

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

John C. Hayes, III, Circuit Court Judge

RECEIVED
SEP 27 2013
SC Court of Appeals

Case No. 2012-213730

Juontonio Pinckney, Josephine Sciacca, Addie Smith, James Barone, Deborah Barone, Ismael Gonzalez, Valerie Gonzales, Joe Moore, and Sandra Moore, Plaintiffs,

v.

Epcon Communities, Inc., Epcon Communities Franchising, Inc., Brock L. Fankhauser, Fankhauser Property Group, Inc. and Stonecrest Villas of Tega Cay Home Owners Association, Inc., Defendants,

Of whom Epcon Communities, Inc. and Epcon Communities Franchising, Inc., are the Respondents,

And Fankhauser Property Group, Inc. is the Appellant.

Fankhauser Property Group, Inc., Third Party Plaintiff,

v.

Architectural Alliance, Ltd., Exterior Expressions of North Carolina, Inc., Al-Mega Construction, Inc., Procar, Inc., Procar II, Inc., The Southeastern Group, Inc., Lucas Lawn and Landscape, Inc., Jose Simenez, Individually and d/b/a M&L Roofing, Co., LLC and/or MB Roofing Company, Third Party Defendants,

Stonecrest Villas of Tega Cay Condominium Owners Association, Inc., Third Party Plaintiff,

v.

Stonecrest Villas of Tega Cay, LLC and Epcon Communities Franchising, Inc., Third Party Defendants.

Exterior Expressions of North Carolina, Inc., Fourth Party Plaintiff,

v.

Marcos Gonzalez, Fourth Party Defendant

Procar, Inc. and Procar II, Inc., Fourth Party Plaintiffs,

v.

Marcos Zertuche, David Carbajal, Victorina Cortez, Balancos Construction Co., Balanos Framing, Inc., Ricardo Hernandez, and Silverio Cortez, Fourth Party Defendants.

Al-Mega Construction, Inc., Fourth Party Plaintiff,

v.

Noe Perez, Juan Abundez Saucedo, and Moises Chavarra Hernandez, Fourth Party Defendants.

FINAL REPLY BRIEF OF APPELLANT

WALL TEMPLETON & HALDRUP, P.A.

Morgan S. Templeton
Graham P. Powell
William W. Watkins, Jr.
145 King Street, Suite 300
Post Office Box 1200
Charleston, South Carolina 29402
Telephone: 843.329.9500
Facsimile: 843.329.9501
Attorneys for the Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
ARGUMENT	
I. THE TRIAL COURT ERRED BY HOLDING THAT FPG IS REQUIRED TO INDEMNIFY EPCON BECAUSE THE CAUSE OF ACTION HAS NOT ACCRUED UNDER OHIO LAW.....	1
A. The Issue Of Whether Contractual Indemnity Is Required Under The Indemnity Clause Was Raised With The Trial Court And Preserved For Review	1
B. The Contractual Indemnity Claim, If Triggered, Has Accrued With Respect To The Duty To Defend But Not The Duty To Indemnify	3
II. THE TRIAL COURT ERRED IN HOLDING THAT FPG IS REQUIRED TO INDEMNIFY EPCON PURSUANT TO THE FRANCHISE AGREEMENT FOR EPCON’S ALLEGED CONDUCT	7
A. The Trial Court’s “Crux” Approach And “But For” Analysis Fails To Comply With The Plain Language Of The Indemnity Clause	7
B. The Trail Court’s Analysis Does Not Comply With Ohio Law Enforcing The Plain Meaning Of The Indemnity Clause.....	9
III. THE TRIAL COURT ERRED IN HOLDING THAT FPG IS REQUIRED TO INDEMNIFY EPCON FOR EPCON’S OWN ALLEGED INTENTIONAL CONDUCT UNDER OHIO LAW	14
CONCLUSION	15

TABLE OF AUTHORITIES

<i>Diamond Wine & Spirits, Inc. v. Dayton Heidelberg Distrib. Co.</i> , 148 Ohio App.3d 596, 774 N.E.2d 775 (2002)	14
<i>Firemen's Ins. Co. v. Antol</i> , 14 Ohio App.3d 428, 417 N.E.2d 831(Ct.App.1984) ...	5, 6
<i>Glaspell v. Ohio Edison Co.</i> , 29 Ohio St.3d 44, 505 N.E.2d 264 (1987)	10, 11, 12, 13, 14
<i>Kovach v. Warren Roofing & Illuminating Co.</i> , 2007 Ohio App. LEXIS 2314 (OhioCt.App.2007)	10, 11, 13, 14
<i>Lawler v. Burt</i> , 7 Ohio St. 340, (1857))	10
<i>Portsmouth Ins. Agency v. Med. Mut. of Ohio</i> , 188 Ohio App.3d 111, 934 N.E.2d 940 (Ct.App.2009)	1, 9
<i>Stengel v. Columbus</i> , 74 Ohio App.3d 608, 600 N.E.2d 248 (Ct.App.1991).	3, 5, 6
<i>Weiner v. American Cancer Soc.</i> , 2002 WL 1265575, (OhioCt.App.June 6, 2002) ...	14

ARGUMENT

I. THE TRIAL COURT ERRED BY HOLDING THAT FPG IS REQUIRED TO INDEMNIFY EPCON BECAUSE THE CAUSE OF ACTION HAS NOT ACCRUED UNDER OHIO LAW

Epcon argues that the trial court should be affirmed because (1) the issue of whether Epcon's cause of action for contractual indemnity has accrued was not properly raised before the trial court and (2) summary judgment was proper because the plain meaning of the indemnity agreement provides that a cause of action for indemnity accrued when Epcon suffered a loss and Epcon has suffered a loss in the form of attorneys' fees and costs.

