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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Jennifer B. McCoy, Circuit Court Judge

Appellate Case No. 2019-001790

Civil Action No. 2015-CP-10-00955

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. Petitioner,

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Petitioners certify the Petition for Rehearing was made and ruled upon by the Court of Appeals on August 10, 2023.

QUESTIONS PRESENTED FOR REVIEW

- I. Did the Court of Appeals Err in Failing to Find Petitioner was Entitled to a Full Setoff for the \$1 Million Insurance Proceeds from July 2018 Mediated Partial Payment/Covenant-Not-to-Execute?
- II. Did the Court of Appeals Err in Finding Petitioner was Not Entitled to Receive a \$500,000 Setoff for the Punitive Damages Portion of the CBC Settlement by Finding the Punitive Damages Award was Not a Part of the Same Injury?
- III. Did the Court of Appeals Err in Failing to Find Petitioner was Entitled to a Full Setoff for the Pretrial Settlements Between Respondents and Novus, Atlantic, H and A, and Cohen's?

STATEMENT OF THE CASE

This is a multi-party construction defect lawsuit with more than 30 defendants involving 40 duplex condominium units at a project called Palmetto Pointe at Peas Island, which is located near Folly Beach, Charleston County, South Carolina (hereinafter the “Project”). [R.201-222 S&C 2/13/2015; R.275-341 Am S&C 11/4/2016; R.387-408 2nd Am S&C 11/2/2017] The Project was constructed in 2006-2007 and received certificates of occupancy from January 19 through November 2, 2007. [R.997-998 Wk-1 Trans p.638 ln.18—p.639 ln.14; R.1075 Wk-1 Trans pp.776 ll.17-18; R.2630-2678 Trial Exhibit 789] Respondents filed their original summons and complaint on February 13, 2015 alleging construction defects and subsequently amended the complaint twice to add new defendants and bring direct claims against the third-party defendants. [R.201-222 S&C 2/13/2015; R.275-341 Am S&C 11/4/2016; R.387-408 2nd Am S&C 11/2/2017] Despite the number of defendants and the causes of action alleged by the Respondents, the Respondents prayed for the same type of relief: repair costs, lost use, and punitive damages. [R.201-222 S&C 2/13/2015; R.275-341 Am S&C 11/4/2016; R.387-408 2nd Am S&C 11/2/2017]

Numerous defendants settled prior to trial leaving only eight defendants in the case when the trial started before the Honorable Jennifer B. McCoy May 6, 2019. [R.688-737 Wk-1 Trans pp.171-220] Those eight defendants were Complete Building Corporation (hereinafter “CBC”), Petitioner Tri-County Roofing, Inc. (hereinafter “Petitioner”), Elroy Alonzo Vasquez (hereinafter “Vasquez”), Wilson Lucas Sales d/b/a Miracle Siding (hereinafter “Miracle”), W.C. Services, Inc. (hereinafter “W.C. Services”), Stanley’s Vinyl Fence Designs (exterior railings) (hereinafter “Stanley’s”), JMC Construction, Inc. and JMC Construction, LLC (repair contractor for a subcontractor that settled out before trial) (hereinafter “JMC”), and Island Pointe, LLC (hereinafter “IP-LLC”). [R.694-737 Wk-1 Trans p.177 ln.4—p.220 ln.3] Stanley’s settled with Respondents on

the second day of trial. [R.838-839 Wk-1 Trans p.339 ln.3—p.340 ln.25; R.861-862 Wk-1 Trans p.411 ln.23—p.412 ln.10] JMC was dismissed by the trial judge on May 9, 2019 by directed verdict after Respondents rested their case. [R.1018-1023 Wk-1 Trans p.659 ln.23—p.664 ln.7] Respondents dismissed their claims against IP-LLC prior to the closing arguments. [R.1580 Wk-2 Trans p.614 ll.2-6]

IP-LLC, the developer, entered into an AIA contract dated December 27, 2005, with CBC, the general contractor, for the construction of the entire project, excluding the clubhouse. [R.2148-2182 Trial Exhibit 5A] W.C. Services was hired by CBC and installed the fire sprinklers at the project. [R.1477 Wk-2 Trans p.442 ll.3-25]

