THE STATE OF SOUTH CAROLINA
IN THE 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.

BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. Did the Circuit Court err as a matter of law by granting summary judgment in favor of the homeowners' association involving the declarant's counterclaim for indemnification based on its conclusion that the indemnification provision in the subdivision's restrictive covenants—which the Circuit Court construed to protect the declarant only against "third-party claims"—does not cover the association's present claims against the declarant when the pleadings and evidence show the association is improperly attempting to bring the claims in its representative capacity on behalf of individual owners in the subdivision (*i.e.*, third parties) for injuries that the individual owners allegedly sustained?

This appeal involves the important question of whether individual members of a homeowners' association created by virtue of restrictive covenants recorded by the subdivision's declarant may circumvent an indemnification provision in the covenants—which the trial court construed to entitle the declarant to indemnification from the association for claims made by third parties ("third-party indemnification") but not from claims made by the association itself ("second-party indemnification")—by bringing suit against the declarant in the association's name rather than in their individual capacities for injuries that the individual members have allegedly sustained.

Appellant Whipple Development Corporation ("Whipple"), which is the declarant under the restrictive covenants purportedly creating the Respondent Cokers Common Homeowner's Association, Inc. ("HOA"), respectfully submits that the Circuit Court erred as a matter of law by granting summary judgment as to Whipple's counterclaim against the HOA for indemnification. Even assuming the Circuit Court correctly construed the restrictive covenants to limit Whipple to indemnification from claims made by third parties and to preclude indemnification from claims made by the HOA itself, the Circuit Court erred by concluding as a matter of law that the HOA's claims do not involve third-party claims against Whipple simply because the HOA is the only named plaintiff in this action. The HOA's claims in actuality are third-party claims by individual members of the HOA which the HOA is improperly attempting to bring against Whipple in the HOA's name. Whipple is entitled to indemnification from the HOA because it is being required to defend against third-party claims posing as claims of the HOA.

STATEMENT OF THE CASE

Whipple is identified as the "Declarant" in the Declaration of Covenants, Conditions, and Restrictions for Cokers Commons dated March 10, 2008 and recorded with the Berkeley County

Register of Deeds on April 15, 2008, at Book 7288, Page 283 (the "CC&R"). (R. p. 22 ¶ 50 (hereinafter "Answer"); (R. pp. 42-79). 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"). (R. p. 6 ¶ 9) (R. pp. 14-15, 22-23 ¶¶ 14, 50-51).[1] The HOA's Complaint suggests that Edward Terry (a real estate developer from Atlanta, Georgia) owns or controls both Whipple and Westgate and alleges that those entities have a "commonality of interest." (R. pp. 5-8 ¶¶ 4, 7, 13, 20).

On March 2, 2015, this lawsuit was commenced purportedly by and in the HOA's name.[2] The Complaint alleges that Whipple failed to convey title to the "common areas of the Cokers Commons subdivision"—including areas known as the "Amenities Lot" (which encompasses a swimming pool) and the "HOA open space"—to the HOA in accordance with the CC&R and seeks to enforce those provisions. (R. pp. 6-7 ¶¶ 11-13, 15-16). The Complaint further alleges that Mr. Terry and his entities (including Whipple and Westgate) "abandoned" and have "not kept up" the Amenities Lot and the HOA open space. (R. pp. 6-7 ¶ 13). The Complaint alleges that the "common areas" (including the Amenities Lot and the HOA open space) have become a nuisance due to neglect. (R. pp. 8-9 ¶¶ 23-24). The Complaint asserts that the common areas "have become a blight to the neighborhood, negatively affecting the quality of life of the owners of Cokers Commons," that "[t]he landowner members" of the HOA "have not been able to use or enjoy the pool," and "[t]he

[1] Defendants maintain the CC&R are null and void because Whipple did not own the property and lacked the right to subject the property to covenants or restrictions. (R. pp. 22-23 ¶¶ 50-52).

[2] 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). (R. pp. 177-80, 191, 222, 242-48).

Defendants['] neglect of the Amenities Lot and the HOA open space lot has unreasonably interfered with the [HOA's] constituent member's use and ownership of their properties as well as their use of the common areas, causing damages." (R. pp. 6-9 ¶¶ 13, 23-24). William F. Barber, Jr. (the real estate developer who is funding this lawsuit against the Defendants) testified that the individual owners in the subdivision have been damaged by an alleged loss of "quiet enjoyment" of the pool, including the "visual aspects," noise, and odor, and that the market value of their properties has been harmed. (R. pp. 191, 222, 226-28, 234). The HOA's nuisance cause of action seeks recovery of "actual and consequential" damages against the Defendants, including Whipple. (R. p. 9).

