QUESTIONS PRESENTED

1. **DID THE COURT OF APPEALS ERR IN REFUSING TO RECOGNIZE THAT RESPONDENT HOMEOWNERS' ASSOCIATION OWED PETITIONERS A NONDELIGIBLE DUTY OF REASONABLE CARE WHEN MAKING REPAIRS OR IMPROVEMENTS, INCLUDING WHEN MAINTAINING TREES IN ITS COMMON AREA, SUCH THAT IT IS LIABLE FOR THE NEGLIGENT ACTIONS OF ITS INDEPENDENT CONTRACTOR**

STATEMENT OF THE CASE

Petitioner Charles Thomas Hobbs ("Tommy Hobbs") suffered debilitating injuries when he was struck in the head by a tree limb on August 21, 2012. (Summons and Complaint, A. pg. 13; Answer, A. pg. 17). The accident occurred on the common areas of the Fairway Oaks Townhome development which was owned by Respondent Fairway Oaks Homeowners Association ("Fairway Oaks"). (Summons and Complaint, A. pg. 12; Answer, A. pg. 17). Tommy Hobbs was a member of Respondent. Pursuant to the Declaration of Covenants and Restrictions for Fairway Oaks Townhouses, Easley, South Carolina, and Provisions for Fairway Oaks Homeowners' Association ("Covenants and Restrictions"), Respondent was responsible for maintaining the common areas. The Covenants and Restrictions provide: "Section 12. Common Area Maintenance. Common Areas shall be the responsibility of the Association, which shall maintain the parking lots, grounds and common buildings. The Association shall make such capital improvements to common areas as the shareholders may determine to be in the best interest of Fairway Oaks Townhouses. The Association shall maintain liability insurance for the common areas." (Covenants and Restrictions, Article VI, Section 12, A. p. 194). Lee Lambright was hired by Respondent to remove a damaged tree limb located on Respondent's common area. (Deposition of Lee Lambright, A. pg. 177 l. 18 – A. pg. 200, l. 7). Lambright was a local handyman who performed various jobs for Respondent and the residents of Fairway Oaks. (Deposition of Lee Lambright, A. pg. 173, ll. 11-18; A. pg. 174, l. 12 – A. pg.175, l. 12). It is undisputed that Lambright was an independent contractor of Respondent. Lambright asked Petitioner Tommy Hobbs to help him carry a ladder to the site where the tree limb would be cut as the ladder was too large for him to handle by himself. (Deposition of Lee Lambright, A. pg. 177, l. 18 – A. pg. 200, l. 2). Tommy agreed, and on August 21, 2012, did in fact assist Lambright in

taking the ladder to the job site and setting it up. (Deposition of Lee Lambright, A. pg. 179, ll. 14-16). After getting the ladder set up, Lambright began to work on the tree limb. (Deposition of Lee Lambright, A. pg. 180, ll. 20-22).

Lambright cut a large tree limb; however, the limb did not fall all the way to the ground but instead was leaning against the tree. After cutting the tree limb, Lambright climbed down and spoke with Petitioner Tommy Hobbs and Daniel Lappin. Lambright then went back to the tree and pushed over the already cut limb. The limb struck Petitioner Tommy Hobbs in the head. (Deposition of Lee Lambright, A. pg. 182, l. 4- A. pg. 202, l. 24; A. pg. 183, l. 22- A. pg. 203, l. 13). While cutting and removing the tree limb, Lambright took no safety precautions, provided no warnings, and did not look to make sure everyone was out of the way immediately prior to pushing over the tree limb. (Deposition of Lee Lambright, A. pg. 184, ll. 13-24; pg. 185, l. 23 – pg. 204 l. 3).

Petitioners filed suit against Respondent on May 19, 2014, asserting that Respondent, acting through Lambright, was negligent. (Summons and Complaint, A. pp. 11-16). Petitioner Mary Hobbs also asserted a claim for loss of consortium. (Summons and Complaint, A. pp. 11-16). After taking depositions, Respondent moved for summary judgment on the ground that it was not liable for the negligence of its independent contractor. On August 7, 2015, the Honorable Edward W. Miller heard Fairway Oaks' Motion for Summary Judgment and issued an Order Granting Summary Judgment to Defendant Fairway Oaks, which was filed on September 23, 2015. (Order Granting Summary Judgment, A. pp. 4-8; See also Hearing Transcript, A. pp. 138-158). The trial court's order held that Fairway Oaks was not liable for the actions of Lambright because he was an independent contractor. (Order Granting Summary Judgment, A. pp. 4-8). On or about October 2, 2015, Petitioners filed a Motion to Alter or Amend Judgment Pursuant to Rule 59, *SCRCP*. (Motion

for Reconsideration, A. pp. 110-125). On or about November 17, 2015, the trial court issued an Order Denying Petitioners' Motion for Reconsideration. (Order Denying Motion for Reconsideration, A. pp. 9-10).

