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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

The Honorable J.C. Nicholson, Jr., Circuit Court Judge

RECEIVED
NOV 21 2016
SC Court of Appeals

Appellate Case No. 2016-001156
Circuit Case No. 2015-CP-08-00547

Cokers Commons Homeowner's Association, Inc.....Respondents,

v.

Park Investors, LLC, CCT Reserve, LLC, f/k/a Harris Street, LLC and Whipple Development Corporation.....Defendants

Of which Whipple Development Corporation.....Appellant.

RESPONDENT'S MOTION TO DISMISS APPEAL

COMES NOW the Respondent, Cokers Commons Homeowner's Association, Inc. (hereinafter the "HOA"), who moves to dismiss[1] the instant appeal for the reasons stated herein:

I. THE INSTANT APPEAL DOES NOT INVOLVE A JUSTICIABLE CONTROVERSY.

"Before any . . . appeal may be maintained, there must exist a justiciable controversy. Toal, *Appellate Practice in South Carolina*, 2d Ed., p. 111 (2002) (citing *Byrd v. Irmo High School*, 321 S.C. 426, 468 S.E.2d 861 (1996)). "Justiciability encompasses several doctrines including

[1] Until the HOA received the Appellant's Initial Brief, it was unaware Appellant would rely upon grounds that would give rise to this Motion, which is why the HOA did not file this Motion prior to the briefing process.

ripeness, mootness, and standing." *James v. Anne's, Inc.*, 390 S.C. 188, 193,701 S.E.2d, 730, 732 (2010) (citing *Jackson v. State*, 331 S.C. 486, 489 S.E.2d 915 (1997); *see also* Toal, *Appellate Practice in South Carolina,* at p. 111 ("The concept of justiciability encompasses . . . ripeness, mootness, and standing.").

A. Appellant never sought any affirmative ruling that the HOA lacks standing; therefore, that issue is not ripe.

The concept of ripeness prevents a court from issuing a ruling that is "contingent, hypothetical, or abstract." *Waters v. South Carolina Land Resources Conservation Comm'n*, 321 S.C. 219, 228, 467 S.E.2d 913, 918 (1996). Our Supreme Court has recognized that where the issue or relief sought has not been presented to the lower tribunal it is not ripe for review on appeal. *Baber v. Greenville County*, 327 S.C. 31, 44, 488 S.E.2d 314, 321 (1997) (citing *Park v. Safeco Ins. Co.*, 251 S.C. 410, 162 S.E.2d 709 (1968) ("Courts generally decline to pronounce a declaration wherein the rights of a party are contingent upon the happening of some event which cannot be forecast and which may never take place.").

Here, the HOA brought an action for declaratory judgment against, Whipple Development Corporation (hereinafter, "Appellant"), in its capacity as the Declarant under the Declarations of Covenants, Conditions and Restrictions for Cokers Commons Home Owner's Association, Inc. (hereinafter the "CCRs"); (*see* Summons and Complaint, attached as **Exhibit 1**). Appellant answered and asserted multiple counterclaims against the HOA including a claim for "Indemnification" under the Bylaws of Cokers Commons HOA. (*See* Answer and Counterclaim, attached as **Exhibit 2**). Appellant's claim for indemnification is the only claim before this Court on appeal. This is true because this appeal arises from, and only concerns, the trial court's grant of partial summary judgment in favor of the HOA. Specifically, the trial court found the indemnification provision applied only to third-party indemnity claims (not second-party

indemnity claims) and further rejected Appellant's alternative contention that the HOA was actually disguising otherwise improper representative claims. (Order Granting Partial Summary Judgment, attached as **Exhibit 3**).[2]

Appellant has not appealed the trial court's ruling that the indemnification provision applies only to third-party indemnification. (See App. Br. pp. 2 and 8-17). Thus, this ruling is the law of the case. *See e.g., Charleston Lumber Co. v. Miller Hous. Corp.*, 338 S.C. 171, 175, 525 S.E.2d 869, 871 (2000) (stating that an "unappealed ruling, right or wrong, is the law of the case").

Instead, Appellant's entire argument on appeal rests upon its belief that the HOA is improperly disguising a third-party action as a second-party action, something Appellant contends the HOA lacks "associational standing" to do. Specifically, Appellant argues the HOA lacks standing to assert claims for money damages for nuisance. This argument demonstrates why there is no justiciable controversy before this Court in this appeal. **The HOA made no claim for nuisance against Appellant**. That claim was made only against defendants Park Investors, LLC, and Harris Street LLC (collectively, the "Non-Appealing Parties"), **neither of which are parties to this appeal.**[3] It logically follows that whether the HOA has standing to assert certain claims against parties not involved in this appeal presents an academic question at best—but certainly not a justiciable controversy. The only claim asserted by the HOA against Appellant is an action for declaratory judgment seeking to declaration the HOA's rights as to certain common areas that were not conveyed to it as required under the CCRs. (Complaint, p. 5). By its very nature, an action

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[2] As the Caption sets out, no third-party has asserted any claim against Appellant. The Court specifically left open the issue of third-party indemnification in the event of any claim was made by a third-party against Appellant. (*Id.* at p. 3).

[3] The reason they are not parties to this appeal is that these two defendants asserted no claim for indemnification under the CCRs, and the Motion for Summary Judgment does not involve them in any way. (See App. Br.).

for declaratory judgment seeking a determination of the requesting party's rights, whatever they may be, is inescapably a claim that belongs solely to that party. The HOA's only claim against Appellant, is for a determination of the HOA's rights, not the rights of any of its members. Appellant rests its entire appeal on a "standing" argument hitched to the HOA's nuisance claims for damages. (App. Br. pp. 8-17). The fatal flaw in this approach is found in the fact that the HOA's nuisance claim is asserted only against **other, Non-Appealing Parties**. (Complaint, p. 5-6). There simply is no justiciable controversy between the HOA and Appellant to which its argument might apply.

As further proof that the "standing" argument now relied upon by Appellant in this appeal does not involve a justiciable controversy between it and the HOA, it is noteworthy that Appellant, along with the Non-Appealing Parties, filed a separate Motion for Summary Judgment with the Court making the exact arguments, citing the same authorities, that are now raised by Appellant in this appeal. (*See* Motion for Summary Judgment, attached as **Exhibit 4**). That Motion was filed the same day as Appellant's Notice of Intent to Appeal, and that Motion has never been heard or ruled upon by the trial court. It remains pending.

The question of the HOA's purported lack of standing is a question of justiciability. *See James,* 390 S.C. at 193,701 S.E.2d, at 732 (stating "justiciability" encompasses the doctrine of ripeness). The only request Appellant ever made before the trial court for a determination of the HOA's standing was not in connection with this appeal, but instead its separately filed, and still pending, Motion for Summary Judgment. As presented, the arguments raised by Appellant in this appeal still await adjudication by the trial court. Therefore, the instant appeal is not ripe and should be dismissed. *See e.g. Baber,* 327 S.C. at 44, 488 S.E.2d at 321 (1997) (stating that relief never sought is not is not ripe for review).

B. Appellant Lacks Standing to Challenge the HOA's Standing to Assert a Nuisance Claim against the Non-Appealing Parties.

Only a party aggrieved by an order, judgment, or sentence may appeal. S.C. Code Ann. §18-1-30; Rule 201(b), SCACR, *Burns v. Gardner*, 328 S.C. 608, 493 S.E.2d 356 (Ct. App. 1997); Toal, *Appellate Practice in South Carolina,* 2Ed. p. 108 (2002). Where the appealing party has not suffered injury, it is without standing to appeal. *Cisson v. McWhorter*, 255 S.C. 174, 177 S.E.2d 603 (1970). A party is prohibited from appealing a ruling of the trial court no matter how "erroneous and prejudicial it may be to the rights and interest **of some other person**." *Biven v. Knight*, 254 S.C. 10, 13, 173 S.E.2d 150, 152 (1970) (emphasis added). This is "a wise and well-reasoned requirement, as our court is concerned with correcting errors that have **practically wronged the appealing party**." *Cisson,* at 177-78, 177 S.E.2d at 605 (emphasis added).

Certainly, Appellant has standing to appeal the grant of summary judgment. For example, it could have appealed (but did not) the trial court's ruling that the indemnification provision contemplates two-party indemnity claims. But by relying entirely on a standing analysis that assails the HOA's nuisance claims, Appellant is attempting to use claims made against other Non-Appealing Parties as a basis to support its own appellate standing. This is improper.

Even if the trial court's grant of summary judgment against Appellant is somehow interpreted by this Court to be a final ruling on the HOA's standing to assert a nuisance claim[4] against the Non-Appealing Parties, this ruling does not affect Appellant. Rather, the right to challenge the HOA's standing to bring a nuisance claim against the Non-Appealing Parties belongs **only** to those Non-Appealing Parties, not Appellant.

[4] This view is undercut by the fact that the Non-Appealing Parties filed their own motion attacking the HOA's standing, which has not yet been heard.

It is Appellant's lack of standing to raise the argument it relies upon in this appeal that merits this Court's attention, not the other way around. Appellant has no standing to assert the rights of another party—particularly one that is not a party to this appeal. *See Biven*, 254 S.C. at 13, 173 S.E.2d at 152 (recognizing a party may not assert the right of another by challenge a ruling that that does not affect it). Thus, Appellant lacks standing to pursue the instant appeal and the same should be dismissed.

CONCLUSION

For the reasons set forth above the instant appeal must be dismissed.

Respectfully submitted,

THURMOND KIRCHNER & TIMBES, P.A.

Michael A. Timbes
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Charleston, South Carolina 29401
Phone: (843) 937-8000
Fax: (843) 937-4200

Attorneys for Respondents

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

The Honorable J.C. Nicholson, Jr., Circuit Court Judge

Appellate Case No. 2016-001156
Circuit Case No. 2015-CP-08-00547

Cokers Commons Homeowner's Association, Inc.....Respondents,

v.

Park Investors, LLC, CCT Reserve, LLC, f/k/a Harris Street, LLC and Whipple Development Corporation.....Defendants

Of which Whipple Development Corporation.....Appellant.

