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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM JASPER COUNTY
In the Court of Common Pleas

Carmen T. Mullen, Circuit Court Judge

Appellate Case No. 2023-001708

Jasper County, Respondent-Appellant,

v.

Western Surety Company and Denise Smith, Defendants

Of which Western Surety Company is the Appellant-Respondent.

RESPONDENT'S INITIAL BRIEF

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July 3, 2024

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STATEMENT OF ISSUES ON APPEAL

Did the trial court correctly award Jasper County the amount of its bond claim (following theft and embezzlement by an employee) against Western Surety Company when the unambiguous face amount of the Bond and terms of the Bond issued by Western Surety covered the claim, when the insurer admitted that the Bond covered the loss suffered by Jasper County, when the insurer admitted Jasper County timely paid the premium charged for the Bond for eleven years, and when the insurer presented no credible proof to support its alleged claims of mistake?

STATEMENT OF THE CASE

On July 27, 2023, the Honorable Carmen T. Mullen issued an Order after a bench trial finding in favor of Respondent-Appellant Jasper County on its breach of contract claim and awarded Jasper County \$374,759.09 (the amount of the bond claim plus pre-judgment interest). Judge Mullen found in favor of Appellant-Respondent Western Surety Company on the bad faith and attorney's fees claims. Appellant-Respondent Western Surety Company appealed the decision on the breach of contract claim. Respondent-Appellant Jasper County cross-appealed the portions of the July 27, 2023 Order that denied Jasper County's claims against Western Surety Company for bad faith and for attorney's fees.


STATEMENT OF FACTS

This lawsuit follows the theft of \$274,175.00 from Jasper County by a former employee, Denise Smith. Smith pled guilty to embezzlement of public funds greater than \$10,000 and was sentenced to prison. Denise Smith Guilty Plea Transcript (Plaintiff's Exhibit 3). Following the discovery of the theft, Jasper County made a timely and proper demand to Defendant Western Surety Company for \$274,175.00 under Public Employees Blanket Bond No. 70471756 issued by Western Surety. Bond Claim Proof of Loss; Trial transcript, p. 60, lines 17-21.

Western Surety admitted that the documents provided by Jasper County demonstrated that Ms. Smith's theft triggered the coverage provided by the bond.

Trial transcript p. 23, lines 20-24. Western Surety did not have any issue with Jasper County’s performance under the Bond. Trial transcript, p. 39, lines 12-19. Western Surety also did not contest the claim—only the amount it owed under the Bond. Trial transcript, p. 58, lines 4-23. As stated at trial, “Western Surety agrees that ... the loss is covered by the bond” and the misdeeds by Ms. Smith triggered coverage under the Bond. Trial transcript, p. 91, lines 3-12.

Western Surety issued Public Employees Blanket Bond No. 70471756 on April 17, 2008. Bond. As shown below and on the face of the Bond, the plain language of the bond stated the “Limits of Liability” for “Insuring Agreement 4 Faithful Performance Blanket Position Bond Coverage” was \$285,000.00 Id.

 Western Surety Company <small>(A Stock Company, herein called Surety)</small>		
PUBLIC EMPLOYEES BLANKET BOND <small>Including Public School System</small>		
Bond No. <u>70471756</u>		
DECLARATIONS		
Item 1.	Name of Obligor: <u>Jasper County</u>	
Item 2.	Name of Insured: <u>Jasper County</u>	
Item 3.	Bond Period: From the beginning of the <u>17th</u> day of <u>April</u> , <u>2008</u> , to 12 o'clock night on the effective date of the cancellation or termination of this bond as an entirety.	
Item 4.	Table of Limits of Liability	
Insuring Agreement 1	Honesty Blanket Bond Coverage	
Insuring Agreement 2	Honesty Blanket Position Bond Coverage	
Insuring Agreement 3	Faithful Performance Blanket Bond Coverage	
Insuring Agreement 4	Faithful Performance Blanket Position Bond Coverage	<u>\$285,000.00</u>

