

BOYCE & ISLEY, PLLC V. COOPER AND THE CONFUSION OF NORTH CAROLINA LIBEL LAW

HUGH STEVENS*

Given that hyperbole, distortion, exaggeration and “spin” are fundamental ingredients of political campaign advertisements, it is not unusual for candidates to complain that their opponents’ ads are misleading, or even false. Occasionally, candidates take their complaints to the courthouse by filing libel suits against their opponents. Most such suits that have been filed in North Carolina have had no effect on state law, but one case has left North Carolina’s unique formulation of libel per se in disarray and stretched the state’s unfair and deceptive trade practices statute beyond recognition. This article analyzes the North Carolina Court of Appeals’ decision in Boyce & Isley, PLLC v. Cooper, and explains how the panel misapplied both common and statutory law in reinstating a claim for libel grounded in a political television advertisement. It concludes by forecasting how North Carolina law will be impaired if the decision is not repudiated.

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* Partner, Everett Gaskins Hancock & Stevens, LLP, Raleigh, N.C. A.B., 1965, J.D. with Honors, 1968, University of North Carolina at Chapel Hill. Co-Author, North Carolina Media Law Handbook (2d ed., 2001). Counsel Emeritus, North Carolina Press Association. The author would like to thank Caroline Lindsey, Erica Teagarden and Mollie T. James for their assistance in researching this Article.

INTRODUCTION

[I]t is of the utmost consequence that the people should discuss the character and qualifications of candidates¹

[T]he candidate who vaunts his spotless record and sterling integrity cannot convincingly cry 'Foul!' when an opponent or an industrious reporter attempts to demonstrate the contrary.²

On the eve of the 2000 election for Attorney General of North Carolina, Republican nominee Dan Boyce cried "Foul!" by suing his opponent, Democratic candidate Roy Cooper, for libel over a television advertisement.³ Boyce's tactic was not unprecedented; at least three other North Carolina political candidates filed defamation actions against opponents between 1988 and 2000, and another has done so since. But while the previous libel and slander suits filed by candidates disappeared without doctrinal impact, Boyce's has spawned an enigmatic and worrisome court of appeals opinion that wrongly applies North Carolina's common law of defamation and impermissibly extends North Carolina's statute on unfair and deceptive trade practices.

By declining to review the court of appeals' erroneous decision, the Supreme Court of North Carolina has left in disarray both the state's common law of defamation and the status of the unfair trade practices statute.⁴ The failure of the state's highest court to correct the decision also means that even if Boyce's suit ultimately is dismissed on First Amendment grounds,⁵ as it should be, the court of appeals' opinion will not disappear. Instead, it promises to become a peculiarly dangerous specimen of legal jetsam, cast adrift on the sea of the law and presenting serious hazards for judges and litigants who attempt to navigate the already confounding currents of North Carolina defamation law.

Although Dan Boyce's case has not gone to trial, and probably never will, the court of appeals' opinion already has demonstrated its potential to

1. Coleman v. MacLennan, 98 P. 281, 286 (Kan. 1908).
2. Monitor Patriot Co. v. Roy, 401 U.S. 265, 274 (1971).
3. Boyce & Isley PLLC v. Cooper, 153 N.C. App. 25, 27, 568 S.E.2d 893, 896-97 (2002), appeal dismissed and review denied, 357 N.C. 163, 580 S.E.2d 361, cert. denied, 124 S.Ct. 431, 157 L.E.2d 310 (2003). Dan Boyce is not the only plaintiff. The others include the candidate's father, G. Eugene Boyce; his sister, Laura Boyce Isley; his brother-in-law, Philip R. Isley; and the family's law firm, Boyce & Isley, PLLC.
4. See N.C. GEN. STAT. §§ 75-1.1 to -16.1 (2003).
5. As this Article went to press, the First Amendment issues presented by the Boyce suit were before the court of appeals as a result of the defendants having appealed from the trial court's denial of their motion for judgment on the pleadings pursuant to Rule 12(c) of the North Carolina Rules of Civil Procedure. See *infra* note 41 and accompanying text.

undermine principles of defamation law laid down by the Supreme Court of North Carolina more than sixty years ago, and to convert garden-variety libel suits into claims for treble damages under North Carolina's unfair trade practices statute.

This Article briefly reviews each of the recent campaign-based libel suits filed in North Carolina,⁶ explains how the court of appeals' opinion in the *Boyce* case misconstrued and misapplied the "single meaning" rule and other fundamental principles of libel per se,⁷ examines the panel's unjustified application of the North Carolina unfair trade practices statute to political speech,⁸ and explains why the opinion, if left uncorrected, is likely to make libel suits more confusing for judges and more difficult for litigants to settle.⁹

I. THE CAMPAIGN-BASED NORTH CAROLINA LIBEL SUITS

On at least five occasions since 1988, North Carolina political candidates have filed libel or slander suits against their opponents. While the political benefit of suing one's opponent is difficult to measure, judged by its legal efficacy the tactic thus far has been futile: two of the complaints were dismissed without the defendants having answered,¹⁰ another was settled on the first day of trial when the defendant issued an apology,¹¹ and in April 2004, a Wake County trial judge dismissed most of the plaintiff's claims in a fourth.¹² Although the suit filed by Dan Boyce and his family has persisted the longest, more than three years have passed without it advancing past the pleading stage and without the parties having conducted any discovery.¹³

