

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Diane Goodstein, Circuit Court Judge

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

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

v.

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

**APPELLANT'S RETURN
TO RESPONDENTS' MOTION TO DISMISS THE APPEAL**

Appellant Builders FirstSource-Southeast Group, LLC ("Builders") submits this response in opposition to Respondents' motion to dismiss the appeal served December 6, 2018. For the reasons set forth below and in Builder's initial brief filed with the Court pursuant to SCACR 262(a)(2) on November 30, 2018, which is incorporated by reference, the motion to dismiss should be denied.

Procedural Background

Plaintiffs filed suit in this construction defect case on November 19, 2012, naming two plaintiffs, the property owners association and an individual owner, six individual defendants,

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and Jane and John Does. (Orig. Compl., excerpts attached as Exhibit 1.) It contained a general factual section alleging “latent building defects,” “repeated water intrusion,” and other general consequential damage to the One Belle Hall buildings and other property. (Ex. 1, ¶¶ 25-35.)

Over the next two years and three months three amended complaints added new parties, whether plaintiffs or defendants, and dropped Does. With the filing of the third amended complaint on February 9, 2015, forty-seven (47) defendants had been added to the case. (3rd Amend. Compl., pp. 1-2, ¶¶ 11-72, excerpts attached as Exhibit 2.) All of the defendants were included in the negligence and breach of warranty products claims. (*Id.* pp. 20-22.) Builders, plus BASF Corporation, Raymond Building Supply Corporation d/b/a Energy Savings Products of Florida, Inc. a/k/a Energy Savings Products of Florida, and TAMKO Building Products were named under the strict liability products claims. (*Id.*, p. 23.)

By the time of trial beginning August 29, 2016, every defendant except Builders was no longer active in the case. Most had settled and been dismissed from the case or had been severed from the matter.

Trial began August 29, 2016, with jury selection. Following testimony on August 30 through the day of September 1, the jury received the case at 6.25 p.m.¹ (Trial Tr. p. 742, excerpts attached as Exhibit 3.) The jury returned a verdict at 10.20 p.m. against Builders for \$2,163,493.00. (Exhibit 3, pp. 743-44.) Over the remaining ten minutes of the trial, the trial court thanked the jury for their service. *Id.* Builder’s counsel moved, without objection by

¹ A severe storm was predicted to strike Charleston the next day, September 2, and the trial court was to be closed that day. The trial court sought to complete the case on September 1.

Plaintiff's counsel as to any procedural defect, for judgment notwithstanding the verdict on "our grounds for the directed verdict motion previously heard by the Judge." (Exhibit 3, p. 748.) The trial court promptly denied the motion and court adjourned at 10.30 p.m. *Id.*

Contrary to the statement of Plaintiffs' counsel in Plaintiffs' motion to dismiss this appeal in paragraph 13 at page 5 and the trial court's statement at page 3 of its order of November 16, 2017, there is absolutely no record of any discussion about set off not being necessary or appropriate in this case at the conclusion of the trial as shown on page 748 of the transcript. Builder's trial counsel did not waive or otherwise surrender its right to assert a claim for set off in the case. *See York v. Conway Ford, Inc.*, 325 S.C. 170, 480 S.E.2d 726 (1997) ("An objection made during an off-the-record conference which is not made part of the record does not preserve the question for review"); *Davis v. Davis*, 372 S.C. 64, 86, 641 S.E.2d 446, 457 (Ct. App. 2006) ("Sidebar conferences without the presence of a court stenographer, must be reiterated for the record"); *In Re Richard D.*, 388 S.C.95, 693 S.E.2d 447 (Ct. App. 2010) ("A bench conference was held off the record after the State began inquiring of Eric if he planned to testify truthfully. This issue may have been discussed at that time, but we cannot review issues not contained in the record").

Consistent with the complete lack of any record of a discussion of set off on the last day of trial, on September 8, 2016, within ten days of the verdict, trial counsel served Builder's motion for set off and to compel production of the co-defendants' settlement agreements in aid of that purpose. (Mot. Set Off., Exhibit 4.) On September 12, again within ten days of the

verdict (per SCRCP 6), Builders served its motion for JNOV and new trial.² (JNOV/NT Motion, excerpts attached as Exhibit 5.)

Subsequently, the trial court entered judgment on the verdict. While the judgment was filed in the clerk of court's office on September 22, 2016, it was expressly dated by Judge Goodstein as "9/1/2016 nunc pro tunc," the date of the verdict. (Exhibit 6, p.2.) The statement of the judgment made no mention of Builder's pending motions, but simply stated that it was a judgment upon the jury's verdict and the amount of that verdict. *Id.*, p. 2.

After several hearings, the trial court denied Builder's motion for set off to alter and amend the verdict to reflect the settlements with codefendants. (Order, 11/16;/17, attached as Exhibit 7.) Builder's promptly served a motion to alter or amend that order to address issues raised in its motion but not addressed by the trial court and to address various procedural issues raised in the trial court's order that were factually or legally unsupported. (Motion, 12/7/17, attached as Exhibit 8.) The trial court denied the motion to alter or amend without further comment by order/judgment filed June 27, 2018. (Exhibit 9.) Builder's appealed the set off decisions promptly by serving a notice of appeal on June 29, 2018 (the Notice of Appeal, without attachments, is attached as Exhibit 10.) Builder's motion asking the trial court again to grant JNOV remains pending with the trial court.

² Builders' motion was subsequently substantially reduced in scope when it was discovered upon obtaining the trial transcript that trial counsel did not raise all of the grounds asserted in the motion in her directed verdict motions at the end of Plaintiffs' and all the evidence (Exhibit 3, p. 639.), and made a similar truncated, oral JNOV motion without asserting any new trial grounds immediately after the verdict (Exhibit 3, p. 748) rather than requesting a ten day period to file such motions in writing as was understood by undersigned counsel retained to work on post-trial motions and appeal. The new trial requests and several of the grounds for JNOV in the original motion were voluntarily withdrawn. The circuit court, despite multiple hearings, has issued no order on the reduced JNOV motion. It remains pending.

Argument

The appeal in this case was timely and within the jurisdiction of the Court on two separate and independent bases. Each is addressed in turn.

I. Builder's Timely Filing of the Set Off Motion Seeking to Alter or Amend the Judgment on the Verdict to Reflect Settlements Received for the Same Alleged Injuries Stayed the Time for Appeal Until the Motion was Fully Resolved.

First, Builder's timely motion to compel production of the settlement agreements with other codefendants and determine set off stayed the time for filing an appeal until the trial court fully resolved the motion. The jury rendered its verdict on September 1, 2016. On September 8, 2016, well within ten days of the verdict, trial counsel filed Builder's motion for set off and to compel production of the co-defendants' settlement agreements in aid of that purpose.

(Exhibit 4.) On its face, in both its title and its text, the motion states that it is a "motion to compel and motion to determine setoff." (*Id.*, p. 1., emphasis added) Plaintiffs make much of the last two sentences of the motion in which the trial counsel discusses the obvious order in which the motion to compel and then determine the amount of any set off must be resolved; that is, the motion to compel must be resolved first so that the amounts of settlements was known before any actual set off amount could be determined as requested in the very first sentence of the motion. The inartful use of the word "move" in the last sentence of the motion to describe the process of actually determining the amount of set off does not negate the earlier express motion asking the trial court to determine the amount of set off to which Builders is entitled. Plaintiff's argument elevates form over substance.

Plaintiffs also focus on the fact that the judgment on the jury verdict was not filed until September 22, 2016, twenty-one days after trial and 14 days after Builders filed its set off

motion. Aside from their argument about the text of the motion discussed in the previous paragraph, Plaintiffs' argument is predicated upon the notion that any motion pertaining to the September 22- filed judgment or any appeal from that judgment had to be made within a thirty day window following the date of filing (9/22/16) or the date the clerk of court gave notice of the filing shortly thereafter. What Plaintiffs steadfastly ignore, however, is that the judgment was expressly dated, on page 2, by Judge Goodstein as "9/1/2016 nunc pro tunc," to be effective as of the date of the verdict, not the nominal date of its filing. (Exhibit 6.)

Judge Goodstein's dating of the judgment in this manner was entirely consistent with SCRCP 58(a)(1) which specifically states that the judgment upon a general verdict shall be "forthwith prepare[d], sign[ed], and enter[ed]...." In this case, the verdict was not delivered until 10:20 p.m. at night (Exhibit 3, pp. 743-47), and the trial adjourned at 10:30 p.m. A severe storm was anticipated the next day and no one wished to remain any longer than necessary. The circuit court's *nunc pro tunc* order filed September 22, but expressly made retroactively effective back to the date of the verdict as if filed then, not September 22, implemented the requirement of Rule 58. As noted by our supreme court in *Ex parte Strom*, 343 S.C. 527, 539 S.E.2d 699 (2000), "*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. *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, Builder's set off motion, filed September 8, was effectively filed after the judgment. The judgment, as dated and entered with a retroactive date

did not resolve or have any effect upon the motions filed after its effective date. This is reflected in the actual language of the “Statement of Judgment by the Court” which says absolutely nothing about the post-trial motions filed by Builders, but only reflects that the jury found for the Plaintiffs on the “Strick [sic] Liability and Breach of Warranty” causes of action and awarded \$2,163,493.00 in actual and compensatory damages. (Exhibit 6, p. 1.) The motion for set off, which post-dates the effective date of the judgment, effectively requests that the trial court alter or amended that judgment upon the jury’s verdict to reflect monies already received by Plaintiffs for the same injuries from co-defendants. Because it asked the trial court to effectively alter or amend the judgment it stayed the time for filing a notice of appeal until the motion was either granted or denied by the trial court. *See* SCACR 203(b)(1); SCRCP 59(e).

For this reason, the Plaintiffs’ arguments are incorrect. The judgment filed on September 22, but made effective September 1, did not address or resolve Builder’s set off motion or its other post-trial motion. No further motion to reconsider the September 22 judgment was necessary within ten days of that date or the date that notice was given of filing that judgment. No appeal was necessary with thirty days after that date or the date notice was received of the filing. The judgment was, by its terms effectively filed and entered September 1, 2016, and Builder’s set off motion and its motion for judgment notwithstanding the verdict and for new trial, as motions effectively calling upon the trial court to alter or amend that September 1 judgment, stayed the time for appeal until the trial court addressed the set off motion. *See* SCACR 203(b)(1); SCRCP 59(e).

Further, when the trial court finally ruled on the motion in its order dated 11/16/17 and failed to address issues raised by Builders in its motion and raised procedural grounds for the

denial of the motion that were factually and legally unsupported, Builder's promptly served, within ten days of receiving notice of that order/judgment,³ a motion under Rule 59(e) to alter or amend that order and judgment in order to preserve for appeal arguments in opposition to the trial court's holdings. Again, pursuant to SCACR 203(b)(1), this first rule 59(e) motion addressing the issue of set off and the missing or new issues raised in the trial court's order stayed the time for appeal. Builders promptly appealed from the trial court's order filed 6/27/18 denying that motion. (Exhibit 9.) Notice of the order was received on 6/28/18 and the notice of appeal was served on June 29, 2018. (Exhibit 10.)

Plaintiffs' argument is also inconsistent with this Court's holding in *Ellis v. Oliver*, 335 S.C. 106, 515 S.E.2d 268 (Ct. App. 1999), a case cited by the circuit court, but not addressed by its order or the Plaintiffs in their motion.⁴ In *Ellis*, plaintiff alleged that defendant failed to timely raise the issue of setoff under the set-off statute, S.C. Code Ann. § 15-38-50, because defendant did not move until after judgment and made the motion after the notice of appeal had been filed. 335 S.C. at 109, 515 S.E.2d at 270.

The *Ellis* court disagreed. The court reasoned that "[i]n enacting § 15-38-50, the General Assembly did not provide the procedural details by which the set-off could be

³ Notice was received on November 27, 2018. The motion was served on December 7, 2018, the tenth day after notice as required by SCRCP 59(e). See Exhibit 8, p. 1

⁴ The only reference to *Ellis* in the order is found at page 6 in footnote 4 where *Ellis* is cited for a generic proposition of statutory construction. Plaintiffs reference the case in passing in footnote 17 of their motion with no analysis except to repeat their argument that the set off motion didn't request set off, which its language expressly does, and to say that Builders did not challenge the judgment entered on September 22, but effective September 1, which is based on Plaintiffs ignoring the *nunc pro tunc* language as to the effective date of the order and the actual statement of the judgment, which did not purport to address or resolve the pending motions filed after the judgment's effective date

claimed.” *Ellis*, 335 S.C. at 110, 515 S.E.2d at 270. Thus, the court held that the “statute likewise does not require that the rights thereunder be asserted at any particular juncture in the litigation.” *Id.* As a result, the court held the motion was timely and, in fact, no motion was required to be filed at all because the right to set-off arose “by operation of law.” *Id.* at 112, 515 S.E.2d at 271. Plaintiffs insistence that the set off motion had to be filed at a precise moment in the course of proceedings does not square with *Ellis*.

Plaintiffs’ argument was also rejected by the South Carolina Supreme Court in the context of a motion for setoff under the equitable power of the courts to apply set off. In *Tilley v. Pacesetter Corp.*, 355 S.C. 361, 585 S.E.2d 292 (2003), the plaintiff argued that defendant’s motion for set off was untimely because defendant made the motion after judgment on liability had been imposed and after defendant appealed the liability issue.⁵ *Id.* at 376, 585 S.E.2d at 300 . The Supreme Court held that defendant timely moved for setoff after a judgment on liability. *Id.*

Moreover, the *Tilley* court further rejected the trial court’s and Plaintiffs’ position here that Builders had to move and set off had to be resolved 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.

⁵ The Supreme Court noted that plaintiff offered no authority to support the proposition that a motion for setoff had to be made prior to a judgment. Such is the case here as well. Moreover, it is incongruous to contend that a motion under Section 15-38-50 can be filed after judgment but not a request under the court’s equitable power.

Thus, although Builder's motion for set off and the appeal from the denial of it complied with all of the traditional rules regarding the timing of motions to alter and amend judgments generally and the time for filing an appeal, as set forth in the preceding and the next sections, the case law in fact allows greater leeway in the time in which such motions may be filed. The motion to dismiss should be denied.

II. Builder's Separate JNOV Motion was Timely and Properly Filed Within Ten Days of the Verdict and the Effective Date of the Judgment, Thus Staying the Time For Appeal Under SCACR 203(b)(1) so that the Time for Appeal has not Run as to any Issue, Including Set Off, as there is Not Yet a Final Appealable Judgment Under S.C. Code Ann. § 14-3-330 Resolving All Claims and Issues in the Case.

For the reasons set forth above, Builder's set off motion effectively and independently stayed the time for serving and filing an appeal of the jury's verdict. Nonetheless, Builder's appeal on the issue of set off is also appropriate, and the Court has jurisdiction to resolve it on the merits, because Builder's separate and appropriate JNOV motion remains unresolved, and stays the time for appeal until it, along with the set off issue, is resolved so that there is a final judgment from which an appeal will lie pursuant to S.C. Code Ann. § 14-3-330. *See Watson v. Underwood*, 407 S.C. 443, 457-58, 756 S.E.2d 155, 163 (Ct. App. 2014)(noting that right to appeal is controlled by statutory law, principally section 14-3-330, and that an appeal ordinarily may be pursued only after a party has obtained a final judgment)(internal quotation marks and citations omitted).

Plaintiffs go through a long recitation of the procedural history of the matter and the arguments raised in hearings on Builder's motion though much of it is immaterial to the question of whether this Court has jurisdiction of this appeal on the set off issue. For purposes

of establishing jurisdiction over this appeal on this alternate basis, however, the material facts are relatively simple and straightforward.

At trial, trial counsel made a directed verdict motion at the close of Plaintiffs' evidence, which was denied. (Exhibit 3, pp. 484-85.) Trial counsel raised the insufficiency of the evidence as to the duty of Builders (*id.* at 484), the failure to demonstrate that the windows were "unreasonably dangerous" as required by the strict liability statute (*id.*), the lack of proof that the windows were a proximate cause of the alleged damages or the windows only nominally contributed to the some damage (*id.*), and finally the insufficiency of the evidence as to the defective condition of the windows (*id.* at 485).

