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.

RESPONDENTS' MOTION TO DISMISS APPEAL

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December 5, 2018
Mount Pleasant, South Carolina

RESPONDENTS' MOTION TO DISMISS APPEAL

Pursuant to Rule 240 of the South Carolina Appellate Court Rules (SCACR), Respondents[1] hereby move this Court for an order dismissing this appeal. The grounds for this Motion are as follows:

1. This Court lacks appellate jurisdiction because Appellant[2] failed to timely serve its Notice of Appeal within 30 days after receiving the final order ending this action;

2. BFS neither moved to reconsider the final order nor appealed the Trial Court's denial of its JNOV Motion; and,

3. As such, any question raised by BFS on appeal is irrelevant because the final order cannot be challenged.

SUMMARY OF ARGUMENT

This Court should dismiss this appeal because this case is over, and this Court lacks jurisdiction to address the final order that ended it. This final order was entered on September 1, 2016 and received by BFS on September 27, 2016. This is the date BFS's thirty-day appeal clock started to run, and it continued to run until it expired on October 28, 2016. Rule 203(b)(1), SCACR. BFS did not appeal the final order by this date; rather, it waited until June 29, 2018 to serve its appeal of the order. As a result, this Court lacks appellate jurisdiction and is required to dismiss this appeal. *Canal Ins. Co. v. Caldwell*, 338 S.C. 1, 5, 524 S.E. 2d 416, 418 (Ct. App. 1999) ("Rule 203(b), SCACR, requires a party to serve his notice of appeal within thirty days after receiving

[1] Respondents, One Belle Hall Property Owners Association, Inc., and Marvin T. Meek and Francis E. Hill, individually, and on behalf of all others similarly situated, are collectively referred to as "Respondents" or "Plaintiffs".

[2] Appellant, Builders FirstSource-Southeast Group, LLC, is referred to as "Appellant" or "BFS".

written notice the entry of a final order or judgment, and failure to do so divests this court of subject matter jurisdiction and results in dismissal of the appeal.").

Because this Court lacks jurisdiction to address BFS's appeal of the final order, there's nothing left for this Court to consider. The only other orders BFS appeals relate to procedurally flawed motions that were not preserved for the Trial Court's review, much less appellate review. Even if this were not the case, the only substantive question raised by BFS, whether it is entitled to a "set-off", is immaterial because the final order (and the $2,163,493 judgment it entered against BFS) stands. *See, e.g., First Union Nat. Bank of S.C. v. Soden,* 333 S.C. 554, 566, 511 S.E.2d 372, 378 (Ct. App. 1998), *cert. denied* (June 18, 1998) (an unchallenged ruling, right or wrong, is the law of the case and precludes consideration on appeal); *Gold Kist, Inc. v. C & S Nat'l Bank*, 286 S.C. 272, 282, 333 S.E.2d 67, 73 (Ct. App. 1985) (under the two-issue rule, when a jury returns a general verdict in a case involving two or more issues, and the verdict is supported as to at least one issue, the verdict stands).

Consequently, BFS's appeal is wholly without merit and warrants dismissal in its entirety.

PERTINENT PROCEDURAL BACKGROUND

An overview of the procedural history of this action[3] establishes that BFS's Notice of Appeal is untimely:

A.) The Trial of the Underlying Case

1. This case was tried before a jury in Charleston County between August 29, 2016 and September 1, 2016.[4]

[3] This action concerns hundreds of leaky windows supplied by BFS to the One Belle Hall Condominiums ("OBH") and the substantial damage these leaky windows caused.

[4] At trial, BFS was represented by Davi Dyer who is referred to as BFS's "trial counsel". Since trial, BFS has been represented by Bill Wood and Mitch Brown who are collectively referred to as BFS's "post-trial counsel".

2. After Plaintiffs rested their case, BFS moved for a directed verdict on each of Plaintiffs' three claims,[5] all of which the Trial Court denied. (Ex. A, Tr. Trans. 482:15-485:19).[6]

3. Following the denial of its directed verdict motions, BFS indicated it had "no further motions" and proceeded with its case-in-chief. (Tr. Trans. 485:16-19).

4. After BFS put on its case, all evidence was closed and the Trial Court requested the parties proceeded with motions. (Tr. Trans. 625:3-8; 626:2-3).

5. Plaintiffs moved for a directed verdict on each of their claims, all of which the Trial Court denied. (Tr. Trans. 626:4-639:9).

6. BFS made no motions and failed to renew the directed verdict motions it previously made at the close of Plaintiffs' case. (Tr. Trans. 639:9-10).

7. Prior to handing the case to the jury, the Trial Court asked the parties to review its proposed jury charges as well as the verdict form. (Tr. Trans. 640:5-22). BFS's trial counsel "was satisfied" with the jury charges and consented to the format of the final verdict form. (Tr. Trans. 735:1-740:13).

8. On September 1, 2016, the jury returned a general verdict in favor of Plaintiffs in the amount of $2,163,493 on their breach of warranty and strict liability claims. (Tr. Trans. 743:16-744:15); (Ex. B, November 16, 2017 Order Denying BFS Motion to Compel at 2); (Ex. C, General Verdict Form).[7]

9. Before excusing the jury, the Trial Court asked the parties whether there were any matters that needed to be taken up and both parties answered in the negative. (Tr. Trans. 744:13-22); *see also* (Ex. B at 2).

