THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas
Honorable Roger M. Young, Sr.

Case No. 2013-CP-26-0488
Appellate Case No. 2014-001685

Horry Electric Cooperative, Inc.,..... Appellant,

v.

South Carolina Public Service Authority and Southern Electric International, Inc., ... Defendants,

Of whom South Carolina Public Service Authority is the.... Respondent.

Final Brief of Respondent

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Counter-Statement of the Case

This appeal arises out of the circuit court's dismissal of an action for equitable indemnification filed by Horry Electric Cooperative, Inc. ("HEC") against South Carolina Public Service Authority ("Santee Cooper"). HEC sought indemnification for costs that HEC allegedly would incur in connection with its settlement of a class action in which a class of customers sued HEC for damages arising out of the purportedly defective construction of homes built to comply with the standards of an energy-efficiency program offered by HEC to its customers.

On February 9, 2011, Ronnie Ferrell, Tammy Vance, and David Montorio filed a putative class action against HEC (the "*Montorio* action"). (*Montorio* Compl., Am. Compl. Ex. D; R. 39-49.) They alleged that they resided in homes constructed as early as 1988 in accordance with standards set forth in HEC's "New Good Cents Program," which was implemented to keep the cost of power low for HEC and its customers. (*Id.* at ¶¶ 6-7, 13; R. 40.) The plaintiffs alleged that, in order to be accepted into the New Good Cents Program, when they built their homes, they were required to have vapor barriers installed on the inside of exterior walls. (*Id.* at ¶¶ 14-17; R. 40-41.) They alleged that the vapor barriers created condensation, which caused mold and other damage to their homes. (*Id.* at ¶¶ 20-23; R. 42.) They further alleged that HEC adopted the vapor barrier specification in 1988 without researching the program specifications and should have known as early as 1985 and no later than 1987 that the vapor barrier would cause condensation problems. (*Id.* at ¶¶ 12, 25; R. 40, 42.)

The *Montorio* action was a putative class action brought on behalf of all HEC customers with a vapor barrier installed pursuant to HEC's New Good Cents Program

between 1988, when the program was adopted, and 2003, when HEC stopped requiring installation of vapor barriers. (*Id.* at ¶ 34; R. 43.) The plaintiffs in the *Montorio* action asserted three causes of action: breach of warranty, negligence/gross negligence, and breach of contract/covenant of good faith and fair dealing. (*Id.* at ¶¶ 35-58; R. 44-48.) Three plaintiffs sought to represent the class: Ronnie Ferrell, Tammy Vance, and David Montorio. (*Id.* at ¶¶ 1-3, 28; R. 39, 43.)

On August 28, 2012, a class certification order was filed in the *Montorio* action. (Order Granting Class Certification, Civil Action No. 2011-CP-26-1266.)[1] In September 2012, HEC moved to file a third-party complaint adding Santee Cooper as a party to the *Montorio* action. (Mot. for Leave to File Third Party Compl., Civil Action No. 2011-CP-26-1266.) HEC's motion to add Santee Cooper as a third-party defendant was denied by Order filed February 6, 2013, on the grounds that the request was late and, if granted, would prejudice plaintiffs and the plaintiff class. (Order Den. Def.'s Mot. for Leave to File Third Party Compl., Civil Action No. 2011-CP-26-1266.)

On January 23, 2013, HEC filed its Complaint in this action. (Compl., R. 210-226.) HEC alleged that Santee Cooper offered the Good Cents Program to HEC, which agreed to participate in the program. (*Id.* at ¶¶ 3-4; R. 210.) HEC further alleged that in 1986 Santee Cooper knew of possible condensation problems with vapor barriers but failed to disclose that information to HEC. (*Id.* at ¶ 6; R. 210.) HEC alleged that to the extent HEC was liable to the plaintiffs in the *Montorio* action, it would be entitled to equitable indemnification from Santee Cooper. (*Id.* at ¶ 8; R. 211.) Santee Cooper moved to dismiss the Complaint on July 5. 2013.

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[1] http://publicindex.sccourts.org/Horry/PublicIndex/CaseDetails.aspx?County=26&CourtAgency=26002&Casenum=2011CP2601266&CaseType=V.

HEC filed an Amended Complaint against Santee Cooper and Southern Electric International, Inc.,[2] on July 26, 2013, asserting causes of action for negligence, breach of the duty of good faith and fair dealing, breach of warranty, civil conspiracy, and equitable indemnity arising out of some of the same allegations that were included in the original Complaint. (Am. Compl. ¶¶ 19-32; R. 31-33.) On August 22, 2013, Santee Cooper moved to dismiss the Amended Complaint on the grounds of the statute of repose, the applicable statutes of limitation, and failure to state facts sufficient to constitute a cause of action against Santee Cooper. (Mot. Dismiss Am. Compl.; R. 401-414.)

On May 27, 2014, the circuit court in this action entered a Form 4 Order on the record dismissing all claims asserted in HEC's Amended Complaint against Santee Cooper, without prejudice as to the equitable indemnification claim and with prejudice as to the remaining claims. In a formal order filed on June 13, 2014, the court explained that it dismissed the equitable indemnification claim as unripe because the *Montorio* settlement had not yet been finalized and no monies had been paid at that time. (Order Granting Public Service Authority's Mot. Dismiss; R. 6-13.) The remaining claims were dismissed as barred by the statute of repose and the applicable statutes of limitation. (*Id.*; R. 6-13.)

On February 28, 2014, two named plaintiffs in the *Montorio* action, Tammy Vance and David Montorio, entered into a preliminary class-action settlement agreement with HEC and its insurer. (Settlement Agreement, Mot. for Continuance and/or to Stay Any Decision Ex. A; R. 502-568.) HEC and its insurer agreed to establish two funds totaling $6,000,000 and pay the plaintiffs' attorneys' fees and expenses. (*Id.* at ¶¶ 4, 17;

[2] HEC did not serve Southern Electric International, Inc.

R. 506-509, 513.) The third plaintiff in the *Montorio* action, Ronnie Ferrell, was not a party to the settlement, having been found to be an unsuitable class representative. (Order Granting Class Certification at 8, Civil Action No. 2011-CP-26-1266.)

The settlement in the *Montorio* action was approved by the court on May 30, 2014. (Final Approval Order, Plaintiff's Rule 59(e) Mot. to Reconsider, Alter and/or Amend Ex. B; R. 660-671.) In approving the *Montorio* settlement, the *Montorio* court made no findings of fact, rulings of law, or other decisions binding upon or otherwise prejudicial to Santee Cooper. (Order Granting Mot. Intervene for Limited Purpose, Civil Action No. 2011-CP-26-1266.)

The parties to the settlement agreement were Mr. Montorio, Ms. Vance, HEC, and HEC's insurance carrier. (Settlement Agreement p. 1, Mot. for Continuance and/or to Stay Any Decision Ex. A; R. 502.) By its terms, the effective date of the *Montorio* settlement agreement was June 30, 2014. (*Id.* at ¶ 1(g); R. 504-505.) HEC and its insurer agreed to establish two funds from which HEC's insurance carrier would pay class members' claims. (*Id.* at ¶ 4; R. 506-509.) From the first, the "Automatic Payment Fund," class members who submitted valid claims would be paid up to $2,000 within the later of sixty days after the effective date of the settlement or sixty days after the claims period. (*Id.* at ¶ 4(a); R. 506-507.) From the second, the "Remediation Fund," class members who submitted valid claims and other documentation would be eligible to receive reimbursement to pay for the removal of vapor barriers from claimants' homes, subject to certain conditions. Class members who wished to participate in the remediation fund had one hundred and eighty days after the effective date to submit claim documentation, with payment to be made within thirty days of receipt of claim

documentation. (*Id.* at ¶ 4(b); R. 507-508.) HEC agreed to pay Mr. Montorio and Ms. Vance $5,000 each within ten days of the effective date. (*Id.* at ¶ 4(d); R. 508-509.) Finally, payment of attorneys' fees pursuant to the settlement agreement was not due to occur until ten days after the effective date. (*Id.* at ¶ 17; R. 513.)

On July 31, 2014, HEC filed its notice of appeal of the circuit court's June 13, 2014 Order dismissing HEC's Amended Complaint. (Notice of Appeal; R. 690-701.)

On October 7, 2014, HEC filed a separate action against Santee Cooper seeking equitable indemnification for costs incurred relating to the *Montorio* settlement ("second HEC suit"). (Compl., Civil Action No. 2014-CP-26-6571.)[3] The complaint in the second HEC suit repeats the equitable indemnification claim that had been asserted in this action. Santee Cooper moved to dismiss the second HEC suit on December 17, 2014. (Mot. Dismiss Compl., Civil Action No. 2014-CP-26-6571.)

