

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM HORRY COUNTY  
Court of Common Pleas  
William H. Seals, Jr., Circuit Court Judge

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Circuit Court Case No. 2009-CP-26-5743

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Hotel and Motel Holdings, LLC,

Respondent,

v.

BJC Enterprises, LLC, Wendy J. Bellamy, Americana, Inc.,  
a/k/a Americana Motel of Myrtle Beach, Inc., Mazingo & Wallace  
Architects, LLC, Kersi S. Shroff, and Shroff Management, Inc.,

Defendants.

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BJC Enterprises, LLC, Wendy J. Bellamy, Americana, Inc.,  
a/k/a Americana Motel of Myrtle Beach, Inc.,

Appellants,

v.

First Palmetto Savings Bank, F.S.B., Jack Jones,  
Donald D. Godwin, and Bhupendra Patel,

Respondents.

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INITIAL BRIEF OF RESPONDENTS HOTEL & MOTEL HOLDINGS, LLC,  
JACK JONES AND DONALD D. GODWIN

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**SC Court of Appeals**

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## STATEMENT OF THE ISSUES ON APPEAL

I. Did the trial court correctly grant summary judgment to Respondent Hotel & Motel Holdings, LLC (“H & M”) on the counterclaims asserted by Appellants BJC Enterprises, LLC (“BJC”), Wendy J. Bellamy (“Bellamy”), and Americana, Inc. (“Americana”) (collectively “Appellants”) for breach of contract, fraud, breach of contract accompanied by a fraudulent act, civil conspiracy, conversion, interference with contractual relationship, intentional infliction of emotional distress/outrage, and violation of the South Carolina Unfair Trade Practices Act where Appellants were in default under the terms of their loan agreement and failed to present even a scintilla of evidence in support of their counterclaims?

II. Did the trial court correctly dismiss Appellants’ third-party claim for civil conspiracy against Respondents Jack Jones and Donald Godwin where Appellants failed to plead special damages or additional acts in furtherance of the alleged conspiracy and instead merely reasserted other claims contained in their counterclaims and third-party complaint and alleged the same damages averred in their other causes of action?

III. Did the trial court correctly strike Appellants’ request for a jury trial where the only affirmative claim pending against any party was equitable in nature and to which there is no right to a jury trial?

## STATEMENT OF THE CASE

This appeal arises from a commercial foreclosure action brought by Respondent First Palmetto Savings Bank, FSB (“First Palmetto”) against, among others, Appellants BJC Enterprises, LLC (“BJC”), Americana, Inc. (“Americana”), and Wendy J. Bellamy (“Bellamy”). First Palmetto filed a Summons and Complaint in the Court of Common Pleas for Horry County on June 11, 2009. On June 30, 2009, Hotel & Motel Holdings, LLC (“H & M”) purchased the mortgages which are the subject of this action, and assignments of the mortgages were recorded with the Office of the Horry County Register of Deeds. [Amended Complaint at ¶ 3 and Exhibits A-C]. Subsequently, H & M filed a motion with the lower court seeking its substitution as the plaintiff. After a hearing, the trial court granted the motion, and H & M was substituted as the plaintiff. [Consent Order Substituting Plaintiff, September 11, 2009].

BJC, Americana and Bellamy answered the Amended Complaint and later filed an Amended Answer with Counterclaims and Third-Party Complaint. In the Amended Answer, BJC, Americana and Bellamy asserted the following counterclaims against H & M: breach of contract, fraud, breach of contract accompanied by a fraudulent act, civil conspiracy, conversion, interference with contractual relationship, intentional infliction of emotional distress/outrage, and violation of the South Carolina Unfair Trade Practices Act. [Amended Answer, Counterclaims, and Third-Party Complaint (hereinafter “Amended Answer”) at ¶¶ 79-147]. The Third-Party Complaint alleged the following causes of action against Respondents Jack Jones and Donald Godwin: civil conspiracy, conversion, interference with contractual relationship, and intentional infliction of

emotional distress/outrage. Bellamy asserted an additional third-party claim against Jones for breach of fiduciary duty. [Amended Answer at ¶¶ 148 - 154].

In response to the third-party claims, Jones and Godwin filed and served motions to strike and to dismiss pursuant to Rules 12(b)(6), 12(b)(8), and 14, SCRPC. [Motion to Strike and Dismiss and Memorandum of Law in Support of Motion, July 16, 2010]. After a hearing before the Honorable Judge Steven H. John on Thursday, September 23, 2010, the third-party causes of action for conversion, interference with contractual relationship, intentional infliction of emotional distress, breach of fiduciary duty, fraud, and violation of the South Carolina Unfair Trade Practices Act were stricken as improper third-party claims under Rule 14, SCRPC. [Transcript of Hearing, September 23, 2010, at p. 39, ln. 25 – p. 58, ln. 10; Order Granting Motion to Dismiss Third Party Complaint, October 15, 2010]. In his order dated October 15, 2010, Judge John ordered those claims stricken from the Third-Party Complaint, but Judge John expressly declined to rule on the Rule 12(b)(6), SCRPC motions of Jones and Godwin. [Id.].

Thereafter, on April 14, 2011, a hearing was held in the lower court on the Rule 12(b)(6) motions to dismiss the third-party claim for civil conspiracy as to Jones and Godwin. [Transcript of Hearing, April 14, 2011, p. 7, ln. 24 – p. 28, ln. 14]. By order dated April 20, 2011, Judge Seals dismissed the third-party claim for civil conspiracy against Jones and Godwin. [Order Granting Motions to Dismiss Filed on Behalf of Third-Party Defendants, April 20, 2011]. In his Order, Judge Seals found that Appellants BJC, Americana, and Bellamy failed to plead special damages unique to the civil conspiracy claim, and failed to make any allegation that they incurred damages as a result of the alleged conspiracy. [Id.]. Further, Judge Seals found that Appellants failed to

plead additional acts in furtherance of the conspiracy, distinct and separate from the other wrongful acts alleged in the Third-Party Complaint. [Id.].

In response to the counterclaims, H & M filed and served a motion for summary judgment, and a hearing on the motion was held before the Honorable William H. Seals, Jr. on Thursday, May 12, 2011. [Motion for Summary Judgment and Memorandum of Law in Support of Motion for Summary Judgment, May 2, 2011; Transcript of Hearing, May 12, 2011 p. 5, ln. 1 – p. 61, ln. 24]. By order filed with the Horry County Clerk of Court on June 6, 2011, the trial court granted the motion for summary judgment as to the counterclaims of BJC, Americana, and Bellamy. [Order Granting Motion for Summary Judgment on Counterclaims, June 1, 2011]. As a result, by June of 2011, the only affirmative claims that had not been adjudicated by the court were those asserted by H & M. Thus, on June 6, 2011, H & M filed a motion to strike the request for jury trial. [Motion to Strike Request for Jury Trial, June 6, 2011]. By order dated September 26, 2011, Judge Seals granted the motion to strike the request for a jury trial, finding that because the only claims pending in the action were related to the foreclosure of real property mortgages, BJC, Americana, and Bellamy were not entitled to a jury trial. [Order Granting Motion to Strike Request for Jury Trial, September 26, 2011].

