

STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

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

Opinion No. 2021-UP-167
(S.C. Ct. App. filed May 12, 2021)

RECEIVED

Jul 13 2021

S.C. SUPREME COURT

Captains Harbour and Racquet Club
Homeowners Association, Inc. Respondent

v.

Jerald W. Jones Petitioner

JOINT APPENDIX

John M. Leiter, Esquire
LAW OFFICES OF JOHN M. LEITER, PA
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Other Counsel of Record:

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STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

APPELLATE CASE NO.: 2018-001724

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

v.

Jerald W. Jones Appellant

RECORD ON APPEAL

John M. Leiter, Esquire
1203 48th Avenue North, Suite 109
Myrtle Beach, South Carolina 29577
(843) 449-1451
Attorney for Appellant

Douglas Walker MacKelcan, III, Esq.
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40 Calhoun Street, Suite 400
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FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF HORRY
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2014-CP-26-7617

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

Jerald W. Jones

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for : ☐ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

THE COURT DENIES DEFENDANT'S MOTION FOR RECONSIDERATION. INASMUCH AS IDENTICAL GROUNDS WERE ARGUED AT PREVIOUS HEARING THE REQUEST FOR A HEARING ON THIS MOTION IS DENIED. THE COURT NOTES THAT DEFENDANT'S MOTION FOR RECONSIDERATION WAS NOT PROVIDED TO THE COURT UNTIL AUGUST 25, 2016. PLAINTIFF'S COUNSEL TO PREPARE A FORMAL ORDER.

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.



Circuit Court Judge

2155

Judge Code

9-1-16

Date

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

 ATTORNEY(S) FOR THE PLAINTIFF(S)

 ATTORNEY(S) FOR THE DEFENDANT(S)

 CLERK OF COURT

Court Reporter:

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON
PAGE 1.

Copy of Order, _____
 filed 10-4-16 mailed to all
 parties not in default on 10-11-16
 initials True

COPIES MAILED

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	CASE NO.: 2014-CP-26-7617
	)	
CAPTAIN'S HARBOUR AND	)	
RACQUET CLUB HOMEOWNERS	)	
ASSOCIATION, INC.,	)	ORDER
	)	
Plaintiff,	)	
vs.	)	
	)	
JERALD W. JONES,	)	
	)	
Defendant.	)	

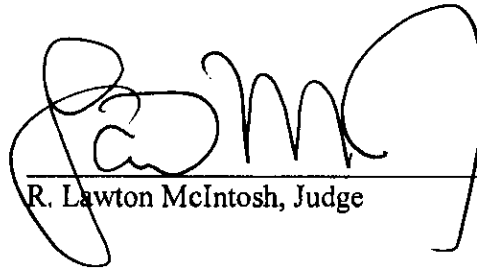
This matter came before the Court for consideration of Defendant's Motion for Reconsideration, filed on March 11, 2016. Plaintiff's and Defendant's Motions for Summary Judgment were heard on February 17, 2016. The Court issued a Form-4 Order Granting Plaintiff's Motion for Summary Judgment and Denying Defendant's Motion for Summary Judgment on February 18, 2016. The Court entered a Formal Order on the motions dated April 7, 2016. Counsel for the Defendant requested the Court consider the Motion for Reconsideration, and, in response, Plaintiff requested that the Court consider the Motion without a hearing and deny the Motion on the ground that Defendant failed to assert any new or supplemental arguments beyond those presented in prior written submissions to the Court or heard at the February 17, 2016 hearing.

Because Defendant has not asserted any new or alternative grounds in support of his Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment,

2016 NOV 28 AM 8:29
CLERK OF COURT
JENNIFER HUGHES-KANE

the Court **DENIES** Defendant's request for a hearing on his Motion to Reconsider, and **DENIES** Defendant's Motion for Reconsideration.

IT IS SO ORDERED.

A handwritten signature in black ink, appearing to read 'R. Lawton McIntosh', is written over a horizontal line.

R. Lawton McIntosh, Judge

This 21 day of November, 2016
Anderson, South Carolina

#10; #11
2-17-16STATE OF SOUTH CAROLINA
COUNTY OF HORRY
IN THE COURT OF COMMON PLEASJUDGMENT IN A CIVIL CASE
CASE NUMBER 2014CP2607617Captains Harbour And
Racquet Club Homeowners
Association Inc

Jerald W Jones

FILED
CLERK OF COURT
HORRY COUNTY
SOUTH CAROLINA
FEB 19 10 41 AM '16

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: ☐ Plaintiff ☒ Defendant
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit);
☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

Plaintiff's Motion for Summary Judgment granted in that the attorney's fees incurred by the Defendant were based on individual charges against him, and the agreement was between the Plaintiff and the Corporate management company. Therefore, Defendant was not entitled to indemnification through the agreement for personal charges. Defendant's Motion for Summary Judgment denied. Mr. MacKelan to prepare formal order.

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk: _____

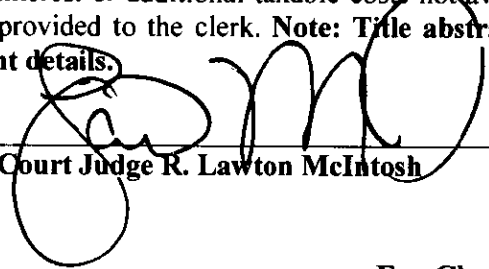
INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
n/a	n/a	n/a

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**


Circuit Court Judge R. Lawton McIntosh

2155
Judge Code

2/18/2016
Date

For Clerk of Court Office Use Only

This judgment was entered on , and a copy mailed first class or placed in the appropriate attorney's box on , to attorneys of record or to parties (when appearing pro se) as follows:

Douglas Walker MacKelcan III 40 Calhoun St., Ste. 400
Charleston, SC 29401

ATTORNEY(S) FOR THE PLAINTIFF(S)

Thomas William Winslow 11019 Tournament Blvd. PO Box
829 Murrells Inlet, SC 29576

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter Teresa Bautz

Melanie Huggins-Ward - Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF HORRY
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2014 CP-26-7617

CAPTAIN'S HARBBOUR AND RACQUET CLUB HOMEOWNERS
ASSOCIATION, INC.

JERALD W. JONES

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: DOUGLAS W. MACKELCAN

Attorney for : Plaintiff Defendant
or
Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.

ACTION DISMISSED (CHECK REASON): Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other

ACTION STRICKEN (CHECK REASON): Rule 40(j), SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other

DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):

Affirmed; Reversed; Remanded; Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

This order ends does not end the case.
Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
CAPTAIN'S HARBBOUR AND RACQUET CLUB HOMEOWNERS ASSOCIATION, INC.	JERALD W. JONES	\$16,321.14
		\$
		\$
If applicable, describe the property, including tax map information and address, referenced in the order:		

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Date

For Clerk of Court Office Use Only

This judgment was entered on the 12th day of April, 2016 and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	CASE NO.: 2014-CP-26-7617
	)	
CAPTAIN'S HARBOUR AND	)	
RACQUET CLUB HOMEOWNERS	)	
ASSOCIATION, INC.,	)	
	)	
Plaintiff,	)	
vs.	)	
	)	
JERALD W. JONES,	)	
	)	
Defendant.	)	

ORDER

2016 APR 12 AM 9:05
 Horry County
 Clerk of Court

This matter came before the Court on February 17, 2016 for consideration of Plaintiff's Motion for Summary Judgment, as well as Defendant's Motion for Summary Judgment. Both parties were represented by counsel at the hearing and were afforded the opportunity to present oral arguments. The Court also considered Plaintiff's Memorandum of Law and documents presented to the Court during the hearing. Following consideration of the evidence before the Court, I find Defendant's argument, that he is entitled to indemnification under the Property Management Agreement between the Plaintiff and ACE Management, is unavailing, and therefore, Plaintiff is entitled to recover those funds Defendant used from Plaintiff's operating account, including applicable interest and costs. Therefore, Plaintiff's Motion for Summary Judgment is **GRANTED** and Defendant's Motion for Summary Judgment is **DENIED**.

STANDARD OF REVIEW

Pursuant to Rule 56(c) of the South Carolina Rules of Civil Procedure, summary judgment is appropriate if "the pleadings, depositions, answers to Interrogatories, and admissions on file, together with affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." In ruling on a motion for

summary judgment, "the court must view the facts and inferences therefrom in a light most favorable to the nonmoving party." *Bravis v. Dunbar*, 316 S.C. 263, 265, 449, S.E.2d 495, 496 (Ct. App. 1994). "A party opposing a properly supported Motion for Summary Judgment, however, may not rest on the mere allegations or denials of its pleading, but must set forth or point to specific facts showing that there is a genuine issue of material fact. Thus, the existence of a mere scintilla of evidence in support of the nonmoving party's position is not sufficient to overcome a motion for summary judgment." *Dickert v. Metropolitan Life Insurance Company*, 306 S.C. 311, 313, 411, S.E.2d 672, 673 (Ct. App. 1991), *reversed in part* on other grounds, 311 S.C. 218, 428, S.E.2d 700 (1993).

FINDINGS

In this case, Plaintiff seeks to recover from Defendant for conversion of funds from the Plaintiff's operating account. Jones, without authorization from Plaintiff, used Plaintiff's funds to pay for personal criminal defense legal fees and personal medical bills following physical altercations on July 7, 2014 that led to his arrest. At the time, Jones was an employee of ACE Management ("ACE"), the property management company for Plaintiff's regime pursuant to a management agreement ("the Agreement"). Jones claims he was entitled to use the Plaintiff's funds under the terms of the Agreement.

In October of 2012 Plaintiff entered the management 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." The parties to the Agreement are identified in the first paragraph of the Agreement:

THIS AGREEMENT, made and entered into this 1st day of October 2012, by and Between Captains 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".

The Agreement outlined the responsibilities and duties ACE owed to Plaintiff and contained an indemnity provision, upon which Defendant relies to justify his use of Plaintiff's operating account funds. The indemnity provision in the Agreement states:

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 of 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 damage, 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.

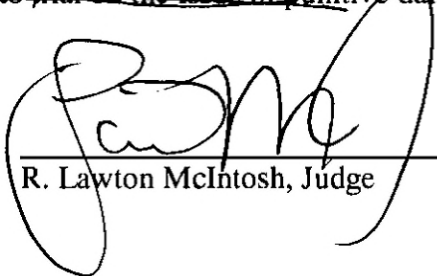
The plain language of the Agreement identifies the parties to the contract as Plaintiff and ACE. Defendant is not a party to the Agreement, and therefore, is unable to claim contractual indemnification in this case.

CONCLUSION

Plaintiff is entitled to damages from the Defendant in the amount of: \$12,788.80, representing the money converted from Plaintiff's operating account for Defendant's personal use, pre-judgment interest beginning September 1, 2014 of \$1,847.71, and costs involved in instituting this action of \$1,684.63. Therefore, the total actual damages Defendant owes Plaintiff

are: \$16,321.14, ~~and this case will proceed to trial on the issue of punitive damages.~~ *This issue of punitive damages was not addressed At the hearing.* (RLM)

IT IS SO ORDERED.


R. Lawton McIntosh, Judge

This 7 day of April, 2016
Anderson, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	CASE NO.: 2014-CP-26-_____
	)	
CAPTAIN'S HARBOUR AND	)	
RACQUET CLUB HOMEOWNERS	)	
ASSOCIATION, INC.,	)	
	)	
Plaintiff,	)	
vs.	)	
	)	
JERALD W. JONES,	)	
	)	
Defendant.	)	
_____	)	

COMPLAINT
(Jury Trial Demanded)

14 NOV 12 PM 2:23
CLERK OF COURT
JUDICIAL CIRCUIT
HORRY COUNTY

Plaintiff Captain's Harbour and Racquet Club Homeowners Association, Inc. alleges as follows:

1. The Plaintiff, Captain's Harbour and Racquet Club Homeowners Association, Inc. is bringing this action to enforce its rights to recover damages for wrongful conversion of its property.
2. Plaintiff is a non-profit corporation existing under the laws of the state of South Carolina for the purpose of administering a condominium located in Horry County, South Carolina.
3. Defendant Jerald W. Jones is a resident of Horry County.
4. Defendant formerly served as the President of the Board of Directors for the Plaintiff.

5. Upon information and belief, Defendant is an owner, employee, or agent of ACE Management.

6. The Plaintiff contracted with ACE Management to provide property management services to Plaintiff's Regime.

7. Defendant, acting in his individual capacity and entirely outside of the scope of his duties as President of the Plaintiff's Board of Directors or agent of the Plaintiff's property management company, improperly utilized Plaintiff's funds to pay personal legal expenses and medical bills of at least \$13,338.41.

8. Defendant made payments directly from Plaintiff's bank account, thereby depriving Plaintiff of its property.

9. Defendant utilized Plaintiff's money for his personal use.

10. Defendant's use of Plaintiff's money for payment of personal legal fees and medical bills was not authorized by Plaintiff.

11. Plaintiff has repeatedly demanded that Defendant return the money to the Plaintiff's accounts.

12. Defendant has repeatedly refused to return the money he has wrongfully converted for his personal use.

WHEREFORE, Plaintiff demands judgment against the Defendant for actual damages, interest, and punitive damages as may be awarded by a jury for the wrongful and willful

conversion of the Plaintiff's property, and any other costs, fees, and other relief the Court deems proper.

This 6th day of November, 2014.

Respectfully submitted,

CARLOCK, COPELAND & STAIR, LLP

By:



DOUGLAS W. MACKELCAN

State Bar No.: 76332

Attorney for the Plaintiff

40 Calhoun Street, Suite 400
Charleston, SC 29401-3531
843-727-0307

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

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

Plaintiff ,

v.

Jerald W. Jones,

Defendant .

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT

C/A No.: 2014-CP-26-7617

ANSWER

(Jury Trial Demanded)

Defendant Jerald W. Jones ("Defendant"), answering the Complaint of Plaintiff Captain's Harbour and Racquet Club Homeowners Association, Inc. ("Plaintiff"), will respectfully show unto this Court as follows:

1. Defendant denies each and every allegation of Plaintiff's Complaint that is not specifically admitted herein.
2. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 1.
3. Upon information and belief, Defendant admits the allegations of Paragraph 2.
4. Defendant admits the allegations of Paragraph 3.
5. Defendant admits the allegations of Paragraph 4.
6. Defendant, upon information and belief, admits the allegations of Paragraph 5 only to the extent that the Defendant is an agent of ACE Management. Defendant denies the remaining allegations of Paragraph 5.
7. Defendant, upon information and belief, admits the allegations of Paragraph 6.

8. Defendant denies the allegations of Paragraph 7.
9. Defendant denies the allegations of Paragraph 8.
10. Defendant denies the allegations of Paragraph 9.
11. Defendant denies the allegations of Paragraph 10.
12. Defendant denies the allegations of Paragraph 11.
13. Defendant denies the allegations of Paragraph 12.
14. Defendant denies the allegations contained in the “wherefore” clause of the Plaintiff’s Complaint.

FOR A FIRST DEFENSE

15. Plaintiff’s Complaint, in whole or in part, fails to state facts sufficient to support a claim upon which relief can be granted and must, therefore, be dismissed pursuant to Rule 12(b)(6), SCRPC.

FOR A SECOND DEFENSE

16. Plaintiff failed to properly serve process on this Defendant and, therefore, this action should be dismissed.

FOR A THIRD DEFENSE

17. Plaintiff’s claims may be barred in whole or in part by the doctrine of waiver.

FOR A FOURTH DEFENSE

18. Plaintiff’s claims may be barred in whole or in part by the doctrine of laches.

FOR A FIFTH DEFENSE

19. Plaintiff's claims may be barred in whole or in part by the doctrine of accord and satisfaction.

FOR A SIXTH DEFENSE

20. Defendant's conduct was privileged under the circumstances.

FOR A SEVENTH DEFENSE

21. The damages allegedly sustained by Plaintiff, if any, were proximately caused and occasioned by their failure to exercise reasonable care to minimize the damages allegedly sustained and, therefore, the doctrine of mitigation of damages acts as a bar to Plaintiff's claims for damages.

FOR AN EIGHTH DEFENSE

22. Plaintiff is not entitled to relief because Plaintiff has unclean hands.

FOR A NINTH DEFENSE

23. Any award of punitive damages in a civil action violates the Due Process and Equal Protection of the law clauses of the Fourteenth Amendment to the United States Constitution, and denied Defendant the protection of the Fifth Amendment to the United States Constitution in that civil punitive damages are sufficiently criminal in nature as to require criminal procedural safeguards.

FOR A TENTH DEFENSE

24. Defendant's alleged conduct does not give rise to liability for punitive damages under the laws controlling in this action and, therefore, must be stricken from the Plaintiff's Complaint.

FOR AN ELEVENTH DEFENSE

25. Plaintiff's claims, if any, may be barred by the terms of the Plaintiff's agreement with Defendant and/or ACE Management.

FOR A TWELFTH DEFENSE

26. 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, if any.

FOR A THIRTEENTH DEFENSE

27. Defendant has not had an opportunity to conduct a sufficient investigation or to engage in adequate discovery regarding the circumstances of Plaintiff's allegations. Defendant will act as best he can to inform himself of the pertinent facts and prevailing circumstances surrounding any of the allegations asserted by Plaintiff in the Complaint and gives notice of Defendant's intent to assert any further defenses, including affirmative defenses, that his information-gathering process may indicate is supported by fact or law.

