

2010-2011 NORTH CAROLINA EMPLOYMENT LAW UPDATE

*Jessica Leaven and Maggie Davis**
Glenn, Mills, Fisher & Mahoney, P.A.

This paper summarizes published employment law decisions from the North Carolina Supreme Court and Court of Appeals from June 1, 2010 to May 15, 2011.

North Carolina Supreme Court Decision

State Employees' Retirement System

McCaskill v. Dep't of State Treasurer, Retirement Systems Div., 706 S.E.2d 226 (N.C. 2011) (per curiam). *Affirming McCaskill v. Department of State Treasurer, 695 S.E.2d 108 (N.C. App. 2010).* A settlement agreement reinstating a state employee and alternating periods of paid and unpaid leave to reach the five-year mark the employee needed to qualify for disability benefits is unenforceable because the Department of Health and Human Services lacked authority to sign a settlement agreement binding the State Retirement System.

The North Carolina Supreme Court issued the following per curiam opinion:

“As to the issues before us on appeal of right, because the Secretary of the Department of Health and Human Services lacked authority to sign the settlement agreement binding the State Retirement System, the executory portions of the agreement are unenforceable. Accordingly, the parties to the agreement are otherwise restored to the positions they held as of 3 July 2002. As to the additional issue, we determine that discretionary review was improvidently allowed.”

North Carolina Court of Appeals Decisions

State Employees' Retirement System

McCaskill v. Department of State Treasurer, 695 S.E.2d 108 (N.C. App. 2010) (Ervin, J.). *Unpaid leave does not count towards “membership service” required to qualify for disability benefits from the Teachers’ and State Employees’ Retirement System under N.C. Gen. Stat. §135-106(a).* Additionally, a settlement agreement which reinstates a state employee, changes the terms of his employment, and alternates periods of paid and unpaid leave must be approved by the Office of State Personnel.

* Ms. Davis graduated this May from the University of North Carolina School of Law.

Donald McCaskill had four years and three months in the Retirement System when he was terminated by the Department of Health and Human Services (DHHS). During the internal grievance procedure, McCaskill and DHHS signed a settlement agreement whereby McCaskill agreed to abandon his grievance in exchange for DHHS reinstating his employment, allowing him to use his accrued paid vacation and sick leave as well as unpaid leave in order to acquire the five years of state employment needed to qualify for disability benefits from the Teachers' and State Employees' Retirement System. McCaskill was reinstated, and alternated between taking paid leave and unpaid leave each month for nine months. McCaskill never returned to work at DHHS. The settlement agreement was not approved by the Office of State Personnel or the Retirement System.

The Retirement System ultimately denied McCaskill's application for long-term disability benefits on the grounds that he lacked the required five years of service for eligibility. McCaskill filed a contested case petition with the Office of Administrative Hearings. The administrative law judge (ALJ) found for McCaskill, and the Board of Trustees of the Teachers' and State Employees' Retirement System rejected the ALJ's recommended decision and concluded that McCaskill was ineligible for benefits because did not have five years of membership service. The trial court upheld the Board.

The Court of Appeals majority (Judges Ervin and Bryant) affirmed. According to N.C. Gen. Stat. § 135-106(a), any "participant who has had five or more years of membership service may receive long-term disability benefits." The Court concluded that the arrangement set forth in the settlement agreement did not provide McCaskill with sufficient "membership service" to render him eligible to receive long-term disability benefits. Specifically, the Court agreed with the trial court's determination that only sick and vacation leave days could be counted toward "membership service" and that leave without pay should be excluded from the calculation. Looking to statutory construction and *Wiebenson v. Bd. of Trustees, State Employees' Ret. Sys.*, 345 N.C. 734 (1997), the Court determined that one day of work equals one day of "membership service" and concluded this approach is consistent with public policy. The Court also reasoned that the settlement agreement was inconsistent with State Personnel rules governing short leave without pay, which is only available when an employee has no accumulated or advanced leave. The Court also agreed with the trial court that such a settlement agreement must be approved by the Office of State Personnel.

The Court held that the Retirement System was not bound by the settlement agreement between McCaskill and DHSS which sought to render McCaskill eligible for long-term disability benefits, as DHHS was not entitled to award service in the Retirement System and McCaskill was only eligible for long-term disability benefits to the extent that he qualified for them under otherwise applicable law. The Court also concluded that the Retirement System was not estopped from denying McCaskill's claim for benefits.

