THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Diane Goodstein, Circuit Court Judge

Case No. 2012-CP-10-7594
Appellate Case No. 2018-001230

One Belle Hall Property Owners Association, Inc., and Marvin T. Meek and Francis E. Hill, individually and on behalf of all others similarly situated,..... Respondents,

v.

Builders FirstSource-Southeast Group, LLC, ... Appellant.

APPELLANT'S INITIAL BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Rules

Statutes

Other Authorities

STATEMENT OF ISSUES ON APPEAL

1. Was Builders' motion for set off timely such that the trial court had and this Court has jurisdiction to address the motion?

2. Is Builders entitled to set off all or parts of the settlements of codefendants for the same product liability claims and alleged damages asserted against it?

3. Did Plaintiffs preempt Builders' right to set off under South Carolina law by purportedly unilaterally limiting their claimed damages at trial?

4. Must set off be pled as an affirmative defense and did Builders' properly assert a request for set off or otherwise waive the right to seek a set off?

5. Is a special verdict form required to apply set off or is set off properly applied to a general verdict where the verdict is on claims and for injuries alleged against and settled by codefendants ?

6. Does the fact that settlement amounts paid by codefendants for all claims and injuries asserted against them may include other claims and other injuries not asserted against Builders completely preclude setting off some portion of the settlements which also settled common claims and injuries asserted against those codefendants and Builders?

7. Did Builders contractually waive its right to set off?

STATEMENT OF THE CASE

Plaintiffs filed suit in this construction defect case on November 19, 2012. (Compl.) The original complaint named two plaintiffs, the property owners association and an individual owner, six individual defendants, and Jane and John Does.[1] (*Id.*) It contained a general factual section alleging "latent building defects," "repeated water intrusion," and other general consequential damage to the One Belle Hall buildings and other property. (Compl. ¶¶ 25-25.)

[1] The Jane Does were identified as affiliates of Tramell Crow Residential ("TCR") and its named affiliates (collectively the "TCR defendants"). (Compl. ¶¶ 10-20.) The John Does were identified as "subcontractors and/or other entities" involved in some aspect of the construction or sale of One Belle Hall besides the one named, alleged stucco supplier, First Exteriors, LLC (Compl. ¶¶21-23.)

The first three claims alleged products liability under the three theories of negligence, breach of warranty, and strict liability. (Compl. ¶¶ 10-13.) Of those, the first two claims – negligence and strict liability—were pursued against "all Defendants." (Compl. pp. 10, 11.) The third – strict liability – was asserted against First Exteriors and the John Doe subcontractors and other entities tied to the construction and sale of One Belle Hall. (*Id.*, p.12.) The remaining claims were asserted against the TCR Defendants only. None of the seven theories of liability asserted contained any distinctive specification of damage suffered beyond the common, general statements in the "Factual Allegations" section of the brief. *Cf.* Compl. ¶¶ 56-57 (Negligence); 62 (Breach of Warranty); 69-70 (Strict Liability); 76 (Breach of Fiduciary Duty); 91 (SCUPTA); p. 17 (Prayer for Relief).)[2]

Over the course of approximately two years and three months three amended complaints added new parties, whether plaintiffs or defendants, and dropped Does. Builders FirstSource-Southeast Group, LLC ("Builders") was added as a defendant in the first amended complaint filed December 31, 2013, for the first three product liability claims-- negligence, breach of warranty, and strict liability (1st Amend. Compl. p. 1 & ¶¶ 9, 44, 118.) Builders answered and denied all liability in that and all subsequent iterations of the complaint. (Builders' Answ. 1st Amend. Compl.)

With the filing of the third amended complaint on February 9, 2015, thirteen TCR Defendants and thirty-four "other" defendants had been added to the case (3rd Amend. Compl., pp. 1-2, ¶¶ 11-72). All of the defendants were included in the negligence and breach of warranty products claims. (*Id.* pp. 20-22.) Builders, plus BASF Corporation, Raymond

[2] The fifth and seventh claims against the TCR Defendants for veil piercing and reformation of the master deed contained no damage claims.

Building Supply Corporation d/b/a Energy Savings Products of Florida, Inc. a/k/a Energy Savings Products of Florida, and TAMKO Building Products were named under the strict liability products claims. (3rd Amend. Compl. p. 23.)

Over the course of the amendments, the first three product liability claims never changed except parties were added or subtracted from the strict liability claim.[3] Basic factual allegations regarding One Belle Hall, the alleged defects, damages, and delicts never changed.[4]

By the time of trial beginning August 29, 2016, every defendant except Builders was no longer active in the case. Most had settled and been dismissed from the case. (*See, e.g.*, Order, 4/19/16 (dismissing the 13 TCR Defendants and 21 other defendants.) Defendant TAMKO was severed from the matter (Order, 7/20/16), and later settled after trial. (Order.)

Trial began August 29, 2016, with jury selection. Following testimony on August 30 through the day of September 1, the jury received the case at 6.25 p.m.[5] (Trial Tr. p. 742.) The jury returned a verdict at 10.20 p.m. against Builders for $2,163,493.00.[6] (Trial Tr. pp. 743-44.)

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[3] For the strict liability theory, First Exteriors, LLC was the only expressly named defendant in the original complaint and was identified as the stucco installer. (Compl.¶¶ 21, 64-66.) It was subsequently dropped from the strict liability claim in the first through third amended complaints.

[4] *Cf.* Compl., ¶¶ 1-6 (opening); 25-35 (factual allegations); 52-57 (negligence); 58-62(breach of warranty); 63, 64-67 (strict liablity); and 3rd Amend. Compl. ¶¶ 2-7 (opening); 73-84 (factual allegations); 109-113(negligence); 114-118 (breach of warranty); 119, 124-131 (strict liability).

[5] A severe storm was predicted to strike Charleston the next day, September 2, and the court was to be closed that day.

[6] The verdict amount exactly matched, except for fifty-five cents, Exhibit 325(f), a repair estimate by Builders' expert that included repairs to the entire One Belle Hall complex, much of which had no causal connection to the alleged defective windows supplied by Builders.

On September 8, 2016, within ten days of the verdict, trial counsel filed Builder's motion for set off and to compel production of the co-defendants' settlement agreements in aid of that purpose. (Mot. Set Off.) On September 12, again within ten days of the verdict (per SCRCP 6), Builders filed its Rule 59 motion for JNOV and new trial.[7] (JNOV/NT Motion.) Subsequently, the trial court entered judgment on the verdict. The judgment was filed on September 22, 2016, but was expressly dated by the circuit court as "9/1/2016 nunc pro tunc," the date of the verdict. (Judgment.)

After briefing, the trial court heard arguments on the set off and JNOV/new trial motions on November 18, 2016 and again on April 20, 2017. At the first hearing, Builders' counsel orally renewed the set off motion in response to Plaintiffs' argument that the written motion did not adequately or timely raise the set off issue. (11/18/16 Hrg. Tr. pp. 30-31.)

The trial court denied the motion for set off. (Order, 11/16/17.) Builders moved to alter or amend the order. (Mot. To Alter or Amend.) The trial court ordered Plaintiffs to produce the settlement agreements between it and any settling co-defendants. (4/20/17 Hrg. Tr. pp. 64-68.) Ultimately, however, it denied the motion without elaboration. (Order, 6/27/18.) Builders received notice of the entry of the order on June 28, 2018, and served its notice of appeal on June 29, 2018. (Notice of Appeal.)

