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CIVIL LIABILITY

Sudden Emergency Doctrine Inapplicable to Medical Malpractice

Lakisha Wiggins was admitted to Chowan Hospital for the birth of her son, Roy. Discovery of an umbilical cord prolapse during delivery led to an emergency Cesarean section. Although he was promptly transferred to The Children's Hospital of the King's Daughters in Norfolk, Virginia, Roy was left with permanent cognitive impairments and loss of motor control.

Wiggins and Roy's guardian ad litem sued the hospital and attending physician for malpractice, alleging that his injury was caused by their failure to more timely perform the C-section. At trial, they offered evidence that the hospital's nurses were negligent in failing to examine Wiggins before they administered a delivery-inducing drug, failing to give her a second drug after the umbilical cord prolapse was discovered, and failing to expeditiously move her to the operating room for the emergency C-section.

The trial judge included in his charge to the jury the pattern instruction for the standard of care applicable to healthcare professionals and, at defendants' request and over plaintiffs' objection, also gave the pattern instruction for the doctrine of sudden emergency. After the jury returned a verdict for the defendants, plaintiffs gave notice of appeal.

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On July 1, in *Wiggins v. East Carolina Health-Chowan, Inc.*, the Court of Appeals found that the question of whether the sudden emergency doctrine applies in medical negligence cases was an issue of first impression. Plaintiffs argued, and the Court agreed, that it did not apply because “medical emergencies are already contemplated and built-in to the standard of care for medical professionals,” so the charge given by the trial court was misleading to the jury. The Court observed that “the standard of care for healthcare professionals, both at common law and ... in section 90-21.12, is designed to accommodate the factual exigencies of any given case, including those that may be characterized as medical emergencies” and, therefore, the instruction on sudden emergency was “unnecessary and inapplicable.” Further, it continued, even if it had been applicable, “the trial court’s specific instructions here would still require a new trial” because the jury was directed to assess defendants’ actions in light of “what a reasonable *person* would do when faced with the same emergency,” rather than what a reasonable *healthcare professional* would do. Therefore, the Court found “the trial court’s language ... far too general to be considered a sound application of the law.... Healthcare professionals are held to a higher standard of care than laypersons” and “must uphold a level of care in accordance with ‘the standards of practice among members of the same health care profession with similar training and experience.’” So, the Court vacated the trial court’s judgment and remanded the case for a new trial.

Service of Process By Publication Found Invalid

Robert and Jonathan Dowd loaned \$150,000 to Charles Johnson, who signed a promissory note secured by a deed of trust on property located in Moore County. After making several payments, he defaulted on the loan and the Dowds initiated foreclosure proceedings. The trial court entered an order authorizing the foreclosure and Johnson appealed, but the Court of Appeals affirmed the

trial court’s order in an unpublished opinion, *In re Foreclosure of Johnson*, __ N.C. App. __ (2012).

The Dowds then sued Johnson for the amount still owed on the promissory note. The first summons they issued listed his address as 3574 Turnberry Circle, Fayetteville. However, it was returned unserved with a notation from the sheriff’s office that Johnson “no longer lives there.” Johnson’s attorney subsequently emailed the Dowds’ attorney with his new mailing address, 2201 Skyview Drive, Fayetteville, and when they had a new summons issued a month later, it contained the Skyview Drive address, but they never attempted to serve him there.

Instead, they had a Notice of Service of Process by Publication printed in *The Fayetteville Observer* once a week for three weeks per Rule 4(j)(1) and then filed a motion for default judgment with an accompanying affidavit attesting to their service of process on Johnson by publication.

The trial court found that Johnson was in default and awarded damages and attorneys’ fees. He then moved for a temporary restraining order and requested that the Court of Appeals set aside the default judgment under Rule 60(b), contending that it was void because he was not properly served and the trial court lacked personal jurisdiction over him. Plaintiffs responded with a Rule 11 motion for sanctions.

The trial court denied Johnson’s Rule 60(b) motion, granted plaintiffs’ motion for sanctions, and ordered the clerk of court to only accept an appeal from Johnson if he first posted an \$88,000 appeal bond. When he attempted to file his notice of appeal without the specified bond, the clerk’s office marked out the file stamp and refused to accept it. However, the Court of Appeals granted certiorari to review the trial court order denying Johnson’s motion to set aside the default judgment and granting plaintiffs’ motion for sanctions.

