THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM FAIRFIELD COUNTY
Court of Common Pleas

The Honorable R. Knox McMahon, Circuit Court Judge

Civil Action No. 2012-CP-20-316

Appellate Case No. 2014-001153

Mary Wall Black, ... Plaintiff.

v.

BI-LO, LLC and UniFirst Corporation, ... Defendants,
of which BI-LO, LLC is the Appellant,
and UniFirst is the Respondent.

AMENDED FINAL REPLY BRIEF OF APPELLANT

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ATTORNEYS FOR APPELLANT

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INTRODUCTION

This is an appeal from a trial court's grant of summary judgment in favor of UniFirst Corp. and against BI-LO, LLC from the bench after a hearing lasting approximately 15 minutes. Appellant BI-LO contends that the trial court did not fulfill its duty under our law in two regards.

Regarding a grant of summary judgment, our law – stated in many cases – imposes two duties on a court prior to granting such final judgment. Those two duties are contained in the following:

> Because summary judgment is drastic remedy, it 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, 69, 580 S.E.2d 433, 439 (2003). Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Lanham v. Blue Cross & Blue Shield of S.C., Inc., 439 S.C. 356, 362, 361, 563 S.E.2d 331, 333 (2002).

Evening Post Pub. Co. v. Berkeley County School Dist., 392 S.C. 76, 82, 708 S.E.2d 745, 748 (2011). *See also, inter alia,* Baughman v. American Tel. and Tel. Co., 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991) (to same effect, also stating "summary judgment's should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues"); Thomas Sand Co. v. Colonial Pipeline Co., 349 S.C. 402, 407-08, 563 S.E.2d 109, 112 (Ct. App. 2002) (to same effect, also stating, "It is the duty of the court, on a motion for summary judgment, not to try issues of fact, but only determine whether there are genuine issues of fact to be tried...." (quoting Spencer v. Miller, 359 S.C. 453, 456, 192 S.E.2d 863, 864 (1972)); J.N. Veronie v. 303 Associates, LLC, 2012 WL 10829719 (S.C. Ct. App. 2012) ("We hold the circuit court erred in granting summary judgment before Veronie had a full and fair opportunity to complete discovery.").

Implicit in these and other cases are two duties which are imposed on trial courts: (1) to ensure that the non-moving party has had a full and fair opportunity to complete discovery; and

(2) to inquire into the facts sufficiently to clarify the application of the law. A breach of either one of these duties should cause a grant of summary judgment to be reversed.

As addressed below, the trial court had adequate notice of potential problems with these requirements to invoke the cited duties. The court, however, did not perform either of these duties prior to imposing the drastic penalty of summary judgment against BI-LO.

ARGUMENT

I. THE TRIAL COURT DID NOT ALLOW APPELLANT BI-LO TO HAVE A "FULL AND FAIR OPPORTUNITY TO COMPLETE DISCOVERY" PRIOR TO GRANTING SUMMARY JUDGMENT TO RESPONDENT.

The trial court was informed in two different ways that BI-LO had not completed discovery. In its memorandum in opposition to UniFirst's motion for summary judgment BI-LO informed the court that:

> Counsel for BI-LO has asked to take the depositions of a UniFirst corporate designee under Rule 30(b)(6), SCRCP, as well as the depositions of UniFirst employees who serviced the Winnsboro store. What these individuals might have seen or done is entirely relevant and may give rise to evidence which suggests that wrongs attributed to BI-LO might have actually been committed by UniFirst or its employees. These depositions have not yet occurred.

R. 54.

This information, in fact, informed the court that BI-LO had taken none of the depositions that were crucial to a pursuit of the cross-claim. If there is no testimony from the relevant employee or the corporation there is virtually no case.

The court was also informed at the hearing that BI-LO was seeking to schedule depositions. Transcript, pp. 9-10; R. 98-99. This is clear evidence that BI-LO had not had a "full" opportunity to complete discovery and that its discovery was clearly not "complete."

