favorable to plaintiff establishes her negligence so clearly that no other reasonable inference or conclusion may be drawn therefrom.” Further, “[o]nly gross contributory negligence by a plaintiff precludes recovery ... from a defendant who was grossly negligent.”

The Court found it “well-established” that “a passenger is contributorily negligent as a matter of law so as to bar recovery in a negligence suit when (1) the driver of the vehicle was under the influence of an intoxicant; (2) the passenger knew or should have known that the driver was under the influence; and (3) the passenger voluntarily rode with the driver even though she knew or should have known that the driver was under the influence.”

In the present case, while it was undisputed that the defendant consumed alcohol in plaintiff’s presence, there was “conflicting evidence of whether defendant was impaired and whether the accident was the result of defendant’s alleged impairment.” Kelly testified that Steven was not intoxicated, she noticed nothing about his speech to cause alarm, she did not observe that his eyes were glassy or that he was unsteady on his feet, and no evidence was offered of his blood alcohol level. Therefore, the Court concluded, the trial court invaded the province of the jury when it granted Steven’s motion for directed verdict. So, it reversed the trial court’s order and remanded the case for a new trial.

Wrongful Death Action Barred by Statute of Limitations

Donald Willis spent the early morning hours of November 15, 2010 asleep in Kenneth Hinton’s barn, which was warmed by a propane heater installed and maintained by Heritage Propane Express. When his girlfriend went to check on him the next morning, she smelled fumes, discovered him unresponsive, and called 911. He was transported to the hospital, but pronounced dead on arrival.

Willis’ mother, Barbara Ann Murphy, filed suit against Hinton and Heritage in June 2012, alleging that “by reason and consequence of the aforementioned negligence, carelessness, recklessness and/or willfulness,” she was entitled to recover for his wrongful death. She subsequently took a voluntary dismissal without

prejudice, but refiled her complaint less than 12 months later.

Defendants moved to dismiss under Rule 12(b)(6), contending that the refiled lawsuit was barred by the statute of limitations because more than two years had passed since their alleged negligence and the normal one-year period to refile authorized by Rule 41(a)(1) did not apply in this case. The trial court agreed and granted their motion. Murphy appealed.

On July 7, in *Murphy v. Hinton*, the Court of Appeals affirmed. Quoting *Estrada v. Burnham*, 316 N.C. 318 (1986), it held that “in order for a timely filed complaint to toll the statute of limitations and provide the basis for a one-year ‘extension’ by way of a Rule 41(a)(1) voluntary dismissal without prejudice, the complaint must conform *in all respects* to the rules of pleading.” While Murphy’s complaint made reference to “the aforementioned negligence, carelessness, recklessness and/or willfulness,” it did not describe the alleged negligence and contained “no mention of any duty owed by Heritage Propane, no allegation of unreasonable conduct, and no other reference to the essential elements of a negligence cause of action.” Indeed, the Court continued, “the complaint does not even allege that Heritage Propane’s propane tank was the source of the carbon monoxide that killed Willis.”

The Court found that because Heritage “cannot possibly prepare a defense to a complaint that does not even disclose what claims are being asserted against it,” Murphy “failed to comply with the rudimentary notice pleading requirement of Rule 8(a)(1), and under *Estrada*, her “failure to conform to this foundational pleading requirement prevents application of Rule 41(a)(1)’s one-year filing extension.” Therefore, even though she refiled her complaint less than a year after the voluntary dismissal, it was properly dismissed by the trial court because the refiling date was “well outside the applicable two-year statute of limitations.”

Nondisclosure Agreement Not Subject to Contractual Arbitration Provision

China-based Neusoft Medical System Company (“Neusoft China”) manufactures CT scanners and other medical imaging equipment. In 2003, it entered into an agreement that made North Carolina-based Neuisys, LLC its exclusive distributor in several markets within the United States. The agreement also provided that any disputes that arose between the parties would be settled through arbitration in China.

In the years that followed, Neuisys sold Neusoft China’s imaging equipment and developed a profitable business outside the distribution agreement, contracting with end users to provide warranty and service work.