A. The Issue Of Whether Contractual Indemnity Is Required Under The Indemnity Clause Was Raised With The Trial Court And Preserved For Review

The issue of whether Epcon's cause of action for contractual indemnity has accrued pursuant to the indemnity clause was properly raised with the trial court because FPG argued that the trial court must give the indemnity clause its plain meaning under Ohio law and the plain meaning of the indemnity clause requires a "judgment" to trigger the indemnity prong of the indemnity clause. FPG argued before the trial court that under Ohio law, "Indemnity agreements must be interpreted in the same manner as other contracts." Portsmouth Ins. Agency v. Med. Mut. of Ohio, 188 Ohio App.3d 111, 117 934 N.E.2d 940, 944 (Ct.App.2009). (FPG Memo In Opposition, p. 4, R. p. 280). The plain and ordinary meaning of the indemnity provision requires a defense and indemnity only if the indemnity clause is triggered. With respect to the indemnity prong, there can be no obligation that FPG indemnify Epcon unless and until there is an entry of judgment against Epcon. Under Article 16 of the Franchise Agreement:

Franchisee shall indemnify and hold harmless, to the fullest extent permitted by law, Franchisor, its directors, officers, employees and

agents, entities affiliated with Franchisor through common ownership, and directors, officers, employees and agents of such affiliated entities, from and against any and all claims, debts, liabilities, losses, expenses or obligations including without limitation compensatory, exemplary or punitive damages, fines, charges, costs, expenses, lost profits, attorney's fees, court costs, settlement amounts, and **judgments, incurred in connection with any action, suit, proceeding, claim, demand, investigation or inquiry** (formal or informal), or any settlement thereof, arising directly or indirectly from, as a result of, or in connection with, Franchisee's ownership or operation of its business hereunder and/or its use or utilization of the Development System. . . In the event that any action, suit, proceeding, investigation or inquiry is instituted, or any claim or demand is asserted against or involving Franchisor, Franchisee shall resist and defend such action, suit, proceeding, investigation, inquiry, claim or demand at Franchisee's sole cost and expense or shall cause it to be resisted or defended by an insurer.

(See Epcon Motion for Summary Judgment, Franchise Agreement, Exhibit A, R. pp. 129-153) (emphasis added).

As indicated in FPG's Initial Brief, the trial court's order clearly holds that the duty to defend prong of the indemnity clause is triggered and appears to go further in granting Epcon's Motion for Summary Judgment outright on its cause of action for contractual indemnity. The trial court's order states that "FPG is obligated to indemnify and defend ECI and ECFI for any litigation fees and costs incurred by ECI and ECFI in this lawsuit." (See Order Granting Epcon Summary Judgment, p. 9, R. p. 30). With respect to the duty to indemnify, the trial court prematurely adjudicates both parties' rights and improperly removes the issue from the province of the jury counter to the plain meaning of the indemnity clause. While the trial court's order specifically finds the duty to defend triggered and the subsequent order awards Epcon damages in that regard, the trial court failed to apply the plain meaning of the indemnity clause if and to the extent that the trial court granted summary judgment on the indemnity prong. If and to the extent that the trial court's order grants Epcon

summary judgment outright on its contractual indemnity claim, leaving nothing for a jury including the contractual prerequisite that a judgment is entered against Epcon on the Plaintiffs' claims in the first instance, the trial court erred in applying the plain language of the indemnity clause and should be reversed.

B. The Contractual Indemnity Claim, If Triggered, Has Accrued With Respect To The Duty To Defend But Not The Duty To Indemnify

Epcon argues that its contractual indemnification cause of action has accrued under Ohio Law because it has suffered a loss in the form of attorneys' fees and costs. Initial Brief of Respondents, p. 2. Epcon argues that FPG misinterprets the Ohio Court of Appeals' decision in Stengel v. Columbus in this regard. See id. (citing Stengel v. Columbus, 74 Ohio App.3d 608, 613, 600 N.E.2d 248, 251 (Ct.App.1991)). FPG agrees that if the indemnity clause is triggered in the first instance, which FPG disputes, that Epcon's claim for contractual indemnity has accrued as it pertains to the first prong of the indemnity clause, which is the duty to defend. However, for the same reasons identified by Epcon, the contractual indemnity claim has not accrued under Ohio law with respect to the duty to indemnify because FPG as indemnitor cannot become liable and the cause of action cannot accrue unless and until the liability of Epcon as the indemnitee arises. Stengel v. Columbus, 74 Ohio App.3d 608, 613, 600 N.E.2d 248, 251 (Ct.App.1991) (holding that under Ohio law, "If the contract provides indemnity against liability, the indemnitor becomes liable and the cause of action accrues when the liability of the indemnitee arises.").

