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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Jennifer B. McCoy, Circuit Court Judge

Civil Action No. 2015-CP-10-00955

Appellate 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, ...Plaintiffs,

vs.

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

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

and

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

PETITIONER'S BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

OTHER AUTHORITY

ISSUES ON APPEAL

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 FAILING TO FIND PETITIONER WAS ENTITLED TO A FULL SETOFF FOR THE PRETRIAL SETTLEMENTS BETWEEN RESPONDENTS AND NOVUS, ATLANTIC, H AND A, AND COHENS?

STATEMENT OF FACTS

This construction defect lawsuit was initially filed in the Charleston County Court of Common Pleas on February 13, 2015, by Palmetto Pointe At Peas Island Condominium Property Owners Association, Inc. and a putative class representative for all other owners (collectively, "Respondents"). (A.201-222 S&C 2/13/2015.) Respondents alleged numerous defects in the design and construction of forty duplex condominium units at a project called Palmetto Pointe at Peas Island, built between 2006 and 2007 near Folly Beach. (Id.) By November 2, 2017, Respondents had amended their Complaint twice, ultimately naming over two dozen defendants. (A.387-408 2nd Am. S&C 11/2/2017.) At all times, Respondents have sought relief in the form of repairs costs, loss of use, and punitive damages.

Complete Building Corporation ("CBC") was the general contractor for the entire project, excluding the clubhouse, for a total contract amount of $11,578,454. (A.2148-2182 Trial Exhibit 5A; A.2194-2198 Trial Exhibit 22; A.1357-1358 Wk-2 Trans. 316:9 – 317:2.) CBC subcontracted the installation of siding, roofs, and waterproofing to Petitioner Tri-County Roofing, Inc. ("Petitioner") for a final contract price of $1,382,558.24. (A.914 Wk-1 Trans. 541:5-25; A.1358 Wk-2 Trans. 317:4-8; A.2183-2193 Trial Exhibit 9; A.2201-

2201 Trial Exhibit 36; A.1357 Wk-2 Trans. 316:2-8.) Petitioner in turn hired sub-subcontractors to complete its scope of work on the project including Eloy Alonzo Vasquez ("Vasquez") for roofs and waterproof membranes, and Miracle Siding, LLC ("Miracle") for installation of siding. (A.223-242 TCR Ans. & 3rd-P. Comp. 4/22/2015; A.342-359 TCR Ans & 3rd-P. Comp. 11/23/2016; A.426-446 TCR Ans. & CC 11/17/2017.)

Prior to trial, multiple defendants settled with Respondent, with those settlements totaling $5,012,500. Some of those settlements were "issue release settlements" that related to damages that were not argued at the trial of this case. The agreed issue release settlements totaled $1,407,500 and related to repairs associated with the HVAC, fireplaces, grading and paving, interior flooring, interior trim and interior railings, concrete, the window product, and site drainage. (A.1914-1917 Email response by TCR dated 6/10/2019.) In addition to the issue release settlements, Respondents entered into nonissue release settlements with multiple other defendants.

Included within the nonissue release settlements, Respondent settled with architect Novus Architects, Inc. for $650,000 (A.2010-2018); framing contractor Atlantic Building Construction Services, Inc. for $700,000 (A.1980-1994); Atlantic's subcontractor H and A Framing Construction, LLC for

$500,000 (A.2131-2142); and Cohen's Drywall Company, Inc. for $125,000 for work related to installing insulation and drywall (A.2107-2121). There were additional nonissue release settlements totaling $630,000. (See, e.g., A.1913.)

In addition to those settlements, on or around July 10, 2018, Respondent entered a covenant not to execute in favor of CBC in exchange for one of CBC's insurance carriers' $1,000,000 payment to Respondents. (A.1914-1917 Email response by TCR dated 6/10/2019; A.1918-1924 CBC Covenant 7/10/2018.) By the terms of the 2018 CBC Covenant, the $1,000,000 payment would "constitute a credit in the same amount against any judgement obtained against CBC." (A.1918-1924 CBC Covenant 7/10/2018.)