CBC subcontracted the installation of siding, roofs, and waterproofing to Petitioner [R.914 Wk-1 Trans p.541 ll.5-25; R.1358 Wk-2 Trans p.317 ll.4-8; R.2183-2193 Trial Exhibit 9] Petitioner in turn hired sub-subcontractors to complete its scope of work on the project including Vasquez (roofs and waterproof membranes), and Miracle (installed siding on seventeen of the twenty buildings in the lawsuit). [R.223-242 TCR Ans & 3rd-P Comp 4/22/2015; R.342-359 TCR Ans & 3rd-P Comp 11/23/2016; R.426-446 TCR Ans & CC 11/17/2017]

“Prior to trial, numerous defendants reached settlement agreements with [Respondents] totaling in aggregate between \$4,725,000 and \$5,012,500. The parties agree some of the settlements were for damages that were removed from the trial of the case. Those settlements total \$1,407,500 and have been referred to as issue release settlements.” Palmetto Pointe at Peas Island Condo. Prop. Owners Ass'n, Inc. v. Island Pointe, LLC, 440 S.C. 190, 197, 890 S.E.2d 603, 607 (Ct. App. 2023), reh'g denied (Aug. 10, 2023)

Respondents also entered into other settlement agreements prior to trial that were not issue release settlements. Those settlements were with Novus Architects, Inc. for \$650,000, Cohen's

Drywall Company, Inc. for \$125,000 for work related to installing insulation and drywall, Atlantic Building Construction Services, Inc. for \$700,000 for framing, and with H and A Framing Construction, one Atlantic's subcontractors, for \$500,000.

On or around July 10, 2018, CBC entered a covenant not to execute with Respondents in favor of CBC in exchange for one of CBC's insurance carriers \$1,000,000 payment to Respondents. [R.1914-1917 Email response by TCR dated 6/10/2019; R.1918-1924 Complete Covenant 7/10/2018] The covenant not to execute did not attempt to allocate any of the \$1,000,000 payment for purposes of setoff, except for the inclusion of language that the \$1,000,000 would "constitute a credit in the same amount against any judgement obtained against CBC." [R.1918-1924 Complete Covenant 7/10/2018]. On June 6, 2019, twenty-one days after the trial, CBC and Respondent entered into a written agreement where CBC agreed to pay an additional \$1,137,500 settlement entering into with the written agreement purportedly allocating the \$1,000,000 settlement funds paid in 2018 as well as the new \$1,137,500 payment. [R.1925-1939 Complete Settlement 6/6/2019] Importantly, this new written agreement allocated the 2018 \$1,000,000 settlement to items not included in the trial. [R.1925-1939 Complete Settlement 6/6/2019]

Petitioners timely appealed the Circuit Court's decision to the Court of Appeals. After briefing and oral argument, the Court of Appeals entered a decision on June 28, 2023, affirming the Circuit Court in part and reversing the Circuit Court in part. See Palmetto Pointe at Peas Island Condo. Prop. Owners Ass'n, Inc. v. Island Pointe, LLC, 440 S.C. 190, 197, 890 S.E.2d 603, 607 (Ct. App. 2023), reh'g denied (Aug. 10, 2023). Petitioners then filed a Petition for Rehearing, and the Court of Appeals issued an order denying rehearing.

This review followed.

STANDARD OF REVIEW

“The right to setoff has existed at common law in South Carolina for over 100 years.” Riley v. Ford Motor Co., 414 S.C. 185, 195, 777 S.E.2d 824, 830 (2015) (citation omitted). This right to setoff was first codified in 1988 as part of the South Carolina Contribution Among Tortfeasors Act. See id. Section 15-38-50 of the South Carolina Code provides that “[w]hen a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death: (1) ... it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater....”

