THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

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

Appellate Case No. 2018-001724

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

v.

Jerald W. Jones.....Appellant

RESPONDENT'S INITIAL BRIEF

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ISSUES ON APPEAL

I. Whether the Circuit Court appropriately granted summary judgment in favor of Captain's Harbour when it found Jones was not entitled to indemnification under the ACE Management Agreement because Jones was not a party to the Agreement.

II. Whether Jones is a third-party beneficiary to the ACE Management Agreement when the clear language of the Agreement establishes that it was the intent of the parties to limit indemnification to only the contracting parties.

STATEMENT OF THE CASE

This case involves Jerald Jones' conversion of funds from the operating account of Captain's Harbour and Racquet Club Homeowners Association, Inc. (the Association), to pay for criminal defense legal fees and medical bills following physical altercations on July 7, 2014, that led to Jones' arrest. On the date of the incidents, Jones was a resident of Captain's Harbour, the President of the Board for the Association, as well as an employee and partial owner of ACE Management—the property manager for the Association pursuant to the ACE Management Agreement (the Agreement).

In October 2012, the Association entered into the Agreement with ACE "for the orderly and uniform administration, operation, maintenance, and management of the Association and for the promotion, preservation, and the protection of property values in the regime." (Plt's MSJ Memo at 15). The only two parties to the Agreement are the Association and ACE. (Id.). The Agreement, which was drafted by ACE, outlines the responsibilities and duties ACE owed to the Association, including accounting guidelines ACE was required to follow when dealing with funds distributed to it from the Association. (Id. at 16). The Agreement contains an indemnity provision, upon which Jones is relying to justify his use of funds from the Association's operating account. (Id. at 19–20).

On July 7, 2014, Jones was involved in verbal and physical altercations with residents of Captain's Harbour that resulted in his arrest. (Id. at 21). The incident began at the community's pool and involved an altercation between Jones and a female resident and her twelve-year-old son. (Feb. 17, 2016 Hearing Transcript at 11). Later, another female resident and Jones had a violent physical encounter at the entrance to Jones' residence. (Id.). These physical exchanges led to Jones' arrest. (Plt's MSJ Memo at 21–25).

Subsequently, without Board approval, Jones used $10,000.00 from the Association's operating account to pay an attorney to defend him against criminal charges arising out of the July 7, 2014 incident. (Id. at 27). He also used $2,788.80 from the same account for medical bills associated with injuries he sustained in the altercations. (Id. at 30). Jones' unauthorized expenditures were brought to the attention of the Association when its treasurer received and reviewed the Association's monthly bank statement. (Id. at 29). When Jones was confronted about the expenditures and asked to return the funds, he refused, claiming he was entitled to the funds under the indemnification provision of the Agreement.

As a result, the Association filed its Complaint on November 14, 2014, requesting return of the funds. (Plt's Cmplt. At 1–2). Jones answered the Complaint on May 1, 2015, and denied he was required to return the funds because he was covered by the indemnification provision. (Def's Ans. at 4). The parties each filed for summary judgment and argument was held before the Circuit Court on February 17, 2016. (Feb. 17, 2016 Hearing Transcript at 1). On April 12, 2016, the Circuit Court issued its Order denying Jones' motion and granting Plaintiff's motion. (April 12 Order Denying Summary Judgment). The Court entered judgment for the Association and against Jones in the amount of $16,321.14, including costs and interest. (Feb. 18, 2016 Order). Jones filed a Motion for Reconsideration, which was denied on November 26, 2016. (Nov. 16, 2016 Order). This appeal followed.

STANDARD OF REVIEW

"An appellate court reviews the granting of summary judgment under the same standard applied by the trial court under Rule 56, SCRCP." *Quail Hill, LLC v. Cty. of Richland*, 387 S.C. 223, 235, 692 S.E.2d 499, 505 (2010). "Summary judgment is appropriate 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if

any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Russell v. Wachovia Bank, N.A.*, 353 S.C. 208, 217, 578 S.E.2d 329, 334 (2003) (quoting Rule 56(c), SCRCP). "[I]n cases applying the preponderance of the evidence burden of proof, the [nonmoving] party is only required to submit a . . . scintilla of evidence in order to withstand a motion for summary judgment." *Hancock v. Mid-South Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). Summary judgment is appropriate, however, when "plain, palpable, and indisputable facts exist on which reasonable minds cannot differ." *Ellis v. Davidson*, 358 S.C. 509, 595 S.E.2d 817 (Ct. App. 2004).

