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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.

RESPONDENT'S REPLY TO APPELLANT'S RETURN TO RESPONDENT'S MOTION TO DISMISS APPEAL

Respondent Cokers Commons Homeowner's Association, Inc. (the "HOA"), replies to Appellant's Return to the HOA's Motion to Dismiss the instant appeal as follows:

I. APPELLANT FAILS TO SET FORTH A COMPELLING REASON WHY THE INSTANT APPEAL SHOULD NOT BE DISMISSED.

In its Motion to Dismiss, the HOA argued this appeal should be dismissed because it does not involve a justiciable controversy. The HOA argues (1) Appellant's allegation of error is not ripe, and (2) Appellant does not have **appellate** standing to assert the arguments raised on appeal.

1. Appellant does not oppose the HOA's claim that the issue is not ripe.

This matter came before the trial court on **the HOA's** Motion for Summary Judgment on

Appellant's claim for indemnity. Appellant made no motion or request for any affirmative relief of any kind. Yet, on appeal Appellant contends that the HOA's claim for nuisance is improper. The only reason offered by Appellant as to why it believes the HOA's claim is improper is that Appellant contends the HOA fails to satisfy the necessary "associational standing" requirements. **At the time this appeal was initiated there was a separately filed motion for summary judgment pending before the trial court specifically raising this same challenge, but that motion has yet to be ruled on by the trial court**. (*See* **Exhibit 4** to Motion to Dismiss).

In its Return to the HOA's Motion to Dismiss, Appellant presents no argument in opposition of the HOA's assertion that the instant appeal is not ripe. Rather, Appellant tellingly concedes that "[neither [its] claim for indemnity, nor this appeal depend on [a finding the HOA lacks standing.] Instead, [Appellant] is entitled to indemnification from the HOA regardless of whether or not the HOA actually has standing[.]" Despite any assertion otherwise, the entirety of Appellant's contention that the HOA is improperly bringing a disguised third-party nuisance claim is based solely on its assertion that the HOA lacks standing to bring representative claims. *See App. Br.* p. 13 (stating the "HOA is improperly attempting to bring claims against [Appellant] in its representative capacity that rightfully belong to the individual members [because the HOA] cannot meet the third prerequisite of the Hunt test for organizational **standing**")(emphasis added). In fact, Appellant flatly concludes the HOA's claims are improper because "the HOA cannot satisfy the third prong of the Hunt test and it **lacks associational standing** to seek money damages on behalf of its members." *App. Br.* p. 15. (emphasis added).

Unavoidably, the singular basis to support Appellant's contention that the HOA's nuisance claim is improper is based on the HOA's alleged lack of standing. Yet, in its Return, Appellant nonetheless asserts that it "is entitled to indemnification from the HOA regardless of whether or

not the HOA actually has standing[.]" (App. Return to Mot. to Dismiss, p. 7 n. 4). The inconsequential nature of the argument raised on appeal is the quintessential hallmark of an argument that is not justiciable. *See e.g., Waters v. South Carolina Land Resources Conservation Comm'n*, 321 S.C. 219, 228, 467 S.E.2d 913, 918 (1996) (stating a matter which is "contingent, hypothetical, or abstract" is not ripe for review). Since, by its own admission, the sole argument that Appellant has put forth on appeal to support the alleged impropriety of the HOA's nuisance claim does not impact whether it is entitled to indemnity (the only issue before this Court and the trial court) then the argument is, by definition, not justiciable. *See id.; see also Linda Mc Co. v. Shore*, 390 S.C. 543, 557, 703 S.E.2d 499, 506 (2010) (recognizing that an academic question will not be passed on by an appellate court because it is not justiciable).

Because the subject indemnity agreement only applies to third-party claims, Appellant's argument is that the HOA's nuisance claim is improper because the HOA does not have standing to assert nuisance in its own right, and as a result the claim must be construed as a "third-party" claim.[1] However, this position presumes that there has been a ruling by the trial court that the HOA has standing. But this is plainly not the case. Indeed a motion challenging the HOAs standing is presently pending before the trial court and has yet to be ruled on. *See* (**Exhibit 4**). Until the trial court rules on this presently pending motion regarding the HOA's standing to maintain the nuisance action, the present appeal is not ripe.

2. Appellant lacks appellate standing to pursue the instant appeal.

Appellant contends that the HOA cannot raise an argument challenging Appellant's standing to pursue the instant appeal because the HOA did not raise this argument to the trial court.

[1] This of course assumes that the HOA has asserted a nuisance claim against Appellant, which the HOA has not. *See infra.*

This is both illogical and inconsequential. First, at trial, Appellant never alleged the HOA lacked "associational standing." Thus, there was no occasion for the HOA to raise the arguments. Naturally, because Appellant raised a new argument on appeal, the HOA had no choice but to raise a new argument in response.

