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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas
J.C. Nicholson, Jr., Circuit Judge

Court of Common Pleas Case No. 2015-CP-08-00547
Opinion No. 2018-UP-191 (S.C. Court of Appeals filed May 9, 2018)

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

Petitioner.

APPENDIX (Volume 1 of 2)

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**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

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.

Appellate Case No. 2016-001156

Appeal From Berkeley County
J. C. Nicholson, Jr., Circuit Court Judge

Unpublished Opinion No. 2018-UP-191
Submitted April 1, 2018 – Filed May 9, 2018

AFFIRMED

Daniel Francis Blanchard III, of Rosen Rosen & Hagood,
LLC, and Russell Britton Kelly, of Kelly Law Firm,
LLC, both of Charleston, for Appellant.

Brent Souther Halversen, of Halversen & Associates,
LLC, and Thomas James Rode and Michael A. Timbes,

both of Thurmond Kirchner & Timbes, P.A., all of
Charleston, for Respondent.

PER CURIAM: Affirmed pursuant to Rule 220(b), SCACR, and the following authorities: Rule 56(c), SCRCP ("[Summary] judgment . . . shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."); *Laurens Emergency Med. Specialists, PA v. M.S. Bailey & Sons Bankers*, 355 S.C. 104, 109, 584 S.E.2d 375, 377 (2003) ("Upon review, an appellate court reviews the grant of summary judgment under the same standard as the [circuit] court."); *Campbell v. Beacon Mfg. Co.*, 313 S.C. 451, 453, 438 S.E.2d 271, 272 (Ct. App. 1993) ("Indemnity is that form of compensation in which a first party is liable to pay a second party for a loss or damage the second party incurs to a third party."); *Laurens Emergency Med. Specialists*, 355 S.C. at 110, 584 S.E.2d at 378 ("[T]he default rule of interpretation for indemnity clauses is that third party claims are a prerequisite to indemnification."); *Campbell*, 313 S.C. at 453, 438 S.E.2d at 272 ("A contract of indemnity will be construed in accordance with the rules for the construction of contracts generally."); *Jordan v. Sec. Grp, Inc.*, 311 S.C. 227, 230, 428 S.E.2d 705, 707 (1993) ("[When] the language of a contract is plain and capable of legal construction, that language alone determines the instrument's force and effect.").¹

AFFIRMED.²

LOCKEMY, C.J., and WILLIAMS and KONDUROS, JJ., concur.

¹ The arguments on the issue of standing are not preserved for this court's review. *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("[A]n issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the [circuit court] to be preserved for appellate review.").

² We decide this case without oral argument pursuant to Rule 215, SCACR.

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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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MAY 21 2018
SC Court of Appeals

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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.,

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

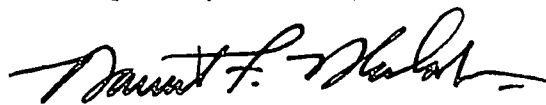
³ In this case, the HOA's Complaint expressly refers to injuries the "landowner members of" the HOA allegedly have suffered because of the matters stated in the Complaint. The Complaint alleges that the Amenities Lot and the HOA open space owned by Whipple "have become a blight to the neighborhood, negatively 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.

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

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MAY 21 2018

SC Court of Appeals

COKERS COMMONS HOMEOWNER'S ASSOCIATION, INC.,

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v.

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Defendants.

Of which WHIPPLE DEVELOPMENT CORPORATION is the

Appellant.

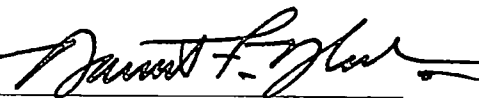
PROOF OF SERVICE

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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May 18, 2018.

The South Carolina Court of Appeals

Cokers Commons Homeowner's Association, Inc.,
Respondent,

v.

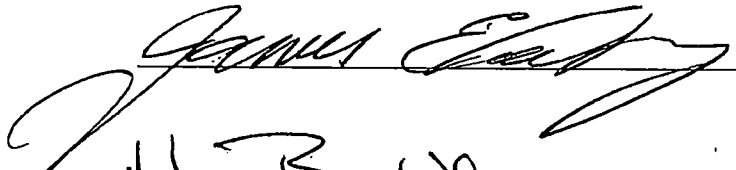
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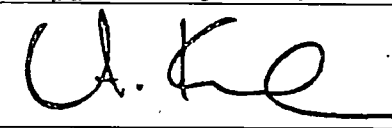
Appellate Case No. 2016-001156

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.


C.J.


J.


J.

Columbia, South Carolina

FILED

June 21, 2018

cc:

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The Honorable J. C. Nicholson, Jr.

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

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SC Court of Appeals

COKERS COMMONS HOMEOWNER'S ASSOCIATION, INC.,

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Defendants.

Of which WHIPPLE DEVELOPMENT CORPORATION is the

Appellant.

BRIEF OF APPELLANT

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 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.8

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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.”).

