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State of South Carolina )  
County of Horry )

Court of Common Pleas  
2015-CP-26-03173

Condo World Development, )  
LLC )  
vs. )  
Myrtle Beach Golf & )  
Yacht Club Association, )  
Inc. )

Transcript of Record

June 5, 2017  
Conway, South Carolina

BEFORE:

Honorable Larry B. Hyman, Judge.

APPEARANCES:

Howell V. Bellamy, III, Esq.  
Attorney for the Plaintiff

Audra McCall Byrd, Esq.  
Christopher H. Pearce, Esq.  
Laurence R. Wells, IV, Esq.  
Attorneys for the Defendant

Teresa J. F. Bautz, RPR  
Official Court Reporter

E X H I B I T S

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NO.	DESCRIPTION	ID	EV
3	No exhibits submitted.		

Exhibits retained by Clerk of Court.

1 (The hearing commenced at approximately  
2 10:04 a.m.)

3 THE COURT: Next we have Condo-World Development  
4 versus are Myrtle Beach Golf and Yacht. Mr. Bellamy,  
5 Ms. Byrd, Mr. Pearce, Mr. Wells, lots of folks, a  
6 motion to dismiss. And it's brought by South State  
7 Bank.

8 MS. BYRD: Yes, sir, Your Honor.

9 THE COURT: Good to see you, Ms. Byrd.

10 MS. BYRD: Yes, sir, good to see you.

11 THE COURT: Where have you been?

12 MS. BYRD: I have been working hard, keeping me  
13 tied up.

14 THE COURT: Well, it's been so long since I've  
15 seen you, used to see you quite often.

16 MS. BYRD: Yes, sir.

17 THE COURT: How about your father-in-law, how's he  
18 doing?

19 MS. BYRD: He's doing great. He's actually over  
20 in -- he was in Rome for two weeks.

21 THE COURT: Good for him, good for him.

22 MS. BYRD: And now he's in England.

23 THE COURT: Mr. Pearce.

24 MR. PEARCE: Yes, Your Honor, how are you?

25 THE COURT: I'm doing well; how about you?

1 MR. PEARCE: Doing great.

2 THE COURT: Okay. Well, I'm glad to hear it.

3 Now, Ms. Byrd, this is your motion?

4 MS. BYRD: Yes, sir, Your Honor, it is.

5 THE COURT: All right. Let's hear it.

6 MS. BYRD: Okay. I represent South State Bank,  
7 and we filed a motion to dismiss under Rule 12(b)(6).  
8 I know Your Honor, I believe, has heard a few motions  
9 in this case, so I'll try to be --

10 THE COURT: I'm a little familiar with it.

11 MS. BYRD: Okay. So I'll just tell --

12 THE COURT: Well, let me just -- I don't want to  
13 cut you short.

14 MS. BYRD: Okay.

15 THE COURT: But, Mr. Pearce, didn't South State  
16 sign off?

17 MR. PEARCE: I'm sorry, Your Honor?

18 THE COURT: Didn't South State sign off on this  
19 matter? I mean, isn't that why you brought them in,  
20 because they may have had some enforceable rights?

21 MR. PEARCE: Historically, Your Honor, we brought  
22 a Rule 19 motion to dismiss the entire action unless  
23 the Plaintiffs brought in South State Bank which is a  
24 successor in interest to People's. They refused to do  
25 that, and we had a hearing on that. And Your Honor

1 basically instructed us, the association, to file a  
2 third-party complaint against South State Bank.

3 THE COURT: So that was my idea?

4 MR. PEARCE: It was your idea.

5 THE COURT: It sounds better now that you say it.

6 MR. PEARCE: So that's how we're here. And  
7 Ms. Byrd and the bank, obviously we've had some  
8 discussions, they obviously don't like it whether it  
9 was my idea or your idea.

10 THE COURT: All right. Let's hear from Ms. Byrd.

11 MS. BYRD: Thank you, Your Honor.

12 THE COURT: Maybe I was thinking they would sign  
13 off.

14 MS. BYRD: No, Your Honor. South State was  
15 brought in as a Third-Party Defendant by the  
16 association, Myrtle Beach Golf and Yacht Club  
17 Association. And the association has alleged three  
18 causes of action against -- I'm sorry -- yes, three  
19 causes of action -- well, four, against South State.  
20 The first cause of action is a breach of contract cause  
21 of action. And as Your Honor might remember, this  
22 involves the development of a large piece of property.

23 THE COURT: Right.

24 MS. BYRD: And the Golf and Yacht Club was put  
25 into involuntary bankruptcy in 1984 or '88.

1 THE COURT: Way back.

2 MS. BYRD: And as a part of that, there was an  
3 agreement signed by People's Federal Bank.

4 THE COURT: Which is successor -- I mean, a  
5 predecessor of South State?

6 MS. BYRD: Well, according to the complaint, it  
7 was People's, then First Federal, then South State.

8 THE COURT: Exactly.

9 MS. BYRD: And in that bankruptcy agreement, there  
10 are three provisions that are of particular relevance  
11 here. And I have a copy of the agreement. If I can  
12 bring that up, it might be helpful.

13 THE COURT: Okay. I've heard a lot about this  
14 agreement, but I haven't seen it.

15 MS. BYRD: Oh, well, I'm so excited to be the  
16 first one to give it to you. May I approach, Your  
17 Honor?

18 THE COURT: Yeah. I was afraid both sides were  
19 scheduled to show up to me.

20 MS. BYRD: Leave it to me.

21 THE COURT: All right. But I also understand this  
22 agreement was never filed here in Horry County. The  
23 clerk never got a copy of it or anything like that.

24 MS. BYRD: No, Your Honor. And as far as we can  
25 tell, it was never filed and even in the bankruptcy

1 court proceedings. But the first provision of the  
2 bankruptcy agreement that is relevant to our motion and  
3 the third-party claims is on page two, paragraph two.

4 THE COURT: All right.

5 MS. BYRD: In the last sentence of that agreement,  
6 the association, the consultants and Myrtle Beach Golf  
7 and Yacht Club agreed to enforce restrictive covenants  
8 as they are amended from time to time.

9 And what's important about that, Your Honor, is  
10 that People's Federal was specifically excluded from  
11 that provision.

12 THE COURT: And it says very clearly, giving  
13 particular scrutiny to the covenant compliance on those  
14 lots and parcels of land which are adjacent and  
15 contiguous to the golf course. Isn't that the same  
16 stuff we're talking about?

17 MS. BYRD: Yes, sir, Your Honor.

18 THE COURT: All right.

19 MS. BYRD: So, again, what's important about that  
20 is People's agreed to a lot of things in this  
21 agreement, but that was not one of the things that they  
22 were included in.

23 THE COURT: Okay.

24 MS. BYRD: The second provision of relevance here  
25 is on page four.

1 THE COURT: Why was People's -- I mean, did they  
2 continue with the security interest after the fact,  
3 after the bankruptcy?

4 MS. BYRD: After the bankruptcy, the reason why  
5 they even signed this agreement was to have the  
6 property released from the bankruptcy from the  
7 automatic stay so that the foreclosure --

8 THE COURT: So it could be foreclosed?

9 MS. BYRD: Yes, sir.

10 THE COURT: I understand.

11 MS. BYRD: And People's was the successful bidder  
12 at the foreclosure sale.

13 THE COURT: All right, okay.

14 MS. BYRD: On page four in paragraph three, that  
15 requires, People agree to --

16 THE COURT: Did People's take title to all of the  
17 property that has not been conveyed out, common areas,  
18 contiguous tracts, People's took title to everything;  
19 right?

20 MS. BYRD: Yes, Your Honor.

21 THE COURT: Okay, all right. I just want to be  
22 clear on that.

23 MS. BYRD: And they also agreed that in the event  
24 that they were the successful bidder at the foreclosure  
25 sale, that they would include a deed restriction that

1 stated the only permitted use of the property is a golf  
2 course, country club or ancillary use related to a golf  
3 club.

4 THE COURT: Okay. Now, where was that?

5 MS. BYRD: That is on page four in paragraph  
6 three.

7 THE COURT: Okay. All right.

8 MS. BYRD: Okay. And then the last provision  
9 that's relevant to our motion is on page six at  
10 paragraph two. And that provision reads, the parties  
11 between and among themselves will execute general  
12 releases so as to acquit, indemnify and hold harmless  
13 each other from any claims or causes of action between  
14 and/or among them prior to the execution of the date of  
15 this instrument.

