

Rel: June 14, 2019

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# **SUPREME COURT OF ALABAMA**

**OCTOBER TERM, 2018-2019**

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**1170694**

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**Phoenix East Association, Inc., Phoenix VIII Association,  
Inc., and Karen Draper**

**v.**

**Perdido Dunes Tower, LLC, et al.**

**Appeal from Baldwin Circuit Court  
(CV-15-900449)**

STEWART, Justice.

This case involves a dispute over the planned construction of a high-rise condominium along the Gulf of Mexico in Orange Beach. For the reasons stated below, we dismiss the appeal in part and affirm the judgment of the

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Baldwin Circuit Court.

Facts and Procedural History

In 1984, Perdido Dunes, a Condominium ("Perdido Dunes"), a beachfront condominium in Orange Beach ("the City"), was created upon the filing of a declaration of condominium in the Baldwin Probate Court ("the probate court"). The declaration established Perdido Dunes Association, Inc. ("PDAI"), as the condominium association for Perdido Dunes. The property on which Perdido Dunes was situated ("the Perdido Dunes property") is a rectangular plat bordered by Alabama State Route 182 to the north and by beachfront along the Gulf of Mexico to the south. As originally constructed, Perdido Dunes consisted of two buildings. The first building contained 8 condominium units ("the 8-unit building") and was located on the southern-most edge of the Perdido Dunes property facing the beach. The second building, containing 35 units ("the 35-unit building"), was constructed along the western property line of the Perdido Dunes property. The eastern side of the Perdido Dunes property contained a parking lot.

The Perdido Dunes property shares common boundaries with property containing other beachfront condominium buildings.

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Phoenix East, a Condominium, which was created by the filing of a declaration of condominium in the probate court in 1995, is a 14-story condominium with 158 residential units located adjacent to and directly east of the Perdido Dunes property. Pursuant to the 1995 declaration, Phoenix East Association, Inc. ("Phoenix East Association"), is the condominium association organized pursuant to the Alabama Uniform Condominium Act, § 35-8A-101 et seq., Ala. Code 1975 ("the Act"), for the purpose of managing Phoenix East.<sup>1</sup> Phoenix VIII, a Condominium, is a 15-story condominium with approximately 81 units that was constructed in 2000 and established by the filing of a declaration of condominium in 2000. Phoenix VIII is located adjacent to and directly west of the Perdido Dunes property. Pursuant to the 2000 declaration, Phoenix VIII Association, Inc. ("Phoenix VIII Association"), is the condominium association organized

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<sup>1</sup>Portions of the Act were substantially amended by the Alabama Legislature in 2018 by Act No. 2018-403, Ala. Acts 2018. Those amendments became effective on January 1, 2019. The matters at issue and the judgment entered in this case predate the effective date of Act No. 2018-403; thus, those amendments do not apply to this appeal. Accordingly, our discussion of the Act in this opinion refers to the provisions of the Act in effect before January 1, 2019.

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pursuant to the Act for the purpose of managing Phoenix VIII. The Perdido Dunes property is separated from the Phoenix East and the Phoenix VIII properties by retaining walls owned by the latter condominiums that run along the boundary lines of the respective properties.

On September 16, 2004, Hurricane Ivan made landfall over Baldwin County, causing significant structural damage to Perdido Dunes. Although repairs were made to the 35-unit building, the 8-unit building was destroyed by the storm, and the remnants of the 8-unit building were subsequently demolished. So that the unit owners of the 35-unit building would not be required to contribute to the cost of rebuilding the 8-unit building, the members of the PDAI negotiated a plan for the Perdido Dunes property. The City's zoning regulations prohibited Perdido Dunes from separating the Perdido Dunes property into two parcels, but the City would allow Perdido Dunes to split the PDAI into two neighborhood associations governed by a master association. Each neighborhood association would own the land beneath its respective building. On October 29, 2005, a majority of the unit owners of the PDAI voted to terminate Perdido Dunes and the PDAI.

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Simultaneously, the unit owners voted to approve an agreement that would reform the PDAI under a master association named the Perdido Dunes Condominium Owners Association, a Master Association, Inc. ("the Master Association"). The ownership interest in the Master Association would comprise the unit owners of two newly created neighborhood associations, namely the Perdido Dunes Tower Condominium Owners Association, Inc. ("the PD Tower Association"), and the Perdido Dunes 2006 Condominium Owners Association, Inc. ("the PD 2006 Association"). The PD Tower Association would serve as the association for Perdido Dunes Tower, a Condominium ("Perdido Dunes Tower"), a prospective 10-story, 20-unit condominium building measuring 56 feet in length that was to be developed by Perdido Dunes Tower, LLC ("Tower LLC"), on the land where the 8-unit building had been located. Likewise, the PD 2006 Association would serve as the association for Perdido Dunes 2006, a Condominium ("Perdido Dunes 2006"), which consisted of the 35-unit building. Under the agreement approved by a majority of the Perdido Dunes unit owners, the common-area property for the two buildings would be owned and managed by the Master Association. The board of directors of the Master

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Association would consist of six members, three of whom would be selected by the unit owners who were members of the PD Tower Association and three of whom would be selected by the unit owners who were members of the PD 2006 Association.