(Signature Page Follows)

Respectfully submitted,

GOLDFINCH WINSLOW, LLC

By:



Thomas Winslow

Ryan Compton

Post Office Box 829

Murrells Inlet, SC 29576

t. 843.357.9301 / f. 843.357.9303

tom@goldfinchwinslow.com

ryan@goldfinchwinslow.com

ATTORNEYS FOR PLAINTIFF CAPTAIN'S
HARBOUR AND RACQUET CLUB
HOMEOWNERS ASSOCIATION, INC.

May 1, 2015
Murrells Inlet, South Carolina

22

case law, governing documents of Captain's Harbour and Racquet Club Homeowners Association, Inc., and any supporting memoranda filed with the Court prior to a hearing on this Motion.

Respectfully submitted,

This 16th day of December, 2015.



Douglas W. MacKelcan
CARLOCK, COPELAND & STAIR, LLP
40 Calhoun Street, Suite 400
Charleston, SC 29401
(843) 727-0307
Attorney for Plaintiff

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

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

Plaintiff,

v.

Jerald W. Jones,

Defendant.

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT

C/A No.: 2014-CP-26-7617

**DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT**

FILED
COUNTY
2016 JAN 11 AM 10:28
CLERK OF COURT
JEROME W. WOOD

COMES NOW, Defendant Jerald W. Jones ("Defendant"), by and through its undersigned attorney, and hereby moves for Summary Judgment pursuant to Rule 56 of the South Carolina Rules of Civil Procedure.

Defendant is the former property manager for the Plaintiff, former Board of Directors Member, and member of the Plaintiff HOA. Upon being hired to manage the property in question the Defendant and Plaintiff signed the "ACE HOA Property Management Agreement." (Exhibit 1) Page 6, Section 6, Paragraph C states "the said association and its members, do hereby agree to indemnify and save harmless the Manager from any such liability for all damage, costs, and expense (including attorney fees incurred by the manager in defending legal action), arising from an injury to any person or property in, about and in connection with the Association...." The Plaintiff was attacked by residents on or about July 2014 due to his attempts to enforce HOA policy and procedure. Further, when the attack occurred he was on the HOA property in a meeting on other HOA business.

As a result of the attack on him, he was injured and required medical attention. Further, he was arrested and had to hire defense counsel to finally have the charges dismissed. The Defendant was not the instigator and ultimately was vindicated, as such under the attached Contract he was entitled to be indemnified from "any such liability for all damage, costs, and expense ... arising from any injury to any person or property in, about and in connection with the association." The Defendant as a Property Manager, President of the HOA, and/or as a member of the HOA has the right to be indemnified under the clear language of the agreement.

Summary Judgment for the Defendant is proper because no issues of material fact exist regarding this claim, and Plaintiff is entitled to a judgment as a matter of law. This Motion is based upon and supported by pleadings, Rules of Civil Procedure, applicable statutes, applicable case law, the contract between the Plaintiff and Defendant, and any supporting memoranda filed with the Court prior to a hearing on this motion.

(Signature Page Follows)

Respectfully submitted,

GOLDFINCH WINSLOW, LLC

By: 

Thomas Winslow

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ATTORNEYS FOR DEFENDANT JERALD W. JONES

Murrells Inlet, South Carolina

January 4, 2016

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

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

Plaintiff,

v.

Jerald W. Jones,

Defendant.

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT

C/A No.: 2014-CP-26-7617

**DEFENDANT'S AMENDED MOTION
FOR SUMMARY JUDGMENT**

2016 JAN 25 PM 1:55
CLERK OF COURT
JEROME L. BROWN, JR.
CLERK OF COURT

COMES NOW, Defendant Jerald W. Jones ("Defendant"), by and through its undersigned attorney, and hereby moves for Summary Judgment pursuant to Rule 56 of the South Carolina Rules of Civil Procedure.

Defendant is the former property manager for the Plaintiff, former President of the Board of Directors, and member of the Plaintiff HOA. Upon being hired to manage the property in question the Defendant and Plaintiff signed the "ACE HOA Property Management Agreement." A copy of which is attached hereto and incorporated herein by reference. Beginning at Page 5, Section IV, Paragraph C, Line 3, the Agreement states "...said association and its members, do hereby agree to indemnify and save harmless the Manager from any such liability for all damage, costs, and expense (including attorney fees incurred by the manager in defending a legal action), arising from an injury to any person or property in, about and in connection with the Association...". The Defendant was attacked by residents on or about July 2014 due to his attempts to force the residents to comply with HOA

As a result of the attack, Defendant was injured and required medical attention. Further, he was arrested and had to hire defense counsel to finally have the charges dismissed. The Defendant was not the instigator and ultimately was vindicated, as such under the attached Contract he was entitled to be indemnified from "any such liability for all damage, costs, and expense ... arising from any injury to any person or property in, about and in connection with the association." The Defendant as a Property Manager, President of the HOA, and/or as a member of the HOA has the right to be indemnified under the clear language of the agreement.

Summary Judgment for the Defendant is proper because no issues of material fact exist regarding this claim, and Defendant is entitled to a judgment as a matter of law.

This Motion is based upon and supported by pleadings, Rules of Civil Procedure, applicable statutes, applicable case law, the contract between the Plaintiffs and Defendant, any Affidavits and supporting memoranda that may be received by the Court.

(Signature page is next page)

Respectfully submitted,

GOLDFINCH WINSLOW, LLC

By:  for

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ATTORNEY FOR DEFENDANT

Murrells Inlet, South Carolina

January 20, 2016

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	CASE NO.: 2014-CP-26-7617
	)	
CAPTAIN'S HARBOUR AND	)	
RACQUET CLUB HOMEOWNERS	)	
ASSOCIATION, INC.,	)	PLAINTIFF'S MEMORANDUM OF LAW IN
	)	SUPPORT OF MOTION FOR SUMMARY
Plaintiff,	)	JUDGMENT AND IN OPPOSITION TO
vs.	)	DEFENDANT'S MOTION FOR SUMMARY
	)	JUDGMENT
JERALD W. JONES,	)	
	)	
Defendant.	)	
_____	)	

The Plaintiff Captain's Harbour and Racquet Club Homeowners Association, Inc. ("Captain's Harbour HOA" or "Plaintiff"), by and through its undersigned attorney, submits this Memorandum of Law in support of its Motion for Summary Judgment and in opposition to Defendant's Amended Motion for Summary Judgment pursuant to Rule 56 of the South Carolina Rules of Civil Procedure.

This Court should grant Captain's Harbour HOA's Summary Judgment and deny Defendant's Motion for Summary Judgment because Defendant Jerald W. Jones ("Jones") converted funds from Captain's Harbour HOA's operating account for his personal use. Jones is not entitled to indemnification as an employee of ACE Management ("ACE"), the property manager for Captain's Harbour HOA, because his conduct was not anticipated by, applicable to, or covered by the indemnification provisions in the ACE Management Agreement ("the Agreement", attached as Exhibit A). Jones' conduct was outside of the scope of his employment with ACE, and was personal, willful, and contrary to the interests of Captain's Harbour HOA. Further, Jones neither sought nor received authorization from the Captain's Harbour HOA Board

of Directors (“the Board”) for use of the funds, which is a strong indication he knew he was not entitled to use the funds.

STATEMENT OF THE FACTS

Plaintiff seeks to recover from Defendant for conversion of funds from the Plaintiff’s operating account. Jones, without authorization, used Captain’s Harbor HOA funds to pay for criminal defense legal fees and medical bills following physical altercations on July 7, 2014 that led to his arrest. Captain’s Harbour is a non-profit corporation existing under the laws of the state of South Carolina for the purpose of administering a condominium association located in Horry County, South Carolina. On July 7, 2014, Jones was a resident of Captain’s Harbour, the President of the Board for Captain’s Harbour HOA, as well as an employee and partial owner of ACE. Jones claims he was entitled to use the Plaintiff funds pursuant to the Agreement.

Property Management Agreement

In October of 2012 Captain’s Harbour HOA entered 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.” The parties are identified in the first paragraph of the Agreement:

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”.

The Agreement, which was drafted by ACE, outlines the responsibilities and duties ACE owed to Captain's Harbour HOA. The first subsection of the "DUTIES AND RESPONSIBILITIES OF THE MANAGER" section of the Agreement is labelled Accounting/Finance. (Ex. A, pp. 1-2). This subsection outlines the accounting guidelines ACE was required to follow when dealing with funds distributed to it from Captain's Harbour HOA. Many of these guidelines require financial records be kept in such a manner as to allow Captain's Harbour HOA to monitor funds allocated to ACE. Additionally, the Agreement expressly requires an Officer of the Board to authorize any expense exceeding five hundred dollars, with a narrow exception for emergency repairs. Even under circumstances requiring an emergency repair, the Management Agreement states ACE "will, if at all possible, confer immediately with the Board of Directors regarding emergency expenditures." (Ex. A, pp. 3 - 4).

Finally, the Agreement contains an indemnity provision, upon which Jones is relying to justify his use of Captain's Harbour HOA operating account funds. The entire indemnity provision reads as follows:

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 of 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.

July 7, 2014 Incidents Involving Jones.

On July 7, 2014 Jones was involved in verbal and physical altercations with residents of Captain's Harbour that resulted in his arrest. The incident began at the association pool and involved an altercation between Jones and a female resident and her twelve year old son. Later, another female resident and Jones had a violent physical encounter at the entrance to Jones' residence. These physical exchanges led to Jones' arrest. (Exhibit B).

Captain's Harbour HOA Funds Used

Jones used Captain's Harbour HOA operating account funds to pay attorney Morgan Martin \$10,000 to defend him against criminal charges arising out of the July 7, 2014 incident. (Exhibit C). He used \$2,788.80 from the Captain's Harbour HOA operating account for medical bills. (Exhibit D). Jones never sought approval from the Board for these expenditures. The Captain's Harbour HOA Board treasurer realized Jones had used the funds when it received and reviewed the Captain's Harbour HOA monthly bank statement. When the Captain's Harbour HOA confronted Jones about the misappropriation, Jones claimed he was entitled to the funds

under the indemnification provision of the Management Agreement. Captain's Harbour HOA Board never approved the expenditure.

LEGAL STANDARD

Summary judgment is appropriate when it is clear there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. Rule 56I, SCRPC; *Baird v. Charleston County*, 333 S.C. 519, 511 S.E.2d 69 (1999); *Young v. S.C. Dep't of Corr.*, 333 S.C. 714, 511 S.E.2d 413 (Ct. App. 1999). In determining whether any triable issue of fact exists so as to preclude summary judgment, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the non-moving party. *Strother v. Lexington County Recreation Comm'n*, 332 S.C. 54, S.E.2d 117 (1998); *Pye v. Aycock*, 325 S.C. 426, 480 S.E.2d 455 (Ct. App. 1997). In ruling on a summary judgment motion, the Court should consider the pleadings, depositions, interrogatory answers, admissions, and affidavits in determining whether there is a genuine issue of material fact for trial. *See Thomas v. Waters*, 315 S.C. 524, 526, 445 S.E.2d 659 (Ct. App. 1994).

ARGUMENT

I. JONES IS NOT A PARTY TO THE AGREEMENT

Captain's Harbour HOA made request to Jones for him to return the money pre-suit. Jones refused and repeatedly attempted to justify his use of the Captain's Harbour HOA funds by citing the Agreement and its indemnity provisions. However, Jones was not even a party to the Agreement. Further, the indemnity provision in the Agreement, drafted by ACE, does not include any reference to Jones or ACE employees. To the extent the Agreement provides for indemnity, it does so for "Manager" which is ACE, not Jones. When a contract is unambiguous, clear, and explicit, it must be construed according to the terms the parties have used. Century

Indem. Co. v. Golden Hills Builders, Inc., 348 S.C. 559, 561 S.E.2d 355 (2002). In this case, Jones relies exclusively on the Agreement, to which he is not a party. As such, Jones is not entitled to contractual indemnification as a matter of law, and this Court should grant summary judgment for the Plaintiff.

II. JONES IS NOT ENTITLED TO INDEMNITY BECAUSE HIS CONDUCT WAS OUTSIDE THE SCOPE OF HIS EMPLOYMENT.

If this Court determines that Jones may be substituted for ACE under the Agreement, summary judgment for the Plaintiff is proper because Jones' actions were outside the scope of ACE's duties for Captain's Harbour HOA. "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). To the extent the indemnity provision in the Management Agreement is open to more than one interpretation, that ambiguity should be resolved against ACE, as ACE was the drafter of the Agreement.

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 Captain's Harbour HOA that result in liability to a third party. Specifically, the indemnity provision states Plaintiff will hold ACE harmless for liability resulting from contracting insurance for Captain's Harbour HOA, contracting with third parties to assist ACE in the fulfillment of its duties as Manager, and from liability for injury to person or property that occurred when ACE is effectuating the business of Captain's Harbour HOA.

The Agreement does not protect Jones individually for intentional acts done on his personal time. Further, the agreement is exclusively between ACE and Captain's Harbour HOA, 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 Plaintiff'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, an interpretation Plaintiff disagrees with, in this case, 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. 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.

Although Plaintiff asserts that Jones is not entitled to indemnity under the Agreement, under any circumstances, the undisputed facts of this case support summary judgment in favor of the Plaintiff because Jones, while engaging in the conduct that led to his arrest and personal injuries, was acting outside of the scope of his duties as an employee of ACE and contrary to the interests of the Plaintiff.

III. JONES IS NOT ENTITLED TO INDEMNITY BECAUSE HIS CONDUCT WAS WILLFUL OR GROSSLY NEGLIGENT.

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 Plaintiff's operating account by asserting that he is entitled to indemnity under the Agreement. However, the clear language of the Agreement, if it is even applicable to Jones personally, 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 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 Captain's Harbour HOA without liability exposure if the policy is inadequate.

The language in the second paragraph of indemnity provision states Captain's Harbour HOA 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." (Ex. A, p. 4). Again, this paragraph involves advice and decisions of ACE for Captain's Harbour HOA.

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 Plaintiff 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. (Ex. A, p. 6). 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 Plaintiff, rather, Jones unilaterally used Captain's Harbour HOA 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 Captain's Harbour HOA. 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. Accordingly, Captain's Harbour's Motion for Summary Judgment should be granted.

IV. JONES IS NOT ENTITLED TO THE FUNDS BECAUSE HE DID NOT FOLLOW THE NECESSARY PROCEDURES WHEN OBTAINING THE FUNDS.

Conversion is defined as the unauthorized assumption in the exercise of the right of ownership over goods or personal chattels belonging to another to the exclusion of the owner's rights. Owens v. Andrews Bank & Trust Co., 265 S.C. 490, 220 S.E.2d 116 (1975). Here, Jones claims he is entitled to the funds he took from Captain's Harbour HOA for reimbursement of the costs he incurred in defending criminal charges and treatment for physical injuries associated with the July 2014 altercation. Jones failed to follow the proper procedure for approval as mandated by the Agreement, which is further indication that Jones knew his use of the funds was not authorized.

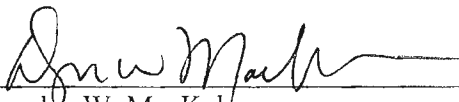
The Agreement requires authorization for the distribution of expenses that exceed the sum of five hundred dollars (\$500) "for any one item of repair, replacement or refurbishing." (Ex. A, pp.3-4) Here, Jones took almost thirteen thousand dollars (\$13,000) from Captain's Harbour HOA's operating account without seeking approval from the Board. Additionally, Jones did not confer with the Board in any way regarding the funds until he was confronted about the expenditures. Although this language does not address the exact issue involved in this case, it provides a clear indication that Captain's Harbour HOA expected be consulted on large expenditures, and never intended for ACE or its employees to spend freely from the Captains' Harbour HOA operating account.

The Agreement provides clear guidelines for how ACE must account for expenditures made on behalf of Captain's Harbour HOA. Jones failed to follow those accounting and notice procedures. His failure to follow these procedures indicates his intent to conceal the conversion of the funds from Captain's Harbour HOA. If Jones' sincerely believed he was entitled to the funds for his medical and legal bills he would have notified the Board of the need and the basis of the need. However, Jones never notified the Board of the significant expenditure of Captain's Harbour HOA funds for his personal legal and medical expenses.

CONCLUSION

Plaintiff is entitled to a judgment against Defendant Jerald W. Jones as a matter of law. The uncontroverted facts are that he used, without proper authorization, \$12,788.80 of Plaintiff's operating funds to pay for a criminal defense lawyer and medical treatment. For the reasons discussed in this memorandum and at the hearing, Defendant is not entitled to indemnification under the Agreement, and Plaintiff respectfully requests this Court issue an Order requiring Defendant to return the converted funds as well as applicable interest, and the fees and costs associated with having to bring this suit.

This 16th day of February, 2016.



Douglas W. MacKelan
CARLOCK, COPELAND & STAIR, LLP
40 Calhoun Street, Suite 400
Charleston, SC 29401
(843) 727-0307
Attorney for Plaintiff

ACE HOA Property Management Agreement

THIS AGREEMENT, made and entered into this 1st day of October 2012, by and Between Captains 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".

