THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

Case No. 2014-CP-40-07037

Century Capital Group, LLC,

Appellant,

v.

Midtown Development Group, LLC,
Richland Joint Venture Group, LLC,
Windsor Richland Mall, L.P. and BRC
Richland, LLC,

Respondents.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

On November 10, 2014, Appellant, Century Capital Group, LLC, ("Century") filed a complaint against the Respondents, Midtown Development Group, LLC ("Midtown"), Richland Joint Venture Group, LLC ("RJVG"), Windsor Richland Mall, L.P. ("Windsor"), and BRC Richland, LLC ("BRC"), in the Circuit Court of Richland County. The complaint was amended twice, once on November 12, 2014, and again by leave of the court on December 8, 2014 to add a paragraph that was inadvertently left out and to correct the request for relief. Century sought recovery against the Defendants for contribution. RJVG filed its motion for summary judgment on May 6, 2015 and Midtown and Windsor filed separate motions for summary judgment on May 11, 2015. BRC could not be served and did not participate in the action.

On July 30, 2015, a hearing was conducted before the Honorable L. Casey Manning regarding the three motions for summary judgment. On September 16 and 17, 2015, the circuit court issued orders granting summary judgment as to all Defendants and dismissing Century's claim with prejudice on the grounds that there were no genuine issues of material fact, the Settlement Agreement does not delineate what portion of the sum paid by Century should be apportioned to each Defendant under a negligence theory, and that Century's claims are barred by the statute of repose.

On September 25, 2015, Century filed motions to alter or amend the September 16 and 17 Orders, which were subsequently denied by the trial court on February 23, 2016.

STATEMENT OF FACTS

This case stems from an underlying lawsuit (Case No.: 2010-CP-40-8407) against Century by Spirit SPE Columbia, LLC ("Spirit"), a non-party in the present matter, based primarily on allegations that Century failed to adequately repair and maintain certain portions of

the Richland Mall. The Richland Mall has a long history of construction defect and maintenance issues and has experienced persistent roof leaks since original construction. The parking deck was designed above occupied space and has a split-slab system of waterproofing, meaning the waterproofing membrane is sandwiched between two layers of concrete and endures regular vehicular and pedestrian traffic. Extensive reports dating back to the 1990's indicate that the roof was defectively constructed based on a failure to install sufficient expansion joints and defective components in the waterproofing structure. In lieu of costly roof repairs, Mall ownership at the time began installing a system of ceiling pans to prevent water from intruding into the occupied space below and injecting the visible cracks in the concrete of the deck with epoxy.

On December 23, 2002, the Mall was sold to Windsor and simultaneously split into separate parcels: the "Bank Parcel," the "TGI Friday Parcel," the "Verizon Parcel" and the "Mall Parcel," which included the remaining portions of the Mall and the Common Areas. 2d. Am. Compl. ¶ 7. Also in 2002, Windsor sold the Verizon parcel to BRC. 2d. Am. Compl. ¶ 8. On September 7, 2005, BRC and Windsor negotiated the Reciprocal Easement, Covenant, Operation and Restriction Agreement ("REA"), which attempted to outline the respective duties of those parties and their successors regarding the maintenance and administration of the Mall. 2d. Am. Compl. ¶ 9. Of particular relevance is the following REA provision:

> (C) Roof and other Repairs. Until November 30, 2010, Windsor as owner of the Midtown Parcel and any successor thereto, shall make all roof repairs, structural repairs to exterior walls, structural repairs to columns and structural floor (excluding floor coverings) which collectively enclose the building on the Verizon Parcel and the building systems (plumbing, sprinkler, electrical, and HVAC) in the building on the Verizon Parcel.

2d. Am. Compl. Ex. 1, at 16.

As the roof leaks continued, Mall Management elected to inject epoxy to chase the cracks

and continued to install galvanized steel catch pans in the roof system to collect the water. Spirit purchased the Verizon Parcel on September 12, 2005. 2d. Am. Compl. ¶ 10. On November 4, 2005, Windsor sold the Mall parcel to Midtown. 2d. Am. Compl. ¶ 11. On May 25, 2007, Midtown sold the Mall parcel to RJVG 2d. Am. Compl. ¶ 12. After receiving a demand for repairs from Spirit on March 3, 2009, RJVG began a program of replacing sections of concrete while maintaining the pan/seal method of repair. RJVG did not re-seal the entire parking deck structure.

