

IN THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Larry B. Hyman, Jr.
Circuit Court Judge

RECEIVED
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SC Court of Appeals

Case No.: 2017-002196

Condo-World Development, LLC
and Heron Point Golf Club Limited Partnership.....Plaintiffs

v.

Myrtle Beach Golf & Yacht Club
Association,
Inc.....Appellant

AND

Myrtle Beach Golf & Yacht Club
Association,
Inc.....Appellant

v.

South State
Bank.....Respondent

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE ISSUES ON APPEAL

- I. Did the Court Err in its Application of the Rule 12(b)(6) Standard of Review?
- II. Did the Court Err in Dismissing the Cause of Action for Breach of Contract?
- III. Did the Court Err in Dismissing the Cause of Action for Contractual Indemnification?
- IV. Did the Court Err in Dismissing the Cause of Action for Equitable Indemnification?
- V. Did the Court Err in Not Allowing Amendment of the Third-Party Complaint, such that the Court of Appeals Should Allow an Amendment?

STATEMENT OF THE CASE

On or about April 27, 2015, Plaintiffs Condo-World Development, LLC and Heron Point Golf Club Limited Partnership (together, “Plaintiffs”) filed the first party action in the Horry County Court of Common Pleas against Myrtle Beach Golf & Yacht Club Association, Inc. (“Appellant”) seeking a declaratory judgment that certain restrictions on the “golf course property” do not apply, have been waived, or have been terminated, which would allow Plaintiffs to develop the golf course property. [R. p. 23-80.]

On June 11, 2015, Appellant filed an Answer and Counterclaims. [R. p. 81-95.] On or about March 13, 2017, Appellant filed a Corrected Second Amended Answer, Counterclaims, and Third-Party Complaint (“Third-Party Complaint”) against South State Bank (“Respondent”). [R. p. 411-701.] In the Third-Party Complaint, Appellant seeks damages based on Respondent’s breach of certain agreements concerning the restrictions on the “golf course property,” contractual indemnification, equitable indemnification, and a permanent injunction. [*Id.*] Respondent moved to dismiss the claims against it. [R. p. 762-771.]

The matter was heard before the Honorable Larry B. Hyman, Jr. on June 5, 2017. The lower court issued an Order, dated July 26, 2017 (the “Order”), dismissing Appellants’ claims for breach of contract, contractual indemnification, and equitable indemnification. [R. p. 7-22, 821.] Thereafter, Appellant filed a motion to reconsider and/or alter and/or amend the Order, pursuant to Rules 52 and 59, *SCRCP*. [R. p. 785-787.] That motion was denied in chambers on September 35, 2017, without oral argument, and, subsequently,

effectuated by a Form 4 Order, dated September 29, 2017 (the “Reconsideration Order”)¹.
[R. p. 3.]

This Interlocutory Appeal followed by timely Notice of Appeal, dated October 18, 2017. [R. p. 795-819.]

STATEMENT OF FACTS

A. The Parties

Appellant is a non-profit corporation existing under the laws of South Carolina and conducts business in South Carolina and is generally charged with the administration, operation, and maintenance of the Myrtle Beach Golf & Yacht Club subdivisions’ common areas located in Horry County, South Carolina. [R. p. 414 ¶ 2; R. p. 418 ¶ 29]. Appellant’s membership includes over one thousand homeowners at Myrtle Beach Golf & Yacht Club whose community is inextricably intertwined with the Heron Point Golf Course Property (“Golf Course Property”). [R. p. 419 ¶ 30]. Plaintiff Heron Point Golf Limited Partnership (“Heron Point”) is a South Carolina limited liability partnership and owns the Golf Course Property, as further described in paragraph 4 of Plaintiff’s Complaint. [R. p. 29 – 31, ¶¶ 2,4]. Respondent is a corporation organized to do business in the State of South Carolina with central offices in Columbia, South Carolina and is the current successor-in-interest to Peoples Federal Savings and Loan Association (“Peoples”) and First Federal Savings and Loan Association of Charleston. [R. p. 426, ¶¶ 62-63, R. p. 694.]

B. The Original Development of Myrtle Beach Golf & Yacht Club

In or around February 1984, Justice, Inc. (“Justice”) and Peoples agreed to enter into a real estate development project (the “Project”) to develop a large tract of land located

¹ There is no transcript of the hearing that resulted in the Reconsideration Order.

in Horry County, South Carolina otherwise known as the Myrtle Beach Golf & Yacht Club (“MBG&YC”). [R. p. 419 ¶ 33]. Peoples funded the Project through various loans and was to receive profits from the development of the Project. [R. p. 419 ¶34]. At that time, Peoples incorporated a wholly owned subsidiary known as Peoples Joint Venture Group, Inc. (“Peoples Joint Venture”). [*Id.*] At that same time, Justice incorporated Myrtle Beach Golf and Yacht Club, Inc. [*Id.*] On February 29, 1984, Myrtle Beach Golf & Yacht Club, Inc. entered into a General Partnership Agreement (“Agreement”) with Peoples Joint Venture for the purpose of developing the Project. R. p. 419, ¶35]. This entity was then identified as the “Myrtle Beach Golf & Yacht Club, a General Partnership”. [*Id.*].

Article 1(c) of the Agreement provided that the partners would “...develop recreational facilities comprised of a club house facility, entry guardhouse, nine hole golf course” [R. p. 420, ¶ 36]. This Project was to be developed on a +/- 1,035 acre tract of land otherwise known as the Enterprise Landing Tract. [R. p. 420, ¶37]. Tract I represented the initial first phase of the construction of the residential housing development. [*Id.*] Tract II represented additional lands which were to be developed as an eighteen-hole golf course, tennis courts, and a swimming pool. [*Id.*] Upon best information and belief, portions of Tracts I and II became known as the Amenities Tract (i.e. – the Golf Course Property) as further described by a recorded Plat filed with the Horry County Register of Deeds Office in February 1984 in Plat Book 79 at Page 208. [*Id.*].

On February 29, 1984, James H. Dusenbury sold a certain parcel of land known as Tract I to Myrtle Beach Golf & Yacht Club, a General Partnership. [R. p. 420, ¶ 38]. On February 29, 1984, James H. Dusenbury sold certain parcels of land known as Tract II, a/k/a the “Amenities Tract”, to Myrtle Beach Golf & Yacht Club, a General Partnership

which, at that time, included a lake and a tennis and swimming club. [R. p. 420, ¶ 39]. Both deeds include the identical, express restrictions:

(b): "...Property shall be used for a residential community (composed single-family and multi-family residences), an associated golf course, open areas, parks, lakes, and various other recreational amenities and retail shops."

[R. p. 420 ¶ 39, 471-475].

On April 25, 1989, James H. Dusenbury sold other certain parcels of land to Heron Point Golf Club, Inc. [R. p. 420-421, ¶ 40, R.p. 477-480]. This deed was subsequently filed with the Horry County Register of Deeds Office in Deed Book 1306 at Page 642. [*Id.*] The deed includes identical, express restrictions as in the 1984 deeds:

The property shall be used for a residential community (composed of single-family and multi-family residences), an associated golf course, open areas, parks, lakes, and various other recreational amenities and retail shops...

[R. p. 420-421 ¶ 40, R. p. 477-480].

The Amenities Tract (i.e. - the Golf Course Property) was subject to the original express deed restrictions contained in the above described deeds for the sale of Tracts I and II from Dusenbury to Myrtle Beach Golf & Yacht Club, a General Partnership and said restrictions run with the title of said lands and to the benefit of the Appellant and its homeowners / members. [R. p. 421 ¶ 43].

**C. The Bankruptcy of the Partnership,
the 1988 Settlement Agreement and the Foreclosure**

On June 3, 1988, American Community Development Corporation put Myrtle Beach Golf & Yacht Club, a General Partnership, into involuntary bankruptcy. [R. p. 422 ¶ 45]. As part of the resolution of the involuntary bankruptcy, Myrtle Beach Golf & Yacht Club, Peoples, Property Consultants, Inc., and Appellant entered into an agreement

whereby Peoples agreed to cause the following deed restriction on the Amenities Tract, (i.e. – the Golf Course Property) owned by Myrtle Beach Golf & Yacht Club:

The only permitted use of this property is a golf course, country club, or other ancillary use relating to golf course or country club use.

[R. p. 422 ¶¶ 46, 69, R. p. 562-578] (emphasis added). The 1988 Settlement Agreement also contained an indemnity agreement whereby:

The parties between and among themselves will execute general releases so as to acquit, indemnify and hold harmless each other from any claims or cause of action between and/or among them, prior to the date of the execution of this instrument.