Because the arrangement contemplated by the agreement was not a conventional situation contemplated by the Act, the PDAI sought ratification of the agreement by the Baldwin Circuit Court ("the trial court"). The PDAI filed a complaint for declaratory relief in the trial court, which was docketed as case no. CV-05-741 ("the termination action"). The complaint named as defendants all Perdido Dunes unit owners. On January 5, 2006, the trial court entered an order finding that Perdido Dunes had been validly terminated pursuant to the terms of the 1984 declaration. The trial court also approved of the formation of the Master Association, the PD Tower Association, and the PD 2006 Association. The trial court further stated that "the officers of [the PDAI] and the managing members of [Tower LLC] are hereby appointed as Trustees for the holders of their respective interests and are further empowered to affect all actions necessary to establish a new master association and two (2) neighborhood condominium

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associations." On January 6, 2006, declarations of condominium creating the Master Association, Perdido Dunes Tower, and Perdido Dunes 2006 were filed in the probate court. The articles of incorporation forming the new condominium associations also were filed in the probate court. The new condominiums and associations were created and organized pursuant to the Act. The trial court entered a final judgment in the termination action on January 6, 2006 ("the 2006 judgment"), acknowledging that the appropriate documents had been filed in the probate court to establish the new condominiums and the new associations. The trial court incorporated the January 5, 2006, order into the 2006 judgment by reference. Neither Phoenix East Association nor Phoenix VIII Association intervened in the termination action. No appeal was taken from the 2006 judgment.

On August 1, 2008, the City issued a building permit to Tower LLC authorizing it to begin construction of Perdido Dunes Tower. Construction, however, was delayed as a result of litigation between the PD Tower Association and the PD 2006 Association. That litigation was resolved in October 2014. Tower LLC established plans to begin construction of the

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building on April 13, 2015.

The planned construction was interrupted on April 6, 2015, when the City notified Tower LLC of concerns relating to the width of the proposed Perdido Dunes Tower in relation to the neighboring properties, namely Phoenix East and Phoenix VIII. Specifically, the City questioned whether the location of Perdido Dunes Tower would comply with the City's zoning regulation requiring a 20-foot side setback in relation to neighboring property on either side of a condominium building. In order for the 56-foot-wide Perdido Dunes Tower to comply with the 20-foot setback requirement in relation to Phoenix East and Phoenix VIII, the southern property line of the Perdido Dunes property would need to measure at least 96 feet in length. The City directed that Tower LLC could not begin substantial construction on the building, and the City informed Tower LLC that its building permit would be revoked. If the building permit were revoked, Tower LLC would be required to apply for a new permit under updated City building standards, which, according to the trial court's judgment being challenged on appeal, "would have required significant additional undertakings by the Tower LLC to attempt to

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complete the building of a compliant tower structure."

On April 13, 2015, the PD Tower Association and Tower LLC filed a complaint in the trial court against the City, seeking a judgment declaring that Tower LLC could move forward with the construction of Perdido Dunes Tower and seeking to enjoin the City from revoking Tower LLC's building permit. The case was docketed as case no. CV-15-900449 ("the declaratory-judgment action"). In the complaint, the PD Tower Association and Tower LLC alleged that, since 1984, they or their predecessors had been in peaceable possession of all property east of the retaining wall separating the Perdido Dunes property from Phoenix VIII and west of the retaining wall separating the Perdido Dunes property from Phoenix East. This, they alleged, included two narrow strips of land, one on the eastern side of the Perdido Dunes property and one on the western side, that Phoenix East Association and Phoenix VIII Association contended were part of the common elements of their respective condominium properties. The PD Tower Association and Tower LLC further alleged that they intended to file a separate action to quiet title to the disputed strips of land. On April 13, 2015, the same day the complaint

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was filed, the trial court entered a temporary restraining order enjoining the City from revoking Tower LLC's permit, but also enjoining Tower LLC from beginning construction on Perdido Dunes Tower. On April 20, 2015, Phoenix East Association filed a motion to intervene in the declaratory-judgment action, arguing that it had an interest in the property that was the subject of the action. The trial court granted Phoenix East Association's motion. In its answer as an intervening defendant, Phoenix East Association denied the allegations in the complaint concerning Tower LLC and the PD Tower Association's adverse-possession claim to the narrow strip of land between the two properties, and it alleged affirmative defenses to contest any claim by Tower LLC and the PD Tower Association of adverse possession of any property belonging to Phoenix East.

