THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
DEC 06 2016
SC Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas
J.C. Nicholson, Jr., Circuit Judge

Court of Common Pleas Case No. 2015-CP-08-00547
Appellate Case No. 2106-001156

COKERS COMMONS HOMEOWNER'S ASSOCIATION, INC.,

Respondent,

v.

PARK INVESTORS, LLC; CCT RESERVE, LLC, F/K/A HARRIS STREET, LLC; AND WHIPPLE DEVELOPMENT CORPORATION,

Defendants.

Of which WHIPPLE DEVELOPMENT CORPORATION is the Appellant.

APPELLANT'S RETURN TO MOTION TO DISMISS APPEAL

Daniel F. Blanchard, III (SC Bar 65342)
ROSEN, ROSEN & HAGOOD, LLC
151 Meeting Street, Suite 400
Post Office Box 893
Charleston, SC 29402
(843) 577-6726 telephone
dblanchard@rrhlawfirm.com

R. Britton Kelly (SC Bar 73741)
KELLY LAW FIRM, LLC
180 Spring Street
Charleston, SC 29403
(843) 991-4128 telephone
britt@kellylawsc.com

ATTORNEYS FOR APPELLANT

Appellant Whipple Development Corporation ("Whipple") submits this return in opposition to the Motion to Dismiss Appeal filed by Respondent Cokers Common Homeowner's Association, Inc. ("HOA").

The HOA's motion requests this Court to dismiss this appeal based on the HOA's brand new arguments that Whipple lacks standing to bring its claim for indemnification and that a justiciable controversy is not present because Whipple purportedly is attempting to seek indemnification against claims the HOA brought against other parties, not against Whipple itself.[1] The HOA buttresses its arguments with another brand new contention that the HOA's lawsuit makes no claim against Whipple for alleged nuisance. The HOA now argues for the first time that its Complaint seeks only declaratory relief against Whipple. However, the HOA's motion is based on a mere heading or label in its Complaint and disregards the actual substance of the allegations and claims for relief asserted therein, which show that the HOA's lawsuit does seek monetary damages and other relief against Whipple for alleged nuisance. Because the Complaint states a claim against Whipple for alleged nuisance and seeks a monetary recovery from Whipple, Whipple is seeking indemnification for claims being asserted against it, not against others. Whipple is asserting its own rights in this appeal; not the rights of any non-parties. As such, a justiciable controversy is present. Because the entire

[1] The HOA never raised these arguments to the Circuit Court and the Circuit Court never ruled on them. As our state supreme court observed in *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000), "[w]hile the current rules do not require the respondent to present an issue to the lower court in order to raise it as an additional sustaining ground, an appellate court is less likely to rely on such a ground when the respondent has failed to present it to the lower court." 526 S.E.2d at 724. "In such cases, the appellate court likely would perceive it as being unfair or unwise to resolve a case on a ground never mentioned by the respondent prior to appeal." *Id.* "Stated another way, the respondent may raise an additional sustaining ground that was not even presented to the lower court, but the appellate court is likely to ignore it." *Id.*; *see also Semken v. Semken*, 379 S.C. 71, 664 S.E.2d 493, 497-98 (Ct. App. 2008) (same).

underpinning for the HOA's motion is incorrect, the motion should be denied.

It is well-settled that labels or headings in a pleading are not dispositive; rather, it is the substance that matters. *Helm v. Helm*, 289 S.C. 169, 345 S.E.2d 720, 722 (1986) ("Our courts are not bound by the labels parties attach to their pleadings."); *Collins Holding Corp. v. Wausau Underwriters Ins. Co.*, 379 S.C. 573, 666 S.E.2d 897, 899 (2008) ("[i]n examining the complaint, a court must look beyond the labels describing the acts to the acts themselves which form the basis of the claim"); *Lane v. Home Ins. Co.*, 190 S.C. 84, 2 S.E.2d 30, 32 (1939) ("The designation of a pleading is not necessarily controlling.") *Sanford v. South Carolina State Ethics Com'n*, 385 S.C. 483, 685 S.E.2d 600, 607 (2009) ("Because it is 'the substance of the requested relief that matters' and not the form in which the petition for relief is framed, we may construe the Governor's request as one for injunctive relief if that is substantively what he is requesting."); *Richland County v. Kaiser*, 351 S.C. 89, 567 S.E.2d 260, 262 (Ct. App. 2002) ("Although the petition in this case was styled as a request for a writ of mandamus, we find that based on the relief sought, the County's pleading is more properly characterized as a request for an injunction. It is the substance of the requested relief that matters 'regardless of the form in which the request for relief was framed.'"); *Historic Charleston Holdings, LLC v. Mallon*, 381 S.C. 417, 437, 673 S.E.2d 448, 458 (2009).