Judge Hunter dissented on the grounds that the settlement agreement entered into between McCaskill and the State of North Carolina was a lawful contract that granted him five years of membership service in the Retirement System. Noting that the State of North Carolina is bound to fulfill the terms of a valid contract entered into by an authorized agent, Judge Hunter opined that DHHS had the authority to enter into the contract and grant McCaskill leave without pay for a portion of each month.

Unemployment Compensation

Edgecombe County Dept. of Social Services v. Hickman, --- S.E.2d ----, 2011 WL 1467554 (N.C. App. 2011) (Stroud, J.). *Trial court lacked authority to reconsider findings of fact made by Employment Security Commission (ESC) where employer failed to except to any of the findings of fact.*

In claimant Clifton Hickman's application for unemployment benefits, the Appeals Referee with the Employment Security Commission (ESC) found that Hickman left his job of 27 years because his work environment was substantially and adversely modified, without justification, and without explanation, and was not disqualified from receiving unemployment insurance benefits. The employer Edgecombe County Department of Social Services (DSS) did not attend the hearing before the Appeals Referee, but did appeal the decision. The ESC affirmed the decision of the Appeals Referee, and DSS appealed and petitioned for judicial review. DSS's petition alleged facts based on Hickman's retirement, which were not argued at the ESC hearing, and did not include any exceptions to the ESC's findings of facts. The trial court reversed the ESC and found that Hickman was not qualified to receive unemployment benefits.

The Court of Appeals held that the trial court applied the incorrect standard of review in reversing the ESC's decision and vacated and remanded for entry of an order applying the correct standard of review. The Court reiterated the standard that findings of fact made by the ESC are conclusive on appeal if they are supported by competent evidence; however, even if findings of fact are not supported by competent evidence, they are presumed to be correct if the petitioner fails to except to them. The Court concluded that because DSS failed to except to any of the ESC's findings of fact, the trial court was bound by these findings, which supported the ESC's conclusion that Hickman was not disqualified from receiving unemployment insurance benefits. The Court also rejected DSS's attempts to argue that Hickman's retirement disqualified him from receiving unemployment benefits because since DSS did not raise the issue of Hickman's retirement before the ESC, this issue was not preserved for appeal.

Employment Contract and Wage and Hour Act

Lockett v. Sister-2-Sister Solutions, Inc., 704 S.E.2d 299 (2011) (Jackson, J.).

Piercing the corporate veil allegations in plaintiff's complaint are insufficient alone to create a genuine issue of material fact as to defendant's individual liability in opposition to motion for summary judgment. Issues of law decided by one superior court judge may not be overturned by another superior court judge in the same case unless significant, new evidence is presented to the second judge.

Plaintiff Jerrian Lockett was hired by Sister-2-Sister Solutions, Inc. in 2006 under an employment contract that stated that he would “not be dismissed from Sister 2 Sister One Transportation unless contract has been broken, or not [ful]filling his duty as indicated above.” Plaintiff was fired on July 31, 2007, and was not paid for working the month of July. Plaintiff brought suit against Sister-2-Sister and Rosa Lockett, the company's co-founder and director, for breach of contract and a violation of the North Carolina Wage and Hour Act (NCWHA). The Complaint alleged that Sister-2-Sister “has no independent identity apart from . . . [Rosa] Lockett,” and the court, therefore, should “pierce the corporate veil and treat [Sister-2-Sister] as the alter ego of . . . [Rosa] Lockett.”

The trial court granted summary judgment in favor of Rosa Lockett on both claims. At the close of plaintiff's evidence, the trial court entered a directed verdict in favor of Sister-2-Sister on the breach of contract claim. The court entered judgment in favor of plaintiff on his wage and hour claim against Sister-2-Sister and awarded plaintiff attorneys' fees. Plaintiff appealed the orders granting summary judgment in favor of Rosa Lockett and directed verdict in favor of Sister-2-Sister.

The Court of Appeals affirmed the trial court's orders granting summary judgment. The Court held that plaintiff failed to offer any evidence creating a genuine issue of material fact as to Rosa Lockett's individual liability for breach of contract. The Court concluded that plaintiff relied solely on the alter ego allegations in his Complaint, contrary to the standards set forth in Rule 56(e), which provides “an adverse party may not rest upon the mere allegations or denials of his pleadings.” While the Court found that the trial court erred by not accepting the deposition testimony of Rosa Lockett that plaintiff offered during the summary judgment hearing, the Court determined that this was harmless error since the testimony did not raise an issue of material fact. The Court similarly held that there was no evidence creating a genuine issue of material fact as to Rosa Lockett's individual liability under the NCWHA.

