



Firm News

Verdicts! It is impossible to reflect on 2006 without recalling what we affectionately refer to as *The Tree Case*. For those not familiar with this case, it involved the tragic death of 3 members of a family when a tree fell on their car as they were entering the parking lot of a local shopping area. The incident occurred during a microburst lightning storm giving rise to an "act of God" defense.

Following a memorable mediation where the Plaintiffs and their attorney rejected offers that would have paid the surviving family member in



excess of twenty-six million dollars over time, the case was tried to a Mecklenburg

County jury by Greg York.

After weeks of trial featuring meteorological and arborist experts, the jury returned a verdict denying any monetary award to the plaintiffs.

Congratulations to Greg York, The Hartford, Zurich and the insured client!

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A Message from the Managing Partner - John Barringer

It is hard to believe that 2007 is upon us. Where does the time go? As we embark on a New Year eagerly contemplating challenges and opportunities that lie ahead, it seems appropriate to take one last look back at 2006.

As a firm we are blessed to have knowledgeable and loyal clients. We are truly grateful for the opportunity to work with good people. In 2006, we enjoyed many successes together. A few of these are particularly noteworthy, but all equally important. Please see *Firm News* for more details.

We also enjoyed another year of amazing success in trial courts throughout the State. Similarly, we continued to be extremely active before the North Carolina Industrial Commission, where we appeared approximately 100 times. Thank you to all of our clients that partnered with us in defense of these cases.

We are also fortunate to have a wonderful group of employees to work with on a daily

basis. We celebrate triumphs together and lean on each other during times of trial. In 2006, we celebrated weddings, new arrivals, significant employment anniversaries and many other things as we also endured sickness, concern for sons and daughters in harms way, departures and loss of loved ones. Through it all, our employees and our firm moved forward with dedication to family, clients and each other. Thank you for who you are and what you do.

As we now look forward to 2007, we reiterate our commitment to be the best firm we can be. We acknowledge that we are in a professional service industry and, as such, we strive to be more efficient, more responsive, more resourceful and better able to serve the needs of our clients. Thank you again to all who contributed to make 2006 a good year. We now move forward to make 2007 a great year at Morris York.

Determination of Statutory Employer Under N.C.G.S. §97-19

In Masood v. Erwin Oil Company, Plaintiff was shot in the neck while working as a cashier at a gas station. The station was uninsured, and Plaintiff proceeded

against Erwin, which owned the gas tanks underneath the station. The station purchased gas from Erwin by way of a lease.

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Verdicts! We also claimed a significant appellate victory during 2006. In *Allstate v. Stilwell*, the North Carolina Court



of Appeals twice ruled in favor of Allstate on the same issue. *Stilwell* involved the question of

whether an insurance carrier that insures more than 4 vehicles on a single policy and, due to the limitations of the carrier's computer software, issues an additional "policy reference number" for the 5th and 6th vehicles, has issued 2 policies for UIM purposes giving rise to stacking of 2 UIM policy limits.

The Court initially affirmed the trial court's grant of Summary Judgment in favor of Allstate and cited as a basis for the decision the fact that the carrier made it clear in letters that the insured in actuality had 1 policy with 2 reference numbers.

The Court was also influenced by the fact that a single premium was charged for the coverage irrespective of the number of vehicles covered. You might note that earlier I said the Court of Appeals ruled in our favor twice on the same issue.



Following the Court's initial decision, the Plaintiff's attorney obtained affidavits from 40 Plaintiff's attorneys throughout the State asking the Court to reconsider its

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The NC Industrial Commission found that Erwin was not a statutory employer, as it "was not an original or principal contractor because it had not 'undertaken for another to do something, the performance of which he has in whole or in part sublet to another.'" Even though there was a contract between the gas station and Erwin, the Commission found the contract did not require Erwin to "re-sell" the gasoline and, therefore, the station was not undertaking or performing any duties owed by Erwin. The Court reversed the Commission's decision, finding that Erwin was indeed a statutory employer, due to the fact that the station was required by the terms

of the lease to operate and maintain the gas pumps. This in effect created a contractor/subcontractor relationship between Erwin and the gas station. Since the station was uninsured, and Erwin never obtained a certificate of workers compensation insurance, Erwin was an "employer" pursuant to N.C.G.S. Sec. 97-19.

TIP: Insureds should always obtain certificates of insurance from any entity that might be considered a subcontractor. In cases involving uninsured defendants, the Commission and the Courts are likely to search for coverage among other potential defendants.