On May 14, 2015, the Defendants (including Whipple) filed an Answer & Counterclaims. The Answer disputes that this action is being brought by a validly elected and operating HOA. (R. pp. 16-18, 23-24 ¶¶ 20-22, 53-61). The Answer asserts that "without proper power, authorization, or approval, persons or entities other than a duly elected, qualified, and authorized board of directors of [the HOA] caused the present lawsuit to be filed, commenced, and prosecuted against the Defendants." (R. p. 24 ¶ 61). The Answer also specifically seeks a judicial determination that the persons prosecuting this action have done so without proper authority and that "the present litigation was improperly commenced and prosecuted by [the HOA] and/or by persons or entities other than a duly elected, qualified, and authorized board of directors of [the HOA]." (R. pp. 24-25 ¶¶ 62-64).

Whipple's Answer also includes a counterclaim for indemnification against the HOA. (R. pp. 26-27 ¶¶ 66-71). The CC&R adopt and incorporate written Bylaws. Article XIII, Section 1, of the Bylaws states as follows:

> 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 [Whipple], against all contractual and other liabilities to others arising out

> of contracts made by or other act of such directors, Board, officers, committee members, or [Whipple], on behalf of the Owners, or arising out of their status as directors, Board, officers, committee members, unless such contract or act is contrary to the provisions of the laws of the State of South Carolina, the Declaration or these By-Laws or shall have been made fraudulently or with gross negligence or criminal intent. It is intended that the forgoing indemnification shall include indemnification against all cost and expenses (including, but not limited to, counsel fees, amounts of judgment paid and amounts paid in settlement) reasonably incurred in connection with the defense of any claim, action, suit or proceeding, whether civil, criminal, administrative or other, in which any such director, officer, Board, committee member or [Whipple], may be involved by virtue of such persons being or having been such directors, officer, Board, committee member, or [Whipple]; provided, however, that such indemnity shall not be operative with respect to (a) any matter as to which such person shall have been finally adjudged in such action, suit or proceeding to be liable for gross negligence or fraud in the performance of his duties as such director, officer, Board, committee member, or [Whipple]; or (b) any matter settled or compromised, unless, in the opinion of independent counsel selected by or in a manner determined by the Board, there is not reasonable ground for such persons being adjudged liable for gross negligence or fraud in the performance of his duties as such director, Board, officer, committee member or [Whipple].

(R. p. 75). Whipple's counterclaim asserts that it is "entitled to indemnification from [the HOA] for its attorney's fees, litigation expenses, and other costs incurred in defending this action" pursuant to Article XIII of the Bylaws. (R. pp. 26-27 ¶¶ 69, 71).

On February 1, 2016, the HOA filed a Motion for Partial Summary Judgment as to Whipple's counterclaim for indemnification. (R. pp. 30-32).[3] On April 16, 2016, Circuit Judge J.C. Nicholson, Jr. conducted a hearing on Plaintiff's motion and heard argument from the parties' attorneys. (R. pp. 127-58). On that same date, Whipple filed a memorandum of law in opposition to the HOA's motion and attached a copy of the CC&R. (R. pp. 33-79). At the hearing, Whipple also offered the transcript of William F. Barber, Jr.'s deposition. (R. p. 153, lines 14-22); (R. pp. 159-241).

[3] The HOA did not file any affidavit or other evidence with or in support of its motion, but based its motion solely on the allegations in the pleadings.

On April 27, 2016, Judge Nicholson entered an Order granting the HOA's motion. (R. pp. 1-3). Judge Nicholson ruled that Whipple cannot assert a counterclaim for indemnification against the HOA because the CC&R protects Whipple only from the claims of third parties, not from claims made by another contracting party to the indemnification provision (the HOA). Judge Nicholson further rejected Whipple's alternative argument that even if the CC&R is limited to indemnification for third-party claims, the HOA's motion still should be denied because the HOA is improperly attempting to bring claims against Whipple that rightfully belong to the individual members of the HOA. Whipple argued that the present claims in actuality are third-party claims by individual members of the subdivision which the HOA is improperly attempting to bring against Whipple in the HOA's name. Because Whipple is being required to defend against third-party claims posing as claims of the HOA, Whipple argued it is entitled to indemnification from the HOA under the terms of the Bylaws. However, Judge Nicholson rejected Whipple's argument that it is entitled to indemnification from the HOA for defending against those claims. His Order simply states that he "rejects Whipple's argument because only the [HOA] has been named as a party to this action." (R. p. 3).

