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CIVIL LIABILITY

Sanction for Attorney's "Extrajudicial Statements to the Media" Reversed

Benjamin Supplee and Mebritt Thomas filed a complaint against Miller-Motte Business College ("MMC") and Delta Career Education Corporation, alleging fraud, fraud in the inducement, unfair and deceptive trade practices, negligent misrepresentation, breach of contract, and negligence. On defendants' motion for summary judgment, the trial court dismissed all of their claims, except breach of contract. It then separated the two plaintiffs' cases for trial and scheduled Supplee's first.

The evidence Supplee offered in support of his claim included testimony that when he met with MMC's dean of education, he expressed interest in obtaining a degree in surgical technology, but was encouraged to apply for the health information technology program instead and told that if he did not like it, he could transfer into the surgical technology program. After he was admitted, Supplee and a representative of the admissions office signed an enrollment agreement, which stated that his enrollment was subject to "all terms and conditions set forth in the Catalog," including a required criminal history check, and MMC would "review any applicant who has been convicted of a crime in order to determine his ... fitness for admission."

After his first quarter at MMC, Supplee transferred into the surgical technology program, which required eighteen months of class work

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DENNIS MEDIATIONS, LLC

GEORGE W. DENNIS III

NCDRC CERTIFIED SUPERIOR COURT MEDIATOR

NC INDUSTRIAL COMMISSION MEDIATOR

dennismediations@gmail.com

919-805-5002

www.dennismediations.com

and a six-month clinical externship. Before completing the transfer, he signed another enrollment agreement. It informed him that MMC reviews students' criminal background checks to screen out applicants who could not complete the program because they have the type of criminal background that would keep them from obtaining an externship.

After MMC conducted its background check on Supplee a month before his class was scheduled to attend an orientation at two clinical externship sites, a contact at one of them informed MMC that four students, including Supplee, would not be permitted to attend the orientation because, in Supplee's case, the background check revealed felony charges of breaking and entering and larceny and two convictions for driving while intoxicated, one of which resulted in a probation violation.

Supplee was given the option of either transferring to another MMC program at no charge or getting his felony charges expunged and then reapplying to the surgical technology program. He elected the latter and was successful in getting the charges expunged, but when he reapplied, was told that MMC now required a "clean record."

When Supplee's lawsuit went to trial, the jury found that the parties entered into a contract and the defendants breached it, entitling him to \$53,481 in damages. The defendants moved for a directed verdict, judgment notwithstanding the verdict, and sanctions, alleging that after the jury's verdict and prior to plaintiff Thomas' trial, which was scheduled to begin in three weeks, a local news station posted a story on its website that Supplee had prevailed on his breach of contract claim and the damages awarded by the jury were based on "wasted tuition and lost income opportunities." It also attributed to plaintiffs' attorney a representation that the school had made a pretrial offer to settle, but then withdrew it midway through trial. The defendants contended that Supplee's statements

were "not a matter of public record," created "a substantial risk of prejudicing an impartial trial" in the Thomas case, and violated Rule 3.6 of the North Carolina Rules of Professional Conduct.

The trial court denied the motions for directed verdict and JNOV, but granted the motion for sanctions, concluding that counsel's comments "created a substantial risk of prejudicing the Thomas jury and ... were in violation of Rule 3.6(a) or 3.3 of the North Carolina Rules of Professional Conduct." It also found that his representation to the media that the Supplee and Thomas cases were "similar" contradicted his earlier representation to the court that they "present[ed] divergent and distinct fact patterns that necessitated two trials," and that contradiction constituted a violation of Rule 3.3. The court sanctioned Supplee \$1,000 and awarded the defendants \$6,395 in attorneys' fees and \$20 in costs.

The defendants appealed the denial of their directed verdict and JNOV motions, Supplee cross-appealed the dismissal of his claims of fraud, fraud in the inducement, unfair and deceptive trade practices, negligent misrepresentation, and negligence, and his attorney appealed the court's award of sanctions, attorneys' fees, and costs.

