EXHIBIT B
11/16/17 Order Denying Builders FirstSource-Southeast Group, LLC's September 8, 2016 Motion to Compel And Motion for Determination of Setoff

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	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,	)	**ORDER DENYING DEFENDANT, BUILDERS FIRSTSOURCE-SOUTHEAST GROUP, LLC'S SEPTEMBER 8, 2016 MOTION**
Plaintiffs,	)	
vs.	)	
Builders FirstSource – Southeast Group, LLC;	)	
Defendant.	)	

Defendant, Builders FirstSource-Southeast Group, LLC's, ("BFS"), "Notice of Motion and Motion to Compel and Motion for Determination of Setoff", filed September 8, 2016 (hereinafter "Motion") was heard by the Court at two separate hearings which occurred on November 18, 2016 and April 20, 2017.

Having reviewed the submissions of the parties and heard oral arguments, this Court finds BFS's Motion is procedurally precluded and substantively unsupported because 1) BFS never moved for a reconsideration, alteration or amendment of the Final Order entered by the Court on September 22, 2016, and this Court no longer has jurisdiction of this case; 2) BFS is not entitled to a statutory mandated setoff on the express warranty verdict, which moots other setoff issues under the two-issue rule; 3) BFS has already received a reduction in damages as contemplated both by the Act and in equity and is therefore not entitled to a double setoff; 4) BFS did not move for equitable setoff and, based on fair nature of the proceedings, BFS is not entitled to an equitable remedy; 5) BFS cannot carry its burden of showing that prior settlements were for the same cause of action and injury; 6) Plaintiffs' prior settlements were for different causes of action and injuries than those awarded by the jury; 7) BFS contractually waived its right to a setoff and, in fact,

assumed sole responsibility for damages awarded; and 8) the case was tried by the consent of the parties as a window only case so the damages are clearly divisible and there is nothing to setoff. Thus, BFS's Motion is DENIED.

BACKGROUND

This case was tried to a jury for four days between August 29 and September 1, 2016. The relevant facts for the Court's purposes are these:

1. During trial, Plaintiffs presented evidence that BFS provided an express warranty that the windows they supplied to One Belle Hall were a "quality" product and were "free from defect," and provided other contractual assurances and obligations as to the performance of the windows.
2. On September 1, 2016, the jury returned a general verdict in favor of Plaintiffs in the amount of $2,163,493 on both Plaintiffs' Breach of Warranty and Strict Liability causes of action.
3. Before excusing the jury, the Court asked the Parties whether there was any matters that needed to be taken up before the jury was excused; both parties answered in the negative. (Tr. Trans 744:13-22).
4. Following the jury being excused, BFS made a Motion for Judgment Notwithstanding the Verdict. (Tr. Trans. 748:2-5). The Court denied the Motion. (Tr. Trans. 748:6-12). BFS presented no other post-trial motions at the conclusion of trial, nor did BFS request leave of Court to file post-trial motions.

5. At the conclusion of the arguments, the Court and counsel discussed that as the jury had found against the Plaintiffs on the negligence cause of action, there would not be a need to consider setoff.

6. On September 8, 2016, BFS filed a Notice of Motion and Motion to Compel and Motion for Determination of Setoff wherein it requested the Court "to compel the production of various releases or covenants not to execute granted by Plaintiff." (BFS's Motion, Sep. 8, 2016, at 2). Notwithstanding the title of the motion, the substance of the motion did not request a setoff; rather, BFS informed the 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.*)

7. As evidenced by the letter transmitting the Sept. 8, 2016 Motion, a courtesy copy of the Motion was not transmitted to the undersigned trial Judge.

8. On September 22, 2016, this Court issued a Form 4 Order signed by the undersigned ending the case and entering judgment against BFS in the same amount the jury generally awarded ($2,163,493) on Plaintiffs' Breach of Warranty and Strict Liability claims. The Form 4 Order indicted by its terms that it was the *Final Order* as it indicated "This order ends the case." No Rule 59(e) motion was subsequently filed after the Form 4 Order was issued.

9. This Court scheduled oral arguments on the Motion for November 18, 2016.

10. On November 18, 2016, the day of the hearing, BFS served its "Memorandum in Support of its Motion to Compel Production of Settlement Agreements and Motion for Setoff."