The first North Carolina libel suit grounded in a political advertisement arose during the closing days of the 1988 lieutenant governor's race between Rocky Mount businessman Jim Gardner, the Republican nominee, and a Fayetteville lawyer, Democrat Tony Rand. A few days before the election Gardner and the state Republican Party placed

6. See *infra* Part I.

7. See *infra* Part III.

8. See *infra* Part IV.

9. See *infra* Part V.

10. See *infra* notes 23 and 29 and accompanying text.

11. Van Denton, *Gardner Apologizes for '88 Ad: Action Ends Suit Filed by Rand, News & Observer* (Raleigh, N.C.), Nov. 6, 1991, at 1A.

12. Grant v. Miller, No. 02-CVS-17172 (Wake County Super. Ct. April 20, 2004) (Memorandum of Decision and Order) (on file with the North Carolina Law Review).

13. See Appellees' Renewed Mot. to Dismiss Interlocutory Appeal and Req. to Expedite Mot. Prior to Filing Further Brs., Boyce & Isley, PLLC v. Cooper, (N.C. Ct. App., Feb. 9, 2004) (No. COA03-1542) (on file with the North Carolina Law Review). The delay is the result of two appeals coupled with orders staying discovery while the appeals have proceeded.

radio, television and newspaper advertisements implying that Rand had an inappropriate attorney-client relationship with George Purvis, a Fayetteville man whom Rand defended in a major drug-smuggling case in the late 1970s.¹⁴ The television advertisement said:

[Voice]: The following is documented by federal court records.

[Script with voice]: When a drug deal went bad, smuggler George Purvis Jr. fled to Fayetteville and hid out in Tony Rand's apartment. There he was able to elude authorities until his escape to Miami.

Upon instructions from Miami, Tony Rand had evidence removed from a Wilmington hotel room. Now Tony Rand claims to be a leader in the war on drugs.

[Voice]: The question is . . .

[Script]: Which side is Tony Rand on?

[Voice]: . . . which side of the war is Tony Rand on?

[Script]: Jim Gardner, Lt. Governor

[Voice]: Let's send a message to drug smugglers and their friends. Elect Jim Gardner lieutenant governor.¹⁵

Gardner's campaign refused Rand's demand that it retract the ads.¹⁶ On the day before the election, which Gardner won, Rand sued for libel.¹⁷ Rand took his suit against the lieutenant governor to trial but, in return for an in-court apology, dismissed it before any evidence was introduced.¹⁸

The 1996 campaign for the North Carolina House of Representatives in District 93 pitted John Rayfield, the Republican incumbent, against

14. Denton, *supra* note 11; Van Denton, *Jury to Evaluate Political Claims: GOP Commercials About Rand at Issue*, NEWS & OBSERVER (Raleigh, N.C.), Oct. 28, 1991, at 1A.

15. Denton, *supra* note 11.
16. Amendment to Defs.' Answer to First Am. Compl. at 2, Rand v. Gardner, (Cumberland County Sup. Ct. Aug. 20, 1991) (No. 90-CVS-5487) (on file with the North Carolina Law Review).

17. Court records show that Rand's libel suit originally was filed in Wake County as *Rand v. Gardner*, No. 88-CVS-10389. A review of court files shows that Rand voluntarily dismissed the Wake County action in September, 1990 and re-filed his suit in Cumberland County as 90-CVS-5487.

18. Denton, *supra* note 11. Rand, who is now a state senator representing Cumberland and Bladen counties, lost the 1988 lieutenant governor's race. He was re-elected to the North Carolina Senate in 1994. He currently serves as Senate Majority Leader. See THE NORTH CAROLINA MANUAL, 2001-02, at 417.

Democrat Billy Joye, whom Rayfield had unseated two years earlier.¹⁹ Joye aired a cable television advertisement purporting to include a picture of Rayfield, but the photo actually was of someone else.²⁰ Rayfield, who believed Joye purposely had substituted a photo of an older man in an attempt to suggest that Rayfield was "infirm," sued Joye for libel.²¹ Shortly after winning the election,²² Rayfield voluntarily dismissed his lawsuit.²³

In March 2000, attorney Jack W. Daly, Certified Public Accountant Les Merritt and electrician Johnnie Mayfield were contesting for the Republican nomination for state auditor.²⁴ Daly labeled Mayfield, a political novice, "johnnie-come-lately."²⁵ Mayfield said Daly was "unfit to run for any office."²⁶ Daly responded to Merritt's pledge to be a taxpayer watchdog by calling him a "taxpayers' Chihuahua."²⁷ When Merritt issued a press release saying that Daly was not authorized to practice law in Charlotte, Daly sued him for libel.²⁸ The suit was dismissed two and a half years later owing to Daly's failure to prosecute it.²⁹

The most recent libel suit spawned by a political campaign arose in October 2002, as Democrat Brad Miller and Republican Carolyn Grant were vying for the seat in the U.S. House of Representatives from North Carolina's newly created Thirteenth Congressional District.³⁰ Miller broadcast a television ad saying: "Carolyn Grant's partners sued her for taking \$95,000 of company money to spend on her political campaign. Carolyn Grant even admitted in court that she took \$40,000 of her son's college money because she wanted to buy a new car."³¹

A few days later Miller aired a different ad containing this statement:

19. Suzanne Jeffries, *Campaign Ad May Land House Combatants in Court*, CHARLOTTE OBSERVER, Oct. 31, 1996, at 4C.

20. *Id.*

21. *Id.*

22. Suzanne Jeffries, *Another Close Race with Joye Goes to Rayfield*, CHARLOTTE OBSERVER, Nov. 7, 1996, at 5C.

23. Rayfield v. Joye, No. 96-CVS-4043 (Gaston County Dist. Ct. Nov. 14, 1996) (Dismissal without Prejudice) (on file with the North Carolina Law Review).

