

**THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

APPEAL FROM RICHLAND COUNTY
L. Casey Manning, Circuit Court Judge

APPELLATE CASE NO. 2018-001874

RECEIVED
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S.C. SUPREME COURT

Century Capital Group, LLC.....Petitioner,

v.

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

**RESPONDENTS MIDTOWN DEVELOPMENT GROUP, LLC,
RICHLAND JOINT VENTURE GROUP, LLC AND
WINDSOR RICHLAND MALL, L.P. RETURN TO PETITION FOR A
WRIT OF CERTIORARI**

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December 13, 2018

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QUESTIONS PRESENTED

- I. Whether the court of appeals erred in affirming the circuit court's grant of summary judgment where no genuine issue of material fact exists as to whether the \$1.45 million payment was made to extinguish liability solely for Century Capital's non-intentional tortious behavior?
- II. Whether the court of appeals overlooked the fact that the parties are joint tortfeasors?
- III. Whether the court of appeals erred in not reversing the circuit court on the issue of whether an "as is/where is" purchase relieves a seller from third party liability for the seller's negligence?
- IV. Whether the court of appeals erred in not reversing the circuit court on the issue of whether the statute of repose bars a contribution claim against a property owner who made permanent improvements to real property more than eight years before the contribution claim is brought?

STATEMENT OF THE CASE

This contribution case arose after Petitioner Century Capital Group, LLC (“Century”) reached a settlement with Spirit SPE Columbia, LLC (“Spirit”) for Spirit’s claims arising out of Century’s failure to maintain and repair portions of the property commonly known as Richland Fashion Mall as required by a real property covenant and misrepresentations made by Century to Spirit. In all, Spirit alleged a total of fifteen (15) causes of action against Century, including breach of contract, fraud, unfair trade practices, negligence, restitution, and trespass. **(R. 72–94)**. The parties then agreed to a written settlement (the “Settlement Agreement”) with Century agreeing to pay \$1,450,000.00 to Spirit to extinguish its liability. **(R. 38–39)**. However, the Settlement Agreement failed to specify how the \$1,450,000.00 was apportioned across each of the claims asserted by Spirit against Century.

After entering the Settlement Agreement with Spirit, Century filed a contribution action against Respondents Midtown Development Group, LLC (“Midtown”), Richland Joint Venture Group, LLC (“Richland”), Windsor Richland Mall, L.P. (“Windsor”) and BRC Richland, LLC¹ (“BRC”) — all previous owners of the Richland Fashion Mall at some point. **(R. 133)**.

¹ BRC never filed an Answer to Century’s Complaint or otherwise respond to Century’s contribution action and is not a party to this appeal.

Windsor purchased the Richland Fashion Mall in 2002, at which time it subdivided the property into four distinct parcels: (1) the TGI Fridays Parcel; (2) the Bank Parcel; (3) the Verizon Parcel; and (4) the Midtown Parcel. In September 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"). 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 the HVAC system, roof system, and structural components of the Verizon Parcel until November 30, 2010. **(R. 134)**. The respective properties then changed hands in several transactions: on September 12, 2005, after the REA took effect, BRC sold the Verizon Parcel to Spirit; on November 4, 2005, Windsor sold the Midtown Parcel to Midtown; Midtown deeded the Midtown Parcel to Richland on May 25, 2007; and, thereafter, in February 2010, Richland sold the Midtown Parcel to Century. **(R. 134 -135)**.

On November 30, 2010, Spirit, as owner of the Verizon Parcel, filed a lawsuit against Century and its associated entities and individuals as owners of the Midtown Parcel. As noted above, Spirit alleged fifteen (15) causes of action against Century, including breach of the REA, negligence, unfair trade practices, and fraud, all based on allegations Century failed to maintain and repair portions of

the property as required by the REA and that Century overbilled Spirit for certain repairs and expenses related to the Verizon Parcel.

