

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF ANTRIM

BRUCE DESPELDER, as assignee of
JESS KINSEL,

Plaintiff,

and

MICHIGAN DEPARTMENT OF
COMMUNITY HEALTH,

Intervenors,

v

File No. 02-7817-NO
HON. PHILIP E. RODGERS, JR.

BARRY L. COLE (in his capacity as
Court appointed Receiver), SKM
DRILLING SERVICES, INC., SKM
ENVIRONMENTAL SERVICES, INC.,

Defendants,

and

ANTONY SCHULTZ,

Defendant/Counter-Plaintiff/
Third-Party Plaintiff,

v

MARTY GRIFFORE,

Third-Party Defendant.

John W. Unger (P21676)
Attorney for Plaintiff

Steve R. DuBois (P23769)
Attorney for Defendants Cole and SKM

C. William Garratt (P13858)
Attorney for Defendant/Counter-Plaintiff/
Third-Party Plaintiff Schultz

Richard T. O'Neill (P25877)
Attorney for Intervenor MDCH

**ORDER GRANTING MOTION FOR RECONSIDERATION OF
THE COURT'S FEBRUARY 3, 2005 ORDER AND
GRANTING SUMMARY DISPOSITION IN FAVOR OF THE RECEIVER**

On February 3, 2005, this Court entered an Order Granting Summary Disposition for Receiver Barry Cole. On February 15, 2005, the Defendant/Counter-Plaintiff Antony Schultz ("Schultz") and Plaintiff Bruce Despelder ("Despelder") filed a Motion for Reconsideration of that Order. On February 16, 2005, the Court issued a pre-hearing order giving any opposing party 7 days from the date of the order to file and serve a response and giving the moving parties 14 days from the date of the order to file and serve a reply. These time limits have now expired.

The Court dispenses with oral argument, pursuant to MCR 2.119(E)(3) and issues this written order. For the reasons stated herein, the Motion for Reconsideration is granted. The Court, nonetheless, grants summary disposition for the Receiver.

STANDARD OF REVIEW

MCR 2.119(F), entitled Motions for Rehearing and Reconsideration, reads in pertinent part, as follows:

(3) Generally, and without restricting the discretion of the court, a motion for rehearing or reconsideration which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted. The moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error.

I.

The Court's Order of February 3, 2005 granting summary disposition for Receiver Barry Cole was premised upon the fact that Despelder had not obtained leave of the Court to bring a lawsuit against a Court-appointed receiver. *Motion for Leave to Sue Receiver of Venus Plaza Shopping Center, In re*, 228 Mich App 357; 579 NW2d 99 (1998). The Court was mistaken.

In a related case, File No. 01-7769-CZ in the Circuit Court for Antrim County, styled *Antony Schultz v Sandra Myers and SKM Drilling Services, Inc. and SKM Environmental Services, Inc.*, purported Michigan corporations, Despelder's assignor, Jess Kinsel moved to intervene. On January 28, 2002, this Court denied his motion to intervene, but granted him

authority to pursue his tort, contract and workers' compensation claims against the receiver by separate suit or proceedings. Subsequently, Kinsel's assignee, Despelder, filed this action. Therefore, Despelder had sought and received the Court's permission to sue the Receiver and the Court erred in granting summary disposition to the Receiver on this basis.

II.

In *Schultz v Myers*, the Receiver was appointed to protect and preserve the assets of the corporations until the rights of Antony Schultz and Sandra K. Myers could be determined. He was not appointed to run the SKM corporations. Sandra K. Myers was specifically entrusted with the day-to-day management and operations of the corporations.

