COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-16-00098-CV

PHILIP FERRANT — APPELLANT

V.

THE INDEPENDENT ORDER OF FORESTERS — APPELLEE

FROM THE 352ND DISTRICT COURT OF TARRANT COUNTY
TRIAL COURT NO. 352-267026-13

MEMORANDUM OPINION[1]

Appellant Philip Ferrant appeals the trial court's order granting summary judgment for appellee The Independent Order of Foresters (the Foresters). We affirm.

[1]*See* Tex. R. App. P. 47.4.

Background Facts

The Foresters is a fraternal benefit society that, according to its pleadings, is "essentially a member-based insurance organization."[2] Ferrant was one of the Foresters' members.

In a case that the trial court severed from the case at issue in this appeal, the Foresters sued Ferrant, proceeded to a jury trial, received a verdict that established his liability,[3] and obtained a judgment requiring him to pay $52,656.16 plus costs and postjudgment interest. Within that suit, Ferrant filed a counterclaim against the Foresters, seeking a declaratory judgment[4] that the following provision of the Foresters' constitution required the Foresters to indemnify him of all costs, charges, and expenses reasonably incurred by him in defending the suit:

> Foresters will indemnify any present or former director, officer, or employee of Foresters or any of its subsidiaries, and his or her heirs

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[2]The Foresters' constitution states in part, "As a Fraternal Benefit Society, [the Foresters] provides family financial products and services to its members; strives to make its members' communities better places; and gives its members opportunities for personal development, social interaction, and voluntary service to others. Foresters operates within the framework of members helping members."

[3]The Foresters asserted several claims against appellant, including fraud and breach of fiduciary duty. In its motion for summary judgment filed in this case, the Foresters alleged that Ferrant "created a scheme to misappropriate money by taking advantage of [the] Foresters' name, the Foresters' . . . not-for-profit tax ID, and [the] Foresters[']status as a not-for-profit fraternal benefit society. This is what the [original lawsuit] was all about."

[4]*See* Tex. Civ. Prac. & Rem. Code Ann. §§ 37.001–.011 (West 2015).

> and legal representatives, against all reasonably incurred costs, charges, and expenses, if the present or former director, officer, or employee is substantially successful in defending a civil, criminal, administrative, or investigative proceeding *to which he or she was made a party by reason of his or her position as director, officer, or employee.* [Emphasis added.]

The trial court severed the counterclaim into this case.

After the severance, in one document, the Foresters filed a combined traditional and no-evidence motion for summary judgment against Ferrant's counterclaim. The Foresters raised the following grounds: (1) there is no evidence of an enforceable contract between Ferrant and the Foresters because the Foresters' constitution does not qualify as a contract; (2) there is no evidence that Ferrant satisfied the language of the indemnity provision because, in part, he was not made a party to the suit "by reason of his position" and was not substantially successful in the suit; (3) Ferrant has no evidence of damages; and (4) section 885.256 of the insurance code[5] precludes indemnification because a jury found Ferrant liable for breaching his duties to the Foresters.

Ferrant responded to the Foresters' summary judgment motion. He asked the trial court to deny the motion because he was once an officer of the Foresters and was sued in that capacity, he was "substantially successful" in the original suit because the Foresters had obtained far less damages than it had sought, an insurance policy served as a valid contract between him and the Foresters, he proved damages because he had incurred $206,498.55 in attorney's fees while

[5]*See* Tex. Ins. Code Ann. § 885.256 (West 2009).

defending against the original suit, and section 885.256 did not apply. Ferrant attached evidence to his response, including his own affidavit in which he stated in part,

> a) I was an officer of the . . . Foresters;
>
> b) I was sued in [my] capacity as an officer of [the] Foresters;
>
> c) I was sued for over a million dollars, plus $3 million in punitive damages;
>
> d) I was "substantially successful" in that I defeated most of their claims and was only found liable for less than 5% of the claims;
>
> e) I have incurred [$206,498.55] in attorney fees from [one attorney] and at least another $20,000 from [another attorney] defending myself in the lawsuit.
>
> f) The actual life insurance policy I got is the contract.

The Foresters replied to Ferrant's response and objected to the admission of his summary judgment evidence. The trial court overruled all but one of the Foresters' objections to Ferrant's summary judgment evidence.[6] But the court granted the Foresters' summary judgment motion and ordered that Ferrant take nothing. The court did not specify the grounds it relied on to grant the motion. Ferrant brought this appeal.

[6]The court sustained one objection to an affidavit signed by Ferrant's attorney concerning attorney's fees.

The Foresters' Entitlement to Summary Judgment

In his only issue, Ferrant contends that the trial court erred by granting summary judgment for any of the independent grounds set forth in the Foresters' motion. After an adequate time for discovery, the party without the burden of proof may move for summary judgment on the ground that there is no evidence to support an essential element of the nonmovant's claim.[7] Tex. R. Civ. P. 166a(i); *see also* Tex. R. Civ. P. 166a(b) (stating that a party "against whom a . . . declaratory judgment is sought may . . . move with or without supporting affidavits for summary judgment"). The trial court must grant the motion unless the nonmovant produces summary judgment evidence that raises a genuine issue of material fact. *See* Tex. R. Civ. P. 166a(i); *Hamilton v. Wilson*, 249 S.W.3d 425, 426 (Tex. 2008).