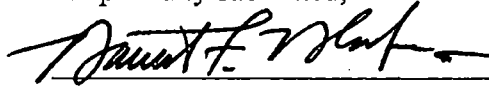
In the present case, because the HOA is attempting to bring claims against Whipple in its representative capacity for injuries allegedly suffered by the individual owners, the HOA stands in the shoes of the individual owners and the HOA’s claims should be treated as claims by the individual owners—i.e., 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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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 Brief of Appellant complies with Rule 211(b), SCACR.


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MAR 24 2017

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In the Court of Appeals

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MAR 27 2017

SC Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

The Honorable J.C. Nicholson, Jr., Circuit Court Judge

Appellate Case No. 2016-001156
Circuit Case No. 2015-CP-08-00547

Cokers Commons Homeowner's Association, Inc.....Respondent,

v.

Park Investors, LLC, CCT Reserve, LLC, f/k/a Harris Street, LLC and Whipple
Development Corporation.....Defendants

Of which Whipple Development Corporation.....Appellant.

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STATEMENT OF THE ISSUES

- I. Is the issue raised by Appellant properly before this Court considering that the Appellant lacks appellate standing to challenge the HOA's standing to assert claims against Non-Appealing Parties and, further, that the Appellant's argument attacking the HOA's standing is not preserved for appellate review?
- II. Did the trial court properly grant the HOA's Motion for Partial Summary Judgment because the HOA has standing to assert its claims and there is no right of second-party indemnification under the applicable bylaws?
- III. Did the trial court properly conclude the subject indemnification provision applies only to third-party claims, and there are no third-party claims asserted in this action?
- IV. Is Appellant's argument, as presented, ripe for appellate review?

STATEMENT OF THE CASE

This appeal arises from an action commenced by Respondent, Cokers Commons Homeowner's Association, Inc. (the "HOA"), against several defendants, including Whipple Development Corporation (the "Appellant") pursuant to the Declarations of Covenants, Conditions and Restrictions for Cokers Commons Home Owner's Association, Inc. (the "CCRs").

As set forth in its Complaint, the HOA asserted a claim against Appellant solely for "declaratory relief" under the CCRs. Specifically, the HOA seeks a declaration of the HOA's rights as to certain common areas described in the CCRs. The HOA brought separate claims for specific performance and nuisance against other named defendants,¹ but those causes of action are not asserted against Appellant. (R. pp. 4-10). Appellant answered and asserted counterclaims against the HOA. Of relevance to this Appeal is Appellant's counterclaim against the HOA seeking indemnification against third-party claims under the CCRs. (R. pp. 11-29).

On February 1, 2016, the HOA filed a Motion for partial summary judgment as to Appellant's counterclaim for indemnification. Among other things, the HOA argued the

¹ These other claims were against Park Investors, LLC, and Harris Street, LLC.

indemnification provision contained in the Bylaws of the CCRs did not provide for indemnification for second-party claims (i.e., a direct claim between the HOA and Appellant), but instead was limited only to third-party indemnification claims. (R. pp. 30-32) and (R. pp. 80-85). Opposing this Motion, Appellant argued the indemnification agreement did contemplate second-party indemnification. Appellant also claimed, “even assuming *arguendo* that the Bylaws only provide for indemnification in the context of third-party claims . . . [Appellant] is being required to defend against third party claims posing as claims of the HOA, thus the indemnification provision applies.” (R. pp. 38-39).

After a hearing held on April 15, 2016, the trial court granted the HOA’s Motion for partial summary judgment. Specifically, the trial court ruled as a matter of law that the indemnification provision did not apply to second-party indemnification claims. (R. p. 155, lines 20-24) and (R. pp. 2-3). Because only the HOA is party to the case, the trial court also rejected Appellant’s contention that the claims asserted by the HOA were actually disguised claims that truly belonged to the HOA’s individual members, none of whom are parties to this action. The Court’s ruling did not foreclose Appellant from pursuing indemnification against third party claims, if such claims are ever brought. (*Id.* at p. 3).

Appellant filed its Notice of Intent to Appeal from this ruling on May 27, 2016. That same day, Appellant joined with the other Defendants in filing a separate Motion for Summary Judgment, asking the trial court to find that the HOA lacks “associational standing,” among other things. That Motion has not been heard or ruled upon by the trial court as a result of this appeal being filed, and the issues raised therein are not before this Court on appeal. However, the argument made by Appellant in its still-pending Motion for Summary Judgment is substantially

the same, and relies on the same authorities, as the argument set forth in Appellant's Brief to this Court.

Appellant did not appeal the trial court's ruling that the indemnification provision in question applies only to third-party indemnification claims, and its Brief is devoid of any argument challenging this particular finding on appeal. (*See* App. Br.). Rather, Appellant's argument is limited to its assertion that this case is truly about claims of unnamed third-parties, "posing as claims of the HOA." (App. Br., p. 2).