In 2009, while Neusoft China was negotiating to acquire Neuisys, the two companies signed a nondisclosure agreement under which Neuisys agreed to disclose confidential information about its warranty business to Neusoft China, which promised that it would only use that information for the purpose of “evaluating, negotiating and implementing” its potential acquisition of Neuisys. After the negotiations fell through, Neusoft China began competing directly with Neuisys, both in the distribution of its equipment and by servicing it through its subsidiary, Neusoft USA, which hired away several Neuisys employees, including Tom Buse and Keith Mildenberger.

During a break in a meeting between Neuisys and Neusoft USA, a representative of Neuisys accessed Buse’s computer without his permission, transferring information from the computer onto a thumb drive, ostensibly to determine whether Neusoft USA was using any of Neuisys’ confidential information. Neusoft USA responded by suing Neuisys and asserting various claims related to the unauthorized access of Buse’s computer. Neuisys counterclaimed against Neusoft USA and brought Neusoft China in as a third party defendant.

The trial court held that because four of Neuisys’ six claims against Neusoft China arose under the distribution agreement, they were subject to its arbitration provision. But, it also ruled that the other two claims, *i.e.*, those for breach of the 2009 nondisclosure agreement and for unfair and deceptive practices (UDTP), were not connected with the distribution agreement and, therefore, not subject to arbitration.

After Neuisys amended its third party complaint to add claims against Buse and Mildenberger, Neusoft China renewed its motion to refer the breach of contract and UDTP claims to arbitration and Buse, Mildenberger, and Neusoft USA moved that resolution of the breach of contract and UDTP claims be stayed, pending arbitration of the other four claims. But, both motions were denied and the trial court allowed Neuisys to proceed with its breach of contract and UDTP claims. Neusoft China, Neusoft USA, Buse, and Mildenberger all appealed.

On July 7, in *Neusoft Medical Systems, USA, Inc. v. Neuisys, LLC*, the Court of Appeals found that the appeal was interlocutory because none of the orders at issue were dispositive as to all claims and all parties and while it is generally the case that there is no right to an immediate appeal from an interlocutory order, N.C.G.S. §§ 1-277 and 7A-27 establish an exception for cases in which the order “deprives the appellant of a substantial right which he would lose if ... [it] is not reviewed before final judgment.” Because *Prime South Homes, Inc. v. Byrd*, 102 N.C. App. 255 (1991), held that the right to arbitrate is a substantial right because it “may be lost if review is delayed,” and as Neusoft China had a contractual right to arbitrate disputes arising out of its distribution agreement with Neuisys, the Court concluded that it had jurisdiction over the appeal.

As for Neusoft USA, Buse, and Mildenberger, while they were not parties to the distribution agreement, the Court nevertheless “recognize[d] that by operation of common law agency and

contract principles, a contractual right to arbitrate may be enforceable by or against a non-signatory to the agreement.” So, it found that it had jurisdiction to review their appeal as well.

Turning to the merits of Neusoft China’s appeal from the trial court’s 2014 order denying its motion to refer Neuisys’ breach of contract and UDTP claims to arbitration, the Court found that, in *State v. Duvall*, 304 N.C. 557 (1981) the Supreme Court held that “one trial court judge has the authority to reconsider an interlocutory order entered by another trial court judge ‘*only in the limited situation* where the party seeking to alter that prior ruling makes a sufficient showing of a *substantial change in circumstances during the interim* which presently warrants a different or new disposition of the matter.’” Otherwise, “the normal reviewing function of appellate courts would be usurped, and, in some instances, the orderly trial process could be converted into a chaotic, protracted affair as one party attempted to shop around for a more favorable ruling from another superior court judge.”

In this case, Neusoft China argued that the deposition testimony of Neuisys’ CEO, Kim Russell, that Neusoft China’s improper use of confidential information as leverage during their negotiations over the distribution agreement was a “substantial change” because it amounted to an admission by Neuisys that the two claims found to be nonarbitrable by the trial court did, in fact, relate to the distribution agreement and, therefore, were subject to its arbitration clause. The Court disagreed. It found that Russell’s testimony “did not introduce some new theory of liability,” but rather, “merely stat[ed] one way Neusoft China used the information competitively.” Therefore, the trial court “did not err in denying Neusoft China’s ... motion to refer the claims continuing in litigation to arbitration or, in the alternative, to stay those claims pending arbitration.”

