

NO. COA97-1525
NO. COA97-1526

NORTH CAROLINA COURT OF APPEALS

Filed: 15 September 1998

ANNA MAE SHERRILL, ANNETTA C.
WHITE, LINDA S. MINTZ, VERNETTE
PRICE, individually and on behalf
of all others similarly situated,
Plaintiffs

v.

(COA97-1525)

AMERADA HESS CORPORATION a/k/a
AMERADA PETROLEUM CORPORATION;
AMOCO OIL COMPANY; BP EXPLORATION
& OIL INC.; CITGO PETROLEUM
CORPORATION; COLONIAL PIPE LINE
COMPANY; CONOCO, INC. a/k/a
SOUTHERN FACILITIES; CROWN
CENTRAL PETROLEUM CORPORATION;
EXXON CORPORATION; MARATHON
OIL COMPANY; THE ETHANOL
CORPORATION a/k/a PETRO SYSTEMS,
INC. a/k/a PUBLIX; PHIBRO ENERGY
USA, INC.; LOUIS DREYFUS ENERGY
CORPORATION; PHILLIPS PIPE LINE
COMPANY; PLANTATION PIPE LINE
COMPANY; SHELL OIL COMPANY;
TEXACO, INC.; STAR ENTERPRISE;
UNION OIL COMPANY OF CALIFORNIA,
Defendants

GROVER BOB CLONINGER, GAIL
LAWING ADAMS and DONALD C. ADAMS,
VIVIAN RAMONA AIKEN and ROBERT
WOODBURG AIKEN, SR., WANDA
JONES ALLEN and JULIEN EMMET
ALLEN, ROSEMARIE ALLMAN and
BOYD ALLEN ALLMAN, PATRICIA
ANN ATKINSON, MARY ATKINSON
and BOBBY ATKINSON, JR., MARY
A. AUTEN, JIMMIE LEE AUTEN,
MELISSA JONES BAKER and THOMAS
ARLEN BAKER, REGINA S. BARKLEY
and MICHAEL S. BARKLEY, GLADYS
M. BARNES, MARGARET TEAGUE BARNES
and HOWARD BARNES, MELVIN D.

BARNES, WILLIAM J. BARNES,
MARY NANCE BARRETT and JAMES
BRYAN BARRETT, HELEN L. BEAMAN
and JOHN R. BEAMAN, RUTH S. BEATTY,
NANCY MULLEN BELL and LESTER
ANTHONY BELL, PEGGY RUSHING
BENNETT, MARY WILLIAMSON RUSHING,
MILDRED H. BENNETT, PHYLLIS E.
BERRY and RODNEY E. BERRY,
JAMES ROSS BLACKWOOD, SARAH
E. BLAIR and J. FRED BLAIR,
RANDALL KERRY BLAKE, JOHN WILLIAM
BOWEN, CYNTHIA A. BOYER, ORA B.
BRASWELL, LESLIE HEAVNER BRIGMAN
and JOE ALLEN BRIGMAN, SANDRA
G. BROOKS, VIRGINIA ROTHERTON,
DEBRA JUNE BROWN, TABITHA BRUNK,
LILLIAN H. BRYANT and EUGENE F.
BRYANT, RODNEY GENE BRYANT,
DEAVEN M. BRYANT, MARSHA C.
MEDLIN-BUFF and MELVIN T. BUFF,
DENNIS L. BUTTS and ELLEN R. BUTTS,
JOHN CAMPBELL, JOYCE CANUP, BETTY
CARDINAL, DAVID L. CARNES and
PAULINE L. CARNES, BARBARA H.
CARPENTER and DARYL G. CARPENTER,
CHARLIE TATE CARTER, HENRY N.
CASTLES, JR., HENRY NEIL CASTLES, SR.
and IRIS JEAN CASTLES, MARIE ADAMS
CHANDLER and BOYCE C. CHANDLER,
MARGARET W. CHAVERS and BILLY G.
CHAVERS, ROBERT K. CLARK and SHEILA
D. CLARK, KEITH CLARK, MARY P.
CLEVELAND and DON E. CLEVELAND,
STEVEN BRIAN CLEWIS and SHEILA
ANNE CLEWIS, DAISY A. CLONINGER,
NELSON GROVER CLONINGER,
VURNIA M. COBB and ROY
NEIL COBB, STEPHEN E. COLEMAN and
SUZANNE LORRAINE COLEMAN, LORNA
CONCEPCION CORDERO, PATRICIA MANES
CORNWELL and SCOTT JEFFREY CORNWELL,
JEPHTHA E. CORNWELL, DONALD EUGENE COX
and ELIZABETH HIX COX, GAY M. CROSBY
and ANDREW B. CROSBY, BRENDA CUPP,
BEATRICE M. DAVENPORT and HERBERT
DAVENPORT, PATRICIA DAVIES, COLLIS
DEAN, JR. and JOAN K. DEAN, JUDY
DOTSON, EMMIE JUNE DOWDLE and CHARLES
DALE DOWDLE, WAYNE DOWDLE, SUSAN
HUSS EAKER and DONALD S. EAKER,
RUSSELL LEE EDENS, JR. and

