THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court Of Common Pleas

Larry B. Hyman, Jr., Circuit Court Judge

Case No: 2015-CP-26-03173

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

v.

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

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

v.

South State Bank, ...Respondent.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE ISSUES ON APPEAL

I. Did the trial court utilize the correct legal standard in dismissing the Third Party Complaint of Appellant Myrtle Beach Golf & Yacht Club Association, Inc. ("the Association") against Respondent South State Bank ("South State") when the court accepted all well-pled allegations of the Third Party Complaint as true and based its dismissal solely on the four corners of the Third Party Complaint?

II. Did the trial court correctly dismiss Appellant's cause of action for breach of contract based upon the expiration of the applicable three-year statute of limitations where the allegations of the Third Party Complaint clearly establish that Appellant's cause of action for breach of contract rests solely on a properly recorded, public document that was recorded with the Horry County Register of Deeds on May 5, 2005, almost twelve years prior to the filing of the Third Party Complaint?

III. Did the trial court correctly dismiss Appellant's cause of action for contractual indemnification where Appellant seeks indemnification for its litigation expenses and attorneys' fees incurred in the underlying declaratory judgment action filed by Condo-World and Heron Point, neither of which are parties to the Bankruptcy Agreement, and the indemnification provision is unambiguous and applies only to claims or causes of action between or among the parties to the Bankruptcy Agreement arising prior to July 25, 1988?

IV. Did the trial court correctly dismiss Appellant's cause of action for equitable indemnification where Appellant alleged a contract between the parties, failed to allege or otherwise plead damages to a third party for which Appellant is responsible to pay, and failed to allege or otherwise plead any fault on the part of Respondent South State in causing any such damages?

V. Did Appellant waive its right to amend the Third Party Complaint where there was no indication that the claims were dismissed with prejudice, the trial court did not deny Appellant the opportunity to file a motion to amend its pleading, and Appellant failed to request leave from the trial court to amend its pleading?

STATEMENT OF THE CASE

This appeal arises from a declaratory judgment action brought by Plaintiffs Condo-World Development, LLC ("Condo-World") and Heron Point Golf Club Limited Partnership ("Heron Point") against Appellant Myrtle Beach Golf and Yacht Club Association, Inc., ("the Association") on April 27, 2015. In their Complaint, Plaintiffs seek a judgment from the Court declaring that certain restrictions on the "golf course property" do not apply or have been waived or terminated, which would allow Plaintiffs to further develop the property at issue in this case. [R. pp. 30-35.]

On June 11, 2015, Appellant filed an Answer, Defenses, and Counterclaims seeking declaratory judgment relief that certain restrictions do apply to the "golf course property," which would prevent residential development of the property. Subsequently, Appellant filed an Amended Answer, Defenses and Counterclaims on November 5, 2015. Nearly two years after the underlying action was filed, on February 14, 2017, Appellant filed a Second Amended Answer, which included for the first time, a Third Party Complaint against South State, alleging breach of contract, contractual indemnity, equitable indemnity and seeking a permanent injunction. Appellant filed a revised and corrected Second Amended Answer and Third Party Complaint on March 13, 2017. [R. pp. 414-432.] In response, South State filed and served a Motion to Dismiss the Third Party Complaint on April 21, 2017. [R. pp. 763-771.] Thereafter, South State filed and served a supplemental memorandum of law in support of the Motion on April 24, 2017. [R. pp. 773-784.]

The Honorable Judge Larry B. Hyman, Jr., Circuit Court Judge for the Fifteenth Judicial Circuit, held a hearing on the Motion to Dismiss on June 5, 2017. At the conclusion of the hearing, the trial court requested that both Appellant and South State submit proposed orders for

the court's consideration. [R. p..759.] Thereafter, on July 26, 2017, the trial court entered an Order granting in part and denying in part the Motion to Dismiss. [R. pp. 821, 21.] In its Order, the trial court dismissed Appellant's causes of action for breach of contract, contractual indemnification and equitable indemnification. [R. pp. 821, 21.] The trial court did not dismiss Appellant's cause of action for permanent injunction. [R. pp. 821, 21.] In its Order, the trial court found that Appellant's breach of contract action was barred by the applicable statute of limitations. [R. pp. 12-16.] The trial court further held that Appellant's contractual indemnification claim must be dismissed because it did not apply to claims brought by Condo-World and Heron Point against Appellant. [R. pp. 16-18.] Finally, the trial court found that Appellant failed to state a cause of action for equitable indemnification because there existed a contract between the parties, and Appellant failed to allege damages to a third party or fault on the part of South State in causing such damages. [R. pp. 18-20, 821.]

Thereafter, on August 2, 2017, Appellant filed a Motion to Reconsider Alter or Amend the Order. [R. pp. 786-787.] The trial court denied the Motion for Reconsideration by Order dated September 29, 2017. [R. pp. 4-6.] This interlocutory appeal followed.

STATEMENT OF THE FACTS

According to the Third Party Complaint filed in this matter, in or around February 1984, Justice, Inc. ("Justice") and Peoples Federal Savings and Loan ("Peoples") entered into a real estate development project to develop a large tract of land located in Horry County, South Carolina otherwise known as the Myrtle Beach Golf & Yacht Club. [R. p. 419.] Approximately four years later, in June of 1988, American Community Development Corporation placed Myrtle Beach Golf & Yacht Club into involuntary bankruptcy. [R. p. 422.] During the bankruptcy proceedings, Myrtle Beach Golf & Yacht Club, Peoples, Property Consultants, Inc., and

Appellant entered into an agreement to release the property so that a foreclosure of the property could be pursued by Peoples. [R. pp. 422, 562-578.] This agreement was executed by the parties on July 25, 1988 ("the Bankruptcy Agreement").