Western Surety agreed that Bond No. 70471756 did not contain any ambiguities and that the face amount of the Bond and every written provision memorialized in the Bond stated that the available Limit of Liability for each employee is \$285,000. Trial testimony, p. 58, lines 1-12; page 61, lines 12-15. Western Surety’s corporate designee (Ginger Barnes) also conceded that the Bond was a contract between Western Surety and Jasper County. Trial transcript, p. 52, lines 22-25. As such, the Bond obligated Defendant Western Surety Company, as

Surety, as follows: “The Surety [Western Surety Company], in consideration of the payment of the premium, and subject to the Declarations made a part hereof, the General Agreement, Conditions and Limitations and other terms of this Bond, agrees, in accordance with such of the Insuring Agreements hereof as are specifically designated by the insertion of an amount of indemnity in the Table of Limits of Liability, to indemnify the Obligee [Jasper County] for the use and benefit of the Insured [Jasper County] for ... Faithful Performance Blanket Position Bond Coverage. Bond.

~~with limitation of contribution to be effective as of the time this bond becomes effective.~~

The Surety, in consideration of the payment of the premium, and subject to the Declarations made a part hereof, the General Agreement, Conditions and Limitations and other terms of this Bond, agrees, in accordance with such of the Insuring Agreements hereof as are specifically designated by the insertion of an amount of indemnity in the Table of Limits of Liability, to indemnify the Obligee for the use and benefit of the Insured for:

INSURING AGREEMENTS

Honesty Blanket Bond Coverage

1. Loss sustained by the Insured through any fraudulent or dishonest act or acts committed by any of the Employees, acting alone or in collusion with others, during the Bond Period, to an amount not exceeding in the aggregate the amount stated in the Table of Limits of Liability applicable to this Insuring Agreement 1.

Honesty Blanket Position Bond Coverage

2. Loss sustained by the Insured through any fraudulent or dishonest act or acts committed by any of the Employees, acting alone or in collusion with others, during the Bond Period, the amount of Indemnity on each of such Employees being the amount stated in the Table of Limits of Liability applicable to this Insuring Agreement 2.

Faithful Performance Blanket Bond Coverage

3. Loss caused to the Insured through the failure of any of the Employees, acting alone or in collusion with others, to perform faithfully his duties or to account properly for all monies and property received by virtue of his position or employment during the Bond Period to an amount not exceeding in the aggregate the amount stated in the Table of Limits of Liability applicable to this Insuring Agreement 3.

Faithful Performance Blanket Position Bond Coverage

4. Loss caused to the Insured through the failure of any of the Employees, acting alone or in collusion with others, to perform faithfully his duties or to account properly for all monies and property received by virtue of his position or employment during the Bond Period, the amount of Indemnity on each of such Employees being the amount stated in the Table of Limits of Liability applicable to this Insuring Agreement 4.

Bond No. 70471756 defined “Faithful Performance Blanket Position Bond Coverage” as “Loss caused to the Insured through the failure of any of the Employees, acting alone or in collusion with others, to perform faithfully his duties or to account properly for all monies and property received by virtue of his position or employment during the Bond Period, the amount of indemnity on each of such Employees being the amount stated in the Table of Limits of Liability applicable to this insuring agreement.” Bond.

Bond No. 70471756 defined “Employee” for the “Faithful Performance Blanket Position Bond Coverage” as “a person while in the employ of the Insured during the

Bond Period who is not required by law to furnish an Individual Bond to qualify for office and who is a member of the staff or personnel of the Insured but does not mean any Treasurer or Tax Collector by whatever title known.” Bond, page 2 “Definitions”. Western Surety did not dispute that Ms. Smith qualified as an “Employee” under Bond No. 70471756 during all relevant times. Trial transcript, p. 58, lines 13-18. Barnes also conceded that Jasper County filed the lawsuit timely. Trial transcript, p. 60, lines 17-21.

Importantly, Western Surety admitted that nothing on the face of the Bond limited the coverage to an amount less than what Jasper County claimed because of the theft. Trial transcript, p. 61, lines 8-11; page 94, line 24 – page 95, line 2. Western Surety also conceded that “the way the bond reads,” Western Surety’s total liability under Insuring Agreement 4 is to each employee and up to the applicable amount of the limit of liability of \$285,000. Trial transcript, p. 58, lines 4-10. As shown below, the “Limits of Liability” section of the Bond clearly indicates that Western Surety, as Surety under the “Faithful Performance Blanket Position Bond Coverage”, has “total liability” ... “as to each Employee ...[that] is limited to the applicable amount of indemnity specified in the Table of Limits of Liability,” which is \$285,000 according to the clear wording of the Bond.