24. Anne Saker, *Rivalry for GOP Auditor Nomination Is No Love Triangle*, NEWS & OBSERVER (Raleigh, N.C.), Apr. 27, 2000, at 1A.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. Daly v. Merritt, No. 00-CVD-4867 (Mecklenburg County Dist. Ct. Dec. 19, 2002) (Administrative Order Closing File) (on file with the North Carolina Law Review).

30. Lynn Bonner, *District 13 Hopeful to Sue Opponent Over Ads*, NEWS & OBSERVER (Raleigh, N.C.), Nov. 5, 2002, at 5B.

31. Complaint at ¶ 7, Grant v. Miller, (Wake County Super. Ct. Dec. 27, 2002) (No. 02-CVS-17172) (on file with the North Carolina Law Review). Please note that the author is a member of Congressman Miller's defense team in this case.

"Carolyn Grant took thousands of dollars from developers and voted to use thirty-three million dollars to build a highway interchange for a developer."³²

The day before the election, Grant announced in the media that she intended to sue Miller for defamation.³³ Miller won the election, and, on December 27, 2002, Grant filed a complaint for defamation and unfair trade practices against him and key members of his campaign staff.³⁴ On April 20, 2004, Judge Howard Manning, Jr. dismissed all of Grant's claims except her claim for libel per se grounded in the statement that "she took \$40,000 of her son's college money because she wanted to buy a new car."³⁵ On May 18, 2004, Congressman Miller filed a notice of appeal from Judge Manning's ruling with respect to that claim.³⁶

To date, none of the cases described above has had a lasting impact on North Carolina's jurisprudence and only one—Grant's suit against Congressman Miller—has an opportunity to have any effect in the future. By contrast, the suit brought against Attorney General Cooper and his campaign by Dan Boyce and his family already casts long shadows over North Carolina's common law of defamation.

II. *BOYCE & ISLEY, PLLC V. COOPER*³⁷

The lawsuit that is the focus of this Article began in October 2000, when Democrat Roy Cooper and Republican Dan Boyce were locked in a heated campaign for Attorney General of North Carolina. In the campaign's closing weeks Cooper aired television ads that said:

I'm Roy Cooper, candidate for Attorney General, and I sponsored this ad. Dan Boyce—his law firm sued the state, charging \$28,000 an hour in lawyer fees to the taxpayers. The judge said it "shocks the conscience." Dan Boyce's law firm wanted more than a police officer's salary for each hour's work. Dan Boyce, wrong for Attorney General.³⁸

Six days before the election, Boyce filed a complaint with the North Carolina State Board of Elections alleging that Cooper's ad violated a state statute prohibiting the publication of "derogatory reports with reference to

32. Bonner, *supra* note 30.

33. *Id.*

34. Complaint at ¶¶ 22, 67, Grant, *supra* note 31.

35. Notice of Appeal, Grant v. Miller (Wake County Super. Ct. May 18, 2004) (No. 02-CVS-17172) (on file with the North Carolina Law Review).

36. *Id.*

37. 153 N.C. App. 25, 568 S.E.2d 893 (2002), appeal dismissed and review denied, 357 N.C. 163, 580 S.E.2d 361, cert. denied, 124 S.Ct. 431, 157 L.Ed.2d 310 (2003).

38. *Id.* at 27, 568 S.E.2d at 897.

any candidate in any primary or election, knowing such report to be false or in reckless disregard of its truth or falsity.”³⁹ The day before the election, Boyce and other members of his law firm sued Cooper for libel, unfair trade practices, and violation of the same section of the state election laws that was the subject of their complaint to the State Board of Elections.⁴⁰ The suit currently is before the North Carolina Court of Appeals for the second time on the defendants’ appeal from the trial court’s denial of their Rule 12(c) motion.⁴¹ The focus of this Article, however, is the inexplicable opinion that resulted from the parties’ first visit to the court of appeals.⁴²

Three weeks after the lawsuit was filed, the Board of Elections unanimously voted to dismiss Boyce’s complaint.⁴³ In its findings, the Board explained that Cooper’s advertisement grew out of a class action in which the law firm Wornble Carlyle Sandridge & Rice and R. Eugene Boyce represented taxpayers who sought refunds of the North Carolina intangibles tax.⁴⁴ When the action was settled, the attorneys asked the

39. N.C. GEN. STAT. § 163-274(8) (2003).

40. Matthew Esley, *Boyce Sues Cooper Over Negative Ad.*, NEWS & OBSERVER (Raleigh, N.C.), Nov. 9, 2000, at 20A. In addition to Cooper, the plaintiffs named as defendants Cooper’s campaign committee and three of his key campaign workers—Julia White, Stephen Bryant, and Kristi Hyman. *Id.*

