

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA01-617

NORTH CAROLINA COURT OF APPEALS

Filed: 7 May 2002

COREY BRANDON BUMGARNER,

Plaintiff,

v.

Jackson County
No. 99 CVD 560

DONALD CHARLES WOOD,

Defendant.

Appeal by defendant from judgment entered 9 April 2001 by Judge Steven J. Bryant in Buncombe County District Court. Heard in the Court of Appeals 21 February 2002.

Gary E. Kirby for plaintiff-appellee.

William C. Morris, Jr., for defendant-appellant.

MARTIN, Judge.

Plaintiff brought this action to recover \$2,164.46 as damages to his vehicle following a motor vehicle collision on 8 May 1999 allegedly caused by defendant's negligence. Defendant answered, denying negligence but asserting as an affirmative defense that plaintiff had been paid for the damages by defendant's insurance carrier. The parties subsequently stipulated that defendant's insurance carrier had mailed a draft in the amount of \$2,164.46 drawn on Fleet Bank of Hartford, Connecticut, dated 28 June 1999, payable to plaintiff, P.O. Box 153, Hillsboro, North Carolina. The

draft was negotiated at Community Bank and Trust at its branch office in either Marion or Rutherfordton. The name "Crystal Bumgarner" was written in handwriting on the back of the draft and plaintiff's name was written below Crystal Bumgarner's name. Crystal Bumgarner's driver's license number was handwritten on the front of the draft. Crystal Bumgarner is plaintiff's former wife from whom plaintiff was separated at the time the draft was negotiated. The parties also stipulated that plaintiff had provided defendant's counsel with an affidavit in which he stated that the endorsement on the draft was not his handwriting, that he did not authorize anyone to endorse the draft on his behalf, and that he had received no proceeds from the negotiation of the draft.

Based upon the stipulated facts, the trial court concluded that plaintiff had never actually received the payment made on defendant's behalf in settlement of plaintiff's property damage claim and that plaintiff was entitled to recover \$2,164.46 from defendant. The trial court also concluded that defendant's insurance carrier was the party with recourse to recover the amount paid as a result of the improper negotiation of the draft at Community Bank and Trust. Defendant appeals.

By a single argument in support of his five assignments of error, defendant contends the trial court erred in holding that plaintiff is entitled to recover judgment against him. For the following reasons, we reverse.

G.S. § 25-3-420 provides:

(a) The law applicable to conversion of personal property applies to instruments. An instrument is also converted if it is taken by transfer, other than a negotiation, from a person not entitled to enforce the instrument or a bank makes or obtains payment with respect to the instrument for a person not entitled to enforce the instrument or receive payment. An action for conversion of an instrument may not be brought by (i) the issuer or acceptor of the instrument, or (ii) a payee or indorsee who did not receive delivery of the instrument either directly or through delivery to an agent or a co-payee.

(b) In an action under subsection (a) of this section, the measure of liability is presumed to be the amount payable on the instrument, but recovery may not exceed the amount of the plaintiff's interest in the instrument.

(c) A representative, other than a depository bank, who has in good faith dealt with an instrument or its proceeds on behalf of one who was not the person entitled to enforce the instrument is not liable in conversion to that person beyond the amount of any proceeds that it has not paid out.

N.C. Gen. Stat. § 25-3-420 (2001). The Official Comment to the statute explains that the statute applies to "cases in which a depository or payor bank takes an instrument bearing a forged indorsement." In those cases where delivery to the payee does not occur, the payee's right to enforce the underlying obligation is unaffected by the fraud of the thief:

Until delivery, the payee does not have any interest in the check. The payee never became the holder of the check nor a person entitled to enforce the check. Section 3-301. Nor is the payee injured by the fraud. Normally the drawer of a check intends to pay an obligation owed to the payee. But if the check is never delivered to the payee, the obligation owed to the payee is not affected. If the check falls into the hands of a thief who obtains payment after forging the signature of the payee as an indorsement, the obligation owed to the payee continues to exist after the thief receives

payment.

Id.

However:

The situation is different if the check is delivered to the payee. If the check is taken for an obligation owed to the payee, the last sentence of Section 3-310(b)(4) provides that the obligation may not be enforced to the extent of the amount of the check. The payee's rights are restricted to enforcement of the payee's rights in the instrument. In this event the payee is injured by the theft and has a cause of action for conversion.

Id. The Official Comment to G.S. § 25-3-420 states that delivery of an instrument occurs when it "comes into the payee's possession, as for example when it is put into the payee's mailbox." Although the Official Comment is not controlling authority, it provides guidance in the interpretation of the statutory provisions. See *Constantine v. Miller Industries, Inc.*, 33 S.W.3d 809, 814 (Tenn.Ct.App.,2000).

Moreover, although the appellate courts of North Carolina have not addressed the specific question of when and how delivery of a negotiable instrument to a payee must occur in order for the payee to have a claim for relief in conversion, a case with similar facts to those in the present case was recently decided by the Mississippi Court of Appeals. In *Hancock Bank v. Ensenat*, ___ So.2d ___ WL 1610059, (Miss.App., 18 December 2001), where four negotiable instruments were issued by two investment companies and sent to the plaintiff's home address; the plaintiff's niece stole the checks from the plaintiff's mailbox, then fraudulently endorsed

and deposited them into an account at Hancock Bank, the defendant. There was no evidence that the plaintiff ever physically possessed the checks. The court in that case stated that "[t]he official comments to this Code section explain what the term 'delivery' should mean in this context." *Id.* at slip op. p. 6.

The official Code comments are entitled to significant weight as aids to interpretation. ¶ 31. The official comments to section 3-420 state that a "payee receives delivery when the check comes into the payee's possession, as for example when it is put into the payee's mailbox." U.C.C. § 3-420 cmt. (1). . . Ensenat received delivery of the four checks. The comments explain that if a payee such as Ensenat was not "delivered" the instruments, then it is the investment service and not the bank that is liable. U.C.C. § 3-420 cmt (1).

Id. at slip op. p. 6-7. "[C]ase law from outside jurisdictions interpreting the U.C.C., while not conclusive, affords guidance to this Court." *Alamance County Bd. of Educ. v. Bobby Murray Chevrolet, Inc.*, 121 N.C. App. 222, 226-27, 465 S.E.2d 306, 310 *disc. review denied*, 342 N.C. 893, 467 S.E.2d 899 (1996) (citation omitted).

In the present case, the parties stipulated:

3. Payment was forwarded to Plaintiff by Defendant's carrier by a draft dated the 28th day of June, 1999 in the amount of \$2,164.46 and made payable to Corey Bumgarner at P.O. Box 153, Hillsboro, North Carolina.

Since the parties stipulated that the instrument was sent to plaintiff's post office box, plaintiff received delivery of the instrument within the meaning of G.S. § 25-3-420. Thus, while plaintiff has a claim for relief for conversion against the individual who allegedly took the instrument and obtained payment,

i.e., Crystal Bumgarner, and the depository bank, Community Bank and Trust, which wrongfully honored the draft, he has no claim against defendant or the drawer of the draft, defendant's insurer.

Reversed.

Judges HUDSON and CAMPBELL concur.

Report per Rule 30(e).