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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Jennifer B. McCoy, Circuit Court Judge

Civil Action No. 2015-CP-10-00955

Appellate Case No. 2019-001790

Palmetto Pointe At Peas Island Condominium Property Owners Association,
Inc. And Jack Love, Individually, and on behalf of all others similarly situated,
.....Plaintiffs,

vs.

Island Pointe, LLC; Complete Building Corporation; Tri-County Roofing, Inc.;
Creekside, Inc; American Residential Services, LLC d/b/a ARS/Rescue Rooter
Charleston; Andersen Windows, Inc; Atlantic Building Construction Services,
Inc., n/k/a Atlantic Construction Services, Inc.; Builder Services Group, Inc.
d/b/a Gale Contractor Services; Novus Architects, Inc., f/k/a SGM Architects,
Inc.; Tallent and Sons, Inc; W C Services, Inc.; CRG Engineering, Inc;
CertainTeed Corporation; Kelly Flooring Products, Inc, d/b/a Carpet Baggers;
Cornerstone Construction and Mark Malloy d/b/a Cornerstone Construction;
Miracle Siding, LLC and Wilson Lucas Sales d/b/a Miracle Siding, LLC; Mark
Palpoint a/k/a Micah Palpoint; Elroy Alonzo Vasquez; Chris a/k/a John Doe
61; Alderman Construction; Stanley's Vinyl Fence Designs; Cohen's Drywall
Company, Inc; Mosely Concrete; Hand A Framing Construction, LLC a/k/a
H&A Framing Construction, LLC and d/b/a H and A Framing, LLC, H&A

Construction, and Hand A Construction; JMC Construction, Inc; JMC Construction, LLC; John Doe 1—15, Defendants,

of which Palmetto Pointe At Peas Island Condominium Property Owners Association, Inc. and Jack Love, individually, and on behalf of all others similarly situated are the Respondents,

and

Tri-County Roofing, Inc.....Appellant.

**APPELLANT’S PETITION FOR REHEARING (PANEL)
AND PETITION FOR REHEARING EN BANC**

TO: THE HONORABLE JUDGES OF THE SOUTH CAROLINA COURT OF APPEALS:

Pursuant to Rules 219, 221, and 240 of the South Carolina Rules of Civil Procedure, Appellant Tri-County Roofing, Inc. (“TCR”) petitions for a rehearing of this Court’s opinion en banc, or in the alternative, by the panel.

The Court of Appeals opinion affirmed in part and reversed the circuit court’s order regarding setoff of settlements paid to Plaintiffs Palmetto Pointe At Peas Island Condominium Property Owners Association, Inc. and Jack Love, Individually, and on behalf of all others similarly situated (“Plaintiffs”). TCR respectfully submits the Court of Appeals overlooked or misapprehended arguments made by TCR in its briefs and oral argument including the

application of South Carolina statutory and common law when the Court of Appeals ruled the trial court did not err in denying the \$1 million payment as setoff; affirming the trial court's refusal to set off the \$500,000 punitive damages award; and affirming the trial court's refusal to set off the entirety of the pretrial settlements between Plaintiffs and Novus, Atlantic, H and A, and Cohen's.

More specifically, the Court of Appeals overlooked or misapprehended the above in the following ways:

I. The \$1 Million Insurance Proceeds from July 2018 Mediated Partial Payment/Covenant-Not-to-Execute.

The Court overlooked or misapprehended the application of The Oaks at Rivers Edge Property Owners Association, Inc. v. Daniel Island Riverside, 420 S.C. 424, 803 S.E.2d 475 (Ct. App. 2017), reh'g den. (Oct. 19, 2017) to the \$1 million July 2018 mediated partial payment/covenant-not-to-execute between Complete Building Corporation ("CBC") and Plaintiffs.

TCR maintained through its briefs and oral argument that the allocation of the \$1 million July 2018 mediated partial payment/covenant-not-to-execute between CBC and Plaintiffs was untimely, and, therefore, never actually allocated by Plaintiffs. Further, there is no true distinction between the

arguments made by TCR in its briefs that the \$1 million payment was untimely and this Court's articulation of arguments TCR did not maintain in footnote 14.