After the denial of several motions to reconsider, BJC, Americana and Bellamy then commenced this appeal. Thereafter, the Honorable J. Derham Cole, Circuit Court Judge held the foreclosure trial of this matter on July 23 – 26, 2012. Judge Cole entered an Order and Judgment of Foreclosure and Sale on October 9, 2012, and the properties were sold at foreclosure by the Horry County Master-in-Equity on August 5, 2013.

## STATEMENT OF THE FACTS

First Palmetto made a commercial loan to BJC for the acquisition of an oceanfront, three-story motel known as the Emerald Shores Motel. [Amended Answer at ¶ 15]. The initial members of BJC were Bellamy, Harvey L. Jones, and Henry C. Coan, III. [W. Bellamy Dep. at p. 17, lns. 4-8]. The initial loan was made by First Palmetto in January of 2005 in the principal amount of \$5,580,000.00. [W. Bellamy Dep. at p. 26, ln. 16 – p. 27, ln. 11]. Under the terms of the initial Note, BJC was to make twenty-three monthly interest payments and a final balloon payment of approximately \$5.6 million in January of 2007. [W. Bellamy Dep. at p. 26, ln. 16 – p. 28, ln. 10]. Prior to the maturity date, BJC renewed its loan with First Palmetto in January of 2007. [B. Hutto Dep. at p. 66, ln. 24 – p. 67, ln. 3]. The 2007 renewal called for eleven monthly interest payments and a balloon payment in January 2008. [B. Hutto Dep. at p. 66, ln. 24 – p. 67, ln. 3]. However, again in January of 2008, First Palmetto renewed the BJC loan. [B. Hutto Dep. at p. 67, lns. 7-13; Amended Complaint at Exhibit D]. Under the final renewal, BJC was required to make eleven monthly payments of principal and interest, with a balloon payment of \$5.5 million due in January 2009. [B. Hutto Dep. at p. 67, lns. 7-13; Amended Complaint at Exhibit D].

BJC defaulted on its loan in late 2008, and the company did not make the required balloon payment on January 17, 2009. [W. Bellamy Dep. at p. 50, ln. 23 – p. 51, ln. 7]. The loan matured on January 17, 2009 and it was not paid. [W. Bellamy Dep. at p. 50, ln. 23 – p. 51, ln. 7]. First Palmetto initiated a foreclosure action on February 2, 2009. Thereafter, BJC and its members negotiated a payment deferral with First Palmetto, whereby First Palmetto agreed to forbear from exercising its legal rights under the terms

of the loan through May 31, 2009. [W. Bellamy Dep. at p. 92, ln. 15 – p. 93, ln. 4; p. 102, lns. 12-16]. First Palmetto voluntarily dismissed its foreclosure action. However, BJC again failed to make the balloon payment in May of 2009, and First Palmetto commenced the present foreclosure action on June 11, 2009.

H & M was formed on June 15, 2009, when its Articles of Organization were filed with the Office of the South Carolina Secretary of State. [J. Jones Dep., Oct. 21, 2010 at p. 81, ln. 23 – p. 82, ln. 14 and Exhibit 26]. On June 30, 2009, H & M closed on the purchase of the BJC note, the mortgages executed by BJC, Americana and Bellamy and the accompanying loan documents (collectively the “Loan Documents”) held by First Palmetto. [J. Jones Dep. at p. 111, lns. 3-14]. As consideration for the purchase of the Loan Documents, H & M immediately paid \$2,000,000.00 to First Palmetto. Half of this money was a down payment, and the other half was placed in a certificate of deposit with First Palmetto to serve as interest carry for the loan for its term of five years. [J. Jones Dep. at p. 52, lns. 4-12]. In addition, H & M executed a promissory note in the principal amount of \$4,000,000.00, secured by mortgages on the properties. [J. Jones Dep. at p. 112, ln. 18 – p. 113, ln. 1]. Initially, Jones was the sole member of H & M. However, in October of 2009, Godwin purchased a fifty percent membership interest in the company. [J. Jones Dep. at p. 82, ln. 18 – p. 85, ln. 25].

On September 11, 2009, H & M was substituted as the plaintiff in this foreclosure action initiated by First Palmetto. [Consent Order Substituting Plaintiff, September 11, 2009]. On April 20, 2010, the Honorable Steven H. John appointed Kenan L. Walker of Waccamaw Land & Timber, LLC as Receiver for the properties secured by the Loan Documents. [Order for the Appointment of Receiver, April 20, 2010]. Since his

appointment, the Receiver has controlled the properties, collected all rental payments, as well as any other income derived from the properties, and each month the Receiver submits a detailed accounting to the Clerk of Court.

## **STANDARD OF REVIEW**

### *Summary Judgment*

When an appellate court reviews a decision to grant summary judgment, it applies the same standards that governed the trial court under Rule 56, SCRPC. Laurens Emergency Med. Specialists v. M.S. Bailey & Sons Bankers, 355 S.C. 104, 109, 584 S.E.2d 375, 377 (2003). Under Rule 56, summary judgment is appropriate when it is clear that there is no genuine issue of material fact, and the conclusions and inferences to be drawn from the facts are undisputed. SSI Med. Servs., Inc. v. Cox, 301 S.C. 493, 392 S.E.2d 789 (1990).

When a court rules on a motion for summary judgment, it must view the evidence, and the inferences reasonably to be drawn from that evidence, in the light most favorable to the nonmoving party. Id. However, a party bearing the burden of proof on a particular claim must factually support each element of that claim, and a “complete failure of proof concerning an essential element [of that claim] necessarily renders all other facts immaterial.” Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

On those issues where the nonmoving party will have the burden of proof, it is that party’s obligation to confront the motion for summary judgment with specific facts demonstrating all elements of the claim. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986). The plain language of Rule 56(c), SCRPC, mandates the entry of summary judgment against a party who fails to make a showing sufficient to establish the existence

of an element essential to that party's case. Baughman v. AT&T, 306 S.C. 101, 410 S.E.2d 537 (1991). In such a situation, the moving party is entitled to judgment as a matter of law because the nonmoving party has failed to demonstrate a genuine issue of material fact as to a necessary part of that party's claim. Id.

Once the party moving for summary judgment meets its initial burden of showing a lack of genuine issue of material fact, the opponent cannot simply rest on mere allegations or denials contained in the pleadings. Bravis v. Dunbar, 316 S.C. 263, 265, 449 S.E.2d 495, 496 (Ct. App. 1994). Rather, the nonmoving party must set forth or point to specific facts showing that there is a genuine issue for trial. Id. Moreover, in cases requiring a heightened burden of proof, the party opposing summary judgment must submit more than a mere scintilla of evidence to withstand the motion. Hancock v. Mid-South Mgmt. Co., Inc., 318 S.C. 326, 330-31, 673 S.E.2d 801, 803 (2009).

