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CIVIL LIABILITY

Arbitration Clause In Loan Agreement Upheld

County Bank of Rehoboth Beach ("County Bank"), an FDIC-insured Delaware bank, retained Financial Services of North Carolina ("FSNC") to offer County Bank loans. Applications were submitted at FSNC locations and transmitted to County Bank. If approved, they were returned to FSNC with a loan agreement that contained a clause expressly waiving the right to bring or participate in class actions and provided that all disputes between the parties would be resolved by binding arbitration governed by the Federal Arbitration Act ("FAA"), with the National Arbitration Forum ("NAF") acting as arbitrator.

James Torrence applied for 11 County Bank loans or renewals and Tonya Burke applied for 7. Each time, they signed an agreement that included the arbitration clause. In the interim, NAF had ceased conducting arbitrations after it entered into a consent judgment with the Attorney General of Minnesota, following allegations of bias on NAF's part in favor of business claimants and against consumer claimants.

Torrence and Burke filed a class action complaint in New Hanover County Superior Court, alleging that, by charging excessive interest on their loans, the defendants had violated North Carolina's Consumer Finance Act and its unfair trade practices and usury laws. Defendants' answer included motions to dismiss for lack of

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personal jurisdiction and to compel arbitration. In separate orders, the trial court denied the motion to dismiss for lack of personal jurisdiction, granted plaintiffs' motion for class certification, and denied defendants' motion to compel arbitration because the arbitration agreement was "unconscionable." Defendants appealed.

On February 4, in ***Torrence v. Nationwide Budget Finance***, a 47 page opinion authored by Judge Steelman, with Judges Stephens and McCullough concurring, the Court of Appeals first addressed the fact that, as the trial court's orders did not constitute a final judgment, they were interlocutory. Citing ***Howard v. Oakwood Homes Corp.***, 134 N.C. App. 116, *review denied*, 350 N.C. 832 (1999), *cert. denied*, 528 U.S. 1155 (2000), the Court held that "[t]he right to arbitrate a claim is a substantial right which may be lost if review is delayed, and an order denying arbitration is therefore immediately appealable."

The Court then addressed defendants' contention that the trial court erred in denying its motion to compel arbitration and appoint a substitute arbitrator for the NAF. Finding no dispute about the fact that the parties had agreed to binding arbitration governed by the FAA, nor that § 5 of the FAA "contains a specific provision that controls a situation where the arbitrator named in the agreement is unable to serve" similar to the provision in N.C.G.S. § 1-567.45(a) that "[w]here the mandate of an arbitrator terminates for any reason, a substitute arbitrator shall be appointed," and as the Court was of the opinion that "the key aspect … of an agreement to arbitrate is the intent of the parties to arbitrate, not the identity of the arbitrator," it concluded that "the trial court erred in not appointing a substitute arbitrator pursuant to § 5 of the FAA."

Turning next to plaintiffs' contention that the arbitration provision in each of the parties' loan agreements was "unconscionable," and therefore unenforceable, the Court looked to "the leading case in North Carolina dealing with unconscionability in the context of an agreement to arbitrate," ***Tillman v. Commercial Credit Loans, Inc.***, 177 N.C. App. 568 (2006), 362 N.C. 93 (2008). It found that, in ***Tillman***, the trial court held the agreement to arbitrate unconscionable and unenforceable, a divided panel of the Court of Appeals disagreed and entered an order compelling arbitration, and then the Supreme Court reversed again, holding that the arbitration agreement was in fact unconscionable, with a plurality of three justices concurring in the decision, two justices concurring in the result only, and two justices dissenting.

After discussing in some detail ***Tillman's*** holding that, to establish that an arbitration provision is unconscionable, a party must demonstrate both procedural and substantive unconscionability, the Court addressed the implications of two subsequent decisions of the United States Supreme Court, ***AT&T Mobility v. Concepcion***, 131 S.Ct. 1740 (2011), and ***American Express Co. v. Italian Colors Rest.***, 133 S.Ct. 2304 (2013), in the first of which the Supreme Court expressly overruled a California Supreme Court decision finding class action waivers in consumer arbitration agreements unconscionable on grounds that "the FAA supersedes any state law that sets aside arbitration agreements or holds them to be unconscionable."

