NORTH CAROLINA CIVIL LITIGATION REPORTER

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CIVIL LIABILITY

Legal Malpractice Claim Time-Barred

Dara Hackos, who was involved in a rear-end collision in Virginia, hired a Virginia attorney to file suit against the tortfeasor, Scottie Sparks, and his employer. She later hired a North Carolina attorney, David Smith, to replace the Virginia attorney. He dismissed the Virginia lawsuit and filed a new one in the United States District Court for the Middle District of North Carolina, but the venue was improper and it was dismissed.

Hackos then hired attorney Brian Davis, who filed a professional malpractice claim which alleged that, through Smith's negligence, the statute of limitations expired and his client lost her right to pursue a personal injury claim against Sparks. Davis later withdrew as counsel and Hackos retained Kerri Taylor and Williams Charters of Goodman Allen & Filetti, PLLC.

Smith filed a motion for summary judgment, and when it came on for hearing, neither Hackos nor her attorneys appeared, so it was granted. Taylor and Charters responded with a motion to reconsider, but it was denied. They appealed the trial court's order granting summary judgment and its subsequent order denying their motion to reconsider, but on December 16, 2008, the Court of Appeals rejected both appeals in ***Hackos v.***

Smith, 194 N.C. App. 532 (2008) ("***Hackos I***") and ***Hackos v. Smith***, 194 N.C. App. 557 (2008) ("***Hackos II***"). In each case, the Court found that Taylor and Charters had violated the Rules of Appellate Procedure by failing to include assignments of error in the record on appeal, a requirement at the time under Rule 10(a), and by filing records that were materially different from the proposed records they submitted to Smith. Nevertheless, the Court considered the merits of their appeal in ***Hackos I***, although it ultimately affirmed the trial court's order granting Smith's motion for summary judgment. And, the Court dismissed the appeal in ***Hackos II*** because there were no assignments of error in the record.

On December 15, 2011, Hackos initiated a professional liability action against Taylor, Charters and their law firm by obtaining an order extending the time to file suit. She then filed her complaint and the defendants responded with a Rule 12(b)(6) motion to dismiss, claiming that the applicable statute of limitations had run. The trial court agreed, Hackos suit was dismissed, and she appealed to the Court of Appeals.

On June 18, in ***Hackos v. Smith*** ("***Hackos III***"), the Court of Appeals affirmed the trial court's order dismissing Hackos' suit against Taylor, Charters and their law firm in an opinion which held that the statute which governs legal malpractice claims, N.C.G.S. 1-15(c), contains both a three year statute of limitations and four year statute of repose. Quoting from ***Goodman v. Holmes & McLaurin Attorneys at Law***, 192 N.C. App. 467 (2008), the Court held that claims for legal malpractice are "deemed to accrue at the time of the occurrence of the last act of the defendant giving rise to the cause of action," with the determination of the last act being a "conclusion of law appropriate for the trial judge to make based on the facts presented." It then found that, in the present case, defendants' alleged malpractice included filing legally deficient documents and failing to appear in court, both of which occurred on or before July 13, 2007, which was well beyond the four year statute of repose, since Hackos did not initiate her suit against Tayler, Charters and their law firm until December 2011.

In an effort to avoid the statute of repose, Hackos contended that the last acts giving rise to her claim did not occur until Taylor and Charters negligently represented her on appeal by failing to submit a proper record. But, the Court found that the three year statute of limitations also applied and the negligence she was alleging occurred more than three years before she initiated her lawsuit. While N.C.G.S. 1-15(c), provides for an exception to the three year statute of limitations if "at least two years … passed between the last act or omission giving rise to the injury and the date that Plaintiff did, or reasonably should have, discovered the injury," the Court found that Hackos had "discovered, or reasonably should have discovered, the alleged injury … well before the two-year period mandated by N.C.G.S. 1-15(c). Therefore, the 'one year from the date discovery …' provision did not apply …, and Plaintiff was required to initiate this action within the three year statute of limitations." As she had not done so, the Court agreed with the trial court that her claim was time-barred and defendants' Rule 12(b)(6) motion was properly granted.

