EXHIBIT P
12/11/17 Builders FirstSource-Southeast Group, LLC's Motion to Alter or Amend the Court's Order Denying Setoff

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	NINTH JUDICIAL CIRCUIT
One Bell Hall Property Owners Association Inc. and Marvin T. Meek and Frances E. Hill, individually, and on behalf of all others similarly situated,	)	Civil Action No. 2012-CP-10-07594
Plaintiffs,	)	
vs.	)	**Builders FirstSource Southeast Group LLC's Motion to Alter or Amend the Court's Order Denying Set-Off**
Builders FirstSource Southeast Group LLC, et al.,	)	
Defendant.	)	

Builders FirstSource Southeast Group LLC ("BFS") moves the Court, pursuant to S.C.R. Civ. P. 59, for an order altering or amending its order filed November 16, 2017, denying BFS a setoff of the amounts received by Plaintiffs from settling co-defendants from the judgment entered against BFS.[1] For the following reasons and those set forth in previous filings with and arguments to the Court, which are incorporated in this motion by reference, the motion should be granted and the judgment amended to allow a set off against the judgment.

[1] Notice of the filing of the Court's order denying set off was received on November 27, 2017, and a copy of the actual order was obtained that same day.

1. **The Court's holding in Part I of its order ignores the text of its own judgment and is in direct conflict with controlling precedent.**

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

The first part of the Court's order is factually and legally incorrect. The verdict was rendered on September 1, 2016. Within ten days of that verdict, BFS filed two motions. It filed Defendant's Notice of Motion and Motion to Compel and Motion for Determination of Set-Off.[2] BFS also filed a Motion for Judgment, New Trial Absolute, or Alternatively for New Trial Nisi Remittitur pursuant to S.C.R. Civ. P. 50 and 59.[3]

The Court's order correctly notes that the judgment was filed September 22, 2016, but fails to expressly note that the judgment was dated "9-1-2016 nunc pro tunc." The Court's order further fails to cite all of the holding of *Ex parte Strom*, 343 S.C. 527, 539 S.E.2d 699 (2000) regarding *nunc pro tunc* orders. That 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, both motions filed by BFS were timely under

[2] This motion was filed September 8, 2016.
[3] This motion was filed September 12, 2016.

Rules 50 and 59 because served within 10 days of the effective date of the judgment. Thus, the Court had jurisdiction to hear and resolve the motions The Court's contrary holding is erroneous as a matter of 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 BFS's set off motion, the Court's holding that the motion was untimely is in direct contravention of precedent. The Court's 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 Court, but not addressed by the Court's order.[4]

In *Ellis*, plaintiff alleged that defendant failed to timely raise the issue of setoff under the statute because defendant did not move until after judgment and made the motion after the notice of appeal had been filed. 335 S.C. 106, 109, 515 S.E.2d 268, 270 (1999).

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. *Id.* 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.

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

The 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.*, 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.[5] 355 S.C. 361, 376, 585 S.E.2d 292, 300 (2003). The Supreme Court held that defendant timely moved for setoff after a judgment on liability. *Id.*

Moreover, the *Tilley* court further rejected Plaintiffs' position here that BFS 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 Court's order regarding successive post-trial motions is factually and legally incorrect.

In footnote 3 of the order, the Court comments that BFS's motion for JNOV and new trial relief is a nullity and did not extend the time for appeal in this case in support of its holding that it lacked jurisdiction. As set forth in the preceding sections, the Court's holding as to its jurisdiction to hear BFS'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

[5] The Supreme Court further 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.

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 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. 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 has stayed the time for the filing of any appeal in this case.[6] The Court's statement to the contrary is incorrect as a matter of fact and law.

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

In Part II of the order, the 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.

[6] Further, the determination of an appellate court's jurisdiction is properly decided only by the appellate court to which an appeal has been taken. A trial court has no jurisdiction to decide the succeeding appellate court's jurisdiction.

