THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

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

Appellate Case No. 2018-001385
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.

RESPONDENT'S RETURN TO PETITION FOR WRIT OF CERTIORARI

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S.C. SUPREME COURT

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STATEMENT OF CASE

This appeal arises from a suit commenced by Cokers Common Home Owner's Association Inc., ("the HOA") against multiple parties, including Whipple Development Corporation ("Petitioner"), against whom the HOA alleged a single cause of action for declaratory judgment. Petitioner counterclaimed for indemnification, relying on the terms of the Declarations of Covenants, Conditions, and Restrictions for Cokers Commons Home Owner's Association, Inc. (the "CCRs")—this despite Petitioner also claiming the very same CCRs to be null and void.

The HOA moved for summary judgment on Petitioner's claim for indemnity. Granting this motion, the trial court ruled the applicable indemnity provision applied only to "third-party claims" as opposed to claims between the HOA and Petitioner (i.e., "second-party claims"). The Court of Appeals affirmed. Petitioner has since conceded the indemnity agreement applies only to third-party claims. Nonetheless, Petitioner seeks a writ of certiorari arguing the Court of Appeals overlooked that the HOA's "nuisance claim" entitled Petitioner to indemnity because it alleges this to be a third-party claim disguised as a second-party claim.

This petition should be denied because the HOA has not asserted a claim for nuisance against Petitioner. However, even if it had, the plain language of the indemnity agreement and the laws of this State demonstrate the instant petitioner should be denied.

ISSUE PRESENTED

I. Did the Court of Appeals properly affirm the trial court's grant of summary judgment against Petitioner's claim for indemnity where Petitioner failed to present any evidence or question of fact that its claim for indemnity is contemplated by the plain language of the indemnity agreement, and also where the entirety of Petitioner's argument on appeal is based upon a hypothetical cause of action for nuisance that the HOA never brought against Petitioner, rendering the instant appeal not justiciable?

FACTUAL AND PROCEDURAL BACKGROUND

On March 8, 2008, Petitioner, as "Declarant," executed the Declaration of Conditions, Covenants, and Restrictions, for Cokers Commons Home Owner's Association Inc. Subsequently, Petitioner failed to convey fee-simple title to certain "Common Areas[1]" consisting of an "Amenities Lot" and an "Open Space Lot," to the HOA as required by Article III, Section 2 of the CCRs. (Appx. Vol. 2, p. 47). 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 is a party to this appeal or the underlying motion from which it arises.

The Non-Appealing Parties neglected the Common Areas and allowed them to fall into a state of disrepair and the Common Areas are now derelict. Therefore, the HOA commenced this action in March of 2015 against Petitioner and the Non-Appealing Parties. The HOA asserted a single cause action against Petitioner for declaratory judgment (S.C. Code §15-53-10 *et seq.*) seeking declaration of the HOA's rights as to the Common Areas. Additionally, the HOA brought claims for specific performance and nuisance, but only against the Non-Appealing Parties. (Appx. Vol. 2, pp. 4-10). Petitioner answered and asserted a counterclaim for (*inter alia*) indemnification under the CCRs. (Appx. Vol. 2, pp. 11-29).

The HOA moved for partial summary judgment on Petitioner's counterclaim for indemnification arguing, among other things, the subject indemnification provision did not extend to second-party claims (i.e., claims by the HOA against Petitioner), but was limited only to third-party claims—of which there were none. (Appx. Vol. 2, pp. 30-32) and (Appx. Vol. 2, pp. 80-85).

[1] 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)

Petitioner has since conceded that indemnity is limited only to third-party claims but argues that nonetheless "[Petitioner] is being required to defend against third-party claims posing as claims of the HOA, thus the indemnification provision applies." (Pet. p. 16); (Appx. Vol. 2, pp. 38-39).

The trial court granted the HOA's motion for partial summary judgment, finding the HOA—the sole plaintiff—asserted no third-party claim against Petitioner. The trial court also rejected Petitioner's contention that the HOA's claims were disguised claims of the HOA's individual members, none of whom are parties to this action.[2] (Appx. Vol. 2, p. 3).

