

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM HORRY COUNTY  
Court of Common Pleas

**Dec 21 2020**

Benjamin H. Culbertson, Circuit Court Judge  
William A. McKinnon, Circuit Court Judge

**SC Court of Appeals**

Appellate Case No. 2020-000407

Douglas Kelsey.....Plaintiff,

v.

House of Blues Myrtle Beach Restaurant Corporation;  
HOB Entertainment, Inc.; and Travis Scott Wagoner.....Defendants.

AND

House of Blues Myrtle Beach Restaurant Corporation .....Third-Party Plaintiff,

v.

Throttlefest, LLC; American Outlaw Spirits Incorporated;  
Full Throttle LLC; and Full Throttle Sloon Shine, LLC.....Third-Party Defendants.

Of Whom House of Blues Myrtle Beach Restaurant Corporation is the Appellant and Throttlefest, LLC, American Outlaw Spirits Incorporated, Full Throttle LLC, and Full Throttle Sloon Shine, LLC are the Respondents.

**INITIAL BRIEF OF APPELLANT  
(AS TO RESPONDENT THROTTLEFEST, LLC)**

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**TABLE OF CONTENTS**

TABLE OF AUTHORITIES .....3

STATEMENT OF ISSUES ON APPEAL .....5

STATEMENT OF THE CASE.....6

STANDARD OF REVIEW .....8

FACTS .....10

LAW/ANALYSIS

    I.    The Circuit Court erred in dismissing Appellant’s third-party claims  
          against Respondent Throttlefest, LLC where the arguments raised  
          required consideration of matter outside the Complaint. ....14

    II.   The Circuit Court erred in dismissing Appellant’s third-party claim for  
          contribution against Respondent Throttlefest, LLC.

        A.  The Circuit Court improperly required Appellant to plead or present  
            evidence that Respondents’ settlement with the underlying Plaintiff  
            was not in good faith.....17

        B.  The Circuit Court improperly relied upon *Smith v. Tiffany* to support  
            a finding that dismissal of the contribution cause of action would not  
            impact Appellant’s due process and equal protection rights. ....19

    III.  The Circuit Court erred in dismissing Appellant’s third-party claims  
          based upon the statute of limitations.....23

    IV.  The Circuit Court erred in dismissing Appellant’s third-party tort claims  
          based upon the existence of a contractual agreement between Appellant  
          and Respondent Throttlefest. ....26

CONCLUSION.....28

**TABLE OF AUTHORITIES**

**STATE CASES**

Baird v. Charleston County,  
333 S.C. 519, 511 S.E.2d 69 (1999),..... 8, 14

Brown v. Leverette,  
291 S.C. 364, 353 S.E.2d 697 (1987),..... 8, 18, 23

Citizens & S. Nat'l Bank of S.C. v. Constr. Enter.,  
309 S.C. 500, 424 S.E.2d 530 (Ct. App. 1992),..... 23

City of Newberry v. Newberry Elec. Co-op., Inc.,  
387 S.C. 254, 692 S.E.2d 510 (2010),..... 24

Corbin v. Kohler Co.,  
351 S.C. 613, 571 S.E.2d 92(Ct. App. 2002),..... 12

Cowart v. Poore,  
337 S.C. 359, 523 S.E.2d 182 (Ct. App. 1999),..... 9

First Gen. Servs. of Charleston, Inc. v. Miller,  
314 S.C. 439, 445 S.E.2d 446 (1994),..... 25

First Union Nat. Bank of S.C. v. Hitman, Inc.,  
308 S.C. 421, 418 S.E.2d 545 (1992),..... 12

Flateau v. Harrelson,  
355 S.C. 197, 584 S.E.2d 413 (Ct. App. 2003),..... 8

Gentry v. Yonce,  
337 S.C. 1, 522 S.E.2d 137 (1999),..... 8, 9

Koontz v. Thomas,  
333 S.C. 702, 511 S.E.2d 407 (Ct. App. 1999),..... 26

Maher v. Tietex Corp.,  
331 S.C. 371, 500 S.E.2d 204 (Ct.App.1998),..... 24

McCormick v. England,  
328 S.C. 627, 494 S.E.2d 431 (Ct. App. 1997),..... 8

Parag v. Baby Boy Lovin,  
333 S.C. 221, 508 S.E.2d 590 (Ct. App. 1998),..... 12

Rumpf v. Mass. Mut. Life Ins. Co.,  
357 S.C. 386, 593 S.E.2d 183 (Ct.App.2004),..... 24

<u>Skydive Myrtle Beach, Inc. v. Horry Cty.</u> , 426 S.C. 175, 826 S.E.2d 585 (2019),	26, 28
<u>Smith v. Tiffany</u> , 419 S.C. 548, 799 S.E.2d 479 (2017),	5, 12, 15, 17, 18, 19, 20, 22
<u>Spence v. Spence</u> , 3368 S.C. 106, 628 S.E.2d 869 (2006),	15, 16
<u>State Ports Auth. v. Booz-Allen</u> , 289 S.C. 373, 346 S.E.2d 324 (1986),	26, 27
<u>Stephens v. Hendricks</u> , 226 S.C. 79, 83 S.E.2d 634 (1954),	18
<u>Stiles v. Onorato</u> , 318 S.C. 297, 457 S.E.2d 601 (1995),	8, 14
<u>Tatum v. Medical Univ. of South Carolina</u> , 346 S.C. 194, 552 S.E.2d 18 (2001),	9
<u>Tommy L. Griffin Plumbing &amp; Heating Co. v. Jordan, Jones &amp; Goulding, Inc.</u> , 320 S.C. 49, 463 S.E.2d 85 (1995),	26, 27
<u>Toussaint v. Ham</u> , 292 S.C. 415, 357 S.E.2d 8 (1987),	9
<u>Town of Iva ex rel. Zoning Administrator v. Holley</u> , 374 S.C. 537, 649 S.E.2d 108 (Ct. App. 2007),	20
<u>Williams v. Condon</u> , 347 S.C. 227, 553 S.E.2d 496 (Ct. App. 2001),	8
<u>Wright v. PRG Real Estate Mgmt., Inc.</u> , 426 S.C. 202, 826 S.E.2d 285 (2019),	27
<b><u>FEDERAL AND OUT-OF-STATE CASES</u></b>	
<u>Elbaor v. Smith</u> , 845 S.W.2d 240, 250 (Tex. 1992)	23
<u>Sylvia Dev. Corp. v. Calvert County, Md.</u> , 48 F.3d 810, 818 (4th Cir. 1995)	20
<b><u>RULES</u></b>	
S.C. Const. Art. I, § 3; U.S. CONST. amend. XIV	19
Rule 8(a), SCRPC	26