EXHIBIT 1

To Respondent's Motion to Dismiss Appeal

(Summons and Complaint of Respondent)

Michael A. Timbes
Thomas J. Rode
THURMOND KIRCHNER & TIMBES, P.A.
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Phone: (843) 937-8000
michael@tktlawyers.com
thomas@tktlawyers.com

Attorneys for Respondents

STATE OF SOUTH CAROLINA COUNTY OF BERKELEY	)	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT CASE NO.: 2015-CP-08-547
COKERS COMMONS HOMEOWNER'S ASSOCIATION, INC., Plaintiff, vs. PARK INVESTORS, LLC, CCT RESERVE, LLC, f/k/a HARRIS STREET, LLC, and WHIPPLE DEVELOPMENT CORPORATION Defendants.	)	SUMMONS

FILED
2015 MAR -2 PM 3:02
MARY [illegible]
CLERK OF COURT
BERKELEY COUNTY, SC

TO DEFENDANTS ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer to the said Complaint on the below subscribed attorney at their office of 171 Church Street, Suite 330, Charleston, SC 29401, within thirty (30) days from the service hereof, exclusive of the day of such service, and if you fail to answer the Complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in the Complaint.

February 26, 2015
Charleston, S.C.

Halversen & Associates, LLC
171 Church Street, Suite 330
Charleston, SC 29401
T: 843-284-5790
F: 864-326-4844
Email: brent@halversenlaw.com
Attorneys for the Plaintiff

STATE OF SOUTH CAROLINA COUNTY OF BERKELEY	)	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT CASE NO.: 2015-CP-08-549
COKERS COMMONS HOMEOWNER'S ASSOCIATION, INC., Plaintiff, vs. PARK INVESTORS, LLC, CCT RESERVE, LLC, f/k/a HARRIS STREET, LLC, and WHIPPLE DEVELOPMENT CORPORATION Defendants.	)	COMPLAINT (Non-Jury Trial Demanded)

FILED
2015 MAR -2 PM 3:02
MARY L. BROWN
CLERK OF COURT
BERKELEY COUNTY, SC

COME NOW THE PLAINTIFF, Cokers Commons Homeowner's Association, Inc., by and through their undersigned counsel, complaining of the Defendants herein, and allege unto this Honorable Court as follows:

PARTIES AND JURISDICTION

1. Plaintiff, Cokers Commons Homeowner's Association, Inc. is a corporation organized and existing under the laws of the State of South Carolina.

2. Defendant, Park Investors, LLC is a South Carolina limited liability company formed on or about April 9, 2010 and is the current owner of that certain piece of land, known as the amenities area, within the Coker's Commons subdivision, TMS No. 235-06-10-087, commonly known as 117 Kirkland Street, Goose Creek, South Carolina (hereinafter, "the Amenities Area").

3. Harris Street, LLC is a Delaware limited liability corporation whose sole member was Edward L. Terry. On or around February 4, 2011, Harris Street, LLC was

merged into CCT Reserve, LLC (hereinafter, "CCT"). CCT is a limited liability company organized under the laws of Georgia. On August 31, 2012, CCT filed a Chapter 11 Petition in the United States Bankruptcy Court for the Northern District of Georgia. *See In re CCT Reserve, LLC*, C.A. No. 12-71670-PWB (Bankr. N.D. Ga.). Harris Street, LLC is the present record owner of the HOA Open Space Lot within the Cokers Commons subdivision, TMS No. 235-06-12-057.

4. Defendant, Whipple Development Corporation (hereinafter, "Whipple") is a corporation organized and existing under the laws of the State of South Carolina. Whipple was the proclaimed owner of the Subject Property by virtue of the signature of Edward M. Terry as Vice President of Whipple Development Corporation to the Declarations of Covenants, Conditions and Restrictions for Cokers Commons (hereinafter, the "CCR's") dated March 10, 2008, recorded March 14, 2008 in Book 7225, Page 1 and re-recorded April 15, 2008 in Book 7288, Page 283.

5. This Honorable Court has jurisdiction over all subject matter alleged herein and over all parties hereto, and venue is proper in this forum as the Subject Property is located in Berkeley County, South Carolina.

FACTUAL ALLEGATIONS

6. Plaintiff hereby incorporates the allegations of the foregoing paragraphs as if fully restated herein.

7. Mr. Edward L. Terry (hereinafter the "Developer" or "Mr. Terry") is a real estate developer from Atlanta, Georgia that is/was the general partner of Westgate Partners, L.P., (hereinafter, "Westgate"). Westgate purchased the Cokers Commons tract (TMS No. 235-00-00-054) (hereinafter, the "Tract") from Montague Lands in 2005.

8. Phase 4 of Cokers Common consists of 2 phases, Phases 4-A and 4-B. Phase 4-A consists of 50 lots and the Amenities Lot. These lots are shown as Lots 1 thru 37, and 81 thru 93 on a plat dated April 7, 2008, and recorded in Plat Cabinet M, Pages 38-P and 39-P. Phase 4-B consists of 56 lots as shown on a plat dated August 5, 2008, and recorded in Plat Cabinet M, Page 300-P together with an HOA Open Space lot. These lots are shown as Lots 38 thru 80, and Lots 94 thru 106 on the plat.

9. At the time the CCR's were initially recorded on March 14, 2008, the Tract was owned by Westgate. However, the Declarant name as indicated on the CCR's is Whipple Development Corporation, the then purported owner of the Tract according to CCR's.

10. Westgate then conveyed the Tract by deed to Harris Street, LLC on April 14, 2008, recorded April 28, 2008 in Book 7312, Page 19.

11. According to the CCR's, the Declarant was to convey fee simple title to the common areas of the subdivision to the Plaintiff prior to the conveyance of the first lot.

12. Harris Street, LLC conveyed the first lot in the Cokers Commons subdivision to Brentwood Homes, Inc. (another Edward Terry related entity) in 2008 who in turn conveyed the lot to an individual purchaser in 2008. Despite the Developer making the conveyance of lots out of Harris Street, LLC, the Amenities Lot and the HOA open space lot were not conveyed (and still not have been coneyed) to the Plaintiff, as per the CCR's.

13. The Amenities Lot area includes a pool whose maintenance and upkeep has been abandoned by the developer for nearly six years. The pool has become a blight and the local municipality of Goose Creek has issued nuisance warnings due to the

condition of the pool. The landowner members of Plaintiff's have not been able to use or enjoy the pool despite repeated requests to Mr. Edward Terry to remediate the condition. As described herein, the Amenities Lot area and the HOA Open Space Area have been abandoned by Mr. Edward Terry's entities, have not been kept up, and should have been conveyed to the Association in 2008 and were not.

FOR A FIRST CAUSE OF ACTION
(Specific Performance as to Park Investors and Harris Street)

14. Plaintiff hereby incorporates the allegations of the foregoing paragraphs as if fully restated herein.

15. The Developer agreed to convey the common areas to the Plaintiff before conveyance of the first lot. The Amenities Lot are and HOA open space lot are common areas, designated and designed to be used for all owners of the subdivision.

16. The Developer never conveyed the common areas as contractually required, has still retained ownership of them, and let them fall into disrepair and blight.

17. The Plaintiff respectfully asks the Court to compel the conveyance by deed of the Amenities Lot and HOA open space lot to the Plaintiff as Plaintiff has no adequate remedy at law and such specific performance is equitable under the circumstances.

FOR A SECOND CAUSE OF ACTION
(Action for Declaratory Relief)

18. Plaintiff hereby incorporates the allegations of the foregoing paragraphs as if fully restated herein.

19. Pursuant to Title 15, Chapter 53 of the South Carolina Code of Laws, the Plaintiff seeks a declaratory judgment declaring that all property owners of record in the Phase 4 of Cokers Commons are subject to the CCR's.

20. Although Whipple was not the owner of the Tract at the time the CCR's were recorded on the property, the Developer was the general partner of the owner, Westgate. The identification of Whipple as the Declarant on the CCR's was either a technical error or correct as there was a commonality of interest between the Developer, Whipple and Westgate such that the CCR's are still valid and binding upon all owners of Phase 4 of Cokers Commons.

21. The Plaintiff seeks from the Court a declaration of Plaintiff's rights as to the common areas as set forth herein and in the CCR's.

FOR A THIRD CAUSE OF ACTION
(Nuisance as to Park Investors and Harris Street)

22. Plaintiff hereby incorporates the allegations of the foregoing Paragraphs as if fully restated herein.

23. Defendants Park Investors and Harris Street are the record owners of the Amenities Lot and the HOA open space lot. As alleged herein, the common areas have been abandoned, neglected, and have become a blight to the neighborhood, negatively affecting the quality of life of the owners of Cokers Commons. The common areas, by contrast and comparison, were intended to preserve, protect and enhance the quality of

life of its owners, as described in the CCR's.

24. The Defendants neglect of the Amenities Lot and the HOA open space lot has unreasonably interfered with the Plaintiff's constituent member's use and ownership of their properties as well as their use of the common areas, causing damages. The Defendants should be required to restore the condition of the common areas to their pre-existing condition to the time at which they were abandoned.

WHEREFORE, the Plaintiff prays this Honorable Court inquire into the matters set forth herein and award judgment in favor of the Plaintiff against the Defendants, jointly and severally, as follows:

1. For specific performance as described herein;
2. For a declaration of Plaintiff's rights as to the amenities lot and HOA open space lot;
3. For all actual and consequential damages against the Defendants, jointly and severally, in an amount to be shown at trial;
4. For punitive damages in an amount to be determined by the trier of fact;
5. For equitable relief as sought herein including but not limited to injunction;
6. For all costs associated with investigating and prosecuting this action; and
7. For all other relief this Honorable Court deems just and proper.

Respectfully submitted,

HALVERSEN & ASSOCIATES, LLC

By: _____

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Charleston, SC 29401
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Attorneys for the Plaintiff

February 26th, 2015.
Charleston, South Carolina

HALVERSEN & ASSOCIATES, L.L.C.
Attorneys - at - Law

BRENT S. HALVERSEN*
Direct Line: (843) 284-5790
brent@halversenlaw.com

*ALSO ADMITTED IN FLORIDA

February 26, 2015

VIA U.S. MAIL

Mary P. Brown
Berkeley County Clerk of Court
300-B California Avenue
P.O. Box 219
Moncks Corner, SC 29461

Re: Cokers Commons Homeowner's Association v. Park Investors, LLC, CCT Reserve, LLC, f/k/a Harris Street, LLC and Whipple Development Corporation
Case No.: 2012-CP-08-3338

Dear Clerk of Court:

Enclosed please find the original and one copy of the Summons and Complaint. Please file the originals and return the clocked copy to me in the enclosed self-addressed stamped envelope.

I have enclosed our firm's check in the amount of $150.00 for the filing fee.

Thank you for your assistance in this matter.

