1993

For the Civil Practitioner: Review of Fourth Circuit Opinions in Civil Cases Decided November 1, 1991 Through December 31, 1992: VII - Federal Civil Procedure

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Circuit also ruled that the trial court was within its discretion in deciding that the plaintiff had failed to establish the existence of a conspiracy that is a necessary predicate to admitting statements under Federal Rule of Evidence 801(d)(2)(E). A senior district judge sitting by designation concurred in the court's ruling on several of the statements based upon the trial court's discretion under Federal Rule of Evidence 403.

FEDERAL CIVIL PROCEDURE

Written by ASSOCIATE PROFESSOR JOAN M. SHAUGHNESSY

A. Joinder

In *Delta Financial Corp. v. Paul D. Comanduras & Associates*, 973 F.2d 301 (1992), plaintiff and defendant had been partners in a limited partnership. The partnership agreement contained an arbitration provision and this case arose from an action by plaintiff, Delta Financial Corporation (Delta), against defendant, Paul D. Comanduras & Associates (PDC), seeking to compel arbitration. Plaintiff's complaint demonstrated that the relief it sought through arbitration was a dissolution of the partnership and liquidation of its assets. The district court granted the motion to compel arbitration and appointed an arbitrator. The Fourth Circuit vacated the order compelling arbitration and remanded. The Fourth Circuit held that the district court erred in compelling arbitration over PDC's objection that one Timothy C. Cranch was also a partner who should be joined under Federal Rule of Civil Procedure 19. The Fourth Circuit reasoned that in an action for liquidation, all partners entitled to share assets are necessary parties under Federal Rule Civil Procedure 19(a) and, therefore, all partners are also necessary parties in an action to compel an arbitration seeking the same result. In the course of its opinion, the court noted that Cranch's joinder would not destroy diversity and did not reach the question of whether he was an indispensable party under Federal Rule of Civil Procedure 19(b). By contrast, the court reached the question of whether the partnership itself, whose joinder would have destroyed diversity, was an indispensable party and found that it was not. The action, the court explained, was an internal conflict between the partners. The partnership itself, in the court's view, had no interest distinct from that of the several partners.

B. Summary Judgment

In *World-Wide Rights Ltd. Partnership v. Combe, Inc.*, 955 F.2d 242 (4th Cir. 1992), the Fourth Circuit addressed the standard to be applied in considering cross motions for summary judgment in cases arising under written contracts. Plaintiff brought an action seeking a declaratory judgment that it was entitled to royalties from the defendants under a written licensing agreement. Plaintiff and defendants filed cross-motions for summary judgment, the district court granted summary judgment for defendants, finding that the written agreement was unambiguous and that plaintiff was not

entitled to royalties thereunder. The Fourth Circuit reversed. It held first that the mere fact that both parties have moved for summary judgment does not establish that summary judgment can be granted under Federal Rule of Civil Procedure 56. The court went on to describe the inquiry required of a court in considering a motion for summary judgment on a matter of contract interpretation. If a written contract is unambiguous on its face, the court may interpret the contract as a matter of law and grant summary judgment based upon its interpretation. If, however, the writing is "'susceptible of two reasonable interpretations,'" *id.* at 245 (quoting *American Fidelity & Casualty Co. v. London & Edinburgh Ins. Co.*, 354 F.2d 214, 216 (4th Cir. 1965)), it is ambiguous and extrinsic evidence of its meaning may be received. The question for the court on summary judgment in the latter case will be whether, in light of the extrinsic evidence made part of the record on summary judgment, there is a genuine issue of fact as to the interpretation of the contract. If there is such an issue, summary judgment may not be granted. The Fourth Circuit held that the licensing agreement was not unambiguous, vacated the district court judgment and remanded for further proceedings.

C. Discovery

In *National Union Fire Insurance Co. v. Murray Sheet Metal Co.*, 967 F.2d 980 (4th Cir. 1992), the Fourth Circuit considered both the scope of work product protection available under Federal Rule of Civil Procedure 26(b)(3) and the procedure to be followed by district court judges faced with claims of work product privilege under that rule. Here, a reinsurer, National Union Fire Insurance Company (National Union), was defending a suit brought by Arkwright Mutual Insurance Company (Arkwright) for reimbursement of insurance payments made by Arkwright following a fire at a General Electric plant in West Virginia. National Union subpoenaed documents concerning the fire from Murray Sheet Metal Company (Murray), which had been renovating the plant at the time of the fire but which was not a party to the National Union—Arkwright litigation. Murray, refusing to produce twenty-six subpoenaed documents, provided a log giving the general description, author, date, recipient, custodian and reason for nondisclosure for each of the twenty-six documents. On the basis of Murray's submission and without examining the documents, the district court refused to compel production of any of the documents. The Fourth Circuit reversed, finding that the district court had conducted an inadequate inquiry into Murray's work product claim. On remand, the district court was directed to examine the documents and the circumstances of their preparation before ruling on the work product claim. The Fourth Circuit also gave a rather restrictive reading of the scope of work product protection. It noted that documentation is to be expected following industrial accidents and that such documentation may be prepared, in part, with the general possibility of litigation in mind. Such documents do not constitute work product. To meet the work product test of Federal Rule of Civil Procedure 26(b)(3), the court held "[t]he document must be prepared *because* of the prospect of litigation when the preparer faces an actual claim

or potential claim following an actual event or series of events that could reasonably result in litigation." 967 F.2d at 984 (emphasis in original). The Fourth Circuit thus questioned, for example, whether documents prepared by Murray's safety director met this test. The court also read the qualified protection afforded non-opinion work product narrowly, describing it as "little more than an 'anti-freeloader' rule designed to prohibit one adverse party from riding to court on the enterprise of the other." *Id.* at 985. Therefore, the court observed that statements taken immediately after the fire, and before National Union was notified, might well meet the showing needed to overcome qualified work product protection.

