

**RESPONDENT'S RETURN TO PETITION FOR A  
WRIT OF CERTIORARI**

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM HORRY COUNTY  
Court of Common Pleas

William H. Seals, Jr., Circuit Court Judge

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Unpublished Opinion No. 2013-UP-247 (S.C. Ct. App. filed June 12, 2013)

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Joseph N. Grate,

Petitioner,

v.

Waccamaw EOC, Inc.,

Respondent.

Appellate Case No.2013-002046

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RESPONDENT'S RETURN TO PETITION FOR A WRIT OF CERTIORARI

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**RECEIVED**

OCT 25 2013

**S.C. SUPREME COURT**

INDEX

Table of Authorities.....ii

Statement of the Issues presented by Petitioner on Certiorari Review.....iii

Certificate of Counsel .....1

Statement of the Case.....1

Arguments

1. THE COURT OF APPEALS CORRECTLY HELD IT WOULD NOT  
CONSIDER ISSUES ON APPEAL WHICH HAVE NOT BEEN PRESERVED  
FOR APPELLATE REVIEW BY PETITIONER.....3

2. THE COURT OF APPEALS CORRECTLY DENIED PETITIONER’S  
PETITON FOR A REHEARING.....4

Conclusion.....5

TABLE OF AUTHORITIES

CASES

Lites v. Taylor, 284 S.C. 316, 318, 326 S.E.2d 173, 175 (Ct. App. 1985).....3

Peay v. Ross, 292 S.C. 535, 537, 357 S.E.2d 482, 484 (Ct. App. 1987).....4

S.C. Dep't of Transp. V.M & T Enters. Of Mt. Pleasant, LLC,  
379 S.C. 645, 659, 667 S.E.2d 7, 15 (Ct. App. 2008) .....3,4

Ulmer v. Ulmer, 369 S.C. 486, 632 S.E.2d 858, 861 (2006) .....3,4

Wilder Corp. v. Wilke, 330 S.C. 71, 497 S.E.2d 731 (1997) .....3

OTHER AUTHORITIES

Rule 220(b)(2), SCACR.....4

STATEMENT OF THE ISSUES PRESENTED BY PETITIONER ON CERTIORARI REVIEW

1. DID THE JURY ERR IN FINDING FOR RESPONDENT, GIVEN THE GLARING EVIDENCE OF RESPONDANT'S TOTAL FAILURE AND NEGLECT, REGARDING THE CONTRACT?
2. SHOULD NOT THE JURY HAVE FOUND FOR PEITIONER, GIVEN THE ABUNDANCE OF CONCISE EVIDENCE SUPPORTING APPELLANT'S POSITION?
3. DOES NOT PEITIONER HAVE A RIGHT TO THE PROVISIONS OF SCACR RULE 201?
4. DOES NOT THE RULE REGARDING DETAIL PER SCACR RULE 220(b) APPLY IN THIS CASE?

## CERTIFICATE OF COUNSEL

Counsel for Respondent certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on August 29, 2013.

## STATEMENT OF THE CASE

Petitioner's Amended Complaint alleges Respondent breached a contract entered into by the parties on April 30, 2010. Respondent is a non-profit organization, who received grants and/or federal funding to construct a Head Start Center in Georgetown, South Carolina. Under the contract, Petitioner was to provide project management services for the design and construction of the Choppee Head Start Center in Georgetown, South Carolina. The compensation clause of the contract in dispute was drafted by the parties. Respondent paid Petitioner an advance payment against future billing in the amount of Ten Thousand (\$10,000.00) Dollars and final payment would not be made until the entire project was complete. The contract stated the contractor, the Petitioner herein, shall be compensated at a fee not to exceed 9% of the total building cost (excluding design, engineering and permitting fees). The price term in the agreement is equivalent to a "cost-plus-a-percentage-of-cost" or "percentage of construction cost" method. Title 45 §74.44(c) of the Code of Federal Regulations precludes "the cost-plus-a-percentage-of-cost" or "percentage or construction cost" methods of contracting. At the time the contract was entered into, neither Petitioner nor Respondent were aware the agreed upon price term of the contract violated Title 45 §74.44(c) of the Code of Federal Regulations. As soon as Respondent was on notice the "cost-plus-a-percentage-of-cost" or "percentage of construction cost" method violated federal law, Respondent met with Petitioner in August of 2010 in an effort to resolve the price-term issue of the contract. Petitioner refused to resolve the

price term issue with Respondent. Thereafter, Petitioner filed the breach of contract action. After the parties received notice the contract violated federal law and after Petitioner refused to fix the price term and initiated the civil action, Respondent sent Petitioner a 30 Day Notice of Termination of Contract letter on February 7, 2011 which was more than one (1) year after Petitioner filed the civil action.