Century purchased the Mall parcel from RJVG on February 16, 2010 and acknowledges that it had notice of the roof leaks; however, it had no indication that Spirit took issue with the maintenance plan in place since the origin of the leaks nor did Century agree to accept responsibility for its predecessors' maintenance failures. Walkup Aff. ¶¶ 3, 5- 6. Spirit initiated the underlying suit against Century only nine months after Century took possession of the Mall parcel. Spirit's complaint sought relief under seventeen causes of action for damages related to maintenance and repair of the Mall Property, common area maintenance charges, and management of the Mall in general. Walkup Aff. ¶ 9; Spirit's 3d. Am. Compl.

In an effort to resolve the costly and protracted litigation with Spirit, Century agreed to settle the underlying lawsuit's claims relating to repair and maintenance of the Mall for One Million Four Hundred Fifty Thousand and No/100 Dollars ($1,450,000.00). The Agreement provides in part:

> The parties agree that the $1,450,000 payment is provided for the release and extinguishment of any pre-June 30, 2013 liability related to the maintenance and repair of the Spirit parcel and the remaining consideration provided by [Century] under this Settlement Agreement is provided for the pre-June 30, 2013 settlement of the CAM, accounting and other claims asserted by Spirit.

Def. Midtown's Mot. Summ. J., Ex. B, at 3.

The Settlement Agreement expressly extinguishes liability and discharges all claims against Century and its predecessors in interest under the REA:

> Based upon the foregoing consideration, Spirit . . . hereby releases and forever discharges from all claims . . . [Century's] predecessors in interest under the REA, and each predecessor in interest's employees, agents, heirs and assigns.

Def. Midtown's Mot. Summ. J., Ex. B, at 10.

Century brought a claim for contribution against the Respondents for their pro rata share of the liability to Spirit for negligent maintenance and repair on the basis that the actions and/or inactions of all successive owners of the Mall necessarily united in causing Spirit's damages.

STANDARD OF REVIEW

When reviewing the grant of a summary judgment motion, the appellate court applies the same standard of review as the trial court under Rule 56, SCRCP. Zurich Am. Ins. Co. v. Tolbert, 378 S.C. 493, 496, 662 S.E.2d 606, 607 (Ct. App. 2008). Principles of equity are applicable to actions determining the pro rata liability of tortfeasors. S.C. Code Ann. § 15–38–30 (Supp. 2000); Florence Cty. Sch. Dist. No. 2 v. Interkal, Inc., 348 S.C. 446, 450, 559 S.E.2d 866, 868 (Ct. App. 2002).

In equity cases tried before a judge without a jury, the appellate court may make a de novo review of properly challenged findings of fact as well as rule upon issues of law. Townes Assoc., Ltd. v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976). Therefore, an appellate court may find facts in accordance with its own views of the preponderance of the evidence. Metromont Materials Corp. v. Pennell, 270 S.C. 9, 18, 239 S.E.2d 753, 758 (1977).

In determining whether a genuine issue of fact exists, the evidence and all reasonable

inferences drawn from it must be viewed in the light most favorable to the nonmoving party. Sauner v. Pub. Serv. Auth. of S.C., 354 S.C. 397, 404, 581 S.E.2d 161, 165 (2003). Even if evidentiary facts are not disputed, if only the conclusions to be drawn from them are, the trial court should deny the motion for summary judgment. Baugus v. Wessinger, 303 S.C. 412, 415, 401 S.E.2d 169, 171 (1991). Summary judgment is not appropriate when further inquiry into the facts is desirable to clarify the application of law. Tupper v. Dorchester Cnty., 326 S.C. 318, 325, 487 S.E.2d 187, 191 (1997).

ARGUMENT

I. THE TRIAL COURT ERRED IN HOLDING AS A MATTER OF LAW THAT THE PARTIES ARE NOT JOINT TORTFEASORS.

The South Carolina Contribution Among Tortfeasors Act (the "Act") provides a right of contribution in favor of a "tortfeasor who has paid more than his pro rata share of [ ] common liability, and his total recovery is limited to the amount paid by him in excess of his pro rata share. Under the Act, a tortfeasor against whom a judgment is rendered is entitled to recover proportional shares of the judgment from other joint tortfeasors whose negligence contributed to the injury and who were also liable to the plaintiff. Andrade v. Johnson, 345 S.C. 216, 225, 546 S.E.2d 665, 669 (Ct. App. 2001). Contribution exists as a way to equitably apportion costs after liability is established. Ashley II of Charleston, L.L.C. v. PCS Nitrogen, Inc., 409 S.C. 487, 491, 763 S.E.2d 19, 21 (2014).