Petitioner filed a notice of intent to appeal the trial court's grant of summary judgment on May 27, 2016. **That same day, Petitioner and the Non-Appealing Parties filed a separate Motion for Summary Judgment, alleging, among other things, that the HOA lacks "associational standing."** That motion has yet to be heard and remains pending before the trial court. The arguments advanced in this still-pending motion are substantially the same, and rely upon the same authorities, as the argument set forth in Petitioner's Brief to the Court of Appeals, as well as in the instant Petition.

The Court of Appeals summarily affirmed the trial court's grant of summary judgment, and this Petition follows. (Appx. pp. 1-2).

ARGUMENT

A Petition for Writ of Certiorari should only be granted when the matter presents a novel issue of law; there was dissent by the Court of Appeals; the decision of the Court of Appeals conflicts with prior law; or where a substantial constitutional issue is directly involved. *See* Rule 242(b), SCACR. None of these factors exist in the present matter. Here, the decision of the Court of Appeals is both consistent with and compelled by the common law of South Carolina.

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[2] The trial court specifically left open Petitioner's right to reassert its claim for indemnification if any third-party claims were ever brought. (Appx. Vol. 2, p. 3).

Despite Petitioner's exhaustive attempts to convince this Court otherwise, the simple question raised here is whether Petitioner is entitled to indemnification from the HOA for a declaratory judgment action—*i.e.*, a clear second-party claim. It is not.

Having conceded it has no right of indemnity for second-party claims, Petitioner attempts to artificially manufacture a third-party claim by alleging "[it] is being required to defend against third-party claims posing as claims of the HOA." (Pet. p. 16). Petitioner erroneously contends the Court of Appeals overlooked its argument regarding the HOA's "associational standing," and therefore misapprehended that the HOA's second-party claims "should be treated as third-party claims" because "[a]lthough the HOA is the named plaintiff, [its] nuisance cause of action seeks to recover money damages on behalf of the subdivision's individual owners for injuries those owners allegedly suffered." (Pet. p. 8). Petitioner suggests that the HOA's lack of standing to sue for nuisance supports its contention that the HOA is asserting third-party claims in disguise, and therefore owes Petitioner indemnity.

Initially this argument is fatally flawed because **the HOA did not bring a cause of action for nuisance against Petitioner**. *See Complaint* (Appx. Vol. 2, pp. 4-10) (emphasis added).[3] Thus, the entirety of Petitioner's argument rests upon a purely hypothetical scenario in which

[3] Oddly, Petitioner also argues that the CCRs are null and void. (Pet. p. 3, n. 2). One is left to wonder: If the CCRs are void, as Petitioner claims, the very document that contains the indemnification provision relied upon by Petitioner 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 Petitioner from seeking indemnity for actual third-party claims "pursuant to the **operative** Covenants and Restrictions." (Appx. Vol. 2, p. 3) (emphasis added). Petitioner cannot rely on a provision it claims is void.

Petitioner pretends the HOA has sued it for nuisance. This despite the fact that the issue of the HOA's standing to bring a claim for nuisance has never been ruled on by the trial court.[4]

Ultimately however, no amount of hypothesizing can avoid the inevitable conclusion that the trial court and Court of Appeals correctly determined the plain language of the indemnity agreement as well as the laws of this State do not support Petitioner's claim for indemnity.

1. The plain language of the indemnification provision demonstrates the Court of Appeals did not misapprehend or overlook anything in summarily affirming the trial court's proper grant of summary judgment on Petitioner's claim for indemnity.

"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). 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, 479, 465 S.E.2d 765, 771 (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).