“[T]he Act represents the Legislature’s determination of the proper balance between preventing double-recovery and South Carolina’s strong public policy favoring the settlement of disputes.” Riley at 196, S.E.2d at 830 (citation and internal quotation omitted). “A nonsettling defendant is entitled to credit for the amount paid by another defendant who settles for the same cause of action.” Rutland v. SC Dep’t of Transp., 400 S.C. 209, 216, 734 S.E.2d 142, 145 (2012) (citing Welch v. Epstein, 342 S.C. 279, 312-313, 536 S.E.2d 408, 425 (Ct. App.2000)). “The trial court’s jurisdiction to set off one judgment against another is equitable in nature and should be exercised when necessary to provide justice between the parties.” Id. “Allowing this credit prevents an injured person from obtaining a double recovery for the damage he sustained, for it is almost universally held that there can be only one satisfaction for an injury or wrong.” Id. (internal quotations omitted; citing Truesdale v. SC Hwy Dep’t, 264 S.C. 221, 235, 213 S.E.2d 740, 746 (1975), overruled on other grounds by McCall v. Batson, 285 S.C. 243, 329 S.E.2d 741 (1985)).

When a prior settlement involves compensation for the same injury for which the jury awarded damages, the right to setoff arises as an operation of law. However, when the settlement involves compensation for an injury different from the one tried to verdict, there is no set off as a matter of law. When the settlement is argued

to involve two claims, one of which involves the same injury as the claim tried to verdict and one of which does not, the circuit court must make the factual determination of how to allocate the settlement between the claims.

Stoneledge at Lake Keowee Owners' Association, Inc. v. IMK Development Co., LLC, 425 S.C. 276, 301, 821 S.E.2d 509, 522 (Ct. App. 2018), reh'g den. (Dec. 13, 2018), cert. granted (Aug. 6, 2019) (citations and internal quotations omitted). And when a plaintiff attempts to allocate the prior settlements, the court should review the allocation under the principles of equity. See eg. Rutland at 216, 734 S.E.2d at 145 (noting it was proper for the trial court to reallocate the proposed settlement allocation because there was no evidence of conscious pain and suffering, so all the settlement funds were reallocated by the court to the wrongful death claim).

Although not explicitly explained in the case law discussing setoff, the appellate courts analyze the setoff appeals under an abuse of discretion standard. Under this standard of review, the appellate court must give some deference to the ruling by the trial court. See State v. Lyles, 379 S.C. 328, 665 S.E.2d 201 (Ct. App. 2008). A lower court has abused its discretion when its ruling is either controlled by an error of law or based on a factual conclusion lacking evidentiary support. See Wilson v. Dallas, 403 S.C. 411, 743 S.E.2d 746 (2013).

An abuse of discretion occurs when the trial court's ruling is based upon an error of law, such as application of the wrong legal principle; or, when based upon factual conclusions, the ruling is without evidentiary support; or, when the trial court is vested with discretion, but the ruling reveals no discretion was exercised; or when the ruling does not fall within the range of permissible decisions applicable in a particular case, such that it may be deemed arbitrary and capricious.

State v. Allen, 370 S.C. 88, 94, 634 S.E.2d 653, 656 (2006)(citations omitted).

LAW/ANALYSIS

I. **Did the Court of Appeals Err in Failing to Find Petitioner was Entitled to a Full Setoff for the \$1 Million Insurance Proceeds from July 2018 Mediated Partial Payment/Covenant-Not-to-Execute**

On or around July 10, 2018, CBC, entered a covenant not to execute with Respondents in favor of CBC after one of its insurance carriers paid Respondents \$1,000,000. [R.1914-1917 Email response by TCR dated 6/10/2019; R.1918-1924 Complete Covenant 7/10/2018] The covenant not to execute did not include any issue releases or attempt to allocate any of the \$1,000,000 payment for purposes of setoff. Id. The covenant included language making the \$1,000,000 a “a credit in the same amount against any judgement obtained against CBC.” [R.1918-1924] Complete Covenant 7/10/2018] On June 6, 2019, twenty-one days after the trial, CBC and Respondent entered into a written settlement agreement where CBC agreed to pay an additional \$1,137,500 settlement. [R.1925-1939 Complete Settlement 6/6/2019] This written agreement purportedly allocated the \$1,000,000 settlement from 2018 as well as the new 2019 \$1,137,500 payment. [R.1925-1939 Complete Settlement 6/6/2019] Importantly, this new written agreement allocated the 2018 \$1,000,000 settlement to items not included in the trial: with \$900,000 to HVAC/electrical and \$100,000 to concrete, flooring, interior handrails, fireplaces, and drainage. [R.1925-1939 Complete Settlement 6/6/2019]. The post-verdict settlement funds were allocated with \$137,500 to exterior railings; \$100,000 to fire separation penetrations other than those caused by the location of the fire sprinkler distribution system within the fire rated wall separating the units within each building; \$400,000 framing work to provide code-compliant access to HVAC equipment; and \$500,000 to punitive damages. [R.1925-1939 Complete Settlement 6/6/2019]