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[7] Builders' Rule 59 motion was subsequently substantially reduced in scope when it was discovered upon obtaining the trial transcript that trial counsel did not make a clear or comprehensive directed verdict motion at the end of all the evidence (Trial Tr. p. 639.), and made a truncated, oral JNOV motion without asserting any new trial grounds immediately after the verdict (Trial Tr. p. 748) rather than requesting a ten day period to file such motions in writing as was understood by undersigned counsel retained to work on post-trial motions and appeal. The circuit court, despite multiple hearings, has issued no order on the reduced JNOV motion. It remains pending.

STATEMENT OF FACTS

Builders supplied the windows for the One Belle Hall project. It did not design or manufacture the windows. It did not install the windows. It was not asked to and did not select the windows for use at One Belle Hall. (*See generally*, Trial Tr. pp. 470-79.) It did not design the window openings. The outside edge of the sill of the windows as designed by the architect and installed by others was not flush with the outer wall, but was inset several inches into the exterior wall of the buildings. (Trial Tr. pp. 372-73, 531-32: Ex. 39.) Builders did not install the exterior finishes above, at the sides of, or under the windows as installed. Builders placed the order for the windows with the manufacturer, Energy Savings Products of Florida, n/k/a Raymond Building Supply, as specified by the general contractor, a TCR defendant, and the windows were drop-shipped to the One Belle Hall site.[8] (Trial Tr. pp. 471-79.)

Prior to trial, Plaintiffs entered into settlements with substantially all of the defendants totaling almost 9.5 million dollars.[9] None of the settlement agreements attempted to allocate the settlement amounts for any particularly identified damages at One Belle Hall or for any particularly theory of liability that might have been alleged against any particular defendant. In

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[8] There was disputed evidence whether the windows were the ones specified by the architect and whether they met the Charleston-area building codes. The local building authorities apparently did not object to their use during building inspections as there was no evidence offered of work being stopped or the windows rejected. Because of the general verdict, there is no indication of how the jury may have resolved this conflicting evidence.

[9] The thirteen settlement agreements produced to Builders, some of which released multiple defendants, are individually marked as confidential. They are reproduced under seal separately in volume ___ of the Record on Appeal, pp. _____-_____ for the use of the Court. Due to the confidential designation of each agreement, Builders' discussion of the agreements in this statement of facts only notes common, general characteristics of the agreements and does not quote specific provisions.

some situations where multiple defendants were released, the settlement agreement made no effort to allocate a common settlement amount among the released parties. The settlement agreements generally simply referenced the unspecific allegations of liability and damages contained in the general fact section of the complaints as discussed, *supra*, pp. 1 - 3.

At trial, despite Plaintiffs' counsel's opening statement that Builders was the only remaining defendant and that only the "window damage portion" of the claimed total damages would be addressed (Trial Tr. p. 186), no witness claimed to be able to distinguish damage caused above, around, or below the windows supplied by Builders solely as a result of any alleged defect in the windows and the exact same damage in the exact same areas caused by defects in the products and work of other defendants. Plaintiffs' expert specifically disclaimed the ability or effort to do so. (Trial Tr. p. 361-62.) Plaintiffs, who bore the burden of proof on damages, made no effort to distinguish the alleged damages recoverable under on as opposed to another of any of the three product liability theories of recovery asserted against Builders as well as every other settling defendant in the case.

Despite Plaintiff's claim that the case was only about Builders' responsibility for the "window damage," at no time before, during, or after the verdict did Builders orally or in writing ever waive an argument or concede that any element of damage was solely its responsibility nor its right to set off Plaintiffs' settlements with co-defendants for the same alleged claims and damages against any verdict or judgment that might be obtained against it.[10] The record is devoid of any such concession by Builders.

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[10] For an example of what such an agreement might look like, *see The Oaks at Rivers Edge Property Owners Association, Inc. v. Daniel Island Riverside Developers, LLC*, 420 S.C. 424, 433-34, 803 S.E.2d 475, 480 (Ct. App. 2017)(quoting from a settlement memorandum in which appellants specifically acknowledged they might not "receive credit on the judgment for amount[s] paid by [other defendants] ....").

Rather, the trial record is replete with argument and evidence that the damage claimed by Plaintiffs was indivisibly caused or contributed to by settling codefendants. Thus, Plaintiffs' window expert testified that both water and untreated or mistreated termites caused damage to the walls about the windows. (Trial Tr. 256, 267.) The expert testified to cracked stucco that allowed water penetration. (Trial Tr. 256.) He testified that leaks occurred "through the balconies," (Trial Tr. 256), some of which were above the windows at issue (*See* Trial Tr. 219-220.) He noted damage associated with the vertical control joints in the stucco. (Trial Tr. 257.) Some of those control joints directly intersected with the window openings. (Trial Tr. 366-70.) The expert noted misapplied or missing sealants around the windows that allowed water to penetrate around the window, not simply through it. (Trial Tr. 275, 362-63.) He noted inadequately installed flashing around the windows that allowed water to penetrate the wall. (Trial Tr. 275.)

Plaintiffs' expert expressly admitted that water in the walls at One Belle Hall came in through "broken sealants between the window and the stucco" that left "joints and cracks" for water penetration (Trial Tr. 356); through improper waterproofing (*id.*); and through "improper or missing flashing" either because the installer failed to put in correctly or at all or the architect didn't call for it where needed. (Trial Tr. 356-57, 364, 365.) Plaintiffs' expert took issue with the window installation methods. (Trial Tr. 360.) He also tested the roofing for water leakage and found such leaks into the buildings at One Belle Hall. (Trial Tr. 360; *see also* 364 (noting defectively installed flashing allowing leakage at the roof line.) He opined that water penetrated through the brick-portion of the exterior. (Trial Tr. 371.) He further admitted that the recessed design of the windows contributed to water leakage into the walls under the windows. (Trial Tr. 372.) Plaintiffs' expert made no effort to compute the

percentage of damage that could be attributed to the windows supplied by Builders versus other sources of leakage. (Trial Tr. 361-62.)

The testimony of Builders' expert only confirmed the indivisible nature of the claimed damages. (*See* Trial Tr. pp. 529-545 (identifying cracked stucco at the window, cracked or separated sealants around the windows, inset window design, missing or improper flashing, missing sealant between the windows and the brick exterior, deficiencies in the water management system behind the brick veneer, improper and out-of-square mounting of the windows in the framed window openings, and construction dirt and debris clogging the window weeps as causes of damage around the windows). Plaintiffs' counsel's own cross-examination revealed the multiple causes of the damage:

Q. There could be multiple causes of problems correct?

A. Oh, there are definitely multiple causes.

Q. In fact there can be two causes of the problems on the windows correct?

A. Sure.

Q. Water from different sources can combine to cause damage correct?

A. Sure.

(Trial Tr. pp. 569-70.)

As to the breach of warranty claims, the testimony established that all of the warranties given by individual defendants like Builders as to their products or services to the TCR Defendants, the developers of the project, were simply passed through to the One Belle Hall owners. (Trial Tr. p. 204-05, 211-12; Exhibits. 162, 31.) No evidence was offered by Plaintiffs segregating or distinguishing how one defendant's breach of warranty that led to water intrusion damaged the areas around the windows as opposed to water intrusion into the

same areas due to alleged breach of the warranty with respect to the windows Builders supplied.