KIMBERLY WALTERS-EDENS, PEGGY COBB EDMUNDS, HERMAN T. ELDER, JR. and NANCY ELDER, PATRICIA ELKOVICH and PETER D. ELKOVICH, BRIAN D. ELKOVICH, THERESA K. EVANS and DANNY R. EVANS, BEVERLY EVANS and ROGER EVANS, MARY D. FAIRCLOTH and JOHN N. FAIRCLOTH, ROY MASON FARGIS and IRENE C. FARGIS, CHARLES D. FERNALD, VIRGINIA B. FERRELL and ROBERT A. FERRELL, EDNA B. FREEMAN, CHARLES H. FREEMAN, PHILIP A. FRYE, JANICE TILLEY-FRYE and RANDALL MACK FRYE, JOE GARMON, LOU M. GATHINGS and JAMES T. GATHINGS, DONALD E. GILBERT and BRENDA W. GILBERT, TONY GILBERT, RUTH CARPENTER GILLENWATER and FRED MANN GILLENWATER, JOANNA GREENE and ROBERT L. GREENE, DOROTHY GREENE, MARGARET B. GREENE and TROY C. GREENE, JAMES F. GREENE and LILLIE MAE GREENE, MAE P. GREGORY and EDWARD ALLEN GREGORY, SR., TRACY S. GREGORY and EDWARD ALLEN GREGORY, JR., JACKIE GUERARD, ROBIN D. GURLEY and GLENN A. GURLEY, JR., MARIA CHRISTINA HAGLER, THELMA A. HAIGLER and AL L. HAIGLER, PAULINE HALL, LUCILLE HATLEY, MILDRED HAUGEN, MILTON J. HAYES and BARBARA A. HAYES, GINA ABERNATHY HELMS and MICHAEL WILTON HELMS, WILLIAM D. HELMS and TERESA S. HELMS, PATSY P. HELMS and ROBERT RAY HELMS, JACK T. HELTON and JANETT HELTON, ODEAN ORVALL HESTIKIND and MARTHA SMITH HESTIKIND, BEVERLY ANN HODGES and JOHN PATRICK HODGES, MARGARET HOFFMAN and STEVEN M. HOFFMAN, LESLIE R. HOPPER and EDDIE R. HOPPER, EDITH COX HORTON, ALBERT A. HOWARD and JEAN C. HOWARD, ROSEMARY BLANKENSHIP HUBBARD, JAMES DENNIS HUDSON and SHERRIE TURNER HUDSON, JOHN B. HUDSON and DOROTHY J. HUDSON, KAREN F. HUGHES and LYNN R. HUGHES, DIANE HUMPHRIES and KENNETH WAYNE HUMPHRIES, BARBARA A. JACKSON and ROBERT H. JACKSON, MOZZELLE G. JARRETT, JUDY BENNETT JOHNSON, EULA LANG JORDAN, BESSIE LEE KILLMAN, LINDA G. KING and