Sincerely yours,

Brent Souther Halversen

BSH/lh
Enclosures

cc: Cokers Commons HOA (Via E-Mail Only)

STATE OF SOUTH CAROLINA)
)
COUNTY OF BERKELEY)
)
COKERS COMMONS HOMEOWNER'S ASSOCIATION, INC.)
Plaintiff(s))
)
vs.)
)
PARK INVESTORS, LLC, CCT RESERVE, LLC, F/K/A HARRIS STREET, LLC, and WHIPPLE DEVELOPMENT CORPORATION)
Defendant(s))

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

2015-CP - 08- 547

Submitted By: Brent Souther Halversen, Esq
Address: Halversen & Associates, LLC
171 Church Street, Suite 330
Charleston, SC 29401

SC Bar #: 76495
Telephone #: (843)-284-5790
Fax #: (864) 326-4844
Other:
E-mail: brent@halversenlaw.com

FILED
2015 MAR -2 PM 3:02
MARY GIBSON BROWN
CLERK OF COURT
BERKELEY COUNTY, SC

NOTE: The coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (*Check all that apply*)

***If Action is Judgment/Settlement do not complete*

☐ JURY TRIAL demanded in complaint. ☒ NON-JURY TRIAL demanded in complaint.
☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☒ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (*Check One Box Below*)

Contracts
- ☐ Constructions (100)
- ☐ Debt Collection (110)
- ☐ Employment (120)
- ☐ General (130)
- ☐ Breach of Contract (140)
- ☐ Other (199)

Torts - Professional Malpractice
- ☐ Dental Malpractice (200)
- ☐ Legal Malpractice (210)
- ☐ Medical Malpractice (220)
- Previous Notice of Intent Case # 20____-NI-____-_____
- ☐ Notice/ File Med Mal (230)
- ☐ Other (299)

Torts - Personal Injury
- ☐ Assault/Slander/Libel (300)
- ☐ Conversion (310)
- ☐ Motor Vehicle Accident (320)
- ☐ Premises Liability (330)
- ☐ Products Liability (340)
- ☐ Personal Injury (350)
- ☐ Wrongful Death (360)
- ☐ Other (399)

Real Property
- ☐ Claim & Delivery (400)
- ☐ Condemnation (410)
- ☐ Foreclosure (420)
- ☐ Mechanic's Lien (430)
- ☐ Partition (440)
- ☐ Possession (450)
- ☐ Building Code Violation (460)
- ☒ Other (499) Specific Performance, Declaratory Relief and Nuisance

Inmate Petitions
- ☐ PCR (500)
- ☐ Mandamus (520)
- ☐ Habeas Corpus (530)
- ☐ Other (599)

Administrative Law/Relief
- ☐ Reinstate Drv. License (800)
- ☐ Judicial Review (810)
- ☐ Relief (820)
- ☐ Permanent Injunction (830)
- ☐ Forfeiture-Petition (840)
- ☐ Forfeiture—Consent Order (850)
- ☐ Other (899)

Judgments/Settlements
- ☐ Death Settlement (700)
- ☐ Foreign Judgment (710)
- ☐ Magistrate's Judgment (720)
- ☐ Minor Settlement (730)
- ☐ Transcript Judgment (740)
- ☐ Lis Pendens (750)
- ☐ Transfer of Structured Settlement Payment Rights Application (760)
- ☐ Confession of Judgment (770)
- ☐ Petition for Workers Compensation Settlement Approval (780)
- ☐ Other (799)

Appeals
- ☐ Arbitration (900)
- ☐ Magistrate-Civil (910)
- ☐ Magistrate-Criminal (920)
- ☐ Municipal (930)
- ☐ Probate Court (940)
- ☐ SCDOT (950)
- ☐ Worker's Comp (960)
- ☐ Zoning Board (970)
- ☐ Public Service Comm. (990)
- ☐ Employment Security Comm (991)
- ☐ Other (999)

Special/Complex /Other
- ☐ Environmental (600)
- ☐ Automobile Arb. (610)
- ☐ Medical (620)
- ☐ Other (699)
- ☐ Pharmaceuticals (630)
- ☐ Unfair Trade Practices (640)
- ☐ Out-of State Depositions (650)
- ☐ Motion to Quash Subpoena in an Out-of-County Action (660)
- ☐ Sexual Predator (510)

Submitting Party Signature: _____ **Date:** 2/26/2015

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous

Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

FOR MANDATED ADR COUNTIES ONLY

Aiken, Allendale, Anderson, Bamberg, Barnwell, Beaufort, Berkeley, Calhoun, Charleston, Cherokee, Clarendon, Colleton, Darlington, Dorchester, Florence, Georgetown, Greenville, Hampton, Horry, Jasper, Kershaw, Lee, Lexington, Marion, Oconee, Orangeburg, Pickens, Richland, Spartanburg, Sumter, Union, Williamsburg, and York

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

You are required to take the following action(s):

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.

2. The initial ADR conference must be held within 300 days after the filing of the action.

3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs. (Medical malpractice mediation is mandatory statewide.)

4. Cases are exempt from ADR only upon the following grounds:

    a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;

    b. Requests for temporary relief;

    c. Appeals

    d. Post Conviction relief matters;

    e. Contempt of Court proceedings;

    f. Forfeiture proceedings brought by governmental entities;

    g. Mortgage foreclosures; and

    h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.

5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.

6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

Please Note: **You must comply with the Supreme Court Rules regarding ADR. Failure to do so may affect your case or may result in sanctions.**

Common Pleas

Clerk : Mary P. Brown
300 B California Avenue
Moncks Corner, SC 29461
(843) 719-4400

Received From: Halversen, Brent Souther
171 Church Street
Charleston, SC 29401

Date: 3/ 2/2015
Receipt #: 6059706
Clerk: c08tmurphy

Paying for: Cokers Commons Homeowner'S

Transaction Type: Payment
Payment Type: Check $150.00
Total Paid: $150.00

Reference #: 1721
Comment: Non-Refundable

Total Received: $150.00
Change Due: $0.00

Case #	Caption	Previous Balance	Amount Paid	Balance Due	S/T
2015CP0800547	Cokers Commons Homeowner'S Assocation, Inc VS Park Investors, Llc	**$150.00**	**$150.00**	**$0.00**	**499**

Total Cases: **1**	**$150.00**	**$150.00**	**$0.00**	

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

The Honorable J.C. Nicholson, Jr., Circuit Court Judge

Appellate Case No. 2016-001156
Circuit Case No. 2015-CP-08-00547

Cokers Commons Homeowner's Association, Inc.....Respondents,

v.

Park Investors, LLC, CCT Reserve, LLC, f/k/a Harris Street, LLC and Whipple Development Corporation.....Defendants

Of which Whipple Development Corporation.....Appellant.

EXHIBIT 2

To Respondent's Motion to Dismiss Appeal

(Answer and Counterclaims of Appellant)

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Attorneys for Respondents

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF BERKELEY	)	CASE NO. 2015-CP-08-00547
COKERS COMMON HOMEOWNER'S ASSOCIATION, INC.	)	
Plaintiff,	)	**ANSWER & COUNTERCLAIMS**
-vs-	)	
PARK INVESTORS, LLC, CCT RESERVE, LLC, f/k/a HARRIS STREET, LLC and WHIPPLE DEVELOPMENT, INC.,	)	**(Jury Trial Demanded)**
Defendants.	)	

TO: PLAINTIFF ABOVE-NAMED:

Defendants Park Investors, LLC; CCT Reserve, LLC, f/k/a Harris Street, LLC; and Whipple Development, Inc. (hereinafter collectively referred to as "Defendants"), by and through their attorneys, fully answering the Complaint, and asserting Counterclaims, respectfully allege and would show unto this Honorable Court as follows:

FOR A FIRST DEFENSE
(Qualified Denial)

1. Except as otherwise admitted, qualified, or explained hereinafter, Defendants deny each and every allegation contained in the Complaint and demand strict proof thereof.

2. Defendants lack sufficient information or knowledge to form a belief as to the truth or accuracy of the Plaintiff's allegations contained in Paragraph 1 of the Complaint and, therefore, deny same and demand strict proof thereof.

3. In response to paragraph 2 of the Complaint, Defendant Park Investors, LLC admits only that it is a South Carolina limited liability company formed on or about April 9, 2010 and

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craves reference to the documents recorded with the Register of Deeds for Berkeley County, State of South Carolina, involving ownership of property at the Coker's Commons subdivision in Goose Creek, South Carolina, and denies any allegations of paragraph 2 of the Complaint that are inconsistent therewith. Defendants CCT Reserve, LLC, f/k/a Harris Street, LLC, and Whipple Development, Inc. lack sufficient information or knowledge to form a belief as to the truth or accuracy of the Plaintiff's allegations contained in Paragraph 2 of the Complaint and, therefore, deny same and demand strict proof thereof.

4. In response to paragraph 3 of the Complaint, Defendant CCT Reserve, LLC, f/k/a Harris Street, LLC, admits only that Harris Street, LLC formerly was a Delaware limited liability company and, as set forth in a certificate of merger dated February 4, 2011, which was filed with the Georgia Secretary of State, it was merged into CCT Reserve, LLC, the surviving entity; that on or about August 31, 2012 CCT Reserve, LLC filed a Chapter 11 bankruptcy petition in the Northern District of Georgia, Atlanta Division, in the action entitled *In re: CCT Reserve, LLC*, Case No. 12-71670-PWB, and said action was ended on July 2, 2013 and CCT Reserve, LLC was discharged; and craves reference to the documents recorded with the Register of Deeds for Berkeley County, State of South Carolina, involving ownership of property at the Coker's Commons subdivision in Goose Creek, South Carolina, and denies any allegations of paragraph 3 of the Complaint that are inconsistent therewith. Defendants Park Investors, LLC and Whipple Development, Inc. lack sufficient information or knowledge to form a belief as to the truth or accuracy of the Plaintiff's allegations contained in Paragraph 3 of the Complaint and, therefore, deny same and demand strict proof thereof.

5. In response to paragraph 4 of the Complaint, Defendant Whipple Development, Inc. admits only that it is a corporation formed under the laws of the State of South Carolina, but denies the remaining allegations of said paragraph. Defendant Whipple Development, Inc. craves reference to the documents recorded with the Register of Deeds for Berkeley County, State of South Carolina, involving ownership of property at the Coker's Commons subdivision in Goose Creek, South Carolina, and denies any allegations of paragraph 4 of the Complaint that are inconsistent therewith. Defendants Park Investors, LLC and CCT Reserve, LLC, f/k/a Harris Street, LLC, lack sufficient information or knowledge to form a belief as to the truth or accuracy of the Plaintiff's allegations contained in Paragraph 4 of the Complaint and, therefore, deny same and demand strict proof thereof.