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[5] Plaintiffs' three claims consisted of negligence, breach of warranty and strict liability.
[6] The portions of the Trial Transcript referenced herein are attached as Exhibit "A".
[7] The jury found that BFS was not liable in negligence.

B.) Trial Court's Denial of BFS's JNOV Motion

10. After the jury was excused, BFS made a Motion for Judgment Notwithstanding the Verdict ("JNOV Motion"). (Tr. Trans. 748:2-5); *see also* (Ex. B at 2).

11. The Trial Court denied this Motion. (Tr. Trans. 748:6-12); *see also* (Ex. B at 2).

12. BFS did not ask the Trial Court to reconsider its denial, did not present any other post-trial motions, and did not request leave of court to file post-trial motions. (Ex. B at 2).

13. After these arguments, the Trial Court and counsel discussed that setoff was not necessary since the jury had found against Plaintiffs on their negligence claim. (Ex. B at 3).

C.) BFS's Motion to Compel and Second JNOV Motion

14. On September 8, 2016, BFS filed a "Notice of Motion and Motion to Compel and Motion for Determination of Setoff" ("Motion to Compel") requesting the Trial Court to compel the production of certain settlement agreements. (*Id.*); *see also* (Ex. D, Motion to Compel at 2).

15. Despite the title of the Motion to Compel, the substance of the Motion did not request a setoff; rather, BFS informed the Trial Court that following the production of the requested documents, "BFS will move to seek a determination by the Court of the amount of setoff to be taken against the judgment awarded by the jury." (*Id.*)

16. As evidenced by the letter transmitting BFS's Motion to Compel, a courtesy copy of the Motion was not sent to the Trial Judge. (Ex. B at 3); (Ex. E, BFS Motion to Compel Letter).

17. On September 12, 2016, BFS's post-trial counsel served a Motion captioned as BFS's "Motion for Judgment, New Trial Absolute, or, in the alternative, for New Trial *Nisi Remittitur*" ("Second JNOV Motion"). (Ex. F, Second JNOV Motion).

18. In this Motion, BFS again moved for JNOV and attempted to "renew its Motion for Directed Verdict made at the close of Plaintiffs' case-in-chief and at the close of the evidence in full." (Ex. F at 1, 12).

D.) Trial Court's Final Order

19. On September 22, 2016, the Trial Court issued a Form 4 Order ("Final Order") entering judgment against BFS in the same amount the jury awarded ($2,163,493) on Plaintiffs' breach of warranty and strict liability claims. (Ex. B at 3); *see also* (Ex. G, 2016 Final Order at 1).

20. The Form 4 Order is the Final Order – it indicates "This order ends the case." (*Id.*).

21. On September 27, 2016, the parties received written notice of the Final Order. (Ex. H, Written Notice of Final Order).

22. BFS never filed a motion requesting that the Trial Court alter, amend or reconsider this Order or any other decree issued by the Court before or during trial. (Ex. B at 3).

E.) The Initial Post-Trial Hearing on BFS's Motion to Compel

23. The Trial Court's first, post-trial motion hearing occurred on November 18, 2016. (Ex. B at 3).

24. On November 16, 2016, Plaintiffs served a Memorandum Opposing BFS's Second JNOV Motion, arguing that this Motion was procedurally precluded because: (1) BFS already moved for JNOV; (2) BFS never requested ten days to file post-trial motions; and, (3) BFS failed to renew its directed verdict motions at the close of all evidence. (Ex. I, Pl. Second JNOV Motion Opp. Memo).

25. This same day, Plaintiffs also served a Memorandum Opposing BFS's Motion to Compel, arguing that the Motion was only a "compel" motion – not a "setoff" motion; and, that

the Motion was procedurally precluded because BFS did not move to reconsider the Trial Court's Final Order. (Ex. J, Pl. Motion to Compel Opp. Memo).

26. On November 17, 2016, BFS served a Memorandum Supporting its Second JNOV Motion. (Ex. K, BFS Second JNOV Motion Supp. Memo).

27. On November 18, 2016, BFS served a "Memorandum in Support of its Motion to Compel Production of Settlement Agreements and Motion for Setoff" (Ex. B at 4); (Ex. L, BFS Motion to Compel Supp. Memo).[8]

28. The "Motion for Setoff" referenced in BFS's Memorandum was never filed. (Ex. B at 4).

29. During the hearing, BFS's post-trial counsel argued the Second JNOV Motion; it was evident that BFS's post-trial counsel did not understand that BFS's trial counsel already made a JNOV Motion and that this Motion had been denied. *See, e.g.,* (Ex. M, Hr'g Trans. 4:9, 34:6-8, 37:8-9)[9] (BFS's post-trial counsel repeatedly describing its September 12, 2016 motion as one for "JNOV").[10]

30. In responding, Plaintiffs' counsel argued that BFS's Second JNOV Motion was untimely and not properly before the Court:

> We shouldn't be starting over from scratch. That's not what a JNOV—the whole JNOV motion right now is untimely. The motion was made at the close of the case and denied. The law in this state is clear, you cannot have successive JNOV motions. [BFS] cannot pull one ground out of that JNOV motion that's proper for this Court to hear today because JNOV was denied on September 1st. [A]fter [the] Form 4 order was entered, entering the jury's verdict, and the box checking this case is ended was checked, the appeal period has already run. This case has sailed. There's nothing here. . .There's no exception; there's no grounds in the DV motion.