On July 15, in *Dowd v. Johnson*, the Court of Appeals agreed with Johnson that the trial court

erred in denying Johnson's motion to set aside plaintiffs' default judgment, as their service of process by publication was improper. Quoting *Jones v. Wallis*, 211 N.C. App. 353 (2011), it held that "[a] defect in service of process by publication is jurisdictional, rendering any judgment or order obtained thereby void." Therefore, the trial court abused its discretion when it failed to grant Johnson's motion to set aside the entry of default.

The Court explained that service by publication was not appropriate in this case because, while Rule 4(j)(1) "permits service ... by publication on a party that cannot, through due diligence, be otherwise served," plaintiffs failed to establish that they exercised "due diligence" before attempting to serve Johnson in that manner. "Due diligence dictates that plaintiff use all resources reasonably available to [him] in attempting to locate defendants," but in the present case, there was "no indication ... that Plaintiffs ever attempted service on Defendant at his Skyview Drive address, despite having knowledge of said address." Quoting *Thomas v. Thomas*, 43 N.C. App. 638 (1979), the Court held that "service of process by publication is void ... if the information required for personal service is within the plaintiff's actual knowledge or with due diligence could be ascertained."

It also found no merit in plaintiffs' argument that Johnson submitted to the trial court's jurisdiction when he filed motions for a temporary restraining order and to set aside the default judgment. While it is true that if a defendant makes a general appearance, he "waives any defects in the jurisdiction of the court for want of valid summons or of proper service," Johnson did not file the two motions in question until after entry of a judgment against him and "actions subsequent to that order could not retroactively supply jurisdiction." Because plaintiffs' service by publication was invalid, the trial court did not have personal jurisdiction over Johnson, its default judgment was void, and it

was error for the court to deny Johnson's motion to set aside the default judgment.

Standard of Care Not Proven In Professional Negligence Case

Catawba Country Club hired Crawford Sprinkler Company to install a sprinkler system on its grounds. Although the system Crawford designed called for the use of eight-inch ductile iron pipes, it installed six-inch PVC piping instead, even though iron pipes will withstand greater water pressures than PVC pipes.

Soon after the sprinkler system was installed in 2000, the club began having water pressure problems. Between then and July 2009, the PVC pipes burst six times due to excess pressure. On one occasion, Unifour Fire & Safety repaired the resulting leak by replacing a three-foot section of PVC pipe with ductile iron.

The sixth break, which occurred in July 2009, caused flooding in the clubhouse. After the club's insurer, Frankenmuth Insurance, paid for the resulting damage, it filed suit as the club's subrogee against the City of Hickory and Unifour, alleging negligent care of the municipal water system by the City in allowing unreasonably high water pressure to build up and negligence by Unifour in failing to recommend removal of the PVC piping and its replacement with iron pipes. The defendants answered plaintiffs' complaint and then moved for summary judgment. The trial court granted their motion and Frankenmuth appealed.

On July 15, in *Frankenmuth Insurance v. City of Hickory*, the Court of Appeals affirmed the trial court's order granting summary judgment for the City. While it agreed that "summary judgment is rarely an appropriate remedy in cases of negligence or contributory negligence," it found that summary judgment *is* appropriate where "the forecast of evidence fails to show negligence on defendant's part, or establishes plaintiff's contributory negligence as a matter of law."

Applying that principle to the present case, the Court found that plaintiff's lawsuit, although denominated as one for negligence, was "actually one for 'professional negligence' because plaintiff is alleging negligent performance by defendant in its professional capacity as the operator of a municipal water system." And, in professional negligence actions, the plaintiff must establish not only a failure on the defendant's part to "conform to a certain standard of conduct," it must also establish the applicable standard of care through expert testimony.

The Court agreed that there is a "common knowledge" exception to the general requirement that the standard of care be established by expert testimony. But, because that exception only applies when "the service rendered does not involve esoteric knowledge or uncertainty that calls for the professional's judgment," it did not apply in the present case because the City's alleged negligence involved its failure to (1) ensure that its water pressure did not exceed reasonable levels, (2) install a "loop" system to prevent excessive pressures at the terminal ends of the water line, and (3) install, or recommend that the club install, a pressure-relieving device. Because such claims "could not be properly evaluated with the 'common knowledge and experience' of the jury," "plaintiff bore the burden of producing expert testimony to establish the proper standard of care to which defendant should have been held," and it failed to meet that burden. Therefore, plaintiff "failed to establish a prima facie claim for professional negligence" and the trial court properly granted the City's motion for summary judgment.