Gun Owners Not Liable for Unauthorized Use

Bernie Parrish, age 52, lived with his parents, Harvey and Barbara Parrish, who owned a number of firearms to which their son had access. On March 8, 2011, Bernie drove to the workplace of his former girlfriend, Catryn Bridges, and shot her with one of his parents' guns. Bridges sued Harvey and Barbara, alleging that they knew or should have known that their son posed a risk of serious harm to her, yet "failed to take reasonable … steps to keep [their] guns in a safe and secure place." The Parrishes responded with a Rule 12(b)(6) motion to dismiss, which the trial judge granted. A 2-to-1 majority of the Court of Appeals affirmed, but Judge Geer dissented and Bridges exercised her right to a review by the Supreme Court.

On June 13, in ***Bridges v. Parrish***, the Supreme Court agreed with the Court of Appeals' majority that Bridges' claim was properly dismissed, as the Parrishes had no common law duty to secure firearms from their son. Noting that the criminal acts of a third party are generally considered unforeseeable independent intervening causes, the Court held that, as a consequence, "the law does not generally impose a duty to prevent the criminal acts of a third party." And, while North Carolina's common law recognizes an exception to that rule in the case of "special relationships," such as between parents and their unemancipated children, or landowners and their business invitees, or common carriers and their passengers, or innkeepers and their guests, Bridges' complaint was devoid of allegations demonstrating that Harvey and Barbara had a special relationship with her.

The Court also found no merit in Bridges' reliance on prior caselaw characterizing firearms as "dangerous instrumentalities" as support for her argument that the Parrishes had a duty to secure their firearms from others. While the Court agreed that there is authority for the proposition that "a very high degree of care is required from all persons *using* firearms in the immediate vicinity of others," the "mere possession of a legal yet dangerous instrumentality does not create automatic liability when a third party takes that instrumentality and uses it in an illegal act." Thus, the Parrishes were not liable for their 52-year-old son's criminal actions, which were "unforeseeable and independent, intervening cause[s] absolving [defendants] of liability."

Malicious Prosecution Award Vacated

After a house located on property owned by Cully's Motorcross Park in Wilson was damaged by fire, Cully's president, Laurie Volpe, submitted a proof of loss to Farm Bureau, which initiated an investigation that established "a distinctive pour pattern on some walls of the house" and a burn trail that led to a room in which Farm Bureau's investigator, Randall Loftin, found a tipped red gas can labeled "Race Fuel." Volpe and her husband owned a dirt bike racing track and used gas cans labeled in that way in their business. Suspecting arson, Farm Bureau denied Cully's fire damage claim and filed a declaratory judgment action, seeking a determination that it had no obligation to Cully's under its policy. Cully's counterclaimed, asserting breach of contract, unfair claims practices, and unfair and deceptive trade practices under Chapter 75.

Farm Bureau investigator Loftin informed Sergeant Lucas of the Wilson Police Department

of the results of his investigation and Lucas began his own investigation. He eventually concluded that a crime had been committed, consulted with an assistant district attorney, and presented the case to a Wilson County magistrate, who found probable cause and issued a warrant for Volpe's arrest. Later, however, the district attorney dismissed the charges against her and she amended her answer in the declaratory judgment action to add a malicious prosecution claim.

After a bench trial, the trial court found that Farm Bureau neither breached its insurance contract with Cully's nor engaged in unfair and deceptive practices. However, it also found that Volpe was not involved in the fire, her actions did not amount to a crime, Farm Bureau had "caused a criminal prosecution to be instituted against Volpe," and it was liable for malicious prosecution.

Last May, in ***N.C. Farm Bureau Mut. Ins. Co. v. Cully's Motorcross Park, Inc.***, the Court of Appeals affirmed the trial court, but on June 13, a 5-2 majority of the Supreme Court reversed the Court of Appeals and remanded the case with instructions to amend the trial court's judgment to conclude that Farm Bureau "did not institute a malicious prosecution and its actions did not constitute an unfair and deceptive practice." The Supreme Court found that the Court of Appeals' "interpretation of the element of initiation in a malicious prosecution case does not account adequately for the roles played by police and prosecutorial discretion." Quoting from Comment (g) of Section 653 of the Restatement (Second) of Torts, it held that "giving … information or even making an accusation of criminal misconduct does not constitute a procurement of the proceedings initiated by the officer if it is left entirely to his discretion to initiate the proceedings or not." Rather, "[t]he exercise of the officer's discretion makes … initiation of the prosecution his own and protects from liability the person whose information or accusation has led the officer to initiate the proceedings."