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. *See, e.g., Smith v. Widener*, 397 S.C. 468, 724 S.E.2d 188 (Ct. App. 2012). In that matter, 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 BFS and other settling co-defendants on overlapping claims of strict liability for "repeated water intrusion into and damage to One Belle Hall and other building deficiencies." Plaintiffs also sought recovery for the same alleged injury from BFS and all co-defendants on the same 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 . . ." Plaintiffs aggregated damages from those same alleged injury against all defendants, jointly and severally, on both claims.

The 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, the jury returned a single verdict for the tort concept of products liability.

The general verdict rule, to the extent it is relevant at all, does not apply to BFS's motion for setoff. Based on the above, Plaintiffs recovered on the claims to the jury on two products liability theories allowed under the tort theory of products liability. They settled with co-defendants 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 Court's use of the general verdict to bar setoff 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 BFS can. To allow such an argument would authorize Plaintiffs to use the general verdict rule as a sword to bar application of the settlement sums to the judgment while also using it as a shield to defend against BFS's challenges to the judgment in its post-trial motion. The fact of the matter is that the jury returned one verdict that was entered as the judgment against BFS. The damages allowed as to those

two causes of action are exactly 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 BFS 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. *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 order is not to the contrary. As the Court's 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, the tort based products recovery fits within the language of the set off statute. Although the claim has it origin in a contract, the claim itself 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 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 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 in tort. *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 cause of action).

Lastly, the 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. The set off motion does not seek reversal of the jury's verdict or the judgment resulting from it,[7]. The motion presumes there is a judgment on the verdict and seeks to reduce the judgment amount on the basis that it has been satisfied, in whole or in part, by amounts the plaintiff has obtained in settlement for injuries from other potentially responsible parties.

3. **The 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.**

Plaintiffs assert that setoff is unnecessary because Plaintiffs limited the evidence at trial to the damages caused by BFS. Stated differently, Plaintiffs alleged that the case was tried as if setoff was factored into the jury verdict. 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]

[7] That is the function of JNOV and new trial motions under S.C. R. Civ. P. 50 and 59.

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 limited evidence at trial to the conduct of BFS is irrelevant for the determination of setoff.

Plaintiffs reliance on *The Oaks at Rivers Edge Property Owners Association, Inc. v. Daniel Island Riverside Developers, LLC*, Op. No. 5507 (S.C. Ct. App. filed August 2, 2017) (Shearouse Adv. Sh. No. 29 at 128), is misplaced and does not alter the fact that the statute mandates setoff of the settlement amounts received by Plaintiff. The rationale in the *Oaks at Rivers Edge* contradicts the Court of Appeal's opinions on setoff as well as the plain language of the statute. In that matter, the court of appeals weighed the equities and found that the defendant had "already received the benefit of the settlements" 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 finding contradicts the prior, controlling precedent regarding the impact of Section 15-38-50 as quoted above.

Here, Plaintiffs alleged the same causes of action against BFS and the settling defendants. Moreover, Plaintiffs aggregated damages from those same alleged injury

against all defendants, jointly and severally, on both claims. Controlling precedent does not permit the 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 BFS. 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 BFS 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." In the very first line of the text, it states that BFS "respectfully submits this Motion to Compel and Motion for Determination of Setoff." 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. Hrg. Tr., 11/18/2016, pp. 4-29 (initial arguments of the parties). As BFS 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) as discussed above. Further, the Court's statement that there is no duplication of damages is unsupported. As noted in BFS's argument to the 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.

Hrg. Tr., 11/18/2016, pp. 17, lines 7-10; 18, lines 1-13; 32, line 9 - 33, line 4.

Contrary to the 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*, --- S.E.2d ----2017 WL 3044750 (Ct. App. July 19, 2017) (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); *Smith v. Widener*, 397 S.C. 468, 473, 724 S.E.2d 188, 190 (Ct. App. 2012) ("[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").