Under the plain meaning of the contractual indemnity clause, and consistent with Ohio law as set forth in Stengel, FPG cannot be liable to Epcon under the indemnity prong of the indemnity clause unless Epcon is first found liable to the Plaintiffs. There has been no jury trial of the

Plaintiffs' claims against Epcon in order for a jury to make findings of fact as to whether Epcon may be liable to the Plaintiffs. Thus, there has been no "judgment" pursuant to Article 16 of the Franchise Agreement in the first instance in order to find FPG potentially liable to Epcon with respect to Epcon's contractual indemnification cause of action. (See Franchise Agreement, Article 16, Epcon Motion for Summary Judgment, Franchise Agreement, Exhibit A, R. pp. 143-144). Likewise, there has been no jury trial with respect to Epcon's cross-claim against FPG for contractual indemnification. Thus, there has been no opportunity for Epcon or FPG to present evidence and argue that the Plaintiffs' claims against Epcon do or do not arise out of FPG's business operations or use of the Development System under the indemnity clause. (See Franchise Agreement, Article 16, Epcon Motion for Summary Judgment, Franchise Agreement, Exhibit A, R. pp. 143-144). If found liable to the Plaintiffs, Epcon would presumably argue to a jury that any such liability arises out of FPG's business operations and/or use of the Development System such that FPG is required to indemnify Epcon pursuant to the indemnity clause. FPG would have the opportunity to argue to a jury that the Plaintiffs' causes of action against Epcon and any verdict with respect thereto arise out of Epcon's own conduct as alleged in the Plaintiffs' Complaint. To the extent that the trial court's order grants Epcon's Motion for Summary Judgment on its contractual indemnification claim outright, including the duty to indemnify, such a finding is premature because it removes the contractual requirement that there be a judgment in the Plaintiffs' favor against Epcon in the first instance. Moreover, granting Epcon's summary judgment on its contractual indemnity claim outright precludes the ability of either party to obtain the jury's determination of whether any verdict against Epcon arises out of Epcon's own conduct or out of FPG's business operations or use of the Development System as required under the indemnity clause for Epcon to sustain its cause of action

for contractual indemnification.

Indeed, the very language from the Stengel opinion cited by Epcon in its analysis of the duty to defend prong supports FPG's argument that no contractual indemnity claim has accrued pursuant to the plain language of the indemnity clause with respect to the duty to indemnify. Epcon cites the following language from Stengel:

If the contract provides indemnity against loss, the alleged indemnitor becomes liable and the cause of action accrues when the person seeking indemnity suffers a loss. If the contract provides indemnity against liability, the indemnitor becomes liable and the cause of action accrues when the liability of the indemnitee arises.

Stengel, 74 Ohio App.3d at 613, 600 N.E.2d at 249 (citing Firemen's Ins. Co. v. Antol, 14 Ohio App.3d 428, 417 N.E.2d 831 (Ct.App.1984)); Respondent's Initial Brief, p. 3. Epcon maintains that FPG misinterprets Stengel because "the cause of action under the indemnification agreement between the parties accrued when Epcon suffered a loss" and "Epcon has suffered loss in the form of attorneys' fees and costs" Id. Thus, Epcon argues, it was proper for the trial court to grant summary judgment in its favor and Epcon intends to seek additional orders awarding additional attorneys' fees and costs as appropriate. Id. pp. 3-4. FPG does not misconstrue Ohio law or the Stengel case as it applies to the indemnity prong of the indemnity clause. FPG agrees with Epcon that, to the extent that the indemnity clause is triggered in the first instance, Epcon's claim for contractual indemnification has accrued with respect to any loss suffered in terms of the duty to defend. However, the indemnity clause at issue includes separate and distinct obligations in the event that the clause is triggered in the first instance as follows:

Franchisee shall indemnify and hold harmless, to the fullest extent permitted by law, Franchisor, its directors, officers, employees and agents, entities affiliated with Franchisor through common ownership,

and directors, officers, employees and agents of such affiliated entities, from and against any and all claims, debts, liabilities, **losses**, expenses or obligations including without limitation compensatory, exemplary or punitive damages, fines, charges, costs, expenses, lost profits, **attorney's fees, court costs**, settlement amounts, and **judgments, incurred in connection with any action, suit, proceeding, claim, demand, investigation or inquiry** (formal or informal), or any settlement thereof, arising directly or indirectly from, as a result of, or in connection with, Franchisee's ownership or operation of its business hereunder and/or its use or utilization of the Development System. . . In the event that any action, suit, proceeding, investigation or inquiry is instituted, or any claim or demand is asserted against or involving Franchisor, Franchisee shall resist and defend such action, suit, proceeding, investigation, inquiry, claim or demand at Franchisee's sole cost and expense or shall cause it to be resisted or defended by an insurer.

