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

CASE NO. 2016-CP-26-06495

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

vs.

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 Association, Inc., Defendants

OF WHICH:
Prestwick Land Limited Partnership, Jackson Companies and
Campgrounds, Inc. are ..... Respondents

City of Myrtle Beach, Third-Party Plaintiff,

vs.

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

FINAL BRIEF OF APPELLANTS

Gene M. Connell, Jr. (S.C. Bar No. 1358)
KELAHER, CONNELL & CONNOR, P.C.
The Courtyard, Suite 209
1500 U. S. Highway 17 North
Post Office Drawer 14547
Surfside Beach, South Carolina 29587-4547
(843) 238-5648 (phone)
(843) 238-5050 (facsimile)
gconnell@classactlaw.net
Attorney for Appellants

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STATEMENT OF THE CASE

The Appellants, Cornell Patton, Mellissa Patton, Chad Webb and Amy Webb, live on Strathmill Court in the Prestwick Subdivision in Myrtle Beach, South Carolina. The Pattons and the Webbs own homes on Strathmill Court. The Eaves and Pattons jointly own a lot in between the Webb's and the Patton's homes. This lot is currently used for floodwater run off and to protect the Patton and Webb homes from floodwaters.

The homes are in the Prestwick Subdivision and both the Webb's home and the Patton's home were built in the early 1990s. The homes border a canal and/or ditch which drains from the old Myrtle Beach Air Force Base and comes by the Appellants' property and then turns and goes underneath Highway 17 Business into Pirateland Campground wherein it empties into the Atlantic Ocean. At the time of the purchase of the property the Plaintiff Patton and the predecessor in interest to Webb were provided a Property Report from Prestwick Land Limited Partnership which stated:

> None of the lots or any portion of any lot are covered by water at any time of the year. (R. p. 617).

The Property Report further stated:

None of the land in the subdivision will require drainage. (R. p. 617).

It also stated:

> None of the lots in this Property Report are located within a flood plain or an area designated by any Federal, State or local agency as being flood prone. Flood insurance is available from independent insurance companies. Flood insurance is not required in connection with the financing of any improvements to the lots. The cost of a flood insurance varies according to a company and location of the lots. (Plaintiffs' Exhibit 1 (R. p. 617).

Consistent with these promises the Appellants sought to build expensive "dream homes" on the property in this exclusive gated community located south of Myrtle Beach.

In 1999 the Appellants suffered the first of a series of catastrophic floodings. Appellants homes were flooded and a lawsuit was commenced against Prestwick Land Limited Partnership, the Jackson Companies, the City of Myrtle Beach, Pirateland Campground, Horry County and the South Carolina Department of Transportation. After that lawsuit was settled, Appellants did not experience catastrophic flooding again until 2015 and 2016 after additional rapid development of land near their homes.

This lawsuit was filed after the 2015 and 2016 floods against Prestwick Land Limited Partnership, Jackson Companies, City of Myrtle Beach, South Carolina Department of Transportation, Horry County, Myrtle Beach Redevelopment Authority, Nelson L. Hardwick & Associates, the Homeowners of Ocean Walk Property Owners Association, Campgrounds, Inc. and Prestwick Property Owners Association, Inc. (Additional parties were added to this lawsuit because they developed adjacent property and all Defendants' actions combined to injure the Appellants.)

During the course of this litigation it was learned by Appellants that Horry County and Horry County Stormwater Department had commissioned a drainage study from Thomas & Hutton

on August 6, 2013 and had obtained written easements for the ditch/canal from the United States Air Force. (Plaintiffs' Exhibit 1; R. p. 709). This drainage study focused on the collection system draining through Appellants' property on Strathmill Court. Phase II of the report recommended multiple monetary alternatives to stop the flooding in Appellants' property and on certain businesses located on U.S. Highway 17 downstream from Appellants' property.

