

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

Case No. 2014-CP-40-07037

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S.C. SUPREME COURT

Century Capital Group, LLC,

Appellant,

v.

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

Respondents.

**RECORD ON APPEAL
VOLUME II**

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STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE GENERAL COURT OF JUSTICE
FIFTH JUDICIAL CIRCUIT
CIVIL ACTION NO.: 14-CP-40-07037

CENTURY CAPITAL GROUP, LLC,

Plaintiff

v.

MIDTOWN DEVELOPMENT GROUP,
LLC, RICHLAND JOINT VENTURE
GROUP, LLC, WINDSOR RICHLAND
MALL, LP and BRC RICHLAND, LLC,

Defendants.

**MEMORANDUM IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT**

Defendant Windsor Richland Mall, LP ("Windsor") respectfully submits this memorandum in support of its Motion for Summary Judgment as to the claims of Plaintiff Century Capital Group, LLC ("Century").

I. Pertinent Background.

Prior to 2005, the Richland Fashion Mall was split into four distinct parcels, two of which are relevant—the "Midtown Parcel" and the "Verizon Parcel."¹ (2nd Am. Compl. ¶ 7.) As of September 2005, the Midtown Parcel was owned by Windsor and the Verizon Parcel was owned by Defendant BRC Richland, LLC ("BRC"). (2nd Am. Compl. ¶¶ 7–8.)

On or about September 7, 2005, Windsor, as then-owner of the Midtown Parcel, and BRC, as then-owner of the Verizon Parcel, negotiated and executed that certain Reciprocal Easement, Covenant, Operation and Restriction Agreement and Declaration that is attached as Exhibit 1 to the Second Amended Complaint (the "REA"). (2nd Am. Compl. ¶ 9.) Among other things, the REA created a contractual duty on behalf of the owner of the Midtown Parcel to perform and pay for maintenance and repairs to the Common Areas and to the HVAC system,

¹ At times, some of the parties refer to the "Verizon Parcel" as the "Spirit Parcel." These terms are interchangeable.

roof system and structural components of the Verizon Parcel, until November 30, 2010. (2nd Am. Compl. ¶ 9.)

Subsequently, the ownership of the Midtown Parcel changed several times, as follows:

- On or about November 4, 2005, Windsor conveyed the Midtown Parcel to Defendant Midtown Development Group, LLC (2nd Am. Compl. ¶ 10);
- On or about May 25, 2007, Defendant Midtown Development Group, LLC conveyed the Midtown Parcel to Defendant Richland Joint Venture Group, LLC (2nd Am. Compl. ¶ 11); and
- On or about February 16, 2010, Defendant Richland Joint Venture Group, LLC conveyed 79% of its interest in the Midtown Parcel to Century and the remaining 21% to a non-party (2nd Am. Compl. ¶ 13), and, on the next day, that non-party conveyed its 21% interest to Century, making Century the 100% owner of the Midtown Parcel (2nd Am. Compl. ¶ 13).

Similarly, after the REA went into effect, the ownership of the Verizon Parcel changed, but only once—on or about September 12, 2005, BRC conveyed the Verizon Parcel to Spirit SPE Columbia, LLC, which is not a party to this matter (“Spirit”).

On or around November 30, 2010, non-party Spirit, as owner of the Verizon Parcel, initiated litigation against Century, as owner of the Midtown Parcel, and certain principals of Century, in that civil action captioned Spirit SPE Columbia, LLC v. Century Capital Group, LLC (Richland County Civil Action No. 2010-CP-40-8407) (the “Underlying Suit”). Windsor was not party to the Underlying Suit. In the Underlying Suit, Spirit alleged 17 causes of action, and made allegations including, among others, breach of the REA, negligence, unfair trade practices and fraud, based on contentions that, among other things, Century had developed a pattern of

overbilling Spirit for certain costs, and Century had failed to fulfill its contractual obligations under the REA to perform certain maintenance and repairs of the Verizon Parcel. Attached hereto as Exhibit 1 is a copy of Spirit's Third Amended Complaint in the Underlying Suit.

During or around November of 2013, Century and Spirit settled the Underlying Suit, and entered a Settlement Agreement and Mutual Release (the "Settlement"). Attached hereto as Exhibit 2 is a copy of the Settlement. The Settlement provided that, among other things, Century would pay Spirit the amount of \$1,450,000.00. At Paragraph (a)(6), the Settlement states that:

The parties agree that the \$1,450,000 payment is provided for the release and extinguishment of any pre-June 30, 2013 liability related to the maintenance and repair of the [Verizon Parcel] and the remaining consideration provided by [Century] under this Settlement Agreement is provided for the pre-June 30, 2013 settlement of the CAM, accounting, and other claims asserted by Spirit.

Other than this paragraph, the Settlement in no way delineates the reason for the payment of \$1,450,000.00—i.e. the Settlement neither explains if the payment is pursuant to the breach of contract claims, the negligence claims, or any of the several other claims brought against Century by Spirit, nor does the Settlement explain how the payment may be allocated among any particular maintenance or repair failure.

II. The Contribution Claim of Century.

The sole cause of action in the immediate action is for contribution, pursuant to the South Carolina Uniform Contribution Among Tortfeasors Act, Section 15-38-10 et seq., Code of Laws, regarding the \$1,450,000.00 payment that Century made to Spirit pursuant to the Settlement. (2nd Am. Compl. ¶ 21.)

The Uniform Contribution Among Tortfeasors Act only applies to tort claims. *See, e.g.*, §15-38-20, Code of Laws. Accordingly, to the extent that Century settled breach of contract, as opposed to tort, claims with Spirit, Century plainly has no right to recover in the current action.

Sensitive to the need to create the appearance of some of sort of duty in tort, Century contends that the Defendants "negligently repaired the Verizon Parcel, common areas, roof and HVAC system, thus subjecting [Century] to claims by Spirit, the current owner of the Verizon Parcel." (2nd Am. Compl. ¶ 15.)

That is, Century contends that each owner of the Midtown Parcel, during its period of ownership, undertook repairs of the Verizon Parcel, as the REA required of the owner of the Midtown Parcel, but performed such repairs negligently, thereby giving rise to a tort. That this is the premise of Century's contribution claim is confirmed by various answers of Century to Requests for Admission sent by Defendant Richland Joint Venture Group, LLC, including the following:

3. Admit the legal duty of Richland Joint Venture Group, LLC to maintain and repair the common areas, HVAC systems and roof systems of the [Verizon] Parcel at Richland Mall existed from May 25, 2007 until February 15, 2010.

RESPONSE: Admitted. Subject to this admission, Century Capital Group, LLC asserts the Richland Joint Venture Group, LLC made numerous negligent and defective repairs to the HVAC systems, roof systems and other systems on the Spirit Parcel creating liability in tort which Century Capital Group, LLC extinguished through payment and a release from the owner of the [Verizon] Parcel.

7. Admit that Century Capital Group, LLC was a successor owner of the Midtown Parcel at Richland Mall with regards to Richland Joint Venture Group, LLC and that Century Capital Group, LLC is not legally responsible for any deficient maintenance at Richland Mall that would have occurred prior to its ownership of the Midtown Parcel at Richland Mall on February 16, 2010.

RESPONSE: Denied. The Request misconstrues the duties of the owners of the Midtown Parcel. The REA gave rise to certain duties to maintain property within the Richland Mall. Some maintained areas of the Richland Mall were designated as common area and some of the maintained property was owned by the [Verizon] Parcel owner yet was not designated as common area. Due to the nature of the maintenance and the systems and structures in place at the Richland Mall, multiple owners of the Midtown Parcel participated in designing and maintaining the same systems and all owners of the Midtown Parcel provided work on the same systems giving rise [to] claims and damages to the [Verizon] Parcel for which Century Capital Group, LLC procured extinguishment of all tort claims.

8. Admit that the legal duty owed by Richland Joint Venture Group, LLC to Spirit SPE Columbia, LLC to maintain and repair the common areas, HVAC systems and roof systems at Richland Mall terminated on February 15, 2010 when it sold its full ownership interest in the Midtown Parcel.

RESPONSE: Denied as stated. Richland Joint Venture Group, LLC undertook certain repairs and maintenance within the Richland Mall. Richland Joint Venture Group, LLC owed a duty to make such maintenance in [sic] repairs in a safe, workmanlike, prudent, proper manner with regard to the [Verizon] Parcel areas that were not common area. It is admitted that Richland Joint Venture Group, LLC owed no duty to make new repairs to portions of the [Verizon] Parcel that were not damaged after it sold its interest in the Midtown Parcel. Nothing within this response should be construed to admit that Richland Joint Venture Group, LLC did not have an obligation to make proper and appropriate repairs with regard to the Spirit Property or that Richland Joint Venture Group, LLC was not obligated or responsible for defective repairs and maintenance to the [Verizon] Parcel that it undertook while it owned the Midtown Parcel.

12. Admit that Article 3.2 of the Purchase and Sale Agreement between Richland Joint Venture Group, LLC and W.B. Walkup of Century Capital Group, LLC expressly provided that Richland Mall and its HVAC systems had defects and required ongoing maintenance, that Richland Mall was being sold subject to such defects, and that the "Buyer acknowledges that the Mall roof

develops leaks from time to time and that the repair of such leaks will be required on an ongoing basis."

RESPONSE: Admitted. However, these issues were not the basis for the underlying suit or this Contribution action. The defective work provided by the Defendants in this suit pertained to defective repairs and maintenance made to the [Verizon] Parcel owner's property that was not common area. No portion of the underlying suit or Contribution claim pertained to defective work or maintenance to the Midtown Parcel or common areas.

13. Admit that Century Capital Group, LLC was invited under Article 3.2 of the Purchase and Sale Agreement between Richland Joint Venture Group, LLC and W.B. Walkup of Century Capital Group, LLC dated December 22, 2009 to examine and review the condition of Richland Mall to assess the extent of the disclosed defects and maintenance requirements.

RESPONSE: Admitted. However, these issues were not the basis for the underlying suit or this Contribution action. The defective work provided by the Defendants in this suit pertained to defective repairs and maintenance made to the [Verizon] Parcel owner's property that was not common area. No portion of the underlying suit or Contribution claim pertained to defective work or maintenance to the Midtown Parcel or common areas.

(Century Responses to Requests for Admission of Richland Joint Venture Group ¶¶ 3, 7, 8, 12,

13.) A copy of Century's response to the Requests for Admission of Richland Joint Venture Group is attached hereto as Exhibit 3.

III. Standard for Summary Judgment.

The trial court may properly grant summary judgment when the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that 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), South Carolina Rules of Civil Procedure.

IV. The Statute of Repose Bars Recovery from Windsor.

The Statute of Repose completely bars any recovery from Windsor in this matter.

The Statute of Repose, found at Section 15-3-640, Code of Laws, provides that:

No actions to recover damages based upon or arising out of the defective or unsafe condition of an improvement to real property may be brought more than eight years after substantial completion of the improvement. For purposes of this section, an action based upon or arising out of the defective or unsafe condition of an improvement to real property includes:

...

(2) an action to recover damages for the negligent construction or repair of an improvement to real property;

...

(6) an action for contribution or indemnification for damages sustained on account of an action described in this section

This version, the current version, of the Statute of Repose went into effect on July 1, 2005.

As the REA was not executed until September 7, 2005, any repairs of the Verizon Parcel undertaken by Windsor pursuant to the REA necessarily occurred after July 1, 2005 (i.e. any such repairs were after the current version of Section 15-3-640, quoted above, went into effect).²

As Windsor sold the Midtown Parcel on November 4, 2005, any repairs of the Verizon Parcel undertaken by Windsor pursuant to the REA necessarily occurred more than eight years prior to November 10, 2014 (i.e. any such repairs were more than eight years prior to the filing of the immediate lawsuit).

Accordingly, Century's claim against Windsor is barred by the Statute of Repose, and no recovery may be had of Windsor by Century on its claim under the Uniform Contribution Among Tortfeasors Act. *Capco of Summerville, Inc. v. J.H. Gayle Const. Co.*, 368 S.C. 137, 628 S.E.2d 38 (2006) (holding that when any claim against the alleged joint tortfeasor is barred by

² The reason this is important is that the prior version of the Statute of Repose provided for a thirteen year term, whereas the current version, which is applicable to this case, provides for an eight year term.

the Statute of Repose, the settling tortfeasor cannot maintain a contribution action against the alleged joint tortfeasor).

Therefore, summary judgment should be granted in favor of Windsor.

V. Regardless, Century Cannot Recover on a Contribution Claim by Century.

Even if the claims against Windsor were not barred by the Statute of Repose, no recovery in contribution can be had based on the Settlement due to the fact that the Settlement gives no indication as to how the amount paid for the release related to any particular claims brought, or injuries suffered, by Spirit.

That is, while the Settlement provides that the \$1,450,000.00 payment was "provided for the release and extinguishment of any pre-June 30, 2013 liability related to the maintenance and repair of the" Verizon Parcel, the Settlement does not allocate such liability among the breach of contract claim (definitely not subject to contribution) or the the negligence claim (possibly subject to contribution).

Accordingly, Century cannot establish the amount, if any, subject to its contribution claim, and summary judgment must be granted on the contribution claim. *See Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 70-72, 518 S.E.2d 301, 310-311 (Ct. App. 1999) (affirming trial court's grant of summary judgment on contribution claim because the settlement agreement at issue did not place a specific value on the claim that would be subject to contribution, and, accordingly, the court could not determine whether the party seeking contribution actually paid more than its pro rata share of liability).³

Moreover, similarly, the Settlement does not address any specific injury for which the payment of \$1,450,000 was made. However, a recovery under the Uniform Contribution Among

³ Windsor incorporates by reference the arguments of the Memorandum in Support of Motion for Summary Judgment by Defendant Richland Joint Venture Group, LLC regarding the fact that the Settlement does not allocate the payment in such a way that a contribution action can be maintained.

Tortfeasors Act requires the party from whom recovery is sought to have been "jointly or severally liable in tort for the *same injury*" with the party who seeks contribution. § 15-38-20(A), Code of Laws (emphasis added). Century bases its case on each of the Defendants having performed negligent repairs to the Verizon Parcel. However, there is no evidence that all Defendants performed negligent repairs on the same portion of the Verizon Parcel, or otherwise contributed to a single injury. *See Collins v. Bisson Moving & Storage, Inc.*, 332 S.C. 290, 306, 504 S.E.2d 347, 356 (Ct. App. 1998) (explaining that two tortfeasors are not jointly and severally liable unless they are "responsible for a *single injury*").

Rather, the finder of fact would be left to engage in impermissible guesswork as to what amounts of the payment pertained to any of the given, allegedly negligent, repairs performed by the several Defendants over the several years.

Accordingly, summary judgment should be granted on Plaintiff's claim for contribution.

VI. Century Cannot Recover Under Section 27-1-15, Code of Laws.

In the decretal section of the Second Amended Complaint, Century asks the Court to award it "costs and attorney's fees pursuant to SC Code 27-1-15."

Section 27-1-15, Code of Laws, provides that:

Whenever a contractor, laborer, design professional, or materials supplier has expended labor, services, or materials under contract for the improvement of real property, and where due and just demand has been made by certified or registered mail for payment for the labor, services, or materials under the terms of any regulation, undertaking, or statute, it is the duty of the person upon whom the claim is made to make a reasonable and fair investigation of the merits of the claim and to pay it, or whatever portion of it is determined as valid, within forty-five days from the date of mailing the demand. If the person fails to make a fair investigation or otherwise unreasonably refuses to pay the claim or proper portion, he is liable for reasonable attorney's fees and interest at the judgment rate from the date of the demand.

Century is a mall landlord. Century is neither a contractor, a laborer, a design professional, nor a materials supplier. Century seeks to recover from the Defendants, in contribution, for money it paid to Spirit. Century seek to recover from the Defendants for neither labor, services, nor materials.

Section 27-1-15 is wholly inapplicable to the matter before the Court, and judgment as a matter of law should be granted against Century as to any claim for recovery under Section 27-1-15.

VII. Conclusion.

Summary judgment should be granted against Plaintiff Century Capital Group, LLC as to all claims of the Second Amended Complaint.

WINDSOR RICHLAND MALL, LP,
by and through its attorney,


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Wilmington, North Carolina
May 5, 2015

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this the 5th day of May, 2015, he has caused a copy of the foregoing **MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT** to be served upon the other Parties to this action by mailing a copy thereof to the below addresses, which are the last addresses known to him:

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Edward James Coyne III

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

Spirit SPE Columbia, LLC,

Plaintiff,

vs.

Century Capital Group, LLC, Walkup
Management, Inc., Don E. Taylor Realty
Company, Donald E. Taylor, Individually,
William D. Walkup, Individually.

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT
CIVIL ACTION NUMBER: 2010-01-0407

REC'D AND COUNTY
FILED
SEP 19 AM 11:2
J. PETITE W. MCBRIDE
C.C.P. & G.S.

PLAINTIFF SPIRIT SPE COLUMBIA,
LLC'S THIRD AMENDED COMPLAINT

The Plaintiff, above named, complaining of Defendants, above named, alleges
and says as follows:

JURISDICTION AND VENUE

1. Plaintiff Spirit SPE Columbia, LLC ("Spirit") is a Delaware limited
liability company that owns a tract or parcel of land (the "Spirit Parcel") situated in The
City of Forest Acres, County of Richland, South Carolina, within what is commonly
known as Richland Fashion Mall. The parcel is more particularly described on Exhibit
"B" to the Reciprocal Easement, Covenant, Operation and Restriction Agreement and
Declaration attached as hereto as Exhibit 1.

2. Upon information and belief, Defendant Century Capital Group, LLC
("Century") is a South Carolina limited liability company that owns a tract or parcel of
land (the "Shopping Mall Parcel") situated in The City of Forest Acres, County of
Richland, South Carolina, within what is commonly known as Richland Fashion Mall.
The parcel is more particularly described on Exhibit "A" to the Reciprocal Easement,



Covenant, Operation and Restriction Agreement and Declaration attached hereto as Exhibit 1.

3. Upon information and belief, Defendant Walkup Management, Inc. ("Walkup Management"), is a corporation organized and existing under the laws of the State of South Carolina with its principal place of business in Richland County, South Carolina.

4. Upon information and belief, Defendant Don E. Taylor Realty Company ("Taylor Realty"), is a sole proprietorship with its principal place of business in Richland County, South Carolina.

5. Upon information and belief, Defendant Donald E. Taylor, is a citizen and resident of Richland County, South Carolina.

6. Upon information and belief, Defendant William D. Walkup, is a citizen and resident of Richland County, South Carolina.

7. Venue is appropriate in Richland County, South Carolina because the Defendants reside in Richland County, and most of the acts giving rise to the causes of action contained herein occurred in Richland County, South Carolina.

GENERAL ALLEGATIONS

8. A Reciprocal Easement, Covenant, Operation and Restriction Agreement and Declaration ("REA") filed at Richland County Deed book 1097 page 2024 on September 12, 2005, which is attached hereto as Exhibit "2" and made a part hereof, runs with the land and sets forth certain agreements, easements, covenants, restrictions rights and obligations of the owners of the Shopping Mall Parcel and the Spirit Parcel. The REA specifies, among other things, the owner of the Shopping Mall Parcel is responsible

for performing and paying for all maintenance and repairs to the Common Areas and the maintenance and repairs of the HVAC, roof system and structural components of the Spirit Parcel prior to November 30, 2010.

9. Since taking possession and operating as manager of the Shopping Mall Property, Defendants have failed to maintain and repair the Spirit 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 the Defendants' failure to perform as required by the REA, Plaintiff has incurred, and will incur in the future, costs to repair and maintain the HVAC system, roof and other structural systems in the Spirit Parcel and other areas considered common areas under the REA. In addition, Plaintiff has suffered water and mold damage to the interior spaces of the Spirit Parcel as a result of Defendants' failure to properly maintain the Spirit property.

10. All of these costs were incurred as a direct result of Defendants' past and ongoing failure to maintain the Spirit Property as required by the REA.

11. In addition, Plaintiff has been billed for items, including but not limited to "management fees" that were not within the REA and were created as a scheme by which Defendants attempted to enrich themselves without adding any benefit to Plaintiff's ownership and operation of the Spirit Parcel.

12. Notwithstanding that the Defendants' actions were fraudulent, that Defendants have attempted to bill Plaintiff in excess of the amounts allowed under the

REA, and that Defendants knowingly failed and refused to abide by the terms of the REA, specifically as to maintenance of the roof, HVAC and other common areas, Defendants filed liens and a Lis Pendens against the Spirit Property. Defendants never had a legal right to file the liens and Lis Pendens, and their doing so was wrongful, slandered the title of the Plaintiff's property, and constituted a frivolous lien under South Carolina law.

FOR A FIRST CAUSE OF ACTION
(Breach of the REA)

13. The Plaintiff re-alleges and incorporates by reference the allegations of the preceding paragraphs.

14. Century failed to properly maintain the common areas and the HVAC systems, roofing system and structural components of the Spirit Parcel prior to November 30, 2010.

15. Spirit demanded that Century maintain and/or repair the common areas, HVAC systems and roofing system on the Spirit Parcel prior to November 30, 2010.

16. Century knew that the repair work demanded by Spirit needed to be done prior to November 30, 2010.

17. Century failed to and refused to maintain and/or repair the common areas, HVAC systems and roofing system if the Spirit Parcel, and is therefore in breach of the REA.

18. Since November 30, 2010, Century continues to refuse to maintain and repair some common areas of the Mall Property, and maintains other common areas of the Mall Property in a substandard manner in violation of the REA.

expenses allowed is a market rate management fee paid to a third party to manage the common areas.

26. Century is charging Spirit and other parcel owners for expenses that do not constitute legitimate CAM expenses as defined in the REA.

27. Spirit has disputed the legitimacy of amounts charged by Century as CAM expenses.

28. However, in order to have Spirit satisfy the liens filed against its ownership interest in the property, dismiss the counterclaim for foreclosure and remove the Lis Pendens, Spirit paid Century all amounts Century claims it is owed for reimbursement of CAM expenses without waiving its rights to seek a declaration from this Court as to what amounts are properly owed as CAM.

29. Plaintiff seeks a declaration by this Court as to what, if any, additional amounts are owed to Century as reimbursement for legitimate CAM expenses as provided under the terms of the REA. In addition, Spirit seeks a declaration by this Court as to what amounts Century must repay Spirit for illegitimate CAM charges levied by Century.

30. The Defendants refuse to repair their own roof, repair common areas and maintain areas that are defined as common areas by the REA. Their failure to do so is causing damage to Spirit's property and disruption to the business activities of Plaintiff's tenants.

31. Century is also charging Spirit for providing cooling water used in the operation of a cooling water tower situated on Spirit's property. These charges are not permitted under the REA.

32. Defendants have hired entities that they control to act as "management" companies that are not "third parties" as contemplated by the REA, that have an inherent conflict of interest because they are owned by the members of Century, and that have failed to properly maintain the Mall property as required by the REA.

33. Therefore, Plaintiff seeks a declaratory judgment as to (1) what charges constitute legitimate CAM charges under the REA and the proper amounts that can be charged; (2) what areas of the Mall Property that Defendants are required to maintain as common areas under the REA; (3) whether Spirit is required to pay a cooling water charge under the REA; and (4) whether Defendants can appoint themselves or their self-owned business entities as property managers under terms of the REA. The Plaintiff also seeks an Order from this Court requiring the Defendants to repair their roof and common areas so that water does not infiltrate Plaintiff's property and cause damages.

FOR A THIRD CAUSE OF ACTION
(Negligence)

34. The Plaintiff re-alleges and incorporates by reference the allegations of the preceding paragraphs.

35. Defendants owed a duty to Plaintiffs under the REA to maintain the Spirit Parcel and other parts of the Mall Property in compliance with applicable building codes, industry standards and the terms of the REA.

36. Defendants breached those duties by failing to maintain the Spirit Property in one or more of the following particulars:

- (a) In failing to properly maintain and repair the HVAC, roof system and structural components;

- (b) In failing to perform repair work recommended by experts engaged to determine what work needed to be done to stop the roof from leaking on the Spirit parcel;
- (c) In failing to use adequate and proper building materials and techniques for maintenance that was undertaken;
- (d) In failing to protect interior spaces of the Spirit Parcel and common areas from water damage, mold damage and corrosion;
- (e) In failing to use due care in the maintenance of the Spirit Property;
- (f) In failing to properly maintain the common areas of the Mall Property as required by the REA; and
- (g) In failing to use that degree of care and caution which a reasonable and prudent property manager would have exercised in the maintenance of like structures.

37. Furthermore, Defendants owe a duty to repair and maintain their own roof and property to prevent water from entering Spirit's property and causing water damage and business interruption to Spirit's tenants.

38. Despite repeated demands to repair and maintain their property, the Defendants have failed to take corrective action, which is causing continuing and repeated damage to Spirit's property, resulting in damages that are continuing and repetitive in nature.

39. As a direct and proximate result of Defendants' negligent, reckless, willful and wanton conduct, Plaintiff sustained actual damages, including property damage to the Spirit Parcel and their personal property, and the Spirit Parcel and its occupants were and continue to be subjected to continuous and repeated exposure to harmful conditions, as a result of the acts and/or omissions of all Defendants that combined and concurred to cause and have continued to cause Plaintiff harm, causing damages, necessitating repairs and causing Plaintiff to lose the beneficial use of portions of their property and devaluing

said property; accordingly, Plaintiff is entitled to actual and punitive damages in an amount to be determined by the jury.

FOR A FOURTH CAUSE OF ACTION
(Unfair Trade Practices)

40. The Plaintiff re-alleges and incorporates by reference the allegations of the preceding paragraphs.

41. The actions of all of the Defendants in appointing themselves property managers of the Mall Property created an inherent conflict of interest, which, in turn, allowed Defendants to create a scheme by which they fraudulently charged Plaintiff and other tenants excessive fees and costs, which were not allowed under the REA. In addition, the Defendants intentionally failed and refused to perform maintenance and repair work on the Spirit Parcel and other common areas of the Mall Property before and since November 30, 2010.

42. In addition, Defendants filed liens against Spirit's ownership interest and intentionally refused to satisfy those liens once the liens were paid for the purpose of injuring Spirit.

43. Such actions constitute unfair and deceptive acts or practices in the conduct of trade or commerce and violate the South Carolina Unfair Trade Practices Act § 39-5-20 of the Code of Laws of South Carolina.

44. These acts are capable of repetition and affect the public interest.

45. As a result of Defendants' violation of the Unfair Trade Practices Act, Plaintiff sustained actual damages including paying for fees and costs outside of the REA, and were forced to defend against a Lis Pendens that was wrongfully filed and

includes numerous, inflated charges that resulted from Defendants' appointing themselves as managers of the Mall Property.

46. Defendants' actions were willful and Plaintiff is thereby entitled to treble damages and reasonable attorneys' fees as provided in the statute.

FOR A FIFTH CAUSE OF ACTION
(Fraud)

47. The Plaintiff re-alleges and incorporates by reference the allegations of the preceding paragraphs.

48. Prior to the REA, Defendants represented to Plaintiff that they would provide maintenance and repairs to the Mall Property and, in particular, the Spirit Parcel, including maintenance and repairs of the HVAC, roof system and structural components of the Spirit Parcel.

49. Subsequent to the REA, Plaintiff made repeated requests for repairs and routine maintenance services on the Spirit Parcel. Defendants continued to represent to Plaintiff that they would provide maintenance and repairs to the Mall Property and the Spirit Parcel, including maintenance and repairs of the HVAC, roof system and structural components of the Spirit Parcel.

50. Subsequent to the REA, Defendants represented to Plaintiff that Plaintiff was liable to Defendants for HVAC cooling water charges under the terms of the REA. Defendants also informed Plaintiff on numerous occasions that any failure to pay for HVAC cooling water charges constituted a breach of the REA. Defendants have threatened to terminate cooling water service to the Spirit Parcel, claiming that Plaintiff is obligated to pay such charges pursuant to the REA.

51. These representations were false in the following respects:

a) Defendants have not provided accurate and truthful responses to Plaintiff's repeated requests for maintenance and repairs to the Mall Property and the Spirit Parcel, including maintenance and repairs of the HVAC, roof system and structural components of the Spirit Parcel;

b) Defendants accepted Plaintiff's payment of their CAM charges, while simultaneously refusing and failing to make repairs to the HVAC, roof system and structural components of the Spirit Parcel;

c) Defendants knew they were legally obligated to make repairs to the HVAC, roof system and structural components of the Spirit Parcel under the terms of the REA, but purposely ignored and/or refused to make said repairs;

d) Defendants knew their failure to make repairs to the HVAC, roof system and structural components of the Spirit Parcel under the terms of the REA would cause significant damage to the Spirit Parcel;

e) Defendants knew that they were not allowed to charge Plaintiff for cooling water services under the REA. Despite this knowledge, Defendants continued to charge Plaintiff for cooling water service under the guise of CAM charges and have threatened to terminate cooling water service to the Spirit Parcel when they know they have no grounds, contractually or otherwise, for doing so.

52. These representations were material, in that they were the basis of Plaintiff agreeing to enter into the REA with Defendants, Plaintiff's payment of CAM fees to Defendants for the very purpose of providing maintenance and repair services to the Spirit Parcel, and, moreover, entrusting Defendants with the maintenance and repair of the common areas of the Spirit Parcel and Mall Property in general.

53. Upon information and belief, when Defendants made these representations, they either had knowledge of their falsity, or recklessly disregarded for the falsity of the representations.

54. Defendants manifested their intent that Plaintiff act upon these representations through their actions and conduct. Specifically, Defendants intended to enter into the REA with Plaintiff to induce Plaintiff to pay CAM fees to the Defendants, and to entrust Defendants with management of the maintenance and repair of the common areas of the Spirit Parcel and Mall Property.

55. Plaintiff was ignorant of the falsity of Defendants' representations.

56. Plaintiff relied on these representations, as demonstrated by Plaintiff's actions of entering into the REA with Defendants, continuous payment of Defendants' CAM charges, and entrusting Defendants with the maintenance and repair of the common areas of the Spirit Parcel and Mall Property.

57. Plaintiff had a right to rely on these representations as Plaintiff was unable to uncover the falsity with any further due diligence, Defendants were in sole possession of information regarding the truthfulness of these representations, and Defendants were bound by fiduciary duties to Plaintiff when making these representations.

58. Plaintiff has suffered significant economic losses as the direct and proximate result of Defendants' false representations.

FOR A SIXTH CAUSE OF ACTION
(Constructive Fraud)

59. The Plaintiff re-alleges and incorporates by reference the allegations of the preceding paragraphs.

60. In the alternative that Defendants did not have a dishonest purpose or intent to deceive Plaintiff when making the aforesaid representations, Plaintiff asserts that Defendants nevertheless made false, material statements as described in paragraphs 44 to 55.

61. Defendants intended for Plaintiff to rely upon these statements, and Plaintiff did so rightly rely without on them knowledge of their falsity, which could not be uncovered by any further due diligence by Plaintiff. Plaintiff has suffered significant economic losses as the direct and proximate result of Defendant's false representations.

FOR A SEVENTH CAUSE OF ACTION
(Breach of Contract accompanied by a Fraudulent Act)

62. The Plaintiff re-alleges and incorporates by reference the allegations of the preceding paragraphs.

63. Defendants aforesaid breaches of contract were accompanied by fraudulent actions and statements to Plaintiff.

64. Defendants held a fraudulent intent when making the fraudulent acts and statements to Plaintiff while breaching the aforesaid contract.

FOR A EIGHTH CAUSE OF ACTION
(Negligent Misrepresentation)

65. The Plaintiff re-alleges and incorporates by reference the allegations of the preceding paragraphs.

66. Defendants falsely represented to Plaintiff that they would make best efforts in their fulfilling their obligation to maintain and repair the HVAC, roof system and structural components of the Spirit Parcel.

67. Defendants had a pecuniary interest in making these representations as they were positioned to make financial gain as a result of the continued operation of the Spirit Parcel and Plaintiff's payment of CAM charges.

68. Defendants owed a duty of care to the Plaintiff because:

- a) Of the special and fiduciary relationships between Defendants and Plaintiff;
- b) Defendants undertook to act towards Plaintiff on these matters; and
- c) Defendants held a pecuniary interest in and peculiar knowledge of the subject of the representations.

69. Defendants failed to exercise due care in making these representations to Plaintiff.

70. Plaintiff's reliance on the false representations was justifiable in light of the circumstances discussed in the preceding paragraphs and the relationship between the parties.

71. As a proximate result of the Defendants' actions, the Spirit Parcel sustained significant damage and Plaintiff suffered significant financial loss.

FOR A TENTH CAUSE OF ACTION
(Restitution/Unjust Enrichment)

72. The Plaintiff re-alleges and incorporates by reference the allegations of the preceding paragraphs.

73. In the alternative that the Plaintiff has no available remedy at law, Plaintiff has conferred a non-gratuitous benefit on Defendants in the form of payment of CAM charges.

74. Defendants have realized some value from Plaintiff from the receipt or appropriation of these benefits:

75. In light of Defendants' actions discussed in the preceding paragraphs, it would be inequitable for Defendants to retain this benefit, giving rise to unjust enrichment.

76. As a result of Defendants' actions and inactions, Plaintiff is entitled to a judgment and an award of damages for the injury it incurred under this claim for Defendants' unjust enrichment, including prejudgment interest and an order establishing a constructive trust over Defendants' assets for purposes of paying for the repairs to the HVAC, roof system and structural components of the Spirit Parcel that were damaged due to Defendants' failure to perform maintenance and repairs on the Spirit Parcel.

FOR A TWELTH CAUSE OF ACTION
(Piercing the Corporate Veil)

77. The Plaintiff re-alleges and incorporates by reference the allegations of the preceding paragraphs.

78. Upon information and belief, Defendants Taylor and Walkup have improperly utilized the assets of the Century for their own individual purposes and for the purposes of their respective companies, Don E. Taylor Realty Company and Walkup Management, Inc., which are essentially sham corporate entities put in place to disguise Taylor and Walkup's financial and business activities as it relates to the management of the Spirit Parcel and Mall Property.

79. Defendants Taylor and Walkup have used the corporate entities of Don E. Taylor Realty Company, Walkup Management, Inc. and Century Capital Group, LLC for

their own purposes and profit, such that grave injustices have resulted and will continue to all who do business with Defendants if this conduct is allowed to continue.

80. As a result of Defendants' actions, Plaintiff respectfully requests and order from this Court finding that the Defendants Don E. Taylor Realty Company, Walkup Management, Inc. and Century Capital Group, LLC corporate veil is pierced of the corporate entities involved herein, and that the judgments Plaintiff obtains herein shall be effective as against all Defendants jointly and severally where appropriate.

FOR A THIRTEENTH CAUSE OF ACTION
(Civil Conspiracy)

81. The Plaintiff re-alleges and incorporates by reference the allegations of the preceding paragraphs.

82. Defendants Century, Walkup Management, Inc., and Don E. Taylor Realty Company have conspired with each other to engage in management and maintenance services in violation of the REA.

83. The purpose of Defendants Century, Walkup Management, Inc., and Don E. Taylor Realty Company's agreement was to injure Plaintiff and other tenants to cause them damage by violating the REA with respect to management and maintenance of the Spirit Parcel and other common areas of the Mall Property.

84. As a direct and proximate result, Plaintiff has been harmed, and Defendants Century, Walkup Management, Inc., and Don E. Taylor Realty Company have caused damages to Plaintiff. These special damages are in addition to the damages caused by Defendants' breach of the REA.

FOR A FOURTEENTH CAUSE OF ACTION
(Slander of Title)

85. The Plaintiff re-alleges and incorporates by reference the allegations of the preceding paragraphs.

86. Century filed liens against Plaintiff's property as described above, when they knew or should have known that they had no legal right to do so and that the liens included amounts charged by Century as illegitimate CAM charges.

87. Century failed to satisfy those liens when they were paid when they knew or should have known that they had no legal right to maintain those liens as a matter of record and that the liens included amounts charged by Century as illegitimate CAM charges.

88. The filing of the liens was intended to and did, in fact, place a cloud upon and disparage Plaintiff's title to the Spirit Property.

89. As a result of the filing of the liens, Plaintiff's property was impaired and their ability to use it, enjoy the full benefits of it or transfer it was impaired.

90. As a direct and proximate result, Century slandered the title of the Spirit Property, and they are liable for special damages resulting therefrom, including the costs and attorneys' fees associated with removal of the liens and the costs and attorneys' fees incurred in this action.

FOR A FIFTEENTH CAUSE OF ACTION
(Breach of Warranty)

91. The Plaintiff re-alleges and incorporates by reference the allegations of the preceding paragraphs.

92. Pursuant to the terms of the REA, Defendants contracted with Plaintiff to provide maintenance and repair services on the Spirit Parcel. These services included,

among other things, maintenance and repair of the HVAC, roof system and structural components on the Spirit Parcel.

93. Defendants and their subcontractors expressly and/or impliedly warranted that their respective services would be performed in a careful, diligent, and workmanlike manner, that their respective maintenance and repair services would be carried out in a manner consistent with standards of proper workmanship, that their respective services would be free of defects, and that the product of their services would be reasonably fitted for their intended purposes.

94. Defendants provided maintenance and repair services on the Spirit Parcel that were negligent, defective, unworkmanlike in manner, and not suitable or appropriate for their intended purpose and the HVAC, roof system, structural components, and interior of the Spirit Parcel sustained damage in excess of \$3 million as a result of Defendants faulty and defective maintenance and repair services.

95. As a result of Defendants failure to properly repair and maintain the Spirit Parcel, Defendants breached their express and/or implied warranties, and Plaintiff is entitled to judgment against Defendants and their subcontractors for the costs of all remediation and repairs incurred by Plaintiff on the Spirit Parcel to date.

FOR A SIXTEENTH CAUSE OF ACTION
(Nuisance)

96. Plaintiff re-alleges and incorporates by reference the allegations of the preceding paragraphs.

97. Pursuant to the terms of the REA, the owner of the Shopping Mall Parcel is responsible for performing and paying for all maintenance and repairs to the roof system and structural components of the Spirit Parcel prior to November 30, 2010.

98. Since taking possession and operating as manager of the Shopping Mall Property, Defendants have failed to maintain and repair the roof over the Spirit Parcel in accordance with the REA, performed what little maintenance work that was undertaken on the roof in an unworkmanlike and deficient manner, failed and refused to correct deficient maintenance on the roof and have steadfastly refused to cure defective performance or honor express and implied warranties on the roof as required by the REA. More specifically, Defendants have essentially neglected the roof above the Spirit Parcel.

99. As a result of Defendants neglect of the roof above the Spirit Parcel, Plaintiff has suffered water and mold damage to the interior spaces of the Spirit Parcel.

100. Spirit repaired has repaired its roof. However, Century has failed to properly maintain and repair its roof and other common areas, which has resulted in water passing through their roof and common areas and travelling into Spirit's property causing water damage and interruption to the business activities of Spirit's tenants.

101. To date Defendants have made no repairs to their roof and have done nothing to correct the damages that were sustained in the Spirit Parcel. Moreover, Defendants have made no offer to compensate Spirit or the tenant of the Spirit Parcel for the expenses incurred with their efforts to remedy the damages to the interior of the Spirit Parcel or the damages resulting from the interruption of the business operations of the tenant in the Spirit Parcel.

102. Defendants' neglect of their roof and Mall common areas that continues to cause unfettered water intrusion constitutes an ongoing, unreasonable interference with Spirit's use and enjoyment of the Spirit Parcel and is a permanent nuisance. Moreover,

the water intrusion caused by Defendant's lack of maintenance on the roof has caused continuous, severe interruptions in the business operations at the Spirit Parcel.

103. This permanent nuisance entitles Spirit to equitable relief in the form of an injunction ordering Defendants to immediately remedy the leaks in the roof above the Spirit Parcel. Additionally, Spirit alleges that such nuisance entitles it to recover both actual and punitive damages.

FOR A SEVENTEENTH CAUSE OF ACTION
(Trespass)

104. Plaintiff re-alleges and incorporates by reference the allegations of the preceding paragraphs.

105. Defendants have actual knowledge of the long history of water intrusion from the roof above the Spirit Parcel and have intentionally neglected their duty to remedy this situation. Defendants' knew that their intentional neglect of the roof issues would allow water to penetrate the roof, enter the Spirit Parcel and damage the surrounding areas. All of these actions were taken without Spirit's permission. In fact, Spirit and its representatives have, on countless occasions, brought this problem to Defendants' attention, but Defendants have adamantly refused to repair the roof.

106. Spirit was in lawful possession of the Spirit Parcel at the time of the damages have occurred.

107. Defendants' knew about the water intrusion issues at the Spirit Parcel and intentionally refused to remedy this situation in order to avoid costs associated with repairs to their roof and the common areas.

108. Defendants knew that rainstorms would lead to further water penetration from the roof into the Spirit Parcel.

109. Defendants' intentional refusal to remedy the roof problems has caused and will continue to cause damages to the interior of the Spirit Parcel. Defendants' intentional conduct constitutes a voluntary intrusion in to the Spirit Parcel. This intrusion occurred without Spirit's permission.

110. The intrusion of water from originating from Defendants' roof and mall common areas constitutes a continuing trespass that, based on the intentional refusal of Defendants to act in the face of an open and obvious defect, shows no signs of remedy in the future and will continue to cause damage to the Spirit Parcel.

111. Further, this trespass creates an unreasonably hazardous condition wherein the water intrusion, both seen and unseen, can lead to the development of mold and other issues in the interior of the Spirit parcel.

112. This continuing trespass entitles Spirit to equitable relief in the form of an injunction ordering Defendants to immediately remedy the leaks in the roof above the Spirit Parcel in order to prevent any further invasion of the Spirit Parcel by Defendants. Additionally, Spirit alleges that such trespass entitles it to recover both actual and punitive damages.

WHEREFORE, Plaintiff prays that the Court grant judgment against the Defendants and for the following relief:

a. For a declaration setting forth to the acceptable charges under REA, what areas of the Mall Property that Defendants have to maintain as common areas under the REA; whether Spirit is required to pay a cooling water charge under the REA; whether Defendants can appoint themselves as property managers under terms of the REA without an apparent and/or inherent conflict of interest; and an Order directing the

Defendants to repair their roof and the commons areas so as to stop the water intrusion into Spirit's property.

b. For actual damages against all Defendants in an amount to be determined by the Court;

c. For punitive damages against all Defendants in an amount to be determined by the Court;

d. For attorneys' fees and costs in favor of Plaintiff as the prevailing party under the REA;

e. For attorneys' fees and costs as consequential damages for slander of title;

f. For treble damages, reasonable attorneys' fees and costs pursuant to the Unfair Trade Practices Act;

g. For special damages;

h. For an order piercing the corporate veil as to Defendants Century Capital Group, LLC, Walkup Management, Inc., and Don E. Taylor Realty Company and that the judgments Plaintiff obtains herein be effective as against all Defendants jointly and severally;

i. For pre-judgment interest;

j. For a constructive trust over Defendants' assets for purposes of paying for repairs to the HVAC, roof system and structural components of the Spirit Parcel that were damaged due to Defendants' failure to perform maintenance and repairs; and

k. For an order requiring Defendants to repair the roof above the Spirit Parcel to remedy the constant, unfettered water intrusion that is currently experienced at the

Spirit Parcel and to further order Defendants to repair the damages sustained in the interior of the Spirit Parcel as a result of said water intrusion;

1. For such other and further relief as the Court shall deem just and proper.

GALLIVAN, WHITE & BOYD, P.A.



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Attorneys for the Plaintiff
Spirit SPE Columbia, LLC

Columbia, South Carolina

September 13, 2012

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Spirit SPE Columbia, LLC,

Plaintiff,

vs.

Century Capital Group, LLC, Walkup
Management, Inc., Don E. Taylor Realty
Company, Donald E. Taylor, Individually,
William D. Walkup, Individually.

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT
CIVIL ACTION NUMBER: 2010-CP-40-8407

CERTIFICATE OF SERVICE

RICHLAND COUNTY
FILED
2012 SEP 19 AM 11:29
JEANETTE W. MCGRIDE
C.C. # 65.

The undersigned hereby certifies that on September 17, 2012, she served a copy
of the Plaintiff Spirit SPE Columbia, LLC's Third Amended Complaint on all known
counsel of record by placing a copy in the United States Mail, with due and proper
postage affixed thereto and addressed as follows:

D. Ryan McCabe
Brian Gambrell
McCabe, Trotter, Gambrell & Beverly, PC
140 Stonelridge Drive, Suite 650
Columbia, SC 29210


Heather Hagen

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

Spirit SPB Columbia, LLC,

Plaintiff,

vs.

Century Capital Group, LLC, Walkup
Management, Inc., Don E. Taylor Realty
Company, Donald E. Taylor, Individually,
William B. Walkup, Individually.

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT
CIVIL ACTION NUMBER: 2010-CP-40-8407

**SETTLEMENT AGREEMENT AND
MUTUAL RELEASE**

WHEREAS, Spirit SPB Columbia, LLC ("Spirit") purchased a parcel of property located at 3400 Forest Drive and known as the "Verizon Parcel" in the REA (defined below) in September 2005; and

WHEREAS, Century Capital Group, LLC ("CCG") purchased a parcel of property located at 3400 Forest Drive and known as the "Midtown Parcel" in the REA (defined below) in February 2010; and

WHEREAS, previous owners of the Midtown Parcel and Verizon Parcel entered into that certain Reciprocal Easement, Covenant, Operation and Restriction Agreement and Declaration dated September 7, 2005, and recorded in Book 1037 at Page 2024 in the Office of the Register of Deeds for Richland County, South Carolina (the "REA"), that runs with the Midtown Parcel and Verizon Parcel and sets forth certain duties, responsibilities, obligations and easements between the owners of the Midtown Parcel, the Verizon Parcel, and the other properties that comprise the property commonly known as Richland Mall and located at 3400 Forest Drive; and



WHEREAS, Spirit and CCG are bound by the terms of the REA and the terms of the REA are incorporated herein by reference; and

WHEREAS, Spirit filed an action, entitled Spirit SPB Columbia, LLC, v. Century Capital Group, LLC, Walkup Management, Inc., Don E. Taylor Realty Company, Donald E. Taylor, Individually, William B. Walkup, Individually, civil action number 2010-CP-40-8407 in the Richland County Court of Common Pleas (hereinafter the "action" or the "lawsuit"), alleging that CCG had breached the terms of the REA in various respects; and

WHEREAS, CCG denied liability to Spirit, raised affirmative defenses and alleged cross-claims against Spirit; and

WHEREAS, the parties to the action desire to resolve the disputes and terminate the pending litigation.

NOW THEREFORE, intending to be legally bound, the parties agree and covenant as follows:

(a) Payment from CCG to Spirit: In exchange for the release, covenants and promises contained herein, CCG will pay Spirit the total sum of One Million Four Hundred Fifty Thousand and NO/100 Dollars (\$1,450,000.00) as follows:

1. Eight Hundred Thousand and NO/100 Dollars (\$800,000.00) upon execution of this Settlement Agreement and Mutual Release ("Settlement Agreement").
2. Six-Hundred Fifty Thousand and NO/100 Dollars (\$650,000.00) paid within six (6) months of the execution of this Settlement Agreement pursuant to the terms and conditions set forth herein.
3. CCG releases and waives any and all claims against Spirit to recover payment for providing condenser water or maintenance of the cooling tower prior to June 30, 2013. Spirit releases and waives any and all claims (including without limitation claims for negligence) against

CCG relating to the operation, maintenance or repair of the cooling tower and related piping prior to June 30, 2013.

4. As evidence of the requirement to make the \$650,000.00 final payment within six (6) months of the Settlement Agreement, simultaneous with the execution of this Settlement Agreement, Defendant CCG shall execute and deliver to Spirit a Promissory Note in the initial principal amount of \$650,000.00 (the "Note"). The Note shall be in the form of that note attached hereto as Exhibit "A". The Defendant CCG's obligations under the Note shall be secured by a first-priority lien on the Midtown Parcel to be evidenced by a mortgage executed by CCG and delivered to Plaintiff in the form of that mortgage attached hereto as Exhibit "B" (the "Spirit Mortgage"). CCG represents and warrants that the Midtown Parcel is currently unencumbered by any lien or mortgage and that the Spirit Mortgage shall be a first-priority lien superior to any other liens (other than possibly liens arising under the REA). Upon receipt of the executed Spirit Mortgage Spirit shall cause title to the Midtown Parcel to be updated in order to confirm that the Spirit Mortgage shall constitute a first-priority lien on the Midtown Parcel. Defendants shall cause any monetary lien shown to be senior to the Spirit Mortgage to be satisfied, released or subordinated to the lien of the Spirit Mortgage. If CCG sells its parcel before the expiration of (6) months, the Spirit Mortgage must be satisfied prior to or at the time of the sale.
5. Upon receipt of payment as required under the terms and conditions of the Note, Spirit will mark the Note and the Spirit Mortgage satisfied.
6. 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 the CAM, accounting, and other claims asserted by Spirit.

(b) Management of Common Areas

Defendants William B. Walkup and Donald E. Taylor will cede management of the Common Areas (as defined in the REA) to a bona fide, independent third-party manager within ninety (90) days of the execution of this Settlement Agreement for so long as CCG owns the Midtown parcel. If Defendant CCG's employees or the third-party manager of the Common Area provide services to both the Common Area and the remainder of the

Midtown parcel, only an agreed upon portion of each such employee's salary or the third-party manager's fees will be allocated to Common Area Maintenance Charges (as defined in the REA) ("CAM"). The parties also agree that, to the extent administrative items relate to both CAM and the remainder of the Midtown parcel, only a portion of certain administrative items may be charged to CAM. Expenses will be determined by the third party manager in accordance with the REA.

(c) Modification of REA:

CCG and Spirit will enter into a modification of the REA (with respect to the owner of the Midtown Parcel and the owner of the Verizon Parcel) that reflects the following:

(1) The owner of the Verizon Parcel (currently the Plaintiff (Spirit)) agrees that it will pay Six Thousand Five Hundred and NO/100 Dollars (\$6,500.00) per month, subject to annual Consumer Price Index ("CPI") increases, as payment for cooling water provided to the Verizon Parcel. The owner of the Midtown Parcel shall be responsible for the costs associated with maintaining and operating the cooling tower that provides condenser water to the Verizon Parcel. Maintenance shall mean all routine work to operate the cooling tower and to keep it running and shall specifically include chemicals, flushing of the cooling tower, and other routine maintenance of the cooling tower. The owner of the Verizon Parcel agrees to pay its pro-rata share, based on pro-rata design tonnage of the units serviced by the cooling tower, of the cost for repairs (to include replacement of components including motors, fans, cells exceeding \$7,500) and replacement of the cooling tower. In the event of replacement of the cooling tower, the amount of the monthly cooling water payment to be delivered by the owner of the

Verizon Parcel may be re-negotiated to reflect its pro rata share of any cost savings achieved by installing a more efficient system.

(2) The owner of the Midtown Parcel shall operate, maintain and repair the cooling tower and also have the authority to continue to charge other users, parcel owners, Common Areas, and CCG tenants for the condenser water service it provides. Spirit shall have the right to continue to seek reimbursement from its tenants for the provision of condenser water to the Verizon Parcel. Under no circumstances shall either CCG or Spirit have the right to interfere with, terminate or disrupt each other's use of condenser water supplied by the cooling tower. In the event that the owner of the Midtown Parcel fails to repair or replace the condenser water system or disrupts the supply of condenser water to the Verizon Parcel, the owner of the Verizon Parcel shall have the right to undertake the necessary repair or replacement and deduct the expenses (less the Verizon Parcel owner's pro rata share, per the above, of such expenses) from future CAM payments.

(3) If the owner of the Verizon Parcel determines that it will no longer need cooling water provided from the cooling tower, such owner may terminate its obligations to pay for cooling water and the repair and replacement of the cooling tower upon one hundred eighty days' prior notice to the owner of the Midtown Parcel. If the owner of the Midtown Parcel determines that it will no longer need cooling water provided from the cooling tower, such owner may terminate its obligations to maintain, operate, repair and replace the cooling tower and provide cooling water for the Verizon Parcel upon one hundred eighty days' prior notice to the owner of the Verizon Parcel. Upon the effectiveness of the termination described in the immediately preceding sentence, the

foregoing paragraphs (1) and (2) shall terminate.