(See Epcon Motion for Summary Judgment, Franchise Agreement, Exhibit A, R. pp. 129-153.)

(emphasis added). With respect to the duty to defend, FPG disputes that the indemnity provision is triggered because the Plaintiffs allege damages against Epcon arising out of Epcon's own conduct. FPG does not dispute that if the duty to defend is triggered, Epcon has suffered a loss and the cause of action has accrued consistent with Stengel and Ohio law. However, contrary to Epcon's focus on the duty to defend prong and contrary to Epcon's assertion that FPG misinterprets Stengel, no cause of action for contractual indemnity has accrued under Ohio law for any duty to indemnify. Namely, "if the contract provides indemnity against liability, the indemnitor becomes liable and the cause of action accrues when the liability of the indemnitee arises." Stengel, 74 Ohio App.3d at 613, 600 N.E.2d at 249 (citing Firemen's Ins. Co. v. Antol, 14 Ohio App.3d 428, 417 N.E.2d 831 (Ct. App. 1984)); Respondent's Initial Brief, p. 3. Consistent with Ohio law and the plain language of the indemnity clause, no claim for contractual indemnity with respect to the indemnification prong of the indemnity clause has accrued. Therefore, the trial court erred as a matter of law and should be

reversed.

II. THE TRIAL COURT ERRED IN HOLDING THAT FPG IS REQUIRED TO INDEMNIFY EPCON PURSUANT TO THE FRANCHISE AGREEMENT FOR EPCON'S ALLEGED CONDUCT

The trial court erred by requiring that FPG indemnify Epcon regardless of whether the allegations against Epcon arise out of FPG's business operations or use of the Development System as required under the indemnity clause. (See Order Granting Epcon Summary Judgment, R. pp. 20-30). Epcon agrees with FPG that the indemnity clause only requires that FPG indemnify Epcon for claims related to (1) FPG's ownership or operation of its business under the agreement; (2) FPG's use of the Development System; or (3) both. Initial Brief of Respondents, p. 6. The trial court erred by adopting a more expansive view than that permitted under the plain language of the indemnity clause by finding that because the "crux" of the action involves allegations of defective construction, FPG must indemnify Epcon. (See Order Granting Epcon Summary Judgment, p. 6, R. p. 27). FPG maintains that the trial court's analysis should have focused on whether the allegations against Epcon arise out of FPG's ownership or operation of its business under the agreement or FPG's use of the Development System in the light most favorable to FPG. In response, Epcon incorrectly maintains that the trial court's "crux" analysis comports with the indemnity clause and that such an approach is consistent with Ohio law.

A. The Trial Court's "Crux" Approach And "But For" Analysis Fails To Comply With The Plain Language Of The Indemnity Clause

The trial court erred by failing to properly apply the indemnity clause to the claims asserted against Epcon. (See Order Granting Epcon Summary Judgment, R. pp. 20-30). Instead, the trial court found that the "crux" of the action as a whole involves allegations of defective construction

and, “but for FPG’s proceeding under the Franchise Agreement, Epcon would not have any exposure to claims by Plaintiffs.” (Id. p. 7, R. p. 28). The trial court took a broad approach and found that “The claims asserted by Plaintiffs and Third-Party Plaintiffs all arise from and in connection with FPG’s use of the Development System.” (Id. p. 8, R. p. 29). The trial court’s approach is inherently inconsistent. On the one hand, the trial court adopts the “crux” approach and the “but for” analysis in holding that FPG must indemnify Epcon because, in sum, the case is a construction defect case. On the other hand, the trial court held that none of the claims against Epcon involve alleged defective construction. The court specifically stated that “Plaintiffs have not alleged any construction defect claims against ECI or ECFI.” (Id. p. 6, R. p. 27). Likewise, Epcon concedes that “Plaintiffs have not alleged any construction defect claims against ECI or ECFI.” (Epcon Memo in Support of Motion for Summary Judgment at 8, R. p. 226). If the basis for indemnity is the mere allegation of construction defects (it should not be), then the lack of any such allegations against Epcon should logically result in a finding that there is no duty to indemnify. The trial court should have analyzed whether the claims against Epcon triggered the indemnity provision rather than the allegations asserted against FPG or any other party and erred by failing to do so and should be reversed.¹

The indemnity clause does not require that FPG indemnify Epcon for Epcon’s own conduct. The trial court’s order was manifestly incorrect when it states that the indemnity clause requires

¹Epcon further concedes that the risk it sought to allocate to FPG pursuant to the Franchise Agreement was the risk associated with alleged construction defects caused by FPG. Epcon states that “As it turns out in this case, the additional risk manifested itself in the form of water intrusion issues, which Plaintiffs allege are caused by construction defects.” Initial Brief of Respondents, p. 9. Further, Epcon states that “Epcon does not seek to exculpate itself for its actions under all circumstances.” Id. However, by taking the position that the case is a construction defect case with no construction defect claims against it, Epcon seeks to exculpate itself from claims involving its own alleged conduct.