At the close of Builder's evidence, the trial court asked if there were any motions. (Exhibit 3, p. 626.) Plaintiffs' counsel responded first with a motion for a directed verdict on liability. (*Id.* pp. 626-28.) Builder's trial counsel responded, essentially asserting that such a directed verdict was improper because the evidence supported the grounds she had previously asserted for a directed verdict in favor of Builders in her initial directed verdict motion, such as lack of or intervening proximate causation (*id.* at p. 629, 631), lack of evidence that the windows were "unreasonably dangerous" as required by the strict liability statute (*id.*), the insufficiency of the evidence on the negligence action as to the duty of care as to the certification of the windows (*id.* at 629, 634), and the insufficiency of and speculative nature of proof as to damages. (*Id.* at 630.)

At the end of this argument, the trial court made it clear, based on these countering arguments regarding the sufficiency of the evidence that the matter was going to the jury for a decision. (*Id.*, p. 639.) The trial court then inquired if there were any additional motions to which Builder's counsel replied "No" (*Id.*) Having just argued all of the grounds

previously asserted for a directed verdict at the close of Plaintiffs' evidence in response to the motion of Plaintiffs and having those arguments expressly ruled upon and rejected by the trial court, she was not required to engage in the futile act of restating all of the arguments once again and invoking the magic words "directed verdict" simply to have them yet again rejected and the case sent to the jury. As stated in *Staubes v. City of Folly Beach*, 339 S.C. 406, 529 S.E.2d 543 (2000):

As to the City's argument that Staubes should have requested a specific ruling on his motion to amend, we find that a Rule 59(e), SCRPC, motion was not warranted under the circumstances of this case. First, as discussed above, the summary judgment order reflected that the trial court effectively treated the pleadings as amended. Second, Staubes knew from the order that the trial court had decided to grant summary judgment for the City on any negligence claim he might raise. Thus, requesting permission to add a negligence claim to his complaint would have been futile. This Court does not require parties to engage in futile actions in order to preserve issues for appellate review.

Id. at 414-15, 529 S.E.2d at 547. Similarly, in *Dunn v. Charleston Coca-Cola Bottling Co.*, 311 S.C. 43, 426 S.E.2d 756 (1993), the court noted:

The judge had a fair opportunity to rule upon the issue and did so. It was not incumbent upon defense counsel to harass the judge by parading the issue before him again, by asking for a mistrial.

...

In *Bowers v. Watkins*, 259 S.C. 371, 192 S.E.2d 190 (1972), the Supreme Court held in a case involving a similar issue as follows:

'The suggestion in plaintiff's brief that relief should be denied because the impropriety of the argument was not made the ground of a motion for mistrial or new trial is unsound. When the court, in effect, overruled defendant's objection to the argument, it would have been futile to move for a mistrial based upon the same objection. A motion for new trial is not necessary to preserve for review on appeal a question which has been fairly and properly raised in the trial court and passed upon there.'

Hubbard v. Rowe, 192 S.C. 12, 5 S.E.2d 187 (1939).

Dunn, 311 S.C. at 45-46, 426 S.E.2d at 758. This was particularly true in this situation where the presentation of evidence apparently concluded sometime shortly after noon and the trial court was pressing to get the matter to the jury and have a verdict before the end of the day because of the approaching severe storm and the closure of the court the following day.⁶

After the jury verdict, sometime between the dismissal of the jury at 10.24 p.m. and the end of the trial at 10.30 p.m., Builder's trial counsel moved for judgment notwithstanding the verdict. (Exhibit 3, p. 748.) She stated, "We renew our grounds for the directed verdict motion previously heard by the Judge." (*Id.*) Plaintiffs' counsel raised no objection based on a lack of a formally stated directed verdict motion at the end of all the evidence to the trial court's consideration of this oral JNOV motion. The trial court, therefore, promptly considered and denied the motion on its merits, not on the basis of any procedural defect in the making of the motion. (*Id.*)

Even assuming there was a formal procedural defect in the way Builder's trial counsel made her second directed verdict motion, by failing to raise the supposed procedural defect as to this claim processing rule, which in and of itself has no bearing on this Court's jurisdiction, to the trial court, Plaintiffs have waived the argument in its entirety. The rule regarding the making of directed verdict motions as a prerequisite to making a JNOV motion is not a statute or rule concerning or governing the jurisdiction of the appellate courts of this state, which are principally governed by S.C. Code Ann. § 14-3-330 and similar statutes or the South Carolina Appellate Court Rules as provided by S.C. Code Ann. § 18-9-10, and may be waived. *See*

⁶ Following lunch and other procedural housekeeping, the closing arguments in the case were presented starting at 3.11 p.m. (Exhibit 3, p. 641), the charge to the jury commenced at 5 p.m., (*id.*, pp. 704-05), the jury received the case at 6.42 p.m. (*id.*, p. 742), and the verdict was returned at 10.20 p.m. (*Id.*, p. 743.)

generally *Hamer v. Neighborhood Housing Services of Chicago*, ___ U.S. ___, 138 S.Ct. 13, 17-18 (2017)(noting that “[i]f properly invoked, mandatory claim-processing rules must be enforced, but they may be waived or forfeited,” and do not deprive an appellate court of jurisdiction over an appeal if not timely raised); *see also Coon v. Coon*, 364 S.C. 563, 568, note 7, 614 S.E.2d 616, 618, note 7 (2005)(citing *Kontrick v. Ryan*, 540 U.S. 443, 454-55, 124 S.Ct. 906, 915, 157 L.Ed.2d 867, 879 (2004), a case distinguishing between waivable claim processing rules and truly jurisdictional rules, for the proposition that it is appropriate to use “the label ‘jurisdictional’ ... only for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court’s adjudicatory authority.”) Thus, at the close of the trial, Builder’s counsel had properly raised and received a ruling on the merits of its directed verdict arguments at the close of Plaintiffs’ case and all the evidence and made and received a ruling on the merits of its oral motion for JNOV. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 497 S.E.2d 731 (1998)(noting that a party must raise and receive a ruling on an issue to preserve it for appeal).

On September 12, 2016, within 10 days of the oral denial of the oral JNOV motion, Builder’s made its first written motion regarding JNOV and New Trial.⁷ The filing met the 10 day timing requirement of Rule 59 since the denial of the JNOV motion and the effective date of the judgment, as discussed in the previous section, was September 1, 2016, and the counting

⁷ As noted in Plaintiffs’ motion (although immaterial to the resolution of the motion to dismiss this appeal), undersigned counsel, retained post-trial to handle post-trial motions and appeal, mistakenly believed that this written motion was the first motion pertaining to JNOV and new trial made on behalf of Builders as they did not have access to a transcript at time the motion was filed and not been told that an oral motion had been made. Upon receiving a complete transcript, counsel withdrew the new trial requests in the written motion and the majority of the separate JNOV grounds to reflect only those grounds which had been arguably asserted at the directed verdict and original oral JNOV stages of the trial.

rules of SCRCP 6(a) extended the time for filing from Sunday, September 11, to Monday, September 12. Because the oral JNOV motion had been previously made, the September 12 written JNOV/New Trial motion was appropriately treated as a motion to reconsider the prior denial of the oral JNOV motion. *Fields v. Reg. Med. Ctr. Orangeburg*, 363 S.C. 19, 27, 609 S.E.2d 506, 510 (2005)(citing *Mickle v. Blackmon*, 255 S.C. 136, 140, 177 S.E.2d 548, 549 (1970) for the proposition that a court must treat a “motion based on its substance and effect as opposed to how it was captioned by party”).

Plaintiffs cite numerous cases regarding the legal effect of repetitive motions to reconsider or to alter or amend a judgment upon the right to appeal. This case is, contrary to the statement in footnote 3 of the trial court’s November 16, 2017, initial denial of Builder’s set off motion, and Plaintiffs’ argument in the motion to dismiss, controlled by *Elam v. S.C. Dept. of Trans.*, 361 S.C. 9, 602 S.E.2d 772 (2004). The *Elam* court 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, an oral post-verdict motion was made immediately after the verdict in the rush to leave the courtroom late at night before the anticipated storm. (Exhibit 3, p. 748.) The September 12 motion was the first written motion seeking further consideration of grounds for judgment notwithstanding the verdict in favor of Builders. The motion was not successive under *Elam* and stayed the time for the filing of any appeal in this case pursuant to SCACR 203(b)(1). Plaintiffs statements to the contrary are incorrect as a matter of fact and law. The

September 12 motion, as subsequently and substantially reduced, remains pending before the trial court. Thus, the time for appeal has not, contrary to Plaintiffs argument, begun to run to this very day. The appeal of the trial court's order denying set off is timely. The motion to dismiss should be denied.

III. The Doctrine of "the Law of the Case" and the "Two Issue Rule" Have No Application and Do Not Bar this Court's Jurisdiction Over This Appeal.

Plaintiffs' motion raises two additional issues, one pertaining to the merits rather than the supposed procedural defects that deprive this Court of jurisdiction to hear the appeal.

Plaintiffs make a "law of the case" argument based upon the incorrect premise that no timely appeals have been made and that the time for an appeal has run. (Pl. Mot. To Dismiss, p. 13.) The argument fails for two reasons.

First, for the reasons set forth above and in Builder's initial brief filed November 30, 2018, attached as Exhibit 11, Builders timely appealed the trial court's ruling on its motion for set off which asked the trial court to alter or amend the judgment upon the jury's verdict that was made effective as of September 1, 2016, to reduce the amount owed based on pre-trial settlements made with other parties. Builder's entitlement to set off remains an open question to be decided by this Court. There is no unappealed judgment on the issue of set off that bars this Court's jurisdiction over or consideration of the issue on this appeal.

Second, the time to appeal from the oral JNOV denial has not yet, contrary to Plaintiffs argument, begun to run as set forth more fully in the preceding section. Builder's written motion, filed within 10 days of the jury verdict and the effective date of the judgment upon that verdict asking that court to consider again whether Builders is entitled to JNOV is still pending. Pursuant to SCACR 203(b)(1), the time for appeal does not begin to run until the

motion is resolved. Again, there is no unappealed or unappealable judgment or order that deprives this Court of jurisdiction or precludes Builder's from prevailing on the question of set off.

Plaintiffs also invoke the "two issue rule" as a grounds for dismissal. (Pl. Mot. To Dismiss, pp. 13-14.) As framed by the Plaintiffs, however, this argument is an argument on the merits of the set off and not whether the issue of set-off is properly within this Court's jurisdiction for resolution on the merits. Builders has appealed the trial court's order stating that, on the merits, set-off cannot be applied to a claim for breach of warranty. (Exhibit 7, pp. 6-8; Exhibit 10). Contrary to the argument of Plaintiffs, set-off is available on the two claims upon which Plaintiffs prevailed at trial, including breach of warranty, for the reasons set forth at pages 14-20 in Builders Initial Brief, incorporated into this argument by reference. (Exhibit 11.)

This is particularly true in light of this Court's recent decision in *Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. IMK Development Co., LLC*, ___ S.C. ___, ___ S.E.2d ___, 2018 WL 4905983 (filed October 10, 2018). The Court was faced with judgments where Plaintiff sought and recovered separate damage verdicts for a negligence claim (3 million dollars) and a breach of warranty claim (one million dollars) against the non-settling defendants in a construction defect case like this case. 2018 WL 4905983 at *11. In applying set off, the Court took the combined negligence and breach of warranty verdict (4 million dollars) and subtracted from that total "the amount of the prior settlements" with other parties in the case, leaving a judgment balance of \$2,144,088.23. *Id.* at *12. Because, unlike this case, the jury returned separate verdicts and there was more than one non-settling defendant to whom fault had been allocated on the negligence and breach of warranty claims, the Court then reallocated

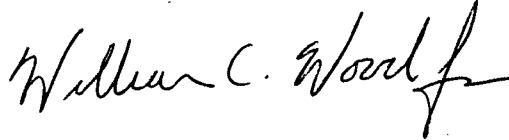
the remaining judgment on a proportional basis between the negligence and breach of warranty claim and then applied the apportionment statute to allocate the judgment on each claim against the separate defendants. *Id.*

The issue of whether set off is available on a breach of warranty claim goes to the merits of the set off question, not whether this Court has jurisdiction to make a merits determination in the first instance. The motion to dismiss should be denied.

Conclusion

For the reasons set forth above and in Builder's initial brief filed with the Court, the motion to dismiss the appeal should be denied, briefing completed, and the matter scheduled for argument and a decision on the merits.

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January 2, 2019

Exhibit 1

Page Excerpts from the Original Complaint

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

ONE BELLE HALL PROPERTY OWNERS)
ASSOCIATION, INC. and BRANDY RAMEY,)
individually, and on behalf of all others)
similarly situated,)

Plaintiffs,)

vs.)

TRAMMELL CROW RESIDENTIAL; TCR)
NC CONSTRUCTION I, LP; BELLE HALL)
DIRECT 101, LP; TCR RLD)
CONDOMINIUMS, INC.; CS 101 BELLE)
HALL, LP; JANE DOE 1-5; FIRST)
EXTERIORS, LLC; AND JOHN DOE 1-60,)

Defendants.)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO. 2012-CP-10- 7594

COMPLAINT
(Defective Construction)

(Jury Trial Demand)

2012 NOV 19 PM 3:47
JUDGE J. ARMSTRONG
CLERK OF COURT

FILED

The Plaintiffs, One Belle Hall Property Owners Association, Inc. and Brandy Ramey, individually and on behalf of all others similarly situated, complaining of the Defendants named herein, would respectfully allege and show the Court as follows:

PARTIES AND JURISDICTIONAL STATEMENT

1. Plaintiff One Belle Hall Property Owners Association, Inc. ("POA") is a non-profit corporation organized and existing under the laws of the State of South Carolina.

2. The POA is the property owners association for the One Belle Hall Horizontal Property Regime.

3. The One Belle Hall Horizontal Property Regime is a Horizontal Property Regime ("One Belle Hall") which exists by virtue of a Master Deed dated December 11, 2006 and recorded December 12, 2006 in the RMC Office of Charleston County, SC in Book K608, Page 211.

4. One Belle Hall consists of fifty-nine (59) condominiums located in four (4) buildings and related common elements, which are located behind the Belle Hall shopping center in Mount Pleasant, South Carolina.

5. By virtue of governing documents and the South Carolina Horizontal Property Regime Act, S.C. Code § 27-31-10, *et. seq.*, the POA is charged with certain duties, powers, rights and authority in connection with One Belle Hall.

6. The POA is charged with, *inter alia*, the management and administration of One Belle Hall, the investigation, maintenance and repair of One Belle Hall's Common Elements and Areas of Responsibility, and has the right and obligation to bring this action on behalf of One Belle Hall, the POA, and the respective owners and members.

7. Plaintiff Ramey (hereinafter "Plaintiff Ramey") is a citizen of Charleston County, South Carolina and is an owner of a condominium within One Belle Hall more particularly described as 2100 Belle Isle Avenue, Unit 101, Mount Pleasant, South Carolina, 29464.

8. Plaintiff Ramey entered into a contract to purchase the above-described real property on or about October 2, 2009.

9. By virtue of property ownership in One Belle Hall, Plaintiff Ramey is a member of the POA, has been a member of the POA at all times relevant hereto, and has ownership and membership rights relating thereto.

10. Defendant Trammell Crow Residential ("Trammell Crow") is a company organized and existing under the laws of the State of Texas. At all times relevant to this action, Trammell Crow was engaged in the business of designing, developing, marketing, constructing, repairing and/or selling condominiums in Charleston County, South Carolina.

11. Defendant Belle Hall Direct 101, LP (hereinafter "Belle Hall Direct") is a limited partnership organized and existing under the laws of the State of Texas. At all times relevant to

this action, Belle Hall Direct was engaged in the business of designing, developing, marketing, constructing, repairing and/or selling condominiums in Charleston County, South Carolina.

