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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 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.

APPENDIX
Volume VIII

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

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/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; H and 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. is the Appellant.

Appellate Case No. 2019-001790

Appeal From Charleston County
Jennifer B. McCoy, Circuit Court Judge

Opinion No. 5996
Heard February 14, 2023 – Filed June 28, 2023

AFFIRMED IN PART AND REVERSED IN PART

Christian Stegmaier and James Lloyd Williams, both of
Collins & Lacy, PC, of Columbia, for Appellant.

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Anna Scarborough McCann and Justin O'Toole Lucey,
both of Justin O'Toole Lucey, P.A, of Mount Pleasant, all
for Respondents.

KONDUROS, J.: In this condominium construction defect case, subcontractor defendant Tri-County Roofing, Inc. (TCR) appeals the trial court's decision regarding setoff. TCR contends the trial court erred in not setting off the entirety of a posttrial settlement between the plaintiffs and codefendant general contractor Complete Building Corporation (CBC). TCR further contends the trial court erred in denying its motion for a complete setoff of pretrial settlements between the plaintiffs and several other defendants involved in the project. We affirm in part and reverse in part.

FACTS/PROCEDURAL HISTORY

In 2005, Island Pointe, LLC, as developer, entered into a contract with CBC for the construction of forty duplex condominium units¹ as a project called Palmetto Pointe at Peas Island, located near Folly Beach. CBC subcontracted with TCR to install the siding and roofing. Later, the installation of waterproof membranes on decks was added by change order. TCR's general scope of work included the roofing, siding, trim, and waterproofing the decks, and their bid included fascia, soffits, gutters, and downspouts. TCR hired subcontractors to complete its obligations to CBC,² including Eloy Alonzo Vazquez and Miracle Siding, LLC (Miracle). Vazquez was responsible for roofs and waterproof membranes, and Miracle was responsible for siding on seventeen of the twenty buildings. The units were built during 2006 and 2007.

In late 2014 to early 2015, the Palmetto Pointe Condominium Property Owners Association (the Association) noticed ongoing leaking issues related to the roofing. The Association hired a company to investigate. Later, an engineer was hired and discovered building code violations and other construction deficiencies.

On February 13, 2015, the Association and a homeowner, as class representative,³ (collectively, Plaintiffs) filed a complaint. The complaint alleged negligence, gross negligence, and breach of implied warranty against CBC, TCR, and other subcontractors. The complaint requested actual and punitive damages. TCR answered and cross-claimed against its subcontractors. Plaintiffs amended their complaint twice and added TCR's subcontractors as defendants. CBC, the developer, and Novus Architects filed cross-claims against other defendants.

Prior to trial, numerous defendants reached settlement agreements with Plaintiffs totaling in aggregate between \$4,725,000 and \$5,012,500. The parties agree some of the settlements were for damages that were removed from the trial of the case.

¹ Eventually, two more duplex buildings were built. Those were built at a later time by different entities and were not at issue in these proceedings.

² TCR did not do any actual work on the construction of the units; it was a middleman between CBC and TCR's subcontractors and also supervised those subcontractors' work.

³ That representative was later replaced by another homeowner, Jack Love, who is a respondent in addition to the Association in this appeal. The class was never certified.

Those settlements total \$1,407,500 and have been referred to as issue release settlements.⁴

In addition to the issue release settlements, Plaintiffs entered into several other settlement agreements. Plaintiffs settled with Novus Architects, Inc. f/k/a SGM Architects, Inc. for \$650,000,⁵ and with Cohen's Drywall Company, Inc. (Cohen's) for \$125,000 for work related to installing insulation and drywall. Plaintiffs settled with framing subcontractor, Atlantic Building Construction Services, Inc. n/k/a Atlantic Construction Services, Inc. for \$700,000 and with a subcontractor to Atlantic, H and A Framing Construction, LLC, (H and A) for \$500,000.⁶

Trial began on May 6, 2019, with eight remaining defendants: Stanley's Vinyl Fence Designs; JMC Construction, Inc. (JMC); Island Pointe; CBC; TCR; Miracle; Vasquez; and W.C. Services, Inc. Prior to the verdict, three defendants left the case. Stanley's settled on the second day of trial for \$295,000. The trial court dismissed JMC at the directed verdict stage, and Plaintiffs released their claims against Island Pointe prior to closing arguments.

During trial, Plaintiffs presented testimony from various experts demonstrating numerous code violations and faulty workmanship. Plaintiffs' expert, Russell Mease, testified as to the scope of work that would be required to remedy the

⁴ Most of these settlement agreements are included in the record. For a few, the record only contains emails agreeing to settlement terms. The following settlements are referred to as issue release settlements: (1) American Residential Services, LLC d/b/a ARS/Rescue Rooter Charleston, HVAC, \$795,000; (2) Andersen Windows, Inc.; window product manufacturer, \$200,000; (3) Tallent and Sons, Inc., grading & paving, \$195,000; (4) Kelly Flooring Products, Inc. d/b/a Carpet Baggers, carpet and wood flooring installer, \$25,000; (5) Alderman Construction, interior trim & railings, \$75,000; and (6) Mosley Concrete, concrete, \$95,000. Plaintiffs also settled with Builder Services Group, Inc. d/b/a Gale Contractor Service, which had supplied and installed fireplaces, for \$22,500.

⁵ The trial court's posttrial order states that the settlement amount was \$600,000, but this appears to be incorrect.

⁶ Plaintiffs entered into a few more pretrial settlements that were not issue releases but are not at dispute on appeal: Creekside, Inc., \$150,000, painting and caulking; Certainteed, Corp., \$35,000, manufacturer of roofing shingles, siding, and trim; and Cornerstone Construction, \$150,000, siding and flashing. In the settlement agreement with Cornerstone, Plaintiffs agreed to grant TCR a setoff for the amount paid by Cornerstone for TCR's release of its claims against Cornerstone.

defects at Palmetto Pointe. Much of the work he described required significant demolition and reconstruction in order to rectify the buildings' defects. Plaintiffs' damages expert, Jerry Handegan, testified regarding an estimate he prepared after being provided with Mease's scope of work evaluation. Handegan's original estimate, prepared in December of 2017, totaled \$15,257,512. A hand-revised estimate, removing certain elements of damage and other revisions, totaled \$13,428,826 and was completed in May of 2019.

CBC hired Alan Schweickhardt⁷ to investigate the alleged defects at Palmetto Pointe. Schweickhardt's testimony focused on deficiencies in the areas covered by TCR and its subcontractors, namely roofing, decking, and siding as a water intrusion investigation. Steven Watkins prepared an estimate for the scope of work investigated by Schweickhardt using more targeted repairs and arrived at a cost of \$1,898,163.27.

Mark Poyner testified as the operations manager for TCR. He stated the contract between TCR and CBC for was roofing, siding, and deck waterproofing and totaled \$1,382,558.24. He also testified the amount of the contract between CBC and Palmetto Pointe was \$11,578,454. His testimony addressed, among other things, the liability of CBC and the designers of the project for the resultant defects.

James Lawrence "Larry" Elkin was the damages expert who evaluated the damages as to Miracle Siding and Vasquez. Elkin testified the work on the issues causing the water intrusion, including flashing and waterproofing, should have been coordinated, supervised, and tested—shifting ultimate responsibility back up the contracting chain to TCR and CBC.

In closing, Plaintiffs requested \$12.8 million in damages comprised of \$12.4 million in repair costs and \$800,000 in lost use. CBC questioned Handegan's damages estimate and encouraged the jury to go line by line to see which items should be included and which items should be reduced based on the timeline of the revised estimate.⁸ After reviewing some of these items with the jury, CBC suggested \$6.5 million would be the remaining amount of damages.

⁷ Schweickhardt, Watkins, and Poyner are all listed as a plaintiff's witness presumably because of the cross-claims between CBC and TCR.

⁸ Plaintiffs argued some costs should be reduced because they were based on renting equipment etc. for a shorter period of time than originally anticipated.

The jury returned a verdict in W.C. Services' favor. As to the remaining defendants, the jury found actual damages in the amount of \$6.5 million. The jury also found CBC was grossly negligent and awarded punitive damages in the amount of \$500,000. It likewise found TCR grossly negligent and awarded \$500,000 in punitive damages. After the verdict form was received, the trial court, pursuant to section 15-38-15 of the South Carolina Code (Supp. 2022), crafted a special verdict form for the jury in which it would apportion the percentage of responsibility for the \$6.5 million among the remaining defendants. However, because CBC and TCR had been found grossly negligent, their liability could not be apportioned pursuant to subsection 15-38-15(F).⁹ The jury found Miracle and Vasquez each responsible for 5% of the actual damages, or \$325,000 each. CBC and TCR 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.

Prior to the hearing on posttrial motions and twenty-one days after the conclusion of the trial, Plaintiffs entered into a settlement with CBC for \$2,137,500. The parties allocated \$1 million of the settlement proceeds to items not discussed at trial and \$637,500 to items that were considered by the jury at trial. \$500,000 of the settlement proceeds were earmarked for CBC's punitive damages.

TCR filed multiple posttrial motions, including ones for new trial nisi remittitur, new trial absolute, judgment notwithstanding the verdict, elimination of punitive damages, and setoff. Both parties prepared setoff recommendation charts. The trial court issued a Form 4 Order denying all of TCR's motions except the motion for setoff, which it granted in the amount conceded to by Plaintiffs—\$1.67 million. TCR filed a motion for reconsideration that was primarily devoted to the issue of setoff. The trial court did not alter the amount of setoff but offered a somewhat more detailed explanation for its rulings. The trial court held a plaintiff is entitled to allocate settlement funds in the most advantageous way to it even if that may disadvantage a nonsettling tortfeasor like TCR. *See Riley v. Ford Motor Co.*, 414 S.C. 185, 197, 777 S.E.2d 824, 831 (2015). Additionally, the trial court concluded TCR had not met its burden of establishing a dollar-for-dollar setoff by establishing the settlements with other defendants were for the same injury. This appeal followed.

⁹ § 15-38-15(F) ("This section does not apply to a defendant whose conduct is determined to be wilful, wanton, reckless, grossly negligent, or intentional or conduct involving the use, sale, or possession of alcohol or the illegal or illicit use, sale, or possession of drugs.").

GENERAL LAW REGARDING SETOFF

"A nonsettling defendant is entitled to credit for the amount paid by another defendant who settles." *Welch v. Epstein*, 342 S.C. 279, 312, 536 S.E.2d 408, 425 (Ct. App. 2000). "[S]uch a credit is to prevent an injured person from obtaining a second recovery of that part of the amount of damages sustained which has already been paid to him. In other words, there can be only one satisfaction for an injury or wrong." *Id.* (citation omitted). "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 v. S.C. Dep't of Transp.*, 400 S.C. 209, 216, 734 S.E.2d 142, 145 (2012) (quoting *Truesdale v. S.C. Highway Dep't*, 264 S.C. 221, 235, 213 S.E.2d 740, 746 (1975), *overruled on other grounds by McCall v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985)).

"The right to setoff has existed at common law in South Carolina for over 100 years." *Riley*, 414 S.C. at 195, 777 S.E.2d at 830. "In 1988, these equitable principles were codified as part of the South Carolina Contribution Among Tortfeasors Act (the Act), [sections] 15-38-10 to -70 [of the South Carolina Code] (2005 and Supp. 2014)." *Id.* "[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.'" *Id.* at 196, 777 S.E.2d at 830 (quoting *Chester v. S.C. Dep't of Pub. Safety*, 388 S.C. 343, 346, 698 S.E.2d 559, 560 (2010)).

Section 15-38-50 provides:

When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death:

- (1) it does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide, but 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; and

- (2) it discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor.

Id.

[A] critical feature of the [Act] is the codification of the empty chair defense—a defendant 'retain[s] the right to assert another potential tortfeasor, whether a party or not, contributed to the alleged injury or damages'—which necessarily contemplates lawsuits in which an allegedly culpable person or entity is not a party to the litigation (hence the chair in question being 'empty').

Smith v. Tiffany, 419 S.C. 548, 557, 799 S.E.2d 479, 484 (2017) (quoting § 15-38-15(D)).

"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[set]tling defendant may be entitled to offset." *Id.*

"When the settlement is for the same injury, the nonsettling defendant's right to a setoff arises by operation of law. Under this circumstance, '[s]ection 15-38-50 grants the court no discretion . . . in applying a set-off.'" *Smith v. Widener*, 397 S.C. 468, 472, 724 S.E.2d 188, 190 (Ct. App. 2012) (alterations in original) (citation omitted) (quoting *Ellis v. Oliver*, 335 S.C. 106, 112-13, 515 S.E.2d 268, 271-72 (Ct. App. 1999)). Nevertheless, 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 S.C. 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.>").

As to allocation of settlement funds by and between settling parties, our supreme court has agreed with the following approach taken by the Illinois Court of Appeals:

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 Edge Prop. Owners Ass'n. v. Daniel Island Riverside Devs., LLC*, 420 S.C. 424, 442, 803 S.E.2d 475, 484 (Ct. App. 2017) (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).

ANALYSIS

I. Setoff For Posttrial Settlement With CBC

To examine the setoff of the posttrial settlement between CBC and Plaintiffs, the \$2,137,500 at issue must be broken down into separate components. First, the \$1 million in insurance proceeds from a July 2018 agreement between Plaintiffs, CBC, and an insurer of CBC's was allocated by those parties as follows:¹⁰

¹⁰ This agreement was denominated a "Mediated Partial Payment" and incorporated a "Covenant-Not-to-Execute." The insurer paid \$1 million, which "constitute[ed] a credit in the same amount against any judgement obtained against CBC." The agreement released the insurer from any further obligation to CBC under the policy, primarily a duty to defend, and provided Plaintiffs would not

- \$900,000 - HVAC and electrical
- \$100,000 - concrete, flooring, interior handrails, fireplaces, and drainage¹¹

Second, an additional \$1,137,500 was allocated as follows:

- \$137,500 - exterior railings¹²
- \$100,000 - 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
- \$500,000 - punitive damages

In declining to grant TCR a setoff for the entirety of the settlement, the trial court relied on *Riley v. Ford Motor Co.*, 414 S.C. 185, 197, 777 S.E.2d 824, 831 (2015), for the proposition that a plaintiff is entitled to allocate settlement funds in the most advantageous way to it, even if that may disadvantage a nonsettling tortfeasor like TCR.¹³ The trial court also stated TCR was not entitled to a setoff for the

execute against CBC's assets or its officers' personal assets in collecting any judgment. The agreement did not release CBC as a defendant and specifically reserved Plaintiffs' right to pursue its claims against CBC and all other parties. All necessary signatures—Plaintiffs', CBC's, and the insurer's—were obtained at that time; the document, according to its terms, became irrevocable at that time, and the \$1 million was paid to Plaintiffs at that time.

¹¹ The settlement denotes these were "items not included at trial."

¹² Plaintiffs conceded and the trial court allowed this portion of the CBC settlement as a setoff to TCR.

¹³ We caution the trial bench that allocations in settlements are not simply to be accepted but are to be examined to ensure a measure of fairness to all parties. As the trial court and Plaintiffs have pointed out, our courts have generally recognized Plaintiffs are permitted to allocate settlement proceeds as they determine, even if that might be detrimental to a nonsettling defendant. *Riley*, and the Illinois case on which it relies, contemplate the possibility that agreed-upon settlement allocations, largely driven by plaintiffs, may not always be appropriate. *See Riley*, 414 S.C. at 197, 777 S.E.2d at 831 ("Although the manipulation of an allocation can be evidence of bad faith in a settlement negotiation, it is not *per se* bad faith to engage in the advantageous apportioning of a settlement." (quoting *Lard*, 901 N.E.2d at

portion of the settlement allocated to punitive damages. We will address each component of the CBC postverdict settlement in turn.

A. The \$1 Million Insurance Proceeds from July 2018 Mediated Partial Payment/Covenant-Not-to-Execute

TCR 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. Therefore, it was entitled to a setoff. *See* § 15-38-50 (explaining right to setoff arises when two parties are liable in tort for the same injury). Plaintiffs claim these damages did not represent the same injury and because they did not seek damages for HVAC, electrical, drainage, and fireplaces at trial, TCR is not entitled to a setoff. We agree with Plaintiffs.

In *Oaks at Rivers Edge*, 420 S.C. at 432, 803 S.E.2d at 479, the developer and the construction manager of condominiums sought a setoff for a pretrial settlement with other tortfeasors in the construction defect case. The settlement contemplated damages resulting from the "design, manufacture, sale, and installation of the windows, window units, exterior doors, exterior door units, railings, balustrades, framing, and caulking." *Id.* at 434, 803 S.E.2d at 480. "However, [because the plaintiffs] removed from their claim the repairs necessitated by the damage caused by the window installation," the court determined the developer and construction manager "have already received a reduction in claims as contemplated by section 15-38-50" *Id.* at 441, 803 S.E.2d at 484.

As in *Oaks at Rivers Edge*, 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. Therefore, we find the trial court did not err in denying the \$1 million payment as a setoff.¹⁴

1018)). *See also Rutland*, 400 S.C. at 220, 734 S.E.2d at 147 (Pleicones, J., dissenting) (suggesting the court's reallocation of settlement proceeds is inappropriate when "*there is no suggestion of fraud or other wrongdoing by the plaintiff*" (emphasis added)).

¹⁴ 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.

B. \$637,500 of CBC Settlement Allocated for HVAC access, fire separation penetration, and exterior railings

Here, unlike the \$1 million payment allocation, the \$637,500 allocation was for issues that Plaintiffs put before the jury.¹⁵ In discussing pretrial matters, Plaintiffs indicated the issue regarding lack of access to the HVAC units due to framing mistakes was "still in the case." Furthermore, during trial, Plaintiffs questioned their expert, Mease, about the lack of access to the HVAC units due to improper framing and introduced photographs documenting the issue, noting it was a code violation. Likewise, Plaintiffs questioned Mease regarding fire separation penetrations. Mease testified numerous firewall penetrations were visible in the attics of the condominium units due to sprinkler installation, framing, ducting, and plumbing. Plaintiffs introduced photographs documenting instances of these errors. Because these issues were raised and discussed at trial, Plaintiffs cannot make the same pretrial damages reduction argument they persuasively made in section IA.

TCR contends the entirety of Plaintiffs' settlement with CBC should be set off from the verdict against it because the settlement is in reality a satisfaction of a judgment, as opposed to an allocated settlement. We agree. Responding to this contention, Plaintiffs maintain that by settling prior to the entry of judgment, CBC was never subject to a judgment and therefore TCR's argument fails. Plaintiffs misconstrue the crux of TCR's argument. 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. *See Widener*, 397 S.C. at 471-72, 724 S.E.2d at 190 ("[B]efore entering judgment on a jury verdict, the court must reduce the amount of the verdict to account for any funds previously paid by a settling defendant, so long as the settlement funds were paid to compensate the same plaintiff on a claim for the same injury."). In this case, TCR and CBC were found jointly and severally liable for *all* the injuries put before the jury including damages related to framing for HVAC access and fire separation penetrations not related to sprinkler installation. The injuries addressed by the jury's verdict cannot now be parsed out and separated simply because Plaintiffs settled their claim against CBC prior to the entry of judgment. *See Armstrong v.*

Likewise, TCR does not allege apportioning this part of the funds to matters not discussed at trial was in bad faith. Regardless, TCR was not found liable for damages related to HVAC, electrical, flooring, concrete, drainage, or interior railings as those were not included in Plaintiff's request for damages at trial.

¹⁵ Plaintiffs concede a setoff of the full \$137,500 allocated to exterior railings.

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"). Therefore, Plaintiffs would receive a double recovery if both TCR were to pay for these injuries and CBC's settlement compensated them for the same injuries. Accordingly, we conclude the trial court erred in denying a setoff to TCR for the remaining \$500,000 of the CBC settlement allocated to framing for HVAC access and fire separation penetrations not related to sprinkler installation.

C. Punitive Damages

Finally, TCR argues it should receive a \$500,000 setoff for the punitive damages portion of the CBC settlement because, pursuant to *Widener*, punitive damages are part of the same injury as actual damages in the context of setoff. Plaintiffs contend the punitive damages award against CBC and TCR constitute two separate injuries so that the trial court properly denied TCR's setoff request. We agree with Plaintiffs.

In *Widener*, the plaintiff sued several defendants under several theories, all seeking \$35,410.38 in damages for wrongfully denying her access to funds from her late husband's retirement account. 397 S.C. at 471, 724 S.E.2d at 190. The plaintiff settled with one defendant for \$35,410.38 and proceeded to trial against two other defendants. *Id.* The jury returned a verdict of \$35,410.38, and the two nonsettling defendants asked for a setoff. *Id.* The plaintiff claimed her settlement had been solely for punitive damages. *Id.* at 472, 724 S.E.2d at 190-91. In reversing the denial of the setoff request, this court, in a 2-1 opinion stated: "[W]e hold that when a plaintiff seeks actual and punitive damages arising out of the same injury, the two types of damages are part of the same claim for purposes of determining whether a nonsettling defendant is entitled to a setoff to account for funds paid to the plaintiff by a settling defendant." *Id.* at 470, 724 S.E.2d at 189. The court further found the plaintiff's position the settlement was solely for punitive damages was not credible. *Id.* at 474, 724 S.E.2d at 191-92.

In this case, if the jury's verdict evidenced a single punitive damages award against TCR and CBC jointly and severally, *Widener* might dictate TCR is entitled to a setoff and the funds would not be insulated by the fact that the punitive damages award against CBC was not carried to final judgment. However, the form of the jury's verdict indicates it found TCR and CBC each individually liable for a punitive damages award. Although section 15-32-520(G) of the South Carolina Code (Supp. 2022) addresses a bifurcated damages trial, it is still relevant: "In an action with multiple defendants, a punitive damages award must be specific to each defendant, and each defendant is liable only for the amount of the award made

against that defendant." Furthermore, in *McGee v. Bruce Hosp. Sys.*, 344 S.C. 466, 545 S.E.2d 286 (2001), the court addressed the situation in which two joint tortfeasors face punitive damages.

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 [one co-defendant] 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.

Id. at 471-72, 545 S.E.2d at 288-89 (footnote omitted).

The facts of this case call for application of the principles set forth in section 15-32-520(G) and *McGee* because 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. Accordingly, we agree with the trial court's refusal to set off the punitive damages award.

II. Setoff For Pretrial Settlements

Next, we turn our attention to setoff involving pretrial settlements. TCR maintains the trial court erred in failing to set off the jury verdict with the full amount of the settlements for damages not specifically removed from the trial of the case as issue release items. It asserts whatever damages were not explicitly removed from trial by the issue releases were presented to the jury through testimony and exhibits. It contends because a general contractor is responsible for the entire construction project and CBC was a defendant throughout the entire trial, any area not covered by an issue release was necessarily included.¹⁶ We disagree. The trial court awarded the following setoffs:

¹⁶ Plaintiffs contend any argument TCR asserts suggesting it is entitled to setoff as a matter of equity or pursuant to the common law is unpreserved. We disagree. At the posttrial hearing, near the beginning of TCR's setoff argument, TCR stated, "back to setoff. As Your Honor is aware, for over 180 years from the common law and at least since the [19]80's according to statutory law, setoff is a required by the law." Even though the trial court did not explicitly refer to common law setoff in its order, the point was sufficiently addressed so as to preserve it for appellate

Party	Settlement	Plaintiffs Concede for Setoff
Atlantic Building (framing)	\$700,000	\$75,000
Novus (architect)	\$650,000	\$65,000
Cohen's (drywall)	\$125,000	\$62,500
H and A (framing)	\$500,000	\$50,000

Plaintiffs assert TCR cannot prove the verdict overlaps with the same damages or claims compensated by these settlements. They argue TCR is not entitled to any further setoff for pretrial settlements than was already awarded and that TCR has already benefited from three damage reductions, to wit: (1) Plaintiffs reduced their damages at trial and only asked the jury for compensation related to defects and damages resulting from work performed by the defendants who remained in the case at the time of trial (to the exclusion of settled issues), and further reduced their damages by an additional \$1 million during closing arguments to account for untried issues; (2) the defendants asserted the empty chair defense to the jury, which awarded Plaintiffs a further reduced amount; and (3) TCR received a \$1.67 million setoff from the trial court to account for any overlap between pretrial and posttrial settlements and the jury's verdict. Plaintiffs also assert they have not received a double recovery because their expert attributed \$8.375 million in damages to TCR and the trial court entered the judgment against TCR for \$4.83 million.

As an initial point, the trial court's order alludes to caselaw involving the *settling parties'* allocation of settlement funds, and suggests that the allocation by those parties is entitled to a certain amount of deference. The trial court's order, quoting *Riley* concluded it could not "disturb the settling parties' agreed-upon allocation solely because the apportionment may have been advantageous to the [plaintiff]." 414 S.C. at 196, 777 S.E.2d at 831. However, in this case, no allocations appeared

review. *See Johnson v. Roberts*, 422 S.C. 406, 412, 812 S.E.2d 207, 210 (Ct. App. 2018) ("It cannot be said that Appellant's arguments are clearly preserved. But in light of the foregoing, it also cannot be said that Johnson's arguments are clearly unpreserved. In these situations, 'where the question of issue preservation is subject to multiple interpretations, any doubt should be resolved in favor of preservation.'" (quoting *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 333, 730 S.E.2d 282, 287 (2012) (Toal, C.J., concurring in result in part and dissenting in part))).

in the pretrial settlement agreements. Rather, these amounts were concessions Plaintiffs made in response to TCR's setoff motion. In spite of this potential conflation, we do not believe the trial court abused its discretion in awarding the setoffs for the pretrial settlements as it did.

Defendants mentioned the work of the architect, Novus, a number of times at trial, ostensibly as part of the empty-chair defense.¹⁷ There were references to the way the roof was designed as being one cause of leaking.¹⁸ Also, testimony was given that the subcontractors made requests for information to the architect that were never answered. Additionally, there was testimony about the complicated intersections of the posts and roofs and decks.¹⁹ 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. However, 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.

Regarding the Atlantic and H and A settlements, framing was mentioned briefly at trial although the parties disagree as to how much that issue was actually before the jury.²⁰ Plaintiffs argue the framing settlements covered two principle issues—

¹⁷ In particular, Plaintiffs maintain TCR pointed the finger at the architect repeatedly during closing arguments and referenced the original damages estimate to assert certain parts of the damages should be ignored.

¹⁸ The record contains testimony that the amount of slope of the roofs was an architectural design and was unusual. This is a separate issue from the slope of the decks, which is discussed in regards to the framers next.

¹⁹ Elkin testified "my initial takeaway was that some of these were some pretty challenging intersections. . . . [A]ny time you have two different materials interface it gets to be -- it is a hard -- it can be a hard transition to make to keep it watertight. In this instance when you have three different materials coming together in different planes it becomes that much harder to make sure it is constructed in a watertight manner."

²⁰ Poyner, of TCR, testified as follows:

Q. Do you recall what it looked like out there at this time period with some of the siding coming off?

A. Well, the -- when this came out, obviously some of the buildings were -- the exteriors were fairly far along,

even having been painted, and the siding had to be -- they asked me to remove a section of the siding.

Q. Now, was the siding being removed for your installation issues?

A. It was not.

Q. Was it a framing issue?

A. Yes, sir, it was.

Q. Okay, and you weren't involved in the framing issue, right?

A. No, sir.

Q. And so you don't -- you're not going to offer any testimony as to what they were looking at with the framing?

A. No, sir.

He also testified:

A piece of plywood does not do weather -- does not do well when it's weathered. So, very early on when they would frame up those decks, we would come in and actually put the base coat on and get the product up the post.

Now, in, in going back and looking, I know that there were some posts that were structural and some that were just ornamental. You couldn't tell the difference, but the difference was the structural posts were put in at the beginning when the building was framed. The ornamental posts weren't always put in at the same time that they built the deck. Were, you know, framing up the house and even when the waterproofing on -- some, some instances they came back and put those posts after we had already waterproofed the deck.

Q. And you were not a framer who installed those posts?

A. No, sir.

Q. The lumber that is out there on the decks, is that pressure treated?

shear walls and window installation—and that these issues were not presented to the jury at all. 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 joint. 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. 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.²¹

A. I do not believe it was. I think the first one they did -
- once again on the River Birch -- I think they had tried to
install treated lumber, but the manufacturer's instructions
say, I believe, not to use treated lumber.

Q. You're talking about the sheathing on the ---

A. That's correct.

Q. --- the posts? Are those treated?

A. They are.

Q. Okay, and the, the, the actual framing parts of the,
the joists, those are treated?

A. As far as I know.

²¹ Poyner testified on cross-examination by one of the codefendants:

Q. So, this is simply if any work that's found not to in
conformance with the plans and specifications is
discovered, it is to be redone and done correctly, correct?

A. That's correct.

Q. All right, and, in fact, you witnessed such a situation
with regard to the slope of the decks on this project, did
you not?

