

THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Richland County  
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

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Appellate Case No. 2018-001874

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Century Capital Group, LLC,

Petitioner,

v.

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

Respondents.

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**BRIEF OF PETITIONER**

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## STATEMENT OF ISSUES ON APPEAL

- I. Did the Court of Appeals err in affirming the circuit court's procedurally premature grant of summary judgment on the basis that Petitioner's \$1.45 million settlement payment in an underlying case was allegedly made to extinguish liability for behavior other than non-intentional tortious behavior, and therefore barred recovery under the Contribution Among Joint Tortfeasors Act ("the Act"), when in fact, genuine issues of material fact exist as Petitioner did indeed render the payment to extinguish liability for non-intentional *negligent* maintenance and repair only?
  
- II. Did the Court of Appeals err in affirming the grant of summary judgment when general issues of material fact exist where the parties to this action are joint tortfeasors from whom contribution is recoverable under the Act as the successors in interest were jointly and severally liable for damages from the negligent maintenance and repair of the Mall, where Petitioner's payment expressly extinguished the parties' tort liability for those same damages, where the \$1.45 million was well in excess of Petitioner's pro rata share of the liability, where the pro rata shares owed by the other parties is reasonable, and where the status of a joint tortfeasor is a question of fact.?
  
- III. Did the Court of Appeals err in affirming the trial court's erroneous grant of summary judgment when the trial court effectively held that a purchase "as is/where is" relieves a seller from third party liability for the seller's negligence where it held Petitioner was barred from seeking contribution from Richland Joint Venture Group, LLC ("RJVC"), solely because the property was purchased "as-is?"
  
- IV. Did the Court of Appeals err in affirming the trial court's grant of summary judgment when the trial court erroneously held that Petitioner's claims for contribution were barred by the Statute of Repose?

## STATEMENT OF THE CASE

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

On July 30, 2015, a hearing was conducted before the Honorable L. Casey Manning regarding the three motions for summary judgment. (App. 617). On September 16 and 17, 2015, the circuit court issued orders granting summary judgment as to all defendants and dismissing Petitioner’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 Petitioner should be apportioned to each defendant under a negligence theory, and that Petitioner’s claims are barred by the statute of repose. (App. 564-602).

On September 25, 2015, Petitioner filed motions to alter or amend the September 16 and 17 Orders (App. 603-614), which were subsequently denied by the trial court on February 23, 2016 (App. 615-616).

Petitioner subsequently filed a Notice of Appeal on March 3, 2016. Petitioner filed its final brief with the South Carolina Court of Appeals on September 14, 2016. Respondents filed

their final brief on September 22, 2016. The matter was heard on May 16, 2018. The Court of Appeals affirmed the trial court's grant of summary judgment in an unpublished opinion filed on June 13, 2018, in which the Court of Appeals found summary judgment was appropriate because it interpreted Petitioner's settlement payment in the underlying case to have extinguished liability for more than just non-intentional tortious behavior and therefore have barred Petitioner from recovery under the Contribution Among Joint Tortfeasors Act ("the Act"). The Court of Appeals did not consider or address the other issues raised by Petitioner. Appellate Case No. 2016-000461. Petitioner subsequently petitioned for a rehearing, but was denied on September 20, 2018.

Petitioner filed its Petition for Writ of Certiorari to the Supreme Court of South Carolina on October 19, 2018. Respondents filed their Return on December 13, 2018. The Court granted certiorari by order issued on August 5, 2019. This Brief of Petitioner follows accordingly.

### **STATEMENT OF FACTS**

This case arises from an underlying lawsuit (Case No.: 2010-CP-40-8407) against Petitioner by Spirit SPE Columbia, LLC ("Spirit") (App. 72-131), a non-party in the present matter, based primarily on allegations that Petitioner failed to adequately repair and maintain certain portions of the Richland Mall (or, "the Mall"). The Richland Mall has a long, documented history of construction defects 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 positioned between two layers of concrete and endures regular vehicular and pedestrian traffic. Extensive reports dating back to the 1990s indicate the roof was defectively constructed based on a failure to install sufficient expansion joints and defective components in the waterproofing

structure. (App. 511-517; 536). In lieu of costly roof repairs, Richland Mall's 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. (App. 511-517; 536).