Rule 8(c), SCRCF.....	15
Rule 12(b)(6), SCRCF.....	8, 14
S.C. Code Ann. § 15-38-15.....	21, 22
S.C. Code Ann. §15-38-50.....	15, 17, 18

**OTHER AUTHORITIES**

Amity S. Edmonds <i>Tort Liability in South Carolina: Does Section 15-38-15 Truly Limit Joint and Several Liability or Is It A Mere Illusion in the Realm of Phantom Tortfeasors?</i> 5 Charleston L. Rev. 679 (2011).....	22
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## STATEMENT OF ISSUES ON APPEAL

- I. Whether the Circuit Court erred in dismissing Appellant's third-party claims against Respondent Throttlefest, LLC where the arguments raised required consideration of matter outside the Complaint?
- II. Whether the Circuit Court erred in dismissing Appellant's third-party claim for contribution against Respondent Throttlefest, LLC where (a) the Court improperly required Appellant to plead or present evidence that Respondents' settlement with the underlying Plaintiff was not in good faith and (b) the Court improperly relied upon *Smith v. Tiffany*<sup>1</sup> to support a finding that dismissal of the contribution cause of action would not impact Appellant's due process and equal protection rights.
- III. Whether the Circuit Court erred in dismissing Appellant's third-party claims based upon the statute of limitations?
- IV. Whether the Circuit Court erred in dismissing Appellant's third-party tort claims based upon the existence of a contractual agreement between Appellant and Respondent Throttlefest?

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<sup>1</sup> 419 S.C. 548, 560-61, 799 S.E.2d 479, 486 (2017).

## STATEMENT OF THE CASE

The first-party lawsuit was filed in the Horry County Court of Common Pleas on May 12, 2017, asserting various causes of action related to injuries Douglas Kelsey (“Kelsey”), the first-party plaintiff, sustained in a motorcycle-on-motorcycle collision on May 16, 2014 in Myrtle Beach, South Carolina. R.\* (Compl.). Following the filing of a First Amended Complaint on July 7, 2017, Appellant House of Blues Myrtle Beach Restaurant Corporation, Respondent Throttlefest, and others were all named defendants. R.\* (First Amd. Compl.). Kelsey alleged that Appellant and Respondent were liable for the over-service of alcohol to co-defendant Travis Wagoner (“Wagoner”) during an event called “Throttlefest 2014.” See id.

On October 15, 2019, Kelsey filed a Second Amended Complaint, at which time only the House of Blues Defendants and Wagoner remained as defendants in the case. R.\* (Sec. Amd. Compl.).

On October 18, 2019, Appellant answered the Second Amended Complaint and asserted a Third-Party Complaint. R.\* (HOB Answer and Third-Party Compl.).

On December 5, 2019, Respondent Throttlefest, one of the third-party defendants, filed an Answer and Motion to Dismiss pursuant to Rule 12(b)(6), SCRCPP, followed by a Memorandum in Support of the Motion. R.\* (Throttlefest Answer and Counterclaim); R.\* (Throttlefest’s Mot. to Dismiss, Dec. 5, 2020); R.\* (Throttlefest’s Memo. in Support of Mot. to Dismiss). Appellant filed a Memorandum in Opposition to Respondent’s Motion. R.\* (HOB’s Memo. in Opp., Jan. 7, 2020).

On January 8, 2020, a hearing on Respondent’s Motion to Dismiss was held before The Honorable Benjamin Culbertson. R.\* (Culbertson Hrg. Tr.). Judge Culbertson orally granted the motion and entered a Form 4 Order providing the same and instructed counsel for Throttlefest to prepare a formal order. Culbertson Hrg. Tr., p. 26, lines 6-16; R.\* (Form 4 Order, Jan. 8, 2020). Judge Culbertson entered a written order granting the motion to dismiss on February 4, 2020, and

entered an identical order again on February 5, 2020. R.\* (Order, Feb. 4, 2020); R.\* (Order, Feb. 5, 2020).

On February 14, 2020, Appellant filed a Motion to Alter or Amend pursuant to Rule 59(e), SCRCP. R.\* (HOB Mot. to Alter or Amend).

On March 4, 2020, Judge Culbertson entered a Form 4 Order denying the Motion to Alter or Amend. R.\* (Form 4 Order, Mar. 4, 2020).

Appellant filed the instant appeal from Judge Culbertson's Orders. Respondent filed a Motion to Dismiss the appeal, which this Court denied by Order entered on July 28, 2020.

This brief of Appellant follows.<sup>2</sup>

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<sup>2</sup> This matter has been consolidated for purposes of the Record on Appeal with the appeal from the Orders of The Honorable William A. McKinnon, which granted the Motion to Dismiss of the other third-party defendants, American Outlaw Spirits Incorporated, Full Throttle LLC, and Full Throttle Sloon Shine, LLC. Though they share a single appellate case number, separate briefs are being filed with respect to the two appeals.

## STANDARD OF REVIEW

Under Rule 12(b)(6), SCRCP, a defendant may move to dismiss based on a failure to state facts sufficient to constitute a cause of action. Flateau v. Harrelson, 355 S.C. 197, 201, 584 S.E.2d 413, 415 (Ct. App. 2003). Generally, in considering a 12(b)(6) motion, the trial court must base its ruling solely upon allegations set forth on the face of the complaint. Stiles v. Onorato, 318 S.C. 297, 457 S.E.2d 601 (1995); Brown v. Leverette, 291 S.C. 364, 353 S.E.2d 697 (1987) (noting trial court must dispose of motion for failure to state cause of action based solely upon allegations set forth on face of complaint); Williams v. Condon, 347 S.C. 227, 233, 553 S.E.2d 496, 499 (Ct. App. 2001) (finding that trial court's ruling on 12(b)(6) motion must be bottomed and premised solely upon allegations set forth by plaintiff).

“A motion to dismiss under Rule 12(b)(6) should not be granted if facts alleged and inferences reasonably deducible therefrom would entitle the plaintiff to relief on any theory of the case.” Flateau, 355 S.C. at 202, 584 S.E.2d at 415; see Gentry v. Yonce, 337 S.C. 1, 522 S.E.2d 137 (1999); see also Baird v. Charleston County, 333 S.C. 519, 527, 511 S.E.2d 69, 73 (1999) (declaring that if the facts and inferences drawn from the facts alleged on the complaint would entitle the plaintiff to relief on any theory, then the grant of a motion to dismiss for failure to state a claim is improper); McCormick v. England, 328 S.C. 627, 494 S.E.2d 431 (Ct. App. 1997) (concluding that motion to dismiss cannot be sustained if facts alleged in complaint and inferences reasonably deducible therefrom would entitle plaintiff to relief on any theory of the case).

