STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

Appeal from Horry County
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge
Trial Case No.: 2014-CP-26-07617

APPELLATE CASE NO.: 2018-001724

CAPTAIN'S HARBOUR AND RACQUET CLUB
HOMEOWNERS' ASSOCIATION, INC.

RESPONDENT

v.

JERALD W. JONES,

APPELLANT

APPELLANT'S FINAL REPLY BRIEF

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STATEMENT OF FACTS

The Respondent, Captain's Harbour and Racquet Club Homeowners Association, Inc. (the "Association"), in its Statement of the Case, alleges that the Management Agreement (the "Agreement") was drafted by ACE Management. The Appellant, Jerald W. Jones ("Mr. Jones") asserts that it was the Association that drafted and prepared the Agreement. [R., p. 65, Tr. p. 5, ll. 22-25].[1]

STANDARD OF REVIEW

Summary judgment is a drastic remedy and should be cautiously invoked. Normally a court must view the facts in the light most favorable to the non-moving party. Metts v. Mims, 384 SC 491, 500, 682 S.E.2d, 813, 818 (2009). Although both parties filed for summary judgment, the party against whom summary judgment is entered should be afforded the benefit of having the facts viewed most favorably in his favor.

In its recitation of the Standard of Review, the Association states that when cross motions for summary for judgment are filed, then the issues raised should be decided as a matter of law and the ". . . courts are authorized to assume there is no evidence that 'needs to be considered other than that which has been filed by the parties'" citing Weigand v. U.S. Auto. Ass'n., 391 S.C. 159, 163, 705 S.E.2d 432, 434 (2011). Although the statement is correct, it is

[1] This is important because a court construes any doubts and ambiguities in an agreement against the drafter. Coastal States Bank v. Hanover Homes, 408 S.C. 510, 519, 759 S.E.2d 152, (Ct. App. 2014). Therefore, to apply this in the case represents an issue of material fact as to who drafted the Agreement for the purpose of application of this rule of construction.

inapposite for the standard to be applied in this case. In Weigand and the other cases that refer to this standard, the issues have involved questions presenting the courts with how to construct a statue, which is not present in this case. For instance, in Weigand, the issue was whether an UIM form complied with the statutory requirements governing UIM forms, and the Supreme Court held that whether or not a form complies with a statute is a question of law for the court to decide.

Likewise, the principle that the filing of cross motions for summary judgment dispenses with the need to determine if further factual inquiry is needed is incorrect as it relates to this case. In Alltel Communications, Inc. v. S.C. Dept. of Revenue, 399 S.C. 313, 319 n.2, 731 S.E.2d 869, 872 n.2 (2012), the Supreme Court expressly reviewed the evidence available to it and determined that further factual inquiry would not be necessary as the issue before the court was solely a legal one.

Although cross motions for summary judgment were filed in this case, issues of fact have been raised. As will be explained more fully below, Mr. Jones, in his Amended Motion for Summary Judgment, states that he was attacked but was not the instigator (R., p. 27). The Association, in its Brief, however, argues that Mr. Jones instigated the fight. This demonstrates that there are issues of fact which require further inquiry.

REPLY ARGUMENT

I. THE CIRCUIT COURT ERRED IN GRANTING SUMMARY JUDGMENT IN THE ASSOCIATION'S FAVOR BECAUSE JONES IS COVERED BY THE AGREEMENT'S INDEMNITY PROVISION.

A. The Indemnity Provision of the Agreement Does Apply to Mr. Jones

As discussed in his Brief, the Indemnity Provision of the Agreement reasonably covers Mr. Jones, as ACE's employee. As explained, a corporation only acts through its agents and employees, and ACE could not have performed any of the duties under the Agreement except through its agents and employees.

In United States Fidelity and Guaranty Co. (USF&G) v. Housing Authority of the City of Poplar Bluff, Missouri, 114 F.3d 693 (8th Cir. 1997), the U.S. Court of Appeals for the Eighth Circuit, addressed this very issue. In USF&G, an elevator installer installed and maintained two elevators in the Housing Authority's housing complex. When a woman fell to her death in one of the elevator shafts, her estate sued the elevator installer. USF&G, the elevator installer's insurance company, paid the claims and subsequently, as assignee of the elevator installer, sued the Housing Authority under the indemnity agreement between the elevator installer and the Housing Authority. The Housing Authority, in turn, by way of a third-party complaint, sued an employee of the elevator installer.

