

TWENTY-SIXTH DISTRICT

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Nos. 08-CVD-20661 &

08-CVD-28389

DEFENDANT-APPELLEE’S BRIEF

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TWENTY-SIXTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

BRIAN Z. FRANCE,

Plaintiff,

V.

MEGAN P. FRANCE,

Defendant.

From Mecklenburg County

Nos. 08-CVD-20661 &

08-CVD-28389

STATEMENT OF GROUNDS FOR APPELLATE REVIEW¹

This is the second of two appeals filed by Brian Z. France (“Mr. France” or “Plaintiff-Appellant”) currently pending before this Court. See Case Nos. COA10-313 (“Appeal 1”) and COA10-425 (“Appeal 2”).² Appeal 1 focuses on the ruling the Honorable Jena P. Culler (“Judge Culler”) rendered on 15 October 2009, and entered on 13 November 2009 (“First Culler Order”), directing that the litigation below proceed in an open courtroom. (R pp 126-129; R S pp 1823-1826; Appeal 1 R pp 6-9, 24-25). Mr. France appealed from such ruling on 13 November 2009. (R pp 23(¶ 5), 66, 113; R S pp 1828-1829; Appeal 1 R pp 11-12).

¹ Megan P. France (“Ms. France” or “Defendant-Appellee”) respectfully sets forth this jurisdictional recitation and subsequent factual recitation pursuant to N.C. R. App. P. 28(c) (2010).

² This Court may take judicial notice of all submissions in each appeal and their two ancillary proceedings (Case Nos. COAP09-1003 and COAP10-92). See, e.g., Sugg v. Field, 139 N.C.App. 160, 163, 532 S.E.2d 843, 845 (2000).

Appeal 2, in turn, centers upon the Order Granting Movants’ Motion to Determine Access to Judicial Proceedings and Documents that Judge Culler entered on 18 December 2009 (“Second Culler Order”). (R pp 14-19, 246-247). At bottom, the Second Culler Order (1) reaffirms the First Culler Order; and (2) mandates unsealing the court files in Case Nos. 08-CVD-20661, 08-CVS-28389, and 08-CVD-28389. (R pp 14-19). Mr. France appealed from such ruling on 21 December 2009. (R pp 20-21).

Mr. France contends that N.C.G.S. §§ 1-277(a), 7A-27(d)(1), and related appellate decisions create jurisdiction in this appeal (Appeal 2). See Plaintiff-Appellant’s Brief, pp 5-8. In doing so, he overlooks the only statute that expressly authorizes such appeal. Compare id. (remaining silent regarding N.C.G.S. § 1-72.1(e)), with N.C.G.S. § 1-72.1(e) (“A ruling on a motion made pursuant to this section may be the subject of an immediate interlocutory appeal by the movant or any party to the proceeding”) (ellipsis added).³ In sum, N.C.G.S. § 1-72.1(e) unquestionably vests this Court with interlocutory appellate jurisdiction in Appeal 2 – unlike Appeal 1 – thereby alleviating the need for this Court to consider Mr. France’s “substantial rights” exposition in relation to Appeal 2. See Plaintiff-Appellant’s Brief, pp 5-8.

³ Unless specified otherwise, all ellipses, emphasis, and alterations appearing in quotations herein have been added, and all internal citations, internal quotation marks, quoted sources, and footnotes omitted.

STATEMENT OF THE FACTS

The parties have been married to each other twice. (R pp 62, 108; R S pp 262(¶ 3), 466(¶ 3)). They first married each other on 20 September 2001, and ended such marriage on 21 April 2004 via entry of a Judgment in California. (R pp 62, 108-109; R S pp 262(¶ 3), 277, 466(¶ 3)). They married each other again on 18 October 2005, the same day that they executed a Prenuptial Agreement in California. (R pp 62, 108-109; R S pp 262(¶¶ 3-4), 277-320, 466(¶¶ 3-4)). Ms. France gave birth to their twin minor children nearly eleven months later on 5 September 2006. (R pp 62, 108-109, R S pp 262(¶¶ 3, 5), 466(¶¶ 3, 5)).