Interlocutory Appeals of Industrial Commission Findings

In *Cash v. Lincare Holdings and Travelers Insurance Company*, the Court upheld the Commission's award of medical benefits to Plaintiff on the basis that the treatment sought was of an "emergency" nature. The Court affirmed the Commission's fact-finding authority with respect to whether treatment was "emergency" in nature.

The Court rejected, however, Plaintiff's contention that the appeal was interlocutory in nature. Since the matter arose from an appeal of an Administrative Order compelling medical treatment (which was subsequently affirmed after hearing by a Deputy Commissioner as well

as the Full Commission), Plaintiff contended the Order was not "final", in that it did not foreclose the possibility that additional disputes over medical treatment could arise in the future. The Court held that the Commission's Opinion and Award constituted a "final" award, such that it could be appealed by Defendants. Thus, the Court considered (and then rejected) the merits of Defendants' appeal.

TIP: There is a procedure for appealing orders of medical compensation, if necessary, to the Appellate Courts. However, the Commission is the sole finder of fact, and generally its exercise of that discretion will not be disturbed on appeal.



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Return To Work Status and Commission Findings on Extent of Plaintiff's Disability

Two cases in 2007 have been remanded to the NC Industrial Commission for additional findings on the extent of Plaintiff's disability. In both Gene Outerbridge v. Perdue Farms, Inc. and Mickey Plott v. Bojangle's Restaurants, Inc. and Insurance Co. of the State of Pennsylvania c/o AIG Claim Services, Defendants contended that Plaintiffs had refused to accept suitable employment within their restrictions.

In both cases, the Court referenced Russell v. Lowes Prod. Distribution, which sets forth the four ways a Plaintiff may prove the existence **and** extent of his or her disability:

1. the production of medical evidence that, as a consequence of the work-related injury, he is physically or mentally incapable of work in any employment;
2. the production of evidence that he is capable of some work, but that he has, after a reasonable effort on his part, been unsuccessful in his effort to obtain employment;
3. the production of evidence that he is capable of some work, but that it would be futile to seek employment because of preexisting conditions such as age, inexperience, and/or lack of education; or
4. the production of evidence that he has obtained other employment at a wage less than that earned prior to his injury.

In Outerbridge, the Court found that the Commission failed to address the extent of Plaintiff's alleged disability. The Commission found that Plaintiff was capable of sedentary work, but did not address the effect of that restriction on his wage-earning ability. Plaintiff conceded that he did not engage in any significant job search since his injury in 2000. Therefore, the Commission's conclusions of law were not supported by the findings of fact with regard to whether Plaintiff met his burden of proof on his alleged loss of wage-earning capacity.

In Plott, Plaintiff again conceded that he had made no effort to return to work since his injury in 2002. Defendant contended, and the Industrial Commission agreed, that Plaintiff had refused to return to work because he refused to accept employment with Defendant within his restrictions and at his pre-injury wage. However, the Court reversed and remanded because the Commission did not make findings about the existence or extent of Plaintiff's disability. The Court also found that N.C.G.S. §97-32 was improperly applied as Defendants had never accepted the compensability of Plaintiff's claim and N.C.G.S. §97-32 can only be used to **suspend** benefits. Because Plaintiff was not receiving benefits, benefits could not be suspended under the statute.

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decision for various reasons.

The Court of Appeals agreed to reconsider and, during the first week of 2007, reaffirmed its prior decision.

Congratulations to Keith Nichols and John Barringer, Allstate and really the entire insurance industry!

Comp Win! For Martha Surles in Joyce Carter v. Lexington Furniture Industries, a decision

involving an alleged wrongful termination and Plaintiff's failure to return to work.



The Employee Plaintiff was found to have sustained an occupational disease of recurrent bilateral carpal tunnel and rotator cuff/supraspinatus tendonosis of the right shoulder as well as a specific traumatic incident to her neck that materially aggravated her preexisting degenerative disc disease and cervical spondylosis.

However, Plaintiff returned to work for Defendant in March 2002 in her regular job with no restrictions. Plaintiff was laid off in October 2003 and claimed that she was laid off because she was not able to complete her work in the "normal" fashion.

The credible evidence showed that Plaintiff collected unemployment benefits following her lay-off and certified that she was able to work. Plaintiff admitted that she was laid off for economic reasons and would have continued to work had she not been laid off.

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Plaintiff did not receive any medical treatment in 2003, but began treating again in October 2004, more than a year from the time she was laid off.

The Commission found that by the time Plaintiff's doctor rendered his deposition testimony, more likely than not her symptoms for which she presented after she was laid off were unrelated to her work and she was simply at or close to her pre-injury "baseline."

