



FIRM NEWS

York Williams Barringer Lewis & Briggs is proud to announce our two new associates! **Neal Collins** and **Amber Dorrell** joined the firm as **associates** in August.

Amber Dorrell is from Florence, SC. She is a graduate of Francis Marion University, and earned her J.D. from the University of South Carolina School of Law in 2007. Amber is a member of the NC State Bar, NC State Bar Association, and NC Association of Defense Attorneys. Amber's previous law experience includes clerking for a large defense firm in SC, as well as a small Plaintiff's firm. Amber has been married for almost seven years to her husband, Billy. They have a five year old son, Will. Amber enjoys spending time with her family and coaching Will's baseball team.

Neal Collins is from Easley, SC, though he has also lived in Virginia, Maryland, and NC. He is a graduate of Furman University and earned his J.D. from the University of South Carolina School of Law in 2007. He is a member of the NC State Bar, NC State Bar Association, and the NC Association of Defense Attorneys. Neal was a Summer Clerk for York Williams, the summer of 2006. Neal's experience also includes working for a family law lawyer in Easley, S.C. and a general practice firm in Lexington, S.C.. Neal enjoys skydiving, playing softball, traveling, and officiating high school wrestling.

E-Briefs

December 2007

A Note from the Managing Partner

It is hard to believe that 2007 will soon come to a close. This year has certainly brought significant change to York Williams. There has been a change in the name of the firm, a change in our physical location to the South Park area and changes in partners and personnel. What has not changed is the core makeup of the firm and our continuing commitment to honor our firm mission statement:

"To provide the highest quality of legal service to our clients while maintaining unquestioned honesty, integrity, efficiency and accountability."

As we draw closer to the end of 2007, we wish to thank our clients and prospective clients for the trust you place in us to deliver the type of legal service that you expect and deserve. If we fail to provide that level of service, we hope and expect to hear from you. We are often asked what sets our firm apart in the legal community. Having considered this matter carefully, I am satisfied that it is our desire and ability to perform the work at a high level while meeting the needs of our clients with respect to ancillary issues such as efficiency, reporting, and consideration of the larger goals and desires of the client.

Let me take this opportunity on behalf of the partners and family of York Williams to wish each of you Happy Holidays and best wishes for 2008. As you confront the challenges of the New Year I hope you will find some comfort in knowing that York Williams is and will be here to work with you and for you to find solutions to your legal needs. If you have not used our firm in the past, I invite you to give us a try and see if we are true to the mission statement above. I trust you will be satisfied. We look forward to our continued association with you as we look forward.

Sincerely,

John Barringer

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Please join us in welcoming Neal and Amber to York Williams!



Worker's Compensation Case Summaries

VET EMPLOYEE FAILED TO ESTABLISH CAUSAL LINK FOR LYME DISEASE

Kahino v. Carolina Veterinary Specialists Medical Services and Atlantic Mutual/GAB Robbins, ---S.E.2d---, No. COA06-1535, N.C.App., October 16, 2007

Plaintiff was an employee at Defendant Carolina's Veterinary Clinic. Her job duties included directly caring for animals in various capacities. She restrained animals, took blood, gave medications, and so forth. During her employment, she came into contact with ticks from the animals. On one particular day in February 2001, she treated a dog infested with ticks, and later discovered that two ticks had attached themselves to her shoulder. While the Plaintiff began experiencing symptoms of Lyme disease about a year after this incident, she was not actually diagnosed with Lyme disease until April or May of 2004.

The Commissioner heard the Plaintiff's worker's compensation claim in April 2005. He decided that the Plaintiff failed to prove a causal relationship between Lyme disease and her job. The Full Commission agreed, and the Plaintiff appealed to the Court of Appeals.

On appeal from the Commission, the review is limited to two issues: (1) whether the findings of fact are supported by competent evidence, and (2) whether the conclusions of law are justified by the findings of fact. The Court of Appeals further noted that the Commission was solely responsible for judging the credibility of the witnesses. In light of these two issues, the Plaintiff first argued that the Commission erred in finding that she did not sustain an occupational disease.

