NORTH CAROLINA CIVIL LITIGATION REPORTER

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CIVIL LIABILITY

Medical Malpractice Claim Survives Summary Judgment Motion

Linda Robinson was admitted to Duke Medical Center suffering from irritable bowel syndrome and underwent an abdominal colectomy to remove a portion of her small intestine and reattach it to her rectum using a surgical stapler. The procedure was performed by Dr. Mantyh, Chief of Gastrointestinal and Colorectal Surgery, and Dr. Huang, a general surgery resident. After Robinson experienced unanticipated post-surgical symptoms, it was discovered that her small intestine had been connected to her vagina, rather than her rectum. A second surgical procedure corrected the problem, but a month later, she presented to Dr. Mantyh with new complaints, including difficulty speaking, left-sided weakness, erratic hand movements, and blurred vision. He re-admitted her to the hospital, where she was diagnosed with conversion disorder and later discharged.

On March 10, 2011, Robinson and her husband sued the parties involved in her care at Duke, including the hospital, Dr. Mantyh, and Dr. Huang, relying on the common law doctrine of *res ipsa loquitur*. Defendants' motion for dismissal under Rules 9(j), 12(b)(2), 12(b)(5), 12(b)(6) and 41(b) was denied by Judge Robert Hobgood. The parties then completed discovery,

after which the defendants moved for summary judgment. Their motion was granted by Judge Orlando Hudson and the Robinsons gave notice of appeal to the Court of Appeals.

On August 20, in ***Robinson v. Duke University Health Systems***, the Court of Appeals first took note of the fact that, in denying defendant's motion to dismiss, Judge Hobgood rejected defendants' argument that the Robinsons' Complaint was legally deficient because it failed to contain a Rule 9(j) allegation that an expert witness had been consulted and was willing to testify that the medical care at issue did not comply with the applicable standard of care. Rather, found Judge Hobgood, attaching a patient's small intestine to her vagina instead of to her anus during surgery, thereby injuring her, "raise[s] a presumption of negligence on the part of the Defendants … [and] it requires neither sophistication, training, nor expertise to understand the factual issues raised by the Complaint." Therefore, Judge Hobgood rejected defendants' argument that the doctrine of *res ipsa loquitur* did not apply. That being so, it was error for Judge Hudson to reach the opposite conclusion in his order granting summary judgment, since, as the Court held in ***Adkins v. Stanly County Board of Education***, 203 N.C. App. 642 (2010), "one judge may not reconsider the legal conclusions of another judge."

The Court also took note of the fact that subsection (3) of Rule 9(j) specifically provides an exception to the normal requirement of a Rule 9(j) statement if "[t]he pleading alleges facts establishing negligence under the existing common-law doctrine of *res ipsa loquitur*." And, it held that *res ipsa* applies when "(1) direct proof of the cause of an injury is not available, (2) the instrumentality involved … [was] under the defendant's control, and (3) the injury is of a type that does not ordinarily occur in the absence of some negligent act or omission."

The Court also considered and rejected defendants' argument that application of *res ipsa* should be limited to two types of medical malpractice cases: those in which injuries result from surgical instruments or other foreign objects left in the body after surgery and those in which there is an injury to an area of the body far from and completely unrelated to the zone of surgery. Rather, "our Supreme Court has long held that 'where proper inferences may be drawn by ordinary men from proved facts which give rise to *res ipsa loquitur* …, there should be no reasonable argument against the availability of the doctrine in medical and surgical cases involving negligence.'" And, the Court held that it was appropriately applied in the present case because "it is common knowledge and experience that intestines are meant to connect with the anus, not the vagina, … [and] it requires no expert testimony to understand that feces are not meant to be excreted from the vagina and that such an injury does not ordinarily occur in the absence of a negligent act…." Therefore, it reversed Judge Hudson's order granting summary judgment and remanded the case to the trial court for "further proceedings" against Dr. Mantyh, Dr. Huang and Duke Hospital.

Fourteen-Year-Old Driver Covered by Auto Policy

Fourteen–year-old Ramses Vargas lost control of an automobile owned by his mother, Elizabeth Villafranco, and it overturned, injuring its four passengers. Villafranco's insurer, Integon, brought a declaratory action, contending that Vargas was not an insured under its policy. However, the trial court disagreed and granted summary judgment in favor of two of the vehicle's four passengers. Integon appealed.

On August 6, in ***Integon National Insurance Company v. Villafranco***, the Court of Appeals first addressed the interlocutory nature of Integon's appeal, since it was taken from an order that only resolved the claims of two of four plaintiffs. It held that Integon was nevertheless entitled to an immediate appeal because the trial court's order affected a "substantial right," as in

Lambe Realty Inv., Inc. v. Allstate Ins. Co., 137 N.C. App. 1 (2000), in which it was held that, in claims brought against liability insurers, granting partial summary judgment on the issue of an insurer's duty to defend "affects a substantial right that might be lost absent immediate appeal."

