STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Horry County
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge
Trial Case No.: 2014-CP-26-07617

APPELLATE CASE NO.: 2018-001724

CAPTAIN'S HARBOUR AND RACQUET CLUB HOMEOWNERS' ASSOCIATION, INC.

RESPONDENT

v.

JERALD W. JONES,

APPELLANT

APPELLANT'S FINAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

I. WHETHER THE TRIAL COURT ERRED IN FINDING THAT THE APPELLANT WAS NOT A PARTY TO THE ACE PROPERTY MANAGEMENT AGREEMENT, AND, THEREFORE, CANNOT CLAIM CONTRACTUAL INDEMNIFICATION.

II. WHETHER THE APPELLANT IS A THIRD-PARTY BENEFICIARY OF THE INDEMNIFICATION CLAUSE OF THE ACE PROPERTY MANAGEMENT AGREEMENT, WHICH THEN ENTITLES HIM TO THE PROTECTION OF THE INDEMNIFICATION CLAUSE.

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

This matter began by the filing of the Captain's Harbour and Racquet Club Homeowners' Association, Inc.'s ("the Association") Summons and Complaint on November 14, 2014 (R., pp. 14-16). In its Complaint, the Association alleges that the Appellant, Jerald W. Jones ("Mr. Jones"), improperly reimbursed himself for medical expenses and attorney's fees. After having been served with the Summons and Complaint in April, 2015, Mr. Jones timely answered, on May 1, 2015 (R., pp. 17-21), denying any allegation of wrongdoing and asserting that he had a right to reimbursement by virtue of the indemnity provisions in the ACE HOA Property Management Agreement (R., pp. 46-47].

The parties filed cross Motions for Summary Judgment pursuant to Rule 56, SCRCP. The Association filed its Motion for Summary Judgment on December 22, 2015 (R., pp. 22-23), and Mr. Jones filed his Amended Motion for Summary Judgment on January 25, 2016 (R., pp. 27-29). The Motions for Summary Judgment were heard by the Honorable R. Lawton McIntosh on February 17, 2016.

Thereafter, Judge McIntosh issued his Order denying the Defendant's Motion for Summary Judgment and granting the Plaintiff's Motion for Summary Judgment on April 12, 2016 (R., pp. 8-13). The trial court entered judgment for the Association and against Mr. Jones in the amount of $16,321.14, of which $10,000.00 was for Mr. Jones's legal fees in defending criminal charges brought

against him, and $2,788.00 for medical expenses. The remainder of the judgment was for pre-judgment interest and costs.

Mr. Jones filed a Motion for Reconsideration on March 11, 2016 (R., pp. 59-60), which Motion was denied by Form 4 Order filed on October 4, 2016 (R., pp. 2-3), with a notation that a formal order would follow. The formal final Order was signed Judge McIntosh on November 21, 2016 and filed on November 26, 2016 (R., pp. 4-5).

Mr. Jones filed his first Notice of Appeal on November 15, 2016, but because of the confusion about the entry of the final Order, the Court of Appeals remanded the matter back to the trial court on April 19, 2017. After the discovery of the filing of the final Order, Mr. Jones then re-filed his Notice of Appeal on September 24, 2018, which was the subject of a Motion to Dismiss filed by the Respondent on November 1, 2018. The Court of Appeals, in its Order dated January 10, 2019, denied that Motion to Dismiss.

B. STATEMENT OF FACTS

Captain's Harbour and Racquet Club is a condominium regime located in the Socastee section of Horry County, South Carolina. On October 1, 2012, the Association entered into the ACE Property Management Agreement ("Management Agreement") with American Contracting Engineers, PA, dba ACE Management (hereinafter referred to as "ACE Management"). Mr. Jones signed the Management Agreement (R., pp. 42-47) on behalf of ACE Management.[1] Mr.

1. At the time, Mr. Jones was the president of the Association; however, he did not sign the Management Agreement in his capacity as the Association president. (R., p. 47). Other officers of the Board of the Association signed on behalf of the Association.

Jones, as its agent and employee, performed all of the management services on behalf of ACE Management for the Association.

On July 7, 2014, an incident occurred at the Association swimming pool. Mr. Jones was at the pool because he was preparing for an Association-sponsored picnic (Tr., p. 16/R., p. 76). A guest apparently became enraged, which ultimately resulted in an altercation. The police were called and several people were criminally charged. (R., pp. 48-53). As a result of the altercation, Mr. Jones was injured and had to seek medical treatment at Grand Strand Regional Medical Center in Myrtle Beach, South Carolina. Mr. Jones was also charged with disorderly conduct and breach of the peace.

