NORTH CAROLINA CIVIL LITIGATION REPORTER

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CIVIL LIABILITY

Order Awarding Attorneys' Fees In Class Action Affirmed

Wachovia Corporation was the fourth largest banking institution in the nation in September 2008. Various events that year, including the federal government's decision to place the Federal National Mortgage Association and Federal Home Loan Mortgage Corporation under government control and conservatorship, culminated in a rapid decline in the public's confidence in banks holding large amounts of government-backed mortgage securities, including Wachovia, which had acquired a substantial number of mortgages when it purchased Golden West Financial Corporation in 2007. A "run" on the bank developed, causing the FDIC to inform Wachovia that it needed to merge with a solvent financial institution or be placed in receivership.

Wachovia's board of directors ultimately accepted a merger proposal advanced by Wells Fargo. Shortly thereafter, Irving Ehrenhaus filed a class action on behalf of Wachovia's common stock shareholders, seeking to enjoin, or alternatively rescind, the merger.

After the class action was designated a complex business case, the parties began settlement negotiations and eventually reached agreement on a settlement that required Wachovia to provide shareholders with a more-detailed proxy statement, allowing them to cast informed votes on whether or not to approve the merger.

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It also included a provision that Wells Fargo would pay various costs, including up to $1,975,000 in attorneys' fees to class counsel.

After the bank's stockholders approved the merger, Judge Calvin Murphy held a fairness hearing regarding the proposed settlement, at which he heard from various parties who objected to it, including Norwood Robinson and John Loughbridge ("Objectors"). However, he eventually entered an order approving the settlement and awarded $932,622 in attorneys' fees. Objectors appealed.

On September 15, in ***Ehrenhaus v. Baker***, 216 N.C. App. 59 (2011) ("***Ehrenhaus I***"), the Court of Appeals affirmed Judge Murphy's order approving the settlement, but found that the absence of findings concerning "reasonableness" prevented a meaningful review of the attorney fee award, so it was vacated and the case remanded for findings of fact and conclusions of law resolving that issue.

On remand, Judge Murphy found that an award of attorneys' fees to class counsel was legally permissible because the defendants had agreed to pay them as part of the settlement. After performing a "reasonableness analysis" regarding the appropriate amount of fees and expenses to be awarded and considering the factors found in Rule of Professional Conduct 1.5, he awarded $1,056,068. Objectors appealed.

On September 15, in ***Ehrenhaus v. Baker*** ("***Ehrenhaus II***"), the Court of Appeals affirmed. It found no merit in the Objectors' argument that Judge Murphy's award was improper under the "American Rule," which provides that "a successful litigant may not recover attorneys' fees … unless such a recovery is expressly authorized by statute." There was a "fatal flaw" in that argument, the Court found, because the parties had agreed to a voluntary settlement. Therefore, there was no "successful litigant" and the "concerns the American Rule was intended to alleviate were not implicated."

Instead, the Court found the fee awarded by Judge Murphy to be like that in ***Carter v. Foster***, 103 N.C. App. 110 (1991), which "expressly recognize[d] the enforceability of settlement agreements providing for the payment of one party's attorneys' fees by the other party." Indeed, the Court continued, "giving effect to a negotiated settlement agreement providing for the payment of one party's attorneys' fees by the other party is consistent with the well-established policy of encouraging the settlement of disputes between litigants and is therefore permissible despite a lack of explicit statutory authorization."

As for Ehrenhaus' cross-appeal, which challenged both the trial court's refusal to apply a "contingency multiplier" when calculating class counsel's fee and its failure to allocate any portion that fee to local counsel, the Court found that it was not timely, as the only notice of appeal Ehrenhaus filed within the ten-day period of time provided for in Rule of Appellate Procedure 3(c) was sent to the Business Court through its electronic filing system. Although he later attempted to remedy that error by filing a second notice with the Mecklenburg County Clerk of Court, he failed to do so within the ten days mandated by Rule 3, so Business Court Judge James Gale dismissed the cross-appeal.