#### ***Dismissal Pursuant to Rule 12(b), SCRPC***

In reviewing a decision on a motion to dismiss, the appellate court applies the same standard of review as the trial court. Doe v. Marion, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007). "If the facts alleged and inferences reasonably deducible therefrom, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, then dismissal under Rule 12(b)(6) is improper." Id. "The question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief." Id., 645 S.E.2d at 247-48. However, "[q]uestions of law may be decided with no particular deference to the trial court." Carolina Park Assocs., LLC v. Marino, 400 S.C. 1, 6, 732 S.E.2d 876, 878 (2012).

## ARGUMENT

### I. THE TRIAL COURT CORRECTLY FOUND THAT THERE IS NO EVIDENCE TO SUPPORT APPELLANTS' COUNTERCLAIMS AGAINST H & M.

#### **A. There is No Evidence to Support Appellants' Breach of Contract Claim.**

In their counterclaim, Appellants do not allege a breach of any specific provision of the loan documents by H & M. Instead, Appellants allege generally that H & M breached the implied covenant of good faith and fair dealing as contained in the loan transaction documents and any subsequent modifications and renewals. [Amended Answer ¶ 82]. “Although implied covenants are not favored in the law, . . . there exists in every contract an implied covenant of good faith and fair dealing.” Commercial Credit Corp. v. Nelson Motors, Inc., 247 S.C. 360, 366-67, 147 S.E.2d 481, 484 (1966). A breach of the implied covenant of good faith and fair dealing is not an independent cause of action separate from the claim for breach of contract. RoTec Services, Inc. v. Encompass Services, Inc., 359 S.C. 467, 473, 597 S.E.2d 881, 884 (Ct. App. 2004). Since its application in this state, South Carolina courts have consistently given credence to the underlying purpose of the doctrine of good faith and fair dealing by using it to protect the intentions of the parties to the contract. As stated by this Court:

An allegation of breach of the implied covenant of good faith and fair dealing is an allegation of breach of an “ex contractu” obligation, namely one arising out of the contract itself. The covenant of good faith is read into contracts in order to protect the express covenants or promises of the contract, not to protect some general public policy interest not directly tied to the contract's purposes.

Williams v. Riedman, 339 S.C. 251, 272, 529 S.E.2d 28, 39 (Ct. App. 2000). However, “[t]here is no breach of an implied covenant of good faith where a party to a contract has done what the provisions of the contract expressly gave him the right to do.” First Fed.

Sav. & Loan Ass'n of S.C. v. Dangerfield, 307 S.C. 260, 267, 414 S.E.2d 590, 594 (Ct. App. 1992).

There is no dispute that Appellants were in default under the terms of the Loan Documents in January of 2009 and again after May 31, 2009, when Appellants failed to make the required \$150,000.00 interest payment. As a result, Appellants' claim for breach of the implied obligation of good faith and fair dealing fails as a matter of law.

Nonetheless, Appellants make numerous allegations in support of their claim that H & M breached its implied covenant of good faith and fair dealing, however, at the hearing on the motion for summary judgment, Appellants failed to present any evidence in support of their counterclaims and instead relied upon general, unsupported allegations of wrongdoing, each of which is addressed in detail below.

**(1) H & M foreclosed On Appellants' Property [Amended Answer ¶ 86(e)].**

Though the public record clearly indicates that H & M did not initiate the foreclosure proceedings against Appellants, H & M certainly had the right to continue the foreclosure proceedings after its purchase of the Loan Documents from First Palmetto. An assignee has the same rights as the assignor, including the right to sue. Moore v. Weinberg, 373 S.C. 209, 220, 644 S.E.2d 740, 745 (Ct. App. 2007). Since H & M had the right to continue the foreclosure proceedings, then its continuation of the foreclosure action is not evidence which would support a claim for breach of contract.

**(2) H & M Purchased The Loan Documents In A Transaction That Was Not At Arms' Length [Amended Answer ¶ 88].**

Appellants assert that the loan sale transaction between H & M and First Palmetto was not at arms' length. However, not only did Appellants present no evidence of this

allegation, it is demonstrably false and has no bearing on the obligations of BJC under the terms of its loan with First Palmetto. In other words, even assuming the transaction was not at arms' length, BJC still owes the debt, and there is no dispute that it has not been paid. Moreover, there is no dispute that under the terms of the Loan Documents, if BJC fails to make payment on the note (as it certainly has failed to do), the holder has a right to foreclose on the properties securing the loan. Both H & M and First Palmetto assert that H & M is the rightful owner of the promissory note and mortgages. Therefore, the trial court correctly held that H & M was entitled to maintain and complete the foreclosure action below.

Substantively, Appellants' allegation that the transaction was not at arms' length is wholly unsupported by the facts and evidence in this case. At the time of its purchase of the Loan Documents, the principal amount of the BJC Note was \$5,029,708.41, and H & M purchased the Loan Documents for \$5,000,000.00. [J. Jones Dep. p. 112, ln. 18 – p. 113, ln. 1]. Thus, the purchase price was approximately at par value, and there was only a nominal discount of the loan. Therefore, any allegation that the transaction was not at arms' length is negated by the actual amount of money paid for the Loan Documents, and Appellants produced no evidence which would support their claims to the contrary.

In summary, the allegation that the loan sale transaction was not at arms' length is wholly unfounded, and even if it was not, the obligations of BJC do not change. Therefore, there is no evidence to support Appellants' counterclaim for breach of contract against H & M, and the trial court correctly granted summary judgment on this claim.

**(3) H & M Has Trespassed On The Property Of Appellants And Interfered With The Operations Of The Properties [Amended Answer ¶¶ 89 – 90];**

In their counterclaims, Appellants made the conclusory allegation that H & M has trespassed on their properties and interfered with operations on the properties. Appellants, however, offered no evidence of trespass, and more importantly, Appellants offered no explanation as to how H & M's presence on the property constitutes a violation of its duties of good faith and fair dealing. While H & M denies the trespassing allegations, the Loan Documents expressly provide for entry on the premises. [Amended Complaint at Exhibit K, p. 4, ¶ 11(G)].

Moreover, any presence H & M has had at the properties was expressly authorized by the Receiver and was for the purpose of benefiting the properties. The evidence establishes numerous monetary contributions, as well as manual labor, provided by H & M for the betterment of the properties. [J. Jones Dep. at p. 190, ln. 6 – p. 192, ln. 2]. Quite simply, the activities of H & M conducted on the properties were to maximize the income generated from the properties, and all such income has been documented and accounted for by the Receiver. [J. Jones Dep. at p. 104, ln. 22 – p. 105, ln. 14]. It would be illogical for H & M to attempt to harm the hotel operations, and Appellants presented no evidence of such.

