THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Charleston County
Court of Common Pleas

Jennifer B. McCoy, Circuit Court Judge

Case No. 2015-CP-10-00955
Supreme Court Case No. 2023-001422

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

v.

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.; WC 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 LLC; Mark Palpoint a/ka Micah Palpoint; Elroy Alonzo Vasquez; Chris a/k/a John Doe 61; Alderman Construction; Stanley's Vinyl Fence Designs; Cohen's Drywall Company, Inc; Mosley 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 Tri-County Roofing, Inc. is the Petitioner.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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Plaintiffs/Respondents, Palmetto Pointe at Peas Island Condominium Property Owners Association, Inc. (the "Association") and Jack Love, individually, and on behalf of all others similarly situated (collectively, "Plaintiffs"), submit this return in opposition to the petition for a writ of certiorari of Petitioner/Defendant, Tri-County Roofing, Inc. ("TCR").

COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. Do special and important reasons exist to warrant a writ of certiorari?

II. Did the Court of Appeals err in not finding TCR entitled to a full setoff for the $1,000,000 insurance proceeds from July 2018 Mediated Partial Payment/Covenant-Not-to-Execute?

III. Did the Court of Appeals err in not finding TCR entitled to a setoff with respect to the $500,000 award of punitive damages against it?

IV. Did the Court of Appeals err in not finding TCR entitled to a full setoff for Plaintiffs' pre-trial settlements with Novus[1], Atlantic[2], H and A[3], and Cohen[4]?

V. Should the petition be denied for the additional reason that TCR cannot both pursue an "empty chair" defense and argue for setoff at the same time?

COUNTER-STATEMENT OF THE CASE

A. Introduction

This case concerns the construction of forty (40) townhome-style residences located in twenty (20) buildings and related common areas on Peas Island, just outside of Folly Beach, South Carolina (the "Project"). The Project was constructed in 2006–2007 by general contractor Complete Building Corporation ("CBC") and its subcontractors and sub-subcontractors. After Plaintiffs started noticing persistent roof leaks in early 2015, they initiated this construction defect suit on February 13, 2015, seeking compensation to remedy the defects. (R. pp. 201-221.) Plaintiffs asserted claims of

[1] "Novus" refers to design professional Novus Architects, Inc. f/k/a SGM Architects, Inc.
[2] "Atlantic" refers to framing subcontractor Atlantic Building Construction Services, Inc. n/k/a Atlantic Construction Services, Inc.
[3] "H and A" refers to framing subcontractor H and A Framing Construction, LLC.
[4] "Cohen" refers to Cohen's Drywall Company, Inc.

negligence/gross negligence and breach of warranty against CBC, its subcontractors, including TCR, and their sub-subcontractors, which performed the siding, roofing, flashing, framing, grading, concrete work, fire sprinklers, deck waterproofing, aluminum wrapping of pressure treated beams, soffit, fascia, hand and guard rails, mechanical/electrical and painting/caulking work. (*Id.*)

B. The Trial

From May 6-16, 2019, the case was tried before the Honorable Jennifer B. McCoy and a jury against seven Defendants: (1) CBC; (2) TCR; (3) Miracle Siding, LLC and Wilson Lucas Sales d/b/a Miracle Siding ("Miracle"); (4) Eloy Alonso Vasquez ("Vasquez"); (5) Stanley's Vinyl Fence Designs ("Stanley"); (6) WC Services, Inc. ("WCS"); and (7) JMC Construction, LLC and JMC Construction, Inc. (collectively, "JMC").

During the trial, Stanley, the vinyl exterior railing installer, settled with Plaintiffs and was dismissed from the case. (R. p. 838, lines 7-10.) JMC was dismissed by directed verdict at the close of Plaintiffs' case. (R. p. 1022, line 25-p. 1023, line 6.)

On Thursday, May 16, 2019, two causes of action against the remaining Defendants, negligence and breach of implied warranties, were submitted to the jury. (R. p. 1746, line 24.) The jury found for Plaintiffs on both the negligence and breach of implied warranty claims, awarding actual damages in the amount of $6,500,000. (R. p. 1756, line 25-p. 1759, line 24.) The jury made an express finding of grossly negligent, willful, and/or wanton conduct as to both TCR and CBC and separately awarded punitive damages of $500,000 against each of them. (*Id.*)[5] The jury returned a defense verdict in favor of WCS. (*Id.*)

[5] TCR's second-tier subcontractors, Miracle and Vazquez, were found simply negligent. A supplemental post-trial argument was conducted pursuant to § 15-38-15 of the South Carolina Contribution Among Tortfeasors Act, and the jury found that Vazquez and Miracle were each five percent (5%) responsible for the total damages. (R. p. 1760, line 5-p. 1779, line 14; R. pp. 116-122.)

Following the jury verdict of May 16, 2019, but prior to the Trial Court's entry of final judgment, three (3) of the last four (4) Defendants settled with Plaintiffs in the following amounts: CBC ($1,137,500); Miracle ($325,000); and Vasquez ($325,000). (*See* R. pp. 1912-1913.)

C. TCR's Post-Trial Motions

On May 28, 2019, TCR filed six (6) post-trial motions: (1) JNOV; (2) New Trial Absolute; (3) New Trial *Nisi Remittitur*; (4) Motion Regarding Punitive Damages and Negligence *Per Se* Jury Charge; (5) Motion for Setoff; and (6) Motion to Dismiss CBC's Cross-Claims. (R. pp. 525-545.)

On June 7, 2019, the Trial Court held a hearing and heard Plaintiffs' and TCR's arguments on TCR's post-trial motions. (*See generally* R. pp. 1785-1845.) During and after the hearing, TCR and Plaintiffs submitted separate allocation charts to the court: Plaintiffs' chart showed TCR was entitled to a $1,670,000 setoff, for a total judgment in the amount of $5,330,000, and TCR argued it was entitled to a $5,415,000 setoff, for a total verdict of $1,585,000. (R. p. 1823, lines 13-15; R. pp. 1912-1913.)[6] TCR argues that it is owed a dollar-for-dollar setoff for every settlement dollar paid by any settling Defendant regarding issues that were not "otherwise removed from review by the jury and designated as issue releases", and also argues it is entitled to a credit for the $500,000 punitive damages award the jury levied against CBC. (Appellant's Final Brief).

