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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,

REPLY TO RESPONDENTS' RETURN TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF FACTS

Petitioner Tri-County Roofing, Inc. ("TCR") incorporates by reference the Statement of Facts articulated in its Petition for Writ of Certiorari.

ARGUMENT IN REPLY

I. Special and Important Reasons Exist to Warrant a Writ of Certiorari

Respondents contend that special and important reasons do not exist to warrant a writ of certiorari. Respondents submit that the Court of Appeals issued a "unanimous, well-reasoned, and thoroughly considered opinion." (Resp. Reply, p. 27).

TCR submits that the Court of Appeals' holding is in direct contravention of the well-establish law regarding setoff. See Rule 242(b)(3), SCACR. "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. The following, while neither controlling nor fully measuring the Supreme Court's discretion or power to grant review in general, indicate the character of reasons which will be considered: ... (3) Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court." Id.

As articulated, infra, as well as the arguments contained within the petition for writ of certiorari, the Court of Appeals decision is inconsistent with the well-articulated statutory and common law principles of setoff. For these reasons, a special and important reason exists to grant the petition for writ of certiorari.

II. TCR is Entitled to a Setoff of the 2018 $1,000,000 Settlement, Allocated Post-Verdict

Respondents aver that the Court of Appeals did not err in not finding TCR entitled to a full setoff for the $1,000,000 insurance proceeds from the July 2018 mediated partial payment, formalized by a covenant-not-to-execute. Specifically, Respondents contend: 1. TCR abandoned

this issue by failing to argue the same in its brief to the Court of Appeals; and 2. Allowing a party to allocate post-verdict is consistent with public policy favoring settlement.

As an initial matter, and as articulated in TCR's petition for writ of certiorari, the issue of the $1,000,000 insurance proceeds formalized by a covenant-no-to-execute, but not allocated until post-verdict, was properly before the Court of Appeals. Specifically, TCR argued in its Appellate Brief that: 1. CBC's carrier agreed to pay its $1,000,000 limits for a covenant not to execute; (App. Br. p. 22); 2. The covenant did not articulate an allocation and there was no issue release at the time of payment; 3. Respondents' first attempt to formalize settlement and allocate the $1,000,000 was in the June 6, 2019, settlement agreement with CBC, which was post-trial (App. Br. p. 22, n. 9); 4. Respondents' settlement agreement with CBC incorporated the funds from the covenant not to execute and, therefore, CBC's settlements are partial satisfaction of a judgment (App. Br. p. 29); and 5. TCR Maintained that Respondent's allocation of the settlement monies from the CBC settlement of $1,000,000 was untimely (App. Reply Br. p. 6). Accordingly, the Court of Appeals—and Respondents' within their Return—misapprehended TCR's arguments before the Court of Appeals when it noted that TCR did not argue the 2018 payment was untimely allocated.

As to the merits of this issue, Respondents focus on the state's public policy favoring settlements and cites Riley v. Ford Motor Co, 414 S.C. 185,197, 777 S.E.2d 824, 831 (2015) for the proposition that when a plaintiff settles with a defendant, it gains a position of control and acquires leverage in relation to a nonsettling defendant, and that settlements are not designed to benefit nonsetttling third parties. (Resp. Return pp. 19-20). Respondents contend there exists no authority to the effect that the plaintiff's control over the allocation of settlement proceeds is affected by the timing of the allocation. However, this statement misconstrues TCR's argument concerning timing of allocation. TCR contends that the $1,000,000 settlement for a covenant not

to execute did not allocate any of the settlement funds. Accordingly, absent a pre-verdict allocation, the $1,000,000 can only be construed as a settlement for the same injury represented by the verdict in the case.

The Court of Appeals holding that the $1,000,000 settlement was not for the same injury even though it was not specifically allocated pre-verdict is inconsistent with its ruling wherein it agreed that the $500,000 Respondents attempted to allocate after the jury verdict to various scopes of work that were not within TCR'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). In the same way the Court held the $500,000 attempted allocation post-verdict was improper, Respondents post-verdict attempted allocation of the $1,000,000 settlement is improper. "While CBC was not technically subject to a judgment, that is not what is required for TCR to be entitled to setoff. Setoff is premised on a settlement corresponding to the same injury." Id. at 206, 890 S.E.2d at 612. Where at the time the verdict was entered the $1,000,000 was not allocated, the $1,000,000 could only be construed as settlement for the same injury.

