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S.C. SUPREME COURT

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

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APPEAL FROM 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  
RESPONDENTS MIDTOWN DEVELOPMENT GROUP, LLC,  
RICHLAND JOINT VENTURE GROUP, LLC, AND  
WINDSOR RICHLAND MALL, L.P.**

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## QUESTIONS PRESENTED

**I. Did the court of appeals err in affirming the trial 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 Group, LLC's non-intentional tortious behavior?**

**II. Did the court of appeals err in affirming the trial court's grant of summary judgment where no genuine issues of material fact exist as to whether the parties are joint tortfeasors from whom contribution is recoverable because the parties are not jointly and severally liable for the same injury?**

**III. Did the court of appeals overlook that an "as is/where is" purchase relieves a seller from third-party liability for the seller's negligence?**

**IV. Did the court of appeals err in declining to overturn the trial court's grant of summary judgment where the trial court properly held Century Capital's claims for contribution against Respondent Windsor Richland Mall, L.P. were barred by the statute of repose?**

## STATEMENT OF THE CASE

This case involves Petitioner Century Capital Group, LLC's ("Century") attempt to win a contribution award based on a settlement agreement arising from its own intentional torts, breaches of contract, and fraud—an effort which must fail under the South Carolina Uniform Contribution Among Tortfeasors Act. Century's settlement of liability for negligence cannot entitle it to contribution from alleged joint tortfeasors when that settlement amount was inextricably entwined with Century's liability for intentional torts, fraudulent behavior, and misconduct.

Century entered into a settlement agreement with Spirit SPE Columbia, LLC ("Spirit") for claims arising out of Century's misrepresentations, concealment, and failure to maintain and repair property as required by a real property covenant for the property in question, the Richland Fashion Mall. Spirit alleged a total of fifteen (15) causes of action against Century, including breach of contract, fraud, unfair trade practices, negligence, negligent misrepresentation, nuisance, and trespass. Spirit alleged that since taking possession of the property, Century engaged in repeated fraudulent and intentional behavior, including making representations to Spirit that certain repairs were made or would be made and intentionally failing to perform repairs and maintenance to avoid incurring expenses. Century and Spirit then entered into a settlement ("Settlement Agreement"), with Century agreeing to pay \$1,450,000.00 to Spirit to extinguish its liability for any claims related to the

maintenance and repair of the property. Those claims include causes of action such as negligence, fraud, breach of contract, unfair trade practices, negligent misrepresentation, and trespass.

After entering the Settlement Agreement with Spirit, Century brought 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, LLC (“BRC”)<sup>1</sup>—all previous owners at some point of the Richland Fashion Mall. Despite the fact Spirit’s complaint against Century was limited to injuries from misconduct occurring since Century took possession of the property, Century sought to spread its liability to past owners of the property with no connection to Spirit’s injuries and no responsibility for Century’s intentional misconduct.

Respondents all filed separate motions for summary judgment, with one common theme: Century’s contribution claim must be dismissed because the right to contribution is limited to non-intentional torts *only* and the Settlement Agreement failed to distinguish such sums from Century’s liability for intentional torts and breaches of contract.

The trial court agreed, granting summary judgment in favor of all Respondents after finding the Settlement Agreement failed to differentiate between

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<sup>1</sup> BRC could not be served by Century and is not a party to this appeal.

the non-intentional torts for which Century may seek contribution, and the intentional torts, breaches of contract, and other claims for which contribution is not allowed under South Carolina law. Based on the lack of specificity in the Settlement Agreement, the trial 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.

Century appealed to the court of appeals, which affirmed the trial 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 because 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. Century then filed a petition for a writ of certiorari to review the court of appeals opinion, which this Court granted.

### **STATEMENT OF THE FACTS**

Windsor purchased the property known as Richland Fashion Mall in 2002 and subsequently subdivided the property into four distinct parcels: (1) the TGI Friday

Parcel; (2) the Bank Parcel; (3) the Verizon Parcel<sup>2</sup>; and (4) the Midtown Parcel. At the time of subdivision, Windsor conveyed the Verizon Parcel to BRC.

