THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
Court of Common Pleas

Mikell R. Scarborough, Master-in-Equity

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

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 BRIEF OF RESPONDENTS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes

Rules

Other Authorities

RESPONDENTS' STATEMENT OF THE ISSUE ON APPEAL

Did the master properly grant Respondents[1] judgment against Appellant[2] for contribution under the Uniform Contribution Among Tortfeasors Act, S.C. Code Ann. §§ 15-38-10 to -70 (the "UCATA" or the "Contribution Act" or the "Act"), where the record shows that, with respect to the underlying litigation, Appellant shared a common tort liability with the Settling Defendants and that, without contribution from Appellant, the Settling Defendants extinguished Appellant's liability by payment of an amount in settlement that the master found to be reasonable—and that Appellant has not challenged as being in excess of what was reasonable?

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[1] For and on behalf of all owners of the Montclair Horizontal Property Regime, Respondents Montclair Property Owners Association, Inc. and Montclair Property Owners Association Board are the plaintiffs in this contribution action. They were also the plaintiffs in underlying construction-defect-related litigation arising out of the conversion of a rental apartment complex in Mount Pleasant, South Carolina, into condominium units for public sale. Respondents are pursuing the present litigation by virtue of claim assignments from certain defendants with whom they settled the underlying litigation; namely, Montclair Associates Limited Partnership ("MALP"); Cremco, LLC; and Montclair Homes, LLC ("Montclair Homes") (collectively, the "Settling Defendants"). (R. pp. 99-113, 1195-1232.)

[2] Appellant Church Creek Construction, LLC, is the defendant in this action. Appellant was also a defendant in the underlying litigation. Its liability was extinguished by the Settling Defendants' payment of $3,000,000. (R. pp. 101-113, 1195-1232.)

ARGUMENT

I. The master properly granted Respondents judgment against Appellant for contribution under the UCATA, because the record shows that, with respect to the underlying litigation, Appellant shared a common tort liability with the Settling Defendants and that, without contribution from Appellant, the Settling Defendants extinguished Appellant's liability by payment of an amount in settlement that the master properly found to be reasonable—and that Appellant has not challenged as being in excess of what was reasonable.

The essence of Appellant's argument is this technical point: even though Appellant clearly shared common tort liability with the Settling Defendants and even though Appellant clearly benefitted from that liability being extinguished by the Settling Defendants' payment of $3,000,000, since the underlying plaintiffs did not pursue the same causes of action against all of the underlying defendants and since the underlying plaintiffs and the Settling Defendants did not expressly allocate damages constituting common liability in settling the underlying litigation, as a matter of law, the master could not award Respondents contribution against Appellant, because the amount of common liability, and pro rata shares thereof, could not properly be determined.

Respectfully, Appellant's argument is without merit, because it is founded on a construction of the Contribution Act that is at odds with its

ameliorative purpose and ignores the express legislative directive that courts do equity in applying the Act.

A. As an initial matter, Appellant has the burden to show any reversible error.

Notwithstanding the broad scope of review in an action in equity, the appellate court is, of course, "not required to disregard the findings of the trial judge who saw and heard the witnesses and was in a better position to judge their credibility." Ingram v. Kasey's Assocs., 340 S.C. 98, 105, 531 S.E.2d 287, 291 (2000). Moreover, as a general rule, to upset the presumptive validity of a lower court's decision on appeal, the appellant has the affirmative obligation to preserve for appeal and properly present issues, argument, and analysis to this Court sufficient to show reversible error. *See* McCall v. IKON, 380 S.C. 649, 659-60, 670 S.E.2d 695, 701 (Ct. App. 2008) (noting an appealed order comes to the appellate court with a presumption of correctness, with the burden on the appellant to demonstrate reversible error, and an appellate court is obliged to reverse when error is called to its attention, but it is not in the business of figuring out on its own whether error exists); *see also* Jinks v. Richland County, 355 S.C. 341, 344, 585 S.E.2d 281, 283, n. 3 (2003) (an issue which is not argued in the brief is deemed abandoned and precludes consideration on appeal); First Union

Nat'l Bank of S.C. v. Soden, 333 S.C. 554, 566, 511 S.E.2d 372, 378 (Ct. App. 1998) (holding an "unchallenged ruling, right or wrong, is the law of the case and requires affirmance").

