THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
In the Business Court

Edward W. Miller, Circuit Court Judge

Case No. 2012-CP-23-2325
Appellate Case No. 2019-001909

Stop-A-Minit #17, LLC,..... Appellant,

V.

Beck Enterprises, Inc., ... Respondent.

PETITION FOR REHEARING

Respondents ask the Court to review whether it overlooked, misapprehended or misconstrued the Indemnification Agreement that is the subject of this appeal.

1. The Opinion does not explain how the Indemnification Agreement is ambiguous.

"Typically, courts will construe an indemnification contract 'in accordance with the rules for the construction of contracts generally.'" *Johnson v. Little*, 426 S.C. 423, 430, 827 S.E.2d 207, 211 (Ct. App. 2019) (quoting *Concord & Cumberland*

Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 650, 819 S.E.2d 166, 172 (Ct. App. 2018)). "The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language." *Whitlock v. Stewart Title Guar. Co.*, 399 S.C. 610, 614, 732 S.E.2d 626, 628 (2012) (quoting *McGill v. Moore*, 381 S.C. 179, 185, 672 S.E.2d 571, 574 (2009)). "Where the contract's language is clear and unambiguous, the language alone determines the contract's force and effect." *Id.* at 615, 732 S.E.2d at 628 (quoting *McGill*, 381 S.C. at 185, 672 S.E.2d at 574). However, "[a] contract is ambiguous when the terms of the contract are reasonably susceptible to more than one interpretation." *S.C. Dep't of Nat. Res. v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 302 (2001). "Ambiguity of a contract is a question of law, which we review de novo." *McCord v. Laurens Cnty. Health Care Sys.*, 429 S.C. 286, 292, 838 S.E.2d 220, 223 (Ct. App. 2020) (quoting *Gibson v. Epting*, 426 S.C. 346, 351, 827 S.E.2d 178, 181 (Ct. App. 2019)). "Once the court decides the language is ambiguous, evidence may be admitted to show the intent of the parties." *Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC*, 374 S.C. 483, 500, 649 S.E.2d 494, 503 (Ct. App. 2007).

The Opinion states these standards and principles of law but fails to set forth how the Indemnification Agreement is susceptible to more than one interpretation. Presumably, the Court is persuaded by Appellant's argument that one possible interpretation of the Indemnification Agreement is that Paragraph Numbered Two (2), entitled "Limitation of Responsibility to Indemnify", could be construed as an absolute cap of all responsibility that Appellant has to Respondent pursuant to the Indemnification Agreement. However, this interpretation is not a reasonable interpretation of the Indemnification Agreement as it completely ignores certain

language contained in Paragraph Numbered One and Paragraph Numbered Two of the Indemnification Agreement.

First, Paragraph One (1) contains the phrase "without limitation" as to the responsibility of Appellant with respect to reasonable attorney's fees. It is not a reasonable interpretation to find that a reasonable attorney's fee, which is without limitation, is also limited by Paragraph Two (2). Something simply cannot be both "without limitation" and also be "limited."

Furthermore, a careful reading of Paragraph Numbered Two (2) shows that all of the duties imposed on Appellant by Paragraph One (1) are not limited by Paragraph Two (2). In fact, only one of those duties is limited in Paragraph Two (2): the duty to "indemnify" Respondent. The other duties imposed by Paragraph One (1), namely the duties to "defend, protect, and hold harmless" are not mentioned at all in Paragraph Two (2).

The duties to indemnify, defend, protect and hold harmless are all distinct duties and are not one obligation of the Appellant. Defining these words is instructive. Black's Law Dictionary, 11th edition, defines "Indemnify" thusly:

> **indemnify** (in-**dem**-nə-fI) *vb.* (17c) **1.** To reimburse (another) for a loss suffered because of a third party's or one's own act or default; HOLD HARMLESS. **2.** To promise to reimburse (another) for such a loss. **3.** To give (another) security against such a loss. — **indemnifiable,** *adj.*

"Defend" is defined by Black's Law Dictionary, 11th edition, thusly:

> **defend** *vb.* (14c) **1.** To do something to protect someone or something from attack. **2.** To use arguments to protect someone or something from criticism or to prove that something is right. **3.** To do something to stop something from being taken away or to make it possible for something to continue. **4.** To deny, contest, or oppose (an allegation or claim) <the corporation vigorously defended against the shareholder's lawsuit>. **5.** To represent

(someone) as an attorney; to act as legal counsel for someone who has been sued or prosecuted <the accused retained a well-known lawyer to defend him>.