The Court also found no merit in Neusoft China’s argument that the trial court erred when

it failed to conclude that Neuisys was equitably estopped from denying that the distribution agreement’s arbitration clause applied to their dispute over whether the nondisclosure agreement was breached. Equitable estoppel “arises when one party ... induces a person to believe that certain facts exist, and that person reasonably relies on and acts on those beliefs to his detriment.” But, in the present case, as in *Ellen v. A.C. Schultes of Maryland*, 172 N.C. App. 317 (2005), Neuisys was not “seeking any direct benefits from the contract containing the relevant arbitration clause,” or asserting any rights arising under that ... contract.” Therefore, the trial court did not err when it concluded that equitable estoppel did not bar Neuisys’ claims.

Because its claims for breach of the nondisclosure agreement and for unfair and deceptive practices presented “distinct legal issues from those presented by the arbitrable claims,” *i.e.*, whether the other parties to the lawsuit impermissibly used Neuisys’ confidential information to compete with it, rather than for the “permissible purposes of evaluating and negotiating a potential acquisition and whether such use constituted unfair and deceptive practice under North Carolina law,” the Court held that the trial court did not err when it denied Neusoft China’s motion to refer Neuisys’ breach of contract and UDTP claims to arbitration.

Order Denying Motion to Compel Arbitration Reversed

The trustees of the Earl/Simmet Living Trust, which owned two lots in Carefree Cove, a residential subdivision in Ashe and Watauga Counties, filed a declaratory judgment action against the subdivision’s developer and homeowner’s association, alleging that they failed to perform the acts required by the subdivision’s restrictive covenants to convey its common areas to the association, turn over management of the association, and allow the association’s members to elect a majority of the Board of Administrators. Citing the arbitration

clause in the subdivision's bylaws, the defendants moved to dismiss under Rule 12(b)(6). When the trial court denied their motion, they appealed.

On July 7, in *Earl v. CGR Development Corporation*, the Court of Appeals held, as in *Neusoft Medical Systems, USA, Inc. v. Neuisys, LLC*, that "an order denying arbitration, although interlocutory, is immediately appealable because it involves a substantial right which might be lost if appeal is delayed." Turning then to the applicable standard of review, it observed that, in reviewing an arbitration agreement, it "examines '(1) whether the parties had a valid agreement to arbitrate, and also (2) whether the specific dispute falls within the substantive scope of that agreement.'"

In this case, the trial court's order provided no explanation for its denial of defendants' motion, nor were there any findings for the Court to review in attempting to determine whether competent evidence supported the court's ruling. Because "[t]he trial court's order fails to state whether the parties were bound by an arbitration agreement or whether this matter fell within the scope of that agreement," the Court was "unable to determine any basis for the trial court's ruling," so it remanded the case for entry of an order that "includes findings and conclusions necessary to resolve defendants' motion to dismiss."

Jury Verdict for Conversion Trebled and Attorney's Fee Awarded

Christopher Faucette operates his dental practice in Unit 102 of the commercial condominiums located at 6303 Carmel Road in Charlotte. When a pipe burst above the adjacent unit, owned by condominium association president Bradley Winer, Faucette's unit was flooded and extensively damaged.

After his insurer reimbursed his repair costs, less the policy's \$5,000 deductible, Faucette submitted a claim to the condominium association, whose insurer issued a settlement

check to Winer and his limited liability company that included full reimbursement of the deductible. But, Winer refused to turn over the funds, citing an ongoing dispute regarding condominium association dues. Instead, he deposited the check in the association's bank account and later turned the funds over to his attorney for deposit in his trust account.

After Faucette sued Winer and his LLC for conversion, negligence, trespass, mold-related bodily injury, unfair and deceptive trade practices under Chapter 75, and punitive damages, the parties participated in a mediated settlement conference, but were unable to reach agreement on a settlement.

The defendants then filed a motion for partial summary judgment, seeking dismissal of all of Faucette's claims except conversion, and the motion was heard by Judge Richard Boner, who entered an order granting it "in its entirety as to all Plaintiffs' Claims ... EXCEPT for the claims ... against Bradley Winer for 'conversion' and 'unfair and deceptive trade practices.'"