On April 21, 2015, Tower LLC and the PD Tower Association filed a complaint in the trial court seeking to quiet title to the disputed strips of lands, naming the Master Association and Phoenix East Association as defendants. That case was docketed as case no. CV-15-900468 ("the adverse-possession action"). In the complaint, Tower LLC and the PD Tower

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Association alleged that they had acquired title by adverse possession to a narrow strip of land measuring 2.4 feet in width lying west of the retaining wall that separated the properties.<sup>2</sup> Similarly, Tower LLC and the PD Tower Association later named Phoenix VIII Association as a defendant in an amended complaint alleging that Tower LLC and the PD Tower Association had acquired title by adverse possession to a narrow strip of land measuring 1.3 feet between the Perdido Dunes property and the retaining wall adjacent to Phoenix VIII's property. The trial court consolidated the adverse-possession action and the declaratory-judgment action. Tower LLC and the PD Tower Association amended the complaint in the adverse-possession action to join as defendants all owners of condominium units in Phoenix East, Phoenix VIII, and Perdido Dunes 2006, including Karen Draper, who is the owner of a unit at Perdido Dunes 2006 and who aligned her interests in the litigation with those of Phoenix East Association and Phoenix VIII Association.

In the declaratory-judgment action, the trial court held

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<sup>2</sup>Initially, the parties alleged that the disputed strip of land measured at 5 feet wide, but the strip was measured at 2.4 feet in a survey conducted in 2015, discussed *infra*.

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a hearing on April 23, 2015, on the motion for a preliminary injunction. Vincent Lucido, a licensed land surveyor, testified that he had prepared a special-purpose survey, which also constituted a boundary survey, of the Perdido Dunes property on April 22, 2015.<sup>3</sup> Lucido testified that the survey was conducted to show the location of the Phoenix VIII and Phoenix East properties in relation to the prospective Perdido Dunes Tower. Lucido testified that he used landmarks in the field and the description of the property in the original warranty deed of the Perdido Dunes property from 1969 to determine the location of the section line between the properties and to establish the starting point of his survey. Lucido testified that descriptions of the property in surveys conducted after the 1969 deed but before the 2015 survey altered the starting point by approximately three feet, which would have shortened the width of the Perdido Dunes property. Lucido stated that markers that had been relied upon by previous surveyors were no longer in place because they been destroyed by storms or by utility construction and that, as a

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<sup>3</sup>Other witnesses testified at the hearing, but the record contains a transcript of only Lucido's testimony.

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result, "[t]he written word [in surveys and recorded documents] and where [a property line] actually is in the field are two different things sometimes." Lucido further testified that discrepancies in measurements between the 2015 survey and older surveys of the properties in question could have been caused by different surveyors using different starting points. Under direct examination by counsel for Tower LLC and the PD Tower Association, Lucido testified as follows concerning the distance he measured between the retaining wall of Phoenix VIII and the retaining wall of Phoenix East:

"Q. So, if I understand your process, you set out the lines that were the eastern boundary for Phoenix [VIII] and the western boundary for Phoenix East and you put those on the survey?

"A. That's correct.

"Q. And then you've taken measurements of distances north and south in between the lines that you set out that are those neighbor's boundaries. You've also measured in between the walls, haven't you?

"A. That's correct. That's that mention there, 100.2 between the two walls."

According to Lucido's testimony and Lucido's 2015 survey, the southern property line of the Perdido Dunes property between Phoenix VIII's and Phoenix East's property lines, excluding

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the narrow strips of land at issue in the adverse-possession case, measures 96.5 feet wide. Lucido testified that, although his survey was not a title-boundary survey for the PD Tower Association or Tower LLC, he would not object to it being used for title purposes. Following the hearing, the trial court converted the temporary restraining order to a preliminary injunction.

At a meeting held on November 17, 2017, a majority of the members of the Master Association voted to convey to Tower LLC a one-foot-wide parcel of the common-area property located immediately west of the footprint of where Perdido Dunes Tower would be constructed. The purpose of this conveyance was to center Perdido Dunes Tower to comply with the 20-foot side setback requirement on both the east and west sides of the Perdido Dunes property. The PD Tower Association, the Master Association, and the City later asserted to the trial court that, after the centering of the proposed Perdido Dunes Tower, the 20-foot side setbacks would not include any portion of the disputed strips of land at issue in the adverse-possession action. On December 29, 2017, the Master Association deeded the one-foot-wide strip of land west of Perdido Dunes Tower to

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Tower LLC.

On February 6, 2018, Tower LLC, the PD Tower Association, the Master Association, and the City collectively filed in the declaratory-judgment action and in the adverse-possession action a document titled "Notice of Proposed Settlement and Motion to Enter Consent Decree." The trial court entered a consent decree in the declaratory-judgment action on February 15, 2018 ("the consent decree"), stating, in pertinent part:

"13. The Tower LLC and [PD] Tower Condominium Association subsequently undertook additional efforts to replot and adjust where the footprint of the tower would be located in an effort to meet the twenty (20) foot side setback requirements. The Tower LLC and [PD] Tower Condominium Association submitted to the City a revised site plan, moving the footprint of the condominium in a westerly direction. No other aspects of the footprint (e.g., size) were changed. The results of this adjustment allow for a twenty (20) foot side setback on the east and west sides of the property. ...

"14. The City has reviewed the site plan provided and concluded that it is not contrary to the public interest to allow the footprint of the tower structure presented in 2008, and which formed the basis for the initial approval of the building permit, to be adjusted so as to provide for side setbacks between the east and west property lines and the tower structure equal to or in excess of twenty (20) feet. The City has also concluded that it is not contrary to the public interest to allow the tower structure with that change to be constructed in substantial compliance with the plans submitted in support of the 2008 permit, and to

allow construction of the tower structure as previously submitted in compliance with the building code requirements in place at the time of the initial issuance of the permit.

