Robert "Robby" Jessup

is a partner at Howard Stallings' Raleigh office and serves as editor of the Verdicts, Settlements & Dispositions column

Verdicts, Settlements & Dispositions

4th Circuit Employment Law Victory

In July of 2018, **Robert Elliot** and **Michael Elliot** of the law firm Elliot Morgan Parsonage in Winston-Salem and Charlotte, respectively, won a landmark case at the U.S. 4th Circuit Court of Appeals arising from the termination of three former Mocksville police officers in 2011.

These officers' terminations came just two weeks after they contacted the N.C. Attorney General's Office and the N.C. Office of the Governor. Their allegations centered on reports that the then-police chief drank excessively while on duty, ignored officer misconduct, and mismanaged the department's money. The Town of Mocksville alleged that it fired the officers for poor performance.

In May of 2016, after an eight-day jury trial in U.S. District Court (Winston-Salem Division), before U.S. District Court Judge Thomas Schroeder, a jury disagreed and sided with the Mocksville police officers. The jury awarded compensatory and punitive damages, in addition to an advisory verdict on front pay, to each of the officers, in the total amount of $4.1 Million Dollars.

In August of 2016, Judge Schroeder reduced the total amount of damages to approximately $2.1 million dollars, and subsequently ruled that, based on immunity, the judgment against the Town for wrongful discharge and the individuals for federal constitutional violations was limited to $1 Million Dollars in insurance coverage for all three officers (and that the Mocksville had not waived its immunity beyond this amount).

Hoppy Elliot and Michael Elliot thereafter appealed Judge Schroeder's rulings on insurance, in addition to the dismissal of the officers' constitutional claims against the Town (which would not be subject to the Town's immunity defense) under 42 U.S.C. 1983, to the 4th Circuit Court of Appeals.

The Fourth Circuit held that the district court erred when it concluded that each plaintiff's claim arose out of the "same" wrongful act and that the plaintiffs' claims arose out of "interrelated" acts. Therefore, the panel held that Mocksville waived its governmental immunity for up to $1 million per plaintiff for damages resulting from the three wrongful terminations of plaintiffs, subject to the $3 million Annual Aggregate Limit of the Town's insurance policy.

Significantly, on an issue strongly supported by NCAJ (Narendra Ghosh and Paul Smith for amicus) the panel also held that the town manager was a final policymaker. Therefore, it found that her unconstitutional actions in firing the plaintiffs were actions of the Town. The panel reversed the district court's dismissal of plaintiff's claims under 42 U.S.C. 1983 against the Town and remanded with instructions to enter judgment for plaintiffs.

Excess Verdict in Auto-Torts Trial

In May of 2018, **Justin L. Lowenberger** of Ted A. Greve & Associates in Charlotte won an excess verdict from a Gaston County jury in an auto-torts trial, presided over by the Honorable Julia Gullett.

In April of 2014, Plaintiff, a 43-year-old nursing professor at Gaston College, was driving her daughter home from cheerleading practice on a two-lane road. At the same time and place, Defendant crossed into Plaintiff's lane of travel, causing a head-on collision. Plaintiff's daughter was not injured in the crash; however, Plaintiff struck her head and became pinned in the vehicle.

After being cut free by emergency responders, Plaintiff declined EMS transport, and her husband, a professional fire fighter and EMT who arrived at the scene, drove her to Cleveland Regional Medical Center. At the emergency room, Plaintiff was diagnosed with a concussion and a sprained knee.

Shortly after the crash, Plaintiff followed-up with OrthoCarolina for her knee injury. She attended three appointments over a two-month period. OrthoCarolina performed a knee MRI, which was negative, and Plaintiff was placed on crutches for one month.

Following the crash, Plaintiff developed light and noise sensitivity, migraines, and an inability to concentrate. After waiting approximately four months, Plaintiff went to an appointment with a local neuroradiologist, Jill Thompson. Dr. Thompson performed a brain MRI, which was negative. She thereafter conducted five months of cognitive therapy with Plaintiff. Among other medications, Plaintiff was prescribed Aderall, and it significantly reduced her symptoms. Dr. Thompson diagnosed Plaintiff with post-concussion syndrome and a mild Traumatic Brain Injury ("TBI"). She assigned Plaintiff a 20% permanent partial impairment.

Plaintiff's Rule 414 medical expenses were $15,000, and she did not incur lost wages or miss any time form work.

Defendant had a $30,000 minimum limits policy with Allstate. Plaintiff had $100,000 UIM policy with Nationwide.