In the Bankruptcy Agreement, the parties made numerous assurances regarding the development of the property and the terms of the foreclosure. Three provisions of the Bankruptcy Agreement are of particular relevance with regard to the Third Party Complaint. First, in paragraph two on page two of the Bankruptcy Agreement, only Appellant, Property Consultants, Inc. and Myrtle Beach Golf & Yacht Club, jointly and severally, agreed "to enforce the Restrictive Covenants, as they may be amended, from time to time, giving particular scrutiny to Covenant Compliance on those lots and parcels of land which are adjacent and contiguous to the golf course." [R. p. 563.] Peoples was specifically excepted from this provision and made no agreement to enforce the Restrictive Covenants related to the property. Second, in paragraph three on page four of the Bankruptcy Agreement, it was agreed that in the event Peoples was the successful bidder at the foreclosure sale of the property, it would cause the following deed restriction to be placed on the property: "The only permitted use of this property is a golf course, country club, or other ancillary use relating to golf course or county club use." [R. p. 565.] Finally, paragraph two on page six of the Bankruptcy Agreement provides: "The parties between and among themselves will execute general releases so as to acquit, indemnify, and hold harmless each other from any claims or causes of action between and/or among them, prior to the execution of the date of this instrument." [R. p. 567.]

On September 12, 1988, Peoples filed for foreclosure and was the successful bidder for the property at the subsequent judicial sale. [R. p. 422.] Peoples continued to own and operate the property for some time thereafter but eventually sold the property to Heron Point Golf Club

Limited Partnership as evidenced by the Indenture Deed recorded April 15, 1992 with the Horry County Register of Deeds in Deed Book 1540 at Page 483. As required under the terms of the Bankruptcy Agreement, the deed to Heron Point included the specified deed restriction language. [R. p. 423.] Peoples subsequently quitclaimed all of its remaining interest in the property to Appellant. [R. pp. 423-424.] On March 22, 2005, Heron Point Golf Club Limited Partnership obtained a Waiver of Restrictions from First Federal Savings and Loan Association of Charleston (successor in interest to Peoples) ("First Federal") regarding the property in which it waived the following restriction: "The only permitted use of this property is a golf course, country club or other ancillary use relating to golf course or country club use." [R. p. 424.]

STANDARD OF REVIEW

A trial court may properly grant a motion to dismiss for failure to state facts sufficient to constitute a cause of action when the facts alleged in the complaint, along with all reasonable inferences deducible therefrom, do not entitle the plaintiff to recovery on any theory of the case. McCormick v. England, 328 S.C. 627, 632-33, 494 S.E.2d 431, 433 (Ct. App. 1997). When deciding a motion to dismiss pursuant to Rule 12(b)(6), SCRCP, the Court may only consider the allegations set forth on the face of the complaint. Dye v. Gainey, 320 S.C. 65, 67, 463 S.E.2d 97, 98 (Ct. App. 1995). "The question is whether in the light most favorable to the plaintiff, and with every reasonable doubt resolved in her behalf, the complaint states any valid claim for relief." McCormick, 328 S.C. at 633, 494 S.E.2d at 433-34.

ARGUMENT

I. IN RULING UPON THE MOTION TO DISMISS, THE TRIAL COURT APPLIED THE APPROPRIATE LEGAL STANDARD UNDER RULE 12(b)(6), SCRCP BY CONSIDERING ONLY THE ALLEGATIONS CONTAINED IN THE THIRD PARTY COMPLAINT.

In ruling upon the Motion to Dismiss filed by Respondent, the trial court applied the proper legal standard under Rule 12(b)(6) of the South Carolina Rules of Civil Procedure. In its Order, the trial court outlined the pertinent legal standard and held that "[w]hen deciding a motion to dismiss pursuant to Rule 12(b)(6), SCRCP, the Court may only consider the allegations set forth on the face of the complaint." [R. p. 11.] A plain reading of the trial court's order reveals that the court based its decision solely upon the factual allegations of Appellant's Third Party Complaint.

As an initial matter, the trial court adopted and incorporated the factual allegations of the Third Party Complaint into the 'Factual Background' section of its Order and included numerous citations to the Third Party Complaint. [R. pp. 9-11.] During the hearing, counsel and the trial court repeatedly emphasized that the Motion was made under Rule 12(b)(6) rather than Rule 56 of the South Carolina Rules of Civil Procedure and cited the appropriate legal standard. [R. pp. 718-719, 730, 737.] In its Order, the trial court reiterated its obligation to accept all well-pled allegations as true in considering the Motion to Dismiss. [R. pp. 17, 20.] Appellant does not cite a single factual finding included in the trial court's Order that is not contained in the Third Party Complaint.

Rather, Appellant argues that because there was general discussion of factual matters not contained in the pleadings during the hearing, the trial court improperly considered these matters when rendering its decision. However, an examination of the discussions cited by Appellant reveals that these discussions involved innocuous matters that had no influence whatsoever on

the trial court's legal analysis. It should be noted that prior to the hearing on the Motion to Dismiss, the trial court had previously heard numerous motions in the underlying case and was familiar with the issues and factual background. [R. p. 706.] The discussions cited by Appellant were initiated by the trial judge to clarify or confirm his recollection of the issues in the underlying case and in no way formed the basis of the court's ultimate decision in the case.

For example, Appellant assigns error to the trial court's questions to counsel regarding whether the Bankruptcy Agreement was recorded. However, whether the Bankruptcy was recorded makes no difference with regard to the third party claims against Respondent. At the hearing, Respondent's counsel acknowledged that for purposes of the Motion to Dismiss, the allegation that South State, a purported successor in interest with notice, must be taken as true. [R. pp. 719-720.] Further, the trial court did not include in its Order any finding with regard to whether the Agreement was recorded because such a finding was unnecessary for purposes of determining whether Appellant stated a cause of action against Respondent. The issue of notice of the Agreement on the part of third parties, namely Plaintiffs Condo-World and Heron Point, had no bearing the court's consideration of the Motion to Dismiss. In fact, in its Order, the trial court concluded: "Accepting the allegations of the Third Party Complaint as true, as required under Rule 12(b)(6) of the South Carolina Rules of Civil Procedure, the Court considers the cited provision sufficient to create an agreement between the parties." [R. p. 17.]

Similarly, Appellant cites a discussion of whether an additional agreement or general release was executed as grounds supporting its contention that the trial judge improperly considered allegations outside of the pleading. Notably, in its quotation of the transcript, Appellant fails to include the entire response of counsel to the trial judge's question about whether a general release was signed. Appellant includes only the prefatory statement "No, Your Honor," but the

complete response given by counsel was: "No, Your Honor. And it's not alleged in the pleading that there ever was any further general release, and it's not attached to the pleading." [R. p. 711.] Nonetheless, this issue had no impact whatsoever on trial court's consideration of the Motion to Dismiss because, as set forth more fully below, there is no allegation whatsoever contained in the Third Party Complaint that an additional agreement or general release was or may have been signed, and no such agreement or release was attached to the pleading. As such, the trial court correctly refused to consider anything other than what was alleged in the Third Party Complaint, and the trial court's Order does not include any finding on this issue.

