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.*

PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for the Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on June 21, 2018.

QUESTIONS PRESENTED

I. Did the Court of Appeals erroneously affirm the Circuit Court's Order granting summary judgment in favor of the Respondent-Homeowners' Association (HOA) involving the Petitioner-Subdivision Declarant's (Declarant) counterclaim for indemnification based on the Circuit Court's conclusion that the indemnification provision—which the Circuit Court construed to protect the Declarant only 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")—does not allow for indemnification in this case because the HOA is the only plaintiff named in the case caption when the pleadings and evidence show the HOA has brought claims in its representative capacity on behalf of individual owners in the subdivision (i.e., third parties who are not named parties) for injuries the individual owners allegedly sustained?

INTRODUCTION

This appeal involves the novel and important question of whether individual members of a HOA may circumvent an indemnification provision in the subdivision's restrictive covenants—which entitles the Declarant to indemnification from the HOA for claims made by third parties but not from claims made by the HOA itself—merely by bringing suit against the Declarant in the HOA's name rather than in their individual names or capacities for injuries the individual members have allegedly sustained. Petitioner Whipple Development Corporation ("Declarant") is the declarant under the restrictive covenants purportedly creating the Respondent Cokers Common Homeowner's Association, Inc. ("HOA"). Declarant respectfully submits the Court of Appeals erred by affirming the Circuit Court's Order granting summary judgment against the Declarant as to its counterclaim for indemnification from the HOA.

Even if the indemnification provision is properly construed to protect the Declarant only from

third-party claims and not from claims made by another contracting party to the indemnification provision itself (the HOA), the Circuit Court and Court of Appeals erred by holding as a matter of law the HOA's claims do not constitute "third-party claims" against Declarant 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 attempting to bring against the Declarant in the HOA's name. As such, 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., as "third-party claims" for indemnification purposes. Declarant 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[1]

On March 2, 2015, this lawsuit was commenced purportedly by and in the HOA's name. The suit 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). (ROA pp. 177-80, 191, 222, 242-48). On February 26, 2015, Mr. Barber and another landowner 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." (ROA 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 a swimming pool and an "open space." Throughout its Complaint, the HOA refers to Edward Terry (a real estate developer from Atlanta)

[1] Throughout this petition citations to the Record on Appeal in the Court of Appeals are referred to as "ROA" and citations to the Appendix in this Court are referred to as "App."

and Mr. Terry's alleged "entities" as being the "Developer" of the property in question. (ROA pp. 5-8 ¶¶ 7, 12-13, 15-16, 20). As named in the Complaint, "the Defendants" are Mr. Terry's alleged entities: the Declarant; 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.

Declarant is identified as the "Declarant" in the Declaration of Covenants, Conditions, and Restrictions for Cokers Commons recorded with the Berkeley County Register of Deeds on April 15, 2008 (the "CC&R"). (ROA pp. 22 ¶ 50, 42-79). Park Investors and Harris Street are identified as the "record owners" of the "common areas of the Cokers Commons subdivision," including the swimming pool and the open space. (ROA pp. 4-5, 8-9 ¶¶ 2-3, 23).

The Complaint alleges that the Declarant failed to convey title to the "common areas of the Cokers Commons subdivision"—including areas known as the "Amenities Lot" (which encompasses the swimming pool) and the "HOA open space"—to the HOA in accordance with the CC&R and seeks to enforce those provisions.[2] (ROA pp. 6-7 ¶¶ 11-13, 15-16). The Complaint further alleges that Mr. Terry and his entities "abandoned" and have "not kept up" the Amenities Lot and the HOA open space. (ROA pp. 6-7 ¶ 13). The Complaint alleges that the Amenities Lot and the HOA open space have become a nuisance due to neglect. (ROA 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