Specifically, the Plaintiff argued that the Commission erred in not finding that her job placed her at a greater risk of contracting Lyme disease. While the Court of Appeals agreed that the Plaintiff's job put her at an increased risk of contracting Lyme disease, it nonetheless affirmed the Commission's decision because the Commission was justified in concluding that no causal relationship between the disease and the Plaintiff's employment was proven. For occupational diseases, plaintiffs must prove not only that their jobs placed them at an increased risk for the disease, but also that there was a causal connection between the disease and the employment. In this case, the Plaintiff's own expert witness acknowledged that there was no way to determine if the Plaintiff contracted Lyme disease from a tick she came into contact with at her job.

The Court noted, "since there is no competent evidence in the record supporting the finding of no casual link, that finding must stand." **In sum, the Court noted that simply having an increased risk for a disease due to one's job is not enough to establish an occupational disease. A causal connection must also be established.**

FAILURE TO FILE FORM RESULTS IN SANCTIONS AND NO CREDIT FOR OVERPAYMENT

Bennett v. Sheraton Grand and Cornhusker Insurance Company, --- S.E.2d---, No. COA07-221, N.C.App., October 2, 2007

Plaintiff was employed by Defendant Sheraton when she sustained an injury at work on January 29, 1999. Without filing a Form 60 or a Form 22, Defendants began paying indemnity benefits to the Plaintiff. Based upon Plaintiff's average weekly wage, she should have received \$143.17 per week. However, due to a miscalculation, Plaintiff received payments in the amount of \$281.76 per week from June 25, 1999 through February 20, 2004.

On February 20, 2004, Defendants filed a Form 22 and a Form 60. At that time, Defendants erroneously calculated that the Plaintiff should receive \$163.76 per week, and the Defendants began paying the Plaintiff that reduced amount without receiving approval from the Commission. The Plaintiff then sought a hearing, and the Commission determined that the Defendants violated N.C.G.S. 97-118 by failing to give the Commission notice of acceptance of the Plaintiff's claim. As a sanction, the Commission also declined to give the Defendants credit for their overpayment.

The court noted that granting a credit to defendants who overpay a plaintiff is within the discretion of the Commission. A defendant is not generally entitled to a credit for overpayment, although a credit is to be given in the event of overpayment to a defendant when the claim has neither been accepted as compensable or determined compensable by the Industrial Commission. Furthermore, a credit is not allowed under N.C.G.S. 97-42 in situations where a defendant accepts an employee's claim as compensable, and also stipulates that the claim arises out of the course of the employment.

Defendants argued that the sanction imposed by the Commission was unreasonable under N.C.G.S. 97-18(j). Under the language of this section, the Defendants were clearly subject to sanction, but they objected to not being allowed a credit for the \$35,139.26 they overpaid the Plaintiff. The Court noted that the Defendants failed to show the sanction was unreasonable, citing the fact that the Defendants were solely responsible for the amount of the overpayment by not complying with N.C.G.S. 97-18 for approximately five years.

The Defendants also argued that they did not have to seek approval from the Commission to decrease Plaintiff's compensation rate on February 20, 2004 because no Form 60 or Form 21 was filed. The Court disagreed, noting that "defendants constructively admitted to Plaintiff's right to compensation at \$281.76 per week pursuant to N.C.G.S 97-87." Therefore, the change in award could only be modified through the Industrial Commission.

YOUR TIP: Be sure to file all required Forms within the time lines given in the statutes, especially the Form 60. In addition, be sure to accurately calculate an employee's average weekly wage, as a credit for overpayment will not be given when an employer admits that the claim arose out of the course of employment and is compensable.

Other Firm News....

Michelle May, a NC Certified Paralegal with York Williams was instrumental in the recent establishment of the new Paralegal Division within the NC Association of Defense Attorneys. Michelle will serve as the first Division Chair and as an ex-officio member of NCADA's Board of Directors. Michelle has been with York Williams for 3 years. She is currently paralegal to Greg York, Susan Briggs, and Steve Kushner.