The Court of Appeals then took note of the fact that, in ***Muriithi v. Shuttle Exp., Inc.***, 712 F.3d 173 (2013), the Fourth Circuit followed ***Concepcion***, holding that it was error for the trial court to find a class action waiver in an arbitration agreement unconscionable. After finding that, in ***Italian Colors***, the Supreme Court "reiterated its prior holding [in ***Concepcion***] that 'Congress enacted the FAA in response to widespread judicial hostility to arbitration,'" the Court concluded that "[b]oth ***Conception*** and ***Italian Colors*** hold that a class action waiver does not render an arbitration agreement unconscionable. ***Italian Colors*** specifically holds that a party can 'effectively vindicate' their rights in the context of a bilateral arbitration."

Therefore, the Court concluded, "the legal theories upon which ***Tillman's*** substantive unconscionability analysis is based have been undermined by subsequent decisions of the United States Supreme Court in the context of cases under the FAA." As a result, it held that, "based upon ***Italian Colors,*** the trial court erred in ruling that the arbitration agreement was substantively unconscionable … [and] in not granting defendants' motion to compel arbitration," so it remanded the case for entry of an order appointing a substitute arbitrator and directed the parties to arbitrate plaintiffs' claims.

The Court of Appeals filed a second opinion raising the same issues with the same result on February 4, ***Knox v. First Southern Cash Advance***, in which plaintiffs Tommy Knox, Velma Knox, Kerry Gordon, and Willie Patrick obtained short-term, single-disbursement, single-repayment loans from Community State Bank in amounts up to $750 in exchange for their promise to pay the principal amount of the loan plus a finance charge ranging from 18 to 27 percent. They also agreed to binding arbitration and to not participate in class action lawsuits. Based on the decisions of the United States Supreme Court in ***Concepcion*** and ***Italian Colors***, and for the reasons set forth in ***Torrence***, the Court held that "the trial court erred in determining that the arbitration agreement was substantively unconscionable." Therefore, as in ***Torrence***, it reversed the ruling of the trial court and remanded the case for entry of an order compelling arbitration.

Court Splits Over Admissibility of Medical Causation Opinion

Robert Webb underwent oral surgery to extract four of his teeth and have the remainder cleaned in a procedure during which he was under general anesthesia for 8 hours and 20 minutes, which was about four times longer than the advance time estimate given to his parents. He was sent home from the hospital that same day, but after becoming unresponsive on the following day, he was rushed back to the hospital, where he was diagnosed with cerebral edema, anoxic brain damage, and cardiac arrest. He died a day later.

After the administratrix of his estate filed suit against the treating dentists and hospital, the defendants moved for summary judgment. In its response, the estate offered the depositions of two dental experts, Dr. Thomas David and Dr. David Behrman, who testified that the dental care provided to the decedent violated the standard of care for dental professionals and that, as a result, he developed bronchopneumonia. An affidavit from the doctor who performed the autopsy stated that bronchopneumonia caused his death.

After agreeing with the defense that the testimony of plaintiffs' experts failed to satisfy Rule of Evidence 702, the trial court denied the motion for summary judgment as to anesthesia care, but granted it as to "all allegations, claims, and causes of action involving the dental care provided to decedent." Plaintiff appealed.

On February 18, in ***Webb v. Wake Forest University Baptist Medical Center***, a 2-to-1 majority of the Court of Appeals reversed the trial court's order excluding the opinions of plaintiff's experts as to the cause of the decedent's bronchopneumonia. Quoting from ***Diggs v. Novant Health, Inc.***, 177 N.C. App. 290 (2006), the majority opinion observed that "[t]he essential question in determining the admissibility of opinion evidence is whether the witness, through study or experience, has acquired such skill that he was better qualified than the jury to form an opinion on the subject matter to which his testimony applies." Finding that when he earned his Doctor of Dental Medicine degree, Dr. Behrman "completed an internship in anesthesia and a residency in oral and maxillofacial surgery," that as Chief of the Division of Dentistry, he oversees residency programs, and that he is "Chair of the Institutional Review Board of a medical center in

New York," the Court's majority concluded that Dr. Behrman's "knowledge, skill, experience, training, and education qualify him to opine as to the causation of bronchopneumonia."

In his dissent, Judge Dillon disagreed with that conclusion "[b]ecause I do not believe that the trial court abused its discretion under … Rule 702 by excluding from its consideration the opinions of these dentists as to the cause of Decedent's bronchopneumonia." Rather, "the trial court is 'afforded "wide latitude of discretion when making a determination about the admissibility of expert testimony."'" Since Dr. David admitted he was not qualified to offer an expert opinion on the cause of decedent's bronchopneumonia and was not offering such an opinion, as Dr. Behrman qualified his response to the medical causation question by stating that his opinion was "[w]ithin [his] knowledge as an oral and maxillofacial surgeon," and as he further limited his response by stating that he would "defer [his] opinion … to a medical doctor," Judge Dillon was of the opinion that plaintiff's evidence of medical causation failed to meet the three-pronged test for admitting expert opinion testimony adopted by the Supreme Court in ***State v. Goode***, 341 N.C. 513 (1995).

