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.

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APPELLANT'S INITIAL REPLY BRIEF

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ARGUMENT IN REPLY

Respondents' argument is divided into nine parts. The first three arguments raise supposed jurisdictional or procedural hurdles to this appeal. The remaining six focus more on what may be termed substantive arguments regarding set-off. Each of the nine parts is infected with factual or legal errors regarding this Court's jurisdiction of the appeal or the substantive law of set-off. For the reasons stated below, in Builder's opening brief, in its response to Respondents' motion to dismiss the appeal, and in its filings and arguments before the trial court, which are incorporated by reference, the judgment of the circuit court as to set off should be reversed and the settlements of codefendants set off against the judgment as required by law.

I. The Court has jurisdiction over the Appeal.

A. Builder's timely post-trial motions stayed the time for appeal.

The jury rendered its verdict at approximately 10:20 p.m. on Thursday, September 1, 2016. (R.p. ___.) Presumably due to the late hour, the previously announced closure of the courthouse the next day due to an anticipated storm, and her departure from the Charleston County Court of Common Pleas to other assignments in Berkeley and Dorchester Counties,[1] Judge Goodstein did not immediately enter a separate judgment on the verdict. Nevertheless, in accord with Rule 58, SCRCP, the trial court entered a judgment on the jury verdict on September 22, 2016, with an express notation that the judgment was effective *nunc pro tunc* as of September 1, 2016, the date of the verdict. (Judgment, 9/22/16.)

[1] Judge Goodstein's schedule for the month of September 2016 following the trial may be viewed at the South Carolina Judicial Branch website (https://www.sccourts.org) by clicking on the "Calendar" tab, the "Circuit Judge Assignments" tab, entering Judge Goodstein's name and the September 2016 date.

Builders, meanwhile, served two distinct, written, post-trial motions, both seeking to alter or amend the judgment reflecting the jury's verdict: (1) Defendant's Notice of Motion and Motion to Compel and Motion for Determination of Set-Off, (Mot. Set Off.), served September 8, 2016, and (2) a Motion for Judgment, New Trial Absolute, or Alternatively for New Trial Nisi Remittitur pursuant to SCRCP 50 and SCRCP 59, (JNOV/NT Motion), served on September 12.[2]

These two motions seeking to alter or amend the judgment were each timely filed and independently stayed the time for appeal. To be timely under Rule 59(e) governing efforts to alter or amend a judgment rendered after a jury trial, a motion seeking to alter or amend a judgment must be "served *not later* than 10 days after receipt of written notice of the order." Rule 59(e), SCRCP (emphasis added). Whether measured from the effective date of the judgment as expressly stated on the face of the judgment (September 1) or from the physical entry date of September 22, neither motion was served *later* than 10 days after that date. The motion to alter or amend the judgment to reflect set off was served 7 days after the effective date of the judgment and 15 days *before* its physical entry.[3] The JNOV/NT motion was served on

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[2] As noted in Builder's opening brief at page 4, footnote7, the JNOV/NT motion was voluntarily and substantially reduced in scope – specific JNOV grounds and the new trial grounds in total were dropped—due to trial counsel's failure to preserve them in the course of trial. The circuit court, despite supplemental briefing and multiple hearings has never ruled on the reduced JNOV motion; it remains pending.

[3] As the Court held in *Ellis v. Oliver*, 335 S.C. 106, 515 S.E.2d 268 (Ct. App. 1999), the set off "statute ... does not require that the rights thereunder be asserted at any particular juncture in the litigation," *id.* at 110, 515 S.E.2d at 270, and no motion is necessarily even required because the right to set-off arises "by operation of law." *Id.* at 112, 515 S.E.2d at 271. Similarly, set off arises from a court's equitable powers. *W. M. Kirkland, Inc. v. Providence Washington Ins. Co.*, 264 S.C. 573, 580, 216 S.E.2d 518, 521 (1975) (stating that a setoff belongs to the inherent power of a court in the exercise of its equitable jurisdiction). It's equitable power "is not founded on any statute or fixed rule of court, but grows out of the inherent equitable jurisdiction which the court exercises over suitors in it." *Hawkins v. Pathology Assocs. of Greenville, P.A.*, 330 S.C. 92, 113, 498 S.E.2d 395, 406 (Ct. App. 1998)(quoting *Rookard v. Atlanta & Charlotte Air Line Railway Co.*, 89 S.C. 371, 71 S.E. 992, 995 (1911)).

September 12, within the 10 day limit (per Rule 6, SCRCP) of the effective date of the judgment and ten days *before* its physical entry.

