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**Sep 19 2024**

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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

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Civil Action No. 2015-CP-10-00955

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Appellate Case No. 2023-001422

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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 Baggcrs;  
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.

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**PETITIONER’S REPLY BRIEF**

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## LAW/ANALYSIS

The crux of Respondents' argument, which echoes the trial court's ultimate ruling on Petitioner's Motion for Setoff, that Petitioner has failed to present evidence sufficient to justify a dollar-for-dollar setoff, confuses the issues currently before this Court. The real issue is whether the trial court abused its discretion in adopting the allocations proposed by Respondents. The trial court's treatment of post-verdict setoffs with an all-or-nothing approach caused it to overlook the key inquiry. As further explained herein, Respondents' proposed allocations were not supported by the evidence. While there does not appear to be any authority placing such a burden on a plaintiff, the fact remains that the trial court had a duty to conduct an inquiry and order "reasonable" allocations and setoff as dictated by law and the evidence.

### **I. THE COURT OF APPEALS ERRED 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**

As this Court has made clear in its recent opinion in Jolly v. Fisher Controls Int'l, LLC, the source of any allocation proposed to a trial court, and whether such proposed allocation was done unilaterally by the plaintiff or bilaterally with the settling defendant, is largely, if not completely, immaterial.

No. 2022-000272, 2024 WL 3882708, at \*7 (S.C. Aug. 21, 2024). However, as the Court noted in Jolly, “trial courts cannot blindly accept a party’s allocation of settlement funds for purposes of setoff.” Id. at \*6. While Petitioner understands this Court’s emphasis on the importance of the trial court’s inquiry over the source of any allocation, it maintains that the source of a proposed allocation is or at least can be, material in certain cases. Here, the fact that Respondents, post-trial, unilaterally allocated the settlement funds at issue in this appeal to damages not in controversy at trial is important because of the increased potential for abuse. Further, the trial court’s adoption of the unilateral allocation is an abuse of discretion.

Similarly, Petitioner maintains that the timing of a proposed allocation must be considered. Petitioner has continually argued that Respondents’ post-trial attempt to allocate the 2018 CBC Covenant, and the other settlement funds at issue in this appeal, to damages not argued at trial was untimely, and Petitioner was, therefore, entitled to a setoff in that amount. The Court of Appeals, and Respondents, take issue with the fact that Petitioner described Respondents’ attempted allocation as “untimely” instead of specifically stating that these funds were “unallocated.” (See A.3016, Court of Appeals Opinion, p. 10 n. 14; Respondents’ Brief, p. 18.) Indeed, Respondents now even argue

that Petitioner has abandoned this argument. (Respondents' Brief, p. 18.) This play on words is immaterial. Petitioner has consistently maintained that Respondents' unilateral post-verdict allocations were improper and should never have been adopted by any court. See, e.g., State v. Hendricks, 408 S.C. 525, 531, 759 S.E.2d 434, 437 (2014) (holding that, even when an issue is raised without specificity, when it is clear from the record that both the parties and the trial court immediately understood the issue being raised, the issue is preserved).

The 2018 CBC Covenant, like all of the settlements at issue in this appeal, were unallocated until Respondents unilaterally concocted allocations post-verdict. See also, Rule 43(k), SCRCPP (stating that agreements are not binding unless reduced to writing and signed by the parties and their counsel.) Respondents had the opportunity to allocate and inform the trial court prior to trial but did not. The timing of these allocations, and the fact that the settling-defendants did not give any indication as to their belief as to the amount of any specific damage, draws the proposed allocation into question and requires the trial court to conduct the proper inquiry necessary to exercise discretion and determine the proper setoff. As further explained herein, the record lacks any indication that such discretion was exercised and, as a result, the trial court

abused its discretion in adopting Respondents' allocation of the 2018 CBC Covenant. See, e.g., State v. Hawes, 411 S.C. 188, 191, 767 S.E.2d 707, 708 (2015) ("A failure to exercise discretion amounts to an abuse of that discretion").

