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CIVIL LIABILITY

Parent-Child Immunity Bars Gross Negligence and IIED Claims

Before they separated, Stephanie Needham and Roy Price had in a long-term relationship that produced three minor children. At 1:25 am on November 20, 2009, Needham and the children were occupying a house owned by Price when he surreptitiously entered it by way of the garage and attic. As he was unfolding the attic stairway to the hall below, it struck Needham, injuring her.

Alleging negligence, negligent and intentional infliction of emotional distress, and gross negligence, Needham sued Price individually and as guardian *ad litem* for the children, contending that they were awakened by noise in the attic, observed her being struck by the stairway, "recoiled in terror," and "watched in shock as their father descended … shouting obscenities at their fallen mother, causing severe emotional distress." Price pled parent-child immunity and moved for summary judgment on the children's claims. His motion was granted and Needham appealed.

On January 20, in ***Needham v. Price*** ("***Needham I***"; see *North Carolina Civil Litigation Reporter*, January 2015, p. 3), the Court of Appeals agreed that parent-child immunity barred the minor children's ordinary negligence claims, but citing ***Doe v. Holt***, 332 N.C. 90 (1992) as authority, held that their gross negligence, intentional infliction of emotional distress, and punitive damages

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claims were *not* barred. Price petitioned for discretionary review.

His petition was granted and on December 18, the Supreme Court reversed in ***Needham v. Price*** ("***Needham II***"). While the Court of Appeals concluded from its reading of ***Holt*** that "because gross negligence and intentional infliction of emotional distress require conduct that goes beyond ordinary negligence, an unemancipated minor could pursue those claims against a parent," the Supreme Court disagreed. Noting that it had taken "great care" in ***Holt*** to repeatedly use the phrase "willful and malicious conduct" when describing the circumstances under which an unemancipated minor might seek damages for injuries suffered as the result of a parent's conduct, it held that an act is only "willful" when done "purposely and deliberately in violation of the law" or "knowingly and for a particular purpose." And, an act is not "malicious" unless it is "committed deliberately" and "reasonably calculated to injure another."

Therefore, the Court concluded, "the term 'willful and malicious acts,' refers to *intentional* acts." Since there was no evidence that Price's conduct was directed toward the sleeping children or "reasonably calculated to injure another," it found that Price's conduct was not "willful and malicious" and it was error for the trial court to deny his motion for summary judgment.

Claim of Conspiracy to Defraud Real Estate Investors Fails

After purchasing a large tract of land in Brunswick County, real estate developer Mark Saunders transferred it to Rivers Edge Golf Club & Plantation, recorded a series of subdivision plats, marketed the property through promotional materials and sales events, and provided prospective investors with details of the development's plans, construction guidelines, and timelines. BB&T, the primary lender for most of the investors who sought bank financing to invest in the subdivision, hired James Powell Appraisals to provide appraisals to the bank.

Two years after the national real estate market collapsed in 2008, eighteen Rivers Edge investors who financed their purchases through BB&T sued the bank, its appraisers, and Saunders, alleging that they schemed to defraud them by artificially inflating property values and that, but for the appraisers' "faulty" appraisals, they would not have made the purchases they did. Arguing that the bank should have both discovered and disclosed that the development's property values were inflated, plaintiffs sought rescission of their sales contracts, a preliminary injunction, and treble and punitive damages.

The trial court concluded that plaintiffs failed to demonstrate a likelihood of success on the merits, since lenders generally do not owe duties to borrowers beyond their contractual obligations, so it denied their motion for preliminary injunction and granted defendants' Rule 12(b)(6) motion to dismiss. Plaintiffs appealed.

After certifying the appeal for review prior to determination by the Court of Appeals under N.C.G.S. § 7A-31(a) and Rule of Appellate Procedure 15(e)(2), a divided Supreme Court affirmed on December 18 in ***Arnesen v. Rivers Edge Golf Club & Plantation, Inc***. Writing for the majority, Justice Newby observed that a review of the complaint "reveals that plaintiffs did not view, receive, order, or even inquire about the appraisal before purchasing the property, nor that their purchases were contingent upon an appraisal, faulty or not. Because no legal duty exists … between a debtor and creditor, or between a bank's appraisers and a purchaser, plaintiffs' claims … fail." Moreover, plaintiffs failed to allege justifiable reliance on the appraisers' allegedly faulty appraisals, so the trial court's dismissal of their claims was proper.