Argument

The circuit court properly exercised its discretion in denying HEC's request for a continuance of the hearing on the motion to dismiss and correctly dismissed all of the claims asserted in the Amended Complaint. The claim for equitable indemnification seeks only speculative or unrecoverable damages, and because the contingent events establishing those damages had not yet occurred when the circuit court ruled, it properly found the claim to be unripe. The record also supports affirmance of the dismissal of the equitable indemnification claim because it is barred by the construction statute of repose. The claims for negligence, breach of duty of good faith and fair dealing, breach of warranty, and civil conspiracy were properly found to be barred by the two-year statute

[3] http://publicindex.sccourts.org/Horry/PublicIndex/CaseDetails.aspx?County=26&CourtAgency=26002&Casenum=2014CP2606571&CaseType=V.

of limitations and the construction statute of repose. Moreover, this Court may affirm the dismissal of all of the claims because the allegations of the Amended Complaint, taken in a light most favorable to HEC, fail to state a claim for any of the asserted causes of action. For all of these reasons, the decision of the circuit court to dismiss the Amended Complaint should be affirmed.

I. The circuit court did not abuse its discretion in denying the motion to continue and in dismissing the equitable indemnification claim without prejudice; and even if there were error, it would be harmless error because the claim was dismissed *without prejudice* and HEC has already re-filed its action for equitable indemnification.

A. The circumstances of the case and HEC's reason for requesting the continuance support the circuit court's decision to deny the motion to continue and dismiss the claims as unripe.

The circuit court did not abuse its discretion in denying the motion to continue in light of Santee Cooper's repeated attempts to secure a hearing on its motion to dismiss HEC's prematurely filed action for equitable indemnification. HEC elected to file this action in January 2013. Santee Cooper moved to dismiss on July 5, 2013. HEC amended its Complaint, and Santee Cooper moved to dismiss the Amended Complaint on August 22, 2013. (Mot. Dismiss Am. Compl.; R. 401-414.)

The motion to dismiss was scheduled for a hearing twice, first on October 1, 2013, and again on December 4, 2013, and HEC did not move for a continuance either time. When the parties appeared through counsel for the first scheduled hearing, the circuit judge recused himself *sua sponte*. (10/1/13 Form 4 Order; R. 1-2.) When the parties appeared through counsel for the second scheduled hearing, HEC questioned whether the circuit judge might have a disqualifying conflict and, in response, the circuit judge recused himself. (12/4/13 Form 4 Order; R. 3-4.) After assignment of the case to

the business court, the motion to dismiss was set for hearing a third time, on May 27, 2014—almost a year after Santee Cooper first filed a motion to dismiss.

HEC sought to continue the hearing on Santee Cooper's motion to dismiss until the final approval order in the *Montorio* action was entered. (Mot. for Continuance and/or to Stay Any Decision; R. 499-569.) Santee Cooper opposed the motion to continue on the grounds that the hearing on the motion had been delayed twice and the interests of the just, speedy, and inexpensive determination of the matter, *see* Rule 1, SCRCP, favored moving forward with the hearing. (Obj. to Mot. to Continue; R. 641-644.) Santee Cooper also countered HEC's contention that approval of the class-action settlement agreement would exonerate HEC from liability. (*Id.* at p. 2; R. 642.) The circuit court properly denied the motion to continue the hearing and granted Santee Cooper's motion to dismiss.

This Court reviews a circuit court's denial of a motion to continue under an abuse of discretion standard. *Holmes v. Haynsworth, Sinkler & Boyd, P.A.*, 408 S.C. 620, 640-41, 760 S.E.2d 399, 409-10 (2014). Absent an abuse of that discretion, an appellate court will not overturn the circuit court's decision. *See M & M Grp., Inc. v. Holmes*, 379 S.C. 468, 474-75, 666 S.E.2d 262, 265 (Ct. App. 2008) ("The grant or denial of a continuance lies with the sound discretion of the trial court and such ruling will not be reversed absent a clear showing of abuse of discretion."). The reversal of a circuit court's denial of a request for continuance is rarely overturned. *Trotter v. Trane Coil Facility*, 393 S.C. 637, 650, 714 S.E.2d 289, 295 (2011) ("A tribunal necessarily exercises wide discretion in managing a case, and decisions denying a request for a continuance are 'rarely' overturned." (citing *Morris v. State*, 371 S.C. 278, 283, 639 S.E.2d 53, 56 (2006)); *State*

v. Lytchfield, 230 S.C. 405, 409, 95 S.E.2d 857, 859 (1957) (stating that "reversals of refusal of continuance are about as rare as the proverbial hens' teeth").

This Court should not overturn the circuit court's denial of the motion for continuance. As shown herein, HEC sought the continuance in an effort to delay further the adjudication of Santee Cooper's motion for the sole reason that it desired a final approval order in the *Montorio* action and because Santee Cooper might argue that its equitable indemnity claim was premature. (Mot. for Continuance and/or to Stay Any Decision ¶¶ 1-2; R. 499-500.) Such grounds did not justify another delay of the prematurely filed action. To the contrary, HEC's contention that the ripeness of the action filed in January 2013 should not be considered until after some future contingency had occurred, *i.e.,* the *Montorio* court's anticipated approval of the settlement, simply underscores the correctness of the circuit court's ripeness decision and, together with the other circumstances described above, demonstrates that the circuit court correctly exercised its discretion in denying the motion to continue.

B. HEC has not suffered any prejudice as a result of the trial court's denial of its request for a continuance and the dismissal of its equitable indemnity claim *without prejudice*.

By definition, HEC has not been prejudiced by the circuit court's orders denying the continuance and dismissing the claim for equitable indemnification because the dismissal was *without prejudice*. The dismissal without prejudice allowed HEC to re-file the action for equitable indemnification—which it now has done.[4] (Compl., Civil Action No. 2014-CP-26-6571.) Nevertheless, HEC contends that it would be prejudiced by the dismissal of the claim for equitable indemnification because the statute of repose would

[4] This Court can take judicial notice of court records. *See Wise v. Wise*, 394 S.C. 591, 601, 716 S.E.2d 117, 122 (Ct. App. 2011) (taking judicial notice of filings in related suit).

bar claims for residences completed between January 23, 2000, and thirteen years before the date of re-filing. (Brief of Appellant at § VII pp. 12-13.) HEC's argument is unavailing for several reasons, any one of which would suffice to refute the contention of prejudice.

First, there is no legal prejudice because HEC's claim for indemnification is barred in any event. HEC has conceded that the statute of repose bars claims for equitable indemnification arising from residences built prior to January 23, 2000. (Brief of Appellant at § VII pp. 12-13.) As the circuit court correctly observed, the Amended Complaint sought indemnification for residences constructed as early as 1988—far beyond the 13-year period conceded by HEC. (Order Granting Public Service Authority's Mot. Dismiss at 5; R. 10.) Moreover, the public record—of which this Court may take judicial notice—shows that David Montorio and Tammy Vance, the plaintiffs who entered into the *Montorio* settlement agreement on which HEC's indemnification claims were based, built their houses prior to January 23, 2000. The review of the dates contained in public record, as set forth below, demonstrates the lack of prejudice to HEC.

The online public index from the Horry County Register of Deeds[5] reflects that the Deed and Mortgage for the property owned by David Montorio were recorded on February 2, 1998:[6]

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[5] http://www.horrycounty.org/OnlineServices/SearchDeeds.

[6] The **dates** of recordation of the deeds and mortgages may be judicially noticed as indisputable facts of public record. *See Masters v. Rodgers Dev. Grp.*, 283 S.C. 251, 256, 321 S.E.2d 194, 197 (Ct. App. 1984) (demonstrating dates are indisputable facts of recorded mortgages and deeds).

656495

Prepared By and Return to:
N. David DuRant & Associates, P.A.
1801 Glenns Bay Road
Surfside Beach, SC 29575
98-8306NDD

HORRY COUNTY ASSESSOR
Parcel ID# 179-12-01-113
Map Blk Parcel 2-3-98 jc

FILED
HORRY COUNTY
98 FEB -2 PM 3:47
R.M.C.

STATE OF SOUTH CAROLINA)
) WARRANTY DEED
COUNTY OF HORRY)

KNOW ALL MEN BY THESE PRESENTS, that it, ***J. A. FOX, INC.***, in the State aforesaid, for and in consideration of the sum of Ninety-four Thousand Four Hundred and no/100 ($94,400.00) Dollars to it paid by ***DAVID E. MONTORIO*** and ***HOLLY S. MONTORIO***, in the State aforesaid, the receipt whereof is hereby acknowledged, has granted, bargained, sold and released and by these presents does grant, bargain, sell and release unto the said ***DAVID E. MONTORIO*** and ***HOLLY S. MONTORIO***, as tenants in common, for and during their joint lives, and upon the death of either of them, then to the survivor of them, their heirs and assigns forever, in fee simple, together with every contingent remainder and right of reversion, the following described property, to wit:

> *ALL AND SINGULAR, that certain piece, parcel or lot of land lying, situate and being in Horry County, South Carolina and shown as* ***LOT TWENTY-EIGHT (28) of WORTHINGTON ESTATES*** *on that certain plat prepared by Michael S. Culler, Jr., P.L.S. of Culler Land Surveying Co., Inc., for J. A. Fox, Inc., dated November 6, 1996 and recorded January 13, 1997 in Plat Book 145 at Page 203, in the Office of the R.M.C. for Horry County, South Carolina. Said lot being more particularly described on said Plat and reference to which is craved as forming a part of this description.*
>
> *This is the identical property conveyed to the Grantor herein by Deed of Foxworth Porter Development, LLC, dated October 20, 1997, and recorded in the Office of the RMC for Horry County, South Carolina on October 20, 1997, in Deed Book 1984 at Page 508.*

STATE 245.70 COUNTY 103.85
EXEMPT YES (NO)
ASSESSOR

Grantee(s)' Address: ***303 WORTHINGTON CIRCLE, MYRTLE BEACH, SC 29577***

BOOK 2009 PAGE 476

476

656499

Record and return to:
N. David DuRant & Associates, PA
1801 Glenns Bay Road
Surfside Beach, SC 29575
98-0806NDD

972419711

FILED
HORRY COUNTY
98 FEB -2 PM 3:48
R.M.C.