Professional Malpractice Policy Affords Primary Coverage

Dr. Michael Cinoman was sued for malpractice by the guardian ad litem for Armani Wakefall as the result of allegedly negligent treatment provided while he served as a temporary

attending physician in the Pediatric Intensive Care Unit at UNC Hospital. Although Dr. Cinamon was insured under a professional liability policy issued by Medical Mutual Insurance Company ("MMIC"), a question arose as to whether he was also entitled to coverage under the University of North Carolina Liability Insurance Trust Fund ("UNC-LITF"), which provides coverage for claims against employees of the university and its hospital. UNC-LITF maintained that Dr. Cinamon was not entitled to coverage because he was not a full-time employee of UNC at the time.

In an attempt to resolve the coverage issue, Dr. Cinoman and MMIC filed a declaratory judgment action against UNC and UNC-LITF. After both sides moved for summary judgment, the trial court ruled for the defendants, but in an unpublished opinion issued in 2011, *Cinoman v. Univ. of N.C.*, 216 N.C. App. 585 (2011) ("*Cinoman I*"), the Court of Appeals concluded that there were questions of material fact that rendered summary judgment for either party inappropriate, so it remanded the case for trial.

In February 2013, UNC and UNC-LITF moved to stay further proceedings in the DJ action, pending final resolution of the underlying malpractice claim. The trial court granted the stay because an "actual controversy" between adverse parties is a jurisdictional prerequisite to a declaratory judgment and it found that "while an actual controversy exists as to the UNC-LITF's duty to defend, no such controversy exists as to the UNC-LITF's duty to indemnify until the underlying malpractice action is finally resolved." When plaintiffs appealed the trial court's order, the defendants moved to dismiss the appeal on grounds that it was interlocutory.

On March 4, the Court of Appeals vacated the order staying the DJ action in an unpublished opinion, *Cinoman v. Univ. of N.C.*, ___ N.C. App. ___ (2014) ("*Cinoman II*"). However, defendants' Petition for Rehearing was granted by the Court, and on July 1 it issued a revised opinion,

Cinoman v. Univ. of N.C., ___ N.C. App. ___ (2014) (“*Cinoman III*”), in which it first addressed the interlocutory nature of the order and the question of whether it was immediately appealable. The Court found that it *was* because “the issue of whether an insurer has a duty to defend ... ‘affects a substantial right that might be lost absent immediate appeal.’”

It then turned to the merits and the question of whether the trial court erred in determining that there would be no “actual controversy” as to UNC-LITF’s duty to indemnify until after the underlying malpractice action was finally resolved. And, when it did, the Court agreed with plaintiffs that “an actual controversy exists where an insurer seeks a determination that primary coverage is not provided under its policy and is instead provided under [other] policies issued by other insurers.”

The Court explained that “[w]hen more than one insurance policy affords coverage for a loss, the ‘other insurance’ clauses in the competing policies must be examined to determine which ... provides primary coverage and which ... provides excess coverage.” After explaining the difference between “excess” and “pro rata” other insurance clauses, it examined the wording of the other insurance clause in the UNC-LITF policy and found that it was *not* an excess clause, as alleged by the UNC defendants, but a pro rata clause. That being so, the UNC-LITF policy also provided Dr. Cinoman with primary coverage, so an “actual controversy” existed as to whether UNC-LITF had a duty to indemnify him. Therefore, it held that the trial court erred in granting UNC-LITF’s motion to stay plaintiffs’ declaratory judgment action.

Award of Attorney’s Fee and Costs Affirmed

Terri Robertson and Mary Daniel claimed to have been injured while working at Brunswick County Hospital when toxic liquids and gases were released from a sterilization machine.

They each settled their workers’ compensation claim for several hundred thousand dollars and then sought to bring a tort claim against the manufacturer of the sterilization machine and the company that produced the seals used in it. After two attorneys declined to take the case, they approached Raleigh attorney Henry Temple, who filed suit on their behalf in Brunswick County Superior Court without entering into a written contract of representation with them.