"NOW THEREFORE, in consideration of the premises, based upon the agreed facts as set forth above, and in furtherance of the agreement of the Settling Parties, it is hereby:

"ORDERED, ADJUDGED and DECREED that:

"15. The Tower LLC and the [PD] Tower Condominium Association have already submitted and the City Building Department has approved full and complete building plans for the tower structure in connection with the permitting process. The Tower LLC has already submitted a revised site plan (drawing C-1) to the City, which has been approved by the City Building Department and the City Council. Additionally, the Tower LLC shall submit the remaining site plan drawing (drawings C-2 through C-4) reflecting the movement of the Tower building footprint to the west as herein described, to the City Building Department.

"16. Upon receipt of the revised site plans ..., the City staff will undertake a review of these plans to ensure compliance with the twenty (20) foot side setback provisions. Upon review and confirmation of compliance with the side setback provisions, the Tower LLC and [PD] Tower Condominium Association will be allowed to construct the proposed structure as long as the Tower LLC and [PD] Tower Condominium Association and their builder comply with the process and procedures for construction that were in place in 2008 and the substantive requirements contained in the Building Code as they existed in 2008.

"17. At the completion of construction, if the footprint of the tower structure conforms to

'Exhibit A' [to the consent decree] and the tower structure conforms to the relevant 2008 Building Code provisions, the City will issue a Certificate of Occupancy to the [PD] Tower Condominium Association.

"18. The provisions of this Consent Decree shall run with the land and may be relied upon, enjoyed and enforced by the Tower LLC and the [PD] Tower Condominium Association, their successors, grantees or assigns.

"19. The provisions of this Consent Decree are unique to the facts of this action and may not be cited as precedent in any proceeding before any City Board, Council or Commission by any person or entity not a party to this action or a successor in interest to any party to this action.

"20. While [Phoenix East Association and Phoenix VIII Association] are not participating in the settlement which has resulted in this Consent Decree, they are nevertheless parties to this consolidated action and their attorneys have received timely notice of the motion of the other parties for the entry of this Consent Decree, and said attorneys have either remained silent after such notice or have notified the Court that they and their clients have no objection to this settlement or to the terms of this Consent Decree. [Phoenix East Association and Phoenix VIII Association] are therefore bound by its provisions, including but not limited to those concerning the issuance and enforceability of the 2008 building permit, the requirements for construction and placement of the tower structure, and the issuance of a Certificate of Occupancy should the Tower structure be built in conformance with the terms of this Consent Decree. All other claims of the Tower LLC, the [PD] Tower Condominium Association, and the Master Association against the City are hereby dismissed, with prejudice.

"21. Pursuant to the provisions of Alabama Rules of Civil Procedure 54(b), the Court expressly determines that there is no just reason for delay in the entry of this Order, and expressly directs the entry of this Consent Decree as to all issues addressed herein."<sup>4</sup>

(Capitalization in original.)

On February 15, 2018, Phoenix East Association and Phoenix VIII Association filed a motion to vacate the consent decree. On March 16, Draper filed a motion joining Phoenix East Association and Phoenix VIII's motion. The trial court

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<sup>4</sup>The consent decree resolved all claims asserted by the PD Tower Association and Tower LLC against the City. Although the consent decree states that Phoenix East Association is bound by the consent decree, nothing in the decree or elsewhere in the record indicates that the trial court adjudicated claims asserted against Phoenix East Association as an intervenor in the declaratory-judgment action. The claims asserted against Phoenix East Association as intervenor, therefore, remain pending in the declaratory-judgment case. The trial court properly certified the consent decree as a final judgment pursuant to Rule 54(b), Ala. R. Civ. P. As discussed *infra*, Phoenix VIII Association and Draper were not parties to the declaratory-judgment action. As also discussed *infra*, consolidation of the declaratory-judgment action and the adverse-possession action did not merge those actions into a single action. Accordingly, the consent decree is not final as to the adverse-possession action, which had not been resolved at the time of the appeal of the judgment in the declaratory-judgment action. Furthermore, although the consent decree states that all claims of the Master Association against the City have been resolved, we note that the Master Association was never added as a party in the declaratory-judgment action, although it was a party to the settlement agreement.

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entered an order denying the motion to vacate on March 20, 2018. Phoenix East Association, Phoenix VIII Association, and Draper filed a notice of appeal to this Court on April 20, 2018.

### Analysis

Phoenix East Association, Phoenix VIII Association, and Draper raise several issues on appeal. They contend (1) that the consent decree is void because the PD Tower Association and the Master Association were invalidly created; (2) that the consent decree purports to sanction the conveyance of "common elements," as that term is defined in the Act, of Perdido Dunes 2006 in violation of the Act; (3) that the partition of common elements is prohibited by the Act and the declaration of condominium for Perdido Dunes 2006; (4) that the consent decree effectively "takes" title to the disputed real property from Phoenix East and Phoenix VIII; and (5) that the consent decree has established title to the disputed narrow strips of land in Tower LLC, the PD Tower Association, and/or the Master Association without requiring those entities to establish their burden of proving ownership of the disputed lands by adverse possession.

