APPENDIX B

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

Civil Division

Central District, Stanley Mosk Courthouse, Department 46

BC462891 January 16, 2019
TODD McNAIR VS THE NATIONAL COLLEGIATE ATHLETIC ASSOC ET AL 10:14 AM

Judge: Honorable Frederick C. Shaller
Judicial Assistant: R. Aquino
Courtroom Assistant: None

CSR: None
ERM: None
Deputy Sheriff: None

APPEARANCES:

For Plaintiff(s): No Appearances

For Defendant(s): No Appearances

NATURE OF PROCEEDINGS: Ruling on Submitted Matter - Motion for New Trial

The Court, having taken the matter under submission on 1/11/2019, now rules as follows:

Plaintiff's Motion for New Trial is GRANTED. New Trial is ordered on the defamation cause of action that was submitted to the jury. On the issue relating to "insufficiency of the evidence to justify the verdict" the motion is GRANTED pursuant to CCP §657, subdivision (6). On the issue regarding the disqualification of Juror No. 2 for implied bias, the motion is GRANTED on the grounds of CCP §657, subdivisions (1), (2), and (7).

The court's decision on the declaratory relief cause of action (seventh cause of action of the Complaint) based upon Business & Professions Code §16600 remains unchanged and is not affected by this ruling, as it involves distinct and severable issues.

The entry of judgment was stayed pending the ruling on the motion for new trial. The stay is lifted. The Judgment is entered on the jury verdict on the form submitted by Defendant NCAA and lodged in Department 46 on 10/29/2018. The notice of entry of judgment and conformed copy of said Judgment are served upon the parties under a separate minute order and sent by U.S. mail this date.

In light of the Court's ruling granting the motion for new trial, the Judgment entered this date is ordered vacated and set aside.

Notice of this ruling is served on the parties by electronic mail pursuant to CRC 3.1109 and by U.S. mail this date.

DISCUSSION OF REASONS

Insufficiency of Evidence to Justify the Verdict CCP §657, Subdivision (6)

This motion is based upon the jury's Special Verdict to question No. 3. The jury answered "YES" to Special Verdict questions 1 and 2 and "NO" to question 3 as follows:

"1. Did the NCAA make any statements of fact about TODD McNAIR to persons other than TODD McNAIR in any of the following?
A. The Committee on Infractions Report of June 10, 2010 (Trial Exhibit 61)
B. The statement of Mark Emmert of December 15, 2010 (quoted in Trial Exhibit 848) ; or
C. The Infractions Appeals Committee Report of April 29, 2011 (Trial Exhibit 110)

ANSWER: YES

2. With respect to the statements for which you answered Yes in Question 1, did the people to whom the statements were made reasonably understand that any of the statements were about TODD McNAIR?

ANSWER: YES

3. With respect to the statements for which you answered Yes in Question 2, were any of the statements false?

ANSWER: NO"

As a result of answer "NO" to question 3, the jury reached a defense verdict in favor of NCAA on the defamation cause of action.

Plaintiff contends in the motion for new trial that the jury's verdict in answering "NO" to question No. 3 was "against the evidence" and, in fact, against the "uncontroverted evidence" in the trial. The motion is based upon CCP §657(6), which provides that "a judge may grant a new trial under CCP §657(6) based on the insufficiency of the evidence to justify the verdict only if, after weighing the evidence, the judge is convinced from the entire record, including reasonable inferences, that the jury clearly should have reached a different verdict or decision."

NCAA Investigators took an unsworn statement from Mr. Lake on 11/6/2007. The investigative

report is hearsay (and at times double hearsay) and otherwise inadmissible except that it was admitted for the limited purpose of showing the basis for the NCAA's Committee on Infractions Report. The report is trial Exhibit 29. It states in pertinent part as follows (RJ is Richard Johanningmeier of the NCAA, AC is Angie Cretors of NCAA, and LL is Lloyd Lake):

"RJ: Well let me ask you this one, too, Lloyd, on, uh, January 8, 2006, at 1:34 in the morning, there's a call, McNair call to you for two minutes and 32 seconds.
LL: What time was that?
RJ: This is January 8, 2006 it's at 1:34 in the morning, and it's a call, uh, McNair –
AC: Coach doesn't understand why people are calling at 1:34.
RJ: - McNair makes a call to you at 2:32. I was asleep at that time - -
LL: Yeah.
RJ: - personally, but, but in your case - -
LL: I think that was like, that was like him trying to resolve it, you know, and like Reggie's wrong, he should make it right and basically don't implement the school.
RJ: Because this, this is 2006 we're talking about.
LL: Yeah, that's when I went to jail, that's when everything started falling apart, I mean, it fell apart.
RJ: What can you tell us that you specifically recall about that conversation with him?
LL: Uh, just telling him about Reggie and all, he knew about the money he took, he knew that he had an agreement and -
AC: Todd McNair indicated to you in the telephone conversation that he was aware that Reggie took money -
LL: I mean, he knew -
RJ: from you?
LL: Yeah, bec, he knew Reggie took money from me. There's no doubt he knew about that.
RJ: And why do you say that?
AC: Yeah, we need to know why you, why you believe that he knew that?
LL: 'Cause he was around a lot and, you know, it's like he watched me get them guys, his friends hotel rooms, Reggie told me he knew about certain things he was doing but he's cool. You know what I mean? It's like basically through Reggie - -
AC: Reggie said he -
LL: 'cause I told Reggie you shouldn't be having the, no, he's cool, the coach, that's my, he's my friend. He's not -."