Further, Appellant cites a single question from the trial judge, taken wholly out of context, regarding the parties' intent as a basis for concluding the trial court improperly considered allegations outside of the pleadings. A review of the entire exchange reveals that Appellant's assertion is misplaced. The relevant exchange was this:

> THE COURT: Well, Mr. Pearce, I mean, wouldn't you look at this [the indemnification clause] and say it was the intent of the parties to say, okay, we're all here in the bankruptcy court, we're fussing and feuding, we're going to lay it all to rest right now. From this point back, this takes care of it all, we're not going to – we're not going to raise any issues prior to this, it's ended right here. I mean, isn't that what that agreement was for; I mean, isn't that what the clause it? I mean, from a practical standpoint, isn't that what they're saying?

[R. pp. 729-730.] The trial judge was not inquiring about the intent of the parties but rather, the court was explaining its own interpretation of the plain language of the indemnification clause and asking Appellant's counsel for any contrary interpretation. Notably, in response to the trial court's interpretation, Appellant's counsel offered no alternative interpretation of the clause and further stated "Your Honor, I don't necessarily disagree with the reading of that paragraph." [R. p. 731.] It is clear from the record, taken as a whole, that the trial judge found no ambiguity in

the indemnification agreement and was merely offering Appellant's counsel an opportunity to provide an alternative interpretation that could support a cause of action against Respondent or, at a minimum, make dismissal inappropriate. Appellant was unable to do so, and ultimately, the court correctly held that the indemnification provision was unambiguous and did not apply to the claim between the Association and Plaintiffs Condo-World and Heron Point. The cited exchange actually establishes the trial court's willingness to construe the allegations of the Third Party Complaint in the light most favorable to Appellant and does not support Appellant's contention that the trial court improperly considered matters outside of the pleading.

Finally, Appellant claims that the trial court considered matters outside of the pleading in making its factual determination that Appellant had constructive or inquiry notice of the Waiver of Restrictions in 2005. Appellant argues "There is nothing in the pleadings to suggest that Appellant had notice." However, the Third Party Complaint includes the following allegation:

> On March 22, 2005, Heron Point Golf Club Limited Partnership obtained a Waiver of Restrictions from First Federal Savings and Loan Association of Charleston regarding [a portion of the property] specifically waiving the following restriction: "The only permitted use of this property is a golf course, country club or other ancillary use relating to golf course or country club use."

[R. p. 424.] The Waiver was attached to the Third Party Complaint and clearly bears the recording stamp establishing that the Waiver was properly recorded with the Horry County Register of Deeds on May 5, 2005. [R. p. 694.] Further, the Waiver is a public record which the trial court could appropriately take judicial notice of without running afoul of the legal standard for analyzing the Motion to Dismiss. A court may take judicial notice of facts established by records from the Horry County Registrar of Deeds without converting a motion to dismiss into a motion for summary judgment. Sec'y of State for Defence v. Trimble Navigation Ltd., 484 F.3d 700. 705 (4th Cir. 2007) ("In reviewing the dismissal of a complaint under Rule 12(b)(6), we

may properly take judicial notice of matters of public record."). Judicial notice "may be taken at any stage of the proceeding." Rule 201(f), SCRE. Under Rule 201 of the South Carolina Rules of Evidence, "if requested by a party and supplied with the necessary information," a court must take judicial notice of facts not subject to reasonable dispute in that they are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Rule 201(b) and (d), SCRE. It is well established that public records are not subject to reasonable dispute and are therefore appropriate matters for judicial notice. Cox v. Fleetwood Homes of Ga., Inc., 329 S.C. 157, 159, 494 S.E.2d 463 n.2 (Ct. App. 1997), *rev'd on other grounds*, 334 S.C. 55, 512 S.E.2d 498 (1999).

Based upon the foregoing, the trial court used the appropriate standard of review under Rule 12(b)(6), SCRCP when considering the Motion to Dismiss and based its decision solely on the allegations contained in the Third Party Complaint. Any discussions of matters outside of the pleading were innocuous and had no bearing whatsoever on the trial court's ultimate determination. The Order of the trial court demonstrates that the court's legal analysis was guided only by the allegations of the Third Party Complaint, and the Order does not reference or include any finding related to matters outside of the pleading. Therefore, the trial court did not err in dismissing three of Appellant's causes of action against Respondent.

II. THE TRIAL COURT PROPERLY DISMISSED APPELLANT'S CAUSE OF ACTION FOR BREACH OF CONTRACT BECAUSE THE APPLICABLE STATUTE OF LIMITATIONS BARRED THE CLAIM.

A. The Applicable Statute of Limitations Began to Run on May 5, 2005, when the Waiver of Restrictions was Properly Recorded and Publicly-Filed with the Horry County Register of Deeds.

Under South Carolina law, the statute of limitations for filing an action based upon "a contract, obligation, or liability" is three (3) years. S.C. Code Ann. §15-3-530 (1) (1976). In

determining when the statute of limitations begins to run, South Carolina courts have consistently adopted the "discovery rule." *See* Matthews v. City of Greenwood, 305 S.C. 267, 407 S.E.2d 668 (Ct. App. 1991); Santee Portland Cement Co. v. Daniel International Corp., 299 S.C. 269, 384 S.E.2d 693 (1989); Dean v. Ruscon Corp., 321 S.C. 360, 468 S.E.2d 645 (1996). Under the discovery rule, the statute of limitations commences when "the injured party knows or should have known by the exercise of due diligence that a cause of action arises from the wrongful conduct." Walsh v. Woods, 358 S.C. 259, 264, 594 S.E.2d 548, 551 (Ct. App. 2004). A cause of action arises when it ought to have been discovered through reasonable diligence when "the facts and circumstances would have put a person of common knowledge and experience on notice that some right had been invaded or a claim against another party might exist." Id. at 265, S.E.2d at 551 (quoting Maher v. Tietex Corp., 331 S.C. 371, 377, 500 S.E.2d 204, 207 (Ct. App. 1998)). "A party cannot escape the application of this rule by claiming ignorance of existing facts and circumstances, because the law also provides that if such facts and circumstances could have been known to the party through the exercise of ordinary care and reasonable diligence, the same result follows." Burgess v. American Cancer Soc., 300 S.C. 182, 186, 386 S.E.2d 798, 799-800 (Ct. App.1989).