Finally, there is no dispute that Appellants were in default prior to any entry unto the premises by representatives of H & M. A claim for breach of covenant of good faith and fair dealing cannot stand if the party seeking the damages has not performed under the contract. Swinton Creek Nursery v. Edisto Farm Credit, ACA, 334 S.C. 469, 514 S.E.2d 126 (1999) ("One who seeks to recover damages for breach of contract, to which

he was a party, must show that the contract has been performed on his part, or at least that he was, at the appropriate time, able, ready, and willing to perform it.") (citation omitted).

Therefore, Appellants failed to present any evidence to support their allegations of trespass, the allegations are clearly unfounded and cannot form the basis of a breach of contract counterclaim against H & M. As such the trial court did not err in granting summary judgment on this claim.

**(4) H & M Has Converted Rent Monies From Appellants  
[Amended Answer ¶ 92];**

Appellants have presented no evidence that H & M has either received money from rental operations of the properties or failed to deliver or account to Appellants for any such money. The Amended Answer does not set forth any specific amount of money that H & M has allegedly misappropriated. To the contrary, the evidence in this case establishes that in fact, H & M has contributed a substantial amount of money to fund the operations of the properties. [J. Jones Dep. at p. 190, ln. 6 – p. 192, ln. 2]. Moreover, a Court-appointed Receiver has been in place since April 2010 and is charged with collecting and accounting for all rent monies received. [Order for Appointment of Receiver, April 10, 2010]. Even if H & M had collected rent, which is denied vigorously, it has a contractual right to do so.

H & M is the assignee of the Assignment of Leases and Rents [Amended Complaint at Exhibit K]. The Assignment of Leases and Rents provides in pertinent part as follows:

Assignor may collect, receive, enjoy and use the Rents so long as Assignor is not in default. . . . Upon default, Assignor will receive any Rents in trust for Lender and Assignor will not commingle the Rents with any other funds.

[Id.]. Appellants do not contest that BJC was in default prior to the formation of H & M. As a result, H & M had a contractual right to receive any rents received from the hotel operations, and those rents are not the property of Appellants. Instead, Appellants assigned the rents to First Palmetto as security for the loan transaction, and First Palmetto subsequently assigned the same to H & M. Therefore, even assuming H & M collected rents from the hotel operations, those monies could not have been converted, as they were not owned by Appellants.

Based on the foregoing, Appellants failed to present any evidence whatsoever that H & M converted rent monies from Appellants, and H & M vehemently denies any such conversion. Nonetheless, even assuming rent monies were collected by H & M, those monies were collected in accordance with the terms of the Loan Documents and have been fully accounted for by the Receiver. Thus, the trial court did not err in granting summary judgment in favor of H & M on Appellants' counterclaim for breach of contract by H & M.

**(5) H & M Divulged Private and Confidential Information Concerning the BJC Loan and its Status to Third Parties [Amended Answer ¶ 96].**

Appellants allege that H & M divulged private and confidential information concerning the BJC loan to third parties. However, Appellants presented no evidence to support this claim. In fact, the evidence clearly establishes that a foreclosure action and three personal guaranty actions were pending prior to the formation of H & M. As such, the so-called "private" and "confidential" information regarding the status of the BJC loan was public record for any and every one to see and know. Based on the foregoing, Appellants presented no evidence that H & M divulged any private or confidential

information to third parties. Therefore, the trial court did not err in granting summary judgment to H & M on this claim for breach of contract.

**B. There is No Evidence to Support Appellants' Fraud Claim.**

To establish a cause of action for fraud, Appellants were required to present evidence of the following nine elements: (1) a representation; (2) the falsity of the representation; (3) the materiality of the representation; (4) the speaker's knowledge of its falsity or a reckless disregard for its truth or falsity; (5) the speaker's intent that the representation be acted upon by the person hearing the representation; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury. M. B. Kahn Constr. Co., Inc. v. S.C. Nat'l Bank of Charleston, 275 S.C. 381, 384, 271 S.E.2d 414, 415 (1980). Each and every one of these elements must be proven by clear, cogent, and convincing evidence, and “[f]ailure to prove any one of the foregoing elements is fatal to recovery.” Id.

In their Counterclaims, Appellants alleged that H & M “fraudulently induced Defendant Bellamy to execute a personal guaranty in January, 2008 for the debt incurred in 2005” by falsely representing its need for the guaranty when one was not previously required. [Amended Ans. ¶¶ 101 – 105]. This assertion fails for several reasons. First, H & M was not formed until June 2009, and therefore, it could not have acted in any manner in January of 2008. Second, the evidence establishes that Appellant Bellamy, along with Harvey L. Jones and Henry C. Coan, III, were in fact required to execute personal guaranties in 2005 and 2007. [W. Bellamy Dep. at p. 31, Ins. 3-17, p. 40, ln. 20 – p. 41, ln. 15 and Exhibits 88 and 132]. As such, Appellants’ assertion is contrary to the

undisputed evidence presented in this case. Therefore, there was no genuine issue of material fact, and the lower court correctly granted H & M summary judgment with respect to Appellants' counterclaim for fraud.

**C. There Is No Evidence To Support Appellants' Breach Of Contract Accompanied By A Fraudulent Act Claim.**

As set forth above, the facts alleged in support of Appellants' counterclaims for breach of contract and fraud are not supported by the evidence in this case. For the same reasons, Appellants' counterclaim for breach of contract accompanied by fraud fails as a matter of law.

"In order to state a claim for breach of contract accompanied by a fraudulent act, the plaintiff must plead facts establishing three elements: (1) a breach of contract; (2) fraudulent intent relating to the breaching of the contract and not merely to its making; and (3) a fraudulent act accompanying the breach." Harper v. Ethridge, 290 S.C. 112, 119, 348 S.E.2d 374, 378 (Ct. App. 1986). Here, Appellants failed to present any evidence to establish a breach of contract on the part of H & M, much less a fraudulent act relating to any such breach. Indeed, the fraudulent act alleged by Appellants consists of H & M allegedly requiring a personal guaranty from Appellant Bellamy in January 2008 when a guaranty was not required in the previous years. However, as set forth above, Appellant Bellamy was required to, and did, execute a personal guaranty in 2005 and 2007. [W. Bellamy Dep. at p. 31, lns. 3-17, p. 40, ln. 20 – p. 41, ln. 15 and Exhibits 88 and 132]. Thus, the allegedly fraudulent act was not fraudulent at all.

For the foregoing reasons, Appellants' counterclaim for breach of contract accompanied by fraudulent act fails as a matter of law, and the trial court properly granted H & M summary judgment on this claim.

