THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough, Master-in-Equity

Case No. 2012-CP-10-8447
Appellate Case No. 2014-001273

Montclair Property Owners Association, Inc. and Montclair Property Owners Association Board of Directors for and on behalf of all owners of the Montclair Horizontal Property Regime, as assignees of Montclair Associates Limited Partnership, Cremco, LLC, and Montclair Homes, LLC .. .. Respondent,

v.

Church Creek Construction, LLC,. .... Appellant.

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STATEMENT OF ISSUE ON APPEAL

Did the trial court err in ruling in favor of Plaintiffs as to their contribution claim against Defendant Church Creek where Plaintiffs failed to establish that the settling defendants, who assigned their contribution claims to Plaintiffs, paid more than their pro rata share of any common liability with Church Creek because: (1) the settlement agreements released claims that did not involve Church Creek; (2) the agreements failed to allocate any amount attributed to a common liability between the settling defendants and Church Creek; and (3) the settlement amounts, parties, and claims involved made it impossible for Plaintiffs to prove an entitlement to contribution from Church Creek?

STATEMENT OF THE CASE

Montclair Property Owners Association, along with Montclair Property Owners Association Board of Directors for and on behalf of all owners of the Montclair Horizontal Property Regime (collectively, Plaintiffs or "the Regime"), initiated the underlying action in this case on December 31, 2008. (Summons & Compl., R. at 44.) In the operative complaint in the underlying action, Plaintiffs asserted claims arising out of the conversion of the Montclair apartments to condominiums against the following defendants (Third Am. Compl., R at 67):

- Montclair Associates Limited Partnership ("MALP"), which owned and operated Montclair as an apartment community from 1992 until 2003 (Cremco & MALP Settlement at 2, R at 1215),

- Montclair Homes, LLC ("Montclair Homes"), which was organized May 8, 2003, purchased Montclair from MALP on November 11, 2003, and then undertook the conversion of Montclair from apartments to condominium units (R. at 1061, 1063, 1236);

- Bruce Kinney, individually, as incorporator for Montclair Homes, and as an officer/director of the Montclair Property Owners Association a/k/a Montclair Homeowners Association, who served as managing member of Montclair Homes, (Third Am Compl. ¶ 7, R at 71);

- CREMCO, LLC ("CREMCO"), which formerly served as property management for MALP and Montclair Homes (Cremco & MALP Settlement at 2, R. at 1215; Third Am. Compl. ¶ 9, R at 71);

- Montclair Property Owners Association a/k/a Montclair Homeowners Association ("Montclair POA"), formed September 26, 2003 and named as a Defendant for the grantor control period (the period that Montclair Homes controlled the board of the POA) (Consent Judgment ¶ 5, R. at 16);

- Church Creek Construction, LLC ("Church Creek"), which performed repair work to the interiors and exteriors of the Montclair condominiums from 2003 to 2005 (Stipulations of Fact ¶ 3, R. at 1197) and is owned jointly by Larry Elsey and Kevin Molony (Trial Tr. at 138:11–14, R. at 259),

- Larry Elsey (individually and d/b/a ECI or Elsey Construction) ("Elsey" or "ECI"), who performed repair work at Montclair under the direction of Church Creek, (Trial Tr. at 130:23–31:7, R. at 251-52); and

- Roger Lockey ("Lockey"), who also performed repair work at Montclair under the direction of Church Creek, (id.).

In the operative underlying complaint, Plaintiffs asserted the following claims: (1) declaratory judgment; (2) negligent construction and repairs (as to Kinney, Montclair Homes, MALP, and CREMCO),[1] (3) breach of implied warranty of workmanship (as to Kinney, Montclair Homes, MALP, and CREMCO); (4) negligent and grossly negligent misrepresentation (Kinney, individually, Montclair Homes, Montclair POA, MALP, and CREMCO); (5) breach of fiduciary duty and failure to adequately reserve funds for use of the POA (as to all Defendants, except Church Creek, Elsey, and Lockey); (6) breach of express warranties and/or advertisements (as to Kinney, Montclair Homes, MALP, and CREMCO); (7) failure to comply with South Carolina Condominium Disclosure of Physical Condition of Buildings (as to Kinney and Montclair Homes); (8) disbursements from a dissolved LLC under South Carolina Code Section 33-44-808 (as to Kinney and other Unnamed Members of Montclair Homes), (9) negligent construction (as to Church Creek, Elsey, and Lockey); and (10) breach of implied warranty of workmanship (as to Church Creek, Elsey, and Lockey). (Third Am. Compl. ¶¶ 63–121, R. at 85-97.) As to these ten claims, Plaintiffs only asserted the ninth and tenth causes of action against Church Creek, the appellant in this appeal.[2]

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[1] Plaintiffs refer to these four defendants as the Joint Enterprise Defendants, alleging that these Defendants were involved in a joint enterprise for the development of the Montclair Horizontal Property Regime (Third Am. Compl. ¶¶ 52–62, R. at 82-85.)

[2] Notably, although Plaintiffs filed the underlying lawsuit in 2008, Plaintiffs did not amend their complaint to add Church Creek, Elsey, and Lockey as defendants until August 30, 2010. (Third Am. Compl., R. at 67.)

In May of 2012, Plaintiffs settled with Elsey and Lockey for $525,000 00, and their settlement agreement did not reserve any contribution claims. (Settlement Agreement, R. at 1226.) Plaintiffs subsequently entered into a stipulation of dismissal as to their claims against Elsey and Lockey (Stipulation of Dismissal, R. at 1.)

On October 4, 2012, the trial court entered a consent judgment in the underlying matter against Montclair Homes and Montclair POA for $1.6 million and against MALP and CREMCO for $1.4 million (Judgment, R. at 15.) In November of 2012, Plaintiffs executed two settlement agreements—one with Bruce Kinney, Montclair Homes, and Montclair POA for $1 6 million, and the other with CREMCO and MALP for $1.4 million (Settlement Agreements, R. at 1214.) Both settlement agreements extinguished *all liability* for the allegations covered by the underlying complaint, *including* Plaintiffs' claims against Church Creek. Plaintiffs and the settling defendants executed and filed a satisfaction and cancellation of judgment on December 28, 2012. (Satisfaction and Cancellation, R. at 18.) MALP, CREMCO, and Montclair Homes subsequently assigned to Montclair POA their potential claims for contribution against Church Creek. (Assignments, R at 1219, 1222, 1224)

On December 31, 2012, Plaintiffs filed a complaint against Church Creek seeking contribution, based upon the amounts paid by the defendants of the $3 million settlement. (Summons & Compl., R at 99) Church Creek filed an answer denying the allegations of the complaint and asserting affirmative defenses (Answer, R. at 114) On May 6, 2013, the trial court referred the contribution action to the Master-in-Equity. (Consent Order of Reference, R. at 21.)

The Master-in-Equity held a hearing to decide the contribution claims on July 24, 2013. (Trial Tr at 1, R. at 119.) In an Order filed on November 14, 2013, the Master-in-Equity ruled in favor of Plaintiffs as to their contribution claim and ordered Church Creek to pay $475,000.00. (Judgment & Order, R at 25.)

Church Creek timely filed a motion for reconsideration (Mot. to Reconsider, R at 1247.) Following a hearing, (Hearing Tr., R. at 304), the Master-in-Equity denied Church Creek's motion by entry of a form judgment without analysis on May 9, 2014, (Notice of Entry & Judgment, R. at 42). Church Creek timely appealed both of the Master-in-Equity's orders.