The construction of an unambiguous contract and whether a contract is ambiguous are questions of law to be decided by the appellate court without deference to the circuit court. *Dep't of Transp. v. M & T Ent.*, 379 S.C. 645, 667 S.E.2d 7, 13 (Ct. App. 2008). Similarly, when "cross motions for summary judgment are filed, the parties concede the issue . . . should be decided as a matter of law" and courts are authorized to assume there is no evidence that "needs to be considered other than that which has been filed by the parties." *Weigand v. U.S. Auto. Ass'n*, 391 S.C. 159, 163, 705 S.E.2d 432, 434 (2011); *accord Alltel Commc'ns, Inc. v. S.C. Dep't of Revenue*, 399 S.C. 313, 319 n.2, 731 S.E.2d 869, 872 n.2 (2012).

ARGUMENTS

I. The Circuit Court properly granted summary judgment in the Association's favor because Jones is not covered by the Agreement's indemnity provision.

A. The contract is unambiguous and does not apply to employees or agents of ACE Management.

"When a contract is unambiguous, clear and explicit, it must be construed according to the terms the parties have used, to be taken and understood in their plain, ordinary and popular sense. Extrinsic evidence giving the contract a different meaning from that indicated by its plain

terms is inadmissible." *C.A.N. Enterprises, Inc. v. S.C. Health and Human Services Finance Comm'n*, 296 S.C. 373, 377–78, 373 S.E.2d 584, 586 (1988) (citation omitted). "Common sense and good faith are the leading touchstones of" contract construction. *Id.* at 377, 373 S.E.2d at 586. When "one construction makes the provisions unusual or extraordinary and another construction[,] which is equally consistent with the language employed, would make it reasonable, fair and just, the latter construction must prevail." *Id.* Further, courts are prohibited from construing a contract in a way that would alter it—regardless of the parties' wisdom, "folly, apparent unreasonableness, or failure to guard their rights carefully." *Id.* at 378, 373 S.E.2d at 586 (quoting *Gilstrap v. Culpepper*, 283 S.C. 83, 320 S.E.2d 445, 447 (1984)). Terms in a contract, if defined, are to be construed according to those definitions if free from ambiguity. *Id.* (finding the term "audit" was not ambiguous because it was defined by the contract and the definition was not ambiguous).

Here, the first paragraph of the contract establishes that the only two parties to the Agreement are the Association and ACE:

> THIS AGREEMENT, made and entered into this 1st day of October 2012, by and Between Captain's Harbour and Racquet Club Homeowners Association, a nonprofit corporation organized and existing under the laws of South Carolina, hereinafter called "The Association" and American Contracting Engineers, PA, a Corporation organized and existing under the laws of Delaware and doing business as (dba) ACE Management hereinafter called "The Manager".

(Plt's MSJ Memo at 15). The indemnity provision provides the following:

> 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 [or] 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 said Manager's gross negligence or willful misconduct.
>
> **C. General:** Including Items A and B above, the Manager shall not be liable to 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 damages, costs, and expense (including attorney fees incurred by the Manager 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.

(Plt's MSJ Memo at 19–20).

In the first paragraph, the parties defined the term "Manager" as "American Contracting Engineers, PA, . . . doing business as (dba) ACE Management." Notably, the definition of the term does not include employees, agents, successors, or assigns of the entities named. The term "Manager" unambiguously refers to only the entities named. Therefore, this Court is required to construe the term as it is defined, regardless of the parties' wisdom, folly, or failure to protect their rights. *See C.A.N. Enterprises*, 296 S.C. at 378, 373 S.E.2d at 586 (finding a term defined by the parties was unambiguous when the definition was unambiguous). Because Jones is not "the Manager" as defined by the Agreement and used in the indemnity provision, he is not a party to the Agreement and the provision does not apply to him. Accordingly, the circuit court properly granted summary judgment on this ground.

B. Even if the term Manager included employees or agents of ACE, Jones is not entitled to indemnification because his conduct was outside the scope of his employment.[1]

"Indemnity" is that form of compensation in which a first party is liable to pay a second party for a loss or damage the second party incurs to a third party. *Toomer v. Norfolk Southern Ry. Co.*, 344 S.C. 486, 544 S.E.2d 634 (Ct. App. 2001). A right of indemnity may arise by contract (express or implied) or by operation of law as a matter of equity. *Campbell v. Beacon Mfg. Co.*, 313 S.C. 451, 453, 438 S.E.2d 271, 272 (Ct. App. 1993). A contract of indemnity will be construed in accordance with the rules for the construction of contracts generally. *Federal Pacific Electric v. Carolina Production Enterprises*, 298 S.C. 23, 378 S.E.2d 56 (Ct.App.1989).