In a lengthy opinion issued on February 3, *Supplee v. Miller-Motte Business College, Inc.*, the Court of Appeals found that there was no merit in defendants' appeal from the denial of their motions for directed verdict and JNOV. Supplee's lawsuit did not inquire into the "nuances of educational processes and theories," which would have subjected it to dismissal under *Ross v. Creighton University*, 957 F.2d 410 (7th Cir. 1992) and *Ryan v. University of N.C. Hospitals*, 128 N.C. App. 300 (1998). Instead, its premise was that MMC's failure to perform a criminal background check before it admitted Supplee, although it knew that he intended to pursue the surgical technology program and his ability to complete the program might be affected

by the results of the background check, was a “substantial” breach of their contract. That being the case, there was no error in the trial court’s denial of defendants’ directed verdict and JNOV motions.

The Court also found no merit in defendants’ argument that Supplee’s testimony about his past earnings as a landscaper, car salesman, and janitor was “speculative” and, therefore, not competent evidence under the authority of *McNamara v. Wilmington Mall Realty Corp.*, 121 N.C. App. 400 (1996) and *Olivetti Corp. v. Ames Business Systems, Inc.*, 319 N.C. 534 (1987). Instead, his testimony was “probative in the determination of lost opportunity to earn income during his time of enrollment.”

Nor did the Court find error in the trial court’s dismissal of plaintiff’s fraud, fraud in the inducement, unfair and deceptive trade practices, negligent misrepresentation, and negligence claims. The fraud and unfair and deceptive trade practices claims lacked evidence of intent to deceive, an essential element of all three causes of action, the facts of the case failed to establish any of the four exceptions to the general rule that a breach of contract does not give rise to a tort action, and “a breach of contract does not in and of itself provide the basis for liability in tort.” The Court held that “failure to perform a contractual obligation is never a tort unless such nonperformance is also the omission of a legal duty,” and there was no such duty in this case. Defendants’ obligation to conduct a criminal background check “arose under the terms of the contract between the parties and not by operation of law independent of the contract.” Therefore, the trial court did not err in its ruling on defendants’ motion for summary judgment.

However, the Court *did* find error in the sanctions entered against Supplee’s attorney under Rules of Professional Conduct 3.3 and 3.6. It held that the “extrajudicial statements” he made to the news media after the jury returned its verdict regarding MMC’s contractual

obligations and the basis for the jury’s award of damages, which the trial court found created “a substantial likelihood of materially prejudicing” the upcoming Thomas trial, were matters of “public record” and not subject to sanction under Rule 3.6. And, it found that the representations he made to the media and trial court about the similarity of the Supplee and Thomas claims were “not contradictory and do not constitute a ‘false statement’ under Rule 3.3.” Therefore, while there was no error in the trial court’s denial of defendants’ motions for directed verdict and JNOV, the trial court’s order granting defendants’ motion for sanctions was reversed.

Order Compelling Disclosure of Unemployment Hearing Notices Reversed

In exchange for a monthly fee, Monica Wilson and other local attorneys received daily notices from the North Carolina Division of Employment Security (“DES”) that listed all scheduled appeal hearings and provided for each claimant her name, address, and telephone number, the last four digits of her social security number, and information about her termination. When Wilson was advised that, for security reasons, attorneys would no longer be able to pick up the hearing notices as they had in the past, by entering DES through the back door without the knowledge of its security guard, but instead, they would be sent to their offices “at least three times per month,” she and her law firm filed a complaint seeking injunctive relief, claiming that they were entitled to the notices on a daily basis because they were “public records” under N.C.G.S. § 132-6(a) of the “North Carolina Public Records Act” and because the proposed change would negatively impact the ability of claimants to obtain counsel, resulting in an unfair advantage to employers, since they only provided 14 days notice of the scheduled hearing.