(4) Spirit and CCG agree that under the terms of the REA, with respect to expenses related to the maintenance of the Common Areas as defined in the REA, the REA does not require the owner of the Verizon Parcel to pay for any non-maintenance expense including, but not limited to the following: security, leasing, marketing, wired music, depreciation, travel and entertainment, business license and registration, subscriptions, membership/association fees and business meals. This paragraph (4) does not, however, affect the Verizon Parcel's owner's obligations under Article IV(B) of the REA regarding real property taxes, insurance premiums, deductibles or third-party management expenses.

(5) The parties agree that the Common Areas include the surface lot and landscaping on the Verizon Parcel, and the owner of the Midtown Parcel has an obligation to maintain that surface lot and landscaping subject to the reimbursement provisions of the REA.

(6) The parties agree that no lien placed on the property by one of the parcel owners for breach of the REA will have a priority that relates back to the date the REA was filed. Such a lien will have priority based upon its date of filing. Such a lien will not be subordinated to any other later-filed mortgage or lien unless by written consent of the party who filed the lien.

(7) Roof Leaks

(A) As to the current or any future roof leaks in the Verizon Parcel space that the owner of the Verizon Parcel believes is caused by a leak from the Midtown Parcel, the parties agree to the following:

(i) The Midtown Parcel owner will select a roofing expert and the Verizon Parcel owner will select a roofing expert. These two experts will then select a third, independent roofing expert to conduct a reasonable investigation to determine the most probable source of the active leaks in the Verizon Parcel space. The determination of the most probable specific source of the leak and the scope of repair is to be made by the independent roofing expert. If the independent expert is unable to determine the most probable specific source of the leak after a reasonable investigation, the Midtown Parcel owner shall not be obligated to repair the leak. In this context, to "repair" means to stop the leak at its source.

(ii) If the leak is determined to most probably arise on the Midtown Parcel, the Midtown Parcel owner shall have the leak repaired at its expense. The Midtown Parcel owner shall commence repairs within sixty (60) days of receiving the independent expert's opinion and scope of work. The repairs must be completed in a timely manner and must, in the case of the current roof leaks in the PWC space, be completed before CCG sells the Midtown Parcel.

(iii) If the Midtown Parcel owner does not commence or make the repairs as determined by the independent expert as required in section (ii), the Verizon Parcel owner shall have the right to make the repairs as determined by the independent expert. The Midtown Parcel owner shall be responsible for the costs incurred by the Verizon Parcel owner in performing the repairs as determined by the independent expert and shall remit payment for any expenses for said repair within ten (10) days after the receipt of an invoice therefor from the Verizon Parcel owner. In the event that said amounts are not paid to the owner of the Verizon Parcel within said period, such past due amounts shall

constitute a lien on the Midtown Parcel and the owner of the Verizon Parcel shall be permitted to file such lien and notice thereof as it deems necessary. If the independent expert determines that the leak most probably arises from the Verizon Parcel, the Verizon Parcel owner shall have the leak repaired at its own expense.

(iv) Each owner will pay for its own expert and will equally share the cost of the independent expert. The Verizon Parcel owner will have the right to have its expert monitor the repair if the most probable cause of the leak is found to be from the Midtown Parcel. The Midtown Parcel owner will have the right to have its expert monitor the repair if the most probable cause of the leak is found to be from the Verizon Parcel.

(B) As to any future roof leaks in the Midtown Parcel space that the owner of the Midtown Parcel believes is caused by a leak from the Verizon Parcel, the parties agree to the following:

(i) The Midtown Parcel owner will select a roofing expert and the Verizon Parcel owner will select a roofing expert. These two experts will then select a third, independent roofing expert to conduct a reasonable investigation to determine the most probable source of the active leaks in the Midtown Parcel space. The determination of the most probable specific source of the leak and the scope of repair is to be made by the independent roofing expert. If the independent expert is unable to determine the most probable specific source of the leak after a reasonable investigation, the Verizon Parcel owner shall not be obligated to repair the leak. In this context, to "repair" means to stop the leak at its source.

(ii) If the leak is determined to most probably arise on the Verizon Parcel, the Verizon Parcel owner shall have the leak repaired at its expense. The Verizon Parcel

owner shall commence repairs within sixty (60) days of receiving the independent expert's opinion and scope of work. The repairs must be completed in a timely manner.

(iii) If the Verizon Parcel owner does not commence or make the repairs as determined by the independent expert as required in section (ii), the Midtown Parcel owner shall have the right to make the repairs as determined by the independent expert. The Verizon Parcel owner shall be responsible for the costs incurred by the Midtown Parcel owner in performing the repairs as determined by the independent expert and shall remit payment for any expenses for said repair within ten (10) days after the receipt of an invoice therefor from the Midtown Parcel owner. In the event that said amounts are not paid to the owner of the Midtown Parcel within said period, such past due amounts shall constitute a lien on the Verizon Parcel and the owner of the Midtown Parcel shall be permitted to file such lien and notice thereof as it deems necessary. If the independent expert determines that the leak most probably arises from the Midtown Parcel, the Midtown Parcel owner shall have the leak repaired at its own expense. .

(iv) Each owner will pay for its own expert and will equally share the cost of the independent expert. The Midtown Parcel owner will have the right to have its expert monitor the repair if the most probable specific source of the leak is found to be from the Verizon Parcel. The Verizon Parcel owner will have the right to have its expert monitor the repair if the most probable specific source of the leak is found to be from the Midtown Parcel.

(C) The parties will submit the following issue to be decided by Judge Howard: "Is the expense for a roof repair to address leaks over a common area to be borne by the owner of the roof above the common area or is it chargeable to CAM?" The

parties will be bound by the Judge's ruling, and there will be no appeal from his ruling. The result will be included in the REA amendment.

(d) Mutual Release

1. Spirit's Release:

Based upon the foregoing consideration, Spirit, for itself and all of its members, managers, officers, directors, employees, representatives, assigns and successors hereby releases and forever discharges from all claims (known or unknown, contingent or otherwise) arising, or relating to any period, before the date of this Settlement Agreement CCG, Walkup Management, Inc., Don E. Taylor Realty Company, Donald E. Taylor, William B. Walkup, and their respective employees, agents, officers, directors, shareholders, managers, members, heirs, executors, administrators, assigns, successors in interest under the REA, their predecessors in interest under the REA, and each predecessor in interest's employees, agents, heirs and assigns. This Settlement Agreement and Release cannot be construed as a release of any future claim respecting any period after the date of this Settlement Agreement and arising out of a (i) breach of the REA (original or amended) or (ii) failure to properly maintain the Midtown Parcel so as to avoid damage to the Verizon Parcel or a release of any claim for breach of this Settlement Agreement.

2. CCG, Walkup Management, Inc., Don E. Taylor Realty Company, Donald E. Taylor and William B. Walkup Release:

Based upon the foregoing consideration, CCG, Walkup Management, Inc., Don E. Taylor Realty Company, Donald E. Taylor and William B. Walkup (collectively "Defendants") for themselves and all of their members, officers, directors, employees, representatives, assigns and successors hereby release and forever discharge Spirit, its

affiliates and each of their successors, assigns, employees, agents and officers from all claims (known or unknown, contingent or otherwise) arising, or relating to any period, before the date of the Settlement Agreement. This Settlement Agreement and Release cannot be construed as a release of any future claim respecting any period after the date of this Settlement Agreement and arising out of a (i) breach of the REA (original or amended) or (ii) failure to properly maintain the Verizon Parcel so as to avoid damages to the Midtown Parcel or a release of any claim for breach of this Settlement Agreement. Furthermore, Spirit acknowledges that this release does not release Spirit for any amounts not yet billed to it for the monthly period that includes the date of this Settlement Agreement.

Defendants will hold harmless, indemnify and defend Spirit for any and all costs, expenses and attorney fees arising from any attempt by Defendants to recover any amount paid under this Settlement Agreement from any third party. If any portion of the Amended REA is invalidated, the terms of this Settlement Agreement and Release will remain in force.

(e) **No Liability Admitted.** This Settlement Agreement is a compromise and settlement of a disputed claim and is intended merely to terminate the controversy between the parties and to avoid further litigation between them; it is not and is not to be construed to be an admission of liability on the part of any of the parties hereby released.

(f) **Dismissal with Prejudice.** The parties will, at the time they execute the Settlement Agreement, enter into a Consent Order of dismissal, dismissing the above-referenced lawsuit with prejudice.

(g) **Confidentiality:** Terms of the Settlement Agreement shall be kept

confidential except to the extent property recordings/agreements need recording, to the extent necessary to sell or lease property, and to the extent necessary for Defendants to prosecute Contribution claims.

(h) Attorneys' Fees. Each party hereto shall bear its own attorneys' fees and costs incurred in connection with the lawsuit and/or the Settlement Agreement.

(i) Miscellaneous Provisions.

1. Additional Instruments. The Plaintiff and Defendants will each execute and deliver such other and further instruments as may be necessary to implement fully the terms of the Settlement Agreement, and agree to cooperate fully and to take all additional actions that may be necessary or appropriate to give full force and effect to the terms and intent of the Settlement Agreement.

2. Binding Effect. This Settlement Agreement shall inure to the benefit of and be binding upon the heirs, executors, administrators, successors, assigns, and estates of the Parties.

3. Governing Law. This Settlement Agreement shall be construed and interpreted in accordance with the laws of the State of South Carolina.

4. Invalid Provisions. If, after the date hereof, any provision of this Settlement Agreement is held to be invalid or unenforceable under present or future laws, such provision shall be fully severable.

5. Severability. If a provision of this Settlement Agreement is held to be unenforceable, the other provisions will remain in effect. If possible, the offending provision will be modified to the slightest degree necessary to make it enforceable, remaining as close as possible to the parties' original intent for the provision.

6. Entire Agreement. This Settlement Agreement constitutes the entire agreement among the parties pertaining to the subject matter contained herein.

7. Amendment. This Settlement Agreement shall not be modified or amended except by an instrument in writing signed by all of the parties.

WITNESSES:

(1) D. Ryan Milake (signature)

(1) D. Ryan Milake (name, printed)

(2) Angela S. Hook (signature)

(2) Angela S. Hook (name, printed)

(1) Angela S. Hook (signature)

(1) Angela S. Hook (name, printed)

(2) D. Ryan Milake (signature)

(2) D. Ryan Milake (name, printed)

(1) D. Ryan Milake (signature)

(1) D. Ryan Milake (name, printed)

(2) Angela S. Hook (signature)

W B Walkup
As representative of Century Capital
Group, LLC

By: William B. Walkup

Its: Managing Member

Date: 11-20, 2013

[Signature]
As representative of Don E. Taylor
Realty Company

By: Donald E. Taylor

Its: President

Date: 11/20/13, 2013

W B Walkup
As representative of Walkup
Management, Inc.

By: William B. Walkup

Its: President

(2) Angela S. Hook (name, printed)

Date: 11/20/13, 2013

(1) Angela S. Hook (signature)


Don E. Taylor

(1) Angela S. Hook (name, printed)

(2) D. Ryan Meluh (signature)

(2) D. Ryan Meluh (name, printed)

Date: 11-20-2013, 2013

(1) D. Ryan Meluh (signature)

WB Walkup
William B. Walkup

(1) D. Ryan Meluh (name, printed)

(2) Angela S. Hook (signature)

(2) Angela S. Hook (name, printed)

Date: 11-20, 2013

(1) _____ (signature)

As representative of Spirit SPE
Columbia, LLC

(1) _____ (name, printed)

By: _____

(2) _____ (signature)

Its: _____

(2) _____ (name, printed)

Date: _____, 2013

(1) _____ (signature)

Don E. Taylor

(1) _____ (name, printed)

(2) _____ (signature)

(2) _____ (name, printed)

Date: _____, 2013

(1) _____ (signature)

William B. Walkup

(1) _____ (name, printed)

(2) _____ (signature)

(2) _____ (name, printed)

Date: _____, 2013

(1) [Signature] (signature)

(1) Daniel Rosenberg (name, printed)

(2) [Signature] (signature)

[Signature]
As representative of Spirit SPE
Columbia, LLC

By: Mark Manheimer

Its: SVP

(2) Catherine Tiffany (name, printed)

Date: 12/4, 2013

For the Plaintiff:

**A. Johnston Cox
Gallivan, White & Boyd, P.A.
Attorney for Spirit SPE Columbia, LLC**

Date: _____, 2013

For the Defendants:

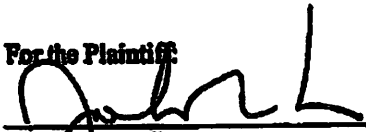
**D. Ryan McCabe
McCabe, Trotter & Beverly, P.C.
Attorney for CCG, Walkup Management,
Inc., Ben E. Taylor Realty Company,
Donald E. Taylor and William B. Walkup**

Date: _____, 2013

(2) _____ (name, printed)

Date: _____, 2013

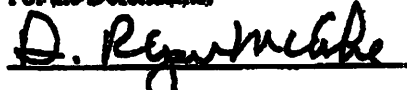
For the Plaintiff:



A. Johnston Cox
Gallivan, White & Boyd, P.A.
Attorney for Spirit SPE Columbia, LLC

Date: 12/6, 2013

For the Defendants:



D. Ryan McCabe
McCabe, Trotter & Beverly, P.C.
Attorney for CCG, Walkup Management,
Inc., Don E. Taylor Realty Company,
Donald E. Taylor and William B. Walkup

Date: 11-20, 2013

EXHIBIT "A"

PROMISSORY NOTE

\$650,000.00

Columbia, South Carolina
November 20, 2013

FOR VALUE RECEIVED, Century Capital Group, LLC, a South Carolina limited liability company (the "Borrower"), promises to pay to the order of Spirit SPE Columbia, LLC, a Delaware limited liability company (the "Lender"), at _____, or at such other place or to such other party or parties as Lender may from time to time designate, the principal sum of up to Six Hundred Fifty Thousand and no/100 (\$650,000.00) Dollars, with interest thereon (to the extent applicable) computed from date of each advance at the fixed rate of 18% per annum. Interest shall be computed on the actual number of days elapsed divided by a 360-day year and shall only accrue in the event of default in payment of this Note.

The entire outstanding principal balance of this Note shall be paid in a single, lump-sum payment be due and payable in full on JUNE 2 2014 (the "Maturity Date"). If the principal balance of this Note is paid on or before the Maturity Date, no interest shall be payable. Otherwise, accrued interest under this Note shall be payable on the Maturity Date.

All payments under this Note shall be applied first to late charges, if any, then to accrued interest (if applicable) and then to principal. All installments of principal and all interest are payable in lawful money of the United States of America, which shall be legal tender in payment of all debts and dues, public and private, at the time of payment; and in the event of (a) failure to pay this Note in full on the Maturity Date, or (b) default in the payment of any other installment of interest or principal or any other sum payable pursuant to the terms of this Note or any lien document securing this Note, not cured within ten (10) days after written notice from Lender, or (c) an "Event of Default" as such term is defined in the Mortgage executed of even date between Century and Lender, then or at any time thereafter, at the option of Lender, the whole of the principal sum then remaining unpaid hereunder together with all interest accrued thereon, shall immediately become due and payable without further notice, and the lien given to secure the payment of this Note may be foreclosed. From and after the maturity of this Note either according to its terms or as the result of a declaration of maturity, the entire principal remaining unpaid hereunder shall bear interest at a rate of three (3%) percent per annum above the rate otherwise in effect hereunder (the "Default Rate"), or the highest applicable lawful rate, whichever is the lesser; provided that there shall be no automatic reduction to the highest lawful rate as to Borrower or any endorser or guarantor barred by law from availing itself in any action or proceeding of the defense of usury, or Borrower or any

endorser or guarantor barred or exempted from the operation of any law limiting the amount of interest that may be paid for the loan or use of money, or in the event this transaction, because of its amount or purpose or for any other reason is exempt from the operation of any statute limiting the amount of interest that may be paid for the loan or use of money. Failure to exercise such option or any other rights Lender may in the event of any such default be entitled to, shall not constitute a waiver of the right to exercise such option or any other rights in the event of any subsequent default, whether of the same or different nature.

If this Note is placed in the hands of an attorney for collection or is collected through any legal proceedings, Borrower promises to pay all expenses of collection and reasonable attorney's fees incurred by Lender in such proceedings.

In the event the interest provisions hereof or any exactions provided for herein or in the lien documents or any other instruments securing this Note shall result, because of the monthly deduction of principal or any other reason related or unrelated to the interest provisions, at any time during the life of the loan, in an effective rate of interest which, for any period of time, transcends the limit of the usury or any other law applicable to the loan evidenced hereby, all sums in excess of those lawfully collectible as interest for the period in question shall, without further agreement or notice between or by any party hereto, be applied to principal immediately upon receipt of such monies by Lender with the same force and effect as though the payor had specifically designated such and agreed to accept such extra payment(s) as a premium free payment. Notwithstanding the foregoing, however, Lender may at any time and from time to time elect, by notice in writing to the owners of the property affected by the lien document securing this Note, to reduce or limit the collection of any interest to such sums, which, when added to the said first-stated interest, shall not result in any payments toward principal in accordance with the requirement of the preceding sentence. In no event shall any agreed to or actual exaction as consideration for this loan transcend the limits imposed or provided by the law applicable to this transaction or Borrower in the jurisdiction in which the land is located for the use or detention of money or for forbearance in seeking its collection.

This Note is secured by a certain first-priority Mortgage of Real Estate and Security Agreement of even date herewith (the "Mortgage"), to which reference is made from the terms thereof, and the same are made a part of this Note.

Lender may collect a late charge of five (5%) percent of any installment of principal or interest which is not paid within five (5) days of the due date thereof to cover the extra time and expense involved in handling delinquent payments. Such late charge shall apply to late payments prior to maturity or acceleration. Upon maturity or acceleration, no further late charges shall be assessed, but Borrower shall pay the Default Rate of interest on all amounts due from the date of maturity or acceleration until the Note is paid in full. The collection of the late charge shall not be deemed a waiver by Lender of interest accruing after the due date of any installment or of any of Lender's other rights under this Note.

Borrower agrees that the late charge provided above is fair and reasonable compensation to Lender for the additional administrative time and effort incurred in collecting and processing delinquent payments. Borrower further agrees that the Default Rate is a fair and reasonable rate of interest to be charged after maturity or acceleration of this Note in light of the increased risks to Lender inherent in a past due loan and the administrative time and effort incurred in collecting a past due loan.

Borrower waives presentment, protest and demand, notice of protest, demand and dishonor and nonpayment of this Note, and consent to any and all renewals and extensions of the time of payment hereof, and agree, further, that at any time and from time to time without notice, the terms of payment herein may be modified or the security described in the lien document securing the Note released in whole or in part, or increased, changed or exchanged by agreement between Lender and any owner of premises affected by said lien document securing this Note without in anywise affecting the liability of any party to this instrument or any person liable with respect to any indebtedness evidenced hereby.

Lender is not required to rely on the collateral for the payment of the Note in the event of default by the maker, but may proceed directly against the maker, endorsers, or guarantors, if any, in such manner as it deems desirable. None of the rights and remedies of Lender hereunder are to be waived or affected by failure or delay to exercise them. All remedies conferred on Lender by this Note or any other instrument or agreement shall be cumulative, and none is exclusive. Such remedies may be exercised concurrently or consecutively at Lender's option.

Borrower shall have the option of prepaying the principal amount due under this Note in whole or in part without penalty.

This Note shall be governed as to validity, interpretation, construction, effect, and in all other respects by the laws and decisions of the State of South Carolina.

Wherever possible each provision of this Note shall be interpreted in such manner as to be effective and valid under applicable law, but if any provision of this Note or portion thereof shall be prohibited by or be invalid under such law, such provision shall be ineffective to the extent of such prohibition or invalidity, without invalidating the remainder of such provision or the remaining provisions of this Note.

This Note may be assigned by Lender with or without recourse.

Borrower submits to the jurisdiction of any court of competent jurisdiction within the State of South Carolina. Borrower agrees that any action concerning this Note or any instrument securing this Note, whether initiated by Lender, Borrower or any other party, shall be tried only in a court of competent jurisdiction within the State of South Carolina, and Borrower waives all objections to venue therein. All matters arising hereunder shall be determined in accordance with the law and practice of such South Carolina court. Borrower further agrees to comply with all requirements necessary to give such court in

paranam jurisdiction and agrees that service of process may be accomplished by, in addition to any other lawful means, certified mail, return receipt requested.

WAIVER OF JURY TRIAL. BY THE EXECUTION HEREOF, BORROWER KNOWINGLY, VOLUNTARILY AND INTENTIONALLY HEREBY AGREES THAT:

(A) NEITHER BORROWER NOR LENDER, NOR ANY ASSIGNEE, SUCCESSOR, HEIR, OR LEGAL REPRESENTATIVE OF BORROWER OR LENDER, SHALL SEEK A JURY TRIAL IN ANY LAWSUIT, PROCEEDING, COUNTERCLAIM, OR ANY OTHER LITIGATION PROCEDURE ARISING FROM OR BASED UPON THIS NOTE, THE MORTGAGE, THE LOAN AGREEMENT (IF ANY) OR ANY OF THE LOAN DOCUMENTS EVIDENCING, SECURING, OR RELATING TO THE LOAN EVIDENCED HEREBY, OR TO THE DEALINGS OR RELATIONSHIP BETWEEN OR AMONG THE PARTIES HERETO;

(B) NEITHER BORROWER NOR LENDER WILL SEEK TO CONSOLIDATE ANY SUCH ACTION IN WHICH A JURY TRIAL HAS BEEN WAIVED WITH ANY OTHER ACTION IN WHICH A JURY TRIAL HAS NOT BEEN OR CANNOT BE WAIVED;

(C) THE PROVISIONS OF THIS PARAGRAPH HAVE BEEN FULLY NEGOTIATED BY THE PARTIES HERETO, AND THESE PROVISIONS SHALL BE SUBJECT TO NO EXCEPTIONS;

(D) NEITHER BORROWER NOR LENDER HAS IN ANY WAY AGREED WITH OR REPRESENTED TO ANY OTHER PARTY THAT THE PROVISIONS OF THIS PARAGRAPH WILL NOT BE FULLY ENFORCED IN ALL INSTANCES; AND

(E) THIS PROVISION IS A MATERIAL INDUCEMENT FOR LENDER TO MAKE THE LOAN EVIDENCED BY THIS NOTE.

IN WITNESS WHEREOF, Borrower has executed this Note under seal, as of the date first above written.

**Century Capital Group, LLC,
a South Carolina limited liability company**

By: W B Walkey
Its: managing member
Address: _____

EXHIBIT "B"

**STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND**

**MORTGAGE OF REAL ESTATE
AND SECURITY AGREEMENT**

THIS MORTGAGE AND SECURITY AGREEMENT is made this 20th day of ~~November~~ 2013, by Century Capital Group, LLC, a South Carolina limited liability company whose address is _____ (the "Borrower"), and given Spirit SPE Columbia, LLC, a Delaware limited liability company, whose address is _____ (the "Lender").

WITNESSETH:

THAT WHEREAS, Borrower is indebted to Lender in the maximum principal sum of \$650,000.00, which indebtedness is evidenced by the Note made by Borrower dated of even date, said principal (plus interest thereon) being payable as provided for in said Note; the terms of said Note and any agreement modifying it are incorporated herein by reference.

NOW, THEREFORE, KNOW ALL MEN BY THESE PRESENTS that the said Borrower, for and in consideration of the aforesaid indebtedness and in order to secure the payment thereof together with any renewals or extensions or modifications thereof upon the same or different terms or at the same or different rate of interest and also to secure in accordance with Section 29-3-50, as amended, Code of Laws of South Carolina (1976): (i) all future advances and re-advances that may subsequently be made to Borrower by Lender evidenced by the aforesaid Note, or by other promissory notes, and all modifications, renewals and extensions thereof; and (ii) all other indebtedness of Borrower to Lender, now or hereafter existing, whether direct or indirect, the maximum amount of all indebtedness outstanding at any one time secured hereby not to exceed \$650,000.00, plus interest, charges, expenses and attorneys fees as permitted by the terms of the Promissory Note executed by Borrower on 11/20, 2013, has granted, bargained, sold, released and by these presents does grant, bargain, sell and release unto the Lender, its successors and assigns, the following described property (collectively hereinafter referred to as the "Property" or "Land"):

SEE ATTACHED EXHIBIT "A" FOR LEGAL DESCRIPTION

TOGETHER WITH:

(a) all singular rights, members, hereditaments and appurtenances belonging or in any way incident or appertaining thereto;

(b) all buildings and improvements of every kind and description now or hereafter erected or placed on the Land (the "Improvements") and all materials intended for construction, reconstruction, alteration and repair of such improvements now or hereafter erected thereon, all of which materials shall be deemed to be included within the premises hereby conveyed immediately upon the delivery thereof to the aforesaid Land, and all fixtures and articles of personal property now or hereafter owned by the Borrower and attached to or contained in and used in connection with the aforesaid Land and Improvements or any part thereof or derived from or acquired by any proceeds of the Land or Improvements or any part thereof, including, but not limited to, all goods, furniture, appliances, furnishings, apparatus, machinery, equipment, motors, elevators, fittings, radiators, ranges, refrigerators, awnings, shades, screens, blinds, carpeting, office equipment and other furnishings and all plumbing, heating, lighting, cooking, laundry, ventilating, refrigerating, incinerating, air conditioning and sprinkler equipment, telephone systems, televisions and television systems, computer systems and fixtures and appurtenances thereto and all renewals or replacements thereof or articles in substitution thereof, whether or not the same are or shall be attached to the Land and Improvements in any manner (the "Tangible Personalty");

(c) all easements, rights of way, gores of land, streets, ways, alleys, passages, sewer rights, waters, water courses, water rights and powers, and all estates, rights, titles, interests, privileges, liberties, tenements, hereditaments and appurtenances whatsoever, in any way belonging, relating or appertaining to any of the property hereinabove described, or which hereafter shall in any way belong, relate or be appurtenant thereto, whether now owned or hereafter acquired by Borrower, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, and all the estate, right, title, interest, property, possession, claim and demand whatsoever, at law as well as in equity, of Borrower of, in and to the same, including but not limited to all judgments, awards of damages and settlements hereafter made resulting from condemnation proceedings or the taking of the property described in paragraphs (a) and (b) hereof or any part thereof under the power of eminent domain, or for any damage (whether caused by such taking or otherwise) to the property described in paragraphs (a) and (b) hereof or any part hereof, or to any rights appurtenant thereto (together the "Easements and Other Interests");

(d) as additional collateral and further security for the indebtedness, the Borrower hereby conditionally assigns to the Lender all the security deposits, rents, issues, profits, revenues, accounts, accounts receivable, contract rights, rights to payments for goods sold or leased or services rendered, checks, notes, drafts, acceptances, instruments, deposit accounts, chattel paper, documents, securities, rentals receivables, installment payment obligations, book debts, actions, choses in action, judgments, awards, money, general intangibles, other forms of obligations and receivables, all monies due or to become due and all returned or repossessed goods now or hereafter pertaining to or resulting from the Property or any part hereof or constituting or derived from or acquired by any proceeds of the Property or any part thereof (the "Rents and Profits") reserving only the right to the Borrower to collect the same as long as there shall exist no Default (as hereinafter defined).

Together with all proceeds, including cash proceeds, non-cash proceeds, insurance proceeds, products, replacements, additions, substitutions, renewals and accessions of the Rents and Profits or any part hereof, and all replacements, modifications, renewals and substitutions thereof or therefore;

(e) as additional collateral and further security for the indebtedness, the Borrower does hereby assign to the Lender and grants to the Lender a security interest in all of the right, title and the interest of the Borrower in and to any and all leases (including equipment leases), rental agreements, management contracts, franchise agreements, construction contracts, architect's contracts, technical services agreements, licenses and permits now or hereafter affecting the Property (the "Intangible Personalty") or any part hereof, and the Borrower agrees to execute and deliver to the Lender such additional instruments, in form and substance satisfactory to the Lender, as may hereafter be requested by the Lender to evidence and confirm said assignment; provided, however, the acceptance of any such assignment shall not be construed as a consent by the Lender to any lease, rental agreement, management contract, franchise agreement, construction contract, technical services agreement or other contract, license or permit, or to impose upon the Lender any obligation with respect hereto;

(f) any proceeds of any sales or other dispositions of the property described in paragraphs (a), (b), and (c), hereof or any part hereof, including cash proceeds, non-cash proceeds, insurance proceeds, products, replacements, additions, substitutions, renewals and accessions of any of the foregoing ("Proceeds"); and

(g) all the Tangible Personalty which comprise a part of the Property shall, as far as permitted by law, be deemed to be affixed to the aforesaid land and conveyed therewith. As to the balance of the Tangible Personalty and the Intangible Personalty, this Mortgage shall be considered to be a security agreement which creates a security interest in such items for the benefit of the Borrower. In that regard, the Borrower grants to the Lender a security interest in the Tangible Personalty, the Intangible Personalty and the Rents and Profits, and grants to Lender all of the rights and remedies of a secured party under the South Carolina Uniform Commercial Code.

TO HAVE AND TO HOLD all and singular the Property unto Lender and the successors or assigns of Lender forever.

BORROWER covenants that Borrower is lawfully seized of the Property in fee simple absolute, that Borrower has good right and is lawfully authorized to sell, convey or encumber the same, and that the Property is free and clear of all encumbrances except as expressly disclosed to Lender. This Mortgage shall constitute a first-priority lien on the subject Property. Borrower further covenants to warrant and forever defend all and singular the Property unto Lender and the successors or assigns of Lender from and against Borrower and all persons whomsoever lawfully claiming the same or any part thereof.

PROVIDED ALWAYS, nevertheless, and it is the true intent and meaning of Borrower and Lender, that if Borrower pays or causes to be paid to Lender the debt secured

hereby, the estate hereby granted shall cease, determine and be utterly null and void; otherwise said estate shall remain in full force and effect

IT IS AGREED that Borrower shall be entitled to hold and enjoy the Property until a Default has occurred.

BORROWER further covenants and agrees with Lender as follows:

1. **Assignment of Rents and Profits.** As further security for all sums secured by this Mortgage, Borrower absolutely and unconditionally assigns to Lender all Rents and Profits arising from the Property; provided however, that so long as no Default has occurred and is continuing, Borrower shall be entitled, as trustee for the use and benefit of the Lender, to collect and retain all such Rents and Profits as they become due and payable (but in no event for more than two (2) months in advance); provided, however, that if the Rents and Profits exceed the payments due under the Note, Borrower may use such excess, first, for the operation and benefit of the Property and, second, for the general benefit of Borrower. Upon the occurrence of a Default, Lender may, at its option, remove the Borrower as trustee for the collection of the Rents and Profits and appoint any other person including, but not limited to, itself as a substitute trustee to collect, receive, accept and use all such Rents and Profits in payment of the obligations secured by this Mortgage, in such order as Lender shall elect in its sole and absolute discretion, whether or not Lender takes possession of the Property. Upon a Default, Borrower hereby directs each of the respective tenants under all leases of any part of the Property now and hereafter existing (the "Leases"), and any rental agent, to pay to Lender all such Rents and Profits, as may now be due or shall hereafter become due, upon demand for payment thereof by Lender without any obligation on the part of any such tenant or rental agent to determine whether or not a Default has in fact occurred. Upon a Default, the permission hereby given to Borrower to collect, receive and accept such Rents and Profits as trustee shall terminate and such permission shall not be reinstated upon a cure of the Default without Lender's specific written consent. Further, upon a Default, Borrower shall immediately turn over to Lender all Rents and Profits in the actual or constructive possession of Borrower, its affiliates, contractors, or its agents, together with an accounting thereof. Exercise of Lender's rights under this Section, and the application of any such Rents and Profits to the obligations secured by this Mortgage, shall not cure or waive any default or notice of default hereunder or invalidate any act done pursuant hereto, but shall be cumulative and in addition to all other rights and remedies of Lender.

2. **Intenance.** Borrower will maintain the Property in good condition and repair and will neither permit nor allow waste thereof. Borrower will promptly repair or restore any portion of the Property which is damaged or destroyed by any cause whatsoever and will promptly pay when due all costs and expenses of such repair or restoration. Borrower will not remove or demolish any improvement or fixture which is now or hereafter part of the Property, other than in the ordinary course of business, without the express written consent of Lender which consent shall not be unreasonably withheld, conditioned or delayed. Lender shall be entitled to specific performance of the provisions of this paragraph.

3. **Insurance.** Borrower will keep, or shall cause to be kept, all improvements and fixtures which are now or hereafter part of the Property insured by such company or companies as Lender may reasonably approve for the full insurable value thereof against all risks including, if coverage is available, flood. Such insurance will be payable to Lender as the interest of Lender may appear pursuant to the New York standard form of Lender clause or such other form of Lender clause as may be required by the Lender and will not be cancelable by either the insurer or the insured without at least ten (10) days prior written notice to Lender. Borrower hereby assigns to Lender the right to collect and receive any indemnity payment otherwise owed to Borrower upon any policy of insurance insuring any portion of the Property, regardless of whether Lender is named in such policy as a person entitled to collect upon the same. Any indemnity payment received by Lender from any such policy of insurance may, at the option of Lender, (i) be applied by Lender to payment of any sum secured by this Mortgage in such order as Lender may determine, or, (ii) be applied in a manner determined by Lender to the replacement, repair or restoration to the portion to the Property damaged or destroyed, or, (iii) be released to Borrower upon such conditions as Lender may determine, or, (iv) be used for any combination of the foregoing purposes. No portion of any indemnity payment which is applied to replacement, repair or restoration to any portion of the Property or which is released to Borrower shall be deemed a payment against any sums secured by this Mortgage. Borrower will keep the Property continuously insured as herein required and will deliver to Lender the original of each policy of insurance required hereby. Borrower will pay each premium coming due on any such policy of insurance and will deliver to Lender proof of such payment at least ten (10) days prior to the date such premium would become overdue or delinquent. Upon the expiration or termination of any such policy of insurance, Borrower will furnish to Lender at least ten (10) days prior to such expiration or termination the original of a renewal or replacement policy of insurance meeting the requirements hereof. If Borrower fails to insure the Property as herein required, Lender may, after giving (10) days written notice to Borrower, so insure the Property in the name of Borrower or in the name of Lender or both, and the premiums for any such insurance obtained by Lender shall be the obligation of Borrower. Upon foreclosure to this Mortgage, all right, title and interest of Borrower in and to any policy of insurance upon the Property which is in the custody of Lender, including the right to unearned premiums, shall vest in the purchaser of the Property at foreclosure, and Borrower hereby appoints Lender as the attorney in fact of Borrower to assign all right, title and interest of Borrower in and to any such policy of insurance to such purchaser. This appointment is coupled with an interest and shall be irrevocable.

4. **Taxes and Assessments.** Borrower will pay all taxes, assessments and other charges which constitute or are secured by a lien upon the Property which is superior to the lien of this Mortgage and, if requested by Lender, will deliver to Lender proof of payment of the same not less than ten (10) days prior to the date the same becomes delinquent; provided, however, that Borrower shall be entitled by appropriate proceedings to contest the amount or validity of such tax, assessment or charge so long as the collector of the same by foreclosure of the lien upon the Property is stayed during the pendency of such proceedings and Borrower deposits with the authority to which such tax, assessment or charge is payable or with Lender appropriate security for payment of the same, together with any applicable interest and penalties, should the same be determined due and owing.

5. Appraisal. Borrower shall pay when due the reasonable cost of providing to Lender, at its request from time to time, a then-current appraisal of the market value of the Property prepared by an appraiser or by another appraiser acceptable to Lender in its discretion; provided, however, that Lender shall make such request no more frequently than once every third year, unless Lender is required by any law, regulation, order, or other directive from any regulatory agency having jurisdiction over Lender to obtain any such appraisal more frequently than every third year. If Borrower fails to pay such cost when due, Lender may pay such cost on Borrower's behalf and the same shall constitute principal under the Note, shall bear interest at the applicable rate provided in the Note, and shall be due and payable on demand. Borrower's failure to pay such amount (with all accrued interest) in full within thirty (30) days of the date of such demand shall constitute an event of Default entitling the Lender to accelerate the maturity of the Note.

6. After Acquired Property. The lien of this Mortgage will automatically attach, without further act, to all fixtures now or hereafter owned by Borrower and located in or on, or attached to, or used or intended to be used in connection with or with the operation of, the Property or any part thereof.

7. Condemnation. Lender shall be entitled to be made a party to and to participate in any proceeding, whether formal or informal, for condemnation or acquisition pursuant to power or eminent domain of any portion of the Property. Borrower hereby assigns to Lender the right to collect and receive any payment or award to which Borrower would otherwise be entitled by reason of condemnation or acquisition pursuant to power of eminent domain of any portion of the Property. Any such payment or award received by Lender may, at the option of Lender, (i) be applied by Lender to payment to any sums secured by this Mortgage in such order as Lender may determine, or, (ii) be applied in a manner determined by Lender to the replacement of the portion of the Property taken and to the repair or restoration of the remaining portion of the Property or, (iii) be released to Borrower upon such conditions as Lender may determine, or, (iv) be used for any combination of the foregoing purposes. No portion of an indemnity payment which is applied to replacement, repair or restoration to any portion to the Property or which is released to Borrower shall be deemed a payment against any sums secured by this Mortgage.

8. Transfer. At the option of the Lender, the indebtedness secured by this Mortgage shall become due and payable if, without the written consent to the Lender, the Borrower shall convey away the mortgaged premises, or if the title shall become vested in any other person in any manner whatsoever other than by death to the Borrower. It is understood and agreed that in consideration for the consent to the Lender to any transfer of title to the mortgaged premises, the Lender at its option may charge a loan transfer fee and/or require changes in the rate of interest, term of loan, monthly payments to principal and interest and other terms and conditions of this Mortgage and/or the Note secured hereby.

9. Default. A "Default" shall be the occurrence or existence of any of the events listed in the Note or the Loan Agreement, including any grace and/or cure periods provided for therein.

10. Remedies. In addition to the remedies set forth in the Note or the Loan Agreement, upon the occurrence of a Default, Lender may, without notice to Borrower, declare all sums secured by this Mortgage immediately due and payable and may commence proceedings to collect such sums, foreclose this Mortgage and sell the Property. If default shall be made in the payment of any amount due under the Note, the Mortgage or any other instrument securing the Note, then, upon Lender's demand Borrower will pay to Lender the whole amount due and payable under the Note and all other sums secured hereby; and if Borrower shall fail to pay the same forthwith upon such demand, Lender shall be entitled to sue for and to recover judgment for the whole amount so due and unpaid together with costs and expenses including the reasonable compensation, expenses and disbursements of Lender's agents and attorneys incurred in connection with such suit and any appeal in connection therewith. Lender shall be entitled to sue and recover judgment as aforesaid either before, after or during the pendency of any proceedings for the enforcement of this Mortgage and the right of Lender to recover such judgment shall not be affected by any taking, possession or foreclosure sale hereunder, or by the exercise of any other right, power or remedy for the enforcement of the terms of this Mortgage, or the foreclosure of the lien hereof. At the foreclosure Lender shall be entitled to bid and to purchase the Property and shall be entitled to apply the debt secured hereby, or any portion thereof, in payment for the Property. In case of a foreclosure sale of all or any part of the Property and of the application of the proceeds of sale to the payment of the sums secured hereby, Lender shall be entitled to enforce payment of and to receive all amounts then remaining due and unpaid and to recover judgment for any portion thereof remaining unpaid, with interest. The remedies provided to Lender in this paragraph shall be in addition to and not in lieu of any other rights and remedies provided in this Mortgage or by law, all of which rights and remedies may be exercised by Lender independently, simultaneously or consecutively in any order without being deemed to have waived any right or remedy previously or not yet exercised. Without in any way limiting the generality of the foregoing, Lender shall also have the following specific rights and remedies:

(a) To exercise any and all rights of set-off which Lender may have against any account, fund, or property of any kind, tangible or intangible, belonging to Borrower which shall be in Lender's possession or under its control.

(b) To cure such defaults, with the result that all costs and expenses incurred or paid by Lender in effecting such cure shall be additional charges on the Note which bear interest at the interest rate of the Note and are payable upon demand.

(c) If the Note is secured by a lien on any real property, to foreclose on such real property and to pursue any and all remedies available to Lender at law or in equity, and in any order Lender may desire, in Lender's sole discretion.

11. No Waiver of One Default to Affect Another. No waiver of Default hereunder shall extend to or affect any subsequent or any other Default then existing, or impair any rights, powers or remedies consequent thereon. If Lender (a) grants forbearance or an extension of time for the payment of any sums secured hereby; (b) takes other or additional security for the payment thereof; (c) waives or does not exercise any right granted in the Note, this Mortgage or any other instrument securing the Note; (d) releases any part of the Property from the lien of this Mortgage or any other instrument securing the Note, or (e) makes or consents to any agreement changing the terms of this Mortgage or subordinating the lien or any charge hereof, no such act or omission shall release, discharge, modify, change or affect the original liability under the Note, the Mortgage or otherwise of Borrower, or any subsequent purchaser of the Property or any part thereof or any maker, cosigner, endorser, surety or guarantor. No such act or omission shall preclude Lender from exercising any right, power or privilege herein granted or intended to be granted in case of any event of Default then existing or of any subsequent event of Default nor, except as otherwise expressly provided in an instrument or instruments executed by Lender, shall the lien of this Mortgage be altered thereby.

12. Appointment of Receiver. Upon the occurrence of a Default, Lender shall be entitled to the appointment of a receiver to enter upon and take and maintain full control of the Property in order to perform all acts necessary and appropriate for the operation and maintenance thereof including, but not limited to, the execution, cancellation or modification of leases, the making of repairs to the Property and the execution or termination of contracts providing for the management or maintenance of the Property, all on such terms as are deemed best to protect the security of this Mortgage. The receiver shall be entitled to receive a reasonable fee for so managing the Property. All rents collected pursuant to this paragraph shall be applied first to the costs of taking control of and managing the Property and collecting the rents, including, but not limited to, reasonable attorney's fees, receiver's fees, premiums on receiver's bonds, costs of repairs to the Property, premiums in insurance policies, taxes, assessments and other charges on the Property, and the costs of discharging any obligation or liability of Borrower as lessor or landlord of the Property and then to the sums secured by this Mortgage. Lender or the receiver shall have access to the books and records used in the operation and maintenance of the Property and shall be liable to account only for those rents actually received. Lender shall not be liable to Borrower, anyone claiming under or through Borrower, or anyone having an interest in the Property by reason of anything done or left undone by Borrower under this paragraph. If the rents of the Property are not sufficient to meet the costs of taking control of and managing the Property and collecting the rents, Lender, at its sole option, may advance moneys to meet the costs. Any funds expended by Lender for such purposes shall become indebtedness of Borrower to Lender secured by this Mortgage. Unless Lender and Borrower agree in writing to other terms of payment, such amounts shall be payable upon notice from Lender to Borrower requesting payment thereof and shall bear interest from the date of disbursement at the rate stated in the Note unless payment of interest at such rate would be contrary to applicable law, in which event such amounts shall bear interest at the highest rate which may be collected from Borrower under applicable law. The entering upon and taking and maintaining of control of the Property by

Lender or the receiver and the application of rents as provided herein shall not cure or waive any Default hereunder or invalidate any other right or remedy of Lender hereunder.

13. Waiver by Lender. Lender may, in the sole discretion of Lender, from time to time waive or forbear from enforcing any provision of this Mortgage, and no such waiver or forbearance shall be deemed a waiver by Lender of any other right or remedy provided herein or by law or be deemed a waiver of the right at any later time to enforce strictly all provisions of this Mortgage and to exercise any and all remedies provided herein and by law.

14. Notices. Any notice given by either party hereto to the other party shall be in writing and shall be signed by the party giving notice. Any notice or other document to be delivered to either party hereto by the other party shall be deemed delivered if mailed postage prepaid by U.S. Mail, certified mail, return receipt requested to the party to whom directed to the address stated above or to the latest address of such party known to the party sending the same. Rejection or other refusal to accept or the inability to deliver because of changed address of which no notice was given shall be deemed to be receipt of the notice, demand or request sent. This paragraph shall not be deemed to prohibit any other manner of delivering a notice or other document.

15. Greater Estate. In the event that Borrower is the owner of a leasehold estate with respect to any portion of the Property and, prior to the satisfaction of the indebtedness and the cancellation of this Mortgage of record, Borrower obtains a fee estate in such portion of the Property, then, such fee estate shall automatically, and without further action of any kind on the part of Borrower, be and become subject to the security lien of this Mortgage.

16. Imposition of Tax. In the event of the passage of any state, federal, municipal or other governmental law, order, rule or regulation, in any manner changing or modifying the laws now in force governing the taxation of debts secured by mortgages or the manner of collecting taxes so as to affect adversely the Lender, the Borrower will promptly pay any such tax on or before the due date thereof, and if the Borrower fails to make such prompt payment or if any such state, federal, municipal or other governmental law, order, rule or regulation prohibits Borrower from making such payment or would penalize Lender if Borrower makes such payment, then the entire balance of the Loan shall become due and payable upon demand at the option of the Lender, unless Borrower agrees in writing to indemnify Lender against any loss or damage associated with such payment or penalty.

17. Changes, etc. Neither the Mortgage nor any term hereof may be changed, waived, discharged or terminated orally, or by any action or inaction, but only by an instrument in writing signed by the party against which enforcement of the change, waiver, discharge or termination is sought. Any agreement hereafter made by Borrower and Lender relating to the Mortgage shall be superior to the rights of the holder of any intervening lien or encumbrance.

18. Partial Foreclosure. In the event the Property is comprised of more than one parcel of real property, Borrower hereby waives any right to require Lender to foreclose or exercise any of its other remedies against all of the Property as a whole or to require Lender to foreclose or exercise such remedies against one portion of the Property prior to the foreclosure or exercise of said remedies against other portions of the Property.

19. Security Agreement: Financing Statement. This Mortgage constitutes a security agreement within the meaning of and shall create a security interest under the Uniform Commercial Code as adopted by the State of South Carolina and as amended from time to time. The addresses for the Borrower as debtor and the Lender as secured party are set forth in the introductory paragraph to this Mortgage. Some of the items of property described herein are goods that are or are to become fixtures related to the real estate described herein, and it is intended that, as to those goods, this Mortgage and Security Agreement shall be effective as a financing statement filed as a fixture filing from the date of its filing for record in the real estate records of the County in which the Land is located. Information concerning the security interest created by this instrument may be obtained from the Lender, as secured party, or the Borrower, as debtor, at the address first shown above.

20. Miscellaneous.

(a) It is understood and agreed that all indebtedness of Borrower to Lender at any time hereafter existing resulting from advances and re-advances heretofore, now or hereafter made by Lender to Borrower, regardless of whether such advances and re-advances are made at the option of the Lender, or otherwise, will be secured by this instrument up to the maximum principal amount hereinabove set forth, plus interest thereon, court costs and attorney's fees until all of said indebtedness has been satisfied in full.

(b) The agreements herein shall inure to the benefit of Lender, its successors and assigns, and any successor or assign of Lender may make advances hereunder, and all advances and all other indebtedness of Borrower to such successor or assign shall be secured hereby.

(c) Whenever in this Mortgage one of the parties hereto is named or referred to, the heirs, legal representatives, successors and assigns of such parties shall be included and all covenants and agreements contained in this Mortgage by or on behalf of the Borrower or by or on behalf of the Lender shall bind and inure to the benefit of their representatives, heirs, successors and assigns, whether so expressed or not.

(d) The headings of the sections, paragraphs and subdivisions of this Mortgage are for the convenience of reference only, are not to be considered a part hereof and shall not limit or otherwise affect any of the terms hereof.

(e) If fulfillment of any provision hereof or any transaction related hereto or to the Note, at the time performance of such provisions shall be due, shall involve

transcending the limit of validity prescribed by law, then ipso facto, the obligation to be fulfilled shall be reduced to the limit of such validity; and if such clause or provision herein contained operates or would prospectively operate to invalidate this Mortgage, in whole or in part, then such clause or provision only shall be held for naught, as though not herein contained, and the remainder of this Mortgage shall remain operative and in full force and effect.

(f) This Mortgage shall be construed and enforced in accordance with the laws of South Carolina.

(g) Waiver by Borrower. Borrower understands that upon default hereunder, among other remedies set out herein and in the Note, the Lender may foreclose upon the mortgaged premises and ask for a deficiency judgment pursuant to Section 29-3-660, South Carolina Code of Laws (1976). The laws of South Carolina provide that in any real estate foreclosure proceeding a defendant against whom a personal judgment is taken or asked may within thirty days after the sale of the mortgaged property apply to the court for an order of appraisal. The statutory appraisal value as approved by the court would be substituted for the high bid and may decrease the amount of any deficiency owing in connection with the transaction. **THE BORROWER HEREBY WAIVES AND RELINQUISHES THE STATUTORY APPRAISAL RIGHTS WHICH MEANS THE HIGH BID AT THE JUDICIAL FORECLOSURE SALE WILL BE APPLIED TO THE DEBT REGARDLESS OF ANY APPRAISED VALUE OF THE MORTGAGED PROPERTY.**

IN WITNESS WHEREOF, Borrower has executed this Mortgage under seal the day and year first above written.

Witnesses:

BORROWER:

Century Capital Group, LLC

D. Roger McInnis

By: W B Walkup

Name: W B WALKUP

Title: MANAGING member
Angela S. Hord

STATE OF SOUTH CAROLINA

ACKNOWLEDGEMENT

COUNTY OF RICHLAND

I, Angela S. Hook, do hereby certify that William B. Walker, as the managing member of Century Capital Group, LLC, appeared before me this day and acknowledged the due execution of the foregoing instrument.

Witness my hand and seal this the 20th day of November, 2013.