In the case at bar, Century sought contribution from its predecessors in interest to the Mall for sums Century paid to Spirit to settle the underlying lawsuit. The separate and independent acts of all the tortfeasors over the course of many years combined to damage Spirit, yet Century, as the last party in line, was left to settle the common liability on its own.

A. The determination of joint tortfeasor status is a question of fact and is disputed.

The trial court erred in deciding that the parties were not joint tortfeasors as a matter of law at the summary judgment stage in spite of the evidence Century presented demonstrating tort liability of the Respondents. South Carolina case law is clear that the fact-finder must determine whether two parties are joint tortfeasors for purposes of the Act when that fact is disputed:

> "Joint tortfeasor" refers to "[t]hose who act together in committing wrong, or whose acts if independent of each other, unite in causing single injury"; "two or more persons jointly or severally liable in tort for the same injury to person or property." To determine whether Vermeer and Wood/Chuck are joint tortfeasors, we factually analyze the record.

Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp., 336 S.C. 53, 64, 518 S.E.2d 301, 307 (Ct. App. 1999) (citation omitted).

> Where it is not conceded that the acts of two or more persons, resulting in injury to another, were done in pursuance of a common design or concert of purpose, or were the result of the joint negligence of the actors, it becomes a question of fact to be determined by the jury whether the persons so engaged were joint tort-feasors.

Edwards v. Atl. Coast Line R. Co., 148 S.C. 266, 146 S.E. 97, 101 (1928).

Century demonstrated in its pleadings and by affidavits that the damages caused to Spirit necessarily resulted from the common acts or omissions of itself and the Respondents. Wilson Dep. 84:15-85:2; Vitale Aff. ¶ 6 ("The parking deck on the Richland Mall was in substantially the same condition in 2013 as it was when I inspected it in 2003"). This evidence demonstrates that despite the fact that Spirit limited its recovery against Century to damages occurring after Century took title to the property, Century alone could not have been solely responsible for the damages.

The Respondents refuted liability, but offered no evidence disproving it. The burden should have been on the Respondents to demonstrate that no scintilla of evidence existed. This

issue should have caused the denial of any ruling at the summary judgment stage based on the genuine issues of material fact integral to the determination of the Act's application. By ruling that a contested issue of fact is, as a matter of law, non-existent, the trial court erred in granting summary judgment to the Respondents.

B. A separate tort duty to reasonably repair and maintain exists outside the REA's contractual duties.

The Trial Court erred in holding that because the parties had a contractual duty to repair and maintain the Mall under the REA, there could be no tort liability as is required to bring an action of contribution. Pursuant to the Act, "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 (Supp. 1998). However, the mere existence of a contractual obligation under the REA does not foreclose the possibility of tort liability to support an action for contribution.

The underlying case by Spirit sought recovery against Century for, *inter alia*, negligent maintenance of the Mall. It is well settled that in order to establish a cause of action for negligence, the following four elements must be proven: (1) a duty of care owed by defendant to plaintiff; (2) breach of that duty by a negligent act or omission; (3) resulting in damages to the plaintiff; and (4) damages proximately resulted from the breach of duty. Fettler v. Gentner, 396 S.C. 461, 466-67, 722 S.E.2d 26, 29 (Ct. App. 2012). The Order states as follows as it relates to the existence of a legal duty in this action:

> It is clear in the record before this Court that any duty of the Defendants regarding maintenance to the Spirit Parcel was a contractual duty arising from the REA, and parties may not seek contribution as alleged joint tortfeasors for breaches of contractual duties under S.C. Code Ann. § 15-38-20.

Order Granting Mot. Summ. J., Sep. 16, 2015.

