South Carolina Law Review

Volume 24 | Issue 4 Article 3

1972

Contracts

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CONTRACTS

I. RECISSION OF PERSONAL INJURY RELEASE

Remarkably, especially in view of the volume of motor vehicle collision litigation, *Herndon v. Wright*[1] was the first case to reach the Supreme Court of South Carolina impugning a personal injury release on the ground of mistake since the invention of the automobile. The plaintiff prosecuted this appeal from an order sustaining the defendant's demurrer to his second cause of action. This division of the complaint sought recission of the release on the ground of mutual mistake in that both the appellant and the respondent's agent had acted under the mistaken belief that the appellant's injuries were relatively minor as described by the attending physician. Soon after the release was executed, serious and disabling back injuries were discovered, to the effect that if such had been known, the release would not have been given.

The court opined that these allegations, assumed to be true for purposes of the demurrer, were sufficient to state a cause of action. Its holding rested on the doctrine that a contract may be rescinded if it "was executed as a result of a mutual mistake of the contracting parties with reference to a material matter, and . . . the agreement would not have been entered into except for that mutual mistake . . . ."[2] *Lawton v. Charleston & W. C. Ry.*,[3] upon which the circuit judge had relied, was distinguishable on its facts in that it dealt with a unilateral mistake by the party granting the release.

II. CONSTRUCTION OF CONTRACTS

The issue in two cases decided by the supreme court during this survey period focused upon the construction of the contract involved therein. In *Derrick, Stubbs & Stith v. Rogers*[4] a partnership engaged in the practice of public ac-

1. 257 S.C. 98, 184 S.E.2d 444 (1971).

2. *Id.* at 103-04, 184 S.E.2d at 446, *citing* Blassingame v. Greenville County, 134 S.C. 324, 132 S.E. 616 (1926); Jumper v. Queen Mab Lumber Co., 115 S.C. 452, 106 S.E. 473 (1921).

3. 91 S.C. 332, 74 S.E. 750 (1912).

4. 256 S.C. 395, 182 S.E.2d 724 (1971).

counting sought to enforce a covenant-not-to-compete provision contained in its partnership agreement against a former partner. The circuit court had sustained the defendant's demurrer to the complaint on the ground that no cause of action was stated, and the partnership appealed. Its complaint, which incorporated the entire partnership agreement,[5] alleged that Rogers was involuntarily withdrawn from the partnership by the action of the other partners. It further alleged that the respondent had violated Section 17.02 in that he had practiced public accounting within the prohibited geographical area prior to the expiration of three years from the date of withdrawal.

In affirming the circuit judge's ruling, the supreme court held that "expulsion is not compatible with the type of withdrawal contemplated by the wording of Section 17 because such withdrawal connotes action on the part of the partner. Expulsion, on the other hand, contemplates action taken against the will of the affected party."[6] It was significant that the only reference to the covenant-not-to-compete provision was found in the section covering voluntary withdrawal, and that there was no mention of involuntary withdrawal in the disputed provision. The court further noted that its holding in *Oxman v. Sherman*[7] would require that an ambiguity,

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5. The relevant portions of the contract were as follows:
   12. VOLUNTARY WITHDRAWAL
   12.01 Any partner shall have the right to withdraw from the partnership at the end of any fiscal year provided written notice of intention to withdraw shall be delivered to the partners . . . See Section 17.
   13. INVOLUNTARY WITHDRAWAL
   13.01 A partner who conducts himself in such a way as to jeopardize the reputation of the partnership . . . shall thereby make himself liable for expulsion from the partnership . . . . Expulsion may be ordered only by unanimous agreement by all the other active partners.
   17. GENERAL GROUND-RULES FOR SETTLING A PARTNER'S CAPITAL ACCOUNT
   17.02 A partner withdrawing or retiring from the partnership agrees that, if the partnership continues its practice of public accountancy, he will not engage in the practice of public accounting either, in a self-employed capacity or as an employee within a radius of [60] miles of the State House in Columbia, S. C. for a period of [3] years from the date of withdrawal.
6. 256 S.C. at 399, 182 S.E.2d at 726.
7. 239 S.C. 218, 122 S.E.2d 559 (1961).

if any existed, be construed against the applicability of a covenant-not-to-compete.

In *Lewis v. Carnaggio*[8] the plaintiff had constructed a residence for the defendants under a written contract which provided that the defendants were not required to pay "any amount in excess of the sum of [$34,500.00] which is the estimated cost of construction, plus the fee provided for herein."[9] The defendant had successfully contended in the trial court that the total amount due, including the contractor's fee, could not under any circumstances exceed $34,500.00. In reversing and remanding the case the supreme court held that punctuation is controlling in the construction of a contract which is unambiguous and whose meaning is clear when read as punctuated.