WITNESSETH

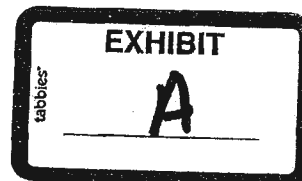
WHEREAS, the ASSOCIATION is made up of the owners of a Property Regime, "The Association", and by its Association Documents is vested with certain powers and charged with certain duties relative to the operation of the Association; and

WHEREAS, under the provisions of the Master Document establishing the regime, the Association bears certain responsibilities and duties with regard to the dwellings and common elements of the regime; and

WHEREAS, the nature of the regime, and the complexity and burden of the duties and the responsibilities of the Association with the regard thereto necessitate the employment of a manager 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;

NOW THEREFORE, in consideration of the mutual covenants herein made, the parties agree as follows;

- I. APPOINTMENT: The Association hereby appoints the Manager and the Manager hereby accepts appointment on the terms and conditions hereinafter provided as exclusive Managing Agent of the Association located in Horry County, State of South Carolina, and consisting of the land, dwellings, common elements and limited common elements.
- II. TERM: Unless sooner terminated as elsewhere herein provided, the term of this agreement shall be for a period of 12 months beginning October 1, 2012 and continuing through October 1, 2013. This agreement shall automatically renew for subsequent one (1) year periods unless terminated in writing by either party within thirty (30) days prior to the expiration of this agreement. **This agreement may be cancelled without cause by either party hereto by giving thirty (30) days written notice.**
- III. DUTIES AND RESPONSIBILITIES OF THE MANAGER The manager shall assist the Board of Directors of the Association in the administration of the property as hereinafter more specifically set forth. It is not the intention of the parties to transfer the authority or control vested in the Association's Board of Directors or its officers nor their duties and responsibilities to the Manager. The Manager shall be responsible directing the implementation of the general management policy decisions of the Board of



Directors with respect to the property and the affairs of the Association, and shall be subject to the Board with respect to matters of policy, but shall be entitled to exercise its discretion in the day to day details of implementation of such policies.

A. Accounting/Finance: With the authority of, and at the special direction of the Board of Directors of the Association and in accordance with the Association Master Documents, the Manager shall:

1. Prepare an annual operating budget for the Association setting forth Projected revenues and expenditures for the ensuing (accounting) year based on anticipated operations and taking into account the general fiscal condition of the association and the directives of the Board of Directors for the year. The proposed budget will be submitted to the Board of Directors for their approval at such times as shall be directed by them.
2. Prepare a monthly financial report, on a modified cash basis of receipts and disbursements, itemized according to the budget, and submit these statements to the Board of Directors.
3. Maintain all accounting records in a manner to facilitate an annual audit and the preparation of tax returns by an independent certified public accountant. Such records will be available for inspection by the Association's Officers and Board during regular business hours.
4. Prepare an annual mailing to all members of the Association including the proposed budget and assessments for each member and such other information as the Board of Directors shall direct.
5. Be the exclusive agent to receive all assessments from the Association, which will be sent from the homeowners to the Association at 1425 Teague Rd. Unit 511, Myrtle Beach, SC 29577.
6. Invoice and collect all assessments and other monies, which may be due the Association. If any assessment is not paid, on the request of the Board, the Manager may, in the name of the Association, institute an action at law against the delinquent member.
7. Notify the Board of Directors in writing, if at any time during the fiscal year, it should appear to the manager that the assessments received or the collection of assessments may be insufficient to pay the disbursements that are to come due. The Manager shall not undertake to pay the expenses of the Association from the Manager's own funds.
8. Deposit all funds collected from the members in accounts, in the name of the Association with an approved bank. Additional accounts will be maintained if requested by the Board of Directors.
9. Review, process, and pay all expenses and obligations of the Association out of the funds collected and deposited on behalf of the Association in accordance with this Agreement.
10. With board approval purchase, out of the funds of the Association, equipment, tools goods, supplies, and materials as shall be reasonably necessary to perform maintenance, upkeep, repair, replacement, refurbishing and preservation of the property and common elements of the regime.
11. Coordinate with and assist the Certified Public Accountant selected by the Association in the preparation of the annual; federal tax returns and annual State of South Carolina tax returns.
12. Handle all correspondence related to business matters concerning financial transactions of the association.

B. Administrative

1. The Manager shall be available to attend up to five(5) Board Meetings per year. The Manager shall prepare and send the written notice of the Board meetings and prepare and agenda for

each meeting. Following the Board meetings, the Manager shall prepare the minutes as transcribed by a member of the Board or an employee of the Manager and send a copy to each Board member. The Board of Directors shall appoint a single Board member or Association officer who shall act as liaison between Board/Association and the Manager during the time period between scheduled board meetings.

2. The manager shall attend the Annual Meeting each year. The Manager shall assist the Board of Directors in preparing for the annual meeting.
3. The Manager shall assist the officers of the Board in maintaining the Association's records including the minutes of meetings, membership list, and financial records required to be kept by the Association. Such records shall be kept by the Association. Such records shall be kept in possession of the Manager, but shall be the property of the Association and be available for use and inspection by the Association during normal business hours.
4. The Manager shall investigate and make recommendations to the Board of Directors as to the forms of insurance needed by the Association to comply with the provisions of the Association master documents. The Manager shall assist the Board in acquiring insurance policies for the Association. The Association may delegate to the Manager its authority to obtain bids for, contract to purchase and actually purchase such insurance for the Association as the Manager, in its sole discretion, shall deem advisable in the best interest of the Association.
5. The Manager shall assist in preparing and distributing bulletins to the general membership relating to affairs of the Association and/or new policies approved by the Board of Directors.
6. The Manager shall notify the Board of any information of which the manager becomes aware or becomes available to the Manager and which may be necessary for the Association to comply with all laws, statutes, ordinances or rules of all appropriate government authorities.
7. The Manager, at the discretion of the Board and at the expense of the Association, may retain and employ attorneys, accountants and such other experts and professionals whose services are reasonably required by the Manager to effectively perform Manager's duties and responsibilities under this agreement.
8. The Manager shall assist the Board of Directors and/or appointed Committees in drafting and notifying owners of Rules and Regulations adopted by the Association.

C. PROPERTY SUPERVISION

1. The Manager shall, under the direction of the Board, cause the buildings, grounds, lands and other common and limited common elements to be maintained and repaired, including painting, roofing, paving, landscaping, cleaning, and such other normal maintenance and repair work as may be necessary. The Manager shall inspect, with the assistance and/or guidance of the Board, the general appearance of the buildings and grounds, to determine that the subcontractors are reasonably performing in accord with the specifications as have been agreed to between the Manager, subcontractors and the Board of Directors. For any one item of repair, replacement or refurbishing, the expense incurred may not exceed the sum of (\$500) unless specifically authorized by an Officer of the Board, excepting, however, that emergency repair involving manifest danger to persons or property or immediately necessary for the preservation or safety of the property or for the safety of the persons or required to avoid suspension of any necessary services to the Association, may be made by



the Manager irrespective of the above limitation. Notwithstanding this authority as to emergency repairs, it is understood that the Manager will, if at all possible, confer immediately with the Board of Directors regarding emergency expenditures.

2. The Association grants to the Manager access at all times to all of the Property the Association to carry out functions and purposes set forth in this Agreement. Subject to the provisions of the Association documents, the Association grants the Manager access to each dwelling during reasonable business hours may be necessary for the performance of the Manager's duties. The Association shall indemnify the Manager from any claims, demands, judgments, or suits that may be brought against on incurred by the Manager by reason of the Manager exercising its right of access to individual dwellings as herein provided, except as set forth in Article VI herein.
3. The Manager shall, subject to final contract approval by the Board, be authorized to negotiate, contract with and supervise, maintenance and service contracts that are needed by the Association.

- D. Maintenance Services/Supplying Goods and Services: As applicable and after submission of a proposal (written or oral) and subject to final contract approval by the Board, the Manager may negotiate, contract with and supervise the performance of the following services:

Landscaping services; Electrical, plumbing and other repair services; Pest Control services; Carpenters and general repair services.

The Manager shall, when possible, obtain some discounts by dealing on a volume basis with suppliers, subcontractors and laborers. Any deviation from the budget for goods and/or services provided by the Manager must have prior approval of the Board of Directors and/or the designee before the rendering of such by the Manager, except in the event of an emergency, when the Manager is authorized to act in its sole discretion. 1. On-site Maintenance Personnel: If the Association authorizes the Manager to provide their own personnel for the care and maintenance of the property the following fees will apply: a. The Association will be charged the hourly rate for the employees needed. Additional work for special projects, authorized by the Board of Directors and performed by an employee of the Manager, will be charged by a bid/estimate contract.

The services, materials, and goods set forth in this Item D will be provided on a need, use, and demand basis, invoiced and payable according to the terms of the Service contracts.

- E. Casualty Loss, Restoration, Major Projects and Improvements

1. Casualty Loss and Restoration: With respect to casualty loss and restoration of the property, or any portion thereof, including restoration or repair made necessary by Acts of God or other cause of any portion of the Common Area or Limited Common Area, the Manager shall, if Authorized by the Board of Directors, provide the necessary service for the filing of insurance claims, coordination with adjusters and/or individual contractors and such proportions as it deems advisable, notwithstanding the fact that in the event of casualty loss, damage may be covered by insurance.

2. In addition to the regular fees herein set forth, for services rendered under this item E, a fee for supervision for each occurrence (insurance claim) or project over ten thousand dollars (\$10,000) due to casualty loss, or restoration, major projects and improvements shall be negotiated and approved by the Board on a case by case basis; and the fee shall not exceed three percent (3%) for all work performed over the ten thousand dollars (\$10,000) per occurrence or project.

IV. COMPENSATION

- A. **Manager:** The Association agrees to pay the Manager a fee of \$ 750.00 per month, payable in monthly installments for items A,B,C, D and E.1. as set forth in Article III herein unless otherwise indicated. The management fee is due and payable on the 1st day of each month.
- B. **Costs and Expenses:** The Association agrees to pay all reasonable costs and expenses incurred by the Manager in the performance of his duties, including office supplies, and postage, expensed for items A,B,C, and E as set forth in Article III herein unless otherwise indicated.
- C. **Other Compensation:** The Association agrees to pay any compensation due the Manager under Section III, Item B (1) and (2), Item D (1), Section III, Items E and Section IV, Item B within fifteen (15) days receipt of an invoice for those services.
- D. **Other:** Association agrees to allow Manager to place a sign at the entrance(s) to the development announcing the name, logo and phone number of the Manager.

- V. INDIVIDUAL MEMBER DWELLINGS: This agreement does not contemplate nor is the Manager responsible or required to perform the upkeep and repair of that property, the responsibility for which, under the Association master documents, is that of a Dwelling Owner. However, the Manager may, in its sole and absolute discretion, perform such maintenance and repair service for and to a Dwelling as may be requested by an individual member and negotiate the deal with the Individual Owner with respect to a reasonable charge for those services. All correspondence, letters, emails, etc., from Manager to Captains Harbour homeowners shall approved by the Board and all related correspondence shall be copied and sent to the Board by Manager.

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 damage, 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.

Signed this 1st day of October 2012.

Matthew J. Myers V.P.
HOA Representative & Title

Daniel W. Jones 10/1/2012
ACE Manager

James A. Myers, Treas.
HOA Representative & Title

[Signature] SECRETARY
HOA Representative & Title

Horry County Police Arrest Report

App. 000049

Horry County Police
2580 N Main ST
Conway, SC 29526
843 915-5350

Case No. 14061944
Report No. 14061944.1
Report Date: 7/7/2014 5:22:00 PM

1

Page 1 of 6

Subject: Assault/1425 Teague Rd/Myrtle Beach

Case Report Status	A - Approved	Date Entered	7/7/2014 11:35:35 PM	Reporting Officer	
Status Indicator	A - Administrative Filler (Filler for when "U" or "C" is not used)	Entered By	9196 - Sotile, John		9196 - Sotile, John
Status Change Date		Date Verified	7/14/2014 5:57:27 AM	Assisted By	
Occurred On	7/7/2014 5:22:00 PM	Verified By	H415 - Headley, Ryan		
(and Between)		Date Approved	7/21/2014 3:51:31 PM		
End Date		Approved By	8829 - Vasquez, Erica		
End Time					
Location	1425 Teague rd. Myrtle Beach	Connecting Cases			
Jurisdiction	JJ - JURISDICTION	Disposition	Arrest		
Grid		Clearance Reason			4479 - Neely, Jeremy
Sector		Date of Clearance			
Map		Reporting Agency	Horry County Police		
Tract/Geo-Indicator		Division			
Cell Source	Field	Notified			
		Means			
Vehicle Activity		Other Means			
Vehicle Traveling		Motive			
Cross Street		Other Motives			

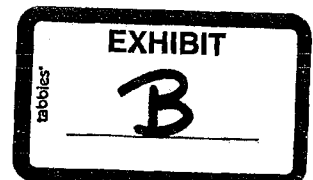
Report Narrative On 07-07-2014 R/O was dispatched to 1425 Teague Rd for a report of a non active assault. On arrival R/O was met in the parking lot by witness #2 (W2) and Arrestee #1 (A1). A1 stated she was assaulted in the pool area of the apartment complex by Arrestee #2 (A2) and Arrestee #3 (A3). A1 also stated that Suspect #1 (S1) had also been assaulted. R/O Checked on the status of S1 at her residence. EMS was requested due to visible injuries on A1 and S1. Both parties declined transport to the hospital. S1 stated she would self transport to seek medical attention. R/O then interviewed arrestee #3 (A3). A3 stated that while in the pool area A1 and A2 engaged in a verbal altercation that eventually became physical with A1 striking A2. When asked how S1 became injured A3 stated she came to his apartment and began yelling at A2. A3 then showed this R/O a video that showed S1 arrive at his apartment and then engage in a verbal altercation with A2. during the altercation A3 could be seen taking offensive postures challenging an unknown male in the video. During the altercation A2 can be seen grabbing/striking S1. A2 then pushed and shoved S1 around the balcony/hallway area outside of the apartment. S1 signed a Voluntary Statement describing the events. R/O was able to obtain a Voluntary Statement from an impartial witness (W1) describing the altercation in the pool area. Based on the statement signed by W1, A1 will be charged with Assault and Battery 3rd Degree and A3 will be Charged with Public Disorderly Conduct. Based on the video supplied by A3, A2 will be charged with Assault and Battery 3rd Degree and a Warrant will be requested for the arrest of S1 for Public Disorderly Conduct. Nothing Further.

Offense Detail: 9172 - HCPD SIMPLE ASSAULT

Offense Description	9172 - HCPD SIMPLE ASSAULT	Offense Date		No. Prem. Entered	
IBR Code	13B - Simple Assault	Location	28 - Apartments/Condominiums	Entry Method	
IBR Group	A	2nd Location Type			
Crime Against	PE	Special Circumstance			
Using		Offense Completed?	Yes		
Victim Use		Hate/Bias	88 - None (No Bias)		
		Domestic Violence	No	Type Security	
Criminal Activity	N - None/Unknown			Tools Used	
Weapons/Force	40 - Personal Weapons (Hands, Feet, Teeth, etc.)			Cargo Theft	

Offense Detail: 9211 - HCPD DISORDERLY CONDUCT/BREACH OF PEACE

Offense Description	9211 - HCPD DISORDERLY CONDUCT/BREACH OF PEACE	Offense Date	7/7/2014	No. Prem. Entered	
IBR Code	90C - Disorderly Conduct	Location	28 - Apartments/Condominiums	Entry Method	
IBR Group	B	2nd Location Type			
Crime Against	SO	Special Circumstance			
Using		Offense Completed?	Yes		
Victim Use		Hate/Bias	88 - None (No Bias)		
		Domestic Violence	No	Type Security	
Criminal Activity				Tools Used	



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Page 2 of 6

Cargo Theft

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Horry County Police Arrest Report

App. 000051

Case No. 14061944
Report No. 14061944.1
Report Date: 7/7/2014 5:22:00 PM

Horry County Police
2580 N Main ST
Conway, SC 29526
843 915-5350

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Page 3 of 6

Type Criminal Activity
Drug Type

Held For

Arrest Notes

Arrestee A2: Kablinger, Renate

Arrestee Number
Name
AKA
Alert(s)

[REDACTED]

W - White
N - Not of Hispanic Origin
5' 5"
190
BRO - Brown
BRO - Brown

Place of Birth
SSN
DLN
DLN State
DLN Country
Occupation/Grade
Employer/School
Employer Address
Employer CSZ

Res. County
Res. Country
Resident Status
Horry
USA - United States of America
J - This Jurisdiction

Arrest No. 28537

Arrested For 9172 - HCPD SIMPLE

Arrest Type T - Taken Into Custody

Fingerprints

Arrested On 7/7/2014 7:33:00 PM
Arrest Location 1425 Teague Rd

FBI No.

Photos

Booked On

State No.

Miranda Read

Booked Location

Armed With

Miranda Waived

Released Location

Multi. Clearance

Number of Warrants

Released On

Multi. Clearance

Juvenile Disposition

Released By

Prev. Suspect No.