Thus, the Trial Court improperly held that a legal duty could not and did not exist outside of the contractual REA. As a general rule, a negligence action will not lie when the parties are in privity of contract; "however, [when] there is a special relationship between the alleged tortfeasor and the injured party not arising in contract, the breach of that duty of care will support a tort action." Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc., 320 S.C. 49, 55, 463 S.E.2d 85, 88 (1995). "Under South Carolina law, breach of industry standard may establish that special duty outside of contract exists, and thus prevent application of economic loss rule." Eaton Corp. v. Trane Carolina Plains, 350 F. Supp. 2d 699 (D.S.C. 2004).

In the case at bar, the Respondents and Century owed a common law duty to Spirit to reasonably maintain and repair the Mall according to industry standards, applicable building codes and in the manner of a reasonably prudent person. This duty arises by virtue of the obligations a landowner owes to an adjoining landowner to act reasonably to prevent damages to the adjoining landowner's property. This duty also arises based on the fact that when the Respondents and Century undertook to make repairs to the roof structure, they failed to do so in a reasonably prudent manner. These failures amounted to breach of industry standards, violations of building codes and were most certainly not in accordance with the reasonably prudent person standard of care. For these reasons, the Trial Court erred in holding that there could be no tort liability to support an action for Contribution.

C. Common liability to Spirit exists because the damages to the Spirit for repair and maintenance of the Mall are indivisible.

"The basic premise of contribution is commonality. Under the statute, 'common liability,' rather than joint negligence, determines the right to contribution." Vermeer Carolina's, Inc. v.

Wood/Chuck Chipper Corp., 336 S.C. 53, 68, 518 S.E.2d 301, 309 (Ct. App. 1999). It is well established in South Carolina that the focus should be on the harm to the Plaintiff, not the acts of the Defendants. Pendleton v. Columbia Railway, Gas & Elec. Co., 133 S.C. 326, 131 S.E. 265 (1926). The court in Pendleton held:

> That a single injury, which is the proximate result of the separate and independent acts of negligence of two or more parties, subjects the tort-feasors, even in the absence of community of design or concert of action, to liability which is both joint and several is a proposition recognized and approved in this state and supported by the great weight of authority elsewhere.

Pendleton, 133 S.C. at 326, 131 S.E. at 267.

In the Vermeer case, the Court of Appeals held that there was no right to contribution because the party against whom contribution was sought had been dismissed with prejudice by the Plaintiff. Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp., 336 S.C. 53,68, 518 S.C. 301,310 (Ct. App. 1999). There was "no 'common liability' that could have been discharged by the settlement" because the Plaintiff had dismissed that particular Defendant with prejudice, which operated as an adjudication on the merits discharging that Defendant from *any* liability to the Plaintiff. Vermeer Carolina's, Inc., 336 S.C. at 68, 518 S.C. at 310. At present, the Respondents were not parties in the underlying case, but Century ensured that any common liability shared by the Respondents and Century related to the repair and maintenance of the building was discharged by the Settlement Agreement.

Likewise, in the case of Collins v. Bisson, the court noted that there was no common liability as between two Defendants because there was no common injury to the Plaintiff. Collins v. Bisson, 332 S.C. 290, 306, 504 S.E. 2d 347, 356 (1998). In Collins, the Plaintiff was injured in a first automobile accident with one Defendant and then while being transported by ambulance to

the hospital was also injured in a second automobile accident with a second Defendant.Collins, 332 S.C. at 293, 504 S.E. 2d at 349. In its holding, the court focused on the fact that the Plaintiff incurred "different injuries" and differing damages in each of the two separate accidents.332 S.C. at 306, 504 S.E. 2d at 356. Specifically, the court acknowledged that the Plaintiff was "unscathed" in the first accident but was left "screaming in pain" after the second accident. Id.at 293, 504 S.E. 2d at 349. The court emphasized that "joint and several liability arises only when two or more tortfeasors are responsible for a *single* injury." Id.at 306, 504 S.E. 2d at 356 (emphasis in original).

In the case at bar, the Defendants and Century are joint tortfeasors because their separate and independent acts of negligent maintenance and repair combined to cause one indivisible injury to Spirit. Unlike in Collins, this case deals with defendants whose actions united to cause a one injury to property, not separate and distinct injuries. Century acknowledges that the underlying lawsuit sought recovery against it for failure to repair and maintain the Mall since taking possession and operating as manager of the Shopping Mall Property. However, Century has demonstrated that it could not feasibly have been responsible for the damages Spirit alleged in nine months because the damages were indivisible and were the result of many years of improper maintenance and repair to a defective structure. All Parties had the same duty to Spirit with respect to maintenance of the Mall. Testimony shows that the building remained in substantially the same condition during the entire relevant time period. Vitale Aff. ¶ 6.

