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.

RESPONDENT'S INITIAL BRIEF

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STATEMENT OF THE ISSUES

I. Is the issue raised by Appellant properly before this Court considering that the Appellant lacks appellate standing to challenge the HOA's standing to assert claims against Non-Appealing Parties and, further, that the Appellant's argument attacking the HOA's standing is not preserved for appellate review?

II. Did the trial court properly grant Respondent's Motion for Partial Summary Judgment because the HOA has standing to assert its claims and there is no right of second-party indemnification under applicable bylaws?

III. Did the trial court properly conclude the subject indemnification provision applies only to third-party claims, and there are no third-party claims asserted in this action?

IV. Is Appellant's argument, as presented, ripe for appellate review?

STATEMENT OF THE CASE

This appeal arises from an action commenced by Respondent, Cokers Commons Homeowner's Association, Inc. (the "HOA"), against several defendants, including Whipple Development Corporation (the "Appellant") pursuant to the Declarations of Covenants, Conditions and Restrictions for Cokers Commons Home Owner's Association, Inc. (the "CCRs").

As set forth in its Complaint, the HOA asserted a claim against Appellant solely for "declaratory relief" under the CCRs. Specifically, the HOA seeks a declaration of the HOA's rights as to certain common areas described in the CCRs. The HOA brought separate claims for specific performance and nuisance against other named defendants,[1] but those causes of action are not asserted against Appellant. (*See* Complaint). Appellant answered and asserted counterclaims against the HOA. Of relevance to this appeal is Appellant's counterclaim against the HOA seeking indemnification against third-party claims under the CCRs. (*See* Answer and Counterclaim).

[1] These other claims were against Park Investors, LLC, and Harris Street, LLC.

On February 1, 2016, the HOA filed a motion for partial summary judgment as to Appellant's counterclaim for indemnification. Among other things, the HOA argued the indemnification provision contained in the Bylaws of the CCRs did not provide for indemnification for second-party claims (i.e., a direct claim between the HOA and Appellant), but instead was limited only to third-party indemnification claims. (*See* Motion for Summary Judgment and Memo in Support of Motion for Summary Judgment). Opposing this Motion, Appellant argued the indemnification agreement did contemplate second-party indemnification. Appellant also claimed, "even assuming *arguendo* that the Bylaws only provide for indemnification in the context of third-party claims . . . [Appellant] **is being required to defend against third party claims posing as claims of the HOA**, thus the indemnification provision applies." (Memo in Opposition pp. 6-7) (emphasis added).

After a hearing held on April 15, 2016, the trial court granted the HOA's Motion for partial summary judgment. Specifically, the trial court ruled as a matter of law that the indemnification provision did not apply to second-party indemnification claims. (April 15, 2016, Trans. p. 29, ln. 20-24) (Order Granting Partial Summary Judgment p. 2-3). Because only the HOA is party to the case, the trial court also rejected Appellant's contention that the claims asserted by the HOA were actually disguised claims that truly belonged to the HOA's individual members, none of whom are parties to this action. The Court's ruling did not foreclose Appellant from pursing indemnification against third party claims, if such claims are ever brought. (*Id.* at p. 3).

Appellant filed is Notice of Intent to Appeal from this ruling on May 27, 2016. That same day, Appellant joined with the other Defendants in filing a separate Motion for Summary Judgment, asking the trial court to find that the HOA lacks "associational standing," among other things. That motion has not been heard or ruled upon by the trial court as a result of this appeal

being filed, and the issues raised therein are not before this court on appeal. However, the argument made by Appellant in its still-pending Motion for Summary Judgment is substantially the same, and relies on the same as authorities, as the argument set forth in Appellant's Initial Brief to this Court on appeal.

Appellant did not appeal the trial court's ruling that the indemnification provision in question applies only to third-party indemnification claims, and its Initial Brief is devoid of any argument challenging this particular finding on appeal. (See App. Br.) Rather, Appellant's argument is limited to its assertion that this case is truly about claims of unnamed third-parties, "posing as claims of the HOA." (App. Br., p. 2).

