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North Carolina Workers' Compensation Case Law Update

August 1, 2015 – August 16, 2016

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FACTS:

Plaintiff worked as a sales representative for Defendant-Employer. Defendant-Employer hosted an annual National Sales and Marketing Conference ("the Conference") for its employees. At the Conference, Defendant-Employer discussed the past year's sales and prospective strategies, introduced new products, held training sessions, presented end-of-year awards, and provided opportunities for employees to meet and network with colleagues from other regions of the country. Plaintiff was required to attend and he was paid his normal salary for the three-day Conference. Plaintiff was not able to bring family members with him to the Conference.

On the first night of the Conference, Defendant-Employer organized and paid for a social event at which employees were assigned to participate in bowling and/or laser tag. Defendant-Employer paid for all the expenses, assigned employees to teams, and assigned employees to a specific activity — bowling or laser tag. Mr. Holliday's first assigned activity was laser tag. Plaintiff was playing laser tag when he felt a sharp pain in his right knee. After the Conference, Plaintiff sought treatment for a meniscal tear to his right knee, ultimately requiring a total knee replacement. The Deputy Commissioner awarded Plaintiff TTD benefits and ordered Defendants to provide necessary medical treatment. The Full Commission affirmed the Deputy Commissioner's Opinion and Award, and Defendants appealed.

ISSUES:

1. Whether the Commission erred by finding that Plaintiff's injury arose out of his employment with Defendant-Employer.

2. Whether the Commission erred by finding that Plaintiff's injury constituted an injury by accident given that Plaintiff did not produce evidence to demonstrate the exact moment in time or precise motion that caused his injury.

3. Whether the Commission erred in awarding TTD benefits without evidence of Plaintiff's specific work restrictions after his total knee replacement surgery.

HOLDINGS:

1. No. Defendants argued that Plaintiff's injury did not arise out of his employment because participation in the laser tag event was a "fun outing" and did not provide measurable benefit to Defendant-Employer. However, the Court found that there was "copious competent evidence" that Defendant-Employer "paid for and controlled every

aspect of the conference," which included taking attendance at all scheduled events. Plaintiff's attendance at the event was required, and his participation in the social activities was encouraged for the purpose of networking with colleagues in other offices. Accordingly, the Court also found that there was competent evidence to support the finding that the laser tag event was an essential part of the Conference and served a business purpose for Defendant-Employer.

In distinguishing this case from previous cases in which recreational activity injuries fell short of arising out of employment, the Court focused on the following facts: (1) employee attendance at the laser tag event was mandatory and participation was encouraged; (2) Defendant-Employer fully coordinated and financed the laser tag event; and (3) Defendant-Employer benefitted from the laser tag event because it created a team-building and networking opportunity for employees.

2. No. The Commission's findings that (1) the laser tag activity was not one normally performed by Plaintiff as a Sales Representative for Defendant-Employer, and (2) the act of playing laser tag constituted an interruption in Plaintiff's regular work routine, were sufficient to support the conclusion that Plaintiff suffered an injury by accident while playing laser tag. The Court noted that Plaintiff need not produce evidence as to the exact moment in time or precise motion that caused his meniscal tear in order to establish that an injury by accident occurred during the game of laser tag.

3. No. Defendants unsuccessfully argued that the award of TTD benefits was improper because there was insufficient evidence regarding Plaintiff's specific work restrictions. However, Plaintiff's treating physician was deposed less than one month after Plaintiff's total knee replacement and before Plaintiff's post-surgery follow-up appointment. The Court deemed it appropriate for Plaintiff's doctor to express his opinion as to Plaintiff's recovery timeline in terms of an average recovery for a total knee replacement. The Court held that the doctor's testimony concerning average surgical recovery time established that Plaintiff was unable to work in any capacity immediately following his total knee replacement surgery and, therefore, was sufficient to support the TTD award.

- ***Barnette v. Lowe's Home Ctrs., Inc.,*** **___ N.C. App. ___, 785 S.E.2d 161 (April 2016) (Stephens, J.)** *(Injury by Accident)*

FACTS:

Defendant-Employer hired Plaintiff as a delivery driver in 2004. Prior to his employment, Plaintiff had a history of back problems. In 2000 or 2001, Plaintiff's pre-existing back problems began requiring medical attention. On August 8, 2012, Plaintiff and a co-worker delivered a refrigerator to a beach home, requiring them to install the refrigerator on the upper floor. At the hearing, Plaintiff testified that this was a difficult delivery and that the home had a narrow twisting set of stairs that were narrower than the staircases in other homes. The evidence

presented at the hearing was that this staircase was between three and six inches narrower than the other staircases. Mr. Barnette testified that they discovered the refrigerator would not fit through the final turn at the top of the stairwell, and had to take the refrigerator back down the stairs. Near the bottom of the stairs, Mr. Barnett lost feeling in his right hand and forearm, which later returned approximately 20 to 30 minutes later. Evidence was unclear whether Plaintiff reported his symptoms to his co-worker or what he subsequently reported to his manager that day. Plaintiff's Form 18 alleged injury to his right arm/elbow/hand "when performing [an] unusually difficult delivery of a refrigerator up and down a narrow set of stairs." Two months later, Defendants denied the claim on a Form 61. Plaintiff subsequently filed a Form 33. Following the hearing, the Deputy Commissioner denied Plaintiff's request for benefits on the grounds that Plaintiff had failed to show that he sustained an injury by accident. The Full Commission affirmed, and Plaintiff appealed to the Court of Appeals.

ISSUES:

1. Whether the Full Commission's Findings of Fact that Plaintiff failed to report his injury was supported by competent evidence.

2. Whether the Full Commission erred by concluding that Plaintiff had not suffered a compensable injury by accident.

HOLDING:

1. No. The Full Commission did not err by finding that Plaintiff had not reported his injury to his co-worker and manager. Although the record contained conflicting evidence, the Court held that Plaintiff's failure to recollect, combined with his co-worker's attributing perceived weakness to Plaintiff's age, was competent to support a finding that Plaintiff did not tell his co-worker about an injury on the alleged date of injury. Moreover, Plaintiff's manager's testimony that she could not recall being informed about the nature and work-relatedness of Plaintiff's injury was also competent to support a finding that Plaintiff did not report the injury to his supervisor.