16 THE COURT: Okay.

17 MS. BYRD: So that's the background and that's  
18 really what gives rise to the third-party claim.

19 THE COURT: Was there a general release ever  
20 executed?

21 MS. BYRD: No, Your Honor. And it's not alleged  
22 in the pleading that there ever was any further general  
23 release, and it's not attached to the pleading in 1992.  
24 So after the foreclosure sale and after the bankruptcy  
25 agreement, People's continued to own the property until

1 1992, when it sold the property to Heron Point. And in  
2 the 1992 deed, it included the restriction that is  
3 cited in the bankruptcy agreement.

4 THE COURT: So South State, People's, whoever,  
5 complied with the requirement of the agreement?

6 MS. BYRD: Right.

7 THE COURT: That's your position?

8 MS. BYRD: Yes, Your Honor.

9 THE COURT: Okay, all right.

10 MS. BYRD: And then thereafter, People's quit  
11 claimed all of the remaining property that it owned to  
12 the association. So after that point they --

13 THE COURT: You mean, that would be most likely  
14 the common areas?

15 MS. BYRD: Yes, sir, Your Honor.

16 THE COURT: Okay.

17 MS. BYRD: And then in 2005 when First Federal  
18 apparently was the current holder of the mortgage note,  
19 they executed a waiver of restrictions in favor of  
20 Heron Point where this -- and I don't know if Your  
21 Honor has seen a copy of that, but I also have a copy  
22 of that if you want to see.

23 THE COURT: Okay. All right. So in the  
24 bankruptcy court -- and let's just refer to it as South  
25 State.

1 MS. BYRD: Okay.

2 THE COURT: When I say that, I mean People's  
3 Federal and First Federal, whatever it was. South  
4 State agreed to restrict; right?

5 MS. BYRD: It agreed to include that language in  
6 the deed.

7 THE COURT: And if it took it, the property, at  
8 the bankruptcy sale; okay?

9 MS. BYRD: Yes, Your Honor.

10 THE COURT: And there was a -- I mean, a  
11 foreclosure sale.

12 MS. BYRD: Um-hum.

13 THE COURT: And there was a foreclosure sale, it  
14 did take title. And then it conveyed the property out,  
15 and pursuant to that agreement included the restrictive  
16 language?

17 MS. BYRD: Yes, Your Honor.

18 THE COURT: And sold it to Heron Point?

19 MS. BYRD: Yes, Your Honor.

20 THE COURT: Then at some time Heron Point comes  
21 back and asks for a release?

22 MS. BYRD: A release of the restrictions, yes,  
23 Your Honor.

24 THE COURT: And South State obliges?

25 MS. BYRD: That's correct.

1 THE COURT: Okay. And that's the agreement you  
2 have right there?

3 MS. BYRD: Yes, sir.

4 THE COURT: And that's just between -- I don't  
5 need it -- it's just between Heron and South State  
6 Bank?

7 MS. BYRD: That's correct, Your Honor.

8 THE COURT: Okay, all right.

9 MS. BYRD: And, Your Honor, importantly, this  
10 agreement, the waiver of restrictions was filed with  
11 the clerk of the register of deeds in Horry County on  
12 May the 5th, 2005. So with regard to --

13 THE COURT: Does it reference the prior agreement  
14 in the bankruptcy court?

15 MS. BYRD: No, Your Honor.

16 THE COURT: So if Heron Point came to me and asked  
17 me to examine the title, and I had examined the title,  
18 I would simply find a restriction placed on the  
19 property in favor of South State that South State  
20 subsequently released. Had there been any other  
21 conveyances out to anyone else, someone who could come  
22 in as a third party and claim the protection of that  
23 easement?

24 MS. BYRD: Not that I'm aware of, Your Honor.

25 THE COURT: All right, okay.

1 MS. BYRD: Okay.

2 THE COURT: So South State, how would South -- I  
3 mean, Heron know that this could not be released?

4 MS. BYRD: Your Honor, I don't believe that  
5 there's any way that they could have known that it  
6 couldn't be released.

7 THE COURT: All right. Let's go ahead.

8 MS. BYRD: So with regard to the breach of  
9 contract claim, it's alleged that South State breached  
10 the bankruptcy agreement, the 1992 deed to Heron Point,  
11 and failed to act in good faith. And the allegation is  
12 that they breached that by not providing notice or  
13 information regarding the 2005 waiver that was filed  
14 with the Clerk of Court.

15 Your Honor, our position is that this is clearly  
16 barred by the statute of limitations. For a breach of  
17 contract action is a three-year statute, and we use the  
18 discovery rule. And case law is very clear that in the  
19 case of a recorded document, the statute begins to run  
20 as soon as it's filed.

21 THE COURT: Okay.

22 MS. BYRD: And in this case there's no --

23 THE COURT: Maybe I would like to see that 2005  
24 waiver.

25 MS. BYRD: May I approach, Your Honor?

1 THE COURT: Yes.

2 MS. BYRD: And these are attached to the  
3 third-party complaint, Your Honor.

4 THE COURT: Now, is Heron Point -- I should know  
5 this -- is Heron Point the same as Condo-World, or has  
6 Heron Point made another conveyance?

7 MS. BYRD: Your Honor, the Plaintiffs in the case  
8 are Heron Point and Condo-World Development.

9 THE COURT: Okay, all right.

10 MS. BYRD: And I'm not certain about that.

11 THE COURT: But are they the same, are they the  
12 same folks?

13 MR. PEARCE: Your Honor, I can clarify it, and  
14 Mr. Bellamy or Bellamy II or III, but Heron Point still  
15 owns the golf course. Condo-World a number of years  
16 later is an entity that's held by the same principal,  
17 owner Roy Clyburn. He ended up purchasing --

18 THE COURT: As a matter of convenience they have  
19 two companies?

20 MR. PEARCE: Right. He ended up purchasing the  
21 South State Bank note, as you described it, he ended up  
22 purchasing that at a reduced cost to, I think in 2012  
23 or sometime thereafter but well after this 2005  
24 incident, he purchased the note from the bank.

25 THE COURT: Did South State finance it for Heron

1 Point? You said there's a note out there? I thought  
2 maybe they bought it at foreclosure.

3 MS. BYRD: First Federal held the note and  
4 mortgage.

5 THE COURT: Okay. But then they foreclosed. And  
6 they bought it at foreclosure, they took title, they  
7 don't own a note.

8 MR. PEARCE: The bank, South State Bank, and  
9 successor interest originally financed the property for  
10 Heron Point. And they had the note at the time of the  
11 2005 transfer. Subsequently, that note  
12 because People's --

13 THE COURT: Well, that's what I was asking you.  
14 Subsequently when they sold it to Heron Point, did they  
15 finance it?

16 MR. PEARCE: They did, they financed it.

17 MS. BYRD: Yes.

18 THE COURT: Okay. That makes it clear then, okay.  
19 Now I understand.

20 MS. BYRD: Yes, Your Honor.

21 THE COURT: All right.

22 MS. BYRD: And so in this case because it was  
23 registered and recorded May the 5th, 2005, the statute  
24 began to run at that time. So at the latest, the  
25 statute expired on May the 5th, 2008. And this action

1 was filed in March of 2017, nine years after the  
2 statute expired.

3 THE COURT: Okay.

4 MS. BYRD: So we think the breach of contract  
5 claim should clearly be dismissed.

6 THE COURT: Okay. Is this a summary judgment or a  
7 12(b)(6)?

8 MS. BYRD: This is a 12(b)(6). And I'm using only  
9 the allegations in the complaint.

10 THE COURT: Okay.

11 MS. BYRD: And everything I've handed you are  
12 attachments.

13 THE COURT: So you have raised the statute then;  
14 right?

15 MS. BYRD: Yes.

16 THE COURT: In your complaint?

17 MS. BYRD: Yes.

18 THE COURT: All right. Well, does anybody else  
19 have a dog in this fight other than you?

20 MS. BYRD: Chris might.

21 THE COURT: I mean, I see this band of bandits  
22 back here on the next row here, and they seem to be  
23 interested in this. But this is your motion?