**D. There Is No Evidence To Support Appellants' Civil Conspiracy Claim.**

A civil conspiracy consists of three elements: (1) a combination of two or more persons; (2) joining for the purpose of injuring the plaintiff; and (3) which causes special damage to the plaintiff. Cowburn v. Leventis, 366 S.C. 20, 49, 619 S.E.2d 437, 453 (Ct. App. 2005). McMillan v. Oconee Memorial Hosp., Inc., 367 S.C. 559, 564, 626 S.E.2d 884, 886 (2006). To establish special damages, Appellants were required to present evidence that H & M engaged in acts in furtherance of the alleged conspiracy and that these acts were separate and independent from the other wrongful acts alleged in Appellants' counterclaims. See Todd v. S.C. Farm Bureau Mut. Ins. Co., 276 S.C. 284, 293, 278 S.E.2d 607, 611 (1981).

“Special damages must be properly pled, or the claim for civil conspiracy will be dismissed.” AJG Holdings, LLC v. Dunn, 392 S.C. 160, 168, 708 S.E.2d 218, 223 (Ct. App. 2011). Moreover, Rule 9(g) of the South Carolina Rules of Civil Procedure requires special damages be specifically stated in the pleadings. Stated differently, “the damages alleged must go beyond the damages alleged in the other causes of action.” Pye v. Estate of Fox, 369 S.C. 555, 568, 633 S.E.2d 505, 511 (2006). For the reasons below, the lower court correctly held that allegations of civil conspiracy are insufficient, and summary judgment was appropriate.

A civil conspiracy claim requires one to plead additional acts in furtherance of the conspiracy which are distinct and separate from the other wrongful acts alleged in the complaint. Todd, at 293, 278 S.E.2d at 611. If the party fails to plead such separate acts, the civil conspiracy claim shall be dismissed. Hackworth v. Greywood at Hammett, LLC, 385 S.C. 110, 116, 682 S.E.2d 871, 875 (Ct. App. 2009). The civil conspiracy

claim must do more than incorporate the prior allegations and then allege the existence of a civil conspiracy and pray for damages resulting from the conspiracy. Kuznik v. Bees Ferry Assocs., 342 S.C. 579, 611, 583 S.E.2d 15, 31 (Ct. App. 2000).

The acts alleged by Appellants in their counterclaims in support of their claim for civil conspiracy all occurred prior to the date on which H & M was formed. It is axiomatic that a limited liability company cannot act if it does not exist, and a company does not exist until its articles of organization are filed with the Office of the Secretary of State. See S.C. Code Ann. § 33-44-202(b) (“Unless a delayed effective date is specified, the existence of a limited liability company begins when the articles of organization are filed.”). In the case *sub judice*, the articles of organization for H & M were filed with the Secretary of State on June 15, 2009. [J. Jones Dep, Oct. 21, 2010 at p. 81, ln. 23 – p. 82, ln. 14 and Exhibit 26]. Even assuming H & M could have acted prior to its existence, Appellants merely repeated the allegations contained in their prior counterclaims in support of their civil conspiracy claim. Appellants made no additional or independent allegations of conspiracy and instead relied on the exact allegations contained in their remaining counterclaims.

In addition to the failure to identify any wrongful acts on the part of H & M, Appellants failed to plead special damages unique to the civil conspiracy claim. The damages allegedly incurred by Appellants as a result of the purported conspiracy are the precise damages averred in Appellants’ remaining counterclaims. Thus, Appellants’ allegations of civil conspiracy fail as a matter of law, and the trial court correctly found that H & M was entitled to summary judgment on this counterclaim.

**E. There Is No Evidence To Support Appellants' Conversion Claim.**

Appellants alleged that H & M converted the real property owned by Appellants, as well as rental income derived from the properties. [Amended Answer ¶¶ 118-120]. Conversion is “defined as the unauthorized assumption in the exercise of the right of ownership over goods or personal chattels belonging to another to the exclusion of the owner’s rights.” SSI Medical Services, 301 S.C. at 498, 392 S.E.2d at 792. “There can be no conversion of money unless there is an obligation on the defendant to deliver a specific, identifiable fund to the plaintiff.” Mullis v. Trident Emergency Physicians, 351 S.C. 503, 507, 570 S.E.2d 549, 551 (Ct. App. 2002) (quoting Richardson’s Rests., Inc. v. Nat’l Bank of S.C., 304 S.C. 289, 294, 403 S.E.2d 669, 672 (Ct. App. 1991)). A claim for conversion fails if the opposing party is merely exercising its legal right over the property. Castell v. Stephenson Finance Co., 244 S.C. 45, 135 S.E.2d 311 (1964).

Appellants alleged in part that H & M “converted” their real property. However, “[i]t is well settled that a conversion action does not lie when alleging the exercise of dominion or control over real property.” Hawkins v. City of Greenville, 358 S.C. 280, 297 594 S.E.2d 557 (Ct. App. 2004) (affirming trial court’s grant of summary judgment granted where plaintiff alleged conversion of real property). Therefore, to the extent that Appellants alleged conversion of their real properties, this cause of action fails as a matter of law.

Appellants also alleged that H & M converted rental income from their real properties. Money can be the subject of a conversion action only “if it is capable of being identified and there may be conversion of determinate sums even though the specific coins and bills are not identified.” Mullis, 351 S.C. at 507, 570 S.E.2d at 551. However,

Appellants failed to bring forth even a scintilla of evidence of any specified, determinative fund of money that H & M either (1) received from Appellants' rental operations or (2) failed to deliver or account to Appellants for any such funds. Indeed, the Amended Answer does not set forth any specific amount of money that H & M has allegedly misappropriated. Further when asked directly what property or money was taken, Appellant Bellamy admitted that she could not identify any property or money that was taken by anyone. [W. Bellamy Dep., at p. 202, ln. 8 – p. 203, ln. 1]. Moreover, a Court-appointed Receiver has been in place since April of 2010, and the Receiver has submitted monthly accountings to the lower court and all parties.

Additionally, as stated above, H & M is the assignee of the Assignment of Leases and Rents. [Amended Complaint at Exhibit K]. An assignee has the same rights as the assignor. Moore, 373 S.C. at 220, 644 S.E.2d at 745. The Assignment of Leases and Rents provides in pertinent part as follows:

Assignor may collect, receive, enjoy and use the Rents so long as Assignor is not in default. . . . Upon default, Assignor will receive any Rents in trust for Lender and Assignor will not commingle the Rents with any other funds.

There is no dispute that Appellants were in default prior to the formation of H & M so at that point, the rents received were not the property of Appellants, as they had assigned this property right to First Palmetto as security for the loan transaction. Therefore, even assuming rents have been realized by H & M, the rents alleged to have been converted were not owned by Appellants. Thus, the trial court rightly granted H & M summary judgment on Appellants' conversion cause of action.

**F. There Is No Evidence To Support Appellants' Claim For Violation Of The South Carolina Unfair Trade Practices Act.**

The trial court correctly found that Appellants' claim for violation of the South Carolina Unfair Trade Practices Act ("UTPA") failed as a matter of law because the conduct complained of does not in any way affect the public interest.