2. Yes. The Full Commission erred by concluding that Plaintiff had not experienced a compensable injury by accident. The Court noted that an accidental cause will be inferred where the work routine is interrupted and the introduction of unusual conditions is likely to result in unexpected consequences. The Court further clarified that this rule applies where an employee's work is physically awkward, strenuous, or demanding. In this case, Plaintiff had been required to carry a refrigerator up an unusually narrow staircase and the refrigerator would not fit through the door, requiring Plaintiff and his co-worker to carry the refrigerator back down the staircase. The Court held that the resulting unusual and awkward forces that caused Plaintiff's injury required a conclusion that Plaintiff had suffered a compensable work-related injury.

❖ ***Harris v. S. Comm. Glass*, ___ N.C. App. ___, S.E.2d ___ (August 2016) (Zachary, J.)** *(New Injury by Accident/Specific Traumatic Incident; Material Aggravation; Apportionment of Liability)*

FACTS:

On July 13, 2010, Plaintiff suffered a back injury while working for Southern Commercial Glass, Inc. ("Glass") at a jobsite in Georgia. After the injury, Plaintiff moved home to North Carolina, and the parties agreed to a change of jurisdiction from Georgia to North Carolina. After being terminated from employment with Glass, Plaintiff began working for Southeastern Installation, Inc. ("Southeastern") in 2012. Nevertheless, Glass continued to provide workers' compensation benefits. Thereafter, Glass went out of business and Plaintiff continued to work for Southeastern. On April 1, 2014, while working for Southeastern, Plaintiff bent over slightly and was unable to straighten his back. He was then written out of work by his authorized treating provider and remained out of work. Plaintiff's doctor recommended a fusion surgery, and Glass thereafter denied that Plaintiff was entitled to further benefits given that he had suffered a new injury while employed by Southeastern. Both Glass and Southeastern filed Form 61s denying Plaintiff's claim for benefits. Southeastern argued that Plaintiff's need for surgery was related to his prior July 2010 injury while working for Glass.

The Deputy Commissioner held that Plaintiff did not suffer a compensable injury by accident on April 1, 2014, and that his need for surgery was caused by the July 13, 2010, injury. The Full Commission reversed the Deputy Commissioner's Opinion and Award and found that Plaintiff had suffered a compensable specific traumatic incident on April 1, 2014, holding Southeastern solely responsible for benefits. Southeastern appealed to the Court of Appeals.

ISSUES:

1. Whether the Commission erred in finding that Plaintiff suffered a new compensable injury by accident resulting from a specific traumatic incident on April 1, 2014.

2. Whether the Commission erred in failing to apportion liability for Plaintiff's benefits between Glass and Southeastern.

3. Whether the Commission erred in its analysis of causation and material aggravation.

4. Whether the Commission erred in concluding that the April 1, 2014, incident constituted a new specific traumatic incident.

5. Whether the Commission erred in indicating that the *Parsons* presumption did not apply in this case while also applying the presumption in the alternative.

HOLDINGS:

1. No. The Court noted that the Commission is the sole judge of credibility and the weight to be given to conflicting testimony, and found that the Commission had placed more

weight on Dr. Cohen's testimony rather than Plaintiff's testimony regarding his recollection of the extent to which the April 1, 2014, incident differed from earlier episodes. The Court noted that the doctor had testified that, to a reasonable degree of medical certainty, the April 1, 2014, incident had caused Plaintiff's injury and materially aggravated his pre-existing back condition to the point of requiring the fusion surgery.

2. No. The Court held that apportionment was not required in this case, distinguishing between this case and *Newcomb v. Greensboro Pipe Co.*, 196 N.C. App. 675, 677 S.E.2d 167 (2009). The Court emphasized that the Commission did not make a finding adopting the doctor's testimony that, in response to a hypothetical question, 70% of Plaintiff's need for surgery was related to his 2010 injury and 30% was related to the 2014 injury. The Court also noted that the hypothetical question posed to the doctor was premised on a hypothetical assumption that did not come to pass after the Commission rendered its decision.

3. No. The Court rejected the argument that the Commission had erred in its finding of causation and material aggravation by citing *Moore v. Fed. Express*, 162 N.C. App. 292, 297, 590 S.E.2d 461, 465 (2004).

4. No. The Court held that the Commission's finding that Plaintiff suffered a new compensable injury by accident on April 1, 2014, was based on expert medical testimony and not merely on the temporal connection between the incident and onset of pain. The Court further held that the expert medical testimony was not based on speculation and found that Plaintiff's doctor had testified to a reasonable degree of medical certainty that the April 1, 2014, incident materially aggravated Plaintiff's pre-existing condition.

5. No. The Court held that it was not obligated to provide "clarity for future matters" given that the Commission applied the *Parsons* presumption, despite its conclusion that the presumption did not apply to this case, and given that a reversal on this issue would not have changed the outcome for Defendants. The Court emphasized that its proper function was not to give advisory opinions or answer moot questions.

II. *Parsons* Presumption

- ***Wilkes v. City of Greenville*, ___ N.C. App. ___, 777 S.E.2d 282 (October 2015) (Davis, J.)** *(Parsons Presumption; Futility of Seeking Employment)*

FACTS:

Plaintiff was working as a landscaper and driving one of Defendant-Employer's trucks when a third-party ran a red light and collided with the truck. Plaintiff's truck then collided with a tree,

breaking the windshield and deploying the airbags. He was transported to Pitt County Memorial Hospital, where he was treated for an abrasion on his head, broken ribs, and various injuries to his neck, back, pelvis, and left hip. He also underwent a brain MRI, which showed negative results for acute injury but did reveal some evidence of sinus disease resulting from a concussion.

Defendant-Employer filed a Form 19 reporting to the Commission that Plaintiff had, in the course of performing his duties as a landscaper, sustained injuries in a multi-vehicle accident. Defendants also filed a Form 60 admitting Plaintiff's entitlement to compensation for injuries to his "ribs, neck, legs and entire left side." Thereafter, both parties filed Form 33s requesting that the claim be assigned for hearing. Defendants' Form 33 stated that the "[p]arties disagree[d] about the totality of plaintiff's complaints related to his compensable injury and need for additional medical evaluations." Plaintiff's Form 33 alleged that Plaintiff "[was] in need of additional medical treatment . . . specifically an evaluation by a neurosurgeon."

