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CIVIL LIABILITY

Libel Action Against *The News and Observer* Survives Appeal

After a verbal dispute escalated into an incident in which several shots were fired, one of which struck and killed a ten-year-old boy playing in the area, *The News and Observer* ("the N&O") published an article by reporters Mandy Locke and Joseph Neff entitled "SBI Relies On Bullet Analysis Critics Deride As Unreliable." The authors were highly critical of the bullet analysis performed by State Bureau of Investigation forensic firearms examiner Beth Desmond and her later testimony during criminal trials in which separate juries found Jemaul Green guilty of second-degree murder and Vonzeil Adams guilty of voluntary manslaughter. Locke and Neff later published a follow-up article entitled "Report Backs SBI Ballistics."

Desmond brought a libel action against the N&O, its parent company, Locke, Neff, and several other employees of the N&O, including two of its editors. Defendants' motion for summary judgment was granted by the trial court as to Neff and the two editors, but denied as to the N&O, its parent company, and Locke, who then gave notice of appeal.

On May 19, in ***Desmond v. The News and Observer Publishing Company***, the Court of Appeals acknowledged that defendants' appeal was interlocutory, but found that although an immediate appeal is generally not available from an interlocutory order, it is permissible when the

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order "affects a substantial right." As the defendants contended that the trial court had misapplied the "actual malice standard," which "adversely affected their rights to free speech and freedom of the press," and as "a misapplication of the actual malice standard when considering a motion for summary judgment would have a chilling effect on a defendant's right to free speech," the Court concluded that a "substantial right" was implicated and defendants' appeal was proper.

Turning next to whether the trial court erred when it denied defendants summary judgment, the Court found that "to recover for defamation, a plaintiff generally must show that the defendant caused injury to the plaintiff by making false, defamatory statements of or concerning the plaintiff, which were published to a third person" and, when the claim involves a "public official," it must also be shown that the statement at issue was "made with actual malice – that is, with knowledge that it was false or with reckless disregard of whether it was false or not."

The Court then analyzed each of the sixteen statements plaintiff alleged to be defamatory, observing in the process that while the United States Supreme Court has consistently held that expressions of opinion "cannot form the basis for a defamation claim," it held in ***Milkovich v. Lorain Journal Co.***, 497 U.S. 1, 111 L. Ed. 2d 1 (1990), that "expressions of 'opinion' may often imply an assertion of objective fact" and "[i]t would be destructive of the law of libel if a writer could escape liability for accusations of defamatory conduct simply by using, explicitly or implicitly, the words 'I think.'"

Applying those principles to the statements at issue, the Court found that six of them, "though stated as expressions of opinion from experts, may be factually false because Locke reported that the experts expressed opinions regarding Desmond's work that they actually did not express," rendering them actionable under ***Milkovich***. As a consequence, the Court held that the trial court properly denied defendants' motion for summary judgment.

At the same time, it found that plaintiff's brief did not address the "fair report privilege" established in ***LaComb v. Jacksonville Daily News Co.***, 142 N.C. App. 511 (2001), under which "the press has a privilege to report on … judicial proceedings, provided the reporting offers a substantially accurate account." Finding that six of the sixteen statements at issue were in fact "substantially accurate," that there was "no genuine dispute" as to the truth of another two, and that two others were not libelous, the Court concluded that summary judgment should have granted as to those ten statements.

Having found that the trial court properly denied defendants' motion for summary judgment as to six of the allegedly defamatory statements, but erred in denying the motion as to the other ten, and having distinguished between libel *per se* and libel *per quod* in the process, the Court affirmed the trial court's order in part, reversed it in part, and remanded the case for "further proceedings consistent with this opinion."

