

N.C. Federal Court Dismisses Libel Claim

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North Carolina federal district court Judge Louise Flanagan offered a helpful reminder to lawyers last week that the first month of Civil Procedure class really does matter. The result of her Order in *Dutcher v. Eastburn, Da Capo Press, LLC, and Perseus Books, Inc.* was that a libel claim brought in North Carolina against two out-of-state publishers and an author from Colorado was dismissed, relieving the defendants from the substantial cost of taking depositions and attempting to get the case dismissed on summary judgment.

The case arose from the publication in late 2007 of a book titled *Simon Says: A True Story of Boys, Guns, and Murder*, which focused on the grisly murder in rural Colorado of a high school student and his grandparents on New Year's Eve 2000. Three high school classmates were eventually sentenced for the deaths.

The plaintiff in this case was one son of the murdered grandparents, who happened to be living in North Carolina at the time the book was published. He objected to a small handful of statements about him in the book and filed suit in Wake County, North Carolina in November of 2008. In September of 2009, however, the plaintiff voluntarily dismissed that claim.

Then, in April of 2010, the plaintiff re-filed the lawsuit, again in Wake County. This time the defendants chose to remove the case to federal court and to file a motion to dismiss on the ground that the North Carolina court could not exercise personal jurisdiction over the defendants.

Personal jurisdiction is one of those law school topics that causes most students' eyes to glaze over, but every once in a while it pays to remember those lectures. The basic idea is that the Constitution requires that a defendant have a certain level of "contacts" with the state in which he or she is being asked to defend a lawsuit. Those "contacts" might arise from the incident leading to the lawsuit (i.e., a Virginia resident was driving through North Carolina and ran into another car), or they might arise from the general operations of a company (i.e., a Delaware company that has a number of stores and employees in North Carolina).

The question at issue in this case is one that has challenged courts across the country for years -- what are the limits on personal jurisdiction when dealing with the publication of a book, magazine, or newspaper by out-of-state defendants? The Supreme Court in 1984 handed down a pair of cases -- *Calder v. Jones* and *Keeton v. Hustler Magazine* -- that shed considerable light on this thorny

issue.

In *Calder*, the Court held that an out-of-state publisher and author can only be haled into a California court to defend a defamation claim if they "expressly aimed" their activity at California. The Court held that they had done so in *Calder* because the entire article focused on actress Shirley Jones, a resident of California, and her career in Hollywood. The authors had placed several calls to California in reporting the story, and, in short, the story centered around California. Under those circumstances, the Court held, there were sufficient contacts to support the exercise of personal jurisdiction.

The Court also found sufficient contacts in *Keeton* based on the fact that *Hustler* sold as many as 15,000 copies in New Hampshire every month. In *Keeton*, the plaintiff did not even live in New Hampshire, but had chosen that forum because it had a friendly statute of limitations.

In *Dutcher*, Judge Flanagan rejected the plaintiff's argument that personal jurisdiction in North Carolina was appropriate because the defendants knew the plaintiff lived in North Carolina at the time the book was published and therefore knew he might be "injured" there by allegedly defamatory statements. Judge Flanagan distinguished this case with *Calder*, pointing out that *Simon Says* had nothing to do with North Carolina and was plainly not "expressly aimed" at North Carolina.

She also rejected plaintiff's "stream of commerce" argument -- i.e., that a handful of copies of the book available for sale in North Carolina created the required "minimum contacts." Quoting *Lesnick v. Hollingsworth & Vose Co.*, 35 F.3d 939, 945 (4th Cir. 1994), Judge Flanagan held that:

"[t]o permit a state to assert jurisdiction over any person in the country whose product is sold in the state simply because a person must expect that to happen destroys the notion of individual sovereignties inherent in our system of federalism."

Because (1) only 14 copies of the book were sold in North Carolina; (2) no marketing activities for *Simon Says* were aimed at the state; and (3) the defendant publishers had published only a handful of books over the years that were "aimed" at a North Carolina audience, Judge Flanagan ruled that exercising personal jurisdiction over the defendants in this case would not comport with due process.

Combined with the plaintiff's earlier voluntary dismissal of his first lawsuit, the Court's Order means that the plaintiff's claim is now dismissed with prejudice. *Dutcher* has 30 days to decide whether to appeal Judge Flanagan's Order to the Fourth Circuit.