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[8] This memorandum was hand delivered at the hearing then filed on November 21, 2016.
[9] The portions of the November 18, 2016 hearing transcript referenced herein are attached as Exhibit "M".
[10] BFS's post-trial counsel also conceded they had not reviewed (or even requested) the trial transcript. (Hr'g Trans. 34:10-16).

> There was no second DV motion. The JNOV motion has already been denied. This JNOV motion is untimely. It doesn't exist in the eyes of [the] law. This motion does not exist. And the jury was charged without objection.

(Hr'g Trans. 39:19-40:12).

31. Plaintiffs' counsel then provided relevant portions of the trial transcript which showed that: (a) BFS's JNOV Motion had been already raised and ruled upon by the Trial Court; (b) BFS failed to renew its directed verdict motions at the close of evidence; and, (c) BFS failed to request ten days leave to file post-trial motions. (Hr'g Trans. 40:13-25; 43:20-48:18).

32. In response, BFS's post-trial counsel requested the Trial Court continue the hearing so they could order and review the trial transcript in full. (Hr'g Trans. 51:1-55:25).

F.) The Continued Post-Trial Hearing

33. The continued, post-trial motion hearing occurred on April 20, 2017.

34. On April 18, 2017, BFS submitted a Supplemental Memorandum that attempted to characterize its Second JNOV Motion as one for reconsideration of the Trial Court's denial of its first JNOV Motion. (Ex. N, BFS's Second JNOV Motion Suppl. Memo at 4) ("[T]his Court should reconsider the denial of JNOV and enter judgment in favor of BFS.").

35. In this same memorandum, BFS withdrew 20 grounds initially asserted in its Second JNOV Motion as well as its New Trial, New Trial Absolute, Thirteenth Juror and New Trial Remittitur arguments in their entirety. (*Id.* at 1,4).

36. On April 20, 2017, Plaintiffs submitted a Supplemental Memorandum opposing BFS's Motion to Compel, again asserting that BFS was not entitled to any relief whatsoever because the case was over. (Ex. O, Pl. Motion to Compel Suppl. Memo).

37. At the hearing, BFS's post-trial counsel argued BFS was entitled to Plaintiffs' settlement documents and that BFS's Second JNOV Motion was not successive. Plaintiffs

reiterated their position that (1) setoff was procedurally impossible; and, (2) there was nothing left to decide as to BFS's Second JNOV Motion because this Motion mirrored BFS's first JNOV Motion which the Trial Court denied. (Ex. B at 4).

G.) Plaintiffs Produced Settlement Documents and BFS Failed to Move for Setoff

38. Following counsels' arguments, the Trial Court orally ordered Plaintiffs to produce certain settlement agreements so there would be an adequate, appellate record regardless of the Court's eventual ruling. (*Id.*)

39. Plaintiffs provided the settlement agreements to BFS.

40. BFS never filed the setoff motion it indicated it would file after receiving these agreements. (*Id.*)

H.) Trial Court's Denial of BFS's Motion to Compel and Subsequent Appeal

41. On November 16, 2017, the Trial Court issued an Order denying BFS's Motion to Compel. (Ex B, 2017 Order Denying BFS's Motion to Compel, at 1-19).

42. On December 11, 2017, BFS filed its third, post-trial motion, a Motion to Reconsider the November 16, 2017 Order. (Ex. P, BFS Motion to Reconsider).

43. On June 27, 2018, the Trial Court denied BFS's final Motion. (Ex. Q, 2018 Order Denying Motion to Reconsider).

44. On June 29, 2018, BFS served its Notice of Appeal on Plaintiffs. (Ex. R, Notice of Appeal to Pl.).

45. On July 2, 2018, BFS mailed its Notice of Appeal to this Court for filing. According to this Notice, BFS appeals from the: (1) 2016 Final Order; (2) 2017 Order Denying BFS's Motion to Compel; and, (3) 2018 Order Denying BFS's Motion to Reconsider (Ex. S, Filed Notice of Appeal).

ARGUMENT

A. This Court Must Dismiss This Appeal for Lack of Jurisdiction

This Court lacks jurisdiction over this appeal because BFS's Notice of Appeal is more than 600 days late.

1. Rule 203's Thirty-Day Deadline for Serving a Notice of Appeal is a Jurisdictional Requirement

Rule 203 controls the timely filing of a Notice of Appeal and it requires an aggrieved party to serve a Notice of Appeal "within thirty (30) days after receipt of written notice of entry of the order of judgment". Rule 203(b)(1), SCACR (emphasis added). When a Notice of Appeal is not filed within this thirty-day period, this Court lacks jurisdiction to hear the appeal. *See, e.g.*, *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 14–15, 602 S.E.2d 772, 775 (2004). As the South Carolina Supreme Court has previously explained:

> The notice of appeal in a case appealed from the Court of Common Pleas must be served on all respondents within thirty days after receipt of written notice of entry of the order or judgment. . .The requirement of service of the notice of appeal is jurisdictional, *i.e.*, if a party misses the deadline, the appellate court lacks jurisdiction to consider the appeal and has no authority or discretion to "rescue" the delinquent party by extending or ignoring the deadline for service of the notice.