In November 2013, Century and Spirit resolved the litigation by entering the Settlement Agreement. Among other things, the Settlement Agreement provided that Century would pay Spirit the total sum of \$1,450,000.00. More specifically, paragraph (a)(6) of the Settlement Agreement states:

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.

(R. 39) (emphasis added). Other than this paragraph, the Settlement Agreement is silent with regard to the reason for the payment and in no way delineates how the payment is apportioned across the fifteen causes of action asserted against Century. Moreover, the Settlement Agreement contains no further explanation as to whether the payment is for the breach of contract claims, the negligence claims, the restitution claims, the unfair trade practices claims, or any of the numerous other claims brought against Century by Spirit, nor does the Settlement Agreement explain how the payment may be allocated amongst the various causes of action. Century then filed the underlying contribution action against Respondents, seeking their pro rata share of the \$1.45 million payment.

Respondents all filed separate Motions for Summary Judgment, with one common theme: Century's contribution claim must be denied because the Settlement Agreement does not explain to which causes of action the payment applies, nor does it explain how much of the payment is allocated to those causes of action eligible for contribution and those for which contribution is not available. **(R. 176-183, 275-285, 438-439).**

The circuit court agreed and granted summary judgment in favor of all Respondents after finding the Settlement Agreement failed to differentiate between the non-intentional torts for which Century may seek contribution and the intentional torts, breach of contract, and breach of warranty claims for which contribution is not allowed under South Carolina law. **(R. 569, 583, 594).** Based on the lack of specificity in the Settlement Agreement, the circuit court held the payment was incapable of being apportioned in any rational, logical way so as to enable a fact finder to determine what portion of the Settlement Agreement may be subject to contribution as required by law. **(R. 570, 584, 595).**

Century then appealed to the court of appeals, who affirmed the circuit court in an unpublished, per curiam opinion. *Century Capital Group, LLC v. Midtown Development Group, LLC* (Unpublished Opinion No. 2018-UP-24, June 13, 2018). The court of appeals found summary judgment appropriate, recognizing at least three of the theories for which Century may have been liable for damages under

the Settlement Agreement are not eligible for contribution and finding Century failed to present a mere scintilla of evidence indicating the \$1.45 million payment was made to extinguish Century's non-intentional tort liability only. (R. 780-781).

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), SCRCF. A court must construe all ambiguities, conclusions, and inferences arising from the evidence in the light most favorable to the non-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.* 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.

ARGUMENT

A writ of certiorari should be granted only when, in the Court's discretion, there are special and important reasons. Rule 242(b), SCACR. Those important

reasons may include novel questions of law; a dissent in the court of appeals; a court of appeals' decision in conflict with prior precedent from this Court; the involvement of substantial constitutional issues; and where a decision of the court of appeals conflicts with a decision of the United States Supreme Court. Rule 242(b)(1)-(5), SCACR. None of these concerns warranting a grant of certiorari are present in this case. Therefore, and for the reasons addressed more fully herein, Respondents respectfully request this Court deny Century's Petition for a Writ of Certiorari.

I. THE CIRCUIT COURT PROPERLY GRANTED SUMMARY JUDGMENT BECAUSE THERE EXISTS NO GENUINE ISSUE OF MATERIAL FACT AS TO WHETHER THE \$1.45 MILLION PAYMENT WAS MADE BY CENTURY TO EXTINGUISH LIABILITY FOR NON-INTENTIONAL TORTIOUS BEHAVIOR ONLY.