In addition, the fact that the injured party may not realize the entire extent of the damage is irrelevant in determining when the statute of limitations begins to run. Dean, at 364, S.E.2d at 647; *see also*, Dillon County Sch. Dist. No. Two v. Lewis Metal Works, Inc., 286 S.C. 207, 332 S.E.2d 555 (Ct. App. 1985). In Carolina Marine Handling, Inc. v. Lasch, the Court wrote:

> Statutes of limitations embody important public policy considerations in that they stimulate activity, punish negligence, and promote response by giving security and stability to human affairs." The cornerstone policy consideration underlying statutes of limitations is the laudable goal of law to promote and achieve finality in litigation. Significantly, "statutes of limitations provide potential defendants with certainty that after a period of time, they will not be hailed [sic] into court to

> defend time-barred claims. Moreover, limitation periods discourage plaintiffs from sitting on their rights." Statutes of limitations are, indeed, fundamental to our judicial system.

363 S.C. 169, 175-176, 609 S.E.2d 548, 552 (Ct. App. 2005) (internal citations omitted).

In reviewing the Third Party Complaint, Appellant's breach of contract claim rests solely upon the Waiver of Restrictions executed in 2005 and recorded with the Horry County Register of Deeds on May 5, 2005. However, Appellant did not file its breach of contract claim against South State until February of 2017, nearly twelve years after the Waiver of Restrictions was made public through the recording of the document with the Register of Deeds. Based upon the allegations of the Third Party Complaint, Appellant clearly knew or should have known of the alleged breach in May of 2005, and the applicable statute of limitations began to run, at the latest, when the Waiver of Restrictions was recorded with the Register of Deeds, the mechanism by which notice of the Waiver was provided to the world.

"[C]onstructive notice or inquiry notice in the context of a real estate transaction often is grounded in an examination of the public record because it is the proper recording of documents asserting an interest or claim in real property which gives constructive notice to the world." Spence v. Spence, 368 S.C. 106, 119, 628 S.E.2d 869, 876 (2006). A party is charged with constructive notice of the contents of documents filed in conformity with applicable statutory law, which an inquiry would have revealed. *See* Fuller–Ahrens v. SC Dept. of Highways and Pub. Transp., 311 S.C. 177, 427 S.E.2d 920 (Ct. App. 1993). "The statute of limitations begins to run at the time the individual has inquiry or constructive notice." Berry v. McLeod, 328 S.C. 435, 445, 492 S.E.2d 794, 799-800 (Ct. App. 1997) (holding that the statute of limitations began to run, at the latest, when the contested documents were publicly filed with the clerk of court).

Contrary to the assertions of Appellant, constructive notice is not limited to cases involving subsequent purchasers of real property. Rather, our courts have held that when a publicly filed or recorded document discloses facts sufficient to form a cause of action, the statute of limitations begins to run when the document is made public through filing or recording. See Menezes v. WL Ross & Co., LLC, 403 S.C. 522, 744 S.E.2d 178 (2013) (holding that the statute of limitations begins to run when documents, which formed the basis of the plaintiffs' claims, were publicly filed with the Securities and Exchange Commission) (citing Seidel v. Lee, 954 F. Supp. 810 (D. Del. 1996) (holding that Plaintiff's claims were time-barred because publicly filed documents give adequate notice of possible wrong-doing, sufficient to support a claim)); see also, Landmark 501(C)(9) Trust Agreement For Landmark Group ex rel. Dunlap v. Pierce, Couch, Hendrickson, Baysinger & Green, 2004 WL 6331249, *2 (Ct. App. 2004) (holding that the statute of limitations began to run when a plaintiff had constructive notice of a potential claim based upon a counterclaim which was a matter of public record).

Further, in Berry v. McLeod, another case that did not involve a subsequent purchaser of real estate, this Court affirmed the trial judge's determination that the statute of limitations began to run, at the latest, when the bond documents were publicly filed with the clerk of court. 328 S.C. at 445, 492 S.E.2d at 799-800 ("An individual on inquiry or constructive notice is held to be on notice of the contents of documents filed in conformity with applicable statutory law, which an inquiry would have revealed."). This Court concluded that the Berry plaintiffs had inquiry or constructive notice at the time of public disclosure by virtue of the filing of the true terms of the bond, and any possible cause of action began to run at that time. Id. Like the case *sub judice*, the Waiver of Restrictions was a properly-filed, public document, the contents of which disclosed the factual basis upon which Appellant's breach of contract is based. Therefore, the

statute of limitations applicable to Appellant's breach of contract cause of action began to run, at the latest, when the Waiver was filed with the Clerk of Court in May of 2005, and the statute of limitations expired in May of 2008, almost nine years before Appellant filed the Third Party Complaint against South State in February of 2017.

Appellant cites Cohen's Drywall Co., Inc. v. Sea Spray Homes, LLC, 374 S.C. 195, 648 S.E.2d 598 (2007) for the proposition that Appellant has no continuous record-checking obligation. However, Appellant's reliance on Cohen's Drywall is misplaced. In that case, the plaintiff filed a mechanic's lien against property owned by the defendants. Id. at 197, 648 S.E.2d at 599. The defendants posted a cash bond to release the property from the lien. Id. A few months later, but still within the applicable six-month time period, the plaintiff brought an action to enforce the lien and named the property as the subject of the action. Id. The plaintiff, upon later discovering that the defendants had posted the cash bond to release the property, amended its complaint to identify the bond as the subject of the enforcement action. Id. This amendment occurred after the expiration of the time limit for bringing an action to enforce the lien. Id. The trial court granted the defendants' motion to dismiss. Id.

On appeal, the Supreme Court reversed, finding that the mechanic's lien statute merely requires a suit for the enforcement of the lien to be brought within six months; it does not require the lienholder to name a substituted cash bond or other undertaking as the subject of the suit. Id. at 200, 648 S.E.2d at 600. The Court's holding was simply that the language of S.C. Code Ann. § 29-5-110 requires a judgment on a foreclosed mechanic's lien to be executed against a cash bond or other substituted undertaking, and that holding otherwise would read a continuing record-checking obligation into the mechanic's lien statute. Id. at 200, 648 S.E.2d at 600-01. Thus, Cohen's Drywall has no application to the case at bar, as its holding was limited to the

construction of the mechanic's lien statute and how enforcement actions are to be pled by lienholders. It unequivocally does not stand for the proposition that Appellant was entitled to tolling of the statute of limitations for the claims Appellant asserted in its Third Party Complaint.