A Deputy Commissioner entered an Order requiring Defendants to send Plaintiff for a one-time evaluation with a neurosurgeon of their choosing. If that neurosurgeon recommended additional treatment, Defendants were to provide that treatment. Another Deputy Commissioner later entered an Opinion and Award determining that Plaintiff's low back, knee, anxiety, depression, sleep disorder, tinnitus, headaches, and joint pain were all causally related to his compensable injury and ordering Defendant-Employer to pay all of Plaintiff's medical expenses. The Deputy Commissioner also concluded that Plaintiff demonstrated that it was futile for him to search for work because of pre-existing conditions such as age, full-scale IQ of 65, education level and reading capacity at grade level 2.6, previous work history of manual labor jobs, and Plaintiff's physical conditions resulting from his compensable injury. The Deputy Commissioner concluded that Plaintiff was entitled to TTD compensation.

The Full Commission reversed the Deputy Commissioner's decision, holding that: (1) Plaintiff failed to meet his burden of demonstrating that his anxiety and depression were caused by his work-related accident; and (2) Plaintiff was no longer entitled to TTD benefits because he "presented insufficient evidence that a job search would be futile." Plaintiff timely appealed.

ISSUES:

1. Whether the Full Commission erred in concluding that Plaintiff was not entitled to medical compensation for his anxiety and depression because these conditions were not causally related to his work-related accident.

2. Whether the Full Commission erred in concluding that Plaintiff was not entitled to TTD benefits because he presented insufficient evidence that a job search would be futile.

HOLDINGS:

1. Yes. To find that Plaintiff's anxiety and depression were not caused by his work-related accident, the Full Commission relied upon conflicting testimony of physicians and

psychologists who evaluated Plaintiff. Based on this, the Court held that it was evident that the Commission did not apply the rebuttable presumption under *Parsons v. Pantry, Inc.,* 126 N.C. App. 540, 485 S.E.2d 867 (1997), to Plaintiff's psychological symptoms and instead kept the burden on Plaintiff to demonstrate causation despite Defendants' prior admission of general compensability in the Form 60. The Court remanded this matter to the Commission so that it could apply the *Parsons* presumption and then make a new determination as to whether Plaintiff's psychological symptoms were casually related to his injury.

2. Yes. Plaintiff offered evidence of pre-existing conditions such as his age, full-scale IQ of 65, education level and reading capacity at grade level 2.6, previous work history of manual labor jobs, and his physical conditions resulting from his compensable injury. Therefore, by introducing evidence of these pre-existing conditions, Plaintiff offered sufficient evidence that engaging in a job search would be futile so as to shift the burden to his employer to show that suitable jobs were available and that he was capable of obtaining suitable employment taking into account his limitations. Thus, because Plaintiff demonstrated the futility of engaging in a job search, and because Defendants made no attempt to show that suitable jobs were available to Plaintiff, the Commission erred in ruling that Plaintiff was not entitled to temporary total disability.

3. The Court distinguished the case at hand with its recent decision in *Fields v. H & E Equip. Servs., LLC*, ___ N.C. App. ___, 771 S.E.2d 791 (2015), where it held that the Plaintiff did not demonstrate that engaging in a job search would be futile because he "failed to provide competent evidence through expert testimony of his inability to find any other work as a result of his work-related injury . . . ." *Id.* at ___, 771 S.E.2d at 794-95. The Court noted that the present case was distinguishable from *Fields* factually, and took the opportunity to clarify that "a plaintiff is not required to present medical evidence or the testimony of a vocational expert on the issue of futility." *Thompson v. Carolina Cabinet Co.*, 223 N.C. App. 352, 360, 734 S.E.2d 125, 129 (2012).

III. Suitable Employment

❖ ***Falin v. The Roberts Co. Field Servs., Inc.*, ___ N.C. App. ___, 782 S.E.2d 75 (February 2016) (Bryant, J.)** *(Suitable Employment, N.C.G.S. 97-2(22))*

FACTS:
Defendant-Employer hired Plaintiff on October 2011. Although Plaintiff lived in Tennessee, Plaintiff's application stated that he was available to work out of town. On December 10, 2012, Plaintiff was working as an ironworker on a construction project in North Carolina when he suffered a compensable fracture to his lower left leg. After several months of treatment, Plaintiff demonstrated the capacity to work a medium-duty job. Following his clearance for medium-level work, Defendant-Employer offered Plaintiff a position as a tool clerk in

Charleston, South Carolina. The tool clerk position paid wages equal to Plaintiff's pre-injury earnings and Plaintiff's orthopaedist had cleared him to work in the tool clerk position. Rather than accept the tool clerk position, Plaintiff instead took a job washing cars at minimum wage for a different employer. Next, Plaintiff began working as a traffic controller for a third employer. In response, Defendants filed a Form 24 Application to Terminate or Suspend Payment of Compensation on the grounds that Plaintiff had refused suitable employment.

The Industrial Commission declined to rule administratively on Defendants' Form 24. As a result, the issue of Plaintiff's disability benefits proceeded to hearing and resulted in an Opinion and Award in favor of Plaintiff. On appeal, the Full Commission affirmed and held in favor of Plaintiff, in a two-to-one decision, on the grounds that the tool clerk position was greater than 50 miles from Plaintiff's home. Defendants appealed to the Court of Appeals.

ISSUE:
Whether the Full Commission erred by holding that a position greater than 50 miles away from a Plaintiff's home could not be suitable employment as a matter of law under N.C.G.S. § 97-2(22).

HOLDING:

No. The Full Commission did not err by concluding that the plain language of N.C.G.S. § 97-2(22) prohibited the tool clerk position from constituting suitable employment. Providing the first authoritative interpretation of § 97-2(22) since its 2011 enactment, the Court rejected Defendants' argument that the 50-mile radius was merely one factor to be considered amongst all of the others. The Court relied on the provision's grammatical structure, noting that the 50-mile radius requirement was contained within its own clause and was not joined to the other factors by a comma. Moreover, the Court noted that, while all of the balancing factors are nouns, the 50-mile radius is an adjective phrase. Therefore, the Court held that the 50-mile requirement was a necessary element for suitable employment.

IV. Medical Causation

- ***Pickett v. Advance Auto Parts*, ___ N.C. App. ___, 782 S.E.2d 66 (February 2016) (McCullough, J.)** *(Medical Causation; Expert Testimony; Disability)*

FACTS:
Plaintiff worked as a salesperson and driver for Defendant-Employer in Greensboro, North Carolina. Immediately following an armed robbery, Plaintiff began to complain of chest pains and throbbing headaches, but he was told to finish his shift. Plaintiff subsequently sought treatment from a primary care physician and psychologist, among other medical providers. Both the primary care physician and psychologist diagnosed Plaintiff with post-traumatic stress

disorder as a result of the robbery. Defendants ultimately denied compensability for the claim upon filing of a Form 61. Plaintiff responded by filing a Form 33 Request for Hearing.