The Court found that Vargas qualified as an insured because Integon agreed to "pay damages … for which any insured becomes legally liable because of an auto accident" and the policy defined "insured" as the named insured "or any family member," and "family member" as "a person related … by blood … who is a resident of [the named insured's] household." Giving those terms their "plain, ordinary and accepted meaning," the Court agreed with the trial court that Villafranco's fourteen-year-old son met Integon's definition of an insured.

As for Integon's reliance on ***Newell v. Nationwide***, 334 N.C. 391 (1993), in which it was held that a family member who does not have a reasonable belief he is entitled to use the insured vehicle is excluded from coverage, the Court found that the holding in ***Newell*** was based on the standard exclusion from coverage for "[use of] a vehicle without a reasonable belief that [the] insured is entitled to do so." But, Integon had modified the language in its policy so that the exclusion "did not apply to a family member using your covered auto …." Since it had "explicitly extended coverage to family members using the covered auto even when they did not have a reasonable belief that they were entitled to use [it]," ***Newell*** did not apply, and Vargas was covered by Integon's policy.

UIM Carrier Denied Offset for Liability Coverage of Joint Tortfeasor

While traveling east on I-40 in McDowell County, Thomas Mills lost control of his tractor-trailer and it flipped over. A local volunteer firefighter, Douglas Lunsford, was the first person to respond to the accident scene. He parked on the right shoulder of the westbound lanes of travel, crossed the highway, and was attempting to carry Mills over the concrete median to safety as Shawn Buchanan was approaching the accident scene. Buchanan failed to notice the traffic slowing down in front of him, nearly rear-ended another vehicle, swerved, and struck Lunsford, who suffered serious injuries.

Lunsford filed suit against Mills, Mills' employer, and Buchanan, claiming they were jointly and severally liable. The defendants answered and crossclaimed against each other for contribution and indemnity. Farm Bureau, which was not a named party, but had issued two policies to Mills, a business auto policy with UIM coverage limits of $300,000 and a personal auto policy with UIM coverage limits of $100,000, filed its own answer, claiming entitlement to an offset against its coverage for any damages Lunsford recovered from the named defendants.

Buchanan's insurer, Allstate, paid its liability limits of $50,000 to Lunsford, who demanded that Farm Bureau tender its UIM coverage to him. But, before he received a response to his demand from Farm Bureau, Lunsford settled with Mills and Crowder for $850,000 of their $1,000,000 policy with US Fire. That settlement was approved by the trial court in an order dismissing with prejudice all claims and crossclaims brought in Lunsford's lawsuit.

Farm Bureau then moved for summary judgment, seeking a declaration that Lunsford was not entitled to UIM coverage because the aggregate amount of the two settlements, $900,000, exceeded the aggregate amount of his two UIM policies, $400,000. Lunsford responded with his own motion for summary judgment, contending that the policy limits of his two Farm Bureau policies stack and he was entitled to judgment against Farm Bureau for the combined total of his two UIM policies, less the $50,000 he had already received from Allstate. The trial court agreed and entered summary judgment against Farm Bureau for $350,000, plus costs and pre- and post-judgment interest. Farm Bureau appealed.

On August 20, in ***Lunsford v. Mills***, the Court of Appeals first observed that Farm Bureau's appeal "raises the question of when UIM coverage is triggered in instances in which the insured is injured in a motor vehicle accident caused by multiple tortfeasors." The issue was "whether Farm Bureau was obligated to provide UIM coverage to Plaintiff once Allstate had tendered its policy limits … on behalf of Mr. Buchanan, or, whether Farm Bureau was entitled to withhold coverage until Plaintiff had recovered … under the liability policies insuring the tractor trailer driven by Mr. Mills." In a lengthy opinion affirming the trial court's order, the Court held that "Plaintiff's UIM coverage was triggered the moment that all policies applicable to Mr. Buchanan's vehicle had been exhausted; Farm Bureau was not at liberty to withhold coverage until Plaintiff reached settlement agreements with Mr. Mills and Mr. Crowder…. Had Farm Bureau tendered its policy limits …, it would have had the opportunity for reimbursement and there would have been no windfall. To hold otherwise would not only punish the insured, but also reward UIM insurers for withholding coverage when due."

The Court also affirmed the trial court's award of costs and pre- and post-judgment interest. In doing so, it distinguished ***Sproles v. Greene***, 329 N.C. 603 (1991), because ***Sproles*** "holds that the UIM carrier is not required to pay pre and post-judgment interest *on behalf of the insured* where the judgment has been entered *against the insured*, … [whereas in] the case at hand, … the judgment was entered against Farm Bureau itself, not against its insured…."