The doctrine of *respondeat superior* rests upon the relation of master and servant. *Lane v. Modern Music, Inc.*, 244 S.C. 299, 136 S.E.2d 713 (1964). The act of a servant done to effect some independent purpose of his own and not with reference to the service in which he is employed, or while he is acting as his own master for the time being, is not within the scope of his employment so as to render the master liable therefor. *Id.* If a servant steps aside from the master's business for some purpose wholly disconnected with his employment, the relation of master and servant is temporarily suspended; and this is so no matter how short the time, and the master is not liable for his acts during such time. *Hamilton v. Davis*, 300 S.C. 411, 416, 389 S.E.2d 297, 299 (Ct. App. 1990). The general rule is that an employer is not liable to a third party for an assault indulged by the employee since such acts are not incidental to the work for which he was hired, but are personal in nature. *Id.* at 299–300.

Jones seeks indemnification based on his role as an employee of ACE. The purpose of the indemnity provision is to hold ACE harmless for acts perpetuated on behalf of the

[1] Although the circuit court granted summary judgment on other grounds, this Court may affirm summary judgment upon any ground appearing in the record on appeal. Rule 220(c), SCACR.

Association that result in liability to a third party. The indemnity provision states, in pertinent part, the Association will hold ACE harmless from liability for injury to person or property that occurred when ACE is effectuating the business of the Association.

The Agreement does not protect Jones individually for intentional acts done on his personal time. Further, the agreement is exclusively between ACE and the Association, and the indemnity provision does not anticipate personal liability involving ACE employees. It is clear that all three subsections of the "Hold Harmless" section of the agreement are aimed at protecting ACE, a corporate entity, from liability for acts or omissions while engaged in its managerial duties at Captain's Harbour. The language in the Agreement does not entitle ACE or its agents to use physical force to fulfill its responsibilities under the contract, and it does not provide for ACE to unilaterally fund its employees' legal and medical expenses arising out of personal disputes.

Jones alleges he is entitled to retain the Association's funds because he was acting within the scope of his duties under the Agreement when he incurred the injuries. Even if Jones is entitled to contractual indemnification under certain circumstances, engaging in verbal and physical altercations with two female residents and a child is never within the scope of the duties of the Manager. While the incident began at the pool, the altercation that allegedly caused Jones' personal injuries and led to his arrest took place in and around the entrance to his condominium. South Carolina case law is clear when a servant steps aside from the business of his master, the master ceases to be liable for the acts of the servant. *See Hamilton v. Davis*, 300 S.C. 411, 416, 389 S.E.2d 297, 299 (Ct. App. 1990). Here, Jones was outside of the scope of his employment when he was involved in the altercations, thus, even ACE would likely not have liability for Jones' actions.

In sum, even if the Agreement contemplated indemnification for ACE employees, the undisputed facts of this case establish Jones was acting outside of the scope of his duties as an employee of ACE by engaging in verbal and physical altercations with multiple residents. Therefore, this Court should affirm the circuit court's grant of summary judgment.

C. Even if Jones was acting within the scope of employment, he is not entitled to indemnification because his actions were willful or grossly negligent and, therefore, are excepted from coverage under the indemnity provision.[2]

"Negligence is the failure to use due care," i.e., "that degree of care which a person of ordinary prudence and reason would exercise under the same circumstances." *Hart v. Doe*, 261 S.C. 116, 122, 198 S.E.2d 526, 529 (1973). The test by which a tort is to be characterized as reckless, willful or wanton is whether it has been committed in such a manner or under such circumstances that a person of ordinary reason or prudence would then have been conscious of it as an invasion of the plaintiff's rights. *Rogers v. Florence Printing Co.*, 233 S.C. 567, 577, 106 S.E.2d 258, 263 (1958). The element distinguishing actionable negligence from willful tort is inadvertence. *Id.*

As discussed, Jones attempts to justify his unauthorized use of funds from the Association's operating account by asserting that he is entitled to indemnity under the Agreement. However, the clear language of the Agreement, clearly states that the Manager is not entitled to indemnity if the injury is caused by Manager's gross negligence or willful misconduct. In this case, the injuries were Jones' injuries, and he was an active participant in the physical altercation. It was certainly willful misconduct, if not gross negligence.

The language in the first paragraph of the indemnity provision provides indemnity for the Manager when fulfilling certain administrative obligations under Section III, Item B(4) of the

[2] Although the circuit court granted summary judgment on other grounds, this Court may affirm summary judgment upon any ground appearing in the record on appeal. Rule 220(c), SCACR.

Agreement, which primarily deals with the Manager's role in recommending insurance coverage to the Board. This provision enables the Manager to participate in the acquisition of insurance policies for the Association without liability exposure if the policy is inadequate.