Angela S. Hook
Notary Public for South Carolina
My Commission expires: 1/27/2021

EXHIBIT "A"

**LEGAL DESCRIPTION
SHOPPING MALL PARCEL**

That certain tract of land, with improvements thereon, situate, in the Town of Forest Acres, Richland County, South Carolina, containing 32.9393 acres as shown on ALTA/ACSM Land Title Survey prepared for JTL Capital, LLC by Steadman & Associates, Inc. dated October 3, 2002, revised December 13, 2002, recorded in the Office of the Register of Deeds for Richland County in Book 739 at page 10, said plat being incorporated herein by reference, said property being more particularly described as follows:

BEGINNING at a point designated as "POB", said point being PK nail along the western margin of the right-of-way of Bellline Boulevard (S.C. Highway No. 16) where the subject property corners with property of Colt Site 12 Inc. a distance of 163.15 feet from the intersection of Bellline Boulevard with the southern margin of the right-of-way of Forest Drive (S.C. Highway No. 12) and running along Bellline Boulevard as follows: in a curve to the right having a radius of 141.03 feet, an arc distance of 38.64 feet, the chord of which runs S06°00'05"W - 38.52 feet to a rebar; S76°30'04"E - 29.01 feet to an "X" in concrete; S24°20'15"E - 66.91 feet to a PK nail; S20°58'56"W - 29.14 feet to a rebar; in a curve to the right having a radius of 33.77 feet, an arc distance of 22.47 feet, the chord of which runs S49°48'51"E - 22.06 feet to a PK nail; S27°51'15"E - 103.05 feet to a rebar; S28°34'06"E - 516.45 feet to a rebar; in a curve to the right having a radius of 52.17 feet, an arc distance of 35.19 feet, the chord of which runs S48°47'02"E - 34.53 feet to a rebar; S28°43'30"E - 131.12 feet to a rebar; S21°53'30"E - 101.50 feet to a rebar; S31°13'04"E - 149.11 feet to a rebar; S31°45'00"E - 19.48 feet to a rebar; S40°50'56"E - 84.56 feet to a PK nail; S40°36'04"E - 109.70 feet to a rebar; thence turning and running along property of Woodland Village Apartments S42°18'17"W - 285.91 feet to a rebar; thence turning and running along property of Diane R. Spearman as follows: N59°24'55"W - 186.52 feet to a rebar; N64°17'05"W - 51.76 feet to an open top; S03°25'35"E - 104.94 feet to an open top; thence turning and running along Brookwood Court S85°00'43"W - 65.00 feet to a calculated point; thence turning and running along property of McQueen Smith as follows: N04°44'57"W - 120.00 feet to an open top; N53°20'55"W - 66.63 feet to an open top; S63°51'41"W - 73.18 feet to a pinch top; thence turning and running along property of Scott L. Wheelchel & Dana H. Wheelchel N26°02'32"W - 65.25 feet to an open top; thence turning and running along property of David B. Tate as follows: N26°28'42"W - 65.03 feet to a rebar; N26°29'46"W - 64.72 feet to a calculated point in concrete; S63°33'42"W - 150.00 feet to a rebar; thence turning and running along Colin Kelly Drive as follows: N25°26'03"W - 280.00 feet to a rebar; in a curve to the left having a radius of 223.79 feet, an arc distance of 77.04 feet, the chord of which runs N52°37'33"W - 76.66 feet to a rebar; in a curve to the left having a radius of 223.79 feet, an arc distance of 77.05 feet, the chord of which runs S87°56'08"W - 76.67 feet to a rebar; S63°34'32"W - 250.47 feet to an open top; thence turning and running along McArthur Avenue N26°18'28"W - 70.15 feet to a rebar; thence turning and running along the terminus of McArthur Avenue and along property of Paula R. Bunt S63°46'47"W - 199.92 feet to an open top; thence turning and running along property of Sunnyside Properties, Inc. as follows: N26°38'48"W - 102.35 feet to an open top; N26°31'13"W - 77.43 feet to an open top; thence turning and continuing along property of Sunnyside Properties, Inc. and along property of Claiborne E. Reeder and Nancy P. Reeder N25°58'44"W - 60.13 feet to an open top; thence turning and continuing along property of Claiborne E. Reeder and Nancy P. Reeder and long properties of C. H. Reeder and Nancy P. Reeder, Robert G. Cook and Robin D. Andersen,

George L. Bryant, Catherine H. Bradley, Martha Diaz, and Joseph M. Diaz and Martha Diaz N26°15'04"W - 324.64 feet to an open top; thence turning and running along property of Sharon Kay Ford as follows: N63°38'18"E - 52.16 feet to an open top; N76°42'51"W - 78.96 feet to an open top; thence turning and running along properties of Martha Diaz and Lorraine M. Tablas N25°58'03"W - 103.51 feet to a rebar; thence turning and continuing along property of Lorraine M. Tablas S63°34'24"W - 53.87 feet to a rebar; thence turning and running along property of Bruckner Associates A Partnership as follows: N26°38'33"W - 87.35 feet to a rebar; S68°31'11"W - 30.08 feet to a pinch top; thence turning and running along property of Carolina Associates, A.S.C. Partnership N26°31'33"W - 79.43 feet to an open top; thence turning and running along Forest Drive N68°21'02"E - 95.19 feet to a rebar; thence turning and running along property of Olin W. Hollis, Jr. as follows: S09°42'05"E - 31.88 feet to a FK nail; in a curve to the left having a radius of 100.00 feet, an arc distance of 84.59 feet, the chord of which runs S35°10'53"E - 82.09 feet to a FK nail; S58°09'49"E - 36.04 feet to a rebar; N44°44'46"E - 164.97 feet to a magnetic nail; N36°34'36"W - 59.14 feet to an "X" in concrete; thence turning and running along Forest Drive as follows: N68°16'41"E - 594.92 feet to a rebar; in a curve to the right having a radius of 92.93 feet, an arc distance of 44.96 feet, the chord of which runs N81°57'26"E - 44.52 feet to a rebar; N09°27'43"E - 23.49 feet to an "X" cut in concrete; N69°11'44"E - 140.34 feet to a rebar; S46°09'12"E - 29.02 feet to a rebar; in a curve to the right having a radius of 89.22 feet, an arc distance of 55.43 feet, the chord of which runs N60°56'39"E - 54.54 feet to a rebar; N78°48'08"E - 17.00 feet to a calculated point in grate; thence turning and running along property of Colt Site 12 Inc. as follows: S16°47'13"E - 165.96 feet to a rebar; N77°22'02"E - 169.17 feet to the Point of Beginning.

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

Century Capital Group, LLC,
Plaintiff,

vs.

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

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT
CIVIL ACTION NUMBER: 2014-CP-40-07037

**PLAINTIFF'S RESPONSES TO RICHLAND
JOINT VENTURE GROUP, LLC'S REQUESTS TO
ADMIT**

(696.72)

**TO: RICHLAND JOINT VENTURE GROUP, LLC AND ITS ATTORNEY OF
RECORD:**

Century Capital Group, LLC ("Century"), by and through its undersigned counsel
Responds and objects to Richland Joint Venture Group, LLC's ("RJVG") Requests to Admit as
follows.

GENERAL COMMENTS

1. These Responses are based upon information presently known to Century.
Because discovery and investigation into the matters at issue in this litigation is ongoing,
Century reserves the right to supplement these Responses as appropriate.

2. Additional information responsive to RJVG's Requests for Production may be
contained in the documents produced by Century.

GENERAL RENEWED OBJECTIONS

1. Century objects to RJVG's Requests to Admit to the extent that they attempt to
impose any obligations beyond those contained in the Rules of Civil Procedure.

2. Century objects to any and all of RJVG's Requests to Admit to the extent that



they call for information subject to the attorney-client privilege, the work product doctrine, any other privilege, or any statutory prohibition.

3. Century objects to RJVG's Requests to Admit to the extent that they seek to require Century to perform RJVG's own legal work, specifically, to correct and reform RJVG's own Requests to Admit that are overbroad, seek irrelevant information, or are otherwise improper.

4. Century objects to each Request to Admit to the extent it seeks information that constitutes or reflects trial preparation materials or work product of Century or its representatives, agents, or attorneys.

5. Century objects to each Request to Admit to the extent it seeks information already available to or equally available to RJVG.

6. Century objects to these Requests to Admit to the extent they are overly broad, unduly burdensome and not reasonably calculated to lead to the discovery of admissible evidence. Subject to, without waiving and while specifically reserving this objection, Century will supplement its Responses as necessary.

7. Century objects to these requests to the extent they seek information which is neither relevant to the subject matter of the litigation nor reasonably calculated to lead to the discovery of admissible evidence, seek documents which constitute or contain confidential, proprietary information, seek information that do not adequately set forth the documents requested with reasonable particularity, and are vague, compound, or ambiguous as to scope and time.

8. By making an answer to any Interrogatory, document request, or request to admit, Century does not intend or mean to waive the attorney-client privilege, the work-product rule or

any other privilege, objection or other limitation upon discovery as to that Interrogatory, Document Request or request to admit, or as to any other present or future request for discovery.

9. All Answers to the Interrogatories and responses to the Requests for Production of Documents and Requests to Admit are made without the waiver of these general objections, or the specific objections hereinafter set forth.

REQUESTS TO ADMIT

1. Admit that Richland Joint Venture Group, LLC, was the owner of the Midtown Parcel at Richland Mall from May 25, 2007 until February 15, 2010.

RESPONSE: Admitted.

2. Admit that Century Capital Group, LLC became the owner of the Midtown Parcel on February 15, 2010 and has continued to be the owner of the Midtown Parcel until the present date.

RESPONSE: Admitted.

3. Admit that the legal duty of Richland Joint Venture Group, LLC to maintain and repair the common areas, HVAC systems and roof systems of the Spirit Parcel at Richland Mall existed from May 25, 2007 until February 15, 2010.

RESPONSE: Admitted. Subject to this admission, Century Capital Group, LLC asserts the Richland Joint Venture Group, LLC made numerous negligent and defective repairs to the HVAC systems, roof systems and other systems on the Spirit Parcel creating liability in tort which Century Capital Group, LLC extinguished through payment and a release from the owner of the Spirit Parcel.

4. Admit that the legal duty of Century Capital Group, LLC to maintain and repair the common areas, HVAC systems and roof systems of the Spirit Parcel at Richland Mall began on February 16, 2010 and continues until the present day.

RESPONSE: Denied. Century Capital Group, LLC continues to maintain certain maintenance duties with respect to common areas, however, the duties to provide maintenance to the Spirit Parcel, with the exception of common areas located on the Spirit Parcel, terminated pursuant to the terms of the REA. Century Capital Group, LLC craves reference to the terms of the REA in responding to this Request.

5. Admit that the Third Amended Complaint filed by Spirit SPE Columbia, LLC in Case No.: 2010-CP-40-8407 in Richland County, South Carolina contains no direct reference to or mention of Richland Joint Venture Group, LLC.

RESPONSE: Admitted.

6. Admit that the Third Amended Complaint filed by Spirit SPE Columbia, LLC in Case No.: 2010-CP-40-8407 in Richland County, South Carolina contains no allegation of deficient maintenance of the common areas, HVAC systems or roof systems at Richland Mall by Richland Joint Venture Group, LLC, Midtown Development Group, LLC or Windsor Mall, LP.

RESPONSE: Admitted.

7. Admit that Century Capital Group, LLC was a successor owner of the Midtown Parcel at Richland Mall with regards to Richland Joint Venture Group, LLC and that Century Capital Group, LLC is not legally responsible for any deficient maintenance at Richland Mall that would have occurred prior to its ownership of the Midtown Parcel at Richland Mall on February 16, 2010.

RESPONSE: Denied. The Request misconstrues the duties of the owners of the Midtown

Parcel. The REA gave rise to certain duties to maintain property within the Richland Mall. Some maintained areas of the Richland mall were designated as common area and some of the maintained property was owned by the Spirit Parcel owner yet was not designated as common area. Due to the nature of the maintenance and the systems and structures in place at the Richland Mall, multiple owners of the Midtown Parcel participated in designing and maintaining the same systems and all owners of the Midtown Parcel provided work on the same systems giving rise claims and damages to the Spirit Parcel for which Century Capital Group, LLC procured extinguishment of all tort claims.

8. Admit that the legal duty owed by Richland Joint Venture Group, LLC to Spirit SPE Columbia, LLC to maintain and repair the common areas, HVAC systems and roof systems at Richland Mall terminated on February 15, 2010 when it sold its full ownership interest in the Midtown Parcel.

RESPONSE: Denied as stated. Richland Joint Venture Group, LLC undertook certain repairs and maintenance within the Richland Mall. Richland Joint Venture Group, LLC owed a duty to make such maintenance in repairs in a safe, workmanlike, prudent, proper manner with regard to the Spirit Parcel areas that were not common area. It is admitted that Richland Joint Venture Group, LLC owed no duty to make new repairs to portions of the Spirit Parcel that were not damaged after it sold its interest in the Midtown Parcel. Nothing within this response should be construed to admit that Richland Joint Venture Group, LLC did not have an obligation to make proper and appropriate repairs with regard to the Spirit Property or that Richland Joint Venture Group, LLC was not obligated or responsible for defective repairs and maintenance to the Spirit Parcel that it undertook while it owned the Midtown Parcel.

9. Admit that the attached Exhibit 1 is a genuine copy of Purchase and Sale Agreement, dated December 22, 2009 between Richland Joint Venture Group, LLC and W.B. Walkup of Century Capital Group, LLC.

RESPONSE: Denied. There is no Exhibit 1 attached to RJVG's Request to Admit to Plaintiff. Subject to this denial, Century Capital Group, LLC admits that it did sign a Purchase and Sales Agreements with Richland Joint Venture Group, LLC.

10. Admit that Article 3.2 of the Purchase and Sale Agreement between Richland Joint Venture Group, LLC, as the seller, and W.B. Walkup of Century Capital Group, LLC, as the buyer, expressly provided that Century Capital Group, LLC purchased the Midtown Parcel in its 'as-is, where-is' condition.

RESPONSE: Admitted and Century Capital Group, LLC craves reference to the terms of the Purchase and Sale Agreement. It is denied that the terms of the Purchase and Sale Agreement obligated Century Capital Group, LLC to indemnify or hold harmless Richland Joint Venture Group, LLC for defective work that Richland Joint Venture Group, LLC provided to an adjacent property owner. Further, the underlying suit to this Contribution action does not pertain to damages to the real property that was purchased by Century Capital Group, LLC (Midtown Parcel).

11. Admit that neither W.B. Walkup nor any other agent and/or employee of Century Capital Group, LLC ever notified Richland Joint Venture Group of the need for any repairs or remediation during the Facilities Review Period set forth in Article 3.2 of the Purchase and Sale Agreement, and that the closing of the sale of the Midtown Parcel at Richland Mall occurred without the need for a credit for the cost of repairs or remediation at Richland Mall.

RESPONSE: Admitted upon belief and Century Capital Group, LLC reserves the right to

amend this Response at a later date. Subject to this admission, the "facilities" did not include nor did the contract to purchase pertain to defective work and maintenance provided by Richland Joint Venture Group, LLC on adjacent property that was not purchased by Century Capital Group, LLC and was not owned by Richland Joint Venture Group, LLC.

12. Admit that Article 3.2 of the Purchase and Sale Agreement between Richland Joint Venture Group, LLC and W.B. Walkup of Century Capital Group, LLC expressly provided that Richland Mall and its HVAC systems had defects and required ongoing maintenance, that Richland Mall was being sold subject to such defects, and that the "Buyer acknowledges that the Mall roof develops leaks from time to time and that the repair of such leaks will be required on an ongoing basis."

RESPONSE: Admitted. However, these issues were not the basis for the underlying suit or this Contribution action. The defective work provided by the Defendants in this suit pertained to defective repairs and maintenance made to the Spirit Parcel owner's property that was not common area. No portion of the underlying suit or Contribution claim pertained to defective work or maintenance to the Midtown Parcel or common areas.

13. Admit that Century Capital Group, LLC was invited under Article 3.2 of the Purchase and Sale Agreement between Richland Joint Venture Group, LLC and W.B. Walkup of Century Capital Group, LLC dated December 22, 2009 to examine and review the condition of Richland Mall to assess the extent of the disclosed defects and maintenance requirements.

RESPONSE: Admitted. However, these issues were not the basis for the underlying suit or this Contribution action. The defective work provided by the Defendants in this suit pertained to defective repairs and maintenance made to the Spirit Parcel owner's property

that was not common area. No portion of the underlying suit or Contribution claim pertained to defective work or maintenance to the Midtown Parcel or common areas.

14. Admit that Recital E of the Second Amendment to the Purchase and Sale Agreement, dated January 12, 2010 between W.B. Walkup of Century Capital Group, LLC and Richland Joint Venture Group, LLC, expressly disclosed that Verizon Wireless, as a tenant of the Spirit Parcel of Richland Mall, claimed that the roof repair obligations of the Spirit Parcel had not been fulfilled.

RESPONSE: Admitted, but this disclosure is not connected with Article 3.2.

15. Admit that W.B. Walkup and Century Capital Group, LLC has notice of potential litigation involving roof repair defects and HVAC system defects associated with the Spirit/Verizon Parcel during the Facilities Review Period outlined in both Article 3.2 of the Purchase and Sale Agreement dated December 22, 2009, and in the Second Amendment to the Purchase and Sale Agreement dated January 12, 2010.

RESPONSE: Denied.

16. Admit that the Plaintiff's current claim for contribution arises out of its allegation that Defendant Richland Joint Venture Group, LLC negligently maintained and repaired the Verizon Parcel, commons areas, roof and HVAC system, thus subjecting Plaintiff to claims by Spirit, the current owner of the Verizon Parcel.

RESPONSE: Denied. Repairs to common areas are not at issue in this action. Admitted that the current claim for contribution arises out of Defendants' negligently maintaining

and repairing the Spirit Parcel / Verizon Parcel.


D. Ryan McCabe
McCabe, Trotter & Beverly, PC
P.O. Box 212069
Columbia, South Carolina 29211
Phone: 803-724-5000
Fax: 803-724-50001
Email: ryan.mccabe@mccabetrotter.com
Attorney for Plaintiff

Columbia, South Carolina
February 26, 2015

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT
CIVIL ACTION NUMBER: 2014-CP-40-07037

Century Capital Group, LLC,
Plaintiff,

vs.

CERTIFICATE OF SERVICE

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

Defendants.

(65472)

I, Angela S. Hook, an employee with the Law Firm of McCabe, Trotter & Beverly, PC, attorneys for Plaintiff, 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 26th day of February, 2015, via U.S. Mail, postage prepaid and addressed as follows:

DOCUMENTS SERVED

Plaintiff's Answers and Responses to Richland Joint Venture Group, LLC's Interrogatories, Request for Production and Request to Admit

PARTIES SERVED

Edward James Coyne, III
Williams Mullen
P.O. Box 1000
Raleigh, NC 27602
Attorney for Windsor Richland Mall, L.P.

R. Trippett Boineau
McAngus Goudelock & Courie
Meridian, 10th Floor
1320 Main Street
Columbia SC 29201
Attorney for Midtown Development Group, LLC

D. Cravens Ravenel
Baker Ravenel Bender
P.O. Box 8057
Columbia, SC 29202
Attorney for Richland Joint Venture Group, LLC

Angela S. Hook
Angela S. Hook, Paralegal

Columbia, SC

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

Century Capital Group, LLC,
Plaintiff,

vs.

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

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT
CIVIL ACTION NUMBER: 2014-CP-40-07037

AFFIDAVIT OF WILLIAM B. WALKUP

RICHLAND COURT
FILED
2015 JUL 27 PM 4:28
JANETTE W. MCBRIDE
C.C.P. & G.S.

(96.72)

PERSONALLY APPEARED before me, William B. Walkup, who after being sworn, deposes and says as follows:

1. I am over the age of 18 and am competent to give this affidavit. I have personal knowledge of the matters set forth herein.
2. I am a Managing Member of Century Capital Group, LLC.
3. Century purchased the Midtown Parcel of the Richland Fashion Mall from Richland Joint Venture Group, LLC ("RJVG") on February 16, 2010.
4. I participated in the negotiations for the purchase of the Mall as well as conducted due diligence for Century.
5. I was aware of the condition of the Mall facilities, specifically the on-going maintenance and defective conditions of the roof system and HVAC.
6. Century purchased the Mall from RJVG in "as-is, where-is" condition. I understand this to mean that Century accepted the Mall property despite its disclosed defects. I did not understand this to mean that Century would be responsible to other third parties for RJVG or any other prior owner's failure to maintain and repair the building during their period

of ownership.

7. Century never agreed to indemnify, hold-harmless or defend RJVG or any other prior owner from future litigation.

8. In November, 2010, Century was sued by Spirit SPE Columbia, LLC, the owner of the Verizon Parcel, for issues relating to the failure to maintain and repair the roof system, which caused damage to Spirit.

9. This lawsuit was brought only nine (9) months after Century took ownership of the Mall Parcel, thus incurring the maintenance and repair obligations under the Reciprocal Easement, Covenant, Operation and Restriction Agreement ("REA").

10. In an effort to resolve the ongoing and protracted litigation with Spirit, Century entered into a settlement agreement with Spirit which was finalized on December 6, 2013.

11. As part of its settlement with Spirit, Century paid it the sum of One Million Four Hundred Fifty Thousand and NO/100 Dollars (\$1,450,000.00).

12. Century also negotiated a complete extinguishment of liability and discharge of all claims by Spirit against Century and its predecessors in title to the Midtown Parcel under the REA.

13. I am informed and believe that the settlement agreement was reasonable and necessary and precludes any further litigation by Spirit against Century or any of its predecessors in interest.

FURTHER AFFIANT SAYETH NAUGHT.

William B. Walkup
William B. Walkup

SWORN TO BEFORE me this
27th day of July, 2015.

Cleto B. [Signature]
Notary Public for Leavenworth County
My Commission Expires: 7-25-22

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT
CIVIL ACTION NUMBER: 2014-CP-40-07037

Century Capital Group, LLC,
Plaintiff,

vs.

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

Defendants.

CERTIFICATE OF SERVICE

RICHLAND COURT
FILED
2015 JUL 27 PM 4:28
JEANNETTE W. HICBRIE
C.C.P. & G.S.

(694.72)

I, Angela S. Hook, an employee with the Law Firm of McCabe, Trotter & Beyerly, PC, attorneys for Plaintiff, 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 27th day of July, 2015, via U.S. Mail, postage prepaid and addressed as follows:

DOCUMENTS SERVED

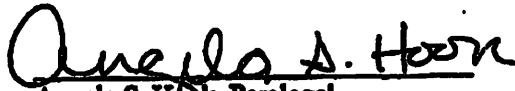
Affidavit of William B. Walkup

PARTIES SERVED

Edward James Coyne, III
Williams Mullen
P.O. Box 1000
Raleigh, NC 27602
Attorney for Windsor Richland Mall, L.P.

R. Trippett Boineau
McAngus Goudelock & Courie
Meridian, 10th Floor
1320 Main Street
Columbia SC 29201
Attorney for Midtown Development Group, LLC

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Baker Ravenel Bender
P.O. Box 8057
Columbia, SC 29202
Attorney for Richland Joint Venture Group, LLC


Angela S. Hook, Paralegal

Columbia, SC

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

Century Capital Group, LLC,
Plaintiff,

vs.

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

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT
CIVIL ACTION NUMBER: 2014-CP-40-07037

AFFIDAVIT OF HENRY VITALE

RICHLAND COUNTY
FILED
2015 JUL 28 AM 10
JEANETTE W. MCBRIDE
C.C.P. & G.S.

(594.75)

PERSONALLY APPEARED before me, Henry Vitale, who after being sworn, deposes
and says as follows:

1. I am over the age of 18 and am competent to give this affidavit. I have personal knowledge of the matters set forth herein.
2. I am a Registered Roof Observer/Roof Consultant and a designated Subject Matter Expert by the Roof Consultants Institute. I am also the Owner and President of James D. Cummins & Company, a full service roofing and waterproofing consulting firm. My Curriculum Vitae is attached as Exhibit A.
4. In 2003, I was asked by Steve Robinson, the facility manager for the Verizon Call Center, to conduct a site visit of the Richland Mall for the purpose of identifying issues with the waterproofing system. My Roof Observation Report from this site visit is attached as Exhibit B.
5. Upon the request of legal counsel for Century Management, I was asked to conduct observations and compile a report on the condition of the roof and waterproof membrane at the Richland Mall. My inspection took place from June 2 to June 4, 2013.

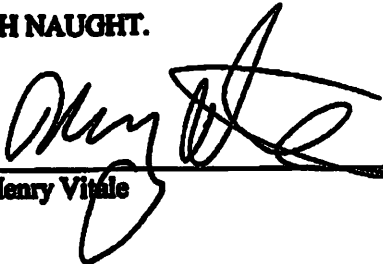
6. The parking deck on the Richland Mall was in substantially the same condition in 2013 as it was when I inspected it in 2003. I did note some normal deterioration as would be expected with ten years of normal use as a driving surface.

7. The continuous failure to properly maintain and repair the roof system since its construction has resulted in an ineffective waterproofing entity.

8. During both of my inspections, I noted a labyrinth of sheet metal catch pans above the ceiling.

9. I am informed and believe that the only true method of repairing the roof system such that water infiltration is eliminated would be to remove the wearing slab and the underlying waterproofing components, clean and properly prepare the structural slab and install a proper waterproofing membrane system designed for this application. This was my recommendation in 2003 as well as in 2013.

FURTHER AFFIANT SAYETH NAUGHT.


Henry Vitale

SWORN TO BEFORE me this
24 day of Jul. 2015.


Richard M. Clay
Notary Public ID #2219993
State of New Jersey
Notary Public for _____ My Commission Expires 04/28/2019
My Commission Expires: _____



Phone: (732) 203-2008
Fax: (732) 203-2009
jd.cummins@verizon.net
www.jdcummins.com
310 Broadway
Keyport, NJ 07735

FIRM FIRM PROFILE

James D. Cummins and Company was founded November 3, 1965. We have been actively operating for the past 46 years as a roofing and waterproofing consulting firm that provides unbiased evaluations. We are not engaged in the manufacture, sale or the installation of any roofing, waterproofing or related products.

Our capabilities include the evaluation and technical services for survey reporting and general consulting on failure analysis, field supervision, recommendations, bid specifications, non-destructive testing, project administration, and inspections.

Although we are a consulting company involved with the total concern of the building envelope, James D. Cummins and Company has developed a particular expertise in the area of roofing. Including amongst the millions of various sloped square feet of roofing James D. Cummins and Company has either inspected, evaluated or designed the following systems: shingle, slate, copper, synthetic single plies, sprayed in place polyurethane, inverted roof assemblies, cold process, SBS modified and built-up roofing consisting of asphalt and coal-tar pitch.

Investigations of in-place roofing systems are conducted by visually observing the entire roof area and taking photographs of our observations. Non-destructive testing is performed with the aid of a capacitance moisture meter or infrared scanner. When necessary to verify our readings, we make test cuts (destructive testing) in the roofing membranes. Test cut repairs are made in a professional, watertight manner. Reports of our findings are written and documented with photographs.

Specifications are prepared based on our investigations and pre-design survey with the purpose of gathering and evaluating data on the existing waterproofing conditions. From this information James D. Cummins & Company develops a comprehensive design criteria and scope of work, necessary to provide a cost effective, long-term, warrantable solution to the existing waterproofing problems.

Monitoring the roof application is done on a random or full-time basis. If requested, a representative from our firm will conduct a Pre-Bid Meeting with the bidding contractors, which generally includes reviewing the specified work and a walk-through of the roof area. Upon award of the roofing project, a Pre-Construction Meeting will be scheduled to go over the plans and specifications to ensure proper compliance of the roofing work specified. During the roofing application, a representative would be at the job site on a random or full-time basis to observe the roofing work performed which is generally followed with a report. Upon completion of the roofing work, a Punch List would be compiled with the items in need of correction or repair (if any). After notification that all the Punch List items are completed we would make a final visit to the job site to inspect the items mentioned in our Punch List.

Litigation - Our firm has extensive experience over the years as expert witnesses, testifying on problem situations that could only be resolved in the courts. This includes depositions, arbitration and trial testimony.

James D. Cummins and Company are members of the National Roofing Contractors Associations (NRCA), National Forensic Center, Construction Specifications Institute (CSI), Roof Consultants Institute (RCI) and the American Institute of Architects -Associate Member (AIA)



SPECIALIZING IN:

Roofing

- System failure analysis
- Material failure analysis
- Visual surveys and evaluation
- Leak evaluations
- Non-destructive testing (infrared, capacitance)
- Core analysis
- ASTM testing
- Design criteria evaluations
- Design and specifications
- Project administration
- Project management
- Asset management programs
- Maintenance programs
- General opinion and third party testimony

Waterproofing

- Masonry evaluations
- Visual surveys and evaluations
- Non-destructive testing
- Core analysis
- ASTM testing
- Design and specifications
- Project administration
- Project management
- Asset management programs
- Maintenance programs
- General opinion and third party testing

OUR CLIENT BASE ENCOMPASSES:

- Hospitals
- Educational Facilities
- Libraries
- Office Buildings
- Universities
- Government Facilities
- Condominiums
- Shopping Malls
- Industrial Buildings
- Insurance Companies
- Religious Facilities

KEY PERSONNEL

Henry Vitale, RRO, SME

President/Owner

Education: Civil Engineering Background, One of 642 Registered Roof Observers in the US and Canada recognized by the Roof Consultants Institute. On May 4, 2012, Mr. Vitale was designated a Subject Matter Expert (SME) by the Roof Consultants Institute and is one of twelve RCI members from the United States and Canada charged with updating and rewriting the exam for Registered Roof Observer.

Responsible for Business Development, Corporate Planning, Contract Negotiations

Qualifications: 30 years Roofing and Waterproofing Technology, Recently elected to the office of President of the Delaware Valley Chapter of the Roof Consultants Institute

Erin Kilroy

Director of Operations

Education: Bachelor's degree of Social Work from Monmouth University

Responsible for all documentation to include preparation of building plans and specifications, detail drawing, job site monitoring, and assists in writing of reports. Also responsible for accounting division, including accounts payable and receivable.

Qualifications: Member of Sustainable Roofing and Waterproofing Alliance, 3 years of accounting experience, 5 years of experience with infrared technology, 9 years of experience with proper ladder safety and maneuvers, continuing education with industry seminars and RCI Educational Programs.

Ricardo Negron

Field Technician

Responsible for job site monitoring

Qualifications: 15 years roofing and waterproofing

Yolany Heredia

Junior Associate

Education: Rising Sophomore Architecture Major at New York Institute of Technology

Responsible for all CAD Operations to include preparation of building plans and detail drawing, Drone Operator, job site monitoring and assists in writing of reports.

Qualifications: attends seminars through product manufacturers, 5 years' experience with Autocad, attended classes on design, and extensive expertise in conversing with project managers.

OUTSIDE RESOURCES

Shupenko Engineering, P.E.

➤ **Structural Engineers**

CLIENT LIST

Townships:

Township of Brick
Township of Carteret
Township of Franklin
Township of Manalapan
Township of Montclair
Township of Old Bridge
Borough of Keyport

School Districts:

Upper Freehold District
Mendham Township District
Galloway Township Public Schools
West Windsor-Plainsboro School District
Watchung Hills Regional Schools
Upper Freehold School District
Essex County College
Asbury Park School District
Wildwood Township
Galloway Township
Saint Rose High School
Marlboro School District
West Windsor Township

Architects:

Heintz & Fiore, Architects
Chyun Associates, P.A.
Fraytak, Veiaz, Hopkins, Duthis, P.C.
Remington & Vernick Engineers

Temples:

Temple Beth Ahm
Beth Tikvah
Temple Shalom
Temple Emanu-el

Others:

Chubb Insurance
Velocity Services Group
Eden Wood Realty, LLC
NJ PAC
Apollo Distributing
Bollerman Associates
Automatic Data Processing (ADP)
GVA Williams
Paper Mill Playhouse
Stonehenge Condominiums
Jewish Community Center of Paramus

Attorneys:

DJS Associates
McCabe, Trotter & Beverly, PC
Post & Schell, Attorneys at Law
Levinson Axelrod, Attorneys at Law
Schibell, Mennis & Kentos, Attorneys at Law
Kent & McBride, Attorneys at Law

Churches:

Saint Clements
Saint Mary's of The Lake
Saint Rose of Lima
Saint Dennis School
Holy Family School Parish
1st United Methodist Church
St. Barnabas R. C. Church
Church of Saint Veronica
Saint Ann's Church
Saint Joseph's Church
Saint Denis Star of the Sea Chapel
Saint Anthony's Parish
Saint Agnes/ Our Lady of Perpetual Help
Mother of Mercy Parish

Contractors:

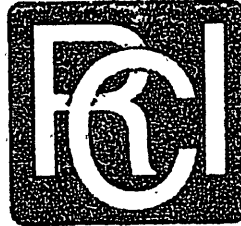
D.A. Nolt, INC
E.R. Barrett
Mike Kobithen Roofing
Badger Roofing
Strober-Wright Roofing
Murray Construction
APS Contracting, INC

Shopping Centers:

Levco Shopping Centers
Inman Grove Shopping Center

Other Continued:

Canoe Brook Country Club
Verizon Wireless
Whiteman House Condominiums
NJ Audubon Society
Kohl's Department Store
Reeves International
Count Basie Theater
Colliers Houston
10th Street Condo Association
Atlantic City Airport



CERTIFICATE OF APPRECIATION

Awarded to

Henry Vitale, RRO

Registered Roof Observer (RRO)
Exam Development Task Force Contributor
2012

James R. Beilman
Executive Vice President & CEO

March 17, 2013
Date

John A. Marshall
President

March 17, 2013
Date



Be it known that

Henry Vitale

having given satisfactory evidence of necessary qualifications with regard to character, education, and experience as required by RCI, Inc. was examined - duly registered - awarded this certificate and is henceforth recognized as a

Registered Roof Observer

In testimony whereof Registration Number 306 is issued under the seal of RCI and the signatures of the President and Secretary, this 11th day of December, 1999.

RCI, Inc.

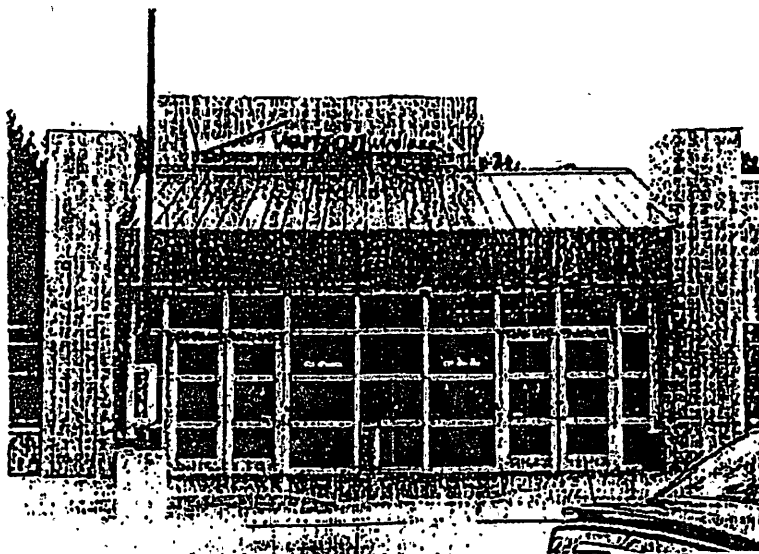
1500 Sunday Drive, Suite 204
Raleigh, NC 27607
(800) 828-1902 ■ www.rci-online.org

President

Secretary

RECORD ON APPEAL 523

ROOF OBSERVATION REPORT



*Columbia Contact Center
Verizon Wireless
3400 Forest Drive
Columbia South Carolina*

Prepared For:

MR. STEVEN ROBINSON
Northeast Area Manager

*Verizon Wireless
3400 Forest Drive, Suite 2100
Columbia, SC 29204*

Prepared By:

JAMES D. CUMMINS & CO.

*Union Square Office Commons
560 Route 35, Unit G
Red Bank, New Jersey 07701*

*Telephone: (732) 842-8215
Fax: (732) 741-2304
Email: info@jdcummins.com
Website: www.jdcummins.com*

*Sept 2003
File Number PROJ03-2086*

Verizon Wireless Columbia Contact Center IVR, et



RECORD ON APPEAL 524

ROOF OBSERVATION REPORT**COLUMBIA CONTACT CENTER****3400 Forest Drive
Columbia, SC****TABLE OF CONTENTS**

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RECOMMENDATION	12
ROOF PLAN.	13
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PRELIMINARY DISCUSSION

Mr. Steve Robinson, Facility Manager for the Verizon Wireless Contact Center located in Columbia South Carolina, first contacted the office of James D. Cummins and Company, an *independent*, full service, roofing and waterproofing *consulting* firm, on July 8, 2003. Mr. Robinson requested the use of our expertise to examine the construction of structural components comprising the waterproofing elements at the above referenced facility as they relate to current roof leaks. After our proposal was accepted a site visit was scheduled for Wednesday, August 13th and Thursday August 14th, 2003.

In consequent conversations, with Mr. Robinson, the writer learned that the Columbia Contact Center occupied a converted retail space in the Richland Mall and the roof over the Center Offices was, in actuality, a parking deck. Mr. Robinson informed us that the 140,000 square foot of space had been renovated over a three (3) year period and consisted of two (2) phases. Phase one had started in 1999 and consisted of 70,000 square feet with Verizon Wireless occupying the space in 2000. Phase two was the conversion of the remaining 70,000 square feet started in late 2000 and was completed in May 2001. The Center Offices have suffered from water infiltration since the space has been occupied. The Richland maintenance team have constantly responded to the influx of leaks and finally were forced to install catch containments above the drop ceiling to thwart water penetrating into the office space.

The writer arrived in Columbia, South Carolina on the given day and was met by Mr. Robinson at the airport. We traveled to the Richland Mall where he had set up a meeting with Mr. Gordon Slaton, the Maintenance Supervisor of the mall and Mr. Craig Booth, a Maintenance Engineer at the mall. According to information supplied by both men the mall was 15 years old with construction of Phase one starting in 1988 and lasting approximately three (3) years. Mr. Slaton reported that the original owner had gone bankrupt at the end of the first phase. Another investment group had continued construction, completing phase two in 1991.

Mr. Slaton's records showed that the components of the deck system consists of a vented, galvanized metal deck; four (4) inches of structural pour concrete; one (1) ply of waterproofing membrane described as Volclay Swellite, manufactured by CETCO; extruded, expanded, styrene insulation boards; drainage mat; and four (4) inches of concrete wearing surface. He explained that over the years the maintenance group attempted remediation of leaks by removing a 15 ft x 15 ft square of concrete wearing surface as defined by the control joints laid out in the concrete wearing surface, removing the underlying materials down to the structural deck and replacing the components in kind. In excavating the materials they found that the waterproofing membrane was not adhered to the structural concrete. Photographs of the operation depict the membrane in most cases wrinkled up and unattached from the structural deck. To avoid this with the remedial installation the perimeter of the waterproofing membrane was pinned with termination and concrete anchors. Photographs of construction, hanging in Mr. Slaton's office, show phased construction with excessive moisture present on the structural deck during the installation of the waterproofing membrane. This would explain why the waterproofing membrane was unattached and wrinkled leaving the structural slab open to moisture contamination.

On Thursday, August 14, 2003, the writer performed observations of the interior leak areas, the catch containment apparatus, and the Parking Deck area.

OBSERVATIONS

In starting my observations of the leak locations, I quickly learned that the Maintenance Team had installed a large expanse of catch containment troughs under what appeared to be structural control joints and thru-deck penetrations. This labyrinth of containment was fabricated from sheet aluminum and measured approximately 12 inches wide by 4 inches deep. Some of the troughs ran in excess of 100 feet. They were tied into the Parking Deck drain leaders with PVC piping. Therefore the visible leaks were only a small percentage of the total of water infiltrating the office space. After examining several areas of the interior ceiling space (the space between the drop ceiling and the underside of the metal decking). I proceeded to the Parking Deck and continued my observations.

As the Parking Deck was covered with a four (4) inch concrete wearing surface my investigation was limited to what could be viewed from the top surface.

In reviewing the top of the Parking Deck I noted an excessive amount of cracks in the concrete wearing surface. This condition was typical throughout the 140,000 square feet of the facility's "roof".

Experience tells us that there is excessive movement of the wearing surface. The movement is exercising stress on the concrete causing the surface to crack and allow copious amounts of water to penetrate down to the structural slab. Two (2) things would cause this, improper installation of control joints in the wearing surface or the use of the wrong mix of concrete.

Continuing my observations I found several penetration points that were compromised and open to water infiltration. Failed repair attempts are superficial at best and do not deal with flashing problems underlying the top, wearing surface. These problems appear at light stanchion bases, curbing, etc.

A retrofit wall flashing system was installed at the perimeter walls. This consists of Ethylene Propylene Diene Monomer (EPDM) rubber sheeting embedded in sealant and fastened with lengths of termination bar. Again repairs have been performed on the surface and do not address the underlying flashing problems. In addition perimeter screen stanchions have been anchored through the concrete wearing surface with no visible water seal. This has opened another means of water infiltration.

The three (3) structural control joints are poorly constructed and in disrepair. The sealant used to seal the surface mounted fasteners is dried out and cracked leaving open pathways for water to enter through the Parking Deck components and into the underlying control joint. Surface applied repairs are also dried out and cracked offering little or no protection against water infiltration. Again repair attempts were performed on the top surface, not taking into consideration the failed or lack of flashing at the structural deck where the waterproofing membrane is in place.

PHOTOGRAPHS

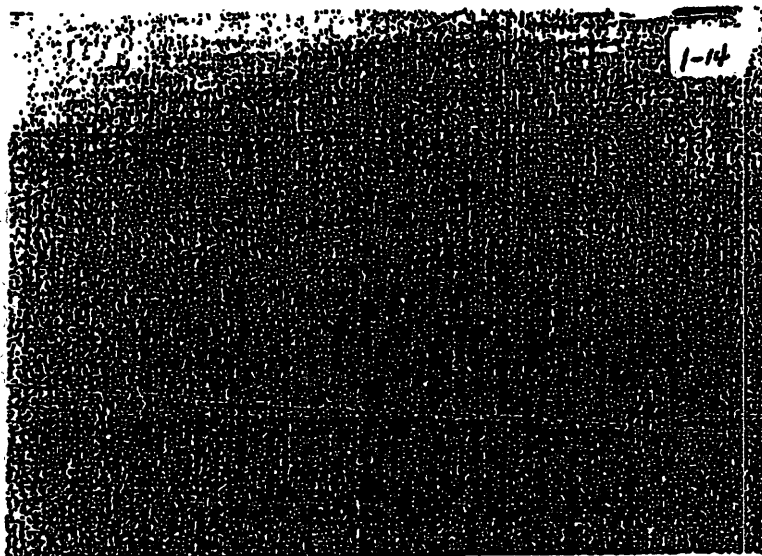
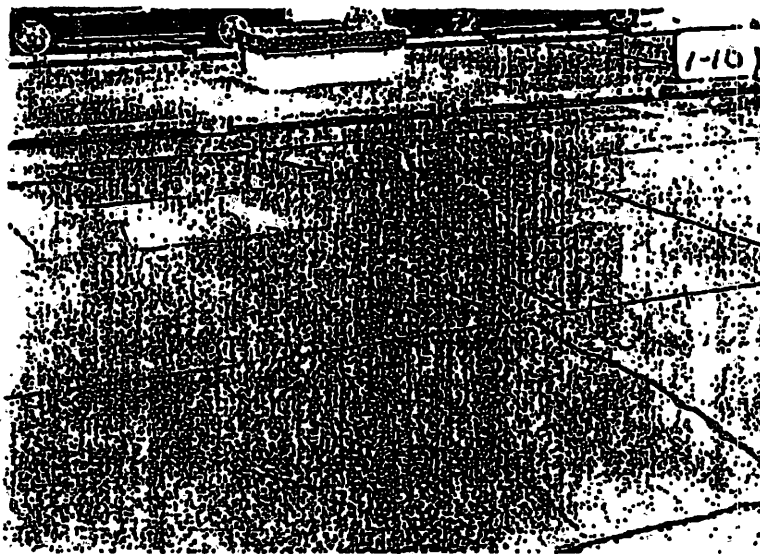
Photographs 2-23 & 2-24 show elaborate interior drainage system of the leak catch containment system.



COLUMBIA CONTACT CENTER, Columbia, SC

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Photographs 1-10 & 1-14 show the excessive amount of cracks in the wearing surface of the Parking Deck.



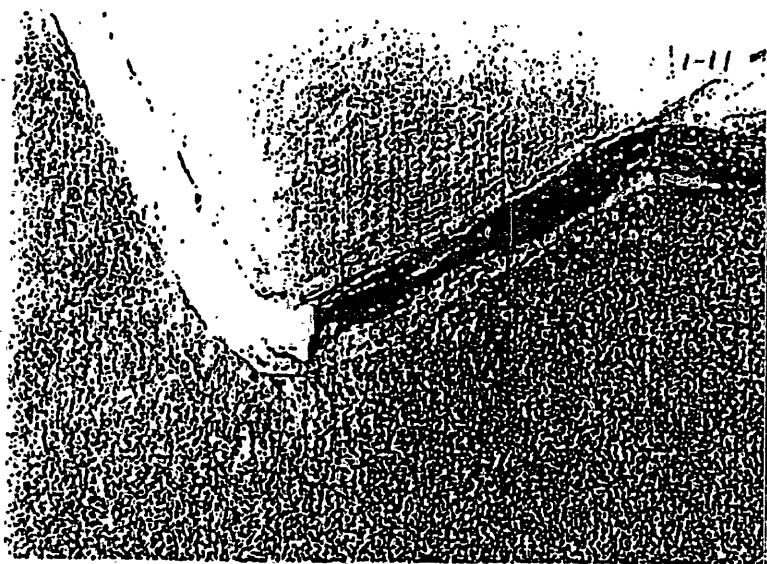
Photograph 1-9 shows cracks telegraphing through remediated 15 ft x 15 ft repair area, typical.



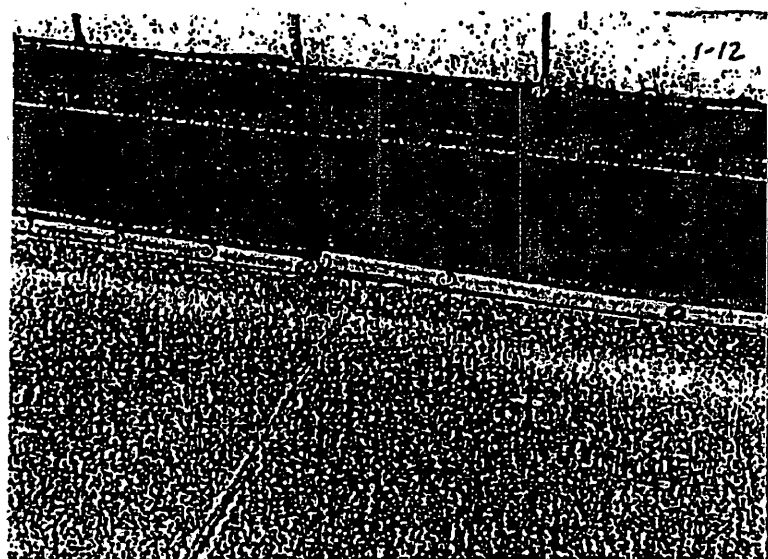
Photograph 1-7 shows sealant delamination at high wall/curb transition allowing uncontrolled amounts of water to enter the building through the waterproofing components.



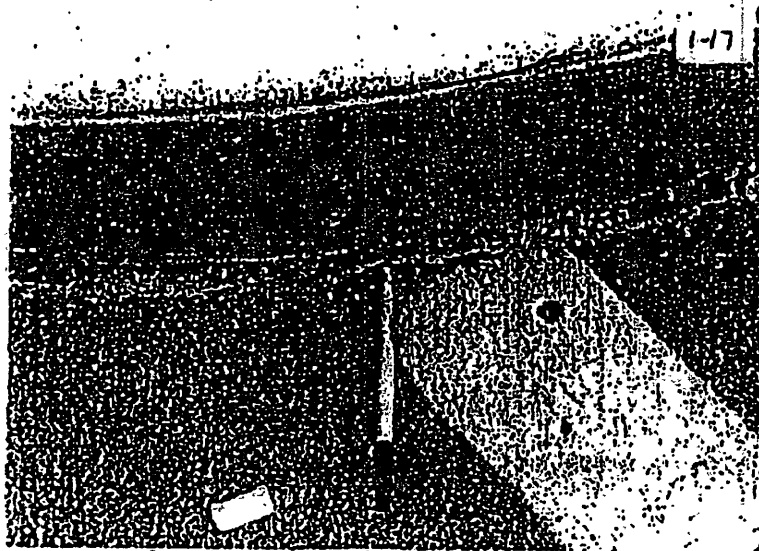
Photograph 1-11 shows delaminated surface applied sealant at light stanchion base; underlying joint was wet to the touch.

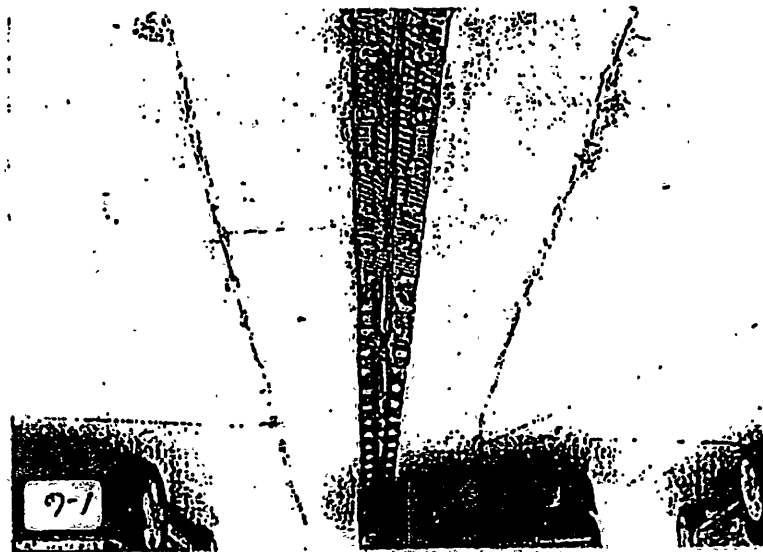
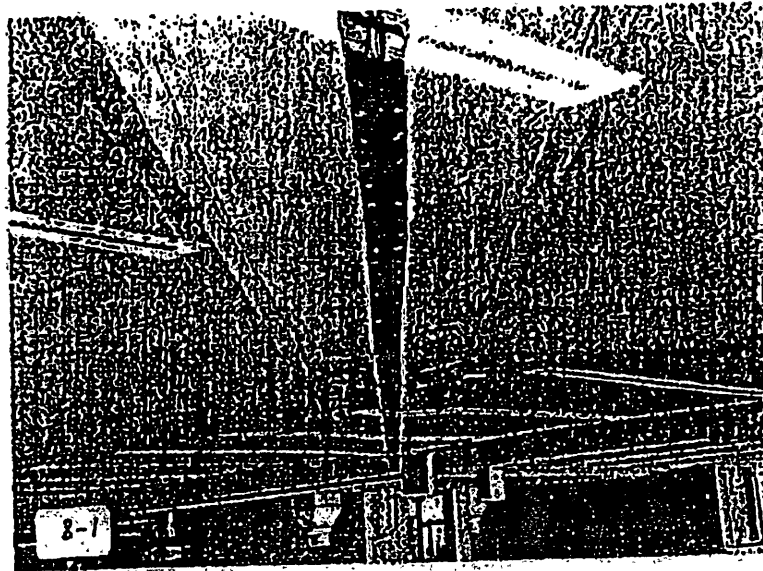


Photograph 1-12 shows "popped" concrete fasteners at retrofit wall flashing termination bar.



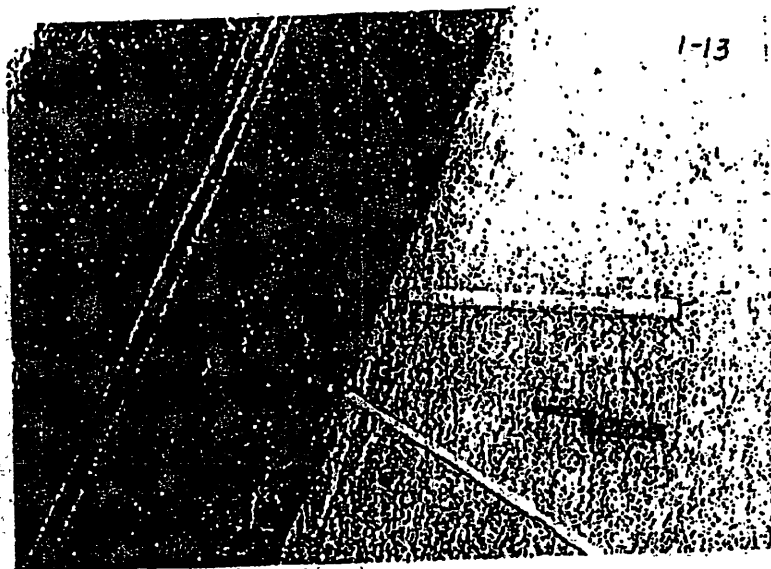
Photographs 1-17 & 1-18 show cracks at transition points of curbs and stanchion bases, typical.



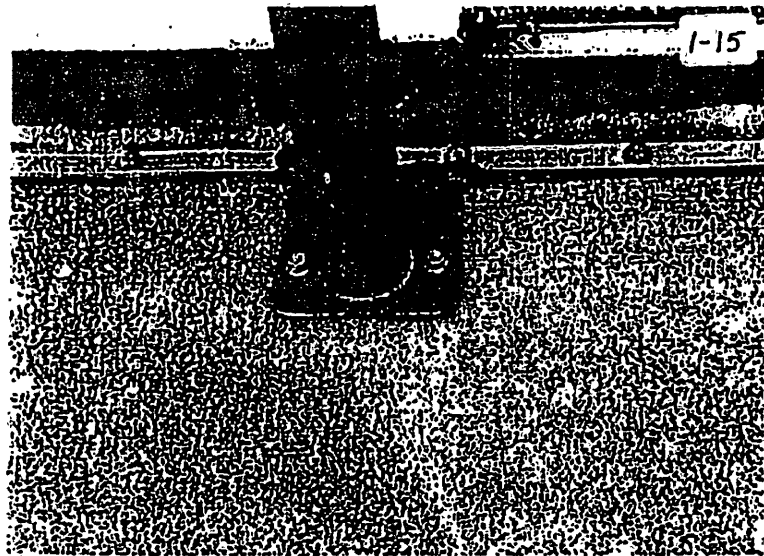


Photographs 1-6 & 1-8 show two (2) of the three (3) structural control joint locations.