FACTS

Montclair at Towne Centre ("Montclair") is a group of 39 buildings, including multi-family dwelling structures, comprising 240 units, a clubhouse, and related facilities located at 1861 Montclair Drive, Mt. Pleasant, South Carolina 29464. (CREMCO/MALP Settlement Agreement at 2, R at 1215, Third Am. Compl. ¶¶ 5, 18–19, R. at 70, 73.) Montclair was constructed between 1980 and 1990 on 26 acres of real property, and the buildings contained apartments. (Third Am Compl. ¶ 19, R at 73.) The original construction included a slab on grade with conventional wood framing, Masonite siding, some brick facades, and asphalt shingle roofs. (Id.)

In 2003, Montclair was converted from apartments to condominiums by the filing of a master deed by the immediate condominium converter, Montclair Homes. (Stipulations of Fact ¶ 2, R. at 1195.) Montclair Homes, the grantor on the condo master deed and the entity which sold to the public, purchased the property immediately prior to the filing of the master deed from MALP, an Illinois limited partnership (Stipulations of Fact ¶ 4, R. at 1196, see also Third Am Compl ¶¶ 22–23 (MALP conveyed the property to Montclair Homes on November 6, 2003, and the next day, Montclair Homes filed the master deed creating the Regime), R at 74.) The new regime, which is the Plaintiff in this case, is known as the Montclair Horizontal Property Regime It has done business since its inception as a non-profit corporation and is administered by a Board of Directors. (Third Am Compl. ¶¶ 1–4, R. at 70.)

In 2002 and 2003, American Consulting, Inc. ("ACE"), architects, consultants and engineers, performed several inspections for MALP and issued two written assessments of the Montclair property. (11/18/02 ACE Report, R. at 336; 4/24/03 ACE Property

Condition Assessment, R. at 366; Third Am. Compl ¶ 24, R. at 74.) As early as November 18, 2002, ACE recommended, in writing, that the Masonite siding on the buildings be repaired or replaced as a priority in need of immediate attention [3] (11/18/02 ACE Report at 1-2, R at 337-38.) The 2002 ACE report, as well as a subsequent ACE report issued in April of 2003, noted a pending class action lawsuit involving the Masonite siding included in the original construction at Montclair.[4] (11/18/02 ACE Report at 1–2, R. at 337-38; 4/24/03 ACE Property Condition Assessment at 1, 5, R. at 367.) Church Creek did not have any involvement with the application of the Masonite siding or with any of the original construction of the Montclair apartments. (Trial Tr at 47 15–25, R. at 168.)

In May of 2003, Montclair Homes hired Epps Edwards Architects ("Epps") to inspect the Montclair buildings "for the purpose of making a disclosure of the physical condition of each residential unit/unit building group for prospective buyers." (Epps Letter dated 5/18/03, R at 335; Epps Report at 4, R. at 326.) In his report, Robert Epps explained that the buildings were painted in 1994 to 1995 and a new roof was installed in 1994. (Epps Report at 3, 5, R. at 325, 327) Epps never mentioned the Masonite siding in his report. (Id. at 1–12, R. at 323-34.) After inspecting all 240 units, Epps only noted minor siding repairs needed to nine of the units. (Id. at 7–10 (Unit 1746: "Wood siding

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[3] The 2002 ACE Report further noted, "it is our opinion that immediate action is needed on the exterior siding, concrete sidewalks, patios, curbing, tennis court, playground equipment, asphalt walkways and tennis court and playground, and the retaining wall " (11/18/02 ACE Report at 4, R at 340) The report defined "immediate" needs as those repairs and replacements that "need[] to be done immediately due to safety concerns and/or preservation of structure and finishes " (Id at 1, R at 337)

[4] Plaintiffs allege that the joint enterprise defendants failed to inform prospective buyers of the information contained in the ACE reports, and instead, provided each buyer at closing with a letter, originating from CREMCO, but on ACE stationery, which "characterized the Masonite siding problem as affecting only a 'small percentage' of the siding and characterized the likelihood of recovery in the class action suit as 'probably low' and concluded that 'it would be better to spend the money on routine maintenance and isolated repairs '" (Third Am Compl ¶ 58, R at 83, 11/6/03 Letter [Ex 76], R at 731)

and trim deterioration at chimney;" Unit 1772: "Minor bottom siding damage at read next to electric meter;" Unit 1774: "Minor siding damage at right side of sliding door;" Unit 1782: "Minor damage to siding at rear elevation near grade;" Unit 1809: "Piece of siding is off the rear elevation (laying on the ground);" Units 1808/1810/1812: "Small area of damaged siding at bottom of right side exterior building elevation;" Unit 1867: "Minor 'openings' in vertical joints of siding at the exterior right side elevation," R. at 329-332.) Epps did not include any opinion as to the useful life expectancy of the siding and building envelope as common elements (Id. at 1–12, R at 323-334) In conclusion, and contrary to the 2002 ACE report, Epps represented that "the residential units and the development as a whole have been well maintained," and "[a]s a result the buildings are in good to very good condition." (Id. at 12, R. at 334.)

Beginning in 2003 and continuing until approximately early 2005, construction work was done on both the interiors and exteriors of the newly formed condominiums by Church Creek, a licensed South Carolina general contractor. (Stipulations of Fact ¶ 3, R. at 1196.) Both MALP and Montclair Homes hired Church Creek to do construction work to accomplish certain work on the interiors, upfits, and on the exteriors, siding and roof repair work, in preparation for sale of the condominiums to the public. (Stipulations of Fact ¶ 4, R. at 1196.) Elsey and Lockey worked for Church Creek or were subcontractors or independent contractors doing exterior work on the condominiums at Montclair at the direction of Church Creek. (Stipulations of Fact ¶ 10, R. at 1197.)

Kevin Molony, one of the owners of Church Creek (along with Elsey), testified at trial that Bruce Kinney initially hired Church Creek to perform extensive interior renovations to the Montclair units at a cost of $2 5 million. (Trial Tr. at 129:11–25,

136.8–10, R. at 250, 257; Elsey Depo. at 31:2–33:25, R. at 1156-58.) Church Creek's original scope of work did not include any exterior work, and Church Creek did not bid for any exterior work. (Trial Tr at 131:8–11, R. at 252.) Molony explained that as Church Creek began performing the interior work at the premises, the Epps report was brought to his attention, which is how Church Creek became involved with some of the exterior repairs. (Trial Tr. at 131:12–17, R at 252.) Molony characterized the work reflected in the Epps report as "very minor exterior work to be done" and indicated that Church Creek was asked to perform the work reflected in the Epps report. (Id.) In October and November of 2003, Church Creek provided Bruce Kinney with estimates to complete the repair work for the items listed in the Epps report (10/10/02 Letter [Ex. 32], R. at 385; 11/10/03 Letter [Ex 33], R. at 391.)

Additionally, Church Creek performed work based on the recommendations of home inspectors as Montclair Homes sold individual units, as well as "very, very minor repairs to some roofs," following a tropical storm. (Trial Tr at 132:8–13, 133:4–11, R. at 253, 254; CL-100 Letter & Report [Ex. 50], R. at 727.) The total cost of Church Creek's exterior work on the project was $317,000 00. (Trial Tr. at 136:1–5, R. at 257; Church Creek Exterior Work Invoice [Ex.34], R at 397.) Finally, Church Creek performed repair work to the firewalls in several units, as requested by Kinney, for a total cost of approximately $10,300.00 (Trial Tr. at 133:16–19, R. at 254, Attic Repairs Estimate [Ex 45], R. at 723; Attic Repairs Invoice [Ex. 136], R. at 1050.)

Molony testified that he never received and had no knowledge of the ACE reports (Trial Tr. at 132:20–23, R at 253) Molony further testified that no one asked him to perform a complete visual inspection of the exterior of the Montclair buildings.