Petitioners filed an appeal to the Court of Appeals which was heard on October 4, 2017. The Court of Appeals issued an unpublished opinion on January 10, 2018, affirming the trial court's decision. (Opinion of Court of Appeals, A. pp. 282-283). The Opinion did not explain the Court's reasoning other than citing to some case law. Petitioners timely filed a Petition for Rehearing which was denied via an Order dated February 22, 2018. (Petition for Rehearing, A. pp. 284-289; Order Denying Petition for Rehearing, A. p. 190).

ARGUMENTS

1. THE COURT OF APPEALS ERRED IN REFUSING TO RECOGNIZE THAT RESPONDENT OWED PETITIONERS A NONDELIGIBLE DUTY OF REASONABLE CARE WHEN MAKING REPAIRS OR IMPROVEMENTS IN ITS COMMON AREA, INCLUDING WHEN MAINTAINING TREES IN ITS COMMON AREA, SUCH THAT IT IS LIABLE FOR THE NEGLIGENT ACTIONS OF ITS INDEPENDENT CONTRACTOR

The question of whether a homeowners' association ("HOA") has a nondelegable duty of reasonable care when making repairs or improvements, including when maintaining trees in the common area, is a novel question in South Carolina. The trial court's Order Granting Summary Judgment states that "there is no recognized exception in South Carolina that removes this case from the general independent contractor rule. To find otherwise would require this court to expand the existing body of case law. Because there is no recognized exception to the general independent contractor rule, Defendant is entitled to judgment as a matter of law." (Order Granting Summary Judgment, A. p. 8). At the motion for summary judgment hearing, the trial judge stated that "I am not, I think, in a position to expand the scope of exception to the rule. And so I'm going to grant their motion for summary judgment, which is not what I normally do." (Hearing Transcript, A. p. 157, ll. 2-5). In its Opinion, the Court of Appeals listed the authorities on which it was affirming the trial court's order. These authorities included the general rule, as set forth in Rock Hill Tel. Co. v. Globe Commc'ns, Inc., that an employer is not vicariously liable for the negligent acts of an independent contractor. 363 S.C. 385, 390, 611 S.E.2d 235, 238 (2005) (Opinion, A. p. 283). The Court of Appeals also cited Gary v. Askew for the principle that "While it is difficult to define the exact circumstances under which a nondelegable duty will be found, a review of case law reveals that our courts' decisions regarding whether to apply the nondelegable duty doctrine are primarily grounded in public policy considerations." 417 S.C. 232, 249, 789 S.E.2d 94, 103 (Ct. App. 2016)

(Opinion, A. p. 283). Finally, the Court of Appeals cites to Rock Hill Tel. Co. where the court reviewed South Carolina's nondeligible duty doctrine and refused to expand it to include public utilities. (Opinion, A. p. 283). As the dearth of precedent cited by the Court of Appeals' opinion makes clear, this is a novel issue of law that is ripe for a decision by our Supreme Court as contemplated by Rule 242(b)(1), SCACR.

For the reasons set forth below, the Court of Appeals erred in failing to recognize that Respondent owed Petitioners a nondelegable duty of reasonable care when making repairs or improvements, so that it is liable for the negligent actions of its independent contractor.

a) The Court of Appeals did not properly consider the fact that Respondent owed an absolute duty to Petitioner Tommy Hobbs.