Id. (emphasis added) (citations omitted).[11]

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[11] *See also* Rule 205, SCACR ("Upon the service of the notice of appeal, the appellate court shall have exclusive jurisdiction over the appeal.") (emphasis added); Rule 263(b), SCACR ("The time prescribed. . .for performing any act except the time for serving the notice of appeal under Rules 203 and 243 may be extended or shortened by the appellate court. . .) (emphasis added); *Hill v. S.C. Dep't of Health & Envtl. Control*, 389 S.C. 1, 21, 698 S.E.2d 612, 623 (2010) ("The service of a notice of appeal is a jurisdictional requirement, and the time for service may not be extended by this Court.") (emphasis added); *USAA Prop. & Cas. Ins. Co. v. Clegg*, 377 S.C. 643, 651, 661 S.E.2d 791, 795 (2008) (noting the requirement of service of the notice of appeal is jurisdictional); *Sadisco of Greenville, Inc. v. Greenville Cty. Bd. of Zoning Appeals*, 340 S.C. 57, 59, 530 S.E.2d 383, 384 (2000) (per curiam) ("This Court has consistently stated that service of the Notice of Appeal is a jurisdictional requirement, and this Court has no authority to extend or expand the time in which the Notice of Appeal must be served."); *Wells Fargo Bank, N.A. v. Fallon Properties S.C., LLC*, 413 S.C. 642, 646, 776 S.E.2d 575, 577 (Ct. App. 2015)

2. BFS's Notice of Appeal was Served Outside of Rule 203's Thirty-Day Deadline

BFS did not meet the service deadline. The Trial Court entered a Final Order ending this case on September 22, 2016 ("Final Order"). (Ex. B at 3, 5) ("The Court's Form 4 Order, issued on September 22, 2016, was the Final Order ending this case."); (Ex. G at 1) ("This order ends the case."); *see also Cheap-O's Truck Stop v. Cloyd*, 350 S.C. 596, 605, 567 S.E.2d 514, 518 (Ct. App. 2002) (finding a Form 4 Order was the final order because a line was drawn through the area for additional writing by the trial judge which indicated no further action was required).

BFS received written notice of this Final Order on September 27, 2016. (Ex. H). This is the date when BFS's appeal clock started running under Rule 203. To stop the clock, BFS was required to either move for the reconsideration of the Final Order within ten days after receipt (by October 10, 2016) or appeal from the Final Order within thirty days after receipt (by October 28, 2016). BFS did neither.

3. BFS Did Not Move to Reconsider the Final Order Within 10 Days

BFS's 10-day reconsideration window began running on Wednesday, September 28, 2016 and ended on Saturday, October 8, 2016. This means BFS had no later than Monday, October 10,

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("Receipt of written notice is the critical event under Rule 203(b)(1), and Appellants received written notice on December 15, 2014—the date of the e-mail. Appellants failed to timely serve the notice of appeal 'within thirty. . .days after receipt of written notice.' Therefore, this court lacks appellate jurisdiction, and it's required to dismiss this appeal.") (emphasis added); *Canal Ins. Co. v. Caldwell*, 338 S.C. 1, 5, 524 S.E. 2d 416, 418 (Ct. App. 1999) ("Rule 203(b), SCACR, requires a party to serve his notice of appeal within thirty days after receiving written notice the entry of a final order or judgment, and failure to do so divests this court of subject matter jurisdiction and results in dismissal of the appeal") (emphasis added); Jean Hoefer Toal et al., *Appellate Practice in South Carolina* 122 (3d ed. 2016) ("If a party fails to [timely serve the notice of appeal], the appellate court has no authority or discretion to rescue the delinquent party by extending or ignoring the deadline because the appellate court lacks jurisdiction over the matter.") (emphasis added) (collecting cases).

2016 to move for reconsideration of the Final Order. Rule 59(e), SCRCP. BFS never made such a Motion as found by the Trial Court:

> BFS had ten days from receipt of the September 22, 2016 Order [the Final Order] to request this Court alter, amend, or reconsider its judgment. SCRCP, Rule 59(e) ("A motion to alter or amend the judgment shall be served not later than 10 days after receipt of written notice of entry of the order."). Notice of entry of the Form 4 Order was served by the Clerk of Court on all Counsel of Record on September 27, 2016. BFS never filed a Rule 59(e) motion requesting this Court alter, amend or reconsider [the Final Order] ending this matter. This Court has lost jurisdiction over this case.

(Ex. B at 5-6) (emphasis added) *citing Pitman v. Republic Leasing Co, Inc.*, 351 S.C. 429, 432-33, 570 S.E.2d 187, 189-90 (Ct. App. 2004) ("[O]ur established case law [is] that a trial judge loses jurisdiction over a case when the time to file post-trial motions has elapsed.") (emphasis added); *see also Great Games, Inc. v. S.C. Dep't of Revenue,* 339 S.C. 79, 85, 529 S.E.2d 6, 9 (2000) (where a trial court does not explicitly rule on an issue, and appellant makes no Rule 59(e) Motion, the appellate court may not address the issue); *Zivitz v. Greenberg,* 279 F.3d 536, 539 (7th Cir. 2002) (noting a Rule 59(e) motion to alter or amend the judgment is an appropriate vehicle to request a setoff of a jury verdict).

