THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

John C. Hayes, III, Circuit Court Judge

Case No. 2012-213730

Juontonio Pinckney, Josephine Sciacca, Addie Smith, James Barone, Deborah Barone, Ismael Gonzalez, Valerie Gonzales, Joe Moore, and Sandra Moore, Plaintiffs,

v.

Epcon Communities, Inc., Epcon Communities Franchising, Inc., Brock L. Fankhauser, Fankhauser Property Group, Inc. and Stonecrest Villas of Tega Cay Home Owners Association, Inc., Defendants,

Of whom Epcon Communities, Inc. and Epcon Communities Franchising, Inc., are the Respondents,

And Fankhauser Property Group, Inc. is the Appellant.

Fankhauser Property Group, Inc., Third Party Plaintiff,

v.

Architectural Alliance, Ltd., Exterior Expressions of North Carolina, Inc., Al-Mega Construction, Inc., Procar, Inc., Procar II, Inc., The Southeastern Group, Inc., Lucas Lawn and Landscape, Inc., Jose Simenez, Individually and d/b/a M&L Roofing, Co., LLC and/or MB Roofing Company, Third Party Defendants,

Stonecrest Villas of Tega Cay Condominium Owners Association, Inc., Third Party Plaintiff,

v.

Stonecrest Villas of Tega Cay, LLC and Epcon Communities Franchising, Inc., Third Party Defendants.

Exterior Expressions of North Carolina, Inc., Fourth Party Plaintiff,

v.

Marcos Gonzalez, Fourth Party Defendant

Procar, Inc. and Procar II, Inc., Fourth Party Plaintiffs,

v.

Marcos Zertuche, David Carbajal, Victorina Cortez, Balancos Construction Co., Balanos Framing, Inc., Ricardo Hernandez, and Silverio Cortez, Fourth Party Defendants.

Al-Mega Construction, Inc., Fourth Party Plaintiff,

v.

Noe Perez, Juan Abundez Saucedo, and Moisese Chavarra Hernandez, Fourth Party Defendants.

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STATEMENT OF ISSUES ON APPEAL

I. **DID THE TRIAL COURT ERR BY HOLDING THAT FPG IS REQUIRED TO INDEMNIFY EPCON WITH RESPECT TO A FUTURE LOSS WHEN THE CAUSE OF ACTION HAS NOT YET ACCRUED UNDER OHIO LAW?**

II. **DID THE TRIAL COURT ERR IN HOLDING THAT FPG IS REQUIRED TO INDEMNIFY EPCON PURSUANT TO THE INDEMNITY CLAUSE IN THE FRANCHISE AGREEMENT FOR EPCON'S OWN ALLEGED CONDUCT?**

III. **DID THE TRIAL COURT ERR IN HOLDING THAT FPG IS REQUIRED TO INDEMNIFY EPCON PURSUANT TO THE INDEMNITY CLAUSE IN THE FRANCHISE AGREEMENT UNDER APPLICABLE OHIO LAW FOR EPCON'S OWN ALLEGED INTENTIONAL CONDUCT?**

STATEMENT OF THE CASE

This matter involves the Stonecrest Villas of Tega Cay ("Project") located in Tega Cay, South Carolina. The Plaintiffs are owners of twelve condominiums in the Project. In sum, the Plaintiffs allege water intrusion and other damages to their units. The case is complex in terms of the various theories of recovery asserted by the Plaintiffs against the Defendants. This appeal involves a cross claim for contractual indemnity asserted by Defendants/Respondents Epcon Communities, Inc. ("ECI") and Epcon Communities Franchising, Inc. ("ECFI") against Defendant/Appellant Fankhauser Property Group, Inc. ("FPG").

Respondent ECI is an Ohio based developer of condominium style "pinwheel" designed homes which, as far as FPG is aware, had nothing to do with the Project. Nevertheless, the Plaintiffs filed suit against ECI. Respondent ECFI is an Ohio based entity affiliated with ECI and franchisor of Epcon's "Development System." Appellant FPG is a franchisee of ECFI pursuant to the Franchise Agreement between ECFI and FPG. FPG was the general contractor for the project. This appeal involves the court's interpretation of the indemnity clause contained in the Franchise

Agreement between ECFI and FPG.

