South Carolina Law Review

Volume 19
Issue 4 *Survey of South Carolina Law 1967*

Article 9

1967

Pleadings

Archie L. Harman

PLEADINGS

I. DEMURRER

There were several cases of interest in South Carolina this year in which actions for declaratory judgments were contested on the pleadings. In *Guimarin & Doan, Inc. v. Georgetown Textile and Manufacturing Co.*[1] an action arose out of the construction of an industrial plant for Georgetown Manufacturing Co. by M. B. Kahn Construction Co. Kahn subcontracted the air-conditioning work to Guimarin and Doan, Inc., which, in turn, subcontracted installation of the ducts to Commercial Roofing and Sheet Metal Co. and installation of the temperature controls to Johnson Service Co. Georgetown Manufacturing Co. claimed that the plant machinery had been damaged by water leakage and made a claim against Kahn which was settled for $22,500. Kahn, in turn, claimed that amount against Guimarin and Doan and withheld a balance due on its subcontract. Guimarin and Doan then brought this action for declaratory judgment to declare the rights and liabilities of the parties under the related construction contracts.

Commercial and Johnson each demurred to the complaint. The case went up on appeal from an order of the circuit court overruling these demurrers. The complaint alleged that all of the cooling work had been performed properly and stated several other theories as to what caused the damage. The complaint also asked that the plaintiff be entitled to indemnity from either Commercial or Johnson or both if it should be determined by the court that such damage was caused by them. From the facts there was the justiciable controversy between the parties mandatory for a declaratory judgment.[2]

The first ground of appeal was misjoinder of causes of action. The court held that the complaint stated only a cause of action for declaratory judgment and that the other damage theories in the complaint were important only to the extent that they bore upon Guimarin's entitlement to the declaration which it sought.[3]

Another contention of the appellants was that the only controversy involving them was the factual issue of proper performance of their respective subcontracts which should be tried

1. No. 18665 (S.C., June 9, 1967).
2. Bank of Augusta v. Satcher Motor Co., 249 S.C. 53, 152 S.E.2d 676 (1967).
3. *See, id.*

by a jury in an action at law. It has generally been held that the granting of a declaratory judgment rests in the sound discretion of the court to be exercised in furtherance of the purposes of the Declaratory Judgments Act.[4] The court admitted that the authorities were in conflict upon the issue of whether a declaratory judgment could be granted where a factual dispute was involved. Our court took the liberal approach and held that the existence of another remedy and the presence of complicated issues of fact may be considered by the court in exercising its discretion as to whether declaratory relief should be granted but that neither was ground for sustaining a demurrer. This view was taken by the United States Supreme Court in *Aetna Life Insurance Co. v. Haworth*.[5] In that case, the Court decided a factual issue under the Federal Declaratory Judgments Act and declared that "[t]he legal consequences flow from the facts and it is the province of the courts to ascertain and find facts in order to determine the legal consequences. This is everyday practice."[6]

The appellants' final contention was that it is impermissible to bring a declaratory action for the purpose of determining which of several defendants is liable to the plaintiff when it is admitted that a recovery can be had against only one. Appellants cited *Town of Manchester v. Town of Townshend*[7] to support their contention. The court felt that this decision was not consistent with the terms and spirit of the Declaratory Judgments Act. The court accepted the contrary position that a declaratory judgment could be brought against several defendants when recovery could be had against only one.[8] The judgment of the lower court overruling the demurrers was affirmed.

In *Bank of Augusta v. Satcher Motor Co.*,[9] L. E. Pate, who was in possession of the original manufacturer's certificate of

4. "The statute providing for declaratory judgments meets a real need and should be liberally construed to accomplish the purposes intended, *i.e.*, to afford a speedy and inexpensive method of adjudicating legal disputes without invoking any coercive remedies of the old procedure, and to settle legal rights and remove uncertainty and insecurity from legal relationships without awaiting a violation of the rights or a disturbance of the relationships." Williams Furniture Co. v. Southern Coatings & Chemical Co., 216 S.C. 1, 6, 56 S.E.2d 576, 578 (1949) *quoting from* Aetna Cas. & Sur. Co. v. Quarles, 92 F.2d 321, 325 (4th Cir. 1937).

5. 300 U.S. 227 (1937).

6. *Id.* at 242.

7. 109 Vt. 65, 192 A. 22 (1937).