12. Defendant TCR NC Construction I, LP (hereinafter "TCR Construction") is a limited partnership organized and existing under the laws of the State of Texas. At all times relevant to this action, TCR Construction was engaged in the business of designing, constructing and/or repairing condominiums in Charleston County, South Carolina.

13. Defendant TCR RLD Condominiums, Inc. (hereinafter "TCR Condominiums") is a corporation organized and existing under the laws of the State of Texas. At all times relevant hereto, TCR Condominiums was engaged in the business of designing, developing, marketing constructing, repairing and/or selling condominiums in Charleston County.

14. Defendant CS 101 Belle Hall, LP (hereinafter "CS 101") is a limited partnership organized and existing under the laws of the State of Texas. At all times relevant to this action, CS 101 was engaged in the business of designing, developing, marketing, constructing repairing and/or selling condominiums in Charleston County, South Carolina.

15. Defendants Trammel Crow, TCR Construction, TCR Condominiums and CS 101, were actual or *de facto* joint ventures, partners, contractors, members, managers, control persons, and/or agents of Belle Hall Direct and participated in the design, development, construction, repair, marketing and/or sale of One Belle Hall condominiums.

16. The address and identity of all Jane Doe Defendants are unknown at this time.

17. Defendants Jane Doe #1-5 (hereinafter "Jane Doe Defendants") are other TCR affiliates which were actual or *de facto* joint ventures, partners, managers, members, contractors, control persons, and/or agents of Belle Hall Direct and participated in the design, development, construction, repair, marketing and/or sale of One Belle Hall condominiums.

18. Defendants Belle Hall Direct, Trammell Crow, TCR Construction, TCR Condominiums, CS 101, and Jane Doe #1-5 (hereinafter collectively referred to as "TCR Defendants") comingled and combined their resources to develop, repair, market, sell, and place the One Belle Hall condominiums into the stream of commerce.

19. The TCR Defendants all use certain trade names interchangeably.

20. The TCR Defendants have been formed and operate so their legal distinction is blurred and they are amalgamated with each other and their principals.

21. Defendant First Exterior, LLC (hereinafter "First Exteriors") is a limited liability company organized and existing under the laws of the State of South Carolina. At all times relevant to this action, First Exteriors supplied materials, installed stucco and/or performed repairs, among other work, at One Belle Hall.

22. The address and identity of all John Doe Defendants are unknown at this time.

23. Defendants John Doe #1-60 (hereinafter "John Doe Defendants") are subcontractors and/or other entities involved in the design, development, marketing, construction, material manufacturing and/or supplying, repair, and/or sale of One Belle Hall.

24. This Honorable Court has jurisdiction over all subject matter alleged herein and over all parties hereto and venue is proper in this forum.

FACTUAL ALLEGATIONS

25. This matter arises out of the design, development, construction, repair and sale of One Belle Hall.

26. At the time the Certificates of Occupancy were issued, One Belle Hall contained latent building defects.

27. Plaintiffs and class members have previously put the TCR Defendants on notice of some or many of the deficiencies. However, the TCR Defendants' repair attempts have failed.

28. The latent building defects in combination with fortuitous weather, repeated water intrusion and/or other events have resulted in consequential damage to other building components and other property.

29. A preliminary inspection of One Belle Hall evidences failure of one or more components the exterior building envelopes; water intrusion into and through the exterior building envelope; and resulting consequential damage to non-defective building components, structural members, and other property. Inspection also reveals failure of other various and sundry building components, with consequential damages resulting there from.

30. Defendants had a duty to design, develop, construct, and repair One Belle Hall in a workmanlike manner with suitable materials and free from all defects.

31. The aforementioned deficiencies and consequential damages evidence that Defendants breached their duties to Plaintiffs.

32. The Defendants' acts and omissions have resulted in building deficiencies, consequential damages, and partial loss of use and enjoyment.

33. Remedying the above-wrongs will result in additional consequential damages and loss of use.

34. As a direct and proximate result of Defendants' violation of their legal duties, Plaintiffs and class members have been proximately damaged in an amount to be determined by the trier of fact, and have had to incur a reasonable attorney's fees and costs for the retention of experts to determine the damage and the scope of work for repair.

35. Upon information and belief, the water intrusion and resulting consequential damages have occurred and have been occurring in each and every year since the completion of construction and constitute "occurrences" and "property damage" under the standard and/or typical general liability policies.

Exhibit 2

Page Excerpts from the 3rd Amended Complaint

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

ONE BELLE HALL PROPERTY OWNERS
ASSOCIATION, INC. and MARVIN T.
MEEK and FRANCIS E. HILL, individually,
and on behalf of all others similarly situated,

Plaintiffs,

vs.

Trammell Crow Residential Company; TCR
NC Construction I, LP; Belle Hall Direct 101,
LP; TCR RLD Condominiums, Inc.; CS 101
Belle Hall, LP; TCR Southeast, Inc.; TCR
Carolina Properties, Inc.; TCR SE
Construction, Inc.; TCR SE Construction II,
Inc.; TCR Construction, a division of
Trammell Crow Residential; TCR
Development, a division of Trammell Crow
Residential; Trammell Crow Residential
Carolina, a division of Trammell Crow
Residential; and Tauer Consulting Company,
Inc., a division of Trammell Crow Residential,
each individually, and collectively d/b/a
"Trammell Crow Residential," "Trammell
Crow" or "TCR"; Halter Properties, LLC; and
Halter Realty Group, LLC, each individually,
and collectively d/b/a "Halter Companies";
ABG Caulking & Waterproofing of
Morristown, Inc; Advanced Building Products
& Services, LLC; BASF Corporation; Billy
Gray d/b/a United Builders, LLC; Budget
Mechanical Plumbing, Inc.; Builders First
Source - Southeast Group, LLC; Builders
Services Group, Inc., individually, and d/b/a
Gale Contractor Services, Inc.; Century Fire
Protection, LLC; Cline Design Associates,
P.A. and Gary D. Cline; Coastal Lumber &
Framing, LLC; Dodson Brothers
Exterminating Co., Inc. a/k/a Dodson Pest
Control; First Exteriors, LLC; Flooring
Services, Inc.; General Heating & Air
Conditioning Company of Greenville, Inc.)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO. 2012-CP-10-7594

THIRD AMENDED COMPLAINT

(Defective Construction)

(Jury Trial Demanded)

FILED
2015 FEB - 9 PM 2:46
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

d/b/a. General Heating and Air; GCI)
 Consultants, LLC f/k/a Glazing Consultants,)
 Inc.; GWC Roofing, Inc., individually, and)
 d/b/a Southcoast Exteriors, Inc.; IES)
 Residential Inc. f/k/a Houston Stafford)
 Electrical Contractors, LP; J. Correa Electrical)
 Company, LLC; Jimmy Warner, individually,)
 and d/b/a Warner Heating & Air; KMAC of)
 the Carolinas, Inc.; P&P Metal Sales Co., Inc.)
 a/k/a P&P Metal Sales, Inc. a/k/a Carolina)
 Metals; Pleasant Places, Inc.; Raymond)
 Building Supply Corporation d/b/a Energy)
 Saving Products of Florida, Inc. a/k/a Energy)
 Saving Products of Florida; RS General)
 Contracting, LLC f/k/a/ RS Custom Homes,)
 LLC; Southern Specialties, Inc.; Stewart)
 Engineering, Inc.; Structural Contractors)
 South, Inc.; Superior Construction Services,)
 Inc., individually, and d/b/a Superior Masonry)
 Unlimited, Inc.; TAMKO Building Products,)
 Inc. f/k/a TAMKO Roofing Products, Inc.;)
 VNS Corporation, individually, and d/b/a)
 Wholesale Building Products; and What Don't)
 We Do;)

Defendants.)

The Plaintiffs, One Belle Hall Property Owners Association, Inc., and Marvin T. Meek and Francis E. Hill, individually, and on behalf of all others similarly situated, complaining of the Defendants named herein, would respectfully allege and show the Court as follows:

PARTIES AND JURISDICTIONAL STATEMENT

1. Plaintiffs file this Third Amended Complaint pursuant to Rule 15 of the South Carolina Rules of Civil Procedure which allows Plaintiffs to freely amend their complaint one time as a matter of right.

2. Plaintiff One Belle Hall Property Owners Association, Inc. ("POA") is a non-profit corporation organized and existing under the laws of the State of South Carolina.

3. The POA is the property owners association for the One Belle Hall Horizontal Property Regime.

4. The One Belle Hall Horizontal Property Regime is a Horizontal Property Regime ("One Belle Hall") which exists by virtue of a Master Deed dated December 11, 2006 and recorded December 12, 2006 in the RMC Office of Charleston County, SC in Book K608, Page 211.

5. One Belle Hall consists of fifty-nine (59) condominiums located in four (4) buildings and related common elements, which are located behind the Belle Hall shopping center in Mount Pleasant, South Carolina.

6. By virtue of governing documents and the South Carolina Horizontal Property Regime Act, S.C. Code § 27-31-10, *et. seq.*, the POA is charged with certain duties, powers, rights and authority in connection with One Belle Hall.

7. The POA is charged with, *inter alia*, the management and administration of One Belle Hall, the investigation, maintenance and repair of One Belle Hall's Common Elements and Areas of Responsibility, and has the right and obligation to bring this action on behalf of One Belle Hall, the POA, and the respective owners and members.

8. Plaintiff Marvin T. Meek (hereinafter "Plaintiff Meek") is a citizen of Charleston County, South Carolina and is an owner of a condominium within One Belle Hall more particularly described as 2100 Belle Isle Avenue, Unit 201, Mount Pleasant, South Carolina, 29464.

9. Plaintiff Francis E. Hill (hereinafter "Plaintiff Hill") is a citizen of Charleston County, South Carolina and is an owner of a condominium within One Belle Hall more particularly described as 2100 Belle Isle Avenue, Unit 104, Mount Pleasant, South Carolina, 29464.

10. By virtue of property ownership in One Belle Hall, Plaintiff Meek, Plaintiff Hill and the Class (hereinafter collectively referred to as "Plaintiffs") are members of the POA, have been members of the POA at all times relevant hereto, and have ownership and membership rights relating thereto.

11. Defendant Trammell Crow Residential Company is a company organized and existing under the laws of the State of Delaware.

12. Defendant TCR Carolina Properties, Inc. is a corporation organized under the laws of the State of Texas, and represented that it was an owner of the One Belle Hall project.

13. Defendant Belle Hall Direct 101, LP is a limited partnership organized and existing under the laws of the State of Texas. At all times relevant to this action, Belle Hall Direct 101, LP was a single purpose entity through which the TCR Defendants' attempted to coordinate their development efforts and was the named seller of One Belle Hall condominiums.

14. Defendant CS 101 Belle Hall, LP is a limited partnership organized and existing under the laws of the State of Texas, and is/was represented as a general partner of Belle Hall Direct 101, LP.

15. Defendant TCR RLD Condominiums, Inc. is a corporation organized and existing under the laws of the State of Texas, and is/was represented as a general partner of CS 101 Belle Hall, LP.

16. Defendant TCR SE Construction, Inc. is a company organized under the laws of the State of Texas, and is/was represented as a general partner of Belle Hall Direct 101, LP.

17. Defendant TCR NC Construction I, LP is a limited partnership organized and existing under the laws of the State of Texas. At all times relevant to this action, TCR NC Construction I, LP was the entity through which the TCR Defendants' attempted to effect their construction efforts and was the named general contractor for One Belle Hall.

18. Defendant TCR SE Construction II, Inc. is a company organized under the laws of the State of Texas, and is/was represented as a partner and/or agent of TCR NC Construction I, LP.

19. Defendant TCR Southeast, Inc. is a company organized under the laws of the State of Texas.

20. Defendant Tauer Consulting Company, Inc., a division of Trammell Crow Residential, is a corporation organized under the laws of the State of Georgia. At all times relevant to this action, Tauer Consulting Company, Inc. served as the punch supervisor and sales coordinator, among providing other services, for One Belle Hall.

21. Defendant Trammell Crow Residential Carolina is a division of Trammell Crow Residential and/or is an entity comprised of "TCR" employees, agents and/or affiliates.

22. Defendant TCR Construction is a division of Trammell Crow Residential and/or is an entity comprised of "TCR" employees, agents and/or affiliates.

23. Defendant TCR Development is a division of Trammell Crow Residential and/or is an entity comprised of "TCR" employees, agents and/or affiliates.

24. The foregoing Defendants, and their divisions and affiliates, operated under the trade names "Trammell Crow Residential," "Trammell Crow," "TCR," and similar names

(herein collectively referred to as the "TCR Defendants"), and at all times relevant to this action, the TCR Defendants coordinated, performed, directed, managed, controlled, supervised and/or otherwise participated in the design, development, marketing, construction, sale and/or repair of One Belle Hall.

25. The TCR Defendants operated together as actual or *de facto* joint venturers, partners, and agents of each other in the design, development, marketing, construction, sale and/or repair of One Belle Hall (the design, development, marketing, construction, sale and/or repair of One Belle Hall hereinafter collectively referred to as the "One Belle Hall Project").

26. At all times material hereto, the TCR Defendants operated a joint enterprise for the common, for-profit purpose of the One Belle Hall Project.

27. The TCR Defendants acted as agents of each other in connection with the One Belle Hall Project.

28. The TCR Defendants have acted collectively and in such manner that the distinction between the TCR Defendants has been blurred and the TCR Defendants should be amalgamated as a single entity.

28. The TCR Defendants have failed to observe corporate formalities and their corporate shells should be disregarded and all TCR Defendants should be held liable for Plaintiffs' damage.

29. Defendant Halter Properties, LLC is a limited liability company organized and existing under the laws of the State of Georgia.

30. Defendant Halter Realty Group, LLC is a limited liability company organized and existing under the laws of the State of Georgia.

31. The foregoing Halter Defendants, their divisions and affiliates, operated under the trade name "Halter Companies" and similar names (herein collectively referred to as the "Halter Defendants"), and at all times relevant to this action, the Halter Defendants coordinated, performed, directed, managed, controlled, supervised and/or otherwise participated in the development and construction of One Belle Hall.

32. The Halter Defendants operated together as actual or *defacto* joint venturers, partners and agents of each other in the One Belle Hall Project.

33. At all times material hereto, the Halter Defendants operated a joint enterprise for the common, for-profit purpose of the One Belle Hall Project.

34. The Halter Defendants acted as agents of each other in connection with the One Belle Hall Project.

35. The Halter Defendants have acted collectively and in such manner that the distinction between the Halter Defendants has been blurred and the Halter Defendants should be amalgamated as a single entity.

36. The Halter Defendants have failed to observe corporate formalities and their corporate shells should be disregarded and all Halter Defendants should be held liable for Plaintiffs' damage.

37. The TCR Defendants and the Halter Defendants were actual or *de facto* joint ventures and/or partners, control persons, and/or agents of each other in the One Belle Hall Project.

38. The TCR Defendants and the Halter Defendants comingled and combined their resources to develop, repair, market, sell, and place the One Belle Hall condominiums into the stream of commerce.

39. Defendant Cline Design Associates, P.A. (hereinafter "Cline Design") is a professional corporation organized and existing under the laws of the State of North Carolina. At all times relevant to this action, Cline Design served as the architect for the construction of One Belle Hall.

40. Defendant Gary D. Cline (hereinafter "Gary Cline") is a registered architect in the State of South Carolina who executed and sealed the plans for the construction of One Belle Hall.

41. Defendant GCI Consultants, LLC f/k/a Glazing Consultants, Inc. (hereinafter "GCI") is a corporation organized and existing under the laws of the State of Florida. At all times relevant to this action, GCI provided consulting services and quality assurance inspections, among other work, at One Belle Hall.

42. Defendant Stewart Engineering, Inc. (hereinafter "Stewart") is a corporation organized and existing under the laws of the State of North Carolina. At all times relevant to this action, Stewart served as the structural engineer for the construction of One Belle Hall.

