Case Brief: Piazza v. Kirkbride, 372 N.C. 137, 827 S.E.2d 479 (2019)*

INTRODUCTION

On May 10, 2019, the North Carolina Supreme Court issued its opinion in *Piazza v. Kirkbride*.[1] After Neogence Enterprises, Inc. began experiencing financial troubles which caused it to cease business performance, its angel investors filed suit in Wake County Superior Court to recoup their investments.[2] The investors, enticed to invest by statements from two Neogence executives, Mr. David Kirkbride and Mr. Robert Rice, and a Neogence director, Dr. Gregory Brannon, argued that the statements were material misstatements under N.C. Gen. Stat. § 78A-56(a)(2).[3] In the trial court and on appeal, Dr. Brannon contended that (1) he was not a "seller" under N.C. Gen. Stat. § 78A-56(a)(2) because he did not own the securities; (2) he did not have the required scienter under the statute; (3) the "Director Safe Harbor" provision of the North Carolina Business Corporation Act shielded him from civil liability; and (4) the verdicts were inconsistent after a jury exonerated one of the Neogence executives, but not Dr. Brannon.[4]

At the trial court level, a jury ruled against Dr. Brannon, and the appeals court affirmed.[5] Ultimately, the Supreme Court affirmed with modifications.[6] Dodging the merits of Dr. Brannon's defenses, three of which were of first impression, the Court relied on procedure, holding that Dr. Brannon did not preserve his defenses because he did not properly request their inclusion in the necessary jury instructions.[7]

BACKGROUND LAW

N.C. Gen. Stat. § 78A-56(a)(2) is the civil liability provision of the North Carolina Securities Act and imposes liability on any person who "Offers or sells a security by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of the untruth or omission), and who does not sustain

1. 372 N.C. 137, 827 S.E.2d 479 (2019).
2. *Id.* at 139–40, 827 S.E.2d at 482.
3. *See id.*
4. *See id.* at 141–42, 827 S.E.2d at 483–84.
5. *Id.*, 827 S.E.2d at 483–84.
6. *Id.* at 167, 827 S.E.2d at 499.
7. *Id.* at 163, 168, 827 S.E.2d at 496, 499.

the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of the untruth or omission."[8] This provision is North Carolina's equivalent to a federal section 12(a)(2) claim of the Securities Act of 1933.[9] While the Supreme Court of the United States has held that the terms "offers" and "sells" in the context of the securities laws should be construed broadly to include offers and sales by persons who do not own title to the securities,[10] the North Carolina Court of Appeals has disagreed.[11] The Supreme Court of North Carolina has not yet ruled on the issue. Additionally, while there is no scienter requirement under the federal statute,[12] the Supreme Court of North Carolina has not ruled in either direction.

The "Director Safe Harbor" is a statute within the North Carolina Business Corporation Act.[13] The statute sets forth that "[a] director is not liable for any action taken as a director, or any failure to take any action, if he performed the duties of the director's office in compliance with this section[.]"[14] To comply with the section "a director shall discharge his duties as a director, including the director's duties as a member of a committee or subcommittee, in accordance with the following: (1) In good faith. (2) With the care an ordinarily prudent person in a like position would exercise under similar circumstances. (3) In a manner the director reasonably believes to be in the best interests of the corporation."[15] It is undetermined whether this shield under the North Carolina Business Corporation Act is relevant or applicable in securities violations under the North Carolina Securities Act, specifically material misstatements under N.C. Gen. Stat. § 78A-56(a)(2).

The facts of this case gave the North Carolina Supreme Court the opportunity to clarify whether civil liability can attach to someone who does not actually own the securities and whether the Director Safe Harbor provision applies to violations of the North Carolina Securities Act.