8. United States Guarantee Co. v. Harrison & Oven Produce Co., 240 Ala. 186, 198 So. 240 (1940).

9. 249 S.C. 53, 152 S.E.2d 676 (1967).

origin for an automobile issued by Satcher Motor Co. showing no lien thereon, executed to the plaintiff a chattel mortgage on the auto securing payment of a note. It was alleged that Satcher wilfully and unlawfully by use of duplicate keys repossessed the auto and sold it to Robert Brown and issued him a duplicate certificate of origin showing a lien in favor of Commercial Credit Corporation. The plaintiff alleged that its mortgage constituted a first lien on the vehicle, that default had been made in payments due, and that plaintiff was entitled to possession. The plaintiff sought a declaratory judgment establishing priority of its mortgage over claims of Satcher and Commercial. Brown brought a cross action against Satcher to recover damages for alleged fraud in representing to him that the auto was not subject to encumbrances. Satcher demurred to the actions by the bank and Brown, and Commercial demurred to the action by the bank. The lower court overruled the demurrers and appeal was taken.

In sustaining the decision of the lower court, the court stated the well-established rule that in an action for declaratory judgment a complaint is not subject to demurrer for failure to state a cause of action if the facts alleged show the existence of a justiciable controversy.[10] The court held that the allegations clearly showed an actual controversy. The defendants contended that the plaintiff had other remedies available and, therefore, the action for declaratory judgment was not proper. The court held that even though the plaintiff had available actions for claim and delivery and foreclosure of its chattel mortgage, the Uniform Declaratory Judgments Act provides that this fact alone would not bar an action for declaratory relief.[11]

The fact that the plaintiff alleged illegal conversion in his complaint did not constitute misjoinder of issues. The complaint set out an action for declaratory judgment and the allegation of conversion by Satcher was inserted to show such acts as might affect the title subsequently acquired by the second purchaser. The complaint did not set out a cause of action for conversion.

The court sustained Satcher's demurrer to the cross action by

10. *See, e.g.*, Dantzler v. Callison, 227 S.C. 317, 88 S.E.2d 64 (1955); Foster v. Foster, 226 S.C. 130, 83 S.E.2d 752 (1954).

11. "Courts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed." S.C. CODE ANN. § 10-2002 (1962). *Construed in* Southern Ry. v. Order of Ry. Conductors of America, 210 S.C. 121, 41 S.E.2d 774 (1947).

Brown on the ground that his cause of action for fraud and deceit had no relation to the action by the bank and thus could not be pleaded as a cross action. A cross action may be filed when the cause of action arises from or is germane to the transaction set forth in the complaint, but a cross action may not introduce new matters which are outside the original controversy.[12] Since the plaintiff's cause of action related solely to priority of liens, the action for fraud and deceit was not pleadable in the action for declaratory judgment.

In *Springfield v. Williams Plumbing Supply Co.*,[13] the court was confronted with the interesting question of whether in an action for breach of an implied warranty it was necessary to allege privity of contract in order to state a cause of action. The plaintiffs sought to recover damages for personal injuries and property damage sustained when a hot water heater exploded in their home. It was alleged that the heater was manufactured by Row Con Co. who sold it to Williams Plumbing Supply Co. who, in turn, sold it to Meaders Co., Inc. Meaders sold the heater to the plaintiffs and installed it in their home. The complaint alleged that an implied warranty had been made by each of the defendants that the water heater was free from any defects. Row Con Co. and Williams Supply Co. moved to dismiss the complaint on the ground that it did not state a cause of action in that there was no privity of contract between them and the plaintiffs. The South Carolina Supreme Court treated the motion to dismiss as a demurrer, and on appeal upheld the decision of the lower court in overruling the demurrers.

The court recognized the general rule in South Carolina "that privity of contract is required in an action for breach of an implied warranty and that there is no such privity between a manufacturer and one who has purchased the manufactured article from a dealer or is otherwise a remote vendee."[14]

The court gave a discussion of products liability law and noted that the entire field is in a state of flux and that the trend in such cases today is generally away from the requirement of privity of contract. The court pointed out that when the cause of action is based on negligence, there is no requirement of privity in South Carolina.[15]

12. Brown v. Quinn, 220 S.C. 426, 68 S.E.2d 326 (1951).
13. 249 S.C. 130, 153 S.E.2d 184 (1967).
14. Odom v. Ford Motor Co., 230 S.C. 320, 325, 95 S.E.2d 601, 603-04 (1956).
15. Salladin v. Tellis, 247 S.C. 267, 146 S.E.2d 875 (1966).