“indemnification for any and all claims to which Epcon has been exposed by virtue of conduct which in any way relates to the Franchise Agreement.” (Order Granting Epcon’s Summary Judgment, p. 7, R. p. 28). With respect to the duty to defend, in the light most favorable to FPG, the trial court should have applied the indemnity clause to the causes of action asserted against Epcon and made a determination of whether the indemnity clause was triggered rather than applying the “crux” analysis or “but for” analysis. This is particularly true when the court’s analysis depends upon allegations in the Plaintiffs’ Complaint that both FPG and Epcon concede are cumbersome at best and unintelligible at worst. Moreover, where the “crux” analysis depends on construction defects as the trigger for the indemnity provision yet the court finds none against Epcon, the order both fails to follow the indemnity clause and rests on a logical flaw. (See Order Granting Epcon Summary Judgment, p. 6, R. p. 27).²

B. The Trial Court’s Analysis Does Not Comply With Ohio Law Enforcing The Plain Meaning Of The Indemnity Clause

FPG argues that the trial court erred by failing to apply the plain meaning of the indemnity clause to the extent that the trial court would require that FPG indemnify Epcon with respect to Epcon’s own alleged conduct. Under Ohio law, “Indemnity agreements must be interpreted in the same manner as other contracts.” Portsmouth Ins. Agency v. Med. Mut. of Ohio, 188 Ohio App.3d 111, 117, 934 N.E.2d 940, 944 (Ct.App.2009). “All words used must be taken in their ordinary and popular sense’ . . . and ‘[w]hen a [writing] is worded in clear and precise terms; when its meaning

²As set forth supra, the trial court also erred in its “crux” analysis by removing the party’s ability to demonstrate to the jury as the finder of fact that in the event of any verdict against Epcon, that any such verdict pertains to claims arising out of Epcon’s own alleged conduct rather than any conduct by FPG as required under the indemnity clause.

is evident, and tends to no absurd conclusion, there can be no reason for refusing to admit the meaning which [it] naturally presents.” Id. (citing Glaspell v. Ohio Edison Co., 29 Ohio St.3d 44, 47, 505 N.E.2d 264, 267 (1987); Lawler v. Burt, 7 Ohio St. 340, 350 (1857)). In response, Epcon incorrectly maintains that requiring that FPG indemnify Epcon is consistent with the indemnity clause and Ohio law.

Epcon relies on the Ohio Court of Appeals’ decision in Kovach v. Warren Roofing & Illuminating Co., 2007 Ohio App. LEXIS 2314, and the Ohio Supreme Court’s decision in Glaspell v. Ohio Edison Co., 29 Ohio St.3d 44, 505 N.E.2d 264 (1987), in support of its contention that FPG must indemnify Epcon with respect to Epcon’s own conduct. Kovach and Glaspell are not dispositive for two reasons: (1) neither opinion stands for the proposition that the court may deviate from applying the plain language of an indemnity clause and (2) neither case involves allegations against the party seeking indemnity that fall outside of the indemnity provision.

In Kovach, an employee of a roofing contractor was injured when working on a roof replacement project at a building owned by CEI. Kovach, 2007 Ohio App. LEXIS 2314, at *3. Tremco was a supplier of materials for the roofing project and entered into a contract with CEI that included an indemnity provision. Id. at *4. The indemnity provision required that Tremco “indemnify CEI and hold them harmless for such fees and costs that were incurred as a result of roofing work that was under Tremco’s control.” Id. at *2. CEI asserted a cross-claim against Tremco for contractual indemnity, and the trial court found that Tremco was not responsible for indemnifying CEI up to the point in the lawsuit where the court found no negligence against CEI as a matter of law. Id. at *5. The trial court reasoned that the “plaintiff asserted a colorable independent negligence claim against [CEI].” Id. CEI argued that Tremco was responsible for

indemnifying CEI even though the plaintiff asserted separate negligence claims against CEI because the claims asserted against CEI arose from activities under Tremco's "contractual control." Id. at *9. The Ohio Court of Appeals reversed the trial court and found that Tremco must indemnify CEI because the alleged negligence claim arose out of activities under Tremco's control consistent with the indemnity provision. Id.

In this case, unlike Kovach, the indemnity clause does not require that FPG indemnify Epcon for anything arising out of FPG's "contractual control." As set forth more fully in FPG's Initial Brief, the allegations against Epcon (meritorious or not) place Epcon's own conduct at issue. For example, the Plaintiffs' claim for rescission against Epcon allegedly arises out of Epcon's own alleged failure to enforce the Franchise Agreement.

Epcon Communities and Epcon Communities Franchising, Inc. willfully and deliberately failed to enforce Franchise Agreement terms and conditions upon Fankhauser and FPG, Inc. as Epcon franchisee, resulting in construction of homes that deviate from Epcon plans, models, specifications, building code, and which now suffer reoccurring water intrusion and mold.