(Trial Tr. at 134:8–11, R. at 255.) In fact, he explained that Church Creek's exterior work "was limited to the Epps Report." (Trial Tr. at 134:12–16 ("Whatever was on that report we addressed that issue."), 134:18–20 (Molony testifying, "I'm not an architect. We followed their lead. [Epps] said everything was good, so we took it for that."), R at 255.) Thus, the scope of Church Creek's work was limited and did not include removing or replacing all of the siding at Montclair or repairing the siding at all of the units. (Trial Tr. at 32:5–8 (Montclair POA board president testifying that Church Creek was "instructed to do isolated spots or incidents on the outside or to address the Epps Report or to do particular things and that they did those particular things"), 120·5–121.9 (Plaintiffs' expert referring to a letter in which Kinney complains to MALP that the damage is much worse than was represented at the sale and testifying that if Kinney/Montclair Homes "actually fixed what needed to be fixed it would have been much more than what he spent"), R at 153, 241-42.) Plaintiff's expert Derek Hodgin also confirmed, based on his review of the documents and invoices in the record, that Church Creek's scope of work was limited to the Epps report (Trial Tr at 65 23–25, R. at 186; 11/10/03 Church Creek Estimate [Ex. 33], R. at 391; Church Creek Exterior Work Invoice [Ex. 34], R. at 397.)

Hodgin specifically noted in his expert report that "[m]ost siding repairs were done over the years by Carolina Builders & Restoration on an emergency basis." (6/8/10 Hodgin Letter at 1–2, R. at 744-45.) As with Church Creek's exterior repairs, "[Carolina Builders] did not perform comprehensive repairs, but only spot repairs to stop leaks." (Id. at 1, R. at 744; Trial Tr at 115:24–116:13, R. at 236-37.) Hodgin recommended that "[a]ll elevations on all buildings with hardboard siding need to be re-clad as the repairs

done cannot be incorporated into the envelope that is needed with any real degree of confidence that it can manage water properly " (Id. at 1–2, R. at 744-45.)

Sales of condominium units to the public began in November of 2003 and continued until May of 2005 when Montclair Homes, the condominium converter, sold the last of the 240 units at Montclair. (Stipulations of Fact ¶ 5, R. at 1196.) Bruce Kinney served as the managing member of Montclair Homes (Id.) Bruce Kinney and his son, James Kinney, oversaw and directed Church Creek's work at Montclair.[5] (Trial Tr. at 135:3–4 (Molony testified that "[a]t the beginning of the project Bruce Kinney spent quite a bit of time."), 135:4–6 ("They sort of instructed us what they wanted us to do, and after we did it they wanted to make sure the work was done "), 144:19–20 ("At the beginning it was Bruce that checked on things Later on James came into the picture."), R. at 256, 265)

In May of 2005, Montclair Homes transferred control over the Montclair POA to the owners of the condominium units. (Third Am. Compl. ¶ 17, R. at 73.) Lawrence A. Laddaga has served on the Montclair POA board since 2005 and is president of the board. (Trial Tr. at 28:4–12, R at 149.) Laddaga testified that "[w]hen the board took over Mr. Kinney left the Association's finances in a pretty terrible state." (Trial Tr. at 29:4–5, 29:5–8 ("He was only setting aside about $30,000 a year for the reserves, and he was using that money each year to balance his budget, which was running a deficit."), 29:9–11 (explaining that "we didn't know how much we needed to have for reserves but we knew zero was not the right number"), R. at 150.)

[5] Although James Kinney is not an engineer, architect, or contractor, Bruce Kinney hired his son to oversee the repairs at Montclair, and James Kinney was "directing the extent of the work of Church Creek" and "giving them the okay on how far they could go " (Trial Tr at 94 7–23, R at 218)

As a result, in late 2005 to early 2006, the Montclair POA board "commissioned the reserve study." (Trial Tr. at 29:11, 29:16–19, R. at 150.) Laddaga testified that "when the reserve study came back," the board was "both completely shocked and devastated that almost everything on the property was beyond its useful life and the enormous amount of money that we were short in the reserves." (Trial Tr. at 29:11–22, R. at 150.) The study revealed the poor overall condition of the Masonite siding and advised the Montclair POA board to partially or totally replace the original Masonite siding on an expedited basis. (Trial Tr. at 34:14–20, 51:12–13, R. at 155, 172; Reserve Study [Ex. 91], R. at 794.) With respect to the insufficient reserve funding, Laddaga agreed that Church Creek did not "have anything to do with the inadequate reserve funding." (Trial Tr. at 51:21–24, R. at 172)

In late 2008, the Regime filed this lawsuit against the underlying Defendants for the causes of action set forth above, arising out of the conversion of Montclair from apartments to condominiums and the subsequent sale of the condominiums to the public. As to Church Creek, Elsey, and Lockey, Plaintiffs asserted that they were negligent in the repairs they made to Montclair and that those repairs allegedly caused property damage, including water leakage, to common elements at the property As to the remaining Defendants, Plaintiffs sought to hold them liable for negligent construction and repairs, as well as for negligent and grossly negligent misrepresentation, breach of fiduciary duty, breaches of express warranties and/or advertisements, failure to comply with the statutory requirements for disclosing the present condition of all common elements of the condominium units to prospective purchasers, and/or for disbursement from a dissolved LLC. With respect to these latter claims, Plaintiffs did not assert those causes of action

against Church Creek, Elsey, or Lockey. Specifically, Plaintiffs alleged, *inter alia*, the following misconduct, which did not involve Church Creek:

- That Montclair Homes, Kinney, MALP, and CREMCO were aware that prospective purchases were given the Epps report, representing the property to be in "good to very good" condition, and that prospective purchasers were not informed of the information in the ACE report, which referenced future repairs needed, including that "repair or replacement of all the exterior siding was a priority that needed immediate attention," (Third Am. Compl ¶¶ 24–32, 37, R. at 74-76, 78);

- That "all Defendants except Lockey, Church Creek and Elsey Construction had knowledge that there was a nationwide class action pending on the siding issue at Montclair and had an affirmative duty to represent that the siding, roofs and other common elements at Montclair had exceeded or were about to exceed their useful life expectancy and that the residents and owners of the units would be put to great expense in the form of future special assessments needed to replace these common elements," (Third Am. Compl. ¶ 48, R. at 81);

- That all defendants except Church Creek, Lockey, and Elsey breached their fiduciary duty by failing to procure a reserve study and set aside a reserve sufficient to permit Plaintiffs to undertake the extensive repairs and replacement of original construction outlined in Plaintiffs' reserve study, (Third Am Compl ¶¶ 44, 92–96, R. at 80, 92-93); and

- That Kinney, Montclair Homes, MALP, and CREMCO represented to prospective purchasers that the condominiums were "Luxury Condominiums" and "nearly maintenance free," (Third Am. Compl. ¶¶ 97–101, R at 93-94).

The underlying case was vigorously contested, many depositions were taken over a two and a half year period of time, dispositive motions were heard and decided, and ultimately, the case was set for trial in October of 2012 before the Honorable Stephanie P McDonald. (Stipulations of Fact ¶ 6, R. at 1196.)