After plaintiffs’ request for a temporary restraining order was heard and granted, a hearing was held on their petition for a preliminary injunction, at which the parties

submitted affidavits, exhibits, and arguments. The trial court subsequently concluded that plaintiffs had established that their claim was likely to succeed and injunctive relief was necessary to protect their rights until the matter could be resolved. Defendants appealed.

During the pendency of the appeal, the General Assembly enacted “An Act to Clarify the Confidentiality of Unemployment Compensation Records,” which amended N.C.G.S. § 96-4(x) so as to provide that unemployment appeal hearing notices are “confidential information” and exempt from the Public Records Act.

On February 17, the Court of Appeals issued its opinion in *Wilson v. North Carolina Department of Commerce*, finding that while preliminary injunctions are interlocutory in nature and not immediately appealable unless they affect a substantial right, the order in this case *did* affect a substantial right because it required disclosure of information the defendants contended was confidential under both state and federal law, and doing so might result in the loss of federal administrative funding.

The Court then considered whether the General Assembly’s amendment of N.C.G.S. § 96-4(x) rendered defendants’ appeal moot and found that it did not because a “statutory amendment does not moot an appeal when the relief sought has not been granted or the questions originally in controversy are still at issue.” While a “clarifying” amendment to a statute applies to both cases brought after its effective date and those pending at the time the amendment was adopted, plaintiffs contended that the amendment at issue substantially changed the statute and, therefore, was not retroactive. As a result, they argued that, at a minimum, they were entitled to disclosure of those hearings that had been scheduled prior to the amendment to N.C.G.S. § 96-4(x) and the attorneys’ fees they incurred in enforcing that right. Therefore, the Court found, “the amendment of N.C. Gen. Stat. § 96-4(x) has not mooted [defendants’] appeal.”

It also held that a preliminary injunction like the one the trial court entered is “an extraordinary measure” that will only be issued if the plaintiff establishes she is likely to succeed on the merits and, without an injunction, will likely sustain irreparable loss, or if issuance of the injunction is necessary to protect her rights during the course of litigation. Here, defendants argued that because the hearing notices contained confidential information, their disclosure violated federal regulations, which might impact DES’s grant money. Because the trial court failed to make findings regarding the interplay between the federal regulations and the state’s Public Records Act, the Court vacated the preliminary injunction order and remanded the case for findings and conclusions related to both that issue and whether, if the General Assembly’s amendment to N.C.G.S. § 96-4(x) did not change the substance of the statute, but merely clarified it, plaintiffs would be able to show a likelihood of success on the merits of their claim.

Statute of Limitations and Laches Defenses Raise Genuine Issues of Material Fact

Wachovia made a mortgage loan to Robert Coleman, secured by a promissory note and deed of trust that both he and his wife signed. While the deed of trust listed the correct street address for their residence, it mistakenly made reference to the book and page number of an adjacent unimproved parcel of land. Later, after Wells Fargo acquired the mortgage and deed of trust by merger with Wachovia, Mr. Coleman died, his estate defaulted on the loan, and Wells Fargo initiated a foreclosure action.

Mrs. Coleman and the estate contested the foreclosure on grounds that the deed of trust described the unimproved parcel of land, rather than the Coleman residence. When Wells Fargo sought to reform the deed of trust, claiming “mutual mistake,” Mrs. Coleman and the estate raised a series of affirmative defenses, including the statute of limitations, laches, lack of reasonable diligence, and the “non-claim statute,”

and moved for summary judgment. Their motion was granted and Wells Fargo appealed.

On February 3, in *Wells Fargo Bank, N.A. v. Coleman*, the Court of Appeals reversed. It found that, to the extent that the order granting summary judgment was based on the running of the statute of limitations, it was in error. While defendants argued that Wells Fargo should have discovered the mistake in the deed of trust when it was executed, which was more than three years prior to the date the bank sought to reform it, the Court held that “the mere fact that there were indications of ... mistake on the face of the document does not trigger the statute of limitations as a matter of law. Instead, the running of the limitations period turns on ... when ... the party reasonably should have expected to ... ultimately discover the mistake,” and that was “a factual determination that ordinarily must be resolved by a jury,” not by the court through summary judgment.