With these principles in mind, Respondents note that, although it contains a lengthy factual presentation and a citation to the broad scope of appellate review allowed in an action in equity, Appellant's brief contains no argument challenging numerous factual findings and legal conclusions set forth in the master's decision,[3] including:

FINDINGS OF FACT

. . .

[3] To be clear, Respondents contend that the master's factual findings and legal conclusions are supported by the record. Indeed, except to the extent that it is somehow inconsistent with the argument/analysis presented herein, Respondents adopt the reasoning set forth in the master's decision by reference in support of its affirmance. And, to the extent there may be any question about the propriety of pointing to the master's own reasoning in support of affirmance, Respondents note that Rule 220(c), SCACR, expressly permits an appellate court to "affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal" and Rule 208(b)(2), SCACR, authorizes a respondent's brief to "contain argument asking the court to affirm for any ground appearing on the record as provided by Rule 220(c)." Respondents submit that such incorporation by reference is a proper way to advocate for affirmance—moreover, it is efficient, and avoids needless redundancy. *Cf.* Rule 208(b)(6), SCACR (providing that "any party may adopt by reference all or any part of the brief of another"). Respondents also submit that incorporation by reference in this manner is consistent with the legal presumption of correctness attached to an appealed order and the affirmative burden imposed upon the appellant to show any reversible error. *See* McCall, 380 S.C. at 659-60, 670 S.E.2d at 701.

2. The Court finds, and it was not disputed at the hearing, that CCC performed and supervised construction-related activities on the exteriors of the buildings at Montclair for the converter group, Montclair Homes, and did firewall repairs for MALP, the seller of the apartments to Montclair Homes, for the apartment-to-condominium conversion between the Fall of 2003 and the Spring of 2005. . . . The Court finds as a fact that the last invoice from Roger Lockey/CCC for repair work is dated April 8, 2005 . . . . The Court finds these repaired areas of the buildings were common elements and were areas that the Plaintiffs in the underlying suit claimed were in substandard and damaged condition due, in part, to defective repairs by CCC. . . .

3. The Court finds that the Plaintiffs alleged . . . deficient and negligent construction causing property damage to them against CCC, MALP, and Montclair Homes. The Court finds that at the time of the release of CCC in November 2012, there was no less than seven (7) separate defendants left which, but for the releases, would have gone to a jury trial with a real possibility that joint and several liability would be established. . . .

5. The Court finds that the work of CCC 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 Plaintiff's indivisible damages. Plaintiffs established by expert testimony that CCC's work in many areas of the exteriors of the building envelope and also in the repair of the firewalls was deficient and violated the building codes in effect for the time period when CCC performed repairs through its

subcontractors. This was established to the satisfaction of the Court by a preponderance of the evidence. The Court notes negligent repairs of the firewalls did affect a life safety system within the buildings. The Court finds that many of the areas of the exteriors of the buildings will need to be repaired again after the CCC repairs, including the repair of consequential damage, and that the firewalls will need to be redone, all at a considerable expense to the Plaintiffs. The Court finds that the Defendant CCC did not present any alternative cost of repair estimate and that the Plaintiff's cost to repair the buildings was in the $12,000,000 range.

6. The Court finds that the Plaintiffs did have viable causes of action still existing upon which they were proceeding to trial in the underlying case at the time of the settlement in November 2012. Some of the causes of action sounded in tort and were for deficient construction with all three groups of defendants alleged to have been jointly and severally responsible. Indeed, these were the most significant causes of action in light of the evidence of record. . . . This Court is convinced that the release which CCC had the benefit of by virtue of the payment by MALP and Montclair Homes had substantial value to CCC. Had a verdict been rendered below in tort for negligent construction, CCC and the other defendants would have faced substantial common liability but for their liability being extinguished by settlement.

CONCLUSIONS OF LAW

. . .