The indemnity clause at issue in USF&G, like this instant appeal, stated that the indemnitee was the corporation and did not include the words that agents, servants, and employees were also covered by the indemnity provision. USF&G moved to have the third-party complaint against the employee dismissed on the grounds that the Housing Authority could not sue its own indemnitee. Ruling that the employee was covered by the relevant indemnity clause, the

district court granted USF&G's motion for summary judgment in favor of the employee and the Housing Authority appealed.

The indemnity clause at issue in USF&G, like this instant appeal, stated that the indemnification was between the elevator installer corporation and the Housing Authority; the agreement did not include language that the elevator company's agents, servants, and employees were covered. The district court held ""[b]ecause a corporation is an artificial entity, it must operate through the acts of its agents . . . . [T]he indemnification agreement served to indemnify [the employee] as agent of the corporation."" USF&G *Id.* at 698. On appeal, the Eighth Circuit ruled:

> In the present case, we find it beyond genuine dispute that the indemnity agreement in the maintenance service contract was intended to cover losses or liabilities arising out of the alleged negligence of individual employees of [the elevator installer] in connection with the use or operation of the elevator equipment.

USF&G, *Id.* at 889.

The indemnity agreement in USF&G did not have to state that it covered agents and employees for it, in fact, to do so. The same logic should be applied to this appeal. Mr. Jones is covered by the indemnity language of the Agreement.

* * * * *

The Association alleges, as two additional grounds for sustaining the grant of summary judgment that: (1) Mr. Jones acted outside of the scope of his employment; and (2) Mr. Jones acted willfully or grossly negligently. Both of these grounds are without factual support.

B. Mr. Jones Acted Within the Scope of His Employment

In his Order (R., pp. 10-13), the trial judge properly found that Mr. Jones acted within the scope of his employment. The trial court stated:

> Jones, without authorization from Plaintiff, used Plaintiff's funds to pay for personal criminal defense legal fees and personal medical bills following physical altercations on July 7, 2014 that led to his arrest. At the time, Mr. Jones was an employee of ACE Management ("ACE"), the property management company for Plaintiff's regime pursuant to a management agreement ("the Agreement"). Jones claims he was entitled to use the plaintiff's funds under the terms of the Agreement. (R., 11, p.2).

The trial court ruled that, at the time of the incident, Mr. Jones was an employee of ACE Management. Had the trial court found that Mr. Jones was acting outside of the scope of his employment, it would have said so. The clear inference is that the court treated Mr. Jones as having acted within the scope of his authority but that he was not covered under the indemnity provision, and that is why the trial judge granted summary judgment in favor of the Association.

The issue of whether Mr. Jones acted within the scope of his employment should either be decided in his favor, or the matter remanded to the trial court for further inquiry on this issue.

C. Mr. Jones Did Not Act Willfully or Grossly Negligently

For the reasons stated in the argument of I.B. above, Mr. Jones did not act willfully or grossly negligently. Again, had this been an issue before by the trial judge, it is reasonable to believe that the judge would have included it in his Order. For the purposes of this appeal, it should be presumed that Mr. Jones did

not act willfully or grossly negligently; or, if that is an issue, the matter be remanded to the trial court for further development of the facts on this issue.

II. MR. JONES IS A THIRD-PARTY BENEFICIARY TO THE INDEMNITY PROVISIONS OF THE MANAGEMENT AGREEMENT.

For the reasons stated in his Brief, Mr. Jones did preserve the issue of his claim for third party status and that it was presented and decided by the circuit court. Although Mr. Jones did not use the term "third-party beneficiary", it is clear that he raised the issue.[2] He has maintained throughout the lower court proceeding that he was entitled to the benefits of the indemnity clause. This includes protection under a third-party beneficiary claim.

Counsel for Mr. Jones would bring to this court's attention the case of McPherson by and through McPherson v. Michigan Mut. Ins. Co., 306 S.C. 456, 412 S.E.2d 445 (Ct. App. 1991), *aff'd as modified* by McPherson by McPherson v. Michigan Mut. Ins. Co., 310 S.C. 316, 426 S.E.2d 779 (1993). It might be argued that this case would not allow a third-party beneficiary claim in an indemnification context.

In McPherson, the City of Charleston and McPherson, a pedestrian who was struck by a police cruiser, sued the S.C. Insurance Reserve Fund and Michigan Mut. Ins. Co., who was the reinsurer of the general tort liability policy

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[2] The purpose of pleadings is to place the opposing party on notice as to what the issues are and the pleadings are to be liberally construed. Shirley's Iron Works v. City of Union, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013). In Shirley's Iron Works, a third-party beneficiary claim was sufficiently pled.

issued by the S.C. Insurance Reserve Fund to the City of Charleston. Under the facts of the case, the trial court ruled that the City's general tort liability policy did not extend coverage to the plaintiffs because of the automobile exclusion in the policy and that the reinsurance policy was, therefore, not at issue. McPherson, *Id.*, at 306 S.C. at 464, 412 S.E.2d at 450.