JAMES L. KING, ANN R. KISER and
ROBERT V. KISER, SR., SANDRA H.
KUYKENDALL, GLENDA HAMRICK LASSITER
and JOHN VERNON LASSITER, JR.,
BETTY J. LEDFORD, CAROL FISHER LONG
and JAMES M. LONG, JOHN C. LOVE, JR.
and TERRY KING LOVE, CANDY LYNN LOVE,
SHIRLEY B. MANUS and WILLIAM HOWARD
MANUS, SR., SHARON D. MANUS, CONSTANCE
VIOLA MARCHBANK, MILDRED Y. MARION
and JOSEPH GENE MARION, KIM IRENE
MATTOX, WANDA H. MATTOX and EDDIE
LAMAR MATTOX, SHELIAH MCCLANAHAN and
WILLIAM E. MCCLANAHAN, CANDI MICHELE
H. MCGEE and JAMES E. MCGEE, JR.,
ROXANIE G. MCLEOD and RONALD L.
MCLEOD, JANET MEIERS and DAVID CHARLES
MEIERS, SUE EVELYN MESSER and ARTHUR
MESSER, CHRISTINA MIDDLETON and STANLEY
LEON MIDDLETON, MAY E. MIDGETT and
JARVIS W. MIDGETT, PATTIE LEE MILES,
MARY MILLER and MARK MILLER, BILLIE
ANN HARTIS MILLER and SAMUEL BRYANT
MILLER, DIANE Z. MILLER, ALICE S.
MINGUS and EARL H. MINGUS, BERNICE
MINGUS and GARLAND J. MINGUS, DAVID
EARL MINGUS, IRIS L. MORGAN and BEN
MORGAN, TERESA MORGAN and GARY B.
MORGAN, JR., ALISA R. MULLIS and
DAVID RANDALL MULLIS, SR., LULA R.
MULLIS, MELODY C. PACE and DONALD
CURTIS PACE, BRENDA C. PAINTER and
JERRY PAINTER, DOROTHY H. PATTERSON,
JUDY B. PAXTON and RICHARD D. PAXTON,
MARION S. PICKETT and GEORGE W. PICKETT,
CYNTHIA R. PRICE and TONY M. PRICE, KIM
RAMSEUR and ROSWELL ALBERT RAMSEUR,
LINDA B. REAMES and JAMES DAVID REAMES,
JEANETTE B. REAMES, SANDRA REID REEVES
and KEVIN D. REEVES, GAYLE FRY RHEA
and DONALD W. RHEA, JEANETTE H. RHYNE
and JAMES D. RHYNE, BETTY JEAN ROBERTS
and JOSEPH D. ROBERTS, AVIE D. ROBERTS,
DARRELL ROBERTSON, SUE ROGERS and
LARRY ROGERS, PHIL W. ROGERS, SUSAN
G. ROSCOE and DANNY O. ROSCOE, MARCIA
L. RUSHING, TRACY JANELLE RUSHING,
GERRIE N. RUSSELL and KEITH A. RUSSELL,
RENA F. SADLER and BOOMER SADLER, JR.,
MARY E. SADLER, ELIZABETH H. SADLER,
VIVIAN A. SCHRONCE and JAMES HASKEL
SCHRONCE, DAVID F. SCOTT, EVELYN STORY

