No. 10-2437

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JEREMY ALLEN MAYFIELD and MAYFIELD MOTORSPORTS, INC.,

Plaintiffs-Appellants

v.

NATIONAL ASSOCIATION FOR STOCK CAR AUTO RACING, INC.; BRIAN ZACHARY FRANCE; AEGIS SCIENCES CORPORATION; DAVID LEE BLACK, Ph.D.; and DOUGLAS F. AUKERMAN, M.D.,

Defendants-Appellees

BRIEF OF APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, the undersigned counsel for Appellant Mayfield Motorsports, Inc. states that Mayfield Motorsports, Inc. is a privately-held North Carolina corporation. No publicly held company owns 10% or more of its stock.

Dated: March 22, 2011

Respectfully submitted,

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I. STATEMENT OF JURISDICTION

Plaintiffs-Appellants originally filed this action in the General Court of Justice, Superior Court Division, Mecklenburg County, North Carolina, and it was thereafter removed to the United States District Court for the Western District of North Carolina. The District Court ultimately made a factual determination that it had subject matter jurisdiction pursuant to 28 U.S.C. § 1332.

This Court has jurisdiction pursuant to 28 U.S.C. § 1291 as this is an appeal from a final judgment disposing of all parties' claims.

The District Court entered judgment on September 29, 2010. Later that day, Appellants filed a Motion for Reconsideration and to Amend the Complaint. The District Court denied Appellants' motion on December 13, 2010 and Appellants timely filed their notice of appeal ten days later on December 23, 2010.

II. ISSUES PRESENTED FOR REVIEW

Appellants-Plaintiffs appeal from the District Court's rulings (1) granting Appellees-Defendants' Motion for Judgment on the Pleadings, and (2) denying Plaintiffs' Motion for Reconsideration and to Amend Complaint.

The District Court's ruling that Defendants were entitled to judgment on the pleadings based upon provisions in the contracts between the parties purporting to release NASCAR and its agents from any liability for their actions presents the following issues:

(1) Whether such anticipatory releases are enforceable under Florida law as applied to intentional, willful, malicious, or grossly negligent conduct; and

(2) Whether and to what extent such anticipatory releases are enforceable under Florida law as applied to claims for breach of the same contract.

The District Court's ruling that Defendants were entitled to judgment on the pleadings because Plaintiffs failed to state claims for defamation, breach of contract, and unfair and deceptive trade practices presents the following issues:

(1) What level of specificity is required to be plead by a plaintiff asserting a defamation claim with respect to the elements of knowledge and malice in light of Federal Rule of Civil Procedure 9, the Supreme Court's ruling in *Bell Atlantic Corp. v. Twombley*, 550 U.S. 554 (2007), and this Circuit's defamation case law and whether Plaintiffs pled their allegations with such sufficiency;

(2) What standards and procedures the contracts at issue obligated Defendants to comply with and whether Plaintiffs sufficiently alleged that they did not abide by those standards and procedures; and

(3) Whether Plaintiffs allegations were sufficient to state a claim for unfair and deceptive trade practices under North Carolina law.

The District Court's ruling denying Plaintiffs' Motion for Reconsideration and to Amend Complaint because it failed to satisfy the standards applicable to

motions under Federal Rules of Civil Procedure 59(e) and 60 presents the following issues:

(1) Whether the District Court should have reconsidered its prior ruling on Defendants' Motion for Judgment on the Pleadings in light of the law and allegations identified by Plaintiffs; and

(2) Whether the District Court erred in concluding that it could not grant Plaintiffs' request for leave to amend their complaint unless it first concluded relief was appropriate under under Federal Rules of Civil Procedure 59(e) and 60.

III. STATEMENT OF THE CASE

Following the reporting and publication of an erroneous drug test result allegedly obtained from Appellant Mayfield in early and mid-May 2009, Appellants-Plaintiffs—professional race car driver Jeremy Allen Mayfield and his corporate race team—filed suit against Defendants-Appellees on May 29, 2009, asserting claims for defamation, violation of the North Carolina Persons with Disabilities Protection Act, unfair and deceptive trade practices, breach of contract, negligence, punitive damages, and injunctive relief.

Appellees-Defendants—stock car racing promoter the National Association for Stock Car Racing, Inc. ("NASCAR"); its principal owner and chief executive officer, Brian Zachary France; drug testing laboratory Aegis Sciences Corporation ("Aegis"); and various individuals associated therewith, David Lee Black, Ph.D.

and Douglas F. Aukerman, M.D.—removed the case to federal court. Thereafter, NASCAR asserted counterclaims against both Plaintiffs for breach of contract, breach of the implied covenant of good faith and fair dealing, unjust enrichment, fraud in the inducement, and fraud.

On November 17, 2009, Defendants filed a motion for judgment on the pleadings (JA at 571-617) which the District Court granted on May 18, 2010 reasoning that certain contractual provisions in Plaintiffs' agreements with NASCAR operated to release Defendants from all liability, even for intentional torts and breach of contract, and that Plaintiffs had failed to sufficiently state their claims. (JA at 953-78.) The court denied a subsequent motion to vacate filed by Appellants, and the parties proceeded to take discovery and litigate NASCAR's counterclaims.

On September 8, 2010, Plaintiffs informed counsel for NASCAR and France that they would seek to amend their complaint to add new allegations in support of their claims and to assert new and additional claims based upon facts learned in discovery and through other investigation. On September 15th counsel met in person and discussed, among other things, the nature of these additional allegations and claims. On September 23, 2010, NASCAR moved voluntarily to dismiss its counterclaims, in response to which Plaintiffs indicated to the District Court that

they intended to file a motion for reconsideration of its order granting judgment on the pleadings and for leave to amend their complaint to add allegations and claims.

The District Court granted NASCAR's motion and dismissed its counterclaims without prejudice, finding no prejudice to Plaintiffs and no reason to impose any conditions upon the mid-litigation dismissal. Hours later, Plaintiffs filed a Motion for Reconsideration and to Amend Complaint asking the court to revisit its ruling on Defendants' Motion for Judgment on the Pleadings and requesting leave to supplement its allegations in support of its claims and to assert new claims. The District Court denied that motion on December 13, 2010, reasoning that the standard under Rules 59(e) and 60 was not satisfied and that, absent a basis warranting the granting of such a motion, it could not grant the motion for leave to file an amended complaint. This appeal followed.

IV. STATEMENT OF FACTS

Appellant-Plaintiff Mayfield is a professional race car driver and the principal owner of Appellant-Plaintiff Mayfield Motorsports, Inc., which operates a race team based in North Carolina. For 17 years leading up to the events at issue in this case, Mayfield raced stock cars and competed in racing events staged by Appellee-Defendant NASCAR. Appellee-Defendant France is the principal owner and chief executive officer of NASCAR.

Prior to the 2009 racing season, Plaintiffs and NASCAR entered into various agreements, including a NASCAR Sprint Cup Series 2009 Driver and Car Owner Agreement ("Driver/Owner Agreement") (JA at 604-14), a NASCAR Competition Membership and License Application NASCAR Sprint Cup Series *Drivers* ("Drivers Application") (emphasis in original) (JA at 598-99), and a NASCAR Competition Membership and License Application NASCAR Sprint Cup Series *Car Owners* ("Owners Application") (emphasis in original) (JA at 601-02).

Paragraph 16 of the Driver/Owner Agreement states, *inter alia*, that "Driver and car owner understand and agree to abide by the NASCAR Substance Abuse Policy …." (JA at 611.) The Substance Abuse Policy requires competitors to submit to random drug tests. It also permits NASCAR to designate "an independent, third-party agency … to administer the collection, transport, and testing of specimens pursuant to this Policy" and provides that such agency may be responsible for complying with certain procedures pertaining to the collection, handling, and security of specimens collected under the Substance Abuse Policy. (JA at 22 [§ 4].)

The Substance Abuse Policy further states that "[a]ll testing will be done at a facility or facilities exclusively selected by NASCAR from among those facilities that have been certified by the Substance Abuse and Mental Health Services Administration ["SAMHSA"] of the United States Department of Health and

Human Services ["HHS"] and/or by the College of American Pathologists Forensic Urine Drug Testing Program." (JA at 22 [§ 5].)

SAMHSA promulgates Mandatory Guidelines for Federal Work Place Drug Testing Programs ("Guidelines and Procedure"). The Guidelines and Procedure set forth the policy and guidelines required to be followed by its certified labs in taking, processing, testing and issuing results for various drug tests.

