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THE DEFENSE NEVER RESTS.

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2007 General Liability Case Law Update

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Premises Liability

<u>Webb v. North Carolina</u>, 637 S.E.2d 304 (N.C. App. 2006)

- Plaintiff stopped at a rest stop off I-95 to purchase a newspaper
- Plaintiff saw 2 routes – the sidewalk to the newspaper kiosk, or
- directly thorough the grass and a bed of pine straw.

- He chose the direct route
- He tripped and fell because of metal landscaping edging that was hidden by the pine straw

Case was dismissed as a matter of law based on Plaintiff's contributory negligence

Issue: Can Plaintiff be contributorily negligent when he does not know of the allegedly dangerous condition?

CSH

Ruling: Court of Appeals said YES; Plaintiff can be contributorily negligent because Plaintiff clearly had the capacity to understand that his shortcut carried a safety risk.

Civil Procedure - Costs

Oates v. Wooten, 620 S.E.2d 39 (N.C. App. 2005)

- Plaintiff won at trial
- After trial, Plaintiff moved for costs, most of which were allowed by trial court

- Among the costs allowed were:
  - obtaining medical reports
  - deposition costs
  - filing fees
  - travel costs
  - trial exhibits
  - color copies
  - photocopies

The Court of Appeals REVERSED for all of these costs and said they could not be awarded because they are not specifically listed in the statute allowing costs (N.C. Gen. Stat. § 7A-305(d))

The Court did allow the Plaintiff to recover:

- mediation fees
- expert witness fees
- service fees

It looks like the Court allowed some costs for the experts' preparation time

Morgan v. Steiner, 619 S.E.2d 516 (N.C. App. 2005)

- Defendant won at trial and moved for costs
- Among the costs allowed were:
  - obtaining medical reports
  - deposition costs
  - lunch during mediation
  - expert witness fees, including preparation and consultation with the attorneys
  - trial exhibits

The Court of Appeals said that the Defendant could recover all costs set out in N.C. Gen. Stat. § 7A-305(d), <u>plus</u> all costs recognized by common law before the statute went into effect

- It ALLOWED recovery of deposition expenses and for expert witness fees for trial but held that the cost of obtaining records was not recoverable, lunch was not recoverable and expert fees for preparation were not recoverable
- The Court did not allow recover of costs for trial exhibits, but recognized that at least one other Court of Appeals panel had

- 3 competing lines of cases have developed:
  - “Strict statutory interpretation”
  - “A reasonable and necessary approach”
  - “Common law approach”

- House Bill 21, filed Jan. 29, 2007
- The bottom line: mediator costs, deposition expenses and expert witness fees would be added to a list of costs authorized by statute and…

- The bill would clarify that the statutory list is "complete and exhaustive."
- Trial judges would retain discretion to award costs enumerated under the statute.

Punitive Damages

<u>Harrell v. Bowen</u>, 635 S.E.2d 498 (N.C. App. 2006)

- Drunk driving accident
- Plaintiff filed action for compensatory and punitive damages
- Defendant dies before Plaintiff filed his Complaint

Issue: Whether Plaintiff can proceed with punitive damages claim against defendant's estate.

N.C. Gen. Stat. § 1D-1 provides that “[p]unitive damages may be awarded, in an appropriate case and subject to the provisions of this Chapter, to punish a defendant for egregiously wrongful acts and to deter the defendant and others from committing similar wrongful acts (emphasis added)

- Trial court dismissed the punitive damages claim
- Court of Appeals affirmed because Defendant could not be deterred from committing future conduct

Expert Witnesses

<u>Van Reypen Associates, Inc. v. Teeter</u>, 175 N.C. App. 535 (2006) *review improvidently granted*, 361 N.C. 107 (December 15, 2006)

- Truck driven by the Defendant hit the Plaintiff's building and one of Plaintiff's vehicles
- Defendant submitted an affidavit saying that he was not speeding, was paying attention and did not engage in any other negligent behavior

- Plaintiff did not depose any witnesses, but submitted an affidavit of an accident reconstruction expert
- That expert said that the Defendant was speeding

The trial court allowed Defendant’s summary judgment motion

- The Court of Appeals AFFIRMED and said that the expert’s opinion on speed was <u>not</u> admissible
- The Court of Appeals said it was bound by North Carolina Supreme Court decisions dating from the 1940s that state "one who did not see a vehicle in motion will not be permitted to give an opinion as to its speed."

- But, the Court of Appeals strongly criticized the rule and encouraged the Supreme Court to reverse it
- Supreme Court accepted the case, heard oral arguments but…

- On December 15, 2006, Supreme Court issued one page opinion stating…
- Review of the case had been improvidently granted

- New DWI laws passed December 1, 2006 amend the Rules of Evidence stating:

“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.” (Rule 702)

Does the law reach back to accidents before December 1, 2006?

Bad Faith – excess verdict

- Personal injury action
- Jury awarded $968,140 in compensatory damages
- After trial, insurer paid the insured defendant's policy limits of $100,000

- As unpaid principal neared $1.5 million, plaintiff’s counsel asked insured to bring bad faith claim against insured for failing to settle case before trial and failing to protect the insured

- Insured defendant refused to help Plaintiff

- Plaintiff filed a direct action against the insurance company for bad faith

Issue: Can a Plaintiff bring a direct action for bad faith against an insurer on the basis of breach of contract?

Ruling: Case was dismissed and Court of Appeals affirmed reasoning:

- insurer's contractual obligations with the Plaintiff ended when insurer paid its $100,000 liability limits to Plaintiff.

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