On or about June 2, 2010, the Plaintiffs filed these actions in the Court of Common Pleas for York County, which were subsequently consolidated and amended, the operative version of which is Plaintiffs' Third Amended Complaint filed September 16, 2011. The Plaintiffs' Amended Complaint asserts causes of action against ECI/ECFI (collectively "Epcon")[1] for rescission, breach of contract, fraud/misrepresentation, breach of express warranty, breach of implied warranty of merchantability, breach of implied warranty of fitness for a particular purpose, and violation of the South Carolina Unfair Trade Practices Act. In addition to Epcon, the Plaintiffs allege causes of action against FPG, the general contractor; Stonecrest Villas of Tega Cay, LLC, the developer; Brock L. Fankhauser, individually, the principal of FPG and Stonecrest Villas of Tega Cay, LLC; and the Stonecrest Villas of Tega Cay Condominium Owners Association, Inc. ("Association").[2] Subsequently, numerous cross claims, third-party claims, and fourth-party claims were filed by and among the parties, including a cross claim by the Association against Epcon. Epcon asserted cross claims against FPG for contractual indemnity and equitable indemnity. The basis for Epcon's cross claims for contractual indemnity is that FPG is required to indemnify Epcon pursuant to the indemnity clause in the Franchise Agreement. FPG answered Epcon's cross claims and denied that

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[1]As set forth, infra, the indemnity clause applies to the "Franchisor" and "entities affiliated through common ownership." See Epcon Motion for Summary Judgment, Franchise Agreement, Exhibit A. The Franchise Agreement is between ECFI and FPG. ECI is not a party to the Franchise Agreement. However, ECFI and ECI are affiliated through common ownership. FPG concedes that if it is required to indemnify ECFI pursuant to the Franchise Agreement, it is also required to indemnify ECI. Thus, for this reason, because the Plaintiffs assert identical claims against ECI/ECFI, and for the sake of simplicity, FPG refers to ECI and ECFI collectively as "Epcon" throughout.

[2]The Plaintiffs filed a separate notice of appeal dated March 25, 2013 as to the trial court's order granting the Association's motion for summary judgment, Case No.: 2013-000327.

FPG was obligated to indemnify Epcon pursuant to the indemnity clause in the Franchise Agreement.

On January 10, 2012, Epcon filed a motion for summary judgment as to the cross claims against FPG, including Epcon's cross claim for contractual indemnity based on the Franchise Agreement. See Epcon Motion for Summary Judgment. On March 22, 2012, Epcon filed a memorandum in support of its motion for summary judgment. See Epcon Memo in Support of Motion for Summary Judgment. On July 27, 2012, FPG filed a memorandum in opposition to Epcon's motion for summary judgment. See FPG Memo In Opposition.

Epcon's motion was heard before the Honorable John C. Hayes, III, on July 30, 2012. See Transcript of Proceeding. On October 2, 2012, the court entered an order granting Epcon summary judgment on its cross claim for contractual indemnity against FPG and not reaching Epcon's motion for summary judgment as to its cross claim for equitable indemnity against FPG. See Order Granting Epcon Summary Judgment. On October 16, 2012, FPG filed a motion to alter or amend the order granting Epcon summary judgment, which was denied by order of the trial court on November 12, 2012. See FPG Motion to Alter or Amend; Order Denying FPG Motion to Reconsider. Pursuant to the original order granting Epcon summary judgment as to its cross claim for contractual indemnity against FPG, the court issued a second order awarding Epcon attorneys' fees and costs on December 13, 2012. See Order Awarding Epcon Attorneys' Fees and Costs.

On December 17, 2012, FPG timely served a Notice of Appeal of the trial court's order granting Epcon's motion for summary judgment dated October 2, 2012 and order denying FPG's motion to alter or amend dated November 12, 2012. See Notice of Appeal dated December 17, 2012. On February 1, 2013, FPG timely served a Notice of Appeal of the trial court's December 13, 2012 order awarding Epcon attorneys' fees and costs. See Notice of Appeal dated February 1, 2013.

The two Notices of Appeal have been consolidated in this appeal.

ARGUMENT

I. THE TRIAL COURT ERRED BY HOLDING THAT FPG IS REQUIRED TO INDEMNIFY EPCON BECAUSE THE CAUSE OF ACTION HAS NOT ACCRUED UNDER OHIO LAW

The trial court should be reversed or, in the alternative, this matter should be remanded to the trial court with instructions to vacate those portions of the order that purport to require that FPG indemnify Epcon with respect to some future loss. Epcon has not been found liable to the Plaintiffs or the Association nor suffered any loss for FPG to indemnify.[3] Under Ohio law,[4] "If the contract provides indemnity against liability, the indemnitor becomes liable and the cause of action accrues when the liability of the indemnitee arises." Stengel v. Columbus, 74 Ohio App.3d 608, 613, 600 N.E.2d 248, 251 (Ct.App.1991).