This Court stated that TCR contended this \$1 million payment was allocated to HVAC, electrical, drainage, and fireplaces, matters which were damages not sought at trial, were actually a settlement for the same injury represented by the verdict. This Court held that the settlement was not of the same injury sought at trial because the repair costs for HVAC, electrical, drainage, and fireplaces were not in Plaintiffs' damages estimate, citing to The Oaks. In footnote 14 of its opinion, the Court states: "TCR does not maintain the \$1 million payment was actually unallocated based on the fact this document was executed and the sum paid to Plaintiffs in July 2018—well before the full posttrial settlement between Plaintiffs and CBC." However, TCR argued throughout its briefs that the allocation of the 2018 settlement payment was both improper and untimely. (App. Br. pp. 27-28; App. Response Br. p. 5). The Court overlooked or misapprehended the application of The Oaks because TCR argued these funds were actually unallocated and should be included in TCR's setoff. Thus, were a settlement for the same injury sought at trial.

II. Punitive Damages.

The Court overlooked or misapprehended the application of Smith v. Widener, 397 S.C. 468, 724 S.E.2d 188 (Ct. App. 2012) and McGee v. Bruce Hosp. Sys., 344 S.C. 466, 545 S.E.2d 286 (2001), as well as the other case law in holding that TCR is not entitled to receive a \$500,000 setoff for the punitive damages portion of the CBC settlement.

As articulated in TCR's briefs to this Court, Widener notes that "a plaintiff's claim for actual and punitive damages arising from the same injury is the same claim for purposes of setoff under section 15-38-50(a)." 397 S.C. at 473, 724 S.E.2d at 191. In short, Widener supports TCR's position that punitive damages are part of the same injury as actual damages in the context of setoff. Accordingly, the Court misapprehended Widener in its application to the subject case.

III. Setoff For Pretrial Settlements.

In its decision that the trial court did not err in finding TCR was not entitled to a full setoff for the pretrial settlements between Plaintiffs and Novus, Atlantic, H and A, and Cohen's, which were not specifically removed from the trial of the case as issue release items, the Court overlooked or misapprehended the case law discussed by TCR in its briefs in support of its

assertion that TCR is entitled to a full setoff of those pretrial settlements not allocated.

At trial, Plaintiffs sought damages to repair the Project and for lost use. The trial judge informed the jury that the damages being sought by Plaintiffs was for the cost of repairs plus lost use, and the trial judge assured the jury that she would act as the gatekeeper to ensure that the Plaintiffs would not receive multiple recoveries for the same damages. Throughout the trial and during the closing arguments in this case, the parties asked the jury to evaluate the damages presented at trial and to ignore the items specifically designated as issue releases. The issue releases explained to the jury included the HVAC, grading and paving, fireplaces, interior flooring, interior trim and interior railings, concrete, and the window products. Whatever was not explicitly removed from the trial was still presented to the jury through witness testimony and trial exhibits. Every item not designated as an issue release was included in the trial since CBC, the general contractor responsible for the entire construction project, was present during the whole trial.

The Court overlooked or misapprehended applicable case law related to setoff and any applicable statutes regarding the same when it affirmed the trial court's limited pretrial settlement setoffs. It is established law that Plaintiffs

here are not entitled to multiple awards for the same injury. See Welch v. Epstein, 342 S.C. 279 at 312, 536 S.E.2d at 425 (Ct. App. 2000) (“In other words, there can only be one satisfaction for an injury or wrong.”); Rutland v. SC Dep’t of Transp., 400 S.C. at 216, 734 S.E.2d at 145 (“A non-settling defendant is entitled to credit for the amount paid by another defendant who settles for the same cause of action.”).

The Court’s opinion affirming the trial court’s limited setoff for pretrial settlements is contrary with South Carolina policy against double recovery. TCR’s requested setoff allocation is the mandated statutory and common law result that furthers the policy to avoid double recovery to the Plaintiff and lead to an equitable result.

