CIVIL LAW UPDATE

Judge Robert C. Ervin

Superior Court Judges Conference

October 2021

ESTATE OF LONG v. FOWLER, et. al.

Supreme Court, August 13, 2021

PERSONAL INJURY CASE AGAINST STATE EMPLOYEES IN THEIR INDIVIDUAL CAPACITY.

MELVIN LONG WAS KILLED WHILE WORKING ON A TRAILER-MOUNTED CHILLER AT NC STATE WHEN A METAL FLANGE SHOT OFF A WATER PIPE AND STRUCK HIM IN THE FACE WITH SUCH FORCE THAT IT KNOCKED OFF PART OF HIS SKULL.

LONG’S ESTATE SUED SIX NC STATE EMPLOYEES WHO HAD WORKED ON THE CHILLER AND WHO HAD ALLEGEDLY NEGLIGENTLY FAILED TO REFILL THE CHILLER WITH ANTIFREEZE TO PREVENT A FREEZE-UP OF ANY REMAINING WATER IN THE CHILLER THAT LED TO THE CRACKING OF PIPES AND THE BUILD UP OF PRESSURIZED REFRIGERANT GAS.

THE DEFENDANTS CONTENDED THAT THE SIX EMPLOYEES WERE BEING SUED IN THEIR OFFICIAL CAPACITIES AND THAT THE SUIT WAS ACTUALLY AGAINST NC STATE WHICH WAS ENTITLED TO ASSERT A DEFENSE OF SOVEREIGN IMMUNITY.

LONG'S ESTATE HAD ALSO INITATED A CLAIM BEFORE THE INDUSTRIAL COMMISSION UNDER THE STATE TORT CLAIMS ACT.

A CLAIM UNDER THE TORTS CLAIMS ACT IS BROUGHT AGAINST THE STATE AGENCY ONLY AND DOES NOT APPLY TO CLAIMS AGAINST AGENTS OR EMPLOYEES.

NO ACTION COULD BE MAINTAINED IN THE INDUSTRIAL COMMISSION AGAINST THE INDIVIDUAL DEFENDANTS.

THIS WAS A SEPARATE SUIT AGAINST THE INDIVIDUAL EMPLOYEES.

IS THE SEPARATE SUIT VIABLE OR IS IT BARRED BY SOVEREIGN IMMUNITY???

A SUIT AGAINST A STATE EMPLOYEE IN THAT EMPLOYEE'S OFFICIAL CAPACITY IS A SUIT AGAINST THE STATE AND IS SUBJECT TO THE DOCTRINE OF SOVEREIGN IMMUNITY.

PUBLIC EMPLOYEES ARE INDIVIDUALLY LIABLE FOR NEGLIGENCE IN THE PERFORMANCE OF THEIR DUTIES.

HOW DO YOU TELL IF A SUIT IS AGAINST A STATE EMPLOYEE IN HIS INDIVIDUAL CAPACITY OR IN HIS OFFICIAL CAPACITY?

IT IS A SIMPLE MATTER FOR ATTORNEYS TO CLARIFY THE CAPACITY IN WHICH A DEFENDANT IS BEING SUED.

PLEADINGS SHOULD INDICATE IN THE CAPTION THE CAPACITY IN WHICH A PLAINTIFF INTENDS TO HOLD A DEFENDANT LIABLE.

WHEN THE COMPLAINT SEEKS MONETARY DAMAGES, THE CLAIM IS AN INDIVIDUAL CAPACITY CLAIM IF THE COMPLAINT INDICATES THAT THE DAMAGES ARE SOUGHT FROM THE POCKET OF THE INDIVIDUAL DEFENDANT.

CLAIMS SEEKING INJUNCTIVE RELIEF ARE ACTIONS AGAINST THE STATE.

IN ESTATE OF LONG:

THE CAPTION OF THE COMPLAINT LISTED EACH DEFENDANT FOLLOWED BY “INDIVIDUALLY” AFTER EACH NAME.

THE FIRST LINE OF THE COMPLAINT INDICATED THAT THE PLAINTIFF IS “COMPLAINING OF THE DEFENDANTS IN THEIR INDIVIDUAL CAPACITIES, JOINTLY AND SEVERALLY.”

THE PRAYER FOR RELIEF SOUGHT RELIEF AGAINST DEFENDANTS “JOINTLY AND SEVERALLY.”