This result, said the Court, "balances and protects important public interests. It allows citizens to make reports in good faith to police and prosecutors without fear of retaliation if the information proves to be incomplete or inaccurate." And, if the information provided is false, it only protects a reporting party who believes it to be true and "deter[s] those who would subvert to their own ends the power held by police and prosecutors," thereby protecting the citizenry from those who resort to "the process of the law without probable cause, willfully and maliciously." Thus, in the present case, while Sergeant Lucas of the Wilson Police Department used the information provided by Farm Bureau's investigator, "he independently exercised his discretion to make the prosecution his own." That being so, Farm Bureau "did not institute a malicious prosecution and its actions did not constitute an unfair and deceptive practice."

Minimal Default Judgment Award Upheld

On July 12, 2002, Alexander Amaxopulos, President of McJas, Inc. (d/b/a McAlister's Deli), entered into a five-year lease of a building in which to operate his restaurant. He, his wife Gina, and his father Douglas were all required to execute a "Guaranty of Lease" that guaranteed the lease "for a term of one five year" [sic]. The guaranty specifically provided that it could not

be changed, except in a writing signed by the guarantor and landlord.

Attached to the lease was a handwritten note dated July 18, 2007 and signed by Alexander that stated the "current lease will be renewed for 5 more years according to all terms of current lease." In 2008, the landlord filed suit in Pitt County Superior Court against McJas, Inc., Gina Amaxopulos and Douglas Amaxopulos, alleging that McJas, Inc. had defaulted on the lease and the defendants were liable for unpaid rent of $87,309.81, plus attorneys' fees. Gina filed an answer, denying liability and asserting as an affirmative defense that the landlord had failed to properly renew the original lease and had not obtained her signature as guarantor of the lease extension. Neither McJas, Inc. nor Douglas Amaxopulos filed an answer, so the landlord obtained an entry of default from the Clerk of Court.

Thereafter, the landlord filed an amended complaint, seeking unpaid rent of $139,259.86, plus attorneys' fees, less the rents that had been paid by its new tenant. Again, Gina filed an answer, but the other two defendants did not, so the landlord obtained another entry of default from the Clerk of Court, who also entered a default judgment against McJas, Inc. and Douglas Amaxopulos for $139,259.86, plus attorneys' fees of $20,888.98.

Douglas moved to set aside the entry of default and default judgment on grounds that because one of the three named defendants had answered plaintiff's complaint, it was improper for the Clerk of Court to enter a default judgment. He also explained that, upon receipt of service of process, he contacted his daughter-in-law, Gina, and was told that "they had talked to an attorney and … the matter was being handled." The presiding judge, Clifton Everett, vacated the default judgment as improperly entered, but denied Douglas' motion to set aside the entry of default because he had failed to show good cause for not having filed an answer to the complaint. Judge Everett also ordered a hearing to determine the amount of damages to be awarded.

That hearing was held by Judge Marvin Blount, who entered a default judgment in the amount of $992.88, plus "reasonable attorneys' fees" of $506.78. Plaintiff appealed, contending that it was error for the court to allow the defendant to present a defense on the merits following entry of default. However, on June 18, in ***Webb v. McJas, Inc.***, the Court of Appeals disagreed. Citing ***Bell v. Martin***, 299 N.C. 715 (1980), the Court held that "[o]nce the default is established [under Rule 55(a)] defendant has no further standing to contest the factual allegations of plaintiff's claim for relief," but the defendant "may still show that the complaint is insufficient to warrant plaintiff's recovery" and, as in ***Decker v. Homes, Inc./Constr. Mgmt & Fin. Grp.***, 187 N.C. App. 658 (2007), "[a]t a damages hearing following entry of default, evidence showing how the injury occurred is competent … to allow the [factfinder] to make a rational decision as to the amount of damages to be awarded."

Applying those principles to the present case, the Court noted that the handwritten lease renewal attached to plaintiff's complaint was signed by Alexander Amaxopulos, but not his father Douglas. It also found significance in the fact that the guaranty agreement Douglas signed "did not automatically renew nor did [defendant] renew his guarantee beyond the original term of the lease." As a consequence, the Court found that "plaintiff's complaint, on its face, is insufficient to support the extent of the recovery

of damages … requested." Since, under the original lease that Douglas guaranteed, plaintiff was due unpaid rent of $3,378.53, less the $2,385.65 plaintiff received from McJas, Inc.'s bankruptcy case, the Court agreed with Judge Blount that plaintiff was due $992.88 from Douglas, as guarantor of the original lease, plus "reasonable" attorneys' fees, which, in his discretion, Judge Blount set at $506.78.

