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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM HORRY COUNTY, COURT OF COMMON PLEAS
THE HONORABLE BENJAMIN H. CULBERTSON, CIRCUIT COURT JUDGE

APPELLATE CASE NO. 2019-000964
CIVIL ACTION NO. 2016-CP-26-06495

Cornell Patton, Melissa Patton, Chad Webb and Amy Webb,

APPELLANTS,

versus

Prestwick Land Limited Partnership; Prestwick Homeowners Association, Inc.; Jackson Companies; City of Myrtle Beach; South Carolina Department of Transportation; Horry County; Myrtle Beach Air Force Base Redevelopment Authority; Nelson L. Hardwick & Associates, Inc.; Bermuda Gardens Homeowners' Association d/b/a Homeowners of Ocean Walk Property Owners Association; Campgrounds, Inc.; and Prestwick Property Owners Associations, Inc.,

DEFENDANTS,

Of which Prestwick Land Limited Partnership, Jackson Companies, and Campgrounds, Inc. are the

RESPONDENTS.

City of Myrtle Beach,

THIRD-PARTY PLAINTIFF,

versus

Phil Eaves and Elizabeth Eaves,
Third-Party Defendants, Counterclaimants,
Cross-Claimants,

APPELLANTS.

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COUNTERSTATEMENT OF ISSUES ON APPEAL

I. The Thirteen-Year Statute of Repose Barred the Plaintiffs' 2016 Lawsuit Against the Respondents Because the Stormwater Management System Which Allegedly Caused Flooding of the Plaintiffs' Properties Was Completed in 1997.

II. The Plaintiffs' 2016 Action Against the Respondents is Based Upon the Same Subject Matter as the Prior 2000 Litigation Which Was Settled and Dismissed With Prejudice and is Therefore Barred By the Doctrine of *Res Judicata*.

III. The Settlement Agreement Executed in the 2000 Litigation Barred the Plaintiffs' 2016 Lawsuit Against the Respondents Because Under the Settlement Agreement, the Plaintiffs Released Claims for Future Damages Against the Respondents; Furthermore, the Plaintiffs Failed to Prove the Respondents Committed Any Tortious Acts After the Settlement of the 2000 Litigation Which Could Subject Them to Additional Liability.

IV. The Trial Court Properly Granted Summary Judgment Because the Plaintiffs Had a Full and Fair Opportunity to Conduct Discovery.

V. The Trial Court's Grant of Summary Judgment to the Respondents Is Not Reversible Because of Alleged *Dicta* in the Order Granting Summary Judgment.

COUNTERSTATEMENT OF THE CASE

This litigation arises out of the flooding claims of certain homeowners residing in the Prestwick Subdivision located in Myrtle Beach, South Carolina. In 2000, homeowners Cornell and Melissa Patton and Phil Eaves filed lawsuits in the Court of Common Pleas for Horry County against Prestwick Land Limited Partnership and Jackson Companies alleging that these defendants, prior to the sale of the properties, failed to disclose that a drainage easement abutting the properties would cause flooding and further failed to design a drainage system on the properties which would prevent flooding and divert water away from the properties. The Pattons and Eaves brought causes of action against Prestwick Land Limited Partnership and Jackson Companies for nuisance, negligence, and trespass. [R.pp. ___; ___; 2000 Compls.]

The Pattons and Phil and Elizabeth Eaves settled their claims against Prestwick Land Limited Partnership and Jackson Companies in 2005, and Stipulations of Dismissal with Prejudice were entered on September 26, 2005 in each lawsuit. [R.pp. ___; ___; Settlement Agreement; Stipulations.] The Eaves sold their property to Chad and Amy Webb in 2007. [R.pp. ___; ___; City of Myrtle Beach Third-Party Compls., ¶ 120.]

Following settlement of the flooding claims in 2005, Cornell Patton, Melissa Patton, Chad Webb, and Amy Webb brought another lawsuit against Prestwick Land Limited Partnership and Jackson Companies, as well as multiple other defendants, on October 4, 2016 in the Court of Common Pleas for Horry County. [R.pp. ____; Compl.] It is this litigation which is at issue in this appeal.

The 2016 lawsuit raised substantially the same claims as in the 2000 lawsuits. The Pattons and the Webbs alleged that Prestwick Land Limited Partnership and Jackson

Companies failed to disclose that a drainage easement abutting the properties would cause flooding and further failed to design a drainage system that would prevent flooding and divert water away from the properties. [R.pp. ___; Id. at ¶ 16.] The Pattons and the Webbs brought causes of action against Prestwick Land Limited Partnership and Jackson Companies for nuisance, breach of easement/negligence, negligence, and trespass. [R.pp. ___; Id. at ¶¶ 20-23, 30-40, 45-63.]

Prestwick Land Limited Partnership and Jackson Companies filed an Answer on November 22, 2016, denying the material allegations of the Complaint and asserting, among other affirmative defenses, that the settlement agreement in the preceding litigation barred the claims in the Complaint, collateral estoppel, and the Statute of Repose. [R.pp. ___; Answer.]

Phil and Elizabeth Eaves, the prior owners of the property now owned by the Webbs, were brought into the 2016 litigation via a Third-Party Complaint filed by the City of Myrtle Beach. [R.pp. ___; ___; Third-Party Compls., ¶¶ 113-124.] On May 10, 2017, the Eaves filed a Cross-Claim against Prestwick Land Limited Partnership and Jackson Companies for negligence, nuisance, breach of easement/negligence, and trespass. [R.pp. ___; Cross-Claim, ¶¶ 10-21, 28-38, 43-61.] Prestwick Land Limited Partnership and Jackson Companies responded to the Cross-Claim on June 9, 2017, denying the material allegations of the Cross-Claim and asserting, among others, the affirmative defenses of release, collateral estoppel, and the Statute of Repose. [R.pp. ___; Answer to Cross-Claim.]

The Pattons and the Webbs filed an Amended Complaint on September 26, 2017 to add Campgrounds, Inc. as well as other new defendants. Prestwick Land Limited

Partnership, Jackson Companies, and Campgrounds, Inc. are collectively referred to as the "Respondents" herein. The Respondents filed an Answer on October 19, 2017, once again denying the material allegations of the Amended Complaint and asserting as affirmative defenses release, collateral estoppel, and the Statute of Repose. [R.pp. ___; Answer to Am. Compl.]

On April 6, 2018, the Respondents filed a Motion for Summary Judgment on the claims made by the Pattons, the Webbs, and the Eaves (collectively, the "Plaintiffs"). [R.pp. ___; April 2018 Mtn. and Memo. in Support of Mtn. for Summary Judgment with Exs.] At the Plaintiffs' request, the Respondents withdrew this Motion for Summary Judgment to allow the Plaintiffs additional time for discovery. [R.pp. ___; ___; Feb. Hearing Tr., p. 5, ll. 14-23; May Hearing Tr., p. 14, ll. 18-24.]

After additional discovery occurred, on October 24, 2018, the Respondents refiled their Motion for Summary Judgment. [R.pp. ___; Oct. 2018 Mtn. and Memo. in Support of Mtn. for Summary Judgment with Exs.] The Respondents argued that they were entitled to summary judgment because (1) the thirteen-year Statute of Repose had expired; (2) the claims were barred by the doctrine of *res judicata*; and (3) the settlement agreement in the prior litigation barred the current claims. [R.pp. __; Id.]

A hearing on the Motion for Summary Judgment was held before The Honorable Benjamin H. Culbertson on February 27, 2019. [R.pp. ___; Feb. Hearing Tr.] Thereafter, on April 1, 2019, the Trial Court granted the Motion for Summary Judgment. [R.pp. ___; Order.] The Plaintiffs filed a Motion for Reconsideration on April 9, 2019. [R.pp. ___; Mtn.] Judge Culbertson held a hearing on the Motion for Reconsideration on

May 29, 2019. [R.pp. ___; May Hearing Tr.] The Trial Court denied the Motion for Reconsideration on May 29, 2019. [R.pp. ___; Form 4 Order.]

The Plaintiffs filed and served their Notice of Appeal on or about June 7, 2019.

COUNTERSTATEMENT OF FACTS

Prestwick Land Limited Partnership was the developer of the Prestwick Subdivision located in Myrtle Beach, South Carolina. [R.p. ___; Wade Aff., ¶ 3.] Prestwick Land Limited Partnership was terminated by agreement on September 30 2007, and the termination was filed with the South Carolina Secretary of State on or about October 3, 2007. [R.pp. ___; ___; Wade Aff., ¶ 12; Memo. in Support of Mtn. for Summary Judgment, p. 2.]

Campgrounds, Inc. was the managing partner of Prestwick Land Limited Partnership at the time it was dissolved. Campgrounds, Inc. was named as a defendant in this action pursuant to S.C. CODE ANN. § 33-41-370. Campgrounds, Inc. did not have any direct involvement with the development of the Prestwick Subdivision. [R.p. ___; ___; Wade Aff., ¶ 13; Memo. in Support of Mtn. for Summary Judgment, p. 2.] Jackson Companies is not a legal entity and is merely a generic name for several affiliated companies, which at the time included Prestwick Land Limited Partnership. [R.p. ___; Wade Aff., ¶ 14.]