Landlord Not Liable for Injuries Caused By Tenant's Dog

When John Covington leased a house he owned on Louisiana Avenue in Wilmington to James and Glenda Hewett, he and the Hewetts contacted Animal Control to obtain advice on satisfying a local ordinance by erecting a fence to confine the Hewetts' Rottweiler, Rocky, to the backyard. They also posted "Beware of Dog" and "No Trespassing" signs on the fence.

Some time later, while eight-year-old Joshua Stephens was visiting the Hewetts' son, Jeremy, Joshua followed Jeremy into the fenced area to refill Rocky's water dish and Rocky bit Joshua's lower leg and shoulder, causing "extremely severe" injuries at both locations.

After he reached the age of majority, Joshua filed a complaint against Covington, his wife Shelby, and the Hewetts. But, Covington had died in the interim, so Joshua took a voluntary dismissal without prejudice. After he refiled his lawsuit against Mrs. Covington and the Hewetts, the trial court granted Mrs. Covington's motion for summary judgment, and at trial, Joshua obtained a judgment against the Hewetts for $500,000. He then appealed the order granting summary judgment to Mrs. Covington.

On February 18, in ***Stephens v. Covington***, the Court of Appeals affirmed. Distinguishing the primary case relied upon by Joshua on appeal, ***Holcomb v. Colonial Associates, LLC***, 358 N.C. 501 (2004), the Court found that, under the Supreme Court's premises liability theory in ***Holcomb***, a landlord can be held liable for a tort committed by a tenant's dog when a lease provision grants the landlord "sufficient control *to remove the danger* posed by the dog" and the landlord has knowledge of the dog's "dangerous propensities." In the present case, however, there was no evidence that either Mr. or Mrs. Covington knew, or had any reason to know, that Rocky was dangerous. The fence was erected not because he was dangerous, but to confine him as required by local ordinance. There was no evidence that Rocky had previously bit anyone, nor did he have a reputation for aggression.

The Court was also not persuaded by Joshua's reliance on ***Hill v. Williams***, 144 N.C. App. 45 (2001), in which a Rottweiler's owners were found to be "chargeable with the knowledge of the general propensities of the Rottweiler animal" after a veterinarian testified that Rottweilers were "aggressive and temperamental, suspicious of strangers, protective of their space, and unpredictable" and the defendants presented no evidence to the contrary. In the present case, however, no evidence was offered that Rottweilers are generally dangerous and the only evidence regarding their general propensities came from an Animal Control Officer, who

testified that "socializing individual dogs is more indicative of an animal's behavior than breed."

The Court found that "***Hill's*** statement regarding the dangerousness of Rottweilers, which was specific to the evidence presented in that case, is not applicable to the instant case," in which the record was devoid of evidence that the Covingtons knew a *dangerous* dog was on the property. As Joshua had failed to establish that they possessed "sufficient control to remove the danger posed" under ***Holcomb***, and as "the record indicates that the Rottweiler breed is not inherently aggressive," the Court held that there was "no genuine issue of material fact, and the trial court correctly granted defendant's motion for summary judgment."

Fireworks Explosion Wrongful Death Claim Raises Genuine Issue of Material Fact

Mark Hill, Melissa Simmons, and Charles Kirkland died and Martez Holland was seriously injured in an explosion during a July 4th fireworks display on Ocracoke Island. Holland subsequently filed a personal injury action, and the estates of Hill, Simmons, and Kirkland each brought wrongful death claims, alleging that Melrose South Pyrotechnics was in the business of providing fireworks displays; the Ocracoke Civic & Business Association contracted with Melrose to provide the fireworks display in question; Terry Holland, who had been trained by Melrose, was its part-time employee and "Chief Pyrotechnician"; Holland conducted fireworks displays on it Melrose's behalf; Melrose advanced money to Holland "to retain the independent services of a crew to assist him"; Holland selected Hill, Simmons, Kirkland, and Martez Holland as crew members on a "job by job basis"; and Hill, Simmons, Kirkland, and Martez Holland were independent contractors, not employees of Melrose.

Plaintiffs brought negligence, gross negligence and strict liability claims against the defendants and, in the alternative, asserted ***Woodson*** claims. The trial court consolidated the individual lawsuits and the defendants moved for summary judgment. After their motion was denied, they appealed to the Court of Appeals, but the appeal was dismissed as interlocutory. However, the Supreme Court allowed their petition for writ of *certiorari* "for the limited purpose of remanding to the Court of Appeals for consideration of the merits."