After filing suit, Plaintiff had trouble serving the Defendant. Likewise, Allstate could not locate the Defendant, so it waived service and statute of limitations defenses, admitted liability, and agreed to defend the case in its own name. In exchange, Plaintiff agreed to cap Allstate's exposure to its $30,000 insurance limits.

Prior to trial, Allstate's top offer was $15,000. Nationwide made no offer.

Plaintiff's medical bills were not presented at trial. Since Allstate was a named party, Plaintiff was permitted to discuss insurance extensively during voir dire and in opening and closing arguments.

The reporting police officer, Plaintiff, her husband, Dr. Thompson and a co-worker/friend of Plaintiff testified on Plaintiff's case. Defense put on no evidence.

In closing arguments, defense counsel acknowledged fault, admitted that the Plaintiff was hurt, and he suggested that the jury render a verdict of $5,000. However, Plaintiff's counsel asked the jury to render a verdict of $150,000. After deliberations, the jury rendered a verdict of $250,000.

In light of Plaintiff's agreement with the insurance carriers, Plaintiff recovered $30,000 from Allstate and $70,000 from Nationwide, for an aggregate recovery of $100,000.

First Degree Murder Charges Dismissed at Pre-Trial Hearing

In June of 2018, Assistant Capital Defender **Stephen Freedman** and **William Durham** of the Center for Death Penalty Litigation obtained a pre-trial ruling, under N.C. Gen. Stat. § 15A-959, that their client was legally insane. As a result, the Honorable Orlando Hudson dismissed all criminal charges against the Defendant, including two counts of First Degree Murder, three counts of Assault with a Deadly Weapon, and one count of Robbery.

The criminal charges arose from an armed robbery at a Durham tire store on March 23, 2012. During the robbery, the Defendant shot four people, and two died. The Defendant also took a substantial amount of money, and he thereafter fled the scene.

At the pre-trial hearing, counsel presented expert testimony that during the armed robbery, the Defendant was suffering from delusions and hallucinations. Testimony was elicited from lay witnesses who said the Defendant was in a psychotic state, recounting his statements that God was directing him to kill. Counsel also presented evidence of prior diagnoses of psychosis.

The State conceded Defendant suffered from a serious mental illness, but it offered expert testimony that the Defendant was not legally insane due to actions he took to elude capture.

After finding the Defendant legally insane (and dismissing all criminal charges), Judge Hudson committed the Defendant to Central Regional Hospital.

The case was originally declared capital, but the State classified the case as non-capital shortly before the pre-trial hearing.

Triumph Over Allstate

In June of 2018, **Sidney Fligel** and **Preston Lesley** of The Law Offices of James Scott Farrin won a significant verdict from a Mecklenburg County jury in an auto-torts trial, presided over by the Honorable Hugh Lewis.

Plaintiff, a registered nurse, was rear-ended while waiting at a stoplight. Defendant fled the scene. Shortly thereafter, the Defendant collided with a third vehicle. The police charged the Defendant with DUI and no operator's license.

Following the crash, Plaintiff drove himself to the hospital where he was diagnosed with a left foot contusion. Plaintiff treated for sixteen months with a pain interventionist and orthopedic specialists. Plaintiff's Rule 414 medical expenses were $9,200.

The Defendant did not own the vehicle driven by him. In fact, the owner of said vehicle claimed it had been stolen. However, during discovery, it was revealed that the vehicle's owner lived with the Defendant, that the Defendant had been previously permitted to operate the vehicle, and that a stolen vehicle report was never filed. Further, there was testimony that the owner of the vehicle knew that the Defendant did not have a license. The owner of the vehicle was sued for negligent entrustment.

Allstate insured the defendants. Prior to trial, the highest offer was $8,000. Allstate contested causation of the Plaintiff's foot injuries on two bases: (1) prior medical records of neuropathic foot pain; and (2) an MRI showing bone spurs in the left foot.

Plaintiff's orthopedic specialist testified, via video, that the aforementioned bone spurs and associated pain were on the rear of Plaintiff's foot but that his injuries from the car wreck were on the lateral front. Accordingly, this doctor asserted that the defense's focus on the bone spurs and prior foot pain was immaterial.

After approximately two hours of deliberations, the jury returned with a verdict of $59,500—more than seven times Allstate's highest offer.

Death Sentence Vacated on Appeal

In June of 2018, Assistant Appellate Defenders **Barbara Blackman, John Carella, and Kathy VandenBerg** persuaded the North Carolina Supreme Court to vacate a client's death sentence in the case of *State of North Carolina v. Juan Carlos Rodriquez (No. 302A14)*.