On May 25, 2016, Whipple timely served its Notice of Appeal in this case.

ARGUMENTS

I. STANDARD OF REVIEW.

An appellate court reviews the granting of summary judgment under the same standard applied by the trial court. George v. Fabri, 345 S.C. 440, 548 S.E.2d 868, 873 n.5 (2001). "A party seeking summary judgment has the burden of clearly establishing by the record properly before the Court the absence of a triable issue of fact." Standard Fire Co. v. Marine Contracting & Towing Co., 301 S.C. 418, 392 S.E.2d 460, 462 (1990). All inferences from facts in the record must be viewed in the light most favorable to the party opposing the motion for summary judgment. Eagle Construction Co. v. Richland Construction Company, Inc., 264 S.C. 71, 212 S.E.2d 580 (1975).

"In order to withstand a motion for summary judgment in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence." Turner v. Milliman, 392 S.C. 116, 708 S.E.2d 766, 769 (2011). "Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law." Middleborough Horizontal Prop. Regime Council of Co-Owners v. Montedison S.p.A., 320 S.C. 470, 479, 465 S.E.2d 765, 771 (Ct. App. 1995) (citing Baugus v. Wessinger, 303 S.C. 412, 401 S.E.2d 169 (1991)). "Summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is dispute as to the conclusion to be drawn from those facts." Moriarty v. Garden Sanctuary Church of God, 341 S.C. 320, 534 S.E.2d 672, 675 (2000).

II. THE CIRCUIT COURT ERRED AS A MATTER OF LAW BY GRANTING SUMMARY JUDGMENT TO THE HOMEOWNERS' ASSOCIATION INVOLVING THE DECLARANT'S COUNTERCLAIM FOR INDEMNIFICATION BASED ON ITS CONCLUSION THAT THE ASSOCIATION'S CLAIMS AGAINST THE DECLARANT ARE NOT "THIRD-PARTY CLAIMS" WHEN THE PLEADINGS AND EVIDENCE SHOW THE ASSOCIATION IS IMPROPERLY ATTEMPTING TO BRING THE CLAIMS IN ITS REPRESENTATIVE CAPACITY ON BEHALF OF INDIVIDUAL OWNERS (I.E., THIRD PARTIES) FOR INJURIES THAT THE INDIVIDUAL OWNERS ALLEGEDLY SUSTAINED.

Citing Laurens Emergency Med. Specialist v. M.S. Bailey & Sons Bankers, 355 S.C. 104, 584 S.E.2d 375 (2003), the Circuit Court granted the HOA's motion for partial summary judgment as to Whipple's counterclaim for indemnification. In Laurens, the supreme court held that the intended purpose of an indemnification clause at issue in that case was protection against third-party claims (third-party indemnification), not reimbursement for claims between the parties themselves (second-party indemnification). In the case at bar, the Circuit Court found Laurens to be controlling and held that Article XIII of the Bylaws protects Whipple only from the claims of third parties, not from claims made by another contracting party to the indemnification provision (the HOA).

The Circuit Court also rejected Whipple's alternative argument that the HOA's summary judgment motion should be denied because the HOA is improperly attempting to bring claims against Whipple that rightfully belong to the individual members of the HOA. Whipple argued that the present claims in actuality are third-party claims by individual members of the subdivision which the HOA is improperly attempting to bring against Whipple in the HOA's name. The HOA is attempting to sue in a representational capacity on behalf of individual owners in the Cokers Commons subdivision; as such, the HOA stands in the shoes of the individual owners. Because Whipple is being required to defend against third-party claims posing as claims of the HOA, Whipple argued it is entitled to indemnification from the HOA under the terms of the Bylaws. The

Circuit Court's Order simply states that it "rejects Whipple's argument because only the [HOA] has been named as a party to this action." (R. p. 3). The Circuit Court refused to consider the nature of the claims that the HOA is attempting to assert against Whipple. Whipple respectfully submits that the Circuit Court erred as a matter of law in granting summary judgment to the HOA.

