THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable 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.

FINAL BRIEF OF RESPONDENTS MIDTOWN DEVELOPMENT GROUP, LLC, RICHLAND JOINT VENTURE GROUP, LLC AND WINDSOR RICHLAND MALL, L.P.

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September 21, 2016

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STATEMENT OF THE CASE

This is a contribution action wherein Appellant Century Capital Group, LLC ("Century") seeks recovery from Respondents Midtown Development Group, LLC ("Midtown"), Richland Joint Venture Group, LLC ("Richland"), Windsor Richland Mall, L.P. ("Windsor") and BRC Richland, LLC ("BRC")[1] (herein collectively referred to as "Respondents") for their respective pro-rata share of a settlement entered into between Century and Spirit SPE Columbia, LLC ("Spirit").

In 2002, Windsor purchased the property known as Richland Fashion Mall and subdivided the property into four distinct parcels: 1) the TGI Friday Parcel; 2) the Bank Parcel; 3) the Verizon Parcel; and 4) the Midtown Parcel. (R. p. 134, ¶ 7). At the same time, Windsor sold the Verizon Parcel to BRC. (R. p. 134, ¶ 8).

On or about September 7, 2005, Windsor, as then-owner of the Midtown Parcel, and BRC, as then-owner of the Verizon Parcel, entered into a Reciprocal Easement, Covenant, Operation and Restriction Agreement and Declaration (the "REA"). (R. p. 134, ¶ 9). Among other things, the REA created a contractual duty on behalf of the owner of the Midtown Parcel to perform and pay for maintenance and repairs to the Common Areas and to the HVAC system, roof system and structural components of the Verizon Parcel until November 30, 2010. (R. p. 134). The property then changed hands in several transactions.

On or about September 12, 2005, after the REA went into effect, BRC sold the Verizon Parcel to Spirit ("Spirit Parcel"). (R. p. 134, ¶ 10). On or about November 4, 2005, Windsor sold the Midtown Parcel to Midtown. (R. p. 134, ¶ 11). On or about May 25, 2007, Midtown deeded the Midtown Parcel to Richland. (R. p. 134, ¶ 12). Thereafter, on or about February 16,

[1] As noted in Century's Initial Brief, BRC has never been served and did not participate in this matter. Appellant's Initial Brief, p. 2. Therefore, BRC is not included and does not join in Respondents' Initial Brief.

2010, Richland sold 79% of its interest in the Midtown Parcel to Century and the remaining 21% interest in the Midtown Parcel to Investment Property Exchange Services. (R. p. 135, ¶ 13). On or about February 17, 2010, Investment Property Exchange Services transferred this 21% interest in the Midtown Parcel to Century. (R. p. 135, ¶ 13).

On November 30, 2010, Spirit filed a lawsuit against Century and its associated entities/individuals, as owners of the Midtown Parcel. (See generally R. pp. 72-131). This litigation between Spirit and Century involved seventeen (17) causes of action, including breach of the REA, negligence, unfair trade practices and fraud. (R. pp. 72-131). These claims were based on allegations that Century had failed to maintain and repair portions of Richland Mall that Century was contractually obligated to maintain and that Century improperly overbilled Spirit for the repairs that were undertaken to the Verizon Parcel. (R. pp. 72-131).

In or around November of 2013, Century and Spirit settled their litigation and entered a Settlement Agreement and Mutual Release (the "Settlement Agreement"). Among other things, the Settlement Agreement provided that Century would pay Spirit an amount totaling $1,450,000.00. (R. p. 135, ¶ 16). More specifically, Paragraph (a)(6) of the Settlement Agreement states that:

> 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 [Verizon 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.

Other than this paragraph, the Settlement Agreement in no way delineates the reason for the payment of $1,450,000.00. In other words, the Settlement Agreement neither explains if the payment is pursuant to the breach of contract claims, the negligence claims or any of the several other claims brought against Century by Spirit, nor does the Settlement Agreement explain how

the payment may be allocated among any particular maintenance or repair failure. However, Century now relies upon this purported extinguishment of liability within the settlement as the primary ground for seeking contribution from Respondents.

Respondents separately moved for summary judgment on several grounds with one common theme among them: Century's failure to point to any evidence showing how its settlement payment may be allocated among any particular maintenance or repair failure. (See generally R. pp. 173-510). Respondents' Motions were heard by Judge L. Casey Manning on July 30, 2015. (See generally R. pp. 617-658). By way of orders dated September 16 and 17, 2015, Judge Manning granted summary judgment to each Respondent with respect to all claims asserted against them. (See generally R. pp. 564-602).