In addition, SAMHSA and HHS promulgate a Medical Review Officer Manual for Federal Agency Work Place Drug Testing Programs (hereinafter the "MRO Manual"). The MRO Manual became effective November 1, 2004. The MRO Manual provides guidance to supplement the medical review officer requirements contained in the Guidelines and Procedure.

Appellee-Defendant Aegis operates a forensic chemical and drug testing laboratory which, by contract with NASCAR, performs testing under NASCAR's Substance Abuse Policy. Aegis is certified by SAMHSA. Appellee-Defendant Black is the president and chief executive officer of Aegis, and the putative administrator of NASCAR's "drug testing program."

As alleged in Plaintiffs' Verified Complaint, on May 1, 2009, at Richmond International Raceway, a NASCAR official instructed Mayfield to report to a trailer for random drug testing. There, an employee or representative of Aegis and/or NASCAR told Mayfield to select a urine sample cup from a cluttered, non-

sterilized table and to urinate into the cup. He complied, utilizing a nearby restroom that was neither secure nor sterilized. (JA at 5-6.)

He was then told to initial two labels, each of which had adhesive backing and neither of which was then affixed to any specimen cup. He again complied. He did not observe the collector affixing any labels to any sample of his urine. (JA at 5-6.)

Mayfield told the collector that he had taken two Claritin-D pills within the preceding twenty-four hours. The collector told Mayfield that he (Mayfield) would need to inform Black about his ingestion of Claritin-D and provided him with a card containing Black's contact information so that he could so inform him. He did not provide Mayfield with any forms on which to provide—or otherwise indicate that Mayfield should provide in writing—information identifying prescription and/or over-the-counter medications. (JA at 5-6.)

The Substance Abuse Policy required NASCAR's agent to, *inter alia*, "[e]nsure that the specimen(s) are from the Competitor … in question (including, where necessary, observation of the collection of the specimen(s);" to "[l]abel, secure, and transport the specimen(s) to NASCAR's designated testing facility … in such a manner as to ensure that the specimen(s) are not misplaced, tampered with, or relabeled;" and to "[p]rovide a form to be completed by the Competitor … in question that identifies all prescription and over-the-counter medications

consumed by the Competitor … in the preceding three months." (JA at 22 [§ 4(A), (D), and (E)].)

Nevertheless and as instructed, Mayfield attempted to call Black immediately following the provision of his sample. After numerous calls to Black, he finally returned Mayfield's call on Sunday, May 3rd. Mayfield then informed Black that he took Adderall XR pursuant to a prescription to treat attention-deficit hyperactivity disorder ("ADHD") and that he also had taken two Claritin-D pills to alleviate the symptoms of his allergies the day before he provided a urine sample. Black expressed his doubt that someone of Mayfield's age legitimately needed to take Adderall and stated that Claritin-D could show up in the test as an unauthorized stimulant. (JA at 6.)

Black advised Mayfield that a physician would contact him if his drug test proved to be positive for an unauthorized substance. (JA at 6.)

Aegis performed its first test of Specimen A prior to 6:01 p.m. on May 6, 2009. (JA at 10.)

On May 7, 2009, Appellee-Defendant Douglas Aukerman called and informed Mayfield that his urine sample "tested positive" for amphetamines. Aukerman, an employee of Penn State Orthopedics and Rehabilitation which is *not* a SAMHSA-certified testing facility, was the MRO with respect to Mayfield's test. Prior to their May 7th conversation, Mayfield had never met or spoken with

Aukerman. (JA at 6.)

Aukerman requested copies of any medical records—not just prescription documentation—related to Mayfield's ADHD diagnosis, stating that such an explanation of why these drugs appeared in his urine sample would turn his "positive test into a negative." Mayfield immediately requested that his physician fax the records to Aukerman, which occurred within the hour. (JA at 6.)

The following morning Aukerman called Mayfield with various questions about his use of Adderall and he also asked if Mayfield had taken any inhalants recently. Initially Mayfield said that he had not but later that day, after practicing for an upcoming race, he again spoke with Aukerman and he explained that although he did not take any inhalants, he had been in a fiery wreck while competing in late April (the week before he provided the sample) and had inhaled a large amount of fumes. (JA at 7.)

Later on May 8, 2009, Aukerman told Mayfield that Aegis had tested his urine Sample "A" and that the results "were positive" for prohibited drugs. Aukerman also told Mayfield that his urine Sample "B" had been frozen, and that it could be tested to see if it was also positive for prohibited substances. Mayfield had no knowledge of any Sample "B," and so informed Aukerman. (JA at 7.)

He also questioned how a second test from the same urine sample could yield a different result and volunteered to immediately submit to one or more

additional tests. Aukerman refused this offer, stating that Aegis could have made a mistake in testing the initial specimen and that therefore Mayfield may want to have *them* test his Sample "B" specimen. (JA at 7.)

But SAMHSA's minimum drug testing procedures provide in pertinent part as follows:

> (e) *Donor Request to MRO for Retest*
>
> (1) For a positive, adulterated, or substituted result reported on a single specimen or a primary (Bottle A) specimen, a donor may request through the MRO that an aliquot from the single specimen or the split (Bottle B) specimen be tested by a second HHS-certified laboratory to verify the results reported by the first laboratory. For a single specimen or primary (Bottle A) specimen reported as an invalid result, a donor may not request that an aliquot from the single specimen or the split (Bottle B) specimen be tested by a second HHS-certified laboratory.
>
> (2) The donor has seventy two (72) hours from the time the MRO notified the donor that his or her specimen was reported positive, adulterated, or substituted to request a retest of an aliquot from a single specimen or to test the split (Bottle B) specimen.

(JA at 9-10, 49.) Further, the MRO Manual contains a specific procedure which the MRO must follow to handle retest requests for positive, adulterated or substituted urine specimens: "[t]he donor has 72 hours from the time the MRO notified the donor that his or her specimen was replied positive, adulterated or substituted to request the retest. (JA at 10-11.)

Mayfield expressed his confusion concerning Aukerman's suggestion regarding the testing of a second urine specimen and never instructed or authorized

Aukerman or anyone else to test the Sample "B" specimen. Aukerman never provided any information to Mayfield, orally or in writing, describing Mayfield's right to require that the Sample "B" be tested by a second SAMHSA-certified laboratory. (JA at 7-8.)

At the end of their conversation on May 8, 2009, Aukerman informed Mayfield that he would have to send a positive test result to NASCAR. Mayfield told him to "[d]o whatever you feel like you need to do because you have done nothing but confuse me and I don't know what else to tell you to do," and he called Appellee Black seeking a copy of his test results. (JA at 7.)

Black refused to provide them, stating that the results were the "property of NASCAR." Then, without Mayfield's consent, knowledge or permission, Aegis on its own or on Aukerman's instructions tested Mayfield's Sample "B" on May 9, 2009. To do so, Aegis broke the seal of Sample "B," thereby rendering it unavailable for independent testing. Aegis forwarded the results of both tests to NASCAR, but not to Appellants. Appellants did not learn this until after May 9, 2009. (JA at 7-8.)

Neither Aukerman nor anyone else affiliated with Aegis or NASCAR informed Mayfield of the actual results of either test. (JA at 8.) On Saturday, May 9, 2009, a NASCAR representative informed Mayfield by telephone that he was indefinitely suspended from competition as both a driver and a team owner. (JA at

8.)

On or about May 13, 2009, Appellant Mayfield's counsel specifically requested that NASCAR provide him with the drug test results. (JA at 8.)

On May 15, 2009, before Mayfield was provided with the results and despite the irregularities in the testing procedures, Appellee-Defendant France held a press conference for the purpose of publicizing that Mayfield had been suspended because he took a "performance-enhancing" or a "recreational" drug. Following his press conference, Appellee-Defendant Black told reporters that Mayfield's positive drug test results were not related to an over-the-counter drug or a prescription medication. Black stated, "[t]hey were not the cause, and could not be the cause, of his result." (JA at 8.)

France and Black's statements were intentional, malicious, reckless and false, and each knew or should have known that his statements were false. (JA at 8, 12-13.)