Fourth, the statement that BFS submitted the issue of allocation to the jury and consented to set off in trial is incorrect. First, 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, BFS could not have tried set off to the jury. It did not have the amounts of the settlements to present to the jury. Rather, BFS 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, BFS 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 BFS'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) 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, the BFS's 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. Rather, as noted above, BFS attempted to show that its windows were sound and 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 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 cause of action, 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 BFS 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.

As to the strict liability claim, Plaintiffs sought recovery from BFS, 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 BFS, namely "repeated water intrusion into and damage to One Belle Hall and other building deficiencies." *See* Third Amended Complaint ¶ 127. Plaintiffs claimed the four defendants were jointly and severally "liable to Plaintiffs under the doctrine of strict liability" for this shared injury. *See* Third Amended Complaint ¶ 131.

Plaintiffs also sought recovery for the same injury from BFS 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 . . ." *See* Third Amended Complaint ¶ 117. Plaintiffs aggregated damages from that same injury against all defendants, jointly and severally. *See* Third Amended Complaint ¶ 118.

Plaintiffs received a judgment against BFS only on their claims for strict liability and breach of warranty. As noted above as to Part 2 of the order, the damages for these two product liability theories are the same. There is no sense in which the damages for one of these causes of action differs from the other since all such damages emanate from the same alleged defective product; therefore, there is no basis for claiming an allocation of damages between the two causes of action leading to the judgment.

Given these facts, BFS is entitled to set off. Initially, the Court should examine the settlements, which arguable resolved, in some cases, a different cause of action (negligence) or involved wholly unrelated damages, for instance, replacement of roofing materials. "[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).

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. *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.

The 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 Court's statement in the first paragraph of page 15 of the order, there is no need for the Court 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 alleged the same injury against the settling co-defendants and BFS on the same claims. Plaintiffs noted the common factual scenario of "repeated water intrusion into and damage to One Belle Hall and other building deficiencies" in their pleadings. 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 BFS. The fact that Plaintiffs pleaded and settled claims with potentially different scope of damages against the settling co-defendants and BFS does not take this matter outside the scope of Section 15-38-50 or equitable set off as applied in South Carolina.

Further, *Smith v. Widener*, 397 S.C. 468, 473, 724 S.E.2d 188, 190 (Ct. App. 2012) holds, 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. *Smith v. Widener*, 397 S.C. 468, 473, 724 S.E.2d 188, 190 (Ct. App. 2012); *see also Huck v. Oakland Wings, LLC*, --- S.E.2d ----2017 WL 3044750 (Ct. App. July 19, 2017) (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 causes of action and common damages, the Court should undertake the analysis required by *Smith* and *Huck* and alter and amend its holding to the contrary.

6. Part VI of the 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 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 or causes of action upon which Plaintiffs prevailed against BFS.

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 Trammell Crowe related entities and TCR NC Construction I LP to which BSF sold the windows, and the window manufacturer, the liability of BSF was also 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 exact same injuries based upon the exact same causes of action, the 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 which covered the same injuries and same causes of action. The court in *Ellis v. Oliver* specifically rejected the 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 BFS 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. 468, 473, 724 S.E.2d 188, 190 (Ct. App. 2012).

The same rationale applies here. Plaintiffs alleged the same injury against the settling co-defendants and BFS on the same claims. Plaintiffs noted the common factual scenario of "repeated water intrusion into and damage to One Belle Hall and other building deficiencies." 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 BFS. The fact that Plaintiffs pleaded and settled claims with potentially different

scope of damages against the settling co-defendants and BFS does not take this matter outside the scope of Section 15-38-50 or equitable set off. The Court should alter and amend its holding to the contrary.

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

The 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 BFS 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 on the warranties, it would have no way of knowing, at the time that it 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 BFS 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 Court's order should be altered and amended

accordingly.

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

In the last part of the order, the Court recapitulates several of its prior holdings to make the general assertion that BFS's 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, and those previously filed or argued to the Court, the Court should reconsider its order and grant set off in this case.