Because both motions -- for set off and JNOV/NT-- were timely filed under the express language of Rule 59, the time for appeal was stayed until receipt of written notice of entry of an order resolving the motions. SCACR, 203(b). No such order was entered until November 16, 2017 (Order, 11/16/17), and even then the order only resolved the set off motion.[4] Further, because the trial court's first order on set off (1) did not fully address the issues raised by Builders in its set off motion and supporting memoranda and arguments; (2) denied Builders access to the settlement agreements with other defendants; (3) contained legal and factual inaccuracies, and (4) asserted grounds for dismissal of the motion for the first time, Builders moved to alter or amend that order. (Mot. To Alter or Amend.) *See Elam v. S.C. Dept. of Trans.*, 361 S.C. 9, 24, 602 S.E.2d 772, 779 (2004) (stating a Rule 59(e) motion is required and stays the time for appeal where the court's order does not address arguments raised by the party); J. Toal, A. Walker, and M. Baker, *Appellate Practice in South Carolina* 189 (3d ed. 2016) (citing cases where reconsideration motion required to preserve issues for appeal where new relief was granted or where there are errors, inaccuracies, or inconsistencies in the trial court's order). Such motion again stayed the time for appeal.

In response, the trial court ordered Respondents 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 that order on June 28, 2018, and served its notice of appeal on June 29, 2018, as to the denial of its right of set off. (Notice of Appeal.) Thus, the initial motion for set off, the motion seeking

[4] The downsized JNOV motion remains pending.

reconsideration, and the notice of appeal were all timely such that the Court has jurisdiction over this appeal.[5]

B. Respondents' arguments on jurisdiction of the appeal are factually and legally incorrect.

Respondents argue several points, all generally raised in the trial court's order, as to why the appeal from the set off order is untimely. All are factually or legally incorrect.

1. Builder's set off motion requested set-off.

First, they argue that Builders never made a motion for set off, only a motion to compel. (Resp. Br., pp. 17-18.) Examination of the written motion expressly belies this argument. 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.) Moreover, if there was any doubt as to the intent of the motion, counsel restated and renewed the motion at the first hearing on the motion. (11/18/16 Hrg. Tr. pp. 30-31.)

2. The judgment as entered on September 22, 2016, did not resolve Builder's pending motions for set off or reconsideration of the denial of JNOV.

Second, Respondents argue that any motion to toll the time for appeal and any notice of appeal had to be served after the September 22 filing date of the judgment or receipt of notice of such filing to be effective because the September 22 judgment resolved the motion for set off and

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[5] Moreover, contrary to the argument of Respondents, Builders has not abandoned or failed to timely appeal the denial of the JNOV motion at trial. The trial court has not ruled on the reduced motion under Rule 59, filed within 10 days of the verdict and effective date of the judgment (but mistakenly labeled as if it were an original JNOV motion), to reconsider the oral JNOV. *See Elam v. S.C. Dept. of Trans.*, 361 S.C. 9, 22, 602 S.E.2d 772, 779 (2004) (stating that the mislabeling of a post-trial motion does not preclude consideration of the motion). Thus, the time to appeal from the denial of JNOV has not been triggered. No further order or judgment has been entered resolving all claims or defenses, but only an order on the merits as to Builder's right to set off.

the JNOV/NT motion served previously on September 8 and September 12. This supposed factual and legal predicate also underlies Respondents' arguments at pages 16 through 24 of their brief.

This argument ignores the express text of the judgment that it was effective "9/1/2016 nunc pro tunc," before either motion was filed, not on the date of its filing. (Judgment) As noted by the Court in *Ex Part Strom*, 343 S.C. 527, 539, 539 S.E.2d 699 (2000), this means that the judgment was deemed to have been entered and taken effect on September 1 when it should have been entered per Rule 58, SCRCP, not September 22. Respondents simply ignore, and make no effort in their brief to address, Judge Goodstein's "nunc pro tunc" notation or the legal principal of retroactivity set forth in *Strom*.

The judgment, as dated and entered with a retroactive date of September 1, did not resolve or have any effect upon the two motions filed after its effective date, but before its entry. A judgment with an effective date of September 1, as intended by Judge Goodstein's express and unambiguous writing, does not address or resolve motions filed after that 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. (Judgment, p. 1.)

Respondents argue that the check mark in the box saying "This order ends … the case" somehow undoes the effective date language and resolved the motions filed after the judgment's effective date. The checking of that box was entirely correct as the matter stood on the effective date of the judgment, September 1. At the end of that day, the trial was complete, the jury dismissed, and no motions were then pending. As to the trial court, the case was ended.

Nothing remained for the trial court to do. The judgment was final in the absence of timely motions by the parties under Rules 50 or 59, SCRCP, or a motion for set off under the rule announced in *Ellis,* 335 S.C. at 112, 515 S.E.2d at 221. As set forth above, such motions were in fact timely filed and this Court has jurisdiction over this appeal from the order denying set off to Builders.