STATEMENT OF THE FACTS

On March 8, 2008, Appellant executed the CCRs as the "Declarant" for the development, and pursuant to Article III, Section 2 thereof, Appellant was required to convey to the HOA fee simple title to the Common Areas described therein. (R. p. 47). The "Common Areas" in question included an "Amenities Lot" (TMS No. 2350610087) on which there is a pool and pool house, as well as an "Open Space" lot (TMS No. 2350612057). Appellant failed to convey these Common Areas to the HOA as required by the CCRs. Instead, the Amenities Lot is now owned by Park Investors, LLC, and the Open Space lot is now owned by Harris Street LLC. Both Park Investors, LLC, and Harris Street, LLC (collectively, the "Non-Appealing Parties"), are named defendants in the underlying action, but neither of them is a party to this appeal. The Non-Appealing Parties have neglected the Common Areas and allowed them to fall into a state of disrepair and the Common Areas are now derelict.

Appellant contends the claims asserted by the HOA in this action are not actually the HOA's claims. Rather, Appellant's theory is that the claims asserted in the Complaint are actually brought by third-parties disguising themselves as the HOA. For this reason, Appellant claims the HOA (which is actually a party to the case) must indemnify it for the claims asserted by the HOA,

because, as Appellant views it, those claims actually belong to persons who appear nowhere in the caption and are not parties to the case. Appellant advances this theory in order to manufacture otherwise non-existent “third-party” claims against it, in an attempt to improperly avail itself of the third-party indemnification rights under the CCRs.²

ARGUMENT AND CITATION OF AUTHORITY

I. APPELLANT’S SINGLE ALLEGATION OF ERROR RELATING TO THE HOA’S LACK OF APPELLATE STANDING IS NOT PROPERLY BEFORE THIS COURT BECAUSE APPELLANT DOES NOT HAVE STANDING TO RAISE THIS OBJECTION, AND BECAUSE IT IS NOT PRESERVED FOR APPEAL.

Appellant’s only argument on appeal is that the trial court erred in concluding that the HOA’s claims against Appellant are not disguised “third-party claims.” According to Appellant, “the pleadings and evidence show the [HOA] is improperly attempting to bring the claims in its representative capacity on behalf of the individual owners (i.e., third-parties) for injuries that the individual owners allegedly sustained.” (App. Br., p. 8) (stating the issue on appeal). Although this particular argument was never made to the trial court, Appellant attacks the HOA’s standing on appeal. In particular, Appellant complains that the HOA lacks standing because its cause of action for nuisance “seeks to recover money damages on behalf of individual owners for injuries the individual owners allegedly suffered.” (App. Br., p. 12).

As explained herein, this argument is fatally flawed for the simple and fundamental reason that the nuisance claim for damages, which lies at the heart of Appellant’s entire argument, was

² Oddly, Appellant also argues in its Brief that the CCRs are null and void. (App Br., p. 3, fn. 1). One is left to wonder: If the CCRs are void, as Appellant claims, the very document that contains the indemnification provision relied upon by Appellant in this appeal has no legal effect whatsoever. If the CCRs and the indemnification provision therein are invalid, then the only error in the trial court’s Order granting partial summary judgment is its separate finding that the order does not prevent Appellant from seeking indemnity for actual third-party claims “pursuant to the **operative** Covenants and Restrictions.” (R. p. 3) (emphasis added). Appellant cannot rely on a provision it claims is void.

not asserted against Appellant. The nuisance claim was asserted only against the Non-Appealing Parties who were not involved in the HOA's Motion for summary judgment that led to this appeal. (R. p. 8).

Consequently, Appellant's arguments are not properly before this court for two reasons. (1) Appellant has no standing to challenge a claim asserted against a different party; and (2) the argument is not preserved for appellate review.

A. Appellant does not have appellate standing to argue the HOA lacks associational standing to assert claims for nuisance when those claims are made only against other, Non-Appealing Parties.

Only a party aggrieved by an order, judgment, or sentence may appeal. S.C. Code Ann. §18-1-30; Rule 201(b), SCACR, *Burns v. Gardner*, 328 S.C. 608, 493 S.E.2d 356 (Ct. App. 1997); Toal, *Appellate Practice in South Carolina*, 2Ed. p. 108 (2002). Where the appealing party has not suffered injury, it is without standing to appeal. *Cisson v. McWhorter*, 255 S.C. 174, 177 S.E.2d 603 (1970). A party is prohibited from appealing a ruling of the trial court no matter how "erroneous and prejudicial it may be to the rights and interest of some other person." *Biven v. Knight*, 254 S.C. 10, 13, 173 S.E.2d 150, 152 (1970) (emphasis added). This is "a wise and well-reasoned requirement, as our court is concerned with correcting errors that have **practically wronged the appealing party.**" *Cisson*, at 177-78, 177 S.E.2d at 605 (emphasis added).