STATEMENT OF THE FACTS

On March 8, 2008, Appellant executed the CCRs as the "Declarant" for the development, and pursuant to Article III, Section 2 thereof, Appellant was required to convey to the HOA fee simple title to the Common Areas described therein. (CCRs p. 4). The "Common Areas" in question included an "Amenities Lot" (TMS No. 2350610087) on which there is a pool and pool house, as well as an "Open Space" lot (TMS No. 2350612057). Appellant failed to convey these Common Areas to the HOA as required by the CCRs. Instead, the Amenities Lot is now owned by Park Investors, LLC, and the Open Space lot is now owned by Harris Street LLC. Both Park Investors, LLC, and Harris Street, LLC (collectively, the "Non-Appealing Parties"), are named defendants in the underlying action, but neither of them is a party to this appeal. The Non-Appealing Parties have neglected the Common Areas and allowed them to fall into a state of disrepair and the Comma Areas are now derelict.

Appellant contends the claims asserted by the HOA in this action are not actually the HOA's claims. Rather, Appellant's theory is that the claims asserted in the Complaint are actually

brought by third-parties disguising themselves as the HOA. For this reason, Appellant claims the HOA (which is actually a party to the case) must indemnify it for the claims asserted by the HOA, because, as Appellant views it, those claims actually belong to persons who appear nowhere in the caption and are not parties to the case. Appellant advances this theory in order to manufacture otherwise non-existent "third-party" claims against it, in an attempt to improperly avail itself of the third-party indemnification rights under the CCRs.[2]

ARGUMENT AND CITATION OF AUTHORITY

I. APPELLANT'S SINGLE ALLEGATION OF ERROR RELATING TO THE HOA'S LACK OF APPELLATE STANDING IS NOT PROPERLY BEFORE THIS COURT BECAUSE APPELLANT DOES NOT HAVE STANDING TO RAISE THIS OBJECTION, AND BECAUSE IT IS NOT PRESERVED FOR APPEAL.

Appellant's only argument on appeal is that the trial court erred in concluding that the HOA's claims against Appellant are not disguised "third-party claims." According to Appellant, "the pleadings and evidence show the [HOA] is improperly attempting to bring the claims in its representative capacity on behalf of the individual owners (i.e., third-parties) for injuries that the individual owners allegedly sustained." (*See* App. Br. p. 8) (stating the issue on appeal). Although this particular argument was never made to the trial court, Appellant attacks the HOA's standing on appeal, and, in particular, complains that the HOA lacks standing because its cause of action for nuisance "seeks to recover money damages on behalf of individual owners for injuries the individual owners allegedly suffered." (App. Br. p. 12) (emphasis added).

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[2] Oddly, Appellant also argues in its Initial Brief that the CCRs are null and void. (App Br., p. 3, fn 1). One is left to wonder: If the CCRs are void, as Appellant claims, the very document that contains the indemnification provision relied upon by Appellant in this appeal has no legal effect whatsoever. If the CCRs and the indemnification provision therein are invalid, then the only error in the trial court's order granting partial summary judgment is its separate finding that the order does not prevent Appellant from seeking indemnity for actual third-party claims "pursuant to the **operative** Covenants and Restrictions." (Order Granting Partial Summary Judgment p. 3) (Emphasis added). Appellant cannot rely on a provision it claim is void.

As explained herein, this argument is fatally flawed for the simple and fundamental reason that the nuisance claim for damages, which lies at the heart of Appellant's entire argument, **was not asserted against Appellant**. The nuisance claim was asserted only against the Non-Appealing Parties who were not involved in the HOA's motion for summary judgment that led to this appeal. (Complaint, p. 5).

Consequently, Appellant's arguments are not properly before this court for two reasons. (1) Appellant has no standing to challenge a claim asserted against a different party; and (2) the argument is not preserved for appellate review.

A. Appellant does not have appellate standing to argue the HOA lacks associational standing to assert claims for nuisance when those claims are made only against other, 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).