[Space Above This Line For Recording Data]

MORTGAGE

THIS MORTGAGE ("Security Instrument") is given on January 30, 1998. The mortgagor is David E. Montorio and Holly S. Montorio

DEM HSM

("Borrower"). This Security Instrument is given to American Home Funding, Inc.

which is organized and existing under the laws of the State of New York, and whose address is 2411 North Oak Street, Myrtle Beach, SC 29577 ("Lender"). Borrower owes Lender the principal sum of Eighty-Nine Thousand Six Hundred and 00/100 Dollars (U.S. $89,600.00). This debt is evidenced by Borrower's note dated the same date as this Security Instrument ("Note"), which provides for monthly payments, with the full debt, if not paid earlier, due and payable on February 1, 2028. This Security Instrument secures to Lender: (a) the repayment of the debt evidenced by the Note, with interest, and all renewals, extensions and modifications of the Note; (b) the payment of all other sums, with interest, advanced under paragraph 7 to protect the security of this Security Instrument; and (c) the performance of Borrower's covenants and agreements under this Security Instrument and the Note. For this purpose, Borrower does hereby mortgage, grant and convey to Lender and Lender's successors and assigns the following described property located in Horry County, South Carolina:

LOT TWENTY-EIGHT (28), of WORTHINGTON ESTATES as is more fully described on Exhibit "A" attached hereto and made a part hereof

SUBJECT TO COVENANTS OF RECORD.

DEM HSM

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which has the address of 303 Worthington Circle, Myrtle Beach, South Carolina 29577 [Zip Code] ("Property Address");

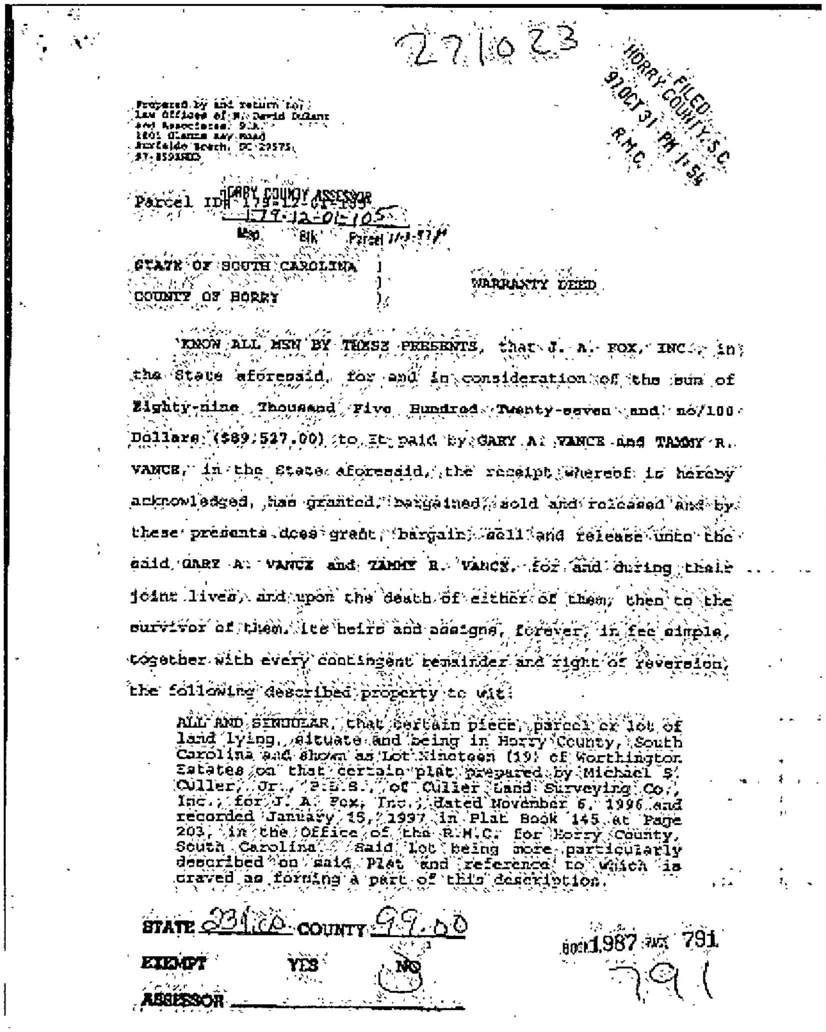
SOUTH CAROLINA-Single Family-FNMA/FHLMC UNIFORM INSTRUMENT, Form 3041 9/90 Amended 10/94

805

[space intentionally left blank]

The Deed and Mortgage for the property owned by Tammy Vance were recorded on October 31, 1997:

Vance Deed and Mortgage



271023

HORRY COUNTY, S.C. FILED 97 OCT 31 PM 1:54 R.M.C.

Prepared by and return to: Law Offices of N. David DuRant and Associates, P.A. 1801 Glenns Bay Road Surfside Beach, SC 29575 97-8599RD

HORRY COUNTY ASSESSOR

Parcel ID# 179-12-01-105

STATE OF SOUTH CAROLINA) COUNTY OF HORRY)

WARRANTY DEED

KNOW ALL MEN BY THESE PRESENTS, that J. A. FOX, INC., in the State aforesaid, for and in consideration of the sum of Eighty-nine Thousand Five Hundred Twenty-seven and no/100 Dollars ($89,527.00) to it paid by GARY A. VANCE and TAMMY R. VANCE, in the State aforesaid, the receipt whereof is hereby acknowledged, has granted, bargained, sold and released and by these presents does grant, bargain, sell and release unto the said GARY A. VANCE and TAMMY R. VANCE, for and during their joint lives, and upon the death of either of them, then to the survivor of them, its heirs and assigns, forever, in fee simple, together with every contingent remainder and right of reversion, the following described property to wit:

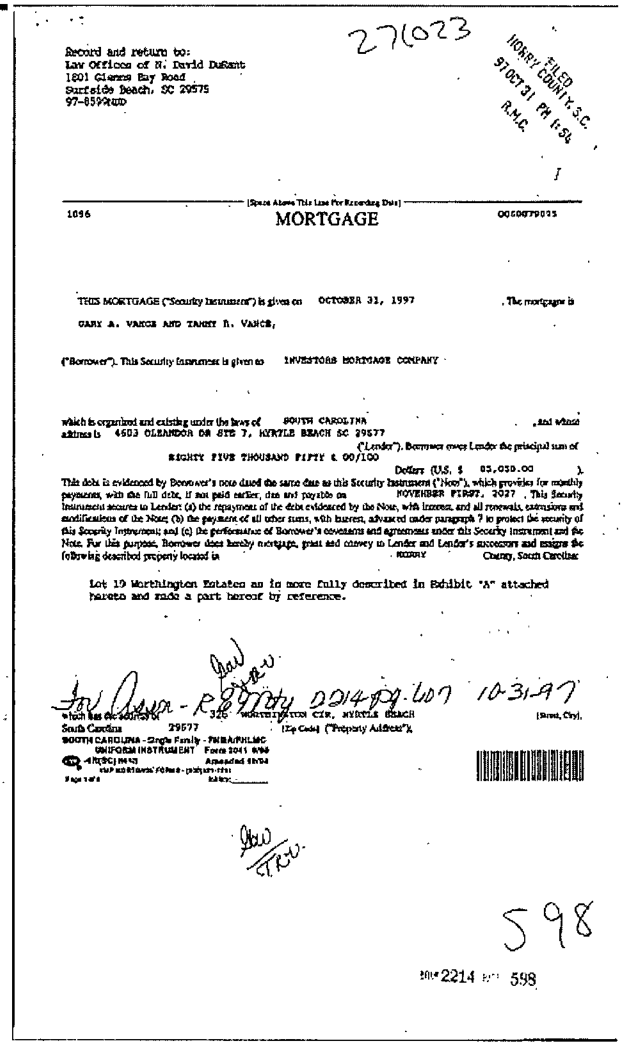
ALL AND SINGULAR, that certain piece, parcel or lot of land lying, situate and being in Horry County, South Carolina and shown as Lot Nineteen (19) of Worthington Estates on that certain plat prepared by Michael S. Culler, Jr., P.L.S., of Culler Land Surveying Co., Inc., for J. A. Fox, Inc., dated November 6, 1996 and recorded January 15, 1997 in Plat Book 145 at Page 203, in the Office of the R.M.C. for Horry County, South Carolina. Said Lot being more particularly described on said Plat and reference to which is craved as forming a part of this description.