I.

Before we address the merits of the appeal, we must first address the appellees' contentions that Phoenix East Association, Phoenix VIII Association, and Draper lack standing to appeal the consent decree. The underlying declaratory-judgment action and the adverse-possession action were consolidated pursuant to Rule 42(a), Ala. R. Civ. P., which provides that,

"[w]hen actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay."

This Court has held that actions consolidated under Rule 42 retain their separate identities.

"[W]hen two or more actions are consolidated under Rule 42, Ala. R. Civ. P., the actions do not lose their separate identities. League v. McDonald, 355 So. 2d 695, 697 (Ala. 1978). Moreover, '[a]n order of consolidation does not merge the actions into a single [action], change the rights or the parties, or make those who are parties to one [action] parties to another.' Jerome A. Hoffman, Alabama Civil Procedure § 5.71 (2d ed. 2001) (citing Evers v. Link Enters., Inc., 386 So. 2d 1177 (Ala. Civ. App. 1980)). Finally, 'in consolidated actions ... the parties and pleadings in one action do not become parties and pleadings in the other.'" Ex parte Flexible Prods. Co., 915 So. 2d 34, 50 (Ala. 2005) (quoting Teague v. Motes, 57 Ala. App. 609, 613, 330 So. 2d 434, 438 (Ala. Civ. App. 1976))."

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Solomon v. Liberty Nat'l Life Ins. Co., 953 So. 2d 1211, 1222 (Ala. 2006).

The trial court's order consolidating the declaratory-judgment action and the adverse-possession action did not "destroy the identity of those actions, but rather provide[d] a means of avoiding repetitious litigation." Ex parte Flexible Prods. Co., 915 So. 2d 34, 50 (Ala. 2005). Consolidation of the actions did not merge the parties in the adverse-possession action into the declaratory-judgment action. Consolidation of the actions did not prevent the parties in the declaratory-judgment action from settling the claims in that action while leaving the claims in the adverse-possession action pending. Nettles v. Rumberger, Kirk & Caldwell, P.C., [Ms. 1170162, Aug. 31, 2018] \_\_\_ So. 3d \_\_\_ (Ala. 2018). Similarly, the trial court's consolidation order does not confer standing on a party in one action to appeal a judgment entered in the other consolidated action in which it is not a party. This Court has held:

"The law in the area of standing for purposes of appeal is well settled. One must have been a party to the judgment below in order to have standing to appeal any issue arising out of that judgment. Triple J Cattle, Inc. v. Chambers, 621 So. 2d 1221 (Ala. 1993). When a court denies a nonparty's motion to intervene in an action, that nonparty cannot

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appeal from the final judgment in the action because it never became a party to that action. Duncan v. First Nat'l Bank of Jasper, 573 So. 2d 270, 273 (Ala. 1990)."

Mars Hill Baptist Church of Anniston, Ala., Inc. v. Mars Hill Missionary Baptist Church, 761 So. 2d 975, 980 (Ala. 1999). See also Marino v. Ortiz, 484 U.S. 301, 304 (1988) ("The rule that only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment, is well settled.").

Phoenix VIII Association was named as a defendant in the adverse-possession action, but it was not a named party in the declaratory-judgment action. Phoenix VIII Association did not intervene in the declaratory-judgment action. Because it was a nonparty in the declaratory-judgment action, Phoenix VIII Association does not have standing to appeal from the consent decree. Similarly, Draper was added as a defendant in an amended complaint filed in the adverse-possession action, but she was not a named party in the declaratory-judgment action. Draper also did not intervene in the declaratory-judgment action. Draper, therefore, does not have standing to appeal from the consent decree. Lack of standing is a jurisdictional defect. State v. Property at 2018 Rainbow Drive, 740 So. 2d 1025, 1027 (Ala. 1999). The notices of appeal filed by Phoenix

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VIII Association and Draper failed to invoke the appellate jurisdiction of this Court; accordingly, their appeal from the consent decree is dismissed.

The trial court, however, granted Phoenix East Association's motion to intervene in the declaratory-judgment action. Although the judgment entered in that action was one by consent, Phoenix East Association was not a party to the consent decree. "A consent decree has elements of difference from one representing judicial determination by the court. For it then 'must be "regarded as in the nature of a contract or binding obligation between the parties thereto.'" "Mudd v. Lanier, 247 Ala. 363, 372, 24 So. 2d 550, 558 (1945) (quoting Garrett v. Davis, 216 Ala. 74, 76, 112 So. 342, 343 (1927), quoting in turn Cowley v. Farrow, 193 Ala. 381, 384, 69 So. 114, 115 (1915) (emphasis added)).

"Although a consent order is a voluntary agreement between the parties, it is also a judicially approved order. Wyatt v. King, 803 F. Supp. 377 (M.D. Ala. 1992). Consent decrees "have attributes both of contracts and of judicial decrees," a dual character that has resulted in different treatment for different purposes.' Local Number 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 519, 106 S.Ct. 3063, 92 L.Ed. 2d 405 (1986)."