The Court held that the trial court erred in granting directed verdict in favor of Sister-2-Sister on plaintiff's breach of contract claim based on Judge Allan Baddour's conclusion that the contract was legally unenforceable and plaintiff's employment was at-will, in direct contradiction of Judge Howard Manning's prior summary judgment order finding that the contract was enforceable and that termination had to be for just cause. The Court of Appeals stated that superior court judges cannot reverse one another on matters of law, and the trial court was bound by the findings on summary judgment unless new evidence

was submitted at trial. Additionally, the Court held that witness testimony of the parties' understanding and intentions was not new evidence because both judges made their findings based on the law and the face of the contract.

Lastly, the Court of Appeals reversed and remanded the trial court's award of plaintiff's attorneys' fees on the NCWHA claim. The Court concluded that the trial court abused its discretion because it failed to note the skill of the attorney, the attorney's hourly rate, and the nature and scope of the services rendered in awarding attorneys' fees.

Kornegay v. Aspen Asset Group, LLC, 693 S.E.2d 723 (N.C. App. 2010) (Geer, J.)
Evidence as to purported oral offer and acceptance of bonus compensation scheme, which contemplated later written agreement and contained sufficiently definite terms, presented issue for jury to determine existence of an enforceable contract. An ambiguous memo indicating payment of a bonus was to be delayed is insufficient to constitute notice eliminating a bonus under the North Carolina Wage and Hour Act (NCWHA). A bonus earned prior to termination of employment can become calculable and due even after employee's termination. The proper standard of review for liquidated damages under the NCWHA is the "competent evidence" standard for findings of fact and de novo review for conclusions of law.

In 1996, Timothy Kornegay approached Michael, Carlton, and Steve Clardy ("the Clardys") about possible employment in their real estate investment company, Aspen Asset Group ("Aspen"). Steve Clardy and Kornegay met eight times to discuss the possible terms of employment. No written contract was ever executed, though drafts were exchanged. Kornegay worked for Aspen from October 1996 until June 2004. During that time, he received an annual salary, but never received any bonuses. In June 2002, after Aspen acquired properties that Kornegay originated, Kornegay received a handwritten note with his pay stub that stated "[n]o bonuses . . . until Aspen sees fit & confident we are making money." In September 2003, Aspen sold three of the properties that Kornegay originated, but did not sell the other six.

Kornegay claimed that he had an oral contract with Aspen providing that, in addition to his salary, he would receive bonuses in the amount of 20% of the profits from any properties he originated and implemented and "fair compensation" for properties that he merely implemented but did not originate. He brought suit against Aspen and the Clardys for breach of contract, violation of the Wage and Hour Act, quantum meruit, and fraud. After various claims were dismissed on summary judgment and directed verdict, the jury found that a contract existed, that Aspen violated that contract, and that there was a violation of the North Carolina Wage and Hour Act (NCWHA). The jury awarded plaintiff damages on these findings. The defendants appealed the denial of their motion for judgment notwithstanding the verdict (JNOV), and Kornegay cross-appealed the denial of liquidated damages and attorneys' fees.

The Court of Appeals affirmed the denial of defendants' motion for JNOV on the breach of contract claim, concluding the evidence was sufficient to allow the jury to determine the existence of an enforceable oral contract. The Court concluded that there was more

than a scintilla of evidence that Steve Clardy made an offer to Kornegay regarding the employment terms and that Kornegay accepted the offer. The Court's conclusion was not affected by evidence that the parties contemplated reducing their agreement to writing. The Court also rejected Aspen's argument that there was no enforceable contract because the reference to "profits" in the contract was not sufficiently specific or certain to give rise to a contract. The Court held the unenforceable provision of "fair" compensation was divisible from the enforceable provision.