The court did not make any inquiry about discovery. R. 98-100. It did not ask whether discovery was complete, and did not ask how much time would be required to complete

discovery. In sum, the court ignored a basic requirement of the review our law requires before granting summary judgment. As quoted above, our law holds that "... summary judgment is a drastic remedy[;] it *must not be granted* until the opposing party has had a 'full and fair opportunity to complete discovery.'" Evening Post, 392 S.C. at 82, 708 S.E.2d at 748 (emphasis added) (includes quotation from Dawkins v. Fields, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003)).

The court's action was not consistent with our law, to the great prejudice of BI-LO. The court did what it is enjoined not to do by our law. The holding should be reversed so discovery can be completed and the dispute about the indemnification provision taken to a jury.

II. THE TRIAL COURT, PRIOR TO TAKING ITS DRASTIC ACTION, DID NOT INQUIRE INTO THE FACTS REGARDING BI-LO'S CLAIM FOR CONTRACTUAL INDEMNITY SUFFICIENTLY TO APPLY OUR LAW.

On or about January 9, 2014, the day of the hearing on UniFirst's motion for summary judgment, BI-LO filed a memorandum in opposition to UniFirst's motion. R. 49. At the hearing, BI-LO presented a copy of the memorandum to the court.[1] R. 96. The memorandum has a discussion of contractual indemnity that raises more than a scintilla of evidence that UniFirst breached its contractual duty to BI-LO. Specifically, Plaintiff Black had testified that "the mat was 'brittle' and 'the rubber part of the rug was dry rotted and it was causing it to bow.'" Memorandum, p. 4; R. 52. As reported to the court, which had a copy of the contract (Transcript, p. 7; R. 96), UniFirst had a duty to provide mats and other materials to BI-LO. Textile Rental and Service Agreement ("TRSA"); R. 103, 109. A mat in the condition alleged

[1] The whole memorandum was given to the court. The transcript's reference to "part" of the memorandum means that the contract was part of the memorandum.

by Plaintiff Black would not have been commercially reasonable and UniFirst's provision of such a mat could have been a breach of the TRSA.

The fact that Judge Kinard granted summary judgment to UniFirst on Plaintiff Black's negligence claim does not obviate the fact that UniFirst could be liable to BI-LO in contractual indemnity. A relatively similar case, Otis Elevator, Inc. v. Hardin Constr. Co. Group, Inc., 316 S.C. 292, 450 S.E.2d 41 (1994), was cited to the court, but there is no evidence that the court in any way considered that precedent. In that case, Otis Elevator settled a tort action and thereafter brought an action for contractual indemnification against Hardin, which had, as part of a "Temporary Acceptance Agreement" with Otis, agreed to an indemnity agreement very similar to the one here, as follows:

> [Hardin Construction] ... assume[s] complete responsibility for any accident to persons or property, howsoever caused, and will indemnify and save [Otis Elevator] harmless against all loss, damage, claims, liability or expenses arising therefrom, except such loss, damage, claims, liability or expense as may be occasioned by [Otis Elevator's] acts or omissions.

316 S.C. at 294, 450 S.E.2d 43.

Here, the indemnity agreement agreed to by UniFirst was not limited to damages caused by UniFirst's torts, but applied to damages caused for any reason. The pertinent words of the TRSA are as follows:

> 9. Company shall indemnify and defend Customer against any liability arising out of any act of Company, its employees or agents in connection with this Agreement, except to the extent caused by the negligence of Customer.

R. 104.

Based on this agreement, BI-LO should be allowed to have a jury determine the liability of the two parties, i.e., how much of the settlement amount arose "out of any act" of UniFirst. To grant summary judgment to preclude that is to violate the principles of freedom of contract.