The parties separated just over one year later in October 2007, and divorced on 29 April 2008. (R pp 62, 108; R S pp 262(¶ 3), 466(¶ 3)). In the interim, they executed a Contract of Separation, Property Settlement, Child Support, Child Custody, and Alimony Agreement (“Separation Agreement”) on 17 December 2007, (R pp 62-63, 109; R S pp 321-364), about which Mr. France’s counsel stated in open court:

. . . The separation agreement has elaborate joint-custody language, goes on for several pages. It has a confidentiality provision that among other things requires the parties to use their best efforts to keep any litigation sealed.

It goes on to require that the children be raised in Mecklenburg County essentially, and then from the cash standpoint, the parties actually have [a] pre-nuptial agreement before this marriage. But in addition to the property distributed to -- to Ms. France by my client, he paid her an additional --

agreed to pay her an additional \$9 [m]illion in distributive award payments, \$32,500 a month in tax-free alimony for ten years -- that's right, \$32,500 per month tax-free alimony for ten years, and \$10,000 a month in child support, plus school and nanny and so forth and so on. So that's the agreement and the situation.

(10/15/09 T p 13, line 21 – p 14, line 12).

Mr. France instituted Case No. 08-CVD-20661 against Ms. France in Mecklenburg County District Court on 11 September 2008, seeking to enforce the Separation Agreement's confidentiality provisions through sealing of the court file in such action and any later action between the parties regarding the Separation Agreement. (R pp 15(¶ 1), 63, 95(¶ 1), 109, 139(¶ 4)). Ms. France thereafter sought the same relief. (R p 139(¶ 6)). That being said, her counsel also opined – as an officer of the Court – that the decision in Virmani v. Presbyterian Health Servs. Corp., 350 N.C. 449, 515 S.E.2d 675 (1999), likely foreclosed such relief. (R S pp 914-918, 920-921; 10/15/2009 T p 14, lines 11-13).

On 18 December 2008, the Honorable N. Todd Owens (“Judge Owens”) entered a Summary Judgment and Order to Seal Court Files (“the Owens Order”). (R pp 137-141). Judge Owens determined therein that the public's qualified right to court access – as recognized in Virmani – is outweighed by the following:

2. There is a compelling countervailing public interest in protecting the privacy of the parties as relates to the provisions of the Agreement concerning their young children and their financial affairs, and in avoiding damage or harm to the parties,

their business interests, and their children which could result from public access to such provisions of the Agreement.

3. There is a compelling countervailing public interest in protecting the sanctity of contracts such as the Agreement, where people bargain for and agree upon a mechanism to resolve future disputes in a confidential manner and other contract terms which are not contrary to law, and where each party relies on the other party to perform his or her obligations under the contract.

(R pp 139-140). Judge Owens thus sealed the court file not only in Case No. 08-CVD-20661, but also in any subsequent judicial action between the parties concerning the Separation Agreement. (R pp 140-141).

Mr. France sued Ms. France in Mecklenburg County Superior Court Case No. 08-CVS-28389 on 31 December 2008, thirteen days after entry of the Owens Order. (R pp 64-65, 110-111; R S pp 262-275). In doing so, he alleged that Ms. France had materially breached certain provisions of the Separation Agreement concerning (1) care and custody of their two minor children, (R S pp 267-270(¶¶ 16-49)); (2) confidentiality, (R pp 64-65, 111; R S pp 270-271(¶¶ 50-60)); and (3) reimbursement for living expenses, (R S p 272(¶ 62)).⁴ Mr. France then alleged that such purported breaches entitle him to one of three alternative remedies: (1) rescission of the Separation Agreement, (R S pp 272-273(¶¶ 63-70)), (2) specific

⁴ According to Mr. France, Ms. France's purported breaches of confidentiality include (1) disparaging him before various persons, including friends and family; (2) disclosing the Separation Agreement to an attorney with whom she purportedly was romantically involved; and (3) not fully cooperating with Mr. France in his lawsuit against her in Case No. 08-CVD-20661. (R S pp 270-271(¶¶ 50-60)).

performance of the Separation Agreement, (R S pp 273-274(¶¶ 71-77)), or (3) recovery of damages, (R S p 274(¶¶ 78-80)).