A bench trial was then held by Judge Eric Levinson, who found that the defendants illegally converted Faucette's \$5,000. Because he also found that the conversion fell within Chapter 75, he trebled the damages to \$15,000 and awarded an attorneys' fee of \$27,000. The defendants appealed.

On July 21, in *Faucette v. 6303 Carmel Road, LLC*, the first question the Court of Appeals addressed was whether the trial court had jurisdiction to enter a judgment against the defendant LLC in light of the wording of Judge Boner's partial summary judgment order. While the LLC contended that the order dismissed *all* of Faucette's claims against it, the Court disagreed. Citing *Blevins v. Welch*, 137 N.C. App. 98 (2000), it held that while the interpretation of a judgment presents a question of law, "this Court will afford some degree of deference to the trial court's interpretation of an ambiguous judgment," and in this case, Judge Levinson interpreted

Judge Boner's order to have denied summary judgment on the conversion and Chapter 75 claims against both Winer *and the LLC*.

Because the Court found that Judge Boner's order "appears to dismiss a claim that Defendants did not even ask to be dismissed," as there was "no basis for the trial court to dismiss the Chapter 75 claim against one but not both Defendants," and since the "Defendants did not even request summary judgment on Faucette's conversion claim," it concluded that there was "strong evidence" Judge Boner's order was ambiguous. Therefore, it was "properly subject to interpretation by another superior court judge later in the proceeding." As a result of that ambiguity, considering the "potential injustice of finding meritorious claims inexplicably dismissed before trial, and according due deference to the trial court in the interpretation of its own orders," the Court affirmed Judge Levinson's finding that Judge Boner's summary judgment order did not dismiss the conversion and Chapter 75 claims Faucette brought against the defendant LLC.

In response to defendants' argument that it was error for the trial court to sustain Faucette's objection to the admission of a letter the defendants sent to Faucette's attorney in which they offered to pay \$5,165 to settle all future claims, the Court found that it did not need to determine whether the trial court correctly applied Rule of Evidence 408 because "any error in the admission of this settlement letter was harmless as a matter of law." Citing *Walker v. Walker*, 201 N.C. 183 (1931), as authority, the Court held that "[a]ppellate courts do not set aside verdicts and judgments for technical or harmless error. It must appear that the error complained of was material and prejudicial, amounting to a denial of some substantial right," and the appellant bears the burden of showing not only error, but that the error was "prejudicial – meaning that there was a reasonable possibility that, but for the error, the outcome would have been different." Because "[e]rror in the exclusion

of evidence is harmless when other evidence of the same import is admitted," and as the trial court considered "numerous examples of Defendants' offers to settle," the Court concluded that "any error in excluding the settlement letter was harmless."

It also found no merit in defendants' argument that the trial court erred when it concluded that they committed unfair or deceptive trade practices in violation of Chapter 75. Responding to defendants' argument that the "improper conversion of the \$5,000" was simply a "private and personal dispute between Faucette and Winer, or intra-corporate dispute among members of the Condominium Association," the Court held that "a defendant's mere act of tortious conversion can satisfy the elements of a Chapter 75 claim" and found that, in this case, "Defendants abused their positions of power to withhold payment of the money Faucette legally was owed, solely to pressure Faucette to resolve several unrelated disputes between the parties, including an ongoing dispute involving payment of condominium association dues. This wrongful conduct is unfair or deceptive within the meaning of the statute." The Court also determined that "[d]efendants' acts ... were in or affecting commerce" because "[w]ithholding money from an insurance carrier's settlement payment in order to force the rightful recipient of those funds to resolve other, unrelated business disputes is conduct 'in or affecting commerce' under Chapter 75."

And, finally, the Court found no error in the \$27,000 fee the trial court awarded to Faucette's attorney. The relevant statute, N.C.G.S. § 75-16.1(1), "employs a two-pronged standard of review in considering a trial court's award of fees.... First, we determine whether any competent evidence supports the trial court's findings of fact and whether these findings support the court's conclusions of law.... Second, we review the trial court's fee award for abuse of discretion," and an abuse of discretion only occurs when the award is "manifestly

unsupported by reason or wholly arbitrary.” In this case, because defendants made “no effort ... to *unconditionally* pay the \$5,000 until years after the litigation began,” the evidence supported the trial court’s conclusion that their refusal to pay was unwarranted.

