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May 26 2021

SC Court of Appeals

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

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, the Appellant respectfully petitions for rehearing of the Court's decision of May 12, 2021 on the grounds that this Honorable Court overlooked or misapprehended the following points:

1. Summary judgment is not appropriate even where there is not a dispute as to the evidentiary facts if the parties disagree concerning the conclusions to be drawn from those facts. Lanham v. Blue Cross & Blue Shield of S.C., 349 S.C. 356, 362, 563 S.E.2d 331, 373 (2002).

In this case, a genuine dispute exists as to whether the indemnification provisions of the Agreement between the Respondent and the Manager intended to apply to the Appellant, either based on the wording of the Agreement or on the basis that Appellant was a third-party beneficiary of the Agreement.

2. “[T]he meaning of a particular word or phrase is not determined by considering the word or phrase by itself, but by reading the contract as a whole considering the contract and subject matter of the contract.” McGill v. Moore, 382 S.C. 179, 186, 672 S.E.2d 571, 575 (2009). This Court is correct that the Respondent and the Manager are the named parties in the Agreement. However, this Court has overlooked that the Appellant signed the Agreement as the ACE Manager (R., 47).¹ The Appellant performed all of the services required of the Manager under the Agreement. This is entirely consistent with the terms of the Agreement which require the Appellant to perform personal services, such as:

III. DUTIES AND RESPONSIBILITIES OF THE MANAGER

B. “1. The Manager shall be available to attend up to five (5) Board Meetings per year.” (R., 42-43)

As it was the Appellant that performed these services, and all other services, as the Manager, it is a reasonable conclusion that Appellant would be covered by the indemnification provisions of the Agreement.

3. The Appellant has asserted that he is a third-party beneficiary to the Agreement and is entitled to indemnification under the Agreement on this basis. This Court ruled that this issue was not preserved for appellate review because the trial court had not ruled on it. This Court overlooked or misapprehended this issue because it was raised before the trial court

¹ The Appellant is the sole shareholder of the Manager.

by way of Defendant's Notice of Motion and Motion for Reconsideration (R., 59). The Motion states, in part:

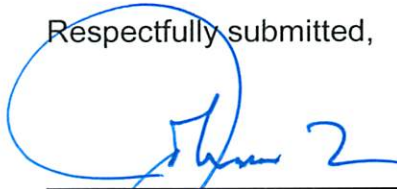
"A motion was brought forward by the Plaintiff claiming that the indemnity clause within the Contract (Exhibit 1) was not applicable to the Defendant. The contract clearly states that the agreement is between the Plaintiff and the "manager." As indicated in the signature block of the contract the Defendant is the clearly noted manager for this property. **It was the intent of all parties that the Defendant be recognized as the manager for this HOA, therefore covered by the attached contract under the plain reading of the contract. [emphasis added]**

Although the Appellate does not use the term "third party beneficiary" in his Motion, the import of this ground for reconsideration is that the Appellant is seeking third-party beneficiary recognition. The trial court denied Appellant's Motion acknowledging that this had been previously argued. (R., 2-5).

Appellant has adequately preserved the issue of third-party beneficiary.²

WHEREFORE, Appellant prays that this Court reconsider its Opinion in this matter filed May 12, 2021.

Respectfully submitted,



May 26, 2021

John M. Leiter
Law Offices of John M. Leiter, PA
405 79th Avenue North, Suite B
Myrtle Beach, SC 29572
(843) 449-1451
Counsel for Appellant

² As stated above, the Appellant, in his Motion to Reconsider, did not use the phrase "third-party beneficiary" but the theory of third-party beneficiary was sufficiently conveyed. See Shirley's Iron Works v. City of Union, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013).

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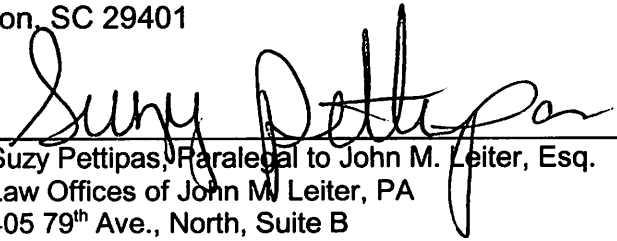
v.

Jerald W. Jones Appellant

AFFIDAVIT OF SERVICE

I certify that I have served a copy of **Appellant Jerald W. Jones's Petition for Rehearing** by email and by depositing a copy of the same in a post office or official depository under the exclusive control of the United States Postal Service, with sufficient postage pre-paid, on May 26, 2021, addressed to the attorneys of record:

Douglas Walker MacKelcan, III, Esquire
Skyler Cole Wilson, Esquire
40 Calhoun Street, Suite 400
Charleston, SC 29401


Suzy Pettipas, Paralegal to John M. Leiter, Esq.
Law Offices of John M. Leiter, PA
405 79th Ave., North, Suite B
Myrtle Beach, SC 29572
(843) 449-1451
Attorney for Appellant

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