Plaintiff was ultimately diagnosed with pronator syndrome, but the Commission found the evidence insufficient to establish that the new diagnosis was related to her prior injury or disease, and that she failed to establish that she was incapable of earning the wages she received prior to her compensable injury.

Congratulations to Martha Surles and to Lexington Furniture!

Spotlight!

We added a number of bright and engaging new attorneys in 2006. We are confident that each will be successful. They are already making positive contributions to the firm and to our clients.



Larissa Bixler joined the firm in August of 2006. She has a law degree from the University of North Carolina at Chapel Hill.

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TIP: These cases are already changing Plaintiff's practice. The threshold of proof for disability appears to be increasing,

and Plaintiffs are having to do more than pay lip service to Russell. At minimum, Plaintiff has to make some showing of an attempt to look for work.

Expert Testimony as to Speed of Vehicles

In December of 2006 two events — one judicial and one legislative — addressed, with different results, the ability of an accident reconstructionist to offer testimony as to the speed of a vehicle involved in a collision. Although the judicial development barred such testimony, the legislative event opens the door for such testimony, at least as to accidents that occur on or after December 1, 2006.

The judicial development was the North Carolina Supreme Court's determination on December 15, 2006 that it would not review the Court of Appeals holding in Van Reypen Associates, Inc. v. Teeter, 175 N.C. App. 535, 624 S.E. 2d 401 (2006). In Van Reypen, the Court of Appeals refused to allow expert testimony as to the speed of a vehicle, citing prior cases for the proposition that:

"...one who does not see a vehicle in motion is not permitted to give an opinion as to its speed. A witness who investigates but does not see a wreck may describe to the jury the signs, marks, and conditions he found at the scene, including damage to the vehicle involved. From these however, he cannot give an opinion as to its speed. The jury is just as well qualified as the witness to determine what inferences the

facts will permit or require".

Although the Court's message in Van Reypen sounds clear, it has been tempered by an amendment to Rule 702 of the North Carolina Rules of Evidence. The amendment states:

"A witness qualified as an expert in accident reconstruction who has performed a reconstruction of a crash, or has reviewed the report of investigation, with proper foundation may give an opinion as to the speed of a vehicle even if the witness did not observe the vehicle moving."

The amendment to Rule 702 became effective December 1, 2006. It was one of several amendments passed to assist law enforcement curb driving offenses, and will certainly apply in criminal cases that arise after that date. Because the final version of the Rule does not limit itself to application in criminal cases, we can expect to see parties ask the Court to apply the Rule to civil cases that involve automobile accidents that occur after that date, as well. We will report on further developments in this area as they occur in subsequent issues of *E-Briefs*.



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Bad Faith Lawsuit Dismissed Due to Lack of Privity

The Plaintiff in Taylor v. North Carolina Farm Bureau (filed January 2, 2007) tried a bodily injury claim against Farm Bureau's insured, receiving a verdict that totaled more than 1 million dollars in compensatory damages and interest. Following the verdict, Farm Bureau paid the Plaintiff the insured's \$100,000.00 in liability limits, plus interest. When Farm Bureau's insured refused to assist the Plaintiff by bringing a bad faith claim against Farm Bureau, the Plaintiff attempted to recover the remainder of the verdict directly from Farm Bureau; alleging that Farm Bureau breached its contractual obligations to its insured by failing to settle the case early on, and protecting its insured from an excess verdict. In an effort to allow a direct suit against the insurer, the Plaintiff contended:

"This case cries out for justice. We have a young judgment-debtor with a wholly unnecessary and perfectly avoidable judgment against her, a brain-damaged, permanently disabled and emotionally tortured judgment-creditor who was wrongfully forced to try his claims, and an elderly mother

who has to work to support her grown son. Normally, a judgment-debtor faced with a massive excess judgment would cooperate with a judgment-creditor in such pathetic circumstances. What happens if she does not cooperate? What happens if the judgment-debtor not only declines to cooperate, she turns on the counsel for the judgment-creditor and complains to the North Carolina State Bar when he tried to contact her."

The Court of Appeals was not moved by the Plaintiff's plea, and consistent with prior holdings ruled that the Plaintiff's privity with Farm Bureau as a third-party beneficiary to the insurance policy existed only until Farm Bureau satisfied its contractual obligations to the extent of the insurance policy provisions. Having done so by paying the limits and interest following the verdict, and in absence of any misconduct by Farm Bureau against the Plaintiff, the Plaintiff could not pursue a bad faith suit against Farm Bureau to recover the excess sum.

The best way to get a bad law repealed is to enforce it strictly.

-- Abraham Lincoln



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