In this case, Appellant is not "practically wronged" by, nor can it be wronged by, the HOA's nuisance claim, because that claim is not brought against Appellant. The only claim asserted by the HOA against Appellant is an action for declaratory judgment seeking a declaration of 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 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—**it is by definition a claim to determine <u>that</u> party's rights**. Thus, the HOA's declaratory judgment action against Appellant involves only a claim to determine the HOA's rights in and to the Common Areas in question. There is no claim asserted against Appellant that involves a determination of the rights of the HOA's individual members, who are not parties to this action. *See e.g., Town of Hilton Head Island v. Coalition of Expressway Opponents*, 307 S.C. 449, 454, 415 S.E.2d 801, 804 (1992) (when party's "rights, status, or other legal relations are affected" a declaratory judgment action can be maintained, and a party has standing to do so when a "justiciable controversy settling [the] legal right of the parties exists").

Appellant's counter-claim for indemnification against the HOA was brought only by Appellant, and not by any of the Non-Appealing Parties.[3] (Answer and Counter-Claims p. 16, ¶¶ 66-71). The HOA's motion for partial summary judgment only related to this single cause of action for indemnification. (Plaintiff's Motion for Partial Summary Judgment). The Non-Appealing Parties were not parties to the underlying motion for summary judgment, and they are not parties to this appeal. Whatever claims may affect them, do not affect this appeal. Appellant overlooks this essential point—Appellant cannot seek indemnification for a claim made against another party and not against it.

In granting summary judgment in favor of the HOA, the trial court held the indemnification provision within the CCRs did not contemplate second-party indemnity claims, only third-party indemnity claims. On appeal, Appellant does not take exception this ruling, and as a result, this ruling (right or wrong) has become the law of the case. *See e.g., Charleston Lumber Co. v. Miller*

[3] The remaining defendants are not parties to the CCRs and therefore have no basis to demand indemnification thereunder.

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 argues that trial court "refused to consider the nature of the claims that the HOA is **attempting to assert against [Appellant]**" (Br. of Applt. p. 9). Therein lies the problem with Appellant's argument. The nature of the claim against Appellant is simply for declaratory judgment to determine the HOA's rights in the Common Areas. The nuisance claim, on which Appellant's Initial Brief focuses is not asserted against Appellant. (Complaint).

Asserting that it is entitled to indemnity, the totality of Appellant's argument attacks the HOA's standing to bring actions on behalf of the individual owners. In particular, Appellant complains that the HOA lacks standing because its cause of action for nuisance "seeks to recover money damages on behalf of individual owners for injuries the individual owners allegedly suffered." (Br. of Applt. p. 12) (emphasis added). This argument cannibalizes itself.

Think of it this way: If the HOA lacks standing to assert the claims raised in the Complaint, those claims cannot proceed because those claims do not belong to the HOA, who is not the real party in interest. The parties to whom those claims rightfully belong, if Appellant is correct, are not plaintiffs in this action, have not advanced those claims, and they are not subject to the jurisdiction of the Court. As a consequence of Appellant's logic, there are no third-parties named in the action in order to invoke the indemnification provision and, for that matter, there are no claims properly before Court. In this way, Appellant's own argument that the HOA has no standing undermines its efforts to demonstrate there is any party before the trial court asserting a third-party claim. If the HOA has no standing, it cannot itself be the "third-party" asserting the claim. Only the actual third party could do so.

Because the only party adverse to Appellant in this case is the HOA, and because the indemnification provision requires the HOA to indemnify only for third party claims, Appellant's argument necessitates that the HOA is both a "second party" (with a duty to indemnify under the CCRs) and, simultaneously, a third party (asserting claims that do not belong to it) triggering the indemnification provision. This is absurd. Without adding additional parties, Appellants essentially seek indemnification straight from a "third-party" if their argument is accepted.