“When a prior settlement involves compensation for the same injury for which the jury awarded damages, the right to setoff arises as an operation of law.” Stoneledge, 425 S.C. at 301,

821 S.E.2d at 522 (citing Widener, 397 S.C. at 473, 724 S.E.2d at 191 (Ct. App. 2012)). “Allowing this credit prevents an injured person from obtaining a double recovery for the damage he sustained, for it is almost universally held that there can be only one satisfaction for an injury or wrong.” Rutland, 400 S.C. at 216, 734 S.E.2d at 145 (internal quotations omitted; citing Truesdale, 264 S.C. at 235, 213 S.E.2d at 746 (overruled on other grounds by McCall, supra). Moreover, the actual damages awarded by the jury are to compensate the plaintiff and not to serve as additional punishment against the defendant. See Rutland at 217, 734 S.E.2d at 146 (citing 22 Am.Jur.2nd Damages §27 and Haselden v. Davis, 353 S.C. 481, 486, 579 S.E.2d 293, 296 (2003) for the proposition that “[c]ompensatory damages are intended to make the plaintiff whole, not to punish the tortfeasor.... [and w]here allocation of damages furthers that policy, we do not believe the result is inequitable.”)

On June 16, 2019 and at the end of the second week of trial, the jury provided a general verdict against CBC, Petitioner, Miracle, and Vasquez in the amount of \$6.5M. The jury determined that CBC, the general contractor in charge of the entire construction site, and Petitioner, the prime subcontractor for the siding, roofing, and deck waterproofing, were jointly responsible for the entire actual damages-general verdict in the amount of \$6.5M. Stated another way, although the Respondents asked the jury for \$12.8M to compensate them for all items still presented at trial, the jury found that after the issue released items were removed, Respondents’ repair cost and lost use damages were valued at \$6.5M. If CBC was the sole non-settled defendant, then Respondents would have to concede setoff of all settlements that were not otherwise removed from deliberation as issue releases. There is no need to parse out which items are characterized as issue releases for the post-verdict settlements because CBC, Petitioner, Vasquez, Miracle, W.C. Services, Stanley’s, and JMC were actually at the trial. “Because a verdict is deemed to be the full

measure of the plaintiff's loss, then a verdict plus a settlement would be more than full recovery. Hence, the result is the allowance of a setoff to the non-settling defendant against his verdict." James L. Ward, Jr. and Edward J. Westbrook, South Carolina Damages, Second Edition (S.C. Bar 2009).

Respondents' post-verdict allocation made on June 6, 2019 is not actually a settlement allocation, but it is an attempt to invade and interpret the general jury verdict that was rendered on May 16, 2019. Our courts have long held that it is improper for the court to invade the province of the jury. See, e.g., Kennedy v. Richland Cty. Sch. Dist. Two, 428 S.C. 98, 119, 833 S.E.2d 414, 425 (Ct. App. 2019), reh'g denied (Oct. 24, 2019), cert. dismissed (Mar. 9, 2020) (when entertaining a motion for a new trial *nisi*, there must be "compelling reasons to justify invading the province of the jury."); Stanton v. Southern Ry. Co., 56 S.C. 398, 34 S.E. 695 (1900) (noting it would be improper for the trial judge to interject his opinions into the jury charge as this would invade the province of the jury). It is the court's duty to enforce a verdict, not make it. Stonededge, 425 S.C. at 302, 821 S.E.2d at 522 (citing Joiner v. Bevier, 155 S.C. 340, 355, 152 S.E. 652, 657 (1930)). But it is also incumbent on the court to apply the statutory mandated setoff post-verdict because setoff is not a matter properly triable to the jury. Broome v. Watts, 319 S.C. 337, 342, 461 S.E.2d 46, 49 (1995).