SEAGLE and DANIEL MONROE SEAGLE,
VAUNETTA H. SELLERS and JOE T. SELLERS,
TONYA RENEE SEVIER and CARL SEVIER,
JEANIE SHARPLING and WILLIAM D.
SHARPLING, LEOTA HOLSHOUSER SHAW and
ROBERT HUGH SHAW, MARGARET SHAW and
CARSON E. SHAW, DEBORAH PAYSEUR SHAW
and WILLIAM LADD SHAW, JANE L. SIDES
and JOHN O. SIDES, HELEN H. SIGMON,
SARAH LOUISE SIMMONS and ROBERT LEE
SIMMONS, DOROTHY R. SKEEN and ALLEN
N. SKEEN, ANNIE EDDLEMAN SMITH, IMOJEAN
R. SMITH and DANNIE E. SMITH, JOY B.
SONS and CHARLES F.L. SONS, THELMA
R. STAFFORD, ELIZABETH ANNE STOKES
and RICHARD DEAN STOKES, MURIEL G.
SUMMERVILLE and JAMES A. SUMMERVILLE,
JOYCE R. TAYLOR, SYBIL TESENIAR and
BOBBY J. TESENIAR, VIRGINIA FERRELL
TOMPKINS and JAMES DUANE TOMPKINS, SR.,
MARGARET H. TOWNSEND and DALLAS W.
TOWNSEND, JOE C. TROUTMAN, NORMA S.
TRUSSELL, KIM D. UNDERWOOD and DAVID
M. UNDERWOOD, TERRY VANZANT and
DANNY K. VANZANT, MARGARET WARRICK
and ROBERT WARRICK, ALICE S. WELLS
and J.C. WELLS, CAROLE WEST and STEVE
WEST, JOYCE ANN WHITE and STEVENSON
ALEXANDER WHITE, JUDY PAULETTE WILLIAMS,
BRANDI NICHOLE WILLIAMS, ZELLIE
DIANE WILLIAMS, DENISE DURHAM WOFFORD
and THOMAS ANTHONY WOFFORD, REBECCA
WOODROW,

Plaintiffs

v.

(COA97-1526)

AMERADA HESS CORPORATION, a/k/a AMERADA
PETROLEUM CORPORATION; AMOCO OIL COMPANY;
BP EXPLORATION & OIL, INC.; CITGO
PETROLEUM CORPORATION; COLONIAL PIPE
LINE COMPANY; CONOCO, INC., a/k/a
SOUTHERN FACILITIES; CROWN CENTRAL
PETROLEUM CORPORATION; EXXON CORPORATION;
MARATHON OIL COMPANY; THE ETHANOL
CORPORATION a/k/a PETRO SYSTEMS,
INC. a/k/a PUBLIX; PHIBRO ENERGY USA,
INC.; LOUIS DREYFUS ENERGY CORPORATION;
PHILLIPS PIPE LINE COMPANY; PLANTATION
PIPE LINE COMPANY; SHELL OIL COMPANY;
TEXACO, INC.; STAR ENTERPRISE; UNION
OIL COMPANY OF CALIFORNIA,