As for defendants’ argument that Wells Fargo’s claim was barred by laches, which the Court defined as an equitable doctrine “designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared,” it held that, for the doctrine to apply, “the delay must be ... unreasonable and must have worked to the disadvantage, injury or prejudice of the person seeking to invoke it.” In this case, Wells Fargo’s forecast of evidence provided an explanation for its delay in seeking reformation, and that explanation created another genuine issue of material fact for the jury, not the trial court, to resolve.

The Court then considered defendants’ plea of the “non-claim statute,” N.C.G.S. § 28A-19-3(a), which sets a window in which to present claims against a decedent’s estate, and found that it has no application to actions to enforce deeds of trust. And, as for defendants’ objection to Wells Fargo’s attempt to reform the deed of trust on

mutual mistake grounds because the bank did not use “reasonable diligence” in drafting it, the Court held that “a party seeking reformation of a written instrument need not allege or prove that the mutual mistake was a reasonable or neglect-free mistake.” Even if it resulted from a failure to exercise reasonable diligence, reformation is available if there is “clear, cogent, and convincing evidence that the mistake was a mutual one and that it prevents the instrument from embodying the parties’ actual, original agreement.” Since there was evidence of mutual mistake, and as defendants’ statute of limitations and laches defenses raised material issues of fact for the jury, not the trial court, to decide, the Court reversed the trial court’s order granting summary judgment and remanded the case for “further proceedings.”

[Sanctions Imposed for Pursuing Nonjusticiable Claim and Frivolous Appeal](#)

Christopher and Susan Wall borrowed \$765,000 from SunTrust Mortgage to acquire Lot 3 of Rebecca’s Pond subdivision in Henderson County, paid \$165,000 to NC Land Finders for the property, and hired ACC Construction to build a house for them. The lot, which was originally owned by GHC Land Development, had been conveyed to NC Land Finders two days earlier. Its deed to the Walls and the deed of trust from the Walls to SunTrust were both recorded in the county registry on April 13, 2007.

After it was discovered that the deed conveying the property from GHC to NC Land Finders had been executed, but not recorded, the record gap in the chain of title was corrected by recording the GHC deed on May 16, 2007. As an added precaution, the deed from NC Land Finders to the Walls was re-recorded that September.

On June 12, 2007, ACC began furnishing labor and materials on the property. After construction was finally completed in January 2009, ACC filed a mechanic’s lien, claiming that it had not been fully paid for the work it did

building the house. Later that same year, the Walls also defaulted on their debt to SunTrust.

That July, ACC filed a lawsuit (“ACC I”) against the Walls and SunTrust to enforce its lien. A month later, SunTrust instituted a foreclosure action. ACC later amended ACC I by adding a request that the trial court enjoin the foreclosure and declare that its lien had priority.

It also responded to SunTrust’s foreclosure action with a petition that advanced a different theory on the priority issue than it did in ACC I. It conceded that the SunTrust lien had priority, but argued that its priority was limited to the purchase price of the lot, and ACC’s lien had priority for all construction loan disbursements over \$165,000. However, the clerk of court disagreed. He found that SunTrust’s deed of trust should be given priority and he authorized SunTrust to proceed with the foreclosure sale, which was set for September 20, 2010 and held as scheduled. SunTrust was the winning bidder.

ACC had filed another lawsuit against SunTrust and the Walls three days earlier, again seeking to enjoin the foreclosure sale. At the same time, it requested that if a foreclosure sale were held, the court determine the rights of the parties to the proceeds. Although the trial court denied both requests, it *did* grant ACC’s Rule 60 motion to reinstate the claims it originally raised in ACC I, but later dismissed with prejudice.