This case went to trial against eight Defendants on May 6, 2019. (A.688-737 Wk-1 Trans. pp. 171-220.) In his closing arguments, counsel for the Respondents referenced a revised damages estimate total and asked the jury to take out damages relating to the clubhouse and window product issues, then added in loss of use damages, and made a revised request to the jury to award damages of $12,800,000. (A.1653 Wk-2 Trans. 726:23-25.) In other words, Respondents claimed at trial that their total damages when the issue released items were taken out was $12.8M. CBC presented testimony regarding the

deficiencies in the areas covered by Petitioner (roofing, decking, and siding) and an estimate for more targeted repairs of those damages at $1,898,163.27. (A.1207 Wk-2 Trans. 131:12-19.) During closing arguments, CBC argued that Respondents' total damages was actually about $6.5 million. (A.1669 Wk-2 Trans. 742:4-16.)

By the time the case went to the jury for deliberations on May 16, 2019, five defendants remained: CBC, Petitioner, Vasquez, Miracle, and W.C. Services, Inc. (A.116-122 Verdict.) Before the case was sent to the jury, the parties debated the format of the jury verdict form. (A.684-685 Wk-1 Trans. 115:23 – 116:21; A.687 Wk-1 Trans. 155:14-18; A.1527-1529 Wk-2 Trans. pp. 493-495; A.1589-1590 Wk-2 Trans. 656:4 – 657:18; A.1596 Wk-2 Trans. 669:14-18; A.1607-1614 Wk-2 Trans. 680:16 – 687:14; A.1624-1626 Wk-2 Trans 697:3 – 699 :7; A.1877-1904 Emails dated 5/15/2019 from Plaintiff, CBC, TCR, Miracle, Vasquez forwarding proposed verdict forms; A.1905-1911 Email dated 5/14/2019 from WC Services forwarding proposed verdict form; A.1748-1749 Wk-2 Trans. 828:15 – 829:12.) Generally, the defendants all advocated for a version of the jury form that asked the jury to allocate liability among each of the defendants. (Id.) Respondents submitted a jury verdict form that did not allow for any such allocations and had a single line

for the jury to fill in a general verdict number that even combined the causes of action for breach of warranty and negligence. (Id.) The Trial Court used the Respondents' version of the jury verdict form with only minor edits. (A.116-122 Verdict; A.1624 Wk-2 Trans 697:3-7; A.1877-1880 Email dated 5/15/2019 from Plaintiff.)

The jury returned a verdict against CBC, Petitioner, Vasquez, and Miracle, finding actual damages in the amount of $6.5 million. The jury also found that CBC and Petitioner acted with gross negligence or with conscious or reckless disregard for Respondents' rights and found each liable for $500,000 in punitive damages. (A.116-122 Verdict.) After the verdict form was received, the trial court crafted a special verdict form for the jury to determine the percentage of responsibility Vasquez and Miracle each bore for the $6.5 million verdict. (A.122 Special Verdict Form.) The court did not order the jury to apportion responsibility among CBC or Petitioner due to the jury's finding of gross negligence against them. See S.C. Code Ann. § 15-38-15(F). The jury found Miracle and Vasquez each responsible for 5% of the actual damages, or $325,000 each. (A.122 Special Verdict Form.) CBC and Petitioner were therefore jointly and severally liable for the remaining 90% of

actual damages—$5,850,000. The trial court gave the parties ten days to file posttrial motions.

Petitioner's posttrial motions focused largely on the allocation of settlement proceeds received by Respondents. (A.525-545 TCR Post-Trial Mot. 5/28/2019.) Petitioner had to file a Motion to Compel Respondents to produce copies of the settlement agreements reached in this case. (A.546-574 TCR Mot to Compel 5/28/2019.) Respondents eventually produced the settlement agreements on June 6, 2019, the day before the post-trial motions hearing. (A.1809-1810 Post-T Hrg. 24:12 – 25:5.) On that same day, twenty-one days after the trial, CBC and Respondent entered into a written agreement where CBC agreed to pay $1,137,500, in addition to the $1,000,000 covenant funds paid in 2018, to settle Respondent's claims against CBC. (A.1925-1939 CBC Settlement 6/6/2019.) Importantly, this new written agreement, for the first time anywhere, attempted to allocate the 2018 $1,000,000 Covenant to items not included in the trial with $900,000 allocated to HVAC/electrical and $100,000 allocated to concrete, flooring, interior handrails, fireplaces, and drainage. (Id.) As for the 2019 $1,137,500 post-verdict settlement, Respondents allocated $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. (Id.)

