

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA05-339

NORTH CAROLINA COURT OF APPEALS

Filed: 20 December 2005

KOHLER COMPANY, INC.,
Plaintiff,

v.

Mecklenburg County
No. 03 CVS 17744

THOMAS H. MCIVOR,
Defendant.

Appeal by defendant from order entered 13 October 2004, and amended 15 October 2004, by Judge Albert Diaz in Mecklenburg County Superior Court. Heard in the Court of Appeals 19 October 2005.

Ogletree, Deakins, Nash, Smoak & Stewart, P.C., by John D. Cole and Kelly S. Hughes, for plaintiff-appellee.

Ferguson, Stein, Chambers, Adkins, Gresham & Sumter, P.A., by John W. Gresham, for defendant-appellant.

HUDSON, Judge.

On 14 October 2003, plaintiff Kohler Company, Inc, ("Kohler") filed a complaint and moved for a temporary restraining order ("TRO"), alleging that defendant Thomas H. McIvor was in breach of a non-competition agreement ("the agreement"). The court issued the TRO *ex parte*, enjoining defendant from working in violation of the agreement. Following another *ex parte* hearing on 21 October 2003, the court entered a preliminary injunction against defendant. Defendant moved for relief from the preliminary injunction, which motion the court denied. On 21 November 2003, defendant moved to

stay the injunction, which motion the court also denied. Defendant appealed the preliminary injunction order and the order denying relief, and moved this Court for a temporary stay, which we allowed. One week after defendant filed his brief with this Court, Kohler voluntarily dismissed its action with prejudice, rendering the appeal moot.

Plaintiff then moved for sanctions pursuant to Rule 11 and for attorney fees. After a hearing, the trial court denied defendant's motion for sanctions and fees. Defendant appeals. As explained below, we affirm.

In November 2000, defendant began working for Kohler, a plumbing manufacturer, as a sales representative and signed a non-compete agreement. The agreement precluded defendant from selling products that compete with Kohler in all of North America for one year after defendant's separation from the company. Defendant's sales territory included South Carolina, part of western North Carolina, the Charlotte region, and Augusta, Georgia. On 18 September 2003, defendant notified his manager that he planned to resign, move to southern California, and join another plumbing manufacturer. After returning materials and equipment to Kohler, defendant began working in southern California, but ultimately resigned his position there due to Kohler's lawsuit.

On 22 September 2003, before he left for California, defendant gave his attorney's business card to his manager at Kohler. Kohler did not serve the pleadings on defendant's counsel, and gave no notice to defendant or his counsel of the TRO hearing. At the

hearing, Kohler's counsel stated that defendant was served in North Carolina, although defendant had actually been served in California only four days prior to the hearing. Kohler's counsel also stated that

On Friday (October 17, 2003), you called his house and his voice mail answers the phone. Today (October 21, 2003), if you call that number's been cancelled. So he's [defendant] been scurrying to erase any sign of residence here as quick as he can. I suppose to support this motion to dismiss

In fact, defendant's phone bill shows that his Charlotte phone number was disconnected on 22 September 2003. During the hearing, the court misread the agreement's geographic restriction as "nationwide," when it actually extended to all of North America. Kohler's counsel did not correct the court's error.

Neither defendant nor his counsel attended the preliminary injunction hearing, which actually took place several hours prior to its scheduled time. At the hearing, Kohler's counsel stated incorrectly that defendant was involved in national deals and worked with national contractors. Defendant's manager, who was present at the hearing, did not correct the misstatements.

Defendant first argues that the court erred in denying his motion for sanctions pursuant to Rule 11. We disagree.

Rule 11 provides, in pertinent part:

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record. . . . A party who is not represented by an attorney shall sign his pleading, motion, or other paper. . . . The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or

other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

N.C. Gen. Stat. § 1A-1, Rule 11(a) (2003). Pursuant to Rule 11, a signer must certify "that the pleadings are: (1) well grounded in fact, (2) warranted by existing law, 'or a good faith argument for the extension, modification, or reversal of existing law,' and (3) not interposed for any improper purpose." *Grover v. Norris*, 137 N.C. App. 487, 491, 529 S.E.2d 231, 233 (2000). Failure as to any one of these requirements constitutes a violation of Rule 11. *Bryson v. Sullivan*, 330 N.C. 644, 655, 412 S.E.2d 327, 332 (1992). This Court reviews a trial court's denial or imposition of Rule 11 sanctions *de novo* and

must determine (1) whether the trial court's conclusions of law support its judgment or determination; (2) whether the trial court's conclusions of law are supported by its findings of fact; and (3) whether the findings of fact are supported by a sufficiency of the evidence.