“Dismissal of an action pursuant to Rule 12(b)(6) is appealable.” Williams, 347 at 233, 553 S.E.2d at 500. Upon review of a dismissal of an action pursuant to Rule 12(b)(6), the appellate court applies the same standard of review implemented by the trial court. Id. In deciding whether the trial court properly granted the motion to dismiss, this Court must consider whether the complaint, viewed in the light most favorable to the plaintiff, states any valid claim for

relief. See Gentry, 337 S.C. at 5, 522 S.E.2d at 139; see also Cowart v. Poore, 337 S.C. 359, 523 S.E.2d 182 (Ct. App. 1999) (explaining that looking at facts in light most favorable to plaintiff, and with all doubts resolved in his behalf, the court must consider whether the pleadings articulate any valid claim for relief).

The trial court's grant of a motion to dismiss will be sustained if the facts alleged in the complaint do not support relief under any theory of law. Tatum v. Medical Univ. of South Carolina, 346 S.C. 194, 552 S.E.2d 18 (2001). The complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action. Toussaint v. Ham, 292 S.C. 415, 357 S.E.2d 8 (1987).

## FACTS

The underlying first-party action arose from a motorcycle-on-motorcycle collision on May 16, 2014 in Myrtle Beach, South Carolina, which resulted in injuries to first-party plaintiff Kelsey. Kelsey alleged that Travis Wagoner was overserved with two free shots of liquor, allegedly given to him by Michael “Fajita Mike” Garner during an event at House of Blues called Full Throttle Saloon Festival, also known also as “Throttlefest 2014.” R.\* (Sec. Amd. Compl. ¶¶ 8-15); R.\* (HOB Third-Party Compl. ¶¶ 93, 107-109). There is a dispute over whether Garner was acting as an employee of Appellant, Respondent, and/or the other Third-Party Defendants, and who was responsible for his training and supervision. Compare R.\* (Sec. Amd. Compl. ¶¶ 8, 29, 40-42), with R.\* (HOB Third-Party Compl. ¶¶ 114-117).

Respondent, and others, were previously parties to the first-party action. Respondent was subsequently dismissed following an apparent voluntary settlement agreement with Kelsey. R.\* (Form 4 Order, Dec. 11, 2018).

When Kelsey filed his Second Amended Complaint, Appellant filed an Answer and also asserted the following causes of action against the third-party defendants, including Respondent: breach of contract, negligent misrepresentation, negligence, equitable indemnification, contractual indemnification, and contribution. R.\* (HOB Answer and Third-Party Compl.).

In the Third-Party Complaint, Appellant alleged that Appellant and Respondent entered into a Co-Promotion Agreement (“Agreement”) with an effective date of March 19, 2014, concerning the functions and acts necessary for promoting and conducting the Throttle Fest event, to be held May 9-17, 2014 at the House of Blues location in Myrtle Beach, South Carolina. R.\* (HOB Third-Party Compl. ¶97); R.\* (Co-Promotion Agreement, Exhibit to Throttlefest’s Memo. in Support of Mot. to Dismiss, Dec. 30, 2019). Michael Ballard and Jesse James Dupree are affiliated with Throttlefest, LLC, as well as related entities Full Throttle, L.L.C., Full Throttle

Sloon Shine, LLC, and American Outlaw Spirits Incorporated, on behalf of which the two men attended the Throttlefest 2014 event. R.\* (HOB Third-Party Compl. ¶¶ 112-113). Appellant avers that throughout the Throttlefest event, Fajita Mike was acting as the employee or agent of the Third-Party Defendants, including Respondent. Id. ¶¶ 114-115. Further, the Third-Party Defendants all had the opportunity and responsibility to supervise and control Fajita Mike and all financially benefited from Fajita Mike's alleged actions. Id. at ¶ 116-117.

Respondent's Motion to Dismiss and supporting Memorandum argued that Appellant's third-party claims should be dismissed because "(1) a release was given in good faith by Plaintiff to Throttlefest which extinguished all liability Throttlefest may have to the Plaintiff, thereby discharging Throttlefest from all liability to any other alleged tortfeasor, including House of Blues; (2) Throttlefest and House of Blues' relationship is governed solely by contract and, therefore, House of Blues' causes of action sounding in tort and equity are barred by South Carolina law; and (3) House of Blues' contract-based claims are barred by the statute of limitations." R.\* (Throttlefest's Mot. to Dismiss, Dec. 5, 2020); R.\* (Throttlefest's Memo. in Support of Mot. to Dismiss). These arguments were made at the motions hearing before Judge Culbertson on January 8, 2020. Culbertson Hr'g Tr. p. 7, line 6 – p. 12, line 18; p. 23, line 10 – p. 26, line 5.

Appellant filed a detailed Memorandum in Opposition to the Motion to Dismiss, the content of which it incorporated and summarized orally at the January 8, 2020 hearing. First and foremost, Appellant argued that dismissal of the third-party claims against Respondent would require findings of fact not evident on the face of the third-party Complaint. Additionally, Appellant argued that Respondent's settlement with Kelsey did not warrant dismissal of the third-party claims where Respondent breached its own duties owed to Appellant, the settlement with Kelsey was not in good faith, and dismissal would violate Appellant's due process and equal protection rights. Appellant further argued that the existence of Appellant's breach of contract

claim against Respondent does not preclude Appellant's additional causes of action based in equity and tort. Lastly, Appellant argued that its claims should not be dismissed based upon the statute of limitations. R.\* (HOB's Memo. in Opp., Jan. 7, 2020); Culbertson Hr'g Tr. p. 12, line 24 – p. 23, line 8.

At the January 8, 2020 hearing, Judge Culbertson issued the following oral ruling:

All right. All right. If I could get you to prepare an order, I'll grant the motion to dismiss. As I understand it, as I look through this, the breach of contract, negligent misrepresentation and the negligence cause of action are barred by the statute of limitations. Likewise, the equitable indemnification, contractual indemnification and the contribution are barred by 15-38-50 since there is a release and they did get a settlement. Based upon those grounds, I'll grant your motion to dismiss. If you would prepare an order to that effect.

Culbertson Hr'g Tr. p. 26, lines 6-16. This oral ruling was followed by a Form 4 Order and a formal written Order, identical copies of which were filed on February 4 and 5, 2020.<sup>3</sup> R.\* (Form 4 Order, Jan. 8, 2020); R.\* (Order, Feb. 4, 2020); R.\* (Order, Feb. 5, 2020).

