

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Walton J. McLeod, Circuit Court Judge

Appellate Case Number 2020-001141

South Carolina Farm Bureau Mutual Insurance Company,Respondent,
v.

Richard K. Longphre and Travis E. Simpson, Defendants,
Of Whom Richard K. Longphre is Appellant.....Appellant.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. DID THE LOWER COURT ERR IN FAILING TO CONSIDER REASONABLE INFERENCES THAT COULD BE DRAWN FROM THE EVIDENCE?
2. DID THE LOWER COURT ERR IN MAKING FACTUAL DETERMINATIONS ON THE MERITS OF COMPETING FACTUAL ACCOUNTS?

STATEMENT OF THE CASE

On October 8, 2018, Appellant filed a Complaint in the Lexington County Court of Common Pleas (Case No. 2018-CP-32-03314) alleging multiple causes of action against two Defendants – Simpson and Santos (Respondent’s homeowner’s insurance policy holders) – seeking recovery for injuries he sustained on December 28, 2017. Through the discovery process, Defendants Santos and Simpson maintained that at all pertinent times, Respondent provided homeowner’s insurance coverage to both Simpson and Santos.

Respondent filed a Declaratory Judgment Action (Case No. 2019-CP-32-01671) on April 30, 2019; seeking a judicial determination that the claims made by Appellant were not covered under Defendant Simpson’s (Respondent’s insured’s) homeowner’s insurance policy, and that Respondent therefor had no duty to provide a defense to Defendant Simpson. On May 15, 2019, Appellant accepted service of the Declaratory Judgment Action.

On June 11, 2019, by and with consent of counsel, the lower Court issued an Order permitting Appellant to file an Amended Complaint (hereinafter, the “underlying case”) because, through discovery and further investigation, Appellant determined that certain causes of action in the initial Complaint were improperly pled, in addition to the fact that a former party to the action (Defendant Santos) had died. The Amended Complaint in the underlying action alleged a single cause of action against Defendant Simpson for negligence.

On October 2, 2019 following a status conference, the lower Court issued a Consent Order staying the underlying case pending the resolution of the Declaratory Judgment Action.

Subsequent to conducting discovery, on March 2, 2020, Respondent filed a Motion for Summary Judgment on the Declaratory Judgment Action. Counsel for the parties agreed to have

the Summary Judgment matter decided on the pleadings and submission of memoranda. Counsel filed and submitted appropriate documentation which is of record. Additionally, Defendant Simpson, via his personal counsel, filed and submitted a memorandum in opposition on May 1, 2020. Respondent filed a Reply on May 4, 2020.

On July 17, 2020, the lower Court issued an Order granting Summary Judgment in favor of Respondent. On July 24, 2020, Appellant filed a Motion to Reconsider and a memorandum in support thereof; to which Respondent filed a memorandum in opposition on July 28, 2020.

The lower Court issued an Order denying Appellant's Motion to Reconsider on July 30, 2020. Appellant served the Notice of Appeal on Respondent.

STANDARD OF REVIEW

Since it is a drastic remedy summary judgment "should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues." Baughman v. Am. Tel. & Tel. co., 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991) (quoting Watson v. Southern Ry. co., 420 F. supp. 483, 486 (D.S.C. 1975)); see also Holloman v. McAllister, 289 S.C. 183, 186, 345 S.E.2d 728, 729 (1986) ("an extreme remedy to be cautiously invoked").

Summary judgment is only appropriate when there is no genuine issue of material fact such that the moving party must prevail as a matter of law. S.C.R.C.P. 56(c).

"The party seeking summary judgment has the burden of clearly establishing the absence of a material fact." Bennett v. Inv'rs Title Ins. co., 370 S.C. 578, 588-89, 635 S.E.2d 649, 654 (Ct. App. 2006).

In determining whether any triable issues of fact exists, the evidence and all inferences

which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party." Grimsley v. SC Law Enf't Div., 415 S.C. 33, 40, 780 S.E.2d 897, 900 (2015).