At the hearing, the Deputy Commissioner received deposition testimony from the primary care physician and psychologist opining that Plaintiff's condition was medically related to the robbery. Accordingly, the Deputy Commissioner filed an Opinion and Award in favor of Plaintiff. Defendants appealed to the Full Commission, who affirmed the Deputy Commissioner's award. Specifically, the Full Commission awarded TTD benefits, reasonable attorney's fees, hearing costs, and all related medical and psychological treatment incurred or to be incurred for Plaintiff's psychological conditions. Defendants appealed to the Court of Appeals.

ISSUES:

1. Whether the Full Commission erred by concluding that the testimony provided by the primary care physician and psychologist regarding causation was sufficient for Plaintiff to meet his burden of establishing compensability.

2. Whether the Full Commission erred under North Carolina Rule of Evidence 702 by concluding that Dr. Morris was an expert in psychology and qualified to give an opinion.

3. Whether the Full Commission erred by concluding that Plaintiff had met his burden of establishing ongoing disability.

HOLDINGS:

1. No. The Full Commission did not err in accepting the causal medical testimony connecting Plaintiff's condition to the robbery. Defendants argued that the medical providers were not credible because Plaintiff was not credible. Defendants specifically pointed to Plaintiff's exaggerated version of events, his failure to reveal evidence of a prior workers' compensation claim, and his denial of pre-existing conditions. The Court of Appeals, however, found Defendants' argument "extremely injudicious," noting that the Industrial Commission is the sole judge of credibility and that it had determined Plaintiff's testimony to be both credible and convincing. Moreover, the Court rejected Defendants' arguments that the medical opinions were mere conjecture. The Court held that *Young v. Hickory Bus. Furniture,* 353 N.C. 227, 538 S.E.2d 912 (2000) (holding that the maxim of 'post hoc, ergo propter hoc' is not competent evidence of causation) did not apply to this case because the medical providers were dealing with a psychological injury with physical symptoms. As such, not only was the temporal proximity relevant, it was a necessary consideration. Moreover, while the medical opinions may have relied on a temporal link, the link was not the sole foundation of the opinion; the doctors also relied on Plaintiff's subjective report and his presentation of symptoms.

2. No. The Full Commission did not err by admitting Dr. Morris, a psychologist, as an expert in psychology. The Court rejected Defendants' argument that Dr. Morris' transient job history combined with the subject of his dissertation (race in education), disqualified him from being properly admitted as an expert. So long as the provider has the proper degree, license, and practice, and his/her opinions are based on reliable principles and methods applied to the facts of the case, the Industrial Commission is within its purview to allow such testimony.

3. No. The Full Commission did not err in concluding that Plaintiff was suffering from ongoing disability as a result of his at-work injuries. Defendants argued that Plaintiff's only evidence of disability consisted of a work-release note that removed Plaintiff from work until October 31, 2012. However, the Court noted that Plaintiff's primary care physician later testified that Plaintiff could not return to work until he was cleared by a psychologist. Dr. Morris, Plaintiff's psychologist, opined that Plaintiff could not return to work for the Defendant-Employer due to the association with the events of the robbery. Accordingly, the evidence supported the Industrial Commission's conclusion that Plaintiff had successfully established ongoing disability.

V. N.C.G.S. §§ 97-52 and 97-53 – Occupational Disease

❖ ***Rainey v. City of Charlotte*, ___ N.C. App. ___, 785 S.E.2d 766 (May 2016) (Elmore, J.)** *(Statute of Limitations; Notice of Occupational Disease)*

FACTS:
Plaintiff worked as an automotive mechanic assistant, which required frequent use of his arms and shoulders. On May 9, 2000, Plaintiff visited an orthopaedic surgeon for evaluation of his right shoulder and was diagnosed with severe osteoarthritis. Plaintiff reported to the doctor that his job required heavy use of his shoulders to break down tires. The medical records indicated that Plaintiff was informed about the likelihood of total joint replacements of both shoulders and he was advised to modify his work. Plaintiff continued to work until his retirement on December 1, 2009; later testifying that he had persistent shoulder pain throughout his later years of employment and needed the help of co-workers to complete certain tasks. Plaintiff testified that he retired due to pain in his left shoulder, which stopped him from performing his normal job functions.

Plaintiff visited a different physician on October 1, 2012, and reported a 12-year history of left shoulder problems. On that date, Plaintiff was diagnosed with end-stage arthritis in his left shoulder. Plaintiff underwent a left total shoulder replacement procedure on November 5, 2012, and was written completely out of work. On November 29, 2012, Plaintiff filed a workers' compensation claim, alleging an occupational disease in his left shoulder. The Deputy Commissioner, and later the Full Commission, dismissed the claim for lack of jurisdiction on

grounds that Plaintiff failed to file his claim within the statutory two-year period. Plaintiff appealed.

ISSUE:
Whether the Full Commission properly dismissed Plaintiff's claim under N.C.G.S. § 97-58(c) after finding that the statute of limitations had expired.

HOLDING:
Yes. The Court of Appeals held that the statute of limitations had expired and that N.C.G.S. § 97-58 barred Plaintiff's claim for benefits. First, the Court concluded that Plaintiff was adequately informed of the nature and work-related cause of his left shoulder injury on May 9, 2000. Plaintiff's testimony at trial corroborated the orthopaedic surgeon's testimony that Plaintiff was told his job was causing his shoulder problems, and that he would likely have to undergo replacement surgery for both shoulders. Second, the Court concluded that Plaintiff was disabled within the meaning of the Workers' Compensation Act on December 1, 2009. Plaintiff argued that he was not legally disabled until he was completely written out of work on November 5, 2012. However, the Court disagreed and relied on Plaintiff's own testimony that he retired because of the pain in his left shoulder, which rendered him incapable of performing his normal job functions. In light of these facts, the Court found that Plaintiff had sufficient notice of an occupational disease claim as of December 1, 2009, and, consequently, N.C.G.S. § 97-58(c) barred Plaintiff's claims for benefits.