On or about September 7, 2005, Windsor, as then-owner of the Midtown Parcel, and BRC, as then-owner of the Verizon Parcel, entered into a Reciprocal Easement, Covenant, Operation and Restriction Agreement and Declaration (the “REA”). (R. 1). 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. 2–4, 8–11). 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. Thereafter, in February 2010, Richland sold the Midtown Parcel to Century.

On November 30, 2010, Spirit filed a lawsuit against Century and its associated entities and individuals, as owners of the Midtown Parcel. Spirit alleged fifteen (15) causes of action against Century, including breach of the REA, negligence, unfair trade practices, and fraud. (R. 72–94). These claims were based

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<sup>2</sup> The Verizon Parcel is also referred to as the “Spirit Parcel” throughout the Record on Appeal.

on allegations Century failed to maintain and repair portions of the property as required by the REA, made misrepresentations that certain maintenance and repairs would be performed, and that Century overbilled Spirit for certain repairs and expenses related to the Verizon Parcel. (R. 74).

In November 2013, Century and Spirit settled the litigation by entering a Settlement Agreement and Mutual Release. (R. 37). Among other things, the Settlement Agreement provided Century would pay Spirit \$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. The Settlement Agreement contains no further explanation as to whether the payment is for the breach of contract claims, the negligence 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 among the various causes of action.

Century then filed an action for contribution against Respondents, seeking their pro-rata share of the \$1.45 million payment. (R. 135–36). Respondents separately moved for summary judgment on several grounds, with the common theme that the Settlement Agreement failed to delineate how payment may be allocated among any specific maintenance failures or causes of action asserted against Century. (R. 176–78, 279–83, 438–39). Respondents’ motions were heard by the trial court on July 30, 2015, and by way of orders dated September 16 and 17, 2015, the trial court granted summary judgment to each Respondent. (R. 564, 576, 589).

The court of appeals affirmed summary judgment in a per curiam unpublished opinion, recognizing at least three of the theories under 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 the \$1.45 million payment was made to extinguish only non-intentional tort liability.

### **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), SCRCPP; *Garvin v. Bi-Lo, Inc.*, 343 S.C. 625, 628,

541 S.E.2d 831, 832 (2001). A court must construe all ambiguities, conclusions, and inferences arising from the evidence against the moving party. *City of Columbia v. Town of Irmo*, 316 S.C. 193, 195, 447 S.E.2d 855, 856 (1994). However, the opposing party may not rest upon mere allegations or denials, but must respond with specific facts showing a genuine issue of material fact. *Id.* More specifically, a responding party “may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.” Rule 56(e), SCRPC. 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**

### **I. SUMMARY JUDGMENT WAS PROPER BECAUSE THERE EXISTS NO GENUINE ISSUE OF MATERIAL FACT AS TO WHETHER THE \$1.45 MILLION PAYMENT WAS MADE 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 the court of appeals erred in affirming summary judgment because discovery was ongoing is not preserved for appellate review by this Court. Century neither raised this argument to the trial court

in its response to Respondents' motions for summary judgment,<sup>3</sup> 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 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. See *S.C. Dep't 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."). Therefore, even if it were timely raised to the trial court, Century waived this argument by failing to raise it to the court of appeals.

Nevertheless, Century now tries to resurrect the issue by making it a focal point of its appeal to this Court. However, despite Century's insistence that summary judgment was premature because more discovery was required, Century does not explain what discovery remains to be completed or what relevant evidence would be produced by further discovery. See, e.g., *Bayle v. S.C. Dep't of Transp.*,

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<sup>3</sup> Century did summarily raise the argument in its Rule 59(e) motion to reconsider.

344 S.C. 115, 128–29, 542 S.E.2d 736, 743 (2001) (holding appellant failed to preserve argument that discovery was incomplete, and even if issue was preserved, appellant failed to demonstrate likelihood further discovery would produce additional relevant evidence). Accordingly, Century’s argument for the need for further discovery lacks any merit and cannot be relied upon as a basis for reversing the trial court’s proper grant of summary judgment.

**B. Summary judgment was proper because there were no genuine issues of material fact as to whether the Settlement Agreement extinguished liability for non-intentional tortious acts only.**

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 to extinguish liability for Century’s non-intentional tort liability only. This argument is unsupported by the record and contradicts the plain language of the Settlement Agreement. There is no question the payment in the Settlement Agreement extinguished Century’s liability for far more than non-intentional tort liability.

