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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

Appellate Case No. 2022-001727
Civil Action Case No. 2014-CP-40-07037

Century Capital Group, LLC, **Appellant**,

v.

Midtown Development Group, LLC; Richland Joint Venture Group, LLC; Windsor Richland Mall, LP; and BRC Richland, LLC, Defendants,

Of whom Windsor Richland Mall, LP is the **Respondent**.

INITIAL REPLY BRIEF OF APPELLANT

D. Ryan McCabe, Jr., SC Bar No. 16977
MCCABE, TROTTER & BEVERLY, P.C.
4500 Fort Jackson Blvd., Suite 250
Columbia, SC 29209
Phone: (803) 724-5000 Fax: (803) 724-5001
Email: ryan.mccabe@mccabetrotter.com
Attorney for Appellant

Other counsel of record:
Ruth A. Levy (SC Bar No. 103371)
John G. Tamasitis (SC Bar No. 101875)
Brian H. Gibbs (SC Bar No. 104137)
WILLIAMS MULLEN
1230 Main Street, Suite 330
Columbia, South Carolina 29201
(803) 567-4613
AttorneyS for Respondent

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ARGUMENT

I. Century properly preserved arguments for appellate review.

In its brief, Windsor incorrectly argues that Century failed to preserve issues for appeal. Pursuant to Rule 59(e), SCRCP, Century timely moved to alter or amend the Order granting Windsor's motion for attorney's fees and costs ((17) Order Granting Fees, hereinafter "Order")) due to the trial court's new findings and conclusions in the Order. Those findings and conclusions contradicted the law of the case and were not supported by the pleadings or the record.

The Order filed September 23, 2022 included findings that had not been alleged in any prior pleading. Specifically, the Order stated: "[Century] filed this action seeking contribution arising out of a Reciprocal Easement, Covenant, Operation and Restriction Agreement and Declaration (the "REA") executed between Century and Defendants herein." (17 Order Granting Fees at 2). These findings were erroneous for two reasons: first, nothing in the record before the trial court characterized the sole cause of action as contribution action arising under the REA. The contribution action arose under the South Carolina Uniform Contribution Among Tortfeasors Act (the "Act"). This is an important distinction as the Act does not provide attorney's fees to the prevailing party, but the REA could provide an award of attorney's fees to a prevailing party. Second, Century did not execute the REA or any other agreement with Respondent, or any other defendant in the underlying action. Further, there was no evidence in the record to support such a finding. Each defendant in the underlying action owned the Midtown Parcel at different times, but never at the same time. Indeed, Windsor recites this fact in its Statement of Facts in its brief.

These new findings also contradicted the law of the case. The Order Granting Defendant's Motion for Summary Judgment dated September 17, 2015 provided, "[t]he sole cause of action in

this case is one for contribution pursuant to the South Carolina Uniform Contribution Among Tortfeasors Act […]" (7 Order granting motion for summary judgment at 5). This same order further found that claims against Windsor were barred by the 8-year Statute of Repose as Windsor sold the Midtown Parcel more than 8 years before the action was commenced. (7 Order granting motion for summary judgment at 12-13).

The trial court lacked jurisdiction and authority to make new findings that fundamentally redefined Century's case, post-remittitur. Prior to the Order, there were no findings or pleadings alleging a contractual relationship between Windsor and Century. The record is clear that Windsor no longer owned the Midtown Parcel and thus had no privity under the REA to Century. Without a beneficial interest in the Midtown Parcel, Windsor had no grounds to enforce the REA as a benefitted owner against a remote grantee. McLeod v. Baptiste, 315 S.C. 246, 433 S.E.2d 834 (1993) (grantor of restrictive covenant cannot enforce covenant against remote grantee when grantor owns no real property which would benefit from enforcement).

II. Windsor mischaracterizes Century's underlying suit as a contract action.

Throughout Windsor's brief, it repeatedly mischaracterizes Century's original claim against it as contractual; ostensibly to imply a right to attorney's fees under the contract, the REA, as no viable argument exists to provide attorney's fees under the Act. Windsor argues that the Second Amended Complaint references the REA in its recitation of facts and that this somehow created privity. The mere mention of a contract in a statement of facts does not create privity of contract, nor does it entitle Windsor to a contractual claim for attorney's fees. While the existence of the REA is necessary to understand the facts of the case, it does not create a contract between the Windsor and Century.