The engineers, Thomas & Hutton, in the study recommended a series of possible repairs to the system in their extensive report (Plaintiffs' Exhibit 1; R. p. 709). The Thomas & Hutton report stated:

> It is recommended that the County pursue the implementation of Alternative 1A as a long-term solution to structural flooding in the watershed and possibly implement Alternative 4A as an interim, partial solution to flooding the watershed. (R. p. 713).
>
> Alternative 1A was the installation of a 5x10 box underneath U.S. Highway 17 parallel to the existing box. (R. p. 712).
>
> Alternative 4A was the modification of Crystal Lake upstream from the Appellants' property. (R. p. 712).
>
> The cost of Alternative 1A according to the Thomas & Hutton report was $815,000.00. (R. p. 763). The cost of Alternative 4A was $95,000.00. (R. p. 763).

Neither of these alternatives were implemented despite the fact that the Thomas & Hutton survey report had been delivered to the County on August 6, 2013 and the prior report regarding a drainage system analysis of the area in question had been delivered to the County on May 3, 2012. (R. p. 709). Three years later Appellants suffered additional floods.

After hearing oral argument, Prestwick Land Limited Partnership, Jackson Companies and Campgrounds, Inc., the original developers, were granted summary judgment (on all causes of action) by the trial court in an Order dated April 1, 2019. Appellants filed a Motion for

Reconsideration which was denied by a Form 4 Order dated May 29, 2019. This appeal was timely filed.

STANDARD OF REVIEW

The trial court granted summary judgement to Prestwick Land Limited Partnership, Jackson Companies and Campgrounds Inc. pursuant SCRCP 56. It is well settled in South Carolina summary judgment is never appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law *USAA Property & Casualty Ins. Co. v. Clegg,* 377 S.C. 643, 661 S.E.2d 791 (S.C. 2008). Summary judgment is a drastic remedy and must not be granted until the opposing party has had a full and fair opportunity to complete discovery. *Cunningham v. Anderson County*, 402 S.C. 434, 741 S.E.2d 545, rehearing denied, affirmed in part, reversed in part, 414 S.C. 798, 778 S.E.2d 884 (2013).

This Court applies the same standard as the trial court and there must be no genuine issue of material fact such that the moving party must prevail as a matter of law. *Savannah Bank, NA v. Stalliard,* 400 S.C. 246, 734 S.E.2d 161 (S.C. 2012). Finally, in determining whether any triable issues of fact exist, this court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party. *Gignilliat v. Gignilliat, Savitz & Bettis*, 385 S.C. 452, 684 S.E.2d 756 (S.C. 2009); *Fleming v. Rose*, 350 S.C. 488, 567 S.E.2d 857 (2002).

In sum, if there is a scintilla of evidence summary judgment should not be granted and this court must review all ambiguities, conclusions and inferences arising in and from the evidence in the light most favorable to the non-moving party. *Hurst v. East Coast Hockey League, Inc.*, 371

S.C. 33, 637 S.E.2d 560 (S.C. 2006). Appellants assert error in failing to apply this standard to the case.

ARGUMENT

I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO PRESTWICK LAND LIMITED PARTNERSHIP, JACKSON COMPANIES AND CAMPGROUNDS INC. WHEN DISCOVERY HAD NOT BEEN COMPLETE.

During the course of oral argument, Appellants' counsel advised the court that discovery was not complete. (Trans. 2/27/19, pp. 4-5; R. pp. 487-488). Appellants' counsel filed an affidavit dated February 26, 2019 advising the trial court of that fact. In the affidavit, Appellants' counsel stated:

> The Defendants jointly have taken multiple depositions, including a partial deposition of the Plaintiffs' expert and the four Plaintiffs.[1] These depositions took place over five days. The Plaintiffs have not yet had an opportunity to take any depositions and desire to take the deposition of Dennis Wade who prepared the Affidavit in this case.
>
> Discovery is still ongoing and Plaintiffs have not been provided a full opportunity to conduct discovery in regard to Defendant Prestwick Land Limited Partnership and Campgrounds, Inc. It is crucial that Plaintiffs be allowed to conduct this discovery before the Court considers these Defendants' Motion for Summary Judgment.