Turning to the language of the agreement, our courts have established that interpretation and application of an indemnity agreement, like any other contract, will be dictated by its plain language. *Ashley II of Charleston, L.L.C. v. PCS Nitrogen, Inc.*, 409 S.C. 487, 492, 763 S.E.2d 19, 22 (2014). This core principle of any contract dispute is lost in the confusion of the instant

[4] Neither the HOA's standing to sue Petitioner nor its standing to sue the Non-Appealing parties has been ruled on by the trial court.

petition,[5] wherein Petitioner, in its attempt to fabricate a third-party claim that does not exist, blindly assumes that all third-party claims invoke indemnity. To find the fatal flaw in this assumption, this Court need only to look to the plain language of the indemnity agreement which provides:

> The [HOA] shall indemnify and hold harmless each of its directors and officers, each member of any committee appointed pursuant to the Bylaws . . ., 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, [or] 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 Bylaws* or shall have been made fraudulently or with gross negligence or criminal intent . . ..

(Appx. Vol. 2, p. 75) (underline and italics added for distinction).

Tellingly, Petitioner does not devote a single line of its lengthy argument to the language of the agreement. This silence, like the simple language of the agreement, speaks volumes.

Here, the HOA's indemnity obligation arises in two circumstances. The first—as shown by the underlined language above—in the event of liability arising out of acts taken "**on behalf of the Owners**." (emphasis added). The second—as shown by the *italicized* language above—in the event of liability arising out of the indemnitees status as a "director[], Board, officer[or] committee member." Clearly, the language describing this second scenario plainly omits reference to the "Declarant"—as Petitioner claims to be—leaving a Declarant's right of indemnity limited only to the first scenario.

Thus, the plain language of the indemnity agreement provides that a Declarant, like Petitioner, is only entitled to indemnity in the event its liability arises from acts taken "on behalf

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[5] Petitioner addresses issues of standing, the enforcement of arbitration provisions on non-signatories, and real parties in interest. All of which are inapplicable here and supported nearly entirely (if at all) by reference to distinguishable foreign and non-binding authority.

of the Owners." *Compare* (Appx. Vol. 2, p. 75) (language distinguished above in underlined which includes reference to "Declarant") *with* (Appx. Vol. 2, p. 75) (language distinguished above in *italics* which omits reference to "Declarant"). This is fatal to Petitioner's claim because it has failed to present any evidence giving rise to a material question of fact that the acts alleged to have caused the nuisance were taken "on behalf of the Owners." *See supra.* In the absence of such evidence, or question of fact, summary judgment is required. *See e.g., Goode*, 329 S.C. at 440, 449 S.E.2d at 830 (reiterating that in order to survive summary judgment, the non-moving party bears the burden of presenting evidence to establish a material question of fact). The result is the same even in Petitioner's hypothetical universe in which it pretends the HOA sued Petition for nuisance. *See id.*

Moreover, the language of the indemnity agreement is in harmony with the laws and policies of South Carolina which have consistently established that an indemnification agreement will not be interpreted to "to relieve an indemnitee from the consequences of its own" bad conduct. *Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC*, Op. No. 5585 (S.C. Ct. App. Filed Aug. 8, 2018) (Shearouse Adv. Sh. No. 32 at 61); ("Indeed, most courts agree with the basic rule that a contract of indemnity will not be construed to indemnify the indemnitee against losses resulting from its own negligent acts") (internal citations omitted); *Laurens,* 355 S.C. at 111, 584 S.E.2d at 378-79. Equating indemnity to total immunity is contrary to the purpose of indemnity. *See Ashley II,* 409 S.C. at 492, 763 S.E.2d. at 22 (the purpose of indemnity is to allocate costs of potential litigation which may attach to conduct arising from the parties' relationship and this is defeated if the indemnitee is saved from liability for which it is at fault).

In summary, the plain language of the agreement makes clear that the indemnity right for "third-party claims"—as Petitioner claims the HOA is bringing—is not absolute, instead limited

only to those scenarios in which the Declarant's liability arises from acts taken "on behalf of the Owners." *See supra* (Appx. Vol. 2, p. 75). In the absence of any evidence that the acts alleged to have caused the nuisance were taken "on behalf of the Owners" no indemnity obligation arises for a third-party claim, leaving Petitioner's contention that the HOA has asserted third-party claims in disguise to be wholly without consequence to whether an indemnity obligation exists. Therefore, this petition should be denied. *See* Rule 220(c), SCACR (an appellate court may affirm for any reason appearing in the record); *McCall v. Finley*, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987) (Sanders, J., "whatever doesn't make any difference, doesn't matter.").

