2024 WL 472570 (C.A.4) (Appellate Brief)
United States Court of Appeals, Fourth Circuit.

FIRST PROTECTIVE INSURANCE COMPANY, Plaintiff-Appellee,
v.
Lewis Edward O'LEARY; Probuilders of the Carolinas, Inc., Defendants-Appellants.

No. 23-2160.
February 1, 2024.

On Appeal from the
United States District Court for the Eastern
District of North Carolina, Eastern Division,
Honorable Louise W. Flanagan, District Judge

Opening Brief of Appellant

Richard W. Farrell, Esq., 5000 Falls of Neuse Rd., Suite 410, Raleigh, NC 27609, rfarrell@farrell-lawgroup.com, Phone: 919-872-0300, for appellants Lewis Edward O'Leary & ProBuilders of the Carolinas, Inc.

Mihaela Cabulea, 400 N. Ashley Dr., Suite 2300, Tampa Bay, FL 33602, mcabulea @butler.legal, Phone: 813-281-1900, for appellee First Protective Insurance Co.

L. Andrew Watson, 11525 N. Community House, Rd., Ste. 300, Charlotte, NC 28277, awatson@butler.legal, Phone: 704-543-2321, for appellee First Protective Insurance Co.

***i TABLE OF CONTENTS**

***iii TABLE OF AUTHORITIES**

CASES

STATUTES

***1 JURISDICTIONAL STATEMENT**

This appeal arises out of the district court's denial of the immunity claims of the appellant, Lewis O'Leary, and his company, ProBuilders of the Carolinas, Inc. [collectively "O'Leary" hereafter] from the claims of First Protective Insurance Company ["FP"], and the resulting denial of O'Leary's motion to dismiss FP's claims. This Court has jurisdiction to review the district court's denial of immunity pursuant to 28 U.S.C. § 1291, and the collateral order doctrine. *Nero v. Mosby*, 890 F.3d 106, 117 (4th Cir. 2020), citing, *Nixon v. Fitzgerald*, 457 U.S. 731, 742, 102 S.Ct. 2690, 73 L.Ed. 2d 349 (1982).

STATEMENT OF ISSUES

1. Did the district court's order improperly ignore FP's admission in its complaint that the role of "O'Leary, as the umpire, [was to] settle the dispute" [JA017].

2. Did the district court improperly hold that the North Carolina Revised Uniform Arbitration Act [the "Act"] applies only to "arbitrators", and "arbitration agreements", where § 1-569.14(b) of the Act provides that the Act "supplements any immunity under other law."

3. The North Carolina Court of Appeals, the highest court in North Carolina to have reviewed the immunity issues now before this Court, has stated expressly, and unequivocally, that the *functionality test*, applying judicial immunity to private citizens performing the function of resolving disputes between parties, or of ***2** authoritatively adjudicating private rights, have immunity when doing so, and comprises the substantive common law of North Carolina. How can that decision be "inapposite" to the immunity issues now before this Court.

4. Do decisions of the U.S. Supreme Court, and of North Carolina U.S. District Courts, provide further support for the holding of the North Carolina Court of Appeals regarding O'Leary's immunity.

5. Does the functionality test comprise the common law of North Carolina.

6. Should the provisions of FP's unilaterally drafted dispute resolution appraisal process be construed strictly against FP regarding FP's arbitrary definition of "umpire" applied by the district court.

7. Does the district court's denial of O'Leary's immunity result in a substantial risk of vexatious litigation against those, such as O'Leary, serving as "umpires", and thereby undermine the independence and conduct of a process closely related to the judicial process.

8. Did FP act vexatiously or vindictively when its appraisal process provided to FP the right to reject the award, vacate the award, or to seek a declaratory judgment, rather than to sue O'Leary.

9. Is FP prohibited from obtaining discovery from O'Leary pursuant to § 1-569.14(d) of the Act.

***3** 10. Is O'Leary entitled to reimbursement of the fees and costs incurred by him in this case pursuant to § 1-569.14(e) of the Act.