This argument only becomes more absurd when it is remembered that the HOA did not assert the nuisance claim against Appellant. Therefore, even if Appellant is right there simply is no third-party nuisance claim against Appellant that might trigger the third-party indemnification provision in the CCRs. Naturally, Appellant cannot seek indemnity for a claim that is not made against it. Even if this Court were to conclude that the HOA has improperly brought a nuisance claim against the Non-Appealing Parties, the third-party indemnification remedy available under the CCRs to Appellant would not apply, because Appellant is not a target of that claim. Thus, Appellant has not been "practically wronged" by the trial court's ruling. *Cisson,* at 177-78, 177 S.E.2d at 605. The question of whether the HOA has standing to assert a nuisance claim against the Non-Appealing Parties is a right that belongs, if at all, only to the Non-Appealing Parties against whom the nuisance claim is asserted.[4] *See Biven at* 13, 173 S.E.2d at 152 (an appellant may not assert another party's rights by appealing an order, no matter how "erroneous and prejudicial it may be to the rights and interest **of some other person**")(emphasis added). Therefore, Appellant has no standing to make the instant argument.

[4] Prior to this appeal the Non-Appealing Parties had not asserted this right. They have since filed a motion in the trial court on this basis which has yet to be ruled on. (*See* May 27, 2016, Motion for Summary Judgment).

B. The issue of the HOA's standing to maintain suit in an alleged representative capacity against the Non-Appealing Parties was not raised to or ruled on by the trial court.

There are only four basic tenants to preserving an issue for appeal: that it be raised to and ruled on by the trial court; that it be raised by the Appellants; that it be raised in a timely manner; and that it be raised with specificity. *See* Toal, *Appellate Practice in South Carolina*, 2 ed. at pp.57-66; *see, e.g., Johnson v. Sam English Grading, Inc.*, 412 S.C. 433, 457, 772 S.E.2d 544, 557 (Ct. App. 2015).

In this case, the only issue before the trial court was whether Appellant was entitled to indemnification, not whether the HOA had standing. At no time prior to this appeal did Appellant (or the Non-Appealing Parties for that matter) seek any affirmative relief based on the HOA's alleged lack of standing. On the same day the Notice of Appeal was filed in this matter, Appellant and the Non-Appealing Parties did, however, file a separate Motion for Summary Judgment based on the HOA's lack of standing. This proves the issue now on appeal was not previously before the Court for a ruling, and therefore forms no part of this appeal. That Motion remains pending in the trial court and has not been ruled upon.

In short, Appellant never argued the HOA lacked standing. Rather it argued: "even assuming *arguendo* that the Bylaws only provide for indemnification in the context of third-party claims . . . [Appellant] is being required to defend against third party claims posing as claims of the HOA, thus the indemnification provision applies." (Memo in Opposition pp. 6-7). These arguments are not akin to each other, and the entire premise is flawed because the only claim brought by the HOA against Appellant is one for declaratory judgment to determine the HOA's rights as to certain Common Areas. It cannot be reasonably questioned that the determination **of the HOA's rights**, whatever they may be, is a question that does not turn on the rights of unnamed third-parties. It turns only on whatever rights the HOA may have.

Because no argument concerning the HOA's standing to maintain the action has ever been raised to or ruled upon by the lower court in connection with this appeal, the entire argument relied upon by Appellant is it not preserved for review. *See I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (finding an appellant must "both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments"). In essence, Appellant is seeking an end run around the trial court to have this Court rule on the merits of the Motion for Summary Judgment it filed simultaneously with the commencement of this appeal before the trial court has even considered it.

Additionally, the issue is not preserved because there has been no ruling by the trial court on the issue of the HOA's standing. *See I'On*, 338 S.C. at 422, 526 S.E.2d at 724 (stating an issue must be ruled on in order to be preserved). Here, Appellant contends it "has asserted defenses based on the contention that the proper party is not in this case" (Trx. p. 13, lns. 7-9), and "asserted a declaratory judgment counterclaim which is alleging the lawsuit is really not being brought by the HOA but by third parties." (Trx. p. 31, lns. 9-11). Neither of these issues have been ruled on by the Court. Nor has Appellant brought any motion to join the allegedly necessary parties. In fact, the trial court specifically stated "bring [the third-party's in], it's your responsibility to bring them in if you think they are essential parties." (Trx. p. 13, lns. 10-12). To which Appellant stated: "We can make a motion to do that your honor." (Trx. p. 13, lns. 13-14). However, no such motion has been made, despite the trial court specifically stating: "If you file some type of motion to interplead or bring in some other parties and we've got a third-party involved and you want to revisit [] the indemnification as to third-parties that's fine." (Trx. p. 30, lns 18-21).