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[3]The trial court granted Epcon's motion for summary judgment as to Plaintiffs' First (rescission), Fourth (breach of contract), Tenth (breach of express warranties), and Fourteenth (breach of express warranties) causes of action by order dated August 27, 2012. The remaining causes of action are Plaintiffs' Sixth (fraud/misrepresentation), Eleventh (breach of implied warranty of merchantability), Twelfth (breach of implied warranty of fitness for a particular purpose), and Fifteenth (South Carolina Unfair Trade Practices Act). The trial court also granted Epcon's motion for summary judgment as to the single cause of action asserted by the Association against Epcon for breach of express warranties. The trial court's order at issue here pertains to Epcon's claim for contractual indemnity as to all causes of action, including an award of attorney's fees and costs. The order and subsequent order awarding attorneys' fees presumably applies to Epcon's defense of all causes of action asserted by the Plaintiffs and the Association. Therefore, all causes of action are pertinent to this appeal with respect to the issue of whether the trial court erred in applying the indemnity clause as the orders relate back to the beginning of Epcon's involvement in the lawsuit.

[4]The Franchise Agreement between FPG and ECFI provides in Section 20.2 that "this Agreement shall be deemed to have been entered into under, and for all purposes shall be interpreted, construed, and governed by, the local laws of the State of Ohio, without application of its conflicts of laws principles." See Epcon Motion for Summary Judgment, Franchise Agreement, Exhibit A.

The indemnity clause contains, in sum, separate duties to defend and indemnify when the provisions of the indemnity clause are met. Under Article 16 of the Franchise Agreement:

> Franchisee shall indemnify and hold harmless, to the fullest extent permitted by law, Franchisor, its directors, officers, employees and agents, entities affiliated with Franchisor through common ownership, and directors, officers, employees and agents of such affiliated entities, from and against any and all claims, debts, liabilities, losses, expenses or obligations including without limitation compensatory, exemplary or punitive damages, fines, charges, costs, expenses, lost profits, attorney's fees, court costs, settlement amounts, and judgments, incurred in connection with any action, suit, proceeding, claim, demand, investigation or inquiry (formal or informal), or any settlement thereof, arising directly or indirectly from, as a result of, or in connection with, Franchisee's ownership or operation of its business hereunder and/or its use or utilization of the Development System. . . In the event that any action, suit, proceeding, investigation or inquiry is instituted, or any claim or demand is asserted against or involving Franchisor, Franchisee shall resist and defend such action, suit, proceeding, investigation, inquiry, claim or demand at Franchisee's sole cost and expense or shall cause it to be resisted or defended by an insurer.

See Epcon Motion for Summary Judgment, Franchise Agreement, Exhibit A. Although not entirely clear, the trial court's order appears on the one hand to grant Epcon summary judgment as to its contractual indemnity claims outright, leaving nothing to be determined at trial, and on the other hand appears to limit the order to the duty to defend using the term "indemnify" to refer to the payment of attorneys' fees and costs. The trial court's order states that "FPG is obligated to indemnify and defend ECI and ECFI for any litigation fees and costs incurred by ECI and ECFI in this lawsuit." See Order Granting Epcon Summary Judgment p. 9. The order also grants Epcon's motion for summary judgment and, in so doing, does not reach the equitable indemnity claim. Id. Epcon's motion for summary judgment requested that the court enter summary judgment as to its contractual indemnity and equitable indemnity claims and "further requests that the Court order FPG

to indemnify and reimburse Epcon for any expenses Epcon has incurred or may have to incur in the future in connection with the Action." Epcon Motion for Summary Judgment p. 4. Although the trial court's order clearly addresses the duty to defend, it is less clear whether the order addresses the duty to "indemnify" as the term "indemnify" would apply to a future judgment as opposed to past attorneys' fees and costs incurred. The fact that the trial court's order indicates that summary judgment is granted outright as to Epcon's contractual indemnity claims and the fact that Epcon has cross claimed for contractual indemnity in terms of both the duty to defend and "indemnify" (as with a judgment) would imply that the court has granted summary judgment with respect to both. Under Ohio law, the duty to indemnify does not even accrue until the indemnitee has been found liable. Stengel, 600 N.E.2d at 251. Therefore, the trial court should be reversed to the extent that the order grants summary judgment outright as no such right or obligation has accrued.