FACTS

On December 28, 2017, Appellant confronted Defendants Santos and Simpson about their hitting glow in the dark golf balls towards Appellant's house (Longphre Dep. P. _____; Order Granting S.J P. _____) At some point during the verbal confrontation with Defendants Santos and Simpson, Longphre went to pick up one of the golf balls and throw it back towards Santos property. (Longphre Dep. P. _____; Order Granting S.J P. _____) Thereafter, a physical engagement occurred wherein Defendant Simpson intentionally tackled Appellant to the ground (Longphre Dep. P. _____; Order Granting S.J P. _____) accompanied by a brief scuffle; however, Appellant suffered no injuries or damages related to this intentional act. (Longphre Dep. P. _____) According to both Appellant and Defendant Simpson, any intentional physical confrontation then ceased. (Longphre Dep. P. _____; Simpson Dep. P. _____; Amended Compl. 10.)

After the scuffle, as both Appellant and Defendant Simpson were trying to get up from the ground, Defendant Simpson negligently made contact with Appellant that resulted in severe injuries to Appellant. (Amended. Compl. P. 11.; Longphre Dep. P. ____; Simpson Dep. P. _____) Thereafter, Appellant underwent surgery and developed life-threatening complications that required extensive, costly medical treatment. (Amended Comp. P. 14 – 17)

Appellant and Defendant Simpson each contend that any intentional, physical contact had ceased, and as the two men were simply getting up off the ground to go their separate ways, they became unintentionally entangled in such a way that Appellant was injured. (Amended. Compl.

P. 11.; Longphre Dep. P. ____; Simpson Dep. P. ____.) Respondent contended that it should not be required to provide insurance coverage for its insured, Defendant Simpson, under the theory that there was a continuous intentional physical confrontation that (Respondent MSJ and Memorandum in Support ____). In doing so, Respondent contends that the allegations made in the Underlying Action, and in the sworn deposition testimony of both Appellant and Simpson, do not meet the homeowner's insurance policy's definitions of occurrence, and/or that same are excluded under an "intentional acts" provision. (Respondent MSJ and Memorandum in Support ____)

ARGUMENTS

I. THE LOWER COURT ERRED IN FAILING TO CONSIDER REASONABLE INFERENCES THAT COULD BE DRAWN FROM THE EVIDENCE.

As a threshold matter, in the underlying action seeking a recovery for Defendant Simpson's negligence, Appellant alleges the essential elements of a negligence claim.¹ The lower Court does not contend that Appellant has failed to meet his burden with respect to establishing the necessary elements of this claim. In that regard, Appellant claims to have been injured when Defendant Simpson breached his duty of due care in **making accidental, unintentional contact with Appellant while the two men were getting up off the ground**, which both proximately

¹ "In a negligence action, a plaintiff must show that the

(1) defendant owes a duty of care to the plaintiff,

(2) defendant breached the duty by a negligent act or omission,

(3) defendant's breach was the actual and proximate cause of the plaintiff's injury, and

(4) plaintiff suffered an injury or damages ."

Bishop v. South Carolina Dep't of Mental Health, 331 S.C. 79, 502 S.E.2d 78 (1998); Shipes v. Piggly Wiggly St. Andrews, Inc., 269 S.C. 479, 238 S.E.2d 167 (1977); W. Keeton, D. Dobbs, R. Keeton, and D. Owen, Prosser and Keeton on the Law of Torts, 164-65 (1984).

and actually caused Appellant to suffer damages (emphasis added).

The fact that Defendant made intentional contact with Appellant at one time is not denied by Appellant. However, it is a red herring issue Respondent continually highlighted to confuse the lower Court. It is uncontested that Defendant Simpson initiated intentional physical contact with Appellant and a brief scuffle took place; however, Appellant sustained no injuries and/or is not seeking a recovery of any damages from that event. It was not until **after that event and after any other intentional contact had ended**, while both men were getting up to walk away that unintentional, physical contact was made and the injuries for which Appellant is seeking a recovery occurred (emphasis added).