III. FRAUD

Allen-Parker Co. v. Lollis[10] was an action in claim and delivery instituted by the assignee of a conditional sales contract to recover possession of a mobile home because of alleged default in payments due under the contract. The defendant counterclaimed that the contract had been fraudulently procured in that the seller-assignor had misrepresented to her that she could assume the balance of $3,100 owed by a previous purchaser from whom the mobile home had been repossessed. She alleged that she had executed the contract in blank, into which the purchase price of $5,301.50 had been subsequently inserted by the seller-assignor.

In affirming the lower court's determination in favor of Mrs. Lollis, the South Carolina Supreme Court held that both the question of fraud and the question of whether she had been negligent in signing a blank contract were properly submitted to the jury. In reply to Allen-Parker's contention that the admission of testimony concerning the oral agreements between the parties prior to the written contract violated the parol evidence rule, the court relied upon the well-established principle that parol evidence is competent to prove the facts which constitute the fraud alleged, notwithstanding the fact that the written contract stated that it contained all of the provisions agreed upon. While the court recognized a duty

8. 257 S.C. 54, 183 S.E.2d 899 (1971).
9. *Id.* at 56, 183 S.E.2d at 900.
10. 257 S.C. 266, 185 S.E.2d 739 (1971).

on the part of a defrauded party to exercise reasonable care to protect himself, it stated:

> Where a person is induced to sign an instrument as a result of a false representation that it will be filled in or prepared as orally agreed upon, the intentional omission of terms required by the authorization to be included, or the inclusion of terms not so authorized, constitute fraud, invalidating the instrument as between the parties thereto, notwithstanding that the person signing it was negligent in relying on the misrepresentation.[11]

In *Dailey Co. v. American Institute of Marketing Systems, Inc.*[12] the plaintiff, a real estate company, brought an action for fraud and deceit against a Missouri corporation which had contracted to provide the former with advertising and promotion material, referrals, and training of Dailey's personnel. The supreme court found that there was not sufficient evidence to support the lower court's verdict in favor of the plaintiff. There was no indication that the defendant entered into the contract without the intention to perform its part of the bargain. Instead, the plaintiff's testimony was directed entirely to the mere failure of the defendant to perform its contractual obligation which, even if sustained, would not constitute fraud.

IV. Applicable Statutes

The distinction between a holdover tenant and a tenant at will was examined by the supreme court in *Townsend v. Singleton.*[13] The appellant had leased certain premises from the respondents pursuant to a written lease agreement at a rental of $150 per month. This arrangement expired on February 1, 1969; thereafter, the parties orally agreed to extend the contract for one month. Although no new contract was ever reached, the appellant continued to occupy the property until November, 1969. The circuit court had concluded that the appellant was a holdover tenant under the same terms and conditions as were contained in the written agreement.

On the basis of Section 41-1 et seq. of the Code,[14] the

11. *Id.* at 276, 185 S.E.2d at 744.
12. 256 S.C. 550, 183 S.E.2d 444 (1971).
13. 257 S.C. 1, 183 S.E.2d 893 (1971).
14. S.C. Code Ann. §41-1(3) (1962) provides:
> Every person other than the owner of real estate . . . using or occupying real estate without an agreement, either oral or in

court reversed and remanded the case, holding that after the termination of the oral agreement on March 1, the appellant was clearly a tenant at will and as such was liable only for a reasonable rental for the premises. It further held that the trial judge was in error in awarding attorney's fees to the respondents because "recoverable damages do not include the expense of employing counsel except when so provided for by contract or statute."[15]

Minter v. State Department of Mental Health[16] was instituted by the administrator to determine the validity of the State's claim against his intestate mother's estate. In 1956 the intestate's husband had entered into a contract with the department to pay for the care and maintenance of his wife at the rate of $7.00 per month, which he told the department he could pay, instead of the established monthly charge of $60.00. Prior thereto the intestate had been supported solely at State expense for almost twenty years.

Finding it unnecessary to determine the validity of the alleged contract since the balance due the State would exhaust the estate, the supreme court held that under Section 32-1028 of the Code,[17] the contract could apply only to the intestate's

writing, shall be deemed a "tenant at will."

S.C. CODE ANN. §41-54 (1962) provides:

When a person enters upon or uses the premises of another without agreement or without the permission of the owner or by trespass the owner may at his option waive such tort and treat and deem such person a tenant at will. In such case the landlord shall have and be entitled to a *reasonable rental* for the use and occupation of such premises and all remedies for the enforcement of his rights in respect thereto as in other cases of tenancy at will (emphasis added).

S.C. CODE ANN. §41-62 (1962) provides:

When there is an express agreement, either oral or written, as to the term of the tenancy for term or for years such tenancy shall end without notice upon the last day of the agreed term.