6. Responding to the allegations of Paragraph 5 of the Complaint, the allegations of said paragraph call for legal conclusions to which the Defendants are not required to respond. To the extent a response is deemed necessary, Defendants lack sufficient information or knowledge to form a belief as to the truth or accuracy of the Plaintiff's allegations contained in Paragraph 5 of the Complaint and, therefore, deny same and demand strict proof thereof.

7. Responding to the allegations of Paragraph 6 of the Complaint, Defendants repeat, allege, and incorporate by reference as if fully set forth herein their answers to the allegations in paragraphs 1 through 5 of the Complaint.

8. Responding to the allegations of Paragraph 7 of the Complaint, upon information and belief, Defendants admit only that Edward L. Terry is a citizen and resident of the State of Florida and that he was the general partner of Westgate Partners, L.P. Defendants crave reference to the documents recorded with the Register of Deeds for Berkeley County, State of South Carolina,

involving ownership of property at the Coker's Commons subdivision in Goose Creek, South Carolina, and deny any allegations of paragraph 7 of the Complaint that are inconsistent therewith.

9. Responding to the allegations of Paragraphs 8, 9, 10, 11, and 12 of the Complaint, Defendants lack sufficient information or knowledge to form a belief as to the truth or accuracy of the Plaintiff's allegations contained in Paragraph 8 and, therefore, deny same and demand strict proof thereof. Defendants crave reference to the documents recorded with the Register of Deeds for Berkeley County, State of South Carolina, involving ownership of property at the Coker's Commons subdivision in Goose Creek, South Carolina, and deny any allegations of paragraph 8 of the Complaint that are inconsistent therewith.

10. Responding to the allegations of Paragraph 13 of the Complaint, Defendants admit only that the property at the Coker's Commons subdivision in Goose Creek, South Carolina, contains a pool. Defendants deny the remaining allegations of paragraph 13 of the Complaint.

11. Responding to the allegations of Paragraph 14 of the Complaint, Defendants repeat, allege, and incorporate by reference as if fully set forth herein their answers to the allegations in paragraphs 1 through 13 of the Complaint.

12. Defendants deny the allegations of Paragraphs 15, 16, and 17 of the Complaint.

13. Responding to the allegations of Paragraph 18 of the Complaint, Defendants repeat, allege, and incorporate by reference as if fully set forth herein their answers to the allegations in paragraphs 1 through 17 of the Complaint.

14. Defendants deny the allegations of Paragraphs 19, 20, and 21 of the Complaint, except the portion stating, upon information and belief, that Whipple Development, Inc. was not the owner of the property located at the Coker's Commons subdivision in Goose Creek, South Carolina,

which is referenced in the Complaint. Defendants admit, upon information and belief, that Whipple Development, Inc. was not the owner of the property located at the Coker's Commons subdivision in Goose Creek, South Carolina, which is referenced in the Complaint.

15. Responding to the allegations of Paragraph 22 of the Complaint, Defendants repeat, allege, and incorporate by reference as if fully set forth herein their answers to the allegations in paragraphs 1 through 21 of the Complaint.

16. Responding to the allegations in the first sentence of Paragraph 23 of the Complaint, Defendants crave reference to the documents recorded with the Register of Deeds for Berkeley County, State of South Carolina, involving ownership of property at the Coker's Commons subdivision in Goose Creek, South Carolina, and deny any allegations of paragraph 23 of the Complaint that are inconsistent therewith. Defendants deny the remaining allegations of Paragraph 23.

17. Defendants deny the allegations of Paragraph 24 of the Complaint.

18. Defendants deny the Plaintiff is entitled to any of the relief requested in the prayer for relief.

FOR A SECOND DEFENSE
(Failure to State a Claim)

19. The Complaint, in whole or in part, should be dismissed pursuant to S.C. R. CIV. PRO. 12(b)(6) for failure to state a claim against the Defendant. The facts as alleged in the Complaint do not state an actionable claim or support a theory of recovery against the Defendants as a matter of law.

FOR A THIRD DEFENSE
(Waiver)

20. Plaintiff's claims are barred in whole or part by the doctrine of waiver due to their own failures to comply and/or conform with the terms of the covenants and restrictions, articles, and bylaws, if any, affecting the property, in such particulars as the evidence will show, including but not limited to the Plaintiff's failure to provide the written notice required for election of a proper board of directors for any homeowner's association and/or any meeting of owners with interests in the property; failure to provide the written notice required for taking any action to enforce any covenants and restrictions, articles, and bylaws, if any, affecting the property, including the present lawsuit; failure to conduct a properly noticed meeting of the owners to elect a board of directors; failure to conduct a meeting of the owners with a proper quorum to elect a board of directors and/or to authorize the filing of this lawsuit; failure to conduct a meeting of the board of directors with a proper quorum to authorize the filing of this lawsuit; failure to elect a proper board of directors; failure to obtain the necessary affirmative vote of 75% of the members needed to commence this litigation; and failure to comply with the dispute resolution and/or arbitration procedures and requirements of the covenants and restrictions, articles, and bylaws, if any, affecting the property.

FOR A FOURTH DEFENSE
(Estoppel)

21. Plaintiff's claims are barred in whole or part by the doctrine of estoppel due to their own failures to comply and/or conform with the terms of the covenants and restrictions, articles, and bylaws, if any, affecting the property, in such particulars as the evidence will show, including but not limited to the Plaintiff's failure to provide the written notice required for election of a proper board of directors for any homeowner's association and/or any meeting of owners with interests in the

property; failure to provide the written notice required for taking any action to enforce any covenants and restrictions, articles, and bylaws, if any, affecting the property, including the present lawsuit; failure to conduct a properly noticed meeting of the owners to elect a board of directors; failure to conduct a meeting of the owners with a proper quorum to elect a board of directors and/or to authorize the filing of this lawsuit; failure to conduct a meeting of the board of directors with a proper quorum to authorize the filing of this lawsuit; failure to elect a proper board of directors; failure to obtain the necessary affirmative vote of 75% of the members needed to commence this litigation; and failure to comply with the dispute resolution and/or arbitration procedures and requirements of the covenants and restrictions, articles, and bylaws, if any, affecting the property.

FOR A FIFTH DEFENSE

(Failure to Comply with Covenants, Restrictions, Articles, and/or Bylaws)

22. Plaintiff's claims are barred in whole or part because of its own failures to comply and/or conform with the terms of the covenants and restrictions, articles, and bylaws, if any, affecting the property, in such particulars as the evidence will show, including but not limited to the Plaintiff's failure to provide the written notice required for election of a proper board of directors for any homeowner's association and/or any meeting of owners with interests in the property; failure to provide the written notice required for taking any action to enforce any covenants and restrictions, articles, and bylaws, if any, affecting the property, including the present lawsuit; failure to conduct a properly noticed meeting of the owners to elect a board of directors; failure to conduct a meeting of the owners with a proper quorum to elect a board of directors and/or to authorize the filing of this lawsuit; failure to conduct a meeting of the board of directors with a proper quorum to authorize the filing of this lawsuit; failure to elect a proper board of directors; failure to obtain the necessary affirmative vote of 75% of the members needed to commence this litigation; and failure to comply

with the dispute resolution and/or arbitration procedures and requirements of the covenants and restrictions, articles, and bylaws, if any, affecting the property.

FOR A SIXTH DEFENSE
(Failure to Satisfy Conditions Precedent)

23. Plaintiff's claims are barred due its failure to satisfy all conditions precedent to any obligation on the part of the Defendants to perform, including but not limited to, the conditions imposed in the covenants and restrictions, articles, and bylaws, if any, affecting the property.

FOR A SEVENTH DEFENSE
(Laches)

24. Plaintiff's claims are barred in whole or part by the doctrine of laches.

FOR AN EIGHTH DEFENSE
(Statute of Limitations/Statute of Repose)

25. Plaintiff's claims are barred in whole or part by the expiration of the applicable statute of limitations and/or statute of repose.

FOR A NINTH DEFENSE
(Unclean Hands)

26. Plaintiff's claims are barred in whole or part by their unclean hands.

FOR A TENTH DEFENSE
(*Ultra Vires* Acts)

27. Plaintiff is not a duly empowered or authorized entity to initiate this lawsuit and is operating *ultra vires* in this action.

FOR AN ELEVENTH DEFENSE
(Lack of Standing)

28. Plaintiff lacks standing to assert the claims raised in the Complaint.

FOR A TWELFTH DEFENSE
(Not Real Party in Interest)

29. Plaintiff is not a real party in interest under SCRCP 17 with authority to bring the claims asserted in the Complaint.

FOR A THIRTEENTH DEFENSE
(Discharge in Bankruptcy)

30. Plaintiff's claims are discharged in whole or part by virtue of the Orders and judgments entered by the United States Bankruptcy Court for the Northern District of Georgia, Atlanta Division, in the action entitled *In re: CCT Reserve, LLC*, Case No. 12-71670-PWB.

FOR A FOURTEENTH DEFENSE
(Extinguishment of Claim)

31. The Orders and judgments entered by the United States Bankruptcy Court for the Northern District of Georgia, Atlanta Division, in the action entitled *In re: CCT Reserve, LLC*, Case No. 12-71670-PWB, have extinguished and/or discharged in whole or in part the claims asserted by the Plaintiff.

FOR A FIFTEENTH DEFENSE
(Arbitration)

32. Plaintiff's claims are subject to the arbitration provision in the Covenants, Conditions and Restrictions for Cokers Commons and must be dismissed.

FOR A SIXTEENTH DEFENSE
(Abandonment)

33. Plaintiff's claims are barred in whole or part due to the Plaintiff's abandonment of its alleged rights.

FOR A SEVENTEENTH DEFENSE
(Absence of Damages)

34. Plaintiff's claims fail because it can show no damages.

FOR AN EIGHTEENTH DEFENSE
(Consent)

35. Plaintiff's claims are barred in whole or part due to its consent to Defendants' alleged nuisance or misconduct.

FOR A NINETEENTH DEFENSE
(Superseding/Intervening Negligence)

36. Plaintiff's claims are barred because even if Defendants' conduct constituted a nuisance as alleged by Plaintiff, which is specifically denied, the intervening and/or superseding negligence of an entity or entities other than Defendants was the direct and proximate cause of the damages suffered by Plaintiff.

FOR A TWENTIETH DEFENSE
(Comparative and/or Contributory Negligence)

37. If and to the extent that Plaintiff was damaged as alleged, which is denied, such damages were the result, in whole or in part, of the fault, negligence, and/or culpable conduct of Plaintiff and/or its agents, as a result of which such damages are barred or must be reduced accordingly.