[6] Separate and apart from its unsupported and illogical arguments, TCR's math, then and now, has been repeatedly indecipherable. Further, the math and supporting analysis presented in the post-trial motion do not match that which was presented in the motion to reconsider, and neither match what is set forth in its principal appellate brief, making this entire appeal improper, as the math and arguments on appeal were never presented to the Trial Court for consideration. (*Compare* May 28, 2019, TCR Post-Trial Motions at 17-18 *with* August 5, 2019, TCR MTR at 7 *and* Final Brief of Appellant at 45.) For a typical illogical argument, please see pages 23-24 of principal appellate brief, which assert that the failure to grant the additional setoffs results in TCR paying CBC's fire protection damages. By all appearances, the jury decided against the fire protection claim and awarded zero damages against the fire sprinkler installer on this issue.

On July 23, 2019, the Trial Court denied TCR's JNOV and New Trial Motions. (R. pp. 166-167.) As for the Motion for Setoff, the Trial Court agreed with Plaintiffs' allocation and granted a setoff in the amount of $1,670,000, entering a total, final judgment against TCR of $5,330,000. (*Id.*)

D. TCR's Motion to Reconsider

On August 5, 2019, TCR filed a Rule 59(e) Motion to Reconsider the Trial Court's July 23, 2019, Order. (R. pp. 620-631.) Specifically, TCR sought reconsideration on the amount of final judgment against TCR. (R. p. 622.) Plaintiffs filed a Memorandum in Opposition to TCR's Motion to Reconsider on August 15, 2019, responding to TCR's sole argument contained therein: the alleged error in the court's decision regarding setoff. (R. pp. 632-648.)[7]

E. Trial Court's Order Denying TCR's Motion to Reconsider

On September 25, 2019, the Trial Court issued a reasoned order denying TCR's Motion to Reconsider. (R. pp. 168-173). The Trial Court's Order Denying TCR's Motion to Reconsider highlighted the absence of evidence presented by TCR to establish its contention that it was entitled to a dollar-for-dollar setoff (including even as to the award of punitive damages against it) for every settlement dollar paid by any settling Defendant regarding issues that were not removed from review by the jury and designated as issue releases:

> TCR has not demonstrated to the court that it is entitled to a dollar-for-dollar setoff of all sums Plaintiffs have received from the settling defendants, nor can TCR do so based upon the record before me.

(R. p. 170.) Conversely, the Trial Court held that TCR sought to setoff damages which were not compensation for the same injuries encompassed in the jury's verdict, and that TCR "failed to meet its burden of persuasion to demonstrate to the court that the allocations […] are unfair or unjust." (R. p.

[7] Because this motion included settlement amounts, which were confidential, Plaintiffs served this Motion and its Exhibit "A" on the Court and opposing counsel via email. (R. p. 2146.) The Trial Court accepted and considered this filing in reaching its final judgment.

171.) The Trial Court was further persuaded by Plaintiffs showing that no double recovery was had, especially given that they had reduced their damages estimate and removed a number of defects from the jury's consideration. (*Id.*)

F. TCR's Appeal

On October 14, 2019, TCR filed its Notice of Appeal to the South Carolina Court of Appeals. According to this Notice, TCR appealed from the: (1) July 23, 2019, Form 4 Order Denying TCR's JNOV, New Trial, New Trial *Nisi*, and Motion Regarding the Award of Punitive Damages; and (2) September 25, 2019, Order Denying TCR's Motion to Reconsider. (R. pp. 174-200.) On June 25, 2020, however, TCR filed its principal brief with the Court of Appeals and abandoned all issues on appeal except for the issue of setoff. (*Id.*) After briefing concluded before the Court of Appeals, oral arguments were heard on February 14, 2023. The Court of Appeals issued its opinion on June 28, 2023. A petition for rehearing with suggestions for rehearing en banc was filed thereafter and on August 10, 2023, was denied. On September 11, 2023, TCR filed the instant Petition for Writ of Certiorari. Plaintiffs timely submit this return in opposition to the instant petition.

STATEMENT OF PERTINENT FACTS

A. Introduction

CBC hired TCR to install the siding, roofing, and deck waterproofing/membranes at the Project. (R. pp. 2183-2193.) TCR, in turn, subcontracted out these scopes of work to second-tier subcontractors. The lion's share of evidence presented at trial concerned water damage resulting from the improper installation of portions of TCR's three scopes of work: siding, roofing, and deck waterproofing/membranes. (*See, e.g.,* R. p. 1336, line 3-p. 1337, line 15) (testimony from TCR's expert, Eddie Polk, regarding severely degraded wood below the intersection of roof and decking); *see also* R. p. 1460, lines 2-25 (testimony from TCR's owner, Mark Poyner, regarding sub-standard work of his

subcontractors); R. p. 1564.1, line 6-p. 1564.4, line 16, R. p. 1564.5, lines 10-16, R. p. 1564.6, line 6-p. 1564.7, line 4 (TCR's siding installer's admissions regarding faulty siding installation); R. p. 844, lines 10-20 (testimony from Association's expert, Russell Mease, regarding "very poor" coordination between trades at the intersection of TCR's scopes of work); R. p. 830, lines 11-25 (testimony from homeowner, Kathleen Fitch, regarding shingles and siding blowing off the buildings).) After considering the evidence presented at trial, the jury returned a general verdict against TCR in the amount of $6,500,000, and separately found TCR grossly negligent, levying a punitive damages award of $500,000. (R. p. 116-122.)

The Trial Court found that TCR was entitled to a $1,670,000 setoff against the jury's verdict and issued a Final Order reducing the total verdict amount against TCR from $7,000,000 to $5,330,000. (R. pp. 166-167; R. pp. 170-171.) The Trial Court's setoff was based upon its knowledge of the case, including extensive pre-trial proceedings (with extensive briefings from all parties); the evidence and arguments presented at and after trial; Plaintiffs' proposed allocations; and the court's own review of all settlement agreements. (R. p. 170-171.)