Century filed a Motion to Alter or Amend Summary Judgment as to each of Judge Manning's Orders granting Respondents summary judgment. (See generally R. pp. 603-614).

By order filed February 23, 2016, Judge Manning denied Century's motion as to each Respondent. Century appeals the grant of summary judgment as to each Respondent and the denial of its Motion to Alter Amend Summary Judgment through its Notice of Appeal as served on Respondents on March 3, 2016.

STANDARD OF REVIEW

When reviewing an order granting summary judgment, an appellate court applies the same standard as the court below. David v. McLeod Reg. Med. Ctr., 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006). Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRCP (2016); Garvin v. Bi-Lo, Inc., 343 S.C. 625, 628, 541 S.E.2d 831, 832 (2001). A court must construe all ambiguities, conclusions, and inferences arising from the evidence against the

moving party. City of Columbia v. Town of Irmo, 316 S.C. 193, 195, 447 S.E.2d 855, 856 (1994). However, the opposing party may not rest upon mere allegations or denials, but must respond with specific facts showing a genuine issue of material fact. Id. More specifically, a responding party "may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him." Rule 56(e), SCRCP (2016). A grant of summary judgment is "completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner." David, 367 S.C. at 250, 626 S.E.2d at 5.

ARGUMENTS

I. The Circuit Court properly held that Century and Respondents are not joint tortfeasors.

In the present case, it is factually undisputed that the duty to repair and maintain the HVAC systems, roof systems and structural components of the Spirit Parcel arises contractually from the REA. (R. p. 134). No party to this action has a legal duty or obligation to repair or maintain the roof systems or common areas at the Spirit Parcel indefinitely. Rather, each party was liable for repairing the Spirit Parcel during the timeframe in which each party respectively owned the Midtown Parcel. There is no evidence in the record that a legal duty on the part of the owner of the Midtown Parcel to maintain or repair any components of the Spirit Parcel arises independently of the REA. To adopt the argument proffered by Century that itself and Respondents are joint tortfeasors would be to hold that, despite the terms of the REA, Respondents are liable for negligent repairs that occurred after they each sold the Midtown Parcel and vacated the Richland Mall property and Century is liable for negligent repairs that

occurred years before it even purchased the Midtown Parcel. This result is surely not what the legislature intended when it enacted the South Carolina Contribution Among Tortfeasors Act.

Pursuant to S.C. Code Ann. § 15-38-20(A), joint tortfeasors are those who "become jointly or severally liable in tort for the same injury to person or property." S.C. Code Ann. § 15-38-20(A) (Supp. 2016). Any duty involved in this case amongst Respondents regarding maintenance to the Spirit Parcel was primarily 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. "It is settled law that if a tort arises out of a contract there must also exist a relationship, irrespective of the contract, that gives rise to a duty[,] because a mere breach of contract is not actionable as a tort in South Carolina, no matter what the intent of the breaching party was." Troutman v. Facetglas, Inc., 281 S.C. 598, 601, 316 S.E.2d 424, 426 (Ct. App. 1984).

Even assuming that the duty involved in this case is a tortious duty and not a contractual one, South Carolina courts examining the joint tortfeasor relationship have held that the key characteristic among joint tortfeasors is that the parties owe the same duty of care to the injured party and share a common liability. Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp., 356 S.C. 53, 67, 518 S.E.2d 301, 309 (Ct. App. 1999). If there is no common liability between the parties, a contribution action will not lie even if a settlement agreement purports to extinguish common liability against the party from whom contribution is sought. Id. at 309-10 ("Vermeer did not extinguish any liability of Wood/Chuck to Causey because no liability of Wood/Chuck to Causey existed to be extinguished. In the same vein, there was no 'common liability' that could have been discharged by the settlement agreement. . . . Vermeer could not discharge what did not exist").