43. Defendant ABG Caulking & Waterproofing of Morristown, Inc. (hereinafter "ABG") is a corporation organized and existing under the laws of the State of Tennessee. At all times relevant to this action, ABG supplied materials, installed caulking and/or performed repairs, among other work, at One Belle Hall.

44. Defendant BASF Corporation (hereinafter "BASF") is a corporation organized and existing under the State of Delaware. At all times relevant to this action, BASF supplied stucco, among other building components, at One Belle Hall.

45. Defendant Builders First Source – Southeast Group, LLC (hereinafter "BFS") is a limited liability company organized and existing under the laws of the State of Delaware. At all

times relevant to this action, BFS supplied windows, among other building components, at One Belle Hall.

46. Defendants Builders Services Group, Inc., individually, and d/b/a Gale Contractor Services, Inc. (hereinafter "Gale") is a corporation organized and existing under the laws of the State of Florida. At all times relevant to this action, Gale supplied materials, installed garage doors and/or performed repairs, among other work, at One Belle Hall.

47. Defendant Budget Mechanical Plumbing, Inc. (hereinafter "Budget Plumbing") is a limited liability company organized and existing under the laws of the State of South Carolina. At all times relevant to this action, Budget Plumbing supplied materials, installed plumbing, plumbing fixtures, water heaters, condensate lines and/or performed repairs, among other work, at One Belle Hall.

48. Defendant Century Fire Protection, LLC (hereinafter "Century Fire") is a limited liability corporation organized and existing under the laws of the State of Delaware. At all times relevant to this action, Century Fire provided and/or installed fire protection and fire stopping, among other work, at One Belle Hall.

49. Defendant Coastal Lumber and Framing, LLC (hereinafter "Coastal Framing") is a limited liability company organized under the laws of the State of Florida. At all times relevant to this action, Coastal Framing supplied materials, framed structures and/or performed repairs, among other work, at One Belle Hall.

50. Defendant Advanced Building Products & Services, LLC (hereinafter "ABP&S") is a limited liability company organized under the laws of the State of Florida. At all times relevant to this action, ABP&S operated under a profit sharing agreement with Coastal Framing

by which ABP&S was an actual or *de facto* joint venturer, partner, manager, and/or agent of Coastal Framing in the supply of materials, among other work, at One Belle Hall.

51. Defendant Dodson Brothers Exterminating Co., Inc. a/k/a Dodson Pest Control ("Dodson") is a corporation organized and existing under the laws of the State of Virginia. At all times relevant to this action, Dodson provided termite treatment, among other work, at One Belle Hall.

52. Defendant First Exterior, LLC (hereinafter "First Exteriors") is a limited liability company organized and existing under the laws of the State of South Carolina. At all times relevant to this action, First Exteriors supplied materials, installed stucco and/or performed repairs, among other work, at One Belle Hall.

53. Defendant Flooring Services, Inc. (hereinafter "Flooring Services") is a limited liability company organized and existing under the laws of the State of South Carolina. At all times relevant to this action, Flooring Services supplied materials, installed flooring and/or performed repairs, among other work, at One Belle Hall.

54. Defendant General Heating & Air Conditioning Company of Greenville, Inc. d/b/a General Heating and Air (hereinafter "General Heating") is a corporation organized and existing under the laws of the State of South Carolina. At all times relevant to this action, General Heating supplied materials, installed heating and air conditioning ("HVAC") and/or performed repairs, among other work, at One Belle Hall.

55. Defendant Jimmy Warner (hereinafter "Jimmy Warner") is a resident of Paulding County, Georgia and the owner of Warner Heating & Air. At all times relevant to this action, Jimmy Warner was a subcontractor of General Heating and supplied materials, installed HVAC and/or performed repairs, among other work, at One Belle Hall.

56. Defendant Warner Heating & Air (hereinafter "Warner") is a business entity with its principal place of business located in Paulding County, Georgia. At all times relevant to this action, Warner was a subcontractor of General Heating and supplied materials, installed HVAC and/or performed repairs, among other work, at One Belle Hall.

57. Defendant GWC Roofing, Inc., individually, and d/b/a Southcoast Exteriors, Inc. (hereinafter "GWC") is a corporation organized under the laws of the State of North Carolina. At all times relevant to this action, GWC supplied materials, installed roofing and/or performed repairs, among other work, at One Belle Hall.

58. Defendant Southcoast Exteriors, Inc. (hereinafter "Southcoast") is a corporation organized under the laws of the State of South Carolina. At all times relevant to this action, Southcoast controlled, directed, managed, supervised and/or carried out the business of GWC and supplied materials, installed roofing and/or performed repairs, among other work, at One Belle Hall.

59. Defendant IES Residential, Inc. f/k/a Houston Stafford Electrical Contractors, LP (hereinafter "Houston Stafford") is a limited partnership organized and existing under the laws of the State of Texas. At all times relevant to this action, Houston Stafford supplied materials, installed electrical systems and/or performed repairs, among other work, at One Belle Hall.

60. Defendant J. Correa Electrical Company, LLC (hereinafter "JCEC") is a limited liability organized under the laws of the State of South Carolina. At all times relevant to this action, JCEC was a subcontractor of Houston Stafford and supplied materials, installed electrical systems and/or performed repairs, among other work, at One Belle Hall.

61. Defendant KMAC of the Carolinas, Inc. (hereinafter "KMAC") is a corporation organized and existing under the laws of the State of North Carolina. At all times relevant to this

action, KMAC supplied materials, installed gypcrete and waterproofing and/or performed repairs, among other work, at One Belle Hall.

62. Defendant P&P Metal Sales Co., Inc. a/k/a P&P Metal Sales, Inc. d/b/a Carolina Metals, Inc. (hereinafter "P&P Metal") is a corporation organized and existing under the laws of the State of North Carolina. At all times relevant to this action, P&P Metal supplied materials, installed aluminum porch railings and/or performed repairs, among other work, at One Belle Hall.

63. Defendant Pleasant Places, Inc. (hereinafter "Pleasant Places") is a corporation organized under the laws of the State of South Carolina. At all times relevant to this action, Pleasant Places supplied materials, installed irrigation and landscaping and/or performed repairs, among other work, at One Belle Hall.

64. Defendant Raymond Building Supply Corporation d/b/a Energy Saving Products of Florida, Inc. a/k/a Energy Saving Products of Florida, a division of Raymond Building Supply Corporation (hereinafter "ESP") is a corporation organized under the State of Florida. At all times relevant to this action, ESP supplied windows, among other building components, at One Belle Hall.

65. Defendant RS General Contracting, LLC f/k/a RS Custom Homes, LLC (hereinafter "RS Custom") is a limited liability company organized and existing under the laws of the State of South Carolina. At all times relevant to this action, RS Custom supplied materials, installed stucco and/or performed repairs, among other work, at One Belle Hall.

66. Defendant Southern Specialties, Inc. (hereinafter "Southern Specialties") is a corporation organized and existing under the laws of the State of South Carolina. At all times

relevant to this action, Southern Specialties supplied materials, installed insulation, gutters and downspouts and/or performed repairs, among other work, at One Belle Hall.

67. Defendant Structural Contractors South, Inc. (hereinafter "Structural Contractors") is a corporation organized and existing under the laws of the State of Florida. At all times relevant to this action, Structural Contractors supplied materials, performed punch labor and/or performed repairs, among other work, at One Belle Hall.

68. Defendant Superior Construction Services, Inc., individually, and d/b/a Superior Masonry Unlimited, Inc. (hereinafter "Superior") are corporations organized under the laws of the State of South Carolina. At all times relevant to this action, Superior supplied materials, installed brick veneer and/or performed repairs, among other work, at One Belle Hall.

69. Defendant TAMKO Building Products, Inc. f/k/a TAMKO Roofing Products, Inc. (hereinafter "TAMKO") is a corporation organized and existing under the State of Missouri. At all times relevant to this action, TAMKO supplied shingles, among other building components, at One Belle Hall.

70. Defendant VNS Corporation, individually, and d/b/a Wholesale Building Products (hereinafter "VNS") is a corporation organized and existing under the laws of the State of Georgia. At all times relevant to this action, VNS supplied materials and installed interior finishes, accessories and/or bath fixtures, among other work, at One Belle Hall.

71. Defendant Billy Gray d/b/a United Builders, LLC (hereinafter "United") is a limited liability company organized and existing under the laws of the State of Tennessee. At all times relevant to this action, United was a subcontractor of VNS Corporation d/b/a Wholesale Building Products, and supplied materials, installed interior trim, door units, hardware, attic access doors, and bath accessories, among other work, at One Belle Hall.

72. Defendant What Don't We Do (hereinafter "WDWD") is business entity with its principal place of business located in Horry County, South Carolina. At all times relevant to this action, WDWD supplied materials and/or performed window repairs, among other work, at One Belle Hall.

FACTUAL ALLEGATIONS

73. This matter arises out of the design, development, construction, repair and sale of One Belle Hall.

74. At the time the Certificates of Occupancy were issued, One Belle Hall contained latent building defects.

75. Plaintiffs and class members have previously put the TCR Defendants on notice of some or many of the deficiencies.

76. The TCR Defendants attempted to repair One Belle Hall's defective condition, but said attempts have failed and/or were otherwise negligently performed.

77. The latent building defects in combination with fortuitous weather, repeated water intrusion and/or other events have resulted in consequential damage to other building components and other property.

78. A preliminary inspection of One Belle Hall evidences failure of one or more components of the exterior building envelopes; water intrusion into and through the exterior building envelope; and resulting consequential damage to non-defective building components, structural members, and other property. Inspection also reveals failure of other various and sundry building components, with consequential damages resulting there from.

79. Defendants had a duty to design, develop, construct, and repair One Belle Hall in a workmanlike manner with suitable materials and free from all defects.

80. The aforementioned deficiencies and consequential damages evidence that Defendants breached their duties to Plaintiffs.

81. The Defendants' acts and omissions have resulted in building deficiencies, consequential damages, and partial loss of use and enjoyment.

82. Remedying the above-wrongs will result in additional consequential damages and loss of use.

83. As a direct and proximate result of Defendants' violation of their legal duties, Plaintiffs and class members have been proximately damaged in an amount to be determined by the trier of fact, and have had to incur a reasonable attorney's fees and costs for the retention of experts to determine the deficiencies, damage and the scope of work for repair.

84. Upon information and belief, the water intrusion and resulting consequential damages have occurred and have been occurring in each and every year since shortly after the completion of construction and constitute "occurrences" and "property damage" under the standard and/or typical general liability policies.

CLASS ACTION ALLEGATIONS

85. Pursuant to the common law of South Carolina and Rule 23 of the South Carolina Rules of Civil Procedure ("SCRCPP"), Plaintiff Meek and Plaintiff Hill bring this action both individually and as a proposed class action against Defendants on behalf of themselves and all other similarly situated persons and entities, who own, per the class definition, a condominium within One Belle Hall (hereinafter collectively referred to as the "Class"). The Class is particularly defined as follows:

All persons and entities that own a condominium within One Belle Hall located in the Town of Mt. Pleasant, Charleston County, South Carolina.

103. Accordingly, any warranty provided by Defendants fails its essential purpose because its purports to warrant that One Belle Hall and/or its building components will be free from defects for a limited period of time when in fact One Belle and/or its building components fail far short of the expected life cycle of the condominium buildings.

104. Moreover, Defendants' warranties are woefully inadequate to repair and replace failed building components, let alone reimburse for any damage suffered to the underlying structure due to the inadequate protection provided by the product. The remedies available Defendants' warranties are limited to such an extent that they do not provide a minimum adequate remedy.

105. As a result, any time limitations on the remedies encompassed within Defendants' warranties are unconscionable and unenforceable, and therefore, Defendants are estopped from relying on the same.

ESTOPPEL FOR PLEADING NOTICE OF OPPORUNITY TO CURE

106. The TCR Defendants are further estopped from relying on the Notice of Opportunity to Cure Act to stay the progression of Plaintiffs' claims.

107. The TCR Defendants were put on sufficient notice of One Belle Hall's defective condition within any statutory period prescribed by the Act.

108. In addition, the TCR Defendants were provided an opportunity to cure One Belle Hall's defective condition previously, but failed to adequately perform.

FOR A FIRST CAUSE OF ACTION
(Negligence/Gross Negligence as to All Defendants)

109. Plaintiffs repeat and reallege the allegations contained in the above paragraphs as if more fully set forth herein.

110. At all times relevant hereto, the Defendants, its agents, servants, employees, and subcontractors undertook and had a duty to Plaintiffs to exercise and use due care in the design, construction and repair of One Belle Hall in a good workmanlike manner and with suitable materials, in accordance with the applicable building codes, state law, good design, and in conformance with the prevailing industry standards.

111. Defendants breached their duties to Plaintiffs and the Class in a manner that was negligent, careless, reckless, and wanton in the following particulars:

- (a) In designing, developing, constructing, repairing and selling, One Belle Hall with construction deficiencies including those previously identified;
- (b) In failing to construct One Belle Hall in accordance with due care and in accordance with standard building practices;
- (c) In failing to construct One Belle Hall in accordance with building code;
- (d) In failing to properly supervise the work and construction of One Belle Hall;
- (e) In failing to properly coordinate the subcontractors and with other subcontractors;
- (f) In failing to construct with an adequate exterior building envelope;
- (g) In failing to act as a reasonable person would in the circumstances then and there prevailing;
- (h) In negligently covering up their own defective work and the defective work of others;
- (i) In failing to make proper repairs; and
- (j) Such other failures to be proven at trial.

112. Plaintiffs have been damaged as a direct and proximate result if the negligence, carelessness, recklessness, willfulness, and wantonness of the Defendants.

113. If it is shown that said failures were committed with gross negligence and/or reckless disregard for the rights of others, and/or constituted negligence per se, Plaintiffs are entitled to an award of punitive damages against the Defendants.

FOR A SECOND CAUSE OF ACTION
(Breach of Warranty as to All Defendants)

114. Plaintiffs repeat and reallege the allegations contained in the above paragraphs as if more fully set forth herein.

115. The design, construction, sale, and repair of One Belle Hall came with express and implied warranties that the work would be performed in a careful, diligent and workmanlike manner and that One Belle Hall would be constructed with suitable materials and components and free from all defects and be of superior quality befitting of an upscale condominium complex.

116. The design, construction, sale and/or repair of One Belle Hall, and the components used therein, came with implied warranties of fitness, merchantability and workmanship. Additionally, the TCR Defendants owed Plaintiffs a warranty of habitability.

117. Defendants have breached their warranties by designing, constructing, and/or repairing One Belle Hall in a defective manner as set forth above.

118. As a direct and proximate result of the Defendants' breach of the implied warranty, Plaintiffs have suffered actual and consequential damages.

FOR A THIRD CAUSE OF ACTION
(Strict Liability in Tort: *S.C. Code Ann. § 15-73-10 et seq.* as to BASF, BFS, ESP, and TAMKO)

119. Plaintiffs repeat and reallege the allegations contained in the above paragraphs as if more fully set forth herein.

120. Defendant BASF manufactured and/or supplied the stucco installed during the construction and/or repair of One Belle Hall.

121. Defendant BFS supplied the ESP windows installed during the construction and/or repair of One Belle Hall.

122. Defendant ESP manufactured the windows installed during the construction and/or repair of One Belle Hall.

123. Defendant TAMKO manufactured and/or supplied the shingles installed during the construction and/or repair of One Belle Hall.

124. In manufacturing and/or supplying products for the construction and/or repair of One Belle Hall, the aforementioned Defendants placed products into the stream of commerce.

125. By introducing their products into the stream of commerce, the aforementioned Defendants represented said products were safe and suitable for their foreseeable use.

126. In the manufacture and/or supply of products to One Belle Hall, the aforementioned Defendants anticipate and expect that their products will reach the public in substantially the same condition in which they were designed, developed, constructed, and sold.

127. The aforementioned Defendants have manufactured and/or sold products in a defective manner which has resulted in repeated water intrusion into and damage to One Belle Hall and other building deficiencies.

128. Plaintiffs could not have discovered the product defects through the exercise of reasonable care.

129. The cost of altering the design, construction, and/or repair of the products supplied to One Belle Hall was substantially less than the resulting damage, cost, and injury suffered by the Plaintiffs.