- ***Ketchie v. Fieldcrest Cannon, Inc.*, ___ N.C. App. ___, 777 S.E.2d 129 (October 2015) (Inman, J.)** *(N.C.G.S. § 97-130)*

FACTS:
Plaintiffs (Ms. Ketchie and Mr. Joines) worked for Defendant-Employer over the course of approximately two and 45 years respectively. The parties stipulated that Ms. Ketchie was last injuriously exposed to asbestos in the seven months before January 31, 1974. The parties stipulated that Mr. Joines' last injurious exposure was in the seven months before September 24, 1986. In 2000, Ms. Ketchie was diagnosed with asbestosis as a result of her exposure during employment with Defendant-Employer. In 2003, Mr. Joines was diagnosed with mesothelioma and died on May 9, 2004.

The North Carolina General Assembly created the Security Association on October 1, 1986, to provide a way to pay covered claims against member self-insurers in order to avoid, among other things, non-payment of claims due to the insolvency of a member self-insurer. All self-insurers are required to be members of the Security Association as a condition of being licensed to self-insure. Defendant-Employer was a member of the Security Association from October 1986 until December 19, 1997, after which the company purchased workers' compensation insurance. Defendant-Employer thereafter filed for bankruptcy in 2000 and 2003. After the bankruptcy in 2003, Defendant-Employer defaulted on its outstanding workers' compensation claims incurred during this period of self-insurance before the company became a member of

the Security Association on October 1, 1986. Mr. Ketchie and Mr. Joines' claims, along with other Plaintiffs, fell into the category where their employment and last injurious exposure occurred before October 1, 1986, but were not diagnosed until after the bankruptcies. As such, these Plaintiffs sought compensation from the Security Association because Defendant-Employer had declared bankruptcy and had defaulted on their claims. In 2009, both Ms. Ketchie and Mr. Joines' estate filed workers' compensation claims against Defendant-Employer and the Security Association.

The Full Commission concluded that the plain language of N.C.G.S. § 97-130 statutorily excluded Plaintiffs' claims because covered claims only included those claims where an injury occurred while the employer was a member of the Security Association. Under N.C.G.S. § 97-57, liability for an occupational disease attaches when the last injurious exposure occurs. Because Defendant-Employer was not a member of the Security Associates on the date of the last injurious exposures, Plaintiffs' claims were not covered claims.

ISSUE:
Whether the Commission erred in holding that Plaintiffs' claims were statutorily excluded under N.C.G.S. § 97-130.

HOLDING:
No. The Court of Appeals affirmed the Commission's decision, relying on the plain language of N.C.G.S. §§ 97-130 and 131 to find that there was no coverage for these claims. In order for the claims to be covered by the Security Association, the claims must have arisen when the self-insured company was insolvent and when the company was a member of the Security Association. The Court found that these claims arose in 1974 and September 1986, while Defendant-Employer was solvent, and before the company joined the Security Association. Because the Security Association was not created until after Plaintiffs' last injurious exposures, these claims could not be covered. As such, Plaintiffs' claims were barred and there was no recourse for them as a result of Defendant-Employer's bankruptcy.

VI. Procedural Issues

A. Interest and Attorney's Fees

- ***Chandler v. Atl. Scrap and Processing*, ___ N.C. App. ___, 780 S.E.2d 575 (December 2015) (Stroud, J.)** *(Reasonableness of Delay in Requesting Compensation for Attendant Care Services; Attorney's Fees)*

FACTS:
Plaintiff worked as a cleaner for a metal recycling facility. On August 11, 2003, Plaintiff was walking down a flight of steps and fell backwards, striking her head and neck. Her claim was accepted as compensable pursuant to a Form 60. Over time, her condition deteriorated. Ultimately, she suffered severe cognitive impairment, resulting in her having the intellectual

capacity of a four year old. By June 28, 2004, Plaintiff was unable to care for herself. She required constant supervision and attendant care services, which were provided by her husband.

Throughout Plaintiff's treatment, Defendants directed care. She treated with Dr. Carlo Yuson and Dr. Cecile Naylor. On June 28, 2004, following cognitive testing, Dr. Naylor determined that Plaintiff required constant attendant care services. On July 20, 2004, Dr. Naylor discussed her conclusion regarding attendant care services with the nurse case manager. On October 27, 2004, Dr. Yuson also concluded that Plaintiff would require constant attendant care services due to her cognitive and emotional impairments.

Plaintiff first requested attendant care services on August 27, 2008, pursuant to the filing of a Form 33. This case has previously been heard by the Court of Appeals and Supreme Court. In *Chandler I*, both the Deputy Commissioner and Full Commission found Plaintiff was permanently and totally disabled and Defendants were required to provide medical compensation, including around the clock attendant care services dating back to June 28, 2004. Defendants appealed, arguing Plaintiff was not entitled to attendant care services as she failed to request prior approval from the Commission for the same. The Court of Appeals (217 N.C. App. 417, 720 S.E.2d 745 (2011)) held that Defendants had notice of Plaintiff's required attendant care services, which were being provided by Plaintiff's husband. They based this conclusion on the fact that Defendants' selected nurse case manager was informed of the need for attendant care approximately one month after the recommendation was made by Dr. Naylor. The Supreme Court affirmed the Court of Appeals decision, but remanded to the Commission "for further proceedings not inconsistent with *Mehaffey v. Burger King*, 367 N.C. 120, 749 S.E.2d 252 (2013)."

In *Chandler II*, the Full Commission awarded interest on the unpaid balance of attendant care compensation and attorney's fees. Defendants appealed.

ISSUES:

1. Whether the Full Commission erred in awarding interest on the unpaid balance of the attendant care compensation Defendants owe to Plaintiff pursuant to N.C. Gen. Stat. § 97-86.2.

2. Whether the Full Commission erred in awarding Plaintiff attorney's fees pursuant to N.C. Gen. Stat. § 97-88.

HOLDINGS:

1. No. The Court of Appeals began their analysis by finding "the matter on appeal" before the Supreme Court was the award of compensation for attendant care services provided by Plaintiff's husband. As the Supreme Court affirmed the Court of Appeals' decision in *Chandler I*, the *Chandler II* Court determined that the Supreme Court remanded the case to the Commission only to enter an award of interest on the unpaid balance of

attendant care compensation and to determine that amount of attorney's fees. The Court held that the Commission's award of interest was correct, as Defendants were informed that constant attendant care services was required less than one month following that determination. Additionally, the Court pointed to the fact that Defendants directed Plaintiff's medical treatment and both physicians agreed constant attendant care was necessary. Finally, the Court noted Plaintiff's mental functioning was at the level of a four year old child.

