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1980, all arising out of the dissolution of their business association in 1980. In the present litigation, Fiberglass sought to introduce the testimony of Dupuy's attorney, which included statements made to Krauss's lawyer in the course of prior litigation. Dupuy moved for a protective order, and the United States District Court for the District of South Carolina granted Dupuy's motion. The district court found that an attorney had made the statements in the context of settlement negotiations, and the statements, therefore, were inadmissible under rule 408.

Fiberglass appealed to the Fourth Circuit, arguing that the district court improperly excluded the testimony at issue. To determine whether the district court's exclusion of the statements was clearly erroneous, the Fourth Circuit began its discussion of the case by reviewing rule 408, which excludes from evidence all statements made in the course of settlement negotiations. In deciding whether rule 408 covered the statements, the Fourth Circuit inquired into whether the parties intended the statements to be part of the negotiations for compromise. Finding that the district court considered the evidence at four separate hearings and determining that the parties made these statements during settlement discussions, the Fourth Circuit held that the district court's decision was not clearly erroneous. To encourage settlement and to foster frank discussions, the Fourth Circuit recognized the need to make settlement negotiations inadmissible. The Fourth Circuit stated that, for rule 408 to have any effect, attorneys must be afforded wide latitude in the conduct of settlement negotiations. Fiberglass claimed that, even if the statements were made in the course of settlement discussions, the district court should have admitted these statements under rule 408 for "other purposes." Stating that the district court's decision on this issue would not be reversed in the absence of an abuse of discretion amounting to manifest error, the Fourth Circuit found that the district court did not abuse its discretion in holding these statements to be inadmissible.

Fiberglass also argued that rule 408 does not bar admission of the testimony at issue because the parties did not offer the statements to prove liability on the claims decided by the settlements. The Fourth Circuit reasoned that, while the present suit was grounded in antitrust and the prior lawsuits were not, the claims presented were simply matters arising from the same litigation and represented the continuing feud between Krauss and Dupuy. The Fourth Circuit, consequently, decided that the present suit, like the prior suits, arose out of the same transaction, the breakup of the Krauss and Dupuy business relationship. Thus, the Fourth Circuit held in *Dupuy* that a court may exclude statements that attorneys have made in the course of settlement negotiations. According to the Fourth Circuit, courts should exclude such evidence if the present suit arises out of the same transaction as the settlement and if the settlement negotiations are between the same parties to the suit at hand.

DEFAMATION AND LIBEL

In *De Leon v. Saint Joseph Hospital, Inc.*, 871 F.2d 1229 (4th Cir.), *cert. denied*, 110 S. Ct. 87 (1989), the United States Court of Appeals for

the Fourth Circuit considered whether a hospital and the hospital's chief of surgery had defamed a physician by denying the physician's application for hospital admitting privileges. In *De Leon* the defendant hospital, Saint Joseph Hospital (the Hospital), employed the plaintiff physician, Jose S. De Leon, M.D., as a resident and later as a house surgeon. The Hospital allowed De Leon only limited medical privileges. Specifically, De Leon could not admit patients to the Hospital and could treat patients only under another physician's supervision. After one year's employment at the Hospital, De Leon applied for privileges to admit patients to the Hospital without supervision. When making his application, De Leon signed a form release that absolved from any civil liability arising from the application process the Hospital, the Hospital's agents, and persons providing information to the Hospital pursuant to the application.

As part of the application process, the Hospital's Credentials Committee solicited from the Hospital's Chief of Surgery, William L. Macon, IV, M.D., an assessment of De Leon's qualifications. Macon responded with a letter containing statements about De Leon's ability and performance, along with Macon's conclusion that De Leon was unqualified to hold admitting privileges at the Hospital. Accordingly, Macon recommended in his letter that the Hospital deny De Leon's application.