Petitioner further submits that a closer review of Respondents' proposed allocations was warranted, due to Respondents allocating the 2018 CBC Covenant to then-nonexistent claims. See Jolly, at \*8 ("We are concerned, however, that allocated pretrial settlement proceeds to a then-nonexistent claim to limit setoff poses the potential for abuse."). By the time trial had commenced, Respondents were not seeking damages relating to HVAC, electrical, drainage, and fireplaces. As a result, those specific claims had been abandoned, at least with respect to CBC. Respondents' post-trial allocation of those settlement funds to those damages constituted an allocation to nonexistent claims. Unlike the potential wrongful death claim at issue in Jolly, however, the nonexistent claims involved here posed a real threat for abuse due to the lack of information surrounding those claims insofar as the trial court lacked information about the damages claimed in relation to those settling defendants, including any indication on the settling defendants' valuation of

those claims or, in some cases, Respondents' valuation on those specific claims.

As further evidence of improper allocation to avoid setoff, Respondents allocated the entirety of the 2018 CBC Covenant funds to damages not argued at trial, but for which there is insufficient evidence to support the allocation. \$900,000 was allocated to "HVAC". Petitioner acknowledges that Jay Handegan, Respondents' damages expert, estimated HVAC repairs in excess of \$2,000,000, and that Respondents had previously received \$795,000 in settlement funds from the HVAC contractor. (A.2627 Handegan Est.; A.1955 ARS Settlement.) However, within the Settlement Agreement and Release between Respondents and ARS, Respondents "provid[ed] CBC a release of all claims for the work performed any/or materials provided, or that should have been performed and/or provided, by Releasees and/or Hernandez Defendants pursuant to its contract with CBC, including specifically HVAC systems and electrical line items from the Handegan Estimate, for Palmetto Point." (A.1961-1962 ARS Settlement, ¶ 6.) This Settlement Agreement and Release was executed on April 23, 2019, roughly two weeks before the start of the trial in this case. (A.1969-1971 ARS Settlement signature pages.) As a result, the trial court's order allocating \$900,000 of the 2018 CBC Covenant (which was

silent as to allocation of the settlement funds to any specific damage) to HVAC and electrical damages is not supported by the evidence and was an abuse of discretion.

As to the remaining \$100,000, the trial court allocated those funds to damages relating to “concrete, flooring, interior handrails, fireplaces, and drainage”. (A.3015 Court of Appeals Opinion.) However, there is no indication that the trial court considered the total damages estimated for those items, the amount of settlements Respondents already received in relation to those damages, or whether Respondents had fully released those claims prior to trial.

Consequently, because the trial court blindly adopted the allocations proposed by Respondents, it committed an abuse of discretion. Petitioner respectfully requests this Court reverse the Court of Appeals and award Petitioner a setoff in the full amounts of the 2018 CBC Covenant.

**II. THE COURT OF APPEALS ERRED IN FAILING TO FIND PETITIONER WAS ENTITLED TO A FULL SETOFF FOR THE PRETRIAL SETTLEMENTS BETWEEN RESPONDENTS AND NOVUS, ATLANTIC, H AND A, AND COHEN’S.**

Similar to its argument that the 2018 CBC Covenant was “unallocated” until after the jury rendered its verdict, Petitioner asserts that Respondents’

post-trial attempt to allocate the funds from the settlements between Respondents and Novus, Atlantic, H and A, and Cohen's was untimely and improper. Additionally, Respondents, and the trial court, admit that there is at least some overlap in damages, with respect to these settlements due to the allocation of a portion from each settlement to setoff "as damages potentially representing TCR's joint liability". (See A.0171 Order 9/25/2019.) However, as argued in further detail in this Reply, the trial court abused its discretion when it adopted Respondents' allocations of settlement funds without conducting the proper inquiry and analysis. Indeed, the trial judge "has the responsibility to make a reasonable allocation of settlement funds as a predicate to a setoff ruling." Jolly, at \*6.

The evidence in the record does not support the trial court's allocations. Several of the alleged damages for which the bulk of these settlements were allocated were not included in Respondents' damages estimate. As a result, the trial court's allocation of certain settlement amounts to unquantified damages is questionable. For example, the trial court allocated 50% of the \$125,000 settlement with Cohen's to "insulation", which was not argued at trial and no damages estimates were provided. (Respondents' Brief, pp. 7-8.) The trial court also allocated 90% of the \$1,200,000 in settlement funds from

Atlantic and H and A to “shear walls”. (Id. at p. 8.) Again, there is no evidence in the record by which the trial court could have evaluated whether the allocation of those funds to that category of damages was reasonable.