11. The forthcoming motion for setoff referenced in the Motion to Compel has not been filed.

12. This Court again heard oral arguments on the Motion on April 20, 2017. BFS's post-trial counsel argued that they were statutorily entitled to setoff. Plaintiffs reiterated their position that BFS was not entitled to setoff in any form.

13. On April 20, 2017, this Court orally ordered Plaintiffs to produce the Settlement Agreements, regardless of the eventual ruling on the Motion, so that there would be an adequate record. Plaintiffs complied shortly thereafter.

14. Although Defendant has possessed the settlement agreements for some time, the indicated subsequent setoff motion has not been filed and no further briefing has been received from the Defendant as to its entitlement to a setoff.

I. BFS's Motion is Procedurally Precluded Because This Court Filed A Final Order Ending the Case and BFS Did Not Move to Alter, Amend or Reconsider that Order

After the jury was excused, this Court considered the applicability of setoff. For the substantive reasons discussed below, this Court eventually entered a Form 4 Order enrolling the full verdict of the jury as judgment in this case and ending the matter. As BFS never filed a motion

to alter, amend or reconsider this Court's Final Order ending this case, this Court has lost jurisdiction of this case.[1]

A. This Court's Form 4 Order Ended the Case

An Order that indicates that no further action is contemplated is a Final Order that ends the case. *Cheap-O's Truck Stop v. Cloyd*, 350 S.C. 596, 605, 567 S.E.2d 514, 518 (Ct. App. 2002) (A Form 4 Order where a diagonal line was penned through the area for additional writing by the trial judge indicated no further action was contemplated and was a final order ending the case.).

This Court's Form 4 Order, issued on September 22, 2016, was the final order ending the case and enrolling the jury's verdict.[2] The Form 4 Order expressly recites "This order ends the case"— an even clearer indication of finality than the Form 4 Order considered by the court in the *Cheap-O's Truck Stop* decision. This Court's judgment enrolling the jury verdict in favor of the Plaintiffs is the Final Order in this matter.

B. BFS Never Requested This Court Alter, Amend, or Reconsider its Order

BFS had ten days from receipt of the September 22, 2016 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 its September 22, 2016 Form 4 Order ending this matter. This Court has lost jurisdiction

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[1] While this analysis may or may not be different if BFS was entitled to a statutorily mandated verdict reduction, the Court need not reach this issue since the breach of express warranty verdict takes this verdict out of the ambit of the joint tortfeasor statute. *See infra.*

[2] This Court's Form 4 Order was entered *nunc pro tunc*. The sole purpose of *nunc pro tunc* is "to place in the record evidence of judicial action that has actually taken place." *Ex parte Strom*, 343 S.C. 527, 539 S.E.2d 699 (2000). Here, the application of *nunc pro tunc* has no effect on BFS's obligation to file a motion to alter, amend or reconsider judgment within ten days of written notice of entry of judgment.

over this case. *Pitman v. Republic Leasing Co, Inc.*, 351 S.C. 429, 432 (Ct. App. 2004) ("The established case law is that the trial judge loses jurisdiction over a case when the time to file post-trial motions has expired.").[3]

II. Breach of Express Warranty Sounds in Contract and Cannot Be Setoff Under the Joint Tortfeasor Statute

The jury's general verdict on Breach of Warranty includes a general verdict on breach of express warranty and breach of implied warranty. The language of the South Carolina Contribution Among Tortfeasors Act expressly limits the Act's applicability to "two or more persons liable *in tort* for the same injury." S.C. Code Ann. § 15-38-50 (emphasis added).[4] Because breach of express warranty sounds in contract,[5] it is not subject to the joint *tort*feasor setoff statute. *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); *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*

[3] Further, the filing of the JNOV motion on September 12, 2016 by new, post-trial counsel, as a successive JNOV motion, is a nullity in the eyes of the law and did not suspend the time for appeal or preserve the jurisdiction of this Court. *Elam v. S.C. Dept. of Trans.*, 361 S.C. 9, 16, 602 S.E.2d 772, 776 (Successive post-trial motions do not stay the time for serving notice of appeal.)