On February 4, in ***May v. Melrose South Pyrotechnics, Inc.***, the Court affirmed the denial of defendants' motion for summary judgment. Rejecting their argument that ***Hayes v. Elon College***, 224 N.C. 11 (1944), supported defendants' contention that the "undisputed facts" "show conclusively that Plaintiffs were employees" of Melrose, the Court found that "there remain several genuine issues of fact … material to determining the nature of the relationship between Plaintiffs and Defendants," including a "substantial controversy" regarding the nature of that relationship.

The Court then observed that, in determining whether plaintiffs were employees or independent contractors, "[t]he vital test is to be found in the fact that the employer has or has not retained the right of control or superintendence over the contractor or employee as to details." It then reiterated the eight factors to consider in resolving that issue first articulated by the Supreme Court in ***Hayes*** and subsequently repeated in ***Morales-Rodriguez v. Carolina Quality Exteriors***, 205 N.C. App. 712 (2010), and concluded that, because of the "substantial controversy as to the facts, … we cannot determine the nature of the relationship" that existed between plaintiffs and defendants. Therefore, the trial court properly denied defendants' motion for summary judgment.

City's Purchase of Excess Liability Insurance Not Waiver of Sovereign Immunity

James Hinson, an African-American police officer for the City of Greensboro, filed suit

against the City, former Police Chief David Wray, and former Deputy Police Chief Randall Brady, claiming that they subjected him to racial discrimination, conspired to discriminate against him on the basis of his race, and "conspired to injure his … reputation and profession," in violation of 42 USC §§ 1981, 1983, and 1985 and North Carolina common law. Wray and Brady moved to dismiss under Rule 12(b)(6) and the City moved to dismiss under Rules 12(b)(1), 12(b)(2), and 12(b)(6), but their motions were all denied by the trial court, except as to Hinson's punitive damages claim. Defendants appealed.

On February 4, in ***Hinson v. City of Greensboro***, the Court of Appeals held that, although the appeal was interlocutory, "appeals from interlocutory orders raising issues of governmental or sovereign immunity affect a substantial right sufficient to warrant immediate appellate review." However, it limited application of its holding to motions under Rules 12(b)(2), 12(b)(6), 12(c) and 56, ruled that it did not apply to motions under Rule 12(b)(1), and refused to consider defendants' non-immunity related challenges to the trial court's order.

As for defendants' contention that plaintiff's suit was barred by governmental immunity, the Court held that it is "well established that '[s]overeign immunity shields the State, its agencies, and officials sued in their official capacities from suit on state law claims unless the State consents to suit or waives its right to sovereign immunity,'" a rule that applies to suits involving "govenmental, rather than proprietary, function[s]." Since law enforcement is "well established as a governmental function" and "includes the training and supervision of officers by a police department," the Court held that, absent waiver, the defendants were entitled to sovereign immunity for actions taken in their official capacities.

Turning next to the issue of waiver, the Court noted that a city may waive its immunity to suit by purchasing liability insurance or participating in a local government risk pool. However, as held by the U.S. District Court for the Middle District of North Carolina in ***Pettiford v. City of Greensboro***, 556 F. Supp. 32d 512 (M.D.N.C. 2008), neither participation in a Local Government Excess Liability Fund nor purchase of an excess liability insurance policy constitutes a waiver of immunity. Finding the federal court's analysis in ***Pettiford*** both persuasive and consistent with its own holding in ***Magana v. Charlotte-Mecklenburg Board of Education***, 183 N.C. 146 (2007), the Court held that it was error for the trial court to deny defendants' motion to dismiss, as while Greensboro had purchased $5,000,000 in excess insurance coverage, it still had a self-insured retention of $3,000,000. So, it reversed the trial court's denial of defendants' motion to dismiss the state law claims Hinson brought against the City and defendants Wray and Brady in their official capacities.

Noncompetition Agreement Found Overly Broad and Unenforceable

CopyPro, Inc., which sold, maintained, and leased office equipment in eastern North Carolina, hired Joseph Musgrove as a salesman. As a condition of his employment, he was required to sign a covenant not to compete and nondisclosure agreement. In the covenant not to compete, he agreed that, for a period of three years from the termination of his employment, he would not work for, or be connected in any way with, a business of the type and character of CopyPro.