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[2] At the time the CC&R were executed and recorded, the Declarant did not own the property purportedly affected by the CC&R; instead, the property was owned by Westgate Partners, L.P ("Westgate"). (ROA p. 6 ¶ 9, pp. 14-15, 22-23 ¶¶ 14, 50-51). The HOA's Complaint apparently contends that Mr. Terry, the Declarant, and Westgate are alter egos of each other because they share a "commonality of interest." (ROA pp. 5-8 ¶¶ 4, 7, 13, 20). Although not at issue for purposes of this appeal, Defendants maintain the HOA cannot sue to enforce the CC&R because they are null and void given that the Declarant did not own the property and lacked the right to subject the property to covenants or restrictions. (ROA pp. 22-23 ¶¶ 50-52).

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 [HOA's] constituent member's use and ownership of their properties as well as their use of the common areas, causing damages." (ROA pp. 6-9 ¶¶ 13, 23-24). Mr. Barber testified 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. (ROA pp. 191, 222, 226-28, 234). The HOA's nuisance claim seeks recovery of "actual and consequential" damages against all of the Defendants, including the Declarant. (ROA p. 9).

On May 14, 2015, the Defendants filed an Answer and Counterclaims. The Answer disputes that this action is being brought by a validly elected and operating HOA. (ROA 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." (ROA p. 24 ¶ 61). The Answer also 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]." (ROA pp. 24-25 ¶¶ 62-64).

Declarant's Answer also includes a counterclaim for indemnification against the HOA based on an indemnification provision contained in Bylaws incorporated into the CC&R. (ROA pp. 26-27 ¶¶ 66-71). Article XIII, Section 1, of those 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 Declarant, 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 Declarant, 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 Declarant, may be involved by virtue of such persons being or having been such directors, officer, Board, committee member, or Declarant; 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 Declarant; 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 Declarant.

(ROA p. 75). This provision entitles the Declarant 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. Declarant's counterclaim avers 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. (ROA pp. 26-27 ¶¶ 69, 71).

On February 1, 2016, the HOA filed a Motion for Partial Summary Judgment as to the Declarant's counterclaim for indemnification. (ROA pp. 30-32).[3] On April 16, 2016, Circuit Judge J.C. Nicholson, Jr. conducted a hearing on the HOA's motion and heard argument from the parties' attorneys. (ROA pp. 127-58). On that same date, the Declarant filed a memorandum of law in opposition to the HOA's motion and attached a copy of the CC&R. (ROA pp. 33-79). At the

[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.

hearing, the Declarant also offered the transcript of Mr. Barber's deposition. (ROA p. 153, lines 14-22; pp. 159-241).

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

On May 25, 2016, the Declarant timely served its Notice of Appeal to the Court of Appeals. On May 9, 2018, without oral argument, the Court of Appeals issued an unpublished memorandum opinion summarily affirming the Circuit Court's Order. (App. p. 0001).

On May 21, 2018, the Declarant filed its Petition for Rehearing. (App. p. 0003). The Court of Appeals denied the petition by Order filed on June 21, 2018. (App. p. 0012).

ARGUMENTS

I. THE COURT OF APPEALS ERRED BY AFFIRMING THE CIRCUIT COURT'S ORDER GRANTING SUMMARY JUDGMENT TO THE HOMEOWNERS' ASSOCIATION INVOLVING THE DECLARANT'S COUNTERCLAIM FOR INDEMNIFICATION BASED ON ITS ERRONEOUS FINDING THAT THE "THIRD PARTY INDEMNIFICATION" PROVISION AT ISSUE IS INAPPLICABLE BECAUSE THE HOMEOWNERS' ASSOCIATION IS THE ONLY NAMED PLAINTIFF IN THE CASE CAPTION WHEN THE PLEADINGS AND EVIDENCE SHOW THE HOMEOWNERS' ASSOCIATION HAS BROUGHT CLAIMS IN ITS REPRESENTATIVE CAPACITY ON BEHALF OF NON-PARTY INDIVIDUAL OWNERS FOR INJURIES THE INDIVIDUAL OWNERS ALLEGEDLY SUSTAINED; THEREFORE, THE HOMEOWNERS' ASSOCIATION STANDS IN THE SHOES OF THE INDIVIDUAL OWNERS AND HAS ASSERTED "THIRD-PARTY CLAIMS" AGAINST THE DECLARANT, THUS TRIGGERING THE HOA'S OBLIGATION TO INDEMNIFY THE DECLARANT.

