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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.

PETITION FOR REHEARING

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Appellant Whipple Development Corporation ("Whipple") petitions this Court for a rehearing of its unpublished opinion filed on May 9, 2018.

The core argument that Whipple raised to this Court in its appeal is that Respondent Cokers Common Homeowner's Association, Inc.'s ("HOA") lawsuit is asserting (albeit improperly) a nuisance claim on behalf of the HOA's individual members for actual and punitive damages the individual members supposedly have incurred, which triggers Whipple's right to indemnification from the HOA under the indemnification provision contained in the HOA's Bylaws (the "Bylaws").[1] The HOA does not dispute that if the individual members had brought nuisance claims for money damages against Whipple in their own names for the subject matters referenced in the Complaint, then Whipple would be entitled to indemnification from the HOA pursuant to the indemnification provision in the Bylaws. However, because the individual members chose to prosecute this lawsuit in the HOA's name rather than in their own names (despite the fact they seek damages for their individual injuries), these same members maintain they have successfully circumvented or defeated Whipple's contractual right to indemnification from the HOA.

This Court's one-sentence opinion summarily affirms the Circuit Judge's order granting summary judgment in favor of the HOA as to Whipple's Counterclaim for indemnification, which the Circuit Judge based on his conclusion that the indemnification provision provides protection only

[1] The indemnification provision in the Bylaws provides in pertinent part that the HOA "shall indemnify and hold harmless" Whipple against "contractual and other liabilities to others" and "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.

against third-party claims (so-called third-party indemnification), not protection for claims between the parties to the indemnification provision themselves (so-called second-party indemnification). This Court's opinion is devoid of analysis, reasoning, or discussion of the issues, but cites to case law standing for the proposition that indemnification provisions normally protect only from the claims of third parties, not from claims made by another contracting party to the indemnification provision. Respectfully, that was not the issue before this Court. The cases cited in this Court's opinion do not rule on or discuss the core issue framed in Whipple's appeal.

The question before this Court is not whether the indemnification provision contained in the Bylaws provides protection for claims between the parties to the indemnification provision themselves (second-party indemnification). Indeed, Whipple did not quarrel with the Circuit Judge's ruling that the indemnification provision in the Bylaws is a third-party indemnification provision, not a second-party indemnification provision. For purposes of the appeal, it was undisputed that the indemnification provision provides protection only against third-party claims.

Rather, the dispositive question before this Court is whether the indemnitee under such a third-party indemnification provision is entitled to indemnification when third-party claims have been improperly brought in the name of the indemnitor (another party to the indemnification provision) rather than in the names of the third parties. This Court's opinion nowhere addresses, discusses, or even acknowledges that issue.

Whipple clearly argued in the Circuit Court and to this Court that it is entitled to indemnification because the HOA is attempting (albeit improperly) to bring claims against Whipple that rightfully belong to the individual members of the HOA. The individual members of the HOA are not parties to the indemnification provision—i.e., they are "third-parties." 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.[2]

As a result, Whipple is not and has not been seeking so-called second-party indemnification; *rather, it is specifically seeking third-party indemnification.* Importantly, Whipple is not seeking indemnification from the HOA for any claims the HOA may be bringing in its own right for alleged injuries to the HOA's own property. Instead, Whipple is simply seeking indemnification from the HOA for claims the HOA is attempting to pursue in its representational capacity on behalf of the individual owners for alleged injuries to the individual owners' property. This Court's opinion fails to recognize or misapprehends this critical distinction.

Because the HOA is attempting to sue in a representational capacity on behalf of individual owners in the Cokers Commons subdivision, the HOA stands in the shoes of those individual owners and the HOA's claims are treated as if they are claims by the individual owners—i.e., the claims are treated as "third-party claims" for indemnification purposes even if the HOA is the only party named as a plaintiff. Satomi Owners Ass'n v. Satomi, LLC, 225 P.3d 213 (Wash. 2009) (en banc); Stanford Dev. Corp. v. Stanford Condo. Owners Ass'n, 285 S.W.3d 45 (Tex. Ct. App. 2009); Pinnacle Museum Tower Assn. v. Pinnacle Mkt. Dev. (US), LLC, 282 P.3d 1217, 1228 (Cal. 2012). For example, in Zephyr Lofts Condominium Ass'n, Inc. v. Henderson Lofts Urban Renewal, L.L.C.,

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[2] As shown in the record, William F. Barber, Jr. (the developer who purchased lots in the Cokers Commons subdivision through his wife's company and who is funding, controlling, and orchestrating this lawsuit against the Defendants) and Kerine Borrillo (another landowner in the subdivision) signed a document expressly 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). Thus the individual owners specifically voted to authorize the HOA to bring this action on their behalf.