Venue Objection Waived

While investigating Jarrod Beddingfield, an employee of LendingTree, Inc., a multistate mortgage broker headquartered in Mecklenburg County, for possible insider trading violations, federal authorities obtained records that revealed fee referral arrangements between Beddingfield, David Anderson and others which LendingTree later characterized as a "kickback" scheme in the complaint it filed against the involved parties in April 2008.

After Chief Justice Parker assigned the case to the Business Court, the parties submitted a Joint Case Management Report to Judge Calvin Murphy, in which they stipulated that "venue is proper in this action," but also stated that "[n]othing in this Report is intended to waive any of the objections or defenses Defendants may raise." Judge Murphy then entered an order finding that "[v]enue is proper in this action."

The attorney for defendant Anderson obtained two extensions of time to file an answer and Beddingfield asked for a stay of discovery on grounds that he was the target of a federal criminal investigation. Judge Murphy then entered an order staying the case "until the ongoing criminal investigation of Beddingfield is resolved."

In the interim, Anderson filed an answer that included a motion to dismiss for improper venue, based on a forum selection clause in his employment agreement providing that all disputes arising under the agreement would be determined in the State of Delaware. He also served interrogatories and a request for production of documents and noticed a series of depositions.

After the discovery stay was lifted more than two years later, Anderson asked the Business Court for a ruling on his motion to dismiss, but the court found that he had waived his venue defense, so it denied his motion. Anderson then gave notice of appeal to the Court of Appeals.

On August 6, in ***LendingTree, LLC v. Anderson***, the Court of Appeals affirmed the trial court's resolution of the venue issue. While it agreed with Anderson that he had the right to pursue an immediate appeal, even though the Business Court's order was interlocutory, since the question of venue is a procedural one and the right to the venue established by statute is a

"substantial right," the Court agreed with the trial court that Anderson "waived his venue defense because (i) he did not unambiguously raise and press his objection; (ii) he subsequently participated in litigation; and (iii) he delayed pursuing his defense for almost three years." The Court acknowledged that, although N.C.G.S. 1-82 provides that actions "must be tried in the county in which the plaintiffs or the defendants … reside at its commencement," a contractual forum selection clause "can modify this default venue rule" and "our courts generally enforce mandatory selection clauses" like the one involved in the present case. At the same time, however, the defendant "must affirmatively raise a venue objection to enforce a forum selection clause," and if he fails to object by timely motion or answer, the defense is waived.

Applying those principles to the present case, Anderson failed to unambiguously pursue his venue objection. In fact, he stipulated in the Joint Case Management Report that "venue is proper." While it also provided that "[n]othing in this Report is intended to waive any … objections … Defendants may raise," Anderson did not press his venue objection by contesting the joint case management order, nor did he seek immediate relief from it, even though it was immediately appealable, as "a right to venue established by statute is a substantial right."

Rather than pursue his venue defense, Anderson participated in discovery. While the Court found no case law specifically holding that discovery participation constitutes waiver *per se*, it found that "it *can* constitute a factor supporting a waiver determination." Where, as here, the defendant would be able to take advantage of the running of the statute of limitations in his desired venue, Delaware, upholding his waiver objection would deprive LendingTree of any substantive remedy. Therefore, the Court held that Anderson "waived his venue defense when he delayed pursuing his objection for almost three years" and the Business Court correctly denied his motion to dismiss on that basis.

Judgment Vacated Due to Improper Service of Process

In April 2011, Carla Hamilton filed a complaint for child custody and support in Mecklenburg County against Lateef Johnson, a citizen and resident of Houston, Texas. She attempted to serve the complaint by certified mail, restricted delivery, return receipt requested, deliver to addressee only, at Johnson's last known address in Texas, but it was returned unclaimed, so she hired a detective to confirm Johnson's address and obtain personal service on him. He discovered where Johnson lived, but the building was controlled by a concierge, who denied him access to Johnson's residence.

Hamilton tried retransmitting the summons and complaint to Johnson at his last known address via "Federal Express, DIRECT SIGNATURE, deliver to addressee only," but an individual identified as "KKPOINI" signed for it. She also retransmitted the pleadings via UPS Ground Residential, "SIGNATURE REQUIRED, deliver to addressee only," and this time the documents were signed for by an individual identified as "Washington."