STATEMENT OF THE CASE

This case arises out of an insurance coverage dispute between the plaintiff insurer, FP, and its insured, Rike, regarding the amount of loss incurred by Rike under the policy. Within its policy FP established an appraisal "umpire" process to resolve such disputes. JA075. The appraisal process set forth in FP's policy states the following:

"F. Appraisal

If you and we fail to agree on the value or amount of any item or loss, either may demand an appraisal of such item or loss. In this event, each party will choose a competent and disinterested appraiser within 20 days after receiving a written request from the other. The two appraisers will choose a competent and impartial umpire. If they cannot agree upon an umpire within 15 days, you or we may request that a choice be made by a judge of a court of record in the state where the "residence premises" is located. The appraisers will separately set the amount of loss. *If the appraisers submit a written report of an agreement to us, the amount agreed upon will be the amount of loss. If they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two will set the amount of loss.* Each party will:

1. Pay its own appraiser; and

2. Bear the other expenses of the appraisal and umpire equally.

In no event will an appraisal be used for the purpose of interpreting any policy provision, determining causation or determining whether any item or loss is covered under this policy. *If there is an appraisal, we still retain the right to deny the claim*." [Underlining added].

***4** That process was invoked to resolve the insurance dispute. Each side selected an appraiser. O'Leary was mutually selected by the appraiser for FP, and for the insured, under FP's policy, to be the umpire to resolve the dispute. As alleged by FP in its complaint, O'Leary was then advised "that the appraisers could not agree on a valuation for the Claim, and requested that O'Leary, as the umpire, settle the dispute." JA017.

As umpire, having considered the determinations of the respective appraisers, O'Leary performed FP's designated function of resolving the dispute between FP and its insured, adjudicating those private rights, and determined an appropriate award on 15 March 2022. Under the policy's appraisal process FP was not obligated to accept the umpire's award, but could deny the claim, or move to vacate the award pursuant to the standards of the Federal Arbitration Act, 9 U.S.C. § 10. FP also had the procedural option of seeking a declaratory judgment. Rather than exercising any of those options, FP sued O'Leary.

In its complaint [JA009], FP's allegations are limited to its claims of a failure by O'Leary to disclose prior relationships. JA130. [1] Therein, FP claims that O'Leary failed to disclose that he had prior dealings with the insured, with insured's contractor, and appraiser, and that because O'Leary was alleged to predominantly ***5** work on behalf of policyholders against insurers, that he was somehow biased in a general sense (in favor of policyholders).

FP's policy provides that North Carolina law governs. JA076. § 1-569.14(a) of the Act provides that arbitrators are statutorily immune from civil liability "... to the same extent as a judge of a court of this State acting in a judicial capacity". Subpart (b) of § 1-569.14 states that the immunity provided under the Act "supplements any immunity under other law." § 1-569.12 of the Act requires certain disclosures to be made by arbitrators which would be considered by a reasonable person to impact upon their impartiality. § 1-569.14(c) states that a failure to make such disclosures *"... shall not cause any loss of immunity under this section."* Underlining added.

O'Leary moved pursuant to Rule 12(c) requesting that judgment be entered dismissing the claims of FP against O'Leary because those claims did not identify a claim upon which relief could be granted as a result of O'Leary's immunity. The district court denied O'Leary's motion, finding that the provisions of the Act did not apply to O'Leary acting as the "umpire" in the appraisal process, and that O'Leary's service as an "umpire" did not arise out of an "arbitration agreement". JA133-JA135. As a result of those findings the district court held that O'Leary was not entitled to immunity from the claims of FP.

***6** The district court's order improperly ignored FP's admission in its complaint that the role of "O'Leary, as the umpire, [was to] settle the dispute" [JA017], and also failed to apply the proper "functionality test", comprising the substantive law of North Carolina, to the admitted role of O'Leary. The district court then failed to apply the express provisions of the Act requiring the incorporation of "other law" (the functionality test) into the immunity provisions of the Act. The result of these errors was the improper denial of O'Leary's motion to dismiss, and this appeal.