With respect to the \$650,000 Novus settlement, the trial court committed an error of law when it found that “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”. (A.0172 Order 9/25/2019.) The fact that Respondents claimed a cause of action against Novus for professional negligence is immaterial.<sup>1</sup> The issue the trial court should have considered is whether the damages alleged and recovered from these parties overlapped. There was considerable overlap between these design damages and the damages Petitioner is being held accountable. Respondents, and Novus, even acknowledged this overlap in their Settlement Agreement and Release, which states:

8. Set-off/Credit. In consideration for CBC’s release of its claim against Settling Defendant, Plaintiffs shall grant CBC

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<sup>1</sup> While causes of action relating to breaches of trust or other fiduciary obligations are excluded from the statutory scheme requiring setoff, there is no such equivalent provision that would be applicable here. See S.C. Code Ann. § 15-38-50(G); 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).

(and only CBC) a credit or set-off against any judgment equal to the Settlement Amount paid by Settling Defendant.

(A.2013 Novus Settlement.) The parties involved in the settlement fully intended that the full amount would be applied to a setoff to “any judgment” against CBC, not a mere 10%. Respondents obtained a judgment against CBC at trial, and Petitioner is being held jointly and severally liable for that judgment. As a result, Petitioner is entitled to the full amount of Respondents’ settlement with Novus as a setoff and the trial court’s refusal to grant this setoff was an abuse of discretion.

Therefore, because the trial court blindly adopted the allocations proposed by Respondents, it committed an abuse of discretion. Petitioner respectfully requests this Court reverse the Court of Appeals and award Petitioner a setoff in the full amounts of the settlements between Respondents and Novus, Atlantic, H and A, and Cohen’s.

### **III. THE TRIAL COURT ABUSED ITS DISCRETION IN ADOPTING RESPONDENTS’ ALLOCATION OF SETTLEMENT FUNDS FOR PURPOSES OF SETOFF**

Ultimately, “the setoff judge may accept [an] allocation only if the judge determines it is reasonable.” Jolly, at \*7. “A ‘reasonable allocation’ is one that fairly approximates the value the settling defendants paid in exchange for a release of each of the several claims.” Id. at \*6. Here, it is readily apparent

that the trial court and the Court of Appeals failed to make any inquiry into whether Respondents' proposed allocations fairly approximated the value those settling defendants paid. At the post-trial hearing, Petitioner argued that Respondents' attempt to allocate settlement funds to damages Respondents claimed were not argued at trial and, therefore, completely separate from the damages for which Petitioner was held liable was unreasonable because the damages presented at trial, which included loss of use and total overhead costs, overlapped with the damages sought against Petitioner. (A.1822 Post-T Hrg. pp. 37-38.) This is a distinctly different situation from that presented in Jolly, where the Plaintiffs allocated settlement funds to three separate causes of action with distinct damages and even different parties. See Jolly, at \*8. As a result, the trial court was required to make a more detailed factual inquiry than was involved in the Jolly case.

However, there is no indication in the record that the trial court considered whether Respondents were actually entitled to the damages that were not argued at trial, whether those alleged damages were significant enough to warrant the allocations proposed by Respondents; or whether these alleged damages had been satisfied by previous settlements. Respondents' argument that Petitioner "does not contend that there were not in fact sufficient

damages” to justify the proposed allocation misses the mark. (Respondents’ Brief, p. 19.) The trial court made no inquiry into any of these matters, and that “failure to exercise discretion amounts to an abuse of that discretion.” State v. Hawes, 411 S.C. 188, 191, 767 S.E.2d 707, 708 (2015) (quoting Samples v. Mitchell, 329 S.C. 105, 112, 495 S.E.2d 213, 216 (Ct. App. 1997)). “When a trial judge is vested with discretion, but his ruling reveals no discretion was, in fact, exercised, an error of law has occurred.” Fontaine v. Peitz, 291 S.C. 536, 538, 354 S.E.2d 565 (1987). Additionally, if a court has discretionary authority, but rules as a matter of law, the matter should be reconsidered and passed on as a discretionary matter. Id.

There is no indication in the record that the trial court exercised any discretion in reviewing and adopting the proposed allocations. The trial court first accepted Respondents’ proposed allocations by Form 4 Order on July 23, 2019, finding only:

As to Tri-County Roofing, Inc’s Motion for Setoff, the judgment against TCR should be reduced by \$1,670,000.00 for a total judgment against TCR of \$5,330,000.00 in accordance with the Plaintiffs’ proposed allocations and setoff amounts.