II. THE TRIAL COURT ERRED IN HOLDING THAT FPG IS REQUIRED TO INDEMNIFY EPCON PURSUANT TO THE FRANCHISE AGREEMENT FOR EPCON'S ALLEGED CONDUCT

A. The Trial Court Erred Generally By Not Applying The Indemnity Clause

The trial court erred in granting Epcon's motion for summary judgment because the Plaintiffs and the Association asserted causes of action directly against Epcon pertaining to Epcon's own alleged conduct independent of any alleged conduct by FPG. The relevant inquiry is whether, in the light most favorable to FPG as the nonmoving party, the allegations in the Plaintiffs' Amended Complaint and the Association's cross claim require that FPG defend and/or indemnify Epcon.[5]

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[5]As set forth, supra, FPG maintains that the trial court erred to the extent it reached the duty to indemnify in addition to the duty to defend as no such cause of action has accrued and, therefore, the correct analysis should focus on whether FPG has a duty to defend Epcon under the indemnity clause in the Franchise Agreement.

Singleton v. Sherer, 377 S.C. 185, 196, 659 S.E.2d 196, 202 (Ct.App.2008) (stating that appellate court applies the same standard as the trial court under Rule 56, SCRCP and "the evidence and all inferences that can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party.").

The trial court erred in this case by requiring that FPG indemnify Epcon regardless of whether the allegations arise out of FPG's business operations or use of the Development System. See Order Granting Epcon Summary Judgment. Instead, the trial court looked at the nature of the action as a whole and, in doing so, found that the case primarily involves alleged defective construction of the Project. See id. p. 6 (stating that "The crux of this action is alleged defective construction in the Project."). The relevant inquiry is not the nature or "crux" of the action as a whole, however, but whether the allegations asserted against Epcon are those for which FPG has a duty to defend or indemnify Epcon under the Franchise Agreement. In fact, the trial court specifically found that "Plaintiffs have not alleged any construction defect claims against ECI or ECFI." Id. p. 6. Indeed, Epcon also conceded that "Plaintiffs have not alleged any construction defect claims against ECI or ECFI." Epcon Memo in Support of Motion for Summary Judgment at 8. While the allegations in the case as they pertain to FPG may arise out of FPG's business operations or use of the Development System, the allegations as they are directed to Epcon do not as Epcon concedes and the trial court specifically held. The trial court's order contains absolutely no reference to any portion of the Plaintiffs' Complaint or the Association's cross claim and allegations therein against Epcon in order to analyze whether those allegations trigger the indemnity clause. The order references only one paragraph in the Plaintiffs' Complaint where the allegations are directed towards FPG. By removing the requirement that the allegations arise out of FPG's

business operations or use of the Development System as required under the indemnity clause, the trial court erred as a matter of law in its application of the indemnity clause and should be reversed. In the alternative, the matter should be remanded to the trial court to make specific findings as to how the indemnity clause applies to the specific allegations against Epcon.

B. The Trial Court Erred Because The Indemnity Clause Does Not Apply To Epcon's Own Alleged Conduct

The indemnity clause only requires that FPG indemnify Epcon for claims related to (1) FPG's ownership or operation of its business under the agreement; (2) FPG's use of the Development System; or (3) both. Under Ohio law, "Indemnity agreements must be interpreted in the same manner as other contracts." Portsmouth Ins. Agency v. Med. Mut. of Ohio, 188 Ohio App.3d 111, 117, 934 N.E.2d 940, 944 (Ct.App.2009). "All words used must be taken in their ordinary and popular sense' . . . and '[w]hen a [writing] is worded in clear and precise terms; when its meaning is evident, and tends to no absurd conclusion, there can be no reason for refusing to admit the meaning which [it] naturally presents.'" Id. (citing Glaspell v. Ohio Edison Co., 29 Ohio St.3d 44, 47, 505 N.E.2d 264, 267 (1987); Lawler v. Burt, 7 Ohio St. 340, 350 (1857)). The indemnity clause is clear and unambiguous. The indemnity clause does not require that FPG indemnify Epcon for any loss based in whole or in part on Epcon's own breach of any legal duty.[6] As set forth above, the trial court never addressed FPG's argument that the indemnity clause did not apply to the allegations asserted against Epcon. The Plaintiffs asserted causes of action against Epcon for rescission, breach