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, or breach of warranty. 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 *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 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, who ultimately moved for summary judgment. The trial court granted summary judgment in favor of the subcontractor because the arbitrator's award did not specify how the damages were allocated across the various causes of action asserted. *Id.* at 149, 810 S.E.2d at 44. The court of appeals affirmed, finding 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 in favor of Builders FirstSource. *Id.* at 153, 810 S.E.2d at 46.

A similar unreasoned settlement award was presented in *Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 518 S.E.2d 301 (Ct. App. 1999), where the seller of defective equipment entered 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. However, the court of appeals found the seller was not entitled to contribution under the Act because the settlement neither placed a specific value on any claim by the wife, nor indicated 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 for amounts paid in settlement to the wife. In reaching this holding, the court of appeals quoted favorably from *Houser v. Witt*, 443 N.E.2d 725 (Ill. App. Ct. 1982):

In short, the open-end, blanket, joint release gives no indication as to how the amount paid for the release relates to any present or future damage to either party. In this case lack of apportionment may work a hardship on Witt, but it is one which he could have avoided by a properly drawn release.

*Vermeer*, 336 S.C. at 70, 518 S.E.2d at 310 (quoting *Houser*, 443 N.E.2d at 726–28).

The instant case is analogous to *D.R. Horton* 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 of only the blanket statement explaining the \$1.45 million payment is for *any liability related* to the maintenance and repair of the Verizon

Parcel. Century incorrectly posits “the settlement agreement on its face...reveals the \$1.45 million was clearly paid to settle liability for damages arising from the negligence in maintenance and repair....” See Brief of Petitioner, p. 8. Century inexplicably reads the word “negligence” into this provision of the Settlement Agreement where it simply does not exist. Tellingly, Century does not cite to the language of the Settlement Agreement to support this position.

To reiterate, the Settlement Agreement explains the \$1.45 million payment as follows:

The parties agree that the \$1,450,000 payment is provided for the release and extinguishment of any pre-June 30, 2013 liability related to the maintenance and repair of the [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). The word “negligence” is conspicuously absent from this paragraph.

Understanding the actual scope of liability asserted by Spirit against Century “related” to maintenance and repair can be had by reference to Spirit’s complaint. Among the causes of action asserted against Century related to the maintenance and repair of the Verizon Parcel are:

- 1) Breach of the REA, alleging Century failed and refused to maintain and repair the common areas, HVAC systems, and roofing system (R. 75);
- 2) Negligence, alleging Century breached its duties to maintain and repair the property and failed to take corrective actions (R. 78–79);

3) South Carolina Unfair Trade Practices Act, alleging Century intentionally failed and refused to perform maintenance and repair work on the property before and since November 30, 2010 (R. 80);

4) Fraud, alleging Century knew it was legally obligated to make repairs to the HVAC system, roof system, and structural components of the Verizon Parcel under the REA, but purposely ignored or refused to make such repairs, knowing such failure would cause significant damage to the Verizon Parcel (R. 82);

5) Constructive Fraud, alleging Century made false, material statements about maintenance and repairs to the Verizon Property and intended for Spirit to rely on those statements (R. 84);

6) Breach of Contract Accompanied by a Fraudulent Act, alleging Century's breaches of contract, which included the failure to maintain and repair the property, were made with a fraudulent intent (R. 84);

7) Negligent Misrepresentation, alleging Century falsely represented to Spirit that it would use its best efforts in fulfilling its obligation to maintain and repair the HVAC system, roof system, and structural components of the Verizon Parcel (R. 84-85);

8) Restitution/Unjust Enrichment, praying the court establish a constructive trust over Century's assets to pay for repairs to the HVAC system, roof system, and

structural components of the Verizon Parcel that were damaged by Century's failure to perform maintenance and repairs (R. 86);

9) Civil Conspiracy, alleging Century and its co-defendants agreed to injure Spirit by violating the REA with respect to management and maintenance of the Verizon Parcel and common areas (R. 87);