3. Builder's JNOV motion is not a "second and successive" nullity under the principles set forth in *Elam*.

Builder's trial counsel made an *oral* motion for JNOV after the verdict, which was denied. (Trial Tr. p. 748.) That motion was made on September 1, the effective date of the judgment in this case as discussed above. Within the ten-day limit of Rule 59(e), SCRCP, Builders made its first written motion regarding JNOV. Builders acknowledges that the motion, which references both Rule 50 and 59, SCRCP and contains multiple JNOV and new trial grounds, was believed by undersigned post-trial counsel, in the absence of a transcript and after consultation with trial counsel, to be the first JNOV and new trial motion made. It was not and consequently counsel dropped certain grounds as previously noted. *See supra* p. 2, footnote 2.

Given these undisputed facts, under *Elam,* this first written motion is properly treated as a motion to alter or amend or reconsider the denial of the oral JNOV motion at trial, incorporated in the judgment effective as of September 1. *Id.*, 361 S.C. at 22, 602 S.E.2d at 779; *see also 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"). The motion so treated is not second or successive. Per *Elam*:

> [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. There is no "second" rule 59(e) motion, only a first, written, motion following an oral motion. To date, the trial court has never entered an order granting or denying the JNOV motion in its current, shortened form.

For this reason, Respondents' rhetorical question and comments in footnote 12 of their brief are meaningless. Builders has not appealed from the denial of JNOV or argued the merits of the JNOV motion in this appeal from the set off orders because there is no final trial court order or judgment on the motion for JNOV to appeal, not because of any lack of merit in the JNOV motion.

As to Respondents' argument regarding procedural issues with the motion for JNOV and directed verdicts (Resp. Br. pp. 22-24), Builders has already thoroughly addressed the lack of merit in this argument in its response to the motion to dismiss the appeal, pages 10 through 14, and incorporates that argument in full in this reply.

4. Respondents' efforts to distinguish *Ellis v. Oliver* and *Tilley v. Pacesetter* do not support a lack of jurisdiction over this appeal.

Respondents' initial argument as to *Ellis v. Oliver*, 335 S.C. 106, 515 S.E.2d 268 (Ct. App. 1999) and *Tilley v. Pacesetter Corp.*, 355 S.C. 361, 585 S.E.2d 292 (2003) is predicated on the same factual and legal errors regarding the timing of Builder's motions and the effect of the "nunc pro tunc" judgment entered by Judge Goodstein. Builders agrees that the motions in *Ellis* and *Tilley* were timely. So were its motions in this case as discussed above.

Second, Respondents note that in *Ellis* only negligence claims were at issue and negligence is not at issue in this case. The *Ellis* holding as to the timing of a set off motion did

not depend on whether the injuries alleged were the result of negligence as opposed to another theory of products liability. Even if the timing rule in *Ellis* was inapplicable (which Builders does not concede), the set off motion in this case, seeking to alter or amend the judgment by offsetting the settlements obtained from other defendants for alleged injuries for the same products liability theories of strict liability and breach of warranty upon which a verdict was rendered, was timely under Rule 59 and stayed the time for appeal under SCACR 203(b).

Respondents correctly note that *Tilley* involved equitable, as opposed to statutory, set off and that the set off amounts at issue did not involve settlements with other parties. (Resp. Br. p. 25.) Respondents incorrectly argue that Builder's did not argue equitable set off to the trial court.

In *Riley v. Ford Motor Co.*, 414 S.C. 185, 195-96, 777 S.E.2d 824, 830 (2015), the Court noted that both the equitable and statutory right to set off exist as a matter of South Carolina law; availability of one does not necessarily preclude use of the other. In its motion, both in the caption and in the opening text, Builders moved for set off without limiting the request to one form of set off or the other. At the end of the motion it expressly noted statutory set off by cite, but did not expressly limit its motion to that theory. (Mot. For Set Off.) In its supporting papers (Builder's Memo … Set Off, pp. 3-5) and at the hearings on the motion (11/18/16 Hrg. Trans. pp. 1-19, 30-33) Builders argued both equitable and statutory set off to the trial court. Respondents were afforded opportunity to address those arguments, and the trial court ruled upon Builder's requests for such relief and Respondents' defenses. Because equitable set off, which like statutory set off, arises by operation of law, was raised and ruled upon by the trial court, it is preserved for appeal in this case. *Wilder Corp. v. Wilke*, 330 S.C. 1, 497 S.E.2d 731 (1998).