STATE 231.00 COUNTY 99.00

EXEMPT YES NO

ASSESSOR

BOOK 1987 PAGE 791



271023

HORRY COUNTY, S.C. FILED 97 OCT 31 PM 1:54 R.M.C.

Record and return to: Law Offices of N. David DuRant 1801 Glenns Bay Road Surfside Beach, SC 29575 97-8599RDD

[Space Above This Line For Recording Data]

1096 MORTGAGE 0060079025

THIS MORTGAGE ("Security Instrument") is given on OCTOBER 31, 1997. The mortgagor is GARY A. VANCE AND TAMMY R. VANCE, ("Borrower"). This Security Instrument is given to INVESTORS MORTGAGE COMPANY which is organized and existing under the laws of SOUTH CAROLINA, and whose address is 4603 OLEANDER DR STE 7, MYRTLE BEACH SC 29577 ("Lender"). Borrower owes Lender the principal sum of EIGHTY FIVE THOUSAND FIFTY & 00/100 Dollars (U.S. $ 85,050.00). This debt is evidenced by Borrower's note dated the same date as this Security Instrument ("Note"), which provides for monthly payments, with the full debt, if not paid earlier, due and payable on NOVEMBER FIRST, 2027. This Security Instrument secures to Lender: (a) the repayment of the debt evidenced by the Note, with interest, and all renewals, extensions and modifications of the Note; (b) the payment of all other sums, with interest, advanced under paragraph 7 to protect the security of this Security Instrument; and (c) the performance of Borrower's covenants and agreements under this Security Instrument and the Note. For this purpose, Borrower does hereby mortgage, grant and convey to Lender and Lender's successors and assigns the following described property located in HORRY County, South Carolina:

Lot 19 Worthington Estates as is more fully described in Exhibit "A" attached hereto and made a part hereof by reference.

which has the address of 326 WORTHINGTON CIR, MYRTLE BEACH [Street, City], South Carolina 29577 [Zip Code] ("Property Address");

SOUTH CAROLINA - Single Family - FNMA/FHLMC UNIFORM INSTRUMENT Form 2041 9/90 Amended 10/94

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Montorio and Vance were the only plaintiffs who were parties to the class-action settlement agreement.[7] (Settlement Agreement, Mot. for Continuance and/or to Stay Any Decision Ex. A; R. 502-568.) Because HEC's indemnification claim arises from a settlement agreement that HEC entered into with parties whose homes were constructed

7 Ronnie Ferrell, the third named plaintiff in the *Montorio* action, was not a party to the settlement, as he was found not suitable as a class representative. (Order Granting Class Certification, Civil Action No. 2011-CP-26-1266.)

prior to January 23, 2000, it is barred by the thirteen-year statute of repose, and HEC cannot claim legal prejudice as a result of the circuit court's order. The "prejudice" of which HEC complains results not from any proceedings in the circuit court, but by operation of the statute of repose.

Second, there is no legal prejudice—and HEC's claim of prejudice rings especially hollow—because HEC itself delayed and repeatedly failed to assert and/or prosecute the statute of repose in the underlying *Montorio* action. The court's record of proceedings and the class certification order in the *Montorio* action demonstrate the point.

The record in the *Montorio* action shows that HEC raised the statute of repose three times by motion for summary judgment, but failed to appear for the hearing twice, and when the motion was finally granted in part, HEC never supplied the court with a formal order to memorialize its decision:

- On May 27, 2011, HEC filed a motion for summary judgment based on the statute of repose. (5/27/11 Mot. Summ. J., Civil Action No. 2011-CP-26-1266.)

- On August 29, 2011, the court signed a Form 4 Order (filed September 1, 2011) denying the motion without prejudice because HEC failed to appear for the hearing. (9/01/11 Form 4 Order, Civil Action No. 2011-CP-26-1266.)

- On September 28, 2011, HEC filed a motion seeking summary judgment on the grounds that (a) the statute of repose barred the action and (b) a prior class action settlement included a release of claims that prevented some class members from obtaining relief. (9/28/11 Mot. Summ. J., Civil Action No. 2011-CP-26-1266.)

- This motion was denied by order dated August 13, 2012 (filed August 21, 2012) for failure to prosecute, because HEC failed to appear for the hearing after having received notice. (8/21/12 Form 4 Order, Civil Action No. 2011-CP-26-1266.)

- On August 17, 2012, HEC filed yet another summary judgment motion, this one duplicating the motion filed on September 28, 2011, seeking summary judgment on the basis of the statute of repose and the prior class action settlement. (8/17/12 Mot. Summ. J., Civil Action No. 2011-CP-26-1266.)

- The class certification order in the *Montorio* action, filed August 28, 2012, provided that "the defendant may assert the statute of repose as a defense to certain members of the class." (Order Granting Class Certification at p. 8, Civil Action No. 2011-CP-26-1266.)

- A Form 4 Order dated November 7, 2012 and filed November 26, 2012, indicates that HEC's 8/17/12 motion for summary judgment was granted in part and denied in part, with a formal order to follow by Attorney Pope Johnson. (11/26/12 Form 4 Order, Civil Action No. 2011-CP-26-1266.) The public index does not reflect entry of a subsequent formal order. (Public Index, Civil Action No. 2011-CP-26-01266.)[8]

HEC's failure to reduce the statute of repose issue to judgment is especially curious in light of the language in the August 2012 class certification order specifically allowing the defendant to assert the statute of repose as a defense. (Order Granting Class Certification at p. 8, Civil Action No. 2011-CP-26-1266.) The complaint in the *Montorio* action was filed on February 9, 2011, thirteen years and a week after the date of the recording of the Deed and Mortgage for the Montorio home, and thirteen years and four months after the date of the recording of the Deed and Mortgage for the Vance home. (*See Montorio* Compl., Am. Compl. Ex. D; R. 39-49.) Therefore, it appears that HEC could have successfully asserted the statute of repose against Mr. Montorio and Ms. Vance, cutting off their representation of the class. *See, e.g.*, *Anderson v. Holy See*, 934 F. Supp. 2d 954, 961 (N.D. Ill. 2013) (holding that a plaintiff whose claim was barred by the statute of repose was an inadequate class representative).[9] For whatever reason, however, HEC never addressed, either in a formal order or by subsequent motion, the fact

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[8] http://publicindex.sccourts.org/Horry/PublicIndex/CaseDetails.aspx?County=26&CourtAgency=26002&Casenum=2011CP2601266&CaseType=V.

[9] Put simply, it appears that HEC decided to settle extinguished claims—and now seeks to recover all of its costs of that settlement from Santee Cooper. However, under South Carolina law, an equitable indemnification claim seeking recovery of costs associated with the settlement of claims may survive only if the decision to settle was reasonable. *Griffin v. Van Norman*, 302 S.C. 520, 523, 397 S.E.2d 378, 380 (Ct. App. 1990).

that Mr. Montorio's and Ms. Vance's homes were substantially completed more than 13 years prior to the filing of the *Montorio* action.

In addition, HEC delayed in attempting to seek indemnification from Santee Cooper. HEC was sued in the *Montorio* action in February 2011 but did not seek to add Santee Cooper via a third-party complaint until September 2012—that is, the month after the class certification order was entered. Its motion to add Santee Cooper as a third-party defendant was denied because of HEC's delay and the consequent prejudice to plaintiffs and the plaintiff class. (Order Den. Def.'s Mot. for Leave to File Third Party Compl, Civil Action No. 2011-CP-26-1266.)

Whatever the reason for HEC's delays and inaction regarding the statute of repose and its claim for indemnification, HEC cannot assert prejudice as a result of the circuit court's order of dismissal after it repeatedly failed to prosecute and/or assert the statute of repose. *See Eldridge v. Eldridge*, 398 S.C. 113, 121, 728 S.E.2d 24, 28 (2012) (stating that "equity aids the vigilant, not those who slumber on their rights"); *see also McKinney v. CSX Transp., Inc.*, 298 S.C. 47, 51, 378 S.E.2d 69, 71 (Ct. App. 1989) (refusing to toll the statute of limitations where the plaintiff voluntarily dismissed his case after the expiration of the limitations period because he had failed to timely prosecute it).

Finally, HEC has not suffered legal prejudice because the circumstances are of its own making. HEC elected to file suit when it did, seeking indemnification for claims paid pursuant to a settlement agreement that had not been consummated. HEC's subsequent assertions that the circuit court should refrain from ruling until after approval of the settlement underscore the propriety of the circuit court's decision to deny the continuance and rule that the claim for equitable indemnification was premature. In its

court filings regarding the continuance, HEC has acknowledged that its claim would not ripen until the *Montorio* settlement was consummated, as it asserted that the proposed settlement agreement included "certain allegations regarding the absence of personal negligence on the part of Horry Electric," and that, when approved, the settlement agreement "will establish the damage incurred by Horry Electric and the absence of fault on the part of Horry Electric." (Mot. for Continuance and/or to Stay Any Decision ¶ 2; R. 500.) HEC's motion to continue was an effort to forestall the result that it foresaw—the result that the circuit court reached—dismissal of the claim as premature. It cannot claim prejudice when the record shows that it knew its suit was prematurely filed.

