

Circuit Court for Baltimore County  
Case No. C-03-CV-19-002440

UNREPORTED  
IN THE COURT OF SPECIAL APPEALS  
OF MARYLAND

No. 0868

September Term, 2020

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JAMES D. MILLER

v.

BARRETT BUSINESS SERVICES, INC

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Nazarian,  
Reed,  
Shaw,

JJ.

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Opinion by Nazarian, J.

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Filed: February 11, 2022

\* This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

This case concerns an odyssey of litigation for the corporate officers and directors of Barrett Business Services, Inc. (“BBSI”). In this appeal, we interpret the scope of an indemnification agreement (“Indemnification Agreement”) between James D. Miller and BBSI in which BBSI agreed to indemnify and advance to Mr. Miller his legal expenses in connection with two lawsuits, a shareholder derivative suit in the Circuit Court for Baltimore City and a securities class action in federal court in Washington State. The Baltimore case was dismissed for lack of personal jurisdiction and the Washington case settled.

In 2019, a new shareholder derivative action was filed in federal court in Washington, where Mr. Miller lives, and he sought advancement of his legal expenses in that case as well. BBSI refused to advance the additional expenses, asserting that the Indemnification Agreement covered only the first two actions, and Mr. Miller filed suit in the Circuit Court for Baltimore County. The parties entered a stipulation of undisputed facts and filed cross-motions for summary judgment. The court granted summary judgment in favor of BBSI, Mr. Miller appeals, and we affirm.

## **I. BACKGROUND**

From May 2008 to March 2016, Mr. Miller served as the Chief Financial Officer of BBSI, a Maryland corporation with its primary place of business in the State of Washington. BBSI provides business management services to small and mid-sized companies that include, among other things, workers’ compensation coverage and claims-management services. After a multi-year process of reviewing its workers compensation

claims-handling and claims-reserve practices, BBSI announced on October 28, 2014 that it would increase its workers compensation reserves by \$80 million. After this announcement, the price of BBSI’s common stock fell from over \$44 per share to around \$18 per share.

Beginning on November 6, 2014, private plaintiffs filed class action lawsuits against BBSI under the Securities Exchange Act, and those actions were consolidated in the United States District Court for the Western District of Washington under the caption *In re Barrett Business Services Securities Litigation*, Case No. C14-cv-5884 (the “2014 Washington case”). On June 17, 2015, Daniel Salinas, a BBSI shareholder, filed a derivative lawsuit in the Circuit Court for Baltimore City, *Daniel Salinas v. Barrett Business Services, Inc. et al.*, No. 24-C-25-003178 (the “2015 Maryland case”), alleging that certain BBSI executive officers, including Mr. Miller, and members of BBSI’s Board of Directors breached their fiduciary duties, were enriched unjustly, and engaged in violations of law that caused BBSI to sustain damages.

On September 8, 2015, the parties entered into the Indemnification Agreement. The preamble to the Indemnification Agreement provides that it applies to certain board members and covers only the 2015 Maryland case and the 2014 Washington case:

**This Agreement applies only to Michael Elich, James Miller, and Gregory Vaughn in (1) *Salinas v. Barrett Business Services, Inc., et al.*, Circuit Court for Baltimore City, Maryland, Case No. 24-C-15-003178 OT (the “Derivative Litigation”); and (2) to Michael Elich and James Miller in *In re Barrett Business Services Securities Litigation*, United States District Court for the Western District of Washington, Case No. C14-5884 BHS (the**

“Securities Litigation”).

(Emphasis in original.) Section 1(g) of the Indemnification Agreement defines “Proceeding” to mean “the Derivative Litigation and/or the Securities Litigation,” as defined in the preamble. Section 8 covers advancement by BBSI of litigation expenses:

Advance of Expenses for Indemnitee. If, by reason of Indemnitee’s Corporate Status, Indemnitee is, or is threatened to be, made a part to a Proceeding, the Company shall, without requiring a preliminary determination of Indemnitee’s ultimate entitlement to indemnification hereunder, advance all Expenses incurred by or on behalf of Indemnitee in connection with such Proceeding. The Company shall make such advance or advances within ten days after the receipt by the Company of a statement or statements requesting such advance or advances from time to time . . . .