THE PRAYER FOR RELIEF SOUGHT DAMAGES AGAINST THE INDIVIDUAL DEFENDANTS AND NOT INJUNCTIVE RELIEF.

THE MAJORITY OF THE SUPREME COURT OPINED THAT “IT IS ABUNDANTLY CLEAR FROM THE COMPLAINT THAT THE DEFENDANTS ARE BEING SUED IN THEIR INDIVIDUAL CAPACITIES.”

THE DEFENDANTS CLAIMED THAT THEY WERE BEING SUED IN THEIR OFFICIAL CAPACITY BECAUSE THEIR TORTIOUS CONDUCT WAS PERFORMED IN THE SCOPE AND COURSE OF THEIR EMPLOYMENT.

THE MAJORITY REJECTED THAT ARGUMENT BECAUSE THAT CLAIM WAS CONTRARY TO EARLIER SUPREME COURT CASES THAT HELD THAT “PUBLIC EMPLOYEES MAY BE HELD INDIVIDUALLY LIABLE FOR MERE NEGLIGENCE IN THE PERFORMANCE OF THEIR DUTIES.”

THE DISSENT ALSO CONTENDED THAT THE TORT CLAIMS ACT CASE MADE THIS AN ACTION AGAINST THE STATE.

THE MAJORITY CITED SUPREME COURT CASE LAW THAT “A PLAINTIFF MAY MAINTAIN BOTH A SUIT AGAINST A STATE AGENCY IN THE INDUSTRIAL COMMISSION UNDER THE TORT CLAIMS ACT AND A SUIT AGAINST THE NEGLIGENT AGENT OR EMPLOYEE IN THE GENERAL COURT OF JUSTICE FOR COMMON-LAW NEGLIGENCE.”

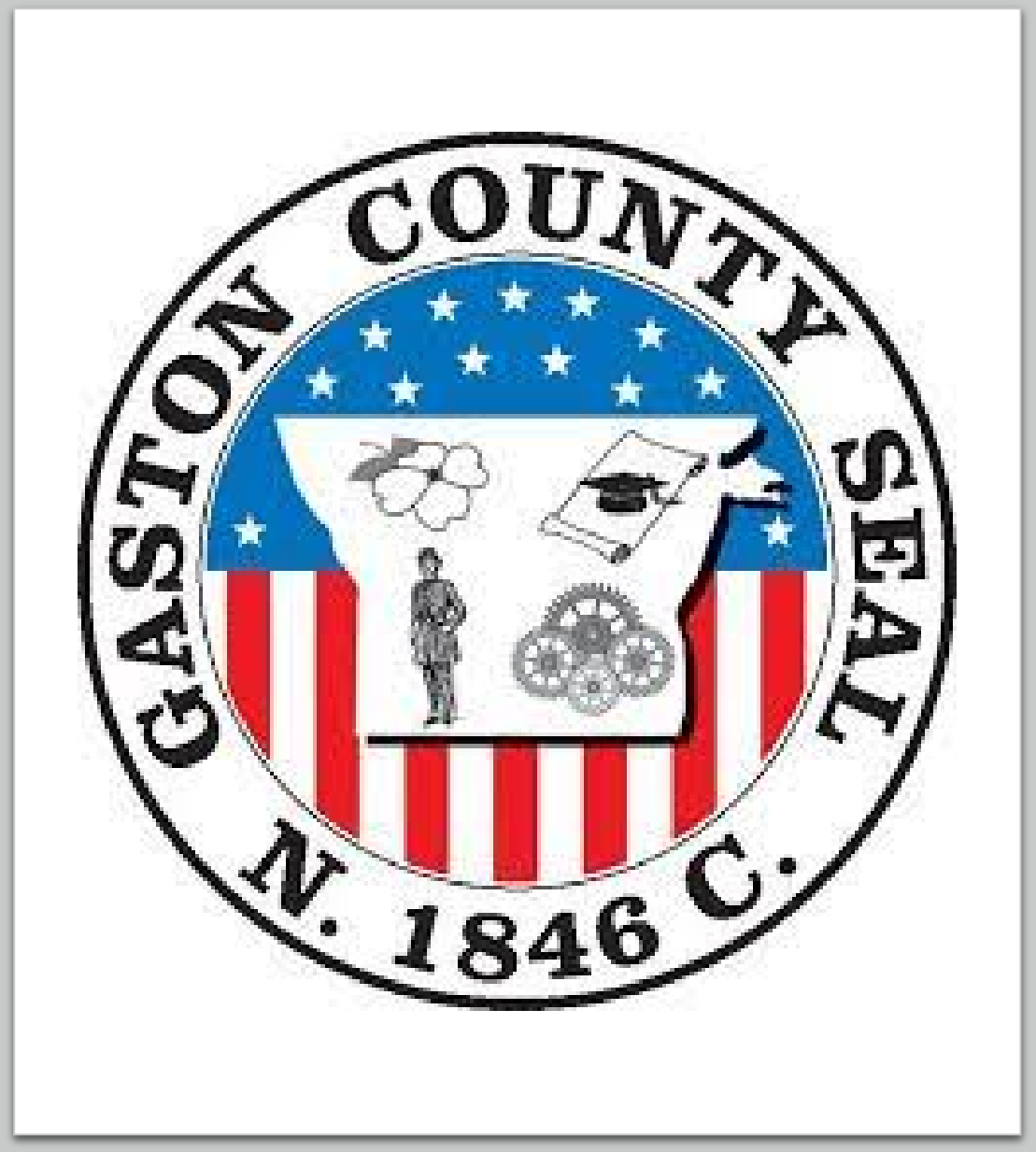
INTERESTINGLY, THERE IS A STATUTE THAT PROVIDES “UPON REQUEST OF AN EMPLOYEE OR FORMER EMPLOYEE, THE STATE MAY PROVIDE FOR THE DEFENSE OF ANY CIVIL OR CRIMINAL ACTION OR PROCEEDING BROUGHT AGAINST HIM IN HIS OFFICIAL OR INDIVIDUAL CAPACITY, OR BOTH, ON ACCOUNT OF AN ACT DONE OR OMISSION MADE IN THE SCOPE AND COURSE OF HIS EMPLOYMENT AS A STATE EMPLOYEE.”