24 MS. BYRD: Yes, Your Honor.

25 THE COURT: This is your motion, okay.

1 MS. BYRD: And there's three other claims, and I  
2 can do those, we can go one at a time or however.

3 THE COURT: Okay. So right now you're talking  
4 about which claim?

5 MS. BYRD: The breach of contract claim.

6 THE COURT: The breach the contract, okay. Now,  
7 Mr. Pearce, let's talk about that. And Ms. Byrd, I'm  
8 going to get back to you. It's just that it's easier  
9 for me to do them one at a time.

10 MS. BYRD: Yes, sir.

11 THE COURT: Mr. Pearce, we're talking about an  
12 agreement, and I assume that's what the contract is,  
13 the agreement?

14 MR. PEARCE: The agreement, yes, sir.

15 THE COURT: All right. The agreement was executed  
16 back in what, 19 -- no, it's earlier than that, '88?

17 MS. BYRD: Yes, sir, Your Honor.

18 THE COURT: July the 25th of 1988; right?

19 MR. PEARCE: Sounds correct, Your Honor.

20 THE COURT: Okay. And, Ms. Byrd, you don't  
21 challenge the legality of the agreement; do you? I  
22 mean, it's properly executed and --

23 MS. BYRD: Your Honor, for purposes of this  
24 motion, I accept that it is, absolutely, of course.

25 THE COURT: All right. So we have an agreement,

1 Mr. Pearce. We have an agreement that was executed in  
2 1988, an agreement that apparently for the purposes of  
3 this part of the hearing was breached in 2005 with the  
4 waiver of those restrictions. Now, tell me about, how  
5 does the statute not run here?

6 MR. PEARCE: Okay. Your Honor, just briefly, and  
7 you touched on it a little earlier, this is a 12(b)(6)  
8 motion. I'm not going to bore Your Honor with the  
9 standard of review for that motion, but we're looking  
10 at a four corners review in the light most favorable to  
11 my client at this point.

12 THE COURT: Well, that's what I'm looking for  
13 here. I want to know...

14 MR. PEARCE: The statute of limitations argument,  
15 Your Honor, is interesting. Basically Ms. Byrd relies  
16 on the three-year statute of limitations as the  
17 governing statute.

18 THE COURT: What statute do you think would apply;  
19 do you think there's a different one on breach of  
20 contract?

21 MR. PEARCE: In this instance, I do, Your Honor,  
22 in relation to the fact that the 2005 document that was  
23 filed and put in the public record, I believe that it  
24 is -- qualifies as a sealed instrument. And to the  
25 extent it's not a sealed instrument, I think that the

1 statute 19-1-160 gives us the protection of a sealed  
2 instrument by virtue of that document.

3 THE COURT: Well, bring me back up to speed on  
4 that. How does that...

5 MR. PEARCE: That would make the statute of  
6 limitations 20 years, Your Honor, not three. And  
7 that's just the one issue that I would bring up.

8 THE COURT: And you're talking about 20 -- like in  
9 a mortgage situation, 20 years?

10 MR. PEARCE: Correct, Your Honor. And just to be  
11 clear, all of the case law and the statute of  
12 limitations that Ms. Byrd has cited as motion for  
13 summary judgment case law and directed verdict case  
14 law, in relation to that, the case of Garner v. Houck  
15 has -- survives through to the day.

16 But basically that case law says that if there's  
17 any question about the reasonableness of the actions of  
18 a party in regards to the statute of limitations and  
19 when the statute of limitations began and ran, that  
20 that issue is to be decided by the finder of fact,  
21 whether it be a jury or judge, once the matter is moved  
22 forward.

23 I don't believe that it's ripe for being dismissed  
24 at a motion to dismiss stage.

25 THE COURT: But we're talking about an action,

1 just your action for breach of contract; is that  
2 correct?

3 MR. PEARCE: Correct.

4 THE COURT: Correct, okay.

5 MR. PEARCE: Your Honor, one thing I need to  
6 clarify, Ms. Byrd stated to you that the bank, South  
7 State Bank entities, would have had no knowledge or  
8 understanding of the bankruptcy agreement. That is not  
9 true. I understand she's not been a part of the  
10 discovery in this case --

11 THE COURT: Well, I think I asked her, how would  
12 they know.

13 MR. PEARCE: The reason they would know is it's in  
14 their file.

15 THE COURT: I really ask in the context if I were  
16 an attorney --

17 MR. PEARCE: Right.

18 THE COURT: -- who was asked to certify title, how  
19 would I pick it up?

20 MR. PEARCE: To clarify just a couple things, the  
21 bankruptcy agreement, we found that document and that  
22 document was originally produced early on in this  
23 litigation by South State Bank. It was in their files.  
24 They produced it to us under response to a Rule 45  
25 subpoena.

1           We've not gone back and tried to broaden that  
2 subpoena to see what other documents they have, but it  
3 was in their file. They produced it to us. And the  
4 issue of the bankruptcy agreement and the bankruptcy  
5 court, Your Honor, I've gone to the bankruptcy court  
6 clerk in Columbia, Atlanta and Washington looking for  
7 this bankruptcy file, and nobody has it. And I don't  
8 have an explanation to offer the Court as to why that  
9 is, but that's the way it is.

10           I contacted every lawyer that I could find that  
11 signed that agreement, and none of them have their  
12 files because of the time that's passed. But everybody  
13 that looks at the agreement says, yeah, that was the  
14 agreement we made, that was what we understood to be  
15 the trigger to release the property so it could be  
16 foreclosed on. And that bankruptcy agreement is  
17 referenced time and time again in the other documents  
18 relating to the workout of this golf course property.  
19 So it's not like people at the time didn't know.

20           And, again, the bank is the party that produced it  
21 to us. So now to sit here at a motion to dismiss  
22 hearing and say, golly, we had no idea that it was out  
23 there, well, you had to or you should have because it  
24 was in your file.

25           And then, we moved forward a number of years, and

1 I understand the Court's concern with the amount of  
2 time that passed, I'm kind of stuck with the facts and  
3 circumstances that I've been dealt in this case. But  
4 in 2005, Heron Point comes to the bank and says, you  
5 know, we want a waiver of these deed restrictions so  
6 that we can sell this property.

7 And through that transaction the bank got roughly  
8 a hundred thousand dollars, Heron Point got a hundred  
9 thousand dollars. There's other evidence and  
10 information, again, which doesn't lend itself to the  
11 motion to dismiss argument that says the bank and Heron  
12 Point have been talking about this for a long time, and  
13 they've been talking about it in the context of dealing  
14 with the association.

15 THE COURT: Let's say that's true. Let's say  
16 that's absolutely dead on the truth, they were  
17 monkeying around, they knew all about it. Say that  
18 they did. How did we get past the fact that the breach  
19 is when they conveyed it? Doesn't make any difference  
20 if they talked about it, if they knew about it, the  
21 breach occurred when they waived it.

22 And the waiver was filed in the public record in  
23 2005, and what, nine years before this action was  
24 brought, nine years before. The property's out there,  
25 I would assume somebody is doing something with the

1 property in the meantime.

2 I mean, you seem to be telling me, if I have an  
3 agreement and it gets recorded for some reason, that  
4 all of a sudden the statute of limitations for the  
5 breach of that agreement is 20 years instead of three  
6 years. You know, the clerk used to be, I don't know if  
7 she would do it now or not, but used to you could file  
8 anything you wanted if you had a few dollars. You just  
9 go and file any kind of agreement, bingo, all of a  
10 sudden you got a 20-year statute of limitations on it.

11 I don't think that's right. I think that the  
12 statute of limitations on the contract action is three  
13 years. I mean, show me where it's extended because it  
14 happened to have been -- the waiver was filed in the --

15 MR. PEARCE: This is the end result that this was  
16 intended to accomplish. Again, Garner v. Houck, the  
17 case law there says that the reasonableness of a  
18 party's actions in regards to response of the statute  
19 of limitations a factual issue, and I believe that to  
20 be the case.