On December 20, 2010, Petitioner, Joseph N. Grate, filed a breach of contract action against Respondent, Waccamaw EOC, Inc. In January of 2011, Petitioner filed an Amended Complaint. Thereafter, Respondent answered the Amended Complaint and counterclaimed alleging breach of contract. The contract action was tried by a jury on January 10 and 11, 2012. The jury found for Respondent and awarded Two Thousand Ninety (\$2,090.00) Dollars in damages. On March 7, 2012, Petitioner served the Notice of Appeal on Respondent. On June 12, 2013, the Court of Appeals affirmed the judgment of the circuit court pursuant to Rule 220(b), SCACR, and the following authorities: *Ulmer v. Ulmer*, 369 S.C. 486, 490, 632 S.E.2d 858, 861 (2006); *Peay v. Ross*, 292 S.C. 535, 537, S.E.2d 482, 484 (Ct. App. 1987) and *Lites v. Taylor*, 284 S.C. 316, 318, 326 S.E.2d 173, 175 (Ct. App. 1985). Joseph N. Grate v. Waccamaw EOC, Inc., Unpublished Op. No. 2013-UP-247 (S.C. Ct. App. filed June 12, 2013). Petitioner filed a Petition for Rehearing on June 24, 2013. On August 29, 2013, the Court of Appeals denied Petitioner's petition for rehearing. On September 26, 2013, Petitioner filed a Petition for Writ of Certiorari to review that decision.

## ARGUMENT

1. THE COURT OF APPEALS CORRECTLY HELD IT WOULD NOT CONSIDER ISSUES ON APPEAL WHICH HAVE NOT BEEN PRESERVED FOR APPELLATE REVIEW BY PETITIONER.

An issue that is not raised to the trial court will not be considered by the appellate court.

Wilder Corp. v. Wilke, 330 S.C. 71, 497 S.E.2d 731 (1997). An appellate court will not consider an issue that has not been preserved for appellate review. Ulmer v. Ulmer, 369 S.C. 486, 632 S.E.2d 858, 861 (2006). Issue preservation requires a party to preserve an issue both at trial and in presentation of the issue on appeal. S.C. Dep't of Transp. V. M & T Enters. Of Mt. Pleasant, LLC, 379 S.C. 645, 659, 667 S.E.2d 7, 15 (Ct. App. 2008).

Here, Petitioner did not raise issues that were ruled upon in the trial court to be preserved for appellate review. Petitioner alleges Respondent failed to substantiate its breach of contract counterclaim, Respondent breached the contract and Petitioner should be compensated as the jury verdict was in error. Petitioner argues there was no evidence to support the verdict. However, Petitioner did not move at trial for a directed verdict, but instead, let the case go to the jury without objection to the sufficiency of the evidence. The failure of Petitioner to move for a directed verdict at trial precludes a challenge on appeal to the sufficiency of the evidence. Lites v. Taylor, 284 S.C. 316, 318, 326 S.E.2d 173, 175 (Ct. App. 1985). Additionally, Petitioner made no motion for judgment notwithstanding the verdict or motion to alter or amend, or for a new trial. In order to preserve an issue for review, the issue must be raised by appellant with sufficient specificity in a timely manner and ruled on by the lower court. Petitioner failed to preserve any issues for review. In Petitioner's appeal, he did not cite any issues from the record ruled upon by the trial judge in support of a motion or objection. Since the sufficiency of the evidence was not

properly raised at trial, the Appellate Court cannot review the trial court judgment on that ground. Peay v. Ross, 292 S.C. 535, 537, 357 S.E.2d 482, 484 (Ct. App. 1987). Thus, the Court of Appeals correctly held it would not consider issues on appeal which have not been preserved for appellate review by Petitioner. Therefore, Petitioner's Petition for a Writ of Certiorari should be denied since an objection to the sufficiency of the evidence cannot be raised for the first time on appeal.

