

IN THE SUPREME COURT OF THE STATE OF DELAWARE

OLD GUARD INSURANCE	§	
COMPANY,	§	
	§	No. 542, 2003
Plaintiff Below,	§	
Appellant,	§	Court Below: Superior Court of
	§	the State of Delaware in and for
v.	§	New Castle County
	§	
JIMMY'S GRILLE, INC., JIMMY	§	C. A. No. 01C-06-110
TENEFOSS, EVELYN CUMMINGS,	§	
HARRY CUMMINGS,	§	
	§	
Defendants Below,	§	
Appellees.	§	

Submitted: July 21, 2004

Decided: September 21, 2004

Before **STEELE**, Chief Justice, **BERGER** and **JACOBS**, Justices.

**ORDER**

This 21<sup>st</sup> day of September, 2004, upon consideration of the briefs of the parties and their presentations at oral argument, it appears to the Court that:

1. Old Guard appeals from an adverse Superior Court judgment based upon an unfavorable jury verdict. At issue are three pretrial rulings. To understand how those issues arose in this procedurally convoluted insurance coverage matter, some background is required.

## The Underlying Personal Injury Lawsuit

2. In July 1997, Evelyn Cummings sustained injuries from a fall while she was a customer at Jimmy's Grille, a restaurant in Bridgeville, Delaware. In July 1999, Mr. and Mrs. Cummings filed a personal injury action in the Superior Court against Jimmy's Grille and its alleged owner, Jimmy Tenefoss. Tenefoss claimed that after receiving the summons and complaint, he forwarded them to Calloway, which was the agent for the restaurant's liability insurance carrier, First Delaware Insurance (the predecessor in interest of Old Guard). It appears that Calloway, the agent, did not forward the Cummings' suit papers to the insurer. As a consequence, a default judgment was entered against Jimmy's Grille and Tenefoss in November 1999.

3. The landlord of Jimmy's Grille, who was a co-defendant, did enter an appearance. Thereafter, the matter was referred to arbitration. After the arbitration hearing, \$100,000 in damages was awarded against Jimmy's Grille and Tenefoss but the landlord was found to be not liable.

4. The Cummings next filed a proceeding in the Superior Court to convert the arbitrator's award into a judgment. At that point, Old Guard, which had received notice of the judgment previously entered against its insureds, appeared and moved to vacate the default judgment against Jimmy's Grille and Tenefoss. The Superior Court denied Old Guard's motion on July 7, 2000. The Superior

Court also informed the parties that to fix the amount of the damages award against Jimmy's Grill and Tenefoss an inquisition hearing was required. An inquisition hearing took place on December 4, 2000, at which neither Jimmy's Grille nor Tenefoss appeared. A damages award was ultimately entered, but the amount of that judgment does not appear of record.

#### The Instant Declaratory Judgment Action

5. Old Guard then commenced, in the Superior Court, an action for a declaratory judgment against Jimmy's Grille, Tenefoss, and the Cummings. Old Guard sought a determination that it (Old Guard) was not liable under its liability policy either to indemnify any of its insureds against, or to pay to the Cummings, the amount of the judgment(s) in the underlying action. The basis for Old Guard's no-coverage claim was that Jimmy's Grille and Tenefoss had failed to provide timely notice to the carrier (Old Guard) as the insurance contract required.

6. The Cummings opposed Old Guard's claim for declaratory relief, and counterclaimed for a declaration that the Old Guard insurance policy covered the underlying judgment(s) and claims at issue. Jimmy's Grille and Tenefoss did not respond to the Old Guard complaint, and default judgment(s) were (again) entered against them in Old Guard's declaratory action on September 27, 2001.

7. On June 26, 2002, Old Guard moved for summary judgment on its "no-coverage" declaratory claim. At the hearing on that motion, the Cummings'

attorney attempted to advance, on behalf of Jimmy's Grille and Tenefoss, the same position as he was asserting on behalf of the Cummings. The Superior Court precluded Cummings from asserting that position, because the Cummings had not received an assignment of rights from Jimmy's Grille or Tenefoss. The Court did, however, temporarily stay all proceedings on Old Guard's summary judgment motion, to afford the Cummings an opportunity to supplement the record by obtaining and filing an assignment of rights. The record was so supplemented in August 2002.