In dissent, Justices Hudson and Beasley argued that while many of plaintiffs' claims were properly dismissed, their claims for negligent misrepresentation, unfair and deceptive acts and

practices, and fraud were "sufficiently pleaded to survive dismissal," and they also would have allowed their claim for civil conspiracy to go forward. In a separate opinion, Justice Edmunds also dissented, but he limited his dissent from the majority opinion to the claims filed against the defendant appraisers.

In four ***per curiam*** opinions issued on the same day as ***Arnesen***, the Supreme Court reached the same result for the same reasons, with the same three justices dissenting, in ***Beadnell v. Coastal Communities at Ocean Ridge Plantation, Inc.***; ***Anderson v. Coastal Communities at Ocean Ridge Plantation, Inc.***; ***Alvarez v. Coastal Communities at Ocean Ridge Plantation, Inc.***; and ***Barry v. Ocean Isle Palms, Inc.***

Order Denying Motion to Compel Arbitration Reversed

Ricardo Bailey entered into a "Stock Redemption Plan Dealer Development Agreement" with Ford Motor Company when he invested $180,000 in its dealership in Sanford in February 2003. Article 10 of that agreement provided that arbitration would be the "sole and exclusive remedy … with respect to any dispute, protest, controversy or claim arising out of or relating to this Agreement."

In April 2009, Ford offered to waive repayment of the outstanding balance owed under the agreement if Bailey satisfied certain conditions. When a dispute arose over whether he had met them all, Bailey filed suit, alleging breach of contract and unjust enrichment. Ford moved to compel arbitration, but its motion was denied and the company appealed.

On December 15, in ***Bailey v. Ford Motor Company***, the Court of Appeals held that while Ford's appeal was interlocutory, it was nevertheless properly before the Court because "the right to arbitrate a claim is a substantial right which may be lost if review is delayed." It then turned to the merits of the appeal and found that "it is incumbent upon a trial court when considering a motion to compel arbitration to address whether the Federal Arbitration Act ("FAA") or … North Carolina Revised Uniform Arbitration Act ("NCRUAA") … applies." That being so, the trial court should have addressed the choice of law issue first and found that since the parties "affirmatively chose the FAA to govern the Dealer Development Agreement," it applied to Bailey's claim.

The Court cautioned that "[a]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." It then distinguished between "substantive arbitrability" and "procedural arbitrability" and found that issues of "substantive arbitrability" are generally decided by courts, whereas "procedural preconditions" to the use of arbitration, such as "time limits, notice, laches, estoppel and other conditions precedent to an obligation to arbitrate," are for the arbitrator to decide. Thus, the 4th Circuit held in ***Glass v. Kidder Peabody & Co., Inc.***, 114 F.3d 446 (1997) that the trial court's first duty in reviewing an arbitration proceeding under the FAA is to engage in a limited "substantive arbitrability inquiry" to ensure that a valid agreement to arbitrate exists and the parties' dispute falls within its "substantive scope." If it does, the matter may then be referred to the arbitrator for decision.

In this case, Ford contended that the trial court erred in concluding that Bailey's claims did not fall within the scope of the agreement's arbitration clause. Although that was a "substantive arbitrability" issue and there is a general presumption that substantive arbitrability issues will be decided by the trial court, that presumption can be overcome if it is shown that the parties intended for the arbitrator to resolve it, not the court.

The Court then chose to follow the majority rule among federal circuit courts that the parties' express adoption of an arbitral body's rules delegating questions of substantive arbitrability to the arbitrator evidences an intent for them to

be arbitrated, and concluded from the fact that the agreement between Bailey and Ford adopted the rules of the CPR Institute for Dispute Resolution that they "clearly and unmistakenly intended that an arbitrator would decide questions of substantive arbitrability, like the one at issue here." Accordingly, the Court held that it was error for the trial court to conclude that the parties had agreed that the court, rather than an arbitrator, would decide the arbitrability of plaintiff's claims, so it reversed the trial court's order denying Ford's motion to compel arbitration.