[R. p. 429-430 ¶¶ 80-82, R. p. 567] (emphasis added). Finally, the 1988 Settlement Agreement is expressly binding upon successors and assigns, to wit:

Each party signatory to this agreement represents, warrants and guarantees that he/she/it/they have full authority to execute this agreement so as to make it valid, and binding upon the parties, their successors and assigns.

[R. p. 567] (emphasis added).

On September 12, 1988, Peoples filed for foreclosure on the Amenities Tract, (i.e. - the Golf Course Property) against Myrtle Beach Golf & Yacht Club, a General Partnership. [R. p. 422 ¶ 47]. Peoples was the successful bidder for the property at the subsequent judicial sale and a Master's Deed was issued by the Court as a result thereof. [*Id.*] (Portions of the Court's foreclosure rulings were subject to certain appellate processes between the parties.²) [*Id.*; see R. p. 580-664].

On September 12, 1990, an Easement Maintenance Agreement ("Easement

² For additional information on these proceedings, see generally *Peoples Federal Sav. & Loan Ass'n v. Myrtle Beach Golf and Yacht Club*, 310 SC 132, 425 S.E. 2d 764 (1992).

Agreement”) was entered into between Peoples and Appellant to memorialize the terms of a negotiated agreement made between them and a third party, Property Consultants, Inc., on or about July 25, 1985. [R. p. 666 – 674, R. p. 422 ¶ 48].

Upon best information and belief, Peoples continued to own and operate the subject Golf Course for a period of years thereafter in full cooperation with Appellant and its members. [R. p. 422-423, ¶49].

D. The Sale to Heron Point, the 1992 Indenture Deed and Mortgaging of the Golf Course Property

Thereafter, Peoples sold the Amenities Tract, (i.e. - the Golf Course Property) to Heron Point Golf Club Limited Partnership as evidenced by the Indenture Deed recorded April 15, 1992 in the Horry County Register of Deeds. [R. p. 423 ¶ 50, 676-682].

The Indenture Deed between Peoples and Heron Point Golf Club Limited Partnership contains specific, express limitations on the future use of the property and expressly states that:

The property conveyed herein shall be subject to the following covenants:

(a) The only permitted use of this property is as a golf course, country, club, or other ancillary use relating to golf course or country club use;

(b) Grantee, its Successors and Assigns agree to offer memberships to members of Myrtle Beach Gold and Yacht Club Association, Inc., its Successors and Assigns on the same basis that it offers memberships to the public at large, provided, however, that there shall be no requirement to offer memberships.

(R. p. 423 ¶51, 676). Covenant (a) is the exact deed restriction that the 1988 Settlement Agreement required Peoples place in any deed transferring the Amenities Tract.

In relation to that Indenture Deed, on April 15, 1992, Heron Point Golf Course Limited Partnership executed and delivered unto Peoples that certain Promissory Note in

the original principal sum of Three Million Six Hundred Ninety Thousand and No/100 (\$3,690,000.00) Dollars (the “Note”). [R. p. 427 ¶65]. The Note is secured by that certain First Mortgage and Security Agreement, dated April 15, 1992, and recorded April 15, 1992, in Mortgage Book 1669, at Page 301 (the “Mortgage”). [*Id.*] On April 30, 2012, Plaintiff Condo World Development, LLC, by Assignment and Assumption of Mortgage Loan Documents, became the holder of the note and mortgage on the Golf Course Property. [R. p. 427, ¶¶ 66-67.]

E. Heron Point Obtains a Waiver of Restriction from First Federal Saving & Loan Association of Charleston (the Predecessor-in-Interest to Respondent)

On March 22, 2005, Heron Point Golf Club Limited Partnership obtained a limited Waiver of Restrictions regarding certain property designated the “Enterprise Tracts”³ from First Federal Savings and Loan Association of Charleston, as successor-in-interest to Peoples, specifically waiving the following restriction:

The only permitted use of this property is a golf course, country club or other ancillary use relating to golf course or county club use.

[R. p. 428 ¶ 70, R. 694-696]. The Waiver of Restrictions applied to approximately five acres of Plaintiff Heron Point’s property. [R. p. 694-696.]

Respondent, as successor-in-interest to Peoples and First Federal Savings and Loan Association of Charleston, became aware of the deed restrictions on the subject property in or about 2005. [R. p. 428, ¶ 72.]

³ Although the Waiver of Restrictions references the Enterprise Tracts, the description in the Waiver of Restrictions is clear that it applied only to the five acres that were to be sold to Enterprise Road Development, LLC, and not to the entire Enterprise Landing Tract. [R. 694-695]. Plaintiffs, however, have used this Waiver of Restrictions to allege that the restrictions have been waived as to the entirety of their property. [R. p. 34 ¶ 18(d).]

F. The Closing of the Golf Course and the Underlying Litigation

On December 14, 2014, Plaintiffs decided to close the Heron Point Golf Course. [R. p. 32 ¶ 11]. On April 27, 2015, Plaintiffs filed a Complaint seeking a declaratory judgment against Appellant stating that Appellant may have standing to enforce any alleged violations of certain covenants restrictions on behalf of Appellant' membership to the extent that they run with the land. [R. p. 30 ¶ 3]. Plaintiffs further seek a judgment that they have the right to develop the Golf Course Property for single-family and multi-family purposes. [R. p. 33 ¶12].

In relevant part, Plaintiffs seek a declaration that:

(c) The alleged use restrictions reference in the "Heron Point Deed" were personal to First Federal Savings and Loan Association of Charleston, the successor by merger to Peoples Federal Saving and Loan Association as the grantor/covenantor, and do not run with the golf course property, formally known as the Myrtle Beach Golf & Yacht Club Golf Course;

(d) That First Federal Savings and Loan Association of Charleston as the Grantor/Covenantor had previously waived, relinquished and released the following restrictions as the same may have applied, if at all, to the Enterprise Tracts, including the golf course property, by Deed known as "Waiver of Restriction [Deed] recorded May 5, 2005...;

(e) That the [Appellant] lacks standing to enforce the alleged restrictions in the "Heron Point Deed" recorded on April 15, 1992...because they are personal to Peoples ("Grantor"), its heirs, successors and assigns and do not run with the golf course property...

[R. p. 34, ¶ 18]. Plaintiffs' Complaint expressly references the deed restrictions contained in the Dusenbury deeds. [R. p. 35¶18(h)]. Plaintiffs' Complaint states:

(h)That even if the use restrictions described above do apply to the golf course property ...

[*Id.*]

The term “use restrictions” is followed by a footnote stating:

James H. Dusenury (“Dusenbury”) deeded separate tracts of the land (1) to Heron Point Golf Club, Inc., recorded in Deed Book 855 at Page 771... Each deed stated that the property “*shall be used for a residential community (composed of single-family and multi-family residences), an associates golf course, open areas, parks, lakes, and various other recreational amenities and retail shops.*” ...

[R. p. 35¶18(h) fn.(b)] (emphasis in the Complaint). Appellant answered, counterclaimed for a declaratory judgment and, subsequently, brought the Third-Party Complaint against Respondent for breach of contract, contractual indemnification, equitable indemnification and permanent injunction. [R. p. 414-432].

ARGUMENT
STANDARD OF REVIEW OF MOTION TO DISMISS

“Dismissal of an action pursuant to Rule 12(b)(6) is appealable.” *Williams v. Condon*, 347 S.C. 227, 553 S.E.2d 496 (Ct. App. 2001). Upon review of a dismissal of an action pursuant to Rule 12(b)(6), the appellate court applies the same standard of review implemented by the trial court. *Id.* Under Rule 12(b)(6), *SCRPC*, a defendant may move for dismissal based on a failure to state facts sufficient to constitute a cause of action. *Flateau v. Harrelson*, 355 S.C. 197, 201, 584 S.E.2d 413, 415 (Ct. App. 2003) (citing *Baird v. Charleston County*, 333 S.C. 519, 511 S.E.2d 69 (1999)). A trial judge in the civil setting may dismiss a claim when the defendant demonstrates the plaintiff has failed to state facts sufficient to constitute a cause of action in the pleadings filed with the court. *Williams v. Condon*, 347 S.C. 227, 553 S.E.2d 496 (Ct. App. 2001). “Generally, in considering a 12(b)(6) motion, the trial court must base its ruling solely upon allegations set forth on the face of the complaint.” *Doe v. Marion*, 361 S.C. 463, 469, 605 S.E.2d 556, 559 (Ct. App. 2004), *aff’d* 373 S.C. 390, 645 S.E.2d 245 (2007); *accord Stiles v. Onorato*, 318 S.C. 297, 457 S.E.2d 601 (1995); *see also Brown v. Leverette*, 291 S.C. 364, 353 S.E.2d 697 (1987)

(noting trial court must dispose of a motion for failure to state a cause of action based solely upon the allegations set forth on face of complaint); *Williams*, 347 S.C. at 233, 553 S.E.2d at 499 (finding trial court's ruling on 12(b)(6) motion must be bottomed and premised solely upon allegations set forth by plaintiff).