THE STATE MAY ALSO SET OUT ITS INTENTION TO PAY A FINAL JUDGMENT AWARDED IN COURT OR THE AMOUNT OF A SETTLEMENT.

N. C. GEN. STAT. 143-300.6

CLINE v. JAMES BANE HOME BUILDING, LLC.
Court of Appeals, June 15, 2021

LIABILITY OF A COUNTY ENVIRONMENTAL HEALTH ADMINISTRATOR AS A PUBLIC OFFICIAL OR A PUBLIC EMPLOYEE.



UNLESS WAIVED, A COUNTY AND ITS EMPLOYEES ACTING IN THEIR OFFICIAL CAPACITIES ARE PROTECTED FROM TORT ACTIONS UNDER THE DOCTRINE OF GOVERNMENTAL IMMUNITY.

THE DOCTRINE OF PUBLIC OFFICIAL'S IMMUNITY PROTECTS A PUBLIC OFFICIAL, WHEN SUED IN HIS OR HER INDIVIDUAL CAPACITY, FROM ACTIONS FOR MERE NEGLIGENCE IN THE PERFORMANCE OF THEIR DUTIES.

THIS IMMUNITY DOES NOT APPLY TO FOR PUBLIC EMPLOYEES.

THE ISSUE IN CLINE WAS WHETHER THE COUNTY ENVIRONMENTAL HEALTH ADMINISTRATOR WAS A PUBLIC OFFICIAL OR A PUBLIC EMPLOYEE.

THE TORT CLAIMS ACT DOES NOT APPLY TO A CLAIM AGAINST A COUNTY AGENCY SINCE IT IS NOT A STATE AGENCY OR INSTITUTION.

THE SUPERIOR COURT AND NOT THE INDUSTRIAL COMMISSION HAS JURISDICTION OF THIS CLAIM.

IN CLINE, THE COUNTY OF GASTON AND THE EMPLOYEE IN HIS OFFICIAL CAPACITY ASSERTED THE DEFENSE OF GOVERNMENTAL IMMUNITY.

IN THIS PART OF THE CASE, THERE WAS A CLAIM THAT AN INSURANCE POLICY WAIVED GOVERNMENTAL IMMUNITY.

THE PLAINTIFFS FAILED TO PRODUCE THE INSURANCE POLICY WHICH ALLEGEDLY WAIVED GOVERNMENTAL IMMUNITY AND THE COURT OF APPEALS CONCLUDED THAT THE PLAINTIFF FAILED TO SHOW A WAIVER OF THE IMMUNITY.