And Section 12(b) provides that if there is a question of entitlement to advancement under the Indemnification Agreement, there will be a presumption in favor of Mr. Miller:

In any judicial proceeding or arbitration commenced pursuant to this Section 12, Indemnitee shall be presumed to be entitled to indemnification or advancement of Expenses . . . under this Agreement and the Company shall have the burden of proving that Indemnitee is not entitled to indemnification or advancement of Expenses . . . .

On November 5, 2015, Mr. Miller retained Janet Hoffman & Associates LLC as his individual counsel, and on January 21, 2016, BBSI, Mr. Miller, and Janet Hoffman & Associates LLC executed a retainer agreement (“Retainer Agreement”). The Retainer Agreement includes BBSI’s agreement to pay all of the fees and expenses related to the firm’s representation of Mr. Miller in the 2014 Washington case and the 2015 Maryland case, including the amount of the initial retainer fee:

The undersigned, James D. Miller (“Client”), effective

November 5, 2015, hereby retains Janet Hoffman & Associates LLC to represent him in connection with the Security & Exchange Commission (SEC) investigation of BBSI, including the BBSI Audit Committee’s internal investigation, and in the following civil matters: *In Re Barret Business Services Securities Litigation* and *Daniel Salinas, Derivatively on behalf of Nominal Defendant, Barrett Business Services, inc. v. Barrett Business Services, Inc., et al.* (all together the “Matters”). The undersigned, Barrett Business Services, Inc. (BBSI) hereby agrees, in accordance with the Indemnification Agreements dated September 8, 2015 and November 19, 2015 executed by Client and BBSI, to directly pay or to reimburse Client for all fees and expenses resulting from Janet Hoffman & Associates LLC’s representation of Client in the Matters.

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For the present phase of the representation, Janet Hoffman & Associates LLC will represent Client in the Matters with a view toward protecting Client’s rights in criminal, civil and regulatory capacities. Client and BBSI agree to pay Janet Hoffman & Associates LLC \$25,000 as a retainer. Janet Hoffman & Associates LLC will, however, require a larger retainer should an SEC complaint and/or criminal charges be filed against Client in the future.

On February 22, 2017, the United States District Court for the Western District of Washington granted final approval of a settlement and entered final judgment in the 2014 Washington case. On December 31, 2018, the Circuit Court for Baltimore City dismissed the 2015 Maryland case, finding that the court lacked personal jurisdiction over the individual defendants. Mr. Salinas did not appeal the decision or seek to amend his Complaint.

This case arises in connection with what happened next. On May 7, 2019, Mr. Salinas filed a new action in the United States District Court for the Western District of Washington, *Salinas v. Miller*, No. 3:19-cv-05383 (the “2019 Washington case”), based in

large part on facts also alleged in the 2015 Maryland case complaint. On May 20, 2019, Mr. Miller’s counsel sought advancement of legal fees from BBSI under the Indemnification Agreement for the 2019 Washington case. BBSI responded that the 2019 Washington case was not covered by the Indemnification Agreement and that it would not advance funds.

On July 17, 2019, Mr. Miller filed suit in the Circuit Court for Baltimore County. His complaint alleged anticipatory breach of contract, specific enforcement, declaratory judgment, and injunctive relief, and sought to compel BBSI to advance his expenses. Based on a stipulation of undisputed facts, the parties filed cross-motions for summary judgment. Mr. Miller contends that the obligation to advance expenses defined in the Indemnification Agreement includes the 2019 Washington case. BBSI argues that the Indemnification Agreement and the Retainer Agreement extend only to the 2015 Maryland case and the 2014 Washington case.