8. Thereafter, the Cummings' attorney entered his appearance on behalf of Jimmy's Grille and Tenefoss, and on behalf of those defendants, he filed a motion to vacate the default judgments. The Superior Court granted the motion to vacate on October 31, 2002, over Old Guard's objection. Old Guard's first claim of error on appeal is that the default judgments were improperly vacated.

9. Thereafter, Old Guard renewed its motion for summary judgment on its claim that there was no policy coverage by reason of the insureds' failure to give timely notice of the Cummings' claim. The Superior Court denied that motion on December 20, 2002. The Court held that if, in fact, Jimmy's Grille and Tenefoss did give to Old Guard's agent (Calloway) timely notice of the Cummings' claim against the restaurant and Tenefoss, such notice to the agent would also legally constitute notice of the claim to Old Guard. The reasons were that (i) the agent

was required by its contract with Old Guard to notify Old Guard of any notice of claims that the agent received, and (ii) Old Guard was bound by the notice to its agent under the doctrine of apparent agency. Despite that legal ruling, the trial court denied Old Guard's summary judgment motion, because whether or not Tenefoss had given notice of the Cummings' claim to Old Guard's agent (Calloway), was a disputed fact issue. The trial court's denial of summary judgment to Old Guard, and its legal determination that notice to the agent would operate as notice to the insurer, are Old Guard's remaining claims of error in this appeal.

10. The coverage issue was then tried to a jury on the narrow factual question of whether Tenefoss had notified Old Guard's insurance agent of the Cummings' lawsuit. The jury found that Tenefoss had given the agent such notice. As a result, the Old Guard policy was determined to cover the Cummings' personal injury judgment. This appeal followed.

### The Claims on Appeal

11. Old Guard first claims that the trial court erroneously vacated the default judgment(s) against Jimmy's Grille and Tenefoss. A motion to vacate a default judgment is left to the sound discretion of the trial court.<sup>1</sup> Where an order

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<sup>1</sup> *A Child's Dream, Inc. v. Mills*, 765 A.2d 950 (Del. 2000).

vacating a default judgment results from an orderly and logical deductive process, it will not be found to constitute an abuse of discretion.<sup>2</sup>

12. In determining whether the trial court abused its discretion by granting a motion to vacate a Rule 60(b) default judgment, this Court applies a two-part test. First, the Court must be persuaded that the defaulting party has demonstrated that if relief is granted, the outcome of the action might be different from the result that would obtain if the default judgment is permitted to stand.<sup>3</sup> This test has been expressed as a requirement that the defaulting party demonstrate a meritorious defense to the claim.

13. Second, the Court must be satisfied that no substantial prejudice will result to the non-defaulting party if the motion is granted.<sup>4</sup> In its application, Rule 60(b) has been accorded a liberal construction because of the underlying public policy that favors a trial on the merits, as distinguished from a judgment based on a default. Given the force of that public policy, any reasonable doubt is resolved in favor of the party seeking relief from the default judgment.<sup>5</sup>

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<sup>2</sup> *Gomez v. Morning*, 795 A.2d 667 (Del. 2002).

<sup>3</sup> *Battaglia v. Wilmington Sav. Fund Soc.*, 379 A.2d 1132, 1135 (Del. 1977), *citing* Wright & Miller, Federal Practice and Procedure: Civil § 2697.

<sup>4</sup> *Id.*

<sup>5</sup> *Model Finance Co. v. Barton*, 188 A.2d 233 (Del. Super. Ct. 1963), *citing* *Tozer v. Charles A. Krause Milling Co.*, 189 F. 2d 242, 245 (3d Cir. 1951).

14. Applying that two-part test to the facts at bar, it is clear that the outcome might have been—indeed was—different from the result that would have obtained had the default judgment been allowed to stand. Here, the position advanced by the parties seeking relief from the default judgment was found to constitute a meritorious defense, both as a legal matter by the trial court on the Rule 60(b) motion, and later as a factual matter by the jury at the conclusion of trial. Moreover, no prejudice to Old Guard was shown, other than the fact that Old Guard would be required to answer the motion and then defend on its merits, despite its belief the case had already been resolved. Because that did not constitute substantial prejudice to Old Guard, the trial court did not abuse its discretion by vacating the default judgment.