The circuit court dismissed the third-party claim for contribution against Respondent, citing S.C. Code Ann. § 15-38-50 and Smith v. Tiffany, 419 S.C. 548, 560-61, 799 S.E.2d 479, 486 (2017), based upon the Release entered between Kelsey and Respondent. (Order, Feb. 5, 2020, pp. 5-7). The trial court dismissed the remaining causes of action for breach of contract, contractual indemnity, negligent misrepresentation, and negligence, based upon the statute of limitations, finding that the claims accrued in May 2014. (Order, Feb. 5, 2020, pp. 8-10). The

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<sup>3</sup> To the extent that Judge Culbertson's written Order is inconsistent with his oral ruling, the written order controls. See Parag v. Baby Boy Lovin, 333 S.C. 221, 226, 508 S.E.2d 590, 592 (Ct. App. 1998) ("To the extent the written order may conflict with the prior oral ruling, the written order controls."); First Union Nat. Bank of S.C. v. Hitman, Inc., 308 S.C. 421, 422, 418 S.E.2d 545, 545 (1992) ("a judge is not bound by the prior oral ruling and may issue a written order which is in conflict with the oral ruling"); Corbin v. Kohler Co., 351 S.C. 613, 621, 571 S.E.2d 92, 97 (Ct. App. 2002) ("The written order is the trial judge's final order and as such constitutes the final judgment of the court.").

court further found that Appellant's causes of action for negligent misrepresentation, negligence, and equitable indemnification were barred by the terms of the Co-Promotion Agreement. (Order, Feb. 5, 2020, pp. 11-12).

On February 14, 2020, Appellant filed a Motion to Alter or Amend pursuant to Rule 59(e), SCRC.P. R.\* (HOB Mot. to Alter or Amend). Appellant's motion argued that the trial court should amend its Order to correct the following errors and omissions:

1. The trial court failed to rule on Appellant's argument that Respondent's arguments were not proper for Rule 12(b)(6) dismissal because they required the Court to consider information outside of the Third-Party Complaint.
2. The trial court erred in finding that Appellant was required to plead that Respondent's settlement with Plaintiff was not in good faith or present evidence of the same in order for its contribution claim to survive.
3. The trial court erred in relying upon Smith v. Tiffany to find that Appellant's federal and state constitutional rights of due process and equal protection were protected after admitting that the case explicitly failed to consider such arguments.
4. The trial court erred in dismissing causes of action based upon the statute of limitations where the court failed to properly apply the discovery rule and failed to distinguish the accrual of the indemnification claim.
5. The trial court erred in finding that the existence of the Co-Promotional Agreement precluded alternative tort and equitable claims.
6. The trial court erred in failing to address why amendment of the pleadings was not the proper remedy for any alleged deficiency in the initial pleading.

Appellant's motion was decided on the written submissions alone and denied by a Form 4 Order entered on March 4, 2020. R.\* (Form 4 Order, Mar. 4, 2020).

## LAW/ANALYSIS

### **I. The Circuit Court Erred in Dismissing Appellant's Third-Party Claims Against Respondent Throttlefest, LLC Where the Arguments Raised Required Consideration of Matter Outside the Complaint.**

While Respondent's motion was articulated only under Rule 12(b)(6), it required consideration outside of the pleadings for a full and fair adjudication. There was no notice provided to Appellant that the motion to dismiss would be converted to one for summary judgment. Thus, Appellant was not given an opportunity to fully contravene Respondent's arguments with deposition testimony, affidavits, and other evidence. The disconnect between the applicable standard and the arguments made by Respondent infected the circuit court's rulings on the existence and nature of the prior settlement, the statute of limitations, and the efficacy of the tort claims. Had the proper standard been applied, the circuit court would have found that dismissal was improper and ruled that Respondent could raise its claims in a future summary judgment motion.

Respondent brought its motion to dismiss pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure, the ruling on which must be based solely upon allegations set forth on the face of the complaint. Stiles v. Onorato, 318 S.C. 297, 457 S.E.2d 601 (1995). While a 12(b)(6) motion may be converted to a motion for summary judgment when matters outside the pleading are presented to and not excluded by the Court, all parties must be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56. Baird v. Charleston County, 333 S.C. 519, 527, 511 S.E.2d 69, 73 (1999) (citing Rule 12(b)(6), SCRPC). Where the trial court does not give notice to the parties that it will consider the affidavits and hear the 12(b)(6) motion as a motion for summary judgment, the evidence outside of the complaint is not properly considered. Id.

Here, the only document overtly considered by the circuit court was the Co-Promotion Agreement, which was referenced and quoted in the Third-Party Complaint. While Respondent offered a copy of its confidential Release with Kelsey to the court at the hearing, Appellant objected that review of such would be matter outside of the pleadings. Culbertson Hr'g Tr. p. 9, lines 7-16. Nevertheless, the court relied upon the Release to dismiss Appellant's contribution claim. See R.\* (Order, Feb. 5, 2020, pp. 3, 5-7). As discussed *infra*, it is not mere existence of a settlement agreement, but the good faith nature of such an agreement, that entitles a settling co-defendant to protections under S.C. Code Ann. §15-38-50. Thus, in order to fairly assess the applicability of the statute, the Court would necessarily have to review the content of the Release. Appellant should also have been given an opportunity to conduct discovery into the circumstances surrounding the release. It is notable that Smith v. Tiffany, upon which Respondent relied in support of its argument, involved a motion for summary judgment and not a motion to dismiss.

The circuit court should have found that the viability of the contribution cause of action was not proper for dismissal and could be raised again on summary judgment. The same is true for Respondent's claim that the relationship between it and Appellant is purely contractual, a full and fair evaluation of the argument would have required a review of deposition testimony of various witnesses, which are outside of the Third-Party Complaint.

With respect to Respondent's claim that the third-party action is barred by the statute of limitations, the defense of the running of the statute of limitations is an affirmative defense that normally must be asserted in an Answer. Rule 8(c), SCRPC. An affirmative defense ordinarily may not be asserted in a motion to dismiss under Rule 12(b)(6) unless the allegations of the complaint demonstrate the existence of the affirmative defense. Spence v. Spence, 368 S.C. 106, 123, 628 S.E.2d 869, 878 (2006). "This rule arises out of the notion that consideration of an affirmative defense usually requires reference to factual allegations and matters which are beyond

the scope of allegations set forth in the complaint. Therefore, because the factual analysis of a Rule 12(b)(6) motion is confined to the four corners of the complaint, an affirmative defense usually must be pled in an answer and either resolved in later motions such as summary judgment or directed verdict or at trial.” Id. However, most courts allow such defenses to be raised in a motion to dismiss under Rule 12(b) “when there is no disputed issue of fact raised by an affirmative defense, or the facts are completely disclosed on the face of the pleadings, and realistically nothing further can be developed by pretrial discovery or a trial on the issue raised by the defense....” Id. at 124, 628 S.E.2d at 878. Here, the statute of limitations issue could not be resolved based solely on the pleadings, as the matter of when Appellant could and should have reasonably discovered Respondent’s contractual breaches and tortious conduct was not apparent from the Complaint. Appellant argued that it had no reason to know of Respondent’s malfeasance until after it learned of the off-site collision and allegations of the over-service of alcohol by Michael Gardner.

