

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

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SC Court of Appeals

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 Respondents,

v.

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

FINAL REPLY BRIEF OF APPELLANT

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FACTS

Respondents' brief does not contain a statement of facts. Respondents fail to dispute numerous significant facts set forth in Church Creek's opening brief. These facts establish that, by their payment of the \$3 Million, the settling defendants resolved and were released from numerous claims for which they did not share any common liability with Church Creek. These facts include, *inter alia*, the following:

- The 2002 ACE Report establishes that, prior to the sale of the Montclair units, the settling defendants knew the Masonite siding needed to be repaired or replaced "as a priority in need of immediate attention" (11/18/02 ACE Report at 1-2, R at 337-338.) The 2003 ACE Report also mentioned the pending class action involving the Masonite siding used in the original construction at Montclair. (4/24/03 ACE Property Condition Assessment at i, 5, R at 366.) Church Creek was not involved in this original construction.
- The settling defendants presented prospective purchasers with a letter, originating from CREMCO, but on ACE stationery, which contradicted the earlier ACE reports and incorrectly minimized the severity of the Masonite siding problems (11/6/03 Letter [Ex. 76], R. at 731.) The settling defendants also failed to provide prospective purchasers with the earlier ACE reports. (Third Am. Compl ¶ 58, R at 84.) Church Creek did not install the Masonite siding or fail to provide the reports.
- Montclair Homes, one of the settling defendants, hired Epps Edwards Architects 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 323.) The Epps report never mentioned the Masonite siding, and contrary to the ACE reports, represented the buildings to be in “good to very good condition.” (Epps Report at 12, R. at 334.) Church Creek was not involved with the Epps report.

- Plaintiffs’ underlying lawsuit asserted claims against the settling defendants based upon their failure to disclose accurate facts regarding the condition of the buildings to purchasers of the condominium units. (Third Am Compl. ¶ 58, R. at 84.) Plaintiffs did not assert those claims against Church Creek (Id.)
- Bruce Kinney also “left the Association’s finances in a pretty terrible state” and failed to maintain adequate reserve funding, which had nothing to do with Church Creek’s work. (Trial Tr. at 29:4–11, 51:21–24, R at 150, 172.) Plaintiffs did not assert a claim for inadequate reserves against Church Creek.
- After the sale of all condominium units, the Montclair POA commissioned a reserve study, which revealed the poor overall condition of the Masonite siding and recommended a partial or total replacement on an expedited basis, (Reserve Study [Ex. 91], R at 794 ; Trial Tr. at 29:11–22, 34:14–20, 51:12–13, R. at 150, 155, 172), consistent with the earlier ACE reports that the settling defendants failed to provide to prospective purchasers. Church Creek did not install the Masonite siding and was not involved with the earlier ACE reports.
- The settling defendants presented an expert report, which estimated repairs for Montclair at \$12.5 Million. (9/18/12 Calibogue Repair Estimate [Ex 262], R. at 1052; 11/15/10 Calibogue Repair Estimate [Ex. 99], R. at 895) However, Respondents’ expert witness 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 to windows, balconies, roofing, and brick facades. (Trial Tr. at 58:12–15, 59:6–11, 104:21–106:9, 108:22–109:2, 111:5–118:20, R. at 179, 225-27, 229-30, 232-239.) Laddago, the current president of the Montclair POA board, provided similar testimony (Trial Tr. at 39:8–40:14, 46:22–47:25, 49:6–50:6 (testifying that much of the work in the \$12.5 Million repair estimate, Hodgins report, and the future expenditures estimated in the reserve study have nothing to do with Church Creek's work), R. at 160-61, 167-68, 170-71; see also 10/12/10 Hodgins Letter [Ex. 79], R. at 732; Reserve Study (Future Expenditures), R. at 794, 883.)