Respondent has cleverly conflated both the timing and the triggering event, which included the newly discovered information that served as a primary basis for, and resulted in the filing of, an Amended Complaint. By repeatedly making reference to the original Complaint (which obviously pre-dated the Amended Complaint) and referring to a statement Appellant made to law enforcement sometime after he was injured, Respondent was able to misdirect the lower Court's attention to issues not germane to the issue that while the two men were getting up to leave, there was negligent contact that injured Appellant. At the appropriate time (i.e. a hearing on the merits), the original Complaint and any statement(s) made to law enforcement near the time of the injury would provide fertile ground for cross-examination by Respondent. However, because there is direct, testimonial evidence from both Appellant and Defendant Simpson presenting discrepancies and/or disputed facts, these are not matters to be resolved by the lower Court at Summary Judgment.

Respondent has refuted the positions taken by both Appellant and its own insured, Defendant Simpson, to attempt to accomplish its pecuniary goal: to avoid coverage

responsibilities. In his September 9, 2019 deposition testimony, Appellant consistently averred that he believed that the contact that Defendant Simpson made with him:

- a. came after the physical confrontation was ended,
- b. that the contact was not intentional, and
- c. was accidental.

Likewise, in his November 21, 2019 deposition, Defendant Simpson also consistently averred, that he believed that the contact that he made with Appellant:

- a. came after the physical confrontation was ended,
- b. that the contact was not intentional, and
- c. was accidental.

Questions of negligence are ordinarily questions of fact for the jury, as to which the trial court's only function is to inquire whether particular conclusions are or are not the only reasonable inferences to be drawn from the evidence (Kennedy v. Custom Ice Equipment Co., 271 S.C. 171, 246 S.E.2d 176 (1978)). It is reasonable for the lower Court to have inferred that the events that took place on December 28, 2017 occurred in a manner consistent with the corroborated testimony of both Appellant and Defendant Simpson.

The events of December 28, 2017 were not documented continuously or contemporaneously by any unbiased witness or recording device. The only other person there at that time is now deceased. Therefore, what the lower Court had before it to examine was an unresolved/disputed question of fact. On the one hand, both Appellant and Defendant Simpson contended that, following the conclusion of an intentional act, there was unintentional, negligent physical contact that caused harm to Appellant; and on the other hand, Respondent claimed there was one continuous, intentional act where Appellant was harmed by intentional conduct.

Disputed questions of fact, even when mixed with questions of law should be resolved by a jury at a hearing on the merits (Mahaffey v. Ahl, 214 S.E.2d 119), and any and all inferences should have been resolved in favor of Appellant.

If viewed in a light most favorable to Appellant, the finder of fact could reasonably determine that the contact between Defendant Simpson and Appellant was unintentional and accidental, which would trigger coverage. Because there are reasonable inferences that could be drawn from corroborated, testimonial evidence from both Appellant and Defendant Simpson that would support Appellant's cause of action, the lower Court erred in granting Summary Judgment for Respondent.

II. THE LOWER COURT ERRED IN MAKING FACTUAL DETERMINATIONS ON THE MERITS OF COMPETING FACTUAL ACCOUNTS.

The lower Court made (a) factual determination(s) and/or premised it's decision to grant Summary Judgment on Respondent's premise: that Appellant's injuries arose/resulted from one, continuous and intentional physical conflict/confrontation; not two distinct events (as provided in corroborated, sworn, testimonial evidence by both Appellant and Defendant Simpson). In doing so, the lower Court erroneously and improperly decided the merits of competing, factual accounts.

Appellant and Defendant Simpson testify independently to a consistent version/account of the events of December 28, 2017: that two, separate events occurred involving physical contact between the men, and that there was only an injury to Appellant in the second event that involved accidental and unintentional contact. The two pertinent events involving physical contact between Appellant and Defendant Simpson can be both separated and distinguished: one

intentional with expected consequences, and one unintentional with unexpected consequences.