Musgrove was given responsibility for the company's accounts in Pender and Onslow Counties, but when he learned in August 2012 that he was no longer its sole service representative in Onslow County, he resigned his employment and went to work for Coastal Document Systems ("Coastal"). Coastal was a competitor of CopyPro, but only in three of the thirty-three counties in which it did business, Brunswick, Columbus, and New Hanover Counties.

After Musgrove began working for Coastal, he refrained from calling on customers in Onslow and Pender Counties. Despite that fact, when CopyPro learned he was working for Coastal, it filed suit, claiming breach of the nondisclosure and noncompetition agreements in his employment contract, and moved for a TRO and preliminary injunction. The trial court granted the motion and entered an order enjoining Musgrove from violating the two agreements. He gave notice of appeal.

On February 4, in ***CopyPro, Inc. v. Musgrove***, the Court of Appeals looked first at the question of its jurisdiction over Musgrove's appeal and held that, while a preliminary injunction is interlocutory in nature, "when … granting … a preliminary injunction has the effect of destroying a party's livelihood, the order … affects a substantial right and is … subject to immediate appellate review."

The Court then addressed the standard of appellate review and observed that, as a general proposition, a trial court's decision to issue or deny an injunction will be upheld if there is "ample competent evidence" to support it. It also held that there is "a presumption … the judgment entered below is correct" and "the burden is upon appellant to … show error."

When the Court reached the merits of CopyPro's claim, it cautioned that noncompetition agreements are "subject to careful scrutiny" and must be in writing, reasonable as to time and territory, part of the employment contract, based on valuable consideration, and designed to protect a "legitimate business interest of the employer." On the one hand, employers have the right to protect "the unique assets of [their] business"; on the other, they may not "impose unreasonable hardship" on the employee while doing so.

Applying those principles to the present case, the Court found that Musgrove's employment contract met most of the criteria for a valid noncompetition agreement, but while CopyPro "would have clearly had the right to seek 'to prohibit defendant from working in an identical position with a competing business,'" its decision to draft a "much broader noncompetition agreement" that "prohibited him from working for Coastal in any capacity, including as a custodian," had the effect of barring him from "engaging in a much broader array of activities than is necessary to protect Plaintiff's legitimate business interests." Therefore, it held that the agreement was unenforceable and the trial court erred when it issued its preliminary injunction.

County Commissioners' Order Barred by *Res Judicata*

In January 2005, Davidson County Broadcasting, Inc. ("DBCI") applied to the Rowan County Board of Commissioners ("the Board") for a conditional use permit ("CUP") to construct a 1,350 foot radio tower. After conducting a public hearing, the Board voted to deny the CUP because the proposed tower would pose an air safety hazard to the users of a nearby private airport, Miller Airpark. DCBI then petitioned the Rowan County Superior Court for a writ of *certiorari*. Its petition was granted, but the court ultimately affirmed the Board's denial of the CUP, as did the Court of Appeals in ***Davidson County Broadcasting, Inc. v. Rowan County Board of Commissioners***, 186 N.C. App. 81 (2007).

In May 2010, DCBI applied for a CUP again, this time to construct a 1,200 foot radio tower in substantially the same location as in its previous application. The Mount Ulla Historical Preservation Society, Miller Air Park Owners Association, and several dozen private individuals ("petitioners") moved to dismiss DCBI's new application on grounds that it was barred by the doctrines of *res judicata* and collateral estoppel. The Board of Commissioners denied petitioners' motion to dismiss, held another public hearing, entered a written decision finding that the proposed tower would not create a hazardous safety condition, and approved the CUP.

At that point, petitioners petitioned the Rowan County Superior Court for a writ of *certiorari*, seeking review of the Board's CUP approval and once again arguing *res judicata* and collateral estoppel. The superior court agreed and entered an order reversing the Board's approval of the 2010 CUP application. DCBI appealed.

On February 18, in ***Mount Ulla Historical Preservation Society, Inc. v. Rowan County***, the Court of Appeals affirmed, holding that "the 2010 CUP application was barred by *res judicata*," which it defined as a doctrine in which "a final judgment on the merits in a prior action … precludes a second suit involving the same claim between the same parties or those in privity with them." In the process, it acknowledged the Supreme Court's holding on several occasions in the past that the *res judicata* defense applies not only to the final decisions of judicial bodies, but also to "quasi-judicial" bodies such as the Board of Commissioners in the present case.