Although Ehrenhaus argued that it was error for Judge Gale to do so, the Court of Appeals found it "well-established … that '[n]o appeal lies from an order of the trial court dismissing an appeal for failure to perfect it within apt time." Rather, the proper pleading for Ehrenhaus to have filed to obtain a review of the judge's order was a petition for writ of certiorari. And, while Rule of Appellate Procedure 21 authorizes issuance of such a writ "in appropriate circumstances," the Court determined that "the circumstances of the present case do not justify this extraordinary remedy," so it declined to grant certiorari and affirmed Judge Gale's dismissal of Ehrenhaus' cross-appeal.

Collateral Estoppel Bars Fraudulent Misrepresentation Claim

Julie and Brannon Lancaster purchased a tract of land in Brunswick County, formed Village Landing, LLC, transferred the property to the LLC, and met with agents of Harold K. Jordan and Company ("HKJ"), a builder specializing in the construction of multi-family housing. HKJ recommended architect Arthur Cogswell, who prepared preliminary sketch designs for an apartment complex, but the Lancasters decided they did not want to own or manage apartments, so they asked Cogswell to prepare plans for townhomes. They also hired the engineering firm of Withers & Ravenel ("W&R") to assist them in developing the property as a townhouse project and incorporated "Shady Grove" with the intention that it would purchase the property from the LLC and they and Harold K. Jordan would each own 50% interests in the project.

After HKJ submitted a proposal to construct 60 "condos," which HKJ's agent told the Lancasters were the same as townhomes, Shady Grove contracted with HKJ for their construction. Cogswell then finalized his construction drawings for townhomes and W&R obtained approval of the project from the Town of Leland and North Carolina Department of Environment and Natural Resources.

When the Lancasters met with representatives of Cooperative Bank to discuss funding the project, HKJ confirmed that they planned to construct townhomes. The bank subsequently issued commitment letters for an initial loan of over $2 million, conditioned on personal guarantees from the Lancasters, and construction began. However, HKJ was unable to obtain certificates of occupancy for the first twelve units it completed, and that kept Village Landing from generating the profit it needed to make its loan payments to Cooperative Bank. As a result, Mrs. Lancaster had to cash in her IRA to cover the outstanding loan payments.

The Lancasters filed suit, alleging negligent or intentional misrepresentations during the construction process. They alleged that before construction began, the building inspector advised HKJ that while the project had been approved for the construction of townhomes, Cogswell's plans could not be permitted under the building code because they appeared to be for "apartments" or "condominiums" and only one permit would be issued per building, rather than the three required for townhomes. The Lancasters' also contend that HKJ had a duty to inform them of the conversations it had with the building inspector and of the deficiencies he found in the project's plans.

HKJ's answer contained a motion for summary judgment, in support of which it argued that the Lancasters' claims were barred by *res judicata* and collateral estoppel, as it had previously brought a breach of contract action against Shady Grove and Village Landing that was resolved in HKJ's favor by an arbitrator whose judgment was subsequently entered in Wake County Superior Court after a hearing at which the Lancasters testified and, through Village Landing, offered the testimony of 16 other witnesses. The trial court agreed with HKJ that the Lancasters were collaterally estopped from relitigating the misrepresentation issue, so it granted summary judgment, and the Lancasters appealed.

On September 1, in ***Lancaster v. Harold K. Jordan and Co., Inc.***, the Court of Appeals affirmed. After observing in a footnote that *res judicata* and collateral estoppel are "companion doctrines developed by the courts 'for the dual purposes of protecting litigants from the burden of relitigating previously decided matters and promoting judicial economy by preventing needless litigation,'" it found that the required elements of collateral estoppel, identified by the Supreme Court in ***King v. Grindstaff***, 284 N.C. 348 (1973), are that the earlier suit resulted in a final judgment on the merits, the issue in dispute in the second action was identical to an issue

actually litigated and necessary to the judgment in the first, and both parties were either in the earlier suit or in privity with them.

The Court then found that the Supreme Court created an exception to the general requirement of an identity of parties in ***Thompson v. Lassiter***, 246 N.C. 34 (1957), which held that one who is not a party to an action is nevertheless bound by its adjudication as if he were when he controlled the action and had a proprietary or financial interest "in the determination of a question of fact or law with reference to the same subject matter," as long as the other party was also bound by the result.