THE CLAIM AGAINST THE EMPLOYEE WAS ASSERTED IN HIS INDIVIDUAL CAPACITY.

PUBLIC OFFICIAL'S IMMUNITY PRECLUDES SUITS AGAINST PUBLIC OFFICIALS IN THEIR INDIVIDUAL CAPACITIES AS LONG AS A PUBLIC OFFICER LAWFULLY EXERCISES THE JUDGMENT AND DISCRETION WITH WHICH HE IS INVESTED BY VIRTUE OF HIS OFFICE, KEEPS WITHIN THE SCOPE OF HIS OFFICIAL AUTHORITY, AND ACTS WITHOUT MALICE OR CORRUPTION.

AN EMPLOYEE, ON THE OTHER HAND, IS PERSONALLY LIABLE FOR NEGLIGENCE IN THE PERFORMANCE OF HIS OR HER DUTIES PROXIMATELY CAUSING AN INJURY.

HOW DO YOU DETERMINE WHO IS A PUBLIC OFFICIAL AND WHO IS A PUBLIC EMPLOYEE?

THERE ARE SEVERAL BASIC DISTINCTIONS BETWEEN A PUBLIC OFFICIAL AND A PUBLIC EMPLOYEE:

A PUBLIC OFFICE IS A POSITION CREATED BY THE CONSTITUTION OR BY STATUTE;

A PUBLIC OFFICIAL EXERCISES A PORTION OF THE SOVEREIGN POWER; and

A PUBLIC OFFICIAL EXERCISES DISCRETION WHILE PUBLIC EMPLOYEES PERFORM MINISTERIAL DUTIES.

IN CLINE;

THERE WAS NO CLEAR STATUTORY BASIS FOR THE POSITION OF ENVIRONMENTAL HEALTH ADMINISTRATOR.

THERE WAS NO STATUTORY AUTHORIZATION FOR THE DELEGATION OF THE DUTIES INVOLVED.

THE COURT OF APPEALS CONCLUDED THAT THE FIRST FACTOR WAS NOT MET AND THAT THE DEFENDANT WAS A PUBLIC EMPLOYEE.

BUTTERFIELD and CAVENESS as CO-ADMINISTRATORS OF ESTATE OF CAVENESS v. GRAY, et. al.

COURT OF APPEALS, OCTOBER 5, 2021

WRONGFUL DEATH CASE ARISING FROM AN INMATE CONDUCTING A HUNGER STRIKE AT THE WILSON COUNTY JAIL.

THE PLAINTIFF'S DECEDENT WAS A SCHIZOPHRENIC JAIL INMATE WHO REFUSED FOOD AND WATER BELIEVING IT HAD BEEN TAMPERED WITH.

THE INMATE DIED AS A RESULT OF DEHYDRATION AND MALNUTRITION.

THE PLAINTIFFS SUED THE SHERIFF, JAIL DETENTION OFFICERS, THE COUNTY, A NURSE AND THE CONTRACTOR THAT PROVIDED MEDICAL SERVICES AT THE JAIL AND THE SHERIFF'S SURETY BOND COMPANY.

THE APPEAL ADDRESSES ISSUES INVOLVING THE DETENTION OFFICERS AND THE SHERIFF WHEN SUED IN THEIR OFFICIAL CAPACITY AND THE COUNTY.

THESE DEFENDANTS ASSERTED A DEFENSE OF GOVERNMENTAL IMMUNITY AGAINST THE PLAINTIFFS' CLAIMS.

BECAUSE A SUIT AGAINST A PUBLIC OFFICIAL IN HIS OFFICIAL CAPACITY OPERATES AS A SUIT AGAINST THE GOVERNMENTAL ENTITY ITSELF, AN OFFICIAL SUED IN THIS CAPACITY MAY RAISE THE DEFENSE OF GOVERNMENTAL IMMUNITY.

UNDER THE DOCTRINE OF GOVERNMENTAL IMMUNITY, BOTH A COUNTY AND A COUNTY'S PUBLIC OFFICIALS ARE IMMUNE FROM SUITS ALLEGING NEGLIGENCE IN THE EXERCISE OF A GOVERNMENTAL FUNCTION, UNLESS THE PLAINTIFF SHOWS THAT THE COUNTY OR THE COUNTY'S PUBLIC OFFICIALS WAIVED IMMUNITY.

SHERIFFS, SHERIFF'S DEPUTIES AND JAILERS ARE PUBLIC OFFICIALS.