A. Century's argument regarding incomplete discovery is not preserved for appellate review.

As an initial matter, Century's argument that the court of appeals erred in affirming summary judgment because discovery was ongoing is not preserved for appellate review by this Court. Century never raised this argument to the circuit court in its response to Respondents' Motions for Summary Judgment,² nor did Century raise it in its brief to the court of appeals. *See* Rule 242(d)(2), SCACR ("Only those questions raised in the Court of Appeals and in the petition for

² Century did summarily raise the argument in its Rule 59(e), SCRCPP, Motion to Reconsider and in its Petition for Rehearing with the court of appeals.

rehearing shall be included in the petition for writ of certiorari as a question presented to the Supreme Court.”); *Dixon v. Dixon*, 362 S.C. 388, 399, 608 S.E.2d 849, 854 (2005) (holding that an issue raised for the first time in a post-trial motion is not preserved for appellate review). At the court of appeals, Century argued summary judgment was improper because material questions of fact remain in dispute, but nowhere did it argue summary judgment was improper because discovery was ongoing. Therefore, this Court should decline to reach the issue because it is not preserved for review. *See S.C. Dept. of Transp. v. M & T Enters. of Mt. Pleasant, LLC*, 379 S.C. 645, 659, 667 S.E.2d 7, 15 (Ct. App. 2008) (“[E]ven if an issue is preserved at the trial court level, it must still be properly raised and argued to the appellate court.”).

B. Summary judgment is proper because there are no genuine issues of material fact.

Century argues the court of appeals erred in affirming summary judgment because a genuine issue of material fact exists as to whether the \$1.45 million payment was made by Century to extinguish liability for non-intentional tort liability only. This argument is unsupported by the record and contradicts the plain language of the Settlement Agreement.

The South Carolina Uniform Contribution Among Tortfeasors Act (the “Act”) creates a right of contribution for non-intentional tort claims only. *See* S.C. Code Ann. § 15-38-20. The Act does not, for example, create a right of

contribution for intentional torts, breach of contract, breach of warranty, restitution, or statutory claims such as those under the South Carolina Unfair Trade Practices Act. The court of appeals has previously addressed similar scenarios where a settlement agreement or damages award fails to allocate costs between claims eligible and not eligible for contribution.

In *Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 518 S.E.2d 301 (Ct. App. 1999), the seller of defective equipment entered into a settlement with the injured plaintiff and his wife. The seller then sought contribution from the manufacturer, in part, for its pro rata share of the settlement with the wife. *Id.* at 69, 518 S.E.2d at 310. However, the court of appeals found the seller was not entitled to contribution under the Act because the settlement failed to place a specific value on any claim by the wife, nor did the settlement indicate what portion of the settlement was allocated to her. *Id.* at 70–71, 518 S.E.2d at 310–11. Therefore, because there was no way to determine whether the seller paid more than its pro rata share of liability to the wife, the court held the seller was not entitled to contribution from the manufacturer. *Id.* at 71, 518 S.E.2d at 311.

Likewise, in *D.R. Horton, Inc. v. Builders FirstSource – Southeast Group, LLC*, 422 S.C. 144, 810 S.E.2d 41 (Ct. App. 2018), D.R. Horton was sued by a homeowner for negligence, breach of contract, breach of warranty, and unfair trade

practices. After arbitrating the claims, the arbitrator awarded the homeowner \$150,000.00 in a single-page unreasoned award, but did not indicate what damages the arbitrator found compensable. *Id.* at 148, 810 S.E.2d at 43. D.R. Horton then sought contribution from its subcontractor, Builders FirstSource. *Id.* Ultimately, the court of appeals held D.R. Horton's failure to obtain a specific verdict from the arbitrator made it impossible to determine whether it sustained tort liability, and prevented a jury from determining the extent of tort liability and whether D.R. Horton paid more than its fair share, thus making summary judgment proper. *Id.* at 153, 810 S.E.2d at 46.

The instant case is analogous to *D.R. Horton* and *Vermeer* in that the amount paid by Century under the Settlement Agreement does not allocate damages based on the various causes of action asserted by Spirit against Century. Instead, the Settlement Agreement consists only of a blanket statement explaining the \$1.45 million payment is for *any* liability related to the maintenance and repair of the Verizon Parcel. Construing the facts in a light most favorable to the non-moving party, the court of appeals correctly found at least three theories under which Century may have been liable for damages related to the maintenance and repair of the Verizon Parcel are not eligible for contribution: breach of contract, breach of warranty, and trespass. **(R. 780).**