Applying the holding in ***Lassiter*** to the Lancasters' claim, the Court found the fact that they were the "sole member-managers" of the defendant at the arbitration hearing and were among the 18 witnesses who testified was "sufficient to satisfy the control element of the ***Lassiter*** exception." The other requirements of the exception were also met, since the Lancasters had a "proprietary or financial interest" in the outcome of the arbitration action and the same questions of fact were at issue in both actions. Therefore, the trial court did not err when it applied the doctrine of collateral estoppel and granted HKJ's motion for summary judgment.

Ruling Applying Equitable Estoppel to Bar Plea of Statute of Limitations Reversed

Business partners William Ussery and Wayne Barker formed Chair Specialists, Inc. with the understanding that Barker would run day-to-day operations and Ussery would fund the company's operations. They met with Wiley Mabe, a commercial lending officer for BB&T, in 1999 to discuss their business plan and learn about government-backed loans. After Ussery obtained three loans from BB&T to cover startup costs and other company purchases between 1999 and 2001, he was notified by Mabe that no government-backed loan was available, nor would BB&T extend a long-term loan to them.

Knowing that a government-backed loan was not available, Ussery and Barker shut down Chair Specialists and began selling its assets. While they were attempting to sell the company's assets, Ussery approached BB&T about a single loan to consolidate his business debts, and in April 2002, BB&T made a $425,000 personal loan to him, secured by a promissory note and deed of trust on commercial property he owned.

The following April, fifteen months after learning that no government-backed loan was available, Ussery and BB&T entered into the first of six promissory note modification agreements. In it and the five that followed over the course of the next three and a half years, BB&T agreed to extend the maturity date of the promissory note and allowed Ussery to continue making interest-only payments. In exchange, he reaffirmed his payment obligation and waived any offsets and defenses he had against the note.

Ussery sued BB&T in 2008, claiming that the $425,000 he borrowed was intended as a "bridge loan" that would be repaid with the proceeds of the anticipated government-backed loan. He alleged that he only borrowed the money and signed the promissory note upon Mabe's assurance that a government-backed loan would be approved. Claiming breaches of a fiduciary relationship and good faith dealing, negligence, negligent misrepresentation, breach of contract, unfair and deceptive practices, and fraud, he sought compensatory and punitive damages and a declaratory judgment voiding the promissory note and cancelling the bank's deed of trust on his commercial property.

In answer, BB&T pled the statute of limitations, asserted a counterclaim for the outstanding principal and interest owed on the note, and filed a motion for summary judgment. The trial court granted summary judgment, awarded $645,383 in damages, and taxed Ussery with costs, interest, and attorney fees. He appealed.

On May 21, 2013, in ***Ussery v. Branch Banking and Trust Company***, a 2-to-1 majority of the

Court of Appeals held that although Ussery did not file suit within the applicable statute of limitations, thereby rendering his claim time-barred, a material issue of fact arose as to whether BB&T should be estopped from raising that defense. In lengthy majority and minority opinions, the Court discussed the requisite elements of equitable estoppel, debated its application to this case, and ultimately held that the events alleged by Ussery raised an inference that BB&T should be equitably estopped from asserting the statute of limitations as a defense. It reversed the trial court's judgment and BB&T gave notice of appeal under N.C.G.S. § 7A-30(2).

On September 25, in ***Ussery v. Branch Banking and Trust Company***, the Supreme Court reversed, finding that "parties are generally free to waive various rights," Ussery benefitted from the six note modifications he and BB&T executed between April 2003 and November 2006, in them he "repeatedly reaffirmed his indebtedness and expressly waived his defenses and offsets," and his waiver "necessarily included the claims … pled in his complaint." The Court was not persuaded by Ussery's argument that the loan from BB&T was a "bridge loan" obtained before he knew the government-backed loan was not available, as "his own evidence directly contradicts this assertion." BB&T was entitled to summary judgment because "[a] debtor who, on the one hand, acknowledges his debt obligations and waives any defenses against that obligation cannot, at the same time, claim he reasonably relied on contemporaneous assurances that the very same debt would be canceled."

Injunction Limiting Salesman's Work Activities Affirmed

When Joel Miller was hired by A&D Environmental Services, he signed a non-competition agreement, in which he agreed that for a period of 24 months after his last day of employment, he would not solicit business from, or provide services to, a defined group of A&D's customers and prospects. Three years later, he resigned from his job and began working for a competitor. Believing that he was violating the non-compete agreement, A&D sued him in Guilford County, the location of its principal place of business. Miller moved to dismiss for improper venue, but the trial court denied his motion, and on April 7, the Court of Appeals affirmed in ***A&D Environmental Services, Inc. v. Miller***, (see *North Carolina Civil Litigation Reporter*, April 2015, page 4).