"Protect" is not defined by Black's Law Dictionary but dictionary.com defines it as:

to defend or guard from attack, invasion, loss, annoyance, insult, etc.; cover or shield from injury or danger.
Economics. to guard (the industry or an industry of a nation) from foreign competition by imposing import duties.
to provide funds for the payment of (a draft, note, etc.).

"Hold Harmless" is defined by Black's Law Dictionary, 11th edition, thusly:

hold harmless vb. (18c) To absolve (another party) from any responsibility for damage or other liability arising from the transaction; INDEMNIFY. — Also termed save harmless.

These terms are not mere synonyms but impose separate and distinct duties on Appellant. Only one of them is limited by Paragraph Numbered Two (2).

It is Appellant's duty to defend, protect and hold Respondent harmless in the underlying lawsuit that is the key point of contention in this appeal. Respondent contends that Appellant has a contractual duty to protect and defend Respondent in the underlying lawsuit, including paying for Respondent's attorney's fees and also to hold Respondent harmless from any damages sought by the Third-party Plaintiffs in the underlying lawsuit. These duties are not limited by Paragraph Two (2) of the Indemnification Agreement.

This is the only construction of the Indemnification Agreement that reads all of its terms together and gives meaning to all of the terms used, and not used, by the parties. Any other construction of the agreement requires the reader to completely ignore certain phrases (e.g. "without limitation") and not give meaning to the plain words used by the parties in the

Agreement. Because there is only reasonable interpretation of Indemnification Agreement and the parties intent for the Agreement, it is unambiguous as a matter of law.

Applying this interpretation to the Indemnification Agreement leads to the same conclusion that the trial court made: that the Indemnification Agreement is unambiguous and that Appellant has not met all of its obligations required by the Indemnification Agreement.

2. The Court's discussion of the clerical errors in Paragraph Two (2) of the Indemnification Agreement is misplaced.

The Opinion makes reference to clerical errors in Paragraph Two (2) of the Indemnification Agreement and state that the use of the terms "Owner" and "Purchaser" create confusion. It is conceded that this is an error and that an unbiased reader of the agreement would rightly be confused. However, the parties to the Indemnification Agreement were not confused and there is no legitimate dispute as to the intent of the parties as to who owed indemnification and other duties to whom.

The opinion correctly states that this point was conceded by Appellant at trial: "In any event, Brent conceded, 'I believe where it says owner, it should have said purchaser; and where it says buyer, it should have said seller, would be my assumption.'"

Mr. Drake further testified that:

"Q: Well, there is not a real dispute about what's intended there, is there?

A: As far as who is providing the Indemnification and who is receiving it, I don't think there is a dispute.

Q: Right. Stop A Minit 17 is supposed to indemnify Beck, is that correct?

A: I would—I would think that's what the drafter intended." (R. p 76, line 25; R. p. 77, lines 1-8).

Furthermore, at trial, Counsel for Appellant likewise agreed that the use of these terms was simply a clerical error, stating "[w]ell, Your Honor, I think that the — probably the purchaser-seller owner-buyer is likely a clerical error." (R. p. 67 lines 17-21).

No party to the Indemnification was actually confused by this clerical error or had any misapprehension about what was required of either party as a result of this error. Importantly, this error is found in a paragraph in the Indemnification that Appellant has already performed by paying Forty- Eight Thousand Six Hundred and Forty-Eight and 00/100 Dollars ($48,648.00) on behalf of Beck for early termination of the Motor Fuel SA. It is clear that Appellant understood what was required of it by this Paragraph, as it has completely satisfied its obligations required by this paragraph.

The interpretation of the Indemnification Agreement by Appellant's agent at trial is the same suggested by the Respondent and the same adopted by the Trial Court. Any weight given to these clerical errors in determining whether or not the Indemnification Agreement is ambiguous is error.

Conclusion

The Court should withdraw its opinion and affirm the judgment of the trial court. Alternatively, Respondent asks the Court to explain how the Circuit Court committed error in determining that the Indemnification Agreement is unambiguous and not capable of more than one

reasonable interpretation.

Respectfully submitted ,

September 21, 2023
Mauldin, South Carolina

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PROOF OF SERVICE

I certify that I have served the Petition for Rehearing by e-mail upon counsel for the Appellant at the e-mail address listed below:

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September 21, 2023

/s Erick M. Barbare
Attorney for Respondent