Thus, the circuit court erred in two ways. First, the court failed to notice Appellant that Respondent’s motion would be converted to one for summary judgment so that Appellant could present additional material in support of its claims and assert defenses to summary judgment, such as a Rule 56(f) affidavit. Second, despite the lack of formal conversion to a motion for summary judgment, the court proceeded to consider material outside of the pleadings presented by Respondent despite the proper standard requiring consideration of only the pleadings and perhaps such an integral document as the Co-Promotion Agreement. Accordingly, Appellant was not given an opportunity to fully contravene Respondent’s arguments with deposition testimony, affidavits, and other evidence. Had the proper standard been applied by the circuit court, Respondent’s motion to dismiss would have been denied because the pleadings were sufficient to sustain the causes of action asserted and Respondent’s arguments were more properly raised after discovery, in a motion for summary judgment.

**II. The Circuit Court Erred in Dismissing Appellant’s Third-Party Claim for Contribution Against Respondent Throttlefest, LLC.**

**A. The Court Improperly Required Appellant to Plead or Present Evidence that Respondents’ Settlement with the Underlying Plaintiff Was Not in Good Faith.**

The trial court erred in ruling that Appellant’s contribution claim was barred by Smith v. Tiffany and S.C. Code Ann. §15-38-50. It was Respondent’s Motion to Dismiss and memorandum which raised an argument that the contribution cause of action (and all other causes of action) should be precluded pursuant to S.C. Code Ann. §15-38-50 and Smith v. Tiffany. R.\* (Throttlefest’s Mot. to Dismiss, Dec. 5, 2020); R.\* (Throttlefest’s Memo. in Support of Mot. to Dismiss). In response, Appellant distinguished Smith v. Tiffany, which was notably a summary judgment case, and argued that this Court’s decision would necessarily require consideration of matters outside of the Third-Party Complaint to determine if the settlement with Throttlefest was made in good faith. R.\* (HOB Memo. in Opp., pp. 6-8).

Nonetheless, the circuit court ruled that Appellant’s contribution claim was barred and explained further:

House of Blues argues that §15-38-50 does not apply here because the settlement between Throttlefest and the Plaintiff was not in “good faith,” as is required by the statute. However, House of Blues did not allege in its Third-Party Complaint that the settlement was not in good faith. Nor did House of Blues present anything else that the Court could consider to support this argument. Accordingly, the Court rejects it.

R.\* (Order, Feb. 5, 2020, p. 6).

In Smith v. Tiffany, our Supreme Court acknowledged that “achieving a more fair apportionment of damages among joint tortfeasors was one of the policy goals underlying the legislature’s enactment of the [South Carolina Contribution Among Joint Tortfeasors] Act.” 419 S.C. at 556, 799 S.E.2d at 483-84. “[T]he legislature was attempting to strike a fair balance for all involved—plaintiffs and defendants—and to do so in a way that promotes and fosters settlements.”

Id. at 557, 799 S.E.2d at 484. The Act provides:

When a release or a covenant not to sue or not to enforce judgment is given **in good faith** to one of two or more persons liable in tort for the same injury or the same wrongful death:

(1) it does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide, but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater; and

(2) it discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor.

S.C. Code Ann. § 15-38-50 (emphasis added).

There is no basis to find that Appellant was required to anticipate that Respondent would raise its settlement with Plaintiff as a defense and preemptively plead that such a settlement existed and was not made in good faith. See Stephens v. Hendricks, 226 S.C. 79, 88, 83 S.E.2d 634, 639 (1954) (“It is a general principle that a pleading need and should not, by its averments, anticipate a defense thereto, and negative or avoid it.”). Further, to require Appellant to produce evidence that the settlement was not made in good faith at the Rule 12(b)(6) level is to convert the claim to one for summary judgment. Neither the terms nor the amount of the settlement have been disclosed to Appellant. Appellant was not put on notice that such conversion of the motion from an ordinary dismissal motion would be made so as to subpoena this evidence or call a witness in order to compel the disclosure of the same. Rather, by making this ruling, the circuit court confirmed that it was applying a different standard than that for a Rule 12(b)(6) motion. See Brown v. Leverette, 291 S.C. 364, 367, 353 S.E.2d 697, 699 (1987) (reversing dismissal where it was apparent the trial court looked beyond the complaint and gave no notice to the parties that it was going to hear the 12(b)(6) motion as a motion for summary judgment). Accordingly, the circuit court’s ruling that Respondent’s settlement with Plaintiff warranted dismissal of Appellant’s contribution cause of action should be reversed.

**B. The Court Improperly Relied Upon *Smith v. Tiffany* to Support a Finding That Dismissal of the Contribution Cause of Action Would Not Impact Appellant's Due Process and Equal Protection Rights.**

The circuit court further erred in its analysis and rejection of Appellant's argument that the application of S.C. Code §15-38-50 to preclude Appellant's contribution claim would violate Appellant's due process and equal protection rights. See S.C. Const. Art. I, § 3; U.S. CONST. amend. XIV. Specifically, the circuit court ruled:

House of Blues next argues that Smith v. Tiffany did not decide whether due process and equal protection would allow a non-settling defendant to bring a settling party back into a case. **While it is true that Smith v. Tiffany did not decide this issue, the Court declines to rule that House of Blues' due process or equal protection rights would be violated by not allowing it to bring Throttlefest back into this case.** Throttlefest has already settled with the Plaintiff. House of Blues had ample opportunity to assert crossclaims against Throttlefest when they were both parties to this case, and further has had opportunities to file a separate action against Throttlefest. House of Blues' constitutional rights are not violated by its inability to bring Throttlefest back into this case. House of Blues further argues that its ability to use the "empty-chair defense" at trial is insufficient to protect its rights. **However, the emptychair defense was adopted by the legislature and discussed in Smith v. Tiffany as a non-settling defendant's remedy in place of being able to bring settling entities in as parties to a case.**

R.\* (Order, Jan. 5, 2020, pp. 6-7) (emphasis added).

The circuit court's reference to past opportunities to file crossclaims or a separate action certainly are improper. If, in fact, the contribution cause of action is precluded now, then the same causes of action raised in a different posture would not be in any better position to survive.