2009 WL 3416051 (N.J. Super. Ct. App. Div. 2009), the New Jersey appellate court addressed a similar situation and stated:

> In this case, plaintiff [condominium association] chose to include the unit owners' claims in its complaint. Having done so, plaintiff is bound by the unit owners' agreements to arbitrate and must submit all of the claims in the complaint to arbitration. To conclude otherwise would allow the unit owners to do an end-run around their arbitration agreements merely because plaintiff is asserting the claims and the unit owners are not named as plaintiffs in the complaint.

Id. at *3.

Because the HOA is suing Whipple for damages on behalf of its individual members, Whipple is being required to defend against claims of third parties posing as claims of the HOA. If the subdivision's individual owners had sued Whipple in their own names, the HOA would be required to indemnify Whipple under the Bylaws. The individual owners cannot circumvent or avoid the indemnification provision by bringing suit against Whipple in the HOA's name rather than in their individual names for injuries the individual owners have allegedly suffered.[3]

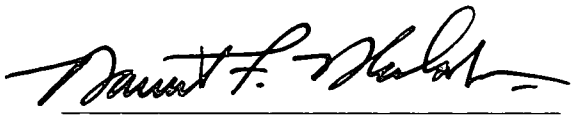
[3] In this case, the HOA's Complaint expressly refers to injuries the "landowner members of" the HOA allegedly have suffered because of the matters stated in the Complaint. The Complaint alleges that the Amenities Lot and the HOA open space owned by Whipple "have become a blight to the neighborhood, 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). Mr. Barber 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. 177-80, 191, 222, 226-28, 234, 242-48). The HOA's nuisance cause of action seeks recovery of "actual and consequential" damages against the Defendants, including Whipple. (R. p. 9). These allegations clearly seek recovery on behalf of the HOA's individual members for injuries that the individual members have allegedly suffered.

Because Whipple is being required to defend against third-party claims brought under the guise of the HOA, Whipple is entitled to indemnification from the HOA pursuant to the Bylaws. This Court's opinion fails to discuss the question of whether the indemnitee under a third-party indemnification provision is entitled to indemnification when third-party claims have been brought in the name of the indemnitor. It fails to address the core issue in the appeal.

The absence of meaningful analysis or discussion has rendered Whipple unable to respond to the basis for the Court's affirmance of the Circuit Judge's order. It has been observed that "[e]mpty words devoid of analysis are not enough to satisfy a thoughtful conscience." Kennedy v. Singletary, 599 So.2d 991, 995 (Fla. 1992) (Kogan, J., concurring); see Fayette County Nat. Bank v. Lilly, 484 S.E.2d 232, 237 n.8 (W.Va. 1997) ("When we are through with our analysis, we render written findings, i.e., opinions which set out reasons that explain our decisions. Were we to continue to follow the logic of [courts that do not require findings in orders granting summary judgment], we must ultimately concede that this Court cannot render opinions rationalizing our decisions when reviewing summary judgment orders.").

In summary, Whipple respectfully submits the Court has overlooked or failed to apprehend Whipple's core argument in this appeal. For this reason, Whipple respectfully requests this Court to grant a rehearing on the issues in this appeal or, in the alternative, to issue a revised opinion reversing the Circuit Court's Order granting the Respondents' Motion for Summary Judgment and to remand this action for further proceedings accordingly.

Respectfully submitted,



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May 18, 2018.

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PROOF OF SERVICE

I certify that I have served the Appellant's Petition for Rehearing on the Respondent by mailing copies to its attorneys of record on May 18, 2018 via first-class mail, postage prepaid, and addressed as follows:

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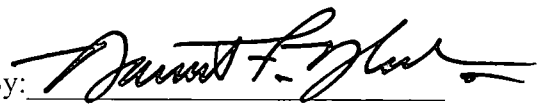
By: 

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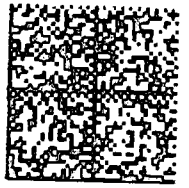

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