In Collins v. Bisson Moving & Storage, Inc., 332 S.C. 290, 504 S.E.2d 347 (Ct. App. 1998), a driver (Collins) was injured in an automobile accident with another driver (Wiles). After an ambulance arrived to transport Collins to the hospital, the ambulance was involved in a second car accident with an automobile owned by Bisson Moving & Storage, Incorporated (Bisson). Collins later entered into a settlement with Wiles and Bisson attempted to claim that Bisson and Wiles were joint tortfeasors such that Bisson was entitled to an offset for the settlement funds paid by Wiles. This court addressed its response to Bisson's argument as follows:

> Bisson's argument for an offset is valid only if Bisson and Wiles are co-tortfeasors, jointly and severally liable for Collins's injuries. This is patently erroneous. Bisson clearly has no liability for the first accident, and Wiles has no liability for the second accident. The amount Wiles paid to Collins was for the settlement of her own accident with Collins and was not made on behalf of Bisson. Moreover, Collins received different injuries in the two accidents. Joint and several liability arises only when two or more tortfeasors are responsible for a single injury. . . . That Wiles and Bisson were responsible for separate tortious acts resulting in separate injuries is immaterial to the jury's award of $600,000 to Collins from the accident with Bisson. Accordingly, the trial court correctly denied Bisson's request for an offset for the amount paid by Wiles to Collins in settlement of the first accident.

Collins v. Bisson Moving & Storage, Inc., 332 S.C. 290, 306, 504 S.E.2d 347, 356 (Ct. App. 1998).

The present case is analogous to Collins v. Bisson. Although both Wiles and the truck driver for Bisson owed the same duty of care to Collins to operate their respective vehicles with reasonable care, they owed those duties at temporally severable times and could not be jointly and severally liable in tort for breaching the same duty at distinct times, causing separate injuries. In the present case, the duties owed by both Century and Respondents to properly maintain the common areas and parking decks at Richland Mall were completely severable

temporally and would have constituted separate injuries, even assuming, *arguendo*, that Respondents' repairs (if any) were improper while they each owned the Midtown Parcel.

The duty to repair/maintain that was owed by Respondents under the REA existed during their ownership periods (if such period fell within the REA) and Respondents would be liable for property damage sustained at the Spirit Parcel during that timeframe. In contrast, the duty owed by Century under the REA began on February 16, 2010 and continued until November 30, 2010 when its duties under the REA terminated. Thus, Century is liable for property damage sustained at the Spirit Parcel from February 16, 2010 until November 30, 2010. The underlying case between Century and Spirit did not involve a single injury, as espoused by Century. Rather, that case involved separate timeframes in which totally separate repairs and maintenance were involved that would, in turn, constitute separate injuries. As acknowledged extensively by Century, Spirit only sought damages from Century for the timeframe when Century owned the Midtown Parcel. Thus, the "injury" complained of in the underlying action between Spirit and Century was attributable solely to improper maintenance and repairs that occurred once Century purchased the Midtown Parcel on February 16, 2010. Respondents, separately and/or collectively, were no longer the owners of the Midtown Parcel at this time and, accordingly, are not jointly liable for these improper repairs.

In sum, the question of whether two entities are joint tortfeasors is a matter of law to be determined by the court when the facts in evidence are undisputed. See Gordon v. Phillips Utilities, Inc., 362 S.C. 403, 407, 608 S.E.2d 425, 427 (2005); Edwards v. Atlantic Coast Line R. Co., 148 S.C. 266, 146 S.E. 97, 103 (1928). It is fundamental that Spirit limited the recovery sought against Century in the underlying lawsuit between those two parties to the deficient maintenance that had occurred since Century began maintaining the common areas at Richland

Mall on February 16, 2010. Therefore, Respondents are not jointly liable for the improper repairs or maintenance that occurred after they each sold the Midtown Parcel and their legal duty to maintain/repair the Spirit Parcel that arose under the REA, if any, were terminated. Under the undisputed facts of this case, there was no joint tortfeasor relationship between Century and Respondents. Therefore, Century has no right to seek contribution from Respondents under S.C. Code Ann. § 15-38-20.

II. The Circuit Court properly granted summary judgment to each Respondent on Century's claim for contribution.

The sole cause of action in this case is one for contribution under the South Carolina Uniform Contribution Among Tortfeasors Act (the "Act") regarding the $1,450,000.00 payment Century made to Spirit under the terms of their Settlement Agreement.