An association may have standing to bring suit either as a separate plaintiff on its own behalf to redress injury to the organization itself (individual standing) or as a representative of injured members of the organization (associational standing). See Maryland Highways Contractors Ass'n, Inc. v. State of Md., 933 F.2d 1246, 1250 (4th Cir. 1991); Georgetown Cty. League of Women Voters v. Smith Land Co., 393 S.C. 350, 359, 713 S.E.2d 287, 292 (2011) (Hearn, J., concurring in part and dissenting in part). First, "[a]n association may have standing in its own right to seek judicial relief from injury to itself and to vindicate whatever rights and immunities the association itself may enjoy." Warth v. Seldin, 422 U.S. 490, 511 (1975). To establish standing in its own right, the association must establish (1) that it "suffered an injury in fact," that is, "an invasion of a legally protected interest which is (a) concrete and particularized, meaning that the injury must affect the plaintiff in a personal and individual way, and (b) actual or imminent, not conjectural or hypothetical"; (2) that there is "a causal connection between the injury and the conduct complained of," that is, "the injury has to be fairly traceable to the challenged action of the defendant"; and (3) that there is a likelihood "that the injury will be redressed by a favorable decision." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992) (citations and internal quotation marks omitted). Our state courts have adopted the Lujan test. See Sea Pines Ass'n for Prot. of Wildlife, Inc. v. S. Carolina Dep't of Nat. Res., 345 S.C. 594, 550 S.E.2d 287, 291 (2001); Beaufort Realty Co. v. Beaufort Cty., 346 S.C. 298, 551 S.E.2d 588, 589 (Ct. App. 2001).

Second, if certain criteria are met, an association also may sue in a representative capacity. "When an organization is involved, the organization has standing on behalf of its members if one or more of its members will suffer an individual injury by virtue of the contested act." Sea Pines, 550 S.E.2d at 291 (citing Sierra Club v. Morton, 405 U.S. 727 (1972)). "Associational standing carves only a narrow exception from the ordinary rule that a litigant 'must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.'" Bano v. Union Carbide Corp., 361 F.3d 696, 715 (2nd Cir. 2004) (quoting Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 474 (1982)). Because "the policy behind permitting associational standing is to allow a group with shared resources to pursue a common, collective interest," the court's "analysis must center on whether the organization seeks to enforce the rights of the group as a whole and not just the right of an individual." Georgetown Cty., 713 S.E.2d at 292. "If the involvement of individual members of an association is necessary, either because the substantive nature of the claim or the form of the relief sought requires their participation, [there is] no sound reason to allow the organization standing to press their claims. . . ." Bano, 361 F.3d at 715.

To supplement the analysis for individual standing that our courts adopted from Lujan, our courts adopted another test from the United States Supreme Court regarding the standing of an organization to bring a claim on behalf of its members. Georgetown Cty., 713 S.E.2d at 292 (citing Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333 (1977)). Specifically, our courts adopted the test applied in Hunt wherein the Supreme Court established three prerequisites for an association

to sue in a representative capacity:

> [A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted, nor the relief requested, requires the participation of individual members in the lawsuit.

Hunt, 432 U.S. at 343; see also Beaufort Realty, 551 S.E.2d at 589 (citing Hunt); Georgetown Cty., 713 S.E.2d at 292 (citing Hunt). To satisfy the third prong of this test, "the organization must show that the right it seeks to vindicate is common to the membership and the interest of the harmed members in the proceedings derives from their membership." Georgetown Cty., 713 S.E.2d at 293 (citing Warth and Creek Pointe Homeowner's Ass'n, Inc. v. Happ, 552 S.E.2d 220, 227 (N.C. Ct. App. 2001)).

In this case, the HOA's Complaint alleges that Whipple failed to convey title to the "common areas of the Cokers Commons subdivision"—including areas known as the "Amenities Lot" (which encompasses a swimming pool) and the "HOA open space"—to the HOA in accordance with the CC&R, thus the HOA admits that it presently is not the owner of the common areas. (R. pp. 6-7 ¶¶ 11-13, 15-16). The Complaint further alleges that Mr. Terry and his entities (including Whipple and Westgate) "abandoned" and have "not kept up" the common areas and thus the common areas have become a nuisance due to neglect. (R. pp. 6-9 ¶¶ 13, 23-24). Because the HOA alleges that 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 injuries to its own property. Regardless, Whipple is not seeking indemnification from the HOA for any claims that the HOA may be bringing in its own right for alleged injuries to the HOA's own property. Instead, Whipple is seeking indemnification from the HOA for claims that the HOA is improperly attempting to pursue

in its representational capacity on behalf of individual owners for alleged injuries to the individual owners' property.