Ten-Year Statute of Limitations Applied to Claim Between Joint Owners of Property

Martin Marietta Materials, Inc. jointly owned a 90-acre tract of land in Chesterfield County, Virginia, first with Tamojira, Inc., and then later with Bondhu, LLC. Because neither of its co-tenants paid their share of the tax owed on the property for the years 2002 through 2013, Martin Marietta paid the entire amount and then sued for reimbursement. Bondhu moved for partial summary judgment, arguing that the applicable statute of limitations barred Martin Marietta's claim for any taxes paid prior to the three-year period immediately preceding the filing of its complaint in October 2013, but the trial court disagreed and granted summary judgment for Martin Marietta. Bondhu appealed.

On May 19, in ***Martin Marietta Materials, Inc. v. Bondhu, LLC***, the Court of Appeals held that the

ten-year statute of limitations of N.C.G.S. § 1-56 applied to Martin Marietta's claim, rather than the three-year statute of limitations of N.C.G.S. § 1-52. Since the property was located in Virginia, the tax debt accrued there and, under North Carolina choice of law rules, it is the substantive law of the state where the cause of action accrues and the procedural rules of North Carolina that apply. Because the Supreme Court held in ***Boudreau v. Baughman***, 322 N.C. 331 (1988) that "statutes of limitations are clearly procedural, affecting only the remedy directly and not the right to recover," the applicable statute of limitations was North Carolina's.

When the Court turned to the question of which of North Carolina's statute of limitations applied, it determined that its first task was to "identify the nature of the substantive claims asserted by Plaintiff as they exist under Virginia law." It then found that Martin Marietta's second claim for relief, which sought recovery in *quantum meruit*, under the theory that Bondhu was unjustly enriched by Martin Marietta's full payment of taxes for which Bondhu was jointly responsible, was subject to a three-year statute of limitations, since "[i]t is clear that the statute of limitations for unjust enrichment is three years."

As for Martin Marietta's first cause of action, Bondhu characterized it as a claim for contribution arising out of a joint debt and, therefore, was subject to the three-year statute of limitations applicable to obligations "arising out of a contract, express or implied." On the other hand, Martin Marietta argued that it should be viewed as a cause of action for an "accounting in equity" between two tenants in common under Va. Code Ann. § 8.01-31, which provides that "[a]n accounting in equity may be had against any fiduciary or by one joint tenant, tenant in common, or coparcener for receiving more than comes to his just share or portion" and, therefore, was governed by the ten-year limitations period of N.C.G.S. § 1-56 that applies to "action[s] for relief not otherwise limited by this subchapter."

After finding that "North Carolina courts have previously applied N.C. Gen. Stat. § 1-56 to claims seeking an accounting between the parties," the Court concluded that the first cause of action could be viewed as one that asserted a "substantive right stemming from the parties' trust relationship as co-tenants rather than one arising from principles of contract law." As a consequence, it was "unable to discern a clear answer to the question of which of the two respective limitations periods applies most directly to the substantive claim [Martin Marietta] has pled in its first claim for relief." And, since the Supreme Court held in ***Fowler v. Valencourt***, 334 N.C. 345 (1993) that "where there is doubt as to which of two possible statutes of limitations applies, the rule is that the longer statute is to be selected," the Court concluded that the ten-year statute of limitations of N.C.G.S. § 1-56 applied to Martin Marietta's first cause action. That being so, the trial court did not err when it granted Martin Marietta's motion for summary judgment.

Petition for Judicial Review Dismissed

Erin Isenberg filed a petition for judicial review after her claim for unemployment benefits was denied, but when she attempted to serve her former employer, Growing Years Burlington, by certified mail, no authorized recipient was available. Although the U.S. Postal Service left Growing Years a notice that the petition was available to be picked up, no one claimed it, so it was eventually returned to Isenberg.

The Department of Commerce, Division of Employment Security, responded to the petition with a motion to dismiss on grounds that Isenberg did not serve all of the parties of record, as she was required to do by N.C.G.S. § 96-15(h). The motion was granted by the superior court, which concluded that because Growing Years was not served within the time allowed, it lacked jurisdiction. Isenberg then gave notice of appeal to the Court of Appeals.