Austin v. Alabama Check Cashers Ass'n, 936 So. 2d 1014, 1039 (Ala. 2005). "[A] consent decree is binding only on the

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parties to it." Lott v. Toomey, 477 So. 2d 316, 319 (Ala. 1985) (citing Cowley, 193 Ala. at 384, 69 So. at 115).

"'[P]arties who choose to resolve litigation through settlement may not dispose of the claims of a third party, and a fortiori may not impose duties or obligations on a third party, without the party's agreement. A court's approval of a consent decree between some of the parties therefore cannot dispose of the valid claims of nonconsenting intervenors; if properly raised, these claims remain and may be litigated by the intervenor. And, of course, a court may not enter a consent decree that imposes obligations on a party that did not consent to the decree.'"

Austin, 936 So. 2d at 1040-41 (quoting Local No. 93, Int'l Ass'n of Firefighters, AFL-CIO C.L.C. v. City of Cleveland, 478 U.S. 501, 529 (1986) (emphasis added in Austin)).

In its motion to intervene and its answer stating its defenses for which intervention was sought, Phoenix East Association stated that it was seeking to protect its interest in the narrow strip of property between Phoenix East's western property line and the retaining wall adjacent to the Perdido Dunes property that Tower LLC and the PD Tower Association claimed they had acquired by adverse possession. Pursuant to the trial court's order granting its motion to intervene, which was without limitation, Phoenix East Association became

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a party to the declaratory-judgment action. Phoenix East Association, however, was not a party to the consent decree, although the trial court stated in the consent decree that Phoenix East Association would be bound by it. The trial court certified the consent decree as a final judgment pursuant to Rule 54(b), Ala. R. Civ. P., leaving the adverse-possession claims against Phoenix East Association pending in the declaratory-judgment action along with the claims pending in the adverse-possession action. Accordingly, Phoenix East Association has standing to appeal from the consent decree.

## II.

Phoenix East Association first contends that the 2006 declaration of condominium that created Perdido Dunes Tower, along with forming the PD Tower Association and the Master Association, is a legal nullity because, it says, it failed to comply with the Act. Phoenix East Association argues that § 35-8A-201(c), Ala. Code 1975, which is part of the Act, requires that a condominium building must be substantially constructed before a declaration of condominium can be filed. Section 35-8A-201(c) states:

"A declaration or an amendment to a declaration adding units to a condominium, may not be recorded unless all structural components and mechanical

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systems of all buildings containing or comprising any units thereby created are substantially completed in accordance with the plans as evidenced by a recorded certificate of completion executed by an independent registered engineer or registered architect."

Furthermore, Phoenix East Association contends that the § 35-8A-103(27), Ala. Code 1975, which defines the term "unit owner," also requires that a condominium be in existence before a person can be considered a "unit owner." That section defines a "unit owner" as

"a declarant or other person who owns a unit, or a lessee of a unit in a leasehold condominium whose lease expires simultaneously with any lease the expiration or termination of which will remove the unit from the condominium, but does not include a person having an interest in a unit solely as security for an obligation. In a condominium, the declarant is the initial owner of any unit created by the condominium."

Phoenix East Association argues that there can be no unit owners of Perdido Dunes Tower because, it contends, the condominium has not been created and does not exist under the Act. It further argues that because there is no condominium building and because there are no unit owners, the PD Tower Association has no members, the PD Tower Association has no functioning board of directors, and the Master Association's board of directors cannot assemble a quorum of members to

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conduct business. Phoenix East Association contends that, because of the legal insufficiencies in the creation of and operation of Perdido Dunes Tower, the PD Tower Association, and the Master Association, those entities lacked the authority under the Act and under their own governing documents to take any official action, including creating the condominium and the respective associations and entering into the settlement agreement with the City that resulted in the consent decree in the declaratory-judgment action. Phoenix East Association contends that the consent decree is, therefore, void. We do not agree.

In the 2006 judgment, the trial court in the termination action concluded that the termination of Perdido Dunes was valid and ratified the formation of Perdido Dunes Tower, the PD Tower Association, Perdido Dunes 2006, the PD 2006 Association, and the Master Association under the Act. As a result of the 2006 judgment, declarations of condominium for the reformed condominiums and the organizing documents for the above-listed associations were recorded in the probate court pursuant to the Act. As noted, no party appealed from the 2006 judgment.

Essentially, Phoenix East Association, a nonparty to the

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termination action, is waging a collateral attack on the trial court's 2006 judgment by asserting that Perdido Dunes Tower, the PD Tower Association, Perdido Dunes 2006, the PD 2006 Association, and the Master Association were not validly created. In Randolph County v. Thompson, 502 So. 2d 357 (Ala. 1987), this Court stated:

"As explained in Williams v. First National Bank of Mobile, 384 So. 2d 89, 93 (Ala. 1980):

''[A] direct attack upon a judgment is an attempt to amend, correct, reform, vacate, or enjoin the execution of that judgment in a proceeding instituted for that purpose, and ... a collateral attack is an attempt to avoid the binding force of a judgment in a proceeding not instituted in an attempt to amend, correct, reform, vacate or enjoin its execution.'