10) Breach of Warranty, alleging Century expressly and impliedly warranted its respective services would be performed in a careful, diligent, and workmanlike manner, but provided maintenance and repair services on the Verizon Parcel that were negligent, defective, and unworkmanlike causing damages in excess of \$3 million to the HVAC system, roof system, structural components, and interior of the Verizon Parcel (R. 88–89);

11) Nuisance, alleging that since taking possession of the property, Century failed to maintain and repair the roof over the Verizon Parcel, performed maintenance in an unworkmanlike and deficient manner, and refused to correct deficient work, causing water and mold damage to the Verizon Parcel (R. 90); and

12) Trespass, alleging Century intentionally neglected its duties to maintain and repair the roof and knew of water intrusion issues at the Verizon Parcel but intentionally refused to remedy the situation in order to avoid costs for repairs (R. 91).

It is clear Century's liability "related to the maintenance and repair" of the Verizon Parcel embraces a bounty of claims, only one of which—negligence—would be eligible for contribution under the Act. Therefore, the only conclusion to be drawn from the Settlement Agreement is the \$1.45 million payment was made to extinguish liability for numerous causes of action asserted against Century, including those claims for which the Act does not provide for contribution.

Thus, the trial court's grant of summary judgment was proper based on the plain language of section 15-38-20(C), which provides, "There is no right of contribution in favor of any tortfeasor who has intentionally caused or contributed to the injury or wrongful death." S.C. Code Ann. § 15-38-20(C). Based on these facts, the trial 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 causes of action. 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 was made to extinguish liability for Century's non-tortious behavior only.<sup>4</sup> Therefore, the court of appeals properly affirmed summary judgment as to Century's contribution claims.

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<sup>4</sup> It is important to note Century does not appeal from the trial court's interpretation of the Settlement Agreement. The trial court found the Settlement Agreement was a wholly integrated document and was a complete expression of the whole

Century claims equity is not served by such a harsh result, but Century could have avoided this outcome by carefully drafting the Settlement Agreement. To hold otherwise would subject Respondents to bearing the burden of paying for Century's fraud, breaches of contract, and misrepresentations—a result surely not tenable under the Act.

## **II. THE TRIAL COURT PROPERLY HELD RESPONDENTS AND CENTURY WERE NOT JOINT TORTFEASORS.**

It is factually undisputed the duty to repair and maintain the HVAC systems, roof systems, and structural components of the Verizon Parcel arose contractually from the REA. However, no party to this action has or had a legal duty or obligation to repair or maintain the roof systems or common areas of the Verizon Parcel indefinitely. Rather, each party was liable for repairing the Verizon Parcel during the timeframe in which each party respectively owned the Midtown Parcel. There is no evidence in the record that a legal duty on the part of the owner of the Midtown

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agreement of the parties. (R. 572). Based on this interpretation, the trial court ruled Century could not present additional evidence to vary the terms of the Settlement Agreement or delineate how it contemplated the apportionment of liability between allegations that may have been subject to contribution. Century has not challenged this holding nor has it alleged the Settlement Agreement is ambiguous. Therefore, the trial court's interpretation of the Settlement Agreement is the law of the case and may not be relitigated even if the case were to be remanded. *See Judy v. Martin*, 381 S.C. 455, 458, 674 S.E.2d 151, 153 (2009) (“Under the law-of-the-case doctrine, a party is precluded from relitigating, after an appeal, matters that were either not raised on appeal, but should have been, or raised on appeal, but expressly rejected by the appellate court.”).

Parcel to maintain or repair components of the Verizon Parcel arises independently of the REA. To adopt the argument proffered by Century that it and Respondents are joint tortfeasors would be to hold that, despite the terms of the REA, Respondents are liable for negligent repairs, failures to act, and misrepresentations that occurred after they each sold the Midtown Parcel and vacated the Richland Mall property. This could not be what the legislature intended when it enacted the Act.