While Miller's appeal was still pending at the Court of Appeals, A&D moved for a preliminary injunction, reiterating its contention that Miller was performing duties for a competitor in violation of the non-compete agreement. When the preliminary injunction motion came on for hearing, Miller argued that the trial court lacked jurisdiction because the case was pending before the Court of Appeals. He also raised the venue question again, contending that he had evidence suggesting that A&D's principal place of business was *not* in Guilford County, but the trial court concluded that since the venue issue was already before the Court of Appeals, it would not be appropriate for it to consider Miller's new venue theory regarding A&D's principal place of business. The trial court granted A&D's motion and enjoined Miller from marketing, selling, or providing any services or products to a specified group of customers. He filed another appeal.

On September 15, in ***A&D Environmental Services, Inc. v. Miller***, the Court of Appeals affirmed. It was not persuaded by Miller's argument that although his appeal was interlocutory, he was nevertheless entitled to immediately contest the preliminary injunction because it affected his right to earn a living, which was a "substantial" right. It held that "whether such an order affects a substantial right depends on the extent that a person's right to earn a living is affected," and "an injunction which merely limits a person's ability to earn a living may not affect a substantial right." And, since the preliminary injunction in this case "merely limits his activities by not allowing him

to call on or service a narrowly defined group of customers," it was not immediately appealable.

The Court *did* agree that the preliminary injunction entered by the trial court affected Miller's right to have the case heard in the proper venue, and that right was a substantial one, but when it turned to the merits of the appeal, and in particular his argument that the trial court erred in refusing to consider his new venue argument, the Court was not persuaded. It concluded that the trial court correctly interpreted N.C.G.S. § 1-294 so as to stay "all further proceedings in the court below." Since Miller's appeal of the order denying his motion to dismiss for improper venue was already pending before the Court, it held that the trial court correctly determined that it did not have jurisdiction to consider his new venue argument as grounds for denying A&D's motion for preliminary injunction.

Quasi In Rem Jurisdiction Exercised Over New York Company

Credit Union Auto Buying Service ("CUABS"), a not-for-profit corporation with its principal place of business in Winston-Salem, began purchasing vehicles from a New York company, Burkshire Properties Group, that bought them from another New York company, State Line Auto Auction, under a line of credit extended by Straight Line, LLC. After a dispute arose over the certificates of title to 46 of the vehicles it purchased from Burkshire, CUABS sued Burkshire, its owners, State Line, and Straight Line in Forsyth County, alleging breach of contract and unjust enrichment. Straight Line moved to dismiss under Rule 12(b)(2), alleging a lack of personal jurisdiction, but its motion was denied, and Straight Line appealed.

On September 15, in ***Credit Union Auto Buying Service, Inc. v. Burkshire Properties Group Corp.***, the Court of Appeals held that although the general rule is that denial of a motion to dismiss is interlocutory and not immediately appealable, there is an exception when the issue is personal jurisdiction. However, when the Court turned to the merits of Straight Line's appeal, it found no error in the denial of its motion to dismiss.

After observing that "[t]he appropriate exercise of personal jurisdiction by our courts is determined first by the existence of a statutory basis for the exercise of jurisdictional authority and second by the dictates of federal due process," the Court found that the trial court had properly exercised jurisdiction over the dispute between the parties because N.C.G.S. § 1-75.8 provides that *quasi in rem* jurisdiction may be invoked "[w]hen the subject of the action is real or personal property in this State and the defendant has or claims any lien or interest therein," and in this case, CUABS's claim concerned Straight Line's security interest in the vehicles it purchased from Burkshire and the certificates of title to those vehicles.