C. To the extent the Court finds error in the trial court's denying the motion to continue and dismissing the equitable indemnification claim without prejudice, the error was harmless.

Even if there were error in the circuit court's orders denying the motion to continue and dismissing the equitable indemnification claim without prejudice, it would be harmless error because HEC has now re-filed the equitable indemnification claim and, as outlined above, HEC has suffered no legal prejudice. *See Sanders v. Wal-Mart Stores, Inc.*, 379 S.C. 554, 562, 666 S.E.2d 297, 301 (Ct. App. 2008) ("An error not shown to be prejudicial does not constitute grounds for reversal." (quotation omitted)).

II. The circuit court properly dismissed the equitable indemnification claim as unripe.

A. The circuit court correctly determined that the equitable indemnification claim was not ripe because HEC had not yet suffered damages from the settlement of the *Montorio* action.

The circuit court dismissed HEC's equitable indemnification claim as not ripe because, when the circuit court issued its order granting the motion to dismiss, the contingencies upon which HEC's damages allegations hinged had not yet occurred: the

settlement agreement in the *Montorio* action had not yet been approved and HEC had not made any payments pursuant to the settlement agreement. (Order Granting Public Service Authority's Mot. Dismiss at pp. 2-3; R. 7-8.) Consequently, the circuit court's decision to dismiss the claim was proper and should be affirmed.

In its Amended Complaint, HEC premised its equitable indemnification claim on the allegation that Santee Cooper *may be* liable to HEC for any expenses incurred in connection with the settlement of the *Montorio* action—if it were exonerated in the underlying action:

> ***"[T]o the extent Horry Electric is exonerated from liability to the plaintiffs in Civil Action No. 2011-CP-26-1266***, Horry Electric is informed and believes that the defendants are or may be liable to Horry Electric for all expenses incurred by Horry Electric in protecting its interests."

(Am. Compl. ¶ 32; R. 32-33 (emphasis added).) When the Amended Complaint was filed on July 26, 2013, HEC's exoneration from liability was hardly a foregone conclusion. Rather than being exonerated, HEC could have been found at fault or the action could have been resolved without any findings of fault (as it eventually was).

The record demonstrates that HEC intended to try to use court approval of the settlement agreement to satisfy the condition embodied in its Amended Complaint—*i.e.*, its exoneration from liability to the *Montorio* plantiffs. As noted above, in its motion asking the circuit court to continue the hearing on Santee Cooper's motion to dismiss, HEC took the position that the proposed settlement agreement, once approved by the *Montorio* court, would establish the absence of negligence on the part of HEC and damages incurred by HEC, rendering its equitable indemnification claim ripe. (Mot. for Continuance and/or to Stay Any Decision ¶ 2; R. 500.) Indeed, the settlement agreement

did contain gratuitous statements about what "the evidence established" and "the evidence . . .. indicated" concerning Santee Cooper's supposed knowledge and HEC's purported ignorance of certain facts related to the vapor barrier. (Settlement Agreement ¶ 2, Mot. for Continuance and/or to Stay Any Decision Ex. A; R. 505-506.) HEC intended to ask the circuit court in this action "to take judicial notice of the approval of the Settlement Agreement and consider it in connection with the motion to dismiss." (Mot. for Continuance and/or to Stay Any Decision ¶ 3; R. 500.)

HEC's machinations are noteworthy in two respects. First, in seeking a delay until the settlement was consummated, HEC conceded the contingent nature of its claims. Second, it is clear that HEC's gambit was to combine the court-approved settlement agreement containing the gratuitous liability-related language with the subsequent approval order (which would adopt the settlement) to establish that HEC was "exonerated from liability." Over HEC's objection, however, Santee Cooper moved to intervene in the *Montorio* action and obtained a ruling that court approval of the *Montorio* settlement entailed no findings of fact or rulings of law prejudicial to Santee Cooper or exonerating HEC. (Order Granting Mot. to Intervene for Limited Purpose, Civil Action No. 2011-CP-26-1266.) As a result, HEC was unable to contend that it had been "exonerated from liability" by the approval order, and HEC will never be able to support the allegations of the Amended Complaint with factual findings from the *Montorio* action. HEC's allegations of damages supporting its equitable indemnification claim would thus remain speculative (*i.e.*, Santee Cooper "may be" liable to HEC), and the claim would remain unripe, until payments were actually made pursuant to the settlement agreement.

Because no payments had been made, the circuit court properly dismissed the equitable indemnification claim as unripe.

B. Approval of the *Montorio* settlement did not render HEC's equitable indemnification claim ripe because the effective date would follow approval, and payment would follow the effective date.

HEC attempted to delay hearing on the motion to dismiss until the *Montorio* settlement became final. Based on the denial of that request, HEC now argues that its damages would have become concrete—and that its equitable indemnification claim would have thus become ripe—had the circuit court waited and taken judicial notice of the subsequent order approving the settlement in the *Montorio* action. (Brief of Appellant at §§ I-II, pp. 4-5.) However, had the circuit court taken judicial notice of the approval order as HEC requests, it would have conclusively determined that HEC had not yet suffered any damages and the damages alleged in the Amended Complaint were still contingent as pled by HEC. By its terms, the settlement agreement in the *Montorio* action would not become effective until thirty-one days after the order finally approving the settlement. (Settlement Agreement ¶ 1(g), Mot. for Continuance and/or to Stay Any Decision Ex. A; R. 504-505.) Only after the settlement became effective could any claims be paid, and HEC's insurer would not be required to pay any claims until sixty days after the effective date under the automatic fund or over one hundred and eighty days under the remediation fund. (*Id.* at ¶ 4; R. 506-509.) Only after the settlement became effective would HEC pay plaintiffs' attorneys' fees and costs. (*Id.* at ¶ 17; R. 513.)

Not until HEC made payment would any hypothetical damages in connection with the settlement be rendered concrete. South Carolina law does not allow the recovery

of damages based on a projection that the plaintiff may eventually incur expenses, so until HEC actually incurred damages based on its obligation to pay the *Montorio* settlement, its claim for equitable indemnification in this action would remain unripe. *See 56 Leinbach Investors, LLC v. Magnolia Paradigm, Inc.*, Op. No. 5270, ___ SC ___, ___ S.E.2d ___, 2014 WL 4437465, at *6 (S.C. Ct. App. Sept. 10, 2014) ("Speculative damages are damages that depend upon future developments which are contingent, conjectural, or improbable. As a general rule, courts will find that all damages must be susceptible of ascertainment with a reasonable degree of certainty, and that uncertain, contingent, or speculative damages cannot be recovered in any action ex contractu or ex delicto." (quoting 11 S.C. Jur. Damages § 5 (1992))).

This is not a case involving third-party practice in which a defendant impleads a third-party defendant, asserting that the third-party defendant is or may be liable to the defendant for all or part of the plaintiffs' claim against him. *See* Rule 14, SCRCP (allowing impleader of any "person not a party to the action who is or *may be liable* to him for all or part of the plaintiff's claim against him"). In third-party practice, Rule 14 allows an equitable indemnification claim to be asserted in the original action while the damages are still contingent so that all parties to the *existing* controversy can establish their rights. *See, e.g., First Gen. Servs. of Charleston, Inc. v. Miller*, 314 S.C. 439, 443, 445 S.E.2d 446, 448 (1994) (allowing Rule 14 impleader where it had not yet been established whether the impleading party was at fault). In contrast, this is a separate, independent action for equitable indemnification, governed by the usual rules of justiciability, such as ripeness. There must be a concrete and justiciable controversy, and if the matter is not ripe for adjudication, as here, it should be dismissed. *See A/S J.*

Ludwig Mowinckles Rederi v. Tidewater Const. Co., 559 F.2d 928, 932 (4th Cir. 1977) (concluding that, where the putative indemnitor had not been found liable on the underlying admiralty claim and the putative indemnitee had not yet incurred the entirety of its expenses, the indemnitee's action for equitable indemnification was unripe). Realizing its claim was unripe, HEC attempted to delay consideration of the motion to dismiss until final approval of the *Montorio* settlement, and based on this recognition, the circuit court properly dismissed the claims without prejudice.

Finally, to the extent HEC contends that its own attorneys' fees and costs represented damages ripe for adjudication, such fees and costs were not recoverable. HEC argues that the equitable indemnification claim contains allegations of concrete damages because HEC alleged that it had incurred attorneys' fees and costs in defending the *Montorio* action. (Brief of Appellant at § V pp. 10-11; *see also* Am. Compl. ¶¶ 17-18, 32; R. 31-32.) However, HEC failed to allege any basis for an award of attorneys' fees, and no statute or contract authorizing the recovery of attorneys' fees exists. *See Hegler v. Gulf Ins. Co.*, 270 S.C. 548, 549, 243 S.E.2d 443, 444 (1978) ("As a general rule, attorney's fees are not recoverable unless authorized by contract or statute."). As described above, to the extent that HEC sought fees pursuant to a theory of equitable indemnification, the allegations of liability depended on an event that remained contingent. To the extent that HEC sought any attorneys' fees already incurred, they were not recoverable as a matter of law.