Respondents received a general verdict in their favor, and it would be improper and inequitable for Respondents to now reinterpret the jury's verdict under the disguise of a setoff allocation. Respondents are only entitled to one recovery for their injury. See Huck v. Oakland Wings, LLC, 422 S.C. 430, 437 813 S.E.2d 288, 291 (Ct. App. 2018), reh'g den. (March 28, 2018), cert den. (Aug. 3, 2018) ("In other words, there can be only one satisfaction for an injury or wrong."); Rutland, 400 S.C. at 216-217, 734 S.E.2d at 145-146 (noting that a setoff

prevents a person from obtaining a double recovery since “[c]ompensatory damages are intended to make the plaintiff whole, not to punish the tortfeasor.”); Truesdale, 264 S.C. at 235, 213 S.E.2d at 746 (“[I]t is almost universally held that there can be only one satisfaction for an injury or wrong.”).

The Court of Appeals essentially ruled that a plaintiff may settle with a defendant, at least partially settle, and then take no steps to allocate that payment to any specific damages or causes of action until after a jury verdict has been rendered against the settling defendant and non-settling defendants. However, a common fact shared by the published setoff cases in South Carolina is the proposed allocation was disclosed *before* the *jury* rendered its verdict. See Riley v. Ford Motor Co., 414 S.C. 185, 777 S.E.2d 824 (2015) (Settlement allocation was approved by the court prior to the commencement of trial.); Rutland v. SCDOT, 400 S.C. 209, 734 S.E.2d 142 (2012) (Affirming the Court of Appeal’s decision in Rutland v. SCDOT, 390 S.C. 78, 700 S.E.2d 451 (Ct. App. 2010), reh’g den. (Oct. 29, 2010), cert. granted (Oct. 19, 2011), that a settlement allocation that was approved by the court prior to trial was properly re-allocated for setoff after trial because there was no evidence supporting damages for a survival claim.); Widener, 397 S.C. 468, 724 S.E.2d 188 (Settlement reached at start of trial and the proposed allocation disclosed before the conclusion of trial; moreover, the appellate court found the claims for actual and punitive damages arose from the same injury and were subject to setoff.); Welch v. Epstein, 342 S.C. 279, 536 S.E.2d 408 (Ct. App. 2000), reh’g den. (Nov. 4, 2000) (Settlements were allocated between survival and wrongful death claims prior to trial against Dr. Epstein, and because Dr. Epstein was not a party to the settlement agreement and because there was no evidence at trial in support of damages for a survival claim, the court properly re-allocated the setoff.); Ward v. Epting, 290 S.C. 547, 351

S.E.2d 867 (Ct. App. 1986) (Settlements were allocated between survival and wrongful death claims prior to trial against Dr. Epting.)

The Court of Appeals summarizes Petitioner's argument by stating: "[Petitioner] contends the \$1 million insurance payment allocated to HVAC, electrical, drainage, and fireplaces --- matters for which damages were not sought at trial -- was a settlement for the same injury represented by the verdict in the case." Palmetto Pointe, 440 S.C. at 204, 890 S.E.2d at 611 (Ct. App. 2023), reh'g denied (Aug. 10, 2023). The Court of Appeal went on to agree with Respondents' argument that those damages were not for the same injury because Respondents removed damages for HVAC, electrical, drainage, and fireplaces from the trial. The Court of Appeals did not address the \$1 million paid in 2018 having not being allocated until after the 2019 trial.

The Court of Appeals did include a footnote stating that Petitioner did not argue this 2018 payment was unallocated based on the document having been executed in 2018 at the time of the payment. However, Petitioner argued in its briefs and oral argument that the allocation of the \$1 million 2018 payment was untimely, and, therefore, never actually allocated by Plaintiffs. Further, there is no true distinction between the arguments made by Petitioner in its briefs, that the \$1 million payment was untimely, and the Court of Appeals' articulation in footnote 14 regarding arguments it says Petitioner did not maintain.