On May 5, in ***Isenberg v. North Carolina Department of Commerce, Division of Employment Security***, the Court found that N.C.G.S. § 96-15(h) requires of those seeking judicial review that they "serve copies of the petition by personal service or by certified mail, return receipt requested, upon the Division and … all parties of record" within "10 days after the petition is filed with the court." While the superior court interpreted the statute's service provision to require that copies of the petition be *delivered* to "the Division and … all parties of record," Isenberg contended that actual delivery was not required; rather, she argued, service was complete under N.C.G.S. § 96-15(h) when she deposited a copy of her petition in the mail.

The Court held that "[t]he crucial inquiry in deciding this issue is whether Rule 4 or Rule 5 of the N.C. Rules of Civil Procedure applies to service of the petition under N.C. Gen. Stat. § 96-15(h)." While Rule 4 "governs the manner of service to exercise personal jurisdiction" and is complete "upon actual delivery," Rule 5 governs the service of "all pleadings subsequent to the original complaint," and under it, "[s]ervice by mail shall be complete upon deposit of the pleading or paper … in a post-paid, properly addressed wrapper in a post office or official depository under the exclusive care and custody of the Postal Service." Citing ***Nissan Division of Nissan Motor Corp. in USA v. Nissan***, 111 N.C. App. 748 (1993) as authority, the Court held that "[w]hen a statue requires 'certified mail, return receipt requested,' it is clear … that the emphasis is on actual delivery." Because the language in N.C.G.S. § 96-15(h) "closely mirrors" the language in Rule 4(j), "actual delivery is required to accomplish service of the petition." And, since the statute's service requirements are jurisdictional, the superior court correctly dismissed Isenberg's petition.

Additional Opinions

On May 5, the Court of Appeals dismissed two other appeals in ***Larsen v. Black Diamond French Truffles, Inc.*** and ***Larsen v. Susan Rice Truffle Products, LLC***, lawsuits brought by qualified shareholders to inspect corporate records under N.C.G.S. § 55-16-02. After the trial court granted judgment on the pleadings to three of the four plaintiffs in ***Black Diamond***, the defendants appealed, contending among other things that the court's order "did not fully resolve all issues between all of the parties." Citing ***Jeffreys v. Raleigh Oaks Joint Venture***, 115 N.C. App. 377 (1994), as authority, the Court of Appeals found it to be "appellant's burden to present appropriate grounds for this Court's acceptance of an interlocutory appeal." But, in the present case, defendants' principal brief did not address the interlocutory nature of the appeal, nor did they allege that the trial court's order deprived them of a substantial right. Although they *did* allege a substantial right deprivation in their reply brief, the Court ruled that it would "not allow Defendants to use their reply brief to independently establish grounds for appellate review." Under Rule of Appellate Procedure 28(b)(6), "where a party fails to assert a claim in its principal brief, it abandons that issue and cannot revive the issue via reply brief."

On May 19, in ***Strikeleather Realty & Investments Co. v. Broadway***, a summary ejectment action brought by a landlord for breach of a residential lease after its tenant failed to pay his rent, the Court of Appeals reversed a Mecklenburg County District Court judgment awarding the tenant treble rent abatement damages and attorney's fees on his counterclaim for unfair and deceptive trade practices (UDTP) and breach of the implied warranty of habitability. The Court found that the trial court's conclusion that the landlord violated the Residential Rental Agreement Act by failing to provide an operable smoke alarm and carbon monoxide detector was not supported by a finding that the property was "unfit for human habitation," nor "how this unfitness devalued the fair rental value of the property such that Defendant-Tenant should be entitled to rent abatement…. Without a finding that the

property was unfit for human habitation, or of the fair rental value of the property in its unwarranted condition …, an award of rent abatement cannot be sustained." Therefore, the Court held, plaintiff's claims for rent abatement and UDTP, and the district court's award of treble damages and attorney's fees pursuant to UDTP, "necessarily fail."