The trial judge heard the post-trial motions the next day, on Friday June 7, 2019. (A.1785-1845 Post-T Hrg. Trans.) The principal arguments at the post-trial motions hearing were regarding the issue of setoff. Respondents initially conceded only $630,000 of all settlements were subject to setoff. (A.1829 Post-T Hrg. 44:16; A.1831 Post-T Hrg. 46:2-14; A.1838 Post-T Hrg. 53:12-16.) Respondents did not even acknowledge setoff of the post-verdict settlements from Petitioner's subcontractors, Vasquez and Miracle! (A.1818 Post-T Hrg. 33:17-18.) On the Monday following the motions hearing, Respondents e-mailed the trial judge with a modified setoff allocation wherein they stated that Petitioner was entitled to only $1,670,000 in setoffs, including the $630,000 in uncontested nonissue release settlements, the $650,000 in payments from Vasquez and Mircale, $137,500 (out of the $2,137,500) from CBC, and $252,500 (out of the $1,975,000) from the nonissue release settlements with Novus, Atlantic, H and A, and Cohen's. (A.1912-1913 email 6/10/2019.)

The trial judge issued her Form 4 order regarding the post-trial motions on July 23, 2019 which awarded Petitioner a total setoff in the amount of $1,670,000 and ordered a revised judgment against Petitioner in the amount of $5,330,000, "in accordance with Plaintiffs' proposed allocations and setoff amounts." (A.166-167 Form Order 7/23/2019.) On July 24, 2019, Petitioner received an electronic copy of the filed verdict form and judgment, which was retroactively file stamped on May 16, 2016, the last day of trial. (A.116-122 Form Order & Verdict.) Petitioner timely filed a Motion to Reconsider on August 5, 2019. (A.620-631 TCR Mot to Reconsider 8/5/2019.) Respondents e-mailed a memorandum in opposition to Petitioner's Motion to Reconsider dated August 15, 2019. (A.632-648 Memo in Opp dated 8/15/2019.) Petitioner filed a return to Respondents' memorandum on August 26, 2019. (A.649-660 TCR Return 8/26/2019.) The trial judge denied the Motion to Reconsider in a final order filed September 25, 2019. (A.168-173 Order 9/25/2019.) Petitioner then appealed to the South Carolina Court of Appeals. (A.174-200 TCR NOA 10/14/2019.)

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. (A.3006-3025 Court of Appeals Opinion.) The Court of Appeals

concluded that the trial court did not abuse its discretion in denying Petitioner's request for setoff of the 2018 $1,000,000 CBC Covenant, the $500,000 of the 2019 $1,137,599 CBC settlement allocated to punitive damages, and the entirety of the nonissue release settlements with Novus, Atlantic, H and A, and Cohen's. (Id.) The Court of Appeals did reverse the portion of the trial court's order denying Petitioner a setoff for the full remaining $637,500 of the 2019 CBC settlement. Petitioner then filed a Petition for Rehearing and Petition for Rehearing *En Banc* on July 13, 2023, which was denied by the Court of Appeals on August 10, 2023. (A.3026-3035; A.3036-3037.)

Petitioner then filed its Petition for Writ of Certiorari on September 11, 2023, which was granted on June 20, 2024. (A.3175-3198; A.3247-3248.)

This appeal follows.

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) (citing Rookard v. Atlanta & Charlotte Air Line Ry. Co., 89 S.C. 371, 71 S.E. 992, 995 (1911)). Initially, the court's ability to order setoff was not based on any statute or fixed rule of court but grew out of the inherent equitable jurisdiction of the court. See id. At its very core, "[t]he jurisdiction of the court to set off one judgment against another is equitable in its nature, and should be exercised so as to do justice between parties". Id. The right to setoff was eventually 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 . . . 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, 414 S.C. at 196, 777

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)).