Black's Law Dictionary (7th ed.) defines a "receiver" as "[a] disinterested person appointed by a court, or by a corporation or other person, for the protection or collection of property that is the subject of diverse claims (for example, because it belongs to a bankrupt or is otherwise being litigated)." A receiver is an officer of the court who protects and preserves property on behalf of the parties to a pending lawsuit. 65 Am Jur 2d, *Receivers*, § 1, p 654. The purpose of a receivership is to protect the parties' rights to the property until a final disposition of the issues. *Id*, § 6, p 657. A receiver also may control and manage property. 19 Michigan Law & Practice (1957), *Receivers*, § 1, p 351. As a general rule it may be stated that property in the possession of a receiver is in the custody of the law, and the receiver's possession is the possession of the court for the benefit of those ultimately entitled. Also, a receiver "is appointed to subserve the interests of all persons interested in the subject-matter committed to his care. A receiver, by his appointment, does not become a litigant in, or party to, the suit in which he is appointed." *Id*, § 51, p 388. The appointment of a receiver does not affect parties' contractual rights. *Rowe v William Ford & Co*, 257 Mich 646, 650; 241 NW 889 (1932).

A receiver's standard of care is to be determined solely by the court's order appointing him. While a receiver may be liable for failure to perform his duties as outlined in the court order, bad faith is a necessary element in a claim against a court-appointed receiver. *Venus Plaza Shopping Center*, *supra* at 360. The Michigan Supreme Court has stated:

It is urged on the part of the respondent that, as the receiver is an officer of the court, the control of the court over him is plenary, that whatever he does is done under the direction of the court, and that he is bound to observe the order of the court . . . It is true that receivers are officers of the court. It is also true that less discretion is given to passive receivers, whose duty consists simply of taking possession of property, and converting it into money, and distributing it, than is

allowed to an active receiver, who is required to manage a going concern . . . Such an officer, to be successful, must possess large executive ability, and must be clothed with considerable discretion . . . He may do such things, in the ordinary course of business, as to him, in good faith, seem necessary to render the business . . . profitable and successful.

Venus Plaza Shopping Center, supra at 361, quoting *Morley v Snow*, Circuit Judge, 117 Mich 246, 250; 75 NW 466 (1898).

In the instant case, the Plaintiff does not allege that the Receiver acted in bad faith and failed to perform his duties. Instead, he alleges that the negligence of Kinsel's co-worker, Marty Griffore, can be imputed to the Receiver; that the Receiver had a duty to properly and safely operate the drilling rig upon which Kinsel was injured; and that the Receiver is liable for Kinsel's injury because the injury occurred during the course of the receivership.

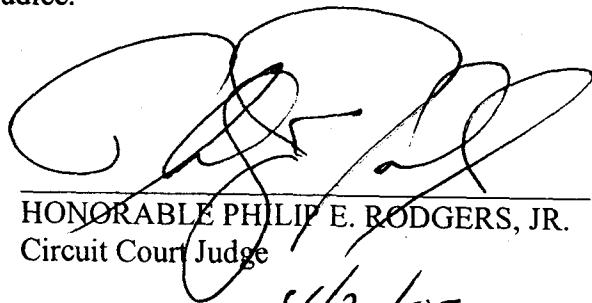
The Receiver moved for summary disposition pursuant to MCR 2.116(C)(8) and (10). He claims that, as a matter of law, the negligence of a co-worker can not be imputed to him as Receiver; as Receiver, he did not have a duty or obligation to operate or supervise the operation of the drilling rig; and, while any judgment obtained by Despelder would be a claim against the receivership estate, it would not be an administrative cost of the Receivership.

The Court agrees with the Receiver. As a matter of law, the Receiver cannot be liable to Kinsel, or his assignee Despelder, for the personal injuries Kinsel suffered while working on one of the SKM drilling rigs. While any judgment Despelder might obtain against the corporations would be a liability of the corporations and the corporate assets in the receivership estate may be used to satisfy that obligation, it is neither a personal liability of the Receiver nor a cost of the administration of the receivership. Therefore, the Receiver is entitled to summary disposition.

The Motion for Reconsideration is granted.

Upon reconsideration, summary disposition is granted in favor of the Receiver. The claims against the Receiver are dismissed with prejudice.

IT IS SO ORDERED.



HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: _____

11/20/05