The record is devoid of a single instance where either Century or Windsor alleged the existence of a contract between them. To emphasize this point, Windsor's first claim for attorney's fees came nearly nine (9) months after remittitur, in a motion with 18 numbered paragraphs. (10 Motion for Attorney's Fees). The first 16 paragraphs recite the facts and procedural history of the case and acknowledge Windsor last owned an interest in the subject properties in 2005, five years before Century purchased one of the subject properties. (10 Motion for Attorney's Fees ¶¶ 8-12). No where in the motion, nor previously in the case, did Windsor allege a contract with Century that entitled it to attorney's fees. It merely recited the attorney's fees provision in the REA and then stated, "Now that all grounds for appeal have been exhausted by Century, Windsor is entitled to its reasonable attorneys' fees and costs under Article IX, Section B of the REA." (10 Motion for Attorney's Fees ¶ 18).

The facts of this case are complex and convoluted – but the point is simple. A party cannot claim a contractual right to attorney's fees against a party to which it is not in privity. Under the REA, the various owners of the Midtown Parcel were obligated to undertake certain maintenance and repairs on the Verizon Parcel during their period of ownership. It is undisputed that Windsor last owned the Midtown Parcel on November 4, 2005 when it sold the Midtown Parcel to an intervening owner. (7 Order granting motion for summary judgment at 12-13). The sale of the Midtown Parcel by Windsor terminated its obligations under the REA to maintain the Verizon Parcel. (7 Order granting motion for summary judgment at 12-13). It is also undisputed that Century did not become an owner of the Midtown Parcel until February 16, 2010 almost 5 years after Windsor sold the Midtown Parcel. Both Windsor and Century's Statements of the Case in their briefs to this Court attest to these facts. No survivorship clause exists under the REA. A grantor of property may not enforce restrictions against a remote grantee if the grantor owns no

real property which would benefit from the restriction. (3 the REA). (7 Order granting motion for summary judgment at 12-13). See Id. at 246 433 S.E.2d at 834.

Approximately nine (9) months after Century purchased the Midtown Parcel, Spirit SPE Columbia, LLC ("Spirit") sued Century under numerous causes of action. (7 Order granting motion for summary judgment at 2-3). The gravamen of Spirit's complaint was that it had to replace its roof based upon years of poor maintenance. Century settled with Spirit for $1,450,000.00. (7 Order granting motion for summary judgment at 3). Century subsequently brought suit against Windsor and other prior owners of the Midtown Parcel for contribution under the Act. (2 Second amended complaint). Century was unable to sue the prior owners under the terms of the REA because it lacked privity with the prior owners. It could proceed under the Act if it alleged that it and the defendants were joint tortfeasor and that Century paid more than its share to settle the underlying dispute, which Century elected to do. (2 Second amended complaint ¶21). It defies logic that Century lacked privity to bring a contractual claim against Windsor under the REA, but Windsor could avail itself to that same contract in order to obtain an award of attorney's fees against Century.

III. Windsor mischaracterizes Century's claims against Windsor.

In the Initial Brief of Respondent, it alleges that "…Century also sought contribution in part for alleged acts that do not fall under the Act, such as Windsor's alleged negligence in maintaining and repairing the Verizon Parcel, common areas, roof and HVAC system. (2 2d Am. Compl., pg. 4-5)." (Pg. 4). However, Century's Second Amended Complaint clearly brought only a single cause of action - Contribution under the Act. (2 Second amended complaint). Likewise, Spirit's lawsuit against Century specifically included allegations under its negligence cause of

action for repairs to the Verizon Parcel, common areas, roof and HVAC system. (Spirit's Third Amended Complaint ¶¶ 34-39).

Windsor also states that, "Century cannot argue that Windsor does not have privity or standing under the REA when Century itself alleged the REA provided an avenue for contribution." (Initial Brief of Respondent Pg. 10). There is no reference to anything in the record to support this, because Century never made such an allegation. Century settled tort claims brought against it by Spirit for defective repairs and defective maintenance of improvements connected with the Verizon Parcel. (7 Order granting motion for summary judgment at 3).Century believed that some of these defective repairs were performed by Windsor and thus unsuccessfully sought a recovery under the Act. (2 Second amended complaint ¶15).

These mischaracterizations attempt to reinterpret Century's claims against Windsor as arising under contract when the record is devoid of any such contract between Century and Windsor. The sole purpose of such mischaracterization is to claim a basis for attorney's fees where one does not otherwise exist.

CONCLUSION

For all the foregoing reasons, this Court should reverse the order of the Circuit Court Judge awarding attorney's fees to Windsor.

Respectfully submitted,

November 28, 2023
Columbia, SC

s/ D. Ryan McCabe, Jr.

D. Ryan McCabe, Jr., SC Bar No. 16977
MCCABE, TROTTER & BEVERLY, P.C.
4500 Fort Jackson Blvd., Suite 250
Columbia, SC 29209

Phone: (803) 724-5000 Fax: (803) 724-5001
Email: ryan.mccabe@mccabetrotter.com
Attorney for Appellant