Odom v. Ford Motor Co.[16] which laid down the privity requirement was distinguished from the instant case in that the court there was not concerned "with a factual situation where serious, substantial personal injury and property damage were admittedly caused by a defective appliance or product."[17]

In reaching its decision the court relied on the following rule. "It has been held that if a demurrer to a pleading raises merely a doubtful question or that the case is such that justice may be promoted by a trial on the merits, the court should exercise a fair, judicial discretion to that end, although it may be that in technical points the grounds of demurrer are sustainable under strict law."[18] Apparently this rule had not been considered before in South Carolina in connection with a demurrer although substantially the same rule has been applied to motions to strike defective pleadings.[19] Since the question presented was one of novel impression, the court decided that justice could best be served by having a trial on the merits rather than by ruling on the pleadings.

In *Hartford Accident and Indemnity Co. v. South Carolina Insurance Co.*,[20] an action was brought by the plaintiff (first insurer) for amounts allegedly due because of the defendant's (second insurer) withdrawal from an action. The lower court sustained a demurrer to the complaint for insufficiency of facts to state a cause of action and appeal was taken. It appeared that in sustaining the demurrer, the lower court considered facts not set forth in the complaint, thus violating the elementary rule that in passing on a demurrer the court is restricted to the facts as they appear in the pleadings.[21] The court reversed the order sustaining the demurrer.

In *Kline v. City of Columbia*,[22] the plaintiff's property was damaged by an explosion and fire allegedly caused by leaking gas coming into contact with a suspended gas heater. The complaint alleged that the city negligently pulled loose a gas line while in the process of widening a public street. The cause of

16. 230 S.C. 320, 95 S.E.2d 601 (1956).

17. Springfield v. Williams Plumbing Supply Co., 249 S.C. 130, 134, 158 S.E.2d 184, 186 (1967).

18. *Id.* at 138, 158 S.E.2d at 188, *quoting from* C.J.S. *Pleading* § 265 (1951).

19. *See,* Sams v. Sams, 247 S.C. 467, 148 S.E.2d 154 (1966); Archambault v. Sprouse, 215 S.C. 336, 55 S.E.2d 70 (1949).

20. 249 S.C. 120, 153 S.E.2d 124 (1967).

21. Fleming v. Pioneer Life Ins. Co., 178 S.C. 226, 182 S.E. 154 (1935).

22. No. 18663 (S.C., June 7, 1967).

action for damages against the city was based on section 47-70 of the Code[23] and Article I, Section 17, of the state constitution.[24] On appeal, the demurrer of the City of Columbia was overruled. The court held that the complaint stated a good cause of action under the constitution in that the damage caused by the gas leakage was just as much a taking of property as if some government authority had backed water over the plaintiff's premises.

The question of whether there was a cause of action under the statute depended on how it should be construed and the particular question had never been decided. The court followed its decision in *Springfield v. Williams Plumbing Supply Co.*[25] and held that a decision as to whether a good cause of action had been stated could best be determined by a trial on the merits.

The defendant claimed that the plaintiff's cause of action for a taking of property was improperly joined with the cause of action against the power company for negligence. *Clarke v. City of Greer*[26] was cited to support this contention. However, that case was easily distinguishable in that the cause of action under the constitution against the city was joined with an action against a contractor for both actual and punitive damages. In the instant case only actual damages were sought against both defendants, and since there is no distinction in South Carolina between "damage" and "taking,"[27] the measure of damages against both defendants was the same. The court found no misjoinder of issues.

Warren v. Allstate Insurance Company[28] involved an action for the alleged wrongful breach of an assigned risk insurance policy in that the defendant cancelled the plaintiff's certificate of insurance with the Highway Department. The court in overruling a demurrer held that the insured's complaint for alleged wrongful cancellation of the insurance certificate followed by the mandatory suspension of the insured's driver's license was sufficient to state a cause of action for breach of the insurance

23. S.C. CODE ANN. § 47-70 (1962).

24. S.C. CONST. art. 1, § 17.

25. 249 S.C. 130, 153 S.E.2d 184 (1967).

26. 231 S.C. 327, 98 S.E.2d 751 (1957).