“A motion to dismiss under Rule 12(b)(6) should not be granted if facts alleged and inferences reasonably deducible therefrom would entitle the plaintiff to relief on any theory of the case.” *Flateau*, 355 S.C. at 202, 584 S.E.2d at 415; *see Baird*, 333 S.C. at 527, 511 S.E.2d at 73 (declaring that if the facts and inferences drawn from the facts alleged in the complaint would entitle the plaintiff to relief on any theory, then the grant of a motion to dismiss for failure to state a claim is improper); *McCormick v. England*, 328 S.C. 627, 494 S.E.2d 431 (Ct. App. 1997) (concluding a motion to dismiss cannot be sustained if the facts alleged in the complaint and inferences reasonably deducible therefrom would entitle the plaintiff to relief on any theory of the case). In considering a motion to dismiss, the court must consider whether the complaint, viewed in the light most favorable to the plaintiff, and with all doubts resolved in his behalf, articulates any valid claim for relief. *See Cowart v. Poore*, 337 S.C. 359, 523 S.E.2d 182 (Ct. App. 1999) (explaining that looking at facts in light most favorable to plaintiff, and with all doubts resolved in his behalf, the court must consider whether the pleadings articulate any valid claim for relief).

The complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action. *Toussaint v. Ham*, 292 S.C. 415, 357 S.E.2d 8 (1987). The grant of a motion to dismiss will be sustained only if the facts alleged in the complaint do not support relief under any theory of law. *McEachern v. Black*, 329 S.C. 642, 496 S.E.2d 659 (Ct. App. 1998); *see also Gray v. State Farm Auto Ins. Co.*, 327 S.C. 646, 491 S.E.2d 272

(Ct. App. 1997) (stating motion must be granted if facts and inferences reasonably deducible from them show that plaintiff could not prevail on any theory of the case).

I. THE COURT APPLIED THE WRONG STANDARD OF REVIEW IN DISMISSING APPELLANT'S CAUSES OF ACTION AGAINST RESPONDENT

The lower court erred in its application of the Rule 12(b)(6), *SCRPC*, standard of review. A reading of the transcript and the Order indicate that at no time did Respondent move to convert the motion to dismiss to a motion for summary judgment, under Rule 56, *SCRPC*, and the lower court did not do so, *sua sponte*. [R. p. 8-21; 703-761]. However, it is abundantly clear from a review of the transcript and Order, that the lower court went well beyond the four corners of the pleadings in its consideration of the motion to dismiss. [R. p. 8-21; 703-761]. *See Doe v. Marion*, 361 S.C. 463, 469, 605 S.E.2d 556, 559 (Ct. App. 2004), *aff'd* 373 S.C. 390, 645 S.E.2d 245 (2007). (“Generally, in considering a 12(b)(6) motion, the trial court must base its ruling solely upon allegations set forth on the face of the complaint.”)

To wit:

When discussing the 1988 Settlement Agreement (referred to as the bankruptcy agreement, the following exchange occurred:

The Court: ...I understand this agreement was never filed here in Horry County. The clerk never got a copy of it or anything like that.

Ms. Byrd: No, Your Honor. And as far as we can tell, it was never filed and even in the bankruptcy court proceedings.

[R. p. 708 1.21-25; R. p. 709 1.1]. There is no mention in the pleadings that the 1988 Settlement Agreement was never filed in Horry County. [See R. p. 27-36; 412-432].

When discussing the general release that was to be executed pursuant to the 1988 Settlement Agreement, the following exchange occurred:

The Court: Was there a general release ever executed?

Ms. Byrd: No, Your Honor...

[R. p. 711, l.19-21.] Whether the general release was executed is a question of fact and was not raised in the pleadings. [See R. p. 27-36; 412-432].

With respect to the 2005 Waiver of Restrictions, the following exchange occurred:

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

Ms. Byrd: Not that I'm aware of, Your Honor.

[R. p. 714, l. 16-24]. First, this statement by the Court is incorrect – as the waiver of restrictions applied only to five acres of Plaintiff Heron Point's property. Second, the lower court asks for information not contained within the pleadings or even within the knowledge of Respondent's counsel.

The Court: So South State, how would South – I mean, Heron know that this could not be released?

Ms. Byrd: Your Honor, I don't believe that there's any way that they could have known that it couldn't be released.

[R. p. 715. l.2-6.] Again, the Court is looking beyond the four corners of the pleadings.

The Court even inquires as to the nature of Respondents motion:

The Court: Okay. Is this a summary judgment or a 12(b)(6)?

Ms. Byrd: This is a 12(b)(6) And I'm using only the allegations in the compliant (sic).

[R. p. 718, 1.6-9.] Respondent's counsel confirmed during oral argument that she was moving to dismiss – not for summary judgment. [*Id.*] And the lower court conceded that it knew this was a Rule 12(b)(6) *SCRCP* motion, but arguments extended beyond that:

Mr. Pearce: Two brief points. This is a 12(b)(6) motion.

The Court: I know. And we've gotten way beyond that.

[R. p. 758, 1.13-16].

The Court inquired as to when Appellant learned about the Waiver of Restrictions:

The Court: Well, when did your folks find out that it was done?

Mr. Pearce: Our folks found out that that was done through litigation.

The Court: Like nine years later they didn't know anything about it?

Mr. Pearce: That's correct, Your Honor. The two parcels that were sold by Heron Point were directly to and were integrated into the Cypress River Plantation development.

The Court: And you say nothing has occurred on any of this property that would give it --

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

The Court: When did they start building houses ad all; I mean, when did they –

Mr. Pearce: I don't have that information.

The Court: Apparent, you know there's something going on here, you know.

Mr. Pearce: Your Honor, I don't have that information. Again in talking with my folks, and again, we're going well beyond 12(b)(6) argument, but my folks said, look, all along the perimeter our property construction was going on,

houses were being built. Until they started doing detailed review and analysis of this and until Heron Point brought the lawsuit nine years later, that's when it became apparent that this had taken place.

The Court. Ok.

[R. p. 726, 1.2-25; p. 727 1.1-7]. Again, the Court is trying to determine a factual issue – when Respondents had notice of the waiver on a motion to dismiss.

With respect to the indemnification provision, the Court inquired as to the intent of the parties:

The Court: Well, Mr. Pearce, I mean wouldn't you look at this and say it was the intent of the parties ...

[R. p. 729, 1.25, 730 1.1] Again, the intent of the parties is a factual issue. Those are just a few of the relevant citations to the transcript where the lower court clearly was looking outside the four corners of the document and inquiring of the parties regarding information outside the four corners. The transcript is replete with further references where the Court asks the parties about circumstances that are not within the four corners of the pleadings.

[See 703-760, *generally*.]

For instance, the Order, in turn, makes a finding of fact that the Appellant had constructive or inquiry notice in 2005. [R. p.14]. There is nothing in the pleadings to suggest that Appellant had that notice. The cases cited by the Court also utilize a summary judgment standard. On a whole, the Court erred in its application of the standard of law on ruling on a motion to dismiss. Accordingly, the Order should be reversed.

II. APPELLANT STATED A CAUSE OF ACTION FOR BREACH OF CONTRACT THAT WAS BROUGHT WITHIN THE STATUTE OF LIMITATIONS

To recover upon a breach of contract claim, a plaintiff must plead a binding contract between the parties, a breach of the contract and damage suffered by the plaintiff as a direct

and proximate result of said breach. *See e.g. Fuller v. Eastern Fire & Casualty Ins. Co.*, 240 S.C. 75, 124 S.E.2d 602 (1962). Appellant stated a claim for breach of contract of the 1988 Settlement Agreement by Respondent as successor-in-interest to Peoples. [R. p. 414 - 432.] The 1992 Indenture Deed, which conveyed property to Plaintiff Heron Point, contained the restrictions required by the 1988 Settlement Agreement. [R. p. 562-577; 676-682]. Respondent breached those agreements when it issued the 2005 Waiver of Restrictions and failed to act in good faith and provide Appellant notice or information regarding the waiver. [R. p. 414 - 432.] Respondent's breach caused Appellant damages, primarily the diminution in property values (actual damages), the costs, expenses and attorney's fees incurred in defending against the first party action filed by Appellants. [R. p. 414 - 432.]