"Whether an association has standing to invoke the court's remedial powers on behalf of its members depends in substantial measure on the nature of the relief sought." Warth, 422 U.S. at 515. The HOA's nuisance cause of action seeks to recover money damages on behalf of the subdivision's individual owners for injuries the individual owners allegedly suffered. The HOA's Complaint specifically refers to alleged injuries that the "landowner members of" the HOA have suffered because of the matters alleged in the Complaint. The Complaint alleges that the neglected common areas (including the Amenities Lot and the HOA open space) "have become a blight to the neighborhood, negatively affecting the quality of life of the owners of Cokers Commons," that "[t]he landowner members" of the HOA "have not been able to use or enjoy the pool," and "[t]he Defendants[']' neglect of the Amenities Lot and the HOA open space lot has unreasonably interfered with the Plaintiff's constituent member's use and ownership of their properties as well as their use of the common areas, causing damages." (R. pp. 6-9 ¶¶ 13, 23-24). William F. Barber, Jr. (the developer who purchased lots in the Cokers Commons subdivision through his wife's entity and who is funding this lawsuit against the Defendants) testified that the individual owners in the subdivision have been damaged by an alleged loss of "quiet enjoyment" of the pool, including the "visual aspects," noise, and odor, and that the market value of their properties has been harmed. (R. pp. 191, 222, 226-228, 234). The HOA's nuisance cause of action seeks recovery of "actual and consequential" damages against the Defendants, including Whipple. (R. p. 9). These allegations seek recovery on behalf of the HOA's individual members for injuries that the individual members have allegedly suffered.

The HOA is improperly attempting to bring claims against Whipple in its representative capacity that rightfully belong to the individual members. Courts have consistently held that an organization cannot meet the third prerequisite of the Hunt test for organizational standing—that neither the claim asserted nor the relief requested requires participation of the individual members—when the organization seeks monetary damages on behalf of its members. This is because each member would have to establish individual damages and if the individual members must participate, no need exists for the association to do so. See Creek Pointe, 552 S.E.2d at 226-27 ("An organization generally lacks standing to sue for money damages on behalf of its members if the damage claims are not common to the entire membership, nor shared equally, so that the fact and extent of injury would require individualized proof."); River Birch Associates v. City of Raleigh, 388 S.E.2d 538, 555 (N.C. 1990) ("[W]here an association seeks to recover damages on behalf of its members, the extent of injury to the individual members and the burden of supervising the distribution of any recovery mitigates against finding standing in the association."); Rutherford Cty. v. Bond Safeguard Ins. Co., 2011 WL 809821, at *5 (W.D.N.C. Mar. 2, 2011) (homeowners' association lacked standing to seek money damages on behalf of its members because each member's damages would vary depending on the value of each member's lot in the development and "[a]s such, the damages claimed are 'not common to the entire membership, nor shared by all in equal degree.'" (citation omitted)); Bano, 361 F.3d at 714-15 ("Although the Bhopal organizations argue that they have the ability to pursue their members' damages claims without the participation of the members themselves, we disagree. The claims are that individuals have suffered bodily harm and damage to real property they own. Necessarily, each of those individuals would have to be involved in the proof of his or her claims. The district court did not err in concluding that the organizations lack standing to pursue these

claims."); Lake Lucerne Civic Ass'n, Inc. v. Dolphin Stadium Corp., 801 F. Supp. 684, 691 (S.D. Fla. 1992) (association lacked standing to seek compensatory damages on behalf of its members because the participation of individual members of the association would be required in assessing the damage claims because the amount of money damages sought varies, depending upon the particular circumstances of each individual member, and because the monetary relief requested will vary from member to member depending upon factors requiring their participation, i.e., their proximity to the stadium, the amount of noise and light allegedly emitted onto their property, proximity to pedestrian walkways); United Union of Roofers v. Ins. Corp. of Am., 919 F.2d 1398, 1400 (9th Cir. 1990) ("[N]o federal court has allowed an association standing to seek monetary relief on behalf of its members. The courts have consistently held that claims for monetary relief necessarily require individualized proof and thus the individual participation of association members, thereby running afoul of the third prong of the Hunt test."); Neighborhood Action Coalition v. Canton, Ohio, 882 F.2d 1012 (6th Cir. 1989) (association lacked standing to obtain compensatory relief on behalf of individual plaintiffs where the diminished value of each plaintiff's property as a result of the city's alleged conduct would require individualized proof); Telecommunications Research v. Allnet Communic. Servs., Inc., 806 F.2d 1093 (D.C. Cir. 1986) (nonprofit association lacked standing to pursue claim for money damages on behalf of its members).