SunTrust moved for, and was granted, summary judgment in ACC I and ACC gave notice of appeal, but its appeal was later dismissed by the trial court for failure to prosecute. ACC then dismissed its claims against the Walls and filed another appeal, but it, too, was dismissed, this time by the Court of Appeals.

Ten months later, ACC sued SunTrust once more, asserting claims of unjust enrichment and constructive trust, and contending that under the doctrine of “instantaneous seisin,” its rights as a junior lienholder had been violated. SunTrust responded with motions to dismiss and for

sanctions, contending that ACC’s new claims were frivolous and barred by *res judicata*. The trial court agreed, dismissed the lawsuit, granted the motion for sanctions, and awarded \$19,045 in attorneys’ fees. After ACC appealed yet again, SunTrust moved for additional sanctions, this time under Rule of Appellate Procedure 34(a).

On February 17, in *ACC Construction, Inc. v. SunTrust Mortgage, Inc.*, the Court of Appeals found that the purpose of the doctrine of *res judicata* is to “protect litigants from the burden of relitigating previously decided matters” and to “preserve the integrity and finality of judgments by prohibiting collateral attacks and estopping litigants from intentionally adopting self-contradictory positions.” The three essential elements of the doctrine are “(1) a final judgment on the merits in an earlier suit, (2) an identity of the causes of action in both the earlier suit and the later suit, and (3) an identity of the parties or their privies in the two suits.”

Here, the only essential element in question was whether there was an identity of causes of action between the previous and current lawsuits. While ACC contended that its claims for unjust enrichment and constructive trust were not resolved in ACC I, but instead arose from a “new and distinct injury” when the trustee distributed all of the proceeds of the foreclosure sale to SunTrust, the Court disagreed, holding that “[u]nder *res judicata*, ‘all matters ... that were or should have been adjudicated in the prior action are deemed concluded.’” Although there was a disagreement between the parties over whether the trial court resolved ACC I under the doctrine of “instantaneous seisin” or based on the holding in *West Durham Lumber Co. v. Meadows*, 179 N.C. App. 347 (2006), it did not matter, as “ACC could and should have brought these claims in its prior lawsuit.” Therefore, the Court reasoned, “just as ... in *West Durham Lumber II* [___ N.C. App. ___ (2009) (unpublished)], ACC’s current lawsuit is barred because ‘simply asserting a new legal theory or seeking a different remedy does not circumvent the application of *res judicata*.’”

As for the sanctions assessed by the trial court, the Court found that N.C.G.S. § 6-21.5 authorizes an award of “reasonable attorney fees to the prevailing party if [it] finds ... a complete absence of a justiciable issue of either law or fact raised by the losing party in any pleading.” In the present case, because “the record simply does not support ACC’s argument that its claims were meritorious,” the Court affirmed the trial court’s order imposing sanctions under N.C.G.S. § 6-21.5.

It reached the same conclusion regarding ACC’s violation of Rule 11, finding that, in *Bryson v. Sullivan*, 330 N.C. 644 (1992), the Supreme Court made it clear that under Rule 11, the signer of a pleading certifies that it is “(1) well grounded in fact; (2) warranted by existing law, or a good faith argument for the extension, modification, or reversal of existing law ...; and (3) not interposed for any improper purpose,” and a breach of that certification “as to any one of these prongs is a violation of the Rule.” Since “an improper purpose may be inferred from ‘filing successive lawsuits despite the *res judicata* bar of earlier judgments,’” and as it found that “ACC’s current lawsuit basically amounts to a collateral attack on the summary judgment order that resolved ACC I,” the Court concluded that the trial court did not err when it determined that the current action was brought for an improper purpose.

For the same reasons, it also found that ACC’s appeal was “frivolous and taken for an improper purpose,” so it remanded the case for entry of an order “that ACC and its appellate counsel pay the costs and reasonable expenses, including reasonable attorneys’ fees, incurred by SunTrust on account of this appeal.”