The lower court erred in holding that the three-year statute of limitations generally applicably to contract actions barred Appellant's breach of contract cause of action. When the Third-Party Complaint is viewed in the light most favorably to Appellant, Appellant stated a claim for breach of contract when the statute of limitations is based on the:

- (i) the application of the discovery rule, which determines when the cause of action accrues, and there is a question of fact as to when the cause of action accrued for statute of limitation purposes;
- (ii) the application of discovery rule, and when construing the Third-Party Complaint in the light most favorable to Appellant, Appellant only had notice of the 2005 Waiver of Restrictions when the Complaint was filed and served on Appellant; or
- (iii) the application of the twenty-year statute of limitations for sealed instruments.

Accordingly, the order dismissing the cause of action for breach of contract should be reversed.

(A) Whether Appellant Knew It Had a Cause of Action for Breach of Contract is an Issue of Fact that Cannot Be Determined on a Motion to Dismiss

The lower court erred in applying the three-year statute of limitations generally applicable to contract actions as the discovery rule is applicable to Appellant's breach of contract cause of action and the application of the discovery rule is a question for the jury. In this case, the question of the application of the discovery rule, and when the cause of action accrued, should not have been determined on a motion to dismiss. Pursuant to S.C. Code Ann § 15-3-530(1), a breach of contract action must be brought within three years from the date the cause of action accrues. *Maier v. Tietex Corp.* 331 S.C. 371, 500 S.E.2d 204 (Ct. App. 1998).

The discovery rule determines the date of accrual for a breach of contract action. *Santee Portland Cement Co. v. Daniel Int'l Corp.*, 299 S.C. 269, 384 S.E.2d 693 (1989), *overruled on other grounds by Atlas Food Sys. and Servs., Inc. v. Crane Nat'l Vendors Div.*, 319 S.C. 556, 462 S.E.2d 858 (1995). Pursuant to the discovery rule, a breach of contract action accrues not on the date of the breach, but rather on the date the aggrieved party either discovered the breach, or could or should have discovered the breach through the exercise of reasonable diligence. *Dillon County Sch. Dist. No. Two v. Lewis Sheet Metal Works, Inc.*, 286 S.C. 207, 332 S.E.2d 555 (Ct. App. 1985), *cert. dismissed by* 288 S.C. 468, 343 S.E.2d 613 (1986), *and overruled on other grounds by Atlas Food*, 319 S.C. 556, 462 S.E.2d 858.

Maier v. Tietex Corp. 331 S.C. 371, 500 S.E.2d 204 (Ct. App. 1998).

The application of the discovery rule and determination of whether Appellant should have known of any potential claims is an issue that should be determined by the ultimate fact finder at the ultimate trial on the issues. *See Turner v. Milliman*, 381 S.C. 101, 671 S.E. 2d 636 (2009), *reversed on other grounds by, Turner v Milliman*, 392 S.C. 116, 708 S.E. 2d 766 (2011); *see Santee Portland Cement Co. v. Daniel Int'l Corp.*, 299

S.C. 269, 274, 384 S.E.2d 693, 696 (1989); *overruled on other grounds by Atlas Food Sys. & Servs., Inc. v. Crane Nat'l Vendors Div. Of Unidynamics Corp.*, 319 S.C. 556, 462 S.E.2d 858 (1995) (application of discovery rule to a claim is question of fact for a jury). *See also Garner v. Houck*, 312 S.C. 481, 435 S.E.2d 847 (1993) (if there is conflicting evidence as to whether claimant knew or should have known he had a cause of action, for statute of limitation purposes, it is a question for the jury); *Moriarty v. Garden Sanctuary Church of God*, 341 S.C. 320, 534 S.E.2d 672 (2000) (application of discovery rule at summary judgment is a question of fact for the jury to determine when parties present conflicting evidence).

In this case, on a motion to dismiss, where the Third-Party Complaint is viewed in the light most favorable to Appellant, and with all doubts resolved in its behalf, Appellant has articulated a valid claim for breach of the 1988 Settlement Agreement because the question of when the cause of action arose for statute of limitations purposes is a question for the jury. South State Bank, the successor-in-interest to Peoples, breached the 1988 Settlement Agreement and 1992 Indenture Deed and failed to act in good faith by failing to provide Appellant notice or information regarding the Waiver of Restrictions. [R. p. 414-432.] The breach resulted in damages, which damages includes the diminution in property values, and attorney's fees, cost and expenses incurred in the first party litigation. [*Id.*] When the cause of action accrued and how the discovery rule is applied is a question for the jury (and or ultimate finder of fact at a trial) that cannot and should not have been resolved on a motion to dismiss.

(B) The Cases Relied on by the Lower Court do not Support the Determination that Appellant Had Constructive or Inquiry Notice of the Waiver of Restrictions

Respondent's argument, adopted by the lower court, is that Appellant should have known about the breach of the 1988 Settlement Agreement and 1992 Indenture Deed when the breach occurred in 2005 because: (i) the Waiver of Restrictions was a recorded document and (ii) the act of recording provided Appellant with constructive notice of the Waiver of Restrictions' content. However, the pleadings do not assert that the 2005 Waiver of Restrictions was in Appellant's chain of title. [R. p. 414-432.] Indeed, there are no facts stated within the Third-Party Complaint to support a determination that it had constructive or inquiry notice of the 2005 Waiver of Restrictions. [R. p. 414-432.] Moreover, there is no continuous record-checking obligation on Appellant, after it obtains title to its property, to check on recorded instruments within or without its own chain of title. *See, Cohens Drywall Co, Inc. v. Sea Spray Homes LLC* 374 S.C. 195, 648 S.E.2d 598 (2007) (reversing motion to dismiss and noting that there is no continuous record-checking obligation on the holder of a mechanics' lien).

Even the cases cited by the lower court fail to support its determination that the Appellant had constructive notice or inquiry notice of the existence of the Waiver of Restrictions. *See Spence v. Spence*, 368 S.C. 106, 628 S.E.2d 869 (2006), *Fuller-Ahrens v. SC Dept. of Highways and Pub Transp.*, 311 S.C. 177, 427 S.E.2d 920 (Ct. App. 1993), First, the lower court cited *Spence v. Spence*, 368 S.C. 106, 628 S.E.2d 869 (2006) for the proposition that "constructive or inquiry notice in the context of a **real estate transaction** often is grounded in an examination of the public record because it is the proper recording of documents asserting an interest or claim in real property which gives constructive notice to the world." *Id.* (emphasis added). In *Spence*, the Court held: "[t]he recording of a

document alerts all **future grantees** of the rights of the recorder because the law assumes the grantee will search the index and discover the interest or claim.” *Id.* (emphasis added). The Third-Party Complaint does not allege that after 2005 it was a **future grantee** of the rights of South State Bank or the property of Plaintiffs that the subject of the limited Waiver of Restrictions. Similarly, the Third-Party Complaint does not allege that Appellant was involved in a **real estate transaction** with South State Bank or Plaintiffs, after the recording of the Waiver of Restrictions, that would have put them on constructive or inquiry notice of the Waiver of Restrictions. Thus, the Spence case does not support the dismissal of Appellant’s Third-Party Complaint as it is factually inapplicable.

Second, *Fuller-Ahrens v. SC Dept. of Highways and Pub Transp.*, 311 S.C. 177, 427 S.E.2d 920 (Ct. App 1993) is distinguishable from this case. In that case, the motion to dismiss was converted to summary judgment, and, to that extent, the standard of review is different than the case at bar. Further, in that case, the Court of Appeals found that a deed that was in Plaintiff’s chain of title and recorded prior to Plaintiff’s purchase of the subject property, imparted constructive notice to Plaintiffs of a right-of-way on their property. In this case, the Waiver of Restrictions was recorded: (i) after the 1988 Settlement Agreement and 1992 Indenture Deed and (ii) the pleadings do not allege that the 2005 Waiver of Restrictions was within Appellant’s chain of title. Thus, *Fuller-Ahrens* case is factually inapplicable.