When Hamilton's claim for child support came on for hearing, Johnson did not appear. Judge Christy Mann found that service of process was proper and entered an order for child support. Several months later, Johnson's attorney made a limited appearance at a contempt hearing to raise the issue of ineffective service of process, and he later filed a motion to vacate the child support order, which was denied by Judge Mann, who instead entered an order for Johnson's arrest. After he unsuccessfully moved to vacate that order, Johnson gave notice of appeal to the Court of Appeals.

On August 6, in ***Hamilton v. Johnson***, the Court first addressed the interlocutory nature of Johnson's appeal and found that he was entitled to an immediate appeal because, as the Supreme Court held in ***Willis v. Duke Power Co.***, 291 N.C.

19 (1976), contempt orders that impose purging conditions affect a "substantial right." Further, N.C.G.S. 1-277(b) provides that "[a]ny interested party shall have the right of immediate appeal from an adverse ruling as to the jurisdiction of the court over the person …."

The Court then addressed Johnson's contention that the trial court lacked jurisdiction over him because he was not properly served under Rule 4, the provisions of which are "to be strictly enforced to insure that a defendant will receive actual notice of a claim against him." While ***Lewis Clarke Associates v. George P. Tobler***, 32 N.C. App. 435 (1977), held that a presumption of service arises when a summons and complaint are transmitted by registered or certified mail and signed for by a person of "reasonable age and discretion on the addressee's behalf," the legislature redrafted Rule 4(j) in 2001 and the ***Tobler*** presumption was codified as part of Rule 4(j2)(2), but only made applicable to default judgments. Absent a ***Tobler*** presumption, Hamilton bore the burden of proving that either "KKPONI" or "Washington" was Johnson's agent and authorized to accept service of process on his behalf. As she had failed to do so, the Court of Appeals agreed with Johnson that the trial court erred when it found that Hamilton obtained proper service. Therefore, the Court vacated the child support order and all subsequent orders entered in reliance on it.

Civil Contempt Order Affirmed

After they separated in 2001, Joseph and Jamesia Barker entered into a Consent Order in which Joseph agreed to pay 90% of their children's college tuition, room and board "as long as they diligently applied themselves to the pursuit of education." Although their daughter Holly was placed on academic probation with a cumulative GPA of 1.908 during her first year at college in 2010-2011, Joseph paid his share of her expenses. However, after she enrolled in 16.5 hours in the Fall 2011, but only earned 7.5 hours of credit and finished the semester with a 1.000 GPA and a cumulative GPA of 1.658, Joseph decided not pay Holly's tuition for that school year until he saw a transcript of her grades.

In April 2012, Jamesia filed a Motion to Show Cause why Joseph should not be held in contempt for violating the Consent Order. The evidence taken at a subsequent evidentiary hearing established that Holly was treated for depression and prescribed medication and therapy following the unexpected death of her best friend in the Fall 2011 semester, and that she finished the Spring 2012 semester with a 2.907 GPA, which improved her cumulative GPA to 2.000. The trial court concluded that Joseph had the ability to comply with the Consent Order, but refused to do so. It also determined that Holly diligently applied herself to the pursuit of her education, that Joseph was in willful civil contempt, and that he could purge his contempt by paying $15,150. Joseph appealed.

On August 6, in ***Barker v. Barker***, a 2-to-1 majority of the Court of Appeals affirmed, holding that a person is in civil contempt for failure to comply with a court order when (1) the order remains in force; (2) its purpose can be served by compliance; (3) the noncompliance is willful; and (4) the person to whom the order is directed is able to comply, or with reasonable measures could do so. Responding to Joseph's contention that the evidence did not support the trial court's conclusion that his noncompliance with the Consent Order was *willful*, the Court's majority pointed to his testimony that he withheld payment to "leverage" Holly to improve her grades, i.e., he *decided* not to pay after "unilaterally decid[ing] that [Holly] was not diligently applying herself."

In dissent, Judge Dillon took exception to the majority's conclusion that the record supported the trial court's finding that Joseph's noncompliance with the Consent Order was willful. Quoting from ***Ross v. Voiers***, 127 N.C. App. 415 (1987), he would only define as willful "disobedience which imports knowledge and a

stubborn resistance, … something more than an intention to do a thing." In the present case, the trial court specifically found that "Defendant refused to pay tuition for the [third] semester *because … he did not feel like his daughter was 'diligently' applying herself*." In other words, reasoned Judge Dillon, the trial court found that Joseph's motivation in not paying was "not because he was acting stubbornly in refusing to meet his obligations under the terms of the 2003 [consent] order, but rather because he honestly believed that the terms of the 2003 order did not require him to provide for his daughter's education during her time of poor academic performance." That being so, Judge Dillon was of the opinion that "the trial court's findings do not support its adjudication of contempt."