In argument and through the verdict form, Plaintiffs asserted that under all three theories of products liability asserted against Builders, the damages were the same. (Trial Tr. pp. 676-77.) Counsel admitted that there were other leak sources that contributed to the damaged areas around the windows. (Trial Tr. 677-78; 701-02.) In closing argument Builder's counsel reiterated the indivisibility of the damages and the lack of testimony segregating the damage allegedly caused by the windows from the damage caused by other defects above, around and below the windows. (Trial Tr. 693-94.) The jury charges—correctly—informed the jury that there could be more than one proximate cause. (Trial Tr. 716-17.) Nothing about the general verdict rendered purported to isolate damages alleged caused by Builder's windows from the damage caused in and around the windows by other codefendants' alleged defective work or products.

ARGUMENT

The circuit court's order denying set-off is divided into eight parts. Each of the eight parts is infected with factual or legal errors regarding the timeliness of Builders' motion for set-off, the timelessness of post-trial motions and, consequently, the appellate courts' jurisdiction, and the substantive law of set-off. Each is addressed in turn. For the reasons stated below and before the trial court, the judgment of the circuit court should be vacated and the settlements of codefendants set off against the judgment as required by law.

1. The circuit court's holdings in Part I of its order regarding the timeliness of the motion for set-off, the timeliness of post-trial motions, and this Court's jurisdiction ignores the text of its own judgment and is in direct conflict with controlling precedent.

A. Builders' motions were timely filed in light of the *nunc pro tunc* entry of the judgment.

The first part of the circuit court's order is factually and legally incorrect. The verdict was rendered on September 1, 2016. Within ten days of that verdict, Builders filed two motions. It filed Defendant's Notice of Motion and Motion to Compel and Motion for Determination of Set-Off.[11] Builders also filed a Motion for Judgment, New Trial Absolute, or Alternatively for New Trial Nisi Remittitur pursuant to SCRCP 50 and SCRCP 59.[12]

The circuit court's order correctly states that the judgment was filed September 22, 2016, but fails to expressly note that the judgment was dated "9-1-2016 nunc pro tunc." SCRCP 58(a)(1) specifically states that the judgment upon a general verdict shall be "forthwith

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[11] This motion was filed September 8, 2016. (Motion for Set Off.)

[12] This motion was filed September 12, 2016. (Motion for JNOV/NT.) As of the date of the filing of this brief, the circuit court has not acted upon this motion though it's holdings on the motion for set-off that are the subject of this appeal would suggest that it would deny the motion on timeliness grounds.

prepare[d], sign[ed], and enter[ed]...." In this case, the verdict was not delivered until 10:20 p.m. at night (Trial Tr. pp. 743-47), and the trial adjourned at 10:30 p.m. A severe storm was anticipated the next day and no one wished to remain any longer than necessary. The circuit court's *nunc pro tunc* order filed September 22 but effective back to the date of the verdict was entirely consistent with Rule 58.

The circuit court's order cites *Ex parte Strom*, 343 S.C. 527, 539 S.E.2d 699 (2000) regarding *nunc pro tunc* orders, but fails to cite the entirety of that court's holding. The court stated, "*Nunc pro tunc* is a phrase applied to acts allowed to be done after the time when they should have been done, *with a retroactive effect.* ... *Nunc pro tunc* orders can only be used to place in the record evidence of judicial action that has actually taken place." *Id.* at 264, 539 S.E.2d at 703 (emphasis added, internal citation omitted); *see also Black's Law Dictionary* 1174 (9th ed.2009) (explaining that "*nunc pro tunc* " is Latin for "now for then" and that the phrase means having retroactive legal effect through a court's inherent power). Consequently, because the judgment as filed was made retroactively effective to September 1, 2016, the date of the verdict, consistent with SCRCP 58. Both motions filed by Builders were timely under Rules 50 and 59 because each was served within ten days of the effective date of the judgment. Thus, the circuit court had jurisdiction to hear and resolve the motions Its contrary holding is clearly erroneous as a matter of fact and law.

B. Alternately, the motion for set-off was timely under binding precedent of the South Carolina Supreme Court and Court of Appeals.

Further, as to Builder's set off motion, the circuit court's holding that the motion was untimely is in direct contravention of binding precedent. That holding was expressly rejected

by the Court of Appeals in *Ellis v. Oliver*, 335 S.C. 106, 515 S.E.2d 268 (Ct. App. 1999), a case cited by the circuit court, but not addressed by its order.[13]

In *Ellis*, plaintiff alleged that defendant failed to timely raise the issue of setoff under the set-off statute, S.C. Code Ann.§ 15-38-50, because defendant did not move until after judgment and made the motion after the notice of appeal had been filed. 335 S.C. at 109, 515 S.E.2d at 270.

The *Ellis* court disagreed. The court reasoned that "[i]n enacting § 15-38-50, the General Assembly did not provide the procedural details by which the set-off could be claimed." *Ellis, 335* S.C. at 110, 515 S.E.2d at 270. Thus, the court held that the "statute likewise does not require that the rights thereunder be asserted at any particular juncture in the litigation." *Id.* As a result, the court held the motion was timely and, in fact, no motion was required to be filed at all because the right to set-off arose "by operation of law." *Id.* at 112, 515 S.E.2d at 271.

The South Carolina Supreme Court also rejected this argument in the context of a motion for setoff under the equitable power of the court. In *Tilley v. Pacesetter Corp.*, 355 S.C. 361, 585 S.E.2d 292 (2003), the plaintiff argued that defendant's motion for set off was untimely because defendant made the motion after judgment on liability had been imposed and after defendant appealed the liability issue.[14] *Id.* at 376, 585 S.E.2d at 300 . The Supreme Court held that defendant timely moved for setoff after a judgment on liability. *Id.*

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[13] The only reference to *Ellis* in the order is found at page 6 in footnote 4 where *Ellis* is cited for a generic proposition of statutory construction.

[14] The Supreme Court noted that plaintiff offered no authority to support the proposition that a motion for setoff had to be made prior to a judgment. Such is the case here as well. Moreover, it is incongruous to contend that a motion under Section 15-38-50 can be filed after judgment but not a request under the court's equitable power.

Moreover, the *Tilley* court further rejected the trial court's and Plaintiffs' position here that Builders had to move for setoff prior to entry of judgment. There, the circuit court calculated the judgment prior to addressing and granting defendant's motion for setoff. *Id.* at 367, 585 S.E.2d at 295 ("The order calculated the total amount of the judgment, prior to setoff . . . ."). The Supreme Court disagreed, finding setoff of the judgment would be appropriate. *Id.* at 376, 585 S.E.2d at 300.

C. Footnote 3 of the trial court's order regarding successive post-trial motions is factually and legally incorrect.

In footnote 3 of the order, the circuit court comments that Builder's motion for set off and, particularly its motion for JNOV and new trial relief were nullities and did not extend the time for appeal in this case in support of its holding that it lacked any power to address the issues on their merits. As set forth in the preceding sections, the circuit court's holding as to its own jurisdiction to hear Builder's motion for set off is incorrect as a matter of fact and law. Its statement that the motion filed September 12, 2016, is a nullity, successive, and does not stay the time for appeal is also incorrect.