"The name given to a pleading is not controlling, but its character is always to be determined by its allegations." *Atlantic Coast Lumber Corp. v. Morrison*, 152 S.C. 305, 149 S.E. 243, 245 (1929). "The court must examine the relief sought to understand the true nature of the pleading." *Rowe v. Advance America,* 2006 WL 7285680, *1 (S.C. Ct. App. 2006); *cf. McMaster v. Strickland*, 322 S.C. 451, 472 S.E.2d 623, 625 (1996) (Although plaintiff's complaint alleged only a claim for specific performance and did not request money damages as an alternative remedy, the supreme court

affirmed the trial court's award of money damages to the plaintiff because "[i]n addition to a prayer for specific performance, the complaint in this case contains a prayer for general relief [which asks the court to] '[g]rant[] such other or further relief as the Court deems just and proper'" and "the factual allegations of the complaint support an award of money damages.").

On March 2, 2015, the present lawsuit was commenced purportedly by and in the HOA's name. As discussed in Whipple's initial brief, this lawsuit is being funded and controlled by William F. Barber, Jr., a real estate developer who purchased 47 lots in the Cokers Commons subdivision on April 3, 2014 through his wife's entity (Kirkland Holdings, LLC). *See* Trans. of Depo. of William F. Barber, Jr. pp. 19-22, 33, 64; Deed Recorded April 14, 2014. On February 26, 2015, Mr. Barber and Kerine Borrillo (another landowner in the subdivision) signed a letter representing that "[a] vote was taken on February 20, 2015 by the current homeowners and landowners [in the subdivision] and the results were to pursue legal action against Park Investors, Whipple Development, Harris St Properties or any other related entity for failure to deliver and/or maintain the common areas within the subdivision." *See* Letter dated 2.26.15 (attached hereto as "Exhibit A"). Thus the individual owners actually took a vote to authorize the HOA to bring this action on their behalf.

The gravamen of the suit involves a dispute over the control, use, and condition of the "common areas" in the subdivision, which include the "Amenities Lot" (a swimming pool) and the "HOA open space." Throughout its Complaint, the HOA refers to Edward Terry (a real estate developer from Atlanta, Georgia) and Mr. Terry's alleged "entities" as being the "Developer" of the property in question. See Complaint ¶¶ 7, 12, 13, 15, 16, 20. As named in the Complaint, "the Defendants" are Mr. Terry's alleged entities: Whipple; Park Investors, LLC ("Park Investors"); and CCT Reserve, LLC, f/k/a Harris Street, LLC ("Harris Street"). The allegations in the Complaint

effectively treat Mr. Terry and his alleged entities as being one and the same.

Whipple is identified as the "Declarant" in the Declaration of Covenants, Conditions, and Restrictions for Cokers Commons recorded with the Berkeley County Register of Deeds (the "CC&R"). See Defendants' Answer & Counterclaims ¶ 50 (hereinafter "Answer"); Cokers Commons Covenants & Restrictions.[2] Park Investors and Harris Street are identified as the "record owners" of the "common areas of the Cokers Commons subdivision," including the Amenities Lot and the HOA open space. See Complaint ¶¶ 2-3, 23.

The Complaint alleges that "the Declarant" and "the Developer" failed to convey title to the common areas—including the Amenities Lot and the HOA open space—to the HOA in accordance with the CC&R and seeks to enforce those provisions. See Complaint ¶¶ 11-13, 15-16. Paragraph 16 of the Complaint, which is incorporated by reference into the third cause of action for nuisance, avers that "[t]he Developer never conveyed the common areas as contractually required, has still retained ownership of them, and let them fall into disrepair and blight." Id. ¶ 16. Paragraph 13, which also contains allegations common to all of the Defendants that are incorporated by reference into the nuisance claim, alleges that "[t]he Amenities Lot area includes a pool whose maintenance and upkeep has been abandoned by the developer for nearly six years" and "[t]he pool has become a blight and the local municipality of Goose Creek has issued nuisance warnings due to the condition of the pool." Id. ¶ 13. This same paragraph asserts that "as described herein [*i.e.*, as stated in other

---

[2] At the time the CC&R were executed and recorded, Whipple did not own the property purportedly affected by the CC&R; instead, the property was owned by Westgate Partners, L.P ("Westgate"). See Complaint ¶ 9; Answer ¶¶ 14, 50-51. However, the HOA's Complaint contends that Mr. Terry, Whipple, and Westgate all share a "commonality of interest," which appears to be an allegation that they are alter egos of each other. See Complaint ¶¶ 4, 7, 13, 20.

paragraphs of the Complaint], the Amenities Lot area and the HOA Open Space Area have been abandoned by Mr. Edward Terry's entities [*i.e.*, Whipple, Park Investors, and Harris Street], have not been kept up, and should have been conveyed to the [HOA] in 2008 and were not." Id. This paragraph further alleges that "[t]he landowner members of [the HOA] have not been able to use or enjoy the pool despite repeated requests to Mr. Edward Terry to remediate the condition." Id.