In this case, Appellant is not "practically wronged" by, nor can it be wronged by, the HOA's nuisance claim, because that claim is not brought against Appellant. The only claim asserted by the HOA against Appellant is an action for declaratory judgment seeking a declaration of the HOA's rights as to certain common areas that were not conveyed to it as required under the CCRs. (R. p. 8). By its very nature, an action for declaratory judgment seeking a determination of the requesting party's rights, whatever they may be, is inescapably a claim that belongs solely to that party—it is by definition a claim to determine that party's rights. Thus, the HOA's

declaratory judgment action against Appellant involves only a claim to determine the HOA's rights in and to the Common Areas in question. There is no claim asserted against Appellant that involves a determination of the rights of the HOA's individual members, who are not parties to this action. *See e.g., Town of Hilton Head Island v. Coalition of Expressway Opponents*, 307 S.C. 449, 454, 415 S.E.2d 801, 804 (1992) (when party's "rights, status, or other legal relations are affected" a declaratory judgment action can be maintained, and a party has standing to do so when a "justiciable controversy settling [the] legal right of the parties exists").

Appellant's counter-claim for indemnification against the HOA was brought only by Appellant, and not by any of the Non-Appealing Parties.³ (R. p. 26, ¶ 66 – p. 27, ¶ 71). The HOA's Motion for partial summary judgment only related to this single cause of action for indemnification. (R. pp. 30-32). The Non-Appealing Parties were not parties to the underlying motion for summary judgment, and they are not parties to this appeal. Whatever claims may affect them, do not affect this appeal. Appellant overlooks this essential point—Appellant cannot seek indemnification for a claim made against another party and not against it.

In granting summary judgment in favor of the HOA, the trial court held the indemnification provision within the CCRs did not contemplate second-party indemnity claims, instead, only third-party indemnity claims. On appeal, Appellant does not take exception with this ruling, and as a result, this ruling (right or wrong) has become the law of the case. *See e.g., Charleston Lumber Co. v. Miller Hous. Corp.*, 338 S.C. 171, 175, 525 S.E.2d 869, 871 (2000) (stating that an "unappealed ruling, right or wrong, is the law of the case").

³ The remaining defendants are not parties to the CCRs and therefore have no basis to demand indemnification thereunder.

Instead, Appellant only argues the trial court “refused to consider the nature of the claims that the HOA is **attempting to assert against [Appellant]**” (App. Br., p. 9). (emphasis added). Therein lies the problem with Appellant’s argument. The nature of the claim against Appellant is simply for declaratory judgment to determine the HOA’s rights in the Common Areas. The nuisance claim, on which Appellant’s Brief focuses is not asserted against Appellant. (R. pp. 4-10).

Asserting that it is entitled to indemnity, the totality of Appellant’s argument attacks the HOA’s standing to bring actions on behalf of the individual owners. In particular, Appellant complains that the HOA lacks standing because its cause of action for nuisance “seeks to recover money damages on behalf of individual owners for injuries the individual owners allegedly suffered.” (App. Br., p. 12). This argument cannibalizes itself.

Think of it this way: If the HOA lacks standing to assert the claims raised in the Complaint, those claims cannot proceed because those claims do not belong to the HOA, who is not the real party in interest. The parties to whom those claims rightfully belong, if Appellant is correct, are not plaintiffs in this action, have not advanced those claims, and they are not subject to the jurisdiction of the Court. As a consequence of Appellant’s logic, there are no third-parties named in the action in order to invoke the indemnification provision and, for that matter, there are no claims properly before the Court. In this way, Appellant’s own argument that the HOA has no standing undermines its efforts to demonstrate there is any party before the trial court asserting a third-party claim. If the HOA has no standing, it cannot itself be the “third-party” asserting the claim. Only the actual third-party could do so.

Because the only party adverse to Appellant in this case is the HOA, and because the indemnification provision requires the HOA to indemnify only for third-party claims, Appellant’s

argument necessitates that the HOA is both a “second-party” (with a duty to indemnify under the CCRs) and, simultaneously, a third-party (asserting claims that do not belong to it) triggering the indemnification provision. This is absurd. Without adding additional parties, Appellants essentially seek indemnification straight from a “third-party” if their argument is accepted.

This argument only becomes more absurd when it is remembered that the HOA did not assert the nuisance claim against Appellant. Therefore, even if Appellant is right there simply is no third-party nuisance claim against Appellant that might trigger the third-party indemnification provision in the CCRs. Naturally, Appellant cannot seek indemnity for a claim that is not made against it. Even if this Court were to conclude that the HOA has improperly brought a nuisance claim against the Non-Appealing Parties, the third-party indemnification remedy available under the CCRs to Appellant would not apply, because Appellant is not a target of that claim. Thus, Appellant has not been “practically wronged” by the trial court’s ruling. *Cisson*, at 177-78, 177 S.E.2d at 605. The question of whether the HOA has standing to assert a nuisance claim against the Non-Appealing Parties is a right that belongs, if at all, only to the Non-Appealing Parties against whom the nuisance claim is asserted.⁴ *See Biven* at 13, 173 S.E.2d at 152 (an appellant may not assert another party’s rights by appealing an order, no matter how “erroneous and prejudicial it may be to the rights and interest of some other person”) (emphasis added). Therefore, Appellant has no standing to make the instant argument.

B. The issue of the HOA’s standing to maintain suit in an alleged representative capacity against the Non-Appealing Parties was not raised to or ruled on by the trial court.