Adult Present

Release Reason

Notified

Held For

Type Criminal Activity
Drug Type

Arrest Notes

Arrestee A3: Jones, Jerry W.

Arrestee Number
Name
AKA
Alert(s)

A3
Jones, Jerry W.

Male
W - White
N - Not of Hispanic Origin
5' 8"
150
HAZ - Hazel
WHI - White

Place of Birth
SSN
DLN

[REDACTED]

Address

CSZ

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Horry
USA - United States of America
J - This Jurisdiction

Home Phone

Work Phone

Email Address

Horry County Police Arrest Report

Case No. 14061944
Report No. 14061944.1
Report Date: 7/7/2014 5:22:00 PM

Horry County Police
2560 N Main ST
Conway, SC 29528
843 815-5350

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Page 4 of 6

Scars/Marks/Tattoos	Build	
Modus Operandi	Teeth	
Other MD		
Attire		
Habitual Offender Status		
Arrest No. 28538	Arrested For 8211 - HCPD DISORDERLY CONDUCT/BREACH OF PEACE	Arrested On 7/7/2014 7:33:00 PM
Arrest Type T - Taken into Custody	Fingerprints	Arrest Location 1425 Teague Rd.
FBI No.	Photos	Booked On
State No.	Miranda Read	Booked Location
Armed With 01 - Unarmed	Miranda Waived	Released Location
Multi. Clearance N - Not Applicable	Number of Warrants	Released On
Multi. Clearance	Juvenile Disposition	Released By
Offense	Adult Present	Release Reason
Prev. Suspect No.		Held For
Notified		
Type Criminal Activity		
Drug Type		
Arrest Notes		

Victim V1: Vinson, Nancy

Victim Code V1	Victim Of 9172 - HCPD SIMPLE ASSAULT	
Victim Type I - Individual		
Name Vinson, Nancy	DOB [REDACTED]	Place of Birth [REDACTED]
AKA	Age 56	SSN [REDACTED]
Alert(s)	Sex F - Female	DLN [REDACTED]
Address [REDACTED]	Race W - White	DLN State SC - South Carolina
CSZ [REDACTED]	Ethnicity N - Not of Hispanic Origin	DLN Country USA - United States of America
Home Phone [REDACTED]	Ht. 5' 5"	Occupation/Grade
Work Phone [REDACTED]	Wt. 140	Employer/School
Email Address	Eye Color GRY - Gray	Employer Address
Attire	Hair Color	Employer CSZ
Injury M - Apparent Minor Injury	Facial Hair	Res. County
Circumstances	Complexion	Res. Country USA - United States of America
		Resident Status J - This Jurisdiction
		Testify

Law Enforcement Officer Killed or Assaulted Information	Type
	Assignment
	Activity
	Other ORI

Justifiable Homicide Circumstances

Victim Offender Relationships

Offender	Relationship
A2	NE - Victim Was Neighbor
A1	NE - Victim Was Neighbor
A3	NE - Victim Was Neighbor
S1	VO - Victim Was Offender

Victim Notes

Victim V2: Kablinger, Renate

Victim Code V2	Victim Of 9172 - HCPD SIMPLE ASSAULT
Victim Type I - Individual	

Horry County Police Arrest Report App. 000053

Case No. 14061944
Report No. 14061944.1
Report Date: 7/7/2014 5:22:00 PM

Horry County Police
2580 N Main ST
Conway, SC 29526
843 915-5350

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Name	Kablinger, Renate	61	Place of Birth	
AKA		F - Female	SSN	
Alert(s)		W - White	DLN	
		N - Not of Hispanic Origin	DLN State	
		5' 5"	DLN Country	
		190	Occupation/Grade	
Home Phone		BRO - Brown	Employer/School	
Work Phone		BRO - Brown	Employer Address	
Email Address			Employer CSZ	
			Res. County	Horry
			Res. Country	USA - United States of America
Attire			Resident Status	J - This Jurisdiction
Injury	N - None		Testify	
Circumstances				

Law Enforcement Officer Killed or Assaulted Information	Type
	Assignment
	Activity
	Other ORI

Justifiable Homicide Circumstances	
---------------------------------------	--

Victim Offender Relationships

Offender	Relationship
A1	NE - Victim Was Neighbor
S1	NE - Victim Was Neighbor
A2	VO - Victim Was Offender
A3	NE - Victim Was Neighbor

Victim Notes

Witness W1: Minton, Pam

Witness Code		45	Place of Birth	
Name		F - Female	SSN	
AKA		W - White	DLN	
Alert(s)		N - Not of Hispanic Origin	DLN State	
			DLN Country	
			Occupation/Grade	
			Employer/School	
			Employer Address	
			Employer CSZ	
			Res. County	Horry
			Res. Country	USA - United States of America
			Resident Status	J - This Jurisdiction
			Testify	

Witness W2: Hunt, Nathaniel

Witness Code	W2	1/25/2002	Place of Birth	
Name	Hunt, Nathaniel	12	SSN	
AKA		M - Male	DLN	
Alert(s)		W - White	DLN State	
		N - Not of Hispanic Origin	DLN Country	
Address	1425 Teague RD		Occupation/Grade	
CSZ	Myrtle Beach, SC 29577		Employer/School	
Home Phone			Employer Address	
Work Phone			Employer CSZ	
Email Address			Res. County	Horry
			Res. Country	USA - United States of America
Attire			Resident Status	
Witness Notes			Testify	

Case# 14061944**HORRY COUNTY POLICE DEPARTMENT***Dedicated to Providing Comprehensive, Quality Law Enforcement*

2560 North Main Street, Suite 7 - Conway, SC 29526 - Tel: 843-915-5350 - Fax 843-248-1886

Voluntary StatementTime: 6:50 Date: 7-7-14 Location: [REDACTED] Page 1 of 1I, Nancy Winsor am [REDACTED] years old, my date of birth is: [REDACTED]

my Social Security # is [REDACTED]; my phone number is: [REDACTED]

my address is: 1425 Decade Rd, [REDACTED]I am giving this statement to G. Neely of the Horry County Police Department.

I volunteer to give the following information of my own free will, for whatever purpose it may serve.

Came home from Dr. evidently everyone
 had been fight, Stephanie called me and
 said Renata + Genny Jones called me a whore
 and a fat bitch. So I went to ask them
 why? Because I am disabled stay in
 bed most of the time they come
 out of their door and beat me up
 Broke arm + Damaged eye socket, I
 can't believe a man + woman both
 beat me. Going to hospital

I have read each page of this statement, consisting of 1 pages, each of which bears my signature
 and correction, any if, bear my initials and I certify that the facts contained herein are true and
 correct.

SIGNATURE: Nancy WinsorWITNESS: [Signature]

Feb. 15. 2016 11:27AM

No. 8425 P. 2

*****SEVEN-HUNDRED and FIFTY & 00/100'S*****

ACE Management Co
3210 Mason Pkwy
Chattanooga, TN 37415

MEMO Invoice 140701 July Management Fee

[Signature]
AUTHORIZED SIGNATURE

DOLLARS

Date 7/7/2014 Check 1515 Amount \$750.00

CAPTAINS HARBOUR & RACQUET CLUB
1475 TEAGUE RD STE 511
MYRTLE BEACH, SC 29577

CND The Conway National Bank
CHARTERED, SAVINGS, BUSINESS BANKS
67-271-532

July 15, 2014

1518

PAY TO THE ORDER OF L. Morgan Martin Attorney at Law

*****TEN THOUSAND & 00/100'S*****

L. Morgan Martin Attorney at Law
1121 Third Avenue
Conway, SC 29525

MEMO Legal Services

[Signature]
AUTHORIZED SIGNATURE

DOLLARS

\$10,000.00

Date 7/18/2014 Check 1518 Amount \$10,000.00

Apply to account: Invoice 1184

CAPTAINS HARBOUR & RACQUET CLUB
1475 TEAGUE RD STE 511
MYRTLE BEACH SC 29577

67-0211 2306142824
0172

DATE 06/23/2014

10000110

AMOUNT

***\$365.00

YAY TO THE ORDER OF GLOBAL ADVANTAGE LANDSCAPING SERVICES

THREE HUNDRED AND SIXTY FIVE DOLLARS AND NO/100

MEMO Global Advantage Landscaping Services

THIS CHECK IS VOID WITHOUT THE SIGNATURE OF THE ISSUING OFFICE

THIS CHECK IS VOID WITHOUT THE SIGNATURE OF THE ISSUING OFFICE



*****AUTO**SCH 5-DIGIT 29577
 4075 0.8400 AV 0.381 13 1 10
 CAPTAINS HARBOUR & RACQUET CLUB
 1425 TEAGUE RD STE 511
 MYRTLE BEACH SC 29577-6359

Date 9/30/14
 Primary Account

Page 1

CHECKING ACCOUNTS

Account Title: CAPTAINS HARBOUR & RACQUET CLUB

SMALL BUSINESS		Number of Enclosures	19
Account Number	173301	Statement Dates	9/02/14 thru 9/30/14
Previous Balance	71,221.59	Days in the statement period	29
6 Deposits/Credits	11,147.85		
22 Checks/Debits	82,399.44		
Service Charge	7.00		
Interest Paid	.00		
Current Balance	37.00-		

SERVICE CHARGES

DATE	DESCRIPTION	AMOUNT
9/30	*Balance Fee in Service Charge	7.00

Deposits and Additions

Date	Description	Amount
9/08	DEPOSIT	225.00
9/10	Credit Back Item 119	365.00
9/16	DEPOSIT	705.85
9/16	DEPOSIT	4,500.00
9/16	DEPOSIT	5,100.00
9/16	DEPOSIT ADJUSTMENT - CR	252.00

Checks and Withdrawals

Date	Description	Amount
9/08	Stop Payment Charge	30.00-SC
9/08	Stop Payment Charge	30.00-SC
9/09	CHECK NUMBER 10000119	365.00-
	GLOBAL ADVANTAGE LANDSCAPING SERVICES	
9/15	Bill paid-030 WASTE INDUSTRIES	253.20-



CAPTAINS HARBOUR & RACQUET CLUB
1528
August 26, 2014
\$ 322.26

PAY TO THE ORDER OF: Jimmy W Jones

***** THREE HUNDRED AND TWENTY TWO & 26/100 *****

JIMMY W JONES
1422 Temple Road #102
Myrtle Beach, SC 29577

MEMO: Invoice 154226 Rebill for Cleaning & Upkeep Supplies

Date 9/4/2014 Check 1528 Amount \$322.26

CAPTAINS HARBOUR & RACQUET CLUB
1529
August 29, 2014
\$ 1,216.08

PAY TO THE ORDER OF: GRAND STRAND RES CTR

***** TWELVE HUNDRED AND SIXTEEN & 8/100 *****

GRAND STRAND RES CTR
400 E 10th Parkway
Myrtle Beach, SC 29577

MEMO: Invoice 148901 Rebill for Janitorial Services per CHH Invoice #1514

Date 9/17/2014 Check 1529 Amount \$1,216.08

CAPTAINS HARBOUR & RACQUET CLUB
1530
August 29, 2014
\$ 1,164.93

PAY TO THE ORDER OF: GRAND STRAND REGIONAL

***** ELEVEN HUNDRED AND SIXTY FOUR & 93/100 *****

GRAND STRAND REGIONAL
PO BOX 482724
Atlanta, GA 30384-2724

MEMO: Invoice 148901 Rebill for Janitorial Services per CHH Invoice #1514

Date 9/17/2014 Check 1530 Amount \$1,164.93

CAPTAINS HARBOUR & RACQUET CLUB
1531
September 1, 2014
\$ 750.00

PAY TO THE ORDER OF: ACE

***** SEVEN HUNDRED FIFTY & 00/100 *****

ACE Management Co
3016 Hudson Pk
Charleston, SC 29405

MEMO: Invoice 148901 Rebill for Janitorial Services per CHH Invoice #1514

Date 9/9/2014 Check 1531 Amount \$750.00

CAPTAINS HARBOUR & RACQUET CLUB
1532
September 1, 2014
\$ 550.00

PAY TO THE ORDER OF: Robert Cribben

***** FIVE HUNDRED AND FIFTY & 00/100 *****

Robert Cribben
1318 S. 1st St.
Myrtle Beach, SC 29577

MEMO: Invoice 148901 Rebill for Janitorial Services per CHH Invoice #1514

Date 9/4/2014 Check 1532 Amount \$550.00

CAPTAINS HARBOUR & RACQUET CLUB
1533
August 26, 2014
\$ 80.25

PAY TO THE ORDER OF: DOCTORS CARE LLC AR

***** EIGHTY & 25/100 *****

DOCTORS CARE LLC AR
1818 W. 1st St.
Columbia, SC 29201

MEMO: Invoice 148901 Rebill for Janitorial Services per CHH Invoice #1514

Date 9/22/2014 Check 1533 Amount \$80.25

CAPTAINS HARBOUR & RACQUET CLUB
1534
August 21, 2014
\$ 83.25

PAY TO THE ORDER OF: CANDIDIA RADIOLOGY ASSOCIATES

***** EIGHTY THREE & 25/100 *****

CANDIDIA RADIOLOGY ASSOCIATES
P.O. BOX 51020
Myrtle Beach, SC 29577

MEMO: Invoice 148901 Rebill for Janitorial Services per CHH Invoice #1514

Date 9/24/2014 Check 1534 Amount \$83.25

CAPTAINS HARBOUR & RACQUET CLUB
1535
August 18, 2014
\$ 185.12

PAY TO THE ORDER OF: GRAND STRAND HEART AND VASCULAR SPECIALIST

***** ONE HUNDRED AND EIGHTY FIVE & 12/100 *****

GRAND STRAND HEART AND VASCULAR SPECIALIST
3 MARVELAND PARKWAY STE 200
Myrtle Beach, SC 29577

MEMO: Invoice 148901 Rebill for Janitorial Services per CHH Invoice #1514

Date 9/18/2014 Check 1535 Amount \$185.12

CAPTAINS HARBOUR & RACQUET CLUB
1536
September 3, 2014
\$ 59.25

PAY TO THE ORDER OF: CARDIOLOGY GASTROENTEROLOGY

***** FIFTY NINE & 25/100 *****

CARDIOLOGY GASTROENTEROLOGY
400 E 10th Parkway
Myrtle Beach, SC 29577

MEMO: Invoice 148901 Rebill for Janitorial Services per CHH Invoice #1514

Date 9/16/2014 Check 1536 Amount \$59.25

CAPTAINS HARBOUR & RACQUET CLUB
1537
September 1, 2014
\$ 29,840.78

PAY TO THE ORDER OF: SPANOFF & ASSOCIATES, INC.

***** TWENTY NINE THOUSAND AND EIGHT HUNDRED AND EIGHTY & 78/100 *****

SPANOFF & ASSOCIATES, INC.
11001 100th St.
Myrtle Beach, SC 29577

MEMO: Total Insurance Premium received for Aug 27, 2014 - Aug 27, 2015

Date 9/12/2014 Check 1537 Amount \$29,840.78

CAPTAINS HARBOUR & RACQUET CLUB
1538
September 9, 2014
\$ 94.49

PAY TO THE ORDER OF: Jerry W Jones

***** NINETY FOUR & 49/100 *****

JERRY W JONES
1422 Temple Road #102
Myrtle Beach, SC 29577

MEMO: Invoice 148901 Rebill for Janitorial Services per CHH Invoice #1514

Date 9/16/2014 Check 1538 Amount \$94.49

CAPTAINS HARBOUR & RACQUET CLUB
1540
September 29, 2014
\$ 200.00

PAY TO THE ORDER OF: Shari Higgins

***** TWO HUNDRED & 00/100 *****

ALL POINTS HEATING & PLUMBING SERVICES
1817 10th St.
Myrtle Beach, SC 29577

MEMO: Invoice 148901 Rebill for Janitorial Services per CHH Invoice #1514

Date 9/29/2014 Check 1540 Amount \$200.00

CAPTAINS HARBOR & HACKETT CLUB
1000 HARBOR BLVD. S.W.
SEASIDE, OR 97138

CNB
CHECK NUMBER
1545

DATE
September 24, 2014

PAY TO THE ORDER OF
Retirement

AMOUNT
\$ 603.24

MEMBER'S ACCOUNT NO.
10000000000000000000

MEMBER'S NAME
DANIELA HACKETT

MEMBER'S ADDRESS
1000 HARBOR BLVD. S.W.
SEASIDE, OR 97138

MEMBER'S PHONE
(503) 734-1234

MEMBER'S SIGNATURE
DANIELA HACKETT

MEMBER'S ID
10000000000000000000

Date 9/29/2014 Check 1545 Amount \$603.24

Apply to account number 10000000000000000000

CAPTAINS HARBOR & HACKETT CLUB
1000 HARBOR BLVD. S.W.
SEASIDE, OR 97138

CHECK NUMBER
10000119

DATE
08/25/2014

PAY TO THE ORDER OF
GLOBAL ADVANTAGE LANDSCAPING SERVICES

AMOUNT
**\$365.00

MEMBER'S ACCOUNT NO.
10000000000000000000

MEMBER'S NAME
DANIELA HACKETT

MEMBER'S ADDRESS
1000 HARBOR BLVD. S.W.
SEASIDE, OR 97138

MEMBER'S PHONE
(503) 734-1234

MEMBER'S SIGNATURE
DANIELA HACKETT

MEMBER'S ID
10000000000000000000

Date 9/9/2014 Check 10000119 Amount \$365.00



Date 9/30/14
Primary Account

Page 2

SMALL BUSINESS

(Continued)

Checks and Withdrawals

Date	Description	Amount
	Confirmation number 1425800316	
9/16	Bill paid-GRAND STRAND WATER & Confirmation number 1425900148	1,376.35
9/16	MTHLY SVC TWC CHARLOTTE	861.24-
	PPD CAPTAIN'S HARBOUR	
9/19	PAYMENT SANTEE COOPER	541.59-
	PPD CAPTAIN'S HARBOUR	
9/30	Stop Payment Charge	30.00-SC
9/30	Closing entry - Deposit funds	43,762.49-
	Acct No. 1804206601	
9/30	Service Charge	7.00-SC

--- CHECKS IN NUMBER ORDER ---

Date	Check No	Amount	Date	Check No	Amount
9/04	1528	322.26	9/18	1535	185.12
9/17	1529	1,216.00	9/16	1536	59.25
9/17	1530	1,164.93	9/12	1537	29,840.78
9/09	1531	750.00	9/16	1538	94.49
9/04	1532	550.00	9/29	1540*	200.00
9/22	1533	80.25	9/29	1545*	603.24
9/24	1534	83.25	9/09	10000119*	-See above-

* Denotes missing check numbers

Daily Balance Information

Date	Balance	Date	Balance	Date	Balance
9/02	71,221.59	9/12	39,923.55	9/19	44,729.23
9/04	70,349.33	9/15	39,670.35	9/22	44,648.98
9/08	70,514.33	9/16	47,836.87	9/24	44,565.73
9/09	69,399.33	9/17	45,455.94	9/29	43,762.49
9/10	69,764.33	9/18	45,270.82	9/30	37.00-

App. 000060

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

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

Plaintiff ,

v.