While the question of whether an HOA owes its members a nondelegable duty when performing maintenance and repairs in its common area is a novel issue, the Court has already held that a contractual duty to perform maintenance is an absolute duty for which the principal remains liable for the negligence of its independent contractor. "The general rule is that an employer is not vicariously liable for the negligent acts of an independent contractor." Rock Hill Telephone Co. v. Globe Communications, Inc., 363 S.C. 385, 390, 611 S.E.2d 235, 238 (2005) (internal citations omitted). However, "[a]n exception to the general rule is that '[a] person who delegates to an independent contractor an absolute duty owed to another person remains liable for the negligence of the independent contractor just as if the independent contractor were an employee.'" Id. (internal citations omitted). Here, Respondent's Covenants and Restrictions created an affirmative duty for Respondent to maintain its common area. (Covenants and Restrictions, Article VI, Section 12, A. p. 194). In Durkin v. Hansen, the court found that a landlord's duty to maintain a premises pursuant to

a rental agreement was an absolute duty owed to another person so that the landlord would be liable for the negligence of its independent contractor. 313 S.C. 343, 437 S.E.2d 550 (Ct. App. 1993). Respondent owed the same absolute duty to Petitioner Tommy Hobbs to maintain the common area as the landlord in Durkin owed to its tenant and cannot escape liability by delegating the duty to an independent contractor. The Court of Appeals failed to discuss or cite to Durkin in its Order, despite the fact that this case presents the most similar factual scenario to the present case. The Court of Appeals should have found that the same absolute duty which gave rise to a nondelegable duty in Durkin also gives rise to a nondelegable duty in the present case.

b) The Court of Appeals did not properly consider the fact that a nondelegable duty exists in other similar circumstances such as the landlord-tenant context.

The novel issue of whether an HOA owes its members a nondelegable duty when performing maintenance and repairs in its common area fits squarely with already recognized exceptions to the general rule of non-liability for the actions of an independent contractor. There are a number of recognized exceptions to the general rule that a principal is not liable for the negligent acts of its independent contractor. See Simmons v. Tuomey Regional Medical Center, 341 S.C. 32, 42-43, 533 S.E.2d 312, 317-318 (2000). One such exception occurs in the landlord-tenant context wherein "[a] landlord who undertakes repair of his property by use of a contractor has a nondelegable duty to see that the repair is done properly, and remains vicariously liable for injuries caused by improper repairs." Id at 42-43, 317-318. This exception was examined in Durkin v. Hansen where the court found that a landlord was liable for the negligent acts of its independent contractor carpet cleaner. 313 S.C. 343, 437 S.E.2d 550 (Ct. App. 1993). In Durkin, the landlord was obligated to maintain the

leased premises by virtue of its lease agreement with the tenant.[1] Id at 347-348, 553. The court found that the landlord owed a nondelegable duty to its tenant when performing maintenance on the leased premises and could not escape liability for injuries caused by the negligence of an independent contractor. Id at 348, 553. In the present case, Respondent was obligated to maintain its common area by its Covenants and Restrictions. (Covenants and Restrictions, Article VI, Section 12, A. p. 194). Like the landlord's duty to maintain the premises in Durkin, Respondent here had a duty to maintain its common areas. Respondent owed the same absolute duty to Petitioner Tommy Hobbs to maintain the common area as the landlord in Durkin owed to its tenant and cannot escape liability by delegating the duty to an independent contractor. In its Opinion, the Court of Appeals failed to address the South Carolina precedent most similar to the present case.

c) The Court of Appeals failed to properly consider the fact that Petitioner Tommy Hobbs, as a member of Respondent, was considered an invitee in Respondent's common area, and South Carolina has recognized a nondelegable duty in other similar cases where the injured party was an invitee.

The Court has never decided whether or not a member of an HOA is owed a nondelegable duty by an HOA when performing maintenance and repairs in its common area. However, it is settled that a member of an HOA is an invitee in the HOA's common areas. Further, invitees are owed a nondelegable duty in the customer/business owner context. Petitioner Tommy Hobbs was a member of Respondent and was injured on Respondent's common area. A member of a homeowners' association, such as Petitioner Tommy Hobbs, is considered an invitee on the common

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1 In Durkin, the Court states that in addition to the duties set forth in the rental agreement, Defendants also had duties imposed by the South Carolina Residential Landlord Tenant Act. 313 S.C. at 348-349, 437 S.E.2d at 553.