FACTS

In 2007, Mr. Kirkbride and Mr. Rice founded Neogence Enterprises, Inc., of which Mr. Rice was the Chief Executive Officer.[16] Using funds from angel

8. N.C. GEN. STAT. § 78A-56(a)(2) (2019).

9. Piazza v. Kirkbride, 246 N.C. App. 576, 599, 785 S.E.2d 695, 709–10 (2016).

10. Pinter v. Dahl, 486 U.S. 622, 647 (1988) ("[W]e conclude that Congress intended § 12(1) liability to extend to those who solicit securities purchases[.]").

11. State v. Williams, 98 N.C. App. 274, 279, 390 S.E.2d 746, 749 (1990).

12. Thomas Lee Hazen, *Treatise on The Law of Securities Regulation* § 7:52 (2019) ("Section 12(a)(2)'s private right of action for material misrepresentations and omissions does not require scienter and thus is not truly based in fraud.").

13. North Carolina Business Corporation Act, N.C. GEN. STAT. § 55 (2019).

14. *Id.* § 55-8-30(d).

15. *Id.* § 55-8-30(a).

16. Piazza v. Kirkbride, 372 N.C. 137, 138, 827 S.E.2d 479, 481–82.

investors, including Dr. Piazza, Neogence developed Mirascape, a smartphone augmented reality application , and was attempting to market the application, later hiring Mr. Cummings as Chief Sales Officer.[17] Dr. Piazza became a member of Neogence's board of Directors.[18]

In April 2010, Mr. Cummings secured a meeting at Verizon Wireless where he described Neogence's work to a Verizon executive and an executive from an advertising agency.[19] During the meeting, the advertising executive expressed to Mr. Cummings that, should Neogence develop Mirascape to expectations, his advertising agency would consider using the application as part of an upcoming advertising campaign for Verizon.[20]

After the meeting, Dr. Brannon emailed Dr. Piazza and several others, informing them of the events surrounding the Verizon meeting, and requesting additional capital contributions to Neogence.[21] Specifically, Dr. Brannon stated "Guys John Cummings just had a meeting in NY with Verizon. We need $ 100K – $ 200K ASAP, in 3-4 weeks we go back to Verizon we have an opportunity to be their featured AR. Rob is going to send out a summary later today. I know all of you are BUSY!!! I need you to give a few minutes to look at this potential. THANK YOU for your TRUST!!"[22] Later, Mr. Rice followed up Mr. Brannon's email with one of his own, revealing essentially the same opportunity, but he "provided considerably more detail" than the e-mail sent by Dr. Brannon.[23] As a result, Dr. Piazza invested an additional $150,000 into Neogence.[24] After Mr. Lampuri held similar conversations between Mr. Rice and other Neogence agents, he invested $100,000 into Neogence.[25]

After Neogence was unable to develop Mirascape properly and began to struggle financially, Dr. Piazza attempted to recoup his investment per the terms of the promissory notes.[26] Neogence failed to comply and, in July 2011, ceased doing business.[27]

Dr. Piazza and Mr. Lampuri, filed suit in Wake County Superior Court, seeking to recover damages from Dr. Brannon, Mr. Kirkbride, and Mr. Rice.[28] The court granted summary judgment in favor of Mr. Kirkbride but held a jury trial for Dr. Brannon and Mr. Rice to determine, namely, whether the plaintiffs

17. *Id.*, 827 S.E.2d at 481–82.
18. *Id.*, 827 S.E.2d at 482.
19. *Id.* at 138–39, 827 S.E.2d at 482.
20. *Id.* at 139, 827 S.E.2d at 482.
21. *Id.*
22. *Id.* at 145, 827 S.E.2d at 485–86.
23. *Id.* at 148, 827 S.E.2d at 487.
24. *Id.* at 139, 827 S.E.2d at 482.
25. *Id.* at 139, 141, 827 S.E.2d at 482–83.
26. *Id.* at 139, 827 S.E.2d at 482.
27. *Id.*
28. *Id.* at 139–40, 827 S.E.2d at 482.