The record before the Court is clear. Spirit filed a Complaint against Century alleging fifteen causes of action. Century then entered into the Settlement Agreement to discharge *any* liability for maintenance and repair of the Verizon Parcel. At minimum, this liability includes breach of contract, breach of warranty, and trespass in addition to negligence. The Settlement Agreement in no way allocates payment or assigns a dollar value for each individual cause of action. In fact, the Settlement Agreement expressly states Spirit filed the action against Century, “alleging that [Century] had *breached the terms* of the REA in various respects.” (R. 38) (emphasis added). As the circuit court properly found—and Century does not appeal—the Settlement Agreement is a complete document and contains a merger clause, meaning its terms cannot be altered or supplemented by parol evidence. *See Stevens and Wilkinson of South Carolina, Inc. v. City of Columbia*, 409 S.C. 568, 577–78, 762 S.E.2d 696, 701 (2014). Therefore, the only conclusion is that the \$1.45 million payment was made to extinguish liability for numerous causes of action, including those claims for which the Act does not provide for contribution, but it is impossible to further differentiate between those claims. Accordingly, the circuit court’s grant of summary judgment was proper based on the plain language of section 15-38-20(c), which provides that “[t]here is no right of contribution in favor of any tortfeasor who has intentionally caused or contributed to the injury or wrongful death.”

Based on these facts, the circuit court and court of appeals were correct in finding any contribution awarded against Respondents would be wholly speculative because the Settlement Agreement fails to differentiate between the various causes of action resolved therein. Like the arbitration award at issue in *D.R. Horton*, because the Settlement Agreement did not distinguish the type of liability subject to the agreement, Century cannot meet its burden of proving the payment—or any portion thereof—was made to extinguish liability for non-tortious behavior only. Therefore, the court of appeals properly affirmed summary judgment as to Century’s contribution claims. As a result, Century’s Petition for a Writ of Certiorari should be denied.

II. THE COURT OF APPEALS DID NOT OVERLOOK WHETHER THE PARTIES ARE JOINT TORTFEASORS.

At the outset, it should be noted that Century misconstrues the holding of the court of appeals. The controlling issue before the Court is not whether Century and Respondents are joint tortfeasors because, regardless of that determination, Century cannot clear its hurdle of proving the amounts subject to contribution since the Settlement Agreement fails to distinguish in any way between tort liability and Century’s other liabilities for which contribution is unavailable. Properly read, the court of appeals’ opinion does not affirm summary judgment based on a finding the parties are not joint tortfeasors; rather, the court of appeals held Century failed to present a mere scintilla of evidence to prove it paid more

than its share of the common tort liability because the Settlement Agreement was silent as to how the payment was allocated. This was also the main basis for the circuit court's grant of summary judgment. The court of appeals correctly declined to address the remaining issues because this first issue was dispositive.

Nevertheless, the record demonstrates the circuit court properly held Respondents and Century are not joint tortfeasors as contemplated under the Act. Section 15-38-20(A) creates a right of contribution when two or more parties become jointly or severally liable *in tort for the same injury* to person or property. Paragraph 9 of Spirit's Third Amended Complaint explains the nature of Spirit's claims against Century. Spirit alleged Century:

[F]ailed to maintain and repair the [Verizon] Parcel in accordance with the REA, over billed and/or billed for expenses not allowed under the REA, performed what little maintenance work that was undertaken in an unworkmanlike and deficient manner, failed and refused to correct deficient maintenance and refused to cure defective performance or honor express and implied warranties under the REA. As a result of [Century's] failure to perform as required by the REA, [Spirit] has incurred, and will incur in the future, costs to repair and maintain the HVAC system, roof and other structural systems in the [Verizon] Parcel and other areas considered common areas under the REA. In addition, [Spirit] has suffered water and mold damage to the interior spaces of the [Verizon] Parcel as a result of [Century's] failure to properly maintain the [Verizon Parcel].

(R. 74).