Jerald W. Jones,

Defendant .

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT

C/A No.: 2014-CP-26-7617

**DEFENDANT'S NOTICE OF
MOTION AND MOTION FOR
RECONSIDERATION**

HORRY COUNTY
CLERK OF COURT
JAN 11 AM 8:56

COMES NOW, Defendant Jerald W. Jones ("Defendant"), by and through its undersigned attorney, and urges the Court to reconsider its ruling regarding the inapplicability of the contract to the Defendant Jerald W. Jones and the Summary Judgment against said Defendant. As detailed below, Plaintiff believes the Court's discretion is inconsistent with case precedent, and applies a sanction unfairly prejudicial to the Plaintiff.

A motion was brought forward by the Plaintiff claiming that the indemnity clause within the Contract (Exhibit 1) was not applicable to the Defendant. The contract clearly states that the agreement is between the Plaintiff and the "manager." As indicated in the signature block of the contract the Defendant is the clearly noted manager for this property. It was the intent of all parties that the Defendant be recognized as the manager for this HOA, therefore covered by the attached contract under the plain reading of the contract.

The Court is urged to reconsider its ruling that the contract is not applicable to the Defendant and that Summary Judgment should be issued to the Plaintiff. The Defendant ask that the Summary Judgment be rescinded.

(Signature page is next page)

App. 000061

Respectfully submitted,

GOLDFINCH WINSLOW, LLC

By:  _____

Thomas Winslow
Post Office Box 829
Murrells Inlet, SC 29576
t. 843.357.9301 / f. 843.357.9303
tom@goldfinchwinslow.com
ATTORNEY FOR DEFENDANT

Murrells Inlet, South Carolina

March 9, 2016

1 State of South Carolina) Court of Common Pleas
2 County of Horry) 2014-CP-26-07617

3

4

5 Captain's Harbour HOA)
6 vs.) Transcript of Record
7 Jerald W. Jones)

8

9

10 February 17, 2016
11 Conway, South Carolina

12

13 BEFORE:

14 Honorable R. Lawton McIntosh, Judge.

15

16 APPEARANCES:

17

18 Douglas W. Mackelcan, Esq.
19 Attorney for the Plaintiff

20

21 Thomas W. Winslow, Esq.
22 Attorney for the Defendant

23

24

25

26 Teresa J. F. Bautz, RPR
27 Official Court Reporter

28

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1	E X H I B I T S			
2	NO.	DESCRIPTION	ID	EV
3	No exhibits submitted.			
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17	Exhibits retained by Clerk of Court.			
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1 (The hearing commenced at approximately
2 10:26 a.m.)

3 THE COURT: All right. This is Captain's Harbour
4 Racquet Club Homeowners Association versus Jerald W.
5 Jones. I did read your submissions. The issue seems
6 to be whether Mr. Jones' use of the homeowners' funds
7 was appropriate.

8 MR. MACKELCAN: That's it.

9 MR. WINSLOW: That's fair, judge.

10 THE COURT: Who represents Mr. Jones?

11 MR. WINSLOW: I do, Your Honor, Tom --

12 THE COURT: Explain to me how Mr. Jones could ever
13 use these funds in an appropriate manner, basis.

14 MR. WINSLOW: I'll be happy to make that argument
15 to Your Honor.

16 THE COURT: Sure.

17 MR. WINSLOW: Tom Winslow, Goldfinch Winslow Law
18 Firm, here representing the Defendant, Jerald Jones.

19 THE COURT: Okay.

20 MR. WINSLOW: Your Honor, in most of these cases,
21 as we all know, it boils down to the language of the
22 contract he had with the Plaintiff, Captain's Harbour.
23 When renumbering the -- I believe you have a copy of
24 the management agreement, Your Honor?

25 THE COURT: Yeah.

1 MR. WINSLOW: We renumbered the agreement is the
2 invitation of Plaintiff that 6-C regarding the
3 indemnity clause, as it reads, Your Honor, if you'll
4 allow me.

5 Including items A and B, the manager shall not be
6 liable to the association and/or its members for any
7 loss or damage caused by acts of the manager, unless
8 said acts constitute gross negligence, and said
9 association and its members do hereby agree to
10 indemnify and save harmless the manager for any such
11 liability for all damage cost and expense, including
12 attorney's fees incurred by the manager in defending
13 his legal action arising from any injury to any person
14 or property in and about or in connection with the
15 association, its common elements, limited common
16 elements and dwellings from any cost whatsoever, unless
17 such injury shall be caused by said manager as gross
18 negligence or willful misconduct.

19 Mr. Jones' injuries and attorney's fees stem from
20 him being attacked due to his work as manager and also
21 being on the HOA board, clearly coming from his
22 relationship with Captain's Harbour. He was attacked
23 twice, once at the pool, and if you read the memo, it
24 basically says he is the guilty party. He was found
25 not guilty, completely --

1 THE COURT: Sir?

2 MR. WINSLOW: He was found not guilty of any
3 crimes, completely exonerated of the crimes. There's
4 video of him being attacked at the pool while
5 conducting a meeting regarding property business, and
6 there's video of him being attacked actually at his
7 residence by another set of tenants that were angry
8 about fines he was assessing on them in his role as a
9 manager.

10 And as such, he had to defend himself, and he had
11 medical injuries. He did not try to hide those bills,
12 as you saw probably from the checks. He did not try to
13 hide those bills. He was up front about it. He wrote
14 on a memo line exactly what they were for under his
15 perception that C covers all attorney's fees and other
16 damages or losses stemming from his relationship or any
17 relationship with this property.

18 THE COURT: What about the requirement under
19 the -- what is it, the agreement that requires anything
20 over \$500 to be approved by the present homeowners
21 association in advance?

22 MR. WINSLOW: Yes, Your Honor. This contract,
23 contract and written memo, was not drafted by
24 Mr. Jones, the Defendant. It was actually drafted by
25 the Plaintiff, Captain's Harbour. And I have in my

1 possession --

2 THE COURT: Well, that's not ambiguous, 500 is
3 500. That's pretty clear.

4 MR. WINSLOW: And I will actually -- I do believe
5 it is ambiguous. And the reason is because of another
6 section in the contract itself, Your Honor.

7 THE COURT: Okay. Point them out to me, explain
8 that to me.

9 MR. WINSLOW: Yes, Your Honor. On page two, it's
10 section 3-A-9.

11 THE COURT: Just one second.

12 MR. WINSLOW: Yes, Your Honor.

13 THE COURT: Okay.

14 MR. WINSLOW: Looking at the checks that are
15 attached, you will see a number of checks here for over
16 \$500, waste collection, payment to ACE Management
17 itself, a check to Spangler and Associates. The normal
18 course of business, the normal standard they had was if
19 it was a contract approved by the HOA, he could pay
20 those costs.

21 So the contract to ACE Management was approved.
22 Within that contract that we're discussing, it was
23 approved under the indemnity agreement that he would be
24 allowed to pay for any damages including any loss,
25 attorney's fees or any other damages so-called within

1 this contract.

2 So it's his understanding that under the contract
3 in the normal course of business, he was allowed to pay
4 for any expenses, no matter what the amount was, if the
5 contract was approved by the HOA. With that section as
6 being pointed out is referred to if there's a
7 maintenance issue and the cost to fix the maintenance
8 issue that's unexpected is over \$500, not as an
9 expected cost. As the contract was approved by the
10 HOA, the costs were approved by the HOA under paragraph
11 9, A-9, Your Honor.

12 That's the argument of the Plaintiff in regard to
13 the \$500 limitation put into the memo, Your Honor.
14 That's why we do think it was ambiguous. This was a
15 contract created by the HOA. They used it for other
16 individuals, I have another copy that's on this exactly
17 the same. It was not created by aids or by the
18 Defendant. So any ambiguity should go in favor of the
19 Defendant, not the Plaintiff.

20 In this contract there's two contradictory terms;
21 one is saying you have to pay according to the
22 agreement, the other one is saying \$500. There is a
23 course of business, according to the checks that are
24 attached, where it's not just for him, it's for other
25 people as well. He was not required to go there every

1 single time there was a contract or expense over \$500.
2 He just had to go when it was unexpected, and it was
3 not a part of the original contract. There was a
4 contract in place when these expenses came up.

5 And all these stemmed from his business with the
6 HOA, they were not personal in nature. He was
7 attacked, he was not at fault. Under the indemnity,
8 again, he did not draft this. If there's ambiguity,
9 it's in his favor. It says, any at all, any loss, any
10 loss or damage cost.

11 There's case law, Your Honor, that says the very
12 words, any and all, stress the breadth of the indemnity
13 provision, compel the conclusion, and the legal expense
14 would be considered a loss within the contract.

15 So there is ambiguity, we believe, Your Honor,
16 that he had a loss, he had damages. It explicitly says
17 attorney's fees are covered and says under paragraph
18 A-9 that he has the right to pay those contracts -- or
19 pay those expenses under the contract.

20 And as such, we believe actually we have a
21 competing summary judgment that he is not liable for
22 this money, he acted in his scope of duty. He was just
23 paying himself back for damages he incurred as a
24 manager and as a board member of the HOA, not personal
25 in nature whatsoever, Your Honor.

1 THE COURT: So tell me about, I believe, this
2 Mr. Jones was arrested for disorderly conduct?

3 MR. WINSLOW: Correct, Your Honor.

4 THE COURT: And those charges were nolle prossed.
5 Did he go to trial, what happened?

6 MR. WINSLOW: Once the video was shown to the
7 solicitor, the charges were completely dismissed, Your
8 Honor.

9 THE COURT: Nolle prossed those charges?

10 MR. WINSLOW: Yeah, they were completely
11 dismissed, yes, sir. And that's another, if I can
12 bring that up. There's a lot of things said within the
13 memo that are factually inaccurate. The HOA drafted
14 the contract, not Mr. Jones. He was not found guilty,
15 they were nolle prossed.

16 And the reason is because we haven't even done
17 discovery, not one deposition has been taken. Not one
18 set of discovery, I think, has been transferred back
19 and forth. I don't think any discovery had been done,
20 Your Honor. So if anything, it's premature. Because
21 clearly as illustrated by the memo itself, there are
22 things left unknown of the factual consequence, Your
23 Honor.

24 THE COURT: Thank you. All right, sir.

25 MR. MACKELCAN: Your Honor, my name is Doug

1 Mackelcan, and I'm here on behalf of the Plaintiff,
2 Captain's Harbour and Racquet Club Homeowners
3 Association. We obviously began by you saying you had
4 read my memo, so I'm not going to go through that in
5 great deal. But I just want to point out a couple of
6 things, because I do think the memo is sufficient to
7 support the motion for summary judgment.

8 As far -- and I'll work backwards. We've
9 exchanged over 500 pages of documents, videotapes,
10 recordings. We've done a significant amount of
11 discovery. But because this is really about an
12 interpretation of a contract, I didn't feel the need to
13 spend more of the association's money to take
14 depositions and do a bunch of discovery when really
15 what this is about is Mr. Jones is not the manager in
16 the contract. The manager is ACE. And he's an
17 employee, he was an employee of ACE.

18 THE COURT: Is that a single member LLC; do you
19 know?

20 MR. MACKELCAN: It is not. From my understanding
21 is it is a corporation that was registered in
22 Tennessee. I don't know much more about ACE, this
23 really is not about ACE. This case is about Mr. Jones
24 using his access to the association's funds to pay
25 bills that are far outside of the scope of what he

1 would be entitled to.

2 THE COURT: Well, does it make any difference in
3 this case that Mr. Jones essentially was found not
4 guilty by the charges being nolle prossed?

5 MR. WINSLOW: I don't think it does. And I do
6 want to address something.

7 THE COURT: Doesn't that take away your argument
8 that his acts were ultra vires?

9 MR. MACKELCAN: It doesn't. And I think I was
10 careful in my memo to not say anything that it was
11 criminal or guilty or anything. I said that he was
12 arrested, he was arrested. And so factually I think
13 that that is accurate, and I was careful not to take it
14 further than that.

15 THE COURT: Yeah.

16 MR. MACKELCAN: But, you know, the undisputed
17 facts -- we've got cross motions for summary
18 judgment -- was that he was at the pool and he was
19 engaged verbally. Either he started it, she started
20 it; we don't think it matters. He's a resident of the
21 association, he lives there. He's engaged by a woman
22 and her 12-year-old son. There is no debate about
23 facts that there was profanity exchanged.

24 There was no debate about the facts that at some
25 point later in that day a different resident, another

1 woman, came to his door and there was a physical
2 altercation. She provided evidence of bruises and
3 having gone to the hospital and various other things.
4 And it led to an arrest.

5 In any case, I think the reason why the ultimate
6 outcome doesn't matter is whether he was found guilty,
7 not guilty, there's nothing about any of that that went
8 on that is in any way in furtherance of the
9 association's business. And then that's not even what
10 really is anticipated by this indemnity.

11 And I do a lot of homeowners association work and
12 property managers, and obviously we're talking about
13 this section and not about others. But what these
14 indemnity provisions are is to say manager -- and
15 again, manager being the corporate entity, not the
16 individual. Jones may have some claims against ACE as
17 an employee, that's not what we're here about today.

18 But these indemnity provisions really say if an
19 individual is injured on the property that you're
20 managing and they allege negligence and they sue you
21 too, and it's really about the association, whether
22 it's a slip and fall or something like that, and they
23 sue everybody involved, what the manager -- what this
24 agreement is intended to do is to say it's really the
25 association you're suing. There was no gross

1 negligence, there was no willful misconduct, we'll
2 indemnify you.

3 That's not what happened here. I mean, first of
4 all, Jones is the allegedly injured party. He's not
5 really a third party, he's an employee of the manager.
6 You know, he's engaged in this altercation, whether he
7 was not guilty or not, there's no question that he was,
8 you know, inappropriately engaged in an altercation
9 with two women and a child that became physical and
10 included profanity. I don't think we need to go any
11 further than that, regardless of who started it. I
12 mean, come on, you know.

13 And, I think, but even outside of that, it's just
14 not what this indemnity provision includes. And I
15 think, you know, it's important to note that this is --
16 Mr. Winslow indicated that he was up front about these
17 charges. That is not accurate at all. You know, the
18 treasurer found out about these charges when he got the
19 bank statements, okay. That's not up front.

20 You know, this is a small condominium association.
21 If you're going to spend \$10,000 on an attorney
22 retainer for criminal charges, I mean, I think, and I
23 don't have access to the entire book of the
24 association, but a \$10,000 charge is going to be one of
25 the higher charges annually for a homeowners

1 association.

2 You're going to have their property insurance and
3 that kind of thing, but I mean, that's an enormous
4 charge. And to think that you can write a check right
5 out of the account without even talking to anybody
6 about it, I think, shows the intent here, and --

7 THE COURT: Let me ask you this. Factually, at
8 the time of this alleged altercation, I think it was
9 around the pool, what was going on? Is there any
10 question as to what Mr. Jones was doing at this
11 juncture?

12 MR. MACKELCAN: He has said that he was meeting
13 with someone about association business. I don't know
14 what that means. But I think it is important
15 Mr. Winslow has referenced his role as the president of
16 the board. And there is nothing that he can point to
17 as president of the board that entitles him to this
18 kind of indemnification.

