

NORTH CAROLINA  
WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
05 CvS 4005

KEVIN A. MONCE, )  
 )  
 Plaintiff, )  
 vs. )  
 NANCY G. DEAS and EDNA E. DEAS, )  
 )  
 Defendants. )

**DEFENDANTS' SUPPLEMENTAL  
AND REPLY BRIEF IN SUPPORT OF  
MOTION FOR SUMMARY JUDGMENT**

Defendants Nancy G. Deas and Edna E. Deas, through their undersigned counsel of record and pursuant to Rule 5 of the North Carolina Rules of Civil Procedure, respectfully submit this Supplemental and Reply Brief in response to plaintiff's Brief Opposing Summary Judgment ("the plaintiff's brief") in order clarify or correct certain statements contained therein with respect to the underlying facts and to respond to some specific arguments presented therein.

**Clarification and correction of plaintiff's statements about the underlying facts.**

The plaintiff's brief indicates that no genuine dispute exists between the plaintiff and the defendants with respect to the material facts, but the plaintiff's brief includes some misleading or incorrect characterizations about some of the underlying facts of record, as follows.

**1. The plaintiff mischaracterizes the date on which the defendants created their web site, and why they did so.** At page 1, the plaintiff's brief implies that the defendants created their web site because of their "disappointment" over the compromise consent order entered into between Dr. Monce and the North Carolina Veterinary Medical Board ("the Board") in April, 2003. In fact, however, the undisputed evidence plainly shows that the defendants created their web site in November, 2002, and that their motivation was to alert the public to the vagaries of the Board's administrative processes. Nancy Deas dep., at 71, 74.

**2. The plaintiff's brief mischaracterizes the defendants' complaint to the North Carolina Veterinary Medical Board.** At page 2 of his brief, the plaintiff asserts that the complaint filed by the defendants with the North Carolina Veterinary Medical Board ("the Board") asserted "that Drs. Monce and Jones had been incompetent and negligent in the treatment of [their dog]." A review of the defendants' complaint, which is attached to the plaintiff's brief, reveals that it makes no such accusation. Rather, the complaint simply asks the Board to determine "what actually did happen" in connection with the veterinarians' treatment of their dog, and whether the Board's own rules and standards of conduct were followed. Ex. 25, at p. 053. To assist the Board in making these determinations, the defendants provided the Board with their pet's medical history, a detailed chronology of the events leading up to his demise, and an extensive list of questions to which they sought answers. Id., at pp. 056-080. The determination that the plaintiff's treatment of the defendants' dog was affected by malpractice, incompetence and negligence was the Board's. Ex. 17.

**3. The defendants never sought an opinion concerning Dr. Monce's competence or compliance with the applicable standard of care from any veterinarian except the members of the Board.** At page 2, the plaintiff's brief asserts that "[t]he Deas consulted numerous veterinarians . . . but never found anyone who would opine that Dr. Monce was negligent or incompetent or had committed veterinarian [*sic*] malpractice." This statement is repeated in a slightly different form at page 6. Both statements seriously mischaracterize the defendants' testimony, because they suggest that the defendants *sought* such an opinion, but the record clearly shows that they did not. Nancy Deas testified that she asked numerous veterinarians to review Alex's records because she wanted to know "what was wrong with my dog, why he died." Nancy Deas dep. at p. 35. She also testified that as the result of her discussions with these veterinarians she formed her own opinions concerning the quality of Dr. Monce's care. Id., at pp. 33, 35 and 41-42. She also testified as follows:

**Q. (By Mr. Crowell)** Did you ask any of the veterinarians you contacted to opine as to whether Dr. Monce's treatment had been incompetent or negligent or constituted malpractice?

**A.** I did not.

Id., at p. 35. See also Id. at p. 41. (Nancy Deas never asked the veterinarians to opine as to whether Dr. Monce's treatment had met the standard of care applicable to a veterinarian in the same situation.)

Ms. Deas explained her consultations with the veterinarians this way: "My concern was why my dog died. It was not personal about Dr. Monce or Dr. Jones. I didn't have enough information to even form an opinion until I started seeking information. And I did form opinions after that based on the information I obtained . . ." Id., at p. 41.

The plaintiff's misrepresentation concerning the defendants' purpose in consulting with a series of veterinarians after their dog died is part and parcel of the plaintiff's attempt to divert the court's attention by converting this lawsuit into what it is not – a malpractice case against Dr. Monce in which the defendants, rather than he, would have the burden of proof. The issue in this case is not whether Dr. Monce's treatment of Alex *in fact* was negligent, incompetent or constituted malpractice; the issue is whether Dr. Monce can put forward any legal theory or forecast any evidence that would permit a jury to hold the defendants liable for having truthfully reported and fairly commented on the Board's findings and conclusions in that regard. A viewing of the video of Dr. Monce's insouciant demeanor and egocentric testimony at his deposition strongly suggests that he is incapable of admitting that he was incompetent or negligent or had committed malpractice, no matter what the circumstances. What he cannot deny, however, no matter how desperately he wishes to do so, is that the Board made such findings, and has never abrogated or rescinded them.