[4] These terms are clear and should be applied using their literal meanings. *Ellis v. Oliver*, 335 S.C. 106, 110, 515 S.E.2d 268, 270 (Ct. App. 1999) ("Where the terms of the statute are clear, the court must apply those terms according to their literal meaning.").

[5] A seller's express warranty sounds in contract. S.C. Code Ann. § 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.").

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).

Even if one was permitted to look behind the jury verdict, which one cannot do, the jury's express warranty verdict (and the Court's denial of JNOV) is supported by the evidence adduced at trial. At trial, Plaintiffs presented evidence that would allow the jury to determine BFS breached the express warranty it provided in the window purchase contract (Jt. Ex. 44A, para. 4(c)) (BFS expressly warranted and promised that the windows would be "free from defect in material, design and workmanship."). This warranty was transferred to the Plaintiffs both via contract and by operation of law. S.C. Code Ann. § 36-2-318 (A seller's express warranty extends to any natural person who may be expected to use, consume or be affected by the goods and whose persons or property is damaged by breach of the warranty); (Jt. Ex. 214, para. 16(d)) (Terradista sales contract containing an assignment of all warranties). The Court charged the jury with the law of both express and implied warranties.[6] The jury returned a general verdict awarding damages for Breach of Warranty, which included the contract-based breach of express warranty. Therefore, the jury's general verdict for Breach of Warranty cannot be setoff under the joint tortfeasor statute.

Under the two-issue rule, when there is a general verdict on two or more causes of action and setoff is not applicable to at least one of the causes of action, the total damages stand. *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). Therefore, it is of no moment whether the strict liability or implied warranty verdicts might be subject to set off; it would not

[6] Neither party objected to any of the jury charges as presented by this Court after the clarification of several charges at Plaintiffs' request.

affect the amount of the written warranty verdict, which is two million one hundred sixty-three thousand four hundred ninety-three dollars and zero cents ($2,163,493.00).

III. BFS Already Received a Reduction in Damages As Contemplated by the Statute and Common Law

Even if this Court were to agree with BFS's proposition that the general verdict rendered by the jury on Plaintiffs' strict liability and breach of warranty causes of action is subject to setoff either under the Act or at common law, BFS already received the benefit of the pre-trial settlements: first, by virtue of Plaintiffs' reduced claim for damages at trial, and again by the jury's further reduction reflected in the verdict amount. The relief BFS now seeks would result in a *double*, or even *triple*, setoff, which is not contemplated either by the Act or principles of equity.

Our Court of Appeals very recently issued an opinion addressing setoff in the context of a multi-defendant, construction defect case that gives guidance in this arena where there was previously very little, as the lion's share of setoff precedent in South Carolina comes from cases involving medical malpractice and automobile accidents. In *The Oaks at Rivers Edge Property Owners Ass'n, Inc. v. Daniel Island Riverside Developers, LLC*, the plaintiffs filed suit against the developer, general contractor and subcontractors involved in the construction of a thirty-six (36) unit condominium complex alleging a wide range of defects that resulted in widespread water intrusion and damages.[7] ---S.E. 2d---, No. 2014-002390, 2017 WL 3272138, at *1 (S.C. Ct. App. Aug. 2, 2017). Prior to trial, the plaintiffs settled with a number of defendants, including the window manufacturer, window installer, caulking subcontractor and framer. *Id.* at *2. The remaining defendants proceeded to a bench trial and were found jointly and severally liable for

[7] Plaintiffs alleged negligence, *inter alia*, against all defendants. *See* Complaint, *The Oaks at Rivers Edge Property Owners Ass'n, Inc., et. al v. Daniel Island Riverside Developers, LLC, et. al*, C/A No. 2009-CP-08-3916, Dec. 3, 2009, at 10.

negligence, gross negligence, and negligent misrepresentation,[8] as well separately liable for various other causes of action. The court awarded the plaintiffs $7,934,704.06 in damages for the cost of repair. *Id.* Thereafter, defendants moved for setoff. *Id.* The trial court denied the motion, and an appeal followed.