Third, and finally, *Berry v. McLeod*, 328 S.C. 435, 492 S.E.2d 794 (Ct. App. 1997) is factually inapplicable to this case. Once again, in *Berry*, the lower court converted the motion to dismiss to a motion for summary judgment. Moreover, that case concerned the issuance of public bonds, which involved public notice meetings and a short statute of limitations. In that case, the Court held that the action on a bond was time-barred based on

the public policy consideration surrounding short statute of limitations, as set forth in *Morgan v. Feagin*, 230 S.C. 315, 95 S.E. 621 (1956). To the extent that the Court considered whether the claim for damages may be considered separate from “an action on account of the issuance of the bond,” the lower court determined that the date the three-year statute of limitations provided by statute controlled based on its analysis of the action on a bond. In this case, there is no underlying policy regarding short statute of limitations. Accordingly, the *Berry* case is factually inapplicable.

It is worth noting that two of the three cases cited by the lower court are decisions based on a different standard of review – the standard for a motion for summary judgment – than the one applicable here – a motion to dismiss. In addition, the lower court’s Order failed to cite a single case in which a property owner had a continuous duty to check public records to determine if covenants and/or restrictions contained in its chain of title had been breached by the recording of a document outside its chain of title. Appellant’s research has failed to reveal a single case in South Carolina that stands for such a proposition.

Moreover, to impose a continuous duty on an entity or individual to check the public record after it has title to a property would be beyond onerous and beyond any reasonable due diligence required under the discovery rule. The lower court’s Order imposes upon every property owner in South Carolina the duty to check the filings at the Register of Deeds Office at least every three years to determine if the grantor of any deed restriction which is intended to benefit the owner’s property has released that restriction. This title search would need to include not only the owner’s property, but all neighboring properties whose restrictions were intended to benefit the owner’s property and would need to include not only the grantor, but any successor to the grantor. This issue is certainly not ripe for adjudication on a motion to dismiss.

In sum, the pleadings show that, in 1988, Appellant entered into the 1988 Settlement Agreement with Respondent's predecessor-in-interest, Peoples. [R. p. 414-432.] The Indenture Deed, wherein Peoples caused the deed restriction was executed in 1992. Respondent's breach – the execution of the Waiver of Restrictions and failure to notify or inform Appellant of the same - occurred in 2005. [R. p. 414-432.] There is no transaction, notice, physical act or other fact that Respondent can point to in the Third-Party Complaint that Respondent can argue should have put Appellant on constructive or inquiry notice of the 2005 Waiver of Restrictions. [*Id.*] And, as stated, *supra*, Appellant stated a claim for damages, including its attorney's fees. Accordingly, viewed in the light most favorable to Appellant, Appellant has stated a claim for breach of contract against Respondent. Accordingly, the Court erred in dismissing the cause of action for breach of contract and its decision should be reversed.

(C) When Considering the Pleadings in the Light Most Favorable to Appellant, Appellant Asserted its Cause of Action for Breach of Contract Against Respondent within Three Years of Discovering the Breach

Moreover, the lower court also erred in determining that the cause of action was not brought within the statute of limitations. Looking solely at the four corners of the Third-Party Complaint, the only possible theory upon which Appellant received notice of the 2005 Waiver of Restrictions was in this litigation, when the Complaint was filed by Plaintiffs. [R. p. 29-39.] The Plaintiffs' Complaint was filed on April 27, 2015 and mentions the Waiver of Restrictions. *Id.* The Third-Party Complaint was filed March 13, 2017. [R. p. 432]. When applying the discovery rule, the third-party complaint was filed well within the three-year statute of limitations applicable to breach of contract actions. Accordingly, the lower court erred in dismissing the Third-Party Complaint as it stated a valid theory of relief within the statute of limitations.

(D) The Motion to Dismiss Should Have Been Denied Because the Twenty-Year Statute of Limitations Applicable to Sealed Instrument Applies to Respondent's Cause of Action for Breach of Contract

The lower court erred in dismissing the Third-Party Complaint because it held that the 1988 Settlement Agreement was not a sealed instrument. An additional theory upon which Appellant's cause of action breach of contract against Respondent may survive a motion to dismiss is if the 1988 Settlement Agreement is a sealed instrument. Sealed instruments are subject to a twenty-year statute of limitations found in S.C. Code Ann. § 15-3-520(b) as opposed to the general three-year statute of limitations for contracts. *Carolina Marine Handling, Inc. v. Lasch*, 363 S.C. 169, 609 S.E.2d 548 (Ct. App. 2005); *South Carolina Dept. of Social Services v. Winyah Nursing Homes, Inc.*, 282 S.C. 556, 320 S.E.2d 464 (Ct. App. 1984). *See also* S.C. Code Ann. § 19-1-160.

The 1988 Settlement Agreement does not contain a seal upon its face. However, S.C. Code Ann. § 19-1-160 provides that:

Whenever it shall appear from the attestation clause or from any other part of any instrument in writing that it was the intention of the party or parties thereto that such instrument should be a sealed instrument then such instrument shall be construed to be and shall have the effect of a sealed instrument although no seal be actually attached thereto.

Id. Thus, pursuant to S.C. Code Ann. § 19-1-160, the Court may consider the writing and its language to determine the intent of the parties to create a sealed instrument and may consider a non-sealed instrument, sealed despite the lack of a physical seal. In this case, the language of the instrument demonstrates the intent of the parties was to create a sealed document. *See id.*; [R. p. 562-578].

The 1988 Settlement Agreement states "IN WITNESS WHEREOF, the parties have hereunto set their hands and seals this 25th day of July 1988. SIGNED, SEALED,

AND DELIVERED in the PRESENT OF:”. [Id.] The probate pages attached to the 1988 Settlement Agreement provide that the individuals “sign, seal and as her/his act and deed, and deliver the within Agreement.” [Id.] The probate pages as also contain the notation (“L.S.”) after the signature of the notary public. [Id]. This language evidences an intent of the parties to create a sealed instrument. See S.C. Code Ann. § 19-1-160.

The language in the 1988 Settlement Agreement is analogous to the language construed in the instrument in *South Carolina Dept. of Social Services v. Winyah Nursing Homes, Inc.* 282 S.C. 556, 320 S.E.2d 464 (Ct. App 1984). In that case, the contracts at issue were construed as being a sealed instrument, pursuant to S.C. Code Ann. § 19-1-160, because of the inclusion of the “L.S.”: along with the attestation clause that stated “the parties hereto have set their hands and seals”.

Significantly, the Court discussed their construction of the non-sealed instrument in *Winyah Nursing Homes, Inc.*, in *Carolina Marine Handling, Inc.* and stated:

Following the standard language-“the parties hereto have set their hands and seals”-the contract noted “L.S.” adjacent to the contracting parties' signatures. *Id.* at 561, 320 S.E.2d at 467. The inclusion of L.S. was a significant feature in *Winyah Nursing Homes*, for L.S. is an abbreviation for *Locus sigilli*, which means “the place of the seal; the place occupied by the seal of written instruments.” L.S. usually appears on documents in place of, and serves the same purpose as, a seal. *Black's Law Dictionary*, 948 (6th ed.1990); see 68 Am.Jur.2d *Seals* § 6 (2004) (Use of the notation “L.S.” is generally held as applicable to replace a physical seal on a document). Accordingly, we found the parties intended the contract in *Winyah Nursing Homes* to be a sealed instrument.

Carolina Marine Handling, Inc. v. Lasch, 363 S.C. 169, 609 S.E.2d 548 (Ct. App. 2005)⁴.

⁴ See also *Cook v. Cooper*, 59 S.C. 560, 38 S.E. 218 (1901). “In *Cook*, the validity of a deed was at stake, and appellants argued the “deed is void for the reason that it is not under seal.” *Id.* at 560, 38 S.E. at 219. While the deed lacked a seal “upon its face,” the following three features were

In this case, as in *Winyah Nursing Homes, Inc*, the 1988 Settlement Agreement is an instrument that lacks a physical seal but, includes the “L.S.” adjacent to all the notary public signatures. It also includes the language “signed, sealed and delivered.” Thus, pursuant to *Winyah Nursing Homes, Inc.*, and S.C. Code Ann. § 19-1-160 there is at least a theory upon which the 1988 Settlement Agreement could be considered a sealed document subject to the twenty-year statute of limitations for sealed documents.

