

THE STATE OF SOUTH CAROLINA
In The Supreme Court
Appellate Case No.: 2021-000729

APPEAL FROM HORRY COUNTY
Court of Common Pleas

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

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S.C. SUPREME COURT

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

Captains Harbour and Racquet Club
Homeowners Association, Inc.Respondent

v.

Jerald W. Jones.....Petitioner

**RETURN TO
PETITION FOR WRIT OF CERTIORARI**

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Questions Presented

1. Should the Supreme Court consider Petitioner's Writ of Certiorari when Petitioner did not comply with the rules for serving the Petition?
2. Should the Supreme Court grant Petitioner's Writ of Certiorari on an allegedly novel issue when Petitioner is barred by the "two issue rule," the Court of Appeals correctly interpreted the unambiguous contract, and there exists alternate sustaining grounds by which to affirm the Court of Appeals?
3. Should the Supreme Court grant Petitioner's Writ of Certiorari on the third-party beneficiary issue when Petitioner did not present the issue to the circuit court or receive a ruling before appealing?

Counter-Statement of 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." **J.A. at 43.** The only two parties to the Agreement are the Association and ACE. **J.A. at 43.** 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. **J.A. at 44.** The Agreement contains an indemnity provision, upon

which Jones is relying to justify his use of funds from the Association's operating account. **J.A. at 47–48.**

On July 7, 2014, Jones was involved in verbal and physical altercations with residents of Captain's Harbour that resulted in his arrest. **J.A. at 49; 51–52.** The incident began at the community's pool and involved an altercation between Jones and a female resident and her twelve-year-old son. **J.A. at 72.** Later, another female resident and Jones had a violent physical encounter at the entrance to Jones' residence. **J.A. at 72.** These physical exchanges led to Jones' arrest. **J.A. at 49–54.**

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. **J.A. at 55.** He also used \$2,788.80 from the same account for medical bills associated with injuries he sustained in the altercations. **J.A. at 57.** Jones' unauthorized expenditures were brought to the attention of the Association when its treasurer received and reviewed the Association's monthly bank statement. **J.A. at 56, 59.** 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. **J.A. at 15.** 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. **J.A. at 21.** The parties each filed for summary judgment and argument was held before the circuit court on February 17, 2016. **J.A. at 23, 28, 62.** On April 12, 2016, the circuit court issued its Order denying Jones' motion and granting Plaintiff's motion. **J.A. at 7.** The circuit court found that the costs Jones incurred "were based on individual charges against him, and the agreement was between the

Association and Ace Management. Therefore, [Jones] was not entitled to indemnification through the agreement for personal charges.” **J.A. at 7, 12.** The court entered judgment for the Association and against Jones in the amount of \$16,321.14, including costs and interest. **J.A. at 14.** Jones filed a Motion for Reconsideration, which was denied on November 26, 2016. **J.A. at 5.** Jones then appealed to the South Carolina Court of Appeals.

After briefing, the Court of Appeals decided the case on the briefs and determined Jones was not entitled to indemnification because he was not a party to the agreement and he had not preserved his third-party beneficiary argument. **J.A. at 142-43.** Jones filed a petition for rehearing, which was denied. **J.A. at 144-49.** Jones filed his writ of certiorari via email to the Supreme Court on June 11, 2021.

Standard

“A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only [when] there are special and important reasons,” including that there is a novel question of law. Rule 242(b), SCACR.

Argument

I. This Court should refuse to grant the Petition for Writ of Certiorari because Jones did not comply with Rule 242(c), SCACR.

Rule 242(c) of the South Carolina Appellate Court Rules requires a petition for writ of certiorari to be “served on opposing counsel and filed with proof of service with the Clerk of the Court of Appeals and the Clerk of the Supreme Court within thirty (30) days after the petition for rehearing . . . is finally decided by the Court of Appeals.” Here, Jones’ petition for rehearing before the Court of Appeals was denied on June 11, 2021. Jones filed his petition with the Supreme Court on July 12, 2021, the 30th day after the petition for rehearing was denied. Jones’ petition included proof of service on counsel for the Association via email at

dmackelcan@carlockcopeland.com.¹ **See Petition at 16.** Jones, however, failed to file his petition for writ of certiorari with the Court of Appeals. It appears the Court of Appeals was advised of Jones' petition for writ of certiorari by the Supreme Court on July 13, 2021. According to the Court of Appeals online case management system, it still does not have a copy of Jones' petition for writ of certiorari. Because Jones did not comply with the rules governing service of the petition for writ of certiorari, this Court should deny the petition.

II. This Court should refuse to grant the Petition for Writ of Certiorari because Petitioner is barred by the two issue rule, the Court of Appeals correctly interpreted the unambiguous contract and there exists alternate grounds to affirm on the issue of indemnity.