To be actionable under the UTPA, an unfair or deceptive practice or act must adversely affect the public interest. Florence Paper Co. v. Orphan, 298 S.C. 210, 379 S.E.2d 289 (1989); Noack Enters., Inc. v. Country Corner Interiors of Hilton Head Island, Inc., 290 S.C. 475, 351 S.E.2d 347 (Ct. App. 1986). "[C]onduct which only affects the parties to the transaction provides no basis for a UTPA claim." Jefferies v. Phillips, 316 S.C. 523, 527-528, 451 S.E.2d 21, 23 (Ct. App. 1994). South Carolina courts have held that even an intentional breach of contract in a commercial setting is not a violation of UTPA. Wilson Group, Inc. v. Quorum Health Resources, Inc., 880 F.Supp. 416, 427 - 428 (D.S.C. 1995) (applying South Carolina law) (citing Ardis v. Cox, 314 S.C. 512, 518-519, 431 S.E.2d 267, 271 (Ct. App. 1993) (appellate court upheld grant of summary judgment on UPTA claim where case involved an intentional breach of contract between commercial parties)). As stated by the Fourth Circuit,

While every private dispute doubtless has remote public ramifications, these cannot be held to satisfy the element of injury to the public interest which is a prerequisite to any recovery under the UTPA. Were we to rule otherwise, every ordinary commercial dispute would become a candidate for the extraordinary remedies provided by the Act.

Omni Outdoor Advertising, Inc. v. Columbia Outdoor Advertising, Inc., 974 F.2d 502, 508 (4th Cir. 1992) (applying South Carolina law).

In this case, there was only a single transaction between sophisticated, commercial parties. H & M was formed on June 15, 2009 for the purpose of buying investment property and notes. [D. Godwin Dep., November 3, 2010 at p. 33, Ins. 11-16; p 34, Ins. 21-24]. Further, the only business ever conducted by H & M was the purchase of the Loan Documents from First Palmetto. [D. Godwin Dep. at p. 88, Ins. 8-12].

Appellants offered no evidence whatsoever that H & M was ever in the business of lending money to the general public as alleged in their counterclaim. [Amended Answer at ¶ 124]. Appellants also failed to set forth any specific facts that demonstrate that the public interest is affected by the conduct alleged. Therefore, the trial court properly granted H & M summary judgment as to Appellants' counterclaim for violation of the South Carolina Unfair Trade Practices Act.

**G. There Is No Evidence To Support Appellants' Interference With Contract Claim.**

Under South Carolina law, to state a cause of action for tortious interference with contract, Appellants were required to present evidence of the following: "(1) a contract; (2) the wrongdoer's knowledge thereof; (3) his intentional procurement of its breach; (4) the absence of justification; and (5) the damage resulting therefrom." Kinard v. Crosby, 315 S.C. 237, 240, 433 S.E.2d 835, 837 (1993). In their counterclaims, Appellants referenced two contracts: a lending contract between First Palmetto and BJC and a contract with renters of hotel rooms, apartments, and/or houses. [Amended Answer at ¶¶ 132 – 137].

With regard to the first alleged contract, Appellants failed to plead, much less offer any evidence of, a breach of the lending contract. Instead, Appellants merely alleged an assignment of the contractual rights of First Palmetto to H & M. There is no

prohibition in the Loan Documents which would prevent the assignment of the Loan Documents. Moreover, an assignment of the Loan Documents is clearly anticipated under the terms of the agreement between First Palmetto and BJC. [Amended Complaint at Exhibit D (defining the mortgagee as “the Lender and its successors and assigns.”)]. As to the second alleged contract between Appellants and renters, Appellants similarly failed to present any evidence of the existence of any contract with renters, much less a breach procured by H & M.

Therefore, the trial court did not err in granting H & M summary judgment as to Appellants’ claim for intentional interference with contractual relationship.

**H. There is No Evidence to Support Appellant’s Intentional Infliction Of Emotional Distress/Outrage Claim.**

To state a cause of action for intentional infliction of emotional distress or outrage, Appellant Bellamy must present evidence that H & M:

(1) ‘intentionally or recklessly inflicted severe emotional distress, or was certain, or substantially certain, that such distress would result from his conduct’;

(2) that the conduct was so outrageous it exceeded ‘all possible bounds of decency’ and so ‘atrocious’ it was ‘utterly intolerable in a civilized community’;

(3) such actions actually caused plaintiff’s emotional distress; and

(4) the emotional distress was so severe ‘no reasonable man could be expected to endure it.’

AJG Holdings, LLC, 392 S.C. at 169, 708 S.E.2d at 223 (quoting Hansson v. Scalise Builders of S.C., 374 S.C. 352, 356, 650 S.E.2d 68, 70 (2007)). A claim for intentional infliction of emotional distress or outrage carries a “heightened burden of proof,” and

there must be “more than a scintilla of evidence in order to defeat a motion for summary judgment.” Id. (quoting Hancock, 381 S.C. at 330-31, 673 S.E.2d at 802-03).

In the counterclaim, Appellant Bellamy made the conclusory allegation that H & M engaged in “extreme and outrageous conduct [that] caused severe emotional distress.” [Amended Answer at ¶ 144]. However, Appellant Bellamy offered no evidence whatsoever in support of her claim of emotional distress. In her counterclaim, Appellant Bellamy averred that the allegedly outrageous conduct of H & M caused her to attempt suicide. [Amended Answer at ¶ 146]. But this assertion was contradicted by her sworn deposition testimony. In relevant part, Appellant Bellamy testified as follows:

Q: What was the reason that you attempted suicide in November of 2008?

A: Everything was closing in on me. I mean, my word is my word. We owed the bank and I knew I had my obligations, you know. I wasn’t going to let the motel go down. I was going to do whatever it took to save it.

\* \* \*

A: I wasn’t going to renew the note. I was going to pay it off.

\* \* \*

Q: And you were going to pay the entire principal amount of five million, whatever it was at that time?

A: Yes.

Q: And how were you going to do that?

A: Because I had \$5,500,000.00 worth of life insurance that I have had for like 8, 9, 10 years.

[Bellamy Dep. at p. 60, lns. 10-16; p. 63, lns. 11-22]. Additionally, when asked specifically whether she was claiming any type of emotional distress, Appellant

Bellamy responded “I don’t know how to answer that.” [Bellamy Dep. at p. 217, lns. 7-20].

Based on the foregoing, the evidence clearly established that it was Appellant Bellamy’s financial situation that caused her suicide attempt, not any conduct on the part of H & M. Moreover, it is undisputed that Appellant Bellamy’s suicide attempt occurred almost two years prior to the formation of H & M, and therefore, H & M could not possibly have contributed to her attempted suicide. As a result, there existed no genuine issue of material fact in dispute, and the trial court properly found that H & M was entitled to summary judgment on Appellant Bellamy’s claim for intentional infliction of emotional distress/outrage.