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. (App. 134). Also in 2002, Windsor sold the Verizon parcel to BRC. (App. 134).

On September 7, 2005, BRC and Windsor entered into and executed the Reciprocal Easement, Covenant, Operation and Restriction Agreement ("REA") (App. 137-172), which attempted to outline the respective duties of those parties and their successors regarding the maintenance and administration of the Mall. (App. 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.

(App. 152).

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. (App. 134) On November 4, 2005, Windsor sold the Mall parcel to Midtown. (App. 134) On May 25, 2007, Midtown sold the Mall parcel to RJVG. (App. 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 deck structure.

Petitioner purchased the Mall parcel from RJVG on February 16, 2010, less than a year after Spirit made its demand for repairs to RJVG. Petitioner acknowledges that it had notice of the roof leaks when it purchased the Mall parcel. However, Petitioner had no indication that Spirit took issue with the maintenance plan in place or work conducted since the original discovery of the leaks, nor did Petitioner agree to accept responsibility for its predecessors' maintenance failures. (App. 511). Spirit initiated the underlying suit against Petitioner only nine months after Petitioner 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. (App. 72-131).

In order to resolve the costly and protracted litigation with Spirit, Petitioner 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.

(App. 223) (emphasis added).

The Settlement Agreement expressly extinguishes liability and discharges all claims against Petitioner 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.

(App. 230).

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

### **STANDARD OF REVIEW**

When reviewing the grant of a summary judgment motion, the appellate court applies the same standard of review as the trial court; summary judgment is only proper when "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCF; *Zurich Am. Ins. Co. v. Tolbert*, 378 S.C. 493, 496, 662 S.E.2d 606, 607 (Ct. App. 2008). 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 616, 165 (2003). Even if evidentiary facts are not disputed, if only the conclusions to be drawn from them are, a motion for summary judgment should be denied. *Baugus v. Wessinger*, 303 S.C. 412, 415, 401 S.E.2d 169, 171 (1991).

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).

Pertinent to the court's fact-finding role, summary judgment is a drastic remedy and is therefore 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). Accordingly, a non-movant should have a full and fair opportunity to conduct discovery before the court grants a motion for summary judgment. *Baughman v. American Tel. and Tel. Co.*, 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991). Thus, a trial court's decision to grant summary judgment before the opposing party has had a full and fair opportunity to complete discovery constitutes reversible error. *See e.g., Evening Post Pub. Co. v. Berkeley County School Dist.*, 392 S.C. 76, 81, 708 S.E.2d 745, 747-48 (2011) (reversing trial court's grant of summary judgment where appellant argued it did not have an adequate opportunity to conduct discovery).

### ARGUMENT

**I. The Court of Appeals erred in affirming the circuit court's procedurally premature grant of summary judgment on the basis that Petitioner's \$1.45 million settlement payment in an underlying case was allegedly made to extinguish liability for behavior other than non-intentional tortious behavior, and therefore barred recovery under the Uniform Contribution Among Tortfeasors Act ("the Act"), when in fact, genuine issues of material fact exist as Petitioner did indeed render the payment to extinguish liability for non-intentional *negligent* maintenance and repair only.**

The Court of Appeals affirmed the trial court's grant of summary judgment by holding that some of the theories under which Petitioner may have been liable for damages in the underlying action were not eligible for contribution, i.e. non-tortious actions.<sup>1</sup> However, notwithstanding the fact that summary judgment was premature and deprived the parties of the necessary discovery to properly defend against a motion for summary judgment, there still

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<sup>1</sup> Having disposed of the appeal on this issue, the Court of Appeals declined to address Petitioner's remaining issues.

existed a genuine issue of material fact as to whether the settlement extinguished liability for non-intentional tortious behavior or other behavior not contemplated by the Act. In fact, the settlement agreement on its face, in addition to the nature of the damages for which Petitioner was remitting payment, reveals the \$1.45 million was clearly paid to settle liability for damages arising from the negligence in maintenance and repair, an action squarely within the purview of the Act.