A. That is correct.

Q. Is it true that a gentleman named Gary Stanley was
the superintendent for [CBC]?

A. Yes, he was.

Q. And he was the one that was on-site most of the time
for [CBC]?

A. That and later they had brought Joe Brown as well.

Finally, regarding the Cohen's settlement, Plaintiffs assert it involved drywall and insulation issues. 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. The court reduced the final judgment by \$62,500 due to the potential of drywall overlap. The testimony included in the record only contains a few references to insulation.²² Accordingly, we conclude the trial court did not abuse its discretion in awarding a setoff in this amount for this settlement.

CONCLUSION

In sum, we conclude the trial court did not abuse its discretion in refusing to set off the entirety of the pretrial settlements between Plaintiffs and Novus, Atlantic, H and A, and Cohen's. Further, we find the trial court did not err in denying TCR's request for setoff as to the \$1 million of the CBC settlement allocated to matters not raised at trial or for the \$500,000 allocated for punitive damages. We reverse the portion of the trial court's order denying TCR a setoff for the \$500,000 of the \$637,500 portion of the CBC settlement not already setoff for exterior railings. Accordingly, the trial court's order is

Q. Okay, and Mr. Stanley, at least as part of his duties, would also spot check and come behind each of the subcontractors to look at their work, did he not?

A. Yes, sir.

Q. Okay, and isn't it true that Mr. Stanley, before the waterproofing was put down, he would check the slope of the decks? Isn't that, correct?

A. I believe so, yes, sir.

Q. And, in fact, you saw him use a level to look at the decks to make sure they had proper slope?

A. I did.

Q. And, in fact, there was -- if a deck was discovered not to have a proper slope, Mr. Stanley would make the framer redo it before you put your waterproofing on the deck, correct?

A. That's correct.

²² Elkin's testimony refers to insulation but it does not appear to be referencing any problem with insulation. Schweickhardt mentioned damaged insulation in his testimony but he appears to have attributed the damage to the leaking from flashing, not due to any issue with the insulation.

AFFIRMED IN PART AND REVERSED IN PART.

HEWITT and VINSON, JJ., concur.

RECEIVED

Jul 13 2023

SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Jennifer B. McCoy, Circuit Court Judge

Civil Action No. 2015-CP-10-00955

Appellate Case No. 2019-001790

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.

**APPELLANT’S PETITION FOR REHEARING (PANEL)
AND PETITION FOR REHEARING EN BANC**

TO: THE HONORABLE JUDGES OF THE SOUTH CAROLINA COURT OF
APPEALS:

Pursuant to Rules 219, 221, and 240 of the South Carolina Rules of Civil Procedure, Appellant Tri-County Roofing, Inc. (“TCR”) petitions for a rehearing of this Court’s opinion en banc, or in the alternative, by the panel.

The Court of Appeals opinion affirmed in part and reversed the circuit court’s order regarding setoff of settlements paid to Plaintiffs Palmetto Pointe At Peas Island Condominium Property Owners Association, Inc. and Jack Love, Individually, and on behalf of all others similarly situated (“Plaintiffs”). TCR respectfully submits the Court of Appeals overlooked or misapprehended arguments made by TCR in its briefs and oral argument including the

application of South Carolina statutory and common law when the Court of Appeals ruled the trial court did not err in denying the \$1 million payment as setoff; affirming the trial court's refusal to set off the \$500,000 punitive damages award; and affirming the trial court's refusal to set off the entirety of the pretrial settlements between Plaintiffs and Novus, Atlantic, H and A, and Cohen's.

More specifically, the Court of Appeals overlooked or misapprehended the above in the following ways:

I. The \$1 Million Insurance Proceeds from July 2018 Mediated Partial Payment/Covenant-Not-to-Execute.

The Court overlooked or misapprehended the application of The Oaks at Rivers Edge Property Owners Association, Inc. v. Daniel Island Riverside, 420 S.C. 424, 803 S.E.2d 475 (Ct. App. 2017), reh'g den. (Oct. 19, 2017) to the \$1 million July 2018 mediated partial payment/covenant-not-to-execute between Complete Building Corporation ("CBC") and Plaintiffs.

TCR maintained through its briefs and oral argument that the allocation of the \$1 million July 2018 mediated partial payment/covenant-not-to-execute between CBC and Plaintiffs was untimely, and, therefore, never actually allocated by Plaintiffs. Further, there is no true distinction between the

arguments made by TCR in its briefs that the \$1 million payment was untimely and this Court’s articulation of arguments TCR did not maintain in footnote 14.

This Court stated that TCR contended this \$1 million payment was allocated to HVAC, electrical, drainage, and fireplaces, matters which were damages not sought at trial, were actually a settlement for the same injury represented by the verdict. This Court held that the settlement was not of the same injury sought at trial because the repair costs for HVAC, electrical, drainage, and fireplaces were not in Plaintiffs’ damages estimate, citing to The Oaks. In footnote 14 of its opinion, the Court states: “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.” However, TCR argued throughout its briefs that the allocation of the 2018 settlement payment was both improper and untimely. (App. Br. pp. 27-28; App. Response Br. p. 5). The Court overlooked or misapprehended the application of The Oaks because TCR argued these funds were actually unallocated and should be included in TCR’s setoff. Thus, were a settlement for the same injury sought at trial.

II. Punitive Damages.

The Court overlooked or misapprehended the application of Smith v. Widener, 397 S.C. 468, 724 S.E.2d 188 (Ct. App. 2012) and McGee v. Bruce Hosp. Sys., 344 S.C. 466, 545 S.E.2d 286 (2001), as well as the other case law in holding that TCR is not entitled to receive a \$500,000 setoff for the punitive damages portion of the CBC settlement.

As articulated in TCR's briefs to this Court, Widener notes that "a plaintiff's claim for actual and punitive damages arising from the same injury is the same claim for purposes of setoff under section 15-38-50(a).". 397 S.C. at 473, 724 S.E.2d at 191. In short, Widener supports TCR's position that punitive damages are part of the same injury as actual damages in the context of setoff. Accordingly, the Court misapprehended Widener in its application to the subject case.

III. Setoff For Pretrial Settlements.

In its decision that the trial court did not err in finding TCR was not entitled to a full setoff for the pretrial settlements between Plaintiffs and Novus, Atlantic, H and A, and Cohen's, which were not specifically removed from the trial of the case as issue release items, the Court overlooked or misapprehended the case law discussed by TCR in its briefs in support of its

assertion that TCR is entitled to a full setoff of those pretrial settlements not allocated.

At trial, Plaintiffs sought damages to repair the Project and for lost use. The trial judge informed the jury that the damages being sought by Plaintiffs was 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. Throughout the trial and during the closing arguments in this case, the parties asked the jury to evaluate the damages presented at trial and to ignore the items specifically designated as issue releases. 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. 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 Court overlooked or misapprehended applicable case law related to setoff and any applicable statutes regarding the same when it affirmed the trial court's limited pretrial settlement setoffs. It is established law that Plaintiffs

here are not entitled to multiple awards for the same injury. See Welch v. Epstein, 342 S.C. 279 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 v. SC Dep’t of Transp., 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.”).

The Court’s opinion affirming the trial court’s limited setoff for pretrial settlements is contrary with South Carolina policy against double recovery. TCR’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.

Conclusion

TCR respectfully submits the Court overlooked or misapprehended arguments made by TCR in its briefs and oral argument including the application of South Carolina statutory and common law in the above discussed manner. Accordingly, TCR respectfully requests the Court alter or amend its opinion to further reverse the trial court’s order regarding setoff in the following manner: TCR is given setoff for the \$1 million settlement for CBC’s 2018 settlement payment to Plaintiffs; TCR is given a \$500,000 setoff

for the punitive damages portion of CBC's post-trial settlement; and TCR is entitled to setoff for the entirety of the pretrial settlements between Plaintiffs and Novus, Atlantic, H and A, and Cohen's.

Respectfully submitted,

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July 13, 2023
Columbia, South Carolina

RECEIVED

Jul 13 2023

SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Jennifer B. McCoy, Circuit Court Judge

Civil Action No. 2015-CP-10-00955

Appellate Case No. 2019-001790

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.

PROOF OF SERVICE

I certify that I have served a true copy of the Appellant's Petition for Rehearing (Panel) and Petition for Rehearing En Banc upon all parties via email, on July 13, 2013, addressed as follows:

Respectfully submitted,

COLLINS & LACY, P.C.



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and on behalf of all others similarly situated*

The South Carolina Court of Appeals

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

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/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,

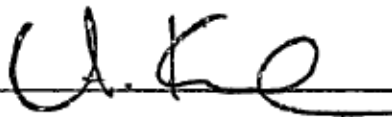
and

Tri-County Roofing, Inc. is the Appellant.

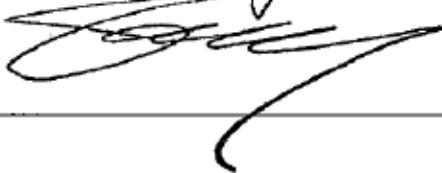
Appellate Case No. 2019-001790

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.



J.


J.


J.

Columbia, South Carolina

cc:

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The Honorable Jennifer B. McCoy

FILED
Aug 10 2023

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

RECEIVED

FEB 22 2021

SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Jennifer B. McCoy, Circuit Court Judge

Civil Action No. 2015-CP-10-00955

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American Residential Services, LLC d/b/a ARS/Rescue Rooter Charleston; Andersen Windows,
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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; Eloy 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 Does 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.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

- I. DID THE TRIAL COURT ERR WHEN IT FAILED TO SETOFF THE JURY VERDICT WITH ALL THE SETTLEMENTS THAT WERE ENTERED POST-VERDICT?
- II. DID THE TRIAL COURT ERR WHEN IT FAILED TO SETOFF THE JURY VERDICT WITH THE SETTLEMENTS THAT WERE NOT REMOVED FROM THE TRIAL OF THIS CASE AS ISSUE RELEASE ITEMS?

STATEMENT OF THE CASE

On February 13, 2015, Respondents filed a construction defect lawsuit regarding a condominium project located on Peas Island, which is located near Folly Beach, Charleston County, South Carolina. [R.201-222 S&C 2/13/2015] The pleadings were revised several times and various defendants asserted crossclaims and third-party claims. [R.223-242 TCR Ans & 3rd-P Comp. 4/22/2015; R.243-252 Complete Ans 4/27/2015; R.253-262 Complete Ans & CC 7/22/2015; R.263-274 TCR Ans to Complete 8/5/2015; R.342-359 TCR Ans to Am. S&C 11/23/2016; R.360-371 Complete Ans to Am. S&C 11/29/2016; R.372-386 TCR Ans to Complete CC 12/16/2016; R.409-425 Novus Ans & CC 11/16/2017; R.426-446 TCR Ans to 2nd Am. S&C & CC 11/17/2017; R.447-456 TCR Ans to Novus CC 12/1/2017; R.457-469 Complete Ans to 2nd Am S&C & CC 12/11/2017; R.470-478 TCR Ans to Complete CC 4/18/2018] The Respondents' amended complaint was filed November 4, 2016 and the second amended complaint was filed November 2, 2017. [R.275-341 Am. S&C 11/4/2016; R.387-408 2nd Am S&C 11/2/2017] The case was tried before the Honorable Jennifer B. McCoy from May 6 through 16, 2019. Respondents settled with various defendants other than Appellant Tri-County Roofing, Inc. ("TCR") before, during, and after the case was tried. Thirty-three of the thirty-six defendants named in the caption

participated in the lawsuit at some time. There were eight defendants at the start of trial and five when the case went to the jury for deliberations. In their pleadings and at trial, Respondents sought damages for repair costs, lost use claimed during the future repairs, and punitive damages.

On May 16, 2019, the jury returned a general verdict of \$6.5M actual damages against four of the five defendants remaining at trial: Complete Building Corporation, the general contractor (hereinafter “Complete”); TCR, a prime subcontractor to Complete for siding, roofing, and balcony waterproofing; Eloy Alonzo Vasquez, a sub-subcontractor for roofing and waterproofing (hereinafter “Vasquez”); Miracle Siding, LLC and Wilson Lucas Sales d/b/a Miracle Siding, LLC, the sub-subcontractor that installed siding on seventeen of the twenty buildings (hereinafter “Miracle”); and W.C. Services, Inc., a prime subcontractor for fire sprinkler installation (hereinafter “W.C. Services”). [R.116-122 Form 4 filed 5/16/2019; R.1756-1760 Wk-2 Trans pp.836-840] The jury found Complete and TCR were grossly negligent and awarded \$500k in punitive damages against them both. [Id.] The trial judge submitted Complete’s crossclaim for contractual indemnity to the jury. The jury awarded Complete \$1,000 on its crossclaim against TCR. [Id.] The jury returned a defense verdict in favor of W.C. Services on both Respondents’ claims and Complete’s crossclaims. [Id.] After the initial jury verdict was returned, Vasquez and Miracle, which were found simply negligent, argued for a finding of their relative percentages of fault under Section 15-38-15 of the S.C. Contribution Among Tortfeasor’s Act. [R.1760-1782 Wk-2 Trans pp.840-862] The jury found that Vasquez and Miracle were

each five percent (5.00%) responsible for the general verdict award. [R.122 Special Verdict Form; R.1760-1782 Wk-2 Trans pp.840-862]]

The trial judge gave the parties ten (10) days to file their post-trial motions. [R.1782 Wk-2 Trans p.862] After accounting for the weekend and holidays, TCR timely filed its post-trial motions on May 28, 2019. [R.525-545 TCR Post-Trial Motion 5/28/2019] TCR was the only defendant that filed post-trial motions because Complete, Vasquez, and Miracle entered into post-verdict settlements with Respondents. [R.1925-1939 Complete Settlement 6/6/2019; R.2065-2076 Miracle Siding Settlement 5/28/2019; R.2077-2088 Vasquez Settlement 5/28/2019] The post-trial motion hearing was held on Friday, June 7, 2019 where Complete, Vasquez, and Miracle confirmed their settlements with Respondents and Complete withdrew its crossclaims against TCR. [R.1809-1812 Post-T Hrg pp.24-27] The trial judge subsequently issued a Form 4 Order denying TCR's post-trial motions on July 23, 2019, which also allocated a portion of the settlement setoffs and reduced the total general verdict amount against TCR from \$7M (actual plus punitive damages) to \$5.33M. [R.166-167 Form Order 7/23/2019] On July 24, 2019, TCR received an electronic copy of the filed verdict form, which was retroactively file stamped on May 16, 2019, the last day of trial. [R.116-122 Form Order 5/16/2019]

TCR timely filed its motion to reconsider the Form 4 Order on August 5, 2019. [R.620-631 TCR 59(e) Motion 8/5/2019] Although TCR did not abandon any of its post-trial motions, TCR principally addressed setoff in its motion to reconsider. Respondents e-

mailed a memorandum in opposition to the motion to reconsider on August 15, 2019.¹ [R.632-648 Plaintiff Memo 8/15/2019] TCR filed a return to Respondents memorandum on August 23, 2019. [R.649-660 TCR Return 8/26/2019] On September 25, 2019, the trial judge entered her final order denying TCR's motion to reconsider. [R.168-173 Order 9/25/2019] TCR timely filed its notice of appeal with the South Carolina Court of Appeals on October 14, 2019 and served the notice on Respondents and the trial court on October 21, 2019. [R.174-200 TCR NOA] Although the notice of appeal addressed several issues, the only question TCR is prosecuting in this appeal is the trial court's inadequate setoff.

STANDARD OF REVIEW

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

"[T]he Act represents the Legislature's determination of the proper balance between preventing double-recovery and South Carolina's strong public policy favoring the

¹ There is no record that Respondents' reply memorandum was filed with the court.

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

When a prior settlement involves compensation for the same injury for which the jury awarded damages, the right to setoff arises as an operation of law. However, when the settlement involves compensation for an injury different from the one tried to verdict, there is no set off as a matter of law. When the settlement is argued to involve two claims, one of which involves the same injury as the claim tried to verdict and one of which does not, the circuit court must make the factual determination of how to allocate the settlement between the claims.

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

of conscious pain and suffering, so all the settlement funds were reallocated by the court to the wrongful death claim).

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

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

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

FACTS

1. General Background

This is a construction defect lawsuit involving 40 duplex condominium units at a project called Palmetto Pointe at Peas Island, which is located near Folly Beach, Charleston County, South Carolina (hereinafter the "Project").² [R.201-222 S&C 2/13/2015; R.275-

² The Project also includes a clubhouse and two additional duplex buildings. Only one of the defendants at trial—W.C. Services—acknowledged performing any work on the clubhouse. The two additional duplex buildings were constructed after the buildings in the lawsuit and by different contractors, so they were not joined into the litigation.

341 Am S&C 11/4/2016; R.387-408 2nd Am S&C 11/2/2017] The Project was constructed in 2006-2007 and received certificates of occupancy from January 19 through November 2, 2007. [R.997-998 Wk-1 Trans p.638 ln.18—p.639 ln.14; R.1075 Wk-1 Trans pp.776 ll.17-18; R.2630-2678 Trial Exhibit 789] Numerous parties were involved in the construction of Palmetto Pointe. In fact, thirty-six defendants were named in the caption, and thirty-three defendants participated in the litigation. [R.201-222 S&C 2/13/2015; R.275-341 Am S&C 11/4/2016; R. 387-408 2nd Am S&C 11/2/2017; R.1-5 Dismissal of Union and Browne 8/2/2017; R.6-9 Dismissal of CRG 1/24/2018; R. 10-42; Dismissal of Cornerstone 6/28/2018; R.43-49 Dismissal of H&A 7/10/2018; R.50-59 Dismissal of Novus 7/12/2018; R.60-69 Dismissal of Alderman 8/9/2018; R.70-77 Dismissal of CertainTeed 8/21/2018; R.78-81 Dismissal of Cohens 9/27/2018; R.82-112 Dismissal of Kelly 3/1/2019; R.113-115 Dismissal of Crossclaims vs. Andersen 5/7/2019; R.123-128 Dismissal of Gale 5/20/2019; R.129-131 Dismissal of Tallent 5/24/2019; R.132-143 Dismissal of ARS, et al. 6/6/2019; R.144-156 Dismissal of Atlantic 6/7/2019; R.157-160 Dismissal of Creekside, Mosely, Andersen, Complete, Vasquez, Miracle Siding, and Stanley's 6/7/2019; R.1925-1939 Complete Settlement 6/6/2019; R.1940-1954 Creekside Settlement 6/6/2019; R.1955-1979 ARS Settlement 4/23/2019; R.1980-1994 Atlantic Settlement 4/5/2019; R.1995-2009 Gale Settlement 7/24/2018; R.2010-2018 Novus Settlement 2/22/2018; R.2019-2033 Tallent Settlement 2/22/2019; R.2034-2048 CertainTeed Settlement 7/12/2018; R.2049-2056 Kelly Flooring Settlement 1/25/2019; R.2057-2064 Cornerstone Settlement 4/25/2018; R.2065-2076 Miracle Siding Settlement 5/28/2019; R.2077-2088 Vasquez Settlement 5/28/2019; R.2089-2091 Alderman

Settlement 6/19/2018; R.2092-2106 Stanley's Settlement 5/8/2019; R.2107-2121; Cohen's Settlement 7/12/2018; R.2122-2130; Moseley Settlement May-June, 2019; R.2131-2142 H&A Settlement 1/31/2018; R.2143-2145 Andersen Settlement 4/30/2019; R.116-122 Verdict]

Island Pointe, LLC (hereinafter "IP-LLC"), the developer, entered into an AIA contract dated December 27, 2005, with Complete, the general contractor, for the construction of the entire project, excluding the clubhouse. [R.2148-2182 Trial Exhibit 5A] The IP-LLC and Complete contract lists various duties and the scope of work of Complete, which includes oversight of the entire construction process, coordination of its subcontractor trades, coordination of the architects' plans and specifications that were given to the various subcontractors, plus other obligations and duties. [Id.] After twelve change orders, the total contract amount was \$11,578,454. [R.2194-2198 Trial Exhibit 22; R.1357-1358 Wk-2 Trans p.316 ln.9—p.317 ln.2]

TCR entered into its subcontract with Complete on April 17, 2006 for the installation of the siding and roofs at the project. [R.2183-2193 Trial Exhibit 9] The installation of the waterproof membranes on the decks was added by a change order. The total subcontract between Complete and TCR after change order number twelve was \$1,382,558.24. [R.2201-2202 Trial Exhibit 36; R.1357 Wk-2 Trans p.316 ll.2-8] TCR in turn hired sub-subcontractors to complete its scope of work on the project including Vasquez (roofs and waterproof membranes), and Miracle (installed siding on seventeen of the twenty buildings in the lawsuit). [R.223-242 TCR Ans & 3rd-P Comp 4/22/2015; R.342-359 TCR Ans & 3rd-P Comp 11/23/2016; R.426-446 TCR Ans & CC 11/17/2017] As with

all construction projects, the general contractor, architect, engineers, subcontractors, and material suppliers worked on the Project in some coordinated fashion.

Q. When you were out there doing the work, were you out there by yourself just making stuff up, or were people assisting you?

A. No. No. That, that, that wouldn't happen. Once again, there's, there's so many entities involved here with architects, engineers, people that are way smarter than me that -- I mean, we took our direction from, you know, what they wanted us to do.

Trial Transcript, Week Two, p.371 ll.15-22. [R.1406]

The architect and engineers on the project were involved throughout the entire construction process. The architect provided the plans and specifications, which set forth the entire design intent that Complete was charged with constructing.

Q. Okay, and we talked a little bit about the role of the architect, and you've looked at the specifications already and you -- in response to Mr. Cole's questions, correct?

A. Yes, sir.

Q. And, and it was the architect in its specifications that determined the types of materials that the owner wanted on this project, correct?

A. I would think so.

Q. And, in fact, the architect specified in the case of the siding the size of the siding the owner wanted on this project, correct?

A. I don't know. I was asked to submit two bids for it on two different sidings, so.

Q. You were just shown by Mr. Cole the siding specification prepared by the architect, correct?

A. That's correct.

Q. An architect called for a 9 and a quarter inch ---

A. That is correct.

Q. --- siding?

A. He approved that.

Q. And that's what you installed?

A. That is correct.

Trial Transcript, Week Two, p.385 ln.18—p.386 ln.14. [R.1420-1421]

Q. Okay, and what exactly is a project manual?

A. The project manual lays out the specifications for the project, to include what products are to be used, size, all the different particulars so that we can give an adequate estimate on that project.

Q. Where does the project manual come from? Who, who puts it together?

A. This one looks like it came from SGM and was given to me by Complete Building.

Q. And who is SGM?

A. It's an architectural firm.

Q. Were they involved in the construction process?

A. Yes, sir, they were.

Q. Were they involved during construction as well?

A. Yes, sir.

Trial Transcript, Week Two, p.329 ln. 22—p.330 ln.11. [R.1367-1368]

The architect addressed issues that came up during construction at regular meetings held at the job site.

A. A lot of times we had meetings with the GC, the architect, the engineer, all to collaborate on the project.

Trial Transcript, Week Two, p.350 ll. 24-25. [R.1385]

Q. And when the meetings were held, was there somebody that was in charge of them?

A. Yes, sir. Typically the GC. In this case Buddy Hilton oversaw, along with Gary Stanley, who was the project manager out there.

Q. Do you know how often you were out there at these meetings?

A. Sometimes weekly, sometimes every other week. It really just depended on what phase we're at in the project and how many buildings were going up and what different phases they were.

Trial Transcript, Week Two, p.351 ln.22—p.352 ln.7. [R.1386-1387]

Respondents filed their original summons and complaint on February 13, 2015 alleging construction defects and praying for the common damages of repair costs plus lost use. [R.201-222 S&C 2/13/2015] TCR brought third-party claims against its sub-contractors when it answered the original complaint on April 22, 2015. [R.223-242 TCR Ans & 3rd-P Comp 4/22/2015] Respondents amended their complaint on November 4, 2016 [R.275-341 Am S&C 11/4/2016] and filed a second amended complaint on November 2, 2017. [R.387-408 2nd Am S&C 11/2/2017] The Respondents' amended their pleadings to add new defendants and bring direct claims against the third-party defendants. Despite the number of defendants and the causes of action alleged by the Respondents, the Respondents prayed for the same type of relief: repair costs, lost use, and punitive damages. [R.201-222 S&C 2/13/2015; R.275-341 Am S&C 11/4/2016; R.387-408 2nd Am S&C 11/2/2017] Complete, IP-LLC, and Novus Architects, Inc. f/k/a SGM Architects, Inc.

(hereinafter “Novus”) filed crossclaims against the co-defendants generally alleging claims sounding in either contractual or equitable indemnity. [R.253-262 Complete Ans & CC 7/22/2015; R.360-371 Complete Ans & CC 11/29/2016; R.409-425 Novus Ans and CC 11/16/2017; R.457-469 Complete Ans & CC 12/11/2017]

2. The Parties at Trial

TCR was not the only defendant at trial and it is not the only party that took a judgment at trial. A number of defendants settled prior to trial. Eight defendants were still in the case when the trial started on May 6, 2019. [R.688-737 Wk-1 Trans pp.171-220] Five defendants were still in the case when it went to the jury for deliberations on May 16, 2019: Complete, TCR, Miracle, Vasquez, and W.C. Services. [R.116-122 Verdict] Complete, as the general contractor, was responsible for the entire project. Testimony was provided explaining the role of the general contractor on the job site and its responsibility to coordinate all of the trades as well as the architect and the engineers. [R.844 Wk-1 Trans p.382 ll.6-22; R.886-887 Wk-1 Trans p.461 ln.20—p.462 ln.13; R.1039 Wk-1 Trans p.727 ll.4-15; R.1058 Wk-1 Trans p.746 ll.18-24; R.1069-1070 Wk-1 Trans p.763 ln.10—p.764 ln.19; R.1072-1073 Wk-1 Trans p.768 ln.9—p.769 ln.21; R.1177-1179 Wk-2 Trans p.101 ln.13—p.103 ln.23; R.1366 Wk-2 Trans p.328 ll.14-17; R.1385-1389 Wk-2 Trans p.350 ln.10—p.354 ln.15; R.1455-1456 Wk-2 Trans p.420 ln.5—p.421 ln.8; R.1559-1560 p.569 ln.3—p.570 ln.4] This testimony was supplemented by the language of the contract between IP-LLC and Complete for the construction of the project. [R.2148-2182 Trial Exhibit 5A]

TCR was the prime contractor for the siding, roofs, and waterproofing installed at the project. [R.914 Wk-1 Trans p.541 ll.5-25; R.1358 Wk-2 Trans p.317 ll.4-8; R.2183-2193 Trial Exhibit 9] This work was done in coordination with and direction from Complete according to the drawings and specifications from the architect and the engineers. [R.844 Wk-1 Trans p.382 ll.6-22; R.886-887 Wk-1 Trans p.461 ln.20—p.462 ln.15; R.914-915 Wk-1 Trans p.541 ln.5—p. 542 ln.4; R.1039 Wk-1 Trans p.727 ll.4-15; R.1058 Wk-1 Trans p.746 ll.18-24; R.1069-1070 Wk-1 Trans p.763 ln.10—p.764 ln.19; R.1072-1073 Wk-1 Trans p.768 ln.9—p.769 ln.21; R.1366 Wk-2 Trans p.328 ll.14-17; R.1385-1389 Wk-2 Trans p.350 ln.10—p.354 ln.15; R.1455-1456 Wk-2 Trans p.420 ln.5—p.421 ln.8] TCR hired subcontractors that actually performed the siding, roofing and waterproofing scope of work. [R.914-916 Wk-1 Trans p.541 ln.5—p.543 ln.20] Miracle installed siding. [R.916-917 Wk-1 Trans p.543 ln.21—p.544 ln.23; R.1358 Wk-2 Trans p.317 ll.15-16] Vasquez installed the roofs and waterproofing. [R.917-919 Wk-1 Trans p.544 ln.24—p.546 ln.7; R.1347 Wk-2 Trans p.273 ll.3-15; R.1349 Wk-2 Trans p.296 ll.8-21; R.1358 Wk-2 Trans p.317 ll.12-14; R.1375 Wk-2 Trans p.340 ll.11-18]

W.C. Services was hired by Complete and installed the fire sprinklers at the project. [R.1477 Wk-2 Trans p.442 ll.3-25]

3. The Trial

Trial started on May 6, 2019. The defendants present at the start of trial were Complete, TCR, Vasquez, Miracle, W.C. Services, Stanley's Vinyl Fence Designs (exterior railings) (hereinafter "Stanley's"), JMC Construction, Inc. and JMC Construction, LLC (repair contractor for a subcontractor that settled out before trial)

(hereinafter “JMC”), and IP-LLC (developer). [R.694-737 Wk-1 Trans p.177 ln.4—p.220 ln.3] Stanley’s settled with Respondents on the second day of trial. [R.838-839 Wk-1 Trans p.339 ln.3—p.340 ln.25; R.861-862 Wk-1 Trans p.411 ln.23—p.412 ln.10] JMC was dismissed by the trial judge on May 9, 2019 by directed verdict after Respondents rested their case. [R.1018-1023 Wk-1 Trans p.659 ln.23—p.664 ln.7] Respondents dismissed their claims against IP-LLC prior to the closing arguments. [R.1580 Wk-2 Trans p.614 ll.2-6]

All of the parties at trial took care to clarify to the jury what claims and issues were still in the case. [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 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]

The parties also explained to the jury that certain items had been removed from the case and those previously resolved items were referenced as “issue releases” or “resolved claims.”[Id.]