THE PLAINTIFF'S FIRST ARGUED THAT PROVISION OF MEDICAL SERVICES TO INMATES IS NOT A GOVERNMENTAL FUNCTION.

THE COURT OF APPEALS REJECTED THAT CONTENTION AND HELD THAT THIS CONDUCT WAS SUBJECT TO GOVERNMENTAL IMMUNITY.

THE PLAINTIFFS THEN ARGUED THAT THE DEFENDANTS WAIVED IMMUNITY BY PURCHASING LIABILTY INSURANCE.

N. C. GEN. STAT. 153A-435 PROVIDES THAT THE PURCHASE OF LIABILITY INSURANCE MAY WAIVE GOVERNMENTAL IMMUNITY.

THE PURCHASE OF INSURANCE WAIVES GOVERNMENTAL IMMUNITY TO THE EXTENT OF THE INSURANCE COVERAGE FOR ANY ACT OR OMISSION OCCURRING IN THE EXERCISE OF A GOVERNMENTAL FUNCTION.

THERE WAS AN INSURANCE POLICY.

IT PROVIDED THAT:

> THE PARTIES TO THIS CONTRACT INTEND FOR NO COVERAGE TO EXIST UNDER THIS SECTION VI OF THE CONTRACT AS TO ANY CLAIM WHICH THE COVERED PERSON IS PROTECTED BY SOVEREIGN IMMUNITY AND/OR GOVERNMENTAL IMMUNITY UNDER NORTH CAROLINA LAW.

THERE WAS ALSO AN EXCLUSION THAT PROVIDED THE POLICY "DOES NOT APPLY TO… CLAIMS OR SUITS TO WHICH A COVERED PERSON IS ENTITLED TO SOVEREIGN IMMUNITY OR GOVERNMENTAL IMMUNITY UNDER NORTH CAROLINA LAW."

NO WAIVER OF GOVERNMENTAL IMMUNITY.

ALL WAS NOT LOST TO THE PLAINTIFFS DUE TO THE SHERIFF'S BOND.

N. C. GEN. STAT. 162-8 PROVIDES THAT EACH SHERIFF "SHALL FURNISH A BOND PAYABLE TO THE STATE OF NORTH CAROLINA FOR THE DUE EXECUTION AND RETURN OF PROCESS, THE PAYMENT OF FEES AND MONEYS COLLECTED, AND THE FAITHFUL EXECUTION OF HIS OFFICE AS SHERIFF."

PURCHASING A SHERIFF'S BOND AS REQUIRED BY N. C. GEN. STAT. 162-8 WAIVES THE SHERIFF'S GOVERNMENTAL IMMUNITY TO THE EXTENT OF THE COVERAGE PROVIDED.

UNFORTUNATELY, HERE THE BOND WAS $20,000.

NATION FORD BAPTIST CHURCH, INC. v DAVIS

COURT OF APPEALS, OCTOBER 5, 2021

CHURCH FIGHT

THE CORE FACTS ARE:

THE ELDERS ACTED AS THE CHURCH'S BOARD OF DIRECTORS.

THEY HIRED DAVIS AS "SENIOR PASTOR" IN 2016.

SENIOR PASTOR WAS EMPLOYED "AT WILL."

THE CONTRACT SAID THE CHURCH HAS THE RIGHT TO TERMINATE EMPLOYMENT AT ANY TIME, WITH OR WITHOUT REASON OR NOTICE.

THE RECORD INCLUDED TWO SETS OF BYLAWS.

THE ELDERS VOTED TO TERMINATE THE PASTOR.

THE PASTOR IGNORED IT AND CONTINUED RELIGIOUS ACTIVITIES.

THE CHURCH SUED AND THE PASTOR COUNTERCLAIMED.

THE CHURCH MOVED TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION.

THE TRIAL COURT DENIED THE MOTION TO DISMISS.

THE CHURCH AND ELDERS APPEALED.

THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION PROHIBITS A CIVIL COURT FROM BECOMING ENTANGLED IN ECCLESIASTICAL MATTERS.

AN ECCELESIASTICAL MATTER IS ONE WHICH CONCERNS DOCTRINE, CREED, OR FORM OF WORSHIP OF THE CHURCH, OR THE ADOPTION OR ENFORCEMENT WITHIN A RELIGIOUS ASSOCIATION OF NEEDFUL LAWS AND REGULATIONS FOR THE GOVERNMENT OF MEMBERSHIP.