This Court should find that Appellant's arguments are not preserved and affirm the decision of the trial court.

II. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT.

"Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Goode v. St. Stephens United Methodist Church*, 329 S.C. 433, 440, 449 S.E.2 827, 830 (Ct. App. 1997) (citing *Tupper v. Dorchester County,* 326 S.C. 318, 487 S.E.2d 187 (1997)). "Summary judgment is proper where plain, palpable, and indisputable facts exist on which reasonable minds cannot differ." *Id.* (citing *Rothrock v. Copeland,* 305 S.C. 402, 405, 409 S.E.2d 366, 368 (1991)). Summary Judgment is properly granted when there is no need for further inquiry into the facts to clarify the application of the law. *See Middleborough Horizontal Property Regime Council of Co-Owners v. Montedison*, 320 S.C. 470, 465 S.E.2d 765 (Ct. App. 1995). An appellate court reviews the grant of summary judgment under the same standard as the trial court. *Fleming v. Rose*, 350 S.C. 488, 493 567 S.E.2d 857, 860 (2002).

Appellant's argument on appeal focuses on the HOA's standing to pursue money damages in a representative capacity for nuisance claims against the Non-Appealing Parties. At the risk of sounding like a broken record, no claim for nuisance was ever asserted against Appellant. Nonetheless, even assuming Appellant has appellate standing to assert this argument, and it is preserved for appellate review, it still fails.

A. The HOA has standing in its own right to assert its claims, and therefore summary judgment was proper.

An association may acquire standing in one of two ways, either it has standing in its own right, or it may have standing by "virtue of associational standing to bring suit on behalf of its members." *Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n*, 407 S.C. 67, 76, 753 S.E.2d 846, 850 (2014). ("[T]o possess standing, either the Plaintff[] alone must have suffered a

concrete particularize injury **or** [its] members must have suffered such an injury and the other elements of associational standing are satisfied")

For an association to have standing in its own right, requires three elements: First, "the plaintiff must have suffered an injury-in-fact which is concrete, particularized, and [an] actual or imminent invasion of a legally protected interest;" Second, a "causal connection must exist between the injury, and the challenged conduct;" and Third, a "favorable decision will redress the injury." *Id.*, at 75, 753 S.E.2d at 850 (internal citations omitted).

Turning first to the HOA's cause of action for declaratory judgment, the HOA clearly has standing in its own right, **and Appellant does not challenge the HOA's standing to assert this particular claim.** (*See* App. Br. pp. 2. and 8-17). The right of an association of co-owners to bring an action for declaratory judgment under its respective covenants, master deed, or bylaws is well recognized in this state. *See, e.g., Spur at Williams Brice Owners Ass'n, Inc. v. Lalla*, 415 S.C. 72, 83, 781 S.E.2d 115, 121 (Ct. App. 2015). In this case, all three elements are met in order for the HOA to have standing in its own right to assert a declaratory judgment action for a declaration of its own rights as to certain Common Areas. First, the HOA has suffered an injury in that Appellant has not performed under the terms of the CCRs and the HOA has not received the benefits conferred by the CCRs, to wit, receiving title to the Common Areas. Second, Appellant's non-performance under the CCRs is the direct cause of the HOA's alleged injury. Finally, a favorable decision would remedy the alleged injury. This all that is required. Nowhere in Appellant's Initial Brief does it challenge the standing of the HOA to have its rights and interest in and to the Common Areas determined by the trial court. That is the only claim brought against Appellant.