4. BFS Did Not Appeal the Final Order Within Thirty Days

BFS's 30-day appeal window began running on Wednesday, September 28, 2016, and ended on Friday, October 28, 2016. BFS did not appeal the Final Order by this date; rather, BFS waited almost two years before serving its Notice of Appeal on June 29, 2018. *Compare* (Ex. H) (showing the parties were notified of the Final Order on September 27, 2016) *with* (Ex. S) (showing that BFS did not appeal the Final Order until June 29, 2018). Due to this delay, BFS cannot challenge, and this Court cannot consider, the Final Order (including the judgment it entered against BFS) on appeal. *See, e.g.,* Rule 203(b)(1), SCACR; Rule 263, SCACR.

B.) BFS's Failure to Timely Appeal the Final Order Bars Appellate Consideration in its Entirety

This proves fatal to BFS's entire appeal because no argument BFS asserts can change the fact that the $2,163,493 judgment ("the Judgment") stands.

1. The Judgment Stands Because it's the Law of the Case

First, the Judgment stands because it is the law of the case. Under the law of the case doctrine, an unappealed ruling cannot be changed on appeal. *Atlantic Coast Buildings and Contractors, LLC v. Lewis*, 308 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) ("While [a trial court's] calculation of damages may have been incorrect, an unappealed ruling, right or wrong, is the law of the case.") (emphasis added); *Jasdip Properties SC, LLC v. Richardson*, 395 S.C. 633, 641, 720 S.E.2d 485, 489 (Ct. App. 2011) ("The unappealed finding of the jury. . .right or wrong, is the law of the case.") (emphasis added); *First Union Nat. Bank of S.C. v. Soden,* 333 S.C. 554, 566, 511 S.E.2d 372, 378 (Ct. App. 1998), *cert. denied* (June 18, 1998) (an unchallenged ruling "precludes consideration on appeal") (emphasis added).

Here, there were only two "judgment rulings": (1) the Final Order entering the Judgment; and, (2) the Trial Court's oral denial of BFS's September 1, 2016 JNOV Motion. BFS did not timely appeal the Final Order and does not appeal the Trial Court's oral denial of its JNOV Motion. (Ex. S) (BFS'S Notice of Appeal omits the Trial Court's oral denial of its JNOV Motion from the orders BFS appeals). As such, the Judgment stands as the law of the case.

2. The Judgment Stands Under the Two-Issue Rule

Second, the Judgment stands under the two-issue rule because the jury entered the same $2,163,493 verdict against BFS on two causes of action – strict liability and breach of warranty. *See Gold Kist, Inc. v. C & S Nat'l Bank*, 286 S.C. 272, 282, 333 S.E.2d 67, 73 (Ct. App. 1985) (under the two-issue rule, when a jury returns a general verdict in a case involving two or more

issues, and the verdict is supported as to at least one issue, the verdict stands). Breach of express warranty sounds in contract,[12] and is not subject to setoff under the joint tortfeasor statute. (Ex. D at 2); *Atkinson v. Orkin Exterminating Co.*, 97-CP-10-775 (S.C. Ct. Com. Pl. June 7, 2007) (holding the defendant was not entitled to setoff on an action sounding in contract) *aff'd*, 361 S.C. 156, 604 S.E.2d 385 (2004) (finding the defendant was not entitled to a setoff because the case involved duties arising out of two independent contracts).[13] Because setoff is not applicable to breach of express warranty verdicts, and the jury here returned such a verdict against BFS, the total damages the jury awarded (and the Trial Court also entered) stands regardless of whether setoff is applicable to the jury's strict liability verdict.

3. BFS's Other Post-Trial Motions Do Not Save its Appeal

BFS's other post-trial motions did not toll BFS's time to appeal the Final Order entering the Judgment.

1. BFS's Motion to Compel Did Not Toll BFS's Appeal Deadline

BFS's Motion to Compel did not toll its time to appeal the Final Order or otherwise challenge the Judgment because it sought only to compel settlement documents:

> Plaintiff has reached settlement with all co-defendants except for BFS in exchange for releases or covenants not to execute. BFS is not in possession of the settlement terms or documents related thereto and moves before the Court to compel the

[12] A seller's express warranty sounds in contract. S.C. Code § 36-2-313 (1976) ("Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise."); *Herring v. Home Depot, Inc.*, 350 S.C. 373, 379, 565 S.E.2d 773, 776 (Ct. App. 2002) (In a products defect case, "[b]reach of warranty is an action affirming the contract.").

[13] *See also Hartford Ins. Co. of Midwest v. Phillip Ins. Agency Inc.*, No. CIV06CV00043-REB-MEH, 2007 WL 601974, at *2 (D. Colo. Feb. 22, 2007) (a party found liable for breach of contract is not a joint tortfeasor); *Sterbenz v. Anderson*, No. 8:11-CV-1159-T-33TBM, 2013 WL 1278160, at *7–8 (M.D. Fla. Mar. 28, 2013) (Florida's contribution among joint tortfeasors setoff statute does not apply to contract based actions); *Guang Dong Light Headgear Factory Co. v. ACI Int'l, Inc.*, No. 03-4165-JAR, 2008 WL 1924948, at *5 (D. Kan. Apr. 28, 2008) (the one satisfaction (setoff) rule does not apply to claims brought in contract).