21 Again, I understand it's an odd situation with the  
22 waiver of the restrictions being the breach. But  
23 again, our argument is to the extent that that is a  
24 sealed instrument that the 20-year statute of  
25 limitations would apply and/or it would be protected

1 under --

2 THE COURT: Well, when did your folks find out  
3 that it was done?

4 MR. PEARCE: Our folks found out that that was  
5 done through this litigation.

6 THE COURT: Like nine years later they didn't know  
7 anything about it?

8 MR. PEARCE: That's correct, Your Honor. The two  
9 parcels that were sold by Heron Point were directly  
10 adjacent to and were integrated into the Cypress River  
11 Plantation development.

12 THE COURT: And you say nothing has occurred on  
13 any of this property that would give it --

14 MR. PEARCE: No, they've built houses on it. The  
15 issue is you would have had to have gone out and  
16 surveyed the property lines in order to determine what  
17 ownership of the property had been transferred or  
18 conveyed.

19 THE COURT: When did they start building houses  
20 and all; I mean, when did they --

21 MR. PEARCE: I don't have that information.

22 THE COURT: Apparent, you know, there's something  
23 going on here, you know.

24 MR. PEARCE: Your Honor, I don't have that  
25 information. Again, in talking with my folks, and

1 again, we're going well beyond the 12(b)(6) argument,  
2 but my folks said, look, all along this perimeter of  
3 our property construction was going on, houses were  
4 being built. Until they started doing a detailed  
5 review and analysis of this and until Heron Point  
6 brought the lawsuit nine years later, that's when it  
7 became apparent that this is what had taken place.

8 THE COURT: Okay.

9 MR. PEARCE: And, again, the bank did know it, it  
10 was in their files, nobody bothered to look. And it  
11 was convenient for them not to look because it  
12 benefitted them to the tune of a hundred thousand  
13 dollars.

14 THE COURT: All right. Ms. Byrd, you're next.

15 MS. BYRD: Yes, Your Honor. And I just want to be  
16 very brief.

17 THE COURT: Okay.

18 MS. BYRD: I understood your question to me as how  
19 would Heron Point have known that it couldn't obtain,  
20 not the bank.

21 THE COURT: My question was how would an attorney  
22 who was hired by Heron Point know?

23 MS. BYRD: Right. That's what I thought your  
24 question was, not how would South State know.

25 THE COURT: Okay.

1 MS. BYRD: I understood that South State had this  
2 in their file.

3 THE COURT: All right. I would think that South  
4 State would have had it somewhere. I don't know that,  
5 but I would certainly think that it was stuck somewhere  
6 after the three name changes.

7 MS. BYRD: Yes, sir.

8 THE COURT: Or two. Or three, I don't know how  
9 many more there are. Anyway, Ms. Byrd, what's your  
10 next?

11 MS. BYRD: Okay. The next cause of action, we can  
12 deal with two at the same time, contractual  
13 indemnification and equitable indemnification. And as  
14 a basis for that, contractual indemnification, the  
15 association cites the bankruptcy agreement at page six,  
16 paragraph two, that we looked at earlier where the  
17 parties between and among themselves will execute  
18 general releases so as to acquit, indemnify and hold  
19 harmless each other from any claims or causes of action  
20 between and/or among them prior to the execution of the  
21 date of this instrument.

22 THE COURT: I saw that. That's what, four or  
23 five, page four, paragraph two.

24 MS. BYRD: Page six, paragraph two.

25 THE COURT: Wait a minute. I'm sorry. Yes, I see

1 it, yes.

2 MS. BYRD: Yes, Your Honor. And you asked earlier  
3 about whether or not there was a generally signed.  
4 There wasn't one alleged in the pleading, and there  
5 wasn't one attached to the pleading. So first, Your  
6 Honor, we believe that this provision is not sufficient  
7 to constitute a contract for indemnification.

8 But even if the Court finds that this is a  
9 contract for indemnification, it clearly would not  
10 apply to the case here, because based on the clear  
11 language of the provision, it applies to claims between  
12 and/or among the parties. And in this case it was  
13 Condo-World and Heron Point and Myrtle Beach Golf and  
14 Yacht Club Association.

15 THE COURT: And it says prior to the execution --

16 MS. BYRD: Exactly, Your Honor.

17 THE COURT: -- of the date of these instruments.

18 MS. BYRD: And this was signed in 1988. So we're  
19 talking about a claim that is, you know, 30 years plus  
20 after this was signed. So based on the clear language,  
21 it doesn't apply because the cause of action is not  
22 between the parties here, and it didn't occur prior to  
23 the execution date. So we believe the contractual  
24 indemnification claim fails.

25 THE COURT: Well, Mr. Pearce, I mean, wouldn't you

1 look at this and say it was the intent of the parties  
2 to say, okay, we're all here in the bankruptcy court,  
3 we're fussing and feuding, we're going to lay it all to  
4 rest right now. From this point back, this takes care  
5 of it all, we're not going to -- we're not going to  
6 raise any issues prior to this, it's ended right here.  
7 I mean, isn't that what that agreement was for; I mean,  
8 isn't that what the clause is? I mean, from a  
9 practical standpoint, isn't that what they're saying?

10 MR. PEARCE: Your Honor, that indemnity agreement,  
11 our position on it is that the bank is a party to that  
12 agreement. What they are trying to argue is that, hey,  
13 when we sold the property we were no longer bound by  
14 these covenants, I guess. I'll admit --

15 THE COURT: I don't think that's what she's  
16 saying.

17 MS. BYRD: No, Your Honor, that's not what we're  
18 saying at all. What we're saying is if the Court finds  
19 this is a valid contract and we accept it's true that  
20 it is --

21 THE COURT: You mean the whole, the agreement en  
22 toto, or are you talking about that clause?

23 MS. BYRD: This clause.

24 THE COURT: Okay.

25 MS. BYRD: For purposes of the motion, I think,

1 we'll -- we do have to assume this is -- we take it as  
2 true. But we think based on the clear language of what  
3 it says, it's limited to actions among the parties and  
4 prior to the date of execution. It's clear as it is.

5 THE COURT: I mean, isn't that -- let's just look  
6 at prior to the date of execution, you know. If we  
7 take it as a valid contractual obligation, if we look  
8 at the clear wording of the -- that clause, that  
9 paragraph, doesn't it just clearly say, prior to the  
10 execution of the date of this instrument?

11 MR. PEARCE: Your Honor, again, the only  
12 differentiation that I would make is that People's did  
13 take title to this property, and then they did sell it  
14 to Heron Point. And as far as the parties and who's --  
15 how they got to be in the position of obligation under  
16 this agreement, I would just clarify that.

17 Your Honor, I don't necessarily disagree with the  
18 reading of that paragraph. But what we've ended up  
19 here is based upon this agreement, we've had a breach  
20 of this agreement sometime later, which then takes us  
21 back in time to this agreement, which I agree, it's  
22 very old, it's been around a long time.

23 But the question in my mind becomes when does the  
24 settlement agreement over the passage of time no longer  
25 become enforceable or at issue.

1 THE COURT: Well, why didn't your association  
2 record this and make it a part of the record here in  
3 Horry County?

4 MR. PEARCE: Your Honor, I can't answer that for  
5 you. At the time that this was going on, Allen  
6 Jeffcoat who's now an expert for the Plaintiffs was a  
7 lawyer.

8 THE COURT: I mean, it's a waiver, you know, not  
9 to do that. I mean, it just --

10 MR. PEARCE: For the association. He was the  
11 lawyer for the association, I can't answer that. He  
12 was also the lawyer for the developer, I can't answer  
13 that. My research says that they then had an attorney  
14 by the name of Anoni, and then Fred Parsons was their  
15 attorney for a number of years. But I can't answer  
16 that question for you. Fred has since retired  
17 obviously.

18 THE COURT: Okay. And nobody even has a copy of  
19 the agreement?

20 MR. PEARCE: The general release agreement, Your  
21 Honor?

22 THE COURT: Yes.

23 MR. PEARCE: Not that we've been able to discover  
24 to this point.

25 THE COURT: Okay, all right.

1 MR. PEARCE: And, Your Honor, just to clarify, I  
2 have gone to Richard Lovelace, I've gone to Mike  
3 Battle, I've gone to everybody that was involved in  
4 this litigation either at the bankruptcy side or the  
5 foreclosure side. Richard and Mike basically lost all  
6 of their files in a warehouse fire. I mean, everywhere  
7 we go it's a dead end. And part of that is the passage  
8 of time is that it makes it very difficult to address  
9 these matters in any detail.

