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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY CIRCUIT COURT
Bentley D. Price, Circuit Court Judge

Appellate Case No.: 2020-000932

Miguel Oyuela-Martinez,…………………...…...…....................... Appellant,

v.

Kuhn & Kuhn, LLC and John Robert Kuhn, Defendants,
Of Which Kuhn & Kuhn, LLC is the ………………………….……Respondent.

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE ISSUES ON APPEAL

1. Whether the trial court erred in ruling on a motion previously decided by another circuit court judge.
2. Whether the trial court erred in refusing to decide the issue of fraud.

STATEMENT OF THE CASE

On October 24, 2018, John Robert Kuhn was in the middle lane of three (3) lanes headed south on Ashley Phosphate Road in North Charleston. According to an independent eyewitness:

> [Mr. Kuhn] sped up and made an aggressive lane change into the right lane and hit [the vehicle to his right]. [Mr. Kuhn] hit [this vehicle] very hard and forced [it] off to the right, and onto the curb at the corner of Rock Street. There was a man sitting on a bus stop bench at the corner of Ashley Phosphate Road and Rock Street. The [vehicle Mr. Kuhn hit] continued onto the corner and ran over the man and the bench and hit some vehicles that were parked in a lot near the bench. I stopped and prepared myself for what I was about to see, because the man who got run over on the bench had his head under the jeep, and I thought that the man had to be dead.

(R. p. 159).

Mr. Martinez was taken by EMS to Trident Hospital emergency department. He was admitted for two (2) weeks, underwent surgery and was diagnosed with the following: *Closed right ankle fracture, multiple abrasions, chest wall contusion, abdominal wall contusion, multiple leg contusions, epistaxis, intraperitoneal hemorrhage, closed right trimalleolar fracture, closed left trimalleolar fracture, fracture of the head of the left fibula, closed fracture of the left distal fibula, left tibial fracture, left fibular fracture, fibula upper end fracture, open toe fractures, nasal fracture, mesenteric laceration, acute blood loss, tachycardia, and a dislocation of right ankle joint*. The bill for the hospital alone was $361,662.00. Upon his release, Mr. Martinez was confined to his house and unable to walk. He continues to be seen for his injuries.

Mr. Kuhn carried personal automobile liability insurance with limits of $500,000.00. After payment of other claims in relation to the collision, his carrier agreed to tender the remaining balance of $469,884.60. Payment was made under a Covenant Not to Execute.

Prior to litigation, Mr. Kuhn adamantly denied (and still does) that he was within the scope of his employment at the time of the wreck. On January 22, 2019, Mr. Martinez filed a lawsuit

against Mr. Kuhn and his employer, Kuhn and Kuhn, LLC. In Mr. Kuhn's *pro se* Answer, he denies that he did anything to cause or even contribute to the collision, and admitted "only that the two parties were involved in an accident." (R. p. 17).

Along with his Answer, Mr. Kuhn also personally filed a Motion to Dismiss and two (2) Bar Complaints. One Bar Complaint against Kevin Smith, Mr. Martinez's attorney. The other Bar Complaint against David Hoffman, a lawyer in Mr. Smith's firm. It is important to note that Mr. Hoffman was in no way involved in either the claim or the lawsuit. In the Bar Complaints, Mr. Kuhn represented to the Bar in his complaint that "he was not on law firm business", that the purpose of his trip "had nothing to do with working", **and that "[h]e was not even at work that day."** (R. p. 167-171).

Discovery has revealed a copy of Mr. Kuhn's calendar for the day of the collision (and an admission by his lawyer that he was at work that day), a recorded statement he gave to his insurance company (saying the purpose of his trip "was for [his] work."), cell phone records, an affidavit and other notable information showing that Mr. Kuhn was absolutely within the scope of his employment at the time of the collision. Therefore, Kuhn and Kuhn, LLC is vicariously liable for Mr. Kuhn's reckless driving.

On June 18, 2019, Judge Culbertson heard and ruled on Respondent's Motion to Dismiss, which was converted into a Motion for Summary Judgment. Judge Culbertson denied Respondent's Motion for Summary Judgment as to vicarious liability. (R. p. 2-3).

On May 5, 2020, Judge Price heard several motions relating to this case, including Respondent's second Motion for Summary Judgment. Appellant requested additional time to respond to Respondent's second Motion for Summary Judgment in order to fully brief Judge Price

regarding Appellant's fraud in the inducement defense. An extension was granted and a new hearing date was scheduled.