After a hearing on September 21, 2020, the circuit court granted BBSI’s motion for summary judgment, entered judgment in favor of BBSI, and denied Mr. Miller’s motion for summary judgment. On September 29, 2020, the circuit court issued an Order stating that “[s]tarting with the preamble, the indemnification agreement is plain, unambiguous and specific with respect to its scope.” It held that the Indemnification Agreement extends only to the two lawsuits identified in the preamble by case caption, court, and case number, *i.e.*, the 2014 Washington case and the 2015 Maryland case. The court found further that neither the presumption in favor of advancement contained in the Indemnification

Agreement nor the reference to “matters” in the Retainer Agreement created “an open-ended indemnification and advancement obligation” beyond the “clear and unambiguous terms of the agreement.”

This appeal followed. We supply additional facts as necessary below.

## II. DISCUSSION

Although the parties differ somewhat in their formulations of the questions presented,<sup>1</sup> this case presents us with two straightforward questions of contract

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<sup>1</sup> Mr. Miller phrased his Questions Presented as follows:

1. Did the Circuit Court err in its holding that the Indemnification Agreement between Mr. Miller and BBSI does not require advancement of his expenses in connection with a subsequent stockholder derivative action filed against him in the United States District Court for the Western District of Washington notwithstanding that the allegations in that case are virtually identical to those in the stockholder derivative action filed in the Circuit Court for Baltimore City for which BBSI advanced expenses that was dismissed for lack of personal jurisdiction?
2. Did the Circuit Court err in its failure to consider the Retainer Agreement as an independent basis for advancement of Mr. Miller’s expenses in connection with the stockholder derivative action filed against him in the United States District Court for the Western District of Washington?

BBSI phrased its Questions Presented as follows:

1. Did the Circuit Court correctly hold that the plain, unambiguous, and specific language of the Indemnification Agreement between BBSI and Miller limited the scope of BBSI’s obligations to advance expenses to Miller to the two actions named therein and did not extend to a different lawsuit filed nearly four years later in a different court?
2. Did the Circuit Court correctly conclude that the Retainer Agreement between Miller’s counsel and BBSI did

interpretation: *first*, whether the circuit court found correctly that BBSI’s obligation to advance costs is limited to the two actions identified by case caption, court, and case number in the Indemnification Agreement, and *second*, whether the language of the Retainer Agreement expands BBSI’s obligation of advancement beyond the scope of the Indemnification Agreement.

Whether the circuit court’s order entering summary judgment was proper is a question of law subject to *de novo* review on appeal. *Myers v. Kayhoe*, 391 Md. 188, 203 (2006). Summary judgment is appropriate when “there is no genuine dispute as to any material fact” and “the party in whose favor judgment is entered is entitled to judgment as a matter of law.” Md. Rule 2-501(f). We review an appeal of an order granting summary judgment “by considering the record in the light most favorable to the non-moving party.” *Long Green Valley Ass’n v. Bellevalle Farms, Inc.*, 432 Md. 292, 311 (2013) (citations omitted). In matters of contract interpretation, the Court of Appeals has “consistently held that ‘the interpretation of a contract, including the question of whether the language of a contract is ambiguous, is a question of law subject to *de novo* review.’” *Credible Behav. Health, Inc. v. Johnson*, 466 Md. 380, 392 (2019) (*quoting Myers*, 391 Md. at 198).

**A. The Circuit Court Did Not Err In Granting Summary Judgment In Favor Of BBSI Because The Operative Language Of The Indemnification Agreement Is Unambiguous And Limits The Scope Of The Legal Obligation.**

Mr. Miller argues that summary judgment was inappropriate because, he asserts, the

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not expand BBSI’s obligation to advance legal expenses to include the 2019 Washington Action?



entire language of the Indemnification Agreement, when construed properly, creates an obligation of advancement broad enough to include the 2019 Washington case. BBSI counters that the language of the Indemnification agreement is plain, unambiguous, specific, and limited to the 2014 Washington case and 2015 Maryland case. The circuit court agreed with BBSI's reading and so do we.