During discovery, Plaintiffs' experts opined that the cost to do a comprehensive repair at Montclair would be in excess of $12.5 million. (Stipulations of Fact ¶ 11, R. at 1197; 9/18/12 Calibogue Repair Estimate [Ex. 262], R at 1052; 11/15/10 Calibogue

Repair Estimate [Ex 99], R. at 895.) Defendants had several experts listed, but did not offer an alternative cost estimate for repair of the entire exterior of the 36 buildings and 240 units. (Id.) Derek Hodgin, employed by Construction Science and Engineering, Inc. and an expert for Plaintiffs, evaluated the condition of the Montclair property, (Trial Tr at 58:12–15, 59·6–11, R. at 179, 180), and testified that much of the work in the $12.5 million estimate has nothing to do with Church Creek's work on the project, including repairs associated with the windows, balconies, roofing, and brick facades of the Montclair units, (Trial Tr. at 104:21–106:9, 108:22–109:2, 111 5–118 20, R at 225-27, 229-30, 232-39).

Laddago also testified that much of the repairs covered by the $12.5 million repair estimate, by Hodgin's report, and by the reserve study do not relate to work by Church Creek. (Trial Tr at 39.8–40.14 (total replacement of the windows at an estimated cost of $5 million, which the board elected not to do and which do not relate to Church Creek's work), 46:22–47:25 (repair work needed to reroof all of the buildings and work related to original construction), 49:6–50:6 (approximating the following repair costs, which have nothing to do with Church Creek's work: reserve study update for $4,500; pool elements for $1.2 million, clubhouse and pool elements for $359,000, property site elements for $4 million; and exterior building elements for $8 million), R at 160-61, 167-68, 170.) The record does not contain any cost estimate to correct work done solely by Church Creek.

Although Hodgin testified that, in his opinion, Church Creek negligently performed some of its work, Hodgin did not delineate areas where Church Creek's exterior siding work was deficiently performed versus areas where original construction issues caused water intrusion or moisture damage. Further, Hodgin testified that of the

twenty-six areas in which destructive testing was performed, only six of those showed work performed by Church Creek (Trial Tr at 108:13–21, R. at 229.) In areas where Hodgin observed water damage, he attributed the damage to deficiencies in the original construction, yet criticized Church Creek for not correcting those deficiencies as part of its repair, which was, however, admittedly limited to the Epps report. (Trial Tr. at 76 18–77:9, 77:20–78:21, 92:9–16, R. at 197-99, 213.) Notably, Laddaga testified that he believed Church Creek reported any issues it discovered to Montclair Homes. (Trial Tr. at 32 9–14, R at 153.) Lockey also testified that he compiled a list of anything that he saw in need of repair and gave it to James Kinney. (Lockey Dep at 22:19–23:9, R. at 143-44.)

In April of 2012, the Regime settled with Elsey and Lockey, and their insurance carriers paid a combined total of $525,000.00 for complete individual releases for only themselves. (Stipulations of Fact ¶ 10, R. at 1197.) Elsey and Lockey did not reserve any contribution claims in their settlement agreement and releases. (Id.; see also Settlement Agreement, R at 1226) Their release was specific only as to ECI, Elsey, and Lockey and by its terms did not inure to the benefit of any of the remaining parties. (Stipulations of Fact ¶ 10, R at 1197.)

In November of 2012, Defendants MALP, CREMCO, Montclair Homes, Montclair POA, and Bruce Kinney executed separate settlement and release agreements with Plaintiffs for a total settlement by these Defendants of $3 million. (Settlement Agreements, R at 1203.) Pursuant to their agreement, MALP and CREMCO paid Plaintiffs $1.4 million, with their insurance carriers contributing $1,385,000.00 and MALP and CREMCO paying $15,000.00. (CREMCO/MALP Settlement Agreement, R.

at 1214.) Under the other agreement, Montclair Homes, Montclair POA, and Bruce Kinney (individually and as a member of Montclair Homes) paid Plaintiffs $1.6 million, also through their insurance carrier (Montclair Settlement Agreement, R. at 1203.) The liability as to all defendants in the underlying case, including Church Creek, was extinguished by payment of the settlement amounts. (Stipulations of Fact ¶ 7, R. at 1196; CREMCO/MALP Settlement Agreement ¶ 3, R. at 1216, Montclair Settlement Agreement ¶ 4, R. at 1206.) By the agreements, these settling Defendants reserved their potential claims for contribution against Church Creek and assigned those claims to Plaintiffs. (CREMCO/MALP Settlement Agreement ¶ 2, R. at 1216, Montclair Settlement Agreement ¶ 3, R. at 1206, Assignments, R. at 1210.) These settlement agreements also contain an express disclaimer of any liability on the part of these settling defendants. (CREMCO/MALP Settlement Agreement ¶ 4, R. at 1216; Montclair Settlement Agreement ¶ 7, R at 1206.) Importantly, neither settlement agreement purports to allocate the payments among the various claims asserted by Plaintiffs against these settling Defendants.

In late December 2012, Plaintiffs filed an action against Church Creek, seeking contribution under the South Carolina Contribution Among Tortfeasors Act ("UCATA" or "the Act"), Sections 15-38-10 *et seq* (Compl., R at 99.) The master accepted Plaintiffs' view that the underlying defendants could be divided into the following three groups, with "each group having members with common interests for purposes of applying contribution law in an equitable fashion": (1) the "Converter Group" or the Montclair Homes Group; (2) the "Seller of the Apartments Group" or the MALP group;

and (3) the "Construction Group" or the Church Creek Group (comprised of Church Creek, Elsey/ECI, and Lockey). (Order at 7–8, R. at 31-32.)

The master found that "the work of [Church Creek] was negligent and caused consequential damage to Plaintiff's property other than to the work itself and that the negligent construction work combined and concurred with the negligence of the other two defendant groups and contributed to the Plaintiffs' indivisible damages " (Order at 8, R. at 32.) The master then found that this contribution action is governed by the UCATA as it existed prior to the 2005 amendments. (Order at 9–11, R. at 33-35) Accordingly, the master applied principles of equity and a pro rata analysis to determine whether Church Creek was liable in contribution, and if so, in what amount. (Id. at 10, R. at 34.) The master found that the $3 million settlement "is the only settlement that gave rise to any contribution claim" because that "amount paid for the global release which finally extinguished everyone's liability in this case " (Id. at 13, R. at 38) Thus, the master found that no contribution rights arose from the $525,000.00 settlement with Elsey and Lockey, explaining that their settlement agreement did not extinguish any liability of Church Creek.[6] (Id)

However, the master did find that Church Creek was entitled to a set-off in the amount paid by Elsey and Lockey. (Id. at 14–15, R. at 39-40.) The master reasoned that "the equities favor that the $525,000 should be credited to the Construction group's payment of its fair share of the common liability."[7] (Id at 15, R. at 40.) The master then determined that "the 'pro rata share' of the $3,000,000 for each group would be

[6] This ruling was unappealed and is now final

[7] The ruling that Church Creek is entitled to this set off, if the master is affirmed with respect to his contribution ruling, is also unappealed

$1,000,000." (Id.) Accordingly, the master ordered Church Creek to pay $475,000.00 under the contribution statute. (Id at 15–16, R at 40-41.)

SUMMARY OF ARGUMENT

The trial court erred as a matter of law in finding that Plaintiffs are entitled to contribution from Defendant Church Creek under the UCATA Plaintiffs' contribution claim arose through an assignment from the settling defendants in the underlying action. However, the settlement agreements released multiple claims against multiple defendants, and the agreements failed to allocate the amount of damages that constituted a common liability with Church Creek. Accordingly, the trial court could not determine, without improper speculation, what amount, if any, the settling defendants paid in excess of their pro rata share of a common liability with Church Creek.

The settlement agreements released several claims against the settling defendants that Plaintiffs did not assert against Church Creek Despite this fact, the trial court allocated the entire $3 million settlement as representing a common liability with Church Creek under the negligent construction claims. The trial court incorrectly ignored the many other claims released by the settlement agreement.