Appellants' counsel also advised the Court that there were multiple factual issues including the following factual issues:

> Has Prestwick Land Limited Partnership taken any action to repair the drainage system?
>
> Has Prestwick Land Limited Partnership or Campgrounds, Inc. agreed to make any payments to the Prestwick Homeowners Association for drainage defects?
>
> Has Campgrounds, Inc. or Prestwick Land Limited Partnership been involved in any ongoing repairs?

[1] Plaintiffs' expert's deposition was taken for a full day and not completed due to the number of parties. The court reporter prepared a "rough deposition" because it was not completed and several parties (including Appellants) had not been able to examine the witness. It is in the record and is unsigned because the parties contemplated additional days of testimony from the witness. (R. p. 203).

Has any of Prestwick Land Limited Partnership's or Campgrounds, Inc.'s employees performed any work on the drainage system?

What do the documents reveal between Prestwick Land Limited Partnership as to how the property was transferred to the Homeowners Association?

The parties had also taken a partial deposition of Appellants' expert, Robert Taylor. However, due to the number of parties (10), the deposition of Taylor had not been completed at the time the motion for summary judgment was heard. (R. p. 203)

Taylor, a former professor at the University of South Carolina who holds a bachelor's degree and master's degree in civil engineering, had offered the opinion that each of the Defendant's actions caused, combined and contributed to the flooding and that it was not just one Defendant but each was a contributor to the flooding events on the Appellants' property. When asked during the partial deposition to summarize his findings, Taylor provided a summary of each Defendant's responsibility for the flooding as follows:

- The property was presented as non-flooding and that building houses on it was permissible. (R. p. 230, lines 1-25). (Prestwick Land Limited Partnership and Campground Inc.'s responsibility).
- A conduit under U.S. Highway 17 caused floodwaters to backup into Appellants' homes. (R. p. 230, lines 1-25). (SCDOT and Horry County).
- The internal planning of the Prestwick development was defective. (R. p. 230, lines 1-25). (Prestwick Land Limited Partnership and Campgrounds Inc.).
- The lack of follow-up plans in handling water runoff. (R. p. 230, lines 1-25; p. 231, lines 1-3). (Prestwick Land Limited Partnership. Prestwick Homeowners Association Campgrounds Inc., Jackson Companies, City of Myrtle Beach, SCDOT, Horry County,

Myrtle Beach AFB Redevelopment Authority, Nelson L. Hardwick & Associates, Homeowners of Ocean Walk Property Owners Assoc. and Prestwick Property Owners Assoc.).

- The design and maintenance of the channel. (R. p. 230, lines 1-25). (Horry County and Prestwick Land Limited Partnership, Campgrounds, Inc.).
- The runoff on the golf course contributed to the flooding of Appellants' homes. (R. p. 230, lines 1-25). (Prestwick Land Limited Partnership and Prestwick Homeowners Association).
- The design of Crystal Lake and no flood control contributed to the flooding. (R. p. 230, lines 1-25). (Prestwick Land Limited Partnership).
- The building across the canal and rerouting the canal contributed to the flooding. (R. p. 230, lines 1-25). (Bermuda Gardens Homeowners Association d/b/a Homeowners of Ocean Walk Property Owners Association).

Taylor further went on to observe that there was a significant problem with flooding of the Appellants' houses in Prestwick (R. p. 241, lines 14-16) and that the houses should never have been built (R. p. 241, lines 17-25); also, swales had not been built as per the drainage plans (R. p. 244., lines 20-25); and that it was going to flood again (R. p. 245, lines 10-15)

Taylor also testified that everything causes the flooding (R. p. 250, lines 16-25; p. 251, lines 1-10); that there was a lack of maintenance (R. p. 252, lines 1-25); that the plans were inadequate (R. p. 256, lines 5-11); the plans had no berm, that a well-built berm was needed and that a pumping station was also appropriate (R. p. 256, lines 1-25). See also Exhibit 6 to Taylor's Deposition. "Flooding concerns have been voiced by many of the businesses and residents in the Lakewood-Pirateland Swash Basin." (R. p. 460).