Rule 59 Order Amending Judgment Affirmed

James Tucker and Derek Baker formed several business entities to develop and built residential properties, including a corporation and a limited liability company. Claiming that Tucker wrongfully appropriated the proceeds from the

sale of some of those properties, Baker filed suit, seeking a return of the misappropriated funds, damages for unfair and deceptive trade practices, and judicial termination of the corporation and LLC. Tucker counterclaimed for breach of fiduciary duty and unjust enrichment.

Following a bench trial, the court entered a judgment that dissolved the corporation and LLC, found that Baker loaned the company \$85,588.37, ordered all funds held by either the corporation or the LLC disbursed to Baker, and taxed the costs to Tucker. But, because it failed to specifically provide for repayment of the loan, half of which was owed by Tucker, Baker moved to amend the judgment. The trial court granted the motion, amended the judgment, and directed Tucker to pay his half of the debt, plus interest. Tucker appealed.

On February 17, in *Baker v. Tucker*, the Court of Appeals affirmed, finding no merit in Tucker’s argument that Baker’s motion to amend “did not properly state any basis for amendment of the judgment under Rule 59 or Rule 60.” While it agreed that a motion to amend, rather than be relieved of, a judgment is not properly made under Rule 60, here, as in *Coleman v. Arnette*, 48 N.C. App. 733 (1980), plaintiff requested that the court’s judgment be “alter[ed] or amend[ed],” and that is an appropriate request for relief under Rule 59(e).

Baker’s motion identified two subsections of Rule 59(a), 7 (“insufficiency of the evidence to justify the verdict or that the verdict is contrary to law”) and 9 (“any other reason heretofore recognized as grounds for a new trial”), as the basis for his request to amend the judgment, and the Court found that both applied. It held that, by failing to account for all of the corporation’s liabilities in its dissolution decree, “the trial court ‘misapprehended the relevant facts or ... misapplied the applicable law’ – grounds that this court has held to be valid grounds for relief pursuant to Rules 59(a)(7) and (9).” And, the motion to amend was also valid under Rule

59(a)(8) (“Error in law occurring at the trial and objected to by the party making the motion”), even though Baker did not actually object at trial, since the “error of law ar[ose] for the first time in the [court’s] order.” So, the Court concluded, his motion “constituted a valid motion to amend pursuant to Rules 59(a)(7), (8), and (9)” and it affirmed the trial court’s amended judgment.

WORKERS’ COMPENSATION

Death Benefits Awarded In Asbestosis Case

Thurman Patton worked for Sears Roebuck & Company as a service technician from 1958 until 1995, repairing, installing, and maintaining home heating, ventilation, and air conditioning (HVAC) units. He brought a claim for asbestosis in 2003 and settled it with Commission approval in 2009. After his death in 2010, the administrator of his estate filed a death claim. Although it was denied by a deputy commissioner, the Full Commission found it compensable and awarded 400 weeks of benefits and a \$3,500 burial fee. Sears appealed.

On February 17, in *Patton v. Sears Roebuck & Co.*, the Court of Appeals affirmed. After reiterating the applicable standard of appellate review, *i.e.*, “[i]f supported by competent evidence, the Commission’s findings are binding on appeal even when there exists evidence to support findings to the contrary,” it found that, under N.C.G.S. § 97-57, “where compensation is payable for an occupational disease, the employer in whose employment the employee was last injuriously exposed to the hazards of such disease ... shall be liable,” and in claims for asbestosis and silicosis, an exposure is deemed “injuriously” if the worker was exposed for “30 working days within seven consecutive months.” Although Sears argued otherwise, the Court found that the testimony of two of Patton’s coworkers, Johnny Carroll and Jerry Dean Davis, supported the Commission’s finding that his

employment with Sears exposed him to asbestos for a minimum of thirty to thirty-six days during the six-month winter season between October and March, when he worked on furnaces “almost every day.”