Conclusion

TCR respectfully submits the Court overlooked or misapprehended arguments made by TCR in its briefs and oral argument including the application of South Carolina statutory and common law in the above discussed manner. Accordingly, TCR respectfully requests the Court alter or amend its opinion to further reverse the trial court’s order regarding setoff in the following manner: TCR is given setoff for the \$1 million settlement for CBC’s 2018 settlement payment to Plaintiffs; TCR is given a \$500,000 setoff

for the punitive damages portion of CBC's post-trial settlement; and TCR is entitled to setoff for the entirety of the pretrial settlements between Plaintiffs and Novus, Atlantic, H and A, and Cohen's.

Respectfully submitted,

COLLINS & LACY, P.C.



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Columbia, South Carolina

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APPEAL FROM CHARLESTON COUNTY
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vs.

Island Pointe, LLC; Complete Building Corporation; Tri-County Roofing, Inc.; Creekside, Inc; American Residential Services, LLC d/b/a ARS/Rescue Rooter Charleston; Andersen Windows, Inc; Atlantic Building Construction Services, Inc., n/k/a Atlantic Construction Services, Inc.; Builder Services Group, Inc. d/b/a Gale Contractor Services; Novus Architects, Inc., f/k/a SGM Architects, Inc.; Tallent and Sons, Inc; W C Services, Inc.; CRG Engineering, Inc; CertainTeed Corporation; Kelly Flooring Products, Inc, d/b/a Carpet Baggers; Cornerstone Construction and Mark Malloy d/b/a Cornerstone Construction; Miracle Siding, LLC and Wilson Lucas Sales d/b/a Miracle Siding, LLC; Mark Palpoint a/k/a Micah Palpoint; Elroy Alonzo Vasquez; Chris a/k/a John Doe 61; Alderman Construction; Stanley's Vinyl Fence Designs; Cohen's Drywall Company, Inc; Mosely Concrete; Hand A Framing Construction, LLC a/k/a H&A Framing Construction, LLC and d/b/a H and A Framing, LLC, H&A Construction, and Hand A Construction; JMC Construction, Inc; JMC Construction, LLC; John Doe 1—15,.....Defendants,

of which Palmetto Pointe At Peas Island Condominium Property Owners Association, Inc. and Jack Love, individually, and on behalf of all others similarly situated are the Respondents,

and

Tri-County Roofing, Inc..... Appellant.

PROOF OF SERVICE

I certify that I have served a true copy of the Appellant's Petition for Rehearing (Panel) and Petition for Rehearing En Banc upon all parties via email, on July 13, 2013, addressed as follows:

Respectfully submitted,

COLLINS & LACY, P.C.



By:

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July 13, 2023
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and on behalf of all others similarly situated*



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SC Court of Appeals

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VIA HAND DELIVERY

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

Re: Palmetto Pointe at Peas Island Condominium Property Owners Association, Inc. v.
Tri-County Roofing, Inc.
Appellate Case No. 2019-001790
Claim No. R&A THA10396
C&L File No. 001083-00167

Dear Ms. Kitchens:

Enclosed please find this firm's check number 49926 in the amount of \$50.00 as the filing fees associated with the filing of the Appellant's Petition for Rehearing (Panel) and Petition for Rehearing En Banc, filed on July 13, 2023.

Sincerely,

A handwritten signature in blue ink, appearing to read 'C Stegmaier', written over a light blue horizontal line.

Christian Stegmaier

CS/tmj
cc: Enclosure



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VENDOR:

OUR REF. NO.	YOUR INVOICE NUMBER	INVOICE DATE	INVOICE AMOUNT	AMOUNT PAID	DISCOUNT TAKEN
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S C COURT OF APPEALS



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Collins & Lacy
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 P.O. BOX 12487
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TO THE ORDER OF

S C COURT OF APPEALS
 P.O. BOX 11629
 COLUMBIA, SC 29211

COLLINS & LACY ATTORNEYS AT LAW

Handwritten signature in blue ink



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