After being deposed for almost a whole day, the parties agreed to suspend the deposition because each of the parties had not had a full and fair opportunity to cross-examine Taylor, nor had Appellants' counsel been able to offer any redirect testimony. In fact, the parties asked for a rough draft of the deposition since it had not been completed. (R. p. 416, lines 20-25; p. 417, lines 1-25).

Appellants raised this issue at the summary judgment hearing and the trial judge noted: "I'll go ahead and hear it, but if you're saying discovery is ongoing then that's something I'll have to take into consideration." (Trans. of Hearing 2/27/19, p. 5, R. p. 488, lines 1-14). [2]

Despite Appellants' objections, the trial judge granted summary judgment and never addressed this issue. Plaintiff again thereafter filed a motion for reconsideration asking the court to rule on the issue of whether or not the summary judgment motion should have been heard when there was pending discovery including an unfinished expert deposition. The trial court refused to address this issue but executed a Form 4 Order denying Appellants' motion for reconsideration. (R. p. 9). The first ground in Appellants' motion for reconsideration was that the trial court erred in hearing the motion for summary judgment when discovery had not been completed. Appellants assert error by the trial court, first in not addressing it, and second, based on South Carolina case law, which holds Appellants are entitled to the requested discovery.

It is well settled in South Carolina that summary judgment is a drastic remedy and must not be granted until the opposing party has had a full and fair opportunity to complete discovery. In this case, a complex construction matter, the Appellants had provided a good reason, i.e., Dr. Taylor's deposition had not been finished and that Appellants needed an additional deposition testimony from Campground Inc.'s Chief Executive Officer. Further, Appellants' counsel's affidavit provided

[2] The Judge's understanding of the law was erroneous—if discovery is ongoing, summary judgment is not appropriate.

a litany of reasons why additional discovery was necessary and was not merely a fishing expedition. (Affidavit of Gene Connell, R. pp. 158-160).

In sum, Appellants respectfully submit that they did not have a full and fair opportunity to complete discovery, that Appellants were not dilatory in pursing discovery, that numerous depositions had been scheduled and that this was a complex construction case. See *Doe, Ex. Rel. Doe v. Batson*, 345 S.C. 316, 548 S.E.2d 854 (S.C. 2001) (Court reverses summary judgment because plaintiff did not have full and fair opportunity to complete discovery); *BPS Inc. v. Worthy*, 362 S.C. 319, 609 S.E.2d 155 (S.C.App. 2005) (Plaintiff entitled to additional discovery before trial court granted summary judgment to defendant); *Dawkins v. Fields*, 354 S.C. 58, 580 S.E.2d 433, rehearing denied (S.C. 2003) (Summary judgment is drastic remedy and must not be granted until opposing party has a full and fair opportunity to complete discovery). See *Baughman v. American Tel. & Tel. Co.*, 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991) (summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery); see also, SCRCP 56(f); See also *Schmidt v. Courtney and Kemper Sports of Crowfield,* 357 S.C. 310, 592 S.E.2d 326 (2003) ("We find it extremely troubling this case was resolved on a summary judgment basis... trial court did not allow expert testimony to be developed and granted summary judgment which was error.")

In summary, Appellants request this Court reverse the grant of summary judgment because of the outstanding discovery issues and the requirement that Appellants be allowed to complete discovery especially in a case such as this in which Appellants were subject to repetitive and dramatic flooding due to the combined actions of the Defendants. Appellants suggest the other grounds in this brief need not be addressed if this Court agrees that Appellants were entitled to full discovery.