CIVIL COURTS DO NOT VIOLATE THE FIRST AMENDMENT MERELY BY OPENING THEIR DOORS TO DISPUTES INVOLVING CHURCH PROPERTY.

THERE ARE NEUTRAL PRINCIPLES OF LAW, DEVELOPED FOR USE IN ALL PROPERTY DISPUTES, WHICH CAN BE APPLIED WITHOUT ESTABLISHING CHURCHES TO WHICH PROPERTY IS AWARDED.

THE FIRST AMENDMENT COMMANDS CIVIL COURTS TO DECIDE CHURCH PROPERTY DISPUTES WITHOUT RESOLVING UNDERLYING CONTROVERSIES OVER RELIGIOUS DOCTRINE.

THE DISPOSITIVE QUESTION IS WHETHER RESOLUTION OF THE LEGAL CLAIM REQUIRES THE COURT TO INTERPRET OR WEIGH CHURCH DOCTRINE. IF NOT, THE FIRST AMENDMENT IS NOT IMPLICATED AND NEUTRAL PRINCIPLES OF LAW ARE PROPERLY APPLIED TO ADJUDICATE THE CLAIM.

IN NATION FORD BAPTIST, THE FIGHT WAS OVER WHICH SET OF BYLAWS APPLIED.

THE BYLAWS WEREN'T IN THE OPINION.

THE MAJORITY THOUGHT A COURT COULD DETERMINE WHICH BYLAWS APPLIED AND THEN DECIDE IF THE PROCEDURAL PROVISIONS OF THE BYLAWS WERE COMPLIED WITH.

“THERE IS NO GUARANTEE THAT OUR COURTS WILL BE FORCED TO WEIGH ECCELESIASTICAL MATTERS AT THIS STAGE OF THE PROCEEDING.”

IF THE COURT DETERMINES THAT THE TERMINATION COMPLIED WITH THE BYLAWS, THEN THE COURT WOULD BE REQUIRED TO ASSESS WHETHER THE PASTOR WAS UNFIT TO SERVE.

THAT DETERMINATION CANNOT BE MADE APPLYING ONLY NEUTRAL PRINCIPLES OF LAW.

IN NATIONS FORD BAPTIST, THERE IS A DISSENTING OPINION.

THE PLEADINGS IN THIS CASE ARE MESSY AND THE DISSENTING JUDGE PERCEIVED THAT IT WOULD BE IMPOSSIBLE TO DECIDE ANYTHING IN THIS CASE BASED ON NEUTRAL PRINCIPLES OF LAW.

THE MAJORITY ONLY SEEMS TO SAY THAT AT THIS STAGE WE CAN'T DETERMINE FOR CERTAIN WHETHER ENTANGLEMENT CAN BE AVOIDED.

BARROW v. SARGENT

Court of Appeals July 6, 2021

NEGLIGENCE CASE ARISING FROM A COLLISON BETWEEN A BICYCLE AND A CAR.

SPECIAL JURY INSTRUCTIONS

Plaintiff's counsel requested a special jury instruction about the duty of a motorist towards the user of a crosswalk and an alternate instruction on a definition to the effect that "a sidewalk is part of the highway."

TRIAL COURT JUDGE REFUSED TO GIVE EITHER INSTRUCTION.

WHICH BEGS THE QUESTION:

WHAT IS THE STANDARD FOR GIVING SPECIAL JURY INSTRUCTIONS?

THE PARTY REQUESTING THE JURY INSTRUCTION, MUST DEMONSTRATE:

1. THE REQUESTED INSTRUCTION WAS A CORRECT STATEMENT OF LAW;
2. IT WAS SUPPORTED BY THE EVIDENCE:
3. THE INSTRUCTION ACTUALLY GIVEN, CONSIDERED IN ITS ENTIRETY, FAILED TO ENCOMPASS THE SUBSTANCE OF THE LAW REQUESTED; and
4. THE FAILURE TO INSTRUCT LIKELY MISLED THE JURY.

TO BE BASED ON THE EVIDENCE, THE PROPOSED INSTRUCTION, WHEN VIEWED IN THE LIGHT MOST FAVORABLE TO THE REQUESTING PARTY, WILL SUPPORT A REASONABLE INFERENCE OF EACH ESSENTIAL ELEMENT OF THE CLAIM OR DEFENSE ASSERTED.