The Plaintiffs' lots at issue in this litigation are located in Phase 4-D of the Prestwick Subdivision. [R.p. ___; Wade Aff. ¶ 4.] Construction of the stormwater management system for Phase 4-C and Phase 4-D began on or after February 13, 1997, and the work was completed in the fall of 1997. [R.p. ___; Id. at ¶¶ 6-7.] On October 10, 1997, the Office of Ocean and Coastal Resource Management ("SC DHEC") issued

final approval for the as-built stormwater management system. [R.pp. ___; ___; Wade Aff., ¶ 7; Oct. 10, 1997 DHEC letter.]

On or about July 28, 1998, Prestwick Land Limited Partnership conveyed Lot 360 of Prestwick Phase 4-D with an address known as 1288 Strathmill Court, Myrtle Beach, South Carolina to the Pattons. [R.pp. ___; ___; Memo., p. 2; 2000 Patton Compl., ¶ 7.] On or about May 28, 1999, Prestwick Land Limited Partnership conveyed Lot 362, Prestwick Phase 4-D to Phillip and Elizabeth Eaves with an address known as 1284 Strathmill Court, Myrtle Beach, South Carolina. [R.pp. ___ ; ___; Memo., p. 2; 2000 Eaves Compl., ¶ 7.]

Through a series of quitclaim deeds, all of the roads, common areas, open areas and easements for the Prestwick Subdivision were conveyed to the Prestwick Property Owners' Association, Inc. [R.p. ___; Wade Aff., ¶ 8.] As of March 24, 2000, Prestwick Land Limited Partnership had relinquished control of the Board of Directors for the Prestwick Property Owners' Association. Prestwick Land Limited Partnership further relinquished control of the architectural review board for the Prestwick Subdivision to the Prestwick Property Owners' Association on May 24, 2003. In 2004, Prestwick Land Limited Partnership sold the last residential lot which it owned in the Prestwick Subdivision. [R.p. ___; Id. at ¶¶ 9-11.]

On or about February 24, 2000, the Pattons and Phil Eaves brought lawsuits against Prestwick Land Limited Partnership and Jackson Companies, as well as other defendants, alleging that their properties were experiencing flooding problems. [R.pp. ___; ___; Patton Compl. (2000-CP-26-0765); Eaves Compl. (2000-CP-26-0780).] More specifically, the Pattons and Eaves claimed that prior to purchasing their properties in the

Prestwick Subdivision, they were provided Property Reports which stated: "None of the lots or any portion of any lot are covered by water at any time of the year;" "None of the lots in this Property Report are located within a flood plain; and "None of the lots in the subdivision required drainage." [R.pp. ___; ___; 2000 Compls., ¶ 10.] The Pattons and Eaves alleged that the properties were subject to flooding from a drainage ditch abutting the properties and contended that Prestwick Land Limited Partnership and Jackson Companies were aware of potential flooding from the drainage easement. [R.pp. ___; ___; 2000 Compls., ¶¶ 12-13.]

The Pattons and Eaves alleged that Prestwick Land Limited Partnership and Jackson Companies were negligent in fourteen particular ways including (1) failing to inform them that the drainage easement would cause the properties to flood; (2) providing Property Reports prior to purchase which indicated that the properties were not subject to flooding; and (3) by designing a drainage system which would not prevent flooding on the properties and channel water away from the properties. [R.pp. ___; ___; 2000 Compls., ¶ 14.]

The Pattons and Eaves asserted that they had suffered "severe and catastrophic" flood damage to their properties and further alleged that they would "continue to suffer flooding" and would "have ongoing damages." [R.pp. ___; ___; 2000 Compls., ¶¶ 15, 49.] They brought causes of action for nuisance, negligence, and trespass against Prestwick Land Limited Partnership and Jackson Companies. [R.pp. ___; ___; 2000 Compls., ¶¶ 18-21, 44-62.]

On or about September 2, 2005, the Pattons and Phillip and Elizabeth Eaves, as well as two other property owners, as "Landowners," entered into a Settlement

Agreement and Release (the "Settlement Agreement") with Prestwick Land Limited Partnership and Jackson Companies, as well as other defendants, under which a total of $470,000.00 was paid to settle the claims. Prestwick Land Limited Partnership and Jackson Companies contributed a total of $246,666.66 to the settlement amount. [R.pp. ___; Settlement Agreement.]

In exchange for the settlement payment, the Pattons and the Eaves, as well as their "heirs, executors, administrators, successors, and assigns," agreed to:

> remise, release, and forever mutually discharge the said Defendants, her/his or their heirs, executors or administrators or its successors as the case may be of and from all, and all manner of action and actions, cause and causes of actions, suits . . . trespass and trespasses, damage and damages, judgments . . . claim and claims, and demand and demands whatsoever both at law and in equity which the undersigned, ***ever had, now has, or*** which the undersigned [the Pattons and the Eaves], their heirs, executors, administrators, assigns or successors hereinafter ***can, shall, or may have***, for, upon or by reason of any matter, cause or thing whatever from the beginning of the world up to the day, hour, minutes of the execution of these presents, and with special reference to the following specifically stated matter or thing, to-wit:
>
>> **ANY AND ALL CLAIMS** for property damage/inverse condemnation, nuisance, breach of easement/negligence/trespass arising out of or in connection with drainage from the drainage easement which abutted the property of the Landowners located at Prestwick Subdivision located in Horry County, South Carolina and any and all other claims arising out of or in connection with Civil Action Nos. 2000-CP-26-0765; . . . 2000-CP-0780; . . . filed with the Clerk of Court for Horry County, South Carolina.

[R.pp. ___; Id. at pp. 1-2 (italic emphasis added).]

The Settlement Agreement went on to further provide that in consideration of the payment of the Settlement Amount, the Landowners agreed to release:

> Defendants, their officers, directors, shareholders, owners, employees, servants, agents, insurers, executors, administrators and successors, ***from any and all claims and causes of action of any nature whatsoever, whether known or unknown,*** which Landowners ***now have, had or may have relating to the claims, demands, and allegations*** which were or could have been set forth and asserted in the above-referenced actions or which otherwise arise out of those matters described in the pleadings in the above-referenced actions.

[R.p. ___; Id. at p. 3. (emphasis added).]

The express purpose of the Settlement Agreement was described as the Respondents' desire to "avoid any ***future claims and causes of action*** related to any ***future flooding*** of Landowners' property." [R.p. ___; Id. at p. 5 (emphasis added).] The Settlement Agreement further required the Landowners to disclose the flooding issues with the properties in a Residential Property Condition Disclosure Statement provided to future purchasers should the Landowners sell the properties. [R.pp. ___; Id. at pp. 3-4.] Finally, the Settlement Agreement required the parties to file a dismissal with prejudice of the pending actions. [R.p. ___; Id. at p. 5.] Stipulations of Dismissal with Prejudice were filed in the Patton and Eaves lawsuits on September 26, 2005. [R.pp. ___; Stipulations.]

Following the settlement of the 2000 lawsuits, the Eaves conveyed their property located in the Prestwick Subdivision to Chad and Amy Webb on or about August 16, 2007. [R.pp. ___; ___; Third-Party Compls., ¶ 120.] Prestwick Land Limited Partnership, as noted above, was terminated and dissolved on September 30, 2007. [R.p. ___; Wade Aff., ¶ 12.]

After the settlement of the 2000 lawsuits, the Respondents took no further action with respect to the properties in the Prestwick Subdivision which would have affected or contributed to the alleged flooding of the properties. [R.p. ___; Id. at ¶ 15.]

On October 4, 2016, the Pattons and the Webbs filed a new action against Prestwick Land Limited Partnership and Jackson Companies, as well as other defendants, bringing claims for nuisance, breach of easement/negligence, negligence, and trespass. [R.pp. ___; Compl.] The Eaves, brought into the litigation via a Third-Party Complaint filed by the City of Myrtle Beach, also filed a Cross-claim against Prestwick Land Limited Partnership and Jackson Companies asserting the same claims and allegations as the Pattons and Webbs. [R.pp. ___; ___; ___; Third-Party Complaints; Cross-Claim.] The Plaintiffs filed an Amended Complaint on September 26, 2017 to add Campgrounds, Inc. as a defendant. [R.pp. ___; Am. Compl.]

The allegations of the Amended Complaint are virtually identical to the allegations of the Patton and Eaves Complaints filed in 2000. The Amended Complaint states that the Plaintiffs' properties have continually flooded since 1999, including floods on October 4-5, 2015 and September 2, 2016. [R.p. ___; Am. Compl., ¶¶ 17-18.] The allegations of negligence against the Respondents are, as in the 2000 Complaints, that the Respondents (1) failed to inform the Plaintiffs that the drainage easement would cause the properties to flood; (2) provided inaccurate Property Reports prior to purchase which indicated that the properties were not subject to flooding; and (3) designed a drainage system which would not prevent flooding on the properties and channel water away from the properties. [R.pp. ___; Id. at ¶¶ 14-16, 20.]