## **II. THE TRIAL COURT CORRECTLY FOUND THAT APPELLANTS FAILED TO STATE A CAUSE OF ACTION FOR CIVIL CONSPIRACY.**

A civil conspiracy claim consists of three elements: (1) a combination of two or more persons; (2) joining for the purpose of injuring the plaintiff; (3) which causes special damage to the plaintiff. Cowburn, 366 S.C. at 49, 619 S.E.2d at 453; McMillan, 367 S.C. at 564, 626 S.E.2d at 886. “[I]n civil conspiracy, the gravamen of the tort is the damage resulting to plaintiff from an overt act done pursuant to a common design.” Hackworth, 385 S.C. at 115, 682 S.E.2d at 874 (citing Pye v. Estate of Fox, 369 S.C. 555, 567-68, 633 S.E.2d 505, 511 (2006) (“The gravamen of the tort of civil conspiracy is the damage resulting to the plaintiff from an overt act done pursuant to the combination, not the agreement or combination per se.”)).

A civil conspiracy claim requires one to plead additional acts in furtherance of the conspiracy as opposed to reasserting other claims contained in the complaint. Todd, 276 S.C. at 293, 278 S.E.2d at 611. In addition, “because the quiddity of a civil conspiracy

claim is the special damage resulting to the plaintiff, the damages alleged must go beyond the damages alleged in other causes of action.” Hackworth, 385 S.C. at 115, 682 S.E.2d at 874.

**A. Appellants Failed To Plead Additional Acts In Furtherance Of The Conspiracy.**

To state a cause of action for civil conspiracy, one must plead additional acts in furtherance of the conspiracy which are distinct and separate from the other wrongful acts alleged in the complaint. Todd, 276 S.C. at 293, 278 S.E.2d at 611. Stated differently, in order to maintain a civil conspiracy claim, the plaintiff must do more than incorporate the allegations contained in other claims, allege the existence of a civil conspiracy, and pray for damages resulting from the conspiracy. Kuznik, 342 S.C. at 611, 583 S.E.2d at 31. If the party fails to plead separate acts in furtherance of the conspiracy, the civil conspiracy claim shall be dismissed. Hackworth, 385 S.C. at 116, 682 S.E.2d at 875.

In their civil conspiracy cause of action, Appellants began by incorporating by reference the allegations which also formed the basis of their counterclaims and third-party claims for breach of contract, fraud, breach of contract accompanied by a fraudulent act, conversion, interference with contractual relationship, violation of the South Carolina Unfair Trade Practices Act, and intentional infliction of emotional distress. [Amended Answer at ¶ 112]. Then, Appellants made the conclusory allegation that H & M, Jones and Godwin, as well as other third-party defendants “entered into a common scheme and conspiracy to deprive, steal and take property” belonging to Appellants. [Amended Answer at ¶ 113]. This allegation of what is essentially conversion was repeated throughout the pleading and formed the basis of third-party claims for breach of contract, conversion, interference with contractual relationship, violation of the South Carolina

Unfair Trade Practices Act, and intentional infliction of emotional distress. Appellants clearly predicated their conspiracy cause of action on the same facts as those contained in their remaining claims. Indeed, in the third-party complaint, Appellants asserted that the allegations of civil conspiracy are “further set forth in the defenses, counterclaims and Third-Party claims above and below.” [Amended Answer at ¶ 113].

Moreover, the act allegedly taken in furtherance of the conspiracy was described as follows: “Third-Party Defendant Bank assigned the note, mortgages, guaranties, and other security interests to Plaintiff . . . in a less than arm’s length transaction and induced Defendant Bellamy to sign over a Power of Attorney to Third-Party Defendant Jones.” [Amended Answer at ¶ 114]. This allegation was set forth almost verbatim in Appellants’ breach of contract cause of action and apparently related only to actions purportedly taken by First Palmetto. [Amended Answer at ¶¶ 86(b), 88 and 94].

The lower court conducted a thorough review of the pleading and held that the Appellants’ allegations in support of their civil conspiracy claim were the same as those alleged in support of their other defenses, counterclaims and third-party claims. Appellants made no additional or independent allegations of acts done in furtherance of the conspiracy and instead relied on the exact allegations contained in their remaining causes of action. Nothing in the civil conspiracy cause of action informed Jones or Godwin of what acts in furtherance of the alleged conspiracy they were accused of taking, and as a result, the trial court did not err in finding that Appellants failed to allege sufficiently the alleged acts of Jones and Godwin taken in furtherance of the civil conspiracy. Therefore, the lower court properly dismissed the third-party claim of civil conspiracy.

## **B. Appellants Failed To Plead Special Damages.**

A viable civil conspiracy claim must contain an allegation of special damages resulting to the complaining party. Special damages are defined as those which are the natural, but not necessary or ordinary, consequences of a defendant's conduct. Hackworth, 385 S.C. at 116, 682 S.E.2d at 875. Because special damages are never implied at law, they must "be specifically alleged in the complaint to avoid surprise to the other party." Id.; see also, AJG Holdings, 392 S.C. at 168, 708 S.E.2d 223 ("Special damages must be properly pled, or the claim for civil conspiracy will be dismissed."). Moreover, Rule 9(g) of the South Carolina Rules of Civil Procedure requires special damages be specifically stated in the pleadings.

"If a plaintiff merely repeats the damages from another claim instead of specifically listing special damages as part of their civil conspiracy claim, their conspiracy claim should be dismissed." Hackworth, 385 S.C. at 117, 682 S.E.2d at 875. (citing Vaught v. Waites, 300 S.C. 201, 387 S.E.2d 91 (Ct. App.1989) ("The damages sought in the conspiracy cause of action are the same as those sought in the breach of contract cause of action. Because no special damages are alleged aside from the breach of contract damages, we hold the conspiracy action is barred.")). Stated differently, "the damages alleged must go beyond the damages alleged in the other causes of action." Pye, 369 S.C. at 568, 633 S.E.2d at 511.

In the third-party complaint, there is only one paragraph containing any reference to special damages, and it was alleged that the purpose of the civil conspiracy was to cause Appellants special damages. [Amended Answer at ¶ 115]. There was no allegation whatsoever as to whether the special damages were actually incurred by Appellants, and

if so, what the alleged special damages were. Additionally, Appellants concluded their civil conspiracy claim by requesting the exact relief that was requested in nearly every other claim: “a judgment of actual, consequential, and punitive damages.” [Amended Answer at ¶ 116].

For each of the foregoing reasons, the trial court correctly found that Appellants failed to plead special damages unique to the civil conspiracy claim and failed to make any allegation that they actually incurred damages as a result of the alleged conspiracy. Therefore, the lower court did not err in dismissing Appellants’ third-party claim pursuant to Rule 12, SCRCP because Appellants failed to plead properly their claim of civil conspiracy.