19 So to the extent that that's what they're saying,
20 I think that is an absolute loser, and the entire
21 argument has always been that this contract entitles
22 him to it. That's what was written on the checks and
23 what they've said from the beginning and what their
24 cross motion for summary judgment says.

25 So his role -- I mean, the reality is that his

1 role as president of the board and employee of the
2 property manager is an inherent conflict and is really
3 what allowed this problem to develop. And he took
4 advantage of that situation. But so whether -- you
5 know, the property manager doesn't plan -- you know,
6 plan things. I mean, whether he was meeting or not, it
7 doesn't really matter.

8 I think that if you look at the case law about
9 respondeat superior that I've discussed in my memo, you
10 can quickly move outside of your scope as an employee
11 or outside the scope. And what I would say is he may
12 have been having a meeting at the pool about
13 association business. But as soon as he is engaged in
14 an inappropriate altercation with a resident, guests,
15 whoever, he has stepped out of his role in that
16 capacity and is no longer entitled to any of those
17 protections that he might be entitled to.

18 Again, in this case, the contract is with the
19 manager. Jones is not mentioned in this contract,
20 ACE's employees are not mentioned in this contract.
21 The language is, it does not state that. And again,
22 there is no indemnification that I have been able to
23 find in his role as president of the board. So I just
24 don't think that that's applicable to this case.

25 THE COURT: You said a second ago, what --

1 MR. WINSLOW: Yes, Your Honor.

2 THE COURT: -- does your client contend that he
3 was doing in which capacity at the time this alleged
4 altercation occurred?

5 MR. WINSLOW: I'll be happy to elaborate on that.
6 He was meeting with someone, they were going to have a
7 picnic, and they were meeting to -- as a manager to
8 determine what kind of supplies they would need down by
9 the water for this picnic they were going to have,
10 tables and chairs.

11 So he was in a meeting at the pool side regarding
12 managerial responsibilities. The lady and child in the
13 pool -- and I can't remember her name -- but the lady
14 and the child in the pool were upset with him as a
15 manager because they had not properly registered as
16 guests with a owner of a condo.

17 And so they are required to have proper
18 identification on the vehicles and stuff of that
19 nature, and they had not identified themselves to him,
20 and he had gotten on them and fined them for that
21 previously. And as such, they were not happy with him.
22 So during this meeting at the pool, they attacked him.
23 Again, that's what the video says. And this
24 12-year-old boy, I actually believe he was like 20.

25 THE COURT: I don't need him to...

1 MR. WINSLOW: Okay, I'm sorry, I apologize. I
2 believe he was 20 years old. The boy, there's video
3 the boy punched him in the face. I'm not going to
4 stand back and say that Mr. Jones probably didn't say
5 some stuff like, you have a responsibility, you have to
6 do what you have to do. But he was attacked as a
7 manager.

8 In looking at the agreement itself, the agreement,
9 if you look at it on the very last page where Mr. Jones
10 signs on behalf of the association, Mr. Jones signs on
11 behalf of the association as the ACE manager. And the
12 entire time through this manager, manager, manager, who
13 is the ACE manager? The signature is Jerry Jones.

14 So yes, it does, it clearly says that he is the
15 ACE manager, it references the manager throughout the
16 contract. Again, if there's ambiguity, it's found in
17 his favor. It doesn't just say ACE on it, it says ACE
18 manager, clearly indicating that he was the one being
19 protected. ACE didn't have anyone else at this
20 location, only him.

21 If he's going to be found under respondeat
22 superior as being liable for his actions and ACE is
23 held responsible, you got to have a reverse. He's got
24 to be also found responsible in a part of this, Your
25 Honor. I apologize.

1 THE COURT: That's all right. I'm going to hear
2 you. I was just saying just -- so let me make sure I
3 understand what your argument is under this
4 indemnification or this management agreement, is that
5 although this unambiguously provides in the agreement
6 that anything over \$500 has to be approved by
7 the homeowners association president, that paragraph
8 A-9 makes that ambiguous because it provides for the
9 manager to review process and pay expenses. In
10 addition, the course of conduct and dealings between
11 the association and the management company shows that
12 they were basically a blind eye turned to checks being
13 written over \$500. And he was not at fault in bringing
14 on this.

15 MR. WINSLOW: I think there are actually three
16 points to that.

17 THE COURT: But is that correct, the rest?

18 MR. WINSLOW: Yes, sir. I agree with you. But
19 I --

20 THE COURT: I'm not arguing that. I'm trying to
21 understand it.

22 MR. WINSLOW: No, I think you're right. I think
23 you're right. And also at that time Jerry Jones was
24 the HOA president. So I know it was kind of a --

25 THE COURT: That's an inherent conflict, but

1 that's something the parties let happen.

2 MR. WINSLOW: Yeah. But eventually the president
3 has to approve it. He was the president, he approved
4 it.

5 THE COURT: All right. So go ahead. I stopped
6 you.

7 MR. MACKELCAN: I think it's important to point to
8 the first paragraph of the agreement Mr. Winslow was
9 discussing and saying that Jerry Jones was the manager.
10 The fact that he signed on behalf of ACE does not make
11 him the manager in the contract.

12 And I think the contract is clear and unambiguous
13 in the first paragraph, where it says, This agreement
14 made and entered into this first day of October, 2012,
15 by and between Captain's Harbour and Racquet Club
16 Homeowners Association nonprofit corporation, organized
17 and existing under the laws of South Carolina,
18 hereinafter called the association -- and of course
19 that term is used throughout the contract -- and
20 American Contracting Engineers, PA, a corporation
21 organized and existing under the laws of Delaware and
22 doing business as ACE Management, hereinafter called
23 the manager.

24 That's clear and unambiguous. It doesn't
25 reference employees, it doesn't reference Jerry Jones,

1 and it uses the word manager throughout the contract.
2 You know, when you're a corporate entity, you can't
3 have the benefit of hiding behind your corporate
4 protections in a contract and then say, oh, well, wait
5 a second, you know, the manager term actually includes
6 all of our employees as well.

7 And, again, if you look at the paragraph
8 discussing indemnity, it says manager. It doesn't say
9 manager's agents, employees, assigns, you know,
10 whatever indemnity provisions might say. It just says
11 the manager.

12 And so, you know, it's fairly clear, I believe
13 it's clear, that Mr. Jones can't claim contractual
14 indemnification for a contract to which he is not a
15 party. That's the basic argument that we have. All
16 the rest of this stuff, I think, supports --

17 THE COURT: It's irrelevant.

18 MR. MACKELCAN: -- supports our motion. But at a
19 very basic level, to the extent he has a claim of any
20 kind for his medical expenses, his legal expenses, all
21 of this stuff that he wrote out of the association
22 account, that's got to go to ACE. And then if ACE
23 wants to take it up with Captain's Harbour, they can
24 appropriately take it up with Captain's Harbour.

25 The proper way of doing it is not to just start

1 writing checks out of the HOA account.

2 THE COURT: All right, thank you. I saw you
3 jumping too, so go ahead.

4 MR. WINSLOW: I think you'll discover me jumping
5 back and forth.

6 THE COURT: Not long.

7 MR. WINSLOW: I do believe there's ambiguity. And
8 the reason is not because of either section, but
9 because there are two sections that conflict with each
10 other, Your Honor.

11 THE COURT: I don't necessarily agree that that
12 paragraph A-9 -- and where is the provision about the
13 \$500?

14 MR. WINSLOW: Let me try and find that for you.

15 THE COURT: I just don't think those -- I think
16 your construction rules says that you're supposed to
17 read them together if you can. I think you can't.

18 MR. WINSLOW: I'll try and find this, Your Honor.

19 THE COURT: Where is that provision about the
20 \$500. I remember it, but I can't --

21 MR. WINSLOW: Here it is, Your Honor. It's C --
22 let's see here. It's under the same section 3-C-1.

23 THE COURT: All right.

24 MR. WINSLOW: So it's within the same area. And
25 the \$500 is limited on property supervision. This

1 doesn't have anything to do with property supervision,
2 Your Honor. Where it talks about buildings, grounds,
3 lands and other common area, limited to \$500.

4 So I'd even make the argument that that's not even
5 applicable to this situation.

6 THE COURT: Yeah. I start -- you know, you are
7 giving the terms of the contract, but look and see one.
8 It says, for any one item of repair, replacement,
9 refurbishing as to, you know, which involves the
10 maintenance and repairs of the property.

11 Is there any other provision under this management
12 agreement that limits expenditures over \$500 to
13 presidential approval?

14 MR. MACKELCAN: Your Honor, I --

15 THE COURT: Yes or no?

16 MR. MACKELCAN: No, it doesn't. And I'm going to
17 agree with you. And I think that that's why I wanted
18 to explain that, because I do think that I say that in
19 my memo, which is I'm not sure that that provision
20 applies exactly to the scenario we have in this case.
21 But I think it's instructive.

22 And that was what I argued in my memo is -- I
23 mean, the reality is the contract doesn't anticipate a
24 situation like this. I mean, this is not the type of
25 thing that you're -- that an association intends for

1 its manager to engage in.

2 So I don't know that -- you know, again, what I'm
3 talking about is, A --

4 THE COURT: I got what you're talking about.

5 MR. MACKELCAN: Judge, so I put that in more for
6 the idea that as an association the proper course when
7 you're making a substantial expenditure without, you
8 know -- the proper course of business is to discuss
9 this with the board as the manager.

10 So I'm not saying that this is a contract
11 violation because the facts of this case specifically
12 fall into that. I'm just saying, hey, the contract
13 says you're supposed to approve everything over 500 for
14 these types of things.

15 THE COURT: It doesn't say that, it says for the
16 particular line items. That's what I'm saying.

17 MR. MACKELCAN: Right. And so --

18 THE COURT: So it doesn't -- that provision of the
19 contract is irrelevant to the facts in this case
20 totally.

21 MR. MACKELCAN: Other than I think it shows that
22 the proper course of business when you're making a
23 large expenditure, but maybe not a contractual
24 obligation.

25 THE COURT: Based on what? And your contract was

1 drafted by your company.

2 MR. MACKELCAN: Well, and I wanted to point that
3 out.

4 THE COURT: Yes or no?

5 MR. MACKELCAN: Your Honor. No, it was not.

6 THE COURT: It was not?

7 MR. MACKELCAN: It was not. And so I think that
8 that is apparently an issue of fact that, again, I
9 don't think matters for this motion, because I don't
10 think the contract is ambiguous. So it only comes into
11 play from an ambiguity standpoint.

12 But my understanding from my client is that they
13 were presented with this contract by ACE. But I don't
14 know that, you know, that's -- I'm just going on what
15 they have told me. And that's why it was put in my
16 memo in that way. But this is the first that I had
17 heard otherwise. So I can't say one way or the
18 other --

19 THE COURT: Okay.

20 MR. MACKELCAN: -- as far as that.

21 MR. WINSLOW: If I may, I was brought this this
22 morning by my client, if I can approach with this, Your
23 Honor.

24 THE COURT: Show it to him first.

25 MR. WINSLOW: Okay. Of course I will. This is

1 just an example of a very similar contract used by the
2 Plaintiffs with a completely different party other than
3 ACE. It's almost the exact same contract. I only have
4 but one copy, but it's just an example that is almost
5 the exact same contract.

6 THE COURT: Well, was that done by him as
7 president or property management? That would explain
8 where the contact came from. I don't think it matters
9 who drafted the contract, quite frankly. I don't think
10 that's going to make a difference in my decision.

11 MR. WINSLOW: Well, I'll just hold onto it, then,
12 Your Honor. But I do have an example. It is our
13 understanding that the HOA drafted it, not the
14 Defendant. With that being said, we keep alluding to
15 the conduct of Mr. Jones. He didn't do anything wrong.

16 THE COURT: Well, let me just tell you.

17 MR. WINSLOW: Yes, sir.

18 THE COURT: When I look at this gentleman writing
19 a check to himself for his legal fees for \$10,000 out
20 of homeowners association fees, doesn't strike a good
21 cord with me at all.

22 MR. WINSLOW: I understand. I think that --

23 THE COURT: And I think it's improper, and I think
24 it's just not what he should have done. But I'm not
25 making that ruling yet. I'm going to look at it again

1 under the idea that the property manager is the
2 corporate entity, not this individual, and the
3 indemnification is to the corporation, not the
4 individual; also in light of the fact that the \$500
5 does not apply to this circumstance at all and the fact
6 that Mr. Jones apparently was essentially found not
7 guilty by the solicitor's nolle prosequing of the public
8 disorderly conduct charges against him.

9 With that being said, let me look at this a little
10 bit further; okay?

11 MR. WINSLOW: Thank you, Your Honor.

12 THE COURT: Thank you, guys. Appreciate it.

13 MR. MACKELCAN: Thank you, Your Honor.

14 THE COURT: Good arguments.

15 MR. WINSLOW: Appreciate it. Thank you, sir.

16 (The hearing concluded at approximately
17 10:53 a.m.)

18 (End of Transcript of Record.)
19
20
21
22
23
24
25

1 CERTIFICATE OF REPORTER

2
3 STATE OF SOUTH CAROLINA)
4)
5 COUNTY OF HORRY)

6 I, TERESA J.F. BAUTZ, Official Court
7 Reporter for the Fifteenth Judicial Circuit of the
8 State of South Carolina, do hereby certify that the
9 foregoing is a true, accurate and complete Transcript
10 of Record of the proceedings had and evidence
11 introduced in the trial of the captioned case, relative
12 to appeal, in the Court of Common Pleas for Horry
13 County, South Carolina, on the 17th day of March, 2017.

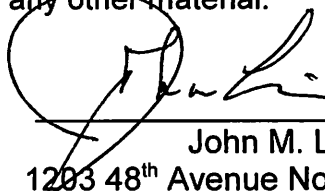
14
15 I FURTHER CERTIFY that I am neither of
16 kin, counsel nor interest to any party hereto.

17
18
19 S/ *Teresa J. Bautz*
20 TERESA J.F. BAUTZ, RPR
21 Official Court Reporter
22
23
24
25

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

May 10, 2019

A handwritten signature in black ink, appearing to read "John M. Leiter", is written over a horizontal line.

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In the Court of Appeals

Appeal from Horry County
Court of Common Pleas

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

APPELLATE CASE NO.: 2018-001724

CAPTAIN'S HARBOUR AND RACQUET CLUB
HOMEOWNERS' ASSOCIATION, INC.

RESPONDENT

v.

JERALD W. JONES,

APPELLANT

APPELLANT'S FINAL BRIEF

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The undersigned certifies that this Final Brief complies with Rule 211(b),
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STATEMENT OF ISSUES ON APPEAL

- I. WHETHER THE TRIAL COURT ERRED IN FINDING THAT THE APPELLANT WAS NOT A PARTY TO THE ACE PROPERTY MANAGEMENT AGREEMENT, AND, THEREFORE, CANNOT CLAIM CONTRACTUAL INDEMNIFICATION.
- II. WHETHER THE APPELLANT IS A THIRD-PARTY BENEFICIARY OF THE INDEMNIFICATION CLAUSE OF THE ACE PROPERTY MANAGEMENT AGREEMENT, WHICH THEN ENTITLES HIM TO THE PROTECTION OF THE INDEMNIFICATION CLAUSE.

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

This matter began by the filing of the Captain's Harbour and Racquet Club Homeowners' Association, Inc.'s ("the Association") Summons and Complaint on November 14, 2014 (R., pp. 14-16). In its Complaint, the Association alleges that the Appellant, Jerald W. Jones ("Mr. Jones"), improperly reimbursed himself for medical expenses and attorney's fees. After having been served with the Summons and Complaint in April, 2015, Mr. Jones timely answered, on May 1, 2015 (R., pp. 17-21), denying any allegation of wrongdoing and asserting that he had a right to reimbursement by virtue of the indemnity provisions in the ACE HOA Property Management Agreement (R., pp. 46-47).

The parties filed cross Motions for Summary Judgment pursuant to Rule 56, SCRCP. The Association filed its Motion for Summary Judgment on December 22, 2015 (R., pp. 22-23), and Mr. Jones filed his Amended Motion for Summary Judgment on January 25, 2016 (R., pp. 27-29). The Motions for Summary Judgment were heard by the Honorable R. Lawton McIntosh on February 17, 2016.

Thereafter, Judge McIntosh issued his Order denying the Defendant's Motion for Summary Judgment and granting the Plaintiff's Motion for Summary Judgment on April 12, 2016 (R., pp. 8-13). The trial court entered judgment for the Association and against Mr. Jones in the amount of \$16,321.14, of which \$10,000.00 was for Mr. Jones's legal fees in defending criminal charges brought

against him, and \$2,788.00 for medical expenses. The remainder of the judgment was for pre-judgment interest and costs.

Mr. Jones filed a Motion for Reconsideration on March 11, 2016 (R., pp. 59-60), which Motion was denied by Form 4 Order filed on October 4, 2016 (R., pp. 2-3), with a notation that a formal order would follow. The formal final Order was signed Judge McIntosh on November 21, 2016 and filed on November 26, 2016 (R., pp. 4-5).