Damages for alleged nuisance depend on the injuries actually suffered as a result of the nuisance. Any monetary damages to be awarded would call for individualized proof and would not necessarily be common to all. The participation of individual members of the HOA would be required in assessing the damage claims because the amount of money damages sought would vary depending upon the particular circumstances of each individual member. The money damages

requested will vary from member to member depending upon factors requiring their participation such as each member's view of or proximity to the allegedly blighted area, the number of times or frequency that each member has been prevented from using or enjoying the pool or amenities, and the manner in which the alleged nuisance has negatively affected the quality of life of each of the members. Each member of the HOA cannot claim to have suffered from the alleged nuisance in exactly the same way as every other member. In short, 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.

Courts have rejected attempts by individual members of a homeowners' association to circumvent their legal obligations by bringing suit in the name of the association rather than in their individual capacities for injuries that the individual members have allegedly sustained. For example, in Satomi Owners Ass'n v. Satomi, LLC, 225 P.3d 213 (Wash. 2009) (en banc), a developer built a condominium project consisting of commercial and residential units. Every purchaser of a residential unit executed a warranty addendum containing an arbitration clause. After the condominium association filed a construction defect lawsuit against the developer, the developer moved to compel arbitration of the association's claims based on the arbitration clause agreed to by the individual unit owners. On appeal, the Washington Supreme Court held that the association was bound by the arbitration provision even though it was not a signatory. The court held that the "claims against [the developer] are brought solely in a representative capacity by [the association] on behalf of its members who own the allegedly damaged property." Id. at 230–31. Because the association was bringing the claims on behalf of the individual unit owners in a representative capacity, the court held that the arbitration clause was "enforceable against [the association] to the same extent as it would have been against the unit owners." Id. at 231.

Similarly, in Stanford Dev. Corp. v. Stanford Condo. Owners Ass'n, 285 S.W.3d 45 (Tex. Ct. App. 2009), the Texas Court of Appeals examined the issue of "whether a condominium homeowners' association that brings suit against the condominium developer on behalf of its homeowners is bound by arbitration agreements in earnest money contracts between the developer and the individual homeowners." Id. at 46-47. In holding that the association was bound by the arbitration agreements even though the association was not a signatory to those agreements, the court "conclude[d] that because the Association is suing 'on behalf of' the individual condominium owners, it stands in their shoes and is also bound by any arbitration provisions that bind them." Id. at 49. The court found that "[t]he Association's pleading clearly alleges that it is bringing suit on behalf of its constituent owners," "[a]lthough the Association has standing to bring the suit, its rights are limited to those possessed by the people it represents," and "[b]ecause the homeowners are bound by arbitration agreements, and the Association has sued on their behalf, it, too, is bound by the agreements." Id. at 50; see also Pinnacle Museum Tower Assn. v. Pinnacle Mkt. Dev. (US), LLC, 282 P.3d 1217, 1228 (Cal. 2012) ("[C]ondominium owners should not be permitted to thwart the expectations of a developer by using an owners association as a shell to avoid an arbitration covenant in a duly recorded declaration.").

In the present case, because the HOA is attempting to bring claims against Whipple in its representative capacity for injuries allegedly suffered by the individual owners, the HOA stands in the shoes of the individual owners and the HOA's claims should be treated as claims by the individual owners—i.e., the claims should be treated as "third-party claims." Although the HOA is the named plaintiff in this action, the claims in actuality are "third-party claims" by individual owners which the HOA is improperly attempting to bring against Whipple in the HOA's name.

Whipple is being required to defend against claims of third parties brought under the guise of the HOA. If the subdivision's individual owners had sued Whipple in their own names, Whipple could have sought indemnification from the HOA under Article XIII of the Bylaws. The individual owners should not be allowed to circumvent or avoid the indemnification provision by bringing suit against Whipple in the HOA's name rather than in their individual capacities for injuries that the individual owners have allegedly suffered. The Circuit Court erred as a matter of law by holding that Whipple is not entitled to indemnification from the HOA for defending against those claims.

CONCLUSION

For the reasons stated, this Court should reverse the Circuit Court's Order granting Respondent's motion for partial summary judgment as to Appellant's counterclaim for indemnification and should remand the case to the Circuit Court for further proceedings accordingly.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Brief of Appellant complies with Rule 211(b), SCACR.

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