- The settling defendants failed to provide any evidence, through expert testimony or otherwise, of the cost to repair only Church Creek's work. Although the master found that Church Creek was negligent in some of its repairs, the settling defendants did not submit, and the master did not find, any valuation as to the cost to repair Church Creek's work. Thus, the record does not contain any evidence as to how much, if any, of the \$12.5 Million repair estimate would be a common liability shared between Church Creek and the settling defendants for negligent repairs.¹
- Plaintiffs' underlying lawsuit asserted the following claims against the settling defendants, and not Church Creek: negligent and grossly negligent misrepresentation, breach of fiduciary duty, breach of express warranties and/or advertisements, failure to comply with the statutory requirements for disclosing

¹ The parties stipulated that "[during discovery, plaintiff's experts opined that the cost to do a comprehensive repair would be in excess of \$12,500,00 Dollars]" (Stipulations at 3, ¶ 11, R. at 1197) Neither the stipulations nor any evidence identified what portion, if any, of this repair estimate covered work performed by Church Creek

the present condition of all common elements of the condominium units to prospective purchasers, and/or for disbursement from a dissolved LLC. (Third. Am. Compl. ¶¶ 24–32, 37, 44, 48, 92–101, R. at 74-76, 78, 80-81, 92-94)

As explained below and in Church Creek’s opening brief, the master erred as a matter of law in awarding contribution under the facts contained in this record.² Respondents do not advance any argument to overcome the master’s clear error of law in this case.

ARGUMENT

I. This Court Should Reject Respondents’ Request for Affirmance Because Respondents Fail to Advance Any Argument to Overcome the Master’s Clear Error of Law.

A. Respondents misconstrue the governing provisions of the South Carolina Contribution Act.

Respondents’ argument in support of affirmance rests almost entirely upon their mistaken characterization of Church Creek’s argument as based on a “technical point.” (Brief of Resp. at 2, 11–12.) To the contrary, Church Creek’s argument is based upon the substantive language of the South Carolina Uniform Contribution Among Tortfeasors Act (“UCATA” or “the Act”), which the master failed to apply properly.

Although Respondents quote the relevant statutory provisions of the UCATA in a footnote, they incorrectly propose the following interpretation of those provisions, arguing:

Under the UCATA, a right of contribution exists in favor of a settling tortfeasor against a non-settling tortfeasor in the amount

² Respondents erroneously state that Church Creek does not challenge “numerous factual findings and legal conclusions set forth in the master’s decision ” (Brief of Resp. at 4) To the contrary, Church Creek’s opening brief and this brief contain numerous challenges throughout to the master’s findings of fact and conclusions of law. Notably, Church Creek disputes the master’s finding which suggests that the \$12 million repair estimate is for the work that Church Creek performed (See Order at 9, R. 33 (“The Court finds that the Defendant CCC [Church Creek] did not present any alternative cost of repair estimate and that the Plaintiffs’ cost to repair the buildings was in the \$12,000,000 range ”) Church Creek also disputes the master’s finding that the construction defect claims which included Church Creek “were the most significant causes of action ” (See *id.*) Church Creek also argues that the master erred as a matter of law in finding that the \$3 Million settlement represented a common liability with Church Creek (See *id.* at 13, R. 38)

of the non-settling tortfeasor's pro rata share of the settlement payment when the settlement extinguishes tort liability common to the settling and non-settling tortfeasors **except** as to any amount paid in the settlement which is in excess of what is reasonable. *See* § 15-38-20(A)(B) and (D).

(Brief of Resp. at 10 (emphasis theirs).) This interpretation of the contribution law omits the most critical requirement of subsection (B) of § 15-38-20 at issue in this case—namely, that a settling tortfeasor is ***only*** entitled to contribution if he can prove that he “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) Thus, Respondents were required to prove both the amount of a common liability the settling defendants shared with Church Creek, and the amount paid in excess of their pro rata share. *See* 18 Am Jur. 2d Contribution § 117 (explaining that the party seeking contribution bears the burden of proof). Respondents did neither. The master-in-equity thus erred in awarding them judgment.

Respondents improperly attempt to focus this Court on subsection (D), which limits recovery to a reasonable amount.³ However, the first hurdle that Respondents must clear in order to establish a right to recovery is that they paid more than their pro rata share of a common