Litigants Imprisoned for Civil Contempt

In 1911, Elijah Reels purchased a tract of land along Adams Creek in Carteret County. Years later, he failed to pay the property tax and the tract was conveyed to the county, but his son Mitchell later bought it back. After Mitchell died intestate, a dispute arose among members of the family over who owned the property. Mitchell's brother Shedrick filed a petition under the North Carolina Torrens Act, N.C.G.S. 43-1 *et seq.*, and obtained a Superior Court decree declaring him owner of the 13.25 acres of the tract that were located along the creek (the "Waterfront Property"). He subsequently sold the property to Adams Creek Development, which conveyed it to Adams Creek Associates ("Adams Creek").

In October 2002, Adams Creek sued Melvin Davis and Licurtis Reels, alleging trespass and seeking to remove the cloud on its title caused by Licurtis' contention that she had an interest in the Waterfront Property by way of a deed from Mitchell Reed's daughter, Gertude. In May 2004, Judge Benjamin Alford found Adams Creek owner of the property. He also ordered Melvin and Licurtis not trespass and directed them to remove the structures they had placed on the property. But, they continued to occupy it, despite an intervening trial court order holding them in contempt for failing to comply with Judge Alford's order of May 2004, and notwithstanding their unsuccessful appeal of that order in ***Adams Creek Associates v. Davis***, 186 N.C. App. 512 (2007), *appeal dismissed and disc. review denied*, 362 N.C. 354 (2008) ("***Adams Creek I***").

In March 2011, Judge Jack Jenkins granted Adams Creek's motion to hold Melvin and Licurtis in civil contempt, and he ordered them imprisoned until their contempt was purged. While in prison, where they remain to this day, Melvin and Licurtis filed motions for summary judgment and to set aside the 2004 order, which were denied in February 2012, a motion to dismiss the Adams Creek lawsuit, and another motion to purge their civil contempt. They also filed a Rule 54(b) motion, seeking rescission of Judge Alford's 2004 order and a second order denying their motion to set the 2004 order aside. Adams Creek responded with a Rule 11 motion for sanctions. Judge Alford denied all of the motions filed by Melvin and Licurtis, granted Adams Creek's Rule 11 motion, and awarded it $11,000 to cover the fees it incurred responding to defendants' motions. Melvin and Licurtis then appealed to the Court of Appeals once again.

On June 4, in ***Adams Creek Associates v. Davis*** ("***Adams Creek II***"), the Court of Appeals affirmed in a lengthy opinion that discusses in detail the law of lappage, the statute of limitations for adverse possession under color of title, use of the Torrens Act to settle title to real property, and the doctrine of collateral estoppel. When the Court turned to defendants' appeal from Judge Jenkins' order holding them in contempt, it noted that "[c]ivil contempt is designed to coerce compliance with a court order, and … is based on a willful violation of a lawful … order …. Willfulness constitutes (1) an ability

to comply with the court order; and (2) a deliberate and intentional failure to do so." Since the applicable standard of review limits the appellate court to determining whether there is any competent evidence to support the trial court's findings, and as the defendants admitted in their brief that their structures and equipment remained on the property, there was competent evidence in the record to support the findings contained in the trial court's contempt order. Therefore, they were conclusive on appeal.

Turning to the Rule 11 sanctions assessed against the defendants, the Court observed that the trial court "may impose [such] sanctions on a party that files a motion that is factually insufficient, legally insufficient, or filed for an improper purpose." It agreed with the trial court that "[i]nstead of seeking through appropriate means appellate review of orders about which they disagree, defendants have continued to ignore and violate the[m] … and have … attempted to re-litigate title … determined … in prior proceedings." Consequently, the trial court's $11,000 award to cover the fees Adams Creek incurred "as a result of defendants' meritless motions" was not an abuse of discretion.

Motion for Class Certification Denied

Agean, Inc., the owner two restaurants in Durham, purchased a list of business fax numbers and arranged for 7000 restaurant coupons to be faxed to 978 people, including Jonathan Blitz, who received five one-page fax-transmitted coupons. Claiming that he had not requested advertisements from Agean, nor given it permission to send him fax transmissions, Blitz filed suit. After his case was transferred to the Business Court, he amended his complaint to seek class certification, damages and an injunction.