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 South Carolina, the right to contribution among joint tortfeasors exists under the South Carolina Contribution Among Tortfeasors Act (“the Act”). S.C. Code Ann. §§ 15-38-10 to -70 (Supp. 2003); *Cowden Enterprises, Inc. v. East Coast Millwork Distributors*, 363 S.C. 540, 543, 611 S.E.2d 259, 260 (Ct. App. 2005). Under the Act, where two or more persons become jointly or severally liable in tort for the same injury to property, a right of contribution arises among them, even if judgment has not been recovered against all or any of them. *Id.* (citing *Vermeer Carolina’s, Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 68, 518 S.E.2d 301, 309 (Ct. App. 1999)). “A tortfeasor who enters into a settlement with a claimant is not entitled to recover contribution from another tortfeasor whose liability for the injury or wrongful death is not extinguished by the settlement...” S.C. Code Ann. § 15-38-20(D). The trial court and Court of Appeals mistakenly relied on this requirement in granting and affirming summary judgment.

Petitioner’s December 2013 Settlement Agreement and Mutual Release (“Settlement Agreement”) with Spirit in the underlying case provided, among other things, the following:

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. (App. 39) (emphasis added).

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

Based upon the foregoing consideration, Spirit ... hereby releases and forever discharges all claims ... [Petitioner’s] predecessors in interest under the REA, and each predecessor in interest’s employees, agents, heirs, and assigns. (App. 39).

Petitioner raised Contribution as its sole cause of action in the present case and specifically alleged Respondents negligently maintained and negligently repaired the relevant properties. (App. 135). While the trial court and Court of Appeals have relied on the notion that Petitioner in its Settlement Agreement could have conceivably been extinguishing liability for breach of contract or other non-tortious actions outside of the Act’s purview, the Settlement Agreement provides the release was for the very conduct that is alleged to have been carried out *negligently*. There is no dispute that negligence is a tort contemplated by the Act. Rather, Respondents have endeavored to redefine the nature of both the conduct and the damages at issue in this case to inaccurately redefine a settlement and injury which was clearly the result of negligence, not a breach of contract or other cause of action not contemplated by the Act.

Respondents rely on the existence of the underlying REA to manipulate the appearance of the negligence claims extinguished by the Settlement Agreement into being interpreted as a breach of contract matter. Obviously, Petitioner does not dispute the existence or effect of the REA. However, the REA is in no way dispositive to the action for Contribution. While the REA enumerated duties to maintain and repair the property, it was merely these duties being carried

out *negligently* that is at issue, not the contract; the settlement was to resolve the liability for damages arising from negligent furtherance of duties, and these duties arise not only from contract but also independently as adjacent and successive property owners. The REA is merely one *theory* which gives rise to the duty which was breached through the parties' negligence. Even when two tortfeasors are liable to a plaintiff under differing or multiple theories, they can nevertheless be liable to each other when their actions unite to cause one injury to the plaintiff.

*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 tortfeasors 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 neglects concurred and united together in causing injury, the tort is equally joint, and the tortfeasors are subject to a like liability.*

*Id.* at 514-515.

The Settlement Agreement properly discharged Respondents from liability to Spirit and outlines that \$1.45 million was paid to settle liability for their negligence in failing to maintain and repair portions of the Richland Mall affecting the Spirit Parcel. Regardless of the legal theories or various duties at issue, each successor in interest to the Richland Mall negligently 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 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.

There is common liability between successors in interest to the Richland Mall Parcel as to Spirit. Each owner owed a duty, regardless of the source of that duty, to Spirit to properly maintain and repair the common areas and roof. This continuous term of maintenance and repair was breached in succession by each owner leading up to Petitioner, which was ultimately held liable for the entirety of the damages to Spirit. Furthermore, the premature granting of summary judgment while discovery was ongoing denied Petitioner the opportunity to present even further evidence supporting its intent and interpretation of the Settlement Agreement extinguishing the negligence claims as well as further evidence supporting the negligence claims themselves against Petitioner's successors in interest and joint tortfeasors, Respondents.