On May 19, 2009, Mayfield's counsel again requested the test results. Because NASCAR provided only one set of results, the following day Mayfield's counsel requested the results for Aegis' test of Sample "B," and any other specimens allegedly obtained from Mayfield, which were plainly and intentionally omitted from the single set of results provided on May 19th. On the afternoon of May 20, 2009, NASCAR finally provided the test results allegedly related to

Mayfield's Sample "B." (JA at 8-9.)

On May 29, 2009, Appellants filed suit against Appellees asserting claims for defamation, violation of the North Carolina Persons with Disabilities Protection Act, unfair and deceptive trade practices, breach of contract, negligence, punitive damages, and injunctive relief.

In seeking judgment on the pleadings, Appellees invoked exculpatory provisions contained within the various agreements between Appellants and NASCAR. First, the Driver/Owner Agreement provides that:

> **18. INDEMNIFICATION.** Car owner agrees that it is solely responsible for, and will defend, indemnify and hold harmless NASCAR and its affiliates, and the shareholders, directors, officers, agents, and employees of NASCAR and of its affiliates from any third-party loss, costs, expenses (including attorneys' fees), claims, demands, liabilities, causes of action or damages, arising out of or in any way related to this Agreement.

(JA at 611.)

In addition, the Drivers Application and Owners Application each contain the following provision:

> I recognize that the NASCAR Substance Abuse Policy promotes the integrity of NASCAR-sanctioned racing and the safety of NASCAR Competitors, Officials, and spectators. Accordingly, I HEREBY RELEASE, DISCHARGE, COVENANT NOT TO SUE, AND AGREE TO HOLD HARMLESS NASCAR, its officers, employees, directors, agents, and such testing facilities and Medical Review Officers as NASCAR retains or selects in connection with implementation of the Policy, as well as the officers, employees, and agents of each of them, and any other persons or entities against whom I might have a claim, from and/or for claims, damages, losses,

> or expenses of any kind, whether caused by negligence or otherwise, arising out of the implementation of the Policy, or any act or omission in connection therewith, including and without limitation, the testing of specimens and the publication of the test results and circumstances giving rise to such test or tests to any third party or parties by NASCAR or said testing facilities or said Medical Review Officers, as well as the officers, employees, and agents of each of them, or any other persons or entities.

(JA at 599, 602.)

Finally, Section 7(C) of the January 2009 NASCAR Substance Abuse Policy states as follows:

> C. NASCAR may publish the results of any test or tests conducted pursuant to this Policy and the circumstances giving rise to such test to such third parties as NASCAR, in its sole discretion, deems reasonable under the circumstances. The Competitor or Official shall have no claim or cause of action of any kind against NASCAR or any director, officer, employee or agent of NASCAR with respect to such publication.

(JA at 23.)

On May 18, 2010 the District Court granted Defendants' motion for judgment on the pleadings (JA at 953-78), but the case proceeded as to NASCAR's counterclaims.

Based upon their investigation to that point, on September 3, 2010, Plaintiffs served interrogatories and document requests upon NASCAR which sought documents pertaining to radio communications between Mayfield and NASCAR race officials during races in 2006 and telephone account numbers for France during the same period. Because of the events that followed, the District Court

dismissed the case on September 29, 2010, and NASCAR never responded to those requests, as the responses were not due until October 4, 2010. (JA at 1292.)

On September 8, 2010, counsel for Plaintiffs advised counsel for NASCAR that they expected to seek leave to amend the complaint to add additional averments with respect to malice and to add facts which would demonstrate malice, and other possible causes of action including, in particular, misconduct by France. (JA at 1293.)

At Plaintiffs' request, counsel for the parties met in person on September 15, 2010, to discuss further the topic of settlement. During this meeting, Defendants' counsel asked why Plaintiffs were seeking discovery pertaining to France's telephone accounts and radio communications during races in which Mayfield had driven. Plaintiffs' counsel explained, in detail, the allegations which they anticipated adding to the complaint regarding France's conduct during the August 6, 2006, Allstate 400 race. Defense counsel stated that she did not believe the allegations. Plaintiffs' counsel stated that he found the witnesses to be credible and that, if she had any evidence to contradict the allegations, she should let him know. (JA at 1293-94.)

On September 22, 2010, NASCAR contacted Plaintiffs' counsel and requested that they stipulate to the dismissal of NASCAR's counterclaims. (JA at 1294.) On September 23, 2010, after Plaintiffs declined to stipulate to NASCAR

voluntarily dismissing its counterclaims without prejudice and subject to no conditions, NASCAR filed a motion to dismiss its counterclaims. (JA at 1017-21, 1294.) The same day, the District Court issued an order giving Plaintiffs five calendar days to respond to the motion to dismiss. (JA at 1022.)

On September 28, 2010, Plaintiffs opposed the motion unless the dismissal was going to be with prejudice or NASCAR paid fees and costs. In addition, the response advised the District Court that Plaintiffs expected to file a motion for leave to amend the complaint, on the very next day, September 29, 2010. (JA at 1023-32.)

The next day, before Plaintiffs could file the motion they had promised to file, the District Court granted NASCAR's motion to dismiss without prejudice and ordered that a final judgment be entered (JA at 1033-36), which the Clerk did the same day. (JA at 1037.)

Just a few hours later, Plaintiffs filed a Motion for Reconsideration and to Amend the Complaint identifying various errors in the District Court's ruling on Defendants' Motion for Judgment on the Pleadings, and seeking leave to amend their complaint to supplement the allegations in support of their original claims and to assert new claims based upon additional facts. (JA at 1038-1128.) Defendants opposed by seeking sanctions against counsel for Plaintiffs and attempting to defend against the new allegations and claims on a factual basis. (JA at 1129-

1232.) The District Court denied Plaintiffs' motion on December 13, 2010, reasoning that the standard under Rules 59(e) and 60 was not satisfied and that, absent a basis warranting the granting of such a motion, it could not grant the motion for leave to file an amended complaint.

VII. ARGUMENT

A. The District Court Erroneously Granted Judgment on the Pleadings Against Plaintiffs

A district court's decision to grant judgment on the pleadings is reviewed *de novo*, applying the same standard for Rule 12(c) motions as for motions made pursuant to Rule 12(b)(6). *Burbach Broad. Co. of Delaware v. Elkins Radio Corp.*, 278 F.3d 401, 405-06 (4th Cir. 2002). The Court must accept as true the factual allegations contained in the complaint and draw all reasonable inferences in favor of the plaintiffs below. *Id.*

1. The District Court Incorrectly Held the Anticipatory Releases Enforceable as Against *Any and All* Claims

The principal basis upon which the District Court granted Defendants judgment on the pleadings was its conclusion that "[u]nder Florida law, a party can waive its right to sue for breach of contract, negligence, and intentional torts" and that Plaintiffs had done so with respect to any and all claims arising from NASCAR's Substance Abuse Policy. (JA at 959-61.) Though correct as to ordinary negligence claims, the District Court's ruling is contrary to controlling

Florida case law[1] and works a substantial expansion of that state's law limiting the enforceability of anticipatory releases.

"Exculpatory clauses 'are not favored in the law, and Florida law requires that such clauses be strictly construed against the party claiming to be relieved of liability. Such clauses are enforceable only where and to the extent that the intention to be relieved was made clear and unequivocal in the contract, and the wording must be so clear and understandable that an ordinary and knowledgeable party will know what he is contracting away.'" *Hertz Corp. v. David Klein Mfg, Inc.*, 646 So. 2d 189, 191 (Fla. Ct. App. 1994) (quoting *Southworth & McGill, P.A. v. Southern Bell Tel. & Tel. Co.*, 580 So. 2d 628, 634 (Fla. Ct. App. 1991)).

a. Florida Law Holds Anticipatory Releases Unenforceable as Applied to Claims of Willful, Malicious, and Grossly Negligent Conduct

Though the Florida Supreme Court does not appear to have addressed the issue directly, the Florida Court of Appeals has repeatedly held that putative releases of intentional tort claims are void and unenforceable. In the words of one such court, "Florida courts will not enforce releases of *intentional* torts, as they violate public policy." *Horizons Rehabilitation, Inc. v. Health Care & Retirement Corp.*, 810 So. 2d 958, 962 n.3 (Fla. Ct. App. 2002) (emphasis in original), *review denied*, 832 So. 2d 104 (Fla. 2002); *see also Loewe v. Seagate Homes, Inc.*, 987

[1] The Owner/Driver Agreement contains a choice-of-law provision providing that Florida law shall govern it. (JA at 611.)

