

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court building in the City of Richmond on Thursday the 24th day of October, 2019.

PRESENT: All the Justices.

City of Richmond, Appellant,

against Record No. 181226
Circuit Court No. CL18-2151

New Irish, LLC, Appellee.
d/b/a Sine Irish Pub,

Upon an appeal from a judgment rendered by the Circuit Court of the City of Richmond.

The City of Richmond (the “City”) appeals from a judgment of the circuit court sustaining a demurrer and dismissing its action to enforce an indemnification agreement with New Irish, LLC, d/b/a Sine Irish Pub (“Sine”). Upon consideration of the record, briefs, and argument of counsel, we conclude that no claim was made against the City, and thus, the indemnity provision of the agreement was not triggered. Therefore, the Court is of the opinion that the judgment of the circuit court should be affirmed.

I.

The City of Richmond Police Department (the “RPD”) and Sine entered into an “Employment Agreement for Extra-Duty Police Services” (the “Agreement”). The Agreement contained the following provision addressing liability arising from the extra-duty employment of RPD employees:

LIABILITY

13. Employee(s) will be covered by the city of Richmond Workman’s Compensation Insurance only if performing a law enforcement related function at time of the injury.
14. The employer will save harmless the city of Richmond from any and all claims or liabilities resulting from employment, and indemnify the City for any loss due to any injury of its employee.

Although the Agreement defines “Employer” as Sine, it does not define “employee” or “employment.”

In May 2015, Jason Marek (“Marek”), a Sine customer, filed suit against Sine and Eric Allen (“Allen”), an RPD officer. Marek alleged that he was injured when Allen ejected him from Sine in May 2013. The complaint asserted a claim of negligence against Sine, and claims of battery, false imprisonment, and malicious prosecution against both Sine and Allen in his individual capacity. No claims were made against the City and it was not a named party. Marek further alleged that Allen was “off-duty and acting as an agent, servant, or employee” of Sine at the time of the incident. The record does not indicate the outcome of the underlying claims against Sine. However, a jury returned a defense verdict in the claims against Allen.

On April 26, 2018, the City filed a complaint against Sine seeking indemnification for the legal fees and expenses that it incurred defending Allen in the Marek proceedings. The City stated that it had retained outside counsel to represent Allen and had incurred \$131,977.07 in legal fees and expenses. During the underlying Marek proceedings, the City sent two letters to Sine demanding indemnification pursuant to Paragraph 14 of the Agreement. Each time, Sine refused to indemnify the City.

On May 15, 2018, Sine filed an answer and demurrer to the City’s complaint. Sine contended that because no claims were made against the City and the City was not a named party in the underlying proceedings, the legal fees and expenses incurred by the City were not covered by the indemnity provision. In the alternative, Sine argued that even if the City was covered by the indemnification provision, Allen’s acts were intentional torts. As such, they occurred outside the scope of his employment with Sine. Sine also contended that even if Allen was acting within the scope of his employment, the City did not have a duty to defend him.

On June 21, 2018, the circuit court sustained Sine’s demurrer and dismissed the City’s complaint with prejudice. The circuit court stated “[i]f they . . . wanted to be indemnified on any defense that they had to do for the policeman, they could have said that.” The circuit court went on to say,

if you look at the liability section [of the Agreement], to me it’s crystal clear they were talking about injury to the police officer and possible workman compensation issues. . . . [I]t’s clear they say in there the policeman is an employee of the City. It’s clear . . . the policeman [is at Sine] for law enforcement activity

The circuit court ruled that “the City is obligated to defend [Allen] because he is there as a hired law enforcement officer on extra duty. . . . [T]his is a policeman, you get to use the policeman’s badge, gun, arrest powers, but you have to pay for it and all he is going to do is what he would do as [a] policeman anyway.”

The City filed a motion to reconsider on July 3, 2018. The City argued that Allen could have been acting in a “dual capacity” as an employee for both Sine and the RPD, therefore not precluding indemnification. Alternatively, the City argued that Allen was a Sine employee at the time of the incident. The circuit court denied the motion to reconsider and entered final judgment for Sine.

II.

The dispositive threshold issue in this case is whether the City incurred any liability resulting from employment under the Agreement.

“[W]e construe [a contract] as written, without adding terms that were not included by the parties. When the terms in a contract are clear and unambiguous, the contract is construed according to its plain meaning. Words that the parties used are normally given their usual, ordinary, and popular meaning.”

RECP IV WG Land Inv’rs LLC v. Capital One Bank (USA), N.A., 295 Va. 268, 283 (2018) (second alteration in original) (quoting *City of Chesapeake v. Dominion SecurityPlus Self Storage, L.L.C.*, 291 Va. 327, 335 (2016)).

The indemnity clause in the Agreement at issue states that “[Sine] will save harmless the city of Richmond from any and all claims or liabilities resulting from employment.” However, a “claim” was never made against the City of Richmond. Marek’s claims only named Allen in his individual capacity.