C. Lack of ripeness was properly before the circuit court and HEC had notice and an opportunity to respond to Santee Cooper's ripeness argument.

1. Ripeness may be raised *sua sponte*.

HEC's argument that it was error for the circuit court to dismiss the equitable indemnification claim for lack of ripeness *sua sponte* fails because the determination of whether a controversy is ripe is properly within the purview of the circuit court regardless of whether the issue was raised on motion of a party. (*See* Brief of Appellant at § IV pp. 6-9.) Ripeness is a threshold question of justiciability, which affects whether an action may be maintained at all. *Sloan v. Greenville Cnty.*, 356 S.C. 531, 546, 590 S.E.2d 338, 346 (Ct. App. 2003). Accordingly, this Court has stated that ripeness considerations "may be and should be raised *sua sponte*." *Eagle Container Co., LLC v. Cnty. of Newberry*, 366 S.C. 611, 634, 622 S.E.2d 733, 745 (Ct. App. 2005) *rev'd on other grounds*, 379 S.C. 564, 666 S.E.2d 892 (2008); *see also Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 808 (2003) ("[T]he question of ripeness may be considered on a court's own motion."). Equivalent questions regarding whether a case or controversy exists, such as standing, similarly may be raised *sua sponte*. *Lennon v. S. Carolina Coastal Council*, 330 S.C. 414, 417, 498 S.E.2d 906, 908 (Ct. App. 1998) (citing 6A Charles A. Wright et al., *Federal Practice and Procedure* § 1542 (1990)). Therefore, in order to avoid ruling on an action without a controversy, the circuit court properly determined as a threshold matter that HEC's claim for equitable indemnification was unripe.

2. HEC was on notice of and had an opportunity to address the ripeness issue.

Moreover, Santee Cooper raised the ripeness issue sufficiently for HEC to be on notice of the issue and to have an opportunity to address it. Two weeks before the hearing on Santee Cooper's motion to dismiss, HEC filed its motion to continue the hearing. (Mot. for Continuance and/or to Stay Any Decision; R. 499-569.) HEC anticipated the argument from Santee Cooper that its equitable indemnification claim was not ripe for adjudication because HEC had not yet suffered any damages:

> Santee Cooper will argue that the equitable indemnity claim should be dismissed because the claim for equitably indemnity requires proof that the party seeking indemnity have no personal negligence of his own. Santee Cooper may also argue that the above-captioned action is premature and should be dismissed since Horry Electric has not yet suffered any damages in Civil Action No. 2011-CP-26-1266.

(*Id.* at ¶ 1; R. 499-500.) Having sought a continuance on the grounds that Santee Cooper would argue that the action was not ripe, HEC cannot credibly contend that Santee Cooper never raised the issue.

Similarly, having known for at least two weeks prior to the hearing that the issue of ripeness might arise, HEC cannot claim that it was deprived it of an opportunity to address the issue. Moreover, at the hearing on the Motion to Dismiss, the circuit court expressly raised lack of ripeness to counsel for HEC and allowed an opportunity to be heard. (Tr. 20:2-21:10; R. 69-70.)

"To demonstrate prejudice in a matter involving allegedly insufficient notice, an appellant must establish if he or she had received appropriate notice, he or she would have done something different, thereby affecting the decision of the trial court and

advancing his or her case." *Chastain v. Hiltabidle*, 381 S.C. 508, 517, 673 S.E.2d 826, 831 (Ct. App. 2009) (citing *Gardner v. S. Carolina Dep't of Revenue*, 353 S.C. 1, 14, 577 S.E.2d 190, 197 (2003)). HEC has not attempted to show that it would have done anything different that would have affected the decision of the circuit court, and it is unable to make such a showing. HEC was aware of the ripeness argument and had an opportunity to be heard on lack of ripeness at the hearing on the motion to dismiss. Accordingly, HEC was not prejudiced by dismissal of the equitable indemnification claim for lack of ripeness.

III. The record also supports the conclusion that the equitable indemnification claim is barred as a matter of law by the statute of repose applicable to claims arising out of construction.

The circuit court correctly held that all of the claims other than equitable indemnification were barred by the construction statute of repose. Although the circuit court did not expressly dismiss the equitable indemnification claim for this reason, the record supports dismissal of that claim as also barred by the statute of repose. *See* Rule 220(c), SCACR; *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 420-21, 526 S.E.2d 716, 723 (2000) (stating that an appellate court may affirm the decision of the trial court on an additional sustaining ground for any reason appearing in the record on appeal). Accordingly, this Court should affirm the decision of the circuit court to dismiss the equitable indemnification claim.

All of the claims asserted in the Amended Complaint are subject to the construction statute of repose, which bars "actions to recover damages based upon or arising out of the defective or unsafe condition of an improvement to real property" that are brought after a defined number of years "after substantial completion of the

improvement." S.C. Code Ann. § 15-3-640. Actions for indemnification for damages sustained on account of an action arising out of defective construction, such as HEC's equitable indemnification claim alleging damages incurred from the settlement of the *Montorio* action, are also expressly barred by the statute if brought outside of the repose period. S.C. Code Ann. § 15-3-640(6). Unlike a statute of limitations, a statute of repose is "an absolute time limit beyond which liability no longer exists . . . ." *Langley v. Pierce*, 313 S.C. 401, 403-04, 438 S.E.2d 242, 243 (1993).

The current construction statute of repose, which applies to actions in connection with improvements with certificates of occupancy issued after July 1, 2005, establishes an eight-year repose period. *See* 2005 S.C. Acts 27 (H.B. 3008) (implementing eight-year statute of repose). The prior statute of repose, which HEC asserts is applicable to the homes at issue in the *Montorio* action, established a thirteen-year repose period. S.C. Code Ann. § 15-3-640 (1986). The circuit court, without deciding whether the eight-year period might apply, analyzed HEC's claims under the thirteen-year statute of repose. Regardless of whether the eight- or the thirteen-year statute of repose applies, HEC's claim seeking equitable indemnification from Santee Cooper is barred, and this Court may affirm the order of dismissal for this reason in addition to the others appearing in the record.

HEC has conceded on multiple occasions that its equitable indemnification claim is barred as to any plaintiffs in the *Montorio* action whose homes were constructed before January 23, 2000. (Brief of Appellant at § VII, p. 13; *see also* Tr. 14:7-19; R. 63.) The public records detailed and cited above demonstrate that the Deed and Mortgage for the property owned by David Montorio were recorded on February 2, 1998, and the Deed

and Mortgage for the property owned by Tammy Vance were recorded on October 31, 1997. The Montorio and Vance homes were substantially completed prior to January 2000 based on the dates contained in the public record. (*See* Section I(B), *supra.*) HEC's Complaint was filed on January 23, 2013, more than thirteen years after the completion of both the Montorio and Vance homes. Accordingly, HEC's equitable indemnification claim is barred by the thirteen-year statute of repose. The decision of the circuit court to dismiss the equitable indemnification claim may be affirmed for this reason as well.

IV. The circuit court correctly determined that the claims for negligence, breach of duty of good faith and fair dealing, breach of warranty, and civil conspiracy were barred by the statutes of limitation and repose.

A. The allegations of the Amended Complaint demonstrate that the remaining claims are barred by the statute of limitations.

The circuit court correctly determined that all of the claims in the Amended Complaint, other than the claim for equitable indemnification, were barred by the two-year statute of limitations. (Order Granting Public Service Authority's Mot. Dismiss at pp. 6-8; R. 11-13.) In making this determination, the circuit court did not rely on evidence outside of the allegations of the Amended Complaint and the exhibits attached thereto. As a result, dismissal of the remaining causes of action should be affirmed.

1. The claims for negligence, breach of the duty of good faith and fair dealing, breach of express and implied warranties, and civil conspiracy were barred by the statute of limitations.

The two year statute of limitations contained in the Tort Claims Act applies to HEC's claims for negligence, breach of the duty of good faith and fair dealing, breach of express and implied warranties, and civil conspiracy. *See* S.C. Code Ann. § 15-78-110; *see also Hodges v. Rainey*, 341 S.C. 79, 91-92, 533 S.E.2d 578, 584 (2000) (recognizing that the Tort Claims Act applies to Santee Cooper). The act alleged to give rise to these

claims, which was the purported nondisclosure of information about the vapor barrier issue, was alleged to have occurred in 1986. (Am. Compl. ¶¶ 21, 25, 27, 29; R. 31-32.) Thus, the statute of limitations on these claims expired in 1988. Because all of the allegations giving rise to the claims asserted against Santee Cooper, except for the equitable indemnification claim, are alleged to have occurred between 1988 and 2003, the circuit court properly found those claims to be barred by the two-year statute of limitations.

