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February 13, 2023

VIA E-MAIL
The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

Re: ***Palmetto Pointe v. Tri-County Roofing***
Appellate Case No.: 2019-001790

Dear Ms. Kitchings:

Pursuant to Rule 208(b)(7) of the South Carolina Appellate Court Rules, and in advance of argument scheduled for February 14, 2023, Respondent hereby submits as supplemental authority the following cases, both of which were decided by this Court after final briefing concluded in the instant matter: *Jolly versus General Electric Co.*, 435 S.C. 607, 869 S.E.2d 819 (Ct. App. 2021), *reh'g denied* (Feb. 25, 2022), and *Edwards versus Scapa Waycross, Inc*., 437 S.C. 396, 878 S.E.2d 696 (Ct. App. 2022), *reh'g denied* (Oct. 26, 2022).

(1) *Jolly v. Gen. Elec. Co*., 435 S.C. 607, 869 S.E.2d 819 (Ct. App. 2021), *reh'g denied* (Feb. 25, 2022)

In *Jolly*, this Court reaffirmed the setoff and allocation principles enunciated in *Riley versus Ford Motor Company*[1] and *Smith versus Widener*,[2] namely, that for setoff to apply automatically to a non-settling defendant, the settlement must have been for the same cause of action as that tried to a verdict. However, when the prior settlement involves compensation for a different cause of action, there is no setoff as a matter of law. *Jolly*, 435 S.C. at 665, 869 S.E.2d at 850. When a settlement involves more than one claim, "allocation of settlement proceeds between various causes of action impacts the amount a non-settling defendant may be entitled to offset." *Id.* at 850-51, *quoting Riley*, 414 S.C. at 196.

The allocation at issue in *Jolly* was an "internal allocation […] claimed by Respondents post-settlement rather than designated by all parties to the settlement agreement." *Jolly*, 435 S.C. at 666, 869 S.E.2d at 851. Put differently, the *Jolly* Plaintiffs/Respondents unilaterally allocated pre-trial settlement proceeds, rather than negotiating the allocation with the settling Defendants. *Id*. at 664, 869 S.E.2d at 850. During a post-trial hearing, the trial court reviewed the settlement agreements *in camera*, confirmed the settlement amounts were accurate, and determined the Plaintiffs/Respondents' unilateral allocations were reasonable. *Id.* at 666, 869 S.E.2d at 851.

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[1] *Riley v. Ford Motor Co*., 414 S.C. 185, 192, 777 S.E.2d 824, 828 (2015).
[2] *Smith v. Widener*, 397 S.C. 468, 471–72, 724 S.E.2d 188, 190 (Ct. App. 2012).

This Court upheld the trial court's acceptance of Plaintiffs/Respondents' allocation, reaffirming that South Carolina jurisprudence "favors a plaintiff's ability to apportion settlement proceeds in the manner most advantageous to it." *Id.* (internal quotations omitted). This Court went on to forcefully caution that non-settling Defendants do not get to retroactively meddle in the choices of the settling Defendant(s) and the plaintiff; rather, settlements are not intended to benefit non-settling Defendants:

> Therefore, we reject Appellants' assumption that if a settling defendant obtains a release of the personal injury claim, then it is unreasonable for that defendant to also obtain a release of any future wrongful death claim due to its derivative nature. **Were this assumption to control how settlement proceeds are allocated, it would allow a non-settling defendant to second-guess the settling defendant's choice of the claims for which it will pay the plaintiff to release. Only the settling parties get that choice.**

Id. at 668, 869 S.E.2d at 852.

(2) *Edwards v. Scapa Waycross, Inc.*, 437 S.C. 396, 878 S.E.2d 696 (Ct. App. 2022), *reh'g denied* (Oct. 26, 2022)

Similarly, in *Scapa Waycross*, this Court upheld the trial court's refusal to reallocate the plaintiff/respondent's "internal apportionment" of pre-trial settlements. 878 S.E.2d at 711. Appellant there argued that respondent's internal allocation "did not reflect fairness and justice." *Id.* (internal quotations omitted). In so arguing, Appellant claimed that a reallocation would not simply be beneficial to Appellant but would also be "more reasonable under the facts." *Id.* This Court disagreed, again reiterating that reallocation merely to benefit a non-settling defendant is not in accord with South Carolina jurisprudence:

> Scapa's argument stands in contrast to the principle that plaintiffs who settle with defendants gain control and leverage in relation to nonsettling defendants—control that is often reflected in the plaintiff's ability to apportion settlement proceeds in a manner most advantageous to it.

Id. This Court went on to reject Appellant's proffered alternative allocation:

> Scapa's percentages-based allocation argument is an attempt to refashion a disadvantageous allocation of the settlement proceeds. Merely because Stewart's internal allocation of the proceeds is not in Scapa's best interests is insufficient to justify an appellate reapportionment for the sole purpose of benefitting a nonsettling party. Because we do not perceive the effect of setoff based on Stewart's internal allocation as improper, unreasonable under the facts of this case, or unfair simply because it favored Stewart and did not reflect percentages that corresponded with the percentage of each award, we find the trial court did not err in denying Scapa's motion to reallocate Stewart's settlement proceeds for the purpose of setoff.

Id. (internal quotations omitted).

Additionally, a slightly older case became more relevant/illustrative based upon the Appellant's assertion it its Response Brief that:

> TCR and Respondent also agree that some testimony regarding the responsibility and potential culpability of the architect, framers, drywall installer, and the other parties that settled before the trial was presented to the jury. [citation omitted] Stated another way, the parties acknowledge that the defendants used the empty chair defense at trial, and therefore, these issues were included in the jury's deliberations.

(Resp. Br. at 3). The case of *Smith versus Tiffany* explained what the "empty chair defense" contemplates:

> Thus, a critical feature of the statute is the codification of the **empty chair defense**—a defendant retains the right to assert another potential tortfeasor, whether a party or not, contributed to the alleged injury or damages […].

799 S.E.2d 479, 484, 419 S.C. 548, 557 (2017) (internal citations omitted). It goes without saying that to the extent that a defendant *successfully* employs an empty chair defense, the resulting verdict will not be for the same damages that a prior settling defendant has paid, because the defendant has successfully persuaded the jury that a portion of the damages were due to a party no longer in the trial and removed that at fault party's damages from its verdict.

By all appearances, that is what happened here as the jury reduced Plaintiffs' damages from $12.8m to $6.5m. Appellant's concession regarding its use of the empty chair defense belies its own argument that the jury was asked to determine the total cost of Plaintiffs' repairs; the jury was actually asked to determine the cost of Plaintiffs' repairs which were proximately caused by the Defendants at trial, while the Appellant and other defendants repeatedly attempted to persuade the jury that significant portions of Plaintiffs' damages were caused by the previous settling parties – and should therefore be excluded from the verdict. This concept was addressed in Respondents' principal brief, but perhaps less artfully in arguing that the Appellant had, in effect, tried set off to the jury with its empty chair defenses.

Put differently, it would be inequitable to allow this or any other defendant to argue that an absent subcontractor was at least partially at fault, receive a verdict that appears to favorably reflect that argument, and then subsequently seek a reduction in the verdict for the subcontractor's settlement amount.

Sincerely,

/s/ Justin Lucey

Justin Lucey, Esq.

cc: All Counsel of Record (*via Email*)