10 THE COURT: Yes, ma'am.

11 MS. BYRD: Your Honor, the next claim is equitable  
12 indemnification. And essentially, I think it's an  
13 alternate, you know, cause of action. And if the Court  
14 finds that this was a contract for indemnification but  
15 just doesn't apply, then we don't have to deal with  
16 equitable indemnification.

17 But, Your Honor, even if there's no contract this  
18 equitable indemnification claim also fails. Because  
19 under South Carolina case law you have to have  
20 liability, be compelled to pay damages for equitable  
21 indemnification to apply, and there has to be --

22 THE COURT: It's premature; isn't it, at this  
23 juncture?

24 MS. BYRD: Yes, Your Honor. Also, there's a lack  
25 of a special relationship which is a required element

1 of that claim. There's no relationship whatsoever  
2 between South State and the association.

3 THE COURT: Could it be arguably -- or could it be  
4 argued that the agreement creates some sort of  
5 relationship?

6 MS. BYRD: That is what is alleged in the  
7 pleadings, Your Honor, that a relationship is created  
8 by this --

9 THE COURT: Well, do you have anything for me that  
10 would show that --

11 MR. PEARCE: Your Honor, this agreement set off a  
12 relationship with the parties that went on from '88 to  
13 '92 and beyond, where these two parties were  
14 interacting with each other, operating the golf course,  
15 working on the development, trying to preserve the  
16 value of the assets of People's, the association was  
17 working --

18 THE COURT: But doesn't that tell me exactly what  
19 the Plaintiffs are saying, hey, you were involved in  
20 this whole deal, you knew everything that was going on.  
21 Doesn't that just counter your argument that, you know,  
22 we should have an extended statute of limitations, we  
23 really didn't understand or know what was going on,  
24 but --

25 MR. PEARCE: The timeframe I'm talking about is

1 '88 to '92. And that's when the special relationship  
2 was at its height between these parties. The timeframe  
3 that you're talking about is when we jump forward to  
4 '05, and literally you're talking --

5 THE COURT: 13 years.

6 MR. PEARCE: -- 13 years later. And, you know,  
7 the bank has gone through several reiterations, our  
8 board has changed multiple times. I think there's just  
9 a distinct difference in what we're discussing here,  
10 and my comments were in response to Ms. Byrd's  
11 allegation or assertion that there was no special  
12 relationship between the parties. And I don't think  
13 that's the case. Back in the '88 to '92 and around  
14 that timeframe, these parties were working together  
15 quite frequently on these issues.

16 MS. BYRD: Well, and Your Honor, I just want to  
17 again state that under our well-established case law,  
18 in order to claim equitable indemnification, then they  
19 would have to -- Mr. Pearce's clients would have to  
20 establish that they were compelled to pay damages.

21 THE COURT: And you're not even asking for damages  
22 or monetary -- or excuse me, the Plaintiffs are not  
23 even asking for monetary damages against you,  
24 Mr. Pearce, or your clients. This is basically a DJ  
25 action.

1 MR. PEARCE: That's arguably true, Your Honor.  
2 Contractual indemnity and equitable indemnity in South  
3 Carolina includes cost of litigating, it includes costs  
4 of attorney's fees, it includes other aspects of things  
5 like this. And part of our argument is we've been in  
6 this protracted litigation with Heron Point and  
7 Condo-World for a number of years now, we've  
8 experienced costs and expenses. And that would be at  
9 least in relevant part of our damages, but what --

10 THE COURT: Can that support your action if that's  
11 your only damages?

12 MR. PEARCE: Well, Your Honor, the other damages  
13 that really haven't been discussed or alluded to is --

14 THE COURT: No, we're talking about monetary  
15 indemnification --

16 MR. PEARCE: I understand.

17 THE COURT: -- requires that you are required to  
18 pay.

19 MR. PEARCE: Right.

20 THE COURT: Now, can an action for equitable  
21 indemnification be based upon nothing more than your  
22 expenses?

23 MR. PEARCE: And that's not necessarily our theory  
24 of the case. Obviously our theory of the case is if  
25 the golf course is allowed to go away and redevelop by

1 virtue of either the 2005 deed restriction waiver or  
2 some other potential waiver, then, you know, every  
3 property owner and the association is going to be  
4 injured or damaged by virtue of that occurring is my  
5 client's theory of the case, in regards to other  
6 damages.

7 THE COURT: Ms. Byrd.

8 MS. BYRD: Yes, Your Honor. Again, I know this is  
9 a rule 12(b)(6) motion, and I think that's critical.  
10 Because I'm looking at the complaint and the damages  
11 that have been alleged are the costs and expenses  
12 incurred in defending this case brought by Condo-World.

13 So based solely on the pleadings, those are the  
14 only damages that are alleged. And that's not enough  
15 under our case law, Your Honor. And the final --

16 THE COURT: Tell me about it. What case law?

17 MS. BYRD: The final cause of action is -- I'm  
18 sorry?

19 THE COURT: What case law?

20 MS. BYRD: Vermeer Carolina, Inc. versus Wood  
21 Chuck Chipper Corp.

22 THE COURT: All right. What does it say?

23 MS. BYRD: It says -- well, let me give you --  
24 well, because it cites another case as well. It  
25 says --

1 THE COURT: Okay. I'll take either of them.

2 MS. BYRD: The indemnity plaintiff must prove the  
3 following elements to recover damages on an equitable  
4 indemnity claim. The indemnity defendant is at fault  
5 in causing the damages of a third party; the plaintiff  
6 has no fault for those damages, the plaintiff incurred  
7 expenses that were necessary to protect his interest in  
8 defending the third-party's claim which were the fault  
9 of the defendant.

10 So in other words, the defendant --

11 THE COURT: Well, that says that -- according to  
12 that, it would be supported by a claim for expenses of  
13 litigation; wouldn't it?

14 MS. BYRD: Well, Your Honor, what this says is  
15 that the indemnity defendant, in other words, there has  
16 to be a third party, not damages to him, not his  
17 damages.

18 THE COURT: Well, that would be Condo-World;  
19 wouldn't it?

20 MS. BYRD: Right. And they're not seeking  
21 damages, they are seeking a declaratory judgment. So  
22 there's no damages caused to Condo-World.

23 THE COURT: But does it say that that has to be in  
24 the form of -- or do you have any case law that says  
25 that has to be in the form of monetary damages?

1 I mean, he has alleged damage to property. That's  
2 the basis of his claim; right, Mr. Pearce?

3 MS. BYRD: He's alleged expenses necessary to  
4 defend against the Plaintiff's claims.

5 THE COURT: Okay. Is that the only thing he  
6 has -- is that the only thing you got in your  
7 complaint?

8 MR. PEARCE: Your Honor --

9 THE COURT: You got to have more than that.

10 MR. PEARCE: Your Honor, this is the answer and  
11 third-party complaint here with numerous exhibits. And  
12 we incorporated every complaint, answer, exhibit, into  
13 this third-party complaint.

14 As far as that one interlineation in my complaint,  
15 you know, part of what we were trying to put out there  
16 additionally was that we believe we were due indemnity  
17 for costs and expenses of litigation aside from our  
18 other damages. If that --

19 THE COURT: But do you -- this is 12(b)(6) -- do  
20 you make proper allegations in your complaint to  
21 support an action for equitable indemnification?

22 MR. PEARCE: My position is we do, Your Honor.  
23 And if the absence of some other damages is critical,  
24 we'll amend and add it. I mean, our assumption was  
25 that with this document and all of the back and forth

1 between the Plaintiffs and Defendants and the other  
2 exhibits, then that would be an unnecessary  
3 re-allegation. But we can certainly do that.

4 THE COURT: Well, that would, of course -- you  
5 could move to that. But, you know, the question here  
6 is have you made the allegations?

7 MS. BYRD: And, again, Your Honor, if the Court  
8 finds that there's contractual indemnification, then  
9 the equitable indemnification fails as a matter of law.  
10 Because there would be a contract, so you're not  
11 entitled to an equitable indemnification claim.

