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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Honorable Kristi F. Curtis, Circuit Court Judge

Appellate Case No. 2023-000289

Jack Kelly, *Appellant,*

vs.

Roger D. Cox, Cox Millwork & Supply Inc., Waterside Drive Boat Ramp, LLC,
and Cox Properties, LLC *Respondents.*

[INITIAL] BRIEF OF APPELLANT

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I. STATEMENT OF ISSUES ON APPEAL

- A. Did the lower Court err in granting summary judgment as to all Defendants when substantial discovery had yet to be completed?
- B. Did the lower Court err in dismissing the damages for Outrage?

II. STATEMENT OF THE CASE

This action is before this Court on appeal from Orders of the Horry County Court of Common Pleas, the Honorable Kristi F. Curtis presiding in Case No. 2020-CP-26-06286. (*Order Granting Summary Judgment To All Defendants; Form 4 Order Denying Appellant's Motion for Reconsideration*; also attached as *Exhibits A and B to Appellant's Notice of Appeal*); R. pp. ____.) Specifically, the action was before the Court of Common Pleas for a hearing on November 29, 2022, upon a Motion for Summary Judgment as to all Defendants that was filed on August 17, 2022. The Court's Order recited that the Court had considered the Motion, reply, pleadings, discovery and depositions on file, together with arguments of counsel, and expressly granted Defendants Roger D. Cox, Cox Millwork & Supply Inc., Waterside Drive Boat Ramp, LLC and Cox Properties, LLC (Defendants/Respondents) Motion for Summary Judgment. Thus, final judgment is entered on their behalf, ending this case with prejudice. (*Order Granting Summary Judgment To All Defendants (Ends Case)*; also attached as *Exhibit A to Appellant's Notice of Appeal*; R. pp. ____.)

Thereafter, on December 29, 2022, Appellant timely filed a Motion to Reconsider the December 29, 2022 Order, with Exhibits A through D attached. (R. pp. ____.) On February 3, 2023, the Honorable Kristi F. Curtis issued a Form 4 Order, which Denied Appellant's Motion to Reconsider. (*Form 4 Order Denying Appellant's Motion for Reconsideration; Exhibit B to Appellant's Notice of Appeal*; R. pp. ____.) The Appellant timely filed a Notice of Appeal with

Exhibits A and B attached, on February 8, 2023 (R. pp. ____); transcripts of the proceedings were ordered and then received on April 15, 2023.

III. STANDARD OF REVIEW

The trial court granted summary judgment in favor of the Respondents. (*Order Granting Summary Judgment To All Defendants; Exhibit A to Appellant's Notice of Appeal*; R. pp. __.) “When reviewing an order granting summary judgment, the appellate court applies the same standard as the trial court.” David v. McLeod Reg'l Med. Ctr., 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006). Summary judgment is improper when there is a genuine issue as to any material fact; and so, the moving party would not be entitled to judgment as a matter of law. Fleming v. Rose, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). A trial court may not grant a motion for summary judgment “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,” show that there is a genuine issue as to any material fact. Bovain v. Canal Ins., 383 S.C. 100, 678 S.E.2d 422, 424 (2009); Rule 56, SCRPC (2020). “Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law.” Robinson v. Estate of Harris, 378 S.C. 140, 662 S.E.2d 420, 422 (Ct. App. 2008) (citing Moore v. Weinberg, 373 S.C. 209, 215–16; 644 S.E.2d 740 (Ct. App. 2007)).

In determining whether a genuine issue of fact exists, the evidence and all reasonable inferences drawn from it must be viewed in the light most favorable to the non-moving party. Sauner v. Public Serv. Auth. of S.C., 354 S.C. 397, 404, 581 S.E.2d 161, 165 (2003). The Appellant was the non-moving party before the Court, and therefore all reasonable inferences must be viewed in the light most favorable to him. Law v. S.C. Dep't of Corr., 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006).

IV. ARGUMENT

A. **The lower Court erred in granting summary judgment as to all Defendants when substantial discovery had yet to be completed.**

Appellant's counsel informed the Court that discovery had not been completed and informed the Court of the existence of an Amended Consent Scheduling Order filed with the Court on August 31, 2022. (*Exhibit C to Appellant's Motion for Reconsideration*; R. pp. ____.) Appellant's counsel informed the Court that discovery was open pursuant to the Amended Scheduling Order through May 31, 2023 (*Exhibit C to Appellant's Motion for Reconsideration*; R. p. __), and that the Court was putting the cart before the horse since discovery was not complete. (*Exhibit D to Appellant's Motion for Reconsideration*; Tr. p. 12, line 22–p. 13, line 17.) Appellant's counsel also argued to the Court that Appellant had, just thirty-two (32) days prior to the Summary Judgment hearing, received the Respondents' tax returns and had not had the opportunity to depose the Respondents. (*Exhibit D to Appellant's Motion for Reconsideration*; Tr. p. 13, lines 14–17; R. pp. ____.) “Summary Judgment is a drastic remedy and must not be granted until the opposing party has had a full and fair opportunity to complete discovery.” Dawkins v. Fields, 354 S.C. 58, 59, 580 S.E.2d 433, 439 (2003). “Summary Judgment is not appropriate when further inquiry into the facts of the case is desirable to clarify the application of the law.” Gary v. Askew, 417 S.C. 232, 239, 789 S.E.2d 94, 98 (Ct. App 2016), reh'g denied (Aug. 17, 2016).