**A. The Court of Appeals erred in affirming the trial court's grant of summary judgment where discovery was still ongoing and summary judgment was therefore premature and procedurally improper.**

Notwithstanding the substantive error in the granting of summary judgment, the grant of summary judgment was procedurally improper because Petitioner 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”). Moreover, summary judgment is inappropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. *Brockbank v. Best Capital Corp.*, 341 S.C. 372, 378, 534 S.E.2d 688, 692 (2000) (citing *Tupper v. Dorchester County*, 326 S.C. 318, 487 S.E.2d 187 (1997)). Furthermore, summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is dispute as

to the conclusion to be drawn from those facts. *Id.*

In this case, the trial court granted summary judgment before adequate discovery was conducted in a case involving four corporate defendants with \$1.45 million at issue some months after the suit was filed. The Court of Appeals affirmed summary judgment on the ground that Petitioner had not produced a scintilla of evidence that the \$1.45 million payment was made to extinguish liability for its non-intentional tortious behavior only. Since it is a drastic remedy, summary judgment should be invoked with caution, “so that no person will be improperly deprived of a trial of the disputed factual issues.” *Baughman v. American Tel. and Tel. Co.*, 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991) (citing *Watson v. Southern Ry. Co.*, 420 F.Supp. 483, 486 (D.S.C. 1975)). “This means, among other things, that summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery.” *Id.*

In the present case, notwithstanding the fact the trial court and Court of Appeals misinterpreted the Settlement Agreement resulting in Petitioner’s bar from Contribution, summary judgment was granted on the issue before Petitioner had a full and fair chance to discover more evidence to support its position and reasonably be expected to defend against such a motion, much less for the trial court to be positioned to evaluate under which causes of action Petitioner may have been liable to Spirit in the underlying case. The present case is precisely the type of conflict for which the principle of cautious invocation of summary judgment stands. Accordingly, the Court should reverse the affirmation of summary judgment in order for Petitioner to be afforded the opportunity to complete the discovery process and, in turn, allow for a meaningful and informed determination of whether a scintilla of evidence exists to indicate the \$1.45 million payment was to extinguish liability for the non-intentional tortious behavior only.

**II. The Court of Appeals erred in affirming the grant of summary judgment because general issues of material fact exist where the parties to this action are joint tortfeasors from whom contribution is recoverable under the Act as the successors in interest were jointly and severally liable for damages from the negligent maintenance and repair of the roof, where Petitioner's payment expressly extinguished the parties' tort liability for those same damages, where the \$1.45 million was well in excess of Petitioner's pro rata share of the liability, where the pro rata shares owed by the other parties is reasonable, and where the status of a joint tortfeasor is a question of fact.**

While the Court of Appeals did not address the issue, the trial court erroneously granted summary judgment on the basis that Petitioner and Respondents were not joint tortfeasors. Once more, 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). First, it must be understood that the determination of one as a joint tortfeasor is a question of fact to be determined in light of evidence in the record, evidence which in this case may or may not have been left undiscovered as summary judgment was prematurely granted before the conclusion of discovery. South Carolina case law is clear that the fact-finder must determine whether parties are joint tortfeasors for purposes of the Act when that fact is disputed, as it is in the present case:

*“Joint tortfeasor” refers to “[t]hose who act together in committing wrong, or whose acts if independent of each other, unite in causing single injury”; “two or more persons jointly or severally liable in tort for the same injury to person or property.” To determine whether Vermeer and Wood/Chuck are joint tortfeasors, we factually analyze the record. Vermeer, 336 S.C. at 64.*

Where it is not conceded that the acts of two or more persons, resulting in injury to another were done in pursuance of a common design or concert of purpose, or were the result of the joint negligence of the actors, *it becomes a question of fact to be determined by the jury whether the persons so engaged were joint tortfeasors. Edwards v. Atl. Coast Line R. Co., 148 S.C. 266, 146 S.E. 97, 101 (1928).*

The trial court's improper grant of premature summary judgment deprived itself of the opportunity to make such a determination of fact. Certainly, discovery in a contribution case would contain materials that tend to either support or undermine a determination that parties are joint tortfeasors. Evidence supporting either position would no doubt comprise the great weight of either party's cases. Nevertheless, the trial court failed to consider an adequately developed or ripe evidentiary record in granting summary judgment based on Respondents' arguments and before full opportunity for discovery.