SUMMARY OF O'LEARY'S ARGUMENT

The immunity provisions of N.C.G.S § 1-569.14 of the Act state expressly that: "(a) An arbitrator... is immune from civil liability to the same extent as a judge of a court of this State acting in a judicial capacity;" and, "(b) The immunity afforded by this section *supplements any immunity under other laws*." [italics added]. In rejecting O'Leary's immunity claim the district court improperly ignored the "other law" expressly incorporated into the immunity provisions of the Act. That "other law" necessarily includes determinations with regard to North Carolina common law as it relates to the immunity of citizens adjudicating and resolving disputes between private parties. That common law is definitively stated by the highest North Carolina Court examining this precise issue in *Dalenko v. Collier*, 191 N.C. App. 713, 722 (2008). *Dalenko* cites to the same issue reviewed and determined by the U.S. ***7** Supreme Court in *Burns v. Reed*, 500 U.S. 478, 499-500, 111 S.Ct 1934, 114 L.Ed.2d 567-68 (1991).

Under North Carolina common law, in his capacity as an "umpire", pursuant to the terms of FP's own contract, and pursuant to the allegations of FP in its complaint, O'Leary performed the function of resolving the dispute between FP and its insured, and of authoritatively adjudicating those private rights. Under the functionality test recognized as North Carolina's common law, and pursuant to the North Carolina Court of Appeals direct adoption in *Dalenko* of the reasoning of the U.S. Supreme Court in *Burns*, O'Leary is entitled to immunity from the claims as alleged by FP, and to the immunity protections afforded by the Act.

Contrary to the district court's order, pursuant to the functionality test, the presence, or absence, of an "agreement to arbitrate" is irrelevant, as is FP's arbitrary term of "umpire". Rather, it is the function of resolving the dispute performed by O'Leary, as established pursuant to the terms of FP's own insurance contract, and admitted by FP, that establishes O'Leary's entitlement to immunity from the claims of FP pursuant to North Carolina law.

*8 ARGUMENT

1. The district court's denial of O'Leary's immunity, and of O'Leary's motion to dismiss, is reviewable by this Court *de novo*.

This Court reviews the district court's denial of O'Leary's immunity claim, and his motion to dismiss, *de novo*. *Nero v Mosby*, 890 F.3d 106, 117 (4th Cir. 2018).

2. In its analysis, the district court improperly rejected the holding of the North Carolina Court of Appeals in *Dalenko v. Collier*, 191 N.C.App. 713 (2008).

As defined by the district court, the determinative issue in this case is whether only those private citizens designated as "arbitrators", pursuant to an "arbitration agreement", are entitled to the immunity provisions of § 1-569.14 of the Act. Pursuant to *United States v. Little*, 52 F.3d 495, 498 (4th Cir. 1995),[2] without a North Carolina Supreme Court case on point, the district court reviewed various North Carolina Court of Appeals cases,[3] noting that, "[I]n particular, the 'court must follow the decision of an intermediate state appellate court unless there is persuasive data that the highest court would decide differently.' "

Only one of those cases reviewed by the district court, *Dalenko*, *supra*, is directly on point with that issue in this case. *Dalenko*, holds that, "[W]hether a private citizen ***9** is clothed with judicial immunity is based on a functionality test." *Burns v. Reed*, 500 U.S 478, 499- 500, 111 S.Ct. 134, 114 L.Ed. 2d 547, 567- 68 (1991) ".... [P]rivate citizens acting as arbitrators are afforded judicial immunity when performing the function of resolving disputes between parties, or of authoritatively adjudicating private rights."[4] *Dalenko* at 722-23.

The highest court in North Carolina to have reviewed the specific issue now before this Court has therefore clearly considered, and ruled, that whether a private citizen, such as O'Leary "... is clothed with judicial immunity is based on a functionality test", and that "private citizens acting as arbitrators are afforded judicial immunity when performing the function of resolving disputes between parties, or of authoritatively acting as arbitrators are afforded judicial immunity."[5]

None of the prior North Carolina cases reviewed by the district court addresses the functionality/immunity test established in *Dalenko*, the determinative legal issue ***10** in this case. The decision of the North Carolina Court of Appeals in *Dalenko*, rendered well after each of the cases reviewed by the district court, has therefore expressly decided, without equivocation, that the functionality test is the common law of North Carolina. No subsequent Court of Appeals, or North Carolina Supreme Court, decision has rejected the *Dalenko* decision, or addressed this issue in any way. As the district court stated within its order, the "court must follow the decision of an intermediate state appellate court unless there is 'persuasive data' that the highest court would decide differently."[6] There is no such "persuasive data". The district court was required to follow *Dalenko*, and its failure to do so should be reversed.