[6]FPG maintains that the indemnity clause is clear and unambiguous. To the extent that the indemnity clause is not deemed clear and unambiguous, Ohio law requires that any such clause is strictly construed. See Baker v. Kimberly-Clark Corp., 364 F. Supp. 63, 65 (S.D.Ohio 1973) (applying Ohio law and stating "that while contracts seeking to relieve a party from the consequences of his own negligence or breach of duty are strictly construed, general rules of contract construction are not invoked where the contract is clear and unambiguous.").

of contract, fraud/misrepresentation, breach of express warranty, breach of implied warranty of merchantability, breach of implied warranty of fitness for a particular purpose, and violation of the South Carolina Unfair Trade Practices Act. The Association asserted a single cause of action for breach of warranty. Analysis of the allegations demonstrates that the allegations do not fall under the indemnity agreement because they do not involve FPG's business operations or use of the Development System and, therefore, the trial court erred as a matter of law.

First, and particularly illustrative, FPG is not required to indemnify Epcon with respect to Plaintiffs' frivolous cause of action against Epcon for rescission. It is undisputed that Epcon did not enter into any purchase agreements with the Plaintiffs, and, therefore, there is no contract to rescind. See generally Ellie, Inc. v. Miccichi, 358 S.C. 78, 95, 594 S.E.2d 485, 494 (Ct.App.2004) (noting that rescission is the abrogation of a contract, which requires a contract in the first instance). The basis for the Plaintiffs' claim for "rescission" appears to be Epcon's own alleged failure to enforce the Franchise Agreement.

> Epcon Communities and Epcon Communities Franchising, Inc. willfully and deliberately failed to enforce Franchise Agreement terms and conditions upon Fankhauser and FPG, Inc. as Epcon franchisee, resulting in construction of homes that deviate from Epcon plans, models, specifications, building code, and which now suffer reoccurring water intrusion and mold.

Plaintiffs' Third Amended Complaint filed September 16, 2011, p. 6, ¶¶ 16-17. The court granted Epcon's motion for summary judgment as to this cause of action. The Plaintiffs should not have brought this cause of action against Epcon. However, the Plaintiffs are masters of their own Complaint over which FPG has no control. It is also undisputed that FPG (just like Epcon) did not enter into any purchase agreements with the Plaintiffs and, therefore, the Plaintiffs' cause of action

for rescission does not arise out of FPG's business operations or use of the Development System as required by the indemnity clause.

Similarly, the Plaintiffs allege in their cause of action for breach of contract that "Epcon and ECF, Inc. fail[ed] to enforce strict compliance upon Epcon builder Fankhauser with Franchise Agreement terms, conditions, and restrictions." Plaintiffs' Third Amended Complaint filed September 16, 2011, p. 13, ¶ 4(a). The trial court again granted Epcon's motion for summary judgment as to the breach of contract action. In this instance, the alleged conduct is Epcon's alleged failure to enforce its own franchise agreement. Epcon's alleged conduct does not fall under FPG's ownership/operation of its business nor FPG's use of the Development System as provided in the indemnity provision and, therefore, FPG is not required to indemnify Epcon with regard to Plaintiffs' claims against Epcon.

The Plaintiffs' cause of action for breach of express warranty against Epcon alleges:

> Defendants Epcon, ECF, Inc., Fankhauser, FPG, Inc. and Stonecrest HOA knew, or should have known, of the need to fully disclose to potential purchasers the defects each known (sic) water intrusion problems to exist within the condominium's property; yet failed to disclosed (sic) and materially concealed the same and continue to market and sell the properties despite defects for cash to innocent purchasers for value, including Vicari unit 830.

Plaintiffs' Third Amended Complaint filed September 16, 2011, p. 26, ¶ 14.

> Defendant Epcon Communities permitted and by affirmative representation and display of Epcon sales literature, videos, and model condominiums representing (sic) to Plaintiffs that they the were purchasing an Epcon home in terms of value, quality and workmanship. Said representations were materially false.

Plaintiffs' Third Amended Complaint filed September 16, 2011, p. 32, ¶ 13(a). Here again, the court found that Epcon made no direct representations to the Plaintiffs and granted Epcon summary

judgment. However, in the event (however unlikely) that Epcon made any direct representations to any Plaintiff for purposes of the Plaintiffs' allegations against Epcon for breach of express warranty, any such representations would not have been related to FPG's ownership/operation of its business under the Franchise Agreement nor FPG's use of the Development System, which would be required to trigger the indemnity provision. As such, FPG is not required to indemnify Epcon with regard to Plaintiffs' cause of action against Epcon for breach of express warranty.