41. North Carolina’s Rules of Civil Procedure Rule 12(c) employs different standards than Rule 12(b). A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of the complaint by determining “whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory.” “*Verteen v. Holden*, 121 N.C. App. 779, 783, 468 S.E.2d 471, 474 (1996) (citing *Lynn v. Overlook Dev.*, 328 N.C. 689, 692, 403 S.E.2d 469, 471 (1991)). A complaint is subject to dismissal under Rule 12(b)(6) “if no law exists to support the claim made, if sufficient facts to make out a good claim are absent, or if facts are disclosed which will necessarily defeat the claim.” *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990). By contrast, the function of Rule 12(c) is “to dispose of baseless claims or defenses when the formal pleadings reveal their lack of merit. A motion for judgment on the pleadings is the proper procedure when all the material allegations of fact are admitted in the pleadings and only questions of law remain.” *Ragsdale v. Kennedy*, 286 N.C. 130, 137, 209 S.E.2d 494, 499 (1974). In a 12(c) ruling on a motion for judgment on the pleadings, “[t]he trial judge is to consider only the pleadings and any attached exhibits which become part of the pleadings.” *Minor v. Minor*, 70 N.C. App. 76, 78, 318 S.E.2d 855, 867 (1984). Because the two rules do not employ the same standards, a claim that survives a Rule 12(b)(6) motion may still be dismissed pursuant to Rule 12(c). *Cash v. State Farm Mutual Auto. Ins. Co.*, 137 N.C. App. 192, 201–02, 528 S.E.2d 372, 378 (2000). In this case, the defendants’ Rule 12(c) motion focuses on the First Amendment issues raised by the complaint. *Def.-Appellants’ Br.*, *Boyce & Isley, PLLC v. Cooper*, (N.C. Ct. App. Feb. 4, 2004) (No. COA03-1542) (on file with the North Carolina Law Review).

42. *Boyce & Isley, PLLC v. Cooper*, 153 N.C. App. 25, 568 S.E.2d 893 (2002), appeal dismissed and review denied, 357 N.C. 163, 580 S.E.2d 361, *cert. denied*, 124 S.Ct. 431, 157 L.Ed.2d 310 (2003).

43. Order of the State Board of Elections, In the Matter of the Complaint of Boyce & Isley, PLLC of November 2, 2000 (Wake County Dec. 20, 2000) (on file with the North Carolina Law Review).

44. *Id.* at ¶ 1.

presiding judge to award \$23 million in attorney fees from the settlement proceeds.⁴⁵ In his order denying the fee request, Judge Howard E. Manning, Jr. criticized it as amounting to a fee of \$28,000 an hour, which he noted was in excess of a policeman's yearly salary, and stated that it "shocked the conscience."⁴⁶

The Board also found as a fact that during the campaign Dan Boyce had associated himself with all of the tax cases in which his family had been involved, including the case in which the \$23 million dollar attorney fee request was presented.⁴⁷ Until Cooper began to cite the fee request as a negative, the Board said, "R. Daniel Boyce used the Boyce family tax cases as a positive campaign issue. He associated himself with all the cases even though he was not counsel of record in all of the cases."⁴⁸

After the State Board of Elections dismissed Boyce's complaint, Cooper and his co-defendants moved to dismiss the lawsuit pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure.⁴⁹ The defendants also asked the trial court to take judicial notice of the Board of Elections' findings and conclusions and of various newspaper articles concerning the election campaign.⁵⁰ On April 6, 2001, the trial court granted the motion to dismiss but declined to take judicial notice of the Board of Elections' rulings or the newspaper articles.⁵¹ The plaintiffs appealed the dismissal of their defamation and unfair trade practices claims, but did not appeal the dismissal of their claim grounded in North Carolina's statutory prohibition against making false, derogatory statements against a candidate;⁵² the defendants cross-appealed from the trial court's refusal to take judicial notice of the newspaper articles or the Board of Elections' order.⁵³ On September 17, 2002, the court of appeals panel issued an opinion reinstating the plaintiffs' defamation and unfair trade practices claims and upholding the trial court's refusal to take judicial

45. *Id.*

46. *Id.* at ¶¶ 1-2.

47. *Id.* at ¶ 4.

48. *Id.*

49. Boyce & Isley, PLLC v. Cooper, 153 N.C. App. 25, 26-27, 568 S.E.2d 893, 896 (2002), appeal dismissed and review denied, 357 N.C. 163, 580 S.E.2d 361, *cert. denied*, 124 S.Ct. 431, 157 L.Ed.2d 310 (2003).

50. *Id.* at 37, 568 S.E.2d at 903. The opinion does not identify the newspaper articles of which Cooper and his co-defendants wanted the trial court to take judicial notice, nor does it explain why they were proffered. These articles are, however, on file with the North Carolina Law Review.

51. *Id.* at 28, 37, 568 S.E.2d at 897, 903. The court of appeals' opinion in the Southeastern Reporter Second Series erroneously gives the date of the trial court's dismissal order as "April 6, 2000."