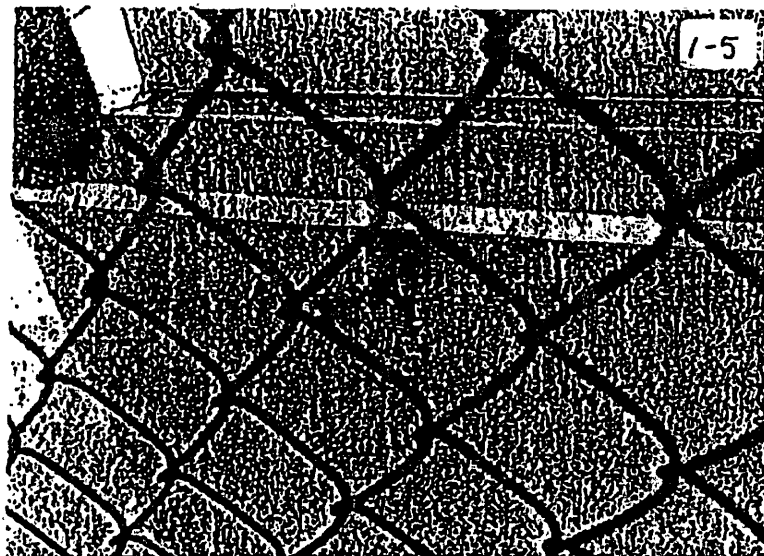
Photographs 1-3 & 1-13 show compromised structural control joint expansion material allowing water to enter the waterproofing system and underlying office space, typical.



Photograph 1-15 shows perimeter screen stanchion fasteners without any apparent sealant.



Photograph 1-5 shows holes punched into an equipment curb wall, typical. This type of compromise is another pathway for water to enter the waterproofing system and building.



DISCUSSION

The in-place waterproofing, as previously identified by Mr. Slaton, the Maintenance Supervisor for the Richland Mall, is Volclay Swelltite. This material is described as a composite of bentonite clay adhered to a 12 mil. puncture resistant geotext fabric forming a 90 mil thick membrane. It can be installed in any weather condition and over uncured concrete. The manufacturer states that the bentonite compound has the capacity to expand when coming in contact with and seal installation anomalies forming a monolithic waterproof membrane. The material is self-adhering and supposedly requires no priming of the substrate. (See Exhibit #1).

Apparently the material has not performed as designed. According to photo documentation taken at remediated areas, the waterproofing membrane did not adhere either to the substrate (structural concrete) or to itself. The material has been found folded over and wrinkled up leaving the structural concrete deck exposed and unprotected. The constant seepage of water through the topical concrete wearing surface has been soaked up into the underlying substrate and has been drawn to the warm, interior side of the slab causing leakage into the building. Furthermore, leak locations indicate to us that flashing details have failed and are allowing uncontrolled amounts of water to enter the waterproofing system and eventually the building. It has been our experience that when flashings (wall, control joints, or penetrations) are not fabricated or installed properly it causes widespread leakage and premature failure of the waterproofing system.

In reading through the Manufacturer Technical Data Sheet we find that the material was not to be installed in standing water or during periods of precipitation. The Swelltite membrane is not to be left exposed to the elements it is only to be installed in a confined (encapsulated) application. In reviewing the pictures supplied by the Maintenance Supervisor and seeing the amount of standing water on the structural deck we surmise that the waterproofing membrane was installed over ill-prepared substrate.

The spec sheet also states that the Swelltite membrane is not designed to span structural control joints (expansion joints). Control joints are to be fabricated from materials supplied by others specifically designed to perform this function. Without performing destructive testing we can only guess what was used to seal structural control joints and if the materials were installed correctly.

The manufacturer (CETCO) also relates that the bentonite based membrane can expand up to 15 times its dry weight when unconfined. As we mentioned earlier there is excessive cracking of the concrete wearing surface. We attribute this phenomenon to the fact that, over the years, uncontrolled amounts of water have caused the Swelltite to expand and push up on the four (4) inch concrete slab with enough pressure to create the stress cracks in the wearing surface.

COLUMBIA CONTACT CENTER, Columbia, SC

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VWS900180

RECOMMENDATION

We feel there is very little that can be done to permanently repair the waterproofing system in its current condition. Any attempts should be, at best, considered temporary as they will be short lived and fail. The only logical approach of longevity would be to remove and replace the current roof system with a newly installed system, properly installed to industry standards and incorporating proper details at vertical transitions, penetrations, drains, and structural control joints.

If you have any questions with the material contained within this report or if we can be of further assistance, please feel free to contact us.

Respectfully submitted,

Henry Vitale

**Henry Vitale, RRO
President**

VOLCLAY SWELLTITE

COMPOSITE BENTONITE WATERPROOFING SYSTEM

DESCRIPTION

Volclay Swellite is a highly effective waterproofing composite of sodium bentonite compound integrally bonded to a HDPE geomembrane liner. This composition combines the active waterproofing benefits of sodium bentonite with the strength and puncture resistance of a thick geomembrane liner.

Volclay Swellite is a true advancement in waterproofing membrane technology. Unlike other membrane systems which require near-perfect installation, Swellite's active bentonite compound can expand to seal installation imperfections or small punctures in the membrane. Swellite is manufactured at a factory controlled thickness of 90 mils (0.090") assuring the specifier, contractor, and owner of consistent material application. This engineered composite consists of a white (heat reflective) 12-mil HDPE geomembrane liner and 78-mils of bentonite compound with a clear release film attached. Swellite contains virtually zero VOC, can be installed in almost any weather condition to green concrete, and most importantly, has proven effective for more than 15 years.

Swellite works by forming a monolithic membrane upon hydration with water. When wetted, unconfined bentonite can swell up to 15 times its dry volume. When confined under pressure the swell is controlled, forming a dense, impervious waterproofing membrane. The swelling action of the bentonite compound can seal small concrete cracks caused by ground settlement, concrete shrinkage, or seismic action; problems over which there is normally no control.

APPLICATIONS

Volclay Swellite is designed for below-grade vertical and horizontal structural foundation surfaces, as well as, above grade split-slab construction. Typical below-grade applications include backfilled concrete walls, masonry block walls, earth-covered roofs, and tunnels. Typical above grade split-slab construction applications include plaza decks, parking decks, and balconies. Additionally, Swellite can be used for interior split-slab applications for mechanical rooms, kitchens, and laboratory facilities. Applications may include structures under continuous or intermittent hydrostatic pressure.

INSTALLATION

General Install Volclay Swellite in strict accordance with the manufacturer's installation guidelines. Use accessory products as recommended. Install Swellite

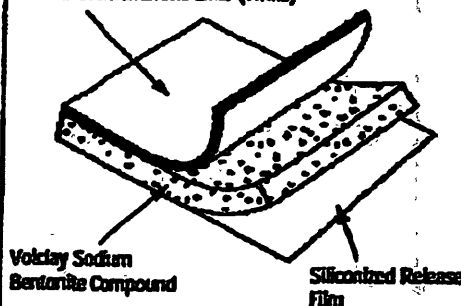
with the bentonite compound directly against the surface to be waterproofed. For ease of handling, the sticky bentonite compound is covered with a siliconized release film that must be removed during installation. Schedule waterproofing material installation to permit prompt placement of backfill material or concrete. For applications not covered herein, contact CETCO for specific installation guidelines.

Storage: Store Swellite and accessory products in a dry location protected from construction operations and weather. Protect materials from moisture, excessive temperatures and prolonged exposure to direct sunlight during storage. When storing materials outside at a jobsite, provide weather-proof covering, top and all sides (allow for adequate ventilation). Do not double stack pallets in storage or during shipment.

Preparatory Work: Structural concrete surfaces should be smooth and free of dirt, rock, debris, oil, grease, laitance, or other foreign materials. Remove form fins and other protrusions to match substrate surface. Completely fill any Form-tie holes, honeycombing, voids, and cracks with non-shrink cementitious grout, M-2000 or Bentoseal. Concrete surfaces to receive M-2000 Liquid Flashing should be water cured a minimum of 7 days prior to application. Where possible, design horizontal concrete surfaces with proper slope to drain.

VOLCLAY SWELLTITE COMPOSITE

HDPE Geomembrane Liner (White)



FOUNDATION WALL INSTALLATION

Before installing Swellite membrane to foundation walls, prepare substrate, and detail all vertical inside corners, penetrations, and the footing/wall joint as follows:

Vertical Inside Corners: Install a 3/4" (18 mm) thick, continuous fillet of Bentoseal® at all vertical inside corners.

Penetrations: Apply a 3/4" (18 mm) thick fillet of Bentoseal around base of penetrations. Extend Bentoseal a minimum of 6" (150 mm) outward from penetration 90-mils thick. After Swellite membrane is installed, apply a counter flashing of Bentoseal at membrane edge around penetration.

Footing/Wall Joint: Install at footing/wall joint a continuous 3/4" (18 mm) thick, 45° angle fillet of Bentoseal.

Membrane Installation: REMOVE CLEAR RELEASE FILM from back of membrane before installation. Starting at the base of the wall, install the membrane over the Bentoseal cant and onto the footing a minimum of 6" (150 mm) with bentonite compound directly against the wall (white HDPE liner side toward installer). Secure all membrane edges with washer-head mechanical fasteners 24" (600 mm) on center or less as required to contour surface. Swellite membrane may be installed either horizontally or vertically oriented. Overlap all membrane edges a minimum of 2" (50 mm). Stagger membrane roll ends a minimum of 12" (300 mm). Continue membrane installation to finished grade or as specified.

Cut membrane to closely fit around penetrations. Trowel a minimum 3/4" (18 mm) thick layer of Bentoseal around penetrations. Extend Bentoseal onto penetration and completely fill area between membrane edge and penetration. Seal all overlap seams with Volclay Seamtape.

Terminate membrane at finished grade line with rigid termination bar fastened 12" (300 mm) on center. Trowel M-2000 90-mils thick by 3" (75 mm) wide centered on the top edge of the membrane.

Backfill material should be placed and compacted to 85% Modified Proctor density immediately following the application of the membrane. If backfill contains sharp or irregular material, cover membrane with Protection Mat 10V or Aquadrain® drainage composite to avoid damage during backfilling and compaction.

Tie into under-slab waterproofing as required by overlapping the under-slab waterproofing a minimum of 6" (150 mm). When a drain tile is required, install it below the top of the footing.

Masonry Block Walls: CETCO recommends that the masonry block cells be filled with cementitious grout or concrete. All mortar joints should be completely filled and struck flush before membrane is installed to masonry walls.

HORIZONTAL DECK INSTALLATION

Before installing Swellite membrane, prepare substrate, apply adhesive, and detail all drains, transition corners and penetrations. Consult manufacturer if deck is precast concrete planks or for other conditions not stated herein.

Drains: Trowel a minimum 90-mil (2.3 mm) thick layer of Volclay M-2000 on the drain ring and continuing into the drains inward toward slope. Extend M-2000 a minimum of 6" (150 mm) around the drain. Allow M-2000 to cure a minimum of 12 hours prior to installing membrane. After Swellite membrane is installed around drain, apply a 60-mil thick counter flashing of M-2000 covering the membrane edge.

Penetrations: Trowel a minimum 3/4" (18 mm) cant of Volclay M-2000 around the penetration. Extend M-2000 outward from penetration a minimum of 6" (150 mm) at 90 mils thick. After membrane has been installed overlapping M-2000 2" (50 mm), apply a 60-mil thick counter flashing of M-2000 at the membrane edge.

Transition Corners: Apply a 3/4" (18 mm) thick Volclay M-2000 fillet to inside transition corners. Then extend M-2000 at 90-mil minimum thickness for 6" (150 mm) in both directions from the corner. Allow M-2000 to cure a minimum of 12 hours prior to installing membrane. After membrane has been installed to the corner, apply a 60-mil thick counter flashing of M-2000 covering the membrane edge.

Membrane Installation: REMOVE CLEAR RELEASE FILM from back of membrane before installation. Install membrane with bentonite compound directly against the deck (white HDPE liner side up) from the low point to the high point across the full line to create a shingle-style installation. Overlap all membrane edges a minimum of 2" (50 mm). Stagger membrane roll ends a minimum 12" (300 mm).

Cut membrane to closely fit around penetrations overlapping previously installed M-2000. Trowel 90-mil thick counter flashing of M-2000 over membrane edge. Seal all membrane overlap seams with Volclay Seamtape.

OPTIONAL ADHESIVE METHOD

Apply A-3000WB Adhesive by roller or sprayer at a rate of 250-275 sq ft per gallon (25 sq m per 3.8 liters) and allow to cure (dry black) before applying membrane. After adhesive has cured, follow membrane installation instructions for applicable application, foundation wall or deck, excluding the mechanical fasteners. Primed surfaces not covered with membrane during the same working day must be re-primed.

SIZE AND PACKAGING

Volday Swellite roll size is 40" wide by 37' 9" long (1.02 m x 11.5 m); 125 square feet (11.5 sq m) per roll. Each roll weighs approximately 81 lbs. (36.8 kg).

LIMITATIONS

Do not install Swellite in standing water or during precipitation. If ground water contains strong acids, alkalies, or is of a conductivity of 2,500 μ mhos or greater, submit water samples to the manufacturer for compatibility testing.

Swellite is not designed for unconfined above-grade waterproofing applications or subsurface applications that do not provide full confinement coverage. Do not install Swellite on horizontal plaza deck applications that utilize pavers placed on pedestals.

Swellite is not designed to waterproof expansion joints. Expansion joints require a properly engineered expansion joint sealant product manufactured by other companies.

For foundation walls, backfill should consist of compactible soils, pea gravel, or crushed stone (3/4" or less). Compact soils to minimum 85% Modified Proctor density. Stone backfill larger than 3/4" (19 mm) may require the use of a protection course; consult CETCO for specific guidelines. Avoid backfill with aggregate 1-1/2" (38 mm) or larger.

On horizontal decks, Swellite requires proper containment from a topping ballast material. Swellite requires a minimum 3" (75mm) thick structural concrete slab or a minimum paver assembly weight of 20-lbs. (9 kg) per square foot (includes sand or grout leveling course). When compactible soil topping is used, it must be at least 18" thick and compacted to a minimum 85% Modified Proctor density.

ACCESSORY PRODUCTS

M-2000 Liquid Flashing: M-2000 Liquid Flashing is a trowel-grade, bitumen modified polyurethane waterproofing mastic used as a detailing product around penetrations, drains and at corner transitions for horizontal deck and vertical wall installations. M-2000 is a single-component moisture curing elastomer that meets the requirements of ASTM C836-84. Non-hazardous material when shipped via ground trucking service. Do not ship air freight.

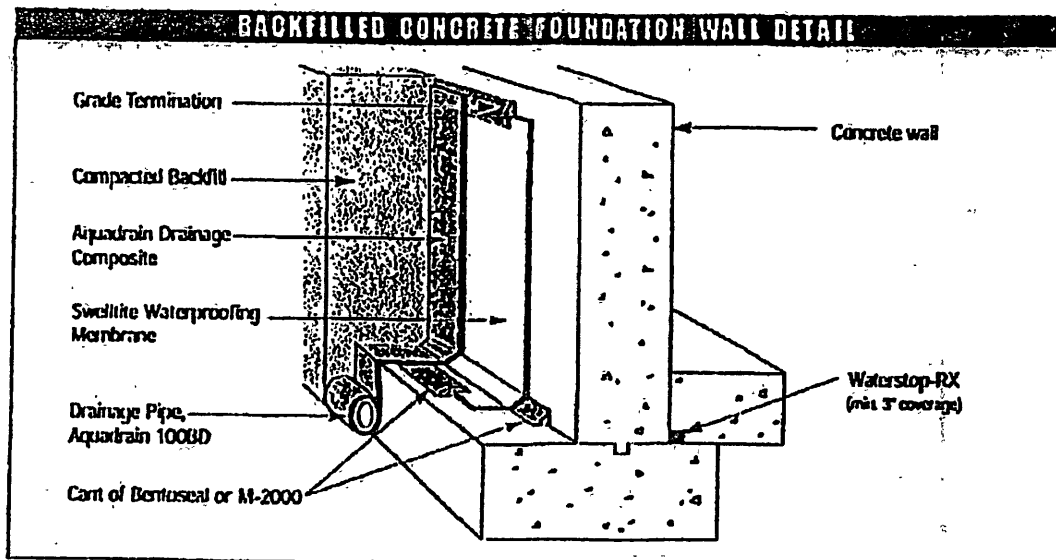
BENTOSEAL: trowel grade sodium bentonite compound used as a detailing mastic around penetrations and corner transitions. Bentoseal is packaged in 3 gallon pails (36 lbs (16.34 Kg)). Non-hazardous material when shipped via ground trucking service. Do not ship air freight.

A-3000WB ADHESIVE: water-based latex adhesive applied to substrates to promote adhesion of Swellite Membrane. Typical application rate 250-275 sq ft/gallon. Packaged in plastic 5-gallon pails; 36 pails per pallet. Non-hazardous material when shipped via ground trucking service. Do not ship air freight.

SEAMTAPE: thick butyl tape with poly film backing used to seal membrane overlap seams.

AQUADRAIN: prefabricated drainage composite consisting of a heavy filter fabric adhered to a high-strength plastic drainage core. Aquadrain is available in 4' x 52" rolls.

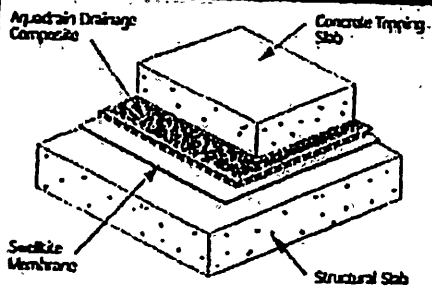
WATERSTOP-RX: expanding bentonite-based concrete joint strip waterstop designed to replace PVC dumbbell waterstops. Adhered into place with Volday WB-Adhesive. Waterstop-RX 101T is packaged in cartons of 100 linear feet (30.46 m); 36 cartons per pallet.



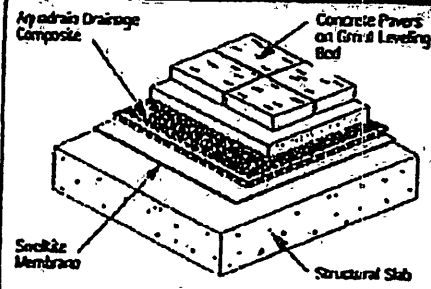
VOLCLAY SWELLTITE WATERPROOFING GENERAL APPLICATION DETAILS

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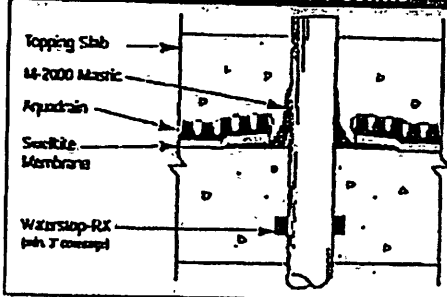
PLAZA DECK - CONCRETE TOPPING SLAB



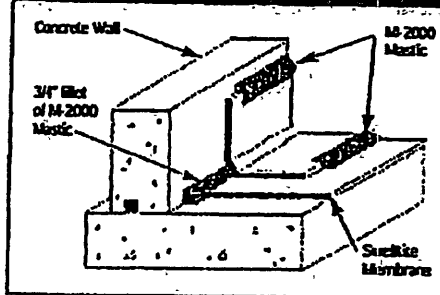
PLAZA DECK - PAVERS OVER GROUT BED



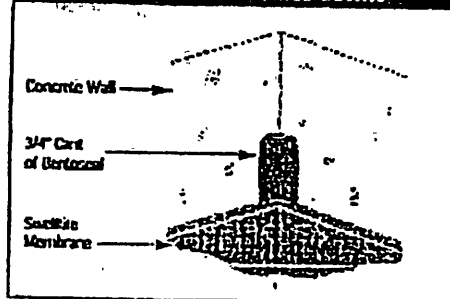
PLAZA DECK PENETRATION DETAIL



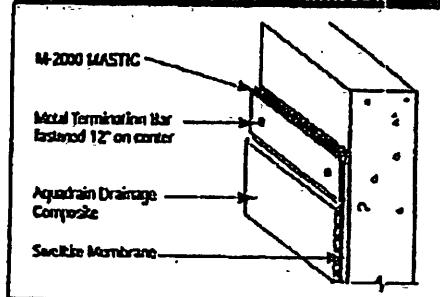
PLAZA DECK TRANSITION DETAIL



INSIDE CORNER WALL DETAIL



TYPICAL GRADE TERMINATION



JUNE 2001 (Supersedes All Previous Versions)
Do not use this information for Swellite 3000.
Refer to Swellite 3000 Techdata Sheet for
product specific installation instructions.

The information contained herein supersedes all previous versions printed prior to June 2001, and is believed to be accurate and reliable. CETCO makes no warranty of any kind and accepts no responsibility for the results obtained through application of this information. CETCO reserves the right to update information without notice.

CETCO

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RECORD ON APPEAL 541

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

Century Capital Group, LLC,

Plaintiff,

vs.

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

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT
CIVIL ACTION NUMBER: 2014-CP-40-07037

CERTIFICATE OF SERVICE

RICHLAND COURT
FILED
2015 JUL 28 AM 11:10
JERINETTE W. MCBRIDE
C.C.P. & G.S.

(694,72)

I, Angela S. Hook, an employee with the Law Firm of McCabe, Trotter & Beverly, PC, attorneys for Plaintiff, 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 28th day of July, 2015, via U.S. Mail, postage prepaid and addressed as follows:

DOCUMENTS SERVED

Affidavit of Henry Vitale

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Columbia, SC

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

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FOR THE FIFTH JUDICIAL CIRCUIT
CIVIL ACTION NUMBER: 2014-CP-40-07037

CENTURY CAPITAL GROUP, LLC
MEMORANDUM IN OPPOSITION TO
DEFENDANTS' MOTIONS FOR SUMMARY
JUDGMENT

FILED
RICHLAND COUNTY
JUL 29 PM 4:12
JANETTE W. MCBRIDE
J.C.P. & G.S.

(005,72)

Plaintiff Century Capital Group, LLC ("Century"), through its undersigned counsel, respectfully submits this memorandum in opposition to Defendants' Motions for Summary Judgment. As will be more fully explained below, there are genuine issues of material fact precluding any grant of summary judgment in favor of Defendants.

STATEMENT OF FACTS

This case stems from an underlying lawsuit against Century by Spirit SPE Columbia, LLC ("Spirit") based on allegations that Century breached the duties created by the Reciprocal Easement, Covenant, Operation and Restriction Agreement ("REA") by failing to adequately repair and maintain certain portions of the Richland Mall. The Richland Mall has a long history of construction defect and maintenance issues and has experienced persistent roof leaks since inception as a result of its unusual design and construction. The parking deck was designed above occupied space and has a split-slab system of waterproofing, meaning the waterproofing membrane is sandwiched between two layers of concrete and endures regular vehicular and pedestrian traffic.

From 1996-1998, Michael D. Wilson, P.E. of Williamson & Associates performed several extensive reviews of the rooftop parking deck and provided a document entitled Parking Deck Maintenance and Preventative Maintenance Guidelines and Recommendations to the then General Manager of the Mall. Mr. Wilson opined that the deck was defectively constructed based on a failure to install sufficient expansion joints and defective components in the waterproofing structure. In lieu of costly roof repairs, Mall ownership at the time began installing a system of ceiling pans to prevent water from intruding into the occupied space below and injecting the visible cracks in the concrete of the deck with epoxy.

On December 23, 2002, the Mall was sold to Windsor Richland Mall, LP ("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. Also in 2002, Windsor sold the Verizon parcel to BRC Richland, LLC ("BRC Richland"). On September 7, 2005, BRC Richland and Windsor negotiated the REA, which attempted to outline the respective duties of those parties as they relate to maintenance and administration of the Mall. 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.

As the roof leaks continued, Mall Management elected to inject epoxy to chase the cracks and continue to install galvanized steel catch pans in the roof system to collect the water. Spirit purchased the Verizon Parcel "AS IS" "WHERE IS." on September 12, 2005, five days after the REA was filed as a matter of record. On November 4, 2005, Windsor sold the Mall parcel to Midtown Development Group, LLC ("Midtown"). On May 25, 2007, Midtown sold the Mall

parcel to RJVG.

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.

Century purchased the Mall parcel from RJVG on February 16, 2010 and acknowledges that it had notice of the roof leaks; however, it had no indication that Spirit took issue with the maintenance plan in place since the building's inception. Spirit initiated the underlying claim against Century only nine months after Century took possession of the Mall parcel.

In an effort to resolve the costly and protracted litigation with Spirit, Century agreed to settle the underlying lawsuit for One Million Four Hundred Fifty Thousand and No/100 Dollars (\$1,450,000.00). The Settlement Agreement expressly extinguishes liability and discharges all claims against Century and its predecessors in interest under the REA. Century seeks contribution from the Defendants in the present action 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 parties to the present action united in causing the damages to Spirit.

LEGAL STANDARD

Under Rule 56(c), summary judgment is only appropriate when there is no genuine issue of material fact such that the moving party must prevail as a matter of law. "Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law." *Carolina Chloride, Inc. v. S. Carolina Dep't of Transp.*, 391 S.C. 429, 434, 706 S.E.2d 501, 504 (2011). "All ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the movant. (*Staubes v. City of Folly Beach*, 331 S.C. 192, 500 S.E.2d 160 (Ct. App. 1998)). Even when there is no dispute as to evidentiary

facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied." *Young v. S. Carolina Dep't of Corr.*, 333 S.C. 714, 718, 511 S.E.2d 413, 415 (Ct. App. 1999).

ARGUMENT

I. The Determination of a Joint Tortfeasor Relationship is a Question of Fact.

The South Carolina Contribution Among Tortfeasors Act ("Act") provides a right of contribution in favor of a "tortfeasor who has paid more than his pro rata share of [] common liability, and his total recovery is limited to the amount paid by him in excess of his pro rata share. No tortfeasor is compelled to make contribution beyond his own pro rata share of the entire liability." S.C. Code Ann. § 15-38-20. Under the Act, a tortfeasor against whom a judgment is rendered is entitled to recover proportional shares of judgment from other joint tortfeasors whose negligence contributed to the injury and who were also liable to the plaintiff. *Andrade v. Johnson*, 345 S.C. 216, 546 S.E.2d 665 (Ct. App. 2001). Thus, contribution exists as a way to equitably apportion costs after liability is established. *Ashley II of Charleston, L.L.C. v. PCS Nitrogen, Inc.*, 409 S.C. 487, 491, 763 S.E.2d 19, 21 (2014).

Through Motions for Summary Judgment, the Defendants request that the Court decide, as a matter of law that no joint tortfeasor relationship exists between themselves and Century. As a preliminary matter, the cases cited illustrate that the determination of joint tortfeasor status is a question of fact:

'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.' Black's Law Dictionary 839 (6th ed. 1990). *To determine whether Vermeer and Wood/Chuck are joint tortfeasors, we factually analyze the record.*

***Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 64, 518 S.E.2d 301, 307 (Ct. App. 1999) (emphasis added).**

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) (emphasis added).**

The case of *Gordon v. Phillips Utilities, Inc.* is distinguishable from the case at bar because it involved a determination of whether or not the workers' compensation statute entitled a third party to contribution against an employer for an employee's injuries. 362 S.C. 403, 406, 608 S.E.2d 425, 427 (2005). The Court in *Gordon* held that the employer and the third-party defendant were not tortfeasors for the purposes of applying contribution to a workers' compensation scenario. *Id.*

Since the determination of whether or not the parties are joint tortfeasors is a question of fact, summary judgment is premature. For this reason alone, the Defendants' motions on this basis should be denied.

a. The Defendants share common liability to Spirit with Century.

"The basic premise of contribution is commonality. Under the statute, 'common liability,' rather than joint negligence, determines the right to contribution." *Vermeer Carolina's, Inc.*, 336 S.C. at 68, 518 S.E.2d at 309. It is well established in South Carolina that the focus should be on the harm to the Plaintiff, not the acts of the Defendants. *Pendelton v. Columbia Railway, Gas & Elec. Co.*, 133 S.C. 326, 131 S.E. 265 (1926). The court in *Pendelton* held:

That a single injury, which is the proximate result of the separate and independent acts of negligence of two or more parties, subjects the tort-feasors, 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.

In the *Vermeer* case, 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. 336 S.C. at 68, 518 S.C. at 310. As cited by RJVG, there was "no 'common liability' that could have been discharged by the settlement." 336 S.C. at 68, 518 S.C. at 310. The reason that no common liability existed revolved only around the fact that 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, 518 S.C. at 310.

Likewise, in the case of *Collins v. Bisson*, the court noted that there was no common liability as between two Defendants because there was no common injury to the Plaintiff. 332 S.C. 290, 306, 504 S.E. 2d 347, 356 (1998). In *Collins*, the Plaintiff was injured in a first automobile accident with Defendant Wiles and then while being transported by ambulance to the hospital was also injured in a second automobile accident with Defendant Bisson. 332 S.C. at 293, 504 S.E. 2d at 349. In its holding, the court focused on the fact that the Plaintiff incurred "different injuries" and damages in each of the two separate accidents. 332 S.C. at 306, 504 S.E. 2d at 356. The court emphasized that "joint and several liability arises only when two or more tortfeasors are responsible for a *single* injury." 332 S.C. at 306, 504 S.E. 2d at 356 (emphasis in original).

A temporal relationship between the acts of successive tortfeasors is required in several jurisdictions, including Florida and Pennsylvania. *See Touche Ross & Co. v. Sun Bank*, 366 So. 2d 465 (Fla. Dist. Ct. App.), *cert. denied*, 378 So. 2d 350 (Fla. 1979) (holding that the Florida Contribution Act appears to require that joint tortfeasors act within a reasonably related time

frame). However, this requirement is conspicuously absent in the South Carolina Act or in any case law interpreting the Act. While the Defendant RJVG asserts that South Carolina courts have noted that a temporal relationship is an important consideration, the Defendant fails to actually cite any South Carolina cases supporting this proposition.

In the case at bar, the Defendants and Century are joint tortfeasors because their separate and independent acts of negligent maintenance and repair combined to cause one indivisible injury to Spirit. The Parties had the same duty to Spirit with respect to maintenance of the Mall. Testimony shows that the building remained in substantially the same condition during the entire relevant time period. Michael D. Wilson, P.E. observed the rooftop parking structure in 1999 and again in 2012. In his November 6, 2012 deposition, Mr. Wilson states "Spirit as an owner of a portion of this property chose one of those choices as maintenance. And for the years 2005 through 2010 the choice that Spirit made that was adequate to them was the bottom end. Maintain the leaks, mitigate the leaks with a system of catchment pans and piping that was done for that time frame. It was done for before that time frame. It's been document in numerous reports that's what people were doing to manage and maintain the property which controlled and mitigated." (Pg. 84 Ln.15 through Pg. 85 Ln. 2 – attached as Exhibit A)

Henry Vitale inspected the roof in 2003 and again in 2013. Mr. Vitale observed that the roof degradation over the course of the ten year span was minimal, with the exception of normal wear and tear.

This witness testimony illustrates the fact that Century could not have singlehandedly acted or failed to act in such a manner that the roof deteriorated to the condition it was in at the time Spirit brought suit. The testimony also shows that Spirit's damages were indivisible, not distinctly different from each prior owner of the Mall parcel. Century only owned the Mall for

nine months before the underlying lawsuit was filed. Century inherited a problem stemming from the acts of negligent maintenance of its predecessors in interest. Acting reasonably, Century settled with Spirit and made sure to discharge the present Defendants from any liability through the settlement agreement. Century now seeks contribution for the liability it shares with the present Defendants for the indivisible damages caused to Spirit.

Summary judgment is not appropriate in this case because there are genuine issues of material fact regarding the determination of joint tortfeasor status amongst the parties. As stated above, joint tortfeasors may act independently of each other if those acts unit to cause a single injury. Black's Law Dictionary 839. Our courts are instructed to focus on the Plaintiff's injury itself, not the nature of the tortfeasors' wrongs. Here, the independent actions and inactions of the successive owners of the Mall Parcel over the course of many years united in causing the Spirit's damages.

II. Spirit had the option of suing any or all of the successive Mall owners.

It is well settled in South Carolina that a Plaintiff has the option of bringing suit against one or all joint tortfeasors who have damaged it. *See Green v. Blanton*, 294 S.C. 14, 17, 362 S.E.2d 179, 181 (Ct. App. 1987) (quoting *Conyers v. Stewart*, 247 S.C. 403, 147 S.E.2d 640 (1966)) ("the negligent acts or omissions of two or more persons may combine to produce an injury, and in such case the injured party has the option of suing either, both or all of the wrongdoers."); *Adcox v. Am. Home Assur. Co.*, 258 S.C. 331, 338, 188 S.E.2d 785, 789 (1972) ("Under the law of this State, one injured by the actionable negligence of two or more joint tortfeasors may elect that party or parties whom he will sue and may pursue the collection of a judgment procured against any one or more of the judgment debtors.").

As the Plaintiff in the underlying suit, Spirit could elect to sue any or all of the parties

whose actions damaged it. The fact that Spirit chose not to name Century's predecessors in interest in the underlying suit does not mean that these parties are blameless or that they did not contribute to the indivisible damages suffered by Spirit. Each owner of the Mall Parcel had a successive duty to Spirit to maintain the common areas and roofs under the terms of the REA. Spirit's trial strategy in seeking to be compensated from only the last party responsible in no way absolves the others from their share of the liability.

III. The Settlement Agreement Adequately Extinguishes Liability and Allocates Damages.

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). Contribution is an equitable theory which seeks to apportion liability between joint tortfeasors proportionately. *Ashley II of Charleston, L.L.C.*, 409 S.C. at 491, 763 S.E.2d at 21. The equitable maxim equality is equity, "a principle that has long been embodied in our jurisprudence . . . is applicable to burdens as well as to rights, and means that, in the absence of relations or conditions requiring a different result, equity will treat all members of a class as on an equal footing, and will distribute benefits or impose burdens and charges either equally or in proportion to the several interests, and without preferences." *Myers v. Sinkler*, 235 S.C. 162, 175, 110 S.E.2d 241, 247 (1959). Under the "equality is equity" rule, damages are apportioned equally among the tortfeasors without the necessity of determining relative degrees of fault. *W. Keeton, D. Dobbs, R. Keeton & D. Owen, Prosser and Keeton on the Law of Torts* § 50, at 340 (5th ed. 1984).

Joint and several liability revolves around the indivisibility of the injury to the Plaintiff, not the nature of the tortfeasors' wrong. Thus, even if two tortfeasors are liable to a Plaintiff

under differing or multiple theories, when their actions unite to cause one injury to the Plaintiff they can be liable to each other for contribution. See *Matthews v. Seaboard Air Line Ry.*, 67 S.C. 499, 46 S.E. 335, 340 (1903).

If two or more persons owe to another the same duty, and by their common neglect of that duty he is injured, doubtless the tort is joint, and upon well-settled principles each, any, or all of the tort feorsors may be held. But when each of two or more persons owe to another a separate duty, which each wrongfully neglects to perform, then, although the duties were diverse and disconnected, and the neglect of each was without concert, if such several neglects concurred and united together in causing injury, the tort is equally joint, and the tort feorsors are subject to a like liability.

Id. at 514-15, 46 S.E. at 340.

Century and Spirit executed a Settlement Agreement and Mutual Release on December 6, 2013. Section (a)6 of the agreement provides 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 Spirit parcel and the remaining consideration provided by CCG under this Settlement Agreement is provided for the pre-June 30, 2013 settlement of the CAM, accounting and other claims asserted by Spirit.

Section (d)1 provides in part as follows:

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.

The Defendants argue under the *Vermeer* case that the damages at present cannot be allocated by the fact finder. The *Vermeer* case is distinguishable from the case at bar for several reasons. *Vermeer* dealt with the issue of whether a defendant was entitled to contribution or indemnification for settlement of a *potential* claim by a *non-party* who *never* asserted or litigated the claim. Specifically, *Vermeer* sought contribution from Wood/Chuck for payment of a potential loss of consortium claim to Mrs. Causey. 336 S.C. at 69, 518 S.E.2d at 310. Mrs.

Causey was not a Plaintiff in the underlying lawsuit brought by her husband nor was there any admission of liability to Mrs. Causey. 336 S.C. at 69, 518 S.E.2d at 310. For these reasons, "Vermeer did not 'discharge' any 'common liability' as to Mrs. Causey because there was no 'common liability.'" 336 S.C. at 69, 518 S.E.2d at 310.

As stated above, there is common liability between successors in interest to the Mall Parcel as to Spirit. Each owner owed a duty to Spirit to properly maintain and repair the common areas and roof. This continuous term of maintenance and repair was breached in succession by each owner leading up to Century, which was ultimately held liable for the entirety of the indivisible damages to Spirit. The Settlement Agreement properly discharged the present Defendants from liability to Spirit and outlines that \$1.45M was paid to settle liability for failing to maintain and repair the portions of the Mall affecting the Spirit Parcel. Thus, Century paid \$1.45M to Spirit to compensate it for damages relating to maintenance and repair of the building. Regardless of the legal theories or various duties at issue, each successor in interest to the Mall acted to cause this injury to Spirit. Pursuant to the Act, each joint tortfeasor is responsible for its equal share of the settlement figure.

IV. Century Never Agreed to Assume Responsibility for RJVG's Negligence or to Indemnify RJVG for Liability as to a Third Party.

Century purchased the Mall Parcel on February 16, 2010 with knowledge of roof leaks and accepted the building as is/where is. In the attached affidavit of William B. Walkup, it is acknowledged that Century had notice of the leaks, repairs, and ongoing maintenance obligations that it would be responsible for. However, Century never agreed to assume responsibility for or to indemnify RJVG or any other predecessor for their negligent conduct. Acceptance of a patent defect does not operate as a waiver of the right to contribution as to liability owed a third party.

V. The Statute of Repose does not Bar Century's Claim.

The Statute of Repose does not bar recovery from the Defendants in this case for several reasons, which will be further explained below. The Statute of Repose provides in part as follows: "No actions to recover damages based upon or arising out of the defective or unsafe condition of an improvement to real property may be brought more than eight years after substantial completion of the improvement." S.C. Code Ann. § 15-3-640. As argued by Defendant Windsor, the current version of the statute went into effect on July 1, 2005, two months prior to the execution of the REA. The essential elements of the statute are (1) an improvement to real property and (2) substantial completion of that improvement. Because the ongoing maintenance of the Mall never amounted to an "improvement" and because there is no substantial completion of the maintenance, the statute does not bar recovery against the present Defendants in a contribution cause of action. Further, the statute is not applicable 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.

A. Routine Maintenance of the Mall is not an Improvement under the Statute of Repose.

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. Our 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 the 2001 case *South Carolina Pipeline Corp. v. Lone Star Steel Co.*, 345 S.C. 151, 546 S.E.2d 654 (2001). In defining "improvement," the Court looked to various secondary sources, other courts' interpretations and attempted to glean legislative intent from the preamble to the statute. In doing so, the court developed the following necessary elements for something to be considered an improvement under our Statute of Repose: (1) enhancement to the value of the property; (2) an

investment of time and money; and (3) permanence, as the term is commonly understood. *Id.* at 155, 546 S.E.2d at 657.

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*. See *Kohn*, 283 Wis.2d 1, ¶ 71, 698 N.W.2d 794 (the statute does not protect conduct that precedes or follows the improvement to real property).

2015 WI App 17, ¶ 23, 360 Wis. 2d 411, 427-28, 860 N.W.2d 308, 315.

In this case, the Defendants' 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 Mall. At best, these actions were ongoing day to day repairs to keep water out of the Mall interior. As the affidavit of Mr. Vitale provides, the roof structure stayed in substantially the same condition throughout all relevant time periods. No action taken by any Defendant enhanced the property's value, required an investment of labor or money beyond just ordinary repairs, nor can they be considered permanent in the common-sense understanding of the term. Further, as the Wisconsin Court found instructive, on-going repairs on the roof have continued from the Mall's construction to present. The water intrusion never ceased and the repairs were never completed. For these reasons, the Statute of Repose cannot bar Plaintiff's claim because Defendants' actions did not amount to an improvement.

B. The Repairs Made by the Defendants were never Substantially Completed.

As stated above, the repairs at issue cannot be considered "improvements" under the Statute of Repose. Going one step further in the analysis, however, there is no "substantial completion" as required by the statute. "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 involved on-going, daily maintenance to a failed roof system over the course of many years. There is no point in the history of the 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 Mall's interior. Absent a date of substantial completion, the Statute of Repose never started running and cannot be used to bar Century's claim for contribution.

C. Defendant had actual control and possession of the Mall.

The Statute of Repose contains the following restriction:

(A) The limitation provided by Sections 15-3-640 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 or 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 defective or unsafe condition

S.C. Code Ann. § 15-3-670.

Each of Century's predecessors in interest had actual possession or control of the property during the time their negligent actions or inactions proximately contributed to the damages to Spirit. Each party knew and understood the defective conditions of the roof structure and failed to take proper steps to remedy them. Therefore, the Defendants cannot rely on the

Statute of Repose to bar Century's claim for contribution.

CONCLUSION

Based on the foregoing reasons, Century respectfully requests that the Court deny the Defendants' Motions for Summary Judgment.



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Attorney for Plaintiff

Columbia, South Carolina
July 29, 2015

STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS

COUNTY OF RICHLAND

Spirit SPE Columbia, LLC,

Plaintiff,

vs.

CIVIL ACTION NUMBER: 2010-CP-40-8407

Century Capital Group, LLC, Walkup
Management, Inc., Don E. Taylor
Realty Company, Donald E. Taylor,
Individually, William D. Walkup,
Individually,

Defendants.

- - -

Tuesday, November 6, 2012

- - -

ORAL DEPOSITION OF MICHAEL D. WILSON,
taken at Gallivan, White & Boyd, PA, 1201 Main
Street, Suite 1200, Columbia, South Carolina,
commencing at 10:06 a.m., before Yvonne R.
Thurston-Bohannon, Registered Merit Reporter,
Certified Realtime Reporter, Georgia Certified
Court Reporter, and Notary Public for the States
of North Carolina and South Carolina.

- - -
EVERYWORD, INC.

Post Office Box 1459
Columbia, South Carolina 29201
803-212-0012

EXHIBIT

1A

1 owned or been a manager or partial owner or
2 partial manager has known about this problem for a
3 long time and -- and known about these choices.
4 And one of opinions is that Spirit knew all of
5 this --

6 Q. Okay.

7 A. -- that Spirit has reports prepared by
8 others that talk about these things.

9 And I'm giving you my opinions.

10 Q. I understand.

11 A. I -- I don't know what other people
12 know or don't know. But my opinion is, one of
13 them, is that Spirit knew --

14 Q. Okay.

15 A. -- and that Spirit as an owner of a
16 portion of this property chose one of those
17 choices as maintenance. And for the years 2005
18 through 2010 the choice that Spirit made that was
19 adequate to them was the bottom end. Maintain the
20 leaks, mitigate the leaks with a system of
21 catchment pans and piping that was done for that
22 time frame. It was done for before that time
23 frame.

24 It's -- it's been documented in
25 numerous reports that that's -- that's what people

1 were doing to manage and maintain this property
2 which controlled and mitigated.

3 Q. Okay. Now, this -- this last opinion
4 you're giving, that's not necessarily an opinion
5 as an engineer; that's just an opinion as --

6 A. As a consultant.

7 Q. -- as someone who's looked at the
8 documents and seen the reports?

9 A. Yes.

10 Q. All right. Any other opinions?

11 A. I'm sure I have plenty more opinions.

12 Q. And we'll probably -- anything that --
13 and it will probably come up during our
14 conversation --

15 A. Yeah.

16 Q. -- but anything -- have you been asked
17 by Century to consult with them on how to fix
18 their roof?

19 A. No.

20 Q. Hadn't asked you anything about that?

21 A. No. I have discussed -- I was not
22 asked.

23 Q. Okay.

24 A. I have discussed these ideas and these
25 thoughts with my clients. Okay? But they didn't

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT
CIVIL ACTION NUMBER: 2014-CP-40-07037

Century Capital Group, LLC,

Plaintiff,

vs.

CERTIFICATE OF SERVICE

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

Defendants.

RICHLAND COUNTY
FILED
2015 JUL 29 PM 4:11
JEANNETTE W. MCBRIDE
C.C.P. & G.S.

(1591.72)

I, Angela S. Hook, an employee with the Law Firm of McCabe, Trotter & Eberly, PC, attorneys for Plaintiff, 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 29th day of July, 2015, via U.S. Mail, postage prepaid and addressed as follows:

DOCUMENTS SERVED

Plaintiff's Memorandum in Opposition to Defendants' Motions for Summary Judgment

PARTIES SERVED

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Angela S. Hook, Paralegal

Columbia, SC

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
CENTURY CAPITAL GROUP, LLC,

Plaintiff,

vs.

MIDTOWN DEVELOPMENT GROUP,
LLC, RICHLAND JOINT VENTURE
GROUP, LLC, WINDSOR RICHLAND
MALL, L.P., AND BRC RICHLAND,
LLC,

Defendants.

IN THE COURT OF COMMON PLEAS

Civil Action No. 2014-CP-40-0203

ORDER GRANTING
DEFENDANT MIDTOWN
DEVELOPMENT GROUP, LLC
MOTION FOR SUMMARY
JUDGMENT

2015 SEP 16 PM 11:30
JENNIFER W. HARRIS
JEN C.C.P. &
RICHLAND COUNTY

This matter comes before the Court upon the various Motions for Summary Judgment filed by Defendants Midtown Development Group, LLC, Richland Joint Venture Group, LLC, Windsor Richland Mall, L.P. and BRC Richland, LLC (herein collectively referred to as "Defendants") in the above captioned matter. A hearing was held before the undersigned on July 30, 2015 in Richland County, South Carolina. All parties were represented by counsel at the hearing.

After considering the parties' various Motions, Memoranda in Support, Memorandum in Opposition and other supporting documents and hearing arguments on the matter, for the reasons stated below, I find that there exists no genuine issue of material fact and Defendant Midtown Development Group, LLC is entitled to judgment as a matter of law on Plaintiff Century Capital Group, LLC's cause of action for contribution. Therefore, Defendant Midtown Development Group, LLC's Motion for Summary Judgment is hereby granted.

STATEMENT OF FACTS

This is a contribution action wherein Plaintiff Century Capital Group, LLC ("Century") seeks recovery from Defendants Midtown Development Group, LLC ("Midtown"), Richland Joint Venture Group, LLC ("Richland"), Windsor Richland Mall, L.P. ("Windsor") and BRC Richland, LLC (hereinafter referred to as "BRC") for their respective pro-rata shares of a settlement entered into between Century and Spirit SPE Columbia, LLC ("Spirit").

In 2002, Windsor purchased the property known as Richland Fashion Mall and subdivided the property into four distinct parcels: 1) the TGI Friday Parcel; 2) the Bank Parcel; 3) the Verizon Parcel; and 4) the Midtown Parcel. At the same time, Windsor sold 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"). Among other things, the REA created a contractual duty on behalf of the owner of the Midtown Parcel to perform and pay for maintenance and repairs to the Common Areas and to the HVAC system, roof system and structural components of the Verizon Parcel until November 30, 2010. The property then changed hands in several transactions.

On or about September 12, 2005, BRC sold the Verizon Parcel to Spirit. On or about November 4, 2005, Windsor sold the Midtown Parcel to Midtown. On or about May 25, 2007, Midtown deeded the Midtown Parcel to Richland. Thereafter, on or about February 16, 2010, Richland sold 79% of its interest in the Midtown Parcel to Century and the remaining 21% interest in the Midtown Parcel to Investment Property Exchange Services. On or about February

17, 2010, Investment Property Exchange Services transferred this 21% interest in the Midtown Parcel to Century.

On or about September 12, 2005, after the REA went into effect, BRC conveyed the Verizon Parcel to Spirit. However, Spirit is not a party in the case before the court.

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

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

The parties agree that the \$1,450,000 payment is provided for the release and extinguishment of any pre-June 30, 2013 liability related to the maintenance and repair of the [Verizon Parcel] and the remaining consideration provided by [Century] under this Settlement Agreement is provided for the pre-June 30, 2013 settlement of the CAM, accounting, and other claims asserted by Spirit.

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

Century now relies upon this purported extinguishment of liability within the settlement as the primary ground for seeking contribution from the above listed Defendants, including Midtown.

STANDARD OF REVIEW

Rule 56(c) of the South Carolina Rules of Civil Procedure provides that a trial court may grant a motion for summary judgment "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." S.C.R.Civ.P. 56(c). In determining whether any triable issues of fact exist, the Court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party. *Brock Bank v. Best Capital Corp.*, 341 S.C. 372, 534 S.C.2d 688 (2000).

In order to resist a motion for summary judgment, the non-moving party must come forward with specific facts showing genuine issues necessitating trial. *NationsBank v. Scott Farm*, 320 S.C. 299, 302 (1995). When a plaintiff is faced with a defendant's motion for summary judgment that is supported by evidence, the plaintiff cannot defeat the motion by relying on the allegations of his Complaint, but must disclose the facts he intends to rely on by affidavit or the proof. *Shupe v. Settle*, 315, S.C. 510, 516 (1994). A conclusory statement as to the ultimate issue in a case is not sufficient to create a genuine issue of fact for purposes of resisting summary judgment. *Id.* at 516-517. A trial court should grant summary judgment against a party who fails to make and show insufficient to establish the existence of an essential element of the party's case. *Defender and Latham, Inc. v. First Union Nat. Bank of S.C.*, 316 S.C. 48, 50 (1994).

"Where there is present on a motion for summary judgment a question as to the construction of a written agreement that can be determined by consideration of the plain and unambiguous language of the contract, the question is one of law that may be resolved by the court." *Lyles v. BML, Inc.*, 292 S.C. 153, 157 (1987)(quoting *First Citizens Bank and Trust Co. v. Conway National Bank*, 282 S.C. 303 (1984)).

In a Motion for Summary Judgment, the evidence and all reasonable inferences thereof must be viewed in the light most favorable to the non-moving party. *Fleming v. Rose*, 350 S.C. 488, 493-94, 567 S.E.2d 857 (2002)(citing *Summer v. Carpenter*, 328 S.C. 36, 492 S.E.2d 55 (1997)).

ARGUMENT

- A. Midtown is entitled to summary judgment on Century's claims for contribution under the terms of the South Carolina Uniform Contribution Among Tortfeasors Act.

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

At the outset, it must be noted that the Act only applies to tort claims. See S.C. Code Ann. § 15-38-20 (1976)(as amended). Accordingly, to the extent Century settled breach of contract as opposed to tort claims with Spirit in the course of their litigation, Century plainly has no right to recover for those claims in this case. However, Century alleges that Defendants "negligently repaired the Verizon Parcel, common areas, roof and HVAC system, thus subjecting [Century] to claims by Spirit, the current owner of the Verizon Parcel." (Plaintiff's Second Amended Complaint, ¶ 15). In other words, Century contends that each owner of the Midtown Parcel, during its period of ownership, undertook repairs to the Verizon Parcel, as the REA

required of the owner of the Midtown Parcel, but performed such repairs negligently, thereby giving rise to a tort.