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 the Declarant's counterclaim for indemnification. (ROA p. 2). In Laurens, this Court held that the intended purpose of the indemnification clause at issue in that case was protection against third-party claims ("third-party indemnification"), not reimbursement for claims between the parties to the indemnification provision themselves ("second-party indemnification"). In the case at bar, the Circuit Judge found Laurens to be controlling and held that Article XIII of the Bylaws protects the Declarant only from the claims of third parties, not from claims made by another contracting party to the indemnification provision (the HOA). (ROA p. 2). On appeal, the Declarant did not challenge the ruling that the indemnification provision is a thirty party indemnification provision.

However, in the Circuit Court and before the Court of Appeals, the Declarant argued that even if Article XIII of the Bylaws is a third-party indemnification provision, the Declarant is nevertheless entitled to indemnification because the HOA has asserted third-party claims against the Declarant in its own name rather than in the names of the third parties. Declarant argued the present

claims in actuality are third-party claims by individual members of the subdivision which they are attempting to bring against the Declarant in the HOA's name. Declarant argued the HOA's summary judgment motion should be denied because the HOA is attempting in a representative capacity (albeit improperly) to bring claims against the Declarant that belong to the individual members of the HOA, thus triggering the HOA's indemnification obligation. (ROA p. 3).

The Circuit Court's Order simply states that it "rejects [Declarant's] argument because only the [HOA] has been named as a party to this action." (ROA p. 3). The Circuit Court refused to consider the nature of the claims the HOA is attempting to assert against the Declarant or to go beyond the parties named in the case caption to determine if the HOA's claims are actually being brought on behalf of third parties not named in the caption. Instead, the Circuit Court found solely dispositive the fact that the HOA is the only named plaintiff in the case caption.

The Court of Appeals affirmed the Circuit Court's Order without any analysis or discussion. (App. p. 0001). Declarant respectfully submits the Court of Appeals erred in affirming the Circuit Court's Order granting summary judgment to the HOA.

The HOA's Complaint and the evidence show the HOA is suing in a representative capacity on behalf of individual owners in the Cokers Commons subdivision. 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 those owners allegedly suffered. Because the HOA is attempting to sue in a representational capacity on behalf of individual owners and thus stands in their shoes, the HOA's claims should be treated as claims by the individual owners for indemnification purposes—*i.e.*, the claims should be treated as third-party claims. The Declarant is entitled to indemnification from the HOA because it is being required to defend against third-party

claims posing as claims of 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). In the present case, the HOA is asserting claims against the Declarant based both on individual standing and associational standing.[4]

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

[4] 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 such a claim against the Declarant. 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 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).

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 Beaufort Realty, 551 S.E.2d at 589 (citing Hunt); Georgetown Cty., 713 S.E.2d at 292 (same). 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 the Declarant 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 it presently is not the owner of the common areas. (ROA pp. 6-7 ¶¶ 11-13, 15-16). The Complaint further alleges that Mr. Terry and his entities (including the Declarant and Westgate) "abandoned" and have "not kept up" the common areas and thus the common areas have become a nuisance due to neglect. (ROA 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, the HOA would not seem to have any claims to assert "in its own right" for alleged injuries to its own property. Regardless, the Declarant 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, the Declarant is seeking indemnification from the HOA for claims it is 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. Indeed, the individual owners of the subdivision actually took a vote to authorize the HOA to bring this action on their behalf. (ROA p. 123). In its brief filed in the Court of Appeals, the HOA conceded that its Complaint asserts a nuisance claim for money damages in a representational capacity on behalf of the individual owners. (App. pp. 0052-56).