Additionally, the Plaintiffs allege in their cause of action for "fraud and misrepresentation" (a cause of action that survived summary judgment) the following:

> That Epcon, by and through its employees, agents, independent contractors, and affiliates, including Brock L. Fankhauser 'an Epcon Communities' developer, represented the dwellings to be constructed and ultimately sold to Plaintiffs to be quality Epcon homes built pursuant to Epcon architectural plans, designs, guidelines and specifications, free from defects. Said representation were *materially false* . . .
>
> Plaintiffs are informed and believe that Epcon Communities and ECF, Inc., pursuant to Franchise Agreement (sic), had the absolute right to enforce strict adherence to Epcon Developmental System (sic), including architectural guidelines, blueprints, material use, and specifications used by builder Brock L. Fankhauser and FPG, Inc.
>
> Plaintiffs are informed and believe that Epcon and ECF, Inc. knowingly failed to do so, resulting in builder deviations from the Epcon Developmental system, Epcon plans, and Epcon specifications as published by Epcon or its affiliate Epcon Communities Franchising, Inc.

Plaintiffs' Third Amended Complaint filed September 16, 2011, p. 18, ¶¶ 8, 19-20. The Plaintiffs allege conduct and affirmative representations made by Epcon through its own employees. The Plaintiffs here again also allege Epcon's own failure to enforce its Franchise Agreement. The trial court found sufficient issues of fact for these allegations pertaining to Epcon's own alleged

fraud/misrepresentations sufficient to survive Epcon's motion for summary judgment. As with the allegations addressed above, the Plaintiffs include allegations that Epcon acted or failed to act directly towards the Plaintiffs, which does not arise out of FPG's operations or FPG's use of the Development System.

Plaintiffs' claims for breach of implied warranty of fitness for a particular purpose to the extent they are directed to Epcon are less clear. See Plaintiffs' Third Amended Complaint filed September 16, 2011, p. 27-28. Plaintiffs' allegations against ECI and ECFI specifically are also unclear under the UTPA cause of action as the Plaintiffs direct multiple allegations therein against "Defendants" while referencing multiple alleged instances of supposed unfair trade practices, including those pertaining to advertising. Id. at 33-36. Unfortunately, as it pertains to the Plaintiffs' allegations, the Complaint is cumbersome and perhaps inartfully pled. Factual allegations are lumped into the Complaint against multiple Defendants in a manner that makes deciphering which factual allegations pertain to which Defendants, including Epcon, difficult. Thus, while the indemnity clause itself is clear, application of the indemnity clause to the Plaintiffs' allegations is made difficult in some instances by the language in the Complaint. To the extent that the trial court (had it applied the indemnity clause to specific causes of action) was unable to discern whether the allegations pertained to Epcon, the court should have viewed the allegations in the light most favorable to FPG as the nonmoving party. See Singleton, 377 S.C. at 196, 659 S.E.2d at 202. Because the trial court did not include specific references to the allegations and, therefore, failed to include findings supporting the order granting Epcon's motion for summary judgment, the trial court should be reversed.

With regard to the Association's claims directed towards ECFI, the claims pertain to alleged

conduct of ECFI independent of any alleged conduct by FPG. According to the Association:

> Third-Party Defendant Epcon Communities has been building condominium communities for more than 20 years. Epcon represents itself to have a successful history of condominium developments throughout the United States. Third-Party Defendant Epcon Communities marketed and represented that
> Stonecrest Villas of Tega Cay was an Epcon Community and was an exceptional community. Being part of an Epcon Community, Third-Party Defendant Epcon Communities represented and warranted that the construction in the community would result in buildings with zero defects and a high level of quality. Third-Party Defendant Epcon Communities represented and warranted that
> Stonecrest Villas at Tega Cay was part of Epcon Communities QualityMark warranty program. The specific objectives of warranty program are:
>
> a. to produce a high quality product
> b. identify defects in the buildings at a time when it is appropriate for Epcon Communities' contractors and subcontractors to respond
> c. identify and correct deficiencies before occupancy occurs
> d. to endure that the quality of the construction meets Epcon Communities' alleged standard of excellence.
>
> Third-Party Defendant Epcon Communities represented and warranted that the construction would be thoroughly inspected, including mechanical, structural and cosmetic items. Third-Party Defendant Epcon Communities represented and warranted that the construction would be maintenance free. The clubhouse and common elements in Stonecrest Villas at Tega Cay were part of the construction that was warranted by Third-Party Defendant Epcon Communities. Third-Party Defendant Epcon Communities breached its warranties in that, among other things:
>
> a. Failed to construct Stonecrest Villas, including the clubhouse and common elements, in such a manner as to result in zero defects and a high level of quality;
> b. It failed to identify defects at a time when its contractors and subcontractors can address the defect before occupancy occurs;
> c. It failed to thoroughly inspect the construction, including mechanical, structural and cosmetic items;
> d. It failed to construct Stonecrest Villas, including the clubhouse and common elements in such a manner