Even after the codification of the right to setoff, the court's jurisdiction still lies in equity. Id. ("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"). As a result, when a plaintiff attempts to allocate prior settlements, the court must apply equitable principles in reviewing the allocation. See, e.g., id. (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).

"[W]hen 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." Smith v. Widener, 397 S.C. 468, 473, 724 S.E.2d 188, 191 (Ct. App. 2012). 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.

Hawkins v. Pathology Assocs. of Greenville, P.A., 330 S.C. 92, 114-15, 498 S.E.2d 395, 407 (Ct. App. 1998). 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. Smith, 397 S.C. at 473, 724 S.E.2d at 191. "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.

Although not explicitly explained in the case law discussing setoff, the appellate courts analyze trial courts' decisions on setoff 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, 425, 743 S.E.2d 746, 754 (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

The trial court abused its discretion in allocating only $1,670,000 the settlement proceeds received by Respondents to setoff. Petitioner is entitled to a total setoff of $4,892,500, which includes all settlements from Codefendants relating to damages/injuries that were presented at trial and the post-verdict satisfactions of judgments against Codefendants. The Court of Appeals, who reversed the trial judge in part, finding that Petitioner is entitled to a total setoff of $2,170,000, erred in not reversing the trial judge with respect to her allocation of the 2018 CBC Covenant and the portions of the settlements with Novus, Atlantic, H and A, and Cohen's. Petitioner is entitled to an additional $2,722,500 in setoff, comprised of the full $1,000,000 2018 Covenant with CBC and the remaining $1,722,500 from the settlements with Novus, Atlantic, H and A, and Cohen's. Petitioner respectfully requests this honorable Court issue an Order reversing the Court of Appeals and finding that Petitioner is entitled to setoff for the full amount of the 2018 CBC Covenant for $1,000,000 and the full settlement amounts of the Novus, Atlantic, H and A, and Cohen settlements, which total $1,975,000, and directing the Trial Court to issue an Amended Judgment against the Petitioner for $2,107,500.

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?

The Court of Appeals erred in failing to find the trial court abused its discretion in failing to find that Petitioner is entitled to a full setoff for a $1,000,000 payment made in 2018 on behalf of CBC that remained unallocated until after the jury rendered its verdict because this settlement related to the same injuries presented at trial.

"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." Smith, 397 S.C. at 473, 724 S.E.2d at 191. "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. 221, 235, 213 S.E.2d 740, 746 (overruled on other grounds by McCall v. Batson, 285 S.C. 243, 329 S.E.2d 741 (1985)). 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 and responsible for the entire construction project, and Petitioner, a prime subcontractor responsible only for the siding, roofing, and deck waterproofing, were jointly responsible for the entire actual damages verdict in the amount of $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 because CBC, as the general contractor, was ultimately responsible for the entire project. There is no need to parse out which items are characterized as issue releases for the post-verdict settlements because CBC, Petitioner, and several other Defendants 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).

After the jury rendered its verdict, Respondent entered into a settlement agreement with CBC for an additional $1,137,500. In that settlement agreement, Respondent attempted to, for the first time, allocate the 2018 $1,000,000 Covenant with CBC to damages not included in the judgment, with $900,000 to HVAC/electrical and $100,000 to concrete, flooring, interior handrails, fireplaces, and drainage. (A.1925-1939 CBC Settlement 6/6/2019.) This attempted allocation to damages not presented at trial is in direct conflict with the 2018 Covenant, which states that the $1,000,000 was to be applied as "a credit in the same amount against ***any judgment*** obtained against CBC." (A.1918-1924 CBC Covenant 7/10/2018 (emphasis added).) Respondents' post-verdict allocation of the 2018 $1,000,000, 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. Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. IMK Dev. Co., LLC, 435 S.C. 109, 131, 866 S.E.2d 542, 554 (2021). 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 or any court 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, or 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. The effect of this ruling will be that parties may, after a jury has rendered its verdict, concoct settlement allocations that allow the party a double recovery while punishing the tortfeasor. The Court of Appeals' ruling appears to be in conflict with established precedent. 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, 414 S.C. at 192, 777 S.E.2d at 828 (Settlement allocation was approved by the court prior to the commencement of trial.); Rutland, 400 S.C. at 216-17, 734 S.E.2d at 145-46 (Affirming 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.); Smith, 397 S.C. at 471-73, 724 S.E.2d at 190-91 (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, 342 S.C. at 312-13, 536 S.E.2d at 425-26 (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, 559-60, 351 S.E.2d 867, 874-75 (Ct. App. 1986) (Settlements were allocated between survival and wrongful death claims prior to trial).