Further, the trial court failed to consider that Church Creek was not involved in the vast majority of the work covered by the $12.5 million repair estimate, which Plaintiffs claimed as their damages. Instead, the settling defendants alone faced a potential liability of $12.5 million dollars, and their settlement of $3 million fails to demonstrate that they paid an amount in ***excess*** of their common liability with Church Creek.

While Plaintiffs did assert negligent construction claims against Church Creek and other defendants, the crux of their lawsuit was that the settling defendants sold them condominium units that were in need of substantial repairs, and that the buyers were not

informed of these needed repairs. In short, Plaintiffs claim that they did not receive what they thought they were purchasing, and they later learned that they purchased property in need of $12.5 million in repairs, due to the misrepresentations regarding the useful life expectancy of the common elements on the property.

Thus, the settling defendants could have faced at least a $3 million verdict based solely on the causes of action that Plaintiffs did not assert against Church Creek. Under these circumstances, the trial court could not award contribution, as a matter of law, because it could not find on this record that the settling defendants paid more than their pro rata share of a common liability with Church Creek.

STANDARD OF REVIEW

"When an appeal involves stipulated or undisputed facts," as exist in this case, "the appellate court is free to review whether the trial court properly applied the law to those facts" Cowden Enterprises, Inc v. East Coast Millwork Distributors, 363 S.C 540, 611 S.E 2d 259 (Ct App. 2005) (reversing the trial court's order granting a claim for contribution) (citing WDW Prop. v. City of Sumter, 342 S C. 6, 10, 535 S.E.2d 631, 632 (2000)) "In such cases, the appellate court is not required to defer to the trial court's legal conclusions." Id. (citing Scott v. Brunson, 351 S C. 313, 316, 569 S.E.2d 385, 387 (Ct App. 2002))

Moreover, "[p]rinciples of equity are applicable to actions determining the pro rata liability of tortfeasors." Florence County School Dist. No. 2 v. Interkal, Inc., 348 S C. 446, 559 S E.2d 866 (Ct. App. 2002) (citing S.C. Code Ann § 15–38–30 (Supp. 2000)) "In actions in equity referred to a special referee with finality, the appellate court may view the evidence to determine the facts in accordance with its own view of the

preponderance of the evidence, though it is not required to disregard the findings of the special referee." Id (citing Pinckney v Warren, 344 S.C. 382, 544 S.E.2d 620 (2001); Wilder Corp. v. Wilke, 324 S.C. 570, 479 S E 2d 510 (Ct. App. 1996)).

This appeal involves both stipulated facts as well as other facts found by the master based upon the evidence in the record. Thus, as to the disputed facts, this Court may review the record and determine those facts according to its view of the preponderance of the evidence. As to the stipulated facts, this Court is free to make a *de novo* determination as to whether the master properly applied the law to those facts.

ARGUMENTS

I. The Master Erred in Finding in Favor of Plaintiffs on Their Contribution Claim Because Plaintiffs Failed to Establish That the Settling Defendants Paid More Than Their Pro Rata Share of Any Common Liability with Church Creek.

MALP, CREMCO, and Montclair Homes assigned their contribution claims to Plaintiffs, and thus, Plaintiffs stand in the shoes of those defendants in asserting their claim for contribution. As shown below, Plaintiffs did not and cannot establish that these settling defendants[8] paid more than their pro rata share of any common liability, as required by law to create any right of contribution.

A. Plaintiffs have the burden of proving contribution, and the law of contribution is strictly construed.

"The common law rule against contribution was abrogated in 1988 when our General Assembly enacted the South Carolina Uniform Contribution Among Tortfeasors Act." G & P Trucking v. Parks Auto Sales Serv. & Salvage, Inc., 357 S C. 82, 86–87,

[8] For purposes of this brief, "settling defendants" refers to the defendants that were parties to the settlement agreements that gave rise to the contribution claim at issue in this appeal and who assigned their contribution claim to Plaintiffs (*i e*, MALP, CREMCO, and Montclair Homes), and not the subcontractors who settled earlier in the underlying case

591 S.E.2d 42, 44 (Ct. App 2003) "Because the Act is in derogation of the common law, it must be strictly construed." Id.

The Act provides for the following right of contribution:[9]

> Except as otherwise provided in this chapter, where two or more persons become jointly or severally liable in tort for ***the same injury to*** person or ***property*** or for the same wrongful death, there is a right of contribution among them even though judgment has not been recovered against all or any of them.

S.C Code Ann. § 15-38-20(A) (emphasis added) "The right of contribution exists only in favor of a tortfeasor who has paid ***more than his pro rata share of the common liability***, and his total recovery is ***limited to the amount paid by him in excess of his pro rata share***." S.C. Code Ann § 15-38-20(B) (emphasis added). "No tortfeasor is compelled to make contribution beyond his own pro rata share of the entire liability " Id.

The burden of proof in this case rests on Plaintiffs to show a right to contribution from Church Creek.

> The burden of proving by preponderance of evidence whatever facts are necessary to establish a right of action for contribution rests upon the party who has the affirmative of that issue, and the general rule is that in order to recover he or she must prove both that there was a

[9] As the trial court found, Plaintiffs would not have any right to contribution from Church Creek under the 2005 amendments to the UCATA, which do not allow for contribution from a defendant who is less than 50% at fault (See Order at 10 n 1 & text (citing S C Code Ann § 15-38-15 (providing that "joint and several liability does not apply to any defendant whose conduct is determined to be less than fifty percent of the total fault")), R at 34) Although the 2005 amendments do allow for contribution from a tortfeasor found less than 50% at fault where the jury or the court apportions his percentage of fault, that provision would not apply here because neither a jury nor the court made any determination as to Church Creek's percentage of fault See S C Code Ann § 15-38-15(A) (providing that a "defendant whose conduct is determined to be less than fifty percent of the total fault shall only be liable for that percentage of the indivisible damages determined by the jury or trier of fact") The trial court concluded that the pre-2005 version of the Act applies because Church Creek completed its construction work prior to the effective date of the 2005 amendments (Order at 10, R at 34), see also S C Code Ann § 15-38-15 Editor's Note (citing 2005 Act No 32, § 21(A)) (explaining that this statute applies only to causes of action arising on or after July 1, 2005, "except for causes of actions relating to construction torts which would take effect on July 1, 2005, and apply to improvements to real property that first obtain substantial completion on or after July 1, 2005")

> common burden of debt and that he or she has, as between himself or herself and those from whom he or she seeks contribution, paid more than his or her fair share of the common obligation.

18 Am Jur. 2d Contribution § 117. "If two or more persons, acting independently, tortiously cause distinct harms or a single harm for which there is a reasonable basis for division according to the contribution of each, each is subject to liability only for the portion of the total harm that he has himself caused." Restatement (Second) of Torts § 881 (1979).

"The basic premise of contribution is commonality." Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp., 336 S.C. 53, 68, 518 S.E.2d 301, 309 (Ct App. 1999). "Under the statute, 'common liability,' rather than joint negligence, determines the right to contribution." Id. "In order for a party to be entitled to contribution, he must allege and the evidence must show the amount he has paid in excess of his just proportion of the joint indebtedness." Id. at 70, 518 S.E.2d at 310 (citation omitted). "There is nothing in the Contribution Act, nor in subsequent case law, to negate the proposition that one seeking contribution must be able to establish the amount to which he is entitled." Id.