Since it was also “willful,” having been “done voluntarily and intentionally with the view to doing injury to another,” the Court affirmed the attorney’s fee awarded by the trial court. And, because *Willen v. Hewson*, 174 N.C. App. 714 (2005), held that if “plaintiffs were entitled to attorneys’ fees for hours expended at the trial level, plaintiffs are entitled to attorneys’ fees on appeal,” the Court remanded the case to the trial court to determine the number of hours Faucette’s attorney spent on appeal and “entry of an appropriate attorneys’ fee award” to him.

Service of Process On Secretary of State Found Effective

Electrical contractor Doug Besaw Enterprises was sued for breach of contract and unjust enrichment by Builders Mutual after failing to pay the premiums it owed for workers’ compensation insurance coverage. Builders Mutual attempted to serve Besaw by certified mail addressed to its registered agent, but because the registered address could not receive mail, the summons and complaint were returned undelivered.

Four months later, Builders Mutual sent an alias and pluries summons to the North Carolina Secretary of State, whose office forwarded it to Besaw’s registered office pursuant to N.C.G.S. § 55D-33. Later, after the summons and complaint were again returned undelivered, Builders Mutual moved for and obtained an entry of default and default judgment and had a writ of execution issued to freeze the funds in Besaw’s bank account. Besaw subsequently moved to set aside the default judgment and Builders Mutual filed a motion that requested release of the funds in Besaw’s bank account. When the trial court

denied Besaw’s motion and granted Builders Mutual’s, Besaw appealed.

On July 21, in *Builders Mutual Insurance Company v. Doug Besaw Enterprises, Inc.*, the Court of Appeals found no merit in Besaw’s argument that it was error for the trial court to deny its motion to set aside Builders Mutual’s default judgment, as “[a] default judgment may be set aside under Rule 60(b) only upon a showing that: (1) extraordinary circumstances were responsible for the failure to appear, and (2) justice demands that relief.” Since the decision to grant “exceptional relief” is within the trial court’s discretion, the Court found that it would not be proper for it to “substitute what it consider[s] to be its own better judgment for a discretionary ruling of a trial court.... [It] may not overturn the judge’s ruling unless it was manifestly unsupported by reason.”

As for Besaw’s argument that its motion to set aside the default judgment should have been granted because Builders Mutual “failed to exercise due diligence” in attempting to serve the summons, which “lay dormant” until the alias and pluries summons was issued, the Court found that while Rule 4(d)(2) only authorizes issuance of an alias or pluries summons “within 90 days after the date of issue of the last preceding summons” and Builders Mutual waited more than 90 days before it issued its alias and pluries summons and served it on the Secretary of State, doing so was authorized by Rule 4(e), which provides that if an alias or pluries summons is issued after 90 days, “the action shall be deemed to have commenced on the date of such issuance.” Therefore, Besaw’s contention that the alias and pluries summons issued by Builders Mutual violated Rule 4 was without merit.

Nor was the Court persuaded by Besaw’s alternative argument that the Secretary of State’s “independent error in mailing the lawsuit documents to the wrong address invalidated the attempted service of process.” To the contrary,

said the Court, N.C.G.S. § 55D-33 provides that when suit papers are served on the Secretary of State, they are to be mailed to the named defendant “at its principal office or, if there is no mailing address for the principal office on file, to ... its registered office.” Because Besaw failed to register the address of its principal office, the Secretary of State was authorized by the statute to mail the alias and pluries summons to the address that Besaw *did* register, and Builders Mutual’s service of process was, “for all intents and purposes, effective ‘from and after the date of ... service on the Secretary of State.’”

While Besaw made the additional argument that the trial court’s “flexible” interpretation of N.C.G.S. § 55D-33 violated its “procedural due process rights,” it admitted that it did not raise that issue before the trial court. Because the Supreme Court held in *State v. Hunter*, 305 N.C. 106 (1982), that “a constitutional question which is not raised and passed upon in the trial court will not ordinarily be considered on appeal,” the Court found no merit in Besaw’s constitutional argument and affirmed the trial court’s order denying its motion to set aside Builders Mutual’s default judgment.