Respondents finally raise an issue regarding the timing of the motion for set off in *Tilley* and its implications for Builder's argument. In *Tilley*, the first trial judge granted summary judgement on the issue of liability. 355 S.C. at 366, 585 S.E.2d at 294. The defendant immediately appealed the adverse liability judgment, lost, and the matter was remanded to a second trial judge to determine damages. *Id.*. On remand, the trial judge first entered an order in favor of the Plaintiffs for 3,273,010.52 "prior to set off." *Id.* at 367, 585 S.E.2d at 295. Entirely contrary to Respondents' insistence that a motion for set off must be raised and ruled upon prior to entry of judgment, the trial judge, after entering the order on damages for the Plaintiffs, took up the issue of equitable set off and ruled the Defendant was entitled to set off. *Id.* at 376, 585 S.E.2d at 299. He did not immediately calculate the amount of set off and enter an amended judgment, however, because the Defendant was entitled to present evidence, and the Plaintiffs were entitled to receive discovery regarding the evidence, on the calculation of the set off amount. *Id.* Even at the time of this second appeal, the trial court had not held a hearing on the set off evidence or entered a judgment subtracting a set off amount from the previously entered judgment as to damages. *Id.* at 377, 585 S.E.2d at 300.

Contrary to Respondents' repeated argument that set off must be moved for and applied prior to entry of judgment, the procedure followed in *Tilley* fully supports the contention of Builders that set off need not necessarily be addressed before, and taken into account in, a judgment finding defendant liable and assessing plaintiff's total damages as contained in the verdict, as the trial court incorrectly held and Respondents argue.

Again, whether a motion for set off is necessary, whether set off arises by operation of law, and whether a motion must comply with the timing requirements of Rule 59, SCRCP is ultimately beside the point. As set forth above, Builder's motion for set off seeking to alter and

amend the judgement of September 1 was timely filed under Rule 59 and stayed the time for appeal. This Court has jurisdiction of the appeal and should reverse the order of the trial court denying set off against the jury's verdict and remand for further proceedings.

5. The Law of the Case and Two-Issue Rules do not apply in this case to bar Builder's claim for set-off.

Builders does not disagree with the general propositions of law in the cases Respondents cite regarding the law of the case rule. Respondents' law of the case argument, however, is predicated on the incorrect premise that the judgment entered September 22 resolved Builder's motion for set off and its motion regarding JNOV and that a notice of appeal had to be filed within thirty days of receiving notice of entry of that judgment. As set forth above, that premise is factually and legally incorrect. There is no unappealable or unappealed order that bars this appeal of the denial of Builder's set off motion. Builder's motions were timely filed and stayed the time for appeal. The trial court's order denying Builders the right to seek set off as a defense to payment of all or some portion of the verdict, a right that arises by operation of law, *Smith v. Widener*, 397 S.C. 468, 473, 724 S.E.2d 188, 191 (Ct. App. 2012), was timely appealed. The motion to reconsider denial of JNOV remains pending to date, thus the time for appeal as to the denial of JNOV has not run. *See* J. Toal, A. Walker, & M. Baker, *Appellate Practice in South Carolina* 143 (3rd ed. 2016) (upon entry of a final judgment resolving all claims as to all parties the "court may review any intermediate orders or decrees necessarily affecting the judgment that were not previously appealed from," citing S.C. Code Ann. § 14-3-330(1); *see also Link v. School Dist. of Pickens Cty.*, 302 S.C. 1, 6, 393 S.E.2d 176, 179 (1990)).

As to the two-issue rule, Builders has no disagreement with the general statement of the rule in the case cited by Respondents, *Gold Kist Inc. v. C&S Nat'l Bank*, 286 S.C. 272, 282, 333 S.E.2d 67, 73 (Ct. App. 1985). The rule simply does not apply in this case.

The jury's general verdict and the judgment entered upon it says nothing about set off because set off is not a question for decision by a jury. *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"). Rather, the general verdict is a singular amount of $2,163,000.00 entered for the strict liability and breach of warranty product liability claims. This is unsurprising since these two theories of products liability have an identical measure of damages and Respondents' counsel so admitted at trial (Trial Trans. pp. 676-77); *Rife v. Hitachi Const. Machinery Co., Ltd.*, 363 S.C. 209, 216, 609 S.E.2d 565, 569 (Ct. App. 2005). As to this verdict, the two issue rule would only come into play if one of the two product liability theories – strict liability or breach of warranty – was found on appeal to be legally unsupportable for some reason, such as a statute of limitation problem or failure to satisfy some element of proof, but the other was found to be legally sufficient. In that situation, the general verdict amount would stand. The rule says nothing about set off, because, as set forth in Builder's opening brief and below, set off is applicable as a matter of statute and equity as to either theory of products liability, strict liability or breach of warranty.