LIMITS OF LIABILITY

Section 4. Indemnification by the Surety for any loss under Insuring Agreement 1 or 3 shall not reduce the Surety's liability for other losses under the applicable Insuring Agreement, whenever sustained; provided, however, that the Surety's total liability under each such Insuring Agreement for any loss caused by any Employee or in which such Employee is concerned or implicated is limited to the applicable amount of indemnity specified in the Table of Limits of Liability.

Indemnification by the Surety for any loss under Insuring Agreement 2 or 4 shall not reduce the Surety's liability for other losses under the applicable Insuring Agreement, whenever sustained; provided, however, the Surety's total liability under each such Insuring Agreement as to each Employee is limited to the applicable amount of indemnity specified in the Table of Limits of Liability.

ARGUMENTS

I. THE TRIAL COURT CORRECTLY RULED THAT THE BOND WAS UNAMBIGUOUS.

As stated, Western Surety agreed at trial that Bond No. 70471756 did not contain any ambiguities and that the face amount of the Bond and every written provision stated in the Bond stated that the available Limit of Liability for each employee was \$285,000. Trial testimony, p. 58, lines 1-2; p. 61, lines 12-15. Western Surety also conceded that the Bond was a contract between Western Surety and Jasper County. Trial Testimony, p. 52, lines 22-25. As such, the Bond obligated Defendant Western Surety Company, as Surety, as follows: “The Surety [Western Surety Company], in consideration of the payment of the premium, and subject to the Declarations made a part hereof, the General Agreement, Conditions and Limitations and other terms of this Bond, agrees, in accordance with such of the Insuring Agreements hereof as are specifically designated by the insertion of an amount of indemnity in the Table of Limits of Liability, to indemnify the Obligee [Jasper County] for the use and benefit of the Insured [Jasper County] for ... Faithful Performance Blanket Position Bond Coverage. Exhibit 4, page 1.

Western Surety did not have any issue or objection with Jasper County’s performance for the 11 years that Bond was in effect. Jasper County timely paid all bond premiums as they came due over those 11 years. In response to the Bond claim, however, Western Surety immediately cancelled the Bond on March 1, 2019. Plaintiff Exhibit 8.

Western Surety did not question the amount Ms. Smith stole. Trial transcript, p. 23, lines 20-24. Western Surety also did not contest that the claimed amount of \$274,175 was inflated or incorrect. Trial transcript, p. 65, lines 14-20. The amount claimed by Jasper County was the same amount to which Ms. Smith pled guilty. See transcript of guilty plea.

The Bond should be interpreted according to the specific words found in the bond. Under South Carolina law, insurance policies are interpreted according to

general rules of contract construction. A court must give the clear policy language its “plain, ordinary, and popular” meaning. Nationwide Mut. Ins. Co. v. Commercial Bank, 325 S.C. 357, 479 S.E.2d 524, 526 (1996).

“If language used by a bond is plain and unambiguous the bond should be interpreted like any other contract to determine the intention of the parties.” Employers Ins. of Wausau v. Constr. Mgmt. Eng’rs of Florida, Inc., 297 S.C. 354, 357, 377 S.E.2d 119, 121 (Ct. App. 1989). Further,

In construing and determining the effect of a written contract, the parties' intention and the meaning are gathered from the document itself. When the language of the contract is clear and unequivocal its meaning must be determined by its contents alone. The language determines the full force and effect of the document when it is perfectly plain and capable of legal construction. Gilstrap v. Culpepper, 283 S.C. 83, 320 S.E. (2d) 445 (1984) (extrinsic evidence giving the contract a different meaning from that indicated by its plain terms is inadmissible.