3. *Dalenko* is not "inapposite" to the facts of this case.

The application of the functionality test arose out of the direct examination of arbitrator immunity in *Dalenko*, at 722-723. The *Dalenko* court did not consider, or refer to, the immunity provisions of the Act. Rather than being inapposite, the *Dalenko* court stated unequivocally, including its adoption by direct citation to the principles of common law immunity stated in *Burns*, that

the functionality test comprises the proper standard for review of the immunity of those serving as private citizens acting as arbitrators, and that such individuals are afforded judicial ***11** immunity when performing the function of resolving disputes between parties, or of authoritatively acting as arbitrators.

The district court's dismissal of the holding of *Dalenko* was therefore improper, and should be rejected by this Court.

4. The express incorporation of "other law" into the immunity provisions of the Act necessarily includes North Carolina's functionality test.

The immunity provisions of the Act state that: "An arbitrator... is immune from civil liability to the same extent as a judge of a court of this State acting in a judicial capacity; and, *[T]he immunity afforded by this section supplements any immunity under other law*." N.C.G.S § 1-569.14(a) and (b). Italics added.

Contrary to the reasoning of the district court, pursuant to the "immunity under other law" provision, application of the immunity provisions of the Act are not limited to an "agreements to arbitrate", or to only private citizens identified as "arbitrators". Rather, pursuant to *Dalenko*, the immunity provided under the Act is provided to those private citizens performing the function of resolving disputes between parties, or of authoritatively adjudicating private rights. This application of the functionality test is also mandated by FP's admission that "...the appraisers could not agree on a valuation for the Claim, and requested that O'Leary, as the umpire, settle the dispute." JA017.

***12** The district court's analysis of FP's arbitrary application of the term "umpire" to O'Leary therefore has no relevance to the determination of whether or not O'Leary is immune from the claims of FP. Rather, it is his responsibility as defined within FP's policy, to resolve the dispute by adjudicating the private rights of FP and its insured, that define his functionality, and his immunity, under governing law. *Dalenko*, at 722-23; *Burns v. Reed*, 500 U.S. at 499-500; *See also*, *Howland v. U.S. Postal Service*, 209 F.Supp. 2d 586, 592 (W.D.N.C. 2002), also cited by *Dalenko* at 722.

5. It is undisputed that O'Leary was a private citizen performing the function of adjudicating the private rights of FP, and its insured, in accordance with the express provisions of FP's own contract, and as conceded by FP.

The touchstone for the applicability [of immunity] is performance of the function of resolving disputes between parties, or of authoritatively adjudicating private rights." *Dalenko, supra*; *Burns, supra; Shrader, supra; Howland, supra at* 592. In the case now before the Court, FP granted to O'Leary, as a private citizen, the contractual authority to adjudicate the private rights between FP and its insured. Having granted that authority to O'Leary, FP cannot now seek to deprive O'Leary of the immunity provided to him under the substantive common law of North Carolina. Allowing FP to do so would allow, as has occurred here, vexatious ***13** litigation, consisting in this case of FP seeking to intimidate O'Leary in the conduct of a process closely related to the judicial process, which process FP itself created.

6. Acceptance of the order of the district court would adopt a policy that is contrary to North Carolina's substantive common law, undermines and deters the acceptance of a private adjudicatory function by private citizens, threatens such individuals with vexatious litigation, and improperly interferes with the credible conduct of such proceedings. Such a policy should be rejected by this Court.

Clearly, if parties to a dispute could file suit against the person(s) contractually appointed to resolve that dispute the credibility of the dispute resolution process would be undermined, and obtaining persons to resolve such disputes would be greatly hindered. It should not be assumed that FP would, in good faith, create such a process for the resolution of appraisal disputes while retaining the ability to undermine the credibility of the process established. Consistent with this premise, "individuals... cannot be expected to volunteer to arbitrate disputes if they can be caught up in the struggle between the litigants, and saddled with the burdens of defending a lawsuit. *Howland, supra*, at 593, citing, *Tamri v. Conrad*, 552 F.2d 778, 781 (7th Cir. 1977).