With respect to the NCWHA claim, the Court of Appeals also affirmed the trial court's denial of JNOV. The Court held that the note on Kornegay's 2002 pay check was not a sufficient notice of loss or forfeiture of the bonuses under N.C. Gen. Stat. § 95-25.13(3), which requires an employer to "[n]otify employees, in writing or through a posted notice maintained in a place accessible to its employees, at least 24 hours prior to any changes in promised wages." Kornegay testified that he was confused by the note, and the trial judge read the note to say that the bonus would be paid at a later date, not forfeited completely. Because the relevant NCWHA regulations provide that ambiguous notices shall be construed against the employer, and the memo did not state that Aspen was eliminating the bonus, the Court held that the ambiguous note did eliminate the bonus.

Additionally, the Court rejected defendants' argument that Kornegay was not entitled to a bonus because his employment ended before the properties were sold and, thus, the bonus amount was not quantifiable at the time his employment ended, citing N.C. Gen. Stat. § 95-25.13(3) ("Wages based on bonuses . . . shall be paid on the first regular payday after the amount becomes calculable when a separation occurs."). The Court held that the bonuses were earned when Kornegay had performed the work required to earn them and the bonuses became calculable, and thus due, when Aspen earned a profit, even if that occurred after the termination of his employment. The Court also held that the trial court did not err in allowing the bonus for unsold properties to be calculated under the "reasonable time for resale" rule, which allows the recovery of profits which would have been made upon a resale of the property in the exercise of reasonable care and judgment.

The Court also clarified that the two-year statute of limitations under the NCWHA does not begin to run until a promise is broken, which would have been the earliest date that Kornegay was due bonus money and did not receive it; when the properties were resold in September 2003, as that was when Aspen realized the profit and the bonus became due. The Complaint was filed timely filed in December 2004.

In addressing Kornegay's cross-appeal, the Court first addressed whether the trial court properly decided the issue of liquidated damages rather than submitting it to the jury and held, based upon the language of the NCWHA, that doing so was proper. The Court then addressed the proper standard of review for a trial court's liquidated damages determination as a matter of first impression. Under the NCWHA, liquidated damages are mandatory if the employer does not carry the burden of proving to the judge that it acted in good faith and with a reasonable belief that its actions were legal under the Wage and Hour Act. Adopting the prevailing standard for Fair Labor Standards Act cases, the Court held that because the issue of liquidated damages presents a mixed question of law

and fact, the underlying factual findings are reviewed under the “competent evidence” standard, and the legal conclusions are reviewed de novo. The Court noted that this is the same standard of review used by courts reviewing Rule 11 sanctions. The Court went on to state that good faith must be both subjective and an objective in order for an employer to avoid liability for liquidated damages under the Wage and Hour Act.

The Court upheld the trial court’s ruling that, despite the jury’s verdict, the defendant had both a subjective good faith that it did not have a contract requiring the payment of a bonus to plaintiff and that its good faith belief was objectively reasonable. The trial court also did not abuse its discretion in not awarding attorneys’ fees under the NCWhA.

Retaliatory Employment Discrimination Act

McDowell v. Central Station Original Interiors, Inc., --- S.E.2d ----, 2011 WL 1467567 (N.C. App. 2011) (Stroud, J.). *Reversing summary judgment for employer under the Retaliatory Employment Discrimination Act where witnesses disagree about the job performance of the plaintiff and there is evidence supporting termination because of the “costs” of employee’s workers’ compensation claim.*

On November 5, 2007, James McDowell was injured on the job at Central Station Original Interiors. He filed a workers’ compensation claim and remained on leave until March 3, 2008. When he returned to work, McDowell was put on a 90-day probation. On March 18, 2008 he missed work for health reasons, and he was fired the following day. McDowell brought suit alleging he was terminated in violation of the Retaliatory Employment Discrimination Act (REDA). The trial court granted summary judgment in favor of Central Station.

The Court of Appeals reversed, concluding that a genuine issue of material fact existed on the issue of whether or not McDowell was terminated because of his workers’ compensation claim. The Court reviewed the evidence in the record. An affidavit filed by Central Station’s Chief Financial Officer (CFO) claimed she fired McDowell because of his poor job performance and excessive absences. Two former employees of Central Station filed affidavits stating that McDowell’s on-the-job performance was good and that he did not have excessive absences. These affidavits and the deposition testimony of these two former employees also suggested that McDowell may have been fired in retaliation for his filing a workers’ compensation claim. The employees specifically alleged, among other things, that the CFO told them that “they need to get rid of James before he gets hurt again” and “before he cost the company a bunch of money” and that the CFO put McDowell on probation for him “not [to] get hurt.” During his deposition, McDowell testified that when he returned to work, the CFO told him he had not “done nothing but cost the company money. Now [he’s] a risk to that company.” The Court found the “costs” statements made by the employer to be compelling and, considering the

evidence in the light most favorable to McDowell, concluded that the “costs” statements could be construed to refer to the cost of his workers’ compensation claim.