For these reasons, the statute of limitations applicable to Appellant's breach of contract cause of action began to run in May of 2005, when the Waiver was filed with the Register of Deeds, and the statute of limitations expired in May of 2008, almost nine years before Appellant filed the Third Party Complaint against South State in February of 2017. As such, the trial court properly dismissed as time-barred Appellant's breach of contract claim.

B. The Twenty-Year Statute of Limitations Applicable to Sealed Instruments Does Not Apply to the Contract at Issue in this Case.

Appellant argues that the three-year statute of limitations may not be applicable if the Court determines the Bankruptcy Agreement at issue is a sealed instrument, subject to the twenty-year statute of limitations found in S.C. Code Ann. § 15-3-520(b) (providing that sealed instruments are subject to a twenty-year statute of limitations). Initially, it should be noted that "whether or not an instrument is under seal, or whether or not a certain device constitutes a seal, is a question of law for the court." 78A C.J.S. Seals § 8 (2017). Here, in the Bankruptcy Agreement attached to the Third Party Complaint, there is no physical seal or notation included with the signatures of the parties to the Bankruptcy Agreement. [R. p. 568.] It is well established under South Carolina law that a contract that does not include a physical seal may only be deemed a sealed instrument where "the contract clearly evidences an intent to create a sealed instrument." Carolina Marine Handling, 363 S.C. at 175, 609 S.E.2d at 552.

In Carolina Marine Handling, this Court held that the inclusion of standard attestation language, such as "IN WITNESS WHEREOF, the parties have hereunto set their hands and seals," is insufficient to clearly evidence intent to create a sealed instrument. Carolina Marine

Handling, 363 S.C. at 169, 609 S.E.2d at 551-552 (holding that generic and boiler plate language referring to seal in the standard attestation clause in a lease was not enough to demonstrate an intent to create a sealed instrument and, to hold otherwise, "would likely transform the twenty-year statute of limitations into the standard period of limitations for contract actions in this state"). Similarly, in Orlando Residence, LTD v. Hilton Head Hotel Investors, the United States District Court for the District of South Carolina found as follows:

> The settlement agreement in this case includes the following standard attestation language immediately preceding the parties' signatures: "IN WITNESS WHEREOF, the undersigned have hereunto set their hands and seals as of this 1st day of November, 1994. South Carolina judicial precedent dictates that the settlement agreement and confession of judgment cannot be considered sealed instruments, and therefore are not subject to the twenty-year statute of limitations for sealed instruments.

Orlando Residence, 2013 WL 1103027, *11 (D.S.C. 2013); see also, S.C. Dep't of Social Servs. v. Winyah Nursing Homes, Inc., 282 S.C. 556, 320 S.E.2d 464 (Ct. App. 1984) (holding that a contract which contained the language "the parties hereto have set their hands and seals" **and** the notation "L.S.," an abbreviation meaning in the place of a seal, followed each of the parties' signatures was a sealed instrument and subject to the twenty-year statute of limitations). In this case, there is no physical seal or notation following the parties' signature, and the Bankruptcy Agreement contains only the standard attestation language which our courts have consistently held is insufficient to create a sealed instrument. [R. p. 568.] The sole notation of "L.S." is contained on the probate page of the Agreement beside the signature and seal of the notary is not sufficient to create a sealed document under our case law. There is no such notation beside the contracting parties' signatures, which, among other things, is required in order to create a sealed instrument. As such, the Bankruptcy Agreement, on its face, cannot be considered a sealed instrument.

Based on the foregoing, the trial court correctly found that the three-year statute of limitations generally applicable to contracts applied to Appellant's cause of action for breach of contract. Further, because Appellant filed its breach of contract action nearly nine years after the statute of limitations expired, the trial court properly dismissed Appellant's claim for breach of contract.

III. THE TRIAL COURT PROPERLY DISMISSED APPELLANT'S CLAIM FOR CONTRACTUAL INDEMNIFICATION BECAUSE APPELLANT FAILED TO STATE FACTS SUFFICIENT TO FORM A CAUSE OF ACTION AGAINST SOUTH STATE.

A. There is No Valid or Enforceable Contract of Indemnification Between Appellant and South State.

Contractual indemnity involves a transfer of risk for consideration, and the contract itself establishes the relationship between the parties. Rock Hill Telephone Co., Inc. v. Globe Communications, Inc., 363 S.C. 385, 389, 611 S.E.2d 235, 237 (2005). General rules that govern construction and interpretation of contracts also apply to construction and interpretation of a contract of indemnity. Laurens Emergency Medical Specialists v. M.S. Bailey & Sons Bankers, 348 S.C. 191, 558 S.E.2d 531 (Ct. App. 2002), *rev'd*, 355 S.C. 104, 584 S.E.2d 375 (2003). As with other contracts, the principal question focuses on the intent of the parties. Id. Their intentions are determined from the language used in the contract. Id.

Appellant argues that the following provision in the 1988 Settlement Agreement creates an indemnity agreement between Appellant and Respondent: "The parties between and among themselves will execute general releases so as to acquit, indemnify, and hold harmless each other from any claims or causes of action between and/or among them, prior to the execution of the date of this instrument." [R. p. 567.] Appellant's argument, however, is contrary to the plain language of the provision. If the parties to the 1988 Settlement Agreement had desired for that

document to contain an indemnity provision, they could have easily included one. Instead, they agreed that the parties "*will execute general releases* so as to . . . indemnify . . . each other." The emphasized language unambiguously indicates the parties' intent to prepare and execute releases in the future as standalone instruments. This provision is merely an "agreement to agree in the future," which has no legal effect. See, e.g., North Am. Rescue Prods., Inc. v. Richardson, 411 S.C. 371, 769 S.E.2d 237 (2015) ("Provisions which are essentially agreements to agree in the future have no legal effect."); Stevens & Wilkinson of S.C., Inc. v. City of Columbia, 409 S.C. 568, 762 S.E.2d 696 (2014) (finding that an MOU was an agreement to agree in the future, and as such was nonbinding); Blanton Enterprises, Inc. v. Burger King Corp., 680 F. Supp. 753, 770 n.20 (D.S.C. 1988) ("[A]greements to agree do not amount to a contract in South Carolina."). There is no allegation in the Third Party Complaint that the parties executed an additional agreement or general release, and no such agreement or release was attached to the Third Party Complaint.