12 And the last cause of action is a permanent  
13 injunction --

14 THE COURT: Well, run that by me one more time  
15 there, Ms. Byrd.

16 MS. BYRD: Well, he's pled it as an alternative  
17 claim because if you have a contract, then equity won't  
18 control. So you --

19 THE COURT: Right.

20 MS. BYRD: -- don't have that equitable cause of  
21 action. So if the Court's finds, well, okay, there is  
22 a contract and this is it and the bankruptcy agreement,  
23 and it's limited to claims between the parties --

24 THE COURT: Mr. Pearce, why would you say  
25 there wasn't? You pled that there was a contractual

1 right to indemnification; haven't you?

2 MR. PEARCE: We have, Your Honor. And I think  
3 Ms. Byrd is right.

4 THE COURT: Isn't that your position?

5 MR. PEARCE: We're -- the equitable indemnity  
6 claim is basically an alternative claim --

7 THE COURT: Okay.

8 MR. PEARCE: -- if the contractual indemnity claim  
9 were to fail.

10 THE COURT: Okay. All right.

11 MS. BYRD: And the last cause of action, Your  
12 Honor, is the action for a permanent injunction. And  
13 there's -- the association is seeking to enjoin South  
14 State from any future waiver of restrictions related to  
15 the property. And, Your Honor, our position is that  
16 there's just no controversy here for the Court to  
17 decide.

18 South State has already waived, or First Federal  
19 and South State's successor, has already waived every  
20 restriction that was placed on the property in 2005.  
21 So there's nothing else we can waive, it's already been  
22 waived. So there's no need for the Court to --

23 THE COURT: I'm sure that's Condo-World's position  
24 too; isn't it?

25 MS. BYRD: I would assume so, Your Honor.

1 MR. PEARCE: Your Honor, on its face, again, the  
2 document that was signed by the bank has a legal  
3 description attached to it. And it limits the waiver  
4 to the -- I think it's roughly seven or nine acres that  
5 were part of that transaction. But that's been part of  
6 our concern this entire time is my client's believe  
7 that the 2005 transaction was a test balloon.

8 THE COURT: Is the bank still a holder?

9 MR. PEARCE: Of?

10 THE COURT: South State doesn't hold any interest  
11 in that -- any of the properties; does it, didn't they  
12 convey it all out?

13 MS. BYRD: Yes, Your Honor.

14 MR. PEARCE: That's correct. And in candor with  
15 the Court, with the note that Mr. Plyler purchased  
16 through Condo-World, he holds the note now. But our  
17 position is that the 2005 transaction was a test  
18 balloon, it was orchestrated by the parties to deal  
19 with the association which is cited in the  
20 memorandum --

21 THE COURT: So what your position is is that now  
22 Condo-World and Heron -- or what was it? I'm sorry.

23 MR. PEARCE: Condo-World and Heron Point.

24 THE COURT: Heron Point are the holders of title  
25 now, they are fee simple owners; right?

1 MR. PEARCE: They are.

2 THE COURT: Subject to, they have some sort of  
3 financing agreement with South State; is that right?

4 MR. PEARCE: They don't any --

5 MS. BYRD: No, Your Honor.

6 THE COURT: South State sold the paper on it?

7 MS. BYRD: Yes, Your Honor.

8 THE COURT: Okay. So they have an individual that  
9 actually holds the paper on it?

10 MS. BYRD: It's an LLC, Your Honor.

11 THE COURT: Okay. So someone else got the paper,  
12 and they bought a bunch of property. And you're saying  
13 that they are only developing part of it, and you're  
14 afraid they are going to develop the rest; right?

15 MR. PEARCE: That's generally correct, Your Honor.  
16 But we believe that --

17 THE COURT: I think that's a pretty good  
18 assumption. If they bought it, that's when they plan  
19 to do is develop it.

20 MR. PEARCE: That's correct. And our  
21 understanding or our belief of what's going to happen  
22 is depending on how this litigation goes, they'll go  
23 back to the bank or whoever they feel like they need  
24 waivers from to obviate their obligations under the  
25 settlement agreement and the other documentation and

1 then use that --

2 THE COURT: But hasn't the bank released all the  
3 property anyway? Was it a release of everything?

4 MS. BYRD: Yes, Your Honor. We no longer own it.

5 THE COURT: This 2005 document that --

6 MR. PEARCE: Yeah. That restriction of waivers  
7 did not release the deed restrictions on the remainder  
8 of the property. It's specifically limited by the  
9 legal description to that nine acres. Now, that  
10 subsequently have released or sold, I think they  
11 factored to a company in Texas their note at a reduced  
12 cost by virtue of these multiple failed banks.

13 They sold it to a company in Texas. Mr. Clyburn  
14 became aware of that and purchased it at about 30 cent  
15 on the dollar, 25 or 30 cent on the dollar. And they  
16 don't hold the note on the property nor a mortgage on  
17 the property by virtue of that. But the deed  
18 restriction in '05 did not release and cannot be read  
19 to release the remainder of the deed restrictions.

20 THE COURT: Okay. Well, doesn't that kind of  
21 cause me to have to look at this a little differently  
22 if there are -- how many acres are there all together,  
23 the golf course and other properties, how many acres  
24 are we talking about?

25 MS. BYRD: 164.

1 THE COURT: 164 acres. Are you telling me that  
2 this litigation only involves seven or nine acres?

3 MS. BYRD: No. And, Your Honor, I want to be  
4 clear. What I do mean that the waiver released what  
5 was left that we sold to Heron Point. But once we quit  
6 claimed all the property in the area in that  
7 development with -- we own nothing. We don't hold the  
8 note, we don't own any property. We quit claimed it,  
9 we have no interest whatsoever.

10 THE COURT: And you quit claimed it to?

11 MS. BYRD: The association. So we can't enforce,  
12 or there's nothing that South State can do.

13 THE COURT: What I'm getting at is either Heron  
14 Point got everything with the restriction lifted, or  
15 the association got it; right?

16 MS. BYRD: Right.

17 THE COURT: Is there any property owned by Heron  
18 Point or Condo-World that is presently subject to this  
19 restriction, these restrictions?

20 Is there anything -- what am asking you is when  
21 this 2005 document was signed, okay, it looks like  
22 it's -- you're talking about parcel one, parcel two,  
23 and I guess it's two parcels there. One was five acres  
24 and another was 2.5 acres.

25 MR. BELLAMY: Your Honor, may I?

1 THE COURT: Yes, Mr. Bellamy, tell me about it.

2 MR. BELLAMY: There's one parcel alone is 164  
3 acres, and the two other remaining parcels comprised  
4 roughly about six acres, which was the property that  
5 Heron Point back in 2005 -- that Heron Point sold to  
6 Enterprise Road Development, LLC, which became a part  
7 of the Cypress River subdivision.

8 THE COURT: Okay.

9 MR. BELLAMY: So it's --

10 THE COURT: Are you telling me the only thing that  
11 Heron Point owns now is about seven or eight acres?

12 MR. BELLAMY: No. The 164 acres is what Heron  
13 Point owns currently.

14 THE COURT: Okay. All right. I'm looking at this  
15 waiver of restrictions given by People's Federal  
16 Savings and Loan Association in favor of Heron Point  
17 Golf Club Limited Partnership, okay.

18 It releases exactly what? It releases the  
19 restrictions as to what, the whole 164 acres, or just  
20 the property described on Exhibit A, which is only  
21 about eight acres?

22 MS. BYRD: Your Honor, I think based on the  
23 document, it released only what is listed in Exhibit A.  
24 But, again, South State did release this or First  
25 Federal did this at a time when it had an interest in

1 the property and could release.

2 THE COURT: Okay.

3 MS. BYRD: In other words, we no longer hold the  
4 note or the mortgage, we don't own anything.

5 THE COURT: I understand.

6 MS. BYRD: So we can't do anything.

7 THE COURT: And I -- you know, gosh, I'm somehow  
8 not getting my question over. South State, People's  
9 Federal Savings, whoever, when they went to the  
10 foreclosure, they bought how much property?

11 MS. BYRD: I believe it was the total 164 acres.

12 THE COURT: They bought 164 acres, okay.

13 MS. BYRD: Yes, Your Honor.

14 THE COURT: They divested themselves of that  
15 property, one, by deed in 1992 to Heron Point Golf Club  
16 Limited Partnership.