area owned by the homeowners' association. Landry v. Hilton Head Plantation Prop. Owners Ass'n, Inc., 317 S.C. 200, 204, 452 S.E.2d 619, 621 (Ct. App. 1994). As an invitee, Petitioner Tommy Hobbs was owed the utmost duty of care by Respondent. See Sims v. Giles, 343 S.C. 708, 715, 541 S.E.2d 857, 861 (Ct. App. 2001). In other situations, a landowner cannot escape liability for an injury to an invitee caused by the negligence of its independent contractor. See S. Carolina Nat. Gas Co. v. Phillips, 289 F.2d 143, 148 (4th Cir. 1961)(Discussing the nondelegable duty owed by a storekeeper to its invitee customers when performing maintenance and repairs). Like a customer in a store, Petitioner Tommy Hobbs was an invitee when on Respondent's common area and Respondent cannot escape liability for the negligence of its independent contractor. In its Opinion, the Court of Appeals failed to address the fact that Petitioner Tommy Hobbs was an invitee on Respondent's property, and was entitled to the same protections as invitees in other situations.

d) The Court of Appeals failed to properly consider the fact that Courts in other states who have ruled on similar issues have determined that homeowners' associations owe nondelegable duties to their members in circumstances similar to the present case.

As discussed above, the issue of whether a homeowners' association owes a nondelegable duty to a member in its common areas is a novel question in South Carolina. In Simmons v. Tuomey Regional Medical Center, the Court was similarly presented with the novel issue of "whether a hospital owes a common law nondelegable duty to render competent service to its emergency room patients, such that it may not avoid liability for the negligent acts of emergency room physicians hired as independent contractors under a contract between the hospital and a separate corporation." 341 S.C. 32, 35, 533 S.E.2d 312, 314 (2000). In answering this question, the Court looked to other jurisdictions who had previously addressed the issue. Id at 44-48, 318-321 (Discussion of decisions

in other jurisdictions). Other states which have addressed similar issues to the one in the present case have found that a nondelegable duty is owed. See Affan v. Portofino Cove Homeowners Association, 189 Cal. App. 4th 930, 945 (2010 Cal. App. 4th)(Finding that a homeowners' association had a nondelegable duty to property owners to maintain common area plumbing, and that the homeowners' association could be liable for damage caused by an independent contractor's negligent actions in repairing the plumbing); see also Vasquez v. Lago Grand Homeowners, 900 So.2d 587 (Finding that the defendant homeowners' association had a duty to keep the premises secure, was liable for its failure to do so as a result of its contractual obligations, and noting that the defendant homeowners' association could not escape liability even though its independent contractor had performed the negligent acts); see also Moon v. Homeowners' Ass'n of Sibley Forest, Inc., 202 Ga. App. 821, 415 S.E.2d 654 (1992)(Finding that, where a guest was injured at a common area pool, the homeowners' association could be liable for the negligence of the lifeguard despite the fact that the company who was hired to provide the lifeguard was an independent contractor of the homeowners' association); see also Gazo v. City of Stamford, 255 Conn. 245, 765 A.2d 505 (2001)(Where the court stated that the occupier of a premises owes a nondelegable duty to exercise ordinary care for the safety of invitees). Because the issue presented to the Court of Appeals was a novel issue, the Court should have considered the opinions of courts in other states who have already determined similar issues.

CONCLUSION

For reasons stated, petitioner asks that the Supreme Court grant Certiorari in this case so as to provide clarity on the novel issue of whether a homeowners' association owes a nondelegable duty to its members when making improvements and repairs. Allowing this decision to stand, even

though unpublished, would allow a decision detrimental to the Petitioners and contrary to public policy considerations.

RESPECTFULLY SUBMITTED,

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March 22, 2018

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Opinion No. 2018-UP-011 (S.C. Ct. App. Filed January 10, 2018)

Charles Thomas Hobbs and Mary Hobbs,. . . . . Petitioners,

vs.

Fairway Oaks Homeowners Association, ... Respondents,

CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the Petitioner for Rehearing was made and finally ruled on by the Court of Appeals on February 22, 2018.

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PROOF OF SERVICE

I certify that I have served one (1) copy of the Petition for Writ of Certiorari and the Appendix on counsels addressed below, by depositing a copy of it in the United States Mail with postage prepaid on March 22, 2018.

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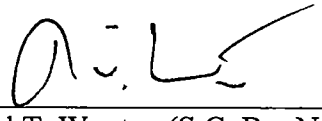

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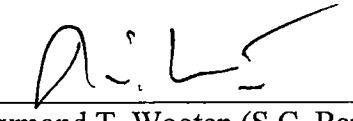
I certify that I have served six (6) copies of the Petition for Writ of Certiorari and two (2) copies of the Appendix on The Clerk of the South Carolina Supreme Court by mailing it, March 22, 2018, addressed to Daniel E. Shearouse, Post Office Box 11330, Columbia, SC 29211.



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