Second, and more importantly, the HOA has asserted that Appellant lacks **appellate** standing to pursue this appeal. Naturally, the question of **appellate** standing was not germane to any proceeding before the trial court. Appellant mischaracterizes the argument offered by the HOA in support of dismissal to be that Appellant "lacks standing to bring its claim for indemnification." This is not correct. Rather, the HOA's argument is Appellant lacks **appellate** standing to appeal a ruling of the trial court which relates only to whether the HOA may properly maintain a nuisance action against the Non-Appealing Parties. The difference between Appellant's standing to assert indemnity in the trial court and Appellant's standing to maintain an appeal is more than semantic, and the HOA only challenges the latter. *See* (*Motion to Dismiss* p. 5) ("Only a party aggrieved by an order, judgment, or sentence **may appeal**. Where an appealing party has not suffered injury, it is without **standing to appeal**.") (citing the S.C. Appellate Court Rules, *inter alia*) (emphasis added).[2]

In electing not to respond to the HOA's position that the present appeal is not ripe, Appellant instead takes the position that the HOA asserts a "brand new contention" that "the HOA's lawsuit makes no claim against [Appellant] for alleged nuisance." (*Appellant's Return* p. 1). This is particularly odd considering the three-claim Complaint asserts only one cause of action

[2] The HOA does not concede Appellant's standing to assert indemnity in the trial court, but simply makes clear that for the limited purpose of its Motion to Dismiss, the HOA is only attacking **appellate standing**. Appellant's standing to assert the claim in the trial court is a matter that touches on the merits of the case that the HOA acknowledges would not be proper in a motion to dismiss.

against Appellant, that being for declaratory relief. *See Complaint* (setting forth three causes of action: Declaratory Relief – as against Appellant **only**; Specific Performance – as against the Non-Appealing Parties **only**; and Nuisance – as against the Non-Appealing Parties **only**). *See* (**Exhibit 1**). The only claim Appellant asserts to be improper is the nuisance claim, and the HOA did not bring a nuisance claim against Appellant. This is not a "brand new contention," it is plainly evidenced by the Complaint.

Appellant's position would have this Court conclude that the single "second-party" plaintiff—the HOA—is both a third-party claimant **and** a second party indemnitor. But to say the HOA wears both hats is legally and factually impossible.[3] The trial court specifically directed Appellant to add whatever parties it deemed necessary and the issue of indemnity would be reconsidered. However, Appellant has not done so. Electing rather to appeal and argue that the HOA's nuisance claim made against the Non-Appealing Parties is improper. Quite simply, as this claim was not made against Appellant, Appellant is not an aggrieved party and therefore lacks standing to appeal. *See e.g., Biven v. Knight*, 254 S.C. 10, 13, 173 S.E.2d 150, 152 (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**."); *Cisson v. McWhorter*, 255 S.C. 174,

[3] If the HOA is, in fact, asserting the vicarious claims of the individual homeowners as Appellant suggests, then one would wonder why Appellant brought a *counterclaim* for indemnity against the HOA. Accepting Appellant's arguments as true, if an undisclosed "third party" actually brought the claims as Appellant contends, Appellant should have brought a third party complaint against the real HOA for indemnity, not a counterclaim against the strawman party they allege brought the suit. The HOA cannot be both the HOA *and* the "Third Party."

Naturally, Appellant brought a counterclaim because the HOA is the Plaintiff listed in the caption, and inquiry into the identity of the Plaintiff stops there. Either the HOA's claims are proper or not. And despite the fact that this issue has not yet been ruled on, it is inconsequential because the HOA is the only plaintiff and Appellant undisputedly has no right of indemnity against a claim (whether proper or not) brought by the HOA.

177 S.E.2d 603 (1970) (This is "a wise and well-reasoned requirement, as our court is concerned with correcting errors that have **practically wronged the appealing party**.").

At bottom, and notwithstanding the fact that the HOA brought no nuisance claim against Appellant, the question of whether the HOA can maintain a nuisance claim remains pending before the trial court. Further, it is undisputed that Appellant has no right of indemnity for claims made by the HOA—whether proper or not. *See* (App. Return to Mot. to Dismiss, p. 7 n. 4) (stating the propriety of the HOA's nuisance claim is inconsequential to the issue before this court). Thus, there is no justiciable issue before this court on appeal.

CONCLUSION

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

Respectfully submitted,

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PROOF OF SERVICE OF
RESPONDENT'S REPLY TO 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' Reply to Motion to Dismiss Appeal, to the following counsel of record:

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December 19, 2016
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