Order Denying Motion to Compel Arbitration Affirmed

Marco Contractors contacted TM Construction about renovating a Wal-Mart store in Winston-Salem and TM submitted quotes for the project's carpentry and painting work. After they agreed that TM would do the work as proposed, Marco drafted a contract that included a provision giving Marco the option of arbitrating any dispute that might later arise between the parties.

They subsequently agreed that TM would perform additional work on the project, and later change orders modified the contract even further, but TM eventually completed its work on the project, filed a lien on the property, and brought suit, seeking damages in excess of $100,000. After court-ordered mediation failed to produce a settlement and the parties engaged in a protracted battle over discovery issues, the trial court granted TM's motions to compel discovery and for sanctions and denied Marco's motion to compel arbitration. Marco appealed.

On December 1, in ***T.M.C.S., Inc. v. Marco Contractors, Inc.***, the Court of Appeals acknowledged that Marco's appeal from the order denying its motion to compel arbitration was interlocutory, but nevertheless found it immediately appealable because "the right to arbitrate a claim is a substantial right which may be lost if review is delayed." It then turned to the appeal's merits and found that when one party claims that a dispute is covered by an agreement to arbitrate and the other contends otherwise, resolution of their disagreement involves the two-step process of ascertaining "(1) whether the parties had a valid agreement to arbitrate, and … (2) whether the specific dispute falls within the substantive scope of that agreement."

Although the trial court in the present case "declined to decide whether the contract and the arbitration provision were valid and enforceable," the Court found that decision "eminently reasonable given … the standstill that the parties' discovery battle … produced," which resulted in "an insufficient record to determine the contract's enforceability." Instead, the court assumed that there was a valid arbitration agreement between the parties and found that even if it existed, Marco's demand to arbitrate was untimely, and therefore barred, because the agreement provided that a demand to arbitrate had to be made within 30 days after the "claim or dispute has arisen." Because Marco did not seek to arbitrate its dispute with TM until nearly a year after TM filed its lien claim, the Court found that it forfeited its right to do so and held that the trial court properly denied its motion to compel arbitration.

Summary Judgment Set Aside for Failure to Provide Hearing Notice

While he was employed as TigerSwan's Director of Operations, Dale Buckner made two loans to the company and received promissory notes in return. He later sued on the notes, alleging that they were in default. TigerSwan's answer raised multiple affirmative defenses, sought injunctive relief, and included a counterclaim for breach of contract and fiduciary duty, constructive fraud, unfair and deceptive trade practices, and misappropriation of trade secrets.

Buckner filed a motion *in limine* regarding TigerSwan's counterclaim and noticed it for hearing. At the hearing, TigerSwan voluntarily

dismissed its counterclaim. The court then heard oral argument on the issues still in dispute. After both parties presented evidence, the trial judge directed judgment in Buckner's favor and entered a written order to that effect. TigerSwan appealed.

On December 15, in ***Buckner v. TigerSwan, Inc.***, the Court of Appeals distinguished the case Buckner cited as authority for affirming the trial court's summary judgment order, ***Erthal v. May***, 223 N.C. App. 373 (2012). It found that in this case, unlike ***Erthal***, in which the defendants moved for summary judgment, but the trial court granted it to the plaintiffs instead, there were no pending summary judgment motions. The only pending motion was Buckner's motion *in limine*, and the only notice the parties received was of a hearing to resolve that motion. Although Rule 56 does not require a party to file a motion in order to be entitled to summary judgment, it "does require at least ten days' notice of the time fixed for the hearing." That being so, the Court held that "the trial court erred in entering summary judgment in favor of plaintiff."

In reaching that conclusion, it also found no merit in Buckner's alternative argument that the trial court's summary judgment order should be upheld as a judgment on the pleadings or directed verdict. Citing ***Lambert v. Cartwright***, 160 N.C. App. 73 (2003) as authority, it observed that under Rule 12(c), "[n]o evidence is to be heard, and the trial judge is not to consider statements of fact in the briefs of the parties." Yet, the trial court in the present case considered "matters outside of the pleadings, including arguments from both sides and a binder full of evidentiary materials," so the judgment order it entered could not be treated as a judgment on the pleadings.