Turning next to the HOA's claim for nuisance, to the extent it matters at all as to Appellant, it argues "[b]ecause the HOA alleges it does not yet own the common areas and it is not in control

of the common areas, it would seem that the HOA does not have any claims to assert 'in its own right' for alleged injury to its own property." (App. Br. p. 11). However, this is not correct. It is not necessary for the HOA to "own" the property in order to make a claim for nuisance or, for that matter, to have its rights and interests determined.

Our Supreme Court has specifically held that a valid claim for nuisance "does not require ownership or possession of the land." *Brooks v. Council of Co-Owners of Stones Throw Horizontal Property Regime I*, 315 S.C. 474, 477, 445 S.E.2d 630, 632 (1994) (emphasis added). In *Brooks*, the Plaintiff was not the "owner" of the affected property, but had a contingent contractual right based on a contract for sale, and therefore could maintain an action for nuisance. Just as in *Brooks,* the HOA in this case is not the record "owner" of the Common Areas, but it has a contractual right to those Common Areas as set forth in the CCRs. Consequently, the HOA, just like the Plaintiff in *Brooks*, has standing in its own right to assert a cause of action for nuisance. This is true, regardless of the fact that the nuisance claim is not asserted against Appellant anyway.

Appellant has clearly stated it "is not seeking indemnification for any claim the HOA may be bringing in its own right" (App. Br. p. 11). This admission should end the matter. However, for the sake of completeness, the HOA will address Appellant's argument on "associational standing" as well.

B. Assuming that the issue of "associational standing" is preserved and that Appellant has standing to raise this issue, and to the extent the HOA does not have standing in its own right, the HOA has associational standing, defeating Appellant's argument on appeal.

"Associational standing" is a concept through which an association that would not otherwise have standing can be conferred standing vicariously through its members. *See Carnival Corp.*, 407 S.C. at 76, 753 S.E.2d at 850 (recognizing that associational standing is an alternative means of acquiring standing when the plaintiff itself lacks standing). It provides that a plaintiff

"that is an association . . . may possess standing by virtue of associational standing on behalf of its member . . . if one or more of its members will suffer an individual injury by virtue of the contested act." *Id.* at 76, 753 S.E.2d at 851. The three-part test our Supreme Court has adopted requires that the "members would otherwise have standing to sue in their own right, the interests at stake are germane to the organizations purpose, and neither the claim asserted nor the relief requested require the participation of individual members." *Id.*

Appellant only asserts that the HOA fails to meet the third element of the three-part test—*i.e.*, the claim asserted and the relief requested require the participation of the individual members. (App. Br. pp. 12-16). But, this is not the case at all.

Unable to draw on any legal authority of this state, Appellant turns to foreign jurisdictions for support of its proposition that generally an association cannot "sue for money damages on behalf of its members if the damage claims are not common to the entire membership, nor shared equally." *See, e.g., Creek Pointe Homeowner's Association v. Happ,* 552 S.E.2d 220, 226 (N.C. Ct. App. 2001). To this point, Appellant incorrectly asserts that the claim for nuisance will require individual proof of damage from the homeowners and therefore results in a lack of standing. But, unlike the situation in *Creek Point*, the case at hand does not present a factual scenario in which individual proof is necessary. In *Creek Pointe,* a homeowner built a fence across a neighborhood road. The association and a single homeowner brought an injunctive action to have the fence removed and to enjoin any reconstruction of the fence. The association and the homeowner plaintiffs also specifically requested "just compensation for their property rights for Creek Pointe residents." *Id.*. (emphasis added). Because the complaint specifically sought monetary damages for all residents, and because all residents were not equally affected by the fence, the North Carolina Court of Appeals ruled the financial damage caused to each individual homeowner would

be different, and as a result the association could not maintain an action for damages in a representative capacity, but it could maintain an injunctive action in its own right. *Id.* at 226-27.[5]

The case at hand is fundamentally different. Here, the HOA does not specifically request damages on behalf of all property owners. Instead, as stated in the complaint the HOA requests that the Non-Appealing Parties "should be required to restore the condition of the common areas to their pre-existing condition at the time they were abandoned." (Complaint p. 6). Pursuant to the CCRs, the HOA is responsible for the "improvements, maintenance, repairs and reconstruction" of the common areas, and thus has, itself, a direct and real financial interest in the property that has been damaged by the wrongful neglect of the Common Areas. (CCRs, p. 6). However, all of this discussion leads to no meaningful end—the nuisance claim was not asserted against Appellant, and no one else has appealed.