"While it is the exclusive province of the jury to find the facts, it is the duty of the trial court to see that this function is intelligently and justly performed, and in the exercise of the supervisory

power over the verdict, the court, on motion for new trial, should consider the probative force of the evidence and satisfy itself that the evidence as a whole is sufficient to sustain the verdict." Dominguez v. Pantilone (1989) 212 Cal. App. 3d 201, 216. If the judge finds that the evidence is not sufficiently probative to sustain the verdict, the court must grant a new trial. David v. Hernandez (2014) 226 Cal. App.4th 578, 588.

In the court's judgment no reasonable trier of fact could have made the determination that answer to Special Verdict Question 3 should be "NO" based upon the Lake interview. The Committee on Infractions ("COI") report of June 10, 2010 (Trial Exhibit 61) was false in several material ways. In the COI report, NCAA stated:

"The committee nonetheless remains particularly troubled by the two minute and 32 second telephone call from agency partner A to the assistant football coach that took place at 1:34 a.m. on January 8, 2006. The assistant football coach claimed that he did not remember the phone call and denied agency partner A's description of what was said. The committee finds agency partner A credible in his report of the call. Agency partner A said that he phoned the assistant football coach to ask him to intercede with student-athlete 1 and get him to adhere to the agency agreement that he made with agency partners A and B. Agency partner A said he also told the assistant football coach that he did not intend to lose the money he had given student-athlete 1 and his parents and preferred not to go public with the matter and implicate the institution."

The falsity of the summary of the phone call as quoted above is material, because the content of this phone call has been cited by the NCAA as the "linchpin" upon which McNair was sanctioned by the NCAA. The report was false in at least the following ways.

The COI report stated that Lake said he called McNair. In fact the interview shows Lake never stated who initiated the call – Lake was told in the interview by NCAA investigators that McNair had called him. Phone records admitted into evidence (Trial Exhibit 903.12) clearly document that Lake called McNair.
The COI reports the call by Lake was for the purpose of getting McNair to intercede to force Reggie Bush to comply to Lake's so-called agency agreement with Reggie Bush. In fact, the interview did not mention Lake making the phone call to request McNair's intercession. The actual interview answer was made after the investigators told Lake that McNair had made the call to him, and Lake was attributing a motive to McNair for the reason why McNair purportedly called him – but there was no such phone call initiated by McNair, and McNair could have had no purpose in making an unmade phone call.

In fact, the interview does not state that McNair and Lake discussed the agency agreement between Lake and Reggie Bush during the phone call, even though the report states that the reason that Lake called McNair was to get him to adhere to the agency agreement. It appears that Lake was merely assuming that McNair "knew" about the money that Reggie Bush allegedly took and the agreement between Bush and Lake, not because of anything said during the phone conversation, but "basically through Reggie" or McNair's allegedly having seen Lake get hotel rooms for some of Bush's friends.

Also, it would be unreasonable to interpret the sloppy interview, which was full of interruptions, to state that Lake ever told McNair that he "did not intend to lose the money he had given student-athlete 1 (Reggie Bush) and his parents."

The answers made by Lake to interview questions were unclear and unresponsive to the point of being unreliable and lacking in any value. When the report was written, the actual and critical content of the questions and answers was changed and/or recharacterized. Also, improperly non-responsive and speculative responses by Lake were recorded as being true.