While it recognized that "[e]ven though *quasi in rem* jurisdiction is provided by statute, such jurisdiction must also meet the standards of federal law," the Court found that the determinative factor was "whether the nonresident defendant has certain minimum contacts with the forum state such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" And, it added, there are two forms of personal jurisdiction that are properly exercised by North Carolina's courts, specific jurisdiction and general jurisdiction. Specific jurisdiction exists when the defendant has "purposely directed his conduct towards a resident of the forum state" and "purposefully availed itself of the privilege of conducting activities in-state," thereby invoking "the benefits and protections of the forum state's laws." On the other hand, "general jurisdiction exists if the defendant has continuous and systematic contacts with the forum state."

Finding that the facts in this case were analogous to those in ***Canterbury v. Monroe Lange Hardwood Imports Division of Macrose Indus.***

Corp., 48 N.C. App. 90 (1980), the Court found no merit in Straight Line's argument that it would be unconstitutional for North Carolina to exercise *quasi in rem* jurisdiction over. Rather, the Court found, "the controversy at hand concerns a number of vehicles in which appellant Straight Line claims a security interest. These vehicles were purchased by a North Carolina plaintiff and … are located in North Carolina. Moreover, … Straight Line had prior knowledge that [they] would be sold in North Carolina. ***Shaffer [v. Heitner***, 433 U.S. 186 (1977)] and ***Canterbury*** make quite clear that the presence of these vehicles in the State is a perfectly reasonable basis upon which a trial court could find the existence of *quasi in rem* jurisdiction, as their presence constitutes evidence of contact with the State." Therefore, the Court concluded, the trial court did not err when it denied Straight Line's motion to dismiss.

Negligence Claim Against Town of Erwin Barred by Sovereign Immunity

Erica Parker brought her two sons, Cullen and Colby, to the Christmas parade held in Erwin on December 5, 2011. Barricades restricted vehicular traffic from the parade route, but traffic was permitted into and out of a publicly-accessible, privately-owned parking lot off South 12th Street through a privately-owned alley adjacent to a building owned by Timothy Morris.

After viewing the parade, the Parkers walked across the parking lot and proceeded north along 12th Street, in front of Mr. Morris' building, before stopping at the end of the building as a car exited the parking lot. They then proceeded to walk across the alley toward a nearby restaurant. Just as most of the group cleared the alley, Colby screamed "get out of the way" to his brother, but Cullen was struck by an automobile driven by a woman who later reported that she did not see him before impact. The sun had set at 5:01 pm, it was after 8:00 pm, and the alley was not illuminated by streetlights or any other lighting from buildings in the area, including Mr. Morris'. Cullen was taken by ambulance to Betsy Johnson Regional Hospital, where he died, despite treatment received from emergency department personnel. Parker and her husband then filed a wrongful death action against the Town of Erwin and its Public Works Department, Chief of Police, and Town Manager (collectively, the "Town Defendants"), the Erwin Area Chamber of Commerce, various emergency medical responders, and the owners of the restaurant, parking lot, and other area businesses, including Mr. Morris. They did not sue the woman whose vehicle struck Cullen.

The Town Defendants moved to dismiss under Rules 12(b)(2) and 12(b)(6), challenging personal jurisdiction on grounds of sovereign immunity, public official immunity, and the public duty doctrine. The motion was supported by affidavits, discovery responses, the Town's insurance policy, and other documents. Morris also filed a Rule 12(b)(6) motion to dismiss, contending that he had no duty to illuminate adjacent property and that no conduct on his part caused or contributed to Cullen's death.

After the Parkers submitted additional discovery materials to the court, an affidavit from an expert on risk management and safety for municipal parades, 200 pages of documents produced by the Chamber of Commerce, and affidavits of their own, the trial court heard the various motions to dismiss and concluded that because the General Assembly "has not designated a parade as a governmental activity," and as parades "are not necessarily governmental in nature," it was obligated to consider the "three-step inquiry for determining whether an activity is governmental or proprietary in nature" established by the Supreme Court in ***Bynum v. Wilson County***, 367 N.C. 355 (2014) (see *North Carolina Civil Litigation Reporter*, June 2014, p. 1).

When it did, the trial court found that the parties' conflicting allegations and discovery materials rendered it "unable to conclusively determine" whether plaintiffs' contention that the Town

Defendants violated N.C.G.S. § 160A-296 by failing to maintain safe streets and sidewalks stated a claim upon which relief could be granted, so it denied Town Defendants' motion to dismiss. But, the court *did* dismiss plaintiffs' claim against defendant Morris. The Town Defendants then gave notice of appeal and the Parkers cross-appealed from the dismissal of their claim against defendant Morris.