The trial court denied Blitz's motion for class certification, but in ***Blitz v. Agean, Inc.***, 197 N.C. App. 296 (2009) ("***Agean I***"), the Court of Appeals reversed. Blitz then filed another amended class action complaint, in which he defined the class as the 978 holders of telephone numbers in the database that had been purchased by Agean. Again, however, the trial court denied Blitz's motion to certify a class, finding that he had "failed to provide a theory of generalized proof that allows for common questions to predominate over individual inquiries." It also determined that class certification would be "unjust on equitable grounds" because it would provide Blitz "inappropriate leverage in settlement negotiations." So, Blitz appealed to the Court of Appeals again.

On June 4, in ***Blitz v. Agean, Inc.*** ("***Agean II***"), the Court of Appeals acknowledged that, although Blitz's appeal was interlocutory, interlocutory orders denying class certification affect a "substantial right," making them immediately appealable. The Court then observed that a class exists when its members each have an interest in the same issue of fact or law and that issue predominates over others affecting only individual class members. Finding that Blitz did not limit his proposed class to persons who received *unsolicited* fax advertisements, and considering the fact that, in its 12 years of existence, Agean had served over 50,000 meals to its customers, many of whom had requested information about the company, with some having consented to that information being faxed to them, the Court determined that there was competent evidence in the record to

support the trial court's determination that individualized issues about whether Agean's faxes were unsolicited predominated over issues of law and fact common to the proposed class. Therefore, the trial court did not abuse its discretion when it denied Blitz's motion for class certification.

Joint Venture Defined

In exchange for an "income subsidy" of $195,804 and a $20,000 relocation loan from Halifax Regional Medical Center, Darrell James Brown, MD, a specialist in obstetrics and gynecology, agreed to establish an OB/GYN practice in Roanoke Rapids. To avoid repayment of the full amount he received under the agreement, Brown was required to maintain his practice in Roanoke Rapids for one year beginning in June 2007. Thereafter, for each of the next 24 months in which he continued his practice in Roanoke Rapids, Halifax Regional would forgive an additional portion of the money owed, until June 2010, when his indebtedness would be completely forgiven.

Consistent with that agreement, Brown entered into an employment contract with Smith Church Obstetrics & Gynecology, and he remained in that practice until June 2009, when Smith Church terminated his employment. Later, after he accepted a position in Duplin County, Halifax Regional sent him a demand letter seeking repayment of $107,902, as he had not maintained his practice in Roanoke Rapids for the full three years contemplated by the contract. Brown responded by alleging that he entered into the agreement under the belief that there were "unmet demands" for an OB/GYN physician in Roanoke Rapids, but after he signed the contract, Halifax Regional recruited another OB/GYN doctor, which created an "oversupply" of obstetricians in the county and made it difficult for him to start his own practice, so he "look[ed] for employment elsewhere." He also brought a third party complaint against Smith Church, alleging breach of contract and interference with his agreement with Halifax Regional.

The trial court granted summary judgment in Halifax Regional's favor and ordered Brown to pay $107,902, plus interest. He appealed, arguing that (a) one who prevents performance of an agreement by another may not take advantage of the nonperformance; (b) each member of a joint venture is responsible for the other's actions; and (c) Halifax Regional and Smith Church and were engaged a joint venture. Therefore, Brown argued, Halifax Regional was liable for Smith Church's actions, including its termination of Brown's employment, which was what prevented him from honoring the terms of his agreement with Halifax Regional.

On June 18, in ***Halifax Regional Medical Center v. Brown***, the Court of Appeals rejected Brown's argument and affirmed the trial court's award. It defined a joint venture as "an alliance between two or more people in pursuit of a common purpose" and concluded that Halifax Regional and Smith Church were *not* engaged in a joint venture. While "a joint venture is a plan carried out *for profit*," none of Halifax Regional's business had that purpose. Further, for a joint venture to exist, "one party must have "the legal right to control the conduct of the other with respect to the prosecution of the common purpose," but here, the agreement between Brown and Halifax Regional not only made no mention of Smith Church, but Brown was not required to establish his practice there and nothing in the record established a fiduciary

relationship between Halifax Regional and Smith Church. Therefore, Smith Church's decision to terminate Brown's employment had no bearing on his obligation to perform under his agreement with Halifax Regional. As a consequence, it was not error for the trial court to grant summary judgment for the hospital.