Mr. Kendall: Your Honor, Rhett Kendall again. We had one other motion that we had filed, and it mirrors what Mr. Lucey has already raised in terms of the issue of preclusion.

So we have – we listed out the ones that we have. I think there is a little bit of difference from the list that he had: Andersen Products.

Alderman on interior Handrail. ARS and all of its subcontractors on HVAC and electrical. Builder Services Group, DBA Gayle were fireplaces. And Kelly Flooring was a limited issue.

And we probably ought to talk to each other in advance to make sure we don't step on each other. I think we probably have an agreement in spirit. We generally do. But we will get together and figure that one out.

But I wanted to raise to the court that my list was just slightly different than the list that he had.

The Court: Okay.

Mr. Kendall: But and I hope we can work everything through.

Mr. Lucey: Yes, Your Honor, if I may clarify the list for both of our benefits. As to Andersen Windows what is settled is any allegation of manufacturing defect. As to ARS and its subcontractors what is settled is any defect that is the sole liability of ARS and its electricians and its HVAC subs.

The actual HVAC repair and electrical repair line – and the estimate is growing [sic] out the window. There is a semi-related HVAC related area which is that the framer didn't build access to the HVAC units. The framing issue is still in the case. That has nothing to do with the HVAC subcontractor.

Trial Transcript, Week One, p.112 ln.9—p.113 ln.12. [R.681-682]

Although more causes of action were asserted in the pleadings, the only claims that went to the jury were Respondents' claims for (1) breach of warranty, (2) negligence, and (3) Complete's crossclaims for contractual indemnity. [R.1007 Wk-1 Trans p.648 ll.6-13; R.1566 Wk-2 Trans p.600 ll.8-10; R.1715-1746 Wk-2 Trans p.795 ln.11—p.826 ln.23; R.116-122 Verdict] The damages Respondents sought were for the cost to repair alleged construction defects, lost use contemplated during the repairs, and punitive damages. (See, generally, pleadings and the jury verdict form.) [R.201-478 Pleadings; R.116-122 Jury Verdict Form; R.1723 Wk-2 Trans p.803 ll.21-23] In fact, these are the same injuries that

Respondents sought redress in their original summons and complaint and throughout the entire litigation. [R.201-222 S&C 2/13/2015; R.275-341 Am S&C 11/4/2016; R.387-408 2nd Am S&C 11/2/2017; R.694-709 Wk-1 Trans p.177 ln.4—p.192 ln.20; R.949-954 Wk-1 Trans p.590 ln.4—p.595 ln.25; R.1723 Wk-2 Trans p.803 ll.21-23]

The jury also heard testimony that some of the issues the jury was asked to deliberate over included work attributed to Complete and some subcontractors or other parties not actually in the courtroom. For example, the design and specifications from the architect were addressed.

A. ...What is creating these very low slope areas is the meeting of different slopes that come together and they kind of cancel each other out, if you understand what I'm saying.

Q. Yes.

A. And it creates a spot that is just really flat.

Q. So the idea though – because this is a very complicated roofline on these buildings, isn't it, where you have –

A. It is very –

Q. -- these lines that come together and do strange things?

A. It is very architectural, as I like to say.

Q. Right.

A. There are lots of places to it.

Trial Transcript, Week One, p.434 ln.25—p.435 ln.11. [R.869-870]

The jury was also informed about various framing repairs that were necessary to be completed along with the repairs alleged against the parties at trial.

Q. And you, you went and investigated four or five houses for deflections in the main floor you have in the foyer, correct?

A. Floor slopes, yes.

Transcript, Week Two, p.81 ll. 4-7. [R.1157]

Q. What would be the appropriate repair for the siding issue that was identified and talked about be?

A. Sure. So it is a two-step process. The first step is the sheathing, underlying sheathing, appropriately nailed to the structure.

So and there are -- there were requirements about a nailing pattern for that. That could be evaluated using engineering principles. Then assuming that the sheathing is adequately attached it would be possible to face nail the siding to the sheathing and into the studs and have it work.

Trial Transcript, Week One, p.759 ln.24—p.760 ln.8. [R.1065-1066]

Respondents' cost estimator, Jerry "Jay" Handegan, issued his cost estimate dated December 21, 2017. [R.2619-2629 Trial Exhibit 677; R.958-959 Wk-1 Trans p.599 ln.23—p.600 ln.16] However, in contemplation of removing the issue release items, Mr. Handegan produced a revised estimate during the Respondents' case in chief that was dated May 7, 2019. [R.950-951 Wk-1 Trans p.591 ln.14—p.592 ln.11] Mr. Handegan's revised estimate was comprised of handwritten notes made directly onto his December 21, 2017 estimate. [Id.] Respondents presented the revised estimate to the jury through trial testimony. [R.949-954 Wk.1 Trans p.590 ln.4—p.595 ln.22] In order to cross-examine Mr. Handegan on his repair line items, Complete had the original cost estimate entered without objection as Exhibit 677 [R.2619-2629] to the trial. [R.958-959 Wk-1 Trans p.599 ln.23—p.600 ln.16] The revised estimate [R.2993-3003] was not entered into the record.

Mr. Handegan's revised estimate removed the issue release items and added new figures for fire wall repairs plus an additional 10% contingency. The net change results in a reduction of Respondents' repair estimate from \$15,257,512 to \$13,428,826. [R.950-951 Wk-1 Trans p.591 ln.14—p.592 ln.11; R.2993-3003 revised estimate]

It was clear from the arguments from Respondents and defense counsel as well as the testimony from Mr. Handegan that the jury was *not* to consider the line items referencing the Clubhouse [R.952 Wk-1 Trans p.593 ll.23-25; R.1652-1653 Wk-2 Trans p.725 ln.22—p.726 ln.2; R.2993-3003 Handegan Rev. Est.]; section 1738.010 for the removal of the windows and doors [R.970 Wk-1 Trans p.611 ln.10—p.612 ln.13; R.1666 Wk-2 Trans p.739 ll.2-6; R.2995 Handegan Rev. Est.]; section 1739.010 for the demolition of the floors [R.968 Wk-1 Trans p.609 ln.2—p.610 ln.9; R.1666 Wk-2 Trans p.739 ln.6-10; R.2995-2996 Handegan Rev. Est.]; section 2620.010 regarding drainage issues [R.972 Wk-1 Trans p.613 ln.10-20; R.1667 Wk-2 Trans p.740 ln.1-4; R.2996 Handegan Rev. Est.]; section 2900.010 regarding landscaping and irrigation repairs [R.1667 Wk-2 Trans p.740 ll.4-6; R.2996-2997 Handegan Rev. Est.]; section 3310.210 regarding concrete repairs [R.968 Wk-1 Trans p.609 ln.2—p.610 ln.3; R.1667 Wk-2 Trans p.740 ll.7-9; R.2997 Handegan Rev. Est.]; section 6160.010 regarding subfloor repairs [R.968-969 Wk-1 Trans p.609 ln.2—p.610 ln.6; R.1667 Wk-2 Trans p.740 ll.9-16; R.2997 Handegan Rev. Est.]; section 6430.010 regarding interior stair railing repairs [R.968-969 Wk-1 Trans p.609 ln.2—p.610 ln.9; R.1667 Wk-2 Trans p.740 ll.14-16; R.2997-2998 Handegan Rev. Est.]; section 6450.010 regarding interior shoe molding replacement [R.968-972 Wk-1 Trans p.609 ln.2—p.613 ln.9; R.1667 Wk-2 Trans p.740 ll.17-22; R.2997-2998 Handegan Rev.

Est.]; section 6452.010 regarding interior wood casing around the windows replacement [Id.]; section 8550.010 regarding the window product replacement [R.969-970 Wk-1 Trans p.610 ln.10—p.611 ln.25; R.1668 Wk-2 Trans p.741 ll.5-6; R.3000 Handegan Rev. Est.]; section 9133.010 regarding sheetrock repairs for HVAC repairs and window replacement [R.973-974 Wk-1 Trans p.614 ln.12—p.615 ln.9; R.1668 Wk-2 Trans p.741 ll.6-10; R.3000 Handegan Rev. Est.]; sections 9310.010, 9640.010, and 9680.010 for the replacement of interior floor tile, hardwood, and carpets [R.1668 Wk-2 Trans p.741 ll.10-17; R.3001 Handegan Rev. Est.]; section 15400.000 regarding plumbing work associated with replacing the floors [R.1668 Wk-2 Trans p.741 ll.17-19; R.3001 Handegan Rev. Est.]; section 15700.000 regarding HVAC repairs [Id.]; and section 16500.010 regarding electrical work [Id.]. These were the line items from Mr. Handegan's cost estimate associated with the issue releases. All of the other line items and claimed damages Respondents were seeking were presented to the jury through testimony or by inclusion of Mr. Handegan's cost estimate.

Although Mr. Handegan had reduced his original cost estimate of \$15,257,512 to \$13,428,826 at trial, counsel during Respondents' closing arguments told the jury they took out the Clubhouse numbers and added a lost use figure and specifically asked the jury for actual damages in the amount of \$12.8M. [R.1653 Wk-2 Trans p.726 ll.23-25] When the jury started its deliberations, Respondents had already received settlements for the settlements labeled as issue release, for other settlements, and for funds from a covenant not to execute favoring Complete totaling \$5,012,500. [R.1914-1917 TCR Email Response 6/10/2019; R.1918-1924 Complete Covenant 7/10/2018; R.1940-1954 Creekside

Settlement 6/6/2019; R.1955-1979 ARS Settlement 4/23/2019; R.1980-1994 Atlantic Settlement 4/5/2019; R.1995-2009 Gale Settlement 7/24/2018; R.2010-2018 Novus Settlement 2/22/2018; R.2019-2033 Tallent Settlement 2/22/2019; R.2034-2048 CertainTeed Settlement 7/12/2018; R.2049-2056 Kelly Flooring Settlement 1/25/2019; R.2057-2064 Cornerstone Settlement 4/25/2018; R.2089-2091 Alderman Settlement 6/19/2018; R.2092-2106 Stanley's Settlement 5/8/2019; R.2107-2121 Cohen's Settlement 7/12/2018; R.2122-2130 Moseley Settlement May-June, 2019; R.2131-2142 H&A Settlement 1/31/2018; R.2143-2145 Andersen Settlement 4/30/2019]

Before the case was sent to the jury, Respondents, Complete, TCR, Vasquez, Miracle, and W.C. Services debated the format of the jury verdict form. [R.684-685 Wk-1 Trans p.115 ln.23—p.116 ln.21; R.687 Wk-1 Trans p.155 ll.14-18; R.1527-1529 Wk-2 Trans p.493—p.495 ln.4; R.1589-1590 Wk-2 Trans p.656 ln.4—p.657 ln.18; R.1596 Wk-2 Trans p.669 ll.14-18; R.1607-1614 Wk-2 Trans p.680 ln.16—p.687 ln.14; R.1624-1626 Wk-2 Trans p.697 ln.3—p.699 ln.7; R.1877-1904 Emails dated 5/15/2019 from Plaintiff, Complete, TCR, Miracle, Vasquez forwarding proposed verdict forms; R.1905-1911 Email dated 5/14/2019 from WC Services forwarding proposed verdict form; R.1748-1749 Wk-2 Trans p.828 ln.15—p.829 ln.12] 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 made no such allocations and had a single line for the jury to fill in a general verdict number that 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 slight edits. [R.116-122 Verdict; R.1624 Wk-2 Trans p.697 ll.3-7; R.1877-1880 Email dated 5/15/2019 from Plaintiff]

The jury returned its verdict on May 16, 2019. The jury found the total construction defect/repair damages that were presented at trial were valued at \$6.5M. [R.1756-1759 Wk-2 Trans p.836 ln.14—p.839 ln.24; R.116-122 Jury Verdict] The jury found Complete and TCR were both grossly negligent and awarded \$500k in punitive damages against both. [Id.] The trial judge had submitted Complete's crossclaim for contractual indemnity to the jury. The jury awarded Complete \$1,000 for its crossclaim against TCR. [Id.] The jury returned a defense verdict in favor of W.C. Services. [Id.] Vasquez and Miracle were found only simply negligent; therefore, a supplemental post-trial argument to the jury was conducted pursuant to § 15-38-15 of the South Carolina Contribution Among Tortfeasors Act. [R.1760-1779 Wk-2 Trans p.840 ln.5—p.859 ln.12] Complete and TCR did not participate in this post-verdict allocation hearing because they were found jointly and grossly negligent. [Id.] The jury found that Vasquez and Miracle were both deemed five percent (5.00%) responsible for the total damages. [R.1780-1781 Wk-2 Trans p.860 ln.19—p.861 ln.18; R.116-122 Jury Verdict]

4. The Settlements

Prior to the start of trial, Respondents received \$5,012,500 dollars in settlements. [R.1914-1917 Email response by TCR dated 6/10/2019; R.1918-1924 Complete Covenant 7/10/2018; R.1940-1954 Creekside Settlement 6/6/2019; R.1955-1979 ARS Settlement 4/23/2019; R.1980-1994 Atlantic Settlement 4/5/2019; R.1995-2009 Gale Settlement 7/24/2018; R.2010-2018 Novus Settlement 2/22/2018; R.2019-2033 Tallent Settlement

2/22/2019; R.2034-2048 CertainTeed Settlement 7/12/2018; R.2049-2056 Kelly Flooring Settlement 1/25/2019; R.2057-2064 Cornerstone Settlement 4/25/2018; R.2089-2091 Alderman Settlement 6/19/2018; R.2092-2106 Stanley's Settlement 5/8/2019; R.2107-2121 Cohen's Settlement 7/12/2018; R.2122-2130 Moseley Settlement May-June, 2019; R.2131-2142 H&A Settlement 1/31/2018; R.2143-2145 Andersen Settlement 4/30/2019]

This figure includes \$1M from a covenant not to execute favoring Complete that was paid by one of Complete's insurance carriers. [R.1914-1917 Email response by TCR dated 6/10/2019; R.1918-1924 Complete Covenant 7/10/2018] Some of the pre-suit settlements were clearly designated by the parties at trial 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.935-943 Wk-1 Trans p.572 ln.18—p.580 ln.2; R.1217 Wk-2 Trans p.141 ll.23-25; R.1652-1653 Wk-2 p.725 ln.22—p.726 ln.25; R.1662-1678 Wk-2 p.735 ln.19—p.751 ln.6] The agreed issue released settlements include the repairs

associated with the HVAC,³ fireplaces,⁴ grading and paving,⁵ interior flooring,⁶ interior trim and interior railings,⁷ concrete,⁸ and the window product.⁹ These conceded issue release settlements total \$1,407,500. [R.1914-1917 Email response by TCR dated 6/10/2019]

Respondents received settlements prior to trial that were not designated as issue releases, including a covenant not to execute for Complete,¹⁰ and repairs for painting and

³ American Residential Services, LLC d/b/a ARS/Rescue Rooter Charleston and its various sub-contractors, Victor Hugo Hernandez and Hernandez Electric, LLC, Liliana Rojas Flores, Martin Barr d/b/a Port City Structured Wiring, Keller Electric, LLC, John Toolin d/b/a John F. Toolin Heat and Air, Russell “Rusty” Hill d/b/a Rusty’s Heating & Air, and Warren Anderson, all contributed to a total settlement of \$795,000 that was entered around April 23, 2019. [R.1914-1917 Email response by TCR dated 6/10/2019; R.1955-1979 ARS Settlement 4/23/2019]

⁴ Complete noted in its Motion in Limine to Exclude Evidence Related to Released Claims [R.483-494 Complete Mot in Limine 5/6/2019] that the \$22,500 settlement reached with Building Services Group, Inc. d/b/a Gale Contractor Services around July 24, 2018 was an issue release. [R.1914-1917 Email response by TCR dated 6/10/2019; R.1995-2009 Gale Settlement 7/24/2018] Because of this pre-trial filing, TCR now concedes that the fireplace settlement was considered an issue release.

⁵ Tallent and Sons, Inc. settled with Respondents for \$195,000 around February 2, 2019. [R.1914-1917 Email response by TCR dated 6/10/2019; R.2019-2033 Tallent Settlement 2/22/2019]

⁶ Kelly Flooring Products, Inc. d/b/a Carpet Baggers settled with Respondents for \$25,000 around January 25, 2019. [R.1914-1917 Email response by TCR dated 6/10/2019; R.2049-2056 Kelly Settlement 1-25-2019]

⁷ Alderman Construction settled with Respondents for \$75,000 around June 19, 2018. [R.1914-1917 Email response by TCR dated 6/10/2019; R.2089-2091 Alderman Settlement 6/19/2018]

⁸ Mosley Concrete settled with Respondents for \$95,000 around April 29, 2019. [R.1914-1917 Email response by TCR dated 6/10/2019; R.2122-2130 Mosley Settlement May-June 2019]

⁹ Anderson Windows, Inc. settled with Respondents for \$200,000 around April 30, 2019. [R.1914-1917 Email response by TCR dated 6/10/2019; R.2143-2145 Andersen Settlement emails 4/30/2019.]

¹⁰ One of Complete’s carriers agreed to pay its \$1M limits for a covenant not to execute, which covenant was entered around July 10, 2018. [R.1914-1917 Email response by TCR dated 6/10/2019; R. 1918-1924 Complete Covenant 7/10/2018] Respondents’ treatment of this \$1M is inconsistent as Plaintiff argued to the trial court that the covenant not to execute should not be considered a settlement and the first time that any settlement funds paid on behalf of Complete were attempted to be allocated were in a June 6, 2019 settlement agreement with Complete. [R.1925-1939 Complete Settlement 6/6/2019]

caulking,¹¹ framing,¹² siding,¹³ exterior residential railings,¹⁴ insulation and drywall,¹⁵ and from the architect,¹⁶ and from the asphalt shingle and siding manufacturer.¹⁷ These non-issue release settlements total \$3,605,000.

Complete, Vasquez, and Miracle settled after the jury rendered its general verdict on May 16, 2019. [R.1914-1917 Email response by TCR dated 6/10/2019; R.1925-1939 Complete Settlement 6/6/2019; R.2065-2076 Miracle Settlement 5/28/2019; R.2077-2088 Vasquez Settlement 5/28/2019] These post-verdict settlements total \$1,787,500. However, funds from the covenant not to execute favoring Complete should be included here because the final settlement agreement with Complete was entered on June 6, 2019, twenty-one

¹¹ Creekside, Inc. settled with Respondents for \$150,000 around June 6, 2019. [R.1914-1917 Email response by TCR dated 6/10/2019; R.1940-1954 Creekside Settlement 6/6/2019]

¹² Atlantic Building Construction, Services, Inc. n/k/a Atlantic Construction Services, Inc. settled with Respondents for \$700,000 around April 5, 2019. [R.1914-1917 Email response by TCR dated 6/10/2019; R.1980-1994 Atlantic Settlement 4/5/2019] H and 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 H and A Construction settled with Respondents for \$500,000 around January 31, 2018. [R.1914-1917 Email response by TCR dated 6/10/2019; R.2131-2142 H&A Settlement 1/31/2018]

¹³ Cornerstone Construction and Mark Malloy d/b/a Cornerstone Construction, which installed the siding on a few of the units at the project, settled with Respondents for \$150,000 around April 25, 2018. [R.1914-1917 Email response by TCR dated 6/10/2019; R.2057-2064 Cornerstone Settlement 4/25/2018]

¹⁴ Stanley's Vinyl Fence Designs settled with the Respondents on the second day of trial for \$295,000 on May 8, 2019. [R.1914-1917 Email response by TCR dated 6/10/2019; R.2092-2106 Stanley's Settlement 5/8/2019; R.838-839 Wk-1 Trans p.339, ln.3—p.340, ln.25; R.861-862 Wk-1 Trans p.411, ln.23—p.412, ln.10]

¹⁵ Cohen's Drywall settled with Respondents for \$125,000 around July 12, 2018. [R.1914-1917 Email response by TCR dated 6/10/2019; R.2107-2121 Cohen's Settlement 7/12/2018]

¹⁶ Novus Architects, Inc. f/k/a SGM Architects, Inc. settled with Respondents for \$650,000 around February 22, 2018. [R.1914-1917 Email response by TCR dated 6/10/2019; R.2010-2018 Novus Settlement 2/22/2018]

¹⁷ CertainTeed Corporation, a product manufacturer, settled with Respondents for \$35,000 around July 12, 2018. [R.1914-1917 Email response by TCR dated 6/10/2019; R.2034-2048 CertainTeed Settlement 7/12/2018]

days after the trial. [R.1925-1939 Complete Settlement 6/6/2019] These post-verdict settlements were deemed entered after the jury's joint and several verdict was entered against Complete, Vasquez, TCR, and Miracle.

5. Post-Verdict Proceedings

TCR was required to file a motion to compel Respondents to produce copies of the settlement agreements reached in this case. [R.546-574 TCR Mot to Compel 5/28/2019] See Huck v. Oakland Wings, LLC, 422 S.C. 430, 813 S.E.2d 288 (Ct. App. 2018), reh'g den. (March 28, 2018), cert. den. (Aug. 3, 2018) (finding that settlement agreements are relevant and must be produced after a verdict is reached). Respondents eventually produced the settlement agreements the day before the post-trial motions hearing on June 6, 2019. [R.1809-1810 Post-T Hrg p.24, ln.12—p.25, ln.5] Respondents filed general dismissals of the claims against the parties that settled. [R.1-5 Dismissal of Union and Browne 8/2/2017; R.6-9 Dismissal of CRG 1/24/2018; R.10-42 Dismissal of Cornerstone 6/28/2018; R.43-49 Dismissal of H&A 7/10/2018; R.50-59 Dismissal of Novus 7/12/2018; R.60-69 Dismissal of Alderman 8/9/2018; R.70-77 Dismissal of CertainTeed 8/21/2018; R.78-81 Dismissal of Cohens 9/27/2018; R.82-112 Dismissal of Kelly 3/1/2019; R.113-115 Dismissal of Crossclaims vs. Andersen 5/7/2019; R.123-128 Dismissal of Gale 5/20/2019; R.129-131 Dismissal of Tallent 5/24/2019; R.132-143 Dismissal of ARS, et al. 6/6/2019; R.144-156 Dismissal of Atlantic 6/7/2019; R.157-160 Dismissal of Creekside, Mosely, Andersen, Complete, Vasquez, Miracle Siding, and Stanley's 6/7/2019] No dismissal filings attempted to allocate the settlement funds. Respondents entered into separate settlement agreements. [R.1918-1924 Complete Covenant 7/10/2018; R.1925-1939

Complete Settlement 6/6/2019; R.1940-1954 Creekside Settlement 6/6/2019; R.1955-1979 ARS Settlement 4/23/2019; R.1980-1994 Atlantic Settlement 4/5/2019; R.1995-2009 Gale Settlement 7/24/2018; R.2010-2018 Novus Settlement 2/22/2018; R.2019-2033 Tallent Settlement 2/22/2019; R.2034-2048 CertainTeed Settlement 7/12/2018; R.2049-2056 Kelly Flooring Settlement 1/25/2019; R.2057-2064 Cornerstone Settlement 4/25/2018; R.2065-2076 Miracle Siding Settlement 5/28/2019; R.2077-2088 Vasquez Settlement 5/28/2019; R.2089-2091 Alderman Settlement 6/19/2018; R.2092-2106 Stanley's Settlement 5/8/2019; R.2107-2121 Cohen's Settlement 7/12/2018; R.2122-2130 Moseley Settlement May-June, 2019; R.2131-2142 H&A Settlement 1/31/2018; R.2143-2145 Andersen Settlement 4/30/2019] The settlement agreement signed by Respondents and Complete on June 6, 2019, the day before the post-trial motions hearing on a Friday, is the only settlement agreement that includes language purporting to allocate any settlement funds paid by to Respondents in this case. [R.1925-1939 Complete Settlement 6/6/2019] The June 6th agreement includes the settlement proceeds from the execution of a covenant not to execute favoring Complete. [Id.]

The trial judge heard the post-trial motions on June 7, 2019. [R.1785-1845 Post-T Hrg. Trans] The principal arguments at the post-trial motions hearing were regarding the issue of setoff. This hearing was held on a Friday. At this hearing, Respondents conceded only \$630,000 of all settlements were subject to setoff. [R.1829 Post-T Hrg p.44, ln. 16; R.1831 Post-T Hrg p.46, ll.2-14; R.1838 Post-T Hrg p.53, ll.12-16] Respondents did not even acknowledge setoff of the post-verdict settlements from TCR's subcontractors, Vasquez and Miracle! [R.1818 Post-T Hrg p.33, ll.17-18] Respondents e-mailed the trial

judge with a modified setoff allocation on the Monday following the motions hearing. [R.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 setoff in the amount of \$1,670,000 and ordered a revised judgment against TCR in the amount of \$5,330,000. [R.166-167 Form Order 7/23/2019] On July 24, 2019, TCR 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. [R.116-122 Form Order & Verdict] TCR timely filed a motion to reconsider on August 5, 2019. [R.620-631 TCR Mot to Reconsider 8/5/2019] Respondents e-mailed a memorandum in opposition to TCR's motion to reconsider dated August 15, 2019.¹⁸ [R.632-648 Memo in Opp dated 8/15/2019] TCR filed a return to Respondents' memorandum on August 26, 2019. [R.649-660 TCR Return 8/26/2019] The trial judge denied the motion to reconsider in a final order filed September 25, 2019. [R.168-173 Order 9/25/2019] This appeal followed. [R.174-200 TCR NOA 10/14/2019]

ARGUMENTS

TCR is entitled to complete setoff of the jury verdict by the settlements reached in this case that were not otherwise removed from review by the jury and designated as issue releases.

I. TCR is entitled to setoff of all post-verdict settlements.

TCR was not the only defendant at trial and it is not the only party that took a judgment at trial. At the end of the second week of trial, the jury provided a general verdict

¹⁸ TCR sees no indication that this memorandum was actually filed with the Charleston County Clerk of Court.

against Complete, TCR, Miracle, and Vasquez. The jury did not find W.C. Services liable for the damages claimed against it and awarded it a defense verdict. JMC was dismissed by directed verdict at the close of Respondents' case. Stanley's settled during trial. Respondents acknowledge that TCR is entitled to setoff of the exterior railing settlement from Stanley's. Respondents eventually conceded that TCR is entitled to a setoff of the post-verdict settlements from TCR's own subcontractors, Vasquez and Miracle. However, Respondents only concede a small portion of the post-verdict settlements from Complete should be setoff. TCR submits that it should receive full setoff credit for the post-verdict settlements by Complete, including the \$1M paid on behalf of Complete for the covenant not to execute, which was included in the settlement agreement with Complete. See Smalls v. S.C. Dept of Ed., 339 S.C. 208, 221, 528 S.E.2d 682, 688 (Ct. App. 2000).

The verdict in the amount of \$6.5M is dated June 16, 2019—the last day of trial. Despite any arguments to the contrary, the jury rendered the decision on the items presented to the jury and found the total actual damages for Respondents' claims is \$6.5M. There is no need to parse out which items are characterized as issue releases for the post-verdict settlements because Complete, TCR, Vasquez, Miracle, W.C. Services, Stanley's, and JMC were actually at the trial. "Because a verdict is deemed to be the full measure of the plaintiff's loss, then a verdict plus a settlement would be more than full recovery. Hence, the result is the allowance of a setoff to the non-settling defendant against his verdict." James L. Ward, Jr. and Edward J. Westbrook, South Carolina Damages, Second Edition (S.C. Bar 2009).