“Maryland courts subscribe to the objective theory of contract interpretation.” *Credible Behav. Health*, 466 Md. at 393 (citing *Myers*, 391 Md. at 198). “Under the objective view, a written contract is ambiguous if, when read by a reasonably prudent person, it is susceptible of more than one meaning.” *Calomiris v. Woods*, 353 Md. 425, 436 (1999). “[W]e interpret a contract’s plain language in accord with its ‘ordinary and accepted meaning[.]’” *Credible Behav. Health*, 466 Md. at 394 (quoting *Ocean Petroleum, Co., Inc. v. Yanek*, 416 Md. 74, 88 (2010)). “[W]hen the language of the contract is plain and unambiguous there is no room for construction, and a court must presume that the parties meant what they expressed.” *Calomiris*, 353 Md. at 436 (quoting *General Motors Acceptance Corp. v. Daniels*, 303 Md. 254, 261 (1985)). “Maryland Courts have acknowledged that when determining whether a contract is ambiguous, the mere fact that the parties disagree as to the meaning does not necessarily render it ambiguous.” *Sierra Club v. Dominion Cove Point LNG, L.P.*, 216 Md. App. 322, 334 (2014).

In this case, we begin with the language of the Indemnification Agreement’s preamble. In identifying the litigation to which the Indemnification Agreement applies, the preamble specifies two actions by case caption, court, and case number: *first*, the 2015

Maryland case refers to the “Derivative Litigation,” and *second*, the 2014 Washington case refers to the “Securities Litigation.” *Next*, Section 1(g) provides that for the purposes of the Indemnification Agreement “‘Proceeding’ means the Derivative Litigation and/or the Securities Litigation,” terms that are defined in the preamble. The preamble specifies that the agreement “applies only to” those named and defined actions. The plain meaning of the language of the preamble to the Indemnification Agreement is not ambiguous. It limits the scope of the Indemnification Agreement only to those two actions named by case caption, court, and case number.

Against this unambiguous scope, Mr. Miller points to two other provisions of the contract where the scope seems at first blush not to be so limited. He points first to Section 8 on “Advance of Expenses for Indemnitee,” which requires BBSI to advance expenses, without first determining whether he’s entitled to indemnification, if he’s made or threatened to be made a party to a Proceeding:

If, by reason of Indemnitee’s Corporate Status, Indemnitee is, or is threatened to be, made a party to a Proceeding, the Company shall, without requiring a preliminary determination of Indemnitee’s ultimate entitlement to indemnification hereunder, advance all Expenses incurred by or on behalf of Indemnitee in connection with such Proceeding.

Mr. Miller also cites Section 12(b), which flips the usual burden of proof:

In any judicial proceeding or arbitration commenced pursuant to this Section 12, Indemnitee shall be presumed to be entitled to indemnification or advance of Expenses, as the case may be, under this Agreement and the Company shall have the burden of proving that Indemnitee is not entitled to indemnification or advance of expenses, as the case may be.

Mr. Miller contends that the circuit court erred by looking only to the language of the

preamble in defining the scope of the contract’s obligations. He contends that the court failed to look to the entire language of the agreement, rather than merely the opening portion.

When faced with a dispute over contract language, we “attempt to construe contracts as a whole, to interpret their separate provisions harmoniously, so that, if possible, all of them may be given effect.” *Credible Behav. Health*, 466 Md. at 396 (quoting *Walker v. Dep’t of Human Res.*, 379 Md. 407, 421 (2004)). “More specifically, contract interpretation requires that ‘[e]ffect . . . be given to each clause’ to avoid ‘an interpretation which casts out or disregards a meaningful part of the language of the writing unless no other course can be sensibly and reasonably followed.’” *Id.* at 397 (quoting *Clancy v. King*, 405 Md. 541, 557(2008)). Section 8 of the Indemnification Agreement specifies that the obligation to advance expenses shall be discharged without undue delay, and Section 12(b) places the burden of demonstrating that the Indemnitee is not entitled to advancement on BBSI. If we interpret the scope of the Indemnification Agreement as limited by the plain language of the preamble, these provisions describe the mechanics of the advancement obligation and shift the burden of proving lack of entitlement onto BBSI. But those provisions go only as far as the indemnification obligation they modify. Put another way, we can give effect to all of the provisions if we apply the obligation to advance without a determination and the burden of proof to indemnification demands arising in the two cases defined in the preamble.