On May 19, in ***130 of Chatham, LLC v. Rutherford Electric Membership Corporation***, an action brought by a member of the defendant electric membership corporation (EMC) to obtain the corporation's membership list and other records in order to participate in the nomination and election of its board of directors, the trial court granted the property owner's motion to permit the requested inspection and copying pursuant to N.C.G.S. § 55A-16-04. The EMC then filed notice of appeal and an emergency motion for a stay pending appeal. When its motion for a stay was denied, the EMC complied with the trial court's order and allowed plaintiff to inspect its membership list and corporate records. But, the Court of Appeals found that having done so, the issues on appeal were now moot, and since neither of the two recognized exceptions to the mootness doctrine, *i.e.*, where the issue in dispute "involves a matter of public interest" or where the case was "capable of repetition, yet evading review," applied, it dismissed the EMC's appeal.

WORKERS' COMPENSATION

Commission Lacks Jurisdiction Over Injury Suffered In Maryland

Burlington, North Carolina truck driver Bruce Taylor worked for Howard Transportation, Inc. ("HT"), a trucking company located in Laurel, Mississippi, from December 2002 until June 2003, when he resigned his employment to begin working for another company. The following May, he responded to a letter from a recruiter for HT inviting him to reapply for work with the company by calling the recruiter from his home in Burlington and advising that he *would* be willing to return to work for HT, if it gave him a better truck and assigned him to a different dispatcher. HT agreed to those terms and sent a van to bring him to Mississippi, where he completed the company's orientation, road and drug tests, a physical exam, and employment paperwork over the course of three days. He was then rehired, and continued to work for HT until October 6, 2006, when he was struck by a pickup at a truck stop in Maryland and suffered left knee, hip, and back injuries.

Taylor gave notice of a claim for benefits under the North Carolina Workers' Compensation Act, which HT denied on a Form 61. Deputy Commissioner Baddour subsequently found that the Commission lacked subject-matter jurisdiction and dismissed the claim, but the Full Commission reversed and remanded for a full evidentiary hearing, which was conducted by Deputy Commissioner Griffin, who awarded TTD benefits until "Plaintiff returns to work or further order of the Commission." Defendants appealed.

On May 5, in ***Taylor v. Howard Transportation, Inc.***, the Court of Appeals reversed the Commission's award, holding that it lacked subject-matter jurisdiction over the claim. Citing N.C.G.S. § 97-36, the Court found that "[w]here an accident happens while the employee is employed elsewhere than in this State …, then the employee … shall be entitled to compensation (i) if the contract of employment was made in this State, (ii) if the employer's principle place of business is in this State, or (iii) if the employee's principal place of employment is within this State."

Since neither HT's principal place of business nor Taylor's principal place of employment was in North Carolina, the Court found that "in order for the Commission to have subject matter jurisdiction, plaintiff's contract of employment must have been made in North Carolina." And, it continued, to determine where a contract for

employment was made, "the Commission and the courts of this state apply the 'last act' test." That is, "[f]or a contract to be made in North Carolina, the final act necessary to make it a binding obligation must be done here."

After discussing in some detail ***Murray v. Ahlstrom Industrial Holdings, Inc.***, 131 N.C. App. 294 (1998), and ***Thomas v. Overland Express, Inc.***, 101 N.C. App. 90 (1990), the Court found that Taylor's claim was more closely analogous to ***Thoma***s than to ***Murray*** because his employment with HT was "contingent upon his successful completion of the orientation, road test, drug test, and physical exam." Therefore, since the "last act of the employment contract took place in Mississippi," the Commission lacked subject matter jurisdiction, so it erred when it awarded benefits to Taylor.

The full text of the appellate decisions summarized in this newsletter can be found at www.nccourts.org.

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