"Lawyers who use plain language know it doesn't just make good sense, it makes good cents."
*Christopher Balmford,
Words and Beyond,
Australia.*

"The language of law must not be foreign to the ears of those who are to obey it."
Learned Hand

Liability Case Summaries

INJURY ARISES OUT OF “OWNERSHIP, MAINTENANCE OR USE” OF VEHICLE DESPITE VEHICLE NOT BEING INVOLVED IN ACCIDENT

Integon v. Ward, 646 S.E.2d 395, N.C.App., July 3, 2007

In February 2002, Thomas Taylor obtained a personal automobile liability insurance policy with Integon National Insurance Company. In March of 2002, Taylor, accompanied by two-year-old Brandon Ward, drove in Taylor’s automobile to a repair shop to have some exhaust work done. While Taylor and Ward were waiting for the repair work to be completed, they walked around the repair shop’s premises.

As Taylor and Ward were walking, a repair shop employee backed another vehicle into Ward. Ward suffered bodily injuries. Ward, through his Guardian ad Litem, brought suit against the repair shop, the employee, and Taylor. The trial court held that Taylor’s automobile insurance policy does not provide medical payments coverage for Ward but does provide liability coverage to Taylor.

Plaintiff, insurer, appealed contending Ward’s injury did not arise out of the ownership, maintenance, or use of Taylor’s vehicle. The Court of Appeals analyzed the word “arising out of.” The Court held that the words are not of narrow and specific limitation but are broad, general, and comprehensive terms affecting broad coverage. “They are intended to, and do, afford protection to the insured against liability imposed upon him for all damages caused by acts done in connection with or arising out of such use. They are words of much broader significance than ‘caused by.’”

The Court noted that the test for determining whether an automobile liability policy provides coverage for an accident is not whether the automobile was a proximate cause of the accident; instead, the test is whether there is a causal connection between the use of the automobile and the accident.

The Court found that Taylor drove his insured vehicle to the repair shop for some maintenance work. The Court held that “while the use of Taylor’s vehicle cannot be said to have been the direct cause of Ward’s injuries, a sufficient causal connection between the use and the injuries does exist.” Thus, although Taylor’s vehicle was not involved in the accident, the child’s injuries arose out of the ownership, maintenance, or use of customers’ car.

UM/UIM - “OWNED VEHICLE” EXCLUSION DOES NOT APPLY TO NAMED INSURED

Beddard v. McDaniel, 645 S.E.2d 153, N.C.App., June 5, 2007 (UIM Insurance/Owner Vehicle Exclusion)

On May 15, 2001, Defendant made a left turn from a driveway onto a U.S. highway. After crossing two lanes and the center turn lane, Defendant’s vehicle collided with Plaintiffs’ vehicle, traveling in the far two lanes.

Plaintiffs filed suit against Defendant. As part of the action, the Plaintiffs sought a declaratory judgment they were entitled to UM/UIM coverage under their insurance policy with Defendant Universal Underwriters Insurance Company. The policy was written for Plaintiffs’ company, Beddard’s Affordable Tire & Auto. However, Plaintiffs were listed as “designated individuals” on the UIM policy. Both the Plaintiffs and Universal Insurance filed motions for summary judgment. The trial court denied Universal Insurance’s motion for summary judgment and granted summary judgment to the Plaintiffs.

Universal Insurance appealed contending that the Plaintiff’s policy excluded UIM coverage because they were not driving a “covered auto” within the meaning of the policy at the time of the collision. The Court of Appeals disagreed with Universal Insurance and affirmed the trial court. The Court found that the Plaintiffs were the “named insureds” and therefore concluded that the “owned vehicle” exclusion did not apply.

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In North Carolina, insurance coverage for damages caused by uninsured and underinsured motorists “follows the person, not the vehicle,” such that an “owned vehicle” exclusion will not apply if the individuals injured in a collision are the named insureds on the policy. Here, although the Plaintiffs were driving a vehicle not listed in their Universal Insurance policy at the time of collision, Plaintiffs were named as “designated individuals” on the UIM policy.

The Court held that the owned vehicle exclusion was unenforceable as to insureds who were driving a personal car, but were designated individuals entitled to UIM coverage. Thus, the Court affirmed summary judgment in favor of the Plaintiffs.

ACCIDENT RECONSTRUCTIONIST CAN TESTIFY AS TO SKID TESTS AND STOPPING DISTANCES

Hoffman v. Oakley, 647 S.E.2d 117, N.C.App., July 17, 2007

On March 13, 2003, Catherine Hoffman, Plaintiff, was driving her mother’s car when the Defendant backed a mini-van out of a driveway causing a collision. Plaintiff’s mom brought suit for the property damage. Defendant answered and filed a third-party complaint against Plaintiff for negligence or contributory negligence.