This dovetails into Petitioner's argument regarding standing and demonstrates that—even if justiciable—whether the HOA's alleged lack of standing suggests that its second-party claims should be treated as third-party claims is wholly without consequence to the HOA's indemnity obligation. Petitioner concedes this point.

2. The HOA's standing to sue for nuisance is neither properly before this Court nor relevant to any indemnity obligation.

Petitioner offers extended commentary of the issue of the HOA's standing (or lack thereof) to sue for nuisance. Again—because it bears repetition—the HOA did not bring an action for nuisance against Petitioner. Thus, the entirety of Petitioner's argument exists in a hypothetical realm. Nevertheless, Petitioner's lengthy commentary regarding the HOA's standing is wholly unrelated to the HOA's indemnity obligation. *See supra* (demonstrating no indemnity obligation owed by the HOA even in the event of a third-party nuisance claim). Petitioner concedes as much in footnotes 4 and 5 of its petition stating; "[i]t matters not whether the HOA actually has standing to assert a nuisance claim for money damages[]" and [a]lthough resolution of this issue is

unnecessary to this appeal, [Petitioner] disputes that the HOA has standing to assert these claims."[6] The concession that this issue is not necessary to decide this appeal conclusively demonstrates this petition should be denied. *See Baber v. Greenville County*, 327 S.C. 31, 44, 488 S.E.2d 314, 321 (1997) (courts will not pass on contingent matters).

Further still, the question of the HOA's standing to bring suit for nuisance—either against the Non-Appealing Parties or Petitioner—is neither justiciable nor preserved for appellate review.

a. The issue of the HOA's standing, as raised by Petitioner, is not justiciable.

Appellate Courts, like trial courts, "will not address the merits of any case unless it presents a justiciable controversy." *See generally Byrd v. Irmo High Sch.*, 321 S.C. 426, 430-31, 468 S.E.2d 861, 864 (1996). "Justiciability encompasses ripeness and standing." *Jowers v. S.C. Dep't of Health & Envtl. Control*, -- S.C. --, 815 S.E.2d 446, 451 (2018) *citing James v. Anne's Inc.*, 390 S.C. 188, 193, 701 S.E.2d 730, 732 (2010) (internal punctuation and quotations omitted). 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).

Here, the HOA's nuisance claim was asserted only against the Non-Appealing Parties. Thus, the right to challenge the HOA's standing belongs—if at all—to the Non-Appealing Parties, not Petitioner. To the extent that the lower court's ruling on indemnity implicates the HOA's standing to sue for nuisance, because neither of the Non-Appealing Parties is a party to this appeal or the underlying motion from which this appeal arises, Petitioner lacks standing to make such a challenge. *See Biven v. Knight*, 254 S.C. 10, 13, 173 S.E.2d 150, 152 (1970) (an appellant may

[6] It is presumably for this reason that despite the impressive length of Petitioner's commentary on the issue it seemingly takes no position, one way or another, as to whether the HOA has standing.

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); *Cisson v. McWhorter*, 255 S.C. 174, 177 S.E.2d 603 (1970) (where the appealing party has not suffered injury, it is without standing to appeal).

Additionally, Petitioner's argument is not ripe. Although seeking indemnity under a provision in the CCRs, Petitioner confoundingly claims those same CCRs are "null and void." (Pet. p. 3, n. 2). 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).

b. The HOA's standing is not preserved.

In addition to being procedurally barred for lack of standing and ripeness, Petitioner's challenge to the HOA's standing is not preserved for appeal.