FOR A TWENTY-FIRST DEFENSE
(Assumption of Risk)

38. If and to the extent that Plaintiff was damaged as alleged, which is denied, such damages were the result, in whole or in part, of the assumption of the risk of Plaintiff and/or its agents, as a result of which such damages are barred.

FOR A TWENTY-SECOND DEFENSE
(Failure to Mitigate Damages)

39. Plaintiff has failed to mitigate its damages and, therefore, its claims are barred in whole or part.

FOR A TWENTY-THIRD DEFENSE
(Coming to the Nuisance)

40. If and to the extent that Plaintiff was damaged as alleged, which is denied, such damages were the result, in whole or in part, of the Plaintiff's coming to the nuisance, as a result of which such damages are barred.

FOR A TWENTY-FOURTH DEFENSE
(Statute of Frauds)

41. Plaintiff's claims are barred in whole or in part based on the failure to comply with the Statute of Frauds.

FOR A TWENTY-FIFTH DEFENSE
(Reservation of Additional and Further Defenses)

42. Defendants reserve any additional and further defenses as may be revealed by additional information through the course of discovery and investigation in a manner that is consistent with the South Carolina Rules of Civil Procedure.

FOR A TWENTY-SIXTH DEFENSE AND BY WAY OF COUNTERCLAIM AGAINST THE PLAINTIFF
(Declaratory Judgment)

As defense and/or a counterclaim against Plaintiff Cokers Commons Homeowner's Association, Inc., Defendants Park Investors, LLC; CCT Reserve, LLC, f/k/a Harris Street, LLC; and Whipple Development, Inc. allege and state as follows:

43. Defendants repeat, allege, and incorporate by reference as if fully set forth herein its

answers to the allegations contained in the Complaint and its allegations in paragraphs 1 through 42 herein-above.

44. At all times pertinent herein, Defendant Park Investors, LLC is and was a limited liability company organized and existing under the laws of the State of South Carolina.

45. At all times pertinent herein, Defendant CCT Reserve, LLC is and was a limited liability company formed under the laws of the State of Georgia.

46. At all times pertinent herein, Defendant Whipple Development, Inc. is and was a corporation formed under the laws of the State of South Carolina.

47. Upon information and belief, Plaintiff Cokers Commons Homeowner's Association, Inc. is a corporation formed under the laws of the State of South Carolina.

48. Defendant Park Investors, LLC currently owns property located within the Coker's Commons subdivision in Goose Creek, South Carolina.

49. Upon information and belief, Defendant CCT Reserve, LLC formerly owned property located within the Coker's Commons subdivision.

50. Upon information and belief, Defendant Whipple Development, Inc. is named as the "declarant" in the Declaration of Covenants, Conditions and Restrictions for Cokers Commons dated March 10, 2008 and recorded on April 15, 2008 with the Register of Deeds for Berkeley County, South Carolina, at Book 7288, Page 283, which are incorporated herein by reference. However, upon information and belief, Defendant Whipple Development, Inc. did not own any property in the Coker's Commons subdivision in Goose Creek, South Carolina, and more specifically, did not own and was not deeded the property described in the above-referenced Covenants, Conditions and Restrictions when said Covenants, Conditions and Restrictions were executed and recorded.

51. Upon information and belief, Whipple Development, Inc. lacked the right, power, or authority to record the above-referenced Covenants, Conditions and Restrictions upon or affecting any property in the Coker's Commons subdivision in Goose Creek, South Carolina, because it did not own and was not deeded the property at the time the Covenants, Conditions and Restrictions were executed and recorded and did not possess such an interest in the property as to amount to a privity of estate.

52. Upon information and belief, the above-referenced Covenants, Conditions and Restrictions are invalid, null, void, and unenforceable.

53. Upon information and belief, even assuming arguendo the Covenants, Conditions and Restrictions are valid, Plaintiff Cokers Commons Homeowner's Association, Inc. failed to provide the written notice required for election of a proper board of directors for the homeowner's association and/or for any meeting of owners or members with interests in the property.

54. Upon information and belief, even assuming arguendo the Covenants, Conditions and Restrictions are valid, Plaintiff Cokers Commons Homeowner's Association, Inc. failed to conduct a properly noticed meeting of the owners or members with a proper quorum to elect a board of directors and/or to authorize the filing of this lawsuit.

55. Upon information and belief, even assuming arguendo the Covenants, Conditions and Restrictions are valid, Plaintiff Cokers Commons Homeowner's Association, Inc. has not properly elected a proper board of directors in accordance with and as required by the covenants and restrictions, articles, and bylaws, if any, affecting the property.

56. Upon information and belief, even assuming arguendo the Covenants, Conditions and Restrictions are valid, Plaintiff Cokers Commons Homeowner's Association, Inc. presently does not

have a duly elected, qualified, and acting board of directors.

57. Upon information and belief, even assuming arguendo the Covenants, Conditions and Restrictions are valid, Plaintiff Cokers Commons Homeowner's Association, Inc. failed to conduct a meeting of a properly elected board of directors with a proper quorum to authorize the filing of this lawsuit.

58. Upon information and belief, even assuming arguendo the Covenants, Conditions and Restrictions are valid, Plaintiff Cokers Commons Homeowner's Association, Inc. failed to provide the written notice required under the covenants and restrictions, articles, and bylaws, if any, affecting the property for taking any action to enforce said covenants and restrictions, including the commencement of the present lawsuit.

59. Upon information and belief, even assuming arguendo the Covenants, Conditions and Restrictions are valid, prior to institution of this litigation, Plaintiff Cokers Commons Homeowner's Association, Inc. failed to obtain the necessary affirmative vote of 75% of the members of Cokers Commons Homeowner's Association, Inc. authorizing it to commence this litigation.

60. Upon information and belief, even assuming arguendo the Covenants, Conditions and Restrictions are valid, prior to institution of this litigation, Plaintiff Cokers Commons Homeowner's Association, Inc. failed to comply with the dispute resolution and/or arbitration procedures and requirements of the covenants and restrictions, articles, and bylaws, if any, affecting the property.

61. Upon information and belief, without proper power, authorization, or approval, persons or entities other than a duly elected, qualified, and authorized board of directors of Plaintiff Cokers Commons Homeowner's Association, Inc. caused the present lawsuit to be filed, commenced, and prosecuted against the Defendants.

62. Defendants bring this action pursuant to S.C. CODE ANN. § 15-53-30 for the purpose of obtaining a declaratory judgment with respect to (a) the legality and validity of the above-described Covenants, Conditions and Restrictions; (b) the authority of Plaintiff Cokers Commons Homeowner's Association, Inc. to file, commence, and prosecute this lawsuit against the Defendants; and (c) the propriety of the commencement and prosecution of the present litigation by Plaintiff Cokers Commons Homeowner's Association, Inc. and/or by persons or entities other than a duly elected, qualified, and authorized board of directors of Plaintiff Cokers Commons Homeowner's Association, Inc.

63. Due to the facts, conditions, and circumstances set forth herein-above, an actual and justiciable controversy has arisen and now exists between the Plaintiff and the Defendants regarding (a) the legality and validity of the above-described Covenants, Conditions and Restrictions; (b) the authority of Plaintiff Cokers Commons Homeowner's Association, Inc. to file, commence, and prosecute this lawsuit against the Defendants; and (c) the propriety of the commencement and prosecution of the present litigation by Plaintiff Cokers Commons Homeowner's Association, Inc. and/or by persons or entities other than a duly elected, qualified, and authorized board of directors of Plaintiff Cokers Commons Homeowner's Association, Inc. Declaratory relief is necessary to adjudicate the rights of the parties.

64. Defendants are entitled to a declaratory judgment declaring the rights of the parties and, more specifically, declaring (a) that the above-described Covenants, Conditions and Restrictions are invalid, null, void, and unenforceable; (b) that Plaintiff Cokers Commons Homeowner's Association, Inc. lacks the proper right, power, or authority to file, commence, and prosecute this lawsuit against the Defendants; and (c) the present litigation was improperly commenced and

prosecuted by Plaintiff Cokers Commons Homeowner's Association, Inc. and/or by persons or entities other than a duly elected, qualified, and authorized board of directors of Plaintiff Cokers Commons Homeowner's Association, Inc.

65. Defendants have no adequate remedy at law.

FOR A TWENTY-SEVENTH DEFENSE AND BY WAY OF COUNTERCLAIM AGAINST THE PLAINTIFF
(Indemnity)

As defense and/or a counterclaim against Plaintiff Cokers Commons Homeowner's Association, Inc., Defendant Whipple Development, Inc. alleges and states as follows:

66. Defendant Whipple Development, Inc. repeats and realleges the allegations contained in Paragraphs 1 through 65 herein-above as if reiterated verbatim.

67. Upon information and belief, Defendant Whipple Development, Inc. is named as the "declarant" in the Declaration of Covenants, Conditions and Restrictions for Cokers Commons dated March 10, 2008 and recorded on April 15, 2008 with the Register of Deeds for Berkeley County, South Carolina, at Book 7288, Page 283, which are incorporated herein by reference.

68. The above-referenced Covenants, Conditions and Restrictions adopt and incorporate written Bylaws of Cokers Commons Homeowner's Association, Inc., which are incorporated herein by reference.

69. Pursuant to Article XIII of the Bylaws, Plaintiff Cokers Commons Homeowner's Association, Inc. agreed to indemnify and hold harmless Defendant Whipple Development, Inc. against all cost and expenses (including, but not limited to, counsel fees, amounts of judgment paid and amounts paid in settlement) reasonably incurred in connection with the defense of any claim, action, suit or proceeding, whether civil, criminal, administrative or other, in which Defendant

Whipple Development, Inc., the declarant, may be involved by virtue of it being or having been the declarant, except for gross negligence or fraud.

70. In its Complaint in this action, Plaintiff Cokers Commons Homeowner's Association, Inc. has asserted claims against Defendant Whipple Development, Inc. because or on the basis that it is or was the declarant under the above-referenced Covenants, Conditions and Restrictions and involving acts or omissions that do not constitute gross negligence or fraud.

71. Defendant Whipple Development, Inc. is, therefore, entitled to indemnification from Plaintiff Cokers Commons Homeowner's Association, Inc. for its attorney's fees, litigation expenses, and other costs incurred in defending this action brought by the Plaintiff, and award of pre-judgment and post-judgment interest, and to be held harmless from any liability in this action.