"See also Williams v. Overcast, 229 Ala. 119, 155 So. 543 (1934). This distinction between a direct and a collateral attack cannot be overemphasized.

"A judgment which is regular on its face and indicates subject matter and personal jurisdiction is conclusive on collateral attack. Otto v. Guthrie, 475 So. 2d 856 (Ala. 1985); Nigg v. Smith, 415 So. 2d 1082 (Ala. 1982); Williams v. First National Bank of Mobile, supra.

"The general rule regarding the collateral attack of a judgment by a person who was not a party to the prior proceeding is adequately stated in 49 C.J.S. Judgments § 414 (1947):

''A stranger to the record, who was not a party to the action in which the

judgment was rendered or in privity with a party is not prohibited from impeaching the validity of the judgment in a collateral proceeding; but in order to do so he must show that he has rights, claims or interests which would be prejudiced or injuriously affected by the enforcement of the judgment, and which accrued prior to its rendition, unless the judgment is absolutely void. Thus situated he may attack the judgment on the ground of want of jurisdiction, or for fraud or collusion; but he cannot object to it because of mere errors or irregularities or for any matters which might have been set up in defense to the original action.'"

502 So. 2d at 361-62.

In its principal brief on appeal, Phoenix East Association does not allege that the trial court lacked jurisdiction to enter the 2006 judgment or that the 2006 judgment was based on fraud or collusion. It does not argue that the 2006 judgment is void. Phoenix East Association fails to even acknowledge the existence of the 2006 judgment in relation to its argument. Phoenix East Association provides citations to the Act in support of its argument concerning the alleged legal shortcomings of the creation of Perdido Dunes Tower, the PD Tower Association, and the Master Association, but, in its principal brief and in its reply brief, Phoenix East Association does not cite any authority that would compel

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this Court to declare the 2006 judgment void. Phoenix East Association does not argue that its rights, claims, or interests are prejudiced or injuriously affected by the 2006 judgment. Thompson, 502 So. 2d at 362. No argument is made that the 2006 judgment was a product of fraud or collusion. Accordingly, Phoenix East Association's collateral attack on the 2006 judgment fails, and we conclude that Perdido Dunes Tower, the PD Tower Association, and the Master Association were legally constituted under the Act with authority to enter into the settlement agreement with the City and to become parties to the consent decree.

### III.

Phoenix East Association next argues that the consent decree authorizes the conveyance of common elements of Perdido Dunes 2006 by the Master Association in violation of the Act. Section 35-8A-312, Ala. Code 1975, a part of the Act, states, in pertinent part:

"(a) In a condominium portions of the common elements may be conveyed or subjected to a security interest by the association if persons entitled to cast at least 80 percent of the votes in the association, including 80 percent of the votes allocated to units not owned by a declarant, or any larger percentage the declaration specifies, agree to that action; but all the owners of units to which any limited common element is allocated must agree

in order to convey that limited common element or subject it to a security interest. The declaration may specify a smaller percentage only if all of the units are restricted exclusively to nonresidential uses. Proceeds of the sale or loan are an asset of the association.

"(b) An agreement to convey common elements in a condominium or subject them to a security interest must be evidenced by the execution of an agreement, or ratifications thereof, in the same manner as a deed, by the requisite number of unit owners. The agreement must specify a date after which the agreement will be void unless recorded before that date. The agreement and all ratifications thereof must be recorded in every county in which a portion of the condominium is situated, and is effective only upon recordation.

"(c) The association, on behalf of the unit owners, may contract to convey an interest in a condominium pursuant to subsection (a), but the contract is not enforceable against the association until approved pursuant to subsections (a) and (b). Thereafter, the association has all powers necessary and appropriate to effect the conveyance or encumbrance, including the power to execute deeds or other instruments.

"(d) Any purported conveyance, encumbrance, judicial sale, or other voluntary transfer of common elements, unless made pursuant to this section, is void.

"(e) A conveyance or encumbrance of common elements pursuant to this section does not deprive any unit of its rights of access and support."

In its motion to vacate the consent decree, Phoenix East Association argued that the one-foot-wide strip of common area conveyed by the Master Association to Tower LLC in December

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2017 for the purpose of centering Perdido Dunes Tower was, in actuality, an attempted conveyance of the common elements of Perdido Dunes 2006. Phoenix East Association alleged that the original developer of Perdido Dunes conveyed deeds to purchasers of the units of Perdido Dunes that transferred to them "an undivided interest in and to the common area as shown and defined in the Declaration of Condominium of Perdido Dunes, a Condominium, and amendments thereto." According to Phoenix East Association, the termination of Perdido Dunes did not supersede the transfers made by deeds to the original unit purchasers and the Perdido Dunes common areas remained common elements of Perdido Dunes 2006. Phoenix East Association argues that the unit owners of Perdido Dunes 2006, not the Master Association, were in possession of those common elements. Under § 35-8A-312, a transfer of the common elements could not occur without a vote of approval of at least 80% of the unit owners; thus, Phoenix East Association contends, the transfer of the one-foot-wide strip of land by the Master Association would be void unless 80% of the unit owners constituting the PD 2006 Association agreed to the transfer.