> In weighing the evidence, the Court finds that CCC and its subcontractors did in fact conduct negligent construction activities on multiple parts of the common elements of these buildings and did contribute to causing the Plaintiff's significant consequential property damage. Therefore, this Court finds CCC was a joint tortfeasor with MALP and Montclair Homes and finds the overall November 2012 settlement to have been a fair and reasonable settlement . . . .
>
> CCC contends it only "touched" 65% of the buildings. However, this was sufficiently rebutted in the Court's opinion by the Plaintiffs' experts that CCC touched slightly in excess of 90% of the buildings. The Plaintiffs introduced evidence that CCC's own invoices indicated it worked on buildings housing 218 of 240 units, or slightly over 90%. This Court finds the Plaintiffs' evidence to be compelling and of greater weight as it includes actual invoices from CCC demonstrating where it worked. The Court therefore declines to deduct 10% from the amount of fair contribution from the amount of fair contribution CCC should pay.
>
> The release which extinguished CCC's liability was purchased in the context of a possible joint and several liability. . . .

(R. pp. 31-33, 39-40 (internal citations omitted).)

B. The master properly determined that Respondents met their burden of proof in this case and, in so doing, properly effectuated the ameliorative purpose of the Contribution Act and followed the legislature's directive to see that equity was done in applying the Act.[4]

While it is true that "statutes in derogation of the common law are to be strictly construed,"[5] this rule is of no help to Appellant here. It is, after all, merely one of a number of rules of statutory construction, not a substantive limitation on legislative power, and it in no way alters "[t]he cardinal rule of statutory construction," which remains, "to ascertain and effectuate the intent of the legislature." Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000); *see also* Grier, 397 S.C. at 536, 725 S.E.2d at 696 ("Under this rule, a statute restricting the common law will 'not be extended beyond the clear intent of the legislature.'"); Nelson v. Ozmint, 390 S.C. 432, 436, 702 S.E.2d 369, 371 (2010) ("[A]ll rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute.")

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[4] This section of Respondents' brief is generally intended to correspond to Arguments I.A., I.B.1., I.B.2., I.B.3.a., and I.B.3.c. in Appellant's brief.

[5] Grier v. AMISUB of S.C., Inc., 397 S.C. 532, 536, 725 S.E.2d 693, 696 (2012) (citing Epstein v. Coastal Timber Co., 393 S.C. 276, 285, 711 S.E.2d 912, 917 (2011)).

As our Supreme Court has recognized, the legislative purpose of the Contribution Act "was to 'ameliorate the unfairness vested on all joint tortfeasors by the common law's prohibition against contribution.'" Capco of Summerville, Inc. v. J.H. Gayle Const. Co., Inc., 368 S.C. 137, 144, 628 S.E.2d 38, 42 (2006) (quoting Se. Freight Lines v. City of Hartsville, 313 S.C. 466, 470, 443 S.E.2d 395, 397 (1994), *superseded by statute as stated in* Steinke v. S.C. Dep't of Labor, Licensing and Reg., 336 S.C. 373, 402-03, 520 S.E.2d 142, 157-58 (1999)); *see also* Se. Freight Lines, 313 S.C. at 469, 443 S.E.2d at 397 ("In 1988, the Legislature enacted the Uniform Contribution Among Tortfeasors Act to provide a right of contribution for joint tortfeasors who have paid more than their pro rata share of a common liability.").

Indeed, "an action for contribution lies in equity,"[6] and, as Appellant acknowledges,[7] the legislature has directed courts to apply principles of equity in determining liability under the Contribution Act. § 15-38-30 ("In determining the pro rata shares of tortfeasors in the entire liability (1) their relative degrees of fault shall not be considered; (2) if equity requires, the

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[6] RIM Assocs. v. Blackwell, 359 S.C. 170, 178, 597 S.E.2d 152, 157, n. 3 (Ct. App. 2004).

[7] (*See* App's Br. at p. 19 ("Moreover, '[p]rinciples of equity are applicable to actions determining the pro rata liability of tortfeasors.'") (citation omitted).)

collective liability of some as a group shall constitute a single share; and (3) principles of equity applicable to contribution generally shall apply.").

