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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

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

Opinion No. 2021-UP-167
(S.C. Ct. App. filed May 12, 2021

Captains Harbour and Racquet Club
Homeowners Association, Inc. . . . . Respondent

v.

Jerald W. Jones . . . . . Petitioner

PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATION BY COUNSEL

Counsel for Petitioner Jerald W. Jones certifies that he filed a Petition for Rehearing on May 26, 2021 and the South Carolina Court of Appeals denied the Petition on June 11, 2021.

QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals err in ruling that the Petitioner/Appellant is not covered by the indemnification clause because he was not named in it?

2. Did the Court of Appeals err in ruling that the Petitioner/Appellant did not raise or had waived his right for review as to his claim that he was a third-party beneficiary to the indemnity clause?

INTRODUCTION

This lawsuit arises out of the application of an indemnity agreement between a homeowner's association and its property manager.[1] ACE Management's only employee, Mr. Jones, was reimbursed by the Association for medical expenses and legal fees he incurred while performing ACE Management's duties pursuant to its Management Agreement between ACE Management and the Association[2]. The reimbursement was made by virtue of the indemnity provisions contained in the Management Agreement.

After Mr. Jones was paid, the Association sued him for the return of the reimbursement. The Association argued that, since Mr. Jones was not named in the Management Agreement, he was not entitled to reimbursement. The circuit court granted summary judgment in favor of the Association and entered a judgment against Mr. Jones on the grounds that Mr. Jones was not entitled to claim contractual indemnification because he was not a party to the Management Agreement. On appeal, the Court of Appeals affirmed the circuit court's ruling.

The issue of whether an employee while acting within the scope of his employment, in furtherance of the Management Agreement, is covered under a corporate indemnity is a matter of first impression in this state. Mr. Jones contends, under the facts of this case, he is covered by the contractual indemnity agreement between the Association and ACE Management. Mr. Jones argues that this Court should adopt the reasoning of the Eighth

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[1] For brevity and ease of reference, the Appellant/Petitioner will be referred to as "Mr. Jones"; the Respondent, Captain's Harbour and Racquet Club Homeowners' Association, Inc. will be referred to as "Association"; and American Contracting Engineers, PA d/b/a East Management will be referred to as "ACE Management".

[2] The Association and ACE Management entered into the ACE HOA Property Management Agreement which will be referred to as the "Management Agreement" (R., 42-47.)

Circuit Court of Appeals in *United States Fidelity and Guaranty Co. v. Housing Authority of the City of Poplar Bluff*, 114 F.3d 693 (8th Cir. 1997).

Additionally, Mr. Jones would show this Court that the Court of Appeals erred in finding and concluding that Mr. Jones had not preserved the issue of whether he was a third-party beneficiary for appellate review. Mr. Jones will show that this issue was sufficiently raised by him, both in his pleadings and in his motion to reconsider before the circuit court.

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

The Association is a condominium regime located in the Socastee section of Myrtle Beach, South Carolina. On October 1, 2012, the Association entered into the Management Agreement with ACE Management. Mr. Jones, ACE Management's sole employee, signed the Management Agreement (R.,47) on behalf of ACE Management. His signature appears above the title "ACE Manager" (R., 47). Mr. Jones, as its 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 (R.,76). A guest apparently became enraged, which ultimately resulted in an altercation. The police were called and several people, including Mr. Jones, were criminally charged. (R., 48-53).

As a result of the altercation, Mr. Jones was injured and had to seek medical treatment at Grand Strand Regional Medical Center. Mr. Jones was charged with public disorderly conduct, based on the statement of one of the other parties to the altercation.

Thereafter, Mr. Jones hired L. Morgan Martin, Esquire, a criminal defense lawyer in Conway, South Carolina to represent him. The criminal charges were subsequently dismissed as to Mr. Jones. (R., 69).

Based on the indemnity provision in the Management Agreement, Mr. Jones, acting on behalf of the ACE Management, 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., 54). Mr. Jones was also reimbursed for his medical bills by the Association, in the amount of $2,788.80. (R., 55-57).

Thereafter, the Association decided that the payment of Mr. Jones's legal fees and medical expenses was improper and filed this instant lawsuit. The Association claimed that as Mr. Jones was not a party to the Management Agreement, his expenses would not be reimbursed pursuant to the indemnity clause of the Management Agreement.