So. 2d 758, 760 (Fla. Ct. App. 2008) ("Here, the exculpatory clause is obviously unenforceable to the extent that it attempts to release Seagate of liability for an intentional tort."); *Southworth & McGill*, 580 So. 2d at 631 ("the exculpatory clause does not protect against willful, malicious, or grossly negligent actions"); *Theis v. J & J Racing Promotions*, 571 So. 2d 92, 94 (Fla. Ct. App. 1990) (observing that broad language releasing from liability for acts or omissions resulting from negligence "or otherwise" would not exculpate from intentional torts); 1 *La Coe's Pleadings Under the Florida Rules of Civil Procedure with Forms*, R. 1.110 (1320) (2009 ed.) ("Releases for intentional torts will not be enforced, as contrary to public policy."). *cf. L. Luria & Son, Inc. v. Honeywell, Inc.*, 460 So. 2d 521, 523 (Fla. Ct. App. 1984) ("Fraud is an intentional tort and thus not subject to the cathartic effect of the exculpatory clauses found in contracts such as the one in the present case.").

In concluding that the releases encompassed intentional torts, the District Court cited three cases, only one of which—*Universal City Dev. Partners, Ltd. v. Ride & Show Eng'g, Inc.*, 2006 WL 845167 (M.D. Fla. Mar. 30, 2006)—involved intentional tort claims.[2] Citing this case, the District Court held that "Florida law

[2] *Torjagbo v. United States*, 285 Fed. App'x 615 (11th Cir. 2008), involved the application of a convent not to sue to claims based solely upon alleged negligence. *Id.* at 617. *Greater Orlando Aviation Auth. v. Bulldog Airlines, Inc.*, 705 So.2d 120 (Fla. Ct. App. 1998) involved three theories of recovery: negligence, breach of contract, and third-party beneficiary. *Id.* at 121.

allows for the waiver of claims regardless of the level of culpability." (JA at 961.) *Universal City*, however, was wrongly decided and—just like the District Court—ignored controlling Florida authority to the contrary.

"In the absence of Florida Supreme Court precedent, [a] federal district court [is] *bound* by intermediate Florida appellate decisions in [a] diversity case." *Blanchard v. State Farm Mut. Auto. Ins. Co.*, 903 F.2d 1398, 1399 (11th Cir. 1990) (emphasis added); *see also Hartford Ins. Co. of Midwest v. Koeppel*, 629 F. Supp. 2d 1293, 1298 (M.D. Fla. 2009) ("If the state supreme court has not decided the relevant issue(s), decisions of the intermediate Florida appellate courts *control* absent persuasive indication that the state's highest court would rule otherwise.") (emphasis added).

But in both this case and in *Universal City* the district court rendered an opinion contrary to the above-cited Florida authorities. The reasoning in *Universal City* was not based upon any authority suggesting releases of intentional torts were enforceable, but rather on distinction of the two, slightly off-point cases the plaintiff had cited. 2006 WL 845167, at *4. Those two cases—*Oceanic Villas v. Godson*, 4 So. 2d 689 (Fla. 1941) and *Mankap Enterprises, Inc. v. Wells Fargo Alarm Servs.*, 427 So. 2d 332 (Fla. Ct. App. 1983)—reflect a slightly different line of Florida authority invalidating on public policy grounds waiver provisions contained within contracts that are induced by fraud. The *Universal City* court

summarily concluded that because the plaintiff in that case did not contend it had been fraudulently induced into signing the release agreement, *Oceanic Villas* and *Mankap* did not require the invalidation of the release. The court never considered—and the plaintiff apparently never cited—any of the aforementioned controlling authority specifically establishing that contractual waiver provisions (however procured) are not enforceable as applied to intentional torts. Accordingly, *Universal City* was a case of the plaintiff not citing, and the court not *sue sponte* identifying, the pertinent case law.

On-point case law, however, makes clear that Florida law does not, as the District Court held, "allow[] for the waiver of claims regardless of the level of culpability. In *Horizons Rehabilitation, Inc. v. Health Care & Retirement Corp.*, 810 So. 2d 958 (Fla. Ct. App. 2002), the court found that an anticipatory release provision contained within a loan agreement between the parties was unenforceable as applied to "uncommitted intentional torts," specifically causes of action for intentional interference with economic advantage, fraud, and outrageous conduct based upon events subsequent to the parties entering the loan agreement. *Id.* at 962-64 & n.3 (emphasis added), *review denied*, 832 So. 2d 104 (Fla. 2002).

In *Loewe v. Seagate Homes, Inc.*, 987 So. 2d 758 (Fla. Ct. App. 2008), the court held that a release in an agreement for the construction and purchase of a new home was "obviously unenforceable" as applied to any intentional torts that later

may have been committed in the course of performing under the contract. *Id.* at 760.[3]

None of these cases involved any allegation that the contract containing the release provision was induced by fraud and the intentional tort claims that were sought to be released all occurred *after and apart from* the negotiation of the contract and/or release provision.

Accordingly, it matters not whether the fraud was ongoing at the time the release was obtained or only began later—in neither instance may a party exempt himself from liability from any present or future intentional tort. Stated simply, "[r]eleases for intentional torts will not be enforced, as contrary to public policy." 1 *La Coe's Pleadings Under the Florida Rules of Civil Procedure with Forms*, R. 1.110 (1320) (2009 ed.); *see also Whitney Nat'l Bank v. SDC Communities, Inc.*, No. 8:09-cv-01788-EAK-TBM, 2010 WL 1270266, at *4 (M.D. Fla. Apr. 1, 2010) ("Clauses allowing a party to contract against liability for fraud or an intentional tort are void against public policy.").

The rule of Florida law conjured by the District Court is contrary not only to controlling Florida authority, but to widely-accepted principles of contract law. *See* Restatement (Second) of Contracts § 195(1) (1981) ("A term exempting a

[3] In fact, the *Loewe* court went on to hold the release unenforceable even as against claims based upon negligence or recklessness in light of the law's "disfavor" for exculpatory clauses and the public policy in favor of protecting the public from unsafe construction practices. 987 So. 2d at 760-61.

party from tort liability for harm caused intentionally or recklessly is unenforceable on grounds of public policy."); *Corbin on Contracts* § 85.18 (2009) ("Courts do not enforce agreements to exempt parties from tort liability if the liability results from that party's own ... intentional conduct."); 8 *Williston on Contracts* § 19:23 (4th Ed.) ("An attempted exemption from liability for a future intentional tort or crime or for a future willful ... act is generally held void.").

Accordingly, the District Court erred in concluding that Florida law allowed the enforcement of exculpatory contractual provisions as applied to claims for intentional, willful, malicious, reckless, or grossly negligent conduct, and its order granting judgment on the pleadings on this basis should be reversed.

b. Florida Law Holds Anticipatory Releases Unenforceable Where Applied so as to Render Contracts Unilateral

The District Court also erred in applying the purported releases to Plaintiffs' breach of contract claims. While Florida law permits contracting parties to limit or quantify in advance the damages or potential recovery in the event of a breach by one or the other party, it will not enforce a limitation-of-liability provision that would preclude *any and all recovery* for a breach of the contractual undertaking. *Golden v. Mobil Oil Corp.*, 892 F.2d 490, 494 (11th Cir. 1989). This rule is necessitated by the fundamental requirements of mutuality of obligation and mutuality of remedy necessary to the formation of a contract. *Id.*; *see also Ivey*

Plants, Inc. v. FMC Corp., 282 So. 2d 205, 208 (Fla. Ct. App. 1973) (narrowly construing exculpatory clause to preclude only claims for acts of negligence and not to breaches of contractual obligations), *reviewed denied*, 289 So. 2d 731 (Fla. 1974).

"Whatever the possible effect of [an] exculpatory clause in other situations in which it may well be validly applied, it is clear that it cannot be employed, as it was below, to negate the specific contractual undertaking …." *Sniffen v. Century National Bank of Broward*, 375 So. 2d 892, 893 (Fla. Ct. App. 1979). A contract may limit or define the extent or nature of the remedy for breach, but it cannot operate to exculpate or exonerate a party from performing under the terms of the contract. *Id.* at 893-94 (explaining that acceptance of the position advanced by the defendant "would render the agreement between the parties entirely nugatory"). As noted by the court in *Sniffen*, "[t]he authorities are unanimous in indicating that no such drastic effect may properly be attributed to contractual provisions …." *Id.* at 894; *see also Castillo Grand LLC v. Sheraton Operating Corp.*, No. 06 Civ. 5526(RPP), 2009 WL 2001441, at *5-6 (S.D.N.Y. July 9, 2009) (applying Florida law and holding exculpatory provisions did not apply to claims for breach of contract, breach of the implied covenant of good faith and fair dealing, breach of fiduciary duty, negligent performance of contract, and indemnification).