Under Petitioner's rational, the HOA's standing is a prerequisite to the ultimate issue on appeal—*i.e.*, whether it is owed indemnity by the HOA. However, because Petitioner, and the Non-Appealing Parties, have separately challenged the HOA's standing through a motion that has yet to be ruled upon in the trial court, the issue fails the most basic requirements of issue preservation. *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");[7] *see also Waters v. South Carolina Land Resources Conservation Comm'n*, 321 S.C. 219, 228, 467 S.E.2d 913, 918

[7] For further discussion on the issues of justiciability and issue preservation, the HOA adopts the arguments it set forth to the Court of Appeals as if restated herein. (Appx. pp. 43-58).

(1996) (the concept of "ripeness" prevents a court from issuing a ruling that is "contingent, hypothetical, or abstract").

c. ***Even if the issue is not procedurally barred, the HOA has standing.***

An association may acquire standing in one of two ways; either it has standing in its own right, or it has "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). Here, the single cause of action asserted against Petitioner is for declaratory judgment. The right of an association of co-owners to bring an action, in its own right, for declaratory judgment under its 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). Moreover, Petitioner **does not challenge the HOA's standing to assert this particular claim**. (Appx. pp. 2, 8-17) (emphasis added); *see also* (Pet. p. 12) ("[Petitioner] is not seeking indemnification from the HOA for any claims the HOA may be bringing in its own right[.]").

Furthermore, and to the extent it is germane to this petition, the HOA likewise has standing, both in its own right and/or as an association to bring suit for nuisance against the Non-Appealing parties.[8] *See 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) (holding that a valid claim for nuisance "**does not** require ownership or possession of the land") (emphasis added). A contingent interest in the property—as granted to the HOA in the CCRs—is sufficient to confer standing to allege nuisance. *See id.* Similarly, the HOA likewise has associational standing to bring a claim for nuisance. *See Carnival Corp.*, 407 S.C. at 76, 753 S.E.2d at 850 (recognizing that associational standing is an

[8] The HOA further adopts and incorporates the arguments offered on this issue as set forth in its Final Brief to the Court of Appeals. (Appx. pp. 43-58).

alternative means of acquiring standing where the members would otherwise have standing to sue in their own right). Associational standing is distinct from the standing of an individual because the "interests at stake are germane to the organizations purpose" and common to the membership rather than unique to the individual. *See generally, Creek Pointe Homeowner's Association v. Happ,* 552 S.E.2d 220, 226 (N.C. Ct. App. 2001). For these same reasons, the HOA would, hypothetically, also have standing to make such a claim against Petitioner.

Ultimately however, the HOA's standing is mutually exclusive of any indemnity obligation and is neither justiciable nor preserved for appeal. Nonetheless, and without conceding the issue is properly before the Court, the HOA has standing to bring a claim for nuisance—even assuming such claim was brought against Petitioner. Therefore, the Court of Appeals did not misapprehend any argument in this regard and the instant petition for *writ of certiorari* should be denied.[9]

CONCLUSION

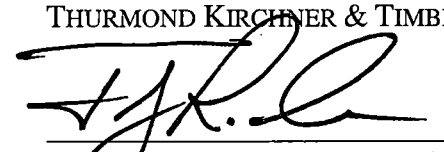
For the reasons stated herein, the instant Petition should be denied.

[signature block to follow]

[9] The HOA's arguments on standing are offered simply for completeness in this Return. Because the issue remains pending before the trial court, the HOA identifies and reserves the right to assert any all arguments in opposition to this still-pending motion regarding its standing.

Respectfully submitted,

THURMOND KIRCHNER & TIMBES, P.A.



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August 22, 2018
Charleston, South Carolina

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APPEAL FROM BERKELEY COUNTY
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Of which Whipple Development Corporation.....Appellant.

AFFIDAVIT OF SERVICE

I, Moira K. McIntire, an employee of Thurmond Kirchner & Timbes, P.A., attorneys for the Respondents, do hereby certify that I have on this date, served a true and correct copy of the Respondent's Return to Petition for a Writ of Certiorari via US Mail and electronic mail to the following counselors of record:

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August 22, 2018
Charleston, South Carolina