When a party seeks to recover in contribution for amounts paid under a settlement agreement that releases multiple claims and/or multiple parties, the settlement agreement must demonstrate that a portion of the amount paid was allocated to a common liability See Vermeer Carolina's, Inc., 336 S.C. at 70, 518 S.E.2d at 310 (affirming the trial court's summary judgment in favor of the defendant as to the plaintiff's contribution claim, in part, because "the settlement agreement does not place a specific value on any potential claim by Mrs Causey); see also Houser v. Witt, 443 N.E 2d 725 (Ill. App Ct. 1982), quoted in Vermeer Carolina's, Inc., 336 S.C. at 70, 518 S.E.2d at 310 (affirming

the trial court's directed verdict as to a contribution claims, holding that "the open-end, blanket, joint release gives no indication as to how the amount paid for the release relates to any present or future damage to either party."

In Vermeer, for example, the Court of Appeals addressed a "blanket" settlement agreement involving a release of multiple claims without an express allocation of the payments. Vermeer Carolina's, Inc., 336 S.C at 70, 518 S.E.2d at 310. In the underlying case in Vermeer, plaintiff Elbert Causey filed suit against the seller and manufacturer of a machine that amputated his hand. Id at 57–58, 518 S.E.2d at 304. Prior to trial, Mr. Causey requested a nonsuit with prejudice as to all claims against the manufacturer, Wood/Chuck. Id. at 58, 518 S.E 2d at 304. Mr Causey then settled with the seller, Vermeer, which agreed to make a lump payment of $200,000.00, as well as monthly payments of $926.00 for five years Id. Vermeer subsequently instituted an action against Wood/Chuck seeking either contribution or indemnity. Id The trial court granted summary judgment in favor of Wood/Chuck as to both claims. Id

As to Vermeer's contribution claim, this Court affirmed the trial court's grant of summary judgment. Id at 68, 518 S.E.2d at 309. The Court noted that because Mr. Causey released Wood/Chuck from the lawsuit with prejudice prior to Vermeer's settlement with Mr. Causey, the settlement agreement did not extinguish any liability of Wood/Chuck. Id. at 68–69, 518 S.E.2d at 309. Thus, no right of contribution existed against Wood/Chuck. Id. at 69, 518 S E 2d at 309–10.

Vermeer next turned to its arguments concerning Mrs. Causey's consortium claim. Vermeer argued that the release of Mrs. Causey's loss of consortium claim constituted a discharge of a common liability for both Vermeer and Wood/Chuck, giving

rise to a right of contribution as to that claim. Id. at 69, 518 S.E 2d at 310. Mrs. Causey was not a party in the underlying suit, there was no admission of liability concerning Mrs. Causey, and the settlement agreement did not allocate any portion of the proceeds to a potential claim of Mrs. Causey. Id. This Court rejected Vermeer's argument, noting that "[t]he settlement agreement does not place a specific value on any potential claim by Mrs. Causey," and "[u]nder the agreement, no portion of the settlement is allocated to her for any potential loss of consortium claim." Id. at 70–71, 518 S E.2d at 310–11. This Court held, "[w]e cannot, therefore, determine whether Vermeer paid more than its pro rata share of liability to Mrs. Causey." Id. at 71, 518 S E.2d at 311 (citing S.C. Code Ann. § 15-38-20(B)). Accordingly, this Court affirmed the trial court's ruling that Vermeer was not entitled to contribution from Wood/Chuck for any amount paid as part of the settlement based on a failure of proof. Id.

More recently, in addressing the issue of setoff, the Court of Appeals explained the requirement of allocating liability among multiple claims that are released by a settlement agreement to determine the right to a setoff and the amount Smith v. Widener, 397 S.C. 468, 473, 724 S E.2d 188, 191 (Ct. App 2012). The Court noted that "when a settlement is argued to involve two claims, one of which involves the same injury as the claim tried to verdict and one of which does not, the circuit court must make the factual determination of how to allocate the settlement between the two claims." Id. Again, this is because the plaintiff bears the burden of proof with respect to any entitlement to contribution. Such allocation was not shown here.

B. The trial court failed to apply the governing law, which required the settlement agreements to allocate the amount paid towards a common liability in order to determine what amounts, if any, the settling defendants paid in excess of their pro rata share.

1. The settlement agreements released claims that did not involve Church Creek.

Here, the settlement agreements did not allocate the settlement amounts amongst the multiple claims or multiple parties. Specifically, the settlement agreement between Plaintiffs, MALP, and CREMCO expressly stated that it would "forever settle ***all claims asserted by Plaintiffs*** in accordance with the terms of this Agreement." (MALP & CREMCO Settlement Agreement at 2, R. at 1215 (emphasis added).) The release clause of the settlement agreement merely stated that Plaintiffs agreed to release MALP and CREMCO

> from ***any and all*** past, present and future claims, demands, debts, rights, actions, damages (including direct, indirect, incidental, and consequential damages), costs, causes of action, suits at law or in equity, expenses and fees of attorneys, expenses and fees of consultants and/or experts and ***all claims*** of any nature or kind whatsoever, now existing or which may hereafter accrue, ***which may in any way be alleged to have resulted of and from the prior ownership and management of Montclair by MALP and CREMCO***.

(Id. at 3, R. at 1216 (emphasis added).) Plaintiffs' operative complaint in the underlying action asserted the following claims against MALP and CREMCO:

1. Negligent construction and repairs
2. Breach of implied warranty of workmanship
3. Negligent and grossly negligent misrepresentation
4. Breach of fiduciary duty and failure to adequately reserve
5. Breach of express warranties and/or advertisements

(Third Am. Compl. ¶¶ 75–101, R. at 88-94.) Of these five claims, only the first two were common claims that MALP and CREMCO shared with Church Creek. As to the

remaining claims, Plaintiffs did not assert those causes of action against Church Creek. Thus, the settlement agreement on its face dismissed three additional claims for which Church Creek did not share any potential common liability with MALP or CREMCO

As to the settlement agreement between Plaintiffs, Kinney, Montclair Homes, and Montclair POA, the agreement referred to "***all causes of action*** set forth against them in the Third Amended Complaint in the above civil action." (Montclair Settlement Agreement at 2, R. at 1204 (emphasis added).) The agreement then expressly stated that "Plaintiffs and Settling Defendants being released herein desire to compromise fully, finally, and forever settle ***all claims*** asserted by Plaintiffs in accordance with the terms of this Agreement." (Id. (emphasis added)) The settlement agreement also contained a release clause identical to the one recited above, specifying that it applied to all claims "which may in any way be alleged to have resulted of and from the prior ownership, management and activities of Montclair Homes, LLC, Bruce Kinney and Montclair Property Owners Association, Inc. (Control Period) as alleged in the above lawsuit." (Id at 4, ¶ 4, R at 1206) Plaintiffs' operative complaint in the underlying action asserted the following claims against Kinney and Montclair Homes·

1. Negligent construction and repairs
2. Breach of implied warranty of workmanship
3. Negligent and grossly negligent misrepresentation
4. Breach of fiduciary duty; failure to adequately reserve
5. Breach of express warranties and/or advertisements
6 Failure to comply with South Carolina Condominium Disclosure of physical conditions of buildings

(Third Am. Compl. ¶¶ 75–107, R. at 88-95) As to Kinney (and other unnamed members of Montclair Homes), Plaintiffs also asserted a claim for disbursement from a dissolved LLC in violation of Section 33-44-808. (Third Am. Compl. ¶¶ 108–10, R. at 95.)

Finally, as to Montclair POA, Plaintiffs asserted a claim for negligent and grossly negligent misrepresentation (Third Am. Compl. ¶¶ 87–91, R. at 91-92.) Thus, the settlement agreement as to these defendants covered a total of seven causes of action asserted in the Third Amended Complaint. Of these seven claims, Kinney and Montclair Homes shared a potential common liability with Church Creek only as to the first two claims listed above.

2. The settlement agreements failed to allocate any amount attributed to a common liability between the settling defendants and Church Creek.