Under the UCATA, a right of contribution exists in favor of a settling tortfeasor against a non-settling tortfeasor in the amount 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).[8]

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[8] The full text of § 15-38-20(A)(B) and (D) is as follows:

> (A) 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.
>
> (B) 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. No tortfeasor is compelled to make contribution beyond his own pro rata share of the entire liability.
>
> . . .
>
> (D) A tortfeasor who enters into a settlement with a claimant is not entitled to recover contribution from another tortfeasor whose liability for the

Here, there is no question that Appellant and the Settling Defendants shared common tort liability that the Settling Defendants extinguished for a total payment of $3,000,000. To be clear, Appellant has **not** argued that there was no such common liability or that this settlement did not extinguish its liability or that the amount paid in settlement exceeded what was reasonable to resolve the common liability.[9] Rather, Appellant relies on the aforementioned technical point, which it views as making it impossible for Respondents to properly prove the amount of common liability and, therefore, impossible for Respondents to prove a right of contribution. In other words, Appellant contends that, in this case, the Contribution Act

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> injury or wrongful death is not extinguished by the settlement nor in respect to any amount paid in a settlement which is in excess of what was reasonable.

[9] 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. (*See* App's Br. at 27 ("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.") (emphasis in original); id. at p. 28 ("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."); id. ("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

mandates a patently inequitable result in this equitable case: that it receive a windfall.

Again, Appellant'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. Where, as here, it is undeniable that common liability was extinguished by settlement, under § 15-38-20(D), the question is whether the settlement amount was in excess of what was reasonable. And, again, Appellant has not argued that the settlement amount was in excess of what was reasonable to resolve the common liability; rather, Appellant argues a technical point about an alleged failure of proof as to allocation of the settlement proceeds to common liability.

Whether it was Respondents or Appellant that bore the initial burden of proof with regard to the reasonableness of the settlement amount, this question of reasonableness has by now been answered affirmatively, because the master found the amount to be reasonable and Appellant has not questioned that finding. *See* Jinks, 355 S.C. at 344, 585 S.E.2d at 283, n. 3; Soden, 333 S.C. at 566, 511 S.E.2d at 378.[10] With Appellant's common liability having been extinguished by the Settling Defendants' payment of a

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broadly worded agreement.").)

[10] Of course, Respondents also contend that the master's finding that the settlement amount was reasonable is supported by the record. (*See also*

reasonable amount, the master did not err in determining that Respondents had put forth sufficient proof of a right of contribution against Appellant and in finding that the $3,000,000 total payment by the Settling Defendants equated to common liability to be prorated.

The master's decision is consistent with the letter and the spirit of the governing law, i.e., the Contribution Act, effectuating its ameliorative purpose and following its directive to follow time-honored principles of equity. *See* Buckley v. Shealy, 370 S.C. 317, 323-24, 635 S.E.2d 76, 79 (2006) (recognizing "the time honored equitable maxim that all courts have the inherent power to [do] all things reasonable necessary to ensure that just results are achieved to the fullest extent possible") (citing Ex Parte Dibble, 279 S.C. 592, 595-96, 310 S.E.2d 440, 442 (Ct. App. 1983)); *see also* Lane v. New York Life Ins. Co., 147 S.C. 333, 369, 145 S.E. 196, 207 (1928) ("Equity will not suffer a wrong without a remedy."); Regions Bank v. Wingard Properties, Inc., 394 S.C. 241, 253, 715 S.E.2d 348, 354-55 (Ct. App. 2011) (discussing equitable maxims, including, "equity regards as done that which ought to be done" and "equity looks to substance rather than to form").

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footnote 3, *supra*.)

Appellant makes too much of Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp., 336 S.C. 53, 518 S.E.2d 301 (Ct. App. 1999).

In Vermeer, the only claim that had actually been pursued in the underlying litigation was Mr. Causey's personal injury claim against Vermeer. This claim resulted in a monetary settlement, which, it appears, was consummated via a release that was signed not only by Mr. Causey but by his wife as well, even though Mrs. Causey had not alleged any claim.