Defendants

In case No. COA97-1525, appeal by plaintiffs Anna Mae Sherrill, Annetta C. White, and Lynda S. Mintz, and in case No. COA97-1526, appeal by plaintiffs Grover Bob Cloninger, Gail Lawing Adams and Donald C. Adams, Vivian Romona Aiken and Robert Woodburg Aiken, Sr., Wanda Jones Allen and Julien Emmet Allen, Rosemarie Allman and Boyd Allen Allman, Patricia Ann Atkinson, Mary Atkinson and Bobby Atkinson, Jr., Mary A. Auten, Jimmie Lee Auten, Melissa Jones Baker and Thomas Arlen Baker, Regina S. Barkley, Gladys M. Barnes, Margaret Teague Barnes and Howard Barnes, Melvin D. Barnes, William J. Barnes, Mary Nance Barrett and James Bryan Barrett, Helen L. Beaman and John R. Beaman, Ruth S. Beatty, Peggy Rushing Bennett, Mary Williamson Rushing, Mildred H. Bennett, Rodney E. Berry, James Ross Blackwood, Sarah E. Blair and J. Fred Blair, Randall Kerry Blake, John William Bowen, Cynthia A. Boyer, Ora B. Braswell, Leslie Heavner Brigman and Joe Allen Brigman, Sandra G. Brooks, Virginia Brotherton, Debra June Brown, Tabitha Brunk, Lillian H. Bryant and Eugene F. Bryant, Rodney Gene Bryant, Deaven M. Bryant, Marsha C. Medlin-Buff and Melvin T. Buff, Dennis L. Butts and Ellen R. Butts, John Campbell, Joyce Canup, Betty Cardinal, David L. Carnes and Pauline L. Carnes, Barbara H. Carpenter and Daryl G. Carpenter, Charlie Tate Carter, Henry N. Castles, Jr., Henry Neil Castles, Sr. and Iris Jean Castles, Marie Adams Chandler and Boyce C. Chandler, Margaret W. Chavers and Billy G. Chavers, Robert K. Clark and Sheila D. Clark, Keith Clark, Mary P. Cleveland and Don E. Cleveland, Steven Brian Clewis and Sheila Anne Clewis, Daisy A. Cloninger, Nelson Grover Cloninger, Steven Cloninger, Vurnia M. Cobb and Roy Neil Cobb, Stephen E. Coleman and Suzanne Lorraine Coleman, Lorna Concepcion Cordero, Patricia Manes Cornwell, Jephtha E. Cornwell, Donald Eugene Cox, Brenda Cupp, Beatrice M. Davenport and Herbert Davenport, Patricia Davies, Collis Dean, Jr. and Joan K. Dean, Judy Dotson, Emmie June Dowdle and Charles Dale Dowdle, Wayne Dowdle, Susan Huss Eaker and Donald S. Eaker, Russell Lee Edens, Jr. and Kimberly Walters-Edens, Peggy Cobb Edmunds, Herman T. Elder, Jr. and Nancy Elder, Patricia Elkovich and

Peter D. Elkovich, Brian D. Elkovich, Theresa K. Evans and Danny R. Evans, Beverly Evans and Roger Evans, Mary D. Faircloth and John N. Faircloth, Roy Mason Fargis and Irene C. Fargis, Charles D. Fernald, Virginia B. Ferrell and Robert A. Ferrell, Edna B. Freeman, Charles H. Freeman, Philip A. Frye, Janice Tilley-Frye and Randall Mack Frye, Joe Garmon, Lou M. Gathings and James T. Gathings, Donald E. Gilbert and Brenda W. Gilbert, Tony Gilbert, Ruth Carpenter Gillenwater and Fred Mann Gillenwater, Joanna Greene and Robert L. Greene, Dorothy Greene, Margaret B. Greene and Troy C. Greene, James F. Greene and Lillie Mae Greene, Mae P. Gregory and Edward Allen Gregory, Sr., Tracy S. Gregory and Edward Allen Gregory, Jr., Jackie Guerard, Robin D. Gurley and Glenn A. Gurley, Jr., Maria Christina Hagler, Thelma A. Haigler and Al L. Haigler, Pauline Hall, Lucille Hatley, Mildred Haugen, Milton J. Hayes and Barbara A. Hayes, Gina Abernathy Helms and Michael Wilton Helms, William D. Helms and Teresa S. Helms, Patsy P. Helms and Robert Ray Helms, Jack T. Helton and Janett Helton, Odean Orvall Hestikind and Martha Smith Hestikind, Beverly Ann Hodges and John Patrick Hodges, Margaret Hoffman and Steven M. Hoffman, Leslie R. Hopper and Eddie R. Hopper, Edith Cox Horton, Albert A. Howard and Jean C. Howard, Rosemary Blankenship Hubbard, James Dennis Hudson and Sherrie Turner Hudson, John B. Hudson and Dorothy J. Hudson, Karen F. Hughes and Lynn R. Hughes, Diane Humphries and Kenneth Wayne Humphries, Barbara A. Jackson and Robert H. Jackson, Mozzelle G. Jarrett, Judy Bennett Johnson, Eula Lang Jordan, Bessie Lee Killman, Linda G. King and James L. King, Ann R. Kiser and Robert V. Kiser, Sr., Sandra H. Kuykendall, Glenda Hamrick Lassiter and John Vernon Lassiter, Jr., Betty J. Ledford, Carol Fisher Long and James M. Long, John C. Love, Jr. and Terry King Love, Candy Lynn Love, Shirley B. Manus and William Howard Manus, Sr., Sharon D. Manus, Constance Viola Marchbank, Mildred Y. Marion and Joseph Gene Marion, Kim Irene Mattox, Wanda H. Mattox and Eddie Lamar Mattox, Sheliah McClanahan and William E. McClanahan, Candi Michele H. McGee and James E. McGee, Jr., Janet Meiers and David Charles Meiers, Sue Evelyn Messer and Arthur Messer, Christina