There are only four basic tenants to preserving an issue for appeal: that it be raised to and ruled on by the trial court; that it be raised by the Appellants; that it be raised in a timely manner;

⁴ Prior to this appeal, the Non-Appealing Parties had not asserted this right. They have since filed a motion in the trial court on this basis, which has yet to be ruled on. (R. pp. 86-126).

and that it be raised with specificity. See Toal, *Appellate Practice in South Carolina*, 2 ed. at pp. 57-66; see, e.g., *Johnson v. Sam English Grading, Inc.*, 412 S.C. 433, 457, 772 S.E.2d 544, 557 (Ct. App. 2015).

In this case, the only issue before the trial court was whether Appellant was entitled to indemnification, not whether the HOA had standing. At no time prior to this Appeal did Appellant (or the Non-Appealing Parties for that matter) seek any affirmative relief based on the HOA's alleged lack of standing. On the same day, the Notice of Appeal was filed in this matter, Appellant and the Non-Appealing Parties did, however, file a separate Motion for Summary Judgment based on the HOA's lack of standing. This proves the issue now on appeal was not previously before the Court for a ruling, and therefore forms no part of this Appeal. That Motion remains pending in the trial court and has not been ruled upon.

In short, Appellant never argued the HOA lacked standing. Rather it argued: "even assuming *arguendo* that the Bylaws only provide for indemnification in the context of third-party claims . . . [Appellant] is being required to defend against third-party claims posing as claims of the HOA, thus the indemnification provision applies." (R. pp. 38-39). These arguments are not akin to each other, and the entire premise is flawed because the only claim brought by the HOA against Appellant is one for declaratory judgment to determine the HOA's rights as to certain Common Areas. It cannot be reasonably questioned that the determination of the HOA's rights, whatever they may be, is a question that does not turn on the rights of unnamed third-parties. It turns only on whatever rights the HOA may have.

Because no argument concerning the HOA's standing to maintain the action has ever been raised to or ruled upon by the lower court in connection with this appeal, the entire argument relied upon by Appellant is it not preserved for review. See *I'On, L.L.C. v. Town of Mt. Pleasant*, 338

S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (finding an appellant must “both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments”). In essence, Appellant is seeking an end run around the trial court to have this Court rule on the merits of the motion for summary judgment it filed simultaneously with the commencement of this Appeal before the trial court has even considered it.

Additionally, the issue is not preserved because there has been no ruling by the trial court on the issue of the HOA’s standing. *See I’On*, 338 S.C. at 422, 526 S.E.2d at 724 (stating an issue must be ruled on in order to be preserved). Here, Appellant contends it “has asserted defenses based on the contention that the proper party is not in this case” (R. p. 139, lines 7-9), and “asserted a declaratory judgment counterclaim which is alleging the lawsuit is really not being brought by the HOA but by third parties.” (R. p. 139, lines 9-11). Neither of these issues have been ruled on by the Court. Nor has Appellant brought any motion to join the allegedly necessary parties. In fact, the trial court specifically stated “bring [the third-party’s in], it’s your responsibility to bring them in if you think they are essential parties.” (R. p. 139, lines 10-12). To which Appellant stated: “We can make a motion to do that your honor.” (R. p. 139, lines 13-14). However, no such motion has been made, despite the trial court specifically stating: “If you file some type of motion to interplead or bring in some other parties and we’ve got a third-party involved and you want to revisit [] the indemnification as to third-parties that’s fine.” (R. p. 156, lines 18-21).

This Court should find that Appellant’s arguments are not preserved and affirm the decision of the trial court.

II. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT.

“Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.” *Goode v. St. Stephens United Methodist Church*, 329 S.C. 433, 440, 449 S.E.2 827, 830 (Ct. App. 1997) (citing *Tupper v.*

Dorchester County, 326 S.C. 318, 487 S.E.2d 187 (1997)). "Summary judgment is proper where plain, palpable, and indisputable facts exist on which reasonable minds cannot differ." *Id.* (citing *Rothrock v. Copeland*, 305 S.C. 402, 405, 409 S.E.2d 366, 368 (1991)). Summary Judgment is properly granted when there is no need for further inquiry into the facts to clarify the application of the law. See *Middleborough Horizontal Property Regime Council of Co-Owners v. Montedison*, 320 S.C. 470, 465 S.E.2d 765 (Ct. App. 1995). An appellate court reviews the grant of summary judgment under the same standard as the trial court. *Fleming v. Rose*, 350 S.C. 488, 493 567 S.E.2d 857, 860 (2002).

Appellant's argument on appeal focuses on the HOA's standing to pursue money damages in a representative capacity for nuisance claims against the Non-Appealing Parties. At the risk of sounding like a broken record, no claim for nuisance was ever asserted against Appellant. Nonetheless, even assuming Appellant has appellate standing to assert this argument, and it is preserved for appellate review, it still fails.