The Defendant was convicted in March of 2014 of the first-degree murder, kidnapping and assault of his wife, Maria. A Forsyth County jury recommended the death penalty, and the Defendant was so sentenced by the Honorable Stuart Albright.

According to the State's evidence, due to years of domestic abuse, the Defendant's wife left him and took the couple's three children. Then, in November of 2010, the Defendant went to his estranged wife's apartment and called her into a bedroom. The couple's children claimed they heard their mother cry for help. According to the children, the Defendant eventually came out of the bedroom with blood on his knuckles, feet and clothes. The Defendant told his children that he was taking their mother to the hospital, and he carried her out to his car. Maria was never seen alive again. In December of 2010, her decapitated body was found in a nearby forest.

At trial, there was substantial evidence that the Defendant was intellectually disabled, with an IQ of approximately 60. His trial attorney therefore requested that the jury be instructed on the statutory mitigating factor of diminished capacity.

After the jury found the Defendant guilty and returned a "no" verdict on diminished capacity, the trial court denied defense counsel's request for the instruction enumerated in N.C. Gen. Stat. 15A-2000(f)(6) that if the jury found "the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired," then it must give this factor weight in sentencing.

On appeal, the defense argued that the trial court committed prejudicial error by failing to submit this instruction to the jury at Defendant's capital hearing.

The North Carolina Supreme Court heard oral arguments in Mr. Rodriguez's appeal twice. John Carella first argued the case before the Court in October of 2016. The Court was unable to reach a decision after Justice Edmunds departed, and it requested that the case be argued again so that Justice Morgan could participate in its consideration. Mr. Carella argued the case a second time in October of 2017.

In a 5-2 decision, the Court held that the trial court's refusal to instruct the jury on this mitigating factor was a prejudicial error because the State could not show that the failure to submit it was harmless beyond a reasonable doubt. The Court vacated Mr. Rodriguez's death sentence and remanded the case for a new sentencing hearing at which Mr. Rodriguez may again present the evidence of his intellectual disabilities and seek a life sentence.

UIM Coverage Appellate Victory

In May of 2018, **Paul Tharp** of Arnold & Smith, PLLC in Charlotte obtained a successful ruling from the North Carolina Court of Appeals that maximizes the amount of Underinsured Motorist Coverage ("UIM") to car crash victims. (*Nationwide v. Le Bei,* No. COA17-1086)

In September of 2014, Sa Hietha was driving north on I-77, near Fort Mill, South Carolina, when he ran into the back of a bus. Mr. Hietha's vehicle then spun into the adjacent lane and collided with a third vehicle. At the time of the crash, there were five passengers in Mr. Hietha's car. Three died, and two suffered personal injuries.

Mr. Hietha had an insurance policy with Nationwide that provided liability insurance coverage with limits of $50,000 per person and $100,000 per accident. The policy also provided UIM coverage with limits of $50,000 per person and $100,000 per accident.

The estates of the decedents along with the other injured parties entered into a settlement agreement that exhausted the $100,000 per accident liability coverage.

At the time of the crash, two of Hietha's passengers had separate UIM policies with Nationwide. Accordingly, these two passengers' estates argued that they were entitled to recover upon both Mr. Hietha's and their own UIM policies.

Nationwide denied coverage, arguing that passengers in a tortfeasor's vehicle could not recover under the tortfeasor's UIM coverage. Therefore, Nationwide instituted a declaratory judgment action for the Court to determine coverage.

In February of 2017, the estates of the two deceased passengers filed a joint motion for summary judgment. They requested the trial court to "declare that they are entitled to UIM coverage under Sa Hietha's policy, in amounts sufficient to exhaust said UIM coverage." Thereafter, Nationwide filed a cross motion for summary judgment. Nationwide contended the "multiple claimant exception" contained in N.C. Gen. Stat. § 20-279.21(b)(4) of the Financial Responsibility Act precluded the passengers' estates from recovering UIM coverage under Mr. Hietha's policy.

In May of 2017, the trial court held a hearing on the parties' motions. The trial court found that the passengers (and their estates) "are entitled to payment under at-fault Sa Hietha's per-person underinsured motorist coverage provided by [Nationwide], subject to any applicable credits." Nationwide appealed the ruling.

In May of 2018, a unanimous panel of the Court of Appeals affirmed the trial court's decision. In the opinion, Judge Robert Hunter wrote, "[k]eeping in mind we are required to liberally construe the [Financial Responsibility] Act, we decline to apply the multiple claimant exception in a way which would reduce compensation to innocent victims and conflict with the avowed purpose of the Act." The Court of Appeals concluded that the passengers (and their estates) were entitled to recover UIM coverage under their own policies and the UIM coverage under Mr. Hietha's policy.