Uniform Enforcement of Foreign Judgment Act Applied

Lumbermans Financial, LLC loaned money to Lucas Home Builders, LLC, a residential building company owned by Sean Poccia, contingent upon Poccia's personal guaranty of the debt. When Poccia sought bankruptcy protection, Lumbermans filed an adversary proceeding seeking to have the debt guaranteed by Poccia deemed non-dischargeable. The parties later entered into a Consent Judgment, pursuant to which they estimated Lumbermans' damages to be $250,000 and agreed that once the project under construction was sold, an audit would be performed at Poccia's expense to determine Lumbermans' actual damages, which might be less or more than the stipulated amount of $250,000. Based on that stipulation, a federal bankruptcy court in Michigan entered a Consent Judgment "in the amount of Two Hundred Fifty Thousand ($250,000.00) plus statutory interest."

Lumbermans subsequently filed notice of a foreign judgment under the Uniform Enforcement of Foreign Judgments Act (UEFJA), N.C.G.S. 1C-1701 *et seq*., in Mecklenburg County Superior Court, stating that the Consent Judgment entered in bankruptcy court was for the principal amount of $240,479.80, plus post-judgment interest of 2.18%. Later, Lumbermans forwarded an accounting of the debt to Poccia, alleging that the actual judgment should be $305,340.61, plus interest. Poccia objected, contending that he did not agree to pay more than $250,000. Following a hearing to consider Poccia's objection, Judge Yvonne M. Evans determined that Lumbermans' actual damages were subject to the audit described in the parties' stipulation, and as a result, Poccia owed $280,368.55, plus interest. Poccia appealed.

In an opinion filed on June 18, ***Lumbermans Financial, LLC v. Poccia***, the Court of Appeals observed that "[t]he Constitution's full faith and credit clause requires states to recognize and enforce valid judgments rendered in sister states." It then held that, while North Carolina's UEFJA permits post-judgment relief from foreign judgments under Rule 60(b), the grounds for doing so are limited to situations in which "the foreign judgment was based on extrinsic fraud, is void, has been satisfied, released or discharged, … reversed or vacated, or should no longer be enforced … on equitable grounds." In the present case, however, Lumbermans was asking the court to revise the amount of damages set forth in "a final judgment of the United States Bankruptcy Court." While the parties' "Stipulation clearly contemplate[d] … that the debt Poccia owed to Lumbermans 'may be less or may be more' than $250,000 …, the Stipulation was not incorporated into the consent judgment." Since the UEFJA provides for enforcing valid foreign judgments, not modifying them, and as foreign judgments are only entitled to "the *same* credit, validity and effect" in a sister state as in the state in which it was entered, it was improper for the trial court to conclude that the parties' Consent Judgment entitled Lumbermans to a judgment in excess of $250,000.

County Water Distribution System Deemed A Proprietary Function

As was his custom, James Earl Bynum drove to the Wilson County office building to pay his water bill. He started down the front stairs to return to the vehicle in which his wife was waiting and fell, sustaining serious injuries. The Bynums sued the county and the owner of the building, Sleepy Hollow Development Company, alleging that its exterior steps were kept in an unsafe condition. Both defendants denied negligence, pled contributory negligence, and moved for summary judgment. The county also claimed immunity from suit because "operating and maintaining a county office building is a governmental function."

In an unpublished opinion filed on September 6, 2011, ***Bynum v. Wilson County*** (***Bynum I***), the Court of Appeals dismissed as interlocutory defendants' appeal from the trial court's denial of summary judgment on the issues of negligence and contributory negligence. At the same time, because it had previously held that "appeals from interlocutory orders raising issues of governmental … immunity affect a substantial right sufficient to warrant immediate appellate review," the Court did *not* dismiss the county's challenge to the trial court's ruling on governmental immunity. But, the county withdrew its appeal on that basis because it had mistakenly submitted an insurance policy different from than the one that was in effect at the time of Bynum's accident.

Bynum subsequently died. After plaintiffs asserted a wrongful death claim, the defendants renewed their motions for summary judgment, but they were again denied by the trial court, so they appealed to the Court of Appeals. Plaintiffs then moved to dismiss defendants' appeal, contending once again that it had been taken from an unappealable interlocutory order. On June 18, in ***Bynum v. Wilson County*** (***Bynum II***), the Court of Appeals agreed. It found that Sleepy Hollow had not identified a substantial right that would be lost if it were not accorded an immediate right of appeal. Therefore, except as to the issue of governmental immunity, the trial court's order dismissing defendants' appeal was affirmed.