The settlement entered into between Spirit and Century in the underlying case was finalized and signed on December 6, 2013. The settlement purported to extinguish liability for both the claims against Century as well as the potential and unfilled claims against Century's "predecessors in interest under the REA, and each predecessor in interest's employees, agents, heirs and assigns." Nevertheless, the settlement provides no insight into how liability could be allocated between these predecessors in interest in the event a contribution action was filed. Spirit listed seventeen (17) causes of action in their Third Amended Complaint, including both contractual and equitable causes of action. Of these seventeen causes of action, only certain causes of action are based in tort and some of these causes of actions are intentional torts for which contribution may not be sought under S.C. Code Ann. § 15-38-20(C). Lastly, some of the tort claims relate to specific billing representations by Century which Midtown could not be jointly liable for in tort, such as Spirit's negligent misrepresentation cause of action. In total, there is only one cause of action out of seventeen in which Midtown could conceivably be held jointly liable: negligence.

Further, Midtown could not be jointly liable for any of the allegations that Century overbilled Spirit for repairs once it took over maintenance duties under the REA described above. During the underlying case, Spirit was granted partial summary judgment as to liability for overbilling, so the only issue left to be decided at trial was the amount of damages recoverable by Spirit. However, it is impossible to decipher from the language of the lump-sum settlement what percentage of the total settlement concerned the causes of action for which contribution could be sought versus which portion of the settlement concerned Spirit's

allegations of improper overbilling. Any attempt to determine what percentage of the settlement did include recoverable damages on a contribution claim would be purely speculative such that a fact finder cannot logically allocate damages to Midtown for contribution.

The issues in this case are similar to those presented in *Vermear Carolina's, Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 518 S.E.2d 301 (Ct. App. 1999). That case involved a settlement that extinguished liability for both a well pled strict liability products liability claim and a potential loss of consortium claim that had not yet been sought by the wife of the plaintiff injured by the defective product. The South Carolina Court of Appeals held that it could not permit the settling tortfeasor to pursue a contribution claim to recover funds paid in extinguishing liability for the wife's potential and unfilled loss of consortium claim because the agreement failed to put a specific value on that individual theory of liability. The Court of Appeals stated:

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

Vermear Carolina's, Inc. v. Wood/Chuck Chipper Corp., 336 S.C. at 70-72, 518 S.E.2d at 310-11.

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

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

Vermser Carolina's, Inc. v. Wood/Chuck Chipper Corp., 336 S.C. at 70, 518, S.E.2d at 310 (citing with approval *Houser v. Witt*, 443 N.E.2d 725, 728).

In the underlying case between Century and Spirit, Midtown was neither a party in the case nor involved in the settlement discussions and subsequent settlement. Therefore, Midtown has no way of knowing what portion of the settlement money was paid towards any claims that may now be covered in Century's contribution action. A party drafting a settlement agreement has a duty to help draft the settlement agreement in such a way as to place a specific value on claims so that the fact finder is not left to speculate as to what portion of the settlement relates to specific claims. The fact finder can then determine whether the settling defendant has paid more than its pro rata share of liability on the claims for which contribution is sought. *Vermser*, 356 S.C.at 70-72, 518 S.E.2d at 310-11.

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

Further, by its own terms, the Settlement Agreement expressly provides that it “constitutes the entire agreement among the parties pertaining to the subject matter contained

herein" and "[t]his Settlement Agreement shall not be modified or amended except by an instrument in writing signed by all of the parties." (Settlement Agreement and Mutual Release, p. 13). As a result and in the absence of an instrument signed by all the parties to the agreement, including Spirit, no additional evidence may be proffered to delineate how the settlement contemplated the apportionment of liability between the allegations that might have been jointly recoverable. The South Carolina Supreme Court has recently held that when a writing, upon its face, imports to be a complete expression of the whole agreement and contains all that is necessary to constitute a contract, it is presumed that the parties have incorporated every material item and term and parol evidence is not admissible to add another term to the agreement, although the writing contains nothing on the particular item to which the parol evidence is directed. *Stevens and Wilkinson of South Carolina, Inc. v. City of Columbia*, 409 S.C. 568, 577-78, 762 S.E.2d 696, 701 (2014).

An example of a similar argument to Century's current claim can be found in a recent Charleston County case that involved questions of contribution among several defendants arising out of a construction defect claim concerning the construction of a single family residence.¹

In *D.R. Horton, Inc. f/k/a C. Richard Dobson Builders, Inc. v. Builders Firstsource-Southeast Group, LLC, et al*, D.R. Horton ("DRH") filed a lawsuit seeking contribution from Builders Firstsource ("BFS") for an unreasoned arbitration award in the construction defect litigation by the homeowner. (Order Granting Defendants Builders Firstsource-Southeast Group, LLC, and Builders Firstsource, Inc. Partial Summary Judgment, Civil Action No. 2010-CP-10-10355, September 5, 2014). Arbitration was requested after the homeowner filed her Complaint

¹ The court acknowledges that this circuit court opinion is not binding precedent. However, the court believes this Order is useful as persuasive authority insofar as it is essentially an application of the *Vermeer* holding to similar facts and it reaches the same conclusion presented by *Midtown* in the present case.

alleging construction defects in the original construction of her home. (*Id.*). The court's Order notes that "[t]he parties to the Homeowner's Suit requested an unreasoned arbitration award that would not contain findings of fact or conclusions of law." (Order, p. 3, ¶ 9). Further, the Order concludes that the arbitration award "does not indicate what amounts, if any, were awarded for specific defects. Nor does the award specify which of the causes of action asserted in the Homeowner's Suit were successful." (*Id.*). Finally, the Order found that "there is no basis in the record to find that DRH has sustained tort liability. Plaintiff in the Homeowner's Suit alleged causes of action for breach of contract, breach of warranty, negligence and violations of the UTPA. The parties to the Homeowner's Suit requested an award from the arbitrator that does not specify the legal basis for his award of damages." (*Id.* at p. 4, ¶ 15).

Based on this lack of specificity, the Order notes that "[e]ven if, somehow, DRH was able to establish its own tort liability, and that BF's work was determined to be defective in the Homeowner's Suit, there is no way to determine what portion of the Judgment is related to said liability." (*Id.* at p. 5, ¶ 18). Lastly, summary judgment was granted on the contribution claim based on the *Vermeer* decision because "[a]ny attempt to determine what portion of the Judgment is attributable to the joint negligence of BFS and DRH would be an exercise in impermissible guesswork." (*Id.* at p. 6, ¶ 19).

Based on the above, the Spirit and Century's Settlement Agreement—as drafted—is incapable of being apportioned in any rational, logical way so as to enable a fact finder to determine what portion of the settlement might be subject to contribution by Midtown and any attempt to do so is purely speculative. Midtown is not jointly liable with Century for the allegations that Century overbilled Spirit or for the allegations by Spirit that were set forth in the contractual, equitable or intentional tort causes of action. Further, it is impossible to tell from the

terms of the blanket settlement what portion of the settlement the parties intended to be subject to contribution. The Settlement Agreement further provides that it cannot be modified or amended in order to show how the parties intended to allocate settlement costs. As stated by the South Carolina Court of Appeals, a "lack of apportionment may work a hardship on [the plaintiff], but it is one which he could have avoided by a properly drawn release." *Vermeer*, 356 S.C. at 70, 518 S.E.2d at 310.

Finally, the Settlement Agreement does not address any specific injury for which the payment of \$1,450,000.00 was made by Century to Spirit. By its terms, recovery under the Act requires the party from whom recovery is sought to have been "jointly or severally liable in tort for the *same injury*" with the party who seeks contribution. S.C. Code Ann. § 15-38-20(A)(emphasis added). Century bases its current case on each of the Defendants having performed negligent repairs to the Verizon Parcel. However, there is no evidence that all Defendants performed negligent repairs on the same portion of the Verizon Parcel or otherwise contributed to a single injury as required. See *Collins v. Bisson Moving & Storage, Inc.*, 332 S.C. 290, 306, 504 S.E.2d 347, 356 (Ct. App. 1998)(explaining that two tortfeasors are not jointly and severally liable unless they are "responsible for a *single injury*").

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

Even in viewing the facts in the light most favorable to Century, Century cannot recover on its claims for contribution as to Midtown. The Settlement Agreement is silent as to which portion of the monies paid can be subject to contribution by Midtown and, therefore, Century's claims must fail. Further, a fact finder is left to guess at the amount of the settlement funds paid

by Century related to any of the allegedly negligent repairs cited by Century. As a result, Century cannot point to one piece of evidence that shows Midtown is responsible for the same injury Century paid to settle with Spirit.

CONCLUSION

In viewing the facts in the light most favorable to Century, there remains no genuine issue of material fact and Midtown is therefore, entitled to summary judgment on Century's claims for contribution. In this case, Century's Settlement Agreement does not delineate what portion of the monies paid by Century in settlement can be subject to contribution by Midtown. Further, there is no way for the court to allocate any of the settlement money paid by Century to any of the allegedly negligent repairs cited by Century.

For the foregoing reasons, it is therefore ordered that Defendant A Midtown Development Group, LLC's Motion for Summary Judgment is hereby granted, and Plaintiff Century Capital Group, LLC's claims for contribution are dismissed with prejudice as a matter of law.

AND IT IS SO ORDERED.


L. Casey Manning
Fifth Judicial Circuit

Sept 16, 2015
Columbia, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Century Capital Group, LLC,

Plaintiff,

vs.

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

Defendants.

IN THE COURT OF COMMON PLEAS

Civil Action No. 14-CP-40-07037

**ORDER GRANTING DEFENDANT
RICHLAND JOINT VENTURE
GROUP, LLC'S MOTION FOR
SUMMARY JUDGMENT**

2015 SEP 16 AM 11:45
FILED
C.C.P. & C.P.

This matter came before this Court on July 30, 2015, for a hearing on the motion for summary judgment filed by Defendant Richland Joint Venture Group, LLC (hereinafter "Defendant RJVG") against the Plaintiff Century Capital Group, LLC (hereinafter "Century"). Defendant RJVG moved for summary judgment in this contribution case on the grounds that there is no issue of any material fact and Defendant RJVG is entitled to judgment as a matter of law in that (1) there is no joint tortfeasor relationship between Defendant RJVG and Century; (2) the underlying settlement from which Century seeks contribution does not contain a proper allocation among the claims for which contribution could be sought; and (3) Century purchased the subject property from Defendant RJVG "as-is" with full knowledge of the patent defects for which it now improperly seeks recovery.

Defendant RJVG submitted a Memorandum in Support of its Motion for Summary Judgment, which Century opposed with its own memorandum as well as the Affidavits of William B. Walkup and Henry Vitale. Century was represented at the hearing by Ryan McCabe of McCabe Trotter & Beverly, PC. Defendant RJVG was represented by D. Cravens Ravenel of

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Baker, Ravenel & Bender, LLP. For the reasons set forth in this Order, this Court grants summary judgment in favor of Defendant RJVG.

FACTUAL BACKGROUND

The present lawsuit is a contribution action seeking recovery for Century from the Defendants for their allegedly respective pro-rata shares of a settlement entered into between Century and non-party Spirit SPB Columbia, LLC (hereinafter "Spirit"). The underlying lawsuit between Spirit and Century involved claims that Century negligently maintained and repaired the Spirit Parcel during the period of its ownership of the Midtown Parcel, as opposed to the period of ownership by Defendant RJVG. See Ex. 2 to Defendant RJVG Memo. In Support. In 2002, Richland Mall was subdivided into four distinct parcels: the TGI Friday Parcel, the Bank Parcel, the Spirit Parcel, and the Midtown Parcel (Second Amended Complaint ¶ 7). On September 7, 2005, the owners of the four parcels entered into a Reciprocal Easement, Covenant, Operation and Restriction Agreement (hereinafter "REA"), which summarily provided that the owner of the Midtown Parcel was required to perform all maintenance and repairs to the HVAC systems, roof systems, and structural components of the Spirit Parcel (Second Amended Complaint ¶ 9). The documents in the record before this Court occasionally refer to the Midtown Parcel by other interchangeable names, including the Shopping Mall Parcel and the Verizon Parcel.

By its terms, the covenants and duties set forth in the REA ran with the land to all successive purchasers of the four parcels at Richland Mall (Second Amended Complaint ¶ 9). Defendant RJVG became the owner of the Midtown Parcel on May 25, 2007 (Second Amended Complaint ¶ 12). Century then became the owner of the Midtown Parcel on February 16, 2010, when it purchased the Midtown Parcel from Defendant RJVG (Second Amended Complaint ¶ 13). Spirit filed the underlying lawsuit against Century and its associated entities/individuals in

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Richland County on November 30, 2010 (Case No.: 2010-CP-40-8407). Spirit summarized its general allegations against Century in the underlying lawsuit (Case No.: 2010-CP-40-8407) in Paragraph 9 of its Third Amended Complaint, as follows:

Since taking possession and operating as manager of the Shopping Mall Property, Defendants have failed to maintain and repair the Spirit 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 Defendants' failure to perform as required by the REA, Plaintiff has incurred, and will incur in the future, costs to repair and maintain the HVAC system, roof and other structural systems in the Spirit 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 Spirit Parcel as a result of Defendants' failure to properly maintain the Spirit property (See Ex. 2 to Defendant RJVG Memo. In Support).

The settlement between Spirit and Century in the underlying lawsuit was finalized for the sum of One Million Four Hundred Fifty Thousand and NO/100 Dollars (Second Amended Complaint ¶ 16). The settlement contained terms that purported to extinguish common liability of Century and the Defendants in the present action despite the fact that Spirit had initiated suit against Century strictly for its failure to maintain and repair the Spirit Parcel "[s]ince taking possession and operating as manager of the Shopping Mall Property[.]" thereby limiting Century's exposure to damages arising from actions taken by Century. Century nevertheless relies upon this purported extinguishment of common liability within the settlement and its allegation of a joint-tortfeasor relationship as the basis for seeking contribution from Defendant RJVG (Second Amended Complaint ¶¶ 21-22).

SUMMARY JUDGMENT STANDARD

"The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." Dawkins v. Fields, 354 S.C. 58, 69, 580 S.E.2d 433, 438

(2003). A trial court may properly grant summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that 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), SCRPC. "In determining whether summary judgment is appropriate, the evidence and its reasonable inferences must be viewed in the light most favorable to the nonmoving party." Dawkins, 354 S.C. at 69, 580 S.E.2d at 439.

"Under Rule 56(c), SCRPC, the party seeking summary judgment has the initial burden of demonstrating the absence of a genuine issue of material fact." Hedgepath v. American Tel. & Tel. Co., 348 S.C. 340, 354, 559 S.E.2d 327, 335 (Ct. App. 2001). "Once the moving party carries its initial burden, the 'opposing party must, under Rule 56(c), 'do more than simply show that there is some metaphysical doubt as to the material facts' but 'must come forward with specific facts showing that there is a *genuine issue for trial*.'" Id.

CONCLUSIONS OF LAW

I Defendant RJVG and Plaintiff are not joint tortfeasors as a matter of law.

As a matter of law, I find that the Plaintiff has not presented any evidence to create a genuine issue of material fact regarding the status of the Plaintiff and Defendant RJVG as joint tortfeasors. In its Memorandum in Opposition to Summary Judgment on this issue, Plaintiff relies upon Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp., 356 S.C. 53, 64, 518 S.E.2d 301, 307 (Ct. App. 1999), for the proposition that "[t]o determine whether Vermeer and Wood/Chuck are joint tortfeasors, we factually analyze the record." While this is a true statement of the law, if the record does not reveal a genuine issue of material fact regarding the joint tortfeasor relationship, summary judgment should be granted as a matter of law. See Gordon v. Phillips Utilities, Inc., 362 S.C. 403, 406, 608 S.E.2d 425, 427 (2005).

In the present case, it is factually undisputed that the duty to repair and maintain the HVAC systems, roof systems, and structural components of the Spirit Parcel arises contractually from the REA (Second Amended Complaint ¶ 9). No party to this action has a legal duty or obligation to repair or maintain the roof systems or common areas at the Spirit Parcel indefinitely. Rather, each defendant was liable for repairing the Spirit Parcel during the timeframe in which each defendant respectively owned the Midtown Parcel. To adopt the argument proffered by the Plaintiff that Plaintiff and the Defendants are joint tortfeasors would be to hold that, despite the terms of the REA, Defendant RJVG is jointly liable for negligent repairs that occurred after it sold the Midtown Parcel and vacated Richland Mall, and Century is liable for negligent repairs that occurred years before it even purchased the Midtown Parcel. This absurd result is surely not what the legislature intended when it enacted the South Carolina Contribution Among Tortfeasors Act, codified at S.C. Code Ann. § 15-38-10, et seq., particularly since Spirit limited the recovery sought in its Third Amended Complaint to the acts or omissions of Century that had occurred "[s]ince taking possession and operating as manager of the Shopping Mall Parcel." See Ex. 2 to Defendant RJVG Memo. In Support.

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" (emphasis added). 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. "It is settled law that if a tort arises out of a contract there must also exist a relationship, irrespective of the contract, that gives rise to a duty[,] because a mere breach of contract is not actionable as a tort in South Carolina, no matter what the intent of the breaching

party was." Troutman v. Facetglas, Inc., 281 S.C. 598, 601, 316 S.E.2d 424, 426 (Ct. App. 1984).

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

In Collins v. Bisson Moving & Storage, Inc., 332 S.C. 290, 504 S.E.2d 347 (Ct. App. 1998), a driver (Collins) was injured in an automobile accident with another driver (Wiles). After an ambulance arrived to transport Collins to the hospital, the ambulance was involved in a second car accident with an automobile owned by Bisson Moving & Storage, Incorporated (Bisson). Collins later entered into a settlement with Wiles, and Bisson attempted to claim that Bisson and Wiles were joint tortfeasors responsible for a single injury, such that Bisson was entitled to an offset for the settlement funds paid by Wiles. The Court of Appeals disagreed and held that the Plaintiff suffered different injuries in the two accidents, such that there was not a joint tortfeasor relationship between Wiles and Bisson. Collins v. Bisson Moving & Storage, Inc., 332 S.C. 290, 306, 504 S.E.2d 347, 356 (Ct. App. 1998).

The present case is analogous to Collins v. Bisson. Although both Wiles and the truck driver for Bisson owed the same duty of care to Collins to operate their respective vehicles with reasonable care, they could not be jointly and severally liable in tort for breaching the same duty at distinct times, causing separate injuries. Similarly, the duties owed by both Century and Defendant RJVG to Spirit to properly maintain the common areas and parking decks at Richland Mall would have constituted separate injuries even assuming *arguendo* that Defendant RJVG's repairs were improper while it owned the Midtown Parcel. Simply put, Defendant RJVG was responsible for correcting damages resulting from leaks at the Spirit Parcel while it owned the Midtown Parcel, and Century was responsible for repairing the leaks that occurred at the Spirit Parcel while it owned the Midtown Parcel. As outlined in Paragraph Nine of the Third Amended Complaint from the underlying case, Spirit only sought damages from Century for the timeframe in which Century owned the Midtown Parcel. The "injury" complained of in the underlying action was attributable solely to improper maintenance and repairs that occurred once Century purchased the Midtown Parcel on February 16, 2010. Defendant RJVG was no longer the owner of the Midtown Parcel at this time, and it is accordingly not jointly liable for the improper repairs made from February 16, 2010, onward.

In sum, the question of whether two entities are joint tortfeasors is a matter of law to be determined by the court when the facts in evidence are undisputed. See Gordon v. Phillips Utilities, Inc., 362 S.C. 403, 407, 608 S.E.2d 425, 427 (2005); Edwards v. Atlantic Coast Line R. Co., 148 S.C. 266, 146 S.E. 97, 103 (1928). It is fundamental that Spirit limited the recovery sought against Century in the underlying lawsuit to the deficient maintenance that had occurred since Century began maintaining the common areas at Richland Mall on February 16, 2010. Defendant RJVG is not jointly liable for any improper repairs or maintenance that occurred after

it sold the Midtown Parcel and its legal duty to maintain/repair the Spirit Parcel that arose under the REA was terminated. Under the undisputed facts of this case, there was no joint tortfeasor relationship between Defendant RJVG and Century, and Century accordingly has no right to seek contribution from Defendant RJVG under S.C. Code Ann. § 15-38-20.

II. The underlying settlement from which the Plaintiff seeks contribution does not contain a proper allocation among the claims for which contribution could be sought.

In the underlying lawsuit between Spirit and Century, Spirit asserted fifteen causes of action against Century regarding Century's allegedly improper repairs and overbilling that had been performed since it took possession of the Spirit Parcel: (1) Breach of the REA, (2) Declaratory Judgment, (3) Negligence, (4) Unfair Trade Practices, (5) Fraud, (6) Constructive Fraud, (7) Breach of Contract Accompanied by a Fraudulent Act, (8) Negligent Misrepresentation, (9) Restitution/Unjust Enrichment, (10) Piercing the Corporate Veil, (11) Civil Conspiracy, (12) Slander of Title, (13) Breach of Warranty, (14) Nuisance, and (15) Trespass. See Ex. 2 to Defendant RJVG Memo. In Support. Of these fifteen causes of action, improperly labeled as seventeen in the Third Amended Complaint, only certain causes of action are tortious in nature, and some of these causes of action are intentional torts for which contribution may not be sought, according to S.C. Code Ann. § 15-38-20(C). Lastly, some of the tortious causes of action relate to specific representations or actions by Century which Defendant RJVG could not be jointly liable for in tort, such as the negligent misrepresentation cause of action. In total, there is only one cause of action out of fifteen which Defendant RJVG could conceivably be jointly liable for in the Third Amended Complaint: negligence. However, the settlement contains no allocation to the negligence cause of action and Century now claims the entire settlement amount is subject to pro-rata contribution.

The settlement entered into between Spirit and Century in the underlying case was signed on December 6, 2013. See Ex. 3 to Defendant RJVG Memo. In Support. The settlement between Spirit and Century sets forth in Paragraph (a)(6) that "[t]he 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 the CAM, accounting, and other claims asserted by Spirit." This language represents the only attempt within the settlement to breakdown the settlement in any meaningful way, and this language fails to break down the "maintenance and repair" payment by the intentional tort, negligence, contractual, and equitable causes of action related to it. The settlement additionally fails to specify what portion of the settlement is allocated to the potential but unfilled claims against Defendant RJVG. Thus, any attempt to determine what percentage of the settlement did contemplate recoverable damages in a contribution action at this point would be purely speculative such that a fact finder cannot logically allocate damages to Defendant RJVG.

This same issue arose in the case of Vermear Carolina's, Inc. v. Wood/Chuck Chipper Corp., 356 S.C. 53, 518 S.E.2d 301 (Ct. App. 1999). That case involved a settlement that extinguished liability for both a strict liability products liability claim, which was properly pleaded in the Complaint, and a potential loss of consortium claim that had not yet been sought by the wife of the plaintiff injured by the defective product. The Court of Appeals held that it could not permit the settling tortfeasor to pursue a contribution claim to recover funds paid in extinguishing liability for the wife's potential and unfilled loss of consortium claim because the agreement failed to put a specific value on that individual theory of liability:

The settlement agreement does not place a specific value on any potential claim by Mrs. Causey. Under the agreement, no portion of the settlement is

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

Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp., 356 S.C. 53, 70-72, 518 S.E.2d 301, 310-11 (Ct. App. 1999).

In coming to this conclusion, our Court of Appeals noted the parties could not cite any South Carolina case involving a settlement agreement that did not contain an allocation of damages, so the Court sought advice from the case of Houser v. Witt, 111 Ill.App.3d 123, 443 N.E.2d 725 (Ill. App. 1982). In Houser v. Witt, Plaintiff Houser was driving a vehicle in which his wife was a passenger when they collided with another vehicle driven by the defendant Witt. All three parties entered into a settlement and defendant Witt filed a contribution action against Mr. Houser, claiming he was a joint tortfeasor along with defendant Witt in causing Mrs. Houser's injuries. The *Houser* court noted the settlement did not provide any way to determine whether the amount paid by Witt was in excess of his pro-rata share: "*In short, the open-end, blanket, joint release gives no indication as to how the amount paid for the release relates to any present or future damage to either party. In this case lack of apportionment may work a hardship on Witt, but it is one which he could have avoided by a properly drawn release.*" *Id.* at 728. Our Court of Appeals cited this same language in reaching its conclusion in Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp., 356 S.C. 53, 518 S.E.2d 301 (Ct. App. 1999).

It is clear that Century was contemplating a contribution action against Defendant RJVG at the time it engaged in discussions leading up to the settlement of December 6, 2013, as Paragraph (g) of the settlement contains a confidentiality clause and an exception "to the extent

necessary for Defendants to prosecute Contribution claims." Century had every opportunity to coordinate with Spirit and draft the settlement agreement in such a way as to help discern what portions of the settlement contemplated the tortious causes of action or the unfilled claims as opposed to the contractual or equitable causes of action or what portion of the settlement contemplated the wrongful acts of Century as opposed to wrongful acts, if any, of its predecessors in interest under the REA. A party drafting a settlement agreement must not leave the fact finder to speculate as to what portion of the settlement relates to specific unfilled claims so that the fact finder can determine whether the settling defendant has paid more than its pro rata share of liability on the claims for which contribution is sought. Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp., 356 S.C. 53, 70-72, 518 S.E.2d 301, 310-11 (Cl. App. 1999). The present case is analogous to Vermeer Carolina's, because the settlement extinguished potential but unfilled claims against Defendant RJVG and Century's other predecessors in interest with no value allocated to those specific claims that Spirit released or to the tortious/contractual/equitable causes of action brought against Century, and now Century claims the entire settlement is subject to contribution. This is precisely the scenario that Vermeer Carolina's sought to prevent

Based on the foregoing, the settlement agreement, as drafted, is incapable of being apportioned in any rational, logical way so as to enable a fact finder to determine what portion of the settlement might be subject to contribution by Defendant RJVG, and any attempt to do so at this time is purely speculative. As stated by the *Houser v. Witt* court and cited by our Court of Appeals, "*lack of apportionment may work a hardship on [the plaintiff], but it is one which he could have avoided by a properly drawn release.*" Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp., 356 S.C. 53, 70, 518 S.E.2d 301, 310 (Cl. App. 1999). Century, therefore, cannot seek contribution from Defendant RJVG under S.C. Code Ann. § 15-38-20.

III. The Plaintiff purchased the subject property from Defendant RJVG "as-is" with full knowledge of the patent defects that it now improperly seeks recovery for.

Under the common law of South Carolina, a person who knowingly accepts property with a patent defect waives claims arising out of that defect, and the law thus only protects the purchaser from defects that a reasonably careful inspection would not reveal. *See Fields v. J. Haynes Waters Builders, Inc.*, 376 S.C. 545, 563, 658 S.E.2d 80, 90 (2008); *Monroe v. Wood*, 186 S.C. 507, 197 S.E. 39, 43 (1938). In the present case, Article 3.2 of the Purchase and Sale Agreement between Defendant RJVG and Century, dated December 22, 2009, unambiguously provided the following disclosure of patent defects:

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

See Ex. 6 to Defendant RJVG Memo. In Support. Plaintiff has submitted the Affidavit of William B. Walkup, managing member of Century, before this Court in opposition to Defendant RJVG's Motion for Summary Judgment. This Affidavit contains the admission that "I was aware of the condition of the Mall facilities, specifically the on-going maintenance and defective conditions of the roof system and HVAC[.]" but proffers that Mr. Walkup "did not understand this to mean that Century would be responsible to other third parties for RJVG or any other prior owner's failure to maintain and repair the building during their period of ownership."

Century may not maintain the present contribution action against Defendant RJVG, which is premised on the same patent defects that were fully disclosed to Century in the Purchase

and Sale Agreement and accepted "as-is, where-is[.]" pursuant to Article 3.2. The statement in Mr. Walkup's Affidavit that he did not understand the "as-is" waiver provision to mean that Century would be responsible to Spirit or other parties for Defendant RJVG's failure to maintain and repair the Spirit Parcel fails to acknowledge that Spirit limited the recovery sought against Century in the Third Amended Complaint in the underlying lawsuit to the deficient maintenance that had occurred since Century began maintaining the common areas at Richland Mall on February 16, 2010. See Ex. 2 to Defendant RJVG Memo. In Support. There is no indication that Spirit intended to recover against Century for any allegedly deficient repairs that occurred prior to February 16, 2010, when Century had no legal duty to repair or maintain the Spirit Parcel.

Century chose to proceed with the purchase of the Midtown Parcel, after acknowledging that there were defects and ongoing maintenance obligations with the property under the REA, as admitted by William. B. Walkup in Paragraph Five (5) of his Affidavit. Century's subsequent failure to uphold those maintenance obligations after February 16, 2010, constituted the basis of the underlying lawsuit between Century and Spirit (Case No.: 2010-CP-40-8407). Century is now barred from maintaining the present contribution action against Defendant RJVG under the common law rule regarding the acceptance of patent defects.

CONCLUSION

For the reasons stated hereinabove, Defendant RJVG's Motion for Summary Judgment is granted and the case against Defendant RJVG is dismissed.

AND IT IS SO ORDERED.

Sept 16
August 2015


The Honorable L. Casey Manning
Judge, Fifth Judicial Circuit

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
CENTURY CAPITAL GROUP, LLC,

Plaintiff

v.

MIDTOWN DEVELOPMENT GROUP,
LLC, RICHLAND JOINT VENTURE
GROUP, LLC, WINDSOR RICHLAND
MALL, LP and BRC RICHLAND, LLC,

Defendants.

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

CIVIL ACTION NO.: 2014-CP-40-07037

ORDER ON MOTION FOR SUMMARY
JUDGMENT OF DEFENDANT
WINDSOR RICHLAND MALL, LP

RECEIVED
SEP 17 2015
CLERK OF COURT

This matter comes before the Court upon the various Motions for Summary Judgment filed by Defendants Midtown Development Group, LLC, Richland Joint Venture Group, LLC, Windsor Richland Mall, L.P. and BRC Richland, LLC (herein collectively referred to as "Defendants") in the above captioned matter. A hearing was held before the undersigned on July 30, 2015 in Richland County, South Carolina. All parties were represented by counsel at the hearing.

After considering the parties' various Motions, Memoranda in Support, Memorandum in Opposition and other supporting documents and hearing arguments on the matter, for the reasons stated below, I find there exists no genuine issue of material fact and Defendant Windsor Richland Mall, L.P. is entitled to judgment as a matter of law on Plaintiff Century Capital Group, LLC's cause of action for contribution. Therefore, Defendant Windsor Richland Mall, L.P.'s Motion for Summary Judgment is hereby GRANTED.

STATEMENT OF FACTS

This is a contribution action wherein Plaintiff Century Capital Group, LLC ("Century") seeks recovery from Defendants Midtown Development Group, LLC ("Midtown"), Richland Joint Venture Group, LLC ("Richland"), Windsor Richland Mall, L.P. ("Windsor"), and BRC Richland, LLC (hereinafter referred to as "BRC") for their respective pro-rata shares of a settlement entered into between Century and Spirit SPE Columbia, LLC ("Spirit").

In 2002, Windsor purchased the property known as Richland Fashion Mall and subdivided the property into four (4) distinct parcels: 1) the TGI Friday Parcel; 2) the Bank Parcel; 3) the Verizon Parcel; and 4) the Midtown Parcel. At the same time, Windsor sold 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 (hereinafter the "REA"). Among other things, the REA created a contractual duty on behalf of the owner of the Midtown Parcel to perform and pay for maintenance and repairs to the Common Areas and to the HVAC system, roof system and structural components of the Verizon Parcel until November 30, 2010. The property then changed hands in several transactions.

On or about September 12, 2005, BRC sold the Verizon Parcel to Spirit. On or about November 4, 2005, Windsor sold the Midtown Parcel to Midtown. On or about May 25, 2007, Midtown deeded the Midtown Parcel to Richland. Thereafter, on or about February 16, 2010, Richland sold 79% of its interest in the Midtown Parcel to Century and the remaining 21% interest in the Midtown Parcel to Investment Property Exchange Services. On or about February

17, 2010, Investment Property Exchange Services transferred its 21% interest in the Midtown Parcel to Century.

On or about September 12, 2005, after the REA went into effect, BRC conveyed the Verizon Parcel to Spirit. However, Spirit is not a party in the case before the court.

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

In or around November of 2013, Century and Spirit settled their litigation and entered a Settlement Agreement and Mutual Release (the "Settlement Agreement"). Among other things, the Settlement Agreement provided that Century would pay Spirit an amount totaling \$1,450,000.00. 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.

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

Century now relies upon this purported extinguishment of liability within the settlement as the primary ground for seeking contribution from the above listed Defendants, including Windsor.

STANDARD OF REVIEW

Rule 56(c) of the South Carolina Rules of Civil Procedure ("S.C. R. Civ. P.") provides a trial court may grant a motion for summary judgment "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." S.C. R. Civ. P. 56(c). In determining whether any triable issues of fact exist, the Court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party. *Brock Bank v. Best Capital Corp.*, 341 S.C. 372, 534 S.C.2d 688 (2000).

In order to resist a motion for summary judgment, the non-moving party must come forward with specific facts showing genuine issues necessitating trial. *NationsBank v. Scott Farm*, 320 S.C. 299, 302 (1995). When a plaintiff is faced with a defendant's motion for summary judgment that is supported by evidence, the plaintiff cannot defeat the motion by relying on the allegations of his Complaint, but must disclose the facts he intends to rely on by affidavit or the proof. *Shupe v. Settle*, 315, S.C. 510, 516 (1994). A conclusory statement as to the ultimate issue in a case is not sufficient to create a genuine issue of fact for purposes of resisting summary judgment. *Id.* at 516-517. A trial court should grant summary judgment against a party who fails to make a showing sufficient to establish the existence of an essential element of the party's case. *Defender and Latham, Inc. v. First Union Nat. Bank of S.C.*, 316 S.C. 48, 50 (1994).

"Where there is present on a motion for summary judgment a question as to the construction of a written agreement that can be determined by consideration of the plain and unambiguous language of the contract, the question is one of law that may be resolved by the court." *Lyles v. BMI, Inc.*, 292 S.C. 153, 157 (1987) (quoting *First Citizens Bank and Trust Co. v. Conway National Bank*, 282 S.C. 303 (1984)).

In a Motion for Summary Judgment, the evidence and all reasonable inferences thereof must be viewed in the light most favorable to the non-moving party. *Fleming v. Rose*, 350 S.C. 488, 493-94, 567 S.E.2d 857 (2002) (citing *Summer v. Carpenter*, 328 S.C. 36, 492 S.E.2d 55 (1997)).

ARGUMENT

A. Windsor is entitled to summary judgment on Century's claims for contribution under the terms of the South Carolina Uniform Contribution Among Tortfeasors Act.

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

At the outset, it must be noted the Act only applies to tort claims. See S.C. Code Ann. § 15-38-20 (1976)(as amended). Accordingly, to the extent Century settled breach of contract as opposed to tort claims with Spirit in the course of their litigation, Century plainly has no right to recover for those claims in this case. However, Century alleges Defendants "negligently repaired the Verizon Parcel, common areas, roof and HVAC system, thus subjecting [Century] to claims by Spirit, the current owner of the Verizon Parcel." (Plaintiff's Second Amended Complaint, ¶ 15). In other words, Century contends each owner of the Midtown Parcel, during its period of

ownership, undertook repairs to the Verizon Parcel, as the REA required of the owner of the Midtown Parcel, but performed such repairs negligently, thereby giving rise to a tort.

The settlement entered into between Spirit and Century in the underlying case was finalized and signed on December 6, 2013. The settlement purported to extinguish liability for both the claims against Century as well as the potential and unfiled claims against Century's "predecessors in interest under the REA, and each predecessor in interest's employees, agents, heirs and assigns." Nevertheless, the settlement provides no insight into how liability could be allocated between these predecessors in interest in the event a contribution action was filed. Spirit listed seventeen (17) causes of action in their Third Amended Complaint, including both contractual and equitable causes of action. Of these seventeen (17) causes of action, only certain causes of action are based in tort and some of these causes of actions are intentional torts for which contribution may not be sought under S.C. Code Ann. § 15-38-20(C). Lastly, some of the tort claims relate to specific billing representations by Century which Windsor could not be jointly liable for in tort, such as Spirit's negligent misrepresentation cause of action. In total, there is only one (1) cause of action out of seventeen (17) in which Windsor could conceivably be held jointly liable; negligence.

Further, Windsor could not be jointly liable for any of the allegations which Century overbilled Spirit for repairs once it took over maintenance duties under the REA described above. During the underlying case, Spirit was granted partial summary judgment as to liability for overbilling, so the only issue left to be decided at trial was the amount of damages recoverable by Spirit. However, it is impossible to decipher from the language of the lump-sum settlement what percentage of the total settlement concerned the causes of action for which contribution could be sought versus which portion of the settlement concerned Spirit's

allegations of improper overbilling. Any attempt to determine what percentage of the settlement did include recoverable damages on a contribution claim would be purely speculative such that a fact finder cannot logically allocate damages to Windsor for contribution.

The issues in this case are similar to those presented in *Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 518 S.E.2d 301 (Ct. App. 1999). That case involved a settlement which extinguished liability for both a well pled strict liability products liability claim and a potential loss of consortium claim that had not yet been sought by the wife of the plaintiff injured by the defective product. The South Carolina Court of Appeals held it could not permit the settling tortfeasor to pursue a contribution claim to recover funds paid in extinguishing liability for the wife's potential and unfilled loss of consortium claim because the agreement failed to put a specific value on that individual theory of liability. The Court of Appeals stated:

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

Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp., 336 S.C. at 70-72, 518 S.E.2d at 31011.

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

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

Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp., 336 S.C. at 70, 518, S.E.2d at 310 (citing with approval *Houser v. Witt*, 443 N.E.2d 725, 728).

In the underlying case between Century and Spirit, Windsor was neither a party in the case nor involved in the settlement discussions and subsequent settlement. Therefore, Windsor has no way of knowing what portion of the settlement money was paid towards any claims that may now be covered in Century's contribution action. A party drafting a settlement agreement has a duty to help draft the settlement agreement in such a way as to place a specific value on claims so the fact finder is not left to speculate as to what portion of the settlement relates to specific claims. The fact finder can then determine whether the settling defendant has paid more than it's pro rata share of liability on the claims for which contribution is sought. *Vermeer*, 356 S.C.at 70-72, 518 S.E.2d at 310-11.

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

Further, by its own terms, the Settlement Agreement expressly provides it “constitutes the entire agreement among the parties pertaining to the subject matter contained herein” and “[t]his Settlement Agreement shall not be modified or amended except by an instrument in writing signed by all of the parties.” (Settlement Agreement and Mutual Release, p. 13). As a result and in the absence of an instrument signed by all the parties to the agreement, including Spirit, no additional evidence may be proffered to delineate how the settlement contemplated the apportionment of liability between the allegations that might have been jointly recoverable. The South Carolina Supreme Court recently held when a writing, upon its face, imports to be a complete expression of the whole agreement and contains all necessary to constitute a contract, it is presumed the parties have incorporated every material item and term and parol evidence is not admissible to add another term to the agreement, although the writing contains nothing on the particular item to which the parol evidence is directed. *Stevens and Wilkinson of South Carolina, Inc. v. City of Columbia*, 409 S.C. 568, 57778, 762 S.E.2d 696, 701 (2014).

An example of a similar argument to Century’s current claim can be found in a recent Charleston County case that involved questions of contribution among several defendants arising out of a construction defect claim concerning the construction of a single family residence.¹ In *D.R. Horton, Inc. f/k/a C. Richard Dobson Builders, Inc. v. Builders Firstsource-Southeast Group, LLC, et al.*, D.R. Horton (“DRH”) filed a lawsuit seeking contribution from Builders Firstsource (“BFS”) for an unreasoned arbitration award in the construction defect litigation by the homeowner. (Order Granting Defendants Builders Firstsource-Southeast Group, LLC, and Builders Firstsource, Inc. Partial Summary Judgment, Civil Action No. 2010-CP-10-10355,

¹ The court acknowledges this circuit court opinion is not binding precedent. However, the court believes this Order is useful as persuasive authority insofar as it is essentially an application of the *Vermear* holding to similar facts and it reaches the same conclusion presented by Windsor in the present case.

September 5, 2014). Arbitration was requested after the homeowner filed her complaint alleging construction defects in the original construction of her home. (*Id.*). The court's Order notes "[t]he parties to the Homeowner's Suit requested an unreasoned arbitration award that would not contain findings of fact or conclusions of law." (Order, p. 3, ¶ 9). Further, the Order concludes the arbitration award "does not indicate what amounts, if any, were awarded for specific defects. Nor does the award specify which of the causes of action asserted in the Homeowner's Suit were successful." (*Id.*). Finally, the Order found "there is no basis in the record to find that DRH has sustained tort liability. Plaintiff in the Homeowner's Suit alleged causes of action for breach of contract, breach of warranty, negligence and violations of the UTPA. The parties to the Homeowner's Suit requested an award from the arbitrator that does not specify the legal basis for his award of damages." (*Id.* at p. 4, ¶ 15).

Based on this lack of specificity, the Order notes "[e]ven if, somehow, DRH was able to establish its own tort liability, and that BF's work was determined to be defective in the Homeowner's Suit, there is no way to determine what portion of the Judgment is related to said liability." (*Id.* at p. 5, ¶ 18). Lastly, summary judgment was granted on the contribution claim based on the *Vermeer* decision because "[a]ny attempt to determine what portion of the Judgment is attributable to the joint negligence of BFS and DRH would be an exercise in impermissible guesswork." (*Id.* at p. 6, ¶ 19).

Based on the above, the Spirit and Century's Settlement Agreement – as drafted – is incapable of being apportioned in any rational, logical way so as to enable a fact finder to determine what portion of the settlement might be subject to contribution by Windsor and any attempt to do so is purely speculative. Windsor is not jointly liable with Century for the allegations Century overbilled Spirit or for the allegations by Spirit that were set forth in the

contractual, equitable or intentional tort causes of action. Further, it is impossible to tell from the terms of the blanket settlement what portion of the settlement the parties intended to be subject to contribution. The Settlement Agreement further provides it cannot be modified or amended in order to show how the parties intended to allocate settlement costs. As stated by the South Carolina Court of Appeals, a "lack of apportionment may work a hardship on [the plaintiff], but it is one which he could have avoided by a properly drawn release." *Vermeer*, 356 S.C. at 70, 518 S.E.2d at 310.

Finally, the Settlement Agreement does not address any specific injury for which the payment of \$1,450,000.00 was made by Century to Spirit. By its terms, recovery under the Act requires the party from whom recovery is sought to have been "jointly or severally liable in tort for the *same injury*" with the party who seeks contribution. S.C. Code Ann. § 15-38-20(A)(emphasis added). Century bases its current case on each of the Defendants having performed negligent repairs to the Verizon Parcel. However, there is no evidence all Defendants performed negligent repairs on the same portion of the Verizon Parcel or otherwise contributed to a single injury as required. See *Collins v. Bisson Moving & Storage, Inc.*, 332 S.C. 290, 306, 504 S.E.2d 347, 356 (Ct. App. 1998)(explaining that two tortfeasors are not jointly and severally liable unless they are "responsible for a *single injury*").

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

Even in viewing the facts in the light most favorable to Century, Century cannot recover on its claims for contribution as to Windsor. The Settlement Agreement is silent as to which portion of the monies paid can be subject to contribution by Windsor and, therefore, Century's

claims must fail. Further, a fact finder is left to guess at the amount of the settlement funds paid by Century related to any of the allegedly negligent repairs cited by Century. As a result, Century cannot point to one (1) piece of evidence that shows Windsor is responsible for the same injury Century paid to settle with Spirit.

B. Windsor is entitled to summary judgment on Century's claims for contribution under the Statute of Repose.

The Statute of Repose, S.C. Code Ann. § 15-3-640, as amended, completely bars any recovery from Windsor in this matter.

No actions to recover damages based upon or arising out of the defective or unsafe condition of an improvement to real property may be brought more than eight years after substantial completion of the improvement. For purposes of this section, an action based upon or arising out of the defective or unsafe condition of an improvement to real property includes:

* * *

(2) an action to recover damages for the negligent construction or repair of an improvement to real property;

* * *

(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 (July 1, 2005).

"A statute of repose is typically an absolute time limit beyond which liability no longer exists and is not tolled for any reason because to do so would upset the economic balance struck by the legislative body." *Capco of Summerville, Inc. v. J.H. Gayle Const. Co.*, 368 S.C. 137, 142, 628 S.E.2d 38, 41 (2006). "Moreover, section 15-3-640(6) specifically applies to 'an action for contribution or indemnification for damages sustained on account of an action' arising out of the defective or unsafe condition of an improvement to real property." *Id.* at 143.

As the REA was not executed until September 7, 2005, any repairs of the Verizon Parcel undertaken by Windsor pursuant to the REA occurred after July 1, 2005.² Moreover, Windsor sold the Midtown Parcel on November 4, 2005; therefore, any repairs of the Verizon Parcel undertaken by Windsor pursuant to the REA occurred more than eight (8) years prior to commencement of this action; November 10, 2014.

Accordingly, Century's claim against Windsor is barred by the Statute of Repose, and no recovery may be had against Windsor by Century on its claim under the Uniform Contribution Among Tortfeasors Act.

CONCLUSION

In viewing the facts in the light most favorable to Century, there remains no genuine issue of material fact and Windsor is therefore, entitled to summary judgment on Century's claims for contribution. In this case, Century's Settlement Agreement does not delineate what portion of the monies paid by Century in settlement can be subject to contribution by Windsor. There is no way for the court to allocate any of the settlement money paid by Century to any of the allegedly negligent repairs cited by Century. Moreover, with respect to Windsor, Century's claim was filed more than eight (8) years after any of the allegedly negligent repairs cited by Century and is barred by the Statute of Repose.

For the foregoing reasons, it is therefore ordered that Defendant Windsor Richland Mall L.P.'s Motion for Summary Judgment is hereby granted, and Plaintiff Century Capital Group, LLC's claims for contribution are dismissed with prejudice as a matter of law.

AND IT IS SO ORDERED.

² The prior version of the Statute of Repose, not applicable here, provided a thirteen (13) year term.


The Honorable L. Casey Manning
Fifth Judicial Circuit

September 17, 2015
Columbia, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

Century Capital Group, LLC,

Plaintiff,

vs.

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

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT
CIVIL ACTION NUMBER: 2014-CP-40-07037

**PLAINTIFF'S MOTION TO ALTER OR AMEND
SUMMARY JUDGMENT GRANTED TO
DEFENDANT WINDSOR RICHLAND MALL, L.P.**

RICHLAND COUNTY
FILED
2015 SEP 25 PM 4:14
CLERK OF COURT
C.C.P. & G.S.

(894.75)

Plaintiff, Century Capital Group, LLC, hereby makes the following Motion to Reconsider and respectfully requests from this court an Order granting the relief requested below. Pursuant to Rules 59(b) and 59(e) SCRPC, Plaintiff moves the court to alter or amend its ruling filed September 17, 2015, which was received by Plaintiff on September 17, 2015, on the following grounds and such other grounds as may be presented to the court in a memorandum of law and/or at a hearing on this matter:

- The Order states that there is no evidence that all Defendants performed negligent repairs on the same portion of the Verizon Parcel. These facts are disputed and evidence was set forth by the Plaintiffs in the form of affidavits filed with the court;
- The Order does not specifically rule on whether or not Defendant Windsor and Plaintiff are joint tortfeasors. This is a question of fact, is disputed, and is integral in the determination of entitlement to contribution under the Uniform Contribution Among Tortfeasors Act (the "Act");
- The Order improperly states that the underlying Settlement Agreement fails to delineate

the reason for the settlement amount;

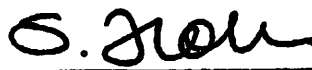
- The Order misconstrues the holding of *Vermeer Carolinas, Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 518 S.E.2d 301 (Ct. App. 1999) in that the court's holding in *Vermeer* was based on the fact that no common liability existed between the retailer and the manufacturer. The retailer was not entitled to contribution from the manufacturer for the retailer's settlement of potential claims with the purchaser's wife because the wife never sued the manufacturer or the retailer, she was not a party to the action brought by the purchaser/husband, there was no admission of liability to the wife, neither company was compelled to pay her anything, and no portion of the settlement agreement was allocated to her potential claim of loss of consortium. Further, the Plaintiff husband dismissed the manufacturer with prejudice, which operated as an adjudication on the merits discharging the manufacturer's liability as to the Plaintiff husband. Therefore, no common liability existed between the manufacturer and the retailer as to either the husband or wife that could be discharged by the agreement rendering contribution impossible under the Act;
- The Order fails to properly apply the economic loss rule as modified by South Carolina Courts in the case of *Kennedy v. Columbia Lumber & Mfg. Co.*, 299 S.C. 335 (1989), which recognized a tort duty separate and apart from an underlying contractual duty to act as a reasonably prudent person in undertaking manufacture or repairs;
- The Order ignores the Act by stating that each co-defendant's relative degree of fault must be allocated in the settlement agreement. To the contrary, damages should be apportioned equally among the joint tortfeasors;
- The Order fails to consider the common law duties owed by all co-defendants to property

repair and maintain the property during their successive periods of ownership;

- The Order fails to consider the one continuous term of maintenance owed by all successive owners of the property to properly maintain and repair it;
- The Order applies the Statute of Repose even though the Defendant was engaged in routine maintenance and not in making Improvements, that the repairs were never substantially completed as per the affidavits, and even though the Defendant acknowledged that it was in actual control and possession of the Mall at the time the maintenance was performed;
- The Order does not consider the facts in the light most favorable to Plaintiff; and
- Discovery in the case is not complete.

CONCLUSION

Plaintiff respectfully requests that the court issue an Order reversing its Order filed on September 17, 2015, and reinstate Plaintiff's Cause of Action for Contribution.


for D. Ryan McCabe
McCabe, Trotter & Beverly, PC
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Fax: 803-724-50001
Email: ryan.mccabe@mccabetrotter.com
Attorney for Plaintiff

Columbia, South Carolina
September 25, 2015

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

Century Capital Group, LLC,
Plaintiff,

vs.

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

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT
CIVIL ACTION NUMBER: 2014-CP-40-07037

PLAINTIFF'S MOTION TO ALTER OR AMEND
SUMMARY JUDGMENT GRANTED TO
DEFENDANT RICHLAND JOINT VENTURE
GROUP, LLC

RICHLAND CO.
FILED
2015 SEP 25 PM 4:15
C.C.P. & N.C.

(094.72)

Plaintiff, Century Capital Group, LLC, hereby makes the following Motion to Reconsider and respectfully requests from this court an Order granting the relief requested below. Pursuant to Rules 59(b) and 59(e) SCRPC, Plaintiff moves the court to alter or amend its ruling filed September 16, 2015, which was received by Plaintiff on September 17, 2015, on the following grounds and such other grounds as may be presented to the court in a memorandum of law and/or at a hearing on this matter:

- The Order finds no genuine issues of material fact; however, Plaintiff presented more than a scintilla of evidence in contradiction to the Defendant's Motion and timely filed three (3) affidavits in support of its position which set forth disputed material facts;
- By stating there are no genuine issues of material fact, the Order improperly weighs the credibility of the facts set forth in the affidavits;
- The Order states that RJVG and Plaintiff are not joint tortfeasors as a matter of law. This is a question of fact, is disputed, and is integral in the determination of entitlement to contribution under the Uniform Contribution Among Tortfeasors Act (the "Act");

- The Order improperly states that the underlying Settlement Agreement fails to delineate the reason for the settlement amount;
- The Order misconstrues the holding of *Vermeer Carolinas, Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 518 S.E.2d 301 (Ct. App. 1999) in that the court's holding in *Vermeer* was based on the fact that no common liability existed between the retailer and the manufacturer. The retailer was not entitled to contribution from the manufacturer for the retailer's settlement of potential claims with the purchaser's wife because the wife never sued the manufacturer or the retailer, she was not a party to the action brought by the purchaser/husband, there was no admission of liability to the wife, neither company was compelled to pay her anything, and no portion of the settlement agreement was allocated to her potential claim of loss of consortium. Further, the Plaintiff husband dismissed the manufacturer with prejudice, which operated as an adjudication on the merits discharging the manufacturer's liability as to the Plaintiff husband. Therefore, no common liability existed between the manufacturer and the retailer as to either the husband or wife that could be discharged by the agreement rendering contribution impossible under the Act;
- The Order improperly relies on the holding in *Collins v. Bisson*, 332 S.C. 290, 306, 504 S.E. 2d 347, 356 (1998). *Collins* involved two separate car accidents and two separate and distinct injuries. Here, all tortfeasors owed the same duty to maintain and repair the Mall with reasonable care. All tortfeasors breached this duty to Spirit at different points in time, but the continuing duty and continuing breach caused one indivisible injury to Spirit;
- The Order fails to consider the common law duties owed by all co-defendants to properly

repair and maintain the property during their successive periods of ownership;

- The Order fails to properly apply the economic loss rule as modified by South Carolina Courts in the case of *Kennedy v. Columbia Lumber & Mfg. Co.*, 299 S.C. 335 (1989), which recognized a tort duty separate and apart from an underlying contractual duty to act as a reasonably prudent person in undertaking manufacture or repairs;
- The Order fails to consider the one continuous term of maintenance owed by all successive owners of the property to properly maintain and repair it;
- The Order fails to consider the facts set forth in Plaintiff's affidavits that there is no way to apportion or divide the damages to Spirit in the underlying case;
- The Owner ignores the fact that the Settlement Agreement does separate the repair and maintenance liability to Spirit from the other causes of action:

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 the CAM, accounting and other claims asserted by Spirit.