Endorsing Respondents' proposed two-issue rule argument would violate the rule that a party cannot use a general verdict as both 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). Here, Respondents sought and received a general verdict to shield against possible disparate verdicts on the separate product liability theories and cannot now use the same general verdict as a sword to argue that set off for settlements for the same alleged injury on the same theories of products liability cannot be had.

Finally, in the last sentence of their argument on the two-issue rule, Respondents mischaracterize Builder's request for relief. Only the issue of whether set off is available is on appeal at this time. Reversal of the trial court's order on appeal has absolutely no effect on the validity of the jury's verdict or the amount of damage it determined. Rather, reversal will only restore Builder's right to receive a set off against the verdict of the jury as incorporated into a final judgment, assuming any adverse verdict remains after resolution of the stilling pending JNOV reconsideration motion.

II. Respondents' argument regarding the application of set off to this case on the merits are inconsistent with South Carolina law and the facts.

Respondents make six arguments pertaining to why set off should not substantively apply to this case. Each is inconsistent with South Carolina law and the facts as presented during the trial of this case.

A. Respondents' product liability claims of strict liability and breach of warranty are subject to both statutory and equitable set off.

At pages 28-35 of their brief, Respondents attempt to demonstrate that statutory set off cannot apply to an award of damages on a claim of breach of warranty or strict liability. This argument is addressed at pages 14-20 and 28-33 of Builder's opening brief, which are incorporated herein in full. Respondent's argument simply ignores South Carolina case law demonstrating that where, as here, a plaintiff alleges a products liability claim under the three theories of negligence, strict liability, and breach of warranty, and admits, as Respondents did at trial (Trial Trans. pp. 676-77) that the injuries incurred under all three theories are identical, the products liability case is subject to the set off statute as a matter "in tort for the same injury." *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 in their book on torts); *see also Smith v.*

Widener, 397 S.C. 468, 473, 724 S.E.2d 188, 191 (Ct. App. 2012) ("[W]hen 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"); *Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. IMK Development Co.*, LLC, 425 S.C. 276, 821 S.E.2d 509 (Ct. App. 2018) (citing *Smith v. Widener* and applying the set off statute, S.C. Code Ann. § 15-38-50, to both negligence and breach of warranty product liability claims).[6]

The treatment of a product liability claim based on a theory of breach of warranty or strict liability as a claim "in tort" where, as here, a plaintiff seeks recovery for injury to more than just the product itself is further reinforced by the Court's decision in *Sapp v. Ford Motor Co.*, 386 S.C. 143, 687 S.E.2d 47 (2009). There, just as in this case, the plaintiff brought a products liability action premised on theories of negligence, strict liability, and breach of warranty.[7] *Id.* at 146, 687 S.E.2d at 48. Unlike this case, the injuries incurred in *Sapp* were only to the product, a truck, and no other property or person. *Id.* The Court affirmed the trial court's characterization of all the claims as "tort claims" and dismissal of all the claims, including the breach of warranty claim, on the basis of the economic loss rule because, in that case, the damage was limited to the truck sold by Ford.

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[6] Respondents attempt to distinguish *Stoneledge* on the basis that it involved claims of implied warranty while they asserted an express warranty (Resp. Br. pp. 33-34), but cite no South Carolina authority for why this distinction makes any legal difference since a products liability case where the damages for negligence, strict liability, and breach of warranty are admitted by Plaintiff to be indistinguishable (Tr. Trans. 676-77) may be brought under any type of warranty, not just implied warranties. *Cf. Hinkle v. Continental Motors, Inc.*, 2017 WL 776992 at *3 (D.S.C. 2017) (noting that products liability claim may be brought on any of the theories of warranty, including express warranty, contained in the South Carolina Commercial Code).

[7] The plaintiff in *Sapp* also brought a claim for fraud/misrepresentation. *Id.*

As to strict liability, our Legislature created strict liability in tort in South Carolina by adopting Section 402(A) of the Restatement (Second) of Torts in 1974. Schall v. Sturm, Ruger Co., Inc., 278 S.C. 646, 648, 300 S.E.2d 735, 736 (1983).

In adopting that section the Restatement (Second) of Torts, the Legislature also adopted, verbatim, the comments to Section 402(A) of the Restatement (Second) of Torts. S.C. Code Ann. § 15-73-30 ("Comments to § 402A of the Restatement of Torts, Second, are incorporated herein by reference thereto as the legislative intent of this chapter"); Schall, 278 S.C. at 648, 300 S.E.2d at 736. The comments unequivocally provide that strict liability originated from tort, stating: "**The basis of liability [under § 402A] is purely one of tort**." Section 402(A), comment m (emphasis added).