In fact, the particular allegations of negligence listed in Paragraph 20 a. –n. are identical to the allegations contained in Paragraph 14 a. – n. of the 2000 Complaints. [R.pp. ___; ___ ; ___; Am. Compl., ¶ 20; 2000 Compls., ¶ 14.] The causes of action asserted and damages sought against the Respondents are also virtually indistinguishable

to those in the 2000 Complaints. [R.pp. ___; ___; ___; Am. Compl., ¶¶ 24-27, 34-44, 49-67; 2000 Compls., ¶¶ 18-21, 28-39, 44-62.] While the Amended Complaint does contain some new allegations of negligence, these allegations pertain to the failure of other named defendants to follow recommendations made by drainage assessment reports dated May 3, 2012 and August 6, 2013 and in changing the course of the canal following the development of a neighboring subdivision which occurred after the settlement in 2005. [R.pp. ___; ___; Amended Compl., ¶¶ 20 o. – ee.; 80; Storm Water Report for Bermuda Cottages Proposed Development dated May 25, 2006 (Ex. 10 to Taylor Dep.); see also Appellants' Brief, p. 3;] The Plaintiffs' expert, Robert K. Taylor, a professional engineer, conceded he had no evidence that the Respondents had any involvement with the drainage system after the 2005 settlement. [R.pp. ___; ___; ___; Taylor Dep., pp. 7, ll. 21-22; 123, l. 14 – 127, l. 15; 131, l. 6 – 137, l. 23.] Dennis Wade, the President of Prestwick Land Limited Partnership before it was dissolved, averred that after the settlement of the 2000 lawsuits, the Respondents took no further action with respect to the drainage system in the Prestwick Subdivision. [R.pp. ___; Wade Aff., ¶¶ 2, 15.] Therefore, the Plaintiffs' allegations of negligence in the Amended Complaint occurring after 2005 do not pertain to the Respondents.

The Trial Court granted summary judgment to the Respondents on the claims asserted by the Plaintiffs for three reasons: (1) the expiration of the thirteen-year Statute of Repose; (2) the absolute bar of the Plaintiffs' 2016 lawsuit under the doctrine of *res judicata*; and (3) the preclusion of the Plaintiffs' claims against the Respondents under the release provisions of the Settlement Agreement. [R.pp. ___; Order.] The Plaintiffs now challenge on appeal the Trial Court's Order granting summary judgment.

STANDARD OF REVIEW

When reviewing the grant of a summary judgment motion, the appellate court applies the same standard which governs the trial court under Rule 56(c) of the South Carolina Rules of Civil Procedure. Ellis v. Davidson, 358 S.C. 509, 517, 595 S.E.2d 817, 821 (Ct. App. 2004). Rule 56(c) provides a motion for summary judgment shall be granted if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." See Progressive Max Ins. Co. v. Floating Caps, Inc., 405 S.C. 35, 42, 747 S.E.2d 178, 181 (2013). "In determining whether any triable issues of fact exist, the trial court must view the evidence and all reasonable inferences that may be drawn therefrom in the light most favorable to the party opposing summary judgment." Id.; Wachovia Bank, N.A. v. Coffey, 404 S.C. 421, 425, 746 S.E.2d 35, 38 (2013).

"The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." Dawkins v. Fields, 354 S.C. 58, 69, 580 S.E.2d 433, 438 (2003) (citations omitted). The party seeking summary judgment under Rule 56(c) has the initial burden of demonstrating the absence of a genuine issue of material fact. Ellis, 358 S.C. at 518, 595 S.E.2d at 822. "Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings. . . . Rather, the nonmoving party must come forward with specific facts showing there is a genuine issue for trial." Id. at 518-19, 595 S.E.2d at 822. "[W]hen

plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted." Id. at 518, 595 S.E.2d at 822.

ARGUMENT

I. The Thirteen-Year Statute of Repose Barred the Plaintiffs' 2016 Lawsuit Against the Respondents Because the Stormwater Management System Which Allegedly Caused Flooding of the Plaintiffs' Properties Was Completed in 1997.

The Trial Court properly granted summary judgment on the Plaintiffs' 2016 action because South Carolina's Statute of Repose barred the action. The Statute of Repose in effect required the Plaintiffs bring their action within thirteen (13) years of substantial improvement to real property. S.C. CODE ANN. § 15–3–640 (Supp. 2003)[1]. Specifically, Section 15–3–640 provided:

> No actions to recover damages based upon or arising out of the defective or unsafe condition of an improvement to real property may be brought more than thirteen years after substantial completion of the improvement. For purposes of this section, an action based upon or arising out of the defective or unsafe condition of an improvement to real property includes:
>
> (1) an action to recover damages for breach of a contract to construct or repair an improvement to real property;
>
> (2) an action to recover damages for the negligent construction or repair of an improvement to real property;
>
> (3) an action to recover damages for personal injury, death, or damage to property;
>
> (4) an action to recover damages for economic or monetary loss;
>
> (5) an action in contract or in tort or otherwise;
>
> . . .

---

[1] This statute was amended on July 1, 2005 to reduce the repose period to eight (8) years but the amended statute only applies to improvements completed after July 1, 2005. 2005 South Carolina Laws Act 27, § 16(2) (H.B. 3008). Here, the improvement at issue was completed by February 10, 1997. [R.p. ___; DHEC ltr.]

> (8) an action brought against any current or prior owner of the real property or improvement, or against any other person having a current or prior interest in the real property or improvement;
>
> (9) an action against owners or manufacturers of components, or against any person furnishing materials, or against any person who develops real property, or who performs or furnishes the design, plans, specifications, surveying, planning, supervision, testing, or observation of construction, or construction of an improvement to real property, or a repair to an improvement to real property.
>
> This section describes an outside limitation of thirteen years after the substantial completion of the improvement, within which normal statutes of limitations continue to run.

S.C. CODE ANN. § 15-3-640.

A statute of repose represents "an absolute time limit beyond which liability no longer exists." Langley v. Pierce, 313 S.C. 401, 404, 438 S.E.2d 242, 243 (1993) (quoting First United Methodist Church v. United States Gypsum Co., 882 F.2d 862, 865–66 (4th Cir. 1989)). The statute is a societal recognition that at some point in the future liability no longer exists. "When causes of action are extinguished after such time, society generally may continue its business and personal relationships in peace, without worry that some cause of action may arise to haunt it because of some long-forgotten act or omission." Langley, 313 S.C. at 404, 438 S.E.2d at 244 (quoting Kissel v. Rosenbaum, 579 N.E.2d 1322, 1326–28 (Ind. Ct. App. 1991)).

To further that purpose, a statute of repose, unlike a statute of limitations, cannot be defeated by estoppel, waiver, or claims of tolling. G & P Trucking v. Parks Auto Sales Serv. & Salvage, Inc., 357 S.C. 82, 89, 591 S.E.2d 42, 45 (Ct. App. 2003). In short, a statute of repose is a substantive defense that prevents a cause of action from coming into being after a pre-determined period of time. See Langley, 313 S.C. at 403–04, 438 S.E.2d at 243–44.

The Statute of Repose applies to the Plaintiffs' action because it is one "based upon or arising out of the defective or unsafe condition of an improvement to real property" – the stormwater management system of the Prestwick Subdivision. The Plaintiffs do not contest that the stormwater management system is an improvement to real property.

The Plaintiffs had thirteen years to bring their suit from the date the stormwater management system was completed. The stormwater management system was completed by October 10, 1997 when SC DHEC issued its letter noting that final inspection of the system had been completed and that the as-built stormwater management system complied with the previously approved plans and the Storm Water Management and Sediment Reduction Permit and the Coastal Zone Management Program.[2] [R.p. ___; DHEC ltr.] Therefore, any claim arising out of the stormwater management system should have been brought by October 10, 2010. The Statute of Repose had expired and extinguished any claims of the Plaintiffs arising out of the stormwater management system when the lawsuit was brought by the Plaintiffs on October 4, 2016.

The Plaintiffs contend that the ownership and gross negligence exceptions set forth in S.C. CODE ANN. § 15-3-670(A) prevent the Respondents from asserting the Statute of Repose as a defense. This Section provides:

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[2] The Order noted that the stormwater management system was complete on October 2, 1998 but this appears to be a scrivener's error. [R.p. ___; Order, p. 4.]

> The limitation provided by Sections 15-3-640 through 15-3-660 *may not be asserted as a defense by a person in actual possession or control, as owner, tenant, or otherwise, of the improvement at the time the defective or unsafe condition constitutes the proximate cause of the injury or death for which it is proposed to bring an action*, in the event the person in actual possession or control knows, or reasonably should have known, of the defective or unsafe condition. The limitations provided by Sections 15-3-640 through 15-3-660 *are not available as a defense to a person guilty of fraud, gross negligence, or recklessness* in providing components in furnishing materials, in developing real property, in performing or furnishing the design, plans, specifications, surveying, planning, supervision, testing or observation of construction, construction of, or land surveying, in connection with such an improvement, or to a person who conceals any such cause of action.

S.C. CODE ANN. § 15-3-670(A) (emphasis added).