## ARGUMENT

1. **The plaintiff's reliance on *Boyce & Isley, PLLC v. Cooper* is misplaced.** At several points the plaintiff cites the Court of Appeals' decision in *Boyce & Isley, PLLC v. Cooper* for fundamental principles of North Carolina defamation law. The authoritative exposition of North Carolina's common law of libel, however, is the North Carolina Supreme Court's venerable opinion in *Flake v. Greensboro News Co.*, 212 N.C. 780, 195 S.E. 55 (1938). Indeed, the Court of Appeals panel that issued the *Boyce & Isley* opinion tacitly recognized *Flake's* authoritative status by multiple citations, but then muddled the law by misapplying the very principles for which *Flake* was cited.<sup>1</sup> Moreover, the issue in *Boyce & Isley* was whether the plaintiff had alleged sufficient facts to survive a motion to dismiss pursuant to Rule 12(b)(6) and thus has no application to this case, in which the issue is whether the plaintiff can forecast evidence and posit legal theories sufficient to overcome the defendants' motion for summary judgment.

2. **The fact that the plaintiff negotiated a consent order with the Board does not render the defendants' web site "false."** Plaintiff's brief attempts to wish away the findings and conclusions embodied in the Board's letter of reprimand to Dr. Monce, but they really happened, and the fact that plaintiff's counsel was able to negotiate a consent order that makes no mention of them does not change that fact. Plaintiff asserts that the consent order effectively dismissed the defendants' claim and rejected the findings set out in the Letter of Reprimand, but it does neither. He wants the court to read the consent order as saying that the Board had repudiated or withdrawn or at least thought better of the findings and conclusions set out in the Letter of Reprimand, but he can point to no evidence to support such a reading. He argues that the consent order somehow expunged the Letter of Reprimand, but it didn't. What

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<sup>1</sup> In the interest of full disclosure, the court should be aware that defendants' lead counsel has authored both a law review article critical of the Court of Appeals' *Boyce & Isley* opinion and an *amicus* brief filed in the case in connection with an appeal subsequent to the one in which the opinion cited by the plaintiff was issued. See, Hugh Stevens, "*Boyce & Isley, PLLC v. Cooper* and the Confusion of North Carolina Libel Law," 82 N.C. L. REV. 2018 (2004).

the record shows is not that Dr. Monce convinced the Board that its findings were unjustified, but that his lawyer is a very skilled negotiator.

**3. Plaintiff's proposed application of the "four corners" rule is too limited.**

The plaintiff argues that the defendants' "four corners" argument "twists the meaning of *Flake*, declaring in essence that a libelous statement does not matter if it is surrounded by a sufficient volume of other stuff." Plaintiff's brief, at 7. This statement twists the meaning of defendants' argument, which simply is that a defamation plaintiff cannot convert a truthful publication into a false one by lifting selected words or phrases out of their proper context. In this regard, the defendants do not disagree that the Board's findings of incompetence, negligence and malpractice on the part of Dr. Monce are *defamatory*. Dr. Monce's problem is that because the Board actually made and published those findings, he has no hope of carrying his burden that the defendants' web site is both defamatory and *false*, which is the burden he assumed by filing this lawsuit. Put another way, his problem is that, as the Board's counsel acknowledged, the information on the defendants' web site about the Board's findings of incompetence, negligence and malpractice on the part of Dr. Monce (*and* about his successful "plea bargain" resulting in the consent order) is precisely the same information that would be seen by a visitor to the Board's offices who reviewed Dr. Monce's file. This court should reject Dr. Monce's attempt to re-write history.

**4. Plaintiff's crabbed view of "matters of public concern" does not reflect the law.** In sections III and IV of his brief the plaintiff dismisses the defendants' "matter of public concern" arguments and denigrates their First Amendment rights by arguing that the purpose or content of the web site does not matter so long as it contains defamatory statements about Dr. Monce. That simply is not the law. As noted in the defendants' principal brief, this issue arises because the First Amendment is deemed to accord more protection to speech about public issues than to speech about purely private matters. See, e.g., *Neill Grading and Const. Co., Inc. v. Lingafelt*, 168 N.C. App. 36, 42-43, 606 S.E.2d 734, 738-39 (2005). Contrary to the

plaintiff's argument, whether speech is addressed to a matter of public concern is determined by the content and context of the speech – not by how much media coverage the subject matter of the speech has attracted. As explained at pages 13-15 of the defendants' principal brief, a web site that discusses, and provides detailed information about, the workings of a government regulatory and licensing agency is intrinsically addressed to "matters of public concern."

Respectfully submitted this 14<sup>th</sup> day of November, 2006.



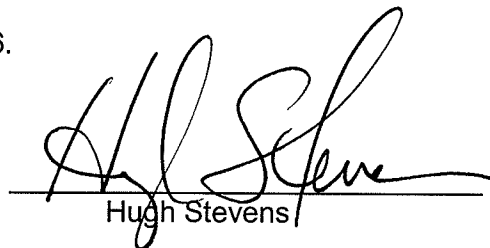
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing was served on counsel of record by hand delivery to:

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