While Appellant argues for the first time to this Court that the existence of an additional general release creates an issue of fact, Appellant and Plaintiffs Condo-World and Heron Point engaged in substantial written and oral discovery spanning nearly two years, and the Agreement itself was produced during discovery by South State in response to a subpoena. [R. p. 722.] Further, in so arguing, Appellant essentially requests this Court do precisely what it assigns as error on the part of the trial court – Appellant asks this Court to consider allegations not contained in the Third Party Complaint. Specifically, Appellant would have this Court write into the Third Party Complaint an additional allegation that the parties did, or may have executed a subsequent agreement. No such allegation is contained in the Third Party Complaint, and therefore any consideration of this allegation would be wholly inappropriate. Nonetheless, for

the reasons set forth below, even if such general release agreement existed, which is not even alleged, it would not apply to the underlying Plaintiffs' claims against the Association nearly thirty years after the Bankruptcy Agreement was signed.

B. The Unambiguous Language of the Indemnity Agreement Does Not Apply to Plaintiffs' Claim Against Appellant in the Underlying Action, and South State Has No Indemnity Obligation.

While Respondent maintains that the cited provision is insufficient as a matter of law to create a binding and enforceable contract, if this Court finds a valid agreement exists, it does not apply in the underlying action between Appellant, Condo-World, and Heron Point. It is clear from the language of the indemnity provision that any contemplated indemnification agreement would encompass only claims or causes of action between or among the parties to the Bankruptcy Agreement occurring prior to July 25, 1988, the date of the execution of the Bankruptcy Agreement. The indemnification provision reads as follows: "The parties between and among themselves will execute general releases so as to acquit, indemnify, and hold harmless each other from any claims or causes of action ***between and/or among them, prior to the execution of the date of this instrument***." [R. p. 567 (emphasis added).] The indemnification clause unambiguously limits the parties' indemnification obligations to claims and causes of action "between and/or among" the parties to the Bankruptcy Agreement prior to the date of the execution of the Bankruptcy Agreement: July 25, 1988.

There can be no serious dispute that Heron Point and Condo-World, Plaintiffs below, are not parties to the Bankruptcy Agreement, and the underlying declaratory judgment action for which Appellant seeks indemnification was not filed until April of 2015, over twenty-five years after the Bankruptcy Agreement was executed. Therefore, the indemnification provision has no application because the underlying action involves a claim or cause of action between non-

parties to the Bankruptcy Agreement which necessarily arose after the date of the execution of the Bankruptcy Agreement.

Incredibly, Appellant argues, again for the first time to this Court, that although Condo-World and Heron Point, Plaintiffs below, are not parties to the Bankruptcy Agreement, they may be successors in interest to the Agreement by virtue of the 1992 Indenture Deed. This argument is nonsensical and without any legal or factual support. There is no reference whatsoever in the 1992 Indenture Deed to the Bankruptcy Agreement, much less any assignment of rights thereunder to Heron Point. [R. pp. 387-393.][1] More importantly, Appellant did not make such an allegation in the Third Party Complaint; Appellant did not allege in its Third Party Complaint that Condo-World or Heron Point were successors in interest to the parties to the Bankruptcy Agreement. Yet again, Appellant asks this Court to deviate from the appropriate legal standard of review and write an additional allegation into the Third Party Complaint.

C. The Indemnification Provision is Not Ambiguous.

Finally, Appellant argues that the indemnification clause is ambiguous. According to Appellant, the terms "general releases," "any claims or causes of action," "between and/or among them," and "prior to the execution of the date of this instrument" are ambiguous. To the contrary, these terms are straight-forward and uncomplicated, and Appellant is simply attempting to obfuscate the plain language of the indemnification provision to undermine the trial court's dismissal.

"The cardinal rule of contract interpretation is to ascertain and give effect to the intention of the parties and, in determining that intention, the court looks to the language of the contract.

[1] Additionally, if Heron Point is a successor in interest to South State's obligations under the Bankruptcy Agreement as suggested by Appellant, than South State would necessarily have no obligation to indemnify Appellant and dismissal was appropriate. This allegation would form the basis of a counterclaim against Heron Point, not a third party claim against South State.

If the language is clear and unambiguous, the language alone determines the contract's force and effect." Sphere Drake Ins. Co. v. Litchfield, 313 S.C. 471, 438 S.E.2d 275 (Ct. App. 1993) (citing United Dominion Realty Trust, Inc. v. Wal–Mart Stores, Inc., 307 S.C. 102, 413 S.E.2d 866 (Ct. App. 1992)). Where an agreement is unambiguous, clear, and explicit, it must be interpreted in accordance with the terms the parties have chosen which must be taken and understood in their plain, ordinary, and popular sense. C.A.N. Enterprises, Inc. v. South Carolina Health and Human Services Finance Comm'n, 296 S.C. 373, 377, 373 S.E.2d 584, 586 (1988). Further, the court is without authority to alter a contract by construction or to make a new contract for the parties. Id. at 378, 373 S.E.2d at 587; see also, Pee Dee Stores, Inc. v. Doyle, 381 S.C. 234, 241, 672 S.E.2d 799, 802 (Ct. App. 2009) ("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.")

The purportedly ambiguous indemnification provision at issue is only one sentence which reads: "The parties between and among themselves will execute general releases so as to acquit, indemnify, and hold harmless each other from any claims or causes of action between and/or among them, prior to the execution of the date of this instrument." [R. p. 567.] Taken in its plain, ordinary and popular sense, the language used by the parties is subject to only one reasonable interpretation, and the ambiguities urged by Appellants are disingenuous at best.

For example, Appellant goes to great lengths to create some ambiguity in the parties' use of the term 'claim.' However, regardless of how the term 'claim' is construed, the operative language of the provision requires that the 'claim' be between or among the parties to the Bankruptcy Agreement. [R. p. 567.] As such, no matter what definition the Court uses to define the term 'claim,' the indemnification obligation is only triggered if the 'claim' is between or

among the parties to the Agreement. This obligation to indemnify clearly would not encompass the underlying action between Appellant and non-parties to the Bankruptcy Agreement.