Regardless, Respondents are joint tortfeasors squarely within the purview of the Act, and summary judgment was therefore substantively improper as well. Petitioner sought contribution from its predecessors in interest to the Richland Mall for sums Petitioner paid to Spirit to settle the underlying lawsuit. The separate and independent acts of all the tortfeasors over the course of many years combined to damage Spirit, yet Petitioner, as the last party in line, was left to settle the common liability on its own.

The trial court's reliance on *Vermeer Carolina's* in finding damages could not be allocated in this case is, respectfully, misplaced. *Vermeer Carolina's* is readily distinguishable from the present case. In *Vermeer Carolina's*, the Court of Appeals addressed a claim in which the retailer of a defective chipper reached a settlement with an injured purchaser and subsequently sought contribution from the manufacturer. 336 S.C. at 58. The plaintiff in that underlying action had requested a nonsuit with prejudice for all claims against Wood/Chuck Chipper Corp. before proceeding to trial against Vermeer Carolina's, Inc. and settling. *Id.* Understandably, the Court of Appeals held Vermeer Carolina's was not entitled to contribution from Wood/Chuck Chipper Corp. when the claims against them had been dismissed with prejudice, and therefore, the company could not be liable to the underlying plaintiff regardless of

the settlement. *Id.* at 69. The Court of Appeals was then tasked with determining whether a defendant (Vermeer Carolina's, Inc.) was entitled to contribution for settlement of a potential claim for loss of consortium by the underlying plaintiff's wife. *Id.* Again, the Court of Appeals found Vermeer Carolina's was not entitled to contribution, as this was a *potential* claim by a *non-party* who *never* asserted or litigated the claim. The Court of Appeals reasoned, "Vermeer did not 'discharge' any 'common liability' as to [the wife] because there was no such 'common liability.'" *Id.*

In contrast to *Vermeer Carolina's*, the present case involves real negligence claims actually raised by the party in the underlying action who actually suffered the very real damages and settled with Petitioner. Petitioner demonstrated in its pleadings and by affidavits that the damages caused to Spirit necessarily resulted from the common acts or omissions of itself and Respondents. ("The parking deck on the Richland mall was in substantially the same condition in 2013 as it was when I inspected it in 2003"). App. 517. This evidence demonstrates that, despite the fact Spirit limited its recovery against Petitioner to damages occurring after Petitioner took title to the property, Petitioner alone could not have been solely responsible for the damages. This contested issue should have resulted in the denial of summary judgment based on the genuine issues of material fact integral to the determination of the Act's application. Accordingly, the trial court erred in granting summary judgment, and it should not have been affirmed.

- A. **The existence of some contractual duty imposed on the parties is not dispositive to bar recovery under the Act as a separate tort duty to reasonably repair and maintain exists outside of the parties' contract, and it is the negligent breach of the *tort* duty for which Petitioner rendered the settlement payment and is now entitled to contribution from Respondents.**

The Court of Appeals erred in affirming the trial court's strained holding that because the

parties had a contractual duty to repair and maintain the Mall under the REA, there could be no tort liability as is required to bring an action of contribution. Again, the mere existence of a contractual obligation under the REA does not foreclose the possibility of tort liability to support an action for contribution. It is undisputed that the REA specifically committed parties' duties to writing. That being said, such duties being carried out *negligently* is at issue here not the contract. Once more, the settlement was to resolve the liability for damages arising from negligent furtherance of duties, and these duties arise not only from contract but also independently as adjacent and successive property owners. Numerous, distinct theories may give rise to a duty upon which negligence can be based. Even when two tortfeasors are liable to a plaintiff under differing or multiple theories, they can nevertheless be liable to each other when their actions unite to cause one injury to the plaintiff. *See Matthews v. Seaboard Air Line Ry.*, 67 S.C. 499, 46 S.E. 335, 340 (1903). In the present case, of course, at issue was the matter that the maintenance and repair were carried out in a negligent manner and their duty to conduct such work in a reasonable manner is not reliant on a contract. At issue here is a negligence action.

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

It is clear in the record before this Court that any duty of the Defendants regarding maintenance to the Spirit Parcel was a contractual duty arising from the REA, and parties may not seek contribution as alleged joint tortfeasors for breaches of contractual duties under S.C. Code Ann. § 15-38-20. App. 580.