After receiving Macon's recommendation, the Hospital proceeded to evaluate De Leon's application. During the evaluation process, three Hospital committees independently considered De Leon's application, determined that De Leon's credentials were unsatisfactory, and recommended denial of De Leon's application. Subsequently, the full Board of Trustees of the Hospital (the Board), the body that made the Hospital's final decisions on medical privilege applications, denied both De Leon's initial application and De Leon's subsequent appeal for rehearing on the grounds that De Leon's credentials were unsatisfactory.

In response to the Board's refusal to grant De Leon's application, De Leon filed in the United States District Court for the District of Maryland a suit against Macon and the Hospital, alleging in part that the Hospital and Macon had defamed De Leon in connection with the denial of De Leon's application. In alleging defamation De Leon claimed that Macon, in his assessment letter to the board, made malicious and intentionally false statements about De Leon and that the Hospital intentionally had denied De Leon's application on the basis of Macon's false statements. Specifically, De Leon claimed that Macon made seven false statements regarding De Leon's ability and performance as a physician. In response to De Leon's claims the defendants filed motions for summary judgment on all counts, and the district court granted the defendants' motions. De Leon then appealed the district court's grant of summary judgment on the defamation claim to the United States Court of Appeals for the Fourth Circuit.

In considering De Leon's appeal, the Fourth Circuit noted that the district court relied on four distinct grounds for granting summary judgment. First, the district court held that the release from civil liability that De Leon executed at the time of De Leon's application barred De Leon's claims.

Second, the district court held that, because the allegedly defamatory material was not published, De Leon's claims legally were insufficient. Third, the district court held that, even if defamatory, Macon's statements were privileged under Maryland law. Finally, the district court held that Macon's statements were not defamatory. The Fourth Circuit stated that any one of these four grounds, if upheld on appeal, provides a basis to affirm the district court's grant of summary judgment.

In reviewing the district court's first holding that the release barred De Leon's claims, the Fourth Circuit noted that under Maryland law parties contractually may exculpate themselves from any liability not arising from willful and wanton conduct. De Leon claimed that, because Macon allegedly made malicious and intentionally false statements about De Leon, and that because the Hospital intentionally denied De Leon's application on the basis of Macon's statements, the Hospital and Macon each were guilty of willful and wanton conduct sufficient to make the release ineffective. However, after review of seven allegedly false statements Macon made in his letter to the Credentials Committee, the Fourth Circuit found De Leon's showing of the falsity of these statements limited to conclusory allegations. Accordingly, the court stated that De Leon failed to prove that the defendants engaged in the extreme, wanton behavior necessary to make the release ineffective. Thus, because De Leon failed to provide any support for the allegations of intent or wantonness, the Fourth Circuit stated that the release precluded De Leon from recovery.

In reviewing the district court's second holding that the allegedly defamatory statements never were published, the Fourth Circuit noted that under Maryland law, for a defamation claim a plaintiff must show an unprivileged publication to a third party. De Leon claimed that, because De Leon will have to reveal the Hospital's decision if De Leon applies for another position, the Hospital's action compels De Leon to engage in self-publication of the Hospital's decision. However, the Fourth Circuit rejected De Leon's self-publication argument, stating that Maryland law does not recognize the self-publication theory. Consequently, because the Fourth Circuit concluded that the Hospital never published to any third party the Hospital's decision on De Leon's application, the Fourth Circuit held that De Leon's defamation claim was insufficient.

In reviewing the district court's third holding that Macon's communications were privileged, the Fourth Circuit reasoned that, even if Macon's statements to other Hospital officials technically constituted publication, no actionable publication had occurred because Macon's communications enjoyed a qualified privilege. The Fourth Circuit determined that Macon's statements were privileged under two Maryland statutory provisions that grant good faith immunity to persons who give information to a medical review committee. Additionally, the Fourth Circuit determined that Macon's statements were privileged under a Maryland common-law rule that grants immunity to communications arising in an employment context or by a common interest in the subject matter of the communication. The court said that De Leon could overcome the statutory and common-law privileges

only by showing that Macon knew his statements were false or that Macon acted with reckless disregard as to the statements' truth. In determining that De Leon had not met the burden of showing intentional falsity the Fourth Circuit relied on the court's earlier discussion of De Leon's failure to make such a showing. Consequently, the Fourth Circuit concluded that the defendants' statements were privileged.