The Plaintiffs first argue that the ownership exception prohibits the Respondents' reliance upon the Statute of Repose. The Plaintiffs have both factually misstated the Record and misconstrued the ownership exception. The ownership exception provides that a defendant cannot assert the Statute of Repose as a defense if the defendant is "in actual possession or control, as owner, tenant, or otherwise, of the improvement ***at the time the defective or unsafe condition constitutes the proximate cause of the injury or death for which it is proposed to bring an action***." § 15-3-670(A) (emphasis added). The critical language is that the defendant cannot be an owner of the improvement ***at the time*** the defective or unsafe condition ***causes*** the injury.

Here, the Plaintiffs bring claims for floods occurring on October 4-5, 2015 and September 2, 2016 in their 2016 lawsuit. [R.p. ___; Am. Compl., ¶ 18.] The Respondents presented evidence that Prestwick Land Limited Partnership, and thus Campgrounds, Inc., as managing partner, and Jackson Companies, a generic name given for affiliated companies including Prestwick Land Limited Partnership, no longer

maintained any ownership over the storm management system in the Prestwick Subdivision at the time of the 2015 and 2016 floods. [R.p. ___; Wade Aff., ¶¶ 13-14.]

Through a series of quitclaim deeds, all of the roads, common areas, open areas and easements for the Prestwick Subdivision were conveyed to the Prestwick Property Owners' Association, Inc. [R.p. ___; Id. at ¶ 8.] As of March 24, 2000, Prestwick Land Limited Partnership had relinquished control of the Board of Directors for the Prestwick Property Owners' Association. Prestwick Land Limited Partnership further relinquished control of the architectural review board for the Prestwick Subdivision to the Prestwick Property Owners' Association on May 24, 2003. In 2004, Prestwick Land Limited Partnership sold the last residential lot which it owned in the Prestwick Subdivision. On September 30, 2007, Prestwick Land Limited Partnership was terminated and dissolved. [R.p. ___; Id. at ¶¶ 9-12.] The Respondents were not owners of the stormwater management system in 2015 and 2016, the relevant time period for determining whether the ownership exception provided under § 15-3-670(A) applies.

The Plaintiffs also argue that Prestwick Land Limited Partnership did not relinquish control of the architectural review board until May 28, 2013. This is a misstatement of the Record because the affidavit of Dennis Wade avers that Prestwick Land Limited Partnership relinquished control on May 28, 2003. [R.p. ___; Wade Aff., ¶ 10.] The ownership exception of the Statute of Repose is not applicable and does not preclude the Respondents from asserting the thirteen-year Statute of Repose as a defense.

The Plaintiffs also suggest that the gross negligence exception prevents the Respondents from asserting the Statute of Limitations. "Gross negligence is the intentional, conscious failure to do something which it is incumbent upon one to do or the

doing of a thing intentionally that one ought not to do." Clyburn v. Sumter Cnty. Sch. Dist. No. 17, 317 S.C. 50, 53, 451 S.E.2d 885, 887 (1994). Robert K. Taylor, a professional engineer serving as the Plaintiffs' expert, could not identify any acts of the Respondents which would rise to the level of gross negligence or recklessness. He could give no opinion as to whether the stormwater management system, including the plans or the as-built system, failed to meet the minimum requirements of the South Carolina Storm Water Management and Sediment Reduction Act. Mr. Taylor could further identify no violation of any law, statute, or regulation by the Respondents. [R.pp. ___; ___; ___; ___; Taylor Dep., pp. 7, ll. 21-22; 111, l. 23 — 113, l. 21 (cannot give any specific opinion on whether system met or did not meet standards); 119, ll. 9-13 (cannot recall whether minimum requirements met); 130, l. 20 – 131, l. 2 (could give no opinion on whether system met minimum requirements).]

The Plaintiffs cite certain portions of Mr. Taylor's deposition in their effort to prove that the Respondents were grossly negligent or reckless but the testimony upon which they rely only shows that Mr. Taylor could not specifically remember or recall facts relating to his vague opinions and could provide no specific testimony as to how the Respondents were grossly negligent or reckless. This vague and nonspecific testimony cannot support a finding that the Respondents were grossly negligent or reckless. [R.pp. ___; ___; ___; ___; ___; ___; ___; Id. at pp. 110, ll. 21-25 (cannot recall why he believed plans for the stormwater management system were deficient); 113, ll. 9-21 (only vaguely recalled opinion that the plans did not meet the minimum requirements of the Stormwater Management and Sediment Reduction Act but could not remember any specifics and was ultimately unable to give opinion as to whether minimum requirements were met because

things happened "a long time ago"); 53, ll. 1-25; 54, ll. 10-15 (believed there was an inadequate drainage plan but gave no specifics as to why or why any failure to adopt his proposed alternatives was grossly negligent or reckless); 54, l. 20 – 55, l. 3; 118, l. 24 – 119, l. 3 (no testimony that alleged failure to build swales was grossly negligent or reckless and instead states that swales are not necessary, only helpful, which does not rise to the level of gross negligence or recklessness); 63, ll. 16-25 (provides no specific testimony as to how water is mismanaged in the Prestwick Subdivision); 105, ll. 23-25 (testifying as to alleged negligent acts of Horry County; in addition while he alleges plans were not followed, as stated above, Mr. Taylor could not give an opinion that the as-built system did not meet minimum standards or violated any laws or other requirements); 131, ll. 15-25 (cannot recall what the Respondents may have done with respect to alleged changes to the drainage system).]

The Plaintiffs did not prove that either the ownership or gross negligence exceptions set forth under § 15-3-670(A) applied to preclude the Respondents from asserting the Statute of Repose as a defense. Therefore, the Trial Court properly ruled that the Plaintiffs' action brought in October 2016 against the Respondents arising out of the stormwater management system of the Prestwick Subdivision which was completed by October 10, 1997 was barred by the thirteen-year Statute of Repose.

II. The Plaintiffs' 2016 Action Against the Respondents is Based Upon the Same Subject Matter as the Prior 2000 Litigation Which Was Settled and Dismissed With Prejudice and is Therefore Barred By the Doctrine of *Res Judicata*.

The Plaintiffs' 2016 action against the Respondents is also barred by the doctrine of *res judicata* which precludes the relitigation of claims that were raised or could have been raised in the prior litigation. "Res judicata bars subsequent actions by the same

parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties. . . . Under the doctrine of res judicata, [a] litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit. . . . [T]he fundamental purpose of res judicata ... is to ensure that no one should be twice sued for the same cause of action." Zinn v. CFI Sales & Marketing, Ltd., 415 S.C. 93, 105-06, 780 S.E.2d 611, 617-18 (Ct. App. 2015) (internal citations omitted); Plum Creek Dev. Co. v. City of Conway, 334 S.C. 30, 34, 512 S.E.2d 106, 108 (1999) ("Res judicata ends litigation, promotes judicial economy and avoids the harassment of relitigation of the same issues.") (internal citations omitted).

The following elements must be shown in order to establish the plea of res judicata:

> (1) The parties must be the same or their privies;
>
> (2) the subject matter must be the same; and
>
> (3) while generally the precise point must be ruled, yet where the parties are the same or are in privity the judgment is an absolute bar not only of what was decided but of what might have been decided.

Nunnery v. Brantley Constr. Co., 289 S.C. 205, 209, 345 S.E.2d 740, 743 (Ct. App. 1986) (internal citations omitted).

Furthermore, "[a] dismissal 'with prejudice' indicates an adjudication on the merits and, operating as *res judicata,* precludes subsequent litigation to the same extent as if the action had been tried to a final adjudication. . . . Where an action has been so dismissed, the judgment operates, in a subsequent action involving the same subject matter, so as to conclusively settle not only all matters litigated in the earlier proceedings,

but also all matters which might have been litigated therein." Id. (internal citations omitted); see also Collins v. Sigmon, 299 S.C. 464, 467, 385 S.E.2d 835, 837 (1989) ("[D]ismissals with prejudice are intended to bar relitigation of the same claim.").

Here, the actions brought in 2000 against Prestwick Land Limited Partnership and Jackson Companies were dismissed with prejudice on September 26, 2005. [R.pp. ___; Stipulations.] Contrary to the Plaintiffs' contention that the dismissals with prejudice cannot be subject to *res judicata*, South Carolina law, as indicated above, holds that dismissals with prejudice conclusively settle all matters raised or which could have been raised in the earlier litigation to the same extent as if the action had been tried to a final adjudication. See Nunnery, 289 S.C. at 208-09, 345 S.E.2d at 742-43 (finding dismissal with prejudice by consent order after settlement in earlier litigation barred subsequent litigation arising out of same subject matter); Nelson v. QHG of South Carolina, Inc., 354 S.C. 290, 311, 580 S.E.2d 171, 182 (Ct. App. 2003) ("When an action has been dismissed with prejudice, the judgment operates in subsequent litigation to the same extent as if the action had been tried to a final adjudication.").

The 2000 litigation and the 2016 litigation also involve the same parties or their privies. The 2000 litigation was brought by the Pattons and Eaves against Prestwick Land Limited Partnership and Jackson Companies. The 2016 litigation was brought by the Pattons, the Webbs, and the Eaves (brought in via a Third-Party Complaint) against Prestwick Land Limited Partnership, Jackson Companies, and Campgrounds, Inc.