Respondents' attempt to allocate the post-verdict settlement by Complete is improper. Moreover, the attempt to allocate the post-verdict settlement by Complete is untimely. The general verdict amounts entered against Complete, TCR, Vasquez, and Miracle were set by court order effective May 16, 2019. [R.116-122 Form Order & Jury Verdict 5/16/2019] The first reference to any attempt by Respondents to allocate any settlements was in the settlement agreement with Complete that was executed on June 6, 2019—twenty-one days after the jury rendered its verdict. In fact, the June 6th settlement agreement with Complete is the only settlement agreement that references any attempt by Respondents to allocate the settlement proceeds they received. [R.1918-1924 Complete Covenant 7/10/2018; R.1925-1939 Complete Settlement 7/10/2018; R.1940-1954 Creekside Settlement 6/6/2019; R.1955-1979 ARS Settlement 4/23/2019; R.1980-1994 Atlantic Settlement 4/5/2019; R.1995-2009 Gale Settlement 7/24/2018; R.2010-2018 Novus Settlement 2/22/2018; R.2019-2033 Tallent Settlement 2/22/2019; R.2034-2048 CertainTeed Settlement 7/12/2018; R.2049-2056 Kelly Flooring Settlement 1/25/2019; R.2057-2064 Cornerstone Settlement 4/25/2018; R.2065-2076 Miracle Settlement 5/28/2019; R.2077-2088 Vasquez Settlement 5/28/2019; R.2089-2091 Alderman Settlement 6/19/2018; R.2092-2106 Stanley's Settlement 5/8/2019; R.2107-2121 Cohen's Settlement 7/12/2018; R.2122-2130 Moseley Settlement May-June, 2019; R.2131-2142 H&A Settlement 1/31/2018; R.2143-2145 Andersen Settlement 4/30/2019; R.1819 Post-T Hrg p.34 ll.13-24] Respondents provided no notice to the trial judge or to the other parties how they would attempt to allocate the settlement funds until after the jury returned its verdict against Complete, TCR, Vasquez, and Miracle. "[B]efore entering judgment on a

jury verdict, the court must reduce the amount of the verdict to account for any funds previously paid by a settling defendant, so long as the settlement funds were paid to compensate the same plaintiff on a claim for the same injury.” Smith v. Widener, 397 S.C. 468, 471-472, 724 S.E.2d 188, 190 (Ct. App. 2012) (citing Hawkins v. Pathology Assocs. of Greenville P.A., 330 SC 91, 113, 498 S.E.2d 395, 406-407 (Ct. App. 1998)). In the instant case, Complete entered into its settlement agreement after the jury rendered its verdict and after the judgment was filed. The Complete settlement agreement also incorporated the funds from the covenant not to execute. Therefore, Complete’s settlements are in actuality partial satisfactions of a judgment. The verdict must be reduced by the post-verdict settlements, to do otherwise would be wholly prejudicial and inequitable. Such a procedure advocated by Respondents would allow double recovery because they could recover part of a judgment from one defendant and call it a settlement, and then later execute the entirety of the judgment against another defendant.

“When a prior settlement involves compensation for the same injury for which the jury awarded damages, the right to setoff arises as an operation of law.” Stoneledge, 425 S.C. at 301, 821 S.E.2d at 522 (citing Widener, 397 S.C. at 473, 724 S.E.2d at 191 (Ct. App. 2012)). “Allowing this credit prevents an injured person from obtaining a double recovery for the damage he sustained, for it is almost universally held that there can be only one satisfaction for an injury or wrong.” Rutland, 400 S.C. at 216, 734 S.E.2d at 145 (internal quotations omitted; citing Truesdale, 264 S.C. at 235, 213 S.E.2d at 746 (overruled on other grounds by McCall, supra)). Moreover, the actual damages awarded by the jury are to compensate the plaintiff and not to serve as additional punishment against

the defendant. See Rutland at 217, 734 S.E.2d at 146 (citing 22 Am.Jur.2nd Damages §27 and Haselden v. Davis, 353 S.C. 481, 486, 579 S.E.2d 293, 296 (2003) for the proposition that “[c]ompensatory damages are intended to make the plaintiff whole, not to punish the tortfeasor.... [and w]here allocation of damages furthers that policy, we do not believe the result is inequitable.”)

The jury determined that Complete, the general contractor in charge of the entire construction site, and TCR, the prime subcontractor for the siding, roofing, and deck waterproofing, were jointly responsible for the entire actual damages-general verdict in the amount of \$6.5M. Stated another way, although the Respondents asked the jury for \$12.8M to compensate them for all items still presented at trial, the jury found that after the issue released items were removed, Respondents’ repair cost and lost use damages were valued at \$6.5M. If Complete was the sole non-settled defendant, then Respondents would have to concede setoff of all settlements that were not otherwise removed from deliberation as issue releases. There is no reasonable argument to deny TCR a setoff of the entire settlement that Complete paid to Respondents when no attempted allocation was submitted before the jury verdict and because TCR was deemed jointly responsible for the judgment under the general verdict.

TCR acknowledges that on the night before the post-trial motions hearing Respondents produced copies of the settlement agreements it had entered with the various settled parties. [R.1809-1810 Post-T Hrg p.24 ln.12—p.25 ln.5] These settlement agreements generally acknowledge that Complete is entitled to setoffs. However, these settlement agreements do not state that the settlements are for anything other than the

resolution of Respondents' claims seeking reimbursement for the cost of repair and for lost use. Because of the joint and several verdict against Complete and TCR, TCR is now responsible for all of the damages that Complete was responsible for, including damages resulting from Complete's management and oversight of the entire project, addressing framing repairs of the sheathing and porch joists, repairing the exterior railings and wood columns, repairing all of the fireproofing and fire wall deficiencies, repainting, and repairing the siding, roofing, and deck waterproofing. [R.845-856 Wk-1 Trans p.386, ln.7—p.397, ln.2; R.865-868 Wk-1 Trans p.427, ln.20—p.430, ln.25; R.869-874 Wk-1 p.434, ln. 4—p.439, ln.5; R.894-899 Wk-1 Trans p.491, ln.3—p.496, ln.24; R.900-905 Wk-1 Trans p.500, ln.23—p.505, ln.4; R.950-954 Wk-1 Trans p.591, ln.14—p.595, ln.22; R.974-976 Wk-1 Trans p.615, ln.10—p.617, ln.12; R.982-995 Wk-1 Trans p.623, ln.21—p.636, ln.19; R.1106-1138 Wk-2 Trans p.28, ln.3—p.60, ln.16; R.1157 Wk-2 Trans p.81, ll.4-17; R.1166-1168 Wk-2 Trans p.90, ln.23—p.92, ln.5; R.1177-1179 Wk-2 Trans p.101, ln.13—p.103, ln.23; R.1181-1183; Wk-2 Trans p.105, ln.16—p.107, ln.19; R.1538-1544 Wk-2 Trans p.522, ln.15—p.528, ln.6; R.1628-1655 Wk-2 Trans p.701, ln.11—p.728, ln.21; R.1707-1713 Wk-2 Trans p.782, ln.13—p.788, ln.8; R.1832-1836 Post-T Hrg p.47, ln.8—p.51, ln.14] TCR is now deemed responsible for more than its actual scope of work on the Project because of the general verdict entered by the jury.

TCR and the other defendants at trial submitted proposed jury verdict forms that would have allowed the jury to separate out which components of repair were properly associated with a defendants' scope of work. Respondents insisted on a general verdict damages number. While Complete was responsible for the entire project, it is

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

According to Respondents' post-verdict allocation of the Complete settlement, the repairs that Complete defended at trial were claims regarding the exterior railings, fire separation walls and other issues related to W.C. Services' work, framing repairs, and punitive damages. [R.1925-1939 Complete Settlement 6/6/2019] All the damages

Respondents' sought in this construction defect litigation are to recover for the common injury relating to the cost to repair, lost use, and punitive damages. See Widener, supra. (noting that setoff is proper between actual and punitive damages because the damages arise out of the same type of injury); accord Centex-Rooney Construction Co., Inc. v. Martin County, 706 So.2d 20, 29 (Dist. Ct. App. Fla. 1997), reh'g den. (March 11, 1998) (allowing setoff of prior settlements paid by an architect and a concrete and masonry construction company to a judgment against the construction manager because "the damages were not separate and distinct" and the setoff prevents a double recovery for the plaintiff). Respondents' received a general verdict in their favor, and it would be improper and inequitable for the Respondents to now reinterpret the jury's verdict under the guise of a setoff allocation. Respondents are only entitled to one recovery for their injury. See Huck, 422 S.C. at 437, 813 S.E.2d at 291 ("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.").

TCR was not the only defendant at trial and it is not the only party that took a judgment at the trial. TCR is entitled to a setoff of all post-verdict settlements, which includes the full settlements paid by Complete, the settlements by Vasquez and Miracle, and any future post-verdict settlements, if any, by any other parties that were joined in the litigation. Respondents' already concede that the settlement funds from Stanley's,

Vasquez, and Miracle—three of the parties at trial—properly setoff the general jury verdict. There is no rational basis to treat the post-verdict settlement executed by Complete on June 6, 2019 differently. TCR is entitled to setoff in the amount of \$3,082,500 for the post-trial and during trial settlements.¹⁹ “Where reallocation of damages furthers th[e] policy [that compensatory damages are intended to make a plaintiff whole, not to punish the tortfeasor], we do not believe the result is inequitable.” Rutland at 217, 734 S.E.2d at 146.

II. TCR is entitled to setoff of all the settlements that were not otherwise removed from the trial of this case and designated as issue releases.

A plaintiff is only entitled to recover once for their injuries. The law prevents a plaintiff from receiving a double recovery by applying setoff. See Welch, 342 S.C. at 312, 536 S.E.2d at 425 (“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, 330 S.C. 92, 113, 498 S.E.2d 395, 406 (Ct. App. 1998) (“A non-settling defendant is entitled to credit for the amount paid by another defendant who settles.”). “The trial 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.” Welch at 313, 536 S.E.2d at 425. The common law

¹⁹ This total includes \$2,137,500 from Complete, \$295,000 from Stanley’s, \$325,000 from Miracle, and \$325,000 from Vasquez.

regarding setoff was codified in 1988. See Riley at 195, 777 S.E.2d at 830. “[I]n the absence of bad faith, the function of the trial court is limited to applying the settlement credit pursuant to § 15-38-50.” Ellis v. Oliver, 335 S.C. 106, 112, 515 S.E.2d 268, 271 (Ct. App. 1999). “[T]he [South Carolina Contribution Among Tortfeasors] Act represents the Legislature’s determination of the proper balance between preventing double-recovery and South Carolina’s ‘strong public policy favoring the settlement of disputes.’” Riley at 196, 777 S.E.2d 830 (quoting Chester v. S.C. Dep’t of Pub. Safety, 388 S.C. 343, 698 S.E.2d 559 (2010)).

In the first complaint filed in this case, 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. The names of the legal theories asserted by Respondents do not control whether setoff should be applied when the claimed damages are the same and they arise from the same factual scenario. See Widener, 468 S.C. at 472, 724 S.E.2d at 190 (finding a claim against an employee benefits provider was for the same injury for the damages sought against beneficiaries charged with improperly removing funds from the employee benefits account, thus setoff was applied); Vortex Sports & Ent., Inc. v. Ware, 378 S.C. 197, 209-210, 662 S.E.2d 444, 451 (Ct. App. 2008), reh’g den. (June 26, 2008) (noting that setoff was proper for causes of action for aiding and abetting a breach of fiduciary duty and tortious interference with contract because the damages “arose out of the same factual scenario.”); Ellis, 335 S.C. at 113, 515 S.E.2d 268 at 272 (pointing out the claims against

Richland Memorial and Dr. Oliver “arose out of the same factual scenario” and that the plaintiff “confuse[d] the concept of damages within the meaning of the word injury as used in [S.C. Code § 15-38-50].”). The injury contemplated in the setoff statute “is broad enough to include all damages.” Ellis at 113, 515 S.E.2d at 272. In fact, Respondents specifically requested the jury issue a single damages number on the jury verdict form.

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.

With regard to cost of repair, the plaintiffs are not required to prove that the repairs have actually been made. A competent estimate of the cost of repairs is sufficient to create a factual issue for you to determine damages.

With regard to loss of use, if you find that the plaintiff was or will be unable to use its property for a period of time because of a defendant’s wrongful conduct, you should award the plaintiff compensation for the loss of use only if you believe the loss of use was proximately caused by a defendant’s conduct.

The cost of repair or restoration is a valid measure of damages for injury to a building. When determining the amount of damages, if any, you may consider a competent estimate of the cost to repair to a building.

If you find that the plaintiff proved its right to recover on multiple causes of action, then plaintiff is entitled to receive a full set of damages on each individual cause of action so proven. The trial judge will ensure the plaintiff does not receive a double recovery. In other words, although plaintiff is entitled to receive a full set of damages for each individual claim, a plaintiff will only recover once.

Trial Transcript Week Two, p.815 ll.8-17; p.816 ll.9-12; and p.816 ln.23—p.817 ln.5. [R.1735-1737]

Generally, damages in construction defect cases like the Palmetto Pointe litigation all arise out of the same set of facts or type of injury. See Widener, supra. (noting that setoff is proper between actual and punitive damages because the damages arise out of the same type of injury); accord Centex-Rooney, supra (allowing setoff of prior settlements paid by an architect and a concrete and masonry construction company to a judgment against the construction manager because “the damages were not separate and distinct” and the setoff prevents a double recovery for the plaintiff). The confusion regarding whether the injury and claim in a construction defect lawsuit are similar and therefore subject to setoff appears to derive from the fact that the seminal cases discussing setoff in South Carolina involve claims for wrongful death and survivorship.

Wrongful death and survivorship claims in South Carolina are created by statute. There is no question that these are distinct claims that seek separate forms of damages. A wrongful death claim is brought by the beneficiaries of the decedent to compensate for their own losses. “In a wrongful death action in South Carolina, the damages recoverable by the statutory beneficiaries of the decedent include (1) pecuniary loss, (2) mental shock and suffering, (3) wounded feelings, (4) grief and sorrow, (5) loss of companionship, and (6) deprivation of the use and comfort of the intestate's society.” Boyle v. U.S., 948 F.Supp.2d 577, 580 (D.S.C. 2012) (citing Knoke v. South Carolina Dept. of Parks, Recreation & Tourism, 324 S.C. 136, 141, 478 S.E.2d 256, 258 (1996)). “In a wrongful death case, the question of damages is not directed toward the value of the human life that

was lost, but rather the damages sustained by the beneficiaries as a result of the death.” Id. (citing Self v. Goodrich, 300 S.C. 349, 351, 387 S.E.2d 713, 714 (Ct. App. 1989)). “In a survival action, the legal representative of the deceased may recover damages for the deceased's conscious pain and suffering and medical expenses.” Boyle at 580 (citing Baker v. Sanders, 301 S.C. 170, 391 S.E.2d 229 (1990)).

In the cases discussing setoff and the allocation of damages between claims for wrongful death and survivorship, the analysis turns on whether there was sufficient information in the record regarding the decedent’s pain and suffering to support an allocation proposed by the plaintiffs. The appellate courts have overturned allocations where no evidence of pain and suffering was presented giving no justification to apply any portion of the settlement to the wrongful death claim (see Rutland, supra.) and the courts have upheld allocations where there was some evidence to support the proposed allocation (see Riley, supra.). Claims other than wrongful death and survivorship claims do not share this same distinction. See, e.g., Widener, supra.; Vortex, supra.; Ellis, supra.

Throughout the trial and during the closing arguments in the present Palmetto Pointe case, 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 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 Complete, the general contractor responsible for the entire construction project, was present during the whole trial.

The construction of the Palmetto Pointe Project was not completed in a bubble. 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 ln.15; 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 ln.14; 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] These so called “empty chair defendants” are allowed because they are not placed on the jury verdict form. See Smith v. Tiffany, 419 S.C. 548, 557, 799 S.E.2d 479, 484 (2017). There is no allocation to the empty chair defendants, but the parties at trial are not without a remedy in the post-trial procedures because the court may apportion liability among the parties at trial pursuant to S.C. Code § 15-78-100 and “any respondent found liable will be entitled to an equitable set-off against the settlements... already received.” Chester, 388 S.C. at 346, 698 S.E.2d at 560.

The defendants objected to Plaintiffs’ proposed jury verdict form that lumped all of the issues at trial into a single, general verdict figure. Although the parties worked together to construct the Project, some scopes of work can be distinguished. For example, if the jury was allowed to allocate responsibility between the parties at trial, then the firestopping issues alleged against W.C. Services and Complete would not now be attributable to TCR as part of the general verdict. It is improper for the Plaintiffs now to attempt to dissect which claims at trial should be allocated out of the general jury verdict via arbitrary allocations.

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, 330 S.C. at 113, 498 S.E.2d at 406 (“A non-settling defendant is entitled to credit for the amount paid by another defendant who settles.”). On the other hand, TCR is not seeking to get credit for the items labeled as issue releases twice. TCR concedes that it, as well as Complete, Miracle, Vasquez, and W.C. Services, received the benefit of a lower trial demand when the items labeled as issue releases were taken out of Respondents’ repair cost estimate. See The Oaks at Rivers Edge Property Owners Association, Inc. v. Daniel Island Riverside Developers, LLC, 420 S.C. 424, 803 S.E.2d 475 (Ct. App. 2017), reh’g den. (Oct. 19, 2017).

The Oaks is a construction defect case that was tried against various construction parties including the developer and the construction manager. Prior to the scheduled trial date, several settlements were entered. The developer and construction manager were granted a partial release by the POA and they signed the settlement documents that set forth which claims were dismissed with prejudice and which claims remained. The Oaks court makes clear that the settlement agreement reserved the question of whether the developer construction manager would receive any credits from the settlement, which “will be determined by the court consistent with South Carolina Law.” Id. at 433, 803 S.E.2d at 481. The jury awarded a judgment against the appellants and the appellants moved for allocation of the damages and setoff. The court disagreed and found that the appellants had “already received the benefit of the settlements” because the amount of damages the plaintiff presented at trial had removed the items from the settlements that were paid. See Id. at 442, 803 S.E.2d at 484. The Oaks court noted that the POA’s total repair estimate prior to trial was approximately \$13M but the POA only asked for approximately \$9M in

damages at trial. The difference in the pre-trial repair estimate and the damages requested at trial was calculated by the POA having “removed from their claim the repairs necessitated by the damage cause by the window installation.” Id.

In the present Palmetto Pointe case, Respondents’ cost estimator, Mr. Handegan, testified that he modified his original repair cost estimate by subtracting out the issue releases and then adding in additional fire wall and fire sprinkler damages. [R.950-954 Wk-1 Trans p.591 ln.14—p.595 ln.22] The Respondents’ original repair cost estimate was \$15,257,512. [R.2619-2629 Trial Exhibit 677] The revised repair cost estimate at trial was \$13,428,826. [R.951 Wk-1 Trans p.592 ll.8-11] The issue releases thus reduced the Respondents’ repair cost demand by \$1,828,686. In his closing arguments, counsel for the Respondents restated the amount of Mr. Handegan’s revised estimate total and then he told the jury he was taking out the clubhouse damages and the window product issues, adding in lost use damages, and made a revised request to the jury to award actual damages of \$12.8M. [R.1653 Wk-2 Trans p.726 ll.23-25] Stated another way, Respondents claimed at trial that their total damages when the issue released items were taken out was \$12.8M.

TCR is not asking for a setoff of the issue release settlements for the HVAC, grading and paving, fireplaces, interior flooring, interior trim and interior railings, concrete, and the window products that reduced Respondents’ original cost estimate to their demand of \$12.8M at trial. TCR is asking for a setoff of all of the claims *other than the issue releases*. The trial court erred when it failed to properly set off the remaining items not designated as issue releases by the parties. See Tubbs v. Bowie, 308 S.C. 155, 417 S.E.2d 550 (1992) (since “one tortfeasor is entitled to credit for the amount paid by another tortfeasor, the

amount of setoff is the amount actually paid rather than the lifetime value of a structured settlement.”); Widener, 397 S.C. at 473, 724 S.E.2d at 191 (noting “a plaintiff’s claim for actual and punitive damages arising from the same injury is the same claim for purposes of setoff under section 15-38-50(1).”); Smalls, 339 S.C. at 219, 528 S.E.2d at 688 (As a general rule, “[a] nonsettling defendant is entitled to credit for the amount paid by another defendant who settles.”); 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.”).

At the time of the post-trial motions hearing, Respondents had received total settlements in the amount of \$6.8M. The settlements that all parties agree were for the issue released items for the HVAC, grading and paving, fireplaces, interior flooring, interior trim and interior railings, concrete, and the window products total \$1,407,500. Subtracting this figure from Respondents’ original repair estimate yields \$13,850,012, which figure is close to Mr. Handegan’s revised estimate dated May 7, 2019 of \$13,428,826. TCR acknowledges that the issue released items for the HVAC, grading and paving, fireplaces, interior flooring, interior trim and interior railings, concrete, and the window products are incorporated into the Respondents’ revised trial demand. Prior to trial, Respondents had received settlements of \$4,012,500 or \$5,012,500, depending on whether the funds from the covenant not to execute befitting Complete are referenced pre-trial or as part of the

settlement agreement that was entered on June 6, 2019, twenty-one days after the jury returned its trial verdict. If all the pre-trial settlements were in fact removed from the trial as Respondents apparently advocate now, then Mr. Hendegan's revised estimate at trial should have been either \$10,245,012 or \$11,245,012, depending on whether the funds from the covenant not to execute are included. Respondents' position guarantees that they will receive double recovery on the items that were not removed from the case as issue releases. The trial judge abused her discretion when she failed to act as the gatekeeper to prevent such a double recovery. "Compensatory damages are intended to make the plaintiff whole, not to punish the tortfeasor." Rutland, 400 S.C. at 217, 734 S.E.2d at 146. Respondents are made whole when the proper setoffs are applied. TCR'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.

CONCLUSION

The trial judge abused her discretion and committed an error of law by failing to allocate the full amount of setoff available in this case. TCR does not seek setoff of the items that all parties agreed were issue releasees and where the jury was specifically informed that they were not to include as damages at trial. All settlements paid by the defendants who were at the trial of this case should reduce the final jury verdict as setoffs. This includes the Stanley's settlement of \$295,000 already conceded by Respondents. Once the jury rendered its verdict against the parties at trial, the damages were set, and any post-verdict settlements merely reduce the amount of the verdict. Thus, the post-verdict

settlements by Complete for \$2,137,000, by Miracle for \$325,000, and by Vasquez for \$325,000 should reduce the general jury verdict.

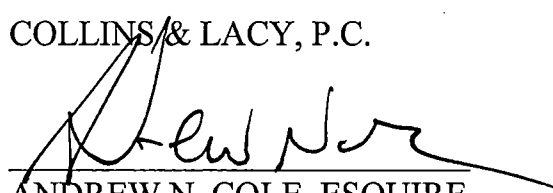
Respondents incorporated all claims that were not otherwise removed as issue releases in their case against the parties at trial. This included the claims against Complete, the general contractor. By the gross negligence/joint and several verdict entered against Complete and TCR, TCR is deemed responsible for all the issues that Respondents sought against the general contractor, whether the claims relate to TCR's actual scope of work on the Project or not. The damages sought in this construction defect action are common and arise out of the same facts and are subject to setoff. This is why TCR also requests full credit and setoffs for prior settlements that were not designated as issue releases. The general jury verdict should be reduced further by the \$150,000 settlement paid by Creekside for painting and caulking (Respondents concede this full amount as setoff); by the \$700,000 settlement paid by Atlantic Building for framing; by the \$500,000 settlement paid by H and A Framing, Atlantic Building's subcontractor; by the \$650,000 settlement paid by Novus Architects for its architectural design and specifications for the Project; by the \$35,000 settlement paid by Certainteed, the siding and roofing product supplier (Respondents concede this full amount as setoff); by the \$150,000 settlement paid by Cornerstone Construction for siding installation on three buildings (Respondents concede this full amount as setoff); and by the \$125,000 settlement paid by Cohen's Drywall for insulation and drywall. The total setoffs not designated as issue releases and already accounted for at trial add up to \$5,392,500.

The appellate court should remand this case to the trial court with direction to properly account for the settlements available for setoff. With the information currently available, the general verdict amount should be reduced to reflect a final judgment against TCR of \$1,607,500.

Respectfully submitted

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February 22, 2021

Attorney for Appellant

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FEB 22 2021

SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Jennifer B. McCoy, Circuit Court Judge

Civil Action No. 2015-CP-10-00955

Appellate Case No. 2019-001790

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

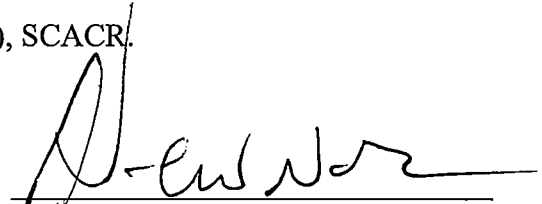
Tri-County Roofing, Inc. Appellant.

CERTIFICATION FOR FINAL BRIEF OF APPELLANT

I, Andrew N. Cole, Esquire, of the law office of Collins & Lacy, P.C., do hereby certify that the Final Brief of Appellant complies with Rule 211(b), SCACR.

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Feb 19 2021

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
The Honorable Jennifer B. McCoy, Circuit Court Judge

Case No. 2015-CP-10-00955
Appellate Case No. 2019-001790

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

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 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. is the Appellant.

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COUNTER-STATEMENT OF ISSUES ON APPEAL

- 1) Is the outcome of this appeal dictated by the overlapping injury methodology set forth in *Smith v. Widener*, the burden of proof standard set forth in *In re Wells* and *Diamond Swimming Pool Co. vs. Broome*, and the guidance of *Oaks at Rivers Edge vs. Daniel Island* ?**
- 2) Has TCR met its burden to establish that the Trial Court abused its discretion in conducting its setoff analysis pursuant to, *inter alia*, *Smith*, *Oaks*, and *In re Wells*?**
- 3) Has TCR met its burden to establish that the Trial Court’s reasoned allocation and setoff was unfair, unreasonable, or unjust?**
- 4) Has TCR met its burden (1) to proffer an equitable allocation; or (2) justify that allocation as fair, bona fide, and just?**
- 5) Has TCR shown that Plaintiffs are reaping a double recovery?**
- 6) Did TCR preserve its ability to argue for an equitable, or common law setoff on appeal?**
- 7) Did TCR offer a single justification, then or now, for its claimed setoff entitlement for the \$500,000 in punitive damages paid by CBC? Or for the monies paid by the Architect for its liability on design and construction issues that never made it to trial?**

SUMMARY OF ARGUMENT

TCR is not entitled to the automatic, non-discretionary setoff it seeks pursuant to the South Carolina Contribution Among Tortfeasors Act, § 15-38-10, *et. seq.*, because many “injuries” in a multi-party, complex construction defect case are distinct; therefore, settlements for injuries different from those tried against a non-settling defendant are not automatically setoff against a verdict. The Trial Court, therefore, properly exercised its discretion in making a factual determination of how to allocate the settlements between the overlapping and non-overlapping claims.

Furthermore, TCR has already received three damage reductions. First, the Association twice reduced its original damages at trial and only asked the jury for compensation related to

defects and damages resulting from work performed by the Defendants remaining at the time of trial. Second, the jury effectuated a setoff when, at the Defendants' urging, it awarded Plaintiffs a further reduced amount for damages presented at trial arguably due, at least in part, to the alleged fault of empty chair defendants. Third, TCR received an additional \$1,670,000 setoff by the Trial Court to account for pre- and post-trial settlements. TCR now challenges the Trial Court's setoff and allocation analyses, arguing it is entitled to an additional, fourth round of setoffs for settlements compensating Plaintiffs for injuries that were not tried to the jury, all while failing to proffer any evidence from the record supporting its additional setoff and allocation position. The Trial Court's setoff and allocation determinations were within its discretion and should be sustained.

COUNTER-STATEMENT OF THE CASE

A.) Introduction and Pre-Trial Matters

This case concerns the construction of forty (40) townhome-style residences located in twenty (20) buildings on Peas Island, just outside of Folly Beach, South Carolina (hereinafter "the Project"). The Project was constructed in 2006-2007 by Complete Building Corporation ("CBC") and its subcontractors and sub-subcontractors.

In early 2015, the Palmetto Pointe Condominium Property Owners Association ("Association") began to notice persistent roof leaking and hired Elite Development Group, LLC to investigate these leaks. After this initial investigation, an engineer was then hired by counsel to investigate the buildings, and he found the initial building code violations and construction deficiencies that prompted this suit.

On February 13, 2015, the Association and (then) Class Representative Kathy Milner initiated this construction defect suit (hereinafter "Plaintiffs" or "Association"; R. pp. 201-221,

Initial Complaint). The suit sought compensation to remedy the defects at each of the forty (40) residences constructed, as well as the common areas. *Id.* Plaintiffs asserted claims of negligence/gross negligence and breach of warranty against the General Contractor, Complete Building Corporation (“CBC”), its subcontractors, including Tri-County Roofing (“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

On Monday, May 6, 2019 through Thursday, May 16, 2019, this construction defect suit was tried before The Honorable Jennifer B. McCoy against seven (7) Defendants: (1) Complete Building Corporation; (2) Tri-County Roofing, Inc.; (3) Miracle Siding, LLC and Wilson Lucas Sales d/b/a Miracle Siding; (4) Eloy Alonso Vasquez; (5) Stanley's Vinyl Fence Designs; (6) WC Services, Inc.; and (7) JMC Construction, LLC and JMC Construction, Inc.

During the trial, Defendant Stanley's Vinyl Fence Designs, the vinyl exterior railing installer, settled with Plaintiffs and was dismissed from the case. (R. p. 838, lines 7-10, Tr. Trans.).¹ Defendants JMC Construction, LLC and JMC Construction, Inc. were dismissed by directed verdict at the close of Plaintiffs’ case. (R. p. 1022, line 25-p. 1023, line 6, Tr. Trans.).

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, W-2 Tr. Trans.). The jury found for the 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.

¹ The trial of this matter spanned two (2) weeks. All “Tr. Trans.” cites are to Week One of the Trial, unless otherwise noted as “W-2” (referencing Week Two).

1759, line 24, W-2 Tr. Trans.). The jury made an express finding of grossly negligent, willful, and/or wanton conduct as to Tri-County Roofing, Inc. and Complete Building Corporation and separately awarded punitive damages of \$500,000 against each of them. *Id.*² The jury returned a defense verdict in favor of WC Services, Inc. *Id.*

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); Vasquez (\$325,000). (See R. pp. 1912-1913, June 10, 2019 Email from Jennifer Zambriczki to Judge McCoy's Clerk Serving Settlement and Release Chart) (hereinafter "Pl. Settlement and Release Chart").