II. THE TRIAL COURT ERRED IN HOLDING THAT A PRIOR SETTLEMENT AGREEMENT RELEASED FUTURE FLOODING CLAIMS.

When the first flood was settled in 2005, the parties entered into a Settlement Agreement and Release. The Settlement Agreement and Release stated as follows:

> CORNELL PATTON, MELISSA PATTON, SCOTT WERTER, CHARISE WERTER, PHIL EAVES, ELIZABETH EAVES, SCOTT PLYLER AND MICHELLE PLYLER their heirs, executors, administrators, assigns or successors hereinafter can, shall, or may have, for, upon or by reason of any matter, cause or ting 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-26-0775; 2000-CP-26-0780; 2001-CP-26-2540 filed with the Clerk of Court for Horry County, South Carolina.

It is notable that the Release did not address future damages for future flooding events but claims only up to the execution of the Release. In fact, Appellant Cornell Patton, in an affidavit filed in the trial court dated October 10, 2018 stated that this was the second lawsuit he had filed regarding flooding. He further stated in his affidavit:

> When I signed the Settlement Agreement and Release dated September 2, 2005, it was never my intention that it would cover future storm events. In fact, the only release I signed was a release up to the date of the execution of that Release. I refer the Court to page 2 of the Release which states "whatever from the beginning of the world up to the day, hour, minutes of the execution of these presents . . . ." I understood this language to mean that a release that I signed was only for that particular flood event and for other flood events prior to that date. Since that time, I have had a new flood event and new rain events, all of which have damaged my property. It was never my intention, belief or understanding that the Release which has been presented in this case would bar me from further lawsuits over future flooding. In fact, discussions were held on this very topic and I understood when I signed the Release that it would in no way prohibit me from bringing another claim should I have another flood event.

(Affidavit of Patton, October 10, 2018; R. pp. 161-164)

Despite this affidavit and the language in the Release, the trial court found the language of the Release to be "clear and unambiguous and a question of law for the Court." (R. p. 6). It is well settled in South Carolina that settlement agreements are contracts and that a breach of contract is a jury issue not a judge decision. In this case, the Settlement Agreement was silent as to future flooding events and Cornell Patton's affidavit clearly addresses his belief that the Release would not bar future flood events.

South Carolina courts have always held that if the terms of a settlement are ambiguous, the meaning of the agreement is then to be a question of fact, generally for the jury to decide. *See Town of Winnsboro v. Wiedemann-Singleton Inc.*, 398 S.E.2d 500 (Ct.App. 1990). Further, general contract principals are applied in the construction of a settlement agreement because a settlement agreement is a contract. *Pee Dee Stores v. Doyle*, 672 S.E.2d 799 (S.C.Ct.App. 2009); see also *Fisher v. Stevens*, 355 S.C. 290, 584 S.E.2d 149 (Ct. App. 2003) (future release executed for wrecker crew at Speedway of South Carolina not enforceable—must clearly inform party was waiving all claims) (an exculpatory contract is unenforceable as a matter of law if it is ambiguous and uncertain); *McCune v. Myrtle Beach Indoor Shooting Range*, 364 S.C. 242, 612 S.E.2d 462 (2005) (release must be unambiguous and not overbroad to be effective) (McCune in deposition described the release as a standard waiver).

Finally, settlement agreements are like other written agreements and the terms are to be given their ordinary and popular meaning. In this case the Settlement Agreement does not reference future flooding claims and accordingly, the trial court was in error in holding that the Settlement Agreement and Release was unambiguous, thus, this Court should reverse the grant of summary judgment on this ground.

III. THE TRIAL COURT ERRED IN FINDING THAT THE STATUTE OF REPOSE (S.C. CODE ANN. § 15-3-640) PROHIBITED THIS ACTION.

South Carolina had a Statute of Repose (S.C. Code Ann. § 15-3-640) when this project was built which provided that an action may not be brought more than thirteen years after substantial completion of the improvement. In this case, Prestwick offered the affidavit of Dennis Wade on October 24, 2018. In the affidavit Wade stated:

> Through a series of quit claim deeds, all the roads, common areas, open areas and easements for the Prestwick Subdivision were conveyed to Prestwick Property Owners Association Inc.
>
> By supplemental declaration of covenants and restrictions for Prestwick Subdivision dated May 28, 2013 Prestwick Land Limited Partnership relinquished control of the architectural review board for Prestwick Subdivision to the Prestwick Property Owners Association.