Mr. Jones filed his first Notice of Appeal on November 15, 2016, but because of the confusion about the entry of the final Order, the Court of Appeals remanded the matter back to the trial court on April 19, 2017. After the discovery of the filing of the final Order, Mr. Jones then re-filed his Notice of Appeal on September 24, 2018, which was the subject of a Motion to Dismiss filed by the Respondent on November 1, 2018. The Court of Appeals, in its Order dated January 10, 2019, denied that Motion to Dismiss.

B. STATEMENT OF FACTS

Captain's Harbour and Racquet Club is a condominium regime located in the Socastee section of Horry County, South Carolina. On October 1, 2012, the Association entered into the ACE Property Management Agreement ("Management Agreement") with American Contracting Engineers, PA, dba ACE Management (hereinafter referred to as "ACE Management"). Mr. Jones signed the Management Agreement (R., pp. 42-47) on behalf of ACE Management.¹ Mr.

1. At the time, Mr. Jones was the president of the Association; however, he did not sign the Management Agreement in his capacity as the Association president. (R., p. 47). Other officers of the Board of the Association signed on behalf of the Association.

Jones, as its agent and employee, performed all of the management services on behalf of ACE Management for the Association.

On July 7, 2014, an incident occurred at the Association swimming pool. Mr. Jones was at the pool because he was preparing for an Association-sponsored picnic (Tr., p. 16/R., p. 76). A guest apparently became enraged, which ultimately resulted in an altercation. The police were called and several people were criminally charged. (R., pp. 48-53). As a result of the altercation, Mr. Jones was injured and had to seek medical treatment at Grand Strand Regional Medical Center in Myrtle Beach, South Carolina. Mr. Jones was also charged with disorderly conduct and breach of the peace.

Thereafter, in order to defend himself, Mr. Jones hired L. Morgan Martin, Esquire, a criminal defense lawyer in Conway, South Carolina. Based on the Hold Harmless provision in the Management Agreement, Mr. Jones caused a check to be written from the Association's account to pay for Mr. Morgan's retainer in the amount of \$10,000.00 (R., p. 54). Mr. Jones also paid his medical bills with the Association's checking account, in the amount of \$2,788.80. (R., pp. 55-57).

The criminal charges were subsequently dismissed as to Mr. Jones. [Tr., p. 9/R., p. 69].

Thereafter, the Association decided that the payment of Mr. Jones's legal fees and medical expenses was improper and filed this instant lawsuit. The primary basis of the Association's claim is that Mr. Jones is not a party to the Management Agreement, and, therefore, that he cannot rely on the Hold

Harmless provision of the Management Agreement. The Hold Harmless provision states:

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 of 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 Manager's gross negligence or willful misconduct.
- C. General:** Including Items A and B above, the Manager shall not be liable for 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 damage, costs, and expense (including attorney fees incurred by the Manger 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.

(R., pp. 46-47). Sections A and B apply to specific situations where third party claims are made. Section C, as its heading, states, is general and can apply to claims made by ACE Management (to include its agent) against the Association.

The trial court entered judgment in favor of the Association against Mr. Jones, in the amount of \$16,321.14, finding that:

The plain language of the Agreement identifies the parties to the contract as Plaintiff and ACE. Defendant is not a party to the Agreement, and therefore, is unable to claim contractual indemnification in this case. (R., p. 13).

STANDARD OF REVIEW

“When reviewing the grant of summary judgment, the appellate court applies the same standard applied by the trial court pursuant to Rule 56(c), SCRCP.” *Savannah Bank, N.A. v. Stalliard*, 400 S.C. 246, 250, 734 S.E.2d 161, 163 (2012) (quoting *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002)). “Summary judgment is appropriate when there is no genuine issue of material fact such that the moving party must prevail as a matter of law.” *Id.* (quoting *Fleming*, 350 S.C. at 493, 567 S.E.2d at 860). “To withstand a motion for summary judgment ‘in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence.’” *Id.* (quoting *Hancock v. Mid-South Mgmt. Co., Inc.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009)).

D.R. Horton, Inc. v. Builders FirstSource-Southeast Group, LLC, 422 S.C. 144, 150–51, 810 S.E.2d 41, 44–45 (Ct. App. 2018).

ARGUMENTS

I. The Hold Harmless Section of the Management Agreement Applies to Mr. Jones

Mr. Jones, through ACE Management, caused the Association to reimburse him for his legal fees and medical expenses incurred as a result of work he performed for and on behalf of the Association. Mr. Jones reasonably believed that the Hold Harmless provision of the Management Agreement allowed him to do so. The trial court entered judgment against Mr. Jones because it concluded that Mr. Jones was not a party to the Management Agreement "... and therefore, is unable to claim contractual indemnification in this case." (R., p. 13). This was the sole basis for entry of judgment against Mr. Jones.

It is axiomatic that a corporation can only act through its agents and employees. *Jost v. Equitable Life Assurance*, 271 S.C. 492, 495, 248 S.E.2d 778, 779 (1978); *State ex rel Callison v. National Linen Service Corp.*, 225 S.C. 232, 235, 81 S.E.2d 342, 344 (1954). Mr. Jones was acting within the scope of his employment and agency and was working on a project for the Association at the time of the incident. Mr. Jones was the "manager" for all practical purposes. Mr. Jones's need for legal representation and medical assistance arose out of his actions performed for the benefit of the Association.

As a corporation, ACE Management only acts through its agents and employees, and its agent, Mr. Jones, was, for all intents and purposes, ACE Management, because ACE Management could not perform its obligations without

Mr. Jones. As a result, he comes under the Hold Harmless provision of the Management Agreement, which provides that the Association and/or its Members:

“ . . . agree to indemnify and save harmless the Manager from any such liability for all damage, 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 . . .”. (R., p. 47).

Indemnity coverage is not mutually exclusive between ACE Management and Mr. Jones; in this context, it covers both the corporation and its agent who performed all of the services.

The rules of construction and interpretation of contracts generally apply to indemnity contracts and these rules support Mr. Jones's position.

General rules that govern the construction and interpretation of other contracts also apply to the construction and interpretation of a contract of indemnity. As with other contracts, the principal question focuses on the intent of the parties. The intention is determined from the language used in the contract. If that language is clear and unambiguous, it must be given its plain and usual meaning. A contract of indemnity will cover all losses that reasonably appear to have been within contemplation of the parties.

Laurens Emergency Medical Spec. v. M.S. Bailey & Sons Bankers, 348 S.C. 191,

195, 558 S.E.2d 531, 533 (Ct. App., 2002), *rev'd on other grounds*, 355 S.C. 104,

584 S.E.2d 375 (2003). Mr. Jones's claim is that it is only logical that the indemnity

provision covers ACE Management and, implicitly, Mr. Jones, ~~and that this is what~~

~~the parties intended.~~

Contracts should be interpreted to give the greatest effect possible to all provisions rather than to leave any part of the contract rendered unreasonable or

having no effect. *Vaughn, Coltrane & Assoc. v. Van Horn Construction*, 354 Ga.App. 693, 694, 563 S.E.2d 438 (2002). In *Vaughn*, the Georgia Court of Appeals held that the consultants to a construction project were covered by the indemnity clause even though “consultants” were not identified as an indemnified party. Similarly, Mr. Jones should be considered covered by the indemnification clause, as this more accurately fulfills the intent of the parties.

Additionally, as there is an ambiguity as to the construction and interpretation of the indemnity clause, the issue of the intent of the parties has to be decided by the trier of fact. 41 Am. Jur. 2d *Indemnity* § 13.

II. Mr. Jones Is a Third-Party Beneficiary of the Indemnification Clause of the Management Agreement, Which Entitles Him to the Protection of the Indemnification Clause.

The trial court, in essence, ruled that Mr. Jones was not in privity of contract with the Association and therefore could not rely on the indemnity provision. Mr. Jones should still prevail in that his position is analogous to a third-party beneficiary. In his Twelfth Defense of his Answer, Mr. Jones avers that:

FOR A TWELFTH DEFENSE

26. 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, if any. (R., p. 20).

In other words, in this defense, Mr. Jones is alleging third-party beneficiary status.

As stated in *Fabian v. Lindsay*, 410 S.C. 475, 488, 765 S.E.2d 132, 139 (2014),

“Generally, one not in privity of contract with another cannot maintain an action against him in breach of

contract, and any damage resulting from the breach of a contract between the defendant and third party is not, as such, recoverable by the plaintiff.” *Windsor Green Owners Ass’n. v. Allied Signal, Inc.*, 362 S.C. 12, 17, 605 S.E.2d 750, 752 (Ct. App. 2004). (Citation omitted.) “However, if a contract is made for the benefit of a third person, that person may enforce the contract if the contracting parties intended to create a direct, rather than an incidental or consequential benefit to such third person.” (Citation omitted.)

As the Supreme Court extended third party beneficiary status to beneficiaries in an estate claims; it only stands to reason that Mr. Jones should be considered a third party beneficiary under the facts of this case. As discussed above, the acts of Mr. Jones were the acts of ACE Management. It is not unreasonable that the parties would intend that indemnification would extend to the sole agent of ACE Management. For this reason, Mr. Jones is included in the scope of the indemnification clause.

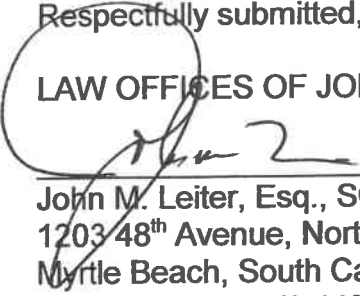
CONCLUSION

Based on the above and foregoing, the Appellant prays that this Court reverse the Order granting judgment to the Respondent and remanding this matter to the trial court for further proceedings.

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Respectfully submitted,

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In the Court of Appeals

Appeal from Horry County
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge
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APPELLATE CASE NO.: 2018-001724

CAPTAIN'S HARBOUR AND RACQUET CLUB
HOMEOWNERS' ASSOCIATION, INC.

RESPONDENT

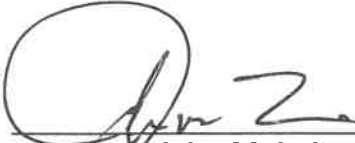
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Appellate Case No. 2018-001724

Captains Harbour and Racquet Club
Homeowners Association, Inc. Respondent

v.

Jerald W. Jones.....Appellant

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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.” **R. at 42.** The only two parties to the Agreement are the Association and ACE. **R. at 42.** 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. **R. at 43.** The Agreement contains an indemnity provision, upon which Jones is relying to justify his use of funds from the Association's operating account. **R. at 46–47.**

On July 7, 2014, Jones was involved in verbal and physical altercations with residents of Captain's Harbour that resulted in his arrest. **R. at 48; 50–51.** The incident began at the community's pool and involved an altercation between Jones and a female resident and her twelve-year-old son. **R. at 71.** Later, another female resident and Jones had a violent physical encounter at the entrance to Jones' residence. **R. at 71.** These physical exchanges led to Jones' arrest. **R. at 48–52.**

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. **R. at 54.** He also used \$2,788.80 from the same account for medical bills associated with injuries he sustained in the altercations. **R. at 56.** Jones' unauthorized expenditures were brought to the attention of the Association when its treasurer received and reviewed the Association's monthly bank statement. **R. 55, 58.** 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. **R. at 14.** 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. **R. at 20.** The parties each filed for summary judgment and argument was held before the Circuit Court on February 17, 2016. **R. at 22, 27, 61.** On April 12, 2016, the Circuit Court issued its Order denying Jones' motion and granting Plaintiff's motion. **R. at 8.** The Court entered judgment for the Association and against Jones in the amount of \$16,321.14, including costs and interest. **R. at 13.** Jones filed a Motion for Reconsideration, which was denied on November 26, 2016. **R. at 2.** 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), SCRPC). “[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”.

R. at 42. 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.

R. at 46–47.

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 the 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." **R. at 20.** 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.

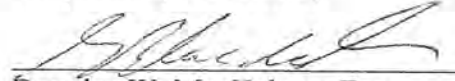
CONCLUSION

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 30 day of May, 2019.

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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

Captains Harbour and Racquet Club
Homeowners Association, Inc. Respondent

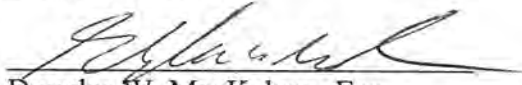
v.

Jerald W. Jones..... Appellant

PROOF OF SERVICE

I certify that I have served the *Respondent's Final Brief* by depositing a copy in the United States Mail, postage prepaid, on this the 30 day of May, 2019, addressed to Appellant's counsel of record as follows:

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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

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STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Horry County
Court of Common Pleas

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

APPELLATE CASE NO.: 2018-001724

CAPTAIN'S HARBOUR AND RACQUET CLUB
HOMEOWNERS' ASSOCIATION, INC.

RESPONDENT

v.

JERALD W. JONES,

APPELLANT

APPELLANT'S FINAL REPLY BRIEF

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STATEMENT OF FACTS

The Respondent, Captain's Harbour and Racquet Club Homeowners Association, Inc. (the "Association"), in its Statement of the Case, alleges that the Management Agreement (the "Agreement") was drafted by ACE Management. The Appellant, Jerald W. Jones ("Mr. Jones") asserts that it was the Association that drafted and prepared the Agreement. [R., p. 65, Tr. p. 5, ll. 22-25].¹

STANDARD OF REVIEW

Summary judgment is a drastic remedy and should be cautiously invoked. Normally a court must view the facts in the light most favorable to the non-moving party. Metts v. Mims, 384 SC 491, 500, 682 S.E.2d, 813, 818 (2009). Although both parties filed for summary judgment, the party against whom summary judgment is entered should be afforded the benefit of having the facts viewed most favorably in his favor.

In its recitation of the Standard of Review, the Association states that when cross motions for summary for judgment are filed, then the issues raised should be decided as a matter of law and the ". . . courts are authorized to assume there is no evidence that 'needs to be considered other than that which has been filed by the parties'" citing Weigand v. U.S. Auto. Ass'n., 391 S.C. 159, 163, 705 S.E.2d 432, 434 (2011). Although the statement is correct, it is

¹ This is important because a court construes any doubts and ambiguities in an agreement against the drafter. Coastal States Bank v. Hanover Homes, 408 S.C. 510, 519, 759 S.E.2d 152, (Ct. App. 2014). Therefore, to apply this in the case represents an issue of material fact as to who drafted the Agreement for the purpose of application of this rule of construction.

inapposite for the standard to be applied in this case. In Weigand and the other cases that refer to this standard, the issues have involved questions presenting the courts with how to construct a statute, which is not present in this case. For instance, in Weigand, the issue was whether an UIM form complied with the statutory requirements governing UIM forms, and the Supreme Court held that whether or not a form complies with a statute is a question of law for the court to decide.

Likewise, the principle that the filing of cross motions for summary judgment dispenses with the need to determine if further factual inquiry is needed is incorrect as it relates to this case. In Alltel Communications, Inc. v. S.C. Dept. of Revenue, 399 S.C. 313, 319 n.2, 731 S.E.2d 869, 872 n.2 (2012), the Supreme Court expressly reviewed the evidence available to it and determined that further factual inquiry would not be necessary as the issue before the court was solely a legal one.

Although cross motions for summary judgment were filed in this case, issues of fact have been raised. As will be explained more fully below, Mr. Jones, in his Amended Motion for Summary Judgment, states that he was attacked but was not the instigator (R., p. 27). The Association, in its Brief, however, argues that Mr. Jones instigated the fight. This demonstrates that there are issues of fact which require further inquiry.

REPLY ARGUMENT

I. THE CIRCUIT COURT ERRED IN GRANTING SUMMARY JUDGMENT IN THE ASSOCIATION'S FAVOR BECAUSE JONES IS COVERED BY THE AGREEMENT'S INDEMNITY PROVISION.

A. The Indemnity Provision of the Agreement Does Apply to Mr. Jones

As discussed in his Brief, the Indemnity Provision of the Agreement reasonably covers Mr. Jones, as ACE's employee. As explained, a corporation only acts through its agents and employees, and ACE could not have performed any of the duties under the Agreement except through its agents and employees.

In United States Fidelity and Guaranty Co. (USF&G) v. Housing Authority of the City of Poplar Bluff, Missouri, 114 F.3d 693 (8th Cir. 1997), the U.S. Court of Appeals for the Eighth Circuit, addressed this very issue. In USF&G, an elevator installer installed and maintained two elevators in the Housing Authority's housing complex. When a woman fell to her death in one of the elevator shafts, her estate sued the elevator installer. USF&G, the elevator installer's insurance company, paid the claims and subsequently, as assignee of the elevator installer, sued the Housing Authority under the indemnity agreement between the elevator installer and the Housing Authority. The Housing Authority, in turn, by way of a third-party complaint, sued an employee of the elevator installer.

The indemnity clause at issue in USF&G, like this instant appeal, stated that the indemnitee was the corporation and did not include the words that agents, servants, and employees were also covered by the indemnity provision. USF&G moved to have the third-party complaint against the employee dismissed on the grounds that the Housing Authority could not sue its own indemnitee. Ruling that the employee was covered by the relevant indemnity clause, the

district court granted USF&G's motion for summary judgment in favor of the employee and the Housing Authority appealed.