Thus, the trial court improperly held that a legal duty could not exist and did not exist outside of the contractual REA. Indeed, as a general rule, a negligence action will not lie where the parties are in privity of contract; “however, [when] there is a special relationship between the alleged tortfeasor and the injured party not arising in contract, the breach of that duty of care will support a tort action.” *Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.*, 320 S.C. 49, 55, 463 S.E.2d 85, 88 (1995). Furthermore, in South Carolina, a breach of an industry standard may establish that a special duty outside of contract exists, and thus prevent application of the economic loss rule. *See Eaton Corp.*, 350 F.Supp.2d at 702-03.

In the case at bar, Respondents and Century owed a common law duty to Spirit to reasonably maintain and repair the Richland Mall according to industry standards, applicable building codes, and in the manner of a reasonably prudent person. This duty arises by virtue of the obligations a landowner owes to an adjoining landowner to act reasonably to prevent damages to the adjoining landowner’s property and to act reasonably in performing such repairs as those presently at issue. *See Staples v. Duell*, 329 S.C. 503, 510, 494 S.E.2d 639, 643 (Ct. App. 1997) (“One who undertakes ... to render services to another which he should recognize as necessary for the other’s person or things, is subject to liability...”)(citing *Restatement (Second) of Torts* § 323(a) (1965)). Respondents breached their duty when they undertook to make repairs and maintenance to the roof structure, but failed to do so in a reasonably prudent manner. Further evidence substantiating this assertion would be foreseeably supported by evidence found in discovery, which again was still ongoing at the time of summary judgment. For all these reasons, the Court of Appeals erred in affirming the trial court’s holding that there could be no tort liability to support an action for Contribution.

**B. Common liability to Spirit, the plaintiff in the underlying case, exists because the damages to Spirit for repair and maintenance at the Richland Mall are indivisible.**

In further support of Respondents' status as joint tortfeasors, the Court should look to the commonality of damages caused by Respondents, of which there is ample evidence to support. "The basic premise of contribution is commonality. "Common liability," rather than joint negligence, determines the right to contribution. *Vermeer Carolina's, Inc.*, 336 S.C. at 68. It is well established in South Carolina this analysis should concern the harm to the Plaintiff, not the specific acts of the Defendants. *Pendleton v. Columbia Railway, Gas & Elec. Co.*, 113 S.C. 326, 131 S.E. 265 (1926). This Court in *Pendleton* held:

[A] single injury, which is the proximate result of the separate and independent acts of negligence of two or more parties, subjects the tortfeasors, even in the absence of community of design or concert of action, to liability which is both joint and several is a proposition recognized and approved in this state and supported by the great weight of authority elsewhere. *Id.* at 326.

As discussed above, in *Vermeer Carolina's*, the Court of Appeals held that there was no right to contribution because the party against whom contribution was sought had been dismissed with prejudice by the plaintiff. There was "no 'common liability' that could have been discharged by the settlement" because the plaintiff had dismissed that particular defendant with prejudice, which operated as an adjudication on the merits discharging that defendant from *any* liability to the plaintiff. 336 S.C. at 68. In the present case, Respondents were not parties in the underlying case, but Petitioner ensured that any common liability shared by Respondents and Petitioner arising from the repair and maintenance of the building was discharged by the Settlement Agreement.

Likewise, in *Collins v. Bisson*, the Court noted that there was no common liability between two defendants on the basis that there was no *common injury* to the plaintiff. 332 S.C.

290, 306, 504 S.E.2d 347, 356 (1998) (emphasis added). In *Collins*, the plaintiff was injured in an initial automobile accident with one defendant and then subsequently injured in a second automobile accident with a second defendant while being transported by ambulance. 332 S.C. at 306. Specifically, the Court acknowledged that the plaintiff was “unscathed” in the first accident but was left “screaming in pain” after the second accident. *Id.* at 293. The Court emphasized, “joint and several liability arises only when two or more tortfeasors are responsible for a *single* injury. *Id.* at 306 (emphasis in original).