Further, because the verdict was a general verdict as to the defendants at trial, the $1,000,000 settlement is for the same injuries and damages as considered by the jury within its general verdict. Therefore, the TCR is entitled to a setoff for the $1,000,000 post-verdict allocated settlement.[1] See Smith v. Widener, 397 S.C. 468, 471-72, 724 S.E.2d 188, 190 ("Ct. App. 2012) ("[B]efore entering judgment on a jury verdict, the court must reduce the amount of the verdict to

[1] Respondents contend that by not seeking damages for HVAC, electrical, drainage, and fireplaces at trial, TCR was—in effect—granted a setoff of those damages. However, this is a red herring. As articulated, supra, because the allocation did not occur until post-verdict, at the time the verdict was issued, the settlement was—for all intents and purposes—for general damages not specific to any excluded issue.

account for any funds previously paid by a settlement defendant, so long as the settlement funds were paid to compensate the same plaintiff on a claim for the same injury."); see also Armstrong v. Collins, 366 S.C. 204, 227, 621 S.E.2d 368, 379 (Ct. App. 2005) (declining to "speculate as to how the jury allocated damages resulting from a general verdict").

Moreover, Respondents contend that an adverse ruling on this issue would undermine the public policy interests in promoting settlement post-trial. However, Respondents do not articulate how such a ruling would hinder settlement post-trial. Indeed, the ruling of the Court of Appeals would render plaintiffs to have complete control over the amount of setoff a non-settling defendant may be entitled to. While TCR does not contest Respondents contention that public policy favors settlements, there must be a balance. To allow a post-verdict allocation of settlement would not only be contrary to well-established case law, see Widener, 397 S.C. at 471-72, 724 S.E.2d at 190, but a post-verdict allocation would circumvent this well-established rule. Allowing a plaintiff to allocate a settlement post-verdict would put the plaintiff in the role of a Monday morning quarterback, articulating what is would change from a jury verdict issued on Sunday. It would permit a plaintiff to consider what issues a jury considered and the amount of the verdict, and allow a plaintiff to attempt to reduce a setoff amounts in order to enlarge the total recovery. Such scenario—as occurred in this case—violates public policy. See Riley v. Ford Motor Co., 414 S.C. 185, 196, 777 S.E.2d 824, 830 (2015) ([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."); Rutland v. SC Dep't of Transp., 400 S.C. 209, 216, 734

S.E.2d 142, 145 (2012) ("A nonsettling defendant is entitled to credit for the amount paid by another defendant who settles for the same cause of action.").[2]

III. TCR is Entitled to Full-Setoff of Pre-Trial, Non-Issue Release Settlements

Respondents contend that it removed certain elements of damages from its case due to pretrial settlement of several previously named defendants and, therefore, TCR received the benefit of a setoff based on the Respondents' lowered request for damages. Further, Respondents submit that TCR received the benefit for a certain amount of setoff as to these settling defendants by the Court, when the Court allocated a certain portion of each settlement to setoff.

The crux of TCR's argument on this issue relates to the general verdict. Over TCR's (and other defendants) objection at trial, Respondents requested and received a general verdict form. The general verdict form did not allocate the verdict amount for each claimed damage/injury.

Further, Respondents sought damages to repair the Project and to reimburse the Plaintiffs for any lost use they may suffer while the repairs are performed. [R.201-222 S&C 2/13/2015]. Respondents sought these same damages when they asked the jury to return a general verdict at trial for their alleged cost of repair plus lost use damages. Throughout the trial and during the closing arguments, the parties asked the jury to evaluate the damages presented at trial and to ignore the items specifically designated as issue releases. [R.671-672 Wk-1 Trans p.11, ln.5—p.12, ln.5; R.675-678 Wk-1 Trans p.106, ln.10—p.109, ln.17; R.681-682 Wk-1 Trans p.112, ln.9—p.113, ln.12; R.840 Wk-1 p.372, ll.1-10; R.857-858 Wk-1 Trans p.407, ln.25—p.408, ln.6; R.861-862 Wk-1 Trans p.411, ln.23—p.412, ln.10; R.863 Wk-1 Trans p.415, ll.3-17; R.935-943

[2] Because Respondents attempted to allocate the post-verdict settlement with CBC to include $500,000 purported allocated to the punitive damages verdict against CBC, for the same reasons as articulated supra, as well as those articulated in TCR's petition for writ of certiorari, TCR submits that it is also entitled to a $500,000 setoff related to this purported allocation.