WHEREFORE, Defendants pray that this Honorable Court grant its judgment against Plaintiff and in favor of the Defendants as follows:

(1) dismissing the Plaintiff's Complaint with prejudice;

(2) awarding judgment against the Plaintiff and in favor of the Defendants under their Counterclaim for a declaratory judgment and declaring (a) that the above-described Declaration of Covenants, Conditions and Restrictions for Cokers Commons are invalid, null, void, and unenforceable; (b) that Plaintiff Cokers Commons Homeowner's Association, Inc. lacks the proper right, power, or authority to file, commence, and prosecute this lawsuit against the Defendants; and (c) the present litigation was improperly commenced and prosecuted by Plaintiff Cokers Commons Homeowner's Association, Inc. and/or by persons or entities other than a duly elected, qualified, and authorized board of directors of Plaintiff Cokers Commons Homeowner's Association, Inc.;

(3) awarding judgment against the Plaintiff and in favor of Defendant Whipple

Development, Inc. under its Counterclaim for indemnity and rendering a judgment for indemnity in favor of Defendant Whipple Development, Inc. and against Plaintiff, ordering that Defendant Whipple Development, Inc. be awarded all costs, attorney's fees, and other litigation costs incurred by it in the defense of this lawsuit, and that Defendant Whipple Development, Inc. be held harmless from all liability in this lawsuit;

(4) awarding prejudgment interest, post-judgment interest, costs, and disbursements of this action to the Defendants; and

(5) awarding such other legal and equitable relief as to the Court seems necessary and proper.

ROSEN, ROSEN & HAGOOD, LLC

By: _____

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ATTORNEYS FOR DEFENDANTS

Charleston, South Carolina
May 11, 2015.

A JURY TRIAL IS DEMANDED AS TO ALL ISSUES SO TRIABLE

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 11th day of May, 2015, a true and correct copy of **Defendants' Answer and Counterclaims** was placed in an envelope and hand-delivered to:

Brent S. Halversen, Esquire
Halversen & Associates
171 Church Street, Suite 330
Charleston, SC 29401

Attorney for Defendants

ROSEN | HAGOOD

Daniel F Blanchard, III
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843-266-8123

May 11, 2015

The Honorable Mary P. Brown
Berkeley County Clerk of Court
P.O. Box 219
Moncks Corner, SC 29461

Re: Cokers Commons Homeowners Association, Inc. v. Park Investors, LLC, CCT Reserve, LLC, f/k/a Harris Street, LLC, and Whipple Development Corporation
Case No. 2015-CP-08-0547

Dear Ms. Brown:

Please find enclosed for filing the original and one copy of the Defendants' Answer and Counterclaims in the above matter. We would greatly appreciate your filing these and returning the clocked-in copy to us in the envelope provided.

Thank you for your assistance. Of course, please do not hesitate to contact me if we can be of further assistance.

Sincerely,

Daniel F. Blanchard, III

Enclosures as stated

Cc: Brent S. Halversen, Esquire (with encl.)

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

The Honorable J.C. Nicholson, Jr., Circuit Court Judge

Appellate Case No. 2016-001156
Circuit Case No. 2015-CP-08-00547

Cokers Commons Homeowner's Association, Inc.....Respondents,

v.

Park Investors, LLC, CCT Reserve, LLC, f/k/a Harris Street, LLC and Whipple Development Corporation.....Defendants

Of which Whipple Development Corporation.....Appellant.

EXHIBIT 3

To Respondent's Motion to Dismiss Appeal

(Circuit Court's Order Granting Partial Summary Judgment)

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Attorneys for Respondents

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF BERKELEY) FOR THE NINTH JUDICIAL CIRCUIT
) CASE NO.: 2015-CP-08-547
COKERS COMMONS HOMEOWNER'S)
ASSOCIATION, INC.,)
)
Plaintiff,) **ORDER ON PLAINTIFF'S MOTION**
) **FOR PARTIAL SUMMARY JUDGMENT**
vs.)
)
)
PARK INVESTORS, LLC, CCT RESERVE,)
LLC, f/k/a HARRIS STREET, LLC, and)
WHIPPLE DEVELOPMENT)
CORPORATION)
)
Defendants.)

THIS CAUSE comes before the Court on the Plaintiff's Motion for Partial Summary Judgment filed with this Court on February 1, 2016. This Court heard the arguments of counsel regarding the motion on April 15, 2016 at 10:00 AM. Brent Halversen, Esq. appeared on behalf of the Plaintiff, Cokers Commons Homeowners Association, Inc. (hereinafter, "the Association"). Daniel F. Blanchard, III Esq. appeared on behalf of the Defendant, Whipple Development Corporation (hereinafter, "Whipple").

The Association moved for partial summary judgment on Whipple's Counterclaim of Indemnity, filed with this Court on May 14, 2015, asserting, *inter-alia*, that Whipple cannot maintain a claim of indemnity between Plaintiff and Whipple as the contract of indemnity in its Covenants and Restrictions was one to protect Whipple from the claims of third parties, not from claims made directly

with the contracting party, the Association. This Court agrees. While the South Carolina Supreme Court case of Laurens Emergency Medical Specialist, P.A. v. M.S. Bailey & Sons Bankers, 355 S.C. 104, 584 S.E.2d 375 (2003) may allow for indemnity claims between contracting parties (so-called "second party indemnity"), the Court here, as in Laurens, sees no language in the contract of indemnity between Whipple and the Association calling for such second party indemnification. To the contrary, as in Laurens, this Court finds the contract of indemnity at bar to be one of third party indemnification.

Generally, "the construction of contracts is a question of law for the court." Watson v. Underwood, 407 S.C. 443, 455, 756 S.E.2d 155, 161-62 (Ct. App. 2014), citing, Hope Petty Motors v. Hyatt, 310 S.C. 171, 175, 425 S.E.2d 786, 789 (Ct.App.1992). Determining what the parties intended becomes a question of fact for the jury only when the contract is ambiguous. Id. "If a contract is unambiguous, extrinsic evidence cannot be used to give the contract a meaning different from that indicated by its plain terms." Bates v. Lewis, 311 S.C. 158, 161 n. 1, 427 S.E.2d 907, 909 n. 1 (Ct.App.1993). "A contract is ambiguous only when it may fairly and reasonably be understood in more ways than one." Jordan v. Sec. Grp., Inc., 311 S.C. 227, 230, 428 S.E.2d 705, 707 (1993). "Whe[n] the language of a contract is plain and capable of legal construction, that language alone determines the instrument's force and effect." Id. "The [c]ourt's duty is to enforce the contract made by the parties regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully." Id.

Here, the Court finds as a matter of law the contract of indemnity between Whipple and the Association presented to this Court is clear and unambiguous, and can be construed with no other meaning than one of third party indemnity, and not of second party indemnity. As referenced above, this Court finds no clear language of second party indemnity in the contract of indemnity, and, only finds language of third party indemnity. Accordingly, this Court finds that Whipple cannot maintain a claim of second party indemnity against the Association.

Whipple contends that even if the Covenants and Restrictions provide only for indemnification involving third party claims, the Association's motion still should be denied because a dispute exists as to whether or not the claims in the present case are properly being brought by the Association instead of by individual members of the Association. This Court rejects Whipple's argument because only the Association has been named as a party to this action.

Nothing in this Order shall in any way, shape, or form prevent Whipple from pursuing a claim of indemnity, pursuant to the operative Covenants and Restrictions presented to this Court for review, from any third party.

IT IS THEREFORE ORDERED that Plaintiff's Motion for Partial Summary Judgment is **GRANTED**.

This 22 ~~day~~ of April, 2016 at Charleston, South Carolina.

Hon. J.C. Nicholson, Jr.
Circuit Court Judge, Ninth Judicial Circuit

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

The Honorable J.C. Nicholson, Jr., Circuit Court Judge

Appellate Case No. 2016-001156
Circuit Case No. 2015-CP-08-00547

Cokers Commons Homeowner's Association, Inc.....Respondents,

v.

Park Investors, LLC, CCT Reserve, LLC, f/k/a Harris Street, LLC and Whipple Development Corporation.....Defendants

Of which Whipple Development Corporation.....Appellant.

EXHIBIT 4

To Respondent's Motion to Dismiss Appeal

(Motion for Summary Judgment filed by Appellant and Non-Appealing Parties on May 27, 2016—without exhibits)

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STATE OF SOUTH CAROLINA COUNTY OF BERKELEY Cokers Commons Homeowner's Association, Inc. [ ] Plaintiff v. Park Investors, LLC, et al.. [ ] Defendant.	)))))))))	IN THE COURT OF COMMON PLEAS CASE NO. 2015-CP-08-00547 MOTION INFORMATION FORM AND COVER SHEET

Plaintiff's Attorney: Brent S. Halverson Bar No. Address: 171 Church Street, Suite 330, Charleston, SC 29401 phone: 843-284-5790 fax: e-mail: other:	Defendant's Attorney: Daniel F. Blanchard, III, Esquire Bar No. 65342 Address: P.O. Box 893, Charleston, SC 29402 phone: 843-577-6726 e-mail: dblanchard@rrhlawfirm.com other:

[X] MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
[ ]FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: Motion for Summary Judgment
Estimated Time Needed: 45 minutes Court Reporter Needed: [X] YES / [ ] NO

SECTION II: Motion Type

[X]Written motion attached
[ ]Form Motion --
I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for __ Plaintiff / ✓ Defendant Date submitted 5/25/16

SECTION III: Motion Fee

[X] PAID B AMOUNT: $25.00
[ ]EXEMPT: [ ] Rule to Show Cause in Child or Spousal Support
(check reason) [ ] Domestic Abuse or Abuse and Neglect
[ ] Indigent Status [ ] State Agency v. Indigent Party
[ ] Sexually Violent Predator Act [ ] Post-Conviction Relief
[ ] Motion for Stay in Bankruptcy
[ ] Motion for Publication G Motion for Execution (Rule 69, SCRCP)
[ ] Proposed order submitted at request of the court; or, reduced to writing from motion made in court per judge=s instructions
Name of Court Reporter:_____
[ ] Other:_____

FILED
2016 MAY 27 PM 12:41
MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, SC

JUDGE'S SECTION [ ] Motion Fee to be paid upon filing of the attached order. [ ] Other:	_____ JUDGE CODE: _____ Date:

CLERK'S VERIFICATION

Date Filed:
Collected by: BSM
[ ] MOTION FEE COLLECTED: 25.00
[ ] CONTESTED B AMOUNT DUE: _____

25.00 DFB

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF BERKELEY	)	CASE NO. 2015-CP-08-00547
COKERS COMMONS HOMEOWNER'S ASSOCIATION, INC. Plaintiff,	)	**DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**
-vs-	)	
PARK INVESTORS, LLC, CCT RESERVE, LLC, f/k/a HARRIS STREET, LLC and WHIPPLE DEVELOPMENT CORPORATION, Defendants.	)	

FILED
2015 MAY 27 PM 12:41
MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, SC

TO: PLAINTIFF ABOVE-NAMED:

YOU WILL PLEASE TAKE NOTICE THAT Defendants Park Investors, LLC (hereinafter "Park Investors"); CCT Reserve, LLC, f/k/a Harris Street, LLC (hereinafter "CCT"); and Whipple Development Corporation (hereinafter "Whipple") (collectively the "Defendants"), by and through their attorneys, hereby move this Court pursuant to S.C. R. CIV. PRO. 56 for summary judgment in favor of Defendants and against Plaintiff Cokers Commons Homeowner's Association, Inc. (hereinafter "HOA") as to (a) all causes of action alleged in the Complaint and (b) as to Defendants' Counterclaim against the HOA for a declaratory judgment pursuant to S.C. CODE ANN. § 15-53-30.