Thereafter, in order to defend himself, Mr. Jones hired L. Morgan Martin, Esquire, a criminal defense lawyer in Conway, South Carolina. Based on the Hold Harmless provision in the Management Agreement, Mr. Jones caused a check to be written from the Association's account to pay for Mr. Morgan's retainer in the amount of $10,000.00 (R., p. 54). Mr. Jones also paid his medical bills with the Association's checking account, in the amount of $2,788.80. (R., pp. 55-57).

The criminal charges were subsequently dismissed as to Mr. Jones. [Tr., p. 9/R., p. 69].

Thereafter, the Association decided that the payment of Mr. Jones's legal fees and medical expenses was improper and filed this instant lawsuit. The primary basis of the Association's claim is that Mr. Jones is not a party to the Management Agreement, and, therefore, that he cannot rely on the Hold

Harmless provision of the Management Agreement. The Hold Harmless provision states:

VI. HOLD HARMLESS

A. **Section III, Item B (4):** The Association shall indemnify the Manager from any claims, demands, judgments or suits that may be brought against or incurred by the Manager by reason of the Manager's recommendations unless such acts shall be caused by said Manager's gross negligence of willful misconduct;

B. **Section III, Item D:** The Association specifically agrees and shall indemnify the Manager from any claims demands, judgments or suits or damages that may be brought against or incurred by the Manager by reason of Manager's role in assisting the Board with regard to the services set forth in this Section III, Item D. Manager agrees to use Manager's best efforts to investigate and recommend qualified, reputable subcontractors; however, Manager shall not be responsible for any nonperformance, negligence or any loss or damages resulting from the provision of these services unless such acts shall be caused by Manager's gross negligence or willful misconduct.

C. **General**: Including Items A and B above, the Manager shall not be liable for the Association and/or its Members for any loss or damage caused by acts of the Manager unless said acts constitute gross negligence, and said Association and its Members, do hereby agree to indemnify and save harmless the Manager from any such liability for all damage, costs, and expense (including attorney fees incurred by the Manger in defending legal action), arising from any injury to any person or property in, about and in connection with the Association, its Common Elements, Limited Common Elements, and Dwellings, from any cause whatsoever, unless such injury shall be caused by said Manager's gross negligence or willful misconduct.

(R., pp. 46-47). Sections A and B apply to specific situations where third party claims are made. Section C, as its heading, states, is general and can apply to claims made by ACE Management (to include its agent) against the Association.

The trial court entered judgment in favor of the Association against Mr. Jones, in the amount of $16,321.14, finding that:

> The plain language of the Agreement identifies the parties to the contract as Plaintiff and ACE. Defendant is not a party to the Agreement, and therefore, is unable to claim contractual indemnification in this case. (R., p. 13).

STANDARD OF REVIEW

> "When reviewing the grant of summary judgment, the appellate court applies the same standard applied by the trial court pursuant to Rule 56(c), SCRCP." *Savannah Bank, N.A. v. Stalliard*, 400 S.C. 246, 250, 734 S.E.2d 161, 163 (2012) (quoting *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002)). "Summary judgment is appropriate when there is no genuine issue of material fact such that the moving party must prevail as a matter of law." *Id.* (quoting *Fleming*, 350 S.C. at 493, 567 S.E.2d at 860). "To withstand a motion for summary judgment 'in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence.'" *Id.* (quoting *Hancock v. Mid-South Mgmt. Co., Inc.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009)).

D.R. Horton, Inc. v. Builders FirstSource-Southeast Group, LLC, 422 S.C. 144, 150–51, 810 S.E.2d 41, 44–45 (Ct. App. 2018).

ARGUMENTS

I. The Hold Harmless Section of the Management Agreement Applies to Mr. Jones

Mr. Jones, through ACE Management, caused the Association to reimburse him for his legal fees and medical expenses incurred as a result of work he performed for and on behalf of the Association. Mr. Jones reasonably believed that the Hold Harmless provision of the Management Agreement allowed him to do so. The trial court entered judgment against Mr. Jones because it concluded that Mr. Jones was not a party to the Management Agreement "... and therefore, is unable to claim contractual indemnification in this case." (R., p. 13). This was the sole basis for entry of judgment against Mr. Jones.

It is axiomatic that a corporation can only act through its agents and employees. *Jost v. Equitable Life Assurance*, 271 S.C. 492, 495, 248 S.E.2d 778, 779 (1978); *State ex rel Callison v. National Linen Service Corp.*, 225 S.C. 232, 235, 81 S.E.2d 342, 344 (1954). Mr. Jones was acting within the scope of his employment and agency and was working on a project for the Association at the time of the incident. Mr. Jones was the "manager" for all practical purposes. Mr. Jones's need for legal representation and medical assistance arose out of his actions performed for the benefit of the Association.