130. The design and manufacture of the products supplied to One Belle Hall was inherently defective as sold was a direct and proximate cause of the damages suffered by Plaintiffs.

131. The aforementioned Defendants are therefore liable to Plaintiffs under the doctrine of strict liability in an amount to be determined by the trier of fact.

FOR A FOURTH CAUSE OF ACTION
(Breach of Fiduciary Duty as to the TCR Defendants)

132. Plaintiffs repeat and reallege the allegations contained in the above paragraphs as if more fully set forth herein.

133. The TCR Defendants have a fiduciary relationship to the Plaintiffs by virtue of their capacity as the developer and steward of One Belle Hall and their former capacity controlling the POA.

134. The TCR Defendants promoted, created and maintained control of the POA and One Belle Hall for several years, and thus, had fiduciary duties they owed to the POA, its members and individual homeowners.

135. The TCR Defendants breached the fiduciary duties they owed to the Plaintiffs by:

- (a) failing to investigate defective conditions prior to handing over the property to the POA and the homeowners;
- (b) failing to disclose said defective conditions;

Exhibit 3

Trial Transcript Excerpts

One Belle Hall POA v Builders First Source Southeast Group, LLC.
Motion for Directed Verdict
August 31, 2016

MOTION FOR DIRECTED VERDICT

BY MS. DYER:

We'd like to move for a directed verdict. The first directed verdict would be in regards to the cause of action for negligence. We feel there has been a failure by the plaintiff to meet its burden of proof that Builder's First Source had a duty with regard to selling the windows that was in fact breached and caused damage. The second directed verdict ---

THE COURT: --- let me go ahead and handle it now. I am going to respectfully deny your motion. Taking the evidence in the light most favorable to the non-moving party I do believe there is evidence of negligence. Yes, next?

MS. DYER: Yes, Your Honor. The next would be directed verdict on the cause of action of strict liability. Under the statute code section 15-73-10 it's our position that there has been a failure of proof by the evidence or testimony that the windows were in fact unreasonably dangerous. The windows have been in operation for ten years. If they have contributed at all to damage it is only one small component of the damage and the buildings are certainly habitable. There has been no injury to life or limb. Those are the grounds of our motion, Your Honor.

One Belle Hall POA v Builders First Source Southeast Group, LLC
Motion for Directed Verdict
August 31, 2016

1 THE COURT: Very well. Likewise I would
2 respectfully deny your motion. Taking the evidence in
3 the light most favorable to the non-moving party I do
4 believe that there is evidence in which a jury can make
5 that determination that these windows pose an
6 unreasonable danger. Next?

7 MS. DYER: Yes, Your Honor ---

8 THE COURT: --- especially based on what we just saw
9 and heard.

10 MS. DYER: Yes, Your Honor. The breach of warranty
11 cause of action we would move for a directed verdict on
12 that cause of action in that there has been insufficient
13 evidence and proof to establish that the windows are in
14 fact in a defective condition which would constitute
15 breach of warranty.

16 THE COURT: Respectfully denied.

17 MS. DYER: Yes, Your Honor.

18 THE COURT: Very well. All right.

19 MS. DYER: No further motions from the defendant.

20 THE COURT: Very well. Are you ready?

21 MS. DYER: Yes.

22 THE COURT: Excellent. Let's have the jury please.

23 [Whereupon, the jury enters at 4:37 p.m.]

24 THE COURT: Thank you so much. Ladies and
25 gentlemen as I mentioned to you we heard from the

1 MOTION FOR DIRECTED VERDICT

2 THE COURT: All right, motions. Any from the
3 plaintiff first?

4 MR. LUCEY: Yes, Your Honor. Plaintiff moves for
5 a directed verdict on all three causes of action so we
6 can argue them at the same time. The core issues in all
7 three are the same. Among other things but certainly the
8 absolute most obvious, Your Honor, the only testimony in
9 this case, the unrefuted testimony in this case is that
10 the twin windows were illegal for use in this
11 jurisdiction.

12 Now we've established Builder's First Source's
13 duties from a number of sources including the ones they
14 voluntarily undertook in the purchase order. And just
15 referring to that for a moment one of the duties they
16 undertook in the purchase order was to comply with all
17 state and federal laws. They clearly did not do that by
18 distributing a window in this jurisdiction that can't be
19 used in this jurisdiction. Because it can't be used in
20 this jurisdiction it is on its face unsuitable and will
21 not pass without objection in the trade.

22 And Your Honor we have both the expressed warranty
23 and the implied warranty and I think the record will
24 reflect that the defendants never actually said the
25 windows don't leak or the windows don't cause damage.

1 They were very careful about that. They tried to provide
2 alternative explanations as to why things were occurring
3 in the building and why some of the tests might have
4 failed regardless of the windows performance. But they
5 never actually said these windows don't leak. These
6 windows haven't failed and these windows have not caused
7 damage. In fact they were very careful in that and
8 instead they more couched their testimony in terms of you
9 know these are five, six, eight year old windows. These
10 things may have to be done.

11 And that's another thing I want to point out when
12 the court is considering the testimony on these motions.
13 Ninety percent of Mr. Drake's testimony was this may
14 happen or this could happen. Very little did he actually
15 give an opinion to a reasonable degree of certainty in
16 his field of expertise.

17 In fact I'll give the court an example. When
18 Builder's First Source asked Mr. Drake about why windows
19 can fail testing he didn't say he had an opinion to a
20 reasonable degree of certainty or anything like that as
21 to why the windows failed the testing. He said well
22 sometimes you can leak if you apply too much pressure or
23 if the weeps are clogged. He didn't say that's what
24 occurred here. He said ~~it~~ can happen. They really have
25 not contested plaintiff's evidence that the windows leak

One Belle Hall POA v Builders First Source Southeast Group, LLC
Motion for Directed Verdict-Remarks by Mr. Lucey
September 1, 2016

1 and are causing damage. They're illegal. The undisputed
2 evidence is that Builder's First Source employees did not
3 perform any of the undertakings that they agreed to do in
4 the terms and conditions including ensuring the quality
5 of the windows and making sure not just that they were
6 suitable; the terms actually provide that they will be
7 the most suitable for this type of material and goods.
8 And clearly that has not occurred. The evidence is
9 overwhelming and the contradictory evidence is very
10 little, Your Honor.

11 The plaintiffs believe that they are entitled to a
12 directed verdict both on negligence, warranty implied
13 warranty and on strict liability. I'll note to the court
14 too we put in the unreasonable dangerous aspect of this
15 through Builder's First Source's own witnesses in our
16 case. So there can be little dispute on that issue and
17 we believe satisfy the elements of each of those causes
18 of action.

19 THE COURT: Thank you so much. Yes, ma'am?
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One Belle Hall POA v Builders First Source Southeast Group, LLC
Motion for Directed Verdict-Remarks by Ms. Dyer
September 1, 2016

1 MS. DYER: Our position is that we have provided
2 evidence that not only are the windows -- plaintiffs have
3 put up evidence that the windows, the DP windows the
4 certification test reports to prove that they are DP-50
5 haven't been found. We have -- the fact that the
6 evidence doesn't exist doesn't mean that the windows were
7 illegal. We haven't heard from a Mount Pleasant building
8 official; we haven't heard from an architect.

9 But moreover there is evidence, there is testimony
10 and documentation in evidence that there are alternative
11 causes for the windows to leak. Supposing and providing
12 the jury with alternates is an acceptable alternative in
13 this case.

14 As far as the strict liability cause of action Mr.
15 Woodward's testimony is that windows can be unreasonably
16 dangerous. We would argue that there isn't actually
17 testimony here that the windows at One Belle Hall are
18 unreasonably dangerous.

19 As far as the negligence cause of action there is a
20 failure to prove what duty Builder's First Source had
21 with regard to the inspection of the certifications
22 supporting the windows. And the breach of warranty we
23 would argue that there has been sufficient evidence that
24 the windows are defective by manufacturing purposes as
25 opposed to having some kind of damage that's occurred

1 from the time that the windows arrived on site until the
2 time that they currently exist. We feel that there has
3 been a sufficient showing of evidence on all three causes
4 of action to allow the jury to make the final
5 determination.

6 There is also a question as far as damages go and
7 the damages would be applicable to all three of those
8 causes of action. There is a question on whether or not
9 the windows -- if the windows have caused damage then how
10 much damage have the windows caused. There is an element
11 of speculation there. We've heard Doctor Whitlock wasn't
12 able to quantify for the jury what percentage or what
13 share of the damage at the buildings he would attribute
14 to the windows.

15 We've also heard that Mr. Moore who provided the
16 estimate would defer to Mr. Whitlock as far as how much
17 damage the windows have caused and how much damage needs
18 to be repaired as to the window elements themselves. He
19 was unable to testify or was yesterday in providing
20 documentation as far as what is actually necessary in the
21 field for repair. So we believe there is a question of
22 fact and plenty of evidence that could be weighed either
23 way as to damages which would be applicable to all three
24 causes of action.

25 THE COURT: You haven't mentioned although it was

1 in your pleadings about intervening negligence and
2 reliability with regards to third parties. You did not
3 mention that in your argument now.

4 MS. DYER: Correct. Well, clearly there were a
5 number of other parties involved in the litigation. The
6 windows are incorporated into a wall system and there is
7 clear evidence there is defects from both sides. There
8 are defects with multiple elements within the wall system
9 that could contribute to and have contributed to the
10 damage and to compromising the window's ability to
11 perform essentially. And for those reasons we believe
12 that the liability of Builder's First Source as the
13 supplier of the windows is unclear as it is muddled by
14 the intervening negligence of other parties who aren't in
15 court today.

16 THE COURT: Okay. Yes sir, anything further?
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One Belle Hall POA v Builders First Source Southeast Group, LLC
Motion for Directed Verdict-Remarks by Mr. Lucey
September 1, 2016

1 MR. LUCEY: Yes, Your Honor. There doesn't seem
2 to be that there can't be any intervening negligence as
3 to the windows, only the twin windows because they were
4 the intervening party, they were the -- party, they were
5 the middle party that actually bought the windows and
6 then resold them to this project. That aspect is just is
7 just what it is.

8 As to the damages that are arguing there we didn't
9 move for a directed verdict as to the amount of damages;
10 only as to the issue of liability. To the extent that
11 there is some sort of argument that we had a lack of
12 proof on damages because we can give a percentage ---

13 THE COURT: --- I'm not concerned about that.
14 Don't worry about that. Go back to liability; go back
15 to liability on the twin windows. Talk to me about that.

16 MR. LUCEY: Well, Your Honor, this middle man
17 bought the windows and resold them.

18 THE COURT: I'm not concerned about that. Clearly
19 our law says that the seller of the windows implied and
20 express warranty and it certainly has been your position
21 that they had an affirmative duty to do certain things
22 that they did not do like make sure that they were
23 appropriate windows, make sure that they had -- that the
24 testing had been complied with, etcetera. You've got
25 that. Talk to me specifically your position with regards

1 to the twin windows.

2 MR. LUCEY: The twin windows were illegal for use
3 from the get go.

4 THE COURT: Okay.

5 MR. LUCEY: They can't say somebody else handled
6 that issue. There are no test reports on the twin
7 windows, there are no certifications. They can claim
8 confusion as to the certification or the test reports on
9 the single windows but there never was, there is no
10 evidence of a test report or a certification on the twin
11 windows.

12 There is no way they can blame somebody else for
13 that; they just never even checked. They never checked
14 anything but had they checked they would have found there
15 is none. There is just no mistake to be made. There is
16 no certification; you can't use it, they can't be sold
17 here. And there is no just way for them to blame anybody
18 else for that.

19 THE COURT: Okay. On that one issue let me hear
20 from you about that.

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1 MS. DYER: Yes, Your Honor. The plaintiff has the
2 burden to prove that the windows were illegal. And here
3 we just have an absence of that proof. We have Doctor
4 Whitlock, the finding that the windows didn't meet
5 building code. Doctor Whitlock is not a building code
6 official. We haven't heard from a building code official
7 to indicate that the windows do violate the code.

8 We also haven't seen again a test report and the
9 plaintiff has the burden of proof that there isn't a test
10 report; not just that there is an absence of one overall.

11 THE COURT: I'm trying to remember the testimony
12 that was elicited by Builder's Source that in fact
13 Builder's Source had made a determination that in fact
14 that the twin windows had -- that they had done a review
15 to be sure that they had been tested because as I
16 remember they were drop shipped to the site.

17 And I don't remember any testimony -- I do remember
18 the testimony about the single windows and I remember
19 there were some questions about a number of issues but
20 you walked the witnesses for the plaintiff through that
21 on the single windows. What about the double windows?

22 MS. DYER: The specification from the architect,
23 the design professional in this case, wasn't exclusive to
24 a single window or a twin window. It was more all of the
25 windows. The window component itself before it is joined

One Belle Hall POA v Builders First Source Southeast Group, LLC
Motion for Directed Verdict-Remarks by Ms. Dyer
September 1, 2016

1 together is the same window.

2 THE COURT: I remember that.

3 MS. DYER: And so the architect design professional
4 is who Builder's First Source relied on as far as calling
5 out the appropriate window for this particular project,
6 calling out that that window met the specifications,
7 which in turn met the building code as it was a permitted
8 project and eventually was C-O'ed [phonetic].

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1 MR. LUCEY: There is actually no evidence of
2 reliance in the record. No evidence that Builder's First
3 Source relied on the architect. The evidence is that the
4 Builder's First Source sales person prepared the purchase
5 order and the model number on the purchase order is not
6 found in these facts. You can believe whatever
7 explanation you want but the two model numbers do not
8 match. And the sales person is deceased and we don't
9 have his testimony.

10 But not only is there no evidence of reliance there
11 was testimony from Builder's First Source current
12 consultant and former area V.P. that neither he nor
13 Bratten looked at the specs or looked at the test
14 reports. They didn't look at anything; that was the
15 their testimony. There can't be reliance if they didn't
16 even look at it.

17 THE COURT: Yes?
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1 MS. DYER: I believe that Bob Lanier did testify
2 that Builder's First Source relies on the specifications
3 from the design professionals.
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One Belle Hall POA v Builders First Source Southeast Group, LLC
Motion for Directed Verdict-Remarks by Mr. Lucey
September 1, 2016

1 MR. LUCEY: But that general practice can't
2 contradict the specific testimony as to this transaction
3 where he said they didn't look at it. He didn't look at
4 it. Bratten didn't look at it. They didn't look at the
5 specs, they didn't look at the tests; they didn't look at
6 anything.

One Belle Hall POA v Builders First Source Southeast Group, LLC
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September 1, 2016

1 THE COURT: Okay. Taking the evidence in the
2 light most favorable to the non-moving party, which of
3 course would be the defendant I believe that what has
4 been laid out are issues for the jury and I am
5 respectfully going to deny the motion for -- see I think
6 it is an involuntary non-suit with prejudice but a
7 directed verdict is what it is commonly called at this
8 juncture so I would respectfully deny your motion noting
9 your exception thereto. Yes, motions?

10 MS. DYER: No, Your Honor.
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1 THE COURT: Now we've got to get us a charge, we've
2 got to get some lunch, and we got to be back by 2:30. So
3 y'all go get some lunch. Can you do that in just a short
4 period of time? I'm finishing the charge as we speak and
5 meet me back about a quarter to 2. Give some thought to
6 the verdict form because this is going to be a little bit
7 different and the reason is there is a request for
8 punitives and I know what their decision is based upon.
9 So y'all will have to help me with that one.

10 MS. DYER: I'm sorry, Your Honor?

11 THE COURT: Verdict form; I'm just going to need
12 your help with that.

13 MR. LUCEY: On our last couple of trials, Your
14 Honor, we just did an interrogatory at the bottom of the
15 sheet do you find the conduct ---

16 THE COURT: --- if you've got it bring it with you
17 or if y'all can reproduce it bring it.

18 MR. LUCEY: Yes, ma'am. Thank you.

19 THE COURT: That would be lovely. Thank you.
20 I'll see you in about 30 or 40 minutes. Thanks. Let me
21 know because I want to have an informal charge
22 conference. When y'all both get back y'all come on back.