Both at the trial court level and on appeal, the defendants argued the evidence presented at trial established the damages were for items that were the responsibility of the defendants who settled before trial, and the trial court's failure to setoff the verdict by the prior settlement amounts resulted in a double recovery for the plaintiffs. *Id.* at 2-3. The plaintiffs countered, arguing principally that the defendants were not so entitled because the plaintiffs removed from their claimed damages those amounts received from the settling defendants, and thus the defendants had already received a reduction in damages as contemplated by the Act. *Id.* at *6.

In reaching its decision to affirm the trial court's denial of the motion for setoff, the Court of Appeals engaged in a comprehensive recitation of relevant setoff precedent, both in relation to common law setoff as well as that encompassed by the Act. *See id.* at 3-4.[9] Turning to the facts of the case, the Court of Appeals first noted that the trial court's order levying damages against the

[8] Therein lies a distinction between *The Oaks at Rivers Edge* and this case: unlike the defendants in *The Oaks*, here BFS was *not* found liable by the jury for negligence or gross negligence. In that regard, the plaintiffs in *The Oaks* did not argue that the Act did not apply, as Plaintiffs do here.

[9] Like our state's supreme court did in *Riley v. Ford Motor Co.*, the Court of Appeals cited with favor the following language from the Illinois Court of Appeals:

> A plaintiff who enters into a settlement with a defendant gains a position of control and acquires leverage in relation to a nonsettling defendant. This posture is reflected in the plaintiff's ability to apportion the settlement proceeds in the manner most advantageous to it. Settlements are not designed to benefit nonsettling third parties. They are instead created by the settling parties in the interests of these parties. If the position of a nonsettling defendant is worsened by the terms of a settlement, this is the consequence of a refusal to settle. A defendant who fails to bargain is not rewarded with the privilege of fashioning and ultimately extracting a benefit from the decisions of those who do.

The Oaks at Rivers Edge, 2017 WL 3272138, at *4 (quoting *Lard v. AM/FM Ohio, Inc.*, 901 N.E.2d 1006, 1019 (Ill. App. Ct. 2009).

non-settling defendants included repairs for damages "independent of those addressed by the settlement[s] [...]." *Id.* at 4. For example, while the settling subcontractors' defective products and work likely contributed to the need to remove certain portions of exterior cladding at the property, testimony at trial evidenced that the entirety of the brick and stucco, as well as compromised wood sheathing and framing, had to be repaired anyway to remedy water-related deterioration and/or building code violations. *Id.* at 4-5. This discussion highlights the unique task of distinguishing injuries in the context of a construction defect case involving water intrusion and the damages resulting therefrom; more importantly, however, the opinion in *The Oaks at Rivers Edge* removes the notion that such a task is impossible and therefore automatically requires a setoff.

Subsequently, the Court of Appeals zeroed-in on the *self-imposed*, pre-trial reduction in damages claimed by the plaintiffs to reflect those amounts already paid out by the settling subcontractors; for example, the plaintiffs "removed from their claim the repairs necessitated by the damage caused by the window installation." *The Oaks at Rivers Edge*, 2017 WL 3272138, at *6. Put differently, the plaintiffs recognized that the work of the window manufacturer, window installer, caulking subcontractor and framer contributed to the water intrusion at the property; accordingly, the plaintiffs reduced their cost of repair estimate at trial by $4,260,497.93, a sum which exceeded the amount paid by the aforementioned subcontractors in pre-trial settlements. *Id.* By virtue of this reduction, the Court of Appeals held that defendants "already received the benefit of the settlements," rejected the notion that failing to further reduce the verdict would constitute a double recovery for the plaintiffs, and affirmed the trial court's denial of the motion for setoff. *Id.* In essence, the Court of Appeals refused to grant the defendants a second "bite" at setoff: a reduction in damages, however achieved, satisfies the principles underlying the Act as well as those underlying the common law.