- The Order improperly rules that a purchase "as is/where is" relieves a seller from liability to third parties for its own negligent acts. On the contrary, as set forth by affidavit, Plaintiff acknowledges it has waived the right to sue RJVG for patent defects to the property, but it did not agree to assume RJVG's liability as to any third party or to waive the right to seek contribution from RJVG as to liability to any third party;
- The Order applies the Statute of Repose even though the Defendant was engaged in routine maintenance and not in making Improvements, that the repairs were never substantially completed as per the affidavits, and even though the Defendant acknowledged that it was in actual control and possession of the Mall at the time the

maintenance was performed;

- The Order does not consider the facts in the light most favorable to Plaintiff; and
- Discovery in the case is not complete

CONCLUSION

Plaintiff respectfully requests that the court issue an Order reversing its Order filed on September 17, 2015, and reinstate Plaintiff's Cause of Action for Contribution.


D. Ryan McCabe
McCabe, Trotter & Beverly, PC
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Attorney for Plaintiff

Columbia, South Carolina
September 25, 2015

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

Century Capital Group, LLC,
Plaintiff,

vs.

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

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT
CIVIL ACTION NUMBER: 2014-CP-40-07037

CERTIFICATE OF SERVICE

RICHLAND COUNTY
FILED
2015 SEP 25 PM 4:15
JEANETTE W. HARRIS
C.C.P. & C.S.

(2015.72)

I, Angela S. Hook, an employee with the Law Firm of McCabe, Trotter & Beverly, PC, attorneys for Plaintiff, 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 25th day of September, 2015, via U.S. Mail, postage prepaid and addressed as follows and electronic mail:

DOCUMENTS SERVED

**PLAINTIFF'S MOTION TO ALTER OR AMEND SUMMARY JUDGMENT GRANTED TO
DEFENDANT WINDSOR RICHLAND MALL, L.P.;**

**PLAINTIFF'S MOTION TO ALTER OR AMEND SUMMARY JUDGMENT GRANTED TO
DEFENDANT MIDTOWN DEVELOPMENT GROUP, LLC; and**

**PLAINTIFF'S MOTION TO ALTER OR AMEND SUMMARY JUDGMENT GRANTED TO
DEFENDANT RICHLAND JOINT VENTURE GROUP, LLC**

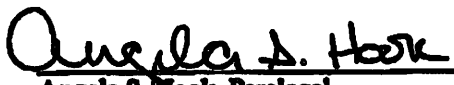
PARTIES SERVED

Keith McAlister, Jr.
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1441 Main Street, Suite 1250
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kmcaster@williamsmullen.com
Attorney for Windsor Richland Mall, L.P.

R. Trippett Boineau
McAngus Goudelock & Courie
Meridian, 10th Floor
1320 Main Street
Columbia SC 29201
trippett.boineau@mglaw.com
Attorney for Midtown Development Group, LLC

D. Cravens Ravenel
Baker Ravenel Bender
P.O. Box 8057
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cravenel@brblegal.com
Attorney for Richland Joint Venture Group, LLC

The Honorable L. Casey Manning
P.O. Box 192
Columbia, SC 29202-0192
cmanningj@sccourts.org
cmanninglc@sccourts.org


Angela S. Hook, Paralegal

Columbia, SC

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

Century Capital Group, LLC,

Plaintiff,

vs.

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

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT
CIVIL ACTION NUMBER: 2014-CP-40-07037

**PLAINTIFF'S MOTION TO ALTER OR AMEND
SUMMARY JUDGMENT GRANTED TO
DEFENDANT MIDTOWN DEVELOPMENT
GROUP, LLC**

RICHLAND CO. CLERK
FILED
2015 SEP 25 PM 4:55
CLERK OF COURT
C.C.P. & C.S.

(094.75)

Plaintiff, Century Capital Group, LLC, hereby makes the following Motion to Reconsider and respectfully requests from this court an Order granting the relief requested below. Pursuant to Rules 59(b) and 59(e) SCRPC, Plaintiff moves the court to alter or amend its ruling filed September 16, 2015, which was received by Plaintiff on September 16, 2015, on the following grounds and such other grounds as may be presented to the court in a memorandum of law and/or at a hearing on this matter:

- The Order states that there is no evidence that all Defendants performed negligent repairs on the same portion of the Verizon Parcel. These facts are disputed and evidence was set forth by the Plaintiffs in the form of affidavits and deposition transcript filed with the court even while discovery was not complete and while no affidavits were filed by defendants in support of their motions for summary judgment;
- The Order does not specifically rule on whether or not Defendant Midtown and Plaintiff are joint tortfeasors. This is a question of fact, is disputed, and is integral in the determination of entitlement to contribution under the Uniform Contribution Among

Tortfeasors Act (the "Act");

- **The Order improperly states that the underlying Settlement Agreement fails to delineate the reason for the settlement amount which was in contravention to the affidavit of Bill Walkup and the Settlement Agreement itself;**
- **The Order misconstrues the holding of *Vermeer Carolinas, Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 518 S.E.2d 301 (Ct. App. 1999) in that the court's holding in *Vermeer* was based on the fact that no common liability existed between the retailer and the manufacturer. The retailer was not entitled to contribution from the manufacturer for the retailer's settlement of potential claims with the purchaser's wife because the wife never sued the manufacturer or the retailer, she was not a party to the action brought by the purchaser/husband, there was no admission of liability to the wife, neither company was compelled to pay her anything, and no portion of the settlement agreement was allocated to her potential claim of loss of consortium. Further, the Plaintiff husband dismissed the manufacturer with prejudice, which operated as an adjudication on the merits discharging the manufacturer's liability as to the Plaintiff husband. Therefore, no common liability existed between the manufacturer and the retailer as to either the husband or wife that could be discharged by the agreement rendering contribution impossible under the Act;**
- **The Order fails to properly apply the economic loss rule as modified by South Carolina Courts in the case of *Kennedy v. Columbia Lumber & Mfg. Co.*, 299 S.C. 335 (1989), which recognized a tort duty separate and apart from an underlying contractual duty to act as a reasonably prudent person in undertaking manufacture or repairs;**
- **The Order applies the Statute of Repose even though the Defendant was engaged in**

routine maintenance and not in making Improvements, that the repairs were never substantially completed as per the affidavits, and even though the Defendant acknowledged that it was in actual control and possession of the Mall at the time the maintenance was performed;

- The Order does not follow the Act by stating that each co-defendant's relative degree of fault must be allocated in the settlement agreement. To the contrary, damages should be apportioned equally among the joint tortfeasors;
- The Order does not consider the common law duties owed by all co-defendants to properly repair and maintain the property during their successive periods of ownership;
- The Order does not to consider the one continuous term of maintenance owed by all successive owners of the property to properly maintain and repair it;
- The Order does not consider the facts in the light most favorable to Plaintiff; and
- Discovery in the case is not complete

CONCLUSION

Plaintiff respectfully requests that the court issue an Order reversing its Order filed on September 16, 2015, and reinstate Plaintiff's Cause of Action for Contribution.

for 
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Email: ryan.mccabe@mccabetrotter.com
Attorney for Plaintiff

Columbia, South Carolina
September 25, 2015

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
CENTURY CAPITAL GROUP, LLC,

Plaintiff,

vs.

MIDTOWN DEVELOPMENT GROUP,
LLC, RICHLAND JOINT VENTURE
GROUP, LLC, WINDSOR RICHLAND
MALL, L.P., AND BRC RICHLAND,
LLC,

Defendants.

IN THE COURT OF COMMON PLEAS

Civil Action No. 2014-CP-40-07037

**ORDER DENYING PLAINTIFF
CENTURY CAPITAL GROUP, LLC'S
MOTION TO ALTER OR AMEND
SUMMARY JUDGMENT**

2016 FEB 23 PM 5:12
JEANETTE A. McBRIDE
C.C.P.

RICHLAND COUNTY
FILED

This matter comes before the Court upon several Motions filed by Plaintiff Century Capital Group, LLC's (herein "Century") seeking to alter or amend the Orders issued September 16 and 17, 2015, granting summary judgment on the various Motions for Summary Judgment filed by Defendants Midtown Development Group, LLC, Richland Joint Venture Group, LLC, Windsor Richland Mall, L.P. and BRC Richland, LLC (herein collectively "Defendants") in the above captioned matter.

Century's Motions set forth several grounds they contend entitle them to an amended ruling on Defendants' Motions for Summary Judgment. At the outset, it should be noted that this case involves one single cause of action: contribution. Century's case centers around the litigation between Spirit SPE Columbia, LLC ("Spirit") and Century that began in 2010. As noted throughout the parties' briefs in support of summary judgment, that case involved seventeen (17) causes of action, including breach of the REA, negligence, unfair trade practices and fraud. After three years of litigation—during which time none of the above listed Defendants were ever brought into the case—Spirit and Century entered into a Settlement

SCANNED²

RECORD ON APPEAL 615

Agreement and Mutual Release (the "Settlement Agreement") outlining the terms of settlement. However, the only allocation of payment of the \$1,450,000.00 paid by Century to Spirit in "extinguishment of liability" broadly states that an *unspecified portion* of the payment is made for the maintenance and repair of the Spirit parcel with the remaining, *unspecified portion* is provided for settlement of the outstanding accounting charges asserted by Spirit.

Even taking everything in the light most favorable to Century, Century has failed to offer any competent evidence—either by way of the Settlement Agreement or affidavit—that shows a measurable allocation of the \$1,450,000.00 between the above listed Defendants that Century can recoup in the current action. In short, there is nothing for this Court to consider to show what money(ies) Century is entitled to under a negligence theory as required under our State's law governing contribution.

For these reasons and those outlined in the Orders issued on September 16 and 17, 2015, granting the various Motions for Summary Judgment filed by Defendants, Century's Motions to Alter or Amend the grant of summary judgment as to each above listed Defendant are denied.

IT IS THEREFORE ORDERED that each Motion filed by Plaintiff Century Capital Group, LLC to alter or amend each Order granting the above listed Defendants summary judgment is hereby denied, and Plaintiff Century Capital Group, LLC's claims for contribution are dismissed with prejudice as a matter of law.

AND IT IS SO ORDERED.


L. Casey Manning
Fifth Judicial Circuit

Feb. 22 2016

Columbia, South Carolina

SCANNED

Page 2 of 2

RECORD ON APPEAL 616

State of South Carolina)
County of Richland)

In The Court of Common Pleas
Fifth Judicial Circuit
2014-CP-40-07037

Century Capital Group,
Plaintiff,

vs.

Midtown Development, et al.,
Defendants.

Transcript of Record

July 30, 2015
Columbia, South Carolina

B E F O R E:

The Honorable L. Casey Manning, Judge

A P P E A R A N C E S:

Donald Ryan McCabe, Jr., Esquire
Attorney for the Plaintiff

R. Trippett Boineau, Esquire
Attorney for Defendant Midtown Development Group, LLC

Edward James Coyne, III, Esquire
Attorney for Defendant Windsor Richland Mall, LP

D. Cravens Ravenel, III, Esquire
Attorney for Defendant Richland Joint Venture Group

Elizabeth B. Harris, CVR-M-CM
Circuit Court Reporter

I N D E X

<u>Witness/Description</u>	<u>Page No.</u>
Certificate Page.	42

E X H I B I T S

<u>No.</u>	<u>Description</u>	<u>ID.</u>	<u>Ev.</u>
P-1	Enlarged Chart	18	
P-2	Enlarged Chart	20	
D-1	Enlarged Chart	18	

(AT THE CLOSE OF HEARING, ALL EXHIBITS ORDERED BY THE COURT
TO BE RELEASED TO MR. McCABE.)

1 THE COURT: Let's see, we've got five, five, six,
2 seven. Have y'all resolved this?

3 MR. BOINEAU: I wish I could say we have. We have
4 not.

5 THE COURT: If you can't, that's fine. Motion to
6 compel, summary judgement. summary judgement, summary
7 judgement. All right, you ready?

8 MR. BOINEAU: I don't think there's a motion to
9 compel.

10 THE COURT: Well, that's what it says. I don't know.

11 MR. BOINEAU: I think we can agree that could be
12 resolved.

13 THE COURT: Well, no, no, no. no. Maybe that's
14 another case.

15 (A PAUSE.)

16 THE COURT: And then you guys have five, six, and
17 seven?

18 MR. BOINEAU: Yes, sir.

19 THE COURT: Motion for summary judgement.

20 (A PAUSE.)

21 THE COURT: Mr. Boineau, these are your motions?

22 MR. BOINEAU: Your Honor, one of them was mine, but I
23 think it will be simplified if -- we have agreed as the
24 defense counsel to allow me to argue the motion, and then
25 there is one separate minor issue that Mr. Coyne over here,

1 I think, is going to talk about for his client.

2 THE COURT: All right. Are you ready?

3 MR. McCABE: Yes, Your Honor.

4 THE COURT: All right, you're opposing? Do you have a
5 motion? You have a ---

6 MR. McCABE: Yes.

7 THE COURT: Are these cross motions just -- all right.

8 MR. McCABE: Yeah.

9 THE COURT: Okay.

10 All right. Go ahead, Mr. Boineau.

11 MR. BOINEAU: Thank you, Your Honor. Trippett Boineau
12 here on behalf of Midtown Development Group, Your Honor.

13 This case arises out of an issue with the mall on the
14 corner of Beltline and Forest Drive, Richland Mall, which
15 is ---

16 THE COURT: Oh, Richland Fashion Mall?

17 MR. BOINEAU: That's right, Your Honor.

18 THE COURT: All right.

19 MR. BOINEAU: And, and just as a brief background, in,
20 in 2002 Windsor owned the mall and they divided it into
21 four separate parcels basically. So, you got a TGI
22 Friday's parcel, the bank parcel, the Verizon parcel, and
23 then the Midtown parcel, which is the mall parcel of it.

24 THE COURT: I thought Verizon, didn't they vacate the
25 premises like seven or eight years ago?

1 MR. BOINEAU: Yes, sir, and that's, that's -- Spirit
2 was, was -- purchased it from them.

3 THE COURT: Oh.

4 MR. BOINEAU: A company by the name of Spirit, and
5 what -- in the meantime, there was a -- in 2005, there was
6 a reciprocal easement and covenant agreement entered into
7 which required the mall owner to maintain the Verizon space
8 essentially, and this was done in 2005.

9 Midtown, Your Honor, came along -- just, just for a
10 little bit of background -- and purchased the mall in 2005
11 to my client -- or, excuse me, my client bought it from
12 Windsor in 2005, and then in May of 2007, due to a
13 foreclosure, Judge Strickland issued a deed distributing
14 the mall to the then subsequent owner, who is Mr. Ravenel's
15 client, Richland Joint Venture Group. So, that's, that's
16 kind of how we all fit in. You got Windsor; my client,
17 Midtown; and then Mr. Ravenel's client; and then lastly Mr.
18 McCabe's client was the last owner of the mall. They, they
19 took over the mall and they were sued in 2010 by Spirit
20 SPE, who owned what, what I call initially the Verizon
21 parcel.

22 THE COURT: All right.

23 MR. BOINEAU: They were sued. There were seventeen
24 causes of action alleged against Mr. McCabe's client. They
25 included fraud, negligent misrepresentation, breach of

1 contract, breach of contract obtained by fraudulent act. A
2 declaratory judgment action, they alleged issues with
3 respect to the accounting: that they had withheld money,
4 that they were mismanaging funds, all kinds of issues.

5 The case went on for about three years, and in
6 December of 2013 after it was tried for three days -- and I
7 want to be sure. I wasn't in that case, but I believe it
8 was tried ---

9 THE COURT: In front of Judge Strickland, I assume.

10 MR. McCABE: It was Judge Howard as the arbitrator ---

11 THE COURT: Okay.

12 MR. McCABE: --- in this courtroom.

13 THE COURT: All right. Go ahead.

14 MR. BOINEAU: Tried for three days, and they came to a
15 settlement agreement wherein Century Capital agreed to pay
16 Spirit SPE \$1,450,000, and there was a release agreement
17 signed on that. The release agreement purported to
18 extinguish the liability of all the previous owners.

19 THE COURT: All right, stay right there. This is Bill
20 Howard, Court of Appeals, Charleston. This had to be about
21 two years ago, wasn't it?

22 MR. McCABE: Yes, sir.

23 MR. BOINEAU: That's correct.

24 THE COURT: Because I had lunch with him. He didn't
25 mention this case, but go ahead. All right, that makes --

1 I'm up. I'm up.

2 MR. BOINEAU: Okay.

3 THE COURT: I'm up with you now.

4 MR. BOINEAU: That's, that's how we got here.

5 THE COURT: Yeah. Okay.

6 MR. BOINEAU: So, they settled in 2013. They, they
7 did a release in December 2013. They entered into a
8 release agreement. The release agreement is lengthy and it
9 is in -- and is contained in the, the documents provided to
10 you, that release. And it says in there that they are
11 extinguishing the liability of the previous owners of the
12 mall who were set to maintain this, this area as well.

13 They then filed a lawsuit, Century did, against our
14 client alleging one cause of action, and the only cause of
15 action alleged is contribution, and the -- that's why we're
16 here today is we're asking the court to grant summary
17 judgment on that one cause of action, and there's three
18 reasons why it should be granted, and, and ---

19 THE COURT: Well, I assume if they released you, then
20 said they didn't -- was this an Indian gift or something?

21 MR. BOINEAU: Well, Your Honor, they didn't -- they
22 signed an agreement with Spirit saying that they were
23 essentially buying our liability.

24 THE COURT: All right.

25 MR. BOINEAU: That they were paying for us our

1 liability.

2 THE COURT: But now they want -- now they say they
3 want some -- they want more money? Is that what they're
4 ---

5 MR. BOINEAU: They say we didn't pay our, our pro rata
6 share ---

7 THE COURT: Okay.

8 MR. BOINEAU: --- of, of what we owed.

9 THE COURT: Okay.

10 MR. BOINEAU: The problem with that is, is really
11 there's three prongs to it. Number one is we're not a
12 joint tortfeasor with them; we were not in that case. That
13 the contribution statute doesn't -- I, I don't think it was
14 passed by the legislature to, to handle these type of
15 situations where you don't even bring a party in.

16 They could have easily have sued all of us as well,
17 brought us into the case. We'd have certainly, you know,
18 put our affirmative defenses out and argued whether or not
19 we should have been in there, but they had a right to do it
20 at the time, and they didn't do it.

21 So, because of that and because you have all these
22 seventeen different causes of action -- there's only one
23 cause of action that they allege that they could even seek
24 contribution on, and that's negligence. So -- and the, and
25 the release agreement spells out nothing as to what they've

1 done with the other causes of action. So, for all we know,
2 the other causes of action -- that they have paid \$1.45
3 million relative to accounting issues.

4 And, in fact, we know that the arbitrator, Judge
5 Howard, granted partial summary judgment on the case on the
6 issue of the accounting. So, at least part of the \$1.45
7 million was paid for an accounting issue that wouldn't be
8 subject to contribution from tortfeasors because obviously
9 a breach of contract in accounting is not a tort. It's a
10 completely separate cause of action.

11 So, so, for that reason, none of the parties here --
12 that, that Windsor, Midtown, Richland Joint Venture -- are
13 joint tortfeasors with Century Capital. So, therefore,
14 they can't, they can't prevail because if we're not joint
15 tortfeasors, there's no right of contribution.

16 But let's pretend they are joint tortfeasors, that,
17 that the court says that somehow you could have been a
18 joint tortfeasor and the whole thing's under negligence.
19 There's two cases in South Carolina, the Vermeer case and
20 the Witt case and, Your Honor, if you look at the notebook
21 I handed you, they're number 9 and number 4 are the two key
22 cases in that. Number 9 is the Vermeer case, and number 4
23 is the Witt.

24 THE COURT: What tab?

25 MR. BOINEAU: Tab number 9, Your Honor, the numbered

1 tab.

2 THE COURT: Okay. I see it. All right.

3 MR. BOINEAU: Your Honor, the first one I'll address
4 with you, and they kind of go hand-in-hand, but the Vermeer
5 case, Your Honor, specifically in that case there was a
6 product defect. There was -- a gentleman was injured. His
7 arm was cut off, and he sued the manufacturer and the
8 seller. In the ---

9 THE COURT: I'm sorry, I missed that last one. Go
10 ahead.

11 MR. BOINEAU: There was a, there was a product defect
12 case where the man's arm was cut off and he sued the
13 manufacturer and the seller of it.

14 THE COURT: All right.

15 MR. BOINEAU: Of the product. The manufacturer,
16 interestingly enough, for whatever reason was dismissed
17 from the case, which left just Vermeer in the case with the
18 plaintiff. And Vermeer settled its portion of the case and
19 came back after the manufacturer for a contribution, and
20 the court did not allow the contribution claim against in
21 that case the seller -- I mean, excuse me, the manufacturer
22 because primarily they were considered -- they were, they
23 were dismissed from the case and so, therefore, they
24 weren't in the underlying case, and if you're not in the
25 underlying case, then they couldn't have been a joint

1 tortfeasor. So, they were dismissed from that case, and
2 the court said look, there's no way they were a joint
3 tortfeasor. They, they were dismissed from the action.

4 So, for that reason -- then the court also went on and
5 cited the *Witt* case in *Vermeer*, which is number 4, and they
6 talked about how in the release agreement for *Vermeer*,
7 likened -- and *Witt* is a little bit different case. It's a
8 car wreck case, Judge. But in that case as it relates to
9 *Vermeer*, there was nothing spelled out through a release
10 agreement as to how much was being paid on behalf of the
11 parties whose liability you were extinguishing.

12 So, in other words, in the release agreement -- which
13 again is in the notebook I handed you -- spells out that
14 \$1.45 million is being paid. It does not say how much is
15 being paid on behalf of Richland, Midtown, or Windsor
16 relative to the claims that were brought in that suit.
17 Further, it does not spell out whether the money paid was
18 relative to accounting issues, negligent maintenance,
19 bookkeeping problems. Whatever it was, it doesn't spell
20 out what causes of action.

21 So, we're, we're simply left to guess, and that's
22 exactly, if you read *Witt* and *Vermeer*, that's what our
23 court says. You cannot be -- you can't proceed with a
24 contribution action if it's a guessing game. There has to
25 be something in there that spells out what was paid and why

1 it was paid on behalf of these parties you're extinguishing
2 liability for.

3 So, for those reasons, Your Honor, and, and as well --
4 again, summary judgment was granted under the accounting
5 issue. So, we, we know at least part of the damages for
6 that. We'll never know what part.

7 And, and I tell you, Judge, there was a -- believe it
8 or not, it's an interesting case, but I've been involved in
9 another one just like this. There was *DR Horton* case in
10 Charleston where *DR Horton* sued Builders First Source, and
11 I was brought into that case. Builders in that case moved
12 for summary judgment. I know this is not controlling law,
13 but I did want to make the court aware of it, and the order
14 is in your, your packet as well, the order of Judge Dennis.
15 Judge Dennis granted summary judgment based upon the exact
16 same arguments that I put forth here today. They, they
17 are ---

18 THE COURT: Well, I've always been skeptical of
19 following the lead of somebody who lives in Wampee or
20 Pinopolis, but I'll listen to your argument anyway. Go
21 ahead.

22 MR. BOINEAU: I understand but, Your Honor, I, I
23 included that order in there. In that case, the *DR Horton*
24 case was, was almost factually -- they did not bring them
25 into the case in that case, and they proceeded to an

1 arbitration. The arbitrator gave a unreasoned award. It
2 was Tom Wills arbitrating it. Gave an unreasoned award at
3 the request of the, the parties, and then they sought
4 indemnification and contribution from Builders First
5 Source. And after hearing the motion, the court, based
6 upon the same reason I put forward, said look. They may
7 have been negligent; they may not have been. I don't know
8 what cause of action you prevailed on, and I don't know
9 what, what the arbitrator awarded you or what you were paid
10 for. It's not spelled out in this agreement, in the
11 arbitration finding. So, I, I can't say one way or the
12 other whether -- you know, what you would be entitled to.
13 It would be a guessing game. So, the court knows, that,
14 that order is under appeal right now, but, but that was the
15 order of Judge Dennis. It's included in there.

16 And, and, Your Honor, I'll finish up with this. The
17 last issue that we have is the fact that my client sold
18 this property to Richland. I say sold. It was by a deed
19 of Judge Strickland. Obviously under that kind of a deed,
20 there's no warranties. Richland sold this property to the
21 current plaintiff, who is, who is Century Capital.

22 In that, that deed, it specifically says the property
23 is being sold as-is, no warranties, no nothing. So, you
24 have a plaintiff now who was a defendant in that case who
25 bought the, the property as-is. They, they knew when they

1 went in there -- they should have know. If they had done
2 their due diligence, their problems may or may not have
3 existed, and now they're coming back and trying to collect
4 from previous owners who have been out of this mall for
5 years. I mean, my, my client sold it, or their piece was
6 gone in 2007.

7 We've got eight years later they're, they're asking us
8 to pay and for who knows what. We don't know what, and
9 that's what the courts in other cases have said: it's
10 impossible to spell that out. So for those reasons, Your
11 Honor, we'd ask the court to grant summary judgment in
12 favor of all three of the defendants.

13 THE COURT: All right. Thank you, Mr. Boineau.
14 Nicely put for somebody who has connections with Orangeburg
15 County.

16 MR. BOINEAU: Thank you, Your Honor.

17 THE COURT: Yes, sir.

18 MR. COYNE: Your Honor, I'm the ---

19 THE COURT: Your name for the record, sir.

20 MR. COYNE: I'm sorry.

21 THE COURT: This is going to be confusing for ---

22 MR. COYNE: Tripp Coyne. I represent Windsor Richland
23 Mall.

24 I have a sort of unique statute of repose argument as
25 the initial owner. We're actually outside the statute of

1 repose. I'm happy to proceed in whatever fashion you
2 believe best.

3 I might think it was best -- to Ryan, if you want me
4 to respond to it all, or if you, if you prefer to respond
5 to this argument? Then we can deal with the statute of
6 repose subsequently.

7 THE COURT: It makes very little difference what you
8 -- well, it may be cleaner for the record if you respond to
9 Mr. Boineau now, what you're suggesting.

10 MR. COYNE: Thank you.

11 THE COURT: Where are you from?

12 MR. COYNE: I live in Wilmington, North Carolina.

13 THE COURT: Where are you from?

14 MR. COYNE: Roswell, Georgia. Roswell, Georgia.

15 THE COURT: Okay.

16 MR. COYNE: Yes, sir. Kit McAllister has recently
17 joined our firm in the Columbia office.

18 THE COURT: That's all right. You didn't spend four
19 years in Clark County, did you?

20 MR. COYNE: I did not.

21 THE COURT: Good. Good.

22 Yes, sir?

23 MR. RAVENEL: Judge Manning, if I may? I represent
24 one of the defendants, and I'd like to add one additional
25 thing to the argument that was presented.

1 THE COURT: Go ahead.

2 MR. RAVENEL: My name is Cravens Ravenel.

3 We sold -- this little chart that I have here outlines
4 the different parts of the mall. It was divided. The mall
5 was all together, and then it was divided up and sold
6 separately. The Midtown parcel was -- had an obligation to
7 provide maintenance to the -- all, all the areas and then
8 they would bill the other owners with whatever that was.
9 They would divide it up and bill it.

10 So the Midtown parcel, the people who bought the
11 Midtown parcel owned that. During the period of time that
12 they owned it, they would have responsibility for the
13 maintenance that's complained about in this lawsuit.

14 THE COURT: All right.

15 MR. RAVENEL: My client, RJVG, owned it from May the
16 25th of 2007 to February 15th of 2010, at which time they
17 sold it to the plaintiff in this case, Century.

18 And just as a way of background, during the
19 negotiations on that sale that ultimately led to the
20 purchase and sale agreement, we advised -- representatives
21 of RJVG advised representatives of the plaintiff in this
22 case. Look, we're not making any warranties. We are
23 telling you specifically that there are problems, defects
24 in the, in the roof. There are leaks ,and there's a litany
25 of those listed in Exhibit 6 to the memorandum that I

1 submitted, and in it it says: Buyer acknowledges that the
2 mall roof develops leaks from time to time that ---

3 THE COURT: So, you're saying they were put on notice
4 they were buying a lemon?

5 MR. RAVENEL: Yes, sir. They were put on notice of
6 precisely what the issues were and that we were not -- we
7 were selling it ---

8 THE COURT: This is a used car. Take it as is.

9 MR. RAVENEL: Exactly, and that's all I wanted to add
10 to that.

11 THE COURT: That's fine. Thank you, sir.

12 MR. McCABE: May it please the court?

13 THE COURT: Yes, sir.

14 MR. McCABE: Ryan McCabe for plaintiff and, Judge, if
15 you don't mind, I'd like to cover a few facts.

16 THE COURT: I'm not going to stop you.

17 MR. McCABE: Okay. Thank you.

18 I'm going to show you this layout of the mall because
19 I think this helps.

20 THE COURT: All right. Well, it might help. Maybe
21 you should mark this for ID so ---

22 MR. McCABE: Sure.

23 THE COURT: --- if y'all need a transcript of this
24 hearing, we'll know what we're talking about.

25 MR. McCABE: Yeah.

1 THE COURT: And we'll go back and mark yours, too.

2 MR. RAVENEL: Yes, sir.

3 THE COURT: Just to keep it straight.

4 (ENLARGED CHART MARKED AS PLAINTIFF'S EXHIBIT NUMBER 1
5 FOR IDENTIFICATION.)

6 THE COURT: Yeah, yeah. Well, let's go ahead and do
7 that now, just for demonstrative purposes. I don't know if
8 it's going to come back up or not.

9 (ENLARGED CHART MARKED AS DEFENDANT'S EXHIBIT NUMBER 1
10 FOR IDENTIFICATION.)

11 THE COURT: All right, Mr. McCabe, you ready?

12 MR. McCABE: Yes, sir. Thank you.

13 THE COURT: And for reference purposes, that's been
14 marked as what?

15 MR. McCABE: Plaintiff's Exhibit 1.

16 THE COURT: All right, sir, go ahead.

17 MR. McCABE: And I represent Century Capital Group.

18 It's a group of twenty local investors who wanted to
19 restore this part of the mall. They lived in this downtown
20 area, and they bought the -- what's called the mall parcel,
21 and that is essentially this area from here, right here.
22 They own this part of the mall. Spirit, the old Verizon
23 call center, owns this portion right here, and so my folks
24 own this part of the mall, plus they own the parking deck
25 and, and the other areas. Parking areas are considered

1 common areas under the REA.

2 What happened is in 2005, an REA was entered by one of
3 the defendants prior to selling the property. When they
4 sold the property, they created a restriction that required
5 the owner of the mall parcel to make repairs to the Spirit
6 or the Verizon call center until November 2010. So, what
7 we're in a lawsuit about has nothing to do with the defects
8 that existed in the mall itself. It had to do with this
9 maintenance obligation in the REA that required the owner
10 of the mall to make repairs to the roof and to the HVAC
11 systems of the Spirit property or the Verizon parcel until
12 November 2010.

13 THE COURT: Didn't Nelson Mullins rent space up there,
14 still do?

15 MR. McCABE: They do.

16 THE COURT: All right. All right.

17 MR. McCABE: They're in this, in this ---

18 THE COURT: Okay.

19 MR. McCABE: --- old Verizon space. They've got --
20 encompass some things that are documented.

21 Anyway, so this is what the suit is about, and I
22 wanted to show you rather than tell you.

23 THE COURT: All right, sir.

24 MR. McCABE: The Century Capital Group owned the
25 property for approximately nine months, when a demand was

1 made on them to ---

2 THE COURT: Go ahead and mark this, too.

3 MR. McCABE: Sorry.

4 THE COURT: For demonstrative purposes.

5 MR. McCABE: They owned the property for approximately
6 nine months, when a claim was made by the owner of the
7 Verizon parcel to do -- to make about \$4 million in
8 repairs.

9 (ENLARGED CHART MARKED AS PLAINTIFF'S EXHIBIT NUMBER 2
10 FOR IDENTIFICATION.)

11 MR. McCABE: And 2 and a half million of the \$4
12 million in repairs related to repairs to the roofing over
13 the Verizon parcel. This wasn't property that my clients
14 purchased as-is or any -- by any other means. They
15 purchased their building. They knew it had leaks and
16 defects.

17 What they were sued for in large part and what -- they
18 had received a 2 and a half million dollar demand solely to
19 make repairs to this roof structure, and the argument was
20 that for five years, and there's -- I submitted a brief
21 yesterday. I recorded affidavits as well. I emailed them
22 to you late yesterday, so you ---

23 THE COURT: Oh. Thank you very much, but I wasn't
24 waiting around for them, so I haven't seen them.

25 MR. McCABE: Oh.

1 THE COURT: If you had let me know they were coming, I
2 might would have stayed and read them. I had no idea.

3 MR. McCABE: I didn't want you to do that.

4 THE COURT: That's all right. I gave up my crystal
5 ball a couple of weeks ago. Go ahead, Mr. McCabe.

6 MR. McCABE: So, what happened is this structure was
7 defective. There was a construction defect suit back in
8 the late '80s, early 1990s. The owner of that mall at that
9 time received some type of settlement. They never made the
10 repairs that were recommended, which was to tear off,
11 remove the entire parking deck structure, and replace it.
12 That never happened.

13 So, in two thousand and -- so, what did happen is when
14 cracks would appear on the top, they would seal those
15 cracks sometimes when they knew where they were, and they
16 would place a pan underneath the ceiling called a
17 catch-drip pan and would drain it out like a gutter outside
18 the building. So, that was the issue that was tried was
19 whether or not that was a reasonable repair, whether that
20 was a negligent repair.

21 THE COURT: When you said that was the issue that was
22 tried, was it in the lawsuit, or it was in the ---

23 MR. McCABE: In the ---

24 THE COURT: This was before Judge Howard?

25 MR. McCABE: Yes, sir.

1 THE COURT: All right. All right.

2 MR. McCABE: So, after three days my client settled
3 the claim for \$1.45 million, and this liability arose out
4 of the carrying out of managing the adjacent space of --
5 all, all of the defendants, along with my client, made
6 repairs during that timeframe. My client only made -- had
7 the obligation to make the repairs for nine months. They
8 were the last one. They were sued. They did the
9 reasonable thing under the circumstances, which was settle
10 the claims in an amount less than what the plaintiff paid
11 to actually make the repairs. So, my client paid 1 and a
12 half million dollars for these repairs.

13 Now in the settlement agreement, it does state that
14 they paid 1 and a half million dollars. It also states
15 that they released all their claims. They didn't receive
16 all the money that they were due from the ---

17 THE COURT: But let's back up just a half a sentence.
18 What did you say?

19 MR. McCABE: 1.45 million was not the only
20 consideration paid by my client. It was the only
21 consideration that they paid to address the maintenance
22 issues related to the parking.

23 THE COURT: Now, is that specified in the agreement or
24 the order of settlement?

25 MR. McCABE: It is and you would have to go to -- it's

1 attached to their motion for summary judgement, and if you
2 go to page 2 of the agreement, it says: Payments from
3 Century Capital Group to Spirit. And then it goes through
4 and it's got 800 was paid immediately. 650 was paid at a
5 later date. There was a mortgage that was paid, I think,
6 six months later, and they released all claims that they
7 had for condensation where they were paid something like
8 \$6,500 a month, and they hadn't received those payments for
9 two years. So, they gave up their right to these payments.
10 It's like 150 grand or so to resolve the accounting issues.

11 Some of the accounting issues we're talking about is
12 not the missing money. There was a dispute about whether
13 the owner of the Verizon parcel had an obligation to
14 contribute to security. Century believed that they did
15 have an obligation to contribute; they asserted that they
16 didn't. Those are the type of issues that were litigated.
17 It had to do with what were appropriate charges.

18 THE COURT: All right.

19 MR. McCABE: The settlement agreement breaks down the
20 \$1.45 million extinguished liability in sub -- excuse me,
21 under this paragraph A, and then on the release which
22 appears on paragraph -- excuse me, D.1, which is on page
23 10. So, just wanted to clarify these factual issues.

24 THE COURT: All right, sir.

25 MR. McCABE: In the -- which the defendants

1 acknowledge the release entered clearly resolves all prior
2 owners of their liability. It extinguished their
3 liability, as well as the liability of Century, the current
4 owner. I don't think that's a disputed fact.

5 As far as the Vermeer case is concerned, that case
6 really dealt with a situation, two situations. One, there
7 was a -- prior to the case going to trial and settlement,
8 the original plaintiff released, dismissed with prejudice
9 one of the parties. As the court said, there can't be
10 common liability if one party did not have the ---

11 THE COURT: That was the manufacturer that you were
12 referring to earlier?

13 MR. BOINEAU: Correct. Yes, sir.

14 THE COURT: I assume to get rid of any diversity
15 issues so they could remove it to cross the street, so to
16 speak, but that's neither here nor there.

17 MR. McCABE: There was also an issue ---

18 THE COURT: It happens a lot. On the eve of trial,
19 they drop a party. You can't go -- anyway, go ahead.

20 MR. McCABE: So, the case ---

21 THE COURT: Apparently y'all have read about those
22 cases, too.

23 MR. McCABE: I think the cases ---

24 THE COURT: That was a tactical decision, but go
25 ahead.

1 MR. McCABE: Yes, sir, and so the case, I think,
2 stands for that proposition.

3 In addition, there was a claim brought by the wife for
4 loss of consortium, and she had never asserted a claim,
5 apparently had never filed a claim. The court said no
6 common liability.

7 Here there is a common injury that one defendant or
8 one original plaintiff, Spirit, their damages were that --
9 they alleged that this parking deck needed to be recoated
10 because the repairs that had been made by all of the
11 parties per the affidavit and the testimony were not
12 acceptable, and that they were negligent repairs, and that
13 the defendant breached the duty. What Century was sued for
14 in part was maintenance issues to this structure that were
15 made by these other defendants.

16 Now, my client also made some of these same repairs,
17 but it's the same injury, same common set of facts, and my
18 client received a release extinguishing not only itself but
19 the other defendants in this action. And there is an
20 affidavit submitted from Henry Batali that says that he
21 went out there in two thousand ---

22 THE COURT: Don't tell me this is the affidavit you
23 emailed yesterday.

24 MR. McCABE: I actually filed that one before.

25 THE COURT: All right. Okay.

1 MR. McCABE: I actually filed that one earlier this
2 week.

3 2003, he said he went out. He inspected in 2003 and
4 he went out in 2013, and he said the roof was in
5 substantially the same condition less some normal wear and
6 tear in that time period.

7 THE COURT: So, you read me an affidavit that dates
8 prior to Judge Howard's decision or settlement of Judge
9 Howard? I'm confused a little bit.

10 MR. McCABE: Well, I resubmitted a new affidavit.
11 However, Mr. Batali did submit testimony in the prior case.

12 THE COURT: All right.

13 MR. McCABE: He didn't testify on the stand, but he
14 did submit affidavits in the prior case. Additionally, I
15 pulled some affi -- testimony, transcript from the original
16 case where Mr. Wilson said that all of the parties had
17 engaged in the same maintenance plan, which was the basis
18 for the underlying suit. So, Judge, I could go on, but
19 that's our position.

20 As far as as-is is concerned, again that -- we agree
21 that we purchased the property as-is. What we don't agree
22 is that we took some responsibility for maintenance that
23 were made by prior owners to a third party. We did take --
24 to the extent that we were to make the claim for damages to
25 our roof or to the HVAC system, I think they waived that.

1 They agreed when they purchased the building that they had
2 no right. That they took this structure as-is.

3 However, my client was -- wasn't sued and is not
4 bringing suit based on damages to the property that it
5 owns. All of the owners of the property, the mall parcel,
6 were obligated to maintain this other third party's parcel
7 of property. They maintained it the same way. There was a
8 suit. My client did not agree to hold harmless and
9 indemnify them from any claims or to pay any liabilities
10 that they would be responsible for to a third party, and
11 that's what the case is about.

12 And then I'll just hold off, I guess, until Tripp
13 makes his argument about the statute of repose issue.

14 THE COURT: All right. That's fine.

15 MR. McCABE: Thank you.

16 THE COURT: Any response to his remarks before we go
17 to the next one?

18 MR. BOINEAU: Really quickly, Your Honor. The facts
19 are what the facts are. I mean, as he said, they're,
20 they're fine. If you look at the release agreement, the
21 release is what it is. If the court looks at it, you'll
22 see in there it doesn't spell out any portion of liability
23 as being paid on behalf of any of these defendants.
24 Whether it was paid for negligence or accounting or
25 whatever, they still -- it was being paid on behalf of an

1 order to recover a contribution.

2 THE COURT: All right. Thank you, sir.

3 Yes, sir.

4 MR. COYNE: Thank you, Your Honor. Again, Tripp Coyne
5 for defendant Windsor Richland Mall.

6 So sticking with the history, we were the owner of
7 what we're calling the mall parcel, which is the parcel
8 that has -- the owner of that parcel has the obligation
9 under the REA to maintain what we're calling the Verizon
10 parcel.

11 Okay. So, interestingly Windsor actually entered the
12 REA in September of 2005. So prior to that time, the owner
13 of one building would have had no duty to maintain another
14 building for another owner; only because of this
15 contractual easement agreement would that duty have ever
16 existed. You know, you don't have to take care of your
17 neighbor's roof unless you agree to, all right?

18 So, that agreement gets entered in September 2005.
19 November of 2005, Windsor sells the mall parcel. At that
20 point, it no longer has any obligations under the REA; it
21 is not subject to that contract that made it maintain the
22 Verizon parcel. So, this happens in November of 2005.

23 More than eight years later, almost nine years later
24 to the day, we get sued in this action for contribution.
25 Now, it's important to remember a contribution can only be

1 based in tort. You don't get a contribution claim because
2 somebody else breached a contract with you. So in reality,
3 because Windsor sold out in November of 2005, any repairs
4 it ever made to that building were plainly made prior to
5 November of 2005. Any obligation it had to maintain or
6 repair that building was -- only existed prior to November
7 of 2005. So in November of 2014 when we got sued, the
8 statute of repose gave us completely clean hands, and all
9 claims are barred.

10 Now, sort of recognizing that, in the brief submitted
11 late yesterday afternoon, the plaintiff all of a sudden
12 took the position that, oh, it's not only repairs you
13 actually performed negligently, which has been their theory
14 all along because they have to create a tort. They said
15 you also just totally failed to do certain things. So, the
16 statute of repose shouldn't really apply because you didn't
17 actually conduct a repair as contemplated by the statute of
18 repair. You just failed to do anything -- or, I'm sorry,
19 as contemplated by statute of repose, you just failed to do
20 anything.

21 The problem they have is if we truly failed to do
22 anything, that's what we did was we breached a contract.
23 You know, a contract doesn't get them to a contribution
24 claim. To get to the tort claim, they have to stick with
25 their theory that we performed a repair and we performed

1 that repair negligently and, therefore, we were a
2 tortfeasor.

3 THE COURT: Well, you ---

4 MR. COYNE: Which we weren't.

5 THE COURT: --- can't blame them for trying, do you?

6 MR. COYNE: I don't blame them for trying. I would
7 like to, if I may approach, just hand up a copy ---

8 THE COURT: Yes, sir.

9 MR. COYNE: --- of the statute of repose and just
10 point out a few specifics. There's two copies. Thank you.

11 So, I would just note this is the statute of repose as
12 is in effect now and as it was in effect at the time that
13 the REA was entered and at the time that Windsor sold out
14 the mall. And I would just note that the introductory
15 paragraph says you can't get sued for anything based upon -
16 - arising out of a defective, defective or unsafe condition
17 or improvement to real property, paraphrasing, more than
18 eight years after you are done with that property, after
19 substantial completion. And then it goes on to sort of
20 further explain the statute. Number one:

21 An action to recover damages for breach of a
22 contract to construct or repair an improvement to
23 real property.

24 That's, that's what that REA was, a contract for us to
25 repair an improvement for real property. We were out more

1 than eight years ago. The statute of repose, clean hands,
2 complete bar, not a statute of limitations, no exceptions,
3 no exemptions.

4 I sold a house eight years ago. Doesn't matter that I
5 put those attic stairs in shoddy. My hands are clean. You
6 know, if one of my landlord clients sold a building more
7 than eight years ago, it doesn't matter that when they sold
8 it, there was unworkmanlike, you know, repairs in there.
9 Their hands are clean. If one of my home builder clients
10 sells that house, after eight years passes it doesn't
11 matter that he poorly constructed the front porch and it
12 collapses. His hands are clean, and if it is a clean bar,
13 you get to sleep easy after eight years, and my client is
14 uniquely situated to have that defense, which is an
15 absolute bar. And the other defendants have great
16 arguments put forward, and we also enjoy those arguments,
17 but we are unique in the statute of repose argument, Your
18 Honor.

19 THE COURT: All right. Thank you, sir.

20 MR. COYNE: Thank you.

21 THE COURT: Mr. McCabe.

22 MR. McCABE: Yes, sir. May it please the court?

23 THE COURT: Yes, sir.

24 MR. McCABE: Actually, that is not the plaintiff's
25 argument. The plaintiff's argument is that the statute of

1 repose doesn't apply for several reasons. One, the statute
2 of repose applies to improvements. These were not
3 improvements. This was maintenance, and we cited in our
4 brief the case law about that, and there's an analysis
5 about that.

6 Second thing is for the statute of repose to apply, it
7 has to be substantially completed. They weren't
8 substantially completed. It was an ongoing obligation to
9 maintain this deck until 2010, and so the repair -- these
10 repairs were never substantially completed. For the
11 statute of repose to apply, you have to have a situation
12 where substantially -- has to be substantially completed.
13 That's when the statute begins to run.

14 Third, under section -- under sub A, 15-3-670(a) it
15 says the statute of:

16 The limitations provided in the statute of repose
17 may not be asserted as a defense by a person in
18 actual possession or control as owner, tenant, or
19 otherwise of the improvement at the time of the
20 defective or unsafe condition.

21 They were a prior owner of the building. So, I think
22 under these three things, the statute of repose just
23 doesn't apply.

24 THE COURT: All right.

25 MR. RAVENEL: Your Honor.

1 THE COURT: Yes, sir.

2 MR. RAVENEL: Cravens Ravenel again for Richland Joint
3 Venture.

4 I think in order to understand the issues that were
5 litigated in the case out of which this lawsuit arises, you
6 have to look at the *Spirit SPE Columbia vs. Century Capital*
7 *Group, Don Taylor, William Walkup, and others.*

8 THE COURT: Who?

9 MR. RAVENEL: William Walkup.

10 THE COURT: Oh.

11 MR. RAVENEL: He was one of the defendants, individual
12 defendants.

13 THE COURT: I thought you said William Walker. I was
14 wondering.

15 MR. RAVENEL: No. No, sir.

16 THE COURT: Okay.

17 MR. RAVENEL: The allegation in a third amended
18 complaint, which is the one that was operable, it says:

19 Since taking possession and operating ---

20 This is, this is paragraph 9:

21 Since taking possession and operating as manager
22 of the shopping mall property, defendants ---

23 Which would be Mr. -- the client in question, the
24 plaintiff in this action:

25 --- had failed to maintain and repair the Spirit

1 parcel in accordance with the REA.

2 Now, what they're saying is while you had possession
3 of it, you have not maintained it and as a result of that,
4 we are damaged. They're not saying you have the obligation
5 that other people failed to carry out. They're saying your
6 obligation, you failed in your obligation, and that's the
7 basis for this. That's the basis for this claim. So, to
8 say that they -- that, that our conduct is what's at issue
9 is not accurate. The time involved that's the subject of
10 this lawsuit -- not this lawsuit but the lawsuit out of
11 which this lawsuit arises -- was the timeframe that it was
12 in the possession and control of Century Capital. Century
13 Capital's failure is what was at issue, not anything else,
14 and so to bring up our ---

15 THE COURT: They would have blamed somebody else for
16 their mistakes.

17 MR. RAVENEL: Exactly.

18 THE COURT: Is that what you're saying?

19 MR. RAVENEL: And as we pointed out, my client
20 revealed when they -- when, when Century bought it, it
21 revealed the condition and it said here as-is. Do you want
22 to buy it? If you want to buy it, these are the
23 conditions. You don't have to buy it, but then we were
24 very clear about the condition.

25 THE COURT: All right.

1 MR. RAVENEL: And they bought it, and they had it, and
2 they operated it, and during the period of time that they
3 had it, the complaints arose from Spirit that were the
4 subject of the lawsuit in question out of which this
5 arises.

6 THE COURT: All right.

7 Who wants to go?

8 MR. COYNE: I'd like to respond on the statute of
9 repose argument.

10 THE COURT: Go ahead. Go ahead.

11 MR. COYNE: We're getting a little round robin.

12 THE COURT: We'll figure it all out. We'll sort it
13 out. Go ahead.

14 You're okay with him going now?

15 MR. McCABE: Yes, sir.

16 THE COURT: All right. Go ahead.

17 MR. COYNE: Thank you, Your Honor.

18 Your Honor, the statute of repose, I think we heard
19 three counter arguments.

20 THE COURT: Yeah.

21 MR. COYNE: One, we heard they used to own it, and
22 there is a statute that says that you can't assert the
23 statute of repose if you are an actual possessor or
24 controller of the property. That makes sense. I still own
25 my house. You come over. You fall down those shoddy attic

1 stairs I built when I was trying to find something better
2 to do with my life than law school fifteen years ago, and
3 you come after me, I don't ---

4 THE COURT: Where did you go to law school?

5 MR. COYNE: Wake Forest, sir.

6 THE COURT: Baptist institution. Forsyth County, huh?

7 MR. COYNE: Yes, sir.

8 THE COURT: Go ahead.

9 MR. COYNE: But you come to my house that I still own
10 and you fall down those attic stairs, God forbid, I don't
11 get to say to you, oh, I built those fifteen years ago,
12 Your Honor. I'm protected by the statute of repose because
13 you get to point at me and say you still own the house,
14 Tripp, you know? You still have some obligation to let me
15 know and to fix it, you know?

16 We, Windsor, my client, sold out of this mall in
17 November of 2005, rather the parcel at issue. We're not
18 the current owner today. His reliance on the fact that
19 somebody happens to own the mall still in no way means my
20 liability carries forward indefinitely. Just like if I
21 sold that house and you fell down the stairs and the next
22 owner and then you came after me, I'd get to say, Your
23 Honor, I'm sorry, but I built those stairs fifteen years
24 ago. Statute of repose protects me, and I'm no longer the
25 homeowner. The idea of a property owner helping the

1 plaintiff in any way is nonsensical.

2 The -- there's a suggestion that we didn't
3 substantially complete our portion. We sold out in
4 November 2005. Clearly anything we had to complete,
5 anything we had to do, any repair we did make -- and all
6 morning you've heard argument about this is about the
7 repairs that were made. Anything we did was done prior to
8 December 2005. Plaintiff now wants to argue there wasn't
9 substantial completion because it was this ongoing item.

