



Liability

Recent Decisions

Contrib Tees Golfer Into the Rough Cottam v. ClubCorp USA, Inc., et.al.

Plaintiff Cottam was a member of one of 29 teams playing in ClubCorp's Country Club and Resort Team Championship Tournament on Pinehurst's No. 8 golf course in September, 2003. The Tournament employed a "Shotgun Start," where all teams begin play at exactly the same time but at different holes, and the course was full. The Plaintiff was injured when he was struck in the head by a golf ball hit by the Defendant Dalton while the plaintiff was finishing play on the same hole. The Defendant was playing directly behind the Plaintiff, and the hole in question had a blind spot, where players at the hole's tee box could not see the area where Plaintiff was standing. Plaintiff was struck in the temple by Defendant Dalton's ball, knocking him unconscious, and allegedly causing brain damage.

Plaintiff contended that the Defendant Dalton "knew or should have known" that it was dangerous to tee off before the Plaintiff's team had cleared the hole. The Plaintiff also brought suit against the Tournament corporation, as well as Pinehurst

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Workers' Compensation

Announcing a brand new Workers'

Compensation seminar!

Just approved in July 2007 by the North Carolina Department of Insurance for the award of four continuing education credits (P&L). We are ready to present this seminar at your workplace. The seminar titled "Significant Topics in Defense of Workers' Compensation Claims" covers Occupational Diseases, House Bill 99, Suitable Employment, Intervening Injuries & Causation, Immigration and Illegal Aliens, Medicare & Medicare Set-Asides, and recent Case Law decisions. If interested, please contact Tom Koch to discuss scheduling this seminar. (704-375-4480 or email to tkoch@morrisyork.com)

Proposed Legislation

Allowing Stacking of Uninsured and Underinsured Insurance

A new proposal from the General Assembly's 2007-2008 session could have a significant impact on the insurance industry concerning "stacking" of underinsured and uninsured provisions. The bill was filed on April 16, by Representative Faison and would essentially allow inter-policy stacking

of underinsured and uninsured motorist coverage.

For example, under the proposal, if a claimant is entitled to recover damages, then the limits of the coverage provided by the owner or operator of an uninsured vehicle will be determined by adding the highest limit available under an underinsured provision. Essentially, a claimant who is legally entitled to recover damages will be able to receive the full benefit from both coverage provisions. This act, if passed, will become effective on January 1, 2008, and would apply to policies issued or renewed on or after that date.

Proposal to Add to the Workers' Compensation Schedule of Injuries

A new proposal to the Workers' Compensation Statute, if passed, would expand the scheduled injuries that are already provided for in the statute. This particular legislation would add injuries to the brain, heart, and reproductive organs. If the proposed legislation is passed, § 97-31 will include a new subdivision stating as follows: "In case of serious injury to the brain, heart, or reproductive organs for which no compensation is payable under any other subdivision in this section, the Industrial Commission shall award proper and equitable compensation not to exceed \$100,000."

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Resort for negligence, on the basis that they did not notify Tournament players of the danger posed by the blind spot, by failing to instruct players to use a “monitor” or other means to check for players in the area, and by failing to “promulgate and enforce reasonable rules” to protect the players. Plaintiff alleged Defendant Pinehurst was also negligent in failing to provide “adequate appliances for prevention of injuries.”

After a short deliberation period of approximately 40 minutes, the jury returned a verdict of no negligence on the part of the Tournament and Pinehurst. Defendant Dalton was found negligent, but was able to use North Carolina’s contributory negligence doctrine to negate liability. According to the *Southern Pines Pilot*, the jury found that the Plaintiff was found contributorily negligent for playing slower-than-normal.

At the charge conference prior to the jury deliberating, Plaintiff contended that the trial judge should have instructed the jury on the doctrine of “last clear chance.” Plaintiff argued that he had no obligation to go back and tell players that he was still on the same hole, and that the Defendant had the last clear chance to avoid injury to Plaintiff. The trial judge denied that request, and the jury was not instructed on last clear chance.

Plaintiff’s counsel, Mark Sternlicht, was quoted in *Lawyers Weekly* (May 28, 2007) as saying that contributory negligence is “a very harsh rule” and that “a change is long overdue.” The President-elect of the N.C. Association of Defense Attorneys responded by saying that any changes would necessarily have to come from the legislature, which has historically upheld contributory negligence.

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Solving Problems...
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type of causal relation between the accident and the performance of some service of the employment.

In Frost, the Supreme Court held that driving a go-cart is not something that most people would say has a causal relation to the duties or services of an EMT employee. Driving a go-cart is also not a risk that a reasonable person would associate or relate to the anticipated risks that are part of the EMT’s job description. Instead, the type of injury that was sustained by the plaintiff is more of a hazard that is contemplated by the general public that takes part in the activity of riding a go-cart. The Court also cited precedent, stating that when an employer provides a recreational activity outside of work that is voluntary and an employee is injured while participating in the voluntary recreational activity, such injuries will not be deemed to arise out of the employment.