Id. (emphasis added). See also Preservation Capital Consultants, LLC v. First Am. Title Ins. Co., 406 S.C. 309, 751 S.E.2d 256, (2013); Stevens Aviation, Inc. v. DynCorp Int'l, L.L.C., 394 S.C. 300, 307, 715 S.E.2d 655, 659 (Ct. App. 2011): “When the contract's language is unambiguous it must be given its plain and ordinary meaning and the court may not look to extrinsic evidence to interpret its provisions.”

The plain language of the Bond clearly stated that the “Faithful Performance Blanket Position Bond Coverage” was \$285,000.00. According to the Bond, this “Faithful Performance Blanket Position Bond Coverage” applied to “Loss caused to the Insured through the failure of any of the Employees acting alone or in collusion with others, to perform faithfully his duties or to account properly for all monies and property received by virtue of this position or employment during the Bond Period, the amount of indemnity on each of such Employees being the amount stated in the Table of Limits of Liability applicable to this insuring agreement for.” Further, under “Limits of Liability:” “The Surety’s total liability under each such insuring agreement as to each Employee is limited to the applicable amount of indemnity specified in the

Table of Limits of Liability.” Accordingly, Jasper County presented sufficient proof to substantiate the loss of \$274,175.00 for the acts committed by Denise Smith.

Further, by comparison, the Supreme Court of South Carolina has stated that, in the context of automobile liability insurance, “once the face amount of coverage is agreed upon, it may not be arbitrarily reduced or limited by conflicting policy provisions that effectively retract [the] stated coverage.” Williams v. Government Employees Ins. Co., 409 S.C. 586, 762 S.E.2d 705 (2014). In that case, the Court ruled that a family step-down provision in an automobile insurance policy was void as against public policy. The Court opined that once the insurer agreed to \$100,000 as the amount of the liability coverage, the insurer should not be permitted to subsequently reduce that amount of coverage “with what it deems an ‘exclusion’ in the policy.” 409 S.C. at 604, 762 S.E.2d at 715. Similarly, Western Surety unambiguously plastered a face amount for the Bond with Jasper County at \$285,000, and the Bond did not have any other dollar amount listed or any statement that the coverage would be or could be less under any circumstance.

Accordingly, Judge Mullen properly determined that the Bond was unambiguous. The Record clearly supports that conclusion.

II. **WESTERN SURETY FAILED TO PROVE EITHER THAT A “MUTUAL MISTAKE” OR A “UNILATERAL MISTAKE” OCCURRED WHEN WESTERN SURETY ISSUED THE BOND IN 2008 OR RENEWED IT ANNUALLY FROM 2009 THROUGH 2017.**

The only Western Surety employee who testified at the trial of this case was Ginger Barnes, who was a claims handler assigned adjust Jasper County’s claim. Ms. Barnes (a) never wrote a bond, (b) never worked for the underwriting department, (c) was not an underwriter, and (d) was not involved with Western Surety’s decision to issue the Bond in 2008 or to renew the bond each year from 2009 to 2018. Trial transcript, p. 40, line 14 – p. 42, line 11.

Western Surety’s initial defense was that it would not have written a bond for \$285,000. That defense was not accurate and was without any proof. Moreover, after prompting from Judge Mullen at trial that the judge had seen Western Surety bonds

for amounts greater than \$285,000, Ms. Barnes conceded that Western Surety could have written the bond for that amount but she did not have any knowledge about the premium or the calculation because she never worked in the company's underwriting department. Trial transcript, p. 28, line 2 – p. 30, line 29. Ms. Barnes then conceded to questioning from Western Surety's attorney that she did not know and "couldn't tell" the court what the largest amount Western Surety would have written in regard to a blanket liability policy in 2008 when it issued the Bond to Jasper County. Trial transcript, p. 144, line 18 – p. 146, line 4.

No proof of a "unilateral mistake" existed to reform the contract under South Carolina law.

"Where the mistake is unilateral, equity will refuse to grant reformation except under strong and extraordinary circumstances showing imbecility or something which would make it a great wrong to enforce the agreement. These circumstances must be shown by competent testimony of the clearest kind." Sims v. Tyler, 276 S.C. 640, 643, 281 S.E.2d 229, 230 (1981). Western Surety provided no testimony of "the clearest kind" of any "extraordinary circumstances" to reform the bond using this defense.