Here, if the release provisions are applied without limitation or qualification

to all breach of contract claims (as the District Court did) then the contracts between Plaintiffs and NASCAR are nullities which NASCAR may comply or not comply with at its discretion, leaving Plaintiffs with no remedy (apparently even injunctive or specific performance relief) to enforce their terms.

Moreover, because the question of the enforceability of an exculpatory provision with respect to a breach of contract claim turns on whether such a provision is unconscionable, the issue is not appropriate for resolution based upon the pleadings alone. *Whitney Nat'l Bank v. SDC Communities, Inc.*, No. 8:09-cv-01788-EAK-TBM, 2010 WL 1270266, at *4 (M.D. Fla. Apr. 1, 2010) ("This determination goes beyond the purview of a motion to dismiss and should not be made on the pleadings alone.").

The District Court therefore erred in concluding that Florida law allowed the enforcement of exculpatory contractual provisions as applied to breach of contract claims where, has here, the provisions did not allow for *any* remedy in the event of a breach.

2. Plaintiffs Sufficiently Alleged a Claim for Defamation

The District Court also found that Plaintiffs had failed to sufficiently allege that Defendants knew the drug test results were suspect and that they acted with malice. (JA at 962-64.) Plaintiffs, however, expressly alleged in their complaint that Defendants' statements were "known by [them] to be false at the time they

were made, were malicious or were made with reckless disregard as to their veracity" (JA at 12 [¶ 99]), that Defendants *intended* to harm Appellant Mayfield by their statements (JA at 12-13 [¶¶ 102-104]), and that such was demonstrated by Defendants' "intentional failure to follow proper protocols when allegedly testing Mayfield's urine sample, their willful failure to timely provide Mayfield with the actual results of his drug test, and their expressed desire to make an example of Mayfield …." (JA at 13 [¶ 105].)

Defendants argued, and the District Court ruled, that these allegations were "conclusory" and unsupported. But Rule 9(b) expressly permits a plaintiff to allege generally "[m]alice, intent, knowledge, and other conditions of a person's mind." Accordingly, the District Court's examination of the facts alleged in the original complaint and assessment as to whether they supported an inference of malice was erroneous. *Southprint, Inc. v. H3, Inc.*, 208 Fed. App'x 249, 254 n.2 (4th Cir. 2006) ("To state a claim for defamation per se, … a plaintiff need only allege 'a publication of false information concerning the plaintiff that tends to defame the plaintiff's reputation.").

Plaintiffs simply were not required in their complaint to specifically enumerate all of the facts showing that Defendants' defamatory statements were made with knowledge of the falsity of those statements and/or in reckless disregard of whether the statements were true or not. Fed. R. Civ. P. 9(b); *Hatfill v. The New*

York Times Co., 416 F.3d 320, 329 (4th Cir. 2005) ("[T]he usual standards of notice pleading apply in defamation cases such as this one."). "The First Amendment imposes substantive requirements on the state of mind a public figure must prove in order to recover for defamation, but it doesn't require him to prove that state of mind in the complaint." *Flowers v. Carville*, 310 F.3d 1118, 1130 (9th Cir. 2002); *see also Boyd v. Nationwide Mut. Ins. Co.*, 208 F.3d 406, 410 (2d Cir. 2000); *Belli v. Orlando Daily Newspapers, Inc.*, 389 F.2d 579, 589 (5th Cir. 1967). Indeed, a plaintiff who has been defamed cannot be expected to even know what, if anything, a defendant possibly could have relied upon when making a defamatory statement. The plaintiff can only know that the statement was made, that it was published, and that it was false. Only through discovery can the plaintiff learn the defendant's supposed basis for its defamatory statements.

The argument advanced by Defendants and accepted by the District Court is one *for summary judgment and/or trial*; it is not a proper argument for a motion for judgment on the pleadings. Indeed, the very authorities cited by the District Court—*St. Amant v. Thompson*, 390 U.S. 727 (1968) and *Hatfill v. N.Y. Times Co.*, 532 F.3d 312 (4th Cir. 2008)—involve not what a defamation plaintiff must allege, but what he must ultimately be able to *prove* after the conclusion of discovery as it relates to the constitutional malice standard. *St. Amant*, 390 U.S. at 729-30 (appeal from ruling on motion for new trial); *Hatfill*, 532 F.3d at 317 (appeal from order

granting summary judgment). These cases do not consider or relate at all to what a plaintiff must *allege* in his complaint.

Indeed, in *Hatfill*, the Fourth Circuit had previously reversed the district court's grant of a Rule 12(b)(6) motion to dismiss, specifically observing that defamation claims involved no heightened or stricter standard of pleading. 416 F.3d 320, 329 (4th Cir. 2005). While the First Amendment may impose certain requirements on the nature of a defamation plaintiff's *proof* with respect to a defendant's state of mind, neither it nor the Federal Rules of Civil Procedure "require him to prove that state of mind in the complaint." *Flowers*, 310 F.3d at 1130.

The Supreme Court's rulings in *Bell Atlantic Corp. v. Twombley*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009), are not to the contrary. *Twombly* requires a plaintiff to allege facts in the complaint sufficient for a court to find it plausible that the plaintiff is entitled to relief. 550 U.S. at 556. *Twombly* does not require (or permit) courts to weigh the probable truth of the factual allegations; it instructs the court to assume the factual allegations are true and to determine, based upon the assumedly-true factual allegations, whether there is a "reasonable expectation that discovery will reveal evidence" that would entitle the plaintiff to relief, "even if it strikes a savvy judge that actual proof of those facts is improbable." *Twombly*, 550 U.S. at 556. *Iqbal* affirms this standard,

holding that "[w]hen there are well-pleaded factual allegations, a court should assume their veracity and *then* determine whether they plausibly give rise to an entitlement to relief." *Iqbal*, 129 S. Ct. at 1949 (emphasis added).

By this standard, Plaintiffs' defamation claim was plainly sufficient and not just a "formulaic recitation of the elements of a cause of action." *See id.* Plaintiffs expressly alleged in their complaint that Defendants' statements were "known by [them] to be false at the time they were made, were malicious or were made with reckless disregard as to their veracity" (JA at 12 [¶ 99]; *see also* JA at 8, 12-13 [¶¶ 76, 102-04]), and backed that allegation up with specific allegations regarding Defendants' failures to follow procedures required by SAMHSA and the Substance Abuse Policy despite obvious shortcomings and hazards (JA at 5-8, 13 [¶¶ 44-70, 105]), that Defendants were specifically informed that Mayfield had taken Adderall XR pursuant to a prescription as well as two Claritin-D pills and had inhaled a large amount of fumes during a wreck the previous week (JA at 6-7 [¶¶ 52-60]), that Defendants refused to provide Mayfield with the alleged results of the tests (JA at 8-9 [¶¶ 69-70, 77-81]), and that Defendants hindered Plaintiffs ability to obtain an independent test of his Sample "B." (JA at 7-9 [¶¶ 61-68].)

The factual allegations, as well as the reasonable inferences to be drawn therefrom—considered against the backdrop of Plaintiffs' allegations that Defendants intentionally failed to follow proper protocols when testing Mayfield's

urine sample, failed to timely provide Mayfield with the actual results of his drug test, and Defendants' expressed desire to make an example of Mayfield as the first NASCAR driver to be suspended under the Substance Abuse Policy (JA at 13 [¶ 105])—show, at the very least, reckless disregard by France and Black as to the veracity of their statements about Mayfield. Because there were obvious reasons to doubt the accuracy of Mayfield's test results, Black and France made such statements with reckless disregard. *See CACI Premier Technology Inc. v. Rhodes*, 536 F.3d 280, 300 (4th Cir. 2008) ("Simple reliance upon someone else's statement does not absolve an author or publisher of liability. Recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.") (quoting *Fitzgerald v. Penthouse Int'l*, 691 F.2d 666, 670 (4th Cir. 1982)).