And, while the Court agreed that under Rule 50(a), "a party may move for a directed verdict at the close of the evidence offered by the opponent," it was "well-settled" that a motion for directed verdict is only proper in a jury trial, whereas in this case "the parties were in court for a pretrial hearing on a motion *in limine* and were not participating in a jury trial." Therefore, the trial court's order granting summary judgment to Buckner was reversed and the case remanded for a new hearing.

Law of the Case Doctrine Found Inapplicable

Christopher Rice, who was hired by Banc of America Investment Services (BAI), a corporate affiliate of Bank of America (BOA), on September 24, 2004, signed a promissory note that same day in which he agreed to pay $500,000 to BOA in six annual installments. He later signed two more promissory notes, one in 2005 and the other in 2006, that were similar to the first, but payable to BAI, not BOA.

In 2010, BOA entered into three "Promissory Note Novation Agreements" (the "2010 novations"), all of which stated they were between the bank and Rice and replaced the promissory notes from 2004, 2005, and 2006. A year later, BOA sued Rice, alleging that he had breached the 2010 novations.

Rice moved to compel arbitration, arguing that the 2010 novations were invalid and did not supersede the 2004, 2005, and 2006 notes because there was no mutuality of parties between the 2010 novations and the original notes. The trial court disagreed and denied the motion, and Rice appealed, but the Court of Appeals affirmed in ***Bank of America, N.A. v. Rice***, ___ N.C. App. ___ (2013)("***BOA I***").

On remand, BOA established that after Rice signed his promissory notes to BAI, BOA acquired BAI by merger. It then moved for summary judgment, once again seeking to enforce Rice's payment obligations under the 2010 novations. Rice responded with a cross-motion for summary judgment, contending that under the law of the case doctrine, the decision in ***BOA I*** precluded the trial court from finding that

the 2010 novations superseded the original promissory notes. The trial court agreed and entered summary judgment for Rice. BOA appealed.

On December 15, in ***Bank of America, N.A. v. Rice***, ("***BOA II***"), the Court of Appeals found that when an appellate court resolves a case and remands it for further proceedings, "the questions there settled become the law of the case …, provided the same facts and … questions … determined in the previous appeal are involved in the second appeal." But, the law of the case doctrine does *not* apply "when the evidence presented at a subsequent proceeding is different from that presented on a former appeal."

In the present case, because ***BOA I*** was decided on the "bare factual record" and before it was established during discovery that BOA had acquired Rice's 2005 and 2006 promissory notes by merging with BAI, the Court found that the "observations" it made in ***BOA I*** "no longer conform to the factual record before us." Therefore, the law of the case doctrine did not apply, and since BOA owned all three of Rice's notes at the time of the 2010 novations, the Court concluded the trial court erred in granting his motion for summary judgment. It also found that while the general rule is that "a successful litigant may not recover attorneys' fees … unless such a recovery is expressly authorized by statute," N.C.G.S. § 6-21.2 provided authority for an award of attorney's fees in this case. So, Judge Bell's order was reversed and the case was remanded for the trial court to address BOA's motion for attorneys' fees.

Additional Opinions

On December 18, in ***Branch Banking and Trust Company v. Peacock Farm, Inc.***, a contract action in which BB&T sued on a personal guaranty signed by Rodolphe Lynch, one of the developers of a residential horse farm project financed by BB&T, the Supreme Court affirmed *per curiam* a Court of Appeals opinion that dismissed for "lack of appellate jurisdiction" Lynch's appeal from a $3,749,256 summary judgment entered in BB&T's favor (see *North Carolina Civil Litigation Reporter*, June 2015, p. 4). After Lynch's earlier appeal was dismissed as interlocutory, he obtained an order certifying the case for immediate appeal, but the Court found that while Rule 54(b) authorizes trial courts to certify interlocutory orders for immediate appeal, they may only do so "if there is no just reason for delay *and it is so determined in the judgment*." Here, the trial court's certification was not in the judgment from which Lynch took appeal, but in a separate order entered later. Because "[n]either Rule 54(b) itself nor the cases interpreting it authorize such a retroactive attempt to certify a *prior* order for immediate appeal …, dismissal of Lynch's appeal [was], once again, appropriate."