> production of [these documents]. Thereafter, pursuant to S.C. Code § 15-38-50, BFS will move to seek a determination by the Court of the amount of setoff to be taken against the judgment awarded by the jury.

(Ex. D at 2) (emphasis added); *see also* (Ex. B at 3).

BFS has not moved for setoff since it received these settlement agreements so no "setoff motion" exists. (Ex. B at 4) (finding "[BFS] has possessed the settlement agreements for some time, [but] the indicated subsequent setoff motion has not been filed and no further briefing has been received from [BFS] as to its entitlement to a setoff"). There is only this Motion to Compel which: (a) the Trial Judge was not copied on;[14] (b) does not reference "Rule 50", "Rule 59", "alter", "amend" or "reconsideration";[15] (c) does not indicate that BFS will move for any sort of "equitable" relief;[16] and, (d) does not challenge the Final Order.[17] In the end, the Trial Court was left with deciding a Motion to Compel settlement documents that were irrelevant because BFS failed to properly challenge the Final Order, divesting both the Trial Court's and this Court's jurisdiction over this matter. (*Id.*).

2. BFS's Second JNOV Motion Did Not Toll BFS's Appeal Deadline

BFS's Second JNOV Motion "is a nullity in the eyes of the law" that also did not toll BFS's time to appeal the Final Order. (Ex B. at 6, n. 12); (Ex. F at 1-12). This is the case because BFS

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[14] *See* (Ex. B at 3); (Ex. D at 1); *see also S.C. Self Storage Assoc. v. City of Forest Acres*, No. 2007-CP-40-316, 2010 WL 9499363, S.C. Ct. Com. Pl. (June 16, 2010) (J. Michelle Childs) (Failure to serve the trial judge with a copy of a Motion to Alter or Amend within 10 days, as stated in Rule 59(g), procedurally precludes the Motion; Motion overruled on other or additional grounds).

[15] *See* (Ex. P at 2-3) (BFS claiming that its Motion to Compel was timely under Rule 50 and Rule 59 when this Motion was not made under these rules and does not qualify to be made under these rules since its neither a new trial or JNOV motion).

[16] *See* (Ex. P at 4) (BFS referencing "equitable" setoff even though BFS's Motion to Compel indicated that it would later move for setoff only under S.C. Code § 15-38-50).

[17] *See* (Ex. P at 3) *citing Ellis v. Oliver,* 335 S.C. 106, 515 S.E.2d 268 (Ct. App. 1999) (BFS relying on *Ellis* for its proposition that its non-existent setoff motion was timely made but ignoring the fact that its untimely challenge of the Final Order precludes any such motion).

already moved for JNOV and the Trial Court already denied BFS's first JNOV Motion. (Tr. Trans. 748:2-12). BFS does not appeal this denial and did not file a Rule 59(e) Motion asking the Trial Court to reconsider any aspect of this denial. (Ex. F at 1-12); *see also Elam v. SCDOT*, 361 S.C. 9, 21, 602 S.E.2d 772, 778 (2004) (finding a Rule 59(e) Motion is the proper motion to follow a party's oral JNOV trial motion).

Rather, without requesting leave of Court, BFS filed a Second JNOV Motion requesting this Court again rule on issues already ruled upon and rule on issues never raised. (Ex. F at 1-12). To be clear, BFS's Second JNOV Motion:

- Expressly moves the Court for "(1) JNOV; (2) A New Trial Absolute; and (3) New Trial Nisi Remittur." (Ex. F, at 1);[18]
- Attempts to renew the directed verdict motion which was never made "at the close of the evidence in full." (Ex. F, at 1);
- Argues that "BFS is entitled to JNOV" without mention of the denial of BFS's first JNOV Motion. (Ex. F at 2-6);
- Indicates that "if the Trial Court denies BFS's JNOV Motion," BFS moves for a New Trial Absolute as its first alternative. (Ex. F at 6, 10);
- Claims that "if the Trial Court denies both BFS's JNOV Motion and New Trial Absolute Motion, BFS moves for a New Trial Remittitur as its last alternative. (Ex. F at 11); and,
- Concludes without mentioning the words "alter," "amend", or "reconsideration" anywhere throughout its 12 pages. (Ex. F. at 1-12).

South Carolina Courts are clear that successive JNOV Motions such as this are improper. In *Quality Trailer*, for example, our Supreme Court confronted a similar situation involving successive JNOV Motions. *Quality Trailer Products, Inc. v. CSL Equipment Co., Inc.*, 349 S.C. 216, 562 S.E.2d 615 (2002). *Quality Trailer* involved a dispute among trucking companies

[18] BFS later withdrew these New Trial motions in full as well as twenty of the grounds it initially asserted in support of its Second JNOV Motion. (Ex. N).

wherein, following trial, the jury found against defendant trucking company ("I-Corp") on plaintiff trucking company's ("Quality Trailer") promissory estoppel and successor liability claims.[19] *Id.* at 218, 562 S.E.2d 615. Following the jury's verdict, I-Corp made a timely, post-trial motion for JNOV and a new trial ("First Motion") which the Court denied. *Id.* I-Corp later filed a Second Motion substantively identical to its First Motion, only altering "form" to make the Second Motion appear as if it were a Rule 59(e) Motion.[20] *Id.* at 218, 562 S.E.2d 615-16. The trial court, recognizing the duplicity between the two motions, denied the Second Motion. *Id.* On appeal, our Supreme Court affirmed the trial court, finding:

> Despite its caption, I Corp.'s second motion was not a Rule 59(e), SCRCP, motion. The motion did not ask the trial court to rule on an issue presented but not ruled upon in any previous motion. . . .Notwithstanding its caption, the second motion did not ask for relief available pursuant to Rule 60, SCRCP. Rule 60 allows a motion for relief from the judgment based on a number of specific grounds, including clerical mistake, other mistake, inadvertence, excusable neglect, newly discovered evidence, and fraud. The second motion raised none of these grounds. . . . I Corp. argues on appeal that the second motion was required to preserve issues raised, but not ruled upon, in the trial court's order denying JNOV and new trial. The second motion did not, however, identify a single issue raised but not ruled upon. . .The trial court's denial of the JNOV and new trial motions was a ruling on all issues raised, and preserved for appellate review all issues raised therein.

Id. at 220-21, 562 S.E.2d 617-18 (emphasis added); *see also Elam,* 361 S.C. at 21, 602 S.E.2d at 778 ("affirming principles set forth in *Coward Hund, Quality Trailer,* and *Collins Music*" and noting "[w]e view the use of oral or written JNOV/new trial motions, followed by an initial Rule

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[19] During trial, I-Corp moved for directed verdicts against each of Quality Trailer's three claims (violation of bulk transfers act, promissory estoppel and successor liability), one of which was granted (bulk transfers act) and two of which were not (promissory estoppel and successor liability).

[20] I-Corp captioned its Second Motion as a motion to "Alter, Amend or Reconsider Judgment and Findings Denying Defendant's Motion for [JNOV] and Motion for New Trial" ("Second Motion"). The caption of the Second Motion indicated it was made pursuant to Rules 52, 59 and 60, SCRCP, and the relief requested was tailored to match; however, in all other aspects, I-Corp's Second Motion duplicated its First Motion. Unlike I-Corp, BFS's Second JNOV Motion is not, in form or substance, a Rule 59(e) Motion. (Ex. F at 1-12).

59(e) motion, as part and parcel of a party's 'single bite at the apple' in presenting his case.") (emphasis added); *Collins Music Co. v. IGT,* 353 S.C. 559, 579 S.E.2d 524 (Ct. App. 2002) (finding written post-trial motion, which followed post-trial motion made at the end of the trial, was an improper successive motion); *Coward Hund Construction Company v. Ball Corporation,* 336 S.C. 1, 518 S.E.2d 56 (Ct. App. 1999) (finding post-trial motion successive because it "did not challenge a new ruling") (emphasis added).[21]

Quality Trailer, and its progeny, "clearly stand for the proposition that a successive post-trial motion" is only proper in a limited context – it must arise "as a result of an order following an initial post-trial motion that alters or amends the judgment." *Collins,* 353 S.C. at 564, 579 S.E.2d at 526 (emphasis added); *Coward Hund*, 336 S.C. at 3, 518 S.E.2d at 58 ("A second motion. . .is appropriate only if it challenges something that was altered from the original judgment as a result of the initial motion. . .") (emphasis added).

Here, however, there is no order altering or amending judgment. There is only the Trial Court's denial of BFS's first JNOV Motion and its Final Order entering an unaltered judgment. (Tr. Trans. 748:2-12); (Exhibit G); *see Elam*, 361 S.C. at 20, 602 S.E.2d at 788 ("An appeal may be barred due to untimely service of the notice of appeal when a party, instead of serving a notice of appeal, files a successive Rule 59(e) motion, where the trial judge's ruling on the

[21] To the extent BFS relies on the case of *Fields versus Regional Medical Center Orangeburg,* 363 S.C. 19, 609 S.E.2d 506 (2005) to somehow argue its Second JNOV Motion is not successive, Respondents note the circumstances at issue in *Fields* are distinguishable from those here because: (1) BFS did not renew its directed verdict motions whereas Fields did; (2) BFS did not request ten days to file a written JNOV Motion whereas Fields did; and, (3) BFS did not support its First JNOV Motion with any specific ground whereas Fields did. Notably, the *Fields* Court also did not find the entirety of the Second JNOV Motion at issue there proper; rather, the *Fields* Court found only certain grounds, relating to the Court's evidentiary rulings, were properly raised because only these grounds were stated in support of the original JNOV Motion. Where, like here, no specific grounds are raised in support of an initial JNOV Motion, it follows that all grounds newly raised in a subsequent JNOV motion are improper.

first Rule 59(e) motion does not result in a substantial alteration of the original judgment."); *Coward Hund,* 336 S.C. at 3–6, 518 S.E.2d at 58–59 (dismissing an appeal as untimely because a successive Rule 59(e) motion did not stay the time for filing an appeal when the court's order denying the first Rule 59(e) motion did not alter its original judgment).