Civil Contempt Order Vacated

William White and Frances Wellons were divorced eight months after their son was born in April 2005. Over the course of the next seven years, they and Frances' parents, John and Bobbie Wellons, engaged in protracted litigation over child support, child custody, and grandparent visitation rights, resulting in multiple support, custody and visitation orders, the last of which declared White to be "in direct and wilful [sic] civil contempt of the prior Orders of the Court," allowed him to "purge his contempt by fully complying with the [court's previous] order," and threatened imprisonment if he did not adhere to the order's terms. White appealed to the Court of Appeals.

In a lengthy opinion entered on August 20, ***Wellons v. White***, the Court resolved a series of family law issues, including the grandparents' visitation rights, and then addressed White's contention that it was error for the district court to hold him in civil contempt. After stating that "[t]he purpose of civil contempt is not to punish but to coerce the defendant to comply with a court order," the Court held that "a contempt order 'must specify how the person may purge himself of the contempt'" and must "'clearly specify what the defendant can and cannot do.'" Applying those principles to the present case, it found the district court's order, which provided that White could "purge his contempt by fully complying with the terms of [its prior] Interim Order," was unacceptable, both because it was "impermissibly vague" and as "[w]e will not allow the district court to hold Mr. White indefinitely in contempt." As a consequence, the Court reversed the district court's determination that White was in civil contempt.

Unilateral Mistake Insufficient to Void Contract

Kenneth Grich's home was damaged when employees of Mantelco broke a water line while they were installing a satellite dish. A dispute subsequently arose between Grich and Mantelco's insurer, Universal Insurance. Before it was settled, Universal made three payments to Grich totaling $7000. After further negotiations, Grich hired an attorney, who offered to settle for $38,020. Universal agreed to the proposal if Grich was willing to sign a "Property Damage Release" releasing Universal and Mantelco from all liability for the "sole consideration" of $38,020 "in hand paid, receipt whereof is hereby acknowledged."

Before receiving his settlement check, Grich executed the proposed release and returned it to Universal, which issued a check for $31,020, after taking credit for the $7000 it had already paid. Grich then filed suit against Mantelco and Universal, claiming breach of contract and unfair and deceptive trade practices. In his prayer for relief, he sought specific performance, attorney's fees and treble damages. The defendants responded with a Rule 12(b)(6) motion to dismiss, which was granted by the trial court. After the Grich's motion for reconsideration was denied, he appealed to the Court of Appeals.

On August 6, in ***Grich v. Mantelco, LLC***, the Court affirmed, finding that Grich's appeal was premised on an alleged unilateral mistake: he

claimed he was unaware that the defendants intended to offset the $7000 it had already paid against the amount it owed. But, as the Court held in ***Lowry v. Lowry***, 99 N.C. App. 246 (1990), "[a] unilateral mistake … is insufficient to avoid a contract" and it was undisputed that the release at issue was a valid contract. Since Grich released the defendants from all liability for the "sole consideration" of $38,020 "in hand paid," the plain language of the release barred his claim, and the trial court properly granted defendants' Rule 12(b)(6) motion to dismiss.

Governmental Immunity Not Applicable to Wrongful Discharge Claim

Rebecca White, a detention officer with the Swain County Sheriff's Department, slipped, fell and sustained an on-the-job injury in November 2008. She was out of work from January 24 through February 24, 2009, filed a claim, and received weekly benefits. After working four days in late February and early March 2009, her employment was terminated.

White filed a complaint with the Department of Labor, contending that she was wrongfully terminated for seeking workers' compensation benefits, in violation of N.C.G.S. 95-240, *et seq*. After the Department of Labor issued a right to sue letter authorizing legal action against the county and its sheriff's department, White sued Sheriff Curtis Cochran, alleging retaliatory termination and wrongful discharge.

Judge Bradley Letts granted Sheriff Cochran's motion for judgment on the pleadings because White's right to sue letter authorized legal action against the county and sheriff's department, not the sheriff himself. However, on October 4, 2011, in ***White v. Cochran*** ("***White I***"), ___ N.C. App. ___ (2011), the Court of Appeals reversed, holding that a suit against Sheriff Cochran in his official capacity was tantamount to a suit against the sheriff's department and, as a consequence, White's claim was consistent with her right to sue letter. At the same time, the Court cautioned that the issue of whether White's claim was barred by governmental immunity had not been addressed.

White amended her complaint to add the company that had issued the sheriff's bond as a defendant and the defendants moved for summary judgment, asserting governmental immunity and contending that White's claim was excluded from coverage under both the sheriff's bond and the county's insurance policy. After the trial court denied their motion, the defendants appealed to the Court of Appeals.