³ Respondents incorrectly suggest that Church Creek “implicitly” conceded the reasonableness of the settlement agreement and that it faced a potential liability of \$3 Million (Brief of Resp at 11 n 9 (incorrectly stating, “Indeed, Appellant implicitly concedes that it ‘faced a potentially significant liability’ that was extinguished by the settling defendants for a total payment of \$3,000,000, which was not an unreasonable settlement value”)) Church Creek did not make any such concession in its brief or below To the contrary, Church Creek simply does not dispute the reasonableness of the settling defendants’ agreement to pay \$3 Million to settle the entirety of the eight (8) claims ***asserted against them*** Church Creek has never agreed to or conceded any amount of liability for its work and certainly never conceded that the \$3 Million settlement equates to the amount of a common liability with the settling defendants In fact, this is one of the central points that Church Creek argued below and advances on appeal as the basis for reversible error in the master’s findings There is simply no evidence to support the conclusion that Church Creek shares a common liability with the settling defendants in the amount of \$3 Million (See Trial Tr at 149 13–150 24 (arguing for directed verdict on the grounds that Plaintiff failed to establish any amount of a common liability between the settling defendants and Church Creek and failed to establish what amount, if any, of the settlement proceeds represented a common liability), R at 270-71, Mot to Reconsider, Alter or Am at 5 (arguing below that “there is simply no reasonable basis from which the Master may determine what portion of the [settlement] payments satisfied a liability common to Church Creek and the settling defendants”), R at 1251)

liability. Thus, the Act required Respondents to prove whether they paid any amount “in excess.” S.C. Code Ann. § 15-38-20(B). Respondents failed to do so.

Respondents failed to present sufficient evidence to determine any excess the settling defendants may have paid, and the master failed to address what amount of the settlement payment constituted a common liability shared with Church Creek. The master mistakenly viewed the \$12.5 Million repair estimate as a liability of all defendants, including Church Creek, despite the undisputed testimony of Respondents’ own expert and board president that the majority of the estimate called for repairs to work that *Church Creek did not perform*.

The master also erred in viewing the \$3 Million settlement as the amount of a common liability with Church Creek because the record clearly establishes the existence of numerous other claims asserted *only* against the settling defendants, and the settlement agreements expressly stated that those claims were being settled. (MALP & CREMCO Settlement Agreement at 2–3, R. at 1215–1216, Montclair Settlement Agreement at 2, 4, R. at 1227, 1229.) In other words, the settlement agreement could have constituted a \$3 Million payment in exchange for a resolution of *only* those other claims, for which there was no common liability with Church Creek. Because the settlement agreements do not specify the claims or allocate any amounts, the master-in-equity erred in speculating and on rendering a judgment with no foundation. Accordingly, this Court should find that the master erred as a matter of law in finding a right to contribution without any evidence as to any amount of a common liability resolved by the settlements or any evidence that the settling defendants paid an amount “in excess” of their pro rata share of that common liability.

B. Equity does not require affirmance, as Respondents argue.

Respondents argue that reversal would result in a “windfall” for Church Creek, which they claim “mandates a patently inequitable result ” (Brief of Resp. at 12.) To the contrary, no such determination can be made because the record does not contain any evidence to establish the amount of damages caused solely by Church Creek. On this record, neither the master nor this Court can determine whether a “windfall” would result to Church Creek. The only testimony on this point establishes that the majority of the work covered by the \$12.5 Million repair estimate does not involve Church Creek’s work, and therefore, does not constitute damages for which Church Creek would share a common liability with the settling defendants. The UCATA does not allow for a right to contribution on the evidence contained in this record, and the master’s finding otherwise is contrary to the law and inequitable.

Respondents also argue that reversal would unfairly relieve Church Creek of any liability and that equity requires affirmance. While the right to contribution is an equitable claim, it does not allow for the replacement of the clear requirements of the UCATA, as Respondents propose. Respondents argue that Church Creek’s “position is at odds with the ameliorative purpose of the UCATA and ignores the express legislative directive that our courts do equity in applying the Act.” (Brief of Resp. at 12) Respondents are wrong. While the UCATA does serve an ameliorative purpose, it only does so where the settling tortfeasor can establish a right to contribution under the express language of the Act. Here, Respondents failed to present sufficient evidence to support the master’s finding of a right to contribution, as a matter of law. The only common liability that the settling defendants could share with Church Creek is the liability for repairs to work that Church Creek performed. However, Respondents did not present any evidence to establish the amount of any such liability. Thus, the master could not

reasonably determine either the amount of the settling defendants' pro rata share or whether the settling defendants paid an amount in excess of their pro rata share of a common liability with Church Creek. Respondents' current position is one of their own making, and not the fault of Church Creek. Respondents bore the burden of proof at trial, and they failed to carry their burden. This is not a "technical point," as Respondents claim; it is an express requirement for establishing any right to contribution under the UCATA.