The Court of Appeals, in sustaining the lower court's decision, in *dicta,* stated however, found that even if the Michigan Mutual Ins. Co. policy did provide coverage, the plaintiffs could not sue it because there was no privity of contract between the parties. The Court of Appeals stated:

> A contract of reinsurance is a contract of indemnity which flows only to parties in privity of contract with the indemnitor. The original insured (here the City) may not sue the reinsurer (here Michigan Mutual) because there is no privity of contract between them. The right of indemnity is personal to the indemnitee and creates no legal or equitable interest in third party beneficiaries by contract or by lien. McPherson, *Id.* See United States v. Federal Surety Co., 5 F.Supp. 247 (D.Md.1933), *aff'd.*, 72 F.2d 964 (4th Cir.1934), *cert. denied*, 294 U.S. 711, 55 S.Ct. 508, 79 L.Ed. 1245 (1935); Schuylkill Products, Inc. v. H. Rupert & Sons, Inc., 305 Pa.Super. 36, 451 A.2d 229 (1982). Accordingly, we affirm the circuit court on this issue.

McPherson, *Id.* Although this language appears to stand for the proposition that third party claims will not be recognized in the context of an indemnity agreement, Mr. Jones argues that this holding should be limited to cases in which reinsurance policies are involved.

Mr. Jones's contention is supported by the cases cited by the Court of Appeals in the McPherson case. Both cited cases dealt with claims against the reinsurer. The Schuykill case explains it clearly:

> Appellant contends that a reinsurer on a surety bond issued under the Public Works Contractors' Bond Law is a proper party defendant in an action by an unpaid supplier. The law is clear, however, that there is no right of direct action against a reinsurer by any party except the reinsured. "[T]he ordinary contract of reinsurance operates solely between reinsured and reinsurer, and creates no privity whatever between reinsurer and the persons originally insured, the contract of insurance and that of reinsurance remain totally distinct and unconnected, and reinsurer is in no respect liable, either as surety or otherwise, to reinsured's policyholders; and accordingly they have no right of action against reinsurer on the contract of reinsurance, nor have they any right of action against reinsurer to reform the policy." 46 C.J.S., Reinsurance, § 1232.

Schuylkill Prod., Inc. v. H. Rupert & Sons, Inc., 305 Pa. Super. 36, 40, 451 A.2d 229, 231 (1982)

The McPherson case deals with a reinsurance policy that was between Michigan Mutual and the S.C. Insurance Reserve Fund. As the McPherson plaintiffs were suing the reinsurer directly, their claim could not be sustained.

In Mr. Jones's situation, Mr. Jones was the agent and employee of ACE Management and the intent of the parties was that ACE Management and its necessary employees would be covered by the indemnity provision. This position was recognized in the concurring opinion of Judge Johnson in Schuylkill, who opined that there could be times when a direct action would be appropriate:

> However, there are situations that I foresee where the original insured should be permitted to sue a reinsurer directly. An example would be where an agency relationship exists between the reinsured (the original insurer) and the reinsurer and the reinsurer has significant control over the actions of the original insurer. In such a case, the fact that the insurance company with control is labeled a "reinsurer" should not necessarily relieve it of liability on contractual actions arising out of certain conduct of the "reinsurer", e.g., bad faith.

> The instant facts do not lead me to the conclusion that Fidelity had, for example, any agency relationship with H. Rupert & Sons, Inc., nor does Appellant allege any fact that would lead me to the conclusion that Appellant's suit should be permitted.

Id., at 305 Pa. Super. at 45, 451 A.2d at 234.

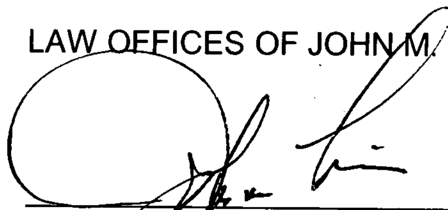
Mr. Jones was an agent of ACE Management and both were in privity of contract to the Association. For this reason, the holding in McPherson should be limited to those claims arising in an insurance context and not to all indemnity claims generally.

CONCLUSION

Based on the above and foregoing, the Appellant prays that this Court reverse the Order granting judgment to the Respondent and remanding this matter to the trial court for further proceedings.

Respectfully submitted,

LAW OFFICES OF JOHN M. LEITER, PA



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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Reply Brief complies with Rule 211(b), SCACR.

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