Ms. France subsequently responded under oath to the Complaint, denying all liability and counterclaiming for specific performance, damages, counsel fees, and mandatory injunctive relief based on Mr. France's numerous breaches of the Separation Agreement. (R S pp 466-500, 570-575). Specifically, she alleged that Mr. France had materially breached the Separation Agreement in seven (7) ways:

- (1) By failing to pay governess expenses for their two minor children – totaling \$52,090.00 from August 2008 through February 2009 – in violation of Paragraph 40 of the Separation Agreement, (R S p 487(¶ 30)),
- (2) By failing to pay the \$3 million distributive award due on 1 January 2009, in violation of Paragraph 24(b) of the Separation Agreement, (R S pp 487-488(¶ 31)),
- (3) By harassing her in many ways – including, but not limited to, engaging private investigators to surveil her – in violation of Paragraph 4 of the Separation Agreement, (R S pp 488-492(¶ 32)),
- (4) By violating Paragraph 36(a) of the Separation Agreement concerning the care of, and joint decision-making for, their two minor children, (R S pp 492-493(¶¶ 33-34)),
- (5) By failing to pay \$5,015.00 in school-related expenses for Ms. France's minor daughter from a prior marriage, in violation of Paragraph 43 of the Separation Agreement, (R S p 493(¶ 35)),
- (6) By violating the confidentiality provisions of Paragraph 47 of the Separation Agreement in various ways, (R S pp 493-494(¶¶ 36-38)), and

(7) By refusing to pay the \$32,500 alimony payment for May 2009 and future alimony payments, in violation of Paragraph 32 of the Separation Agreement, (R S pp 570-571(¶¶ 27a., 38a)).

Mr. France later admitted that he did not make the payments described in bulleted items (1), (2), (5), and (7), supra – despite a clear ability to do so – and denied liability for any other breach of the Separation Agreement. (R S pp 567-569).

Case No. 08-CVD-28389 subsequently appeared on a printed calendar when several substantive and discovery related matters were noticed for hearing, including, but not limited to, Ms. France's motions (1) to compel discovery concerning surveillance-related activities; and (2) for a mandatory preliminary injunction requiring Mr. France to fulfill his financial obligations under the Separation Agreement, (R p 112; R S pp 496-497, 571-573, 633-638, 686-686, 689-690, 791-794). Mr. France moved on 29 September 2009 to close all proceedings in light of the Owens Order, (R pp 65, 112; R S pp 731-740), the same day he moved for (1) appointment of a parenting coordinator; and (2) imposition a custody arrangement consistent with the parenting plan prescribed by the Separation Agreement. (R S p 741-758).

Judge Culler heard the parties' respective positions regarding Mr. France's closure motion, in open court, on 15 October 2009. (R pp 66, 113; 10/15/09 T pp 1-24; R S pp 803-816). After doing so, Judge Culler declared that upon

considering Virmani and an article published by the North Carolina Institute of Government, she was denying Mr. France's motion:

My concern, even though I have two parties who I believe would love to have this private, is that it certainly doesn't set a very good precedent to allow people to agree to make the courthouse private. I don't think that that's enforceable if they did do so.

(10/15/2009 T p 19, line 24 – p 20, line 3).

Ms. France's long-pending motions for injunctive relief and to compel surveillance-related discovery again came on for hearing before Judge Culler on 13 November 2009, (R p 113), with full briefing from the parties. (R S pp 1283-1297, 1463-1472, 1535-1559, 1681-1685). Mr. France asked Judge Culler at the outset of such hearing to enter the First Culler Order before reaching the scheduled substantive matters, and she obliged. (R pp 7(¶¶ 5-6), 66, 113).⁵ Mr. France immediately appealed, prompting Judge Culler to take under advisement how she could proceed in light of such appeal. (R pp 7(¶ 7), 13(¶ 4), 66, 113; R S 1828-1829).

⁵ The transcript from the 13 November 2009 hearing – which was open to the public and attended by media representatives, (R pp 7(¶¶ 5-7), 12-13) – is attached as Exhibit C to the Defendant's Response to Petition for Writ of Supersedeas filed in Case No. COAP09-1003. Ms. France is unsure whether this Court ought to even look at such transcript, however, because Mr. France characterizes her filing thereof as a breach of confidentiality. See Plaintiff-Appellant's Response to Defendant's Motion to Dissolve Writ of Supersedeas (No. COAP09-1003), p 17, n.4 (decrying pp 44-76 of Ms. France's "First Petition for Writ of Discretionary Review" filed with our Supreme Court in Case No. 149P10).