Additional Opinions

On July 21, in *Davis v. Williams*, a declaratory judgment action in which six members of New Zion Baptist Church alleged that their pastor, Henry Williams, Jr., violated the church’s bylaws while conducting a vote to amend them, converted church funds for personal use, and embezzled from the church, the Court of Appeals held that while the trial court properly denied defendants’ Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction over the bylaws claim, it erred when it denied their motion to dismiss the conversion and embezzlement claims. While the First Amendment prohibits courts from “becoming entangled in ecclesiastical matters ..., not every dispute involving church property implicates ecclesiastical matters.” The Court found that

since the claim that Williams violated the church’s bylaws “in no way implicates an impermissible analysis by the court based on religious doctrine or practice,” it could be resolved by applying “neutral principles of law.” However, the conversion and embezzlement claims, like similar claims in *Harris v. Matthews*, 361 N.C. 265 (2007), would require the court to examine the church’s view of the role of the pastor and church management, and doing so, the Supreme Court held in *Harris*, was “no different than asking a court to determine whether a particular church’s grounds for membership are spiritually or doctrinally correct or whether a church’s charitable pursuits accord with the congregation’s beliefs. None of these issues can be addressed using neutral principles of law.” Therefore, the trial court erred when it denied Williams’ motion to dismiss plaintiffs’ conversion and embezzlement claims.

On July 7, in *John Doe 200 v. Diocese of Raleigh*, a personal injury action brought against a Catholic priest, the Diocese of Raleigh, and its bishop, involving allegations of assault and battery and claims of negligence, negligent infliction of emotional distress, and vicarious liability, the trial court dismissed the vicarious liability claim and so much of plaintiff’s negligence claim as was premised on the Diocese’s alleged failure to educate him about the proper boundaries concerning contact between priests and parishioners, but declined to dismiss the remaining claims against the Diocesan defendants, the Court of Appeals found, as it did in *Davis v. Williams*, that the Supreme Court held in *Harris v. Matthews*, 361 N.C. 265 (2007), that the dispositive question in determining whether it is constitutional for the court system to adjudicate claims involving religious entities “is whether resolution of the legal claim[s] requires the court to interpret or weigh church doctrine.” Because the negligent supervision claim in the present case can be resolved “without excessively entangling a civil court in the examination and interpretation of church doctrine and practice” through the

application of “neutral principles of tort law,” the Court concluded that there was no error in the trial court’s denial of the Diocesan defendants’ motion to dismiss it. At the same time, the Court found that the trial court erred when it failed to dismiss the claim that the Diocesan defendants negligently failed to compel the defendant priest to undergo sexually transmitted disease testing because that claim was “*premised* on the tenets of the Catholic church – namely, the degree of control existing in the relationship between a bishop and a priest ... and cannot be adjudicated without entangling a secular court in ecclesiastical matters.”

On July 21, in *House of Raeford Farms, Inc. v. North Carolina Department of Environment and Natural Resources*, a proceeding in which the Department of Environment and Natural Resources (“DENR”) found that the chicken processing facility operated by House of Raeford Farms in Duplin County caused waste to be discharged into the waters of an enjoining creek, thereby violating N.C.G.S. § 143-215.1(a)(6) and the dissolved oxygen water quality standards of 15A N.C.A.C. 2B.0211(3)(c), the Court of Appeals found no merit in House of Raeford’s objection to the fact that DENR based its conclusion that House of Raeford dumped sludge into the creek on “wholly circumstantial evidence,” as “[i]t has long been the law in our state that circumstantial

evidence may be used, and is highly satisfactory in matter of gravest moment.” At the same time, however, the Court found that it was error for DENR to assess what it found to be duplicative penalties for the same act, so it remanded the case to the trial court to make specific findings with regard to the eight statutory factors required by N.C.G.S. § 143B-282.1(b) when determining the penalty to be imposed for violating N.C.G.S. § 143-215.1(a)(6).

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

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