The lawsuit he filed was designated “exceptional” under General Rule of Practice 2.1 and assigned to Judge Jack Hooks, who ruled that plaintiffs’ product liability claims were barred by the statute of repose. Temple then shifted the theory of his case to defendants’ “inadequate maintenance” of the sterilization machine. Despite research, including two mock juries, indicating that they would likely lose the case because of credibility problems and other issues, Temple was able to reach an agreement with the defendants to settle for an amount that hired consultants considered “surprisingly high.”

At that point, a dispute arose between Temple and his clients over his fee and litigation costs. After he filed a motion to intervene in their lawsuit, they agreed to the settlement he reached with the defendants, fired him, hired substitute counsel, and moved to dismiss his motion to intervene. Judge Hooks denied the motion to dismiss, granted Temple’s motion to intervene, conducted a bench trial to resolve the fee issue, ordered reimbursement of a portion of Temple’s costs, and awarded an attorney’s fee equal to one-third of plaintiffs’ net recovery after the workers’ compensation lien and Temple’s costs were reimbursed. Plaintiffs appealed.

On July 1, in *Robertson v. Steris Corporation*, the Court of Appeals first addressed plaintiffs’ argument that Temple was obligated to bring a separate action to recover his fee and costs because Judge Hooks only had subject matter jurisdiction over the underlying lawsuit. The Court did not agree. Citing a “remarkably

similar case,” *Guess v. Parrott*, 160 N.C. App. 325 (2003), it held that “an attorney who has provided legal service pursuant to a contingency fee agreement and then [been] fired has a viable claim in ... *quantum meruit* ... and the filing of a motion in the underlying action ... was a proper procedure for asserting such a claim.”

The Court also affirmed the attorney’s fee set by Judge Hooks because “[t]he apportionment of attorneys’ fees ... not regulated by statute ... is ... within the province of the trial court ... [and] committed to [its] sound discretion....” It found the trial judge to be “in the best position to make the determination of ability and skill of the parties, as well as to the difficulty of the case.” Therefore, it overruled plaintiffs’ objection to Judge Hooks’ assumption of jurisdiction over the setting of Temple’s fee.

The Court also disagreed with plaintiffs’ argument that awarding an attorney’s fee to Temple was “contrary to public policy” because they did not sign a fee contract with him and Rule of Professional Conduct 1.5(c) provides that contingent fee agreements “shall be in writing signed by the client.” The Court found that “the plain language of the Rules makes clear that a ‘[v]iolation of a Rule should not ... create any presumption ... that a legal duty has been breached ...[, nor does it] necessarily warrant any other nondisciplinary remedy.’” The Court held that an attorney can recover a “reasonable fee,” even in the absence of a written or oral fee agreement, so it affirmed the trial court’s order setting Temple’s fee.

Untimely Appeal Dismissed Under Rule of Appellate Procedure 3(c)(1)

New Milford Savings Bank obtained a judgment against James Creagh in Connecticut. Claiming to be the bank’s successor in interest, Victor Magazian filed a “Notice of Filing of Foreign Judgment” in Wake County Superior Court. Ten years later, he filed a “Complaint to Renew Judgment,” seeking to “renew” the original

Wake County judgment under N.C.G.S. § 1-47(1). After both parties moved for summary judgment, the trial court granted Creagh’s motion, denied Magazian’s, and dismissed the claim in an order entered on September 20, 2013. Magazian, who received actual notice of the trial court’s order by email on September 25, 2013, appealed thirty days later, on October 25, 2013.

On July 1, in *Magazian v. Creagh*, the Court of Appeals held that Magazian’s appeal was “not timely and this court lacks jurisdiction.” In reaching that conclusion, it turned first to Rule of Civil Procedure 58 and Rule of Appellate Procedure 3(c)(1), which provide that a notice of appeal must be filed “within thirty days after entry of the judgment if the party has been served with ... the judgment within ... three day[s]” of its entry. It then looked to Rule of Civil Procedure 6(a), which provides that the three-day time period for serving a court order excludes weekends. Because the judgment in question was entered on Friday, September 20, 2013, and Magazian admitted that he received actual notice of its entry on the following Wednesday, it was received “within three days of [its] entry.” Therefore, Magazian had thirty days from September 20, 2013, or until October 20, 2013, to file his appeal. But, he did not file it until five days after that. Therefore, the Court held, it was “not timely and this court lacks jurisdiction.” As a consequence, it dismissed Magazian’s appeal.