B. Settlements

Prior to the start of trial, Plaintiffs received $4,725,000 in settlements. (R. p. 648.) There is a category of these pre-trial settlements that TCR refers to as "agreed issue released settlements."[8] (Final Brief of Appellant at 22, 43-44.) TCR concedes it is not entitled to receive a setoff for the "issue release settlements," because those items were "removed from the trial of this case." (*Id.* at 43.) There is a second category of eleven (11) pre-trial settlements for which Plaintiffs have conceded TCR is entitled to either a full or partial setoff, which totals $587,500. (R. p. 648.) For five (5) of these settlements, Plaintiffs

[8] TCR's repeated references to "agreed" and/or "designated" issue releases is a misnomer as to TCR, and it is a red herring as it relates to setoff. Plaintiffs had issue release agreements with the general contractor (not TCR) to procure the general contractor's dismissal of its contractual indemnity cross-claims against the settling parties. (*See* R. pp. 483-492; *see, e.g.,* R. pp. 1995-2009.)

concede only a partial setoff in order to account for any potential overlap in the injury and resulting damage caused by the settling party with the issues tried before the jury. (R. pp. 640-641.) In total, therefore, and accounting for the setoffs offered and/or conceded, Plaintiffs received $4,137,500 in pre-trial settlements for which no setoff is being offered or conceded.

There are five (5) settlements[9] and corresponding partial setoff amounts that TCR disputes: CBC, Atlantic (framing subcontractor), CBC (general contractor), H and A (framing subcontractor), Cohen (drywall and insulation subcontractor), and Novus (project architect) (hereinafter, the "Contested Settlements"). (R. pp. 637-638.) Four (4) of the five (5) Contested Settlements were settlements that resulted in the de facto exclusion of all or substantially all of the settling Defendants' scope of work or related damages at trial. The fifth, CBC, was contractually allocated by written agreement of the parties; this same allocation is also contested by TCR.

(1) Allocation of Insulation and Drywall Settlements

Cohen supplied and installed the drywall and insulation at the Project. (R. pp. 387-408.) In turn, Cohen's settlement involved damages associated with Cohen's scope of work. (R. pp. 2107-2121.) Drywall issues related to firestopping repairs were litigated at trial (*see, e.g.* Tr. Trans. 394:4-25); however, insulation issues were not litigated, and Plaintiffs sought no damages related to insulation deficiencies. (*See* R. pp. 2619-2629.) Plaintiffs allocated Cohen's $125,000 settlement equally between drywall and insulation, so that each was attributed $62,500. (R. pp. 632-648.) The Trial Court reduced the final judgment against TCR by $62,500 to account for the potential of drywall overlap. (R. pp. 166-167; R. pp. 168-173.) TCR has not proffered any evidence showing that it is entitled to a dollar-for-dollar setoff for the monies paid by Cohen beyond the $62,500 allocated to drywall.

[9] In its post-trial briefings, TCR claimed it was entitled to a setoff of $22,500 paid by Builders Services Group ("BSG"). BSG installed the fireplaces at the Project, which were not litigated. TCR dropped its claim to this setoff. (Final Brief of Appellant at 23 n.4.)

(2) Allocation of Framer Settlements

Atlantic and H & A were the framing subcontractors at the Project (collectively, the "Framing Subcontractors"). The Framing Subcontractors' settlements, which totaled $1,200,000, covered two (2) principal issues: (1) shear walls[10] and (2) window installation. Neither issue was presented to the jury, and neither was included in the damages sought at trial. (R. p. 1653, line 3-9; R. p. 1829, line 17-p. 1830, line 21, R. p. 1839, lines 10-23.) Plaintiffs' allocation accounted for any potential overlap, and the Trial Court reduced the final judgment against TCR by $125,000 to account for it.[11] TCR has not proffered any evidence showing that it is entitled to a dollar-for-dollar setoff for the monies paid by the Framing Subcontractors and has not proffered any evidence or argument contrary to Plaintiffs' allocation, which was adopted by the Trial Court.[12]

To be clear, there is a dearth of evidence presented by TCR that framing defects were litigated or that they proximately caused any damage. The best TCR could do before the Court of Appeals was to reference a quote that during siding replacement, the fastening of the existing substrate should be confirmed. This is a complete failure of evidence.

(3) Allocation of Novus Settlement

Novus provided professional architectural services at the Project. (R. pp. 275-341.) Plaintiffs' claims against Novus arose out of Novus' breach of its professional standard(s) of care and damages

[10] A "shear wall" is a (vertical) wall with increased fastening and/or reinforcement to keep the building (stick) framing from being distorted (blown over) by winds (or other lateral forces).

[11] Plaintiffs' allocation chart incorrectly indicated that the Framing Subcontractors settled for $1,250,000, and Plaintiffs' intent was to allocate a 10% setoff to account for potential overlap of issues at trial. The total framing settlements were actually $1,200,000; therefore, the overlap setoff was in excess of 10%.

[12] The shear wall field reports by Britt Peters were listed as Exhibits 459-463 in the list appended to Plaintiffs' Pretrial Brief but were not entered into evidence. (R. pp. 1854-1876.) Also listed was Ex. 613, evidence regarding collateral litigation on the shear walls. (*Id.*) Similarly, the Britt Peters engineers (Jason McDonald and Seth Robertson) were listed as potential witnesses in the joint voir dire presented to the Court and jury. (R. pp. 1846-1853.) TCR has the shear wall evidence and testimony and chose not to address it.

related to those unique breaches. (R. p. 340.).[13] Plaintiffs' settlement with Novus was for its claim of professional negligence, a cause of action inapplicable to TCR. (R. p. 1827, lines 17-23.) At trial, Plaintiffs did not pursue a claim of professional negligence or otherwise put-on evidence regarding design defects or professional negligence during contract administration.

TCR's reference to some vague project involvement of an empty chair architect, without showing any architect negligence or proximate causation of damages, does not alter the overwhelming evidence in the record concerning TCR's own negligent conduct. (*See* Final Brief of Appellant at 20-21,40-42.) There was no expert testimony presented at trial to establish the architect's standard of care, their breach of standard of care, or that any theoretical but unproven professional negligence proximately caused any of the damages comprising the judgment against TCR. This was recognized by the Trial Court:

> TCR has not demonstrated any evidence in the record to establish that Novus was, or ever could be, jointly responsible for TCR's hundreds or perhaps, thousands of code violations in the defective installation of otherwise non-defective materials such as roof shingles and siding. Yet, TCR advocates for a setoff in the entire amount of the Novus payment. The court found initially and now reaffirms its earlier finding that TCR has not established that the Novus settlements and other like settlement overlap or coincide with the damages the jury awarded against it.