By contrast, in the case at bar, Respondents and Petitioner are joint tortfeasors because their separate and independent acts of negligent maintenance and repair combined to cause one indivisible injury to Spirit. Unlike in *Collins*, the present case concerns defendants whose actions united to cause one injury to property, not separate and distinct injuries. Petitioner acknowledges that the underlying lawsuit sought recovery against it for failure to repair and maintain the Richland Mall since taking possession and operating as manager of the Shopping Mall Property. However, Petitioner has demonstrated it could not possibly, in a mere nine months, have caused the damages claimed by Spirit as the damages were the result of many years of improper maintenance of a defective structure. While all parties owed the same duty to Spirit with respect to maintenance at the Richland Mall, testimony evidences the building remained in substantially the same poor condition during the entire relevant time period. (App. 517).

Summary judgment was not appropriate in this case because there are genuine issues of material fact regarding the determination of parties’ status as joint tortfeasors. Again, joint tortfeasors may act independently of each other if those acts unite to cause a single injury. The independent actions and inactions of the successive owners of the Richland Mall Parcel over the course of *many* years united in causing Spirit’s damages, and equity is not served in requiring

Petitioner to carry the entire burden of inherited liability.

**III. The Court of Appeals erred in affirming the trial court's erroneous grant of summary judgment when the trial court effectively held that a purchase "as is/where is" relieves a seller from third party liability for the seller's negligence where it held Petitioner was barred from seeking contribution from Richland Joint Venture Group, LLC ("RJVC"), solely because the property was purchased "as-is."**

The trial court granted summary judgment as to RJVC on the basis that Petitioner was barred from seeking contribution when Petitioner bought the property "as-is." This was erroneous. Petitioner does not dispute that it purchased the Richland Mall Parcel on February 16, 2010, with knowledge of roof leaks and accepted the building as "is/where is." William B. Walkup, principal of Petitioner, acknowledged by filed affidavit that Petitioner had notice of the leaks as well as the ongoing maintenance obligations for which Petitioner would be responsible after taking title to the Richland Mall. (App. 511). However, Petitioner never agreed to assume responsibility for or to indemnify its predecessors, RJVC, or any other party, for their negligent conduct and damages suffered by third parties. The trial court erred by essentially holding that acceptance of a patent defect operates as a waiver of the right to contribution as to liability owed to a third party. This is not, and never has been, the law in this state. Therefore, while the Court of Appeals did not address this issue, the trial court erred in granting summary judgment on this issue, and the grant of summary of judgment should not have been affirmed.

**IV. The Court of Appeals erred in affirming the trial court's grant of summary judgment when the trial court erroneously held that Petitioner's claims for contribution were barred by the Statute of Repose.**

The trial court also committed reversible error in granting summary judgment on the basis that Petitioner's contribution claims were barred by the Statute of Repose. 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 the substantial completion of the improvement.” S.C. Code Ann. § 15-3-640 (Supp. 2000). The current statute became effective July 1, 2005, two months prior to the execution of the REA, and therefore applies to this case. The essential elements of the statute are twofold: (1) an improvement to real property and (2) substantial completion of that improvement. Because the ongoing maintenance of the Richland Mall never amounted to an “improvement” and because there was never substantial completion of the maintenance, the statute does not operate to bar Petitioner’s recovery in a contribution cause of action. Moreover, the statute is inapplicable as a defense by a party who was in actual control or possession of the property at the time and was aware of the defective condition of the property. S.C. Code Ann. § 15-3-670 (Supp. 2000). Because these essential elements were not met and because Respondents were all aware of the defective roof during their respective periods of control and possession of the Richland Mall, the statute of repose does not bar Petitioner’s cause of action. Accordingly, summary judgment should not have been granted.

**A. Routine maintenance of the Mall is not an “improvement to real property,” and the Statute of Repose is therefore inapplicable.**

In determining whether or not something is an improvement for purposes of a statute of repose, jurisdictions throughout the country have resorted to various tests to aid their analyses. The South Carolina Supreme Court took up the issue of what constitutes an improvement to real property under the statute of repose as a matter of first impression by certified question in *South Carolina Pipeline Corp. v. Lone Star Steel Co.*, 345 S.C. 151, 546 S.E.2d 654 (2001). To define “improvement,” the Court looked to various secondary sources, other courts’ interpretations, and also attempted to glean legislative intent from the preamble to the statute. The Court developed the following necessary elements for something to be considered an improvement under the

Statute of Repose: (1) enhancement to the value of the property; (2) an investment of time and money; (3) permanence, as the term is commonly understood. *Id.* at 155.