The Webbs, having purchased the property at issue from the Eaves and who raise allegations based upon the disclosures provided to the Eaves regarding flooding on the property, are in privity with the Eaves. "For purpose of res judicata, the concept of

privity rests not on the relationship between the parties asserting it, but rather on each party's relationship to the subject matter of the litigation. . . . . The term 'privy,' when applied to a judgment or decree, means one so identified in interest with another that he represents the same legal right. . . . One in privity is one whose legal interests were litigated in the former proceeding. . . Privies are those who are so connected with the parties in estate, or in blood, or in law, as to be identified with them in interest. . . ." Equivest Fin., LLC v. Ravenel, 422 S.C. 499, 507, 812 S.E.2d 438, 442 (Ct. App. 2018) (internal citations issued).

The legal interest of the Webbs in the property was litigated by the Eaves in the earlier 2000 litigation. Therefore, the Webbs are the privies of the Eaves. The Plaintiffs do not dispute this in their Appellants' Brief. Likewise, the Plaintiffs do not dispute that Campgrounds, Inc. is also in privy with Prestwick Land Limited Partnership as the managing partner of Prestwick Land Limited Partnership. [R.p. ___; Wade Aff., ¶ 13.]

The Plaintiffs argue that there is not an identity of parties between the 2000 litigation and the 2016 litigation because the Plaintiffs named additional defendants. It is not essential to the application of the doctrine of *res judicata* that there should be a complete identity as to all the parties in both proceedings, but only that the persons between whom the judgment is to operate as *res judicata* should be the same. Even though additional defendants were added to the 2016 litigation, the Respondents are only asking that the judgment in the 2000 litigation bar subsequent litigation against the Respondents. The only parties that matter to the question of whether the subsequent litigation is barred by the doctrine of *res judicata* are the Pattons, Webbs, and the Eaves, as plaintiffs, and Prestwick Land Limited Partnership, Jackson Companies, and

Campgrounds, Inc., as defendants. As shown above, the 2000 litigation and the 2016 litigation involve identical parties or their privies.

The 2000 litigation and the 2016 litigation also involve the same subject matter. In the preceding and current litigation, the exact allegations of the negligence were alleged against the Respondents. More particularly, in both actions it was alleged that the Respondents (1) failed to inform the Plaintiffs that the drainage easement would cause the properties to flood; (2) provided inaccurate Property Reports prior to purchase which indicated that the properties were not subject to flooding; and (3) designed a drainage system which would not prevent flooding on the properties and channel water away from the properties. [R.pp. ___; ___; ___; 2000 Compls., ¶¶ 10, 12-14; Am. Compl., ¶¶ 14-16, 20.]

In fact, the particular allegations of negligence listed in Paragraph 20 a. –n. of the Amended Complaint in the 2016 litigation are identical to the allegations contained in Paragraph 14 a. – n. of the 2000 Complaints. [R.pp. ___; ___ ; ___; Am. Compl., ¶ 20; 2000 Compls., ¶ 14.] The causes of action asserted and damages sought against the Respondents, including a request for future damages, are also virtually indistinguishable to those in the 2000 Complaints. [R.pp. ___; ___; ___ Am. Compl., ¶¶ 24-27, 34-44, 49-67; 2000 Compls., ¶¶ 18-21, 28-39, 44-62.] Notably, in both the 2000 and 2016 litigation, the Plaintiffs alleged to suffer the exact damages:

> That Plaintiffs will continue to suffer flooding; will have ongoing damages, have property damage from the last heavy rain, are unable to sell their property for a fair market price, have a distressed property because of the flooding and will be required to disclose the flooding problem for the remainder of time which Plaintiffs live there. That Plaintiffs will be unable to sell their property at a reasonable price. That the damages sustained are a direct result of the artificial channeling by these Defendants.

[R.pp. ___; ___; ___; 2000 Compls., ¶ 49; Am. Compl., ¶ 54.]

While the Amended Complaint does contain some new allegations of negligence, these allegations pertain to the failure of the other named defendants to follow recommendations made by drainage assessment reports dated May 3, 2012 and August 6, 2013 and in changing the course of the canal following the development of a neighboring subdivision which occurred after the settlement in 2005. [R.pp. ___; ___; Amended Compl., ¶¶ 20 o. – ee., 80; Storm Water Report for Bermuda Cottages Proposed Development dated May 25, 2006 (Ex. 10 to Taylor Dep.); see also Appellants Brief, p. 3.] The Plaintiffs' expert, Robert K. Taylor, a professional engineer, conceded he had no evidence that the Respondents had any involvement with the drainage system after the 2005 settlement. [R.pp. ___; ___; ___; Taylor Dep., pp. 7, ll. 21-22; 123, l. 14 – 127, l. 15; 131, l. 6 – 137, l. 23.]

More specifically, Mr. Taylor was unaware of any deficiencies involving the Respondents and related to the stormwater drainage system in the Prestwick Subdivision not previously identified in conjunction with his investigation for the 2000 lawsuits. He further could not point to any acts taken by the Respondents with respect to the drainage system after the 2005 settlement. He testified as follows:

> Q: Between 2003 and, say, 2017, 2016, do you have any information as to any work done by Prestwick Limited Land Partnership with regards to the drain system in the Prestwick development?
>
> A: At that time, I don't think I was aware of anything. I mean it was pretty much off the radar.

[R.p. ___; Taylor Dep., p. 123 ll. 14-21.]

> Q: [H]ave you learned anything about Prestwick Land Limited Partnership, any work that they would have done after, say, 2003, 2004?

A: I don't think I've picked up on who had it done, but certainly some work has been done in the area with respect to drainage. As so what Prestwick specifically has done as compared to the Pattons and the others to help their own situation, ***I'm not aware of what specifically Prestwick has done.***

. . .

Q: [Y]ou don't have any information that they have done anything since 2003?

A: Well, I have information that things were done and whether Prestwick did them or somebody else, I don't know.

[R.p. ___; Id. at p. 124, ll. 2 – 23 (emphasis added).]

Q: Have you identified any deficiencies or problems that would have been in existence as of this date [September 2, 2005], that date, that you didn't find in the first go-around?

A: I don't remember from just looking at those dates and what happened.

Q: Assuming that this case, the previous case ended in September of 2005, are you aware of or can you give any testimony that there were problems that existed before that date that weren't identified before that date?

A: I can't remember everything to be specifically aware of, but I can allow that that could have well happened.

Q: But you can't sit here and say that there were some problems that we were unaware of or we couldn't have known about or they were hidden or anything like that; correct?

A: I don't remember anything specifically.

. . .

Q: [S]itting here, you can't identify anything - -

A: No.

[R.pp. ___; ___; Id. at pp. 132, ll. 4-22; 134, ll. 16-18.]

Q: I want to know is there something that you found that would have been in existence in 2003 that you were unaware of in 2003, not what you could or you might but sitting here today that you can say, here's a problem that I failed to identify or I was unaware of back in 2003?

. . .

[A]nd I want to just ask you about the drainage system within Prestwick.

. . .

A: Okay. Well then, the extent that you don't have swales guiding the water to catch basins.

Q: Okay. You were fully aware of that; correct?

A: I was aware of that before but I was not quite as aware of the significance of that with respect to getting water out into the creek.

Q: But you were aware that the swales were not present [in 2003]?

A: Yes.

[R.pp. ___; Id. at pp. 134, l. 19 – 135, l. 25.]

Q: With regards to the drainage system as designed and built by Prestwick Limited Land Partnership, are you aware of any problems today that you were unaware back in 2003?

A: You mean problems with the hardware?

Q: Yes, sir.

. . .

A: I don't think that I am aware of additional hardware problems.

Q: And I'm asking the question as we settled the previous case and I want to make sure, ***is there something we didn't cover in the previous case that we need to cover in this case***?

A: *No*.

[R.pp. ___; Id. at pp. 136, l. 24 – 137, l. 18 (emphasis added).]

Since the dismissal of the 2000 lawsuits in 2005, the Respondents have not taken any action which would have affected or contributed to the alleged flooding of the Plaintiffs' properties, and the Plaintiffs have not identified any actions taken by the Respondents with respect to the Prestwick Subdivision and its stormwater management system after the first litigation settled. [R.p. ___; Wade Aff., ¶ 15.] The Plaintiffs are therefore suing the Respondents in 2016 for the same alleged tortious acts settled in 2005 which is prohibited under the doctrine of *res judicata.*

The Plaintiffs argue that because they have sued for different flooding events than the one they sued for in 2000 that the 2016 action is not barred by *res judicata.* The Plaintiffs' argument fails because the underlying facts are identical in each lawsuit. In both suits, the Plaintiffs raise exact allegations that the Respondents provided the Plaintiffs prior to purchase with a "Property Report" which stated that the properties were not subject to flooding, not located within a flood plain, and did not require drainage. [R.pp. ___; ___; ___; 2000 Compls., ¶ 10; Am. Compl., ¶ 14.] The Plaintiffs alleged this disclosure was false because the properties had flooded. [R.pp. ___; ___; ___; 2000 Compls., ¶ 12; Am. Compl., ¶ 16.] In the 2016 litigation, as in the 2000 litigation, the Plaintiffs claimed that the Respondents failed to inform them that the drainage easement would cause the properties to flood, provided inaccurate Property Reports prior to purchase which indicated that the properties were not subject to flooding, and designed a drainage system which would not prevent flooding on the properties and channel water away from the properties. [R.pp. ___; ___; ___; 2000 Compls., ¶¶ 10-12, 14; Am. Compl., ¶¶ 14-16, 20.]