17 MS. BYRD: Yes, Your Honor.

18 THE COURT: Right, okay.

19 MS. BYRD: Yes, Your Honor.

20 THE COURT: Subsequent to that they deeded out the  
21 balance of the property to the homeowners association  
22 by quit claim.

23 MS. BYRD: That's right, Your Honor.

24 THE COURT: Okay. After that, some eight years  
25 later -- or no, 13 years later, Heron Point comes back

1 and says, we want to make sure that we can develop this  
2 property, we want you to release that restriction you  
3 put in. South State, or People's Federal Savings it  
4 looks like, says okay, and they sign a release.

5 That waiver of restrictions seems to describe only  
6 the property described in Exhibit A, which is 5.9 acres  
7 and 2.51 acres, eight acres; okay?

8 MS. BYRD: Yes, Your Honor.

9 THE COURT: What about the other 157 acres, how  
10 did that get released?

11 MS. BYRD: I understand, Your Honor. And I think  
12 that it has not, is the answer. I mean, based on the  
13 waiver of restriction --

14 THE COURT: Okay. That's what you're complaining  
15 about, we don't want them to release it?

16 MS. BYRD: But we don't --

17 MR. PEARCE: That is correct, Your Honor. That's  
18 the bottom line is we want --

19 THE COURT: Whew.

20 MS. BYRD: But, Your Honor, I think that that's  
21 right. And I'm sorry I misunderstood what you were  
22 asking me, but I guess the point is South State is not  
23 in a position where it can release anything else. It  
24 doesn't own any property there, it doesn't hold a note  
25 or mortgage.

1           So if it's going to be released from the  
2 restrictions, it's going to be from some other bank  
3 that holds the note and mortgage. And South State, as  
4 alleged in his complaint, doesn't own it.

5           THE COURT: But since when was a deed restriction,  
6 when did it have anything to do with a mortgage? There  
7 are deed restrictions on this property that rise out of  
8 an agreement entered into in the bankruptcy court in  
9 1988. So that agreement required the bank, its  
10 predecessor, South State predecessor, whether it's  
11 People's Federal or Federal Savings, whatever they  
12 are -- there's been several changes, and I'm sorry I  
13 can't keep up with them -- but South State, required  
14 South State to restrict when you deed it out, okay.

15           They deeded it out and they restricted it, they  
16 complied, they -- apparently. When they deeded it out,  
17 they did it in two deeds, one to Heron Point and then  
18 the common areas went back to the homeowners  
19 association by way of quit claim, okay.

20           So what we got here, then, is even though South  
21 State may have divested itself of the property, that  
22 has nothing to do, from what I've seen, with any  
23 mortgage that it may have held and later sold. It goes  
24 back to the original document which required it to  
25 restrict the property.

1 Well, if it restricted the property, isn't it the  
2 person, the party in interest, who could release that  
3 restriction at any time, like they did on the eight  
4 acres?

5 MS. BYRD: Well --

6 THE COURT: Don't we have to look at them? Even  
7 though they say, we don't hold a mortgage on it  
8 anymore, okay, you don't hold a mortgage. But you  
9 still have that right to restrict, or you reserve the  
10 right to restrict.

11 MS. BYRD: Well, I think that as to South State,  
12 the new holder of the mortgage would be the successor.  
13 In other words, the allegation is because we're not a  
14 party, South State's not a party, to the waiver of  
15 restrictions, that was People's Federal. But and I  
16 understand that we're the successor in interest.

17 So as to that obligation, that is now with our  
18 successor which is the company that holds the note and  
19 mortgage. We don't have any legal --

20 THE COURT: Yeah, but --

21 MS. BYRD: -- or equitable right to do anything  
22 out there.

23 THE COURT: But does the right and obligation, the  
24 obligation to restrict, does it arise out of your  
25 mortgage that was originally given, or does it arise

1 out of this agreement in 1988 in the bankruptcy court?

2 MS. BYRD: Well, I think, Your Honor, if at all,  
3 it rises out of the deed that was in 1992, deed to  
4 Heron Point.

5 THE COURT: There you go, exactly. And that was  
6 in conjunction with the mortgage that was given that  
7 you keep talking about.

8 MS. BYRD: Yes, sir.

9 THE COURT: Surely there was a mortgage, you know.  
10 But the restrictions arise out of the deed --

11 MS. BYRD: Yes, Your Honor.

12 THE COURT: -- as a result of the 1988 bankruptcy  
13 agreement.

14 MS. BYRD: Right.

15 THE COURT: So I don't -- if you look at the face  
16 of the mortgage, the mortgage might have some reference  
17 to the restriction, but that's simply because it was  
18 probably included in the deed. It has probably nothing  
19 to do with the right of the bank to foreclose or what  
20 it would foreclose on. But that deed to Heron Point  
21 for -- how many acres did they buy? Did they buy 164  
22 acres?

23 MS. BYRD: I would have to add it up.

24 MR. PEARCE: Roughly, Your Honor, they did. They  
25 bought the entirety of the golf course and supporting

1 amenities.

2 THE COURT: All right. Let's just call it 164  
3 acres. And in the deed it has this restriction; right?

4 MS. BYRD: Yes, Your Honor.

5 THE COURT: Okay. Later, we get -- just 164  
6 acres -- later we get this waiver of restriction in  
7 2005 which seems to release the restriction on about  
8 eight acres. Mr. Pearce says he's concerned about you  
9 releasing it on the balance of the property; is that  
10 right, Mr. Pearce?

11 MR. PEARCE: That's correct, Your Honor.

12 THE COURT: Is that where you're coming from?  
13 Okay.

14 MR. PEARCE: That's our issue with the last cause  
15 of action.

16 THE COURT: Okay. He's saying there's another 150  
17 some acres out there, and we don't want you to release  
18 it on that, we think we have a contractual right that  
19 would prevent you from doing that. And is that what  
20 you're asking for in your lawsuit?

21 MR. PEARCE: That is basically it, Your Honor, in  
22 a nutshell between the multiple causes of action,  
23 between the breach of contract down to the injunction.

24 THE COURT: Okay. And, Ms. Byrd, suppose  
25 Mr. Pearce wasn't out here fussing and his people,

1 okay. And suppose I came to you with this problem, and  
2 I said, Ms. Byrd, I want to buy this piece of property,  
3 they've got about a hundred and 50 some acres here that  
4 they got way back in 1992. In 2005, they got the bank  
5 to release this restriction that was on it.

6 I want to buy the rest of that property, but I  
7 want to get that restriction off of there. Who would  
8 you go to to see to release that restriction?

9 MS. BYRD: Your Honor, it would be --

10 THE COURT: The bank.

11 MS. BYRD: I think --

12 THE COURT: Even though the bank might not care,  
13 that's where you would go.

14 MS. BYRD: Right.

15 THE COURT: Where else could you go?

16 MS. BYRD: But I think you would have to go to the  
17 bank that held the note mortgage. Because they have  
18 some interest in the property where South State has  
19 no --

20 THE COURT: Well, you might have to get them to do  
21 it also. And I would agree with that. I would agree  
22 if you got a bank holding a note and mortgage out here  
23 that properly they should be made a party in case there  
24 was a default and they had to foreclose. They might be  
25 foreclosing and get something less than what they

1 traded for.

2 MS. BYRD: Right.

3 THE COURT: Most cases the bank wouldn't care if  
4 you lifted the restrictions, makes it more marketable  
5 to them. But you've got to go back to the person, to  
6 the seller who originally reserved this restriction on  
7 the property. You've got to do both at least.

8 MS. BYRD: I understand. And I think it's just  
9 complicated because the case law is really clear that,  
10 you know, when we don't own a property out there, we  
11 lose the right to enforce a restrictive covenant. What  
12 he's saying is, I'm not asking you to enforce it, I  
13 just don't want you to waive it.

14 THE COURT: Think of it like this. You know,  
15 there's a 30-acre tract next door to your home. And  
16 somebody comes up and wants to buy it, and you say,  
17 okay, I will sell it to you, but I'm going to restrict  
18 it. You don't have any interest anymore in that  
19 property except that restrictive right. You have the  
20 right to enforce that restriction or release it.

21 And I think that's what Mr. Pearce is fussing  
22 about. Mr. Pearce is saying, we don't want you to  
23 release any other property; right?