C.) TCR's Post-Trial Motions

On May 28, 2019, TCR filed six (6) post-trial motions: (1) Judgment Not Withstanding the Verdict ("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 Complete Building Corporation's ("CBC") Cross-Claims. (R. pp. 525-545, May 28, 2019, TCR Post-Trial Motions).

Plaintiffs filed a memorandum in opposition to each of TCR's post-trial motions, excepting TCR's Motion regarding CBC's crossclaims. (R. pp. 588-619, June 7, 2019, Pltfs' Memo in Opp'n. to TCR Post-Trial Motions). 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, Hrg. Trans.). During and after the hearing, TCR and Plaintiffs submitted separate allocation charts to the Court:

² TCR's second-tier subcontractors, Miracle and Vasquez, 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 Vasquez and Miracle were each five percent (5%) responsible for the total damages. (R. p. 1760, line 5-p. 1779, line 14, W-2 Tr. Trans.; R. pp. 116-122, Verdict Form).

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, Hrg. Trans.; R. pp. 1912-1913, Pl. Settlement and Release Chart). 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 CBC's payment of the \$500,000 punitive damages award the jury levied against CBC. (TCR Initial Brief).

On July 23, 2019, the Trial Court denied TCR's JNOV and New Trial Motions. (R. pp. 166-167, July 23, 2019, Form 4 Order). 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 ("Motion to Reconsider" or "MTR") 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, TCR MTR). 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, August 15, 2019, Pltfs' Memo in Opp'n to MTR).³

On September 25, 2019, the Trial Court issued a reasoned order denying TCR's Motion to Reconsider. (R. pp. 168-173, September 25, 2019, Order Denying TCR MTR). Judge McCoy's

³ 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, August 15, 2019 Email from Laura Knight to J. McCoy's Clerk Serving Pltfs' Memo in Opp'n to MTR). The Trial Court accepted and considered this filing in reaching its final judgment.

Order Denying TCR's Motion to Reconsider highlighted the absence of evidence presented by TCR to establish it was entitled to a dollar-for-dollar setoff:

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, September 25, 2019, Order Denying TCR MTR). 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. 171, September 25, 2019, Order Denying TCR MTR). 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.*

E.) TCR's Subsequent Appeal

On October 14, 2019, TCR filed its Notice of Appeal. According to this Notice, TCR appeals 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, Notice of Appeal). TCR has filed its Initial Brief with this Court **and has abandoned all issues on Appeal except for the issue of setoff.** (TCR Initial Brief at 4).

STATEMENT OF PERTINENT FACTS

A.) Introduction

Appellant Tri-County Roofing ("TCR") was hired by the general contractor, Defendant Complete Building Corporation ("CBC"), to install the siding, roofing, and deck waterproofing/membranes at the Palmetto Pointe project (the "Project"). (R. pp. 2183-2193, P. Ex.

9). 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, W-2 Tr. Trans.) (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, W-2 Tr. Trans.) (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, W-2 Tr. Trans.) (TCR's siding installer's admissions regarding faulty siding installation); (R. p. 844, lines 10-20, Tr. Trans.) (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, Tr. Trans.) (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, Verdict Form).

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, July 23, 2019, Form 4 Order; R. pp. 170-171, September 25, 2019, Order Denying TCR MTR). The Trial Court's setoff was based upon the Court's 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, September 25, 2019, Order Denying TCR MTR).

The Trial Court's setoff determination should be sustained, as 1) each allocation is supported by the record; and 2) because TCR did not proffer (and has not preserved its ability to proffer now) an alternative allocation or factual support for any allocation other than that submitted by the Plaintiffs and adopted by the Trial Court.

B.) Settlements

Prior to the start of trial, Plaintiffs received \$4,725,000 in settlements. (R. p. 648, August 15, 2019, Pltfs' Memo in Opp'n to MTR). There is a category of these pre-trial settlements that TCR refers to as "agreed issue released settlements."⁴ (TCR Initial Brief 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, August 15, 2019, Pltfs' Memo in Opp'n to MTR). For five (5) of these settlements, Plaintiffs 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, August 15, 2019, Pltfs' Memo in Opp'n to MTR).⁵

⁴ Discussed in further detail *infra*, 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, May 6, 2019, CBC Motion in Limine; see, e.g., R. pp. 1995-2009, Settlement Agreement and Mutual Release as to Builder Services Group, Inc. d/b/a Gale Contractor Services).

⁵ In total, therefore, Plaintiffs received \$4,725,000 in pre-trial settlements and gave \$1,407,500 in issue releases and \$587,500 in partial setoff for a net of \$2,730,000.

There are five (5) settlements⁶ and corresponding partial setoff amounts that TCR disputes: Atlantic (framing subcontractor), CBC (general contractor), H and A (framing subcontractor), Cohen (drywall and insulation subcontractor), and Novus (project architect). (Hereinafter, “Contested Settlements”). (R. pp. 637-638, August 15, 2019, Pltfs’ Memo in Opp’n to MTR). 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.

i. Allocation of Insulation and Drywall Settlements

Cohen’s Drywall Company, Inc. (“Cohen’s”) supplied and installed the drywall and insulation at the Project. (R. pp. 387-408, November 2, 2017, Second Amd. S&C). In turn, Cohen’s settlement involved damages associated with Cohen’s scope of work, specifically “claims [...] for supplying [sic] and installing insulation and drywall [...]” (R. pp. 2107-2121, July 12, 2018, Cohen’s Settlement). A narrow category of drywall issues related to firestopping repairs was litigated at trial (*see, e.g.* R. p. 853, lines 4-25, Tr. Trans.); however, injuries related to defective insulation installation were not litigated, and Plaintiffs sought no damages at trial related to insulation deficiencies⁷. (*See* R. pp. 2619-2629, P. Ex. 677). Plaintiffs allocated Cohen’s \$125,000 settlement equally between injuries related to drywall and insulation, so that each was attributed \$62,500. (R. pp. 632-648, August 15, 2019, Pltfs’ Memo in Opp’n to MTR). The Trial Court

⁶ 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 has dropped its claim to this setoff. (TCR Initial Brief at 22, fn.4).

⁷ The repair estimate did include duct insulation in the MEP repair (mechanical, electrical, plumbing). This has nothing to do with Cohen, as it was not an MEP subcontractor. For a list of all MEP subcontractors, see the Consent Order of Dismissal, filed June 6, 2019. (R. pp. 132-143).

reduced the final judgment against TCR by \$62,500 to account for the potential of drywall overlap (*i.e.*, the potential that the injury and resulting damages from drywall defects contemplated in the Cohen’s settlement overlapped with an injury tried to verdict against TCR, even though, by all appearances, the jury did not award damages on the fire suppression drywall).⁸ (R pp. 166-167, July 23, 2019, Form 4 Order; R. pp. 168-173, September 25, 2019, Order Denying TCR MTR). TCR has not proffered any evidence showing that it is entitled to a dollar-for-dollar setoff for the monies paid by Cohen for either the first \$62,500 paid by Cohen or beyond the \$62,500 allocated to drywall, nor has TCR attempted to show that injuries related to defective insulation were presented to the jury and/or encompassed in the jury’s verdict against TCR.

ii. Allocation of Framing Settlements

Atlantic Building Construction Services, Inc. n/k/a Atlantic Construction Services, Inc. and H & A Framing Construction, LLC were the framing subcontractors at the Project. (“Framing Subcontractors”). The Framing Subcontractors’ settlements, which totaled \$1,200,000, covered two (2) principal issues: (1) shear walls;⁹ 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, W-2 Tr. Trans.; R. p. 1829, line 17-p. 1830, line 21, R. p. 1839, lines 10-23, Hrg. Trans.).

The previously litigated and settled shear wall substrate fastening issue (which was not reflected in any estimate admitted at trial) was referenced by Plaintiffs during opening in explaining to the jury the role of the siding repair subcontractor Defendant, JMC; and by JMC in its opening in explaining its own role to the jury. (R. p. 706, lines 4-10, R. p. 736, lines 10-14, Tr.

⁸ There was actually no evidence adduced that the fire suppression drywall work was performed by Cohen’s.

⁹ 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).

Trans.). In fact, JMC's counsel further confirmed that it had been paid by the framer, Atlantic Construction, for the siding work. (R. p. 736, lines 17-18, Tr. Trans). Notwithstanding, TCR has made absolutely no effort to explain why the shear wall defects are the same injury, or what an equitable allocation would be in light of minor references to other framing issues, *e.g.*, hurricane strapping, during the trial.

Plaintiffs' allocation accounted for any potential overlap between settled injuries and framing-related damages sought at trial; and the Trial Court reduced the final judgment against TCR by \$125,000¹⁰ to account for it. 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, nor has TCR attempted to show that injuries related to the defective installation of shear walls were presented to the jury, or that the injury related to defective installation of windows was accounted for in the jury's verdict, beyond the amount allocated by the Trial Court.¹¹

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 in its Initial Brief was to reference a quote that during siding replacement, the fastening of the existing substrate should be confirmed. (TCR Initial Brief at 17). This is a complete failure of evidence.

¹⁰ 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%.

¹¹ The shear wall field reports by Britt Peters were listed as Exhibits 459-463 in the list appended to Plaintiffs' Pre-trial Brief but were not entered into evidence. (R. pp. 1854-1876, Pl. Pre-trial Brief). 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, Joint Voir Dire). TCR has the shear wall evidence and testimony and chose not to address it.

iii. Allocation of Novus Settlement

Novus Architects, Inc. f/k/a SGM Architects, Inc. (“Novus”) provided professional architectural services at the Project. (R. pp. 275-341, November 4, 2016, Amd. S&C). Plaintiffs’ claims against Novus arose out of Novus’ breach of its professional standard(s) of care and damages related to those unique breaches. (*Id.*, R. p. 340).¹² Plaintiffs’ settlement with Novus was for its claim of professional negligence, a cause of action inapplicable to TCR. (R. p. 1827, lines 17-23, Hrg. Trans.). 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* TCR Initial Brief 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.

¹² 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, P. Ex. 5-A).

(R. p. 172, September 25, 2019, Order Denying TCR MTR). 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.*

Notably, when Novus was added as a defendant in the Amended Summons and Complaint on November 4, 2016, Respondents justified the addition with three expert affidavits as to professional negligence by Douglass Smits, Robert Castles, and David VanDommelen. (See R. pp. 298-341, Amd. S&C). The three (3) experts opined as to three (3) different types of professional negligence by Novus: negligent fire suppression design (Smits), negligent civil site drainage design (Castles), and negligent exterior envelope component design (VanDommelen). (See *Id.*). Two (2) of the three (3) system defects described in these affidavits, *i.e.*, two-thirds of Plaintiffs' claims against the architects, did not result in any portion of the verdict against TCR. (Site drainage was a settled issue, and there was a defense verdict on the fire suppression construction that TCR was not involved in.) How can TCR possibly prove that the claim against it was the same as the claim against the architects? No wonder it did not even try – it can't.

Notwithstanding the lack of evidence as to the standard of care, breach, or proximate cause, 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, August 15, 2019, Pltfs' Memo in Opp'n to MTR). The Trial Court agreed and further reduced the judgment against TCR by \$65,000. (R. pp. 166-167, July 23, 2019, Form 4 Order; R. pp. 168-173, September 25, 2019, Order Denying TCR MTR). TCR has not proffered any evidence showing that it is entitled to further setoff and has proffered no evidence contradicting Plaintiffs' allocation, which was adopted by the Trial Court.

iv. 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 Settlement Agreements, July 10, 2018 and June 6, 2019).
- 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, CBC Settlement Agreement, June 6, 2019; R. pp. 166-167, July 23, 2019, Form 4 Order). 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, August 5, 2019, TCR MTR) (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, July 23, 2019, Form 4 Order; R. pp. 168-173, September 25, 2019, Order Denying TCR MTR). 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, P. Ex. 677; R. pp. 2683-2977, P. Exs. 962-997; R. pp. 2978-2992, P. Exs. 1040-1043). 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, W-2 Tr. Trans.).¹³

The jury heard from the Association's 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, Tr. Trans.). In December 2017, Mr. Handegan issued a **\$15,258,000** damage estimate. (R. pp. 2619-2629, P. Ex. 677). 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, Tr. Trans.). This revised estimate (R. pp. 2993-3003, P. Ex. 1049) 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, line 17, Tr. Trans.). The revised total repair cost testified to by Handegan was \$13,428,000. (R. p. 951, lines 9-11, Tr. Trans.).

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 trim¹⁴ around the windows and to

¹³ 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, P. Ex. 931).

¹⁴ 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, W-2 Tr. Trans.).

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.

(R. p. 1652, line 22-p. 1653, line 11, W-2 Tr. Trans.). As to a loss of use, 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, Tr. Trans.). 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, W-2 Tr. Trans.).

In sum, Mr. Handegan removed \$3,827,000 from his 2017 estimate (*see infra* fn. 30 and accompanying text), 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, W-2 Tr. Trans; R. p. 1653, lines 23-25, W-2 Tr. Trans.) *with* (R. pp. 2619-2629, P. Ex. 677). 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 the Association requested. *Compare* (R. pp. 116-122)(Verdict Form of \$6,500,000) *with* (R. p. 1653, lines 11-25, W-2 Tr. Trans.)((\$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.

STANDARD OF REVIEW

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 (emphasis added); *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).

Conversely, when a prior settlement involves compensation for a **different injury** from the injury tried to a verdict, there is no setoff as a matter of law. *See Smith*, 397 S.C. at 473, 724 S.E.2d at 191; *see also 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) (emphasis added). If setoff is not “automatic,” the issue becomes an equitable one for the trial court’s consideration and discretion.

When a settlement involves two or more claims, one of which involves the same injury as the claim tried to verdict and one or more of which does not, the circuit court must make the **factual** determination of how to allocate the settlement between the two claims. *Smith v. Widener*, 397 S.C. at 473, 724 S.E.2d 188, 191 (Ct. App. 2012)(emphasis added); *see also Morris v. Bland*, No. 5:12-CV-3177-RMG, 2014 WL 12637911, at *13 (D.S.C. Dec. 31, 2014) (“In particular,

compensatory damages on survival claims and wrongful death damages are compensation for different injuries, and courts must determine what portion of a settlement are attributable to each injury.”).

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”).

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.

Id., 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).

Here, the contested settlements TCR seeks to setoff did not involve the same claims for the same injuries as those tried to a verdict against TCR, and thus setoff does not arise automatically as a matter of law. The Trial Court, therefore, engaged in the factual determination mandated by our jurisprudence (*see e.g., Smith*) when it assessed Plaintiff's proffered allocations and approved them. The Trial Court's engaging in this factual determination was not controlled by an error of law, nor were its reasoned allocations unsupported by the record. TCR is not entitled to further setoff as a matter of law or equity.

LEGAL ARGUMENT

TCR is not entitled to further setoff for a number of reasons, including: (1) TCR fails to show, through facts, law, or otherwise, that settling defendants paid more than \$1,670,000 for the *same* injuries as those tried to a verdict against TCR; (2) TCR fails to show, through facts, law, or otherwise, that the Court unfairly or unreasonably allocated any settlement; (3) TCR seeks to reapportion agreed-upon allocations solely to benefit itself; (4) TCR has already received three damage reductions and setoffs and is not entitled to further setoff based on the *Oaks* decision; (5) TCR already asked the jury to allocate fault and damages amongst different issues and Parties; and, (6) further setoff is not necessary to provide justice between the parties.

The speciousness of Appellant's argument(s) is well illustrated by its claim that it is entitled to setoff the verdict with the punitive damages paid by CBC – even though the jury awarded separate punitive damage awards against CBC and TCR.¹⁵ There is no supporting legal precedent, logic, or common sense for this setoff claim – and it must fail. The failure of this portion of the TCR setoff claim 1) shows that the setoff rights in the situation presented by this case are not

¹⁵ While TCR appears to add its own punitive damage verdict back into its final judgment in its previously filed Reply Brief, by sleight of hand, TCR discretely and brashly tries to setoff CBC's payment of CBC's punitive damage verdict against TCR's actual damages.

automatic; and 2) highlights the importance of the lack of evidence proffered by TCR to support any part of their setoff claim.¹⁶

A. TCR Has Not Preserved its Ability to Argue Equitable or Common Law Setoff on Appeal

TCR has consistently argued that it is entitled to 100%, non-discretionary setoff under the Act for all settlements other than those it calls “issue release” settlements. *See, e.g.* (R. p. 535, TCR Post-Trial Mot.) (“Applying set off is mandatory.”); *see also* (R. p. 1814, lines 6-7, Hrg. Trans.) (“[S]etoff is a –required by the law. It is not discretionary.”); (R. p. 624, TCR Mot to Reconsider Form 4 Order) (“Applying set off is mandatory.”); (TCR Initial Brief at 27) (“TCR is entitled to complete setoff of the jury verdict by the settlements reached in this case that were not otherwise removed from review by the jury and designated as issue releases.”).

Because TCR failed to argue for an equitable or “common law” setoff in either its post-trial motions or at the post-trial motion hearing, the Trial Court’s Order denying TCR’s Motion to Reconsider did not address TCR’s common law setoff position. Rather, the Trial Court found that TCR “failed to establish that the settlements plaintiffs received in excess of \$1,670,000.00 are damages awarded against a settling joint tortfeasors [sic] who has compensated the Plaintiff for the same claim and for the same injury.” (R. p. 171, Order Denying TCR’s MTR) *citing* (S.C. Code Ann. §15-38-50).

TCR did not move to reconsider or clarify the Court’s final order, and thus the issue is not preserved for appellate review.¹⁷ *Glover v. Stack*, No. 2016-001807, 2019 WL 2024579, at *2

¹⁶ For additional TCR illogical arguments, *see, e.g.*, pages 32-33 of TCR’s Initial 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 on this issue. (See R. pp. 116-122, Verdict Form).

¹⁷ It is unclear to Respondents whether TCR is now arguing for common law setoff in the alternative, as TCR makes tangential references to preventing “double recovery” and related

(S.C. Ct. App. May 8, 2019) (“Although [Appellant] raised [equitable setoff] during the motion hearing, the circuit court’s final orders addressed only Simpson’s entitlement to a setoff under the statute. Because Simpson did not subsequently file a Rule 59(e), SCRCPP, motion seeking a ruling on her common law equity argument, it is not preserved for appellate review.”) *citing Elam v. S.C. Dep’t of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) (holding a party must file a Rule 59(e), SCRCPP, motion to reconsider when an argument has been raised, but not ruled on, to preserve it for appellate review).

Even if this Court were to disagree and find that TCR *has* preserved the issue of equitable setoff, TCR betrays itself with the final sentence of its Second Amended Initial Brief: “TCR’s requested setoff allocation is the mandated statutory and common law result [...]” (TCR Initial Brief at 46). There is no “mandatory” common law setoff.

B. TCR is Not Entitled to Automatic, Dollar-for-Dollar Setoff Under the Act Because Settlement Amounts in Excess of the \$1,670,000 Setoff Already Granted Were Paid to the Association for Different Claim(s) for Different Injur(ies) From Those Tried Against TCR and Awarded by the Jury

TCR takes the position that it is entitled to a dollar-for-dollar setoff of the Contested Settlements, and that the Trial Court has no discretion in the matter:

[S]etoff is a —required by the law. It is not discretionary. [...] This is not a duty; it is not a burden. I don’t have a burden to prove what should be a setoff because the law and the statutes say I’m entitled to it. [...] The reason why this is important is because when we’re talking about setoff what we’re looking at is the damages that are incurred at the end, the injury is what we’re looking at. We’re not looking at whether or not a person put in the same type of flashing, not looking at if the person did the same type—scope of work.

(R. p. 1814, lines 6-7, R. p. 1814, lines 15-17, R. p. 1816, lines 3-8 , Hrg. Trans.). TCR’s argument in both its briefings to the Trial Court and now on appeal that setoff for each penny of the Contested

“equitable” principles; however, TCR has made no attempt (either here or in the Trial Court) to show that Plaintiffs have received a double recovery.

Settlements is “**not discretionary**” means that TCR believes it is entitled to setoff pursuant to the South Carolina Contribution Among Tortfeasors Act (the “Act”). S.C. Code § 15–38–10, *et seq.* For this statutory, non-discretionary setoff to attach, however, the Contested Settlements must have been paid to Plaintiffs **on the same claim for the same injury** as that tried to a verdict against TCR. (*See Smith v. Widener*, 397 S.C. at 471-2, *supra*) (emphasis added). The “trigger” for the Act to apply, therefore, is relatively simple, and it turns on the question of whether the settlement(s) were for the “same injuries” as those alleged and tried to a verdict against TCR.

TCR argues that the Act applies because “damages in construction defect cases like [this one] all arise out of the same set of facts or type of injury.” (TCR Initial Brief at 38). And, therefore, each penny of the Contested Settlements was paid for the “same injury” for which the jury awarded damages, and thus TCR is entitled to a dollar-for-dollar setoff for each. (*See Id.* at 35, 37-38, 42; *see also* R. p. 1820, R. pp. 1829-1830, Hrg. Trans.). TCR cites to no South Carolina authority to support this argument; accordingly, it is abandoned. *See Bennett v. Inv'rs Title Ins. Co.*, 370 S.C. 578, 599, 635 S.E.2d 649, 660 (Ct. App. 2006) (noting when appellants fail to cite any case law for their positions and make conclusory arguments, the appellants abandon those issues on appeal).

In South Carolina, however, the question of whether injuries and resulting damages are indivisible for the purpose of setoff in the context of a construction defect suit has already been answered by this Court. Although TCR acknowledges the existence of the highly relevant, factually similar *Oaks* decision, it ignores one of that case’s main holdings: cost of repair damages for distinct and uniquely damaged building components are not the “same injury” for setoff purposes. TCR’s brief discusses setoff precedent in South Carolina as if the *Oaks* does not exist; specifically, TCR ignores that this Court in the *Oaks* found that damages awarded for, *e.g.*, window repair, address a **distinct injury** from damages awarded for, *e.g.*, brick replacement. The *Oaks*

Court ultimately determined that defendants were not entitled to setoff settlements that compensated an association for certain building components, because the damages awarded at trial addressed repairs of other building components. *Id.* at 420 S.C. 424, 439, 803 S.E.2d 475, 483. The same is true here – the damages awarded at trial address repairs of building components different than those addressed by settlement.¹⁸ The *Oaks* holding makes sense, and to hold otherwise would chill settlements and clog the courts. To hold otherwise would be to establish a rule that the plaintiff must always prove a full set of damages in a multi-party complex case, no matter how circumscribed the remaining unsettled issue/damage. Stated differently, if the plaintiff still has to prove his, *e.g.*, stucco defects, the incentive to settle with the stucco subcontractor is reduced.

¹⁸ *Oaks* also holds that certain damages attendant to construction defect actions, *i.e.*, loss of market value, are distinct injuries from damages related to the repair of defective items. 420 S.C. 424, 443, 803 S.E.2d 475, 485 (Ct. App. 2017). (“[T]he trial court did not err in awarding Respondents damages for both loss of access to the market and the cost of repairs. [...] [Plaintiffs] suffered two separate injuries with two different sets of damages.”). This is important here because no pre-trial settlements paid the Association for loss of use – a “different” injury the Association asked the jury to include in its verdict. Appellant asserts the prior settlements included loss of use recovery because of the “loss of use” standard language in the releases. The releases, *e.g.*, Atlantic, also include “loss of companionship,” but it is unlikely that Appellant can argue that Plaintiffs were compensated for that. (R. pp. 1984-1985, Atlantic Settlement Agt.). The fact that the releases were comprehensive (using boiler plate language) provides no evidence that Respondent was paid for loss of use. Importantly, the scope of the release was based upon “work performed” and “materials... supplied” by Releasee (Atlantic). *Id.* TCR has not demonstrated that the verdict against TCR is for the work performed or materials supplied by, *e.g.*, Atlantic – and its effort so seek credit for Atlantic’s payment must fail.

TCR implicitly concedes, in multiple ways, that construction defect damages are, in fact, separable, and therefore all injuries relating thereto are not the “same.” For example, TCR’s drumbeat regarding “issue release” settlements actually *support* Plaintiffs’ arguments here. TCR is not entitled to setoff for “issue release[d] items” not because of any formal or informal agreement; rather, TCR is not entitled to that setoff because **those injuries were not tried to the jury, nor did Plaintiffs seek damages related to those injuries against TCR.** TCR’s tacit “agreement” to consider those items as “issue released items” is a fiction, and TCR’s attempt to setoff, e.g., 100% of the framing settlements against the jury’s verdict does not survive the “straight face test” when TCR’s own logic regarding issue-released items is applied. (See TCR Initial Brief at 35) (“TCR is entitled to setoff of all the settlements that were not otherwise removed from the trial of this case [...]”); (See also *Id.* at 43) (“TCR is not seeking to get credit for the items labeled as issue releases twice. TCR concedes that it [...] received the benefit of a lower trial demand when the items labeled as issue releases were taken out of Respondents’ repair cost estimate.”).

As a second example, TCR argues that it would be “fundamentally unfair [...] for TCR to be responsible for repairing the firewall and fireproofing deficiencies arguably attributable to W.C. Services [...] as it would be unfair for W.C. Services to be responsible for the alleged siding deficiencies.” (TCR Initial Brief at 33). How then is it fair for TCR to receive a credit for 100% of prior settlements with defendants with distinct scopes of work to address distinct injuries resulting in distinct damages? TCR cannot have it both ways.

TCR is not entitled to mandatory setoff contemplated by S.C. Code Ann. § 15-38-50 because the Contested Settlements were not paid to compensate Plaintiffs “for the same injur[ies]” as those tried to a verdict. S.C. Code Ann. § 15-38-50 (2005); see also *Smith v. Widener*, 397 S.C. 468, 473, 724 S.E.2d 188, 191 (Ct. App. 2012) (“[W]hen the prior settlement involves

compensation for a different injury from the one tried to verdict, there is no setoff as a matter of law.”). Because TCR is not entitled to setoff as a matter of law, the analysis must shift to an equitable one: has TCR shown that the Trial Court abused its discretion in applying an equitable setoff based upon the allocations proffered by Plaintiffs and supported by the facts in and trial of this case? The answer is no, TCR has not, nor did it make any such attempt.

C. The Trial Court’s Allocation and Resulting Setoff Were Lawful, Fair, and Just and TCR Has Failed to Meet its Burden Showing Otherwise; Nor Has it Proffered an Alternative Allocation

The Association’s allocation, the Court’s approval of that allocation, and the resulting setoff of the verdict are reasonable, fair, and supported by both the record and South Carolina law. Importantly, and because TCR believes it is entitled to setoff as a matter of law, TCR does not proffer an alternative setoff based upon the evidence presented at trial or evidence otherwise in the record, nor does TCR argue for a different allocation methodology. (*See generally* TCR Initial Brief). Furthermore, TCR’s reliance on its failed “empty chair” arguments made during trial is misplaced: “empty chair” arguments made by a non-settling defendant do not create a mandatory setoff.

i. The Trial Court’s Allocation Was Fair, Reasonable, and Supported by South Carolina Law

Given that the Contested Settlements involved injuries which differed from those tried to a verdict, the Trial Court made the factual determination of to allocate the Contested Settlements to account for any potential overlap. (*See* “Statement of Pertinent Facts”, *supra*, at §B). The Trial Court examined each of the Contested Settlements and found that “only \$1,670,000.00 in settlement[s]” represent “damages awarded against a settling joint tortfeasor who has compensated Plaintiff for the same claim and for the same injury.” (R. p. 171, September 25, 2019, Order Denying TCR MTR). The Trial Court gave an example of one such “factual determination”:

By way of illustration, H and A framing paid \$500,000 for damages to shear walls, window installation, deflecting floors and framing defects. Arguably, none of that settlement represents compensation for damages which are included in the jury's verdict against TCR. Nevertheless, the court in the exercise of its discretion, accepted the plaintiffs' allocation of \$50,000 of that sum as damages potentially representing TCR's joint liability, and the court included that amount in its setoff. **The court analyzed each of the settlements in the same manner.**

(R. p. 171, September 25, 2019, Order Denying TCR MTR) (emphasis added). Taking this example, the Association's allocation of 10% of the framing settlement(s) was not arbitrary.