As a corporation, ACE Management only acts through its agents and employees, and its agent, Mr. Jones, *was,* for all intents and purposes, ACE Management, because ACE Management could not perform its obligations without

Mr. Jones. As a result, he comes under the Hold Harmless provision of the Management Agreement, which provides that the Association and/or its Members:

> ". . . agree to indemnify and save harmless the Manager from any such liability for all damage, costs, and expense (including. attorney fees incurred by the Manager in defending legal action), arising from any injury to any person or property in, about and in connection with the Association . . .". (R., p. 47).

Indemnity coverage is not mutually exclusive between ACE Management and Mr. Jones; in this context, it covers both the corporation and its agent who performed all of the services.

The rules of construction and interpretation of contracts generally apply to indemnity contracts and these rules support Mr. Jones's position.

> General rules that govern the construction and interpretation of other contracts also apply to the construction and interpretation of a contract of indemnity. As with other contracts, the principal question focuses on the intent of the parties. The intention is determined from the language used in the contract. If that language is clear and unambiguous, it must be given its plain and usual meaning. A contract of indemnity will cover all losses that reasonably appear to have been within contemplation of the parties.

Laurens Emergency Medical Spec. v. M.S. Bailey & Sons Bankers, 348 S.C. 191, 195, 558 S.E.2d 531, 533 (Ct. App., 2002), *rev'd on other grounds*, 355 S.C. 104, 584 S.E.2d 375 (2003). Mr. Jones's claim is that it is only logical that the indemnity provision covers ACE Management and, implicitly, Mr. Jones, and that this is what the parties intended.

Contracts should be interpreted to give the greatest effect possible to all provisions rather than to leave any part of the contract rendered unreasonable or

having no effect. *Vaughn, Coltrane & Assoc. v. Van Horn Construction*, 354 Ga.App. 693, 694, 563 S.E.2d 438 (2002). In *Vaughn*, the Georgia Court of Appeals held that the consultants to a construction project were covered by the indemnity clause even though "consultants" were not identified as an indemnified party. Similarly, Mr. Jones should be considered covered by the indemnification clause, as this more accurately fulfills the intent of the parties.

Additionally, as there is an ambiguity as to the construction and interpretation of the indemnity clause, the issue of the intent of the parties has to be decided by the trier of fact. 41 Am. Jur. 2d *Indemnity* § 13.

II. Mr. Jones Is a Third-Party Beneficiary of the Indemnification Clause of the Management Agreement, Which Entitles Him to the Protection of the Indemnification Clause.

The trial court, in essence, ruled that Mr. Jones was not in privity of contract with the Association and therefore could not rely on the indemnity provision. Mr. Jones should still prevail in that his position is analogous to a third-party beneficiary. In his Twelfth Defense of his Answer, Mr. Jones avers that:

FOR A TWELFTH DEFENSE

> 26. Plaintiff may have a contractual obligation to Defendant in which Plaintiff is to indemnify and save harmless Defendant from any liability for all damages alleged in this action, if any. (R., p. 20).

In other words, in this defense, Mr. Jones is alleging third-party beneficiary status.

As stated in *Fabian v. Lindsay*, 410 S.C. 475, 488, 765 S.E.2d 132, 139 (2014),

> "Generally, one not in privity of contract with another cannot maintain an action against him in breach of

> contract, and any damage resulting from the breach of a contract between the defendant and third party is not, as such, recoverable by the plaintiff." *Windsor Green Owners Ass'n. v. Allied Signal, Inc.*, 362 S.C. 12, 17, 605 S.E.2d 750, 752 (Ct. App. 2004). (Citation omitted.) "However, if a contract is made for the benefit of a third person, that person may enforce the contract if the contracting parties intended to create a direct, rather than an incidental or consequential benefit to such third person." (Citation omitted.)

As the Supreme Court extended third party beneficiary status to beneficiaries in an estate claims; it only stands to reason that Mr. Jones should be considered a third party beneficiary under the facts of this case. As discussed above, the acts of Mr. Jones were the acts of ACE Management. It is not unreasonable that the parties would intend that indemnification would extend to the sole agent of ACE Management. For this reason, Mr. Jones is included in the scope of the indemnification clause.

CONCLUSION

Based on the above and foregoing, the Appellant prays that this Court reverse the Order granting judgment to the Respondent and remanding this matter to the trial court for further proceedings.

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Respectfully submitted,

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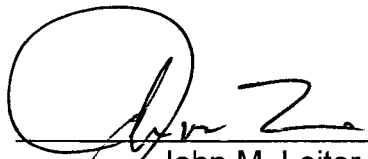
CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.



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