(R. p. 172.) If anything, TCR's half-hearted attempts to blame empty chair Defendants like the architect underscores the Trial Court's determination that damage allocation was essentially tried to the jury. (*Id.*)

Plaintiffs allocated $65,000, or 10% of Novus' settlement, to account for any potential overlap between injuries and resulting damage caused by Novus and injuries and resulting damage tried to a verdict against TCR. (R. pp. 632-648.) The Trial Court agreed and further reduced the judgment against TCR by $65,000. (R. pp. 166-167; R. pp. 168-173.) TCR has not proffered any evidence showing that it

[13] Novus had a professional services contract directly with the owner/developer that did not run through or incorporate the general contractor's contract, duties, or obligations. (*See* R. pp. 2148-2182.)

is entitled to further setoff and has proffered no evidence contradicting Plaintiffs' allocation, which was adopted by the Trial Court.

(4) Allocation of CBC Pre- and Post-Trial Settlement

Plaintiffs and CBC contractually allocated CBC's $2,137,500 settlement as follows:

- CBC's initial $1,000,000 settlement (by the first exhausting insurance carrier), which was consummated by a covenant not to execute entered into a year before trial on July 10, 2018, was allocated between HVAC, concrete, flooring, interior handrails, and fireplaces. (R. pp. 1918-1924; R. pp. 1925-1939.)

- CBC's subsequent $1,375,000 post-trial, but pre-final judgment settlement was allocated between exterior railings ($137,500); fire separations ($100,000); HVAC framing ($400,000); and punitive damages ($500,000).

CBC's post-trial settlement was allocated on June 6, 2019, before the Trial Court entered final judgment against TCR. (R. pp. 1925-1939; R. pp. 166-167.). Of the allocated items, the record reflects that only the $137,500 allocated to exterior railings related to a damage issue tried to and decided by the jury. (*See, e.g.,* R. p. 625 (TCR acknowledging that HVAC, window product, grading, paving, flooring, interior trim and railings, and concrete issues "were taken out of the case" and not before the jury).) The Trial Court agreed and provided TCR a $137,500 setoff to account for this damage overlap. (R. p. 166-167; R. pp. 168-173.). This determination is reasonable and supported by the facts of this case.

C. Damages Presented at Trial

The way that this case was tried made it clear to the jury that the Project experienced multiple defects and damages, many of which were not to be included in their verdict. All parties introduced evidence, including expert testimony, photographs, and repair estimates, detailing the myriad of problems these forty (40) homeowners suffered. (*See, e.g.,* R. pp. 2619-2629; R. pp. 2683-2977; R. pp. 2978-2992.) The jury was presented with at least five (5) different damage analyses during the May 2019 trial of this case: Plaintiffs' revised trial estimate; Plaintiffs' five (5) category breakdown of their trial

estimate; Plaintiffs' outdated December 2017 estimate; and the original and revised defense estimates. (R. p. 1255, lines 21-24.)[14]

The jury heard from Plaintiffs' repair cost expert, licensed general contractor Jay Handegan, who prepared a cost estimate to perform the repair scope recommended by Plaintiffs' forensic engineer, Russell Mease, P.E. (R. p. 950, lines 8-17.) In December 2017, Mr. Handegan issued a **$15,258,000** damage estimate. (R. pp. 2619-2629.) At trial, Plaintiffs took this 2017 repair estimate, removed numerous items that no longer applied to the case being tried, and added repair costs for several additional defects which had arisen (primarily including fire suppression repair costs). (R. p. 950, line 8-p. 951, line 17.) This revised estimate (R. pp. 2993-3003) was marked for identification purposes only, but the foregoing details were put into evidence through the oral testimony of Plaintiffs' repair expert, Jay Handegan. (R. p. 950, line 8-p. 951.) The revised total repair cost testified to by Handegan was $13,428,000. (R. p. 951, lines 9-11.)

Plaintiffs further reduced the damages it sought by asking the jury to return a verdict of $12,400,000, to account for issues which were not litigated at trial:

> 13, 4, 28. $13,428,000, that is what Mr. Handegan told you was his revised estimate. That's how he revised Exhibit 677 when he testified to you at trial: 13.428. 26,000 of that is attributable to the clubhouse. We never figured out who did the clubhouse, so we're going to just knock it off the top. A little less than a million of that relates to windows, and the only window claim we really addressed with you all much this week was the failure to properly trim[15] around the windows and to leave the caulk joint between the window and the trim so that works right. That's part of this case. The window product itself is not part of this case. So, we're deducting that, and we're asking you to return a verdict for plaintiffs of actual damages of $12.4 million plus the homeowners' loss of use.

[14] The jury heard from Defendant CBC's repair estimator, Steve Watkins with Watkins Services. Watkins' estimate, based on a limited scope of a series of spot repairs, was rejected by the jury. (*See* R. pp. 2679-2682.)

[15] At trial, TCR conceded that it and its subcontractor, Miracle, applied the trim around the windows—not the framer. (R. p. 1411, line 19-p. 1412, line 8.)

(R. p. 1652, line 22-p. 1653, line 11.) Plaintiffs also asked the jury to include a loss of use award in its verdict. Mr. Handegan opined that all forty (40) homeowners would have to vacate their homes for "3 months" during the repair of the Project. (R. p. 965, lines 18-24.) The jurors were then asked to compute the loss of use that should be awarded based on the reasonable rental value of the residences:

> The testimony is that Mr. Handegan is going to be in each residence for three months. There's forty residences, and the loss of use of the rental value of those residences is from 3,000 to 3,500 per month. So, we're asking for a $10,000 loss of use award for each homeowner for a total of $400,000. And you hear me say for each homeowner. Y'all may recall in evidence is an exhibit whereby each homeowner has assigned their claim to the homeowners association to bring and complete this action on their behalf so that they can get these residences repaired properly. So, it is, in fact, part of our claim in this case for the homeowners. So, 12.4 and 400,00 will be $12.8 million, and that's what we'd like you to return a verdict for, $12.8 million for plaintiffs.