Renner v. Hawk, 125 N.C. App. 483, 491, 481 S.E.2d 370, 375, *disc. review denied*, 346 N.C. 283, 487 S.E.2d 553 (1997).

In analyzing whether a complaint meets the first certification requirement, we must determine: "(1) whether the plaintiff undertook a reasonable inquiry into the facts and (2) whether the plaintiff, after reviewing the results of his inquiry, reasonably believed that his position was well grounded in fact." *McClerin v.*

R-M Industries, Inc., 118 N.C. App. 640, 644, 456 S.E.2d 352, 355 (1995). “[I]n determining compliance with Rule 11, courts should avoid hindsight and resolve all doubts in favor of the signer.” *Twaddell v. Anderson*, 136 N.C. App. 56, 70, 523 S.E.2d 710, 720 (1999), *disc. review denied*, 351 N.C. 480, 543 S.E.2d 510 (2000) (internal quotation marks and citations omitted).

Here, defendant contends that discovery materials demonstrate that Kohler and its counsel knew their filings contained incorrect factual allegations and unsupported legal assertions and were aware that pleadings were filed for an improper purpose. Defendant contends that the complaint misstates his job duties and territory by alleging that defendant was the primary contact to Kohler’s most important Mid-Atlantic region. Defendant acknowledges that he had responsibility for parts of North and South Carolina, and Georgia.

Although plaintiff does not address this issue, we conclude that the term “Mid-Atlantic” is imprecise and defined quite differently by different entities. For example, while the United States Census Bureau defines the Mid-Atlantic region as New Jersey, New York, and Pennsylvania, the Environmental Protection Agency defines the Mid-Atlantic region as including Delaware, District of Columbia, Maryland, Pennsylvania, Virginia, and West Virginia. The Mid-Atlantic Seagrant Program, part of the National Sea Grant College Program, includes North Carolina in the Mid-Atlantic region, as does Joe Surkiewicz, the author of a book entitled Mountain Bike! Mid-Atlantic States: South Carolina to Washington DC. As these examples demonstrate, the term “Mid-Atlantic” simply

is not well-defined enough to support an allegation of factual insufficiency under Rule 11 when it is used to refer to North Carolina. Defendant does not present any definition in his brief of the term "Mid-Atlantic" which would support his contention.

Defendant also contends that the complaint makes false allegations without qualification regarding the misappropriation of trade secrets and confidential information. However, Kohler responds that the allegations in question were made upon information and belief. Defendant cites *Static Control Components, Inc. v. Vogler* as supporting sanctions in this case. 152 N.C. App. 599, 568 S.E.2d 305 (2002). We find *Static Control* distinguishable because the employer in that case "admitted that [the employee] had not violated the agreement, as was alleged in the complaint, and that there was no evidence that [the employee] was unwilling to abide by the agreement." *Id.* at 606, 568 S.E.2d at 310. Here, in contrast, Kohler never made such an admission.

In addition, "[t]he trial court's findings of fact are conclusive on appeal if supported by competent evidence, even when the record includes other evidence that might support contrary findings [and] findings of fact to which plaintiff has not assigned error and argued in his brief are conclusively established on appeal." *Id.* at 603, 568 S.E.2d at 308. Defendant here has not challenged findings that he was the local contact for local divisions of national builders, that he had access to proprietary information or that when reminded of the agreement's terms, he responded that he believed it was unenforceable and that he

welcomed any attempts to stop him from competing. These findings, which are conclusive before this Court, support the trial court's denial of Rule 11 sanctions. We overrule this assignment of error.

Defendant next argues that Kohler's complaint and memorandum in support of the motion for TRO were legally insufficient and require Rule 11 sanctions. We disagree.

As discussed above, "findings of fact to which plaintiff has not assigned error and argued in his brief are conclusively established on appeal." *Id.* Here, defendant failed to assign error to the following findings:

2. Because Rule 11, however, should "not have the effect of chilling creative advocacy, courts should [avoid hindsight] and resolve all doubts in favor of the signer." *Cross & Cross Properties, Ltd. v. Everett Allied Co.*, 886 F.2d 497, 504 (2d Cir. 1989).