Similarly, Appellant asserts that the provision is ambiguous because Appellant alleges that the phrase "between and/or among themselves" could be interpreted to encompass not only the parties to the Agreement but also to their successors and assigns. However, when read in its entirety, there is no ambiguity at all as to whether this phrase includes successors and assigns of the parties. The Agreement provides: "Each party signatory to this agreement represents, warrant[s] and guarantees [that] he/she/it/they have full authority to execute this agreement so as to make it valid, and binding upon the parties, **their successors and assigns**." [R. p. 567 (emphasis added).] Thus, the Agreement explicitly provides that it is binding upon the parties and their successors and assigns.

Finally, Appellant makes the incredible allegation that the phrase "prior to the date of the execution of this instrument" is ambiguous. According to Appellant, it is not clear from the language of the provision whether claims arising out of the Agreement itself are included in the indemnification obligation. It is wholly unclear how the parties to the Agreement could have expressed their intent any plainer. However, even assuming the parties may have intended to include claims or causes of action arising at some point in time other than **prior** to the execution of the Agreement, the operative language of the provision again requires that the claim be **between or among** the parties to the Bankruptcy Agreement. [R. p. 567 (emphasis added).] As such, even if there is some ambiguity as to whether claims arising from the Agreement itself are included in the indemnification obligation, the provision applies only to claims or causes of action between or among the parties to the Agreement. This obligation to indemnify clearly would not encompass the underlying action between Appellant and non-parties to the

Bankruptcy Agreement, regardless of whether the claim arose from the Bankruptcy Agreement itself. Notably, it would be illogical to interpret the language of the indemnification clause to include claims arising out of the Bankruptcy Agreement itself. If so construed, Appellant would have released its right to bring the current causes of action against South State which, according to Appellant, arise from the Bankruptcy Agreement.

In a final attempt to undermine the trial court's dismissal, Appellant argues that in the event the Court finds the provision to be facially unambiguous, there nonetheless exists a latent ambiguity in the Agreement. Appellant makes the cursory statement that "upon attempting to effectuate the 1988 Settlement Agreement, a latent ambiguity has arisen and parol evidence should be admitted." However, Appellant offers no explanation as to what the latent ambiguity is or what uncertainty exists in the application of the Agreement. Rather, as set forth above, the intent of the parties can be discerned from the plain language of the Agreement, and therefore, there is no ambiguity.

For the foregoing reasons, the trial court did not err in dismissing Appellant's cause of action for contractual indemnification. The indemnification agreement unambiguously applies only to claims or causes of action between or among the parties to the Bankruptcy Agreement and arising prior to the date of its execution: July 25, 1988. The underlying action involves a claim by non-parties to the Agreement which necessarily arose after July 25, 1988.

IV. THE TRIAL COURT PROPERLY DISMISSED APPELLANT'S CLAIM FOR EQUITABLE INDEMNIFICATION BECAUSE APPELLANT FAILED TO ALLEGE FACTS SUFFICIENT TO STATE A CAUSE OF ACTION AGAINST SOUTH STATE.

A. Appellant's Equitable Cause of Action Fails as a Matter of Law if there is a Contractual Agreement Between the Parties.

Taking the allegations of the Third Party Complaint as true, South State is a successor in interest to a party to the Bankruptcy Agreement, and therefore, the Bankruptcy Agreement is a contractual agreement between the parties. As such, Appellant cannot maintain an equitable indemnification claim since it would have an adequate remedy at law based upon the Bankruptcy Agreement.

It is well established under South Carolina law that "equity is only available when a party is without an adequate remedy at law." EllisDon Constr., Inc. v. Clemson Univ., 391 S.C. 552, 707 S.E.2d 399, 401 (2011). Our courts have consistently held that "[t]he basis for granting equitable relief is the impracticability of obtaining full and adequate compensation at law." Nutt Corp. v. Howell Road, LLC, 396 S.C. 323, 721 S.E.2d 447, 449 (Ct. App. 2011) (citing Monteith v. Harby, 190 S.C. 453, 3 S.E.2d 250, 251 (1939)). Because the Court must accept as true the allegation that South State is a successor in interest to a party to the Bankruptcy Agreement and is therefore, bound by its terms, Appellant cannot state a cause of action for equitable indemnification in an attempt to avoid an unfavorable indemnity clause contained in its contract. *See* Nutt Corp., 396 S.C. at 328, 721 S.E.2d at 450 (holding that a remedy at law was available because there was a contractual agreement between the parties).

Further, the fact that Appellant's legal remedy based in contract may be barred by the applicable statute of limitations is not grounds for the assertion of an equitable cause of action. Id., 396 S.C. at 329, 721 S.E.2d at 450 (citing Stewart v. Seigle, 274 P.2d 395, 397–98 (Okl. 1954) (finding no basis existed to exercise the equitable power of the court where the plaintiff failed to exercise his statutory remedy within the time prescribed by the statute of limitations); U.S. v. Cent. Livestock Corp., 616 F.Supp. 629, 633 (D. Kan.1985) (holding equity will not intervene if it appears the absence of a remedy at law is due to the plaintiff's failure to pursue

that remedy); Witmer v. Exxon Corp., 260 Pa. Super. 537, 394 A.2d 1276, 1286 (1978) (holding it is not proper to seek equitable relief where no pursuit has been made of available contractual remedies because equity aids the vigilant and not those who slumber on their rights); McKittrick v. Bates, 47 R.I. 240, 132 A. 610, 612 (1926) ("When one who has a clear method of fully determining his rights at law voluntarily adopts improper procedure, or pursues proper procedure negligently or mistakenly, without any inducement from one having adversary interests, it is no function of equity to relieve him from the result of his erroneously conducted lawsuit.")).

Based on the above, the trial court did not err in dismissing Appellant's cause of action for equitable indemnification because Appellant had an adequate remedy at law.

B. Appellants Failed to Plead Damages to a Third Party and Failed to Plead Any Act, Omission or Fault on the Part of South State in Causing Any Such Damages to a Third Party.

Appellant's claim for equitable indemnification fails as a matter of law because Appellant failed to plead facts sufficient to state a claim for equitable indemnification. Appellant failed to plead damages to a third party and failed to plead any act, omission or fault on the part of South State causing any such damages to a third party, which are necessary elements to state a cause of action for equitable indemnification.