Further still, the involvement of the individual homeowners is unnecessary in this action, because any damages resulting from claims asserted in respect of the "Common Areas" are, as the word implies, "**common** to the entire membership [and] shared equally." (*See* CCRs p. 3) (defining "common area" as real property "**owned by the HOA** for the common use and enjoyment of all [o]wners) (emphasis added). The annual and special assessments collectable from the individual homeowners for the costs of the HOA's improvements, maintenance, repairs and reconstruction of the common areas, are to "be fixed **at a uniform rate** for all lots." (CCRs, p. 7) (emphasis added).

In *Creek Pointe,* the damages for the diminution in property value necessitated the participation of the individual homeowner based on the facts of their specific circumstances, which

[5] Unlike the case at hand, in *Creek Pointe*, the defendant specifically filed a motion to dismiss attacking the HOA's standing. 552 S.E.2d at 223.

meant their damages "could vary from significant to minimal." *Creek Pointe,* 552 S.E.2d at 226. The same is not true here. The failure of Appellant to convey the Common Areas to the HOA invokes a right of the HOA itself. To the extent its members are affected, their injury is common to one another as members of the HOA having equal, undivided rights in and to the Common Areas in question. Because the HOA "owns" the Common Areas, the individual owners will only be damaged if the HOA fails to recover, and even in this scenario, it would be in equal and "uniform" amounts and does not require the involvement of the individual owners. Indeed, the foreign authorities referenced in Appellant's Initial Brief are distinguishable for the same reason. *Contra. River Birch Assoc. v. City of Raleigh*, 388 S.E.2d 538, 555 (N.C. 1990) (finding that an claim brought by the HOA for damages to individual homeowners for fraud and unfair trade practices required individualized proof of damages because there was no allegation that the fraudulent statement was made to all homeowners and the measure of damaged for fraud in the inducement is necessarily the difference between the contract price and fair market value, and this was obviously unique to each owner); *Rutherford Cty. v. Bond Safeguard Ins. Co*, 2011 WL 809821, at *5 (W.D.N.C 2011) (finding association could not seek damages on behalf of individuals for diminution in property value because this would depend on the value of each owner's specific lot); *Bano v. Union Carbide Corp.*, 361 F.3d 696, 714-15 (2nd Cir. 2004) (claims for bodily harm and damage to real property were unique to each individual member); *Lake Lucerne Civic Assoc., Inc., v. Dolphin Stadium Corp*, 801 F.Supp. 684, 691 (S.D. Fla. 1992) (finding association cannot seek money damages where members damages were not uniform).

On the other hand, the mere fact that "some" involvement may be necessary from members does not destroy associational standing. *See e.g., Pa. Psychiatric Soc'y v. Green Spring Health Servs.*, 280 F.3d 278, 286 (3d Cir. 2002) (declining to dismiss a matter for lack of

associational standing where the record demonstrated the damages were similar enough among all members that they could likely be shown with limited member participation and did not require a "fact-intensive-individual inquiry"); *N.Y. State Nat'l Org. for Women v. Terry,* 886 F.2d 1339, 1349 (2nd Cir. 1989) (allowing associational standing although evidence from some individual members is necessary); *see also Virginia Hosp. Assoc. v. Baliles,* 868 F.2d 653, 663 (4th Cir. 1989) (finding a plaintiff association to have standing where the equitable relief sough on behalf of its members would not "require findings specific to its individual members."). Here Appellant cites to the deposition testimony of Freeman Barber who testified that individual owners have been damaged in the loss of quiet enjoyment and diminution in property value. (App. Br. p. 12). And while this may be true, the HOA does not seek damages for diminution in value. This testimony, does not change the nature of the relief sought, nor does it establish that substantial and fact intensive inquiry must be made to the individual homeowners to establish damages. To the extent this may require "some" involvement from the members (which the HOA does not concede), it is at "a uniform rate to each lot" (CCRs p. 7), and does not necessitate a "fact-intensive-individual inquiry." Thus, it is not contrary to the rules of associational standing. *See Green Spring,* 280 F.3d at 286. Therefore, the HOA has such standing.