The September 12 motion was made pursuant to Rule 59 and within 10 days of the verdict and effective date of the judgment. *Elam v. S.C. Dept. of Trans.*, 361 S.C. 9, 602 S.E.2d 772 (2004), cited by the circuit court in footnote 3 actually stands for the exact opposite rule from that applied by the court. *Elam* stated:

> [A] party usually is free to file an initial Rule 59(e) motion, regardless of whether the previous JNOV/new trial motions were made orally or in writing, without unnecessary concern the repetition of an issue or argument made in a previous motion will result in a subsequent appeal being dismissed as untimely. In essence, we view the use of oral or written JNOV/new trial motions, followed by an initial Rule 59(e) motion, as part and parcel of a party's "single bite at the apple" in presenting his case to the trial court.

Id. at 21, 602 S.E.2d at 778.

In this case, oral post-verdict motions were made immediately after the verdict in the rush to leave the courtroom late at night before the anticipated storm. (Trial Tr. p. 748.) The September 12 motion was the first written motion seeking further consideration of grounds for judgment in favor of BSF. The motion was not successive under *Elam* and stayed the time for the filing of any appeal in this case. Likewise, the set off motion, which sought to alter or amend the judgment entered on the jury's verdict stayed the time for appeal. The Court's statements to the contrary are incorrect as a matter of fact and law.

2. **Set off is allowed against the judgment regardless of the product liability theory upon which the verdict, and the subsequently entered judgment, is based.**

In Part II of the order, the circuit court holds that where a judgement is entered on a verdict that is general or is based on a claim for express or implied warranty, set off law is inapplicable. This holding is incorrect.

First, the form of verdict is not determinative of whether set off is required or appropriate. The text of S.C. Code Ann. §15-38-50, the case law interpreting it, and the case law discussing equitable principles of set off, do not condition the application of set off on the form of the verdict. Rather, the plain and unambiguous language of Section 15-38-50, and case law interpreting it and equitable set off, couches the setoff analysis in terms of whether the party settled the same "claim" for the same "injury" with the settling party as alleged against the non-settling party. As cogently summarized in this Court's most recent decision addressing set off, *Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. IMK Development Co., LLC*, ___ S.C. ___, ___ S.E.2d ___, 2018 WL 4905983 (filed October 10, 2018):

> "When a prior settlement involves compensation for the same injury for which the jury awarded damages, the right to setoff arises as an operation of law."

> *Smith v. Widener*, 397 S.C. 468, 473, 724 S.E.2d 188, 191 (Ct. App. 2012). However, when the settlement involves compensation for an injury different from the one tried to verdict, there is no set off as a matter of law. *Hawkins v. Pathology Assocs. of Greenville, P.A.*, 330 S.C. 92, 114-15, 498 S.E.2d 395, 407 (Ct. App. 1998). When the settlement "is argued to involve two claims, one of which involves the same injury as the claim tried to verdict and one of which does not, the circuit court must make the factual determination of how to allocate settlement between" the claims. *Smith*, 397 S.C. at 473, 724 S.E.2d at 191.

Id. at *11.

In *Smith v. Widener* , the plaintiff argued that the nature of the verdict, i.e., actual damages only against the non-settling party, precluded setoff because plaintiff settled with the co-defendants for different damages for a different injury. *Widener*, 397 S.C. at 472, 724 S.E.2d at 190-91. The court applied Section 15–38–50 to reject the argument that the type of verdict controlled. *Id.* at 472, 724 S.E.2d at 190. The court held that:

> The **injury** [plaintiff] **alleged** she suffered as a result of the tortious conduct of all defendants was the same. Therefore, the court was required to grant the request for setoff.

Id.

This matter is analogous. Plaintiffs sought recovery from Builders and other settling co-defendants on overlapping claims of product liability – negligence, breach of warranty, and strict liability. Plaintiffs alleged the same injury against each named defendant under each separate product liability claim, such as "latent building defects" (3rd Amend. Compl. ¶ 77), "water intrusion into and through the exterior building envelope" (*id.* ¶ 78), and "resulting consequential damage to non-defective building components, structural members, and other property" (*id.*). Plaintiffs aggregated damages from those same alleged injuries against all defendants and sought jointly and several liability on all such claims. (3rd Amend Compl. p. 28.)

The trial court's holding renders the "claim" and "injury" language in the statute, and the language utilized in the appellate cases, meaningless by conditioning setoff on the nature of the verdict issues. That is improper. *See, e.g., Hinton v. S. Carolina Dep't of Prob., Parole & Pardon Servs.*, 357 S.C. 327, 342, 592 S.E.2d 335, 343 (Ct. App. 2004) (holding that courts should seek a construction of a statute that gives meaning to every word of a statute rather than one that renders a portion meaningless).

Second, the verdict in this case is not truly a general verdict upon differing causes of action with different elements of damage. As our appellate courts have repeatedly held, "An action for products liability may be brought under several theories, including negligence, strict liability, and warranty....In a products liability action, regardless of the theory of recovery pursued, a plaintiff must establish three elements: (1) he was injured by the product; (2) the injury occurred because the product was in a defective condition, unreasonably dangerous to the user; and (3) the product, at the time of the accident, was in essentially the same condition as when it left the hands of the defendant. *Jackson v. Bermuda Sands, Inc.*, 383 S.C. 11, 15, 677 S.E.2d 612, 614 (Ct. App. 2009) (internal citations omitted). As to the two theories upon which the jury found for Plaintiffs—strict liability and breach of warranty—the damages are, in this construction and product defect context, largely coextensive. *Rife v. Hitachi Const. Machinery Co., Ltd.*, 363 S.C. 209, 216, 609 S.E.2d 565, 569 (Ct. App. 2005). Plaintiffs' warranty and strict liability claims emanate from this same basis for liability—the tort of products liability. *See* F.P. Hubbard and R. Felix, *The South Carolina Law of Torts*, pp. 279-361 (4th ed. 2011) (discussing the three theories of product liability). Thus, Plaintiffs admitted that the damages for all three products liability claims involved the same damages, (Trial Tr.

pp. 676-77.) The jury returned a single verdict for the two theories upon which it found liability. (Verdict.)

The general verdict rule, to the extent it is relevant at all, does not apply to Builder's motion for set off. Based on the above, Plaintiffs recovered on the claims to the jury on two products liability theories for the same damages. The settlements with co-defendants were, in whole or in part, on the exact same claims for the same general injuries. Set off is, therefore appropriate. *See Smith v. Widener*, 397 S.C. 468, 724 S.E.2d 188 (Ct. App. 2012).

Additionally, the trial court's use of the general verdict to bar set off violates the rule that a party cannot use a general verdict both as a shield and a sword. *See Harleysville Group Ins. v. Heritage Communities, Inc.*, 420 S.C. 321, 356, 803 S.E.2d 288, 307-08 (2017) (holding that a party cannot claim the general verdict rule as a "shield and a sword" by arguing the rule "shields any evaluation" of how a verdict should be apportioned and also use the rule to consolidate the verdict in full). Plaintiffs cannot arbitrarily allocate the settlement amounts to the strict liability and warranty causes of action any more than Builders can. The jury returned one verdict for common damage that was entered as a singular judgment against Builders. The damages allowed as to those two claims are same. *See* S.C. Code Ann.§ 36-2-715 (damages for breach of warranty to include "injury to person or property proximately resulting from any breach of warranty"); *Rife*, 363 S.C. at 216, 609 S.E.2d at 569 ("A plaintiff suing under a products liability cause of action can recover all damages that were proximately caused by the defendant's placing an unreasonably dangerous product into the stream of commerce"). Consequently, no allocation between the two theories of product liability is appropriate or required. The rules allow Builders to set off settlement amounts from the judgment as entered.