When reviewing a no-evidence summary judgment, we examine the entire record in the light most favorable to the nonmovant, indulging every reasonable inference and resolving any doubts against the motion. *Sudan v. Sudan*, 199 S.W.3d 291, 292 (Tex. 2006). If the nonmovant brings forward more than a scintilla of probative evidence that raises a genuine issue of material fact, then a no-evidence summary judgment is not proper. *Smith v. O'Donnell*, 288 S.W.3d 417, 424 (Tex. 2009); *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 751 (Tex.

[7]As explained below, we conclude that the trial court did not err by granting summary judgment for the Foresters on a no-evidence ground. Thus, we do not include a discussion of the standards for granting a traditional motion for summary judgment.

2003), *cert. denied*, 541 U.S. 1030 (2004). Because the trial court did not specify grounds upon which it granted the Foresters' summary judgment motion, we must affirm the summary judgment if any ground was meritorious. *Star-Telegram, Inc. v. Doe*, 915 S.W.2d 471, 473 (Tex. 1995); *Little v. Delta Steel, Inc.*, 409 S.W.3d 704, 710 (Tex. App.—Fort Worth 2013, no pet.).

In his counterclaim, Ferrant pled that he was entitled to a judgment declaring that the Foresters had to indemnify him under the provision of its constitution quoted above. In its motion for summary judgment, the Foresters contended, among many other arguments, that Ferrant had no evidence that, as required by the constitutional provision, he "was made a party [to the suit that the Foresters filed against him] *by reason of his . . . position as a director, officer, or employee*." [Emphasis added.] In response, Ferrant argued that he was "sued in his capacity as an officer of [the Foresters]." He also filed an affidavit stating the same. The Foresters' reply to Ferrant's response stated,

> The pleadings in the 2010 Lawsuit make clear that he was not made a party to that lawsuit *by reason of his position* as a director, officer, or employee. To the contrary, he was a party to the 2010 Lawsuit because of his *actions as an individual*. His conclusory assertion that he was made a party because he was an officer is unavailing and should not be considered. [Emphasis added.]

On appeal, Ferrant contends that he satisfied the "by reason of" language in the constitutional provision, stating that the Foresters' pleading in the original suit, "with its allegation and a cause of action founded explicitly on Ferrant's officer status, constitutes more than a scintilla of evidence that Ferrant was made

a party by reason of being a Foresters officer." In response, the Foresters contends in this court, in part, that Ferrant's

> wrongful acts fell outside the scope of permissible officer conduct. It makes no sense to suggest that Ferrant was made party to the prior suit by reason of his local Branch officer position—and thus, entitled to indemnity from Foresters—when the suit stemmed from Ferrant's own unlawful conduct designed to injure Foresters and enrich himself. In short, Ferrant's reading of the indemnity provision yields absurd results.

We agree with the Foresters' contention that neither Ferrant's status as an officer of the Foresters nor evidence that the Foresters sued him in that capacity was sufficient to satisfy the "by reason of" language of the indemnity provision.

As we have recently explained,

> Indemnity provisions are construed under the normal rules of contract construction, with the primary goal of determining the intent of the parties. *Assoc. Indem. Corp. v. CAT Contracting, Inc.*, 964 S.W.2d 276, 284 (Tex. 1998). In that endeavor, the objective, not subjective, intent of the parties controls, and the instrument alone is generally deemed to express that intent. *Sun Oil Co. v. Madeley*, 626 S.W.2d 726, 731 (Tex. 1981). Because indemnity provisions are construed under the normal rules of contract construction, if courts can give an indemnity provision a definite or certain legal meaning, it is unambiguous and can be construed as a matter of law. *See Classic C Homes, Inc. v. Homeowners Mgmt. Enters., Inc.*, No. 02-14-00243-CV, 2015 WL 5461517, at *3 (Tex. App.—Fort Worth Sept. 17, 2015, no pet.) (mem. op.) . . . .
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> Further, "We construe contracts 'from a utilitarian standpoint bearing in mind the particular business activity sought to be served' and 'will avoid when possible and proper a construction which is unreasonable, inequitable, and oppressive.'" *Frost Nat'l Bank v. L & F Distrib., Ltd.*, 165 S.W.3d 310, 312 (Tex. 2005) . . . .