4. For purposes of Rule 11, "[a] legal contention is unjustified when a reasonable attorney would recognize [it] as frivolous." *Forrest Creek Assocs. Ltd. v. Mclean Sav. & Loan Ass'n*, 831 F.2d 1238, 1245 (4th Cir. 1987). Put differently, a legal position violates Rule 11 if it "has **absolutely no chance of success** under the existing precedent." *Brubaker v. City of Richmond*, 943 F.2d 1363, 1373 (4th Cir. 1991) (quoting *Cleveland Demolition Co. v. Azcon Scrap Corp.*, 827 F.2d 984, 988 (4th cir. 1987)) (emphasis added).

6. Plaintiff's Verified Complaint and supporting Affidavits satisfy the certification requirements of Rule 11. On their face, these papers set out facts alleging that [defendant] (a) accepted employment with one of Plaintiff's direct

competitors in violation of the non-compete provision of the Agreement; and (b) improperly retained a variety of confidential information that should have been returned to Kohler, in violation of the Agreement and North Carolina statutory law.

9. North Carolina law on this issue is simple enough: "In deciding which law should govern interpretation of a contract, North Carolina follows the principle of *lex loci contractus*, which provides that the law of the state where the last act occurred to form a binding contract should apply." *NAS Surety Group v. Precision Wood Products*, 271 F. Supp. 776, 780 (M.D.N.C. 2003). Accord *Walden v. Vaughn*, 157 N.C. App. 507, 510, 579 S.E.2d 475, 477 (2003). Applying it to the muddled facts of this case, however, would test the most seasoned of choice of law practitioners, given that three jurisdictions (Virginia, North Carolina, and Wisconsin) arguably fit the bill.

11. While the Court is tempted to tackle this bar exam puzzler, the critical question, for purposes of Rule 11, is whether Plaintiff and its counsel made a "reasonable inquiry" before settling on their choice of North Carolina law. The Court concludes that they did. In particular, on the date Plaintiff filed its Verified Complaint, Kohler and its counsel had adequate grounds for believing, based on the documents available to them, that McIvor had accepted Plaintiff's offer of employment in North Carolina on November 6, 2000, and that this acceptance was the last act necessary to make the Agreement binding.

12. Defendant complains that he included the North Carolina address of his girlfriend (now wife) at Plaintiff's behest so as not to confuse Plaintiff's Human Resources Department, presumably because Defendant was being hired to work in North Carolina. Nevertheless, there is no evidence that Plaintiff knowingly kept this information from its attorneys, or that it even maintained

records from which it could cull this obscure fact almost three years later.

13. In short, neither a reasonable client nor its attorneys would be expected to discern the choice of law machinations resulting from the bizarre execution of an employment agreement by a mid-level sales executive and a multinational conglomerate, which occurred nearly three years before the filing of the Verified Complaint. As a result, Kohler's decision to advocate for the application of North Carolina law was reasonable.

14. Defendant also argues that Plaintiff's interpretation of North Carolina law (as set forth in Plaintiff's Memorandum) is patently unreasonable and therefore warrants Rule 11 sanctions. As to the legal sufficiency of a paper under Rule 11, the relevant inquiry is not the relative merits of the parties' positions, but instead (1) whether the paper is facially plausible, and, if not (2) whether the alleged offender undertook a reasonable inquiry into the law and thereafter formed a reasonable belief that the paper was warranted by existing law, judged as of the time the paper was signed. *Mack v. Moore*, 107 N.C. App. 87, 91, 418 S.E.2d 685, 688 (1992).

16. Defendant spends much time disputing Plaintiff's recitation of Defendant's duties and geographic areas of responsibilities while a Kohler and TOTO employee. Since Plaintiff's claims were not resolved on the merits, however, the Court is left with dueling affidavits and deposition testimony on these and many other factual issues. Rule 11, however, is not an end-around the crucible of a trial to conclusively determine the facts, nor does it authorize the award of sanctions where the evidence is in conflict.