The court's conclusion is supported by the unprofessional interview taken by NCAA investigators. The Lake interview was done informally, was not under oath, and the interview was done by NCAA investigative personnel who were clearly not prepared, as they were mistaken as to basic facts pertaining to the phone call of 1/8/2006 and were making jokes and interruptions during the interview that obscured the actual answers. When it should have been obvious to NCAA that the interview was botched due to the fact that they understood McNair instigated the call rather than Lake and that the motive attributed by Lake to the reason McNair called him was clearly fabricated, the interview should have been redone or scrapped. It should have been obvious to the NCAA that the statements made by Lake in response to the investigators questions were non-responsive and that if made in a court of law would have been stricken.
In the context of the importance of this interview to McNair's case, it is ludicrous, in the court view, for NCAA to attempt to excuse the variance between the actual content of the Lake interview and the COI report as mere "paraphrase." The COI report in this regard is a fictional account of the Lake version of the phone call. The report gave evidentiary weight to statements that were not made and were the impetus for sanctions imposed against McNair.
The court found McNair to be a credible witness and that his denial of knowledge about Lake's payoffs to Bush was not credibly rebutted or impeached. Lake did not testify in the trial. Lake's interview was not admitted for the truth of the matter, only for the purpose of showing what NCAA based its report on. Since the content of the interview was impossibly vague, without

evidentiary value to support the false statements by NCAA in the COI report, the court cannot find any credible basis for the jury to have found that these NCAA statements in the NCAA report as quoted above were other than false statements.
A judge may grant a new trial under CCP §657(6) based on the insufficiency of the evidence to justify the verdict only if, after weighing the evidence, the judge is convinced from the entire record, including reasonable inferences, that the jury clearly should have reached a different verdict or decision. CCP §657(6).

After weighing the evidence, the court is convinced from the entire record, including reasonable inferences therefrom, that the jury should have answered question 3 "YES." Based upon the foregoing, a new trial is warranted pursuant to CCP §657(6). Therefore, the motion for new trial on this basis is GRANTED.

Motion for New Trial based upon Disqualification of Juror 2 for Implied Bias CCP §657, Subdivisions (1), (2) and (7)

The basis for the motion for new trial relating to Juror No. 2 is that Juror No. 2 should have been removed from the jury panel for implied bias pursuant to CCP §229(b) after Plaintiff's challenge for cause. As Plaintiff points out, the participation of Juror No. 2 in the deliberations and decision in the case is particularly meaningful in light of the fact that Juror No. 2 served as the presiding juror in deliberations, and he made the deciding vote in the 9 -3 verdict in favor of NCAA on Special Verdict Question 3.

The issue regarding Juror No. 2 first arose after voir dire had ended, the jury was empaneled, and the parties had given their opening statements. Although both parties had been aware of Juror No. 2's firm's (Latham & Watkins) participation as co-counsel for NCAA in this case, both sides claimed that they had either forgotten or did not know due to change of counsel after the Latham & Watkins participation had ended.

Counsel brought the issue of the Latham & Watkins representation of the NCAA in this case to the attention of the court on the same date that Juror No. 2 also sought to talk to the court about his concerns about sitting as a juror in the case. In a conference outside the presence of the jury, Juror No. 2 stated that he had no knowledge of his firm's involvement in this case, or in any legal matter involving the NCAA. He also professed impartiality. However, based upon the prior representation by Latham & Watkins as co-counsel for the NCAA in this case, Plaintiff raised an objection to Juror No. 2 and requested that he be removed from the jury pursuant to CCP §229(b) for implied bias. At this point in the proceedings removal and replacement of the juror with an

alternate was the only viable choice as the jury and alternates had already been sworn, so voir dire could not be reopened. The objection by counsel for the Plaintiff at the time of trial was not briefed or presented in writing.

The jury trial in this civil action was authorized by California Constitution Art. I, §16. CCP §631(a) states that the right to jury trial shall be "preserved to the parties inviolate." "The right to unbiased and unprejudiced jurors is an inseparable and inalienable part of the right to trial by jury guaranteed by the Constitution." Grobeson v. City of Los Angeles (2010) 90 Cal.App.4th 778. An impartial jury is one "in which every member is capable and willing to decide the case solely upon the evidence before it." In Re Hamilton (1999) 20 Cal.4th 273. One of the mechanisms imposed by law to assure an impartial jury is that challenges to a prospective juror may be made by a party on grounds listed by CCP §225. CCP §225(b)(1)(A) lists as one challenge for cause "Implied bias – as, when the existence of the facts as ascertained, in judgment of law disqualifies the juror."

CCP §229 identifies further the specific "causes" upon which a challenge for implied bias may be taken. The cause that is pertinent here, as it relates to Juror No. 2, is where the juror "stood within one year previous to the filing of the complaint in the action in the relation of attorney and client with either party or with the attorney for either party."

Juror No. 2 was a member of the Los Angeles office of Latham & Watkins. He did not individually stand in the relation of attorney for the NCAA, but his firm members did. He was a transactional attorney for the firm, not involved in trial work. Other attorneys from Latham & Watkins, Mr. Garre and Ms. Fox, participated as co-counsel for NCAA in connection with the prior interlocutory appeal in this case. The offices of Garre and Fox were located, respectively, in Washington D.C. and San Diego.