52. N.C. GEN. STAT. § 163-274(8) (2003). See also *supra* note 39 and accompanying text.

53. Boyce & Isley, 153 N.C. App. at 37, 568 S.E.2d at 903.

notice of the Board of Elections' order or the newspaper articles.⁵⁴ In holding that the plaintiffs had stated judiciable claims for defamation and unfair trade practices, the panel seriously undermined established principles of North Carolina defamation law.

III. THE COURT OF APPEALS' MANIPULATION AND MISAPPLICATION OF NORTH CAROLINA LIBEL COMMON LAW

The seminal summary of North Carolina's unique⁵⁵ formulation of the common law of libel is found in *Flake v. Greensboro News Co.*⁵⁶ With respect to "libel per se"—the only category of libel pleaded by the *Boyce* plaintiffs⁵⁷—Justice Barnhill's erudite opinion for the court in *Flake* laid down several rules of construction that have been applied repeatedly by North Carolina courts for more than six decades.⁵⁸ For purposes of this

54. *Id.* at 39, 568 S.E.2d at 904. The members of the panel were Judge Patricia Timmons-Goodson, who wrote the opinion, and Judges Linda McGee and Edward Greene. *Id.* at 26, 39, 568 S.E.2d at 893, 904. Because the court of appeals never sits en banc, this Article refers to the opinion as having been issued by "the panel," rather than by "the court." See generally John V. Orth, *Why the North Carolina Court of Appeals Should Have a Procedure for Sitting En Banc*, 75 N.C.L. REV. 1981 (1997) (discussing the lack of an en banc proceeding in North Carolina).

55. A leading treatise describes North Carolina libel law as "a stew" that is not duplicated in any other jurisdiction. 1 ROBERT D. SACK, DEFAMATION: LIBEL, SLANDER AND RELATED PROBLEMS 2-111 to -112 (3d ed. 2004). See also Sleem v. Yale Univ., 843 F. Supp. 57, 62 (M.D.N.C. 1993) ("North Carolina's libel law is a somewhat unique variation on the generic common law"). What makes North Carolina's formulation unique is its division of libel into three categories, each of which functionally constitutes a separate tort: (1) libel per se, which refers to publications that are facially and unambiguously defamatory; (2) publications that are susceptible to two reasonable interpretations one of which is defamatory and the other of which is not; and (3) libel per quod, which refers to publications that are not transparently defamatory, but which become so when considered with innuendo, colloquium, and explanatory circumstances. SACK, at 2-111 to -112. Although the nuances of defamation law vary from state to state, most jurisdictions simply divide the tort into two categories—per se and per quod. *Id.* at 2-104 to -105.

56. 212 N.C. 780, 195 S.E. 55 (1938).

57. Plaintiffs' complaint includes a claim labeled "slander per se," but it is well settled that when defamatory matter is distributed by radio, television or cable it is deemed "libel," not "slander." RESTATEMENT (SECOND) OF TORTS § 568A (1977). See also Woody v. Catawba Valley Broad. Co., 272 N.C. 459, 462, 158 S.E.2d 578, 581 (1979) (ruling that defamatory radio broadcast presents potential claim for libel per se); Greer v. Skyway Broad. Co., 256 N.C. 382, 390-91, 124 S.E.2d 98, 104 (1962) (noting that the distinctions between libel and slander are inapplicable to radio broadcasting).

58. See, e.g., *Renwick v. News & Observer Publishing Co.*, 310 N.C. 312, 318, 312 S.E.2d 405, 409 (1984) (holding that an editorial susceptible of both defamatory and non-defamatory meaning will not support a claim for libel per se); R.H. Bowling, Inc. v. United Steelworkers of America, AFL-CIO, 270 N.C. 160, 168-69 154 S.E.2d 344, 352-53 (1967) (applying *Flake* principles to uphold corporation's claim for libel per se); Bell v. Simmons, 247 N.C. 488, 493-94, 101 S.E.2d 383, 387-88 (1958) (applying *Flake* to reverse trial court's dismissal of plaintiff's claim for libel per se); Roth v. Greensboro News Co., 217 N.C. 13, 18, 23, 6 S.E.2d 882, 886, 889 (1940) (holding that newspaper article falsely reporting that plaintiff was arrested and charged with "white slavery" supports jury award for libel per se); Broughton v. McClatchy Newspapers, Inc., 161 N.C. App. 20, 28, 588 S.E.2d 20, 27 (2003) (holding that statements complained of are

case, the most important of these principles is that to be libelous per se, publications "must be susceptible of but one meaning and of such nature that the court can presume as a matter of law that they tend to disgrace and degrade the party or hold him up to public hatred, contempt, or ridicule, or cause him to be shunned and avoided."⁵⁹ This principle means that "[t]he initial question for the court in reviewing a claim for libel per se is whether the publication is such as to be subject to only one interpretation."⁶⁰ In addressing this question, "[t]he principle of common sense requires that courts shall understand them as other people would."⁶¹