As for Rowan County's argument that *res judicata* only applies to land use decisions when the applicant is attempting to "re-open and rehear the case upon the *identical facts* presented in the former record," the Court disagreed. Although the Supreme Court stated in ***In re Broughton Estate***, 210 N.C. 62 (1936), that "[m]aterial operative facts occurring after the decision of an action with respect to the same subject matter may … comprise a transaction which may be made the basis of a second action not precluded by the first," the ***Mount Ulla*** Court ultimately concluded that the kind of "material change" that would preclude the use of the defense of *res judicata* is one in which "the specific facts or circumstances which led to the prior … decision have changed to the extent that they 'vitiate … the reasons which produced and supported' the prior decision such that the application 'can no longer be characterized as the same claim.'"

Applying that rule to Rowan County's claim that, by lowering the height of the proposed radio tower by 150 feet, DCBI had made a "material change" in its CUP application, thereby precluding use of the *res judicata* doctrine as a defense, the Court agreed it "constituted a change," but held that the change was not a *material* one. It found in the record no evidence "that this change would undermine the reasoning behind the denial of the 2005 CUP application," *i.e.*, the safety hazard to nearby air travel. Thus, "the Board's finding … that there was a material change in the 2010 CUP application was not supported by the evidence…. [T]he Board essentially considered the same information in both the 2005 and 2010 CUP applications and reached different decisions. *Res judicata* forbids such a result." Therefore, the Court affirmed the trial court's conclusion that the 2010 application was barred by *res judicata*.

Additional Opinions

On February 18, the Court of Appeals addressed for a third time plaintiff Barbara Duncan's action for divorce, equitable distribution, alimony, and child support, after having twice dismissed as interlocutory an appeal from defendant John Duncan, first in an unpublished opinion, ***Duncan v. Duncan***, 193 N.C. App. 752 (2008), and then later in ***Duncan v. Duncan***, ___ N.C. App. ___ (2012). The Supreme Court reversed the latter in ***Duncan v. Duncan***, 366 N.C. 514 (2013), holding that "an open request for attorney's fees does not prevent a judgment on the merits from being final." Upon remand from the Supreme Court, the Court of Appeals addressed the merits of defendant's appeal, holding that he was not *judicially* estopped from contesting the validity of his 1989 marriage to plaintiff in a ceremony officiated by Hawk Littlejohn, a Cherokee Medicine Man and minister of the Universal Life Church, since he had not taken the position "in this or any other judicial proceeding that the 1989 ceremony was valid," but it found him *equitably* estopped from challenging the marriage's validity because he and plaintiff were "equally negligent in relying on Hawk Littlejohn's credentials" to marry them, when in fact "Littlejohn was not authorized under N.C. Gen

Stat. § 51-1 to solemnize the 1989 marriage ceremony."

On February 18, in ***Peters v. Peters***, a divorce action brought by plaintiff Jermaine Peters in which the defendant, Rasheedah Peters, counterclaimed for child custody and other relief, the Court of Appeals dismissed Rasheedah's appeal as interlocutory because the order from which it was taken, which denied her claim for retroactive child support, "did not dispose of the case, but … [rather, left] for further action by the trial court … to … determine the entire controversy." Although Rasheedah claimed the right to an immediate appeal, alleging that the trial court's interlocutory order affected a "substantial right," the Court found that she failed to satisfy Rule of Appellate Procedure 28, which requires the appealing party to cite the statute authorizing review. And, defendant's appeal also did not affect a substantial right, as "a substantial right is one which will clearly be lost or irremediably adversely affected if … not reviewable before final judgment." While an order regarding *prospective* child support affects a substantial right, defendant was seeking *past* child support, and such claims do not, since "[t]he harm done to Defendant, if any, has already occurred and cannot intensify."

WORKERS' COMPENSATION

Nurse Satisfies *Russell v. Lowes* Test for Disability

According to its Form 19, Wake Medical Center (WakeMed) staff nurse Tracy Beard felt lower back pain while "pulling a patient in their bed." Although the parties later stipulated that she suffered an injury at the time, WakeMed denied her claim for workers' compensation benefits on grounds that it was not the result of an accident or specific traumatic incident and did not arise out of and in the course of her employment.

Deputy Commissioner Homick found otherwise. She ordered the defendants to provide medical care and awarded temporary total disability benefits, "reasonable attorney's fees," and costs. The Full Commission affirmed and WakeMed appealed to the Court of Appeals.

On February 4, in ***Beard v. WakeMed***, after reiterating that "the Commission is the sole judge of the credibility of the witnesses and the weight to be given to their testimony" and the standard of review in workers' compensation cases "is limited to consideration of whether competent evidence supports the Commission's findings of fact and whether the findings support the Commission's conclusions of law," the Court found no merit in WakeMed's argument that Beard's claim should have been denied because she was "not honest" and the only evidence that she sustained an injury was her own testimony. It found that those arguments amounted to a request that it "reweigh the evidence … [, which] we cannot do…. The fact that the evidence may support a different finding of fact is irrelevant if there is 'any evidence tending to support' the findings of fact actually made by the Commission."