(R. p. 1653, lines 11-25.)

In sum, Mr. Handegan removed $3,827,000 from his 2017 estimate and Plaintiffs further reduced damages sought by an additional $1,026,000 during closing, for a total reduction of $4,853,000. (*Compare* R. p. 1653, lines 9-11; R. p. 1653, lines 23-25 *with* R. pp. 2619-2629.) This reduction exceeds the dollar amount of settlements received prior to trial, $4,725,000, before one even considers that $1,407,500 of the pre-trial settlements resulted in issues releases, and $587,500 of the pre-trial settlements were offered and granted as setoff.

The verdict the jury ultimately returned is millions of dollars less than what Plaintiffs requested. (*Compare* R. pp. 116-122 (Verdict Form of $6,500,000) *with* R. p. 1653, lines 11-25) ($12,800,000 verdict requested).) TCR cannot and has not proved that the judgment entered overlaps with any injuries or damages purportedly included within settlements paid to Plaintiffs, beyond the $1,670,000 setoff granted by the Trial Court.

THE COURT OF APPEALS' OPINION

The Court of Appeals considered this matter and made the following well-reasoned findings in its opinion (among others):

- The $1 million insurance payment allocated to HVAC, electrical, drainage, and fireplaces – matters for which were not sought at trial – did not represent the same injury represented by the verdict in the case. (Ct. App. Op. p. 11).

- By eliminating repair costs for HVAC, electrical, drainage, and fireplaces from its damages estimate, Plaintiffs effectively gave TCR (and all the defendants at trial) a setoff and thus the trial court did not err in declining to give a second reduction by setting off this amount from the Verdict. (*Id*. at p. 11).

- The form of the jury's verdict indicates it found TCR and CBC each individually liable for a punitive damages award. (*Id*. at p. 13).

- Both TCR and CBC proceeded to a verdict on the punitive damages issue and the verdict indicated separate exemplary damages for each tortfeasor's conduct. (*Id*. at p. 13).

- As to setoff for pretrial settlements of Novus,

    - Defendants mentioned the work of the architect, Novus, a number of times at trial, ostensibly as part of the empty-chair defense. (*Id*. at p. 16).
        - There were references to the way the roof was designed as being one cause of leaking. (*Id*.).
        - Testimony was given that the subcontractors made requests for information to the architect that were never answered. (*Id*.).
        - There was testimony about the complicated intersections of the posts and roofs and decks. (*Id*.).
    - The testimony presented supports a finding that some measure of negligence by Novus in its planning impacted TCR's performance resulting in leaking in the condominiums. (*Id*.).
    - In the absence of further testimony or evidence as to the extent of Novus's responsibility for injuries encompassed in the jury's verdict, we find the trial court did not abuse its discretion in granting a 10% setoff. (*Id*.).

- Regarding setoff for pretrial settlements of Atlantic and H and A,

    - Framing was mentioned briefly at trial…. According to Plaintiffs, the record shows the only possible framing scope litigated that might relate to TCR's "siding work" was the installation of the windows' caulk joints. (*Id*. at 16).
    - Plaintiffs conceded and the trial court accepted a 10% setoff of the verdict for the Atlantic and H and A settlements, respectively, to allow for any potential overlap;

accordingly the jury verdict was set off by $75,000 for Atlantic and $50,000 for H and A. (*Id*. at 18).

- While TCR asserts some testimony was presented that framing contributed to the faulty waterproofing of the decks, we cannot conclude the trial court abused its discretion in declining to award TCR a setoff for the full amounts of the Atlantic and H and A settlements. (*Id*.)

- Regarding setoff for pretrial settlements of Cohens,

  - Plaintiffs contend drywall issues were litigated at trial but insulation issues were not and thus they proposed the $125,000 settlement be divided equally between the drywall and insulation so that each was attributed $62,500. (*Id*. at 19).
  - The court reduced the final judgment by $62,500 due to the potential of drywall overlap. (*Id*.)
  - The testimony included in the record only contains a few references to insulation. (*Id*.)
  - Accordingly, we conclude the trial court did not abuse its discretion in awarding a setoff in this amount for the Cohens settlement. (*Id*.)

In addition, the Court of Appeals concluded that TCR was entitled to an additional $500,000 in setoff (for the portion of the $637,500 CBC settlement for HVAC access and fire separation penetrations not related to fire sprinkler installation; the other $137,500 for exterior railings was previously set off and not at issue on appeal).

STANDARD OF REVIEW

A non-settling defendant's motion to set off a damages award by the amount of a codefendant's settlement with the plaintiff is addressed to the discretion of trial court. *Oaks at Rivers Edge Property Owners Assoc., Inc. v. Daniel Island Riverside Developers, LLC*, 420 S.C. 424, 436–37, 803 S.E.2d 475, 482 (Ct. App. 2017). Under an abuse of discretion standard, the trial court's ruling should be affirmed unless the ruling is based on an error of law or is without necessary evidentiary support. *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000).

As a matter of law, a non-settling defendant is only entitled to setoff payments made by a joint tortfeasor on the same claim for the same injury. S.C. Code § 15–38–50; *see also Smith v. Widener*, 397

S.C. 468, 471-2, 724 S.E.2d 188, 190 (Ct. App. 2012) ("A settlement by a joint tortfeasor reduces the claim against the other to the extent of any amount stipulated by the release or covenant. . . so long as the settlement funds were paid to compensate the same plaintiff on a claim for the same injury. When the settlement is for the same injury, the non-settling defendant's right to setoff arises by operation of law.") (citations omitted) (emphasis added); *Hawkins v. Pathology Assocs. of Greenville, P.A.*, 330 S.C. 92, 114-15, 498 S.E.2d 395, 407 (Ct. App. 1998) (holding when the prior settlement involves compensation for a different injury from the one tried to verdict, there is no setoff as a matter of law). If setoff is not established as a matter of law, then it becomes a discretionary issue for the trial judge, who must assess the need for an equitable setoff.