The Court of Appeals summarized 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." (A.3016.) However, that is only part of the argument. The Court of Appeals accepted Respondents' post-verdict allocation of settlement funds without question, then 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 $1,000,000 paid in 2018 having not being allocated until after the 2019 trial and stated in a footnote 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. (Id.) However, Petitioner argued in its briefs and oral argument that the allocation of the $1 million 2018 payment was untimely and improper, 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. Petitioner has at all times contested Respondents' post-verdict attempt to allocate settlement funds to maximize their recovery. In Petitioner's Final Brief, Petitioner specifically stated that Respondents' attempt to allocate the CBC settlements was "improper" and "untimely". (A.3072; A.3077; A.3085.) In Petitioner's Final Reply Brief, Petitioner discussed 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. (A.3157; A.3161.)

Although, the language from Petitioner's Briefs does not exactly match footnote 14, the argument that a plaintiff cannot allocate a previous payment after the jury renders its verdict is essentially the same as arguing that the

execution of the document in 2018 without any allocation language meant it was unallocated. Additionally, the Court of Appeals ignores the fact that the 2018 Covenant specifically allocates the $1,000,000 payment to "***any judgment*** obtained against CBC." (A.1918-1924 CBC Covenant 7/10/2018 (emphasis added).) By its own terms, the 2018 Covenant was allocated to the jury's verdict. Therefore, the 2018 $1,000,000 was a settlement for the same injury represented by the verdict in the case and was in fact a satisfaction of a judgment. There is no evidence in the record supporting the trial court's ruling denying Petitioner a setoff for this amount. Moreover, it is 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. As a result, the trial court's order contains an error of law.

Additionally, the Court of Appeals' ruling as to the 2018 Covenant is inconsistent with its ruling that Respondents' post-verdict attempt to allocate the $637,500 from the CBC settlement was "in reality a satisfaction of judgment, as opposed to an allocated settlement". (A.3017.) Respondents had the opportunity in 2018 to allocate the $1M Covenant, but declined to do so, instead stating that CBC would receive "a credit in the same amount against

any judgement obtained against CBC." (A.1918-1924.) Respondents' attempt to allocate fund paid by or on behalf of CBC, whether we are referring to the 2018 funds or the 2019 funds, occurred at the same time and in the same document and was in fact an attempt to disguise a satisfaction of judgment as a pretrial settlement.

As a result, the entirety of CBC's settlement was unallocated, and the Court of Appeals decision was erroneous. The same result must be reached for both the 2018 payment and the 2019 payment because neither were allocated until after a general verdict was issued. Petitioner therefore respectfully requests this honorable Court rectify this inconsistency and issue an Order reversing the Court of Appeals and finding that Petitioner is entitled to a setoff for the full amount of the 2018 $1,000,000 CBC Covenant.

II. 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 Cohens?

The Court of Appeals erred in failing to find Petitioner is entitled to a setoff for the full amounts of the pretrial settlements of Novus, Atlantic, H and A, and Cohen's, totaling $1,950,000 and which remained unallocated until after the jury rendered its verdict, because those settlements related to the same injuries presented at trial.

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."). "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. The trial judge abused her discretion when she failed to act as the gatekeeper to prevent such a double recovery and prevent the jury's award of compensatory damages from being applied against Petitioner as additional punitive damages.

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. (A.1735-1737 Wk-2 Trans. 815:8-17, 816:9-12; and 816:23 – 817:5.) Petitioner is not attempting to get credit for any settlement funds relating to damages not presented at trial, such as the issue release settlements. Petitioner is seeking credit only for those settlements that relate to damages that were not specifically removed from the trial. Respondents have conceded that these scopes of work were at least partially presented to the jury, as evidenced by their proposing assigned percentages of each settlement to setoff. (A.1912-1913 email 6/10/2019.) Respondents argue, however, that these settlements mostly relate to damages not considered by the jury or included in Respondents' damages estimate. (A.632-648 Memo. in Opp. 8/15/2019.) There are several issues with Respondents' position.