The converse approach, to read these latter provisions open-endedly and start from

there, doesn't work. Interpreting Sections 8 and 12(b) to impose on BBSI an obligation to advance Mr. Miller's expenses in the 2019 Washington action forces us to disregard the language of the preamble that says the agreement "applies only to" the two cases named by caption, court, and case number. The interpretation that respects the overall scope defined in the preamble is the only reasonable interpretation of this Agreement.

Mr. Miller suggests two other reasons why we nevertheless should construe the obligation of advancement to extend to the 2019 Washington case. His first and most searching argument is that indemnification and advancement law is a specialized area of law in which Maryland courts have sometimes been willing to look to the guidance of Delaware courts. There, Mr. Miller suggests, we will find that policy considerations related to the need to attract and retain capable individuals for corporate service have led the courts to favor a procedure that requires immediate advancement, and he invites us to import this procedure to Maryland. Mr. Miller's counsel, however, confirmed in oral arguments that the BBSI's indemnification and advancement obligation, whatever its scope, lies only in the contractual agreements we interpret here and that there is no independent ground in the law or BBSI's corporate documents for any indemnification obligation. As we previously have held, "we should keep the analysis simple when the language permits: [w]here the instrument includes clear and unambiguous language of the parties' intent, we will not sail into less charted waters to interpret what the parties thought that the agreement meant or intended it to mean." *Newell v. Johns Hopkins Univ.*, 215 Md. App. 217, 236 (2013) (cleaned up). We decline, therefore, to reach beyond the plain and unambiguous language

of the Indemnification Agreement to construe the scope of this obligation.

Closer to home, and more fundamentally, Mr. Miller also urges us to find that the 2019 Washington case is covered by the Indemnification Agreement because it is essentially the same case as the 2015 Maryland case and, accordingly, fits within the scope of the term “Proceeding” defined in the Indemnification Agreement. He asserts that the two actions are based largely on the same set of facts, that the causes of action and allegations are nearly identical, and that the prayers for relief are nearly identical with respect to Mr. Miller. The main difference, he asserts, is that the 2019 Washington case is filed where the court had personal jurisdiction over Mr. Miller, whereas the 2015 Maryland case was dismissed on December 31, 2018 by the court for lack of personal jurisdiction over the individual defendants. The 2019 Washington case is, he contends, a re-filed version of the 2015 Maryland case.

But events in the meantime undermine this contention. In March 2016, BBSI terminated Mr. Miller’s employment as CFO in response to his alleged admission of unsupported accounting practices. In September 2018, the Department of Justice indicted Mr. Miller on multiple counts of securities fraud, making false statements to accountants, making false entries in books and records, and certification of false financial reports. The Securities and Exchange Commission followed quickly with a civil enforcement action. These events, in turn, provide the basis for the additional factual allegations against Mr. Miller in the 2019 Washington case complaint that were not included in the 2015 Maryland case.

Under Maryland’s objective theory of contract interpretation, “the primary goal of contract interpretation is to ascertain the intent of the parties in entering the agreement and to interpret ‘the contract in a manner consistent with [that] intent.’” *Credible Behav. Health, Inc.*, 466 Md. at 393 (quoting *Ocean Petroleum*, 416 Md. at 88). “An inquiry into the intent of the parties, where contractual language is unambiguous, is based on what a reasonable person in the position of the parties would have understood the language to mean and not ‘the subjective intent of the parties at the time of formation.’” *Id.* (quoting *Ocean Petroleum, Co.*, 416 Md. at 86). Here, the question is whether we can infer that a reasonable person in the parties’ position would have intended in 2015 to reach an agreement that is open-ended enough to obligate BBSI to advance costs under circumstances as they might later come to appear, such as four years later at the time of the 2019 Washington case. “Ascertaining the parties’ intentions requires us to consider the plain language of the disputed contractual provisions in context, which includes not only the text of the entire contract but also the contract’s character, purpose, and the facts and circumstances of the parties at the time of execution.” *Id.* at 394 (cleaned up).