The Court was also not persuaded by WakeMed's contention that the Commission ignored the fact that Beard failed to disclose her history of back difficulties to her medical providers and "made no findings of fact regarding this evidence." Its failure to make a finding "regarding every piece of evidence presented does not mean that the Commission 'ignored' that evidence, … only that it did not determine that a finding of fact regarding such evidence was necessary to support its determination."

Nor did the Court find merit in WakeMed's argument that the record contained "no medical evidence that plaintiff sustained an injury at the time she alleges" because her doctors' medical causation opinions were based on "plaintiff's subjective history." As recently held in ***Yingling v. Bank of America***, ___ N.C. App. ___ (2013), "a doctor's medical determination is not rendered

incompetent because it is based upon a patient's subjective reports."

The Court also affirmed the Commission's determination that Beard proved her entitlement weekly benefits by meeting the second prong of the ***Russell v. Lowes*** test for disability, in which "[t]he burden is on the employee to show … [incapacity] to earn the same wages he … earned before the injury, either in the same employment or in other employment … [by producing evidence that] he is capable of some work, but …, after a reasonable effort … [was] unsuccessful." While Beard's doctor released her to return to work, he imposed a 20 pound lifting restriction, and although she spent "four or five hours a day looking" for jobs and sending out resumes, when she tried to return to work she had to abandon the job due to back pain, which made "it … hard for [her] to move" by the end of the day. Therefore, the Court agreed that Beard's evidence satisfied the second prong of the ***Russell v. Lowes*** test for disability and it affirmed the Commission's award of benefits.

Brain Cancer Occupational Disease Claim Denied

The Salisbury plant of Norandal USA in which Douglas File worked from 1984 until 2007 manufactured aluminum foil. His job duties included preventative maintenance and repairs on the plant's "mills," the machines that transform thick sheets of aluminum into thin sheets of aluminum foil utilizing a "Measurex" device manufactured by Honeywell that sends beams through the aluminum sheet to measure its thickness and then transmits the data to a computer, which modifies the mill rolls to ensure that the sheet's thickness is correct.

File was diagnosed with brain cancer in 2000. After undergoing surgery, he returned to work, only to have the cancer return in 2004. After missing additional time while undergoing further treatment, he returned to work again, but was diagnosed with cancer for a third time in 2007. At that point, due to complications from an operation to remove a malignant tumor on his brain, he retired on disability.

File subsequently filed a Form 18, alleging that close proximity to the machinery operated at his workplace exposed him to radiation, which contributed to the development of his brain cancer. He offered testimony from Drs. Max Costa and David Schwartz that his radiation exposure at work increased the risk of developing brain cancer.

Norandal offered the testimony of Robert Kesslick, the on-site Honeywell technician who was responsible for maintaining and repairing Norandal's "Measurex" devices. He testified that the closest an individual could get to mills 2 and 3 was five feet and to the mills 1 and 4, ten feet. He also testified that, throughout his years testing Norandal's mills, he "never received a dosage of any recordable level of radiation." In addition, Norandal presented the testimony of Dr. Robert Dixon, an expert in x-ray physics, with subspecialties in radiation shielding and dosimetry, who concluded that any radiation exposure to employees from Norandal's mills would be "virtually non-existent."

Deputy Commissioner Donovan denied File's claim for benefits and, on appeal, the Full Commission affirmed, ruling that he failed to prove that he suffered from an occupational disease compensable within the meaning of N.C.G.S. § 97-53(13). File appealed.

On February 18, in ***File v. Norandal USA, Inc.***, the Court of Appeals affirmed the denial of File's claim. While it agreed that the Commission "must consider and evaluate all of the evidence" and "may not wholly disregard or ignore competent evidence," it disagreed with File's contention that the Commission disregarded the Honeywell safety manual, "Ionizing Radiation Fact Book," and "BEIR Study," which File had offered into evidence in an attempt to contradict the testimony from Norandal's witnesses about radiation levels around the mills and the effects

of radiation on humans. The Court found that, while the Commission did not specifically mention the three documents, "it made detailed findings of fact about both Dixon's and Kesslick's testimony." As in ***Hunt v. NCSU***, 194 N.C. App. 662 (2009), it "was not required to make specific findings of fact related to the documents used during the[ir] testimony."