Curiously, the affidavit does not state when the quit claim deed conveying the stormwater management system were deeded over to the Prestwick Property Owners Association. Further, it is undisputed from Wade's affidavit that Prestwick did not relinquish control of the architectural review board until May 28, 2013,[3] thus maintaining control over what could be built in the subdivision. S.C. Code Ann. §§ 15-3-640 through 15-3-670 are applicable to this action. More importantly, S.C. Code Ann. § 15-3-670(a) provides as follows:

> The limitation provided by § 15-3-640 through 15-3-660 may not be asserted by a person in actual possession or control, as an owner, tenant or otherwise...the limitations provided by § 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.

In this case, Robert Taylor, Appellants' expert, in his partial rough deposition, which was not completed, offered the following salient testimony:

[3] This case was brought in 2016 well within the Statute of Repose.

- The plans were deficient and the Defendant (Prestwick) knew the houses would flood. (R. p. 313, lines 21-25);
- The plans did not meet stormwater retention regulations. (R. p. 316, lines 9-15);
- The stormwater retention system was not built per the plans. (R. p. 257, lines 10-15);
- The plans were inadequate (R. p. 256, lines 5-11);
- The plans had no berm or pumping station. (R. p. 256, lines 1-25);
- The plans had swales which are required; however, no swales were built (R. p. 257, lines 20-25; R. p. 258, lines 1-3);
- There was mismanagement of the water in Prestwick. (R. p. 266, lines 16-25);
- Prestwick did not follow the plans. (R. p. 308, lines 23-25);
- It appears Prestwick made changes to the drainage system in 2006 (R. p. 334, lines 15-25).

Appellants submit that this testimony by Appellants' expert clearly shows that there is no available defense under S.C. Code Ann. § 15-3-640 because Prestwick was involved in the design, plans, specifications and supervision of the stormwater retention system (as well as being the owner or in control until 2013).

Further, the court was without evidence to consider when the stormwater system was turned over to the Homeowners Association since the affidavit of Dennis Wade is deficient in describing dates and times those deeds were actually entered into the record. It should also be noted that the Court's observation that Prestwick completed stormwater management system on October 2, 1998 is of no consequence. This is because clearly Prestwick continued to be an owner of the stormwater system (and in control until 2013). Further, under S.C. Code Ann. § 15-3-670 this could not be asserted as a defense since Prestwick owned and controlled the storm water system. Simply because

the stormwater system was completed does not release the controlling agent/owner of responsibility for a claim.

Accordingly, the trial court's ruling that S.C. Code Ann. § 15-3-640 prohibited Appellants from proceeding was erroneous as a matter of law.

IV. THE TRIAL COURT ERRED IN HOLDING THAT THE PRIOR LITIGATION WAS *RES JUDICATA.*

The trial court in its Order cited the doctrine of *res judicata* for the principal that litigation which had been previously litigated could not be litigated again. The trial court noted:

> 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. (R. p. 5).

The Appellants assert that *res judicata* is not applicable to the facts of this case. Here, the parties are different since the Appellants named ten defendants,. Also, the subject matter is similar but not identical to the previous case. This case involves an entirely separate incident with a separate date of loss with multiple defendants. The facts in this case are that the Appellants were flooded in 2015 and 2016 and that Defendant Prestwick Land Limited Partnership's and other Defendants' actions also combined and concurred to cause the flooding.

The trial court erroneously held that this action could not be brought under the doctrine of *res judicata*. *Res judicata* simply means a final judgment on the merits in a prior action will preclude the parties and their privies in a second action on the same claim as to issues actually litigated and as to issues which might have been litigated in the first action. See *Beal v. Doe*, 281 S.C. 363, 315 S.E.2d 186 (Ct. App. 1984).