In granting the motion to dismiss, the court below relied on *Carolina Marine Handling*. In that case, the Court held pursuant to S.C. Code Ann. § 19-1-160, that the language “IN WITNESS WHEREOF, the parties have hereupon set their hands and seals” in an instrument which is neither sealed nor required to be sealed is insufficient standing alone to create a sealed instrument under section 19-1-160.” *Id.* In that case, the court considered the intent of the parties and, noting the parties were sophisticated, held that the standard attestation language standing alone was insufficient to create a sealed document. However, *Carolina Marine Handling, Inc* is distinguishable from the facts in this case because in that case there was no “L.S.” or language evidencing an intent to create a sealed document. Notably, the Court in *Carolina Marine Handling, Inc.*, considered the sophistication of the parties in determining whether they intended to create a sealed document. In that case, the parties were sophisticated. Here, there is no allegation that Appellant is sophisticated – it is a non-profit organization that had been incorporated only four years prior to the 1988 Settlement Agreement. Thus, pursuant to *Carolina Marine*

present: (1) the deed provided an attestation, “In witness whereof I hereunto sed [sic] my hand and seal this...;” (2) immediately adjacent to the grantor's signature was the word “seal;” and (3) the deed concluded with “Signed, Sealed and Delivered in the presents [sic] of [names of witnesses].” *Id.* The supreme court relied in part on the predecessor to section 19-1-160 and found that a sealed instrument had been intended.” *South Carolina Department of Social Services v. Winyah Nursing Homes, Inc.*, 282 S.C. 556, 320 S.E.2d 464 (Ct.App.1984)

Handling, Inc. the Court can look outside the document to determine the intent of the parties to create a sealed instrument. The intent of the parties cannot be determined on a motion to dismiss.

Based on the holding in *Winyah Nursing Homes, Inc.*, S.C. Code Ann. § 19-1-160, and the language of the 1988 Settlement Agreement, the 1988 Settlement Agreement could reasonably be intended to be a sealed instrument. Accordingly, there is a question of fact that should not be decided on a motion to dismiss based on the language of the 1988 Settlement Agreement as to whether it was intended to be a sealed instrument.

Based on the question of fact as to whether the 1988 Settlement Agreement was a sealed instrument, Appellant's have put forth a theory of recovery sufficient to state a claim to survive a motion to dismiss the claim for breach of contract. In sum, the 1988 Settlement Agreement was a sealed instrument. It was breached by Respondent in 2005, when Respondent issued the Waiver of Restrictions. The statute of limitations for sealed instruments does not expire until twenty years after the breach – in 2025. The action against Respondent was brought within the twenty-year statute of limitations for sealed instruments. The Third-Party Complaint seeks actual damages, those damages include the diminution in property value of their members' property, the costs, expenses and attorney's fees incurred in defending the first party action.

Appellant has set forth three theories of recovery that would entitled Appellant to relief under its breach of contract cause of action: (i) there is a question of fact as to when the cause of action accrued under the discovery rule; (ii) the action against Respondent was brought within three years of the accrual of the cause of action under the discovery rule because Appellant receive actual notice of the 2005 Waiver of Restrictions when Plaintiffs brought the First Party Action in 2015 and filed the action against Respondents in 2017;

and (iii) the 1988 Settlement Agreement was a sealed instrument subject to the twenty-year statute of limitations. Accordingly, the motion to dismiss the cause of action for breach of contract should have been denied.

III. APPELLANT STATED A CAUSE OF ACTION FOR CONTRACTUAL INDEMNIFICATION

Appellant stated a cause of action for contractual indemnification.

Indemnity is that form of compensation in which a first party is liable to pay a second party for a loss or damage the second party incurs to a third party. A right of indemnity may arise by contract (express or implied) or by operation of law as a matter of equity. A contract of indemnity will be construed in accordance with the rules for the construction of contracts generally.

Campbell v. Beacon Mfg. Co., Inc., 313 S.C. 451, 438 S.E.2d 271 (Ct. App. 1993) (internal citations omitted).

The 1988 Settlement Agreement contains an express provision wherein the parties agreed to indemnify each other. The relevant clause states:

The parties between and among themselves will execute general releases so as to acquit, indemnify and hold harmless each other from any claims or cause of action between and/or among them, prior to the date of the execution of this instrument.

[R. p. 562-577, 567]. Moreover, the 1988 Settlement Agreement is binding upon successors-in-interest. To wit:

Each party signatory to this agreement represents, warrant and guarantees the he/she/it/they have full authority to execute this agreement so as to make it valid, and binding upon the parties, their successors and assigns.

[R. p. 562-577, 567].

In this case, the clear language of the 1988 Settlement Agreement states that the parties will execute general releases. [R. p. 562-577, 567]. Counsel for Appellant conceded

at oral argument that no such document had yet been discovered. [R. p. 732, 1.18-24]. However, Appellant should have the opportunity to conduct discovery with Respondent to determine whether a release was ever executed and its terms. On this basis alone, the motion to dismiss should have been denied as Appellant stated a cause of action for contractual indemnity and should be provided the opportunity to proceed with discovery with Respondent.

Regardless of whether the releases can be located, the cited provision is sufficient to create an indemnity agreement between Appellant and Respondent.

For a contract to be binding material terms cannot be left for future settlement. However, absolute certainty is not required, but only reasonable certainty. A contract will not be held unenforceable for indefiniteness because its performance is, as to particular details, left open to subsequent agreement of the parties. This is especially true where the contract provides the guidelines for the subsequent agreement.

Aperm of S.C. v. Roof, 290 S.C. 442, 351 S.E.2d 171 (Ct. App. 1986) (internal citations omitted). Construing the cause of action in the light most favorable to Appellant, Respondent as successor-in-interest to Peoples, agreed to indemnify Appellant. An enforceable indemnity agreement exists between Appellant and Respondent, which was breached by Respondent when it issued the 2005 Waiver of Restrictions, and damages have occurred as a result of that breach. The damages include actual damages, such as diminution in property value, and attorney's fees, costs and expenses.

The court below found that the "indemnification agreement does not apply to [Appellant's] claims against [Respondent]" because: (i) Plaintiffs are not parties to the 1988 Settlement Agreement and (ii) the first party action was initiated after execution of the 1988 Settlement Agreement. [R. p. 16-18]. Therefore, the court below dismissed

Appellant's claim for contractual indemnification. [*Id.*] However, a motion to dismiss under Rule 12(b)(6), *SCRCP*, should not be granted and the complaint dismissed merely because the court doubts Appellant will prevail in the action. *Toussaint v. Ham*, 292 S.C. 415, 357 S.E.2d 8 (1987). The court below essentially made findings of facts, applying the incorrect standard of review of summary judgment, in making its decision.

First, construing the facts in the light most favorable to Appellant, Respondent is a successor or successor-in-interest to Peoples and, thus, under the 1988 Settlement Agreement is liable for its indemnity obligations. Similarly, Plaintiff Heron Point, by virtue of the 1992 Indenture Deed, is a successor or successor-in-interest to Respondent's obligations under the 1988 Settlement Agreement.⁵ To the extent that Respondent argues those positions are inconsistent with one another, that is a question of fact that should not be resolved on a motion to dismiss. Accordingly, there is a theory of law under which Plaintiff Heron Point is a party to the 1988 Settlement Agreement.

Second, the "contractual indemnification" clause is ambiguous. A contract of indemnity will be construed in accordance with the rules for the construction of contracts generally. *Campbell v. Beacon Mfg. Co., Inc.*, 313 S.C. 451, 438 S.E.2d 271 (Ct. App. 1993).

Where the terms of a contract are clear and unambiguous, the construction of the contract is a matter of law for the court, but where the terms of a contract are ambiguous, the intention of the parties becomes a question of fact to be determined by the jury. Extrinsic evidence relating to the conditions surrounding the parties, the circumstances under which the contract was executed and the negotiation between the parties leading to the execution thereof is admissible to aid the jury in determining the intent of the parties if the contract is ambiguous.

⁵ The 1988 Settlement Agreement contains a provision that the agreement is "binding upon the parties, their successors and assigns". [R. p. 562-578].