3. BFS's Second JNOV Motion is Otherwise Procedurally Precluded

BFS's Second JNOV Motion is further precluded from appellate review because it was improperly made from the beginning.

a. BFS's Second JNOV Motion Did Not Follow a Directed Verdict Motion Made at the Close of All Evidence

A JNOV Motion must follow a directed verdict motion made at the close of all evidence. *See* Rule 50(b), SCRCP ("Whenever a motion for a directed verdict made at the close of all the evidence is denied. . . .[a party] may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict") (emphasis added); *RFT Mgmt. Co., LLC v. Tinsley & Adams*, L.L.P., 399 S.C. 322, 331, 732 S.E.2d 166, 170 (2012) *quoting Wright v. Craft,* 372 S.C. 1, 20, 640 S.E.2d 486, 496 (Ct. App. 2006) ("When a party fails to renew a motion for a directed verdict at the close of all evidence, he waives his right to move for JNOV.") (emphasis added); *State v. Bailey,* 368 S.C. 39, 43, 626 S.E.2d 898, 900 (Ct. App. 2006) ("If a defendant presents evidence after the denial of his motion for a directed verdict at the close of the [plaintiff's] case, he must make another motion for a directed verdict at the close of all evidence in order to appeal the sufficiency of the evidence.") (emphasis added).

When a defendant fails to move for directed verdict at the close of all evidence, appellate courts are precluded from reviewing both (1) the denial of prior directed verdict motions; and, (2) any subsequent JNOV Motion. This Court, in *Wright versus Craft*, explained as follows:

> Initially, we address several procedural matters, noting that a number of Craft's issues on appeal are not preserved for our review. When a defendant moves for a directed verdict. . .at the close of the plaintiff's case, he must renew that motion at the close of all evidence. . .Otherwise, this court is precluded from reviewing the denial of the motion on appeal. . .Craft moved for a directed verdict at the close of Wright's case but failed to renew the motion after concluding his presentation of evidence. Consequently, the denial of Craft's motion is not preserved for our review. Concomitantly, a motion for JNOV is a renewal of a directed verdict motion. When a party fails to renew a motion for a directed verdict at the close of all evidence, he waives his right to move for JNOV. Because Craft did not renew his motion for a directed verdict at the close of all evidence, there is no JNOV motion to review.

Wright, 372 S.C. at 20, 640 S.E.2d at 496 (emphasis added) (citations omitted).

Here, like in *Wright*, BFS moved for directed verdict at the close of Plaintiffs' case, but did not renew its motion at the close of all the evidence. *Compare* (Tr. Trans. 482:15-485:19) *with* (Tr. Trans. 639:9-10). In fact, the Trial Court asked BFS if it had any motions at the close of the evidence, and BFS responded with an unequivocal "No." (Tr. Trans. 639:9-10). BFS's failure to renew its directed verdict motions at the close of all evidence procedurally bars this Court from considering BFS's Second JNOV Motion. *Wright*, 372 S.C. at 20, 640 S.E.2d at 496.

b. BFS Did Not Request Ten Days to File its Second JNOV Motion

A party must also request ten days to file post-trial JNOV Motions. *See, e.g.,* Rule 50(e), SCRCP ("The [JNOV Motion] shall be made promptly after the jury is discharged, or in the discretion of the court not later than 10 days thereafter") (emphasis added); Rule 59(b), SCRCP ("The motion for a new trial shall be made promptly after the jury is discharged, or in the discretion of the court not later than 10 days thereafter.") (emphasis added);[22] *Boone v. Goodwin*, 314 S.C.

[22] The Official Notes accompanying the 1986 Amendment to Rule 59 further clarify this point: "In jury trials, post-trial motions are made promptly at the end of the trial, or at that time the court, upon motion, may grant an additional ten days to make them." (emphasis added).

374, 444 S.E.2d 524 (1994) (noting "a request to file post-trial motions must be made promptly after the jury is dismissed") (emphasis added).

Here, BFS made one post-trial motion (its first JNOV Motion) at the end of trial and did not request additional time to file any other post-trial motions. (Tr. Trans. 748:2-12). Because BFS did not request leave to its file its Second JNOV Motion as required by applicable court rules, this Motion is improper and not preserved for appellate consideration. Rules 50, 59, SCRCP.

CONCLUSION

In sum, this Court should dismiss BFS's appeal in its entirety because BFS failed to timely appeal the Final Order ending this action; and, BFS never moved to reconsider the Final Order. As such, any question raised by BFS on appeal is irrelevant because the Final Order cannot be challenged.

JUSTIN O'TOOLE LUCEY, P.A.

By: _____

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December 5, 2018
Mount Pleasant, South Carolina

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.

PROOF OF SERVICE

The undersigned hereby certifies that on this day (s)he served a true copy of the within and foregoing **Respondents' Motion to Dismiss** upon all parties to this matter by depositing the same in the U.S. Mail, proper prepaid postage, and addressed to counsel of record as follows:

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December 6, 2018

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

Re: One Belle Hall Property Owners Association, Inc., and Marvin T. Meek and Francis E. Hill, individually and on behalf of all others similarly situated vs. Builders FirstSource-Southeast Group, LLC
Appellate Case No.: 2018-001230

Dear Ms. Kitchings:

Please find enclosed for filing the original and seven (7) copies of Respondents' Motion to Dismiss Appeal in the above-referenced matter. Please file the original and return one clocked-in copy to me in the self-addressed, stamped envelope provided for your convenience. Also enclosed is our firm's check in the amount of $50.00 for the filing fee.

By copy of this letter, I am hereby serving counsel of record with a copy of the same.

With kindest regards, I am

Sincerely,

Annette M. Mixson
Paralegal

:amm
Enclosures (as stated)
cc w/ encl.: C. Mitchell Brown, Esquire
William C. Wood, Jr., Esquire