Failure to Object to Jury Charge Precludes Challenge On Appeal

Waters Construction Company, which owned a tract of land in Mecklenburg County known as Lost Tree, hired Geoscience Group to prepare plans for and obtain approval of the tract’s development. After a dispute arose over its final invoice, Geoscience sued Waters for breach of contract, implied contract, and unjust enrichment.

At trial, Geoscience offered evidence of the value of what it argued were additional services not

covered by the parties' contract and sought payment under the doctrine of *quantum meruit*. Waters objected, claiming that *quantum meruit* does not apply when the parties have entered into an express contract, but the trial court disagreed. After the jury returned a verdict for Geoscience and Waters' motion for judgment notwithstanding the verdict was denied, Waters appealed.

On July 1, in *Geoscience Group, Inc. v. Waters Construction Company, Inc.*, the Court of Appeals first addressed Waters' argument that the trial court committed reversible error when it instructed the jury on *quantum meruit* and allowed Geoscience to obtain an additional recovery beyond that contemplated in the parties' written contract. It found that Waters failed to properly preserve its challenge to the trial court's charge because Rule of Appellate Procedure 10(a)(1) provides that, "to preserve an issue for appellate review, a party must have presented to the trial court a timely ... objection, ... stating the specific grounds for the ruling ... desired," and Waters made no such objection. Since Rule of Appellate Procedure 10(a)(2) provides that "a party waives appellate review of any instructions to which no objection is made at trial," Waters' failure to clearly state its objection to the trial court's charge was grounds for dismissing its appeal.

The Court also found no merit in Waters' alternative argument that the trial court "made a variety of other errors in its instructions to the jury." But, because Waters did not object when the instructions were given and failed to make a request for special instructions, Waters' belated objection on appeal was "invalid" under *Hendrix v. Casualty Co.*, 44 N.C. App. 464 (1980), in which it was held that "[a] party who is dissatisfied ... should raise the question at once, by objecting.... If a party ... does not object at the time ..., he cannot make the objection later on appeal." Therefore, having found no reversible error, the Court affirmed the jury's verdict in Geoscience's favor.

Additional Opinions

On July 1, in *Cox v. Town of Oriental*, a declaratory judgment action brought by a town resident, David Cox, to appeal an ordinance that closed a street located near his property, the Court of Appeals affirmed the trial court's order, which found that he lacked standing. In reaching that result, the Court addressed the propriety of Cox's reply brief and found that Rule of Appellate Procedure 28(h) provides that "[a]ny reply brief ... shall be limited to a concise rebuttal of arguments set out in the appellee's brief and *shall not reiterate arguments set forth in the appellant's principal brief.*" Because a reply brief "does not serve as a way to correct deficiencies," nor to "merely expand upon [an] alleged error" raised in a party's principal brief and Cox's brief violated the rule in both respects, the Court "decline[d] to consider" it.

On July 15, in *Lewis v. Lewis*, a breach of contract action brought by one of Floyd Lewis' nephews against another, the Court of Appeals affirmed a trial court order granting summary judgment for the defendant nephew on grounds that their alleged oral contract lacked consideration. While plaintiff contended that he and the defendant agreed to split their uncle's estate equally in exchange for plaintiff's promise to act as the uncle's power of attorney, he testified by deposition that he would have done so regardless of their agreement. Quoting *Allen v. Seay*, 248 N.C. 321 (1958), the Court held that "services performed by one member of the family for another ... are presumed to have been rendered in obedience to a moral obligation and without expectation of compensation," and while that presumption "can be rebutted by evidence that the party rendering the services reasonably expected compensation," the evidence in the present case was to the contrary. The Court also determined that there was a "separate and independent basis supporting the trial court's entry of summary judgment for the defendant." Since the estate included both personal and real property, the alleged oral agreement between the

parties was unenforceable because “[i]t is settled law in North Carolina that an oral contract to convey or to devise real property is void by reason of the statute of frauds (G.S. § 22-2) ... [and a]n indivisible oral contract to devise both real and personal property is also void.”

WORKERS’ COMPENSATION

Surveillance Evidence Leads to Termination of Benefits

Deborah Miller, an employee of Mission Hospital, aggravated her pre-existing cervical spondylosis in a work-related injury and underwent a cervical fusion at C3-C4. A disc protrusion was later found at C2-C3, but tests performed by Dr. Stephen David revealed that it did not impinge on her spinal nerves.