Middleton and Stanley Leon Middleton, May E. Midgett and Jarvis W. Midgett, Pattie Lee Miles, Mary Miller and Mark Miller, Billie Ann Hartis Miller and Samuel Bryant Miller, Diane Z. Miller, Alice S. Mingus, David Earl Mingus, Iris L. Morgan and Ben Morgan, Teresa Morgan and Gary B. Morgan, Jr., Alisa R. Mullis and David Randall Mullis, Sr., Lula R. Mullis, Melody C. Pace and Donald Curtis Pace, Brenda C. Painter and Jerry Painter, Dorothy H. Patterson, Judy B. Paxton and Richard D. Paxton, Marion S. Pickett and George W. Pickett, Cynthia R. Price and Tony M. Price, Kim Ramseur and Roswell Albert Ramseur, Linda B. Reames and James David Reames, Jeanette B. Reames, Sandra Reid Reeves and Kevin D. Reeves, Gayle Fry Rhea and Ronald W. Rhea, Jeanette H. Rhyne and James D. Rhyne, Betty Jean Roberts and Joseph D. Roberts, Avie D. Roberts, Darrell Robertson, Sue Rogers and Larry Rogers, Phil W. Rogers, Susan G. Roscoe and Danny O. Roscoe, Marcia L. Rushing, Tracy Janelle Rushing, Gerrie N. Russell and Keith A. Russell, Rena F. Sadler and Boomer Sadler, Jr., Mary E. Sadler, Elizabeth H. Sadler, Vivian A. Schronce and James Haskell Schronce, David F. Scott, Evelyn Story Seagle and Daniel Monroe Seagle, Vauneta H. Sellers and Joe T. Sellers, Tonya Renee Sevier and Carl Sevier, Jeanie Sharpling and William D. Sharpling, Leota Holshouser Shaw and Robert Hugh Shaw, Deborah Payseur Shaw and William Ladd Shaw, Jane L. Sides and John O. Sides, Helen H. Sigmon, Sarah Louise Simmons and Robert Lee Simmons, Dorothy R. Skeen and Allen N. Skeen, Annie Eddleman Smith, Imojean R. Smith and Dannie E. Smith, Joy B. Sons and Charles F.L. Sons, Thelma R. Stafford, Elizabeth Anne Stokes and Richard Dean Stokes, Joyce R. Taylor, Sybil Teseniar and Bobby J. Teseniar, Virginia Ferrell Tompkins and James Duane Tompkins, Sr., Margaret H. Townsend and Dallas W. Townsend, Joe C. Troutman, Norma S. Trussell, Kim D. Underwood and David M. Underwood, Terry Vanzant and Danny K. Vanzant, Margaret Warrick and Robert Warrick, Alice S. Wells and J.C. Wells, Carole West and Steve West, Joyce Ann White and Stevenson Alexander White, Judy Paulette Williams, Brandi Nichole Williams, Zellie Diane Williams, Denise Durham Wofford and Thomas Anthony Wofford, and Rebecca Woodrow from order dated 30 May 1997 by Judge Marvin K. Gray in

Mecklenburg County Superior Court. Heard in the Court of Appeals 25 August 1998.