were entitled to recover damages under § 78A-56(a)(2).[29] While the jury exonerated Mr. Rice, it found that Dr. Brannon made material false or misleading statements or omissions in soliciting the offer and sale of securities and that Mr. Piazza and Mr. Lampuri were not aware of the false, misleading, or omitted facts.[30] The court entered a judgment ordering Dr. Brannon to pay $150,000 and $100,000 in compensatory damages to Dr. Piazza and Mr. Lampuri, respectively, as well as $123,804.00 in attorney's fees and $8,493.79 in costs, plus interest.[31] The court denied both Dr. Brannon's motion for a judgment notwithstanding the verdict and a new trial.[32]

The Court of Appeals affirmed the trial court's judgment, holding, most notably, that (1) plaintiffs need not prove scienter to establish a claim under N.C. Gen. Stat. § 78A-56(a)(2); (2) although Brannon, as a promoter, did not own the sold securities, he could be held liable as an offeror or seller of securities; (3) "it is not illogical or inconsistent for two [Securities Act] defendants to achieve different results in a single action; and (4) Brannon was not entitled to protection under the "Director Safe Harbor" provision, given that he made the representations at issue in his individual capacity.[33]

The Supreme Court of North Carolina modified and affirmed the Court of Appeals' decision. In handling the potentially inconsistent verdicts, the Supreme Court determined that "the record disclose[d] ample justification for a jury decision to treat [Dr. Brannon] and Mr. Rice differently,"[34] because "the jury heard evidence from which it could reasonably conclude that [Dr. Brannon] made more direct, less nuanced, comments to Dr. Piazza concerning the extent to which Neogence had the opportunity to have Mirascape preloaded onto Verizon phones than Mr. Rice did; that defendant reiterated this contention to Dr. Piazza more frequently than Mr. Rice did; and that Mr. Rice's statements included more accurate descriptions of the opportunity that had become available to Neogence than those made by defendant."[35] Addressing the applicability of the director safe harbor provision, the Supreme Court dodged the issue of the safe harbor's applicability and held that Dr. Brannon "failed to submit a proper written request for such an instruction."[36] Dr. Brannon's submitted instruction "contained a great deal of information that was totally irrelevant to the issues that were actually before the trial court and the jury in this case," and wrongly placed the burden on the plaintiffs as opposed to

29. *Id.* at 140, 827 S.E.2d at 482.
30. *Id.* at 140–41, 827 S.E.2d at 482–83.
31. *Id.* at 141, 827 S.E.2d at 483.
32. *Id.*
33. *Id.* at 142, 827 S.E.2d at 483–84.
34. *Id.* at 154, 827 S.E.2d at 491.
35. *Id.* at 152, 827 S.E.2d at 489.
36. *Id.* at 164, 827 S.E.2d at 497.

themselves.[37] Thus, Dr. Brannon lost the ability to "properly preserve the issue of the trial court's failure to deliver such an instruction to the jury for purposes of appellate review."[38] The Supreme Court elected to rely on these grounds, leaving unresolved the issues regarding Dr. Brannon's status as a non-owner seller without a finding of scienter, and whether the director safe harbor was applicable.[39]

IMPACT

Despite the chance for the Supreme Court of North Carolina to provide guidance on several unclear aspects of the North Carolina Securities Act, its civil liability provisions, and its relationship with the North Carolina Business Corporations Act, the Court sidestepped the opportunity. Specifically, the unanswered questions awaiting resolution regard (1) whether a non-owner stock promoter may be held liable as a section 78A-56(a)(2) "seller," (2) whether a seller may be held liable under N.C. Gen. Stat. § 78A-56(a)(2) in the absence of a finding of scienter, and (3) whether the Corporation Act's "Director Safe Harbor" protects directors in violation of section 78A-56(a)(2). While the facts of *Piazza v. Kirkbride* appeared to provide an opening, the Supreme Court of North Carolina shut the door. Those looking for answers to these questions will have to keep waiting.

WILL BOWERS**

37. *Id.* at 163, 827 S.E.2d at 496.
38. *Id.*
39. *Id.* at 168 n.15, 827 S.E.2d at 499 n.15.

** J.D. Candidate, 2021.