The hospital admitted the compensability of Miller’s injury on a Form 60 and paid for epidural injections, physical therapy, heat, ice, and a variety of medications. Following a functional capacity evaluation, she was found to be at maximum medical improvement and told that she could return to full time work with restrictions. However, she reported a worsening of her symptoms a few weeks later. Dr. David, who found his patient “difficult to treat” because she did not have any “significant break-throughs” despite all the treatment he provided, eventually wrote her out of work permanently.

The hospital hired a private investigator, who videotaped Miller engaging in a variety of activities over a number of days. Dr. Dennis White, a pain medicine specialist, found the movements depicted in the surveillance video inconsistent with the symptoms Miller reported when he examined her. Dr. Craig Brigham, an orthopedic surgeon specializing in spine surgery, who found “near full range of motion” and no objective reason why she could not return to full duty work without restriction, testified that the consequences of her work-related injury had resolved and no further treatment was needed.

Dr. Dahari Brooks, another orthopedic specialist, agreed with Dr. Brigham that the movements shown in the surveillance video were inconsistent with the complaints he found in Miller’s medical records. He, too, felt that she was capable of returning to full duty work without restriction and needed no further medical treatment.

Miller requested a hearing, claiming that she was permanently and totally disabled and entitled to additional benefits. The Commission found otherwise. It determined that she had regained the capacity to earn the same wages she was earning at the time of her injury, was not disabled, and did not need ongoing treatment, so it authorized the hospital to stop paying both indemnity and medical compensation. Miller appealed.

On July 1, in *Miller v. Mission Hospital, Inc.*, the Court of Appeals affirmed the Commission’s denial of her claim for additional benefits. While one of her arguments on appeal was that the Commission erred in failing to find that she had herniated a disc in her cervical spine, the Court found that the forms filed by the parties indicated that the issue in dispute was the extent of Miller’s disability, not the nature of her injury. As the hospital made no attempt to void its Form 60, on which it not only admitted compensability, but described her injury as a “C2-3 disc herniation,” the Court concluded that “plaintiff was not prejudiced by the Commission’s characterization of her admittedly compensable injury as an aggravation of her pre-existing condition rather than an aggravation of her condition and ... a separate disc herniation.”

Miller also alleged that the Commission erred when it concluded that the “consequences of Plaintiff’s work-related injury have resolved and ... there is no need for ongoing medical treatment.” Again, the Court disagreed. While it acknowledged that there is a “*Parsons* presumption” that once an injury has been found compensable it is presumed that “additional

medical treatment is directly related to the compensable injury,” the caveat to that rule is that if the defense rebuts the presumption, “the burden of proof shifts back to the plaintiff.” Because, in the present case, the testimony of Drs. White, Brigham, and Brooks fully supported the Commission’s finding that there was “no objective basis for Plaintiff’s complaints of ongoing, disabling ... pain” and her complaints were “belied by the video surveillance evidence,” the Court found that the evidence and the Commission’s findings supported its conclusion that the consequences of Miller’s work-related injury had resolved and she needed no further medical treatment.

As for Miller’s final argument that the Commission erred when it allowed the hospital to cease paying indemnity benefits, the Court found the Commission’s conclusion that she was “capable of returning to full duty work without restriction” fully supported by not only the testimony of Drs. Brigham and Brooks, but the holding in *Sims v. Charmes/Arby’s Roast Beef*, 142 N.C. App. 154 (2001) that a Form 60 admission of compensability “d[oes] not entitle plaintiff to a presumption of continuing temporary disability” and the four-prong test for proving disability established in *Russell v. Lowe’s Product Distribution*. Therefore, it held that there was no error in the Commission’s determination that Miller was no longer disabled and affirmed the denial of her claim for additional benefits.

Court Splits Over Commission’s Obligation to Resolve Issues In Controversy

Carl Poole injured his lower back moving a table for his employer, the University of North Carolina at Chapel Hill, in April 1992. UNC voluntarily paid temporary total disability, medical, vocational rehabilitation, and other benefits pursuant to a Form 21 agreement until July 1998, when its Form 24 application to suspend payment of compensation was granted by (then) Special Deputy Commissioner James

Gillen “until plaintiff makes a proper showing that he is willing to comply with reasonable rehabilitation efforts.”

