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THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

Appellate Case No.: 2016-000461

Century Capital Group, LLC, ... Appellant,

v.

Midtown Development Group, LLC, et al., ... Respondents.

APPELLANT'S PETITION FOR REHEARING

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STATEMENT OF THE CASE

On November 14, 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 (R. 132-172) 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 (R. 272-430) and Midtown and Windsor filed separate motions for summary judgment on May 11, 2015 (R. 173-271) (R. 431-510). 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. (R. 617-658). 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. (R. 564-602).

On September 25, 2015, Century filed motions to alter or amend the September 16 and 17 Orders (R. 603-614), which were subsequently denied by the trial court on February 23, 2016 (R. 615-616). Following an appeal, the Court of Appeals filed its decision on June 13, 2018. In its decision, the Court of Appeals affirmed the circuit court's ruling granting summary judgment to all Defendants. This Petition for Rehearing follows pursuant to Rule 221 and Rule 240 of the South Carolina Appellate Court Rules.

STATEMENT OF FACTS

This case stems from an underlying lawsuit (Case No.: 2010-CP-40-8407) against Century by Spirit SPE Columbia, LLC ("Spirit") (R. 72-131), 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. (R. 134). Also in 2002, Windsor sold the Verizon parcel to BRC. 2d. Am. Compl. ¶ 8 (R. 134). On September 7, 2005, BRC and Windsor negotiated the Reciprocal Easement, Covenant, Operation and Restriction Agreement ("REA") (R. 137-172), 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. (R. 134). 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.[1]

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. (R. 134). On November 4, 2005, Windsor sold the Mall parcel to Midtown. 2d. Am. Compl. ¶ 11 (R. 134). On May 25, 2007, Midtown sold the Mall parcel to RJVG. 2d. Am. Compl. ¶ 12. (R. 134). 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 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. (R. 511). 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 (R.512).; Spirit's 3d. Am. Compl. (R. 72-131).

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[1] 2d. Am. Compl. Ex. 1, at 16. (R. 152).

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.[2]

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.[3]

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.

[2] Def. Midtown's Mot. Summ. J., Ex. B, at 3. (R. 223).
[3] Def. Midtown's Mot. Summ. J., Ex. B, at 10. (R. 230).

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. Appellant Seeks Rehearing Because the Court Of Appeals Erred In Affirming The Circuit Court's Grant of Summary Judgment When A Genuine Issue Of Material Fact Exists As To Whether The $1.45 Million Payment Was Made To Extinguish Liability For Century Capital's Non-Intentional Tortious Behavior Only.

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). 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). 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 changes 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.[4]

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.*[5]

[4] W. KEETON, D. DOBBS, R. KEETON & D. OWEN, *Prosser and Keeton on the Law of Torts*, § 50 at 340 (5th ed. 1984).

[5] Matthews, 67 S.C. at 514-15, 46 S.E. at 340

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

> 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 CAM, accounting and other claims asserted by Spirit.[6]

The "remaining consideration" stated above is further outlined in subsequent paragraphs of the Agreement to include modifications to the REA, and Section (d)(1) provides in part:

> Based upon the foregoing consideration, Spirit . . . hereby releases and forever discharges all claims . . . [Century's] predecessors in interest under the REA, and each predecessor in interest's employees, agents, heirs and assigns. [7]

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.*, 336 S.C. 53, 69, 518 S.E.2d 301, 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. *Id.* For these reasons, "Vermeer did not 'discharge' any 'common liability' as to [the wife] because there was no 'common liability.'" *Id.*

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

[6] Settlement Agreement § (a) 6 (R. 39).
[7] Settlement Agreement § (d) 1 (R. 39).

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 $1.45 million 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). 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.

A. The Court of Appeals Erred in Affirming Summary Judgment Because Discovery Was Ongoing.

The grant of summary judgment was inappropriate procedurally because Appellant was not given the opportunity to complete discovery. *See Eaton Corp. v. Trane Carolina Plains*, 350 F.Supp.2d 699, 703 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S. Ct. 2505 (1986)) ("[S]ummary judgment must be refused where the nonmoving party has not had the opportunity to discover information that is essential to his opposition."). While the Court of Appeals affirmed summary judgment on the ground that Appellant has not produced a scintilla of evidence that the $1.45 million payment was made to extinguish liability for its non-intentional tortious behavior only, summary judgment was originally granted on the issue before Appellant

had a full and fair chance to discover any evidence to the contrary. Thus, the Court should reverse its affirmation of summary judgment on the issue in order for Appellant to be afforded the opportunity to complete the discovery process and, in turn, afforded the opportunity to determine whether a scintilla of evidence exists that indicates the $1.45 million payment was to extinguish liability for its non-intentional tortious behavior only.

The following issues were fully briefed already in Appellant's Final Brief. To the extent that the court decides to reverse its previous decision, Appellant relies on its arguments presented in the Final Brief.

II. Appellant Seeks Rehearing Because The Court Of Appeals Overlooked That The Parties Are Joint Tortfeasors.

III. Appellant Seeks Rehearing Because The Court Of Appeals Overlooked That A Purchase "As Is/Where Is" Does Not Relieve A Seller From Third Party Liability For The Seller's Negligence.

IV. Appellant Seeks Rehearing Because The Court Of Appeals Overlooked That The Statute Of Repose Does Not Bar Century's Claim.

CONCLUSION

Based on the reasons stated herein, Appellant requests this Honorable Court to grant this Petition for Rehearing.

Respectfully submitted,

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June 27, 2018

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

Appellate Case No.: 2016-000461

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v.

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PROOF OF SERVICE OF PETITION FOR REHEARING

I, J. Ryan Oates, of McCabe, Trotter & Beverly, P.C., attorney for Century Capital Group, LLC, do hereby certify that a copy of the foregoing documents have been served upon the below named individual and/or counsel on the 27 day of June, 2018, via US First Class Mail, addressed as follows:

DOCUMENTS SERVED

PETITION FOR REHEARING

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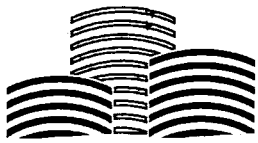

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June 27, 2018

The Honorable Jenny Abbott Kitchings
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Re: Century Capital Group, LLC v. Midtown Development Group, LLC, et al.
Appellate Case No. 2016-000461
MTB File No. 000696.00072

Dear Ms. Kitchings:

Enclosed, please find the original and ten copies of Appellant's Petition for Rehearing. Please have a member of your staff return the clocked-in copies to our office via our courier. By copy of this letter, I am serving counsel of record with same.

If you have any questions, please do not hesitate to contact me.

Sincerely,

Susan Raines
Paralegal

:sr
Enclosures
cc: All Counsel of Record (w/enclosure)