23 [Whereupon, court is in recess from 1:16 p.m. until
24 2:26 p.m.]

25 THE COURT: Thank you so much.

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1 MS. DYER: Your Honor, I have a housekeeping
2 matter.

3 THE COURT: Sure.

4 MS. DYER: We marked the photos that we used in Mr.
5 Drake's presentation today as Joint exhibit 169. I
6 failed to move it into evidence.

7 [Whereupon, joint exhibit number 169 is entered into
8 evidence by the court]

9 THE COURT: Are y'all ready?

10 MS. DYER: Yes, Your Honor.

11 THE COURT: We're ready. Let's have the jury.

12 [Whereupon, the jury enters at 3:11 p.m.]

13 THE COURT: Ladies and gentlemen we have now
14 reached the point in the trial where we are going to have
15 the closing arguments and this is how we're going to be
16 proceedings. You're first going to hear from the
17 plaintiff in the plaintiff's closing argument, and then
18 you're going to hear from the defendant in the
19 defendant's closing argument, and then a reply rebuttal
20 argument from the plaintiff.

21 So there will be three closing arguments. Then
22 there is going to be a short break that is going to
23 really make sense to you -- I'll tell you what it is now.
24 I'm going to find out if anybody needs to take a comfort
25 break quite frankly because I want you to be able to pay

1 THE COURT: All right. Ladies and gentlemen you
2 have now heard the arguments of counsel. Who needs to
3 take a short comfort break from my jurors? I figured
4 that; that is typical. Ladies and gentlemen let me tell
5 you you have not heard the arguments of counsel -- you've
6 not heard my charge on the law and you are not prepared
7 to deliberate so please be mindful do not discuss this
8 matter or allow anyone to discuss it with you.

9 Here's what we are going to do. I want you all to
10 take your comfort break that you need to take and when
11 you have finished taking your comfort break knock on the
12 door so you can come on back in. When you return I will
13 deliver the charge and the instruction on the law to you.
14 Have a good break.

15 [Whereupon, the jury exits at 4:47 p.m.]

16 THE COURT: Y'all please be at ease. I do need
17 y'all to look at the -- I've got the verdict form if
18 y'all will look at that for me and then everybody just be
19 at ease.

20 [Whereupon, counsel reviews the verdict form]

21 [Whereupon, court is in recess from 4:48 p.m. until
22 4:58 p.m.]

23 THE COURT: Thank you.

24 [Whereupon, the jury enters at 4:58 p.m.]

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JURY CHARGE

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2 THE COURT: Ladies and gentlemen you have now heard
3 the witnesses, you have received the evidence, you've
4 heard the arguments of counsel in this case. It is now
5 my duty to instruct you regarding the law applicable to
6 this case. And I remind you that during this trial you
7 and I have had and have certain duties to perform. As
8 the trial judge it is my responsibility and it has been
9 my responsibility to preside over the trial of this case.
10 And I have also had the duty to rule on the admissibility
11 of the evidence offered during this trial.

12 Ladies and gentlemen you will of course consider the
13 evidence before you and you are to consider only the
14 testimony which has been presented from this witness
15 stand and any exhibits which have been made part of the
16 record in this case. I have the additional duty to
17 charge you regarding the law applicable to this case.

18 It is your duty as jurors to accept and apply the
19 law as I now state it to you. If you think you have any
20 idea as to what the law is or what it ought to be and it
21 does not agree with what I now tell you the law is you
22 must forget your preconceived idea because you are sworn
23 to accept and apply the law exactly as I state it to you.
24 Ladies and gentlemen in every case tried in this court
25 before a jury the jury, you, become the sole, the only,

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1 deliberations. Very well. Please retire to your jury
2 room.

3 [Whereupon, the jury exits at 6:16 p.m.]

4 THE COURT: Now, 15 minutes; who has a stop watch?

5 [Whereupon, the alternates exit at 6:17]

6 THE COURT: Please check the exhibits to be sure
7 that what is going to the jury is supposed to be going to
8 the jury. Then we will be in recess until we hear from
9 our...

10 [Whereupon, counsel and the court reporter review
11 exhibits]

12 [Whereupon, evidence out to the jury at 6:25 p.m.]
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VERDICT

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2 THE COURT: Thank you so much. Please be seated.
3 It my understanding that the jury has reached its
4 verdict. Anything from the plaintiffs before we bring
5 the jury out?

6 MR. LUCEY: Yes, Your Honor. There is a second
7 phase. Ms. Dyer and I have stipulated as to the net
8 worth of BFS and I will use that for the jury and that
9 will speed things up.

10 THE COURT: Okay. Very well.

11 [Whereupon, the jury enters at 10:20 p.m.]

12 THE COURT: Thank you so much. Ladies and
13 gentlemen it is my understanding that you have reached
14 your verdict. If you would, please pass it along?

15 [Whereupon, the verdict is provided to the court]

16 THE COURT: All right. I find the verdict is in
17 due form.

18 [Whereupon, the verdict is provided to the Clerk of
19 Court]

20 CLERK OF COURT: The State of South Carolina Court
21 of Common Pleas County of Charleston for the Ninth
22 Judicial Circuit case number 2012-CP-10-7594 One Belle
23 Hall Property Owners Association, Inc. and Marvin T. Meek
24 and Francis B. Hill individually and on behalf of all
25 others similarly situated plaintiffs versus Builder's

1 First Source Southeast Group, LLC. We, the jury, find
2 for the plaintiffs on the following causes of action
3 strict liability and breach of contract and we award the
4 plaintiffs two million one hundred sixty three thousand
5 four hundred ninety three dollars in actual and
6 compensatory damages signed Ms. Foreperson September 1,
7 2016.

8 THE COURT: Ladies and gentlemen if this was your
9 verdict in your jury room and continues to be your
10 verdict here in the courtroom please indicate by raising
11 your right hand.

12 [Whereupon, all jurors comply]

13 THE COURT: Let me observe for the record that all
14 of our jurors have their right hands raised. Thank you
15 so much. You can put your hands down. On behalf of the
16 plaintiffs anything else?

17 MR. LUCEY: Nothing, Your Honor. Thank you.

18 THE COURT: Very well. And from the defense?

19 MS. DYER: No.

20 THE COURT: Very well. It is my intention to
21 dismiss the jury.

22 MR. LUCEY: Yes, ma'am.

23 THE COURT: Very well. Ladies and gentlemen I
24 would tell you what time it is but my watch has died so I
25 can't. But look up here it is now 10:22. You have been

1 terrific. I am so grateful for every tick of the clock.
2 It is not my policy to ask jurors to remain this late but
3 due to the weather I really appreciate you all hanging
4 with us and working so hard. I would love to be able to
5 take lots of time on each and every one of our behalf
6 tell you how grateful we are but I'm going to speed it
7 up.

8 A couple of things I need you to know you are at
9 liberty to talk about this case if you want to talk about
10 it. Talk about it. Now the practice of law is an art
11 and not a science and sometimes folks that try cases want
12 to have a conversation with jurors because it helps them
13 get better. If you're fine about that, that's fine. If
14 you're not fine about it, just tell them I don't want to
15 talk about it. And these lawyers certainly aren't going
16 to press you if you tell them you do not want to talk
17 about the case.

18 Should anyone ever want you to talk about this case
19 and you have explained to them that you don't want to
20 talk about it if that person doesn't want to accept what
21 you have said then just contact your Clerk of Court, Ms.
22 Julie Armstrong, and she'll contact me and I will of
23 course intercede on your behalf. That's not going to
24 happen but the first time I don't tell a jury that that's
25 exactly what is going to happen so I do that in an

1 abundance of precaution. Now remember you are now not at
2 liberty to serve on a jury in a court of record the
3 balance of 2006 [sic]. Oh, I know you are upset. I feel
4 your pain but there is hope for you in magistrate's court
5 and municipal court. Remember you have an exception for
6 your service in any court of record Common Pleas, General
7 Sessions for 2017 and 2018 should you choose to exercise
8 that exemption.

9 I would tell you also that the check is in the mail
10 except it isn't. But it will be shortly for your big fat
11 jury service check. However you will learn very quickly
12 that it is a very small token of all that you have given
13 to us which of course is your dear and precious time and
14 for that we are so incredibly grateful.

15 I would tell you it has been an honor and a
16 privilege of mine to serve with you in this capacity. I
17 hope you have found your jury service to be interesting.
18 I can assure you it has been critical to our way of life,
19 to our democracy and for that I am forever grateful to
20 you. I know the hour is late. I know that you are parked
21 nearby and it's safe for you to walk over there. They
22 don't need a lot of escorts or whatever.

23 THE BAILIFF: We'll escort them.

24 THE COURT: Ladies and gentlemen again I thank you.
25 Please stay dry tomorrow -- high and dry so that your

One Belle Hall POA v Builders First Source Southeast Group, LLC
Verdict
September 1, 2016

1 tootsies don't get wet and thank you again so much. Be
2 well. You are free to go.

3 [Whereupon, the jury exits at 10:24 p.m.]

4 THE COURT: All right. Nothing further from the
5 plaintiff?

6 MR. LUCEY: Nothing further.

7 THE COURT: From the defense?

8 [Whereupon, court's exhibit numbers 3, 4, and 5 are
9 marked by the court reporter]

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POST TRIAL MOTION

MS. DYER: The defense would move for a judgment notwithstanding the verdict. We renew our grounds for the directed verdict motion previously heard by the Judge.

THE COURT: Thank you ever so kindly. As you know at this juncture all presumptions are of course in favor of the jury in having reached this verdict. The jury issues I believe were properly placed before the court. It was certainly a well tried, hard fought matter on both sides and I would respectfully deny your motions noting your exception hereto.

MS. DYER: One question as well, Your Honor. It was breach of warranty as to liability not breach of contract.

THE COURT: Not breach of contract, breach of warranty.

MS. DYER: I just heard contract and I wanted ---

THE COURT: --- yes, breach of warranty and strict liability.

MS. DYER: Okay.

THE COURT: All right. Thank you, thank you, thank you.

MR. LUCEY: Thank you, Your Honor.

[Whereupon, the jury trial concludes at 10:30 p.m.]

Exhibit 4

Builder's Motion for Set Off, 9/8/2016

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON) FOR THE NINTH JUDICIAL CIRCUIT
CASE NO.: 2012-CP-10-7594

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

Plaintiffs,

vs.

Builders FirstSource –Southeast Group,
LLC;

Defendant.

**DEFENDANT'S NOTICE OF MOTION
AND MOTION TO COMPEL AND
MOTION FOR DETERMINATION OF
SETOFF**

FILED
2016 SEP -8 PM 2:51
JULIE J. ARMSTRONG
CLERK OF COURT
BY

Defendant Builders FirstSource-Southeast Group, LLC. ("BFS"), by its undersigned attorneys, respectfully submits this Motion to Compel and Motion for Determination of Setoff.

This case concerns alleged construction defects to a development of condominiums known as One Belle Hall, located in Mt Pleasant, South Carolina ("the Project"). The Project consists of four three-story buildings that contain fifty-nine units in total.

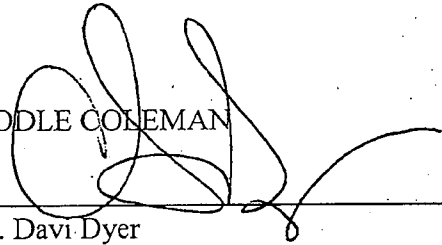
The buildings were constructed by Trammel Crow Residential through the use of various subcontractors and vendors. Certificates of Occupancy were issued on the buildings between December 18, 2006 and March 5, 2007. BFS was the supplier of the vinyl Energy Saving Products windows, which were installed at the project during original construction.

Beginning on August 29, 2016 a jury trial was held with Judge Goodstein presiding, which resulted in a September 1, 2016 verdict in favor of Plaintiff in the amount of \$2,163,000.00 on the breach of express and implied warranties and strict liability causes of action.

Defendant BFS, the supplier of the windows, was one of several defendants sued jointly for proximately causing the damage to the Project and more specifically, for the damage the windows

caused through the selection and/or installation of the product. Plaintiff has reached settlements with all co-defendants except 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 production of the various releases or covenants not to execute granted by Plaintiff to each co-defendant. 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.

KERNODLE COLEMAN

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FIRSTSOURCE-SOUTHEAST GROUP, LLC

August 7, 2016

Charleston, South Carolina

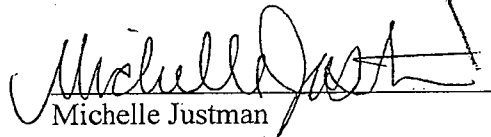
2012-CP-10-7594

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date, Defendant Builders FirstSource - Southeast Group, LLC's *Notice of Motion and Motion to Compel and Motion for Determination of Setoff* was sent via email, hand delivery and/or by depositing a copy in the United States Mail, First Class, to:

Justin O'Toole Lucey, Esquire
Dabny Lynn, Esquire
Taylor M. Morris, Esquire
JUSTIN O'TOOLE LUCEY, P.A.
415 Mill Street
Mt. Pleasant, SC 29464
Attorneys for Plaintiffs

KERNODLE COLEMAN


Michelle Justman

September 7, 2016
Charleston, South Carolina

FILED
2016 SEP - 8 PM 2:32
JULIE J. ARMSTRONG
CLERK OF COURT
BY

Exhibit 5

Builder's Motion for JNOV/New Trial, 9/12/2016

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

)
) IN THE COURT OF COMMON PLEAS
) NINTH JUDICIAL CIRCUIT

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

Plaintiffs,

vs.

Builders FirstSource Southeast Group
LLC, et al.,

Defendants.

Civil Action No. 2012-CP-10-7594

**BUILDERS FIRSTSOURCE-
SOUTHEAST GROUP LLC'S
MOTION FOR JUDGMENT, NEW
TRIAL ABSOLUTE, OR, IN THE
ALTERNATIVE, FOR NEW TRIAL
NISI REMITTITUR**

BY

JULIE J. ARMSTRONG
CLERK OF COURT

2016 SEP 13 AM 11:35

FILED

Pursuant to Rules 50 and 59 and all other applicable rules of the South Carolina Rules of Civil Procedure, Defendant Builders FirstSource Southeast Group LLC ("BFS") moves the Court for: (1) Judgment Notwithstanding the Verdict; (2) A New Trial Absolute; and, failing the above, (3) New Trial Nisi Remittitur. The grounds for this motion are those set forth below. Any grounds asserted prior, during, and after the trial in this matter not herein listed are adopted and incorporated the same is if fully set forth below.

Judgment Notwithstanding the Verdict

BFS renews its Motion for Directed Verdict made at the close of Plaintiffs' case-in-chief and renewed at the close of the evidence in full. There is no legally sufficient basis for a jury to find for Plaintiffs or for judgment to be entered against BFS. Specifically, based on the grounds listed below, the evidence is insufficient to support a verdict for Plaintiffs, and the evidence affirmatively demonstrates BFS is

entitled to judgment as a matter of law on each and every cause of action asserted by Plaintiffs. To the extent not inconsistent with the relief sought, all arguments advanced in support of BFS's Motions for New Trial Absolute and New Trial Nisi Remittitur also support this relief.

1. The strict product liability claim is barred by the statute of limitations as a matter of law on the evidenced presented at trial.

2. The issue of the statute of limitations was improperly submitted to the jury because the issue of whether Defendant was equitably estopped to assert the statute of limitations based on the actions of or representations of others to Plaintiffs is an equitable issue that must be tried by the Court and not an issue for the jury to decide.

3. The trial court improperly submitted the issue of whether Defendant was equitably estopped to assert the statute of limitations based on the actions or representations of others to Plaintiffs because the actions or representations of others cannot be used to preclude the statute of limitations from barring Plaintiffs' claims against Defendant.

4. Plaintiffs presented, and the trial court improperly allowed to be admitted, inadequate expert testimony or other record evidence to establish that Defendants breached the applicable standard of care with regard to the manufacture or design of the windows.