IN THIS CASE,

THE FIRST PROPOSED INSTRUCTION WAS PROPERLY DECLINED BECAUSE IT WAS NOT A CORRECT STATEMENT OF LAW.

THE SECOND PROPOSED INSTRUCTION WAS PROPERLY DECLINED BECAUSE THE PLAINTIFF FAILED TO OFFER EVIDENCE NECESSARY TO TRIGGER THE APPLICATION OF A PARTICULAR STATUTE.

USE OF DEPOSITIONS

IN BARROW v. SARGENT, THERE WAS A SECOND ISSUE ARISING FROM THE TRIAL COURT'S DECISION TO REQUIRE THE PLAINTIFF TO READ ADDITIONAL PORTIONS OF THE DEFENDANT'S DEPOSITION TO THE JURY OVER PLAINTIFF'S OBJECTIONS.

WHAT IS THE STANDARD FOR THAT DECISION?

A TRIAL COURT MAY REQUIRE A PARTY TO READ A COMPLETE STATEMENT OR OTHER RELEVANT PORTIONS OF EVIDENCE IN ORDER TO PROVIDE CONTEXT FOR THE JURY; HOWEVER, THIS DECISION IS WITHIN THE TRIAL COURT'S DISCRETION AT TRIAL.

RULE 32(a)(5) PROVIDES THAT "IF ONLY PART OF A DEPOSITION IS OFFERED IN EVIDENCE BY A PARTY, AN ADVERSE PARTY MAY REQUIRE HIM TO INTRODUCE ANY OTHER PART WHICH IS RELEVANT TO THE PART INTRODUCED…."

NO ABUSE OF DISCRETION IN THIS CASE.

MEABON v. ELLIOTT AND ELLIOTT LAW FIRM

Court of Appeals, June 15, 2021.

DISMISSAL FOR FAILURE TO PROSECUTE

THE CASE WAS A LEGAL MALPRACTICE ACTION WHICH WAS FILED IN 2015. THE PLAINTIFF DID NOT ATTEMPT SERVICE FOR ALMOST FOUR YEARS. IN THE INTERIM, THE DEFENDANT ATTORNEY DIED, A WITNESS MOVED AND FIRM'S COMPUTER SYSTEMS CHANGED.

THE DEFENDANT MOVED TO DISMISS FOR FAILURE TO PROSECUTE AND THE MOTION WAS ALLOWED.

PRIOR TO DISMISSING A CLAIM FOR FAILURE TO PROSECUTE, THE TRIAL COURT IS TO DETERMINE THREE FACTORS:

(1) WHETHER THE PLAINTIFF ACTED IN A MANNER WHICH DELIBERATELY OR UNREASONABLY DELAYED THE MATTER;
(2) THE AMOUNT OF PREJUDICE, IF ANY; AND
(3) THE REASON, IF ONE EXISTS, THAT SANCTIONS SHORT OF DISMISSAL WILL NOT SUFFICE.

IN MEABON:

THE PLAINTIFF DELAYED SERVICE OVER FOUR YEARS USING ALIAS AND PLURIES SUMMONSES;

THE ATTORNEY DIED AND A WITNESS MOVED;

THE PLAINTIFF EXPLAINED HIS DELAY ON THE GROUNDS THAT HE WAS "GUTTED" OR "DEVASTATED" BY THE OUTCOME OF OTHER COURT PROCEEDINGS;

WHEN WITNESSES DIE OR DISAPPEAR DURING A DELAY, THE PREJUDICE IS OBVIOUS.

85 AND SUNNY, LLC. V. CURRITUCK COUNTY

Court of Appeals August 17, 2021

REVIEW OF A ZONING BOARD OF ADJUSTMENT DECISION

FIRST STEP—TRIAL COURT MUST SET FORTH SUFFICIENT INFORMATION IN ITS DECISION OR ORDER TO REVEAL THE SCOPE OF REVIEW IT USED.

IF THE PETITIONER CONTENDS THE BOARD'S DECISION WAS NOT SUPPORTED BY THE EVIDENCE OR WAS ARBITRARY AND CAPRICIOUS, THEN THE TRIAL COURT MUST APPLY THE WHOLE RECORD TEST.