Similarly, the Court found that the testimony of treating physician Dr. Marc Guerra and expert pulmonologist Dr. Jill Ohar supported the Full Commission’s determination that Patton’s exposure to asbestos at work met the *Rutledge v. Tultex Corporation*, 308 N.C. 85 (1983), test for establishing a compensable occupational disease, *i.e.*, it “‘significantly contributed to, or was a significant causal factor in,’ the development of the disease.” Therefore, the Commission’s award of death benefits was affirmed.

Civil Action Against Workers’ Compensation Insurer Barred

After Jeffrey Bowden, manager of a fast food restaurant in Wilson, was assaulted during an attempted robbery, he filed a claim for physical and emotional injuries caused by the assault. While his workers’ compensation claim was still pending, he sued his employer’s insurer, First Liberty Insurance Company, for bad faith and intentional infliction of emotional distress, contending that it engaged in a pattern of improper conduct while processing his claim, including communicating with his doctors without permission, hiring a “professional witness for the defense ... who opined in exactly the fashion for which he was paid,” treating him “belligerently” over the telephone, denying requests for medical treatment by form letter, improperly filing paperwork to suspend his compensation, and insisting that he needed to settle his claim.

First Liberty moved to dismiss under Rule 12(b)(1) for lack of subject matter jurisdiction, arguing that the Workers’ Compensation Act vests the Industrial Commission with exclusive jurisdiction, but its motion was denied by the trial court. First Liberty appealed.

On February 17, in *Bowden v. Young*, the Court of Appeals first addressed the question of whether it had jurisdiction, since First Liberty's appeal was interlocutory. Because a court order denying a Rule 12(b)(1) motion to dismiss based on the exclusivity doctrine "affects a substantial right," the Court concluded that it is immediately appealable, so it *did* have jurisdiction.

Citing *Johnson v. First Union Corp.*, 131 N.C. App. 142 (1998) and *Deem v. Treadway & Sons Painting & Wallcovering, Inc.*, 1423 N.C. App. 472 (2001), as authority, the Court observed that it has "repeatedly ... held that all claims concerning the processing and handling of a workers' compensation claim are within the exclusive jurisdiction of the Industrial Commission, whether the alleged conduct is intentional or not." Indeed, in *Deem*, "the injured worker made the identical argument that Bowden makes here ... [and t]his Court rejected that argument, holding that 'plaintiff's claims are ancillary to his original compensable injury and thus, are absolutely covered under the Act and this collateral attack is improper.'" Because all of Bowden's allegations involved First Liberty's handling of his workers' compensation claim, they fell within the Commission's exclusive jurisdiction, so the trial court erred when it denied First Liberty's motion to dismiss.

In a separate concurring opinion, Judge Dillon took exception to the majority's assertion that "*all* claims arising from an ... insurer's processing and handling of a workers' compensation claim fall within the exclusive jurisdiction of the Industrial Commission," as, under the *Woodson* exception to the exclusivity of the Workers' Compensation Act, an employee may pursue a civil action against an insurer where it "intentionally engages in misconduct knowing it is substantially certain to cause serious injury or death." But, because he found that none of Bowden's allegations rose to the "level of extreme and outrageous conduct necessary to state a claim for intentional infliction of emotional distress," he agreed with the

majority's dismissal the civil action Bowden brought against First Liberty.

Late Payment Penalty Denied

Lowes Home Improvement employee Gilbert Silva suffered a compensable injury, but was later able to return to work. When he sought additional benefits after his employment was terminated, Lowes denied liability, contending that his injury was not the reason he was no longer working. However, the Commission ruled otherwise and he was awarded ongoing temporary total disability benefits.

After Lowes appealed, the Court of Appeals remanded the case for further findings on the issue of continuing disability in *Silva v. Lowe's Home Improvement*, 176 N.C. App. 229 (2006) ("*Silva I*"). The Commission subsequently entered a new opinion and award which again awarded ongoing TTD, and the Court of Appeals affirmed that award in *Silva v. Lowe's Home Improvement*, 197 N.C. 142 (2009) ("*Silva II*").