In this case, and in the prior 2000 case no issues were actually determined by a court. The case was settled. (A Stipulation of Dismissal was filed 9/26/2005.) (R. p. 199). Further, the Release

clearly provides that future damages and future damages claims were not considered to be part of the prior action. More importantly, there must be an adjudication on the merits which never occurred in the first action. An order dismissing the case because of a settlement is not a prior adjudication. In sum, in order to have *res judicata* there must have been an order of a court determining an identical issue in the prior case. See *Nelson v. QHG of South Carolina*, 354 S.C. 290, 580 S.E.2d 171 (S.C. App. 2003). (Circuit court order for failure to comply with the court's extension of time to present expert witnesses was substantive and an adjudication on the merits).

The trial court cited *Nunnery v. Brantley Construction*, 345 S.E.2d 740 (Ct.App. 1986) for the proposition that this lawsuit should be dismissed. In fact, this case involves a different flooding event with multiple defendants filed almost sixteen years after the first flood of 1999. The case at bar is an entirely new event with different defendants, additional legal theories, a different date of injury and new damages to the property. In *Nunnery*, the pivotal question was whether the subject matter of the arbitration proceeding and of Brantley's prior counterclaim embraced the same cause of action. In this case, there had been no prior adjudication and Appellants' rights to future claims were specifically reserved as per the Settlement Agreement and Release. (See also Patton Affidavit, R. p. 161). Further, and more importantly, the Appellants had repaired their houses after the 1999 flood and now have endured an entirely different flood injury from the 2015-2016 floods. Unlike *Nunnery*, Appellants' damages are different and do not involve the same incident or parties.

The trial court also cites *Nunnery v. Brantley Construction*, 345 S.E.2d 740 (Ct.App. 1986) as authority for its decision *res judicata* bars the case. However, *Nunnery* is factually different since the claim in that case arose out of the exact same incident. The facts of *Nunnery* involve a dispute over a roofing contract and an order of the court. Thereafter, additional damages were discovered to the roof and Brantley filed the exact same claim in an arbitration forum. This Court held that this

was the precise point which had been ruled on in the prior action and *res judicata* prohibited such a claim. This is not the case here as the Court has made no rulings in the prior litigation.

In this case, Appellants specifically reserved their claims for future damages in a release and the instant action concerns new flooding losses with multiple additional parties all of which combined and concurred to cause damage to the Appellants.

In support of the argument that the claim was barred in *Nunnery*, the Court of Appeals observed: "Brantley's cause of action for an alleged defective roof had accrued before the earlier action was dismissed." (345 S.E.2d at 744). Here, Appellants' cause of action did not occur until sixteen years later when another flood damaged Appellants' property. The theory in this case is that multiple Defendants' actions combined and concurred to cause this new injury. Clearly, Appellants and the parties could not litigate this new flooding claim since it had not yet occurred. See *Griggs v. Griggs*, 214 S.C. 177, 515 S.E.2d 622 (1949) (for a judgment to bar the maintenance of a subsequent action there must be identity of a cause of action as well as identity of the subject matter).

Also, Prestwick consented to additional lawsuits for flooding when the general release and settlement agreement did not release future floods. Clearly, Patton makes this point stating in his affidavit that when he signed the release he did not intend to release any future flooding claims. (R. p. 163). Respondents waived its argument by drafting the releases without future flooding claims language. Also, the release prepared by Respondents is to be construed against the drafters. See *Williams v. Teran*, 266 S.C. 55, 221 S.E.2d 526 (1976).