Moreover, Respondents fail to address the fact that the crux of the underlying lawsuit revolved around claims that Plaintiffs did not assert against Church Creek. In fact, the impetus for the underlying lawsuit was Plaintiffs' dispute with the settling defendants, and not Church Creek, as evidenced by the fact that Plaintiffs did not even amend their complaint to add Church Creek as a defendant until almost two years after initiating the underlying lawsuit. (Compare Summons & Compl. (filed 12/31/08), R. at 45, with Third Am. Compl. (filed 8/30/10), R. at 67.)

C. Respondents are incorrect in their attempt to distinguish case law that supports reversal of the master's ruling.

Respondents also argue that this Court should not follow its earlier decision in Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp., 336 S.C. 53, 518 S.E.2d 301 (Ct. App. 1999), because the relevant portion is, in their view, dicta. (Brief of Resp. at 15.) First, the identified portion of Vermeer is not dicta. Rather, it was a necessary part of the opinion to resolve one of the issues on appeal. In Vermeer, Mr. Causey (and only Mr. Causey) sued Wood/Chuck (the manufacturer of the wood chipper that amputated his hand) and Vermeer (the seller of the wood chipper). Prior to trial, Mr. Causey dismissed his claims against Wood/Chuck with prejudice and thereafter settled with Vermeer. The settlement and release was signed by both Mr. and Mrs. Causey. Vermeer subsequently sought contribution from Wood/Chuck. This Court rejected Vermeer's claim for contribution from Wood/Chuck as to Mr. Causey's claims because Mr.

Causey had dismissed his claims against Wood/Chuck with prejudice prior to the settlement. Thus, Vermeer's settlement with Mr. Causey could not extinguish any liability of Wood/Chuck to Mr. Causey because none existed. A separate issue on appeal, however, was whether Wood/Chuck should contribute toward Vermeer's settlement of Mrs. Causey's claim for loss of consortium—a claim she had not yet asserted in any proceeding (and thus was not part of Mr. Causey's dismissal as to Wood/Chuck), but which she had nevertheless released as part of the settlement with Vermeer. Accordingly, this Court's ruling as to whether Vermeer was entitled to contribution from Wood/Chuck for Mrs. Causey's potential loss of consortium claim was a necessary ruling, and not dicta.

Vermeer demonstrates this Court's previous agreement with the arguments that Church Creek advances on appeal and that the master erroneously rejected below. See Vermeer Carolina's Inc., 336 S.C. at 70–71, 518 S.E.2d at 310–11 (denying contribution, in part, because “[t]he settlement agreement does not place a specific value on” the claim for which there is an alleged common liability, and “[u]nder the agreement, no portion of the settlement is allocated to [that claim];” thus, “[w]e cannot determine whether Vermeer paid more than its pro rata share of liability [for that claim]”).

Respondents incorrectly attempt to distinguish Houser v. Witt, 443 N.E.2d 725 (Ill. App. Ct. 1982), by arguing that the Illinois law of contribution renders Witt inapplicable. First, Respondents failed to address the fact that this Court relied upon Witt in deciding Vermeer, and this Court cited Witt for the same proposition for which Church Creek cites it. Further, contrary to Respondents' assertion, the relevant Illinois contribution statute is functionally identical to the relevant South Carolina contribution statute. Compare S.C. Code Ann. § 15-38-20 with 740 Ill. Comp. Stat. Ann. § 100/2. Indeed, Illinois courts have specifically noted the parallels between

the Illinois Act and the UCATA, adopted in South Carolina. See Wreglesworth v. Arctco, Inc., 738 N.E.2d 964, 972 (Ill. Ct. App. 2000) (noting that the Illinois Joint Tortfeasor Contribution Act “is based upon the Uniform Contribution Among Tortfeasors Act”); Lowe v. Norfolk & W.R. Co., 463 N.E.2d 792, 803 (Ill. Ct. App. 1984) (“The Uniform Contribution Among Tortfeasors Act is in many respects parallel to the Illinois Contribution Among Joint Tortfeasors Act.”) In light of the striking similarity between the two states’ statutes, our appellate courts have on a number of occasions relied on Illinois precedent when interpreting and applying the South Carolina UCATA. See, e.g., G&P Trucking v Parks Auto Sales Serv & Salvage, Inc., 357 S.C. 82, 88 n.8, 591 S.E.2d 42, 45 n.8 (Ct. App. 2003) (quoting Pearson Bros. Co. v Allen, 476 N.E.2d 73, 75 (Ill. Ct. App. 1985)), see also Shaw v. City of Charleston, 351 S.C. 32, 38–39, 567 S.E.2d 530, 533 (Ct. App. 2002) (citing Hammond v. N. Am. Asbestos Corp., 565 N.E.2d 1343 (Ill. Ct. App. 1991)). For these reasons, this Court should reject Respondents’ unmeritorious attempt to distinguish the Vermeer and Witt cases, both of which support reversal of the master’s judgment in this case.