(Plaintiffs' Third Amended Complaint filed September 16, 2011, p. 6, ¶¶ 16-17, R. p. 48). These allegations against Epcon do not arise out of FPG's "contractual control" as in Kovach. In fact, the Plaintiffs allege the very opposite, i.e. that Epcon failed to enforce its own Franchise Agreement, which would fall under Epcon's "contractual control."³

For similar reasons, the Ohio Supreme Court's decision in Glaspell v. Ohio Edison Co. is not

³Moreover, Kovach involves a single cause of action for negligence against the indemnitee. Kovach, 2007 Ohio App. LEXIS 2314, at *4. Here, the Plaintiffs assert causes of action against Epcon for rescission, breach of contract, fraud/misrepresentation, breach of express warranty, breach of implied warranty of merchantability, breach of implied warranty of fitness for a particular purpose, and violation of the South Carolina Unfair Trade Practices Act. The Association asserted a single cause of action for breach of warranty.

dispositive. In Glaspell, an employee of a cable television company was injured while working on utility poles, which were owned and maintained by a utility company. Glaspell, 29 Ohio St.3d at 45, 505 N.E.2d at 265. The utility company filed a cross-claim against the cable company pursuant to an indemnity agreement. Id. The trial court addressed whether the indemnification clause applied and found that it did not because the clause failed to express in clear and unequivocal terms that the cable company was required to indemnify the utility company with respect to the utility company's own negligence. Id. The Ohio Supreme Court reversed and found that the indemnification clause should not be strictly construed against the utility company because the parties were both businesses that entered into the agreement "in a context of free and understanding negotiation." Id., 29 Ohio St.3d at 47, 505 N.E.2d at 266. The Glaspell court further found that the loss at issue fell squarely within the terms of the indemnity agreement, which required that the cable company indemnify the utility company "for, or by reason, or on account of (i) the installation, maintenance or use of the said equipment on or in. . . (utility company's) facilities." Id., 29 Ohio St.3d at 48, 505 N.E.2d at 278. Thus, the Glaspell court concluded that the indemnity provision did not require strict construction against the utility company as the indemnitee and the cable company as the indemnitor would be required to indemnify the utility company for "any loss" in accordance with the terms of the indemnity provision. Id. This included any loss caused by the negligence of the utility company as the indemnitee despite the fact that the indemnity clause did not specifically reference indemnity for the utility company's own negligence. Id.

By contrast, the indemnity clause at issue here contains no such broad "any loss" provision. The indemnity clause specifically spells out that indemnity is required only where an alleged loss arises out of FPG's business operations or use of the Development System. Epcon maintains that

Glaspell stands for the proposition that FPG must indemnify Epcon because “FPG and Epcon freely entered into the Franchise Agreement” and both entities are “commercial enterprises.” Initial Brief of Respondent, p. 9. Unlike Glaspell, the case at bar does not require a determination of whether the indemnity clause should be strictly construed against Epcon because there is no similar broad “any loss” language that would require that FPG indemnify Epcon for Epcon’s own negligence or intentional conduct.⁴ Further, the injury at issue in Glaspell fell squarely within the “any loss” provision of the indemnity agreement such that the cable company was required to indemnify the utility company under the clear language of the indemnity clause at issue. Unlike Glaspell, the indemnity clause at issue here does not require that FPG indemnify Epcon with respect to anything whatsoever having to do with the project. The trial court erred in this regard when it held that “but for FPG’s proceeding under the Franchise Agreement, Epcon would not have any exposure to claims by Plaintiffs.” (Order Granting Epcon’s Summary Judgment, p. 7, R. p. 28). The trial court’s “but for” analysis resembles that which might be applied to an indemnity provision with an “any loss” provision similar to that at issue in Glaspell. However, such an analysis removes the specific limiting requirement within the indemnity clause here that requires indemnity only for any loss arising out of FPG’s use of the Development System or business operations. As such, the trial court erred by interpreting the indemnity clause with impermissible breadth contrary to the plain meaning of the indemnity clause and should be reversed.

⁴Moreover, as with the Kovach decision, the Glaspell case addressed a single cause of action for negligence against the indemnitee where as multiple causes of action are asserted against Epcon in this case. These include allegations of fraud which, if proven, would necessarily involve Epcon’s own intentional conduct.

III. THE TRIAL COURT ERRED IN HOLDING THAT FPG IS REQUIRED TO INDEMNIFY EPCON FOR EPCON'S OWN ALLEGED INTENTIONAL CONDUCT UNDER OHIO LAW

FPG argues that under Ohio law, a party cannot be indemnified for its own intentional tortious conduct. See Diamond Wine & Spirits, Inc. v. Dayton Heidelberg Distrib. Co., 148 Ohio App.3d 596, 774 N.E.2d 775 (2002). In response, Epcon argues that (1) Ohio law permits indemnity at least where there are allegations of “willful, careless, and wanton” conduct consistent with Glaspell and (2) the fraud and SCUTPA claims arise out of FPG’s “contractual control” and, therefore, indemnity should be required pursuant to Kovach.