The first event involved an intentional, physical engagement wherein Defendant Simpson intentionally tackled Appellant to the ground, followed by a brief scuffle. The expected consequence was that both men ended up on the ground. Thereafter, the men disengaged and were merely getting up off the ground and go their separate ways. According to deposition testimony of both Appellant and Defendant Simpson, all physical confrontation and contact had ceased.

The second event took place after the men were simply getting up off the ground to go their separate ways. Defendant Simpson made unintentional contact with Appellant, and there were wildly unexpected consequences – Appellant was severely injured. Respondents naked claim is that there was no distinct ending to the original, intentional physical contact initiated by Defendant Simpson. Ironically and further compounding the error of the lower Court, by directly disputing the factual accounts of both Appellant and Defendant Simpson, Respondent directly demonstrates that it cannot meet its burden of clearly establishing the absence of (a) disputed material fact(s). Both Defendant Simpson and Appellant supply a reasonable alternative factual account that is in opposition to Respondent’s contention, and the lower Court disclaimed it out of hand.

Specifically looking at the evidence before the lower Court, as it relates to information regarding the second event, both Appellant and Defendant Simpson testified that:

- a. both men had been on the ground;
- b. any physical “confrontation” was already over and neither man was actively fighting or planning to fight or otherwise engage the other at that time;
- c. Appellant was not injured or harmed in the first confrontation;

- d. both men were simply getting up off the ground intending to separate; and
- e. negligent, accidental, and unintentional contact occurred while both men were in the process of getting up,
- f. that unintentional contact caused Appellant to suffer the damages complained of in the underlying action for negligence.

There was ample evidence before the lower Court that the first confrontation ended and that Appellant had suffered no injury. There was also ample evidence before the lower Court that only after the intentional confrontation ended was there a second event involving accidental contact between Appellant and Defendant Simpson. It would be reasonable for a finder of fact to reach that same conclusion; however, the lower Court supplemented its judgment and/or made its own factual determination as to how events transpired – this was done despite both Appellant and Defendant Simpson testifying under oath that there was accidental and unintentional physical contact by Defendant Simpson which caused Appellant to sustain injuries. Defendant Simpson testified that he did not intend to injure Appellant, and Appellant did not assert that Defendant Simpson made intentional contact with him.

The lower Court cited S.C. Farm Bureau Mutual Insurance Co. v. Dawsey (371 S.C. 353, 357, 638 S.E.2d 103, 105) in support of its conclusion; however, Dawsey can be easily distinguished from the facts of this case. In Dawsey, the defendant engaged in continuous, dangerous, intentional actions that had unintentional, harmful results. In this matter, after Defendant Simpson intentionally made physical contact with Appellant; that intentional physical contact ceased. The two men had no attempt to physically engage further and each was going to go his separate way. Only then, in a second and unintentional event, did Defendant Simpson negligently make contact with Appellant, causing an injury.

In the instant matter, unlike in Dawsey, both Appellant and Defendant Simpson testify that the contact was accidental and unintentional; a fact pattern and issue was not decided by Dawsey and misconstrued by the lower Court.

The testimonial evidence clearly establishes contested, genuine issues of material fact that exist. Nevertheless, the lower Court erroneously has discounted or ignored the material, sworn testimonial evidence; or made factual determinations and improperly decided the merits of competing, factual accounts. The lower Court erred when it resolved material, disputed accounts of factual events at Summary Judgment.

CONCLUSION

For the reasons stated, this Court should reverse the judgment of the lower Court.

Respectfully submitted,

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PROOF OF SERVICE

I, Neal D. Truslow, Esquire, attorney for Appellant, certify that a true and correct copy of the forgoing document(s) was served upon all parties of record listed below by placing a copy in the United States Mail to the following address:

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DOCUMENT(S): 1. **INITIAL BRIEF OF APPELLANT**



Neal D. Truslow

Columbia, South Carolina

September 30, 2020