Moreover, the claim that Western Surety "made a mistake" when it issued the Bond for \$285,000 was also not supported by the record. First, no one from Western Surety contacted the person who wrote the Bond (Scott Reinke), who Western Surety listed as a witness in its discovery responses with a Nashville, Tennessee address. Trial transcript, p. 42, line 15 – p. 44, line 1; p. 92, lines 9 – p. 100, line 16. A 10-second internet search shows that Reinke still works in Nashville for the same company identified by Western Surety in its discovery responses. Yet, Barnes testified that she did not talk to Reinke about the Bond. Id. Western Surety offered no testimony about the bond writing process other than a quick fax exchange between Reinke and the broker, Cheryl Stolte, about changes Reinke wanted to the Bond. Trial transcript, p. 206, line 14 – p. 212, line 3.

Secondly, Western Surety produced no meaningful documents from the underwriting file about what process Reinke followed and what information he considered. Id. Barnes also admitted that she did not talk with either the Western Surety corporate officer who sealed the Bond before it was issued or the Senior Vice President of Western Surety (Paul Bruflat, Sr.), who signed the Bond for Western Surety. Trial transcript, p. 50, line 6 – p. 51, line 11. Barnes admitted that she did not make any efforts to speak with either, even though she was assigned to investigate the claim. Id. Very simply, Western Surety offered no proof that it made a mistake in issuing the Bond for \$285,000.

In addition, Barnes conceded that Western Surety would have undertaken a review process each year when it renewed the Bond. Trial transcript, p. 100, lines 17-25. Yet, Barnes did not speak with any person involved with the renewals of the Bond in 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, or 2018 (before the cancellation). Trial transcript, p. 44, line 2 – p. 47, line 9; p. 101, line 1 – p. 123, line 20; p. 131, line 7 – p. 134, line 20. In each of those years, Western Surety employees reviewed the Bond and reviewed the charged premium before Western Surety submitted the Bond for renewal to Jasper County. None of those Western Surety employees ever informed Jasper County that Western Surety would not write the Bond or that there was some “mistake” with how Western Surety wrote the Bond. Moreover, Western Surety did not offer any documentation about what the company reviewed or the process the company undertook during the review process. The only credible inference that can be drawn is that numerous Western Surety employees for eleven consecutive years approved the \$285,000 amount of the Bond and the Bond premium charged to Jasper County. And Jasper County believed what was written as the face amount of the Bond.

No proof of a “mutual mistake” existed to reform the contract under South Carolina law.

Under South Carolina law, “[a] contract may be reformed on the ground of mistake when the mistake is mutual and consists in the omission or insertion of some

material element affecting the subject matter or the terms and stipulations of the contract, inconsistent with those of the parole agreement which necessarily preceded it. A mistake is mutual where both parties intended a certain thing and by mistake in the drafting did not obtain what was intended. **Before equity will reform a contract, the existence of a mutual mistake must be shown by clear and convincing evidence.**” Crosby v. Protective Life Ins. Co., 293 S.C. 203, 206, 359 S.E.2d 298, 300 (Ct. App. 1987) (emphasis added). “Clear and convincing evidence is that degree of proof which will produce in the mind of the trier of facts a firm belief as to the allegations sought to be established.” Anonymous (M-156-90) v. State Bd. of Med. Exam'rs, 329 S.C. 371, 373, 496 S.E.2d 17, 18 (1998). Western Surety’s efforts with that defense also failed.

Western Surety’s claim that Jasper County made a “mistake” by “believing that it had coverage for all their employees in this amount of \$285,000 when they know for a fact that that’s not what they applied for and it’s not what they paid for” was not accurate. Barnes confirmed that the three pages of the Bond did not contain any provision that the bond coverage would be anything less than \$285,000. Trial testimony, p. 59, lines 1-12; p. 61, lines 12-15. Barnes also admitted Western Surety never communicated that alleged “mistake” during the decade that the Bond was in existence until Jasper County made the claim and the company decided to hire a lawyer “in an effort to reduce our loss.” Trial testimony, p. 98, line 11 – p. 102, line 21. The Bond issued by Western Surety was the first blanket bond obtained by the county.