On September 15, in ***Parker v. Town of Erwin***, the Court of Appeals found that defendants' appeal was interlocutory, but because the "denial of a Rule 12(b)(2) motion premised on sovereign immunity constitutes an adverse ruling on personal jurisdiction," it held that the trial court's order denying the Town Defendants' motion to dismiss was immediately appealable.

The Court then turned to the merits of the appeal and found that while sovereign immunity ordinarily provides "an unqualified and absolute immunity from law suits," it is only applicable to cases in which the governmental entity is sued for the performance of a "governmental, rather than proprietary function." After acknowledging the general rule that an activity is governmental when it is "one in which only a governmental agency could engage," whereas, it is "proprietary and private when any corporation, individual, or group of individuals could do the same thing," the Court looked, as the trial court had, to the "three-step inquiry for determining whether an activity is governmental or proprietary in nature" articulated by the Supreme Court in ***Bynum***: "First, … whether the legislature has designated the activity as governmental or proprietary…. Second, when [it] has not been designated as governmental or proprietary by the legislature, [it] is necessarily governmental in nature when it can only be provided by a governmental agency or instrumentality…. Finally, when [it] can be performed both privately and publicly, the inquiry involves consideration of a number of additional factors, of which no single factor is dispositive." But, at the same time, the Court cautioned that "the analysis *should center upon the governmental act or service* that was allegedly done in a negligent manner … and the focus … should be on 'the importance of the character of the municipality's acts, rather than the nature of the plaintiff's involvement.'"

Applying those principles to plaintiffs' contention that the Town Defendants violated their "duty to ensure the safety of citizens and visitors who [came] to the Parade" because "vehicular and pedestrian traffic was disorganized, unmonitored and unsafe" and the "lighting and visibility at and around the location of the incident was inadequate and unsafe," the Court found that the defendants' allegedly tortious conduct "arose from activities that have already been designated as governmental or are necessarily governmental in nature because they can only be provided by a governmental agency or instrumentality." Therefore, plaintiffs' negligence claim was barred by sovereign immunity.

As for their alternative argument that the Town breached its duty under N.C.G.S. § 160A-296(a) to "keep streets, sidewalks, and alleys in proper repair, in a reasonably safe condition and free from unnecessary obstructions" by allowing the parade route to be both inadequately lighted and obstructed by parked vehicles, the Court found that while maintaining public roads and highways is generally a governmental function, the Supreme Court created an exception to that rule in ***Kirkpatrick v. Town of Nags Head***, 213 N.C. 132 (2011), for the maintenance of streets and sidewalks in a municipality, which it found to be a "ministerial or proprietary function." Therefore, sovereign immunity was *not* available as a defense to plaintiffs' claim that their son's death resulted from defective maintenance of the Town's streets and roads.

However, because the trial court made no findings as to whether that alleged failure proximately caused Cullen's injuries and death, the Court remanded the case "to determine the weight and sufficiency [of] the evidence

presented concerning alleged violations of N.C. Gen. Stat. § 160A-296(a) …[,] to make findings and conclusions with respect to this evidence," and to determine whether those alleged violations "directly and proximately caused the driver of the vehicle to strike Cullen."

The Court also considered plaintiffs' appeal from the trial court's dismissal of their claim that defendant Morris "fail[ed] to maintain functioning lights in his building to light the alley, thus restricting visibility for the driver who struck Cullen." Noting that the alley was owned by Erwin Parking, not Morris, the Court cited ***Lampkin ex rel. Lapping v. Hous. Mgmt. Res., Inc.***, 220 N.C. App. 457 (2012), as authority for holding that "a landlord's duty to keep property safe (1) does not extend to guarding against injuries caused by dangerous conditions located off … the landlord's property, and (2) coincides exactly with the extent of the landlord's control of his property." Therefore, there was no error in the trial court's dismissed plaintiffs' claim against defendant Morris.