The indemnity clause at issue in USF&G, like this instant appeal, stated that the indemnification was between the elevator installer corporation and the Housing Authority; the agreement did not include language that the elevator company's agents, servants, and employees were covered. The district court held "[b]ecause a corporation is an artificial entity, it must operate through the acts of its agents [T]he indemnification agreement served to indemnify [the employee] as agent of the corporation." USF&G *Id.* at 698. On appeal, the Eighth Circuit ruled:

In the present case, we find it beyond genuine dispute that the indemnity agreement in the maintenance service contract was intended to cover losses or liabilities arising out of the alleged negligence of individual employees of [the elevator installer] in connection with the use or operation of the elevator equipment.

USF&G, *Id.* at 889.

The indemnity agreement in USF&G did not have to state that it covered agents and employees for it, in fact, to do so. The same logic should be applied to this appeal. Mr. Jones is covered by the indemnity language of the Agreement.

* * * * *

The Association alleges, as two additional grounds for sustaining the grant of summary judgment that: (1) Mr. Jones acted outside of the scope of his employment; and (2) Mr. Jones acted willfully or grossly negligently. Both of these grounds are without factual support.

B. Mr. Jones Acted Within the Scope of His Employment

In his Order (R., pp. 10-13), the trial judge properly found that Mr. Jones acted within the scope of his employment. The trial court stated:

Jones, without authorization from Plaintiff, used Plaintiff's funds to pay for personal criminal defense legal fees and personal medical bills following physical altercations on July 7, 2014 that led to his arrest. At the time, Mr. Jones was an employee of ACE Management ("ACE"), the property management company for Plaintiff's regime pursuant to a management agreement ("the Agreement"). Jones claims he was entitled to use the plaintiff's funds under the terms of the Agreement. (R., 11, p.2).

The trial court ruled that, at the time of the incident, Mr. Jones was an employee of ACE Management. Had the trial court found that Mr. Jones was acting outside of the scope of his employment, it would have said so. The clear inference is that the court treated Mr. Jones as having acted within the scope of his authority but that he was not covered under the indemnity provision, and that is why the trial judge granted summary judgment in favor of the Association.

The issue of whether Mr. Jones acted within the scope of his employment should either be decided in his favor, or the matter remanded to the trial court for further inquiry on this issue.

C. Mr. Jones Did Not Act Willfully or Grossly Negligently

For the reasons stated in the argument of I.B. above, Mr. Jones did not act willfully or grossly negligently. Again, had this been an issue before by the trial judge, it is reasonable to believe that the judge would have included it in his Order. For the purposes of this appeal, it should be presumed that Mr. Jones did

not act willfully or grossly negligently; or, if that is an issue, the matter be remanded to the trial court for further development of the facts on this issue.

II. MR. JONES IS A THIRD-PARTY BENEFICIARY TO THE INDEMNITY PROVISIONS OF THE MANAGEMENT AGREEMENT.

For the reasons stated in his Brief, Mr. Jones did preserve the issue of his claim for third party status and that it was presented and decided by the circuit court. Although Mr. Jones did not use the term “third-party beneficiary”, it is clear that he raised the issue.² He has maintained throughout the lower court proceeding that he was entitled to the benefits of the indemnity clause. This includes protection under a third-party beneficiary claim.

Counsel for Mr. Jones would bring to this court’s attention the case of McPherson by and through McPherson v. Michigan Mut. Ins. Co., 306 S.C. 456, 412 S.E.2d 445 (Ct. App. 1991), *aff’d as modified* by McPherson by McPherson v. Michigan Mut. Ins. Co., 310 S.C. 316, 426 S.E.2d 779 (1993). It might be argued that this case would not allow a third-party beneficiary claim in an indemnification context.

In McPherson, the City of Charleston and McPherson, a pedestrian who was struck by a police cruiser, sued the S.C. Insurance Reserve Fund and Michigan Mut. Ins. Co., who was the reinsurer of the general tort liability policy

² The purpose of pleadings is to place the opposing party on notice as to what the issues are and the pleadings are to be liberally construed. Shirley’s Iron Works v. City of Union, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013). In Shirley’s Iron Works, a third-party beneficiary claim was sufficiently pled.

issued by the S.C. Insurance Reserve Fund to the City of Charleston. Under the facts of the case, the trial court ruled that the City's general tort liability policy did not extend coverage to the plaintiffs because of the automobile exclusion in the policy and that the reinsurance policy was, therefore, not at issue. McPherson, *Id.*, at 306 S.C. at 464, 412 S.E.2d at 450.

The Court of Appeals, in sustaining the lower court's decision, in *dicta*, stated however, found that even if the Michigan Mutual Ins. Co. policy did provide coverage, the plaintiffs could not sue it because there was no privity of contract between the parties. The Court of Appeals stated:

A contract of reinsurance is a contract of indemnity which flows only to parties in privity of contract with the indemnitor. The original insured (here the City) may not sue the reinsurer (here Michigan Mutual) because there is no privity of contract between them. The right of indemnity is personal to the indemnitee and creates no legal or equitable interest in third party beneficiaries by contract or by lien. McPherson, *Id.* See United States v. Federal Surety Co., 5 F.Supp. 247 (D.Md.1933), *aff'd.*, 72 F.2d 964 (4th Cir.1934), *cert. denied*, 294 U.S. 711, 55 S.Ct. 508, 79 L.Ed. 1245 (1935); Schuykill Products, Inc. v. H. Rupert & Sons, Inc., 305 Pa.Super. 36, 451 A.2d 229 (1982). Accordingly, we affirm the circuit court on this issue.

McPherson, *Id.* Although this language appears to stand for the proposition that third party claims will not be recognized in the context of an indemnity agreement, Mr. Jones argues that this holding should be limited to cases in which reinsurance policies are involved.

Mr. Jones's contention is supported by the cases cited by the Court of Appeals in the McPherson case. Both cited cases dealt with claims against the reinsurer. The Schuykill case explains it clearly:

Appellant contends that a reinsurer on a surety bond issued under the Public Works Contractors' Bond Law is a proper party defendant in an action by an unpaid supplier. The law is clear, however, that there is no right of direct action against a reinsurer by any party except the reinsured. "[T]he ordinary contract of reinsurance operates solely between reinsured and reinsurer, and creates no privity whatever between reinsurer and the persons originally insured, the contract of insurance and that of reinsurance remain totally distinct and unconnected, and reinsurer is in no respect liable, either as surety or otherwise, to reinsured's policyholders; and accordingly they have no right of action against reinsurer on the contract of reinsurance, nor have they any right of action against reinsurer to reform the policy." 46 C.J.S., Reinsurance, § 1232.

Schuylkill Prod., Inc. v. H. Rupert & Sons, Inc., 305 Pa. Super. 36, 40, 451 A.2d 229, 231 (1982)

The McPherson case deals with a reinsurance policy that was between Michigan Mutual and the S.C. Insurance Reserve Fund. As the McPherson plaintiffs were suing the reinsurer directly, their claim could not be sustained.

In Mr. Jones's situation, Mr. Jones was the agent and employee of ACE Management and the intent of the parties was that ACE Management and its necessary employees would be covered by the indemnity provision. This position was recognized in the concurring opinion of Judge Johnson in Schuylkill, who opined that there could be times when a direct action would be appropriate:

However, there are situations that I foresee where the original insured should be permitted to sue a reinsurer directly. An example would be where an agency relationship exists between the reinsured (the original insurer) and the reinsurer and the reinsurer has significant control over the actions of the original insurer. In such a case, the fact that the insurance company with control is labeled a "reinsurer" should not necessarily relieve it of liability on contractual actions arising out of certain conduct of the "reinsurer", e.g., bad faith.

The instant facts do not lead me to the conclusion that Fidelity had, for example, any agency relationship with H. Rupert & Sons, Inc., nor does Appellant allege any fact that would lead me to the conclusion that Appellant's suit should be permitted.

Id., at 305 Pa. Super. at 45, 451 A.2d at 234.

Mr. Jones was an agent of ACE Management and both were in privity of contract to the Association. For this reason, the holding in McPherson should be limited to those claims arising in an insurance context and not to all indemnity claims generally.

CONCLUSION

Based on the above and foregoing, the Appellant prays that this Court reverse the Order granting judgment to the Respondent and remanding this matter to the trial court for further proceedings.

Respectfully submitted,

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/s/ John M. Leiter

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ATTORNEY FOR APPELLANT

May 13, 2019
Myrtle Beach, South Carolina

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

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

v.

Jerald W. Jones, Appellant.

Appellate Case No. 2018-001724

Appeal From Horry County
R. Lawton McIntosh, Circuit Court Judge

Unpublished Opinion No. 2021-UP-167
Submitted March 1, 2021 – Filed May 12, 2021

AFFIRMED

John M. Leiter, of Law Offices of John M. Leiter, PA, of
Myrtle Beach, for Appellant.

Douglas Walker MacKelcan, III, and Skyler Cole
Wilson, both of Copeland, Stair, Kingma & Lovell, LLP,
of Charleston, for Respondent.

PER CURIAM: Jerald W. Jones appeals the grant of summary judgment to Captain's Harbour and Racquet Club Homeowners Association, Inc. (the Association). On appeal, Jones challenges the circuit court's findings that he was

not a party to the property management agreement (the Agreement) between the Association and American Contracting Engineers, PA, doing business as ACE Management (the Manager), and he therefore could not claim contractual indemnification. He also argues he was a third-party beneficiary of the indemnification clause of the Agreement, which entitled him to the protection of the indemnification clause. We affirm pursuant to Rule 220(b), SCACR, and the following authorities:

Regarding whether Jones was a party to the Agreement, considering the evidence in the light most favorable to Jones, we hold the circuit court properly granted summary judgment in the Association's favor because there was no genuine issue of material fact and the Association was entitled to judgment as a matter of law. *See Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 438-39 (2003) ("In reviewing the grant of a summary judgment motion, the Court applies the same standard as the [circuit] court under Rule 56(c), SCRCF: 'summary judgment is proper when there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law.'" (citing *Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 114-15, 410 S.E.2d 537, 545 (1991))); *id.* at 69, 580 S.E.2d at 439 ("In determining whether summary judgment is appropriate, the evidence and its reasonable inferences must be viewed in the light most favorable to the nonmoving party."); *Wiegand v. U.S. Auto. Ass'n*, 391 S.C. 159, 163, 705 S.E.2d 432, 434 (2011) ("Where cross motions for summary judgment are filed, the parties concede the issue before us should be decided as a matter of law."); *S.C. Dep't of Transp. v. M & T Enters. of Mt. Pleasant, LLC*, 379 S.C. 645, 655, 667 S.E.2d 7, 13 (Ct. App. 2008) ("The construction of a clear and unambiguous contract presents a question of law for the court."); *id.* ("It is also a question of law whether the language of a contract is ambiguous."). Here, the Agreement unambiguously establishes the Association and the Manager as the parties. *See C.A.N. Enters., Inc. v. S.C. Health & Human Servs. Fin. Comm'n*, 296 S.C. 373, 377, 373 S.E.2d 584, 586 (1988) ("In construing terms in contracts, [an appellate court] must first look at the language of the contract to determine the intentions of the parties."). Further, the Agreement defines the "Manager" only as "American Contracting Engineers, PA, . . . doing business as (dba) ACE Management," which fails to make any reference to the Manager's employees, agents, successors, or assigns. *See id.* at 378, 373 S.E.2d at 587 ("[W]here the parties define the words or terms which they propose using, the contract will be interpreted according to such definitions if free from ambiguity."). Therefore, because this court is limited to the interpretation of the contract made by the parties themselves regardless of the parties' wisdom or folly, unreasonableness, or failure to carefully guard their rights and because Jones was not the "Manager" as defined by the Agreement, the circuit

court correctly determined he was not a party to the Agreement and was not entitled to contractual indemnification. *See id.* at 378, 373 S.E.2d at 587 (holding an appellate court "is limited to the interpretation of the contract made by the parties themselves ' . . . regardless of its wisdom or folly, apparent unreasonableness, or failure to guard their rights carefully.'" (quoting *Gilstrap v. Culpepper*, 283 S.C. 83, 86, 320 S.E.2d 445, 447 (1984))).

Regarding whether Jones was a third-party beneficiary, this issue is not preserved for appellate review because the circuit court did not rule upon it. *See Chastain v. Hiltabidle*, 381 S.C. 508, 514-15, 673 S.E.2d 826, 829 (Ct. App. 2009) ("It is well settled that, but for a very few exceptional circumstances, an appellate court cannot address an issue unless it was raised to and ruled upon by the trial court."). Further, Jones did not raise the issue in his motion to reconsider. *See id.* ("When an issue is raised to but not ruled upon by the trial court, the issue is preserved for appeal only if the party raises the same issue in a Rule 59(e) motion.").

AFFIRMED.¹

LOCKEMY, C.J., and HUFF and HEWITT, JJ., concur.

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

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

APPELLATE CASE NO.: 2018-001724

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

v.

Jerald W. Jones Appellant

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, the Appellant respectfully petitions for rehearing of the Court's decision of May 12, 2021 on the grounds that this Honorable Court overlooked or misapprehended the following points:

1. Summary judgment is not appropriate even where there is not a dispute as to the evidentiary facts if the parties disagree concerning the conclusions to be drawn from those facts. Lanham v. Blue Cross & Blue Shield of S.C., 349 S.C. 356, 362, 563 S.E.2d 331, 373 (2002).

In this case, a genuine dispute exists as to whether the indemnification provisions of the Agreement between the Respondent and the Manager intended to apply to the Appellant, either based on the wording of the Agreement or on the basis that Appellant was a third-party beneficiary of the Agreement.

2. “[T]he meaning of a particular word or phrase is not determined by considering the word or phrase by itself, but by reading the contract as a whole considering the contract and subject matter of the contract.” McGill v. Moore, 382 S.C. 179, 186, 672 S.E.2d 571, 575 (2009). This Court is correct that the Respondent and the Manager are the named parties in the Agreement. However, this Court has overlooked that the Appellant signed the Agreement as the ACE Manager (R., 47).¹ The Appellant performed all of the services required of the Manager under the Agreement. This is entirely consistent with the terms of the Agreement which require the Appellant to perform personal services, such as:

III. DUTIES AND RESPONSIBILITIES OF THE MANAGER

B. “1. The Manager shall be available to attend up to five (5) Board Meetings per year.” (R., 42-43)

As it was the Appellant that performed these services, and all other services, as the Manager, it is a reasonable conclusion that Appellant would be covered by the indemnification provisions of the Agreement.

3. The Appellant has asserted that he is a third-party beneficiary to the Agreement and is entitled to indemnification under the Agreement on this basis. This Court ruled that this issue was not preserved for appellate review because the trial court had not ruled on it. This Court overlooked or misapprehended this issue because it was raised before the trial court

¹ The Appellant is the sole shareholder of the Manager.

by way of Defendant's Notice of Motion and Motion for Reconsideration (R., 59). The Motion states, in part:

"A motion was brought forward by the Plaintiff claiming that the indemnity clause within the Contract (Exhibit 1) was not applicable to the Defendant. The contract clearly states that the agreement is between the Plaintiff and the "manager." As indicated in the signature block of the contract the Defendant is the clearly noted manager for this property. **It was the intent of all parties that the Defendant be recognized as the manager for this HOA, therefore covered by the attached contract under the plain reading of the contract. [emphasis added]**

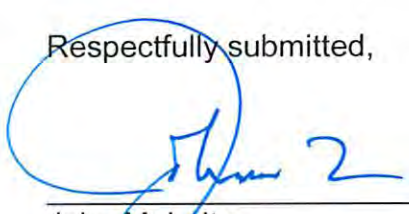
Although the Appellate does not use the term "third party beneficiary" in his Motion, the import of this ground for reconsideration is that the Appellant is seeking third-party beneficiary recognition. The trial court denied Appellant's Motion acknowledging that this had been previously argued. (R., 2-5).

Appellant has adequately preserved the issue of third-party beneficiary.²

WHEREFORE, Appellant prays that this Court reconsider its Opinion in this matter filed May 12, 2021.

Respectfully submitted,

May 26, 2021



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² As stated above, the Appellant, in his Motion to Reconsider, did not use the phrase "third-party beneficiary" but the theory of third-party beneficiary was sufficiently conveyed. See Shirley's Iron Works v. City of Union, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013).

The South Carolina Court of Appeals

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

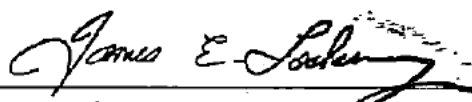
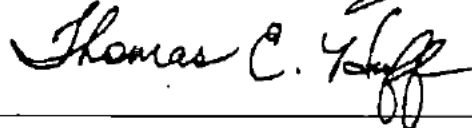
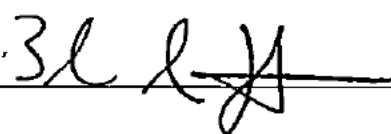
v.

Jerald W. Jones, Appellant.

Appellate Case No. 2018-001724

ORDER

After 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.

 C.J.
 J.
 J.

Columbia, South Carolina

cc:

Douglas Walker MacKelcan, III, Esquire
John M. Leiter, Esquire
Skyler Cole Wilson, Esquire
The Honorable R. Lawton McIntosh

FILED
Jun 11 2021