In May 2007, Poole requested a hearing, alleging a change in condition and ongoing disability. It was held by Deputy Commissioner Kim Ledford, who found that he “essentially abandoned and failed to prosecute his claim” in the “almost nine years” between the suspension of his weekly benefits and his hearing request, a delay she found “unreasonable.” Because in the interim his “physical condition ... changed due primarily to health issues unrelated to his compensable injury,” she concluded that UNC “has been prejudiced by Plaintiff’s failure to pursue this matter in a timely manner,” so she dismissed his claim for failure to prosecute under Industrial Commission Rule 613.

However, the Full Commission vacated her order and remanded the case for another evidentiary hearing, which was held by Deputy Commissioner Gillen. He transmitted the additional evidence he received to the Full Commission, which ordered UNC to reinstate TTD. UNC appealed.

On July 15, in *Poole v. University of North Carolina, Chapel Hill*, a 2-to-1 majority of the Court of Appeals affirmed the Full Commission’s award of additional TTD benefits. In doing so, it rejected UNC’s argument that the Commission applied an incorrect legal standard “by allowing [p]laintiff to merely assert a present willingness to comply with vocational rehabilitation” because, under N.C.G.S. § 97-25, “a claimant who refuses to cooperate with a rehabilitative procedure is only barred from receiving further compensation ‘until such refusal ceases.’” While *Powe v. Centerpoint Human Services*, 215 N.C. App. 395 (2011) held that “declarations of a willingness to comply [with vocational rehabilitation] are not necessarily sufficient if deemed not credible by the Commission,” in the present case, the Commission specifically found that Poole *was* credible when he testified that, if

employment was available within his restrictions, he would cooperate in pursuing it. Therefore, since competent evidence supported the findings in question, they were binding on the Court.

The Court was also not persuaded by UNC's argument that the Commission erred when it held that two of Poole's physicians, Drs. Clarke and Tobin, were "authorized treating physicians." It found that "UNC acknowledged and accepted plaintiff's change in medical providers to Dr. Clarke, even though Dr. Clarke was not an authorized medical provider," when it approved Poole's request for pain management treatment. And, since Dr. Tobin "succeeded Dr. Clarke as plaintiff's primary physician," he, too, was an "authorized treating physician."

Injury From Unexplained Fall Found Compensable

Norlinda Philbeck, a 67-year-old field interviewer in social sciences research for the University of Michigan, whose job duties required her to travel from her home in North Carolina to Columbia, Maryland to conduct interviews for a university study, fell and fractured her left arm. She advised both the medical personnel by whom she was treated and the deputy commissioner before whom her claim was heard that "I don't know why I fell.... I might have stumbled. I don't know what happened.... Seconds after I hit the ground I think that I – I was kind of dazed."

One of Philbeck's treating physicians, Dr. Michael Carlos, noted in his report that a "vasovagal mechanism" was the "most likely reason" for her loss of consciousness. Another, Dr. Neveen Habashi, attributed her fall to heat exhaustion, since she had "no underlying medical problems that would predispose her" to falling and passing out. However, Dr. Habashi was unable to state that opinion with a reasonable degree of medical certainty.

After Philbeck's fracture was surgically repaired, she was released to return to work, initially with

a one-pound lifting restriction on the use of her injured arm, then with a 20 pound restriction, and finally to full work duties without restriction.

The University and its insurer denied Philbeck's claim for benefits on grounds that her disability was the result of an idiopathic condition and Deputy Commissioner Phillip Holmes agreed. He found that her condition was "due to factors that were not job related." However, the Full Commission, with one commissioner dissenting, reversed and awarded temporary total disability benefits. Defendants appealed.

On July 15, in *Philbeck v. University of Michigan*, the Court of Appeals affirmed. Applying the "doctrine of 'unexplained falls,'" it held that "if the cause or origin of a fall is unknown or undisclosed by the evidence, ... an inference arises that the fall arose out of the employment." The Court found that such an inference was appropriate because, when the cause of a fall is unexplained, "[t]here is no finding that any force or condition independent of the employment caused or contributed to the accident." Therefore, "the only active force involved [was] the employee's exertions in the performance of his duties."

The Court was not persuaded by defendants' argument that Philbeck's fall was caused by an idiopathic condition not associated with a risk attributable to her employment and, therefore, was noncompensable, as in *Hollar v. Montclair Furniture Co.*, 48 N.C. App. 489 (1980). Instead, it found *Hollar* distinguishable because the injured worker's fall in that case was *not* unexplained. To the contrary, it was "uncontroverted" that she fell because she fainted, whereas "[h]ere, conversely, the Commission found that the medical evidence did not sufficiently establish the cause of Plaintiff's fall." Since that finding was supported by Philbeck's testimony that she "does not know what caused her to fall," it was binding on appeal, and it, in turn, supported the Commission's legal conclusion that her fall was "unexplained."