**III. THE TRIAL COURT CORRECTLY FOUND THAT APPELLANTS WERE NOT ENTITLED TO A JURY TRIAL ON H & M’S EQUITABLE CLAIM.**

Appellants contend that the trial court erred in granting Respondent’s motion to strike their request for a jury trial with regard to the “claim and delivery” cause of action initially asserted by H & M in its Amended Complaint. However, for the reasons set forth below, the lower court correctly determined that the only remaining affirmative claim in the action below was one for foreclosure of three real property mortgages. Therefore, Appellants were not entitled to a jury trial.

**A. There Is No Right To A Jury Trial In A Foreclosure Action.**

It is axiomatic that foreclosures are equitable actions, and in equitable actions, there is no right to a jury trial. Gardner v. Travis, 316 S.C. 315, 450 S.E.2d 54 (Ct. App. 1994); Lester v. Dawson, 327 S.C. 263, 267, 491 S.E.2d 240, 242 (1997). There is no dispute between the parties on this point; during the hearing on H & M’s motion to strike,

counsel for Appellants conceded that the claims for foreclosure of the real property mortgages at issue in this case did not require a trial by jury.

Therefore, the lower court did not err in striking Appellants' request for a jury trial on the claims for the foreclosure of real property mortgages.

**B. The Causes Of Action Asserted By H & M For Appointment Of Receiver And Claim And Delivery Were Moot As Those Claims Were Adjudicated By The Court Prior To Trial.**

The initially-asserted causes of action for claim and delivery and for the appointment of a receiver were disposed of and rendered moot by lower court's order dated April 20, 2010. In the April 20, 2010 order, the Honorable Steven H. John appointed Kenan S. Walker of Waccamaw Land & Timber Management Co., LLC as Receiver and further ordered that Mr. Walker take immediate possession of the properties which were the subject of the action below. [Order for the Appointment of Receiver, April 20, 2010]. During his appointment, the Receiver has maintained possession and control of the properties, including the personal property which is the subject of the Claim and Delivery cause of action. [Order Granting Motion to Strike Request for Jury Trial, September 26, 2011]. After the April 20, 2010 order, Appellants were no longer in possession of the personal property, and therefore, the claim labeled as one for "claim and delivery" was rendered moot.

Based on the foregoing, prior to the trial of the case below, the causes of action for appointment of receiver and claim and delivery were rendered moot and did not require a trial. Therefore, the trial court did not err in finding Appellants were not entitled to a trial by jury.

**C. The Claim Labeled As A Cause Of Action For “Claim And Delivery” Sounded In Equity, And Therefore, Appellants Were Not Entitled To A Jury Trial.**

As set forth above, the initial cause of action labeled as “claim and delivery” was rendered moot by the lower court prior to trial. However, even if this Court determines that the cause of action labeled as one for “claim and delivery” was not moot based upon the lower court’s orders, Appellants were not entitled to a jury trial on this claim because it sounds in equity.

Pleadings must be liberally construed in favor of the pleader, and the nature of the action is to be determined primarily by the allegations of the complaint. Barnwell Prod. Cred. Ass’n v. Hartzog, 231 S.C. 340, 347, 98 S.E.2d 835, 839 (1957). More significantly, the complaint must be considered as a whole, and “the theory most apparent and clearly outlined by such consideration will be adopted rather than another possible theory which may be, to some extent, indicated by a consideration of the formal parts or of detached parts and fragmentary statements.” Id. (quoting 71 C. J. S. Pleading, § 92, p. 230 et seq.).

In the case of security interests secured by personal property, upon default, the secured party has multiple remedies available to him to realize his security, and a secured party is not limited to those remedies outlined in the Uniform Commercial Code adopted by this State. Nat’l Bank of S.C. v. Daniels, 283 S.C. 438, 441, 322 S.E.2d 689, 691 (Ct. App. 1984). A secured party has three options to recover his security:

- (1) He may peaceably take possession of the chattel, advertise and sell and apply the proceeds of sale to his secured debt, paying the surplus, if any, to the mortgagor;

(2) if possession be refused, he may institute claim and delivery proceedings to get possession of the chattel for the purpose of sale as in the first instance; or

(3) he may institute a proceeding similar to the foreclosure of a mortgage of real estate.

Id. (quoting Stokes v. Liverpool & London & Globe Ins. Co., 130 S.C. 521, 531, 126 S.E. 649 (1925)).

Claim and delivery is a statutory remedy for the recovery of specific personal property wrongfully taken or withheld from its rightful owner, accompanied by the recovery of any damages resulting from the taking or possession of the property. See S.C. Code Ann. § 22-3-1310 et seq. In order to state a viable cause of action for claim and delivery, the plaintiff must submit an affidavit with his complaint establishing, among other things, that he owns the property or is entitled to immediate possession of it, that the property is being wrongfully withheld or detained, the cause of the wrongful detention or withholding, and the value of the property. S.C. Code Ann. § 22-3-1320. In the case below, H & M submitted no such affidavit, and the Amended Complaint did not contain any similar allegations.

Rather, in its Amended Complaint, H & M merely requested the personal property subject to its security interest be sold, along with the real properties, and the proceeds applied towards its secured debt. [Amended Complaint at ¶¶ 30-38]. H & M did not demand possession of the property or allege that Appellants refused to relinquish possession of the property. To the contrary, the pleadings and orders of the lower court clearly indicate the personal property remained in the possession of the Receiver. [Order for Appointment of Receiver, April 20, 2010]. Further, while Appellants contested the appointment of the Receiver requested by H & M, Appellants consented to the

appointment of a Receiver and peaceably gave up possession of the personal property. [Id.]. Therefore, the trial court correctly concluded that the cause of action initially labeled as claim and delivery should be viewed as a claim for the foreclosure of a chattel mortgage. [Order Granting Motion to Strike Request for Jury Trial, September 26, 2011]. This conclusion is supported by the pleadings filed in the action below and the prevailing case law. See Barnwell Prod., at 346-347, 98 S.E.2d at 838-839 (holding that although the complaint contained a cause of action titled as “claim and delivery,” it lacked the requisite allegations, and the claim was in substance a claim for foreclosure of a chattel mortgage).

Based on the above, even if this Court finds that the cause of action titled as “claim and delivery” was not been rendered moot by prior orders of the lower court, the claim nonetheless sounds in equity. As such, the trial court properly held that Appellants were not entitled to a trial by jury.

#### CONCLUSION

For the reasons set forth above, Respondents Hotel & Motel Holdings, LLC, Donald D. Godwin, and Jack Jones respectfully request this Court affirm the lower court’s order granting summary judgment, dismissing the third-party claim, and striking Appellants’ request for a trial by jury.

[SIGNATURE PAGE FOLLOWS]

Respectfully submitted,

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