On May 14, 2020, Judge Price heard Respondent's second Motion for Summary Judgment. Appellant argued two positions. First, the Motion for Summary Judgment was improperly before Judge Price, since Judge Culbertson already ruled on this exact matter. Second, Appellant's evidence of fraud questioned the validity of the Covenant, which Respondent relied on in arguing summary judgment. Judge Price granted Respondent's Motion for Summary Judgment based on the covenant and said that the fraudulent misrepresentations "should be brought in a separate action." (R. p. 5). Appellant appeals this decision and argues initially that the trial court did not have standing to hear Respondent's Motion for Summary Judgment which was previously argued and ruled on by another circuit court judge. And secondly, argues that the trial court should have considered Appellant's fraudulent misrepresentation arguments as a defense to Respondent's Motion for Summary Judgment.

STANDARD OF REVIEW

In reviewing the grant of a summary judgement motion, an appellate court applies the same standard as the trial court under South Carolina Rules of Civil Procedure Rule 56. *Dawkins v. Fields*, 354 S.C. 58, 69 (2003).

ARGUMENTS

I. First, Appellant argues the trial court erred in ruling on a motion previously decided by another circuit court judge.

South Carolina courts have repeatedly held that the denial of summary judgment is not directly appealable. *Fisher v. Stevens*, 355 S.C. 290, 298, 584 S.E.2d 149, 154 (Ct. App. 2003). Following a denial of summary judgment, an attorney may file for reconsideration or later request

a directed verdict. *Brown v. Pearson*, 326 S.C. 409, 416-17, 483 S.E.2d 477, 481 (Ct. App. 1997). An attorney cannot reargue the same matters from an earlier motion for summary judgment with a different judge. *Croswell v. Enterprises, Inc. v. Arnold*, 309 S.C. 276, 279, 422 S.E.2d 157, 159 (Ct. App. 1992). To do such, could pit two circuit court judges against one another and endorse judge shopping. During the hearing, Judge Price specifically noted this as a big concern. (R. p. 131, lines 3-7).

In Respondent's first Motion for Summary Judgment, Respondent argued "Lastly, the suit is wholly improper, due to the fact that even if hypothetically, Kuhn & Kuhn LLC were found to be vicariously liable under the theory of respondeat superior, Kuhn & Kuhn LLC as the employer has the right of <u>indemnity</u>, as a matter of law, against Mr. Kuhn personal, as the employee, which would further violate the Agreement…" (R. p. 25).

In Respondent's second Motion for Summary Judgment, Respondent argued:

> When [the consumer] issued a covenant not to sue in [agent's] favor, any claims she had against him were terminated. Thus, SCE&G's derivative liability based upon Johnson's conduct was extinguished. Were we to find the covenant released [agent] but not SCE&G, it would necessarily follow the SCE&G could seek **<u>indemnification</u>** from [agent] and recover the entire amount of any verdict against it from him. **This would effectively strip the covenant not to sue of any real meaning**...

(R. p. 38).

In the first motion, Respondent argued signing the covenant eliminates vicarious liability because Respondent "has the right of *indemnity*... which would further violate the Agreement", and then in the second motion, Respondent argued "*Indemnification* ...would effectively strip the covenant not to sue of any real meaning..." The basis for both of Respondent's summary judgment arguments revolved around the covenant. Respondent argues that Judge Culbertson did not rule on the issue of the covenant, because Judge Culbertson did not discuss it during the hearing. However,

that analysis overlooks the fact that the position was argued by Respondent and Judge Culbertson's order which reflects that he considered all materials submitted by Respondent's counsel. The fact that a Judge does not discuss or agree with an argument does not allow counsel to take the position that the Judge did not consider the argument and then shop around for a Judge who will.

The summary judgment argument that indemnification principles and the covenant precludes the issue of vicarious liability was presented to Judge Culbertson and again in Respondent's second Motion for Summary Judgement. Clearly, rearguing the same matters in front of a different judge is not allowed and should not be allowed in this instance. Our court systems are designed to handle this conflict effectively and efficiently. However, in this case Appellant argues it was error for the trial court judge to rehear the same arguments previously ruled on by a fellow circuit court judge.