The Supreme Court also cited a six-question analysis to aid in determining whether an injury arises out of employment.

- 1.) Did the employer in fact sponsor the event?
- 2.) To what extent was the attendance really voluntary?
- 3.) Was there some degree of encouragement to attend, evidenced by such factors as:
 - a. taking a record of attendance,
 - b. paying for time spent,
 - c. requiring the employee to work if he did not attend, or
 - d. maintaining a known custom of attending?
- 4.) Did the employer finance the occasion to a substantial extent?
- 5.) Did the employees regard it as an employment benefit to which they were entitled as of right?
- 6.) Did the employer benefit from the

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Recent Opinions

Determining whether an injury “arises out of or in the course of employment”

Frost v. Salter Path Fire & Rescue, 361 N.C. 181, 639 S.E. 2d 429 (2007).

The North Carolina Supreme Court recently considered when an injury “arises out of or in the course of employment” under § 97-2(6) in Frost v. Salter Path Fire & Rescue, 361 N.C. 181, 639 S.E. 2d 429 (2007). The defendant appealed from the Industrial Commission’s award of temporary total disability benefits. In that case, the plaintiff, an EMT employee, was injured while operating a go-cart at a private amusement park. Her employer, Salter Path Fire had arranged the event for their employees at the amusement park, which was known as “fun day.” The costs of the event were not funded by the defendant, but were paid for by the community. Also, participation at the event was entirely voluntary, no employee was obligated to attend, no awards or recognition was given at the event, and there were no organized discussions concerning work at the event.

Section 97-2(6) defines injury under the act as meaning only “injury by accident arising out of and in the course of employment.” Arising out of employment refers to the manner in which the injury occurs or the origin of the accident. This is often referred to as the causal relation rule. The rule states that an injury arises out of the employment when it is a “natural and probable consequence or incident of the employment and a natural result of one of its risks.” There must be some



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event, not merely in a vague way through better morale and good will, but through such tangible advantages as having an opportunity to make speeches and awards?

Always run through the above six question analysis in determining whether an injury received during a recreational event would be compensable under the Workers' Compensation Act.

The "Going and Coming Rule" and the use of a personal vehicle

Hollin v. Johnston County Council on Aging, 639 S.E. 2d 88 (N.C. App. 2007).

The "going and coming rule" provides that injuries sustained by an employee while going to and from work are usually not compensable under the Workers' Compensation Act because the injuries do not arise out of or in the course of employment. The rationale for this rule is that the risk of injuries while traveling to and from work are injuries that are common to the public at large and not due to specific course of employment. However there are four notable exceptions to this general rule:

- 1.) Premises exception-where an employee is going to or coming from work but is on the employer's premises when the accident occurs.
- 2.) Special errands exception-where an employee is acting in the course of his employment and in the performance of some duty, errand, or mission.
- 3.) Traveling salesman exception-where an employee has no definite time and place of employment, requiring them to make a journey to perform service on behalf of the employer.

4.) Contractual duty exception-where an employer contractually provides transportation or allowances to cover the cost of transportation.

In the recent case Hollin v. Johnston County Council on Aging, the Court of Appeals described the general rule and the exceptions in regards to an employee's use of their private vehicle as part of their employment. There, the plaintiff was a health care aide who provided assistance to patients in their homes. She was required to use her own personal vehicle for transportation to the patients' homes and she received reimbursement for any travel costs. However, the plaintiff was not considered to be "on the clock" when traveling from her residence to the first patient's home, as well as from her last patient's home back to her residence. Consequently, she did not receive any reimbursement for those traveling expenses.

The injuries sustained by the plaintiff were a result of an accident that occurred when the plaintiff was traveling from her residence to her first patient's home in the morning. The Industrial Commission held that the injuries did not arise out of the course of employment and denied the plaintiff's claim.

The plaintiff in Hollin argued that her injury fell under the "traveling salesman exception" and/or the "contractual duty exception." The applicability of the traveling salesman exception depends on whether the employee has fixed job hours and location. In Hollin, the plaintiff did have fixed job hours as she worked from 8 a.m. to 4 p.m., Monday through Friday. The Commission also found that although the plaintiff had multiple patients in different locations, she would routinely see the same patients for a significant period of time until the patients died.

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Apparently Sternlicht is not alone with respect to his opinions on contributory negligence. Rep. John Blust, N.C. House of Representatives member from Guilford County, has proposed House Bill 1571, which would authorize a study of the doctrine of contributory negligence, as well as joint and several liability, by the Legislative Research Committee. The Committee would then make recommendations on whether comparative negligence or another method of determining tort liability would be more appropriate. On May 22, 2007, the Bill was re-referred to the Committee on Rules, Calendar, and Operations of the House.