This motion is based on the grounds that no genuine issue as to any material fact exists and because Defendants are entitled to judgment against the HOA as a matter of law for the following reasons:

1. Plaintiff's first cause of action for "specific performance" against Defendants Park Investors and CCT fails as a matter of law because:

a. Plaintiff cannot show any contract between Plaintiff and Defendants Park

Investors or CCT. "The fundamental basis of a suit for specific performance is that there is a contract between the parties." *Masonic Temple v. Ebert*, 18 S.E.2d 584, 587 (S.C. 1942); *Finklea v. Carolina Farms Co.*, 13 S.E.2d 596, 599 (S.C. 1941). Park Investors and CCT were not parties to the Declaration of Covenants, Conditions and Restrictions for Cokers Commons dated March 10, 2008 and recorded on April 15, 2008 with the Register of Deeds for Berkeley County, South Carolina, at Book 7288, Page 283 (hereinafter referred to as the "C&R"). Restrictive covenants are contractual in nature and bind the parties thereto in the same manner as any other contract. *Palmetto Dunes Resort v. Brown*, 287 S.C. 1, 336 S.E.2d 15 (Ct. App. 1985). However, non-parties to a contract cannot be ordered to specifically perform the contract. *Yawkey v. Lowndes*, 148 S.E. 554, 560-61 (S.C. 1929) ("Before specific performance can be decreed, it is first necessary to determine whether there is a contract between the parties or not. If there is no contract, then there is nothing to enforce."); *Pulliam v. Clark*, 2012 WL 1835717, *7 (D.S.C. 2012) (dismissing claim for specific performance when breach of contract claim had been dismissed on basis that the defendant was not a party to the contract).

b. As part of its claim for specific performance, Plaintiff seeks to have property referred to as an "HOA Open Space Lot" (TMS No. 235-06-12-057) that is owned by CCT transferred to Plaintiff. This property is not and has never been owned by Defendants Park Investors or Whipple. The Complaint alleges that the "HOA Open Space Lot" is part of the common areas of Coker's Commons that was to be transferred by one or more of the Defendants prior to the first sale of property in Coker's Commons. However, Plaintiff has admitted in responses to Requests for Admissions and through the deposition testimony of

Freeman Barber that the "HOA Open Space Lot" was never subjected to the C&R and was not identified in the attachments to the C&R as common property that was to be transferred by the Declarant to the C&R. *See* Exhibits 1, 2 & 3 attached hereto. Because the "HOA Open Space Lot" was not part of the C&R or subjected to the C&R, the Defendants did not have an obligation to transfer the lot to the Plaintiff. Without an obligation to transfer the property to the Plaintiff, the Defendants could not have breached any obligation. Consequently, the Defendants cannot be required to convey the "HOA Open Space Lot" because the Plaintiff has no right to the property.

Similarly, the Plaintiff seeks specific performance asking for the transfer of the Amenities Lot to Plaintiff. As discussed above, Park Investors is the owner of the Amenities Lot, which it purchased at a tax sale attended by Freeman Barber. CCT nor Whipple have any ownership in the Amenities Lot. Plaintiff's claim for specific performance related to the Amenities Lot against CCT and Whipple must fail because the entities do not own the Amenities Lot and therefore have no ability to transfer the property to Plaintiff.

c. The C&R are invalid, null, void, and unenforceable as a matter of law because they were purportedly created by an entity that did not own the subject property. The lot owners of Phase IV of the Cokers Commons subdivision and/or their property are not subject to the C&R. The C&R were recorded with the Register of Deeds for Berkeley County on April 15, 2008 by Defendant Whipple. Whipple is named as the "declarant" in the C&R. However, Whipple never owned any property in the Cokers Commons subdivision. At the time the C&R were executed and recorded, Whipple did not own the subject property and did not own an interest in the property. Instead, at that time, the subject property was owned by

Westgate Partners, L.P. (hereinafter "Westgate"). Westgate did not sign the C&R. As a matter of law, Whipple lacked the right, power, or authority to record the C&R upon or affecting the subject property because it did not own the property at the time the C&R were executed and recorded and did not own an interest in the property. *See Birdwood Subdivision Homeowners' Ass'n, Inc. v. Bulotti Const., Inc.*, 175 P.3d 179, 183 (Idaho 2007) ("It is axiomatic that one person cannot unilaterally restrict the use of another's land simply by drafting and recording restrictive covenants allegedly applicable to that land."); *New Falmouth Woods, LLC v. Ballymeade Property Owners Ass'n, Inc.*, 2012 WL 3570868, *7 (Mass. Land Ct. 2012) ("It is axiomatic that a party cannot unilaterally impose restrictions on land in which that party holds no interest. At the time the 1987 Declaration was executed and recorded, the Declarant held no deeded interest in Lots 9 or 11 on the North Plan (the designated 'Country Club Area'). The Longshank Trustee (the then-record owner of the 'Country Club Area') did not sign the Declaration, and did not otherwise agree in writing to a restriction on said Area. Therefore, as the FWDC had no power to impose a restrictive covenant on the use of North Plan Lots 9 and 11 for the benefit of the Subdivision, the Country Club Provision did not effect an enforceable restriction.");

d. The HOA's claim is barred by the applicable statute of limitations and/or laches. The HOA's Complaint alleges that the C&R required non-party CCT (then known as Harris Street, LLC) to convey the common areas (including amenities area and open space lot) to the HOA before the first lot in the subdivision was conveyed to an individual purchaser, which occurred in 2008. The HOA did not commence this action until March 2, 2015. The statute of limitations began to run as of the time that the individual members of

the HOA actually knew or reasonably should have known of the events that comprise the elements of the HOA's cause of action. The individual members knew or should have known of those events more than three years prior to the HOA's commencement of this action, as the absence of the transactions has been a matter of public record since 2008 that was capable of being discovered by the HOA and members of Plaintiff prior to the purchase of property in Coker's Commons; thus, the HOA's claim is time-barred as a matter of law.

c. The HOA's claim was discharged by virtue of the Orders and judgments entered by the United States Bankruptcy Court for the Northern District of Georgia, Atlanta Division, in the action entitled *In re: CCT Reserve, LLC*, Case No. 12-71670-PWB. As stated above, the HOA's Complaint is based on the allegation that CCT (then known as Harris Street, LLC) was required to convey the common areas to the HOA prior to the conveyance of the first lot to an individual purchaser, which occurred in 2008. On August 31, 2012, CCT filed a Chapter 11 bankruptcy petition in Case No. 12-71670-PWB, said action was ended on July 2, 2013, and CCT was discharged. Under the federal bankruptcy laws, the discharge of CCT in the bankruptcy proceedings bars the HOA's pre-petition claim against CCT.

2. Plaintiff's second cause of action for "declaratory judgment" against the Defendants fails as a matter of law because:

a. The C&R are invalid, null, void, and unenforceable for the reasons stated herein-above. At the time the C&R were executed and recorded, Whipple lacked the right, power, or authority to record the C&R upon or affecting the property known as Phase IV of the Cokers Commons subdivision because it did not own

and was not deeded the property at the time the C&R were executed and recorded and did not possess an interest in the property.

b. The HOA's claim is barred by the applicable statute of limitations and/or laches for the reasons stated herein-above. The HOA's Complaint seeks a declaration that all property owners in Phase IV of the Cokers Commons subdivision are subject to the C&R and that the C&R are valid and enforceable. The HOA did not commence this action until March 2, 2015. The statute of limitations began to run as of the time that the individual members of the HOA actually knew or reasonably should have known of the events that comprise the elements of the HOA's cause of action. The individual members knew or should have known more than three years prior to the HOA's commencement of this action that Defendant Whipple (the entity that purported to impose the C&R upon the subject property) was not the owner of the property at that time, thus the HOA's claim is time-barred as a matter of law.

3. Plaintiff's third cause of action for "nuisance" against the Defendants Park Investors and CCT fails as a matter of law because:

a. The HOA's Complaint alleges that the common areas "have become a blight to the neighborhood, negatively affecting the quality of life of the owners of Cokers Commons," that "[t]he landowner members" of the HOA "have not been able to use or enjoy the pool," and "[t]he Defendants[']neglect of the Amenities Lot and the HOA open space lot has unreasonably interfered with the Plaintiff's constituent member's use and ownership of their properties as well as their use of the common areas, causing damages." *See* Complaint

¶¶ 13, 23-24. These allegations seek recovery on behalf of the individual members for injuries that the individual members have allegedly suffered. However, Plaintiff lacks the right, power, or authority to assert claims on behalf of the individual members of the HOA and is not a real party in interest under SCRCP 17 with authority to bring the nuisance claim. A corporation may exercise only those powers granted to it by law, its charter or articles of incorporation, and any bylaws made pursuant thereto. *Seabrook Island Property Owners Ass'n v. Pelzer*, 292 S.C. 343, 347-48, 356 S.E.2d 411, 414 (Ct. App. 1987); *Fisher v. Shipyard Village Council of Co-Owners, Inc.*, 415 S.C. 256, 271, 781 S.E.2d 903, 911 (2016). A corporation's actions taken beyond the scope of its powers are *ultra vires* acts. *Id.* Article XIII.1 of the C&R, which is entitled "Enforcement," states that the "Declarant, Association, or any Owner shall have the right to enforce by proceeding at law or in equity, all restrictions, conditions, covenants, reservations, liens, and charges now or hereafter imposed by the provisions of this Declaration." The HOA's nuisance cause of action does not seek to enforce the provisions of the C&R; instead, it seeks to recover money damages against the Defendants for common-law nuisance. Nothing in the C&R or the bylaws authorizes the HOA to bring an action on behalf of the individual members of the HOA for injuries suffered by them due to an alleged common-law nuisance. The HOA's prosecution of its nuisance claim is beyond the scope of its powers and constitutes an *ultra vires* act. *See Rutherford County v. Bond Safeguard Ins. Co.*, 2010 WL 5903828, *7 (W.D.N.C. 2010) (holding that homeowners' association lacked standing to bring an action on behalf of its members when statute underlying the formation of homeowners' associations did not grant such a power to homeowners' associations).

