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.

REPLY BRIEF OF APPELLANT

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

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I. WHIPPLE HAS STANDING TO BRING THIS APPEAL.

Respondent Cokers Common Homeowner's Association, Inc. ("HOA") makes the brand new arguments on appeal that Appellant Whipple Development Corporation ("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 argument 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. In short, Whipple is asserting its own rights in this appeal; not the rights of any non-parties. Because the entire underpinning for the HOA's argument is incorrect, the argument should

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[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).

be rejected.

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). (R. pp. 177-80, 191, 222, 242-48). 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." (R. p. 123).

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. (R. pp. 5-8 ¶¶ 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"). (R. p. 222 ¶ 50) (hereinafter "Answer"); (R. pp. 42-79).[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. (R. pp. 4-5, 8-9 ¶¶ 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. (R. pp. 6-7 ¶¶ 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." (R. p. 7 ¶ 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." (R. pp. 6-7 ¶ 13). This same paragraph asserts that "as described herein [*i.e.*, as stated in other 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

[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"). (R. p. 6 ¶ 9) (R. pp. 14-15, 22-23 ¶¶ 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. (R. pp. 5-8 ¶¶ 4, 7, 13, 20).

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." (R. pp. 8-9 ¶ 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." (R. p. 9 ¶ 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.**

(R. p. 9) (underlining in original; bold added).

The Complaint specifically alleges 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."). 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 against Whipple for alleged nuisance and seeks a monetary recovery from Whipple, the HOA's assertion that Whipple lacks standing to seek indemnification against the claim is meritless.

[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).

II. WHIPPLE'S ARGUMENTS WERE PROPERLY PRESENTED TO AND RULED ON BY THE TRIAL COURT; THEREFORE, THE ISSUES ARE PRESERVED FOR APPEAL.

A linchpin to the HOA's appellate brief is its erroneous contention that Whipple's indemnification claim and, therefore, this appeal depend on a finding that the HOA lacks standing to assert the claims raised in its Complaint.[4] However, the HOA fundamentally misunderstands the law of indemnification as well as Whipple's arguments in the Circuit Court and on appeal. Neither Whipple's claim for indemnification nor this appeal depend on a finding that the HOA lacks standing to assert the claims raised in its Complaint. *Instead, Whipple is entitled to indemnification regardless of the HOA's standing to assert the claims raised in its Complaint.*

Whipple has consistently argued in the Circuit Court and on appeal that it is entitled to indemnification from the HOA because the HOA is attempting (albeit improperly) to bring claims against Whipple that rightfully belong to the individual members of the HOA and that the HOA's claims in actuality are third-party claims by individual members of the subdivision which the HOA is 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, thus the HOA's claims should be treated as claims by the individual owners—*i.e.*, the claims should be treated as "third-party claims" for indemnification purposes. Because Whipple is being required to defend against third-party claims posing as claims of the HOA, Whipple is entitled to indemnification from the HOA under the terms of the Bylaws.

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[4] The HOA also never raised this argument to the Circuit Court and the Circuit Court never ruled on it. It was first presented on appeal, thus this Court "is likely to ignore it." I'On, L.L.C., 526 S.E.2d at 724; Semken, 664 S.E.2d at 497-98.

This is the same argument that Whipple made to the Circuit Court and on which the Circuit Court made a ruling. The Circuit Court ruled that it "rejects Whipple's argument because only the [HOA] has been named as a party to this action." (R. p. 3). It refused to consider the nature of the claims that the HOA is asserting against Whipple. Instead, the Circuit Court found solely dispositive the fact that the HOA is the only named plaintiff in the case caption. The Circuit Court refused to go beyond the named parties in the pleading to determine if the HOA's claims are actually being brought on behalf of third parties who are not named in the caption.