A. The HOA has standing in its own right to assert its claims, and therefore summary judgment was proper.

An association may acquire standing in one of two ways, either it has standing in its own right, or it may have standing by "virtue of associational standing to bring suit on behalf of its members." *Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n*, 407 S.C. 67, 76, 753 S.E.2d 846, 850 (2014). ("[T]o possess standing, either the Plaintiff[] alone must have suffered a concrete particularize injury or [its] members must have suffered such an injury and the other elements of associational standing are satisfied")

For an association to have standing in its own right, requires three elements: First, "the plaintiff must have suffered an injury-in-fact which is concrete, particularized, and [an] actual or imminent invasion of a legally protected interest;" Second, a "causal connection must exist

between the injury, and the challenged conduct;” and Third, a “favorable decision will redress the injury.” *Id.*, at 75, 753 S.E.2d at 850 (internal citations omitted).

Turning first to the HOA’s cause of action for declaratory judgment, the HOA clearly has standing in its own right, **and Appellant does not challenge the HOA’s standing to assert this particular claim.** (App. Br., pp. 2, 8-17) (emphasis added). The right of an association of co-owners to bring an action for declaratory judgment under its respective covenants, master deed, or bylaws is well recognized in this state. *See, e.g., Spur at Williams Brice Owners Ass’n, Inc. v. Lalla*, 415 S.C. 72, 83, 781 S.E.2d 115, 121 (Ct. App. 2015). In this case, all three elements are met in order for the HOA to have standing in its own right to assert a declaratory judgment action for a declaration of its own rights as to certain Common Areas. First, the HOA has suffered an injury in that Appellant has not performed under the terms of the CCRs and the HOA has not received the benefits conferred by the CCRs, to wit, receiving title to the Common Areas. Second, Appellant’s non-performance under the CCRs is the direct cause of the HOA’s alleged injury. Finally, a favorable decision would remedy the alleged injury. This is all that is required. Nowhere in Appellant’s Brief does it challenge the standing of the HOA to have its rights and interest in and to the Common Areas determined by the trial court. That is the only claim brought against Appellant.

Turning next to the HOA’s claim for nuisance against the Non-Appealing Parties, Appellant argues “[b]ecause the HOA alleges 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 injury to its own property.” (App. Br., p. 11). However, this is not correct. It is not necessary for the HOA to “own” the property in order to make a claim for nuisance or, for that matter, to have its rights and interests determined.

Our Supreme Court has specifically held that a valid claim for nuisance “does not require ownership or possession of the land.” *Brooks v. Council of Co-Owners of Stones Throw Horizontal Property Regime I*, 315 S.C. 474, 477, 445 S.E.2d 630, 632 (1994) (emphasis added). In *Brooks*, the plaintiff was not the “owner” of the affected property, but had a contingent contractual right based on a contract for sale, and therefore could maintain an action for nuisance. Just as in *Brooks*, the HOA in this case is not the record “owner” of the Common Areas, but it has a contractual right to those Common Areas as set forth in the CCRs. Consequently, the HOA, just like the plaintiff in *Brooks*, has standing in its own right to assert a cause of action for nuisance. *Id.* This is true, regardless of the fact that the nuisance claim is not asserted against Appellant anyway.

Appellant has clearly stated it “is not seeking indemnification for any claim the HOA may be bringing in its own right.” (App. Br., p. 11). This admission should end the matter. However, for the sake of completeness, the HOA will address Appellant’s argument on “associational standing” as well.

B. Assuming that the issue of “associational standing” is preserved and that Appellant has standing to raise this issue, and to the extent the HOA does not have standing in its own right, the HOA has associational standing, defeating Appellant’s argument on appeal.

“Associational standing” is a concept through which an association that would not otherwise have standing can be conferred standing vicariously through its members. *See Carnival Corp.*, 407 S.C. at 76, 753 S.E.2d at 850 (recognizing that associational standing is an alternative means of acquiring standing when the plaintiff itself lacks standing). It provides that a plaintiff “that is an association . . . may possess standing by virtue of associational standing on behalf of its member . . . if one or more of its members will suffer an individual injury by virtue of the contested act.” *Id.* at 76, 753 S.E.2d at 851. The three-part test our Supreme Court has adopted requires that the “members would otherwise have standing to sue in their own right, the interests at stake are

germane to the organizations purpose, and neither the claim asserted nor the relief requested require the participation of individual members.” *Id.*

Appellant only asserts that the HOA fails to meet the third element of the three-part test—*i.e.*, the claim asserted and the relief requested requires the participation of the individual members. (App. Br., pp. 12-16). But, this is not the case at all.

Unable to draw on any legal authority of this state, Appellant turns to foreign jurisdictions for support of its proposition that generally an association cannot “sue for money damages on behalf of its members if the damage claims are not common to the entire membership, nor shared equally.” *See, e.g., Creek Pointe Homeowner’s Association v. Happ*, 552 S.E.2d 220, 226 (N.C. Ct. App. 2001). To this point, Appellant incorrectly asserts that the claim for nuisance will require individual proof of damage from the homeowners and therefore results in a lack of standing. But, unlike the situation in *Creek Pointe*, the case at hand does not present a factual scenario in which individual proof is necessary. In *Creek Pointe*, a homeowner built a fence across a neighborhood road. The association and a single homeowner brought an injunctive action to have the fence removed and to enjoin any reconstruction of the fence. The association and the homeowner plaintiffs also specifically requested “just compensation for their property rights for Creek Pointe residents.” *Id.* Because the Complaint specifically sought monetary damages for all residents, and because all residents were not equally affected by the fence, the North Carolina Court of Appeals ruled the financial damage caused to each individual homeowner would be different, and as a result the association could not maintain an action for damages in a representative capacity, but it could maintain an injunctive action in its own right. *Id.* at 226-27.⁵

⁵ Unlike the case at hand, in *Creek Pointe*, the defendant specifically filed a motion to dismiss attacking the HOA’s standing. 552 S.E.2d at 223.