Having cited the correct principle of law,⁶² the court of appeals panel proceeded to emasculate it by parsing and interpreting language that supposedly was not amenable to parsing or interpretation. At one point the opinion says: "If proven, the above-stated facts would show that defendants' advertisement contained several central errors of fact, publication of which tended to falsely *imply* that plaintiffs had sued the state and demanded excessive fees"⁶³ At another point, the opinion says, "the term 'charged' or 'charging' *suggests* that, not only did plaintiffs actually receive such compensation at the taxpayers' expense, they did so without deference to the court."⁶⁴ At still another point the panel engages in speculation as to what potential meaning the defendants might have had in mind when they chose the wording for the advertisement.⁶⁵ The panel then chastises the defendants for failing to include explanatory material that would have rendered their message unambiguous.⁶⁶

If the ad truly were defamatory per se, however, it would not "imply" or "tend to imply" or "suggest" anything: it would say something unequivocally and without nuance. Nor would there be room for speculation as to what the defendants intended the ad to convey, or how they might have made their meaning clear. Tendency, suggestiveness and the potential of defamatory meaning do not constitute libel per se under North Carolina law.

susceptible of more than one meaning and thus do not support claim for libel per se); *Martin Marietta Corp. v. Wake Stone Corp.*, 111 N.C. App. 269, 277-280, 432 S.E.2d 428, 433-35 (1993) (applying *Flake* "single meaning" rule and "four corners" principle to uphold dismissal of plaintiff's claim for libel per se).

59. *Flake*, 212 N.C. at 786, 195 S.E. at 60.

60. *Remwick*, 310 N.C. at 318, 312 S.E.2d at 409.

61. *Flake*, 212 N.C. at 786, 195 S.E. at 60 (referring to publications).

62. *Boyce & Isley, PLLC, v. Cooper*, 153 N.C. App. 25, 30-31, 568 S.E.2d 893, 898-99 (2002), *appeal dismissed and review denied*, 357 N.C. 163, 580 S.E.2d 361, *cert. denied*, 124 S.Ct. 431, 157 L.Ed.2d 310 (2003).

63. *Id.* at 29, 568 S.E.2d at 898 (emphasis added).

64. *Id.* at 31, 568 S.E.2d at 899 (emphasis added).

65. *Id.* at 32, 568 S.E.2d at 900.

66. *Id.* at 31, 568 S.E.2d at 899.

In its clumsy attempt to apply the "single meaning" rule, the court of appeals panel focused on the word "charged."⁶⁷ In response to the defendants' argument that the word was susceptible of a non-defamatory meaning, and thus was not libelous per se, the panel responded:

Although we agree with defendants that "it is not libelous per se as a matter of law to state that an attorney sought a very large fee—not in the context of a \$150 million class action lawsuit[,]” such is not the case here. Defendants' advertisement did not state that plaintiffs *sought* a very large fee—it stated that plaintiffs *charged* a very large fee. There is an important distinction between these two words, of which defendants, in crafting the text of their advertisement, were undoubtedly aware. The word "sought" or "seeking" indicates that plaintiffs submitted their request for compensation to the court. The fact that plaintiffs *sought* extraordinary compensation, moreover, does not imply that plaintiffs actually *received* such compensation. In contrast, the term "charged" or "charging" suggests that, not only did plaintiffs actually receive such compensation at the taxpayers' expense, they did so without deference to the court. Contrary to defendants' argument, we do not believe the average layperson to be so familiar with the intricacies of class-action lawsuits as to know that the courts must approve of attorney compensation in such suits.⁶⁸

The rhetorical gymnastics in this passage obscure, but do not conceal, the key error in the panel's reasoning—its determination that "charging" a fee is synonymous with collecting or receiving it. Any lawyer who has ever submitted legal invoices to clients knows otherwise.⁶⁹

Justice Barnhill's opinion in *Flake* prescribes that, in determining whether a publication is libelous per se, the publication must be construed, "stripped of all insinuations, innuendo, colloquium, and explanatory circumstances,"⁷⁰ and must be defamatory on its face "within the four corners thereof."⁷¹ As with the "single meaning" rule, the court of appeals panel wholly ignored this principle, seizing on and parsing the single word "charged" while ignoring contextual language such as, "Dan Boyce's law

67. *Id.*

68. *Id.*

69. If the panel wished to use common sense and experience to interpret the ad as other people would, it could have consulted the nearest dictionary. *Webster's* lists more than 20 definitions for the verb "to charge," including "to fix or ask as fee or payment;" "to ask payment of a person;" and "to ask or set a price." MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 192 (10th ed. 1995).

70. *Flake*, 212 N.C. 780, 787, 195 S.E. 55, 60 (1938) (citations omitted).

71. *Id.* (citing *Kee v. Armstrong, Byrd & Co.*, 182 P. 494 (Okla. 1919)).

firm wanted more than a police officer's salary for each hour's work,"⁷² which indicates that a large fee was merely requested, rather than actually required or received.