2. No. The Court upheld the Full Commission's grant of attorney's fees, noting that they could use their discretion to award the same. Because Defendants unsuccessfully appealed, the Court affirmed the Commission's decision to award fees.

❖ ***Campbell v. Garda USA, Inc.,*** **___ N.C. App. ___, 785 S.E.2d 443 (May 2016) (J., Dietz)** *(Attorney's Fees; Unfounded Litigiousness)*

FACTS:
Plaintiff filed two separate workers' compensation claims against Defendants, with the first date of injury in December 2011 and the second date of injury in July 2012. During discovery Defendant-Employer falsely stated that it did not possess any written documents concerning the 2012 injury. However, during a subsequent deposition, an employee of Defendant-Employer acknowledged that a written document existed and that it was on his laptop, which was present at the deposition. Defendant-Employer's attorney ordered the employee to stop speaking and power off his laptop. After the deposition, Defendants refused to produce the document. Ultimately, the Industrial Commission ordered the document's production. The Commission also sanctioned Defendants with attorney's fees for unfounded litigiousness under N.C.G.S. § 97-88.1. Defendants appealed.

ISSUE:
Whether the Full Commission erred by assessing attorney's fees of $13,212.50 against Defendants.

HOLDING:
Yes and No. The Court of Appeals held that Defendants' false representations during discovery and their unwillingness to produce documents without an Order from the Industrial Commission constituted unfounded litigiousness. On its own, Defendants' discovery violations were sufficient to maintain an award of attorney's fees.

However, the Full Commission had also grounded its award of attorney's fees on other improper grounds. In addition to the discovery violation, the Full Commission also cited Defendants' failure to contest the claim within 90 days as well as its assertion of an unfounded notice defense in support of the attorney's fees award. First, the Court reasoned that Defendants' administration of Plaintiff's claim under a medical-only Form 63 indicated that the

90-day response requirement under N.C.G.S. § 97-18(d) did not apply to the case, noting that "[w]e cannot fault Garda for relying on the instructions in a government-issued form." Second, the Court held that Defendants had never actually asserted a notice defense. Therefore, it was improper for the Industrial Commission to sanction Defendants for something they had not done. Thus, while the award of attorney's fees was legally supportable, the Court of Appeals remanded the case to the Full Commission to reassess the award of attorney's fees in light of its opinion.

B. N.C.G.S. § 97-10.2

- ***Easter-Rozzelle v. City of Charlotte*, ___ N.C. App. ___, 780 S.E.2d 244 (December 2015) (Tyson, J.)** *(N.C.G.S. § 97-10.2; Settlement of Third-Party Claim Without Written Consent by Employer)*

FACTS:

On June 18, 2009, Plaintiff sustained injuries to his neck and right shoulder while working as a utility technician. Plaintiff's claim was accepted as compensable pursuant to a Form 60. Following the injury, Plaintiff continued to experience pain and Defendant-Employer instructed him to obtain an updated work note from his doctor. On his way to his doctor's office to pick up the note, Plaintiff was involved in an automobile accident and sustained a traumatic brain injury. Plaintiff reported to Defendant-Employer that he was on his way to pick up the requested note when the accident occurred.

Plaintiff filed a personal injury claim for the motor vehicle accident. He had different attorneys representing him in the personal injury claim and in the workers' compensation claim. Plaintiff ultimately settled the personal injury claim for $45,524.00. After paying attorney's fees, costs, and medical expenses, Plaintiff received $16,000.00. The settlement proceeds were disbursed without reimbursement to Defendants and without a Superior Court order eliminating the lien or an Industrial Commission Order allowing distribution of the funds. In the personal injury case, Plaintiff's attorney alleged in correspondence to Plaintiff's personal health insurance carrier that he was not "at work" when he sustained his injuries and maintained that the personal health insurance carrier should be responsible for those bills. In terms of the workers' compensation claim, Plaintiff's workers' compensation attorney first became aware at the mediation that Plaintiff was traveling to obtain an updated work note when he was involved in the accident. Plaintiff's attorney suspended the mediation and filed a Form 33. Defendants denied the claim on the basis of estoppel and because the settlement proceeds were disbursed without Industrial Commission approval or release by Superior Court.

The Deputy Commissioner found for Defendants, holding that Plaintiff had no right to recover additional compensation from Defendants when the third-party settlement funds had already been disbursed. Plaintiff appealed. The Full Commission reversed, concluding that Defendants had sufficient notice of the motor vehicle accident and subsequent injuries. The Commission found that Defendants were entitled to a statutory lien on recovery from the third-party

proceeds Plaintiff received from settlement of his personal injury claim, once the subrogation amount was determined by agreement of the parties or a superior court judge.

ISSUE:
Whether the Full Commission erred in concluding Plaintiff was entitled to recover additional compensation from Defendants for injuries sustained in a third-party motor vehicle accident when the settlement amount had already been disbursed.

HOLDING:
Yes. The Court reiterated the rule from *Hefner v. Hefner Plumbing Co., Inc.*, 252 N.C. 277, 113 S.E.2d 565 (1960), which states that where 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 of the settlement are disbursed in violation of N.C.G.S. § 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. The Court found that the Full Commission should have applied *Hefner*. In *Hefner*, the Plaintiff was injured in an automobile accident during the course and scope of his employment. Plaintiff's counsel advised the workers' compensation carrier that Plaintiff was not making a claim for workers' compensation benefits. Following settlement of the third-party claim, Plaintiff filed a claim with the Industrial Commission. He argued that the carrier should be ordered to pay a proportionate amount of the Plaintiff's attorney's fees. The Supreme Court held that Plaintiff could not seek compensation from his employer after having settled the third-party claim and after the settlement proceeds had been disbursed. In this case, the Court held that, regardless of the settlement amount, which Plaintiff argued as "grossly inadequate," Plaintiff was not entitled to recover additional compensation given that Defendants were not given the opportunity to participate in settlement or allocation of the settlement disbursement. The Court noted that Defendants maintain the right to participate in the settlement process by requiring review and written consent to the settlement agreement. Given the holding, the Court did not address the applicability of the principles of judicial and equitable estoppel.