On August 20, in ***White v. Cochran*** ("***White II***"), the Court acknowledged that defendants' appeal was interlocutory, but held that, as in ***Waters v. Personnel, Inc.***, 294 N.C. 200 (1978), when a motion to dismiss is made on grounds of sovereign immunity, its denial is immediately appealable, because "to force a defendant to proceed with a trial from which he should be immune would vitiate the doctrine of sovereign immunity." Therefore, Sheriff Cochran had an immediate right of appeal from the denial of his motion to dismiss.

At the same time, however, the Court agreed with the trial court that both the sheriff's bond and the county's liability insurance policy covered claims of the nature asserted by White. As a consequence, it held that the sheriff waived governmental immunity to the extent of his coverage. N.C.G.S. 162-8 required his bond to ensure that he "in all things faithfully perform the duties of his office." Because White was alleging that the sheriff wrongfully terminated her employment in retaliation for her decision to file a workers' compensation claim, and as acting in that manner would constitute a failure to properly perform his job, the Court concluded that White's claim, "if supported by adequate proof, comes within the scope of Sheriff Cochran's official duties" and, therefore, was covered by his bond.

The Court was also not persuaded by the sheriff's argument that he was not covered by the

county's liability policy because of its exclusion for "[Equal Employment Opportunity Commission] hearings or similar proceedings." Rather, held the Court, the EEOC is responsible for enforcing federal anti-discrimination laws, whereas the Department of Labor enforces the state's Retaliatory Employment Discrimination Act, or "[s]imply put, the EEOC serves to protect individuals from discrimination based on certain characteristics … while the Department of Labor serves to protect individuals from retaliation stemming from their decision to exercise specific statutory rights." As the sheriff's bond and the county's liability insurance policy both provided coverage for claims of the nature asserted by White, governmental immunity did not protect him from her lawsuit and the trial court properly denied the sheriff's motion to dismiss.

"Instrumentality Rule" Applied to Pierce Limited Liability Company's Corporate Veil

Timothy Hurst owned 72.229 acres of land in Cabarrus County and Jeffrey and Beverly Hensley owned an adjoining 3.476 acres. They entered into a written agreement to sell their property to Cramer Mountain Development, LLC for $4.7 million, with the closing to take place in June 2007. On March 12, 2007, Cramer assigned its interest in the sale and purchase of the Hurst/Henley tract to Moorehead I, LLC, whose sole member was Bruce Blackmon.

On that same day, Hurst and the Hensleys met with real estate brokers for Blackmon, who obtained their signatures on multiple documents, including warranty deeds conveying their properties. The sellers received a check for $200,000 and a second priority deed of trust for the $4.5 million balance owed. The following day, the two warranty deeds were recorded in the office of the Cabarrus County Register of Deeds and Moorehead I obtained a $3.4 million loan from F&M Bank, secured by a first priority deed of trust against the Hurst/Henley tract.

Moorehead I eventually defaulted on its obligations to Hurst, the Henleys, and the bank. Hurst and the Hensleys then filed suit, alleging breach of contract, fraud, and unfair and deceptive trade practices. They also asserted that Blackmon exercised complete domination over Cramer and Moorehead I, justifying a disregard of the corporate form. At trial, the jury's verdict contained findings of fact addressing twelve issues, from which the presiding judge entered a judgment concluding that Blackmon was the alter ego of Moorehead I and personally liable for the jury's $4.9 million verdict in plaintiffs' favor. Defendants appealed to the Court of Appeals.

On August 6, in ***Estate of Timothy Alan Hurst v. Moorehead I, LLC***, the Court of Appeals affirmed the trial court's judgment holding Blackmon personally liable, finding that, under N.C.G.S. 57C-3-30(a), and through the doctrine of piercing the corporate veil, "a member of a limited liability company may be held individually liable for the company's obligations if the member engages in individual conduct that subjects him to liability." The Court held that "what has been commonly referred to as the 'instrumentality rule' forms the basis for disregarding the corporate entity … [when] the corporation is so operated that it is a mere instrumentality or *alter ego* of the sole or dominant shareholder" and three elements are met: (1) complete domination of policy and business practice, so the corporate entity has no separate mind, will or existence of its own; (2) use of that control by the defendant to violate a legal duty or commit fraud or a dishonest or unjust act in contravention of plaintiff's legal rights; and (3) plaintiff's injury was proximately caused by defendant's control of the corporate entity and breach of duty. Inasmuch as the jury found that Blackmon controlled Moorehead I with respect to the transactions that damaged Hurst and the Henleys, the Court affirmed the judgment entered by the trial court.