Further, nothing in the law of set off prohibits the set off a settlement on a warranty claim, express or implied, against a judgment based on a warranty claim, express or implied, where, as here, the alleged breach of warranties by various settling defendants, whether express or implied, caused common injuries to the windows, or around and under windows, or to other parts of the building. This principle is illustrated in the Court's recent decision in *Stoneledge*. There, the court was faced with judgments where Plaintiff sought and recovered separate damage verdicts for a negligence claim (3 million dollars) and a breach of warranty claim (one million dollars) against the non-settling defendants.[15] 2018 WL 4905983 at *11. In applying set off, the Court took the combined negligence and breach of warranty verdict (4 million dollars) and subtracted from that total "the amount of the prior settlements" with other parties in the case, leaving a judgment balance of $2,144,088.23. *Id.* at *12. Because, unlike this case, the jury returned separate verdicts and there was more than one non-settling defendant to whom fault had been allocated on the negligence and breach of warranty claims, the Court then reallocated the remaining judgment on a proportional basis between the negligence and breach of warranty claim and then applied the apportionment statute to allocate the judgment on each claim against the separate defendants. *Id.* Although the trial court did not have the benefit of the *Stoneledge* decision, its holding directly contradicts the rationale and application of set off law set forth in that decision.

Herring v. Home Depot, Inc., 350 S.C. 373, 379, 565 S.E.2d 773, 776 (Ct. App. 2002), cited in footnote 5 of the trial court's order is not to the contrary. As the trial court's

[15] There was a third, separate verdict for one million dollars against an individual for breach of fiduciary duty. No set off was allowed as to that portion of the total verdict because no other individual person alleged to have breached a fiduciary duty to plaintiffs had, based on the record, settled for that particular cause of action. *Id.* at *12.

parenthetical states, a breach of warranty claim, made in the context of an allegedly defective product, is "a products defect case." As set forth above, and as illustrated in the *Stoneledge* decision, a products liability recovery, whether based on negligence, breach of warranty, or strict liability, fits within the language of the set off statute. Although the breach of warranty claim has its origin in a contract, the claim as tried in this case is a products liability claim and contains common elements of proof and damages with the other theories—negligence and strict liability--under which a products liability claim may be brought.

Similarly, *Atkinson v. Orkin Exterminating Co. Inc.*, 361 S.C. 156, 604 S.E.2d 385 (2004), cited by the trial court, does not stand for the proposition that a settlement of a claim on a theory of implied or express contract in a products liability context may not be set off against a judgment based on a verdict upon the same causes of action with common injury. In that case, plaintiff settled with Terminix on a breach of contract claim involving the provision of termite inspection and treatment services, not for sale of a product. Plaintiffs went to trial against Orkin on negligence and breach of contract for the breach of similar services (or the lack thereof). The trial court construed Terminix as a joint tortfeasor, although the claim against it, unlike in this case, was not a products liability claim based in breach of warranty, but a straight breach of contract regarding a sale of services, not goods, and allowed setoff against the judgment against Orkin. *Id.* at 172, 604 S.E.2d at 393.

The South Carolina Supreme Court reversed, finding Terminix could not be a joint tortfeasor because its settlement with plaintiff was based solely on a breach of contract involving services. *Id.* at 172, 604 S.E.2d at 394. No theory of tort or products liability was asserted against Terminix, therefore, the common cause of action requirement for application of the set off statute or equitable set off was not present, nor any basis for asserting that the

defendants were jointly liable. *See Riley v. Ford Motor Co.*, 414 S.C. 185, 196, 777 S.E.2d 824, 830 (2015) (noting the requirement that set off of a settlement against a judgment must involve the same claim and damages). The trial court's application of Atkinson conflicts with this Court's decision in *Stoneledge* specifically setting off a settlement of a breach of warranty products liability claim against a judgment for such a claim as discussed above.

Lastly, the trial court's invocation of the two issue rule is legally erroneous. As stated by the South Carolina Supreme Court, "the rule is utilized by courts on appeal, not trial courts." *Anderson v. S.C. Dept. of Trans.*, 322 S.C. 417, 421, 472 S.E.2d 253, 255 (1996). Further, the rule simply has no application to the question of set-off presented in this case. Appellate courts apply the rule to avoid reversal of a general verdict "when the jury returns a general verdict involving two or more issues and its verdict is supported as to at least one issue." J. Toal, S. Vafai, and R. Muckenfuss, *Appellate Practice in South Carolina* (2d ed. 2002), p. 79.

Builders' set off motion does not seek reversal of the jury's verdict or the judgment resulting from it. The motion presumes by its nature there is a judgment on the verdict and seeks to reduce the judgment amount for commonly caused damage on the basis that it has been satisfied, in whole or in part, by amounts the plaintiff has obtained in settlement for the same injuries from other potentially responsible parties.

3. The trial court's holding in Part III of the order that statutory and equitable set-off are inapplicable because of Plaintiffs' purported voluntary reduction of their claimed damages is in direct conflict with precedent.

The trial court held that setoff is unnecessary because Plaintiffs limited the evidence at trial to the damages caused by Builders. Stated differently, the court reasoned that the case

was tried as if setoff was factored into the jury verdict. This conclusion is incorrect for multiple reasons.

First, this very argument was considered and rejected in *Ellis v. Oliver*. In that case, plaintiff asserted that how the case tried to the jury meant that setoff under Section 15-38-50 "did not serve its intended purpose of preventing double recovery." *Ellis*, 335 S.C. at 113, 515 S.E.2d at 272. Plaintiff supported that argument by "not[ing] that she made no attempt during the trial to present the medical expenses attributable to [settling co-defendant's] alleged negligence." *Id.* As a result, Plaintiff argued that "the jury's verdict in her case against [defendant] did not take into account . . . her settlement with [settling co-defendant]." *Id.* The Court of Appeals rejected this argument, holding that:

> Application of the settlement credit was statutorily mandated in this case. Section 15–38–50 grants the court no discretion in determining the equities involved in applying a set-off once a release has been executed in good faith between a plaintiff and one of several joint tortfeasors . . . . We recognize that a strict application of the statute may lead to unintended results; however, this is a matter for the legislature to correct if our interpretation is contrary to its intent.

Id. Thus, the fact that Plaintiffs perhaps attempted to limit evidence at trial to the conduct of Builders (it was not so limited) is irrelevant for the determination of setoff.

Second, the trial court's reliance on *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), is misplaced and does not alter the fact that the statute mandates setoff of the settlement amounts received by Plaintiffs. The rationale in the *Oaks at Rivers Edge* contradicts the Court's prior opinions on setoff as well as the plain language of the statute.

In *Oaks at Rivers Edge*, the court weighed the equities and found that the defendant had "already received the benefit of the settlements," *id.* at 441, 803 S.E.2d at 484, based on how

the plaintiff tried the case to limit the evidence at trial to the damages caused by the defendant and with no reference to the settlement amounts. That rationale directly contradicts the prior, controlling precedent in *Ellis v. Oliver* regarding the impact of Section 15-38-50 as quoted above.