In this case, Plaintiffs' repair cost estimate, totaling $14,451,023.34, was admitted into evidence and published to the jury. (Ct. Ex. 48). Plaintiffs' reduced the repair estimate by $9,751,023.00,[10] and presented the jury with a number that was associated with the defective windows alone. Plaintiffs' counsel did not conceal this reduction, or its purpose, from the jury:

> Well, you heard from [Watkins] and you heard from him. . .its 12,000 dollars. . .This is in contrast to Gary Moore, plaintiffs' damage estimator. . .[who] got up there are he told you about his experience and he showed you his detailed estimate. Now at the time he prepared that estimate the entire buildings were an issue. . .so it contained lots of things that don't apply to a case just about windows. So what he did was he backed out the components that related to windows into a smaller number. He testified that repairing the windows by themselves [would be] 3.5 million. Repairing the damage associated with the windows [would be] 5 to 5.2 million. And if you took off the cladding work that needs to be done to repair a window because you've got to replace your stucco anyway then it would be reduced down to 4.7 million dollars.
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> . . .[P]laintiffs ask that you award them the full amount of damages they have put on at trial. They're okay with the reduction for the stucco that has to be replaced anyways. We do understand it's going to be an overlap on the repair job. . .But the full amount of damages even with that portion removed is 4.7 million dollars and that is what the plaintiffs are asking you to award them.

(Tr. Transcr. 91:5-94:12; 97:5-12) (emphasis added). Plaintiffs' expert, Gary Moore, testified that repairing all damages associated with the defective windows would cost approximately $5,200,000.00. Plaintiffs reduced that number by $500,000.00 to account for any "overlap on the repair job," and asked the jury to award $4,700,000.00 in damages. The jury further reduced this number and returned a verdict for $2,163,493.00. Like the defendants in *The Oaks at Rivers Edge*, BFS received the benefit of the pre-trial settlements when Plaintiffs reduced their claim for damages, and again when the jury reduced it further. These reductions remove any concern of a double recovery for the same injuries;[11] rather, any further reduction by this Court would constitute a double setoff for BFS, which is not contemplated by the Act or in equity.

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[10] This voluntary reduction by Plaintiffs exceeds the amounts recovered though settlements with others.

[11] BFS argues that the verdict should be setoff by the amounts received by Plaintiffs from *each* of the settling co-defendants, including, for example, the stucco manufacturer (BASF), the shingle manufacturer (TAMKO), the brick

IV. Equitable Setoff is Not Necessary or Appropriate to Provide Justice Between the Parties.

Since it is clear that BFS is not entitled to a statutory setoff on the express warranty verdict, the only avenue left for BFS would be an equitable setoff. However, even if the Motion to Compel can be construed as a Motion for a Setoff,[12] despite the fact that its content and relief request otherwise, the Motion specifically limits itself to statutory setoff, not equitable. In addition to not requesting equitable setoff as relief in its motion, BFS never plead equitable setoff in any of its three Answers.

Even if BFS had moved for an equitable setoff, this Court believes the jury's verdict to be fair and just and finds no reason to apply an equitable setoff to the jury's verdict. *Rutland v. S.C. Dep't of Transp.*, 390 S.C. 78, 82-83, 700 S.E.2d 451, 453-54 (2010) ("The trial court's jurisdiction to set off one judgment against another is equitable in nature and should be exercised when necessary to provide justice between the parties."). The undersigned studiously observed the trial of this case; and believes the verdict is fair and equitable as it stands for a number of reasons, and sets forth several examples below:

First, and as explained in Section III above, Plaintiffs reduced their total estimate and presented the jury with a number that was associated with the windows alone. Further, ultimately, the jury awarded Plaintiffs approximately two million less than the already reduced amount put

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veneer subcontractor (Superior), and even the electrical wiring installer (J. Correa). Even before the decision in *The Oaks at Rivers Edge*, such a position was untenable; now, it is clear that BFS is unable to show, via testimony elicited at trial or otherwise, that the jury's verdict against BFS included compensation for injuries that overlapped with the damages addressed by Plaintiffs' settlements with each of BFS's co-defendants.

[12] BFS has never actually moved for a setoff. In its Motion to Compel production of Plaintiffs' settlement agreements, the relief BFS requests concludes as follows: "Thereafter . . . 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." (Motion at 2) (emphasis added). This never happened; this subsequent application for setoff by BFS never occurred. S.C. R. Civ. P. 7(b)(1) ("An application to the court for an order shall be by motion which . . . shall state with particularity the grounds therefor, and shall set forth the relief or order sought.").

into evidence by Plaintiffs. It certainly appears that the jury may have considered the contribution of other parties in reaching its ultimate verdict amount.[13] Therefore, Plaintiffs' recovery is not duplicative of any settlement funds received by other parties. The jury's verdict was fair and just, and this Court refuses to further reduce the jury's award. There has been no double recovery.