***14 7. If FP claims that its prescribed "umpire" process was not properly conducted, its remedies were to either reject O'Leary's decision, to move to vacate that decision, or to seek a declaratory judgment. FP should not have the additional option of suing O'Leary individually.**

It was unnecessary, and clearly vexatious, for FP to commence suit against O'Leary to protect its rights under the policy. The policy allowed FP to reject O'Leary's award. Alternatively, FP had the right to seek to vacate the award pursuant to 9 U.S.C. § 10 if it could establish the grounds to do so,[7] or to seek a declaratory judgment,[8] rather than suing O'Leary for monetary damages. FP's election to sue O'Leary was therefore vexatious, and vindictive, and clearly intended to punish O'Leary individually, threaten him with damages, and burden him with the extensive costs of litigation regardless of the outcome. Without the protections of immunity such dispute resolution processes can never be credible, and the arbitrary powers of those such as FP will be available for abuse, as has occurred in this case with regard to FP's claims against O'Leary.

8. Discovery may not be obtained by FP from O'Leary.

§ 1-569.14(d) of the immunity provisions of the Act provides that O'Leary "is not competent to testify and shall not be required to produce records as to any statement, conduct, decision, or ruling occurring during the arbitration proceeding ***15** to the same extent as a judge of a court... sitting in a judicial capacity." The exceptions set forth in subparts (1) and (2) of the statute did not apply.

The district court's denial of O'Leary's motion seeking a protective order to prevent the taking of discovery of him prohibited by section 1-569.14(d) should have therefore been granted. The district court's refusal to grant that motion should be reversed.

9. O'Leary's fees and costs must be reimbursed to him by FP.

§ 1-569.14(e) of the Act provides that, upon a finding that O'Leary is immune from the claims of FP, "the court shall award to the arbitrator... reasonable attorney's fees, costs and other reasonable expenses of litigation". Such a finding is appropriate in this case, and an award of fees and costs to O'Leary is therefore mandated by the governing statute. O'Leary's motion before the district court seeking such an award should be granted.

CONCLUSION

For the reasons set forth above the order of the district court should be reversed. The claims of FP against O'Leary should be dismissed, O'Leary's motion requesting a protective order from any discovery in this case should be granted, and O'Leary's motion for fees and costs required to be reimbursed by statute should be ***16** granted, subject to an appropriate submission by counsel with regard to those fees and costs to be determined by the district court.

STATEMENT REGARDING ORAL ARGUMENT

Counsel for O'Leary does not request oral argument. However, if the Court believes that oral argument on this case would be helpful, O'Leary's counsel would welcome that opportunity.

Respectfully submitted this the 1st day of February, 2024,

SUBMITTED BY:

/s/Richard W. Farrell

Richard W. Farrell, Esq.

The Farrell Law Group, P.C.

5000 Falls of Neuse, Rd.,

Suite 410

919-872-0300

rfarrell@farrell-lawgroup.com

Counsel for Appellants

Footnotes

1 Order of the district court at p. 6, summarizing the claims of FP against O'Leary alleged in FP's complaint.

2 Cited by the district court at page 13 of its order. JA137.

3 Beginning at p. 10 of the district court's order, JA134.

4 Adopting the concurrent opinion [dissenting in part] of Justice Scalia in *Burns*.

5 *See also, Shrader v. Nat'l Assoc. of Securities Dealers, Inc. et al.*, 855 F. Supp. 122, 122-123 (E.D.N.C, Raleigh Div., June 9, 1994), cited by the *Dalenko* court at 430-431. Schrader *was decided before North Carolina's adoption of the Uniform Arbitration Act on December 8, 1994*. Applying the principles of judicial immunity to persons acting as arbitrators, the court in *Schrader* held that, "the doctrine of judicial immunity is sufficiently well-developed under North Carolina substantive law to encompass the facts of this case and to afford the arbitrators... arbitrator immunity, which will exempt them from civil liability for their activities as arbitrators within the course and scope of the arbitration proceeding."

6 Citing *U.S. v Little, supra*, at 498.

7 No such facts have been shown to exist.

8 28 U.S.C. § 2201; F.R.C.P. Rule 57

End of Document