Summary judgment is not appropriate in this case because there are genuine issues of material fact regarding the determination of joint tortfeasor status amongst the parties. As stated above, joint tortfeasors may act independently of each other if those acts unit to cause a single injury. The independent actions and inactions of the successive owners of the Mall Parcel over

the course of many years united in causing the Spirit's damages and equity is not served in forcing Century to carry the entire burden of liability it inherited.

II. THE TRIAL COURT ERRED BY IGNORING THE SETTLEMENT AGREEMENT'S APPORTIONMENT OF REPAIR AND MAINTENANCE LIABILITY.

In order to seek contribution from a joint tortfeasor after entering into a settlement agreement with the Plaintiff, the settling tortfeasor must ensure that those from whom he seeks contribution are discharged from liability to the Plaintiff and must ensure that the amount paid in settlement is reasonable. S.C. Code Ann. § 15-38-20(D) (Supp. 1998). Contribution is an equitable theory which seeks to apportion liability between joint tortfeasors proportionately. Ashley II of Charleston, L.L.C. v. PCS Nitrogen, Inc., 409 S.C. 487,491, 763 S.E.2d 19,21 (2014). The equitable maxim equality is equity, "a principle that has long been embodied in our jurisprudence . . . is applicable to burdens as well as to rights, and means that, in the absence of relations or conditions requiring a different result, equity will treat all members of a class as on an equal footing, and will distribute benefits or impose burdens and charges either equally or in proportion to the several interests, and without preferences." Myers v. Sinkler, 235 S.C. 162, 175, 110 S.E.2d 241, 247 (1959). Under the "equality is equity" rule, damages are apportioned equally among the tortfeasors without the necessity of determining relative degrees of fault. W. Keeton, D. Dobbs, R. Keeton & D. Owen, Prosser and Keeton on the Law of Torts § 50, at 340 (5th ed. 1984).

Even if two tortfeasors are liable to a Plaintiff under differing or multiple theories, when their actions unite to cause one injury to the Plaintiff they can be liable to each other for contribution. See Matthews v. Seaboard Air Line Ry., 67 S.C. 499, 46 S.E. 335, 340 (1903).

> If two or more persons owe to another the same duty, and by their common neglect of that duty he is injured, doubtless the tort is joint, and upon well-settled

> principles each, any, or all of the tort feasors may be held. But when each of two or more persons owe to another a separate duty, which each wrongfully neglects to perform, then, although the duties were diverse and disconnected, and the neglect of each was without concert, *if such several neglects concurred and united together in causing injury, the tort is equally joint, and the tort feasors are subject to a like liability.*

Matthews, 67 S.C.. at 514-15, 46 S.E. at 340 (emphasis added).

Century and Spirit executed a Settlement Agreement and Mutual Release on December 6, 2013. Section (a) 6 of the agreement provides as follows:

> The parties agree that the $1,450,000 payment is provided for the release and extinguishment of any pre-June 30, 2013 liability related to the maintenance and repair of the Spirit parcel and the remaining consideration provided by CCG under this Settlement Agreement is provided for the pre-June 30, 2013 settlement of the CAM, accounting and other claims asserted by Spirit.

Settlement Agreement § (a) 6.

The "remaining consideration" stated above is further outlined in subsequent paragraphs of the Agreement to include modifications to the REA, ...

Section (d) 1 provides in part as follows:

> Based upon the foregoing consideration, Spirit . . . hereby releases and forever discharges from all claims . . . [Century's] predecessors in interest under the REA, and each predecessor in interest's employees, agents, heirs and assigns.