Additionally, BFS made it clear to the jury its position that other prior defendants 1) were partially responsible for the damages asserted against BFS; and 2) that Plaintiffs had already received payment from other responsible parties. As such, BFS already submitted the issue of allocating damages amongst the defendants to the jury; and is not entitled to a second bite at that apple with the Court. *McCurry v. Keith*, 352 S.C. 441, 481 S.E.2d 166 (Ct. App. 1997) (setoff deemed tried by consent based upon how the case was ultimately presented at trial).

Notably, in its Motion in *Limine*, BFS indicates to this Court there is no joint liability for any damages for which it could be found liable because any damages applicable to BFS are clearly divisible from all other damages at the project. (Def. Mot. In Lim. at 5) ("Should it be found that BFS is liable in this case . . . damages applicable to [BFS] are clearly divisible from all other damages at the project . . . BFS cannot be held jointly and severally liable for any all-encompassing damages awarded to Plaintiff."). This statement by BFS to the Court is BFS's concession that the window only case tried by the parties resulted in damages clearly divisible from all other damages that occurred at One Belle Hall. BFS is not entitled to setoff for damages attributable to its sole conduct.

V. Even if There Was a Plausible Avenue for BFS to Seek Set Off, BFS Cannot Meet its Burden of Proof that the Verdict is for the Same Cause

[13] While the jury may have reached the reduced award due to a decision by them to adjust the repair scope or cost of repair, this is less likely as the Defendant did not submit a comparative competing scope of window repair by replacement or repair of compromised sheathing; Defendant simply proposed to add some caulk. However, all this speculation illustrates why a Court will not attempt to "look behind" a jury verdict. *See infra.* Special interrogatories should have been proposed by the Defendant if it felt this information was necessary.

of Action and Injury for which Plaintiffs have been Previously Compensated

Any reduction in the judgment must be from a settlement for the same cause of action. *Riley v. Ford Motor Co.*, 414 S.C. 185, 196, 777 S.E.2d 824, 830 (2015) (citing *Hawkins v. Pathology Assocs. Of Greenville*, P.A. 330 S.C. 92, 113, 498 S.E.2d 395, 407 (Ct. App. 1998); *Ward v. Epting*, 290 S.C. 547, 351 S.E.2d 867 (Ct. App. 1986) (allocation of settlement proceeds between various causes of action impacts the amount a non-settling defendant may be entitled to offset). To determine setoff, the Court must be able to ascertain the jury's allocation of damages. *Hawkins v. Pathology Assocs. Of Greenville, P.A.*, 330 S.C. 92, 498 S.E.2d 395 (Ct. App. 1998) (lack of special interrogatories prevented the court from determining what damages had been included in the jury's South Carolina wrongful death verdict (as opposed to prior recovery under Georgia wrongful death statute with different injury components) and caused a failure of evidence to justify setoff). Without a special verdict form, the moving party's burden to determine the jury's allocation between multiple injuries cannot be met. *Holly Woods Ass'n of Residence Owners v. Hiller*, 392 S.C. 172, 708 S.E.2d 787 (Ct. App. 2011) (The court cannot determine an allocation of damages when there is a failure to request special interrogatories); *see also Zivitz v. Greenberg*, 279 F.3d 536, 540 (7th Cir. 2002) (The defendant bears the burden of proving he is entitled to setoff on grounds that damages awarded were for the same injury for which settling defendants had already compensated plaintiff and cannot do so without special interrogatories.). This Court cannot speculate as to how a jury allocated damages when a general verdict is returned. *Armstrong v. Collins*, 366 S.C. 204, 227, 621 S.E.2d 368, 379 (Ct. App. 2005) ("The appellate courts of this State exercise every reasonable presumption in favor of the validity of a general verdict.") (*internal citation omitted*).