Richmond City Code § 2-57(b) requires the City to “represent, without charge, all City officers . . . with respect to any claim or cause of action arising from the conduct of such officers . . . in the discharge of their official duties.” If a conflict of interest arises, “the City Attorney shall be authorized and shall have sole discretion to retain independent counsel” to represent the officer. Richmond City Code § 2-57(c). Therefore, the City only had a legal obligation to defend Allen for claims or causes of action that arose from the discharge of his official duties.

In this case, the Marek Complaint alleged specifically that Allen was “off-duty and acting as an agent, servant or employee of the defendant, Sine.” Nonetheless, the Richmond City Attorney appointed outside counsel to defend Allen and paid \$131,977.07 in fees and expenses. While it may have been morally commendable to voluntarily provide Allen’s defense, the expenses the City incurred did not constitute a liability that triggered the indemnification provision of the Agreement with Sine. As the drafter of the Agreement, the City could have included indemnification for claims against City employees if it had intended to be reimbursed for such claims. In the absence of a provision requiring such indemnification, Sine was under no obligation to indemnify the City for the expenses incurred in Allen’s defense.

For the above-stated reasons, the Court affirms the decision of the circuit court under the right result for a different reason doctrine. “An appellate court may properly affirm a judgment appealed from where the court from which the appeal was taken reached the correct result but assigned a different reason for its holding.” *Collins v. Commonwealth*, 292 Va. 486, 505 (2016) (quoting *Rives v. Commonwealth*, 284 Va. 1, 2 (2012)). Even though the circuit court improperly held that the City was obligated to defend Allen, its conclusion that Sine was not responsible for reimbursing the City for Allen’s defense was the proper conclusion.

Because the Court finds that the City did not incur any liability in this case, any additional assignments of error need not be addressed.

This order shall be certified to the Circuit Court of the City of Richmond.

JUSTICE GOODWYN, joined by JUSTICE POWELL and JUSTICE MCCULLOUGH, dissenting.

I respectfully dissent. I disagree with the majority’s conclusion that the City was not statutorily liable, pursuant to Richmond City Code § 2-57(b), to provide its police officer legal representation, without charge.

As noted in the order, the Richmond Police Department (the “RPD”) and Sine Irish Pub (“Sine”) entered into an “Employment Agreement for Extra-Duty Police Services” (the “Agreement”). The Agreement requires Sine to “save harmless the city of Richmond from any and all claims *or liabilities*” arising from the extra-duty employment of RPD employees. (Emphasis added.)

RPD Officer Eric Allen was providing extra-duty police services for Sine pursuant to the Agreement when he initiated the arrest of David Marek, a Sine customer, after Marek had been ejected from Sine's building. Marek subsequently sued Officer Allen in a civil action arising from that arrest and Marek's subsequent criminal prosecution.

Richmond City Code § 2-57(b) requires the City to "represent, without charge, all City officers . . . with respect to any claim or cause of action arising from the conduct of such officers . . . in the discharge of their official duties" and the ordinance authorizes the City Attorney to retain independent counsel for that purpose. Richmond City Code § 2-57(b).

As stated by the circuit court judge in this case, "[I]t's clear they say in there the policeman is an employee of the City. It's clear . . . the policeman [is at Sine] for law enforcement activity . . ." "[T]his is a policeman, you get to use the policeman's badge, gun, arrest powers, but you have to pay for it and all he is going to do is what he would do as [a] policeman anyway."

Officer Allen asked for legal representation, pursuant to Richmond City Code § 2-57(b). It is not disputed by the City or the officer that the officer was discharging his official duties when he initiated the arrest of Marek. Pursuant to its obligation under Richmond City Code § 2-57(b), the City was required to, and did, hire and pay counsel to represent Officer Allen in the civil action filed by Marek.

Liability is defined as "[t]he quality, state, or condition of being legally obligated or accountable . . . to another." Black's Law Dictionary 1097 (11th ed. 2019). A statutory liability is created by a statute. *See id.* at 1099. As noted by the circuit court, the City was statutorily liable to provide and pay for an attorney to represent its police officer in the action which was brought against him by Marek. The cost of doing so was a statutory liability incurred by the City as a result of Officer Allen providing Sine extra-duty police services pursuant to the Agreement.

Under the terms of the indemnification agreement, it is irrelevant that no claim was brought against the City. Pursuant to the plain language of Richmond City Code § 2-57(b), the allegations in Marek's complaint against Officer Allen are not dispositive of the City's statutory liability to provide its officer legal representation, without charge.

The Agreement states that the City is to be held harmless from claims *or* liabilities. The City claims it was liable to pay for Officer Allen's legal representation. The City's statutory liability is dependent upon whether the cause of action against the officer arose from conduct in

the discharge of the police officer's official duties. The City and Officer Allen claim it clearly did. No dispute concerning that point was discerned by the circuit court, but to the extent there is a factual question regarding whether the cause of action arose from conduct in discharge of the officer's official duties, the issue could not have been properly decided on demurrer.

Accordingly, I would reverse the judgment of the circuit court.

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Teste:



Clerk