The Court also affirmed the Commission's award of TTD benefits from December 12, 2011, when Philbeck was released to return to work without restrictions, through February 2, 2012, when she refused suitable employment offered by the University. In doing so, it cited *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593 (1982), in which the Supreme Court identified the three elements necessary to establish disability, and *Russell v. Lowes Product Distribution*, 108 N.C. App. 762 (1993), in which it outlined four methods by which an injured worker may prove the first two of the *Hilliard* elements, and found that, in the present case, "once Plaintiff was released to return to work, the University ... did not have a job available for her and ... [she] 'engaged in an unsuccessful, reasonable job search ..., but received no job offers.'" Because that finding satisfied the second prong of the *Russell* test for disability, the Court affirmed the Full Commission's award of additional TTD benefits.

Truck Driver's Stroke Found Noncompensable

Jimmy Hill, a 59 year-old courier for Federal Express Corporation, began experiencing impaired vision and significant difficulties with motor control while operating his delivery truck shortly after 11:00 am on December 23, 2011. After parking the truck at a nearby fire station, he was taken by ambulance to Moses Cone Hospital, diagnosed with a stroke caused by a carotid dissection, treated, underwent rehabilitative therapy, and made a good recovery. However, as of the time of the hearing held after he filed a claim for workers' compensation benefits, he was still experiencing cognitive and physical effects from his stroke and had not yet returned to work.

After Hill's claim was denied by Federal Express, it was heard by a deputy commissioner and then appealed to the Full Commission, which issued an Opinion and Award on August 30, 2013, concluding that his job duties as a courier "were not a significant factor in his development of a

carotid dissection and did not cause the carotid dissection that led to his stroke." Hill gave notice of appeal.

On July 1, in *Hill v. Federal Express Corporation*, the Court of Appeals affirmed the denial of his claim in an opinion that reiterated several well-known principles: (1) appellate review of an Industrial Commission order is "limited to reviewing whether any competent evidence supports the Commission's findings of fact and whether the findings ... support the Commission's conclusions of law"; (2) the Commission has "sole responsibility for evaluating the weight and credibility to be given to the record evidence"; and (3) the "claimant ... bears the burden of initially proving 'each and every element of compensability.'"

The Court found that the parties to Hill's claim disagreed about whether his employment bore a causal relationship to his carotid dissection, whether there was an "interruption of his normal work routine," and whether there were "unexpected or unusual circumstances" sufficient to establish that he suffered an "injury by accident" on the date in question, so it examined the evidence of record and ultimately concluded that it contained competent evidence supporting the Commission's findings, which in turn supported its conclusion that the claim was non-compensable.

Citing *Southards v. Motor Lines*, 11 N.C. App. 583 (1971) as authority, the Court observed that "an injury is not the result of an 'accident' simply because it occurs during a challenging workday in which the claimant performs his ... duties under more difficult conditions," nor is the "mere fact" that plaintiff was in a hurry sufficient to constitute an injury by accident. After an exhaustive review of both the Commission's findings and the evidence that supported them, the Court found that Hill "experienced stroke symptoms after working only two hours and delivering about 20 packages, a rate of delivery that was no faster than usual," and "failed to

articulate the legal or medical significance of the circumstances he posit[ed] as unusual.”

The Court also found no merit in Hill’s argument that it was error for the Commission to “narrowly construe the North Carolina Workers’ Compensation Act in detriment to the plaintiff” because the Act “should be liberally construed” and “evidence tending to support plaintiff’s claim is to be viewed in the light most favorable to plaintiff.” It found that, in essence, Hill was arguing that “when the Commission resolves contradictions in the evidence or issues of credibility, it must employ the standard applicable to appellate review.” However, he offered no authority in support of that argument and it is inconsistent with the “well-established” principle that “the Commission may accept or reject the testimony and opinions of any witness, even if that testimony is uncontradicted.”

Since “the Commission’s findings of fact were supported by competent evidence and they supported its conclusion that ... plaintiff did not experience an interruption of his work routine,” the Court affirmed the Commission’s Opinion and Award denying Hill’s claim.

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

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