Rather, the allocation was supported by what was and was not presented to the jury at trial:

- Deflecting floors: no evidence presented that the flooring needs to be removed and/or replaced at the Project. (R. p. 1666, lines 6-10, R. p. 1667, lines 10-14, R. p. 1668, lines 10-14, W-2 Tr. Trans.).
- Windows: no longer part of case, not litigated, and all window product damages removed during closing argument. (R. p. 1666, lines 3-6, R. p. 1667, lines 20-22, R. p. 1668, lines 9-10, W-2 Tr. Trans.).
- Shear Walls: not litigated during trial and not in estimate. (R. pp. 2619-2629, P. Ex. 677).¹⁹

TCR makes no attempt to show how or why it is entitled to a dollar-for-dollar setoff, or why the Association's reasoned allocation is unfair or unsupported. Instead, TCR attempts to distract from its own lack of evidence by calling the Association's allocation "arbitrary". (TCR Initial Brief at 42).

ii. TCR Fails to Show Allocation and Resulting Setoff Was Unfair, and Also Fails to Proffer an Alternative Allocation Methodology

TCR does not explain in its brief *how* any of the settlements totaling the \$3,722,500 *additional* setoff it seeks compensated the Association on the same claim for the same injury as that tried to the jury, because it does not believe that it needs to do so. TCR has realized that it

¹⁹ As can be seen from the absence of shear wall damages in both P. Ex. 677 (R. p. 2619-2629) and P. Ex. 1049 (R. p. 2993-3003), the shear wall issue surfaced after the compilation of the original estimates and settled before the adjustment in the revised estimate and is not reflected in either.

cannot make such a showing and instead has permeated its briefing with a flawed initial premise: “damages in construction defect cases like the Palmetto Pointe litigation all arise out of the same set of facts or type of injury.” (TCR Initial Brief at 38).²⁰ It then uses this fallacious jump-off point to justify its conclusion, which is that TCR is entitled to a non-discretionary setoff (as a matter of law) for all settlements, except for those it calls “issue releases” settlements. (*Id.* at 44). TCR does not believe it has to show, *e.g.*, that the settlement monies paid by the architect were paid to compensate Plaintiffs for the *same claim(s)* for the *same injury(ies)* as those tried to a verdict.²¹ Since TCR already submitted its brief, it abandoned any chance it had to resuscitate its argument.

Separately, TCR has abandoned its ability to factually contest the Plaintiffs’ allocation of Contested Settlements and the Trial Court’s approval of the same. TCR’s arguments on appeal do not negate TCR’s lack of setoff evidence proffered to the Trial Court post-trial and do not show how TCR’s proffered allocation (100% setoff of the Contested Settlements) is more fair than

²⁰ Not only does TCR not proffer *any* South Carolina precedent to support this argument as it relates to construction defect injuries, it cites to *Ellis versus Oliver* for the proposition that “[t]he injury contemplated in the setoff statute is broad enough to include all damages.” (TCR Initial Brief at 37) *citing Ellis*, 335 S.C. at 113, 515 S.E.2d at 272 (Ct. App. 1999). However, the court in *Ellis* erroneously held that “wrongful death and survival are the same claim for the same injury.” *Id.* This was in error, as clarified by this Court in *Smith*:

The conflict between *Rutland* and *Ellis* is resolved by reference to *Bennett v. Spartanburg Railway, Gas & Electric Co.*, 97 S.C. 27, 81 S.E. 189 (1914), in which the supreme court held that wrongful death and survival actions are different claims for different injuries. 97 S.C. at 29–30, 81 S.E. at 189–90.

Smith v. Widener, 397 S.C. 468, 474, 724 S.E.2d 188, 191 (Ct. App. 2012). Although not explicitly overruled, this Court in *Smith* made clear that wrongful death and survival claims are *not* the same claims for the same injuries. *Id.* Therefore, TCR’s reliance on *Ellis* for any related premise is nebulous.

²¹ See, *e.g.* *Oaks at Rivers Edge Prop. Owners Ass’n, Inc. v. Daniel Island Riverside Developers, LLC*, 420 S.C. 424, 438, 803 S.E.2d 475, 482 (Ct. App. 2017); see also *Riley v. Ford Motor Co.*, 414 S.C. 185, 195, 777 S.E.2d 824, 830 (2015); *Hawkins v. Pathology Assocs. of Greenville, P.A.*, 330 S.C. 92, 113, 498 S.E.2d 395, 407 (Ct. App. 1998); *Ward v. Epting*, 290 S.C. 547, 559-60, 351 S.E.2d 867, 874-75 (Ct. App. 1986).

Plaintiffs' allocation. In fact, TCR does not state, assert, or otherwise show that the Trial Court's allocation is *unreasonable*.²² An attempt at re-allocation must be supported by the party who seeks it (*see Riley* and *In re Wells*, *supra*), and TCR failed to offer any justification either at the Trial Court or now, on appeal. For example, what evidence is there to show TCR is entitled to a setoff of the entire framing related settlement(s), as opposed to the ten percent (10%) allocation proffered by the Association, and approved by the Trial Court? TCR has not shown, or even argued, that it was held liable for injuries and related damages caused by the Framing Subcontractors *in excess of* the \$125,000 setoff granted by the Trial Court.

Not only has TCR abandoned this issue, it is impossible for TCR to prove that the verdict overlaps with the "same" damages or claims already compensated. As explained by the Trial Court:

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, September 25, 2019, Order Denying TCR MTR).²³ At this juncture, TCR not only has a failure of proof, it has a complete lack of proof.

iii. TCR's "Empty Chair" Defense Does Not Resuscitate its Setoff Argument

TCR spends a great number of pages in its Initial Brief explaining to the Court that "[t]he jury heard testimony regarding all the different parties that worked together to construct the Project" in an attempt to validate complete setoff of the Contested Settlements. (*See, e.g.* TCR

²² *Riley v. Ford Motor Co.*, 414 S.C. 185, 197, 777 S.E.2d 824, 831 (2015) ("Here, the trial court-approved allocation is unquestionably reasonable under the facts. In fact, Ford has never suggested that \$20,000 for the survival action is unreasonable.").

²³ "[T]he court cannot parse the jury's award to determine which items or portions of plaintiffs' claims it accepted or, conversely, which items it allowed." (R. p. 170, September 25, 2019, Order Denying TCR MTR).

Initial Brief at 40-42). TCR erroneously equates its ability to argue an “empty chair defense” with an ability to argue that certain settled injuries were *actually* encompassed in the jury’s verdict. The empty chair defense, as codified by the Act, gives a defendant the “the right to assert that another potential tortfeasor, whether or not a party, contributed to the alleged injury or damages and/or may be liable for any or all of the damages alleged by any other party.” S.C. Code Ann. § 15-38-15(D). TCR’s arguing during trial that, *e.g.*, the architect is actually to blame for Plaintiffs’ injuries does not mean that the jury’s verdict therefore encompassed Plaintiffs’ claims for injuries against the architect. Put differently, simply because TCR blames the architect for its own failings does not mean that Plaintiffs’ claims and injuries alleged against the architect were *actually* on trial.

TCR’s arguments regarding its use of the empty chair defense to the Trial Court in post-trial briefings also does not rectify its abject failure to proffer an alternative allocation. Although TCR pointed to tangential references in the trial transcript to, *e.g.*, “framing”, (R. p. 877, line 21- p. 881, line 25, Tr. Trans), it never showed the Trial Judge why any prior settlements by the Framing Subcontractors should have been allocated any differently. By all accounts, TCR’s gamble on the empty chair defense failed in part and succeeded in part: it failed in that it did not break the causal chain enough to result in a defense verdict, and it succeeded in that the jury awarded Plaintiffs far fewer damages than Plaintiffs sought. As stated by the Trial Court, “TCR has failed to establish that the settlements plaintiffs received in excess of \$1,670,000 are damages awarded against a settling joint tortfeasor who has compensated the Plaintiff for the same claim and for the same injury.” (R. p. 171, Order Denying MTR).²⁴

²⁴ Similarly, TCR attempts to blame the “empty chair” architect for the claims and related injuries Plaintiffs presented at trial while simultaneously conceding issue releases. In so doing, TCR is implicitly conceding that the portion of the work that the architect performed related to the released issue is a different injury; and therefore, the architect’s settlement must be allocated - and no

Relatedly, because TCR was found liable for gross negligence by the jury, the entirety of Section 15-38-15 is not available to TCR. *See* S.C. Code Ann. § 15-38-15 (F) (“This section does not apply to a defendant whose conduct is determined to be willful, wanton, reckless, grossly negligent, or intentional [...]”); *see also Oaks* 420 S.C. at 442, 803 S.E.2d at 485 (holding that trial court properly declined to allocate damages against condominium developer and construction manager under contribution statute where developer and manager were found grossly negligent).

D. Allocation of the CBC Settlements Was Fair, Reasonable, and Supported by the Record, and TCR Seeks to Reallocate the CBC Settlements Solely to Benefit Itself

South Carolina law grants the Trial Court substantial discretion to allocate settlement proceeds between claims in applying a setoff. *See Rutland v. S.C. Dep't of Transp.*, 390 S.C. 78, 87, 700 S.E.2d 451, 456 (Ct. App. 2010); *Welch v. Epstein*, 342 S.C. 279, 313, 536 S.E.2d 408, 426 (Ct. App. 2000). This is due, in part, to South Carolina's “strong public policy favoring the settlement of disputes.” *Chester v. S.C. Dep't of Pub. Safety*, 388 S.C. 343, 346, 698 S.E.2d 559, 560 (2010). Here, the Trial Court properly allocated and setoff all applicable settlements, including the CBC settlements. Importantly, and because any attempt at re-allocation must be supported by the party who seeks it (*In re Wells, supra*), TCR's failure, at the Trial Court level to either 1) show Plaintiffs' allocation of the CBC settlement was unreasonable or unfair or 2) to show that such allocation actually resulted in Plaintiffs' receiving a double recovery, is fatal to its argument now on appeal.

i. The Association's Allocation Was Timely

First, TCR claims that the Association's allocation of its settlements with CBC is “untimely,” because the general verdict was set by Court Order on May 16, 2019. (TCR Initial

request was made or evidence submitted by TCR to support an allocation of this Contested Settlement.

Brief at 29). If the May 16, 2019, Court Order was the “final judgment” of the Trial Court, then it would be incumbent upon TCR to either move to reconsider that order or appeal it. TCR did neither. Instead, TCR moved to reconsider the Court’s actual final judgment, which was the July 23, 2019, Court Order allocating the setoffs and reducing the total general verdict amount against TCR from \$7,000,000 to \$5,330,000. (R. pp. 166-167, July 23, 2019, Form 4 Order).²⁵ TCR does not appeal the May 16, 2019, Form 4 Order; rather, it appeals the July 23, 2019, Form 4 Order and the Trial Court’s September 25, 2019, Order Denying TCR’s Motion to Reconsider. (R. pp. 174-200, Notice of Appeal). The first settlement agreement with CBC was reached on July 10, 2018, approximately one (1) year before entry of the final judgment on July 23, 2019.²⁶ (R. pp. 1918-1924, July 10, 2018, CBC Settlement Agreement). The post-trial settlement agreement with CBC was entered on June 6, 2019, over a month before the Trial Court entered the final judgment against TCR. (R. pp. 1925-1939, June 6, 2019, CBC Settlement Agreement). The allocation was neither untimely nor was it improper. It simply did not benefit TCR.

ii. The Association’s Allocation of CBC’s Pre-Trial and Post-Trial Settlements Was Proper

TCR next argues that the Association’s allocation was “improper,” and the CBC settlements were actually “partial satisfaction[s] of a judgment.” (TCR Initial Brief at 29-30). Again, TCR cites to no caselaw in support of this position. Rather than encouraging settlements, such an approach would encourage defendants in multi-party litigation not to settle but to instead vie to be the last one standing in the hope that other parties will pay more than their fair share of the verdict. Furthermore, settlement dollars are not synonymous with damages and instead include

²⁵ The Trial Court called its July 23, 2019 Order its “final judgment.” (R. p. 173, September 25, 2019, Order Denying TCR MTR).

²⁶ TCR argues without legal support that \$1,000,000 of CBC’s settlement, which was paid one (1) year before pre-trial by one of CBC’s insurers, should be considered a post-verdict settlement for the purposes of allocation. (TCR Initial Brief at 23).

the value of avoiding the risk, exposure, and expense of trial and appeal. *See, e.g. Griffin v. Van Norman*, 302 S.C. 520, 524, 397 S.E.2d 378, 380 (Ct. App. 1990) (“The decision to settle was reasonable in the circumstances, because it “bought peace” and avoided a costly trial which might possibly result in a verdict adverse to the [Defendant].”); *see also Wells v. Tallahassee Mem’l Reg’l Med. Ctr., Inc.*, 659 So. 2d 249, 252 (Fla. 1995); *Neil v. Kavena*, 176 Ariz. 93, 859 P.2d 203, 206 (App.1993); *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 431 (Tex.1984).²⁷

To the extent TCR argues that it is entitled to a 100% setoff of the contractually allocated CBC settlements because the settlements were actually in satisfaction of a judgment, it cites to no caselaw in support of this argument. Such an approach “would defeat ‘the preeminent object of the [setoff] statute to encourage settlement” and would “place a nonsettling defendant in an advantageous position vis a vis settling tortfeasors.” *Daversa v. P.T.C. Properties*, 599 N.Y.S.2d 432, 434 (Civ. Ct. N.Y. 1993) (quoting *Matter of New York City Asbestos Litig.*, 188 AD2d 214, 218 [1st Dept 1993]) (emphasis added). The *Daversa* court further observed that “[t]here is no justification for rewarding recalcitrant nonsettling defendants by permitting them to apply the [statutory] offset in a manner that reduces or even obliterates their own liability in cases where plaintiffs are not fully compensated.” *Id.*

iii. South Carolina Law Does Not Allow A Settlement Allocation to Be Disturbed Simply Because It Benefits the Settling Parties

TCR asks this Court to reallocate and setoff CBC’s two (2) settlements totaling \$2,137,500 in their entirety just because the allocations to which Plaintiffs and CBC agreed benefit Plaintiffs as opposed to TCR. However, this fact alone is insufficient to warrant reallocation by this Court.

²⁷ For example, CBC paid \$125,000 to avoid an appeal of its share of liability on the fire suppression issues.

Riley v. Ford Motor Co., 414 S.C. 185, 196, 777 S.E.2d 824, 831 (2015). As explained by our Supreme Court in *Riley*:

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.

Id. (citations and quotations omitted). Thus, a court cannot “disturb the settling parties’ agreed-upon allocation solely because the apportionment may have been advantageous to [Plaintiff].” *Id.* Plaintiffs and CBC contractually allocated its two (2) settlements, which totaled \$2,137,500. *See* (Statement of Pertinent Facts, Section B(iv), *supra*). Based upon this allocation, as well as the evidence presented at trial, the Trial Court provided TCR a \$137,500 setoff to account for overlap of issues which were presented at trial. (R. pp. 166-167, July 23, 2019, Form 4 Order; R. pp. 168-173, September 25, 2019, Order Denying TCR MTR). This determination is reasonable and supported by the facts of this case. On the contrary, allowing TCR to set off the remaining proceeds that CBC and Plaintiffs contractually allocated to damages that are foreign to the damage TCR caused is unreasonable and conflicts with South Carolina law. Furthermore, the purpose behind the Legislature’s codification of setoff was to strike a balance between “preventing a 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. Beyond stating that Plaintiffs would receive a double recovery with the Trial Court’s reasoned allocation of CBC’s settlements, TCR has not demonstrated that a double recovery would occur. (*See* TCR Initial Brief at 46). Indeed, the Supreme Court in *Riley* reversed the Court of Appeals’ reallocation in part because the Court of

Appeal's decision did not explain "how [the allocated settlement] ran afoul of the public policy preventing a plaintiffs' double recovery. 414 S.C. at 191, fn. 3. No double recovery was had (see §F, *infra*), and TCR has not shown otherwise. Plaintiffs had the right to allocate the CBC payments to damage elements that were not TCR's shared responsibility. It did so, and TCR cannot unwind those allocations having itself chosen not to settle with the Plaintiffs.

iv. TCR is Not Entitled to a Setoff for the Punitive Damages Award Levied Against CBC

After hearing the evidence, the jury found TCR was grossly negligent and imposed a punitive damage verdict against TCR in the amount of \$500,000. (R. pp. 116-122, Verdict Form). The jury separately found Defendant CBC was grossly negligent and imposed a punitive damage verdict against CBC. *Id.*

TCR is not entitled to a setoff for CBC's payment of the punitive damage award levied against CBC by the jury. Section 15-32-520(G) requires that "[i]n an action with multiple defendants, a punitive damages award must be specified as to each defendant, and each defendant is *liable only for the amount of the award made against that defendant.*" S.C. Code § 15-32-520(G) (emphasis added); *see also McGee v. Bruce Hosp. Sys.*, 344 S.C. 466, 471-72, 545 S.E.2d 286, 288-89 (2001) (holding that punitive damages claim against a second tortfeasor was entirely separate from compensatory and punitive award against the first tortfeasor).

Clearly, the jury separately levied punitive damages awards against TCR and CBC—distinct awards for distinct reckless, grossly negligent, or willful misconduct. (R. pp. 116-122, Verdict Form). TCR should get no credit for the \$500,000 punitive damages award levied against CBC. TCR argues that CBC's payment of the punitive damages awarded against it absolves TCR of the responsibility to pay for its egregious conduct. The law does not afford TCR the luxury of

escaping the punitive damage judgment imposed upon it where, as here, a co-defendant paid the punitive damages the court separately imposed upon that Defendant.

E. TCR's "Verdict Form" Arguments Are Without Merit and Do Not Save its Failure of Proof

Further, TCR's arguments as to the significance of the form and content of the verdict form are misplaced. Notably, Appellant moved in *limine* for special verdicts addressing the unique characteristics of this case. (R. pp. 518-524, May 6, 2019, Motion in *Limine* for Special Verdicts; R. p. 684, line 23-p. 685, line 20, Tr. Trans.). The Court expressly assigned to TCR the task of drafting and submitting a proposed verdict form that would satisfy TCR's concerns. (R. p. 685, lines 8-11, Tr. Trans.). This never happened. (R. p. 1596, R. pp. 1607-1626, W-2 Tr. Trans.).

TCR did, in fact, submit a proposed verdict form. (See R. pp. 1885-1894, May 15, 2019 Email from R. Campbell to Court, attaching TCR's proposed Jury Verdict Form). Notably, TCR's proposed verdict form asks the jury for a single damage number against all defendants as to each cause of action. (See *id.* at R. pp. 1888, 1889, 1892). This runs in stark contrast to TCR's representation to this Court that "[g]enerally, the defendants all advocated for a version of the jury form that asked the jury to allocate liability among each of the defendants"; "TCR and the other defendants at trial submitted proposed jury verdict forms that would have allowed the jury to separate out which components of repair were properly associated with a defendants' scope of work"; and "Respondents insisted on a general verdict damages number." (TCR Initial Brief at 20, 32).

The Defendants failed to submit a single agreed upon verdict form as requested by the Court. (R. p. 1596, R. pp. 1607-1626, W-2 Tr. Trans.). No Defendant submitted a plausible verdict form. (Defendants' Proposed Verdict Forms). Like so many other portions of the trial, the Defendants intermingled, and leap-frogged their arguments and issues (in this instance, verdict

form and jury charge arguments) in a manner that no reasonable person could follow. (R. pp. 1595.1-1627, W-2 Tr. Trans.).

Having caused or failed to take any steps to avoid trial court error, TCR cannot now, on appeal, argue that the verdict form used by the Trial Court in any way resulted in prejudice. Nor did Appellant ever object to the final proposed verdict form proffered by the Judge immediately prior to closing. (R. pp. 1880.1-1880.14, Plaintiffs' Revised Verdict Form and Cover Email; R. p. 1624, W-2 Tr. Trans.). TCR's verdict form arguments otherwise throughout its initial brief is pure sleight of hand.

F. TCR Has Already Received Three Reductions and is Not Entitled to Further Setoff

TCR has already effectively received a triple setoff. First, Plaintiffs reduced their damages at trial and only asked the jury for compensation related to defects and damages resulting from work performed by the Defendants who remained in the case at the time of trial (to the exclusion of settled issues), and further reduced their damages by an additional \$1,000,000 during closing arguments to account for untried issues. Second, empty chair blame and damage allocation setoff were tried to the jury who awarded Plaintiffs a further reduced amount. Third, TCR received an additional \$1,670,000 setoff by the Trial Court to account for any overlap between pre- and post-trial settlements and the jury's verdict. As a result, additional setoff is not necessary to provide justice between the parties.

i. TCR is Not Entitled to Further Setoff Based on this Court’s Recent Decision in *The Oaks*

TCR makes the argument that “the seminal cases discussing setoff in South Carolina involve claims for wrongful death and survivorship,” and that damages in a construction case are unique, because they “all arise out of the same set of facts or type of injury.” (TCR Initial Brief at 38). Contrary to this assertion, this Court recently issued an opinion addressing setoff in the context of a multi-defendant construction defect case that gives guidance in this arena where there was previously little. The *Oaks* decision confirms that TCR is not entitled to additional setoff because the Association reduced its damages at trial to account for the amounts received in pre-trial settlements for which no setoff was offered. *The Oaks at Rivers Edge Property Owners Ass’n, Inc. v. Daniel Island Riverside Developers, LLC*, 420 S.C. 424, 803 S.E.2d 475 (Ct. App. 2017) (citations omitted).²⁸

In the *Oaks*, the plaintiffs filed suit against the developer, general contractor and subcontractors involved in the construction of a thirty-six (36) unit condominium complex alleging a wide range of defects that resulted in widespread water intrusion and damages. 420 S.C. 424, 433, 803 S.E.2d 475, 480 (Ct. App. 2017). Prior to trial, the plaintiffs settled with a number of defendants, including the window manufacturer, window installer, caulking subcontractor, and framer. (*Id.* at 434.) The remaining defendants proceeded to a bench trial and were found jointly

²⁸ To the extent this Court alters the holdings from *Oaks*, *Riley*, and/or other decisions relevant to the issue of setoff in the context of multi-party tort litigation upon which Plaintiffs relied when pursuing, resolving, and trying this case, fairness requires that any such alteration should be applied prospectively. *Wells Fargo Bank, N.A. v. Fallon Properties S.C., LLC*, 422 S.C. 211, 217, 810 S.E.2d 856, 859 (2018) (“Nevertheless, fairness dictates that our holding on this issue be applied prospectively given the novelty of the issue, the frequency in which the issue is likely to arise, and the inconsistency in the case law [interpreting the statute].”).

and severally liable for negligence, gross negligence, and negligent misrepresentation, as well as separately liable for various other causes of action, and the court awarded the plaintiffs \$7,934,704.06 in damages for the cost of repair. (*Id.* at 435.) Thereafter, defendants moved for setoff. *Id.* The *Oaks* Trial Court denied the motion and an appeal followed. *Id.*

Both at the Trial Court level and on appeal, the defendants argued the evidence presented at the *Oaks* trial established the damages were for items that were the responsibility of the defendants who settled before trial, and the Trial Court's failure to setoff the verdict by the prior settlement amounts resulted in a double recovery for the plaintiffs. (*Id.* at 436.) The plaintiffs countered, arguing principally that the defendants were not so entitled because the plaintiffs removed from their claimed damages those amounts received from the settling defendants, and thus the defendants had already received a reduction in damages as contemplated by the Act. (*Id.* at 441.) In reaching its decision to affirm the Trial Court's denial of the motion for setoff in *Oaks*, this Court engaged in a comprehensive recitation of relevant setoff precedent, both in relation to common law setoff as well as that encompassed by the Act. (*Id.* at 436.) Turning then to the facts of the case, the Court of Appeals first noted that the Trial Court's order levying damages against the non-settling defendants included repairs for damages "independent of those addressed by the settlement[s] [...]." (*Id.* at 439.) For example, while the settling subcontractors' defective products and work likely contributed to the need to remove certain portions of exterior cladding at the property, testimony at trial evidenced that the entirety of the brick and stucco, as well as compromised wood sheathing and framing, had to be repaired anyway to remedy water-related deterioration and/or building code violations. *Id.* This discussion highlights the unique task of distinguishing injuries in the context of a construction defect case involving water intrusion and

the damages resulting therefrom; more importantly, however, this Court's opinion in *Oaks* removes the notion that such a task is impossible and therefore automatically requires a setoff.

Subsequently, the *Oaks* Court zeroed-in on the self-imposed, pre-trial reduction in damages claimed by the plaintiffs to reflect those amounts already paid out by the settling subcontractors; for example, the *Oaks* plaintiffs "removed from their claim the repairs necessitated by the damage caused by the window installation." (*Id.* at 441.) Put differently, the plaintiffs recognized that the work of the window manufacturer, window installer, caulking subcontractor and framer contributed to the water intrusion at the property; accordingly, the plaintiffs reduced their cost of repair estimate at trial by \$4,260,497.93, a sum which exceeded the amount paid by the aforementioned subcontractors in pre-trial settlements. *Id.* By virtue of this reduction, the Court of Appeals held that defendants "already received the benefit of the settlements," rejected the notion that failing to further reduce the verdict would constitute a double recovery for the plaintiffs and affirmed the Trial Court's denial of the motion for setoff. (*Id.* at 442.) In essence, the Court of Appeals refused to grant the defendants a second "bite" at setoff: a reduction in damages, however achieved, satisfies the principles underlying the Act as well as those underlying the common law.

Here, the Peas Island Association reduced their repair estimates at trial and conceded setoffs by more cumulatively than the amount the Association received in pre-trial settlements. The Association's December 2017 Damage estimate was \$15,258,000. (R. pp. 2619-2629, P. Ex. 677). There were \$4,137,500 in pre-trial settlements that resolved various issues and/or reduced

Plaintiffs damages.²⁹ Handegan removed **\$3,827,000** in resolved items from his trial estimate,³⁰ initially reducing the original damages to **\$11,431,000**. He thereafter added back \$789,394 in additional fire suppression damages and an additional contingency “due to recent findings” in the amount of \$1,220,800 for total add backs of \$2,011,000 which, with minor adjustments, results in a revised trial estimate of \$13,428,826. (R. p. 951, lines 4-17, Tr. Trans.).³¹

Plaintiffs’ reduced repair estimate was used extensively by Plaintiffs at trial and it was clear that the reduction was due to issues not on trial. (R. p. 950, line 8-p. 951, line 17, Tr. Trans.). CBC and TCR had Handegan confirm many of the 2017 items that had been crossed out (removed) in his 2019 revised estimate. (*See, e.g.*, R. p. 970, lines 1-25, Tr. Trans. (windows/window trim); R. p. 968, lines 2-11, Tr. Trans. (finished flooring); R. p. 968, lines 15-17, Tr. Trans. (concrete); R. p. 969, lines 4-6, Tr. Trans. (subfloor); R. p. 982, lines 13-19, Tr. Trans. (clubhouse)).

During closing, Plaintiffs’ counsel removed an additional \$1,026,000 of prior damages, accounting for window-related and clubhouse damages, and asked the jury for \$12,400,000 in actual repair damages. (R. p. 1652, line 22-p. 1653, line 11, W-2 Tr. Trans.). Between the pre-

²⁹ There were \$4,725,000 in pre-trial settlements total including the first CBC settlement; Plaintiffs conceded issue releases as to \$1,407,500 of these funds and setoffs as to \$587,500 of these funds, for a net of \$2,730,000 in remaining pre-trial settlements at issue, which were more than offset with the \$3,827,000 reduction in the revised estimates (before additional fire suppression damages).

³⁰ Handegan removed \$98,672 for labor, \$40,210 for material, and \$2,821,880 for subcontracts. (R. p. 3003, P. Ex. 1049). Per the original estimate, the labor needs to be grossed up by 37% for payroll taxes to \$135,181; and the material needs to be grossed up by 8.5% for sales taxes to \$43,628. *Id.* When these adjusted numbers are added to the subcontractor expense, the removed line items subtotal \$3,000,689 in direct costs removed. The indirect cost reduction associated with this adjustment per the estimate is 9% for engineering fees and 17% for overhead and profit, resulting in a total reduction of approximately \$3,826,779. It is necessary to do the implicit math (which TCR ignored) to understand the full reduction because in P. Ex. 1049, Handegan netted the eliminated costs and the new costs *before* making his indirect cost adjustment. *Id.* The foregoing math components are in P. Ex. 677 (R. pp. 2619-2629) and P. Ex. 1049 (R. pp. 2993-3003).

³¹ The “recent findings” which gave rise to the fire stopping additions were gleaned from CBC’s expert, Al Schweickhardt’s testimony. (R. p. 985, line 2-p. 987, line 1, Tr. Trans.).

testimony reduction of \$3,827,000 and the \$1,026,000 reduction in closing, Plaintiffs removed \$4,853,000 from their original damages – in excess of the \$4,137,500 pre-trial settlements for which no setoff was offered. Like it did in *Oaks*, this Court should find that the Plaintiffs’ self-imposed reduction in damages, coupled with the Trial Court’s reasoned further reduction of the verdict, satisfies the principles underlying setoff at law and in equity.

G. TCR Tried Allocation to the Jury and the Jury Complied

The parties at trial, including TCR, effectively tried the issue of damage allocation/setoff to the jury, thereby ensuring Plaintiffs did not receive a double recovery.