Bailey, Patterson, Caddell, Hart & Bailey, PA, by Allen Bailey and Emery E. Milliken; Law Offices of Marvin Blount, Jr., by Marvin Blount, Jr.; and Cohen, Milstein, Hausfeld & Toll, P.L.L.C., by Richard S. Lewis, and Gary E. Mason, for plaintiffs-appellants Anna Mae Sherrill, Annetta C. White, and Lynda S. Mintz.

Womble Carlyle Sandridge & Rice, PLLC, by Brad A. De Vore and Brian E. Heim, for defendant-appellee Amerada Hess Corporation.

Kilpatrick Stockton LLP, by Erin Russell, John T. Allred, and Richard E. Fay, for defendants-appellees Amoco Oil Company; BP Exploration & Oil, Inc.; Citgo Petroleum Corporation; Colonial Pipeline Company; Crown Central Petroleum Corporation; Exxon Company, U.S.A.; Marathon Oil Company; Louis Dreyfus Energy Corporation; Plantation Pipeline Company; Shell Oil Company; Star Enterprise, and Union Oil Company of California.

No brief filed for defendants-appellees Conoco, Inc., a/k/a Southern Facilities; The Ethanol Corporation, a/k/a Petro Systems, Inc., a/k/a Publix; Philbro Energy USA, Inc.; and Phillips Pipeline Company.

GREENE, Judge.

Anna Mae Sherrill et al. and Grover Bob Cloninger et al. (collectively, Plaintiffs) appeal from the trial court's order restricting the speech of all parties and counsel relating to matters of the cases.¹

Plaintiffs are residents and homeowners in the community of Paw Creek, outside of Charlotte, North Carolina. Amerada Hess Corp. et al. (collectively, Defendants) operate a bulk petroleum storage facility in Paw Creek. Plaintiffs allege that Defendants caused leaks, spills, and emissions of petroleum product to the atmosphere, ground, and groundwater. Plaintiffs further allege that such conduct was wilful, negligent, in violation of N.C.

¹Because the two captioned cases present common questions of law, they were consolidated for hearing, pursuant to Rule 40 of our Rules of Appellate Procedure, and are consolidated for purposes of this opinion. N.C.R. App. P. 40.

Gen. Stat. § 143-215.93, constituted trespass, and a nuisance. The complaints seek compensatory and punitive damages.

On 30 May 1997, the trial court, *sua sponte*, entered an order which provided in pertinent part:

No counsel or party in either [a]ction . . . shall communicate in any way with any media representative or other person or entity not a party to either [a]ction concerning either [a]ction until such time as both [a]ctions . . . are finally resolved by a final judgment no longer subject to appeal or by a final and binding settlement.

In support of this directive, the trial court found as a fact: "[T]hat communications concerning the [a]ctions with media representatives and with other persons not parties to this action by the parties and their counsel . . . will be detrimental to the fair and impartial administration of justice in such [a]ctions."

The issues are whether: (I) the order is appealable; and if so, (II) the order constitutes an unconstitutional prior restraint of Plaintiffs' First Amendment right to free speech.

I

As a general rule, there is no right of immediate appeal from an interlocutory order. *Veazey v. Durham*, 231 N.C. 357, 57 S.E.2d 377, *reh'g denied*, 232 N.C. 744, 59 S.E.2d 429 (1950). Because the order in these cases does not finally determine the rights of the parties, the appeal is interlocutory. An appeal from an interlocutory order is permitted, however, if such order affects a substantial right. *Goldston v. American Motors Corp.*, 326 N.C. 723, 726, 392 S.E.2d 735, 736 (1990). An order

implicating a party's First Amendment rights affects a substantial right. *Kaplan v. Prolife Action League of Greensboro*, 111 N.C. App. 1, 15, 431 S.E.2d 828, 834, *dismissal allowed, disc. review denied*, 335 N.C. 175, 436 S.E.2d 379 (1993), *and cert. denied*, 512 U.S. 1253, 129 L. Ed. 2d 894 (1994). In this case, the order of the trial court restricting the parties' right to communicate with others about the claims raises First Amendment issues and thus affects a substantial right. These appeals, therefore, are properly before this Court.