South Carolina law recognizes the principle of equitable indemnification. Generally, a party may maintain an equitable indemnification action if he was compelled to pay damages because of negligence imputed to him as a result of the tortious act of another. *See e.g.,* Vermeer Carolina's Inc. v. Wood/Chuck Chipper Corp., 336 S.C. 53, 60, 518 S.E.2d 301, 305 (Ct. App. 1999). However, equitable indemnification is only allowed where a "special relationship" exists between the parties. Id. "According to equitable principles, a right of indemnity exists whenever the relation between the parties is such that either in law or in equity there is an obligation on one

party to indemnify the other, as where one person is exposed to liability by the wrongful act of another in which he does not join." Id. (citing Stuck v. Pioneer Logging Machinery, Inc., 279 S.C. 22, 24, 301 S.E.2d 552 (1983)).

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

Appellant alleges that a special relationship exists based upon the Bankruptcy Agreement signed by Peoples in 1988. [R. p. 430.] For purposes of the Motion to Dismiss, the trial court accepted as true the existence of a special relationship between the parties, but the court found that Appellant failed to plead liability or damages caused to a third party for which Appellant is responsible or fault on the part of South State in causing any such damages.[2] Appellant's failure to plead these necessary elements is fatal to Appellant's claim for equitable indemnification.

The underlying action for which Appellant seeks indemnification is a request for a declaratory judgment as to the enforceability and/or applicability of certain alleged restrictive covenants regarding "golf course property." [R. pp. 30-35.] In Plaintiffs' Complaint in the main action, there is no request for monetary damages, and there is no allegation of liability on the part

[2] In its Initial Brief, Appellant incorrectly stated that the trial court found that Appellant had not stated a cause of action for equitable indemnity due to the lack of a special relationship. To the contrary, the trial court stated in its Order: "Accepting as true the existence of a special relationship between the parties, the Court finds the Association has failed to plead liability or damages caused to a third party for which the Association is responsible or fault on the part of South State in causing any such damages, both of which are fatal to the Association's claim for equitable indemnification." [R. p. 20.]

of Appellant. To the contrary, Plaintiffs seek a declaratory judgment from the Court, not damages from the Appellant. [R. pp. 30-35.] Moreover, in its Third Party Complaint, Appellant failed to plead any act, omission or fault on the part of South State allegedly causing damage to Plaintiffs. The Third Party Complaint is completely devoid of any allegation of fault on the part of South State. [R. pp. 430.] Nothing in the Third Party Complaint gives South State notice of the damages to a third party for which it is responsible or notice of what fault or liability is allegedly attributable to South State in causing such damages. These are necessary and required elements in order to state a cause of action for equitable indemnification, and the trial court properly dismissed this claim.

V. APPELLANT HAS WAIVED ITS RIGHT TO AMEND THE THIRD PARTY COMPLAINT, AND ITS REQUEST TO AMEND IS NOT PROPERLY BEFORE THIS COURT.

Appellant requests this Court grant it leave to file an Amended Third Party Complaint in the event the Court affirms the trial court's Order. However, this issue is not properly before this Court because Appellant failed to move the trial court for an order allowing it to amend its Third Party Complaint. There is no indication whatsoever in the Order granting dismissal that the claims were dismissed with prejudice. "When a complaint is dismissed under Rule 12(b)(6) for failure to state facts sufficient to constitute a cause of action, the dismissal generally is without prejudice." Spence, 368 S.C. at 129, 628 S.E.2d at 881. Further, in the following exchange with counsel during the hearing on the Motion to Dismiss, the trial court specifically addressed the issue of amendment of the pleadings:

> THE COURT: But do you – this is 12 (b) (6) – do you make proper allegations in your complaint to support an action for equitable indemnification.
>
> MR. PEARCE: My position is we do, Your Honor. And if the absence of some other damages is critical, we'll amend and add it.

> I mean, our assumption was that with this document and all of the back and forth between the Plaintiffs and Defendants and the other exhibits, then that would be an unnecessary re-allegation. But we can certainly do that.
>
> THE COURT: Well, that would, of course – you could move to that. But, you know, the question here is have you made the allegations?

[R. pp. 737-738.]

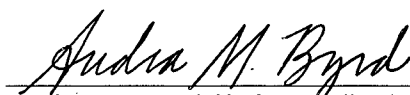
Appellant contends that "at no time was Appellant provided the opportunity to file and serve and amended Third Party Complaint." [Appellant's Initial Brief, p. 44]. This assertion is demonstrably false based upon the trial court's statement. Notably, Appellant does not allege that it attempted to file a motion to amend its pleading, much less that it was denied the opportunity. Nothing in the record before this Court supports such a finding. Quite simply, Appellant failed to even request the trial court grant it leave to amend and instead chose to appeal the trial court's decision. As such, Appellant has waived its right to amend the Third Party Complaint. Spence, 368 S.C. at 130, 628 S.E.2d at 881 ("When a complaint is dismissed without prejudice and the plaintiff is given the opportunity to file and serve an amended complaint, but instead chooses to appeal, the plaintiff ordinarily waives the right to amend his complaint. The appellate court may affirm the dismissal with prejudice if it determines the lower court properly dismissed the complaint.").

In the event this Court determines that Appellant has not waived its right to amend the Third Party Complaint, the trial court is the appropriate forum to determine whether amendment is appropriate considering all of the relevant factors under Rule 15 of the South Carolina Rules of Civil Procedure. Respondent respectfully requests that this Court not grant a motion to amend the pleading that Appellant has not properly filed or noticed. Instead, Respondent requests that this issue be remanded to the trial court for its consideration.

CONCLUSION

For the reasons set forth above, Respondent South State Bank respectfully requests this Court affirm the trial court's Order dismissing Appellant's third party causes of action for breach of contract, contractual indemnification, and equitable indemnification. Respondent further requests this Court deny Appellant's request for leave to file a third amendment of its pleading.

Respectfully submitted,



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Myrtle Beach, South Carolina

June 20, 2018

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court Of Common Pleas

Larry B. Hyman, Jr., Circuit Court Judge

Case No: 2015-CP-26-03173

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

v.

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

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

v.

South State Bank, ...Respondent.

CERTIFICATE OF COUNSEL

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

TURNER PADGET GRAHAM & LANEY P.A.

June 20, 2018

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