The two settlement agreements that gave rise to the claimed right of contribution resolved claims against five separate defendants. Neither settlement agreement allocated the amount paid amongst the multiple claims covered by the agreement or amongst the multiple defendants who executed each agreement. Importantly, both settlement agreements settled numerous claims that Plaintiffs did not assert against Church Creek Under these facts, Plaintiffs failed to establish by a preponderance of the evidence what portion of the amounts paid by the settling defendants represented a common liability with Church Creek, and consequently, failed to establish what amount they paid that was in excess of their pro rate share of a common liability.

The fact that Church Creek faced a potentially significant liability at the time the parties settled the underlying case is irrelevant where, as here, the evidence establishes that other liabilities existed separate and apart from anything Church Creek did or did not do. The question is not whether the settling defendants ***could*** have settled only the two construction claims for $3 million; the question is whether they actually ***did*** so, as shown by the evidence. Plaintiffs bore the burden of proving what amount of the settlement

proceeds was attributable to the construction claims, and thus, represented a common liability with Church Creek Further, the settling defendants alone faced a potential liability of $12.5 million, and thus, their settlement for $3 million fails to demonstrate any excess Hence, Plaintiffs failed to establish any amount that the settling defendants paid in excess of their pro rata share of the construction claims.

The trial court erroneously focused its analysis on the fact that Church Creek did not contribute anything to the settlements, yet had its potential liability extinguished by the settlements (Order at 14, R. at 39 ("Equity would demand some contribution back to those who paid to extinguish [Church Creek]'s liability.").)[10] As explained above, this is not the proper inquiry or concern when determining whether Plaintiffs met ***their*** burden of proving a right to contribution, which requires the court to be able to determine the ***amount*** paid in excess of the settling defendants' pro rata share of the ***common liability***.

As the governing law establishes, where settlement agreements release multiple claims and/or multiple parties, the agreements must demonstrate the existence of a common liability ***and*** the amount that the settling defendants paid in excess of that common liability. See Vermeer Carolina's, Inc , 336 S.C. at 70, 518 S.E.2d at 310. The proper focus is on whether the settling defendants paid more than their share of a common liability, and not on whether a non-settling defendant benefitted from a broadly worded settlement agreement. In this case, the settlement agreements failed to establish what amount was allocated to the claims that the settling defendants shared with Church

[10] At the hearing on the motion to reconsider, the trial court again expressed its concern for Church Creek not paying anything towards the settlement (See Hearing Tr at 16 7–12 ("This is the other thing I wrestled with When Church Creek doesn't pay anything into the settlement, there's a settlement of claims as to the plaintiff's damages, and zero is paid, and some co-defendants reserve the right to seek contribution for all that, how does that defendant get away with zero "), R at 319)

Creek. Thus, the trial court was left to engage in improper speculation in determining the existence and amount of a common liability that the settling defendants had with Church Creek.[11]

The trial court erroneously found that one-hundred percent of the amounts paid by the settling defendants represented a common liability with Church Creek. (Order at 13, R. at 38 (holding that "within the facts of our case, the term 'common liability' would equate to the amount paid for the global release which finally extinguished everyone's liability in this case for $3,000,000").) The settlement agreements do not support the trial court's finding, and in fact, the express, unambiguous language of the agreements refutes such a conclusion. Because the agreements specify that they settle ***all*** claims asserted against the settling defendants, as well as Church Creek, the agreements ***necessarily*** include the claims that Plaintiffs asserted against the settling defendants which were ***not*** also asserted against Church Creek. The trial court neglected to allocate ***any*** amount of the settlement proceeds to these other claims, which include the three additional claims against MALP and CREMCO and the five additional claims against Kinney, Montclair Homes, and/or Montclair POA.

In its order, the trial court referred to the 2005 amendments to the UCATA, which the trial court found do not apply to the facts of this case because the events giving rise to Plaintiffs' causes of action occurred prior to the effective date of the 2005 amendments.

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[11] Although the trial court ultimately denied Church Creek's motion to reconsider, the trial court acknowledged the challenge that it faced in trying to determine the amount to attribute to the common liability, where the settlement agreements covered multiple claims, some of which Plaintiffs did not assert against Church Creek (See Hearing Tr at 3 10–20 ("I think the issue for the Court is, is there a common liability And two, if so, can it be allocated pro rata As I go back through this I think that was the one thing I kept arguing with in my own mind, how do we do this "), at R at 306) Plaintiffs' counsel even acknowledged the difficulty in determining the amount in this case (See Hearing Tr at 14 3–7 ("I wrestled with this thing for a long time When I first started writing the order and getting into it thinking it would be a piece of cake, man, it was a mess And the more you think about it it's a real mind game I think it was a good order "), R at 317)

Those amendments now require courts to consider the percentage of a defendant's ***fault*** in determining the percentage of that defendant's potential contribution amount, if any. Because apportionment of fault only arose through the 2005 amendments, the trial court mistakenly believed that it did not have any duty to determine an allocation of ***damages*** among the claims covered by the settlement proceeds.

However, the trial court failed to distinguish the important difference between allocation of fault (under the 2005 amendments) and allocation of damages, which existed ***prior*** to the 2005 amendments and which the trial court was required to address, as a matter of law. In Vermeer, decided in 1999, this Court made clear that when a settlement involves multiple claims and/or multiple parties, the settlement agreement must demonstrate what portion of the payment was allocated to a common liability, if any, to allow the court to determine the existence and amount of any right to contribution. See Vermeer Carolina's, Inc., 336 S.C. at 70, 518 S.E.2d at 310 (requiring the settlement agreement to place a value on the "common" claim for which contribution is sought); see also Houser, 443 N E 2d at 727–28 (refusing to find a right of contribution where the settlement agreement resolved multiple claims against more than one party and the blanket release failed to apportion the damages among the claims and parties; thus, the court could not determine the amount to which the claimant would be entitled, as required to establish a right to contribution), quoted in Vermeer Carolina's, Inc., 336 S.C. at 70, 518 S.E.2d at 310; Conwed Corp. v. Union Carbide Corp., No. 5-92-88, 2004 U S. Dist. Lexis 2652, *8 (D Minn. Feb. 11, 2004) (noting that where a particular type of settlement was not subject to allocation, the settling defendant could not seek

contribution because "some form of common liability is a necessary predicate for imposing contribution liability on the employer")

Further, although the right to contribution is an equitable claim, the ability of the court to equitably apportion pro rata shares of the entire liability under the UCATA presupposes that the entire common liability is readily determinable based on the settlement agreement. Likewise, while Section 15-38-20(D) allows the court to evaluate the reasonableness of the amount paid in settling a common liability, such a determination is impossible when the amount of the common liability cannot be established from the settlement agreements and settlement amount. For these reasons, the trial court misapplied the law and failed to properly determine an allocation of the settlement proceeds among the claims and parties, which the unambiguous settlement agreements also failed to provide.

3. The settlement amounts, parties, and claims involved made it impossible for Plaintiffs to prove an entitlement to contribution from Church Creek.

a.) The trial court failed to recognize that the settlement amount did not establish any amount paid in excess of a common liability.