On December 15, in ***Landover Homeowners Association, Inc. v. Sanders***, an action brought by a subdivision's homeowners' association for unpaid assessments on undeveloped lots owned by its developers, the Court of Appeals reversed a trial court order granting summary judgment to the developers because their argument that they were not bound by the document entitled "second supplemental declaration" that subjected their lots to assessments was barred by the "equitable doctrine of quasi-estoppel," which "prevent[s] a party from benefitting by taking two clearly inconsistent positions." Having accepted the benefit of the "second supplemental declaration" by making conveyances subject to its terms, equity barred them from asserting otherwise in the action brought by the homeowners' association. The Court also found that because the parties disagreed about the scope of the "second supplemental declaration" and as its language was "fairly and reasonably" susceptible to either construction, it was "sufficiently ambiguous to create an issue of fact." Therefore, it was error for the trial court to grant summary judgment.

On December 15, in ***Southeastern Securities Group, Inc. v. International Fidelity Insurance Company***, a declaratory judgment action filed

after Elder Cortez was indicted for the kidnapping and rape of a child under the age of thirteen, but granted pretrial release after posting an appearance bond of $600,000, only to fail to appear at trial, which led to "a complex history" of criminal and civil proceedings, including numerous civil actions and three prior appeals, the Court of Appeals found that while the case "present[ed] many potential legal issues, including necessary parties, real parties in interest, collateral estoppel, and judicial estoppel," they were not raised by the parties in their briefs. The only issue they preserved was whether the trial court abused its discretion when it stayed the declaratory judgment action, pending resolution of a related indemnification action in New Jersey. Because a trial court may be reversed for abuse of discretion only if it makes a "patently arbitrary decision, manifestly unsupported by reason" and the parties were already litigating in New Jersey the ultimate issue in this case, *i.e.*, "who should be liable for the loss associated with the bond forfeiture," the Court affirmed the trial court's decision to issue a stay because it was not "a patently arbitrary decision, manifestly unsupported by reason."

WORKERS' COMPENSATION

Employee Barred from Recovering Compensation by N.C.G.S. § 97-10.2

After City of Charlotte employee David Easter-Rozzelle injured his neck and right shoulder lifting a manhole cover, he came under the care of Dr. Scott Burbank. While driving to Dr. Burbank's office to pick up a work restriction note, he suffered a traumatic brain injury in an auto accident and was transported to the hospital, where he was treated for a concussion, post-concussion syndrome, PTSD, memory loss, and cognitive deficits by a neurosurgeon and neuropsychologist. He also continued under the care of Dr. Burbank, underwent two surgical procedures on his right shoulder, and was eventually given permanent work restrictions and a 10% PPD rating.

Easter-Rozzelle was represented by different attorneys in his personal injury and workers' compensation cases. After the personal injury attorney told his health insurer that it was responsible for the medical bills that resulted from his auto accident because he was not at work at the time, he settled the personal injury claim for $45,524 and netted $16,000 after deducting attorney fees, costs, and medical expenses. The settlement proceeds were then disbursed without reimbursing the City's workers' compensation lien, obtaining an order of distribution from the Industrial Commission, or seeking a superior court order reducing or eliminating the lien.

When Easter-Rozzelle's workers' compensation attorney learned at mediation that his client was driving to Dr. Burbank's office to obtain a work restriction note when the auto accident occurred, he suspended the mediation, asserted that the head injury should be covered under workers' compensation, and requested a hearing. But, the deputy commissioner who heard the case ruled that Easter-Rozzelle was equitably estopped from recovering workers' compensation, having settled his personal injury claim without preserving the City's lien or applying to a superior court judge to reduce or eliminate it.

The Full Commission reversed on appeal, finding that the case relied upon by the deputy commissioner, ***Hefner v. Hefner Plumbing Co., Inc.***, 252 N.C. 277 (1960), did not apply because it was based on the provisions of N.C.G.S. § 97-10 as they existed prior to 1959, when employees were restricted from recovering both workers' compensation and in an action at law against the third party tortfeasor. Instead, Easter-Rozzelle's claim was controlled by N.C.G.S. § 97-10.2, which does not contain the waiver provisions in effect when ***Hefner*** was decided. Therefore, he was neither judicially nor equitably estopped from recovering compensation for the injuries he

sustained in the auto accident and the City's remedy was its lien against the third party proceeds, which would be determined by agreement of the parties or the superior court.