Moreover, the circuit court's reliance upon Smith v. Tiffany's discussion of the empty-chair defense is misplaced. The Smith v. Tiffany Court wrote:

[P]erhaps in recognition of the perceived inequity complained of by Appellants, the General Assembly took steps to protect nonsettling defendants by codifying a nonsettling defendant's right to argue the so-called empty chair defense in subsection (D) and, in subsection

(E), the right to offset the value of any settlement received prior to the verdict—a right which arises by operation of law and is not within the discretion of the courts. Thus, a critical feature of the statute is the codification of the empty chair defense—a defendant “retain[s] the right to assert another potential tortfeasor, whether a party or not, contributed to the alleged injury or damages”—which necessarily contemplates lawsuits in which an allegedly culpable person or entity is not a party to the litigation (hence the chair in question being “empty”).

419 S.C. at 557, 799 S.E.2d at 484 (internal citations omitted). However, the Court specifically noted:

[B]ecause Appellants’ brief includes only conclusory reference to ‘due process consideration of fairness and equity’ and sets forth no substantive legal argument or supporting citations to authority (even to the due process clauses themselves), we do not consider Appellants’ argument that the trial court erred in finding their due process rights were violated by the inability to join [third party defendant] or include him on the verdict form for purposes of allocation.”

419 S.C. at 558, n. 3, 799 S.E.2d at 484, n.3. Thus, the discussion of the empty chair defense in Smith v. Tiffany was not grounded in any consideration of due process or equal protection.

The Due Process and Equal Protection Clauses of the South Carolina Constitution and United States Constitution require that “the states apply each law, within its scope, equally to persons similarly situated, and that any differences of application **must be justified by the law’s purpose.**” Town of Iva ex rel. Zoning Administrator v. Holley, 374 S.C. 537, 649 S.E.2d 108 (Ct. App. 2007 (emphasis added)) (quoting Sylvia Dev. Corp. v. Calvert County, Md., 48 F.3d 810, 818 (4th Cir. 1995). Any separate classification “must be reasonable, **not arbitrary**, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.” Id. (emphasis added).

Prior to 2005, South Carolina was a pure joint and several liability state. Any defendant, regardless of percentage of fault allocated by a jury, was liable to pay the entire amount of damages

awarded to a plaintiff. On July 1, 2005, the South Carolina legislature modified joint and several liability law, eliminating joint and several liability for “any defendant whose conduct is determined to be less than fifty percent of the total fault ...” S.C. Code Ann. § 15-38-15. The clear intent of the legislature was to protect the least-culpable potential tortfeasors, from those who owned the lion’s share of culpability.

The Act sets forth the procedure for allocation of fault by the fact finder in matters involving more than one defendant:

(C) The jury, or the court if there is no jury, shall:

...

(3) upon motion by at least one defendant, where there is a verdict ... for damages against two or more defendants for the same indivisible injury, death, or damage to property, specify in a separate verdict ... the percentage of liability that proximately caused the indivisible injury, death, damage to property, or economic loss from tortious conduct ... that is attributable to each defendant whose actions are a proximate cause of the indivisible injury, death, or damage to property.” The Act further provides that “[a] defendant shall retain the right to assert that another potential tortfeasor, whether or not a party, contributed to the alleged injury or damages and/or may be liable for any or all of the damages alleged by any other party.

Section 15-38-15 continues:

(D) A defendant shall retain the right to assert that another potential tortfeasor, whether or not a party, contributed to the alleged injury or damages and/or may be liable for **any** or all of the damages alleged by any other party.

As applied, section 15-38-15 provides protections to some defendants (i.e., in cases where all named tortfeasors are named and remain as a defendant) while extinguishing the protections to others (i.e., in cases where not all tortfeasors are named and remain as a defendant). In the latter scenario, the defendants are forced to absorb the entire fault of the non-parties.

Section 15-38-15(D)’s provision regarding an “empty-chair defendant” provides no safety net. The reality is, where a jury cannot apportion fault to a nonparty tortfeasor, a defendant cannot

simply argue that the “empty-chair defendant” contributed to a plaintiff’s injury or damages or may be liable for any portion of the damages. Subsection (C)(3) provides that the total percentages of fault allocated must be one hundred percent. Accordingly, subsection (D) only provides protection to named-defendants on a “perfect” empty-chair defendant argument. Where a nonparty tortfeasor is liable to a plaintiff in an amount less than one hundred percent, the total liability on the verdict form must still be distributed amongst only the plaintiff and the named defendants. Thus, the protections afforded to some defendants under modified joint and several liability are eliminated, while defendants in other actions where a plaintiff has chosen to bring (and keep) all potential tortfeasors to court are provided the protections. The unfortunate elimination of the protections afforded under modified joint and several liability leads to obscure results.

Justice Pleicones, in his dissent, illustrates this principal through several hypotheticals. See Smith v. Tiffany, 419 S.C. 548, 799 S.E.2d 479 (Pleicones, J., dissenting); see also Amity S. Edmonds, Tort Liability in South Carolina: Does Section 15-38-15 Truly Limit Joint and Several Liability or Is It A Mere Illusion in the Realm of Phantom Tortfeasors?, 5 Charleston L. Rev. 679 (2011) (“It is fundamentally unfair to hoist the entire burden of a phantom or absent tortfeasor on a marginally negligent co-defendant .... However, if South Carolina courts fail to allow apportionment of fault to nonparty or settling defendants, the ostensible protection provided to defendants within the Act from the harsh injustice of joint and several liability could all but vanish without a trace.”).

There is no justification for the unequal application of law to defendants in actions where plaintiffs fail to name all potential tortfeasors or settle with one or more them before trial. The inability to assert any cause of action against a nonparty tortfeasor for the purpose of preserving the right to have a jury allocate fault to the nonparty tortfeasor violates the due process and equal protection clauses of the Constitution and the protections afforded to named defendants under the

amended joint and several liability laws. See Elbaor v. Smith, 845 S.W.2d 240, 250 (Tex. 1992) (As a matter of public policy, this Court favors settlements, but we do not favor partial settlements that promote rather than discourage further litigation. And we do not favor settlement arrangements that skew the trial process, mislead the jury, promote unethical collusion among nominal adversaries, and create the likelihood that a less culpable defendant will be hit with the full judgment. The bottom line is that our public policy favoring fair trials outweighs our public policy favoring partial settlements. (emphasis added)). Accordingly, the circuit court erred in dismissing Appellant's contribution claim against Respondent.