First, there is no evidence in the record to support Respondents' allocations. Nothing presented during the trial or in the posttrial motions support the percentages proffered by Respondents and accepted by the trial

court. As a result, the trial court's order adopting Respondents' proposed allocation was based on factual conclusions that lacked evidentiary support. See Wilson, 403 S.C. at 425, 743 S.E.2d 754 ("An abuse of discretion occurs when . . . there is no evidentiary support for the court's factual conclusions"). Additionally, 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. Stoneledge, 435 S.C. at 131-32, 866 S.E.2d at 555 (holding that a trial court must receive input from the jury before reforming a verdict). The trial court's allocation of these settlements invaded the province of the jury.

Furthermore, just like Respondents' post-verdict allocation of the 2018 CBC Covenant, Respondents' allocation of these settlements was untimely. While these settling Defendants were not present at trial and did not have a verdict against them like CBC, this Court should apply the same standard because it is inequitable, and appears to violate existing precedent, to allow a party to allocate settlement funds post-verdict, especially when that party actively prevented the jury from weighing in. The trial court's order adopting Respondents' proposed post-verdict allocation was therefore based on an error of law. See Wilson, 403 S.C. at 425, 743 S.E.2d 754 ("An abuse of discretion

occurs when a court's order is controlled by an error of law"); see also Rutland, 400 S.C. at 216, 734 S.E.2d at 145 (reviewing allocations under the principles of equity); Riley, 414 S.C. at 195, 777 S.E.2d at 830 (noting that the longstanding equitable principles involved in setoff allocations were codified as part of the South Carolina Contribution Among Tortfeasors Act).

Because evidence of damages related to each of these scopes was presented to the jury, Petitioner is entitled to a setoff from these settlements. Smith, 397 S.C. at 473, 724 S.E.2d at 191 ("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"). Due to the jury's return of a general verdict and the lack of any evidence supporting the allocations made by Respondent, the trial court abused its discretion. See Wilson, 403 S.C. at 425, 743 S.E.2d at 754. Petitioner is therefore entitled to a full setoff for each of the settlements paid by Novus, Atlantic, H and A, and Cohen's and respectfully requests this honorable Court issue an Order reversing the Court of Appeals and finding that Petitioner is entitled to a setoff for the full amount of these settlements, totaling $1,975,000.

CONCLUSION

The Court of Appeals' decision in this case departs from longstanding precedent by allowing a plaintiff to prevent a jury from allocating damages then, after the jury renders a verdict, allocate settlement funds in a way most advantageous to plaintiff and without any evidence to support such an allocation. While certainly not intended by the trial court or the Court of Appeals, the decisions of these courts will allow parties to manipulate the system and invade the province of the jury by waiting until after a jury renders its verdict to concoct allocations that maximize that party's recovery to the detriment of and in violation of the rights of defendants. This Court must act to prevent such manipulation of the system, prevent parties from obtaining double recoveries, and prevent manifest injustice. See, e.g., Atlas Food Sys. & Servs., Inc. v. Crane Nat. Vendors, Inc., 99 F.3d 587, 596 (4th Cir. 1996) ("Were we to indulge the parties' manipulative attribution of settlement amounts, we would compromise South Carolina's policy of permitting setoffs to ensure against multiple recovery for the same injury").

Accordingly, Petitioner Tri-County Roofing, Inc. respectfully requests that the decision by the Court of Appeals be reversed and this Court issue an order finding that Petitioner is entitled to full setoff for the 2018 CBC Covenant

for $1,000,000 and the full settlement amounts of the Novus, Atlantic, H and A, and Cohen settlements, which total $1,975,000, and directing the Trial Court to issue an Amended Judgment against the Petitioner for $2,107,500.

[SIGNATURE PAGE FOLLOWS]

Respectfully submitted,

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PETITIONER'S BRIEF

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Columbia, South Carolina