Twombley did not serve to displace Rule 9(b) or heighten the pleading requirements for defamation claims. Malice, intent, and reckless disregard may still be alleged generally. For example, in *DiFolco v. MSNBC Cable L.L.C.*, 622 F.3d 104 (2nd Cir. 2010), the Second Circuit reversed a district court's dismissal of defamation claims. The court cited, quoted from, and gave consideration to both *Twombley* and *Iqbal*, but nonetheless concluded that the plaintiff's defamation claims were properly pled in that "[t]he complaint alleges that the statements were untrue and defamatory and were published with malice and 'with knowledge of

their falsity and/or with a reckless disregard for their truth or falsity" and "that these statements were 'willful' and 'intended to seriously harm [the plaintiff's] … career." 622 F.3d at 113-14.

A motion for judgment on the pleadings is not the time to debate what may be true or not true, or what inferences the evidence may ultimately support or not support. This is especially so with respect to elements of a claim as to which the Federal Rules of Civil Procedure expressly authorize plaintiffs to plead only generally. After full discovery has been afforded, if Defendants believe Plaintiffs have not mustered enough evidence to prove malice then they may move for summary judgment. But they cannot leap-frog discovery and make such arguments at the pleadings stage.

Accordingly, the District Court's analysis of Plaintiffs' defamation claim was erroneous and should be reversed.

3. Plaintiffs Sufficiently Alleged a Breach of Contract Claim

Plaintiffs alleged that NASCAR breached its obligations to them under the annual License Application and Driver/Owner Agreements by failing to comply with the terms of the Substance Abuse Policy, including but not limited to compliance with the SAMHSA Guidelines and the MRO Manual, and that Plaintiffs were a third party beneficiary of NASCAR's contract with Aegis whereby Aegis was obligated to perform drug testing in conformity with the

SAMHSA Guidelines and the MRO Manual and the Substance Abuse Policy. (*See* JA at 14-15, 626-30.) The District Court, however, ruled that Defendants were not obligated to comply with those rules and procedures and that they complied with the NASCAR Substance Abuse Policy. (JA at 970-74.)

a. Defendants Were Obligated to Comply With the SAMHSA Guidelines and the MRO Manual

NASCAR's Substance Abuse Policy requires that "[a]ll testing" be done at a facility that has been certified by either the Substance Abuse Mental Health Services Administration of the United States Department of Health and Human Services (SAMHSA) or the College of American Pathologists Forensic Urine Drug Testing Program. (JA at 9 [¶ 82], 22 [§ 5].) Aegis, the facility used to test Appellant Mayfield's urine, is certified by SAMSHA. (JA at 5, 9 (¶¶ 41, 83].) That certification requires Aegis to comply with guidelines and procedures promulgated by SAMHSA. (JA at 9 ¶¶ 84-85].)

NASCAR was bound by the terms of the Substance Abuse Policy. In requiring its members to abide by the specific rules and procedures promulgated under the Substance Abuse Policy, NASCAR contractually bound itself to those terms as well. Where employment manuals or policies are expressly referenced or included within an employment contract, they become part of that contract. *See Walker v. Westinghouse Electric Corp.*, 335 S.E.2d 79, 83-84 (N.C. Ct. App. 1985); *cf. Toth v. Square D Co.*, 712 F. Supp. 1231, 1235 (D.S.C. 1989)

(explaining that "[i]t is patently unjust to allow an employer to couch a handbook, bulletin, or other similar material in mandatory terms and then allow him to ignore these very policies as 'a gratuitous nonbinding statement of general policy' whenever it works to his disadvantage," and concluding that therefore, "the defendant was contractually bound under the first handbook to lay off employees according to the handbook's provisions and the plaintiffs enjoyed a contractual right not to be laid off except in accordance with those provisions).

Cooper v. Laboratory Corp. of America Holdings, Inc., 150 F.3d 376 (4th Cir. 1998)—relied upon by Defendants and the District Court—is not to the contrary. *Cooper* merely held that the SAMHSA guidelines did not provide a general standard of care applicable in a negligence case and therefore did not generally apply to private employers beyond the direct reach of direct HHS regulatory authority. *Id.* at 379. *Cooper* thus did not address the situation present in this case where SAMHSA compliance is a contractual commitment between private parties.

Further, Plaintiffs were third party beneficiaries to the contract between NASCAR and Aegis. The entire purpose for the existence of the contract between NASCAR and Aegis was to provide for a certified testing facility to perform the very drug testing that had been agreed to between Plaintiffs and NASCAR. A person is a direct beneficiary of the contract if the contracting parties intended to

confer a legally enforceable benefit on that person. *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 407 S.E.2d 178, 181 (N.C. 1991). In determining the intent of the contracting parties, the court "should consider [the] circumstances surrounding the transaction as well as the actual language of the contract." *Id.* at 182. The preamble of the Substance Abuse Policy expressly states that its purpose is to "endeavor[] to make stock car and truck racing in the United States safe for *competitors* as well as spectators." (JA at 20 (emphasis added).) The preamble further states that "this Policy is intended to apply principally to drivers, mechanics and crew members …." (*Id.*)

The sole purpose of the Aegis contract, in turn, is for Aegis "to assist NASCAR in the application and implementation of the Policy" (JA at 367), a policy which is promulgated for the express purpose of protecting drivers such as Mayfield. Accordingly, Mayfield was not merely an incidental beneficiary of the Aegis contract. Here, the principal, *if not only*, reason for NASCAR to enter into an agreement with Aegis was to carry out the drug testing program and procedures agreed to between NASCAR and its drivers. *Lane v. Aetna Casualty & Surety Co.*, 269 S.E. 2d 711, 714-15 (N.C. Ct. App. 1980) (stating that the parties' intentions "must be determined by construction of the 'terms of the contract as a whole, construed in the light of the circumstances under which it was made and the apparent purpose that the parties are trying to accomplish'"). The Substance

Abuse Policy imposed express obligations on NASCAR and created enforceable rights for Plaintiffs. The contract with Aegis was then entered into in fulfillment of NASCAR's obligation and Plaintiffs' rights.

Thus, compliance with the Guidelines was required as a condition of Aegis' certification by SAMSHA, the very certification that qualified it to serve as a testing facility under NASCAR's Substance Abuse Policy. The agreements and policies at issue require that Aegis be certified and the particular type of certification maintained by Aegis requires it to comply with the Guidelines.

Accordingly, the surrounding circumstances indicate that the intended purpose of the NASCAR-Aegis agreement was to provide for the performance of the procedures agreed to by NASCAR and Plaintiffs. At a minimum though, it is a disputed issue of fact whether Plaintiffs and the other drivers were intended beneficiaries of NASCAR's testing agreement with Aegis. In any event, judgment on the pleadings is not warranted.

Because the testing in this case was done in violation of the conditions of Aegis' SAMHSA certification, the contracts with Plaintiffs were breached.

b. Defendants Violated the Substance Abuse Policy

Plaintiffs allege that NASCAR breached its contract by failing to follow the correct procedures in collecting Mayfield's urine specimen pursuant to the Substance Abuse Policy. Although the Policy requires, among other things, that

the specimen collected be labeled, secured, and transported to the testing facility in such a manner as to ensure that the specimen is not misplaced, tampered with, or relabeled, the complaint alleges that Mayfield was told to select a urine sample cup from a cluttered non-sterilized table, he was instructed to urinate into the sample cup in a restroom which was neither secure nor sterilized, and he did not observe the collector affix any labels to his urine samples. (JA at 5-6 [¶¶ 44, 47-49].) By alleging Defendants failed to properly collect and transfer Mayfield's urine specimen and to collect information from him in an appropriate fashion, Plaintiffs sufficiently alleged facts to show a breach of contract, namely paragraph 4 of the Substance Abuse Policy.

4. Plaintiffs Sufficiently Alleged a Claim for Unfair and Deceptive Trade Practices

To establish a prima facie claim for unfair and deceptive trade practices under North Carolina law, the plaintiff must show: (1) an unfair or deceptive act or practice, (2) in or affecting commerce, and (3) that plaintiff was injured thereby. *Carter v. West American Ins. Co.*, 661 S.E.2d 264, 271 (N.C. Ct. App. 2008); *Gress v. Rowboat Co., Inc.*, 661 S.E.2d 278, 281 (N.C. Ct. App. 2008).