A non-settling defendant is only entitled to an *equitable* setoff when necessary to prevent the plaintiff from obtaining a double recovery. *Rutland v. S.C. Dep't of Transp.,* 390 S.C. 78, 82-83, 700 S.E.2d 451, 453-54 (2010) ("The Trial Court's jurisdiction to setoff one judgment against another is equitable in nature and should be exercised when necessary to provide justice between the parties. A setoff is not necessarily founded upon any statute or fixed rule of court but grows out of the inherent equitable jurisdiction of the court. Therefore, a motion for setoff is addressed to the discretion of the court, and this discretion should not be arbitrarily or capriciously exercised.") *citing Welch v. Epstein,* 342 S.C. 279, 312–13, 536 S.E.2d 408, 426 (Ct. App. 2000); *Rookard v. Atlanta & Charlotte Air Line Ry.,* 89 S.C. 371, 376, 71 S.E. 992, 995 (1911). Stated differently:

> [d]espite a defendant's entitlement to setoff, whether at common law or under section 15-38-50, any reduction in the judgment must be from a settlement for the same cause of action. Thus, where a settlement involves more than one claim, the allocation of settlement proceeds between various causes of action impacts the amount a non-settling defendant may be entitled to offset.

Oaks at Rivers Edge, 420 S.C. at 438, 803 S.E.2d at 482 (citations omitted) (*quoting Riley*, 414 S.C. at 196, 777 S.E.2d at 830). When a settlement involves more than one claim, the circuit court must make the factual determination of how to allocate the settlement between the two claims. *Smith*, 397 S.C. at

473, 724 S.E.2d at 191. The party seeking a setoff bears the burden of demonstrating to the court both that it is entitled to a setoff and also the amount of the setoff. *Diamond Swimming Pool Co. v. Broome*, 252 S.C. 379, 386, 166 S.E.2d 308, 312 (1969):

> The defendants, upon whom the burden of proof rested to establish the amount of the setoff with reasonable certainty, have failed to supply sufficient evidence to the master to permit such specific findings, and have failed to convince this court that the figure reached by the master and the lower court was erroneous.

See also In re Wells, 43 S.C. 477, 21 S.E. 334, 337 (1895) (finding the party seeking departure from the application of standard setoff rules bears the burden of proof and must be "prepared to justify such [reallocation] as fair, bona fide, and just," particularly where "there is an executed contract between [the parties], which is not contested as between them but which is sought to be invalidated by third parties").

ARGUMENT

I. Special and important reasons do not exist to warrant a writ of certiorari.

"A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons." Rule 242(b), SCACR. Understanding that the reasons set forth in Rule 242(b) neither control nor fully measure this Court's discretion or power to grant review, Plaintiffs would nonetheless note that none of these reasons is present here. The instant petition does not involve a novel question of law. There is no dissent in the decision of the Court of Appeals. The decision of the Court of Appeals is not in conflict with a prior decision of this Court. No substantial constitutional issues are directly involved. And there is no federal question involved.

Rather, the Court of Appeals has granted TCR an additional setoff of $500,000 over and above the $1,670,000 already granted by the trial court via a unanimous, well-reasoned, and thoroughly considered opinion, the entirety of which Plaintiffs incorporate herein by reference (along with their own

briefing and supplemental citations in the Court of Appels) in opposition to the Court's grant of the instant petition.[16]

Indeed, not only does the instant petition not involve any special and important reasons for granting a writ of certiorari, in its attempt to obtain a setoff with respect to the award of punitive damages against TCR, the petition is obviously contrary to this Court's precedent. TCR seeks to have this Court relieve it of the obligation to pay a punitive damages award that was particularly imposed against TCR because CBC paid the punitive damages award that was particularly imposed against CBC. The absurdity of the petition is transparently obvious where, as here, TCR is attempting to argue against this Court's well settled precedent. *McGee v. Bruce Hosp. Sys.*, 344 S.C. 466, 472, 545 S.E.2d 286, 289 n.3 (2001) ("'[T]he purpose of punitive awards is to punish a *particular* offender rather than to compensate the victim for its injury.'") (emphasis added) (quoting *Beerman v. Toro Mfg. Corp.*, 1 Haw. App. 111, 615 P.2d 749, 755 (1980)); *see also id.* at 344 S.C. at 471–72, 545 S.E.2d at 288–89 ("While it is almost universally held that there can be only one satisfaction for an injury or wrong, allowing petitioner to seek punitive damages against respondent will not result in petitioner having a double recovery. Although Dr. Pearson has paid the punitive damages levied against him, those punitive damages do not reflect the amount of punitive damages for which a jury may find that respondent is responsible.3 In this case, a jury has yet to have the opportunity to determine whether respondent's conduct was willful, wanton, or in reckless disregard of petitioner's rights. Petitioner should not be denied the opportunity to have a jury determine whether respondent is liable for punitive damages.") (internal footnote, citation, and quotations marks omitted); *cf. Atkinson v. Orkin Exterminating Co., Inc.*, 361 S.C. 156, 604 S.E.2d 385 (2004)

[16] *Cf.* Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal."); Rule 220(b)(2) ("Respondent's brief may also contain argument asking the court to affirm for any ground appearing on the record as provided by Rule 220(c).").

("According to the collateral source rule, a wrongdoer should not receive a windfall simply because the injured party received compensation from an independent source. Moreover, this rule has been liberally applied in South Carolina to preclude the reduction of damages.").[17] Indeed, the very idea that any notions of equity would call for conferring the benefit of a setoff upon a party whose conduct is deserving of punitive damages is illogical. *See Ingram v. Kasey's Assocs.*, 340 S.C. 98, 107, 531 S.E.2d 287, 291 (2000) ("'He who seeks equity must do equity.'") (quoting *Norton v. Matthews*, 249 S.C. 71, 152 S.E.2d 680 (1967)).[18]

Respectfully, TCR has not presented an argument worthy of review by this Court. Rather, it is merely attempting another bite at the proverbial apple to have this Court re-examine the Court of Appeals' thorough examination of the trial court's exercise of discretion in determining the appropriate setoff to be afforded to TCR. The Court of Appeals rejected TCR's petition for rehearing and suggestion for rehearing en banc. This Court should likewise deny the instant petition, so this 8-year-old case can be concluded.

II. The Court of Appeals did not err in not finding TCR entitled to a full setoff for the $1,000,000 insurance proceeds from July 2018 Mediated Partial Payment/Covenant-Not-to-Execute.