Conclusion

The Court's order is incorrect factually and legally as set forth above and in BFS's prior filings with and arguments to the Court, which are incorporated by reference. The Court should grant the motion to alter or amend the judgment and grant set off in favor of BFS.

Respectfully submitted,

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: _____

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Attorneys for Defendant Builders FirstSource Southeast Group, LLC

Columbia, South Carolina

December 7, 2017

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	NINTH JUDICIAL CIRCUIT
One Bell Hall Property Owners Association Inc. and Marvin T. Meek and Frances E. Hill, individually, and on behalf of all others similarly situated,	)	Civil Action No. 2012-CP-10-07594
Plaintiffs,	)	**CERTIFICATE OF SERVICE**
vs.	)	
Builders FirstSource Southeast Group LLC, et al.,	)	
Defendant.	)	

I, the undersigned administrative assistant 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: **Motion to Alter or Amend the Court's Order Denying Set-Off**

Counsel Served: **U.S. Mail**
Justin Lucey, Esquire
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FILED
2017 DEC 11 PM 1:56
JULIE J. ARMSTRONG
CLERK OF COURT
BY

Cindy K. Hess
Cindy K. Hess
Sr. Administrative Assistant

December 7, 2017

NELSON MULLINS

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December 7, 2017

The Honorable Julie J. Armstrong
Charleston County Clerk of Court
Charleston County Courthouse
100 Broad Street, #106
Charleston, SC 29401

RE: One Bell Hall Property Owners Association Inc., et al. v. Builders FirstSource Southeast Group LLC, et al.
Civil Action No. 2012-CP-10-07594
Our File No. 00350/01800

Dear Ms. Armstrong:

Enclosed for filing in the above-referenced matter please find the original and one copy of Defendant Builders FirstSource Southeast Group LLC's Motion to Alter or Amend the Court's Order Denying Set-Off, along with a Motion and Order Information Form and Coversheet and check for the filing fee. Please return a clocked-in copy to us.

By copy of this letter, we are hereby serving counsel with a copy of this document and Judge Goodstein with a copy as required.

Sincerely,

William C. Wood, Jr.

WCW:mk
Enclosures
cc: The Honorable Diane Schafer Goodstein
Justin Lucey, Esquire
Dabny Lynn, Esquire

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	
	)	CASE NO.: 2012-CP-10-07594
	)	
One Bell Hall Property Owners Association Inc., et al., Plaintiff,	)	**MOTION AND ORDER INFORMATION**
	)	**FORM AND COVERSHEET**
vs.	)	
	)	
Builders FirstSource Southeast Group LLC, et al., Defendant.	)	

Plaintiff's Attorney:	Defendant's Attorney:
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Other: _____	Other: _____

X **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: to Alter or Amend the Court's Order Denying Set-Off
Estimated Time Needed: 20 minutes Court Reporter Needed: X **YES**/☐ **NO**

SECTION II: Motion/Order Type

X Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☐ Plaintiff /X Defendant — 12/7/2017 Date submitted

SECTION III: Motion Fee

X PAID – AMOUNT: $ 25.00
☐ EXEMPT: (check reason)
- ☐ Rule to Show Cause in Child or Spousal Support
- ☐ Domestic Abuse or Abuse and Neglect
- ☐ Indigent Status ☐ State Agency v. Indigent Party
- ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
- ☐ Motion for Stay in Bankruptcy
- ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
- ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions
  Name of Court Reporter: _____
- ☐ Other: _____

JUDGE'S SECTION	
☐ Motion Fee to be paid upon filing of the attached order.	JUDGE CODE _____
☐ Other: _____	Date: _____

CLERK'S VERIFICATION

Collected by:_____ Date Filed: _____
☐ MOTION FEE COLLECTED: $ _____
☐ CONTESTED – AMOUNT DUE: $ _____

SCCA 233 (11/2003)