The fatal flaw in the HOA's reasoning on appeal is that it altogether fails to appreciate that Whipple is entitled to indemnification from the HOA regardless of whether or not the HOA actually has standing to assert claims in a representational capacity on behalf of individual owners in the Cokers Commons subdivision. *Whipple does not have to show that the HOA's claims have merit or lack merit to be entitled to indemnification.* Instead, Whipple merely has to show that the allegations in the HOA's Complaint raise claims in a representational capacity on behalf of individual owners in the Cokers Commons subdivision (*i.e.*, third-party claims) that are covered by the indemnification provision. Whipple has made that showing. As shown in Whipple's initial brief and above, although the HOA is the named plaintiff, 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.[5] The individual owners actually took a vote to authorize the HOA to bring this

[5] 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

action on their behalf. (R. p. 123). Indeed, the HOA's own appellate brief argues that the HOA's Complaint has properly asserted a nuisance claim for money damages in a representational capacity on behalf of the individual owners. See HOA's Initial Brief pp. 13-17. This triggers Whipple's right to indemnification regardless of whether or not the HOA is actually entitled to assert claims on behalf of the individual members. It matters not whether the HOA actually has standing to assert a nuisance claim for money damages on behalf of the individual members; what matters simply is that the HOA has asserted the claim against Whipple.

Under indemnification law, an "[i]ndemnitor's duty to defend a lawsuit against its indemnitee is totally independent from its obligation to indemnify in the event a judgment is rendered." 42 C.J.S. Indemnity § 3 (2016); see Parks v. W. Washington Fair Ass'n, 553 P.2d 459, 461 (Wash. Ct. App. 1976); Smith v. Board of Educ. of Wooster, 1991 WL 168588, *1 (Ohio Ct. App. 1991). Thus, "an indemnitor's duty to defend [under an indemnification agreement] does not depend on the merits of the claim asserted; instead, the duty to defend arises when potential liability is asserted against the indemnitee." 42 C.J.S. Indemnity § 3 supp. (citing Estate of Kriefall v. Sizzler USA Franchise, Inc., 816 N.W.2d 853, 869 (Wis. 2012)). "The rule in most jurisdictions, regardless of whether indemnity is based upon an implied or an express agreement, is that when a claim is made against an

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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) further 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). These allegations seek recovery on behalf of the HOA's individual members for injuries that the individual members have allegedly suffered.

indemnitee for which he is entitled to indemnification, the indemnitor is liable for any reasonable expenses incurred by the indemnitee in defending against such claim, regardless of whether the indemnitee is ultimately held liable." Pike Creek Chiropractic Center, P.A. v. Robinson, 637 A.2d 418, 420 (Del. 1994) (citing cases); see English v. BGP Int'l, Inc., 174 S.W.3d 366, 370 (Tex. Ct. App. 2005); Bethlehem Steel Corp. v. Sercon Corp., 654 N.E.2d 1163, 1169 (Ind. Ct. App. 1995); Shannon v. Kaiser Aluminum and Chemical Corp., 749 F.2d 689, 690 (11th Cir. 1985); Kelloch v. S & H Subwater Salvage, Inc., 397 F. Supp. 742, 745 (E.D. La. 1973).

The indemnification provision at issue in this case expressly states that the HOA "shall indemnify and hold harmless" Whipple "against all contractual and other liabilities to others arising out of" its status as the Declarant and "[i]t 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 [such] claim, action, suit or proceeding." (R. p. 75). Thus, the provision entitles Whipple to indemnification from the HOA for its attorney's fees and expenses incurred in defending against third-party claims, not simply indemnification against a judgment.

In Stevens Aviation, Inc. v. Blackhawk Modifications, Inc., 2015 WL 1486908 (D.S.C. 2015), which applied South Carolina law to the alleged breach of an indemnification agreement, the district court looked to case law in the insurance context to determine whether the indemnitor had breached its duty to defend the indemnitee. The Court construed the allegations in the pleadings in the underlying lawsuits in conjunction with the indemnification agreement "to decide whether the

claims asserted in those actions triggered the plaintiff's duty to defend . . . ." Id. *4.[6]

In the insurance context, "a defense [must] be furnished even if any of the allegations of the suit are groundless, false or fraudulent." Sloan Constr. Co. v. Central Nat. Ins. Co., 269 S.C. 183, 236 S.E.2d 818, 820 (1977). The "duty to defend depends on an initial or apparent potential liability to satisfy [a] judgment" against the insured and the "duty to defend exists regardless of the insurer's ultimate liability to the insured." Id. "If the underlying complaint creates a possibility of coverage under an insurance policy, the insurer is obligated to defend." Isle of Palms Pest Control Co. v. Monticello Ins. Co., 319 S.C. 12, 459 S.E.2d 318, 319 (Ct. App. 1994) (citation omitted).[7]

Applying these principles to the present case, the HOA had a duty to defend Whipple if the allegations in the underlying suit and the other facts available to the HOA could be construed as possibly falling within the indemnification provision. Lafarge North America, Inc. v. K.E.C.I.