In sum, the panel's own analysis demonstrates that the message conveyed by the Cooper ad is susceptible to at least two meanings; therefore, the panel erred in holding that the ad could support a claim for libel per se. Since that is the only variety of defamation pleaded by the plaintiffs, the panel should have affirmed the trial court's dismissal of the defamation claim.⁷³

IV. THE PANEL'S ERROR IN ALLOWING THE BOYCE PLAINTIFFS' UNFAIR TRADE PRACTICES CLAIM TO PROCEED

The panel's failure to appreciate the significance of the political context in which the Cooper ad was broadcast also led it to err in holding that the complaint states a claim for unfair or deceptive trade practices.⁷⁴

Since the mid-1970s, the Supreme Court has distinguished between, and applied different First Amendment standards to, political speech and commercial speech. Political speech, which is the primary object of the First Amendment,⁷⁵ manifestly includes speech by and on behalf of political candidates.⁷⁶ Indeed, the Supreme Court has held that the constitutional guarantee of freedom of speech "has its fullest and most urgent application precisely to the conduct of campaigns for political office."⁷⁷ As James Madison wrote, "[t]he value and efficacy of [the right

72. *Boyce & Isley*, 153 N.C. at 27, 568 S.E.2d, at 897.

73. Justice Barnhill's opinion in *Fiske* establishes the pleading requirements for each of North Carolina's three libel torts. To assert a claim for libel of the second class, the plaintiff must allege that the publication at issue is susceptible of two interpretations, one of which is defamatory and the other of which is not. *Fiske*, 212 N.C. at 785, 195 S.E. at 59. To allege a judicial claim for libel *per quod*, the plaintiff must allege special damages (i.e., direct pecuniary loss). *Id.* The *Boyce* plaintiffs did not attempt to bring their allegations within either of the standards set forth above; to the contrary, their complaint specifically and affirmatively alleges claims for libel per se and slander per se. *Boyce & Isley*, 153 N.C. App. at 27, 568 S.E.2d at 897.

74. See N.C. GEN. STAT. § 75-1.1 (2003). The statute declares that unfair methods of competition, and unfair or deceptive acts or practices, are unlawful if they are in or affect "commerce," which is defined as all business activities other than "services rendered by a member of a learned profession." *Id.*

75. See, e.g., *Mills v. Alabama*, 384 U.S. 214, 218 (1966) (noting that "there is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs"); *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (discussing the importance of free speech in political discussions); *Z. Chafetz, FREE SPEECH IN THE UNITED STATES* 28 (1941) (noting that "the fundamental policy of the First Amendment [is] the open discussion of public affairs"); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 20 (1971) (arguing that political speech should be the only type of speech protected by the First Amendment).

76. *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 271-72 (1971).

77. *Id.*

to elect members of government] depends on the knowledge of the comparative merits and demerits of the candidates for public trust, and on the equal freedom, consequently, of examining and discussing these merits and demerits of the candidates respectively."⁷⁸

The seminal commercial speech case is *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,⁷⁹ in which the Court struck down a Virginia statute prohibiting licensed pharmacists from advertising the prices of prescription drugs.⁸⁰ Justice Blackmun's opinion for the Court defined commercial advertising as speech which, "however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price."⁸¹ The pharmacist, he said:

does not wish to editorialize on any subject, cultural, philosophical, or political. He does not wish to report any particularly newsworthy fact, or to make generalized observations even about commercial matters. The "idea" he wishes to communicate is simply this: "I will sell you the X prescription drug at the Y price."⁸²

As a result of *Virginia Pharmacy* and its progeny, including *Bates v. State Bar of Arizona*⁸³ and other "lawyer advertising" cases,⁸⁴ lawyers in North Carolina can, and do, engage in commercial advertising, albeit within ethical rules imposed by the State Bar.⁸⁵ One only need watch television for a few hours in any of the state's urban markets to see numerous examples of attorneys communicating the "idea" that consumers should hire them when and if a legal issue or problem arises.

Despite the clear distinction between commercial and political speech, the court of appeals panel inexplicably treated the plainly political advertisement as if it were commercial speech for the purposes of the unfair or deceptive trade practices claim in *Boyce & Isley*. Whatever voters might have thought of the ad, they simply could not have interpreted it as an invitation to hire Roy Cooper's firm over Dan Boyce's firm to handle a legal matter. The message at issue in this case is political, not commercial, and that distinction is unaffected by the fact that the message was

78. James Madison, Report on the Resolutions, in 6 WRITINGS OF JAMES MADISON 341, 397 (G. Hunt ed. 1906).

79. 425 U.S. 748 (1976).

80. *Id.* at 773.

81. *Id.* at 765.

82. *Id.* at 761.

83. 433 U.S. 350, 355, 384 (1977) (holding that rules prohibiting lawyers from advertising in, *inter alia*, newspapers violated the First Amendment).

84. The history of lawyer advertising cases is discussed in *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 622-23 (1995).

85. N.C. RULES OF PROF'L CONDUCT R. 7.1, 7.2 (2004).

distributed in the form of a paid television advertisement.⁸⁶

Given the constitutional distinctions between political speech and commercial speech, and the fact that political speech does not lose its character merely because it is transmitted via a "commercial" medium such as a paid television advertisement, it follows that Cooper's campaign ad—unlike the ads in which attorneys peddle their professional expertise—manifestly was not "in commerce." Therefore, since the North Carolina statute governs only actions that occur "in commerce,"⁸⁷ the panel erred in holding that the plaintiffs' complaint stated a claim for unfair and deceptive trade practices.⁸⁸ Political speech simply lies outside the ambit of Chapter 75.

