Case Law Update

Being a Magistrate

In re Mobley, NC App (6/1/2010) (unpublished).

A magistrate who struck a person in custody engaged in willful misconduct in office, justifying his removal from office. The magistrate argued that his behavior "was merely a reaction prompted by [the person's] own loud and obnoxious behavior rather than conduct arising from any specific intent to misuse the powers of his judicial office." The Court pointed out that the person had made no physical move toward the magistrate and stated that the magistrate had a responsibility to "behave as a responsible adult role model in the community he served." The Court specifically discounted verbal provocation and the fact that the magistrate had worked a long shift as factors excusing his action.

Bare v. Atwood, NC App (6/1/2010).

The Clerk of Superior Court is not subject to being held in contempt for errors committed in the exercise of his official duties. Judicial immunity provides more protection than merely relieving a judicial official from being forced to pay damages—it offers an absolute immunity from being civilly sued. This immunity is subject to only two limitations: 1) A judicial official is not immune from liability for non-judicial actions, and 2) a judicial official is not immune from liability for actions taken in the complete absence of jurisdiction. NOTE: Actions taken in excess of jurisdiction fall within the scope of immunity, while actions taken in the total absence of all jurisdiction do not.

Landlord-Tenant

Woodridge Homes v. Gregory, NC App (7/20/2010).

A landlord waives the right to summary ejectment of a tenant by accepting rent payments with knowledge that the tenant has breached the lease in a manner justifying termination. In a case in which the specific breach identified was "repeated minor violations of the lease," the landlord had no right to terminate the lease until sufficient violations had occurred to constitute "repeated" violations.

In a lease which provided that the landlord's failure to terminate the lease when termination is justified "shall not destroy the right of the landlord to do so later for similar or other causes," the landlord was not barred from seeking SE for

repeated violations, even if it may have been possible for the landlord to seek SE at an earlier point.

After the landlord notified the tenant that the lease would be terminated, the non-waiver provision quoted above does NOT extend to allow the landlord to continue to accept rental payments. In this case, tenant paid no rent, but instead enjoyed fully-subsidized housing provided by the USDA. The court concludes that these payments are "rent," but notes that many courts have reached a contrary conclusion with regard to payments made under Section 8. The court specifically leaves open the question of whether payments made in connection with Section 8 housing will be considered "rent" for purposes of the common-law waiver rule.

Finally, the court considers whether the landlord waived his right to seek ejectment by continuing to accept a combined payment from the USDA for all units in the complex. The court notes that the landlord may have been unable to arrange for the USDA to deduct the tenant's share of this payment, in light of the policy of that agency to continue to compensate landlords until tenants actually vacate the rental property. The court also notes that there may have been no mechanism for returning the money to the USDA. In this case, the court said, the landlord's prompt deposit of tenant's share into a "non-interest-bearing eviction escrow account" may have been "the closest the plaintiff could have come." Consequently, the court remands the case to the trial court to hear evidence and make findings about "what options were available to Plaintiff in terms of rejecting that portion of the monthly rental assistance payment."

Civil Procedure

The Court of Appeals decided three cases involving voluntary dismissals without prejudice under Rule 41, and also reminded us of the importance of using correct names for the parties.

Dunton v. Ayscue (April 6, 2010).

The plaintiff filed Action #1, a personal injury action, against defendant, but was unable to locate the defendant for service. Plaintiff then took a voluntary dismissal without prejudice on 27 March 2008. In June, 2008, plaintiff filed a second action and attempted service at a different address, only to find once again that the defendant had moved. Plaintiff again filed a voluntary dismissal, immediately re-filing his action for a third time. This time defendant was served and filed a motion for dismissal, based on the "two dismissal rule." The case was dismissed (this time, WITH prejudice), with the court saying that the second dismissal operated as an adjudication on the merits, barring the third action. NOTE: The "two-dismissal rule" applies only when the claim being asserted is

based upon the same transaction or occurrence as was the case in the first two actions.

Haynie v. Cobb (September 7, 2010).

Rule 41 allows an action which has been dismissed by the plaintiff to be refilled so long as it is "based on the same claim." In determining whether an action is based on the same claim, the test is whether the complaint in the first action alerted the defendant to the events and transactions forming the basis of the claim, allowing the defendant to understand the nature of the claim and to prepare for trial. This opinion contains a good discussion of the philosophy of "notice pleading," emphasizing that the issue is not what labels or legal theories are set out in the complaint, but instead whether the allegations give "sufficient notice of the wrong complained of."

{*Haynie* also contains a reminder that use of the words "doing business as" does not create an entity separate from the individual.)

Seagraves v. Seagraves (August 17, 2010).

A voluntary dismissal under Rule 41 is not available to a plaintiff if the defendant has filed a counterclaim (unless the defendant consents to the dismissal). However, in this case in which plaintiff was improperly allowed to dismiss his case, the error was not prejudicial because the court went on to hear and decide defendant's counterclaim.

Southern Seeding Service, Inc. v. Martin's Grading and Construction (September 7, 2010) (unpublished decision).

Plaintiff's attempt to enforce a judgment entered against "Martin's Grading and Construction" was unsuccessful, due to the fact that the named defendant was a sole proprietorship and thus owned no property. Plaintiff's effort to reach the property of Greg Martin, the owner, failed because he was not named as a defendant and the judgment consequently made no reference to him. Plaintiff's Rule 60 motion, seeking to have the judgment amended, was denied. Because plaintiff failed to give timely notice of appeal from this denial, the Court of Appeals refused to consider it.

Torts

Harris v. Barefoot (August 3, 2010).

Plaintiff's evidence was insufficient as a matter of law to establish that defendants knew or should have known that their dogs had vicious propensities.

- While the courts have held that certain breeds of dogs are aggressive by nature, plaintiff's description of Riley as a "ninety-pound Rottweiler" was insufficient to establish that fact.

- While Dusty was an Australian Heeler/Border Collie mix, plaintiff's evidence that this breed is aggressive by nature was based only on a Wikipedia article.
- The fact that Riley was tethered for 18-20 hours each day did not establish vicious propensities, where the expert who testified to this behavioral link did not examine Riley or interview anyone with firsthand knowledge of him.
- Defendant presented substantial evidence that Riley was not vicious and had never exhibited behavior suggesting a vicious propensity.
- In addition to the problems noted above in connection with evidence of tethering, plaintiff produced no evidence suggesting that Dusty was typically tethered.
- Dusty's habit of chasing horses and trucks was insufficient to raise a legal issue as to viciousness.

Matthews v. Food Lion (July 6, 2010).

Food Lion was not vicariously liable for the actions of an employee who had clocked out and "entered the bathroom at a brisk pace," thus injuring the plaintiff. Although still on the premises, the employee was not acting within the scope of her employment at the time of the accident in light of the fact that she was "off the clock."

Tyburski v. Steward (June 15, 2010).

Comprehensive discussion of when a plaintiff's failure to avoid an open and obvious danger constitutes contributory negligence. In essence, the test is whether a reasonable person in plaintiff's situation might also have failed to avoid the danger. Contains good review of previous cases.