"What constitutes an unfair or deceptive trade practice is a somewhat nebulous concept. North Carolina courts base their determinations on the circumstances of each case, acknowledging that no precise definition is possible." *Gilbane Building Co. v. Fed. Reserve Bank of Richmond, Charlotte Branch*, 80

F.3d 895, 902 (4th Cir. 1996) (citations omitted). Either unfairness or deception can bring conduct within the purview of the statute; an act need not be both unfair and deceptive. *Rucker v. Huffman*, 392 S.E. 2d 419, 421 (N.C. Ct. App. 1990). North Carolina courts have deemed unfairness in this context to mean conduct "which a court of equity would consider unfair." *Harrington Mfg. Co., Inc. v. Powell Mfg. Co., Inc.*, 248 S.E. 2d 739, 744 (N.C. Ct. App. 1978) (quoting *Extrat Co. v. Ray*, 20 S.E. 2d 59, 61 (N.C. 1942)). Acts are deceptive when they "possess[] the tendency or capacity to mislead, or create[] the likelihood of deception." *Bartolomeo v. S.B. Thomas, Inc.*, 889 F.2d 530, 534-35 (4th Cir. 1989) (quoting *Chastain v. Wall*, 337 S.E. 2d 150, 154 (N.C. Ct. App. 1985)).

"In practice, courts have applied the statute liberally. Fraud is covered, of course, and negligent misrepresentation also has been deemed sufficient. Even failure to disclose information has been considered deceptive when tantamount to misrepresentation." *Gilbane*, 80 F.3d at 903 (citations omitted). A simple breach of contract is not unfair or deceptive, absent "substantial aggravating circumstances," but a broken promise is unfair or deceptive where the promisor had no intent to perform when he made the promise. *Id.* Further, conduct that amounts to an inequitable assertion of its power or position. *Eley v. Mid/East Acceptance Corp. of N.C., Inc.*, 614 S.E. 2d 555,561 (N.C. Ct. App. 2005)

Plaintiffs allege that Defendants (1) misrepresented the standards and

procedures that would be employed in implementing the Substance Abuse Policy, (2) failed to provide notice to Appellant Mayfield of his rights or responsibilities in connection with his drug test, (3) failed to specify in advance which drugs were prohibited by the Policy, (4) refused to provide Appellant Mayfield with a copy of his test results, and (5) falsely impeached Plaintiffs in their business activities, all of which constitute unfair or deceptive trade practices. (JA at 3-4, 6-7, 12 [¶¶ 18-20, 28-29, 32, 51, 64-65, 67, 95, 97], 640-42.)

The District Court held that Plaintiffs failed to state a claim for unfair and deceptive trade practices, concluding (1) that Defendants had not "intentionally misrepresented" the proper testing procedure because neither NASCAR nor Aegis was required to comply with the SAMHSA Guidelines and the MRO Manual, and (2) that NASCAR's Substance Abuse Policy was not unfair in failing to specify which drugs were prohibited or in delaying the provision of test results. (JA at 968-70.)

The first conclusion is premised on an erroneous interpretation of the Substance Abuse Policy. As discussed in detail *supra* in Section VIII(A)(3), NASCAR and Aegis were contractually obligated to follow the SAMHSA Guidelines and the MRO Manual, but even if they were not, NASCAR created the impression that it would abide by those procedures and certainly did not disclose that NASCAR would not conduct itself according to *any* particular guidelines or

standards in implementing the Substance Abuse Policy.

Appellant Mayfield was never provided with oral or written notice of any rights or responsibilities he might have in connection with the drug test and was specifically told that he could have *NASCAR and/or Aegis* test his Sample "B" urine specimen, rather than being notified of his right to require that his Sample "B" be tested by a *second* SAMSHA-certified laboratory. Then, without his consent, knowledge, or permission, NASCAR and/or Aegis proceeded to test Appellant Mayfield's Sample "B", rendering it unavailable for retesting by a second laboratory, and ultimately depriving Plaintiffs of any opportunity to independently confirm or challenge the alleged test results. By withholding information and providing misleading information, Plaintiffs deceived Appellant Mayfield and inequitably asserted their power or position over them.

But conduct need not be deceptive or fraudulent to constitute an unfair trade practice, *Coble v. Richardson Corp. of Greensboro*, 322 S.E. 2d 817, 823 (N.C. Ct. App. 1984), and a failure to disclose information can constitute an unfair and deceptive trade practice. *Gilbane*, 80 F.3d at 903. In addition to failing to provide notice of any rights or responsibilities, Defendants did not identify in advance which drugs were prohibited (or, for that matter, what non-prohibited drugs could potentially trigger a positive result), and initially refused to provide Appellant Mayfield with a copy of his test results claiming they were the "property of

NASCAR." The District Court effectively found all of this "fair" based solely on the pleadings, but this should have been a question for the jury.

Finally, the District Court failed to address Plaintiffs' point that Defendants' defamatory statements themselves constituted an unfair or deceptive trade practice. (*See* JA at 641-42.) "A libel *per se* of a type impeaching a party in its business activities is an unfair or deceptive act in or affecting commerce in violation of N.C. Gen. Stat. § 75-1.1, which will justify an award of damages for injuries proximately caused." *Craven v. Seiu Cope*, 656 S.E. 2d 729, 733-34 (N.C. Ct. App. 2008); *see also DIRECTV, Inc. v. Cephas*, 294 F. Supp. 2d 760, 765-66 (M.D.N.C. 2003) (holding allegation that satellite television broadcaster's letter to suspected signal thief falsely accused him of crime, represented that broadcaster had power of law enforcement, and threatened to take action not permitted by law was sufficient to state a claim for violation of statute).

Accordingly, Plaintiffs sufficiently alleged a prima facie claim for unfair or deceptive trade practices under North Carolina law and the District Court erred in granting Defendants judgment on the pleadings.

B. The District Court Erred in Denying Plaintiffs' Motion to Reconsider and to Amend the Complaint

A district court's ruling on a motion to alter or amend under Rule 59(e) and its determination whether to permit the filing of an amended complaint are reviewed for abuse of discretion. *Matrix Capital Mgm't Fund, LP v. Bearing-*

Point, Inc., 576 F.3d 172, 192 (4th Cir. 2009).

Under Federal Rule of Civil Procedure 15(a)(2), "the court should freely give leave [to amend a complaint] when justice so requires." This directive "gives effect to the federal policy in favor of resolving cases on their merits instead of disposing of them on technicalities." *Laber v. Harvey*, 438 F.3d 404, 426 (4th Cir. 2006). Accordingly, "leave to amend should be denied *only* when the amendment would be prejudicial to the opposing party, there has been bad faith on the part of the moving party, or amendment would be futile." *Matrix Capital*, 576 F.3d at 193 (emphasis added); *see also United States v. Pittman*, 209 F.3d 314, 317 (4th Cir. 2000) ("leave to amend shall be given freely, absent bad faith, undue prejudice to the opposing party, or futility of amendment"). This legal standard applies at all stages of litigation and does not change, even after final judgment is entered. *Matrix Capital*, 576 F.3d at 193. In sum, "[i]f the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits." *Foman v. Davis*, 371 U.S. 178, 182 (1962).

In denying the Motion to Amend, the District Court relied on *Laber v. Harvey* for the proposition that a post-judgment motion to amend can only be granted if the judgment is first vacated pursuant to a Rule 59(e) or Rule 60(b) motion. (JA at 1357 (quoting *Laber*, 438 F.3d at 427).) The court then denied

leave to amend in light of its denial of Plaintiffs' Rule 54(b) Motion for Reconsideration, which the court considered under Rule 59(e) and Rule 60(b) in light of the entry of final judgment on all claims mere hours before Plaintiffs filed the motion.

For all of the reasons articulated *supra* in Section VIII(A), the District Court should have reconsider its previous ruling granting judgment on the pleadings. However, as *Laber* makes clear, a post-judgment motion to amend should be considered on its own merits—given freely, absent bad faith, undue prejudice to the opposing party, or futility of amendment—and failure to do so is grounds for reversing a denial of a Rule 59(e) or Rule 60(b) motion. *Laber*, 438 F.3d at 427 ("A conclusion that the district court abused its discretion in denying a motion to amend, however, is sufficient grounds on which to reverse the district court's denial of a Rule 59(e) motion.") (citing *Foman*, 371 U.S. at 182); *Sciolino v. City of Newport News, Va.*, 480 F.3d 642, 651 (4th Cir. 2007) (holding that the district court abused its discretion by denying leave to amend using the same standard as a Rule 59(e) motion); *see also Dussouy v. Gulf Coast Inv. Corp.*, 660 F.2d 594, 597 n.1 (5th Cir. 1981) ("[T]he disposition of the plaintiff's motion to vacate under [R]ule 59(e) should be governed by the same considerations controlling the exercise of discretion under [R]ule 15(a). Consequently, our discussion of the motion under [R]ule 15(a) applies equally to the motion under [R]ule 59(e).").