The Court of Appeals correctly determined that TCR was not entitled to a setoff for portion of Plaintiffs' settlement with CBC corresponding to the $1 million insurance payment allocated to HVAC, electrical, drainage, and fireplaces—matters for which damages were not sought at trial.

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[17] Of course, "[t]o qualify as a collateral source, the source must be 'wholly independent of the wrongdoer.'" *Atkinson*, 361 S.C. at 172, 604 S.E.2d at 393 (quoting *Citizens and S. Nat'l Bank of South Carolina v. Gregory*, 320 S.C. 90, 92, 463 S.E.2d 317, 318 (1995)). The requisite independence of the source of payment from the wrongdoer is certainly present here where, besides the fact that TCR in no way contributed to any payment of settlement funds with respect to the settlement between Plaintiffs and CBC, "punitive damages against two or more defendants must be separately determined" for each defendant. *McGee*, 344 S.C. at 472, 545 S.E.2d at 289 n.3 (citing *Sanchez v. Clayton*, 117 N.M. 761, 877 P.2d 567, 572 (1994).

[18] To be clear, TCR does not challenge the propriety of the award of punitive damages against it.

First off, TCR does not deny that damages for HVAC, electrical, drainage, and fireplaces were not sought at trial; nor does TCR contend that there were not in fact sufficient damages for HVAC, electrical, drainage, and fireplaces for Plaintiffs to allocate the disputed $1,000,000 to them. TCR simply argues that Plaintiffs could not allocate the $1,000,000 to these damages after the verdict.

As an initial matter, the Court of Appeals correctly noted that "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. from July 2018 after trial." (Ct. App. Op. p. 12 n.14 (emphasis added).) In its petition, TCR contends that it "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"[19] but does not provide a citation to where the supposed argument about the payment never actually being allocated was briefed. *See Jinks v. Richland County*, 355 S.C. 341, 344, 585 S.E.2d 281, 283 n. 3 (2003) ("Since County failed to argue this issue in the body of its brief, the issue is deemed abandoned); *First Savings Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (issues not argued in the brief are deemed abandoned and will not be considered on appeal); *McCall v. IKON*, 380 S.C. 649, 659–60, 670 S.E.2d 695, 701 (Ct. App. 2008) (noting an appealed order comes to the appellate court with a presumption of correctness, with the burden on appellant to demonstrate reversible error, and the appellate court is obliged to reverse when error is called to its attention, but it is not in the business of figuring out on its own whether error exists).

In any event, the supposed pre-versus-post verdict allocation issue is a red herring. Consistent with our state's public policy favoring settlements, this Court has expressly recognized:

> A plaintiff who enters into a settlement with a defendant gains a position of control and acquires leverage in relation to a nonsettling defendant. This posture is reflected in the plaintiff's ability to apportion the settlement proceeds in the manner most advantageous to it. Settlements are not designed to benefit nonsettling third parties. They are instead

[19] (Petition p. 15.)

> created by the settling parties in the interests of these parties. If the position of a nonsettling defendant is worsened by the terms of a settlement, this is the consequence of a refusal to settle. A defendant who fails to bargain is not rewarded with the privilege of fashioning and ultimately extracting a benefit from the decisions of those who do.

Riley v. Ford Motor Co., 414 S.C. 185, 197, 777 S.E.2d 824, 831 (2015) (quoting *Lard v. AM/FM Ohio, Inc.*, 901 N.E.2d 1006, 1019 (Ill. App. Ct. 2009)).

There is no authority to the effect that the plaintiff's control over the allocation of settlement proceeds is affected by the timing of the allocation—and TCR cites none. Indeed, to deny a plaintiff such authority once a verdict is rendered would obviously undermine the public policy interests in promoting settlement post-trial—and, in turn, benefit the defendant who persists in refusing to settle post-trial. The governing mechanism on the allocation of all settlements is the same before and after trial, and it is, as the Court of Appeals correctly noted, the fact "that allocations in settlements are not simply to be accepted but are to be examined to ensure a measure of fairness to all parties." (Ct. App. Op. n.13.) Again, TCR does not contend that there were not in fact sufficient damages for HVAC, electrical, drainage, and fireplaces for Plaintiffs to allocate the July 2018 $1,000,000 payment to them. In other words, TCR does not argue that the allocation of these funds to these damages tainted by fraud or wrongdoing, TCR simply argues for a blanket rule against post-verdict allocations. There is no such rule; nor should there be, because, as explained above, it would plainly frustrate the public policy in favor of settlements post-trial.

Moreover, consistent with *Oaks at Rivers Edge*, 420 S.C. 424, 803 S.E. 475, the Court of Appeals correctly recognized that the practical effect of the Plaintiffs not seeking damages for HVAC, electrical, drainage, and fireplaces at trial was to grant TCR a setoff of these damages. 420 S.C. 424, 803 S.E. 475 (finding that the non-settling party already received the benefit of settlement where the amount of settlement was reduced from what plaintiff sought at trial).

Lastly, to the extent that TCR argues that it could not have been found liable at trial for any damages for HVAC, electrical, drainage, and fireplaces, TCR concedes that it is not entitled to any setoff corresponding to these aspect of Plaintiffs' damages, because the funds paid in settlement with respect to such damages could not have been covered any injury caused by TCR, and thus TCR cannot claim that such funds correspond to payment for any injury for which TCR is liable.

III. The Court of Appeals did not err in not finding TCR entitled to a setoff with respect to the $500,000 award of punitive damages against it.

This argument is already included in Argument I above.

IV. The Court of Appeals did not err in not finding TCR entitled to a full setoff for Plaintiffs' pre-trial settlements with Novus, Atlantic, H and A, and Cohen.

The Court of Appeals correctly found TCR not entitled to a full setoff for Plaintiffs' pre-trial settlements with Novus, Atlantic, H and A, and Cohen, because Plaintiffs did not receive a double recovery.