The Plaintiffs also clearly contemplated the risk of future flooding in their 2000 Complaints because they alleged the properties would continue to suffer flooding causing the Plaintiffs to incur ongoing damages. [R.pp. ___; ___; 2000 Compls., ¶ 49.] The Plaintiffs further alleged permanent diminution in value because of the inability to sell their properties at a reasonable and fair market price. [R.pp. ___; ___; Id.]

Both the 2000 and 2016 lawsuits sought the same recovery based on the same underlying facts. The subject matter is identical. All of the evidence necessary to recover on each suit is identical, particularly where, as explained thoroughly above, the Plaintiffs have not pointed to any new acts taken by the Respondents after the 2005 settlement of the first litigation. Griggs v. Griggs, 214 S.C. 177, 185, 51 S.E.2d 622, 625 (1949) ("If the same facts or evidence would sustain both, the two actions are considered the same within the rule that the judgment in the former is a bar to the subsequent action.")

The transactional nucleus of facts for both actions is the same—the Respondents' alleged failure to design an adequate drainage system and the alleged failure of the Respondents to disclose the potential of flooding on the properties. These are the core facts underlying each of the Plaintiffs' causes of action in both suits. Each flood was not a new cause of action, but rather additional damages resulting from these alleged failures, and these future damages were pled in the original 2000 lawsuits which were dismissed with prejudice.[3] See Plum Creek Dev. Co., 334 S.C. at 36, 512 S.E.2d at 109 ("A claim

[3] The Plaintiffs argue that *res judicata* cannot apply because the Settlement Agreement did not encompass claims for future damages. As argued in Section III of this Brief, the Settlement Agreement did release all claims for future damages. Nonetheless, whether the Settlement Agreement did or did not release future claims is irrelevant to whether *res judicata* applies, particularly where the Plaintiffs did not establish that the Respondents engaged in any alleged tortious acts after the settlement of the 2000 litigation.

for damages is a claim for relief rather than an assertion of a different cause of action for purposes of determining the applicability of *res judicata*.") (internal citations omitted).

The Plaintiffs' claims for the 2015 and 2016 floods were one and the same with the claims brought in the 2000 lawsuit because they were based on the same purportedly wrongful acts. Because their original suits were dismissed with prejudice, principles of *res judicata* do not permit them to recover for those same wrongful acts in perpetuity simply by alleging new damages that resulted from such acts.

The case law relied upon by the Plaintiffs regarding continuing trespass and nuisance have no bearing on whether the Plaintiffs' 2016 litigation is barred by the doctrine of *res judicata*. These cases only address either when the statute of limitations begins to run on a claim for trespass and nuisance or what constitutes a nuisance; these cases do not address the effect of *res judicata* when the plaintiff has already litigated the facts underlying the alleged trespass or nuisance in a previous lawsuit. See Silvester v. Spring Valley Country Club, 344 S.C. 280, 543 S.E.2d 563 (Ct. App. 2001) (addressing whether continuing nuisance claim was timely under the statute of limitations); Hedgepath v. Am. Tel. & Tel. Co., 348 S.C. 340, 559 S.E.2d 327 (Ct. App. 2001) (same); Lucas v. Rawl Family Ltd., 359 S.C. 505, 598 S.E.2d 712 (2004) (finding that continual flooding can constitute a nuisance but case only involved one lawsuit brought).

For the reasons explained, the 2016 litigation brought by the Plaintiffs is barred under the doctrine of *res judicata* by the litigation brought in 2000 and dismissed with prejudice in 2005. If it were not, there would never be finality because the Plaintiffs would continually bring lawsuits after every new flood event. Accordingly, the Trial

Court properly granted summary judgment to the Respondents based upon this second ground of *res judicata*.

III. The Settlement Agreement Executed in the 2000 Litigation Barred the Plaintiffs' 2016 Lawsuit Against the Respondents Because Under the Settlement Agreement, the Plaintiffs Released Claims for Future Damages Against the Respondents; Furthermore, the Plaintiffs Failed to Prove the Respondents Committed Any Tortious Acts After the Settlement of the 2000 Litigation Which Could Subject Them to Additional Liability.

The Trial Court further ruled that the Respondents were entitled to summary judgment because the terms of the Settlement Agreement executed on September 2, 2005 in the 2000 litigation barred the 2016 litigation against the Respondents. Pursuant to the Settlement Agreement, the Pattons and the Eaves, as well as two other property owners, as "Landowners," received a total of $470,000.00 to settle the claims brought in the 2000 litigation. Prestwick Land Limited Partnership and Jackson Companies contributed a total of $246,666.66 to this settlement amount. [R.pp. ___; Settlement Agreement.]

In exchange for the settlement payment, the Pattons and the Eaves, as well as their "heirs, executors, administrators, successors, and assigns," agreed to:

> remise, release, and forever mutually discharge the said Defendants, her/his or their heirs, executors or administrators or its successors as the case may be of and from all, and all manner of action and actions, cause and causes of actions, suits . . . trespass and trespasses, damage and damages, judgments . . . claim and claims, and demand and demands whatsoever both at law and in equity which the undersigned, ***ever had, now has, or*** which the undersigned [the Pattons and the Eaves], their heirs, executors, administrators, assigns or successors hereinafter ***can, shall, or may have***, for, upon or by reason of any matter, cause or thing whatever from the beginning of the world up to the day, hour, minutes of the execution of these presents, and with special reference to the following specifically stated matter or thing, to-wit:

> **ANY AND ALL CLAIMS** for property damage/inverse condemnation, nuisance, breach of easement/negligence/trespass arising out of or in connection with drainage from the drainage easement which abutted the property of the Landowners located at Prestwick Subdivision located in Horry County, South Carolina and any and all other claims arising out of or in connection with Civil Action Nos. 2000-CP-26-0765; . . . 2000-CP-0780; . . . filed with the Clerk of Court for Horry County, South Carolina.

[R.pp. ___; Id. at pp. 1-2 (italic emphasis added).]

The Settlement Agreement went on to further provide that in consideration of the payment of the Settlement Amount, the Landowners agreed to release:

> Defendants, their officers, directors, shareholders, owners, employees, servants, agents, insurers, executors, administrators and successors, ***from any and all claims and causes of action of any nature whatsoever, whether known or unknown,*** which Landowners ***now have, had or may have relating to the claims, demands, and allegations*** which were or could have been set forth and asserted in the above-referenced actions or which otherwise arise out of those matters described in the pleadings in the above-referenced actions.

[R.p. ___; Id. at p. 3. (emphasis added).]

Under South Carolina law, settlement agreements are viewed as contracts. Kinghorn v. Sakakini, 426 S.C. 147, 151, 825 S.E.2d 748, 749 (Ct. App. 2019). "The court's duty is to enforce the contract made by the parties regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully." Ellis v. Taylor, 316 S.C. 245, 248, 449 S.E.2d 487, 488 (1994). Interpretation of a contract "is governed by the objective manifestation of the parties' assent at the time the contract was made," rather than "the subjective, after the fact meaning one party assigns to it." Bannon v. Knauss, 282 S.C. 589, 593, 320 S.E.2d 470, 472 (Ct. App. 1984). In other words, the court must ascertain and give effect to the intention of the parties,

looking first to the language of the contract. Wallace v. Day, 390 S.C. 69, 74, 700 S.E.2d 446, 449 (Ct. App. 2010). "When the language of a contract is clear and unambiguous, the determination of the parties' intent is a question of law for the court." Id. "The court is without authority to consider parties' secret intentions, and therefore words cannot be read into a contract to impart an intent unexpressed when the contract was executed." Nichols Holding, LLC v. Divine Capital Group, LLC, 416 S.C. 327, 336, 785 S.E.2d 613, 617 (Ct. App. 2016) (internal citations omitted).

The language of the Settlement Agreement reflects the clear intent of the parties to foreclosure claims for future damages. The Pattons and the Eaves, as well as their heirs, executors, administrators, assigns or successors which would include the Webbs, agreed to release Prestwick Land Limited Partnership and Jackson Companies, as well as their successors, shareholders, and owners, from any claims which the Pattons and the Eaves "can, shall, or ***may have***" arising out of the 2000 litigation. [R.pp. ___; Settlement Agreement, pp. 1-3 (emphasis added).] The Pattons and the Eaves further released "all claims and causes of action of any nature whatsoever, whether known or unknown" which they "now have, had, or ***may have***" "which otherwise arise out of those matters described in the pleadings in the above-referenced actions [the 2000 litigation]." [R.p. ___; Id. at p. 3. (emphasis added).]