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." (ROA 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. (ROA pp. 191, 222, 226-228, 234). The HOA's nuisance cause of action seeks recovery of "actual and consequential" damages against the Defendants, including the Declarant. (ROA 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 attempting (albeit improperly) to bring claims against the Declarant in its representative capacity for injuries allegedly sustained by the HOA's individual members.[5] 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

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[5] Although resolution of this issue is unnecessary to this appeal, the Declarant disputes that the HOA has standing to assert these claims. Courts have consistently held that an organization cannot meet the third prerequisite of the Hunt test for associational 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; River Birch Associates v. City of Raleigh, 388 S.E.2d 538, 555 (N.C. 1990); Rutherford Cty. v. Bond Safeguard Ins. Co., 2011 WL 809821, at *5 (W.D.N.C. Mar. 2, 2011); United Union of Roofers v. Ins. Corp. of Am., 919 F.2d 1398, 1400 (9th Cir. 1990); Neighborhood Action Coalition v. Canton, Ohio, 882 F.2d 1012 (6th Cir. 1989); Telecommunications Research v. Allnet Communic. Servs., Inc., 806 F.2d 1093 (D.C. Cir. 1986).

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 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. 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.

HOA's claims are treated as if they are claims by the individual owners—i.e., the claims are treated as "third-party claims" even if the HOA is the only party named as a plaintiff.

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 names or capacities for injuries the individual members have allegedly sustained. In Zephyr Lofts Condominium Ass'n, Inc. v. Henderson Lofts Urban Renewal, L.L.C., 2009 WL 3416051 (N.J. Super. Ct. App. Div. 2009), for example, 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.

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.").

This same reasoning has been followed in other similar contexts. For example, in Net2Phone, Inc. v. Superior Court, 109 Cal. App. 4th 583 (Cal. Ct. App. 2003), even though the plaintiff named in the suit was not itself a party to the contract at issue, the plaintiff had sued in a representative capacity on behalf of others to challenge certain contractual terms. The California

Court of Appeals held that "[b]y so doing, [the plaintiff] purports to assert the rights of those who are parties to the contract" and "stands in the shoes of those whom it purports to represent." Id. at 589. In holding that the plaintiff was bound by a forum selection clause in the contract even though it was not a party to the contract, the Court observed that "[w]ere we to hold otherwise, a plaintiff could avoid a valid forum selection clause simply by having a representative non-party file the action." Id.

In the present case, because the HOA is attempting to bring claims against the Declarant 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 attempting to bring against the Declarant in the HOA's name. Declarant 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 the Declarant in their own names, the Declarant could have sought indemnification from the HOA under Article XIII of the Bylaws. The individual owners should not be allowed to circumvent or do an end-run around the indemnification provision merely by bringing suit against the Declarant in the HOA's name rather than in their individual names or capacities for injuries the individual owners have allegedly suffered.

The Circuit Court and the Court of Appeals erred by focusing exclusively on the fact that the HOA is the only named plaintiff in the case caption. They should have considered the nature of the claims the HOA is attempting to assert against the Declarant and gone beyond the parties named in the caption to determine if the HOA's claims are actually being brought on behalf of un-named third parties. Under our law, what matters is the substance of the allegations in a pleading, not mere

nomenclature, labels, or headings. Helm v. Helm, 289 S.C. 169, 345 S.E.2d 720, 722 (1986); Collins Holding Corp. v. Wausau Underwriters Ins. Co., 379 S.C. 573, 666 S.E.2d 897, 899 (2008); Sanford v. South Carolina State Ethics Com'n, 385 S.C. 483, 685 S.E.2d 600, 607 (2009); Richland County v. Kaiser, 351 S.C. 89, 567 S.E.2d 260, 262 (Ct. App. 2002); 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).