Wk-1 Trans p.572, ln.18—p.580, ln.2; R.950-951 Wk-1 Trans p.591, ln.14—p.592, ln.7; R.956 Wk-1 Trans p.597, ll.11-18; R.968-974 Wk-1 Trans p.609, ln.2—p.615, ln.9; R.981-982 Wk-1 p.622, ln.23—p.623, ln.19; R.1217; Wk-2 Trans p.141, ll.23-25; R.1641 Wk-2 Trans p.714, ll.1-8; R.1652-1653 Wk-2 Trans p.725, ln.22—p.726, ln.25; R.1662-1670 Wk-2 Trans p.735, ln.19—p.743, ln.19; Clubhouse: R.952 Wk-1 Trans p.593; R.1652-1653 Wk-2 Trans pp.725-726; windows and doors: R.970 Wk-1 Trans p.611; R.1666 Wk-2 Trans p.739; floors: R.968 Wk-1 Trans p.609; R.1666 Wk-2 Trans p.739; drainage: R.972 Wk-1 Trans p.613; R.1667 Wk-2 Trans p.740; landscaping and irrigation: R.1667 Wk-2 Trans p.740; concrete: R.968 Wk-1 Trans p.609; R.1667 Wk-2 Trans p.740; subfloor: R.969 Wk-1 Trans p.610; R.1667 Wk-2 Trans p.740; interior stairway: Id.; interior stair railing: R.971 Wk-1 Trans p.612; R.1667 Wk-2 Trans p.740; interior shoe molding: Id.; interior wood casing around the windows: Id.; window product: R.969-970 Wk-1 Trans p.610-611; R.1668 Wk-2 Trans p.741; sheetrock for HVAC and window replacement: R.973-974 Wk-1 Trans p.614-615; R.1668 Wk-2 Trans p.741; interior floor coverings: R.1668 Wk-2 Trans p.741; plumbing: Id.; HVAC: Id.; electrical: Id..] Again, 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. [Id.] 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 jury heard testimony regarding all the different parties that worked together to construct the Project. The trial court properly allowed testimony that the architect provided the plans and specifications at issue with the construction, [R.865-868 Wk-1 Trans p.427, ln.19—p.430, ln.25; R.869-870 Wk-1 Trans p. 434, ln.16—p.435, ln.11; R.876 Wk-1 Trans p.445, ll.4-

11; R.881 Wk-1 Trans p.452, ll.10-12; R.1036-1040 Wk-1 Trans p.724, ln.16—p.728, ln.7; R.1044 Wk.1 Trans p.732, ll.21-23; R.1057-1058 Wk-1 Trans p.745, ln.9—p.746, ln.10; R.1363 Wk-2 Trans p.325, ll.7-16; R.1367-1368 Wk-2 Trans p.329, ln.22—p.330, ln.11; R.1373 Wk-2 Trans p.335, ll.9-25; R.1385 Wk-2 Trans p.350, ll.19-25; R.1398 Wk-2 Trans p.363, ll.10-15; R.1407-1408 Wk-2 Trans p.372, ln.10—p.373, ln.14; R.1409 Wk-2 Trans p.374, ll.11-19; R.1412-1413 Wk-2 Trans p.377, ln.17—p.378, ln15; R.144 Wk-2 Trans p.379, ll.4-9; R.1420-1421 Wk-2 Trans p.385, ln.18—p.386, ln.14; R.1429-1430 Wk-2 Trans p.394, ln.22—p.395, ln.3] that certain engineers were involved with the design and product selection process [R.865-868 Wk-1 Trans p.427, ln.19—p.430, ln.25; R.879 Wk-1 Trans p.450, ll.18-22; R.885-886 Wk-1 Trans p.460, ln.22—p.461, ln.24; R.889-891 Wk-1 Trans p.466, ln.4—p.468, ln.7; R.1385 Wk-2 Trans p.350, ll.19-25; R.1393-1395 Wk-2 Trans p.358, ln.7—p.360, ln.2; R.1401 Wk-2 Trans p.366, ll.8-11; R.1406 Wk-2 Trans p.371, ll.15-22; R.1445 Wk-2 Trans p.410, ll.20-22; R.1464-1465 Wk-2 Trans p.429, ln.22—p.430, ln.20], that the manufacturer of the siding and waterproofing inspected the installation of their respective products [R.874 Wk-1 Trans p.439, ll.11-15; R.1351 Wk-2 Trans p.304, ll.1-18; R.1375-1376 Wk-2 Trans p.340, ln.4—p.341, ln.23; R.1381 Wk-2 Trans p.346, ll.3-12; R.1383 Wk-2 Trans p.348, ll.2-18; R.1384-1385 Wk-2 Trans p.349, ln.21—p.350, ln.7; R.1393-1395 Wk-2 Trans p.358, ln.7—p.360, ln.2; R.1396-1397 Wk-2 Trans p.361, ln.2—p.362, ln14; R.1430-1431 Wk-2 Trans p.395, ln.4—p.396, ln.5], and that the framers were responsible for installing the roof and deck slopes on the project. [R.1157 Wk-2 Trans p.81, ll.4-16; R.1379-1380 Wk-2 Trans p.344, ln.7—p.345, ln.5; R.1426-1427 Wk-2 Trans p.391, ln.14—p.392, ln.10].