10 One of the cases cited in the plaintiff's brief in
11 opposition to my statute of repose argument is *Ocean Winds*
12 *Corp. vs. Johnson Island*. I have copies if you'd like. It
13 may be in the plaintiff's materials. Interestingly, that
14 case highlights the fact that it is about your piece of
15 work. When a window installer goes to a construction
16 project and puts in the windows and they walk off the job
17 -- this case talks about thirteen years because it's under
18 the prior statute of repose, which was thirteen rather than
19 eight -- but thirteen years and one day later after that
20 window installer walks off the site, its, its portion of
21 the project was substantially complete. He gets to sleep
22 easy that night. You know, he doesn't have to wait until
23 the day that the general contractor gets a certificate of
24 occupancy and say, oh, well now my thirteen-year clock
25 starts running. The day its little portion of the work,

1 whether it was installing a window, whether it was putting
2 in a piece of trim in, whether it's painting the living
3 room, the day that's done, the statute starts running just
4 like the day Windsor sold out of that mall.

5 There can be no argument that we had any ongoing
6 operation or that we did anything else, and more than eight
7 years run, and that's the current statute of repose, and
8 we're protected.

9 THE COURT: Well, how much time has passed before they
10 dug up Oliver Cromwell bones and burned them? Do you know?

11 MR. COYNE: Was that 1235?

12 THE COURT: Something like that. Anyway, some people
13 believe in punishment after death. Thank you, sir.

14 MR. COYNE: Thank you.

15 THE COURT: Any response?

16 MR. McCABE: Yes, sir. Still there's not a
17 substantial completion. I've already made that argument.

18 THE COURT: That's all right.

19 MR. McCABE: I don't want to beat that dead horse, but
20 wanted to say the testimony presented from the affidavits
21 and in the transcript is that when my client bought this
22 building in 2010, that the adjacent property with the
23 maintenance obligation, it was substantially the same in
24 2010 as it was in 2005. There was nothing that happened in
25 the mere nine months they owned it that meant the entire

1 roof needed to be replaced. Couldn't have happened in nine
2 months, and that's the testimony. They paid to extinguish
3 this liability for everybody, and all they're asking is to
4 get a portion of the money back that they paid to
5 extinguish the liability of the defendants.

6 THE COURT: All right. Okay. Anything else?

7 MR. BOINEAU: Nothing, Your Honor.

8 MR. COYNE: Thank you, Your Honor.

9 THE COURT: Any other arguments y'all want to make
10 about anything? That covers everything y'all wanted to
11 say?

12 MR. BOINEAU: Yes, sir.

13 MR. McCABE: Yes, sir. May I submit -- give you a
14 hardcopy for your law clerk?

15 THE COURT: Sure. Look, I don't like this idea about
16 submitting things the day before, the morning of, and stuff
17 like that. Some of you got plenty of time to go over
18 everything.

19 How much time do y'all want for proposed orders?

20 MR. COYNE: I could hand you one right now, Your
21 Honor.

22 THE COURT: So, how much time do you want? No time at
23 all?

24 MR. COYNE: I can leave with an autograph.

25 THE COURT: You can have sort of a global thing. You

1 know, dot your I's, cross your T's. Y'all want ten days,
2 fifteen days? I don't care. What so you want?

3 MR. COYNE: Fifteen days, Your Honor.

4 THE COURT: All right. Good. Y'all got that.

5 MR. COYNE: Fifteen days?

6 THE COURT: You know the drill. Fifteen days, blah,
7 blah, blah, blah. Is that good?

8 MR. BOINEAU: Yes, sir. Thank you.

9 MR. McCABE: Thank you, Your Honor. Would you like a
10 copy, Your Honor?

11 THE COURT: Yes, give it to me, and give the rest of
12 them a copy, too. I'll hold on to it fifteen days, and you
13 can have -- go back and change it if you want to. You have
14 fifteen days to readjust, change, add, or take away,
15 whatever you want.

16 (A PAUSE.)

17 THE COURT: Fifteen days, that's good. Good luck to
18 everybody, thank you.

19 (OFF THE RECORD.)

20 THE COURT: Go ahead.

21 MR. BOINEAU: Your Honor, for purposes of convenience,
22 there were three exhibits marked for identification. If
23 the court would allow, we would like to keep those exhibits
24 in our possession. We'll let Mr. McCabe keep them and
25 maintain them as opposed to the court having to keep them

1 here at the courthouse. We may want to use them for, for
2 other things.

3 THE COURT: That's fine, and that's the, quote,
4 demonstrative purposes, which means you take them with,
5 with your anyway.

6 MR. BOINEAU: Perfect.

7 THE COURT: I think if you call them demonstrative,
8 you can take them with you anyway, but anyway, you both
9 agree you're going to keep them for the benefit of
10 everybody else involved in this case.

11 MR. BOINEAU: Thank you.

12 THE COURT: All right, thank you all.

13 (WHEREUPON, ALL EXHIBITS MARKED FOR IDENTIFICATION ARE
14 RELEASED TO MR. McCABE.)

15 --- END OF TRANSCRIPT OF RECORD ---

CERTIFICATE

I, THE UNDERSIGNED ELIZABETH B. HARRIS, CERTIFIED
VERBATIM OFFICIAL COURT REPORTER FOR THE FIFTH
JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO
HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE
AND COMPLETE TRANSCRIPT OF RECORD OF ALL THE
PROCEEDINGS HAD AND EVIDENCE INTRODUCED IN THE HEARING
OF THE CAPTIONED CAUSE, RELATIVE TO APPEAL, IN THE
CIRCUIT COURT FOR RICHLAND COUNTY, SOUTH CAROLINA, ON
THE 30TH DAY OF JULY, 2015.

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN,
COUNSEL, NOR INTEREST IN ANY PARTY HERETO.

/S/ELIZABETH B. HARRIS, CVR-M-CM

COLUMBIA, SOUTH CAROLINA

JUNE 5TH, 2016

14
THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

Case No. 2014-CP-40-07037

RECEIVED
MAR 03 2016
SC Court of Appeals

Century Capital Group, LLC,

Appellant,

v.

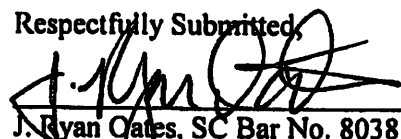
Midtown Development Group, LLC,
Richland Joint Venture Group, LLC,
Windsor Richland Mall, L.P. and BRC
Richland, LLC,

Respondents.

NOTICE OF APPEAL

Century Capital Group, LLC appeals the Order of the Honorable L. Casey Manning dated February 22, 2016. Appellant received written notice of entry of this Order on February 29, 2016.

Respectfully Submitted,


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STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2014CP4007037

Century Capital Group LLC

MAR 03 2016

BRC Richland LLC

PLAINTIFF(S)

SC Court of Appeals

DEFENDANT(S)

Submitted by: _____

Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit);
☐ Rule 43(k), SCRPC (Settled); ☐ Other _____
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☐ Statement of Judgment by the Court

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order: _____

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge _____

Judge Code 2061

Date _____

For Clerk of Court Office Use Only

This judgment was entered on the 34 day of Feb, 2016 and a copy mailed first class or placed in the appropriate attorney's box on this 34 day of Feb, 2016 to attorneys of record or to parties (when appearing pro se) as follows:

Donald Ryan McCabe Jr.

Robert Trippett Boineau III
Allen Keith McAllister Jr.

D. Cravens Ravenel

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court

Jeanette W. [Signature]

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

CENTURY CAPITAL GROUP, LLC,

Plaintiff,

vs.

MIDTOWN DEVELOPMENT GROUP,
LLC, RICHLAND JOINT VENTURE
GROUP, LLC, WINDSOR RICHLAND
MALL, L.P., AND BRC RICHLAND,
LLC,

Defendants.

IN THE COURT OF COMMON PLEAS

Civil Action No. 2014-CP-40-07037

**ORDER DENYING PLAINTIFF
CENTURY CAPITAL GROUP, LLC'S
MOTION TO ALTER OR AMEND
SUMMARY JUDGMENT**

RICHLAND COUNTY
FILED

2016 FEB 23 PM 5:42
JEANETTE V. MCBRIDE
C.C.P. & G.S.

This matter comes before the Court upon several Motions filed by Plaintiff Century Capital Group, LLC's (herein "Century") seeking to alter or amend the Orders issued September 16 and 17, 2015, granting summary judgment on the various Motions for Summary Judgment filed by Defendants Midtown Development Group, LLC, Richland Joint Venture Group, LLC, Windsor Richland Mall, L.P. and BRC Richland, LLC (herein collectively "Defendants") in the above captioned matter.

Century's Motions set forth several grounds they contend entitle them to an amended ruling on Defendants' Motions for Summary Judgment. At the outset, it should be noted that this case involves one single cause of action: contribution. Century's case centers around the litigation between Spirit SPE Columbia, LLC ("Spirit") and Century that began in 2010. As noted throughout the parties' briefs in support of summary judgment, that case involved seventeen (17) causes of action, including breach of the REA, negligence, unfair trade practices and fraud. After three years of litigation—during which time none of the above listed Defendants were ever brought into the case—Spirit and Century entered into a Settlement

SCANNED²

Record on Appeal 662

Agreement and Mutual Release (the "Settlement Agreement") outlining the terms of settlement. However, the only allocation of payment of the \$1,450,000.00 paid by Century to Spirit in "extinguishment of liability" broadly states that an *unspecified portion* of the payment is made for the maintenance and repair of the Spirit parcel with the remaining, *unspecified portion* is provided for settlement of the outstanding accounting charges asserted by Spirit.

Even taking everything in the light most favorable to Century, Century has failed to offer any competent evidence—either by way of the Settlement Agreement or affidavit—that shows a measurable allocation of the \$1,450,000.00 between the above listed Defendants that Century can recoup in the current action. In short, there is nothing for this Court to consider to show what money(ies) Century is entitled to under a negligence theory as required under our State's law governing contribution.

For these reasons and those outlined in the Orders issued on September 16 and 17, 2015, granting the various Motions for Summary Judgment filed by Defendants, Century's Motions to Alter or Amend the grant of summary judgment as to each above listed Defendant are denied.

IT IS THEREFORE ORDERED that each Motion filed by Plaintiff Century Capital Group, LLC to alter or amend each Order granting the above listed Defendants summary judgment is hereby denied, and Plaintiff Century Capital Group, LLC's claims for contribution are dismissed with prejudice as a matter of law.

AND IT IS SO ORDERED.


L. Casey Manning
Fifth Judicial Circuit

Feb. 22, 2016

Columbia, South Carolina

SCANNED

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

MAR 03 2016

SC Court of Appeals

L. Casey Manning, Circuit Court Judge

Case No. 2014-CP-40-07037

Century Capital Group, LLC,

Appellant,

v.

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

Respondents.

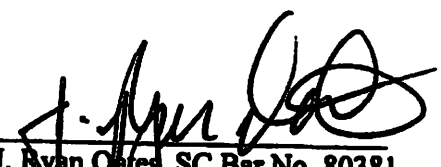
PROOF OF SERVICE

The undersigned herby certifies that on the date indicated below he served counsel for the Respondents with a copy of the Notice of Appeal by depositing a copy in the U.S. Mail, postage prepaid, to the following addresses:

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March 2, 2016

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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JUL 00 2016

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

SC Court of Appeals

L. Casey Manning, Circuit Court Judge

Case No. 2014-CP-40-07037

Century Capital Group, LLC,

Appellant,

v.

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

Respondents.

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OTHER AUTHORITIES

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STATEMENT OF ISSUES ON APPEAL

- I. DID THE TRIAL COURT ERR IN HOLDING AS A MATTER OF LAW THAT THE PARTIES ARE NOT JOINT TORTFEASORS?**
- II. DID THE TRIAL COURT ERR BY IGNORING THE SETTLEMENT AGREEMENT'S APPORTIONMENT OF REPAIR AND MAINTENANCE LIABILITY?**
- III. DID THE TRIAL COURT ERR WHEN IT HELD THAT A PURCHASE "AS IS/WHERE IS" RELIEVES A SELLER FROM THIRD PARTY LIABILITY FOR THE SELLER'S NEGLIGENCE?**
- IV. DID THE TRIAL COURT ERR IN FINDING THAT THE STATUTE OF REPOSE BARRED CENTURY'S CLAIM?**

STATEMENT OF THE CASE

On November 10, 2014, Appellant, Century Capital Group, LLC, ("Century") filed a complaint against the Respondents, Midtown Development Group, LLC ("Midtown"), Richland Joint Venture Group, LLC ("RJVG"), Windsor Richland Mall, L.P. ("Windsor"), and BRC Richland, LLC ("BRC"), in the Circuit Court of Richland County. The complaint was amended twice, once on November 12, 2014, and again by leave of the court on December 8, 2014 to add a paragraph that was inadvertently left out and to correct the request for relief. Century sought recovery against the Defendants for contribution. RJVG filed its motion for summary judgment on May 6, 2015 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. On September 16 and 17, 2015, the circuit court issued orders granting summary judgment as to all Defendants and dismissing Century's claim with prejudice on the grounds that there were no genuine issues of material fact, the Settlement Agreement does not delineate what portion of the sum paid by Century should be apportioned to each Defendant under a negligence theory, and that Century's claims are barred by the statute of repose.

On September 25, 2015, Century filed motions to alter or amend the September 16 and 17 Orders, which were subsequently denied by the trial court on February 23, 2016.

STATEMENT OF FACTS

This case stems from an underlying lawsuit (Case No.: 2010-CP-40-8407) against Century by Spirit SPE Columbia, LLC ("Spirit"), a non-party in the present matter, based primarily on allegations that Century failed to adequately repair and maintain certain portions of

the Richland Mall. The Richland Mall has a long history of construction defect and maintenance issues and has experienced persistent roof leaks since original construction. The parking deck was designed above occupied space and has a split-slab system of waterproofing, meaning the waterproofing membrane is sandwiched between two layers of concrete and endures regular vehicular and pedestrian traffic. Extensive reports dating back to the 1990's indicate that the roof was defectively constructed based on a failure to install sufficient expansion joints and defective components in the waterproofing structure. In lieu of costly roof repairs, Mall ownership at the time began installing a system of ceiling pans to prevent water from intruding into the occupied space below and injecting the visible cracks in the concrete of the deck with epoxy.

On December 23, 2002, the Mall was sold to Windsor and simultaneously split into separate parcels: the "Bank Parcel," the "TGI Friday Parcel," the "Verizon Parcel" and the "Mall Parcel," which included the remaining portions of the Mall and the Common Areas. 2d. Am. Compl. ¶ 7. Also in 2002, Windsor sold the Verizon parcel to BRC. 2d. Am. Compl. ¶ 8. On September 7, 2005, BRC and Windsor negotiated the Reciprocal Easement, Covenant, Operation and Restriction Agreement ("REA"), which attempted to outline the respective duties of those parties and their successors regarding the maintenance and administration of the Mall. 2d. Am. Compl. ¶ 9. 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.

2d. Am. Compl. Ex. 1, at 16.

As the roof leaks continued, Mall Management elected to inject epoxy to chase the cracks

and continued to install galvanized steel catch pans in the roof system to collect the water. Spirit purchased the Verizon Parcel on September 12, 2005. 2d. Am. Compl. ¶ 10. On November 4, 2005, Windsor sold the Mall parcel to Midtown. 2d. Am. Compl. ¶ 11. On May 25, 2007, Midtown sold the Mall parcel to RJVG 2d. Am. Compl. ¶ 12. 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.

Century purchased the Mall parcel from RJVG on February 16, 2010 and acknowledges that it had notice of the roof leaks; however, it had no indication that Spirit took issue with the maintenance plan in place since the origin of the leaks nor did Century agree to accept responsibility for its predecessors' maintenance failures. Walkup Aff. ¶¶ 3, 5- 6. Spirit initiated the underlying suit against Century only nine months after Century took possession of the Mall parcel. Spirit's complaint sought relief under seventeen causes of action for damages related to maintenance and repair of the Mall Property, common area maintenance charges, and management of the Mall in general. Walkup Aff. ¶ 9; Spirit's 3d. Am. Compl.

In an effort to resolve the costly and protracted litigation with Spirit, Century agreed to settle the underlying lawsuit's claims relating to repair and maintenance of the Mall for One Million Four Hundred Fifty Thousand and No/100 Dollars (\$1,450,000.00). The Agreement provides in part:

The parties agree that the \$1,450,000 payment is provided for the release and extinguishment of any pre-June 30, 2013 liability related to the maintenance and repair of the Spirit parcel and the remaining consideration provided by [Century] under this Settlement Agreement is provided for the pre-June 30, 2013 settlement of the CAM, accounting and other claims asserted by Spirit.

Def. Midtown's Mot. Summ. J., Ex. B, at 3.

The Settlement Agreement expressly extinguishes liability and discharges all claims against Century and its predecessors in interest under the REA:

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

Def. Midtown's Mot. Summ. J., Ex. B, at 10.

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

STANDARD OF REVIEW

When reviewing the grant of a summary judgment motion, the appellate court applies the same standard of review as the trial court under Rule 56, SCRPC. Zurich Am. Ins. Co. v. Tolbert, 378 S.C. 493, 496, 662 S.E.2d 606, 607 (Ct. App. 2008). Principles of equity are applicable to actions determining the pro rata liability of tortfeasors. S.C. Code Ann. § 15-38-30 (Supp. 2000); Florence Cty. Sch. Dist. No. 2 v. Interkal, Inc., 348 S.C. 446, 450, 559 S.E.2d 866, 868 (Ct. App. 2002).

In equity cases tried before a judge without a jury, the appellate court may make a de novo review of properly challenged findings of fact as well as rule upon issues of law. Townes Assoc., Ltd. v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976). Therefore, an appellate court may find facts in accordance with its own views of the preponderance of the evidence. Metromont Materials Corp. v. Pennell, 270 S.C. 9, 18, 239 S.E.2d 753, 758 (1977).

In determining whether a genuine issue of fact exists, the evidence and all reasonable

inferences drawn from it must be viewed in the light most favorable to the nonmoving party. Sauner v. Pub. Serv. Auth. of S.C., 354 S.C. 397, 404, 581 S.E.2d 161, 165 (2003). Even if evidentiary facts are not disputed, if only the conclusions to be drawn from them are, the trial court should deny the motion for summary judgment. Baugus v. Wessinger, 303 S.C. 412, 415, 401 S.E.2d 169, 171 (1991). Summary judgment is not appropriate when further inquiry into the facts is desirable to clarify the application of law. Tupper v. Dorchester Cnty., 326 S.C. 318, 325, 487 S.E.2d 187, 191 (1997).

ARGUMENT

I. THE TRIAL COURT ERRED IN HOLDING AS A MATTER OF LAW THAT THE PARTIES ARE NOT JOINT TORTFEASORS.

The South Carolina Contribution Among Tortfeasors Act (the “Act”) provides a right of contribution in favor of a “tortfeasor who has paid more than his pro rata share of [] common liability, and his total recovery is limited to the amount paid by him in excess of his pro rata share. Under the Act, a tortfeasor against whom a judgment is rendered is entitled to recover proportional shares of the judgment from other joint tortfeasors whose negligence contributed to the injury and who were also liable to the plaintiff. Andrade v. Johnson, 345 S.C. 216, 225, 546 S.E.2d 665, 669 (Ct. App. 2001). Contribution exists as a way to equitably apportion costs after liability is established. Ashley II of Charleston, L.L.C. v. PCS Nitrogen, Inc., 409 S.C. 487, 491, 763 S.E.2d 19, 21 (2014).

In the case at bar, Century sought contribution from its predecessors in interest to the Mall for sums Century 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 Century, as the last party in line, was left to settle the common liability on its own.

A. The determination of joint tortfeasor status is a question of fact and is disputed.

The trial court erred in deciding that the parties were not joint tortfeasors as a matter of law at the summary judgment stage in spite of the evidence Century presented demonstrating tort liability of the Respondents. South Carolina case law is clear that the fact-finder must determine whether two parties are joint tortfeasors for purposes of the Act when that fact is disputed:

“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 Carolina's, Inc. v. Wood/Chuck Chipper Corp., 336 S.C. 53, 64, 518 S.E.2d 301, 307 (Ct. App. 1999) (citation omitted).

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).

Century demonstrated in its pleadings and by affidavits that the damages caused to Spirit necessarily resulted from the common acts or omissions of itself and the Respondents. Wilson Dep. 84:15-85:2; Vitale Aff. ¶ 6 (“The parking deck on the Richland Mall was in substantially the same condition in 2013 as it was when I inspected it in 2003”). This evidence demonstrates that despite the fact that Spirit limited its recovery against Century to damages occurring after Century took title to the property, Century alone could not have been solely responsible for the damages.

The Respondents refuted liability, but offered no evidence disproving it. The burden should have been on the Respondents to demonstrate that no scintilla of evidence existed. This

issue should have caused the denial of any ruling at the summary judgment stage based on the genuine issues of material fact integral to the determination of the Act's application. By ruling that a contested issue of fact is, as a matter of law, non-existent, the trial court erred in granting summary judgment to the Respondents.

B. A separate tort duty to reasonably repair and maintain exists outside the REA's contractual duties.

The Trial Court erred in 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. Pursuant to the Act, "where two or more persons become jointly or severally liable in tort for the same injury to person or property or for the same wrongful death, there is a right of contribution among them even though judgment has not been recovered against all or any of them." S.C. Code Ann. § 15-38-20 (Supp. 1998). However, the mere existence of a contractual obligation under the REA does not foreclose the possibility of tort liability to support an action for contribution.

The underlying case by Spirit sought recovery against Century for, *inter alia*, negligent maintenance of the 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 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.

Order Granting Mot. Summ. J., Sep. 16, 2015.

Thus, the Trial Court improperly held that a legal duty could not and did not exist outside of the contractual REA. As a general rule, a negligence action will not lie when 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). "Under South Carolina law, breach of industry standard may establish that special duty outside of contract exists, and thus prevent application of economic loss rule." Eaton Corp. v. Trane Carolina Plains, 350 F. Supp. 2d 699 (D.S.C. 2004).

In the case at bar, the Respondents and Century owed a common law duty to Spirit to reasonably maintain and repair the 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. This duty also arises based on the fact that when the Respondents and Century undertook to make repairs to the roof structure, they failed to do so in a reasonably prudent manner. These failures amounted to breach of industry standards, violations of building codes and were most certainly not in accordance with the reasonably prudent person standard of care. For these reasons, the Trial Court erred in holding that there could be no tort liability to support an action for Contribution.

C. Common liability to Spirit exists because the damages to the Spirit for repair and maintenance of the Mall are indivisible.

"The basic premise of contribution is commonality. Under the statute, 'common liability,' rather than joint negligence, determines the right to contribution." Vermeer Carolina's, Inc. v.

Wood/Chuck Chipper Corp., 336 S.C. 53, 68, 518 S.E.2d 301, 309 (Ct. App. 1999). It is well established in South Carolina that the focus should be on the harm to the Plaintiff, not the acts of the Defendants. Pendleton v. Columbia Railway, Gas & Elec. Co., 133 S.C. 326, 131 S.E. 265 (1926). The court in Pendleton held:

That 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.

Pendleton, 133 S.C. at 326, 131 S.E. at 267.

In the Vermeer case, 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. Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp., 336 S.C. 53,68, 518 S.C. 301,310 (Ct. App. 1999). 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. Vermeer Carolina's, Inc., 336 S.C. at 68, 518 S.C. at 310. At present, the Respondents were not parties in the underlying case, but Century ensured that any common liability shared by the Respondents and Century related to the repair and maintenance of the building was discharged by the Settlement Agreement.

Likewise, in the case of Collins v. Bisson, the court noted that there was no common liability as between two Defendants because there was no common injury to the Plaintiff. Collins v. Bisson, 332 S.C. 290, 306, 504 S.E. 2d 347, 356 (1998). In Collins, the Plaintiff was injured in a first automobile accident with one Defendant and then while being transported by ambulance to

the hospital was also injured in a second automobile accident with a second Defendant. Collins, 332 S.C. at 293, 504 S.E. 2d at 349. In its holding, the court focused on the fact that the Plaintiff incurred "different injuries" and differing damages in each of the two separate accidents. 332 S.C. at 306, 504 S.E. 2d at 356. 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, 504 S.E. 2d at 349. The court emphasized that "joint and several liability arises only when two or more tortfeasors are responsible for a *single* injury." Id. at 306, 504 S.E. 2d at 356 (emphasis in original).

In the case at bar, the Defendants and Century 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, this case deals with defendants whose actions united to cause a one injury to property, not separate and distinct injuries. Century acknowledges that the underlying lawsuit sought recovery against it for failure to repair and maintain the Mall since taking possession and operating as manager of the Shopping Mall Property. However, Century has demonstrated that it could not feasibly have been responsible for the damages Spirit alleged in nine months because the damages were indivisible and were the result of many years of improper maintenance and repair to a defective structure. All Parties had the same duty to Spirit with respect to maintenance of the Mall. Testimony shows that the building remained in substantially the same condition during the entire relevant time period. Vitale Aff. ¶ 6.

Summary judgment is not appropriate in this case because there are genuine issues of material fact regarding the determination of joint tortfeasor status amongst the parties. As stated above, joint tortfeasors may act independently of each other if those acts unit to cause a single injury. The independent actions and inactions of the successive owners of the Mall Parcel over

the course of many years united in causing the Spirit's damages and equity is not served in forcing Century to carry the entire burden of liability it inherited.

II. THE TRIAL COURT ERRED BY IGNORING THE SETTLEMENT AGREEMENT'S APPORTIONMENT OF REPAIR AND MAINTENANCE LIABILITY.

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). 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). The equitable maxim equality is equity, "a principle that has long been embodied in our jurisprudence . . . is applicable to burdens as well as to rights, and means that, in the absence of relations or conditions requiring a different result, equity will treat all members of a class as on an equal footing, and will distribute benefits or impose burdens and charges either equally or in proportion to the several interests, and without preferences." Myers v. Sinkler, 235 S.C. 162, 175, 110 S.E.2d 241, 247 (1959). Under the "equality is equity" rule, damages are apportioned equally among the tortfeasors without the necessity of determining relative degrees of fault. W. Keeton, D. Dobbs, R. Keeton & D. Owen, Prosser and Keeton on the Law of Torts § 50, at 340 (5th ed. 1984).

Even if two tortfeasors are liable to a Plaintiff under differing or multiple theories, when their actions unite to cause one injury to the Plaintiff they can be liable to each other for contribution. See Matthews v. Seaboard Air Line Ry., 67 S.C. 499, 46 S.E. 335, 340 (1903).

If two or more persons owe to another the same duty, and by their common neglect of that duty he is injured, doubtless the tort is joint, and upon well-settled

principles each, any, or all of the tort feasons may be held. But when each of two or more persons owe to another a separate duty, which each wrongfully neglects to perform, then, although the duties were diverse and disconnected, and the neglect of each was without concert, if such several neglects concurred and united together in causing injury, the tort is equally joint, and the tort feasons are subject to a like liability.

Matthews, 67 S.C. at 514-15, 46 S.E. at 340 (emphasis added).

Century and Spirit executed a Settlement Agreement and Mutual Release on December 6, 2013. Section (a) 6 of the agreement provides 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 Spirit parcel and the remaining consideration provided by CCG under this Settlement Agreement is provided for the pre-June 30, 2013 settlement of the CAM, accounting and other claims asserted by Spirit.

Settlement Agreement § (a) 6.

The “remaining consideration” stated above is further outlined in subsequent paragraphs of the Agreement to include modifications to the REA, ...

Section (d) 1 provides in part as follows:

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.

The Trial Court held that the damages could not be allocated by the fact finder, based on its incorrect application of the Vermeer case. The Vermeer case can be distinguished from the case at bar because it dealt with the issue of whether a defendant was entitled to contribution for settlement of a *potential* claim by a *non-party* who *never* asserted or litigated the claim. Specifically, Vermeer sought contribution from Wood/Chuck for payment of a potential loss of consortium claim to the injured party's wife. Vermeer Carolina's Inc. v. Wood/Chuck Chipper Corp. 336 S.C. at 69, 518 S.E.2d at 310. The wife was not a Plaintiff in the underlying lawsuit

brought by her husband nor was there any admission of liability as to her. Vermeer's Carolina, Inc., 336 S.C.53 69, 518 S.E.2d 301,310. For these reasons, "Vermeer did not 'discharge' any 'common liability' as to [the wife] because there was no 'common liability.'" 336 S.C. at 69, 518 S.E.2d at 310.

As stated above, there is common liability between successors in interest to the Mall Parcel as to Spirit. Each owner owed a duty to Spirit to properly maintain and repair the common areas and roof. This continuous term of maintenance and repair was breached in succession by each owner leading up to Century, which was ultimately held liable for the entirety of the damages to Spirit.

The Settlement Agreement properly discharged the Respondents from liability to Spirit and outlines that \$1.45M was paid to settle liability for failing to maintain and repair the portions of the Mall affecting the Spirit Parcel. Regardless of the legal theories or various duties at issue, each successor in interest to the Mall acted to cause this injury to Spirit. Pursuant to the Act, each joint tortfeasor is responsible for its equal share of the settlement figure regardless of each party's relative degree of fault. First Gen. Servs. of Charleston, Inc. v. Miller, 314 S.C. 439, 445 S.E.2d 446 (1994); Southeastern Freight Lines v. City of Hartsville, 313 S.C. 466, 443 S.E.2d 395 (1994). Thus, the Trial Court erred in ignoring the allocation of liability to Spirit for maintenance and repair of the Spirit Parcel of \$1.45M. There is no need for the settlement agreement to further delineate what portion of that figure is attributable to any of the Respondents or to lay out exactly which theory of liability it is meant to cover. Each Respondent is liable for a pro rata, equitable share of this settlement figure under the Act and case law cited herein.

III. THE TRIAL COURT ERRED WHEN IT HELD THAT A PURCHASE "AS IS/WHERE IS" RELIEVES A SELLER FROM THIRD PARTY LIABILITY FOR THE SELLER'S NEGLIGENCE.

Century purchased the Mall Parcel on February 16, 2010 with knowledge of roof leaks and accepted the building as is/where is. William B. Walkup, principal of Century, acknowledged by filed affidavit that Century had notice of the leaks, repairs, and ongoing maintenance obligations that it would be responsible for after taking title to the Mall. Walkup Aff. ¶ 6. However, Century never agreed to assume responsibility for or to indemnify its predecessors for their negligent conduct. The trial court erred in essentially holding that acceptance of a patent defect operates as a waiver of the right to contribution as to liability owed a third party. This is not and has never been the law in this state.

IV. THE TRIAL COURT ERRED IN FINDING THAT THE STATUTE OF REPOSE BARRED CENTURY'S CLAIM.

The statute of repose provides in part as follows: "No actions to recover damages based upon or arising out of the defective or unsafe condition of an improvement to real property may be brought more than eight years after substantial completion of the improvement." S.C. Code Ann. § 15-3-640 (Supp. 2000). The current version of the statute went into effect on July 1, 2005, two months prior to the execution of the REA, therefore it applies to this case. The essential elements of the statute are (1) an improvement to real property and (2) substantial completion of that improvement. Because the ongoing maintenance of the Mall never amounted to an "improvement" and because there was never substantial completion of the maintenance, the statute does not bar Century's recovery in a contribution cause of action. Further, the statute is not applicable 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 the Respondents were all aware of the defective roof during their respective periods of control and possession of the Mall, the statute of repose is not a bar to Century's cause of action and summary judgment should be reversed.

A. Routine maintenance of the Mall is not an improvement under the Statute of Repose.

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 the 2001 case South Carolina Pipeline Corp. v. Lone Star Steel Co., 345 S.C. 151, 546 S.E.2d 654 (2001). In defining "improvement," the Court looked to various secondary sources, other courts' interpretations, and also attempted to glean legislative intent from the preamble to the statute. In doing so, the court developed the following necessary elements for something to be considered an improvement under our statute of repose: (1) enhancement to the value of the property; (2) an investment of time and money; and (3) permanence, as the term is commonly understood. South Carolina Pipeline Corp., 345 S.C. at 155, 546 S.E.2d at 657.

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*.

Peter v. Sprinkmann Sons Corp., 360 Wis.2d 411, 427, 860 N.W.2d 308, 315 (Wis. Ct. App. 2015) (citation omitted).

In this case, the 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 Mall. At best, these actions were ongoing day to day repairs to keep water out of the Mall interior. As the affidavit of Mr. Vitale provides, the roof structure stayed in substantially the same condition throughout all relevant time periods. Vitale Aff. ¶ 6. No action taken by any Respondent enhanced the property's value, required an investment of labor or money beyond just ordinary repairs, nor can they be considered permanent in the common-sense understanding of the term. Further, as the Wisconsin Court found instructive, on-going 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 roof repairs never amounted to an "improvement" under the statute and the statute fails to bar Century's claim.

B. The repairs made by the Respondents were never substantially completed.

The second essential element for qualification as an improvement under the statute of repose is substantial completion. "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, daily 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 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 Mall's interior. Absent a date of substantial completion, the statute of repose never started running and cannot be used to bar Century's claim for contribution.

C. Respondents had actual control and possession of the Mall.

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

(A) The limitation provided by Sections 15-3-640 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 or 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 defective or unsafe condition

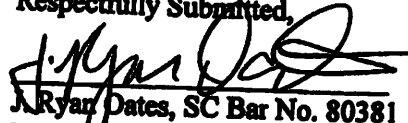
S.C. Code Ann. § 15-3-670 (Supp. 2000).

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 them. Therefore, the Defendants cannot rely on the statute of repose to bar Century's claim for contribution.

CONCLUSION

For the reasons stated herein, this Court should reverse the order of the Circuit Court Judge and reinstate Appellant's cause of action.

Respectfully Submitted,



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July 6, 2016

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

Case No. 2014-CP-40-07037

Century Capital Group, LLC,

Appellant,

v.

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

Respondents.

CERTIFICATE OF SERVICE

I, J. Ryan Oates, with the Law Firm of McCabe, Trotter & Beverly, PC, attorneys for Plaintiff, 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 6 day of July, 2016, via U.S. Mail, postage prepaid and addressed as follows:

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INITIAL BRIEF OF APPELLANT

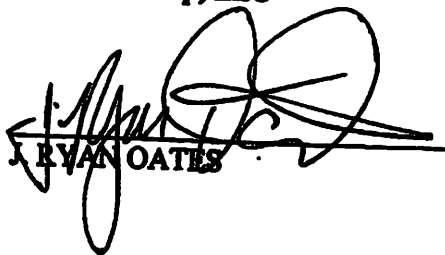
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**Midtown Development Group, LLC,
Richland Joint Venture Group, LLC,
Windsor Richland Mall, L.P. and BRC
Richland, LLC..... Respondents.**

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

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STATEMENT OF ISSUES ON APPEAL

- I. Did the Circuit Court properly hold that Century and Respondents are not joint tortfeasors?**
- II. Did the Circuit Court properly grant summary judgment to each Respondent on Century's claim for contribution?**
- III. Did the Circuit Court properly hold that Century purchased the property "as-is" and with full knowledge of the patent defects for which Century seeks to recover?**
- IV. Did the Circuit Court properly grant summary judgment to Windsor Richland Mall, L.P. on Century's contribution claim based on the applicable statute of repose?**

STATEMENT OF THE CASE

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

In 2002, Windsor purchased the property known as Richland Fashion Mall and subdivided the property into four distinct parcels: 1) the TGI Friday Parcel; 2) the Bank Parcel; 3) the Verizon Parcel; and 4) the Midtown Parcel. (Plaintiff's Second Amended Complaint, ¶ 7). At the same time, Windsor sold the Verizon Parcel to BRC. (*Id.* at ¶ 8).

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

On or about September 12, 2005, after the REA went into effect, BRC sold the Verizon Parcel to Spirit ("Spirit Parcel"). (*Id.* at ¶ 10). On or about November 4, 2005, Windsor sold the Midtown Parcel to Midtown. (*Id.* at ¶ 11). On or about May 25, 2007, Midtown deeded the Midtown Parcel to Richland. (*Id.* at ¶ 12). Thereafter, on or about February 16, 2010, Richland

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

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

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

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

The parties agree that the \$1,450,000 payment is provided for the release and extinguishment of any pre-June 30, 2013 liability related to the maintenance and repair of the [Verizon Parcel] and the remaining consideration provided by [Century] under this Settlement Agreement is provided for the pre-June 30, 2013 settlement of the CAM, accounting, and other claims asserted by Spirit.

Other than this paragraph, the Settlement Agreement in no way delineates the reason for the payment of \$1,450,000.00. In other words, the Settlement Agreement neither explains if the payment is pursuant to the breach of contract claims, the negligence claims or any of the several

other claims brought against Century by Spirit, nor does the Settlement Agreement explain how the payment may be allocated among any particular maintenance or repair failure. However, Century now relies upon this purported extinguishment of liability within the settlement as the primary ground for seeking contribution from Respondents.

Respondents separately moved for summary judgment on several grounds with one common theme among them: Century's failure to point to any evidence showing how its settlement payment may be allocated among any particular maintenance or repair failure. (See generally Defendant Midtown Development Group, LLC's Memorandum in Support of its Motion for Summary Judgment; Defendant Richland Joint Venture Group, LLC's Memorandum in Support of its Motion for Summary Judgment; Defendant Windsor Richland Mall, LP's Memorandum in Support of its Motion for Summary Judgment). Respondents' Motions were heard by Judge L. Casey Manning on July 30, 2015. (See generally Transcript of Proceedings). By way of orders dated September 16 and 17, 2015, Judge Manning granted summary judgment to each Respondent with respect to all claims asserted against them. (See generally Order Granting Defendant Midtown Development Group, LLC's Motion for Summary Judgment, September 16, 2015; Order Granting Defendant Richland Joint Venture Group, LLC's Motion for Summary Judgment, September 16, 2015; Order Granting Defendant Windsor Richland Mall, L.P.'s Motion for Summary Judgment, September 17).

Century filed a Motion to Alter or Amend Summary Judgment as to each of Judge Manning's Orders granting Respondents summary judgment. (See generally Plaintiff Century Capital Group, LLC's Motion to Alter or Amend Summary Judgment Granted to Defendant Windsor Richland Mall, L.P.; Plaintiff Century Capital Group, LLC's Motion to Alter or Amend Summary Judgment Granted to Defendant Richland Joint Venture Group, LLC; Plaintiff Century

Capital Group, LLC's Motion to Alter or Amend Summary Judgment Granted to Defendant Midtown Development Group, LLC).

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

STANDARD OF REVIEW

When reviewing an order granting summary judgment, an appellate court applies the same standard as the court below. David v. McLeod Reg. Med. Ctr., 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006). Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRCP (2016); Garvin v. Bi-Lo, Inc., 343 S.C. 625, 628, 541 S.E.2d 831, 832 (2001). A court must construe all ambiguities, conclusions, and inferences arising from the evidence against the moving party. City of Columbia v. Town of Irmo, 316 S.C. 193, 195, 447 S.E.2d 855, 856 (1994). However, the opposing party may not rest upon mere allegations or denials, but must respond with specific facts showing a genuine issue of material fact. Id. More specifically, a responding party "may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him." Rule 56(e), SCRCP (2016). A grant of summary judgment is "completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner." David, 367 S.C. at 250, 626 S.E.2d at 5.

ARGUMENTS

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

In the present case, it is factually undisputed that the duty to repair and maintain the HVAC systems, roof systems and structural components of the Spirit Parcel arises contractually from the REA. (Plaintiff's Second Amended Complaint, ¶ 9). No party to this action has a legal duty or obligation to repair or maintain the roof systems or common areas at the Spirit Parcel indefinitely. Rather, each party was liable for repairing the Spirit Parcel during the timeframe in which each party respectively owned the Midtown Parcel. There is no evidence in the record that a legal duty on the part of the owner of the Midtown Parcel to maintain or repair any components of the Spirit Parcel arises independently of the REA. To adopt the argument proffered by Century that itself and Respondents are joint tortfeasors would be to hold that, despite the terms of the REA, Respondents are liable for negligent repairs that occurred after they each sold the Midtown Parcel and vacated the Richland Mall property and Century is liable for negligent repairs that occurred years before it even purchased the Midtown Parcel. This result is surely not what the legislature intended when it enacted the South Carolina Contribution Among Tortfeasors Act.

Pursuant to S.C. Code Ann. § 15-38-20(A), joint tortfeasors are those who "become jointly or severally liable in tort for the same injury to person or property." S.C. Code Ann. § 15-38-20(A) (Supp. 2016). Any duty involved in this case amongst Respondents regarding maintenance to the Spirit Parcel was primarily a *contractual* duty arising from the REA and parties may not seek contribution as alleged joint tortfeasors for breaches of contractual duties under S.C. Code Ann. § 15-38-20. "It is settled law that if a tort arises out of a contract there must also exist a relationship, irrespective of the contract, that gives rise to a duty[,] because a

mere breach of contract is not actionable as a tort in South Carolina, no matter what the intent of the breaching party was." Troutman v. Facetglas, Inc., 281 S.C. 598, 601, 316 S.E.2d 424, 426 (Ct. App. 1984).

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

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

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

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

The present case is analogous to Collins v. Bisson. Although both Wiles and the truck driver for Bisson owed the same duty of care to Collins to operate their respective vehicles with reasonable care, they owed those duties at temporally severable times and could not be jointly and severally liable in tort for breaching the same duty at distinct times, causing separate injuries. In the present case, the duties owed by both Century and Respondents to properly maintain the common areas and parking decks at Richland Mall were completely severable temporally and would have constituted separate injuries, even assuming, *arguendo*, that Respondents' repairs (if any) were improper while they each owned the Midtown Parcel.

The duty to repair/maintain that was owed by Respondents under the REA existed during their ownership periods (if such period fell within the REA) and Respondents would be liable for property damage sustained at the Spirit Parcel during that timeframe. In contrast, the duty owed by Century under the REA began on February 16, 2010 and continued until November 30, 2010 when its duties under the REA terminated. Thus, Century is liable for property damage sustained at the Spirit Parcel from February 16, 2010 until November 30, 2010. The underlying case between Century and Spirit did not involve a single injury, as espoused by Century. Rather,

that case involved separate timeframes in which totally separate repairs and maintenance were involved that would, in turn, constitute separate injuries. As acknowledged extensively by Century, Spirit only sought damages from Century for the timeframe when Century owned the Midtown Parcel. Thus, the "injury" complained of in the underlying action between Spirit and Century was attributable solely to improper maintenance and repairs that occurred once Century purchased the Midtown Parcel on February 16, 2010. Respondents, separately and/or collectively, were no longer the owners of the Midtown Parcel at this time and, accordingly, are not jointly liable for these improper repairs.

In sum, the question of whether two entities are joint tortfeasors is a matter of law to be determined by the court when the facts in evidence are undisputed. See Gordon v. Phillips Utilities, Inc., 362 S.C. 403, 407, 608 S.E.2d 425, 427 (2005); Edwards v. Atlantic Coast Line R. Co., 148 S.C. 266, 146 S.E. 97, 103 (1928). It is fundamental that Spirit limited the recovery sought against Century in the underlying lawsuit between those two parties to the deficient maintenance that had occurred since Century began maintaining the common areas at Richland Mall on February 16, 2010. Therefore, Respondents are not jointly liable for the improper repairs or maintenance that occurred after they each sold the Midtown Parcel and their legal duty to maintain/repair the Spirit Parcel that arose under the REA, if any, were terminated. Under the undisputed facts of this case, there was no joint tortfeasor relationship between Century and Respondents. Therefore, Century has no right to seek contribution from Respondents under S.C. Code Ann. § 15-38-20.

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

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

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

The settlement entered into between Spirit and Century in the underlying case was finalized and signed on December 6, 2013. (See generally Settlement Agreement and Mutual Release). The settlement purported to extinguish liability for both the claims against Century as well as the potential and unfiled claims against Century's "predecessors in interest under the REA, and each predecessor in interest's employees, agents, heirs and assigns." Nevertheless, the settlement provides no insight into how liability could be allocated between these predecessors in interest in the event a contribution action was filed. Spirit listed seventeen (17) causes of action in their Third Amended Complaint, including both contractual and equitable causes of action. Of these seventeen causes of action, only certain causes of action are based in tort and some of these causes of actions are intentional torts for which contribution may not be sought under S.C. Code

Ann. § 15-38-20(C). Lastly, some of the tort claims relate to specific billing representations by Century which Respondents could not be jointly liable for in tort, such as Spirit's negligent misrepresentation cause of action. In total, there is only one cause of action out of seventeen in which Respondents could conceivably be held jointly liable: negligence.

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

The issues in this case are similar to those presented in Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp., 336 S.C. 53, 518 S.E.2d 301. That case involved a settlement that extinguished liability for both a well pled strict liability products liability claim and a potential loss of consortium claim that had not yet been sought by the wife of the plaintiff injured by the defective product. This court held that it could not permit the settling tortfeasor to pursue a contribution claim to recover funds paid in extinguishing liability for the wife's potential and unfilled loss of consortium claim because the agreement failed to put a specific value on that individual theory of liability. The court stated:

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

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

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

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

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

In the underlying case between Century and Spirit, Respondents were neither a party in the case nor involved in the settlement discussions and subsequent settlement. Therefore, Respondents have no way of knowing what portion of the settlement money was paid towards any claims that may now be covered in Century's contribution action. A party drafting a settlement agreement has a duty to help draft the settlement agreement in such a way as to place a specific value on claims so that the fact finder is not left to speculate as to what portion of the settlement relates to specific claims. The fact finder can then determine whether the settling

defendant has paid more than its pro rata share of liability on the claims for which contribution is sought. Id. 356 S.C.at 70-72, 518 S.E.2d at 310-11.

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

Further, by its own terms, the Settlement Agreement expressly provides that it “constitutes the entire agreement among the parties pertaining to the subject matter contained herein” and “[t]his Settlement Agreement shall not be modified or amended except by an instrument in writing signed by all of the parties.” (Settlement Agreement and Mutual Release, p. 13). As a result and in the absence of an instrument signed by all the parties to the agreement, including Spirit, no additional evidence may be proffered to delineate how the settlement contemplated the apportionment of liability between the allegations that might have been jointly recoverable. Our Supreme Court has recently held that when a writing, upon its face, imports to be a complete expression of the whole agreement and contains all that is necessary to constitute a contract, it is presumed that the parties have incorporated every material item and term and parol evidence is not admissible to add another term to the agreement, although the writing contains nothing on the particular item to which the parol evidence is directed. Stevens and Wilkinson of South Carolina, Inc. v. City of Columbia, 409 S.C. 568, 577-78, 762 S.E.2d 696, 701 (2014).

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

In D.R. Horton, Inc. f/k/a C. Richard Dobson Builders, Inc. v. Builders Firstsource-Southeast Group, LLC, et al. D.R. Horton ("DRH") filed a lawsuit seeking contribution from Builders Firstsource ("BFS") for an unreasoned arbitration award in the construction defect litigation by the homeowner. (Order Granting Defendants Builders Firstsource-Southeast Group, LLC, and Builders Firstsource, Inc. Partial Summary Judgment, Civil Action No. 2010-CP-10-10355, September 5, 2014). Arbitration was requested after the homeowner filed her Complaint alleging construction defects in the original construction of her home. (*Id.*). The court's Order notes that "[t]he parties to the Homeowner's Suit requested an unreasoned arbitration award that would not contain findings of fact or conclusions of law." (Order, p. 3, ¶ 9). Further, the Order concludes that the arbitration award "does not indicate what amounts, if any, were awarded for specific defects. Nor does the award specify which of the causes of action asserted in the Homeowner's Suit were successful." (*Id.*). Finally, the Order found that "there is no basis in the record to find that DRH has sustained tort liability. Plaintiff in the Homeowner's Suit alleged causes of action for breach of contract, breach of warranty, negligence and violations of the UTPA. The parties to the Homeowner's Suit requested an award from the arbitrator that does not specify the legal basis for his award of damages." (*Id.* at p. 4, ¶ 15).

Based on this lack of specificity, the Order notes that "[e]ven if, somehow, DRH was able to establish its own tort liability, and that BF's work was determined to be defective in the

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

Homeowner's Suit, there is no way to determine what portion of the Judgment is related to said liability." (*Id.* at p. 5, ¶ 18). Lastly, summary judgment was granted on the contribution claim based on the Vermear decision because "[a]ny attempt to determine what portion of the Judgment is attributable to the joint negligence of BFS and DRH would be an exercise in impermissible guesswork." (*Id.* at p. 6, ¶ 19).

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

Finally, the Settlement Agreement does not address any specific injury for which the payment of \$1,450,000.00 was made by Century to Spirit. By its terms, recovery under the Act requires the party from whom recovery is sought to have been "jointly or severally liable in tort for the *same injury*" with the party who seeks contribution. S.C. Code Ann. § 15-38-20(A)(emphasis added). Century bases its current case on each of the Respondents having performed negligent repairs to the Verizon Parcel. However, there is no evidence that all Respondents performed negligent repairs on the same portion of the Verizon Parcel or otherwise

contributed to a single injury as required. See Collins, 332 S.C. at 306, 504 S.E.2d at 356 (explaining that two tortfeasors are not jointly and severally liable unless they are “responsible for a *single* injury”).

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

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

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

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

3.2 Condition of Property. Seller has disclosed to Buyer that the Mall and its HVAC systems (collectively the ‘Facilities’) have defects and require ongoing maintenance. The Property is being sold subject to such defects, and in its ‘as-is, where-is’ condition. Nevertheless, so that Buyer may assess the extent of such defects and maintenance requirements, Buyer shall have from the

effective date of this Agreement until January 29, 2010 (the 'Facilities Review Period') to undertake, at Buyer's sole expense, an examination and review of the condition of the structural, functional, and environmental condition of the Facilities. . . . Buyer acknowledges that the Mall roof develops leaks from time to time and that the repair of such leaks will be required on an ongoing basis.

(Defendant Richland Joint Venture Group, LLC's Memorandum in Support of Summary Judgment, pp. 14-15). In support of its arguments, Century relies on the Affidavit of William B. Walkup, managing member of Century. According to this very Affidavit, Mr. Walkup admits he "was aware of the condition of the Mall facilities, specifically the on-going maintenance and defective conditions of the roof system and HVAC[,]" but proffers that he "did not understand this to mean that Century would be responsible to other third parties for [Richland] or any other prior owner's failure to maintain and repair the building during their period of ownership." (Walkup Aff. ¶ 5-6, July 27, 2015; Plaintiff Century Capital Group, LLC's Memorandum in Opposition to Defendants' Motions for Summary Judgment, p. 11).

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

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

However, Century chose to proceed ahead with the purchase of the Midtown Parcel after acknowledging that there were defects and ongoing maintenance obligations with the property under the REA. (Id. at p. 11). Century's subsequent failure to uphold those maintenance obligations after February 16, 2010, constituted the crux of the underlying lawsuit between Century and Spirit. Century is now barred from maintaining the present contribution action against Respondents under the common law rule regarding the acceptance of patent defects.

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

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

The statute of repose provides in part:

No actions to recover damages based upon or arising out of the defective or unsafe condition of an improvement to real property may be brought more than eight years after substantial completion of the improvement. For purposes of this section, an action based upon or arising out of the defective or unsafe condition of an improvement to real property includes:

* * *

(6) an action for contribution or indemnification for damages sustained on account of an action described in this section

³ For clarification purposes, Century refers to all Respondents in Section IV of its Initial Appellant's Brief; however, only Windsor was granted summary judgment with respect to the statute of repose.

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

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

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

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

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

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

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

Century contends repairs performed by Respondents cannot be considered improvements to the Spirit Parcel because they were day-to-day maintenance. (Appellant's Initial Brief at p. 17.) In other words, Century claims Windsor failed to perform any repairs at all. Century, however, admits there is "no point" where it "can pinpoint a completion date" for work. (Appellant's Brief at p. 18.) Century also fails to identify what repairs or improvements performed by Windsor were allegedly deficient or whether other repairs or improvements were made in addition to those identified. Likewise, there is no evidence such improvements, even though characterized as "day-to-day" by Century, are no longer in place nor any evidence such improvements have not remained for their "lengthy useful lives". Therefore, any repairs necessarily constitute an improvement within the boundaries of the statute of repose.