The Court's mandate in *Silva II* was issued on June 8, 2009. Thirty-one days later, on July 9, 2009, Lowes made a lump sum payment of \$221,158.84 for accrued temporary total disability and it has paid weekly compensation at the rate of \$459.14 per week since. Three years after the lump sum payment, Silva filed a motion for "additional relief," seeking a 10% penalty for late payment of the lump sum, reimbursement of educational expenses and accountant's fees, and an award of attorney's fees under N.C.G.S. § 97-88.1. His motion was denied and he appealed.

On February 3, in *Silva v. Lowes Home Improvement* ("*Silva III*"), the Court of Appeals affirmed. In addressing the penalty claim, it found that N.C.G.S. § 97-18(e) provides for a 10% penalty "if compensation is not paid within 14 days of it becoming due." Because the statute provides that compensation becomes due "10 days from the day following expiration of the time for appeal from the award ...," the question arose whether the word "appeal" only includes

appeals “of right” or petitions for discretionary review as well. Citing the provisions of N.C.G.S. § 7A-31 and the definition of “appeal” found in Black’s Law Dictionary, which includes appeals “by right” and “by application,” the Court held that an “‘appeal by application’ such as a petition for discretionary review would be considered an appeal pursuant to N.C.G.S. § 97-18(e).”

Since Rule of Appellate Procedure 15(b) allows an aggrieved party fifteen days after issuance of the mandate of the Court of Appeals within which to file a petition for discretionary review, and as the mandate in *Silva II* was issued on June 8, 2009, the Court agreed with the Commission that “the time for [Lowes’] appeal expired 23 June 2009.” Under N.C.G.S. § 97-18(e), the defendants had 10 days following expiration of the time for appeal to pay the “first installment” of the award, so Lowes’ lump sum payment was due on July 3, 2009. However, the 10% penalty authorized by in N.C.G.S. § 97-18(g) only applies to payments made more than fourteen days after they became due, so the “first installment” in this case would have been subject to a 10% penalty until July 17, 2009. Since Lowes’ lump sum payment was made on July 7, 2009, the Court held that no penalty was due.

As for Silva’s claimed entitlement to reimbursement for \$513.31 in educational expenses from classes taken at Vance-Granville Community College and the cost of a North Carolina Process Tech Certification Fee, the Court found that while Silva testified that he incurred those expenses in an effort to “do something” about his continued unemployment, it was not an abuse of discretion for the Commission to deny their reimbursement because he offered “[n]o additional evidence, including testimony from any rehabilitation professional or medical provider ... regarding the reasonableness of these expenses.”

The Court also found no merit in Silva’s argument that the \$2,860 charged by his accountant for calculating the compensation

owed to him, including medical and travel expenses and TTD, was analogous to the life care plan expenses found compensable in *Timmons v. North Carolina Department of Transportation*, 351 N.C. 177 (1999) and *Scarboro v. Emery Worldwide Freight Corp.*, 192 N.C. App. 488 (2008). To the contrary, in this case, “unlike either *Timmons* or *Scarboro*, there was no evidence ... that the accounting fees were part of any life care plan nor was there testimony or evidence from a medical or rehabilitative specialist stating that this expense is medically necessary because of Plaintiff’s specific injuries.”

And, finally, the Court affirmed the denial of Silva’s motion for attorney’s fees under N.C.G.S. § 97-88.1, which requires proof that a hearing was “brought, prosecuted, or defended without reasonable ground,” the test of which is whether the defense was “based in reason rather than in stubborn, unfounded litigiousness,” because it agreed with the Commission’s conclusion that “Defendant had reasonable grounds to defend Plaintiff’s claims.”

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

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Dennis Mediations, LLC

George W. Dennis III

NCDRC Certified Superior Court Mediator

NC Industrial Commission Mediator

dennismediations@gmail.com

919-805-5002

www.dennismediations.com