At the outset, it must be noted that the Act only applies to tort claims. *See* S.C. Code Ann. § 15-38-20. Accordingly, to the extent Century settled breach of contract as opposed to tort claims with Spirit in the course of their litigation, Century plainly has no right to recover for those claims in this case. However, Century alleges that Respondents "negligently repaired the Verizon Parcel, common areas, roof and HVAC system, thus subjecting [Century] to claims by Spirit, the current owner of the Verizon Parcel." (R. p. 135, ¶ 15). In other words, Century contends that each owner of the Midtown Parcel, during its period of ownership, undertook repairs to the Verizon Parcel, as the REA required of the owner of the Midtown Parcel, but performed such repairs negligently, thereby giving rise to a tort.

The settlement entered into between Spirit and Century in the underlying case was finalized and signed on December 6, 2013. (See generally R. pp. 37-71). The settlement purported to extinguish liability for both the claims against Century as well as the potential and unfiled claims against Century's "predecessors in interest under the REA, and each predecessor

in interest's employees, agents, heirs and assigns." Nevertheless, the settlement provides no insight into how liability could be allocated between these predecessors in interest in the event a contribution action was filed. Spirit listed seventeen (17) causes of action in their Third Amended Complaint, including both contractual and equitable causes of action. Of these seventeen causes of action, only certain causes of action are based in tort and some of these causes of actions are intentional torts for which contribution may not be sought under S.C. Code Ann. § 15-38-20(C). Lastly, some of the tort claims relate to specific billing representations by Century which Respondents could not be jointly liable for in tort, such as Spirit's negligent misrepresentation cause of action. In total, there is only one cause of action out of seventeen in which Respondents could conceivably be held jointly liable: negligence.

Further, Respondents could not be jointly liable for any of the allegations that Century overbilled Spirit for repairs once it took over maintenance duties under the REA described above. During the underlying case, Spirit was granted partial summary judgment as to liability for overbilling, so the only issue left to be decided at trial was the amount of damages recoverable by Spirit. However, it is impossible to decipher from the language of the lump-sum settlement what percentage of the total settlement concerned the causes of action for which contribution could be sought versus which portion of the settlement concerned Spirit's allegations of improper overbilling. Any attempt to determine what percentage of the settlement did include recoverable damages on a contribution claim would be purely speculative such that a fact finder cannot logically allocate damages to Respondents for contribution.

The issues in this case are similar to those presented in Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp., 336 S.C. 53, 518 S.E.2d 301. That case involved a settlement that extinguished liability for both a well pled strict liability products liability claim and a potential

loss of consortium claim that had not yet been sought by the wife of the plaintiff injured by the defective product. This court held that it could not permit the settling tortfeasor to pursue a contribution claim to recover funds paid in extinguishing liability for the wife's potential and unfiled loss of consortium claim because the agreement failed to put a specific value on that individual theory of liability. The court stated:

> The settlement agreement does not place a specific value on any potential claim by Mrs. Causey. Under the agreement, no portion of the settlement is allocated to her for any potential loss of consortium claim. We cannot, therefore, determine whether Vermeer paid more than its pro rata share of liability to Mrs. Causey. *See* S.C. Code Ann. § 15-38-20(B) (Supp.1998)(right of contribution exists only in favor of tortfeasor who has paid more than his pro rata share of common liability, and his total recovery is limited to amount paid by him in excess of his pro rata share) . . . [W]e rule there is no contribution available to Vermeer under the South Carolina Contribution Among Tortfeasors Act. Accordingly, the order of the trial court granting summary judgment to Wood/Chuck is Affirmed.

Vermeer, 336 S.C. at 70-72, 518 S.E.2d at 310-11.

In coming to this conclusion, the court relied upon the case of Houser v. Witt, 111 Ill.App.3d 123, 443 N.E.2d 725 (Ill. App. 1982). In doing so, the court cited the following language in support of its conclusions:

> In short, 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 this case lack of apportionment may work a hardship on Witt, but it is one which he could have avoided by a properly drawn release.

Id., 336 S.C. at 70, 518, S.E.2d at 310 (citing with approval Houser v. Witt, 443 N.E.2d 725, 728).

In the underlying case between Century and Spirit, Respondents were neither a party in the case nor involved in the settlement discussions and subsequent settlement. Therefore, Respondents have no way of knowing what portion of the settlement money was paid towards

any claims that may now be covered in Century's contribution action. A party drafting a settlement agreement has a duty to help draft the settlement agreement in such a way as to place a specific value on claims so that the fact finder is not left to speculate as to what portion of the settlement relates to specific claims. The fact finder can then determine whether the settling defendant has paid more than its pro rata share of liability on the claims for which contribution is sought. Id, 356 S.C.at 70-72, 518 S.E.2d at 310-11.

