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Pleadings -- Limitations on the Reply

William S. Geimer

It might be argued that these nonprofit charitable, educational and research organizations with primarily noncommercial activities perform functions that may otherwise have to be performed by the government, either local, state or national, and that, therefore, they should not be subjected to the regulation in labor disputes since government activities are not. However, recent labor strife concerning teachers, nurses and sanitation workers illustrate the very definite need in these areas for regulation of labor disputes. Work stoppages in the governmental sector jumped from 42 involving 12,000 workers in 1965 to 142 involving 105,000 workers in 1966.[20] Further, there is some question as to whether the governments should or even would operate some of the activities engaged in by some of the organizations over which the Board refused to assert jurisdiction.

It is submitted that the Board should take jurisdiction over these organizations, and, that, despite the Board's interpretation of the Conference Report, it is perfectly free to do so. If necessary the Congress should consider empowering the Board to do so.

PENDER R. MCELROY

Pleadings—Limitations on the Reply

In *Davis v. North Carolina State Highway Commission*,[1] the North Carolina Supreme Court echoed a long standing notion about the nature of the reply, which merits examination in light of the proposed changes in the state's rules of civil procedure, as well as present practice. The complaint in *Davis* stated that the state highway commission had taken plaintiff's property on January 14, 1965, when in fact it was not needed at that time. It was further alleged that the taking was accomplished by means of false representations, with intent to deceive plaintiffs and force them out before their departure was necessary. Included was a prayer for 50,000 dollars actual and 1,000,000 dollars punitive damages.[2]

Defendants moved to strike the portions of the complaint alleg-

Men's Christian Association; there are many nonprofit research foundations associated with colleges and universities.

[20] U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 249 (88th Ed. 1967).

[1] 271 N.C. 405, 156 S.E.2d 685 (1967).

[2] *Id.* at 406-07, 156 S.E.2d at 686-87.

ing false representations and asking for punitive damages. In their answer, defendants admitted taking the property on January 14, 1965, and stated that they had deposited 15,500 dollars as their estimate of the value of the property.[3] Plaintiffs filed a reply stating that the property had actually been taken on April 24, 1967. They alleged that defendants had pretended to take it on January 14, 1965, pursuant to a scheme to induce them to leave so that the property would deteriorate in value during the interim. Claiming they had been defrauded out of the use of the property for two years, plaintiffs prayed for damages based on the fair market value of the property on April 24, 1967, which they alleged to be 45,000 dollars. The portions of the complaint pertaining to fraud and punitive damages and the entire reply were ordered stricken. The trial court held that the only issue to be tried was that of the value of the property on January 14, 1965. From this ruling plaintiffs unsuccessfully appealed.[4]

The North Carolina Supreme Court held that since both the allegations of the complaint and the reply were grounded in variations of intentional tort, the highway commission was clearly immune from suit under the state Tort Claims Act.[5] By way of dictum the court stated that, even if the reply was sufficient to state a cause of action, it was properly stricken because the reply is a defensive pleading and the cause of action must be stated in the complaint.[6]

Plaintiffs often have to contend with the problem of anticipatory pleading in the complaint versus new affirmative matter in the reply. Dicta such as that found in the principal case tend to perpetuate the problem. It is said that "[t]he purpose of the reply is to deny such allegations of the answer as plaintiff does not admit and to meet new matter set up in the answer. . . . [i]t must be limited to an admission or denial of the new matter set up in the answer."[7]

Apparently, the two principal errors which the North Carolina courts find in replies are (1) inconsistency with the complaint and

[3] *Id.* at 407, 156 S.E.2d at 686-87.

[4] *Id.* at 407, 156 S.E.2d at 687.

[5] N.C. GEN. STAT. § 143-291 (1963). Plaintiffs clearly lost the case on the basis of this statute, and not the ruling on the reply. The commission is only liable for negligence, and is not subject to suit except as provided in the act. Ayscue v. Highway Comm'n, 270 N.C. 100, 153 S.E.2d 823 (1967), Nello L. Teer Co. v. Highway Comm'n, 265 N.C. 1, 143 S.E.2d 247 (1965), Midgett v. Highway Comm'n, 265 N.C. 373, 144 S.E.2d 121 (1965).

[6] 271 N.C. 405, 409, 156 S.E.2d 685, 688 (1967).

[7] Spain v. Brown, 236 N.C. 355, 357, 72 S.E.2d 918, 919 (1952).

(2) attempts to state a cause of action, rather than to reply to allegations of new matter in the answer. Such inconsistency is forbidden in North Carolina by statute,[8] and there is sufficient judicial interpretation of the term to give meaning to the prohibition. The North Carolina Supreme Court has held that inconsistency means that the complaint and reply are contrary to one another, so that one is necessarily false if the other is true.[9] Plaintiff's new matter may be totally unconnected with the complaint as long as it is responsive to defendant's answer.[10]

The court in *Davis* made no mention of inconsistency. However, the facts of the case indicate that such an argument could certainly have been made, since the complaint and the reply contained conflicting allegations as to the date of the taking of plaintiffs' property. Inconsistency has been found in instances where it was not as clearly apparent as in *Davis*. In *Miller v. Grimsley*,[11] plaintiff, suing defendant for cutting timber on plaintiff's land, admitted in the complaint that his deed had reserved a portion of the land to the use of defendant and described that portion to some extent. When defendant answered setting up the deed, plaintiff's reply, stating that the reservation in the deed was too vague for any purpose, was stricken as inconsistent.[12] Inconsistency as to theory of the cause of action, however, is apparently permissible. The court found no inconsistency in *Berry v. Hyde Land & Lumber Company*[13] where the complaint alleged that defendant's canal blocked plaintiff's ingress and egress (tort). Defendant answered that he had a contract with plaintiff to dig the canal. Plaintiff replied that the canal was not dug according to the terms of the agreement (contract).