Although the Ohio Supreme Court upheld an indemnity provision in Glaspell despite allegations against the indemnitee for “willful, careless, and wanton” conduct, Glaspell involved a single cause of action against the indemnitee for negligence. Glaspell, 29 Ohio St.3d at 47, 505 N.E.2d at 266. Glaspell did not involve allegations of fraud or violation of any UTPA. Id. More importantly, as set forth above, the “any loss” language was broad enough to encompass the indemnitee’s own negligent conduct where the indemnity clause here restricts indemnity to instances arising out of FPG’s business operations or use of the Development System.

Epcon does not distinguish nor challenge the application of the Diamond Wine & Spirits or Weiner cases cited by FPG, both of which stand for the proposition that Ohio law does not permit indemnity for ones own intentional conduct. See Diamond Wine & Spirits, Inc. v. Dayton Heidelberg Distrib. Co., 148 Ohio App.3d 596, 774 N.E.2d 775 (2002); Weiner v. American Cancer Soc., 2002 WL 1265575, (Ohio Ct. App. 2002). Allegations of fraud and violation of the SCUTPA necessarily involve ones own conduct. Epcon argues that because these causes of actions survive summary judgment and because the trial court found no specific instances of fraud or violations of

the SCUTPA thus far in the case, the Plaintiffs' allegations are necessarily derivative of conduct by FPG. Initial Brief of Respondents, pp. 10-12. FPG has not made any representations about the viability of the Plaintiffs' causes of action against Epcon. Whether the Plaintiffs' claims are frivolous and whether Epcon obtains summary judgment are irrelevant to the issue of whether the allegations fall under the indemnity clause. In this case, the indemnity clause simply does not require that FPG indemnify Epcon with respect to Epcon's own alleged intentional conduct, irrespective of the merit of such claims. As indicated in FPG's Initial Brief, any such indemnity clause is unenforceable under Ohio law and the trial court erred by requiring that FPG indemnify Epcon for Epcon's own alleged intentional conduct in violation of Ohio law and should be reversed.

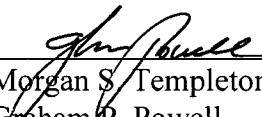
CONCLUSION

For all the reasons set forth above and in its Initial Brief, Appellant Fankhauser Property Group, Inc. respectfully requests that this Honorable Court reverse the order granting Respondents Epcon Communities, Inc. and Epcon Communities Franchising, Inc.'s motion for summary judgment on their cross claims for contractual indemnification against Fankhauser Property Group, Inc. dated October 2, 2012. Because the trial court's order awarding Epcon attorneys' fees and costs dated December 13, 2012 was entered pursuant to the order granting Epcon summary judgment, Appellant Fankhauser Property Group, Inc. further requests that this Honorable Court vacate the order. Appellant further requests that this Honorable Court award the costs of this appeal, including attorneys' fees, and such other and further relief as the court deems just and proper.

September 26, 2013.

Respectfully Submitted,

WALL TEMPLETON & HALDRUP, P.A.



Morgan S. Templeton
Graham P. Powell
William W. Watkins, Jr.
145 King Street, Suite 300
Post Office Box 1200
Charleston, South Carolina 29402
Telephone: 843.329.9500
Facsimile: 843.329.9501
Attorneys for the Appellant

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED
SEP 27 2013

SC Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

John C. Hayes, III, Circuit Court Judge

Case No. 2012-213730

Juontonio Pinckney, Josephine Sciacca, Addie Smith, James Barone, Deborah Barone, Ismael Gonzalez, Valerie Gonzales, Joe Moore, and Sandra Moore, Plaintiffs,

v.

Epcon Communities, Inc., Epcon Communities Franchising, Inc., Brock L. Fankhauser, Fankhauser Property Group, Inc. and Stonecrest Villas of Tega Cay Home Owners Association, Inc., Defendants,

Of whom Epcon Communities, Inc. and Epcon Communities Franchising, Inc., are the Respondents;

And Fankhauser Property Group, Inc. is the Appellant.

Fankhauser Property Group, Inc., Third Party Plaintiff,

v.

Architectural Alliance, Ltd., Exterior Expressions of North Carolina, Inc., Al-Mega Construction, Inc., Procar, Inc., Procar II, Inc., The Southeastern Group, Inc., Lucas Lawn and Landscape, Inc., Jose Simenez, Individually and d/b/a M&L Roofing, Co., LLC and/or MB Roofing Company, Third Party Defendants,

Stonecrest Villas of Tega Cay Condominium Owners Association, Inc., Third Party Plaintiff,

v.

Stonecrest Villas of Tega Cay, LLC and Epcon Communities Franchising, Inc., Third Party Defendants.

Exterior Expressions of North Carolina, Inc., Fourth Party Plaintiff,

v.

Marcos Gonzalez, Fourth Party Defendant

Procar, Inc. and Procar II, Inc., Fourth Party Plaintiffs,

v.