The circuit court correctly determined that the discovery rule does not operate to toll the two-year statute of limitations. (Order Granting Public Service Authority's Mot. Dismiss at pp. 6-7; R. 11-12.) "Under the discovery rule, the statute of limitations begins to run from the date the injured party either knows or should know, by the exercise of reasonable diligence, that a cause of action exists for the wrongful conduct." *Epstein v. Brown*, 363 S.C. 372, 376, 610 S.E.2d 816, 818 (2005). "Exercise of reasonable diligence" means "that the injured party must act with some promptness where the facts and circumstances of an injury place a reasonable person of common knowledge and experience on notice that a claim against another party might exist." *Dean v. Ruscon Corp.*, 321 S.C. 360, 363-64, 468 S.E.2d 645, 647 (1996). Thus, the "critical inquiry" is whether the party seeking to toll the statute of limitations could have discovered its claim. *Republic Contracting Corp. v. S.C. Dep't of Highways & Public Trans.*, 332 S.C. 197, 207, 503 S.E.2d 761, 767 (Ct. App. 1998). The date upon which discovery of the cause of action should have occurred is an objective question. *Id.*

The circuit court rightly determined that the allegations of the Amended Complaint and the engineering standards and trade publication referenced in the Santee

Cooper letters attached to the Amended Complaint show that, by 1986, HEC could have discovered its claims through the exercise of reasonable diligence. (Am. Compl. Exs. B, C; R. 36-38.) The letters that HEC attached to its Amended Complaint reference engineering standards and a trade publication stating that the vapor barrier problem was known in the engineering community; general awareness, standing alone, can be enough to trigger the running of the limitations period. *See Hedgepath v. Am. Tel. & Tel. Co.*, 348 S.C. 340, 358, 559 S.E.2d 327, 337 (Ct. App. 2001) (finding that the widespread awareness of information about an issue was sufficient to trigger the running of the statute of limitations, even if the party was not personally aware of the issue, because that party would be expected to perform due diligence to discover the claim). Moreover, the circuit court correctly found that when Santee Cooper changed the program in 2003, removing the vapor barrier requirement, a reasonable person was then on notice to investigate the reason for the change. Hence, the Amended Complaint and the exhibits attached thereto, on their face, demonstrate that HEC should have known, by the exercise of reasonable diligence, that the supposed issue with the vapor barrier existed.

Moreover, HEC conceded that it did not do the diligence that might entitle it to invoke the discovery rule. In its Answer to the *Montorio* complaint, HEC admitted that "it offered to its members the Good Cents Program that was offered through the South Carolina Public Service Authority without having performed any research regarding the specifications and requirements of the Good Cents Program as offered by the South Carolina Public Service Authority." (*Montorio* Answer ¶ 9, Civil Action No. 2011-CP-

26-1266.)[10] Because HEC admitted that it did not do any research regarding the vapor barrier issue, the circuit court correctly determined that it was not entitled to application of the discovery rule.

HEC argues that, even if knowledge of the vapor barrier problem were available in 1986, 1991, or even 2005, the statute of limitations would not have run until HEC suffered damages by expending costs in defending the *Montorio* action. (Brief of Appellant at § X p. 17.) As the circuit court stated, by making this argument, HEC is "arguing a theory of liability on one hand with damages on the other." (Tr. 15:7-25; R. 64.) Any damages caused by Santee Cooper's alleged failure to disclose the information contained in the letters would flow naturally from that act; the act in 1986 does not give rise to damages in 2011 merely because HEC has to defend claims relating to it. Therefore, the statute of limitations for claims arising out of the alleged failure to disclose in 1986 began to run once the failure to disclose was discoverable; the statute of limitations for indemnification arising out of the *Montorio* settlement is distinct and not at issue. To find that the entirety of the damages for the negligence, breach of the duty of good faith and fair dealing, breach of express and implied warranties, and civil conspiracy claims only arose upon defense of the *Montorio* action would convert these claims into duplicative indemnity claims. The circuit court correctly found that the claims asserted in the Amended Complaint, other than the equitable indemnification claim, were barred by the statute of limitations.

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[10] The trial court could have taken judicial notice of the Answer filed in the *Montorio* class action without converting the motion to dismiss to a motion for summary judgment. *See Doe v. Bishop of Charleston*, 407 S.C. 128, 135, 754 S.E.2d 494, 498 n.2 (2014), *reh'g denied* (Mar. 6, 2014) ("The trial court's reliance on transcripts and court orders in the underlying class action did not convert the motion to one for summary judgment.").

2. The circuit court did not rely upon evidence outside of the allegations of the Amended Complaint to determine that the statute of limitations barred the remaining claims.

HEC argues that the circuit court considered evidence outside the four corners of the Amended Complaint in determining that the statute of limitations barred the claims other than equitable indemnification. (Brief of Appellant at § V, pp. 15-17.) However, the Amended Complaint and the exhibits attached thereto, as well as the public record, demonstrate on their face that the remaining claims were barred by the statute of limitations.

First, the circuit court correctly determined that Exhibits B and C to the Amended Complaint[11] state clearly on their face that the information contained therein was publicly available. (*See* Am. Compl. Exs. B-C; R. 36-38.) Exhibit B states that the vapor barrier issue was "a touchy subject in coastal areas" and discussed in an ASHRAE handbook, which is publicly known to be a primary publication regarding issues in heating, air conditioning, and ventilation. The circuit court could determine by the mere reference to an ASHRAE handbook that the vapor barrier issue was widely known and reasonable research would have discovered it. Similarly, Exhibit C states that an article in Energy Design Update raises the vapor barrier problem, further reinforcing the inference that the vapor barrier problem was publicly known and due diligence would have necessarily

[11] HEC intentionally attached Exhibits B and C to the Amended Complaint to support their allegations against Santee Cooper, so it cannot complain that their contents were facially evaluated to determine whether HEC's claims should survive dismissal. *See Brazell v. Windsor*, 384 S.C. 512, 516, 682 S.E.2d 824, 826 (2009) (stating that, by attaching an exhibit to their complaint, the plaintiffs "brought the [attachment] to the attention of trial court and were on notice of any information contained in it. In our view, allowing a trial court to consider documents that are incorporated by reference in the complaint but not actually attached thereto prevents a plaintiff from benefiting from his own oversight or from surviving a motion to dismiss by intentionally omitting documents upon which their claims are based.").

uncovered the issue. The "information in Exhibits B-C" was the subject of publications then in circulation and was discussed among the building community, not a secret held by Santee Cooper, and Exhibits B and C to the Amended Complaint show clearly on their faces that research would have uncovered the vapor barrier issue.

HEC's own pleadings, together with the exhibits, show that "the information in Exhibits B-C" could have been discovered by HEC in October 1986, so all claims other than the claim for equitable indemnity were properly dismissed as barred by the statute of limitations.

B. The circuit court correctly found that the remaining causes of action were also barred by the construction statute of repose, which was properly before the court.

HEC argues that the circuit court erred in dismissing HEC's causes of action other than for equitable indemnity as barred by the statute of repose because "this ground was not raised in Santee Cooper's motion to dismiss the other causes of action." (Brief of Appellant at § VIII, p. 13.) This argument is without merit. Santee Cooper's first reason for dismissal in its Motion to Dismiss was that "HEC's Amended Complaint is barred by the statute of repose." (Mot. Dismiss Am. Compl. at p. 4; R. 404.) Although the final sentence of the argument contained in the Motion to Dismiss references the claim for equitable indemnity as being barred by the statute of repose, HEC's interpretation is myopic. It is clear from Santee Cooper's motion that the Amended Complaint was barred in its entirety by the statute of repose. (*Id.* at pp. 4-5; R. 404-405.) Accordingly, the issue of the applicability of the statute of repose to the claims other than for equitable indemnity was before the circuit court.

For the same reasons that the statute of repose bars the claim for equitable indemnification (*see* Section III, *supra*), it bars the remaining claims. *See, e.g.*, *Snavely v. Perpetual Fed. Sav. Bank*, 306 S.C. 348, 349, 412 S.E.2d 382, 383 (1991) (holding that the statute of repose barred negligence claim not commenced within thirteen years of substantial completion of the improvement).

V. The record supports the circuit court's dismissal of the Amended Complaint because HEC failed to plead facts sufficient to state a claim for any of the causes of action.

This Court may affirm the decision of the circuit court to dismiss all of the claims in the Amended Complaint because HEC failed to plead facts sufficient to state a claim for any of the claims asserted in the Amended Complaint. *See* Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal.").

A. Dismissal of the equitable indemnification cause of action may be affirmed because HEC failed to plead facts sufficient to state a claim for equitable indemnification.

In order to state a claim for equitable indemnification, the party seeking indemnification must plead and support the following elements: (1) the indemnitor was liable for causing the indemnitee's damages; (2) the indemnitee was exonerated from any liability for those damages; and (3) the indemnitee suffered damages as a result of the plaintiffs' claims against it which were eventually proven to be the fault of the indemnitor. *Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 60, 518 S.E.2d 301, 305 (Ct. App. 1999). "The most important requirement for the finding of equitable indemnity is that the party seeking to be indemnified is adjudged without fault and the indemnifying party is the one at fault." *Id.* at 63, 518 S.E.2d at 307.