A jury found Plaintiff contributorily negligent. Plaintiff appealed arguing that the Defendant’s expert on accident reconstruction gave impermissible opinion testimony regarding the speed Plaintiff was traveling.

Generally, N.C. Rule of Evidence, Rule 702(a) applies to expert testimony. Rule 702(a) provides that an expert witness may testify in the form of an opinion if that expert’s “scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue.” However, Rule 702(i) provides that unless an accident reconstruction expert actually observed the accident, the expert may not testify as to the speed a vehicle was traveling.

Here, Defendant’s expert performed several skid tests at the accident scene. The expert never gave an opinion as to the speed that Plaintiff was traveling. The expert used his scientific expertise to perform an experiment that demonstrated stopping distance and make the ultimate determination of the speed of her car.

Therefore, the Court of Appeals affirmed the trial court’s ruling that accident reconstruction expert’s testimony about skid tests and stopping distances did not amount to an inadmissible opinion on the driver’s speed at the time of the collision.

CGL INSURER LIABLE FOR \$700,00 SETTLEMENT AND COSTS OF INSURED FOR FAILURE TO DEFEND

Pulte Home Corp. v. American Southern Ins. Co., 647 S.E.2d 614, N.C.App., August 7, 2007
(Insurer’s Duty to Defend)

Pulte, a general contractor, was an additional insured under a subcontractor’s commercial general liability coverage. A worker was injured on a project and the general contractor sought legal defense and indemnity under the subcontractor’s policy. The insurer denied any obligation to defend or indemnify. Pulte paid \$700,000 to the worker and incurred approximately \$105,000 in legal costs.

Pulte brought action against the subcontractor’s commercial general liability insurer for breaching duty

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to defend and indemnify general contractor as additional insured. The trial court entered summary judgment in favor of insurer. Pulte appealed.

The Court of Appeals noted the well-established principle in North Carolina that an insurer who unjustifiably refuses to provide an insured with a defense is liable for the amount of a reasonable settlement entered into by the insured. In determining whether an insurer has a duty to defend the underlying lawsuit, North Carolina courts employ the “comparison test.” This test requires the court to read the pleadings in the underlying suit side-by-side with the insurance policy to determine whether the alleged injuries are covered or excluded. An insurer is excused from its duty to defend only “if the facts are not even arguably covered by the policy.” Further, an insurer undertakes a substantial risk when it chooses not to provide a defense.

The Court analyzed the construction of the additional insured endorsement phrase “arising out of.” When construing policies, North Carolina applies the rule that “while policy provisions excluding coverage are strictly construed in favor of the insured, those provisions which extend coverage must be construed liberally so as to provide coverage, whenever possible by reasonable construction.” The words “arising out of” are not words of narrow and specific limitation but are broad, general, and comprehensive terms affecting broad coverage.

North Carolina has established a three-part test to determine whether, under a policy requiring notice “as soon as possible,” untimely notice by the insured will excuse the insurer from its duty to defend and indemnify. If the trier of fact finds that the notice was not given as soon as practicable, the trier of fact must decide whether the insured acted in good faith that he had no actual knowledge that a claim might be filed against him. If the good faith test is met, the burden shifts to the insurer to show that its ability to investigate and defend was materially prejudiced by the delay. Here, the Court held that six months is not soon as practicable. However, there was no evidence of bad faith. Rather, Pulte’s corporate counsel provided an affidavit stating, “At no time did Pulte purposely, knowingly, or deliberately delay or fail to notify a potentially responsible vendor or insurer of the suit. At no time did Pulte act in bad faith.” Insurer then had the burden to show prejudice but failed to do so.

The Court of Appeals held that (1) additional insured endorsement covered Pulte for its independent negligence, if causal nexus with subcontractor’s operations existed; (2) six-month delay in giving notice to insurer did not satisfy requirement of notice as soon as practicable; but (3) general contractor acted in good faith during six-month delay. Thus, the insurer unjustifiably refused to defend the general contractor and was deemed liable for the settlement and the general contractor’s defense costs.

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