Importantly, Barnes admitted that Western Surety never explained to Jasper County how Western Surety calculated the Bond premium it charged Jasper County. Trial testimony, p. 113, lines 14-23. Western Surety did not disclose those calculations because that information was “proprietary” and not shared with the customer. Trial testimony, p. 113, line 24 – p. 114, line 25; p. 159, lines 9-23. In fact, Western Surety admitted that it never communicated at any point directly with Jasper County about the Bond until the county made the bond claim. Accordingly, Western Surety has zero proof that Jasper County had any knowledge that the quoted

premium was for some other coverage than what the three pages of Bond No. 70471756 stated.

Moreover, testimony from Jasper County's Ronnie Malphrus clearly established that the bond premium charged was similar to the total bond premiums paid by Jasper County previously for all of the bonds that the County combined into the Blanket Bond with Western Surety. Trial transcript, p. 220, line 1 – p. 221, line 18. And, again, the broker Stolte also testified that the bond premium charged by Western Surety did not raise any issue to her. Trial transcript, p. 208, line 19 – p. 209, line 24. Malphrus also testified that Jasper County did not request any specific amount for the bond so long as the amounts for individual positions required by state statute be covered. Trial transcript, p. 219, lines 11-25. The Bond issued by Western Surety satisfied that requirement and covered what the county needed. It is also important to remember that the Blanket Bond was combining a number of bonds into one bond document. The limits of liability on the Blanket Bond was not \$285,000 for each occurrence, but was rather a combined limit for all claims in a given year that may arise from the county's operation, which had previously been covered by a number of bonds.

Western Surety's claimed defense that the transmittal letter for the Bond and yearly premium invoices generated by Western Surety somehow informed Jasper County (but not Western Surety) that a "mistake in the Bond" existed also failed. Cheryl Stolte, who Western Surety called as its witness, clearly and unequivocally rejected that position. When Ms. Stolte was asked by Western Surety's counsel about the significance of the description in the transmittal page for the Bond, Ms. Stolte stated that the cover letter had "no significance" and that a person needed to read the Bond to determine the amount of coverage. Trial transcript, p. 169, lines 6-22. Stolte stated "a billing notice has no legal – it doesn't mean – to me it doesn't mean anything legally because it's a bill." Trial transcript, p. 169, lines 6-22. When Stolte was asked by Western Surety's counsel about two specific premium invoices for prior bonds, Stolte ignored the billing statements and cover pages and turned, instead,

immediately to the bond document itself to determine the amount of the bond. Trial transcript, p. 170, line 1 – p. 174, l. 16.

Further, an objective review of the invoices did not show any notice to the County that the amount listed on the Bond was not correct. The invoice did not indicate that the terms or amount of coverage offered by the Bond had changed, nor did the Bond contain any language that said the Limits of Liability can be changed by a subsequent document or billing invoice. Very simply, the Bond did not make any reference that the face amount of the Bond was controlled by any “description” on any invoice or that the face amount would be reduced by any factor. And, as pointed out earlier, the Williams decision, *supra*, did not approve of attempts to lower the stated coverage.

In addition, the “Description” in the invoices changed over time. For example, the first invoice for the 2008 time period had a completely different “Description” of the Bond than what the “Description” for the Bond was on the invoices for years 2017 and 2018. And, these invoices certainly did not alert Jasper County that the coverage afforded by the Bond was not the amount on the face of the Bond of \$285,000, which Western Surety conceded was “unambiguous”, but was rather some different amount. Jasper County cannot be held to understand the internal labeling done by Western Surety with its invoices to the county when no one from Western Surety informed Jasper County that the face amount of the Bond was not correct or that Jasper County somehow needed to decipher the invoice each year to understand the limits of the bond.

CONCLUSION

For these reasons, Jasper County respectfully asks this Court to affirm the trial court’s ruling on these issues and grant the relief it seeks with the Cross-Appeal. The trial court’s ruling properly declined Western Surety’s requested declaratory judgment ruling, and this Court should affirm that decision.

s/David S. Cobb
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