In this case, the entire settlement—which included both claims based in contract and based in equity related to overbilling—is not subject to contribution. However, with the settlement already finalized, any discussion of how much of the settlement contemplated damages that might have been recoverable from Respondents under a theory of contribution would be purely speculative. The settlement signed by Century epitomizes the "open-end, blanket, joint release [that] gives no indication as to how the amount paid for the release relates to any present or future damage to either party." Id.

Further, by its own terms, the Settlement Agreement expressly provides that it "constitutes the entire agreement among the parties pertaining to the subject matter contained herein" and "[t]his Settlement Agreement shall not be modified or amended except by an instrument in writing signed by all of the parties." (R. p. 49). As a result and in the absence of an instrument signed by all the parties to the agreement, including Spirit, no additional evidence may be proffered to delineate how the settlement contemplated the apportionment of liability between the allegations that might have been jointly recoverable. Our Supreme Court has recently held that when a writing, upon its face, imports to be a complete expression of the whole agreement and contains all that is necessary to constitute a contract, it is presumed that the parties have incorporated every material item and term and parol evidence is not admissible to

add another term to the agreement, although the writing contains nothing on the particular item to which the parol evidence is directed. Stevens and Wilkinson of South Carolina, Inc. v. City of Columbia, 409 S.C. 568, 577-78, 762 S.E.2d 696, 701 (2014).

An example of a similar argument to Century's current claim can be found in a recent Charleston County case that involved questions of contribution among several defendants arising out of a construction defect claim concerning the construction of a single family residence.[2]

In D.R. Horton, Inc. f/k/a C. Richard Dobson Builders, Inc. v. Builders Firstsource-Southeast Group, LLC, et al, D.R. Horton ("DRH") filed a lawsuit seeking contribution from Builders Firstsource ("BFS") for an unreasoned arbitration award in the construction defect litigation by the homeowner. (R. p. 256-270). Arbitration was requested after the homeowner filed her Complaint alleging construction defects in the original construction of her home. (R. p. 256-270). The court's Order notes that "[t]he parties to the Homeowner's Suit requested an unreasoned arbitration award that would not contain findings of fact or conclusions of law." (R. p 258, ¶ 9). Further, the Order concludes that the arbitration award "does not indicate what amounts, if any, were awarded for specific defects. Nor does the award specify which of the causes of action asserted in the Homeowner's Suit were successful." (R. p. 258, ¶ 9). Finally, the Order found that "there is no basis in the record to find that DRH has sustained tort liability. Plaintiff in the Homeowner's Suit alleged causes of action for breach of contract, breach of warranty, negligence and violations of the UTPA. The parties to the Homeowner's Suit requested an award from the arbitrator that does not specify the legal basis for his award of damages." (R. p. 259, ¶ 15).

[2] Respondents acknowledge that this circuit court opinion is not binding precedent. However, Respondents believe this Order is useful as persuasive authority insofar as it is essentially an application of the Vermeer holding to similar facts and it reaches the same conclusion presented by Respondents in the present case.

Based on this lack of specificity, the Order notes that "[e]ven if, somehow, DRH was able to establish its own tort liability, and that BF's work was determined to be defective in the Homeowner's Suit, there is no way to determine what portion of the Judgment is related to said liability." (R. p. 260, ¶ 18). Lastly, summary judgment was granted on the contribution claim based on the Vermeer decision because "[a]ny attempt to determine what portion of the Judgment is attributable to the joint negligence of BFS and DRH would be an exercise in impermissible guesswork." (R. p. 261, ¶ 19).

Based on the above, Spirit and Century's Settlement Agreement—as drafted—is incapable of being apportioned in any rational, logical way so as to enable a fact finder to determine what portion of the settlement might be subject to contribution by Respondents and any attempt to do so is purely speculative. Respondents are not jointly liable with Century for the allegations that Century overbilled Spirit or for the allegations by Spirit that were set forth in the contractual, equitable or intentional tort causes of action. Further, it is impossible to tell from the terms of the blanket settlement what portion of the settlement the parties intended to be subject to contribution. The Settlement Agreement further provides that it cannot be modified or amended in order to show how the parties intended to allocate settlement costs. As stated by this court, a "lack of apportionment may work a hardship on [the plaintiff], but it is one which he could have avoided by a properly drawn release." Vermeer, 356 S.C. at 70, 518 S.E.2d at 310.