- ***Dion v. Batten*, ___ N.C. App. ___, ___ S.E.2d ___ (August 2016) (McGee, J.)**
  (N.C.G.S. § 97-10.2; Third-Party Lien)

FACTS:
Plaintiff sustained compensable injuries arising from a car accident occurring in the course and scope of his employment as a servicing agent for Defendant-Employer. The vehicle Plaintiff was driving was struck by Batten, who had failed to stop at a red light. Plaintiff settled his claim with Defendant-Employer and Defendant-Employer's carrier for $528,665.61. Defendant-Employer and Defendant-Carrier asserted a lien against any third-party recovery. Plaintiff then brought a negligence action against Batten. Batten's insurance carrier tendered $100,000.00 for Defendant's liability and UIM coverage limits. Plaintiff's personal insurance carriers proceeded to arbitration, and Plaintiff was awarded $285,000.00. The trial court determined that the arbitration award should be reduced by the $100,000.00 previously tendered to

Plaintiff, and entered the arbitration award as a judgment in the amount of $185,000.00 with interest on the reduced amount. Plaintiff's UIM carrier filed a motion to determine the subrogation amount pursuant to N.C.G.S. § 97-10.2(j). The trial court determined Defendant-Employer and Defendant-Carrier's lien could not exceed $285,000.00. The trial court determined the amount of the lien to be $190,000.00, after subtracting attorney's fees, interest, and court costs. Plaintiff and Defendants both appealed.

ISSUES:

1. Whether Plaintiff's UIM carrier had standing to apply for a determination of the subrogation amount pursuant to N.C.G.S. § 97-10.2(j).

2. Whether the trial court had proper subject matter jurisdiction when it ruled on Plaintiff's UIM carrier's motion to determine the subrogation amount.

3. Whether the trial court erred in interpreting N.C.G.S. § 97-10.2(j) regarding the limit of the available lien.

4. Whether the trial court abused its discretion in determining the lien amount.

HOLDINGS:

1. Yes. Plaintiff's UIM carrier had standing to apply for a determination of the subrogation amount because N.C.G.S. § 97-10.2(j) states as follows: "[I]n the event a judgment is obtained by the employee . . . against a third party . . . *either party may apply* . . . to determine the subrogation amount." The Court found that Plaintiff's UIM carrier was a "third party" permitted to apply for a determination of the lien under N.C.G.S. § 97-10.2(a); which, somewhat indirectly, defines a third party as "some other person other than the employer" who is or may be liable for damages.

2. Yes. The Court rejected Defendants' argument that the lien amount is statutorily set, and the trial court did not have proper jurisdiction to "determine" the lien amount (as opposed to "reducing" or "eliminating" the lien). The Court emphasized that the word "determine" is included in the language of N.C.G.S. § 97-10.2(j), and refused to draw a distinction.

3. No. The trial court properly concluded that the amount of the lien could not exceed the proceeds actually recovered against a third-party tortfeasor. The Court highlighted the statutory language of N.C.G.S. § 97-10.2(f)(1) and (h), which provides that the lien is available on "any amount obtained by any person," and that a given party "shall have a lien to the extent of his interest . . . upon any payment made by the third party."

4. No. The trial court did not abuse its discretion. Specifically, the trial court was required to exclude attorney's fees, interest, and court costs from the lien amount pursuant to N.C.G.S. § 97-10.2(j) and cited *Bartell v. Sawyer*, 132 N.C. App. 484, 512 S.E.2d 93

(1999)(holding that a workers' compensation lien holder is not entitled to a share of pre-judgment interest from a plaintiff's third-party judgment).

C. Joint Employment

- ***Whicker v. Compass Grp. USA, Inc.*, ___ N.C. App. ___, 784 S.E.2d 564 (April 2016) (Tyson, J.)** *(Joint Employment Doctrine; Lent Employee Doctrine; Implied Contract of Employment; Burden of Proof)*

FACTS:

Plaintiff worked as a housekeeper for Crothall Services Group ("Crothall"), who contracted with Novant Health, Inc. ("Novant") to provide cleaning services for Novant facilities throughout North Carolina. On June 2, 2013, Plaintiff was assigned by Crothall to work at Forsyth Medical Center. As she was leaving the facility to take her lunch break, Plaintiff fell in the parking lot and injured her left shoulder. The parking lot was exclusively controlled and managed by Novant. Plaintiff returned to work, but was later terminated for smoking an e-cigarette during an unauthorized break. Crothall's policy required that employees adhere to Novant's non-smoking policy on hospital premises. After the termination, Plaintiff filed a workers' compensation claim against Crothall and Novant. Both Defendants denied compensability.

The Deputy Commissioner held Plaintiff did not sustain an injury by accident in the course and scope of her employment, held she was not a joint employee of Crothall and Novant, and denied her claim for benefits against Novant. Plaintiff appealed to the Full Commission. The Full Commission affirmed and found the claim was not compensable, as the parking lot was solely maintained and controlled by Novant, who was not her employer.

ISSUE:

Whether the Full Commission erred in concluding no employment relationship existed between Plaintiff and Novant under either the joint employment doctrine or the lent employee doctrine.

HOLDING:

No. The Court concluded that Plaintiff was an employee of Crothall only. Joint employment occurs when an employee is under contract with two employers that both exercise control over the employee's activities. The employee must be performing services for both employers and the services provided to both employers must be the same or closely related. Under the lent employee doctrine, the general employer lends an employee to a special employer, thus rendering the special employer liable for workers' compensation benefits if: (1) the employee has made a contract of hire, express or implied, with the special employer; (2) the work being done is essentially that of the special employer; and (3) the special employer has the right to control the details of the work. Plaintiff was hired, paid, trained, and supervised by Crothall only. The contract between Crothall and Novant expressly stated Plaintiff was an employee of Crothall. Further, Plaintiff's own testimony was that she did not believe she was an employee

of Novant. Finally, the Court concluded Plaintiff's work was under the control of Crothall and not Novant. As such, there was no joint employment and employment only with Crothall.

D. Jurisdiction

- ***Burley v. U.S. Foods*, 368 N.C. 315, 776 S.E.2d 832 (September 2015) (Jackson, J.)** *(Subject Matter Jurisdiction Under N.C.G.S. § 97-36; Injury Sustained While Working Out of State)*

FACTS:

Plaintiff was a resident of Augusta, Georgia. Defendant-Employer extended him an offer of employment and he accepted by signing the offer letter. He was in Fort Mill, South Carolina when he signed the offer letter. Plaintiff then began working for Defendant-Employer as a delivery truck driver. His job responsibilities included driving a planned route with stops in Georgia and South Carolina, but no travel in North Carolina was involved. As a result of a merger with another company, Defendant-Employer ceased operating in the Columbia, South Carolina location where Plaintiff was assigned. Plaintiff then transferred to the Charlotte, North Carolina division. After the transfer, Plaintiff performed the same job and his title and responsibilities did not change. Although Plaintiff's supervision was transferred to Charlotte, Plaintiff never had a route that involved any deliveries in North Carolina during his employment with Defendant-Employer.