Traynham v. Yeargin Enterprises, Inc., 304 S.C. 188, 403 S.E.2d 329 (Ct. App. 1991) (internal citations omitted) (holding trial court properly overruled motion to dismiss); *Shaw v. East Coast Builders of Columbia, Inc.*, 291 S.C. 482, 354 S.E.2d 392 (1987) (denying motion to dismiss because contract's reference to the arbitration clause, which was not attached to the contract, was unclear and uncertain, the contract viewed in its totality created an ambiguity which was litigable as to whether the parties agreed to arbitrate). As further explained in *Osborn v. University Med. Associates of Med. University of South Carolina*, 278 F. Supp. 2d 720 (U.S.D.C. D.S.C. 2003):

An action to construe a written contract is an action at law, and in construing a contract, **the primary objective of the court is to ascertain and give effect to the intention of the parties.** In making such a determination, the court must first look solely to the language of the contract. "If the contract's language is plain, unambiguous, and capable of only one reasonable interpretation, no construction is required and the contract's language determines the instrument[']s force and effect." However, if the court determines that the language of the contract is ambiguous, then "parol evidence is admissible to ascertain the true meaning and intent of the parties." An ambiguous contract is one that can be understood in more ways than just one or is unclear because it expresses its purpose in an indefinite manner.. ... South Carolina law clearly provides that although "it is a question of law for the court whether the language of a contract is ambiguous [,]" **the meaning of an ambiguous term is not a matter for the court to decide.** Rather, "[o]nce the court decides the language is ambiguous, evidence may be admitted to show the intent of the parties [And][t]he determination of the parties' intent is then a question of fact."

Id. (internal citations omitted) (denying summary judgment, in part, based on finding of ambiguity). Moreover,

[w]here an agreement is silent as to a particular matter and because of the nature and character of the transaction an ambiguity arises, parol evidence may be admitted in order to

supply a deficiency in the language of the contract. In such instance, parol evidence is admissible not to contradict the terms of the written agreement, but to determine the intent of the parties as to that particular matter.

Ebert v. Ebert, 320 S.C. 331, 339, 465 S.E.2d 121, 126 (Ct. App. 1995).

In the instant case, the terms “general releases,” “any claims or causes of action,” “between and/or among them,” and “prior to the execution of the date of this instrument” are ambiguous. For instance, the word “claim” is ambiguous. “Claim” has been defined as:

1. A statement that something yet to be proved is true ...
2. The assertion of an existing right any right to payment or to an equitable remedy, even if contingent or provisional ...
3. A demand for money, property, or a legal remedy to which one asserts a right ... [and/or]
- 4 an interest or remedy recognized; the means by which a person can obtain a privilege, possession or enjoyment of a right or thing...

Black’s Law Dictionary (10th ed. 2014). Black’s Law Dictionary provides more than four alternate definitions of “claims;” that is without even resorting to caselaw and its interpretation of the word “claim.” It is, thus, unclear what terms are encompassed by “claim.”

For instance, if “claim” can be interpreted as “an interest recognized, by which a person can obtain a privilege, possession or enjoyment of a right or thing,” it is possible that the following theory allows the assertion of a cause of action under the 1988 Settlement Agreement. To wit: Plaintiffs asserted causes of action based on the use restrictions on the property, which use restrictions arise from deeds from James H. Dusenbury to Myrtle Beach Golf & Yacht Club, a General Partnership, which deeds were recorded in 1984. [R. p. 27-36; 412-432; R. p. 420 ¶¶ 38, 39]. To the extent Plaintiffs’ cause of actions may be construed as a breach of the use restrictions in the 1984 deeds, the *claim* existed prior to

the execution of the 1988 Settlement Agreement because the *claim* was an interest recognized in the 1984 deeds. Thus, the *claim* and, accordingly, Plaintiffs' causes of action are encompassed by the contractual indemnification provision of the 1988 Settlement Agreement as the claim occurred "prior to the execution of the date of the [1988 Settlement Agreement]." [R. p. 562-578].

Similarly, it is not clear from the language of the contractual indemnity provision if "between and/or among them" encompasses successors-in-interest or assignees. If it does, then Respondent, as successor-in-interest, and Plaintiff Heron Point, as successor-in-interest or assignee, are parties to the contractual indemnity agreement.

Finally, the language "prior to the date of execution of this instrument" is ambiguous. [R. p. 562-578]. For instance, based on the language of the 1988 Settlement Agreement it is possible that the parties intended for the release and indemnification clause to encompass claims arising out of the 1988 Settlement Agreement.

At a bare minimum, the language of the indemnity clause is ambiguous as to what claims were covered. This is especially true as a subsequent instrument (the general releases), which presumably would include additional terms, were to be executed by the parties. Thus, the causes of action are not barred by the plain language of the 1988 Settlement Agreement and on a motion to dismiss every inference is drawn in favor of Appellant.

Given the fact that a subsequent instrument was going to be drafted (the general releases), the intent of the parties should not be determined on a motion to dismiss. The intent of the parties as to what precisely was being released is an issue of fact that should not be decided on a motion to dismiss. See *Osborn v. University Med. Associates of Med. University of South Carolina*, 278 F. Supp. 2d 720 (U.S.D.C. D.S.C. 2003). Here, the

lower court erred in dismissing the contractual indemnification cause of action, as the construction of the provision and intent of the parties is at issue because the contractual indemnification clause is ambiguous.

Alternatively, if the Court determines that the provision is facially *unambiguous*, a latent ambiguity has arisen in attempting to give effect to that provision. “When there is no defect on the face of a document but an uncertainty appears upon attempting to effectuate the document, then the document contains a latent ambiguity and parol evidence is admissible...” See *Bowles v. Bradley*, 319 S.C. 377, 461 S.E. 2d 811 (1995). Here, upon attempting to effectuate the 1988 Settlement Agreement, a latent ambiguity has arisen and parol evidence should be admitted.

In this case, viewing the Third-Party Complaint in the light most favorable to Appellant, Appellant has stated a cause of action for contractual indemnity. To wit: there was a contract for indemnity between Respondent and Appellant, Respondent breached it by issuing the 2005 Waiver of Restrictions. As a result, Appellant has incurred actual damages, which includes diminution in property values, and attorneys’ fees, costs, and expenses in defending the instant litigation. Moreover, as the indemnity provision references another document, which concededly Appellant has not located, it is inappropriate to grant a motion to dismiss, prior to discovery. Further, the terms of the indemnity provision are ambiguous and because it is ambiguous, the determination of the parties’ intent is a question of fact. To the extent that the indemnity provision is not ambiguous, a latent ambiguity has arisen which permits the introduction of parol evidence.

Accordingly, the Court should reverse the dismissal of Appellant’s cause of action for contractual indemnification.

IV. THE COURT ERRED IN DISMISSING THE CAUSE OF ACTION FOR EQUITABLE INDEMNIFICATION AGAINST RESPONDENT

Appellant has stated a claim for equitable indemnification, which should not be dismissed on a motion to dismiss as it is unclear whether there is a valid contract of indemnification. Admittedly, this claim is pled as an alternative to contractual indemnification. However, at this early stage of litigation, this alternative claim should not be dismissed. Moreover, it should not have been dismissed because the lower court held that the indemnification agreement does not apply to Plaintiffs' claims against Appellant. [R. p. 16-20].

(A) It is Uncertain if an Adequate Remedy at Law Exists, Thus the Court Erred in Dismissing The Alternative Cause of Action for Equitable Indemnification.

Rule 8(e)(2), *SCRPC*, permits a party to set forth two or more statements of a cause of action alternatively or hypothetically.

The function of equity is to supplement the law, not to displace it. The basis for granting equitable relief is the impracticability of obtaining full and adequate compensation at law. Accordingly, equity is generally only available when a party is without an adequate remedy at law. [E]quity will not impose an equitable lien where there is an adequate remedy at law. **An 'adequate' remedy at law is one which is as certain, practical, complete and efficient to attain the ends of justice and its administration as the remedy in equity.**

Nutt Corp. v. Howell Road, LLC, 396 S.C. 323, 721 S.E.2d 447 (Ct. App. 2011) (internal citation and quotations omitted) (emphasis added). In this case, although the lower court only found a contract existed, it did not determine, what the terms of that contract were and if the terms of contractual indemnification applied to the facts of this case. Appellant has asserted that the contractual indemnification clause may be considered to be ambiguous and to the extent that the language "prior to the execution of the date of this instrument" is

construed as not encompassing a breach of the 1988 Settlement Agreement then the contractual indemnification cause of action does not apply to the instant case. Moreover, Appellant has argued that the contractual indemnification clause is ambiguous and requires parol evidence to ascertain its intent. Under the circumstances, at this stage of the litigation, it is uncertain if Appellant has an adequate remedy at law. It cannot be said in this case that “an adequate remedy at law” exists as a matter of law. *See Nutt Corp. v. Howell Road, LLC*, 396 S.C. 323, 721 S.E.2d 447 (Ct. App. 2011). It cannot be said that the contractual indemnification cause of action is “certain, practical, complete and efficient to attain the ends of justice and its administration as the remedy in equity.” *Id.* *See also Santee Cooper Resort, Inc. v. South Carolina Public Service Com’n*, 298 S.C. 179, 379 S.E.2d 119 (1989).