As a consequence, there is no question of material fact that the HOA has a right to pursue damages for the neglect and damage caused to the Common Area. The HOA's request for monetary damages does not leave it without standing, nor does it render is claims "improper third-party claims" as alleged by Appellant. Therefore the trial court properly granted summary judgment on Appellant's claim for indemnity, and this Court should affirm.

III. THE TRIAL COURT PROPERLY RULED THAT THE INDEMNIFICATION PROVISION APPLIES ONLY TO THIRD-PARTY CLAIMS.

Although not challenged by Appellant, for the sake of completeness, the trial court correctly ruled that the subject indemnification agreement applied only to third-party indemnity.

It is well-recognized law that indemnity is only a remedy involving liability from third-parties, not between the contracting parties themselves. *See Smoak v. Carpenter Enters.,* 319 S.C. 222, 224, 460 S.E.2d 381, 383 (1995)*; see also Laurens Emergency Med. Specialist, P.A., v. M.S. Bailey & Sons Bankers*, 355 S.C. 104, 109, 584 S.E.2d 375, 377 (2003) (finding that when the indemnity "clause at issue . . . is a typical indemnity agreement" for indemnity against third-parties, the indemnity provision will not be interpreted to include second party indemnification).

Here the subject indemnification provision states in pertinent part: The [HOA] shall indemnify and hold harmless each of its directors and officers, each member of any committee appointed pursuant to the By-Laws of the [HOA] and the Board, and Declarant, against all contractual and other liabilities **to others**[.]" (Bylaws p.32).

As the trial court properly held there is no express language in the subject indemnity agreement which calls for second party indemnification. Therefore, the trial court properly concluded that the provision contemplates only third-party indemnity. *See Smoak,* 319 S.C. at 224, 460 S.E.2d at 383. Regardless, no appeal was taken from this ruling, and it is now the law of this case.

IV. AS AN ADDITIONAL SUSTAINING GROUND, THE APPELLANT'S 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). "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." *Baber v. Greenville County*, 327 S.C. 31, 44, 488 S.E.2d 314, 321 (1997) (citation omitted).

As noted previously, Appellant "maintain[s] the CCRs are null and void." (App. Br. p. 3, n. 1). However, the trial court has never been asked to rule on the validity of the subject CCRs. Naturally, if the CCRs are void, so too is the indemnification provision that Appellant is seeking to assert. Thus, any ruling from this court would be entirely "contingent" on a subsequent ruling from the trial court as to the validity of the CRRs, and is therefore not ripe for review. *See Baber*, 327 S.C. at 44, 488 S.E.2d at 321 (courts will not pass on contingent matters).

To further illustrate this point, Appellant suggests that whether or not a third-party claim is being asserted should not be based on the name of the party in the caption. (App. Br. p. 2). This is flatly incorrect. In the context of this case, the HOA, is indisputably a "second-party" under the CCRs, and it either has standing to pursue its claims or it does not. There is no middle ground. Even if Appellant is correct that the HOA lacks standing, this simply means that there is no party at all before the court to bring a claim against Appellant (hence its still pending Motion for Summary Judgment). If there is no claimant before the trial court, there can be no claim for which Appellant can seek indemnity, and any ruling from his court is purely academic.

CONCLUSION

For the reasons set forth above the trial court's grant of partial summary judgment must be affirmed.

[signature page to follow]

Respectfully submitted,

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SC Court of Appeals

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 INITIAL BRIEF AND DESIGNATION OF MATTER

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' Initial Brief and Designation of Matter to be Included in the Record to the following counsel of record:

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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
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