Tetra Tech, Inc. v. NSAA Invs. Grp., No. 02-15-00297-CV, 2016 WL 3364876, at *2 (Tex. App.—Fort Worth June 16, 2016, no pet.) (mem. op.). "We give terms in

an indemnity agreement their plain, ordinary, and generally accepted meaning unless the agreement indicates otherwise." *Classic C Homes*, 2015 WL 5461517, at *3; *see Grant Prideco, Inc. v. Empeiria Conner L.L.C.*, 463 S.W.3d 157, 160 (Tex. App.—Houston [14th Dist.] 2015, no pet.) (stating the same).

"By reason of" means "because of" or "for the sake of." *See Southland Life Ins. Co. v. Slagle*, 346 S.W.2d 627, 628 (Tex. Civ. App.—Waco 1961, writ ref'd) (linking the meaning of "on account of" together with "the reason for," "attributable to," "the ground or explanation for," "by reason of," "because of," and "for the sake of"); *see also* Webster's Third New International Dictionary 194 (2002) (defining "because of" as meaning "by reason of" or "on account of"). Thus, we must determine whether the Foresters sued Ferrant because of, for the sake of, or on account of—all ways of saying "by reason of"—his position as a director or officer.

Ferrant filed the Foresters' pleading against him in the original suit as summary judgment evidence. In that pleading, the Foresters alleged that Ferrant was an officer "of the Branch Longhorn" (one of "dozens of [the Foresters'] Branches across the United States"), but the Foresters did not base its suit against him upon the fact of that position or upon acts he committed that were consistent with the execution of that position's duties.

Instead, the Foresters alleged that Ferrant was liable under several theories expressly because he enriched himself by acting beyond his authority as an officer and contrary to the charitable, community-enriching purposes of the

organization. For example, the Foresters alleged, "When [Ferrant] accomplished a charitable distribution, it was done to organizations that [he] controlled and/or were affiliated. These organizations then failed to use the distributions for charitable purposes, but rather improperly used the funds to the benefit of [Ferrant] and/or [his] associates." The Foresters pled that Ferrant was liable for his "unlawful and unauthorized conduct" and for acting "in a manner inconsistent with the manner in which [the Foresters authorized] the use and disbursement of funds for benevolent purposes." The jury found that Ferrant obtained money that belonged to the Foresters.

We cannot conclude that Ferrant raised a genuine issue of material fact regarding whether the Foresters made him a party to the original suit "by reason of" his position because he did not provide more than a scintilla of evidence establishing that the Foresters based the suit on the status of his position or on acts executed consistent with the position. Rather, the evidence establishes that the Foresters sued Ferrant because of his self-enriching acts that were outside the scope of (and contrary to) his position. We cannot adopt Ferrant's interpretation of the indemnity provision, which would authorize indemnification of a director or officer for acts that a jury has determined to be unlawful and contrary to the interests of the organization. *See Jose Carreras, M.D., P.A. v. Marroquin*, 339 S.W.3d 68, 73 (Tex. 2011) (stating that we interpret writings in a way that avoids absurd results); *Markel Ins. Co. v. Muzyka*, 293 S.W.3d 380, 387 (Tex. App.—Fort Worth 2009, no pet.) ("We will not construe contracts to

produce an absurd result when a reasonable alternative construction exists."); *see also Banco Indus. De Venezuela C.A., Miami Agency v. De Saad*, 68 So. 3d 895, 899–900 (Fla. 2011) (holding that under a statute that could have entitled a corporate officer to indemnification for actions brought "by reason of the fact that . . . she . . . was" an officer, the officer was not entitled to indemnification because her conduct "was not required by her position . . . and was, in fact, contrary to corporate policy"); *Minami Int'l Corp. v. Clark*, No. 88 Civ. 2135, 1992 WL 58838, at *1 (S.D.N.Y. Mar. 16, 1992) (holding that a statute that entitled a corporate officer to indemnification for actions brought "by reason of the fact that [the officer] . . . was [an] . . . officer" was "not designed to provide indemnification for officers . . . who [were] sued for their own wrongful conduct and [for] breach of their contractual obligations to the corporation").

We conclude that no summary judgment evidence supports the Foresters' constitutional indemnification requirement that Ferrant was made a party to the original suit "by reason of his . . . position as director, officer, or employee." Therefore, we conclude that the trial court did not err by granting summary judgment against Ferrant's claim for a declaratory judgment that he was entitled to indemnification.[8] *See* Tex. R. Civ. P. 166a(i); *Hamilton*, 249 S.W.3d at 426. We overrule his sole issue.

[8]Because this ground alone supports the trial court's summary judgment decision, we need not analyze the other grounds upon which the Foresters sought summary judgment. *See* Tex. R. App. P. 47.1; *Maddox v. Vantage*

Conclusion

Having overruled Ferrant's only issue, we affirm the trial court's judgment in favor of the Foresters.

/s/ Terrie Livingston

TERRIE LIVINGSTON
CHIEF JUSTICE

PANEL: LIVINGSTON, C.J.; MEIER and GABRIEL, JJ.

DELIVERED: January 19, 2017

Energy, LLC, 361 S.W.3d 752, 756 n.6 (Tex. App.—Fort Worth 2012, pet. denied).