In Petitioner's Final Response Brief, Petitioner was discussing Respondents' attempted allocation of all of CBC's settlement payments and reiterated that Respondents' allocation of the settlement monies was untimely and that only the 2019 settlement agreement had any proposed allocation. Although, the language from Petitioner's briefs does not exactly match Footnote 14, the argument that plaintiffs' cannot allocate the previous payment after the jury trial is essentially the same as arguing that the execution of the document in 2018 without any allocation language

meant it was unallocated. Therefore, the 2018 \$1,000,000 was a settlement for the same injury represented by the verdict in the case. It would be inequitable and inconsistent with prior South Carolina jurisprudence to allow a defendant to partially settle through a covenant without an allocation, then after a jury verdict, allocate the partial settlement.

The Court of Appeals agreed that the \$500,000 Respondents attempted to allocate after the jury verdict to various scopes of work that were not within Petitioner's scope of work was untimely, and "in reality a satisfaction of judgment, as opposed to an allocated settlement. Palmetto Pointe at Peas Island Condo. Prop. Owners Ass'n, Inc. v. Island Pointe, LLC, 440 S.C. 190, 206, 890 S.E.2d 603, 611 (Ct. App. 2023), reh'g denied (Aug. 10, 2023). The same result should be reached for both the \$1,000,000 payment from 2018 and for the for the \$500,000 Respondents allocated to punitive damages because neither were allocated until after a general verdict was issued.

II. Did the Court of Appeals Err in Finding Petitioner was Not Entitled to Receive a \$500,000 Setoff for the Punitive Damages Portion of the CBC Settlement by Finding the Punitive Damages Award was Not a Part of the Same Injury?

South Carolina courts have already determined that "when a plaintiff seeks actual and punitive damages in the same claim, both types of damages arise out of the same injury [and are subject to setoff]." Widener, 397 S.C. at 472, 724 S.E.2d at 191. In this case, the jury awarded the same general verdict against CBC and Petitioner for \$6.5M actual damages and \$500k punitive damages. As discussed above, these damages all arise out of the same injury for construction defect repairs and lost use. Petitioner is not being relieved of its obligation to pay the punitive damages verdict assigned against it; rather, the total verdict of \$7M against Petitioner is the starting point against which the setoffs are applied. The Court of Appeals misapplied section 15-32-520(G)

because, as stated in the Opinion, section 15-32-520(G) applies to bifurcated damages trial. There was no bifurcated damages trial in this case.

The Court of Appeals' reliance on McGee v. Bruce Hosp. System, 344 S.C. 466, 545 S.E.2d 286 (2001), reh'g den. (May 14, 2001) is misplaced. McGee is a medical malpractice case where the court found a physician that was improperly dismissed from trial could still be deemed liable for his willful and wonton conduct by the jury in a second trial. Prior to the retrial of the case, the co-defendant physician settled. The settlement covered all the actual damages. The court found the retrial against the non-settling physician could go forward, but the petitioner must prove that the non-settling physician is liable for actual damages and "[a]t the conclusion of the trial, if the jury has found respondent liable for actual and punitive damages, then the trial court will strike the award of actual damages given the fact that petitioner's actual damages have already been satisfied by [the first physician]." See Id. at 472. McGee prevents a plaintiff from getting a double recovery of their actual damages.

Even if the Court of Appeals interpretation of McGee and Widener are correct, Petitioner is still entitled to a setoff of the \$500,000 purportedly allocated to punitive damages. This attempted allocation was made after a general verdict was issued making the post-verdict allocation untimely the same way all the attempted allocations of CBC's settlement payments were untimely. Therefore, the \$500,000 allocated to punitive damages is actually a partial satisfaction of the general verdict. Stated differently, because Respondent attempted to allocate to punitive damages after the verdict was issued, there was no allocation. Petitioner is entitled to a complete setoff of all funds paid by CBC.