27. Collins v. City of Greenville, 233 S.C. 506, 105 S.E.2d 704 (1958); Webb v. Greenwood County, 229 S.C. 267, 92 S.E.2d 688 (1956); White v. Southern Ry., 142 S.C. 284, 140 S.E. 560 (1927); Wilson v. Greenville County, 110 S.C. 321, 96 S.E. 301 (1918).

28. 152 S.E.2d 727 (S.C. 1967).

contract even though there was no allegation of breach of any specific provision of the policy.[29]

II. MOTION TO STRIKE ALLEGATIONS

In *Rochester v. North Greenville Junior College*,[30] the plaintiff alleged that warning signs were posted near the intersection where the automobile accident occurred showing on the top sign "school bus crossing" and on the lower sign "35 M.P.H." The lower court struck the allegation concerning these signs on the grounds that they were irrelevant since the plaintiff was not a passenger on a school bus, that no school bus was involved in the accident, and that the accident occurred at a time when a school bus would not ordinarily be using a highway. On appeal the South Carolina Supreme Court reversed the lower court ruling and observed that the lower court misconstrued the meaning of the signs. The established rule, that in order to base liability on the violation of a statute or highway warning sign, the plaintiff must establish that he was a member of the class for whose protection the statute was adopted or the sign erected,[31] did not bar the plaintiff's right to allege the existence of the signs. Speed was an important factor in the case, and the signs fixed the speed in the area. They applied to the public generally, and the particular time of day or the fact that no bus was involved in the accident was immaterial. The order striking the allegation was reversed.

In *Myers v. Modern Homes Supply Co.*,[32] the lower court overruled a motion to strike certain allegations in the complaint, and the defendant appealed. The court dismissed the appeal and reaffirmed the general rule in South Carolina that an order refusing to strike allegations in the pleadings is not subject to an interlocutory appeal.[33]

Rimer v. State Farm Mutual Automobile Insurance Company[34] restated the established rule that a motion to strike language from a pleading is addressed to the sound discretion

29. For a discussion of the court's reasoning, see this case surveyed under the heading *Insurance supra* at 588.

30. 249 S.C. 89, 153 S.E.2d 121 (1967).

31. *See, e.g.*, Carma v. Swindler, 228 S.C. 550, 91 S.E.2d 254 (1956); Wright v. South Carolina Power Comm'n, 205 S.C. 327, 31 S.E.2d 904 (1944).

32. 154 S.E.2d 729 (S.C. 1967).

33. *See, e.g.*, DePass v. Piedmont Interstate Fair Ass'n, 217 S.C. 38, 59 S.E.2d 495 (1950); Bowden v. Powell, 194 S.C. 482, 10 S.E.2d 8 (1940).

34. 248 S.C. 18, 148 S.E.2d 742 (1966).

of the trial judge and his ruling on such a motion will, therefore, not be disturbed on appeal in absence of a clear showing of prejudicial error.[35] Here the court found no prejudicial error in denying the defendant's motion to strike certain allegations.

III. MOTION TO MAKE COMPLAINT MORE DEFINITE AND CERTAIN

In *Airfare, Inc. v. Greenville Airport Commission*[36] an action was brought for breach of a lease contract and to enjoin further interference with the plaintiff's use of the leased premises. The issue before the court in this case was whether there had been an abuse of discretion by the lower court in requiring the plaintiff to make its complaint more definite and certain. Since a circuit court judge in South Carolina has wide discretion in passing on such a motion,[37] the ruling of the court in passing on a motion to make a complaint more definite and certain will not be disturbed unless it clearly appears that the appellant has been prejudiced.[38] The complaint had alleged that the plaintiff's business operations had been disrupted and discontinued, causing a loss of profits. The court found no abuse of discretion nor any prejudice in requiring the complaint to be made more definite and certain.

IV. ELECTION OF REMEDIES

In *Jacobson v. Yaschik*,[39] the plaintiff alleged a fraudulent breach of a fiduciary duty owed to the plaintiff by the defendant. The plaintiff sought an accounting for the loss sustained by her as a result of the breach of the fiduciary duty. The complaint also asserted a cause of action for actual and punitive damages based on the same fraudulent breach of duty. The defendant demurred to the complaint and moved to have the plaintiff elect the cause of action under which she would proceed. The lower court ordered the plaintiff to elect whether she would proceed on the first or second cause of action. In overruling

35. J.M.S., Inc. v. Theo, 241 S.C. 394, 128 S.E.2d 697 (1962); Ellen v. King, 227 S.C. 481, 88 S.E.2d 598 (1955).

36. 153 S.E.2d 846 (S.C. 1967).