Our leading commentators in South Carolina have reaffirmed that liability under Section 15-73-10 is tort based, stating that: "[O]f course the type of liability under consideration is one of strict liability in **tort**." John E. Montgomery and David G. Owen, Reflections on the Theory and Administration of Strict Tort Liability for Defective Products, 27 S.C. Law Rev. 803, 813 n. 33 (1976) (emphasis in original). Professors Montgomery and Owen continue, noting that:

> [T]he form of strict liability enunciated in section 402A of the Restatement (Second) of Torts **is a tort law theory of liability which should be analyzed primarily according to traditional tort concepts and terminology**.

Id. at 824 (emphasis added). Respondents' arguments that strict liability is not a tort for purposes of applying statutory set off is incorrect.

Respondents, like the trial court, attempt to rely on *Atkinson v. Orkin Exterminating Co. Inc.*, 361 S.C. 156, 604 S.E.2d 385 (2004) to bar set off in this case. But, contrary to Respondents' and the trial court's arguments, it is readily distinguishable.

No product liability claim was asserted in *Atkinson* involving, as here, identical theories of recovery with identical alleged damages. Appellant's Opening Brief, pp. 1-3 (setting forth the undisputed facts as to the pleading of the claims and damages in the case); Trial Trans. pp. 676-77 (Respondents' counsel admitting that the damages under all three causes of action asserted at trial were identical). Further, in *Atkinson* there was no evidence, and no admission by Respondents' own expert as in this case, that the damages asserted by Respondents and proved at trial were contributed to by the delicts of multiple parties. (Trial Trans. pp. 219-20, 256-67, 275, 356-57, 360-72, 529-545.)

Rather, the claims involved independent service contracts by Orkin and Terminix. Orkin's liability was predicated on a negligent failure to inspect the home. *Atkinson*, at 172, 604 S.E. 2d at 394. No detail is given regarding Terminex's basis for settling other than it, too, entered into an agreement with the Atkinsons for termite treatment and inspection services when Orkin's agreement terminated and termites were found in the house approximately two months later. *Id.* at 161, 604 S.E.2d at 387. Crucially for purposes of set off, the Court expressly found, contrary to the evidence presented at trial in this case, that "we see no indication that the claims against Terminix constituted a "contributing factor" to Orkin's negligent inspection of the house." *Id.* at 172, 604 S.E.2d at 394. The element of common injury necessary to support a claim for set off was not present in *Atkinson*, unlike in this case. *See Smith v. Widener,* 397 S.C. 468, 473, 724 S.E.2d 188, 191 (Ct. App. 2012) ("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").

B. Builders did not contractually waive its right to set off where, as here, Respondents settled with other parties for the same claims for the same injuries.

Respondents argue that the warranty language given by Builders waived its right to seek set off. (Resp. Br. pp. 35-6.) Contrary to Respondents' argument, the language quoted does not state that Builders assumed sole responsibility for compensating any resulting damage that may have been contributed to by a defect in its windows to the exclusion of any remedy that might exist at law in its favor, such as set off, to reduce its ultimate liability. The warranty language is simply silent on the issue of whether or not Builders may assert a claim for set off under factual circumstances such as those in this case where a plaintiff has settled with codefendants for the same claims for the same injury and thus been, at least in part, compensated for an injury to which the windows ordered and shipped by Builders may have contributed in part. Respondents' argument requires the Court to read into the warranty additional language limiting Builder's rights that it are not present in the plain and ordinary words used. *See Bardsley v. Gov't Employees Ins. Co.*, 405 S.C. 68, 77, 747 S.E.2d 436, 440 (2013) (court must read contract according to its plain and ordinary meaning).

Respondents' dismissal of *Janasik v. Fairway Oaks Villas Horizontal Property Regime,* 307 S.C. 339, 344, 415 S.E.2d 384, 388 (1992), cited in Builder's opening brief regarding waiver, is improper for this very reason. As *Janasik* states:

> 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. Here, the language used in the warranty demonstrates no knowing waiver of rights to reduce liability that might arise under the particular circumstances of a case; it is silent on

the issue. There was no other evidence offered at trial or any hearing to show Builders waived rights to set off in its express warranty.

C. *The Oaks at Rivers Edge Prop. Owners Ass'n, Inc.* does not bar Builder's claim for set off.

Respondents claim there is no discernable difference between this case and *The Oaks at Rivers Edge Prop. Owners Ass'n, Inc.,* 420 S.C. 424, 803 S.E.2d 475 (Ct. App. 2017). They are wrong.