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

While there are narrow exceptions to this rule, none of the cases cited by Century suggest the existence of any tort liability by Respondents in this case. South Carolina courts have recognized a contract may give rise to duties that will support

a tort action where there is a special relationship between the alleged tortfeasor and injured party. *See Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.*, 320 S.C. 49, 55, 463 S.E.2d 85, 88 (1995). That special relationship is found where professionals—doctors, lawyers, accountants, engineers—render their specialized services to clients. *See id.* at 55, 463 S.E.2d at 88–89 (collecting cases). No such special relationship existed between Respondents and Spirit because Respondents did not render professional services to Spirit, and Respondents were mere property owners, not specialized professionals with distinct professional duties to their clients. To adopt the argument proffered by Century would effectively erase the economic loss rule and subject every party to a contract to dual liability in tort and contract.

Regardless of the nature and existence of duties owed by Respondents, the record demonstrates the trial court properly held Respondents and Century were 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. The key characteristic among joint tortfeasors is that the parties owe the same duty of care to the injured party and share a common liability. *Vermeer*, 336 S.C. at 67, 518 S.E.2d at 309. If there is no common liability between the parties, a contribution action will not lie even if a settlement agreement purports to extinguish common liability against the party

against whom contribution is sought. *Id.* at 69, 518 S.E.2d at 309–10 (“Vermeer did not extinguish any liability of Wood/Chuck to Causey because no liability of Wood/Chuck to Causey existed to be extinguished. In the same vein, there was no ‘common liability’ that could have been discharged by the settlement agreement.... Vermeer could not discharge what did not exist.”).

In *Collins v. Bisson Moving & Storage, Inc.*, 332 S.C. 290, 504 S.E.2d 347 (Ct. App. 1998), a driver (Collins) was injured in an automobile accident with another driver (Wiles). After an ambulance arrived to transport Collins to the hospital, the ambulance was involved in a second car accident with an automobile owned by Bisson Moving & Storage, Inc. The court of appeals explained Wiles and Bisson were not joint tortfeasors jointly and severally liable for Collins’ injuries:

Bisson clearly has no liability for the first accident, and Wiles has no liability for the second accident. The amount Wiles paid to Collins was for the settlement of her own accident with Collins and was not made on behalf of Bisson. Moreover, Collins received different injuries in the two accidents. Joint and several liability arises only when two or more tortfeasors are responsible for a single injury.... That Wiles and Bisson were responsible for separate tortious acts resulting in separate injuries is immaterial to the jury’s award of \$600,000 to Collins from the accident with Bisson.

*Id.* at 306, 504 S.E.2d at 356.

Like the tortfeasors in *Collins*, the duties owed by both Century and Respondents to properly maintain the common areas and parking decks at the Richland Mall were temporally severable and would constitute separate injuries,

even assuming, *arguendo*, that Respondents were negligent in maintenance and repair of the 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) (emphasis added).

It is apparent the injuries caused by Century are temporally and tangibly severable from those injuries, if any, caused by Respondents years earlier. The injuries complained of by Spirit were attributable to breaches of the REA, improper maintenance and repairs, and failures to conduct repairs, cure defects, and honor warranties. These injuries occurred solely under Century's control. As the master of its complaint, Spirit expressly directed its claims to those injuries caused by Century's failures and breaches. *See Davis v. Monteith*, 289 S.C. 176, 182, 345 S.E.2d 724, 727 (1986) ("This Court will not, under the guise of liberal construction

of the pleadings, write into the complaint allegations that are not presented.”). Spirit’s case involved separate timeframes in which totally separate repairs and maintenance were involved that would, in turn, constitute separate injuries in relation to the time of Respondents’ ownership. As admitted by Century, Spirit only sought damages from Century for injuries occurring during the time Century owned the Midtown Parcel. Thus, the injuries complained of by Spirit were attributable solely to Century’s actions and inactions.

Respondents cannot be liable for injuries to Spirit caused by Century’s misrepresentations and failures to act upon Spirit’s requests for maintenance and repairs, nor may they be jointly liable for improper maintenance and repairs that occurred after they each sold the Midtown Parcel and extinguished their legal duties under the REA. The injuries complained of by Spirit must be born solely by Century.<sup>5</sup> Accordingly, the trial court properly ruled there was no joint tortfeasor relationship between Century and Respondents.