Finally, the Settlement Agreement does not address any specific injury for which the payment of $1,450,000.00 was made by Century to Spirit. By its terms, recovery under the Act requires the party from whom recovery is sought to have been "jointly or severally liable in tort for the *same injury*" with the party who seeks contribution. S.C. Code Ann. § 15-38-20(A)(emphasis added). Century bases its current case on each of the Respondents having

performed negligent repairs to the Verizon Parcel. However, there is no evidence that all Respondents performed negligent repairs on the same portion of the Verizon Parcel or otherwise contributed to a single injury as required. See Collins, 332 S.C. at 306, 504 S.E.2d at 356 (explaining that two tortfeasors are not jointly and severally liable unless they are "responsible for a *single* injury").

Instead, a finder of fact would be left to engage in impermissible guesswork as to what amounts of the payment pertained to any of the allegedly negligent repairs performed by any one of the Respondents over the several years each held ownership of the property.

Even in viewing the facts in the light most favorable to Century, Century cannot recover on its claims for contribution as to Respondents. The Settlement Agreement is silent as to which portion of the monies paid can be subject to contribution by Respondents and, therefore, Century's claims must fail. Further, a fact finder is left to guess at the amount of the settlement funds paid by Century related to any of the allegedly negligent repairs cited by Century. As a result, Century cannot point to one piece of evidence that shows Respondents are responsible for the same injury Century paid to settle with Spirit.

III. The Circuit Court properly held that Century purchased the property "as-is" and with full knowledge of the patent defects for which Century seeks to recover.

Under the common law of South Carolina, a person who knowingly accepts property with a patent defect waives claims arising out of that defect and the law thus only protects the purchaser from defects that a reasonably careful inspection would not reveal. See Fields v. J. Haynes Waters Builders, Inc., 376 S.C. 545, 563, 658 S.E.2d 80, 90 (2008); Monroe v. Wood, 186 S.C. 507, 197 S.E. 39, 43 (1938). In the present case, Article 3.2 of the Purchase and Sale Agreement between Richland and Century provided the following disclosure of patent defects:

> **3.2 Condition of Property**. Seller has disclosed to Buyer that the Mall and its HVAC systems (collectively the 'Facilities') have defects and require ongoing maintenance. The Property is being sold subject to such defects, and in its 'as-is, where-is' condition. Nevertheless, so that Buyer may assess the extent of such defects and maintenance requirements, Buyer shall have from the effective date of this Agreement until January 29, 2010 (the 'Facilities Review Period') to undertake, at Buyer's sole expense, an examination and review of the condition of the structural, functional, and environmental condition of the Facilities. . . . Buyer acknowledges that the Mall roof develops leaks from time to time and that the repair of such leaks will be required on an ongoing basis.

(R. pp. 285-286). In support of its arguments, Century relies on the Affidavit of William B. Walkup, managing member of Century. According to this very Affidavit, Mr. Walkup admits he "was aware of the condition of the Mall facilities, specifically the on-going maintenance and defective conditions of the roof system and HVAC[,]" but proffers that he "did not understand this to mean that Century would be responsible to other third parties for [Richland] or any other prior owner's failure to maintain and repair the building during their period of ownership." (R. p. 511; p. 554).

Century may not maintain the present contribution action against Respondents that is premised on the very same patent defects that were fully disclosed to Century in the Purchase and Sale Agreement and accepted "*as-is, where-is*[,]" pursuant to above cited contractual language. Mr. Walkup's assertion that he did not understand the "as-is" waiver provision to mean that Century would be responsible to Spirit or other parties for Richland's failure to maintain and repair the Spirit Parcel misstates the fact that Spirit limited the recovery sought against Century in the underlying lawsuit to the deficient maintenance that had occurred since Century began maintaining the common areas at Richland Mall on February 16, 2010. There is no allegation of any joint tortfeasor relationship in the underlying lawsuit between Century and Spirit. Nor is there any indication that Spirit intended to recover against Century for allegedly deficient maintenance that occurred prior to February 16, 2010. Although the Settlement

Agreement did purport to extinguish the potential but unfiled claims against Respondents, there is no indication as to what portion of the settlement was allocated to those claims and Century maintains the entire settlement is subject to contribution.