The Court of Appeals first found that Vermeer did not have a claim for contribution against Wood/Chuck, because Vermeer did not buy Wood/Chuck's peace via its settlement with Mr. Causey, Mr. Causey having already dismissed all causes of action against Wood/Chuck with prejudice by that time. The Court of Appeals then addressed Vermeer's claim that it was entitled to contribution from Wood/Chuck for extinguishing any potential liability it had to Mrs. Causey for loss of consortium. In so doing, the court explained as follows:

> Mrs. Causey never sued either Vermeer or Wood/Chuck. She was not a party to the action brought by her husband. There was no admission of liability concerning Mrs. Causey. Neither company was compelled to pay anything to Mrs. Causey. When asked through Wood/Chuck's interrogatories to set forth an itemized statement of all damages claimed to have been sustained, Vermeer answered: "The Plaintiff has been

> damaged in the amount of the settlement paid to Elbert Causey, Two Hundred Thousand Dollars ($200,000.00) and Nine Hundred Twenty Six Dollars ($926.00) per month for five years, plus costs and attorneys fees incurred in bringing this action." There is no claim for and no mention in the Answers to interrogatories of any payment having been made to Mrs. Causey. Vermeer did not "discharge" any "common liability" as to Mrs. Causey because there was no "common liability." As a result, Vermeer was not entitled to contribution from Wood/Chuck as to any potential claim by Mrs. Causey.

Id. at 69, 518 S.E.2d at 310.

It was not until after this analysis—which itself yielded the Court's conclusion that "Vermeer was not entitled to contribution from Wood/Chuck as to any potential claim by Mrs. Causey"—that the Court looked to the matter of allocation that Appellant champions in this case. Consequently, in addition to the fact that the authority cited by the Vermeer Court regarding allocation (i.e., Houser v. Witt, 111 Ill. App. 3d 123, 443 N.E.2d 725 (1982)) is from a jurisdiction that—unlike South Carolina—has not adopted the revised UCATA (a jurisdiction that would seem to countenance an inequitable result that would not be viewed with the same favor in South Carolina),[11] this portion of the Vermeer decision appears to be *dicta*.

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[11] *See* Restatement (Third) of Torts: Apportionment Liability § 23, Reporter's Note, Comment a (identifying South Carolina as one of the jurisdictions that has adopted the Revised UCATA of 1955); id. (identifying

Moreover, even if this portion of the Vermeer decision is rightfully considered in analyzing this case, it does not carry the day for Appellant here. In stark contrast to the wholesale lack of any evidence of liability by either Vermeer or Wood/Chuck to Mrs. Causey in Vermeer, the record in the present case leaves no doubt—and, again, Appellant implicitly concedes as much—that, by their payment of the total amount of $3,000,000, an amount that the master found reasonable and that Appellant has not argued to exceed the reasonable value of common liability, the Settling Defendants extinguished a substantial common liability that Appellant shared. The master's finding that the $3,000,000 in settlement proceeds equated with common liability and determination of pro rata liability for that amount is amply supported by the record.

C. The master did not improperly group the defendants.[12]

Appellant argues that, "[w]hile 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" and Appellant also

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Illinois as one of the jurisdictions that has as contribution statute "other than the Uniform Contribution Among Tortfeasors Act"); *see also* 740 Ill. Comp. Stat. Ann. 100/0.01 to -100/5 (Illinois' Joint Tortfeasor Contribution Act).

[12] This section of Respondents' brief is generally intended to correspond to Argument I.B.3.b. in Appellant's brief.

takes issue with the master designating the Converter Group as only Montclair Homes. (App's Br. at p. 34.)

As an initial matter, Appellant did not obtain—or at least attempt to obtain—a ruling on this issue by the master. (*See* R. pp. 25-41; R. pp. 1247-1252; and R. p. 42.) Consequently, this issue is not preserved for appellate review. Elam v. S.C. Dep't of Transp., 361 S.C. 9, 23, 602 S.E.2d 772, 779-80 (2004) ("Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court.") Also, this portion of Appellant's argument can fairly be described as conclusory and, therefore, abandoned. Mulherin-Howell v. Cobb, 362 S.C. 588, 608 S.E.2d 587 (Ct. App. 2005) (finding conclusory argument abandoned).

In any event, § 15-38-30 expressly instructs that "if equity requires, the collective liability of some as a group shall constitute a single share . . . ." The master's decision with regard to grouping and determining pro rata liability is amply supported as set forth therein and, indeed, Appellant's argument on this point does not actually identify any inequity in this regard.

CONCLUSION

For the foregoing reasons, along with any other reason that may be evident upon the record, Respondents ask the Court to affirm the master's judgment in their favor.

Respectfully submitted,

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Dated: 4/13/15