The case at hand is fundamentally different. Here, the HOA does not specifically request damages on behalf of all property owners. Instead, as stated in the Complaint the HOA requests that the Non-Appealing Parties “should be required to restore the condition of the common areas to their pre-existing condition at the time they were abandoned.” (R. pp. 4-10). Pursuant to the CCRs, the HOA is responsible for the “improvements, maintenance, repairs and reconstruction” of the common areas, and thus has, itself, a direct and real financial interest in the property that has been damaged by the wrongful neglect of the Common Areas. (R. p. 49). However, all of this discussion leads to no meaningful end—the nuisance claim was not asserted against Appellant, and no other party has appealed.

Further still, the involvement of the individual homeowners is unnecessary in this action, because any damages resulting from the claims asserted in respect of the “Common Areas” are, as the word implies, “**common** to the entire membership [and] shared equally.” (R. p. 46) (defining “common area” as real property “**owned by the HOA** for the common use and enjoyment of all [o]wners) (emphasis added). The annual and special assessments collectable from the individual homeowners for the costs of the HOA’s improvements, maintenance, repairs and reconstruction of the common areas, are to “**be fixed at a uniform rate for all lots.**” (R. p. 50) (emphasis added).

In *Creek Pointe*, the damages for the diminution in property value necessitated the participation of the individual homeowner based on the facts of their specific circumstances, which meant their damages “could vary from significant to minimal.” *Creek Pointe*, 552 S.E.2d at 226. The same is not true here. The failure of Appellant to convey the Common Areas to the HOA invokes a right of the HOA itself. To the extent its members are affected, their injury is common to one another as members of the HOA having equal, undivided rights in and to the Common Areas in question. Because the HOA “owns” the Common Areas, the individual owners will only be

damaged if the HOA fails to recover, and even in this scenario, it would be in equal and “uniform” amounts and does not require the involvement of the individual owners. Indeed, the foreign authorities referenced in Appellant’s Brief are distinguishable for the same reason. *Contra. River Birch Assoc. v. City of Raleigh*, 388 S.E.2d 538, 555 (N.C. 1990) (finding that a claim brought by the HOA for damages to individual homeowners for fraud and unfair trade practices required individualized proof of damages because there was no allegation that the fraudulent statement was made to all homeowners and the measure of damages for fraud in the inducement is necessarily the difference between the contract price and fair market value, and this was obviously unique to each owner); *Rutherford Cty. v. Bond Safeguard Ins. Co.*, 2011 WL 809821, at *5 (W.D.N.C. 2011) (finding association could not seek damages on behalf of individuals for diminution in property value because this would depend on the value of each owner’s specific lot); *Bano v. Union Carbide Corp.*, 361 F.3d 696, 714-15 (2nd Cir. 2004) (claims for bodily harm and damage to real property were unique to each individual member); *Lake Lucerne Civic Assoc., Inc. v. Dolphin Stadium Corp.*, 801 F.Supp. 684, 691 (S.D. Fla. 1992) (finding association cannot seek money damages where members damages were not uniform).

On the other hand, the mere fact that “some” involvement may be necessary from members does not destroy associational standing. *See e.g., Pa. Psychiatric Soc’y v. Green Spring Health Servs.*, 280 F.3d 278, 286 (3d Cir. 2002) (declining to dismiss a matter for lack of associational standing where the record demonstrated the damages were similar enough among all members that they could likely be shown with limited member participation and did not require a “fact-intensive-individual inquiry”); *N.Y. State Nat’l Org. for Women v. Terry*, 886 F.2d 1339, 1349 (2nd Cir. 1989) (allowing associational standing although evidence from some individual members is necessary); *see also Virginia Hosp. Assoc. v. Baliles*, 868 F.2d 653, 663 (4th Cir. 1989) (finding a

plaintiff association to have standing where the equitable relief sought on behalf of its members would not “require findings specific to its individual members.”) Here Appellant cites to the deposition testimony of Freeman Barber who testified that individual owners have been damaged in the loss of quiet enjoyment and diminution in property value. (App. Br., p. 12). While this may be true, the HOA does not seek damages for diminution in value. This testimony does not change the nature of the relief sought, nor does it establish that substantial and fact intensive inquiry must be made to the individual homeowners to establish damages. To the extent this may require “some” involvement from the members (which the HOA does not concede), it is at “a uniform rate to each lot” (R. p. 50), and does not necessitate a “fact-intensive-individual inquiry.” Thus, the HOA’s claim is not contrary to the rules of associational standing. *See Green Spring*, 280 F.3d at 286. Therefore, the HOA has such standing.