It is much easier to determine the boundaries of consistency, however, than it is to tell when a reply has lost the defensive character deemed essential by the North Carolina courts. A most striking contrast to the principal case came in *Gilliam Furniture Incorporated v. Bentwood Incorporated*.[14] Here plaintiff brought suit on a note, claiming defendant had guaranteed it. Defendant answered that the alleged guarantee was made to "save face" for one of the com-

[8] N.C. GEN. STAT. § 1-141 (1953).
[9] Scott v. Jordan, 235 N.C. 244, 247, 69 S.E.2d 557, 560 (1952).
[10] Boyette v. Vaughan, 79 N.C. 528, 530 (1878).
[11] 220 N.C. 514, 17 S.E.2d 642 (1941).
[12] *Id.* at 515, 17 S.E.2d at 643-644.
[13] 183 N.C. 384, 111 S.E. 707 (1922).
[14] 267 N.C. 119, 147 S.E.2d 612 (1966).

pany's officers and that, being without consideration, it was of no legal effect. Plaintiff replied that if the guarantee was not authorized, it was fraudulently executed. Plaintiff was later given leave to add to his reply "certain additional facts" which he claimed to be material to the controversy. The court made essentially the same statement as in *Davis* about the necessity of alleging causes of action in the complaint, but then proceeded to treat the reply as an amended complaint, ordering the pleadings to be recast later.[15] Also varying somewhat from the holding in *Davis* was *Bryan v. Acme Manufacturing Company*.[16] In an action to cancel notes due, the complaint alleged delivery of useless cotton fertilizer instead of the desired tobacco fertilizer. Defendant answered that cotton fertilizer was ordered and included a copy of the order form. Plaintiff was allowed to allege in his reply, not only fraud in procuring the order, but also misbranding of the product in violation of a statute. This was held merely to amplify the complaint.[17] It could be said that plaintiff in *Davis* should have been entitled under *Furniture Company* to have his "certain additional facts" concerning the alleged later taking and scheme to be treated also by the court as an amended complaint. It is also arguable that the allegations that these same events, which occurred subsequent to the original complaint, should be construed as merely amplifying the complaint as in *Bryan*.

Even after the adoption of the proposed new rules of civil procedure in North Carolina, plaintiffs will have to contend with a degree of uncertainty about what is to be allowed in the reply and whether their errant replies will be stricken or simply treated as amended complaints. The question is whether the matter is not really one of form rather than substance. The statutory provision which grants judges power to permit amendment of any pleading at any stage[18] and the North Carolina Supreme Court's statement

[15] *Id.* at 121, 147 S.E.2d at 614. *See also* Every v. Every, 265 N.C. 506, 144 S.E.2d 603 (1965) where no defects were found although plaintiff's complaint alleged domestic difficulties as grounds for alimony and in reply to defendant's defense of a separation agreement she alleged fraud and want of consideration.

[16] 209 N.C. 720, 184 S.E. 471 (1936). *See also* the earlier case of Winstead v. Acme Mfg. Co., 207 N.C. 110, 176 S.E. 304 (1934) where the same attorney for the plaintiff, against the same defendant got into difficulty with his pleading and was not even allowed to amend his complaint.

[17] Bryan v. Acme Mfg. Co., 209 N.C. 720, 722, 184 S.E. 471, 472 (1936).

[18] N.C. GEN. STAT. § 1-163 (1953).

that such power is inherent even in the absence of statute[19] support the desirability and propriety of denominating all new affirmative matter in the reply as an amendment to the complaint.

The proposed new rules limit the scope of the problem considerably since a reply is only allowed in response to a counterclaim denominated as such, or when ordered by the court.[20] Thus, unless the courts hold contrary to the apparent intention of the new rules, the number of instances when plaintiff may run afoul of North Carolina restrictions on the reply will be sharply reduced. Noting, however, that under the new rules, the *complaint* may contain claims which are alternative, inconsistent, or unrelated,[21] the striking of the reply as not being defensive seems to find even less justification.

WILLIAM S. GEIMER

Taxation—Reintroduction of the Premium Payment Plan?

In Revenue Ruling 67-463[1] the Commissioner of Internal Revenue has taken the position that when a husband transfers all incidents of ownership of an insurance policy to his wife more than three years prior to his death, but continues to pay the premiums until his death, the premiums paid within the last three years are paid in contemplation of death and represent a transfer of an *interest* in the policy. The interest transferred is measured by the proportion the amount of premiums so paid bears to the total amount of premiums paid; therefore, the proportionate value of the insurance bought by these premiums is includible in his gross estate under section 2035.[2] Arguably, this ruling is a reintroduction of the old "premium payment" plan rejected by Congress in 1954.

In making this ruling, the Commissioner could have taken two

[19] Gilliam Furniture Inc. v. Bentwood Inc., 267 N.C. 119, 120, 147 S.E.2d 612, 613 (1966).
[20] PROPOSED N.C. RULES CIV. PROC. 7(a) (1967).
[21] PROPOSED N.C. RULES CIV. PROC. 8(e) (1967).

[1] Rev. Rul. 67-463, 1967 INT. REV. BULL. No. 52, at 15.
[2] INT. REV. CODE of 1954, § 2035. For example, if A buys an insurance policy worth one hundred thousand dollars and pays eight thousand dollars in premiums over a four year period, with six thousand dollars being paid over the last three years prior to death, the Commissioner would include in his gross estate three-fourths of the value of the policy or seventy-five thousand dollars, and not the six thousand paid for the premiums.