Federal Preemption

Williams v. American Eagle Airlines, Inc., 702 S.E.2d 541 (N.C. App. 2010)
(Jackson, J.) *The Railway Labor Act preempted breach of contract and tortious interference of contract claims arising from collective bargaining agreement.*

Lamez Williams worked for American Eagle Airlines, Inc. as a fleet service clerk, loading and unloading luggage among other manual duties, and she was injured on the job. She reported her injury, sought medical treatment, and was ordered out of work. American notified her of her rights and obligations, including the obligation to notify American of other employment while on leave. Williams was also a member of the Transport Worker’s Union of America, AFL-CIO, and her employment was subject to the terms of a collective bargaining agreement (CBA). During her extended leave, Williams continued to work in an administrative capacity at Duke. Initially, Williams informed American about her job at Duke, but after returning to work for American and reinjuring herself, she did not let Duke know that she would continue to work at Duke. After two conflicting doctor’s notes regarding Williams’ ability to return to work, American’s workers compensation manager called Duke as part of an investigation and Williams answered the phone. Defendant terminated Williams for violating terms of the CBA.

Williams filed suit against American claiming a violation of the Retaliatory Employment Discrimination Act (REDA), wrongful discharge in violation of public policy, breach of contract, tortious interference with her employment contract, and intentional infliction of emotional distress. After Williams presented evidence at trial, the court filed a directed verdict in favor of defendant on the wrongful discharge and emotional distress claims. The court entered judgment on the jury verdict for American on the REDA claim and for Williams on the breach of contract and tortious interference claims in the amount of \$232,000. The court denied American’s motion for judgment notwithstanding the verdict, and American appealed.

The Court of Appeals vacated the judgment on the breach of contract and tortious interference claims. The Court concluded that the contract at issue in both claims was the collective bargaining agreement, which was governed by the Railway Labor Act. The Court held that Railway Labor Act preempted the state law contract-based claims. Accordingly, the Court held that the trial court did not have subject matter jurisdiction.

Negligent Misrepresentation and Wrongful Discharge

Walker v. Town of Stoneville, --- S.E.2d ----, 2011 WL 1467563 (N.C. App. 2011)
(Stephens, J.). *Reinstating a jury verdict for a police officer who was mistakenly given wrong information by his employer about the effect of his continued employment on his retirement benefits. Adopting the “payroll method” for determining the number of*

employees that an employer “regularly employs” is the appropriate method for determining if an employer is subject to N.C. Gen. Stat. § 143-422.2.

In 1994, after more than 25 years of service, Gary Walker retired from the City of Eden Police Department at age 55 with full retirement benefits. The Town of Stoneville asked him to return on a part-time basis due to a shortage of officers. Plaintiff informed the Town that he was willing to work for them as long as his work did not jeopardize his retirement benefits. When he asked the Town's Finance Officer about the effect of his return on his state retirement benefits, he was informed that the additional work would have no impact as long as he received no benefits, he was not enrolled as an active member of the NC Local Governmental Employees' Retirement System (LGERS), and his earnings were kept below a certain level. Based on the information he learned, he agreed to work under these conditions and was eventually appointed the Town's police chief.

After following this arrangement for 12 years, the State Retirement System informed Walker in the fall of 2006 that he had exceeded maximum working hours of 1,000 per year imposed for retirees regardless of income and, thus, was receiving retirement benefits in violation of the law. As a result, the State Retirement System terminated his eligibility for retirement benefits and informed him that he was required to repay all retirement benefits received, and to contribute to LGERS for the previous 12 years of work. After this decision, the Walker was demoted in April 2007, suspended without pay during an investigation by the State Bureau of Investigation regarding a credit of sick leave, and terminated in February 2008.