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<sup>5</sup> Century raises the inequity of carrying the “entire burden” of inherited liability. However, Century was not without recourse to avoid this outcome. First, Century could have secured its right to contribution, if any, by more carefully drafting the terms of the Settlement Agreement. Alternatively, at the outset of Spirit’s case, Century could have initiated a third-party complaint against Respondents pursuant to Rule 14, SCR, if it believed Respondents were liable to it for all or part of Spirit’s claims. Instead, Century agreed to a blanket settlement for all of its liability and now seeks to recover sums from Respondents which are not subject to contribution under the Act.

**III. THE TRIAL 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 this issue 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 trial 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. Thus, the trial court properly found Century is barred from maintaining a contribution action

against Richland under the common law rule regarding the acceptance of patent defects.

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

The court of appeals also declined to reach this issue 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 trial court did not err in finding the statute of repose an additional ground for summary judgment in favor of Windsor.

In its motion for summary judgment, Windsor argued Century's contribution claim was time-barred by the 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 statute of repose. The trial court agreed, finding any repairs made by Windsor occurred beyond the eight-year statute of repose.

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

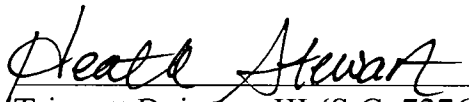
these considerations. Windsor's repairs enhanced the value of the property; required the investment of labor and money; and are permanently affixed to the real property. Moreover, Windsor's repairs to the property were substantially completed by November 4, 2005, when it sold the property and was relieved of further repair obligations. Lastly, despite Century's assertion the statute of repose is inapplicable because Windsor was in possession of the improvement complained of, the trial court properly granted summary judgment on the issue. 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 trial court properly found Century's claim against Windsor, if any, was extinguished by the statute of repose on November 5, 2013.

### **CONCLUSION**

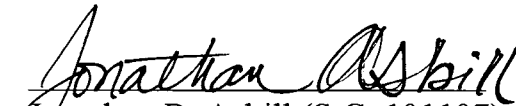
The trial court properly granted summary judgment to Respondents with respect to Century's contribution claims. The Settlement Agreement between Century and Spirit does not delineate what portion of the money paid by Century is compensation for non-intentional torts and what portion is for breach of contract, fraud, unfair trade practices, and intentional torts, among others. Furthermore, there is no way to allocate any of the settlement money paid by Century to any of the allegedly negligent repairs cited by Century. 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 trial court's grant of summary judgment, and the instant case does not present any circumstances warranting departure from that precedent. Accordingly, Respondents respectfully request the Court affirm the court of appeals.

Respectfully submitted,

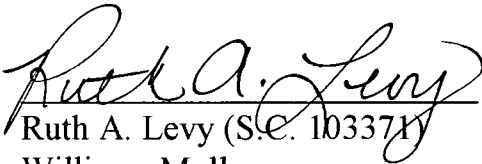


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October 4<sup>th</sup>, 2019

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

---

APPEAL FROM RICHLAND COUNTY  
COURT OF COMMON PLEAS

L. Casey Manning, Circuit Court Judge

---

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.

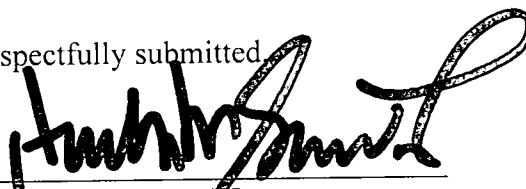
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**CERTIFICATE OF COMPLIANCE WITH RULE 211(b)**

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Respondents hereby certify that they have complied with the requirements of Rule 211(b),  
SCACR.

Respectfully submitted



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October 4, 2019

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**PROOF OF SERVICE OF BRIEF OF RESPONDENTS**

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The undersigned hereby certifies that he has served or caused to be served a copy of the foregoing Brief of Respondents upon the below named party, this the \_\_\_\_\_ day of October, 2019, addressed as follows:

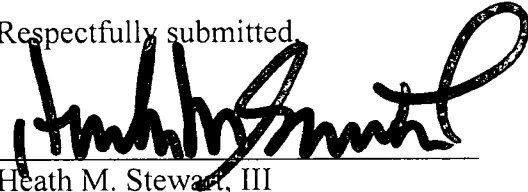
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S.C. SUPREME COURT

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