(B) Appellant Stated a Cause of Action for Equitable Indemnification Against Respondent

South Carolina recognizes the principle of equitable indemnification. *Stuck v. Pioneer Logging Mach., Inc.*, 279 S.C. 22, 301 S.E.2d 552 (1983). “[A] right of indemnity exists whenever the relation between the parties is such that either in law or in equity there is an obligation on one party to indemnify the other, as where one person is exposed to liability by the wrongful act of another in which he does not join.” *Id.* The courts allow equitable indemnity where a special relationship exists between two parties. *See e.g. First Gen. Servs. v. Miller*, 314 S.C. 439, 445 S.E.2d 446 (1994) (“We hold that the relationship of contractor/subcontractor is a sufficient basis to support a claim of equitable indemnification.”); *Stuck v. Pioneer Logging Mach., Inc.*, 279 S.C. 22, 301 S.E.2d 552 (1983) (holding purchaser of defective vehicle was entitled to indemnification from seller where purchaser was sued by a third party for an accident caused by the defective condition); *Addy v. Bolton*, 257 S.C. 28, 183 S.E.2d 708 (1971) (holding landlord entitled

to indemnification from general contractor for damage contractor caused to tenant's property); *Griffin v. Van Norman*, 302 S.C. 520, 397 S.E.2d 378 (Ct. App. 1990) (holding house vendor entitled to indemnification from exterminator for settlement reached with purchaser where vendor had no knowledge that exterminator's wood infestation report issued to seller was false).

Once a sufficient relationship is established, an indemnity plaintiff must prove the following elements to recover damages on an equitable indemnity claim: “(1) the indemnity defendant is at fault in causing the damages of the third party; (2) the [indemnity] plaintiff has no fault for those damages; and (3) the [indemnity] plaintiff incurred expenses that were necessary to protect his interest in defending the third party’s claim.” *Inglese v. Beal*, 403 S.C. 290, 299, 742 S.E.2d 687, 692 (Ct. App. 2013); *McCoy v. Greenwave Enterprises, Inc.*, 408 S.C. 355, 759 S.E.2d 136 (2014).

Applying these principles to this case, Appellant has stated a claim for equitable indemnification. Appellant has alleged a special relationship between Appellant and Respondent based on the 1988 Settlement Agreement and related documents. Respondent is at fault in causing the damages to Appellant because Respondent issued the 2005 Waiver of Restrictions breaching the 1998 Settlement Agreement. Appellant was completely uninvolved with the 2005 Waiver of Restrictions and the damages that flow from it. Appellant has incurred expenses necessary to protect its interest in the subject real covenants. Those expenses include attorneys’ fees, expenses and costs.

In cases of either contractual or equitable indemnification, “reasonable attorney[’s] fees incurred in resisting the claim indemnified against may be recovered as part of the damages and expenses.” *Addy v. Bolton*, 257 S.C. 28, 33, 183 S.E.2d 708, 710 (1971) (quotations and citations omitted). Moreover, costs and expenses may be recovered as well.

[South Carolina courts] have imposed two requirements on parties seeking equitable indemnification for attorney's fees. First, “[t]he attorney[’s] fees and costs must be the natural and necessary consequence of the defendant's act.” *Town of Winnsboro v. Wiedeman–Singleton, Inc.*, 307 S.C. 128, 132, 414 S.E.2d 118, 121 (1992) (citations omitted). Second, “[i]n order to sustain a claim for equitable indemnity, the existence of some special relationship between the parties must be established.” *Toomer v. Norfolk S. Ry. Co.*, 344 S.C. 486, 492, 544 S.E.2d 634, 637 (Ct.App.2001).

McCoy v. Greenwave Enterprises, Inc., 408 S.C. 355, 759 S.E.2d 136 (2014) (reversing trial court and remanding for entry of judgment in favor of Appellants on claim of equitable indemnification for attorney’s fees and costs). Moreover:

Under [South Carolina] law, where the wrongful act of [Respondent] has involved [Appellant] in litigation with others or placed [it] in such relation with others as makes it necessary to incur expenses to protect [its] interest, such costs and expenses, including attorneys' fees, should be treated as the legal consequences of the original wrongful act and may be recovered as damages. In order to recover attorneys' fees under this principle, [Appellant] must show: (1) that [Appellants have] become involved in a legal dispute either because of a breach of contract by [Respondent] ...; (2) that the dispute was with a third party—not with [Respondent]; and (3) that [Appellant] incurred attorneys' fees connected with that dispute. If the attorneys' fees were incurred as a result of a breach of contract between [Appellant and Respondent, Respondent] will be deemed to have contemplated that [its] breach might cause [Appellant] to seek legal services in [its] dispute with the third party.

McCoy v. Greenwave Enterprises, Inc., 408 S.C. 355, 759 S.E.2d 136 (2014) (internal citations and quotations omitted). The facts in this case demonstrate that: (i) Appellant became involved in the First Party Action because of the 2005 Waiver of Restrictions; (ii) that the litigation was with Plaintiffs, not Respondent, and that (iii) Appellant has incurred legal fees in connection with the dispute. The attorneys’ fees that Appellant has incurred

in defending Plaintiffs' lawsuit were the natural and probable consequence of Respondent's breach of the 1988 Settlement Agreement.

According to the Order, the Court found that Appellant has not stated a cause of action for equitable indemnity due to the lack of a special relationship between Appellant and Respondent and Respondent's failure to allege necessary damages incurred by Appellant as caused by a third party. However, accepting the facts stated in the Complaint as true, a special relationship does exist between the parties based on the prior 1988 Settlement Agreement and other related contractual agreements between the parties extending back more than 25 years. Further, Appellant damages at minimum include actual damages, attorney's fees, costs and expenses, which were requested in the Wherefore Clause of the Third-Party Complaint. There are also possible diminution in value damages, as well, which would be encompassed in Appellant's request for "actual damages." Giving every inference in favor of Appellant, the request for actual damages, attorney's fees, costs and expenses stems, *inter alia*, from the equitable indemnification claim. As such, there is conflicting evidence as to a special relationship between Appellant and Respondent and Appellant's failure to allege necessary damages incurred by Appellant as caused by a third party. Therefore, Respondent's motion to dismiss Appellant's equitable indemnification cause of action should have been denied.

V. **TO THE EXTENT THE COURT OF APPEALS AFFIRMS THE DISMISSAL OF APPELLANT'S CAUSES OF ACTION, THE COURT OF APPEALS SHOULD PERMIT THE APPELLANT TO AMEND ITS PLEADINGS**

It is unclear whether the court below dismissed the Appellant's causes of action with prejudice. After receiving notice of entry of judgment, Appellant moved to reconsider, alter or amend judgment. [R. p. 785-793]. There is no transcript of those

proceedings, only a Form 4 Order denying the motion. [R. p. 4-5]. However, counsel for Appellant will represent to this Court that at no time was Appellant provided the opportunity to file and serve an amended Third-Party Complaint.

When a plaintiff is not given the opportunity to file and serve an amended complaint, but is left with no choice but to appeal after dismissal of her case with prejudice, an appellate court which affirms the dismissal may modify the lower court's order to find the dismissal is without prejudice. When the statute of limitations has expired, the appellate court may in its discretion impose a reasonable period of time in which to amend the complaint. An appellate court should follow this procedure when the plaintiff presents additional factual allegations or a different theory of recovery which, taken as true in a well-pleaded complaint, may state a claim upon which relief may be granted.

Spence v. Spence, 368 S.C. 106, 628 S.E.2d 869 (2006). In this case, Appellant has asserted additional theories of recovery and factual allegations, which when taken as true may state a claim upon which relief may be granted. Accordingly, to the extent that the Court affirms the dismissal of the Third-Party Complaint, the Court should grant Appellant leave to file an Amended Third-Party Complaint within a reasonable time period.

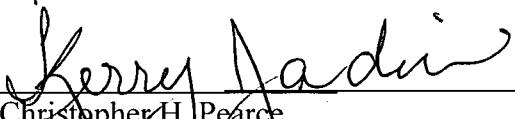
CONCLUSION

For the foregoing reasons, Appellant Myrtle Beach Golf & Yacht Club Association, Inc. respectfully requests that the Court reverse the lower court's decision.

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