Walker filed suit against the Town for negligent misrepresentation, breach of contract, and wrongful discharge claims based on age discrimination. The trial court granted summary judgment in favor of the town on Walker's contract claims and one of his wrongful discharge claims. At the close of Walker's evidence, the trial court granted the Town's motion for directed verdict on the remaining wrongful discharge claim. Following a jury verdict in Walker's favor on the negligent misrepresentation claim, the trial court granted the Town's motion for directed verdict and judgment notwithstanding the verdict. The parties appealed and cross-appealed.

The Court of Appeals reversed in part and remanded, reinstating the jury verdict on the negligent misrepresentation claim. The Town conceded on appeal that it had a duty toward Walker with regard to providing accurate information regarding his questions about the State Retirement System, and that he did not receive accurate information, which jeopardized his retirement benefits. The Court rejected the Town's argument that Walker could not have justifiably relied on information provided by the Town's Finance Officer and that he had an independent duty to verify information given with the State Retirement System. The Court concluded that Walker reasonably relied on information provided by the Town, which possessed superior knowledge and experience with LGERS and typically served as a liaison between its employees and the State Retirement System. The court further determined that there was absolutely nothing to arouse Walker's suspicion or to induce him to believe that the town did not know the facts about the

retirement system. As a result, Walker had no independent duty to confirm whether the advice given by the Town was in fact correct. The Court thus concluded there was substantial evidence to support the jury's verdict.

The Court also concluded that the trial court erred in granting directed verdict against Walker on his wrongful discharge claim and remanded for trial. The Court concluded that the Town "regularly employ[ed] 15 or more employees," as required by N.C. Gen. Stat. § 143-422.2. In determining if an employer "regularly employs" the statutory minimum employees, the Court looked to federal discrimination law precedent, and expressly rejected the method of determining who is "regularly employed" that is established for the State Retirement System. The Court adopted the "payroll method," used in Title VII and ADEA cases, for determining how many employees that an employer "regularly employs." The Court held that "an employer regularly employs 15 or more employees, and is thus governed by N.C. Gen. Stat. § 143-422.2, which 15 or more employees appear on the employer's payroll each working day during each of 20 or more calendar work weeks in the current or preceding calendar year." The Court concluded that evidence presented to the lower court indicated that the Town had at least 15 employees on its payroll during the relevant time.

Townsend v. Shook, --- S.E.2d ----, 2011 WL 879899 (N.C. App. 2011) (Steelman, J.). *Where one suit is filed for defamation and slander and another suit is filed for a violation of N.C. Gen. Stat. §143-422, and where both suits arise out of the same series of events but the parties and legal questions are sufficiently different, the prior action pending doctrine is not triggered, and the second suit is not a compulsory counterclaim of the first.*

Paula Townsend filed an action in the Western District of North Carolina against Mark Shook and others for wrongful termination under Title VII, violations of 42 U.S.C. § 1983 and N.C. Gen. Stat. § 143-422.2, intentional and negligent infliction of emotional distress, and negligent supervision and retention. Townsend alleged she was subjected to disparate treatment and terminated because of her refusal to submit to Shook's sexual advances. Shook, in his individual capacity, filed a counterclaim for defamation based upon Townsend's statements that he "forced himself on her." The federal court granted summary judgment in favor of defendants on all claims except the intentional infliction of emotional distress claim and dismissed Townsend's wrongful discharge claim pursuant to N.C. Gen. Stat. § 143-422.2 and Shook's counterclaim for defamation without prejudice to refiling in State court. Townsend appealed that order to the Fourth Circuit.

Shook then re-filed his claim for defamation and slander against plaintiff in Catawba County, which was placed on inactive status pending appeal. The Fourth Circuit then vacated the entry of summary judgment on plaintiff's wrongful discharge claim based on N.C. Gen. Stat. § 143-422.2 and remanded to the district court, which declined to exercise supplemental jurisdiction over the claim. Townsend then filed this suit in Watauga County against Shook, in his individual and in his official capacity, and against Western Surety Company. Defendant filed motions to dismiss, and the trial court denied them.

The Court of Appeals affirmed. The Court held that Shook's Catawba County action was insufficiently similar to this action for purposes of abatement by reason of the pendency of the prior action. Although a prior action pending between the same parties for the same subject matter in a court within the state having like jurisdiction serves to abate the subsequent action, the Court determined that this case was not substantially similar to the Catawba County case in parties, legal issues, and the facts that would have to be proved. Using similar reasoning, the Court also held that Townsend was not required to file her wrongful termination claim under as a compulsory counterclaim to Shook's action for defamation.