In reviewing the district court's fourth holding that Macon's statements were not defamatory, the Fourth Circuit noted that many of the allegedly defamatory statements were Macon's opinion and were labelled as such. The Fourth Circuit further noted that De Leon's denial or explanation of the incident consistently accompanied each of Macon's statements which reported a factual incident. Thus, the Fourth Circuit concluded that Macon's statements were not defamatory. Accordingly, because each of the district court's four grounds for granting summary judgment were sufficient, the Fourth Circuit affirmed the district court's grant of the defendants' motion for summary judgment.

In *Blue Ridge Bank v. Veribanc, Inc.*, 866 F.2d 681 (4th Cir. 1989), the Fourth Circuit considered whether Veribanc committed libel against Blue Ridge Bank by disseminating misleading information about the stability of the bank. Veribanc is a Massachusetts corporation engaged in the generation and dissemination of information concerning financial institutions based on data submitted to federal regulatory agencies. In *Blue Ridge Bank* the plaintiff, Blue Ridge, alleged that Veribanc distributed a report titled "Federally Insured U.S. Commercial Banks Which Could Reach Zero Equity Within One Year" to Dan Dorfman, a nationally syndicated newspaper columnist. The court found that the report erroneously identified Blue Ridge as a bank that potentially could reach zero equity within one year. Subsequently, the *Richmond Times Dispatch* published an article by Dorfman titled "Possible Bank Flops." According to the court, the Dorfman article identified Blue Ridge as a troubled bank based on the Veribanc report.

Veribanc did not dispute that it mistakenly included Blue Ridge in the report. Veribanc explained that the mistake resulted from Blue Ridge's midyear conversion from a savings and loan institution to a bank. As a result of the conversion, Veribanc erroneously annualized Blue Ridge's year-to-date loss. Blue Ridge reported a year-to-date loss figure that included Blue Ridge's performance as a savings and loan. Veribanc admittedly reported the year-to-date loss figure of the savings and loan and bank entirely as a fourth quarter loss during Blue Ridge's operation as a bank. Consequently, the court found that the Veribanc loss calculations projected unsubstantiated financial problems for the bank.

The United States District Court for the Western District of Virginia found that Blue Ridge was a public figure and, therefore, had to show actual malice on the part of Veribanc to prove libel. Applying that standard, the jury returned a verdict in favor of Blue Ridge for $600,000. Veribanc appealed the liability determination and the assessment of damages. Blue Ridge cross-appealed the district court's decision that the bank, as a public figure, had to prove actual malice.

To resolve the issues, the Fourth Circuit first considered whether Veribanc's defamatory statements were expressions of opinion or statements of fact. According to the court, expressions of opinion are not actionable as libel because the United States Constitution protects such statements under the first amendment. Therefore, the court explained, if the defamatory statement was an expression of opinion rather than a declaration of fact, the district court should have entered judgment for the defendant.

The Fourth Circuit applied a two-pronged test to determine whether the Veribanc statement was fact rather than opinion. First, the court considered whether the court objectively could characterize the challenged statement as true or false. If not, according to the court, the statement was an opinion and Blue Ridge had no cause of action against Veribanc. If the court could characterize the statement as true or false, then the court would proceed to apply the second prong of the test. The court explained that under the second prong the statement still could be an opinion and, therefore, nonactionable, depending on the author's choice of words, the context of the challenged statement within the writing, and the broader social context into which the statement fits. Addressing the first prong, the Fourth Circuit determined that Veribanc's statement was subject to a true or false classification because the Blue Ridge loss figures were either accurate or they were inaccurate. Next, considering the factors of the second prong, the court determined that the statement was an actionable statement of fact. In the court's analysis, the words in Veribanc's statement did not alert the reader that the statement was something other than a factual declaration. Also, according to the court, the statement did not give any indication of alternative meaning when read in the context of the whole report. Finally, the court found no relationship between Veribanc and Blue Ridge suggesting a social context that should alert the reader to possible distortions in the Veribanc report. Therefore, the court held that Veribanc's report was an actionable statement of fact.