(A.0166 Form Order 7/23/2019.) Thereafter, in response to Petitioner’s Motion for Reconsideration, the trial court issued an Order denying this

Motion, this time echoing Respondents' arguments and again adopting Respondents' allocations. (A.0168-173, Order 9/25/2019.) While the trial court stated that it was exercising discretion, there is no indication that discretion was actually exercised. As argued above, the trial court allocated settlement funds to categories of damages for which there was no estimate or other evidence indicating the value assignable to those categories. At best, the trial court accepted the post-verdict arguments of Respondents' counsel that their proposed allocations were proper. Such a reliance is improper because courts "cannot rely on the arguments of counsel to fill in the record," since "[t]he arguments of counsel are not evidence." Owens v. Stirling, 438 S.C. 352, 359, 882 S.E.2d 858, 862 (2023); see also Bowers v. Bowers, 304 S.C. 65, 68, 403 S.E.2d 127, 129 (Ct. App. 1991). As a result, the trial court abused its discretion.

Even if the trial court had exercised discretion, the evidence in the record establishes that the Respondents' allocations were not reasonable, not supported by the evidence, and based on errors of law. The trial court's blind adoption of Respondents' allocations, despite the evidence showing those allocations were unreasonable, brought in front of it through a two-week trial and post-trial motions, was an abuse of discretion.

Petitioner, therefore, respectfully requests this Court reverse the Court of Appeals and award Petitioner a setoff in the full amounts of the settlements at issue in this appeal.

#### **IV. RESPONDENTS' ARGUMENTS REGARDING THE EMPTY CHAIR DEFENSE LACK SUPPORT DUE TO RESPONDENTS' INSISTENCE ON A GENERAL VERDICT**

In its Brief, Respondents argue that because the “empty chair” defense was made by Petitioner at trial, it was therefore included in the jury’s deliberations, resulting in the jury excluding the damages relating to the empty chair defendants from their damages award. (Respondents’ Brief, p. 25-26.) Respondents argue that, in effect, Petitioner has already received the setoff it seeks. (*Id.*) Respondents fail to recognize that their position is based entirely on speculation. At trial, Respondents presented an eleven-page damages estimate through testimony alone. In this testimony, Respondents’ damages expert removed some damages, then added others. Respondents did not enter their damages estimate into evidence. At closing, all parties presented their own estimate of the damages they believed to be in controversy.

Respondents’ argument that the jury accepted defendants’ damages estimate, which supposedly accounts for the empty chair defendants, is based on pure speculation. Respondents insisted on a general verdict form and now,

after refusing to allow the opportunity for the jury to provide information on its damages award, attempts to interject its own opinions into the jury room. Such speculation cannot be done as it would invade the province of the jury. See, e.g., 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).

It would be inequitable to allow Respondents to jumble damages from multiple defendants together into a single general verdict, then allow Respondents to make their own determination as to what the jury considered in its deliberations and what was or was not included in its damages award. Indeed, South Carolina precedent prohibits courts from speculating about any allocation within such a general verdict because it is impossible to determine such an allocation. In parallel tracks, Respondents cannot now speculate as to how the jury reached its verdict. See generally Jenkins v. Few 391 S.C. 209, 221, 705 S.E.2d 457, 463 (Ct. App. 2010) (“Few contributed to drafting and agreed to use a general verdict form that did not include a separate damages award for each cause of action. Because the verdict was a general verdict, it is important to determine how the jury allocated damages between civil conspiracy, conversion, and trespass to personal property. We will not speculate as to how the jury allocated damages.”); Armstrong v. Collins, 366

S.C. 204, 227, 621 S.E.2d 368,379 (Ct. App. 2005) (“Further, the jury’s verdict of \$1.8 million was declared a general verdict by the trial court and was well within the range of damages shown by Armstrong. Because the verdict was a general verdict, we cannot now speculate as to how the jury allocated damages.”). Accordingly, Respondents’ arguments regarding how the jury arrived at its verdict is based solely on pure speculation.

### **CONCLUSION**

For the reasons stated herein, and in its Brief, Petitioner respectfully requests that this Court reverse the Court of Appeals’ order affirming the trial court’s order adopting Respondents’ allocation of the 2018 CBC Covenant and the bulk of the settlements with Novis, Atlantic, H and A, and Cohen’s, and remanding this case to the circuit court with instructions to amend the judgment against Petitioner to \$2,107,500 to reflect a total setoff of \$4,892,500.

Respectfully submitted,

COLLINS & LACY, P.C.

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