Moreover, *Oaks at Rivers Edge* is distinguishable on its facts. In that case, the two remaining defendants seeking to set off prior settlements were the developer of the project and the construction manager for the project, not a materials supplier like Builders. 420 S.C. at 432, 803 S.E.2d at 479. As part of a partial settlement of the claims, they specifically entered into an agreement acknowledging that they might not receive a set off for settlement amounts paid by others or by themselves, for the partial release. *Id.* at 433-34, 803 S.E.2d at 480-81.

By contrast, Builders made no such concession. There is no evidence of such an agreement in the record of the trial. Builders delivered only a component part to the project. It had no other responsibility for the project and its liability was limited only to damage sustained as a result of the alleged defective windows it supplied. As set forth in the statement of facts, *supra.*, pp. 5-9, the testimony at trial demonstrated that these alleged damages were indivisibly caused by multiple delicts of multiple settling parties. Failure to apply set-off would result in double recovery for the damages for which Plaintiffs have already recovered by settlement from others.

Here, Plaintiffs alleged the same claims against Builders and the settling defendants. Moreover, Plaintiffs aggregated damages from those same alleged injuries against all defendants, jointly and severally, on both claims. Controlling precedent does not permit the trial court's holding.

4. Equitable set off is available as to the judgment regardless of the fact that the verdict resulted from claims for breach of warranty and strict liability.

Part IV of the opinion contains several holdings that directly contradict controlling precedent and disregard significant facts.

First, the order states that set-off had to be pled in the answers filed by Builders. This holding is in direct conflict with South Carolina Supreme Court precedent. In *Broome v. Watts*, 319 S.C. 337, 342, 461 S.E.2d 46, 49 (1998) the court specifically held that " Rule 8(c) does not list set-off as an affirmative defense which must be pled in order to be pursued at trial."

Second, in footnote 12, the order incorrectly states that Builders never moved for set off. On its face, the motion was captioned "Defendant's Notice of Motion and Motion to Compel and Motion for Determination of Set Off." (Motion for Set Off.) In the very first line of the text, it states that Builders "respectfully submits this Motion to Compel and Motion for Determination of Setoff." (*Id.*) Memoranda were submitted in support of the motion, without objection, arguing both for compelling production of the agreements showing the amount of prior settlements and arguing the substantive set off issues. At the hearing, the parties argued both the issue of producing the underlying documents and the substantive right to set off and how it might be determined. (11/18/2016 Hrg. Tr., pp. 4-29 (initial arguments of the parties).) As Builders noted on reply to this procedural argument raised by Plaintiffs' counsel at that hearing, to the extent the written motion was inadequate to raise the subsequent substantive set off issue, the motion as to actual set off was made at the hearing orally (*id.* at pp. 30-31) and was absolutely timely under South Carolina Supreme Court and Court of Appeals precedents as

discussed above. *See Tilley v. Pacesetter Corp.*, 355 S.C. 361, 376, 585 S.E.2d 292, 300 (2003); *Ellis v. Oliver*, 335 S.C. 106, 515 S.E.2d 268 (Ct. App. 1999).

Third, as discussed in the preceding section, Plaintiffs' alleged self-imposed limitation of damages that is asserted as a basis for not applying set off is contrary to *Ellis v. Oliver*, 335 S.C. 106, 515 S.E.2d 268 (Ct. App. 1999) and is distinguishable on its facts as discussed above. The trial court's statement that there is no duplication of damages is unsupported by the record. As discussed above, *supra*, pp. 5-9, the overwhelming evidence was that the claimed damage was the result of multiple causes created by multiple settling defendants. As noted in Builders' argument to the trial court on the set off motion:

> I mean, I don't think anybody could've said well, this drop of water that caused this damage under the windows came from the stucco but this drop of water came from there. No; it was a combined injury, Your Honor.
> ...
> I believe you got an issue of double -- these people settled, some of them, on the same cause of action for the same injury. The injuries were combined injuries. There was no hermetically sealed off thing where it was the window leaking and only water coming from the leaking window went down in there. There was water coming in around the sides of the window because the installer didn't put them in right; maybe broke them. There was window damage there that was from the architect because the allegation is, as I understand it, was that he set the window too far back in and recessed it so that the water couldn't clear from the window. There's damage there from the stucco supplier.
> ...
> [H]ere we've got a common source for all of these things. All of the people who are giving warranties are people giving warranties to a building that is managed by the main developer/contractor who then aggregates their warranties and they pass through to Mr. Lucey's clients. Those different things that each one of them warranted they were doing, come together -- not every single one of them, maybe not the shingle guy or maybe not the carpet people. I don't know who -- they're obviously going to be people in an equitable who won't relate to our damages, but there are a lot. The case was tried this way. And that was part of the defense that Ms. Dyer raised was, hey, the evidence is clear. The water was coming in around the windows; that's not our fault. We didn't put them in. That's somebody else's fault. It was coming through the stucco. That's the stucco guy's fault. All that should be taken into account to

> prevent double recovery in this case. And I think it's totally appropriate either under the statute or as a matter of equity for the Court.

(11/18/2016 Hrg. Tr., pp. 17, lines 7-10; 18, lines 1-13; 32, line 9 - 33, line 4.) Plaintiffs' own expert count not quantify what part of the damage in and around the windows was caused by the alleged defective windows or by other defective work or products. (Trial Tr. p. 361-62.)

Contrary to the trial court's holding, neither Plaintiff's supposed limitation nor the jury's verdict is subject to deference in these circumstances. The case law specifically empowers the Court to do a searching inquiry into the facts to determine a proper set off. *See Huck v. Oakland Wings, LLC*, 422 S.C. 430, 813 S.E.2d 288 (Ct. App.) (reversing trial court order stating that it had no jurisdiction to evaluate the 'fairness' or 'reasonableness' of such settlement agreements or to reallocate the settlements, assuming there is anything to reallocate," and "[n]othing in the law or at equity permits this court to conduct such an inquiry" in refusing to consider set off); *Stoneledge*, 2008 WL 4905983 at *11 ("[W]hen a 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") (quoting *Smith v. Widener*, 397 S.C. 468, 473, 724 S.E.2d 188, 190 (Ct. App. 2012).)

Fourth, the statement that Builders submitted the issue of allocation to the jury and consented to set off in trial is incorrect. First, it is incorrect as a matter of law because set off is not a jury issue. *Broome v. Watts*, 319 S.C. 337, 342, 461 S.E.2d 46, 49 (1998)(set off "not a matter properly triable to the jury"). Further, it is clearly erroneous as a matter of fact and law because Builders could not have tried set off to the jury. It did not have the amounts of the settlements to present to the jury. They were not made available to Builders prior to

trial. Rather, Builders did nothing more than argue that it was not responsible for any of the damages at all and sought to zero out the damages as to it by demonstrating that others were the cause of the damages and that the settling parties had paid something as evidence they acknowledged responsibility. Alternatively, Builders argued and attempted to prove that as little of the damage as possible was caused by its windows as opposed to acts of others such as improper window opening design, improper window installation, improper sealing or flashing around the windows, improper maintenance of the windows after installation, improper stucco application around the windows, and other such defective products or work that contributed to water intrusion and damage to property around the windows and necessitated repairs to something other than the windows, themselves. Nothing in Builder's presentation conceded that it was responsible for any of the loss and that specific amounts paid by others should reduce some specific amount that should be awarded against it.