In *The Oaks*, the appellants agreed in writing, as part of a partial settlement, in advance of trial, that they might not receive any credit on a judgment received at trial for any money paid by them or any other party as part of the partial settlement. *Id.* at 433-34, 803 S.E.2d at 480. Builders entered into to no such agreement. The record is devoid of any such concession, either in writing or orally to the trial court.

Further, as noted by the *Oaks* Court, "the trial court's order includes repairs independent of those addressed by the settlement for the issues relating to the windows." *Id.* at 438-39, 803 S.E.2d at 483. The Court then cataloged the evidence of distinct damages recovered from the trial and those addressed by the settlement. *Id.* In this case, by contrast, the settlement agreements contain no language allocating the settlement to particular claims or repairs. (*See* Settlement Agreements, R. pp. ___-___.) Instead, Respondents' settlements with codefendants were, at least in part, for pleaded claims involving the exact same theories of product liability and the exact same injuries for which Builders was found liable. This is particularly illustrated in the settlement with the window manufacturer who designed, manufactured and supplied the windows and the TCR defendants' liability in warranty which was predicated, in part, on the warranty given by Builders which they passed through as their warranty to Respondents. It is also true of the damage over, around and under the windows that was contributed to by multiple

settling parties who settled on the same theories of product liability for, at least in part, the very same injuries. *See supra*, p. 14 (cataloging trial testimony of all delicts identified in experts' testimony contributing to the damage around the windows).

Based on the existence of the pretrial agreement and the state of the evidence after trial as noted above, which is non-existent in the case between Respondents and Builders, the *Oaks* Court affirmed the denial of set off. It also noted the statement of plaintiffs' counsel in that matter that they had not placed into evidence damages that overlapped with the damages that were resolved by the partial settlement, *id.* at 441, 803 S.E.2d at 484, and credited the testimony of plaintiffs' expert to the same effect while discounting defendants' expert's testimony. *Id.* at 441-42, 803 S.E.2d at 484.

Thus, the opinion does not stand for the proposition, asserted by Respondents, that plaintiffs have an absolute ability to unilaterally claim that they are not presenting overlapping evidence of damages settled with other defendants and thereby arbitrarily avoid set off. Respondents' argument would render *The Oaks* unnecessarily inconsistent with other, earlier authority specifically rejecting the ability of a plaintiff to unilaterally limit damages in an effort to thwart set off. *See Ellis v. Oliver*, 335 S.C. at 113, 515 S.E.2d at 272 (rejecting plaintiffs argument that set off for amount of medical bills paid by settling codefendant could not be taken because she did not claim medical bills at trial). *The Oaks* is properly limited to the unique facts presented in that case.[8]

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[8] Though not necessary for Builders to succeed on appeal for the reasons stated, to the extent the Court believes that *The Oaks* establishes a unilateral right of a plaintiff to limit set off in the manner asserted by Respondents' under circumstance similar to this case, Builders believes the Court should clarify or overrule that narrow portion of the opinion to bring it into conformity with prior precedent.

D. Builder's did not try set off to the jury.

Respondents assert that Builder's post-trial motion for set off is improper because Builders tried the issue of set off to the jury. This argument is a variant of Respondents' prior argument that plaintiffs may unilaterally limit damage evidence to avoid set off, but in this argument Respondents attempt to cast Builders as initiating or consenting to the process. This argument is unsupported by evidence in the record.

First, there is a complete dearth of evidence in the record showing Builder's written or oral consent to try set off to the jury. This is unsurprising since set off is not a jury question, but a question of law for a court decide upon evidence and argument submitted for that purpose. *Broome v. Watts,* 319 S.C. 337, 342, 461 S.E.2d 46, 49 (1998).

McCurry v. Keith, 352 S.C. 441, 481 S.E.2d 166 (Ct. App. 1997) does not support Respondents. The statute in that case required that evidence of losses and winnings be presented at trial as part of the substantive claim as only net losses could be recovered as damages. Neither the product liability theories of strict liability or breach of warranty upon which Builders was found liable, nor statutory set off or equitable set off contain any such requirement.

Respondents lastly attempt to argue that because Builder's counsel did what every defendant tries to do in every case – limit its damages by pointing out intervening or superseding causes and questioning the propriety of plaintiffs' claimed damage calculations – Builders must be arguing set off to the jury, thus depriving it later of the right to set off, an issue that is not even a jury issue. As noted in its Opening Brief, Builder's counsel did nothing at trial that inconsistent with a normal defense of the matter and preservation of set off rights. (Appellant's Opening Br., pp. 25-27.)