5. Plaintiffs failed to establish any alleged defect in the manufacture or design of the windows that would support a claim under a theory of strict product liability or breach of warranty.

6. Plaintiffs failed to establish any alleged defect in the manufacture or design of the windows which proximately caused any alleged injuries or damages to Plaintiffs and any product liability theory.

7. Plaintiffs failed to establish any feasible alternative design for the windows as required to establish a design defect claim for a product liability claim as required by *Branham v. Ford Motor Co.*, 390 S.C. 203, 701 S.E.2d 5 (2010).

8. The evidence did not support an award of \$2,163,494.55 in Plaintiffs' favor which demonstrates the jury's failure to properly consider the evidence and the court's instructions.

9. The claim for breach of warranties fails as a matter of law because the Plaintiffs failed to give the required notice and the claim is barred by the express terms of the warranty or warranties given.

10. The jury's award exactly mirrors, and was based upon a portion of a damages estimate prepared by one of Defendant's experts (Tr. Ex. 56, Def. Ex. 325(f)) which contains repair estimates wholly unrelated to any alleged leaks in the windows, thereby demonstrating the jury's failure to properly consider the evidence and the court's instructions.

11. Defendant was entitled as a matter of law to judgment on any claim of damage pertaining to any windows, but was particularly entitled to judgment as a matter of law as to all windows installed in any unit other than the units of the named plaintiffs or in a common-use area since windows are generally a part of the individual units and not part of the common areas of the property by the terms applicable to the property. Therefore, Plaintiffs had no standing to claim damages as to such windows, since no class was certified.

12. The evidence is insufficient to support or raise a jury issue on any of Plaintiffs' claims asserted against the Defendant and judgment should be entered in favor of the Defendant as a matter of law.

13. Plaintiffs failed to present any legally sufficient evidence that any of the Defendant's alleged action and/or inaction proximately caused any harm to Plaintiffs.

14. Defendant are entitled to judgment as a matter of law in their favor because there are no controverted questions of material fact upon which reasonable people could differ.

15. A verdict against Defendant is contrary to controlling principles of law as applied to the facts adduced at trial.

16. Any verdict in favor of Plaintiffs and against the Defendant would be based on pure speculation and conjecture and not on any evidence or any reasonable inferences to be drawn from the evidence.

17. Plaintiffs failed to present legally sufficient evidence for a jury to award any damages to Plaintiffs against Defendant or that they experienced any loss, injury, or damages because of or as a proximate result of any action or inaction of Defendant.

18. Plaintiffs have failed to prove the amount of their alleged damages by competent evidence, and there is no reasonable basis in the record for an award of any damages against Defendant.

19. Any award of damages to Plaintiffs and against Defendant was not based on any reasonable hypothesis supportable or supported or presented by the evidence.

20. Any award of damages to Plaintiffs was improper as a matter of law because it was not based on the evidence and the applicable law, and instead must have been based on the bias, passion, prejudice, or improper motives of the jury, including the desire to leave

the courthouse after being held for deliberations late into the night while storm conditions were threatened in the area as evidenced by their selection of Trial Exhibit 56 (Def. Exhibit 325(f)) upon which to base the damage award even though that exhibit contained damage repair estimates that were, as a matter of law, causally unrelated to any alleged leakage of the windows.

21. Plaintiffs failed to present legally sufficient evidence that Defendants' alleged actions and/or inactions presented to the jury for consideration were the natural and probable sequence of events that, without intervention of any new or independent cause, produced the injury, and without which the injury would not have occurred.

22. Plaintiffs failed to present legally sufficient evidence to support the jury's ascertainment of damage so as to support the amount of the jury's damage award.

23. The jury's \$2,163,494.55 award was clearly the product of bias, passion, prejudice or other improper motive.

24. The jury verdict, and the judgment rendered thereon, are contrary to the law of this case as charged by the trial court.

25. Defendant is entitled to judgment because (a) Plaintiffs failed to prove any defective condition in that the testing presented was conducted improperly, (b) the improper testing created leaks in windows that had otherwise met expectations, and (c) the windows were evaluated by implementing incorrect standards by which to evaluate windows installed for longer than six months (the windows has been installed for over eight years).

26. Defendant is entitled to judgment as a matter of law because the evidence demonstrated that the windows were damaged after arrival on the job site and also during delivery, handling, or storage.

27. Defendant is entitled to judgment in its favor as a matter of law on the basis of set-off as Plaintiffs have already recovered amounts in excess of the verdict from other parties in settlement of claims for the same damages which Plaintiffs claimed were the joint and several responsibility of settling co-defendants.

In addition to the above-stated grounds, Defendant incorporates herein by reference all grounds previously raised in their motions for directed verdict made during trial, the memorandum of law in support hereof to be filed in advance of the hearing, as well as any oral argument the Court may permit in support of the instant motion.

New Trial Absolute

For the specific grounds listed in greater detail below, Defendant's motion is based upon the singular, cumulative, and prejudicial impact of numerous evidentiary and legal rulings by the Court, improper and/or inadequate charges to the jury, the failure of the jury to obey the instructions of the court, the resulting miscarriage of justice, and the excessiveness of the jury's verdict. If this Court grants the motion for judgment notwithstanding the verdict as to Defendants, Defendants also move the Court to conditionally grant a new trial absolute pursuant to Rule 50(b) of the South Carolina Rules of Civil Procedure. If this Court declines to grant judgment notwithstanding the verdict, then Defendant moves for a new trial absolute in this matter. Defendant makes this motion as an alternative to its Motion for Judgment Notwithstanding the Verdict and specifically reserve all grounds stated therein.

The following grounds in support of the motion for new trial are enumerated:

1. Defendant expressly incorporates by reference and repeats each of the grounds set forth above for judgment notwithstanding the verdict.

2. Defendant is entitled to a new trial because the Court's charge to the jury improperly commented upon the facts, or otherwise, of the case by stating that "there is often 'more than one reasonable inference' as to when one 'knows or should have known' that he or she has a claim" when charging on the issue of the statute of limitations.

3. Defendant is entitled to a new trial because the Court improperly submitted the question of equitable estoppel as a defense to the statute of limitations based on the promises or actions of others besides Defendant to the jury when the issue was properly only decided by Court in its equitable jurisdiction.

4. Defendant is entitled to a new trial because the Court failed to charge Defendant's proposed charge on speculative damages, and the Court's failure to do so allowed the jury to base its award on evidence of alleged damages with absolutely no causal relationship to the alleged leakage of the windows.

5. Defendant is entitled to a new trial because the Court failed to charge that Defendant was entitled to notice as a condition to any warranty claim as expressly stated in the warranty given by Defendant and erroneously charged the jury that no proof of notice was required to sustain the claim.

6. The Court erred in not charging each proposed charge submitted by Defendant for inclusion in the charge.

7. Defendant is entitled to a new trial because the Court, despite never ruling upon the claims of class certification, allowed the jury to consider and include repair amounts in the verdict based upon alleged damages to non-party unit owners.

8. Defendant is entitled to a new trial because the Court failed to prohibit Plaintiffs' counsel from referring to the windows at issue as "illegal."

9. Defendant is entitled to a new trial because the Court failed to prevent Plaintiffs' counsel from pitting witnesses against one another.

10. Defendant is entitled to a new trial because the Court allowed Plaintiffs to present evidence of testing on the windows that did not replicate substantially similar conditions to which the windows were exposed while installed and which was designed for windows of a different age and not exposed to conditions similar to those of the windows in this case which had been installed for over eight years.

11. Defendant is entitled to a new trial to the extent the verdict form implies that judgment is mandated against the Defendant.

12. Defendant is entitled to a new trial because the jury's verdict was the product of passion, prejudice or bias.

13. Defendant is entitled to a new trial because the verdict was grossly excessive, as to be clearly actuated by passion, caprice or prejudice; thus, it is the trial judge's duty to set aside the verdict absolutely. *See Allstate Ins. Co. v. Durham*, 314 S.C. 529, 431 S.E.2d 557 (1993).

14. The jury's verdict was so grossly excessive as to have been influenced by matters outside the evidence.

15. The jury was unable to follow the Court's instructions or charges in rendering its verdict and/or deliberately refused or carelessly failed to follow the instructions, including, but not limited to, the fact that it based its verdict on Trial Exhibit 56 (Def. Ex. 325(f)) and such exhibit included repair estimates for portions of the property not within the individual units of the named Plaintiffs and not within any common area of the property as set forth in the governing documents for the property.

16. The Court should order a new trial based on the cumulative impact above.

17. The verdict in Plaintiffs' favor is not in accordance with the facts, is unsupported by the evidence and/or is against the manifest weight of the evidence, and thus, the Court should invoke its authority pursuant to the "thirteenth juror" doctrine to order a new trial. *See Folkens v. Hunt*, 300 S.C. 251, 387 S.E.2d 265 (1990).

18. The Court, sitting as the thirteenth juror, should determine that the evidence and facts do not justify the verdict and order a new trial on the facts.

19. The amount of the verdict awarded by the jury is so "grossly excessive" that it "shocks the conscience" and "clearly indicates the amount of the verdict was the result of caprice, passion, prejudice, partiality, corruption, or other improper motive." *Duncan v. Hampton County School Dist. No. 2*, 335 S.C. 535, 517 S.E.2d 449, 455 (Ct. App. 1990).

20. The jury's consideration of and deliberation involving any extraneous or inappropriate facts, evidence, testimony, argument, standards, or legal principles, whether external or internal in origin, denied Defendant's rights to fundamental fairness and due process in this trial by jury as provided by the law of South Carolina, the South Carolina Constitution, and the Fifth, Fourteenth, and Sixth Amendments to the United States Constitution.

21. The verdict, and each part thereof, was contrary to law.

22. The verdict, and each part thereof, was contrary to the evidence presented at trial.

23. The verdict, and each part thereof, was against the greater weight and preponderance of the evidence.

24. The Court erred in submitting Plaintiffs' claims to the jury because there was no significant evidentiary basis to support such a claim under controlling law.

Alternatively, a new trial is appropriate because the amount of damages awarded by the jury was not supported by the evidence, was contrary to the great weight of the evidence, and was inconsistent with controlling law.

25. Where “good counts” and “bad counts” are submitted to the jury, and a general verdict is returned, a new trial is required because it is impossible to know whether the jury based its verdict on the good count alone. The jury’s award of \$2,163,494.55 fails to state what damages were awarded as to each named party and the amount awarded to each named party and, therefore, mandates a new trial.

26. The Court erred by overruling Defendant’s challenge to the charges given to the jury.

27. The jury considered extraneous matters in reaching its verdict, and therefore, the verdict is due to be set aside.

28. The jury’s verdict and award was arrived at in contravention of the trial court’s instructions regarding damages which could be awarded in this case.

29. A new trial is warranted because the compensatory damage verdict is excessive and far exceeds any legitimate award to compensate Plaintiffs for any alleged damage proximately caused by Defendant’s alleged action and/or inaction.

30. Defendant relies on all grounds set forth in its motions for directed verdict made at the close of Plaintiffs’ case-in-chief and renewed at the close of all evidence, as well as in its Motion for Judgment Notwithstanding the Verdict, and the same are hereby incorporated as if set forth herein *verbatim*. Defendant also relies upon any memorandum in support of its post-trial motions to be filed in support hereof, as well as the governing procedural and substantive law of the United States, this State, and any oral argument the Court may permit in support of the instant motion.

New Trial Remittitur

If this Court chooses not to grant judgment as a matter of law to Defendant and not to grant a new trial absolute on all other grounds previously set forth above that are inconsistent with the relief requested, then this Court should, at a minimum, grant a new trial nisi remittitur. As an initial matter, this motion is also based on all other grounds previously set forth above that are consistent with the relief requested. In South Carolina, the trial judge "has the power, and with it the responsibility," of reducing a damages award that is "unduly liberal" or "merely excessive." *Easler v. Hejaz Temple of Greenville*, 285 S.C. 348, 329 S.E.2d 753, 758 (1985); *Becker v. Wal-Mart Stores, Inc.*, 339 S.C. 629, 529 S.E.2d 758, 762 (Ct. App. 2000).

Here, the total verdict awarded is far in excess of any actual damages attributable to Defendant's conduct which consisted of nothing more than taking an order for windows and communicating it to the manufacturer, which then shipped the windows directly to the construction site. The jury verdict in this case was excessive, arbitrary, capricious, based on emotion and sentiment, unsupported by the evidence in the record, contradictory to the evidence in the record; not in accord with the Court's instructions regarding damages, and was actuated by passion, caprice and prejudice. Consequently, if the Court declines to grant JNOV and further declines to order a new trial absolute, it should at minimum order a new trial nisi remittitur, and reduce the verdict accordingly. As further grounds for this motion, Defendants state as follows:

1. The compensatory damage award in this case is grossly excessive and is not supported by the evidence in this action.
2. The compensatory damage award in this case is far in excess of any amount reasonably calculated to compensate Plaintiffs for any alleged injury and/or damage.

3. The compensatory damages award in this case is grossly excessive in that it is not supported by sufficient direct evidence.

4. Damages should be no more than necessary to repair or replace the specific windows in the units of the two named plaintiffs or any window that might be in a common use area. Defendant is in the process of calculating a number from the trial evidence and will submit a suggested amount in its supporting memorandum of law to be filed with the Court.

5. Defendant reserves the right to add additional and further grounds following sufficient time to review the complete, final trial transcript in this case.

Wherefore, BFS requests that the Court grant judgment in its favor, grant a new trial absolute, or alternatively, grant a new trial nisi remittitur.

Respectfully submitted,

NELSON MULLINS RILEY & SCARBOROUGH LLP

Date: 09/12/2016

By: 

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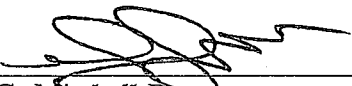
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Attorneys for Defendant Builders FirstSource Southeast
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Columbia, South Carolina

September 12, 2016

CERTIFICATE OF SERVICE

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

Pleadings: **NOTICE OF APPEARANCE**

**BUILDERS FIRSTSOURCE SOUTHEAST GROUP LLC'S MOTION AND
ORDER INFORMATION FORM AND COVERSHEET and MOTION
FOR JUDGMENT, NEW TRIAL ABSOLUTE, OR, IN THE
ALTERNATIVE, FOR NEW TRIAL *NISI REMITTITUR***

Counsel Served:

U.S. Mail

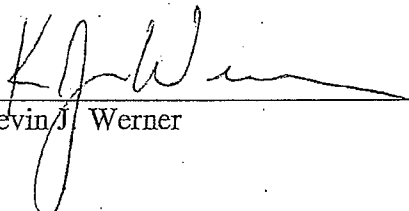
Justin Lucey, Esquire
Dabny Lynn, Esquire
Justin O'Toole Lucey, P.A.
415 Mill Street
Post Office Box 806
Mt. Pleasant, SC 29465

BY

JULIE J ARMSTRONG
CLERK OF COURT

2016 SEP 13 AM 11:35

FILED


Kevin J. Werner

September 12, 2016

Exhibit 6

Trial Court's Judgment Filed 9/22/16

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2012-CP-10-07594

FILED
2016 SEP 22 PM 1:54
JULIE J. ARMSTRONG
CLERK OF COURT

One Belle Hall Property Owners Association, Inc. and

Marvin T. Meeks and Francis E. Hill, individually, and
on behalf of all others similarly situated

PLAINTIFF(S)

Builders First Source- Southeast Group-LLC

DEFENDANT(S)

Submitted by: Court

Attorney for : ☐ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☒ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court: "We the jury find for the Plaintiffs on the following causes of action: Strict Liability and Breach of Warranty. And we award the Plaintiffs Two Million One Hundred Sixty-Three Thousand Four Hundred Ninety-Three Dollars (\$2,163,493.00) in actual and compensatory damages." The forgoing was the verdict.