McCurry v. Keith, 352 S.C. 441, 481 S.E.2d 166 (Ct. App. 1997), cited by the trial court, is not to the contrary. In that case, the set off issue was based on a statute regarding gambling losses that allowed only net losses as damages, such that "set off" of winnings against losses was inherent in the nature of the claim and both defendant and plaintiff gave specific testimony as to specific winnings that were then used to compute the final loss pursuant to the statute.

For these same reasons, Builders' *in limine* motion is irrelevant to the question of whether set off is appropriate post-trial and verdict. There was no ruling so limiting damages. Plaintiffs expressly argued to the jury that the fact that others may have contributed to the damages did not relieve Builders from responsibility for all the damages since its window were a proximate concurring cause of some part of the damage. (Trial Tr. pp. 670-72.) At best,

Plaintiffs argued that the jury might consider deducting the cost of nine inches of stucco repairs around the windows, but otherwise should hold Builders responsible for the entire damage. (Trial Tr. pp. 676-77.)

By contrast, as discussed above, at trial Builders attempted to show that its windows were sound at installation, were as sound as ten year old windows under similar circumstances would be, that all damages were the responsibility of others, and the damages evidence presented indicated that water intrusion above, around and below the windows resulted from multiple sources, including bad architectural design, damage to the windows by the installers, improper window installation, poor stucco installation, and other faulty construction. Because the settlements with other parties were, in part, for the same causes of action and involved common damages, set off should be allowed in this case.

5. Part V of the trial court's order incorrectly holds that a special verdict form is required in this matter to apply set off.

As Part V of the order initially notes, set off against a judgment must be from a settlement for the same claim, citing *Riley v. Ford Motor Co.*, 414 S.C. 185, 196, 777 S.E.2d 824, 830 (2015). In this construction defect, products liability matter, all three theories of liability were asserted against Builders and some of the co-defendants. Some of the codefendants were sued on the basis of strict liability or breach of warranty, but not necessarily both. All codefendants settled each theory of liability asserted against them, including claims for strict liability and breach of warranty. Nothing in any of the settlement agreements with other defendants attempts to allocate settlement to any specific claim or any specific type of damage.

As to the strict liability claim, Plaintiffs sought recovery from Builders, BASF Corporation ("BASF"), TAMKO Building Products ("TAMKO"), and Raymond Building Supply Corporation d/b/a Energy Saving Products of Florida, Inc. a/k/a Energy Savings Products of Florida, a division of Raymond Building Supply Corp. ("ESP"), for the same claimed injury for which the jury entered the verdict against Builders, namely "repeated water intrusion into and damage to One Belle Hall and other building deficiencies." (*See* 3rd Amended Compl. ¶ 127.) Plaintiffs claimed the four defendants were jointly and severally "liable to Plaintiffs under the doctrine of strict liability" for this shared injury. (*Id.*, ¶ 131.)

Plaintiffs also sought recovery for the same injury from Builders and all co-defendants on a breach of express and implied warranties cause of action. Plaintiffs set forth the same injury against each—"Defendants have breached their warranties by designing, constructing, and/or repairing One Belle Hall in a defective manner . . ." (*Id.*, ¶ 117.) Plaintiffs aggregated damages from that same injury against all defendants, jointly and severally. (*Id.* ¶ 118.)

Plaintiffs received a judgment against Builders only on their claims for strict liability and breach of warranty. (Verdict.) As noted above as to Part 2 of the order, *supra*, pp. 14 - 20, the damages for these two product liability theories are the same. There is no sense in which the damages for one of these claims differs from the other since all such damages emanate from the alleged defective products and conduct of the defendants in combination; therefore, there is no basis for claiming an allocation of damages between the two theories of liability leading to the singular judgment for which Plaintiffs expressly advocated. (Trial Tr. p. 676-77.)

Given these facts, Builders is entitled to set off. A court should examine the settlements, which arguable resolved, in some cases, a different claim (negligence) or involved wholly unrelated damages, for instance, replacement of balconies. "[W]hen a 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 two claims." *Smith v. Widener*, 397 S.C. 468, 473, 724 S.E.2d 188, 190 (Ct. App. 2012).

That is the exact approach taken in this Court's *Stoneledge* decision. After deciding what part of the settlements should be allocated against the judgment in this case because they involve, in whole or in part, the same causes of action and same general injuries, the court should deduct that amount from the judgment in this case. As discussed and applied in *Stoneledge*, 2018 WL 4905883 at *11-12, *Hawkins v. Pathology Assocs. of Greenville, P.A.*, 330 S.C. 92, 498 S.E.2d 395 (Ct. App. 1998) is not to the contrary. In that case, as stated by the Court of Appeals, the issue was whether "the Georgia wrongful death statute ... constitutes the same cause of action as the South Carolina Wrongful Death Act." *Id.* at 113, 489 S.E.2d at 407. The court concluded they were not, even though they had one common element of damage. *Id.* at 114, 489 S.E.2d at 407. Given that conclusion, set off was inapplicable as a matter of South Carolina law. In this case, the two product liability theories upon which Plaintiffs prevailed involve the same elements of proof and the same damages.

The *Hawkins* court's subsequent discussion about allocating the South Carolina judgment is *dicta*, the court merely illustrating that there was no basis for the trial court's conclusion that there had been a double recovery in the case that would lead to an inequitable result. *Id.* at 114-15, 489 S.E.2d at 407. This understanding of *Hawkins* is consistent with

South Carolina set off cases noting that a claim for wrongful death and a claim for survival are not the same cause of action because of the different elements of damages. *See Ward v. Epting*, 290 S.C. 547, 351 S.E.2d 867 (Ct. App. 1986) (cited in *Hawkins*).

Contrary to the trial court's statement in the first paragraph of page 15 of the order, there is no need to speculate as to the verdict or judgment in this case because the damages for both causes of action are the same. *See* S.C. Code Ann.§ 36-2-715 (damages for breach of warranty to include "injury to person or property proximately resulting from any breach of warranty"); *Rife*, 363 S.C. at 216, 609 S.E.2d at 569 ("A plaintiff suing under a products liability cause of action can recover all damages that were proximately caused by the defendant's placing an unreasonably dangerous product into the stream of commerce"). Plaintiffs admitted they were the same in closing argument. (Trial Tr. pp. 676-77.)

Plaintiffs alleged the same injury against the settling co-defendants and Builders on the same claims. Plaintiffs noted the common factual scenario of "repeated water intrusion" into One Belle Hall in their pleadings. (3rd Amend. Compl. ¶¶ 78, 84, 127.) While some of the damages claimed as to some of the settling parties may differ, some, as noted above, are coextensive with the damages asserted against Builders. The fact that Plaintiffs pled and settled claims with potentially different scope of damages against the settling co-defendants and Builders does not take this matter outside the scope of Section 15-38-50 or equitable set off as applied in South Carolina.

Stoneledge, 2018 WL 4905883 at *11-12 and *Smith v. Widener*, 397 S.C. at 473, 724 S.E.2d at 190 expressly hold, contrary to the last paragraph of Part V of the order, that where the requirements of set off are met, as here, "the circuit court must make the factual determination of how to allocate the settlement" between covered and uncovered claims. *See*

also Huck v. Oakland Wings, LLC, 422 S.C. 430, 437-38, 813 S.E.2d 288, 291-92 (Ct. App. 2018) (reversing trial court order stating that it could not evaluate the 'fairness' or 'reasonableness' of such settlement agreements or to reallocate the settlements, assuming there is anything to reallocate," and "[n]othing in the law or at equity permits this court to conduct such an inquiry" in refusing to consider set off). Because the settlements in this case involved, in whole or in part, the same claims and common damages, the order of the trial court should be reversed and the matter remanded to undertake the analysis required by *Stoneledge*, *Smith,* and *Huck* and alter and amend its holding to the contrary.