24 MR. PEARCE: That's it, Your Honor.

25 THE COURT: Mr. Bellamy back there is saying, we

1 want you to release all of it. But it hasn't been done  
2 yet; has it yet, Mr. Bellamy? Has the rest of it been  
3 released, has the restrictive covenant been released on  
4 the balance of the 164 acres?

5 MR. BELLAMY: Not by the bank. The bank no longer  
6 owns the note and the mortgage. They have --

7 THE COURT: Somebody else has got it.

8 MR. BELLAMY: They have no other interest in the  
9 property. But bear in mind, if you look at the --

10 THE COURT: Well, let me ask you this. You and I  
11 are probably the only ones in this courtroom that used  
12 to have a key to the courthouse and came in and did our  
13 title work at night.

14 MR. BELLAMY: Right.

15 THE COURT: When that stuff was permitted.  
16 Mr. Bellamy, do you agree or disagree that in spite of  
17 the fact that the bank may have sold the note and  
18 mortgage that it held, South State would still be  
19 required to sign off on any release of its  
20 restrictions?

21 MR. BELLAMY: Let me try to answer you, and I hope  
22 I don't confuse the Court. You have to go back to the  
23 inception of the development of this property between  
24 Rod Propps and People's Federal. He prepared a  
25 document, what's called a development agreement.

1 THE COURT: Okay.

2 MR. BELLAMY: And that agreement applied to a lot  
3 of property that was out there. And it basically  
4 provided that no lot or no part of the 160 or whatever  
5 was subject to any restriction until they complied with  
6 the provisions of that agreement. It is undisputed  
7 that the provisions of that agreement were never  
8 complied with.

9 THE COURT: To even restrict it to begin with?

10 MR. BELLAMY: Yes, sir, to begin with. So when  
11 People -- and bear in mind, move on to this agreement,  
12 it says it's a State of South Carolina, County of  
13 Richland agreement. It ain't a bankruptcy agreement.  
14 It's an agreement, and it never was recorded in Horry  
15 County. In fact, it never was recorded in Richland  
16 County. And when our client bought the property,  
17 there was no knowledge that this so-called agreement  
18 existed.

19 Now, so when People's subsequent to this sold it  
20 to our client, no reference was made in any  
21 documentation as to this agreement. It was never  
22 mentioned, never told, never set out anywhere.

23 The only thing People's had at that point because  
24 the development agreement, amended development  
25 agreement, had not been complied with, all People's had

1 was -- could impose on the property in selling it to  
2 our client was the restriction. And as Ms. Byrd has  
3 indicated, they complied with it.

4 But by not complying with the development  
5 agreement, there were two things it required. All  
6 People's could convey was what they conveyed. But was  
7 it a covenant that ran with the land, or was it  
8 personal? In that case, because they didn't comply  
9 with the development agreement, all they could have  
10 possibly conveyed was a personal covenant.

11 People's conveyed what they agreed to do. Our  
12 client took the position when we tried to go to the  
13 homeowners association when the golf course was going  
14 broke, going busted, and asked them to work with us.  
15 At that point we were told, no, no, no, we're not going  
16 to give you anything. So our client was forced to go  
17 to this Court to ask the Court to determine inasmuch as  
18 they would not agree, would they agree to moving  
19 forward.

20 This case finally boils down to, was the covenant  
21 that People's Federal put in its deed to our client,  
22 was it a personal covenant or a covenant running with  
23 the land. If they didn't comply with it, there's  
24 nothing here really to talk about. The bank has not  
25 done anything wrong. First Federal was the one that

1 released the nine acres. And for that reason we're  
2 going in a direction of what the bank does. And  
3 besides this, the case law is pretty clear. Bank  
4 doesn't own any property, they don't have any ability  
5 to enforce it.

6 THE COURT: All right. Let's do this --

7 MR. BELLAMY: So the question is does the  
8 association have standing to enforce the restriction,  
9 period.

10 THE COURT: Well --

11 MR. PEARCE: Your Honor?

12 THE COURT: Yes.

13 MR. PEARCE: Two brief points. This is a 12(b)(6)  
14 motion.

15 THE COURT: I know. And we've gotten way beyond  
16 that.

17 MR. PEARCE: And one thing I want to point out,  
18 and Mr. Bellamy Skeets was not at the deposition of the  
19 corporate attorney for Heron Point that we took up in  
20 Greenville, and perhaps he's not looked at the  
21 documents or the exhibits from that deposition. But  
22 this deed restriction that we're all arguing and  
23 fighting about is in the transactional record,  
24 contract, documents, you name it.

25 Now, the problem is, just to respond to what he's

1 saying, Mr. Millon Plyler, and Mr. Jerry Spearman, Sr.,  
2 both died around the '07 period of time. And then we  
3 go into Roy Clyburn being the controlling partner, and  
4 Roy basically says, I don't know nothing about nothing.

5 But when you look at the documents and you look at  
6 the transactional record that Mr. Brown, the corporate  
7 attorney, testified to for Heron Point, those documents  
8 are replete with references to this deed restriction.  
9 So to sit here before the Court and say Heron Point  
10 didn't know, Mr. Clyburn may not have known, but his  
11 partners, Millon Plyler and Jerry Spearman, Sr.,  
12 certainly knew about it. And their lawyer even  
13 testified that they had to be reasonably aware of it  
14 because it was in the documents, and how would they not  
15 have known. So I can't let that go that they don't  
16 have knowledge or didn't know about this restriction,  
17 because they certainly did.

18 THE COURT: All right. Each of you please submit  
19 me a proposed order, and try to get it to me by the end  
20 of next week. And I'll rule on the 12(b)(6) motions;  
21 okay?

22 MR. PEARCE: Thank you, Your Honor.

23 MS. BYRD: Thank you, Your Honor.

24 THE COURT: All right, thank you very much.

25 (The hearing concluded at approximately

1 11:11 a.m.)

2 (End of Transcript of Record.)

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## 1 CERTIFICATE OF REPORTER

2

3 STATE OF SOUTH CAROLINA )  
4 COUNTY OF HORRY )

5

6 I, TERESA J.F. BAUTZ, Official Court  
7 Reporter for the Fifteenth Judicial Circuit of the  
8 State of South Carolina, do hereby certify that the  
9 foregoing is a true, accurate and complete Transcript  
10 of Record of the proceedings had and evidence  
11 introduced in the trial of the captioned case, relative  
12 to appeal, in the Court of Common Pleas for Horry  
13 County, South Carolina, on the 4th day of October,  
14 2017.

15

16 I FURTHER CERTIFY that I am neither of  
17 kin, counsel nor interest to any party hereto.

18

19

20

*S/Teresa J. F. Bautz*

21

TERESA J.F. BAUTZ, RPR  
Official Court Reporter

22

23

24

25

December 21, 2017

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SC Court of Appeals

**VIA FIRST CLASS US MAIL**

The Honorable Jenny Abbott Kitchings  
Clerk, South Carolina Court of Appeals  
Post Office Box 11629  
Columbia, South Carolina 29211

Re: Myrtle Beach Golf & Yacht Club Association, Inc. v. South State Bank, Respondent  
Civil Action No.: 2017-002196

Dear Ms. Kitchings:

Our firm represents the Appellant in this matter. I am enclosing herewith a copy of the Transcript of Record from the June 5, 2017 hearing before the Horry County Court of Commons Pleas.

By copy of this letter, I am providing all counsel with a copy of this transcript.

Very truly yours,

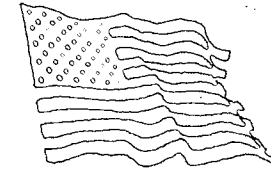
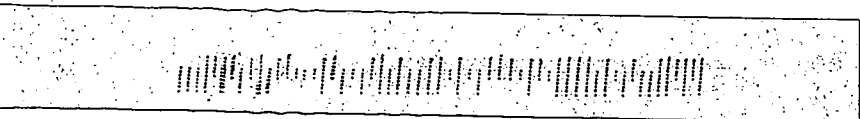
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Kerry K. Jardine

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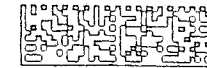
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Audra M. Byrd, Esquire  
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SC Court of Appeals

The Honorable Jenny Abbott Kitchings  
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