III. Did the Court of Appeals Err in Failing to Find Petitioner was Entitled to a Full Setoff for the Pretrial Settlements Between Respondents and Novus, Atlantic, H and A, and Cohen's?

It is established law that Respondents here are not entitled to multiple awards for the same injury. See Welch, 342 S.C. 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, 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.”); Riley, 414 S.C. at 195, 777 S.E.2d at 830 (“[I]t is almost universally held that there can be only one satisfaction for an injury or wrong.”); Hawkins v. Pathology Assocs. Of Greenville, PA, 330 S.C. 92, 113 498 S.E.2d 395, 406 (Ct. App. 1998) (“A non-settling defendant is entitled to credit for the amount paid by another defendant who settles.”).

The trial judge abused her discretion when she failed to act as the gatekeeper to prevent such a double recovery. “Compensatory damages are intended to make the plaintiff whole, not to punish the tortfeasor.” Rutland, 400 S.C. at 217, 734 S.E.2d at 146. Respondents are made whole when the proper setoffs are applied. Petitioner’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. See Id.

In this case, Respondents sought damages to repair the Project and for lost use. The trial judge informed the jury that the damages being sought by Respondents were 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. See Trial Transcript Week Two, p.815 ll.8-17; p.816 ll.9-12; and p.816 ln.23—p.817 ln.5. [R.1735-1737]

Petitioner concedes that it, as well as CBC, Miracle, Vasquez, and W.C. Services, received the benefit of a lower trial demand when the items labeled as issue releases were taken out of

Respondents' repair cost estimate. See The Oaks at Rivers Edge Property Owners Association, Inc. v. Daniel Island Riverside Developers, LLC, 420 S.C. 424, 803 S.E.2d 475 (Ct. App. 2017), reh'g den. (Oct. 19, 2017). However, Petitioner is not seeking to get credit for the issue releases, but those settlements that were not specifically removed from the trial.

Respondents requested and received a general verdict form, over the objections of the defendants at trial. [R.684-685 Wk-1 Trans p.115 ln.23—p.116 ln.21; R.687 Wk-1 Trans p.155 ll.14-18; R.1527-1529 Wk-2 Trans p.493—p.495 ln.4; R.1589-1590 Wk-2 Trans p.656 ln.4—p.657 ln.18; R.1596 Wk-2 Trans p.669 ll.14-18; R.1607-1614 Wk-2 Trans p.680 ln.16—p.687 ln.14; R.1624-1626 Wk-2 Trans p.697 ln.3—p.699 ln.7; R.1877-1904 Emails dated 5/15/2019 from Plaintiff, CBC, Petitioner, Miracle, Vasquez forwarding proposed verdict forms; R.1905-1911 Email dated 5/14/2019 from WC Services forwarding proposed verdict form; R.1748-1749 Wk-2 Trans p.828 ln.15—p.829 ln.12; R.116-122 Verdict; R.1624 Wk-2 Trans p.697 ll.3-7] Because a general verdict was used, it was impossible for the trial judge to know any amount of the general verdict that was meant for the scopes of work performed by Novus, Atlantic, H and A, and Cohen's. Therefore, it is prejudicial and an abuse of discretion to try to assign a percentage of each of these settlements simply based on Respondents' recommendations, as the trial judge did and the Court of Appeals affirmed. Because evidence of damages related to each of these scopes was presented to the jury and Respondents' chose to use a general verdict form, Petitioner is entitled to a full setoff for each of the settlements paid by Novus, Atlantic, H and A, and Cohen's.

CONCLUSION

Petitioner respectfully submits the Court of Appeals overlooked or misapprehended the application of South Carolina statutory and common law in the above discussed manner. Accordingly, Petitioner respectfully requests this Court rule that Petitioner is to be given setoff for

the \$1 million settlement for CBC's 2018 settlement payment to Respondents; Petitioner is given a \$500,000 setoff for the punitive damages portion of CBC's post-trial settlement; and Petitioner is entitled to setoff for the entirety of the pretrial settlements between Respondents and Novus, Atlantic, H and A, and Cohen's.

Respectfully submitted,
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