As our Supreme Court stated, in a case in which the "negligence rule"[2] was held not to preclude indemnification, such rule would not be applied to bar indemnification if the rule's application would have no deterrent value. Ashley II of Charleston, L.L.C. v. PCS Nitrogen, Inc., Op. No. 27420 (S.C. Sup. Ct filed July 23, 2014) Shearouse Adv. Sh. No. 29 at 21 (citations omitted). Here, application of the negligence rule, which the trial court appears to apply by default, would have no deterrent value. The court assumed that the earlier order granting UniFirst summary judgment as to Plaintiff Black's claims implicitly made BI-LO the negligent party regarding those claims. There is no evidence, however, that BI-LO was negligent in any regard or that it had notice of a defective mat provided to UniFirst. It was UniFirst that provided newly-cleaned mats on a weekly basis; put them in place in the BI-LO store; ensured they were flat; and which took defective mats out of service. If the mats were "brittle" and bowing because of dry-rotten rubber – as Plaintiff Black alleged – that was the primary responsibility of UniFirst under the contract.

If the trial court had allowed full and complete discovery the information in the paragraph above would have been available for inquiry.

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[2] Our Supreme Court had defined the rule as follows:

> We have long recognized "that a contract of indemnity will not be construed to indemnify the indemnitee against losses resulting from its own negligent acts unless such intention is expressed in clear and unequivocal terms." Laurens Emergency Med. Specialists, P.A. v. M.S. Bailey & Sons Bankers, 355 S.C. 104, 111, 584 S.E.2d 375, 379 (2003) (quotations and citation omitted). In this case, we are asked whether this "negligence rule" also bars indemnification in cases where the liability is strict and not fault-based. Based on the public policy underlying the negligence rule, the nature of CERCLA liability, and our law respecting the freedom of parties to contract, we would decline to extend the negligence rule to bar indemnification in this case.

Ashley II of Charleston, L.L.C. v. PCS Nitrogen, Inc., Op. No. 27420 (S.C. Sup. Ct filed July 23, 2014) (Shearouse Adv. Sh. No. 29 at 18).

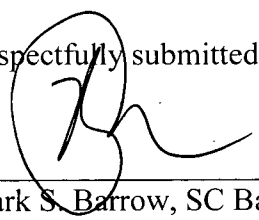
The words of the TRSA should have put the trial court on notice that "further inquiry into the facts," regarding which party was responsible for providing the mats "was desirable to clarify the application of the law." Evening Post, 392 S.C. at 82, 708 S.E.2d at 748. In failing to pursue this inquiry, the trial court erred and took the inappropriate action of granting summary judgment to UniFirst on its cross-claim. Such a premature, erroneous action should be reversed and remanded to give BI-LO the opportunity to try the disputed issues.

This issue was raised to the trial court in BI-LO's motion to alter or amend under Rule 59(e). R. 59-60.

CONCLUSION

The trial court's grant of summary judgment in favor of UniFirst should be reversed and this case remanded for trial on the merits. There is a disputed issue as to whether UniFirst is obligated to indemnify BI-LO for all or part of the amount for which BI-LO settled the claim of Plaintiff Black. BI-LO did not have a full and fair opportunity to complete discovery, which would demonstrably have led to facts that could implicate the contractual agreement for UniFirst to indemnify BI-LO.

Respectfully submitted,



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CERTIFICATE OF COUNSEL

The undersigned certifies that this Amended Final Brief complies with Rule 211(b), SCACR, as well as the Court's recent orders.

January 14, 2015

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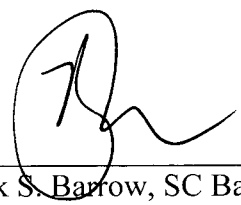
PROOF OF SERVICE

I certify that I have served the Amended Final Reply Brief by depositing a copy of said document in the United States Mail, postage prepaid, addressed to their attorney of record, Gray T. Culbreath, Esquire, Post Office Box 7368, Columbia, SC 29202.

January 14, 2015.



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