1. Plaintiffs Should Have Been Permitted to Assert Additional Facts in Support of Their Defamation Claim

In their proposed amended complaint, Plaintiffs sought to add additional allegations supporting their defamation claim and to assert additional claims based upon different facts and events that had come to light. Plaintiffs utilized newly discovered evidence to make additional allegations in their First Amended Complaint that more than plausibly suggest the requisite state of mind and support the reasonable inference that Defendants' public statements were made in reckless disregard of their truth or falsity and for the purpose of harming Plaintiffs. Plaintiffs should have been permitted the opportunity to conform their allegations to the Court's interpretation of the law. *Matrix Capital*, 576 F. 3d at 192-96 (finding district court abused its discretion in denying plaintiffs' post-judgment motion for leave to file amended complaint to add specificity to allegations that court had found insufficient).

2. Plaintiffs Should Have Been Permitted to Assert Additional Intentional Tort Claims Arising From the May 2009 Events

Plaintiffs also sought to assert additional intentional tort claims based upon the events of May 2009, specifically claims for tortious interference with contract and tortious interference with a prospective business advantage and/or relationship. These claims were based on newly discovered evidence of France's history of personal and professional animus towards Mayfield and facts and circumstances

indicating that Defendants' motive for fabricating the positive drug test result and/or making public statements about said result despite actual or constructive knowledge that the result was not accurate or reliable was to interfere with a $30 million sponsorship agreement that Plaintiffs had recently entered into with SmallSponsor.com, a company that aggregates the resources of a host of small companies who wish to secure the benefit of sponsorship arrangements with NASCAR and/or NASCAR drivers but cannot afford to enter into long-term arrangements alone. This agreement would have permitted Plaintiffs to continue racing for the foreseeable future, contrary to France's expressed desire, and diverting sponsorship dollars away from NASCAR and to Plaintiffs' benefit. Defendants interfered with Plaintiffs' contractual and business relationship with SmallSponsor.com by acting to prevent Plaintiffs from receiving the benefit of the agreement and to inhibit Plaintiffs' ability to perform thereunder. (*See* JA at 1044-45, 1054-83.)

It is well-established that a plaintiff may freely amend a complaint to assert additional legal theories supporting recovery when doing so would not unduly prejudice defendant. *Laber*, 438 F.3d at 428. The new allegations Plaintiffs offered in the proposed amended complaint were not prejudicial to Defendants because they were not "offered shortly before or during trial." *Johnson v. Oroweat Foods Co.*, 785 F.2d 503, 510 (4th Cir. 1986). Indeed, this appeal is from a

judgment on the pleadings, so Defendants could not claim to be prejudiced in defending against these new claims when discovery had not yet begun. *See also Wall v. Fruehauf Trailer Services, Inc.*, 123 Fed. Appx. 572 (4th Cir. 2005) (finding leave to amend a complaint proper when the plaintiff obtained evidence supporting an alternative theory of recovery); *Pittston Co. v. U.S.*, 199 F.3d 694, 705-06 (4th Cir. 1999) (holding that the district court abused its discretion in denying leave to amend the complaint to assert new claims); *Rowe v. United States Fid. & Guar. Co.*, 421 F.2d 937, 943 (4th Cir.1970) ("The fact that the supplemental pleading technically states a new cause of action should not be a bar to its allowance.").

3. Plaintiffs Should Have Been Permitted to Assert Additional Claims Arising From Other Actions and Events Unrelated to NASCAR's Substance Abuse Policy

Whether correct or not, the District Court's ruling enforcing the release of any and all claims relating to NASCAR's Substance Abuse Policy had no effect on claims unrelated to drug testing. Plaintiffs discovered additional evidence supporting various claims arising out of events that took place in August 2006, unrelated to NASCAR's Substance Abuse Policy, specifically their Third, Tenth, Eleventh, Twelfth, and Thirteenth Claims for Relief. (*See* JA at 1075, 1080-82.)

Plaintiffs are entitled to pursue these claims, whether in this action or by filing a separate lawsuit. *See Foman*, 371 U.S. at 182 ("If the underlying facts or

circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits."); *Matrix Capital*, 576 F.3d at 195 (holding plaintiffs' failure to submit formal motion to amend and proposed amended complaint and instead arguing operative complaint was adequate "did not provide the district court with a basis for declining to examine the additional allegations" offered in connection with a subsequent motion to amend). Permitting Plaintiffs to assert those claims in this litigation would only serve the interests of judicial economy and avoid imposing unnecessary and duplicative burdens in terms of time, expense, and judicial resources.

As detailed *supra*, leave to amend should be denied only when granting leave would be prejudicial to the opposing party, where there has been bad faith on the part of the moving party, or where amendment would be futile. *Matrix Capital*, 576 F.3d at 193. None of these considerations warranted denying Plaintiffs leave to file the First Amended Complaint.

First, Defendants would not be prejudiced by the filing of the First Amended Complaint. "Whether an amendment is prejudicial will often be determined by the nature of the amendment and its timing." *Laber*, 438 F.3d at 427. "[D]elay alone is an insufficient reason to deny a motion to amend," even one made after final judgment has been entered. *Matrix Capital*, 576 F.3d at 193. Being required to defend against a claim is not the sort of *undue* prejudice contemplated by the Rule;

to the extent such is prejudice at all, it is an ordinary product of the litigation process. Accordingly, the assertion of a new claim or the introduction of a new legal theory is generally not a basis for denial of leave to amend. *Foman*, 371 U.S. at 182 (reversing district court's denial motion to amend where "the amendment would have done no more than state an alternative theory for recovery"); *Hanson v. Hoffmann*, 628 F.2d 42, 53 n.11 (D.C. Cir. 1980) ("Unless a defendant is prejudiced on the merits by a change in legal theory, a plaintiff is not bound by the legal theory on which he or she originally relied."); *cf. Ellis v. Georgetown Univ. Hosp.*, 631 F. Supp. 2d 71, 80 (D.D.C. 2009) (granting motion to amend to add new legal theories requiring additional discovery even though filed at the close of discovery as any prejudice could be ameliorated by supplemental discovery).

Second, there was no bad faith on the part of Plaintiffs. In the course of investigating and litigating this matter, Plaintiffs discovered additional evidence which formed the basis for claims against NASCAR and France, albeit not precisely the claims Plaintiffs had believed they had at the outset. Plaintiffs had not previously amended their complaint, despite that the original complaint was filed just weeks after Defendants' defamatory statements due to their immediate and extremely detrimental impact upon Plaintiffs. It was not bad faith for Plaintiffs to have failed to include these additional claims and allegations at this time, and Plaintiffs now only seek to litigate the claims that they have discovered

given the benefit of time and discovery.

Finally, as detailed *supra*, the amendments proposed by Plaintiffs would state viable claims outside the properly construed scope of the release relating to NASCAR's Substance Abuse Policy and/or completely unrelated to that Policy. As such, the proposed amendments are not futile and should have been permitted under Rule 15 and in the interests of judicial economy.

VIII. CONCLUSION

For the reasons stated above, Appellants-Plaintiffs respectfully request that the Court reverse the District Court's Order granting Defendants' Motion for Judgment on the Pleadings as it pertains to Plaintiffs' claims for defamation, unfair and deceptive trade practices, breach of contract/third party damages, punitive damages, and injunctive relief.

Further, Appellants-Plaintiffs request that the Court reverse the District Court's denial of Plaintiffs' Motion for Reconsideration and Amend Complaint and remand this action with directions to permit Plaintiffs to file their amended complaint and proceed with the litigation.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
WITH TYPE-VOLUME LIMITATION, TYPEFACE
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This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this petition contains 49 pages and 11,716 words, excluding the parts of the petition exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally-spaced typeface using Microsoft Office Word 2007 in 14 point font size, and Times New Roman type style.

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