### **III. The Circuit Court Erred in Dismissing Appellant's Third-Party Claims Based Upon the Statute of Limitations.**

As discussed more fully in Issue I, *supra*, the trial court erred in considering matters outside of the Complaint and determining that Appellant "should have known" of its claims for breach of contract, contractual indemnity, negligent misrepresentation, and negligence against Respondent during the Event held on Appellant's property on May 9-17, 2014, as such was not apparent from the Complaint. See Brown v. Leverette, 291 S.C. 364, 367, 353 S.E.2d 697, 699 (1987) ("It is also our opinion that the trial court's ruling on the statute of limitations, *res judicata* and collateral estoppel was error because these defenses were not apparent from the face of the complaint."); Citizens & S. Nat'l Bank of S.C. v. Constr. Enter., 309 S.C. 500, 504, 424 S.E.2d 530, 532 (Ct. App. 1992) (reversing the circuit court's grant of judgment on the pleadings based on the defendant's affirmative defense of the statute of limitations where the complaint raised issues of fact regarding the time limit and the plaintiffs were not required to file a reply to the affirmative defenses). This error warrants reversal.

Assuming *arguendo* that this matter was proper for disposition in a motion to dismiss, the trial court erred in its analysis. Appellant's Third-Party Complaint was timely filed on October

18, 2019, because House of Blues first notice of the underlying first party claim, which are what gave rise to the third-party claims, was a letter dated October 20, 2016, from Kelsey's counsel sent certified mail to House of Blues.

“The statute of limitations begins to run when the party either knew or should have known that some legal right had been invaded.” City of Newberry v. Newberry Elec. Co-op., Inc., 387 S.C. 254, 260, 692 S.E.2d 510, 513 (2010); see also Maher v. Tietex Corp., 331 S.C. 371, 376–77, 500 S.E.2d 204, 207 (Ct.App.1998) (“The discovery rule determines the date of accrual for a breach of contract action[.]” and “[p]ursuant to the discovery rule, a breach of contract action accrues not on the date of the breach, but rather on the date the aggrieved party either discovered the breach, or could or should have discovered the breach through the exercise of reasonable diligence”); Rumpf v. Mass. Mut. Life Ins. Co., 357 S.C. 386, 394–95, 593 S.E.2d 183, 187 (Ct.App.2004) (noting that the “exercise of reasonable diligence” means “that the injured party must act with some promptness where the facts and circumstances of an injury place a reasonable person of common knowledge and experience on notice that a claim against another party might exist”).

While actual notice is not the ultimate test, there is no evidence that Appellant had reason to believe that Respondent had done anything wrong prior to notice of the first-party claim from Kelsey's counsel after October 20, 2016. Notably, the collision between Wagoner and Kelsey occurred off of Appellant's property. As was articulated to the circuit court, Appellant is not omnipotent of everything that occurs on its property. Rather, Appellant first learned of the allegation of over-service of alcohol to Wagoner by Fajita Mike in the first-party litigation, as well as Respondent's other breaches of contract, tortious conduct, and the need for indemnification. Travis Wagoner admitted in his deposition that he was not sure if anyone at House of Blues saw him being served by Fajita Mike. R.\* (HOB Mot. to Alter/Amend, Ex. A). Thus, the fact that

Throttlefest 2014 was held from May 9-17, 2014, is of no consequence. Instead, the earliest date from which Appellant knew or should have known of its third-party claims against Respondent was October 20, 2016.

Appellant further made arguments related to equitable tolling for May 12, 2017 to December 14, 2018, when Respondent was a defendant in the first-party litigation. Appellant also argued that equitable estoppel should apply because it was Respondent's procurement of false testimony regarding Respondent's connection to Fajita Mike that enticed its settlement with Kelsey. R.\* (HOB's Memo. in Opp., Jan. 7, 2020).

To the extent that Respondent disputed these facts, Respondent did not present any evidence, beyond mere supposition and speculation, that Appellant should have known about Respondent's breaches and torts during the Event. This further reveals why the limitations should be resolved only after discovery and on a motion for summary judgment, where consideration of this additional evidence would be proper. Dismissal pursuant to Rule 12(b)(6) was not warranted.

Additionally, the circuit court failed to distinguish the breach of contract and contractual indemnity claims, lumping them together as the same. R.\* (Order, Feb. 5, 2020, p. 8) ("The "Contractual Indemnification" cause of action is actually a breach of contract claim, as it alleges that Throttlefest is contractually required to indemnify and defend House of Blues against the allegations made in this case, but has failed to do so."). In First Gen. Servs. of Charleston, Inc. v. Miller, our Supreme Court ruled: "As to indemnity, the statute of limitations generally runs from the time judgment is entered against the defendant. There being no judgment at this time, First General's third-party action for indemnity is not time-barred." 314 S.C. 439, 444, 445 S.E.2d 446, 449 (1994). Thus, Appellant's indemnification causes of action are not time-barred.

In sum, the statute of limitations issue was not proper for 12(b)(6) dismissal, the third-party claims were timely filed, and any untimely filing should be excused under the doctrines of

equitable tolling and/or estoppel. Accordingly, the circuit court erred in dismissing Appellant's claims based upon the statute of limitations.

**IV. The Circuit Court Erred in Dismissing Appellant's Third-Party Tort Claim Based Upon the Existence of a Contractual Agreement Between Appellant and Respondent Throttlefest.**

The circuit court further erred in finding that at Appellant's third-party claims sounded only in contract, and not in tort. R.\* (Order, Feb. 5, 2020, p. 11). The court relied upon language in the Co-Promotion Agreement between Appellant and Respondent that "the parties shall not have any obligations whatsoever to each other outside of the Agreement." *Id.* The court further ruled:

House of Blues argues that Throttlefest made representations to House of Blues outside of the Agreement and, therefore, additional duties were created. A review of House of Blues' Third-Party Complaint shows that the representations that House of Blues alleges Throttlefest made were regarding Throttlefest's performance under the Agreement. The Court is not convinced that these alleged representations support tort claims.

(Order, p. 12).

The existence of the Agreement and its "exclusive duties" provision are not dispositive regarding the propriety of the tort claims. *See, e.g., Skydive Myrtle Beach, Inc. v. Horry Cty.*, 426 S.C. 175, 188, 826 S.E.2d 585, 592 (2019) (finding plaintiff properly pled alternative theories of liability); Rule 8(a), SCRPC ("Relief in the alternative or of several different types may be demanded."). "A breach of a duty which arises under the provisions of a contract between the parties must be redressed under contract, and a tort action will not lie." *Koontz v. Thomas*, 333 S.C. 702, 511 S.E.2d 407 (Ct. App. 1999). "A breach of a duty arising independently of any contract duties between the parties, however, may support a tort action." *Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.*, 320 S.C. 49, 55, 463 S.E.2d 85, 88 (1995) (citing *State Ports Auth. v. Booz-Allen*, 289 S.C. 373, 346 S.E.2d 324 (1986)). "In most

instances, a negligence action will not lie when the parties are in privity of contract.” Id. “When, however, there is a special relationship between the alleged tortfeasor and the injured party not arising in contract, the breach of that duty of care will support a tort action.” Id.