UM/UIM Coverage follows the person, not the vehicle-

Beddard & Beddard v. McDaniel, Cook & Universal, June 5, 2007.

The North Carolina Court of Appeals determined that the "owned vehicle" exclusion was unenforceable as to insureds driving a personal vehicle, where they were "designated individuals," and therefore qualified as insureds under a business policy that provided underinsured motorist coverage (UIM). This case reaffirms the premise that UM and UIM coverage follows the person, and not the vehicle.

The facts of the case show that on the evening of May 15, 2001, the Defendant caused a collision with Plaintiffs' vehicle. Plaintiffs filed suit for their personal injuries, as well as a claim for declaratory judgment, alleging that they were entitled to UIM coverage under their business automobile insurance policy with Defendant Universal. The insurer filed a Motion for Summary Judgment, which was denied, and the trial court allowed summary judgment in favor of Plaintiffs. The insurer appealed, contending that the insurance policy excluded UIM coverage because the

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car the Plaintiffs were driving was not a “covered auto” within the meaning of the policy.

The North Carolina Supreme Court has previously ruled on this particular issue. In Nationwide v. Mabe, the Court ruled that an “owned vehicle” exclusion in the UIM section of a business automobile insurance policy that denies coverage to a family member who is driving a family owned vehicle violates the NC Motor Vehicle Safety and Financial Responsibility Act. One of the reasons the Act was promulgated was to protect the named insured, family and household members, as well as any person who uses the insured’s vehicle with their consent, from financially inept tortfeasors by providing UM/UIM coverage. The North Carolina Supreme Court in Mabe also held that UM/UIM coverage follows the person, and not the vehicle.

The Defendant contends that the Nationwide case does not apply, because the insurance policy in question was made to cover the Beddard’s Affordable Tire & Auto, and thus should only be read to cover their used car business, rather than all liability. It is uncontroverted that the Plaintiffs were driving a car that was not listed on the business insurance policy at the time of the collision. However, the Supreme Court has expressly ruled that UIM coverage follows the person and not the vehicle, and therefore this argument was not persuasive.

The Court found that the Plaintiffs in Beddard were designated individuals on the declarations of the policy, and were therefore named insureds. The Court of Appeals found it irrelevant whether the car involved in the accident was a covered vehicle on the policy. The court found, given the broad purpose of the Financial Responsibility Act to allow an injured tortfeasor to recover damages when the tortfeasor does not have adequate insurance to fully compensate the injured insured, that there was no reason to make an exception that would bar Plaintiffs from a full recovery.



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These facts tended to show that the plaintiff did have fixed hours and locations and, thus, was not applicable to the traveling salesman exception depends on whether the employee has fixed job hours and location. In Hollin, the plaintiff did have fixed job hours as she worked from 8 a.m. to 4 p.m., Monday through Friday. The Commission also found that although the plaintiff had multiple patients in different locations, she would routinely see the same patients for a significant period of time until the patients died. These facts tended to show that the plaintiff did have fixed hours and locations and, thus, was not applicable to the traveling salesman exception.

The contractual duty exception states that where an employer provides transportation or allowances that cover costs of transportation, that injuries resulting from that transportation are compensable. As noted, the plaintiff in Hollin was reimbursed for travel to and from the patients’ homes, but she was not reimbursed for traveling to and from her residence to the first and last patient of the day. Thus, the exception would apply if plaintiff was injured while traveling between patients’ homes, but does not apply when traveling to or from her residence.

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Spotlight!

Morris York is pleased to introduce our two Summer Clerks for 2007!

Danny Bridgman graduated high school from Lakewood High, in Roseboro, North Carolina. He is currently a student at Wake Forest University School of Law. He is active in the School’s Pan Asian Law Association. Danny was a Summer Associate last year, in Ft. Lauderdale, Florida with a Social Security Disability firm. Danny enjoys playing sports, traveling, reading, running, going to the lake, UNC sports, and the Carolina Panthers. Danny considers his mentor his first year torts professor.

Linda Kim graduated from Myers Park High, in Charlotte, and now attends Campbell University. Linda participates in the Christian Legal Society, Prisoners Assistance Legal Services (PALS) program, and the Delta Theta Phi fraternity. She also participated in a Joint Summer Program in Korea. Linda’s previous experience includes clerking for Hayes Williams Turner & Daughtry, PA. Linda enjoys jewelry making, karaoke, and making sushi. She is active in the St. John Lee Korean Catholic Church. Linda considers her parents her mentors and heroes because they made her who she is today.

We are very excited to have Danny and Linda with us this summer!