However, Century chose to proceed ahead with the purchase of the Midtown Parcel after acknowledging that there were defects and ongoing maintenance obligations with the property under the REA. (R. p. 554). Century's subsequent failure to uphold those maintenance obligations after February 16, 2010, constituted the crux of the underlying lawsuit between Century and Spirit. Century is now barred from maintaining the present contribution action against Respondents under the common law rule regarding the acceptance of patent defects.

IV. The Circuit Court properly granted summary judgment to Windsor Richland Mall, L.P. on Century's contribution claim based on the applicable statute of repose.[3]

The trial court correctly granted Windsor's Motion for Summary Judgment because this matter is time-barred as to under the statute of repose as this matter arises from repairs and improvements to realty completed on or before November 4, 2005. This court should uphold the dismissal as to Windsor under the statute of repose since allowing Century to proceed would create infinite liability the statute of repose was designed to prevent.

The statute of repose provides in part:

> 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. For purposes of this section, an action based upon or arising out of the defective or unsafe condition of an improvement to real property includes:
>
> * * *
>
> (6) an action for contribution or indemnification for damages sustained on account of an action described in this section . . . .

[3] For clarification purposes, Century refers to all Respondents throughout Section IV of its Brief; however, only Windsor was granted summary judgment with respect to the statute of repose.

S.C. Code Ann. § 15-3-640 (2005)(as amended). The current version of the statute of repose became effective July 1, 2005.

The statute of repose "creates a substantive right in those protected to be free from liability after a legislatively determined period of time." Capco of Summerville, Inc. v. J.H. Gayle Const. Co., 368 S.C. 137, 142, 628 S.E.2d 38, 41 (2006). It is "an absolute time limit beyond which liability no longer exists and is not tolled for any reason because to do so would upset the economic balance struck by the legislative body." Id. The statute of repose bars "any suit that is brought after a specified time since the defendant acted . . . even if this period ends before the plaintiff has suffered a resulting injury." Id. (citing Black's Law Dictionary 1451 (8th ed. 2004)). Moreover, "section 15-3-640(6) specifically applies to 'an action for contribution . . . arising out of the defective or unsafe condition of an improvement to real property." Id. at 143.

The REA was not executed until September 7, 2005. Any repairs of the Spirit Parcel pursuant to the REA undertaken by Windsor necessarily occurred after July 1, 2005. Windsor sold the Midtown Parcel on November 4, 2005; therefore, any repairs of the Spirit Parcel undertaken by Windsor pursuant to the REA occurred more than eight years prior to commencement of Century's civil action on November 10, 2014. Therefore, the statute of repose bars any recovery from Windsor in this matter and the trial court's order granting summary judgment should be affirmed.

A. Any repairs performed by Windsor were an improvement under the statute of repose.

Century carries the burden to prove it has incurred liability to a third-party because of repairs or work performed by Windsor. In fact, Century admits it has no evidence that any portion of its Settlement Agreement and contribution claim is, in fact, related to repairs or

improvements performed by Windsor. Moreover, Century's reliance upon South Carolina Pipeline Corp. v. Lone Star Steel Co., 345 S.C. 151, 546 S.E.2d 654 (2001), is misplaced.

In South Carolina Pipeline Corp., the Court looked to various secondary sources and other judicial interpretations to define "improvement"; however, it declined to follow the rigid interpretation of "permanent" improvements used by those sources. South Carolina Pipeline Corp., 345 S.C. at 155, 546 S.E.2d at 656. The Court acknowledged the contemporary definitions of "improvement", including considerations such as the enhancement to capital value, investment of labor and money, and a commonly understood implication of permanence, but contrary to Century's argument, the Court did not adopt this approach as the test or necessary elements of an improvement. Id. at 656-57. Instead, the Court turned to the intent of the legislature finding protection is afforded additions or improvements which have "lengthy useful lives", noting no improvement is truly permanent. Id. at 657.

Century contends repairs performed by Respondents cannot be considered improvements to the Spirit Parcel because they were day-to-day maintenance. (Appellant's Final Brief at p. 17). In other words, Century claims Windsor failed to perform any repairs at all. Century, however, admits there is "no point" where it "can pinpoint a completion date" for work. (Appellant's Final Brief at p. 18). Century also fails to identify what repairs or improvements performed by Windsor were allegedly deficient or whether other repairs or improvements were made in addition to those identified. Likewise, there is no evidence such improvements, even though characterized as "day-to-day" by Century, are no longer in place or any evidence such improvements have not remained for their "lengthy useful lives". Therefore, any repairs necessarily constitute an improvement within the boundaries of the statute of repose.