Appellant's counsel further argued to the Court that if there was a scintilla of evidence then it must deny the motion for Summary Judgment. (Tr. p. 23, line 24–p. 24, line 7.) There is a scintilla of evidence against the Respondents. Appellant's counsel argued that Appellant had received counseling at his University and there was a cost for this counseling. (Tr. p. 14, line 21–p. 15, line 1.) Appellant's counsel also argued that

there were costs associated with the throwing of the clothes into the Waterway that was admitted by the Respondent in a handwritten note (see Exhibit B to [Appellant's] Motion for Reconsideration; Tr. p. 14, lines 4–6.) “Summary Judgment is a drastic remedy to be invoked cautiously and must be denied if Appellants demonstrate a scintilla of evidence in support of their claims.” Jericho State Capital Corp. of Fla. v. Chicago Title Ins. Co., 431 S.C. 437, 444, 848 S.E.2d 572, 575 (Ct. App. 2020).

Therefore, Appellant respectfully requests this Court overturn the lower court’s Orders, based on the overwhelming weight of the authority in support of Appellant’s position. (*Order Granting Summary Judgment To All Defendants; Form 4 Order Denying Appellant’s Motion for Reconsideration; Exhibits A and B to Appellant’s Notice of Appeal*; R. pp. ____)

B. The lower court erred in dismissing the damages for Outrage.

Again, it is clear from Exhibit B to Appellant’s Motion for Reconsideration that Summary Judgment should not be granted to Respondents as the damages for which they are liable to Appellant is a question for the jury. It is well settled that the amount of actual damages and punitive damages to be awarded is a question for the jury in South Carolina. It is also noted in actions for outrage/intentional infliction of emotional distress that where reasonable persons may differ as to whether the Respondents’ conduct was so outrageous to permit recovery it is a question for the jury. See, Holtzscheiter v. Thomson Newspapers, 306 S.C. 297, 302, 411 S.E.2d 664, 666 (1991). “It is for the court to determine whether, on the evidence, severe emotional distress can be found; it is for the jury to determine whether, on the evidence, it has in fact existed.” Hansson v. Scalise Builders of S.C., 374 S.C 352, 650 S.E.2d 68 (2007). When there exists evidence of outrageous conduct and severe emotional distress, the question of damages is a jury question. See, id. at 357.

Here, there is clearly evidence of outrageous conduct which has resulted in severe emotional distress to the Appellant. Respondent Roger Cox confessed to the outrageous conduct as shown in Exhibit B to Appellant's Motion for Reconsideration. This conduct includes wiping his butt with Appellant's toothbrush, throwing Appellant's shoes in the waterway, scratching Appellant's car, and putting soap on Appellant's toothbrush. (*Exhibit B to Appellant's Motion for Reconsideration*; R. p. ____.) Appellee wiping his butt with Appellant's toothbrush alone would evidence outrageous conduct warranting a submittal of damages to the jury. Appellant has brought a claim for punitive damages and emotional damages, both of which are submitted to a jury to decide the amount awarded. Therefore, Respondents' motion for Summary Judgment as to the outrage cause of action must be denied as there is clearly a question for the jury as to the level of outrageous conduct and amount of damages to be awarded. "Summary Judgment should not be granted even when there is no dispute as to evidentiary facts if there is dispute as to the conclusion to be drawn from those facts." Lyons v Fid. Nat'l Title Ins. Co., 415 S.C. 115, 123, 781 S.E.2d 126, 130–31 (Ct. App. 2015), reh'g denied (Jan. 21, 2016).

Therefore, Appellants respectfully request this Court overturn the lower court's Orders based on the overwhelming weight of the authority in support of Appellant's position. (*Order Granting Summary Judgment To All Defendants; Form 4 Order Denying Appellant's Motion for Reconsideration; Exhibits A and B to Notice of Appeal*; R. pp. ____.)

V. CONCLUSION

For all the foregoing reasons, the lower court erred in denying Appellant's Motion to Reconsider Summary Judgment. Accordingly, Appellant respectfully requests that the lower court's Orders be overturned.

[signature page follows]

Respectfully submitted,

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North Myrtle Beach, SC
May 26, 2023

CERTIFICATE OF COUNSEL

The undersigned certifies this [Initial] Brief of Appellant complies with Rule 211(b), SCACR. The undersigned further certifies this [Initial] Brief of Appellant complies with the Supreme Court's Orders dated August 13, 2007 and April 15, 2014 regarding personal identifiers and sensitive information.

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