The language in the second paragraph of indemnity provision states the Association will indemnify the Manager for "any claims, demands, judgments or suits or damages that may be brought against or incurred by the Manager . . . in assisting the Board with regard to the services set forth in this Section III, Item D, which lists services such as "Landscaping services; Electrical, plumbing and other repair services; Pest Control services; Carpenters and general repair services." Again, this paragraph involves advice and decisions of ACE for the Association.

These paragraphs do not apply to the facts of this case but are referenced to emphasize the purpose of indemnity in the Agreement—to enable the Manager to engage in its duties on behalf of the Association without exposure to liability for negligence in the furtherance of the duties.

Section VI, Item C, addresses indemnity for acts of the Manager that expose the Manager to liability arising from any injury to any person or property in connection with Captain's Harbour, unless the injury was caused by Manager's gross negligence or willful misconduct. Here, the alleged injury is to the Manager's employee Jones, not an independent third party. Jones did not make a claim against the Manager, or against the Association. Instead, Jones unilaterally used the Association's operating account funds to pay personal financial obligations. This paragraph anticipates a situation such as a slip and fall on common property at Captain's Harbour where a tenant or guest is injured. If that tenant or guest alleges that a dangerous condition existed in the common area causing the slip and fall, the Manager would be entitled to

indemnification from the Plaintiff, assuming that the dangerous condition was not created due to the gross negligence or willful misconduct of the Manager.

In this case, Jones' behavior was not simply negligent, it was willful and grossly negligent. The physical dispute was not an accident occurring as a result of his service to the Association. The fight was a personal dispute between Jones and other residents of Captain's Harbour, including women and children. Jones acted willfully when he engaged his fellow residents and was arrested for his involvement in the altercation. Jones' own involvement precludes any right to indemnity he might have under the Agreement. The general rule is that a contract of indemnity will not be construed to indemnify the indemnitee against losses resulting from its own negligent acts unless such intention is expressed in clear and unequivocal terms. *Fed. Pac. Elec. v. Carolina Prod. Enterprises*, 298 S.C. 23, 26, 378 S.E.2d 56, 57 (Ct. App. 1989). The Agreement does not contain those express terms.

In sum, this Court should affirm the grant of summary judgment to the Association because the indemnity agreement clearly excludes from coverage damages resulting from the willful or grossly negligent acts of the Manager and Jones' damages are the result of his own willful or grossly negligent conduct in choosing to engage in verbal and physical altercations with residents of Captain's Harbour.

II. Mr. Jones is not a third-party beneficiary of the management agreement because the clear language of the Agreement establishes that it was the intent of the parties to limit indemnification to only the contracting parties.

Preservation

As an initial matter, this issue is not preserved because it was not presented to nor decided by the Circuit Court. In order to preserve an issue for appeal review, the appellant must have raised it to the circuit court. *Lucas v. Rawl Family Ltd. P'ship*, 359 S.C. 505, 598 S.E.2d

712 (2004). The party need not use the exact name of the legal doctrine, but it must be clear the argument was presented on that ground. *State v. Brannon*, 388 S.C. 498, 697 S.E.2d 593 (2010). Furthermore, the circuit court must rule upon the issue. *Wilder Corp. v. Wilke*, 330 S.C. 71, 497 S.E.2d 731 (1998). If the circuit court fails to rule an issue it was presented, the party must file a motion to alter or amend the judgment in order to preserve the issue for appellate review. *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000).

Here, to support his argument for third-party beneficiary status, Jones directs this Court's attention to his "Twelfth Defense" in his Answer to the Association's Complaint, which asserts: "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." (Def's Ans. at 4). First, the above assertion is not sufficient to allege third-party beneficiary status. Although a party need not use magical words to invoke a legal doctrine, it must be clear that the argument was presented on the ground asserted. It is not clear that Jones' Twelfth Defense presents the argument of third-party beneficiary status, as distinguished from his primary argument of direct contractual indemnification.

Second, Jones did not raise the argument to the Circuit Court. Jones failed to assert third-party beneficiary status in his Motion for Summary Judgment or at the hearing on the motions for summary judgment. Third, even if the argument had been presented to the Circuit Court, the Circuit Court did not rule on it.. The Circuit Court granted summary judgment solely on the ground that Jones was not a party to the Agreement. Finally, Jones did not request a ruling on the argument he was a third-party beneficiary in his Rule 59(e) motion. Therefore, the issue is not preserved and this Court should decline to address it.