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

The purpose of the statute of repose is to protect contractors who are involved in permanent improvements to real property. Daily repairs are not improvements to real property as that phrase is used in the statute of repose. The legislature has chosen to protect persons or entities which make permanent improvements to real property, not to absolve those who make regular repairs or do maintenance work. This distinction is reasonable because improvements to real property have a completion date whereas regular repairs and maintenance can continue *ad infinitum*. 360 Wis.2d 411, 860 N.W.2d 308, 315 (Wis. Ct. App. 2015) (citations omitted).

In this case, Respondents' actions in putting up sheet metal catch basins, chasing cracks with epoxy and even resealing portions of the parking structure cannot be considered improvements to the Richland Mall. At best, these actions were ongoing day-to-day repairs to keep water out of the Richland Mall interior. As the affidavit of Mr. Vitale provides, the roof structure stayed in substantially the same condition throughout all relevant time periods. (App. 517). No action taken by any Respondent enhanced the property's value or required an investment of labor or money beyond ordinary repairs, nor can they be considered permanent in the common-sense understanding of the term as contemplated by this Court in *South Carolina Pipeline*. Furthermore, as the court in *Peter* found instructive, ongoing repairs on the roof have continued from the Mall's construction to present. The water intrusion never ceased and the repairs continued "*ad infinitum*." Therefore, the repairs in this case never constituted an "improvement" under the statute, and accordingly, the statute does not bar Petitioner's claim.

**B. The repairs and maintenance work conducted by the Respondents were never substantially completed, and the Statute of Repose is therefore inapplicable.**

The second essential element for qualification as an improvement under the statute of repose is substantial completion; Respondents' reliance on the Statute of Repose fails here as well. "The legislature defines 'substantial completion' as 'that degree of completion of a project, improvement, or a *specified area or portion thereof* ... upon attainment of which *the owner can use the same for the purpose for which it was intended...*'" *Ocean Winds Corp. of Johns Island v. Lane*, 347 S.C 416, 419, 556 S.E.2d 377, 379 (2001) (emphasis in original). Unlike typical construction projects contemplated by the statute, the present situation involves on-going maintenance to a failed roof system over the course of decades and continuing through the present. There is no point in the history of the Richland Mall where one can pinpoint a completion date for this work. The roof was usable as a parking structure, but never stopped the chronic intrusion of moisture into the Richland Mall's interior. Absent a date of substantial completion, the statute of repose never started running and cannot be used to bar Petitioner's claim for contribution.

**C. Respondents had actual control and possession of the Mall and are therefore expressly exempt from asserting the Statute of Repose as a defense under S.C. Code § 15-3-670.**

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

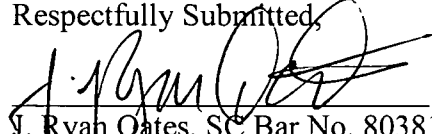
The limitation provided by Sections 15-3-460 through 15-3-660 may not be asserted as a defense by a person in actual possession or control as owner, tenant, or otherwise, of the improvement at the time the defective or unsafe condition constitutes the proximate cause of the injury of death for which it is proposed to bring an action, in the event the person in actual possession or control knows, or reasonably should have known, of the defect or unsafe condition ..." S.C. Code Ann. § 15-3-670(A) (Supp. 2000).

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

**CONCLUSION**

For the reasons stated herein, this Court should reverse the Court of Appeals and remand this matter for further proceedings.

Respectfully Submitted,



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September 4, 2019

THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

—————  
Certiorari to Richland County  
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

—————  
Appellate Case No. 2018-001874

RECEIVED  
SEP 04 2019  
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, LLC, Respondents.

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**PROOF OF SERVICE FOR BRIEF OF PETITIONER**

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I, Deanne Peele, with the Law Firm of McCabe, Trotter & Beverly, PC, attorneys for Petitioner, hereby certify that I have served or caused to be served a copy of the foregoing document upon the below named individual and/or counsel this the day 4th of September, 2019 addressed as follows:

**DOCUMENTS SERVED**

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September 4, 2019  
Columbia, SC