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

B. Any repairs made by Windsor were substantially completed.

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

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

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

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

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

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

Century argues the statute of repose is inapplicable because Windsor is in possession of the improvement complained of. The statute of repose precludes the use of the “defense by a person in actual possession or control, as owner, tenant, or otherwise, of the improvement at the time the defective or unsafe condition constitutes the proximate cause of the injury” S.C. Code Ann. § 15-3-670(A) (2005)(as amended).

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

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

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

CONCLUSION

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

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August 5, 2016

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable L. Casey Manning, Circuit Court Judge

Case No. 2014-CP-40-07037

Century Capital Group, LLC, ...Appellant,

v.

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

PROOF OF SERVICE

I certify that I have served the Initial Brief of Respondents Midtown Development Group, LLC, Richland Joint Venture Group, LLC and Windsor Richland Mall, L.P. by depositing a copy of the same in the United States Mail, postage prepaid, on the 5th day of August, 2016 addressed to Appellant's attorney of record:

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Richland, LLC..... Respondents.**

DESIGNATION OF MATTERS TO BE INCLUDED IN THE RECORD ON APPEAL

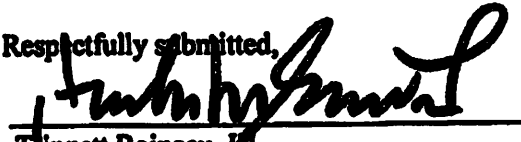
Respondents propose the following be included in the Record on Appeal:

- 1. Reciprocal Easement, Covenant, Operation and Restriction Agreement and Declaration;**
- 2. Settlement Agreement and Mutual Release between Spirit SPE Columbia, LLC and Century Capital Group, LLC;**
- 3. Spirit SPE Columbia, LLC's Third Amended Complaint;**
- 4. Century Capital Group, LLC's Second Amended Complaint;**
- 5. Defendant Midtown Development Group, LLC's Memorandum in Support of its Motion for Summary Judgment;**
- 6. Defendant Richland Joint Venture Group, LLC's Memorandum in Support of its Motion for Summary Judgment;**
- 7. Defendant Windsor Richland Mall, LP's Memorandum in Support of its Motion for Summary Judgment;**
- 8. Affidavit of William B. Walkup;**
- 9. Plaintiff Century Capital Group, LLC's Memorandum in Opposition to Defendants' Motions for Summary Judgment;**
- 10. Order Granting Defendant Midtown Development Group, LLC's Motion for Summary Judgment, September 16, 2015;**

11. Order Granting Defendant Richland Joint Venture Group, LLC's Motion for Summary Judgment, September 16, 2015;
12. Order Granting Defendant Windsor Richland Mall, L.P.'s Motion for Summary Judgment, September 17, 2015;
13. Plaintiff Century Capital Group, LLC's Motion to Alter or Amend Summary Judgment Granted to Defendant Windsor Richland Mall, L.P.;
14. Plaintiff Century Capital Group, LLC's Motion to Alter or Amend Summary Judgment Granted to Defendant Richland Joint Venture Group, LLC;
15. Plaintiff Century Capital Group, LLC's Motion to Alter or Amend Summary Judgment Granted to Defendant Midtown Development Group, LLC;
16. Order Denying Plaintiff's Motions to Alter or Amend Summary Judgment, February 23, 2016;
17. Transcript of Proceedings.

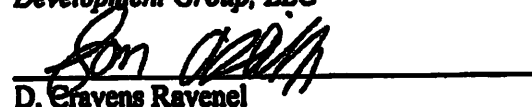
I/we certify that this designation contains no matter which is irrelevant to this appeal.

Respectfully submitted,



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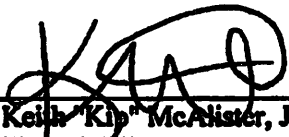
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August 5, 2016

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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The Honorable L. Casey Manning, Circuit Court Judge

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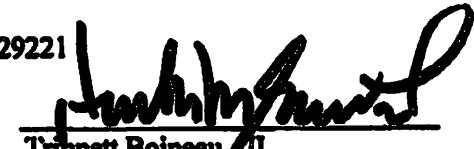
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PROOF OF SERVICE

I certify that I have served the Designation of Matters to be Included in the Record on Appeal by depositing a copy of the same in the United States Mail, postage prepaid, on the 5th day of August, 2016 addressed to Appellant's attorney of record:

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**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

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L. Casey Manning, Circuit Court Judge

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v.

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

Respondents.

FINAL BRIEF OF APPELLANT

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SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

- I. DID THE TRIAL COURT ERR IN HOLDING AS A MATTER OF LAW THAT THE PARTIES ARE NOT JOINT TORTFEASORS?**
- II. DID THE TRIAL COURT ERR BY IGNORING THE SETTLEMENT AGREEMENT'S APPORTIONMENT OF REPAIR AND MAINTENANCE LIABILITY?**
- III. DID THE TRIAL COURT ERR WHEN IT HELD THAT A PURCHASE "AS IS/WHERE IS" RELIEVES A SELLER FROM THIRD PARTY LIABILITY FOR THE SELLER'S NEGLIGENCE?**
- IV. DID THE TRIAL COURT ERR IN FINDING THAT THE STATUTE OF REPOSE BARRED CENTURY'S CLAIM?**

STATEMENT OF THE CASE

On November 10, 2014, Appellant, Century Capital Group, LLC, ("Century") filed a complaint against the Respondents, Midtown Development Group, LLC ("Midtown"), Richland Joint Venture Group, LLC ("RJVG"), Windsor Richland Mall, L.P. ("Windsor"), and BRC Richland, LLC ("BRC"), in the Circuit Court of Richland County. The complaint was amended twice, once on November 12, 2014, and again by leave of the court on December 8, 2014 (R. 132-172) to add a paragraph that was inadvertently left out and to correct the request for relief. Century sought recovery against the Defendants for contribution. RJVG filed its motion for summary judgment on May 6, 2015 (R. 272-430) and Midtown and Windsor filed separate motions for summary judgment on May 11, 2015 (R. 173-271) (R. 431-510) and BRC could not be served and did not participate in the action.

On July 30, 2015, a hearing was conducted before the Honorable L. Casey Manning regarding the three motions for summary judgment. (R. 617-658) On September 16 and 17, 2015, the circuit court issued orders granting summary judgment as to all Defendants and dismissing Century's claim with prejudice on the grounds that there were no genuine issues of material fact, the Settlement Agreement does not delineate what portion of the sum paid by Century should be apportioned to each Defendant under a negligence theory, and that Century's claims are barred by the statute of repose. (R. 564-602)

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

STATEMENT OF FACTS

This case stems from an underlying lawsuit (Case No.: 2010-CP-40-8407) against

Century by Spirit SPE Columbia, LLC ("Spirit") (R. 72-131), a non-party in the present matter, based primarily on allegations that Century failed to adequately repair and maintain certain portions of the Richland Mall. The Richland Mall has a long history of construction defect and maintenance issues and has experienced persistent roof leaks since original construction. The parking deck was designed above occupied space and has a split-slab system of waterproofing, meaning the waterproofing membrane is sandwiched between two layers of concrete and endures regular vehicular and pedestrian traffic. Extensive reports dating back to the 1990's indicate that the roof was defectively constructed based on a failure to install sufficient expansion joints and defective components in the waterproofing structure. In lieu of costly roof repairs, Mall ownership at the time began installing a system of ceiling pans to prevent water from intruding into the occupied space below and injecting the visible cracks in the concrete of the deck with epoxy.

On December 23, 2002, the Mall was sold to Windsor and simultaneously split into separate parcels: the "Bank Parcel," the "TGI Friday Parcel," the "Verizon Parcel" and the "Mall Parcel," which included the remaining portions of the Mall and the Common Areas. 2d. Am. Compl. ¶ 7. (R. 134) Also in 2002, Windsor sold the Verizon parcel to BRC. 2d. Am. Compl. ¶ 8. (R. 134) On September 7, 2005, BRC and Windsor negotiated the Reciprocal Easement, Covenant, Operation and Restriction Agreement ("REA") (R. 137-172), which attempted to outline the respective duties of those parties and their successors regarding the maintenance and administration of the Mall. 2d. Am. Compl. ¶ 9. (R. 134) Of particular relevance is the following REA provision:

(C) Roof and other Repairs. Until November 30, 2010, Windsor as owner of the Midtown Parcel and any successor thereto, shall make all roof repairs, structural repairs to exterior walls, structural repairs to columns and structural floor (excluding floor coverings) which collectively enclose the building on the

Verizon Parcel and the building systems (plumbing, sprinkler, electrical, and HVAC) in the building on the Verizon Parcel.

2d. Am. Compl. Ex. 1, at 16. (R. 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. 2d. Am. Compl. ¶ 10. (R. 134) On November 4, 2005, Windsor sold the Mall parcel to Midtown. 2d. Am. Compl. ¶ 11. (R. 134) On May 25, 2007, Midtown sold the Mall parcel to RJVG 2d. Am. Compl. ¶ 12. (R. 134) After receiving a demand for repairs from Spirit on March 3, 2009, RJVG began a program of replacing sections of concrete while maintaining the pan/seal method of repair. RJVG did not re-seal the entire parking deck structure.

Century purchased the Mall parcel from RJVG on February 16, 2010 and acknowledges that it had notice of the roof leaks; however, it had no indication that Spirit took issue with the maintenance plan in place since the origin of the leaks nor did Century agree to accept responsibility for its predecessors' maintenance failures. Walkup Aff. ¶¶ 3, 5- 6. (R. 511) Spirit initiated the underlying suit against Century only nine months after Century took possession of the Mall parcel. Spirit's complaint sought relief under seventeen causes of action for damages related to maintenance and repair of the Mall Property, common area maintenance charges, and management of the Mall in general. Walkup Aff. ¶ 9 (R. 512); Spirit's 3d. Am. Compl. (R. 72-131)

In an effort to resolve the costly and protracted litigation with Spirit, Century agreed to settle the underlying lawsuit's claims relating to repair and maintenance of the Mall for One Million Four Hundred Fifty Thousand and No/100 Dollars (\$1,450,000.00). The Agreement

provides in part:

The parties agree that the \$1,450,000 payment is provided for the release and extinguishment of any pre-June 30, 2013 liability related to the maintenance and repair of the Spirit parcel and the remaining consideration provided by [Century] under this Settlement Agreement is provided for the pre-June 30, 2013 settlement of the CAM, accounting and other claims asserted by Spirit.

Def. Midtown's Mot. Summ. J., Ex. B, at 3. (R. 223)

The Settlement Agreement expressly extinguishes liability and discharges all claims against Century and its predecessors in interest under the REA:

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

Def. Midtown's Mot. Summ. J., Ex. B, at 10. (R. 230)

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

STANDARD OF REVIEW

When reviewing the grant of a summary judgment motion, the appellate court applies the same standard of review as the trial court under Rule 56, SCRPC. Zurich Am. Ins. Co. v. Tolbert, 378 S.C. 493, 496, 662 S.E.2d 606, 607 (Ct. App. 2008). Principles of equity are applicable to actions determining the pro rata liability of tortfeasors. S.C. Code Ann. § 15-38-30 (Supp. 2000); Florence Cty. Sch. Dist. No. 2 v. Interkal, Inc., 348 S.C. 446, 450, 559 S.E.2d 866, 868 (Ct. App. 2002).

In equity cases tried before a judge without a jury, the appellate court may make a de novo review of properly challenged findings of fact as well as rule upon issues of law. Townes

Assoc., Ltd. v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976). Therefore, an appellate court may find facts in accordance with its own views of the preponderance of the evidence. Metromont Materials Corp. v. Pennell, 270 S.C. 9, 18, 239 S.E.2d 753, 758 (1977).

In determining whether a genuine issue of fact exists, the evidence and all reasonable inferences drawn from it must be viewed in the light most favorable to the nonmoving party. Sauner v. Pub. Serv. Auth. of S.C., 354 S.C. 397, 404, 581 S.E.2d 616, 165 (2003). Even if evidentiary facts are not disputed, if only the conclusions to be drawn from them are, the trial court should deny the motion for summary judgment. Baugus v. Wessinger, 303 S.C. 412, 415, 401 S.E.2d 169, 171 (1991). Summary judgment is not appropriate when further inquiry into the facts is desirable to clarify the application of law. Tupper v. Dorchester Cnty., 326 S.C. 318, 325, 487 S.E.2d 187, 191 (1997).

ARGUMENT

I. THE TRIAL COURT ERRED IN HOLDING AS A MATTER OF LAW THAT THE PARTIES ARE NOT JOINT TORTFEASORS.

The South Carolina Contribution Among Tortfeasors Act (the "Act") provides a right of contribution in favor of a "tortfeasor who has paid more than his pro rata share of [] common liability, and his total recovery is limited to the amount paid by him in excess of his pro rata share. Under the Act, a tortfeasor against whom a judgment is rendered is entitled to recover proportional shares of the judgment from other joint tortfeasors whose negligence contributed to the injury and who were also liable to the plaintiff. Andrade v. Johnson, 345 S.C. 216, 225, 546 S.E.2d 665, 669 (Ct. App. 2001). Contribution exists as a way to equitably apportion costs after liability is established. Ashley II of Charleston, L.L.C. v. PCS Nitrogen, Inc., 409 S.C. 487, 491, 763 S.E.2d 19, 21 (2014).

In the case at bar, Century sought contribution from its predecessors in interest to the Mall for sums Century 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 Century, as the last party in line, was left to settle the common liability on its own.

A. The determination of joint tortfeasor status is a question of fact and is disputed.

The trial court erred in deciding that the parties were not joint tortfeasors as a matter of law at the summary judgment stage in spite of the evidence Century presented demonstrating tort liability of the Respondents. South Carolina case law is clear that the fact-finder must determine whether two parties are joint tortfeasors for purposes of the Act when that fact is disputed:

“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 Carolina's, Inc. v. Wood/Chuck Chipper Corp., 336 S.C. 53, 64, 518 S.E.2d 301, 307 (Ct. App. 1999) (citation omitted).

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).

Century demonstrated in its pleadings and by affidavits that the damages caused to Spirit necessarily resulted from the common acts or omissions of itself and the Respondents. Wilson Dep. 84:15-85:2; Vitale Aff. ¶ 6 (“The parking deck on the Richland Mall was in substantially the same condition in 2013 as it was when I inspected it in 2003”). (R. 517) This evidence demonstrates that despite the fact that Spirit limited its recovery against Century to damages

occurring after Century took title to the property, Century alone could not have been solely responsible for the damages.

The Respondents refuted liability, but offered no evidence disproving it. The burden should have been on the Respondents to demonstrate that no scintilla of evidence existed. This issue should have caused the denial of any ruling at the summary judgment stage based on the genuine issues of material fact integral to the determination of the Act's application. By ruling that a contested issue of fact is, as a matter of law, non-existent, the trial court erred in granting summary judgment to the Respondents.

B. A separate tort duty to reasonably repair and maintain exists outside the REA's contractual duties.

The Trial Court erred in 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. Pursuant to the Act, "where two or more persons become jointly or severally liable in tort for the same injury to person or property or for the same wrongful death, there is a right of contribution among them even though judgment has not been recovered against all or any of them." S.C. Code Ann. § 15-38-20 (Supp. 1998). However, the mere existence of a contractual obligation under the REA does not foreclose the possibility of tort liability to support an action for contribution.

The underlying case by Spirit sought recovery against Century for, *inter alia*, negligent maintenance of the 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 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.

Order Granting Mot. Summ. J., Sep. 16, 2015. (R. 580)

Thus, the Trial Court improperly held that a legal duty could not and did not exist outside of the contractual REA. As a general rule, a negligence action will not lie when 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). "Under South Carolina law, breach of industry standard may establish that special duty outside of contract exists, and thus prevent application of economic loss rule." Eaton Corp. v. Trane Carolina Plains, 350 F. Supp. 2d 699 (D.S.C. 2004).

In the case at bar, the Respondents and Century owed a common law duty to Spirit to reasonably maintain and repair the 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. This duty also arises based on the fact that when the Respondents and Century undertook to make repairs to the roof structure, they failed to do so in a reasonably prudent manner. These failures amounted to breach of industry standards, violations of building codes and were most certainly not in accordance with the reasonably prudent person standard of care. For these reasons, the Trial Court erred in holding that there could be no tort

liability to support an action for Contribution.

C. Common liability to Spirit exists because the damages to the Spirit for repair and maintenance of the Mall are indivisible.

“The basic premise of contribution is commonality. Under the statute, ‘common liability,’ rather than joint negligence, determines the right to contribution.” Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp., 336 S.C. 53, 68, 518 S.E.2d 301, 309 (Ct. App. 1999). It is well established in South Carolina that the focus should be on the harm to the Plaintiff, not the acts of the Defendants. Pendleton v. Columbia Railway, Gas & Elec. Co., 133 S.C. 326, 131 S.E. 265 (1926). The court in Pendleton held:

That 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.

Pendleton, 133 S.C. at 326, 131 S.E. at 267.

In the Vermeer case, 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. Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp., 336 S.C. 53, 68, 518 S.C. 301, 310 (Ct. App. 1999). 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. Vermeer Carolina's, Inc., 336 S.C. at 68, 518 S.C. at 310. At present, the Respondents were not parties in the underlying case, but Century ensured that any common liability shared by the Respondents and Century related to the repair and maintenance of the building was discharged by the Settlement Agreement.

Likewise, in the case of Collins v. Bisson, the court noted that there was no common liability as between two Defendants because there was no common injury to the Plaintiff. Collins v. Bisson, 332 S.C. 290, 306, 504 S.E. 2d 347, 356 (1998). In Collins, the Plaintiff was injured in a first automobile accident with one Defendant and then while being transported by ambulance to the hospital was also injured in a second automobile accident with a second Defendant. Collins, 332 S.C. at 293, 504 S.E. 2d at 349. In its holding, the court focused on the fact that the Plaintiff incurred "different injuries" and differing damages in each of the two separate accidents. 332 S.C. at 306, 504 S.E. 2d at 356. 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, 504 S.E. 2d at 349. The court emphasized that "joint and several liability arises only when two or more tortfeasors are responsible for a *single* injury." Id. at 306, 504 S.E. 2d at 356 (emphasis in original).

In the case at bar, the Defendants and Century 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, this case deals with defendants whose actions united to cause a one injury to property, not separate and distinct injuries. Century acknowledges that the underlying lawsuit sought recovery against it for failure to repair and maintain the Mall since taking possession and operating as manager of the Shopping Mall Property. However, Century has demonstrated that it could not feasibly have been responsible for the damages Spirit alleged in nine months because the damages were indivisible and were the result of many years of improper maintenance and repair to a defective structure. All Parties had the same duty to Spirit with respect to maintenance of the Mall. Testimony shows that the building remained in substantially the same condition during the entire relevant time period. Vitale Aff. ¶ 6. (R. 517)

Summary judgment is not appropriate in this case because there are genuine issues of material fact regarding the determination of joint tortfeasor status amongst the parties. As stated above, joint tortfeasors may act independently of each other if those acts unit to cause a single injury. The independent actions and inactions of the successive owners of the Mall Parcel over the course of many years united in causing the Spirit's damages and equity is not served in forcing Century to carry the entire burden of liability it inherited.

II. THE TRIAL COURT ERRED BY IGNORING THE SETTLEMENT AGREEMENT'S APPORTIONMENT OF REPAIR AND MAINTENANCE LIABILITY.

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). 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). The equitable maxim equality is equity, "a principle that has long been embodied in our jurisprudence . . . is applicable to burdens as well as to rights, and means that, in the absence of relations or conditions requiring a different result, equity will treat all members of a class as on an equal footing, and will distribute benefits or impose burdens and charges either equally or in proportion to the several interests, and without preferences." Myers v. Sinkler, 235 S.C. 162, 175, 110 S.E.2d 241, 247 (1959). Under the "equality is equity" rule, damages are apportioned equally among the tortfeasors without the necessity of determining relative degrees of fault. W. Keeton, D. Dobbs, R. Keeton & D. Owen, Prosser and Keeton on the Law of Torts § 50, at 340 (5th ed. 1984).

Even if two tortfeasors are liable to a Plaintiff under differing or multiple theories, when their actions unite to cause one injury to the Plaintiff they can be liable to each other for contribution. See Matthews v. Seaboard Air Line Ry., 67 S.C. 499, 46 S.E. 335, 340 (1903).

If two or more persons owe to another the same duty, and by their common neglect of that duty he is injured, doubtless the tort is joint, and upon well-settled principles each, any, or all of the tort feors may be held. But when each of two or more persons owe to another a separate duty, which each wrongfully neglects to perform, then, although the duties were diverse and disconnected, and the neglect of each was without concert, if such several neglects concurred and united together in causing injury, the tort is equally joint, and the tort feors are subject to a like liability.

Matthews, 67 S.C., at 514-15, 46 S.E. at 340 (emphasis added).

Century and Spirit executed a Settlement Agreement and Mutual Release on December 6, 2013. Section (a) 6 of the agreement provides 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 Spirit parcel and the remaining consideration provided by CCG under this Settlement Agreement is provided for the pre-June 30, 2013 settlement of the CAM, accounting and other claims asserted by Spirit.

Settlement Agreement § (a) 6. (R. 39)

The "remaining consideration" stated above is further outlined in subsequent paragraphs of the Agreement to include modifications to the REA, ...

Section (d) 1 provides in part as follows:

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. (R. 46)

The Trial Court held that the damages could not be allocated by the fact finder, based on its incorrect application of the Vermeer case. The Vermeer case can be distinguished from the case at bar because it dealt with the issue of whether a defendant was entitled to contribution for

settlement of a *potential* claim by a *non-party* who *never* asserted or litigated the claim. Specifically, Vermeer sought contribution from Wood/Chuck for payment of a potential loss of consortium claim to the injured party's wife. *Vermeer Carolina's Inc. v. Wood/Chuck Chipper Corp.* 336 S.C. at 69, 518 S.E.2d at 310. The wife was not a Plaintiff in the underlying lawsuit brought by her husband nor was there any admission of liability as to her. *Vermeer's Carolina, Inc.*, 336 S.C.53 69, 518 S.E.2d 301,310. For these reasons, "Vermeer did not 'discharge' any 'common liability' as to [the wife] because there was no 'common liability.'" 336 S.C. at 69, 518 S.E.2d at 310.

As stated above, there is common liability between successors in interest to the Mall Parcel as to Spirit. Each owner owed a duty to Spirit to properly maintain and repair the common areas and roof. This continuous term of maintenance and repair was breached in succession by each owner leading up to Century, which was ultimately held liable for the entirety of the damages to Spirit.

The Settlement Agreement properly discharged the Respondents from liability to Spirit and outlines that \$1.45M was paid to settle liability for failing to maintain and repair the portions of the Mall affecting the Spirit Parcel. Regardless of the legal theories or various duties at issue, each successor in interest to the Mall acted to cause this injury to Spirit. Pursuant to the Act, each joint tortfeasor is responsible for its equal share of the settlement figure regardless of each party's relative degree of fault. *First Gen. Servs. of Charleston, Inc. v. Miller*, 314 S.C. 439, 445 S.E.2d 446 (1994); *Southeastern Freight Lines v. City of Hartsville*, 313 S.C. 466, 443 S.E.2d 395 (1994). Thus, the Trial Court erred in ignoring the allocation of liability to Spirit for maintenance and repair of the Spirit Parcel of \$1.45M. There is no need for the settlement agreement to further delineate what portion of that figure is attributable to any of the

Respondents or to lay out exactly which theory of liability it is meant to cover. Each Respondent is liable for a pro rata, equitable share of this settlement figure under the Act and case law cited herein.

III. THE TRIAL COURT ERRED WHEN IT HELD THAT A PURCHASE "AS IS/WHERE IS" RELIEVES A SELLER FROM THIRD PARTY LIABILITY FOR THE SELLER'S NEGLIGENCE.

Century purchased the Mall Parcel on February 16, 2010 with knowledge of roof leaks and accepted the building as is/where is. William B. Walkup, principal of Century, acknowledged by filed affidavit that Century had notice of the leaks, repairs, and ongoing maintenance obligations that it would be responsible for after taking title to the Mall. Walkup Aff. ¶ 6. (R.511) However, Century never agreed to assume responsibility for or to indemnify its predecessors for their negligent conduct. The trial court erred in essentially holding that acceptance of a patent defect operates as a waiver of the right to contribution as to liability owed a third party. This is not and has never been the law in this state.

IV. THE TRIAL COURT ERRED IN FINDING THAT THE STATUTE OF REPOSE BARRED CENTURY'S CLAIM.

The statute of repose provides in part as follows: "No actions to recover damages based upon or arising out of the defective or unsafe condition of an improvement to real property may be brought more than eight years after substantial completion of the improvement." S.C. Code Ann. § 15-3-640 (Supp. 2000). The current version of the statute went into effect on July 1, 2005, two months prior to the execution of the REA, therefore it applies to this case. The essential elements of the statute are (1) an improvement to real property and (2) substantial completion of that improvement. Because the ongoing maintenance of the Mall never amounted to an "improvement" and because there was never substantial completion of the maintenance, the

statute does not bar Century's recovery in a contribution cause of action. Further, the statute is not applicable 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 the Respondents were all aware of the defective roof during their respective periods of control and possession of the Mall, the statute of repose is not a bar to Century's cause of action and summary judgment should be reversed.

A. Routine maintenance of the Mall is not an improvement under the Statute of Repose.

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 the 2001 case South Carolina Pipeline Corp. v. Lone Star Steel Co., 345 S.C. 151, 546 S.E.2d 654 (2001). In defining "improvement," the Court looked to various secondary sources, other courts' interpretations, and also attempted to glean legislative intent from the preamble to the statute. In doing so, the court developed the following necessary elements for something to be considered an improvement under our statute of repose: (1) enhancement to the value of the property; (2) an investment of time and money; and (3) permanence, as the term is commonly understood. South Carolina Pipeline Corp., 345 S.C. at 155, 546 S.E.2d at 657.

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*.

Peter v. Sprinkmann Sons Corp., 360 Wis.2d 411, 427, 860 N.W.2d 308, 315 (Wis. Ct. App. 2015) (citation omitted).

In this case, the 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 Mall. At best, these actions were ongoing day to day repairs to keep water out of the Mall interior. As the affidavit of Mr. Vitale provides, the roof structure stayed in substantially the same condition throughout all relevant time periods. Vitale Aff. ¶ 6. (R. 517) No action taken by any Respondent enhanced the property's value, required an investment of labor or money beyond just ordinary repairs, nor can they be considered permanent in the common-sense understanding of the term. Further, as the Wisconsin Court 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 roof repairs never amounted to an "improvement" under the statute and the statute fails to bar Century's claim.

B. The repairs made by the Respondents were never substantially completed.

The second essential element for qualification as an improvement under the statute of repose is substantial completion. "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, daily 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 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 Mall's interior. Absent a date of substantial completion, the statute of repose never started running and cannot be used to bar Century's claim for contribution.

C. Respondents had actual control and possession of the Mall.

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

(A) 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 or 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 defective or unsafe condition

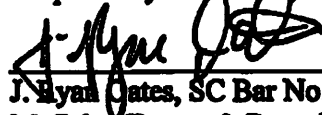
S.C. Code Ann. § 15-3-670 (Supp. 2000).

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 them. Therefore, the Defendants cannot rely on the statute of repose to bar Century's claim for contribution.

CONCLUSION

For the reasons stated herein, this Court should reverse the order of the Circuit Court Judge and reinstate Appellant's cause of action.

Respectfully Submitted,



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Attorney for Appellant

September 13, 2016

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY

Court of Common Pleas

L. Casey Manning, Circuit Court Judge

Appellate Case No. 2015-000461

Century Capital Group, LLC,

Appellant,

v.

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

Respondents.

CERTIFICATE OF COUNSEL

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



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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable L. Casey Manning, Circuit Court Judge

Case No. 2014-CP-40-07037

Cemary Capital Group, LLC, ... Appellant,

v.

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

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

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STATEMENT OF ISSUES ON APPEAL

- I. Did the Circuit Court properly hold that Century and Respondents are not joint tortfeasors?**
- II. Did the Circuit Court properly grant summary judgment to each Respondent on Century's claim for contribution?**
- III. Did the Circuit Court properly hold that Century purchased the property "as-is" and with full knowledge of the patent defects for which Century seeks to recover?**
- IV. Did the Circuit Court properly grant summary judgment to Windsor Richland Mall, L.P. on Century's contribution claim based on the applicable statute of repose?**

STATEMENT OF THE CASE

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

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

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

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

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

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

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

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

The parties agree that the \$1,450,000 payment is provided for the release and extinguishment of any pre-June 30, 2013 liability related to the maintenance and repair of the [Verizon Parcel] and the remaining consideration provided by [Century] under this Settlement Agreement is provided for the pre-June 30, 2013 settlement of the CAM, accounting, and other claims asserted by Spirit.

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

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

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

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

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

STANDARD OF REVIEW

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

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

ARGUMENTS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The statute of repose provides in part:

No actions to recover damages based upon or arising out of the defective or unsafe condition of an improvement to real property may be brought more than eight years after substantial completion of the improvement. For purposes of this section, an action based upon or arising out of the defective or unsafe condition of an improvement to real property includes:

* * *

(6) an action for contribution or indemnification for damages sustained on account of an action described in this section

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

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

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

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

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

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

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

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

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

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

B. Any repairs made by Windsor were substantially completed.

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

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

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

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

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

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

Century argues the statute of repose is inapplicable because Windsor is in possession of the improvement complained of. The statute of repose precludes the use of the “defense by a person in actual possession or control, as owner, tenant, or otherwise, of the improvement at the time the defective or unsafe condition constitutes the proximate cause of the injury” S.C. Code Ann. § 15-3-670(A) (2005)(as amended).

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

hardship of having a claim extinguished before it is discovered, or perhaps before it even exists.”

Capco of Summerville, 368 S.C. at 142, 628 S.E.2d 41 (citing Camacho v. Todd and Leiser Homes, 706 N.W.2d 49, 54, n. 6 (Minn. 2005)).

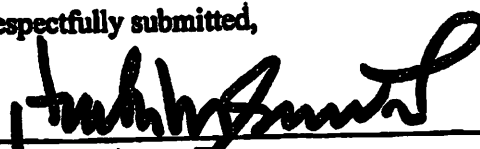
Therefore, Century’s claim against Windsor, if any, was effectively extinguished on November 5, 2013. The circuit court’s order granting summary judgment on this issue should be affirmed.

CONCLUSION

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

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September 21, 2016

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable L. Casey Manning, Circuit Court Judge

Case No. 2014-CP-40-07037

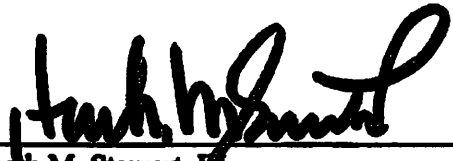
Century Capital Group, LLC, ...Appellant,

v.

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

CERTIFICATE OF COUNSEL

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


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September 21, 2016

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Century Capital Group, LLC, Appellant,

v.

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

Appellate Case No. 2016-000461

**Appeal From Richland County
L. Casey Manning, Circuit Court Judge**

**Unpublished Opinion No. 2018-UP-249
Heard May 16, 2018 – Filed June 13, 2018**

AFFIRMED

**Jesse Ryan Oates, of McCabe, Trotter & Beverly, P.C.,
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McAlvin Stewart, III, both of McAngus Goudelock &
Courie, LLC, of Columbia, for Respondent Midtown**

Development Group, LLC; and Ruth Ann Levy, of
Columbia, for Respondent Windsor Richland Mall, L.P.

PER CURIAM: After purchasing a parcel of property within the Richland Fashion Mall, Century Capital Group, LLC (Century Capital) was sued by its neighboring parcel owner, Spirit SPE Columbia, LLC (Spirit), for fifteen causes of action relating to a dispute regarding Century Capital's responsibility for the repair and maintenance of the mall's parking deck. Spirit's complaint included allegations sounding in contract, negligence, intentional tort, and equity. Eventually, Century Capital and Spirit entered into a settlement agreement (Settlement Agreement), wherein Century Capital agreed to pay Spirit, among other non-monetary consideration, \$1.45 million to end the lawsuit.

Century Capital then initiated the present action against its predecessors in interest—Midtown Development Group, LLC, Richland Joint Venture Group, LLC, and Windsor Richland Mall, L.P. (collectively Respondents)—alleging that, pursuant to South Carolina's Contribution among Tortfeasors Act (Tortfeasors Act),¹ Respondents each owed Century Capital an equitable, pro rata share of the \$1.45 million. Respondents separately filed motions for summary judgment, and, after a hearing, the circuit court granted the motions on several grounds. Century Capital now appeals. We affirm.

"When reviewing the grant of summary judgment, the appellate court applies the same standard applied by the trial court pursuant to Rule 56(c), SCRCP." *D.R. Horton, Inc. v. Builders FirstSource-Se. Grp., LLC*, 422 S.C. 144, 150, 810 S.E.2d 41, 44-45 (Ct. App. 2018) (quoting *Savannah Bank, N.A. v. Stalliard*, 400 S.C. 246, 250, 734 S.E.2d 161, 163 (2012)). "Summary judgment is appropriate when there is no genuine issue of material fact such that the moving party must prevail as a matter of law." *Id.* at 150, 810 S.E.2d at 45 (quoting *Savannah Bank*, 400 S.C. at 250, 734 S.E.2d at 163). "To withstand a motion for summary judgment 'in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence.'" *Savannah Bank*, 400 S.C. at 250, 734 S.E.2d at 163 (quoting *Hancock v. Mid-South Mgmt. Co.*, 361 S.C. 326, 330, 673 S.E.2d 801, 803 (2009)).

Under the Tortfeasors Act, when a defendant is seeking contribution from another entity for a payment made as the result of a settlement agreement, the defendant must

¹ S.C. Code Ann. §§ 15-38-10 to -70 (2005 and Supp. 2017).

prove: (1) the payment was made to extinguish liability for a non-intentional tort; (2) the entity from whom the defendant is seeking contribution is jointly or severally liable in tort for the same injury; (3) the payment made expressly extinguished the other entity's tort liability for the same injury; (4) the payment made was in excess of the defendant's pro rata share of this common liability; and (5) the pro rata share owed by the other entity is not in excess of what is reasonable. *See* S.C. Code Ann. §§ 15-38-20, -30, -40 (2005 and Supp. 2017).

In this case, there is no dispute that, according to the Settlement Agreement, the \$1.45 million payment made by Century Capital to Spirit released and extinguished Century Capital's "liability related to the maintenance and repair of the Spirit parcel." While these words do not describe the particular injury the liability addressed, Century Capital asserts the "liability" described in this portion of the Settlement Agreement is for conduct causing one single, indivisible injury to Spirit: a leaky roof.² Viewing Spirit's complaint in the light most favorable to Century Capital's assertion, we believe "maintenance and repair of the Spirit parcel" could refer to maintenance and repair of the leaky roof.

However, in reviewing Spirit's amended complaint, we find five of the fifteen causes of action alleged injury related to the intrusion of water due to the improperly maintained parking deck/roof. These were: breach of contract, breach of warranty, negligence, nuisance, and trespass. Of these causes of action, only negligence and nuisance are non-intentional torts. *See Snow v. City of Columbia*, 305 S.C. 544, 553, 409 S.E.2d 797, 802 (Ct. App. 1991) (finding that to "constitute an actionable trespass . . . there must be an affirmative act, the invasion of the land must be intentional, and the harm caused must be the direct result of that invasion").

Because at least three of the theories under which Century Capital may have been liable for damages caused by Spirit's leaky roof are not eligible for contribution (breach of contract, breach of warranty, and trespass), we believe summary judgment is appropriate on Century Capital's contribution claim. Century Capital has failed to present a mere scintilla of evidence indicating the \$1.45 million payment was made

² According to evidence presented by Century Capital at summary judgment, the roof over Spirit's parcel "was, in actuality, [the mall's] parking deck," and wear from cars driving on the parking deck was causing the original waterproofing material of the deck (which had been improperly installed) to buckle, and the surface of the parking deck to crack. These cracks then "allow[ed] copious amounts of water to penetrate" through the deck and into Spirit's parcel.

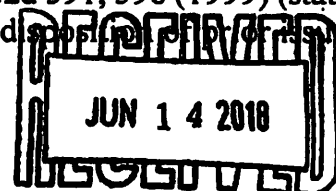
to extinguish liability for Century Capital's non-intentional tortious behavior only. See S.C. Code Ann. § 15-38-20(A) (2005) ("Except as otherwise provided in this chapter, where two or more persons become jointly or severally liable *in tort* for the same injury to person or property . . .") (emphasis added); S.C. Code Ann. § 15-38-20(C) (2005) ("There is no right of contribution in favor of any tortfeasor who has intentionally caused or contributed to the injury . . ."); *D.R. Horton, Inc.*, 422 S.C. at 153–54, 810 S.E.2d at 46 (finding that, when arbitration award did not distinguish type of liability sustained by the plaintiff, summary judgment was appropriate on contractor's contribution action against subcontractor for a pro rata share of award because contractor—who was sued under theories of negligence, breach of contract, and multiple breaches of warranty—did not satisfy its summary judgment burden of proving it sustained tort liability); *Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 69–71, 518 S.E.2d 301, 310–11 (Ct. App. 1999) (finding that, when defective-wood-chipper vendor's settlement agreement with husband did not allocate any payment to extinguish wife's loss of consortium claim, summary judgment was appropriate on vendor's contribution action against manufacturer for wife's claim because vendor did not satisfy its summary judgment burden of proving it paid more than its share of the pro rata common liability for wife's claim).

We therefore affirm the circuit court's orders granting summary judgment to Respondents.³

AFFIRMED.

SHORT, THOMAS, and HILL, JJ., concur.

³ We decline to address Century Capital's remaining issues. See *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (stating appellate court need not address remaining issues when disposition of one issue is dispositive of appeal).



P.O.

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THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

Appellate Case No.: 2016-000461

RECEIVED

JUN 27 2018

SC Court of Appeals

Century Capital Group, LLC, ... Appellant,

v.

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

APPELLANT'S PETITION FOR REHEARING

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STATEMENT OF ISSUES

- I. Did The Court Of Appeals Err In Affirming The Circuit Court's Grant of Summary Judgment When A Genuine Issue Of Material Fact Exists As To Whether The \$1.45 Million Payment Was Made To Extinguish Liability For Century Capital's Non-Intentional Tortious Behavior Only?**
- II. Did The Court Of Appeals Overlook That The Parties Are Joint Tortfeasors?**
- III. Did The Court Of Appeals Overlook That A Purchase "As Is/Where Is" Does Not Relieve A Seller From Third Party Liability For The Seller's Negligence?**
- IV. Did The Court Of Appeals Overlook That The Statute Of Repose Does Not Bar Century's Claim?**

STATEMENT OF THE CASE

On November 14, 2014, Appellant, Century Capital Group, LLC, ("Century") filed a complaint against the Respondents, Midtown Development Group, LLC ("Midtown"), Richland Joint Venture Group, LLC ("RJVG"), Windsor Richland Mall, L.P. ("Windsor"), and BRC Richland, LLC ("BRC"), in the Circuit Court of Richland County. The complaint was amended twice, once on November 12, 2014, and again by leave of the court on December 8, 2014 (R. 132-172) to add a paragraph that was inadvertently left out and to correct the request for relief. Century sought recovery against the Defendants for contribution. RJVG filed its motion for summary judgment on May 6, 2015 (R. 272-430) and Midtown and Windsor filed separate motions for summary judgment on May 11, 2015 (R. 173-271) (R. 431-510). BRC could not be served and did not participate in the action.

On July 30, 2015, a hearing was conducted before the Honorable L. Casey Manning regarding the three motions for summary judgment. (R. 617-658). On September 16 and 17, 2015, the circuit court issued orders granting summary judgment as to all Defendants and dismissing Century's claim with prejudice on the grounds that there were no genuine issues of material fact, the Settlement Agreement does not delineate what portion of the sum paid by Century should be apportioned to each Defendant under a negligence theory, and that Century's claims are barred by the statute of repose. (R. 564-602).

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

STATEMENT OF FACTS

This case stems from an underlying lawsuit (Case No.: 2010-CP-40-8407) against Century by Spirit SPE Columbia, LLC ("Spirit") (R. 72-131), a non-party in the present matter, based primarily on allegations that Century failed to adequately repair and maintain certain portions of the Richland Mall. The Richland Mall has a long history of construction defect and maintenance issues and has experienced persistent roof leaks since original construction. The parking deck was designed above occupied space and has a split-slab system of waterproofing, meaning the waterproofing membrane is sandwiched between two layers of concrete and endures regular vehicular and pedestrian traffic. Extensive reports dating back to the 1990's indicate that the roof was defectively constructed based on a failure to install sufficient expansion joints and defective components in the waterproofing structure. In lieu of costly roof repairs, Mall ownership at the time began installing a system of ceiling pans to prevent water from intruding into the occupied space below and injecting the visible cracks in the concrete of the deck with epoxy.

On December 23, 2002, the Mall was sold to Windsor and simultaneously split into separate parcels: the "Bank Parcel," the "TGI Friday Parcel," the "Verizon Parcel" and the "Mall Parcel," which included the remaining portions of the Mall and the Common Areas. 2d. Am. Compl. ¶ 7. (R. 134). Also in 2002, Windsor sold the Verizon parcel to BRC. 2d. Am. Compl. ¶ 8 (R. 134). On September 7, 2005, BRC and Windsor negotiated the Reciprocal Easement, Covenant, Operation and Restriction Agreement ("REA") (R. 137-172), which attempted to outline the respective duties of those parties and their successors regarding the maintenance and administration of the Mall. 2d. Am. Compl. ¶ 9. (R. 134). Of particular relevance is the following REA provision:

(C) Roof and other repairs. Until November 30, 2010, Windsor as owner of the Midtown Parcel and any successor thereto, shall make all roof repairs, structural repairs to exterior walls, structural repairs to columns and structural floor (excluding floor coverings) which collectively enclose the building on the Verizon Parcel and the building systems (plumbing, sprinkler, electrical, and HVAC) in the building on the Verizon Parcel.¹

As the roof leaks continued, Mall Management elected to inject epoxy to chase the cracks and continued to install galvanized steel catch pans in the roof system to collect the water. Spirit purchased the Verizon Parcel on September 12, 2005. 2d. Am. Compl. ¶ 10. (R. 134). On November 4, 2005, Windsor sold the Mall parcel to Midtown. 2d. Am. Compl. ¶ 11 (R. 134). On May 25, 2007, Midtown sold the Mall parcel to RJVG. 2d. Am. Compl. ¶ 12. (R. 134). After receiving a demand for repairs from Spirit on March 3, 2009, RJVG began a program of replacing sections of concrete while maintaining the pan/seal method of repair. RJVG did not re-seal the entire parking structure.

Century purchased the Mall parcel from RJVG on February 16, 2010 and acknowledges that it had notice of the roof leaks; however, it had no indication that Spirit took issue with the maintenance plan in place since the origin of the leaks nor did Century agree to accept responsibility for its predecessors' maintenance failures. Walkup Aff. ¶¶ 3, 5-6. (R. 511). Spirit initiated the underlying suit against Century only nine months after Century took possession of the Mall parcel. Spirit's complaint sought relief under seventeen causes of action for damages related to maintenance and repair of the Mall Property, common area maintenance charges, and management of the Mall in general. Walkup Aff. ¶ 9 (R.512).; Spirit's 3d. Am. Compl. (R. 72-131).

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

In an effort to resolve the costly and protracted litigation with Spirit, Century agreed to settle the underlying lawsuit's claims relating to repair and maintenance of the Mall for One Million Four Hundred Fifty Thousand and No/100 Dollars (\$1,450,000.00). The Agreement provides in part:

The parties agree that the \$1,450,000 payment is provided for the release and extinguishment of any pre-June 30, 2013 liability related to the maintenance and repair of the Spirit parcel and the remaining consideration provided by [Century] under this Settlement Agreement is provided for the pre-June 30, 2013 settlement of the CAM, accounting and other claims asserted by Spirit.²

The Settlement Agreement expressly extinguishes liability and discharges all claims against Century and its predecessors in interest under the REA:

Based upon the foregoing consideration, Spirit . . . hereby releases and forever discharges from all claims . . . [Century's] predecessors in interest under the REA, and each predecessor in interest's employees, agents, heirs and assigns.³

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

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

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

STANDARD OF REVIEW

When reviewing the grant of a summary judgment motion, the appellate court applies the same standard of review as the trial court under Rule 56, SCRPC. *Zurich Am. Ins. Co. v. Tolbert*, 378 S.C. 493, 496, 662 S.E.2d 606, 607 (Ct. App. 2008). Principles of equity are applicable to actions determining the pro rata liability of tortfeasors. S.C. Code Ann. § 15-38-30 (Supp. 2000); *Florence Cty. Sch. Dist. No. 2 v. Interkal, Inc.*, 348 S.C. 446, 450, 559 S.E.2d 866, 868 (Ct. App. 2002).

In equity cases tried before a judge without a jury, the appellate court may make a de novo review of properly challenged findings of fact as well as rule upon issues of law. *Townes Assoc., Ltd. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976). Therefore, an appellate court may find facts in accordance with its own views of the preponderance of the evidence. *Metromont Materials Corp. v. Pennell*, 270 S.C. 9, 18, 239 S.E.2d 753, 758 (1977).

In determining whether a genuine issue of fact exists, the evidence and all reasonable inferences drawn from it must be viewed in the light most favorable to the nonmoving party. *Sauner v. Pub. Serv. Auth. of S.C.*, 354 S.C. 397, 404, 581 S.E.2d 161, 165 (2003). Even if evidentiary facts are not disputed, if only the conclusions to be drawn from them are, the trial court should deny the motion for summary judgment. *Baugus v. Wessinger*, 303 S.C. 412, 415, 401 S.E.2d 169, 171 (1991). Summary judgment is not appropriate when further inquiry into the facts is desirable to clarify the application of law. *Tupper v. Dorchester Cnty.*, 326 S.C. 318, 325, 487 S.E.2d 187, 191 (1997).

ARGUMENT

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

Contribution is an equitable theory which seeks to apportion liability between joint tortfeasors proportionately. *Ashley II of Charleston, L.L.C. v. PCS Nitrogen, Inc.*, 409 S.C. 487, 491, 763 S.E.2d 19, 21 (2014). In order to seek contribution from a joint tortfeasor after entering into a settlement agreement with the Plaintiff, the settling tortfeasor must ensure that those from whom he seeks contribution are discharged from liability to the Plaintiff and must ensure that the amount paid in settlement is reasonable. S.C. Code Ann. § 15-38-20(D) (Supp. 1998). The equitable maxim equality is equity, “a principle that has long been embodied in our jurisprudence . . . is applicable to burdens as well as to rights, and means that, in the absence of relations or conditions requiring a different result, equity will treat all members of a class as on an equal footing, and will distribute benefits or impose burdens and changes either equally or in proportion to the several interests, and without preferences.” *Myers v. Sinkler*, 235 S.C. 162, 175, 110 S.E.2d 241, 247 (1959). Under the “equality is equity” rule, damages are apportioned equally among the tortfeasors without the necessity of determining relative degrees of fault.⁴

Even if two tortfeasors are liable to a Plaintiff under differing or multiple theories, when their actions unite to cause one injury to the Plaintiff they can be liable to each other for contribution. *See Matthews v. Seaboard Air Line Ry.*, 67 S.C. 499, 46 S.E. 335, 340 (1903).

If two or more persons owe to another the same duty, and by their common neglect of that duty he is injured, doubtless the tort is joint, and upon well-settled principles each, any, or all of the tort feasons may be held. But when each of two or more persons owe to another a separate duty, which each wrongfully neglects to perform, then, although the duties were diverse and disconnected, and the neglect of each was without concert, *if such several neglects concurred and united together in causing injury, the tort is equally joint, and the tort feasons are subject to a like liability.*⁵

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

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

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

The parties agree that the \$1,450,000 payment is provided for the release and extinguishment of any pre-June 30, 2013 liability related to the maintenance and repair of the Spirit parcel and the remaining consideration provided by CCG under this Settlement Agreement is provided for the pre-June 30, 2013 settlement of CAM, accounting and other claims asserted by Spirit.⁶

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

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

The trial court held that the damages could not be allocated by the fact finder, based on its incorrect application of the *Vermeer* case. The *Vermeer* case can be distinguished from the case at bar because it dealt with the issue of whether a defendant was entitled to contribution for settlement of a *potential* claim by a *non-party* who *never* asserted or litigated the claim. Specifically, Vermeer sought contribution from Wood/Chuck for payment of a potential loss of consortium claim to the injured party’s wife. *Vermeer Carolina’s Inc.*, 336 S.C. 53, 69, 518 S.E.2d 301, 310. The wife was not a Plaintiff in the underlying lawsuit brought by her husband, nor was there any admission of liability as to her. *Id.* For these reasons, “Vermeer did not ‘discharge’ any ‘common liability’ as to [the wife] because there was no ‘common liability.’” *Id.*

As stated above, there is common liability between successors in interest to the Mall Parcel as to Spirit. Each owner owed a duty to Spirit to properly maintain and repair the common areas and roof. This continuous term of maintenance and repair was breached in succession by

⁶ Settlement Agreement § (a) 6 (R. 39).

⁷ Settlement Agreement § (d) 1 (R. 39).

each owner leading up to Century, which was ultimately held liable for the entirety of the damages to Spirit.

The Settlement Agreement properly discharged the Respondents from liability to Spirit and outlines that \$1.45 million was paid to settle liability for failing to maintain and repair the portions of the Mall affecting the Spirit Parcel. Regardless of the legal theories or various duties at issue, each successor in interest to the Mall acted to cause this injury to Spirit. Pursuant to the Act, each joint tortfeasor is responsible for its equal share of the settlement figure regardless of each party's relative degree of fault. *First Gen. Servs. Of Charleston, Inc. v. Miller*, 314 S.C. 439, 445 S.E.2d 446 (1994); *Southeastern Freight Lines v. City of Hartsville*, 313 S.C. 466, 443 S.E.2d 395 (1994). There is no need for the settlement agreement to further delineate what portion of that figure is attributable to any of the Respondents or to lay out exactly which theory of liability it is meant to cover. Each Respondent is liable for a pro rata, equitable share of this settlement figure under the Act and case law cited herein.

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

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

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

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

- II. Appellant Seeks Rehearing Because The Court Of Appeals Overlooked That The Parties Are Joint Tortfeasors.**
- III. Appellant Seeks Rehearing Because The Court Of Appeals Overlooked That A Purchase "As Is/Where Is" Does Not Relieve A Seller From Third Party Liability For The Seller's Negligence.**
- IV. Appellant Seeks Rehearing Because The Court Of Appeals Overlooked That The Statute Of Repose Does Not Bar Century's Claim.**

CONCLUSION

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

Respectfully submitted,



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June 27, 2018

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

Appellate Case No.: 2016-000461

RECEIVED
JUN 27 2018
SC Court of Appeals

Century Capital Group, LLC, ... Appellant,

v.

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

PROOF OF SERVICE OF PETITION FOR REHEARING

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

DOCUMENTS SERVED

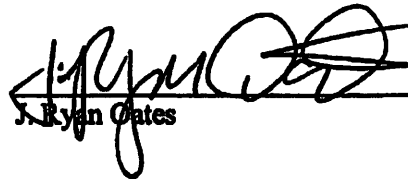
PETITION FOR REHEARING

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J. Ryan Oates

The South Carolina Court of Appeals

Century Capital Group, LLC, Appellant,

v.

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

Appellate Case No. 2016-000461

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

Paul G. Short, Jr. J.
Paul A. Thomas J.
D. G. H. H. J.

Columbia, South Carolina

cc: Jesse Ryan Oates, Esquire
Robert Trippett Boineau, III, Esquire
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FILED

Record on Appeal 798

Sept. 20, 2018

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

Case No. 2014-CP-40-07037

Century Capital Group, LLC, Appellant,

v.

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

Respondents.

CERTIFICATE OF COUNSEL

I certify that the Record on Appeal contains all material proposed to be included by any parties and not any other material.

Respectfully Submitted,

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October ____, 2018

RECORD ON APPEAL 799