The general verdict form utilized by the Court, to which BFS consented, did not ask the jury to specify the injury or allocate the damages for which it is was compensating the Plaintiffs. BFS's failure to request a special verdict form precludes it from ascertaining the jury's allocation of damages between Strict Liability and Breach of Warranty, and/or between window related damages and non-window related damages. Additionally, BFS did not request a special interrogatory that would allocate the jury's finding on Breach of Warranty between express and implied warranties. Without this information, this Court cannot and will not speculate as to the jury's allocations.[14]

Further, the Court will not allow BFS to use Plaintiffs' Settlement Agreements to backfill the evidentiary void left by BFS's failure to request a special verdict form. An attempt to do so would undermine the jury verdict and could not be done with any accuracy, reliability or efficiency. As Plaintiffs noted, a large portion of its settlement recovery came from a single insurer who paid on behalf of over twenty (20) parties. It would be impossible to properly allocate this settlement between the numerous causes of action, damages, and/or parties, and any attempt to do so would result in an additional full-blown allocation trial and potentially an unjust windfall to BFS. *McDermott, Inc. v. AmClyde*, 511 U.S. 202, 219 (1994) (Discussing the one satisfaction rule: "The law contains no rigid rule against overcompensation [of the plaintiff]. Several doctrines . . . recognize that making tortfeasors pay for the damage they cause can be more important than preventing overcompensation."); *Pustaver*, 350 S.C. 409, 566 S.E.2d 199, (Public policy is to prevent a benefit directed to the injured party from resulting in a windfall for the tortfeasor). The burden is on BFS to prove its entitlement to a setoff, and with the information available to it, it cannot do so.

[14] South Carolina's default rule of one recovery gives way when trumped by other policy considerations. *Cf. Atkinson*, 361 S.C. at 171-72 (one recovery rule gives way to collateral source rule).

Finally, even if it was assumed the Court could allow BFS to use Plaintiffs' Settlement Agreements to backfill the evidentiary void, the only settlement this Court believes may have any applicability is the settlement by the window manufacturer, Raymond Building Supply. However, as discussed below, setoff requires the same cause of action. Here, because the settlement funds were paid by Raymond's insurance carriers, the Court can reason that the Raymond payment was for negligence, and BFS cannot prove otherwise. Plaintiffs were not awarded a verdict on negligence; therefore, the Raymond recovery cannot be shown to have occurred on the same cause of action as the verdict against BFS.[15]

VI. Plaintiffs' Prior Settlements were for Different Injuries than the Damages Awarded by the Jury.

There is no setoff as a matter of law when a prior settlement involves compensation for a different claim than the one for which the jury awarded damages. *Smith v. Widener*, 397 S.C. 468, 473, 724 S.E.2d 188, 191 (Ct. App. 2012). If, however, the settlement was arguably for two claims, one of which the settling defendant has in common with the non-settling defendant, "the circuit court must make the factual determination of how to allocate the settlement between the two claims." *Id.* However, "the judgment can only be reduced to the extent that the settlement was for the same cause of action." *Uhlig LLC v. Shirley*, No. 6:08-CV-01208-JMC, 2012 WL 12898405, at *2 (D.S.C. July 23, 2012) (applying South Carolina law).

As indicated above, the case was tried as a window damage case; and that was the only basis upon which the general verdict could have been rendered. Even otherwise, this Court cannot now speculate as to the jury's determination of damages. *Armstrong v. Collins*, 366 S.C. 204, 227,

[15] Furthermore, and as explained in greater detail in Section III above, a reduction in damages, however achieved, satisfies the principles underlying the Act as well as those underlying the common law on setoff. *See The Oaks at Rivers Edge*, 2017 WL 3272138, at *6. Here, the jury ultimately awarded Plaintiffs approximately $2.5 million less than the already reduced amount put into evidence at trial, which further negates the need for additional setoff.

621 S.E.2d 368, 379 (Ct. App. 2005) (The court will not speculate as to how the jury allocated damages when a general verdict is returned). In addition, to attempt to retroactively allocate damages at this point would be a re-trial of the case—something that cannot be intended by the joint tortfeasor statute or the common law.

VII. BFS Contractually Waived Its Right to Setoff and Assumed Sole Responsibility for All Damages Awarded that are Attributable to its Conduct.