Plaintiffs' experts opined that the cost to complete a comprehensive repair at Montclair would be in excess of $12 5 million. (Stipulations of Fact ¶ 11, R at 1197.) The trial court failed to recognize that the $3 million paid by the settling defendants was significantly less than ***their*** potential overall exposure, based upon the evidence in the record. The impetus for Plaintiffs' lawsuit and the primary focus of Plaintiffs' complaint was the misconduct of the settling defendants in selling the condominium units without disclosing to the buyers that they were in substantial need of major repairs. Instead,

Plaintiffs believed that they were purchasing condominiums in "good to very good condition," based upon the documents provided to them. (Third Am. Compl. ¶¶ 24–32, 37, R. at 74, 76, 78)

Plaintiffs alleged that the settling defendants misrepresented the condition of the property, including the useful life expectancy of the common elements on the property. (Third Am. Compl. ¶ 30 (alleging that the report given to each prospective buyer by Montclair Homes "made many characterizations of exterior siding problems noted as being 'minor' and gave no opinion to the Plaintiffs as to the useful life expectancy of the siding/building envelope as a common element"), ¶ 31 (alleging that the report represented to purchasers "that the buildings should have a life of 75 to 100 years and beyond"), ¶ 44 (alleging that Montclair Homes, Montclair POA, and Kinney failed to establish an appropriate level of reserves to replace the common elements in need of repair), ¶ 45 (alleging that Kinney is liable "for the shortfalls in the reserves," and for failing "to fund the reserves," "to adequately represent the physical condition of the common elements of the regime," "to accurately represent the true useful life expectancy of the building envelopes at the time of sale," and "to adequately repair the buildings of the regime"), ¶ 48 (alleging that all defendants except Church Creek, Lockey, and Elsey violated their "affirmative duty to represent that the siding, roofs and other common elements at Montclair had exceeded or were about to exceed their useful life expectancy and that the residents and owners of the units would be put to great expense in the form of future special assessments needed to replace these common elements"), R. at 76, 80, 81.) In short, Plaintiffs claim that the settling defendants misrepresented the value of the Montclair property by $12.5 million. (Third Am. Compl. ¶ 51 (alleging that "due directly

to the negligent failure to disclose the life expectancy of the above common elements by the Defendants or to adequately repair the common elements, the Plaintiffs have been, and will be, damaged in that the reserve accounts at the time of the turnover were woefully underfunded and they are faced with extensive repair costs"), R. at 82.) None of these claims were related to actions of Church Creek.

Moreover, the trial court failed to acknowledge that these non-common claims against the settling defendants could have rendered them liable for the entire potential liability of $12.5 million, which they settled for $3 million. Plaintiffs are only entitled to contribution if they can prove, by a preponderance of the evidence, that the settling defendants paid ***more*** than their pro rata share of a common liability. However, the entire $3 million settlement could have covered only the non-common claims that Plaintiffs asserted against the settling defendants. (See Third Am. Compl. ¶ 90 (alleging that as a result of the negligent and grossly negligent misrepresentations by Kinney, Montclair Homes, Montclair POA, MALP, and CREMCO, "Plaintiffs will be required to expend great sums of money to repair this property damage to the Plaintiffs' structure and to the personal property of the homeowners and they will suffer a loss of use when the repairs are made"), ¶ 101 (alleging that Kinney, Montclair Homes, MALP, and CREMCO are liable for repair costs), ¶ 106 (alleging that Kinney and Montclair Homes' failure to disclose the physical condition of the property "will result in the expenditure of millions of dollars to replace or repair common elements and will result in extensive loss of use of the buildings during repairs to them"), R at 91, 94.) On these facts, the trial court had no basis to determine that the settling defendants paid any amount in ***excess*** of a common liability with Church Creek.

b.) The trial court improperly grouped the defendants.

After improperly allocating all of the settlement proceeds to the two construction claims only, the trial court erroneously relied upon an improper "grouping" of the defendants. The trial court adopted Plaintiffs argument that it should divide defendants into three primary groups—(1) the "Converter Group" (Montclair Homes), (2) the "Seller of the Apartments" Group (MALP and CREMCO), and (3) the "Construction Group" (Church Creek, Elsey, and Lockey). (Order at 3, 7–8, R. at 27, 31-32.) While the Converter Group and Seller of the Apartments Group have some similarities within each group, they also have distinct differences that relate to the claims asserted against the defendants in the groups because the defendants served different roles For example, MALP and CREMCO together executed a settlement agreement, but MALP served as a seller of the Montclair apartments and CREMCO served as the property manager for the apartments. There is no basis in the record for equating the potential liability of these two entities.

Further, the trial court designated the Converter Group as only containing Montclair Homes; however, the settlement agreement that Montclair Homes executed also settled Plaintiffs' claims against Kinney and Montclair POA, which were also parties to that settlement agreement. Their settlement agreement and payment of $1 6 million clearly covered claims that Plaintiffs asserted only against Kinney and Montclair POA, as explained above. Yet, the trial court designated the entire $1.6 million paid under the settlement agreement as a credit to Montclair Homes.

c.) The trial court overlooked the fact that the settlement agreement included a claim that is not subject to contribution and was not asserted against Church Creek.

In their complaint, Plaintiffs allege that all defendants except Church Creek, Elsey, and Lockey breached their fiduciary duty "to insure that at the time the common elements and control thereof were transferred from the grantor to the Plaintiff homeowners association[,] the common elements were in good repair or that sufficient funds had been reserved to effectuate any repairs to the common elements." (Third Am. Compl. ¶ 93, 94 (alleging "a shortfall of millions of dollars in reserves for the repair of the common elements"), R. at 92.) As a result, Plaintiffs sought to recover "actual and punitive damages for the shortfalls in reserves and cost of repair of the various common elements" and for the breach of these fiduciary duties. (Third Am Compl ¶ 96, R. at 93.)

The trial court erred in failing to recognize that a breach of fiduciary duty claim is not subject to contribution, as a matter of law. The UCATA expressly provides that it "does not apply to breaches of trust or of other fiduciary obligation." S.C. Code Ann. § 15-38-20(G)); see also Concerned Dunes W. Residents, Inc. v. Georgia-Pac Corp., 349 S.C 251, 256, 562 S E 2d 633, 636 (2002) (developer has fiduciary duty to insure that common areas are in good repair at the time they are conveyed to property owners association and its members or to provide the association with funds sufficient to effectuate any needed repairs to these areas"). The trial court ignored the fact that the settlement agreements released Plaintiffs' breach of fiduciary duty claim asserted only against the settling defendants, and not Church Creek. The trial court also erred in failing

to allocate any portion of the settlement proceeds to this claim, which was covered by both settlement agreements

Applying the governing law to the record in this case reveals that the trial court erred in finding that the blanket settlement agreements gave rise to a right of contribution against Church Creek. On this record, there was no reasonable basis for the trial court to determine the pro rata shares of MALP, CREMCO, Montclair Homes, or Church Creek for any common liability among them. Further, the record fails to establish the amount, if any, that MALP, CREMCO, or Montclair Homes may have paid in excess of their pro rata share of a common liability. Hence, Plaintiffs failed to carry their burden of proving a right to contribution. Accordingly, this Court should reverse the trial court's order and enter judgment in favor of Church Creek as to Plaintiffs' contribution claim.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the master-in-equity and enter judgment in favor of Church Creek, finding that Plaintiffs failed to meet their burden of proving a right to contribution on the record in this case.

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Respectfully submitted,

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April 13, 2015

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough, Master-in-Equity

Case No. 2012-CP-10-8447
Appellate Case No 2014-001273

Montclair Property Owners Association, Inc. and Montclair Property Owners Association Board of Directors for and on behalf of all owners of the Montclair Horizontal Property Regime, as assignees of Montclair Associates Limited Partnership, Cremco, LLC, and Montclair Homes, LLC . . . . Respondent,

v.

Church Creek Construction, LLC,. .. . . Appellant.

CERTIFICATE OF COUNSEL

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

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PROOF OF SERVICE

I the undersigned Administrative Assistant of the law firm of Nelson Mullins Riley & Scarborough, LLP, attorneys for Church Creek Construction, LLC, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es)

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