WORKERS' COMPENSATION

Occupational Disease Claim Dismissed with Prejudice for Failure to Prosecute

Joseph Lentz, an employee of Phil's Toy Store and Auto, filed a Form 18 on September 18, 2006, alleging the contraction of an occupational disease caused by exposure to toluene. His employer's insurance carrier issued a Form 61 denial, and a year later filed a motion to dismiss, which was denied by the Industrial Commission in an October 2007 order that allowed Lentz 60 days to provide an update on whether he intended to pursue his claim.

In April 2008, the defendants filed another motion to dismiss, to which Lentz responded by requesting a hearing. However, he later moved for voluntary dismissal without prejudice in a pleading which admitted that his expert, Dr. Darcy, was of the opinion that "it was more likely than not … [his] symptoms did not result from toluene exposure." Acknowledging that he could not go forward without expert testimony, Lentz requested a year to locate a witness capable of providing the requisite testimony. The Commission allowed his motion in October 2008 and gave him a year to re-file.

At Lentz's request, his claim was scheduled for hearing on October 21, 2009, but it was subsequently removed from the docket to allow him to retain counsel and obtain the opinion of another doctor. A month later, the defendants filed their own hearing request and renewed their previous motion to dismiss with prejudice.

When the claim came on for hearing again on April 29, 2010, the defendants, their attorney, and a representative of the employer were present, as was Lentz's attorney, but not Lentz. His attorney requested and obtained another 90-day extension of time to obtain a medical opinion and defendants' motion to dismiss was denied. Thereafter, Lentz requested and received two additional extensions of time.

At a special set hearing on May 16, 2011, the defendants again appeared with their counsel and witnesses, as did Lentz's attorney, but once again Lentz did not. In response to defendants' renewed their motion to dismiss, Lentz's attorney argued that the Commission lacked subject matter jurisdiction over the case, but Deputy Commissioner Glenn granted the motion, and his order dismissing the claim was subsequently affirmed by the Full Commission. Lentz then appealed to the Court of Appeals.

On August 6, in ***Lentz v. Phil's Toy Store***, the Court of Appeals affirmed the Commission's order of dismissal. In doing so, it rejected Lentz's argument that, since his right to bring an occupational disease claim was controlled by the statute of limitations contained in N.C.G.S. 97-58(c), which does not begin to run until he has been advised by competent medical authority of the work-related cause of his disease, and as he had been unable to obtain such an opinion, the Commission lacked subject matter jurisdiction. The Court found that his argument was based on the faulty premise that his right to bring an occupational disease claim does not commence until he has obtained a medical opinion supporting it. To the contrary, "[a] claimant is not precluded from filing a claim prior to receiving competent medical advice, which is exactly what plaintiff did" in the present case. As the Supreme Court held in ***Gore v. Myrtle/Mueller***, 362 N.C. 27 (2007), "[o]nce plaintiff elected to file his claim, 'the jurisdiction of the Commission … is invoked.'"

As for Lentz's argument that the Commission erred in dismissing his claim *with prejudice*, the Court noted that, while the Rules of Civil Procedure are not strictly applicable to proceedings before the Industrial Commission, "they may provide guidance in the absence of an applicable rule under the Workers' Compensation Act." Therefore, it was held in ***Lee v. Roses***, 162 N.C. App. 129 (2004), that for a civil case to be involuntarily dismissed with prejudice for failure to prosecute under Rule

41(b), three factors must be present: (1) plaintiff deliberately or unreasonably delayed the matter; (2) the defendant was prejudiced by the failure to prosecute; and (3) sanctions short of dismissal would not suffice. As Lentz failed to appear at the two hearings he requested, whereas the defendants were present and prepared to litigate, as Lentz had over six years after filing his claim to find competent medical authority to support it, as the defendants had already spent considerable time and resources defending the claim over that period of time, and as they would have continued to be prejudiced if it were allowed to continue indefinitely, the Court found that each of the three ***Lee*** factors were present and "no sanction other than dismissal will suffice." As a consequence, it affirmed the Commission's order dismissing Lentz's claim with prejudice.

Late Refiling of Claim Not Attributable to Excusable Neglect

In August 2007, Adan Nieto-Espinoza filed a Form 18 with the Industrial Commission, alleging an on-the-job injury when a nail gun discharged into his knee. Three years later, he moved for voluntary dismissal to give himself additional time to file a new claim with correctly named employers. His motion was allowed by Deputy Commissioner Adrian Phillips in an order dated September 7, 2010. On October 18, 2010, the office of Nieto-Espinoza's attorney acknowledged receipt of the order of dismissal on a form indicating that it had been faxed to the attorneys for both parties on the date it was entered, September 7, 2010. However, Nieto-Espinoza's attorney's paralegal calendared the one-year deadline to re-file the claim for October 18, 2011, one year from their acknowledgement of the order of dismissal, rather than September 7, 2011, one year from entry of the order.