WHEN APPLYING THE WHOLE RECORD TEST, THE REVIEWING COURT:

SITS IN THE POSTURE OF AN APPELLATE COURT;

REVIEWS THE EVIDENCE PRESENTED TO THE BOARD;

DETERMINES IF THE BOARD'S DECISION WAS SUPPORTED BY SUBSTANTIAL EVIDENCE;

SUBSTANTIAL EVIDENCE IS SUCH EVIDENCE WHICH A REASONABLE MIND MIGHT ACCEPT AS ADEQUATE TO SUPPORT A CONCLUSION;

MAY NOT REPLACE BOARD'S JUDGMENT AS BETWEEN TWO REASONABLY CONFLICTING VIEWS OF THE EVIDENCE, EVEN IF THE COURT COULD REASONABLY REACH A DIFFERENT RESULT.

GRIBBLE v. BOSTIAN

Court of Appeals, August 17, 2021

EASEMENT DISPUTE

PLAINTIFF'S PREDECESSOR IN TITLE AND THE DEFENDANT EXCHANGED A DEED WHICH GRANTED THE DEFENDANT AN EASEMENT OVER PLAINTIFF'S PROPERTY.

THE DEED PROVIDED THAT:

> TOGETHER WITH A RIGHT-OF-WAY THIRTY (30) FEET IN WIDTH RUNNING FROM DEAL ROAD TO THIS PROPERTY, THE EXACT LOCATION OF SAID RIGHT-OF-WAY TO BE AGREED UPON BETWEEN THE PARTIES OR THEIR SUCCESSORS AND ASSIGNS.

GUESS WHAT??

THE PARTIES NEVER AGREED IN WRITING WHERE THE EASEMENT REFERENCED IN THE DEED WOULD BE LOCATED.

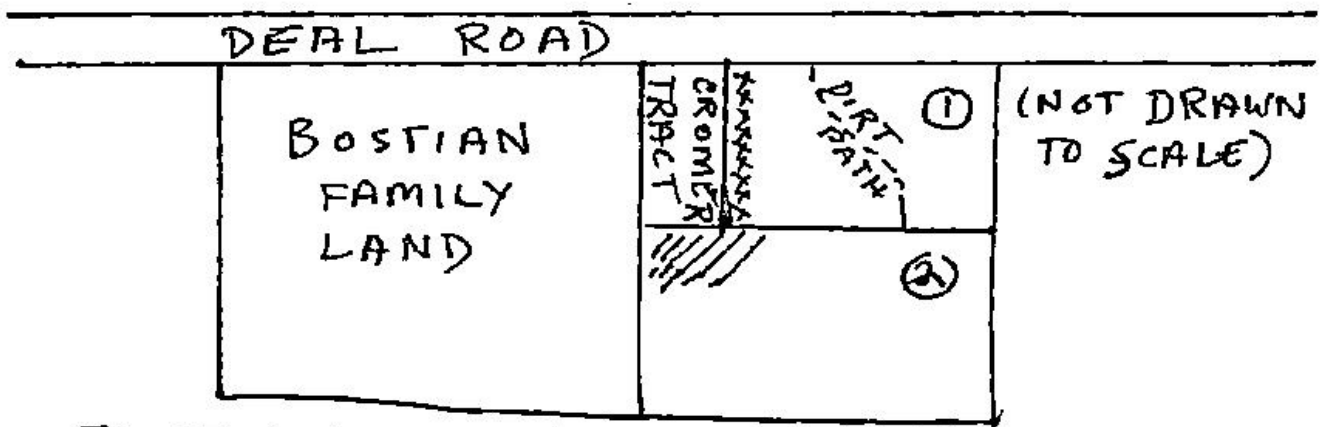
HOW DO YOU DETERMINE WHERE THE EASEMENT IS??

IS THE EASEMENT EVEN VALID??

THE STATUTE OF FRAUDS IS SATISIFED SO LONG AS THE DOMINANT AND SERVIENT ESTATES ARE IDENTIFIED AND THE NATURE OF THE EASEMENT IS SUFFICIENTLY DESCRIBED IN THE WRITING.

WHERE THE LOCATION OF THE EASEMENT ITSELF IS NOT EXPRESSED IN THE GRANT, ITS LOCATION IS ESTABLISHED WHEN THE OWNER OF THE DOMINANT ESTATE MAKES REASONABLE USE OF A PORTION OF THE SERVIENT ESTATE FOR INGRESS AND EGRESS, AND THIS USE IS ACQUIESCED TO BY THE OWNER OF THE SERVIENT ESTATE.

USE OF THE ROAD LOCATES IT.



TRACT 1 is owned by Plaintiff.
TRACT 2 is owned by Defendants and their daughter-in-law