First, Jones is barred by the two issue rule because Jones did not sufficiently appeal all grounds upon which the court ruled he was not entitled to indemnity. "Under the two issue rule, where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become law of the case." *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 328, 730 S.E.2d 282, 284 (2012) (quoting *Jones v. Lott*, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010)). Additionally, no point will be considered on appeal that is not set forth in the statement of issues on appeal. Rule 208(b)(1)(B), SCACR; *Jones*, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010). A court may, however, consider an issue if it is reasonably clear from the party's argument. *See, e.g., Calhoun v. Calhoun*, 339

¹ Jones served the petition via email only to counsel for the Association at *dmackelcan@carlockcopeland.com*. **Petition at 16.** The Supreme Court's order permitting service upon a lawyer via email states service may be accomplished by "using the lawyer's primary email address listed in the Attorney Information System (AIS)." *See* S.C. Supreme Court Order RE: Operation of the Appellate Courts During the Coronavirus Emergency (As Amended May 29, 2020), section (g)(3). Counsel's email address with AIS is *dmackelcan@cskl.law*. Jones' counsel has communicated with counsel for the Association via this newer email address. Further, Jones counsel served the petition for rehearing on counsel for the Association via this email address. Thus, Jones failed to comply with rules for serving attorneys via email. Luckily, counsel for the Association still receives emails at the old address for the time being.

S.C. 96, 529 S.E.2d 14 (2000) (finding “transmutation” issue preserved when, despite not using the word in the statement of issues on appeal, the petitioner’s argument contained discussion of and citations to authority on transmutation).

Here, the circuit court found that Jones was not a party to the agreement and the costs for which Jones sought indemnification were personal. **J.A. at 7, 12.** As personal expenses, they were not incurred while Jones was working within the scope of his employment with ACE Management. Jones’ statement of issues on appeal in his final brief focused on the circuit court’s ruling that Jones was not a party to the agreement. **J.A. at 94** (“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.”). Jones did not mention or argue, with discussion of and citation to authorities, the issue of whether he was acting within the scope of his employment with ACE Management when he incurred the expenses. Because the circuit court also ruled the incurred expenses were personal, and Jones did not appeal the ruling in the statement of issues or argue it in brief with citations to authority on scope of employment, the issue is the law of the case on appeal. Thus, Jones is barred by the two issue rule because he did not appeal both grounds upon which the circuit court ruled and this Court should deny the petition.

Second, the Court of Appeals correctly determined the indemnity agreement was between the Association and ACE Management, and did not include employees of ACE Management. A court must construe the terms in an unambiguous contract according to the definitions provided by the contracting parties, and cannot construe a contract to alter the terms regardless of the parties’ wisdom, folly, apparent unreasonableness, or failure to guard their rights carefully. *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).

The relevant portions of the agreement are as follows:

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".

J.A. at 43. 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.

J.A. at 47–48.

Here, the agreement is unambiguous. The parties to the agreement are the Association and ACE Management. ACE Management is defined as “The Manager.” Notably, the definition of Manager does not include employees, agents, successors, or assigns. The indemnity agreement flows between The Manager and the Association. Because the indemnity agreement is between the Association and The Manager, and the parties did not include employees or other agents within the agreement, the Court of Appeals correctly construed the unambiguous contract and found Jones is not entitled to indemnity. Accordingly, this Court should deny Jones’ petition.

Third, assuming this Court were to find that Jones is not barred by the two issue rule and is a party to the agreement, Jones would not qualify for indemnification under the circumstances because (1) engaging in verbal and physical altercations with two female residents and a child was not within the scope of his duties as the Manager; and (2) Jones’ actions were willful or grossly negligent and, therefore, excepted from coverage under the indemnity agreement. *See Hamilton v. Davis*, 300 S.C. 411, 416, 389 S.E.2d 297, 299-300 (Ct. App. 1990) (noting that physical altercations are not within the scope of employment, but are personal in nature). Furthermore, considering Jones’ dual role as manager and employee of ACE and Board President of Captains Harbour, Jones’ actions in writing checks directly from Captains Harbour to his attorney and the hospital are not “indemnification.” These reasons for denying the petition are contained within the Joint Appendix and are asserted as alternate sustaining grounds under Rule 220(c), SCACR.

III. This Court should deny the Petition for Writ of Certiorari on the third-party beneficiary issue because the Court of Appeals correctly determined the issue was not preserved.

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." **J.A. at 21.** 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. Based on the above, the Court of Appeals properly found the issue was not preserved for appeal. **J.A. at 142.** Accordingly, this Court should decline to address the issue.

Conclusion

Respondent respectfully requests this Court deny Jones' petition for writ of certiorari because Jones did not comply with the rules for serving the petition, he is barred by the two-issue rule, the Court of Appeals correctly interpreted the indemnity agreement, there exists alternate sustaining grounds on which to affirm the Court of Appeals.

This 6th day of August, 2021.

Respectfully submitted,

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