"Despite a defendant's entitlement to setoff, whether at common law or under section 15-38-50, any 'reduction in the judgment must be from a settlement for the same cause of action.'" *Riley*, 414 S.C. at 196, 777 S.E.2d at 830 (quoting *Hawkins v. Pathology Assocs. Of Greenville*, *P.A.*, 330 S.C. 92, 113, 498 S.E.2d 395, 407 (Ct. App. 1998)). "Thus, where a settlement involves more than one claim, the allocation of settlement proceeds between various causes of action impacts the amount a non[]settling defendant may be entitled to offset." *Id*. The trial court has discretion in determining the amount of setoff when the settlement involves more than one claim. *See Glenn v. 3M Co.,* Op. No. 5975 (S.C. Ct. App. Filed Apr. 5, 2023) (Howard Adv. Sh. No. 13 at 102, 143) ("*Riley* [,414 SC. at 196, 777 S.E.2d at 830] indicates that the circuit court has discretion as to merely the amount to be setoff against the verdict when the settlement involves multiple claims.").

> A plaintiff who enters into a settlement with a defendant gains a position of control and acquires leverage in relation to a nonsettling defendant. This posture is reflected in the

> plaintiff's ability to apportion the settlement proceeds in the manner most advantageous to it. Settlements are not designed to benefit nonsettling third parties. They are instead created by the settling parties in the interests of these parties. If the position of a nonsettling defendant is worsened by the terms of a settlement, this is the consequence of a refusal to settle. A defendant who fails to bargain is not rewarded with the privilege of fashioning and ultimately extracting a benefit from the decisions of those who do.

Riley, 414 S.C. at 197, 777 S.E.2d at 831 (quoting *Lard v. AM/FM Ohio, Inc.*, 901 N.E.2d 1006, 1019 (Ill. App. Ct. 2009)).

When a plaintiff removes certain elements of damages from its case because of a pretrial settlement, the court may find the defendant tortfeasor has received the benefit of a setoff based on the plaintiff's lowered request for damages. *See Oaks at Rivers*, 420 S.C. at 442, 803 S.E.2d at 484 (affirming the trial court's denial of setoff, reasoning, "Appellants already received the benefit of the settlements" totaling $4,260,497.93 when the plaintiffs reduced their damages request by that amount).

The jury verdict against TCR and the pre-trial settlements with Novus, Atlantic, H and A, and Cohen did not result in a double recovery for Plaintiffs. Plaintiffs' expert presented damages attributable to TCR's work totaling $8.375 million, yet Plaintiffs were awarded $6 million, exclusive of punitive damages and before setoff. The $2.375 million difference is attributable to the following:

- Plaintiffs reduced their damages at trial and only asked for damages attributable to the remaining defendants.
- Plaintiffs reduced their damages by another $1 million during closing arguments for issues not specifically addressed during trial.
- TCR (and others) asserted and benefited from the empty chair defense, specifically alluding to the absence of Novus, Atlantic, H and A, and Cohens.

Plaintiffs' recovery was further reduced by the $1.67 million setoff TCR received from the trial court. Thus, the net damages awarded against TCR at trial are attributable to TCR alone. TCR has presented no evidence to contradict the trial court's allocation of the pre-trial settlements with Novus, Atlantic, H and A, and Cohen. Yet, TCR is now trying to persuade the Court that it is entitled to setoff for payments made by others for damages not related to TCR's work; effectively, a double setoff.

It was not an abuse of the trial court's discretion to allocate a percentage of settlements to setoff when the settlements at-issue covered additional items not presented at trial. TCR already benefited from a reduction in damages related to these Defendants by Plaintiff reducing their damages to only those items presented at trial and TCR's apparently effective use of the empty chair defense. Allowing TCR to benefit from additional setoff for payments made by Novus, Atlantic, H and A, and Cohen would effectively result in a double setoff.

Moreover, the gravamen of TCR's argument in this regard is that the jury's general verdict resulted in a situation wherein it was impossible for the trial court "to know any amount of the general verdict that was meant for the scopes of work performed by Novus, Atlantic, Hand A, and Cohen's." (Petition p. 19.) Aside from the fact that the converse is in fact true—that TCR cannot show there was any undue double recovery of damages relating to the scopes of Novus, Atlantic, Hand A, and Cohens—by failing to argue this point in its petition to the Court of Appeals for rehearing,[20] TCR has abandoned it before this Court. Rule 242(d)(2), SCACR ("Only those questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for writ of certiorari as a question presented to the Supreme Court.").

V. The petition should be denied for the additional reason that TCR cannot both pursue an "empty chair" defense and argue for setoff at the same time.

As TCR itself acknowledged to the Court of Appeals, it used the empty chair defense at trial:

> 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. 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.

[20] (Petition for Rehearing at 5–7 (raising no point to the Court of Appeals regarding the jury's use of a general verdict).)

(TCR's Final Resp. Br. at 3 (internal citation omitted).) Moreover, during oral argument before the Court of Appeals, counsel for TCR correctly noted the General Assembly has recognized that a party can *either* argue an empty chair defense *or* at the end of the day, seek setoff. *Palmetto Pointe v. Tri-County*, Appellate Case No. 2019-001790, available at https://media.sccourts.org/COA_Videos/2019-001790.mp4. TCR Counsel also conceded, again, that TCR argued an empty chair defense at trial. *Id.*[21]

In *Smith v. Tiffany*, this Court 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 $12,800,000 to $6,500,000. TCR'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 TCR 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.

[21] After making these concessions, TCR counsel closed his oral arguments before the Court of Appeals by noting, without a shred of support and in contravention of his earlier (accurate) statement, that irrespective of whether a party argues empty chair or not, he did not believe that precludes the party from setoff. *Id*.

That is, TCR made its choice. It presented its empty chair arguments to the jury at trial. It coupled absent-parties-were-responsible arguments with arguments to the jury that TCR (and the remaining Defendants at trial) proximately caused only $6.5 million in repair costs, that is $6.3 million less than the Plaintiffs argued to the jury. And the jury entered a verdict against TCR for the reduced amount that TCR's trial counsel advocated.

It would be inequitable to allow TCR 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 at the same time seek a reduction in the verdict for the subcontractor's settlement amount. TCR is not entitled to seek setoff too, after making its choice to argue empty chair to the jury. This blatant attempt by TCR to violate our State's mandate that a party choose to argue empty chair or seek setoff, should be rejected.

CONCLUSION

For the foregoing reasons, and, again, for the reasons set forth in the Court of Appeals' opinion, as well as in their own briefing to the Court of Appeals, the entirety of all of which is hereby adopted and incorporated by reference herein in opposition to the instant petition, Plaintiffs ask that the Court deny TCR's petition.

Respectfully submitted,

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