Respondents' argument that the jury must have engaged in some type of set off simply because it chose not to accept their inflated damages calculation is pure speculation. The jury may have simply disbelieved Respondents' witnesses and concluded that all of the cost of repair for all injury claimed, whether caused in whole or in part by Builders, was only worth the verdict amount, approximately half of what Respondents claimed but substantially more than Builders argued in defense. Acceptance of Respondents' argument, in the absence of some explicit agreement such as was present in *The Oaks*, would be a radical departure from the law of set-off, which allows a defendant to demonstrate to the Court by reference to pleadings, testimony, and other evidence[9] that a "prior settlement involves compensation for the same injury for which the jury awarded damages," at least in some part, and should be deducted from the verdict to avoid double compensation. *Smith v. Widener*, 397 S.C. 468, 473, 724 S.E.2d 188, 191 (Ct. App. 2012).

E. **Builders is entitled to prove the amount of set off at a hearing.**

Respondents argue that Builders has not met a set off burden of proof on appeal because it has not, among other things, specified a particular amount to be set off. Resp. Br. pp. 41-44. This argument ignores the proper process, not allowed by the trial court, for determining the amount of a set off. This process is illustrated in *Tilley v. Pacesetter* and in the *Stoneledge* cases. In both cases, where the trial court determined that set off was allowable by law, it afforded the parties a hearing to produce evidence and argument in support of or against the amount, not just the entitlement, to set off. *Tilley*, 355 S.C. at 376-77, 585 S.E. 2d at 299-300; *Stoneledge,* 425 S.C. at 286, 302, 821 S.E.2d at 514, 522.

[9] *Cf. Tilley*, 355 S.C. at 376-77, 585 S.E. 2d at 299-300 (establishing post-liability discovery and hearing process for establishing the amount, if any, of set off allowable).

Here, the trial court never undertook any such process, but held that set off was simply precluded as a procedural or substantive matter regardless of any particular amount that might be set off. As stated by the United States Supreme Court, appellate courts, like it and this Court, are "a **court of review**, not of **first view.**" *BNSF Railway Co. v. Tyrell*, 137 S.C. 1549, 1559 (2017) (quoting *Cutter v. Wilkinson,* 544 U.S. 709, 718, n. 7, 125 S.Ct. 2113, 161 L.Ed.2d 1020 (2005) and declining to reach an issue not addressed by the lower court and remanding for further proceedings).

Contrary to the argument of Respondents, Builders presented facts and arguments on how an actual determination of the amount of set off might be determined based on the evidence presented at the trial and the presumed lack of any allocation in the settlement agreements. *See, e.g.*, 11/18/16 Hrg. Trans., pp. 1-19, 30-33 (noting evidence at trial of alleged common injury and joint and several liability as alleged in all pleadings, the indivisibility of water intrusion damages, the multiple causation of those damages as admitted by Respondents' expert at trial). The trial court did not hold a hearing of the type suggested, but denied set off principally on the basis that set off was either procedurally or substantively unavailable.

F. Set off is appropriate to prevent overlapping recovery.

Respondents argue that set off is not needed because there is no proof of overlapped recovery. This statement is false.

The complaints in this case asserted product liability claims against defendants on theories of negligence, strict liability, or breach of warranty and pled indistinguishable damages such as water intrusion. (R. pp. ___.) The settlement agreements with other defendants made no allocation of settlement amount to any particular theory of liability or particular item of damage that might be recovered under that theory. Thus, Respondents' argument that "loss of

use" was not released by the settlements is unsupported by the record. The undisputed testimony at trial was that the damages above, below, and around the windows was caused, at least in some part, by the delicts of several other defendants. *See* supra. p. 14 (listing trial testimony detailing the various source points of water intrusion for which Respondents claimed damages). Respondents' damages expert could not, and made no attempt to, parse these damages between the various contributing parties such that only injury caused exclusively by Builders was included in the judgment. This scenario fits squarely within the rationale for set off as expressed in multiple cases where "a prior settlement involves compensation for the same injury for which the jury awarded damages ...." *See, e.g.*, *Smith v. Widener*, 397 S.C. 468, 473, 724 S.E.2d 188, 191 (Ct. App. 2012). Thus, set off is needed to prevent double recovery in this case.

Conclusion

For the reasons set forth above, the orders of the trial court denying Builders the right to set off and any judgments thereupon should be reversed and the matter remanded to the trial court for determination of set off.

Respectfully submitted,

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June 24, 2019

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.

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SC Court of Appeals

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 Initial Reply Brief**

Appellant's Supplemental Designation of Matter for the Record on Appeal

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June 24, 2019

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

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

Dear Ms. Kitchings:

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

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

Sincerely yours,

William C. Wood, Jr.

WCW:cks
Enclosures
cc: Justin Lucey, Esquire
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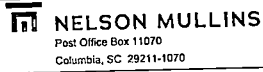

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