2. THE COURT OF APPEALS CORRECTLY DENIED PETITIONER'S PETITION FOR A REHEARING.

An appellate court will not consider an issue that has not been preserved for appellate review. Ulmer v. Ulmer, 369 S.C. 486, 632 S.E.2d 858, 861 (2006). Issue preservation requires a party to preserve an issue both at trial and in presentation of the issue on appeal. S.C. Dep't of Transp. V. M & T Enters. Of Mt. Pleasant, LLC, 379 S.C. 645, 659, 667 S.E.2d 7, 15 (Ct. App. 2008). Here, Petitioner did not follow proper procedures to preserve issues for appellate review as above-addressed in Respondent's Argument number one (1). The Petitioner cannot simply state the decision of the trial court was in error when he did not properly preserve issues and cite to specific error. Thus, the Court of Appeals correctly affirmed the jury decision.

Petitioner argues he should have been afforded the right to appeal pursuant to Rule 201, SCACR. However, Petitioner was afforded the right to appeal. On March 7, 2012, Petitioner served the Notice of Appeal on Respondent. On June 12, 2013, the Court of Appeals affirmed the judgment of the circuit court pursuant to Rule 220(b), SCACR. Joseph N. Grate v. Waccamaw EOC, Inc., Unpublished Op. No. 2013-UP-247 (S.C. Ct. App. filed June 12, 2013). According to Rule 220(b)(2), SCACR, the Court of Appeals need not address a point which is manifestly

without merit. The record must contain the issue or question raised to the trial judge, the arguments or grounds asserted in support of the motion or objection and the trial judge's ruling on the arguments or grounds. This information is necessary because the rules of preservation require that on appeal, the appealing party be limited to the arguments raised to, and ruled upon by, the trial judge in support of a motion or objection. However, Petitioner failed to properly preserve the record and thus, the Court of Appeals correctly affirmed the circuit court.

Petitioner filed a Petition for Rehearing on June 24, 2013. On August 29, 2013, the Court of Appeals denied Petitioner's petition for rehearing. The Order of the Court of Appeals stated, "[a]fter careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied." Due to Petitioner's failure to properly preserve issues at the trial of this matter, the Court of Appeals properly denied the petition for rehearing. Accordingly, the Supreme Court of South Carolina should deny the petition for a writ of certiorari.

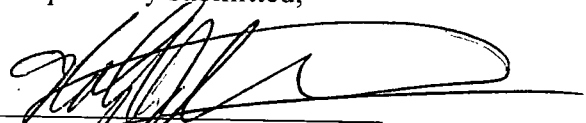
#### CONCLUSION

The Court of Appeals correctly held it would not consider issues on appeal which have not been preserved for appellate review by Petitioner. Since Petitioner did not follow proper procedural steps to preserve the record, the Court of Appeals correctly denied Petitioner's Petition for a Rehearing. For the reasons stated, petitioner respectfully requests the Court to deny the petition for a writ of certiorari.

*[Signature block on following page]*

October 23, 2013

Respectfully submitted,

A handwritten signature in black ink, appearing to read "R. Wilson", written over a horizontal line.

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THE STATE OF SOUTH CAROLINA  
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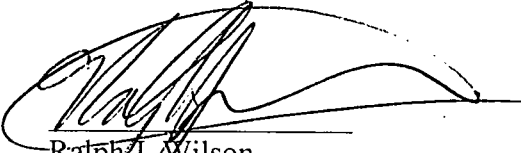
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PROOF OF SERVICE

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I certify that I have served a copy of Respondent's Return To Petition For A Writ of Certiorari on Joseph N. Grate, Post Office Box 1294, Pawley's Island, South Carolina 29585, by depositing a copy of it in the United States Mail, postage prepaid, on October 23, 2013.

October 23, 2013



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