V. IMPLICATIONS OF THE PANEL'S DECISION

The court of appeals' decision in *Boyce & Isley, PLLC v. Cooper* poses two potential problems for lawyers and judges faced with libel and slander cases in North Carolina. First, the decision has muddied the State's common law of defamation per se by misapplying the unique but venerable formulation laid down by Justice Barnhill in *Flake*.⁸⁹ Since an opinion of the court of appeals cannot overrule or override decisions of the Supreme Court of North Carolina, the effect can be overcome only by assiduous advocates and diligent judges who recognize that the last word on a topic is not necessarily the most authoritative word. Nevertheless, the opinion creates needless confusion where none previously existed, especially with respect to the "single meaning rule." The panel's insistence on parsing and interpreting putatively unambiguous words and phrases simply cannot be squared with *Flake*.

86. See, e.g., *Virginia Pharmacy*, 425 U.S. at 761 ("[S]peech does not lose its First Amendment protection because money is spent to project it, as in a paid advertisement of one form or another"); *New York Times v. Sullivan*, 376 U.S. 254, 266 (1964) (holding that "if the allegedly libelous statements would otherwise be constitutionally protected . . . they do not forfeit that protection because they were published in the form of a paid advertisement").

87. N.C. GEN. STAT. § 75-1.1 (2003).

88. The Unfair and Deceptive Trade Practices Act also permits claims for "unfair competition." Thus a commercial advertisement placed by an attorney conceivably could give rise to a Chapter 75 claim if, for example, it falsely accused the advertiser's competitor of a crime or an unethical practice. A Chapter 75 claim cannot be grounded in any publication, however, unless the plaintiff can allege (1) that the defendant's statements deceived or otherwise injured consumers, or (2) that the plaintiff and defendant are competitors or are engaged in commercial business dealings with each other. *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 519–20 (4th Cir. 1999). See also *Ellis v. Northern Star Co.*, 326 N.C. 219, 221, 388 S.E.2d 127, 128 (1990) (upholding claims for libel and unfair trade practices where business of plaintiff food broker was injured by false accusations in letter sent to plaintiff's customers by defendant company, which plaintiff represented).

89. *Flake v. Greensboro News, Co.*, 212 N.C. 780, 787, 195 S.E. 55, 60 (1938); see also *supra* notes 56–62 and accompanying text.

Second, by allowing the plaintiffs' unfair and deceptive trade practices claim to proceed, the panel tacitly invited plaintiff's lawyers to append such a claim to every defamation case, even if it does not arise "in commerce."⁹⁰ Although such claims ultimately should fail, their inclusion will promote judicial inefficiency by making cases more difficult to settle and by lessening the likelihood of their being disposed of by dismissal or summary judgment. The *Boyce* panel did no favors to the plaintiff's bar by issuing a flawed opinion that creates false hope that every defamation claim is a potential vehicle for an award of treble damages.⁹¹

CONCLUSION

As of this writing *Boyce & Isley, PLLC v. Cooper* is before the court of appeals for a second time. This time, the defendants' appeal is grounded in the First Amendment rather than North Carolina common and statutory law.⁹² Unless the new panel misconstrues the applicable First Amendment precedents in the same way the earlier panel misconstrued *Flake*, Attorney General Cooper and his co-defendants will likely prevail. Unless the court somehow repudiates or disavows its earlier decision, however, *Boyce & Isley, PLLC v. Cooper's* common law legacy will continue to be confusion and error.

90. As with defamation claims that arise out of political speech, libel suits against the news media do not arise "in commerce," because individuals or corporations that are the subject of news articles or broadcasts are neither "consumers" nor "competitors" within the meaning of the Unfair and Deceptive Trade Practices Act. *Food Lion*, 194 F.3d at 520.

91. N.C. GEN. STAT. § 75-16 (allowing awards of treble damages in civil suits).

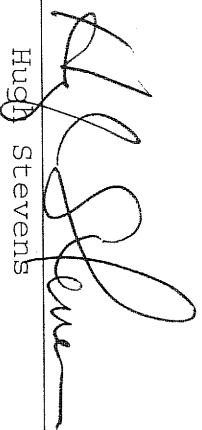
92. See Defs.-Appellants' Br., *supra* note 41.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Motion for Leave to File Brief Amicus Curiae was served on each of the following by depositing a true copy with the United States Postal Service, first class postage prepaid, addressed to:

G. Eugene Boyce R. Daniel Boyce Nexsen Pruet 4141 Parklake Ave, Suite 200 Raleigh, North Carolina 27612	Jim W. Phillips, Jr. Brooks Pierce McLendon Humphrey & Leonard, LLP 2000 Renaissance Plaza 230 North Elm Street Greensboro, North Carolina 27401
Phillip R. Isley Blanchard, Miller, Lewis & Isley, PA 1117 Hillsborough Street Raleigh, North Carolina 27603	Charles E. Coble Brooks Pierce McLendon Humphrey & Leonard, LLP 150 Fayetteville Street 1600 Wachovia Capitol Center Raleigh, North Carolina 27601
Ronald C. Dilthey Patterson Dilthey, LLP 4020 Westchase Blvd, Suite 550 Raleigh, North Carolina 27607	Alan W. Duncan Allison O. Van Lanningham Stephen M. Russell, Jr. Smith Moore Leatherwood, LLP Post Office Box 21927 Greensboro, North Carolina 27420

This the 7th day of June, 2011.



Hugh Stevens