As a consequence, there is no question of material fact that the HOA has a right to pursue damages for the neglect and damage caused to the Common Area. The HOA’s request for monetary damages does not leave it without standing, nor does it render its claims for “improper third-party claims” as alleged by Appellant. Therefore, the trial court properly granted summary judgment on Appellant’s claim for indemnity, and this Court should affirm.

III. THE TRIAL COURT PROPERLY RULED THAT THE INDEMNIFICATION PROVISION APPLIES ONLY TO THIRD-PARTY CLAIMS.

Although not challenged by Appellant, for the sake of completeness, the trial court correctly ruled that the subject indemnification agreement applied only to third-party indemnity.

It is well-recognized law that indemnity is only a remedy involving liability from third-parties, not between the contracting parties themselves. *See Smoak v. Carpenter Enters.*, 319 S.C. 222, 224, 460 S.E.2d 381, 383 (1995); *see also Laurens Emergency Med. Specialist, P.A., v. M.S. Bailey & Sons Bankers*, 355 S.C. 104, 109, 584 S.E.2d 375, 377 (2003) (finding that when the

indemnity “clause at issue . . . is a typical indemnity agreement” for indemnity against third-parties, the indemnity provision will not be interpreted to include second party indemnification).

Here the subject indemnification provision states in pertinent part: 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 Declarant, against all contractual and other liabilities to others[.]” (R. p. 75).

As the trial court properly held, there is no express language in the subject indemnity agreement, which calls for second party indemnification. Therefore, the trial court properly concluded that the provision contemplates only third-party indemnity. *See Smoak*, 319 S.C. at 224. Regardless, no appeal was taken from this ruling, and it is now the law of this case.

IV. AS AN ADDITIONAL SUSTAINING GROUND, THE APPELLANT’S ISSUE IS NOT RIPE.

The concept of ripeness prevents a court from issuing a ruling that is “contingent, hypothetical, or abstract.” *Waters v. South Carolina Land Resources Conservation Comm’n*, 321 S.C. 219, 228, 467 S.E.2d 913, 918 (1996). “Courts generally decline to pronounce a declaration wherein the rights of a party are contingent upon the happening of some event which cannot be forecast and which may never take place.” *Baber v. Greenville County*, 327 S.C. 31, 44, 488 S.E.2d 314, 321 (1997) (citation omitted).

As noted previously, Appellant “maintain[s] the CCRs are null and void.” (App. Br., p. 3, fn. 1). However, the trial court has never been asked to rule on the validity of the subject CCRs. Naturally, if the CCRs are void, so too is the indemnification provision that Appellant is seeking to assert. Thus, any ruling from this Court would be entirely “contingent” on a subsequent ruling from the trial court as to the validity of the CCRs, and is therefore not ripe for review. *See Baber*, 327 S.C. at 44, 488 S.E.2d at 321 (courts will not pass on contingent matters).


To further illustrate this point, Appellant suggests that whether or not a third-party claim is being asserted should not be based on the name of the party in the caption. (App. Br., p. 2). This is flatly incorrect. In the context of this case, the HOA, is indisputably a "second-party" under the CCRs, and it either has standing to pursue its claims or it does not. There is no middle ground. Even if Appellant is correct that the HOA lacks standing, this simply means that there is no party at all before the court to bring a claim against Appellant (hence its still pending Motion for Summary Judgment). If there is no claimant before the trial court, there can be no claim for which Appellant can seek indemnity, and any ruling from this Court is purely academic.

CONCLUSION

For the reasons set forth above the trial court's grant of partial summary judgment must be affirmed.

Respectfully submitted,

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March 23, 2017
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

MAR 27 2017
SC Court of Appeals

The Honorable J.C. Nicholson, Jr., Circuit Court Judge

Appellate Case No. 2016-001156
Circuit Case No. 2015-CP-08-00547

Cokers Commons Homeowner's Association, Inc.....Respondents,

v.

Park Investors, LLC, CCT Reserve, LLC, f/k/a Harris Street, LLC and Whipple
Development Corporation.....Defendants,

Of which Whipple Development Corporation.....Appellant.

CERTIFICATE OF COUNSEL

The undersigned attorney hereby certifies that Respondent's Final Brief complies
with Rule 211(b), SCACR.

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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.

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ARGUMENTS

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

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.

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." *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

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.

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.

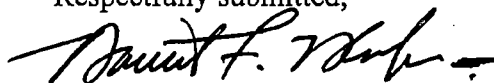
dependent on contingent or hypothetical events that have not yet occurred.

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,



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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.

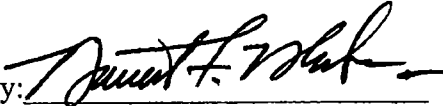
PARK INVESTORS, LLC; CCT RESERVE, LLC, F/K/A HARRIS STREET, LLC; AND
WHIPPLE DEVELOPMENT CORPORATION,
Defendants.

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.

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