Other courts have also held that "[i]n determining the real party in interest, the courts will look beyond the nominal party whose name appears of record and consider the legal questions raised as they may affect the real party in interest." Settle By and Through Sullivan v. Beasley, 308 S.E.2d 288, 289 (N.C. 1983); see Memar v. Styblo, 667 S.E.2d 388 (Ga. Ct. App. 2008) (In ascertaining the identity of a party bringing an action, for purposes of determining whether that party is a real party in interest, the substance of the complaint rather than the caption controls.); Estate of James v. Peyton, 674 S.E.2d 864, 869 (Va. 2009) ("In determining the adequacy of a pleading to identify a party, we consider the pleading as a whole. Thus, whether a party named in a caption is a proper party to the action is to be determined not merely by how that party is identified in the caption of the pleading, but by the allegations set forth within a pleading that identify that party more specifically."); State ex rel. Love v. Jones, 128 N.E.2d 228, 234 (Ohio Ct. App. 1953) (noting "the long established rule that courts will look beyond the nominal party whose name appears formally upon the record and will treat as the real party him whose interests are involved in the litigation—one responsible for

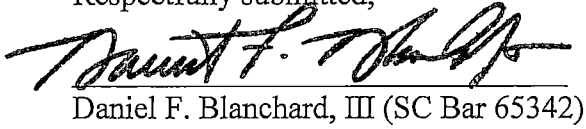
instituting an action and who actively participates in its prosecution").

The Circuit Court and the Court of Appeals erred by finding solely dispositive the fact the HOA is the only named plaintiff in the case caption. They should have gone beyond the parties named in the caption to determine if the HOA's claims are actually being brought on behalf of third parties who are not parties to the suit. The Court of Appeals erred by affirming the Circuit Court's Order that granted summary judgment to the HOA as a matter of law involving the Declarant's counterclaim for indemnification based merely on the names in the case caption when the Declarant is actually being required to defend against third-party claims asserted by the HOA in its representative capacity.

CONCLUSION

For the reasons stated, the Declarant respectfully requests that this Court grant this Petition for a Writ of Certiorari.

Respectfully submitted,



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ATTORNEYS FOR PETITIONER

July 23, 2018.

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED
JUL 25 2018
SC 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
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.*

PROOF OF SERVICE

I certify that I have served the Petition for a Writ of Certiorari and Appendix on the Respondent by mailing copies to its attorneys of record on July 23, 2018 via first-class mail, postage prepaid, and addressed as follows:

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July 23, 2018

The Honorable Daniel E. Shearouse, Clerk of Court
South Carolina Supreme Court
P.O. Box 11330
Columbia, SC 29211

Re: Cokers Commons Homeowners Association, Inc. v. Park Investors, LLC, CCT Reserve, LLC, f/k/a Harris Street, LLC, and Whipple Development Corporation, Inc.
Court of Common Pleas Case No. 2015-CP-08-00547
Opinion No. 2018-UP-191 (S.C. Court of Appeals filed May 9, 2018)

Dear Mr. Shearouse:

Enclosed for filing in the above-referenced case are:

[1] The original and seven copies of the Petition for a Writ of Certiorari on behalf of Whipple Development Corporation,
[2] Two copies of the Appendix (Volumes 1 and 2),
[3] The original and one copy of the Proof of Service, and
[4] Our firm's filing fee check in the amount of $100.00.

Please return a file stamped copy of the Petition for a Writ of Certiorari in the enclosed self-addressed return envelope.

With kindest regards, I am

Sincerely,

Daniel F. Blanchard, III

DFB/db
Encls.
Cc: The Honorable Jenny Abbott Kitchings (w/ encls.)
Brent S. Halversen, Esquire (w/ encls.)
Michael A. Timbes, Esquire (w/ encls.)
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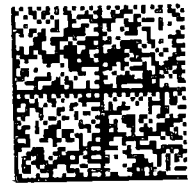

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The Honorable Jenny Abbott Kitchings
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