15. Old Guard next contends that the trial court erroneously denied its motion for summary judgment. The court erred, Old Guard claims, because Tenefoss and Jimmy's Grille did not give timely notice of the Cummings' claim against them. In fact, Old Guard urges, it never received any notice of that claim until the Cummings' attorney first contacted Old Guard's claims processor by a letter written in June 2000. In addition, Old Guard contends, the Superior Court erred as a matter of law in ruling that notice to its agent would constitute notice to Old Guard. Old Guard's contentions lack merit.

16. The Old Guard insurance policy required the insured to notify “the company providing the insurance” of any “occurrence” or “claim.” As the appellees argue, Tenefoss did precisely that, first by timely contacting the agent, Calloway, and then forwarding the Cummings' complaint and summons to Calloway's office. Once Calloway received those papers, it, in turn, was legally obligated to notify the insurance carrier.<sup>6</sup>

17. Moreover, the prior course of dealing between the insureds and the agent gave the insureds a valid reason to believe that giving prompt notice of the claim to the agent would satisfy the policy requirement that the insured give notice to the insurance carrier. On a previous occasion, Jimmy's Grille was sued on a claim that was covered by the insurance policy at issue. Jimmy's Grille then notified the agent, Calloway, of the claim. Thereafter, the insurer processed that claim without difficulty or default. Here, the Superior Court held that, if timely notice to the agent was in fact given, then as a legal matter, such notice to the insurer's agent would operate as sufficient notice of the claim to Old Guard, the insurer. That ruling was correct, because Calloway was legally obligated to notify

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<sup>6</sup> The contract between Calloway and Old Guard provided that:

You [Calloway] will notify us [Old Guard] immediately if you receive notice of any claims, suits or losses under our policies. You will cooperate with us in the investigation and adjustment, settlement, and payment of these claims. You will also assist us in the collection of deductibles from insurers.



Old Guard of claims of which it received notice, and Calloway was at least the apparent, if not the actual, agent of Old Guard. “Apparent authority may be defined as that authority which, though not actually granted, the principal knowingly or negligently permits the 'agent' to exercise or which he holds him out as possessing.”<sup>7</sup> If a third party relies on the agent's apparent authority in good faith and is justified in doing so by the surrounding circumstances, the principal is bound to the same extent as if actual authority had existed.<sup>8</sup>

18. In addition to the prior dealings between the insureds and the agent, Calloway never gave Jimmy's Grille or Tenefoss reason not to believe that (Calloway) was Old Guard's agent, duly authorized to accept (and process) their notice of the Cummings' lawsuit. Indeed, as the trial court noted, Old Guard anticipated that its clients would give notice of claims to its agents, which is consistent with Old Guard having included a notification obligation in its contracts with its agents.

19. For these reasons the trial court properly ruled that Tenefoss reasonably believed that giving notice of the Cummings' lawsuit to Calloway was sufficient to satisfy the requirement that notice be given to the insurer. As the apparent (if not

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<sup>7</sup> *Finnegan Constr. Co. v. Robino-Ladd Co.*, 354 A.2d 142 (Del. Super. Ct. 1976), citing *Petition of Mulco Products*, 123 A.2d 95, 106 (Del. Super. Ct. 1956).

<sup>8</sup> *Id.*

actual) agent of Old Guard, Calloway had the power to bind Old Guard by accepting notice of the claim. Whether or not Tenefoss actually gave timely notice to Calloway was a disputed issue of fact to be resolved at a trial. The jury ultimately resolve that issue against Old Guard.

20. This Court reviews the Superior Court's denial of summary judgment *de novo*.<sup>9</sup> Summary judgment will be granted only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.<sup>10</sup> Because whether or not Tenefoss notified Calloway in timely fashion was a disputed material factual issue, the Superior Court correctly denied Old Guard's motion for summary judgment. The trial court did not abuse its discretion or commit any error of law in its disposition of the three motions that are the subject of this appeal.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is **AFFIRMED**.

BY THE COURT:

/s/ Jack B. Jacobs  
Justice

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<sup>9</sup> *Kaufman v. C.L. McCabe & Sons, Inc.*, 603 A. 2d 831, 833 (Del. 1992).

<sup>10</sup> Super. Ct. Civ. R. 56(c); *Burkhart v. Davies*, 602 A. 2d 56, 59 (Del. 1991).