Later in the Complaint, under the third cause of action for nuisance, the HOA reiterates that "[a]s 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." Id. ¶ 23. Although the heading to the third cause of action refers only to Park Investors and Harris Street and Paragraph 23 references that "Defendants Park Investors and Harris Street are the record owners of the Amenities Lot and the HOA open space lot," Paragraph 24 then refers to and makes allegations against all of the Defendants (not simply Park Investors or Harris Street). Specifically, Paragraph 24 alleges that "**[t]he Defendants[']** neglect of the Amenities Lot and the HOA open space lot has unreasonably interfered with the [HOA's] constituent member's (sic) use and ownership of their properties as well as their use of the common areas, causing damages." Id. ¶ 24 (emphasis added). This same paragraph further asserts that "**[t]he 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." Id. (emphasis added). Throughout the Complaint, the term "the Defendants" is used to refer to all of the Defendants, not simply some of them. Paragraph 24 nowhere indicates that "the Defendants" mentioned in that paragraph mean less than all of the Defendants named in the suit.

In addition to the paragraphs discussed above, the Complaint further alleges as follows:

> WHEREFORE, the Plaintiff prays this Honorable Court inquire into the matters set forth herein and award judgment in favor of Plaintiff [and] **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.**

Id. p. 6 (underlining in original; bold added). Thus, the Complaint specifically alleges that the HOA is seeking a monetary judgment for "actual and consequential damages," "punitive damages," and "other relief" against *all of the Defendants (including Whipple) "jointly and severally."*[3] *See Gissel v. Hart*, 382 S.C. 235, 243, 676 S.E.2d 320, 324 (2009) ("[T]he complaints here specifically named the Harts as individual defendants, and alleged they were jointly and severally liable, or liable in the alternative. It is clear that the Harts were named as individual defendants, and the Court of Appeals erred in [determining] otherwise.").

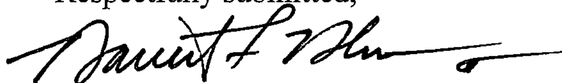
In summary, despite the HOA's new arguments to the contrary, the HOA's Complaint is not limited to seeking only declaratory relief against Whipple. Because the Complaint does state a claim

[3] The doctrine of joint and several liability allows a plaintiff to sue all defendants jointly in one suit or individually in separate suits and when a judgment is rendered in the plaintiff's favor in a suit against multiple defendants who are jointly and severally liable, the plaintiff may collect that judgment from one defendant or divide the award between some or all defendants. *See* 18 S.C. JUR. *Negligence* § 51 (2016) (citing cases).

against Whipple for alleged nuisance and seeks a monetary recovery from Whipple, Whipple is seeking indemnification for claims being asserted against it, not others. Because Whipple is asserting its own rights in this appeal—not the rights of any non-parties—this appeal presents a justiciable controversy and the HOA's motion should be denied.[4]

In conclusion, for the reasons stated herein, the Appellant respectfully requests that the Court deny the Respondent's Motion to Dismiss Appeal.

Respectfully submitted,



Daniel F. Blanchard, III (SC Bar 65342)
ROSEN, ROSEN & HAGOOD, LLC
151 Meeting Street, Suite 400
Post Office Box 893
Charleston, SC 29402
(843) 577-6726 telephone
dblanchard@rrhlawfirm.com

R. Britton Kelly (SC Bar 73741)
KELLY LAW FIRM, LLC
180 Spring Street
Charleston, SC 29403
(843) - telephone
britt@kellylawsc.com
ATTORNEYS FOR APPELLANT

December 5, 2016.

---

[4] As discussed in detail in Whipple's initial reply brief filed along with this return, the HOA fundamentally misunderstands the law of indemnification and Whipple's arguments when it asserts that Whipple's indemnification claim and this appeal depend on a finding that the HOA lacks standing to assert the claims raised in its Complaint. Neither Whipple's claim for indemnification nor this appeal depend on such a finding. Instead, Whipple is entitled to indemnification from the HOA regardless of whether or not the HOA actually has standing in a representational capacity to assert a nuisance claim seeking money damages on behalf of individual owners in the subdivision. *See* Initial Reply Brief pp. 7-13.