15. 257 S.C. at 12, 183 S.E.2d at 898, *citing* Rimer v. State Farm Mut. Auto Ins. Co., 248 S.C. 18, 148 S.E.2d 742 (1966); United States Rubber Co. v. White Tire Co., 231 S.C. 84, 97 S.E.2d 403 (1956); First Nat'l Bank v. McSwain, 93 S.C. 30, 75 S.E. 1106 (1912).

16. 187 S.E.2d 890 (S.C. 1972).

17. S.C. CODE ANN. §32-1028 (1962) provides:

The Commission shall make investigations and ascertain which of the patients or trainees of State mental health facilities or which of the parents, guardians, trustees, committees or other persons legally responsible therefor are financially able to pay

present and future needs. "There is nothing in the letters between the parties from which it can be concluded that such had any reference to the amount due and owing for past support and maintenance existing at the date of the making of the alleged contract."[18] The court further concluded that the State had a valid and subsisting claim and a general lien for the payment thereof existed pursuant to Section 32-1029 of the Code.[19]

V. Breach of Contract

In *Lawyers Title Insurance Corp. v. Elmwood Properties*,[20] Elmwood, the holder of a prior mortgage, entered into an agreement with Lawyers Title and its insured warranting that its mortgage constituted a valid, enforceable, first lien on the property, a portion of which was covered by the insured mortgage. Elmwood further agreed to prosecute its pending foreclosure to a "successful conclusion," specifically defined as "a final judgment confirming the essential allegations of Elmwood's complaint (in its foreclosure action), granting the prayer therein for foreclosure of its said mortgage as a first lien and ordering the sale of the mortgaged property in satisfaction of the debt."[21] Upon performance thereof, Lawyers Title agreed to purchase the prior mortgage, the indebtedness secured thereby, and the judgment of foreclosure. Elmwood subsequently obtained an order of foreclosure; however, it provided for the sale of only a portion of the property covered by its mortgage.

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the expenses of the care and treatment, and it may contract with any of these persons for a patient's or trainee's care and treatment . . . . In arriving at the amount to be paid the Commission shall have due regard for the financial condition and estate of the patient or trainee, *his present and future needs* and the present and future needs of his lawful dependents, and whenever considered necessary to protect him or his dependents may agree to accept a monthly sum less than the actual per capita cost (emphasis added).

18. 187 S.E.2d at 893.
19. S.C. Code Ann. §32-1029 (1962) provides:
There is hereby created a general lien upon the real and personal property of any person who is receiving or who has received care and treatment in a State mental health facility, to the extent of the total expense to the State in providing the care, training or treatment.
20. 187 S.E.2d 799 (S.C. 1972).
21. *Id.* at 800.

Elmwood contended on appeal that such was a "successful conclusion" since the security ordered to be sold was more than sufficient to satisfy its mortgage. In rejecting this argument, the supreme court held:

> The failure to establish the Elmwood mortgage as a first lien against the above stated portion of the property involved clearly constituted a breach of the warranty given by appellants to respondents; and, because of such fact, the lower court properly held that the judgment of foreclosure and sale . . . was not a "successful conclusion" of Elmwood's foreclosure action as defined in the agreement . . . .[22]

VI. IMPLIED CONTRACTS

The issue presented for the court's consideration in *Addy v. Bolton*[23] was whether attorney's fees are recoverable under an implied contract of indemnity. The appellants, owners of a store building leased to the Addys, had engaged the respondent, a general contractor, to make needed repairs to the building. The Addys instituted this action against the appellants and the respondent to recover for the damage to their merchandise resulting from a fire caused by the respondent's welding operation. The jury returned a verdict against the respondent only, thus exonerating the appellants from any liability; however, the appellants prosecuted this appeal from a verdict directed against them on their cross action against the respondent. They contended that even though there was no written contract between themselves and the respondent, an implied contract of indemnity arose by operation of law, under which they were entitled to recover the fees paid the attorneys. The supreme court agreed, stating:

> In actions of indemnity, brought where the duty to indemnify is either implied by law or arises under contract, and no personal fault of the indemnitee has joined in causing the injury, reasonable attorneys' fees incurred in resisting the claim indemnified against may be recovered as part of the damages and expenses.[24]

Phillips Refrigeration Co. v. Commercial Credit Co.[25] was an appeal taken from the trial judge's grant of the defendant's motion for a nonsuit at the conclusion of the plaintiff's testimony. The complaint alleged an express contract by which the

22. *Id.* at 802.
23. 257 S.C. 28, 183 S.E.2d 708 (1971).
24. *Id.* at 34, 183 S.E. at 710.
25. 256 S.C. 500, 183 S.E.2d 330 (1971).

plaintiff stored equipment for the defendant at a certain monthly charge. The plaintiff's contention on appeal was that the evidence established a *quantum meruit* type of lease arrangement. In affirming the action of the circuit court, the Supreme Court reiterated the proposition that a party may not plead an express contract and recover upon an implied contract without amendment of the complaint, which in this case was never sought.

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