Marcos Zertuche, David Carbajal, Victorina Cortez, Balancos Construction Co., Balanos Framing, Inc., Ricardo Hernandez, and Silverio Cortez, Fourth Party Defendants.

Al-Mega Construction, Inc., Fourth Party Plaintiff,

v.

Noe Perez, Juan Abundez Saucedo, and Moises Chavarra Hernandez, Fourth Party Defendants.

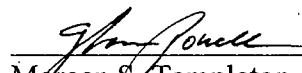
CERTIFICATE OF COUNSEL

The undersigned counsel hereby certifies that Appellant's Final Brief and Appellant's Final Reply Brief comply with SCACR 211(b).

September 26, 2013.

WALL TEMPLETON & HALDRUP, P.A.

By:


Morgan S. Templeton, Esquire
Graham P. Powell, Esquire
William W. Watkins, Jr., Esquire
145 King Street, Suite 300
Post Office Box 1200
Charleston, South Carolina 29402
Telephone: 843.329.9500
Facsimile: 843.329.9501
Attorneys for Appellant

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED
SEP 27 2013

APPEAL FROM YORK COUNTY
Court of Common Pleas

SC Court of Appeals

John C. Hayes, III, Circuit Court Judge

Case No. 2012-213730

Juontonio Pinckney, Josephine Sciacca, Addie Smith, James Barone, Deborah Barone, Ismael Gonzalez, Valerie Gonzales, Joe Moore, and Sandra Moore, Plaintiffs,

v.

Epcon Communities, Inc., Epcon Communities Franchising, Inc., Brock L. Fankhauser, Fankhauser Property Group, Inc. and Stonecrest Villas of Tega Cay Home Owners Association, Inc., Defendants,

Of whom Epcon Communities, Inc. and Epcon Communities Franchising, Inc., are the Respondents,

And Fankhauser Property Group, Inc. is the Appellant.

Fankhauser Property Group, Inc., Third Party Plaintiff,

v.

Architectural Alliance, Ltd., Exterior Expressions of North Carolina, Inc., Al-Mega Construction, Inc., Procar, Inc., Procar II, Inc., The Southeastern Group, Inc., Lucas Lawn and Landscape, Inc., Jose Simenez, Individually and d/b/a M&L Roofing, Co., LLC and/or MB Roofing Company, Third Party Defendants,

Stonecrest Villas of Tega Cay Condominium Owners Association, Inc., Third Party Plaintiff,

v.

Stonecrest Villas of Tega Cay, LLC and Epcon Communities Franchising, Inc., Third Party Defendants.

Exterior Expressions of North Carolina, Inc., Fourth Party Plaintiff,

v.

Marcos Gonzalez, Fourth Party Defendant

Procar, Inc. and Procar II, Inc., Fourth Party Plaintiffs,

v.

Marcos Zertuche, David Carbajal, Victorina Cortez, Balancos Construction Co., Balanos Framing, Inc., Ricardo Hernandez, and Silverio Cortez, Fourth Party Defendants.

Al-Mega Construction, Inc., Fourth Party Plaintiff,

v.

Noe Perez, Juan Abundez Saucedo, and Moises Chavarra Hernandez, Fourth Party Defendants.

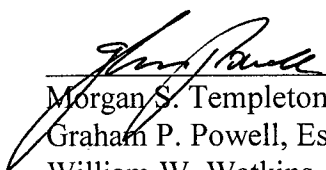
PROOF OF SERVICE

I certify that I have served Appellant Fankhauser Property Group, Inc.'s Final Reply Brief of Appellant on counsel for Respondents Epcon Communities, Inc. and Epcon Communities Franchising, Inc., J. Derham Cole, Jr., and Michael B.T. Wilkes, Wilkes Law Firm, 127 Dunbar Street, Suite 200, Spartanburg, South Carolina 29306, as well as other parties' counsel set forth on the following page by depositing same in U.S. Mail this date.

September 26, 2013.

WALL TEMPLETON & HALDRUP, P.A.

By:


Morgan S. Templeton, Esquire
Graham P. Powell, Esquire
William W. Watkins, Jr., Esquire
145 King Street, Suite 300
Post Office Box 1200
Charleston, South Carolina 29402
Telephone: 843.329.9500
Facsimile: 843.329.9501
Attorneys for Appellant

Other counsel of record served:

J. Cameron Halford, LLC
Halford & Niemiec, LLP
238 Rockmont Drive
Fort Mill, South Carolina 29708
Attorneys for Plaintiffs

Curtis W. Dowling, Esquire
Barnes Alford Stork & Johnson, LLP
Post Office Box 8448
Columbia, South Carolina 29202
-and-

Brett E. Dressler, Esquire
Sellers, Hinshaw, Ayers, Dortch & Lyons, P.A.
301 S. McDowell Street, Suite 410
Charlotte, North Carolina 28204
Attorneys for Stonecrest Villas of Tega Cay Condominium Owners Association, Inc.