II

"The issuance of gag orders prohibiting participants in judicial proceedings from speaking to the public or the press about those proceedings is a form of prior restraint." 1 Rodney A. Smolla, *Smolla and Nimmer on Freedom of Speech* § 15:41 (1996) [hereinafter 1 *Smolla and Nimmer*]. The phrase "prior restraint" refers to "judicial orders or administrative rules that operate to forbid expression before it takes place." *Id.* at § 15:1. "Prior restraints" are not unconstitutional per se, *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558, 43 L. Ed. 2d 448, 459 (1975), but are presumptively unconstitutional as violative of the First Amendment, *New York Times Co. v. United States*, 403 U.S. 713, 714, 29 L. Ed. 2d 822, 824-25 (1971); *State v. Williams*, 304 N.C. 394, 403, 284 S.E.2d 437, 444 (1981), *cert. denied*, 456 U.S. 832, 72 L. Ed. 2d 450 (1982); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 558, 49 L. Ed. 2d 683, 697 (1976), and are "repugnant to the basic values of an open society," 1

Smolla and Nimmer § 15:10. As noted by the United States Supreme Court:

[A] free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand. It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable.

Southeastern Promotions, Ltd., 420 U.S. at 559, 43 L. Ed. 2d at 459.

One who undertakes to show the necessity for "prior restraint" or rebut the presumption of unconstitutionality of such an order must show: (1) a clear threat to the fairness of the trial; (2) such threat is posed by the actual publicity to be restrained; and (3) no less restrictive alternatives are available.² *Nebraska Press Ass'n*, 427 U.S. at 571, 49 L. Ed. 2d at 705 (Powell, J., concurring). Furthermore, the record must reflect findings by the trial court that it has considered each of the above factors, *id.* at 563, 49 L. Ed. 2d at 700, and contain evidence to support such findings, *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 101-02, 68 L. Ed. 2d 693, 703-04 (1981). Finally, any "prior restraint" order must comply with the specificity requirements of the First Amendment. *Nebraska Press Ass'n*, 427 U.S. at 568, 49 L. Ed. 2d at 703 (holding order unconstitutional because it was "too vague and too broad to

²Some alternatives to orders of "prior restraint" include: (1) change of trial venue; (2) postponement of trial; (3) the use of clear and emphatic instructions to the jurors emphasizing their duty to decide the case on evidence presented at trial; (4) sequestration of the jury; and (5) screening of jurors to eliminate those with fixed opinions. *Nebraska Press Ass'n*, 427 U.S. at 563-64, 49 L. Ed. 2d at 700.

survive [First Amendment] scrutiny").

In this case, the 30 May 1997 order of the trial court prohibited any party or their attorney³ from communicating with "any media representative or other person or entity" not a party to the proceeding "concerning" the claims until the suit was resolved. As such, the order operated "to forbid expression before it [took] place" and constitutes a "prior restraint." Although the record reflects a finding that communications concerning the action by the parties to persons not involved in the suit would "be detrimental to the fair and impartial administration of justice," there is no evidence in the record to support this finding. Furthermore, the trial court made no findings reflecting the consideration of less restrictive alternatives. Accordingly, the 30 May 1997 order must be reversed.

Reversed.

Judges TIMMONS-GOODSON and SMITH concur.

³We note that the attorneys for the parties in this case have not appealed the order of the trial court and we do not, therefore, address the validity of the order with respect to these attorneys. We are aware that the Rules of Professional Conduct of the North Carolina State Bar contain a provision restricting the "extrajudicial statement[s]" of attorneys participating or having participated in litigation "if there is a reasonable likelihood that the statement will materially prejudice an adjudicative proceeding in the matter." N.C.R. Professional Conduct 3.6.