Merits

"Generally, a third person not in privity of contract with the contracting parties has no right to enforce a contract." *Wogan v. Kunze*, 623 S.E.2d 107, 366 S.C. 583 (2005). A third party may, however, "enforce the contract if the contracting parties intended to create a direct, rather than an incidental or consequential, benefit to such third" party. *Id.* The question of the parties' intent is answered by construing the terms of the contract. *Goode v. St. Stephens United Methodist Church*, 329 S.C. 433, 445, 494 S.E.2d 827, 833 (Ct.App.1997). Common sense and good faith are the leading touchstones of" contract construction. *C.A.N. Enterprises*, 296 S.C. at 377, 373 S.E.2d at 586. When the language of the contract is clear, explicit and unambiguous, it must be taken and understood in its plain, ordinary, and popular sense. *Id.*

For example, in *Ancrum v. Water*, residents of a city sued a water company for fire damage to their homes that they sustained due to the company's failure to supply adequate water. 82 S.C. 284, 64 S.E. 151, 155 (1909). The city had contracted with the company to provide water to its residents and the contract stipulated the company would provide "a sufficient water supply for the protection of public and private party" and included other provisions for the compensation of losses. *Id.* The residents' asserted they were third-party beneficiaries of that contract but the court disagreed, holding the obligations of the city were limited by the contract and the contract "did not contemplate payment for such losses" as the residents had sustained. *Id.* Importantly, the court acknowledged that the city had the authority to contract with the company so that it would be liable to its residents for losses due to the company's failure to supply adequate water, but that the language indicated it chose not to do so. *Id.*, 64 S.E. at 155.

First, the parties certainly could have contracted to have the Association be liable to employees and agents of ACE, but the language of the contract shows the indemnity provisions

apply only to ACE and not its employees or agents. Similarly, the language of the contract does not establish it was the intent of the parties to create a direct benefit for Jones. If the parties intended to afford employees and agents of ACE the protection of indemnity, the parties would have included employees and agents.

Second, even if Jones is a third-party beneficiary of the indemnification provision, he would not be entitled to its benefit because his actions were willful or grossly negligent and, therefore, he was acting outside of his scope of employment with ACE. Lastly, the indemnification provision would not apply because willful and grossly negligent conduct is excepted from the provision.

CONCLUSION

As outlined above, Jones is not a party to the Agreement because the clear language of the Agreement states it is entered into between ACE and the Association and, therefore, Jones is not entitled to the protection of the indemnification provision. Alternatively, even if Jones was a party to the Agreement, he would not be entitled to indemnification because his conduct—engaging in physical and verbal altercations—was outside the scope of his employment with ACE and was willful or grossly negligent and otherwise excepted from the indemnification provision. Finally, the language in the contract is clear that the parties did not intend to provide the benefit of indemnification to Jones and, even if it was, the provision would not apply because his conduct was willful and grossly negligent and, therefore, not within the scope of his employment and excepted from the indemnification provision. Accordingly, Respondent respectfully requests this Court affirm the Circuit Court's grant of summary judgment.

[SIGNATURE PAGE TO FOLLOW]

This 5th day of April, 2019.

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable R. Lawton McIntosh

Appellate Case. No. 2018-001724
C/A No: 2014-CP-26-50328

Captain's Harbour and Racquet Club Homeowners' Association, Inc., Respondent,

v.

Jerald W. Jones, Appellant,

PROOF OF SERVICE

I certify that I have served the ***Respondent's Initial Brief*** by depositing a copy in the United States Mail, postage prepaid, on this the 5th day of April, 2019, addressed to Appellant's counsel of record as follows:

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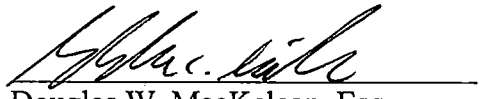

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REPLY TO SC OFFICE

April 5, 2019

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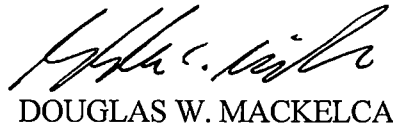
Re: Captain's Harbour and Racquet Club Homeowners' Association, Inc. v. Jerald W. Jones
Horry County Case No2014-CP-26-50328
Appellate Court Case No.: No. 2018-001724
CCS File No.: 4145-50328

Dear Ms. Kitchings:

Enclosed please find the original and one (1) copy of Respondent Captain's Harbour and Racquet Club Homeowners' Association, Inc's Initial Brief, Designation of Matter to be Included in the Record on Appeal, and Proof of Service in this case. Please provide me with a clocked copy in the enclosed, self-addressed, stamped envelope. By copy of this letter, I am serving the same upon all counsel of record. If you have any questions, please feel free to contact me.

Sincerely,



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