The Trial Court held that the damages could not be allocated by the fact finder, based on its incorrect application of the Vermeer case. The Vermeer case can be distinguished from the case at bar because it dealt with the issue of whether a defendant was entitled to contribution for settlement of a *potential* claim by a *non-party* who *never* asserted or litigated the claim. Specifically, Vermeer sought contribution from Wood/Chuck for payment of a potential loss of consortium claim to the injured party's wife. Vermeer Carolina's Inc. v. Wood/Chuck Chipper Corp. 336 S.C. at 69, 518 S.E.2d at 310. The wife was not a Plaintiff in the underlying lawsuit

brought by her husband nor was there any admission of liability as to her. Vermeer's Carolina, Inc., 336 S.C.53 69, 518 S.E.2d 301,310. For these reasons, "Vermeer did not 'discharge' any 'common liability' as to [the wife] because there was no 'common liability.'" 336 S.C. at 69, 518 S.E.2d at 310.

As stated above, there is common liability between successors in interest to the Mall Parcel as to Spirit. Each owner owed a duty to Spirit to properly maintain and repair the common areas and roof. This continuous term of maintenance and repair was breached in succession by each owner leading up to Century, which was ultimately held liable for the entirety of the damages to Spirit.

The Settlement Agreement properly discharged the Respondents from liability to Spirit and outlines that $1.45M was paid to settle liability for failing to maintain and repair the portions of the Mall affecting the Spirit Parcel. Regardless of the legal theories or various duties at issue, each successor in interest to the Mall acted to cause this injury to Spirit. Pursuant to the Act, each joint tortfeasor is responsible for its equal share of the settlement figure regardless of each party's relative degree of fault. First Gen. Servs. of Charleston, Inc. v. Miller, 314 S.C. 439, 445 S.E.2d 446 (1994); Southeastern Freight Lines v. City of Hartsville, 313 S.C. 466, 443 S.E.2d 395 (1994). Thus, the Trial Court erred in ignoring the allocation of liability to Spirit for maintenance and repair of the Spirit Parcel of $1.45M. There is no need for the settlement agreement to further delineate what portion of that figure is attributable to any of the Respondents or to lay out exactly which theory of liability it is meant to cover. Each Respondent is liable for a pro rata, equitable share of this settlement figure under the Act and case law cited herein.

III. THE TRIAL COURT ERRED WHEN IT HELD THAT A PURCHASE "AS IS/WHERE IS" RELIEVES A SELLER FROM THIRD PARTY LIABILITY FOR THE SELLER'S NEGLIGENCE.

Century purchased the Mall Parcel on February 16, 2010 with knowledge of roof leaks and accepted the building as is/where is. William B. Walkup, principal of Century, acknowledged by filed affidavit that Century had notice of the leaks, repairs, and ongoing maintenance obligations that it would be responsible for after taking title to the Mall. Walkup Aff. ¶ 6. However, Century never agreed to assume responsibility for or to indemnify its predecessors for their negligent conduct. The trial court erred in essentially holding that acceptance of a patent defect operates as a waiver of the right to contribution as to liability owed a third party. This is not and has never been the law in this state.

IV. THE TRIAL COURT ERRED IN FINDING THAT THE STATUTE OF REPOSE BARRED CENTURY'S CLAIM.

The statute of repose provides in part as follows: "No actions to recover damages based upon or arising out of the defective or unsafe condition of an improvement to real property may be brought more than eight years after substantial completion of the improvement." S.C. Code Ann. § 15-3-640 (Supp. 2000). The current version of the statute went into effect on July 1, 2005, two months prior to the execution of the REA, therefore it applies to this case. The essential elements of the statute are (1) an improvement to real property and (2) substantial completion of that improvement. Because the ongoing maintenance of the Mall never amounted to an "improvement" and because there was never substantial completion of the maintenance, the statute does not bar Century's recovery in a contribution cause of action. Further, the statute is not applicable as a defense by a party who was in actual control or possession of the property at the time and was aware of the defective condition of the property. S.C. Code Ann. § 15-3-670

(Supp. 2000). Because these essential elements were not met and because the Respondents were all aware of the defective roof during their respective periods of control and possession of the Mall, the statute of repose is not a bar to Century's cause of action and summary judgment should be reversed.

A. Routine maintenance of the Mall is not an improvement under the Statute of Repose.

In determining whether or not something is an improvement for purposes of a statute of repose, jurisdictions throughout the country have resorted to various tests to aid their analyses. The South Carolina Supreme Court took up the issue of what constitutes an improvement to real property under the statute of repose as a matter of first impression by certified question in the 2001 case South Carolina Pipeline Corp. v. Lone Star Steel Co., 345 S.C. 151, 546 S.E.2d 654 (2001). In defining "improvement," the Court looked to various secondary sources, other courts' interpretations, and also attempted to glean legislative intent from the preamble to the statute. In doing so, the court developed the following necessary elements for something to be considered an improvement under our statute of repose: (1) enhancement to the value of the property; (2) an investment of time and money; and (3) permanence, as the term is commonly understood. South Carolina Pipeline Corp., 345 S.C. at 155, 546 S.E.2d at 657.