Accordingly, it is apparent the injuries caused by Century primarily sound in contract and are temporally severable from those injuries, if any, caused by

Respondents years earlier. In other words, the injury complained of by Spirit was attributable solely to breaches of the REA and improper maintenance and repairs that occurred while the property was solely under Century's control. The only duties owed by Respondents in this case were contractual duties arising out of the REA. Respondents had no special professional relationship with the owner of the Verizon Parcel, such as that between a doctor and patient, to give rise to a special duty of care actionable in tort. *See Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.*, 320 S.C. 49, 54–55, 463 S.E.2d 85, 88–89 (1995). The Act does not provide for contribution arising out of breach of contract. Therefore, Respondents are not joint tortfeasors with Century.

Additionally, in granting summary judgment, the circuit court found the Settlement Agreement failed to address any specific injuries giving rise to the \$1.45 million payment, making it impossible for the finder of fact to determine whether Respondents were jointly and severally liable in tort *for the same injury* as that covered in the Settlement Agreement. *See Collins v. Bisson Moving & Storage, Inc.*, 332 S.C. 290, 306, 504 S.E.2d 347, 356 (Ct. App. 1998). Accordingly, there was no error in the circuit court's finding that Century failed to produce any evidence to establish Respondents are jointly and severally liable in tort with Century for the same injury to Spirit. As a result, Century's Petition for a Writ of Certiorari should be denied.

III. THE CIRCUIT COURT PROPERLY HELD CENTURY PURCHASED THE PROPERTY “AS-IS” AND WITH FULL KNOWLEDGE OF THE PATENT DEFECTS FOR WHICH CENTURY SEEKS TO RECOVER.

The court of appeals declined to reach Century’s knowledge of patent defects because it found the first issue dispositive. Respondents agree the first issue is dispositive and the Court need not reach this issue now. However, if the Court wishes to reach the merits, the circuit court properly held Century could not maintain the contribution action against Respondent Richland because Richland disclosed the defects and sold the property on an “as-is” basis to Century.

Under the common law of South Carolina, a person who knowingly accepts property with a patent defect waives all claims arising out of that defect and the law 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). When Richland sold the property to Century, it disclosed defects in the mall and its HVAC systems, and Century expressly acknowledged the mall had problems with its roof, requiring Century to make ongoing repairs. **(R. 587)**. With full knowledge of the defects and its maintenance obligations under the REA, Century chose to proceed with the purchase of the Midtown Parcel. Century’s failure to uphold those maintenance obligations after acquiring the property constituted the crux of the underlying lawsuit between Century and Spirit. Therefore, the circuit court properly found Century is barred

from maintaining a contribution action against Richland under the common law rule regarding the acceptance of patent defects. *See Fields*, 376 S.C. at 563, 658 S.E.2d at 90. As a result, Century's Petition for a Writ of Certiorari should be denied.

IV. THE CIRCUIT COURT PROPERLY FOUND CENTURY'S CONTRIBUTION CLAIM AGAINST RESPONDENT WINDSOR WAS BARRED BY THE STATUTE OF REPOSE.

The court of appeals also declined to rule on the statute of repose upon finding the first issue dispositive. Respondents agree and the Court need not reach this issue if it finds the first issue dispositive. However, in the interests of addressing all of Century's arguments, Respondents contend the circuit court did not err in finding the statute of repose an additional ground for summary judgment in favor of Respondent Windsor.

In its Motion for Summary Judgment, Windsor argued Century's contribution claim was time-barred by the applicable statute of repose because Windsor's alleged negligence arose on or before November 4, 2005—the date it sold the property—and Century did not file its contribution action until after the expiration of the applicable statute of repose. The circuit court agreed, finding any repairs made by Windsor occurred beyond the eight-year statute of repose. (**R. 601**).

The statute of repose provides in part:

No actions to recover damages 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

S.C. Code Ann. § 15-3-640.