BFS is also not entitled to setoff because it contractually waived its right to setoff by agreeing to replace the defective windows and cover any costs or expense that are attributable to the defective windows. *Wachovia Bank, Nat. Ass'n v. Blackburn*, 407 S.C. 321, 755 S.E.2d 437 (2014) (holding the substantial right to a jury trial may be waived and that there is an obligation on the party signing a document, even when that party is an unsophisticated homeowner, to read and understand the contents prior to signing); (Jt. Ex. 44(a), para. 4(c)) ("[BFS] shall replace at its own cost and expense defective items, articles, services, etc. furnished hereunder and indemnify Vendee from any costs or expense attributable to errors in [BFS's] performance."). In addition to this obligation, BFS also promised to make good any defects that developed in the product during the warranty period at its own expense. (Jt. Ex. 188, para. 4(c)) (Should *any defects* develop during the warranty period due to improper workmanship and/or arrangement, the same shall, upon notice, be made good by this Subcontractor *at no expense* to the Contractor, Owner or Owner's Representative.") (emphasis added).

BFS is a national building supply company, a sophisticated party, and bears an even greater obligation than did the homeowners in *Wachovia Bank, N.A.*, to review and understand the terms of any agreement it enters. By entering this transaction, BFS voluntarily, intentionally and knowingly agreed to accept the conditions and obligations of the purchase and warranty

agreements and must comply with the terms. The executed purchase and warranty agreements expressly indicate BFS will, at its own cost, be responsible for the replacement of any defective windows supplied under the agreement. Further, the indemnification term (para. 4(c) above) in effect make BFS solely responsible for costs or expenses attributable to errors caused by the goods. A jury determined the amount of those errors for which BFS is solely responsible, and BFS contractually waived any ability to seek a setoff against that amount.

VIII. Defendants Arguments are Unpersuasive

BFS's arguments for setoff are unpersuasive. For starters, BFS conflates the breach of an express warranty, with the breach of an implied warranty. By further conflating breach of implied warranty with negligence and strict liability, BFS asserts that the breach of an express written warranty is a tort. Now that BFS has converted a contract action to a tort, it asserts that contract actions are subject to joint tortfeasor setoff. This analysis and conclusion does not hold water and fails overtly.

Moreover, the implicit suggestion by BFS that the joint tortfeasor setoff statute somehow supersedes the common law of this state regarding general verdicts cannot be sustained.

Another one of BFS's main assertions is that the pleadings control this analysis; they do not. The pleadings set forth what a party thinks it might prove; the trial transcript and ensuing verdict are the ultimate evidence of what actually occurred. Whether two parties are joint tortfeasors does not turn on the allegations made in the operative complaint, and instead, turns on the evidence presented in the record. *See Griffin v. Van Norman*, 302 S.C. 520, 522, 397 S.E.2d 378, 379 (Ct. App. 1990) ("The Complaint serves merely as a background to this [indemnification] litigation. Allegations in a Complaint denied in answer are evidence of nothing.").

An example of this is BFS's argument that since the shingle manufacturer, Tamko, was also sued in strict liability, BFS therefore is entitled to a setoff for any amounts paid by Tamko. Unfortunately for BFS, there was not a shred of evidence in the trial against BFS that the shingles (1) permitted any water intrusion, let alone (2) permitted any water intrusion which contributed to the damage for which Plaintiffs sued BFS. BFS's whole argument in this regard is a non sequitur, and the Court of Appeals' recent decision in *The Oaks at Rivers Edge* further underscores Plaintiffs' position in this regard.

Ultimately, BFS exemplified the unsupportable nature of its position at the last hearing. According to BFS, by example, if a door manufacturer paid damages for leaky doors, the electrician who mis-wired the stove that caught fire would be entitled to a credit. This Court does not believe the joint tortfeasor statute or the common law of this state contemplates, let alone mandates, such a result, as it would run contrary to the long-standing public policy of this state and its courts to encourage negotiated resolution of disputes. Adopting BFS's interpretation would inevitably create a chilling effect on future partial settlements, if not completely render them futile, leading to longer, extended litigation and a clogging of our courts. Certainly, this is not what the legislature has intended.

CONCLUSION

Based upon the foregoing, it is hereby ORDERED, ADJUDGED, AND DECREED that BFS's September 8, 2016 Motion for Setoff is DENIED.

IT IS SO ORDERED!

Honorable Diane Schafer Goodstein

11-13, 2017
SC Gray, SC