The 2000 litigation brought claims arising out of (1) the alleged failure of the Respondents to inform the Plaintiffs that the drainage easement would cause the properties to flood, (2) the Respondents' provision of Property Reports prior to purchase which indicated that the properties were not subject to flooding; and (3) the design of a drainage system which would not prevent flooding on the properties and channel water

away from the properties. [R.pp. ___; ___; 2000 Compls., ¶ 14.] The Complaints filed in the 2000 litigation also claimed that the Plaintiffs would suffer future flooding and would incur "***ongoing damages***," as well as diminution in value due to the inability to sell at a reasonable and fair market price. [R.pp. ___; ___; Id. at ¶ 49 (emphasis added).]

The express terms of the Settlement Agreement released the Respondents from any and all claims which the Plaintiffs ***may have had*** whether the claims were ***known or unknown*** arising out of the above-described allegations of the 2000 Complaints, including ***future damages.*** Under the Settlement Agreement, the Plaintiffs were prohibited from bringing a claim against the Respondents for any future flooding because the unambiguous intent of the Settlement Agreement from its explicit language was to release the Respondents from any and all claims arising out of their alleged nondisclosure of the flooding and the alleged failure to properly design a drainage system for the Prestwick Subdivision. Because the 2016 litigation raised these exact claims against the Respondents, it is barred under the terms of the Settlement Agreement.

As further proof that the Settlement Agreement intended to release future claims, the Settlement Agreement required the Pattons and the Eaves to disclose the flooding issues with the properties in a Residential Property Condition Disclosure Statement provided to future purchasers should they sell the properties. [R.pp. ___; Settlement Agreement, pp. 3-4.] This requirement indicates the intent to thwart claims for future flooding because any purchasers would be aware of the properties' flooding conditions.

The clear intent of the Settlement Agreement was to avoid further litigation, and the Respondents expressed this desire in the following clause:

> Each Defendant specifically denies liability to any and all Landowners and wishes merely to avoid the expense, inconvenience, and uncertainty of continued litigation and to resolve this matter by compromise and so that each Defendant may avoid any ***future claims and causes of action*** related to any ***future flooding*** of Landowners' property.

[R.pp. ___; Id. at p. 5 (emphasis added).] The deliberate intent of the Settlement Agreement, by ***directly referencing future flooding claims***, was to prohibit litigation with regard to future flooding. Accordingly, the Settlement Agreement bars the 2016 litigation.

The Plaintiffs contend that the language in the Settlement Agreement – that the Plaintiffs release claims and causes of action that they "can, shall, or may have, for, upon or by reason of any matter, cause or thing whatever from the beginning of the world up to the day, hour, minutes of the execution of these presents" – indicates an intent to only release claims up to the execution of the Settlement Agreement. [R.p. ___; Id. at pp. 1-2 (emphasis added).] The inclusion of the phrase – "whatever from the beginning of the world up to the day, hour, minutes of the execution of these presents" – is not, however, inconsistent with a release of future flooding claims.

The Plaintiffs contemplated future flooding and claims in the very language of their 2000 Complaints when they sought "ongoing damages" and pled that the properties would continually flood. [R.pp. ___; ___; 2000 Compls., ¶ 49.] At the time of the execution of the Settlement Agreement, the Plaintiffs were therefore certainly aware that they might have claims for future flooding. The terms of the Settlement Agreement releases claims the Plaintiffs "***may***" have had at the time of the Agreement's execution. The use of the word "***may***" in the Settlement Agreement is necessarily future-oriented and implies a future possibility of claims by the Plaintiffs.

The language of the Settlement Agreement executed by the Plaintiffs expressly indicates that the Plaintiffs, at the time the Agreement was executed, were releasing even those potentially unknown future flooding claims. [R.p. ____; Settlement Agreement, p. 5 (intent of agreement to "avoid any ***future claims and causes of action*** related to any ***future flooding***") (emphasis added).] It is immaterial that the future claims had not occurred yet at the time of the execution of the Settlement Agreement. The Plaintiffs negotiated a settlement payment of all the claims asserted in the 2000 Complaints, including their claims for future damages. When they signed the Settlement Agreement, the Plaintiffs knew of the potential for future claims at that time and released those claims.

Cornell Patton provided an affidavit that he never understood that the Settlement Agreement would cover future flooding events. His subjective, outside intent does not alter the express language of the Settlement Agreement. He had a duty to read the Settlement Agreement which explicitly released claims and causes of action that the Plaintiffs "***may have***," whether known or unknown, and openly provided that the intent of the Agreement was to avoid any "***future claims and causes of action*** related to any ***future flooding.***" See Regions Bank v. Schmauch, 354 S.C. 648, 663, 582 S.E.2d 432, 440 (Ct. App. 2003) ("A person signing a document is responsible for reading the document and making sure of its contents. Every contracting party owes a duty to the other party to the contract and to the public to learn the contents of a document before he signs it.").

Lastly, the Settlement Agreement bars the 2016 litigation because there were no other actions taken by the Respondents with respect to the stormwater management

system in the Prestwick Subdivision after the date of the settlement and dismissals of the 2000 Complaints, as was comprehensively discussed in the argument of this Brief regarding *res judicata*. See, supra, at pp. 24-27. Any and all involvement with the drainage system by the Respondents occurred prior to the settlement; therefore, the Settlement Agreement encompassed all actions for which the Respondents could have been liable. [R.p. ___; Wade Aff., ¶ 15.] There is no new liability of the Respondents not covered by the Settlement Agreement for which the Plaintiffs could sue in 2016.

Accordingly, because the Settlement Agreement included claims for future flooding and damages and because the Respondents did not take any actions with respect to the drainage system in the Prestwick Subdivision after the execution of the Settlement Agreement and dismissals of the 2000 Complaints, the Trial Court properly ruled that the Settlement Agreement barred the 2016 litigation by the Plaintiffs against the Respondents.

IV. The Trial Court Properly Granted Summary Judgment Because the Plaintiffs Had a Full and Fair Opportunity to Conduct Discovery.

The Plaintiffs further contend on appeal that the Trial Court erred in granting summary judgment because discovery was not complete. The Record, however, establishes that the Plaintiffs had more than ample time to conduct discovery. Furthermore, additional discovery would not have contributed to the resolution of the issues at hand.

The rulings of a trial judge in matters involving discovery will not be disturbed on appeal absent a clear showing of an abuse of discretion. An abuse of discretion occurs when the trial judge's ruling is based upon an error of law or, when based on factual

conclusions, is without evidentiary support. Bayle v. South Carolina Dep't of Transp., 344 S.C. 115, 128, 542 S.E.2d 736, 742 (Ct. App. 2001).

The Plaintiffs assert that the submission of their counsel's affidavit on February 26, 2019 advising the Trial Court of the need for further discovery mandated the Trial Court to deny summary judgment to the Respondents. Rule 56(f), SCRCP, allows, *but does not require*, the circuit court to grant a continuance or deny summary judgment:

> Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court ***may*** refuse the application for judgment or ***may*** order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or ***may*** make such order as is just.

(emphasis added). Therefore, it is within the circuit court's discretion to grant relief based on counsel's affidavit. Cf. Kingdomware Techs., Inc. v. United States, 136 S. Ct. 1969, 1977 (2016) (discussing statutory construction and stating that the word "may" implies discretion).

Further, "[a] party claiming summary judgment is premature because they have not been provided a full and fair opportunity to conduct discovery must advance a good reason why the time was insufficient under the facts of the case . . . ." Guinan v. Tenet Healthsystems of Hilton Head, Inc., 383 S.C. 48, 54, 677 S.E.2d 32, 36 (Ct. App. 2009). Moreover, "the nonmoving party must demonstrate the likelihood that further discovery will uncover additional relevant evidence and that the party is 'not merely engaged in a "fishing expedition." ' " Dawkins v. Fields, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003) (quoting Baughman v. Am. Tel. and Tel. Co., 306 S.C. 101, 112, 410 S.E.2d 537, 544 (1991)).

This action was filed on October 4, 2016. [R.pp. ___; Compl.] The Amended Complaint was thereafter filed on September 26, 2017. [R.pp. ___; Am. Compl.] A little over a year and a half after the action was first filed, the Respondents filed a Motion for Summary Judgment on April 6, 2018 with the affidavit of Dennis Wade, the President/CEO of Prestwick Land Limited Partnership before it was dissolved. [R.pp. ___; April 2018 Mtn. and Memo. for Summary Judgment with Exs.]

The Respondents thereafter withdrew this Motion for Summary Judgment for the specific purpose of giving the Plaintiffs, at their request, additional time to conduct discovery. [R.pp. ___; ___; Feb. Hearing Tr., p. 5, ll. 14-21; May Hearing Tr., p. 14, l. 18-24.]

After additional discovery was conducted by the parties, the Respondents filed another Motion for Summary Judgment on October 24, 2018. [R.pp. ___; ___; Oct. 2018 Mtn. and Memo. for Summary Judgment with Exs.; Feb. Hearing Tr., p. 5, ll. 20-23.] The hearing on the Motion for Summary Judgment occurred on February 27, 2019. [R.pp. ___; Feb. Hearing Tr.]