> that it was maintenance free.
>
> As a result of Third-Party Defendant Epcon Communities' breach of its warranties, the Improvements and their components are not fit for the particular purpose for which they were intended, and the structural components of the Improvements are not fit to prevent water intrusion into individual unit owners' residences or the Common Elements.

Association Answer, Cross-claim, and Third Party Complaint, pp. 34-36, ¶¶ 67-77. The Association's claim against ECFI for breach of express warranties does not reference FPG. Rather, the Association maintains that ECFI made certain representations as part of its warranty program but breached its warranty program causing damage to the Association. Id. The trial court granted ECFI's motion for summary judgment as to the Association's claim for breach of warranty. Because the Association's claim, on its face, does pertain to alleged conduct by ECFI that is not covered by the indemnity agreement and does not pertain to alleged conduct by FPG, the trial court erred in granting Epcon's motion for summary judgment as to contractual indemnity.

Under Ohio law, the indemnity provision must be given its plain and ordinary meaning. The trial court did not apply the indemnity provision to any of the allegations as set forth above. In failing to do so and granting Epcon's motion for summary judgment, the trial court erred because the order would require that FPG indemnify Epcon for the allegations asserted against Epcon pertaining to Epcon's own conduct. The trial court should have made a finding as to whether each cause of action asserted against Epcon requires that FPG indemnify Epcon. Instead, the trial court took an impermissible broad approach. The trial court indicates that "but for FPG's proceeding under the Franchise Agreement, Epcon would not have any exposure to claims by Plaintiffs." Order on Motion for Summary Judgment, p. 7. However, the plain language of the indemnity clause only requires that FPG indemnify Epcon with respect to FPG's business operations or use of the

Development System. The indemnity agreement does not require that FPG indemnify Epcon any time that Epcon is sued for anything and does not require that FPG indemnify Epcon with respect to allegations pertaining to Epcon's own conduct, however frivolous they may be. Because the trial court interpreted the indemnity provision to require that FPG indemnify Epcon for anything having to do with the Project whatsoever rather than anything arising out of FPG's business operations or use of the Development System as specifically required under the plain language of the indemnity agreement, the trial court erred in its general approach as well as its failure to apply the indemnity clause and should be reversed.

III. THE TRIAL COURT ERRED IN HOLDING THAT FPG IS REQUIRED TO INDEMNIFY EPCON FOR EPCON'S OWN ALLEGED INTENTIONAL CONDUCT UNDER OHIO LAW

The trial court erred in holding that FPG is required to indemnify Epcon with respect to Epcon's own conduct in violation of the indemnity agreement and Ohio law. Under Article 16, "a Franchisee shall indemnify and hold harmless, to the fullest extent permitted by law, Franchisor. . ." See Epcon's Motion for Summary Judgment, Exhibit A, Franchise Agreement (emphasis added). FPG argued that the causes of action asserted in the lawsuit fall outside of the indemnification provision at issue and arise out of the direct conduct of ECI and ECFI. FPG Memo in Opposition, p. 3-4. Additionally, FPG argued that, under Ohio law, "Indemnity agreements must be interpreted in the same manner as other contracts." Id. p. 4 (citing Portsmouth Ins. Agency v. Med. Mut. of Ohio, 188 Ohio App.3d 111, 117, 934 N.E.2d 940, 944 (Ct.App.2009)). Under Ohio law, a party cannot be indemnified for its own intentional tortious conduct. See Diamond Wine & Spirits, Inc. v. Dayton Heidelberg Distrib. Co., 148 Ohio App.3d 596, 604, 774 N.E.2d 775, 781 (2002). The trial court erred to the extent the order requires that FPG must indemnify Epcon for Epcon's own

intentional tortious conduct in violation of the indemnity clause and Ohio law.