In *McCurry v. Keith*, 325 S.C. 441, 481 S.E.2d 166 (Ct. App. 1997), this Court confronted a scenario in which a circuit court awarded a setoff based upon how the case was ultimately presented at trial. The case, brought by the plaintiff for recovery of video poker gambling losses incurred at defendants’ poker establishment, concluded with the Trial Court finding plaintiff sustained gambling losses of \$8,560, but also earned gambling winnings of \$5,000. (*Id.* at 443, 481 S.E.2d at 167.) Therefore, the circuit court awarded plaintiff \$3,560. *Id.* Plaintiff made a Rule 59(e) motion requesting the circuit court reconsider its order, arguing the circuit court erred by providing the defendants a setoff of \$5,000 when the defendants failed to formally request setoff. *Id.* The circuit court denied the motion holding plaintiff “waived her right to contest that any type of setoff should be allowed”, because “she brought up her winnings and testified about her winnings without any objection.” *Id.* This Court agreed:

[W]e believe McCurry waived her right to object to the trial judge’s consideration of her winnings. The Keiths’ attorney mentioned McCurry’s winnings in her opening statement and questioned McCurry about her winnings without objection. This constituted a waiver of the right to contest McCurry’s winnings on appeal. *See State v. Somerset*, 276 S.C. 220, 221, 277 S.E.2d 593, 594 (1981) (noting that party objecting to course of argument must object). Moreover, McCurry’s counsel questioned McCurry about her winnings on direct examination. If gross losses had been the only issue, winnings would not have been

relevant. Finally, even had we accepted Appellant's argument that the \$5,000 setoff should have been pled, we would have held the issue tried by implied consent pursuant to Rule 15(b), SCRCP.

(*Id.* at 446, 481 S.E.2d at 168-69) (emphasis added); *see also Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 348 (1971) (denying setoff because a prior settlement “was understood by the parties” to cover different damages than the damages sought at trial.); *Ellis v. Arkansas Louisiana Gas Co.*, 609 F.2d 436, 439-40 (10th Cir. 1979), *cert. denied*, 445 U.S. 964 (1980) (noting implied consent is found where the parties recognized that the issue entered the case at trial and acquiesced in the introduction of evidence on that issue without objection).³²

Here, like *McCurry*, the damage allocation was tried by TCR to the jury. The jury was told about the multiple defects and damages suffered by Plaintiffs at the Project: the original \$15,000,000+ repair estimate was introduced into evidence by Defendant CBC and was not objected to by TCR. (R. p. 2619-2629, P. Ex. 677; R. p. 959, lines 1-25, Tr. Trans.). Defendant CBC dissected the original, \$15,000,000+ estimate during closing and pointed out, line by line, items which Plaintiffs were paid for in prior settlements. (R. p. 2619-2629, P. Ex. 677; R. p. 1662, lines 6-23, R. p. 1665, line 18-p. 1678, line 6, W-2 Tr. Trans.) In its Order denying TCR's Motion to Reconsider, the Trial Court recognized that damage allocation was essentially tried to the jury:

The court notes also and has considered that counsel for the general contractor, Complete Building Corp. (“CBC”) argued extensively to the jury that the jury should exclude from its award damages for which the plaintiffs had been compensated prior to submission of the case to the jury. On its face, the award of approximately half the plaintiffs' claimed damages indicates that the jury may have done that here.

³² To avoid repetition, Plaintiffs refer the Court back to “Statement of Pertinent Facts”, *supra*, Section D, as well as to other sections in this brief, for more detailed factual references evidencing that damage reduction was tried to the jury.

(R. p. 172, September 25, 2019, Order Denying TCR MTR at 5). CBC then used the original estimate extensively during closing argument – arguing to the jury that many of the parties responsible for many of the repair costs were no longer in the case and that certain portions of Plaintiffs’ damages should be ignored. Hence, there can be no doubt that the issue of setoff was argued to the jury, without objection by TCR. (See “Statement of Pertinent Facts”, *supra*, Section D).

In addition to what the jury heard from Defendant CBC, TCR’s counsel expressly asked the jury to allocate TCR’s fault and liability based upon the evidence adduced at trial. Specifically, TCR’s counsel pointed the finger repeatedly at the architect during closing arguments, reminding the jury of his clients’ testimony about “all those meetings” with the architects and other professionals during construction. (R. p. 1682, lines 5-13, W-2 Tr. Trans.). In closing, TCR’s counsel used the word “architect” six (6) times; “engineer[]” three (3) times; and mentioned at least three (3) other parties, who were named parties but were absent from trial, by name and/or role. (R. p. 1682, lines 8, 12, R. p. 1687, lines 9-10, R. p. 1688, line 2, R. p. 1690, line 15, W-2 Tr. Trans. (“architect”); R p. 1687, line 7, 1690, lines 16-17, W-2 Tr. Trans. (“engineer[]”); R. p. 1687, lines 6-11, 15, R. p. 1690, line 17, W-2 Tr. Trans. (“Billy Mentor from CertainTeed; Alan Fields from Curry Engineering; Jim McGuire from—the architect; Tommy Smith, an architect [...]”). Each time, TCR’s counsel assigned blame and responsibility to those empty chairs and asked the jury to “be reasonable when you look at the numbers” and that it is “not right” to transfer all the risk to TCR. (R. p. 1690, lines 6-20, W-2 Tr. Trans.).

By the time TCR rested its case, the evidence before the jury included: (1) repair estimates pricing all issues affecting the Project from both the Association’s and TCR’s perspectives; (2) the Association’s revised estimate, reduced to account for resolved issues and augmented to account

for damages attributable to the fire protection defendant present at trial, and further reduced during the Association's closing argument to account for untried issues; and (3) the Association's initial, \$15,000,000 estimate, struck through by Defendant CBC to account for issues and damages removed from the case by prior settlements.

After considering the evidence as summarized by the Parties in closing arguments, the jury did exactly what Defense counsel asked it to do – It found TCR liable for its share, which it determined was \$6,500,000. There is simply no basis for *additional* setoff under these circumstances. A verdict simply cannot be reduced **both** because of damage caused by others **and** for amounts paid by others. The same is true in instances where, as here, a defendant asks the jury to limit its liability after introducing evidence of other parties, other problems, and other settlements. In this circumstance, the court should not further set off a verdict that a defendant already argued to the jury should be reduced because other people previously paid settlements to the plaintiff.

H. Additional Setoff is Not Necessary to Provide Justice Between the Parties

As detailed *ad nauseum* in the preceding argument sections, equity does not require additional setoff in this case because there has been no 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.”).

To underscore the point that there has been no double recovery, anticipating a potential need for allocation by trade/Defendant, Plaintiffs’ counsel asked Mr. Handegan to estimate the breakdown of his \$13,400,000 estimate into five (5) different categories, which he did:

Siding and Trim:	35%
Roofing and Decks	25-30%
Firewalls	10%
Sprinklers	15%
Miscellaneous	10%

(R. p. 951, line 18-p. 952, line 25, Tr. Trans.). Interestingly, as TCR was responsible for siding, trim, roofing, and decks, its share of the \$13,400,000 damages presented at trial was 60-65%; 62.5% of \$13,428,000 is \$8,375,000 attributed to TCR's scope of work by Plaintiffs' repair expert. Given that the final judgment entered by the Trial Court against TCR totaled \$4,830,000 in actual damages, there has been no double recovery. To the contrary, any additional setoff against the damages awarded to the Association as a result of TCR's conduct would result in a windfall to TCR, which is the opposite of an equitable result. See, e.g., *Murphy v. United States*, 836 F. Supp. 350, 351 (E.D.Va. 1993) ("A plaintiff who receives a double recovery for a single tort enjoys a windfall; a defendant who escapes, in whole or in part, liability for his wrong enjoys a windfall.").

CONCLUSION

TCR has failed to meet its burden of proving that the Trial Court abused its discretion in ordering a setoff of \$1,670,000, nor has TCR proved that the net judgment against it amounts to a double recovery by the Plaintiffs. In sum, this Court should find that TCR is not entitled to additional setoff because: the jury's verdict is roughly half of what the Association requested, is not duplicative of any settlement funds received, is substantially less than the repair contractor attributed to TCR's scope of work, and, most certainly, does not amount to any windfall. To the contrary, any additional setoff of the damages the jury awarded the Association as a result of TCR's conduct would result in a windfall to TCR. See, e.g., *Murphy v. United States*, 836 F. Supp. 350, 351 (E.D. Va. 1993) ("A plaintiff who receives a double recovery for a single tort enjoys a windfall; a defendant who escapes, in whole or in part, liability for his wrong enjoys a windfall.").

Further, to hold otherwise would require future plaintiffs to prove a full set of damages (settled and unsettled) at each trial. The motivation to settle would be chilled, and construction defect trials with dozens of defendants would proliferate in and clog our Trial Courts.

Simply put, additional setoff is not required to provide justice between these parties because justice has already been provided through the exercise of the Trial Court's discretion upon the record before her.

Respectfully submitted,

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February 19, 2021
Mt. Pleasant, SC

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Feb 22 2021

SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Jennifer B. McCoy, Circuit Court Judge

Civil Action No. 2015-CP-10-00955

Appellate Case No. 2019-001790

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; Eloy 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 Does 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.

APPELLANT'S FINAL RESPONSE BRIEF

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<u>Rutland v. SC Dep’t of Transp.</u> , 390 S.C. 78, 700 S.E.2d 451 (Ct. App. 2010), reh’g den. (Oct. 29, 2010), cert. granted (Oct. 19, 2011)	7, 12
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<u>Stoneledge at Lake Keowee Owners’ Association, Inc. v. IMK Development Co., LLC</u> , 425 S.C. 276, 301, 821 S.E.2d 509, 522 (Ct. App. 2018), reh’g den. (Dec. 13, 2018), cert. granted (Aug. 6, 2019)	11
<u>The Oaks at Rivers Edge Property Owners Association, Inc. v. Daniel Island Riverside Developers, LLC</u> , 420 S.C. 424, 803 S.E.2d 475 (Ct. App. 2017), reh’g den. (Oct. 19, 2017)	7, 23
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STATUTES & RULES

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STATEMENT OF UNCONTESTED RELEVANT FACTS

There is no dispute that Complete Building Corporation (“Complete”) and Tri-County Roofing, Inc. (“TCR”) were assessed the same judgment at trial: a joint and several general verdict of \$6.5M plus an assessment of \$500k punitive damages against each. [R.116-122 Judgment]. Eloy Alonzo Vasquez (“Vasquez”) and Miracle Siding, LLC (“Miracle”) were assessed their relative percentages of fault as determined by the jury pursuant to S.C. Code § 15-38-15. [*Id.*]. The jury rendered its verdict on May 16, 2019. [*Id.*]. The format of the jury verdict form was contested. The trial judge used the verdict form proposed by Respondent. The formats proposed by the defendants at trial included various ways to allocate responsibility between the defendants.¹ The trial judge explicitly noted that the objections and challenges to the verdict form were preserved:

MR. REESER:² Your honor, I would just restate our objection earlier as to number 3. Again, our claim is that this is not an indivisible injury. Because of that, we’d request that the jury be asked to make a damage award, actual damages as to each defendant.

THE COURT: All right, objection noted for in the record.

MR. REESER: Thank you, Your Honor.

THE COURT: I think we have you all numerous times on this joint tortfeasor issue, so you are well protected for purposes of the record on that issue. Everybody is.

MR. COLE: That’s just – I’m jointly joining in the ---

THE COURT: Yes.

¹ Like many exchanges during the course of the trial, the proposed verdict forms were shared by the parties with each other as well as with the court via email. [R. 1877-1911 E-mail correspondence with court regarding verdict forms on May 14 and 15, 2019]; and see R. 684-685 Wk-1 Trans p.115, ln.23—p.116, ln.21 (trial judge requests proposed verdict forms); R. 1596 Wk-2 Trans p.669, ll.14-21 (trial judge acknowledges receipt of some proposed verdict forms); R. 1607-1614 Wk-2 Trans p.680, ln.16—p.687, ln.14 (other proposed verdict forms); R. 1620-1622 Wk-2 Trans p.693, ln.5—p.695, ln.11 (additional arguments regarding proposed verdict form); and R. 1624-1626 Wk-2 Trans p.697, ln.3—p.699, ln.12 (trial judge picks the verdict form to use).

² Attorney for Vasquez and Miracle.

MR. COLE: --- joint tortfeasor thing. Your Honor.
THE COURT: Absolutely

Wk-2 Trans p.698, ln.18—p.699, ln.7. [R.1625-1626.]

TCR and Respondent agree that the jury was instructed to ignore any testimony or damages related to HVAC, window product, fireplaces,³ grading and paving, interior flooring, interior trim, and concrete. These items are called “issue releases” in TCR’s Initial Brief. Respondent referred to them as “resolved claims” at trial. [R.678 Wk-1 Trans p.109, ln.17]. This is consistent with Respondent’s pre-trial brief to the trial judge stating that “[d]efects in the following narrowly defined areas have been eliminated from the case through settlement: HVAC and electrical (cost of framing work to facilitate access to the HVAC equipment remains in the case), driveways, fireplaces, and window manufacturing defects (but not cost of removal and reinstallation of the windows—which remains in the case.)” [R.1855; R.1854-1876 Plaintiff’s Pre-Trial Brief]. This same list of resolved claims, a/k/a issue releases, was relayed to the trial judge. [R.681-682 Wk-1 Trans p.112, ln.9—p.113, ln.12].

Mr. Handegan crossed out these issue released claims in his revised repair cost estimate dated May 7, 2019 [R.2993-3003 Pl Ex. 1049] and testified as such in his direct examination at trial. [R.950-955 Wk-1 Trans p.591, ln.14—p.596, ln.5]. These issue released items are not included in TCR’s setoff calculations. Notably, none of the settlements that TCR argues are proper for setoff are crossed out on Mr. Handegan’s repair estimate. [R.2993-3003 Pl Ex. 1049]. The first time that Respondent argued that the non-issue released settlements should be excluded from setoff, in whole or in part, was *after* the jury verdict rendered on May 16, 2019. [R.1814-1845 Post-Trial Hearing Trans pp.29-60].

³ TCR acknowledged in its Initial Brief that the settlement with Gale Contractor Services regarding the fireplaces should be included in the issue released items.

TCR and Respondent agree that 100% of the settlements paid by or on behalf of Creekside, Inc. (painter), CertainTeed Corporation (roof and siding manufacturer), Cornerstone Construction (siding), Miracle (siding), Vasquez (roofing and waterproofing), and Stanley's Vinyl Fence Designs (exterior railings) reduce the Respondent's verdict against TCR as setoffs. Respondents only acknowledge a fraction of the settlements paid by Complete (6.4%)⁴, Atlantic Building Construction Services, Inc. (10%; framing), H and A Framing Construction, LLC (10%; framing), Novus Architects, Inc. (10%; architect), and Cohen's Drywall (50%; drywall) are subject to setoff. Therefore, the dispute is not whether setoff should be applied but it is over the total amount of setoff to be applied. TCR has consistently argued that 100% of the non-issue released settlements should be used to setoff the jury verdict. [R.1814-1845 Post-Trial Motion Trans pp.29-60; R.525-545 TCR Post-Trial Motion; R.620-631 TCR Motion to Reconsider; R.649-660 TCR Return; TCR's Appellate Brief].

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 trial was presented to the jury. [TCR's Final Brief pp.6-21]. 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.

On May 28, 2019, TCR was required to file a motion to compel production of the settlement agreements between Respondent and the various settled parties. [R.546-574 Mot. to Compel Settlements]. On Thursday, June 6, 2019, the evening before the post-trial motions hearing with the trial judge, Respondent produced the covenant not to execute with Complete,⁵ sixteen

⁴ Respondent does not provide a specific percentage, so this percentage is calculated by factoring the \$137,500 acknowledged by Respondent against the total settlement paid by CBC of \$2,137,500.

⁵ See R.1918-1924 Complete Covenant 7/10/2018.

settlement agreements,⁶ and two settlement e-mail chains⁷ representing all settlements reached at that time.⁸ The executed settlement agreements include language that the settlement is for the complete dismissal of all claims, known or unknown, that could have been brought in the litigation. The settlement agreements entered with Complete, Creekside, ARS, Atlantic, Gale, Tallent, CertainTeed, Miracle, Vasquez, Stanley's, and Cohen's include a specific reference to damages for, *inter alia*, loss of use.⁹ Only one settlement agreement includes a proposed allocation of the settlement proceeds received by Respondents—the settlement with Complete dated June 6, 2019. [R.1925-1939 Complete Settlement 6/6/2019]. The Complete settlement agreement was entered twenty-one (21) days after the jury handed down its verdict. It also includes an allocation, for the first time, of the settlement funds received from the covenant benefitting Complete. [*Id.*].

ARGUMENTS IN REPLY

The trial court undervalued the amount of setoffs applicable in this case. The damages sought and awarded were to reimburse Respondent for the cost to repair the Palmetto Pointe project

⁶ See R. 1925-1939 Complete Settlement 6/6/2019; R.1940-1954 Creekside Settlement 6/6/2019; R.1955-1979 ARS Settlement 4/23/2019; R.1980-1994 Atlantic Settlement 4/5/2019; R.1995-2009 Gale Settlement 7/24/2018; R.2010-2018 Novus Settlement 2/22/2018; R.2019-2033 Tallent Settlement 2/22/2019; R.2034-2048 CertainTeed Settlement 7/12/2018; R.2049-2056 Kelly Flooring Settlement 1/25/2019; R.2057-2064 Cornerstone Settlement 4/25/2018; R.2065-2076 Miracle Siding Settlement 5/28/2019; R.2077-2088 Vasquez Settlement 5/28/2019; R.2089-2091 Alderman Settlement 6/19/2018; R.2092-2106 Stanley's Settlement 5/8/2019; R.2107-2121 Cohen's Settlement 7/12/2018; R.2131-2142 H&A Settlement 1/31/2018.

⁷ See R.2122-2130 Moseley Settlement May-June, 2019; R.2143-2145 Andersen Settlement April 30, 2019.

⁸ TCR understands that Respondent reached a settlement with JMC Construction sometime around July of 2020. JMC Construction started at trial but was dismissed after the conclusion of Respondent's case in chief. Respondent appealed. The Order for *Remittitur* from the Court of Appeals for Appellate Case No. 2019-001520 that dismisses Respondent's appeal against JMC Construction was signed by the Clerk for the Court of Appeals on July 28, 2020, and the same was filed with the Charleston County Clerk of Court on August 26, 2020.

⁹ See R.1925-1939 Complete Settlement 6/6/2019; R.1940-1954 Creekside Settlement 6/6/2019; R.1955-1979 ARS Settlement 4/23/2019; R.1980-1994 Atlantic Settlement 4/5/2019; R.1995-2009 Gale Settlement 7/24/2018; R.2019-2033 Tallent Settlement 2/22/2019; R.2034-2048 CertainTeed Settlement 7/12/2018; R.2065-2076 Miracle Siding Settlement 5/28/2019; R.2077-2088 Vasquez Settlement 5/28/2019; R.2092-2106 Stanley's Settlement 5/8/2019; R.2107-2121 Cohen's Settlement 7/12/2018.

and for lost use during these repairs. These damages all arose from the same factual scenario and are properly construed as the same damages. See Smith v. Widener, 397 S.C. 468, 472, 724 S.E.2d 188, 190 (Ct. App. 2012) (finding a claim against an employee benefits provider was for the same injury for the damages sought against beneficiaries charged with improperly removing funds from the employee benefits account, thus setoff was applied); Vortex Sports & Ent., Inc. v. Ware, 378 S.C. 197, 209-210, 662 S.E.2d 444, 451 (Ct. App. 2008), reh’g den. (June 26, 2008) (noting that setoff was proper for causes of action for aiding and abetting a breach of fiduciary duty and tortious interference with contract because the damages “arose out of the same factual scenario.”); Ellis v. Oliver, 335 S.C. 106, 113, 515 S.E.2d 268, 272 (Ct. App. 1999) (pointing out the claims against Richland Memorial and Dr. Oliver “arise out of the same factual scenario” and that the plaintiff “confuse[d] the concept of damages within the meaning of the word injury as used in [S.C. Code § 15-38-50].”); accord Centex-Rooney Construction Co., Inc. v. Martin County, 706 So.2d 20, 29 (Dist. Ct. App. Fla. 1997), reh’g den. (March 11, 1998) (allowing setoff of prior settlements paid by an architect and a concrete and masonry construction company to a judgment against the construction manager because “the damages were not separate and distinct” and the setoff prevents a double recovery for the plaintiff).

1. TCR’s arguments for a complete setoff determination is clearly preserved

Respondent invites the appellate court to find that TCR should have filed successive Rule 59(e), SCRCP motions. Respondent cites an unpublished opinion¹⁰ and Elam v. S.C. Dep’t of Transp., 361 S.C. 9, 602 S.E.2d 772 (2004) as support. However, the appellate courts—and the court in Elam in particular—warn litigants about the danger of filing a second Rule 59(e) motion.

¹⁰ Unpublished opinions have no precedential value. Rule 220(a), SCACR; State v. Ross, 423 S.C. 504, 510, 815 S.E.2d 754, 757 (2018) (Noting that “memorandum opinions... shall be of no precedential value.”).

In this case, TCR appealed from the final ruling of the court. The jury rendered its verdict on May 16, 2019; however, before the final judgment was entered on July 23, 2019 and retroactively applied to the May 16, 2019 jury verdict date,¹¹ the trial court was required to determine the amount of the setoff. See Widener, 397 S.C. at 471-472, 724 S.E.2d at 190 (“Therefore, before entering judgment on a jury verdict, the court must reduce the amount of the verdict to account for any funds previously paid by a settling defendant....”). TCR appealed from the final ruling of the trial court. The trial judge, in her ruling, denied the full setoff that TCR has sought consistently in this case. Had TCR filed successive Rule 59(e) motions, then it could have inadvertently forfeited its right to any appeal. As the Elam court explains, the rules are not designed to create a logistical trap for a litigant/appellant to accidentally fall into. See Elam at 25, 602 S.E.2ds at 780-781 (“We strive to avoid an interpretation of procedural rules which routinely would place a party between the proverbial rock and a hard place.”)

2. The entire settlement between Respondent and Complete should be used as setoff

In its Brief, TCR discussed at length how it was not the only defendant at trial and how Complete was found jointly and severally responsible for the same general verdict. Stated more succinctly: TCR and Complete were joint tortfeasors. They were assessed the same joint and several verdict of \$6.5M actual damages by the jury. As further proof that TCR and Complete were joint tortfeasors is Respondent’s confirmation it sought punitive damages against both TCR and Complete. See Harris v. Burnside, 261 S.C. 190, 196, 199 S.E.2d 65, 68 (1973) (“It is of course elementary in this jurisdiction that punitive damages are allowable in tort actions....”). “When the settlement is for the same injury, the nonsettling defendant’s right to a setoff arises by operation of law. Under this circumstance, section 15-38-50 grants the court no discretion...in applying a

¹¹ See the filed Jury Verdict Form 4 Order [R.116-122]

set off.” The Oaks at Rivers Edge Property Owners Association, Inc. v. Daniel Island Riverside Developers, LLC, 420 S.C. 424, 437-438, 803 S.E.2d 475, 482 (Ct. App. 2017), reh’g den. (Oct. 19, 2017) (quoting Widener, 397 S.C. at 472, 724 S.E.2d at 190 (internal quotations omitted)); see also, Lloyd’s, Inc. v. Good, 306 S.C. 450, 412 S.E.2d 441 (Ct. App. 1991) (the amount of 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.”).

TCR reiterates that Respondent’s allocation of the settlement monies was untimely. The only settlement agreement with any proposed allocation was the settlement with Complete that was signed on June 6, 2019. This was entered *after* the jury returned its verdict on May 16, 2019. A common fact shared by the published setoff cases in South Carolina is the proposed allocation was disclosed *before* the *jury* rendered its verdict. See Riley v. Ford Motor Co., 414 S.C. 185, 777 S.E.2d 824 (2015) (Settlement allocation was approved by the court prior to the commencement of trial.); Rutland v. SCDOT, 400 S.C. 209, 734 S.E.2d 142 (2012) (Affirming the Court of Appeal’s decision in Rutland v. SCDOT, 390 S.C. 78, 700 S.E.2d 451 (Ct. App. 2010), reh’g den. (Oct. 29, 2010), cert. granted (Oct. 19, 2011), that a settlement allocation that was approved by the court prior to trial was properly re-allocated for setoff after trial because there was no evidence supporting damages for a survival claim.); Widener, 397 S.C. 468, 724 S.E.2d 188 (Settlement reached at start of trial and the proposed allocation disclosed before the conclusion of trial; moreover, the appellate court found the claims for actual and punitive damages arose from the same injury and were subject to setoff.); Welch v. Epstein, 342 S.C. 279, 536 S.E.2d 408 (Ct. App. 2000), reh’g den. (Nov. 4, 2000) (Settlements were allocated between survival and wrongful death

claims prior to trial against Dr. Epstein, and because Dr. Epstein was not a party to the settlement agreement and because there was no evidence at trial in support of damages for a survival claim, the court properly re-allocated the setoff.); Ward v. Epting, 290 S.C. 547, 351 S.E.2d 867 (Ct. App. 1986) (Settlements were allocated between survival and wrongful death claims prior to trial against Dr. Epting.).

3. Punitive damages can be the subject of setoff.

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

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

by [the first physician].” See *Id.* at 472. *McGee* prevents a plaintiff from getting a double recovery of their actual damages.

4. Respondent’s acknowledged partial setoff percentages for the settlements by Complete, Atlantic, H&A, Novus, and Cohens are arbitrary and not supported by the record.

Respondent disputes the amount of setoff that should be applied from the settlements with Complete, Atlantic, Novus, Cohens, and H&A. However, Respondent offers as proof that its concession of 6.4% of the Complete settlement funds, 50% of the Cohen’s settlement funds, and 10% each of the settlement funds from Atlantic, Novus, and H&A are reasonable merely because Respondent believes it should be so. The architect, framing, and drywall issues were raised to the jury when explaining the construction process and when the defendants argued the empty chair defense. (See the discussion in Section 7 below regarding the empty chair defense.) Nonetheless, Respondent cites no authority or testimony giving the trial court guidance for a percentage of setoff allocation for these components. Since these components were not specifically removed from the case as issue releases, they are part and parcel included in the damages presented to the jury against *all* of the defendants at trial, especially Complete, the general contractor who was found by the jury to be jointly and severally liable with TCR for the same actual damages award. (See the discussion in Section 5 below regarding the general jury verdict.)

Appearing as an afterthought in Respondent’s brief at section H, Respondent generally references the estimated percentage of the losses that may be attributed in Handegan’s estimate to the siding, roof, firewalls, sprinklers, and miscellaneous. Using this testimony, why did Respondent not advocate that 65% of the settlements from Complete, Atlantic, Novus, Cohen’s, and H&A should be subject to setoff? Such a percentage is equally as plausible as Respondent’s purported allocations it currently advocates. The answer, of course, is any percentage closer to the proper allocation of 100% of these non-issue released items would reduce Respondent’s potential

recovery. Respondent could have chosen any number from 1% to 99% where it concedes setoff, but each would be equally as arbitrary.

5. TCR preserved its objections to the general verdict form that was adopted by the court. Moreover, Respondent cannot invade the province of the jury to support its arguments.

Respondent argues in its brief at Section E that TCR waived its reference to the jury verdict form. Every party still in the trial when the jury started its deliberations had submitted a proposed jury verdict form to the trial judge via email. [See Statement of Uncontested Relevant Facts, supra]. TCR's proposed verdict form included a section asking the jury to allocate a percentage of responsibility between all of the parties in the courtroom, which at the time included Island Pointe, LL (developer), Complete, TCR, WC Services, Miracle Siding, Vasquez, and because the caption included possible John Doe defendants, Potential Joint Tortfeasors 1, 2, and 3. Therefore, TCR explicitly asked for an allocation of all liability. [R.1885-1894 TCR proposed verdict] The other defendants at trial made similar requests in their proposed verdict forms.[R.1881-1884 Complete's submittal; R.1895-1904 Miracle's and Vasquez's submittal; R.1905-1911 W.C Services' submittal.] The trial judge adopted the format submitted by the Respondent. [R.1624-1626 Wk.2 pp.697—699]. This jury verdict form asked the jury to render a general verdict—that is, the jury could either render a defense verdict or it could fill in a single number for an award of actual damages with no allocation. [R.116-122 Verdict; R.1877-1880 Respondent's proposed verdict form; R.1911.1-1911.15 Respondent's amended proposed verdict form].

Respondent cannot now try to interpret or speculate what the jury included in its general verdict of \$6.5M. The courts are wary of invading the province of the jury and “will not speculate as to how the jury allocated damages.” Jenkins v. Few, 391 S.C. 209, 221, 705 S.E.2d 457, 463 (Ct. App. 2010), reh'g den. (Feb. 28, 2011), cert. granted (Feb. 13, 2012) (“Because the verdict

was a general verdict, it is impossible 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.”); 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’ Association, Inc. v. IMK Development Co., LLC, 425 S.C. 276, 302, 821 S.E.2d 509, 522 (Ct. App. 2018), reh’g den. (Dec. 13, 2018), cert. granted (Aug. 6, 2019) (citing Joiner v. Bevier, 155 S.C. 340, 355, 152 S.E. 652, 657 (1930)).