EXHIBIT A

Vote by the Members of the Cokers Commons
Homeowners & Landowners

Feb 26, 2015

Brent Halversen, Esq
Halversen & Associates, LLC
171 Church St Suite 330
Charleston SC 29401

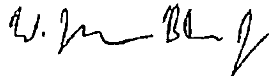
Dear Mr Halversen,

A vote was taken on Feb 20, 2015 by the current homeowners and landowners in the Cokers Commons Subdivision of Goose Creek SC and the results were to pursue legal action against Park Investors, Whipple Development, Harris St Properties or any other related entity for failure to deliver and/or maintain the common areas within the subdivision.

Thank you for your help and please let us know if we can be of further assistance.

Yours truly,

Kerine Borrillo
Verifying Homeowner



Freeman Barber
Landowner Representative

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
DEC 06 2016
SC Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas
J.C. Nicholson, Jr., Circuit Judge

Court of Common Pleas Case No. 2015-CP-08-00547
Appellate Case No. 2106-001156

COKERS COMMONS HOMEOWNER'S ASSOCIATION, INC.,

Respondent,

v.

PARK INVESTORS, LLC; CCT RESERVE, LLC, F/K/A HARRIS STREET, LLC; AND WHIPPLE DEVELOPMENT CORPORATION,

Defendants.

Of which WHIPPLE DEVELOPMENT CORPORATION is the Appellant.

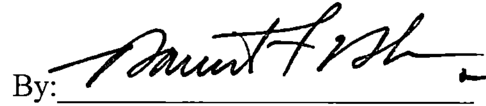
PROOF OF SERVICE

I certify that I have served the Appellant's Return to Motion to Dismiss Appeal on the Respondent by mailing copies to its attorneys of record on December 5, 2016 via first-class mail, postage prepaid, and addressed as follows:

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

Michael A. Timbes, Esquire
Thomas J. Rode, Esquire
Thurmond, Kirchner & Timbes, P.A.
15 Middle Atlantic Wharf
Charleston, SC 29401

ROSEN, ROSEN & HAGOOD, LLC



By:______________________

Daniel F. Blanchard, III
151 Meeting Street, Suite 400
Post Office Box 893
Charleston, SC 29402
(843) 577-6726
ATTORNEYS FOR APPELLANT

December 5, 2016

ROSEN | HAGOOD

RECEIVED

DEC 06 2016

SC Court of Appeals

Daniel F Blanchard, III
dblanchard@rrhlawfirm.com
843-266-8123

December 5, 2016

The Honorable Jenny Abbott Kitchings
Clerk of Court, South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: Cokers Commons Homeowners Association, Inc. v. Park Investors, LLC, CCT Reserve, LLC, f/k/a Harris Street, LLC, and Whipple Development Corporation, Inc.
Case No. 2015-CP-08-0547
Appellate Case No. 2106-001156

Dear Ms. Kitchings:

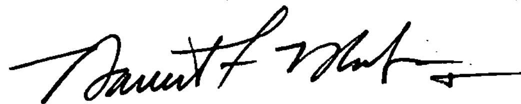
Enclosed for filing in the above-referenced case are:

[1] The original and seven copies of the Appellant's Return to Motion to Dismiss Appeal,
[2] The original and two copies of the Initial Reply Brief of Appellant,
[3] The original and two copies of the Appellant's Reply Designation of Matter to be Included in Record on Appeal, and
[4] The original and two copies of the Proofs of Service.

We would greatly appreciate your filing these and returning the date-stamped copies in the self-addressed return envelope enclosed herewith. Thank you for your assistance with this matter.

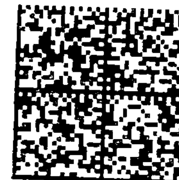
With kindest regards, I am

Sincerely,



Daniel F. Blanchard, III

DFB/db
Encls.
Cc: Brent S. Halversen, Esquire (w/ encls.)
Michael A. Timbes, Esquire (w/ encls.)
Thomas J. Rode, Esquire (w/ encls.)
R. Britton Kelly, Esquire (w/ encls.)



US POSTAGE
$ 06.80
Mailed From 29401
12/05/2016
031A 0004182841

9144.010 DFB

ROSEN | HAGOOD

151 Meeting Street, Suite 400
Charleston, South Carolina 29401

RECEIVED

DEC 06 2016

SC Court of Appeals

The Honorable Jenny Abbott Kitchings
Clerk of Court, South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211