37. "[W]hen the allegations of a pleading are so indefinite or uncertain that the precise nature of the charge or defense is not apparent the court may require the pleading to be made definite and certain by amendment." S.C. CODE ANN. § 10-606 (1962).

38. *See, e.g.*, Seegars v. WIS-TV, 236 S.C. 355, 114 S.E.2d 502 (1960); Epstin v. Berman, 78 S.C. 327, 58 S.E. 1013 (1907).

39. No. 18667 (S.C., June 12, 1967).

this order, the court stated that while in form two causes of action were stated, in fact only one was stated. The sole wrong committed by the defendant was the breach of fiduciary duty. The court followed the established rule that when a plaintiff invokes a remedy at law and one in equity against a defendant at the same time for the same cause, upon application of the defendant, the plaintiff may be compelled to elect whether he will proceed with the legal or the equitable action. The complainant will not be called on to elect, however, until the defendant has answered.[40] The record did not reveal whether the defendant had subsequently answered. The plaintiff was allowed twenty days after the filing of the remittitur in the case or twenty days following the joinder of issues, whichever came later, in which to elect the action under which to proceed.

V. MISCELLANEOUS

The freedom of a plaintiff to amend his complaint before trial was an important issue in *Morgan v. Liberty Mutual Insurance Co.*[41] The plaintiff purchased an automobile from Liberty Motors in Columbia, S. C., and the defendant insurance company was the insurer of Liberty Motors. The dealer failed to comply with the title requirements of the statute governing the transfer of an automobile.[42] The car rolled down a hill in front of the plaintiff's home and into the home of Will Blue. Blue brought an action in the state court against Morgan for personal injuries. The plaintiff and her insurer, American Mutual Fire Insurance Company, sought a declaratory judgment in the federal district court to establish the liability of the defendant insurance company for the damages suffered by Blue. Both sides admitted that the defendant's policy provided coverage of $10,000 for personal injury and $5,000 for property damage. The defendant filed a motion challenging the jurisdiction of the federal court in that the amount in controversy did not exceed the statutory minimum.

The defendant contended that under South Carolina law, when a motorist suffers personal injury and property damage, he is required to sue upon all claims in one action and any claim

40. 25 Am. Jur. 2d *Election of Remedies* § 31 (1966).
41. 261 F. Supp. 709 (1966).
42. S.C. CODE ANN. § 46-150.16 (1962).

omitted is lost.[43] Since Blue only claimed personal injuries, the maximum amount that the defendant would be liable for under the policy was $10,000 which was less than the statutory minimum required for jurisdiction by the federal court.[44]

The court, however, held that it had jurisdiction because the amount in controversy might be more than $10,000. If Blue owned the home, under South Carolina law he could amend his complaint to include another cause of action for property damage.[45] The court stressed that South Carolina is liberal in allowing amendments to a complaint before trial.[46] Blue could amend before the case went to trial or if he does not own the house, the owner might bring suit for property damage within the six years allowed.[47]

When an automobile policy is involved in a proceeding for declaratory judgment, the amount in controversy for jurisdictional purposes is the maximum amount for which the insurer could be liable under the policy.[48] The defendant could be liable for $15,000 under the policy, although at the time of this action the defendant's liability was only $10,000. The motion of the defendant was dismissed and jurisdiction remained in the federal court for further proceedings.

ARCHIE L. HARMAN

43. Powers v. Calvert Fire Ins. Co., 216 S.C. 309, 57 S.E.2d 638 (1950); Holcombe v. Garland Denwiddle, Inc., 162 S.C. 379, 160 S.E. 881 (1931).

44. 28 U.S.C.A. § 1332(b) (1966). Amount of controversy must exceed 10,000 dollars.

45. S.C. CODE ANN. § 10-692 (1962).

46. *See, e.g.*, Elliot v. Carroll, 179 S.C. 329, 184 S.E. 92 (1936); Knight, Yancey & Co. v. Aetna Cotton Mills, 80 S.C. 213, 61 S.E. 396 (1908).

47. S.C. CODE ANN. 10-2002 (1962).

48. New Century Cas. Co. v. Chase, 39 F. Supp. 768 (S.D.W. Va. 1941).