The Court also considered and rejected File's contention that findings of fact 6, 8, 11, and 13 were not supported by competent evidence. It found plenary support for the Commission's finding that Dr. Dixon was of the opinion that "plaintiff was not exposed to radiation above background levels, and therefore, … his employment did not contribute to his … cancer" and, similarly, for its finding that Dr. Costa's increased risk opinion "was not borne out by the testimony of Mr. Kesslick and Dr. Dixon," as Dr. Costa admitted that he did not know the amount of radiation File might have been exposed to, did not know how far the mills emitted radiation, and he "just assumed that there was a … general leakage of radiation."

The Court also found no merit in File's argument that it was error for the Commission to rely on Dr. Dixon's testimony that File's "employment did not contribute to his development of brain cancer." While it agreed that, as in ***Click v. Pilot Freight Carriers***, 300 N.C. 164 (1980), when an injury "involves complicated medical questions far removed from the ordinary experience and knowledge of laymen, only an expert can give competent opinion evidence as to the cause," Dr. Dixon's testimony concerned the level of exposure to radiation was not an opinion about causation. As a consequence, the holding in ***Click*** was inapposite.

Being an expert in "x-ray and physics with subspecialties in radiation shielding and radiation dosimetry," the Court found Dr. Dixon qualified to opine that File "was not exposed to radiation above background levels." And, as "the Commission found that he was not exposed to radiation above background levels, it did not need … testimony as to whether such exposure substantially contributed to the development of … [his] brain cancer."

Therefore, the Court found that "the Commission properly considered all of the evidence," and since the record contained competent evidence supporting each finding of fact, it held that the Commission correctly found File's claim noncompensable.

"Suitable Employment" Analysis Inapplicable to Salary Continuation Claims

Connie Yerby slipped and fell at work, injuring her head, neck, shoulder, back, and right arm. As a Juvenile Justice Officer with the North Carolina Department of Public Safety/Division of Juvenile Justice (NCDPS), she was a "law enforcement officer" entitled to up to two years of full salary benefits under N.C.G.S. § 143-166 if incapacitated as the result of an injury by accident arising out of and in the course of her employment, so NCDPS continued to pay her full salary when she went out of work.

Yerby's treating physician authorized a return to light duty work with restrictions on January 23, 2012, so NCDPS developed a "RETURN TO WORK PLAN" with modified job duties. When she did not return to work because she felt that "her restrictions and physical limitations" put her safety at risk "if she [were] in direct contact with students, who were often violent juvenile offenders," NCDPS stopped making its salary continuation payments and Yerby requested a hearing.

Deputy Commissioner Houser entered an Opinion and Award in Yerby's favor and the NCDPS appealed. The Full Commission concluded that the "modified, light duty job offered to [p]laintiff was not suitable to her restrictions and physical limitations and her refusal of the job was justified," so it awarded salary continuation benefits from January 23 through June 9, 2012. NCDPS appealed.

On February 18, in ***Yerby v. North Carolina Department of Public Safety/Division of Juvenile Justice***, the Court of Appeals first considered, and ultimately disagreed with, NCDPS's contention that the Commission lacked statutory authority to award salary continuation benefits under N.C.G.S. § 143-166.19. The Court found that the statute gives the "department that employs the claimant … [authority to] determine what salary continuation benefits, if any, the claimant shall receive," and if there is a disagreement and timely appeal from that determination, "it is the Commission's duty to hear the parties' arguments, determine their disputes, decide the case, and file an Opinion and Award." Otherwise, "a covered individual would have no ability to appeal an employer's denial of salary continuation benefits," and that would "undermine the purpose of Article 12B to 'provide additional salary benefits for law enforcement officers who are injured on the job.'"

At the same time, however, the Court agreed with the NCDPS that the Commission erred when it awarded salary continuation benefits to Yerby on grounds that the light duty job she was offered by the NCDPS was "not suitable employment." It held that while the question of "whether an individual refused suitable employment is necessary to award or deny workers' compensation benefits pursuant to N.C. Gen. Stat. §§ 97-29 and 97-30 … [, s]uch a determination is absent from N.C. Gen. Stat. §143-166.19, which denies salary continuation benefits to an individual who 'refuses to perform any duties to which he may be properly assigned.'" Because Yerby's right to salary continuation benefits, if any, was dependent upon the provisions of N.C.G.S. § 143-166, not those of N.C.G.S. §§ 97-29 and 97-30, the Court reversed the Commission's award of benefits and remanded the case to "apply the proper legal standard" to the question of Yerby's claimed entitlement to additional salary continuation benefits.

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

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