Involuntary Manslaughter Verdict

In May of 2018, Assistant Capital Defender **Richard G. Miller** and a private-attorney, **Tabitha Bingham** of Bolivia, North Carolina, persuaded a Pender County jury to render a verdict of Involuntary Manslaughter for a client facing First Degree Murder (Life Without Parole). The trial was presided over by the Honorable Joshua Willey, Jr. Jennifer Shires was the private investigator for the defense.

On June 26, 2015, Dennis Westberg shot his friend, Joshua Goodson, in Hampstead, North Carolina. At the time of the shooting, Westberg was working as a paramedic for New Hanover Regional Medical Center. Officers responded to Westberg's home after receiving a 911 call from him shortly after 6 a.m. According to the 911 calls, Westberg lived in the home and shot Goodson after he was threatened.

At trial, Westberg testified in his defense. He claimed that on the night in question, he and Goodson had been drinking together. Westberg testified that after he went to sleep, Goodson entered his bedroom, stood over his bed, and threatened to kill him. Westberg said he then heard Goodson going for the closet, where a gun was kept. Westberg claimed that he was unable to flee the house, and he therefore grabbed a second gun and shot Goodson.

The jury heard testimony from mental health professionals, a district court judge, a probation officer, and other law enforcement officers that Goodson had a history of mental illness and criminal behavior. The jury further heard evidence that Goodson was facing a pending felony and several probation violations.

The jury had the option of finding Westberg guilty of First Degree Murder, Second Degree Murder, Voluntary Manslaughter, or Involuntary Manslaughter. A self-defense instruction was provided to the jury. After a day and a half of deliberations, the jury returned a verdict of Involuntary Manslaughter.

Westberg was sentenced to 12 to 24 months in the North Carolina Department of Adult Corrections, and he was ordered to complete alcohol treatment.

Multi-Million Dollar Wrongful Death Verdict

In June of 2018, **Stuart M. Paynter, Sara C. Willingham, Jennifer L. Murray**, and **Celeste H.G. Boyd** of the Paynter Law Firm in Hillsborough, in association with **Robert B. Carey, Tory Beardsley,** and **Molly A. Booker** of Hagens, Berman, Sobol & Shapiro in Phoenix, won an aggregate of $8.5 Million in compensatory damages and $375 Million in punitive damages from a Colorado jury in a wrongful death trial that was presided over by U.S. District Court Judge R. Brooke Jackson.

This matter concerned the deaths of three patients who suffered cardiac arrests after receiving dialysis treatments at clinics run by DaVita Inc. The Plaintiffs alleged that DaVita was negligent and concealed facts from the patients regarding GranuFlo, a product that the Plaintiffs claimed the company knew could cause dangerous pH imbalances. Suit was filed after the U.S. Food and Drug Administration issued a recall of GranuFlo, because acetate generated by GranuFlo could lead to metabolic alkalosis (a condition in which blood pH level is too high and is associated with an increased risk of cardiac arrest).

Jurors awarded the estates of the deceased patients $125 Million each in punitive damages. The estates were awarded $2 Million, $1.5 Million and $5 Million, respectively, in compensatory damages.

Plaintiffs' expert witnesses included Steven C. Borkan, MD, internal medicine and nephrology, Boston, MA (live testimony); George M. Samaras, PhD, DSc, PE, CPE, CQE, CBA, biomedical science and interdisciplinary engineering, Pueblo, CO (live testimony); and Douglas P. Zipes, MD, internal medicine and cardiology, Indianapolis, IN (live testimony). The Defendants' expert witnesses included Stanley Goldfarb, MD, internal medicine and nephrology, Philadelphia, PA (live testimony); Alan S. Kliger, MD, internal medicine and nephrology, New Haven, CT (testimony by deposition); and Peter A. McCullough, MD, MPH, internal medicine and cardiology, Dallas, TX (live testimony).

DaVita, Inc. has indicated that it intends to appeal the judgment. ◆

NCAJ is publishing a quarterly ***Verdicts, Settlements and Dispositions*** column. We want to encourage all NCAJ members to share their successes. Through your stories, all members learn how to fight, how to persevere, and how to win. NCAJ members become stronger as a group when we share our struggles and triumphs with fellow practitioners.

Civil practitioners: Please use the online form located at www.ncaj.com/verdicts to submit your verdicts/settlements to be considered for publication.

Criminal practitioners: Please use the online form located at www.ncaj.com/dispositions submit your dispositions to be considered for publication.

If you prefer, you may also email your submissions directly to rjessup@hsfh.com.

We are looking forward to hearing from you.