The Hold Harmless provision of the Management Agreement, which contains the indemnity language, 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. [Emphasis added.]*

(R., 46-47). Subsections A and B apply to specific situations where third party claims are made. Subsection C, as its heading, states, is general and applies to claims made by ACE Management (to include its employee) against the Association.

II. PROCEDURAL HISTORY

This matter began by the filing of the Association's Summons and Complaint on November 14, 2014 (R., 14-16). In its Complaint, the Association alleges that the Mr. Jones was improperly reimbursed 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., 17-21), denying any allegation of wrongdoing and asserting that he had a right to reimbursement by virtue of the indemnity provisions in the Management Agreement (R., 46-47).

The parties filed cross motions for summary judgment. The Association filed its motion for summary judgment on December 22, 2015 (R., 22-23), and Mr. Jones filed his amended motion for summary judgment on January 25, 2016 (R., 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., 8-13). The circuit 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., 59-60), which motion was denied by Form 4 Order filed on October 4, 2016 (R., 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., 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.

The Court of Appeals issued its Unpublished Opinion (No. 2021-UP-167) on May 12, 2021. Mr. Jones timely filed a Petition for Rehearing on May 26, 2021, which was denied by the Court of Appeals on June 11, 2021.

ARGUMENTS

I. MR. JONES IS AN INDEMNITEE UNDER THE MANAGEMENT AGREEMENT.

The core issue in this appeal is whether Mr. Jones is covered by the indemnity clause found in Section VI. of the Management Agreement (R., 46). The Management Agreement is silent on this issue, but the circuit court, affirmed by the Court of Appeals, found that, as Mr. Jones was not named as an indemnitee in the Management Agreement, that he was excluded from being covered as an indemnitee. This was the sole basis of entry of judgment against Mr. Jones. For the following reasons, the Court of Appeals committed an error in ruling that the indemnity provision did not include Mr. Jones.

The rules of construction and interpretation of contracts generally apply to indemnity contracts:

> 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 based on the Management Agreement read in its entirety, it is only logical that the indemnity provision that covers ACE Management implicitly cover Mr. Jones, and that this is what the parties intended.

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). As a corporation, ACE Management only acts through its employees, and its employee, Mr. Jones, *was,* for all intents and purposes, ACE Management; ACE Management could not perform its obligations without Mr. Jones. For instance, the Management Agreement requires that "the Manager shall be available to attend up to five (5) Board Meetings per year ...". (R., 43). Likewise, the Management Agreement requires "the manager shall attend the Annual Meeting each year ...". (R., 44). These provisions of the Management Agreement clearly intend that the services required by the Management Agreement would be performed by a living being, i.e., Mr. Jones. The clear intent found in a review of the entire Management Agreement is that Mr. Jones would be performing the services for ACE Management. This intent may be best exemplified by Mr. Jones's signing the Management Agreement as "ACE Manager" (R., 47).

"The 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 the subject matter of the contract." *McGill v. Moore,* 382 S.C. 179, 186, 672 S.E.2d 571, 575 (2009). The Court of Appeals is correct in that the Association and ACE Manager are the named parties in the Management Agreement. However, this Court has overlooked that Mr. Jones signed the Management Agreement as the ACE Manager and that the intent of the parties was that Mr. Jones would perform the services required by the Management Agreement.

Mr. Jones would argue that the rationale of the Eighth Circuit Court of Appeals in *United States Fidelity and Guaranty Co. v. Housing Authority of the City of Poplar Bluff, Missouri*, 114

F.3d 693 (8th Cir. 1997), *("USF&G")*, is the logical position for this Court to adopt when an indemnity clause is silent as to whom is covered under the clause.

In *USF&G*, an elevator installer installed and maintained two elevators in the Housing Authority's housing complex. The parties entered into a maintenance service contract which included an indemnity provisions in favor of the installer, but it only named the installer. It did include language that employees were covered by the indemnity section of the maintenance service contract. As in this case, the indemnity provision was silent as to whether employees were covered by the indemnity clause.

A woman fell to her death in one of the elevator shafts, and her estate sued the elevator installer and another party. USF&G, the elevator installer's insurance company, tendered the defense of the action to the Housing Authority, but subsequently paid the claims.

As assignee of the elevator installer, USF&G then sued the Housing Authority under the indemnity clause of the maintenance service contract. The Housing Authority, in turn, by way of a third-party complaint, sued an employee of the elevator installer, alleging that it was his negligence that caused the accident.