The litigants timely submitted their respective additional authorities to Judge Culler on 17 November 2009, (R pp 66-67, 113-114; R S pp 1831-1879), the same day that The Charlotte Observer Publish Company d/b/a The Charlotte Observer and WCNC-TV, Inc. (“Media Movants”), filed their Motion to Determine Access to Judicial Proceedings and Documents (N.C. Gen. Stat. § 1-72.1) (“the Access Motion”) in Case Nos. 08-CVD-20661 and 08-CVD-28389. (R pp 5-13). Judge Culler heard the litigants’ respective positions regarding the Access Motion on 11 December 2009, (R p 14), at the close of which she granted such motion in each case. (12/11/09 T pp 42-58).

Judge Culler entered the Second Culler Order on 18 December 2009, (R pp 14-19), which, as noted above, is the focus of Appeal 2.⁶ This Court subsequently stayed enforcement of the First Culler Order and the Second Culler Order during the pendency of Mr. France’s interlocutory appeals. See Case No. COA09P-1003.

ARGUMENT

The trial court repeatedly determined that Ms. France has sought – to the extent the law allows – the same relief as Mr. France with respect to sealing court files and closing courtrooms. (R pp 15(¶ 1), 17(¶ 14-16), 127-128(¶¶ 5, 11, 12), 128(¶ 3), 139(¶ 6)). These determinations are unchallenged on appeal, see, e.g.,

⁶ Mr. France moved this Court to approve his attempt to exclude the Media Movants from the record settlement process in Appeal 2, (R pp 60-87), which this Court denied after considering the resistance to such motion. (R pp 89-243).

Plaintiff-Appellant's Brief, pp 13-33, meaning that Judge Culler's rulings equally affect Mr. France and Ms. France from a substantive standpoint. See, e.g., N.C. R. App. P. 28(a), (b)(6) (2010) (confining the scope of appellate review to issues raised and argued in the briefs).

Ms. France nonetheless is reluctant to appear complicit in every appellate argument Mr. France advances. Cf. e.g., State v. Cagle, 182 N.C.App. 71, 75-76, 641 S.E.2d 705, 708-709 (2007) (discussing counsel's ethical duty to disclose adverse authority). For example, while Mr. France asks this Court to review the Second Culler Order *de novo*, see Plaintiff-Appellant's Brief, p 16, it is entirely possible that an abuse-of-discretion standard could apply:

The present case raises issues about whether the press and public have a right of access to search warrants and related documents in criminal proceedings and the extent of this right. Although the issues in this case have not previously been specifically addressed, Virmani . . . and Baltimore Sun [v. Goetz], 886 F.2d 60 (4th Cir. 1989)] set forth standards which guide our analysis. "The judicial officer's decision to seal . . . is subject to review under an abuse of discretion standard." Baltimore Sun, 886 F.2d at 65.

In re Cooper, -- N.C.App. --, 683 S.E.2d 418, 423 (2009), disc. review denied, 363 N.C. 855, -- S.E.2d -- (2010); cf. Wallace Farm, Inc. v. City of Charlotte, -- N.C.App. --, 689 S.E.2d 922, 923 (2010) (employing an abuse-of-discretion standard to review a trial court's ruling that certain public records constituted trial preparation materials and thus were not subject to the plaintiff's inspection).

Similarly, in arguing that the Second Culler Order erroneously disturbs the Owens Order, see Plaintiff-Appellant's Brief, pp 16-22, Mr. France remains curiously silent regarding the following:

- The Owens Order expressly provides that court files could be unsealed later “by further order of the Court, after reasonable notice to the parties[,]” (R p 140-141(¶ 4)),
- Judge Owens’ departure from the bench arguably permitted another judge of coordinate jurisdiction – Judge Culler in this instance – to revisit the Owens Order even absent a finding of changed circumstances, see, e.g., Wachovia Bank, Nat’l Ass’n v. Harbinger Cap. Partners Master Fund I, Ltd., -- N.C.App. --, 687 S.E.2d 487, 494 (2009) ([“G]iven that Judge Ervin’s recusal barred him from revisiting the matter, we believe that Judge Diaz, because the case was reassigned to him by the Chief Justice, stepped into Judge Ervin’s shoes and could, in his discretion, revisit the preliminary injunction and rule on it absent a finding of changed circumstances.”),
- The Owens Order embodies a summary judgment ruling, the subsidiary factual findings and legal conclusions of which are not necessarily binding, see, e.g., Sunamerica Fin. Corp. v. Bonham, 328 N.C. 254, 261, 400 S.E.2d 435, 440 (1991) (“We note that ordinarily, findings of fact and conclusions of law are not required in the determination of a motion for summary judgment, and if these are made, they are disregarded on appeal.”); Metcalf v. Black Dog Realty, LLC, -- N.C.App. --, 684 S.E.2d 709, 717 (2009) (reciting similar principle), and
- The Owens Order seemingly does not bind the Media Movants, as they were not parties to Case No. 08-CVD-20661 or in privity with either party therein, see, e.g., Workman v. Rutherford Elec. Membership Corp., 170 N.C.App. 481, 491-492, 613 S.E.2d 243, 250 (2005) (“Like *res judicata*, collateral estoppel only applies if the prior action involved the same parties or those in privity with the parties and the same issues.”).

Ms. France likewise obviously disputes Mr. France's mantra that she materially breached the confidentiality provisions of the Separation Agreement. See, e.g., Plaintiff-Appellant's Brief, pp 7, 10, 12, 28, 29. Indeed, one glance at the pleadings plainly evinces her verified denial of each dubious accusation in this regard. Compare (R S pp 270-271(¶¶ 50-60)), with (R S pp 474-476(¶¶ 50-60)). In short, Mr. France's cries of "material breach" do not make it so.

Finally, several blemishes surface when viewing the three constitutionally based arguments Mr. France puts forth. See Plaintiff-Appellant's Brief, pp 22-32. For instance, if one carries his freedom-to-contract and right-to-privacy arguments to their respective logical extension, there is reason to believe that most (if not all) family law cases in this state involving (1) a marital separation agreement; and/or (2) a minor child, would unfold in a closed courtroom, with a closed court file. See id., pp 24-27, 30-32. It also is difficult to see how statutory privacy related measures operative in juvenile and adoption proceedings, see id., pp 30-31 (leaning upon such measures for support), in any way bolster Mr. France's right-to-privacy argument:

At least since 1887, this Court has recognized a common law right of the public to inspect public records. However, to the extent our General Assembly has dictated by statute that certain documents will not be available to the public, this common law right has been superseded. We have long held that when the General Assembly, as the policy-making agency of our government, legislates with respect to the subject matter

or any common law rule, the statute supplants the common law rule and becomes the law of the State.

Virmani, 350 N.C. at 473, 515 S.E.2d at 691. Last, but not least, it is extremely telling that the ***first claim for relief*** pled in the Complaint – rescission – is nowhere to be found in Mr. France’s right-to-a-remedy argument. See Plaintiff-Appellant’s Brief, pp 27-30; see also (R S pp 847-848) (delineating the six reasons why Ms. France is entitled to summary judgment regarding such claim).

CONCLUSION

Ms. France respectfully requests that this Court consider the foregoing in expeditiously resolving Appeal 2.

Respectfully submitted this 16th day of June 2010.

JAMES, McELROY & DIEHL, P.A.

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⁷ I certify that each attorney listed below authorized me to list his or her name on this document as if he or she personally signed it. See N.C. R. App. P. 33(b) (2010) (requiring such certification).

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies under N.C. R. App. P. 28(j)(2)(B) (2010) that this **DEFENDANT-APPELLEE'S BRIEF** is presented in Times New Roman 14-point type and contains **3,343** words (exclusive of the Cover Page, Index, Table of Authorities, Certificate of Compliance, Certificate of Filing and Service, and the Appendix), as tabulated by Microsoft Word.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that this **DEFENDANT-APPELLEE'S BRIEF** has been (1) filed this date with the Court of Appeals of North Carolina through proper electronic submission at www.ncappellatecourts.org; and (2) served upon all counsel of record via electronic mail as follows:

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This the 16th day of June, 2010.

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