The record does not include any evidence of what was included in the jury’s verdict. However, there is ample evidence that the issue release items were explicitly *excluded* from the jury’s deliberations. It is improper for Respondent to attempt to separate everything that was included in the general verdict. See D.R. Horton, Inc. v. Builders FirstSource-Southeast Group, LLC, 442 S.C. 144, 153, 810 S.E.2d 41, 46 (Ct. App. 2018) (citing Jenkins, 391 S.C. at 221, 705 S.E.2d at 463) (“The record is devoid of any evidence presented to the arbitrator, and any attempt to devine the reasoning of the arbitrator’s [general verdict] award would be an exercise in speculation.”)

TCR submits that after the HVAC, fireplace, paving, interior flooring, interior trim and railing, concrete, and window products issues were removed from the jury’s deliberations—i.e., the issue releases—what was left over was everything else. Respondent claims it should be able to limit the setoff from the settlements from Complete, Atlantic (framing), H&A (framing), Cohens

(drywall), and Novus (architect), but Respondent does not point to any facts in the record in support its calculations. For example, Respondent claims that 50% of the Cohens settlement should be applied to insulation repairs and 50% to drywall repairs. No facts support this split. The Cohens settlement agreement advocates no such split. This is merely an arbitrary number assigned by Respondent to this claim. Allowing parties to indulge in “manipulative attribution of settlement amounts... would compromise South Carolina’s policy of permitting setoffs to ensure against multiple recovery for the same injury.” Atlas, 99 F.3d at 596.

6. Setoff is not a jury question.

Respondent suggests in its brief at parts F and G that TCR is asking for multiple round of setoffs. On the contrary, TRC asks the court to apply the correct setoff amount. Setoffs of prior settlements against a jury verdict is an issue for the trial judge. The jury does not determine a setoff amount. In fact, there cannot be a setoff until the jury renders its verdict. See Rutland, 390 S.C. at 83, 700 S.E.2d 454. It is 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). Respondent’s reduction in its claimed damages prior to trial is light of the issue releases is a recognition that the jury will not be asked to deliberate over these damages removed from the case. Respondent’s reduced demand in its closing arguments at trial is not a setoff, it is an acknowledgement that Respondents failed to prove part of its damages to the jury.

Moreover, South Carolina recognizes that asserting the empty chair defense at trial does not waive the right to seek setoff of prior settlements.¹² The South Carolina Supreme Court explains in Smith v. Tiffany, 419 S.C. 548, 799 S.E.2d 479 (2017) that the legislative purpose of

¹² Respondent discusses the empty chair defense in its brief at part C.

the South Carolina Contribution Among Joint Tortfeasors Act was to strike a balance of fairness between plaintiffs and defendants.

Specifically, the Act sets forth in section 15-38-15(B) and (C) a detailed method for apportioning fault “among defendants.” Further, and perhaps in recognition of the perceived inequity complained of by Appellants, the General Assembly took steps to protect nonsettling defendants by codifying a nonsettling defendant’s right to argue the so-called empty chair defense in subsection (D) 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.

Tiffany at 557, 799 S.E.2d at 484 (citing Widener, 397 S.C. at 472, 724 S.E.2d at 190 and referencing that “a nonsettling defendant’s right to setoff arises by operation of law, and it is not within the discretion of the trial court to apply setoff”). The court further clarified the trial procedure in Machin v. Carus Corp., 419 S.C. 527, 799 S.E.2d 468 (2017). In Machin, the Supreme Court of South Carolina found that a defendant chemical manufacturer at trial had a right to inform the jury about the culpability of the Town of Lexington, even though the Town could not be held liable due to the preclusive effect of the Worker’s Compensation Act. The court explained:

A defendant may introduce relevant evidence regarding the claim(s) asserted in the Complaint, including any viable defense included in the Answer. If no defense seeks to assign fault to the plaintiff’s employer, there shall be no reference, discussion, evidence, or legal argument relating in any manner to the matter of workers’ compensation. If, however, a defendant asserts a defense that assigns fault for the plaintiff’s injuries to the plaintiff’s employer, the defendant shall, under the well-established “empty chair” defense, have the right to present such evidence and require the fact-finder to consider whether the employer’s actions were the cause of the plaintiff’s injuries. Of course, the employer cannot be found to be the proximate, or legal, cause of the plaintiff’s injuries because the employer is immune from tort liability under the exclusivity provision of the South Carolina Workers’ Compensation Act. By enacting the exclusivity provision, the legislature has already determined that the employer may not be legally responsible in tort for the plaintiff’s injuries.

This is not to say, however, that the employer cannot be found by the fact-finder to have been responsible for the plaintiff’s injuries. If the rule were otherwise, the defendants would effectively be precluded from presenting a defense. A defense that the product was not defective or unreasonably dangerous when it left the defendants’ control would not be credible unless the defendants were permitted to

introduce evidence as to what actually happened to the product leading up to the incident that injured the plaintiff. Excising the employer from that discussion would be tantamount to drawing a line which would make discussion of the case to be tried difficult, if not impossible.

Machin at 542-543, 799 S.E.2d at 476. Respondent's arguments are incorrect that somehow the empty chair defense causes the defendants to waive their right to setoff or that it should be construed as an already applied credit. The jury is only able to allocate fault among the parties at trial, and the total percentage of fault attributed to the plaintiff and to the defendants at trial must be one hundred percent. See Tiffany at 560, 799 S.E.2d at 485 (citing S.C. Code § 15-38-15(C)(3) and Machin).

7. Respondent's reliance on foreign case law supports TCR's position.

Respondent attempts to use post-verdict allocation of prior settlements in an attempt to inflate a jury verdict that Respondent wished was higher. In its brief at part D, Respondent cites cases from Florida, Arizona, Texas, and New York for the proposition that "settlement dollars are not synonymous with damages and instead include the value of avoiding the risk and exposure of trial and appeal." [Respondent's Brief p.31]. Respondent adds that the "recalcitrant non-settling defendant" should not be rewarded by the prior settlements reached in the case. [Id.]. However, these conclusions from the foreign cases are taken wholly out of context. A close reading of these cases actually supports TCR's argument that Respondent's proposed allocation is incorrect.

As an initial matter, the foreign cases can be distinguished in part because they apply contribution and setoff law different from the law in South Carolina. Florida, Arizona, Texas, and New York ask the jury to allocate a percentage of fault between *all* of the defendants and possible defendants in the case. In those jurisdictions, a defendant can only be held responsible for paying its allocated percentage of fault for a plaintiff's injury regardless whether the parties are still in the courtroom. Therefore, the plaintiff's injury is first reduced by prior settlements and then the non-

settling defendant's percentage of fault is applied. This method ensures that the defendants are only ultimately responsible for their relative percentages of fault. These courts explain that the non-settling defendant takes on the risk that the allocated percentage of fault of the settled defendants will be less than the net settlement funds paid, ultimately leaving the non-settling defendant with a higher percentage of the judgment to pay. Conversely, the plaintiff takes on the risk that the jury may cap the non-settling defendant's relative percentage of fault in an amount lower than will fully compensate the plaintiff, suggesting the settled parties should have paid more but did not because of the settlement they reached with the plaintiff. See, generally, Daversa v. P.T.C. Properties, Inc., 599 N.Y.S.2d 432 (Civ. Ct. NY 1993); Matter of New York City Asbestos Litigation, 188 A.D.2d 214 (N.Y.App., 1st Dept. 1993); Duncan v. Cessna Aircraft Co., 665 S.W.2d 414 (Tex.1984), reh'g den. (March 28, 1984); Wells v. Tallahassee Memorial Regional Medical Center, Inc., 659 So.2d 249 (Fla.1995), reh'g den. (Aug. 24, 1995); and Neil v. Kavena, 859 P.2d 203 (Ct. App. Ariz. 1993).

South Carolina does not follow this relative percentage of fault allocation for all parties. See S.C. Code §15-38-15. South Carolina suspends joint and several liability only for those parties deemed to be less than fifty percent of the total fault by the jury, and these defendants are only responsible for the percentage allocated by the jury. S.C. Code Ann §15-38-15. Indeed, this was why the judgments against Miracle Siding and Vasquez were capped at five percent each of the \$6.5M general jury verdict. Moreover, South Carolina only allows the parties still at trial to be included on the jury verdict sheet and potentially be subject to a percentage allocation of fault. See Tiffany, 419 S.C. at 560, 799 S.E.2d at 485.

The policy arguments and equities raised in the foreign cases support TCR's position in this appeal. In Daversa, the jury determined that the non-settling defendant at trial was 30%

responsible for the total verdict. Id. at 433. The non-settling defendant then sought application of both the percentage of fault as well as apply a statutory cap on awards of future damages. It is in this context that the Daversa court found that the “recalcitrant nonsettling defendant[]” was not able to take advantage of the cap on damages as well as the percentage allocation of fault. Id. at 434. Importantly, the court notes that the non-settling defendant is responsible for no more than its allocated percentage of fault for, assuming, *arguendo*, that the credit is applicable, “any credit provided to a nonsettling defendant has no defensible purpose beyond that of assuring that the nonsettlor will not be accountable for more than its equitable share of the verdict.” Id. at 434-435 (citation omitted).

The second New York case cited by Respondent is Matter of New York City Asbestos Litigation. The question addressed by this court is when setoffs should be applied in the post-verdict adjustment period. This matter involved over 600 asbestos cases against 40 named defendants that were aggregated together, resulting in a large jury verdict. Id. at 217. The court found the “aggregate method” was the best methodology. Id. at 222. Under this method, the jury verdict is first reduced by the total value of all prior settlements reached and then the relative percentage of fault is applied. “The purpose of allowing a nonsettling defendant credit for releases obtained by settling defendants is merely to ensure that a tortfeasor who proceeds to verdict is not held responsible for more than his equitable share of the plaintiff’s damages subject, of course, to the doctrine of joint and several liability.” Id. at 218 (citation omitted).

The Texas case cited by Respondent addresses whether a products liability action based on strict liability should be reduced by comparative negligence by the co-defendants and the plaintiff. See Duncan, 665 S.W.2d at 418. The Texas court provides a lengthy analysis that explains why it was adopting a common law procedure to ensure that a defendant would only be responsible for

its relative percentage of fault as determined by the jury. Id. at 427 (“Judicial adoption of a comparative apportionment system, independent of statutory comparative negligence, is a feasible and desirable means of eliminating confusion and achieving sufficient loss allocation in strict liability cases. Accordingly, we hereby adopt such a system.”) Respondent quotes the language that “settlement dollars are not the same as damages” [Respondent’s Brief p.31] to argue that setoff is improper. However, the Texas court noted that the setoff is applied to the total verdict and then the non-settling defendant’s percentage allocation is assessed. Texas applied the “one recovery rule,” which is similar to the law in South Carolina that a plaintiff is not entitled to double recovery for the same damages.

For the reasons stated, we hold that the one recovery rule does not prevent our adopting a system that reduces the plaintiff’s recovery and the non-settling defendants’ liability by the percentage of causation assigned to any tortfeasor with whom plaintiff has settled. We hereby adopt a percent credit rule, which will leave defendants unaffected by settlements in which they do not participate. Each party’s share of liability will be determined by the jury. Plaintiffs will benefit from good settlements and bear the risk of bad ones, just as they do in single-tortfeasor cases. Allowing plaintiffs to keep the excess from a good settlements [sic] may violate the one recovery rule, but no one is harmed.

Duncan at 432. The Duncan case was further clarified in a case titled Sky View at Las Palmas, LLC v. Mendez, 555 S.W.3d 101 (Tex.2018), reh’g den. (Sept. 28, 2018). The court in Sky View discussed the rationale of the one-satisfaction rule in a lawsuit brought by a lender against a borrower and personal guarantors of the debt. Notably, the court found that the damages sought in the lawsuit were for the same claim against all of the defendants. See Id. at 105 (noting that plaintiff was only seeking one damages question for the sum of money to fairly and reasonably compensate it for damages caused by the actions of the defendants). Texas is similar to South Carolina in that a plaintiff is only entitled to one recovery for one injury. Compare Sky View at 107 (“It is a rule of general acceptance that an injured party is entitled to but one satisfaction for the injuries

sustained by him.... There being but one injury, there can, in justice, be but one satisfaction for that injury” (citations and reference to Duncan omitted)); with Rutland, 400 S.C. at 216, 734 S.E.2d at 145 (“Allowing this credit prevents an injured person from obtaining double recover for the damage he sustained, for it is almost universally held that there can be only one satisfaction for an injury or wrong.”) (internal quotations and citations omitted). “The plaintiff should not receive a windfall by recovering an amount in court that covers the plaintiff’s entire damages, but to which a settling defendant has already partially contributed. The plaintiff would otherwise be recovering an amount greater than the trier of fact has determined would fully compensate for the injury.” Sky View at 107 (citation omitted). In fact, Texas holds that it is the *plaintiff that ultimately bears the burden of proving a reduced setoff amount*.

A nonsettling defendant seeking a settlement credit under the one-satisfaction rule has the burden to prove its right to such a credit. In [Mobil Oil Corp. v. Ellender, 968 S.W.2d 917, 927 (Tex. 1998)], we held that a nonsettling defendant meets this burden by introducing into the record either the settlement agreement or some other evidence of the settlement amount. Once the nonsettling defendant demonstrates a right to a settlement credit, the burden shifts to the plaintiff to show that certain amounts should not be credited because of the settlement agreement’s allocation. The plaintiff can rebut the presumption that the nonsettling defendant is entitled to settlement credits by presenting evidence showing that the settlement proceeds are allocated among defendants, injuries, or damages such that entering judgment on the jury’s award would not provide for the plaintiff’s double recovery. A written settlement agreement that specifically allocates damages to each cause of action will satisfy this burden.

Sky View at 107-108 (underlined emphasis added; internal citations and quotations omitted). The Texas court expounded:

A nonsettling party should not be penalized for events over which it has no control. Thus, this burden-shifting framework, based on the presumption that the nonsettling defendant is entitled to a settlement credit after it introduces evidence of the plaintiff’s settlement, is appropriate because the plaintiff is in the best position to demonstrate why rendering judgment based on the jury’s damages award would not amount to the plaintiff’s double recovery. If the plaintiff fails to satisfy this burden, then the defendant is entitled to a credit equal to the entire

settlement amount. We review the trial court's application of the one-satisfaction rule de novo.

Id. at 108-109 (internal citations and quotations omitted).

In Sky View, the court found that plaintiff never offered evidence regarding allocation of the settlement proceeds and, therefore, he failed to rebut the presumption that the non-settling defendant was entitled to setoff the full amount of the prior settlements. See Id. at 111. Under this framework, TCR notes that Respondent did not provide allocations for any settlements except the post-verdict settlement agreement with Complete. If we were in Texas, Respondent would not meet its burden. Although Respondent eventually provided possible percentages for allocating the settlements with Atlantic, H&A, Novus, and Cohens, there is no evidence in the record to justify the proposed allocations. See Bowers v. Bowers, 304 S.C. 65, 68, 403 S.E.2d 127, 129 (Ct. App. 1991) (Arguments of counsel are not evidence) (citations omitted). Respondent provides no basis for the proposed allocations that were first disclosed on Monday, June 10, 2019, other than they are numbers Respondent will accept.

Respondent also references a Florida wrongful death case, Tallahassee Memorial, for the proposition that settlement dollars and damages are not interchangeable. Again, this language is taken out of context. Florida requires the jury to determine the relative percentages of fault of *all* potential parties, even those not at trial, so that the individual defendants will not be responsible for more than their proportional percentage of fault. See Tallahassee Memorial at 251 (Referencing the seminal case of Fabre v. Marin, 623 So.2d 1182 (Fla.1993) for the explanation that "each defendant should pay for noneconomic damages only in proportion to the percentage of fault by which that defendant contributed to the accident. In order to do this, it is necessary to determine the percentage of fault of all entities who contributed to the accident regardless of whether they are joined as defendants."). Moreover, the Florida court found that the settlement agreement that

attempts to apportion the settlement funds is not dispositive on the amount of setoff. See Fabre at 254 (“[A] private unilateral agreement among several plaintiffs to apportion funds paid by one joint tort-feasor is not binding upon the non-settling joint tort-feasors and the courts in determining the claim of the non-settling joint tort-feasors.”). Indeed, the Florida court warns against allowing a plaintiff to merely proclaim an allocation:

To permit the settling parties to control the allocation between economic and noneconomic damages would invite collusion between plaintiffs and settling defendants. That is, plaintiffs would necessarily seek to maximize the amount of the settlement apportioned to noneconomic damages because none of this amount would be set off against the jury verdict of noneconomic damages. At the same time, it would make no difference to the settling defendants, so they could be expected to be amenable to such apportionment in order to settle the case and even reduce the total amount required to settle.

A fairer solution is to have the allocation based upon the jury verdict. Thus, we hold that the settlement proceeds should be divided between economic and noneconomic damages in the same proportion as the jury’s award.

Tallahassee Memorial at 254 (internal citations omitted). Therefore, the Florida court reduced the noneconomic damages award against the non-settling defendant at the same percentage as the ratio of the economic damages award compared to the total award. Stated another way, the Florida court ensured that the non-settling defendant was not found responsible for more than its relative percentage of fault.

Respondents also cites to a medical malpractice case from Arizona titled Neil v. Kavena. Curiously, although Arizona adopted the language of the Uniform Contribution Among Tortfeasors Act (“UCAATA”), which is similar to the language adopted by South Carolina, three years later in 1987 “the [Arizona] legislature abolished joint and several liability in all situations except when both parties were acting in concert and in actions relating to hazardous wastes or substances or solid-waste disposal sites.” Id. at 205 (citations omitted). The revised statute provides that each defendant is only liable “in direct proportion to that defendant’s percentage of

fault, and a separate judgment shall be entered against the defendant for that amount,” and that “all persons who contributed to the alleged injury... [is included in the percentage allocation] regardless of whether the person was, or could have been, named as a party to the suit.” Id. at 205, footnote 2. In its reference that “[s]ettlement dollars are not synonymous with damages” (Neil at 206, citing Duncan, 665 S.W.2d at 431) the Arizona court is merely expressing that in lieu of applying a setoff to the judgment against the non-settling defendant, the court will cap a defendant’s damages at their determined percentage of fault. If South Carolina followed this theory, then the Respondent should have asked the jury to allocate the applicable percentage of fault to all of the potential tortfeasors in the case. That is, the jury would be asked to determine the relative percentages of fault across all the defendants that were or could have been listed in the case caption. In this situation, TCR would not be entitled to a setoff, but its potential liability would be capped by the jury’s percentage allocation of fault across all parties that worked on the Palmetto Pointe project.

In Bishop v. Pecanic, 975 P.2d 114 (Ariz.1998), the Arizona Court of Appeals was asked to determine the impact of Arizona’s version of UCATA between multiple defendants alleged to have committed intentional torts. The court found that the judgment should be set off by the prior settlements. The court noted that “UCATA was adopted to increase fairness for *both* plaintiffs and tortfeasors, and promote settlement of complex and multi-party litigation.” Id. at 528 (emphasis in original). The court points out the disincentive for a plaintiff to settle: “[T]here is a very real possibility that a plaintiff seeking a joint and several recovery against a number of co-tortfeasors would never settle with all of them, opting to settle with some of the tortfeasors and proceed to trial against those with the greatest assets who could ultimately pay the entire jury award without

benefit of a credit.” Id. at 528. The Bishop court distinguished between cases where the jury awards a percentage allocation of fault and where the plaintiff seeks a joint and several judgment:

We must keep in mind that Neil was not a joint and several liability case, and each party was liable only for its proportionate share of the plaintiff’s damages. Any settlement the plaintiff reached with a particular tortfeasor did not affect her recovery against the other tortfeasors. However, this is a joint and several liability case and, in keeping with the Single Recovery Rule, the plaintiff’s recovery against one tortfeasor does reduce the judgment against the other tortfeasors.

Because the appellants were liable in tort for the same injury as were those who settled, they were entitled to the benefits of [Arizona’s UCATA statutes]. The trial court erred in ruling to the contrary.

Bishop at 530 (internal citations and quotations omitted).

Therefore, applying the foreign case law that Respondent asks the Court to consider is simple. First, the total verdict amount is reduced by the settlements paid and then the non-settling defendant’s percentage of fault is applied. The total general verdict rendered by the jury in the present case was \$6,500,000. Complete paid total settlements of \$2,137,500, which reduces the verdict to \$4,362,500. The verdict should be further reduced by the other settlements by the parties at trial,¹³ from Miracle (\$325,000), Vasquez (\$325,000), and Stanly’s Vinyl Fence (\$295,000), which reduces the verdict to \$3,417,500. Respondent acknowledges set off for the settlements paid by Cornerstone (\$150,000), Creekside (\$150,000) and CertainTeed (\$35,000), which reduces the verdict to \$3,082,500. The disputed setoff amounts that TCR advocates should be allocated in full include the settlements for Atlantic Construction (\$700,000), H&A Framing Construction (\$500,000), Novus Architects (\$650,000), and Cohen’s Drywall (\$125,000). Respondent only acknowledges \$252,500 of these last four settlements are subject to setoff; however, if the entire

¹³ TCR understands that JMC Construction reached a settlement with Respondent while Respondent’s appeal of the directed verdict dismissing JMC at the close of Respondent’s case in chief was pending. The JMC settlement should be included in the setoff calculations as well on remand of this appeal to the trial court.

amounts are applied then the judgment is reduced to \$1,107,500. Then the punitive damages award of \$500,000 against TCR is added, resulting in a revised judgment amount against TCR of \$1,607,500.¹⁴ Finally, per the analysis of the foreign jurisdictions, we apply TCR's relative percentage of fault. Since TCR was considered jointly and severally liable with the general verdict rendered at trial, the multiplier under this discussion is 100%, resulting in a final judgment against TCR of \$1,607,500.

8. The resolution of this appeal in favor of TCR's arguments does not require prospective application.

Respondent argues in footnote 28 in its brief that the subject of this appeal is so novel that, in fairness, it should be applied prospectively pursuant to Wells Fargo Bank, N.A. v. Fallon Properties South Carolina, LLC, 442 S.C. 211, 810 S.E.2d 856 (2018). This assertion is incorrect. South Carolina has applied setoff under the common law for over 100 years. See Riley, 414 S.C. at 195, 777 S.E.2d at 830. The right to setoff was first codified in 1988 as part of the South Carolina Contribution Among Tortfeasors Act. See Id. The Oaks case, supra., is another in a long line of cases discussing setoff in South Carolina. In fact, TCR discussed in its initial brief [Initial Brief pp.43-44] and argued at the post-trial motions hearing [R.1820-1821 Post-Trial Hearing Trans pp.35-36] that the issue release settlements in the present case actually comport with The Oaks. The court in Wells Fargo held for the first time that an email from the court, an attorney of record, or a party was "service" for the start of calculating the deadline to file a notice of appeal. Wells Fargo at 217, 810 S.E.2d at 859. The resolution of the present appeal in favor of TCR does not rise

¹⁴ TCR acknowledged in its initial brief that the settlement paid by Gale Contractor services should not be used as a setoff. The Gale settlement amount of \$22,500 is the difference between the calculations discussed above and the "TOTAL estimated, revised verdict amount" that TCR supplied to the trial judge in its spreadsheet at the post-trial motions hearing on June 7, 2020. [R.1914-1917 June 10, 2019 e-mail]

to the same level of prospective application as the new service rule announced in Wells Fargo that impacts the timing of a deadline to confirm jurisdiction in the appellate courts.

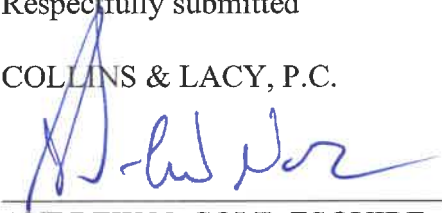
CONCLUSION

For the foregoing reasons, TCR restates that the trial judge abused her discretion by not awarding a complete setoff of the joint and several, general verdict assessed against it. After all applicable settlements known at the preset are applied as setoffs, the judgment assessed against TCR should be reformed to \$1,607,500. TCR requests this court remand the case to the trial court so that the trial court can apply the proper setoff, which may include the post-trial settlement between Respondent and JMC Construction.

Respectfully submitted

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February 22, 2021

RECEIVED

SEP 11 2023

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Jennifer B. McCoy, Circuit Court Judge

Appellate Case No. 2019-001790

Civil Action No. 2015-CP-10-00955

Palmetto Pointe At Peas Island Condominium Property Owners Association, Inc. And Jack Love, Individually, and on behalf of all others similarly situated, ... Plaintiffs,

vs.

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

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

and

Tri-County Roofing, Inc. Petitioner,

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

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

QUESTIONS PRESENTED FOR REVIEW

- I. Did the Court of Appeals Err in Failing to Find Petitioner was Entitled to a Full Setoff for the \$1 Million Insurance Proceeds from July 2018 Mediated Partial Payment/Covenant-Not-to-Execute?
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- III. Did the Court of Appeals Err in Failing to Find Petitioner was Entitled to a Full Setoff for the Pretrial Settlements Between Respondents and Novus, Atlantic, H and A, and Cohen's?

STATEMENT OF THE CASE

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

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

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

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

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

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

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

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

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

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

This review followed.

STANDARD OF REVIEW

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

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

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

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

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

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

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

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

LAW/ANALYSIS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

It is established law that Respondents here are not entitled to multiple awards for the same injury. See Welch, 342 S.C. at 312, 536 S.E.2d at 425 (Ct. App. 2000) ("In other words, there can only be one satisfaction for an injury or wrong."); Rutland, 400 S.C. at 216, 734 S.E.2d at 145 ("A non-settling defendant is entitled to credit for the amount paid by another defendant who settles for the same cause of action."); Riley, 414 S.C. at 195, 777 S.E.2d at 830 ("[I]t is almost universally held that there can be only one satisfaction for an injury or wrong."); Hawkins v. Pathology Assocs. Of Greenville, PA, 330 S.C. 92, 113 498 S.E.2d 395, 406 (Ct. App. 1998) ("A non-settling defendant is entitled to credit for the amount paid by another defendant who settles.").

The trial judge abused her discretion when she failed to act as the gatekeeper to prevent such a double recovery. "Compensatory damages are intended to make the plaintiff whole, not to punish the tortfeasor." Rutland, 400 S.C. at 217, 734 S.E.2d at 146. Respondents are made whole when the proper setoffs are applied. Petitioner's requested setoff allocation is the mandated statutory and common law result that furthers the policy to avoid double recovery to the Plaintiff and lead to an equitable result. See Id.

In this case, Respondents sought damages to repair the Project and for lost use. The trial judge informed the jury that the damages being sought by Respondents were for the cost of repairs plus lost use, and the trial judge assured the jury that she would act as the gatekeeper to ensure that the Plaintiffs would not receive multiple recoveries for the same damages. See Trial Transcript Week Two, p.815 ll.8-17; p.816 ll.9-12; and p.816 ln.23—p.817 ln.5. [R.1735-1737]

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

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

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

CONCLUSION

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

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

Respectfully submitted,
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September 11, 2023
Columbia, South Carolina

RECEIVED

SEP 11 2023

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. Appellant.

PROOF OF SERVICE

I certify that I have served a true copy of the Petition for Writ of Certiorari upon all parties
via email, on September 11, 2023, addressed as follows:

Respectfully submitted,
COLLINS & LACY, P.C.

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September 11, 2023
Columbia, South Carolina

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and on behalf of all others similarly situated***

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

RECEIVED

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S.C. SUPREME COURT

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 Novus¹, Atlantic², H and A³, and Cohen⁴?
- 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 Vasquez, 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 Vasquez 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) settlements⁹ 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 Framing 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 walls¹⁰ 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 trim¹⁵ 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.

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[settlement] 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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THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

Nov 06 2023

S.C. 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.

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I, Russell G. Hines, of Clement Rivers, LLP, attorneys for Respondents, hereby certify that Respondents' **RETURN TO PETITION FOR WRIT OF CERTIORARI** was served on all other parties to this appeal on November 6, 2023, via email (see attached) to their following counsel of record:

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November 6, 2023

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Nov 30 2023

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-established 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-not-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 nonsettling 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, ln.15; 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, ln.14; 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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COUNTY ROOFING, INC.

November 30, 2023
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA

In The Supreme Court

RECEIVED

Nov 30 2023

APPEAL FROM CHARLESTON COUNTY
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S.C. SUPREME COURT

Jennifer B. McCoy, Circuit Court Judge

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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.

PROOF OF SERVICE

I certify that I have served a true copy of the **Reply to Respondents' Return to Petition**
for Writ of Certiorari upon all parties via email, on November 30, 2023, addressed as follows:

Respectfully submitted,
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The Supreme Court of South Carolina

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and

Tri-County Roofing, Inc. is the Petitioner.

Appellate Case No. 2023-001422

ORDER

Based on the vote of the Court, the petition for a writ of certiorari is granted on Petitioner's Questions I and III and denied on Petitioner's Question II. The parties shall proceed to serve and file ten additional copies of the appendix and ten copies of their briefs in the manner provided by Rule 242(i), SCACR.

FOR THE COURT

BY Patricia A. Howard
CLERK

Columbia, South Carolina
June 20, 2024

cc:

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The Honorable Jenny Abbott Kitchings