Clearly, Garre and Fox, if called as potential jurors, would have been disqualified as jurors in this case under CCP §229(b). The first question for determination is whether Juror No. 2, as a member of the same firm, is likewise disqualified for implied bias even though he individually did not do any work on the case, he professed no knowledge about his firm's representation of NCAA in this case, Garre and Fox were in a different specialty group from Juror 2, the Garre and Fox offices were at distant geographical locations, and Latham & Watkins served as appellate co-counsel on the case and not in the trial. In order to maintain the impartiality of trial jurors and following persuasive authorities now cited by Plaintiff, the answer to this question is "Yes."

The primary authority cited by Plaintiff for the conclusion that Juror No. 2 was disqualified for

implied bias based upon the work performed by firm members Garre and Fox is the case of People v. Terry (1994) 30 Cal.App.4th 97, 103 [35 Cal.Rptr.2d 729] ("Terry.") Terry was a case where the juror, a deputy district attorney, worked in the district attorney's office for San Diego County, which was the same office as the prosecuting trial attorney in the case. The trial court's analysis found that the juror was disqualified under CCP §229(b) for implied bias in spite of the claim by the juror that he did not know anything about the case and that he could be fair and unbiased as a juror. In finding the juror disqualified in that case, Terry stated that the "thrust and purpose of section 229, if not perhaps its specific wording, requires that an attorney who is a member of the firm of counsel trying a case should not be permitted, over objection, to serve on the jury." Terry at page 103. Although Terry is distinguishable from this case because in this case Latham & Watkins was not the trial counsel, the Terry analysis supports vicarious disqualification of all potential attorney-jurors who are employed by a firm of attorneys that are involved in the lawsuit.

The reasoning of Terry extends disqualification beyond attorneys in the trial firm and is persuasive authority for extension of the disqualification of an attorney-juror to Juror No. 2. Terry supports its analysis in part upon the conflict of interest rules of professional responsibility whereby communication and knowledge about the representation of a case by one firm member is imputed to all members of the firm. For this reason actual bias and actual knowledge is not a requirement to find disqualification based upon implied bias. Under California conflict of interest cases relating to the disqualification of an attorney due to conflicts of interest, where one attorney in a firm is disqualified, generally the entire firm is disqualified. William H. Raley co. v. Superior Court (1983) 1042, 1049 – 1050. Cases have held that the entire firm is disqualified even if the firm is large and organized into separate practice groups (e.g. Truck Ins. Exchange v. Fireman's Fund Ins. Co. (1992) 6 Cal.App.4th 1050, 1059 – 1060), where the firm has offices in different cities, (e.g. Flatt v. Superior Court (Daniel) 9 Cal. 4th 275, 286,) or even where counsel is "co-counsel" such as on the appeal of this case. (e.g. Fund of Funds, Ltd. v. Arthur Anderson & Co. (2nd Cir. 1977) 567 F. 2d 225, 233-236.)

Reading CCP §227(b) in connection with the holding in Terry and the California conflict of interest rulings results in the conclusion that Juror No. 2 should have been removed as a juror for implied bias in spite of his claim of lack of knowledge or bias. The disqualification of Juror 2 is required due to the knowledge and information he impliedly shared with other firm members. The foregoing cases make it clear that the fact that Garre and Fox were in different practice groups within the firm, were in geographically remote offices, and only acted as co-counsel in appellate matters with trial counsel is not dispositive in the determination of Juror No. 2's disqualification. Bias is implied, and disqualification was required without proof of actual bias,

since bias under these circumstances is inferred. See People v. Wheeler (1978) 22 Cal. 3d 258, 262.

Under these circumstances, Juror No. 2 should have been removed on the basis of implied bias on Plaintiff's objection and challenge for cause.

Prejudice

Permitting Juror No. 2 to remain on the jury and participate in deliberations and the verdict resulted a miscarriage of justice and in Plaintiff being deprived of a fair trial. Without Juror No. 2 it is likely a different outcome would have resulted. Juror No. 2 was both the presiding juror and the deciding vote on the 9 - 3 verdict. As held in Weathers v. Kaiser Found. Hosps. (1971) 5 Cal.3d 98, 110:

"The right to unbiased and unprejudiced jurors is an inseparable and inalienable part of the right to trial by jury guaranteed by the Constitution." (People v. Galloway (1927) 202 Cal. 81, 92 [259 P. 332]; Lombardi v. California St. Ry. Co. (1899) 124 Cal. 311, 317 [57 P. 66].) Since the verdict was nine to three, the disqualification for bias of any one of the majority jurors could have resulted in a different verdict. Under the circumstances, the order granting the new trial is sufficiently supported by competent evidence."

Based upon the foregoing, a new trial is appropriate in this court's view since the constitutional guarantee of a jury comprised only of members "capable and willing to decide the case solely upon the evidence before it" was not met.

The motion for new trial as to the defamation cause of action is granted.

Certificate of Mailing is attached.