On October 3, 2011, Nieto-Espinoza's attorney moved to file a "Form 33 Late Due to Excusable Neglect," but his motion was denied by Deputy Commissioner Phillips, whose order stated that the claim was barred by the provisions of Industrial Commission Rule 613, which provides that, "[u]nless otherwise ordered by the Industrial Commission, a plaintiff shall have one year from the date of the Order of Voluntary Dismissal to refile his claim." After the Full Commission denied Nieto-Espinoza's Rule 801 request that application of Rule 613 be waived "in the interests of justice" and affirmed Deputy Commissioner Phillips' order, he gave notice of appeal to the Court of Appeals.

On August 20, in ***Nieto-Espinoza v. Lowder Construction, Inc.***, the Court of Appeals affirmed the Commission's dismissal of Nieto-Espinoza's claim. In doing so, it agreed with the defense that, although the Commission's rules do not address the issue of excusable neglect, it has the inherent power and authority to consider a motion for relief on that basis. However, the Court ruled that "what constitutes excusable neglect depends upon what … may be reasonably expected of a party in paying proper attention to his case," and it agreed with the Commission that "[a] lack of diligence was shown in the instant case where … counsel failed to note the date of entry of the order…. Here, carelessness if not negligence, caused plaintiff's counsel to enter the wrong date to refile…." As a consequence, the Commission did not err in concluding that counsel's failure to timely re-file the claim was not due to excusable neglect.

The Court also felt bound to affirm the Commission's decision not to waive application of Rule 613's one-year deadline to re-file "in the interest of justice" under Rule 801 because, as it held in ***Soder v. CorVel Corp.***, 202 N.C. App. 724 (2010), "absent an abuse of discretion, [the] Court [of Appeals] shall not overturn the Commission's decision regarding a Rule 801 waiver request," and since Nieto-Espinoza's failure to timely re-file his claim was not due to excusable neglect, "the Commission's decision was logically sound … [and not an] abuse of discretion." Therefore, the Court affirmed the Commission's denial of Nieto-Espinoza's "Motion to File Form 33 Late Due to Excusable Neglect."

Attorney's Fee Limited to One-Third of Third Party Recovery

Michael Tinsley, an employee of the City of Charlotte, hired Curtis Osborne to represent him in workers' compensation and third party claims arising out of a work-related automobile accident. After the City admitted liability and voluntarily paid disability benefits, including PPD for a 10% rating to Tinsley's left shoulder, his third party claim was submitted to arbitration. He was awarded $137,500 in compensatory damages, but was only able to recover $100,000, the combined policy limits of the available liability and underinsured motorist coverage.

The City agreed to reduce its lien against Tinsley's third party recovery to $15,000, the parties' settlement was submitted to the Industrial Commission for an order of disbursal under N.C.G.S. 97-10.2, and Executive Secretary Tracey Weaver entered an order which provided for the City to receive $15,000, Osborne an attorney's fee of $33,333, and Tinsley the balance of $51,667.

After Osborne filed a motion for reconsideration, contending that his fee agreement entitled him to a 40% attorney's fee and reimbursement of costs totaling $8,950, Executive Secretary Weaver modified her order of disbursal to reimburse Osborne's costs and reduce Tinsley's recovery by an equal amount, but she did not increase Osborne's fee. Deputy Commissioner Brad Donovan and the Full Commission subsequently affirmed her award and Osborne appealed to the Court of Appeals, contending that the statutory cap on attorneys' fees contained in N.C.G.S. 97-10.2(f)(1)(b) is unconstitutional.

On August 6, in ***Tinsley v. City of Charlotte***, the Court rejected Osborne's contention that the cap on attorneys' fees in third-party recoveries creates an equal protection issue between two classes of civil litigants, those with concurrent workers' compensation claims and those without. It held that, since the provisions of N.C.G.S. 97-10.2(f)(1)(b) do not interfere with a fundamental right or single out a suspect class, the lower tier of equal protection analysis applies, requiring a "rational basis" for the statutory limitation. And, as the Supreme Court recognized in ***Hendrix v. Linn-Corriher Corp.***, 317 N.C. 179 (1986), the interests behind the Workers' Compensation Act are twofold: (1) to compensate the injured worker and (2) insure the employer a limited and determinate liability. Since "it is axiomatic that increased attorneys' fees reduce the amount of compensation available from a third-party case to be distributed to an injured worker …, [the Court found] the cap on attorneys' fees … rationally related to the legitimate government interest … in compensating the injured worker." Therefore, it held that the provisions of N.C.G.S. 97-10.2(f)(1)(b) are constitutional and it affirmed the Commission's order of distribution limiting Osborne's fee to one-third of his client's third party recovery.

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

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