18. On this question of law, reasonable judges have differed depending on the facts. Cf. *Triangle Leasing Co. v. McMahon*, 327 N.C. 224, 393 S.E.2d 854 (1990) (affirming two-year non-solicitation agreement applicable in North

Carolina or any other state or territory where Plaintiff conducts business); *A.E.P. Industries, Inc., v. McClure*, 308 N.C. 393, 302 S.E.2d 754 (1983) (applying New Jersey law, which the Court determined was similar to North Carolina law, and approving 18-month non-competition agreement applicable throughout the U.S.); *Harwell Enterprises, Inc., supra*; *Dunbar Ins. Agency, Inc. v. Barber*, 147 N.C. App. 463, 556 S.E.2d 331 (2001) (approving two-year agreement prohibiting employee from soliciting any customers, irrespective of prior contact); *Farr Assocs., Inc., v. Baskin*, 138 N.C. App. 276, 530 S.E.2d 878 (2000) (rejecting five-year agreement where prohibition extended to all clients in most of the U.S. and four countries, regardless of client location or employee's prior contact with them); *Market America, Inc., supra*; *Hartman*, 117 N.C. App. at 313-17, 450 S.E.2d at 917-20 (rejecting five-year non-competition agreement that extended beyond Defendant's business operations and was not tied to Defendant's customers); *Electrical South, Inc., v. Lewis*, 96 N.C. App. 160, 385 S.E.2d 352 (1989), *rev. denied*, 326 N.C. 595, 393 S.E.2d 876 (1990) (rejecting two-year world wide non-competition restriction because it failed to focus on legitimate goal of preventing employee's competition for employer's customers in a relevant territory; and *Manpower of Guilford County, Inc., v. Hedgecock*, 42 N.C. App. 515, 257 S.E.2d 109 (1979) (rejecting one-year non-competition agreement; length of restriction was reasonable but restrictions included geographic areas where plaintiff's business did not extend).

19. Given its breadth and scope, the Court finds that the Agreement toes the line of facial plausibility under North Carolina law. Nevertheless, three prior judges of this Court preliminarily determined that the Agreement was enforceable. North Carolina cases provide facially plausible support for this view, just as other cases compellingly support the contrary conclusion. Such a reasonable difference of opinion, however, necessarily defeats Defendant's claim for Rule 11 sanctions. Simply put, Defendant has not

shown that Plaintiff's legal argument had "absolutely no chance of success under the existing precedent." *Brubaker*, 943 F.2d at 1373.

22. Nor did Plaintiff violate the "improper purpose" prong of Rule 11. While Plaintiff is perhaps guilty of using the legal equivalent of a sledgehammer to swat a fly, Plaintiff instituted this suit for a proper purpose-to vindicate its rights under the Agreement. The Court also concludes that Plaintiff acted in good faith by dismissing its claims within a reasonable period after Defendant resigned his employment with TOTO (in effect providing Plaintiff the primary relief sought in this litigation).

Based upon the findings quoted above which are conclusive before this Court, Kohler's complaint and memorandum are legally sufficient, and defendant is not entitled to sanctions pursuant to Rule 11.

Defendant also argues that Kohler's complaint and memorandum were interposed for an improper purpose, requiring Rule 11 sanctions. We disagree.

"[F]indings of fact to which plaintiff has not assigned error and argued in his brief are conclusively established on appeal." *Id.* Here, defendant failed to assign error to finding 22 quoted above. This finding, which is conclusive before this Court, fully supports the conclusions that Kohler's complaint and memorandum were not interposed for an improper purpose, and that defendant is not entitled to sanctions pursuant to Rule 11 on that ground.

Finally, defendant argues that the trial court abused its discretion in failing to grant his motion for attorney fees pursuant to N.C. Gen. Stat. § 6-21.5. We disagree.

The statute provides, in pertinent part:

In any civil action or special proceeding the court, upon motion of the prevailing party, may award a reasonable attorney's fee to the prevailing party if the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the losing party in any pleading.

N.C. Gen. Stat. 6-21.5 (2003). "The decision to award or deny the award of attorney fees [pursuant to N.C. Gen. Stat. § 6-21.5] will not be disturbed on appeal unless the trial court has abused its discretion." *Area Landscaping, L.L.C. v. Glaxo-Wellcome, Inc.*, 160 N.C. App. 520, 528, 586 S.E.2d 507, 513 (2003). Defendant relies on the arguments discussed and rejected *supra* to establish the lack of any justiciable issues of law and fact. Having previously determined that those arguments lack merit, we likewise overrule this assignment of error.

Affirmed.

Judges BRYANT and CALABRIA concur

Report per Rule 30(e).