The Act provides a party aggrieved by an action that is not in compliance with the Act the right to assert a claim

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against the noncompliant person. Section 35-8A-414, Ala. Code 1975, provides, in pertinent part:

"If a declarant or any other person subject to [the Act] fails to comply with any provision hereof or any provision of the declaration or bylaws, any person or class of persons adversely affected by the failure to comply has a claim for actual damages or appropriate equitable relief. The court, in an appropriate case, may award reasonable attorney's fees ...."

The Act defines the term "person" broadly to mean "[a] natural person, corporation, business trust, estate, trust, partnership, association, joint venture, government, governmental subdivision or agency, or other legal or commercial entity." § 35-8A-103(19), Ala. Code 1975. The Act defines the term "association" as "[t]he corporation organized under Section 35-8A-301." § 35-8A-103(3). Because they are corporations organized under § 35-8A-301, both Phoenix East Association and the Master Association are "associations" under the Act and are therefore also considered to be "persons" for purposes of § 35-8A-414.

Pursuant to its motion to intervene and the answer it filed in intervention, Phoenix East Association intervened in the declaratory-judgment action to protect any interest it may have in the narrow strip of land lying west of the retaining

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wall that separated its property from the Perdido Dunes property. Although Phoenix East Association's stated interest in the declaratory-action was confined, the trial court's order granting Phoenix East Association's motion to intervene placed no limitation on the substantive issues or claims Phoenix East Association could raise. See Marcum v. Ausley, 729 So. 2d 845, 848 (Ala. 1999) (holding that the trial court's granting of limited intervention pursuant to Rule 24, Ala. R. Civ. P., effectively foreclosed the intervenor's attempts to argue substantive issues unrelated to the purpose for the intervention); see also Pinto v. Alabama Coalition for Equity, 662 So. 2d 894 (Ala. 1995). Phoenix East Association never sought permission from the trial court to assert a counterclaim pursuant to Rule 13(e), Ala. R. Civ. P., for equitable relief under § 35-8A-414 to have the Master Association's December 2017 transfer of property to Tower LLC declared void for alleged noncompliance with § 35-8A-312 or other provisions of the Act. Furthermore, Phoenix East Association failed to assert as a part of any claim that it is a person "adversely affected" by the Master Association's transfer of the property to Tower LLC. Instead, Phoenix East Association asserted that argument for the first time in its

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postjudgment motion. The failure to properly plead a claim under § 35-8A-414 of the Act is fatal. Phoenix East Association did not avail itself of the rights afforded persons aggrieved under the Act. The issue, therefore, is not properly before this Court, and the consent decree is affirmed as to this issue.

#### IV.

The remainder of Phoenix East Association's arguments are waived. Phoenix East Association contends that both the Act and the declaration of condominium creating Perdido Dunes 2006 prohibit the partition of common elements, but the only authority cited in this section of Phoenix East Association's principal brief is § 35-8A-312(b), which Phoenix East Association cites for the proposition that an agreement to convey common elements in a condominium must be filed in the probate court. Phoenix East Association also argues that the consent decree effectively ordered title of the disputed narrow strip of land to be transferred from Phoenix East to the Master Association, but it provides no citation to authority to support this argument. Lastly, Phoenix East Association argues that the consent decree has vested title to the disputed narrow strip of land in Tower LLC, the PD Tower

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Association, and/or the Master Association without requiring those parties to establish their burden of proving ownership of the disputed lands by adverse possession. As to this argument, Phoenix East Association cites Sparks v. Byrd, 562 So. 2d 211, 214 (Ala. 1990), for the general proposition of law pertaining to the elements of establishing a claim for adverse possession, but it cites no other authority pertinent to its argument.

Regarding these three arguments, Phoenix East Association has not provided this Court with citations to applicable authority that demonstrate error in the consent decree.

"Rule 28(a)(10), Ala. R. App. P., requires that arguments in an appellant's brief contain "citations to the cases, statutes, other authorities, and parts of the record relied on." ... "[I]t is well settled that a failure to comply with the requirements of Rule 28(a)(10) requiring citation of authority in support of the arguments presented provides this Court with a basis for disregarding those arguments." State Farm Mut. Auto. Ins. Co. v. Motley, 909 So. 2d 806, 822 (Ala. 2005).'"

Prattville Mem'l Chapel v. Parker, 10 So. 3d 546, 560 (Ala. 2008) (quoting Jimmy Day Plumbing & Heating, Inc. v. Smith, 964 So. 2d 1, 9 (Ala. 2007)). Accordingly, Phoenix East Association's arguments as to these issues are waived, and the consent decree is affirmed as to these issues.

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Conclusion

For the foregoing reasons, the appeal insofar as it was filed by Phoenix VIII Association and Draper is dismissed because those parties lack standing to appeal. The appellant Phoenix East Association has standing to appeal, but its challenge to the consent decree is unavailing, and the consent decree is affirmed.

APPEAL DISMISSED IN PART; AFFIRMED.

Parker, C.J., and Bolin, Wise, and Sellers, JJ., concur.