A day before the hearing, the Plaintiffs' counsel filed an affidavit averring that Plaintiffs had not been provided a full opportunity to conduct discovery, including completing the deposition of the Plaintiffs' own expert witness. [R.pp. ___; Aff.]

The deposition of the Plaintiffs' expert, Robert K. Taylor, occurred on November 19, 2018. [R.p. ___; Taylor Dep., p. 1.] The Respondents' counsel fully questioned Mr. Taylor on his opinions as to whether the Respondents had any involvement with the drainage system of the Prestwick Subdivision since the 2005 settlement of the first litigation regarding flooding. Mr. Taylor conceded he had no evidence that the

Respondents had any involvement with the drainage system after the 2005 settlement. [R.pp. ___; ___; ___; ___; Taylor Dep., pp. 7, ll. 21-22; 123, l. 14 – 127, l. 15; 131, l. 6 – 137, l. 23; Feb. Hearing Tr., pp. 6, l. 3 – 7, l. 7, l. 14.]

The Plaintiffs argued before the Trial Court that they had not had the opportunity to complete their own expert's deposition and had not been able to take the depositions of the Respondents. [R.pp. ___; ___; Feb. Hearing Tr., pp. 21, l. 24 – 22, 1. 16; 32, ll. 23-25.] The Trial Court disagreed and found that the Plaintiffs had approximately two and a half years to take the depositions of the Respondents and ten months to do so after the first Motion for Summary Judgment was filed. [R.p. ___; Feb. Hearing Tr., p. 33, ll. 1 – 9.] The Trial Court also determined that the Respondents had not taken any action to prevent the Plaintiffs from taking any deposition of the Respondents. [R.p. ___; Id. at p. 33, ll. 10 – 25.]

As to the Plaintiffs' complaint that they had not been able to complete the deposition of their own expert, Robert Taylor, the Trial Court observed that the Plaintiffs could have provided an affidavit of their own expert to refute the assertions in the Motion for Summary Judgment; cross-examination of the Plaintiffs' own expert by the Plaintiffs was not a necessity to refute the arguments in the Respondents' Motion for Summary Judgment. [R.pp. ___; ___; May Hearing Tr., pp. 7, l. 9 – 10, l. 18; 20, ll. 22-24.] In addition, there was no agreement on record by all parties that Mr. Taylor's deposition would be continued for the Plaintiffs' cross-examination. [R.pp. ___; Taylor Dep., pp. 213, l. 19 – 214, l. 22.]

The Plaintiffs had a full opportunity to conduct discovery in this case which was not hindered by the Respondents. They were given notice of the Respondents' Motion

for Summary Judgment in April 2018 which was then withdrawn for the sole purpose of granting the Plaintiffs additional time to conduct discovery. The second Motion for Summary Judgment was not filed until October 2018, and the hearing was not scheduled until February 27, 2019, almost ten months after the filing of the first motion. The case had also been pending for over two years by the time the Trial Court heard the Motion for Summary Judgment. That the Plaintiffs had not noticed and taken depositions of witnesses whose testimony they deemed critical was no one's fault but their own. The Plaintiffs' dilatory conduct in deposing whom they deemed as necessary witnesses does not require reversal of the Trial Court's grant of summary judgment.[4]

Furthermore, the Plaintiffs cannot show that the completion of their own expert's deposition would be beneficial to their case. Mr. Taylor already testified that he had no evidence that the Respondents had any involvement with the drainage system at the Prestwick Subdivision after the 2005 settlement and also had no opinion on whether the storm management system plans or the as-built condition failed to meet the minimum requirements of the South Carolina Storm Water Management Act. Mr. Taylor identified no violation of any law, statute, or regulation. As the Trial Court pointed out, if Mr.

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[4] The Plaintiffs cite the case of Schmidt v. Courtney, 357 S.C. 310, 592 S.E.2d 326 (Ct. App. 2003) for the proposition that the Trial Court erred in not allowing expert testimony to be developed prior to the grant of summary judgment. The Schmidt case, involving the liability of a golf course for injuries received by someone working adjacent to the golf course when hit by an errant golf ball, presented a novel issue under South Carolina law, and the plaintiff, after diligently searching, was only able to locate an expert in golf course design shortly before the motion for summary judgment hearing and had not had ample time for the expert to complete his investigation, particularly where discovery responses had not been received from the opposing party. The Court of Appeals determined that additional discovery, in the form of an expert opinion, was needed prior to the grant of summary judgment. To the contrary, in this case, the Plaintiffs had long retained their expert, Robert Taylor, who had also served as the expert in the 2000 litigation. [R.pp. ___; Taylor Dep., pp. 122, l. 25 – 123, l. 6.] The Plaintiffs had ample time for their expert to formulate his opinion. There were no unique circumstances present as in the Schmidt case.

Taylor had an opinion that the Respondents had been involved with the drainage system after 2005 or that the Respondents had been grossly negligent with their involvement, the Plaintiffs could have obtained and produced his affidavit in opposition to the Motion for Summary Judgment which the Plaintiffs chose not to do. Instead, the Plaintiffs wanted to rely on the hope that their expert's opinions may have changed when he was deposed at a later time. The Plaintiffs' ability to sustain their claims should not hinge upon speculative deposition evidence. As such, summary judgment was warranted to avoid prolonging litigation based upon a mere possibility that the Plaintiffs might obtain some helpful information from a deposition.

The Record in this case therefore does not demonstrate further discovery would have contributed to the resolution of the issues at hand. See Bayle, 344 S.C. at 128-29, 542 S.E.2d at 743 (holding additional discovery would have had no bearing on whether the action was barred by the statute of limitations and thus the grant of summary judgment was proper); see also Thomas v. Waters, 315 S.C. 524, 445 S.E.2d 659 (Ct. App. 1994) (affirming grant of summary judgment when plaintiff did not demonstrate likelihood that further discovery would produce additional relevant evidence). Accordingly, the Trial Court did not abuse its discretion in denying the Plaintiffs additional discovery and granting summary judgment to the Respondents.

V. The Trial Court's Grant of Summary Judgment to the Respondents Is Not Reversible Because of Alleged *Dicta* in the Order Granting Summary Judgment.

The Plaintiffs include a final argument in their appeal, contending the Trial Court erred in finding that a landowner's liability ends when it relinquishes control of the

property. The Plaintiffs admit, however, that that any purported ruling by the Trial Court on this issue is only *dicta* and has no effect on the outcome of the case.

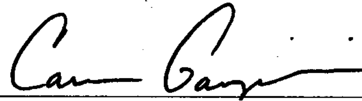
In fact, the Trial Court never made this ruling but rather only recognized that the Plaintiffs had argued that a landowner's liability for the condition of its property extends indefinitely, even after it relinquishes control of the property. The Trial Court found the Plaintiffs had presented no law to support this argument but otherwise made no categorical ruling on this point. [R.p. ___; Order, p. 7.]

Furthermore, whether such an alleged statement of the law is true or not is irrelevant in this appeal. The Trial Court's grant of summary judgment to the Respondents was not based upon this principle of law, but rather on its findings that the time period had expired for the Plaintiffs to bring the 2016 lawsuit and that the Respondents had already discharged and fully settled their liability under the doctrine of *res judicata* and under the release provisions of the Settlement Agreement. Therefore, whether the Trial Court expressed any opinion on this legal principle or not does not determine the outcome of this appeal and should not be considered by this Court.

CONCLUSION

For the reasons set forth herein, the Respondents, Prestwick Land Limited Partnership, Jackson Companies, and Campgrounds, Inc., respectfully request this Court to affirm the Trial Court's Order granting summary judgment.

Respectfully submitted,



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February 13, 2020.

CERTIFICATE OF SERVICE

I, the undersigned, attorney for Respondents, Prestwick Land Limited Partnership, Jackson Companies, and Campgrounds, Inc., do hereby certify that I have this date served the foregoing Initial Respondents' Brief, dated February 13, 2020, by causing the same to be deposited in a United States Postal Service mailbox, postage prepaid, addressed to counsel of record as indicated below:

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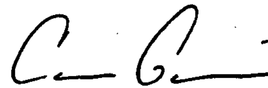

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Dated: February 13, 2020.

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February 13, 2020

The Honorable Jenny Abbott Kitchings
Clerk of Court, S.C. Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: ***Cornell Patton et al. v. Prestwick Land Limited Partnership et al.***
Appellate Case No. 2019-000964
RPR File No.: 8930-001

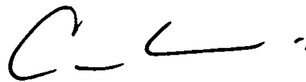
Dear Ms. Kitchings:

Enclosed for filing are the original Initial Respondents' Brief of Prestwick Land Limited Partnership, Jackson Companies, and Campgrounds, Inc. and the Respondents' Designation of Matter to be Included in the Record on Appeal in the above referenced matter, along with our original Certificates of Service.

By copy of this letter, we are this day serving a copy of our Initial Brief and Designations on opposing counsel.

Should you have any questions regarding this matter, please do not hesitate to call.

Sincerely,



Carmen V. Ganjehsani

Encs.
cc: Gene McCain Connell, Jr.
Douglas C. Baxter (FYI)