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.” *Capco of Summerville, Inc. v. J.H. Gayle Const. Co.*, 368 S.C. 137, 142, 628 S.E.2d 38, 41 (2006). The statute of repose “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, and Windsor sold the Midtown Parcel on November 4, 2005. Century did not commence its contribution action against Windsor until November 10, 2014—more than eight years after Windsor last undertook any repairs pursuant to the REA. Therefore, the statute of repose bars Century from any recovery from Windsor for contribution.

Century wrongfully claims the work completed by Windsor is not an “improvement” as contemplated in the statute of repose. Whether an addition to real property constitutes an “improvement” requires a case by case determination.

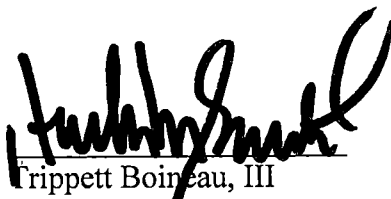
S.C. Pipeline Corp. v. Lone Star Steel Co., 345 S.C. 151, 155, 546 S.E.2d 654, 657 (2001). In making a determination, this Court has considered factors such as whether the addition enhanced the value of the property; involved the investment of labor or money; and was permanent. *Id.* The repairs and alterations made by Windsor satisfy these considerations. Windsor's repairs enhanced the value of the property; required the investment of labor and money; and are permanently affixed to the real property. Moreover, Windsor's repairs to the property were substantially completed by November 4, 2005, when it sold the property and was relieved of further repair obligations. Lastly, despite Century's assertion that the statute of repose is inapplicable because Windsor was in possession of the improvement complained of, the circuit court properly granted summary judgment on the issue because Century could not produce a scintilla of evidence pinpointing the time the injury was proximately caused, nor can Century identify what party was in possession or control of the Verizon Parcel at the time of the alleged injury. Therefore, the circuit court properly found Century's claim against Windsor, if any, was extinguished by the applicable statute of repose on November 5, 2013. As a result, Century's Petition for a Writ of Certiorari should be denied.

CONCLUSION

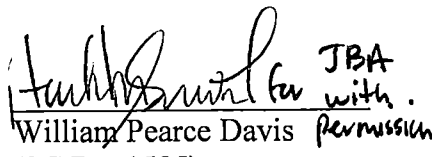
The circuit court properly granted summary judgment to Respondents with respect to Century's contribution claims. The Settlement Agreement between

Century and Spirit does not delineate what portion of the monies paid by Century in settlement can be subject to contribution by Respondents. Furthermore, there is no way to allocate any of the settlement money paid by Century to any of the alleged negligent repairs made by Respondents. Any attempt to determine Respondents' "fair share" of the settlement payment is wholly and impermissibly speculative. The court of appeals followed established precedent in affirming the circuit court's grant of summary judgment and the instant case does not present any circumstances warranting a grant of certiorari. Accordingly, Respondents respectfully request the Court deny Century's Petition for a Writ of Certiorari.

Respectfully submitted,

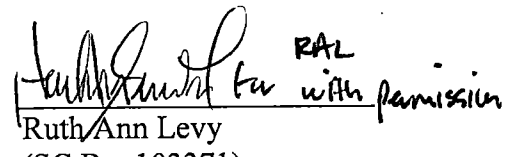


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S.C. SUPREME COURT

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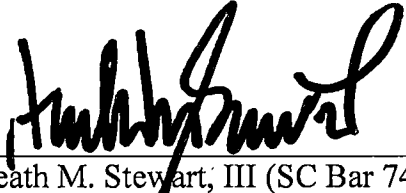
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Richland Joint Venture Group, LLC,
Windsor Richland Mall, L.P., and
BRC Richland, LLC Respondents.

PROOF OF SERVICE

I certify that I have served Respondents Midtown Development Group, LLC, Richland Joint Venture Group, LLC and Windsor Richland Mall, L.P.'s Return to Petition for a Writ of Certiorari by depositing a copy of the same in the United States Mail, postage prepaid, on the 13th day of December, 2018 addressed to Appellant's attorney of record:

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