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[6] Stevens Aviation is consistent with numerous other decisions holding that case law involving the duty to defend in the insurance context are equally applicable to an indemnitor's contractual obligation to defend its indemnitee. English, 174 S.W.3d at 372 & n.6; Fisk Elec. Co. v. Constructor's & Assoc., Inc., 888 S.W.2d 813, 815 (Tex. 1994); Ferro Corp. v. Cookson Group, PLC, 585 F.3d 946, 951 n.3 (6th Cir. 2009); Gen. Motors Corp. v. Am. Ecology Envtl. Svcs. Corp., 2001 WL 1029519, at *6–8 (N.D. Tex. Aug.30, 2001); Pancakes of Hawaii, Inc. v. Pomare Properties Corp., 944 P.2d 83, 88-89 (Haw. Ct. App. 1997); National Union Fire Ins. Co. of Pittsburgh Pennsylvania v. Starplex Corp., 188 P.3d 332, 340 (Or. Ct. App. 2008); J.R. Simplot Co. v. Chevron Pipe Line Co., 2006 WL 2796887, *11 n.10 (D. Utah 2006).

[7] "Although the cases addressing an insurer's duty to defend generally limit this duty to whether the allegations in a Complaint are sufficient to bring the claims within the coverage of an insurance policy, an insurer's duty to defend is not strictly controlled by the allegations in Complaint." USAA Property and Cas. Ins. Co. v. Clegg, 377 S.C. 643, 661 S.E.2d 791, 798 (2008). "Instead, the duty to defend may also be determined by facts outside of the complaint that are known by the insurer." Id.; see also BP Oil Co. v. Federated Mut. Ins. Co., 329 S.C. 631, 496 S.E.2d 35, 39 (Ct. App. 1998) ("Although the determination of an insurer's duty to defend is based upon the allegations in a complaint ... in some jurisdictions, the duty to defend will be measured by facts outside of the complaint that are known by the insurer."). As noted above, in addition to the allegations in the Complaint, the HOA has the deposition testimony of Mr. Barber who provides further information regarding the damages being claimed in this lawsuit.

Colorado, Inc., 250 P.3d 682, 688 (Colo. Ct. App. 2010) (indemnitor's "duty to defend was triggered so long as the injured party alleged facts even potentially triggering the obligation to indemnify"). If, reading the allegations of the Complaint against Whipple and the other known information, there are any facts that could possibly bring the action within the indemnification provision, then a duty to defend exists. The actual merits of the claim are immaterial to the question of whether the HOA has an obligation to defend Whipple. As shown in the preceding section of this brief, the HOA's Complaint and Mr. Barber's testimony show the HOA is asserting a nuisance claim for money damages on behalf of its individual members (*i.e.*, a third-party claim) that is within the indemnification provision. The individual owners voted to authorize the HOA to bring this action on their behalf. (R. p. 123). The HOA's own brief argues that it has properly asserted a nuisance claim for money damages in a representational capacity on behalf of the individual owners. See HOA's Initial Brief pp. 13-17. The HOA's brief nowhere argues that Whipple is not entitled to defense expenses and costs if the HOA's nuisance claim is treated as a third-party claim.

In English, the Texas Court of Appeals rejected arguments similar to the HOA's arguments in this case. In that case, the indemnitee under an indemnification agreement brought a declaratory judgment action against the indemnitor seeking a declaration that the indemnitor must defend and indemnify the indemnitee in numerous pending lawsuits. The indemnitor argued in response that "[the indemnitee's] request for indemnification was premature and not ripe for adjudication until after the conclusion of the underlying Hidalgo County lawsuits." 174 S.W.3d at 369. The indemnitor also claimed that "because there has been no determination that it must indemnify [the indemnitee], [the indemnitor] has no responsibility to bear the costs of providing a defense for [the indemnitee]." Id. at 371. "Instead, [the indemnitor] claim[ed] its duty to defend, or pay costs of defense, only