D. Respondents fail to present any argument to support affirming the master’s improper grouping of the defendants.

Finally, Respondents argue that this Court should affirm the master’s grouping of the defendants. Respondents incorrectly state that Church Creek did not preserve this issue for appeal. To the contrary, the record amply supports Church Creek’s preservation of this issue. Church Creek raised the issue of the improper “grouping” of defendants at trial and in its proposed order filed with the lower court. (See Trial Tr. at 19:14–15 (“first of all we would take exception to these groupings here”), 24:4 (“we don’t concede these groups”), R. at 140, 145, 8/30/13 Letter to the Master with attached proposed order at 2 n.1 (proposing a ruling that rejects Plaintiff’s suggestion to treat MALP and CREMCO as one “group” on the ground that there is

“no basis for treating a property owner and a management company as one ‘group’ under the Contribution Act”), R. at 1233.) Further, the trial court expressly ruled on the “grouping” issue in its order. (See 11/14/13 Order at 3, 7–8, 11–13, R. 27, 31-32, 35-38.) Thus, the issue was preserved because it was raised to and ruled upon by the master. See Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (“It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.”).

Church Creek was not required to raise the issue again in its motion to reconsider; instead, Church Creek’s motion raised issues that the master did not address or rule on in its order. See id. at 77, 497 S.E.2d at 734 (“Post-trial motions are not necessary to preserve issues that have been ruled upon at trial; they are used to preserve those that have been raised to the trial court but not yet ruled upon by it ”); see also State v. McDaniel, 320 S.C. 33, 37, 462 S.E.2d 882, 884 (Ct. App. 1995) (“So long as the judge had an opportunity to rule on an issue, and did so, it was not incumbent upon . . . counsel to harass the judge by parading the issue before him again ”) (internal quotations omitted) In any event, Respondents put the grouping issue back before the master again by raising it and arguing that the grouping was proper in their opposition to Church Creek’s motion to reconsider. (Pl.’s Memo. in Opp. to Defs.’ Mot. to Reconsider, Alter, or Amend at 4 (arguing that “equitable principles supported the grouping into three primary groups, with each to contribute \$1,000,000 (a pro rata share)”).)

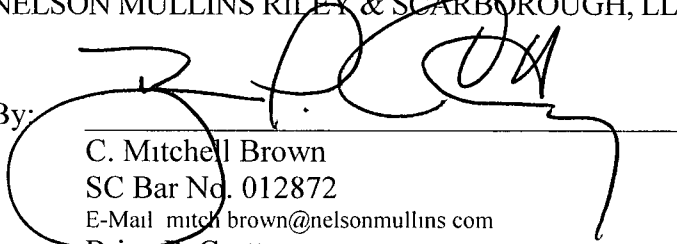
Without any analysis or citation to support in the record, Respondents make the conclusory statement that the master’s grouping was equitable. Respondents fail to address any of Church Creek’s appellate arguments as to the master’s improper grouping, which are amply explained in Church Creek’s opening brief, and thus, not restated here. (See Brief of App. at 34.)

CONCLUSION

For the foregoing reasons, as well as those set forth in Church Creek's opening brief, this Court should reverse the judgment of the master-in-equity and enter judgment in favor of Church Creek. The Respondents failed to meet their burden of proving a right to contribution on the record in this case, and the master-in-equity thus erred in its judgment.

Respectfully submitted,

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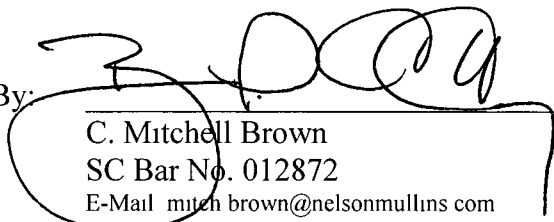
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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Reply 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
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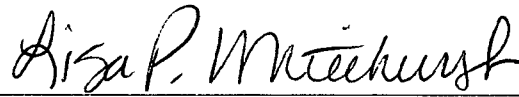
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Final Reply Brief of Appellant

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