6. Part VI of the trial court's order conflicts with controlling precedent and misstates the facts regarding the claims asserted in the case.

The first paragraph of Part VI contains three correct summary statements about the law of set off. The second paragraph misstates the nature of the case. This was not a "window damage case." Rather, it was a case about allegedly defectively designed or manufactured windows that leaked, allegedly needed to be replaced, and allegedly caused damage to other property besides the windows, themselves, due to water intrusion into the buildings in which the windows had been installed. The exact same injuries, or parts of them, were asserted against the other parties to the suit under one or both of the two product liability theories upon which Plaintiffs prevailed against Builders.

As to the strict liability claim and warranty claim asserted in the Third Amended Complaint, Plaintiffs sought joint and several damages for common injuries as noted in the preceding sections. All such claims were settled before trial. As to some of the parties, such as the TCR Defendants to which Builders sold the windows, and ESP, the window manufacturer, the liability of Builders was also arguably the liability of those entities as sellers

or builders within the chain leading to the sale of the property to Plaintiffs under any of the theories asserted by Plaintiffs in their complaint.

Because the settlements resolved claims for the same injuries based upon the same claims, the trial court had, contrary to its holding in Part V, to examine the settlements and set off all or some part of those settlements against the judgment in this case. This Court, in *Stoneledge*, *Huck*, *Smith v. Widener*, and *Ellis v. Oliver* specifically rejected the trial court's basic premise in the order that it is powerless to apply set off simply because some damages caused by each settling co-defendant may differ from the damages caused by Builders and the damages are unique to each defendant. In *Ellis*, plaintiff claimed that the different damages caused by each defendant established that "different injuries occurred and § 15-38-50 is inapplicable." *Ellis*, 335 S.C. at 113, 515 S.E.2d at 272. The Court rejected this different damage argument, holding that:

> [Plaintiff] confuses the concept of damages with the meaning of the word injury as used in the statute. Injury, as used in the statute, is broad enough to include all damages, including those attributable to [different claims] which result from the joint negligence of the various parties. Thus, the trial court did not err in applying § 15-38-50.

Id. The court held setoff was proper because "[plaintiff's] claims against [the settling and non-settling defendants] arose out of the same factual scenario. *Id.*

As noted earlier, "when a 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 two claims." *Smith v. Widener*, 397 S.C. at 473, 724 S.E.2d at 190.

The same rationale applies here. Plaintiffs alleged the same injury against the settling co-defendants and Builders on the same claims. While some of the damages claimed as to

some of the settling parties may differ, some, as noted above, are coextensive with the damages asserted against Builders. The fact that Plaintiffs pled and settled claims with a potentially different scope of damages with the settling co-defendants and Builders does not take this matter outside the scope of Section 15-38-50 or equitable set off. The Court should reverse the order of the trial court so that set off may be applied and the judgment amended accordingly.

7. **Builders did not contractually waive the right to set-off.**

The trial court's waiver holding in Part VII of its order is contrary to South Carolina law. In *Janasik v. Fairway Oaks Villas Horizontal Property Regime,* 307 S.C. 339, 344, 415 S.E.2d 384, 388 (1992), the South Carolina Supreme Court spelled out the necessary elements for establishing a waiver:

> A waiver is a voluntary and intentional abandonment or relinquishment of a known right. Generally, the party claiming waiver must show that the party against whom waiver is asserted possessed, at the time, actual or constructive knowledge of his rights or of all the material facts upon which they depended.

Id.

When Builders facilitated the purchase of the windows and gave the warranties at issue in this case, many years before claims were ever made by Plaintiffs, it had no idea that it would ever have a claim made against it by Plaintiffs. Even if it could reasonably foresee that some claim might be made at some time, by somebody, it would have no way of knowing, at the time that it facilitated the sale or gave the warranties that some other party participating in the construction of a structure where its windows might be utilized would be sued, might be concurrently responsible for damage to the structure, might settle, and that Builders might have a right of set off against that party because the settlement by that party compensated the

Plaintiffs, in whole or in part, for damage also covered by the warranty. None of the elements of waiver are met in this case. The trial court's order should be reversed accordingly and remanded to apply set off.

8. The trial court's general, summary observations in Part VIII of the opinion are addressed above.

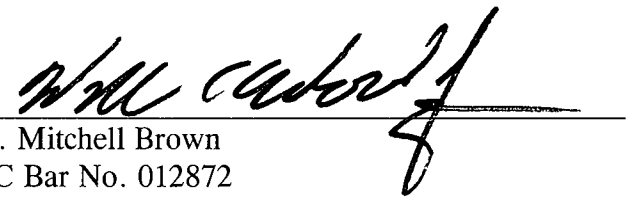
In the last part of the order, the trial court recapitulates several of its prior holdings to make the general assertion that Builders' arguments are unpersuasive. The issue of whether set off is allowed as to a claim based on warranty, express or implied, the applicability of set-off to judgments on a verdict like the verdict in this case, the role of the pleadings in determining the right to set off, and the availability of set off where a plaintiff fails to allocate settlements to specific causes of action is addressed above. For those reasons, the Court should reverse the order and judgment of the trial court so that settlement amounts for the same claims and injury received from other defendants can be set off against the judgment against Builders in this case.

CONCLUSION

The trial court's order is incorrect factually and legally as set forth above. The Court should reverse the trial court's order and judgment so settlement amounts for the same claims and injury received from other defendants can be set off against the judgment against Builders either by this Court or the circuit court upon remand.

Respectfully submitted,

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 

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November 30, 2018

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Diane Goodstein, Circuit Court Judge

Case No. 2012-CP-10-7594

One Belle Hall Property Owners Association, Inc., and Marvin T. Meek and Francis E. Hill, individually and on behalf of all others similarly situated,..... Plaintiffs/ Respondents,

v.

Builders FirstSource-Southeast Group, LLC, ... Defendant/ Appellant.

PROOF OF SERVICE

I, the undersigned paralegal of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Builders FirstSource Southeast Group LLC, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified to the following address(es):

Pleadings: **Appellant's Initial Brief**
Appellant's Designation of Matter for the Record on Appeal

Counsel Served:

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November 30, 2018

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November 30, 2018

U.S. Mail
The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RE: One Bell Hall Property Owners Association Inc., et al. v. Builders FirstSource -- Southeast Group, LLC
Appellate Case No. 2018-001230
Civil Action No. 2012-CP-10-07594
Our File No. 000350/01800

Dear Ms. Kitchings:

Enclosed for filing in the above matter, the original and one copy each of Appellant's Initial Brief and Appellant's Designation of Matter for the Record on Appeal. Please file the original and return a clocked copy to me in the self-addressed stamped envelope provided.

By copy of this letter to counsel of record, we are hereby serving them with a copy of these filings.

With kind regards, I remain

Sincerely yours,

William C. Wood, Jr.

WCWJR:mws
Enclosure

cc: Justin Lucey, Esquire
Dabny Lynn, Esquire

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The Honorable Jenny Abbott Kitchings
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