In Diamond Wine & Spirits, Inc., the Ohio Court of Appeals considered disputes that arose out of an alcohol distributor's attempts "to sell the wine division of its distribution business." Id. at 598, 774 N.E.2d at 776. C & G Distributing Company, Inc. ("C & G") was the seller and Dayton Heidelberg Distributing Co., Inc. ("Heidelberg") and Diamond Wine & Spirits, Inc. ("Diamond") were the potential buyers. Diamond eventually acquired the wine division, except for the distribution rights for eleven distributors who did not consent to the sale. Id. at 599, 774 N.E.2d at 777. For these eleven, "C & G and Heidelberg" entered into an asset purchase agreement." Id. Diamond in turn filed suit against Heidelberg and Canandaigua Wine Company (one of the eleven distributors whose rights were transferred to Heidelberg), "claiming that Heidelberg had interfered with prospective economic advantage and contract, and that Canandaigua had unreasonably refused to consent to the transfer of the distribution franchise." Id. Heidelberg filed a third-party complaint against C & G, claiming, *inter alia*, that it was entitled to indemnity pursuant to a provision in the asset purchase agreement. C & G argued:

> Heidelberg is not entitled to indemnification for Diamond's claims because such claims are predicated upon the commission of an intentional tort, and public policy precludes enforcement of indemnification provisions to the extent that they purport to indemnify a party for their own intentional tortious conduct.

Id. at 601, 774 N.E.2d at 778. One of Heidelberg's claims was for interference with a business relationship, an intentional tort under Ohio law. The court noted, "Ohio law, on public policy grounds, generally prohibits indemnification for damages caused by intentional torts." Id. at 604, 774 N.E.2d at 781. Thus, the court affirmed the lower court's judgment on this issue on the grounds that the indemnification provision is unenforceable as to intentional torts. Id.

In Weiner v. American Cancer Soc., 2002 WL 1265575, (OhioCt.App.June 6, 2002), the Ohio Court of Appeals considered an indemnity provision in a contract between the American Cancer Society ("ACS"), which operated a summer camp for children, and the Girl Scouts of Lake Erie Council ("GSLEC"), the entity that owned the property and provided services including horseback riding. When a camper sustained fatal injuries resulting from a horseback ride, litigation ensued and the court was asked to consider the indemnification clause contained in the agreement between ACS and GSLEC. The court stated, "In Ohio, while one may contractually relieve oneself for responsibility for acts of negligence, one may not contractually relieve oneself from responsibility for acts constituting willful and wanton misconduct." Id. at *8. According to the Court, "willful misconduct" includes:

> Intentional execution of a wrongful course of conduct which one knows should not be carried out, or the intentional failure to do something which once knows should be done under circumstances tending to disclose that one knows or should know that injury to another will be the probable result of such conduct.

Id. The Ohio Court of Appeals reversed the trial court and determined that there was "a genuine issue of material fact as to whether GSLEC acted in a willful and wanton manner." Id. at *9.

In this case, Plaintiffs allege intentional tortious conduct by Epcon in their causes of action for fraud/misrepresentation and violation of the South Carolina Unfair Trade Practices Act. The trial court erred in awarding Epcon summary judgment as to these causes of action because the plain language in the indemnity clause only permits indemnity "to the fullest extent permitted by law." Therefore, to the extent that the trial court's order requires that FPG indemnify Epcon for its own intentional conduct in excess of what is allowed under Ohio law, the trial court should be reversed.

CONCLUSION

For all the reasons set forth above, Appellant Fankhauser Property Group, Inc. respectfully requests that this Honorable Court reverse the order granting Respondents Epcon Communities, Inc. and Epcon Communities Franchising, Inc.'s motion for summary judgment on their cross claims for contractual indemnification against Fankhauser Property Group, Inc. dated October 2, 2012. Because the trial court's order awarding Epcon attorneys' fees and costs dated December 13, 2012 was entered pursuant to the order granting Epcon's motion for summary judgment, Appellant Fankhauser Property Group, Inc. further requests that this Honorable Court vacate the order. Appellant further requests an award of the costs of this appeal, including attorneys' fees, and such other and further relief as the court deems just and proper.

May 31, 2013

Respectfully Submitted,

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