The City appealed, and on December 1, the Court of Appeals reversed in ***Easter-Rozzelle v. City of Charlotte***. It found that ***Hefner*** "was not a blanket preclusion of an employee's right to recover from his employer as well as the third party tortfeasor." The statutory provision that required an injured employee to elect between pursuing a remedy against his employer or the tortfeasor was eliminated in 1933. What ***Hefner*** held was that "[w]here an employee is injured in the course of his employment by the negligent act of a third party, settles with the third party, and proceeds [sic] of the settlement are disbursed in violation of N.C. Gen. Stat. § 97-10.2, the employee is barred from recovering compensation for the same injuries from his employer in a proceeding under the Workers' Compensation Act."

After a third party settlement, either the employee or employer may apply to a superior court judge to determine the subrogation amount, but "the employer must still give written consent pursuant to subsection (e)" and its "mandatory right to reimbursement" is "not waived by failure to admit liability or obtain a final award prior to distribution of the third party settlement proceeds…. By enacting N.C. Gen. Stat. § 97-10.2(e) and (j), the General Assembly clearly intended for the employer to have involvement and consent in the settlement process…. Allowing the employee to settle with the third party tortfeasor, determine the allocation, distribute funds, and later claim entitlement to workers' compensation benefits would eviscerate the statute's intent."

The Court was not persuaded by Easter-Rozzelle's argument that rather than barring him from any recovery under the Workers' Compensation Act, the third party settlement should have been voided, with the superior court determining the City's lien, if any, and deducting the lien from his workers' compensation benefits. It found the cases he cited in support of that argument, ***Pollard v. Smith***, 324 N.C. 424 (1989) and ***Williams v. International Paper***, 324 N.C. 567 (1989), were distinguishable because in both cases the appeal was from from a superior court distribution order, whereas "[h]ere, the settlement was agreed to, paid, allocated and disbursed without notice to Defendant and prior to Plaintiff's later claim for entitlement to workers' compensation benefits." Doing so was inconsistent with the statute, which "specifically prohibits either party from entering into a settlement or accepting payment from the third party without written consent of the other…. Allowing Defendant to recoup its lien from settlement funds already paid and disbursed does not accomplish the statute's purpose and intent, and is unfair to Defendant."

While the Court's majority concluded that its interpretation of the relevant statutory provisions mooted the question of whether the principles of judicial and equitable estoppel applied, Judge Dietz found in a separate concurring opinion that this was "a hornbook example of the doctrine of quasi-estoppel," which "'has its basis in acceptance of benefits' and provides that '[w]here one having the right to accept or reject a transaction … and retains benefits thereunder, he … cannot avoid its obligation … by taking a position inconsistent with it.'" Because Easter-Rozzelle settled his tort claim and received a "substantial settlement payment," Judge Dietz would have held that he "treated his injury claim as one not subject to the Workers' Compensation Act … [and] is estopped from later seeking benefits under the Act for that same injury."

Attorneys' Fees Awarded In Dispute Over Attendant Care

While walking down a concrete stairway at work in August 2003, Connie Chandler fell backward, striking her head and neck. When EMS personnel arrived at the scene, they found her

confused and agitated, with a bruise and swelling on the back of her head, and took her to the hospital, where she complained of a headache and neck pain and was diagnosed with a concussion, neck injury, and right partial rotator cuff tear. Later, after an MRI revealed small ischemic changes in the white matter of her brain, Chandler was seen by a neuropsychologist, Dr. Cecile Naylor, and a neurologist, Dr. Carlo P. Yuson, who diagnosed post-concussion syndrome and depression and recommended a reevaluation of her cognitive functioning and memory problems.

The medical case management nurse, Bonnie Wilson, arranged for Dr. Naylor to perform the reevaluation recommended by Dr. Yuson. After testing revealed sharp declines in Chandler's intellectual and memory functions and a significant compromise in her conversational speech, Dr. Naylor concluded that her condition had greatly deteriorated, found that she was suffering from severe and global cognitive deficits, no longer capable of caring for herself, and needed constant supervision, all of which he attributed to her fall at work in a report he gave to nurse Wilson three weeks later.