Finally, it is well settled in South Carolina that a continuing trespass claim gives rise to multiple new actions *Silvester v. Spring Valley Country Club*, 344 S.C. 280, 543 S.E.2d 563 (Ct. App. 2001); *Hedgepath v. American Tel. & Tel. Co.*, 348 S.C. 340, 559 S.E.2d 327 (Ct. App. 2001)

("the expiration of the limitations period after the first actionable injury does not effect a complete bar as each new injury gives rise to a new cause of action and a landowner may at any time recover for any injury which occurred with the statutory period.") 559 S.E. 2d at 337. In this case, Defendant Prestwick's (and other defendants) water flooded Appellants' property on multiple occasions over a period of years. These are new flooding events or new trespasses and thus are new trespass claims. In sum, repeated or recurring trespasses give rise to repeated additional actions or lawsuits to recover successive damages. *Lucas v. Rawl Family Ltd*, 359 S.C. 505, 598 S.E.2d 712 (S.C. 2004). This is exactly what Appellants have sought here; and, accordingly, the Order of the trial court on this point should be reversed.

V. THE TRIAL COURT ERRED IN FINDING THAT THE LANDOWNER'S LIABILITY ENDS WHEN IT RELINQUISHES CONTROL OF THE PROPERTY.

Here, the Defendants created the hazard which injured the Plaintiff and are responsible as a matter of law. Appellants' expert, Robert Taylor, testified that the drainage system was not built in accordance with the plan and this defect combined and concurred with other Defendants' negligent acts. When a defendant or its employees create a condition, the defendants must as a matter of course be liable. See *Cook v. Food Lion*, 328 S.C. 324, 491 S.E.2d 690 (S.C. App. 1997); *Henderson v. St. Francis Community Hospital*, 303 S.C. 177, 399 S.E.2d 767 (1990); *Major v. City of Hartsville*, 410 S.C. 1, 763 S.E.2d 348 (S.C. 2014) (knowledge of a recurring condition by defendant requires summary judgment be denied). This is especially true when Prestwick owned the property and created, controlled and built the defective drainage system.

Finally, the trial court's Order regarding landowner liability after sale of the property is *dicta* which was never fully argued or briefed and unnecessary to the outcome of the case.

CONCLUSION

In sum, Appellants request this Court reverse the trial court and remand this matter for the following reasons: (1) Appellants were not given a full and fair opportunity for discovery; (2) the trial court erred in holding the case was outside of the Statute of Repose; (3) the trial court erred in holding a prior settlement agreement barred this action; (4) the trial court erred in holding the doctrine of *res judicata* barred this action; and (5) the trial court erred in observing that a landowner was not liable after the sale of the real property.

In sum, Appellants have suffered and will continue to suffer significant injuries from flooding until Defendants repair the drainage system. Appellants are on the horns of a dilemma. The flooding will continue until the Defendants take some proactive measures to stop the flooding of Appellants' homes. Appellants can only hope the Court will see the dilemma they face every day from constant flooding and remand this matter for trial.

Respectfully submitted,

KELAHER, CONNELL & CONNOR, P.C.

Gene M. Connell, Jr. (S.C. Bar No. 1358)
The Courtyard, Suite 209
1500 U. S. Highway 17 North
Post Office Drawer 14547
Surfside Beach, South Carolina 29587-4547
(843) 238-5648 (phone)
(843) 238-5050 (facsimile)
gconnell@classactlaw.net
Attorney for Appellants

April 23, 2020

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

CASE NO. 2016-CP-26-06495

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

vs.

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 Association, Inc., Defendants

OF WHICH:
Prestwick Land Limited Partnership, Jackson Companies and
Campgrounds, Inc. are ..... Respondents

City of Myrtle Beach, Third-Party Plaintiff,

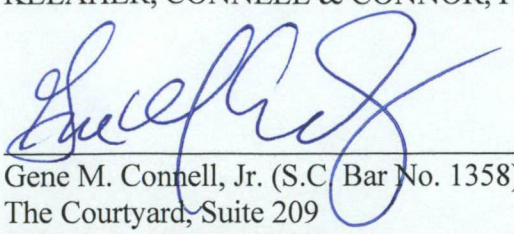
vs.

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

CERTIFICATE OF COUNSEL

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

KELAHER, CONNELL & CONNOR, P.C.



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Post Office Drawer 14547
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gconnell@classactlaw.net
Attorney for Appellants

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