The indemnity clause at issue in *USF&G*, like this instant appeal, stated that the indemnitee was the corporation and did not include language that agents, servants, and employees were also covered by the indemnity provision. USF&G moved to have the third-party complaint against the employee dismissed on the grounds that the Housing Authority could not sue the installer's employee, even though the employee was not a named as an indemnitee. Ruling that the employee was covered by the relevant indemnity clause, and that the action against him was impermissible because he also was an indemnitee, the district court

granted USF&G's motion for summary judgment in favor of the employee and the Housing Authority appealed.

The indemnity clause at issue in *USF&G*, like this instant appeal, stated that the indemnification was between the elevator installer corporation and the Housing Authority; the agreement did not include language that the elevator company's agents, servants, and employees were covered. The district court held "'[b]ecause a corporation is an artificial entity, it must operate through the acts of its agents . . . . [T]he indemnification agreement served to indemnify [the employee] as agent of the corporation.'" *USF&G Id.* at 698.

On appeal, the Housing Authority argued because the maintenance service agreement did not expressly mention "agents, servants or employees" of the elevator installer that indemnification of others, i.e., the employee, cannot be implied. The Housing Authority argued that "when a party to a contract agrees to indemnify a corporation as an entity, it does not without clear and unequivocal language to that effect, contract to indemnify individual agents, servants and employees whose culpable conduct renders the corporation liable." *USF&G, Id.*, The Housing Authority's ultimate position was that unless the indemnity agreement states that employees are covered by the indemnity agreement, then they are clearly and unambiguously excluded. *Id.* at 698-99.

In dismissing the Housing Authority's arguments, the Eighth Circuit reasoned:

> In the present case, we find it beyond genuine dispute that the indemnity agreement in the maintenance service contract was intended to cover losses or liabilities arising out of the alleged negligence of individual employees of [the elevator installer] in connection with the use or operation of the elevator equipment.

USF&G, *Id.* at 669. Based on this conclusion that the indemnity provision was intended to cover employees of the elevator installer, the Eighth Circuit affirmed that the Housing Authority could not bring an action against a party whom it has indemnified.

The indemnity agreement in *USF&G* did not have to state that it covered agents and employees for it, in fact, to do so. The same logic should be applied to this appeal. Mr. Jones is covered by the indemnity language of the Management Agreement. The rationale found in *USF&G* should be applied in this case and the Court of Appeals' decision should be reversed.

II. MR. JONES PROPERLY PLED AND RAISED A THIRD-PARTY CLAIM AND DID NOT WAIVE THE SAME.

Mr. Jones, as an alternative theory, asserted that he was a third-party beneficiary to the indemnity provisions of the Management Agreement. The Court of Appeals ruled that the issue was not preserved for review because the circuit court did not rule on this issue and that Mr. Jones did not raise the issue in his motion to reconsider. Both of these findings and conclusions are in error.

Mr. Jones properly pled and preserved his claim that he was a third-party beneficiary in his answer to the complaint. In his answer, Mr. Jones alleged 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., 20).

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

In his motion for reconsideration, Mr. Jones alleged:

> 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] (R., 59).

Although Mr. Jones does not use the term "third party beneficiary" in his motion, the import of this ground for reconsideration is that Mr. Jones is seeking third-party beneficiary recognition.

The purpose of pleadings is to place the opposing party on notice as to what the issues are and the pleadings are to be liberally construed. *Shirley's Iron Works v. City of Union*, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013). In *Shirley's Iron Works*, a third-party beneficiary claim was sufficiently pled. Although Mr. Jones, in his answer and motion, did not use the term "third-party beneficiary", the theory of third-party beneficiary was sufficiently conveyed.

CONCLUSION

Petitioner Jerald W. Jones respectfully asks this Honorable Court to grant his Writ of Certiorari and ultimately reverse the holding of the Court of Appeals and remand this case for the reasons discussed above.

Respectfully submitted,

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July 12, 2021

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R. Lawton McIntosh, Circuit Court Judge
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Opinion No. 2021-UP-167 (Filed May 12, 2021)

Captains Harbour and Racquet Club
Homeowners Association, Inc.. . . . . Respondent

v.

Jerald W. Jones . . . . . Petitioner

PROOF OF SERVICE

I certify that I have served a copy of **Jerald W. Jones's Petition for Writ of Certiorari, Joint Appendix and this Proof of Service** by electronic mail only, addressed to the attorney of record:

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July 12, 2021