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk :

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
One Belle Hall Property Owners Association, Inc. and Marvin T. Meeks and Francis E. Hill, individually, and on behalf of all others similarly situated	Builders First Source- Southeast Group-LLC	\$2,163,493.00
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:
N/A

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest

or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Deane L. Lucey
Circuit Court Judge

2112
Judge Code

9-1-2016
Date *none pro
tune*

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

Justin Lucey
ATTORNEY(S) FOR THE PLAINTIFF(S)

Catherine Dyer
ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter: Joyce Rueger

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

) IN THE COURT OF COMMON PLEAS
) FOR THE NINTH JUDICIAL CIRCUIT
) CASE NO. 2012-CP-10-7594

ONE BELLE HALL PROPERTY OWNERS)
ASSOCIATION, INC. and MARVIN T.)
MEEK and FRANCIS E. HILL, individually,)
and on behalf of all others similarly situated,)

Plaintiffs,

vs.

Builders First Source – Southeast Group,)
LLC;

Defendant.

VERDICT FORM

We the jury find for the Plaintiffs on the following causes of action:

NO Negligence
YES Strict Liability
YES Breach of Warranty

And we award the Plaintiffs Two Million One Hundred Sixty-Three Thousand
(\$2,163,493) in actual and compensatory damages. Four Hundred Ninety-Three

OR

_____ We the jury find for the Defendant.

Natalie D. Wilson

Presiding Juror

Date: Sept. 01, 2016

Exhibit 7

Trial Court's 11/16/17 Order

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)
ONE BELLE HALL PROPERTY OWNERS)
ASSOCIATION, INC. and MARVIN T.)
MEEK and FRANCIS E. HILL, individually,)
and on behalf of all others similarly situated,)
Plaintiffs,)
vs.)
Builders FirstSource – Southeast Group, LLC;)
Defendant.)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO. 2012-CP-10-7594

FILED
2017 NOV 16 PM 3:16
JULIE J. ARMSTRONG
CLERK OF COURT

**ORDER DENYING DEFENDANT,
BUILDERS FIRSTSOURCE-
SOUTHEAST GROUP, LLC'S
SEPTEMBER 8, 2016 MOTION**

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 indicated 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

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 *tortfeasor* 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.

. . .[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.

¹⁰ This voluntary reduction by Plaintiffs exceeds the amounts recovered through 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

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!

11-13, 2017
SC Gray, SC


Honorable Diane Schafer Goodstein

Exhibit 8

Builder's 12/7/17 Rule 59(e) Motion

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

)
) IN THE COURT OF COMMON PLEAS
) 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,

Plaintiffs,

vs.

Builders FirstSource Southeast Group
LLC, et al.,

Defendant.

) Civil Action No. 2012-CP-10-07594

) Builders FirstSource Southeast Group
) LLC's Motion to Alter or Amend the
) Court's Order Denying Set-Off

JULIE J. ARMSTRONG
CLERK OF COURT

2017 DEC 11 PM 1:57

FILED

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 its 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.

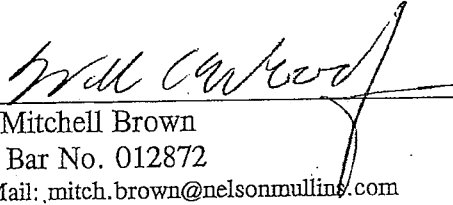
In the last part of the order, the Court recapitulates several of its prior holdings to make the general assertion that BFS's arguments are unpersuasive. The issue of whether set off is allowed as to a claim based on warranty, express or implied, the applicability of set-off to judgments on a verdict 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,

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December 7, 2017

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
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,

Plaintiffs,

vs.

Builders FirstSource Southeast Group LLC,
et al.,

Defendant.

Civil Action No. 2012-CP-10-07594

CERTIFICATE OF SERVICE

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

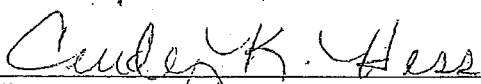
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BY

JULIE J. ARMSTRONG
CLERK OF COURT

2017 DEC 11 PM 1:57

FILED


Cindy K. Hess
Sr. Administrative Assistant

December 7, 2017

Exhibit 9

Trial Court's 6/27/18 Order

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

One Belle Hall Property Owners
Association Inc. and Marvin T. Meek
And Frances E. Hill, individually, and on
Behalf of all others similarly situated,

Plaintiffs,

vs.

Builders FirstSource Southeast Group
LLC, et al.,

Defendant.

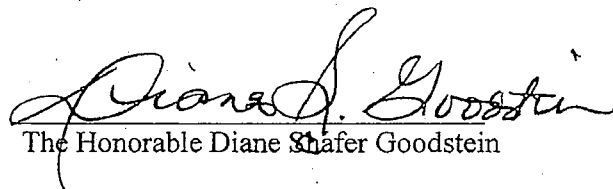
COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO: 2012-CP-10-07594

FILED
2018 JUN 27 AM 11:43
JULIE H. HARRINGTON
CLERK OF COURT

~~ORDER COMPELLING~~
~~DEFENDANT'S DISCOVERY~~
~~RESPONSES~~ DS9

THIS COURT has considered Builder's FirstSource Southeast Group LLC's Motion to Alter or Amend filed pursuant to Rule 59. The Court finds there is no material issue raised by Defendant that has not been previously raised and decided and the arguments made are consistent with those ruled upon by the Court. The Court, having considered the motion and having reviewed its Order filed November 27, 2017 denies Defendant Builders FirstSource motion filed pursuant to Rule 59.

BE IT SO ORDERED!


The Honorable Diane S. Goodstein

This 22 day of June 2018.

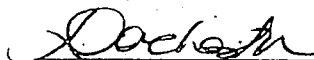
 South Carolina

Exhibit 10

Notice of Appeal Excerpts

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Diane Goodstein, Circuit Court Judge

Case No. 2012-CP-10-7594

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

Plaintiffs/
Respondents,

v.

Builders FirstSource-Southeast Group, LLC, ...

Defendant/
Appellant.

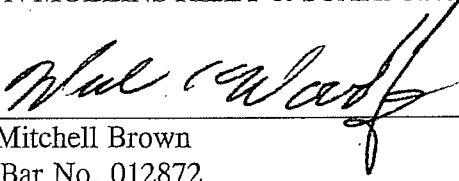
NOTICE OF APPEAL

Builders FirstSource-Southeast Group, LLC ("BFS") appeals the judgment of the Honorable Diane Goodstein filed September 22, 2016, nunc pro tunc September 1, 2016 (attached as Exhibit 1), her order denying BFS's motion for set off filed November 16, 2017, (attached as Exhibit 2), and her order denying BFS's motion for reconsideration of her set off order filed June 27, 2018 (attached as Exhibit 3). BFS received written notice of the entry of the order denying its Rule 59 motion for reconsideration of the set off order on June 28, 2018.

[Signatures Next Page]

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CERTIFICATE OF SERVICE

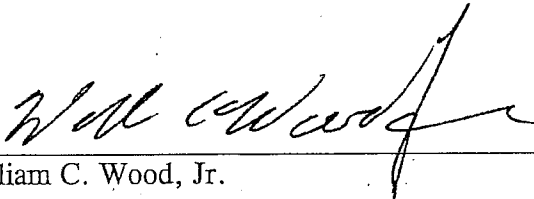
I, the undersigned of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Builders FirstSource, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings:

NOTICE OF APPEAL

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William C. Wood, Jr.

June 29, 2018

Exhibit 11

Builder's Initial Brief Filed 11/30/18

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

RECEIVED

DEC 04 2018

SC Court of Appeals

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.

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STATEMENT OF ISSUES ON APPEAL

1. Was Builders' motion for set off timely such that the trial court had and this Court has jurisdiction to address the motion?
2. Is Builders entitled to set off all or parts of the settlements of codefendants for the same product liability claims and alleged damages asserted against it?
3. Did Plaintiffs preempt Builders' right to set off under South Carolina law by purportedly unilaterally limiting their claimed damages at trial?
4. Must set off be pled as an affirmative defense and did Builders' properly assert a request for set off or otherwise waive the right to seek a set off?
5. Is a special verdict form required to apply set off or is set off properly applied to a general verdict where the verdict is on claims and for injuries alleged against and settled by codefendants ?
6. Does the fact that settlement amounts paid by codefendants for all claims and injuries asserted against them may include other claims and other injuries not asserted against Builders completely preclude setting off some portion of the settlements which also settled common claims and injuries asserted against those codefendants and Builders?
7. Did Builders contractually waive its right to set off?

STATEMENT OF THE CASE

Plaintiffs filed suit in this construction defect case on November 19, 2012. (Compl.)

The original complaint named two plaintiffs, the property owners association and an individual owner, six individual defendants, and Jane and John Does.¹ (*Id.*) It contained a general factual section alleging "latent building defects," "repeated water intrusion," and other general consequential damage to the One Belle Hall buildings and other property. (Compl. ¶¶ 25-25.)

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

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

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

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

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

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

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

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

Trial began August 29, 2016, with jury selection. Following testimony on August 30 through the day of September 1, the jury received the case at 6.25 p.m.⁵ (Trial Tr. p. 742.) The jury returned a verdict at 10.20 p.m. against Builders for \$2,163,493.00.⁶ (Trial Tr. pp. 743-44.)

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

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

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

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

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

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

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

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

STATEMENT OF FACTS

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

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

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

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

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

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

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

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

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

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

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

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

Q. There could be multiple causes of problems correct?

A. Oh, there are definitely multiple causes.

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

A. Sure.

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

A. Sure.

(Trial Tr. pp. 569-70.)

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

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

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

ARGUMENT

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

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

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

The first part of the circuit court's order is factually and legally incorrect. The verdict was rendered on September 1, 2016. Within ten days of that verdict, Builders filed two motions. It filed Defendant's Notice of Motion and Motion to Compel and Motion for Determination of Set-Off.¹¹ Builders also filed a Motion for Judgment, New Trial Absolute, or Alternatively for New Trial Nisi Remittitur pursuant to SCRCP 50 and SCRCP 59.¹²

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Id. at *11.

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

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

Id.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Second, the trial court’s reliance on *The Oaks at Rivers Edge Property Owners Association, Inc. v. Daniel Island Riverside Developers, LLC*, 420 S.C. 424, 803 S.E.2d 475 (Ct. App. 2017), is misplaced and does not alter the fact that the statute mandates setoff of the settlement amounts received by Plaintiffs. The rationale in the *Oaks at Rivers Edge* contradicts the Court’s prior opinions on setoff as well as the plain language of the statute.

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

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

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

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

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

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

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

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

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

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

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

I mean, I don't think anybody could've said well, this drop of water that caused this damage under the windows came from the stucco but this drop of water came from there. No; it was a combined injury, Your Honor.

...
I believe you got an issue of double -- these people settled, some of them, on the same cause of action for the same injury. The injuries were combined injuries. There was no hermetically sealed off thing where it was the window leaking and only water coming from the leaking window went down in there. There was water coming in around the sides of the window because the installer didn't put them in right; maybe broke them. There was window damage there that was from the architect because the allegation is, as I understand it, was that he set the window too far back in and recessed it so that the water couldn't clear from the window. There's damage there from the stucco supplier.

...
[H]ere we've got a common source for all of these things. All of the people who are giving warranties are people giving warranties to a building that is managed by the main developer/contractor who then aggregates their warranties and they pass through to Mr. Lucey's clients. Those different things that each one of them warranted they were doing, come together -- not every single one of them, maybe not the shingle guy or maybe not the carpet people. I don't know who -- they're obviously going to be people in an equitable who won't relate to our damages, but there are a lot. The case was tried this way. And that was part of the defense that Ms. Dyer raised was, hey, the evidence is clear. The water was coming in around the windows; that's not our fault. We didn't put them in. That's somebody else's fault. It was coming through the stucco. That's the stucco guy's fault. All that should be taken into account to

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

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

Contrary to the trial court's holding, neither Plaintiff's supposed limitation nor the jury's verdict is subject to deference in these circumstances. The case law specifically empowers the Court to do a searching inquiry into the facts to determine a proper set off. *See Huck v. Oakland Wings, LLC*, 422 S.C. 430, 813 S.E.2d 288 (Ct. App.) (reversing trial court order stating that it had no jurisdiction to evaluate the 'fairness' or 'reasonableness' of such settlement agreements or to reallocate the settlements, assuming there is anything to reallocate," and "[n]othing in the law or at equity permits this court to conduct such an inquiry" in refusing to consider set off); *Stoneledge*, 2008 WL 4905983 at *11 ("[W]hen a settlement is argued to involve two claims, one of which involves the same injury as the claim tried to verdict and one of which does not, the circuit court must make the factual determination of how to allocate the settlement between the claims") (quoting *Smith v. Widener*, 397 S.C. 468, 473, 724 S.E.2d 188, 190 (Ct. App. 2012).)

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

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

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

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

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

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

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

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

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

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

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

Given these facts, Builders is entitled to set off. A court should examine the settlements, which arguable resolved, in some cases, a different claim (negligence) or involved wholly unrelated damages, for instance, replacement of balconies. “[W]hen a settlement is argued to involve two claims, one of which involves the same injury as the claim tried to verdict and one of which does not, the circuit court must make the factual determination of how to allocate the settlement between the two claims.” *Smith v. Widener*, 397 S.C. 468, 473, 724 S.E.2d 188, 190 (Ct. App. 2012).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

As noted earlier, "when a settlement is argued to involve two claims, one of which involves the same injury as the claim tried to verdict and one of which does not, the circuit court must make the factual determination of how to allocate the settlement between the two claims." *Smith v. Widener*, 397 S.C. at 473, 724 S.E.2d at 190.

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

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

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

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

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

Id.

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

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

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

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

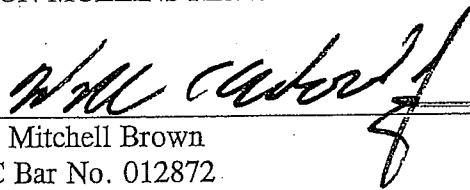
CONCLUSION

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

Respectfully submitted,

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November 30, 2018

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Diane Goodstein, Circuit Court Judge

Case No. 2012-CP-10-7594

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

Plaintiffs/
Respondents,

v.

Builders FirstSource-Southeast Group, LLC, ...

Defendant/
Appellant.

PROOF OF SERVICE

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

Pleadings: **Appellant's Return to Respondent's Motion to Dismiss the Appeal**

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Counsel Served:

U.S. Mail

Justin Lucey, Esquire

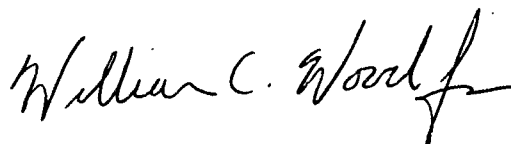
Dabny Lynn, Esquire

Justin O'Toole Lucey, P.A.

415 Mill Street

Post Office Box 806

Mt. Pleasant, SC 29465

A handwritten signature in cursive script, reading "William C. Wood, Jr.", written in black ink.

William C. Wood, Jr.

January 2, 2019



NELSON MULLINS

William C. Wood, Jr.
T 803.255.9534
bill.wood@nelsonmullins.com

NELSON MULLINS RILEY & SCARBOROUGH LLP
ATTORNEYS AND COUNSELORS AT LAW

1320 Main Street | 17th Floor
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January 2, 2019

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

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

Dear Ms. Kitchings:

Enclosed for filing in the above-referenced matter please find the original and seven copies of Appellant's Return to Respondent's Motion to Dismiss the Appeal. Please return a clocked-in copy to us via the enclosed envelope.

By copy of this letter to all counsel, I am hereby serving them with a copy of this document.

Sincerely,

William C. Wood, Jr.

WCW:ckh
Enclosures

cc: Justin Lucey, Esquire
Dabny Lynn, Esquire



NELSON MULLINS

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Post Office Box 11070

Columbia, SC 29211-1070

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00350/01800

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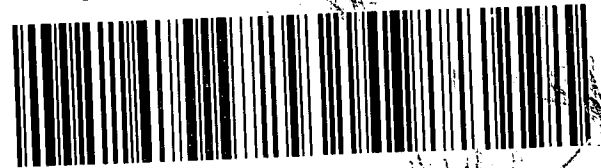
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