On September 23, 2009, Plaintiff injured his back during a delivery in Georgia. His claim was accepted as compensable by Defendant-Employer pursuant to the Georgia Workers' Compensation Act, and he began receiving disability and medical compensation according to Georgia law. On July 8, 2011, Plaintiff filed a claim for benefits with the North Carolina Industrial Commission. After a hearing, the Deputy Commissioner concluded that the Commission did not have subject matter jurisdiction over Plaintiff's claim. The Full Commission affirmed.

Plaintiff appealed and, in a divided opinion, the North Carolina Court of Appeals reversed, holding that the Commission had jurisdiction over the Plaintiff's claim. The majority concluded that Plaintiff's transfer to Defendant-Employer's Charlotte division involved a modification of Plaintiff's employment contract and that such a modification "may be a proper basis to find a contract is 'made' within North Carolina" for purposes of establishing the jurisdiction of the Commission pursuant to N.C.G.S. § 97-36. Judge Dillon dissented, maintaining that modification of Plaintiff's existing contract, in light of the facts presented, was insufficient to confer jurisdiction upon the Commission. Defendant-Employer appealed.

ISSUE:

Whether an employment contract was made in North Carolina when it was originally formed in South Carolina and was allegedly later modified in North Carolina.

HOLDING:
No. N.C.G.S. § 97-36 authorizes compensation pursuant to North Carolina law if an individual's employment contract was "made" in North Carolina; the statute does not include the word "modified." After interpreting N.C.G.S. § 97-36 in light of its plain language and upon considerations of decisions from other jurisdictions, Justice Jackson concluded that § 97-36 does not apply to a contract initially made in another state and subsequently modified in North Carolina. The Court further declined to hold that Plaintiff's internal transfer of supervision, which essentially allowed Plaintiff to continue working for Defendant-Employer in the same capacity throughout the merger, established a new employment contract. The Court thus reversed the decision of the Court of Appeals.

DISSENT:
Justice Hudson, joined by Justices Beasley and Ervin, dissented. Justice Hudson found that the majority's holding contradicted the long-standing rule that North Carolina courts must liberally construe the Workers' Compensation Act in favor of providing relief to workers injured in the scope of their employment. Justice Hudson further found that Plaintiff's employment substantially changed in many ways (he drove a new route, his customers changed completely, his loaded trailer was delivered to him in Augusta, Georgia, and the method by which his pay was calculated changed) as a result of a new contractual arrangement when Plaintiff became based in Charlotte, North Carolina and, thus, the contract in place when Plaintiff suffered his work-related injury was a contract "made" in North Carolina for purposes of N.C.G.S. § 97-36.

E. *Woodson/Pleasant* Claim

- ***Blue v. Mountaire Farms, Inc.*, ___ N.C. App. ___, 786 S.E.2d 393 (May 2016) (Davis, J.)** *(Woodson Claim; Pleasant Claim; Summary Judgment)*

FACTS:
Defendant-Employer operated a poultry processing plant that used ammonia refrigeration to maintain the temperature of its poultry. Following a USDA inspection, Defendant-Employer was ordered to replace specific machinery related to the ammonia refrigeration equipment. Meetings were held to determine whether the new equipment could be installed by existing employees or whether an independent contractor needed to be hired for the installation. Ultimately, Clifton Swain, an existing employee, was tasked with the replacement. While Plaintiff was working on an unrelated assignment in a separate area, Swain called him over the radio to request his assistance. Swain, after failing to remove the ammonia from the refrigeration system as required, began unscrewing a valve causing the ammonia to release in an "explosive manner." As a result of the exposure to the ammonia, Swain died and both Plaintiff and a supervisor were seriously injured.

Plaintiff subsequently filed lawsuits in Superior Court against Defendant-Employer and against Swain and several plant supervisors ("Individual Defendants"). The trial court denied both the

Defendant-Employer's and the Individual Defendants' motion for summary judgment. Defendants appealed.

ISSUES:

1. Whether the trial court erred in denying Defendant-Employer's motion for summary judgment as to Plaintiff's *Woodson* claim.

2. Whether the trial court erred in denying the Individual Defendants' motion for summary judgment as to Plaintiff's *Pleasant* claims.

HOLDINGS:

1. Yes. The trial court erred in denying Defendant-Employer's motion for summary judgment as to Plaintiff's *Woodson* claim. The Court emphasized that *Woodson* represents a narrow and fact-specific exception to the otherwise exclusive remedy provided by the Workers' Compensation Act. *Woodson v. Rowland*, 329 N.C. 330, 407 S.E.2d 222 (1991). Accordingly, appropriate circumstances arise only where there is uncontroverted evidence of an employer's intentional misconduct and where such conduct is substantially certain to result in an employee's serious injury or death. First, the Court reasoned that Plaintiff could not assert a valid *Woodson* claim because he was not assigned by a supervisor to perform any work related to the incident causing his injury. Rather, Plaintiff voluntarily and independently chose to assist with the equipment replacement. Second, the Court reasoned that Plaintiff failed to show that Defendant-Employer had any knowledge that the replacement was substantially certain to cause serious injury or death, noting that: "the mere fact that additional safety measures should — in hindsight — have been implemented is not enough to establish that the Mountaire Defendants intentionally engaged in conduct that they knew was substantially certain to cause serious injury or death to their employees."

2. Yes. The trial court erred in denying the Individual Defendants' motion for summary judgment as to Plaintiff's *Pleasant* claims. *Pleasant* claims also provide a narrow exception to the exclusivity of the Workers' Compensation Act. A Plaintiff may bring an action against a co-worker for injuries received during the course of employment as a result of the willful, wanton, and reckless conduct of the co-worker. *Pleasant v. Johnson*, 312 N.C. 710, 325 S.E.2d 244 (1985). Here, the Court held that Plaintiff failed to provide sufficient evidence that the Individual Defendants had knowledge of the dangers involved with the replacement. Even though a supervisor was present and overseeing the job, there was no indication that anyone on site knew the task would be so risky. Therefore, the individual errors committed by Plaintiff's co-workers leading up to the incident did not amount to the willful, wanton, and reckless conduct required, but were instead just mistakes.

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