Even if the South Carolina Pipeline Corp. analysis applies, Windsor satisfies all considerations of an "improvement". First, repairs referenced by Century enhanced the value of the property. Second, repairs, even if minor, illustrate investment of labor and money. Third, such repairs or improvements are permanently affixed to the real property due to their immoveable and physical characteristics. Therefore, the circuit court's order granting summary judgment should be affirmed.

B. Any repairs made by Windsor were substantially completed.

The trial court correctly granted summary judgment in favor of Windsor because any action as to Windsor's improvements must be brought within eight years of the date of completion of that work, or on or before November 4, 2013.

The statute of repose includes an element that an improvement be substantially completed. "Substantial completion" means "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." S.C. Code Ann. § 15-3-630 (2005)(as amended). "The purpose of the statute of repose is served where the period prescribed therein begins to run on the date installation and incorporation into the larger improvement is complete." Ocean Winds Corp. of Johns Island v. Lane, 347 S.C. 416, 421, 556 S.E.2d 377, 379 (2001). For example, shingles, sheetrock or windows may be "a specified area or portion" of a larger project. Id. at 419. The clock begins to run from the time an improvement is first "utilized, changed or affected" by "people, forces, or things". Id. at 420-21.

The statute's time limitation began when repairs were substantially complete for the purpose for which they were intended. Here, Century admits improvements were made and "[t]he roof was usable as a parking structure." (Appellant's Final Brief at pp. 17-18). Century

also admits there is "no point" where it "can pinpoint a completion date" for work. (Id. at p. 18). Windsor sold the subject parcel on November 4, 2005; therefore, it is irrefutable that any repairs undertaken by Windsor pursuant to the REA necessarily occurred more than eight years prior to commencement of this action. Even if repairs could be pinpointed, Century makes clear such repairs were a portion or component of a larger project and, thus, substantially completed. (Id. at pp. 17-18). Moreover, any repairs made by Windsor were immediately "utilized" by "people, forces, or things" because the parking structure and Richland Mall continued to operate. Therefore, the statute of repose began to run no later than November 4, 2005, and the circuit court's order granting summary judgment should be affirmed.

C. Windsor was not in actual possession or control of the Spirit Parcel.

The trial court correctly granted summary judgment because Windsor was not in actual possession or control of the Spirit Parcel.

Century argues the statute of repose is inapplicable because Windsor is in possession of the improvement complained of. The statute of repose precludes the use of the "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 . . . ." S.C. Code Ann. § 15-3-670(A) (2005)(as amended).

In this case, Century's theory of liability relies upon a duty created by or arising from the REA in 2005. Windsor sold its interest in the Midtown Parcel in 2005, more than 9 years before this action was commenced. Century admits it cannot "pinpoint" the time an injury was proximately caused nor can Century identify what party, if any, was in actual possession or control of the Spirit Parcel at the time of any injury alleged. (Appellant's Final Brief at p. 18). Our courts make clear the statute of repose, by its nature, may "impose on some plaintiffs the

hardship of having a claim extinguished before it is discovered, or perhaps before it even exists." Capco of Summerville, 368 S.C. at 142, 628 S.E.2d 41 (citing Camacho v. Todd and Leiser Homes, 706 N.W.2d 49, 54, n. 6 (Minn. 2005)).

Therefore, Century's claim against Windsor, if any, was effectively extinguished on November 5, 2013. The circuit court's order granting summary judgment on this issue should be affirmed.

CONCLUSION

The Circuit Court properly granted summary judgment to Respondents with respect to Century's claims for contribution. In this case, the Settlement Agreement at issue between Century and Spirit does not delineate what portion of the monies paid by Century in settlement can be subject to contribution by Respondents. Further, there is no way to allocate any of the settlement money paid by Century to any of the allegedly negligent repairs cited by Century. Further, the Circuit Court properly granted summary judgment to Windsor based on the applicable statute of repose. Based on the arguments herein, this court should uphold the decisions of the Circuit Court and hold that Century's claims against Respondents for contribution should be dismissed as a matter of law.

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September 21, 2016

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable 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.

CERTIFICATE OF COUNSEL

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

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