While not binding on this court, the Court of Appeals of Wisconsin analyzed a similar set of facts as those at bar in Peter v. Sprinkmann Sons Corp., where it held that daily repairs to insulation on machine pipes were not permanent additions to real property. The court held in part as follows:

> The purpose of the statute of repose is to protect contractors who are involved in permanent improvements to real property. Daily repairs are not improvements to real property as that phrase is used in the statute of repose. The legislature has chosen to protect persons or entities which make permanent improvements to real property, not to absolve those who make regular repairs or do maintenance work.

> This distinction is reasonable because improvements to real property have a completion date whereas regular repairs and maintenance can continue *ad infinitum.*

Peter v. Sprinkmann Sons Corp., 360 Wis.2d 411, 427, 860 N.W.2d 308, 315 (Wis. Ct. App. 2015) (citation omitted).

In this case, the Respondents' actions in putting up sheet metal catch basins, chasing cracks with epoxy and even resealing portions of the parking structure cannot be considered improvements to the Mall. At best, these actions were ongoing day to day repairs to keep water out of the Mall interior. As the affidavit of Mr. Vitale provides, the roof structure stayed in substantially the same condition throughout all relevant time periods. Vitale Aff. ¶ 6. No action taken by any Respondent enhanced the property's value, required an investment of labor or money beyond just ordinary repairs, nor can they be considered permanent in the common-sense understanding of the term. Further, as the Wisconsin Court found instructive, on-going repairs on the roof have continued from the Mall's construction to present. The water intrusion never ceased and the repairs continued "*ad infinitum.*" Therefore, the roof repairs never amounted to an "improvement" under the statute and the statute fails to bar Century's claim.

B. The repairs made by the Respondents were never substantially completed.

The second essential element for qualification as an improvement under the statue of repose is substantial completion. "The legislature defines 'substantial completion' as 'that degree of completion of a project, improvement, or *a specified area or portion thereof* ... upon attainment of which *the owner can use the same for the purpose for which it was intended* . . . ." Ocean Winds Corp. of Johns Island v. Lane, 347 S.C. 416, 419, 556 S.E.2d 377, 379 (2001) (emphasis in original). Unlike typical construction projects contemplated by the statute, the present situation involves on-going, daily maintenance to a failed roof system over the course of

decades and continuing through the present. There is no point in the history of the Mall where one can pinpoint a completion date for this work. The roof was usable as a parking structure, but never stopped the chronic intrusion of moisture into the Mall's interior. Absent a date of substantial completion, the statute of repose never started running and cannot be used to bar Century's claim for contribution.

C. Respondents had actual control and possession of the Mall.

In addition to the fact that the Mall repairs did not amount to an improvement under the statute of repose, the statute itself contains the following restriction:

> (A) The limitation provided by Sections 15-3-640 through 15-3-660 may not be asserted as a defense by a person in actual possession or control, as owner, tenant, or otherwise, of the improvement at the time the defective or unsafe condition constitutes the proximate cause of the injury or death for which it is proposed to bring an action, in the event the person in actual possession or control knows, or reasonably should have known, of the defective or unsafe condition . . . .

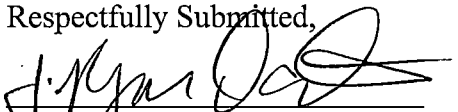
S.C. Code Ann. § 15-3-670 (Supp. 2000).

Each of the Respondents had actual possession or control of the property during the time their negligent actions or inactions proximately contributed to Spirit's damages. Each party knew and understood the defective conditions of the roof structure and failed to take proper steps to remedy them. Therefore, the Defendants cannot rely on the statute of repose to bar Century's claim for contribution.

CONCLUSION

For the reasons stated herein, this Court should reverse the order of the Circuit Court Judge and reinstate Appellant's cause of action.

Respectfully Submitted,



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July 6, 2016