II. <u>Second, Appellant argues the trial court erred in refusing to decide the issue of fraud.</u>

South Carolina Rules of Civil Procedure Rule 56 provides that summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." South Carolina courts have held that even "a mere scintilla of evidence" is enough to withstand summary judgment where the standard of proof is by a preponderance of the evidence. *Hancock v. Mid-South Management Co.,* 381 S.C. 326, 330, 673 S.E.2d 801, 802 (2009). Moreover, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the plaintiff. *Id.*

Respondent's summary judgment argument relied on a single document, the covenant not to execute. However, Appellant raised questions regarding the validity of this covenant due to

fraud in the inducement. Under South Carolina law, evidence of fraudulent inducement is an exception to the parol evidence rule. *Hansen v. DHL Labs., Inc.*, 316 S.C. 505, 510, 450 S.E.2d 624, 627 (Ct. App. 1994).

To establish a claim or **defense of fraud in the inducement**, a plaintiff must prove the nine elements of fraud[1], as well as the following three elements: (1) that the alleged fraudfeasor made a false representation relating to a present or preexisting fact; (2) that the alleged fraudfeasor intended to deceive him; and (3) that he had a right to rely on the representation made to him. *Moseley v. All Things Possible, Inc.*, 388 S.C. 31, 36 (S.C. Ct. App.2010) (emphasis added).

The representation at contention for fraud is that Mr. Kuhn was not within the scope of his employment at the time of the wreck. Appellant reasonably relied on this statement and subsequently signed the covenant not to execute against Mr. Kuhn. Later, Appellant learned that Mr. Kuhn told his insurance company that the purpose of his trip was for his work. Appellant believes the genuine issue of material fact of whether Mr. Kuhn was within the scope of his employment at the time of the wreck goes to the heart of the fraud issue and therefore, should be left for a jury to decide. In Appellant's briefing and oral arguments, Appellant provided sufficient evidence as to the elements of fraud in the inducement and the trial court agreed, stating in its Order "[t]he Court agrees with the Plaintiffs that there potentially could be a scintilla of evidence to get past Summary Judgment as to the fraudulent misrepresentation." (R. p. 5). However, the trial court believed "that should be brought in a separate action" and granted Respondent's Motion

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[1] The nine elements of fraud include (1) a representation; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or a reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury. *Kahn Construction Co. v. South Carolina National Bank of Charleston*, 275 S.C. 381, 384, 271 S.E.2d 414 (1980).

for Summary Judgment. Appellant disagrees and appeals this decision. In drafting the proposed order for Judge Price, emails were exchanged and Judge Price clarified he was "not making a finding of fact" regarding the issue of fraud. (R. p. 156). Appellant argues the trial court's refusal to decide on the issue of fraud was improper.

In *PPG Industries, Inc. v. Orangeburg Paint & Decorating Center, Inc.*, this court stated if the alleged representations do constitute fraud in the inducement, then summary judgment is inappropriate because material facts are in dispute. 297 S.C. 176, 179, 375 S.E.2d 331, 332 (Ct. App. 1988). Here, in Respondent's first Motion for Summary Judgment, Judge Culbertson stated there was evidence Mr. Kuhn was within the scope of his employment and denied summary judgment. Then, in Respondent's second Motion for Summary Judgment, Judge Price also agreed there was evidence Mr. Kuhn was within the scope of his employment, but granted summary judgment.[2] Clearly, a genuine issue of material fact exists regarding whether Mr. Kuhn was within the scope of his employment at the time of the wreck. This factual issue exists for the purpose of determining whether there was fraud in the inducement when signing the covenant not to execute, as well as, whether there is vicarious liability. For these reasons, Appellant argues the trial court judge failed to consider Appellant's defense of fraud in the inducement and granted summary judgment when material facts were clearly in dispute.

CONCLUSION

There is no question that John Robert Kuhn, Esq. made false representations concerning his connection to work after he ran over the Appellant. The trial court correctly found there is evidence of this, but dismissed the case because in signing the covenant, releasing the servant

[2] Again, these conflicting opinions and results reinforces Appellant's earlier argument that a trial court judge should not and cannot rule on an identical summary judgment motion, which was previously decided by another circuit court judge.

releases the master. Fraud in the inducement of the covenant would negate this result and the trial court should have considered and decided the issue. This court should reverse in part the trial court's summary judgment ruling that fraud is for a separate case. Because the trial court already found some evidence of fraud, the case should proceed to the jury.

Respectfully Submitted,

__/s/ Kevin B. Smith_______________

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