b. Alternatively, even assuming *arguendo* that the HOA has the authority under the C&R to bring an action on behalf of the individual members of the HOA for injuries suffered by the HOA's members because of an alleged common-law nuisance, which is denied, the HOA still lacks standing to bring such claims in its representative capacity. An organization has standing to bring suit on behalf of its members only when (i) its members would otherwise have standing to sue in their own right, (ii) the interests at stake are germane to the organization's purpose, and (iii) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Beaufort Realty Co., Inc. v. Beaufort County*, 346 S.C. 298, 301, 551 S.E.2d 588, 589 (Ct. App. 2001) (citing *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977)); *Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n*, 407 S.C. 67, 76, 753 S.E.2d 846, 851 (2014). The HOA cannot meet the third prerequisite for organizational standing—that neither the claim asserted nor the relief requested requires participation of the individual members. This third prerequisite bars the HOA from seeking damages on behalf of members when each member would have to establish individual damages. The HOA's nuisance cause of action seeks recovery of money damages. Damages for nuisance depend on the injuries actually suffered as a result of the nuisance. Any monetary damages owed to the HOA would call for individualized proof and would not necessarily be common to all. The participation of individual members of the HOA would be required in assessing the damage claims because the amount of money damages sought would vary depending upon the particular circumstances of each individual member. The money damages requested will vary from member to member depending upon factors requiring their participation (i.e., each member's

view of or proximity to the allegedly blighted pool area, the number of times or frequency that each member has been prevented from using or enjoying the pool or amenities, the manner in which the alleged nuisance has negatively affected the quality of life of each of the members). Each member of the HOA cannot claim to have suffered from the alleged nuisance in exactly the same way as every other member: thus, the HOA's claim for monetary damages fails the third prong. Accordingly, the HOA does not have standing to seek monetary damages for the alleged nuisance. *See Creek Pointe Homeowner's Ass'n, Inc. v. Happ*, 552 S.E.2d 220, 226-27 (N.C. Ct. App. 2001) ("An organization generally lacks standing to sue for money damages on behalf of its members if the damage claims are not common to the entire membership, nor shared equally, so that the fact and extent of injury would require individualized proof."); *River Birch Associates v. City of Raleigh*, 388 S.E.2d 538, 555 (N.C. 1990) ("[W]here an association seeks to recover damages on behalf of its members, the extent of injury to the individual members and the burden of supervising the distribution of any recovery mitigates against finding standing in the association."); *Bano v. Union Carbide Corp.*, 361 F.3d 696, 714-15 (2nd Cir. 2004) ("Although the Bhopal organizations argue that they have the ability to pursue their members' damages claims without the participation of the members themselves, we disagree. The claims are that individuals have suffered bodily harm and damage to real property they own. Necessarily, each of those individuals would have to be involved in the proof of his or her claims. The district court did not err in concluding that the organizations lack standing to pursue these claims."); *Lake Lucerne Civic Ass'n, Inc. v. Dolphin Stadium Corp.*, 801 F.Supp. 684, 691 (S.D.Fla. 1992) (association lacked standing to seek compensatory damages on behalf of its

members because the participation of individual members of the association would be required in assessing the damage claims because the amount of money damages sought varies, depending upon the particular circumstances of each individual member, and because the monetary relief requested will vary from member to member depending upon factors requiring their participation, i.e., their proximity to the stadium, the amount of noise and light allegedly emitted onto their property, proximity to pedestrian walkways); *United Union of Roofers v. Ins. Corp. of Am.*, 919 F.2d 1398, 1400 (9th Cir. 1990) ("[N]o federal court has allowed an association standing to seek monetary relief on behalf of its members. The courts have consistently held that claims for monetary relief necessarily require individualized proof and thus the individual participation of association members, thereby running afoul of the third prong of the *Hunt* test."); *Neighborhood Action Coalition v. Canton, Ohio*, 882 F.2d 1012 (6th Cir. 1989) (association lacked standing to obtain compensatory relief on behalf of individual plaintiffs where the diminished value of each plaintiff's property as a result of the city's alleged conduct would require individualized proof); *Telecommunications Research v. Allnet Communic. Servs., Inc.*, 806 F.2d 1093 (D.C. Cir. 1986) (nonprofit association lacked standing to pursue claim for money damages on behalf of its members); *Rutherford*, 2010 WL 5903828, *8.

c. The HOA's claim is barred by the applicable statute of limitations. The HOA did not commence this action until March 2, 2015. The statute of limitations began to run as of the time that the individual members of the HOA actually knew or reasonably should have known of the events that comprise the elements of the HOA's cause of action. The individual members knew or should have known of those events more than three years prior

to the HOA's commencement of this action, thus the HOA's claim is time-barred as a matter of law.

4. All of the Plaintiff's claims are barred as a matter of law due to Plaintiff's failure to comply with the dispute resolution and arbitration procedures and requirements of the C&R. Article XII.1 of the C&R, which is entitled "Dispute Resolution and Limitations on Litigation," expressly states that "[t]he [HOA], Declarant, all Persons subject to this Declaration, and any Person not otherwise subject to this Declaration who agrees to submit to this Article (collectively, 'Bound Parties') agree to encourage the amicable resolution of disputes involving the Properties in order to avoid the emotional and financial costs of litigation." That section further states that "each Bound Party covenants and agrees that all claims, grievances or disputes between such Bound Party and any other Bound Party involving the Properties including, without limitation, claims, grievances or disputes arising out of or relating to the interpretation, application or enforcement of [the C&R], the By-Laws, the Association rules, or the Articles (collectively "Claim"), except for those Claims authorized in Section Two, shall be resolved using the procedures set forth in Section Three in lieu of filing suit in any court or initiating proceedings before any administrative tribunal seeking redress or resolution of such Claim." As part of the "mandatory procedures" set forth in the C&R, Article XII.3 requires the HOA to provide written notice of the claim, to attempt to resolve the claim by good faith negotiation, to submit the claim to mediation if the parties do not resolve the claim through negotiation, and to submit the claim to binding arbitration. Article XII.3(d)(1) also clearly states that if the parties do not resolve the claim "within 15 days of the Termination of Mediation, the Claimant shall have 15 additional days to submit the Claim to arbitration in accordance with the Rules of Arbitration contained in Exhibit '13' or the Claim shall be deemed abandoned, and

Respondent shall be released and discharged from any and all liability to Claimant arising out of such Claim . . . ." It is undisputed that the HOA did not submit its claims to binding arbitration in accordance with the requirements of Article XII.1 of the C&R. Accordingly, as a matter of law, the HOA is deemed to have abandoned the claims and the Defendants are released and discharged from any and all liability to the HOA.

5. Defendants are entitled to judgment as a matter of law against the Plaintiff on the Defendants' counterclaim for a declaratory judgment pursuant to S.C. CODE ANN. § 15-53-30, which seeks a judicial declaration that the above-referenced C&R are invalid, null, void, and unenforceable, because the undisputed evidence shows that Defendant Whipple did not own and was not deeded the subject property at the time the C&R were executed and recorded and did not possess an interest in the property, thus it lacked the right, power, or authority to record the C&R upon or affecting the subject property.

For the reasons stated above, summary judgment in favor of Defendants and against the HOA is appropriate. This motion is supported by the pleadings, depositions, affidavits, and other papers on file herein or to be filed in support of this motion, the documents recorded with the Register of Deeds for Berkeley County that are a matter of public record, and as set forth in Defendants' memorandum of law to be filed in support of this motion.

WHEREFORE, Defendants move this Court to grant summary judgment in favor of the Defendants and against the HOA as to all causes of action alleged in the Complaint and as to Defendants' Counterclaim for a declaratory judgment pursuant to S.C. CODE ANN. § 15-53-30 and to award Defendants such other and further relief as the Court may deem just and proper.

ROSEN, ROSEN & HAGOOD, LLC

By: 

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ATTORNEYS FOR DEFENDANTS

Charleston, South Carolina
May 25, 2016.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

The Honorable J.C. Nicholson, Jr., Circuit Court Judge

Appellate Case No. 2016-001156
Circuit Case No. 2015-CP-08-00547

Cokers Commons Homeowner's Association, Inc.....Respondents,

v.

Park Investors, LLC, CCT Reserve, LLC, f/k/a Harris Street, LLC and Whipple Development Corporation.....Defendants

Of which Whipple Development Corporation.....Appellant.

PROOF OF SERVICE OF
RESPONDENT'S MOTION TO DISMISS APPEAL

I, Moira W. Kerrigan, an employee of Thurmond Kirchner & Timbes, P.A., attorneys for the Respondents, do hereby certify that I have on this date sent, by U.S. Mail with sufficient postage affixed, and also by electronic mail, a true and correct copy of the Respondents' Motion to Dismiss Appeal, together with Exhibits 1-4, to the following counsel of record:

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November 18th, 2016
Charleston, South Carolina

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November 18, 2016

VIA US MAIL
The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: Cokers Commons v. Park Investors, et al.
Appellate Case No. 2016-001156

Dear Ms. Kitchings:

This firm represents Respondent, Cokers Commons Homeowner's Association, Inc., in the above referenced appeal. Enclosed for filing, please find the following documents:

1. Letter to Court of Appeals;
2. The original and two (2) copies of Respondent's Initial Brief;
3. The original and two (2) copies of Respondent's Designation of Matter;
4. The original and one (1) copy of Proof of Service of Respondent's Initial Brief & Designation of Matter
5. The original and seven (7) copies of Respondent's Motion to Dismiss with accompanying exhibits; and
6. The original and one (1) copy of Proof of Service of Respondent's Motion to Dismiss.

Also enclosed herewith is this firms' check in the amount of $25.00 in satisfaction of the filing fee associated with Respondent's Motion to Dismiss. I would appreciate it if you would file these documents with the Court and return any file-stamped copies to me using the self-addressed, stamped envelope provided for your convenience.

With kind regards, I am

Very truly yours,

THURMOND KIRCHNER & TIMBES, PA

Moira Kerrigan
Paralegal to Michael A. Timbes

cc: Daniel F. Blanchard, III, Esquire
R. Britton Kelly, Esquire
Brent S. Halverson, Esquire