Additional Opinion

On September 1, in ***Harris v. Testar, Inc.***, a wrongful termination action brought by a part-owner and member of the Board of Directors of an air emissions testing service company, the Court of Appeals affirmed a trial court order granting summary judgment to the defendants after it found that (1) as a director, plaintiff owed the company a fiduciary duty, a duty of loyalty, and a duty to disclose all material facts, (2) there was no genuine dispute about the fact that his termination resulted from his concealment of material facts from the company, and (3) as a consequence, his termination was justified under the Shareholders' Agreement he and the other owners executed when they formed the company.

WORKERS' COMPENSATION

Award of Benefits for Georgia Injury Reversed

Vincent Burley, a resident of Augusta, Georgia, was hired by U.S. Foods as a truck driver after completing pre-hiring paperwork in Fort Mill, South Carolina, taking his road test in Columbia, South Carolina, undergoing drug screening in Georgia, and signing U.S. Foods' offer letter in South Carolina. His route included regular stops in Georgia and South Carolina and no travel in North Carolina.

When U.S Foods later merged with PYA Monarch, Burley had the choice of terminating his employment or having its supervision transferred to either the company's Charlotte division or its Lexington, South Carolina division. He chose Charlotte and his transfer was approved by the Human Resources Department there. He remained continuously employed by the company and his job title and responsibilities did not change, although the method by which he was paid switched from a commission system to one under which his compensation was based on a number of factors in addition to base pay, including a safety bonus and the number of hours he worked, stops he made, and items of cargo he transported.

Burley injured his back while lifting a case of milk during a delivery in Evans, Georgia. After U.S. Foods admitted liability and began paying benefits under Georgia law, he filed a claim in North Carolina that came on for hearing before a deputy commissioner, who denied it after concluding that the final act to create the employment contract did not occur in North Carolina and its subsequent modification did not constitute a contract "made" in this state for purposes of the relevant statute, N.C.G.S. § 97-36.

The Full Commission affirmed and Burley appealed to the Court of Appeals, which on April 1, in ***Burley v. U.S. Foods, Inc.***, reversed in a 2-to-1 decision (see *North Carolina Civil Litigation Reporter*, April 2015, p. 15). The majority found that, under common law, "modification of the terms of a contract may create a new underlying contract ... 'made' in North Carolina" for purposes of N.C.G.S. § 97-36." Judge Dillon dissented on grounds that "the General Assembly intended that only one state be considered an employment contract's situs, namely, where the contract 'was made[,]' and not also every state where the contract might have been 'modified' over the course of an employee's tenure." The defendants then exercised their right of appeal under N.C.G.S. § 7A-30(2).

On September 25, in ***Burley v. U.S. Foods, Inc.***, the Supreme Court reversed the Court of Appeals in a 4-to-3 decision, holding that "[u]nder North Carolina law, a contract is made in the place where the last act necessary to make it binding occurred" and "the modification that occurred here did not alter the state in which the contract was made." After observing that the "courts of several other states that have considered similar factual situations long have held that … modification of a contract did not change the location where the contract was made," and after discussing decisions to that effect from Missouri, Louisiana, and California, the Court found that, "[c]onsistent with these decisions, *Larson's Workers' Compensation Law* states that '[o]nce the contract has achieved an identifiable situs, that situs is not changed merely because the contract is modified in another state.'"

Arguing that after his transfer Burley "drove a new route, served new customers, and earned significantly more money through the use of a new method of calculating his pay," the dissenting justices contended that "this was no mere modification." Rather, the continuation of his relationship with U.S. Foods was "under terms so significantly different that the arrangement amounts, in effect, to a new contract." For that reason, they would have affirmed the Court of Appeals' majority opinion.

The four members of the Supreme Court's majority disagreed. They found that while N.C.G.S. § 97-36 authorizes an award of benefits under North Carolina law if an individual's employment contract was "made" in North Carolina, the contract in this case "was not made in North Carolina," and while Burley's transfer "involved administrative changes, new customers, and increased pay, … his job title and responsibilities did not change." Therefore, the Court's majority "decline[d] to hold that this internal transfer of supervision, which essentially allowed plaintiff to continue working for U.S. Foods in the same capacity throughout the merger, established a new employment contract," but instead held that "section 97-36 does not apply to a contract initially made in another state and subsequently modified in North Carolina." As a consequence, the Court reversed the opinion of the Court of Appeals and reinstated the Industrial Commission's denial of Burley's claim for benefits under the North Carolina Workers' Compensation Act.

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

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