The only damages reduced by Respondents' cost estimator, Handegan, were those related to the issue releases. [R.950-954 Wk-1 Trans p.591, ln.14—p.595, ln.22]. The additional requested setoff amounts were not part of issue releases. While the jury's verdict ultimately was

approximately fifty percent (50%) of the requested total damages Respondents articulated in closing arguments, because testimony was presented as to the involvement in the project and purported negligence of these settling defendants, neither Respondents nor the trial court can second-guess the make-up of the jury's general verdict. Lloyd's, Inc. v. Good, 306 S.C. 450, 412 S.E.2d 441 (Ct. App. 1991) (the amount of the damages recoverable against the non-settling tortfeasor is reduced by the total amount of consideration paid for a release of a joint tortfeasor); Atlas Food Systems and Services, Inc. v. Crane Nat'l Vendors, Inc., 99 F.3d 587, 596 (4th Cir. 1996) ("Under South Carolina law, a non-settling defendant is entitled to a pro tanto reduction of a judgment in a same cause of action.").

For these reasons, TCR is entitled to a setoff of the full-settlement amounts of the non-issue released settlements.

IV. The Rights to an Empty Chair Defense and Setoff Are Not Mutually Exclusive

Respondents contend that TCR is entitled to make only one of two arguments: empty-chair defense *or* the right to set off. Respondents aver that these arguments—the entitlement to an empty chair defense and entitlement to set off—are mutually exclusive. However, Respondents misconstrue TCR's arguments before the Court of Appeals.

In its oral arguments before the Court of Appeals, TCR averred that the General Assembly, and by way of interpretation by this Court in Smith v. Tiffany, 419 S.C. 548, 799 S.E.2d 479, has decided that only named defendants who remain in the case through verdict are placed on the verdict form, and that tortfeasors and settling defendants are not part of the verdict form. Instead, as emphasized in Smith v. Tiffany, nonsettling defendants have the right to argue "the so-called empty chair defense in subsection (D) [of section 15-38-15], **and**, in subsection (E), the right to offset the value of any settlement received prior to the verdict—a right which arises by operation

of law and is not within the discretion of the courts." Id. at 557, 799 S.E.2d at 484 (emphasis added). Respondents contention that the two rights are mutually exclusive is unfounded and in contravention of both S.C. Code Ann. 15-38-15, and common law, and more specifically Smith v. Tiffany.[3]

Additionally, Respondents' contention that TCR—by all accounts based on the verdict—was successful in arguing the empty chair defense is pure speculation. Again, as noted supra, Respondents successfully argued for and received a general verdict form. Accordingly, because there was no breakdown in the verdict award as it relates to the injuries/damages, it is conjecture both by Respondents and the lower court in determining whether a jury did in fact reach a verdict by removing damages it believed were associated with the empty chair defendant(s). Because the breakdown of the verdict is unknown, it cannot be said that it is inequitable to allow TCR or any other defendant to seek a setoff for non-issue released settlements.

CONCLUSION

For the foregoing reasons, as well as those set forth in its Petition for Writ of Certiorari, TCR respectfully requests the Court grant TCR's petition.

[Signature Page to Follow]

[3] Respondents cite no statute or case law in support of their position that these rights are mutually exclusive.

Respectfully submitted,
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