North Carolina Federal Court Applies Single Publication Rule to the Internet

First Decision in the Fourth Circuit on the Issue

By Jonathan Buchan

A North Carolina federal court in March 2013 applied the single publication rule in dismissing on statute of limitations grounds a libel suit against several media defendants arising from articles posted on their websites. *Marcus Jermaine Johnson v. The City of Raleigh, et al.*, No. 5:12-cv-210-BO (E.D.N.C. March 29, 2013). It is the first time a federal court in the Fourth Circuit Court of Appeals has applied the single publication rule to the statute of limitations issue in the internet context.

United States District Court Judge Terrence W. Boyle, while noting that North Carolina's state courts had not had occasion to address the single publication rule in any context, found that it should govern such internet postings because "[a]pplying a 'multiple publication' rule to internet postings would be problematic because it would lead to an increase in 'the exposure of publishers to stale claims,… [and] permit a multiplicity of actions, leading to potential harassment and excessive liability, and draining of judicial resources.'" *Citing Firth v. New York*, 98 N.Y.2d 365 (N.Y. 2002).

The trial court also denied plaintiff's claims against the media defendants under North Carolina's unfair and deceptive trade practices statute because plaintiff had failed to show there was a "competitive or business relationship between the plaintiff and defendants that should be policed for the benefit of the consuming public." North Carolina courts have previously permitted unfair and deceptive trade practice claims to proceed in libel *per se* claims involving non-media defendants. *See, Boyce & Isley, PLLC v. Cooper*, 153 N.C.App. 25, 568 S.E.2d 893 (2002).

Background

Plaintiff Marcus Jermaine Johnson pleaded guilty in 2005 to a felony charge of second degree sexual offense arising from charges he had committed incest with his sister. That conviction required him to register as a sex offender. In 1998 plaintiff had pleaded guilty to a felony charge of solicitation to commit statutory rape. At that time, solicitation of statutory rape was not a reportable offense, and plaintiff was not required to report to the sex offender registry for that crime.

In January, 2009, plaintiff drove to Athens Drive High School in Raleigh, North Carolina, his alma mater, intending to volunteer as a wrestling coach. When plaintiff's identification was scanned during a routine background check conducted at a security kiosk, the computer system alerted school officials that he was listed with the state sex offender registry. School officials promptly reported his school visit to the local police, and he was indicted by a grand jury for violating a state statute prohibiting certain registered sex offenders from entering school grounds. Several weeks later, the charges against Mr. Johnson were dismissed after the district attorney's office determined that neither of his offenses fell under the categories listed in the pertinent state statute. Thus, despite Mr. Johnson's listing with the state sex offender registry, he had not been on school grounds illegally during his January visit.

Prior to the dismissal of those charges, reports about Mr. Johnson's arrest appeared in various news accounts, including broadcast reports and website postings on ABC11 Eyewitness News, WRAL-TV and NBC17 News.

In March, 2009, Mr. Johnson, acting *pro se*, filed numerous complaints in both state and federal courts against school officials, city officials, law enforcement officials, and various media entities, seeking damages in excess of $700 million. The state and federal lawsuits were dismissed on various procedural grounds.

In January, 2012, Mr. Johnson filed a new complaint in state court which was removed to federal court. In addition to numerous claims for civil rights violations and for false imprisonment against city, county and various law enforcement officials, the complaint asserted claims for libel *per se* against ABC, Inc., d/b/a WTVD and ABC11.com, Capital Broadcasting Inc., d/b/a WRAL-TV and WRAL.com, and Media General Operations, Inc., d/b/a NBC17 News and NBC17.com, as well as claims for violation of North

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Carolina's Unfair And Deceptive Trade Practices Act against those media defendants.

In his complaint, plaintiff alleged that all of these reports falsely stated that his criminal record included a conviction for statutory rape, and not just solicitation to commit statutory rape. Plaintiff alleged that his fellow inmates saw this news coverage and made him a target of physical violence which required him to seek medical treatment.

Because the broadcasts and website articles that contained the allegedly defamatory statements had all been made or posted in 2009, media defendants asserted at the Rule 12(b)(6) stage their defense under North Carolina's one-year limitation statute for defamation claims. Defendants cited the numerous cases, including the often cited landmark case *Firth v. State*, explaining why the single publication rule should apply to statements posted on an internet website. In a nutshell, absent application of the single publication rule, the statute of limitations would never expire on a website posting.

Plaintiff's counsel, in its briefing, emphasized language in those cases applying the single publication rule which provides that the rule will not apply where a website posting has been materially changed or altered, which could give rise to a new and separate publication for defamation purposes. Plaintiff argued that because he never alleged that the defamatory statements on the websites had not been subsequently modified, the single publication rule could not be applied at the Rule 12(b)(6) stage. The court rejected that interpretation of the pleadings burden, and noted that the complaint contained no suggestion that the allegedly defamatory material had been altered or republished since 2009. Plaintiff also argued that internet publishers – unlike book publishers, for example – can easily control the extent of their liability after publication by removing false and defamatory content, and that the single publication rule should not apply to them for that reason.

The media defendants also contended that the complaint should be dismissed because the statements alleged were substantially accurate, as reflected by the record before the court, and because the fair report privilege protected the statements complained of by plaintiff. The court did not reach these issues.

Jonathan Buchan of McGuireWoods LLP represented ABC, Inc. in this litigation, along with ABC, Inc.'s in-house counsel, Indira Satyendra.