The Fourth Circuit next looked to the appropriate standard for imposing liability for libel. According to the court, Veribanc's liability depended on whether Blue Ridge was a public or private figure. The court stated that if Blue Ridge was a public figure, Blue Ridge had to show actual malice by clear and convincing proof. However, the court noted that if Blue Ridge was a private figure, Blue Ridge had to prove negligence only by a preponderance of the evidence.

The Fourth Circuit considered two factors in determining whether Blue Ridge was a public figure or a private figure. The first factor was Blue Ridge's access to the media. The second factor that the court considered was the extent to which Blue Ridge invited public comment and attention. The court noted that this second factor was a more important factor than the first factor. The Fourth Circuit further explained that the court must distinguish between public figures who assume a general risk of defamatory comment (general purpose public figures) and those who assume such a risk with respect only to certain topics (limited purpose public figures). According to the court, a figure is a general purpose public figure if the figure occupies

a position of such persuasive power, influence, fame, or notoriety that the figure assumes special prominence in the resolution of public questions. But, according to the court, whether the figure becomes a limited purpose public figure depends on whether the figure thrusts itself into the public eye in a specific controversy. Under this analysis, the Fourth Circuit found no evidence to suggest that Blue Ridge had the media influence necessary to elevate it to a general purpose public figure. Further, the court perceived no grounds for finding Blue Ridge a limited purpose public figure.

The court expressly rejected Veribanc's allegation that Blue Ridge was a public figure because the bank voluntarily injected itself into a pre-existing controversy concerning the bank's financial health. Veribanc alleged that a pre-existing controversy existed over the bank's financial health resulting from Blue Ridge's local economic importance and Blue Ridge's participation in a government regulated industry of economic importance. The Fourth Circuit, however, rejected the argument that a business enterprise loses the protection of defamation law simply as a result of being subject to pervasive government regulation. The court reasoned that such an approach would replace the two-pronged analysis with a single consideration of whether the defendant was engaged in a regulated activity of community importance. According to the Fourth Circuit, a plaintiff becomes a limited purpose public figure only if a predefamation public controversy exists in which the plaintiff becomes directly involved. In this case, the court held that no specific preexisting public controversy directly or proximately concerned Blue Ridge's solvency. Therefore, the court found no adequate basis for concluding that Blue Ridge was either a general or limited purpose public figure.

Because the Fourth Circuit held that Blue Ridge was not a public figure, Blue Ridge had to prove Veribanc's negligence only by a preponderance of the evidence. According to the Fourth Circuit, the jury's determination of liability in the district court under the higher standard of clear and convincing evidence of actual malice subsumed a determination that Veribanc was liable under a preponderance negligence standard. Consequently, the Fourth Circuit affirmed the jury's liability determination.

The Fourth Circuit then rejected Veribanc's remaining allegations. Veribanc challenged the district court's refusal to instruct the jury on the law of republication. According to the court, an originator of a defamation is liable for republication only if the republication is the natural and probable consequence of the originator's act. The Fourth Circuit held, however, that the *Richmond Times Dispatch* article was not an unnatural or improbable consequence of Veribanc's publication, nor an unnatural or improbable result of Veribanc's decision to furnish the Veribanc report to the newspaper's reporter. The Fourth Circuit reasoned that the *Richmond Times* article did not fundamentally distort the information in the Veribanc report and, further, that Veribanc authorized the use of any factual statements contained in the report.

Veribanc next challenged the district court's admission of expert testimony concerning the future lost profits of Blue Ridge. According to Fourth