arises if and when [the indemnitor] is determined to owe a duty of indemnification." Id. The indemnitor argued "the duty to defend is not a justiciable question until a determination has been made on the issue of liability." Id. However, the Court specifically rejected this argument and found the claim ripe for review. In so holding, the Court observed that "numerous [other] courts have held that the duty to defend, unlike the duty to indemnify, is, in most situations, a justiciable issue" even before liability is determined in the underlying lawsuit. Id. at 371 & n.4 (citing cases); see also Medline Industries, Inc. v. Ram Medical, Inc., 892 F.Supp.2d 957, 964-65 (N.D. Ill. 2012) ("The duty to defend arises if the complaint's allegations fall within or potentially within the policy's coverage. . . . Therefore a claim for breach of duty to defend is ripe during the pendency of the underlying suit." (citation omitted)); Tower Nat. Ins. Co. v. Dixie Motors, 2015 WL 2452336, *2 (E.D. La. 2015) ("Because the duty to defend does not depend on the outcome of the underlying law suit but rather upon the allegations in the pleadings, a duty to defend claim is ripe, and presents an actual case or controversy when the underlying suit is filed."); Westfield Ins. Co. v. Sheehan Const. Co., 575 F.Supp.2d 956, 959 (S.D. Ind. 2006) ("Because the duty to defend question usually does not depend on the outcome of the underlying action, there is no barrier to resolving that question before the underlying litigation is resolved.").

III. THE HOA'S ARGUMENTS REGARDING ITS STANDING TO ASSERT CLAIMS ON BEHALF OF ITS MEMBERS ARE IMMATERIAL TO THE RESOLUTION OF THIS APPEAL.

The HOA spends considerable space in its brief attempting to show that the HOA does in fact have associational standing to assert a nuisance claim for money damages on behalf of individual owners in the Cokers Commons subdivision. As discussed above, Whipple's indemnification claim does not depend on a finding that the HOA lacks standing to assert any claims in this case. Although

Whipple disagrees with the HOA's argument that it has associational standing to assert a nuisance claim for money damages on behalf of individual owners,[8] Whipple is entitled to indemnification from the HOA regardless of whether or not the HOA actually has such standing. Whipple simply has to show that the allegations of the Complaint and the other known information reflect claims by the HOA in a representational capacity on behalf of individual owners in the subdivision (*i.e.*, third-party claims) that are covered by the indemnification provision. Whipple has made that showing.

The HOA's arguments regarding its standing to bring claims on behalf of the individual members are meaningless to the resolution of this appeal.

IV. WHIPPLE'S ASSERTION OF ALTERNATIVE AND INCONSISTENT DEFENSES DOES NOT MAKE THEM "UNRIPE" FOR DETERMINATION.

The HOA takes the rather puzzling position that Whipple cannot assert any rights under the CC&R (which contain the indemnification provision) because Whipple sets forth the inconsistent position in another portion of its pleading that the CC&R are null and void. Whipple's pleading asserts in the alternative that because it did not own the property when the CC&R were recorded—the property was owned by Westgate—it lacked the right to subject the property to covenants or restrictions and thus the CC&R are null and void. (R. pp. 222-23 ¶¶ 50-52).

The fact that Whipple raises alternative and inconsistent defenses in its pleading does not make them "unripe" for determination. The validity of the CC&R is an issue that can be determined based on the facts currently available. Likewise, the validity of Whipple's indemnification claim arising from the CC&R can be determined based on the facts currently available. Neither claim is

[8] Notably, the HOA's brief fails to cite a single case from any court anywhere in the country holding that an organization has associational standing to bring a nuisance claim seeking monetary damages on behalf of the organization's individual members.

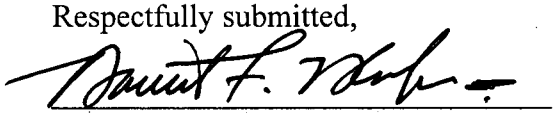
dependent on contingent or hypothetical events that have not yet occurred.

Furthermore, the Rules of Civil Procedure specifically state that "[a] party may set forth two or more statements of a cause of action or defense alternatively or hypothetically, either in one count or defense or in separate counts or defenses" and that "[w]hen two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements." S.C. R. CIV. PRO. 8(e)(2). "A party may also state as many separate causes of action or defenses as he has regardless of consistency and whether based on legal or on equitable grounds or on both." Id.

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,



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

March 23, 2017.

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.

CERTIFICATE OF COUNSEL

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

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

March 23, 2017.