As one example of how Appellant properly pled its additional and alternative tort claims, Respondent has specifically denied that its duties under the Agreement included proper training and supervision of Fajita Mike. Appellant asserted that Respondent represented to them by its words and actions, that Respondent would properly train and supervise Fajita Mike. “While there is generally no duty to act under the common law, a duty to use due care may arise where an act is voluntarily undertaken.” Wright v. PRG Real Estate Mgmt., Inc., 426 S.C. 202, 212, 826 S.E.2d 285, 290 (2019). “The question of whether such a duty arises in a given case may depend on the existence of particular facts. Where there are factual issues regarding whether the defendant was in fact a volunteer, the existence of a duty becomes a mixed question of law and fact to be resolved by the fact finder.” Id. (internal citations and quotations omitted)). Thus, there is a basis to assert that Throttlefest’s breach of duty arose independently of any contract duties between the parties, which is sufficient to support a tort action. See Tommy L. Griffin Plumbing & Heating Co., supra.

Relatedly, the circuit court ruled: “House of Blues’ Equitable Indemnification cause of action is also dismissed because the Agreement contains cross-indemnification provisions.” R.\* (Order, Feb. 5, 2020, p. 12). The circuit court overlooked that the Third-Party Complaint raised allegations in contract and tort, such that reliance upon either contractual or equitable indemnification would necessarily depend upon which theory of liability (or both) was determined by the fact-finder. If a jury found Respondent breached its contract with Appellant, then contractual indemnification would apply. If a jury found that Respondent voluntarily undertook a duty outside of the contract and was liable in tort, then equitable indemnity would apply.

Additionally, Appellant argued that to the extent the circuit court determined that there were any defects in its pleading, the proper relief would be to permit amendment of the Complaint.

A circuit court does not have “discretion” to dismiss a complaint with prejudice for failure to state a claim under Rule 12(b)(6) without at least considering whether to allow leave to amend under Rule 15(a). Under Rules 12(b)(6) and 15(a), the circuit court may not dismiss a claim with prejudice unless the plaintiff is given a meaningful chance to amend the complaint, and after considering the amended pleading, the court is certain there is no set of facts upon which relief can be granted.

Skydive Myrtle Beach, Inc. v. Horry Cty., 426 S.C. 175, 189, 826 S.E.2d 585, 592 (2019). Despite raising the court’s failure to consider amendment as a less drastic relief in Appellant’s Motion to Alter or Amend, the circuit court still failed to permit amendment to cure the alleged deficiencies, most likely in light of the circuit court’s companion ruling on the statute of limitations.

Accordingly, the circuit court erred in finding that Appellant’s tort claims were precluded because of the Co-Promotion Agreement and in denying Appellant the opportunity to amend its Complaint.

### **CONCLUSION**

Based on the foregoing, Appellant respectfully requests that this Court reverse the Order of Dismissal entered by Judge Culbertson in favor of Respondent Throttlefest, LLC.

[SIGNATURE PAGE TO FOLLOW]

Respectfully submitted,  
COLLINS & LACY, P.C.

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ATTORNEYS FOR APPELLANT HOUSE OF  
BLUES MYRTLE BEACH RESTAURANT  
CORPORATION

**INITIAL BRIEF OF APPELLANT (AS TO  
RESPONDENT THROTTLEFEST LLC)**

Columbia, South Carolina  
December 21, 2020

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

**RECEIVED**

**Dec 21 2020**

**SC Court of Appeals**

APPEAL FROM HORRY COUNTY  
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge  
William A. McKinnon, Circuit Court Judge

Appellate Case No. 2020-000407

Douglas Kelsey.....Plaintiff,

v.

House of Blues Myrtle Beach Restaurant Corporation;  
HOB Entertainment, Inc.; and Travis Scott Wagoner.....Defendants.

AND

House of Blues Myrtle Beach Restaurant Corporation .....Third-Party Plaintiff,

v.

Throttlefest, LLC; American Outlaw Spirits Incorporated;  
Full Throttle LLC; and Full Throttle Sloon Shine, LLC.....Third-Party Defendants.

Of Whom House of Blues Myrtle Beach Restaurant Corporation is the Appellant and Throttlefest, LLC, American Outlaw Spirits Incorporated, Full Throttle LLC, and Full Throttle Sloon Shine, LLC are the Respondents.

**PROOF OF SERVICE**

I certify that I have served INITIAL BRIEF OF APPELLANT (AS TO RESPONDENT THROTTLEFEST LLC) by mailing a copy of same in the United States mail, with sufficient postage affixed thereto on this 21<sup>st</sup> Day of December, 2020, to the following:

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**PROOF OF SERVICE**

Columbia, South Carolina  
December 21, 2020



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December 21, 2020

**VIA U.S. MAIL AND EMAIL**

The Honorable Jenny A. Kitchings  
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**RECEIVED**

**Dec 21 2020**

**SC Court of Appeals**

***Re: Douglas Kelsey v. House of Blues Myrtle Beach Restaurant Corporation, HOB Entertainment, Inc., and Travis Scott Wagoner; House of Blues Myrtle Beach Restaurant Corporation v. Throttlefest LLC, American Outlaw Spirits Incorporated, Full Throttle, L.L.C., and Full Throttle Sloon Shine, LLC  
Appellate Case No. 2020-000407  
Claim No. 188372477-001-GL  
C&L File No. 001133-00111***

Dear Ms. Kitchings:

Please find enclosed for filing are the following:

1. Appellant's Motion to File Initial Briefs Out-of-Time, together with our firm's check in the amount of \$50.00 for the filing fee;
2. Initial Brief of Appellant (as to Respondents American Outlaw Spirits Incorporated, Full Throttle, LLC, and Full Throttle Sloon Shine, LLC) with Proof of Service of same;
3. Initial Brief of Appellant (as to Respondent Throttlefest, LLC) with Proof of Service of same; and
4. Designation of Matter.

Pursuant to the Supreme Court's Amended Order "re: Operation of the Appellate Courts During the Coronavirus Emergency" (2020-05-29-02, Appellate Case No. 2020-000447), we have not included any additional copies. If any additional copies are required, please let us know.

By copy of this letter and enclosures, we are serving same on counsel.

The Honorable Jenny A. Kitchings

December 21, 2020

Page 2

Thank you for your time and attention. Should you have any questions or concerns, please do not hesitate to contact us.

Respectfully,

*s/Christian Stegmaier*

Christian Stegmaier

CS/net

Encl.

The Honorable Jenny A. Kitchings

December 21, 2020

Page 3

*cc (via U.S. Mail and email):*

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Kara Shea Grevey, Esquire