As for the immunity issue, the Court found no merit in the county's argument that maintaining a county office building and operating a water supply system are governmental functions. Rather, the Supreme Court has "long held that a municipal corporation selling water for private consumption is acting in a proprietary capacity and can be held liable for negligence just like a privately owned water company." And, the Court was not persuaded by the county's argument that, because the water system's office was located in a county building, it was immune from suit on governmental immunity grounds, as the relevant case law establishes that immunity arises from "the nature of the underlying function being performed at the time of … injury rather than the nature of the tasks associated with maintenance of a governmentally owned building." Therefore, since Bynum's injuries "stemmed from alleged negligence associated with … the operation of … a watering system" and "operation of a system for distributing water to the public is a proprietary activity," the trial court properly concluded that the county was not entitled to governmental immunity.

Additional Opinions

On June 18, in ***Trantham v. Michael L. Martin, Inc. n/k/a Equity Management, Inc.***, the Court of Appeals considered defendants' appeal from a jury verdict finding them liable for constructive fraud, unfair and deceptive trade practices, and negligent misrepresentation arising out of an owner-financed sale of farm property. In an opinion that addressed in detail the legal elements of each of those causes of action, the Court found no merit in defendants' appeal from the trial court's denial of their motion for directed verdict.

On June 18, in ***Hedgepeth v. Lexington State Bank***, the Court of Appeals considered plaintiffs' appeal from the trial court's dismissal of their claim, which alleged unfair and deceptive trade practices arising out of a series of business loans secured by deeds of trust on plaintiffs' personal residence and that of their parents. The Court determined that, although it was error for the trial court to hold that plaintiffs lacked standing, the defendant bank's Rule 41(b) motion to dismiss plaintiffs' unfair and deceptive trade practices claim was correctly granted.

WORKERS' COMPENSATION

Total Disability Benefits Awarded to Stroke Victim

Patricia Church, a high school graduate who had previously performed clerical work and been employed as a machine, rack and twister operator, suffered a compensable injury to her left shoulder while working as a machine operator for Bemis Manufacturing Company. After a period of temporary disability, she returned to work with restrictions in early 2008, although she subsequently had trouble with some of her work tasks, including lifting over ten pounds and putting heavy lids on boxes, for which she usually had to ask someone to help her. Church continued to work for Bemis until she suffered a stroke in August 2009.

After receiving short-term disability benefits from Bemis, Church claimed entitlement to additional workers' compensation benefits. A hearing was held and the Commission awarded ongoing temporary total disability benefits, medical expenses, and attorney's fees. It found that the position of machine operator to which Church returned after her injury was "unsuitable employment" and held that she proved disability under N.C.G.S. 97-2(9) by establishing that, while she was capable of some work, "it would be futile because of preexisting conditions, i.e., age, inexperience, lack of education, to seek other employment."

The defendants appealed, but on June 18, in ***Church v. Bemis Manufacturing Company***, the Commission's award of benefits was affirmed by the Court of Appeals, which found no merit in defendants' contention that the determination of what is "suitable employment" is a conclusion of law. Citing ***Keeton v. Circle K***, ___ N.C. App. ___ (2011) and ***Lowery v. Duke University***, 167 N.C. App. 714 (2005), the Court held that "[t]he question of what constitutes suitable employment is a question of fact." It then found support for the Commission's determination that Church's job as a machine operator was "unsuitable" in her testimony that she could not perform all of the tasks it required and her claim that she had trouble lifting over ten pounds and difficulty putting the heavier lids on boxes. And, while had Church continued to work from early 2008 until her stroke in August 2009, "her arm hurt more."

As for defendants' challenge to the Commission's conclusion of law that after her stroke, Church's disability resulted from a combination of the effects of her left shoulder injury and the neurologic impairment caused by her stroke, the Court cited ***Weaver v. Swedish Imports Maintenance, Inc.***, 319 N.C. 243 (1987), in which it was held that "where a claimant is rendered totally unable to earn wages, partially as a result of a compensable injury and partially as a result of a non-work-related medical condition, the claimant is entitled to an award for total disability in the absence of evidence to apportion Plaintiff's disability as between the compensable and non-compensable events." As the defendants failed to challenge the Commission's determination that there was no evidence of record upon which to apportion Church's disability, the Court found no error in the Commission's award of total disability benefits.

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

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