Indemnification of corporate officers and directors in legal matters related to their service to the corporation is a process fraught with potential conflict. As one indicator of these perils, the circuit court cited § 2-418(f)(1) of the Corporations & Associations Article, which permits advancement of expenses, but requires both a written affirmation of the standard of conduct for indemnification and a written undertaking for repayment if that standard is not met:

Reasonable expenses incurred by a director who is a party to a proceeding may be paid or reimbursed by the corporation in advance of the final disposition of the proceeding upon receipt by the corporation of:

- (i) A written affirmation by the director of the director's good faith belief that the standard of conduct necessary for indemnification by the corporation as authorized in this section has been met; and
- (ii) A written undertaking by or on behalf of the director to repay the amount if it shall ultimately be determined that the standard of conduct has not been met.

Md. Code (1975, 2014 Repl. Vol.), 2-518(f)(1) of the Corporations Associated Article. The extent of these statutory requirements indicate that reasonable parties would not agree lightly to take on obligations of indemnification and advancement. Given the well-known stakes involved in embarking on such a corporate journey, parties define these obligations carefully and precisely. Indeed, the circuit court observed that BBSI could have provided for indemnification and advancement in “related” or “similar” proceedings, but didn't:

Had the parties intended to expand the scope of BBSI's advancement obligation, they could have provided for advancement in “related” or “similar” proceedings or otherwise defined what, if any, other events may trigger an advancement obligation on the part of BBSI in the event of a future lawsuit. They did not though.

We agree. The word “proceeding” in Section 12(b) of the Indemnification Agreement is not open-ended and doesn't expand the advancement obligation in the Indemnification Agreement beyond the two cases defined unambiguously in the Agreement's preamble.

**B. The Retainer Agreement Does Not Expand BBSI’s Advancement Obligations.**

*Second*, Mr. Miller contends that the circuit court erred in not considering the Retainer Agreement as an independent basis for an obligation to advance Mr. Miller’s legal expenses. He notes that the word “Matters” is defined in the first sentence of the Retainer Agreement more broadly than the word “Proceeding” is defined in the Indemnification Agreement. In the Retainer Agreement, the defined matters are indicated only by case name and not limited specifically by case number. That first sentence, however, only defines the scope of the representation for which Mr. Miller retained Janet Hoffman & Associates LLC. The second sentence defines BBSI’s obligations, and it establishes that the agreement is to be construed in accordance with the Indemnification Agreement:

The undersigned, Barrett Business Services, Inc. (BBSI), hereby agrees, *in accordance with the Indemnification Agreements dated September 8, 2015 and November 19, 2015<sup>2</sup> executed by Client and BBSI*, to directly pay or to reimburse Client for all fees and expenses resulting from Janet Hoffman & Associates LLC’s representation of Client in the Matters.

(Emphasis added.) This language clarifies that the Retainer Agreement merely implements the advancement obligation set out in the Indemnification Agreement. Far from expanding that obligation of advancement, BBSI’s obligations under the Retainer Agreement are limited to the scope of its obligations established in the Indemnification Agreement, which unambiguously is limited to the two actions identified there by case caption, court, and case number. Accordingly, we hold that the circuit court did not err when it found that “the

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<sup>2</sup> The November 19, 2015 indemnification agreement dealt with government investigations of BBSI that are not germane to this appeal.



reference to ‘matters’ in the retainer agreement does not expand BBSI’s obligation to advance legal expenses.”

**JUDGMENT OF THE CIRCUIT COURT  
FOR BALTIMORE COUNTY AFFIRMED.  
APPELLANT TO PAY COSTS.**