When Chandler was re-evaluated by Dr. Yuson in late October 2004 accompanied by nurse Wilson, he told her that she was at maximum medical improvement and would never get any better. They also discussed Dr. Naylor's report and conclusions, including his opinion that she required constant attendant care services.

In August 2008, Chandler requested a hearing, seeking an award of permanent total disability and payment for the attendant care services her husband Lester had been providing since May 2004. Later that year, after her condition regressed to that of a four-year-old child, the Stokes County Clerk of Court declared her incompetent and appointed her husband to be her guardian.

Deputy Commissioner Rideout found Chandler permanently totally disabled and ordered the defendants to pay her husband for around-the-clock attendant care services at $15/hour, beginning June 28, 2004. The defendants appealed and Chandler filed a motion for interest on the deputy commissioner's attendant care award. The Full Commission affirmed the attendant care award, but reduced it to 15 hours per day at $11 per hour, and declined to award interest.

Both parties appealed to the Court of Appeals. Defendants argued that because Chandler failed to obtain written authority in advance, it was error for the Commission to award any compensation at all for attendant care services, and in any event, the hourly rate it awarded was excessive. Chandler's appeal was based on her contention that since it was undisputed that attendant care services were needed and they were not provided, interest should have awarded under N.C.G.S. § 97-86.2.

On December 20, 2011, in ***Chandler v. Atlantic Scrap & Processing***, 217 N.C. App. 417 (2011)("***Chandler II***"), the Court of Appeals affirmed the deputy commissioner's award, except as to the issue raised by plaintiff's appeal, and remanded the case "for a determination as to the proper award of interest on the unpaid portion of the attendant care services pursuant to N.C. Gen. Stat. § 97-86.2."

Defendants' petition for discretionary review identified as the issue in dispute "[w]hether the Court of Appeals erred in affirming the Full Commission's award of retroactive attendant care benefits even though Plaintiff failed to seek prior approval for attendant care." On November 8, 2013, in ***Chandler v. Atlantic Scrap & Processing***, 367 N.C. 160 (2013)("***Chandler III***"), the Supreme Court affirmed *per curiam and* remanded the case to the Commission "for further proceedings not inconsistent with [***Mehaffey v. Burger King***, 367 N.C. 120, 749 S.E.2d 252 (2013)."

On remand, the Commission ordered the defendants to pay interest on the accrued

attendant care compensation awarded by the deputy commissioner and then denied defendants' motion to reconsider. So, they appealed again, arguing that because ***Mehaffey*** was remanded for additional findings as to the reasonableness of plaintiff's delay in requesting attendant care, the Supreme Court must have intended the same result in this case.

On December 1, in ***Chandler v. Atlantic Scrap & Processing*** ("***Chandler IV***"), the Court of Appeals disagreed. After describing the facts before the court in ***Mehaffey*** and the prior decision upon which it was based, ***Schofield v. Tea Co.***, 299 N.C. 582 (1980), the Court found both cases distinguishable, as neither involved an injured worker with a cognitive impairment requiring appointment of a guardian or guardian *ad litem*, and as the medical case manager hired by the insurance carrier in the present case was not only "fully and promptly advised of plaintiff's deteriorating situation and consequent need for constant attendant care services," but also "aware that plaintiff's husband was, of necessity, providing the attendant care services."

The Court was not persuaded by defendants' argument that the Supreme Court's reference to ***Mehaffey*** in its earlier opinion was a direction to the Commission to make findings as to whether Chandler's delay in requesting approval of the attendant care services being provided by her husband was reasonable. Rather, "[t]he Supreme Court remanded the case … only to enter an award of interest on the unpaid balance of the attendant care compensation and to determine the amount of attorneys' fees to be awarded to plaintiff for defending against defendants' first appeal," and those were the issues that the Commission addressed.

As for Chandler's motion that the defendants be ordered to pay her attorneys' fees for defending this appeal, the Court found that under N.C.G.S. § 97-88, the Commission or a "reviewing court" has discretionary authority to award such a fee if (1) the insurer has appealed "a decision of the full Commission or … any court" and (2) the Commission or court orders the insurer to "make, or continue making, payments of benefits to the employee." Exercising its discretionary authority under the statute, it granted plaintiff's motion and remanded the case to the Commission to determine a "reasonable amount for appellate attorneys' fees."

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

A Service and Publication of
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