D. Default Judgments

In *Home Port Rentals, Inc. v. Ruben*, 957 F.2d 126 (4th Cir.), *cert. denied*, 113 S. Ct. 70 (1992), an earlier suit between the parties resulted in a consent order allowing a voluntary non-suit without prejudice to the plaintiff and containing defendants' consent to jurisdiction and appointment of defendants' attorney as their agent for service of process for any new action brought within 180 days of the consent order. Plaintiff brought a new action and served defense counsel. Defendants failed to respond to their attorney's attempt to communicate with them and did not otherwise participate. Eventually, defendants' attorney successfully moved to withdraw and the court entered a default judgment against the defendants. Thereafter, the district court refused, pursuant to Federal Rule of Civil Procedure 60, to relieve the defendants of the default judgments. The Fourth Circuit affirmed. First, the court held that, although defendants did not expressly authorize their attorney to accept service on their behalf, they were aware of his activities in defending the original action and in negotiating the non-suit. Therefore, the court held that defendants were bound by the agreement negotiated on their behalf in which any jurisdictional objections were waived.

Second, the court found that under Federal Rule of Civil Procedure 60(b)(1), which provides for relief from judgment for "excusable neglect," the intentional acts of defendant Ruben in making himself unavailable constitutes fault justifying the district court's refusal to relieve him from the default judgment. As to the second defendant, whose motion was made more than one year after judgment, the Fourth Circuit noted that Federal Rule of Civil Procedure 60(b)(6) was not available to circumvent the one year time limit of Federal Rule of Civil Procedure 60(b)(1) and upheld the district court's denial of relief.

E. Statutes of Limitation

In *Jane Doe v. John Doe*, 973 F.2d 237, (4th Cir. 1992), the Fourth Circuit affirmed the district court's dismissal of plaintiff's action to recover damages against an uncle who had sexually abused her when she was a child. The Fourth Circuit, construing North Carolina law, found plaintiff's complaint time barred. Two North Carolina statutes were at issue. The first is a three-year statute of limitations governing claims for emotional distress. N.C.

GEN. STAT. § 1-52(5) (1992). The Fourth Circuit rejected plaintiff's argument that the statute should be construed as running from the date she first discovered the connection between defendant's abuse and her psychological injury. Refusing to read a discovery provision into this statute, the court held that the statute began to run when plaintiff reached eighteen years of age.

Alternatively, the court found that the second statute would bar the action. It reads, "Provided that no cause of action [for personal injury other than medical malpractice] shall accrue more than 10 years from the last act or omission of defendant giving rise to the cause of action." N.C. GEN. STAT. § 1-52(16) (1992). The Fourth Circuit rejected plaintiff's argument that North Carolina would create a judicial exception to the statutory ten-year period of repose for child sex abuse cases, as it has done for occupational diseases. *Wilder v. Amatex Corp.*, 336 S.E.2d 66 (N.C. 1985). The court predicted that North Carolina would await legislative action, given the difficult issues of policy posed by sexual abuse actions.

F. Complex Litigation

In re Showa Denko K.K. L-Tryptophan Products Liability Litigation II, 953 F.2d 162 (4th Cir. 1992), involved interlocutory review by the Fourth Circuit of an administrative order entered in a multidistrict products liability action. The district court entered an order requiring payment by all persons in the United States having claims against defendants related to L-Tryptophan of 1,000 dollars or 0.5 percent of recovery. The payments were to be used to reimburse the steering committee of plaintiffs' attorneys for the costs of discovery. With respect to claimants not before the court in the multidistrict litigation (MDL), the order provided two enforcement mechanisms. First, defendants were required to certify that assessments had been paid on all claims settled or on which judgments had been satisfied. Second, the parties were ordered not to furnish any product of MDL discovery to persons who had not paid their assessments. The order thus sought to reach plaintiffs in federal cases not transferred to the MDL, plaintiffs in 683 state court actions and approximately 180 claimants who had not yet filed suit. The Fourth Circuit held that the district court lacked power to require assessments and reversed the order. The Fourth Circuit held, first, that the district court could not require payments from persons not within its jurisdiction and second, that the order's attempt to restrict discovery in state court proceedings raised serious federalism concerns.

VIII. FEDERAL COURTS

Reviewed by PROFESSOR LEWIS H. LARUE

Abstention

A good rule of thumb for litigators about absention is: Do not bother asking a district court to abstain unless the precedents are squarely on point; if your case is distinguishable, the Fourth Circuit is likely to accept the