Equitable indemnification is not allowed for joint tortfeasors. *Atl. Coast Line R. Co. v. Whetstone*, 243 S.C. 61, 68, 132 S.E.2d 172, 175 (1963) (citing 27 Am. Jur., Indemnity § 18 at 467).

While HEC makes the conclusory assertion that it is without fault and is being sued only on a theory of imputed liability, this is not a well-pled factual allegation but is instead an unsupported legal conclusion. The pleadings and exhibits show that the *Montorio* plaintiffs do not premise their claims on imputed liability; the *Montorio* complaint makes no claims or allegations about Santee Cooper's conduct, and is instead predicated on HEC's alleged wrongdoing. (*Montorio* Compl., Am. Compl. Ex. D ¶¶ 6-33; R. 40-43.) At best, HEC can show only that it is a joint tortfeasor; HEC alleged that it adopted the program, including the design standards, and implemented the program in its retail service area, and that it had been sued based on the "vapor barrier" requirement that was among the program standards. (Am. Compl., ¶¶ 5, 6, 7, 12, 14: R. 29-30.) Because HEC *adopted* the Good Cents standards without any investigation or due diligence and implemented these standards in its dealings with its customers, HEC can never establish that it has been "exposed to liability by the wrongful act of another *in which [it] does not join.*". *Stuck v. Pioneer Logging Mach., Inc.*, 279 S.C. 22, 24, 301 S.E.2d 552, 553 (1983) (emphasis added). HEC's Amended Complaint, read together with the exhibits thereto, reveal an absence of factual allegations to support the requirement that HEC be without fault. Under the circumstances, HEC cannot assert a claim for equitable indemnity.

B. Dismissal of all of the remaining causes of action may be affirmed because HEC failed to plead recoverable damages and Santee Cooper had no duty to disclose the information upon which HEC's claims are predicated.

This Court may affirm the dismissal of the claims for negligence, breach of the covenant of good faith and fair dealing, breach of warranty, and civil conspiracy because HEC failed to state facts sufficient to constitute any of the aforementioned causes of action against Santee Cooper for several reasons applicable to the claims collectively and individually.

First, all of the claims other than the equitable indemnification claim are predicated on actual damages in the form of attorneys' fees and the costs and expenses of litigation. (Am. Compl. ¶¶ 17, 18, 22, 32; R. 31-33.) HEC, however, alleged no basis for an award of attorneys' fees. *See Hegler v. Gulf Ins. Co.*, 270 S.C. 548, 549, 243 S.E.2d 443, 444 (1978) ("As a general rule, attorney's fees are not recoverable unless authorized by contract or statute."). Accordingly, the dismissal of these claims may be affirmed because they fail to allege recoverable damages.

Second, as noted above, each of the claims other than the claim for equitable indemnity is premised on Santee Cooper's alleged failure to disclose "the information contained in Exhibits B-C" of the Amended Complaint. (Am. Compl. ¶¶ 21, 25, 27, 29; R. 31-32.) These claims presuppose a duty to disclose this information. "The information contained in Exhibits B-C" was, according to the exhibits themselves, published in at least two separate publications and discussed in the building community. Accordingly, there was no duty to disclose "the information contained in Exhibits B-C." *See Savannah Bank, N.A. v. Stalliard*, 400 S.C. 246, 251, 734 S.E.2d 161, 163-64 (2012) (finding, on the grounds that a duty generally does not exist for one party to disclose

information to another party when that information is available to the other party, that a bank had no duty to disclose information to borrower that was included in his loan documents); *see also Wright v. Craft*, 372 S.C. 1, 25, 640 S.E.2d 486, 499 (Ct. App. 2006) (analyzing whether duty to disclose existed in context of violation of S.C. Unfair Trade Practices Act); *Hendricks v. Clemson Univ.*, 353 S.C. 449, 456, 578 S.E.2d 711, 714 (2003) (finding that whether a duty exists is a matter of law for the court to decide). HEC alleged no facts that could give rise to a duty to disclose as a matter of law, and the pleadings, together with the exhibits, show that "the information contained in Exhibits B-C" was the subject of certain publications and otherwise discussed. Consequently, the pleadings establish that Santee Cooper had no duty to disclose this information, and this Court may affirm the order of dismissal on this basis as well.

C. Dismissal of each of the remaining causes of action may be affirmed because HEC failed to plead facts sufficient to state claims.

Each of the claims other than equitable indemnification fail individually. In addition to the absence of the "duty" element of the negligence claim, HEC failed to allege a causal connection between the purported failure to disclose "the information contained in Exhibits B-C" and the attorney's fees and expenses HEC seeks as damages. HEC never alleged that if Santee Cooper had provided it copies of the letters, for instance, it would not have suffered the attorney's fees and expenses. *See Rush v. Blanchard*, 310 S.C. 375, 378, 426 S.E.2d 802, 804 (1993). Based on the Amended Complaint, HEC has not shown that Santee Cooper's alleged action was the but-for cause of HEC's legal fees and costs, and this failure to state sufficient facts also supports the order of dismissal.

The cause of action for breach of duty of good faith and fair dealing fails because it is not an independent claim under South Carolina law. *See RoTec Services, Inc. v. Encompass Services, Inc.*, 359 S.C. 467, 473, 597 S.E.2d 881, 884 (Ct. App. 2004) (stating that "the implied covenant of good faith and fair dealing is not an independent cause of action separate from the claim for breach of contract"). HEC alleged that Santee Cooper breached the implied covenant of good faith and fair dealing when Santee Cooper failed to disclose the information in the two letters attached as Exhibits B and C to the Amended Complaint. (Am. Compl. ¶ 25; R. 31-32.) Under the law, HEC cannot, allege such a breach.

The cause of action for breach of warranty fails because HEC failed to allege either an express warranty or any facts giving rise to an implied warranty. HEC alleged that Santee Cooper breached express and implied warranties that the Good Cents program "was appropriate for use by Horry Electric and its members." (Am. Compl. ¶ 27; R. 32.) The agreement attached as Exhibit A to the Amended Complaint contains no express warranty of any kind, and HEC alleged nothing that can be construed as an express warranty, so the claim for breach of an express warranty fails. Further, HEC failed to allege facts giving rise to an implied warranty, so HEC's claim on this basis also fails. There is no authority that general standards like the Good Cents Program standards give rise to an implied warranty of any kind.

Similarly, the civil conspiracy claim fails because HEC made only conclusory, summary allegations of a civil conspiracy. A civil conspiracy exists when there is (1) a combination of two or more persons, (2) for the purpose of injuring the plaintiff, (3) which causes the plaintiff special damage. *Island Car Wash, Inc. v. Norris*, 292 S.C. 595,

600, 358 S.E.2d 150, 152 (Ct. App. 1987). Here, HEC did not allege special damages to support a claim for civil conspiracy. *See Hackworth v. Greywood at Hammett, LLC*, 385 S.C. 110, 117, 682 S.E.2d 871, 875 (Ct. App. 2009) ("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."). Moreover, HEC alleged no covert or clandestine act. *See Island Car Wash* at 601, 358 S.E.2d at 153 ("Civil conspiracy is an act which is by its very nature covert and clandestine and usually not susceptible of proof by direct evidence. . . ."). It did not allege facts showing a joint assent by the defendants to prosecute an unlawful enterprise. *See First Union Nat'l Bank of South Carolina v. Soden*, 333 S.C. 554, 575, 511 S.E.2d 372, 383 (Ct. App. 1998) ("In order to establish a conspiracy, evidence, either direct or circumstantial, must be produced from which a party may reasonably infer the joint assent of the minds of two or more parties to the prosecution of the unlawful enterprise."). Nor did HEC allege any acts in furtherance of the alleged conspiracy. *See Hackworth* at 116, 682 S.E.2d at 875 ("In a civil conspiracy claim, one must plead additional acts in furtherance of the conspiracy separate and independent from other wrongful acts alleged in the complaint, and the failure to properly plead such acts will merit the dismissal of the claim."). Finally, HEC has not alleged facts showing that Santee Cooper's purpose or object was to injure HEC. *See Benedict College v. National Credit Systems, Inc.*, 400 S.C. 538, 545, 735 S.E.2d 518, 522 (Ct. App. 2012) ("To be actionable . . . a conspiracy's 'primary purpose or object' must be 'to injure the plaintiff.'" (quoting *Lee v. Chesterfield Gen. Hosp., Inc.*, 289 S.C. 6, 13, 344 S.E.2d 379, 383 (Ct. App. 1986))). For these reasons, the claim for civil conspiracy is facially insufficient.

Conclusion

Based on the foregoing, the Court should affirm the decision of the circuit court to dismiss the Amended Complaint.

Respectfully submitted,

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March 23, 2015

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas
Honorable Roger M. Young, Sr.

Case No. 2013-CP-26-0488
Appellate Case No. 2014-001685

Horry Electric Cooperative, Inc.,..... Appellant,

v.

South Carolina Public Service Authority and Southern Electric International, Inc., ... Defendants,

Of whom South Carolina Public Service Authority is the.... Respondent.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

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PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Respondent, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same to the following address(es):

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March 23, 2015